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

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Torts—WRONGFUL DEATH—A CHILD IS NOT BORN ALIVE UNTIL HE OR SHE ACQUIRES AN EXISTENCE SEPARATE AND INDEPENDENT FROM THE MOTHER—*Duncan v. Flynn*, 358 So. 2d 178 (Fla. 1978).

On March 20, 1972, Shirley J. Duncan was admitted to St. Joseph's Hospital for the birth of her fourth child.[1] Dr. Flynn, who had cared for Mrs. Duncan during this and previous pregnancies, induced labor. Shortly after she was taken into the delivery room the baby's head emerged, but the baby's shoulders were so wide that the infant remained lodged in the birth canal. After unsuccessful attempts at various procedures for approximately twenty minutes, the attending physicians discovered that the infant's heart had stopped and concluded that the child could not be born alive. At this point the physicians directed their efforts towards protecting the mother's life. After receiving the husband's permission, they decapitated the infant, and extracted the remainder of the body by Caesarean section.[2] The death certificate cited as the cause of death, "cardiovascular failure due to or as a consequence of strangulation."[3]

As administrator of the infant's estate, the father sued the physician, hospital, and their insurers for the child's death under Florida's Wrongful Death Act.[4] Section 768.01 of the Act provided a cause of action whenever the death of *any person* "in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual . . .,"[5] whereas section 768.03 provided a cause of action where the death of *any minor child* is caused by the wrongful act of another.[6] Plaintiff alleged that the defendant's negligent failure to recognize in advance that a Caesarean section would be required was the cause of the baby's death during the birth process.[7] On this basis, plaintiff set forth two main lines of argument. First, plaintiff argued that a living baby which has partially emerged, but which dies during the birth process due to neg-

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1. Duncan v. Flynn, 358 So. 2d 178, 179 (Fla. 1978), *aff'g* 342 So. 2d 123 (Fla. 2d Dist. Ct. App. 1977).

2. *Id.*

3. *Id.* The plaintiff argued that the stated cause of death (*i.e.* strangulation) gave rise to an inference of breathing by the child and that this was consistent with a live birth having occurred. 342 So. 2d at 124.

4. 342 So. 2d at 123. Plaintiff's complaint was brought under Florida's former Wrongful Death Act, ch. 72-35, 1972 Fla. Laws 174, as death occurred prior to July 1, 1972, the effective date of Florida's new act, FLA. STAT. §§ 768.16-.27 (1979).

5. Ch. 53-28280, § 1, 1953 Fla. Laws 934 (current version at FLA. STAT. § 768.19 (1979)).

6. Ch. 13-6487, § 1, 1913 Fla. Laws 300 (current version at FLA. STAT. §§ 768.20-.21 (1979)).

7. 358 So. 2d at 179.

ligence, is *born alive*, so as to give rise to a cause of action for the baby's wrongful death either as a *person* or as a *minor child*.[8] Second, plaintiff argued that the issue of live birth, vel non, is moot, because a viable fetus, although unborn, is a *person* on whose behalf suit is maintainable.[9] Rejecting these contentions the trial court entered summary judgment in favor of the defendants.[10] The Second District Court of Appeal affirmed the lower court's decision, and the Florida Supreme Court granted certiorari.[11]

As to the plaintiff's first point, the Florida Supreme Court adopted the reasoning and holding of the Second District Court of Appeal. The court stated that its interpretation of when a live birth occurs is generally consistent with the legislature's definition of "live birth" under the vital statistics law.[12] The court noted that the Second District had held that a child is not born alive until he or she acquires an existence separate and independent from the mother.[13] In the district court's view, two elements are necessary to establish a separate and independent existence, and thereby establish a case of live birth. These are: (1) evidence of explusion (or in Caesarean section, complete removal) of the child's body from its mother; and (2) evidence that the umbilical cord had been cut and that the infant had an independent circulation of blood.[14] As a corollary to the second of these two elements, the district court stated that expert medical evidence might be required to determine whether an independent circulation of blood had been attained prior to death when death occurred before the unbilicus was sev-

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8. Brief of Petitioner, on Merits, in Support of Petition for Writ of Certiorari at 7, Duncan v. Flynn, 358 So. 2d 178 (Fla. 1978).

