Case Sequence:

Responsibility for Prenatal Injuries

Newman v. City of Detroit, 281 Mich. 60, 274 N.W. 710 (1937).

Estate of Powers v. City of Troy, 380 Mich. 160, 156 N.W.2d 530 (1968).

Womack v. Buchhorn, 384 Mich. 718, 187 N.W.2d 218 (1971).

O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971).

Matter of Dittrick Infant, 80 Mich. App. 219, 263 N.W.2d 37 (1978).

Matter of Baby X, 97 Mich. App. 111, 293 N.W.2d 736 (1980).

Michigan State Court Chart

Michigan State Court Chart

Michigan Supreme Court (Court of Last Resort)
7 justices sit en banc

Case Types:

- Mandatory jurisdiction in judge disciplinary cases.
- Discretionary jurisdiction in civil, criminal, administrative agency, juvenile, lawyer disciplinary, advisory opinion, original proceeding, interlocutory decision cases.

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Michigan Court of Appeals (Intermediate Appellate Court)
4 Districts
28 judges sit in panels

Case Types:

- Mandatory jurisdiction in capital criminal, administrative agency, juvenile cases.
- Discretionary jurisdiction in civil, noncapital criminal, administrative agency, juvenile, original proceeding, interlocutory decision cases.

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Michigan Court of Claims (Court of General Jurisdiction)
210 judges

Case Types:

- Torts, contract, real property rights ($25,000, no maximum), paternity, administrative agency appeals, miscellaneous civil.
- Exclusive small claims, estate, mental health, civil appeals. [Limited jurisdiction: tort, contract, real property rights ($0/$25,000).]
- Exclusive domestic relations.
- Felony, DWI/DUI. Exclusive miscellaneous civil, criminal jurisdiction.
- Delinquency, child protection.

Newman v. Detroit

Supreme Court of Michigan

June 24, 1937, Submitted (Calendar No. 39,455) ; September 1, 1937, Decided

Docket No. 106

Reporter
281 Mich. 60 *; 274 N.W. 710 **; 1937 Mich. LEXIS 837 ***

Opinion by: BUTZEL

Opinion

[*62] [**711] BUTZEL, J. Plaintiff brought suit under the survival act (3 Comp. Laws 1929, §§ 14040-14060), claiming that plaintiff's mother, while a passenger on a street-car, owned and operated by defendant, was injured through the negligence of the motorman, and that decedent thus suffered prenatal injuries from which he died three months after birth. The accident occurred 22 days prior to his birth at the end of the normal period of gestation. It is alleged that as a result of the accident decedent suffered injuries to his skull and others of an internal nature, those to the head causing hydrocephalus and brain hemorrhage, resulting in death. Defendant made a motion to dismiss on the ground that decedent, an unborn child and unable to contract, could not become a passenger for hire, and also that neither under the common law nor under any statute in this State is there any liability to an infant for prenatal injuries. The trial judge, in denying the motion to dismiss, drew an analogy from the criminal law [***4] in reference to the wilful killing of an unborn quick child by any injury to its mother. Act No. 328, § 322, Pub. Acts 1931. As the question of liability to a child for prenatal injuries was never before this court, we allowed an appeal in the nature of certiorari.

Appellant claims that to permit such recovery, in view of the fact that it is not provided for at common law or legislative enactment, would be judicial legislation on our part; that it would open the door [*63] to fraud and perjury, that the cause of physical or mental defects that appear at childbirth or thereafter may be congenital, or due to injuries prior or subsequent to the accident, on account of which liability is asserted, or may have been due to the use of instruments or other mishaps at parturition. Appellee, on the other hand, calls our attention to the criminal law. But there is no claim of any criminal liability and there is no statute governing civil liability. Appellee further points to the survival act (3 Comp. Laws 1929, § 14040), which provides that an action for personal injuries to a person should survive. It is admitted that decedent had viability at the time of the accident, but in [***5] order for an action to survive, it must have existed at the time of the person's death.

We are also referred to the statutes of descent and distribution, which permit a child *en ventre sa mere* at the time of the death of the parent to inherit from such parent. [*] These statutes are not applicable.

Appellee further contends that where there is a wrong, there should be a remedy, and claims that the question of causation is a matter of proof, the same as in other actions for negligence. These arguments may well be addressed to the legislature.

The question before us has been passed upon in other jurisdictions. In some inferior courts where decisions were reversed in the appellate courts and in *Kine* v. *Zuckerman,* 4 Pa. Dist. & County Rep. 227, recovery was allowed for prenatal injuries. However, the overwhelming weight of authority is to the contrary. *Dietrich* v. *Northampton,* 138 Mass. 14 (52 Am. Rep. 242); *Walker* v. *Railway Co.,* 28 L.R. [*64] 69 (Ireland); *Allaire* v. *St. Luke's Hospital,* 76 Ill. App. 441, affirmed in 184 Ill. 359 (56 N.E. 638, 48 L.R.A. 225, 75 Am. St. Rep. 176); [***6] *Gorman* v. *Budlong,* 23 R.I. 169 (49 Atl. 704, 55 L.R.A. 118, 91 Am. St. Rep. 629); *Buel* v. *United Railways Co.,* 248 Mo. 126 (154 S.W. 71, 45 L.R.A. [N.S.] 625, Ann. Cas. 1914C, 613); *Lipps* v. *Milwaukee Electric Ry. & Light Co.,* 164 Wis. 272 (159 N.W. 916, L.R.A. 1917B, 334); *Stanford* v. *Railway Co.,* 214 Ala. 611 (108 South. 566); *Nugent* v. *Railway Co.,* 154 App. Div. 667 (139 N.Y. Supp. 367), appeal dismissed in 209 N.Y. 515 (102 N.E. 1107);

[*] See 3 Comp. Laws 1929, §§ 13452, 15726. -- REPORTER.

Drobner v. *Peters,* 232 N.Y. 220 (133 N.E. 567, 20 A.L.R. 1503); *Magnolia Coca Cola Bottling Co*. v. *Jordan,* 124 Tex. 347 (78 S.W. [2d] 944, 97 A.L.R. 1513). Plaintiff has no cause of action under the common law or under any statute.

The order of the lower court denying the motion to dismiss is reversed, with costs to appellant, and the cause is remanded, with instructions to enter an order granting motion to dismiss.

FEAD, C.J., and NORTH, WIEST, BUSHNELL, SHARPE, POTTER, and CHANDLER, JJ., concurred.

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Estate of Powers v. Troy

Supreme Court of Michigan

October 4, 1967, Submitted ; March 4, 1968, Decided

Docket No. 51,637

Reporter
380 Mich. 160 *; 156 N.W.2d 530 **; 1968 Mich. LEXIS 145 **

Judges: O'Hara, J. (*for affirmance*). Dethmers, C. J., and Kelly and Adams, JJ., concurred with O'Hara, J. Brennan, J. (*for affirmance*). Souris, J. (*for affirmance*). Black, J. (*for affirmance*). T. M. Kavanagh, J. (*dissenting*).

Opinion by: O'HARA (In Part); BRENNAN (In Part); SOURIS (In Part); BLACK (In Part)

Opinion

[*166] [**531] O'Hara, J. (*for affirmance*).

This case involves an interpretation of the Michigan wrongful death act. [1] Specifically, the question is the meaning of the word "person" in the first sentence of the statute:

> "Whenever the death of a *person* or injuries resulting in death, shall be caused by wrongful act * * * then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages." (Emphasis supplied.)

[***11] In this case the *person* said to be involved was a 6-month-old male child *en ventre sa mere*. The child was stillborn. The question of the wrongful act as the proximate cause of the stillbirth is not in issue. The sole question posed by appellant and accepted by appellee is:

> [*167] "Is an unborn child which is negligently injured by defendant and subsequently stillborn a 'person' within the meaning of Michigan's wrongful death act?"

We make clear at the outset that we are not here considering the theological, nor philosophical status of a fetal child in the context of laws relating to abortion. We confine ourselves strictly to the meaning of a "person" within the wrongful death act. The assigned Justice, and any Justice signatory hereto, expressly limit the views they here express to the interpretation of the statute which is the subject of judicial construction.

The probate court for Oakland county appointed an administratrix for the estate of the stillborn child. By that administratrix a suit was started in the circuit court for the same county under the wrongful death act. Defendant prior to answer moved for summary judgment. The trial judge held: [***12]

> "A viable baby boy in its sixth month of gestation which is negligently injured by a defendant and subsequently stillborn is not a 'person' within the meaning of Michigan's wrongful death act."

The Court of Appeals affirmed. Its holding was:

> "Therefore, while we find authority for the proposition of appellant, we are bound by the holding in *Newman,* [2] supra, the intent of the legislature under the Michigan wrongful death act, and the clear meaning of the term 'person' as used therein." 4 Mich App 572, 577.

We granted leave. Appellant urges 2 principal arguments. First, it is claimed that *Newman* was by implication, if not explicitly, overruled by *LaBlue* v. *Specker* (1960), 358 Mich 558. Second, if *Newman* has not been overruled by *LaBlue,* we should do so [*168] now. In support of the second argument appellant contends that the *ratio decidendi* of *Newman* is no longer valid. *Newman,* it is

[1] CLS 1948, § 691.581 *et seq*. (Stat Ann 1959 Cum Supp § 27.711 *et seq*.). See, currently, CLS 1961, § 600.2922, as amended by PA 1965, No 146 (Stat Ann 1968 Cum Supp § 27A.2922).

[2] *Newman* v. *City of Detroit* (1937), 281 Mich 60.

argued, [***13] was based upon the "overwhelming weight of authority" concept, while in the interim, since 1937, many jurisdictions have changed positions. In further support of the second argument, appellant relies on the "enlightened view" concept as part of the "no wrong without a remedy" proposition. [3]

Appellee, *per contra,* premises his argument on the traditional view that to hold a fetal child under our death act to be a "person" we, in legal effect, judicially amend a statute which has been construed [**532] since its enactment over a hundred years ago to exclude the cause of action contended for by appellant. The argument is advanced that the construction asked by appellant is no part of a growth of the common law so vital to its continuing efficacy, but rather that our death act is a lineal descendant of Lord Campbell's act [***14] and is in derogation of the common law, that it is the statute which gives the cause of action, and that the courts are not privileged to create a new cause of action under the guise of liberal interpretation. Additional argument is made to the point that authorities not only divide on the issue here presented, but subdivide on the difference between the right of a viable fetus negligently injured during gestation but born alive, and one stillborn.

We address ourselves first to the contention that *LaBlue, supra,* overruled *Newman*. We do not so read *LaBlue*. First, *LaBlue* was not an action asserted under the wrongful death act. The action was based on the so-called "dram-shop" act [4] by reason of an alleged illegal sale of liquor to a minor. That [*169] minor, prior to his death, had allegedly acknowledged he was the father of a child to be born to an unwed female to whom he was engaged. Conception was alleged to have taken place in June of 1956. The minor father was killed on August 19, 1956. The declaration of paternity must then have been made between those 2 dates. The child was born on March 8, 1957. It was plaintiff's theory that the child lost the [***15] support of the self-declared and betrothed father. No injury to the mother during pregnancy occurred. The fetal child in the period of gestation was not injured in the sense of the injury to the fetal child in this case. *LaBlue* is closer to the family of cases recognizing a posthumous child as a dependent for inheritance purposes. Under the dram-shop act loss of support is the essence of the action. Under the death act it is a wrongful death of a person which is the *sine qua non*. We reject the contention that *LaBlue* overruled *Newman* either expressly or by implication.

Next, we consider the "public policy" argument. We do not express ourselves upon it, nor upon the "majority view" argument. Neither do wo distinguish between assertibility of a cause of action based on injury to a child *in utero* which has survived birth and later dies and one which is stillborn. Rather we rest our decision squarely upon the fact that at the time our [***16] wrongful death act was passed the legislature used the term "person" in its ordinary, generally accepted meaning at that time. Such has been and remains a cardinal principle of statutory construction to ascertain legislative intent:

> "In construing a statute, we are to construe it in the light of the circumstances existing at the date of its enactment, not in the light of subsequent developments." *Wayne County Board of Road Commissioners* v. *Wayne County Clerk,* 293 Mich 229, 235.

[*170] See, also, 25 RCL, Statutes, § 215, p 959, which in turn was fortified by *Platt* v. *Union P. R. Co*. (1879), 99 U.S. 48 (25 L ed 424); 50 Am Jur, Statutes, § 236, p 224.

This has been the uniform policy of this Court beginning with *Green* v. *Graves* (1844), 1 Doug (Mich) 351, where the Court said at p 354:

> "The words of a statute are to be taken in their ordinary signification and import."

We are not convinced that "person" in its ordinary signification in 1848 when our death act was passed included the concept of a fetal child. It should be noted and emphasized that we deal here, not with a cause of action which existed at common law. We do not face here [***17] the question of broadening the base of recovery in an action already recognized at common law. We deal with a statute in derogation of the common law.

[**533] We are constrained to agree with the reasoning of the supreme court of Tennessee in *Hogan* v. *McDaniel* (1958), 204 Tenn 235 (319 SW2d 221). In considering the same question, under a statute substantially the same as ours, the Court said (pp 244, 245):

> "There is no ambiguity in our wrongful death statute. We must consider it as it is written, not as we would have it. Only the legislature has authority to create legal rights and interests. It results that no right of action, such as plaintiffs seek to assert, can be brought until there is legislative authority for it."

Considering the plain import of the word "person" at the time of enactment of our statute and its uniform interpretation through the years, we feel obligated to accord to the term its "ordinary signification" when legislatively employed.

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[3] A suit in Oakland county brought by the parents of the stillborn child as distinguished from the suit by the mother as an administratrix impends in the Oakland county circuit court.

[4] CLS 1956, § 436.22 (Stat Ann 1957 Rev § 18.993).

[*171] The order of the Court of Appeals affirming the entry of summary judgment for defendants is affirmed. Costs to the defendants.

Brennan, J. (*for affirmance*).

This case of Powers is the [***18] *reductio ad absurdum* of *Wycko* v. *Gnodtke* (1960), 361 Mich 331. Having erroneously ruled in *Wycko* that a human being, like a horse or a mule, has a value to be measured in greenback dollars, this Court is now confronted with an extreme case of a very short-lived human being. As in most cases, when an erroneous premise is reduced to its most absurd extreme, our Court would now avoid confessing the error of *Wycko* by changing the subject.

We would now compound our error by holding against the great weight of American jurisprudential authority that a prenatal injury is no injury at all because the plaintiff didn't exist at the time it happened. By such illogical reasoning, we will some day say to a man, horribly scarred or deformed through the malpractice of the obstetrician who delivered him into the light of day, that the scar on his forehead is, by the cruelest legal fiction, an injury to his mother.

