Currently, the majority of states recognize wrongful birth cases. With the increasing accuracy of genetic testing, the number of these cases is likely to continue to increase.

Wrongful birth is generally a tort that allows parents to sue a medical provider for negligence that resulted in a birth of a disabled child who otherwise would have been terminated prior to birth if not for the doctor’s failure to perform or interpret genetic testing properly or inform the parents of the results of the testing. Some jurisdictions also allow for wrongful birth suits for negligent sterilization that results in the birth of a child, whether disabled or otherwise. These cases, revolving around very sensitive issues, require an expert in genetics who can explain both the general genetic cause of defect or disability and the genetic testing and procedures that can detect these potential complications before birth. It is important to note that a wrongful birth claim is different from a wrongful life tort, which is a cause of action brought by or on behalf of the disabled child rather than on behalf of the parents claiming that the doctor was negligent in failing to warn of potential defects or failure to prevent or terminate the pregnancy in light of a known risk. See Miller v. Johnson, 231 Va. 177 (1986) (noting
distinction between wrongful birth and wrongful life); Kassama v. Magat, 368 Md. 113 (2002) (rejecting wrongful life as a tort in Maryland).

The first case recognizing wrongful birth as a valid cause of action arose in Texas. In Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975), during the first trimester of pregnancy the mother contracted rubella and subsequently gave birth to a child whose major organs were defective. The parents filed suit against the mother’s doctor alleging that he negligently failed to diagnose the rubella in the mother and failed to advise them of the risk to the fetus. Id. at 847. The parents testified that they would have terminated the pregnancy had they been properly informed of the risks to the fetus from the rubella. Id. The court reasoned that the doctor did have a duty to disclose the information to the parents and his failure was negligence that resulted in injury, the birth of a child with serious birth defects. Id. at 848. In recognizing an action for wrongful birth, the court limited damages recoverable to those reasonably necessary for the care and treatment of the child. Id. at 849-50. From Theimer wrongful birth came to be recognized by courts in a majority of states, including Virginia, Maryland, and the District of Columbia.
In *Naccash v. Burger*, 223 Va. 406 (1982), the Virginia Supreme Court recognized the tort of wrongful birth. *Naccash* involved parents who were both carriers of Tay-Sachs disease; however, because of the negligence by a doctor during genetic testing, the father was unaware. *See id.* As a result, the child was born with Tay-Sachs and lived less than two years. *Id.* at 411. The Virginia Supreme Court held that a claim for wrongful birth may be brought by the parents of the disabled child. The court noted that the elements of the claim are: (1) a negligent failure to conduct/report genetic testing results; (2) where the birth of a defective child was reasonably foreseeable; (3) which failure prevented the parents from making an informed decision whether to terminate the pregnancy (and they would have terminated); and (4) that resulted in the birth of a disabled child. In recognizing the tort, the court allowed the parents to recover expenses of care and treatment of the child based on traditional tort principles. *Id.* at 413-15; *see also Miller v. Johnson*, 231 Va. at 183. The court in *Naccash* also allowed the parents to recover damages for the emotional distress that they suffered because of their child being born with a fatal disease that resulted in its death. *Naccash*, 223 Va. at 416-17.

Proving the requirements of a wrongful birth action requires an expert in genetics to explain the basics of genetics, genetic testing, how genetics caused the defect, and finally, the
ramifications of the disorder over a lifetime. When qualifying the expert geneticist, it may be useful to follow, to follow the standard set in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which requires that: (a) the testimony must be relevant; and (b) the testimony must be reliable. The analysis includes four non-exclusive factors for the court to consider: (1) whether the theory or technique can be tested; (2) whether the theory or technique has been subject to peer review; (3) the techniques known or potential error rate; and (4) whether the technique is generally accepted in the relevant scientific community. *Id.* Having the geneticist go through these steps when explaining the testing involved is vital not only for qualification purposes but in order to assist the jury in understanding the scientific and medical issues involved in the case.

The necessity of having an expert on genetics for a wrongful birth case was reaffirmed in *Fruiterman v. Granata*, 276 Va. 629 (2008). *Fruiterman* involved two parents whose twins were born with Downs syndrome after the doctor failed to offer the mother first trimester screening that could have shown that the fetuses had Down’s Syndrome. *See id.* at 633. In *Fruiterman*, the Virginia Supreme Court overturned a jury verdict in favor of the plaintiffs because they failed to
have an expert testify that if genetic testing had been performed it would have been positive for the particular defect. See id.

