
UNBORN WRONGFUL DEATH ACT

Model Legislation & Policy Guide
For the 2016 Legislative Year



*Accumulating Victories, Building Momentum,
Advancing a Culture of Life in America*

INTRODUCTION

One December night, David Martin and his wife pulled over on the side of the road in Sabine County, Texas to assist another motorist. Suddenly, a drunk driver traveling at a high rate of speed struck their vehicle. The force of the collision caused extensive injuries to Mrs. Martin – injuries that, ultimately, resulted in the death of the Martins’ unborn daughter, Edie Elizabeth. The drunk driver was never held legally or financially responsible for Edie’s death because – at that time – Texas law did not permit a wrongful death cause of action in the death of an unborn child. Thankfully, Texas has since changed its law.

Like Texas, many states have determined that a wrongful death (civil) claim can be pursued in cases where an unborn child is killed as a result of a third party’s criminal action, negligence, malpractice, or production or distribution of an unsafe product. This issue typically arises in one of two ways:

- (1) An unborn child dies because the mother is killed; or
- (2) The mother survives, but the unborn 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 to permit a civil cause of action for the death of an unborn child. Now, 41 states recognize such a claim. Of these, 27 states and the District of Columbia allow a wrongful death suit only if the child was viable at the time of his or her death, while 14 states allow suits for a pre-viable child. Conversely, 9 states still require a live birth, barring a cause of action for the death of the unborn child unless the child is born alive and dies thereafter.

In summary, a minority of the states have either not addressed this issue or have decided that only persons who die after being born can be the subject of a wrongful death claim. Moreover, the majority of states that permit a wrongful death cause of action for an unborn child do not protect all unborn 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 an unborn child at any stage of development or gestation.

For more information and drafting assistance, please contact AUL's Legislative Coordinator at (202) 289-1478 or Legislation@AUL.org.

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UNBORN WRONGFUL DEATH ACT

HOUSE/SENATE BILL No. _____

By Representatives/Senators _____

Section 1. Title.

This Act may be known and cited as the “Unborn 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) The wrongful death cause of action is intended to correct a flaw in the common law: At common law, 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 damages to be paid by a wrongdoer to his or her victim’s survivors, thus deterring tortuous and harmful behavior and providing for restitution to the victim’s estate.
 - (4) This State has an interest in protecting every human being including unborn children from tortuous and harmful acts.
 - (5) Parents of unborn children have protectable interests in the life, health, and well-being of their children.
 - (6) Tortuous behavior which results in the death of an unborn 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 the lawlessness and disregard for life which characterizes negligent, harmful, and wrongful behavior.

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

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 unborn 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 unborn child;
- (2) Remove a dead unborn child caused by spontaneous abortion; or
- (3) Remove an ectopic pregnancy.

(b) “**Born-alive**” means the substantial expulsion or extraction of an infant from its mother, regardless of the duration of the pregnancy, that 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; or
- (4) Definite movement of voluntary muscles.

(c) “**Conception**” means the fusion of a human spermatozoon with a human ovum.

(d) **“Healthcare provider”** means any individual who may be asked to participate in any way in a healthcare service, including, but not limited to, the following: a physician’s assistant; nurse; nurses’ aide; medical assistant; hospital employee; clinic employee; nursing home employee; pharmacist; pharmacy employee; researcher; medical or nursing school faculty, student, or employee; counselor; social worker; or any professional, paraprofessional, or any other person who furnishes or assists in the furnishing of healthcare services.

(e) **“Physician”** means a doctor legally authorized to practice medicine or surgery in this State [*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*].

(f) **“Unborn child”** means the offspring of human beings from conception until birth.

Section 4. Cause of Action.

The state or location of gestation or development of an unborn child when an injury is caused, when an injury takes effect, or at death shall not foreclose maintenance of a cause of action under the law of this State arising from the death of the unborn child caused by a wrongful act, neglect, carelessness, lack of skill, or default.

Section 5. Exceptions.

(a) There shall be no cause of action against a physician or a medical institution for the wrongful death of an unborn child caused by an abortion where the abortion was permitted by law and the requisite consent was lawfully given; provided, however, that 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) There shall be no cause of action against a physician, another healthcare provider, or a medical institution for the wrongful death of an unborn child *in utero* based on the alleged misconduct of the physician or medical institution where the defendant did not know and, under standard medical practice in the community, had no medical reason to know of the pregnancy of the woman or the existence of the unborn child.

Section 6. Construction.

