

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Appropriations Committee on Criminal and Civil Justice

BILL: SB 164

INTRODUCER: Senator Grall

SUBJECT: Civil Liability for the Wrongful Death of an Unborn Child

DATE: January 27, 2026

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Bond</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2. <u>Kolich</u>	<u>Harkness</u>	<u>ACJ</u>	Favorable
3. _____	_____	<u>RC</u>	_____

I. Summary:

SB 164 expands Florida's Wrongful Death Act to allow the parents of an unborn child to recover damages pursuant to the Act from a person who committed a negligent act that caused the death of the unborn child.

Under current law, damages for the death of an unborn child are not recoverable under the Wrongful Death Act. However, damages may be recoverable for the death of an unborn child who dies at 20 weeks or later into a pregnancy under the common law wrongful stillbirth cause of action. In a wrongful stillbirth action, the damages parents may recover are limited to mental pain and anguish and medical expenses incident to the pregnancy. The mother suffering a loss of an unborn child at any point in the pregnancy that is caused by negligence may sue for general common law personal injury damages if she sustained physical injuries to herself, a requirement of the impact rule.

This bill defines "unborn child" as a human child at any gestational age and provides that the death of an unborn child at any stage of the pregnancy gives rise to a statutory wrongful death action. The effect of these changes is to expand the types of damages recoverable by the parents of an unborn child whose death was caused by a negligent act. Damages recoverable by the parents of a minor child under the Wrongful Death Act include the value of lost support and services, mental pain and suffering from the date of injury, and medical and funeral expenses.

The bill also provides that the mother cannot be sued in a wrongful death action for the death of her unborn child. Similarly, a health care provider providing lawful medical care pursuant with the mother's consent may not be sued in a wrongful death action related to the death of the unborn child, provided that the medical care was provided in compliance with the applicable standard of care. The bill specifies that lawful medical care includes assisted reproductive technologies.

The bill does not impact state revenues or expenditures. See Section V., Fiscal Impact Statement.

The bill is effective July 1, 2026.

II. Present Situation:

Most of the state's tort law is derived from the common law. At common law, there was no right to recover for the wrongful death of another person caused by negligence.¹ This was the law at statehood, but over time the Legislature authorized recoveries for wrongful death and expanded the types of damages recoverable and the classes of survivors entitled to recover. "Because wrongful death actions did not exist at common law, all claims for wrongful death are created and limited by the Florida Wrongful Death Act."²

History of Wrongful Death Actions in Florida

The early versions of the state's wrongful death laws limited the right to recover damages to a surviving spouse, surviving children if there was no surviving spouse, those dependent upon the decedent for support if there was no one belonging to the prior two classes, and finally the executor of the decedent's estate if there was no one belonging to the prior three classes.³ In order to show dependence on the decedent, a claimant had to show that he or she was a minor, physically or mentally disabled, or elderly.⁴ Adults who were mentally and physically capable of providing for themselves could not recover despite having been supported by the decedent.⁵ Any damages recoverable were limited to a form of economic damages.

The wrongful death law was substantially re-written in 1972.⁶ That law created the Florida Wrongful Death Act, which provides the framework for current law. One of the major changes made by this law was to consolidate or merge survival and wrongful death actions.⁷ A survival action is a legal action allowed under the survival statute to continue notwithstanding the plaintiff's death. As merged, the 1972 law allowed the statutory survivors to recover damages for their pain and suffering as a substitute for recoveries for the decedent's pain and suffering under the survival statute.⁸

The type of damages that a survivor is entitled to, under the 1972 law, depends upon the classification of the survivor. The 1972 law allows all survivors to recover the value of lost support and services, a type of economic damages. A surviving spouse may also recover loss of marital companionship and pain and suffering, which are types of noneconomic damages. Minor

¹ *Louisville & Nashville Railroad Co. v. Jones*, 45 Fla. 407, 416 (Fla. 1903).

