

Dear Members of the House Committee on Human Services,

I want to reach out to you with respect to a very specific legal concern I have with regards to H. 57. In particular, I want to make sure that this legislation (in particular the portion of sec. 2 which adds 18 V.S.A. § 9493(c) "A fertilized egg, embryo, or fetus shall not have independent rights under Vermont Law") does not inadvertently overturn the Vermont Supreme Court's Vaillancourt decision. In that decision, the Court held that there may be liability under Vermont's wrongful death statute for negligently causing the death of an unborn, viable fetus. Vaillancourt v. Medical Center Hospital of Vermont, Inc., 139 Vt. 138, 143, 425 A.2d 92, 95 (1980)

While I am pro-choice and support individual reproductive rights, I feel strongly that when evidence supports a woman's contention that she intended to see a pregnancy through to term, there should be compensation available to her and her partner through the wrongful death statute, should that pregnancy be involuntarily terminated as a result of the negligence of a third-party. To use a case from my own legal practice as an example, where as a result of the negligence of a drunk driver, a young woman losses a viable fetus in the eighth month of pregnancy, the law should allow for full recovery from the drunk driver for the death of that fetus. The seven-figure settlement that was provided to the prospective parents in that particular case would not have occurred in the absence of the wrongful death statute's treatment of a viable fetus as a person.

As the Vermont Supreme Court noted in Vaillancourt, there are several persuasive grounds for permitting a viable fetus to be considered a person under the wrongful death statute:

- "A. If a child, injured when a viable fetus as a result of another's negligence, has a cause of action when born, then it can make no difference in liability whether death occurs just prior to or just after birth.
- "B. A viable unborn child is, in fact, biologically speaking, a presently existing person and a living human being, because it has reached such a state of development that it can presently live outside the female body, as well as within it.
- "C. If no right of action is allowed, there is a wrong inflicted for which there is no remedy. Where negligent acts produce a stillbirth and a right of action is denied, an incongruous result is produced. For example, if a doctor acted negligently while delivering a baby and it died, the doctor would be immune from lawsuit. However, if he badly injured the child, the doctor would be exposed to liability. Under such a rule, there is the absurd result that the greater the harm, the better the chance of immunity, and the tort-feasor could foreclose his own liability."

Vaillancourt, 425 A.2d at 92 (citations omitted).

I believe that my concern with H. 57 can be rather easily alleviated with the addition of language in sec. 2, which states something to the effect of, "Nothing in this section should be construed to deny a cause of action under the Vermont Wrongful Death Statute, 14 V.S.A. §§ 1491-92, for the death of a viable fetus."

Thank you for your consideration.

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