

# Senate Judiciary Committee

*Jennifer Horgan 271-7875*

**HB 1609-FN**, relative to certain provisions of the fetal life protection act requiring an ultrasound examination.

**Hearing Date:** April 12, 2022

**Time Opened:** 4:31 p.m.

**Time Closed:** 5:45 p.m.

**Members of the Committee Present:** Senators Carson, Gannon, French, Whitley and Kahn

**Members of the Committee Absent :** None

**Bill Analysis:** This bill provides an exception from the prohibition on abortion after 24 weeks in cases of fetal abnormalities incompatible with life and construes the ultrasound requirement for purposes of determining the gestational age of the fetus.

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**Sponsors:**

Rep. Wolf

Rep. Deshaies

Rep. Allard

Rep. Graham

Rep. Ham

Rep. Depalma IV

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**Who supports the bill:** 992 people signed up in support of the bill. Full sign in sheet available upon request.

**Who opposes the bill:** 22 people signed up in opposition to the bill. Full sign in sheet available upon request.

**Summary of testimony presented in support:**

**Representative Wolf** (provided written testimony)

- As legislators, we never intend to cause harm but sometimes we get additional information that compels us to reconsider and recraft legislation.
- This passed by an over 2/3 majority in the House.
- This bill clarifies the ultrasound requirement and allows an exception for fatal fetal diagnoses.
- Spoke of all the women who have reached out about their experiences of what it is like to deal with these kind of complex circumstances later in pregnancy and why it is critical that they and medical professionals have options.
- These diagnoses often cannot be identified until the 20<sup>th</sup> week of pregnancy or often later.

- These are tragic stories of families who very much wanted their child but received devastating news and therefore tried to make the best decision for their health, their pregnancy, and their family.
- Some mothers choose to carry to term and others choose to terminate the pregnancy, but either way that should be their decision.
- These situations are not for the legislature to determine but for individuals.
- This language is not about disabilities, as those children have long, fulfilling lives.
- This exception is about a fetus that is not viable, a child that cannot survive outside of the womb.
- Shared the story of Lisa Akey and an email she sent two days ago.
- Ms. Akey conceived twin girls last fall and at 21 weeks found out one of the twins has a fatal fetal anomaly at a routine ultrasound. Multiple doctors have said the child will not survive out of the womb and could cause harm or death to the other twin. There is a noninvasive way to allow for that twin to pass painlessly and peacefully. The doctors were clear that that procedure carries a risk because the twins share an amniotic sack and placenta. Chose to use the wait and see approach, but by then they had very little time to decide. The law put agonizing pressure on them and made a terrifying situation more difficult. They have made it through some harrowing times in the pregnancy, and at 29 weeks she was been admitted to Dartmouth-Hitchcock with the goal of getting to 32 weeks on Friday, April 29<sup>th</sup>. Has picked names for the twins, Lily June and Iris Hope. Spoke to how they will meet their twins on the 29<sup>th</sup>. This has been one of the most challenging journeys she has experienced that has been made immeasurably worse with the 24-week ban that has put government in the exam room with them.
- About 2 in 5 pregnancies of more than one baby result in the death of at least one of the babies.
- For the last 50 years Granite Staters had the freedom to make these enormous medical decisions in privacy with their doctors, but that went away with the passage of the 24-week ban.
- This clearly illustrates the unintended consequences that even the most well-intentioned legislation can have.
- Representative Lynn said in support of this, "In the situation of fetal abnormality that is inconsistent with life, it is just too much for government to step in and say, 'you will have the baby'. It seems to me that is a decision for the mother."
- Senator Gannon asked if the amended version took out the exceptions for sexual assault and incest, and if this bill only deals with fatal fetal anomalies.
  - Believes that is correct.
- Senator Kahn asked if other states have adopted similar legislation.
  - Not sure. Is focused on what's right for NH.
- Senator Gannon asked what 'incompatible life' means.

