

Fetal Death by Wrongful Act: Expanding Wrongful Death Actions to the Unborn

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I. Introduction

Chapter 725 of the 2012 Acts of Assembly, which expands the cause of action for the wrongful death of a person to include wrongful fetal death, took effect on July 1, 2012.¹ Chapter 725 adds a new subsection to Virginia's wrongful death statute, which reads as follows:

Whenever a fetal death, as defined in § 32.1-249, is caused by the wrongful act, neglect, or default of any person, ship, vessel, or corporation, the natural mother of the fetus may bring an action pursuant to this section against such tortfeasor. Nothing in this section shall be construed to create a cause of action for fetal death against the natural mother of the fetus.²

Arguably, this Act represents the most substantial expansion of the cause of action for wrongful death in Virginia since the cause of action was first created in 1871. Until the enactment of this bill, a fetus was

legally not considered to be a person for the purposes of Virginia's wrongful death statute and, therefore, no action could be brought to recover damages for the death of a fetus.³

Through this expansion of wrongful death actions to encompass fetal death, Virginia has followed the overwhelming majority of other jurisdictions that likewise allow such actions.⁴ Virginia has now joined the ranks of jurisdictions that have recognized a protectable interest in the life, health, and well-being of a fetus. The recognition of such a protectable interest can also be seen in the advent of laws punishing fetal homicide both in Virginia and across the country.⁵

More importantly, through the enactment of Chapter 725, the General Assembly has accomplished the primary goal of the "personhood bill" introduced in the 2012 Session of the General Assembly, i.e., expanding wrongful death actions to include fetuses.⁶ That this expansion was the paramount purpose of the "personhood bill" is evident from the title to House Bill 1, which explicitly singles out Virginia's wrongful death statute and reads as follows: "A BILL to construe the word 'person' under Virginia law, *including but not limited to* § 8.01-50 of the Code of Virginia, to include unborn children."⁷

However, in order to fully assess the impact in the Commonwealth of this new cause of action for wrongful fetal death, it is essential to first understand the history of the



wrongful death actions and Virginia's wrongful death statute, as well as how that statute has been applied to fetuses in the past.

II. History of Virginia's Wrongful Death Statute

In Virginia, wrongful death actions are governed by the provisions of Article 5 (Death by Wrongful Act) of Chapter 3 of Title 8.01.⁸ Unlike an action for personal injuries, the intent of which is to make the injured person whole through an award of damages, the purpose of a wrongful death action is to compensate certain statutory beneficiaries⁹ "for their loss occasioned by the decedent's death."¹⁰ The cause of action may only be brought by the decedent's personal representative¹¹ who acts "as trustee for certain statutory beneficiaries and not for the general benefit of the decedent's estate."¹²

However, prior to the enactment of Virginia's wrongful death statute, no such cause of action existed. Instead, at common law, a person's claim for injuries caused by another died with the injured party. "At common law no civil action was maintainable against a person for the wrongful death of another. A right of action for personal injuries did not survive the death of the injured party."¹³ Thus, at common law, an injured person who was fortunate enough to survive his or her injury could seek damages from the person who caused the injury. However, if the injured person was not so lucky and died, the person who caused the injury would not be liable for the harm he or she caused.

This state of the law persisted in Virginia until 1871, when Virginia passed its first wrongful death statute. In 1846, the British Parliament had passed the first wrongful death statute, known as Lord

Campbell's Act, which was entitled "An act for compensating the families of persons killed by accidents."¹⁴ Twenty-five years later, Virginia's first wrongful death statute took effect on January 14, 1871.¹⁵ Virginia's law was "modeled on Lord Campbell's Act, and, in its essential features, is substantially the same."¹⁶ The original law read, in part, as follows:

Be it enacted by the general assembly, That whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured, or if she be a married woman, her husband, either separately or together with her, to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or 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 a felony: provided, that in no case shall the recovery exceed the sum of ten thousand dollars.¹⁷

Virginia's wrongful death statute, currently located at Va. Code § 8.01-50, has remained virtually unchanged in the over 140 years from the time it was first enacted in 1871.¹⁸

III. Fetal Death and Virginia's Wrongful Death Statute

A. Lawrence v. Craven

As no cause of action for wrongful death existed at common law and as such a wrongful death action is wholly a creation of the General Assembly, the language of

Virginia's wrongful death statute must be strictly construed.¹⁹ Almost 100 years after Virginia's first wrongful death statute was first enacted, the Virginia Supreme Court was called on in *Lawrence v. Craven*²⁰ to decide whether a fetus is a "person" for purposes of the statute. It is the application of this rule of strict construction that led the Virginia Supreme Court to conclude that Virginia's wrongful death statute did not apply to fetuses.

In *Lawrence*, a pregnant woman was involved in an automobile accident. At the time of the accident the mother's fetus had already achieved viability. However, as a result of injuries as a result of the accident, the fetus was stillborn. The woman's husband, as administrator of the fetus's estate, subsequently filed a wrongful death action against the defendants, including the driver of the vehicle that caused the accident.

The circuit court sustained the defendants' demurrers to the husband's action and dismissed the case, holding that the fetus was not a person under the terms of Virginia's wrongful death statute.

In my opinion the proposition that a viable fetus is a person is a highly theoretical and fictional concept, and to say that such a "person" could have maintained an action if death had not ensued is to carry the fiction even further. This I am unwilling to do.²¹

On appeal, the Virginia Supreme Court affirmed the circuit court's decision that a fetus is not a person for the purposes of Virginia's wrongful death statutes and, therefore, no cause of action could be maintained for the wrongful death of a fetus. The Supreme Court explained that there are two requirements for the maintenance of a wrongful death action: "(1) the death of a 'person' caused by a wrongful act, neglect, or default, etc., and (2) that the act, neglect or

default be 'such as would, if death had not ensued, have entitled the party injured to maintain an action' for personal injuries."²²

The Supreme Court found that a wrongful death action on behalf of a fetus failed to meet either requirement. First, the Court held that a fetus could not "maintain a common law action for personal injuries[.]"²³ The Court likewise held that a fetus could not be considered a person under the plain language of Virginia's wrongful death statute. Relying on the reasoning of the circuit court as well as decisions from other jurisdictions that have likewise held that a fetus may not be the subject of a wrongful death action, the Court was unwilling to include a fetus in the definition of a person under the wrongful death statute.²⁴

