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# **Fertility Torts: Emerging Theories of Recovery for Wrongful Birth, Wrongful Pregnancy, Negligent Genetic Counseling, and Fertility Treatment Fraud**

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# Fertility Torts: Wrongful Birth, Wrongful Life, and Negligent Genetic Counseling

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# Wrongful Life

- Generally a “wrongful life” claim is the claim of the child born with whatever disease the parents sought to prevent.
- “Wrongful life” is not a widely recognized legal claim in many states.
- For policy reasons, most courts (and perhaps legislatures) do not recognize a child’s right to sue for having been born.

# Wrongful Birth

- This a claim brought by parents.
- Generally, it is a direct action, filed in the parents' names against their medical providers for negligent counseling prior to the baby's birth.
- Wrongful birth is far more widely recognized than wrongful life, but barred by statute in some, typically conservative, states.
- Some states that recognize wrongful birth claims do so only if the child is born with significant health problems.

# Wrongful Birth

- Damages:
  - Typically, the *extraordinary* costs (not simply the costs of raising a healthy child) of medical care for the child through the age of 18.
  - In some states, emotional distress damages for the Plaintiff parents. *See Clark v. Children's Memorial, 2011 IL 108656.*
- At least 29 states recognize wrongful birth

# Wrongful Birth

- **States recognizing wrongful birth:**

Alabama, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Nevada, New Hampshire, new Jersey, New York, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin

# Wrongful Birth

- Scenarios in which negligence occurs:
  - Pre-conception genetic counseling
  - Pre-implantation genetic diagnosis (PGD)
  - Post-conception genetic testing (i.e. amniocentesis) and counseling
  - Post-conception ultrasounds and the counseling that follows

# Wrongful Birth

- Pre-conception genetic counseling
  - Typical scenario: Parents have a child with a devastating genetic disorder and they want to determine their risk for having future children with the disorder.
  - Some disorders could be caused by a random genetic mutation, in which case the parents generally would have a risk identical to that of the general population.
  - Other genetic mutations (and by extension, diseases) are hereditary and the parents may have a 25% chance or higher chance of having a second child with the disease.

# Wrongful Birth

- Pre-conception genetic counseling
  - **Keys:** What was communicated to Plaintiffs and when?
  - Was the information accurate and did Plaintiffs understand it?
  - Would **different information** have led to a **different choices**.
  - Typically the parents need to be able to testify that they either: a) would chosen not to have more children; OR b) would have had the pregnancy closely monitored (with the available information) and terminated the pregnancy if the fetus was afflicted with the genetic disease.

# Wrongful Birth

- Pre-implantation genetic diagnosis (PGD)
  - PGD is typically done when parents *know* they are carriers of a particular disease but want to have children anyway.
  - The parents go through essentially IVF treatments where eggs are fertilized and allowed to develop until they have 7-8 cells
  - A single cell is then extracted from the embryo and tested for the genetic mutation or anomaly. Eventually, the parents are advised of which embryos are “affected” by the disease. The doctor managing the IVF then typically implants one or more of the **unaffected** embryos.

# Wrongful Birth

- Pre-implantation genetic diagnosis (PGD)
  - **Keys:** What did / could have the PGD analysis show with respect to each embryo?
  - How was that communicated to the Plaintiffs or their IVF providers?
  - Was the correct embryo transferred?
  - Was informed consent given?
  - Claims: 1) Against PGD lab for negligent testing and/or counseling; 2) potentially against IVF provider if they transplanted the wrong embryo; 3) potentially against IVF physician if they failed to identify the genetic anomaly prenatally (through ultrasound or amniocentesis, for example).
  - Usually if the claim pends solely against the lab, testimony about terminating a pregnancy is not required – the claim is essentially that a different embryo should have been recommended and subsequently transferred .

# Wrongful Birth

- Post-conception genetic counseling
  - Typically, obstetricians will counsel expectant mothers about the availability of prenatal genetic counseling, which includes amniocentesis, chorionic villus sampling (CVS), and/or biochemical marker screening.
  - Amniocentesis and CVS both pose some risk to the mother and fetus; biochemical marker screening does not.
  - Biochemical marker screenings can be the first step in determining whether further testing should be done.

# Wrongful Birth

- Post-conception genetic counseling
  - Keys: Is there something in the patient's family history or age that warranted counseling the patient to receive specific genetic testing?
  - Was the information gleaned from the testing accurately conveyed?
  - Was additional testing (i.e. CVS after a positive biochemical screening) offered? Should it have been?
  - A mother will need to testify that she would have terminated the pregnancy, had she known of the genetic condition.
  - In some states, the genetic condition must be known prior to 24 weeks due to restrictions on abortions (perhaps even sooner now, given the statutes recently passed in some states)

# Wrongful Birth

- Post-conception ultrasounds and counseling
  - Virtually all pregnant women undergo ultrasounds at various points in their pregnancy.
  - This is often the first step in determining whether there may be something wrong with the developing fetus (genetic, or otherwise)
  - A failure to identify an anomaly may give rise to a wrongful birth claim against a sonographer, a radiologist, or an obstetrician.

# Wrongful Birth

- **Post-conception ultrasounds and counseling**
  - Keys: Should an anatomical anomaly have been detected on ultrasound?
  - If an anatomical anomaly was detected on ultrasound, was this accurately conveyed to the patient?
  - Was the patient properly advised of further screening options?
  - Would more or accurate information have changed to parents' decision to carry the pregnancy to term?
  - A mother will need to testify that she would have terminated the pregnancy, had she known of the anomaly.
  - In some states, anomalies shown on later ultrasounds will not give rise to a claim due to restrictions on abortions.

# Wrongful Birth

## Potential Defendants:

- Clinical geneticists (typically MDs)
- Genetic counselors (non-MDs)
- Labs running genetic tests
- Lab employees that design the studies
- Obstetricians
- Reproductive endocrinologists (in IVF cases)
- Radiologists or sonographers
- Hospitals and clinics

# Wrongful Birth

## Case selection considerations:

1. How severe is the child's disease? How significant are the past and future medical bills?
2. Will you have to plead and prove that the mother would have terminated the pregnancy? If so, how will this play to a jury in your jurisdiction?
3. What damages are available to your Plaintiffs in your state?
4. Who are your Defendants and how many experts will you need?
5. What is the child's life like? Generally, the more rewarding and fulfilling (and healthy) the life of the child, the harder the wrongful birth claim.

# Thank You

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