9. *Id.* at 13. Plaintiff also argued that the unborn viable fetus was a *minor child* within the meaning of § 768.03. This argument was foreclosed by the decision of the supreme court in Stokes v. Liberty Mut. Ins. Co., 213 So. 2d 695 (Fla. 1968). A viable fetus is one sufficiently developed to live outside the womb. *Id.* at 697.

10. 358 So. 2d at 178.

11. *Id.*

12. *Id.* at 179. The vital statistics statute defined fetal death. Ch. 67-312, § 1, 1967 Fla. Laws 1018 states:

> (1) Fetal death is death prior to the complete expulsion or extraction from its mother of a product of conception, if the twentieth week of gestation has been reached; the death is indicated by the fact that after such separation, 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.

(current version at FLA. STAT. § 382.071 (1979)).

In fact, the statute is inapplicable to the Second District's definition of live birth since it is concerned with fetal death rather than fetal life.

13. 358 So. 2d at 179.

14. 342 So. 2d at 126.

ered.[15] The factor of respiration did not enter into the Second District's definition of a separate and independent existence.[16] On the second issue, regarding the status of a fetus under the Wrongful Death Act, the Florida Supreme Court found dispositive its recent holding in *Stern v. Miller*,[17] that an unborn viable fetus is not a *person* within the meaning of Florida's new Wrongful Death Act.[18]

The purpose of this note is to examine the standard adopted by the Florida Supreme Court in *Duncan v. Flynn*[19] in light of other decisions defining the moment at which live birth occurs in criminal, property, and tort law. This note will also review the medical factors involved in the determination of live birth and will analyze their relationship to the holding of the Second District.

In the criminal context, the Second District found support in many cases for the proposition that complete explusion is necessary in order for birth to be complete. The first case examined was *Rex v. Ann Poulton*,[20] an English case decided in 1832. In that case, the mother of an infant was charged with the murder of her child.[21] The child was found dead and there was evidence that it had been strangled, but it was not clear whether death occurred before or after birth had been completed. The court began its summation to the jury by stating that a child must be born alive before a murder conviction is possible. In the court's opinion, live birth required the whole body to be brought alive into the world.[22] As noted by the Second District, this English view was generally followed in the early American cases.[23] By way of example, the court

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15. *Id.*

16. 358 So. 2d at 178.

17. 348 So. 2d 303 (Fla. 1977). This case was decided after the court granted certiorari, mooting the petitioner's arguments on this point.

18. 358 So. 2d at 178 n.3. The supreme court noted:

> Although in *Stern* the issue was presented in the context of our current Wrongful Death Act, §§ 768.16-.27, Fla. Stat. (1975), we expressly recognize that "[s]ince the legislature did not materially change the language of the prior section, it must be presumed that the legislature intended to carry forward into the new section the terms 'person' and 'minor child' as previously construed." 348 So. 2d at 307. Thus, it is clear that our decision in *Stern* interpreting the scope of the term "person" as used in the new Wrongful Death Act applies with equal force to the identical term as it appeared in the old Wrongful Death Act.

Id.

19. 358 So. 2d 178 (Fla. 1978).

20. 172 Eng. Rep. 997 (1832).

21. *Id.*

22. *Id.* at 998.

