
HOUSE BILL 1526

State of Washington

66th Legislature

2019 Regular Session

By Representatives Van Werven, Kraft, and Shea

Read first time 01/23/19. Referred to Committee on Health Care & Wellness.

1 AN ACT Relating to enacting the Washington pain capable unborn
2 child protection act; amending RCW 9.02.170, 9.02.100, 9.02.110, and
3 9.02.900; adding new sections to chapter 9.02 RCW; creating new
4 sections; and prescribing penalties.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** This act may be known and cited as the
7 Washington pain capable unborn child protection act.

8 NEW SECTION. **Sec. 2.** The legislature finds that:

9 (1) Pain receptors are present throughout the unborn child's
10 entire body and nerves link these receptors to the brain's thalamus
11 and subcortical plate by no later than twenty weeks;

12 (2) By eight weeks after fertilization, the unborn child reacts
13 to touch. After twenty weeks, the unborn child reacts to stimuli that
14 would be recognized as painful if applied to an adult human, for
15 example, by recoiling;

16 (3) In the unborn child, application of such painful stimuli is
17 associated with significant increases in stress hormones known as the
18 stress response;

19 (4) Subjection to such painful stimuli is associated with long-
20 term harmful neurodevelopmental effects, such as altered pain

1 sensitivity and, possibly, emotional, behavioral, and learning
2 disabilities later in life;

3 (5) For the purposes of surgery on unborn children, fetal
4 anesthesia is routinely administered and is associated with a
5 decrease in stress hormones compared to their levels when painful
6 stimuli are applied without such anesthesia;

7 (6) The position, asserted by some medical experts, that the
8 unborn child is incapable of experiencing pain until a point later in
9 pregnancy than twenty weeks after fertilization predominately rests
10 on the assumption that the ability to experience pain depends on the
11 cerebral cortex and requires nerve connections between the thalamus
12 and the cortex. However, recent medical research and analysis,
13 especially since 2007, provides strong evidence for the conclusion
14 that a functioning cortex is not necessary to experience pain;

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

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

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

26 (10) The position, asserted by some medical experts, that the
27 unborn child remains in a coma-like sleep state that precludes the
28 unborn child experiencing pain is inconsistent with the documented
29 reaction of unborn children to painful stimuli and with the
30 experience of fetal surgeons who have found it necessary to sedate
31 the unborn child with anesthesia to prevent the unborn child from
32 thrashing about in reaction to invasive surgery;

33 (11) Consequently, there is substantial medical evidence that an
34 unborn child is capable of experiencing pain by twenty weeks after
35 fertilization;

36 (12) It is the purpose of this state to assert a compelling state
37 interest in protecting the lives of unborn children from the stage at
38 which substantial medical evidence indicates that they are capable of
39 feeling pain;

1 (13) Washington's compelling state interest in protecting the
2 lives of unborn children from the stage at which substantial medical
3 evidence indicates that they are capable of feeling pain is intended
4 to be separate from and independent of Washington's compelling state
5 interest in protecting the lives of unborn children from the stage of
6 viability, and neither state interest is intended to replace the
7 other;

8 (14) Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which
9 in the context of determining the severability of a state statute
10 regulating abortion, the United States supreme court noted that an
11 explicit statement of legislative intent specifically made applicable
12 to a particular statute is of greater weight than a general savings
13 or severability clause, it is the intent of the state that if any one
14 or more provisions, sections, subsections, sentences, clauses,
15 phrases, or words of the act or the application thereof to any person
16 or circumstance is found to be unconstitutional, the same is hereby
17 declared to be severable and the balance of the act shall remain
18 effective notwithstanding such unconstitutionality. Moreover, this
19 state declares that it would have enacted this act, and each
20 provision, section, subsection, sentence, clause, phrase, or word
21 thereof, irrespective of the fact that any one or more provisions,
22 sections, subsections, sentences, clauses, phrases, or words, or any
23 of their applications, were to be declared unconstitutional.

24 **Sec. 3.** RCW 9.02.170 and 1992 c 1 s 8 are each amended to read
25 as follows:

26 For purposes of this chapter:

27 (1) "Viability" means the point in the pregnancy when, in the
28 judgment of the physician on the particular facts of the case before
29 such physician, there is a reasonable likelihood of the fetus's
30 sustained survival outside the uterus without the application of
31 extraordinary medical measures.