² *Chinghina v. Racik*, 647 So. 2d 289, 290 (Fla. 4th DCA 1994).

³ *Duval v. Hunt*, 34 Fla. 85 (Fla. 1894) (discussing a wrongful death statute enacted in 1883).

⁴ *Id.* at 101-102.

⁵ The Court interpreted the dependency requirement in the statute as requiring a person to have a genuine inability to support himself or herself based on the view that strong, healthy adults who are capable of earning a livelihood should not be content to "live in idleness upon the fruits of [another's] labor." *Id.* at 101.

⁶ Chapter 72-35, Laws of Fla.

⁷ *Sheffield v. R.J. Reynolds Tobacco Co.*, 329 So. 3d 114, 121 (Fla. 2021).

⁸ *Martin v. United Sec. Services, Inc.*, 314 So. 2d 765, 767 (Fla. 1975).

children, then defined as under age 21⁹ and unmarried, may also recover loss of parental companionship and pain and suffering, both past and future. The parents of a deceased minor child may also recover pain and suffering, both past and future. Any survivor who paid final medical, funeral, and burial expenses of the deceased may recover the value of those expenses. The estate of the decedent may recover lost earnings from date of injury to date of death, plus net accumulations, which is essentially an estimate of the present value of the future estate that would have been available for inheritance.

A 1981 act expanded the definition of “minor children” to include all children of the decedent under age 25, regardless of whether a child is married or dependent.¹⁰ The statutes did not authorize a wrongful death action by a nondependent, adult child for the loss of a parent or an action by a parent for the loss of an adult child.¹¹

In 1990, the Legislature generally expanded the class of survivors entitled to recover damages for pain and suffering in a wrongful death action.¹² As expanded, a decedent’s adult children may recover damages for pain and suffering if there is no surviving spouse. The parents of an adult decedent may also recover damages for pain and suffering if there is no surviving spouse or surviving minor or adult children.¹³

Negligence Actions Related to the Death of an Unborn Child

History of Florida Wrongful Death Law related to Unborn Children

In 1978 the Florida Supreme Court held that an unborn fetus is not a “person” for purposes of Florida’s Wrongful Death Act (Act).¹⁴ Thus, the law was that when a person caused the death of an unborn child at any gestational age, the child’s parents could not recover civil damages under the Act for the death.¹⁵

In 1997 the Florida Supreme Court in *Tanner* reiterated that “there is no cause of action under Florida’s Wrongful Death Act for the death of a stillborn fetus.”¹⁶ The Florida courts to this day do not apply Florida’s Wrongful Death Act to an unborn child at any gestational age.

Florida Common Law on Negligence in the Death of an Unborn Child Beyond 20 Weeks Gestation

While the *Tanner* court refused to apply Florida’s statutory Wrongful Death Act, the Court recognized a common law action for “negligent stillbirth.” The Court emphasized that the damages recoverable in such action are limited to mental pain and anguish and medical expenses

⁹ Florida changed the age of majority from 21 to 18 in the following year, but that act did not change the reference to age 21 in the wrongful death law. Section 743.07, F.S.; chapter 73-21, Laws of Fla.

¹⁰ Chapter 81-183, Laws of Fla.

¹¹ *Mizrahi v. North Miami Medical Center, Ltd.*, 761 So. 2d 1040, 1042 (Fla. 2000).

¹² Chapter 90-14, Laws of Fla.

¹³ *Id.* (amending s. 768.18(3) and (4), F.S.). The adult children were also authorized by the 1990 law to recover noneconomic damages for lost parental companionship, instruction, and guidance.

¹⁴ *Duncan v. Flynn*, 358 So. 2d 178 (Fla. 1978).

¹⁵ *Singleton v. Ranz*, 534 So. 2d 847 (Fla. 5th DCA 1988) (citing *Duncan v. Flynn*, 358 So. 2d 178 (Fla. 1978)).

