Approved _____
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Elwaine F. Pomeroy at
Chairperson

10:00 a.m./~~p.m.~~ on February 25, 1983 in room 514-S of the Capitol.

All members ~~were~~ present ~~except~~ were: Senators Pomeroy, Winter, Burke, Feleciano, Gaar, Hein, Mulich, Steineger and Werts.

Committee staff present: Mary Torrence, Revisor of Statutes
Mike Heim, Legislative Research Department
Mark Burghart, Legislative Research Department

Conferees appearing before the committee:

Senator Charlie Angell
Bernie Frigon, Dodge City, Attorney
John Brookens, Kansas Bar Association
Kathleen Sebelius, Kansas Trial Lawyers Association
Dan Lykins, Kansas Trial Lawyers Association
John Smith, Kansas Trial Lawyers Association
Pat Goodson, Right to Life of Kansas, Inc.
Charles Hamm, Social and Rehabilitation Services
Homer Cowan, Western Insurance Companies, Fort Scott, Kansas
Bud Cornish, Kansas Association of Property and Casualty Insurance Companies

Senate Bill 142 - Gifts by conservator on behalf of incapacitated person.

Senator Angell, the sponsor of the bill, appeared in support of his bill. He introduced Bernie Frigon who had contacted him concerning a problem he had involving a client.

Mr. Frigon explained the client is incapacitated and has over a million dollars. There are sufficient assets for the conservatee, but they can't do anything about giving the assets to the children. Committee discussion with him followed.

Senate Bill 258 - Wrongful life or birth actions prohibited.

The chairman explained his bill to the committee.

John Brookens testified his association does not have a position on the policy. They think in line 27 of the bill, the word "possible" should be changed to "probable". Mr. Brookens suggested, if it is to prevent the child from bringing action, adding the word "born" after the word "conceived" in line 23. He also suggested, if the child should not have this right, should expand possibility if parent should have this action. Mr. Brookens stated there have been cases in which the court's decision has gone both ways. He urged the committee to speak on the subject. The chairman explained the intention of the bill was that it would apply in both instances that action by child and action by the parent cannot be taken. Committee discussion with him followed.

Kathleen Sebelius testified her association is opposed to the bill.

Dan Lykins stated he had talked to attorneys who handle medical malpractice cases in the state. He testified the right of action for the citizens of Kansas should not be taken away. The organization he represents feels there is no need for the bill. Committee discussion with him followed.

John Smith also testified at the request of the Kansas Trial Lawyers Association, and as a concerned citizen. He stated this bill has shortfalls; it is very unclear. He thinks there are different causes of action, and they should be treated

Senate Bill 258 continued

differently. He said an identical bill was passed in the state of South Dakota a number of years ago, and he is not sure what that bill means. Mr. Smith stated he would like to establish high standards of care, and to take away the cause of action would dilute the standard of care. He is not saying this cause of action is the right cause of action; he thinks the courts should look at it. He said the trend of authority in the United Stated is towards recognition of these causes of action. The chairman commented the majority of the public is more resentful of courts making the decision; the legislative choice should be to make policy decisions rather than leave it up to the courts. Considerable discussion followed.

Pat Goodson appeared in support of the bill. She stated they see a very clear need for this legislation. A copy of her statement is attached (See Attachment #1).

Senate Bill 262 - Allowing attorney fees, in insurance subrogation.

Kathleen Sebelius testified her organization requested this bill, and they are in support of it.

Dan Lykins appeared in support of the bill. He referred to the Quizenberry v. Coca-Cola Bottling Company case. Quizenberry suffered a loss to their house when the bottling company ran into it. They were awarded $10,000, and the insurance company felt they should get all of their money back. The judge said the insurance company should pay their fair share of the fees. Mr. Lykins explained the loophole in the statute that pertains to no-fault. He feels the bill remedies the problem. He said it is the problem of fairness, and this bill clears up the matter. It will make it fair when the work is done for the insurance company, and they get their money back, they should pay the attorney's fees. Committee discussion with him followed.

John Brookens testified they support this bill. He said the bar association thinks it is the fair way to do it. He pointed out this bill might conflict with House Bill 2437, which is now in the House. Committee discussion with him followed.

Charles Hamm testified SRS is not taking a position on the bill, but he wanted to call the committee's attention to their recovery problem. A copy of his remarks and the proposed amendment to the bill is attached (See Attachments #2, #3). Committee discussion with him followed.