32 (2) "Abortion" means any medical treatment intended to induce the
33 termination of a pregnancy except for the purpose of producing a live
34 birth.

35 (3) "Pregnancy" means the reproductive process beginning with the
36 implantation of an embryo.

37 (4) "Physician" means a physician licensed to practice under
38 chapter 18.57 or 18.71 RCW in the state of Washington.

1 (5) "Health care provider" means a physician or a person acting
2 under the general direction of a physician.

3 (6) "State" means the state of Washington and counties, cities,
4 towns, municipal corporations, and quasi-municipal corporations in
5 the state of Washington.

6 (7) "Private medical facility" means any medical facility that is
7 not owned or operated by the state.

8 (8) "Attempt to perform or induce an abortion" means an act, or
9 an omission of a statutorily required act, that, under the
10 circumstances, as the actor believes them to be.

11 (9) "Fertilization" means the fusion of a human spermatozoon with
12 a human ovum.

13 (10) "Fetal anomaly" means that, in reasonable medical judgment,
14 the unborn child has a profound and irremediable congenital or
15 chromosomal anomaly that, with or without the provision of life-
16 preserving treatment, would be incompatible with sustaining life
17 after birth.

18 (11) "Medical emergency" means a condition that, in reasonable
19 medical judgment, so complicates the medical condition of the
20 pregnant woman that it necessitates the immediate abortion of her
21 pregnancy without first determining postfertilization age to avert
22 her death or for which the delay necessary to determine
23 postfertilization age will create serious risk of substantial and
24 irreversible physical impairment of a major bodily function, not
25 including psychological or emotional conditions. No condition must be
26 considered a medical emergency if based on a claim or diagnosis that
27 the woman will engage in conduct which she intends to result in her
28 death or in substantial and irreversible physical impairment of a
29 major bodily function.

30 (12) "Postfertilization" means the age of the unborn child as
31 calculated from fertilization.

32 (13) "Probable postfertilization age of the unborn child" means
33 what, in reasonable judgment, will with reasonable probability be the
34 postfertilization age of the unborn child at the time the abortion is
35 planned to be performed or induced.

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

1 (15) "Unborn child" or "fetus" means an individual organism of
2 the species homo sapiens from fertilization until live birth.

3 NEW SECTION. Sec. 4. A new section is added to chapter 9.02 RCW
4 to read as follows:

5 Except in the case of a medical emergency or fetal anomaly, no
6 abortion must be performed or induced or be attempted to be performed
7 or induced unless the physician performing or inducing it has first
8 made a determination of the probable postfertilization age of the
9 unborn child or relied upon such a determination made by another
10 physician. In making such a determination, the physician shall make
11 such inquiries of the woman and perform or cause to be performed such
12 medical examinations and tests as a reasonably prudent physician,
13 knowledgeable about the case and the medical conditions involved,
14 would consider necessary to perform in making an accurate diagnosis
15 with respect to postfertilization age.

16 NEW SECTION. Sec. 5. A new section is added to chapter 9.02 RCW
17 to read as follows:

18 (1) No person shall perform or induce or attempt to perform or
19 induce an abortion upon a woman when it has been determined, by the
20 physician performing or inducing or attempting to perform or induce
21 the abortion or by another physician upon whose determination that
22 physician relies, that the probable postfertilization age of the
23 woman's unborn child is at the point of viability or beyond, except
24 in the case of fetal anomaly or, in reasonable medical judgment, she
25 has a condition which so complicates her medical condition as to
26 necessitate the abortion of her pregnancy to avert her death or to
27 avert serious risk of substantial and irreversible physical
28 impairment of a major bodily function, not including psychological or
29 emotional conditions. No such greater risk must be considered to
30 exist if it is based on a claim or diagnosis that the woman will
31 engage in conduct, which she intends to result in her death or in
32 substantial and irreversible physical impairment of a major bodily
33 function.

34 (2) When an abortion upon a woman whose unborn child has been
35 determined to have a probable postfertilization age that is at the
36 point of viability or beyond is not prohibited by subsection (1) of
37 this section, the physician shall terminate the pregnancy in the
38 manner which, in reasonable medical judgment, provides the best

1 opportunity for the unborn child to survive, unless, in reasonable
2 medical judgment, termination of the pregnancy in that manner would
3 pose a greater risk either of the death of the pregnant woman or of
4 the substantial and irreversible physical impairment of a major
5 bodily function, not including psychological or emotional conditions,
6 of the woman than would other available methods. No such greater risk
7 must be considered to exist if it is based on a claim or diagnosis
8 that the woman will engage in conduct, which she intends to result in
9 her death or in substantial and irreversible physical impairment of a
10 major bodily function.