23. 342 So. 2d at 125.

cited *Wallace v. State*,[24] a Texas case decided in 1881. In *Wallace*, the court held that live birth required the child be completely expelled alive from its mother's body.[25] In that case, the court reversed a conviction of infanticide because it was not shown in the facts that the infant was completely expelled before strangulation occurred.[26]

Additionally, the Second District cited *People v. Hayner*,[27] a more recent case supporting the complete expulsion view. The defendant in *Hayner* was charged with the murder of his fourteen year old daughter's illegitimate baby. In *Hayner*, the New York Court of Appeals stated two requirements for live birth. First, the child must be completely expelled from the mother's body; and second, the child must be possessed of, or capable of, existence by means of a circulation independent of the mother's.[28]

The Second District stated that the prevailing view still requires complete explusion, but it noted that recent cases have concluded that no live birth has occurred until the child has attained a "separate and independent existence."[29] The definition of a separate and independent existence presented an area of uncertainty to the Second District.[30] Ultimately, however, the court cited several cases in support of the proposition that, in addition to complete expulsion, an "independent circulation" of blood, and not simply breathing, must be shown in order to prove that the child acquired a separate

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24. 10 Tex. Crim. App. 255 (1881).
25. *Id.* at 270.
26. *Id.*
27. 90 N.E.2d 23 (N.Y. 1949).
28. *Id.* at 24.
29. 342 So. 2d at 125.
30. *Id.* With respect to the uncertainty, the Second District commented that it was not always clear whether the reviewed cases were setting forth actual elements of proof to be shown in addition to the showing of a separate and independent existence, or whether they were only trying to explain what such an existence means physically. *Id.* at 124-26. The district court noted a split of opinion as to whether a newborn still attached to its mother by the umbilical cord may be said to possess a separate and independent existence. *Id.* at 126. The Second District Court of Appeal offered no support for the emphasis it placed on this factor. Justice Karl, writing for the dissent in the supreme court opinion, however, objected strenuously to the adoption of any absolute rule of law fixing the occurrence of live birth on the severing of the umbilical cord. 348 So. 2d at 180. Justice Karl's viewpoint is not unprecedented; as stated by the court in Goff v. Anderson, to make a child's legal existence "date from the time a physician may in his wisdom see proper to cut the navel cord is without reason. . . ." 15 S.W. 866, 867 (Ky. 1891). In fact, however, the standard of the Second District does not absolutely require that the umbilical cord be cut, as independent circulation may also be proven through the use of expert testimony. 342 So. 2d at 126. Justice Karl further contended that whether or not an infant had been born alive should be a question of fact for the jury. 358 So. 2d at 180.

and independent existence.[31]

The other criminal cases cited by the Second District are not as directly supportive of its holding. The cases agree that breathing alone is insufficient to establish live birth, and that a separate and independent existence, in addition to expulsion, must be attained. They disagree, however, on the exact criteria to be used in the definition of independent existence. For example, in *Jackson v. Commonwealth*,[32] the Kentucky Supreme Court held that it was necessary for the prosecution to prove both that the child breathed, and that it had a complete and separate existence of its own after birth, in order to establish the corpus delicti in a homicide. The court stated that being born means that the whole body is brought into the world, but it did not otherwise define a "complete and separate" existence.[33] In addition, the court held that it would be murder to kill a child completely expelled from the mother's body, but still connected by the umbilical cord.[34] This demonstrates that the umbilical connection was no barrier in finding a complete and separate existence; to this extent, *Jackson* is contrary to the rule set forth by the Second District.[35] Similarly, in *Montgomery v. State*,[36] the Georgia Supreme Court held that a child must attain a separate and independent existence after being born alive in order to sustain a conviction for its murder. In addition, the court held that a physician's testimony that the infant had breathed before its throat was cut did not prove a separate and independent existence, because the physician was unable to provide corroborating evidence that the child's heart had beat after complete expulsion.[37] The court found the physician's testimony to be consistent with the theory that the child was born dead.[38] Evidence of a heartbeat is a criterion of complete and separate existence not required by the definition adopted by the Second District.