"We adhere to the rule that an unborn child is a part of the mother until birth and, as such, has no judicial existence." And "we can find no convincing authority that a child born dead ever became a person insofar as the law of torts is concerned."²⁵

The Court bolstered its strict interpretation of the term "person" by further noting that the General Assembly felt compelled to pass a statute expanding the definition of person beyond its common usage as an individual to include bodies politic and other legal entities.²⁶ Thus, the Court declined to expand the definition to include fetuses by judicial fiat, stating "that the Virginia wrongful death statute *as written* does not provide an action for the wrongful death of a stillborn child."²⁷

It is important to note that at the time it decided *Lawrence*, the Virginia Supreme Court was aware of authority from other jurisdictions that allowed a cause of action for the wrongful death of a fetus if the fetus was viable at the time of death.²⁸ The Court clearly found such authority unpersuasive, rejecting it in favor of its holding that a fetus is not a person based upon a strict construction of the terms of Virginia's wrongful death statute. Moreover,

since deciding *Lawrence*, the Virginia Supreme Court has consistently maintained this position.²⁹

B. Other Avenues for Recovery

Although the Virginia Supreme Court's decision in *Lawrence* and its progeny precluded the maintenance of a wrongful death action for a fetus prior to the enactment of Chapter 725, other possible avenues for recovery for damages related to the death or injury of a fetus were available in Virginia.

The first related cause of action was established by the Virginia Supreme Court in *Modaber v. Kelley*.³⁰ In *Modaber*, the Court reaffirmed its holding in *Lawrence* that a fetus could not be the subject of a wrongful death action; however, the Court found that until birth separates the fetus from the mother, the fetus remains a part of the mother.³¹ Thus, the Court concluded "that injury to an unborn child constitutes injury to the mother and that she may recover for such physical injury and mental suffering associated with a stillbirth."³²

The Court stressed that the damages that a mother may recover for her physical and mental injuries suffered in connection with the stillbirth are personal to the mother and, therefore, are distinguishable from the damages that may be recovered in a wrongful death action that are designed to compensate persons for their loss occasioned by the decedent's death.³³ The Court explained this distinction as follows:

She is not entitled, however, to damages ordinarily recoverable in a wrongful death action. For example, the mother may not recover for anticipated loss of the child's society, companionship, comfort, or guidance. She may not be compensated for an expected loss of income of the child or for services, protection, care, or assistance expected to be provided by the child had he lived.³⁴

The second related cause of action involves prenatal injuries caused to a fetus who is later born alive. This cause of action was first recognized by the Virginia Supreme Court in *Kalafut v. Gruver*.³⁵ As a result of injuries sustained in an automobile accident, the mother in *Kalafut* claimed that she went into premature labor and gave birth to a child who died approximately one hour later.³⁶ The trial court, relying on *Lawrence*, dismissed the action brought by the child's personal representative.³⁷

The Virginia Supreme Court reversed the trial court's decision, noting that it was aware of no court of last resort in any jurisdiction that "presently adheres to the rule of nonliability for prenatal injuries when the child is born alive," and announced the following rule:

A tortfeasor who causes harm to an unborn child is subject to liability to the child, or to the child's estate, for harm to the child, if the child is born alive. We do not limit the application of this rule to unborn children who are viable at the time of the tortious act. Thus, an action may be maintained for recovery of damages for any injury occurring after conception, provided the tortious conduct and the proximate cause of the harm can be established.³⁸

It is this second related cause of action that illustrates the inconsistent nature of the law in Virginia governing recovery of damages for fetal death or injuries that existed prior to the enactment of Chapter 725. The logical disconnect in allowing relief for a fetus injured in utero and subsequently born alive while not allowing relief for a similarly injured fetus who is stillborn is brought into stark relief by a hypothetical first posed by the Ohio Court of Appeals:

Suppose, for example, viable unborn twins suffered simultaneously the same prenatal

injury of which one died before and the other after birth. Shall there be a cause of action for the death of the one and not for that of the other? Surely logic requires recognition of causes of action for the deaths of both, or for neither.³⁹

Until the enactment of Chapter 725, Virginia law required that the hypothetical twins described by the Ohio Court of Appeals suffer the exact illogical description set forth in the hypothetical. The decision in *Lawrence* would preclude any recovery for the twin stillborn while *Kalafut* would allow recovery for the twin born alive, regardless of how brief the second twin's life. The enactment of Chapter 725 removes this inconsistency and places all fetuses who die as a result of injuries sustained in utero on the same footing irrespective of whether a child was born alive or not.

These related causes of action will continue to exist side-by-side with the newly created wrongful fetal death statute. After the enactment of Chapter 725, if a fetus is injured in utero resulting in a stillbirth, damages may be sought under the new statute,⁴⁰ and if the fetus is born alive and subsequently dies, damages may be sought pursuant to the Virginia Supreme Court's decision in *Kalafut*.⁴¹

Furthermore, the mother of a fetus who is killed would still be able to seek damages for any injuries she personally sustained as well as for her mental suffering arising from the death of the fetus. The argument that this result would allow a double recovery by the mother has already been rejected by the Virginia Supreme Court, at least in the case where the fetus was born alive.⁴² The Court's reasoning regarding double recovery would seem to equally apply to the case where injuries to the fetus resulted in the fetus being stillborn.⁴³

IV. Law of Other Jurisdictions

A. Wrongful Fetal Death Actions

By enacting Chapter 725, Virginia has joined the overwhelming majority of jurisdictions that already permit a cause of action for the wrongful death of a fetus, now being the forty-third jurisdiction to embrace such a cause of action. In 1949, Minnesota was the first jurisdiction in the United States to recognize a cause of action for the wrongful death of a viable fetus when the Minnesota Supreme Court held in *Verkennes v. Corniea* that “[i]t seems too plain for argument that where independent existence is possible and life is destroyed through a wrongful act a cause of action arises[.]”⁴⁴ Forty-one other jurisdictions followed Minnesota's lead in recognizing a cause of action for wrongful fetal death, some by legislative action like Virginia, others, like Minnesota, through case law interpreting terms like “person” or “individual” contained within a state's respective wrongful death statute to encompass fetuses.⁴⁵

Generally, other states' laws governing fetal wrongful death actions can be broadly divided into two categories: (i) jurisdictions that allow a cause of action for the wrongful death of a fetus regardless of the fetus's stage of development and (ii) jurisdictions that allow a cause of action only if a fetus is viable.⁴⁶ A fetus is deemed to have reached viability if “there is a realistic possibility of maintaining and nourishing a life outside the womb,” even if life is maintained through the use of artificial aid.⁴⁷

The majority of jurisdictions require that a fetus be viable in order to maintain a cause of action for fetal wrongful death.⁴⁸ Eleven jurisdictions, however, allow a cause of action to be brought for the death of any fetus irrespective of the stage of development, covering both viable and nonviable fetuses.