11 NEW SECTION. **Sec. 6.** A new section is added to chapter 9.02 RCW
12 to read as follows:

13 (1) Any hospital or health care facility in which an abortion is
14 performed must report to the department of health the following
15 information:

16 (a) Postfertilization age:

17 (i) If a determination of probable postfertilization age was
18 made, whether ultrasound was employed in making the determination,
19 and the week of probable postfertilization age determined; or

20 (ii) If a determination of probable postfertilization age was not
21 made, the basis of the determination that a medical emergency
22 existed;

23 (b) Method of abortion, of which the following was employed:

24 (i) Medication abortion such as, but not limited to, mifepristone
25 and misoprostol or methotrexate and misoprostol;

26 (ii) Manual vacuum aspiration;

27 (iii) Electrical vacuum aspiration;

28 (iv) Dilation and evacuation;

29 (v) Combined induction abortion and dilation and evacuation;

30 (vi) Induction abortion with prostaglandins;

31 (vii) Induction abortion with intraamniotic instillation such as,
32 but not limited to, saline or urea;

33 (viii) Induction abortion; and

34 (ix) Intact dilation and extraction, also known as partial-birth;

35 (c) Whether an intrafetal injection was used in an attempt to
36 induce fetal demise such as, but not limited to, intrafetal potassium
37 chloride or digoxin;

38 (d) Age of the patient;

1 (e) If the probable postfertilization age was determined to be at
2 the point of viability or later, whether the reason for the abortion
3 was a medical emergency or fetal anomaly and, if the reason was a
4 medical emergency, the basis of the determination that the pregnant
5 woman had a condition which so complicated her medical condition as
6 to necessitate the abortion of her pregnancy to avert her death or to
7 avert serious risk of substantial and irreversible physical
8 impairment of a major bodily function, not including psychological or
9 emotional conditions;

10 (f) If the probable postfertilization age was determined to be at
11 the point of viability or later, whether or not the method of
12 abortion used was one that, in reasonable medical judgment, provided
13 the best opportunity for the unborn child to survive and, if such a
14 method was not used, the basis of the determination that termination
15 of the pregnancy in that manner would pose a greater risk either of
16 the death of the pregnant woman or of the substantial and
17 irreversible physical impairment of a major bodily function, not
18 including psychological or emotional conditions, of the woman than
19 would other available methods; and

20 (g) Other demographic information that the department of health
21 determines is necessary.

22 (2) Reports required by subsection (1) of this section shall not
23 contain the name or the address of the patient whose pregnancy was
24 terminated, nor shall the report contain any other information
25 identifying the patient, except that each report shall contain a
26 unique medical record identifying number, to enable matching the
27 report to the patient's medical records. The reports must be
28 maintained in strict confidence by the department, must not be
29 available for public inspection, and must not be made available
30 except:

31 (a) To the attorney general or solicitor with appropriate
32 jurisdiction pursuant to a criminal investigation;

33 (b) To the attorney general or solicitor pursuant to a civil
34 investigation of the grounds for an action under section 8 of this
35 act; or

36 (c) Pursuant to court order in an action under section 8 of this
37 act.

38 (3) By June 30th of each year, the department of health shall
39 issue a public report providing statistics for the previous calendar
40 year compiled from all of the reports covering that year submitted in

1 accordance with this section for each of the items listed in
2 subsection (1) of this section. Each report also shall provide the
3 statistics for all previous calendar years during which this section
4 was in effect, adjusted to reflect any additional information from
5 late or corrected reports. The department of health shall take care
6 to assure that none of the information included in the public reports
7 could reasonably lead to the identification of any pregnant woman
8 upon whom an abortion was performed, induced, or attempted.

9 (4) Any facility that fails to submit a report by the end of
10 thirty days following the due date must be subject to a late fee of
11 one thousand dollars for each additional thirty-day period or portion
12 of a thirty-day period the report is overdue. Any facility required
13 to report in accordance with this section that has not submitted a
14 report, or has submitted only an incomplete report, more than six
15 months following the due date, may, in an action brought by the
16 department of health, be directed by a court of competent
17 jurisdiction to submit a complete report within a period stated by
18 court order or be subject to civil contempt. Intentional or reckless
19 falsification of any report required under this section is a gross
20 misdemeanor punishable by not more than three hundred sixty-four days
21 in prison.

