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S.B. 23
133rd General Assembly

Bill Analysis

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Primary Sponsor: Sen. Roegner

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Summary

Abortion prohibited when there is a fetal heartbeat

- Generally prohibits 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 human individual whose fetal heartbeat has been detected.
- Provides that a person who violates the above prohibition is guilty of performing or inducing an abortion after the detection of a fetal heartbeat, a felony of the fifth degree.
- Provides that a physician is not in violation of the above prohibition if that physician performs a medical procedure designed to or intended to prevent the death of a pregnant woman or prevent a serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman.
- Provides that a person is not in violation of the prohibition if that person has performed an examination for the presence of a fetal heartbeat and the method used does not reveal a fetal heartbeat.
- Provides that the prohibition does not repeal or limit any other provision of law that restricts or regulates the performance or inducement of an abortion by a particular method or during a particular stage of pregnancy.

Offense of abortion before determining fetal heart beat

- Provides that a person who knowingly and purposefully performs or induces an abortion before determining if there is a fetal heartbeat is guilty of performing or inducing abortion before determining whether there is a detectable fetal heartbeat, a felony of the fifth degree.
- Provides that a physician does not commit the offense if the physician performs or induces an abortion believing that a medical emergency exists.

- Provides that a person does not commit the offense if that person has performed an examination for the presence of a fetal heartbeat and the method used does not reveal a fetal heartbeat.

Wrongful death actions

- Requires a woman to be awarded court costs and reasonable attorney's fees if she prevails in a civil action for the wrongful death of her unborn child.
- Provides that a determination of unconstitutionality is a defense, if the suit is based on a provision that was deemed unconstitutional.
- Requires that a defendant be awarded reasonable attorney fees if the action was frivolous and the defendant was adversely affected.

Adoption promotion and support

- States that it is the General Assembly's intent that women whose pregnancies are protected under the bill be informed of available options for adoption.
- Creates the Joint Legislative Committee on Adoption Promotion and Support, comprised of three House of Representative members and three Senate members, to further the General Assembly's intent described above.
- Permits the Committee to review or study any matter that it considers relevant to the adoption process in Ohio and grants the Committee the same powers as other standing or select committees of the General Assembly.

Declaratory judgments and court orders

- Permits the Attorney General to apply to a state or federal court for a declaration that the bill's provisions are constitutional, or an order lifting an injunction if one exists, if federal abortion law changes.
- Permits a county prosecutor to apply to a state or federal court for the above relief if the Attorney General fails to act within 30 days of the change.

Other provisions

- Requires the Department of Health to consult with independent experts with regard to materials that the Department must publish on its website to inform pregnant women of the probable anatomical and physiological characteristics of a zygote, blastocyte, embryo, or fetus at various gestational increments.
- Requires a person to fulfill certain documentation requirements when the person performs an abortion relating to the bill's provisions.
- Provides that nothing in the bill prohibits the sale, use, prescription, or administration of a drug, device, or chemical for contraceptive purposes.

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Detailed Analysis

Abortion prohibited when there is a fetal heartbeat

The bill generally prohibits 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 in accordance with the requirements of the bill. Whoever violates this prohibition is guilty of performing or inducing an abortion after the detection of a fetal heartbeat, a felony of the fifth degree.¹

Exceptions to prohibition

As described below, there are two circumstances in which the fetal heartbeat prohibition does not apply or is not violated.

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

The prohibition does not apply to a physician who performs 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 Continuing law defines a "serious risk of the substantial and irreversible impairment of a major bodily function" as any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function. A medically diagnosed condition that constitutes a "serious risk of the substantial and irreversible impairment of a major bodily function" includes pre-eclampsia, inevitable abortion, and premature rupture of the membranes, may include, but is not limited to, diabetes and multiple sclerosis, and does not include a condition related to the woman's mental health.³

A physician in this circumstance must declare in writing that the medical procedure is necessary, to the best of that physician's reasonable medical judgment, to prevent the death of the pregnant woman or to prevent a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman. The physician must also provide in the written document the medical condition that the procedure will assertedly address and the medical rationale for the conclusion that the procedure is necessary. The physician must place the written documentation in the pregnant woman's medical records and maintain a copy of the written documentation in the physician's own records for at least seven years.⁴

¹ R.C. 2919.195(A).

² R.C. 2919.195(B).

³ R.C. 2919.19(A)(12); R.C. 2919.16(K), not in the bill.

⁴ R.C. 2919.195(B).