In an effort to avoid facing up to our recent errors in *Wycko, Currie,* [1] Heider, [2] Reisig, [3] we flirt with branding the unreasoned opinion in *Newman* v. *City of Detroit* [4] as an established and binding precedent, [*172] while at the same time overruling [***19] the well-reasoned opinion in *Tunnicliffe* v. *Railway Co*. [5]

Newman v. *City of Detroit* held, without much explanation, that there is no action at common law or by statute for the recovery of damages for prenatal injuries. *Newman* is bad law and some day should be overruled. But the overruling should come in a proper case, either brought by a living plaintiff who alleges an injury to him while he was yet in his mother's womb or brought by the personal representative of a decedent, whose death was caused by the prenatal injury, and on account of whose death actual pecuniary losses can be shown. This instant case of Powers is not such a case.

In this case of Powers, the [***20] complaint alleges in paragraph 22, by way of damages, "the parents of said child have been deprived of the possible and probable monetary contributions of said child; [**534] that they likewise have been deprived of the services of said child, particularly services which would have been rendered to them in their old age; that further, they have been deprived of the mutual society and companionship of said child during their respective lifetimes." Judged as pecuniary loss had always been judged prior to *Wycko,* these allegations do not state a cause of action under the death act. Monetary contributions of a minor child in these times are not to be presumed, and neither are services to be rendered to parents in their old age. In the absence of some specific and unusual circumstances of dependency on the part of the parents, combined perhaps with their inability to have other children, if such were the fact, damages for such items in the case of an infant decedent, are purest speculation. The complaint further claims damages [*173] for deprivation of the mutual society and companionship of the child. In a humane and civilized culture, such a thing is not a pecuniary loss.

[***21] The word *pecuniary* means *consisting in money; exacted or given in money*. The word pecuniary is an adjective. It is the function of an adjective to modify a noun. When so modified, the noun no longer has the universal meaning which it has when it is not so modified. Thus a pecuniary injury is to be distinguished from a nonpecuniary injury. A pecuniary injury is one that *is* measured in money. A nonpecuniary injury is one that *is not* measured in money. The question is not whether a money value *can* be attached or ascribed to the injury.

The majority in *Wycko* suggest that the genius of the common law is capable, where left alone, of ascertaining damages even for the sorrow and anguish caused by death. This capacity of the common law should hardly be called genius. It would be more properly described as fiction. What the learned Justice writing in *Wycko* was really recognizing is that, if a jury be told to place a money value on anything, they can by process of speculation, conjecture, and sympathy do what they are told to do. The capacity of the jury to agree on an award is hardly the thing that distinguishes pecuniary losses or injuries from nonpecuniary [***22] losses or injuries. The thing that distinguishes the two is the nature of the injury itself as it is regarded by persons who suffer such injuries generally.

Thus, a dejected farmer tells his neighbor that he has suffered the loss of a $ 50 horse, but he would not tell a neighbor that he has lost a $ 12,000 wife or a $ 7,000 son. The majority in *Wycko* tell us, though without citation of judicial authority, finding by the jury, or even reference to sociological handbooks, that companionship is obtainable on the open market. If it be so in Lansing or Ann Arbor, or even in [*174] certain sections of Detroit, it is not a commodity generally bought and sold by the citizens of Michigan.

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[1] *Currie* v. *Fiting* (1965), 375 Mich 440.
[2] *Heider* v. *Michigan Sugar Company* (1965), 375 Mich 490.
[3] *Reisig* v. *Klusendorf* (1965), 375 Mich 519.
[4] *Newman* v. *City of Detroit* (1937), 281 Mich 60.
[5] *Tunnicliffe* v. *Bay Cities Consolidated R. Co*. (1894), 102 Mich 624.

The *Wycko* majority wrongly assumed that money is the only verity in life, for it concluded that a rule of law which assigns no *monetary* value for the loss of a human life thereby assigns it no value whatsoever. In a classic *non sequitur,* the Court then says, "This kind of delicacy would prevent the distribution of food to the starving because the sight of hunger is so sickening." In truth, of course, a society which values human life in terms greater than money does not count the [***23] cost when it feeds the starving. Those, so imbued with adulation of shillings and shekels that they would place a money value on the loss of a human life, would surely weigh the economic wisdom of feeding the starving -- placing in the one scale the value of the food, the cost of transportation, and the expense of distribution, and in the other scale, the monetary value of the human lives to be lost through starvation.

Fortunately, our society has not yet come to the stage of enlightened barbarity to which the *Wycko* majority would lead us. We still read of total community mobilization to rescue a little child from the bottom of the well, and the Court can readily [**535] take judicial notice that our people do not, as yet at least, measure human life in terms of dollars and cents, nor regard the loss of human life as a mere pecuniary loss.

Having founded its reasoning on the mucky bedrock of dollar deification, the *Wycko* majority assumed that past legislatures and courts have shied away from allowing damages for loss of companionship of a deceased for the reason that it was difficult to arrive at money damages for the loss of human life. It did not occur, apparently, [***24] to the majority in *Wycko* that the voice of the people heard in the [*175] legislative hall and their wise forebears on the courts did not believe that the assessment of money damages for the loss of human life was right or prudent or directed to the common welfare.

If one begins with the assumption that all well-being is economic well-being, that all security is economic security, and that all happiness is economic prosperity, it would indeed be difficult to imagine why a legislature or a court would eschew the assessment of money damages for the loss of a life. But in a society where other greater values are recognized, the wisdom of the legislative policy is better understood.

Do we indeed become a stronger and braver, more courageous and more noble people when our citizens are invited to the office of the claims examiner or to the courtroom, there to recover in hard cold cash an amount which will be measured by the sincerity of their keening? Does the *Wycko* decision serve the cause of mental health, or contribute to the personal well-being and good adjustment of our people? Or does the *Wycko* decision and others like it contribute to the growing multitude of [***25] patholitigants whose spurious causes and unreasonable demands congest our courts, delay our dockets and vex our people? Does the *Wycko* decision mean that rich parents with substantial investments in their children's upbringing and education will recover more upon the death of their children than poor parents whose children have been forced by economic adversity to leave school at the age of 16 and help support a large or an impoverished family?

Whatever answer one might give to these questions, the fact that the questions can be asked in good faith is evidence that there is a difference of opinion upon the wisdom of valuing human life in terms of dollars and cents. And if there be a difference of [*176] opinion upon the subject, this Court is, by its constitutional oath, obligated to effectuate the policy determination made by the legislature. The legislative line has been drawn at pecuniary loss and pecuniary injury. The legislature has placed the recovery of pecuniary loss on a level with the administration of decedent's estate. It is a business matter. It is not intended to be a substitute for a church funeral or a publicly financed and privately endowed memorial [***26] service.

True it is, that some hard-hearted survivors and avaricious lawyers have in the past and will in the future, by the employment of fiction and fabrication, turn an action for pecuniary loss into an attempt to measure the value of the decedent in order improperly to influence the jury and evoke their sympathy. This is an abuse, and it is an abuse which needs constantly to be guarded against. But it is no solution judicially to decree that the abuse shall be universal and more candidly indulged in. The courts below should be affirmed on the ground that the complaint does not allege a pecuniary injury within the meaning of the death act.

Costs to defendants.

Souris, J. (*for affirmance*).

I concur in affirmance. In this State we have not yet recognized even the right of a child born alive to recover damages for negligently inflicted prenatal injuries. *Newman* v. *City of Detroit* (1937), 281 Mich 60. Someday we may overrule *Newman* in a case which requires our reexamination of *Newman's* holding. [**536] Until we do, I believe it is premature to hold, as we are asked to do today, that a stillborn child's administratrix can sue under the wrongful death [***27] act [1] for damages for [*177]

[1] CL 1948, § 691.581 *et seq*. (Stat Ann 1959 Cum Supp § 27.711 *et seq*.), repealed by PA 1961, No 236, effective

negligently inflicted prenatal injuries which caused the stillbirth. In short, I believe we are being asked to decide too much, too quickly; to move too far, too swiftly; to take two full steps ahead, instead of only one step at a time.

Mr. Justice Kavanagh, writing for the Court in *LaBlue* v. *Specker* (1960), 358 Mich 558, and in his opinion today, has demonstrated exhaustively that courts have not hesitated to consider *in esse* a foetus *en ventre sa mere* whenever to do so would be beneficial to the child born alive. As persuasive as are the cases he cites involving children born alive, when a stillbirth results, as in this case of Powers, there is no live child for whose benefit the [***28] courts can act. For this reason the rationale of the cases Justice Kavanagh and plaintiffs rely upon is not applicable when the negligent injury causes a stillbirth. It is true that during this past decade a number of courts in other jurisdictions, not hampered as we are by precedents like *Newman,* have recognized the right to assert a cause of action such as is attempted here; but in none of those cases has a rationale emerged which persuades me of the necessity for, or the wisdom of, the judicial action taken by those courts.

I am not persuaded that such judicial action is necessary to avoid injustice to anyone in being, assuming *arguendo* that we properly might construe our death act's use of the word "person" to include a stillborn child. For example, we are told that the parents of the stillborn child in this very case have instituted suit against the negligent tort-feasors to recover their damages. While it is true that we have not held yet that parents in such common-law tort actions may recover damages for loss of the companionship of their stillborn child, see *Tunnicliffe* [*178] v. *Bay Cities Consolidated R. Co.* (1894), 102 Mich 624, this Court in that [***29] case recognized that the mother's right to recover damages for pain and suffering includes "to some extent a consideration of the nature of the injury, and cannot exclude from the consideration of the jury the fact that the physical and mental suffering of the mother by reason of such an injury would be more intense than in the case of the ordinary fracture of a limb." (At p 630.) We need not pretend to believe that recoverable damages, limited as they are by *Tunnicliffe* to such physical and mental suffering, currently are commensurate with the loss; but *Montgomery* v. *Stephan* (1960), 359 Mich 33, and *Wycko* v. *Gnodtke* (1960), 361 Mich 331, point the way toward our future development of a more realistic measure of damages recoverable in the tort actions of the injured parents. In my judgment, that sort of development of our common law is preferable to adding still another fiction to the law -- that for negligently inflicted prenatal injuries which result in a stillbirth, the wrongful death act provides a legal remedy for the "benefit" of the child born dead! [2]

[***30] Black, J. (*for affirmance*).

Until the fourth opinion of this case was turned in December 28 last, hope remained that we might remove some of the stigma which, by vote of a bare and now elector-reduced majority, was branded on [**537] all robes of the Court when *Currie* v. *Fiting,* 375 Mich 440, amended the then effective and interconnected acts of 1939 (referring to sections 1 and 2 of Act 297 and section 115 of Act 288) [1] so as to provide damages for loss of [*179] companionship and distribution of such damages to survivors who in no alleged or actual sense were "persons who were dependents of the decedent." But that fourth opinion has left no doubt that a result of this case only can be agreed upon; hence this separate declaration of continued respect for the proposition that judges violate the law when they vote to amend a statute they dare not pronounce unconstitutional.

[***31] It seems to the writer that *all* members of the Court, not just some of us, should face openly two aspects of the cause plaintiff alleged and saw dismissed below (see *Powers* v. *City of Troy,* 4 Mich App 572). The first is that if a cause for wrongful death arose at all, that cause came into being when and only when the claimed death occurred (*Coury* v. *General Motors Corporation,* 376 Mich 248). The second is that the cause alleged may proceed to trial, and the damages claimed may be recovered and distributed, *only if authorized by the acts of 1939 as same stood at the time of such claimed death.*

The *Currie* amendment was enacted blithely in face of first branch legislation providing that damages recovered for "pecuniary injury" resulting from wrongful death of a

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January 1, 1963. For currently applicable wrongful death act, see CLS 1961, § 600.2922, as amended by PA 1965, No 146 (Stat Ann 1968 Cum Supp § 27A.2922).

[2] For a comprehensive scholarly review of the subject of legal rights arising from tortious injury to an unborn foetus, see Gordon, The Unborn Plaintiff, 63 Mich L Rev 579.

[1] Sections 1 and 2, in effect when the causes of *Currie* and *Powers* allegedly arose (*Currie* 1960 and *Powers* 1962), are cited officially as CL 1948, §§ 691.581, 691.582. Section 115, in effect during the same years, is cited officially as CL 1948, § 702.115. I shall refer herein to said sections 1 and 2 and said section 115 as "the acts of 1939."

The 2 acts had to be conceived and fitted together as mutually dependent by the assembly of 1939; 1938 *Venneman* (*In re Venneman's Estate,* 286 Mich 368) having been just handed down. As noted in *Currie* at 484, the 2 acts were passed by the legislature on the same day, May 25, 1939. They were presented to Governor Dickinson on the same day, June 13, 1939. They were approved on the same day, June 20, 1939.

human being, often previously defined as *excluding* damages for loss of companionship, [2] may be distributed -- lawfully that is -- "only to those persons who were dependents of the decedent." The quotation appears in said section 702.115, sub (4), of which more anon. Now we have [*180] before us another demand for another judicial amendment of these same acts of 1939 (retroactive of course [***32] to 1962 when the collision complained of and the alleged death of a statutory "decedent" occurred) which, if enacted by the Court, will provide damages for loss of the companionship of a fetus which cannot rationally be said, under statute or otherwise, *as having left anyone dependent upon it*. Is it not at long last plain that these insatiable demands for unconstitutional legislation by Justices will continue just so long as 5 Justices submit to and appease them?

First: I perceive no reason to consider overruling inapposite *Newman* v. *City of Detroit,* 281 Mich 60. For if we were to overrule it, say here and now on exclusive motion of the Court with declared retroactivity back to September 1, 1937, that would not help the present plaintiff. This is an alleged statutory action for wrongful death. It is brought under and stands or fails by the aforesaid unitary acts of 1939. *Newman,* on the other hand, was an action brought upon alleged [***33] authority of the common law. It was an action which, if sustainable by the common law, survived to Charles L. Newman's personal representative under the then survival act (CL 1929, §§ 14040-14060) with the recoverable damages belonging exclusively to and becoming a part of the decedent's estate. The right of a fiduciary [**538] to prosecute such a common-law right of action did not depend upon proof that the injured person's subsequent death was due in whole or in part to the injuries complained of. It was enough that during the decedent's lifetime he became possessed of what was a property right by the common law, that is, a right of action for tortiously caused personal injuries.

The sooner this presently composed Court comes to understand the difference between the mentioned [*181] common-law right of action, and the right of action for recovery and distribution of "pecuniary" damages which by statute has been provided continuously since 1848, the sooner our *total* membership will comprehend that if there were no *Newman Case* in the books the due result of this fiduciary's appeal would necessarily be the same.

Perhaps all this may be made elementarily clear, [***34] first by quotation of *Rouse* v. *Michigan U. R. Co.,* 164 Mich 475 (a case where the tortiously injured person lived long enough to recover a judgment for his injuries, only to see it reversed [*Rouse* v. *Michigan U. R. Co.,* 158 Mich 109] and then to die of natural causes); second by quotation of another survival act case, *Love* v. *Detroit, J. & C. R. Co.,* 170 Mich 1.

From *Rouse* at 477:

> "A right of action for personal injuries not resulting in the death of the injured person survives his death (CL 1897, § 10117), and a suit for his damages begun by him may be continued by his personal representative after his death, with the same effect, according to the same rules, and to recover the same damages, as if he were living and prosecuting his action in person. Neither the death act, so called (CL 1897, § 10427), nor PA 1905, No. 89, affect such a right of action or have any application to the manner in which it shall be pursued. In the decisions of this Court no different conclusion has been stated or intimated."

