

Date of Hearing: March 10, 2020
Counsel: Matthew Fleming

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Reginald Byron Jones-Sawyer, Sr., Chair

AB 2014 (Maienschein) – As Amended March 4, 2020

SUMMARY: Extends the statute of limitations for civil lawsuits and criminal offenses involving the misuse of sperm, ova, or embryos in assisted reproduction technology. Specifically, **this bill:**

- 1) Extends the statute of limitations in a civil action for assault, battery, or injury to, or for the death of, an individual caused by a wrongful act or neglect in regards to the misuse of sperm, ova, or embryos in assisted reproduction technology from two years beginning at the time of wrongful act or neglect, to three years from the discovery of the wrongful act or neglect.
- 2) Extends the statute of limitations for a criminal offense relating to the misuse of sperm, ova, or embryos in assisted reproduction technology from three years from the time that the offense occurred, to one year from the discovery of the offense.
- 3) Specifies that the statute of limitations proposed by this bill would only apply to offenses committed on or after January 1, 2021, and to crimes for which the statute of limitations that was in effect before January 1, 2021, has not expired as of January 1, 2021.

EXISTING LAW:

- 1) States that it is unlawful for anyone to knowingly use sperm, ova, or embryos in assisted reproduction technology, for any purpose other than that indicated by the sperm, ova, or embryo provider's signature on a written consent form. (Pen. Code § 367g, subd. (a).)
- 2) States that it is unlawful for anyone to knowingly implant sperm, ova, or embryos, through the use of assisted reproduction technology, into a recipient who is not the sperm, ova, or embryo provider, without the signed written consent of the sperm, ova, or embryo provider and recipient. (Pen. Code § 367g, subd. (b).)
- 3) Punishes the unlawful use or implantation of sperm, ova, or embryos by imprisonment in the county jail for three, four, or five years, by a fine not to exceed fifty thousand dollars (\$50,000), or by both that fine and imprisonment. (Pen. Code § 367g, subd. (c).)
- 4) Provides that there is no statute of limitations for crimes punishable by death, or by imprisonment in the state prison for life, or by life without the possibility of parole. (Pen. Code, § 799, subd. (a).)
- 5) Provides that there is no statute of limitations for specified sex crimes if the crime was committed on or after January 1, 2017, or if the crime was committed before that date but the statute of limitations had not expired on January 1, 2017. (Pen. Code, § 799, subd. (b)(1).)

- 6) Provides that prosecution for crimes punishable by imprisonment for eight years or more must be commenced within six years after commission of the offense. (Pen. Code, § 800.)
- 7) Provides that prosecution for other felonies punishable by less than eight years must be commenced within three years after commission of the offense. (Pen. Code, § 801.)
- 8) Provides that the statute of limitations for most misdemeanors is one year. (Pen. Code, § 802, subd. (a).)
- 9) Provides that notwithstanding any other time limitations, for specified sex crimes that are alleged to have been committed when the victim was under the age of 18, prosecution may be commenced any time prior to the victim's 40th birthday. (Pen. Code, § 801.1, subd. (a).)
- 10) Provides that notwithstanding any other time limitations, prosecution for a felony offense requiring sex offender registration shall be commenced within 10 years after commission of the offense. (Pen. Code, § 801.1, subd. (b).)
- 11) Provides that, notwithstanding any other limitation of time, a criminal complaint for specified sex crimes may be filed within one year of the date on which the identity of the suspect is conclusively established by deoxyribonucleic acid (DNA) testing, if specified conditions are met. (Pen. Code, § 803, subd. (g)(1).)
- 12) Provides that, notwithstanding any other limitation of time, a criminal complaint may be filed within one year of the date of a report to a California law enforcement agency by a person of any age alleging that he or she, while under 18 years of age, was the victim of specified sex offenses. (Pen. Code, § 803, subd. (f)(1).)
- 13) Provides that, notwithstanding any other limitation of time, a criminal complaint may be filed within one year of the date on which a hidden recording is discovered related to an invasion of privacy offense. (Pen. Code, § 803 (i).)
- 14) Provides that, notwithstanding any other limitation of time, if a person flees the scene of an accident, a criminal complaint alleging vehicular manslaughter may be filed one year after the person is initially identified by law enforcement as a suspect in the commission of that offense, but not later than six years after the commission of the offense. (Pen. Code, § 803, subd. (k).)
- 15) Provides that if more than one time period described in the statute of limitations scheme applies, the time for commencing an action is governed by that limitation period that expires the latest in time. (Pen. Code, § 803.6, subd. (a).)
- 16) States that a prosecution is commenced when one of the following occurs:
 - a) An indictment or information is filed;
 - b) A complaint charging a misdemeanor or infraction is filed;

- c) The defendant is arraigned on a complaint that charges him or her with a felony; or,
- d) An arrest warrant or bench warrant is issued. (Pen. Code, § 804.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "Making the decision to have a child through Assisted Reproductive techniques is monumental to a couple, and having to experience this type of fraud can be a massive violation of the personal, fiduciary, and ethical realms. While this is an illegal practice in California, there is a glaring deficiency that the legislature can address. Current statute of limitations provides a 3 year window after commission of the offense to be prosecuted; however, it is common for victims to discover this way after the fact. For example, a case in Indiana was uncovered ranging from 26-40 years after the fraud occurred, which would mean this misconduct could not be prosecuted under California law. By changing the statute of limitations to 3 years from discovery, we can provide victims with a viable option for seeking justice."
- 2) **Statute of Limitations:** The statute of limitations requires a prosecution to be initiated within a certain period of time after the commission of a crime. A prosecution is initiated by filing an indictment or information, filing a complaint, certifying a case to superior court, or issuing an arrest or bench warrant. (Pen. Code, § 804.)

