STATE OF NEW YORK

5359

2023-2024 Regular Sessions

IN SENATE

March 2, 2023

Introduced by Sen. FERNANDEZ -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the penal law, in relation to aggravated sexual abuse in the fourth degree; to amend the criminal procedure law, in relation to the time in which to commence actions relating to fertility fraud; to amend the public health law, in relation to creating a private right of action for fertility fraud; and to amend the education law, in relation to including fertility fraud in the definition of professional misconduct for physicians, physician's assistants and specialist assistants

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 130.65-a of the penal law, as added by chapter 1 of the laws of 2000, subdivision 1 as amended by chapter 485 of the laws of 2009, is amended to read as follows:

§ 130.65-a Aggravated sexual abuse in the fourth degree.

1. A person is guilty of aggravated sexual abuse in the fourth degree when:

(a) He or she inserts a foreign object in the vagina, urethra, penis, rectum or anus of another person and the other person is incapable of consent by reason of some factor other than being less than seventeen years old; [~~or~~]

(b) He or she inserts a finger in the vagina, urethra, penis, rectum or anus of another person causing physical injury to such person and such person is incapable of consent by reason of some factor other than being less than seventeen years old**; or**

(c) (i) He or she is a health care practitioner who, in the course of performing an assisted reproduction procedure on a patient, uses human reproductive material from the practitioner or from a donor where the practitioner knows or reasonably should have known that such patient had

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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not expressly consented to the use of human reproductive material from such practitioner or donor.

(ii) As used in this paragraph, the following terms shall have the following meanings:

(1) "Health care practitioner" means a physician, nurse practitioner or physician assistant.

(2) "Human reproductive material" means a human spermatozoon or ovum, or a human organism at any stage of development from fertilized ovum to embryo.

(3) "Assisted reproduction" means a method of causing pregnancy other than sexual intercourse. The term includes intrauterine insemination, donation of eggs, donation of embryos, in vitro fertilization and transfer of embryos and intracytoplasmic sperm injection.

(4) "Donor" means an individual who provides human reproductive material to be used for assisted reproduction, regardless of whether the eggs or sperm are provided for consideration.

2. Conduct performed for a valid medical purpose does not violate the provisions of paragraphs (a) and (b) of subdivision one of this section.

Aggravated sexual abuse in the fourth degree is a class E felony.

§ 2. Subdivision 3 of section 30.10 of the criminal procedure law is amended by adding a new paragraph (h) to read as follows:

(h) A prosecution for aggravated sexual abuse in the fourth degree involving fertility fraud as defined in paragraph (c) of subdivision one of section 130.65-a of the penal law may be commenced within three years after the facts constituting such offense are discovered by an aggrieved party through DNA (deoxyribonucleic acid) analysis, a recording, documents or other instrument to provide evidence sufficient to bring a prosecution, or the defendant confesses to the offense, whichever occurs later.

§ 3. The public health law is amended by adding a new section 2500-l to read as follows:

§ 2500-l. Private right of action; fertility fraud. 1. As used in this section the following terms shall have the following meanings:

(a) "Assisted reproduction procedure" means a method of causing pregnancy other than sexual intercourse. The term includes:

(i) intrauterine insemination;

(ii) donation of eggs;

(iii) donation of embryos;

(iv) in vitro fertilization and transfer of embryos; and

(v) intracytoplasmic sperm injection.

(b) "Human reproductive material" means:

(i) a human spermatozoon or ovum; or

(ii) a human organism at any stage of development from fertilized ovum to embryo.

(c) "Health care practitioner" means a physician, nurse practitioner or physician assistant licensed under the education law.

(d) "Donor" means an individual who provides human reproductive material to be used for assisted reproduction, regardless of whether the eggs or sperm are provided for consideration.

(e) "Assisted reproductive service provider" means a medical provider, fertility clinic, or reproductive tissue bank (which shall include a gamete bank), or any other entity which either provides assisted reproductive services in New York state or for which any component of the assisted reproductive services arranged by the entity is performed in New York state.

(f) "Reproductive tissue bank" means a facility which acquires, processes, stores, distributes and/or releases reproductive tissue to an insemination/implantation site for use in artificial insemination or assisted reproductive procedures. Reproductive tissue banks include, but are not limited to, semen banks, oocyte donation programs and embryo banks.