From *Love* at 4, 5:

> "A right of action is as much property as is a corporeal possession, and, under the survival act, vests at once [***35] in the injured person upon the inflicting of the negligent injury, and, upon his subsequent death, becomes an asset of his estate to be collected and distributed in accordance with the administration statutes. *Berger* v. *Jacobs,* 21 Mich 215; *Power* [*182] v. *Harlow,* 57 Mich 107, 111; *In re Joslyn's Estate,* 117 Mich 442; *Carbary* v. *Detroit U. R.,* 157 Mich 683; *Olivier* v. *Railway Co.,* 134 Mich 367 (104 Am St Rep 607, 3 Ann Cas 53)."

I suggest respectfully that all of us should lay the *Newman Case* aside for consideration when, if ever, there is brought here another common-law action by a prenatally injured living person or, as in *Newman's Case,* a fiduciary of such a prenatally injured person whose death has followed his birth.

Second: We could write great manuscripts, I suppose, for and against reading into said Act 297 an intent by the assembly of 1939 to authorize the recovery of damages, for "pecuniary injury," by the appointed fiduciary of a fetus which never attained birth on account of tortious injury sustained by the pregnant mother. Justice T. M. Kavanagh has already undertaken the *pro* side of the argument by searching [***36] beyond our borders for a "trend" which is said to support his final conclusion that "this Court should not by a strained construction of the act [3] defeat its

[2] See authorities gathered in *Currie* at pp 466-470.

[3] I assume that our Brother refers here to the simultaneously adopted acts of 1939. If he does not, then we must look for authority holding that a fiduciary may recover damages for "pecuniary injury" which he can distribute lawfully to no one;

purpose." [**539] Here indeed we agree. We should not by *any* strained construction of the act defeat its purpose. Nor should we defeat its purpose as done in *Currie,* that is, by an unconstitutionally ordered retroactive amendment which deletes the requirement of distribution "only to those persons who were dependents of the decedent."

The trouble with Justice T. M. Kavanagh's tour abroad is that he did not before embarkation ascertain whether the acts of 1939 in any way correspond with those considered in the out-of-state authorities [***37] he has labored to assemble. He cannot even have [*183] looked at section 2 of said Act 297, to say nothing of section 115 of said Act 288, the specific requirement of which is that damages recovered for "pecuniary injury" must be distributed only to dependents of the decedent.

For the benefit of out-of-state readers of our present indispositions there is appended that part of said section 115 which applies here (emphasis supplied by the writer):

> "Sec. 115. The proceeds of any settlement of a cause of action for wrongful death, or the proceeds of a judgment recovered in an action for damages for wrongful death, *shall be distributed in such manner, to such persons, and in such amounts as hereinafter set forth:*
> "(1) * * *
> "(2) * * *
> "(3) * * *
>
> "(4) After hearing on the petition of the executor or administrator, the probate court shall enter an order distributing such proceeds *only to those persons who were dependents of the decedent* and in such amounts as to said court shall seem fair and equitable considering the relative damages sustained by *each of such dependents* by reason of the decedent's wrongful death: Provided, however, That if the proceeds which are [***38] to be distributed are proceeds of a judgment recovered in a court *which has issued a certificate, as may be provided by law, relative to the damages sustained by each of such dependents,* distribution of such proceeds shall, in the absence of written objections thereto filed by any interested party following service of notice as required by this section, be ordered in accordance with such certificate."

As in *Currie* (375 Mich at pp 471, 484, 485), I stand for oath-bound duty to apply simply worded statutes as they read, not as I might have written them of predilection for a legislative committee. [*184] This plaintiff's cause as alleged, for recovery and distribution of "pecuniary" damages, never arose because there was no "decedent" and no "dependent" as those nouns were known to and used by this Court in *Venneman* and then by the legislators of 1939; legislators who in the same unitary statutes made express provision for recovery of "reasonable compensation for the pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of the inflicting of such injuries and his death."

To Summarize:

1. A fetus [***39] cannot be deemed a "person" or a "decedent" within our unique acts of 1939, whereas that conclusion may have been drawn reasonably from some statutes of other States. All the skilled research clerks of Lansing, laboring unitedly without food or drink, could not possibly come up with any judicially interpreted out-of-state statutory provisions which correspond with our acts of 1939. The reason is that those acts were prodded into controversial drafting and effect by the *Venneman Case, supra,* and they are peculiar to Michigan on account of Venneman's determination that, as a result of suit under the then wrongful death statute and entry of a consent judgment for the plaintiff administratrix, [**540] an adult son of the deceased husband and father, even though not a dependent of his father, was entitled to share with the decedent's dependent widow the proceeds of that consent judgment. The Court said in *Venneman* (pp 376, 377):

> "Because of the statutory mandate, notwithstanding appellant is an adult and in no way dependent upon his father for support, he still is entitled to share in the distribution of the amount recovered. And this is true even though it be admitted [***40] that the son himself could have recovered no damages [*185] because he could show no pecuniary loss, and the only person who did suffer a loss was the widow."

It should not be difficult for any present day Michigan lawyer or judge, whether engaged regularly in trial and appellate work in 1939 or not, to perceive both from the content of 1938 *Venneman* and the wording of the immediately ensuing acts of 1939 that the legislature employed the legal phrase "dependents of the decedent" to make sure that no result like *Venneman* should occur again; also that that body tied section 2 of Act 297 and section 115 of Act 288 together by requiring (in section 2) that the probate court "shall determine *as provided by law* the manner in which the amount representing the total pecuniary loss suffered by the surviving spouse and next of kin shall be distributed."

2. This opinion is not to be taken as affecting in any way

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there being in this *Powers Case* no "dependents of the decedent."

Mrs. Powers' separately pending common-law action for personal injuries and such other damages as may or may not, at common law, be recoverable by her on account of the stillbirth alleged in her separate complaint. That case doubtless will arrive here and I do [***41] not prejudge it. See *Currie* at 486, 487.

I vote to affirm.

Dissent by: KAVANAGH

Dissent

T. M. Kavanagh, J. (*dissenting*).

Plaintiff, the administratrix of the estate of Baby Boy Powers, commenced this action against defendants in the Oakland county circuit court on August 28, 1964, seeking damages under the Michigan wrongful death act. [1] Prior to answer, defendants filed a motion for summary judgment alleging the plaintiff's pleadings failed to state a cause of action. After answer and pretrial conference the trial court [*186] granted defendants' motion for the reason that "a viable baby boy in its sixth month of gestation which is negligently injured * * * and subsequently stillborn is not a 'person' within the meaning of Michigan's wrongful death act."

Plaintiff appealed to the Court of Appeals, which affirmed [***42] the trial court. (4 Mich App 572.) Plaintiff is here on leave granted by this Court on December 30, 1966.

On October 29, 1962, Hazel L. Powers was involved in an automobile accident with a car driven by defendant Ventittelli and owned by defendant City of Troy. At the time she was 6 months pregnant with child. As a result of the accident she and her unborn child each received serious injuries, causing the child to be stillborn.

The first sentence of the Michigan wrongful death act reads as follows:

> "Whenever the death of a person or injuries resulting in death, shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, in respect thereof, then and *in every such case,* the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, *notwithstanding the death of the person injured,* and although the [**541] death shall have been caused under such circumstances as amount in law to felony." (Emphasis supplied.)

The sole question for decision in this case is [***43] whether a 6-month old fetus is a *person* within the meaning of the Michigan wrongful death act.

Defendants rely, as did the trial court and the Court of Appeals, on the case of *Newman* v. *City of Detroit,* 281 Mich 60.

[*187] In the *Newman Case* the injuries suffered by the unborn child occurred 22 days prior to his birth and caused his death 3 months after he was born. The Court there denied decedent's cause of action under the survival act, simply stating that *the overwhelming weight of authority denied liability,* and concluded that (p 64):

> "Plaintiff has no cause of action under the common law or under any statute."

Plaintiff relies on the great weight of authority which presently exists throughout the nation and contends that although *LaBlue* v. *Specker,* 358 Mich 558 (decided in January, 1960), did not expressly overrule *Newman* v. *City of Detroit, supra,* it did so by implication.

LaBlue v. *Specker, supra,* without dissent determined the status of an unborn child as a person entitled to bring an action under the Michigan dram-shop act. [2] [***45] There the Court pointed out that it and other courts have repeatedly held that for all [***44] purposes of construction a child *en ventre sa mere* is considered as a child *in esse* if it would be for the child's benefit to be so considered. It cited the case of *Williams* v. *Marion Rapid Transit, Inc.,* 152 Ohio St 114 (87 NE2d 334, 10 ALR2d 1051), [3] with approval. In that case an unborn child was considered a person within the constitutional provision giving every person a remedy for personal injury. The Court also cited *McLain* v. *Howald,* 120 Mich 274, where it was said (p 279):

> "It may be that these statutes do not in terms cover this case, but they are in harmony with the settled rule when they declare that 'posthumous [*188] children are considered as living at the death of their parents.' *

[1] CL 1948, § 691.581 *et seq.* (Stat Ann 1959 Cum Supp § 27.711 *et seq.).* See, currently, CLS 1961, § 600.2922, as amended by PA 1965, No 146 (Stat Ann 1965 Cum Supp § 27A.2922).

[2] CLS 1961, § 436.22 (Stat Ann 1968 Cum Supp § 18.993). -- Reporter.

[3] Also cited with approval by Justice Talbot Smith in *Montgomery* v. *Stephan,* 359 Mich 33, 47.

> * * And it is held that such children may sue for an injury or loss sustained while *en ventre sa mere*. 27 Am & Eng Enc Law, 420, and note. We feel justified, by these authorities, in saying that Edward McLain, being *in esse,* though *en ventre sa mere,* at the time of the death of the life tenant, was entitled to take under the will with his older brothers and sisters."

In *LaBlue* the Court then analogized between the fact situation there and the holdings of this Court and courts of other States under the workmen's compensation statutes. They hold that posthumous children are entitled to compensation due as the result of the death of a parent.

Turning to the holding of courts in the field of criminal law, the Court stated that a child's legal existence *en ventre sa mere* had long been recognized in abortion and other criminal statutes.

The Court then examined how the Michigan Court and other courts construed civil damage or dram-shop act provisions.

In *LaBlue* it was pointed out that there had been a change in the weight of authority which affected the *Newman* decision. The Court said (p 570):

> "While the statement made by Justice Butzel, in September of 1937 when this case was decided, was true that the overwhelming weight of authority denied liability, the situation with respect to the law has changed considerably since that time."

[***46] [**542] In pointing out that the law had changed, the Court cited 10 ALR2d 1059, which is an annotation dealing with grounds of action for prenatal injuries. That annotation was published in 1950 and stated that cases dealing with prenatal injuries were few in number and that the numerical weight of authority [*189] denied relief under the various wrongful death statutes. The Court then cited a later annotation found in 27 ALR2d 1256 (published in 1953) which supplemented that in 10 ALR2d, and quoted a portion of that annotation which pointed out the fact that 10 jurisdictions to that date had denied a right of action for prenatal injuries and 7 had allowed such actions. The annotation stated (p 1259):

> "However, the fact that 6 jurisdictions out of 7 in the past several years have recognized such an action indicates a definite trend away from the more orthodox view."

The Court then cited many cases from other jurisdictions which point out the drastic change in the law. The *LaBlue* opinion concluded by saying (p 578):

> "Assuming that the guardian would be able to prove the facts alleged in his declaration, that John LaBlue had acknowledged that he was [***47] the father of Deborah Johnson, and assuming that proof of damage and dependency can be shown, it is clear that a cause of action exists."

With the passage of time and resulting sophistication of judicial precedent and medical knowledge, it is most apparent that the Court in *LaBlue* was absolutely correct in its appraisal of the *Newman Case* in stating that the law had changed considerably since *Newman* had been decided. See *Smith* v. *Brennan,* 31 NJ 353 (157 A2d 497); *Daley* v. *Meier,* 33 Ill App 2d 218 (178 NE2d 691); *Sana* v. *Brown,* 35 Ill App 2d 425 (183 NE2d 187); *Sinkler* v. *Kneale,* 401 Pa 267 (164 A2d 93).

In the case of *Sinkler* v. *Kneale, supra* (decided in September, 1960), the Court was considering a case where a Mongoloid infant brought suit for damages caused when defendant, while negligently operating [*190] his motor vehicle, collided with the car which her mother was driving. The plaintiff at that time was a fetus of one month. As a result of these injuries the child claimed she was born Mongoloid. The Court there reversed an earlier Pennsylvania case showing that the authorities relied upon were cases from other [***48] jurisdictions which by that time had reversed themselves, and then upheld the right of action when the child was born alive. The Court then cited a Massachusetts case in which Judge Holmes denied the right of action but felt it necessary to find some opposition to a statement made by Lord Coke on criminal law. Of this the Court in *Sinkler* stated (p 270):

> "Even if the criminal law is faint authority for a tort, the foregoing must show at least that the common law offers no bar to the suit. Judge Holmes' real point d'appui for decision was that the unborn child was part of its mother. *This was undoubtedly the medical view accepted by the law at the time, and it is precisely the view that has altered since*." (Emphasis supplied.)

The Court then gave a detailed consideration of the various jurisdictions and factors pointing out the change in the law (pp 270, 271):

> "Since 1949 seven States have overruled former decisions denying recovery, including the four above cited in *Berlin,* [4] and nine States, dealing with the question for the first time, have upheld recovery. The eighteen States that now allow recovery are: (citing States and cases).
>
> " [**543] At present [***49] eight States deny

[4] *Berlin* v. *J. C. Penney Co.* (1940), 339 Pa 547 (16 A2d 28).

recovery. In two the courts note the recent trend and strongly indicate that reversal is likely. These are Michigan, in *LaBlue* v. *Specker* (1960), 358 Mich 558, and Wisconson, [*191] in *Puhl* v. *Milwaukee Auto Ins. Co.* (1960), 8 Wis 2d 343 (99 NW2d 163). * * *

"Leading text writers have condemned the rule and advocated recovery: (Citing authority). Prosser says that the trend toward allowing recovery 'is so definite and marked as to leave no doubt that this will be the law of the future in the United States.'

"The real catalyst of the problem is the current state of medical knowledge on the point of the separate existence of a fetus. In the *Smith Case* Justice Proctor, speaking for the New Jersey supreme court in a unanimous decision said this [31 NJ 353, 362, 157 A2d 497, 502]:

"'The third reason for the rule denying recovery was the theory that an unborn child was a part of the mother, and therefore not a person in being to whom a duty of care could be owed. All the courts that have permitted recovery for prenatal injuries have disagreed with that theory. They have found that the existence of an infant separate from its mother begins [***50] before birth. * * * *Medical authorities have long recognized that a child is in existence from the moment of conception, and not merely a part of its mother's body*.' (Citing authority.)" (Emphasis supplied.)

The Court concluded by reversing the lower court and remanding the case with a *procedendo*.

