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SFA



BILL ANALYSIS

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Senate Bill 21 (as enrolled)
House Bill 4524 (as enrolled)
Sponsor: Senator William Van Regenmorter (Senate Bill 21)
Representative Nick Ciaramitaro (House Bill 4524)
Senate Committee: Judiciary
House Committee: Judiciary

PUBLIC ACT 238 of 1998
PUBLIC ACT 211 of 1998

Date Completed: 8-4-98

RATIONALE

Under the Michigan Penal Code, the willful killing of an unborn "quick" child by any injury to the mother that would be murder if it resulted in the death of the mother constitutes manslaughter. (A fetus is considered quick when signs of life by way of fetal movements can be felt by the mother.) Manslaughter, under the Penal Code, is a felony punishable by up to 15 years' imprisonment, a maximum fine of \$7,500, or both. In addition, the Revised Judicature Act (RJA) allows civil actions to be brought for wrongful death when someone, by his or her negligent actions, causes the death of a "person". Courts have held, however, that a nonviable fetus is not a person under the wrongful death provisions of the RJA. A wrongful death lawsuit, then, cannot be brought against someone for injuries to a human fetus unless the fetus was viable at the time the injuries occurred. (Viability refers to a fetus's ability to live outside the mother's womb even if artificial assistance is required.) Some people believe that the law does not provide adequate legal remedies in cases in which a pregnant woman who wishes to carry her pregnancy to term suffers a miscarriage or an injury to the fetus through the criminal or negligent actions of a third party. They contend that the Penal Code and the RJA should provide criminal penalties and civil remedies for the assaultive or negligent action of another, and for drunk or reckless driving, that causes the loss of or harm to a fetus.

criminal or grossly negligent acts committed against a pregnant woman that cause a miscarriage or stillbirth or harm to the embryo or fetus. The bills take effect on January 1, 1999.

Senate Bill 21

Exceptions

The bill specifies that it does not apply to an act committed by the pregnant woman; the lawful dispensation, administration, or prescription of medication; or a medical procedure performed by a physician or other licensed medical professional within the scope of his or her practice and with the pregnant woman's consent, with the consent of a person who may lawfully provide consent on her behalf, or without consent as necessitated by a medical emergency.

Assaults

The bill specifies that intentionally committing a violation of various assault offenses under the Michigan Penal Code against a pregnant woman is a felony punishable by imprisonment for life or any term of years, if both of the following apply:

- The person intended to cause a miscarriage or stillbirth or great bodily harm to the

CONTENT

Senate Bill 21 and House Bill 4524 amended the Michigan Penal Code and the Revised Judicature Act, respectively, to prescribe criminal penalties and civil remedies for certain

oman's embryo or fetus, or acted in wanton and willful disregard of the likelihood that the natural tendency of his or her conduct would be to cause a miscarriage or stillbirth or great bodily harm to the embryo or fetus.

- The person's conduct resulted in a miscarriage or stillbirth.

Intentionally committing any of those assault offenses against a pregnant woman also will be penalized as follows:

- If the violation results in a miscarriage or stillbirth, the offense is a felony punishable by up to 15 years' imprisonment, a maximum fine of \$7,500, or both.
- If the violation results in great bodily harm to the embryo or fetus, the offense is a felony punishable by up to 10 years' imprisonment, a maximum fine of \$5,000, or both.
- If the violation results in serious or aggravated physical injury to the embryo or fetus, the offense is a misdemeanor punishable by up to one year's imprisonment, a maximum fine of \$1,000, or both.
- If the violation results in physical injury to the embryo or fetus, the offense is a misdemeanor punishable by up to 93 days' imprisonment, a maximum fine of \$500, or both.