The statute of limitations serves several important purposes in a criminal prosecution, including staleness, prompt investigation, and finality. The statute of limitations protects persons accused of crime from having to face charges based on evidence that may be unreliable, and from losing access to the evidentiary means to defend against the accusation. With the passage of time, memory fades, witnesses may die or otherwise become unavailable, and physical evidence can become unobtainable or contaminated.

The statute of limitations also imposes a priority among crimes for investigation and prosecution. The deadline serves to motivate the police and to ensure against bureaucratic delays in investigating crimes. Additionally, the statute of limitations reflects society's lack of desire to prosecute crimes committed in the distant past. The interest in finality represents a societal evaluation of the time after which it is neither profitable nor desirable to commence a prosecution.

These principals are reflected in court decisions. The United States Supreme Court has stated that statutes of limitation are the primary guarantee against bringing overly stale criminal charges. (*United States v. Ewell* (1966) 383 U.S. 116, 122.) There is a measure of predictability provided by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced. Such laws reflect legislative assessments of the relative interests of the state and the defendant in administering and receiving justice.

More recently, in *Stogner v. California* (2003) 539 U.S. 607, the Court underscored the basis for statutes of limitation: "Significantly, a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. And that

judgment typically rests, in large part, upon evidentiary concerns - for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable." (*Id.* at p. 615.)

The failure of a prosecution to be initiated within the applicable period of limitation is a complete defense to the charge. The statute of limitations is jurisdictional and may be raised as a defense at any time, before or after judgment. (*People v. Morris* (1988) 46 Cal.3d 1, 13.) The defense may only be waived in limited circumstances. (See *Cowan v. Superior Court* (1996) 14 Cal.4th 367.) Furthermore, the court is required to construe application of the statute of limitations strictly in favor of the defendants. (*People v. Zamora* (1976) 18 Cal.3d 538, 574; *People v. Lee* (2000) 82 Cal.App.4th 1352, 1357-1358.)

The amount of time in which a prosecuting agency may charge an alleged defendant varies based on the crime. In general, the limitations period is related to the seriousness of the offense as reflected in the length of punishment established by the Legislature. (*People v. Turner* (2005) 134 Cal.App.4th 1591, 1594-1595; see, e.g., Pen. Code, §§ 799-805.) After a comprehensive review of criminal statutes of limitation in 1984, the Law Revision Commission recommended that the length of a "limitations statute should generally be based on the seriousness of the crime." (17 Cal. Law Revision Com. Rep. (1984) p. 313.) The Legislature overhauled the entire statutory scheme with this recommendation in mind. In *People v. Turner, supra*, 134 Cal.App.4th 1591, the court summarized the recommendations of the Law Revision Commission:

The use of seriousness of the crime as the primary factor in determining the length of the applicable statute of limitations was designed to strike the right balance between the societal interest in pursuing and punishing those who commit serious crimes, and the importance of barring stale claims. It also served the procedural need to provid[e] predictability and promote uniformity of treatment for perpetrators and victims of all serious crimes. The commission suggested that the seriousness of an offense could easily be determined in the first instance by the classification of the crime as a felony rather than a misdemeanor. Within the class of felonies, a long term of imprisonment is a determination that it is one of the more serious felonies; and imposition of the death penalty or life in prison is a determination that society views the crime as the most serious. (*People v. Turner, supra*, 134 Cal.App.4th at pp. 1594-1595, citations omitted.)

There are, however, some statutes of limitations not necessarily based on the seriousness of the offense. The Legislature has acknowledged that some crimes by their design are difficult to detect and may be immediately undiscoverable upon their completion. So for example, crimes involving fraud, breach of a fiduciary duty, bribes to a public official or employee, and those involving hidden recordings have statutes of limitations which begin to run upon discovery that the crime was committed. (See Pen. Code, § 803, subd. (c), see also Pen. Code, § 803, subd. (e).)

- 3) **Fertility Fraud Cases:** In the 1990's, two doctors were charged with stealing embryos and eggs belonging to women who sought fertility treatment at the University of California Irvine Center for Reproductive Health and implanting them in other women without the consent of the donors. (Carollo, *Fertility Doctor on the Run Arrested in Mexico*, ABC News, Dec. 28,

2010, available at: <https://abcnews.go.com/Health/ReproductiveHealth/fugitive-fertility-doctor-ricardo-asch-arrested-mexico/story?id=12492575>, [as of Mar. 2, 2020].) That case, which involved dozens of victims (*Id.*), led California to introduce legislation which criminalized the misuse of sperm, embryo and ova. SB 1555 (Hayden) Chapter 865, Statutes of 1996, made it illegal for any person to knowingly use sperm, embryo and ova in manner that was inconsistent with the consent of the donor, and imposed prison penalties for a violation of that provision.