The very recent Texas case of *Leal* v. *C. C. Pitts Sand & Gravel,* 419 SW2d 820 (decided October 4, 1967), points out emphatically the definite trend in the law today. The court of appeals' decision in that case (413 SW2d 825) stated that it agreed with the plaintiff's theory and rationale as presented, but thought it was for the legislature or the supreme court to change the rule of law in that State. The supreme court reversed a prior decision of that court and allowed the recovery for the injury to the viable baby who was subsequently born live and then [*192] died. Of the change in the law, the court said (p 822): [***51]

"Our research indicates that since this counter trend became evident, no court has denied a right of action for prenatal injuries to a viable infant born alive where the problem has been given re-examination."

In Prosser on Torts (3d ed), ch 10, § 56, p 354, Professor Prosser gives consideration to the field of prenatal injuries. He points out that nearly all the decisions prior to 1946 denied recovery to the child for prenatal injuries -- first, because there was no person in existence; and second, because of the difficulty with the proofs. He continues, saying (p 355):

"So far as duty is concerned, if existence at the time is necessary, medical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by the law. The criminal law regards it as a separate entity, and the law of property considers it in being for all purposes which are to its benefit, such as taking by will or descent. After its birth, it has been held that it may maintain a statutory action for the wrongful death of the parent. So far as causation is concerned, there will certainly be cases in which there are [***52] difficulties of proof, but they are no more frequent, and the difficulties are no greater, than as to many other medical problems. All writers who have discussed the problem have joined in condemning the old rule, in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother, and in urging that recovery should be allowed upon proper proof."

[**544] He goes on to point out that the years of criticism of the rule have finally had their effect and brought about the most "spectacular abrupt reversal" of legal rule in the history of tort law.

[*193] Treating the problem of at what stage in embryonic development there should be redress for injuries, Professor Prosser states (pp 356, 357):

"Certainly the infant may be no less injured; and all logic is in favor of ignoring the stage at which it occurs. But with our knowledge of embryology what it is, as we approach the beginning of pregnancy, medical knowledge, and therefore medical testimony and medical proof of causes, becomes increasingly unreliable and unsatisfactory, so that there is good reason for caution. *This, however, goes to proof rather than principle;* [***53] and if, as is undoubtedly the case, there are injuries as to which reliable medical proof is possible, it makes no sense to deny recovery on any such arbitrary basis." (Emphasis supplied.)

Professor Prosser then turns directly to the issue in question in this case -- that is, whether it makes a difference if the child is born live or is stillborn. He states that the majority of jurisdictions at the time of the printing of his book (1964) are more concerned with compensation for a distressing wrong and allow the action even if the child is stillborn.

We must agree with Professor Prosser that the difficulty of proof while the child is in the mother's womb is no reason to deny recovery. Today the field of medicine is making great strides in this area of prenatal testing. [5]

[***54] [*194] We are told by Justice O'Hara in his opinion that:

> "Considering the plain import of the word 'person' at the time of enactment of our statute and *its uniform interpretation through the years,* we feel obligated to accord to the term its 'ordinary signification' when legislatively employed." (Emphasis supplied.)

The uniform interpretation through the years consists of one decision -- that of *Newman* v. *City of Detroit, supra*. We, too, feel obligated to accord the term "its ordinary signification" when legislatively employed, giving the term "person" the same construction the Michigan Supreme Court [**545] has given it in workmen's compensation cases, in criminal law, and abortion cases, in descent and distribution of property cases, and in civil damage cases, including the dram-shop statute. In all instances save the *Newman Case, supra,* "person" has been interpreted to include a child from the time of conception. In all of the above mentioned instances this Court has found that the legislature used the word "person" to include a fetus from time of conception. Clearly, the legislature used the word "person" with the [*195] same meaning [***55] in drafting the Michigan wrongful death act.

The word "person" is subsequently used in section 2 of the death act in providing that the damages shall go to those "persons" who may be entitled to such damages when recovered. Since the law of descent and distribution includes unborn children, it should be presumed that the legislature used the term "person" in both sections of the wrongful death act with the same meaning. See *People, ex rel. Simmons,* v. *Township of Munising,* 213 Mich 629, where syllabus 3 says:

> "Identical language should receive identical construction when found in the same act."

We do not lightly overrule settled decisions construing any section of a standing statute. The *Newman Case, supra,* is that one decision construing an act which does not approach the dignity of a well-settled interpretation. See *Smith* v. *Lawrence Baking Company,* 370 Mich 169, 177, citing and following *White* v. *Winchester Country Club,* 315 U.S. 32, 40 (62 S Ct 425, 86 L ed 619); and *United States* v. *Raynor,* 302 U.S. 540, 552 (58 S Ct 353, 82 L ed 413). Also, see *Autio* v. *Proksch Construction Company,* 377 Mich 517, where a majority of this [***56] Court, including Justice O'Hara -- over the dissents of Justices Black, Kelly, and Dethmers -- went beyond the one-case rule.

It is, therefore, clear that the *Newman Case* should be and hereby is overruled as its conclusions, regardless of their validity in 1937, are clearly erroneous at this date, there having been an historic change not in theology, but in philosophy, science, medicine, and the law without distinction as to abortion cases, workmen's compensation cases, tort claims including the dram-shop act cases, descent and distribution of property or death act cases.

[*196] It would be enough that we go no further in the determination of this case, as it is clear (1) that Baby Boy Powers was a person from the time of conception, (2) that he suffered injuries which caused his death, and (3) that if he had survived he would have had a cause of action for the injuries. Our death act states that "in *every* such case, the person who * * * would have been liable, if death had

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[5] "*Genetic Damage Detected*
"Prenatal Testing Gains
"By Rudy Abramson
"The Los Angeles Times
"St. Louis -- Medical science is approaching the ability to clinically identify in the womb many babies which will be born malformed because of genetic damage, a George Washington University researcher has disclosed.
"The technique which has been used clinically in 20 cases with 100 per cent accuracy, involves withdrawing a small specimen of the amniotic fluid surrounding the developing fetus, growing it in tissue culture, then studying the chromosomes which carry the genetic material responsible for heredity.
"Over the last few years, the technique has been used in 200 or more patients in research conducted by Dr. Cecil B. Jacobson, director of George Washington University's reproductive genetics unit, who described the work in a talk on new developments in human genetics before a science writers symposium here Friday.
"Jacobson said he believes the number of genetic mutations producing malformed children is increasing.
"The technique of withdrawing amniotic fluid from the womb has been available since the 19th century, but the potential for using it is only now being realized with the ability to inspect chromosomes and associate their abnormalities with specific malformations.
"At least eight genetically induced malformations -- including such well-known ones as Mongolism and Phenylketonuria (PKU) -- can now be identified.
"If the chromosomal analysis of fetal cells from the amniotic fluid should become a widely used procedure in cases where genetic damage is suspected, present abortion laws would presumably permit therapeutic abortion on grounds that to give birth to a child known to be defective would endanger the health of the mother."
(Carried in The State Journal, Lansing, Michigan, on November 20, 1967.)

not ensued, shall be liable to an action for damages, *notwithstanding the death of the person injured*." (Emphasis supplied.) The act makes no distinction as to time of death.

Without stopping [***57] here, however, we turn our attention to the cases heretofore decided in other jurisdictions that are directly in point with this case. Almost all of the cases are collected in 15 ALR3d 992 in an annotation entitled, "Action for death of unborn child." In section 2 of the annotation, at p 995, are listed 14 jurisdictions which have held that an action may be maintained to recover damages for the wrongful death of an unborn child. [6]

[***58] [*197] At page 999 of the annotation, under section 3, are listed 10 jurisdictions which denied liability under the same or similar facts.

For this Court to decide this case as do the shrinking minority of courts today, and as Justice O'Hara would have us do, would be to sanction the turning back of the clock and reverting to judicial and scientific fallacies long since obsolete.

Justice Voelker, writing the majority opinion in *Steger* v. *Blanchard,* 353 Mich 140, 144, said:

> "Rules of law are necessary; properly applied they can succinctly gather in the loose ends of a case and help rationalize the decision. Our courts could scarcely operate without them. But when a rule of law or its application becomes so divorced from the context of reality, from the living human situations to which it is sought to be applied, it becomes meaningless incantation and downright harmful."

The prime purpose of the death act was to put an end to the common-law rule that tort-feasors whose acts killed rather than injured their victims would escape liability. The death act was designed to permit recovery even after death. This Court should not by a strained construction of the [***59] act defeat its purpose.

Since it is not before the Court at this time, we do not take up the question of damages.

The order of the Court of Appeals affirming the entry of the trial court's summary judgment should be reversed and the case remanded to the circuit court for entry of an order denying motion for summary judgment.
Plaintiff shall have costs.

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[6] Connecticut -- *Gorke* v. *Le Clerc* (1962), 23 Conn Supp 256 (181 A2d 448); *Hatala* v. *Markiewicz* (1966), 26 Conn Supp 358 (224 A2d 406).
Delaware -- *Worgan* v. *Greggo & Ferrara, Inc*. (1956), 50 Del 258 (128 A2d 557).
Georgia -- *Porter* v. *Lassiter* (1955), 91 Ga App 712 (87 SE2d 100).
Iowa -- *Wendt* v. *Lillo* (1960, DC Iowa), 182 F Supp 56 (applying Iowa law).
Kansas -- *Hale* v. *Manion* (1962), 189 Kan 143 (368 P2d 1).
Kentucky -- *Mitchell* v. *Couch* (1955, Ky), 285 SW2d 901.
Louisiana -- *Cooper* v. *Blanck* (1923, La App), 39 So 2d 352 (dictum); *Valence* v. *Louisiana Power & Light Co*. (1951, La App) 50 So 2d 847.
Maryland -- *State, use of Odham,* v. *Sherman* (1964), 234 Md 179 (198 A2d 71).
Minnesota -- *Verkennes* v. *Corniea* (1949), 229 Minn 365 (38 NW2d 838, 10 ALR2d 634).
Mississippi -- *Rainey* v. *Horn* (1954), 221 Miss 269 (72 So 2d 434).
New Hampshire -- *Poliquin* v. *MacDonald* (1957), 101 NH 104 (135 A2d 249).
Ohio -- *Stidam* v. *Ashmore* (1959), 109 Ohio App 431 (11 Ohio Ops 2d 383, 167 NE2d 106).
South Carolina -- *Fowler* v. *Woodward* (1964), 244 SC 608 (138 SE 2d 42); *Todd* v. *Sandidge Constr. Co*. (1964, CA 4), 341 F2d 75 (applying South Carolina law).
Wisconsin -- *Kwaterski* v. *State Farm Mut. Auto. Ins. Co*. (1967), 34 Wis 2d 14 (148 NW2d 107).

Womack v. Buchhorn

Supreme Court of Michigan

April 8, 1971, Submitted ; June 1, 1971, Decided

Docket No. 52,534

Reporter
384 Mich. 718 *; 187 N.W.2d 218 **; 1971 Mich. LEXIS 260 ***

WOMACK v. BUCHHORN

Judges: Williams, J. T. M. Kavanagh, C. J., and Black, Adams, T. E. Brennan, T. G. Kavanagh, and Swainson, JJ., concurred with Williams, J.

Opinion by: WILLIAMS

Opinion

[*719] [219]** This case involves a common-law negligence action brought on behalf of an eight-year-old surviving child for prenatal brain injuries suffered during the fourth month of pregnancy in an automobile accident. The matter comes to this Court on grant of summary judgment for defendant by the Circuit Court solely on the basis of *Newman* v. *Detroit* (1937), 281 Mich 60, and leave to appeal to this Court prior to **[***3]** decision by the Court of Appeals.

The only issue in this case is whether a commonlaw negligence action can be brought on behalf of **[*720]** a surviving child negligently injured during the fourth month of pregnancy.

The *Newman* case was an action under the survival act (3 Comp Laws 1929, §§ 14040-14060) involving a child that survived three months after birth from prenatal injuries suffered 22 days prior to birth when his mother was a passenger on a Detroit streetcar. The trial judge denied a motion to dismiss and the case came before this Court by an appeal in the nature of *certiorari*. The decision in *Newman* was based principally on the fact that "the overwhelming weight of authority is * * * contrary" to allowing recovery for prenatal injuries (p 63). [1] The case concluded "Plaintiff has no cause of action under the common law or any statute" (p 64).

[*4]** Since *Newman* has been decided, medical science has probably advanced more in one generation than in the previous 100 years or more. Legal philosophy and **[**220]** precedent have moved in response to scientific and popular knowledge.

When this Court decided *Newman* in 1937, there were ten jurisdictions [2] **[***5]** other than Michigan denying **[*721]** recovery for prenatal injuries and three [3]

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[1] *Newman* cites the following authority: "In some inferior courts where decisions were reversed in the appellate courts and in *Kine* v. *Zuckerman* [1924], 4 Pa. Dist. & County Rep. 227, recovery was allowed for prenatal injuries. However, the overwhelming weight of authority is to the contrary. *Dietrich* v. *Northampton* [1884], 138 Mass. 14 (52 Am. Rep. 242); *Walker* v. *Railway Co.* [1891], 28 L.R. 69 (Ireland); *Allaire* v. *St. Luke's Hospital* [1898], 76 Ill. App. 441, affirmed in 184 Ill. 359 (56 N.E. 638, 48 L.R.A. 225, 75 Am. St. Rep. 176); *Gorman* v. *Budlong* [1901], 23 R.I. 169 (49 Atl. 704, 55 L.R.A. 118, 91 Am. St. Rep. 629); *Buel* v. *United Railways Co.* [1913], 248 Mo. 126 (154 S.W. 71, 45 L.R.A. [N.S.] 625, Ann. Cas. 1914C, 613); *Lipps* v. *Milwaukee Electric Ry. & Light Co.* [1916], 164 Wis. 272 (159 N.W. 916, L.R.A. 1917B, 334); *Stanford* v. *Railway Co.* [1926], 214 Ala. 611 (108 South. 566); *Nugent* v. *Railway Co.* [1913], 154 App. Div. 667 (139 N.Y. Supp 367), appeal dismissed in 209 N.Y. 515 (102 N.E. 1107); *Drobner* v. *Peters* [1921], 232 N.Y. 220 (133 N.E. 567, 20 A.L.R. 1503); *Magnolia Coca Cola Bottling Co.* v. *Jordan* [1935], 124 Tex. 347 (78 S.W. [2d] 944, 97 A.L.R. 1513)" pp 63, 64.

[2] *ALABAMA: Stanford* v. *St. Louis-San Francisco R. Co.* (1926), 214 Ala 611 (108 So 566); *ILLINOIS: Allaire* v. *St. Luke's Hospital* (1900), 184 Ill 359 (56 NE 638); *MASSACHUSETTS: Dietrich* v. *Northampton* (1884), 138 Mass 14 (52 Am Rep 242); *MISSOURI: Buel* v. *United R. Co.* (1913), 248 Mo 126 (154 SW 71); *NEW YORK: Drobner* v. *Peters* (1921), 232 NY 220 (133 NE 567, 20 ALR 1503); *OHIO: Krantz* v. *Cleveland, Akron, Canton Bus Co.* (1933), 32 Ohio NP NS 445; *RHODE ISLAND: Gorman* v. *Budlong* (1901), 23 RI 169 (49 A 704); *TEXAS: Magnolia Coca Cola Bottling Company* v. *Jordan* (1935), 124 Tex 347 (78 SW2d 944, 97 ALR 1513); *WISCONSIN: Lipps* v. *Milwaukee Electric Railway & Light Company* (1916), 164 Wis 272 (159 NW 916); *IRELAND: Walker* v. *Great Northern R. Co.* (1891), Ir LR 28 CL 69.

