
Preborn Children Wrongful Death Act

Model Legislation & Policy Guide



*Advancing the Human Right to Life
in Culture, Law, and Policy*

INTRODUCTION

Many states permit a plaintiff to pursue a civil wrongful death claim where a third party's criminal action, negligence, malpractice, or production or distribution of an unsafe product kills a preborn child. This issue typically arises in one of two ways:

- (1) A preborn child dies because the mother is killed; or
- (2) The mother survives, but the preborn child sustains injuries which lead to his/her death either *in utero* or at the time of delivery.

In 1949, Minnesota became the first state whose highest court permitted a civil cause of action for the death of a preborn child, independent of any pecuniary losses, pain, and suffering from the parents.¹ As of July 2023, 25, other jurisdictions permit a wrongful death action for a viable preborn child: Arizona, Colorado, Connecticut, Delaware, the District of Columbia, Kansas, Kentucky, Maryland, Massachusetts, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, Washington, and Wisconsin.

Fifteen jurisdictions allow suits for a nonviable preborn child: Alaska, Arkansas, Alabama, Georgia, Idaho, Illinois, Louisiana, Michigan, Mississippi, Missouri, Nebraska, Tennessee, Texas, Utah, Virginia, and West Virginia. Nine jurisdictions require the child be born alive before its death to bring a wrongful death suit on his or her behalf: California, Florida, Hawaii, Indiana, Iowa, Maine, New Jersey, New York, and the Virgin Islands.

While an encouraging trend, this yields a disconcertingly inconsistent patchwork of protections. A minority of states have either neglected this key issue or have decided that only persons who die after being born can be the subject of a wrongful death claim.² Even the majority of states that permit a wrongful death cause of action for a preborn child do not protect all preborn children equally.

To remedy both the lack of wrongful death laws in some states and the lack of comprehensive protection provided by most existing state laws, AUL has drafted the *Unborn Wrongful Death Act*. This model language permits a wrongful death claim in the death of a preborn child at any stage of development or gestation.

¹ *Verkennes v. Corniea*, 38 N.W.2d 838 (Minn. 1949) (in interpreting Minn. Stat. § 573.02, reversed a line of cases drawing influence from *Dietrich v. Northampton*, 138 Mass. 14 (1884) (opinion of Holmes, J.) (recovery for an unborn child for a woman four to five months pregnant denied due to lack of precedence and lack of capacity to live outside of the mother). See generally Phyllis A. Dow, *California's Response for Wrongful Death of a Stillborn Fetus: Justus v. Atchison*, 5 Pepp. L. Rev. 589, 595 (1978).

² As of October 2022, for example, no case law or guidance exists as to whether Wyo. Stat. § 1-38-101's definition of a "person" includes a nonviable or viable preborn child.

PREBORN CHILDREN WRONGFUL DEATH ACT

HOUSE/SENATE BILL No. _____
By Representatives/Senators _____

Section 1. Title.

This Act may be known and cited as the “Preborn Children Wrongful Death Act.”

Section 2. Legislative Findings and Purposes.

- (a) The [Legislature] of the State of [Insert name of State] finds that:
- (1) This State has statutorily recognized a wrongful death civil cause of action [Insert appropriate statutory or other reference(s)] since [Insert date].
 - (2) A wrongful death cause of action corrects a flaw in the common law, where no cause of action survived a victim’s death. Thus, a tortfeasor (wrongdoer) could escape liability merely because he or she inflicted injuries so severe that they resulted in the death of the victim.
 - (3) The wrongful death cause of action provides for a wrongdoer to pay damages to his or her victim’s survivors, deterring tortious, harmful behavior and providing restitution to a victim’s estate.
 - (4) This State has an interest in protecting every human being, including preborn children, from tortious and harmful acts. *See, e.g., Dobbs v. Jackson Women’s Health Center*, 142 S. Ct. 2228, 2248 (2022).
 - (5) Parents of preborn children have protectable interests in the life, health, and well-being of their children.
 - (6) Tortious behavior which results in the death of a preborn child carries the same social and emotional cost as that which results in the death of a born and living human being including bereavement, a loss to society, and lawlessness and disregard for life which characterizes negligent, harmful, and wrongful behavior.

