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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2019 - 2020 Regular

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**Bill No:** AB 2014                      **Hearing Date:** July 31, 2020  
**Author:** Maienschein  
**Version:** July 23, 2020  
**Urgency:** No                                      **Fiscal:** No  
**Consultant:** SC

**Subject:** *Medical Misconduct: Misuse of Sperm, Ova, or Embryos: Statute of Limitations*

## HISTORY

Source: Author

Prior Legislation: SB 239 (Chang), held in Asm. Approps. Comm., 2019  
SB 610 (Nguyen), Ch. 74, Stats. 2017  
SB 1088 (Nguyen), vetoed, 2016  
AB 32 (Waldron), Ch. 614, Stats. 2015  
AB 1649 (Waldron), Ch. 379, Stats. 2014  
AB 22 (Torres), Ch. 70, Stats. 2009  
AB 2727 (Wesson), Ch. 635, Stats. 2000  
AB 2232 (Oller), Ch. 634, Stats. 2000  
SB 451 (Maddox), Ch. 254, Stats. 1999  
SB 1555 (Hayden), Ch. 865, Stats. 1996  
SB 255 (Davis), Ch. 1499, Stats. 1987

Support: Crime Victims United of California

Opposition: None known

Assembly Floor Vote: 75 - 0

## PURPOSE

***The purpose of this bill is to extend the statute of limitations for criminal offenses involving the misuse of sperm, ova, or embryos in assisted reproduction technology.***

*Existing law* provides that prosecution for crimes punishable by imprisonment for eight years or more and not otherwise covered must be commenced within six years after commission of the offense. (Pen. Code, § 800.)

*Existing law* provides that prosecution for other felonies punishable by less than eight years must be commenced within three years after commission of the offense. (Pen. Code, § 801.)

*Existing law* provides that prosecution for crimes involving fraud, breach of a fiduciary duty, embezzlement of funds from an elder or dependent adult, or misconduct by a public official does not start to run until the discovery of the offense and prosecution must be commenced within

four years after discovery of the crime or within four years after completion, whichever is later. (Penal Code § 801.5 & 803, subd. (c).)

*Existing law* states that prosecution for a misdemeanor shall be commenced within one year after the commission of the offense, unless otherwise specified. (Pen. Code, § 802, subd. (a).)

*Existing law* specifies that the statute of limitations for misdemeanors related to unlawful business practices and license violations is within three years after discovery of the commission of the offense, or within three years after completion of the offense, whichever is later. (Pen. Code, § 802, subd. (e).)

*Existing law* provides that unless provided, as specified, a limitation of time is not tolled or extended for any reason. (Penal Code § 803, subd. (a).)

*Existing law* provides that if more than one statute of limitations period applies to a crime, the time for commencing an action shall be governed by the period that expires later in time. (Penal Code § 803.6, subd. (a).)

*Existing law* states that, except as otherwise provided, prosecution for an offense is commenced when any of the following occurs:

- An indictment or information is filed;
- A complaint is filed charging a misdemeanor or infraction;
- The defendant is arraigned on a complaint that charges the defendant with a felony; or,
- An arrest warrant or bench warrant is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint. (Pen. Code, § 804.)

*Existing law* states that for purposes of determining the applicable limitation of time the following apply:

- An offense is deemed punishable by the maximum punishment prescribed by statute for the offense, regardless of the punishment actually sought or imposed. Any enhancement of punishment prescribed by statute shall be disregarded in determining the maximum punishment prescribed by statute for an offense;
- The limitation of time applicable to an offense that is necessarily included within a greater offense is the limitation of time applicable to the lesser included offense, regardless of the limitation of time applicable to the greater offense. (Pen. Code, § 805.)

*Existing law* states that it is unlawful for anyone to knowingly use sperm, ova, or embryos in assisted reproduction technology, for any purpose other than that indicated by the sperm, ova, or embryo provider's signature on a written consent form. (Pen. Code, § 367g, subd. (a).)

