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Massachusetts HB 3320: Sweeping Away Commonsense Protections for Women and Children

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Executive Summary

The Massachusetts legislature is currently considering a proposal to further liberalize the law of abortion in the Bay State. HB 3320 would substantially alter Massachusetts law by removing any recognition of an unborn child as a person—or even potential person—worthy of protection.

HB 3320 would explicitly legalize abortion through all nine months of pregnancy by permitting abortion providers to subjectively determine that a late-term abortion is "necessary" because of a patient's age or physical, emotional, psychological, or familial concerns, or because an unborn child has undefined "lethal fetal anomalies" or is "incompatible with sustained life outside the uterus."

Further, the bill would repeal meaningful state protections for unborn children and pregnant women considering abortion and would eliminate explicit protections for children born alive during abortions, thereby increasing the risk of infanticide.

Detailed Analysis

Sections 1 and 2 of HB 3320 make the following modifications to Massachusetts law:

New Section 12K would include modified definitions of "abortion" and "pregnancy" to eliminate any reference to or recognition of an "unborn child," and would remove the definition of "unborn child" entirely.

- Abortion is presently defined as "the knowing destruction of the life of an unborn child or the removal of an unborn child from the womb…" (emphasis added).

  HB 3320 antiseptically defines abortion as "any medical treatment intended to induce the termination of a clinically diagnosable pregnancy except for the purpose of producing a live birth."

- Pregnancy is presently defined as "the condition of a mother carrying an unborn child" (emphasis added).

  HB 3320 defines pregnancy as "the presence of an implanted human embryo or fetus within a person's uterus."

- "Unborn child" is presently defined as "the individual human life in existence and developing from implantation of the embryo in the uterus until birth" (emphasis added).

  HB 3320 does not include the term unborn child.

New Section 12L would prevent the Commonwealth from interfering with an abortion decision consistent with other sections in the bill. This includes an explicit prohibition on restricting "the use of medically appropriate methods of abortion or the manner in which medically appropriate abortion is provided." Medically appropriate is not defined.

New Section 12M would permit physicians to perform abortion up to 24 weeks after implantation without qualification, which is effectively the same as current law. After 24 weeks, however, HB 3320 is substantially broader than existing law, providing:

> [a] physician, acting within their lawful scope of practice, may perform an abortion when, according to the physician's best medical judgment based on the facts of the patient's case, the patient is beyond twenty-four weeks from the commencement of pregnancy and
>
> - the abortion is necessary to protect the patient's life or physical or mental health,
> - in cases of lethal fetal anomalies,
> - or where the fetus is incompatible with sustained life outside the uterus.
>
> Medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the person's age—relevant to the well-being of the patient (emphasis added).

In contrast, current law provides that a physician may perform an abortion after 24 weeks only if:

> necessary to save the life of the mother, or if a continuation of her pregnancy will impose on her a substantial risk of grave impairment of her physical or mental health (emphasis added).

While a health exception, particularly a mental health exception, can be exploited to permit an abortion for any reason, the current requirement that there be a "substantial risk of grave impairment" should discourage some abortion providers from breaking the law.

Conversely, the removal of this language through HB 3320 would invite abortion providers to justify late-term abortions for any reason, even family pressure or age. The undefined terms "lethal fetal anomaly" and "incompatible with sustained life outside the uterus" are similarly open to interpretation and abuse. A "lethal fetal anomaly" or condition "incompatible" with "sustained life" could be a treatable but ultimately life-limiting condition, like cystic fibrosis or a heart defect associated with Down syndrome. The bill also does not specify if "sustained life" refers to life sustainable with or without intervention. If an infant would need dialysis while awaiting a kidney transplant, would that justify a late-term abortion? How long would a life need to be sustainable to receive protection?

New Section 12N would require a physician to obtain a patient's "written informed consent on a form prescribed by the Commissioner of Public Health." While current law has a 24-hour waiting period, new Section 12N does not permit "any waiting period between the signing of the consent form and the performance of the abortion."

New Section 12O would permit the department of public health "to require aggregate reports regarding induced termination of pregnancy," a much narrower reporting requirement than current law.

HB 3320 Sections 1 and 2 would also strike the following provisions, including the law that explicitly protects infants born alive during abortions:

- Current Sections 12N and 12T, which provide criminal penalties for violating the abortion restrictions.

- Current Section 12O, which requires abortion providers to attempt to protect both the mother *and* unborn child in a late-term abortion unless it would "create a greater risk of death or serious bodily harm to the mother…."

- Current Section 12P, which requires abortion providers to "take all reasonable steps, both during and subsequent to the abortion … to preserve the life and health of the aborted child. Such steps shall include the presence of life-supporting equipment … in the room where the abortion is to be performed" (emphasis added). Again, this provision requires the abortion provider to attempt to save the unborn child in a late-term abortion, particularly if the child is *born* alive.

- The requirement in current Section 12Q that abortions after 13 weeks be performed in hospitals.

- Current Section 12R, which requires a written justification for any late-term abortion performed, a requirement that patients be tested for blood type and Rh type (which for some patients is critical to protect future pregnancies), and extensive, necessary reporting requirements.

- Current Section 12S, which includes detailed informed consent requirements and a 24-hour reflection period, and a parental/guardian consent requirement. (Section 3 of HB 3320 would modify another provision of law relating to a minor's ability to consent to medical care, thereby permitting minors to consent to abortion.)

- Current Section 12U, which permits the attorney general to petition the superior court for an order enjoining the performance of an abortion that violates state law.

Section 4 of HB 3320 would require abortion coverage under the Commonwealth's program of medical assistance for pregnant women and infants.

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