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# OHIO LEGISLATIVE SERVICE COMMISSION

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H.B. 64  
134<sup>th</sup> General Assembly

## Bill Analysis

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**Version:** As Reported by House Criminal Justice

**Primary Sponsor:** Rep. Powell

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## SUMMARY

### Criminal offense

- Prohibits a health care professional from knowingly doing any of the following:
  - Using human reproductive material from the health care professional, a donor, or any other person while performing an assisted reproduction procedure if the patient receiving the procedure has not expressly consented to the use of that material.
  - Failing to comply with the standards or requirements of laws governing nonspousal artificial insemination, including the terms of the required consent form.
  - Misrepresenting to the patient receiving the procedure any material information about the donor's profile or the manner or extent to which the material will be used.
- Makes violation of the prohibition on fraudulent assisted reproduction a third degree felony, or, if the violation occurs as part of a course of conduct involving fraudulent assisted reproduction violations, a second degree felony.
- Provides that patient consent to the use of an anonymous donor's human reproductive material is not consent for use of the health care professional's material and that it is not a defense to fraudulent assisted reproduction that a patient expressly consented in writing, or by any other means, to the use of an anonymous donor's material.
- Requires the convicting court to notify the appropriate professional licensing board if a health care professional is convicted of, or pleads guilty to, fraudulent assisted reproduction.
- Bars a prosecution unless commenced within five years after the offense is committed, unless the prosecution commences within five years after either an aggrieved person or the aggrieved person's legal representative discovers the offense.

## Civil actions

- Creates a civil action for remedies specified in the bill for an assisted reproduction procedure performed without consent and performed recklessly and permits a separate action to be brought for each child born as a result of the procedure.
- Creates a civil action for remedies specified in the bill by a donor of human reproductive material against a health care professional who recklessly used, in an assisted reproduction procedure, and without the donor's consent, the material, and permits a separate action to be brought by the donor for each individual receiving the material without donor consent.
- Provides that patient consent to the use of an anonymous donor's human reproductive material is not consent for use of the health care professional's material and that it is not a defense to a civil action under the bill that a patient expressly consented in writing, or by any other means, to the use of an anonymous donor's material.
- Specifies that a plaintiff who prevails in either civil action is entitled to (1) reasonable attorney's fees, and (2) either compensatory and punitive damages or liquidated damages of \$10,000.
- Specifies that a plaintiff who prevails in an action for an assisted reproductive procedure performed without consent is entitled to reimbursement for the cost of the assisted reproduction procedure.
- Specifies that nothing in the bill's provisions governing the civil actions may be construed to prohibit a person from pursuing other remedies for an assisted reproduction procedure performed without consent.
- Requires a civil action created by the bill to be brought not later than five years after the procedure was performed that gives rise to the action.
- Provides that a civil action barred by the five-year limitation may be brought against the health care provider not later than five years after the earliest of the date DNA evidence, or a recording providing evidence, sufficient to bring the action is discovered, or the date the health care professional confesses.
- Provides that the five-year limitation does not begin to run against a person born as a result of an assisted reproduction procedure turns 21 years old, regardless of whether the person discovers any of the abovementioned evidence before the person reaches 21.
- Declares that it is against Ohio's public policy for a health care professional or affiliated person to enter into or require a waiver or provision with any patient or other person that limits or waives any of the patient's or other person's claims or remedies under the bill, and any such provision or waiver is void and unenforceable as against public policy.

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## DETAILED ANALYSIS

### Criminal offense

#### Fraudulent assisted reproduction

The bill prohibits a health care professional, in connection with an assisted reproduction procedure, from knowingly doing any of the following:

