

## ASSEMBLY THIRD READING

AB 2223 (Wicks)

As Amended May 19, 2022

Majority vote

**SUMMARY**

Strengthens and clarifies the state's existing prohibitions on imposing civil and criminal penalties for pregnancy loss, creates a new civil action that allows individuals whose rights to be free of civil and criminal penalties for pregnancy loss are violated to seek accountability, and limits the duties of coroners to be consistent with those laws.

**Major Provisions**

- 1) Makes numerous findings and declarations on the part of the Legislature, including about reproductive justice – the human right to control our bodies, sexuality, gender, work, and reproduction – that can only be achieved when all people, particularly women and girls, have the complete economic, social, and political power and resources to make healthy decisions about their bodies, families, and communities in all areas of their lives; the need to end pregnancies by abortion, including self-managed abortion, which means ending one's own pregnancy outside of the medical system; the threat of criminal prosecutions or civil penalties on pregnant people through child welfare, immigration, housing, or other legal systems has a harmful effect on individual and public health; and opposition by the American Medical Association, the American College of Obstetricians and Gynecologists, and the American Public Health Association to civil and criminal penalties for actual, potential, or alleged pregnancy outcomes.
- 2) Repeals Government Code Section 103000, which provides that. "All other fetal deaths required to be registered under this chapter shall be handled as are deaths without medical attendance."
- 3) Removes from existing law, under existing duties of the coroner, the duty to inquire into and determine the circumstances, manner, and cause of all deaths related to or following known or suspected self-induced or criminal abortion.
- 4) Clarifies that existing law, requiring a coroner to examine a fetus and state on the certificate of fetal death, among other things, the direct causes of the fetal death, the conditions, if any, that gave rise to the cause or causes, shall not be used to establish, bring, or support a criminal prosecution or civil cause of action seeking damages against any person, whether or not they were the person who was pregnant with the fetus. Through its courts and statutes and under its Constitution, California protects the right to reproductive privacy, and it is the intent of the Legislature to reaffirm these protections.
- 5) Provides that notwithstanding any other law, a person shall not be subject to civil or criminal liability or penalty, or otherwise deprived of their rights under this article, based on their actions or omissions with respect to their pregnancy or actual, potential, or alleged pregnancy outcome, including miscarriage, stillbirth, or abortion, or perinatal death due to causes that occurred in utero.
- 6) Provides that a person who aids or assists a pregnant person in exercising their rights under this article shall not be subject to civil or criminal liability or penalty, or otherwise be

deprived of their rights, based solely on their actions to aid or assist a pregnant person in exercising their rights under this article with the pregnant person's voluntary consent.

- 7) Clarifies that an abortion is unauthorized if it meets all of the criteria specified in existing law *and* it is performed by someone other than the pregnant person.
- 8) Allows a party aggrieved by conduct or regulation in violation of the Reproductive Privacy Act (Health and Safety Code Sections 123460 to 123468) to bring a civil action against an offending state actor in a state superior court.
- 9) States that whoever denies the right protected by this article, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:
  - a) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.
  - b) A civil penalty of \$25,000 to be awarded to the person denied the right protected by this article. An action shall be commenced within three years of the alleged practice in violation of this article.
  - c) Preventive relief, including permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct, as the complainant deems necessary to ensure the full enjoyment of the rights described in this article.
- 10) Provides that, upon a motion, a court shall award reasonable attorney's fees and costs, including expert witness fees and other litigation expenses, to a plaintiff who is a prevailing party in an action brought pursuant to 9), above.
- 11) Allows a party aggrieved by conduct or regulation in violation of this article to also bring a civil action pursuant to the Bane Civil Rights Act; and provides that notwithstanding the existing immunities in Section 821.6 of the Government Code, a civil action pursuant to Bane Act may be based upon instituting or prosecuting any judicial or administrative proceeding in violation of this article. Provides, for purpose of establishing liability, that the criminal investigation, arrest, or prosecution, or threat of investigation, arrest, or prosecution, of a person with respect to their pregnancy or actual, potential, or alleged pregnancy outcome, constitutes "threat, intimidation, or coercion" pursuant to the Bane Act.
- 12) Changes gendered terminology in relevant code sections and eliminates the offensive and outdated "crime against nature" from existing code.
- 13) Specifies that sections of the Government Code, which provide for defense and indemnification of an employee or former employee of a public entity, shall apply to any cause of action brought under this section against an employee or former employee of a public entity.