- It goes back to a Supreme Court decision that defines ‘incompatible with life’. This is not ‘with living standards’ or ‘with a disability’. It is if the doctor believes the fetus will not survive outside of the womb.
- Senator Carson asked if the definition for ‘incompatible with life’ was a definition created 50 years ago, should we develop a new definition given the advances in medical technology.
  - Believes that when you have a medical professional make a determination that that fetus will not live outside the womb that is ‘incompatible with life’.
- Senator Whitley asked if a determination of ‘incompatible with life’ should be a legislative decision or a decision for a medical professional.
  - As a firefighter, he was trained with the EMTs to determine if you should continue with lifesaving measures or if someone has passed on. Does not we need a legislative ruling to know what that definition is. Believes in the role of the professional determining that.

**Dr. Danielle Albushies** (NH Medical Society) (provided written testimony)

- Elective terminations that are after 24-weeks do not happen in NH.
- The Fetal Protection Act as it stands without exceptions for a fatal fetal diagnosis does not take into account the complexities regarding such a diagnosis.
- Early blood work or the first ultrasound does not always pick up these diagnoses, and they often require a specialist ultrasound after the routine ultrasound at 21-weeks, which takes time.
- It is very possible that a woman and her family would be faced with this kind of diagnosis at or after 24 weeks
- Many women and their families choose to continue their pregnancy knowing that the fetus may die in utero or die shortly after birth,
- Some will induce labor with their local obstetric provider in their local hospital with access to loved ones.
- Some, when there is access to it, will choose surgical termination of pregnancy.
- The key is to ensure women and their families have time to process a diagnosis and have options.
- A woman should not be forced to continue a pregnancy with a condition that is fatal.
- The House voted to pass this bill and the Governor supports it.
- Provided a letter from obstetric providers who practice across the State.
- Senator Kahn asked if medical facilities in NH perform abortions after 22 weeks.
  - With a patient who has potentially had this diagnosis later than 24 weeks, what is typically best health wise for that woman is induction of labor. After 24-weeks not many doctors have the skill set or it may not be in the best interest of the mother to complete a dilation and evacuation (D&E) procedure. If a woman wants to be induced after 24-weeks because

of a discovery of this kind of diagnosis, she cannot induce that patient. That woman is now asked to carry that fetus. That is not a benign thing. It is really hard to sit in front of a woman and ask her to carry that fetus. These situations are so complex and unique. Asking that when there is the rare situation that is fatal, to be able to give that woman and her family time to process it.

- Senator Kahn asked if she is trained to perform a D&E procedure or if any of her colleagues are.
  - Is personally not trained to do that procedure, nor is anyone in her direct practice. Cannot speak to what Dartmouth-Hitchcock offers.
- Senator French asked how long NH has not had elective terminations at or after 24-weeks.
  - They have never. 24 weeks is considered viable, so a patient who just presents asking for an elective termination after 24-weeks doesn't happen.
- Senator French asked if in her 18 years of practice has she never seen or heard of an abortion occurring at or after 24-weeks for elective reasons in NH.
  - Correct
- Senator Carson asked about inducing after 24-weeks.
  - If this fatal fetal anomaly is diagnosed for whatever reason after 24 weeks, it is more common for a woman to choose induction of labor rather than request the surgical termination. Inductions can be done in local hospitals.
- Senator Carson asked what the difference is between an abortion and being induced.
  - Induction of labor has the goal of delivering the baby intact. Medicines would be given to induce that woman's labor in anticipation of a vaginal birth. In a surgical termination, a woman is given some level of anesthesia, and a skilled professional performs the procedure not with the goal of inducing labor and having a vaginal birth. The fetus is removed with different instruments based on the skill set of the surgeon.
- Senator Carson asked why someone would go the abortion route when they can induce labor.
  - The way the law is written, to medical professionals that means no inductions of labor. And because there are criminal penalties with this, they cannot have anything be vague. This is legislators doing their best with language that means different things to different people. Medical professionals are going to choose the conservative reading of the language because of the criminal penalties associated with this.
- Senator Carson asked if she could provide a textbook definition of what an 'abortion' is and what an 'induction' is.
  - Will provide that.