¹⁶ *Tanner v. Hartog*, 696 So. 2d 705, 706 (Fla. 1997).

incurred incident to the pregnancy, and that such legal action is different from an action under the Wrongful Death Act, as follows:

A suit for negligent stillbirth is a direct common law action by the parents which is different in kind from a wrongful death action. The former is directed toward the death of a fetus while the latter is applicable to the death of a living person. As contrasted to the damages recoverable by parents under the wrongful death statute, the damages recoverable in an action for negligent stillbirth would be limited to mental pain and anguish and medical expenses incurred incident to the pregnancy.¹⁷

Historically, the courts have used the common law terms “stillbirth” and “miscarriage” to determine the common law legal rights and obligations of society regarding a mother, a father, an unborn child, and society in general. The *Tanner* court did not specifically define the term stillbirth but simply used it in context. In general, the common law considers a normal pregnancy to last 40 weeks, a lost pregnancy in the first 20 weeks is characterized as a miscarriage, and a lost pregnancy in the second 20 weeks (and beyond) is characterized as a stillbirth.^{18,19}

Florida Common Law on Negligence in the Death of an Unborn Child in the First 20 Weeks Gestation

The *Tanner* court, in using the term “stillbirth” in naming the common law action for wrongful stillbirth strongly implied that Florida courts do not recognize a specific tort for negligence that causes the death of an unborn child in the first 20 weeks of gestation. The mother can recover from the negligent party her personal losses under general common law tort theories; but this recovery appears in practice to be less than what she would recover if the Wrongful Death Act were applied. It appears that the father, however, may be significantly limited in any common law recovery by the practical realities and limitations resulting from the common law impact rule.²⁰

Other States Laws Regarding the Death of an Unborn Child Resulting from Negligence

Florida remains one of the few states that currently do not recognize a cause of action for the wrongful death of an unborn child.²¹ Forty-three states currently have some form of the cause of action. These statutes generally condition recovery based on the viability²² of the child in question.

¹⁷ *Tanner*, 696 So. 2d at 708-09.

¹⁸ [Centers for Disease Control, About Stillbirth](https://www.cdc.gov/stillbirth/about/index.html), (Aug. 26, 2025) <https://www.cdc.gov/stillbirth/about/index.html>.

¹⁹ MedlinePlus, Miscarriage, <https://medlineplus.gov/ency/article/001488.htm> (last visited Jan, 2026).

²⁰ See, e.g., *Thomas v. OB/GYN Specialists of Palm Beaches, Inc.*, 889 So.2d 971 (Fla. 4th DCA 2004).

²¹ *Stern v. Miller*, 348 So. 2d 303, 307–08 (Fla. 1977); The three other states include Iowa, Maine, and New Jersey. *Dunn v. Rose Way, Inc.*, 333 N.W. 2d 830, 831 (Iowa 1983); *Shaw v. Jendzejec*, 717 A.2d 367, 371 (Me. 1998); *Giardina v. Bennett*, 111 N.J. 412, 421–25 (N.J. 1988).

²² “Viability” is the ability of a developing fetus to survive independent of a pregnant woman’s womb. Elizabeth Chloe Romanis, *Is “viability” viable? Abortion, conceptual confusion and the law in England and Wales and the United States*, 7 J. LAW. BIOSCI. 1 (Jan.-Dec. 2020).

Fifteen states afford a cause of action for the wrongful death of an unborn child at any stage of development.²³ Several of these states, however, provide an exception so that the mother cannot be sued for the wrongful death of her unborn child.²⁴

Three states, including Connecticut,²⁵ Georgia,²⁶ and Mississippi,²⁷ allow a wrongful death action to be brought on behalf of an unborn child if the quickening standard is met, which requires fetal movement to have been detected prior to death.²⁸

Twenty-five states allow a cause of action for the wrongful death of an unborn child under a viability standard, which examines whether an unborn child can exist independently outside of the mother's womb.²⁹ Of these 25 states, one state, Indiana, expressly prohibits a wrongful death action if the death of an unborn child is the result of a lawful abortion.³⁰

