WEST VIRGINIA CODE CHAPTER 16 ARTICLE 2M

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§16-2M-1. Legislative findings.

The Legislature makes the following findings:

(1) Pain receptors (unborn child's entire body nociceptors) are present no later than sixteen weeks after fertilization and nerves link these receptors to the brain's thalamus and subcortical plate by no later than twenty weeks.

(2) By eight weeks after fertilization, the unborn child reacts to stimuli that would be recognized as painful if applied to an adult human, for example, by recoiling.

(3) In the unborn child, application of painful stimuli is associated with significant increases in stress hormones known as the stress response.

(4) Subjection to painful stimuli is associated with long- term harmful neuro developmental effects, such as altered pain sensitivity and, possibly, emotional, behavioral and learning disabilities later in life.

(5) For the purposes of surgery on unborn children, fetal anesthesia is routinely administered and is associated with a decrease in stress hormones compared to their level when painful stimuli is applied without the anesthesia.

(6) The position, asserted by some medical experts, that the unborn child is incapable of experiencing pain until a point later in pregnancy than twenty weeks after fertilization, which point in the pregnancy is generally consistent with twenty-two weeks following the woman's last menstrual cycle, predominately rests on the assumption that the ability to experience pain depends on the cerebral cortex and requires nerve connections between the thalamus and the cortex. However, recent medical research and analysis, especially since 2007, provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain.

(7) Substantial evidence indicates that children born missing the bulk of the cerebral cortex, those with hydranencephaly, nevertheless experience pain.

(8) In adults, stimulation or ablation of the cerebral cortex does not alter pain perception while stimulation or ablation of the thalamus does.

(9) Substantial evidence indicates that structures used for pain processing in early development differ from those of adults, using different neural elements available at specific times during development, such as the subcortical plate, to fulfill the role of pain processing.

(10) Consequently, there is substantial medical evidence that an unborn child is capable of experiencing pain by pain capable gestational age as defined in subsection (7), section two, article two-m of this chapter.

(11) It is the purpose of the state to assert a compelling state interest in protecting the lives

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of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain.

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§16-2M-2. Definitions.

For purposes of this article:

(1) "Abortion" means abortion as that term is defined in section two, article two-f of this chapter.

(2) "Attempt to perform or induce an abortion" means an act or an omission of a statutorily required act that, under the circumstances as the person believes them to be, constitutes a substantial step in a course of conduct planned to culminate in the performance or induction of an abortion in this state in violation of the applicable provisions of this code.

(3) "Fertilization" means the fusion of a human spermatozoon with a human ovum.

(4) "Fetus" means the developing young in the uterus, specifically the unborn offspring in the postembryonic period from nine weeks after fertilization until birth.

(5) "Medical emergency" means a condition that, on the basis of a reasonably prudent physician's reasonable medical judgment, so complicates the medical condition of a pregnant female that it necessitates the immediate abortion of her pregnancy without first determining gestational age to avert her death or for which the delay necessary to determine gestational age will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No condition may be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

(6) "Nonmedically viable fetus" means a fetus that contains sufficient lethal fetal anomalies so as to render the fetus medically futile or incompatible with life outside the womb in the reasonable medical judgment of a reasonably prudent physician.

(7) "Pain capable gestational age" means twenty-two weeks since the first day of the woman's last menstrual period. The pain capable gestational age defined herein is generally consistent with the time that is twenty weeks after fertilization.

(8) "Physician" means a person with an unrestricted license to practice allopathic medicine pursuant to article three of chapter thirty of this code or osteopathic medicine pursuant to article fourteen, chapter thirty of this code.

(9) "Probable gestational age of the fetus" means, in reasonable medical judgment and with reasonable probability, the gestational age of the fetus at the time an abortion is planned to be performed.

(10) "Reasonable medical judgment" means a medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.

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§16-2M-3. Determination of gestational age.

Except in the case of a medical emergency or a nonmedically viable fetus, no abortion may be performed or induced or be attempted to be performed or induced unless the physician performing or inducing it has first made a determination of the probable gestational age of the fetus or relied upon such a determination made by another physician. In making this determination, the physician shall make inquiries of the patient and perform or cause to be performed medical examinations and tests as a reasonably prudent physician, knowledgeable about the case and the medical conditions involved, would consider necessary to perform in making an accurate diagnosis with respect to gestational age.