With the enactment of Chapter 725, Virginia joins this minority and permits a wrongful death action to be brought on behalf of viable and nonviable fetuses. Arguably, Virginia's decision to adopt the minority rule is the more logically consistent position. If Virginia had instead sided with the majority of jurisdictions and required viability, a situation similar to the state of the law prior to the enactment of Virginia's wrongful death statute in 1871 would exist in that if a person who caused the death of a fetus was fortunate enough that the fetus had not yet obtained viability, the person would escape liability. In addition, the minority rule adopted in Virginia eliminates the need to litigate the issue of whether or not a fetus was viable at the time of death as part of a fetal wrongful death action. While during the very early or very late stages of pregnancy it would not be too onerous to establish whether a fetus was viable, considering the fluid nature of the definition of viability and continuous medical progress in keeping increasingly younger prematurely born fetuses alive, difficult evidentiary questions would arise for many fetuses killed during the middle stages of pregnancy.

B. Fetal Homicide

It must also be remembered that the General Assembly's decision to expand the scope of Virginia's wrongful death statute was not the first time it faced the issue of whether to treat fetuses as persons under the law. In the same manner that a fetus was not considered to be a person for purposes of Virginia's wrongful death statute until the enactment of Chapter 725, there was a point in time where a fetus was not considered a person for purposes of Virginia's homicide statutes. At common law, only a person born alive could be the victim of homicide.

The well-settled rule at common law was that there could be no homicide unless the

deceased had been born alive . . . Thus, it has been held that in the absence of statutory modification of the common law, the terms "person," "human being," "another" (in the context of "person") do not include an unborn fetus for purposes of the crime of homicide.⁴⁹

In 2004, the General Assembly made such a modification to the common law and enacted Va. Code § 18.2-32.2, which criminalized the killing of a fetus.⁵⁰ In doing so, Virginia joined the majority of jurisdictions that have enacted some type of fetal homicide statute, many of which apply to fetuses at every stage of development from conception.⁵¹

The criminalization of fetal homicide in derogation of the common law unambiguously illustrates the General Assembly's belief that fetuses have a protectable interest in their life, health, and safety, an interest worthy of protection by the criminal laws of the Commonwealth. Thus, it is evident that the decision to afford additional protection through the extension of the wrongful death statute to cover fetuses did not occur in a vacuum, and instead can be viewed as a continuation of the enactment of the fetal homicide statute. As the Supreme Court of Alabama has explained, "It would be incongruous if a defendant could be responsible criminally for the homicide of a fetal child but would have no similar responsibility civilly."⁵² The enactment of Chapter 725 thus provides for consistency between Virginia's criminal and civil law regarding the treatment of fetuses harmed by another's actions.

V. Wrongful Fetal Death v. Wrongful Death

In most respects, an action for wrongful fetal death will be maintained in the same

manner as an action for the wrongful death of a person. For example, in both cases, the statutory beneficiaries who would be entitled to any award of damages from such action are the same.⁵³ There are, however, some provisions specific to a wrongful fetal death action stemming from the unique circumstances surrounding the death of a fetus.

At the outset, it is important to note that nothing in Chapter 725 should interfere with the performance of a lawful abortion in Virginia or give rise to any cause of action resulting from the performance of a lawful abortion in accordance with the appropriate standard of care. In order to be actionable, a fetal death must be caused by a “wrongful act, neglect, or default” of another.⁵⁴ As the performance of an abortion, subject to certain limits, is lawful in the Commonwealth,⁵⁵ it is axiomatic that the performance of abortion cannot be considered to be done wrongfully and, therefore, cannot give rise to liability.

A. Maintaining the Action

First, no cause of action for wrongful fetal death may be brought against the natural mother of the fetus.⁵⁶ It was determined that the mother’s decisions made during her pregnancy that may have resulted in the death of fetus, regardless of how poor those decisions may have been (e.g., drug use), should not form the basis of liability on the mother’s part. Nor should the mother be responsible for damages in the case where the mother’s negligence or other wrongful act resulted in the fetus’s death, such as where the mother was at fault for an automobile accident that resulted in the death of her fetus. The decision to insulate the mother from liability in a wrongful fetal death action is consistent with Virginia’s criminal laws governing fetal death, which likewise preclude prosecution of the mother.⁵⁷

Another difference between the two types of wrongful death actions is who may

bring the lawsuit. In a typical action for wrongful death, the personal representative of the decedent is the only party who may maintain the action.⁵⁸ A decedent’s personal representative is not limited to the immediate family members of the decedents, and while there is an order of preference for who may serve as personal representative that would favor those with a close connection to the decedent, ultimately any person deemed suitable and competent by the court or clerk making the appointment may serve as a decedent’s personal representative.⁵⁹

The cause of action for wrongful fetal death was intentionally designed to reduce the number of potential personal representatives who could bring the suit, granting only the mother the right to maintain an action for wrongful fetal death.⁶⁰ The underlying reason for this deference to the mother was twofold, both stemming from the obvious inherent personal and physical connection between a mother and her fetus. First, there was the goal of eliminating the need for the mother to race to the courthouse in the immediate aftermath of the death of her unborn child in order to secure her place as personal representative before any other person could qualify. Second, there was the desire to defer to the decision of the mother whether a wrongful fetal death action should be instituted, so that in the event that the mother declined to bring such an action, one could not be imposed upon her by the unilateral action of another person appointed as personal representative.⁶¹

B. Medical Malpractice

In *Bulala v. Boyd*, the Virginia Supreme Court answered the question “[w]here there are two or more plaintiffs entitled to recover damages from the same act or acts of medical malpractice, does § 8.01-581.15 apply individually to each plaintiff or overall to two or more such plaintiffs?”⁶² The Court held that each plaintiff, an infant who suffered injuries during

delivery and subsequently died and the infant's mother, is entitled to his or her own damages cap.⁶³ However, the availability of more than one damage cap only applies in the event that the fetus was born alive. On the other hand, where the fetus was stillborn as a result of the injuries sustained, the Virginia Supreme Court has held in *Modaber* that the injury to the fetus constitutes an injury to the mother, and the mother is only entitled to one damage cap for her claim.⁶⁴

Chapter 725 follows the rationale of *Modaber* in dealing with the medical malpractice damages cap and treats the mother and her fetuses as a single entity for the purposes of a wrongful fetal death action.

