
BORN-ALIVE INFANT PROTECTION ACT

Model Legislation & Policy Guide
For the 2013 Legislative Year



Changing Law to Protect Human Life, State by State

INTRODUCTION

Jill Stanek, a nurse at Christ Hospital in Oak Lawn, Illinois, held a tiny, 21-week-old baby boy in her hands. He weighed about half a pound and was around ten inches long. “He was too weak to move very much, expending any energy he had trying to breathe,” Jill recalled. The baby had survived an abortion and was going to be left alone in a filthy utility room because his parents did not want to hold him as he died, and the attending nurse was too busy to bother with him. Jill intervened. “I could not stand the thought of this suffering child dying alone in the soiled utility room, so I cradled and rocked him for the 45 minutes that he lived,” she testified before the U.S. House of Representatives. “Toward the end, he was so quiet, I couldn’t tell if he was alive unless I held him up to the light to see if I could see his heart beating through his chest wall.”¹

To her horror, Jill discovered that babies who were born alive as a result of failed abortions were routinely left alone to die on the cold metal countertop in the hospital’s utility room.² Distraught and filled with disbelief, Jill spoke out against the practice and was subsequently fired.

Jill worked to have the hospital prosecuted for violating the “Illinois Abortion Law of 1975,” which required physicians to provide medical care for born-alive infants. However, then-Illinois Attorney General Jim Ryan found that there was “no basis for legal action.”³ Similarly, the Office for Civil Rights at the U.S. Department of Health and Human Services wrote a letter to Jill stating that federal “civil rights laws do not cover abortions or the rights of newborns.”⁴

Undeterred, Jill took her story all the way to the U.S. House of Representatives, where, in 2001, she testified in support of the “Federal Born-Alive Infants Protection Act” (BAIPA).

Federal Born-Alive Infant Protection Act

On March 12, 2002, the federal BAIPA passed the House of Representatives by a resounding voice vote. Later, on June 19, 2002, it was approved by a 98-0 vote in the U.S. Senate. All Democrats were present for that vote, and all of them—including Senators Hillary Clinton, Ted

¹ Testimony of Jill Stanek during the hearing before the Subcommittee on the Constitution on the Committee on the Judiciary, U.S. House of Representatives, 107th Congress, on H.R. 2175 (Born Alive Infant Protection Act), July 12, 2001, Serial No. 32, at 19.

² *Id.* One instance involved the failed abortion of a baby boy who was supposed to have spina bifida. What appeared on the ultrasound to be a mass on the baby’s back was actually an incompletely formed twin. The healthy baby was born alive with an intact spine after the failed abortion procedure, and was left to die on the cold countertop of the utility room.

³ *Id.* at 25, 42.

⁴ *Id.* at 25, 41.

Kennedy, Barbara Boxer, and John Kerry—voted in favor of the bill. On the Senate floor, Sen. Boxer voiced her strong support for the bill, exclaiming, “Who would be more vulnerable than a newborn baby?” She continued, stating that “all of our people deserve protection, from the very tiniest infant to the most elderly among us.”⁵

State Born-Alive Infant Protection Acts

Since its enactment, the federal BAIPA has been used as a model for similar state legislation. Currently, the majority of the states have some form of a BAIPA. At least 24 states have laws creating a specific affirmative duty of physicians to provide medical care and treatment to born-alive infants at any stage of development, and at least 3 states require such care and treatment after viability.

Like their federal counterpart, state BAIPAs specifically declare that they do not implicate or infringe on the “right to abortion.” For example, the Illinois BAIPA contains two “neutrality clauses”—one of which is identical to that in the federal BAIPA, and a second one which reinforces the point that *Roe v. Wade* and the right to an abortion are not implicated or altered by BAIPA. This second clause specifically states: “Nothing in this [Act] shall be construed to affect existing federal or State law regarding abortions.”⁶

State BAIPAs are necessary for a several reasons. First, as a federal law, the federal BAIPA only applies in limited circumstances. For example, the federal BAIPA would only extend to those hospitals and employees operated by the federal government or which receive federal funding; it would not prohibit private or state-operated clinics and hospitals from denying care or medical attention to born-alive infants. Second, states can enact versions of the BAIPA that are more comprehensive and protective than the federal version. Lastly, state versions of federal laws function as reinforcement mechanisms for their federal counterpart. The federal government has limited resources for law enforcement and prosecution, so state BAIPAs will help ensure the intent and requirements of BAIPAs are enforced and that violators are prosecuted.