According to the Society for Assisted Reproductive Technology (SART), California is one of just three states that criminalizes fertility fraud. (SART website, <https://www.sart.org/news-and-publications/news-and-research/legally-speaking/fertility-fraud-an-update/>). According to the SART:

“In the typical fertility fraud fact pattern, an adult learns that he or she has different paternal genetic relations and/or unexpected half-genetic siblings. This adult may have already known that he/she was donor-conceived or may discover that fact through the genetic testing process. Conversations with these new relations suggest that something just isn’t right. In some cases, half-genetic siblings find that their parents all sought treatment from the same physician, and in others, their investigative efforts reveal a genetic relationship to the physician. When asked about the circumstances of their fertility treatment, their mothers state that they were told (based on their history of infertility) that the sperm would come from their husbands or anonymous medical residents resembling their husbands. Doctor-conceived individuals and their parents have sought accountability through a number of routes, including speaking with journalists and other media personalities, seeking state law reform, filing a complaint with a state medical board, reporting the physician to a prosecutor or a state Attorney General, pursuing a private legal settlement, and filing a civil tort suit.” (*Id.*)

Although the crimes are rare, the offense of using or implanting reproductive material in a manner that is inconsistent with the will of the donor is one that, by its very nature, is difficult to detect at the time the offense occurs. As indicated by the SART, the typical offense is not likely to be discovered until a person discovers a previously-unknown familial relationship through genetic testing. Such testing may not occur for years or even decades after the moment when a doctor or medical professional fraudulently implanted sperm or an embryo without the consent of the donor. This bill would allow a criminal complaint to be filed within one year of the discovery of the offense and would not require that a criminal complaint be filed within three years of the commission of the fraudulent implantation. This would appear to be consistent with other extended limitation periods for offenses that are unlikely to be discovered until some number of years after the offense is committed.

- 4) **Ex Post Facto:** In *Stogner v. United States*, *supra*, 539 U.S. 607 the Supreme Court ruled that a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution. (*Id.* at pp. 610-611, 616.) However, extension of an existing statute of limitations is not ex post facto as long as the prior limitations period has not expired. (*Id.* at pp. 618-619.) Under these principles, the extended statute of limitations provided for in this bill could not be applied to cases in which the period has expired. This bill includes a provision that specifies that it is not intended to apply retroactively, which is consistent with the holding of the

United States Supreme Court in *Stogner*.

- 5) **Expanded Statute of Limitation in Civil Lawsuits:** In addition to the expansion of the statute of limitations for criminal offenses pertaining to the misuse of sperm, ova, and embryos, this bill would expand the statute of limitations for civil lawsuits resulting from similar conduct. This bill was double-referred to the Assembly Judiciary Committee. A more complete analysis of the civil lawsuit portion of this bill will be completed in that committee.
- 6) **Argument in Opposition:** According to *California Attorneys for Criminal Justice*: “This bill would extend the statute of limitations for crimes involving the misuse of sperm, ova or embryos. The current limitations period is three years, but AB 2014 would extend this period for forty years or more.

“By using the word, “knowingly,” this statute requires the prosecution to prove that the person using the assisted reproduction technology actually knew that the donor had not consented to the way the sperm, ova or embryo were used. In addition, the person using the assisted reproduction technology must have actually known that the recipient of implanted sperm, ova or embryos had not consented to the implantation.

“The best evidence of whether someone actually knew whether consent had been given is the records of the fertility clinic where the procedure was performed. Either there is a written consent form on file, or there is not.

“However, as time passes, records can disappear. Computer storage devices can be damaged or lost or their files can be erased. Paper records can be lost or destroyed. And of course, human memory degrades over time.

“The current statute of limitations period of three years is appropriate for violations of Penal Code Section 367g. Records of consent can be expected to last that long.

“However, AB 2014 would extend the limitations period to ‘within three years after the discovery of the offense.’ There is no maximum period.”

- 7) **Related Legislation:** SB 239 (Chang), would allow a criminal complaint to be filed within three years after the discovery of offense, for a crime involving the unauthorized access to computers.
- 8) **Prior Legislation:** SB 1555 (Hayden), Chapter 865, Statutes of 1996, made it a felony for anyone to knowingly use sperm, ova, or embryos in assisted reproduction technology, for any purpose other than that indicated by the sperm, ova, or embryo provider’s signature on a written consent form, or to implant sperm, ova, or embryos, through the use of assisted reproduction technology, into a recipient who is not the sperm, ova, or embryo provider, without the signed written consent of the sperm, ova, or embryo provider and recipient.

REGISTERED SUPPORT / OPPOSITION:

Support

Crime Victims United of California

Oppose

California Attorneys for Criminal Justice

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