(g) "Insemination/implantation site" means a location at which artificial insemination or assisted reproductive procedures are performed, using reproductive tissue from anonymous donors, directed donors and/or client-depositors, including, semen processing, limited to washing, concentrating and storing of semen from patients of physicians associated with the licensed insemination/implantation sites or the patients' regular sexual partners, as well as limited semen storage of less than six months' duration.

(h) "Semen processing facility" means a tissue processing facility that processes semen for use by other licensed reproductive tissue banks and insemination/implantation sites.

2. (a) The patient, after being treated for infertility by an assisted reproduction procedure, and in the event that such patient gives birth to a child, the spouse of such patient, the surviving spouse of such patient, the legally determined parent, or a child born as a result of the actions described in this section shall have a cause of action against:

(i) a health care practitioner who knowingly, intentionally or negligently performed an assisted reproduction procedure on such patient using:

(1) such health care practitioner's own human reproductive material; or

(2) the human reproductive material of any donor without the informed written consent of such patient to treatment using such reproductive material.

(ii) a donor, health care practitioner, assisted reproductive service provider, reproductive tissue bank, insemination/implantation site or semen processing facility who:

(1) knowingly, intentionally or negligently provides false or misleading information about the donor's identity including but not limited to: the donor's name, the donor's birthdate, the donor's address at the time of donation, the donor's medical history including but not limited to an illness at the time of donation, any past illness of the donor or the social, genetic or family history of the donor;

(2) knowingly, intentionally or negligently uses or provides human reproductive material for an assisted reproduction procedure other than what was agreed to by the patient to be provided;

(3) violates agreements between the donor and the assisted reproductive service provider, reproductive tissue bank, insemination/implantation site or semen processing facility; or

(4) violates the regulations under subpart 52-8 of title ten of the New York codes, rules and regulations, as amended from time to time, for reproductive tissue banks, insemination/implantation sites or semen processing facilities, including but not limited to those regulations on donor qualifications, required laboratory tests, collection, storage and disposition of reproductive tissue, informed consent, required records and quality assurance and safety.

(b) Each child born pursuant to paragraph (a) of this subdivision shall constitute a separate cause of action.

3. (a) A donor of human reproductive material shall have a cause of action against a health care practitioner who performs an assisted reproduction procedure using such donor's human reproductive material who knew or reasonably should have known that such human reproductive material was used either:

(i) without such donor's consent;

(ii) in a manner or to an extent other than to which such donor consented; or

(iii) in a manner that violates the regulations under subpart 52-8 of title ten of the New York codes, rules and regulations, as amended from time to time, for reproductive tissue banks, insemination/implantation sites or semen processing facilities, including but not limited to those regulations on required laboratory tests, collection, storage and disposition of reproductive tissue, informed consent, required records and quality assurance and safety.

(b) Each individual who receives an assisted reproduction procedure pursuant to the provisions of paragraph (a) of this subdivision shall constitute a separate cause of action.

4. (a) Except as provided in paragraph (b) of this subdivision, an action pursuant to this section shall be commenced no later than:

(i) ten years after the eighteenth birthday of the child conceived through the assisted reproduction procedure which is the subject of such action; or

(ii) ten years after an assisted reproduction procedure was performed if subparagraph (i) of this paragraph is not applicable.

(b) An action pursuant to this section that would otherwise be barred under this section may be commenced not later than three years after the earliest of the date on which:

(i) the person first discovers evidence sufficient to bring an action against the defendant through DNA (deoxyribonucleic acid) analysis, a recording, documents or other instrument that provides evidence sufficient to bring an action against the defendant; or

(ii) the defendant confesses to the offense.

5. A plaintiff who prevails in an action under this section shall be entitled to:

(a) reasonable attorneys' fees;

(b) compensatory, punitive and economic damages; and

(c) if such plaintiff commenced such action pursuant to subdivision two of this section, the costs of the assisted reproduction procedure.

6. Nothing in this section shall be construed to prohibit a person from pursuing any other remedy provided by law.

§ 4. Section 6530 of the education law is amended by adding a new subdivision 51 to read as follows:

51. Convicted of a violation of paragraph (c) of subdivision one of section 130.65-a of the penal law or found liable for fertility fraud under section twenty-five hundred-l of the public health law.

§ 5. This act shall take effect immediately.