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Testimony of Cynthia Patton, attorney at law

Proponent of SB 142

Chairman King and Senate Judiciary Committee members:

I am testifying today in support of Senate Bill No. 142, which provides for a ban on civil actions for wrongful life and wrongful birth actions, and which prevents any damages to be recovered in a civil action for any physical condition of a minor that existed at the time of such minor's birth if the damages sought arise out of a claim that a person's action or omission contributed to such minor's mother not obtaining an abortion.

Courts throughout the United States and other countries have recently been struggling with the public policy implications of wrongful birth and wrongful life actions. In response several states have prohibited wrongful birth and wrongful life actions. (Idaho, Indiana, Michigan, Minnesota, Missouri, North Dakota, South Dakota, Pennsylvania, and Utah)

Wrongful life is the name given to a legal action in which someone is sued by a severely disabled child (through the child's legal guardian) for failing to prevent the child's birth. Typically a child and the parents will sue a doctor of a hospital for failing to provide information about a child's disability during the pregnancy, or a genetic disposition before the pregnancy. Had the parents of the child been aware of this information, it is argued, the parents could have had an abortion.

Wrongful birth is a lawsuit by parents suing for their own damages incurred as a result of the birth of a disabled child again premised on the view that the parent would have had an abortion had the parent been aware of the information that her child would have been disabled.

The Kansas Supreme Court rejected wrongful life as a cause of action on the grounds that a child does not suffer an injury simply from being born. Bruggeman v. Schimke, 239 Kan. 295 (1986). Senate Bill 142 preserves the status quo in Kansas with regard to wrongful life claims, and would also prevent the court from reversing this precedent in the future.

The court in Bruggeman, supra, stated a rationale that, I believe, undermines that rationale for wrongful birth claims as well,

“It has long been a fundamental principle of our law that human life is precious. Whether the person is in perfect health, in ill health, or has or does not have impairments or disabilities, the person's life is valuable, precious and worthy of

protection. A legal right not to be born, to be dead, rather than to be alive with deformities – is a theory completely contradictory to our law.”

However, in Arch vs. U.S., 247 Kan. 276 (1990), Kansas recognized wrongful birth as a cause of action. Senate Bill 142 would outlaw the wrongful birth action in Kansas.

The threshold problem with wrongful life actions is that the court or a jury must hold that a child can recover damages for achieving life. The assertion by the infant plaintiff is not that they should not have been born without defects, but that they should not have been born at all.

The essence of the infant’s cause of action is that the negligent conduct of the defendants deprived the child’s mother from obtaining an abortion which would have terminated the infant’s existence. Resting on the belief that human life, no matter how burdened, is, as a matter of law, always preferable to nonlife, the majority of courts nationwide have been reluctant to find that the infant has suffered a legally cognizable injury by being born with a congenital or genetic impairment as opposed to not being born at all.

It is this same public policy problem that justifies the legislature in making a determination that such lawsuits are not a legitimate assertion of rights.

The second problem in rejecting wrongful life claims is the difficulty, if not impossibility, of measuring appropriate damages. The traditional tort remedy is compensatory in nature. The basic rule of tort compensation is that the plaintiff be put in the position that he would have been in absent the defendant’s negligence. The damages recoverable on behalf of a child for wrongful life are limited to those necessary to restore the child to the position he would have occupied were it not for the alleged malpractice of the physician or other health-care provider. In a wrongful life case, there is no allegation that but for the defendant’s negligence the child would have had a healthy, unimpaired life. Instead, the claim is that without the defendants’ negligence the child never would have been born (because the mother would have chosen abortion). Thus, the cause of action involves a calculation of damages dependent upon the relative benefits of an impaired life as opposed to no life at all, a comparison the law is not equipped to make. (See Siemienic v. Lutheran General Hospital, 117 Ill.2d 230, 239-40, 111 Ill.Dec. 302, 512 N.E. 2d 691 (1987).

The damage issue is also inherent in a wrongful birth claim in that the parents have not incurred any physical injury. They, rather, are “injured” by the birth of the child. How can one not weigh the benefit and joys of having a child when assessing damages for wrongful birth?

It appears to me that this same philosophical problem of alleging a wrongful life claim would seem to apply equally in wrongful birth actions.

Another problem is the issue of causation in wrongful birth or wrongful life claims, as both causes of action involve proving that the negligence of the physician, and/ or other medical provider, was the proximate cause of the minor's defects. The heart of the problem in these cases is that the physician cannot be said to have caused the defect. The disorder is genetic and not the result of any injury negligently inflicted by the doctor. It is incurable and was incurable from the moment of conception. Thus the doctor's alleged negligent failure to detect it during prenatal examination cannot be considered a cause of the condition. The child's handicap is an inexorable result of conception and birth.

It is interesting to note that In Germany the Federal Constitutional Court declared wrongful life claims unconstitutional. Given the unfortunate history of that country, the court reasoned that such a claim implies that the life of a disabled person is less valuable than that of a non-disabled one. Therefore, claiming damages for one's life as such violates the human dignity principle codified in the first article of the German Basic Law. BVerfGE88, 203 (296)

This broader philosophical problem was recognized by a Michigan Court of Appeals which stated in denying a wrongful birth claim,

“if one accepts the premise that the birth of one ‘defective’ child should have been prevented, then it is but a short step to accepting the premise that the births of classes of ‘defective’ children should be similarly prevented, not just for the benefit of the parents but also for the benefit of society as a whole: This is the operating principle of eugenics.” Taylor v. Kurapati and Annapolis Hospital, 236 Mich. App. 315, 350, 600 NW 2d 670 (1999).

I urge the legislature to pass this bill and make it clear that no child's life or birth is a wrongful birth, regardless of their handicap or disability.

Respectfully submitted,

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