## COMMENTS

This bill seeks to further clarify and strengthen California's already strong legal protections against civil liability and criminal prosecution of a pregnant person for the death of their unborn

fetus, creates a new civil action allowing individuals whose rights under the Reproductive Privacy Act are violated to seek accountability against "state actors" in the civil courts; and allows a civil action under the Bane Act (Civil Code Section 52.1) to be based upon violation of the bill, including for an exercise of prosecutorial discretion.

The bill also limits the duties of coroners to be consistent with laws that protect pregnant persons from civil liability and criminal prosecution for the death of their unborn fetus.

*Existing criminal homicide statutes prohibit prosecution of a pregnant person for the death of their unborn fetus.* While California's murder statute, Penal Code Section 187, specifically applies to the unlawful killing of a fetus with malice aforethought, by its own terms, it is inapplicable "when the act is solicited, aided, abetted, or consented to by the mother of the fetus." (Penal Code Section 187(b)(3).) While the Legislature broadened the scope of section 187 to include the unlawful killing of a fetus in specific response to the California Supreme Court's decision in *Keeler v. Superior Court* (1970) 2 Cal.3d 619, the revised wording was intended to situations where a third party intended to cause the death of a fetus. In *Keeler*, the defendant was charged with murder after he attacked his pregnant ex-wife, intentionally causing the death of her fetus. The *Keeler* Court held that the then-existing wording of Section 187, defining murder as the unlawful "killing of a 'human being,'" did not encompass the killing of a fetus. In amending Section 187 in response to *Keeler*, the Legislature intended to criminalize only third-party violence against pregnant persons resulting in fetal death. There is no evidence of legislative intent to extend criminal liability to the mother of the unborn fetus.

*Existing state law prohibits a civil cause of action for prenatal torts.* A prenatal tort is a tort (a civil cause of action for damages based upon a wrongful act that causes injury) involving an unborn child. Prenatal tort causes of action include personal injury, wrongful birth, wrongful life, and wrongful pregnancy. But at common law, they do not include wrongful death or wrongful injury. Any right to recovery or cause of action belonged only to the mother because "the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her." (*Dietrich v. Inhabitants of Northampton* (1884) 138 Mass. 14, 17.)

While some states have repudiated the reasoning of *Dietrich* and authorized civil actions for prenatal injuries caused by tortious conduct that occurs prior to birth, California law remains consistent with the theory expressed in *Dietrich*. Under California law, a fetus or embryo not born alive never attains the status of a "person;" and only a "person" can maintain a legal action or be the subject of a wrongful death claim. Thus, whether the alleged tortfeasor is a pregnant person or a third party, a civil cause of action cannot arise under existing California law for injury or death to a fetus if the fetus is never alive outside of the womb. (See *Hegyves v. Unjian Enterprises, Inc.* (1991) 234 CA3d 1103, 1113 [a negligent motorist was found not legally liable to a child conceived after collision occurred].)

*This bill.* The bill has are two main provisions that are in the jurisdiction of the Judiciary Committee. First, it reiterates, and arguably strengthens, the protections in existing state law that prohibit civil or criminal liability for the acts of a pregnant person in relation to their pregnancy outcomes. Second it creates a new private right of action for violations of rights protected by the Reproductive Privacy Act and allows a civil action under the Bane Act (Civil Code Section 52.1) to be based upon violation of the bill, including for an exercise of prosecutorial discretion.

Arguably there is no public policy rationale for giving prosecutors immunity for acts that clearly are outside the normal scope of prosecutorial discretion, such as fabricating evidence. In fact, the United States Supreme Court held as much when it declined to apply absolute immunity to a prosecutor who fabricated evidence of a defendant's guilt on the basis that evidence gathering (and fabrication) is not a prosecutorial function. "When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" (*Buckley*, *supra*, at pp. 273-274.)

