

SB

2000

<TARGET><BILL>SB 200</BILL><SUBJECT>SB
200</SUBJECT><COMM>HRLS28</COMM></TARGET>

HOUSE CS FOR SENATE BILL NO. 200(RLS)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-EIGHTH LEGISLATURE - SECOND SESSION

BY THE HOUSE RULES COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS MCGUIRE, Coghill, Bishop, Giessel, Meyer, Stedman, Dyson, Kelly, Micciche,
Dunleavy

REPRESENTATIVES Lynn, Stoltze

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to an action for the death of an unborn child in certain circumstances."

2 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

3 * Section 1. The uncodified law of the State of Alaska is amended by adding a new section
4 to read:

5 SHORT TITLE. This Act may be known as Jackson's Law.

6 * Sec. 2. AS 09.15 is amended by adding a new section to read:

7 Sec. 09.15.018. Action for wrongful death of an unborn child;
8 applicability. (a) A parent of an unborn child may maintain an action as plaintiff for
9 the death of an unborn child that was caused by the wrongful act or omission of
10 another.

11 (b) This section does not apply to acts or omissions that

12 (1) cause the death of an unborn child if those acts or omissions are
13 committed during a legal abortion to which the pregnant woman or a person
14 authorized by law to act on her behalf consents or for which consent is implied by law;

15 (2) are committed under usual and customary standards of medical

1 practice during diagnostic testing, during therapeutic treatment, or while assisting a
2 pregnancy; or

3 (3) are committed by a pregnant woman against herself and her unborn
4 child.

5 (c) This section does not limit any other cause of action that a parent may
6 maintain for the death of an unborn child.

7 (d) In this section,

8 (1) "abortion" has the meaning given in AS 18.16.090;

9 (2) "unborn child" has the meaning given in AS 11.81.900.

10 * **Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to
11 read:

12 **TRANSITION.** This Act applies to actions arising from a wrongful act or omission
13 that takes place on or after the effective date of this Act.

Fiscal Note

State of Alaska
2014 Legislative Session

Bill Version: SB 200
Fiscal Note Number: 1
(S) Publish Date: 3/14/14

Identifier: SB200-LAW-CIV-03-07-14
Title: WRONGFUL DEATH OF AN UNBORN CHILD
Sponsor: MCGUIRE
Requester: (S) JUDICIARY

Department: Department of Law
Appropriation: Civil Division
Allocation: Torts & Workers' Compensation
OMB Component Number: 2719

Expenditures/Revenues

Note: Amounts do not include inflation unless otherwise noted below. (Thousands of Dollars)

	FY2015	Included in	Out-Year Cost Estimates				
	Appropriation Requested	Governor's FY2015 Request	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
OPERATING EXPENDITURES	FY 2015	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants & Benefits							
Miscellaneous							
Total Operating	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Fund Source (Operating Only)

None							
Total	0.0	0.0	0.0	0.0	0.0	0.0	0.0

Positions

Full-time							
Part-time							
Temporary							

Change in Revenues							
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Estimated SUPPLEMENTAL (FY2014) cost: 0.0 *(separate supplemental appropriation required)*
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY2015) cost: 0.0 *(separate capital appropriation required)*
(discuss reasons and fund source(s) in analysis section)

ASSOCIATED REGULATIONS

Does the bill direct, or will the bill result in, regulation changes adopted by your agency? No
If yes, by what date are the regulations to be adopted, amended or repealed?

Why this fiscal note differs from previous version:

Initial version, not applicable.

Prepared By: <u>Loretta Withington, Division Operations Manager</u>	Phone: <u>(907)465-5427</u>
Division: <u>Department of Law</u>	Date: <u>03/07/2014 03:15 PM</u>
Approved By: <u>Michael C. Geraghty, Attorney General</u>	Date: <u>03/07/14</u>
Agency: <u>Department of Law</u>	

FISCAL NOTE ANALYSIS #1

STATE OF ALASKA
2014 LEGISLATIVE SESSION

BILL NO. SB 200

Analysis

The bill establishes a new civil right of action for the death of an unborn child in certain circumstances. The bill allows the parent of an unborn child whose death is caused by the wrongful act or omission of another to sue for damages – such as when a pregnant woman’s child is killed as a result of domestic violence or in a drunk driving accident. The bill does not apply to acts or omissions that cause the death of the unborn child due to a lawful abortion or specified medical practice or are caused by the pregnant woman herself, such as in an attempted suicide.

The Department of Law does not foresee a fiscal impact as a result of the bill passage.

Alaska State Legislature Senate Rules Committee

Session:
State Capitol 103
Juneau, AK 99801
Phone: (907) 465-2995
Fax: (907) 465-6592

Rules Committee:
Senator McGuire, Chair
Senator Coghill
Senator Huggins
Senator Meyer
Senator Ellis



Interim:
716 W 4th Avenue, Suite 300
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Committee on Committees
Rules Committee
Resources Committee
Judiciary Committee
TAPS Throughput Decline
World Trade and Tourism

Senator Lesil McGuire, Chair

CS for SB 200

EXPLANATION OF CHANGES (Version U)

1. Page 1, line 1

Amends title to read "An Act relating to an action for the death of an unborn child in certain circumstances."

