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S.B. 157*
134th General Assembly

Bill Analysis

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Version: As Reported by Senate Government Oversight

Primary Sponsors: Sens. Johnson and S. Huffman

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SUMMARY

Abortion manslaughter

- Expands the crime of abortion manslaughter to include failure to take measures to preserve the health of a child born alive after abortion.
- Authorizes an affected woman to sue a person guilty of abortion manslaughter.

Duties regarding children born alive after abortion or attempted abortion

- Requires a physician who performs or attempts an abortion in an ambulatory surgical facility or other location that is not a hospital and in which a child is born alive to immediately provide certain newborn care.
- Requires the Director of Health to develop a child survival form that an attending physician must complete each time a child is born alive after an abortion or attempted abortion.
- Specifies that a completed child survival form becomes part of the medical record an abortion facility maintains on the woman who is the subject of the form, and is not a public record.
- Requires each facility in which a child was born alive following an abortion or attempted abortion to submit monthly and annual reports to the Department of Health (ODH).

* This analysis was prepared before the report of the Senate Government Oversight Committee appeared in the Senate Journal. Note that the legislative history may be incomplete

- Requires the Department to issue annual reports summarizing the data in the facility reports.

Criminal penalties and civil action

- Specifies criminal penalties for failure to comply with the bill's child survival form and reporting requirements.
- Authorizes an affected woman to sue a physician or facility for failure to comply with the bill's child survival form and reporting requirements.

Variations from written transfer agreements

- Regarding variations from the written transfer agreement requirement that applies to ambulatory surgical facilities (ASFs), requires each consulting physician to attest that:
 - The physician does not teach or provide instruction at a medical school affiliated with a state university or college, a state hospital, or other public institution;
 - The physician is not employed by, compensated by, and does not provide instruction or consultation to, those institutions.
- Prohibits a consulting physician from engaging in the above activities while serving as a consulting physician for an ASF with an approved variance, or the Director of Health must rescind the variance.
- Requires each ASF with an existing variance to demonstrate compliance with the bill's requirements within 90 days, or the Director must rescind the variance.

DETAILED ANALYSIS

Abortion manslaughter

Under existing law, a person who does either of the following is guilty of abortion manslaughter, a first degree felony:

1. Purposely takes the life of a child born by attempted abortion who is alive when removed from the uterus of the pregnant woman; or
2. When performing an abortion, fails to take the measures required by the exercise of medical judgment in light of the attending circumstances to preserve the life of a child who is alive when removed from the uterus of the pregnant woman.

The bill modifies the second basis for this offense by (a) requiring that the failure be *purposely* done and (b) specifying that this offense also applies to a failure to take the measures required to preserve the *health* of the child who is born alive.

The bill establishes new criminal offenses related to the second basis for this offense. Under the bill, it is abortion manslaughter, a first degree felony, if the child dies as a result of the person's failure to take the measures described above. It is a failure to render medical care to an infant born alive, a first degree felony, if the child survives notwithstanding the person's failure to take the required measures.

The bill authorizes a woman on whom an abortion is performed or attempted to file a lawsuit against a person who commits abortion manslaughter. A woman who prevails in such a lawsuit must receive compensatory and exemplary damages in an amount determined by the trier of fact, court costs, and reasonable attorney's fees.¹

Post-birth physician care requirements

The bill requires a physician who performs or attempts an abortion in an ambulatory surgical facility or other location that is not a hospital and in which a child is born alive to immediately take the following steps upon the child's birth:²

- Provide post-birth care to the newborn in accordance with prevailing and acceptable standards of care;
- Call for assistance from an emergency medical services provider; and
- Arrange for the transfer of the newborn to a hospital.

A physician who fails to comply with this requirement is subject to disciplinary action by the State Medical Board.³

Child survival form

Development

The bill requires the Director of Health to develop a child survival form to be submitted to the Department of Health (ODH) each time a child is born alive after an abortion or attempted abortion. In developing the form, the Director may consult with obstetricians, maternal-fetal specialists, and any other professionals the Director considers appropriate. The form must include areas for all of the following to be provided:⁴

- The patient number for the woman on whom the abortion was performed or attempted;
- The name, primary business address, and signature of the attending physician who performed or attempted to perform the abortion;
- The name and address of the facility in which the abortion was performed or attempted, and whether the facility is a hospital, ambulatory surgical facility, physician's office, or other facility;
- The date the abortion was performed or attempted;
- The type of abortion procedure that was performed or attempted;

¹ R.C. 2919.13.

² R.C. 4731.90.

³ R.C. 4731.22(B)(53).

⁴ R.C. 3701.792(A).

- The gestational age of the child who was born;
- Complications, by type, for both the woman and child; and
- Any other information the Director considers appropriate.