(The assault offenses include assault for which no other punishment is prescribed, or assault of a spouse or former spouse, an individual with whom the offender has had a child, or a resident or former resident of the same household (MCL 750.81); assault, without a weapon, that inflicts serious or aggravated injury (MCL 750.81a); assault with a dangerous weapon without intent to commit murder or inflict great bodily harm (MCL 750.82); assault with intent to commit murder (MCL 750.83); assault with intent to do great bodily harm less than murder (MCL 750.84); assault with intent to maim (MCL 750.86); assault for which the punishment is not otherwise prescribed, with intent to commit a felony (MCL 750.87); unarmed assault with intent to rob and steal (MCL 750.88); and armed assault with intent to rob and steal (MCL 750.89).)

Gross Negligence

Under the bill, a person who commits a grossly negligent act against a pregnant woman is guilty of a crime, as follows:

- If the act results in a miscarriage or stillbirth, the offense is a felony punishable by up to 15 years' imprisonment, a maximum fine of \$7,500, or both.
- If the act results in great bodily harm to the embryo or fetus, the offense is a felony punishable by up to five years' imprisonment, a maximum fine of \$2,500, or both.
- If the act results in serious or aggravated physical injury to the embryo or fetus, the offense is a misdemeanor punishable by up to six months' imprisonment, a maximum fine of \$500, or both.
- If the act results in physical injury to the embryo or fetus, the offense is a misdemeanor punishable by up to 93 days' imprisonment, a maximum fine of \$100, or both.

Drunk Driving/Careless or Reckless Driving

The bill makes it a felony to operate a vehicle while under the influence of, or impaired by, alcohol or a controlled substance in violation of the Michigan Vehicle Code, and be involved in an accident with a pregnant woman. The offense is punishable as follows:

- Up to 15 years' imprisonment and/or a fine of not less than \$2,500 or more than \$10,000, if the offense causes a miscarriage or stillbirth.
- Up to five years' imprisonment and/or a fine of not less than \$1,000 or more than \$5,000, if the offense causes great bodily harm or serious or aggravated injury to the embryo or fetus.

It is a misdemeanor, punishable by up to two years' imprisonment and/or a maximum fine of \$2,000, to operate a motor vehicle in a careless or reckless manner, but not willfully or wantonly, if that operation is the proximate cause of an accident involving a pregnant woman and the accident results in a miscarriage or stillbirth.

House Bill 4524

The bill specifies that a person who commits a wrongful or negligent act against a pregnant woman is liable for damages if the act results in a miscarriage or stillbirth or physical injury to the embryo or fetus. The bill does not prohibit a civil action under any other applicable law.

The bill does not apply to any of the following:

- An act committed by the pregnant woman.
- A medical procedure performed by a “physician or other licensed medical professional” within the scope of his or her practice and with the pregnant woman’s consent, or the consent of a person who could lawfully provide consent on her behalf, or without consent if necessary due to a medical emergency.
- The lawful dispensation, administration, or prescription of medication.
- The bill defines “physician or other licensed medical professional” as a person licensed under Article 15 of the Public Health Code.

MCL 750.90a-750.90f (S.B. 21)
600.2922a (H.B. 4524)

BACKGROUND

Several decisions of the Michigan Supreme Court and the Michigan Court of Appeals demonstrate the state of the law concerning the death of or injury to a fetus. In deciding whether a fetus was a “person” for purposes of wrongful death actions and criminal prosecutions, the courts have based their decisions on whether the fetus was viable or “born alive”.

According to a June 26, 1997, order of the Michigan Supreme Court, “Since at least 1975 it has been held that a non-viable fetus is not a ‘person’ within the meaning of the Wrongful Death Act” (*Estate of Baby Girl McDowell, et al. v Stubbs*). In this case, the plaintiff had delivered twins of approximately 20 weeks’ gestation who had heartbeats briefly after they were born. The plaintiff did not dispute that the twins were not viable at the time of delivery, but focused on her claim that they were born alive. The circuit court granted the defendant’s motion for summary disposition, concluding that the wrongful death act did not apply because it “...is intended to apply to a life which, absent some wrongful act, goes on, and will go on and can be assumed to go on.”

