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BILL ANALYSIS

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House Bill 4777 (Substitute H-1 as reported without amendment)

Sponsor: Representative William Van Regenmorter

House Committee: Judiciary

Senate Committee: Judiciary

Date Completed: 11-28-05

### **RATIONALE**

It appears that the courts in Michigan will not allow a wrongful death action brought on behalf of an embryo or a nonviable fetus (a fetus that would not be able to survive outside the womb). Michigan's wrongful death statute is found in Section 2922 of the Revised Judicature Act (RJA). This section allows an action for damages against a person who caused the death of an individual, when the deceased individual would have had a claim if he or she had survived. The action must be brought by the personal representative of the decedent. After the Michigan Supreme Court in 1997 rejected a claim for the wrongful death of a nonviable fetus, Public Act 211 of 1998 added Section 2922a to the RJA. Under this section, a person who commits a wrongful or negligent act against a pregnant woman is liable for damages if the act results in the woman's miscarriage or stillbirth, or physical injury to or the death of the embryo or fetus.

Despite the enactment of Section 2922a, a 2003 opinion of the Michigan Court of Appeals did not mention that section in a case that involved the miscarriage of an 18-week-old fetus caused by alleged medical malpractice. In *McClain v The University of Michigan Board of Regents*, the Court stated, "...under Michigan law, an action for wrongful death, MCL 600.2922, cannot be brought on behalf of a nonviable fetus, because a nonviable fetus is not a 'person' within the meaning of the wrongful-death act" (256 Mich App 492). Apparently, this decision has contributed to uncertainty among the circuit courts and within the legal community as to whether Section 2922a allows actions on behalf of an embryo or nonviable fetus. According to a June 2004

article in the *Michigan Bar Journal*, Section 2922a is not classified as a wrongful death act by various authorities, including Michigan Civil Jurisprudence ("Prenatal Torts in Michigan", by Marks and Marks). Also, although Section 2922a establishes civil liability, the language does not specify that the estate of the embryo or fetus may bring an action or otherwise indicate who the plaintiff may be.

To address this situation, it has been suggested that the wrongful death statute, Section 2922 of the RJA, should encompass the death of an embryo or fetus caused by the negligent or wrongful conduct of another.

### **CONTENT**

The bill would amend the Revised Judicature Act to allow a wrongful death action to be based on the death of an embryo or fetus caused by a person who committed a wrongful or negligent act against a pregnant woman. The bill also would require that a wrongful death action be brought by the personal representative of the deceased, rather than the deceased "person".

Section 2922 of the RJA specifies that, whenever the death of a person or injuries resulting in death are caused by wrongful act, neglect, or fault of another, which would have entitled the injured party to maintain an action and recover damages had death not ensued, the person or corporation that would have been liable if the individual had not died is liable in an action for damages notwithstanding the death. The bill would refer to the death of a person, injuries

resulting in death, "or death as described in Section 2922a".

In addition, the RJA requires that a wrongful death action be brought by, and in the name of, the personal representative of the estate of the "deceased person". The bill would delete "person" from that provision.

MCL 600.2922

## **BACKGROUND**

Public Acts 211 and 238 of 1998 amended the Revised Judicature Act and the Michigan Penal Code, respectively, to establish civil and criminal liability for conduct against a pregnant woman that caused miscarriage or stillbirth, or injured the embryo or fetus. Before these laws were enacted, several decisions of the Michigan Supreme Court and Court of Appeals demonstrated the state of the law concerning the death of or injury to a fetus. As a rule, the courts based their decisions on whether the fetus was viable or "born alive".

In 1971, the Michigan Supreme Court allowed a common law negligence action brought on behalf of a surviving child for injuries suffered during the fourth month of pregnancy (*Womack v Buckhorn*, 384 Mich 718). The same year, the Supreme Court allowed a wrongful death claim involving the death of an eight-month-old fetus, reasoning that the decedent would have had an action for damages if he had survived (*O'Neill v Morse*, 385 Mich 130). In 1975, the Michigan Court of Appeals, finding that the *O'Neill* decision applied to a *viable* fetus, denied a wrongful death claim brought on behalf of a three-month-old fetus (*Toth v Goree*, 65 Mich App 296). Citing that decision, the Michigan Supreme Court stated in 1997, "Since at least 1975 it has been held that a non-viable fetus is not a 'person' within the meaning of the Wrongful Death Act (*McDowell v Stubbs*, 455 Mich 853).

