



FAMILY ISSUE FACT SHEET

No. 2012-13 (January 2012)

SB 1359 – CIVIL LIABILITY; WRONGFUL LIFE; BIRTH

EXECUTIVE SUMMARY

A number of lawsuits have been brought in recent years in which patients sue their doctors and argue that they would have aborted their child if the doctor had correctly diagnosed a birth defect or fetal anomaly while their baby was in utero. SB 1359 adds Arizona to the list of states that specifically prohibit the ability to recover for these lawsuits.

BACKGROUND

These “prenatal tort” lawsuits are divided into two categories:

- The first is “wrongful birth.” In these cases, the parents of a child born with birth defects or disabilities claim that the doctor or other healthcare provider was negligent in doing prenatal testing or genetic counseling and therefore deprived them of the right to abort their child because the child would be born physically or mentally impaired. This type of lawsuit is saying that the parents are harmed by the child’s birth, and they would have aborted the child if they knew about the child’s disability. At least twenty states recognize this cause of action, and both California and Arizona probably recognize it but have not specifically addressed it.¹
- The other category of cases, known as “wrongful life,” makes the same claims as “wrongful birth” – that the child would not have been born if the doctor had properly informed the parents of the likelihood that the child would have a disability – but this suit is technically brought by or on behalf of the children themselves. Courts in three states have officially recognized the “wrongful life” cause of action.²

These claims are relatively new in origin. The first “wrongful birth” case was recognized in Texas in 1975, and it is estimated that several thousand wrongful birth lawsuits have been filed since the *Roe v. Wade* decision in 1973.³ There have been several cases in recent years involving this claim, including one as recent as 2011:

- In 1999, Willy and Cynthia Fields filed a wrongful birth lawsuit, claiming that they would have aborted their son if they had been told he would be disabled. The case settled out of court, with the couple receiving nearly \$1.7 million.⁴
- In 2006, Donna Branca filed a lawsuit for the wrongful birth of her disabled son. She argued that her doctor’s poor care deprived her of the right to abort him. The parties reached a multi-million dollar settlement out of court.⁵

- In late 2011, a Florida couple claimed that had they known their son would be disabled, they would have had an abortion. The jury found in favor of the couple and awarded them \$4.5 million in damages.⁶

Nine states have specifically prohibited such lawsuits by statute.⁷ SB 1359 proposes to add Arizona to the states that prohibit recovery for a “wrongful birth” and “wrongful life” lawsuit. The bill would still allow a lawsuit for gross negligence or intentional action.

There are several significant public policy reasons that support prohibiting lawsuits based on this legal theory. First, such a prohibition promotes the legislative policy of favoring childbirth over abortion.

Second, refusing to recognize the wrongful life or birth cause of action affirms “the intrinsic value of human life.”⁸ Wrongful life suits “implicitly endorse the view that the life of a disabled child is worth less than the life of a healthy child.”⁹

Third, prohibiting these types of lawsuits “can contribute to a decrease in medical liability claims,” which will help curb rising medical costs.¹⁰ In addition, a statutory prohibition prevents “courts from dictating practice to physicians especially where the doctors were ‘in no way responsible’ for the defects or disabilities of the children.”¹¹

Finally, preventing these claims from being brought will reduce the costs associated with tort litigation and potential damages.

TALKING POINTS

- **Wrongful life suits endorse the viewpoint that the life of a disabled child is worth less than the life of a healthy child.** As a public policy, the state should not allow these types of lawsuits that consider the existence of a life itself to be an injury or harm.
- **SB 1359 is an important tort reform measure that helps avoid frivolous lawsuits.** This bill protects the medical community against predatory lawsuits filed against a medical provider who did nothing wrong.

CONCLUSION

These “prenatal tort” lawsuits promote the belief that the life of a child with disabilities is worth less than the life of a child without disabilities. All life is valuable, and SB 1359 upholds this policy by prohibiting any wrongful life and wrongful birth lawsuits from being brought in Arizona.

¹ Shelley A. Ryan, *Wrongful Birth: False Representations of Women’s Reproductive Lives*, 78 Minn. L. Rev. 857, 859-860 (1994); Kelly E. Rhinehart, *The Debate Over Wrongful Birth and Wrongful Life*, 26 Law & Psychol. Rev. 141, 142 & 152 (2002); *Walker by Pizano v. Mart*, 164 Ariz. 37, 40 (Ariz. 1990) (en banc); *Andalon v. Superior*

Court, 208 Cal. Rptr. 899 (Cal. Ct. App. 1984). Jurisdictions recognizing wrongful birth are: Alabama, Colorado, Delaware, District of Columbia, Florida, Illinois, Kansas, Louisiana, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Ohio, South Carolina, Texas, Virginia, Washington, West Virginia, and Wisconsin.

² Shelley A. Ryan, *Wrongful Birth: False Representations of Women's Reproductive Lives*, 78 Minn. L. Rev. 857, 859-860 (1994); Kelly E. Rhinehart, *The Debate Over Wrongful Birth and Wrongful Life*, 26 Law & Psychol. Rev. 141, 142 & 152 (2002). States recognizing wrongful life are: California, New Jersey, and Washington.

³ *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975); Rebecca Leung, *Is 'Wrongful Birth' Malpractice?* 60 Minutes, February 11, 2009, available at www.cbsnews.com/stories/2003/06/19/60minutes/main559472.shtml.

⁴ Rebecca Leung, *Is 'Wrongful Birth' Malpractice?* 60 Minutes, February 11, 2009, available at www.cbsnews.com/stories/2003/06/19/60minutes/main559472.shtml.

⁵ Elizabeth Weil, *A Wrongful Birth?*, The New York Times, March 12, 2006, available at www.nytimes.com/2006/03/12/magazine/312wrongful.1.html?pagewanted=all.

⁶ Stephanie Rabiner, *FL Wrongful Birth Lawsuit: \$4.5M Jury Award*, FindLaw, September 19, 2011, <http://blogs.findlaw.com/injured/2011/09/fl-wrongful-birth-lawsuit-ends-in-45m-award.html> (last visited Jan. 30, 2012).

⁷ William C. Duncan, *Statutory Responses to "Wrongful Birth" and "Wrongful Life" Actions*, Marriage Family Law Foundation, www.marriagelawfoundation.org/publications/UFFL%20Chapter.pdf (last visited Jan. 27, 2012). States to prohibit wrongful life and/or wrongful birth are: Idaho, Indiana, Michigan, Minnesota, Missouri, North Dakota, Pennsylvania, South Dakota, and Utah.

⁸ William C. Duncan, *Statutory Responses to "Wrongful Birth" and "Wrongful Life" Actions*, Marriage Family Law Foundation, www.marriagelawfoundation.org/publications/UFFL%20Chapter.pdf (last visited Jan. 27, 2012).

⁹ *Taylor v. Kurapati*, 263 Mich. App. 315, 335 (Mich. App. 1999).

¹⁰ Duncan, *Statutory Responses to "Wrongful Birth" and "Wrongful Life" Actions*.

¹¹ Duncan, *Statutory Responses to "Wrongful Birth" and "Wrongful Life" Actions*, quoting *Edmonds v. Western Pennsylvania Hospital Radiology Associated of Western Pennsylvania*, 607 A.2d 1083, 1088-1089 (Pa. Super. 1992) (Weiland, J., concurring).