- (a) This Act does not create, recognize, endorse, or condone a right to an abortion.
- (b) It is not the intention of this Act to 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, shall be construed so as give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed severable herefrom and shall not affect the remainder hereof or the application of such provision to other persons not similarly situated or to other, dissimilar circumstances.

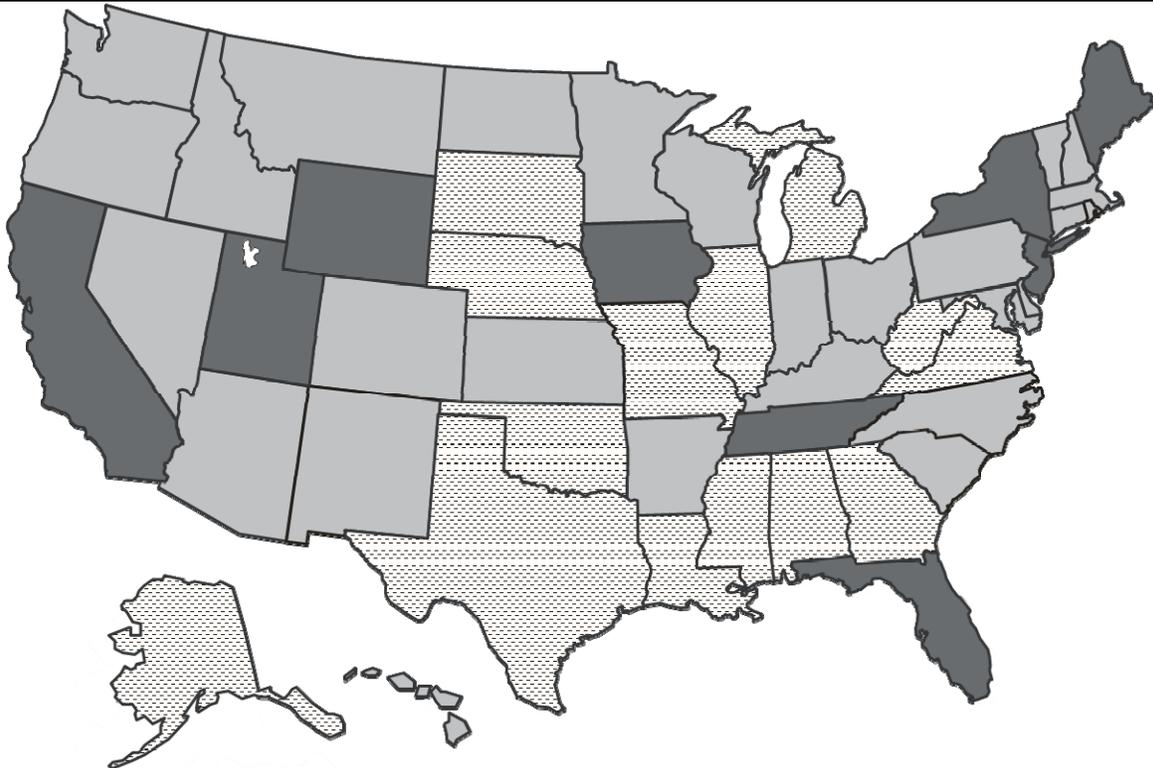
Section 8. Right of Intervention.

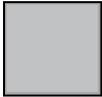
The [*Legislature*], by joint resolution, may appoint one or more of its members, who sponsored or cosponsored this Act in his or her official capacity, to intervene as a matter of right to defend this law in any case in which its constitutionality is challenged.

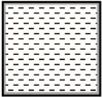
Section 9. Effective Date.

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

STATE OF THE STATES: WHERE ARE WE NOW? WRONGFUL DEATH (CIVIL ACTION)



 Twenty-seven states and the District of Columbia permit a wrongful death action if an unborn child was viable at the time of his/her death: AZ, AR, CO, CT, DE, DC, HI, ID, IN, KS, KY, MD, MA, MN, MT, NV, NH, NM, NC, ND, OH, OR, PA, RI, SC, VT, WA, and WI.

 Fourteen states allow suits for a pre-viable unborn child: AK, AL, GA (limited to quickening), IL, LA, MI, MS (limited to quickening), MO, NE, OK, SD, TX, VA, and WV.

 Nine states still require live birth (and bar a cause of action for the death of the unborn child unless the child is born alive and dies thereafter): CA, FL, IA, ME, NJ, NY, TN, UT, and WY.

More detailed information about the need and justification for laws providing for a wrongful death (civil) cause of action in the death of an unborn child can be found in AUL's annual publication *Defending Life*.

Defending Life 2015 is available online at AUL.org.

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

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