Physician duties

The bill requires the attending physician who performed or attempted an abortion in which a child was born alive to complete a child survival form. The physician must submit the completed form to ODH not later than 15 days after the woman is discharged from the facility.⁵ If enacted, this requirement would be in addition to the existing requirement that a physician who performs an abortion must complete an individual abortion report for each abortion the physician performs.⁶

Confidentiality; medical record

The bill specifies that a completed child survival form is confidential and not a public record.⁷ It must be made part of the medical record maintained for the woman by the facility in which the abortion was performed or attempted.⁸

Abortion facility reports

The bill requires each facility in which an abortion is performed or attempted and in which a child was born alive to submit monthly and annual reports to ODH listing the total number of women on whom an abortion was performed or attempted at the facility in which a child was born alive, delineated by the type of abortion procedure that was performed or attempted. The facility must submit the annual report after the end of the state's fiscal year.⁹ Each monthly or annual report must be submitted not later than 30 days after the end of the applicable reporting period.¹⁰

Criminal penalties

A person who purposely fails to comply with the child survival form or abortion facility report submission requirements is guilty of a third degree felony.¹¹

⁵ R.C. 3701.792(B).

⁶ R.C. 3701.79(C).

⁷ R.C. 3701.792(B).

⁸ R.C. 3701.792(C).

⁹ Each state fiscal year ends on June 30.

¹⁰ R.C. 3701.792(D).

¹¹ R.C. 3701.792(F) and (G) and 3701.99(D).

Civil action

The bill authorizes a woman on whom an abortion is performed or attempted to file a civil lawsuit against a physician or facility that violates the bill's requirements regarding child survival forms and reporting. If she prevails, she must receive from that physician or facility \$10,000 in damages, court costs, and reasonable attorney's fees.¹²

Department of Health annual reports

The bill requires ODH, not later than October 1 each year, to issue a report regarding data that it has received in the previous year through the submission of abortion facility reports as described above. At a minimum, the annual report must specify the number of women on whom an abortion was performed or attempted and in which a child was born alive after that event, delineated by the type of abortion procedure performed or attempted and the facility in which the procedure was performed or attempted. The bill prohibits the report from containing any information from which the identity of a woman on which an abortion was performed or attempted or any child could be ascertained.¹³

Variations from written transfer agreements

The bill modifies current law regarding variations from written transfer agreements for ambulatory surgical facilities (ASFs) by adding two additional limitations on consulting physicians under those agreements. Current law requires each ASF to have a written transfer agreement with a local hospital with a transfer procedure for patients when additional medical care is necessary. An ASF can, however, apply to ODH for a variance if the transfer agreement requirement will cause the facility undue hardship.¹⁴

As part of the variance application, the ASF must include a letter, contract, or memorandum of understanding signed by the ASF and at least one consulting physician agreeing to provide back-up coverage when medical care beyond the level the ASF can provide is necessary. The consulting physician must have admitting privileges at a local hospital within 25 miles of the ASF and must sign a statement attesting that the physician:

- Actively practices clinical medicine within a 25-mile radius of the facility;
- Is familiar with the ASF and its operations; and
- Agrees to provide notice to the ASF of any changes in the physician's ability to provide back-up coverage.¹⁵

¹² R.C. 3701.792(H).

¹³ R.C. 3701.792(E).

¹⁴ R.C. 3702.303 and 3702.304, not in the bill.

¹⁵ R.C. 3702.304(B)(2) and (3).

Consulting physician attestation

The bill adds two more limitations on consulting physicians. In addition to the above attestation, the bill requires each consulting physician to sign a statement attesting to both of the following:

- The physician does not teach or provide instruction at either a medical school or an osteopathic medical school affiliated with a state university or college,¹⁶ any state hospital, or other public institution; and
- The physician is not employed by or compensated under a contract with, and does not provide instruction or consultation to, any of those entities.¹⁷

The bill prohibits a consulting physician from engaging in the above activities while serving as a consulting physician for an ASF that has been granted a variance. If a consulting physician violates this prohibition, the Director of Health must rescind the ASF's variance.¹⁸

Existing variances

An ASF with an existing variance must demonstrate compliance with the bill's provisions within 90 days, or the Director of Health must rescind the variance.¹⁹

Mileage requirement

The bill makes a conforming change related to the distance between an ASF and a local hospital where a consulting physician has admitting privileges. H.B. 110 (the Main Operating Budget) narrowed the distance to 25 miles, from 30 miles.²⁰

HISTORY

| Action | Date |
|-----------------------------------|----------|
| Introduced | 04-13-21 |
| Reported, S. Government Oversight | --- |

S0157-RS-134/ar

¹⁶ R.C. 3345.12, not in the bill. State university or college means the University of Akron, Bowling Green State University, Central State University, University of Cincinnati, Cleveland State University, Kent State University, Miami University, Northeast Ohio Medical University, Ohio University, Ohio State University, Shawnee State University, University of Toledo, Wright State University, and Youngstown State University.

¹⁷ R.C. 3702.305(A).

¹⁸ R.C. 3702.305(B) and (C).

¹⁹ Section 3.

²⁰ R.C. 3702.3010.