In an action for fetal death . . . where the wrongful act that resulted in a fetal death also resulted in the death of another fetus of the natural mother or in the death or injury of the natural mother, recovery for all damages sustained as a result of such wrongful act shall not exceed the limitations on the total amount recoverable for a single patient for any injury under § 8.01-581.15.⁶⁵

The decision to treat the mother and her fetuses as one entity, effectively limiting the liability of any health care provider, was intended to ameliorate any concern that the creation of a cause of action for wrongful fetal death will adversely affect the availability of medical care. This same concern was the fundamental reason for the original enactment of the medical malpractice damages cap by the General Assembly.⁶⁶ Thus, the limitation on possible health care provider liability in Chapter 725 is wholly consistent with the purpose of the damages cap when it was first enacted.

VI. Conclusion

It has been a long journey between the time Lord Campbell's Act was first made law in Virginia in 1871 and the 2012 Session of the Virginia General Assembly. With the enactment of Chapter 725, Virginia has now joined the majority of jurisdictions by no longer allowing a person whose wrongful or negligent actions resulted in the death of a fetus to escape liability for his or her actions depending on whether the fetus died before birth. Virginia has closed the gap between criminal and civil law in the treatment of fetal death and has explicitly acknowledged the personhood of the fetus by affirming that a fetus has a protectable interest in its life, health, and well-being.

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Notes

¹ 2012 Va. Acts ch. 725. Chapter 725 was introduced into the General Assembly as Senate Bill 674 by Sen. William M. Stanley, Jr.
² Va. Code § 8.01-50(B). Chapter 725 also adds a new subsection E to § 8.01-50 defining a “natural mother” as “the woman carrying the child.” The definition of “fetal death” in Va. Code § 32.1-249 that is applicable to § 8.01-50 (B) reads as follows:

“Fetal death” means death prior to the complete expulsion or extraction from its mother of a product of human conception, regardless of the duration of pregnancy; death is indicated by the fact that after such expulsion or extraction the fetus does not breathe or show any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles.

³ See Part III, *infra*.

⁴ See Part IV A, *infra*.

⁵ See Part IV B, *infra*.

⁶ House Bill 1 introduced by Del. Robert G. Marshall.

⁷ *Id.* (emphasis added).

⁸ Va. Code § 8.01-50 et seq.

⁹ Statutory beneficiaries of a wrongful death action may include the decedent’s surviving spouse, children, parents, siblings, and other relatives. Va. Code § 8.01-53.

¹⁰ *Wilson v. Whittaker*, 207 Va. 1032, 1036, 154 S.E.2d 124, 128 (1967). See also *Kone v. Wilson*, 272 Va. 59, 62, 630 S.E.2d 744, 746 (2006) (“A wrongful death action is a statutory action . . . which permits a personal representative of a decedent to bring an action on behalf of the decedent’s beneficiaries to recover damages caused by the wrongful act, neglect, or default of another.”).

¹¹ Va. Code § 8.01-50(C).

¹² *Wilson* at 1036, 154 S.E.2d at 128. See also Charles E. Friend, *Personal Injury Law in Virginia* §15.2(C) (3d ed. 2003 & Supp. 2011) (“The purpose of the wrongful death statutes is to compensate the family of the deceased for their loss, not to punish the wrongdoer,

increase the decedent’s estate, or benefit creditors.”).

¹³ *Id.* at 1035, 154 S.E.2d at 127. See also *Virginia Elec. & Power Co. v. Decatur*, 173 Va. 153, 159, 3 S.E.2d 172, 174 (1939) (“At common law the right of action to recover damages for ‘wrongful death’ was unknown.”); *Anderson v. Hygeia Hotel Co.*, 92 Va. 687, 689, 24 S.E. 269, 270 (1896) (emphasis in original) (“An action for an injury to the *person* still, as at common law, dies with the person, and no right of action for such injury *survives* to his personal representative.”).

¹⁴ *Anderson* at 691, 24 S.E. at 271.

¹⁵ 1870-71 Va. Acts ch. 29.

¹⁶ *Id.*

¹⁷ 1870-71 Va. Acts ch. 29.

¹⁸ Va. Code § 8.01-50(A). There are some differences between the current version of Virginia’s wrongful death statute and the 1871 version, including recognition that wives were not the property of their husbands, adding ships or vessels to the parties that could be held liable for wrongful death, and eliminating the \$10,000 cap on damages. The current version of Virginia’s wrongful death statute reads as follows:

Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, or to proceed in rem against such ship or vessel or in personam against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel in rem, and her owners or those responsible for her acts or defaults or negligence to a libel in personam, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to a felony.

¹⁹ *Harris v. T.I., Inc.*, 243 Va. 63, 68, 413 S.E.2d 605, 608 (1992) (statutes “in derogation of the common law, must be strictly construed.”).

²⁰ 210 Va. 138, 169 S.E.2d 440 (1969).

²¹ *Id.* at 141, 169 S.E.2d at 442.