The law dealing with live birth in criminal prosecutions has, in general, followed the course outlined by the Second District Court of Appeal. The earliest English cases required complete separation from the mother and also independent circulation, neither of

31. 342 So. 2d at 125. *See, e.g., Poulton*, 172 Eng. Rep. at 997.
32. 96 S.W.2d 1014, 1014 (Ky. 1936).
33. *Id.*
34. *Id.*
35. 342 So. 2d at 126.
36. 44 S.E.2d 242, 243 (Ga. 1947).
37. *Id.*
38. *Id.*

which was proved nor disproved by the presence or absence of breathing.[39] In a later case, an English court clarified the meaning of the crucial terms, "complete separation" and "independent circulation." That court held that expulsion from the mother's body without severance of the umbilical cord was sufficient proof of complete separation.[40] In addition, the court held that independent circulation was proven by medical testimony that the child had breathed following complete expulsion.[41]

These presumptions were successfully applied in only a few cases, since the secrecy surrounding such births often made proof difficult.[42] In 1929 these difficulties in proof prompted Parliament to enact The Infant Life (Preservation) Act.[43] The Act imposed a maximum punishment of life imprisonment for the willful destruction of a fetus over twenty-eight weeks old.[44] The Act allowed the courts to avoid the issue of live birth by utilizing a charge for which proof of live birth was unnecessary.[45]

A few American jurisdictions, including Florida, have followed the English approach and enacted feticide statutes.[46] In general, however, the law pertaining to infanticide has developed in a more complex fashion in this country. At the end of the last century, there was no authoritative view with respect to the legal significance of independent circulation and the necessity of breathing.[47] By the middle of the twentieth century, however, a majority and a minority view were firmly established in the criminal law area.[48] The majority view adopts in main part the old English doctrine, insisting generally upon complete expulsion and proof of independent circulation in order to establish live birth.[49] The minority view rejects the necessity of proving live birth at all in infanticide

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39. *See, e.g., Poulton*, 172 Eng. Rep. 997 (1832). For a discussion of the early English cases, see Meldman, *Legal Concepts of Human Life: The Infanticide Doctrine*, 52 MARQ. L. REV. 105, 106 (1968). Proof of live birth was generally held to be necessary to prove the corpus delicti of the crime, for unless the subject of the alleged crime was a living person there could be no murder and therefore no murderer. 41 C.J.S. *Homicide* § 312(f) (1944).

40. Regina v. Trilloe, 174 Eng. Rep. 674 (1842).

41. *Id.*

42. Meldman, *supra* note 39, at 107.

43. 1929, 19 & 20 Geo. 5, c. 34. *See* Meldman, *supra* note 39, at 105-06; Note, *Killing an Unborn but Viable Fetus Is Not Murder Under Section 187 of the California Penal Code*, 22 SYRACUSE L. REV. 828, 830 (1971).

44. 1929, 19 & 20 Geo. 5, c. 34.

45. *Id.*

46. *See, e.g.*, FLA. STAT. § 782.09 (1979); MISS. CODE ANN. 97-3-37 (1972).

47. *See* Meldman, *supra* note 39, at 108.

48. *Id.*

49. *Id.*

prosecutions, stating that there is no substantial distinction between a viable prenatal infant and a newly born one.[50]

A majority of American jurisdictions have accepted independent circulation, in addition to complete expulsion, as a necessary concomitant of live birth. In criminal cases, however, the criteria by which independent circulation can be proved have remained unclear.[51] In contrast to the rule developed by the Second District, respiration has generally been considered one indicator of an independent circulation, though it is almost always considered inconclusive when taken alone.[52] In *Morgan v. State*,[53] the Supreme Court of Tennessee even went to the extreme of stating that the existence of respiration establishes both an independent circulation and an independent existence. In *Hayner*, however, the New York court rejected breathing alone as a reliable indicator of independent circulation.[54] And the Kentucky court in *Jackson* confuses the relationship between breathing and independent circulation even further by requiring both as separate elements of proof in order to establish live birth.[55]

Unfortunately, the confusion resulting from the attempts to incorporate evidence of respiration into the legal definition of live birth has continued in other jurisdictions. Many courts have turned to other factors in order to make the live birth determination.[56] Some courts, as in *Montgomery v. State*,[57] have relied mainly on the opinion of medical experts as to whether or not the child was born alive. Other courts, as in *Hayner*, have held that medical opinion as to live birth is of only slight or conjectural sig-

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50. *Id.* at 111.

51. *Id.* at 109.