**Honorable Matthew Houde** (Dartmouth Hitchcock)

- Dartmouth-Hitchcock opposed the Fetal Protection Act for two reasons that this bill will address.
- Dr. Cass could not be here today, but she can certainly answer any questions the Committee may have.
- This bill does not add exceptions for rape or incest, and it does not remove the criminal penalties.
- The bill does clarify the ultrasound requirement and adds an exception for fatal fetal anomalies incompatible with life.
- Wishes that the bill went further, but supports the bill for what it does do.
- The law as it stands now, not only intrudes on a painful decision point, it takes away choice because the woman is forced to either carry a non-viable fetus to term or if she makes a decision to terminate her pregnancy NH providers would be criminalized or that woman would have to be sent out of state.
- This is talking about rare situations where a fetus is unlikely to survive birth or not survive after birth if delivered.
- An example of this would be anencephaly, which is the absence of the skull or brain matter, absence of kidneys, inability to breath due to a abnormal nervous system, and some genetic disorders incompatible with life.
- Senator Kahn asked if any of the doctors at Dartmouth-Hitchcock have the ability to perform an abortion in this kind of situation.
  - Dartmouth-Hitchcock providers will not break the law and they are prepared to provide services in the situation that is being described with a fetal anomaly incompatible with life.
- Senator Gannon asked if the skills of doctors at Dartmouth-Hitchcock are for induction or surgical.
  - Believes the skill at Dartmouth-Hitchcock could be prepared for both.

**Liz Canada** (Planned Parenthood) (provided written testimony)

- Echoes the testimony in support of the bill
- This bill mitigates some of the harm of the abortion ban.

**Frank Knaack** (ACLU) (provided written testimony)

- Echoes the testimony in support of the bill.

**Reverend Allison Palm** (Unitarian Universalist Church of Nashua)

- As a minister and a mother knows that the death of child is the worst thing that can happen to a parent.
- No matter what age that happens, it is a loss that tears people apart.
- With a fatal fetal diagnosis, the parents know the child will die outside of the womb regardless of what they do.
- The current law requires a mother who knows that her child will not survive, to be forced to carry that child to term and hold the grief in her body potentially for months.
- Her faith tells her every body is sacred, that every person has a right to holy agency over their body.

- Forcing a pregnant woman to continue to carry a fetus that is incompatible with life is not honoring the sacredness of that person's body and is deeply harmful to their spirit and to their mental health.

### **Michelle Cilley Foisy**

- Shared her experience being pregnant with her daughter Kayla, who she lost 16 years ago after having a medical termination in NH at 22-weeks.
- Did not have any testing of the pregnancy until the routine ultrasound at 21-weeks.
- Was referred for a higher-level ultrasound which determined that Kayla only had three chambers in her heart, minimal brain tissue, and severe hydrocephalus,
- Asked the doctor what Kayla's chances for survival were, and he said 'unfortunately your baby has no chance to survive outside of your womb'
- Kayla would have needed an immediate heart transplant and because of her brain they would not be able to give her a new heart.
- Kayla would not be born with a disability, which they would have accepted and welcomed, she would not survive at all.
- The doctor explained that because of the measurement of Kayla's head they need to make an immediate decision. She was measuring 22-weeks and the current situation in NH allowed no time to decide.
- The available providers for a later in pregnancy termination and their own regulations were the time limiting factors.
- Knew she could not continue carrying Kayla, knowing that at any time Kayla was going to die inside of her.
- Kayla's sister would only grow closer to her if they continued with the pregnancy.
- She could not go to work every day having people congratulate her and ask about the baby, all the while knowing that they were just waiting for Kayla to die.
- Chose to have a medical termination.
- Met the physician and she preformed a third ultrasound to confirm the diagnosis.
- On December 10, 2005, she and her husband held Kayla for several hours and had her baptized.
- A month later the amniocentesis autopsy results revealed that Kayla at a large deletion in her 15<sup>th</sup> chromosome.
- If they had waited for those results to determine their decision it would have been beyond the 24-weeks.
- That is why the abortion ban with its arbitrary deadline does not fit the complexities that sometimes come with pregnancy.

### **Honorable Patricia McMahon**

- Concerned about how sometimes the testimonies are not what people are anticipating

- Many citizens want to have fair experiences and want to make sure it is clear what we do in the legislature.
- What occurs is sometimes very challenging and hurtful.
- Looking to the Legislature's leadership and commitment, and to be as supportive as possible to those who choose to come here.

