

2003 DRAFTING REQUEST

Assembly Substitute Amendment (ASA-AB372)

Received: 09/09/2003

Received By: mdsida

Wanted: As time permits

Identical to LRB:

For: Mark Gundrum (608) 267-5158

By/Representing: Mary Klaver

This file may be shown to any legislator: NO

Drafter: mdsida

May Contact:

Addl. Drafters:

Subject: Health - abortion

Extra Copies: dak

Submit via email: YES

Requester's email: Rep.Gundrum@legis.state.wi.us

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Determination of live birth

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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FE Sent For:

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/?	mdsida	1 cjs 9/9/03	9/9/03	9/9/03			

FE Sent For:

<END>

Dsida, Michael

From: Mary Klaver [mklaver@wrtl.org]
Sent: Monday, September 08, 2003 4:03 PM
To: Mike Dsida
Cc: Debora Kennedy; Mark Gundrum
Subject: Draft request for AB 372; executive session on 9/11

Importance: High



Born Alive -
egCoun memo - co.

Mike,

We are contacting you because Debora Kennedy is out until 9/17 and you are the co-drafter with her on AB 372, the Born Alive Infant Protection Act.

Rep. Gundrum has scheduled an executive session on AB 372 for this Thursday, 9/11. He has authorized me to request a substitute amendment to AB 372. He would like to eliminate the definition for "born alive" and just rely on the definition of "live birth".

Although we believe the definition of "born alive" is accurate, the phrase "taking a breath" has caused some unexpected opposition. Please see page 4 of the attached Legislative Council memo from Don Dyke for more details on DHFS's opposition.

The reason there is a separate definition for "born alive" is because that term is used in the statutes as well as "live birth" and Debora felt strongly that we needed to define both terms. An alternative approach was suggested in the original request for this draft (sent by fax on 4/7/03 to Debora Kennedy). The original proposal dealt with the born alive concept by defining "live birth" and creating a separate subsection stating, "An individual who undergoes a live birth is born alive." That approach eliminated the need for a separate definition of "born alive".

Rep. Gundrum would like the substitute amendment to track the original draft request. It appears to me that the new s. 990.001 (17) on page 2, lines 1 to 10, could be amended to insert "An individual who undergoes a live birth is born alive." as subsection (a), and then renumber the existing (a) and (b) as (b) and (c).

Please call me so we can discuss the best way to draft this. Thanks.

Mary A. Klaver
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mklaver@wrtl.org



WISCONSIN LEGISLATIVE COUNCIL

Terry C. Anderson, Director
Laura D. Rose, Deputy Director

TO: REPRESENTATIVE TONY STASKUNAS

FROM: Don Dyke, Senior Staff Attorney

RE: Comparison of 2003 Assembly Bill 372, Defining "Live Birth" and "Born Alive," With the Born-Alive Infants Protection Act of 2002

DATE: September 4, 2003

This memorandum compares 2003 Assembly Bill 372 with the federal Born-Alive Infants Protection Act of 2002, enacted as P.L. 107-207 and codified as 1 U.S. Code s. 8 (attached).

THE FEDERAL LAW

"Person" and Similar Terms Include Infants Born Alive

The federal law provides that for purposes of determining the meaning of any congressional act or of any federal administrative ruling, regulation, or interpretation, the words "person," "human being," "child," and "individual," "shall include every infant member of the species homo sapiens who is born alive at any stage of development." [1 U.S.C. s. 8 (a).]

Definition of "Born Alive"

Under the federal law, "born alive," with respect to a member of the species homo sapiens, means "the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurred as a result of natural or induced labor, cesarean section, or induced abortion. [1 U.S.C. s. 8 (b).]

Effect on Status of Person Before Being Born Alive

The federal law provides that it may not be "construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being 'born alive' as defined in ... [the federal law]." [1 U.S.C. s. 8 (c).]

ASSEMBLY BILL 372

Definitions of "Born Alive" and "Live Birth"

The bill adds definitions of "born alive" and "live birth" to s. 990.01, Stats., which, in its introductory clause, provides: "In the construction of Wisconsin laws the words and phrases which follow shall be construed as indicated unless such construction would produce a result inconsistent with the manifest intent of the legislature:".

Under the bill, "born alive" means, "with respect to a human being, completely expelled or extracted from his or her mother, at any stage of development, and, after the expulsion or extraction, taking a breath or having a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, a cesarean section, or an abortion"

The bill defines "live birth" as "the complete expulsion or extraction from his or her mother, of a human being, at any stage of development, who, after the expulsion or extraction, breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, a cesarean section, or an abortion...."

Construction of Statutes or Rules Referring to Live Birth

The bill adds a new provision to s. 990.001, Stats., which in its introductory clause provides: "In construing Wisconsin laws the following rules shall be observed unless construction in accordance with a rule would produce a result inconsistent with the manifest intent of the legislature:".

