

SUBJECT: Requirements for fetal tissue disposition and donation, banning its sale

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 9 ayes — Cook, Craddick, Geren, Guillen, K. King, Kuempel, Meyer, Paddie, Smithee

3 nays — Giddings, Farrar, E. Rodriguez

1 absent — Oliveira

SENATE VOTE: On final passage, March 15 — 24-6 (Garcia, Miles, Rodriguez, Watson, West, Whitmire)

WITNESSES: *On House companion bill, HB 200:*

For — Tara Lee, Charlotte Lozier Institute; Kyleen Wright, Texans for Life; Jenny Andrews and Joe Pojman, Texas Alliance for Life; Jennifer Allmon, Texas Catholic Conference of Bishops; CJ Grisham; Joe Kral; (*Registered, but did not testify:* Ann Hettinger, Center for the Preservation of American Ideals; Kathryn Freeman, Christian Life Commission; Elisabeth Wheatley and Terry Williams, Texas Alliance for Life; Rick Smith; Cecilia Wood)

Against — Caleb Head, Abolitionist Society of Houston; Andy Prior, Equal Protection for Posterity-Texas; Brenda Koegler, League of Women Voters of Texas; Blake Rocap, NARAL Pro-Choice Texas; and 12 individuals; (*Registered, but did not testify:* Juliana Kerker, American Congress of Obstetricians and Gynecologists, Texas District; Katherine Pace, Austin Jewish Voice for Peace; Lucy Felix, RAL de Texas; Ryan Valentine, Texas Freedom Network; Carisa Lopez, Travis County Democratic Party; and seven individuals)

On — Robert Allison and Wesley Thomas, Abolish Abortion Texas; Justin Stanford, the pre-born of Texas; and 14 individuals; (*Registered, but did not testify:* Jonathan Huss, Department of State Health Services; Michael Toth, Office of the Attorney General; Amy Hedtke)

**BACKGROUND:** Under federal law, 42 U.S.C. sec. 289g-2 makes it unlawful to purchase fetal tissue, to solicit or accept tissue for directed donation under certain circumstances, and to solicit or accept tissue from fetuses gestated for research purposes if the transfer, donation, solicitation, or acquisition affects interstate commerce.

Under 18 U.S.C. sec. 1531, it is unlawful for a physician, in or affecting interstate commerce, to knowingly perform a partial-birth abortion.

**DIGEST:** CSSB 8 would:

- add requirements for the disposition of fetal tissue remains;
- ban the donation of fetal tissue from an elective abortion;
- ban the sale of fetal tissue; and
- prohibit partial-birth abortion.

**Fetal tissue remains.** The bill would add Health and Safety Code, ch. 697 to govern the disposition of embryonic and fetal tissue remains and to specify that embryonic and fetal tissue remains would not be considered pathological waste under state law.

Health care facilities that provided health or medical care to a pregnant woman would be required to dispose of embryonic and fetal tissue remains by interment, cremation, incineration followed by interment, or steam disinfection followed by interment. Ashes could be interred or scattered in any manner as authorized by law and could not be placed in a landfill.

The bill would require the Department of State Health Services (DSHS) to create a registry of participating funeral homes and cemeteries that were willing to provide free common burial or low-cost private burial and of private nonprofit organizations that registered to provide financial assistance for costs associated with the burial or cremation. The registry would be available to physicians and health care facilities. DSHS would be required to develop a grant program that used private donations to

provide financial assistance for the associated costs.

DSHS could suspend or revoke the license of a health care facility that violated the bill's requirements. A person that violated the fetal tissue remains disposition requirements would be liable for a civil penalty of \$1,000 for each violation. The attorney general, at the request of DSHS, could sue to collect the penalty and reasonable expenses, including court costs and witness fees.

**Fetal tissue donation.** The bill would add Health and Safety Code, ch. 173 to place restrictions on the donation of human fetal tissue and to ban it in most instances. Fetal tissue would be defined as any gestational human organ, cell, or tissue from an unborn child. The term would not include supporting cells or tissue derived from a pregnancy, associated maternal tissue that was not part of the unborn child, the umbilical cord, or the placenta.

The donation ban would not apply to fetal tissue obtained for diagnostic or pathological testing or for a criminal investigation. The donation of fetal tissue or human tissue obtained during pregnancy or at delivery of a child would be allowed, provided the tissue was obtained by an accredited public or private institution of higher education for use in approved research. Also exempted from the donation ban would be cell lines derived from fetal tissue or human tissue existing on September 1, 2017, that were used by an accredited public or private institution of higher education in approved research.