2. No fetal heartbeat revealed

A person who has performed an examination for the presence of a fetal heartbeat, in accordance with the person's good-faith understanding of standard medical practice, that does not reveal a fetal heartbeat, is not in violation of the prohibition.⁵

Abortions performed to preserve a woman's health

Additional documentation requirement

After a fetal heartbeat has been detected pursuant to the bill's requirements, any person performing or inducing an abortion for the purpose of *preserving the health* of the pregnant woman is required by the bill to set forth in a written document the medical condition that the abortion will address and the medical rationale for the conclusion that the abortion is necessary to address the condition.⁶ If the abortion is not to preserve the health of the pregnant woman, the person performing or inducing the abortion must specify in a written document that the purpose was not maternal health.⁷ The person must place either written document in the pregnant woman's medical records and maintain a copy in the person's own records for at least seven years.⁸ This documentation requirement appears to be independent of continuing law and the bill's requirements regarding requirements for detecting fetal heartbeat and prohibitions relating to abortions before or after determining a fetal heartbeat.⁹

Although the bill refers to the performance of an abortion to preserve a pregnant woman's health, the bill does not contain an express exception that would authorize an abortion to be performed for this purpose after a fetal heartbeat has been detected.

Relationship to other abortion laws

The bill declares 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.¹⁰ Under continuing law, "pregnancy" is defined as the human female reproductive condition that begins with fertilization, when the woman is carrying the developing human offspring, and that is calculated from the first day of the last menstrual period of the woman.¹¹

Acknowledgment by pregnant woman

If the person who intends to perform or induce an abortion on a pregnant woman detects a fetal heartbeat in the unborn human individual that the pregnant woman is carrying, the pregnant woman must sign a form acknowledging that the pregnant woman has received

⁵ R.C. 2919.192(A) and 2919.195(C).

⁶ R.C. 2919.196(A)(1).

⁷ R.C. 2919.196(A)(2).

⁸ R.C. 2919.196(B).

⁹ R.C. 2919.192 through 2919.195 and 2919.196(A).

¹⁰ R.C. 2919.195(D).

¹¹ R.C. 2919.19(A)(11).

information from the person intending to perform or induce the abortion that the unborn human individual that the pregnant woman is carrying has a fetal heartbeat and that the pregnant woman is aware of the statistical probability of bringing the unborn human individual that the pregnant woman is carrying to term. Notwithstanding this requirement, the person who intends to perform or induce an abortion cannot do so without at least 24 hours elapsing after meeting this requirement, as well as requirements in continuing law that the person must notify the pregnant woman of the existence of a fetal heartbeat and the statistical probability of the unborn human individual being brought to term.¹²

Abortion before determining fetal heartbeat

The bill provides that, except when prevented by a medical emergency in certain cases, whoever knowingly and purposefully performs or induces an abortion without determining whether there is a detectable fetal heartbeat is guilty of a felony of the fifth degree.¹³ The bill provides that nothing in continuing law governing methods of detecting a fetal heartbeat, as specified in rules of the Director of Health, may be construed as requiring a transvaginal ultrasound.¹⁴

Continuing law prohibits such an abortion before determining the presence of a fetal heartbeat already, but only provides for a civil action for compensatory and exemplary damages or disciplinary action by the State Medical Board for a violation.¹⁵ “Medical emergency” under continuing law means a condition that in the physician’s good faith medical judgment, based upon the facts known to the physician at that time, so complicates the woman’s pregnancy as to necessitate the immediate performance or inducement of an abortion in order to prevent the death of the pregnant woman or to avoid a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman that delay in the performance or inducement of the abortion would create.¹⁶

Exceptions

1. Medical emergency

Under the bill, if a medical emergency prevents a physician from determining the presence of a fetal heartbeat, the physician must 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. The physician also must maintain this 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.¹⁷

¹² R.C. 2919.194(A)(1) to (3).

¹³ R.C. 2919.193(A).

¹⁴ R.C. 2919.192(B) (renumbered from 2919.191 under the bill).

¹⁵ R.C. 4731.22(B)(47) and 2919.191(E) (under current law).

¹⁶ R.C. 2919.19(A)(9) and 2919.16, not in the bill.

¹⁷ R.C. 2919.193(B) and (C) and 2919.191(F) (under current law).