The Court of Appeals reversed (*Thomas v Stubbs*, 218 Mich App 46). The Court reviewed prior decisions about “the definition and necessary characteristics of personhood” for purposes of the statute prohibiting negligent operation of a vehicle causing homicide. In 1980 and 1995, the appellate court had adhered to the “born alive” rule. The 1995 case (*People v Selwa*, 214 Mich App 451) involved the delivery of a 6-1/2-month-old fetus that for a short time had a detectable heart rate following 15 minutes of resuscitation. In analyzing

what constituted being “born alive”, the Court looked at statutory definitions of “live birth” and “death”. The *Selwa* Court concluded, “[A] child is ‘born alive’ and thus a ‘person’ under the negligent homicide statute if, following expulsion or extraction from the mother, there is *lacking* an irreversible cessation of respiratory and circulatory functions or brain functions” (emphasis in original). In the *Stubbs* decision, the Court found that there was “...no reason why the *Selwa* definition of ‘born alive’ should not be applied...to determine if plaintiff may pursue a wrongful death action”.

When *Estate of Baby Girl McDowell, et al. v Stubbs* reached the Michigan Supreme Court, the Court reversed the judgment of the Court of Appeals and reinstated the decision of the circuit court. In its order, the Supreme Court cited a 1975 Court of Appeals case (*Toth v Goree*, 65 Mich App 296) as holding that a nonviable fetus is not a person for purposes of wrongful death actions. The Supreme Court did not issue an opinion, and subsequently denied a motion for reconsideration.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

If someone injures a pregnant woman through assault, gross negligence, or drunk or reckless driving, in a manner that causes her to lose the pregnancy or that injures the embryo or fetus, then the person causing the injury should be subject to both civil and criminal penalties. Until the bills take effect, if a third party causes a pregnant woman to miscarry or give birth to a stillborn infant, there may not be any way for the woman or her family to secure civil damages, since the law allows wrongful death actions only for persons and viable fetuses. Additionally, the only applicable criminal penalty is for manslaughter, which is punishable by up to 15 years’ imprisonment and/or a maximum fine of \$7,500, 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” (MCL 750.322). There has been no provision in the Penal Code for an instance in which an embryo or fetus was injured due to a crime committed upon or gross negligence directed toward a pregnant woman. Senate Bill 21 remedies this shortfall in the law by adding criminal penalties for an action by a third party that results in miscarriage, stillbirth, or injury to an embryo or fetus, while House Bill 4524 authorizes civil relief

for miscarriage, stillbirths, or injury to an embryo or fetus.

Supporting Argument

By establishing separate criminal penalties and a civil remedy for injury to or death of a fetus, the bills avoid the difficult and confusing determination of whether a fetus was viable or born alive, particularly in regard to wrongful death actions. Since the wrongful death section of the RJA refers to a "person", the courts have struggled with interpreting that term in cases involving the death of a fetus. As the Court of Appeals pointed out in *Toth v Goree*, "Even though the wrongful death act is for the benefit of certain persons, the cause of action is a derivative one... The suit is brought on behalf of the deceased... When an action is brought under the wrongful death act for the death of a fetus, the rights alleged are those of the fetus." Thus, the courts have had to decide what, if any, rights a fetus would have had to recover for prenatal injuries.

Rather than amending the wrongful death provisions, however, House Bill 4524 adds a separate section to the RJA creating liability if someone's wrongful or negligent act results in a miscarriage, stillbirth, or injury to an embryo or fetus. It will no longer be necessary to determine whether a fetus was born alive or could have survived outside the womb--a determination that has become increasingly difficult in view of modern medical technology.

Opposing Argument

While a woman who loses a wanted pregnancy due to the actions of a third party should have adequate civil and criminal recourse, the bills raise concerns in regard to the wider public debate over abortion. 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 promote a new body of law affording the embryo and fetus rights comparable to those now held by persons. If the bills effectively establish new rights for fetuses and embryos, they could be subject to constitutional challenge. Both *Roe v Wade* and *Planned Parenthood v Casey*, landmark U.S. Supreme Court cases dealing with abortion, have held that a nonviable fetus is not a person, so states are not free to characterize a fetus as a person.

