

FERTILITY FRAUD

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House Bill 5713 (H-1) as reported from committee
Sponsor: Rep. Karen Whitsett

Analysis available at
<http://www.legislature.mi.gov>

House Bill 5714 as reported
Sponsor: Rep. Bronna Kahle

House Bill 5715 as reported
Sponsor: Rep. Kelly Breen

House Bills 5716 (H-3) and 5717 (H-1) as reported
Sponsor: Rep. John R. Roth

1st Committee: Health Policy
2nd Committee: Judiciary
Complete to 6-30-22

BRIEF SUMMARY: The bills would amend different acts to address fraud in reproductive assistance procedures. House Bill 5716 would prohibit providing false or misleading information related to an assisted reproduction procedure and prohibit a health professional from using an embryo, sperm, or egg in such a procedure that is not the one the patient consented to. House Bills 5713, 5714, 5715, and 5717 would make related changes concerning, respectively, statutes of limitations, civil liability, health professional sanctions, and sentencing guidelines.

FISCAL IMPACT: The bills would have an indeterminate fiscal impact on the state and on local units of government. (See **Fiscal Information**, below, for a detailed discussion.)

THE APPARENT PROBLEM:

The fairly recent use of home DNA test kits to explore one's ancestry and locate long-lost relations has enabled a troubling discovery—the practice by some fertility doctors to use their own sperm in assisted reproduction procedures with their patients and the failure of some donors to disclose relevant information. Doctors using their own sperm in place of donor sperm in infertility procedures, although infrequent, has been documented for several decades, but the availability of the home test kits has uncovered numerous more recent incidents around the nation, including in Michigan.

Fertility fraud, as some call the practice, is hardly harmless. In some cases, a doctor has swapped out the husband's semen for his own and only later is it revealed that the husband is not the child's biological father. In all cases of such fraud, the parent or parents have been misled about the donor and important information, such as medical histories, has been hidden.

Several states have enacted some form of legislation to create sanctions against doctors who commit fraud related to assisted reproduction procedures, and legislation is pending in several more. It has been suggested that Michigan also enact sanctions to discourage medical professionals and others from fraudulent assisted reproduction practices and provide relief to patients impacted by the deception.

THE CONTENT OF THE BILLS:

House Bill 5716 would amend the Michigan Penal Code to create two felonies related to ***assisted reproduction***, defined as a method of causing pregnancy other than sexual intercourse.

False representation in assisted reproduction

First, the bill would provide that a person who ***knowingly***, intentionally, or willfully engages in a practice or act the person ***knows*** or reasonably believes provides false or misleading information related to an assisted reproduction procedure is guilty of a felony punishable by imprisonment for up to five years or a fine of up to \$50,000, or both. Such a practice or act would include making a false or misleading representation relating to any of the following:

- The ***human embryo*** or ***gamete*** used or provided for assisted reproduction.
- The ***identity*** (defined to mean “legal name”) of a ***donor*** of the human embryo or gamete used or provided for assisted reproduction, including the donor’s name, birthdate, or address at the time of donation.
- A donor’s medical history, including present illness at the time of donation, any past illnesses, any history of diagnosed mental illness, the ***social history of the donor***, any known genetic defects, the ***family medical history of the donor***, or the donor’s level of education.

Know or knowingly would mean that a health professional or other person undertook an action with knowledge and not because of mistake, accident, or other innocent reason.

Human embryo would mean a human organism at any stage of development from fertilized ovum to embryo.

Gamete would mean sperm, egg, or any part of a sperm or egg.

Donor would mean an individual who provides gametes intended for use in assisted reproduction, regardless of whether the individual receives financial compensation for the donation.

Social history of the donor would mean the personal and sexual history of the donor pertaining to risk factors for relevant communicable disease transmissible via gamete donation.

Family medical history of the donor would mean the complete medical history of the first-, second-, and third-degree relatives of the donor.

Use of another embryo or gamete

Second, the bill would provide that a ***health professional*** who knowingly or recklessly uses or provides a human embryo or gamete, including his or her own human embryo or gamete, for assisted reproduction other than the specific one the ***patient*** expressly consented to in writing is guilty of a felony punishable by imprisonment for up to 15 years or a fine of up to \$100,000, or both.

Health professional would mean an individual licensed, registered, certified, or otherwise authorized to engage in a health profession under Article 15 (Occupations) of the Public Health Code.¹

Patient would mean an individual under the care of a health professional.

Anonymous donors

The use of an **anonymous donor**, if requested by a patient, would not be a defense to a violation of either of the above prohibitions committed by a health professional.

Anonymous donor would mean a donor whose medical history, as described above, is known but whose legal name is not provided to the patient.

The bill would take effect 90 days after the date it is enacted.