*Existing law* states that it is unlawful for anyone to knowingly implant sperm, ova, or embryos, through the use of assisted reproduction technology, into a recipient who is not the sperm, ova,

or embryo provider, without the signed written consent of the sperm, ova, or embryo provider and recipient. (Pen. Code, § 367g, subd. (b).)

*Existing law* punishes the unlawful use or implantation of sperm, ova, or embryos by imprisonment in the county jail for three, four, or five years, by a fine not to exceed fifty thousand dollars (\$50,000), or by both that fine and imprisonment. (Pen. Code § 367g, subd. (c).)

*This bill* extends the statute of limitations for violations of misuse of sperm, ova, or embryos in assisted reproduction technology from three years after commission of the offense to within one year of discovery of the offense or within one year after the offense could have reasonably been discovered.

*This bill* specifies that the amended statute of limitations applies to crimes committed on or after January 1, 2021, and to crimes for which the statute of limitations that was in effect prior to January 1, 2021, has not elapsed as of January 1, 2021.

## COMMENTS

### 1. Need for This Bill

According to the author of this bill:

The deficiency in existing law is that the statute of limitations on this type of offense is 3 years from commission of the offense.

Making the decision to have a child through Assisted Reproductive techniques is monumental to a couple, and having to experience this type of fraud can be a massive violation of the personal, fiduciary, and ethical realms. While this is an illegal practice in California, there is a glaring deficiency that the legislature can address. Current statute of limitations provides a 3 year window after commission of the offense to be prosecuted; however, it is common for victims to discover this way after the fact. For example, a case in Indiana was uncovered ranging from 26-40 years after the fraud occurred, which would mean this misconduct could not be prosecuted under California law.

By changing the statute of limitations to a year from discovery, we can provide victims with a viable option for seeking justice.

### 2. Fertility Fraud Cases

In the 1990's, two doctors were charged with stealing embryos and eggs belonging to women who sought fertility treatment at the University of California Irvine Center for Reproductive Health and implanting them in other women without the consent of the donors. (Carollo, *Fertility Doctor on the Run Arrested in Mexico*, ABC News, Dec. 28, 2010, available at: <https://abcnews.go.com/Health/ReproductiveHealth/fugitive-fertility-doctor-ricardo-asch-arrested-mexico/story?id=12492575>, [as of July 8, 2020].) That case, which involved dozens of victims (*Id.*), led California to introduce legislation which criminalized the misuse of sperm, embryo and ova. SB 1555 (Hayden) Chapter 865, Statutes of 1996, made it illegal for any person to knowingly use sperm, embryo and ova in manner that was inconsistent with the consent of the

donor, and imposed prison penalties for a violation of that provision.

According to the Society for Assisted Reproductive Technology (SART), California was the first state to criminalize fertility fraud and only two other states have similar laws. (SART website, <https://www.sart.org/news-and-publications/news-and-research/legally-speaking/fertility-fraud-an-update/> [as of July 8, 2020].). According to SART:

“In the typical fertility fraud fact pattern, an adult learns that he or she has different paternal genetic relations and/or unexpected half-genetic siblings. This adult may have already known that he/she was donor-conceived or may discover that fact through the genetic testing process. Conversations with these new relations suggest that something just isn’t right. In some cases, half-genetic siblings find that their parents all sought treatment from the same physician, and in others, their investigative efforts reveal a genetic relationship to the physician. When asked about the circumstances of their fertility treatment, their mothers state that they were told (based on their history of infertility) that the sperm would come from their husbands or anonymous medical residents resembling their husbands. Doctor-conceived individuals and their parents have sought accountability through a number of routes, including speaking with journalists and other media personalities, seeking state law reform, filing a complaint with a state medical board, reporting the physician to a prosecutor or a state Attorney General, pursuing a private legal settlement, and filing a civil tort suit.” (*Id.*)

