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To Be or Not to Be: The Pennsylvania General Assembly Eliminates Wrongful Birth and Life Actions

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TO BE OR NOT TO BE: THE PENNSYLVANIA GENERAL
ASSEMBLY ELIMINATES WRONGFUL BIRTH
AND LIFE ACTIONS

I. INTRODUCTION

On March 22, 1988, the Pennsylvania General Assembly enacted the Freind Amendment¹ prohibiting wrongful birth and wrongful life tort actions.² The Freind Amendment was the culmination of a series of

1. 42 PA. CONS. STAT. ANN. §§ 8305-8306 (Purdon Supp. 1989). For the text of the Freind Amendment, see *infra* notes 5-7 and accompanying text. The amendment was introduced on March 22, 1988, by Representative Steven Freind in the House of Representatives for the Commonwealth of Pennsylvania to add the Wrongful Birth and Wrongful Life Act to omnibus legislation amending Title 42 (Judiciary and Judicial Procedure) of the Pennsylvania Consolidated Statutes. See LEGISLATIVE JOURNAL OF THE HOUSE OF REPRESENTATIVES FOR THE COMMONWEALTH OF PENNSYLVANIA, 172d Sess., at 303 (1988) [hereinafter LEGISLATIVE JOURNAL-HOUSE].

2. The wrongful birth tort action is generally brought by parents seeking damages for the negligent act or omission of a physician resulting in the birth of an unwanted child. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON TORTS § 55, at 370 (5th ed. 1984) [hereinafter PROSSER & KEETON]. Typically, physicians have been sued for wrongful birth of unwanted children where the physician negligently performed an unsuccessful abortion procedure or failed to diagnose or inform the child's parents of possible birth defects which would have influenced the parents' decision whether to keep or abort the child. *Id.*; see generally Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 HARV. L. REV. 2017 (1987) [hereinafter Note, *Wrongful Birth Actions*]. For a discussion of Pennsylvania case law concerning the wrongful birth cause of action prior to the Freind Amendment, see *infra* notes 8-19 and accompanying text.

Wrongful life tort actions are brought either by the child in his or her own right or by the child's parents in their capacity as guardians. See, e.g., *Ellis v. Sherman*, 512 Pa. 14, 515 A.2d 1327 (1986). The child seeks damages from the physician for wrongful existence due to the physician's negligent act or omission which gave rise to the child's birth. PROSSER & KEETON, *supra*, § 55, at 370. Courts have balked at allowing this tort claim since the fundamental precept of tort recovery, the restoration of the aggrieved party to his or her whole self as if the tortious conduct had not occurred, necessitates a "comparison between life in an impaired state and nonexistence." *Becker v. Schwartz*, 46 N.Y.2d 401, 412, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1979). See generally Comment, *Wrongful Life: Should the Action Be Allowed?*, 47 LA. L. REV. 1319 (1987); Note, *A Cause of Action for "Wrongful Life": A Suggested Analysis*, 55 MINN. L. REV. 58 (1970). For a discussion of case law in Pennsylvania rejecting the wrongful life cause of action, see *infra* notes 16-18 and accompanying text.

The Freind Amendment does not prohibit causes of action based on "wrongful conception," sometimes called "wrongful pregnancy" actions. See LEGISLATIVE JOURNAL-HOUSE, *supra* note 1, at 308 (statement of Rep. Freind). Wrongful conception suits are brought by parents against physicians who have negligently performed unsuccessful sterilization operations resulting in the birth of unwanted children, usually foreseeably deformed. For a discussion of Pennsylvania case law allowing this cause of action and the remedies available to the aggrieved party, see *infra* notes 9, 18-19 and accompanying text. For a discus-

legislative attempts to override *Speck v. Finegold*,³ the Pennsylvania Supreme Court decision which validated claims for wrongful birth.⁴ The Freind Amendment eliminates claims alleging that “but for [the] act or omission” of a defendant, “a person once conceived would not or should not have been born.”⁵ It also bars claims alleging that “but for [the] act or omission” of a defendant, a “person would not have been conceived or, once conceived would or should have been aborted.”⁶ Finally, the Freind Amendment prevents a defendant from asserting that the aggrieved party’s failure to abort an injured fetus operates as a complete bar to recovery or as a factor to mitigate damages on an in utero injury claim.⁷

sion of the legislative history of the Freind Amendment and its intended effect on the wrongful conception cause of action, see *infra* notes 20-33 & 44-48 and accompanying text.

3. 497 Pa. 77, 439 A.2d 110 (1981) (per curiam). For a detailed analysis of the *Speck* decision, see *infra* notes 8-17 and accompanying text.

4. Provisions almost identical to the Freind Amendment were passed by the General Assembly and vetoed by Governor Thornburgh four years earlier. See LEGISLATIVE JOURNAL-HOUSE, *supra* note 1, at 304. The bill was subsequently resurrected in May, 1987, in the Abortion Control Act (H.B. 1362). Governor Casey later vetoed the entire Abortion Control Act. *Id.* at 304-05. Finally, Representative Freind attached the current law as an amendment to the judiciary omnibus bill (SB 646) on February 24, 1988. *Id.* at 303. After an extensive and often acrimonious floor debate, the House voted 145 to 49 in favor of the constitutionality of the Freind Amendment. *Id.* at 316-17. Subsequently, the House approved the Freind Amendment by a vote of 144 to 50. *Id.* at 317. After passing the omnibus bill, the House sent the bill to the Senate. *Id.* at 325. The Senate, after a heated floor debate, passed the bill by a vote of 31 to 16 on March 22, 1988. See LEGISLATIVE JOURNAL OF THE SENATE FOR THE COMMONWEALTH OF PENNSYLVANIA, 172d Sess., at 1966 (1988) [hereinafter LEGISLATIVE JOURNAL-SENATE]. Governor Casey signed and approved the bill on April 18, 1988. See *id.* at 2061.

