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CIVIL AND CRIMINAL PENALTIES FOR FETAL INJURY

House Bill 4524 (Substitute H-1)
Sponsor: Rep. Nick Ciaramitaro
Committee: Judiciary

Senate Bill 21 (Substitute H-1)
Sponsor: Sen. William VanRegenmorter
House Committee: Judiciary
Senate Committee: Judiciary

First Analysis (5-11-98)

THE APPARENT PROBLEM:

Under the Michigan Penal Code (MCL 750.322) "[t]he wilful killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter." Manslaughter, under the penal code, is a felony punishable by imprisonment for not more than 15 years or by a fine of not more than \$7,500, or both. The Revised Judicature Act allows civil actions to be brought for "wrongful death," when a person, by his or her negligent actions, causes the death of another person. However, the courts have routinely held when interpreting this law, that a nonviable fetus is not a "person" under the wrongful death laws, and, therefore, that a wrongful death lawsuit cannot be brought against someone for injuries to a human fetus unless the fetus was viable at the time the injuries occurred.

Many people believe that there is a gap in current state law that does not provide adequate legal remedies in cases where pregnant women who wish to carry their pregnancies to term suffer a pregnancy loss through the criminal or negligent actions of a third party. Though there have been numerous bills introduced to address this issue, the problem has been writing legislation that would address the issue in the midst of the highly emotionally charged abortion debate. Once again, legislation has been offered to address this issue, and is presented as a compromise by some supporters and opponents of legalized abortion (though not all agree).

THE CONTENT OF THE BILLS:

The bills together would add civil penalties for wrongful or negligent acts against pregnant individuals that resulted in miscarriage or stillbirth or physical injury to the embryo or fetus (House Bill 4524) and would expand the criminal penalties for certain conduct against or involving a pregnant individual that resulted in injury or death to her fetus (Senate Bill 21). If enacted, each bill would take effect on January 1, 1999.

House Bill 4524 would add a new section to the Revised Judicature Act (MCL 600.2922a) that would make a person who committed a wrongful or negligent act against a "pregnant individual" liable for damages if the act resulted in miscarriage or stillbirth or physical injury to the embryo or fetus. The bill would not apply to (a) an act committed by the pregnant woman ("individual"); (b) a medical procedure performed by a physician or other licensed medical professional within the scope of his or her practice and either (i) with the consent of the pregnant woman (or that of someone who could legally provide consent on her behalf) or (ii) without consent as necessitated by a medical emergency; or (c) the legal dispensation, administration, or prescription of medication. The bill would not prohibit a civil action under any other applicable law.

Senate Bill 21 would amend the Michigan Penal Code (MCL 750.90a et al.) to add eight new felonies and five new misdemeanors for conduct involving pregnant women that resulted in miscarriage, stillbirth, or harm

to the embryo or fetus. Generally, causing miscarriage, stillbirth, or "great bodily harm" to the embryo or fetus would be a felony, while causing "serious or aggravated physical injury" or "physical injury" to the embryo or fetus would be a misdemeanor.

The bill would not prohibit prosecution under any other applicable law and would not apply to the following:

- (1) An act committed by the pregnant individual;
- (2) A medical procedure performed by a physician or other licensed medical professional within the scope of his or her practice, and either (a) with the pregnant woman's consent (or the consent of someone who could lawfully provide consent on the woman's behalf) or (b) without consent "as necessitated by a medical emergency"; or
- (3) The lawful dispensation, administration, or prescription of medication.

The crimes and their penalties would be as follows:

- Intentional assault with the intention to cause a miscarriage or stillbirth or great bodily harm to the embryo or fetus, or acting ("in wanton or willful") disregard of the likelihood that the conduct would result in any of these outcomes that resulted in a miscarriage or stillbirth would be a felony punishable by imprisonment for life or any term of years.
- Intentional assault against a pregnant individual that resulted in:
 - ** A miscarriage or stillbirth, a felony punishable by imprisonment for up to 15 years or a fine up to \$7,500, or both;
 - ** "Great bodily harm" to the embryo or fetus, a felony punishable by imprisonment for up to 10 years or a fine up to \$5,000, or both;
 - ** "Serious or aggravated physical injury" to the embryo or fetus, a misdemeanor punishable by imprisonment for up to one year or a fine up to \$1,000, or both; and
 - ** "Physical injury" to the embryo or fetus, a misdemeanor punishable by imprisonment for up to 93 days or a fine up to \$500, or both;

- Gross negligence that resulted in the following:

- ** Miscarriage or stillbirth, a felony punishable by imprisonment for up to 15 years or a fine up to \$7,500, or both;
- ** "Great bodily harm" to the embryo or fetus, a felony punishable by imprisonment up to 5 years or a fine up to \$2,500, or both;
- ** "Serious or aggravated physical injury" to the embryo or fetus, a misdemeanor punishable by imprisonment up to six months or a fine up to \$500, or both; and
- ** "Physical injury" to the embryo or fetus, a misdemeanor punishable by imprisonment up to 93 days or a fine up to \$100, or both.