The bill provides that if a statute or rule refers to a live birth or to the circumstances in which an individual is born alive, "the statute or rule shall be construed so that whoever is born alive or undergoes a live birth as the result of an abortion ... has the same legal status and legal rights as a human being at any point after the human being is born alive or undergoes a live birth as the result of natural or induced labor or a cesarean section."

Effect on Status Before Live Birth

The bill provides that its rule of construction (described above), applicable when a statute refers to a live birth or to the circumstances in which an individual is born alive, "may not be construed to affirm, deny, expand, or contract a legal status or legal right that is applicable to a human being at any point before the human being is born alive or undergoes a live birth."

DISCUSSION

While it appears that Assembly Bill 372 is patterned after the federal law, there are differences in the way in which the bill and federal law are drafted. The style, format, and statutory placement of the provisions in Assembly Bill 372 account for some of the differences and reflect both the structure of the

Wisconsin statutes and the drafting style utilized by the Legislative Reference Bureau (LRB). Other differences are noted in the discussion below.

SECTION 1 of the Bill

That part of SEC. 1 of Assembly Bill 372 establishing a rule of construction, when a statute or rule refers to a live birth or to the circumstances in which an individual is born alive, is not included in the federal law.

It is possible that proponents of Assembly Bill 372 view the rule of construction as reflecting the basic purpose of the federal law and that the proposed Wisconsin version is a better drafted version of the federal law in that regard.¹ You may wish to direct questions concerning the inclusion of the rule of construction in the bill to persons directly involved in drafting the bill.

The provision in SECTION 1 of the bill prohibiting the bill's rule of construction from being construed to affirm, deny, expand, or contract a legal status or legal right that is applicable to a human being at any point before the human being is born alive or undergoes a live birth appears to track the parallel federal language in 1 U.S.C. s. 8 (c).

SECTIONS 2 and 3 of the Bill

In addition to defining "born alive," as the federal law does, the bill also defines "live birth." Presumably, this reflects the use in the Wisconsin statutes of the term "live birth," in addition to the term "born alive."² The bill's definitions generally track the definition in the federal law of "born alive" with allowances for differences in drafting style and format. However, it was noted at the public hearing on

¹ For example, the report of the House Judiciary Committee on the legislation that became the federal Born-Alive Infants Protection Act of 2002 describes the purpose of the legislation as follows:

- (1) to repudiate the flawed notion that a child's entitlement to the protections of the law is dependent upon whether that child's mother or others want him or her;
- (2) to repudiate the flawed notion that the right to an abortion means the right to a dead baby, regardless of where the killing takes place;
- (3) to affirm that every child who is born alive—whether as a result of induced abortion, natural labor, or caesarean section—bears an intrinsic dignity as a human being which is not dependent upon the desires, interests, or convenience of any other person, and is entitled to receive the full protections of the law; and
- (4) to establish firmly that, for purposes of Federal law, the term "person" includes an infant who is completely expelled or extracted from his or her mother and who is alive, regardless of whether or not the baby's development is believed to be, or is in fact, sufficient to permit long-term survival, and regardless of whether the baby survived an abortion.

[House Report 107-186, August 2, 2001, 2002 U.S. Code Cong. and Adm. News, 620 at 625, 626.]

² Reference to "live birth" appears in ss. 40.98 (1) (ag), 48.375 (2) (a), 49.19 (11s) (b) 3., 69.01 (13m), 253.10 (2) (a), and 939.75 (2) (a), Stats.; reference to "born alive" appears in ss. 20.927 (1g), 700.09, 854.21 (5), 939.22 (16), and 940.04 (6), Stats.

Assembly Bill 372 that the use of “taking a breath” in the bill’s definition of “born alive” differs from the use of “breathes” in the federal definition. (Note that the bill’s definition of “live birth” uses “breathes.”) It is the opinion of the LRB drafting attorney that use of “taking a breath” in the definition of “born alive” and of “breathes” in the definition of “live birth” is for grammatical purposes and the terms are capable of being construed to have the same meaning.

The federal law does not define “breathes.” Among the definitions of “breathe” in *Webster’s Third New International Dictionary* is “to draw air into and expel it out of the lungs.” Under this definition, “taking a breath” is arguably consistent with the use of the term “breathes.” In addition, it should be noted that, unless inconsistent with the manifest intent of the Legislature, it is a rule of construction for terms used in Wisconsin statutes that “the singular includes the plural, and the plural includes the singular.” [s. 990.001 (1), Stats.]

Testimony by the Department of Health and Family Services (DHFS) at the public hearing on Assembly Bill 372 indicated that use of “taking a breath” is not consistent with current administrative code concepts of breathing for purposes of DHFS vital records reporting. The administrative code defines “stillbirth” as “a fetus born dead, irrespective of the duration of pregnancy, with death indicated by the fact that after expulsion or extraction from the woman, the fetus does not breathe or show any other evidence of life such as beating of the heart, pulsation of the umbilical cord or definite movement of the voluntary muscles. [s. HFS 135.02 (21), Wis. Adm. Code.] The DHFS supplied material supporting DHFS’s contention that, in the context of vital statistics, “breathing” for determining a live birth is to be diagnosed as “true respiration” and does not include “fleeting respiratory efforts or gasps.” However, this does not directly relate to the issue whether use of “taking a breath” in Assembly Bill 372 differs from use of “breathes” in the Born-Alive Infants Protection Act of 2002.

