OHIO LEGISLATIVE SERVICE COMMISSION

Final Analysis

Brian D. Malachowsky

Sub. H.B. 258

132nd General Assembly
(As Passed by the General Assembly)

Reps. Hagan and Hood, Wiggam, Romanchuk, Ginter, Patton, Patmon, Lanese, Brinkman, Blessing, DeVitis, Roegner, Slaby, Henne, Butler, Antani, Merrin, Schuring, Retherford, Conditt, Keller, Zeltwanger, Stein, Young, Becker, Green, Brenner, Hambley, Kick, Householder, Perales, Dean, LaTourette, Schaffer, Koehler, Huffman, McColley, Riedel, Sprague, Vitale, Pelanda, Goodman, T. Johnson, Rosenberger, R. Smith, Thompson, Landis, Faber, Hill, Lipps, Hoops, Lang, McClain, T. Smith, Wilkin

Sens. Hottinger, Coley, Hoagland, Huffman, Jordan, Lehner, Terhar, Uecker, Wilson

Effective date: Vetoed*

ACT SUMMARY

**This act was vetoed in its entirety. A detailed description of the vetoed provisions is available in LSC's analysis of Sub. H.B. 258, As Reported by S. Health, Human Services & Medicaid. Since the act was not amended on the Senate floor, that analysis accurately describes all of the provisions that were vetoed. The analysis is available online at https://www.legislature.ohio.gov/download?key=10844&format=pdf.*

- Would have generally prohibited a person from knowingly and purposefully performing or inducing an abortion with the specific intent of causing or abetting the termination of the life of an unborn individual whose fetal heartbeat has been detected.

- Would have generally prohibited a person from knowingly and purposefully performing or inducing an abortion before determining if there is a fetal heartbeat.

- Would have provided that a person who violated either prohibition is guilty of a fifth degree felony, is subject to a wrongful death action by the pregnant woman, and is subject to disciplinary action by the State Medical Board.

- Would have created the Joint Legislative Committee on Adoption Promotion and Support to further the General Assembly's goal of informing pregnant women of available options for adoption.

CONTENT AND OPERATION

Abortion prohibited when there is a fetal heartbeat

The Governor vetoed this act that would have generally prohibited a person from knowingly and purposefully performing or inducing an abortion on a pregnant woman with the specific intent of causing or abetting the termination of the life of the unborn human individual that the pregnant woman is carrying and whose fetal heartbeat has been detected. Whoever violated that prohibition would have been guilty of performing or inducing an abortion after the detection of a fetal heartbeat, a fifth degree felony.[1]

Exceptions to prohibition

As described below, there would have been two circumstances in which the fetal heartbeat prohibition would not have applied.

(1) Medical procedures to prevent a woman's death or bodily impairment

The prohibition would not have applied to a physician who performed a medical procedure designed or intended, in that physician's reasonable medical judgment, to prevent the death of a pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman.[2]

(2) No fetal heartbeat revealed

The prohibition would not have been violated if a person performed an examination for the presence of a fetal heartbeat, in accordance with the person's good-faith understanding of standard medical practice, that did not reveal a fetal heartbeat.[3]

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[1] R.C. 2919.195(A).

[2] R.C. 2919.195(B).

[3] R.C. 2919.192(A) and 2919.195(C).

Abortions performed to preserve a woman's health

Additional documentation requirement

After a fetal heartbeat had been detected pursuant to the act's requirements, any person performing or inducing an abortion for the purpose of *preserving the health* of the pregnant woman would have been required to set forth in a written document the medical condition that the abortion would address and the medical rationale for the conclusion that the abortion would be necessary to address the condition.[4]

Relationship to other abortion laws

The act would have declared that the prohibition against knowingly and purposefully performing or inducing an abortion when there is a fetal heartbeat does not repeal or limit any other provision of the Revised Code that restricts or regulates the performance or inducement of an abortion by a particular method or during a particular state of a pregnancy.[5]

Pregnant woman's signed acknowledgement

The act would have required a pregnant woman to sign a form acknowledging that she received information from the person intending to perform or induce the abortion, that the unborn human individual she is carrying has a fetal heartbeat, and that she is aware of the statistical probability of bringing the unborn human individual to term.[6]

Abortion before determining fetal heartbeat

The act would have provided that, except when prevented by a medical emergency in certain cases, whoever knowingly and purposefully performed or induced an abortion without determining whether there was a detectable fetal heartbeat was guilty of a fifth degree felony.[7] Continuing law prohibits such an abortion already, but only provides for a civil action for compensatory and exemplary damages or disciplinary action by the State Medical Board for a violation.[8]

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[4] R.C. 2919.196(A)(1).

[5] R.C. 2919.195(D).

[6] R.C. 2919.194(A)(3).

[7] R.C. 2919.193(A).

[8] R.C. 4731.22(B)(47).

Exceptions

(1) Medical emergency

Under the act, if a medical emergency prevented a physician from determining the presence of a fetal heartbeat, the physician would have been required to note the belief that the medical emergency necessitated the abortion and the medical condition that caused the emergency in the pregnant woman's medical records, and maintain that record for at least seven years in the physician's own records. Current law provides for the same exception and notation requirements, but applies them broadly to "any person" not just physicians.[9]

(2) No fetal heartbeat revealed

A person who had performed an examination for the presence of a fetal heartbeat, in accordance with the person's good faith understanding of standard medical practice, that did not reveal a fetal heartbeat, would not have committed the offense.[10]

No prohibitions regarding contraception

The act would have provided that nothing in its criminal provisions prohibited the sale, use, prescription, or administration of a drug, device, or chemical designed for contraceptive purposes.[11] The act would have defined "contraceptive" to mean a drug, device, or chemical that prevents conception, and "conception" to mean fertilization.[12]

Findings by the General Assembly

The act would have declared findings by the General Assembly with respect to the new prohibitions and regulations. The findings consisted of medical research assertions addressing fetal heartbeat as a predictor of eventual live birth.[13]

Severability

The act would have stipulated two severability provisions. One, codified in statute, would have applied if any provision of R.C. 2919.171 or 2919.19 to 2919.1910 or

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[9] R.C. 2919.193(B) and (C).