Proposed MCL 750.219g

House Bill 5717 would amend the Code of Criminal Procedure to add the felonies that would be created under HB 5716 to the sentencing guidelines as follows:

- False representation with regard to specific circumstances regarding an assisted reproduction procedure would be a class E crime against a person with a statutory maximum term of imprisonment of five years.
- A health professional knowingly or recklessly using a human embryo or gamete other than the one agreed to by the patient in an assisted reproduction procedure would be a class E crime against a person with a statutory maximum term of imprisonment of 15 years.

The bill would take effect 90 days after the date it is enacted, but would not take effect unless HB 5716 were also enacted.

MCL 777.16l

House Bill 5713 would amend statute of limitations provisions in the Code of Criminal Procedure to provide that an indictment for a violation of either of the prohibitions proposed by House Bill 5716 (knowingly, intentionally, or willfully providing false or misleading information related to an assisted reproduction procedure or a health professional using a human embryo or gamete for assisted reproduction without consent) could be found and filed within 15 years after the offense. However, if evidence of the offense were obtained and that evidence contained DNA determined to be from an unidentified individual, an indictment could be found and filed at any time after the offense was committed, except that it would have to be filed within 15 years after the identification of the individual.

¹ Health care professions licensed or registered under Article 15 of the Public Health Code include acupuncturists, athletic trainers, audiologists, behavior analysts, chiropractors, counselors, dental assistants, dental hygienists, dentists, genetic counselors, marriage and family therapists, massage therapists, midwives, nurses, nursing home administrators, occupational therapists and occupational therapy assistants, optometrists, pharmacists and pharmacy technicians, physical therapists and physical therapy assistants, physician's assistants, physicians, podiatrists, psychologists, respiratory therapists, sanitarians, social workers and social service technicians, speech-language pathologists, and veterinarians and veterinarian technicians

The bill would take effect 90 days after the date it is enacted, but would not take effect unless HB 5716 were also enacted.

MCL 767.24

House Bill 5714 would amend the Revised Judicature Act to provide that a *person* that engages in *false representation in assisted reproduction* is liable to an individual injured by that false representation (as described below) for one or more of the following:

- Economic and noneconomic damages.
- Punitive damages.
- Reasonable attorney fees and costs.

False representation in assisted reproduction would mean conduct or a practice of conduct described in section 219g(1) of the Michigan Penal Code. (This provision would be added by HB 5716 and is described above under “False representation in assisted reproduction.”)

Person would mean an individual or a partnership, corporation, limited liability company, association, or other legal entity.

Any individual who is injured by a false representation in assisted reproduction could bring an action under the bill, including any of the following individuals:

- The patient who gives birth to a child conceived through assisted reproduction as a result of the false representation.
- The patient’s spouse at the time the patient used the assisted reproduction services.
- An individual conceived through assisted reproduction as a result of the false representation.
- A donor whose gamete or human embryo resulted in the birth of a child as a result of the false representation.

An individual bringing an action under the bill would have a separate cause of action for each child born as a result of the false representation in assisted reproduction. An action under the bill would have to be brought no later than three years after the individual bringing the action discovers the false representation in assisted reproduction. An action under the bill would be in addition to any other criminal or civil penalties or remedies provided by law.

The bill would not take effect unless HB 5716 were also enacted.

Proposed MCL 600.2980

House Bill 5715 would amend sections 16221 and 16226 of the Public Health Code. Section 16221 requires the Department of Licensing and Regulatory Affairs (LARA) to investigate an allegation that one or more grounds for disciplinary subcommittee action exist concerning a licensee, registrant, or applicant for licensure or registration under the code. The investigation includes conducting hearings, administering oaths, and ordering relevant testimony to be given, and its findings are then reported to the appropriate disciplinary subcommittee. After finding the existence of one or more grounds for disciplinary subcommittee action, a disciplinary

subcommittee must impose one or more of the sanctions listed in section 16226 that apply to the specific violation.

The bill would provide that a final order or judgment against a licensee or registrant under the provisions of House Bill 5714 constitutes grounds requiring subcommittee action, with sanctions for a violation including probation; limitation, denial, suspension, revocation, or permanent revocation of the health professional's license or registration; restitution; or a fine.

The bill also would provide that a conviction for a violation of either of the prohibitions proposed by House Bill 5716 (knowingly, intentionally, or willfully providing false or misleading information related to an assisted reproduction procedure or a health professional using a human embryo or gamete for assisted reproduction without consent) constitutes grounds requiring disciplinary subcommittee action. Sanctions for a violation would include probation; limitation, denial, suspension, revocation, or permanent revocation of the health professional's license or registration; restitution; or a fine.

The bill would not take effect unless HBs 5714 and 5716 were also enacted.