5. 42 PA. CONS. STAT. ANN. § 8305(a) (Purdon Supp. 1989). Section 8305(a) provides:

[T]here shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born. Nothing contained in this subsection shall be construed to prohibit any cause of action or award of damages for the wrongful death of a woman, or on account of physical injury suffered by a woman or a child, as a result of an attempted abortion. Nothing contained in this subsection shall be construed to provide a defense against any proceeding charging a health care practitioner with intentional misrepresentation under . . . any . . . act regulating the professional practices of health care practitioners.

Id.

6. *Id.* § 8305(b). Section 8305(b) provides, in full: “There shall be no cause of action on behalf of any person based on a claim of that person that, but for an act or omission of the defendant, the person would not have been conceived or, once conceived, would or should have been aborted.” *Id.*

7. *Id.* § 8306. Section 8306 provides:

Where a person has, by reason of the wrongful act or negligence of another, sustained injury while in utero, it shall not be a defense to any

This article will examine the history and substance of the Freind Amendment and will analyze the effect it may have on prenatal tort claims in Pennsylvania. This article will also examine the validity of the Freind Amendment under the United States Constitution. This article will conclude that the Freind Amendment is not only constitutional, but that it furthers legitimate state policies as well.

II. WRONGFUL BIRTH AND WRONGFUL LIFE TORT ACTIONS PRIOR TO THE FREIND AMENDMENT

The Supreme Court of Pennsylvania first addressed the issues of wrongful birth and wrongful life in 1981 in the case of *Speck v. Finegold*.⁸ At that time the lower courts had regarded these issues with uncertainty.⁹ The *Speck* court held that the parents of a deformed child sue a physician for negligent acts that resulted in the wrongful birth of a

action brought to recover damages for the injury, or a factor in mitigation of damages, that the person could or should have been aborted.

Id.

For a discussion of Pennsylvania case law leading up to the Freind Amendment, see *infra* notes 8-19 and accompanying text. For a discussion of the legislative history and the provisions of the Freind Amendment, see *infra* notes 20-33 and accompanying text. For a discussion of the impact of the Freind Amendment in Pennsylvania, see *infra* notes 34-79 and accompanying text.

8. 497 Pa. 77, 439 A.2d 110 (1981) (per curiam).

9. See, e.g., *Stribling v. deQuevedo*, 288 Pa. Super. 436, 432 A.2d 239 (1980) (unsuccessful sterilization giving rise to birth of deformed child was actionable under wrongful birth tort principles but recovery limited to expenses incident to birth and raising child and medical expenses for treatment of child's birth defect); *Mason v. Western Pa. Hosp.*, 286 Pa. Super. 354, 428 A.2d 1366 (1981) (unsuccessful tubal ligation resulting in birth of normal healthy child is grounds for cause of action for wrongful birth but not wrongful life; recovery limited to actual expenses for birth and raising child offset by benefit to parents from comfort and society of child), *vacated*, 499 Pa. 484, 487, 453 A.2d 974, 976 (1982) (although cause of action existed under wrongful birth, recovery limited solely to expenses incident to birth); *Speck v. Finegold*, 268 Pa. Super. 342, 408 A.2d 496 (1979) (wrongful birth action allowed but wrongful life action denied; damages for wrongful birth limited to expenses of birth and rearing of deformed child), *aff'd in part and rev'd in part*, 497 Pa. 77, 439 A.2d 110 (1981) (per curiam).

In two of the lower court decisions, the distinction between wrongful conception and wrongful birth causes of action was blurred. See *Stribling*, 288 Pa. Super. at 443-44, 432 A.2d at 243 (even though parents sued physician for negligently performed sterilization, court never distinguishes between wrongful conception and wrongful birth theories); *Mason*, 286 Pa. Super. at 357, 428 A.2d at 1367 (lower court uses wrongful birth and wrongful life terms interchangeably in wrongful conception suit).

This distinction is critically important because the Freind Amendment bars only wrongful birth and wrongful life causes of action and allows causes of action for wrongful conception. For an exposition of the elements of wrongful birth, wrongful life and wrongful conception causes of action, see *supra* note 2 and accompanying text. For a discussion of the legislative history of the Freind Amendment and its impact on wrongful conception causes of action, see *infra* notes 20-33 & 44-49 and accompanying text.

deformed child.¹⁰ The court further held that the damages on this claim included "expenses attributable to the birth and raising of" the deformed child and any "damages for mental distress and physical inconvenience attributable" to the birth of the child.¹¹ By reason of a three-

10. *Speck*, 497 Pa. at 79, 439 A.2d at 111. The *Speck* case involved two alleged negligent actions. First, a urologist failed to perform a successful vasectomy on Mr. Speck resulting in Mrs. Speck's impregnation. *Id.* at 82, 439 A.2d at 113. Second, a different physician failed to successfully abort the fetus. *Id.*

The Specks had engaged the services of Dr. Finegold, a urologist, to perform a bilateral vas ligation on Mr. Speck to prevent the conception of a possibly deformed child. *Id.* Mr. Speck suffered from a genetic defect known as neurofibromatosis. *Id.* at 81, 439 A.2d at 112. After having two children born with this hereditary disease, the Specks decided against the possibility of having a third afflicted child. *Id.* at 81-82, 439 A.2d at 112-13.

After conception, the Specks engaged the services of Dr. Schwartz to terminate the pregnancy. *Id.* at 82, 439 A.2d at 113. Dr. Schwartz consistently represented to the Specks that the abortion had been successful. *Id.* Five months later Mrs. Speck gave birth to a daughter afflicted with neurofibromatosis. *Id.*

The *Speck* court patched together a majority of justices to recognize a wrongful birth cause of action. *See id.* at 79, 439 A.2d at 111. Justice (now Chief Justice) Nix dissented, asserting that in the "absence of unanimity of public opinion," extension of tort principles intruded upon the province of the legislature to set public policy. *Id.* at 99, 439 A.2d at 122 (Nix, J., dissenting). The legislature met Justice Nix's challenge by passing the Freind Amendment after five years of unsuccessful attempts. For a discussion of past attempts of the General Assembly to pass anti-wrongful birth and life laws, see *supra* note 4 and accompanying text.