Finally, one state, Wyoming, remains undecided as to whether a cause of action for wrongful death exists as to an unborn child.³¹

²³ Alabama (*Hamilton v. Scott*, 97 So. 3d 728 (Ala. 2012)); *Mack v. Carmack*, 79 So. 3d 597 (Ala. 2011)); Alaska (Alaska Stat. Ann. § 09.55.585); Arkansas (Ark. Code Ann. § 15-62-102); Illinois (740 Ill. Comp. Stat. Ann. 180/2.2); Kansas (Kan. Stat. Ann. § 60-1901); Louisiana (Louisiana Civil Code Art. 26); Michigan (Mich. Comp. Laws Ann. § 600.2922a); Missouri (Mo. Ann. Stat. § 1.205); Nebraska (Neb. Rev. Stat. § 30-809); Oklahoma (12 Okl. St. Ann. § 1053, OK ST T. 12 § 1053; *Pino v. United States*, 2008 OK 26, 183 P.3d 1001); South Dakota (S.D. Codified Laws §21-5-1); Texas (Tex. Civ. Prac. & Rem. Code § 71.002); Utah (*Carranza v. United States*, 2011 UT 80, 267 P.3d 912); Virginia (Va. Code. Ann. §§8.01-50); West Virginia (*Farley v. Sarti*, 195 W. Va. 671, 681 (1995)).

²⁴ See Kan. Stat. Ann. § 60-1901; Tex. Civ. Prac. & Rem. Code § 71.003.

²⁵ *Elderkin v. Mahoney*, No. CV156056191, 2017 WL 5178583 (Conn. Super. Ct. Sept. 28, 2017).

²⁶ *Porter v. Lassiter*, 91 Ga. App. 712 (1955); *Shirley v. Bacon*, 154 Ga. App. 203 (1980).

²⁷ Miss. Code Ann. § 11-7-13 (2018).

²⁸ Romanis, *supra*, note 20.

²⁹ Arizona (*Summerfield v. Superior Ct. in and for Maricopa County*, 144 Ariz. 467 (Ariz. 1985)); Colorado (*Gonzales v. Mascarenas*, 190 P. 3d 826 (Colo. App. 2008)); Delaware (*Worgan v. Greggo & Ferrera, Inc.*, 50 Del. 258 (Del. Super. Ct. 1956)); Hawaii (*Hawaii Castro v. Melchor*, 137 Hawai'i 179 (Haw. Ct. App. 2016)); Idaho (*Volk v. Baldazo*, 103 Idaho 570 (Idaho 1982)); Indiana (Ind. Code Ann. §34-23-2-1(b)); Kentucky (*Stevens v. Flynn*, No. 2010-CA-00196-MR, 2011 WL 3207952 (Ky. Ct. App. July 29, 2011)); Maryland (*Brown v. Contemporary OB/GYN Assocs.*, 143 Md. App. 199 (Md. Ct. Spec. App. 2002); Md. Code Ann., Cts. & Jud. Proc. §§ 3-902, 3-904); Massachusetts (*Thibert v. Milka*, 419 Mass. 693 (Mass. 1995)); Minnesota (*Pehrson v. Kistner*, 301 Minn. 299 (Minn. 1974)); Montana (*Blackburn v. Blue Mt. Women's Clinic*, 286 Mont. 60 (Mont. 1997)); Nevada (*White v. Yup*, 85 Nev. 527 (Nev. 1969)); New Hampshire (*Wallace v. Wallace*, 120 N.H. 675 (N.H. 1980)); New Mexico (*Miller v. Kirk*, 120 N.M. 654 (N.M. 1995)); North Carolina (*DiDonato v. Wortman*, 320 N.C. 423, 358 S.E.2d 489 (1987)); North Dakota (*Hopkins v. McBane*, 359 N.W. 2d 862 (N.D. 1984)); Ohio (*Griffiths v. Doctor's Hosp.*, 150 Ohio App. 3d 234, 2002-Ohio-6173, 780 N.E.2d 603 (2002)); Oregon (*LaDu v. Oregon Clinic, P.C.*, 165 Or. App. 687 (Or. Ct. App. 2000)); Pennsylvania (*Coveleski v. Bubnis*, 535 Pa.166 (Pa. 1993)); Rhode Island (*Miccolis v. AMICA*, 587 A. 2d 67 (R.I. 1991)); South Carolina (*Crosby v. Glasscock Trucking*, 340 S.C. 626 (S.C. 2000)); Tennessee (Tenn. Code Ann. § 2 0-5-106(c)); Vermont (*Vaillancourt v. Med. Ctr. Hosp. Vt., Inc.*, 139 Vt. 38 (Vt. 1980)); Washington (*Baum v. Burrington*, 119 Wash. App.36 (Wash. Ct. App. 2003)); Wisconsin (*Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 34 Wis. 2d 14 (Wis. 1967)).