52. *Id. See also* Annot., 159 A.L.R. 523, 527 (1945). Bennett v. State, 377 P.2d 634 (Wyo. 1963), was one of the cases offered by the plaintiff in support of his argument that the child was born alive. 342 So. 2d at 124. In *Bennett*, a mother was tried for the death of her newborn infant. The Wyoming Supreme Court allowed evidence of breathing to be presented by the prosecution while it avoided ruling on its probative value. 377 P.2d at 636. The court held that whether or not live birth had occurred was a question of fact for the jury. *Id.* Therefore, the court held it was proper for the court to receive the expert opinion of the autopsy physician. His opinion was that the child was born alive. *Id.* The physician's report was supported by evidence that the child had breathed, and he stated that this was the most reliable indicaton of live birth. *Id.* at 635.

53. 256 S.W. 433 (Tenn. 1923).

54. 90 N.E.2d at 25.

55. 96 S.W.2d at 1014.

56. Meldman, *supra* note 39, at 110.

57. 44 S.E.2d at 244. *See, e.g.*, State v. Merrill, 78 S.E. 699 (W. Va. 1913) (physician's testimony that it was impossible to tell whether infant was alive when strangulation took place, but there was sufficient evidence to establish a live birth).

nificance.[58] In *State v. Osmus*,[59] the Wyoming Supreme Court considered another criterion in establishing live birth. In that case, the expert witness testified that the umbilical cord is not usually cut until after pulsation ceases. On this basis, the court held that one medical criterion of independent circulation was the cessation of pulse, because this indicated that the infant had stopped transferring blood into the placenta for oxygenation.[60] As pointed out by the Iowa Supreme Court, however, this one event might just as easily be caused by the death of the infant, in which case the court might mistake a sign of death as one of life.[61]

People v. Chavez[62] is the leading authority among the minority of American courts that have rejected the necessity of showing live birth in infanticide prosecutions. In *Chavez*, a mother was charged with manslaughter for negligently allowing her newborn to bleed to death after cutting the umbilical cord.[63] The defendant contended on appeal that there was not enough evidence of the traditional requirements of live birth to sustain the conviction.[64] After reviewing the holdings of various courts in this area, the California court rejected the traditional rules, stating that the difficult factual questions of infanticide should be met and decided on the basis of whether or not a living baby with the natural potential for growth and development is being born.[65] The California Supreme Court approved the holding of the court in *Chavez*, stating that a viable fetus in the process of being born is a human being within the meaning of the California homicide statutes.[66] The holding in *Chavez* has subsequently been relied on to make a strong presumption in favor of live birth.[67]

In our noted case, the Second District Court of Appeal cited two cases in the area of property law in support of its conclusions. In *Goff v. Anderson*,[68] a husband's right as tenant by curtesy in his

58. 90 N.E.2d at 25. *Cf.* Shedd v. State, 173 S.E. 847 (Ga. 1934) (unsupported testimony of physician based on post-mortem examination does not establish guilt beyond a reasonable doubt).

59. 276 P.2d 469 (Wyo. 1954).

60. *Id.* at 476.

61. Wehrman v. Farmers' and Merchants' Sav. Bank, 259 N.W. 564, 569 (Iowa 1935).

62. 176 P.2d 92 (Cal. Dist. Ct. App. 1947).

63. *Id.* at 93.

64. *Id.* at 94.

65. *Id.*

66. Keeler v. Superior Court, 470 P.2d 617, 629 (Cal. 1970).

67. *Id. See, e.g.*, Singleton v. State, 35 So. 375 (Ala. Ct. App. 1948); State v. Shephard, 124 N.W.2d 712 (Iowa 1964).