To assist states considering protection for born-alive infants, AUL has drafted “The Born-Alive Infant Protection Act.”

⁵ Congressional Record, S7062-S7064, June 28, 2001.

⁶ 5 ILCS 70 § 1.36 (d).

For more information and drafting assistance, please contact AUL's Legislative Coordinator at (202) 741-4907 or Legislation@AUL.org.

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BORN-ALIVE INFANT PROTECTION ACT

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

Section 1. Title.

This Act may be known and cited as the “Born-Alive Infant Protection Act”.

Section 2. Legislative Findings and Purpose.

- (a) The [*Legislature*] of the State of [*Insert name of State*] finds that:
- (1) The State of [*Insert name of State*] has a paramount interest in protecting all human life.
 - (2) If an [*attempted*] abortion results in the live birth of an infant, the infant is a legal person for all purposes under the laws of this State.
 - (3) A woman's right to terminate a pregnancy ends when the pregnancy is terminated [*, for example by the onset of the birth process or by an induced abortion*]. The right to an abortion has never been legally or morally equated to the “right to a dead child.”
 - (4) It is not an infringement on a woman's right to terminate her pregnancy for this State to assert its interest in protecting an infant whose live birth occurred as the result of an [*attempted*] abortion.
 - (5) Without proper legal protection, newly born infants who survive [*attempted*] abortions have been denied proper life-saving or life-sustaining medical treatment and left to die.
- (b) Accordingly, it is the purpose of this Act to ensure the protection and promotion of the health and well-being of all infants born alive in this State. Therefore, this Act mandates that healthcare providers give medically appropriate and reasonable life-saving and life-sustaining medical care and treatment to all born-alive infants.

Section 3. Definitions.

For the purposes of 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**" or "**live birth**" means the complete expulsion or extraction of an infant from his or her mother, regardless of the state of gestational development, 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) "**Consent**" means the voluntary agreement or acquiescence by a person of age and with the requisite mental capacity who is not under duress or coercion and who has knowledge or understanding of the act or action to which he or she has agreed or acquiesced.

(d) "**Facility**" or "**medical facility**" means any public or private hospital, clinic, center, medical school, medical training institution, healthcare facility, physician's office, infirmary,

dispensary, ambulatory surgical treatment center, or other institution or location wherein medical care is provided to any person.

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

(f) “**Premature**” or “**preterm**” means occurring prior to the thirty-seventh (37th) week of gestation.

Section 4. Requirements and Responsibilities.

(a) A person shall not deny or deprive an infant of nourishment with the intent to cause or allow the death of the infant for any reason, including but not limited to:

- (1) The infant was born with a handicap;
- (2) The infant is not wanted by the parent(s) or guardian(s); or
- (3) The infant is born alive by natural or artificial means.

(b) A person shall not deprive an infant of medically appropriate and reasonable medical care and treatment or surgical care.

(c) The requirements of this Section shall not be construed to prevent an infant's parent(s) or guardian(s) from refusing to give consent to medical treatment or surgical care which is not medically necessary or reasonable, including care or treatment which either:

- (1) Is not necessary to save the life of the infant;
- (2) Has a potential risk to the infant's life or health that outweighs the potential benefit to the infant of the treatment or care; or
- (3) Is treatment that will do no more than temporarily prolong the act of dying when death is imminent.

(d) The physician performing an abortion must take all medically appropriate and reasonable steps to preserve the life and health of a born-alive infant. If an abortion performed in a hospital

results in a live birth, the physician attending the abortion shall provide immediate medical care to the infant, inform the mother of the live birth, and request transfer of the infant to a resident or on-duty or emergency care physician who shall provide medically appropriate and reasonable medical care and treatment to the infant. If an abortion performed in a facility other than a hospital results in a live birth, a physician attending the abortion shall provide immediate medical care to the infant and call 9-1-1 for an emergency transfer of the infant to a hospital that shall provide medically appropriate and reasonable care and treatment to the infant.

(e) If the physician described in subsection (d) of this Section is unable to perform the duties in that paragraph because he is assisting the woman on whom the abortion was performed, then an attending physician's assistant, nurse, or other licensed healthcare provider must assume the duties outlined in subsection (d) of this Section.

(f) Any born-alive infant including one born in the course of an abortion procedure shall be treated as a legal person under the laws of this State, with the same rights to medically appropriate care and treatment, and birth and death (if death occurs) certificates shall be issued accordingly.