Although the crimes are rare, the offense of using or implanting reproductive material in a manner that is inconsistent with the will of the donor is one that, by its very nature, is difficult to detect at the time the offense occurs. As indicated by the SART, the typical offense is not likely to be discovered until a person discovers a previously-unknown familial relationship through genetic testing. Such testing may not occur for years or even decades after the moment when a doctor or medical professional fraudulently implanted sperm or an embryo without the consent of the donor. This bill would allow a criminal complaint to be filed within one year of the discovery of the offense or within one year after the offense could have reasonably been discovered. The current law requires that a criminal complaint be filed within three years of the commission of the fraudulent implantation.

### 3. Statutes of Limitations

Statutes of limitations require commencement of a prosecution within a certain period of time after the commission of a crime. A prosecution is initiated by filing an indictment or information, filing a complaint, certifying a case to superior court, or issuing an arrest or bench warrant. (Penal Code § 804.) The failure of a prosecution to be commenced within the applicable period of limitation is a complete defense to the charge. The statute of limitations is jurisdictional and may be raised as a defense at any time, before or after judgment. (*People v. Morris* (1988) 46 Cal.3d 1, 13.) The defense may only be waived under limited circumstances. (See *Cowan v. Superior Court* (1996) 14 Cal.4th 367.)

The Legislature enacted the current statutory scheme regarding statutes of limitations for crimes in 1984 in response to a report of the California Law Revision Commission:

The Commission identified various factors to be considered in drafting a limitations statute. These factors include: (a) *The staleness factor*. A person accused of crime

should be protected from having to face charges based on possibly unreliable evidence and from losing access to the evidentiary means to defend. (b) *The repose factor*. This reflects society's lack of a desire to prosecute for crimes committed in the distant past. (c) *The motivation factor*. This aspect of the statute imposes a priority among crimes for investigation and prosecution. (d) *The seriousness factor*. The statute of limitations is a grant of amnesty to a defendant; the more serious the crime, the less willing society is to grant that amnesty. (e) *The concealment factor*. Detection of certain concealed crimes may be quite difficult and may require long investigations to identify and prosecute the perpetrators.

The Commission concluded that a felony limitations statute generally should be based on the seriousness of the crime. Seriousness is easily determined based on classification of a crime as felony or misdemeanor and the punishment specified, and a scheme based on seriousness generally will accommodate the other factors as well. Also, the simplicity of a limitations period based on seriousness provides predictability and promotes uniformity of treatment.

The Commission's recommendation that the statute of limitation period should correspond to the seriousness of the crime would best be effectuated by a one-year period for misdemeanors, a three-year period for most felonies, a six-year period for felonies punishable by eight or more years imprisonment), and no limitation for capital crimes or crimes punishable by life imprisonment.

As to tolling of the statute of limitations until discovery of the offense, the Commission noted that tolling is appropriate for crimes where a material element is fraud or breach of a fiduciary obligation, *however tolling should not be permitted to run indefinitely*. The Commission recommended that a crime to which tolling applies should not be subject to prosecution more than nine years after it is committed and that such a limit would be a reasonable balance of interests.<sup>1</sup>

The United States Supreme Court has stated that statutes of limitations are the primary guarantee against bringing overly stale criminal charges. (*United States v. Ewell* (1966) 383 U.S. 116, 122.) There is a measure of predictability provided by specifying a limit beyond which there is an irrebutable presumption that a defendant's right to a fair trial would be prejudiced. Such laws reflect legislative assessments of relative interests of the state and the defendant in administering and receiving justice: "Significantly, a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. And that judgment typically rests, in large part, upon evidentiary concerns – for example, concern that the passage of time has eroded memories or made witnesses or other evidence unavailable. (*Stogner v. California* (2003) 539 U.S. 607, 615.)