### **Summary of testimony presented in opposition:**

#### **Representative Simon**

- Medical professionals are not inherent with their diagnoses; knows plenty of people who have been misdiagnosed.
- Spoke to how people have been told their baby would not survive outside of the womb, but they end up giving birth to healthy babies.
- When talking about 'incompatible with life', is it day one, a month, a year? This is not defined clearly.
- The Fetal Protection Act has to be looked at as a whole, and there are already exceptions for the life of the mother and robust protections for the physical health of a mother.
- The Act does not require a mother to give up her life or the integrity of her long-term physical health.
- These children with fatal fetal anomalies are not posing a physical risk to the mother.
- If the mother wants the child and it is not causing any threat to her health or her life, what is the point of killing the child before extracting it?
- The child at this point is at least 24 weeks and therefore, biologically that child is too big to come out without some medical intervention,
- Why not just induce labor early?
- If the medical diagnosis was incorrect then they have a healthy child, but if it is correct the child will be born dead either way, it is the same result.
- Questions the reason and necessity for aborting the child.
- Why not wait to the 30–32-week mark, which is only a few weeks longer than it would take to get an abortion?
- Inducing labor at 32 week, is not considered an abortion because at 32-weeks there is no difference statistically in fetal death or long-term consequences to the child versus full term.
- An NHPR article has indicated that there isn't a medical facility that performs abortions after 22 weeks and six days.
- The latest is Dartmouth.
- 24-weeks is a whole week and a day after NH facilities claim to have stopped intervening at all.
- In the case of Ms. Akey, she would not have been able to receive that treatment in NH any way.
- An NHPR article also quoted a doctor saying in no circumstances would we treat Ms. Akey's case in NH anyway, it would have to go to a specialist out of state.

- If that is accurate reporting, the Fetal Life Protection Act doesn't have any impact on the State.

**Bob Dunn** (Roman Catholic Diocese of Manchester) (provided written testimony)

- Particularly opposed to the abortion allowance for fetal anomalies incompatible with life.
- NH abortion law avoids designating certain categories of children as being liable to abortion.
- The instruction of the fetal anomaly will be the first time NH has ever designated a particular category of children affirmatively as being liable to abortion.
- The fetal anomalies exception has been framed in different ways throughout this hearing, 'fatal fetal diagnosis', 'fatal fetal abnormalities', and 'fatal fetal anomalies'.
- That illustrates exactly why the language is by no means clear.
- The bill says, 'fetal abnormalities incompatible with life'.
- What are 'fetal abnormalities' and what is 'incompatible with life'?
- These words are not clear and that is especially problematic when we know what is happening in other countries like Iceland, where virtually every child designated in utero with down syndrome is aborted.
- This is problematic when we live in a time where people are prepared to say that those with a quality of life that falls below a certain level are better off dead.
- Would ask the Committee to consider, whether in trying to address one issue, that this language could create broader problems in more circumstances.
- Does support the ultrasound provision that was already passed in SB399.
- Senator Whitley asked if down syndrome is not incompatible with life
  - Agrees that it is not incompatible with life, but there are apparently a lot of people in places like Iceland that don't agree with that, and that illustrates the problem.
- Senator Whitley asked if he believes any of our providers would say down syndrome is incompatible with life.
  - Who would ever have dreamed 20 years ago that we would be living in a world where there would be people anywhere that would say that down syndrome is incompatible with life? Does not know if he would be comfortable saying that into the indefinite future, which is what this legislation is doing. It is always safer in something like this for the Legislature to be clear in what it is allowing and what it isn't allowing.
- Senator Gannon asked if a baby with an abnormality has a life, and we shouldn't judge the quality of life while that baby is alive even if it is between month six or nine.
  - Does not know what 'fetal abnormalities incompatible with life' means. That language is very unclear and very uncertain.

**Roy Dennehy** (Knights of Columbus/NH Right to Life)



- Is opposed to this bill on behalf of those who believe and support the sanctity of human life from conception to natural death.
- The exception language is vague and open to multiple interpretations.
- Requests they remove the exception, so that every pre-born baby has a right to life from 24-weeks and beyond.

jch

Date Hearing Report completed: April 17, 2022