Volume 99
Issue 2 *Symposium: Farley v. Sartin and Fetal Personhood*
Article 4

December 1996

Farley v. Sartin and Tort Claims for the Wrongful Death of a Nonviable Fetus: Paradigms, Imponderables and Proposals

Teree Foster
West Virginia University College of Law

FARLEY v. SARTIN AND TORT CLAIMS FOR THE WRONGFUL DEATH OF A NONVIABLE FETUS: PARADIGMS, IMPONDERABLES AND PROPOSALS

Teree E. Foster[*]

Perhaps the most intractable problem with which human beings have struggled throughout the latter decades of the twentieth century pertains to life itself: its definition, genesis, quality and cessation. Scientific progress unimaginable at the outset of this century has heralded shifting paradigms and intricate ethical and legal questions for which courts struggle to articulate approaches: among others, the definition of "parenthood" in the context of surrogacy; the ownership rights in frozen embryos; the moral and legal questions associated with the cloning of human beings; the choice of a gravely ill person to plan death, and to rely upon trained medical assistance to effectuate those plans.

When does "life" begin? When does a fetus metamorphosize from embryonic matter to personhood, possessed of protectable rights? Is viability the touchstone? As medical science shifts viability — the ability of a fetus to survive outside the womb — earlier and earlier during the second trimester of pregnancy, does viability remain a feasible touchstone? Is viability the only touchstone? Does the latitudinal location of this transformative moment from embryo to person migrate, depending upon the reason for identifying it? When does loss of a fetus through tortious conduct constitute a compensable wrong to its parents? To the fetus?

In *Farley v. Sartin*,[1] the Supreme Court of Appeals of West Virginia, held, in an opinion authored by Justice Franklin D. Cleckley, that West Virginia's wrongful death statutory definition of "person" encompasses a nonviable unborn child, and that a tort cause of action for the death of that unborn child is actionable.[2] *Farley v. Sartin* identifies West Virginia as the only state to permit

[*] Dean and Professor of Law, West Virginia University College of Law.

[1] Farley v. Sartin, 466 S.E.2d 522 (W. Va. 1995).

[2] Justice Cleckley prefers the term "unborn child" to "fetus," because the latter term is descriptive of development from the post-embryonic stage, approximately seven or eight weeks after conception, until birth; the former term emphasizes that the crux of the opinion is the timing of viability: "from conception to viability and viability to birth." *Farley*, 466 S.E.2d at 523 n.3.

recovery for the death of a nonviable unborn child without express legislative direction. To what extent is the comparative conduct of the parents, as it affects fetal development, a relevant concern when the life of a nonviable fetus is tortiously ended? What is the appropriate measure of damages, and what evidence should be admissible thereon? Does recognition of a tort cause of action for wrongful death of a nonviable fetus undermine women's reproductive autonomy and lend support to those who seek to subvert the principle of maternal choice enshrined in *Roe v. Wade*?[3] Should the ambit of child abuse and endangerment laws now be enlarged to protect unborn children from prenatal substance abuse? And, the perennial issue that suffuses questions of this ilk — is the judiciary the appropriate decisional body, or should these fundamental issues be reserved to the legislature for resolution?

This symposium explores some of the ramifications of this momentous decision, and offers proposals that address these imponderable issues.

[3] 410 U.S. 113 (1973).