

HOUSE BILL ANALYSIS

HB 2635

Title: An act relating to the protection of viable children, born or unborn.

Brief Description: Protecting the life of a viable fetus during and after an abortion.

Sponsors: Representatives Carrell, Mulliken, Boldt, Mielke, Sherstad, Sheahan, Sterk, Backlund and Thompson.

HOUSE COMMITTEE ON LAW & JUSTICE

Staff: Bill Perry (786-7123).

Background: Abortion has been the subject of great debate and considerable legislative and judicial activity over the past few decades. Since 1973, both the United States and Washington State Supreme Courts have spoken on the subject, as have the federal Congress, the state Legislature, and the people of the state through the initiative process.

FEDERAL COURT DECISIONS. The U.S. Supreme Court held, in Roe v. Wade, that a woman could choose, in consultation with her doctor, whether or not to have an abortion during the first trimester of her pregnancy. State interference with such a decision was not allowed. The Court held, however, that during the second trimester of a pregnancy, state regulation was permissible at least to the extent of protecting the health of the pregnant woman. The Court further held that during the third trimester, or after "viability," state prohibition of an abortion was permissible, except to the extent that an abortion was necessary to preserve the health or life of the woman.

In 1992, in Planned Parenthood of Southeastern Pennsylvania v. Casey, the Court significantly altered its holding in Roe. The Court did not overturn the basic premise of Roe that a woman has a constitutionally protected right to choose whether or not to have an abortion, although four of the Court's justices would have done so. The Court also retained "viability" as the critical point beyond which a state can prohibit abortions. However, the Court significantly expanded the authority of states to regulate abortions prior to viability. Under Casey, the test to be employed in judging the constitutionality of a state law is whether or not the law is an "undue burden" on a woman's right.

This test prohibits state legislation that has the primary purpose of placing a substantial obstacle in the way of a woman seeking an abortion of a nonviable fetus.

Permissible purposes include protection of a woman's health and expressing a preference for childbirth over abortion. The undue burden test prohibits interference with a woman's right to make the ultimate decision about abortion. The test does not prohibit laws that have incidental effects on the expense or difficulty of obtaining an abortion.

The Court has dealt, to a limited extent, with the issue of legislative attempts to proscribe particular abortion procedures. In 1976, in Planned Parenthood of Central Missouri v. Danforth, the Court declared unconstitutional a state law banning a certain abortion procedure (saline amniocentesis after the 12th week of pregnancy). The court declared the law arbitrary in light of the fact that the method banned was in fact the most commonly used procedure, and its ban would require the use of potentially more dangerous procedures in its place.

FEDERAL LEGISLATION. Recently, Congress passed legislation to generally prohibit "partial-birth" abortions. However, this legislation was vetoed by the President.

STATE COURT DECISIONS. Following Roe v. Wade, the state supreme court declared a parental consent requirement in Washington law unconstitutional. In State v. Koome, the court expressly relied on federal constitutional provisions in striking down the parental consent statute. The court has not addressed the question of whether, or to what extent, independent state constitutional provisions might be used to analyze various issues related to abortion. To date, the court has not considered a case related to regulation or prohibition of particular methods of performing abortions.

STATE LEGISLATION. In 1991, the voters of the state, by a vote of 756,653 to 752,354, approved Initiative 120 which codified the basic holding of Roe v. Wade. The initiative provides that "every woman has the fundamental right to choose or refuse to have an abortion," except as specifically limited by the terms of the initiative. The initiative further declares that, except as specifically permitted by the initiative, "the state shall not deny or interfere with a woman's fundamental right to choose or refuse to have an abortion prior to viability of the fetus."

"Viability" is defined as the point in a pregnancy when, in the judgment of the physician, there is a reasonable likelihood of the sustained survival of the fetus outside the uterus *without* the use of extraordinary medical measures.

The initiative also prohibits interference with a woman's right to choose an abortion "to protect her life or health." It is a class C felony to perform an abortion on a viable fetus for any reason other than the protection of a woman's life or health. It is a defense to a prosecution for performance of an unlawful abortion that the physician

made a good faith judgment as to the viability of the fetus or the risk to the health or life of the woman.

A separate statute declares that an infant born alive in the course of an abortion has the same right to medical treatment as an infant born prematurely who is of an equal gestational age.

Summary of Bill: Abortions resulting in the death or injury of a viable fetus are generally prohibited, and the definition of "viability" is changed.

"Viability" is defined as the point in pregnancy when there is a reasonable likelihood of the sustained survival of the fetus outside the uterus *with or without* extraordinary medical measures. "Abortion" is defined as the termination of a pregnancy, but is specifically defined to exclude the termination of the life of a viable fetus.

An abortion may not be performed unless it is necessary to prevent the death of the mother, or to preserve the health of the mother or the health of the viable fetus. If an abortion is necessary to *prevent the death* of the mother, the pregnancy may be terminated, but the life of the fetus may be terminated only if there is no other alternative that would prevent the death of the mother. If an abortion is necessary to *preserve the health* of the mother, the pregnancy may be terminated, but the life of the viable fetus may not be terminated.

If a child is born as a result of a termination of pregnancy done to *prevent the death* of the mother, the child is a ward of the state until adopted. If a child is born as a result of a termination of pregnancy done to *preserve the health* of the mother *and* the mother relinquishes the child in writing, the child is a ward of the state until adopted. Before adoption, the father of the child may petition the court for custody. If paternity is not established, other family members including grandparents and aunts and uncles may petition for custody.

A violation of the act that does not result in bodily injury or death to a viable fetus is a gross misdemeanor. A violation that results in bodily injury to a viable fetus is an assault. A violation that results in the death of a viable fetus is homicide.

The physicians' "good faith judgment" defense is eliminated. A new defense is created regarding the negation of elements of the offense dealing with the viability of the fetus and the necessity of the abortion to preserve the health or prevent the death of the mother. The defense is to be proved by a preponderance of the evidence and is to be substantiated with competent medical proof and professional opinion.

Fiscal Note: Not requested.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Office of Program Research