Response: Although the introduced versions of the bills used language that was highly emotionally charged within the context of the abortion debate

(e.g., using "unborn child" rather than "embryo or fetus") and could be characterized as treating a fetus as the legal equal of a person, the enrolled versions of the bills use more neutral language. They refer to a pregnant woman's miscarriage or stillbirth rather than an unborn child's death, and injury to an embryo or fetus resulting from an action against a pregnant woman. The use of these terms should blunt any contention that the bills are a vehicle to assert equal legal rights for fetuses.

Opposing Argument

The bills could be challenged as being unconstitutionally vague and overbroad, since it often will be unclear whether a miscarriage early in the term of a pregnancy is caused by the criminal or negligent act of a third party or is the result of a spontaneous abortion, which reportedly occurs in as many as 30% of pregnancies. The question of causation therefore will be highly debatable. Further, adding to the bills' vagueness is the fact that the Senate bill criminalizes conduct that causes "great bodily harm", "serious or aggravated injury", or "physical injury" to an embryo or fetus, but does not define those terms. It should be made clear what, specifically, constitutes the standard for each of those types of injuries.

Opposing Argument

The validity of the new offenses is weakened by the lack of any clear intent requirements in the Senate bill. Unlike some earlier versions of the bill, the legislation does not even require that a person charged with one of the crimes know or have reason to believe that a woman is pregnant. Without an element of intent or knowledge, the bill will do little to deter violence against pregnant women. Rather than creating separate penalties that focus on the fetus, the law should establish enhanced assault penalties for cases involving pregnant women, taking into account an offender's state of mind. It makes little sense to have a strict liability standard, in which the crime is based on the action and not on the offender's intent, for accidentally injuring a previable fetus, or to impose criminal penalties on those who may accidentally cause injury to a fetus, even if the mother is virtually unharmed and neither she nor the wrongdoer knows that she is pregnant.

Response: To be guilty of a felony under the bill, a person must intentionally assault a pregnant woman, commit a grossly negligent act against a pregnant woman, or commit drunk driving. While injury to a fetus during these actions could be accidental in some cases, the bill does not punish innocent individuals. Furthermore, a woman who miscarries or delivers an injured child as a result of

someone's wrongdoing cannot be considered unharmed.

Opposing Argument

Senate Bill 21 fails to address how the law will be enforced. For example, it is not clear how law enforcement officials will determine whether a female assault victim is or was pregnant. If the woman is killed, an autopsy might have to be performed--possibly over the moral or religious objections of her surviving family. If the woman survives, she might have to undergo a pregnancy examination--perhaps against her wishes. In addition, law enforcement officials might subpoena the woman's medical records. Without resolving these issues, the bill threatens the privacy of all women in Michigan.

Legislative Analyst: P. Affholter
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FISCAL IMPACT

Senate Bill 21

The bill will result in an indeterminate, yet potentially increased cost to State government.

There are currently two sections of law that prescribe penalties for causing the death of an unborn child, and both are defined as manslaughter (MCL 750.322 and 750.323). In 1996, there were no individuals tried, convicted, and sentenced to prison under these sections.

The bill essentially will provide increased penalties and increased opportunities for seeking convictions of injuring or causing the death of an unborn child. To the extent that these new violations and new penalties result in increased prison commitments, costs for the Department of Corrections will increase. There are no data currently available that would indicate how many individuals are involved in acts that result in the injury or death of an unborn child which will be punishable under the bill. If, for example, the bill results in two additional prison commitments each year with an average minimum sentence of 25 years, costs for the Department will increase by approximately \$30,000 the first year and reach \$750,000 by the 25th year.

House Bill 4524

The bill will have an indeterminate impact on State and local units of government. The amount of civil litigation that will result from the bill is not determinable.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.