11. *Speck*, 497 Pa. at 79-80, 439 A.2d at 111-12. Child-rearing damages awarded under this language parallel damages recoverable in wrongful conception cases. *See, e.g.*, *Stribling v. deQuevedo*, 288 Pa. Super. 436, 441, 432 A.2d 239, 242 (1980) (but for defendant's breach of duty of care to parents, costs of rearing child would not have been incurred, and thus were proper items of damage); *Mason v. Western Pa. Hosp.*, 286 Pa. Super. 354, 363, 428 A.2d 1366, 1370 (1981) (child-rearing costs included in damage assessment), *vacated*, 499 Pa. 484, 453 A.2d 974 (1982); *Speck v. Finegold*, 268 Pa. Super. 342, 368-69, 408 A.2d 496, 510 (1979) (Price, J., dissenting in part) (child-rearing costs not compensable even if child deformed since no parent is guaranteed healthy child), *aff'd in part and rev'd in part*, 497 Pa. 77, 439 A.2d 110 (1981) (per curiam).

The lower courts have espoused the "benefit rule," which offsets any damages recoverable for child-rearing expenses by the "child's aid, comfort and society" during the parents' lives. *See, e.g.*, *Mason*, 286 Pa. Super. at 363, 428 A.2d at 1370.

The Second Restatement of Torts states the benefit rule as follows:

When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

RESTATEMENT (SECOND) OF TORTS § 920 (1979).

The Supreme Court of Pennsylvania in *Speck* and *Mason* addressed the application of the benefit rule. Although the *Speck* court's opinion was silent on the issue of the benefit rule in its order granting relief, Justice Roberts, in his separate opinion, assumed that application of the benefit rule would allow the "benefits of joy, companionship, and affection" to offset child-rearing damages. *Speck*, 497 Pa. at 90, 439 A.2d at 117 (Roberts, J., concurring).

In *Mason*, the supreme court expressly prohibited child-rearing damages for

three split, however, the court let stand the lower court decision prohibiting the child's wrongful life action.¹²

The *Speck* court justified its extension of common law tort principles on the basis of the defendant physician's duty of care to the parents, who had interests entitled to legal protection.¹³ Further, the *Speck* court set out three important public policies outweighing the policy of favoring childbirth over abortion: compensation to victims, deterrence of negligent conduct and encouragement of due care.¹⁴ Citing the " 'prophylactic' factor of preventing future harm" by holding tortfeasors fully accountable for their conduct, the *Speck* court stated that recognition of wrongful birth claims was an important safeguard against future tortious acts.¹⁵

The *Speck* court joined the vast majority of other jurisdictions in declining to recognize a cause of action for wrongful life.¹⁶ Amidst an acerbic attack by those justices on the court favoring this cause of action, the court let stand the lower court decision prohibiting wrongful life actions.¹⁷

a *healthy* child because the benefits enjoyed by parents in raising a child offset any costs as a matter of law. *Mason*, 499 Pa. at 487, 453 A.2d at 976. For a discussion of the *Mason* decision, see *infra* notes 18-19 and accompanying text.

Thus, although there is clear language in *Mason* adopting a per se benefit rule barring child-rearing damages for a *healthy* child, it is unclear whether the benefit rule will operate to mitigate child-rearing damages for a *deformed* child under a wrongful conception claim. See *id.* at 497, 453 A.2d at 981 (Larsen, J., dissenting in part) (parents should be awarded full costs of rearing child without benefit rule offset because rule "punishes" endearing parents and ignores deterrence of future negligence).

12. *Speck*, 497 Pa. at 80, 439 A.2d at 112. Justices Roberts and Nix and Chief Justice O'Brien voted to affirm the lower court decision while Justices Flaherty, Kauffman and Larsen voted to reverse. *Id.*

13. *Id.* at 84, 439 A.2d at 114. The *Speck* court held that "the concept of duty amounts to no more than 'the sum total of those considerations of policy which led the law to say that the particular plaintiff is entitled to protection' from the harm suffered." *Id.* (quoting *Sinn v. Burd*, 486 Pa. 146, 164, 404 A.2d 672, 681 (1979) (citation omitted)). Justice Nix, in dissent, criticized the court for allowing itself to "[j]udicially legislate two new causes of action heretofore non-existent in this Commonwealth." *Id.* at 94, 439 A.2d at 119 (Nix, J., dissenting) (emphasis added by Justice Nix). He further stated: "Only in the clearest cases . . . may a court make an alleged public policy the basis of judicial decision." *Id.* at 98, 439 A.2d at 121 (Nix, J., dissenting) (emphasis added by Justice Nix) (quoting *Mamlin v. Genoc*, 340 Pa. 320, 325, 17 A.2d 407, 409 (1941)). Noting that the residents of the Commonwealth were evenly divided on the issue of abortion, Justice Nix chastised the court for its "flagrant misuse of [its] role as a tribunal designed to implement societal values and not to create them." *Id.* at 99, 439 A.2d at 122 (Nix, J., dissenting).

14. *Id.* at 85, 439 A.2d at 114.

15. *Id.* at 85-86, 439 A.2d at 114-15. (quoting *Ayala v. Philadelphia Bd. of Pub. Educ.*, 453 Pa. 584, 599, 305 A.2d 877, 884 (1973)).

16. *Id.* at 80, 439 A.2d at 112; see Annotation, *Tort Liability for Wrongfully Causing One to Be Born*, 83 A.L.R.3d 15, 66-76 (1978 & Supp. 1988) (discussing case law concerning wrongful life actions in various jurisdictions).

