Michael J. O'Neill *Legislative Service Commission*

H.B. 339

124th General Assembly
(As Introduced)

Reps. Seaver, Seitz, Krupinski, Young, Faber, Sulzer, Schaffer, Boccieri, Fessler, Jerse

BILL SUMMARY

? Prohibits a person from performing or inducing an abortion on a pregnant woman without the written informed consent of the father of the fetus.

? Requires a pregnant woman seeking to abort her pregnancy to provide, in writing, the identity of the father of the fetus to the person who is to perform or induce the abortion.

? Prohibits a pregnant woman seeking to abort her pregnancy from providing to the person who is to perform or induce the abortion the identity of a man as the father of the fetus if the man is not the father of the fetus.

? Prohibits a man from giving the consent required to perform or induce an abortion as the father of the fetus if the man knows that he is not the father of the fetus.

? Prohibits a person from causing a man to believe that the man is the father of a fetus for the purpose of obtaining the consent required to perform or induce an abortion, if the person knows that the man is not the father of the fetus.

? Requires the person who is to perform or induce an abortion on a pregnant woman who identifies two or more men as possible fathers of the fetus to perform a paternity test, or cause a paternity test to be performed, to determine the father of the fetus prior to accepting any paternal consent.

? Provides exceptions to the above provision in cases of rape and incest and if the abortion is necessary to preserve the life or the health of the pregnant woman.

? Provides that the written paternal consent and the written paternal identification are confidential.

CONTENT AND OPERATION

Operation of the bill

Prohibitions and penalty

The bill enacts a number of prohibitions relating to paternal consent and abortions:

(1) When the fetus that is the subject of the procedure is viable, the bill prohibits a person from performing or inducing an abortion on a pregnant woman without the written informed consent of the father of the fetus. The bill contains a parallel provision for when the fetus is not viable.

(2) The bill requires a pregnant woman seeking to abort her pregnancy to provide, in writing, the identity of the father of the fetus to the person who is to perform or induce the abortion. The bill also prohibits a pregnant woman seeking to abort her pregnancy from failing to comply with this requirement (note the reference in the bill to "division (B)(1)" should be a reference to "division (C)(1)").

(3) The bill prohibits a pregnant woman seeking to abort her pregnancy from providing to the person who is to perform or induce the abortion the identity of a man as the father of the fetus if the man is not the father of the fetus.

(4) The bill prohibits a man from giving the consent required in paragraph (1) as the father of the fetus if the man knows that he is not the father of the fetus.

(5) Finally, the bill prohibits a person from causing a man to believe that the man is the father of a fetus for the purpose of obtaining the consent required by paragraph (1), if the person knows that the man is not the father of the fetus.

(6) If, pursuant to the bill, the pregnant woman identifies two or more men as possible fathers of the fetus, the person who is to perform or induce the abortion must perform a paternity test, or cause a paternity test to be performed, to determine the father of the fetus prior to accepting any paternal consent prior to performing or inducing an abortion of the pregnant woman's pregnancy. The bill

prohibits a person from performing or inducing an abortion in violation of this provision.

A person who violates any of these prohibitions is guilty of abortion fraud, a misdemeanor of the first degree. If the person previously has pleaded guilty to or has been convicted of a violation of any of these prohibitions, abortion fraud is a felony of the fifth degree. (R.C. 2919.123(B), (C), (D), (E), (F), and (J).)

Ignorance of identity of father

It is not a defense to a violation of the prohibitions described in paragraphs (1) and (2), above, that the woman does not know the identity of the father of the fetus (R.C. 2919.123(G)).

Exceptions

Life or health of the mother. The prohibitions in the bill do not apply if the abortion is necessary, in appropriate medical judgment, to preserve the life or the health of the pregnant woman (R.C. 2919.123(H)(2)).