Only an authorized facility could donate human fetal tissue under these provisions and could not donate fetal tissue obtained from an elective abortion. An authorized facility would include a hospital, ambulatory surgical center, or a birthing center. A facility would be required to obtain on a standard form developed by DSHS the written, voluntary, and informed consent of the woman from whose pregnancy the fetal tissue was obtained. An authorized facility could not dispose of any medical record relating to a woman who consented to the donation of fetal tissue before the seventh anniversary of the date consent was obtained or the

later of the seventh anniversary or the woman's 23rd birthday if she was younger than 18 years of age on the date consent was obtained. An authorized facility that donated fetal tissue would be required to submit an annual report containing information specified by the bill.

It would be a criminal offense for a person to offer a woman monetary or other consideration to have an abortion for the purpose of donating human fetal tissue, consent to the donation of fetal tissue, or knowingly or intentionally solicit or accept tissue from a fetus gestated solely for research purposes. Violations would be a class A misdemeanor punishable by a maximum fine of \$10,000.

**Fetal tissue sale.** The bill would add language to Penal Code, ch. 48 to prohibit the purchase and sale of human fetal tissue. A person would commit an offense by knowingly offering to buy, offering to sell, acquiring, receiving, selling, or otherwise transferring any fetal tissue for economic benefit. An offense would be a state-jail felony (180 days to two years in a state jail and an optional fine of up to \$10,000).

It would be a defense to prosecution that the actor was an employee of or under contract with an accredited public or private higher education institution that received donated tissue as allowed by the bill.

**Banned procedure.** The bill would add subchapter F to Health and Safety Code, ch. 171 to prohibit "partial-birth abortions," defined as an abortion performed for the purpose of performing an overt act that the person knew would kill a partially delivered living fetus. The definition would include deliberately and intentionally vaginally delivering a living fetus until the entire fetal head was outside the body of the mother, or for a breech presentation if any part of the fetal trunk past the navel was outside the body of the mother, and performing an overt act, other than completion of the delivery, that killed the partially delivered living fetus.

A physician or other person would be prohibited from knowingly performing such a procedure unless necessary to save the life of a mother whose life was endangered by a physical disorder, physical illness, or

physical injury, including a life-endangering physical condition caused by or arising from the pregnancy.

A person who performed the prohibited procedure would commit a state jail felony. A woman on whom a prohibited procedure was performed or attempted could not be prosecuted.

The bill would allow certain individuals, including the father of the fetus or a parent of the mother of the fetus if the mother was younger than 18 years of age to bring a civil action. Damages could be recovered for physical injury, mental anguish, and emotional distress, and relief could include exemplary damages equal to three times the cost of the procedure. A person could not bring a civil action if the person had consented to the prohibited procedure or if the person's criminally injurious conduct resulted in the pregnancy.

A physician who was the subject of a criminal or civil action could request a hearing before the Texas Medical Board on whether the prohibited procedure was necessary to save the life of a mother as allowed under the terms of the bill. A trial would be delayed 60 days for the board hearing, and the board's findings would be admissible in a court proceeding.

**Enforcement.** The bill would give the attorney general authority, upon request of DSHS or law enforcement, to assist in the investigation of a prohibited donation of fetal tissue and to sue to collect a civil penalty for violations of the fetal tissue remains disposition requirements. The attorney general also could, with the consent of the appropriate local county or district attorney, prosecute violations of the ban on the sale of fetal tissue and donation of fetal tissue from elective abortions.

The bill would take effect September 1, 2017, and would apply only to an abortion, fetal tissue donation, or offense that occurred on or after that date. The bill would apply to fetal tissue disposition that occurred on or after February 1, 2018.

SUPPORTERS  
SAY:

CSSB 8 would affirm the state's profound respect for life by requiring fetal remains to be buried or cremated. In the same spirit, it would ban donations of fetal tissue from elective abortions to prevent situations where abortion procedures could be altered to harvest specific fetal parts. It also would ban the sale of fetal tissue and prohibit partial-birth abortions to allow state law enforcement officials to enforce these prohibitions.