Deletes: "establishing a right of action"

Inserts: "relating to an action"

Explanation- This title change is to clarify the intent of Senate Bill 200 is not to conflict or affect any past or pending cases that may have been have been brought in civil court on behalf of an unborn child.

2. Page 2, lines 10-13

Adds a new section to the uncodified law of the State of Alaska that this act applies to actions arising from a wrongful act or omission that takes place on or after the effective date of this Act.

Explanation- This additional section reaffirms the legislative intent not to conflict or affect any past or pending cases that may have been have been brought in civil court on behalf of an unborn child.

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World Trade and Tourism

Senator Lesil McGuire, Chairman

Sponsor Statement

Senate Bill 200

There is no loss more devastating than the loss of a child, no matter the child's age. Currently Alaskan families have no civil recourse when suffering the loss of an unborn child through the unlawful or negligent actions of another person. Senate Bill 200, also known as "Jackson's Law" is a long overdue response to the heartbreaking stories of families who have suffered such a loss.

In 2006 a law was passed to change the criminal liability for the death of an unborn child. That law established that the unborn can be victims of murder, manslaughter and criminally negligent homicide in a criminal court. Jackson's Law would mirror that law, allowing Alaskan families and parents the same civil recognition of their loss.

Alaska is one of only ten states that do not allow the parents of an unborn victim to seek accountability or damages from a guilty party. Although no compensation could ever account for the loss of parents and families, this bill will provide families with recognition and a course for healing.

INGALDSON FITZGERALD, P.C.

Lawyers

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William H. Ingaldson
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April 11, 2014

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..."

Amy Saltzman
Legislative Aide
April 11, 2014
Page 2

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 Campbell's 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 criterion, 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.

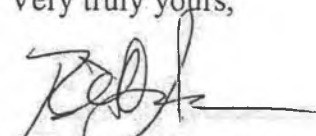
3. I like your idea to add a new subsection (c). I would recommend that the language in that subsection be modified as follows:

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

Amy Saltzman
Legislative Aide
April 11, 2014
Page 5

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

Alaska State Legislature Senate Rules Committee

Session:
State Capitol 103
Juneau, AK 99801
Phone: (907) 465-2995
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Senator Lesil McGuire, Chairman

Sectional Analysis

SB 200

“An Act establishing a right of action for the death of an unborn child in certain circumstances.”

Section 1. Provides short title: “Jackson’s Law”

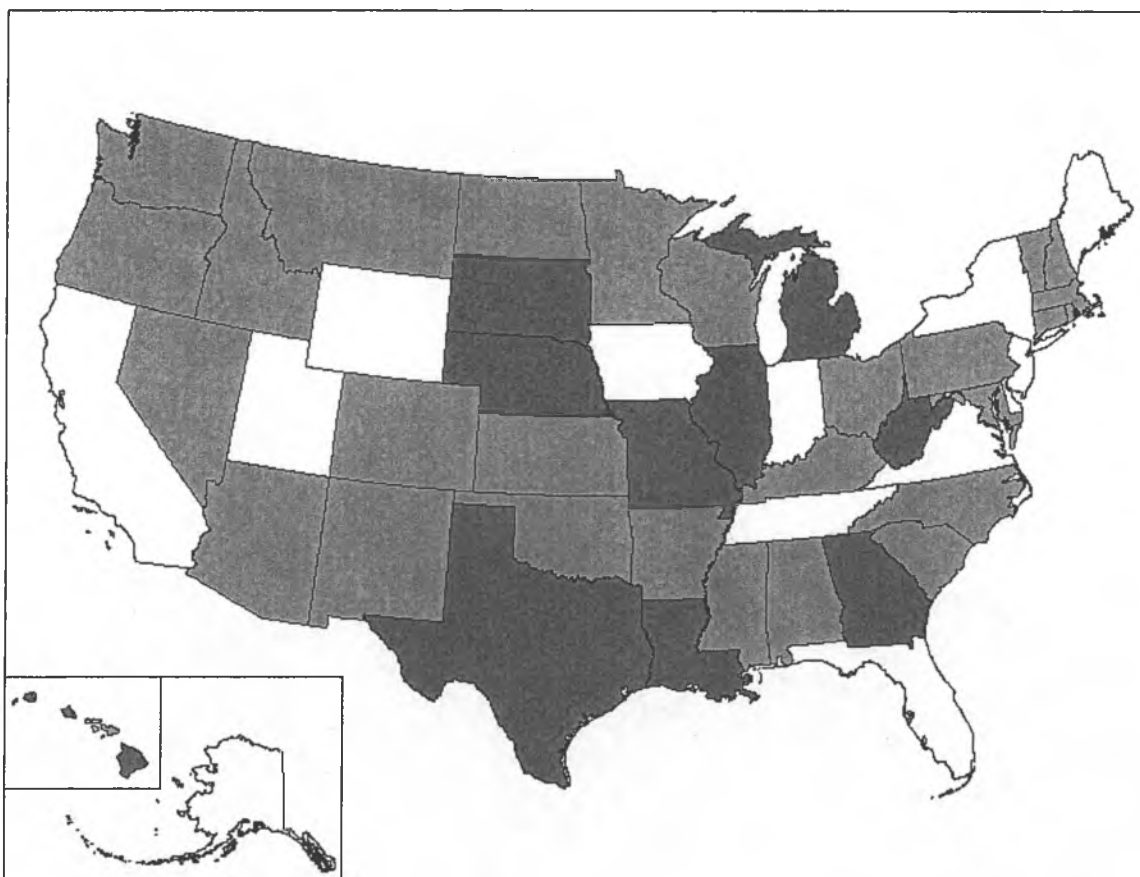
Section 2. Authorizes parent(s) to seek action as a plaintiff in the case of death of an unborn child, caused by wrongful act or omission of another.