(g) If, before the abortion, the mother[, *and if married, her husband,*] has [*or have*] stated in writing that she does [*or they do*] not wish to keep the infant in the event that the abortion results in a live birth, and this writing is not retracted before the [*attempted*] abortion, the infant, if born alive, shall immediately upon birth become a ward of [*Insert name of appropriate state child welfare department or agency*].

(h) No person may use any premature, born-alive infant for any type of scientific research or other kind of experimentation except as necessary to protect or preserve the life and health of the premature, born-alive infant.

[Optional: Section 5. Infanticide. [Consider if the State's criminal code does not include the crime of infanticide or if the State does not wish to add another definition to the existing crime of infanticide.]

(a) ***"Infanticide"*** means any deliberate act that:

(1) *Is intended to kill an infant who has been born alive; and*

(2) *That does kill such infant.*

(b) *Any physician, nurse, or other licensed healthcare provider who deliberately fails to provide medically appropriate and reasonable care and treatment to a born-alive infant, and as a result of that failure, the infant dies, shall be guilty of the crime of infanticide.]*

Section [6]. Exceptions.

The mother will not be liable, criminally or civilly, for actions of a physician, nurse, or other licensed healthcare provider, in violation of this Act to which she did not give her consent.

Section [7]. Criminal Penalties.

(a) Any physician, nurse, or other licensed healthcare provider who knowingly and intentionally or negligently fails to provide medically appropriate and reasonable care and treatment to a born-alive infant in the course of an [*attempted*] abortion shall be guilty of a [*Insert appropriate classification*] felony and upon conviction shall be fined an amount not exceeding [*Insert appropriate amount*], or imprisoned not less than [*Insert appropriate term*] years and not exceeding [*Insert appropriate term*] years, or both.

[Optional (if Act includes Section on “Infanticide”): (b) *Any person found guilty of the crime of infanticide shall be fined an amount not exceeding [*Insert appropriate amount*], or imprisoned not less than [*Insert appropriate term*] years and not exceeding [*Insert appropriate term*] years, or both [or will be punished according to the sentencing guidelines found in the Criminal Code of [*Insert name of State*]].]*

[(c) Any violation of Section 4, subsection (h) of this Act [*concerning the research use of a born- alive infant*] is a [*Insert appropriate classification*] felony and upon conviction shall be fined an amount not exceeding [*Insert appropriate amount*], or imprisoned not less than [*Insert appropriate term*] years and not exceeding [*Insert appropriate term*] years, or both.

Section [8]. Civil and Administrative Action.

In addition to whatever remedies are available under the common or statutory law of this State, failure to comply with the requirements of this Act shall:

(a) Provide a basis for a civil action for compensatory and punitive damages. Any conviction under this Act shall be admissible in a civil suit as *prima facie* evidence of a failure to provide medically appropriate and reasonable care and treatment to a born-alive infant. Any civil action may be based on a claim that the death of or injury to the born-alive infant was a result of simple

negligence, gross negligence, wantonness, willfulness, intentional conduct, or another violation of the legal standard of care.

(b) Provide a basis for professional disciplinary action under [*Insert appropriate reference(s) to state statute(s) and/or administrative rule(s) concerning the state Medical Board's oversight and review authority*] for the suspension or revocation of any license for physicians, licensed and registered nurses, or other licensed or regulated persons. Any conviction of any person for any failure to comply with the requirements of this Act shall result in the automatic suspension of his or her license for a period of at least one (1) year [*or other appropriate penalty*] and said license shall be reinstated after that time only under such conditions as the [*Insert reference(s) to appropriate regulatory or licensing body*] shall require to ensure compliance with this Act.

(c) Provide a basis for recovery for the parent(s) of the infant or the parent(s) or guardian(s) of the mother if the mother is a minor, for the wrongful death of the infant under [*Insert reference(s) to state's wrongful death statute(s)*], whether or not the infant was viable at the time the [*attempted*] abortion was performed.

Section [9]. Construction.

(a) Nothing in this Act shall be construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species *homo sapiens* at any point prior to being born alive, as defined in this Act.

(b) Nothing in this Act shall be construed to affect existing federal or state law regarding abortion.

(c) Nothing in this Act shall be construed as creating or recognizing a right to abortion.

(d) Nothing in this Act shall be construed to alter generally accepted medical standards.

Section [10]. 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 to 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 here from and shall not affect the remainder hereof or the application of such provision to other persons not similarly situated or to other dissimilar circumstances.