Homer Cowan testified in opposition to the bill. He thinks the committee is overlooking trying to keep as much money in the system as you can. He testified you are taking cases of clear liability where the carrier has agreed to reimburse them. You are deducting attorney's fees, no matter what. The insurance company is being represented by an attorney they have not hired and paying those attorney's fees. Committee discussion with him followed.

Bud Cornish testified in opposition to the bill. He stated the insurance industry doesn't mind paying its attorneys. They feel they should choose their attorneys. He inquired if the insurance company should pay its own attorneys and also one-third of the recovery to the plaintiff's attorney? He said the industry does frequently retain a plaintiff's lawyer for this purpose, but sometimes it does not; and sometimes they feel it is to their best interest to have their own attorney. Committee discussion with him followed

The meeting adjourned.

2-25-81

GUESTS

SENATE JUDICIARY COMMITTEE

NAME	ADDRESS	ORGANIZATION
Annette Badwey	Topeka	Sen. Gaines
[illegible]	Topeka	Kans Bankers
Bernie D Frigon	Dodge City	atty
Larry Hynes	Lawrence	Stinegar
Dan Lykins	Topeka	KTLA
Dan Smith	Colo Springs	
Kathleen Sebelius	Top	KTLA
Melissa Ness	Topeka	NARAL
Mary Sherrill	Topeka	Ks NARAL
[illegible]	Topeka	AIA
Charles Hamm	State Off. Bldg.	SRS
Peter River	SOB	SRS
Sophie George	Topeka	Sen. Feleciano
M. Harvey	"	Cap Journal
L M Cornish	"	Ks Assoc of Prop & Cas Cos
LARRY SMITH	FT SCOTT	WESTERN INS COS
HOMER COWAN	Ft Scott	Western Ins Cos
Elizabeth E Taylor	Topeka	~~KAEYC~~ KADVP
DAVID ROSS	Mission, Ks	FARMERS INS. GROUP
Sarah Henson	Topeka	
Pat Gordon	RFL	

2-25-83

t Goodson, Right To Life of Kansas., Inc. Senate Judiciary Committ
February 25, 1983

#1

Mr. Chairman, members of the Judiciary committee; I am pleased and grateful for the opportunity to appear today in support of Senate Bill 258. The prolife movement has been deeply concerned over a series of so called wrongful birth or wrongful life lawsuits. We all know what the term wrongful death means, but wrongful birth and wrongful life are relatively new ~~ones~~ terms. A few years ago, attorneys began taking cases of children with physical and mental handicaps against their parents. The attorneys' argument on behalf of the child was that "I would be better off if I were not alive," and "but for the 'wrongful' act of my parents I would not have been born." In other words, the child argued that not getting an abortion was a wrongful act which causes him to be alive, thus wrongful life. The child then asked for damages from his/her parents (or their insurance company) just as happens in wrongful death cases.

This kind of logic can also be directed at a physician. The parents can sue a physician saying that if the physician failed to perform some test, or in the case of a recent lawsuit in the state of Washington, the physician failed to warn that medication taken by the mother might have damaged the child she was carrying, thus depriving them of the knowlege that their unborn child was not perfect so they could have aborted him or her. Thus, but for the wrongful act of the physician in not warning that the child was not perfect, the child would not have been born. Thus we have wrongful birth. If I were to be cynical, I might say the distinction between wrongful life and wrongful birth is whose insurance company will pay the bill.

Courts in several states have allowed such actions. In the absence of legislative action against the "wrongful life" tort theory, it seems well

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n its way to full acceptance in court jurisdictions accross the Uni d States. The implications of this development [redacted] are ominous and suggest things that are terribly disquieting about the state of our civilization's attitude towards the sanctity of human life. For regardless of their theoretical insulation from the politics and culture of everyday American life, the attitudes of the courts reflect to a large extent where we are as a society.

The notion that human life, whether it results from a botched sterilization or a failure to obtain information that would have led to a eugenic abortion, ever can be "wrongful" is inimical to the reverence for life that always has been an integral part of the moral foundation of Western civilization. The idea that a handicapped child would lead a life that would better never have been lived, or that the parents of such a child are "damaged" by that child's presence in their family, bespeaks not only a pervasive social prejudice against the handicapped, but also involves judgements that are beyond the moral abilities of courts, legislatures, or society as a whole, to make. Is it a measure of our moral degeneration that the courts of modern American society would not reject outright the idea of "wrongful life" in all of its legal embodiments?