[10] R.C. 2919.193(D).

[11] R.C. 2919.197.

[12] R.C. 2919.19(A)(1) and (2).

[13] R.C. 2919.191(A).

their application to any person or circumstance was held invalid.[14] The other, is in uncodified, would have covered all sections of the act (including the heartbeat provisions in the first severability clause).[15]

Medical record inspection

The act would have required the Department of Health to inspect medical records from any facility that performs abortions, to ensure that physicians and other persons who perform abortions at that facility complied with the reporting requirement the act would have imposed. It would have required the facility to make the medical records available for inspection, but prohibited releasing any personal medical information that is prohibited by law.[16]

Reporting requirement

The act would have added to the reports a physician who performs or induces abortions must provide to the Department of Health, to include all of the information the physician would have been required to certify in writing or determine with respect to abortions and the provisions of the law and the act relating to fetal heartbeat detection. If a person other than the physician made or maintained records relating to abortions and fetal heartbeat detection on the physician's behalf or at the physician's direction, that person would have been required to comply with the reporting requirements.[17]

Disciplinary action

The act would have required the Secretary and Supervising Member of the State Medical Board to recommend that the Board summarily suspend an individual's license if they found clear and convincing evidence that an individual performed an abortion after a fetal heartbeat was detected and the individual's continued practice presents a danger of immediate and serious harm to the public.[18]

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[14] R.C. 2919.19(B)(4).

[15] Section 3.

[16] R.C. 2919.1911.

[17] R.C. 2919.171(A).

[18] R.C. 4731.22(G)(2).

It also would have permitted the Board to take disciplinary action for failure to comply with the act's requirements to make or maintain medical records or documents for a pregnant woman regarding an abortion procedure.[19]

Declaratory judgments and court orders

The act would have permitted the Attorney General to take certain legal action if the U.S. Supreme Court overruled *Roe v. Wade*,[20] any other court issued an order or judgment restoring, expanding, or clarifying the authority of states to prohibit or regulate abortion entirely or in part, or the federal Constitution were amended to restore, expand, or clarify the authority of states to prohibit or regulate abortion entirely or in part.[21] The act also would have permitted any county prosecutor to apply to a state or federal court for relief if the Attorney General failed to act within 30 days of the change.[22]

Wrongful death action

Circumstances supporting action

The act would have changed the law that permits a woman who received an abortion to bring a wrongful death action for her unborn child by allowing an action if the abortion was knowingly and purposely performed or induced (1) with the specific intent of causing or abetting the termination of the unborn human individual whose fetal heartbeat had been detected, or (2) without the woman's signature on an acknowledgement that the woman received the information (a) that there was a fetal heart beat and (b) about the statistical probability of the unborn human individual with a fetal heartbeat being brought to term.[23]

Recovery of court costs and attorney's fees

The act would have required the court to award the woman court costs and reasonable attorney's fees if she prevails in the action. This would have been in addition to damages as permitted under current law. But, if the defendant prevailed, the act would have required the court to award reasonable attorney's fees to the defendant if both:

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[19] R.C. 2919.192(A), 2919.193(C), 2919.195(B), 2919.196(A), and 4731.22(B)(47).

[20] 410 U.S. 113 (1973).

[21] R.C. 2919.19(B)(2).

[22] R.C. 2919.19(B)(3).

[23] R.C. 2919.193(A), 2919.194(A), 2919.195(A), and 2919.199(A); and R.C. 2317.56(B).

- Commencement of the action was frivolous conduct and the defendant was adversely affected by it; and

- The court's decision was not based on a finding that the law on which the action was based was unconstitutional.[24]

Pregnant woman not liable

The act would have provided that a pregnant woman on whom an abortion is performed in violation of any of the following crimes was not guilty of the crimes or of attempting to commit, conspiring to commit, or complicity in committing the crimes:

(1) Performing or inducing an abortion before determining whether there is a fetal heartbeat;

(2) Performing or inducing an abortion after the detection of a fetal heartbeat;

(3) Performing or inducing an abortion without informed consent when there is a detectable fetal heartbeat.

Further, the pregnant woman would not be subject to a civil penalty based on the violations.[25]

Intent of General Assembly regarding adoption information

The act would have provided that the General Assembly's intent was that women whose pregnancies are protected under the act to be informed of available options for adoption.[26]

Joint Legislative Committee

The act would have created the Joint Legislative Committee on Adoption Promotion and Support to further the General Assembly's intent to inform women whose pregnancies would have been protected under the act of adoption options. That Committee would have had the same powers as other standing or select committees of the General Assembly.[27]

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[24] R.C. 2919.199(B) and (D).

[25] R.C. 2919.198.

[26] R.C. 2919.1910(A).

[27] R.C. 2919.1910(B) and (D).

HISTORY

ACTION	DATE
Introduced	06-06-17
Reported, H. Health	12-13-17
Passed House (60-35)	11-15-18
Reported, S. Health, Human Services & Medicaid	12-12-18
Passed Senate (18-13)	12-12-18
House concurred in Senate amendments (53-32)	12-13-18
House voted to override veto (61-28)	12-27-18
Senate failed to override veto (19-13)	12-27-18

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