[3] See cases cited in the annotation at 10 ALR2d 1054, 1064: *LOUISIANA: Cooper* v. *Blanck* (La App, 1923), 39 So 2d 352; *PENNSYLVANIA: Kine* v. *Zuckerman* (1924), 4 Pa D&C 227;

allowing it. Today 27 American jurisdictions [4] **[***6]** allow recovery. **[*722]** Federal district courts have upheld **[**221]** recovery in two other jurisdictions [5] and there is favorable dictum by the state supreme court in still another jurisdiction. [6] Only one [7] denies recovery. [8]

[*723] Significantly, seven of the nine jurisdictions relied on by our Court in *Newman* in 1937 have **[***7]** changed their position. [9] **[***8]** This leaves only Alabama and Ireland of

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CANADA: Montreal Tramways Company v. *Leveille* (1933), Can Sup Ct 456 (4 DLR 337).

[4] The 27 jurisdictions allowing recovery for prenatal injuries are divided into four categories: a) those which have allowed common-law negligence actions to surviving children (13); b) those which have allowed wrongful death actions on the rationale that a viable fetus could recover under the applicable wrongful death act (10); c) Massachusetts, which has held that a non-viable fetus was a person within the meaning of the Massachusetts wrongful death act; d) those which in actions under survival type wrongful death statutes have held that the injured unborn child could have brought a common-law negligence action had he survived (3).

In the following jurisdictions a surviving child has been held to have a common-law right of action for negligently inflicted prenatal injuries:

CALIFORNIA: Scott v. *McPheeters* (1939), 33 Cal App 2d 629 (92 P2d 678) (conceived unborn child deemed a person by statute where necessary to protect its interest subsequent to birth); *DISTRICT OF COLUMBIA: Bonbrest* v. *Kotz* (1946), 65 F Supp 138; *GEORGIA: Tucker* v. *Howard L. Carmichael & Sons, Inc.* (1951), 208 Ga 201 (65 SE2d 909); *Hornbuckle* v. *Plantation Pipe Line Company* (1956), 212 Ga 504 (93 SE2d 727); *ILLINOIS: Amann* v. *Faidy* (1953), 415 Ill 422 (144 NE2d 412) (wrongful death action) extended to allow common-law recovery by surviving child injured while he was a one month old fetus in *Daley* v. *Meier* (1961), 33 Ill App 2d 218 (178 NE2d 691); *MARYLAND: Damasiewicz* v. *Gorsuch* (1951), 197 Md 417 (79 A2d 550); *NEW HAMPSHIRE: Bennett* v. *Hymers* (1958), 101 NH 483 (147 A2d 108); *NEW JERSEY: Smith* v. *Brennan* (1960), 31 NJ 353 (157 A2d 497); *NEW YORK: Woods* v. *Lancet* (1951), 303 NY 349 (102 NE2d 691); *OHIO: Williams* v. *Marion Rapid Transit, Inc.* (1949), 152 Ohio St 114 (87 NE2d 334); *OREGON: Mallison* v. *Pomeroy* (1955), 205 Or 690 (291 P2d 225); *PENNSYLVANIA: Sinkler* v. *Kneale* (1960), 401 Pa 267 (164 A2d 93); *RHODE ISLAND: Sylvia* v. *Gobeille* (1966), 101 RI 76 (220 A2d 222); *WASHINGTON: Seattle-First National Bank* v. *Rankin* (1962), 59 Wash 2d 288 (367 P2d 835).

In the following jurisdictions a wrongful death action has been allowed on the rationale that a fetus which was viable at the time the injury occurred could recover under the applicable wrongful death act:

DELAWARE: Worgan v. *Greggo & Ferrara Inc.* (1956), 50 Del 258 (128 A2d 557); *KANSAS: Hale* v. *Manion* (1962), 189 Kan 143 (368 P2d 1); *KENTUCKY: Mitchell* v. *Couch* (Ky App, 1955), 285 SW2d 901; *LOUISIANA: Cooper* v. *Blanck* (La App, 1923), 39 So 2d 352 (statute conferred right of action on parents for death of a child); *MISSISSIPPI: Rainey* v. *Horn* (1954), 221 Miss 269 (72 So 2d 434); *MISSOURI: Steggall* v. *Morris* (1953), 363 Mo 1224 (258 SW2d 577); *SOUTH CAROLINA: Hall* v. *Murphy* (1960), 236 SC 257 (113 SE2d 790); *TENNESSEE: Shousha* v. *Matthews Drivurself Service, Inc.* (1962), 210 Tenn 384 (358 SW2d 471); *TEXAS: Leal* v. *C. C. Pitts Sand and Gravel, Inc.* (Tex, 1967), 419 SW2d 820; *WISCONSIN: Kwaterski* v. *State Farm Mutual Automobile Insurance Company* (1967), 34 Wis 2d 14 (148 NW2d 107).

MASSACHUSETTS allows an action for wrongful death of a non-viable fetus (3-1/2 months), holding that a non-viable fetus is a "person" within the meaning of the Massachusetts wrongful death act. *Torigian* v. *Watertown News Co., Inc.* (1967), 352 Mass 446 (225 NE2d 926).

In the following jurisdictions in actions brought under survival type wrongful death statutes, it was held that the injured unborn child would have been able to bring a common-law negligence action had he survived:

CONNECTICUT: Prates v. *Sears, Roebuck and Company* (1955), 19 Conn Supp 487 (118 A2d 633); *MINNESOTA: Verkennes* v. *Corniea* (1949), 229 Minn 365 (38 NW2d 838, 10 ALR2d 634); *NEVADA: White* v. *Yup* (1969), 85 Nev 527 (458 P2d 617).

[5] *IOWA: Wendt* v. *Lillo* (ND Iowa, 1960), 182 F Supp 56; *WEST VIRGINIA: Panagopoulous* v. *Martin* (SD W Va, 1969), 295 F Supp 220.

[6] *NORTH CAROLINA: Stetson* v. *Easterling* (1968), 274 NC 152 (161 SE2d 531); the North Carolina Supreme Court opined that the prenatally injured child "if he had lived, could have maintained an action to recover damages on account of injuries negligently inflicted upon him when *en ventra sa mere,"* but held no cause of action since the North Carolina death act required proof of "pecuniary injury" and there was no sufficient allegation thereof.

[7] *ALABAMA: Stanford* v. *St. Louis-San Francisco R. Co.* (1926) 214 Ala 611 (108 So 566).

[8] Numerous text writers have also condemned the old rule denying recovery for prenatal injuries, *e.g.,* Prosser, *Torts* (3d ed), § 56, p 355, 2 Harper and James, *Torts,* § 18.3, pp 1028-1031. See also the articles cited in Prosser, *Torts* (3d ed), § 56, p 355, footnote 35.

[9] ***Jurisdiction:*** **Illinois**
Case Cited by Newman; Allaire v. St. Luke's Hospital, (1900), 184 Ill 359 (56 NE 638) *Reversed by:* Amann v. Faidy, (1953), 415 Ill 422 (114 NE2d 412)
Jurisdiction: **Massachusetts**
Case Cited by Newman; Dietrich v. Northampton (1884), 138 Mass 14 (52 Am Rep 242) *Reversed by:* Keyes v. Construction Service, Inc. (1960), 340 Mass 633 (165 NE2d 912); Torigian v. Watertown News Co., Inc. (1967), 352 Mass 446 (225 NE2d 926)
Jurisdiction: **Missouri**
Case Cited by Newman; Buel v. United R. Co. (1913), 248 Mo 126
Reversed by: Steggall v. Morris (1953), 363 Mo 1224
(154 SW 71) (258 SW2d 577)

those **[**222]** originally cited by this Court still denying recovery. As for Alabama of the six cases from other jurisdictions [10] relied on by the Alabama Court in *Stanford* (fn. 5), all of which were also relied upon by this Court in *Newman,* all have now been overruled.

[*724] This Court must therefore face forthrightly whether the law of *Newman* should continue to stand on the basis of *stare decisis* or whether Michigan should recognize what present day science, philosophy and the great weight of the law in this country consider the better and the sound rule. Some 20 years ago the New York Court of Appeals was also faced with the same problem in overruling precedent against allowing recovery for negligent infliction of prenatal injuries. *Woods* v. *Lancet* (1951), 303 NY 349 (102 NE2d 691) overruling *Drobner* v. *Peters* (1921), 232 NY 220 (133 NE 567, 20 ALR 1503) (one of the cases relied on by this Court in *Newman* in 1937). There Judge Desmond speaking for the court said:

> "What, then, stands in the way of a reversal here? Surely, as an original proposition, we would, today, be hard put to it to find a sound reason for the old rule. Following *Drobner* v. *Peters (supra)* would call for an affirmance but the chief basis for that holding **[***9]** (lack of precedent) no longer exists. And it is not a very strong reason, anyhow, in a case like this. Of course, rules of law on which men rely in their business dealings should not be changed in the middle of the game, but what has that to do with bringing to justice a tort-feasor who surely has no moral or other right to rely on a decision of the New York Court of Appeals? Negligence law is common law, and the common law has been molded and changed and brought up-to-date in many another case. Our Court said, long ago, that it had not only the right, but the duty to reexamine a question where justice demands it, * * *." (p 354.)

This Court has followed the same legal philosophy. For example, in *Bricker* v. *Green* (1946), 313 Mich 218, 232, Justice Bushnell speaking for the Court quoted and adopted the following language of the Wisconsin Supreme Court:

> **[*725]** "'Were it a rule of property, we should certainly apply to it the rule of *stare decisis*. But it is not a rule of property. It is a pure judicial decree relating to liability for negligence, and the court would not for a moment give countenance to an argument that a wrongdoer relied upon it. We are, **[***10]** therefore, at liberty to change the rule in the needs of justice, and to conform to the overwhelming majority rule.' *Reiter* v. *Grober* [1921], 173 Wis 493 (181 N.W. 739, 18 A.L.R. 362)."

See also the consideration of the matter by Chief Justice Thomas M. Kavanagh in *Parker* v. *Port Huron Hospital* (1961), 361 Mich 1, 10, 11.

In the light of the present state of science and the overwhelming weight of judicial authority, this Court now overrules *Newman*. We hold that an action does lie at common law for negligently inflicted prenatal injury. We adopt the reasoning and result of the New Jersey Supreme Court (which also involved a common-law action):

> "And regardless of analogies to other areas of the law, justice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body. If the wrongful conduct of another interferes with that right, and it can be established by competent proof that there is a causal connection between the wrongful interference and the harm suffered by the child when born, damages for such harm should be recoverable by the child." *Smith* v. **[**223]** *Brennan* (1960), 31 **[***11]** NJ 353, 364, 365, (157 A2d 497, 503).

"Candor compels acknowledgment that the decision rendered today is a new ruling." *Griffin* v. *Illinois* (1956), 351 U.S. 12, 25 (76 S Ct 585, 100 L Ed 891, 55 ALR2d 1055) (concurring opinion of Justice Frankfurter). In the interests of justice and fairness therefore "we are persuaded to hold that the **[*726]** new rule applies to all pending and future cases, as in *Bricker* v. *Green* (1946), 313 Mich 218." *Daley* v. *LaCroix* (1970), 384 Mich 4, 14.

The judgment entered in the circuit court is vacated and the cause remanded for future proceedings in conformity with this opinion. The costs of this appeal will abide the final decision of this case.

Jurisdiction: **New York**
Case Cited by Newman; Drobner v. Peters (1921), 232 NY 220 (133 NE 567, 20 ALR 1503)
Reversed by: Woods v. Lancet (1951), 303 NY 349 (102 NE2d 691)
Jurisdiction: **Rhode Island**
Case Cited by Newman; Gorman v. Budlong (1901), 23 RI 169 (49 A 704) *Reversed by:* Sylvia v. Gobeille (1966), 101 RI 76 (220 A2d 222)
Jurisdiction: **Texas**
Case Cited by Newman; Magnolia Coca Cola Bottling Company v. Jordan (1935), 124 Tex 347 (78 SW2d 944, 97 ALR 1513)
Reversed by: Leal v. C. C. Pitts Sand and Gravel, Inc. (Tex, 1967), 419 SW2d 820
Jurisdiction: **Wisconsin**
Case Cited by Newman; Lipps v. Milwaukee Electric Railway & Light Company (1916), 164 Wis 272 (159 NW 916) *Reversed by:* Kwaterski v. State Farm Mutual Automobile Insurance Company (1967), 34 Wis 2d 14 (148 NW2d 107)

[10] Illinois, Massachusetts, Missouri, New York, Rhode Island and Wisconsin (see fn 9). **End of Document**

O'Neill v. Morse

Supreme Court of Michigan

January 8, 1971, Submitted ; July 7, 1971, Decided

Docket No. 52,693

Reporter
385 Mich. 130 *; 188 N.W.2d 785 **; 1971 Mich. LEXIS 177 **

Judges: T. E. Brennan, J. T. M. Kavanagh, C. J., and T. G. Kavanagh, Swainson and Williams, JJ., concurred with T. E. Brennan, J. Black, J. (*dissenting*). Adams, J., concurred in the result.

Opinion by: BRENNAN

Opinion

[*132] [**785] The case before us is indistinguishable upon its facts from the case of *Powers* v. *City of Troy* (1968), 380 Mich 160.

The complaint here alleges that plaintiff's decedent, Baby Boy Pinet, was an eight-month-old viable infant *en ventre sa mere* at the time of the injury which caused his death.

Action was brought under Michigan's wrongful death statute. MCLA § 600.2922 (Stat Ann 1971 Cum Supp § 27A.2922). By motion for summary judgment, defendants raised the issue of whether the plaintiff's decedent was a person within the meaning of that statute.

Plaintiff answered the motion, contending that his decedent was a person within the meaning of the wrongful death statute, and further arguing that his decedent was a person within the meaning of the Fourteenth Amendment to the United States Constitution; that [***5] his right of action may not be denied [*133] without depriving him of a vested property right without due process of law.

We lay the constitutional question aside.

Intervening since our decision in *Powers* is the case of *Womack* v. *Buchhorn* (1971), 384 Mich 718, decided at this term.

In *Womack,* we overruled *Newman* v. *Detroit* (1937), 281 Mich 60, and held that a common-law action does lie in this state for prenatal injuries.

Womack being the applicable rule of common-law tort liability, we have only to [**786] apply the wrongful death statute to the facts of this case.

