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Amy Saltzman
Legislative Aide
Senator Lesil McGuire
Senate District K (House Districts 21 & 22)
Alaska State Capitol, Room 103
Juneau, Alaska 99801

Dear Amy:

First, I want to again express my appreciation to Senator McGuire and Representative LeDoux for their efforts with regards to "Jackson's Law." As we have discussed, the Alaska Supreme Court has not yet ruled as to whether or not a cause of action may be brought on behalf of an unborn child. In my opinion, it is highly likely that the Alaska Supreme Court would allow a cause of action on behalf of an unborn, viable child. While I am not as certain that the Alaska Supreme Court would allow a cause of action on behalf of a non-viable, unborn child, I do believe that it is more likely than not that such a claim would be allowed. H.B. 258, "Jackson's Law," would remove any doubt and would clearly establish such a right both on behalf of viable and non-viable, unborn children. My concern, however, is that the language in the bill, especially the preamble to the bill, would very likely prevent such claims that arose before the bill was signed into law, including claims brought on behalf of Jackson, by his parents. I fear that an argument will be made that, if such a right already exists, there would be no need to enact AS 09.15.080. I am particularly concerned that such will be the case because the preamble to the Act currently reads "An Act *establishing* a right of action...."

Background Re: Claims for Wrongful Death of an Unborn Child

Several years ago I extensively researched this issue in a case I had that involved a wrongful death of a mother and her unborn child. I sent an e-mail to the Alaska Academy of Trial Lawyers Networking List concerning this issue in 2008. The following is a summary of my research:

Allowing claims for torts committed against unborn children is evolving, following the path of wrongful death statutes we all take for granted. Currently, all 50 states allow for wrongful death causes of action. That was not always the case. Common law did not permit such claims; when a victim died, so did the cause of action. Lord Campbells Act, passed by England's Parliament in 1846, was the first statute allowing a wrongful death claim. That Act recognized and righted the truism that it was "cheaper to kill than to scratch."

Until 1946, actions to recover for an injury to an unborn child who was subsequently born alive, were not allowed by most states. This determination was largely based on a decision by then Massachusetts Supreme Court Justice Oliver Wendell Holmes whose "single entity view" was that unborn children were part of, and indistinct from, their mother. Under this rule, if a fetus was injured during pregnancy, and later born with a defect or disability as a result of that injury, the child would have no cause of action because, when the injury occurred, the child had no distinct existence apart from his or her mother.

In *Bonbrest v. Kotz*, 65 F.Supp 138 (D.D.C. 1946), the court held that the "single entity view" was based on illogical and outdated precedent. The *Bonbrest* court recognized an inherent unfairness in not compensating a child for an infirmity that occurred during pregnancy. The court held that an infant who survived outside the womb after sustaining injuries caused by a third party, ought to have his day in court. That decision gave rise to the "born alive rule." The reasoning in that decision spread and, eventually, every state allowed claims on behalf of children who were "born alive" for injuries that occurred during pregnancy.

The "born alive rule "has been subject to criticism for being too narrow. Under that rule, for example, a child's estate is able to recover for the child's wrongful death if the child took one breath and then died as a result of injuries that occurred during pregnancy, but if the childbirth process had lasted a little longer so that the child was

stillborn, the estate would not have a cause of action. In 1939 Minnesota became the first state to recognize a cause of action for the wrongful death of a viable unborn child. As of my research in 2008, 37 states specifically allowed wrongful death claims for viable, unborn children. Some states, including Alaska, had not addressed that issue. Of those 37 states, again as of the time I researched that issue, 21 had addressed that issue of non-viable, unborn children. Six of those states allowed such claims. Many of the states that did not allow such claims based their decisions on the inconsistency of allowing such claims with *Roe v. Wade*, (which allowed a woman to abort non-viable fetuses (which it defined as fetuses who had not reached the third trimester).

In *Wiersma v. Maple Leaf Farms*, 543 N.W. 2d 786 (S.D. 1996), the South Dakota Supreme Court noted that "a woman has a privacy right in determining her pregnancy; however, defendants [have] no such interest." The court went on to hold that "viability as a developmental turning point was embraced in abortion cases to balance the privacy rights of a mother against her unborn child. For any other purpose, viability is purely an arbitrary milestone from which to reckon a child's legal existence. Liability of course does not affect the question of the legal assistance of the unborn, and therefore the defendant's duty, and it is a most unsatisfactory criterian, since it is a relative matter, depending on the health of the mother and the child and many other matters in addition to the state of development." In *Farley v. Sartin*, 466 S.E.2d 522 (W.Va. 1995), the West Virginia Supreme Court found that using a viability standard would lead to injustice and would promote inequitable results. The irony of the viability standard was not lost on the *Farley* court. Just as it was "cheaper to kill than to scratch" persons before wrongful death statutes were passed, it is "cheaper to kill than [injure]" non-viable fetuses in states that utilize the viability test."

The Alaska Supreme Court has not addressed this issue. In *Mace v. Jung*, 210 F.Supp 706 (U.S. District Court Alaska 1962), the court did not allow a claim for a four and one-half month fetus because the fetus was "not viable and capable of separate existence." The dicta in that decision suggests that a claim would have been allowed if the unborn child was viable. There is no question that Jackson was viable as his mother had gone full term in her pregnancy. The same is true of several other unborn children whose parents are supporting this bill. I believe the Alaska Supreme Court would certainly allow claims to be brought on behalf of viable unborn children and believe there is a substantial likelihood that they would follow the "enlightened" views of South Dakota and West Virginia, and allow claims on behalf of all unborn children, whether viable or not. Such a result would be consistent with A.S. 11.41.150 – 170, which make it a crime to "murder" or "assault" an "unborn child." A.S. 11.41 deals with crimes against the person, not crimes against property. These statutes specifically recognize that an "unborn child" is a person, even if the unborn child is not "viable."

Consequently, I am very concerned that H.B. 258 will be used as a shield against claims that arose before the bill is passed, which I realize is not Senator McGuire's and Representative LeDoux's intent. Unless the bill is amended to avoid that result, I think it would be better to pull the bill and let the Alaska Supreme Court weigh in on this issue.

Recommendations Re HB No. 258

1. I recommend that the preamble to be amended to read "an Act *confirming the* right of action...;"

or to

"an Act *clarifying the* right of action..."

Either of the above changes will allow the argument that such a right currently exists. The current language that reads "an act *establishing* a right of action..." suggests that such a right does not currently exist.

2. Amend subsection (a) as follows: (a) A parent of an unborn child may maintain an action as plaintiff for the death of *that* child that was caused...."

This is a small change but it implies that an "unborn child" is a "child."

Alternatively, I suggest you change subsection (a) as follows:

"(a) A parent's *rights under Sec. 09.15.010 include the right to* maintain an action as plaintiff..."

This suggestion may be splitting hairs but my intent is to strengthen the argument that such a right already exists or at least that the legislature is not maintaining that such a right does not currently exist, by enactment of this statute.

3. I like your idea to add a new subsection (c). I would recommend that the language in that subsection be modified as follows:

"(c) This section does not limit any parent to maintain an action for the death of an unborn child."

I apologize for the delay in getting this letter to you. Please do not hesitate to contact me if you have any further questions. Your efforts are greatly appreciated.

Very truly yours,

William H. Ingaldson

WHI:cg