Likewise, there is no public policy rationale for granting absolute immunity to prosecutors for a decision to prosecute a pregnant woman for a pregnancy outcome in direct violation of a legislative directive not to do so. Although filing criminal charges is an exercise of prosecutorial discretion, where the law clearly prohibits criminal charges – as existing law does now (and the Reproductive Privacy Act would do in an even more clear and adamant way under the bill) – there is no discretion to file charges. Thus, especially given the extremely narrow scope of the liability under the bill (only for decisions to pregnant women for the loss of their pregnancy when the law prohibiting such prosecutions has clearly prohibited such prosecutions for more than 50 years), modifying the immunity protection offered by Government Code Section 821.6 seems justified and appropriate.

#### **According to the Author**

AB 2223 protects reproductive freedom by clarifying that the Reproductive Privacy Act prohibits pregnancy criminalization, and creates a private right of action for people whose rights have been violated to seek accountability using civil courts. It would also remove outdated provisions requiring coroners to investigate certain pregnancy losses, and ensure that information collected about pregnancy loss is not used to target people through criminal or civil legal systems.

#### **Arguments in Support**

The co-sponsors--ACLU California Action, Black Women for Wellness, California Latinas for Reproductive Justice, If/When/How: Lawyering for Reproductive Justice, NARAL Pro-Choice California, and Planned Parenthood Affiliates of California – write in support of the bill that although it "is not a crime to have an abortion, miscarriage, or experience pregnancy loss. . . [and] despite clear law forbidding these charges and protecting the right to make decisions about pregnancy, Californians have been charged with homicide offenses for pregnancy losses." They observe that, "AB 2223 protects reproductive freedom by clarifying that the Reproductive Privacy Act affirms people's right to be free from investigation, prosecution, and incarceration based on their pregnancy outcomes: whether they have an abortion or experience a pregnancy loss."

#### **Arguments in Opposition**

Americans United for Life writes that, "'Perinatal' is not defined in this bill, causing critics to decry AB 2223 as infanticide. Elsewhere in California law, "perinatal care" is defined as "provision of care during pregnancy, labor, delivery, and postpartum and neonatal periods." . . . Absent a definition in the bill, it certainly appears that the intent of this legislation is to legalize child abandonment (or worse) in the first weeks after birth. If this is not the bill sponsors' intent, they should amend the bill to clarify that the official policy of California is not state-sanctioned infanticide."

**FISCAL COMMENTS**

According to the Assembly Appropriations Committee, cost pressures (Trial Court Trust Fund) in the mid-hundreds of thousands of dollars for trial courts to hear and adjudicate civil actions for any alleged violations of existing abortion protections. If five cases are filed in civil court annually requiring seven to ten days (56 to 80 hours) of court time, at an average cost per hour of \$1,000 in workload costs, the cost to the trial courts would be between \$280,000 and \$400,000 annually. Although courts are not funded on the basis of workload, increased pressure on the Trial Court Trust Fund and staff workload may create a need for increased funding for courts from the General Fund (GF) to perform existing duties.

**VOTES****ASM JUDICIARY: 7-2-1**

**YES:** Stone, Holden, Kalra, Maienschein, Reyes, Robert Rivas, Luz Rivas

**NO:** Davies, Mathis

**ABS, ABST OR NV:** Cunningham

**ASM HEALTH: 11-3-1**

**YES:** Wood, Aguiar-Curry, Arambula, Carrillo, Maienschein, McCarty, Nazarian, Luz Rivas, Rodriguez, Santiago, Kalra

**NO:** Waldron, Bigelow, Flora

**ABS, ABST OR NV:** Mayes

**ASM APPROPRIATIONS: 12-4-0**

**YES:** Holden, Bryan, Calderon, Carrillo, Mike Fong, Gabriel, Eduardo Garcia, Levine, Quirk, Robert Rivas, Akilah Weber, Wilson

**NO:** Bigelow, Megan Dahle, Davies, Fong

**UPDATED**

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