

**House Committee on Judiciary and Civil Justice
Testimony of Joe Pojman, Ph.D.
Executive Director, Texas Alliance for Life**

**in Support of House Bill 4199
April 8, 2019**

My name is Joe Pojman. I am the executive director of Texas Alliance for Life.

On behalf of Texas Alliance for Life, I am here to testify in support of the Committee Substitute for House Bill 4199. This bill reverses an injustice and a bad public policy created in 1975 by the Texas Supreme Court when it recognized a wrongful birth cause of action for civil lawsuits.

A wrongful birth lawsuit occurs when the parents of a child born with a disability, for example Down syndrome, sues the doctor who provided prenatal care because they feel they were not provided sufficient notice of the disability in time to abort the child.

Public Policy

Wrongful birth lawsuits have three very troublesome aspects.

1. **First, these lawsuits send exactly the wrong message – that society believes a child with a disability would have been better off had he or she been aborted.** Texas courts should not be allowed to devalue the life of any child in this manner. This is contrary to the Public Policy of the State of Texas, which favors childbirth over abortion.

There are many examples of this policy in law, but two of the most prominent are the Prenatal Protection Act and the Alternatives to Abortion program.

- In 2003 the Legislature passed the Prenatal Protection Act (SB 319, 78R) to expand the definition of an individual person in the Penal Code to protect the unborn child against violent crimes of homicide and assault. Texas law now protects the unborn child, cradled in his mother's womb, against someone who would abort that child against the mother's wishes. An unborn child receives the same legal protections as a newborn child cradled in his mother's arms against someone who would end that child's life. There are men serving life sentences for killing unborn children against the mother's wishes.
 - In 2005, the Legislature created and funded the Alternatives to Abortion program to promote childbirth as a compassionate alternative to abortion.
2. **Wrongful birth lawsuits promote abortion, rather than discourage abortion.** Wrongful birth liability encourages physicians to over-cautiously seek out all potential disabilities and then to promote abortion to avoid liability. If the baby is aborted, there can be no wrongful birth lawsuit. Thus, this cause of action encourages abortion rather than discourages abortion.
 3. **Wrongful birth lawsuits make physicians liable for a disability they did nothing to cause.** In our view, that is a grave injustice. The cause of action lies on the premise that the parents' "injury" was giving birth to a child, which physicians should be encouraged to do. A genetic disability is not equivalent to a medical injury. If a physician did nothing to cause the disability, he or she should not

be held liable for the costs of raising the disabled child indefinitely.

Occurrence in Texas

We do not know how often these cases occur in Texas. We know of no reported cases since *Jacobs v. Theimer*. However, there is a law firm in Houston that specializes in wrongful birth lawsuits, per its website.

Other States

Approximately 22 states do not recognize or have banned the “wrongful birth” cause of action:

- Twelve states ban wrongful birth lawsuits by statute (see attached list).
 - Arizona, Idaho, Indiana, Minnesota, Michigan, Missouri, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, and Utah
- Three states ban wrongful birth lawsuits by court action.
 - Georgia, Kentucky, and North Carolina
- Seven states are silent.

In each of the three times the statute eliminating the cause of action was challenged, it was upheld:

- Minnesota (*Hickman v. Group Health Plan, Inc.*, 1986),
- Pennsylvania (*Edmonds v. Western Pennsylvania Hospital Radiology Associates of Western Pennsylvania*, 1992), and
- Utah (*Wood v. University of Utah Medical Center*, 2002).

Some of the wrongful birth awards we are aware of include:

- In Washington State, \$50 million was awarded over a child born with “unbalanced chromosome translocation” in 2013.
- In Oregon, \$3 million awarded to the parents of a child with Down Syndrome even though the prenatal test found she did not have the chromosomal abnormality in 2012. The parents’ attorney said his clients “deeply love their daughter,” but they would have aborted her had they know she would be born with Down syndrome.
- In Florida, \$4.5 million was awarded to the parents of a child born with no arms and one leg in 2011.

Full Disclosure

HB 4199 explicitly says the law “may not be construed to eliminate any duty of a physician or other health care practitioner under any other applicable law.”

That means doctors treating pregnant women continue to be required to give available information to their patients. Current law, as enforced by the Texas Medical Board, requires physicians to tell their patients about the availability of prenatal diagnostic tests and, if given, the results of those tests. Failure to do so risks disciplinary action including possible fines, suspension, and loss of license.

Summary

We believe Texas should end what it started in 1975 by and join the 22 other states that do not recognize the wrongful birth cause of action, and we ask you to support House Bill 4199.