²² *Id.* at 140, 169 S.E.2d at 441.
²³ *Id.*
²⁴ *Id.* at 141, 169 S.E.2d at 442.
²⁵ *Id.* at 142, 169 S.E.2d at 442 (quoting *Drabbels v. Skelly Oil Co.*, 155 Neb. 17, 22-3, 50 N.W.2d 229, 232 (1951)). The Virginia Supreme Court also relied on decisions from New Jersey (*Graf v. Taggart*, 43 N.J. 303, 204 A.2d 140 (1964)), Oklahoma (*Howell v. Rushing*, 261 P.2d 217 (Okla. 1953)), Pennsylvania (*Carroll v. Skloff*, 415 Pa. 47, 202 A.2d 9 (1964)), and Tennessee (*Hogan v. McDaniel*, 204 Tenn. 235, 319 S.W.2d 221 (1958)).
²⁶ *Id.* at 141, 169 S.E.2d at 441-42 (citing Va. Code § 1-13.19 (current version at Va. Code § 1-230)).
²⁷ *Id.* at 142, 169 S.E.2d at 442 (emphasis added).
²⁸ *Id.* (acknowledging that other jurisdictions allow actions “to recover damages for the wrongful death of a viable, unborn child”).
²⁹ See *Modaber v. Kelley*, 232 Va. 60, 66, 348 S.E.2d 233, 236 (1986) (“In Virginia, the law is established that an unborn child is not a ‘person’ within the meaning of our wrongful death statute.”); *Castle v. Lester*, 272 Va. 591, 602, 636 S.E.2d 342, 347 (2006) (“[S]ince a fetus is not a legally cognizable ‘person’ separate from its mother until birth, Virginia’s wrongful death statute does not allow a cause of action for the death of an unborn child.”); *Kalafut v. Gruver*, 239 Va. 278, 389 S.E.2d 681 (1990) (holding same). See also *Myrick v. United States*, 723 F.2d 1158 (4th Cir. 1983) (holding same).
³⁰ 232 Va. 60, 348 S.E.2d 233 (1986).
³¹ *Id.* at 66, 636 at 236-37.
³² *Id.*, 636 at 237.
³³ *Id.* at 67, 636 at 237.
³⁴ *Id.*
³⁵ 239 Va. 278, 389 S.E.2d 681 (1990).
³⁶ *Id.* at 280, 389 S.E.2d at 681-82.
³⁷ *Id.* at 280-81, 389 S.E.2d at 682.
³⁸ *Id.* at 283-84, 389 S.E.2d at 683-84.
³⁹ *Stidam v. Ashmore*, 109 Ohio App. 431, 434, 167 N.E.2d 106, 108 (12th Dist. 1959).
⁴⁰ See note 2, *supra*.
⁴¹ See note 38, *supra*.

⁴² *Kalafut* at 285, 389 S.E.2d at 684 (emphasis in original) (“Moreover, in *Modaber* we did not say that injury to the fetus constituted harm *only* to the mother; we merely said the mother had a claim for her personal injuries associated with a stillbirth.”). See also *Castle v. Lester*, 272 Va. 591, 603, 636 S.E.2d 342, 348 (2006) (“when a fetus sustains injury and is subsequently born alive, the mother and the impaired child each have a claim for damages resulting from the negligently caused, in utero injury.”).
⁴³ For the relationship between a wrongful fetal death action and the damages cap on medical malpractice award, see Part V B, *infra*.
⁴⁴ 229 Minn. 365, 370-71, 38 N.W.2d 838, 841 (1949).
⁴⁵ See Appendix A.
⁴⁶ See Appendix A.
⁴⁷ *Planned Parenthood v. Casey*, 505 U.S. 833, 870, 112 S.Ct. 2791, 2817, 120 L.Ed.2d 674, 710 (1992). The point at which viability occurs is somewhat fluid and dependent on the current state of medical technology. The United States Supreme Court noted in *Casey* that although a fetus typically reached viability at 28 weeks at the time *Roe* was decided, viability could occur as early as 23 or 24 weeks of pregnancy and held out the possibility that it could occur even earlier in the future based on medical advancements. *Casey* at 860, 112 S.Ct. at 2811, 120 L.Ed.2d at 704.
⁴⁸ See Appendix A. Two states, Georgia and Mississippi, employ an intermediate threshold, requiring that the child be quick. Quickening occurs earlier than viability, though obviously after conception, and is defined as the time that the fetus begins to move within the mother’s womb. *Roe v. Wade*, 410 U.S. 113, 132, 93 S.Ct. 705, 716, 35 L.Ed.2d 147, 166 (1973).
⁴⁹ 1981 Va. AG LEXIS 166 (internal quotations omitted). See also *Lane v. Commonwealth*, 219 Va. 509, 514, 248 S.E.2d 781, 783 (1978) (holding that in order to prove the *corpus delicti* necessary to sustain a conviction for homicide of a newborn infant, the Commonwealth must prove “that the child was born alive and had an independent and separate existence apart from its mother”).

⁵⁰ 2004 Va. Acts ch. 1023 & 1026. A person “who unlawfully, willfully, deliberately and maliciously kills the fetus of another” is guilty of a felony punishable by five to 40 years in prison, and if the killing is done with premeditation, the person is guilty of a Class 2 felony which is punishable by 20 years to life in prison. Va. Code § 18.2-32.2.

⁵¹ See Appendix B.

⁵² *Mack v. Carmack*, 79 So.3d 597, 611 (2011) (holding that nonviable fetus covered by Alabama’s wrongful death statute).

⁵³ Va. Code § 8.01-50(C). The statutory beneficiaries of a wrongful death actions are set forth in Va. Code § 8.01-53.

⁵⁴ Va. Code § 8.01-50(B).

⁵⁵ See Va. Code §§ 18.2-71 through 18.2-76.2 (setting forth when the performance of an abortion is lawful).

⁵⁶ Va. Code § 8.01-50(B).

⁵⁷ Va. Code § 18.2-32.2 (only another person who kills the fetus of the mother, and not the mother, may be guilty of fetal homicide).

⁵⁸ Va. Code § 8.01-50(B). See also Va. Code § 1-234 (defining “personal representative”). A personal representative is not limited to family and could ultimately be anyone, including creditors.

⁵⁹ Va. Code § 64.1-118 (repealed eff. Oct. 1, 2012, and recodified at § 64.2-502). See also Va. Code § 64.1-75.1 (repealed eff. Oct. 1, 2012, and recodified at Va. Code § 64.2-454) (allowing appointment of administrator solely for the purpose of prosecuting a wrongful death action).

⁶⁰ Va. Code § 8.01-50(C). In the event that the mother dies or otherwise becomes incapacitated, a fetal wrongful death action may be maintained by the mother’s guardian, personal representative, or administrator of her estate.

⁶¹ The unconditional control afforded the mother over any action for the wrongful death of her fetus also mirrors the mother’s ultimate authority in deciding whether or not to have an abortion. See, e.g., *Casey* at 896, 112 S.Ct. at 2830, 120 L.Ed.2d at 727 (law requiring spousal notification prior to abortion by mother unconstitutional where the mother’s decision

must prevail “as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy”).

⁶² 239 Va. 218, 222, 389 S.E.2d 670, 672 (1990).

⁶³ *Id.* at 228-29, 389 S.E.2d at 675.

⁶⁴ See note 32, *supra*.

⁶⁵ *Id.* If the fetus was born alive and subsequently died, a wrongful fetal death action could not be maintained since the definition of “fetal death” would not be met. See note 2, *supra*. In that case, the Virginia Supreme Court’s holding in *Bulala* would control and each party’s claim would be subject to a separate medical malpractice damages cap.