68. 15 S.W. 866 (Ky. 1891).

wife's land was contingent on live issue produced by the marriage. The Supreme Court of Kentucky stated that "a child is completely born when delivered, or expelled from and becomes external of the mother, whether the *placenta* has been separated or the cord cut or not, . . . and, if not at that instant dead, it is to be regarded as born alive for every legal purpose whatever."[69] The Second District found additional support for its conclusion that expulsion is necessary in the more recent case of *Wehrman v. Farmers' & Merchants' Savings Bank.*[70] In *Wehrman,* the Iowa Supreme Court stated that the functioning of the heart after delivery, establishing an independent circulation of blood, was the criterion by which the existence of an infant as a human being could be established.[71] After noting that no attempt to find a heartbeat had been made, however, the court in *Wehrman* established a presumption that the twins lived long enough to survive their mother absent evidence by the defendant to the contrary.[72] The decision of the court in *Goff* lends direct support to the conclusions of the Second District. The holding of the Iowa court in *Wehrman,* however, is not as strong a precedent. *Wehrman,* while adopting a standard seemingly akin to that used in murder prosecutions, actually created a presumption of live birth in the face of evidence tending to show that the children were born dead.[73]

Under the common law, the property rights of an unborn child are recognized from the moment of conception.[74] This view contemplates, however, that the actual vesting of the rights will not occur until the child is born alive. The Florida Supreme Court adopted the common law rule in a case involving an unborn child's right to inherit homestead property.[75] In that case, the court stated that "posthumous children inherit in all cases in like manner as if they were born in the lifetime of the intestate and had survived him."[76] This view has retained general support among other jurisdictions.[77]

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69. *Id.* at 866 (emphasis in original).

70. 259 N.W. 564 (Iowa 1935).

71. *Id.* at 571.

72. *Id.* at 569.

73. *See id.* at 564.

74. Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies,* 46 NOTRE DAME LAW. 349, 354 (1971). *See, e.g.,* Stokes v. Liberty Mut. Ins. Co., 213 So. 2d 695, 700 (Fla. 1968).

75. Shone v. Bellmore, 78 So. 605 (Fla. 1918).

76. *Id.* at 607 (citing 4 J. KENT'S COMMENTARIES ON AMERICAN LAW 412 (13th ed.)).

77. Note, *supra* note 74, at 353. The American law with regard to the property rights of

The Second District cited only one case in the area of tort law in support of its holding. In the California case of *Justus v. Atchison*,[78] the plaintiff argued that *Chavez* was support for his contention that a viable child in the process of being born was a human being for whose death a wrongful death action could be brought. The lower court recognized that *Chavez* supported the argument advanced by the plaintiff, but it pointed out that the *Chavez* decision was made in the context of a homicide prosecution and therefore was distinguishable.[79] On appeal, the California Supreme Court ruled that a baby who died during the process of a delivery or an assisted birth was born dead for purposes of a tort suit and that an action for wrongful death could not be maintained on the child's behalf.[80]

The law governing the general area of prenatal torts has undergone rapid change in the past thirty years.[81] Although the wrongful death action on behalf of infants and adults has long been accepted,[82] in early cases, recovery in tort was not allowed for any injury inflicted upon the prenatal infant, regardless of whether the infant was subsequently stillborn or born alive. A majority of courts have expanded tort liability to include recovery for negligently inflicted prenatal injuries if the child is subsequently born alive,[83] and most courts will now allow the use of a wrongful death action to maintain a suit where an infant is stillborn.[84]

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the unborn was summed up by the court in *In re Holthausen's Will*, 26 N.Y.S.2d 140 (Surr. Ct. 1941). In that case, the court stated that it had been the uniform and unvarying decision of all common law courts with respect to estate matters that an unborn child is "born" and "alive." *Id.* at 143.

78. 126 Cal. Rptr. 150, 155 (Ct. App. 1975), *aff'd*, 565 P.2d 122 (Cal. 1977).

79. 126 Cal. Rptr. at 155.

80. 565 P.2d at 132-33.

81. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 55, at 335-36 (4th ed. 1971). *See generally* Annot., 40 A.L.R.3d 1222, 1226-28 (1971); Note, *A Stillborn Fetus May Not Be Included Within the Meaning of a Statute Permitting Recovery for the Wrongful Death of a Minor Child*, 18 DRAKE L. REV. 310 (1969).

