

Proponent Testimony
House Bill 64 – Fraudulent Assisted Reproduction
Jennifer L. Kovacs, Esq.

Chairman LaRe, Vice-Chair Swearingen and Ranking Member Leland, my name is Jennifer Kovacs. I am an attorney residing in Medina County, Ohio, and I would like to offer proponent testimony for HB 64, legislation sponsored by Representative Powell that deals with the issue of fraudulent assisted reproduction. I support HB64, a bill to criminalize fertility fraud, provided that certain improvements summarized below are made.

Fertility fraud occurs when a patient seeks assistance from a physician to perform an assisted reproductive technology procedure. The patient consents to the procedure, however the patient consents based on false or fraudulent information given by the physician. The physician knowingly uses or implants reproductive material for purposes other than those to which the patient has consented. In a typical case of fertility fraud, a physician represents to the patient that they are using reproductive material from a sperm bank, an anonymous donor or the patient's spouse, but instead substitutes their own reproductive material without the patient's consent. Fertility fraud has become more visible in recent years due to the increased use of direct-to-consumer DNA testing.

When the physician makes false representations to a patient, the physician is violating the moral, ethical and legal duties to the patient. The fraudulent behavior perpetrated by the physician not only affects the patient, but also the children conceived from the physician's insemination. In instances of fertility fraud, impacted families believe that they have this information and may make decisions based on erroneous information. Inaccurate information may have consequences for medical decisions.

Currently, fertility fraud is not a crime in the State of Ohio and there is nothing to discourage this egregious behavior. Recently, Indiana, Florida, Texas, and Colorado have enacted legislation addressing fraudulent insemination. The civil and criminal penalties suggested in HB64 are needed to deter and discourage the fraudulent conduct.

While I support HB64 to address the issues, I urge the Committee to make the following amendments to the bill:

1. In Section 2901.13(A)(5), the statute of limitations for criminal cases should be extended. The statute should be extended from within 10 years of the procedure to within 5 years of the discovery by DNA evidence or within 10 years from the procedure, whichever is longer. This change is important because it is highly unlikely that the parents of donor conceived children will have a DNA test performed on their child before they reached the age of 10.
2. In Section 2901.13(B), the mens rea for the crime should include not only intentional or knowing conduct, but also reckless conduct given how difficult it may be to prove intent or knowledge in these types of procedures.

3. The criminal penalties for fraudulent assisted reproduction should be a first-degree or second-degree felony instead of a third-degree felony as is suggested in the bill. This is important because there is no presumption of prison time for third-degree felonies. A presumption of prison time is critical given the nature of these cases.
4. In Section 2305.118(C), the statute of limitations for civil cases should remove the phrase "earliest date". This would avoid individuals being barred from bringing a claim where a recording or confession exists, but the people do not know that it affects them because they have yet to take a DNA test and discover that they are also a victim.
5. In Section 4731.87, the civil cause of action for parents and offspring should extend, to cases where the professional knows or reasonably should have known that the human reproductive material was used in a manner or to an extent other than that to which the parents consented. This would allow the parents and offspring to address other types of fraudulent and grossly negligent misconduct. This could be accomplished by adding this language that is already in Section 4731.88 for donors to Section 4731.87 for parents and offspring, or by simply adding it to the definition of "Assisted Reproduction Procedure Performed Without Consent" in Section 4731.86(B).

We all know individuals who struggle with fertility issues and have sought various types to fertility treatments. It is not difficult to envision how widely these issues impact Ohioans. Thank you for considering my testimony and requested amendments. I urge the committee to amend and support HB64.

Sincerely,

Jennifer L. Kovacs