⁶⁶ 1976 Va. Acts ch. 611. The Preamble to Chapter 611 contains the General Assembly’s findings explaining the need for the damages cap, providing that “the difficulty, cost and potential unavailability” of medical malpractice insurance has the effect of reducing the number of health care providers and that such reduction constitutes “a significant problem adversely affecting the public health, safety and welfare” of the citizens of the Commonwealth.

APPENDIX A
WRONGFUL FETAL DEATH CAUSES OF ACTION

| State | Wrongful Fetal Death Action | Limited to Viability | Authority |
|--------------|------------------------------------|-----------------------------|---|
| Alabama | Yes | No | <i>Eich v. Town of Gulf Shores</i> , 293 Ala. 95, 300 So. 2d 354 (1974) (cause of action for viable fetus) <i>Mack v. Carmack</i> , 79 So. 3d 597 (Ala. 2011) (cause of action for nonviable fetus) |
| Alaska | --- | --- | No authority addressing existence of cause of action for viable fetus <i>Mace v. Jung</i> , 210 F. Supp. 706 (D. Alaska 1962) (no cause of action for nonviable fetus) |
| Arizona | Yes | Yes | <i>Summerfield v. Superior Ct.</i> , 144 Ariz. 467, 698 P.2d 712 (1985) (cause of action for viable fetus) <i>Jeter v. Mayo Clinic Ariz.</i> , 211 Ariz. 386, 121 P.3d 1256 (Ct. App. 2005) (no cause of action for nonviable fetus) |
| Arkansas | Yes | Yes | Ark. Code § 16-62-102 (cause of action for viable fetus) |
| California | No | --- | <i>Justus v. Atchison</i> , 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977) (no cause of action for fetus), <i>overruled on other grounds by Ochoa v. Superior Court</i> , 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985) |
| Colorado | Yes | Yes | <i>Espadero v. Feld</i> , 649 F. Supp. 1480 (D. Colo. 1986) (cause of action for viable fetus) |
| Connecticut | Yes | Yes | <i>Gorke v. Le Clerc</i> , 23 Conn. Supp. 256, 181 A.2d 448 (1962) (cause of action for viable fetus) |
| Delaware | Yes | Yes | <i>Worgan v. Greggo & Ferrara, Inc.</i> , 50 Del. 258, 128 A.2d 557 (Super. Ct. 1956) (cause of action for viable fetus) |

| State | Wrongful Fetal Death Action | Limited to Viability | Authority |
|----------------------|--|----------------------|---|
| District of Columbia | Yes | Yes | <i>Greater Southeast Community Hosp. v. Williams</i> , 482 A.2d 394 (D.C. 1984) (cause of action for viable fetus) <i>Ferguson v. District of Columbia</i> , 629 A.2d 15 (D.C. 1993) (no cause of action for nonviable fetus) |
| Florida | No | --- | <i>Stern v. Miller</i> , 348 So. 2d 303 (Fla. 1977) (no cause of action for fetus) |
| Georgia | Yes | Quick fetus | <i>Porter v. Lassiter</i> , 91 Ga. App. 712, 87 S.E.2d 100 (1955) (cause of action for quick fetus) |
| Hawaii | Yes | Yes | <i>Wade v. U.S.</i> , 745 F. Supp. 1573 (D. Haw 1990) (cause of action for viable fetus; no cause of action for nonviable fetus) |
| Idaho | Yes | Yes | <i>Volk v. Baldazo</i> , 103 Idaho 570, 651 P.2d 11 (1982) (cause of action for viable fetus) <i>Santana v. Zilog, Inc.</i> , 95 F.3d 780 (9th Cir. 1996) (no cause of action for nonviable fetus) |
| Illinois | Yes | No | 740 Ill. Comp. Stat. 180/2.2 (cause of action for viable or nonviable fetus) |
| Indiana | Yes | Yes | Ind. Code § 34-23-2-1 (cause of action for viable fetus) |
| Iowa | No (however, alternative cause of action is available) | --- | <i>Weil v. Moes</i> , 311 N.W.2d 259 (Iowa 1981) (no cause of action for fetus), <i>overruled on other grounds by Audubon-Exira Ready Mix, Inc. v. Illinois Cent. Gulf R.R., Co.</i> , 335 N.W.2d 148 (Iowa 1983) But see <i>Dunn v. Rose Way, Inc.</i> , 333 N.W.2d 830 (Iowa 1983) (cause of action for death of a viable fetus permitted under Iowa R. Civ. P. 1.206, which allows parents to sue for damages “resulting from injury to or death of a minor child”) |
| Kansas | Yes | Yes | <i>Hale v. Manion</i> , 189 Kan. 143, 368 P.2d 1 (1962) (cause of action for viable fetus) <i>Humes v. Clinton</i> , 246 Kan. 590, 792 P.2d 1032 (1990) (no cause of action for nonviable fetus) |

| State | Wrongful Fetal Death Action | Limited to Viability | Authority |
|---------------|-----------------------------|----------------------|---|
| Kentucky | Yes | Yes | <i>Mitchell v. Couch</i> , 285 S.W.2d 901 (Ky. 1955) (cause of action for viable fetus) <i>Stevens v. Flynn</i> , 2011 Ky. App. Unpub. LEXIS 561 (2011) (no cause of action for nonviable fetus) |
| Louisiana | Yes | No | La. Civ. Code art. 26 (cause of action for viable or nonviable fetus) |
| Maine | No | --- | <i>Shaw v. Jendzejec</i> , 1998 ME 208, 717 A.2d 367 (1998) (no cause of action for fetus) |
| Maryland | Yes | Yes | <i>State v. Sherman</i> , 234 Md. 179, 198 A.2d 71 (1964) (cause of action for viable fetus) <i>Kandel v. White</i> , 339 Md. 432, 663 A.2d 1264 (1995) (no cause of action for nonviable fetus) |
| Massachusetts | Yes | Yes | <i>Mone v. Greyhound Lines, Inc.</i> , 368 Mass. 354, 331 N.E.2d 916 (1975) (cause of action for viable fetus) <i>Thibert v. Milka</i> , 419 Mass. 693, 646 N.E.2d 1025 (1995) (no cause of action for nonviable fetus) |
| Michigan | Yes | No | Mich. Comp. Laws § 600-2922a (cause of action for viable or nonviable fetus) |
| Minnesota | Yes | Yes | <i>Verkennes v. Corniea</i> , 229 Minn. 365, 38 N.W.2d 838 (1949) (cause of action for viable fetus) |
| Mississippi | Yes | Quick fetus | Miss. Code § 11-7-13 (cause of action for quick fetus) |
| Missouri | Yes | No | <i>O'Grady v. Brown</i> , 654 S.W.2d 904 (Mo. 1983) (cause of action for viable fetus) <i>Connor v. Monkem Co.</i> , 898 S.W.2d 89 (Mo. 1995) (cause of action for nonviable fetus) |
| Montana | Yes | Yes | <i>Strzelczyk v. Jett</i> , 264 Mont. 153, 870 P.2d 730 (1994) (cause of action for viable fetus) <i>Blackburn v. Blue Mountain Women's Clinic</i> , 286 Mont. 60, 951 P.2d 1 (1997) (no cause of action for nonviable fetus), <i>cert. denied</i> , 524 U.S. 905, 118 S. Ct. 2062, 141 L. Ed. 2d 139 (1998) |