The first section of that statute reads as follows:

> "Sec. 2922.(1) Whenever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have
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> entitled the party injured to maintain an action and recover damages, in respect thereof, then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death [***6] shall have been caused under such circumstances as amount in law to felony. All actions for such death, or injuries resulting in death, shall be brought only under this section." MCLA § 600.2922 (Stat Ann 1971 Cum Supp § 27A.2922).

The obvious purpose of the statute, originally enacted as PA 1848, No 38, is to provide an action for wrongful death whenever, *if death had not ensued,* there would have been an action for damages. *Womack* settled the question of whether, if death had not ensued, Baby Boy Pinet would have had an action for damages.

[*134] The statutory wrongful death action is co-extensive with the common-law right of action for damages.

We have never supposed that the 1848 legislature intended only to provide an action for wrongful death under those circumstances in which there was precedent for recovery of damages in cases reported before 1848. It would be anomalous indeed if we were to have two co-existing bodies of common-law tort liability in Michigan -- one static and frozen as of 1848 for wrongful death and one living and growing to apply in other cases.

Justices who felt no action should lie for the wrongful death of an unborn person subscribed [***7] to the

following statements in *Powers* v. *City of Troy, supra*:

> "Appellee, *per contra,* premises his argument on the traditional view that to hold a fetal child under our death act to be a 'person' we, in legal effect, judicially amend a statute which has been construed since its enactment over a hundred years ago to exclude the cause of action contended for by appellant. * * *
> "Rather we rest our decision squarely upon the fact that at the time our wrongful death act was passed the legislature used the term 'person' in its ordinary, generally accepted meaning at that time. * * *
> "We are not convinced that 'person' in its ordinary signification in 1848 when our death act was passed included the concept of a fetal child. It should be noted and emphasized that we deal here, not with a cause of action which existed at common law. We do not face here the question of broadening the base of recovery in an action already recognized at common law. We deal with a statute in derogation of the common law.
> * * *
>
> [*135] "Considering the plain import of the word 'person' at the time of enactment of our statute and its uniform interpretation through the years, we feel obligated [***8] to accord to the term its 'ordinary signification' when legislatively employed."

No citation of authority was provided in *Powers* to establish the historical accuracy of those conclusions. It is not accurate to assume that our recent explosion of medical knowledge on the subject of prenatal life constituted a complete reversal of previous thinking on the subject.

The instructive dissent of *Mr. Justice Boggs,* in *Allaire* v. *St. Lukes Hospital*, 184 Ill 359 (56 NE 638), at 368, was written in 1900. His view has been largely adopted in this country.

[**787] The majority in that case held:

> "That a child before birth is, in fact, a part of the mother and is only severed from her at birth, cannot, we think, be successfully disputed."

Justice Boggs wrote:

> "Medical science and skill and experience have demonstrated that at a period of gestation in advance of the period of parturition the foetus is capable of independent and separate life, and that though within the body of the mother it is not merely a part of her body, for her body may die in all of its parts and the child remain alive and capable of maintaining life when separated from the dead body of [***9] the mother."

If the mother can die and the fetus live, or the fetus die and the mother live, how can it be said that there is only one life?

If tortious conduct can injure one and not the other, how can it be said that there is not a duty owing to each?

[*136] The phenomenon of birth is not the beginning of life; it is merely a change in the form of life. The principal feature of that change is the fact of respiration. But the law does not regard the incidence of respiration as the sole determinative of life. Respiration can be artificially induced or mechanically supplied. Life remains.

That the fetus cannot be seen is hardly the measure of life. That it cannot cry or see or remember -- can these things control its right to live?

What of the capacity for "independent" life?

A baby fully born and conceded by all to be "alive" is no more able to survive unaided than the infant *en ventre sa mere*. In fact, the babe in arms is less self-sufficient -- more dependent -- than his unborn counterpart.

Does he want to eat? He cannot take himself to his mother's breast, or even discover the use of it without her help. He cannot keep himself warm or dry or ward off danger. [***10] He lives by the sufferance of others, demanding the means of sustaining his life by the noisy, endearing, obvious fact of his presence.

The demands of the unborn child are no less total, but they are enforced by physical rather than emotional attachments. Ensconced and protected, he takes what he needs without asking. Only the conscious or negligent acts of others can deprive him of sustenance.

The phenomenon of birth is an arbitrary point from which to measure life. True, we reckon age by counting birthdays. The Chinese count from New Years. The choice is arbitrary.

Birth may be natural, where the fetus has commenced the process by chemical changes within himself, and the mother has cooperated; it may be [*137] intentional, as in the case of Cesarean section or induced labor; or it may be accidental, as where the child is separated from the mother by trauma. *

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* Widely reported was the March 20, 1971, birth of one Kimberly Sue Bange, found alive and in good condition some distance from the body of her mother, killed in a fatal auto accident. Termed "a Cesarean section by violence," the event, whether true or not, establishes a useful hypothetical case;

[***11] One need not be alive in order to be born; as the delivery of stillborn babies demonstrates. Neither is it possible for one to be born alive unless he be living prior to the birth.

A fetus having died within its mother's womb is dead; it will not come alive when separated from her. A fetus living within the mother's womb is a living creature; it will not die when separated from her unless the manner, the time or the circumstances of separation constitute a fatal trauma.

[**788] The fact of life is not denied.

Neither is the wisdom of the public policy which regards unborn persons as being entitled to the protection of the law.

PA 1968, No 292, constitutes a legislative recognition of the *personhood* of the unborn:

> "600.2045 Guardian ad litem for *unborn persons*. [M.S.A. 27A.2045].
>
> "Sec. 2045. (1) If in an action or proceeding, other than in probate court, it appears that a person not in being may become entitled to a property interest, real or personal, legal or equitable, involved in or affected by the action or proceeding, and the interest of the unborn person is not or cannot otherwise properly be represented and protected, the court, upon its own motion, [***12] or upon the motion of any party, may appoint a suitable person to appear and act as guardian ad litem of the unborn person. The guardian ad litem is authorized [*138] to engage counsel and do whatever is necessary to defend and protect the interest of the unborn person. A judgment or order made after the appointment shall be conclusive upon the unborn person for whom a guardian was appointed.
> "(2) The guardian ad litem may be removed by the court which appointed him, without notice, when it appears to the court to be for the best interests of the ward. The guardian ad litem may be allowed reasonable compensation by the court appointing him, to be paid and taxed as a cost of the proceedings as directed by the court." MCLA § 600.2045 (Stat Ann 1971 Cum Supp § 27A.2045). (Emphasis added.)

If property interests of unborn persons are protected by the law, how much more solicitous should the law be of the first unalienable right of man -- the right to life itself?

There remains the question of whether the statutory action for wrongful death contemplates an action for the wrongful death of an unborn child, in the light of the unitary and interdependent provisions of PA 1939, [***13] No 297, and sections 114 and 115 of the probate code of the same year, 1939.

These statutes were interpreted in *Breckon* v. *Franklin Fuel Company* (1970), 383 Mich 251.

We there held that damages recoverable in wrongful death actions were limited to pecuniary injury, reasonable medical, hospital, funeral and burial expenses, and conscious pain and suffering, and that the concept of "pecuniary injury" was further delineated by the probate code provision requiring distribution of such pecuniary loss among "dependents of the decedent."

We have never held, however, that "dependents of the decedent" were limited to those persons who received actual support and maintenance from the decedent during his lifetime.

[*139] In *In re Olney's Estate* (1944), 309 Mich 65, we held that a husband was entitled to the value of his wife's services, less the reasonable cost of her maintenance, and that such loss of services constituted a "pecuniary loss" recoverable by him as administrator of her estate, and distributable to him as a "dependent".

So, too, in the case of minor children, parents are entitled to the net value of their children's services; these are pecuniary injuries with [***14] respect to which the parents stand in the capacity of dependents for the purpose of distribution under the probate code.

Admittedly in the case of very young or stillborn children, the value of prospective filial service is not easy to prove.

But pecuniary injuries are alleged in this cause, and no issue has been made of it in this appeal based upon the motion for summary judgment.

Reversed and remanded. Costs to plaintiff.

Dissent by: BLACK

Dissent

This case, dealing as in *Breckon* v. *Franklin Fuel Company* (1970), 383 Mich 251 with the same unitary statutes as are

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suppose Kimberly Sue had also been found dead. How many "persons" would have died in the crash? How many wrongful deaths?

cited at the margin, [1] is fairly entitled to the same [*140] textual beginning as the Court employed for *Breckon*. To quote *Breckon* at 264, 265:

> "All of which brings to the fore that judicial obligation which arises when one party to litigation demands that the Court apply a controlling statute one way and his adversary insists that it should be applied precisely the other way.
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> "50 Am Jur, Statutes, § 223, pp 200-203, speaks tersely the duty called into play here:
>
> "'§ 223. *Legislative Intent as Controlling Factor*. -- In the interpretation of statutes, [***15] the legislative will is the all important or controlling factor. Indeed, it is frequently stated in effect that the intention of the legislature constitutes the law. *The legislative intent has been designated the vital part, heart, soul, and essence of the law, and the guiding star in the interpretation thereof*. Accordingly, the primary rule of construction of statutes is to ascertain and declare the intention of the legislature, and carry such intention into effect to the fullest degree. A construction adopted should not be such as to nullify, destroy, or defeat the intention of the legislature.' (Emphasis by present writer.)"

[***16] For some reason no thoughtful trial lawyer or trial judge is able to rationalize on legal ground, these statutes of 1939 have -- since handing down of *Burns* v. *Van Laan* (1962), 367 Mich 485 -- been treated by some here as exempt from *all* rules of statutory construction. Why the provisions thereof, plucked out and set apart from all other statutes, should be regarded as open to judicial amendment *without word or thought for legislative intent,* is pure mystery; no reason being deigned in or upon any page of our books even after repeated challenge. *Currie* v. *Fiting, supra,* is a prime example of this state of affairs, the issue in that case having been right of suit for alleged pecuniary injury and [*141] eligibility of survivors to distributive proceeds -- under the mentioned acts of 1939.

This writer, slated now to contribute an offering prior to scriven by or on behalf of a majority of the Justices, proposes to lance our feverish disagreement with aim toward ascertainment as now due of the specific issue of legislative intent and purpose. As before in *Powers* v. *City of Troy* (1968), 380 Mich 160, 182-185, I do not care to join others for today's [***17] forthcoming new tour through philosophy, theology, science and legal writings dehors Michigan *where statutes corresponding with or even akin to those now before us have never come to enactment*.

I begin by reference to two mature and obviously necessary rules of statutory construction. The first and *basic* one is that *all* portions of statutory provisions brought under scrutiny should be read together and considered for accurate identification of the will of the legislature.

> "The basic rule governing the matter is to ascertain and give effect to the legislative intent. *City of Grand Rapids* v. [**790] *Crocker,* 219 Mich 178; *Boyer-Campbell Co*. v. *Fry,* 271 Mich 282 (98 ALR 827); *Gardner-White Co*. v. *State Board of Tax Administration,* 296 Mich 225. This requires that the clause in question shall be read in connection with other pertinent provisions of the act and that a meaning shall be given thereto consistent with the general purpose sought to be accomplished." (*Roberts Tobacco Company* v. *Department of Revenue* [1948], 322 Mich 519, 530).

The other is that which most recently was reiterated unanimously in *Detroit* v. *Tygard* [***18] (1968), 381 Mich 271, 275:

> "Perforce we say as we have said uniformly [*142] before in determining legislative intent we accord words their ordinary meaning:
>
> "'The words of a statute are to be taken in their ordinary signification and import.' *Green* v. *Graves* (1844), 1 Doug (Mich) 351, 354." [2]

Now for *our* unitary acts of 1939, as amended, and their relation to *our* original statute of 1848, paying no attention

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[1] PA 1939, No 297; CLS 1961, § 600.2922; MCLA § 600.2922 (Stat Ann 1971 Cum Supp § 27A.2922) as amended by PA 1965, No 146. (Wrongful Death Act.)
PA 1939, No 288; CL 1948, §§ 702.114, 702.115; MCLA §§ 702.114, 702.115 (Stat Ann 1962 Rev § 27.3178[184], 1971 Cum Supp § 27.3178[185]) as amended by PA 1965, No 181 (Portion of Probate Code of 1939 headed "SETTLEMENT OF DEATH AND SURVIVAL ACTIONS -- DISTRIBUTION OF PROCEEDS.")
In the ensuing opinion these statutes will come to reference generally as "the acts of 1939." Their conjoined purpose was reviewed in detail when *Currie* v. *Fiting* (1965), 375 Mich 440, 484, 485, and then *Breckon,* came to discussion and divisive decision.

[2] For additional authorities adhering to this rule of construction see 16 Callaghan's Michigan Digest, § 91, pp 483, 484, and 1971 pocket supplement at pages 157, 158. It was written tersely and perhaps best, by quoting Best, in *Attorney General* v. *The Bank of Michigan,* Harr Ch 315, 324: "'Again, the intent of the legislature is not to be collected from any particular expression, but from a general view of the whole of the act:' *Per Best, Ch. J., 3 Bing., 196; Dwarris on Statutes, 47, 48*."

to foreign statutes and interpretations which no reasonable mind or [***19] man could seriously fit to *our* said statutes.

In *Currie, supra* at 465, the writer called upon the Brethren for response to pointed questions purposed toward ascertainment of the then called up intent of the legislature as regards the aforesaid acts. [3] There was no answer or hint of answer then, anywhere in the 49 pages of *Currie*. Now I try again, hoping that the Brethren this time will join in framing issue *whether,* by the acts of 1939 as amended, *the legislature intended to provide that* "'new in its species, new in its quality, new in its principle, in every way new,'" and wholly "*independent cause of action for the purpose of compensating certain dependent members of the family* [*143] for the deprivation, *pecuniarily,* resulting to them from his ['the injured person'] wrongful death", *in favor of anyone assigning the wrongful taking of a fetus*. (The quotations are taken from *Michigan Central R. Co*. v. *Vreeland* [1913], 227 U.S. 59, 69 (33 S Ct 192, 195, 57 L Ed 417, 421), adopted by our Court in *Lincoln* v. *Detroit & Mackinac R. Co*. [1914], 179 Mich 189, 204).

[***20] In *Currie, supra* at 466, the entire wrongful death act of 1848 was reproduced; my then purpose being that of identifying the legislative intent by utilizing a former regular practice of the legislature (discontinued with the compilation of 1929). That practice was the citation by marginal appendages, in the respective compilations, of extant court decisions construing and applying the theretofore employed statutory language. On the occasion of *Currie* the reproduction was taken from the compiled laws of 1871.

Now and below [4] [***22] I have had reproduced the act of 1848 from the "Laws of Michigan" as then published. Next and below [5] [**793] I have inserted today's [*144]

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[3] "Just what legislative assembly intended that the enacted, reenacted, generations-known, and currently effective composite, 'pecuniary injury resulting from such death,' should include and permit recovery of damages -- of any nature whatever -- on behalf of nondependent parents of a noncontributing adult child? Was it the convocation of 1848? If so, where is the evidence of such 1848 intent? Or was it the assembly of 1873? Why, as to that assembly? Or was such intention evinced when the legislature amended the death act in 1939 and, at the same time, inserted said section 115 in the probate code? If so, where is the evidence of 1939 intent to authorize such recovery?"