17. *Speck*, 497 Pa. at 80, 439 A.2d at 112. Justice Flaherty, writing the lead

One year later, in *Mason v. Western Pennsylvania Hospital*,¹⁸ the Supreme Court of Pennsylvania defined damages recoverable to parents on a wrongful conception claim resulting in the birth of a *healthy* child. The *Mason* court limited recovery to costs associated with pregnancy and delivery, and denied recovery of financial or emotional costs incident to raising the healthy child.¹⁹

III. THE FREIND AMENDMENT: THE GENERAL ASSEMBLY'S RESPONSE TO *SPECK V. FINEGOLD*

Seven years after the *Speck* decision, in the early spring of 1988, the Pennsylvania General Assembly passed the Freind Amendment after heated debate.²⁰ The Freind Amendment contains three distinct provi-

opinion for the court, was joined by only Justices Kauffman and Larsen in advocating the adoption of wrongful life tort actions. *Id.* Justice Flaherty criticized the New York Court of Appeals for rejecting wrongful life tort actions in *Becker v. Schwartz*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1979). *Speck*, 497 Pa. at 86, 439 A.2d at 115. Justice Flaherty stated that the *Becker* court's declared incompetence to decide whether it is better to never have been born than to be born with gross deficiencies did not provide adequate rationale to justify elimination of the wrongful life cause of action. *Id.* (referring without citation to *Becker*, 46 N.Y.2d at 411, 386 N.E.2d at 812, 413 N.Y.S.2d at 900). Justice Flaherty criticized the *Becker* court for denying recovery to an aggrieved plaintiff solely because the court could not "calculate damages based upon a comparison between life in an impaired state and nonexistence." *Id.* (referring without citation to *Becker*, 46 N.Y.2d at 412, 386 N.E.2d at 812, 413 N.Y.S.2d at 900). The *Becker* court's "hyper-scholastic rationale" denying recovery failed to take into account that a "diseased plaintiff exists and . . . would not exist at all but for the negligence of the defendants." *Id.* at 87, 439 A.2d at 115. To deny recovery to the injured plaintiff would imply that his only "alternative remedy, in the extreme event that he finds his life unduly burdensome, is suicide." *Id.*

Three years later, a lower court followed the *Speck* decision in denying a Tay-Sachs child the right to sue for his wrongful life. *Rubin v. Hamot Medical Center*, 329 Pa. Super. 439, 445, 478 A.2d 869, 872 (1984), *appeal granted*, 508 Pa. 493, 498 A.2d 868 (1985).

18. 499 Pa. 484, 453 A.2d 974 (1982). *Mason* involved an action to recover damages in connection with an alleged improper performance of a sterilization operation. *Id.* at 486, 453 A.2d at 975.

19. *Id.* The *Mason* court allowed the parent to recover "all medical expenses and lost wages related to pre-natal care, delivery, and post-natal care, as well as compensation for pain and suffering incurred during the pre-natal through post-natal periods." *Id.* at 486, 453 A.2d at 976. For a discussion of the Freind Amendment's impact on wrongful conception claims, see *infra* notes 44-48 and accompanying text.

20. See LEGISLATIVE JOURNAL-HOUSE, *supra* note 1, at 303-17; LEGISLATIVE JOURNAL-SENATE, *supra* note 4, at 1960-66. The House debate was led by the amendment's sponsor, Representative Freind. LEGISLATIVE JOURNAL-HOUSE, *supra* note 1, at 303. Representative Freind outlined the amendment's provisions and answered specific questions regarding its intended impact. *Id.* at 303-16.

The legislators divided into the pro-life and pro-choice camps. Statements on both sides were sharp. Representative Harper responded to Representative Freind's proposal: "[T]here you go again, trying to legislate your cruel legislation on women." *Id.* at 310. Representative Birmelin responded that Representen-

sions: (1) a provision prohibiting wrongful birth actions;²¹ (2) a provision prohibiting wrongful life actions;²² and (3) a provision barring abortion defenses against in utero claims.²³

The wrongful birth provision, by far the most controversial of the three, denies a plaintiff the ability to assert a claim alleging that "but for an act or omission of the defendant, a person once conceived would not or should not have been born."²⁴ This language parallels other state statutes²⁵ by protecting prenatal health care practitioners for their intentional or negligent conduct resulting in a "failed" abortion—either failure to give information to a parent which would influence the decision whether or not to abort or failure to successfully perform an abortion.²⁶ Additionally, the language "once conceived," as supported by the legislative history, demonstrates that the clear purpose of the Freind

tative Harper's "twisted sense of morality" protects "those who would take the lives of the innocent . . . [while advocating that] it is more cruel to prevent an abortion than it is to kill an unborn baby." *Id.* at 313.

The Senate debate was by no means more congenial. Senator Fumo derided the Freind Amendment as a "crazy scheme" brought on by "the frustration of some people with what the Constitution and what the United States Supreme Court has said is the law of the land." LEGISLATIVE JOURNAL-SENATE, *supra* note 4, at 1964. Senator Bell summarized the pro-life argument by equating the bill with "a simple question, whether we should or should not save the life of an unborn child." *Id.* at 1963.

For a discussion of the history of the anti-wrongful birth statute prohibiting wrongful birth actions, see *supra* notes 2 & 4 and accompanying text.

21. 42 PA. CONS. STAT. ANN. § 8305(a) (Purdon Supp. 1989). For the text of this provision, see *supra* note 5.

22. 42 PA. CONS. STAT. ANN. § 8305(b). For the text of this provision, see *supra* note 6.

23. 42 PA. CONS. STAT. ANN. § 8306. For the text of this provision, see *supra* note 7.

24. 42 PA. CONS. STAT. ANN. § 8305(a).

25. See IDAHO CODE § 5-334; MINN. STAT. ANN. § 145.424; MO. ANN. STAT. § 188.130 (Vernon Supp. 1989); S.D. CODIFIED LAWS ANN. §§ 21-55-1 to 21-55-3 (1987 & Supp. 1988); UTAH CODE ANN. § 78-11-24 (1988).

These state statutes differ from the Freind Amendment in several respects. See, e.g., IDAHO CODE § 5-334 (expressly imposing liability for wrongful conception, maternal death and untreatable disease, defect or deficiency); MINN. STAT. ANN. § 145.424 ("negligent conduct" rather than "act or omission" protected; express liability imposed for wrongful conception and negligent treatment of in utero defect); MO. ANN. STAT. § 188.130 ("negligent conduct" rather than "act or omission"); S.D. CODIFIED LAWS ANN. §§ 21-55-1 to 21-55-3 ("conduct" instead of "act or omission" and "wrongful conception" claims prohibited); UTAH CODE ANN. § 78-11-24 ("person would not have been permitted to have been born alive but would have been aborted").