The District of Columbia recognizes the tort of “wrongful birth” in cases involving disabled children and allows recovery of damages for “extraordinary medical and other expenses attributable to the care of the child.” *Haymon v. Wilkerson*, 535 A.2d 880 (D.C. 1987). *Haymon* allowed a mother of a child born with Down’s syndrome to sue her obstetrician for wrongful birth after he negligently failed to properly advise her on the use of amniocentesis to detect potential birth defects during the pregnancy. *Id.* In recognizing wrongful birth, the court found that limiting recovery to extraordinary medical expenses avoided speculative damages and providing a windfall for the mother while still compensating her for the injury suffered. *Id.* at 886. The D.C. Court of Appeals decided in *Cauman v. George Washington University*, 630 A.2d 1104 (D.C. 1993) to further limit the damages recoverable in a wrongful birth case. In *Cauman*, the parents of a child born with mental and physical disabilities filed suit only for damages for the emotional injuries they suffered as a result of the birth of their disabled son. *Cauman*, 630 A.2d at 1105. The parents were both in their late thirties and, fearing the increased likelihood of their child being born with disabilities, had amniocentesis and genetic testing performed and
analyzed by two separate doctors, both of whom found no abnormalities. *Id.* at 1104. Following
the birth of the disabled child, and unable to afford to care for the child, he was put up for
adoption and adopted by a couple in another state. *Id.* The court, while recognizing that
*Haymon* allowed for extraordinary medical expenses as damages, reaffirmed the trial court’s
dismissal of the parents claim for only emotional damages from a wrongful birth. *Id.* at 1109.
As such only the extraordinary medical and childrearing expenses are recoverable in a wrongful
birth case in the District, and not emotional distress. *Id.; see also Dyson v. Winfield*, 129 F.

Maryland also recognizes an action for wrongful birth, but with an interesting limit on the
damages recoverable by the parents. The first case to recognize a possibility of wrongful birth
tort in Maryland was *Jones v. Maliknowski*, 473 A.2d 429 (Md. 1984). In *Jones*, the parents
filed suit against a doctor for negligently performing a sterilization operation on the mother. *Id.*
Already having three children, and not wishing to have any additional children, the mother
underwent the sterilization procedure. *Id.* at 430. However, because of the surgeon’s negligence
the sterilization was ineffective and the mother gave birth to a fourth child slightly more than a
year after the operation. *Id.* The child was born healthy, unlike in most wrongful birth cases that
deal with children born with disabilities or diseases. *Id.* As a result of the child being born healthy, the court found that the parents did indeed have a right of action against the doctor for his negligence and the birth of the child, however, the damages would be limited. The court ruled that while the parents could recover for the cost of child-rearing expenses to the age of majority, the damages would be offset by the benefits the parents gained by having the child.

*Jones v. Maliknowski,* 473 A.2d 429. Almost a decade later the Maryland Court of Appeals decided *Reed v. Campagnolo,* 630 A.2d 1145 (Md. 1993), a more traditional wrongful birth case. In *Reed,* the court was resolving a certified question from the U.S. District Court in a wrongful-birth case in which the parents alleged that the defendant medical providers failed to inform them of existence or need for genetic testing that would have detected the disabilities their child was born with. *Id.* at 1146. After reviewing the facts of the case and *Jones* as well as case law from other jurisdictions that allowed a cause of action for wrongful birth, the court ruled that the Maryland would in fact recognize a cause of action for wrongful birth. *Id.* Although the court in *Reed* did not fully address the matter of damages, it recognized that the parents could recover, at minimum, damages measured by the extraordinary cost of supporting the disabled child and did not prohibit post-majority damages. *Id.* at 1152. In fact, the court allowed for recovery of
traditional tort damages, finding that a plaintiff may recover not only for the consequences which
have actually and naturally resulted from the tort, but also for those which may certainly or
reasonably and probably result therefrom as proximate consequences, but not for consequences
which are speculative or conjectural. *Jones*, 473 A.2d at 435.

With the increasing accuracy and prevalence of genetic testing during pregnancies, the
tort of wrongful birth is likely to become more common. To successfully bring such a case, it is
important that an attorney find and properly qualify a genetic expert who can provide the
necessary testimony on causation and damages, and potentially standard of care.