

Court Challenges to the Personhood Bill

The “personhood bill” (HB1) would give a fertilized egg the same rights, privileges, and immunities granted to a person. The heart of the bill is the definition “‘*unborn children*’ or ‘*unborn child*’ shall include any unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.” There is no definition of conception in Virginia Code; therefore, courts would use the standard medical dictionary definition: “the union of egg and sperm” which would grant every fertilized egg the full protection of and all rights under the law. Besides legal issues involved in the significant expansion of the concept of “person” in the over 25,000 places in Virginia Code where the word appears, **birth control could be held illegal based on the following:**

– U.S. Supreme Court Justice Blackman writing in dissent for Justice Brennan and Justice Marshall in *Webster v. Reproductive Health Services*, stated that the wording of the Missouri preamble (which is the wording of HB1) includes birth control:

“...because the preamble defines fetal life as beginning upon ‘the fertilization of the ovum of a female by a sperm of a male,’ §188.015(3), the provision also unconstitutionally burdens the use of contraceptive devices, such as the IUD and the ‘morning after’ pill, which may operate to prevent pregnancy only after conception as defined in the statute.”

– HB1 added an exception to the Missouri language: “Nothing in this section shall be interpreted as affecting lawful assisted conception.” The exception changed application of the Missouri language very significantly. This sole exception establishes that everything else that might destroy a fertilized egg is specifically to be included. Furthermore, since another amendment to also exclude birth control (“Nothing in this section shall be interpreted as affecting lawful contraception”) was rejected by the House 64 to 34, there is no question that legislative intent was to make birth control illegal.

– Advocates clearly intend to make birth control illegal. To quote from a Human Life Alliance (humanlife.org) brochure handed-out on the sidewalk in front of the General Assembly:

WHAT ABOUT BIRTH CONTROL?

According to scientific research, all hormonal contraceptives have the capability to cause an abortion (the pill, patch, mini-pill, shot, vaginal ring, emergency contraception, intrauterine devices, etc.)...Birth control manufacturers insist that their products do not terminate an existing pregnancy. However, they have redefined the terms “conception” and “pregnancy” to mean the moment of implantation rather than the moment of fertilization (implantation happens 7-10 days after fertilization).

Court challenges to mandatory ultrasound (HB462 as signed into law) could include:

– Undue burden: Women must wait 24 hours unless they live over 100 miles away between having an ultrasound and the abortion. For many women this will require two days of work leave, child care, and/or significant travel. Under *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) this could be challenged as an undue burden that especially discriminates against poorer women. However, according to guttmacher.org/statecenter, “9 states require that all counseling be provided in person and that the counseling take place before the waiting period begins, thereby necessitating two separate trips to the facility.” I do not know why such waiting periods do not violate *Casey*.

– Free speech: According to Guttmacher, challenges to ultrasound requirements are being argued as violation of free speech: “In March, a state district court judge enjoined an Oklahoma law that required a woman seeking an abortion to undergo an ultrasound prior to the procedure. The measure also required that the provider show and describe the image to the woman. The judge ruled that the law was unconstitutional because it applied only to abortion and not to other medical procedures. The state is expected to appeal the case to the Oklahoma Supreme Court.” However, in February, a U.S. District Court judge allowed Texas’ law requiring an ultrasound before an abortion to go into effect.

– Due process: *Roe v. Wade* held that criminalizing a specific medical procedure without exceptions for circumstances that did not involve the interest of the state violated the due process clause for both the woman and for the physician. In *Roe*, the interest of the state did not apply to a fetus before viability outside the womb. While not defining when life begins, in application, the ultrasound law assumes life begins at implantation of a fertilized egg in the uterus. In its opposition, The Virginia Medical Society pointed out that this is the only instance that medical procedure is dictated in the Virginia Code (with the only other past instance being forced sterilization of the “feble-minded.”)

– Due process / Invasion of Privacy: Women experiencing the trauma of a partial miscarriage, fetal death, or ectopic pregnancy must submit to all of the ultrasound requirements even if they are not medically indicated. Delaying a medical response appropriate for a miscarriage is counter to a woman’s and her doctor’s right to make healthcare decisions. (Note: Since there is no specific right to privacy in the constitution, *Roe* held that the right to privacy existed under the Due Process clause.)

– Due process/ Invasion of Privacy: While the new Virginia law says that a woman may refuse the offer to have a transvaginal ultrasound if the gestational age cannot be determined by a transabdominal ultrasound, three sentences later, the law reads “Nothing herein shall preclude the physician from using any ultrasound imaging that he considers to be medically appropriate pursuant to the standard medical practice in the community.” The woman’s consent is not required..

– Lack of Compelling State Interest: Over 90% of abortions in Virginia are in the first trimester. Over 20% of these are due to the body rejecting the fetus and many women currently turn to their personal doctor to receive the healthcare they need. Ultrasound is not medically necessary to determine the gestational age in many cases. There is no compelling state interest to be achieved in requiring a woman to sign a document, which will be retained for 7 years, that she has refused to look at the ultrasound or to listen for a possible heartbeat.

Finally, since HB462 easily passed, as a pro-life litmus test bill, it was not worked-on in committee. Therefore, it contains inconsistencies that will have a chilling effect on medical personnel who will fear prosecution for failure to follow the law’s unclear provisions. These inconsistencies also could be the basis of a court challenge. Specifically:

– The law provides that the ultrasound can be performed at any time 24 hours before the abortion under the guidance of a physician other than the physician performing the abortion. However, it does not provide (1) whose responsibility it is to transmit the ultrasound to the physician who performs the abortion, (2) procedures to protect custody, or (3) verification that ultrasound is of the woman on whom the abortion is to be performed.

– The new subsection C puts all the burden on the qualified medical professional performing fetal ultrasound imaging pursuant to the new subsection B to verbally offer the woman an opportunity to view the image, to receive a printed copy, and to hear the fetal heart tones. This same “medical professional” is to obtain from the woman written certification whether or not she accepted these offers and verification about how far she lives from the place where the abortion is to be performed. There is no reference to the physician performing the abortion (on which responsibility for informed consent rested under current law in Section A) except for the indirect reference that “the facility where the abortion is to be performed” must retain the ultrasound image for 7 years.