(b) For these reasons, the [*Legislature*] finds that the exclusion of preborn children from coverage under the State’s wrongful death cause of action conflicts with the justifications for the statute[s], and that a cause of action for the wrongful death of a preborn child at any stage of gestation or development should be permitted under this State’s laws.

Section 3. Definitions.

As used in this Act only:

(a) “**Abortion**” means the act of using or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman; with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the preborn child.

Such use, prescription, or means is not an abortion if done with the intent to:

- (1) Save the life or preserve the health of the born child;
- (2) Remove a dead preborn child caused by spontaneous abortion; or
- (3) Remove an ectopic pregnancy.

(b) “**Born alive,**” means the complete expulsion or extraction of an infant from his or her mother, regardless of the state of gestational development, who, after expulsion or extraction, whether or not the umbilical cord has been cut or the placenta is attached, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion, shows any evidence of life including, but not limited to, one or more of the following:

- (1) breathing;
- (2) a heartbeat;
- (3) umbilical cord pulsation, whether cut or uncut;
- (4) definite movement of voluntary muscles; or
- (5) any other medically-recognized vital signs.

(d) **“Conception”** and **“fertilization”** each means the fusion of a human spermatozoon with a human ovum.

(e) **“Infant”** means a child of the species *homo sapiens* who has been completely expelled or extracted from his or her mother, regardless of the stage of gestational development, until the age of thirty (30) days post birth.

(f) **“Healthcare provider”** means any professional, paraprofessional, or other individual a healthcare service may direct to participate in any furnishing or assisting of healthcare services, including, but not limited to the following:

- (1) physician’s assistant;
- (2) nurse;
- (3) nurses’ aide;
- (4) medical assistant;
- (5) hospital employee;
- (6) clinic employee;
- (7) nursing home employee;
- (8) pharmacist;
- (9) pharmacy employee;
- (10) researcher;
- (11) medical or nursing school faculty, student, or employee;
- (12) counselor; or
- (13) social worker.

(g) “**Physician**” means a person licensed to practice medicine by the [*insert name of state health department or other appropriate agency*], including medical and osteopathic doctors [*or any other individual legally authorized by this State to perform abortions; provided, however, that any individual who is not a physician and not otherwise legally authorized by this State to perform abortions, but who nevertheless performs an abortion shall be subject to the provisions of this Act*].

() “**Preborn child**” means the offspring of human beings from conception to birth.

Section 4. Cause of Action.

When a preborn child dies, receives an injury, or succumbs to an injury’s effects, regardless of his or her gestation or development, a cause of action exists under the law of this State arising from the preborn child’s death by a wrongful act, neglect, carelessness, lack of skill, or default.

Section 5. Exceptions.

(a) No cause of action in this Act exists against a physician, another healthcare provider, or a medical institution for the wrongful death of a preborn child caused by an abortion where the abortion was permitted by law and the requisite consent was lawfully given. However, a cause of action is not prohibited where an abortion is performed in violation of state law or where the child is born alive and subsequently dies.

(b) No cause of action in this Act exists against a physician, another healthcare provider, or a medical institution for the wrongful death of a preborn child *in utero* based on their alleged misconduct where the defendant did not know and, under the community’s standard medical practice in, had no medical reason to know of the woman’s pregnancy or the preborn child’s existence.

Section 6. Construction.

(a) This Act does not create, recognize, endorse, or condone a right to an abortion.

(b) This Act does not make lawful an abortion that is currently unlawful.

Section 7. Severability.

Any provision of this Act held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, is construed to give it the maximum effect permitted by law. If such holding wholly invalidates or renders the provision unenforceable, such provision is severable from the Act, and does not affect the remainder of this Act, the application to other persons not similarly situated, or the application to other, dissimilar circumstances.

Section 8. Right of Intervention.

The [*Legislature*], by joint resolution, may appoint one or more of its members who sponsored or cosponsored this Act in his or her official capacity to intervene as a matter of right to in any case in which the constitutionality of this Act or any [*rule or regulation*] adopted under this Act, wholly or partly, is challenged.

Section 9. Effective Date.

This Act takes effect on [*Insert date*].

For further information regarding this or other AUL policy guides, please contact:

AMERICANS UNITED FOR LIFE
1150 Connecticut Avenue NW, Suite 500
Washington, D.C. 20036
202.741.4917 | Legislation@aul.org

www.AUL.org

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