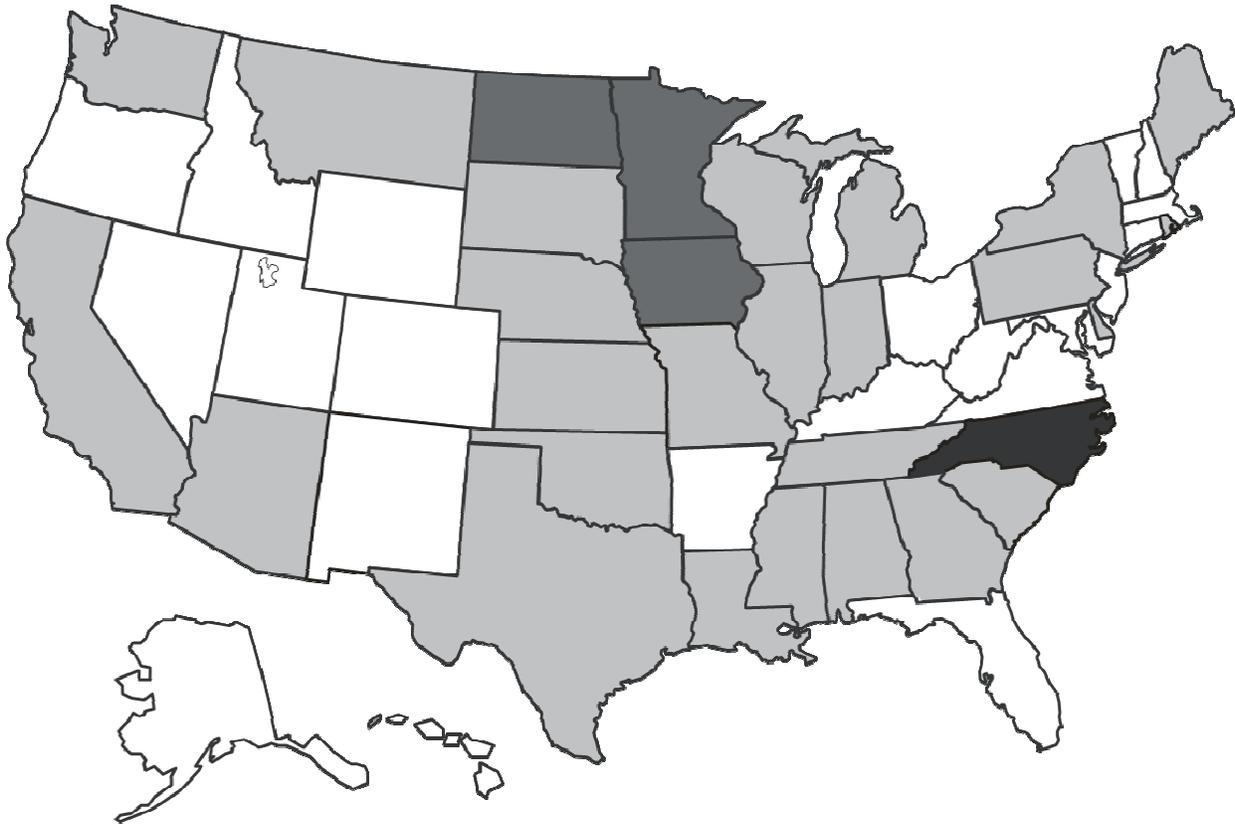
Section [11]. Right of Intervention.

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 in any case in which the constitutionality of this law is challenged.

Section [12]. Effective Date.

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

STATE OF THE STATES: WHERE ARE WE NOW? BORN-ALIVE INFANT PROTECTION (BAIPA)



 Twenty-five states have laws creating a specific affirmative duty for physicians to provide medical care and treatment to born-alive infants at any stage of development: AL, AZ, CA, DE, GA, IL, IN, KS, LA, ME, MI, MS, MO, MT, NE, NY, OK, PA, RI, SC, SD, TN, TX, WA, and WI.

 Three states have laws creating a specific affirmative duty for physicians to provide medical care and treatment to born-alive infants only after viability: IA, MN, and ND.

 One state protects born-alive infants at any stage of development from “deliberate acts” undertaken by a physician that result in the death of the infant: VA.

More detailed information about the need and justification for laws protecting infants who survive an abortion can be found in AUL's annual publication *Defending Life 2012: Building a Culture of Life, Deconstructing the Abortion Industry*.

Defending Life 2012 is available online at AUL.org.

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

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