Generally, the statute of limitations for misdemeanor offenses requires commencement of prosecution within one year of the commission of the offense (Pen. Code § 802) and for felony offenses, within three years of the commission of the offense (Pen. Code § 801). There are specified exceptions that either provides for a longer statute of limitations (Pen. Code, §§ 801.5,

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<sup>1</sup> 1 Witkin Cal. Crim. Law Defenses, Section 214 (3rd Ed. 2004), citing 17 Cal. Law Rev. Com. Reports, pp.308-315.

802), tolls the time that the statute starts to run such as when the crime is discovered (Pen. Code § 803), or provides no statute of limitations at all (Pen. Code § 799).

This bill specifies for crimes involving the misuse of sperm, ova, or embryos in assisted reproduction technology, the statute of limitations is one year after discovery of the offense or within one year after the offense could have reasonably been discovered. This timeframe is similar to statutes of limitations for offenses that may be difficult to detect at the time of commission such as criminal storage of a firearm or installation of an inoperable fire protection system. (See Pen. Code, § 803, subd. (e).)

As discussed in the Law Review Commission's report, tolling the statute of limitations indefinitely may not be reasonable when balancing all of the interests that must be considered when determining an appropriate limitation. The Commission recommended that statutes of limitations should not be allowed to toll for more than 9 years for a felony, however, such a limit may not provide adequate time for these crimes to be discovered considering most people seem to find out by chance that a biological parent is not who they've believed them to be, which can happen at any time, but may be more likely as an adult.

#### 4. Effect of this Legislation

The effect of this change is that the statute of limitations would be longer than the current limit and potentially allow prosecution of cases many years after the crime was committed depending on when the crime is discovered. However, courts have interpreted the date of discovery provision of statutes of limitations to require due diligence in the investigative efforts of the crime. (*People v. Zamora* (1976) 18 Cal.3d 538, 561; *People v. Lopez* (1997) 52 Cal.App.4th 233, 246.) Thus, "discovery of the offense" is not synonymous with the date that the victim gained actual knowledge of the crime. (*People v. Zamora, supra*, 18 Cal.3d at 571.) "The crucial determination is whether law enforcement authorities or the victim had actual notice of *circumstances sufficient to make them suspicious of fraud thereby leading them to make inquiries which might have revealed the fraud.* (*Id.* at 572, original italics.) The identity of the perpetrator of the crime is not an element of the discovery issue. (*People v. Crossman* (1986) 210 Cal. App. 3d 476, 481.)

So while it is possible that the crimes affected by this bill could be prosecuted many years after their commission, the prosecutor would have the burden to prove by a preponderance of the evidence that the prosecution of the crime began within the required time which includes consideration of when the victim or law enforcement was aware of facts that would have alerted a reasonably diligent person in the same circumstances that a crime may have been committed. (CALCRIM No. 3410.)

This bill codifies case law and jury instructions by requiring due diligence in discovering the crime when determining what the date of discovery should be for the purposes of a tolled statute of limitations period. Specifically, this bill provides that for violations of misuse or sperm, ova, or embryos in assisted reproduction technology, a criminal complaint shall be filed within one year of discovery of the offense or within one year after the offense could have reasonably been discovered.

#### 5. Ex Post Facto

In *Stogner v. California, supra*, 539 U.S. 607 the Supreme Court ruled that a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution. (*Id.* at pp. 610-611, 616.) However, extension of an existing statute of limitations is not ex post facto as long as the prior limitations period has not expired. (*Id.* at pp. 618-619.) Existing statutory law also provides that any change in the time period for the commencement of prosecution applies to any crime if prosecution for the crime was not barred on the effective date of the change by the statute of limitations in effect immediately prior to the effective date of the change. (Pen. Code § 803.6, subd. (b).)

Under these principles, the amended statute of limitations provided for in this bill cannot be applied to cases in which the existing statute of limitations period has expired. This bill specifies that the amended statute of limitations applies to crimes committed on or after January 1, 2021 and to crimes for which the statute of limitations that was in effect prior to January 1, 2021, has not elapsed as of January 1, 2021.

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