| State | Wrongful Fetal Death Action | Limited to Viability | Authority |
|----------------|-----------------------------|----------------------|--|
| Nebraska | Yes | No | Neb. Rev. Stat. § 30-809 (cause of action for viable or nonviable fetus) |
| Nevada | Yes | Yes | <i>White v. Yup</i> , 85 Nev. 527, 458 P.2d 617 (1969) (cause of action for viable fetus) |
| New Hampshire | Yes | Yes | <i>Poliquin v. MacDonald</i> , 101 N.H. 104, 135 A.2d 249 (1957) (cause of action for viable fetus) <i>Wallace v. Wallace</i> , 120 N.H. 675, 421 A.2d 134 (1980) (no cause of action for nonviable fetus) |
| New Jersey | No | --- | <i>Graf v. Taggart</i> , 43 N.J. 303, 204 A.2d 140 (1964) (no cause of action for fetus) |
| New Mexico | Yes | Yes | <i>Salazar v. St. Vincent Hosp.</i> , 95 N.M. 150, 619 P.2d 826 (Ct. App. 1980) (cause of action for viable fetus) <i>Miller v. Kirk</i> , 120 N.M. 654, 905 P.2d 194 (1995) (no cause of action for nonviable fetus) |
| New York | No | --- | <i>Endresz v. Friedberg</i> , 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969) (no cause of action for fetus) |
| North Carolina | Yes | Yes | <i>DiDonato v. Wortman</i> , 320 N.C. 423, 358 S.E.2d 489 (1987) (cause of action for viable fetus), <i>rehearing denied</i> , 320 N.C. 799, 361 S.E.2d 73 (1987) |
| North Dakota | Yes | Yes | <i>Hopkins v. McBane</i> , 359 N.W.2d 862 (N.D. 1984) (cause of action for viable fetus) |
| Ohio | Yes | Yes | <i>Werling v. Sandy</i> , 17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985) (cause of action for viable fetus) |
| Oklahoma | Yes | No | Okla. Stat. tit. 12, § 1053 (cause of action for viable or nonviable fetus) |
| Oregon | Yes | Yes | <i>Libbee v. Permanente Clinic</i> , 268 Ore. 258, 518 P.2d 636 (1974) (cause of action for viable fetus), <i>rehearing denied</i> , 268 Ore. 258, 520 P.2d 361 (1974) <i>LaDu v. Oregon Clinic, P.C.</i> , 165 Ore. App. 687, 998 P.2d 733 (2000) (no cause of action for nonviable fetus), <i>review denied</i> , 331 Ore. 244, 18 P.3d 1099 (2000) |

| State | Wrongful Fetal Death Action | Limited to Viability | Authority |
|----------------|-----------------------------|----------------------|---|
| Pennsylvania | Yes | Yes | <i>Amadio v. Levin</i> , 509 Pa. 199, 501 A.2d 1085 (1985) (cause of action for viable fetus) <i>Coveleski v. Bubnis</i> , 535 Pa. 166, 634 A.2d 608 (1993) (no cause of action for nonviable fetus) |
| Rhode Island | Yes | Yes | <i>Presley v. Newport Hosp.</i> , 117 R.I. 177, 365 A.2d 748 (1976) (cause of action for viable fetus) <i>Miccolis v. AMICA Mut. Ins. Co.</i> , 587 A.2d 67 (R.I. 1991) (no cause of action for nonviable fetus) |
| South Carolina | Yes | Yes | <i>Fowler v. Woodward</i> , 244 S.C. 608, 138 S.E.2d 42 (1964) (cause of action for viable fetus) <i>West v. McCoy</i> , 233 S.C. 369, 105 S.E.2d 88 (1958) (no cause of action for nonviable fetus) |
| South Dakota | Yes | No | S.D. Codified Laws § 21-5-1 (cause of action for viable or nonviable fetus) |
| Tennessee | Yes | Yes | Tenn. Code § 20-5-106 (cause of action for viable fetus) |
| Texas | Yes | No | Tex. Civ. Prac. & Rem. Code §§ 71.001, 71.002 (cause of action for viable or nonviable fetus) |
| Utah | Yes | No | <i>Carranza v. U.S.</i> , 2011 UT 80, 267 P.3d 912 (2011) (cause of action for viable or nonviable fetus) |
| Vermont | Yes | Yes | <i>Vaillancourt v. Medical Ctr. Hosp. of Vt., Inc.</i> , 139 Vt. 138, 425 A.2d 92 (1980) (cause of action for viable fetus) |
| Virginia | Yes | No | Va. Code § 8.01-50 (cause of action for viable or nonviable fetus) |
| Washington | Yes | Yes | <i>Moen v. Hanson</i> , 85 Wn. 2d 597, 537 P.2d 266 (1975) (cause of action for viable fetus) <i>Baum v. Burrington</i> , 119 Wn. App. 36, 79 P.3d 456 (2003) (no cause of action for nonviable fetus), <i>review denied</i> , 151 Wn. 2d 1035, 95 P.3d 758 (2004) |

| State | Wrongful Fetal Death Action | Limited to Viability | Authority |
|---------------|------------------------------------|-----------------------------|---|
| West Virginia | Yes | No | <i>Baldwin v. Butcher</i> , 155 W. Va. 431, 184 S.E.2d 428 (1971) (cause of action for viable fetus) <i>Farley v. Sartin</i> , 195 W. Va. 671, 466 S.E.2d 522 (1995) (cause of action for nonviable fetus) |
| Wisconsin | Yes | Yes | <i>Kwaterski v. State Farm Mut. Ins. Co.</i> , 34 Wis. 2d 14, 148 N.W.2d 107 (1967) (cause of action for viable fetus) |
| Wyoming | --- | --- | No authority addressing existence of cause of action for viable or nonviable fetus |

