

Department of Legislative Services
Maryland General Assembly
2022 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 535

(Senator Ready, *et al.*)

Finance

Unborn Child Protection From Dismemberment Abortion Act

This bill prohibits an individual from purposely performing or attempting to perform a “dismemberment abortion” that kills an unborn child unless the abortion is necessary to prevent a “serious health risk to the pregnant woman.” The bill exempts specified individuals from liability and authorizes specified individuals to bring an action to obtain a permanent injunction or to bring a civil action against an individual who has performed or attempted to perform a dismemberment abortion in violation of the bill and establishes additional judicial procedural requirements. The bill may not be construed to create or recognize a right to an abortion or a right to a particular method of abortion. In addition, the bill’s prohibitions may not be construed to prevent an abortion for any reason, including rape and incest, or by any other method.

Fiscal Summary

State Effect: General fund expenditures for Medicaid decrease under the bill to the extent that fewer abortions are performed. Department of Budget and Management (DBM) expenditures may also decrease. Special fund expenditures for the State Board of Physicians (MBP) may increase. Revenues are not affected.

Local Effect: The bill’s provisions related to civil actions are not expected to materially affect local government operations or finances.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Definitions

“Abortion” means the use of any instrument, medicine, drug, or any other substance or device to (1) purposely kill an unborn child or (2) purposely terminate a pregnancy with a purpose other than to produce a live birth and preserve the life and health of the child born alive or to remove the remains of a dead unborn child.

“Attempt to perform a dismemberment abortion” means an act or omission of a statutorily required act that, under circumstances as the individual believes them to be, constitutes a substantial step in the course of conduct planned to culminate in the performance of a dismemberment abortion. The definition includes agreeing to perform, or scheduling or planning to perform, such an abortion whether or not the term “dismemberment abortion” is used and whether or not the agreement is contingent on another factor (such as payment).

“Dismemberment abortion” means, with the intent to cause the death of the unborn child, to purposely dismember a living unborn child by using clamps, grasping forceps, tongs, scissors, or similar instruments that, through the convergence of two rigid levers, slice, crush, or grasp a portion of the unborn child’s body to cut or rip it off and to extract the pieces of the body of the unborn child one at a time with the aforementioned devices or tools or by use of a suction device. The definition does not include an abortion that only uses suction to dismember the body of the unborn child by sucking fetal parts in their entirety into a collection container.

“Serious health risk to the pregnant woman” means the reasonable medical judgment of a physician that the pregnant woman has a condition that so complicates her medical condition that it necessitates the abortion of her pregnancy to avert her death or to avert a serious risk of substantial and irreversible physical impairment of a major bodily function. The definition does not include a psychological or emotional condition.

Exemptions

The bill exempts the following individuals from liability for performing or attempting to perform a dismemberment abortion: (1) the pregnant woman on whom the abortion was performed or attempted; (2) any nurse, technician, secretary, receptionist, or other employee or agent of a physician who performed or attempted to perform a dismemberment abortion and who acts at the direction of the physician; and (3) any pharmacist or other individual who is not a pharmacist who fills a prescription or provides instruments or materials used in the abortion at the direction of or to a physician.

State Board of Physicians Hearing

An individual accused in any proceeding of violating this prohibition may seek a hearing before MBP on whether the dismemberment abortion was necessary to prevent a serious health risk to the pregnant woman. MBP's findings are admissible on that issue at any trial in which a violation of this prohibition is alleged. On motion of the defendant, a court must delay the beginning of a trial for up to 30 days to allow for a hearing before MBP.

Judicial Proceedings

The following individuals may bring an action to obtain a permanent injunction against an individual who performed or attempted to perform a dismemberment abortion: (1) the pregnant woman on whom the abortion was performed; (2) the spouse, parent, or guardian of, or a licensed or formerly licensed health care provider, of the pregnant woman; or (3) a prosecuting attorney with appropriate jurisdiction.

The following individuals may bring a civil action against the individual who performed a dismemberment abortion: (1) any woman on whom such an abortion was performed; (2) the father of the unborn child, if married to the woman at the time of the abortion; or (3) the maternal grandparents of the unborn child, if the woman was a minor at the time of the abortion or died as a result.