³⁰ Ind. Code Ann. §34-23-2-1.

³¹ Wyoming has not determined whether an unborn child is a "person" under the state's Wrongful Death Act. But, the Court has held that an unborn child is not a "minor" for whom guardianship statutes authorize the appointment of a guardian. *Matter of Guardianship of MKH*, 2016 WY 103, 382 P.3d 1096 (Wyo. 2016).

Damages Recoverable Pursuant to Florida Wrongful Death Act

The Florida Wrongful Death Act³² provides that the parents³³ of a minor child who dies due to the negligence of another may recover:

- The value of lost support and services from the date of the decedent's injury to her or his death, with interest, and future loss of support and services from the date of death and reduced to present value. In evaluating loss of support and services, the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the particular survivor, and the replacement value of the decedent's services to the survivor may be considered. In computing the duration of future losses, the joint life expectancies of the survivor and the decedent and the period of minority, in the case of healthy minor children, may be considered.³⁴
- Mental pain and suffering from the date of injury.³⁵
- Medical or funeral expenses due to the decedent's injury or death that were paid by a survivor. These expenses are recoverable by the survivor that paid them.³⁶

The probate estate of the minor child may recover for the estate:³⁷

- Loss of earnings of the deceased from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest.³⁸
- Medical or funeral expenses due to the decedent's injury or death that have become a charge against her or his estate.³⁹

III. Effect of Proposed Changes:

The bill expands Florida's Wrongful Death Act to allow the parents of an unborn child to recover damages through the Act from a person who is responsible pursuant to tort law (that is, a person who has committed a negligent act)⁴⁰ for the death of their unborn child. The bill does not

³² Sections 768.16-.26, F.S.

³³ The use of the term "parents" is arguably unclear, but the use in context is not changed by the bill. In the current statute, the term "parent" is not specifically defined, but is used in the context of survivors of the decedent. See s. 768.21(1), F.S. In general, only a person who is within the category of survivor may be a plaintiff in a statutory wrongful death action. Clearly, the natural mother is a parent and a survivor. The definition of "survivors" excludes a natural father of a child born out of wedlock unless the father has recognized a responsibility for the child's support. *Id.* It appears the statutory intent of the term "parents" in s. 768.21(4), F.S., would be found by a court (whether using the current statute or the law as amended by the bill) to also exclude a natural father who was not supporting the unborn child at the time of his or her wrongful death from collecting a recovery for wrongful death. On the other hand, a predecessor statute that excluded the father of an "illegitimate child" from being a survivor was found unconstitutional as a violation of equal protection. *Wilcox v. Jones*, 346 So.2d 1037 (Fla. 4th DCA 1977).

³⁴ Section 768.21(1), F.S.

³⁵ Section 768.21(4), F.S.

³⁶ Section 768.21(5), F.S.