- Drunk driving ("operating while under the influence of liquor" [OUIL] or "operating while impaired" [OWI]) that involved an accident with a pregnant individual would be a felony punishable depending on the result as follows:

- ** Miscarriage or stillbirth, imprisonment for up to 15 years or a fine of not less than \$2,500 or more than \$10,000, or both; and
- ** "Great bodily harm" or "serious or aggravated injury" to the embryo or fetus, imprisonment up to 5 years or a fine up to \$1,000, or both;

- Careless or reckless driving ("but not willfully or wantonly") that was the proximate cause of an accident involving a pregnant individual and that resulted in miscarriage or stillbirth, a misdemeanor punishable by imprisonment for up to 2 years or a fine up to \$2,000, or both.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, House Bill 4524 would have an indeterminate fiscal impact. (5-14-98) Fiscal information on Senate Bill 21 is not available.

ARGUMENTS:

For:
 Most people would agree that if a woman chooses to be and to remain pregnant, and if someone injures her in such a way as to cause her to lose that wanted

pregnancy, then the person causing the injury should be subject to both civil and criminal penalties. Many people further believe that there currently is a gap in state law that does not allow adequate civil recourse or criminal penalties when an action against a pregnant woman causes the woman to miscarry or results in a stillbirth, or injures the embryo or fetus. Currently, for example, if a third party causes a pregnant woman to miscarry or give birth to a stillborn infant, there is no way for the woman or her family to file for civil damages, since current law allows for "wrongful death" actions only for persons and viable fetuses that are not born alive. Additionally, the only criminal statute applying to cases where an injury to a pregnant woman causes the death of her fetus is the crime of manslaughter (punishable by up to 15 years imprisonment or a fine up to \$7,500, or both) in the case of "the wilful killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother." House Bill 4524 would allow civil relief for miscarriages, stillbirths, or injury to embryos or fetuses, while Senate Bill 21 would add 13 new crimes where an action by a third party resulted in miscarriage, stillbirth, or injury to the embryo or fetus.

Against:

While most, if not all, people would agree that a woman who loses a wanted pregnancy due to the actions of a third party should have adequate civil and criminal recourse, the question remains regarding the effect, if not the intent, of the bills with regard to the wider public debate over abortion. The bills as introduced clearly used highly emotionally charged language used by prolife advocates (e.g., referring to the "unborn child"), as well as treating a woman's "unborn child" as having equal rights to those of legal persons. Though this language has been removed in the bill substitutes, thus making it more acceptable to some prochoice advocates, it is still objectionable to others. By imposing criminal penalties and allowing civil remedies for injury to fetuses and embryos comparable to those allowed in current law for viable fetuses and persons, the bills arguably would develop a new body of law affording the embryo and fetus comparable rights to those now held by persons. Both bills focus on the result of actions to the embryo or fetus, and not on injury to the pregnant woman, which raises questions about claims that the bills are intended to decrease violence against women. In some of the

proposed crimes, no injury to the pregnant woman is required for the crime to take place. If the bills effectively establish new rights for fetuses and embryos

comparable to those of legal persons, then they could be challenged under the Constitution's Supremacy Clause. The United States Supreme Court decisions (in both *Roe v Wade* and *Planned Parenthood v Casey*) have held that a nonviable fetus is not a person, and therefore states are not free to characterize a fetus as a person. The bills also could be challenged as being unconstitutionally vague and over broad, since it will often be unclear whether a miscarriage early in pregnancy is caused by the act of a third party or is the result of the frequent spontaneous abortions that occur early in as many as an estimated 30 percent of pregnancies. The question of causation will be highly debatable, and therefore vague, in many cases because of this high incidence of spontaneous abortions; this vagueness will only be compounded by the lack of any clear intent requirements in several sections. In fact, unlike some other legislation introduced last session and this session, the bills do not even require that a person charged with one of the proposed crimes know or have reason to believe that a pregnant woman is pregnant. It does not make sense to have a strict liability criminal statute (that is, one in which the crime is based on the action and not on the intent of the offender) for accidentally injuring a previable fetus, or to impose excessive criminal penalties on individuals who may accidentally cause injury to a fetus even if the mother is virtually unharmed and neither the wrongdoer nor the woman knows that she is pregnant. Finally, it should be pointed out that the Senate bill criminalizes conduct that causes, variously, "great bodily harm," "serious or aggravated injury," or just "physical injury" to an embryo or fetus without defining what any of this language means. At the very least, the criminal amendments should define these terms and require intent and knowledge of the pregnancy on the part of the wrongdoer, and, finally, continue to require that injury to the pregnant woman also be a condition for the proposed crimes.

POSITIONS:

Right to Life of Michigan supports the bills. (5-7-98)

Planned Parenthood Affiliates of Michigan supports the bills. (5-7-98)

The American Civil Liberties Union of Michigan has concerns that the criminal penalties for injuring a fetus are identical to the criminal penalties for injuring a person. (5-7-98)

Analyst: S. Ekstrom

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.