1. Using human reproductive material from the health care provider,<sup>1</sup> a donor, or any other person while performing the procedure if the patient receiving the procedure has not expressly consented to the use of that material.
2. Failing to comply with the standards or requirements of laws governing nonspousal artificial insemination, including the terms of the required consent form.
3. Misrepresenting to the patient receiving the procedure:
  - a. Any material information about the donor's profile, including the following information that is, on request and to the extent the physician has knowledge of it, provided to the patient and, if married, her husband:
    - i. The donor's medical history, including any available genetic history of the donor and persons related to him by consanguinity, the donor's blood type, and whether he has an RH factor;
    - ii. The donor's race, eye and hair color, age, height, and weight;
    - iii. The donor's educational attainment and talents;
    - iv. The donor's religious background;
    - v. Any other information that the donor has indicated may be disclosed.
  - b. The manner or extent to which the material described in 3. a. (above) will be used.<sup>2</sup>

#### Penalties

Under the bill, any person who violates the bill's prohibition is guilty of fraudulent assisted reproduction, a third degree felony. If an offender violates the prohibition and the violation occurs as part of a course of conduct involving other violations of the prohibition on fraudulent assisted reproduction, it is a second degree felony. The course of conduct may involve one victim or more than one victim.<sup>3</sup>

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<sup>1</sup> A technical amendment may be needed to change this to "health care professional."

<sup>2</sup> R.C. 2907.13(B); R.C. 3119.93(A)(2), not in the bill.

<sup>3</sup> R.C. 2907.13(C).

Patient consent to the use of an anonymous donor's human reproductive material is not effective to provide consent for the use of the human reproductive material of the health care professional performing the procedure. Further, it is not a defense that a patient expressly consented in writing, or by any other means, to the use of an anonymous donor's human reproductive material.<sup>4</sup>

### **Professional licensing board notification**

The bill requires that, if a health care professional is convicted of, or pleads guilty to, fraudulent assisted reproduction, the court in which the conviction or guilty plea occurs must notify the appropriate professional licensing board of the health care professional's conviction or guilty plea.<sup>5</sup>

### **Statute of limitations and exceptions**

The bill also provides that, generally, a prosecution for violation of the prohibition is barred unless it is commenced within five years after the offense is committed. However, prosecution that would otherwise be barred may be commenced within five years after the date of the discovery of the offense by either (1) an aggrieved person or (2) the aggrieved person's legal representative who is not party to the offense. Additionally, the bill expressly applies to the new period of limitation those statute of limitations requirements of current law governing when an offense is committed, when prosecution is commenced, and the running of the period of limitations.<sup>6</sup>

## **Civil actions**

### **For an assisted reproduction procedure performed without consent**

Under the bill, a civil action for the recovery of remedies (discussed below) for an assisted reproduction procedure performed without consent and performed recklessly may be brought by (1) the patient on whom the procedure was performed and the patient's spouse or surviving spouse, and (2) the child born as a result of the procedure. A person may bring a separate action for each child born to the patient or spouse as a result of an assisted reproduction procedure performed without consent.<sup>7</sup>

### **For use of donor material without consent**

The bill permits a donor of human reproductive material to bring a civil action for remedies (discussed below) against a health care professional who recklessly did both of the following:

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<sup>4</sup> R.C. 2907.13(D) and (E).

<sup>5</sup> R.C. 2907.14.

<sup>6</sup> R.C. 2901.13(A)(5) and (E) to (I).

<sup>7</sup> R.C. 4731.861 and 4731.862.

1. Performed an assisted reproduction procedure using the donor's human reproductive material;
2. Knew or reasonably should have known that the human reproductive material was used without the donor's consent or in a manner or to an extent other than that to which the donor consented.

The donor may bring a separate action for each individual who received the donor's human reproductive material without the donor's consent.<sup>8</sup>

### **Prohibited defense**

Under the bill, patient consent to the use of an anonymous donor's human reproductive material is not effective to provide consent for use of human reproductive material of the health care professional performing the procedure. Further, it is not a defense to a civil action under the bill that a patient expressly consented in writing, or by any other means, to the use of an anonymous donor's human reproductive material.<sup>9</sup>

### **Remedies**

A plaintiff who prevails in a civil action under the bill is entitled to (1) reasonable attorney's fees, and (2) either compensatory and punitive damages or liquidated damages of \$10,000. A prevailing plaintiff in an action for an assisted reproduction procedure performed without consent also is entitled to reimbursement for the cost of the assisted reproductive procedure.<sup>10</sup>