2. No fetal heartbeat revealed

In addition, a person who has performed an examination for the presence of a fetal heartbeat, in accordance with the person's good faith understanding of standard medical practice, that does not reveal a fetal heartbeat, does not commit the offense.¹⁸

No prohibitions regarding contraception

Nothing in the bill prohibits the sale, use, prescription, or administration of a drug, device, or chemical for contraceptive purposes.¹⁹ "Contraceptive" means a drug, device, or chemical that prevents conception and "conception" means fertilization.²⁰

Findings by the General Assembly

Under the bill, the General Assembly declares that it finds, according to contemporary medical research, all of the following:²¹

1. As many as 30% of natural pregnancies end in spontaneous miscarriage (defined as the natural or accidental termination of a pregnancy and the expulsion of the fetus, typically because of fetal genetic defects or physical abnormalities in the woman);²²
2. Less than 5% of all natural pregnancies end in spontaneous miscarriage after detection of fetal cardiac activity;
3. Over 90% of in vitro pregnancies survive the first trimester if cardiac activity is detected in the gestational sac;
4. Nearly 90% of in vitro pregnancies do not survive the first trimester where cardiac activity is not detected in the gestational sac;
5. Fetal heartbeat, therefore, has become a key medical predictor that an unborn human individual will reach live birth;
6. Cardiac activity begins at a biologically identifiable moment in time, normally when the fetal heart is formed in the gestational sac;
7. The state of Ohio has a legitimate interest from the outset of the pregnancy in protecting the health of the woman, and a compelling interest from the outset of the pregnancy in protecting the life of the unborn human individual who may be born;
8. In order to make an informed choice about whether to continue her pregnancy, the pregnant woman has a legitimate interest in knowing the likelihood of the fetus surviving to full-term birth based upon the presence of cardiac activity;
9. The state of Ohio finds that the detection of a fetal heartbeat can be accomplished through standard medical practices.

¹⁸ R.C. 2919.193(D).

¹⁹ R.C. 2919.197.

²⁰ R.C. 2919.19(A)(1) and (2).

²¹ R.C. 2919.191(A).

²² R.C. 2919.19(A)(13).

Applicability of the bill

The bill states that provisions in existing law and the bill prohibiting abortion before and after detection of a fetal heartbeat apply only to intrauterine pregnancies.²³ “Intrauterine pregnancy” is defined to mean a pregnancy in which the fetus is attached to the placenta within the uterus of the pregnant woman.²⁴

Severability

The bill contains two severability provisions.

Fetal heartbeat severability

The bill provides that if any provision of R.C. 2919.171 or 2919.19 to 2919.1910 or their application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of those sections that can be given effect without the invalid provision or application, and to this end those provisions are severable. Moreover, the bill expresses that the General Assembly’s intent is to continue the immediate and continuing enforcement of the remainder of the provisions in those sections, should any individual provision of those sections be held invalid or if any provision is potentially invalid.²⁵ The General Assembly also intends a court judgment or order suspending any provision of those sections not to be regarded as tantamount to a repeal of that provision.²⁶ Finally, nothing in R.C. 2919.171 or 2919.191 to 2919.1910 is intended to repeal or limit any other Ohio laws, except as provided in those sections.²⁷

Universal severability

The bill contains an uncodified severability provision that covers all sections of the bill (including the heartbeat provisions covered by the other severability clause). It provides that if any provisions of a section that are amended or enacted by the bill, or their application to a person or circumstance is held invalid, that invalidity does not affect other provisions or applications of the section or related sections that can be given effect without the invalid provision or application, and to that end they are severable.²⁸

Consultation with independent experts

The bill requires the Department of Health to consult with *independent experts*, such as the Ohio State Medical Association and the Ohio section of the American College of Obstetricians and Gynecologists with regard to materials that the Department must publish on

²³ R.C. 2919.191(B).

²⁴ R.C. 2919.19(A)(8).

²⁵ R.C. 2919.19(B)(4).

²⁶ R.C. 2919.19(B)(1).

²⁷ R.C. 2919.19(B)(4).

²⁸ Section 3.

its website that inform pregnant women of the probable anatomical and physiological characteristics of a zygote, blastocyte, embryo, or fetus at various gestational increments.²⁹

Current law requires *direct* consultation with the Ohio State Medical Association and the Ohio section of the American College of Obstetricians and Gynecologists when producing these materials for pregnant women on its website.