Section 3. Provides that the section does not apply to specified circumstances.

Section 4. Give the definition for abortion and unborn child.

STATE OF THE STATES: WHERE ARE WE NOW?

WRONGFUL DEATH (CIVIL ACTION)



-  Twenty-nine states permit a wrongful death action if the unborn child was viable at the time of his/her death: AL, AZ, AR, CO, CT, DE, HI, ID, KS, KY, MD, MA, MN, MS, MT, NV, NH, NM, NC, ND, OH, OK, OR, PA, RI, SC, VT, WA, and WI.
-  Nine states allow suits for a pre-viable unborn child: GA (limited to quickening), IL, LA, MI, MO, NE, SD, TX, and WV.
-  Twelve states still require live birth (and bar a cause of action for the death of the unborn child unless the child is born alive and dies thereafter): AK, CA, FL, IN, IA, ME, NJ, NY, TN, UT, VA, and WY.



ALASKA STATE LEGISLATURE HOUSE RULES COMMITTEE

REPRESENTATIVE CRAIG JOHNSON, CHAIRMAN
State Capitol Room 216, Juneau, AK 99801-1182 (907) 465-4993, (907) 465-3872 Fax
716 W. 4th Ave., Ste. 300, Anchorage, AK 99501 (907) 269-0200, (907) 269-0204 Fax

FAX

To: Leg Legal

From: Debra Higgins

Fax: 465-2029

Phone: 465-3764

Date: 4/15/14

CC:

Re: HCR for SB 200

Pages with Cover: 2

Urgent **For Review** **Please Comment** **Please Reply** **Please Recycle**

•Comments:

Please prepare a final of work draft 28-LS1679\A for a title change for SB 200. Please let me know if you have any questions.

28-LS1676VA
Wallace
4/11/14

HOUSE CONCURRENT RESOLUTION NO.
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-EIGHTH LEGISLATURE - SECOND SESSION

BY

Introduced:
Referred:

A RESOLUTION

1 **Suspending Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State**
2 **Legislature, concerning Senate Bill No. 200, establishing a right of action for the death**
3 **of an unborn child in certain circumstances.**

4 **BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 That under Rule 54, Uniform Rules of the Alaska State Legislature, the provisions of
6 Rules 24(c), 35, 41(b), and 42(e), Uniform Rules of the Alaska State Legislature, regarding
7 changes to the title of a bill, are suspended in consideration of Senate Bill No. 200,
8 establishing a right of action for the death of an unborn child in certain circumstances.

28-LS1382\U
Wallace
4/11/14

HOUSE CS FOR SENATE BILL NO. 200()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-EIGHTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS MCGUIRE, Coghill, Bishop, Giessel, Meyer, Stedman, Dyson, Kelly, Micciche, Dunleavy

REPRESENTATIVES Lynn, Stoltze

A BILL

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4 to read:

5 **SHORT TITLE.** This Act may be known as Jackson's Law.

6 * **Sec. 2.** AS 09.15 is amended by adding a new section to read:

7 **Sec. 09.15.018. Action for wrongful death of an unborn child;**
8 **applicability.** (a) A parent of an unborn child may maintain an action as plaintiff for
9 the death of an unborn child that was caused by the wrongful act or omission of
10 another.

11 (b) This section does not apply to acts or omissions that

12 (1) cause the death of an unborn child if those acts or omissions are
13 committed during a legal abortion to which the pregnant woman or a person
14 authorized by law to act on her behalf consents or for which consent is implied by law;

15 (2) are committed under usual and customary standards of medical

1 practice during diagnostic testing, during therapeutic treatment, or while assisting a
2 pregnancy; or

3 (3) are committed by a pregnant woman against herself and her unborn
4 child.

5 (c) This section does not limit any other cause of action that a parent may
6 maintain for the death of an unborn child.

7 (d) In this section,

8 (1) "abortion" has the meaning given in AS 18.16.090;

9 (2) "unborn child" has the meaning given in AS 11.81.900.

10 * Sec. 3. The uncodified law of the State of Alaska is amended by adding a new section to
11 read:

12 TRANSITION. This Act applies to actions arising from a wrongful act or omission
13 that takes place on or after the effective date of this Act.