In civil actions brought under the bill, the court may award damages and/or an injunction, as specified. Further, in any civil, criminal, or administrative proceeding brought under the bill, the court must determine whether the identity of any woman on whom such an abortion was performed or attempted must be kept confidential if she does not give her consent to disclosure. The bill specifies additional procedures if a court finds that the woman's identity must be kept confidential. Additionally, in the absence of the written consent of the woman on whom such an abortion was performed or attempted, any individual other than a public official who brings an action must do so under a pseudonym.

Current Law: The State may not interfere with a woman's decision to end a pregnancy before the fetus is viable, or at any time during a woman's pregnancy, if the procedure is necessary to protect the life or health of the woman or if the fetus is affected by a genetic defect or serious deformity or abnormality. This is consistent with the U.S. Supreme Court's holding in *Roe v. Wade*, 410 U.S. 113 (1973). A viable fetus is one that has a reasonable likelihood of surviving outside of the womb. The Maryland Department of Health (MDH) may adopt regulations consistent with established medical practice if they are necessary and the least intrusive method to protect the life and health of the woman.

If an abortion is provided, it must be performed by a licensed physician. A physician is not liable for civil damages or subject to a criminal penalty for a decision to perform an

abortion made in good faith and in the physician's best medical judgment using accepted standards of medical practice.

State Expenditures: MDH advises that Medicaid paid for 10,163 abortions in fiscal 2021 at an average cost of \$668 per abortion for a total cost of \$6.8 million. Accordingly, general fund expenditures for Medicaid decrease under the bill to the extent that fewer abortions are performed and, therefore, funded by Medicaid. However, Medicaid has previously noted that any savings may be offset by an increase in costs for labor and delivery services provided to Medicaid-eligible women to the extent that births increase under the bill. The approximate average cost for prenatal care, labor/delivery, and postpartum care for Medicaid beneficiaries is \$36,000. Moreover, newborns born to Medicaid-eligible mothers are deemed automatically eligible for Medicaid benefits for their first year and typically retain eligibility for subsequent years. On average, Medicaid pays \$9,700 for health care per eligible newborn annually (50% general funds and 50% federal funds). The extent of any increase in expenditures cannot be reliably estimated at this time. Federal fund revenues increase accordingly.

Similarly, DBM expenditures (general, federal, and special funds) decrease to the extent fewer abortions are performed under the State Employee and Retiree Health and Welfare Benefits Program. Any potential reduction in expenditures cannot be reliably estimated as DBM has previously advised that it does not monitor claims data for abortion procedures. To the extent that births increase among individuals covered by the program, there is likely an offsetting increase in expenditures (and potentially an overall increase in expenditures) for labor and delivery costs and to cover additional dependents. The extent of any increase cannot be reliably estimated at this time.

The bill authorizes an individual accused of violating the bill's prohibitions to seek a hearing before MBP. To the extent MBP is required to conduct hearings under the bill, special fund expenditures increase. Again, the exact amount of any increase depends on the proportion of abortions that would be prohibited under the bill and cannot be reliably estimated at this time.

The bill's provisions related to civil actions are not expected to materially affect caseloads and/or government finances.

Small Business Effect: Potential meaningful for physicians whose practices currently encompass the bill's specified procedures for abortions. Litigation costs may increase for physicians against whom civil actions are brought under the bill.

Additional Information

Prior Introductions: HB 1355 of 2018 received a hearing in the House Health and Government Operations Committee, but no further action was taken. Its cross file, SB 1067, was referred to the Senate Rules Committee, but no further action was taken. HB 1167 of 2017 received a hearing in the House Health and Government Operations Committee, but no further actions was taken. Its cross file, SB 841, received a hearing in the Senate Finance Committee, but no further action was taken.

Cross File: None.

Information Source(s): Judiciary (Administrative Office of the Courts); Maryland Department of Health; Department of Legislative Services

Fiscal Note History: First Reader - March 11, 2022

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