[4] LAWS OF MICHIGAN.

No. 38.

AN ACT requiring compensation for causing death by wrongful act, neglect or default.

Section 1. Be it enacted by the Senate and House of Representatives of the State of Michigan, Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, (if death had not ensued,) have entitled the party injured to maintain an action, and recover damages, in respect thereof, then and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sec. 2. Every such action shall be brought by, and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property, left by persons dying intestate; and in every such action, the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to the wife and next of kin of such deceased person.

Approved February 12, 1848.

[5] [No. 146.]

AN ACT to amend section 2922 of Act No. 236 of the Public Acts of 1961, entitled "An act to revise and consolidate the statutes relating to the organization and jurisdiction of the courts of this state; the powers and duties of such courts, and of the judges and other officers thereof; the forms and attributes of civil claims and actions; the time within which civil actions and proceedings may be brought in said courts; pleading, evidence, practice and procedure in civil actions and proceedings in said courts; to provide remedies and penalties for the violation of certain provisions of this act; and to repeal all acts and parts of acts inconsistent with, or contravening any of the provisions of this act," being section 600.2922 of the Compiled Laws of 1948.*The People of the State of Michigan enact:*

Section amended.

Section 1. Section 2922 of Act No. 236 of the Public Acts of 1961, being section 600.2922 of the Compiled Laws of 1948, is hereby amended to read as follows:

600.2922 Wrongful death; liability of tort-feasor. [M.S.A. 27A.2922]

Sec. 2922. (1) Whenever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages, in respect thereof, then and in every such case, the person who or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. All actions for such death, or injuries resulting in death, shall be brought only under this section.

Same; persons entitled to sue; damages, distribution.

(2) Every such action shall be brought by, and in the names of, the personal representatives of such deceased person, and every such action the court or jury may give such damages, as, the court or jury, shall deem fair and just, with reference to

outstanding counterpart of the act of 1848, portrayed by section 2 of aforesaid act 297 of 1939, as amended without change by PA 1961, No 236, and as amended without relevant change by PA 1965, No 146. [5] My purpose here is to portray demonstratively [*145] the way in which the legislature has told all willing to read that "person" and "such deceased person," as employed in 1848, again in 1939, and then again in 1965, contemplated -- naturally, precisely and sensibly -- a living human being whose [***21] wrongful death could and did cause that requisite "pecuniary injury" to, or "pecuniary loss" suffered by, a surviving "widow", "wife", "spouse", and "next of kin".

[***23] *Just what legislative assembly of Michigan intended,* by contextual employment of such commonly understood words and phrases as

[*146] "person",

"widow and next of kin of such deceased person",

"wife and next of kin of such deceased person",

"decedent",

"dependents of the decedent",

"each of such dependents",

"reasonable compensation for the pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of inflicting of such injuries and his death",

and particularly by repeated limitation of "pecuniary" benefits to the "surviving spouse and next of kin who suffered such pecuniary injury",

to create a statutory cause for wrongful death of an unborn or stillborn fetus?

This gentle comment is submitted: An unborn or stillborn fetus simply could not and cannot succeed in leaving a "widow", a "wife", a "spouse", or "next of kin who suffered such pecuniary injury". Nor could any legislator of 1848, or of 1939, or of 1965, reasonably have conceived otherwise. If the Brethren purpose to write "nay" to this, I shall read their reasons with controlled and utmost deference.

For further enlightenment [***24] with respect to the legislative intent of 1848 (indeed for the overall intentional purpose of our 1939-strengthened version of Lord Campbell's Act), see this Court's quotation of the original British Act itself (*Hyatt* v. *Adams* [1867], 16 Mich 180, 194), noting particularly that the action must then have been brought "by and in the name of the executor or administrator of the person deceased, and to be for the benefit of the *wife, husband, parent* or *child* of the person whose death shall have been so caused". Would the wrongful prevention of birth into life have qualified [*147] then, any more than now, for action under such a statute? I think it proper to reply that, both in *Powers* and now in *O'Neill,* plaintiff's counsel and others have concentrated too much on that one word "person", and too little on the purposeful rest of these unitary statutes.

Refer (*ante* at p 141) to quotation of *Detroit* v. *Tygard*. Employment by our legislature of the noun "person" in 1848, and again in 1939 and 1965, permits no more today than a century ago any tensional stretch of that noun's common or ordinary understanding. Looking back at its original use both [***25] in England and here, it has occurred to the writer that legislators of the past century [6]

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the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered and also damages for the reasonable medical, hospital, funeral and burial expenses for which the estate is liable and reasonable compensation for the pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of the inflicting of such injuries and his death. Such person or persons entitled to such damages shall be of that class who, by law, would be entitled to inherit the personal property of the deceased had he died intestate. The amount recovered in every such action for pecuniary injury resulting from such death shall be distributed to the surviving spouse and next of kin who suffered such pecuniary injury and in proportion thereto. Within 30 days after the entry of such judgment, the judge before whom such case was tried or his successor shall certify to the probate court having jurisdiction of the estate of such deceased person the amount and date of entry thereof, and shall advise the probate court by written opinion as to the amount thereof representing the total pecuniary loss suffered by the surviving spouse and all of the next of kin, and the proportion of such total pecuniary loss suffered by the surviving spouse and each of the next of kin of such deceased person, as shown by the evidence introduced upon the trial of such case. After providing for the payment of the reasonable medical, hospital, funeral and burial expenses for which the estate is liable, the probate court shall determine as provided by law the manner in which the amount representing the total pecuniary loss suffered by the surviving spouse and next of kin shall be distributed, and the proportionate share thereof to be distributed to the surviving spouse and the next of kin. The remainder of the proceeds of such judgment shall be assets of the estate of the deceased.
This act is ordered to take immediate effect.
Approved July 12, 1965.

[6] We are committed, until at least the Court finds and defines

may have been [**794] just as familiar with English communicative usages as we are supposed to be, and that the common grasp of ordinary words employed then might be obtained by consulting what reputedly remains the most thorough and authoritative dictionary and encyclopedia that was published during the 19th century. Turning upon that thought to the 10-volume, 50 to 55 pound Century Dictionary and Cyclopedia (copyrighted 1889-1902 and published by the Century Company of New York), we find in Volume V the noun "person" defined and discussed in all of its aspects (pp 4414, 4415). Nowhere on any of these pages is there any suggestion that individual "person" meant anything except a living and breathing human. Arriving at Division "9" of the definitions, we find this:

> "9. In *law:* (a) A living human being. (b) A human being having rights and duties before the [*148] law; one not a slave. In old Roman law slaves were not considered to be persons. (c) A being, whether natural or artificial, whether an individual or a body corporate other than the state, having rights and duties [***26] before the law."

I find nothing detracting from this in Webster's New International Dictionary (2d ed 1956), p 1828. See on that page "8. *Law*".

It is true that more can be said, of simple reasoning brewed of common understanding of prevalently familiar words and phrases, for holding that it was the wrongful taking of a breadwinning or otherwise pecuniarily supportive person which the legislature had in mind, all the way through, when that body dealt successively with the wrongful death of a "person" and the wrongful death of "such deceased person." The above however should be enough for initial [***27] writing.

To conclude:

1. I cannot accept for determination plaintiff's constitutional attack upon the mentioned statutes, [7] for even if we should decide that issue in his favor the result would have to be destruction of the very cause he has pleaded, along with all other pending and future actions of its statutory kind. *Neither the Fourteenth Amendment nor our own Constitution may,* without saying so, *amend* any Michigan statute. They may destroy such a statute, depending [*149] upon our interpretation and application of it, but it is for us to say what the legislature meant by employed language when conflicting constructions of such a statute are pressed upon us.

[***28] I *do* accept plaintiff's appeal as a renewed motion (as in *Powers* v. *City of Troy* [1968], 380 Mich 160) for judicial revision of all sections of the unitary acts of 1939 as amended; a revision which if ordered will render eligible thereunder suits by appointed fiduciaries of the unborn or stillborn to recover damages for "pecuniary injury" on behalf of what necessarily must be newly designated beneficiaries. On that issue, that alone, an already divided Court has squared off.

2. *Womack* v. *Buchhorn* 1971, 384 Mich 718 has been decided since submission of the case at bar. Now it is urged that our determination of that *common-law* action, brought as it was (not by a fiduciary of a statutory "decedent" but *by an eight* [**795] *year old child*) for injuries caused by negligence "during the fourth month of pregnancy," authorizes for the first time a statutory action for wrongful death on behalf of the "surviving spouse and next of kin" of an unborn or stillborn fetus.

It is a sufficient answer to point out that this Court expressly confined its *Womack* decision to a holding that an action will lie *at common law,* by a person prenatally injured [***29] and hence born injured, for causal negligence. Such common-law action has to be brought, of course, by or on behalf of a living human being. The measure of damages must be such as have been suffered personally since birth, and as will be suffered personally in the future. No cause for "pecuniary injury" or "pecuniary loss," on behalf of others whether "spouse" or "kin," was authorized by *Womack*.

[*150] All *Womack* did was that which this Court may ever do as maker and molder of the common law of Michigan. Was it not suggested in *Currie, supra* at 486, 487, that it would be a bit more lawful and up-right should the Court fashion -- as now in *Womack* -- a common-law action whenever as in *Currie* we perceive a definite wrong;

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some allegedly better rule *moderne,* to the interpretive proposition that the legislative will is determinable property by the intent of the assembly that passd the statute in question. See Cooley, J., writing for the Court in *Dewar* v. *People* (1879), 40 Mich 401, 403, and *Husted* v. *Consumers Power Co*. (1965), 376 Mich 41, 54.

[7] The entire thrust of plaintiff's appeal is submitted by this stated question:

"II. Does the state deny 'due process of law' and the 'equal protection of the laws' to a person when it declares that an unborn child, negligently killed by a tortfeasor, is not a 'person,' and that therefore his estate may not bring an action for wrongful death under the Michigan wrongful death act?"

(The question itself is faulty, in that it assumes that one's "estate" may sue under the statute. That statute provides precisely that suits thereunder must be brought by the decedent's fiduciary. An estate consists of property, real of personal, and is not as yet an eligible plaintiff suitor.)

a wrong knowing no remedy? Was not another like suggestion made (by separate opinion of *Abendschein* v. *Farrell* [1969], 382 Mich 510, 524-527, supported then by Justice T. G. Kavanagh), that our Court may at will create a remedy for any disclosed wrong when, presently, there is no known remedy therefor?

It may be well to repeat here this Court's employment of the principle to which allusion has just been made (*Creek* v. *Laski* [***30] [1929], 248 Mich 425, 65 ALR 1113; employed later in *B. F. Farnell Company* v. *Monahan* [1966], 377 Mich 552, 556):

"'Action on the case -- "is an outgrowth of the principle that, whenever the law gives a right or prohibits an injury, it will also afford a remedy. Hence, where there has been an injury for which none of the established forms of action will lie, an action on the case may be maintained, it being no objection that there is no precedent for the particular action, since the action is suited to every wrong and grievance that a person may suffer, and varies according to the circumstances of the case." 11 C J p 4.'"

I vote to affirm the judgment entered below (20 Mich App 679).

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In re Dittrick Infant

Court of Appeals of Michigan

October 11, 1977, Submitted ; December 6, 1977, Decided

Docket No. 77-1712

Reporter
80 Mich. App. 219 *; 263 N.W.2d 37 **; 1977 Mich. App. LEXIS 1272 ***

Judges: Danhof, C. J., and Allen and H. L. Heading, [*] JJ.

Opinion by: ALLEN

Opinion

[*221] [**38] On December 17, 1976, the Bay County Probate Court issued an order directing that the plaintiff, Bay County Department of Social Services, take temporary custody of the child of defendants Gary and Carol Dittrick. The situation presented is novel because the child was not born until February 2, 1977, 45 days after the order was issued. This appeal challenges the plaintiff's asserted authority to act in this manner and the probate [***4] court's asserted jurisidiction to issue the challenged order. The appeal comes to this Court following circuit court affirmance of the preliminary probate court order.

The record shows that the defendants' parental rights over defendant Carol Dittrick's first child were permanently terminated in May of 1976, following allegations of continuing physical and sexual abuse. Criminal charges against both defendants are now pending as a result of those abuse allegations.

Shortly before the parental rights over the first child were terminated, defendant Carol Dittrick became pregnant with the child who is the subject of the present litigation.
Believing that the birth of this present child was imminent, the plaintiff filed a petition in probate court on December 17, 1976, seeking an order of temporary custody pending further hearings. JCR 1969, 2.1; MCLA 712A.11; MSA 27.3178(598.11). The defendants were not notified of the filing of this petition. The requested order was entered the same day and was served on the defendants on December 30, 1976. After some initial procedural [*222] maneuvering, the defendants appealed the order to the Bay County Circuit Court which dismissed [***5] their appeal and remanded the proceedings to the probate court for the required preliminary and (possibly) formal hearings. JCR 1969, 4, 7, 8; MCLA 712A.11-19a; MSA 27.3178(598.11)-(598.19a). The defendants appeal from that order. [1]

The defendants have raised multiple statutory and constitutional issues. We address only two of those issues; the remainder are without merit and, in any event, are made moot by our rulings on the first two.

Defendants first argue that the probate court could not find neglect and order a change of custody [***6] based on allegations that they had abused defendant Carol Dittrick's first child. *In the Matter of LaFlure*, 48 Mich App 377; 210 NW2d 482 (1973), properly answers and rejects this argument. Defendants attempt to distinguish *LaFlure* by arguing that it only permits [**39] a finding of anticipated future neglect of a second child where a finding of past neglect of the second child has already been made. We reject that distinction because we believe that the reasoning of *LaFlure* is sound, even when applied to a situation where no prior determination of neglect has been made.

However, we are persuaded by the defendants' alternative argument that the probate court did not have jurisdiction to enter the contested order because it could not acquire jurisdiction over an unborn child. The probate court jurisdiction in such matters is defined by MCLA 712A.2; MSA [*223] 27.3178(598.2). Subsection (b) of that statute provides that the probate court has:

"Jurisdiction in proceedings concerning any child under 17

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[*] Detroit Recorder's Court judge, sitting on the Court of Appeals by assignment.

[1] The preceding procedural history has been greatly simplified. In fact, the contested preliminary hearing has been held and a formal hearing has been ordered -- all this pursuant to the circuit court's order which is belatedly being challenged by this appeal. This confusion exists because the defendants waited until after the preliminary hearing had been held before requesting a clarification of the original circuit court order and then appealing from that clarification.

years of age found within the county

* * *

"(2) whose home or environment, by reason of neglect, cruelty, drunkenness, criminality or depravity on the part [***7] of a parent, guardian or other custodian, is an unfit place for such child to live in."

We recognize that the word "child" could be read as applying even to unborn persons. However, our reading of other sections of Chapter XIIA of the Probate Code convinces us that the Legislature did not intend application of these provisions to unborn children. For example, MCLA 712A.11; MSA 27.3178(598.11), requires that a petition for change of custody state the birthdate of the subject child. This was obviously impossible in the present case. Nothing in the Juvenile Court Rules of 1969 expands the jurisdiction granted by the statutory provisions.