26. Representative Freind hypothesized a worst-case scenario. LEGISLATIVE JOURNAL-HOUSE, *supra* note 1, at 306. Representative Freind gave an example of a doctor who performs an amniocentesis revealing a deformity. *Id.* Rather than telling this to the parents, the doctor lies to them and tells them all is well. *Id.* As a result the parents bring the child to term and it is born severely handicapped. *Id.* Under this scenario, the parents cannot sue the doctor unless the deformity could have been treated in utero. *Id.* at 308.

Amendment is to leave wrongful conception claims unaffected by the statute.²⁷

The wrongful birth provision goes on to state that it does not "prohibit any cause of action or award of damages for the wrongful death of a woman, or on account of physical injury suffered by a woman or a child, as a result of an attempted abortion."²⁸ The legislative history indicates that by this provision the legislature intended to leave unaffected all prenatal malpractice actions other than those involving either the failure of a health practitioner to provide material information influencing the decision to abort or negligence while performing an unsuccessful abortion.²⁹

The wrongful birth provision leaves open the possibility of state-initiated disciplinary proceedings against a health care practitioner for intentional misrepresentation leading to the wrongful birth of a child. Available disciplinary measures include license revocation or suspension, and criminal and civil penalties.³⁰

The wrongful life provision forbids a plaintiff from suing on a claim alleging that "but for an act or omission of the defendant, the person would not have been conceived or, once conceived, would or should have been aborted."³¹ This provision confirms the result reached in *Speck* by precluding a child from suing for damages on a wrongful life

27. Representative Freind, responding to a question raised by Representative Gruitza whether under the Freind Amendment a person could sue a physician for negligently performing a failed tubal ligation (sterilization procedure) on a wrongful conception claim, answered: "[It is] our intention not to preclude in any way that type of lawsuit . . . we were very careful about this." *Id.* at 309. For a discussion of wrongful conception claims and damages recoverable, see *supra* notes 9-11 and accompanying text.

28. 42 PA. CONS. STAT. ANN. § 8305(a) (Purdon Supp. 1989).

29. LEGISLATIVE JOURNAL-HOUSE, *supra* note 1, at 306 (doctor liable for failing to test or treat which would make possible prevention, cure or amelioration of any disease, defect, deficiency or handicap).

30. Disciplinary proceedings against physicians may be brought under PA. STAT. ANN. tit. 40, §§ 1301.901-907 (Purdon Supp. 1989). A physician is defined as "a medical doctor or a doctor of osteopathy." PA. STAT. ANN. tit. 63, § 422.2 (Purdon Supp. 1988). The State Board of Medicine may impose disciplinary measures on any board-regulated medical doctor if the practitioner makes "misleading, deceptive, untrue or fraudulent representations in the practice of the profession." *Id.* § 422.41(2). A similar provision allows the State Board of Osteopathic Examiners to impose disciplinary measures on osteopaths. *Id.* § 271.15(a)(2). Disciplinary measures include:

(1) license revocation, *id.* §§ 271.15(c)(3), 422.42(a)(3);

(2) public reprimand, *id.* §§ 271.15(c)(2), 422.42(a)(2);

(3) criminal fines or imprisonment upon conviction of a medical doctor, *id.* § 422.39(a) (up to \$5,000 or imprisonment not more than six months for first offense and up to \$5,000 to \$20,000 or imprisonment for six months to one year for second offense), or an osteopath, *id.* § 271.11(a) (\$1,000 or imprisonment not more than six months for first offense and up to \$2,000 or imprisonment for six months to one year for second offense); or

(4) imposition of civil penalties, *id.* §§ 271.11(c), 422.39(b) (up to \$1,000).

31. 42 PA. CONS. STAT. ANN. § 8305(b) (Purdon Supp. 1989).

claim.³²

The third provision of the Freind Amendment bars a tortfeasor who wrongfully or negligently injures a person while in utero from asserting as a defense or as a mitigating factor that the injured "person could or should have been aborted."³³

IV. IMPACT OF THE FREIND AMENDMENT

The Freind Amendment significantly limits prenatal tort actions in Pennsylvania and may produce other far reaching consequences. The Freind Amendment furthers two primary purposes. First, it works as a tort reform measure designed to curtail the liability crisis.³⁴ The liability crisis has been particularly burdensome in the area of prenatal health care.³⁵ Second, the Freind Amendment promotes the legislative policy favoring childbirth over abortion³⁶ by implicitly recognizing (1) that birth of a healthy or deformed child is not a legally cognizable injury and (2) that it is unfair to grant relief to parents who would have aborted a deformed fetus had they known of the deformity but deny that same relief to parents who would not have aborted the fetus under any set of circumstances.³⁷ The following section will discuss the Freind Amendment in terms of its effect on prenatal tort liability, its probable effect on the deterrence of malpractice, its effect on a woman's constitutional right to decide whether to terminate a pregnancy within the context of a doctor-patient relationship and its effect on the public policy of cur-

32. For a discussion of the *Speck* court's rejection of the wrongful life claim, see *supra* notes 12-17 and accompanying text.

Following the amendment's prohibitions of wrongful birth and wrongful life actions, there is a definitional section stating: "A person shall be deemed to be conceived at the moment of fertilization." 42 PA. CONS. STAT. ANN. § 8305(c). Although there was vociferous objection to this language by Representative O'Donnell prophesying "the beginning of the end of the abortion debate" by establishing human life at conception, Representative Freind stated this language applied "[o]nly with respect to the purpose of this amendment." LEGISLATIVE JOURNAL-HOUSE, *supra* note 1, at 309.

33. 42 PA. CONS. STAT. ANN. § 8306.

