

Eliminating the Wrongful Birth Cause of Action

PRESENTATION TO THE SENATE HEALTH AND HUMAN SERVICES COMMITTEE

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“Wrongful Birth” Cause of Action

- ▶ Parents of a child with a disability may sue medical providers for failing to inform them that their child would be born with a disability in enough time to have an abortion.
- ▶ The “injury” the parents suffer is having given birth to a disabled child rather than aborting their child.
- ▶ Parents seek to collect the costs of raising their child for his or her entire life.



Jacobs v. Theimer (Texas Supreme Court 1975)

- ▶ Texas was the first state in the United States to recognize a “wrongful birth” cause of action.
- ▶ Parents of a disabled child sued their doctors for failing to diagnose the mother’s rubella she contracted during pregnancy. They were therefore unaware of the risk to the fetus, and the mother gave birth to a disabled child.
- ▶ The court allowed “recovery of expenses reasonably necessary for the care and treatment of their child’s physical impairment.”



Problems with the Cause of Action

- ▶ Sends the message that a child with a disability would have been better off had he or she been aborted.
- ▶ May encourage medical professionals to over-cautiously seek out all potential disabilities and promote abortion in order to avoid liability.
- ▶ Makes medical professionals liable for a disability they did nothing to cause.



Wrongful Life Claims

- ▶ In a “wrongful life” claim, a disabled person (typically their representative) sues medical providers for negligent advice or treatment which caused the disabled person to be born or kept alive.
- ▶ Texas does not recognize wrongful life claims. *Nelson v. Krusen* (Texas 1984).
 - ▶ Courts are unwilling “to hold that plaintiff can recover damages for being alive.”
 - ▶ Courts would have to determine damages by the “weighing of life against non-life, a calculation that cannot rationally be made.”



Other States

- ▶ 28 states have recognized a “Wrongful Birth” cause of action
- ▶ At least 9 states have eliminated the cause of action by statute
- ▶ In each of the three times the eliminating statute was challenged, it has been upheld



States that have eliminated “wrongful birth” lawsuits

- ▶ Arizona (2012)
- ▶ Idaho (1985)
- ▶ Indiana (1998)
- ▶ Michigan (1999)
- ▶ Minnesota (1982)
- ▶ Missouri (1986)
- ▶ Pennsylvania (1988)
- ▶ South Dakota (1981)
- ▶ Utah (1983)



Courts have upheld
statutes eliminating
wrongful birth
lawsuits.



Utah: *Wood v. University of Utah Medical Center* (2002)

- ▶ The Utah Supreme Court upheld a statute eliminating the wrongful birth cause of action.
- ▶ Plaintiffs raised the following arguments:
 - 1) The Utah Constitution's open courts clause,
 - 2) State and federal due process, and
 - 3) State and federal equal protection.
- ▶ The Court found the following:
 - 1) The law did not abrogate an existing right,
 - 2) The statute says nothing about the choice to abort,
 - 3) There are other ways to respond to medical negligence,
 - 4) No studies indicate the statute has an effect on choices to abort, and
 - 5) Other abortion related laws place a greater burden than this law (i.e., waiting periods and parental notification.)



Pennsylvania: *Edmonds v. Western Pennsylvania Hospital Radiology Associated of Western Pennsylvania* (1992)

- ▶ Upheld by the Superior Court of Pennsylvania (appellate court)
- ▶ The Court found there was a rational basis for the law:
 - 1) Preventing a policy that views a birth of a child as a “damaging event for which someone should be punished,” or that a disabled child was “better off dead and of less value” than a non-disable child, and
 - 2) Preventing medical personnel from being coerced into encouraging the abortion of potentially disabled children in order to avoid lawsuits.
- ▶ The Court found five other policy reasons to support the law:
 - 1) Rebutting the view that any birth could be considered “as an evil or wrong,”
 - 2) Not making the disabled “a lower class of citizens,”
 - 3) Avoiding dictating the appropriate practice of medicine to doctors,
 - 4) Slowing the increase of medical malpractice insurance rates, and
 - 5) Freeing doctors from liability for disabilities for which the doctor is in no way responsible for causing.



Minnesota: *Hickman v. Group Health Plan, Inc.* (1986)

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- ▶ The Minnesota Supreme Court ruled on a challenge to the law eliminating the Wrongful Birth cause of action.
- ▶ Plaintiffs raised the following arguments:
 - 1) The statute interfered with the right to abortion,
 - 2) The statute violated the state and federal equal protection guarantees, and
 - 3) The statute violated the Minnesota Constitution's open courts provision.
- ▶ The Supreme Court upheld the law, finding the following:
 - 1) The plaintiffs failed to show state action and were not members of a suspect class,
 - 2) The parents had assumed the risk of childbearing and had deferred to doctors, and
 - 3) The open courts provision only applies to actions available at common law, which wrongful birth was not.



Wrongful Birth Awards



Washington (2013)

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- ▶ **“\$50M awarded over birth defect; test said baby would be OK”– *Seattle Times***
 - ▶ Child was born with “unbalanced chromosome translocation.”
 - ▶ The money is expected to be split between the couple and Oliver.



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Oregon (2012)

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- ▶ **“Jury awards nearly \$3 million to Portland-area couple in 'wrongful birth' lawsuit against Legacy Health” – OregonLive**
 - ▶ Kalanit Levy was born with Down syndrome, even though a prenatal test found she did not have the chromosomal abnormality.
 - ▶ Kalanit's parents' attorney said his clients “deeply love their daughter,” but they would have aborted her had they known she would be born with Down syndrome.



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Florida (2011)

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“Jury awards West Palm Beach parents of child born with no arms, one leg \$4.5 million” – *Palm Beach Post*

- ▶ Bryan, the disabled child, was three years old at the time of trial.
- ▶ According to their attorney, the parents “went from the heights of joyous expectations to the depths of despair” when their son was born missing three limbs.
- ▶ If they had seen he was missing three limbs, the couple said they would have had an abortion.



The screenshot shows a web browser window with the URL www.talaskalawfirm.com/wrongful-birth/. The page features the firm's logo, navigation menu, a search bar, a contact form, and a photograph of newborn babies in hospital cribs.

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Protecting the Rights of Parents for More than 20 Years

In the U.S., laws allow women to make the choice to terminate a pregnancy early in the term if they receive information from their physician that the child has a potentially fatal or severely debilitating condition. If your