**Fetal remains disposition.** The bill would restore a measure of dignity to the remains of aborted fetuses. Current procedures that allow the remains to be treated as medical waste to be incinerated and disposed of in a landfill are inappropriate.

Although a similar fetal remains rule promulgated by the Department of State Health Services (DSHS) has been blocked by a federal district judge, that ruling is on appeal to the 5th U.S. Circuit Court of Appeals. The bill would address concerns the judge expressed about potential costs associated with handling the fetal remains by requiring DSHS to create a registry of the groups that have offered to handle the burial costs and to create a grant program using private donations to offset the costs. The requirements for handling of fetal remains would not apply to a miscarriage that occurred outside of a health facility.

The requirements would not impact the ability of a woman to access abortion services. In addition, if a woman was concerned about the religious faith of an organization that might be handling fetal remains, the DSHS registry could provide other options.

**Fetal tissue sale and donation.** The ban on the sale of fetal tissue and the donation of fetal tissue from elective abortions would address public concerns about how such tissue is being procured. Although there is an existing federal ban on the sale of fetal tissue, the bill would create a state ban that the Texas attorney general could enforce.

Currently, there are no laws in Texas restricting the use of fetal tissue from induced abortions for research purposes. While there could be

potential benefits from the research, the practice of abortion cannot be justified by endorsing the use of the tissue for research. The bill would allow fetal tissue to be donated in an ethically responsible way from a woman who had suffered a miscarriage and given her written consent for the donation to a university hospital for use in approved research. The bill also would allow research to continue using certain existing cell lines.

**Banned procedure.** The bill would prohibit partial-birth abortion to align state and federal statutes on a procedure that has been banned in federal law since 2003 and by 19 other states, giving Texas authority to prosecute violations. The ban was upheld by the U.S. Supreme Court in 2007. Although the bill includes an exception for a mother whose life is endangered, a partial-birth abortion is rarely medically necessary and poses risks to the woman's reproductive health for future pregnancies.

While some have called for an outright ban on abortion, under existing precedents of the U.S. Supreme Court such a law could be struck down as unconstitutional, so the bill aims to limit elective abortions and defend life to the extent possible at this time.

OPPONENTS  
SAY:

CSSB 8 would present more barriers to a woman choosing to terminate a pregnancy by requiring costly burials or cremations for fetal remains. The ban on fetal tissue donations would halt work at some Texas research universities to find cures to diseases and conditions, including some that impact babies born prematurely. It unnecessarily would duplicate existing federal bans.

**Fetal remains disposition.** The bill's requirement that health providers bury or cremate fetal remains likely would be subject to a constitutional challenge. In January, a federal judge in Austin blocked a similar rule promulgated by DSHS from going into effect, saying the rule replaced tissue-disposal regulations that had caused no health problems and expressed concerns that the rule "may be pretext for restricting abortion access."

The requirements that fetal remains be buried or cremated could interfere

with a woman's autonomy and decision-making. Some women may have an objection to having the fetal remains handled by a religious faith to which they do not subscribe.

**Fetal tissue sale and donation.** The bill would be an unnecessary duplication of federal law prohibiting the sale of fetal tissue. The ban on donated tissue from abortions would intrude into a decision that the woman involved should be allowed to make and contributes to the stigmatization of women who seek abortion care. Although the amount of research being done on fetal tissue in Texas is small, it is being used to study several diseases, including Zika. The research has led to progress in the study of lung development in prematurely born children with infant respiratory distress syndrome.

**Banned procedure.** It is unnecessary to ban a procedure that has been illegal in the United States for more than a decade.

OTHER  
OPPONENTS  
SAY:

Instead of enacting more restrictions, the Legislature should prohibit abortion outright. Such a bold move could help lead the way to ending a practice that many Texans believe is morally unjustifiable.

NOTES:

According to the Legislative Budget Board's fiscal note, CSSB 8 could create costs for certain hospitals that are units of local government to meet burial requirements for fetal remains. One estimate from a Texas Hospital Association survey suggests that burial costs involving local funeral homes would be between \$218,400 and \$655,200 per hospital per year.

CSSB 8 differs from the Senate-passed version by including requirements for the disposition of fetal tissue remains and the creation of an ethical fetal remains grant program. CSSB 8 also would exempt certain existing cell lines derived from human fetal tissue or human tissue from the ban on tissue donations.

A companion bill, HB 200 by Burkett, was placed on the House General State Calendar for May 9.