34. See P. DANZON, NEW EVIDENCE ON THE FREQUENCY AND SEVERITY OF MEDICAL MALPRACTICE CLAIMS 29 (1986) (Institute for Civil Justice, Rand Corporation) (despite some tort reforms, frequency and severity of malpractice claims have doubled over last decade).

35. See generally K. FINEBERG, J. PETERS, J. WILLSON & D. KROLL, OBSTETRICS/GYNECOLOGY AND THE LAW 8 (1984) (very broad liability exposure in prenatal care due to necessary use of invasive procedures and involvement of mother and child as two potential plaintiffs).

36. See PA. STAT. ANN. tit. 62, § 453 (Purdon Supp. 1989) (based on policy favoring childbirth over abortion, no public welfare funds shall be expended for performance of abortion).

37. See *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 15 (Minn. 1986) (wrongful birth cause of action requires proof that fetus would have been aborted had parents known of deformity).

tailing medical malpractice liability while promoting childbirth over abortion.

A. Prenatal Tort Liability Following the Freind Amendment

The Freind Amendment overrules that portion of the *Speck* decision that permits a wrongful birth cause of action. The amendment, however, preserves other portions of the *Speck* decision. There were two alleged negligent acts in *Speck*: a negligent sterilization procedure which gave rise to a wrongful conception claim, and an unsuccessful abortion which gave rise to a wrongful birth claim.³⁸ The *Speck* court never separated the two claims.³⁹ Therefore, the scope of relief granted to the plaintiffs under the entire cause of action arguably fits within a wrongful conception claim which is still permitted under the Freind Amendment. In addition, the Freind Amendment does not in any way affect the *Mason* decision, because that case involved only a wrongful conception claim.⁴⁰

Following the Freind Amendment, a plaintiff may sue a physician or health practitioner for negligence resulting in a failed sterilization, i.e., for wrongful conception. The gravamen of a wrongful conception claim is that but for the act or omission of the defendant, a person would not or should not have been conceived. Wrongful conception claims have been successful in the lower courts⁴¹ and have been upheld in the Supreme Court of Pennsylvania.⁴² The requisite act or omission could be a misdiagnosis of risks attendant to bearing a child which influences a decision to procreate. Another more common area of liability would be an unsuccessful sterilization procedure resulting in the birth of an unplanned child.

Damages for wrongful conception vary according to the physical character of the unplanned child. Under *Speck*, the parents of a *deformed* or *diseased* child may recover any expenses relating to prenatal care. These could include all medical expenses from preconception to birth, any medical expenses for continuing treatment of the child, any pain and suffering incurred by the parents during prenatal and postnatal periods and damages for the emotional distress of the parents upon learning of and living with their child's deformity or disease.⁴³

If the unplanned child is *healthy*, under *Mason*, child rearing expenses are *not* recoverable since any cost of raising a healthy child are

38. *Speck*, 497 Pa. at 82, 439 A.2d at 113. For a discussion of the facts of *Speck*, see *supra* note 10 and accompanying text.

39. *Speck*, 497 Pa. at 83, 439 A.2d at 113.

40. For a discussion of the *Mason* decision, see *supra* notes 18-19 and accompanying text.

41. For a discussion of wrongful conception claims and their treatment in the lower courts, see *supra* note 9 and accompanying text.

42. See *Mason*, 499 Pa. 484, 453 A.2d 974; *Speck*, 497 Pa. 77, 439 A.2d 110.

43. For a discussion of damages awarded by the *Speck* decision, see *supra* note 11 and accompanying text.

offset *per se* by the "joy, companionship, and affection" provided by the child.⁴⁴ However, any prenatal or postnatal medical expenses, pain and suffering incident to carrying and giving birth to the child and lost wages are recoverable under the wrongful conception claim.⁴⁵

In utero tort claims are also left unaffected by the Freind Amendment.⁴⁶ Any misdiagnosis by a physician for a *treatable* deformity or disease is actionable by the child in his or her own right under normal tort principles. Also, any negligent in utero treatment is actionable by the child.⁴⁷ The Freind Amendment precludes a physician from asserting as an affirmative defense that no damages are recoverable on the grounds that the injured child "could or should have been aborted."⁴⁸

B. *The Effect of the Freind Amendment in Deterring Prenatal Malpractice*

As stated above, the tort liability of a prenatal health care practitioner is still very broad. Critics charge that wrongful birth and wrongful life prohibitions work against deterring tortious conduct on the part of health care practitioners who treat and diagnose prenatal health problems.⁴⁹ They argue that wrongful birth prohibitions will erode the "standard of good medical practice . . . [in] the performance of prenatal counseling and diagnosis."⁵⁰

It is submitted that the alleged erosion of medical standards in prenatal medical care is grossly overstated by those who fear that wrongful birth prohibitions will allow doctors practicing in the areas of "birth and conception . . . [to] do all the malpractice . . . [they] want."⁵¹

As stated above, physicians are liable for any negligent treatment or misdiagnosis of a treatable condition that gives rise to an in utero injury. As the state of prenatal medical care advances, a wide variety of maladies may be treated or cured in utero by a physician.⁵² Under the Freind

44. *Mason*, 499 Pa. at 487, 453 A.2d at 976. The *Mason* court stated: "In light of this Commonwealth's public policy, which recognizes importance of the family to society, we conclude that the benefits of joy, companionship, and affection which a normal, healthy child can provide must be deemed as a matter of law to outweigh the costs of raising that child." *Id.*

45. For a discussion of damages awarded under the *Mason* decision, see *supra* note 19 and accompanying text.

46. See LEGISLATIVE JOURNAL-HOUSE, *supra* note 1, at 308-09 (statement by Representative Freind that in utero tort claims are unaffected).

47. *Id.*

48. 42 PA. CONS. STAT. ANN. § 8306 (Purdon Supp. 1989).

49. See, e.g., Bell, *Legislative Intrusions Into the Common Law of Medical Malpractice: Thoughts About the Deterrent Effect of Tort Liability*, 35 SYRACUSE L. REV. 939, 965-70 (1984) (deterrence of malpractice demonstrated by increased use of certain medical procedures in New York following recognition of wrongful birth and wrongful life claims).