82. Rose, *Foreign Enforcement of Actions for Wrongful Death*, 33 MICH. L. REV. 545, 545 (1935).

83. Annot., 40 A.L.R.3d at 1228. *See generally* Note, *supra* note 81, at 312-13; Annot., 15 A.L.R.3d 992 (1967).

84. *See* Note, *supra* note 81, at 312-13. *See also* Note, *California's Response for Wrongful Death of a Stillborn Fetus: Justus v. Atchison*, 5 PEPPERDINE L. REV. 589, 597 (1978). Although it is beyond the scope of this article, it should be noted that this is not a violation of the stillborn infant's constitutional rights. In Roe v. Wade, the Supreme Court held that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. 113, 158 (1973) (footnote omitted). *See generally* Note, *Wrongful Death and the Unborn: An Examination of Recovery after Roe v. Wade*, 13 J. FAM. L. 99 (1973-74); Annot., 15 A.L.R.3d at 992.

Florida is in the minority of jurisdictions which have continued to deny recovery in wrongful death when an infant is stillborn. In the first Florida case to address the issue of prenatal tort, *Stokes v. Liberty Mutual Insurance Co.*, the Supreme Court denied recovery for the wrongful death of a stillborn fetus.[85] Subsequently, in *Day v. Nationwide Mutual Insurance Co.*, the Second District Court of Appeal held that a child injured before birth, if it is born alive but dies shortly thereafter, is a person for whom wrongful death recovery is available.[86] Then in *Stern v. Miller*, the Florida Supreme Court reiterated its rule that a recovery for wrongful death is denied in cases where the injured fetus is stillborn.[87]

In *Justus* and *Duncan*, California and Florida courts addressed the issue of whether a child who dies during the birth process is born alive for purposes of a wrongful death suit. The plaintiff in *Justus* argued that the infant was in the process of being born at the time of death, while the plaintiff in *Duncan* argued that the infant had been born alive prior to death. The *Duncan* argument forced the Second District to delineate the exact criteria to establish a live birth for purposes of a wrongful death action. In so doing, *Duncan* became the first Florida case to establish live birth standards for a tort suit.

In addition to its legal analysis, the Second District's live birth definition must be examined from a medical viewpoint. The two elements of the Florida live birth standard are not well founded in a medical sense. The first element requires that complete expulsion occur in order for the child to be considered born alive.[88] There is very little physiological difference, however, between a viable infant just prior to expulsion and a completely born infant.[89]

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85. 213 So. 2d 695 (Fla. 1968). *See* note 9 *supra*. A cogent attack on the Florida rule with respect to the unborn is found in Comment, *The Conditional Liability Rule—A Viable Alternative for the Wrongful Death of a Stillborn Child*, 28 U. FLA. L. REV. 187, 191-92 (1975).

86. 328 So. 2d 560 (Fla. 2d Dist. Ct. App. 1976).

87. 348 So. 2d at 307-08.

88. 342 So. 2d at 126.

89. In general, the viable fetus shares many characteristics in connection with the completely born infant:

> We know that he moves with a delightful easy grace in his buoyant world, that foetal comfort determines foetal position. He is responsive to pain and touch and cold and sound and light. He drinks his amniotic fluid, more if it is artifically sweetened, less if it is given an unpleasant taste. He gets hiccups and sucks his thumb. He wakes and sleeps. He gets bored with repetitive signals but can be taught to be alerted by a first signal for a second different one. And finally he determines his birthday, for unquestionably the onset of labour is a unilateral decision of the foetus.

Both are capable of growth and development if allowed to survive. Because the complete expulsion requirement lacks any particular significance as an indicator of viability from a medical viewpoint, it is essentially an arbitrary standard.