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§16-2M-4. Abortion of fetus of pain capable gestational age prohibited.

(a) No person may perform or induce, or attempt to perform or induce, an abortion when it has been determined, by the physician performing or inducing or attempting to perform or induce the abortion or by another physician upon whose determination that physician relies, that the probable gestational age of the fetus has reached the pain capable gestational age, unless in the reasonable medical judgment of a reasonably prudent physician there exists a nonmedically viable fetus or the patient has a condition that, on the basis of a reasonably prudent physician's reasonable medical judgment, so complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No condition may be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

(b) When an abortion upon a patient whose fetus has been determined to have a probable gestational age that has reached the pain capable gestational age is not prohibited by subsection (a) of this section, the physician shall terminate the pregnancy in the manner which, in reasonable medical judgment, provides the best opportunity for the fetus to survive, unless, in reasonable medical judgment, termination of the pregnancy in that manner would pose a greater risk either of the death of the patient or of the substantial and irreversible physical impairment of a major bodily function of the patient than would other available methods.

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§16-2M-5. Reporting.

(a) Any physician who performs or induces an abortion shall report to the Bureau for Public Health. The reporting shall be on a schedule and on forms set forth by the Secretary of the Department of Health and Human Resources annually, no later than December 31. The reports shall include the following information:

(1) Probable gestational age:

(A) If a determination of probable gestational age was made, whether ultrasound was employed in making the determination, and the week of probable gestational age determined.

(B) If a determination of probable gestational age was not made, the basis of the determination that a medical emergency existed or that there existed a nonmedically viable fetus.

(2) Method of abortion;

(3) If the probable gestational age was determined to have reached the pain capable gestational age, the basis of the determination that there existed a nonmedically viable fetus or that the patient had a condition which so complicated the medical condition of the patient that it necessitated the abortion of her pregnancy in order to avert her death or avert a serious risk of substantial and irreversible physical impairment of a major bodily function; and

(4) If the probable gestational age was determined to have reached the pain capable gestational age, whether the method of abortion used was one that, in reasonable medical judgment, provided the best opportunity for the fetus to survive and, if such a method was not used, the basis of the determination that termination of the pregnancy in that manner would pose a greater risk either of the death of the patient or of the substantial and irreversible physical impairment of a major bodily function of the patient than would other available methods.

(b) Reports required by subsection (a) of this section may not contain the name or the address of the patient whose pregnancy was terminated nor may the report contain any information identifying the patient. These reports shall be maintained in strict confidence by the department, may not be available for public inspection, and may not be made available except pursuant to court order.

(c) Beginning June 30, 2016, and annually after that, the Department of Health and Human Resources shall issue a public report providing statistics for the previous calendar year compiled from all of the reports covering that year submitted in accordance with this section for each of the items listed in subsection (a) of this section. Each report shall provide the statistics for all previous calendar years from the effective date of this section, adjusted to

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reflect any additional information from late or corrected reports. The Department of Health and Human Resources shall take care to ensure that none of the information included in the public reports could reasonably lead to the identification of any patient upon whom an abortion was performed or induced.

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§16-2M-6. Penalties.

(a) Any physician or other licensed medical practitioner who intentionally or recklessly performs or induces an abortion in violation of this article is considered to have acted outside the scope of practice permitted by law or otherwise in breach of the standard of care owed to patients, and is subject to discipline from the applicable licensure board for that conduct, including, but not limited to, loss of professional license to practice.

(b) Any person, not subject to subsection (a) of this section, who intentionally or recklessly performs or induces an abortion in violation of this article is considered to have engaged in the unauthorized practice of medicine in violation of section thirteen, article three, chapter thirty of this code, and upon conviction, subject to the penalties contained in that section.

(c) In addition to the penalties set forth in subsections (a) and (b) of this section, a patient may seek any remedy otherwise available to such patient by applicable law.

(d) No penalty may be assessed against any patient upon whom an abortion is performed or induced or attempted to be performed or induced.

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§16-2M-7. Severability.

Effective from the reenactment of this section during the third extraordinary session of the Legislature, 2022, this article is of no force or effect unless any provision of §16-2R-1 *et seq*. of this code is judicially determined to be unconstitutional.

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