In light of these decisions, Public Acts 211 and 238 were enacted to address what was considered a shortfall in the law: the absence of penalties for a person who injures a pregnant woman through negligence, assault, or other misconduct, in a manner that causes her to have a miscarriage or stillbirth, or that injures the embryo or fetus. The provisions enacted in 1998 were subsequently amended after the

Oakland County Circuit Court ruled that a man, who was convicted of killing his pregnant wife, could not be charged with the death of her embryo because his actions did not technically result in either a miscarriage or a stillbirth (because the embryo was not expelled from the woman's body). In response, Public Act 2 of 2001 and Public Act 164 of 2002 amended the Michigan Penal Code and the Revised Judicature Act, respectively, to extend criminal and civil liability to conduct causing the "death" of an embryo or fetus.

## **ARGUMENTS**

*(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)*

### **Supporting Argument**

Despite the enactment of Section 2922a of the RJA, courts in Michigan apparently are not allowing wrongful death actions brought on behalf of an embryo or nonviable fetus. Although the *McClain* case involved a cause of action that arose *after* Section 2922a was enacted, the Court of Appeals entirely omitted any mention of that law, and essentially reiterated previous holdings that a wrongful death action may not be brought on behalf of a nonviable fetus. Although Section 2922a makes it clear that a person is liable for damages if his or her negligence or wrongful conduct causes the death of an embryo or fetus, the *McClain* decision evidently is being cited by defense attorneys to defeat wrongful death actions involving nonviable fetuses. In addition, it appears that Section 2922a simply is not recognized as a wrongful death statute. According to the June 2004 *Michigan Bar Journal* article, West Publishing classifies Section 2922a under "Assault and Battery"; in Michigan Civil Jurisprudence, the act is classified as "Damages to Pregnant Women"; and in Michigan's Non-Standard Jury Instructions, Civil, the act is in the "Stalking" chapter and is classified as a wrongful act against a pregnant woman. As the article points out, "These interpretations...treat the statute (not to mention its explicit legislative history) like a nullity...".

This situation might result from a lack of clarity in the law itself. Although Section 2922a is codified beside the wrongful death provisions of Section 2922, the language added in 1998 does not spell out that an

action may be brought on behalf of the embryo or fetus, or otherwise indicate who may bring an action for damages. The section states, "A person who commits a wrongful or negligent act against a pregnant individual is liable for damages...", but it does not say liable to whom.

Under the bill, the death of an embryo or fetus as described in Section 2922a would be treated as any other death for purposes of a wrongful death action. Since the courts evidently do not recognize a wrongful death action on behalf of a nonviable fetus, the legislation would do so in statute. An action could be brought by the estate of the embryo or fetus that died. Because an embryo or fetus is not considered a complete person under the law, the bill would require a wrongful death action to be brought by the personal representative of the "deceased", rather than the "deceased person".

### **Supporting Argument**

Allowing a wrongful death action on behalf of a nonviable fetus would be consistent with public policy in Michigan. In 2002, the Michigan Court of Appeals decided a criminal case in which a woman who evidently was in the early stages of pregnancy killed her boyfriend after he hit her twice in the stomach (*People v Kurr*, 253 Mich App 317). The Court held that the "defense of others" concept should extend to the protection of a fetus, viable or nonviable. The Court based its decision on the "fetal protection act", which sets forth criminal penalties for harming or causing the death of a fetus or embryo during an intentional assault on a pregnant woman (sections of the Penal Code added by Public Act 238 of 1998 and amended by Public Act 2 of 2001). According to the Court, "The plain language of these provisions shows the Legislature's conclusion that fetuses are worthy of protection as living entities as a matter of public policy...Moreover, in enacting the fetal protection act, the Legislature did not distinguish between fetuses that are viable...and those that are nonviable."

Legislative Analyst: Suzanne Lowe

### **FISCAL IMPACT**

The fiscal impact of this legislation is indeterminate. To the extent that the bill would pave the way for an increase in civil

suits, there could be an increase in costs to the courts, but it is difficult to predict. There are no data on how many lawsuits of this type are filed.

Fiscal Analyst: Stephanie Yu

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.