22 (5) Within ninety days of the effective date of this section, the
23 department of health shall adopt forms and rules to assist in
24 compliance with this section. Subsection (1) of this section shall
25 take effect so as to require reports regarding all abortions
26 performed or induced on and after the first day of the first calendar
27 month following the effective date of such rules.

28 NEW SECTION. **Sec. 7.** A new section is added to chapter 9.02 RCW
29 to read as follows:

30 Any physician who intentionally or knowingly fails to conform to
31 any requirement in sections 4 and 5 of this act is guilty of a class
32 C felony and, upon conviction, must be fined not less than two
33 thousand dollars nor more than ten thousand dollars or imprisoned for
34 not more than five years, or both. No part of the minimum fine may be
35 suspended. For conviction of a third or subsequent offense, the
36 sentence must be imprisonment for not less than sixty days nor more
37 than three years, no part of which may be suspended.

1 NEW SECTION. **Sec. 8.** A new section is added to chapter 9.02 RCW
2 to read as follows:

3 (1) Sections 4 and 5 of this act may not be construed to repeal,
4 by implication or otherwise, RCW 9.02.120 or any other applicable
5 provision of state law regulating or restricting abortion. An
6 abortion that complies with sections 4 and 5 of this act but violates
7 the provisions of RCW 9.02.120 or any other applicable provision of
8 state law must be considered unlawful as provided in such provision.
9 An abortion that complies with the provisions of RCW 9.02.120 or any
10 other applicable provision of state law regulating or restricting
11 abortion but violates section 4 or 5 of this act must be considered
12 unlawful.

13 (2)(a) If some or all of the provisions of this act are
14 temporarily or permanently restrained or enjoined by judicial order,
15 all other provisions of state law regulating or restricting abortion
16 must be enforced as though such restrained or enjoined provisions had
17 not been adopted.

18 (b) Subsection (2)(a) of this section does not apply if a
19 temporary or permanent restraining order of injunction is stayed or
20 dissolved, or otherwise ceases to have effect, in which case those
21 provisions shall have full force and effect.

22 **Sec. 9.** RCW 9.02.100 and 1992 c 1 s 1 are each amended to read
23 as follows:

24 The sovereign people hereby declare that every individual
25 possesses a fundamental right of privacy with respect to personal
26 reproductive decisions.

27 Accordingly, it is the public policy of the state of Washington
28 that:

29 (1) Every individual has the fundamental right to choose or
30 refuse birth control;

31 (2) Every woman has the fundamental right to choose or refuse to
32 have an abortion, except as specifically limited by RCW 9.02.100
33 through 9.02.170 ~~((and)),~~ 9.02.900 ~~((through)),~~ 9.02.902, and
34 sections 4 and 5 of this act;

35 (3) Except as specifically permitted by RCW 9.02.100 through
36 9.02.170 ~~((and)),~~ 9.02.900 ~~((through)),~~ 9.02.902, and sections 4 and
37 5 of this act, the state shall not deny or interfere with a woman's
38 fundamental right to choose or refuse to have an abortion; and

1 (4) The state shall not discriminate against the exercise of
2 these rights in the regulation or provision of benefits, facilities,
3 services, or information.

4 **Sec. 10.** RCW 9.02.110 and 1992 c 1 s 2 are each amended to read
5 as follows:

6 The state may not deny or interfere with a woman's right to
7 choose to have an abortion prior to viability of the fetus, or to
8 protect her life or health, as provided in sections 4 and 5 of this
9 act.

10 A physician may terminate and a health care provider may assist a
11 physician in terminating a pregnancy as permitted by this section.

12 **Sec. 11.** RCW 9.02.900 and 1992 c 1 s 10 are each amended to read
13 as follows:

14 RCW 9.02.100 through 9.02.170 ~~((and))~~, 9.02.900 ~~((through))~~,
15 9.02.902, and sections 4 and 5 of this act shall not be construed to
16 define the state's interest in the fetus for any purpose other than
17 the specific provisions of RCW 9.02.100 through 9.02.170 ~~((and))~~,
18 9.02.900 ~~((through))~~, 9.02.902, and sections 4 and 5 of this act.

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