Reporting requirement

The bill requires a physician who performs or induces abortions or attempts to do so, in addition to the reports to the Department of Health required under continuing law relating to written certifications and determinations regarding viability, to also provide all of the information the physician is required to certify in writing or determine with respect to abortions and the provisions of existing law and the bill relating to fetal heartbeat detection. The bill provides that if a person other than the physician described above makes or maintains records relating to abortions and fetal heartbeat detection on the physician's behalf or at the physician's direction, that person must comply with the reporting requirements.³⁰

Documentation requirements for disciplinary action

The bill permits the State Medical Board to take disciplinary action for failure to comply with the requirements to make or maintain the following medical records or documents for a pregnant woman regarding an abortion procedure:

- Fetal heartbeat determination test results, date and time of test, test method used, and gestational age;
- Notations of the physician's belief regarding the medical emergency and the woman's medical condition preventing compliance with the requirement to determine the presence of a fetal heartbeat;
- Written declaration that the abortion is necessary to prevent the death of, or serious risk of substantial and irreversible impairment of a major bodily function of, the pregnant woman, in situations in which a fetal heartbeat is present;
- Written documentation regarding medical condition and medical rationale, in situations in which the abortion is purportedly to preserve the pregnant woman's health;
- Written documentation that maternal health is not the purpose of the abortion, in situations in which the abortion is other than to preserve the pregnant woman's health.

Current law permits disciplinary action for (1) failure to comply with the requirements for maintaining notes in the medical records of the emergency necessitating the abortion prior to detecting a fetal heartbeat and the medical condition of the woman that required the abortion, and (2) failure to satisfy all the requirements under law for determining the presence of fetal heartbeat prior to performing or inducing an abortion. Disciplinary action permitted

²⁹ R.C. 2317.56(C)(2).

³⁰ R.C. 2919.171(A).

under current law includes revoking or suspending an individual's certificate to practice or reprimanding or placing a certificate holder on probation.³¹

Declaratory judgments and court orders

The bill permits the Attorney General to take certain legal action if the U.S. Supreme Court overrules *Roe v. Wade*³² and *Planned Parenthood v. Casey*,³³ any other court issues 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 is amended to restore, expand, or clarify the authority of states to prohibit or regulate abortion entirely or in part.³⁴ The bill permits the Attorney General to seek either or both of the following from a federal or state court:

1. A declaration that any of the bill's provisions are constitutional (see **Comment**);
2. A judgment or order lifting an injunction if one has been placed on provisions contained in the bill.

The bill permits any county prosecutor to apply to a state or federal court for the same relief if the Attorney General fails to act within 30 days of the change.³⁵

Wrongful death action

Circumstances supporting action

The bill makes changes to existing law permitting a woman who received an abortion to bring a wrongful death action for her unborn child. The bill permits an action to be brought 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 has been detected, or (2) without the woman's signature on an acknowledgment 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. These circumstances for supporting the wrongful death action are in addition to those under continuing law regarding abortions done:

- Before determining the existence of a fetal heartbeat;
- Without notifying the woman that there was a fetal heartbeat and the statistical probability of the unborn human individual with a fetal heartbeat being brought to term; and
- Without informed consent required under R.C. 2317.56(B).³⁶

³¹ R.C. 2919.192(A), 2919.193(C), 2919.195(B), 2919.196(A), and 4731.22(B)(47).

³² 410 U.S. 113 (1973).

³³ 505 U.S. 833 (1992).

³⁴ R.C. 2919.19(B)(2).

³⁵ R.C. 2919.19(B)(3).

³⁶ R.C. 2919.199(A); R.C. 2919.193(A), 2919.194(A), and 2919.195(A); and R.C. 2317.56(G).

Recovery of court costs and attorney's fees

The bill requires the court to award the woman court costs and reasonable attorney's fees if she prevails in the action. This is in addition to damages as permitted under current law. But, if the defendant prevails, the bill requires the court to award reasonable attorney's fees to the defendant if both of the following apply:

- Commencement of the action was frivolous conduct and the defendant was adversely affected by it;
- The court's decision is not based on a finding that the law on which the action is based is unconstitutional.³⁷

Unconstitutionality defense

The bill provides that a court finding of unconstitutionality of the law under which the wrongful death action is brought shall be a defense to the action.³⁸

Pregnant woman not liable

The bill provides that a pregnant woman on whom an abortion is performed in violation of any of the following crimes is 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; or
3. Performing or inducing an abortion without informed consent when there is a detectable fetal heartbeat (in the situation in which the woman did not sign the acknowledgment form stating that the woman received the information (a) that there was a fetal heartbeat and (b) about the statistical probability of the unborn human individual with a fetal heartbeat being brought to term).

Further, the pregnant woman is not subject to a civil penalty based on the violations.³⁹

Intent of General Assembly regarding adoption information

The bill states that it is the General Assembly's intent that women whose pregnancies are protected under the bill to be informed of available options for adoption.⁴⁰

Joint Legislative Committee on Adoption Promotion and Support

The bill creates the Joint Legislative Committee on Adoption Promotion and Support to further the General Assembly's intent to inform women whose pregnancies are protected

³⁷ R.C. 2919.199(B) and (D).