Whether “taking a breath” is consistent with the term “breathes” for purposes of determining whether a live birth has occurred under Assembly Bill 372 may depend on the understanding of those terms by the medical community. For example, does the use of “taking a breath,” rather than “breathes” or a variation of that term, change the standard for whether an assessment should be made to determine if medical treatment is indicated. You may wish to consult the Wisconsin Medical Society in this regard.

If you have any questions, please contact me directly at the Legislative Council staff offices.

DD:tlu:wu:rv;wu

Attachment

Stays

Tues 5PM

2003 ASSEMBLY BILL 372

SAV

May 29, 2003 - Introduced by Representatives GUNDRUM, VUKMIR, WEBER, KRAWCZYK, A. WILLIAMS, TOWNS, McCORMICK, ALBERS, LADWIG, NISCHKE, JESKEWITZ, HUNDERTMARK, STASKUNAS, GROTHMAN, VAN ROY, J. FITZGERALD, AINSWORTH, HINES, PETROWSKI, NASS, FREESE, LEMAHIEU, GOTTLIEB, KREIBICH, HUEBSCH, VRAKAS, OTT, J. WOOD, PETTIS, KESTELL, SUDER, HAHN, M. LEHMAN, GUNDERSON, FRISKE, LOEFFELHOLZ, LOTHIAN, BIES and JENSEN, cosponsored by Senators LAZICH, STEPP, ROESSLER, HARSDFORF, BRESKE, ZIEN, SCHULTZ, KEDZIE, S. FITZGERALD, KANAVAS, LEIBHAM, A. LASEE, REYNOLDS, WELCH and BROWN. Referred to Committee on Judiciary.

substitute amendment

Reyer cat

1 AN ACT to create 990.001 (17), 990.01 (4m) and 990.01 (19j) of the statutes;
 2 relating to: live birth or the circumstance of being born alive.

Analysis by the Legislative Reference Bureau

Under current law, the terms "live birth" and "born alive" are not defined ^{but} are used in various statutes, including those relating to abortion and disposition of property to heirs at death.

This ~~bill~~ ^{bill} defines "born alive" and "live birth" for application to all of the statutes. Further, the ~~bill~~ ^{bill} requires statutory construction such that one who is born alive or who undergoes a live birth as the result of an abortion has the same legal status and legal rights as a human being at any point after the human being is born alive or undergoes a live birth as the result of natural or induced labor or a cesarean section. Lastly, the ~~bill~~ ^{bill} prohibits construction of this requirement to affirm, deny, expand, or contract a legal status or legal right that is applicable to a human being at any point before the human being is born alive or undergoes a live birth.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

3 SECTION 1. 990.001 (17) of the statutes is created to read:

: 1) an individual who has undergone a live birth is considered to have been born alive; and 2)

that all statutes be construed so

these rules from being construed

of construction

ASSEMBLY BILL 372

An individual who undergoes a live birth is born alive.

SECTION 1

¶ (b)

1 990.001 (17) LIVE BIRTH OR CIRCUMSTANCE OF BEING BORN ALIVE. (a) If a statute
2 or rule refers to a live birth or to the circumstance in which an individual is born alive,
3 the statute or rule shall be construed so that whoever is born alive or undergoes a
4 live birth as the result of an abortion, as defined in s. 253.10 (2) (a), has the same legal
5 status and legal rights as a human being at any point after the human being is born
6 alive or undergoes a live birth as the result of natural or induced labor or a cesarean
7 section.

8 (b) Paragraph (a) ^s and (b) may not be construed to affirm, deny, expand, or contract a
9 legal status or legal right that is applicable to a human being at any point before the
10 human being is born alive or undergoes a live birth.

SECTION 2. 990.01 (4m) of the statutes is created to read:

~~990.01 (4m) BORN ALIVE. "Born alive" means, with respect to a human being, completely expelled or extracted from his or her mother, at any stage of development, and, after the expulsion or extraction, taking a breath or having a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, a cesarean section, or an abortion, as defined in s. 253.10 (2) (a).~~

SECTION 3. 990.01 (19j) of the statutes is created to read:

990.01 (19j) LIVE BIRTH. "Live birth" means the complete expulsion or extraction from his or her mother, of a human being, at any stage of development, who, after the expulsion or extraction, breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or

ASSEMBLY BILL 372

1 extraction occurs as a result of natural or induced labor, a cesarean section, or an
2 abortion, as defined in s. 253.10 (2) (a).

3 (END)