**APPENDIX B
FETAL HOMICIDE LAWS**

**Appendix B contains laws where fetal homicide is treated as a separate crime.
Appendix B does not address laws that provide for an enhanced punishment for crimes
committed against a pregnant woman.**

| State | Fetal Homicide Law |
|----------------------|---|
| Alabama | Ala. Code § 13A-6-1 (viable or nonviable fetus) |
| Alaska | Alaska Stat. §§ 11.41.150–11.41.180, 11.81.900 (viable or nonviable fetus) |
| Arizona | Ariz. Rev. Stat. §§ 13-1102–13-1105 (viable or nonviable fetus) |
| Arkansas | Ark. Code §§ 5-1-102, 5-10-101–5-10-105 (12-week or older fetus) |
| California | Cal. Penal Code § 187 (viable or nonviable fetus) |
| Colorado | None—a person must be born alive for purposes of homicide statutes. Colo. Rev. Stat. § 18-3-101 |
| Connecticut | None—a person must be born alive for purposes of homicide statutes. <i>Connecticut v. Courchesne</i> , 296 Conn. 622, 998 A.2d 1 (2010) |
| Delaware | None—a person must be born alive for purposes of homicide statutes. Del. Code tit. 11, § 222 |
| District of Columbia | None |
| Florida | Fla. Stat. §§ 316.193, 782.071, 782.09 (viable fetus) |
| Georgia | Ga. Code §§ 16-5-80, 40-6-393.1, 52-7-12.3 (viable or nonviable fetus) |
| Hawaii | None—a person must be born alive for purposes of homicide statutes. Hawaii Rev. Stat. § 707-700 |
| Idaho | Idaho Code §§ 18-4001, 18-4006, 18-4016 (viable or nonviable fetus) |
| Illinois | 720 Ill. Comp. Stat. 5/9-1.2, 5/9-2.1, 5/9-3.2 (viable or nonviable fetus) |
| Indiana | Ind. Code §§ 35-42-1-1, 35-42-1-3, 35-42-1-4, 35-42-1-6 (viable fetus) |
| Iowa | Iowa Code § 707.8 (viable or nonviable fetus) |
| Kansas | Kan. Stat. § 21-5419 (viable or nonviable fetus) |
| Kentucky | Ky. Rev. Stat. §§ 507A.010–507A.060 (viable or nonviable fetus) |
| Louisiana | La. Rev. Stat. §§ 14:2, 14:32.5–14:32.8 (viable or nonviable fetus) |
| Maine | None |
| Maryland | Md. Code, Crim. Law § 2-103 (viable fetus) |
| Massachusetts | Viable fetus covered by homicide statutes. <i>Commonwealth v. Cass</i> , 392 Mass. 799, 467 N.E.2d 1324 (1984) |
| Michigan | Mich. Comp. Laws §§ 750.322, 750.323 (quick fetus) |
| Minnesota | Minn. Stat. §§ 609.21, 609-266, 609-2661–609-2665 (viable or nonviable fetus) |
| Mississippi | Miss. Code § 97-3-37 (viable or nonviable fetus) |
| Missouri | Fetus covered by homicide statutes. <i>State v. Holcomb</i> , 956 S.W.2d 286 (Mo. Ct. App. 1997) |

| State | Fetal Homicide Law |
|----------------|--|
| Montana | None—a person must be born alive for purposes of homicide statutes. Mt. Code § 45-2-101 |
| Nebraska | Neb. Rev. Stat. §§ 28-388–28-394 (viable or nonviable fetus) |
| Nevada | Nev. Rev. Stat. § 200.210 (quick fetus) |
| New Hampshire | None—a person must be born alive for purposes of homicide statutes. <i>New Hampshire v. Lamy</i> , 158 N.H. 511, 969 A.2d 451 (2009) |
| New Jersey | None—a person must be born alive for purposes of homicide statutes. <i>New Jersey in re A.W.S.</i> , 182 N.J. Super. 278, 440 A.2d 1144 (App. Div. 1981) |
| New Mexico | None—a person must be born alive for purposes of homicide statutes. <i>State v. Willis</i> , 98 N.M. 771, 652 P.2d 1222 (Ct. App. 1982) |
| New York | None—a person must be born alive for purposes of homicide statutes. N.Y. Penal Law § 125.05 |
| North Carolina | N.C. Gen. Stat. §§ 14-23.1–14-23.4 (viable or nonviable fetus) |
| North Dakota | N.D. Cent. Code §§ 12.1-17.1-01–12.1-17.1-04 (viable or nonviable fetus) |
| Ohio | Ohio Rev. Code §§ 2901.01, 2903.01–2903.06 (viable or nonviable fetus) |
| Oklahoma | Okla. Stat. tit. 21, § 691 (viable or nonviable fetus) |
| Oregon | None—a person must be born alive for purposes of homicide statutes. Or. Rev. Stat. § 163.005 |
| Pennsylvania | 18 Pa. Cons. Stat. §§ 2601–2609 (viable or nonviable fetus) |
| Rhode Island | R.I. Gen. Laws § 11-23-5 (quick fetus) |
| South Carolina | S.C. Code § 16-3-1083 (viable or nonviable fetus) |
| South Dakota | S.D. Codified Laws §§ 22-1-2, 22-16-1, 22-16-1.1, 22-16-4, 22-16-7, 22-16-15, 22-16-20, 22-16-41 (viable or nonviable fetus) |
| Tennessee | Tenn. Code § 39-13-214 (viable or nonviable fetus) |
| Texas | Tex. Penal Code §§ 1.07, 19.01–19.06 (viable or nonviable fetus) |
| Utah | Utah Code § 76-5-201 (viable or nonviable fetus) |
| Vermont | None—a person must be born alive for purposes of homicide statutes. <i>Vermont v. Oliver</i> , 151 Vt. 626, 563 A.2d 1002 (1989) |
| Virginia | Va. Code § 18.2-32.2 (viable or nonviable fetus) |
| Washington | Wash. Rev. Code § 9A.32.060 (quick fetus) |
| West Virginia | W. Va. Code § 61-2-30 (viable or nonviable fetus) |
| Wisconsin | Wis. Stat. §§ 939.75, 940.01–940.10 |
| Wyoming | None—a person must be born alive for purposes of homicide statutes. <i>Bennett v. State</i> , 377 P.2d 634 (Wyo. 1963) |

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