Rape or incest. The prohibitions described in paragraph (1) under "***Prohibitions***," above, do not apply if the pregnant woman provides to the person who is to perform or induce the abortion either of the following (R.C. 2919.123(H)(1)):

(1) A copy of a police report or a complaint, indictment, information, or other court document that gives the person who is to perform or induce the abortion reasonable cause to believe that the woman became pregnant as the result of rape or incest.

(2) A copy of a paternity test that gives the person who is to perform or induce the abortion reasonable cause to believe that the woman became pregnant as the result of incest.

Confidentiality of written consents and identifications

The written paternal consent and the written paternal identification required by the bill are confidential, are not public records under the Public Records Law, and may be viewed only by the pregnant woman, the man claiming to be or the man identified as being the father of the fetus, the person who is to perform or induce the abortion, any law enforcement officer investigating a violation of one of the prohibitions described above, and a court and jury in a criminal case involving an alleged violation of one of the bill's provisions (R.C. 2919.123(I)).

Definitions

As used in the bill, "viable" means the stage of development of a human fetus at which there is a realistic possibility of maintaining and nourishing of a life outside the womb with or without temporary artificial life-sustaining support (R.C. 2919.123(A), by reference to R.C. 2901.01(B)(1)(c)(ii) – not in the bill).

COMMENT

This bill raises constitutional questions, particularly as it applies to pre-viability abortions.

The current standard for analyzing abortion regulations was set forth in *Planned Parenthood v. Casey* (1992), 112 S.Ct. 2791. In a plurality opinion, Justices O'Connor, Kennedy, and Souter stated that the central holding of *Roe v. Wade*, that women have the right to an abortion, should be affirmed on the basis of *stare decisis*, but that the trimester standard adopted by *Roe v. Wade* should be replaced with an undue burden standard. An undue burden exists and a provision of law is invalid if the provision's purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability. Subsequent to viability, the plurality of the Court affirmed the holding in *Roe v. Wade*: the State in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or the health of the mother. (*Casey*, at 2821.) This plurality opinion appears to have been affirmed by a majority of the Court in *Stenberg v. Carhart* (2000), 120 S.Ct. 2597, 2608 – 2609, 2617.

In *Planned Parenthood v. Danforth* (1976), 428 U.S. 52, the United States Supreme Court struck down a spousal consent statute under the former *Roe v. Wade* standard. The statute involved required the prior written consent of the spouse of the woman seeking an abortion during the first 12 weeks of pregnancy, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother. The Court held that the State may not constitutionally require the consent of the spouse as a condition for abortion during the first 12 weeks of pregnancy. The State may not delegate to a spouse a veto power that the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy. The Court concluded that this provision was inconsistent with the standards enunciated in *Roe v. Wade* and is unconstitutional. (*Danforth*, at 67 to 72.) While this case has not been overturned, the analytical standard that it used, the *Roe v. Wade* standard, has been superceded by the undue burden standard in *Casey*.

But, in *Casey*, the Supreme Court also considered the constitutionality of paternal notification. The law at issue generally prohibited, except in cases of medical emergency, a physician from performing an abortion on a married woman without receiving a signed statement from the woman that she had notified her spouse that she is about to undergo an abortion. The woman could provide an alternative certification in specified circumstances. The Court concluded that the spousal notification requirement is likely to prevent a significant number of women from obtaining an abortion, that it will be a substantial obstacle to a woman's choice to undergo an abortion. The Court noted that for living children, the father's interest in the welfare of the child generally is equal to that of the mother, but, before birth, state regulation with respect to the child has a greater impact on the mother than the father. The Court concluded that the principles in *Danforth* should guide the Court's decision. For some women, the prospect of notification itself deters the woman from seeking an abortion or the husband prevents the wife from obtaining an abortion. In such cases, the notice requirement often will be tantamount to the veto found unconstitutional in *Danforth*. The husband's interest in the life of the child does not permit the State to empower him with this degree of authority over his wife. (*Casey*, at 2828 to 2831.) But note that the Court analyzed this provision using the previability abortion framework.

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	08-07-01	p. 812

H0339-I.124/jc