The Legislature may wish to consider appropriate amendments to the Probate Code. Indeed, the background of the present case has convinced us that such amendments would be desirable. However, the Code as now written did not give the probate court jurisdiction to enter its original order in the present case. We decline by judicial amendment to do that which, at the time of enactment, the Legislature did not contemplate.

Although the plaintiff Bay County Department of Social Services and the probate court acted without proper authority, we nevertheless [***8] believe that their actions were "correct" in the sense that the best interests of all concerned required that the defendants' infant not be left in defendants' [*224] custody. While we have ruled in the defendants' favor on the legal question raised, we do not intend to cause an immediate change of custody back to the defendants. We therefore order that the present custody arrangement shall remain in effect until 60 days after the release date of this opinion. GCR 1963, 820.1(1), (7). This will allow sufficient time for a proper invocation of probate court jurisdiction in the event that plaintiff Bay County Department of Social Services believes that the parental home is still an unfit residence.

The defendants' remaining arguments are without merit and most are rendered moot by the preceding analysis. [2]

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[2] The defendants raised a number of constitutional arguments. Michigan has recognized that parental rights are of constitutional magnitude and are protected by the due process clauses of the Michigan and United States constitutions. *In the Matter of LaFlure, supra, Reist v Bay Circuit Judge*, 396 Mich 326; 241 NW2d 55 (1976) (opinion of Levin, J.). But we see no violation of these rights in the present case which has not been remedied by this opinion.

In re Baby X

Court of Appeals of Michigan

January 17, 1980, Submitted ; April 23, 1980, Decided

Docket No. 46543

Reporter
97 Mich. App. 111 *; 293 N.W.2d 736 **; 1980 Mich. App. LEXIS 2632 **

Judges: M. J. Kelly, P.J., and Bronson and D. C. Riley, JJ.

Opinion by: RILEY

Opinion

[*113] [**738] On March 30, 1977, the minor child who is the subject of this lawsuit was born in St. Joseph's Hospital of Pontiac, Michigan. Within 24 hours of birth this child, known as Baby X for purposes of these proceedings, began exhibiting symptoms of drug withdrawal, whereupon a petition was filed with the Oakland County Probate Court alleging that appellant, Mother X, had so neglected her child that the court should assert jurisdiction. The probate judge found sufficient evidence of neglect to take temporary custody of [***5] Baby X, a decision affirmed by the Oakland County Circuit Court and now appealed by the child's mother.

The Probate Code provides as follows:

"Sec. 2. Except as provided herein, the juvenile division of the probate court shall have:

* * *

"(b) Jurisdiction in proceedings concerning any child under 17 years of age found within the county

"(1) Whose parent or other person legally responsible [*114] for the care and maintenance of such child, when able to do so, neglects or refuses to provide proper or necessary support, education as required by law, medical, surgical or other care necessary for his health, morals, or who is deprived of emotional well-being, or who is abandoned by his parents, guardian or other custodian, or who is otherwise without proper custody or guardianship; or

"(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality or depravity on the part of a parent, guardian or other custodian, is an unfit place for such child to live in, or whose mother is unmarried and without adequate provision for care and support." MCL 712A.2; MSA 27.3178(598.2).

A probate court acting pursuant to this statute must make two determinations. [***6] At the *adjudicative* stage, the court should initially consider whether sufficient facts have been alleged to support assertion of jurisdiction. If sufficient jurisdictional facts exist, for instance, if the facts establish neglect, the court can proceed to the *dispositional* stage. After considering all the facts and alternatives, the judge should order disposition according to the best interests of the child. See *In the Matter of Rebecca Oakes*, 53 Mich App 629; 220 NW2d 188 (1974), *People v Brown*, 49 Mich App 358; 212 NW2d 55 (1973), *In re Franzel*, 24 Mich App 371; 180 NW2d 375 (1970).

In the instant case, it is the adjudicative stage that is currently at issue. Mother X contends that prenatal conduct cannot constitute neglect or abuse under the Probate Code; therefore, the probate court wrongly asserted jurisdiction.

It recently has been held that the probate court may not assert jurisdiction over an unborn person as it is not a "child" under MCL 712A.2; MSA 27.3178(598.2). *In re Dittrick Infant*, 80 Mich App 219, 223; 263 NW2d 37 (1977). However, since [*115] Baby X was born before the instant petition was filed by the Department of Social Services, [***7] this aspect of jurisdiction is not properly at issue. The prenatal; period is only pertinent because it is the sole asserted basis for establishing jurisdiction based on neglect. The initial question then becomes whether a mother's prenatal behavior is relevant to a determination of a living child's neglect.

While there is no wholesale recognition of fetuses as persons, *Roe v Wade*, 410 U.S. 113, 162; 93 S Ct 705; 35 L Ed 2d 147 (1973), *Toth v Goree*, 65 Mich App 296, 303; 237 NW2d 297 (1975), fetuses have been accorded rights under certain limited circumstances. *O'Neill v Morse*, 385 Mich 130; 188 NW2d 785 (1971) (wrongful death action

allowable for 8-month-old viable fetus), *Womack v Buchhorn*, 384 Mich 718; 187 NW2d 218 (1971) (common law action allowable for surviving child injured during the fourth month of pregnancy), *LaBlue v Specker*, 358 Mich 558; 100 NW2d 445 (1960) (dramshop action allowable for fetus of dead father). This limited recognition of a child *en ventre sa mere* as a child *in esse* is appropriate when it is for the child's best interest. *LaBLue, supra*, 563. [**739] Since a child has a legal right to begin life with a sound mind [***8] and body, *Womack, supra*, 725, we believe it is within his best interest to examine all prenatal conduct bearing on that right.

It must then be determined whether prenatal conduct—specifically, extensive narcotics ingestion by the mother—can constitute neglect sufficient for the probate court's assertion of jurisdiction.

Under the Probate Code, a permanent custody order must be based on circumstances which "establish or seriously threaten neglect of the child for the long-run future". The quantum of neglect [*116] sufficient for temporary custody or merely establishing jurisdiction implicitly must be less, *i.e.*, temporary neglect. See *Fritts v Krugh*, 354 Mich 97, 113-114; 92 NW2d 604 (1958).

In *Dittrick, supra*, this Court recognized that mistreatment of a child is probative of how a parent may treat other soon-to-be-born siblings. It may readily be inferred, then, that such abuse is sufficient to establish jurisdiction. See also, *In the Matter of LaFlure*, 48 Mich App 377, 392; 210 NW2d 482 (1973).

Since prior treatment of one child can support neglect allegations regarding another child, we believe that prenatal treatment can be considered probative [***9] of a child's neglect as well. We hold that a newborn suffering narcotics withdrawal symptoms as a consequence of prenatal maternal drug addiction may properly be considered a neglected child within the jurisdiction of the probate court. We pass no judgment upon whether such conduct will suffice to permanently deprive a mother of custody. Such custody determinations will be resolved at the dispositional phase where prenatal conduct will be considered along with postnatal conduct.

In addition to the jurisdictional matter, Mother X asserts that her right to confidentiality as a drug abuse patient was impaired by the lower court. Specifically, she contends that a conflict exists between Federal law which protects patients from disclosure of their drug addiction records and state law which mandates disclosure of child abuse and neglect. The probate court rejected Mother X's objections and ruled that hospital records for both her and Baby X were admissible. Although the circuit court did not deal with this issue, we believe that it is of such importance that it must [*117] be addressed here. See *Clark v Dalman*, 379 Mich 251; 150 NW2d 755 (1967).

MCL 722.623; MSA 25.248(3) [***10] [1] [***11] provides that certain professionals should report any suspected child abuse to the proper authorities, supplying such information as the child's name, parents' names and a description of the abuse. No privilege (except for that between attorney and client) can constitute grounds for excusing such a report or for excluding evidence in a protective juvenile proceeding. MCL 722.631; MSA 25.248(11). [2]

[**740] These statutes favoring disclosure are diametrically opposed to drug treatment statutes protective of confidentiality. 21 USC 1175 [3] [***13] states that all

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[1] "Sec. 3. (1) A physician, coroner, dentist, medical examiner, nurse, audiologist, certified social worker, social worker, social work technician, school administrator, school counselor or teacher, law enforcement officer, or duly regulated child care provider who has reasonable cause to suspect child abuse or neglect immediately, by telephone or otherwise, shall make an oral report, or cause an oral report to be made, of the suspected child abuse or neglect to the department. Within 72 hours the reporting person shall file a written report as required in this act. If the reporting person is a member of a hospital, agency, or school staff, the reporting person shall notify the person in charge thereof of his or her finding, that the report has been made, and make a copy of the written report available to the person in charge. One report from a hospital, agency, or school shall be considered adequate to meet the reporting requirement.

"(2) The written report shall contain the name of the child and a description of the abuse or neglect. If possible, the report shall contain the names and addresses of the child's parents, the child's guardian, or the persons with whom the child resides, and the child's age. The report shall contain other information available to the reporting person which might establish the cause of abuse or neglect and the manner in which it occurred." MCL 722.623; MSA 25.248(3).

[2] "Sec. 11. Any legally recognized privileged communication except that between attorney and client is abrogated and shall neither constitute grounds for excusing a report otherwise required to be made nor for excluding evidence in a civil child protective proceeding resulting from a report made pursuant to this act." MCL 722.631; MSA 25.248(11).

[3] "(a) Disclosure authorization" Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes

[*118] patient records, which are maintained in connection with drug abuse programs supported by the Federal government, may not be disclosed absent "good cause" and a court order. Interpretative regulations promulgated by the Department of Health, Education and Welfare have extended this confidentiality to information that is in any way related to the diagnosis and treatment of drug abuse. 42 CFR § 2.13 (1979). Thus, the release of the hospital's report and records concerning Baby X's withdrawal symptoms and the information regarding Mother X's drug abuse was allegedly in contravention [***12] of the Federal statute as well as possibly a state statute, MCL 325.728; MSA 18.1031(28). [4]

[***14] [*119] Two New York courts have dealt with a similar conflict between the Federal and state law. *In the Matter of Dwayne G*, 97 Misc 2d 333; 411 NYS2d 180 (Fam Ct, 1978), [**741] *In the Matter of the Doe Children*, 93 Misc 2d 479; 402 NYS2d 958 (Fam Ct, 1978). In both neglect-proceeding cases, the Social Services Commissioner moved for the production of records on the mothers' drug or alcohol abuse. Production was opposed based on 21 USC 1175(a). In both cases, the family courts held that the records should be produced pursuant to orders issued under 21 USC 1175(b)(2)(C).

We quote *Doe, supra*, 959-960.

"As stated in this section [21 U.S.C. § 1175(b)(2)(C)], it is the duty of the court to weigh the public interest and the need for disclosure against the injury to the patient. In assessing the public interest, the court must consider [*120] the safety and welfare of the three children who are alleged to be neglected. The purpose of the child protective proceeding, is 'to help protect children from injury or mistreatment and to help safeguard their physical, mental and emotional well-being.' Family Court Act Section 1011. This Court is of the opinion [***15] that the interest of these young children in living in secure surroundings outweighs any possible injury to the patient, or to the physician-patient relationship. The private nature of a Family Court proceeding, and the fact that 'the records of any proceeding in the family court shall not be open to

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and under the circumstances expressly authorized under subsection (b) of this section.

"(b) Purposes and circumstances of disclosure affecting consenting patient and patient regardless of consent

"(1) The content of any record referred to in subsection (a) of this section may be disclosed in accordance with the prior written consent of the patient with respect to whom such record is maintained, but only to such extent, under such circumstances, and for such purposes as may be allowed under regulations prescribed pursuant to subsection (g) of this section.

"(2) Whether or not the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, gives his written consent, the content of such record may be disclosed as follows:

"(A) To medical personnel to the extent necessary to meet a bonafide medical emergency.

"(B) To qualified personnel for the purpose of conducting scientific research, management audits, financial audits, or program evaluation, but such personnel may not identify, directly or indirectly, any individual patient in any report of such research, audit, or evaluation, or otherwise disclose patient identities in any manner

"(C) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure." 21 USC 1175.

[4] "Sec. 18. (1) Records of the identity, diagnosis, prognosis, or treatment of any individual which are maintained in connection with the performance of any licensed substance abuse treatment-rehabilitation or prevention service authorized or assisted under this act are confidential and may be disclosed only for the purposes and under the circumstances expressly authorized under this section.

"(2) If the individual with respect to whom any given record referred to in this section is maintained, gives his written consent, the content of the record may be disclosed to medical personnel for the purpose of diagnosis or treatment of the person, or to governmental personnel for the purpose of obtaining benefits to which the person is entitled, * * *

"(3) If the person with respect to whom any given record referred to in this section is maintained, does not give his written consent, the content of the record may only be disclosed as follows:

"(a) To medical personnel to the extent necessary to meet bona fide medical emergency.

"(b) To qualified personnel for the purpose of conducting scientific statistical research, financial audits, or program evaluation, but the personnel shall not identify, directly or indirectly, any individual person in any report of the research audit, or evaluation or otherwise disclose identities in any manner.

"(c) Upon application, a court of proper jurisdiction may order the disclosure of whether a specific person is in treatment with an agency. In all other respects the confidentiality shall be the same as the physician-patient relationship as provided by law." MCL 325.728; MSA 18.1031(28). (This statute was repealed in 1978.)

indiscriminate public inspection' (Family Court Act section 166) minimizes the likelihood of the respondent's status becoming a matter of public record. Thus, this Court finds that there is good cause for disclosure of the requested records, as required by 21 U.S.C. § 1175."

We too agree that in neglect proceedings confidentiality must give way to the best interests of the child. Where treatment records are found to be "necessary and material", *Dwayne G, supra*, 183, to the state's proof of neglect, a court of competent jurisdiction may authorize disclosure. Alleged drug or alcohol dependence (here, the alleged heroin addiction of Mother X) which causes a baby's withdrawal and failure to thrive is sufficient "good cause" as required by the Federal statute (and sufficient under the state statute as well) to order production of the records.

While normally, in the absence of this [***16] necessary court order, we would be compelled to reverse, we need not do so here. The probate judge conducted a substantial inquiry into the competing concerns and policies inherent in the case *sub judice*. He first sought to protect the mother's own confidentiality needs by appointing a separate guardian ad litem for Baby X and then ultimately limited the records to be produced to "objective data" only. [*121] Throughout the proceedings, the court complied with the spirit of the Federal statute that the court weigh "the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services". 21 USC 1175(b)(2)(C). In ultimately concluding that the child's best interests must preponderate over the mother's, the judge below did everything but issue the proper court order. In light of his competent balancing, his carefully restrictive admissions and the limited, private nature of the child neglect proceedings, we see no reason to reverse here based on the lack of a proper court order. In future neglect cases, however, any conflict between Federal and state law can be avoided by filing a John or [***17] Jane Doe petition with the disclosure of any names and confidential information to follow the issuance of a court order upon "good cause".

Affirmed.

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