

Senate Fiscal Agency
 P. O. Box 30036
 Lansing, Michigan 48909-7536



BILL ANALYSIS

Telephone: (517) 373-5383
 Fax: (517) 373-1986
 TDD: (517) 373-0543

Senate Bill 70 (as enrolled)
 Senate Bill 71 (as enrolled)
 Sponsor: Senator Bill Schuette (Senate Bill 70)
 Senator William Van Regenmorter (Senate Bill 71)
 Committee: Judiciary

Date Completed: 2-14-01

RATIONALE

Public Act 238 of 1998 amended the Michigan Penal Code to prescribe penalties for certain criminal or grossly negligent acts committed against a pregnant woman that cause her to suffer a miscarriage or stillbirth or that harm the woman’s embryo or fetus. Public Act 238 applies to various assaultive crimes, acts of gross negligence, drunk driving, and careless or reckless driving. A recent case in Oakland County has raised concerns among some people that the law might not be broad enough.

In the Oakland County case, last year a man was convicted of killing his wife, who was in the early stages of pregnancy. The Oakland County Circuit Court ruled, however, that the man could not be charged with the death of his wife’s embryo under Public Act 238, because his actions did not technically result in either a miscarriage or a stillbirth since the embryo was not expelled from the woman’s body. Some people believe that this technical distinction constitutes an unforeseen loophole in the criminal provisions added by Public Act 238. They suggest that the penalty provisions for causing a miscarriage or stillbirth through

a criminal or grossly negligent act against a pregnant woman should include causing the death of an embryo or fetus.

CONTENT

Senate Bill 70 (S-1) would amend the Code of Criminal Procedure to include death to an embryo or fetus in the sentencing guidelines classifications. Senate Bill 71 (S-2) would amend the Michigan Penal Code to include intending to cause and causing the death of an embryo or fetus in the penalty provisions for various offenses against a pregnant woman. Senate Bill 70 (S-1) is tie-barred to Senate Bill 71. Both bills would take effect on June 1, 2001.

Senate Bill 70 (S-1)

The bill would include causing death to an embryo or fetus, as proposed by Senate Bill 71 (S-2), in each of the existing sentencing guidelines classifications for the following felonies:

Offense	Category	Class	Stat. Max.
Assault committed against a pregnant woman causing miscarriage or stillbirth, with intent or recklessness	Person	A	Life
Assault committed against a pregnant woman resulting in miscarriage or stillbirth	Person	C	15 years
Gross negligence committed against a pregnant woman resulting in miscarriage or stillbirth	Person	C	15 years
Drunk driving causing miscarriage or stillbirth	Person	C	15 years
Careless or reckless driving causing miscarriage or stillbirth	Person	G	2 years

Senate Bill 71 (S-2)

The bill would add causing the death of an embryo or fetus to each of the Michigan Penal Code provisions described below. (Where the Code currently refers to conduct that results in a miscarriage or stillbirth,

the bill also would include conduct resulting in death to an embryo or fetus.)

Under the Code, intentionally committing various assault offenses against a pregnant woman is punishable by up to 15 years’ imprisonment, a

maximum fine of \$7,500, or both, if the violation results in a miscarriage or stillbirth. The offense is punishable by imprisonment for life or any term of years, however, if both of the following apply:

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

In addition, committing a grossly negligent act against a pregnant woman that results in a miscarriage or stillbirth is a felony punishable by up to 15 years' imprisonment and/or a maximum fine of \$7,500. Drunk driving that involves an accident with a pregnant woman, causing a miscarriage or stillbirth, is a felony punishable by up to 15 years' imprisonment and/or a fine of not less than \$2,500 or more than \$10,000. Careless or reckless driving that is the proximate cause of an accident involving a pregnant woman and results in a miscarriage or stillbirth is a felony punishable by up to two years' imprisonment and/or a maximum fine of \$2,000.

(The assault offenses to which the penalties apply 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).)

MCL 777.16d (S.B. 70)
750.90a-750.90e

BACKGROUND

Prior to the enactment of Public Act 238 of 1998, several decisions of the Michigan Supreme Court and the Michigan Court of Appeals demonstrated 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 had 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) based on 1980 and 1995 decisions in which the appellate court had adhered to the "born alive" rule. In the 1995 case (*People v Selwa*, 214 Mich App 451), the 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).

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

Before the passage of Public Act 238 of 1998 (and Public Act 211 of 1998, which addresses civil suits), it was difficult if not impossible to hold a person criminally or civilly accountable for actions that led to the loss of a pregnant woman's unborn child. Under a body of Michigan case law, in deciding a fetus's status as a "person" for purposes of wrongful death actions and criminal prosecutions, decisions were based on whether a fetus was viable or "born alive". Proponents of Public Acts 211 and 238 hoped to circumvent the courts' "born alive" rule legislatively by enacting criminal and civil penalties that apply when someone injures a pregnant woman through assault, gross negligence, or drunk or reckless driving in a manner that terminates the pregnancy or injures the embryo or fetus.

The Oakland County Circuit Court's decision to dismiss the charge against a man for killing his wife's

embryo when he killed his wife, because she did not technically experience a miscarriage or stillbirth, points out an unforeseen consequence of the 1998 legislation, which gears the criminal penalties toward criminal acts committed against a pregnant woman. Essentially, that ruling creates a new “born dead” rule: Unless the miscarried or dead fetus or embryo is expelled from the pregnant woman’s body, no charge may be brought under the criminal penalty provisions of Public Act 238. The man convicted of murder in Oakland County has not been held accountable for the death of his unborn child. The bills would close this loophole in the 1998 law.

The bills would have an indeterminate fiscal impact on State and local government. The impact is indeterminate because there are no data to indicate how many more offenders could be convicted of assault against a pregnant woman, if death to an embryo or a fetus were added to the crimes.

Fiscal Analyst: K. Firestone

Opposing Argument

During deliberation of the 1998 legislation, it was determined that, in order to avoid any conflict with abortion rights granted under Federal case law, the legislation should focus explicitly on actions against a pregnant woman that harmed her fetus or embryo or caused her to suffer a miscarriage or stillbirth, rather than applying criminal sanctions to the death of a fetus or embryo. Many people were concerned that language specifically referring to the death of an embryo or fetus could promote a new body of law affording an embryo or fetus rights comparable to those held by individuals. They suggested that such provisions would be subject to constitutional challenge because 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. By referring to a pregnant woman’s miscarriage or stillbirth, rather than an unborn child’s death, the enacted language does not assert equal legal rights for fetuses.

Senate Bill 71 (S-2), however, proposes to enact language that was discarded in 1998. Extending criminal penalties to actions that cause the death of an embryo or fetus could be interpreted as securing full rights as a person for a nonviable fetus or embryo.

Response: The bill is consistent with the *Roe* decision and all of its Federal court progeny, including *Casey*, as well as with Public Act 238. Those cases, while upholding a woman’s right to choose to have an abortion, also consistently have reiterated that the state has an interest in protecting potential human life. In addition, the bill would not change the focus of Public Act 238 from actions against a pregnant woman to actions against a fetus or embryo. The underlying crime still would have to be an act of assault, gross negligence, or drunk or reckless driving in which the pregnant woman was the victim. The bill would not provide a criminal penalty for an action aimed specifically against the fetus or embryo.

Legislative Analyst: P. Affholter

FISCAL IMPACT

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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.