The bill specifies that nothing in its provisions governing the civil actions and remedies may be construed to prohibit a person from pursuing other remedies provided in Ohio law for an assisted reproduction procedure performed without consent.<sup>11</sup>

### **Limitations of actions**

The bill requires that either civil action created by the bill for an assisted reproduction procedure performed without consent must be brought within ten years after the procedure was performed.<sup>12</sup> Any such action that would be barred by the ten-year limitation, however, may be brought not later than five years after the earliest date that any of the following occurs:

1. The discovery of evidence based on deoxyribonucleic acid analysis sufficient to bring the action against the health care professional;

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<sup>8</sup> R.C. 4731.864 and 4731.865.

<sup>9</sup> R.C. 4731.867.

<sup>10</sup> R.C. 4731.869.

<sup>11</sup> R.C. 4731.8610.

<sup>12</sup> R.C. 2305.118(B).

2. The discovery of a recording providing evidence sufficient to bring the action against the health care professional;
3. The health care professional confesses and the confession is known to the plaintiff

If a person born as a result of an assisted reproduction procedure discovers any of the abovementioned evidence before the person reaches 21 years old, the five-year period does not begin to run until the person reaches 21 years old.<sup>13</sup>

### **Waivers and provisions declared against public policy**

The bill declares that it is against Ohio's public policy for a health care professional or affiliated person to enter into or require a waiver or provision with any patient or other person that limits or waives any of the patient's or other person's claims or remedies under the bill. Any such provision or waiver is void and unenforceable as against public policy.<sup>14</sup>

### **Definitions**

The bill defines the following terms:

"Aggrieved person" includes any of the following individuals with regard to a violation of fraudulent assisted reproduction:

1. A patient who was the victim of the violation;
2. The spouse or surviving spouse of a patient who was the victim of the violation;
3. Any child born as a result of the violation.

"Assisted reproduction" means a method of causing pregnancy other than through sexual intercourse, including all of the following: (1) intrauterine insemination, (2) human reproductive material donation, (3) in vitro fertilization and transfer of embryos, and (4) intracytoplasmic sperm injection.

"Assisted reproduction performed without consent" means the performance of an assisted reproduction procedure by a health care professional who recklessly did any of the following:

1. Used either the professional's or a donor's human reproductive material when the patient on whom the procedure was performed did not consent to use of that material.
2. Fail to comply with the standards or requirements of laws governing nonspousal artificial insemination, including the terms of the written consent form.
3. Misrepresent to the patient receiving the procedure the information described under 3. a. and b. above under "**Fraudulent assisted reproduction.**"

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<sup>13</sup> R.C. 2305.118(C).

<sup>14</sup> R.C. 4731.8611.

“Assisted reproduction procedure performed without consent” includes the performance of an assisted reproduction procedure by a health care professional using the professional’s human reproductive material in situations in which the patient consented to use of an anonymous donor.

“Donor” means an individual who provides human reproductive material to a health care professional to be used for assisted reproduction, regardless of whether the human reproductive material is provided for consideration. It does not include any of the following:

1. A husband or a wife who provides human reproductive material to be used for assisted reproduction by the wife;
2. A woman who gives birth to a child by means of assisted reproduction;
3. An unmarried man who, with the intent to be the father of the resulting child, provided human reproductive material to be used for assisted reproduction by an unmarried woman.

“Health care professional” means any of the following: (1) a physician, (2) an advanced practice registered nurse, (3) a certified nurse practitioner, (4) a clinical nurse specialist, (5) a physician’s assistant, and (6) a certified nurse-midwife.

“Human reproductive material” means (1) human spermatozoa or ova; or (2) a human organism at any stage of development from fertilized ovum to embryo.<sup>15</sup>

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## HISTORY

Action	Date
Introduced	02-03-21
Reported, H. Criminal Justice	04-06-22

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<sup>15</sup> R.C. 2305.188(A), 2901.13(A)(5)(c), 2907.13(A), and 4731.86; R.C. 3111.93(A)(2), not in the bill.