File

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The Honorable Norma Dobler
Idaho State Senator
Statehouse

THIS IS NOT AN OFFICIAL ATTORNEY GENERAL OPINION, AND IS SUBMITTED SOLELY TO PROVIDE LEGAL GUIDANCE

Re: House Bill 120

Dear Senator Dobler:

You have asked the Attorney General for an opinion regarding House Bill 120. That bill is apparently intended to overturn the recent Idaho Supreme Court decision in Blake v. Cruz, in which the court recognized a cause of action for "wrongful birth."

Three states have adopted similar statutes. In 1981, South Dakota adopted a statute barring causes of action based on "wrongful life," i.e., a claim by the child that, but for the negligence of another, he "would not have been permitted to have been born alive." The South Dakota statute likewise barred so-called "wrongful birth" causes of action, i.e., claims brought by another (usually the parent of a handicapped child) alleging that, but for the negligence of another, the child would not have been born alive.

The Minnesota legislature enacted similar measures in 1982. Like South Dakota, its law forbids both "wrongful life" and "wrongful birth" claims. (In Idaho, there has been no impetus to bar "wrongful life" claims because the Idaho Supreme Court itself rejected this cause of action in its opinion in Blake v Cruz.)

Finally, in 1983, the Utah legislature enacted a "right to life" bill as chapter 167 of its session laws. The law states that:

> A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted.

It is this language that has been incorporated into House Bill 120.

In denying a cause of action for "wrongful life" or "wrongful birth," state legislatures rely on broad power to define or otherwise limit tort liability. For example, in Idaho, the legislature has structured the state's entire tort liability system around the concept of comparative negligence. Idaho Code § 6-801, et seq. Further, the Idaho legislature has frequently seen fit to limit various causes of action. See Idaho Code § 25-2119 (owners of animals on "open range" not liable for accidents occurring on highways between animals and motor vehicles); Idaho Code § 49-763 (failure to use child safety seats not admissible as evidence of contributory negligence); Idaho Code § 49-1401 (guest statute governing liability between car owners and their passengers). In addition, the legislature has taken the entire matter of industrial accidents out of the court system by its workers' compensation statute. Idaho Code §§ 72-201, et seq. Thus, there is ample precedent for legislative involvement in this arena.

Our research on the question of "wrongful birth" statutes reveals that, to date, no state or federal court has ruled on any of the statutes enacted by South Dakota, Minnesota or Utah. No challenges have reached an appellate court. A single suit, in Minnesota, was settled and dismissed. The offices of the Attorneys General in the three states inform us that there are no known challenges pending at any level of their state court systems.

Regarding your precise concern as to whether the language in House Bill 120 may be overly "broad" or unconstitutionally "vague," our research has uncovered only one article on point. This article is contained in the annual "Utah Legislative Survey," in the Winter, 1984,, issue of the Utah Law Review. It is pertinent because, as mentioned earlier, House Bill 120 is taken verbatim from the Utah statute. The author notes that the intent of the Utah legislature in passing its "wrongful life" and "wrongful birth" statutes was "to prevent abortions by curbing the perceived trend towards genetic counseling performed routinely." The link was seen as follows:

> Routinely performed genetic testing supposedly encourages abortions by informing parents of their unborn child's defects. Thus, to discourage such testing, the legislature passed legislation that purportedly removes malpractice liability due to a physician's failure to perform genetic tests routinely.

1984 Utah Law Review at 224.

The goal is probably the same in Idaho. The fact situation which gave rise to a "wrongful birth" claim in Blake v. Cruz was the failure of the physician to test for rubella at the time the mother's symptoms were present.

The author of the Utah law review article notes that the language adopted by the Utah legislature (and proposed in House Bill 120) may not perfectly carry out the sponsors' desired intent because it hinges on the question of whether the child "would have been aborted." But:

> a woman has a right to make a fully informed procreative choice, and courts have held that when negligent counseling interferes with that right a woman is entitled to damages, irrespective of whether she would have had an abortion.

Id. See Berman v. Allan, 404 A.2d 8 (1979). (Emphasis added.)

Indeed, a cause of action for "wrongful birth" due to negligent counseling was held to exist even in a situation where abortion itself was not available as a legal option. See Jacobs v. Theimer, 519 S.W.2d 846, 848 (Tex. 1975).

Thus, in response to your inquiry regarding the possible over-breadth of House Bill 120, it appears that certain fact patterns might elude the intended prohibitions. For the most part, however, the bill is drafted in a way that would succeed in overturning the Idaho Supreme Court decision in Blake v. Cruz. Nor do we discern any problems in the bill on the score of "vagueness."

Conclusion.

House Bill 120 bars a cause of action for "wrongful birth." It thereby seeks to overturn the Idaho Supreme Court decision in Blake v. Cruz. In general, the bill succeeds in this endeavor, though there may be fact patterns that slip through the cracks because of the bill's exclusive emphasis on the "abortion" context. The language of the bill, in our opinion, could not be challenged on the ground that its language was unconstitutionally "broad" or void for vagueness.

None of the three parallel laws enacted by other states have been challenged at the appellate court level as to their constitutionality, nor are any such challenges now pending.

Sincerely,

JIM JONES
ATTORNEY GENERAL

JTJ/JJM/lh