50. See Note, *Wrongful Birth Actions*, *supra* note 2, at 2023.

51. LEGISLATIVE JOURNAL-SENATE, *supra* note 4, at 1964.

52. Potentially treatable disorders include fetal hydrops incident to Rh incompatibility, congenital adrenal hyperplasia, certain types of cardiac arrhyth-

Amendment, a physician who negligently fails to conduct tests designed to reveal such maladies is liable for injuries which result from the failure to discover. Ultrasound and amniocentesis, two typical prenatal testing procedures, can reveal a broad range of disorders, both treatable and untreatable.⁵³

Under the Freind Amendment, any physician with knowledge of a *treatable* disorder is fully liable under ordinary tort principles. However, even if the disorder is *untreatable*, although no private cause of action may exist against the physician for failing to reveal this information, the parent can go before the State Board of Medical Education and Licensure or the State Board of Osteopathic Examiners for the enforcement of a wide range of disciplinary sanctions, including revocation of the physician's license.⁵⁴ These sanctions may be imposed not only for intentional misrepresentation under the express terms of the Freind Amendment, but also for any "immoral or unprofession conduct" failing to conform to "a quality standard of the profession" or for "provid[ing] a medical service beneath the accepted standard of care."⁵⁵

Thus, there should be no marked change in the deterrence of tortious conduct of physicians performing prenatal diagnosis and treatment of in utero ailments. In utero tort claims for misdiagnosis and mistreatment are still available. Moreover, in cases involving negligently conducted abortions, the standard of due care in a traditional negligence action is still enforceable by the state licensing board, even though no private cause of action exists.

C. *Constitutional Implications of the Freind Amendment Involving the Right of Privacy Under the Fourteenth Amendment*

Critics charge that statutes prohibiting wrongful birth actions deny women due process rights of privacy under the fourteenth amendment by infringing upon the right to decide whether to terminate a preg-

mias, fetal hydronephrosis, congenital hydrocephalus and diaphragmatic hernia. For a collection of articles discussing new developments in treating some disorders, see 29 CLINICAL OBSTETRICS & GYNECOLOGY 481-612 (1986) (Joseph D. Schulman, guest editor of issue devoted to fetal therapy).

53. See *id.*

54. For a discussion of disciplinary sanctions imposed on health care practitioners for intentional misrepresentation, see *supra* note 30 and accompanying text.

55. PA. STAT. ANN. tit. 63, § 422.41(8) (Purdon Supp. 1989). The Freind Amendment prevents a physician charged before a professional licensing body with intentional misrepresentation from asserting the amendment as a defense. See 42 PA. CONS. STAT. ANN. § 8305(a) (Purdon Supp. 1989). This provision should not be interpreted as a limitation on a licensing board's authority to discipline its licensees for any conduct over which the board is given jurisdiction in its own relevant legislation. While such an interpretation is possible taking a strict approach to construction of the statutory language, it is submitted that this would be an unreasonable construction in light of the fact that the Freind Amendment's clear purpose is to affect only private rights of action.

nancy.⁵⁶ They contend that statutes such as the Freind Amendment constitute state action under *Reitman v. Mulkey*⁵⁷ because state action need not directly affect a fundamental right but may become so significantly involved with a private action as to carry "the imprint of the state."⁵⁸ They further argue that this state action unduly burdens a woman's right to decide whether to bear a child by curtailing the free flow of all relevant information necessary to make an informed decision.⁵⁹

In *Reitman*, a voter-approved referendum amending the California Constitution allowed a home owner to sell his home "to such person or persons as he, in his absolute discretion, chooses."⁶⁰ The *Reitman* Court held that while the state was permitted "a neutral position with respect to private racial discriminations"⁶¹ under the Constitution, if it became significantly involved so as to establish a "right to discriminate," state action could be found for purposes of the fourteenth amendment.⁶²

It is submitted that the *Reitman* analysis for determining whether state action exists is wholly inapposite to a constitutional analysis of the Freind Amendment. The Freind Amendment does not encourage intentional infringement of a fundamental right in the way that the statute in *Reitman* encouraged discriminatory housing practices. Absence of a tort action for wrongful birth does not encourage a physician to fail to report abnormalities that might lead to an abortion decision, because intentional misrepresentation by a physician regarding the health of a fetus may result in the revocation of the physician's license. Further, the Freind Amendment does not directly regulate conduct or in any way impose the state in the doctor-patient relationship.⁶³ It is well estab-

56. For an excellent exposition of arguments challenging the constitutionality of anti-wrongful birth statutes, see Note, *Wrongful Birth Actions*, *supra* note 2, at 2023-27.

57. 387 U.S. 369 (1967).

58. See *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 19 (Minn. 1986) (Amdahl, J., dissenting). In *Hickman*, the first jurisdiction to test the constitutionality of a wrongful birth prohibition, the Minnesota Supreme Court upheld the constitutionality of the Minnesota anti-wrongful birth statute. *Id.* at 11. The *Hickman* court found no *direct* state action affecting a fundamental right. Any possible effect on a woman's right to decide whether to bear a child occurred by reason of *private* and not state action. *Id.* at 13. Thus, the court held that the fourteenth amendment due process analysis of infringement of a fundamental right did not apply. *Id.*

59. See *id.* at 19 (Amdahl, J., dissenting) (statute prohibiting wrongful birth actions directly infringes *informed* decision making process under *Roe v. Wade*, 410 U.S. 113 (1973)).

60. *Reitman*, 387 U.S. at 370.

61. *Id.* at 374-75 (adopting lower court's analysis).

62. *Id.* at 381.