The Illinois Appeals Court did warn, "The legal implications of such a tort are vast, the social impact could be staggering." In the same opinion it went on to say, "What (disturbs) us is the nature of the new action and the related suits which would be encouraged. Encouragement would extend to all others born into the world under conditions they might regard as adverse. One might seek damages for being born of a certain color, another, because of race, one for being born with hereditary disease; one for being born into a large and destitute family, another because a parent

has an unsavory reputation." Zepeda v. Zepeda 41 Ill. App. 2d 240, 259, 260, 262. ;90 N.E.2d 849, 858, 859 (1963).

As you know state legisatures are empowered to create and to abolish civil actions and courts have accorded them very broad powers in this regard. Senate Bill 258 would prevent courts from allowing parents to bring a civil action against physicians or others and would prevent a child from bringing action against its parents on the grounds that the child should not have been concieved or should not have been born but for a "wrongful" action.

I am aware of legislation similar to Senate bill 258 that has been enacted in three other states; Minnesota, California; and South Dakota. I have attached copies of these three laws to my testimony. I believe the bill before you incorporates the best of these.

Senate Bill 258 is constitutional. The U.S. Constitution under present case law guarantees the right of individuals to procure abortion. But it cannot be argued that the Constitution guarantees the right of anyone to sue anyone for money damages for any form of conduct, much less for failure to perform or to recommend an abortion.

It has been argued that wrongful birth legislation is unneccesary even in States where the cause of action has been specifically recognized because; "conscience laws" already protect individual institutions and practitioners. It is true that Kansas law protects individual practitioners and institutions from being sued for refusing or failing to participate in providing abortion services. But it is not clear that the law would permit a physician or institution to fail to refer for abortion, or at least to indicate to a patient that she ought to consider a test to discover whether

she carries a handicapped child where the only "cure" for the handicap is abortion. Moreover, the "conscience" law would not protect physicians who have no "conscientious objection" to abortion.

Right to Life of Kansas believes that the Illinois Court was accurate in its warning. When society recognizes that a family member has a cause of action for "wrongful birth" or "wrongful life" against another family member, a physician, a hospital or anyone else, it has indeed devalued human life. To say that nonexistence is better than life is really to say that life is worthless. And once we say that nonexistence is better than being born with a handicpa surely it is better than being born illegitimate, or as a minority, or as poor, or as not good looking, or whatever.

In order to protect themselves from these kinds of suits physicians hospitals and other health care professions will be quick to advise abortion and parents, fearing similar liability, will be quick to follow the advice.

In conclusion, this piece of legislation prevents us from putting a price tag on life; it prevents us from seeing one another and ourselves in strict economic terms, it perseves essential family relationships and mutual respect, and it recogizes that each of us has a value which goes beyond dollars. This bill reasserts the value of human life, perfect and imperfect, sick and healthy , rich and poor , black and white, it reassures us that all belong to the same human family.

MINNESOTA SESSION LAW SERIES 1982,
ch. 521, H.F. 1532, approved 3-22-82

State of Minnesota

HOUSE OF REPRESENTATIVES

Seventy-Second Session H.F. No. 1532

A bill for an act

relating to tort actions; prohibiting the causes of action for wrongful life and wrongful birth; prohibiting a defense, an award of damages, or a penalty based on the failure or refusal to prevent a live birth; proposing new law coded in Minnesota Statutes, Chapter 145.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. /145.424/ /PROHIBITION OF TORT ACTIONS./

Subdivision 1. /WRONGFUL LIFE ACTION PROHIBITED./ No person shall maintain a cause of action or receive an award of damages on behalf of himself based on the claim that but for the negligent conduct of another, he would have been aborted.

Subd. 2. /WRONGFUL BIRTH ACTION PROHIBITED./ No person shall maintain a cause of action or receive an award of damages on the claim that but for the negligent conduct of another, a child would have been aborted.