³⁷ Note that, as this may be applied to unborn children, an unborn child could not have lawfully executed a will, the laws of intestacy would apply and the parents would share equally in net proceeds of the estate.

³⁸ Section 768.21(6)(a), F.S.

³⁹ Section 768.21(6)(b), F.S.

⁴⁰ A plaintiff in a wrongful death action, like the plaintiff in any form of negligence lawsuit, must prove to the court that one or more defendants committed one or more negligent acts, and that the negligent act or acts caused harm to the plaintiff, in order to prevail in the lawsuit. Ordinary lawful actions are generally not considered negligent under the tort law, and thus, do not support any form of personal injury lawsuit. An act considered negligent under the tort law but that causes no harm to the plaintiff does not support any form of personal injury lawsuit.

reference the gestational age of the unborn child, and thus treats the death of an unborn child at any point in the pregnancy the same as the death of any child as that term is defined in the wrongful death law.

The bill defines the term “unborn child” to mean “a member of the species *Homo Sapiens*, at any stage of development, who is carried in the womb.”⁴¹

Using that definition, the bill creates a statutory wrongful death action that may be pursued by the parents of an unborn child whose death is caused by the negligence of another person which occurs at any stage of a pregnancy.

By expanding the statutory wrongful death law to include unborn children, the parents of the unborn child will not be limited to the damages available under the common law causes of action. The parents are also not limited by the common law differences based on the gestational age, which thereby equalizes the legal effects of this law to apply to all unborn children. The parents, instead, may recover the full measure of the economic and noneconomic damages available under the Florida Wrongful Death Act for the loss of a minor child.⁴²

The bill does not change the statutory requirements for a wrongful death action pursuant to the Wrongful Death Act.⁴³ The bill adopts the current measure of damages available to the parents upon the death of a minor child to equally apply to the death of an unborn child.

The bill specifies that the mother of the unborn child may not be sued in a wrongful death action related to the death of her unborn child. Also, a health care provider may not be sued in a wrongful death action related to the death of an unborn child, provided that the health care provider furnished lawful medical care with the consent of the mother and in compliance with the applicable standard of care. The bill specifies that the lawful medical care that qualifies for protection includes assisted reproductive technologies.⁴⁴

The bill is effective July 1, 2026.

⁴¹ The definition is similar to the definition of unborn child used in the criminal code. See s. 775.021(5)(e), F.S.

⁴² Recovery of some forms of damages, such as lost support and services and net accumulations, may be difficult to calculate given the nature of those damages as they relate to an unborn child. A 1976 DCA opinion that found the Wrongful Death Act applies to an unborn child went on to rule that damages for lost support and services of an unborn child are so speculative that they may not be recovered. *Miller v. Highlands Ins. Co.*, 336 So.2d 636 (Fla. 4th DCA), *overruled on other grounds by Stern v. Miller*, 348 So.2d 303 (Fla. 1977) (ruling that the Wrongful Death Act does not apply to the death of an unborn child).

⁴³ See s. 768.20, F.S. (stating that the “action shall be brought by the decedent’s personal representative, who shall recover for the benefit of the decedent’s survivors and estate all damages”). See also s. 733.301(1)(b), F.S., which establishes an order of preference for appointing personal representatives for intestate estates (persons who die without a will). Probate law requirements giving the court oversight over appointment and actions of a personal representative should preclude the appointment of a personal representative who would take a position adverse to the mother.

⁴⁴ Assisted reproductive technology is defined at s. 742.13(1), F.S., to mean “those procreative procedures which involve the laboratory handling of human eggs or preembryos, including, but not limited to, in vitro fertilization embryo transfer, gamete intrafallopian transfer, pronuclear stage transfer, tubal embryo transfer, and zygote intrafallopian transfer.”

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill may increase private insurance rates to the extent that this bill provides for tort claim recoveries that are not paid under current law.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 768.18, 768.19, and 768.21.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