63. See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 762 (1986) (state requirement that certain printed information be recited to woman before performance of abortion wedged state's message discouraging abortions into privacy of informed consent dialogue between woman and physician).

lished that the fourteenth amendment “erects no shield against merely private conduct, however discriminatory or wrongful.”⁶⁴

Assuming that the Freind Amendment constitutes state action, critics contend that this purported state action denies women due process rights of privacy under the fourteenth amendment pursuant to *City of Akron v. Akron Center for Reproductive Health, Inc.*⁶⁵ by unduly burdening the right to decide whether to bear a child. By removing the tort liability for wrongful birth, critics argue that the statute will restrict the flow of “information necessary to make informed procreative decisions” as physicians either intentionally or negligently fail to disclose information influencing a woman’s decision to terminate her pregnancy.⁶⁶

In *City of Akron*, the Court invalidated a city ordinance requiring a doctor to recite a litany of “facts” including a statement averring “that the unborn child is a human life from the moment of conception” and to describe in detail “the anatomical and physiological characteristics of the . . . unborn child” before obtaining a woman’s valid informed consent.⁶⁷ The Court held this provision to be unconstitutional state action since it was “designed not to inform the woman’s consent but rather to persuade her to withhold it altogether.”⁶⁸ Further, the “unborn child” language in the ordinance was inconsistent with *Roe v. Wade*.⁶⁹ According to the *City of Akron* Court, *Roe v. Wade* prohibits a state from justifying its regulation of abortion by adopting a theory of when life begins.⁷⁰ The ordinance also intruded upon the discretion of a physician in treating his pregnant patients by putting him in an “undesired and uncomfortable straightjacket.”⁷¹ The Court concluded that the statute “placed ‘obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision.’ ”⁷²

It is submitted that the Freind Amendment is easily distinguishable from the ordinance in *City of Akron*. First, *City of Akron* involved state action in the form of a city ordinance that forced a doctor to recite certain “facts” to the woman before medical treatment could be given.⁷³ The Freind Amendment does not regulate in any way the doctor-patient relationship. The Freind Amendment allows free and open discourse

64. *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)).

65. 462 U.S. 416 (1983).

66. Note, *Wrongful Birth Actions*, *supra* note 2, at 2022.

67. *City of Akron*, 462 U.S. at 423 n.5.

68. *Id.* at 444.

69. 410 U.S. 113 (1973).

70. *City of Akron*, 462 U.S. at 444.

71. *Id.* at 445 (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 67 n.8 (1976)).

72. *Id.* (quoting *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977) (brackets in original)).

73. For a discussion of the definition of state action, see *supra* notes 57-64 and accompanying text.

between the doctor and the patient of all relevant factors influencing the decision to abort. Furthermore, under the Freind Amendment, women are still protected from intentional misrepresentation by physicians. This protection shields women from coercion or manipulation resulting in "involuntary" decisions to bear deformed children. Thus, the decision-making process regarding procreative decisions is free from coercion by the state or any deliberate manipulation by another party. Moreover, any decline in the quality of prenatal detection of untreatable deformities caused by the Freind Amendment only indirectly influences a woman's decision.

D. *Furtherance of Legitimate State Policy*

States are afforded broad discretion in deciding whether to extend tort principles to new causes of action and to create immunities designed to further legitimate state policies.⁷⁴ Reigning in skyrocketing medical costs and promoting childbirth are two policies furthered by the Freind Amendment.⁷⁵

The extension of tort law principles to new causes of action is dictated, in large part, by policy considerations.⁷⁶ Policy considerations determine what types of "injuries" should be compensable.⁷⁷

The stated policy of Pennsylvania favors childbirth over abortion.⁷⁸ Prior to the Freind Amendment, a wrongful birth plaintiff had to prove that but for the act or omission of the defendant, a child "would" or "should" have been aborted. In order to prove that a deformed child "would" have been aborted, the aggrieved mother had to demonstrate that she actually would have aborted the child had she known of the deformity. Thus, under prior law there was a paradoxical result in the case of a mother who would not have had an abortion regardless of a deformity, because she would have been denied recovery even though the state policy favoring childbirth had been furthered.⁷⁹ All that the Pennsylvania General Assembly has done is to declare that a deformed

74. See *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 15 (Minn. 1986) (Simonett, J., concurring) ("application of tort rules to create new tort liability depends on the social, cultural, and religious concerns of the people, concerns which a legislature under our system of government is especially designed to reflect").

75. See Bell, *supra* note 49, at 939-40 (discussing insurance crisis in New York).

76. For a discussion of the policy reasons underlying the *Speck* decision, which recognized a wrongful birth cause of action, see *supra* notes 13-15 and accompanying text. For a discussion of Justice Nix's criticism of the *Speck* court for "judicially legislating" a new cause of action, see *supra* note 13.

77. See *Hickman*, 396 N.W.2d at 15 (Simonett, J., concurring).

78. See PA. STAT. ANN. tit. 62, § 453 (Purdon Supp. 1989) (based on policy favoring childbirth over abortion, no public welfare funds shall be expended for performance of abortion).

79. See *Hickman*, 396 N.W.2d at 15.

child should never be aborted, leaving the actual decision whether to abort up to the mother.

It is submitted that by deciding that the birth of a child is not a legally cognizable injury, the Pennsylvania General Assembly has avoided the paradox of "punishing" a woman who decides to carry a fetus to term regardless of its health, and has acted well within its sovereign prerogative.

V. CONCLUSION

The Freind Amendment obviously impacts prenatal tort liability in Pennsylvania by prohibiting wrongful birth and wrongful life tort actions. However, it will not appreciably diminish the incentive to provide quality prenatal health care because wrongful conception and in utero injury claims are still available. Moreover, the failure of a physician to reveal information about an untreatable disease to a parent, which prior to the Freind Amendment would have given rise to a claim for wrongful birth, can be redressed by the state agencies which regulate the licensure and practice of physicians.

The Freind Amendment should be upheld as constitutional for two reasons. First, it does not constitute state action under the fourteenth amendment. Second, the free flow of information enabling a woman to make an informed decision on whether to terminate a pregnancy is protected by existing disciplinary measures.

The refusal of the General Assembly to recognize claims for wrongful birth and wrongful life furthers legitimate state policies promoting childbirth over abortion while limiting excessive medical malpractice costs. Thus, the Freind Amendment serves legitimate state purposes and is within the power of the Pennsylvania General Assembly to promote the general welfare of its citizens.

John Lyons