³⁸ R.C. 2919.199(C).

³⁹ R.C. 2919.198.

⁴⁰ R.C. 2919.1910(A).

under the bill of adoption options. The bill permits the Committee to review or study any matter that it considers relevant to the adoption process in Ohio, with priority given to the study or review of mechanisms intended to increase awareness of the process, increase its effectiveness, or both. The bill grants the Committee the same powers as other standing or select committees of the General Assembly.⁴¹

Committee membership

The committee is to consist of three members of the House of Representatives appointed by the Speaker of the House and three members of the Senate appointed by the Senate President. Not more than two members appointed by the Speaker and not more than two members appointed by the President may be of the same political party.

Terms of office

Each member of the Committee is to hold office during the general assembly in which the member is appointed and until a successor has been appointed, notwithstanding the adjournment sine die of the general assembly in which the member was appointed or the expiration of the member's term as a member of the General Assembly.

Filling of vacancies

The bill requires any vacancies occurring among the members of the Committee to be filled in the manner of the original appointment.⁴²

Background: current Ohio law regarding abortion

Determination of fetal heartbeat before an abortion

Ohio law requires a person who intends to perform or induce an abortion on a pregnant woman to determine whether there is a detectable fetal heartbeat of the unborn human individual the pregnant woman is carrying. The method of determining the presence of a fetal heartbeat must be consistent with the person's good faith understanding of standard medical practice.⁴³

The Director of Health may establish rules specifying the appropriate methods of performing an examination to determine a fetal heartbeat based on standard medical practice; the rules must require the examination to be performed externally.⁴⁴ The person who performs the examination for the presence of a fetal heartbeat must give the pregnant woman the option to view or hear the fetal heartbeat.⁴⁵

⁴¹ R.C. 2919.1910(B) and (D).

⁴² R.C. 2910.1910(C).

⁴³ R.C. 2919.192 (renumbered from 2919.191 under the bill).

⁴⁴ R.C. 2919.192(B).

⁴⁵ R.C. 2919.192(A).

Abortion procedure in case of fetal heartbeat

Current law permits abortions after a fetal heartbeat has been detected, prior to (1) reaching the probable post-fertilization age of 20 weeks or greater or (2) viability.⁴⁶ “Viable” is defined as the stage of development of a human fetus at which in the determination of a physician, based on the particular facts of a woman’s pregnancy that are known to the physician and in light of medical technology and information reasonably available to the physician, there is a realistic possibility of the maintaining and nourishing of a life outside of the womb with or without temporary artificial life-sustaining support.⁴⁷ Viability is presumed to begin at 24 weeks gestation.⁴⁸ The bill does not amend these provisions of law.

Continuing law requires the person intending to perform or induce the abortion to inform the pregnant woman if there is a fetal heartbeat and of the statistical probability of bringing the unborn human individual, for which the fetal heartbeat was detected, to term.⁴⁹ After satisfying the informed consent requirements, the person would also need to wait at least 24 hours before performing or inducing the abortion.⁵⁰ These provisions do not apply when a physician believes that a medical emergency exists.⁵¹

Comment

Article III of the U.S. Constitution limits the jurisdiction of federal courts to “cases” and “controversies.”⁵² Absent any case or controversy, federal courts have no authority to issue advisory opinions that declare the constitutionality of a law.⁵³ The Ohio Constitution has a similar requirement. Ohio courts require litigants to show that they have suffered an injury that is traceable to the defendant’s allegedly unlawful conduct, which is likely to be redressed by the requested relief.⁵⁴ It is unclear whether the Attorney General or county prosecutors applying to federal or state courts for a declaration that Ohio law is constitutional, as provided in the bill, would involve a case or controversy.

⁴⁶ R.C. 2919.194 (renumbered from R.C. 2919.192 under the bill); R.C. 2919.17(A) and 2919.201, neither in the bill.

⁴⁷ R.C. 2919.16(M), not in the bill.

⁴⁸ R.C. 2919.17(E), not in the bill.

⁴⁹ R.C. 2919.194(A)(1) and (2).

⁵⁰ R.C. 2919.194(A).

⁵¹ R.C. 2919.194(B).

⁵² U.S. Const., art. III, § 2.

⁵³ See *Veith v. Jubelirer*, 541 U.S. 267, 302 (2004) (Justice Scalia, writing for the court, provides a history of refusing to issue advisory opinions, beginning in 1793).

⁵⁴ *Prograssohio.org, Inc. v. Jobsohio*, 139 Ohio St.3d 520, 521 (2014) (interpreting art. IV, Ohio Const.).

History

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