

VALLEYWIDE

# Doctor's Discretion

Enacted with little fanfare, Arizona's wrongful birth/wrongful life law protects pro-life physicians from disability-related lawsuits.

**H**ALFWAY INTO HER pregnancy, Wendy Wright did not expect the late night phone call from her doctor. Blood results revealed she carried the gene for cystic fibrosis, a life-threatening genetic disorder. "It came as a complete shock for us," Wright, a Gilbert resident, says.

Although Wright's husband tested negative for the cystic fibrosis gene, improving the chances for a healthy child, a residual risk remained. The doctor asked if she wanted to continue the pregnancy. "To me, there was no option," Wright says. She would have the baby.

This kind of intimate exchange between an expectant mother and her doctor, along with its unintended consequences of abortion, entered into the Arizona Legislature's purview when it passed SB 1359 – the so-called wrongful birth/wrongful life bill.

The law prevents parents who give birth to a disabled child from suing doctors who did not reveal a health defect that may have led to abortion (wrongful birth), and makes doctors immune from similar lawsuits by the child (wrongful life). Governor Jan Brewer signed the bill into law in April 2012 alongside another pro-life measure, HB 2036, which garnered national attention for calculating the gestational age of a fetus to potentially start two weeks before conception.

Though partially overshadowed by HB 2036, the wrongful birth/wrongful life law – which reduces medical malpractice claims and affirms the existing worth of disabled children, according to supporters – is ripe for controversy due to a new prenatal blood screening that will make precise information regarding select birth defects more common. At least 10 other states have wrongful birth/wrongful life laws. Conservative think tank Center for Arizona Policy (CAP) estimates courts have seen a few thousand cases since 1973. In 2011, a Florida couple won \$4.5 million after giving birth to a child with one leg, no arms, and no warning from doctors.

The new statute leaves room for interpretation. It shields Arizona doctors from lawsuits relating to "an act or omission" during prenatal care, but stops short of protecting an "intentional or grossly negligent act or omission." Arizona State University law professor Gary Marchant says courts will ultimately determine the boundary marking gross negligence. For example, a doctor who knowingly neglects to inform an expectant mother about her fetus' risk factors could face liability. However, a doctor who simply limits the scope of test results or avoids conducting a test may not.

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– WENDY WRIGHT

Prenatal blood tests measure risk. A high-risk child might have a one-in-100 chance of having Down syndrome, for example. (By comparison, the average 25-year-old woman has a one-in-1,300 chance of delivering a Down syndrome baby, according to the American Academy of Family Physicians.) An abortion-averse physician could hypothetically avoid alerting the mother to the risk because the child has a 99 percent chance of health, says Valley obstetrician Dr. Larissa Romero, adding that doctors' ethics prevent them from ever with-

holding information.

The new cell-free fetal DNA (cffDNA) test, which Romero began using about a year ago, offers 98 percent accuracy in uncovering genetic defects such as Down syndrome, without the risk of miscarriages associated with invasive diagnostic tests. The technology will increase the frequency of screening, along with doctors' responsibilities to inform patients, creating room for disputes, Marchant says.

Romero says the law offers potential for abuse but could protect doctors from cases of accidental oversight. CAP, in a supportive brief, states that banning wrongful birth/wrongful life suits prevents parents from blaming doctors for their children's disabilities and "promotes the legislative policy of favoring childbirth over abortion."

In Wright's case, her son did not have cystic fibrosis. "I'm just grateful the obstetrician gave us the choice of knowing what we were possibly going to face," Wright says. "I couldn't imagine not knowing."



## Lowest Rates

Wyoming	0.9
Mississippi	4.6
Kentucky	5.1
South Dakota	5.6
Idaho	6.0

## Highest Rates

Delaware	40.0
New York	37.6
New Jersey	31.3
Maryland	29.0
California	27.6

Arizona's abortion rate of 15.2 per 1,000 women (2008) is below the national rate of 19.6, according to the U.S. Census Bureau. Figures represent legal abortions for females ages 15 to 44.

## Uncertain Terms