Subd. 3. /FAILURE OR REFUSAL TO PREVENT A LIVE BIRTH./ Nothing in this section shall be construed to preclude a cause of action for intentional or negligent malpractice or any other action arising in tort based on the failure of a contraceptive method or sterilization procedure or on a claim that, but for the negligent conduct of another, tests or treatment would have been provided or would have been provided properly which would have made possible the prevention, cure, or amelioration of any disease, defect, deficiency, or handicap; provided, however, that abortion shall not have been deemed to prevent, cure, or ameliorate any disease, defect, deficiency, or handicap. The failure or refusal of any person to perform or have an abortion shall not be a defense in any action, nor shall that failure or refusal be considered in awarding damages or in imposing a penalty in any action.

SOUTH DAKOTA CODIFIED LAWS
ANN. §§21-55-1 THROUGH 21-55-4 (1982 SUPP.)

CHAPTER 21-55

Actions For Wrongful Life Prohibited

§21-55-1. Action or damages for conception or birth prohibited - "Conception" defined. There shall be no cause of action or award of damages on behalf of any person based on the claim of that person that, but for the conduct of another, he would not have been conceived or, once conceived, would not have been permitted to have been born alive. The term "conception," as used in this section, means the fertilization of a human ovum by a human sperm, which occurs when the sperm has penetrated the cell membrane of the ovum.

§21-55-2. Action or damages for birth of another prohibited. There shall be no cause of action or award of damages on behalf of any person based on the claim that, but for the conduct of another, a person would not have been permitted to have been born alive.

§21-55-3. Consideration of failure to prevent live birth restricted in actions. The failure or the refusal of any person to prevent the live birth of a person may not be considered in awarding damages or in imposing a penalty in any action. The failure or the refusal of any person to prevent the live birth of a person is not a defense in any action.

§21-55-4. Limited effect of chapter. The provisions of this chapter do not prohibit a cause of action or the awarding of damages, except as specifically provided in this chapter, by or on behalf of any person based on the claim that a person is liable for injury caused by such person's willful acts or caused by such person's want of ordinary care or skill.

CALIFORNIA CIVIL CODE §43.6 (WEST 1982)

§43.6. Immunity from liability; actions against parents on childbirth claims; defenses and damages in third party actions.

(a) No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive.

(b) The failure or refusal of a parent to prevent the live birth of his or her child shall not be a defense in any action against a third party, nor shall the failure or refusal be considered in awarding damages in any such action.

(c) As used in this section "conceived" means the fertilization of a human ovum by a human sperm.

2-25-83

#2

STATE DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES

Re: Senate Bill 262

BACKGROUND

SRS recovers approximately $600,000.00 per year pursuant to its medical assistance recovery statute, K.S.A. 39-719a. The statute states that: "Where medical assistance has been paid by the secretary and a third party has a legal obligation to pay such medical expenses to or on behalf of the recipient the secretary may recover the same from the recipient or from the third party and shall be in all respects subrogated to the rights of the recipient in such cases." Underlining added.

SRS in litigation cases usually works through the injured party's attorney even though the department could under the statute sue the recipient directly to recover our monies.

From time to time claims are discounted based upon (1) probability of success, (2) available monies for attorney, recipient and SRS, and (3) long term medical expenses of recipient (remain off medical assistance program).

POTENTIAL PROBLEM

Even though Senate Bill 262 "relates to insurance", such proposal may well be applicable to SRS' medical assistance recovery program. If applicable to SRS, the comparative negligence and attorney fee provisions of the bill could cost SRS $150,000.00 to $300,000.00 per year in recoveries.

PROPOSED AMENDMENT

Amend Senate Bill 262 to exempt K.S.A. 39-719a recovery actions from the provisions of the bill.

OFFICE OF THE SECRETARY
2-25-83

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Session of 1983

SENATE BILL No. 262

By Committee on Judiciary

2-11

AN ACT relating to insurance; concerning attorney fees.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) In the event of recovery by a person who sustains injury or damages, persons or entities having a right of subrogation shall have a lien against such recovery by judgment, settlement or otherwise.

(b) In the event of a recovery pursuant to K.S.A. 60-258a, and amendments thereto, the right of subrogation shall be reduced by the percentage of negligence attributed to the person who sustains injury or damages.

(c) Pursuant to this section, the court shall fix attorney fees which shall be paid proportionately by the persons or entities having a right of subrogation and the injured person, such person's dependents or personal representatives, in the amounts determined by the court.

(d) The provisions of this act shall not apply to recovery of medical assistance as authorized by K.S.A. 39-719a or amendments thereto.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

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