The second element of live birth, *i.e.* separate and independent existence, requires evidence that the umbilical cord has been cut and that the infant has an independent circulation of blood.[90] Unfortunately, both of these factors are inadequate as indicators of live birth in a medical sense. First, the requirement that the umbilical cord be cut means that an infant's live birth is dependent upon the whim of the doctor. Medically, the concept of independent circulation has no clear meaning.[91] It is true that the prenatal and newly postnatal infant is dependent on its mother via the umbilical cord for oxygen and nourishment gained through circulation of its blood at the placenta.[92] And accordingly, perhaps the district court thought that a severed umbilical cord was necessary in order for the infant to have an independent circulation of blood. But this assumption is incorrect. Circulation of the infant's blood through the umbilical cord may stop before the umbilical cord is actually cut by the doctor. For example, the infant's umbilical blood flow often stops when the placenta is delivered or shortly after birth, when certain internal changes occur which cause the newborn's blood to circulate through its own lungs and to bypass the umbilical connection with the mother's system.[93] In both of these situations, the infant will have actually acquired an independent circulation despite the fact that the umbilical cord remains unsevered. Therefore, the cutting of the umbilical cord is an unrealistic requirement for legal definitions of live birth, since the infant's independent circulation is not necessarily contingent upon the umbilical cord's severance.[94] Second, the legally espoused concept of

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J. WILKE, HANDBOOK ON ABORTION 26 (1975).

As stated by the court in *Chavez:*

> There is not much change in the child itself between a moment before and a moment after its expulsion from the body of its mother, and normally, while still dependent on its mother, the child, for some time before it is born, has not only the possibility but a strong probability of an ability to live an independent life.

176 P.2d at 94.

90. 342 So. 2d at 126.

91. Meldman, *supra* note 39, at 110-11.

92. *See generally* L. HELLMAN & J. PRITCHARD, WILLIAMS OBSTETRICS 211-20 (14th ed. 1971); Harned, *Respiration and the Respiratory System*, in PERINATAL PHYSIOLOGY 53 (2d ed. 1978).

93. *Id.* at 173, 211-14, 371-72.

94. The person who may be responsible for the wrongful death of the infant could deter-

independent circulation is itself without any clear meaning in a medical sense. This lack of established medical significance renders the district court's standard even more obscure.

Unfortunately, the continuing efforts of courts to draw a rigid line separating the born from the unborn by focusing solely on a variety of external signs of birth have resulted in a confusing array of cases.

In sum, the definition chosen by the Florida Supreme Court bases recovery for the wrongful death of an infant dying in childbirth upon factors that are not well established in either a legal or a medical sense. Legally, the Second District's definition suffers because it adopts a high standard of proof from the criminal law and applies it to an area of civil law. Additionally, the Second District derives little support from the only tort case nearly on point since in that case, the criteria of live birth were not specified.[95] The cases cited from the property law area provide little support for the Second District's live birth standard: Indeed, one of the property cases cited actually created a presumption of live birth from the moment of conception.[96]

The Second District's opinion also lacks clearly established medical criteria. The elements of live birth espoused by the Second District are not founded in medical knowledge, but instead reflect a reliance on arbitrary, external indicators of a live birth.

A more sensible definition of live birth should be developed based on accurate medical information and a burden of proof more natural to the civil sphere. There seems to be no reason to require a plaintiff recovering in tort to bear as high a burden of proof as that generally applied in criminal cases. The criteria used to define live birth for purposes of a civil standard should be well based in

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mine the type of proof required by controlling the point at which the umbilical cord is cut. This throws a questionable light on whether the cutting of the umbilical cord should be used as a standard to prove a separate and independent existence.

Death prior to severing the umbilical cord will generally lead to the use of expert testimony to prove live birth. 342 So. 2d at 126. This will probably result in the jury choosing between the veracity of the attending physician and of another physician called in by the plaintiff.

95. *Justus*, 565 P.2d at 132-33.

96. The cases chosen by the Second District in support of its conclusion (*Goff* and *Wehrman*) are the only two property cases dealing with the definition of live birth. *Wehrman*, while adopting a standard seemingly akin to that used in murder prosecutions, actually created a presumption of live birth in the face of evidence tending to show that the children were born dead. *See* 259 N.W. at 564.

medical fact. Development of a live birth standard along these lines will provide needed logic to an area of great confusion.

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