MCL 333.16221 and 333.16226

FISCAL INFORMATION:

House Bill 5713 is a companion bill to HB 5716 that would establish a 15-year statute of limitations provision for an indictment for a violation of either of the prohibitions proposed by HB 5716 (knowingly, intentionally, or willfully providing false or misleading information related to an assisted reproduction procedure or a health professional using a human embryo or gamete for assisted reproduction without consent). House Bill 5713 would not have a direct or immediate fiscal impact on the state or on local units of government.

House Bill 5714 would have an indeterminate fiscal impact on local court systems to the extent provisions of the bill affected court caseloads and related administrative costs. It is difficult to project the actual fiscal impact to courts due to variables such as law enforcement practices, prosecutorial practices, judicial discretion, case types, and complexity of cases.

House Bill 5715 would be unlikely to have a significant fiscal impact on any unit of state or local government. Under the bill, convictions related to providing false or misleading information regarding an assisted reproduction procedure or final orders or judgments regarding engaging in false representation in assisted reproduction would be grounds for departmental disciplinary action under the Public Health Code. Such disciplinary action could include action against an individual's license or imposition of restitution or a fine. The impacts of any fine collections or future losses of revenue from licensure revocation would likely be negligible, given that violations would be expected to be infrequent.

House Bill 5716 would have an indeterminate fiscal impact on the state and on local units of government. Under the bill, violations for false representation in assisted reproduction or for a health professional's use of another embryo or gamete for assisted reproduction (including their own human embryo or gamete) without the patient's knowledge and consent would be felonies with varying imprisonment terms and fine amounts. New felony convictions would result in increased costs related to state prisons and state probation supervision. In fiscal year

2021, the average cost of prison incarceration in a state facility was roughly \$44,400 per prisoner, a figure that includes various fixed administrative and operational costs. State costs for parole and felony probation supervision averaged about \$4,600 per supervised offender in the same year. Those costs are financed with state general fund/general purpose revenue. The fiscal impact on local court systems would depend on how provisions of the bill affected court caseloads and related administrative costs. It is difficult to project the actual fiscal impact to courts due to variables such as law enforcement practices, prosecutorial practices, judicial discretion, case types, and complexity of cases. Any increase in penal fine revenue would increase funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

House Bill 5717 is a companion bill to HB 5716 and amends sentencing guidelines to include false representation in assisted reproduction and a health professional's use of another embryo or gamete for assisted reproduction (including their own human embryo or gamete) without the patient's knowledge and consent. The bill would not have a direct fiscal impact on the state or on local units of government.

MCL 777.16l

ARGUMENTS:

For:

Choosing to pursue pregnancy through an assisted reproduction procedure, such as artificial insemination or in vitro fertilization (IVF), is a deeply personal and intimate decision. It is expensive. Depending on the procedure, patients may need to undergo months of hormone injections or other medical procedures. Choosing a donor for eggs or sperm entails many considerations—do you ask a friend or relative to donate, or pore over bios from donor banks? Do you choose a donor with similar interests and talents, or with similar physical features? Importantly, has the donor been screened for diseases or conditions that may be inherited?

To go through all that, and then find that someone—a physician or other person involved in the process—knowingly used a donor egg or sperm other than that chosen, or knowingly misrepresented pertinent information about the donor, is simply unconscionable. In some known instances, patients requested that donor sperm not come from local donors, only to find that the infertility specialist used his own sperm in place of the chosen donor sperm. The result was that multiple children in the same locale were fathered by the same man, increasing the risk that incestuous relationships would form between couples who did not know they were siblings. In other cases, donors essentially lied when providing background information about a family history of mental or physical illnesses or about their educational achievements.

The bills would create criminal penalties and civil liabilities for those who knowingly or intentionally provide false information related an assisted reproduction procedure and for doctors who use their own sperm for their patients. The penalties and risk of being sued by those they defraud would apply to health professionals and others (including donors who misrepresent their own information). Health professionals could also face license sanctions from their licensing boards. It is hoped that enactment of the bills would deter those who, for whatever reason, would engage in reproductive fraud and therefore offer assurances to those seeking reproductive assistance that a donor egg, a donor embryo, or donor sperm is from the person chosen.

Against:

A concern was raised as to whether the penalty for misrepresenting one's educational level should rise to the same level as withholding or misrepresenting one's medical conditions or family health and mental health history. For example, perhaps at the time of the donation, a young person may have intended to complete college or seek an advanced degree and so recorded that aspiration as a completed goal. If the donation recipient or their child discovers years later that the donor never completed the level of education reported, should that trigger the same felony penalty and civil liability as lying about a history of schizophrenia or breast cancer?

POSITIONS:

Representatives of Right to Know testified in support of the bills. (2-17-22)

The following entities indicated support for the bills:

- Michigan Family Forum (3-3-22)
- American Association of University Women (5-24-22)

The Department of the Attorney General indicated support for HBs 5715, 5716, and 5717. (5-24-22)

Legislative Analyst: Susan Stutzky
Fiscal Analysts: Robin Risko
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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.