ALAN WILSON
ATTORNEY GENERAL

September 3, 2025

The Honorable Neal A. Collins, Member
South Carolina House of Representatives
418-C Blatt Building, P.O. Box 11867
Columbia. SC 29211

Dear Representative Collins:

You seek our opinion regarding whether stillbirths are covered by paid family leave benefits. In your letter, you state the following:

> [t]he South Carolina General Assembly passed six-week paid family leave for state employees in 2022. The General Assembly expanded this benefit for teachers and school district employees in 2023. Denying paid parental leave benefits from parents suffering from stillbirth goes against the plain meaning of the statutes. While I understand that South Carolina is not a legislative intent state, as the primary sponsor to the 2023 legislation, I can attest that any interpretation that a stillbirth is not a "birth" under the statute is incorrect.

Your letter references §§ 8-11-150 and 8-11-151 which authorizes paid family leave for state employees and school district employees. In addition, you state:

> . . . my understanding is that teachers, eligible school district employees, or qualified coparents experiencing a stillbirth are being delayed, or denied, from receiving their paid parental leave benefits when their child is stillborn. These heart-wrenching denials and delays are ongoing even when teachers and eligible employees experience complications. . . . Even though their child was stillborn, these parents went through the birthing process, a major medical event. They need their promised paid parental leave benefits to best recover from their tragic losses and suffering.

While you pose a number of interrelated questions, the essence of your inquiry is whether parents of a stillborn child may receive paid family leave. In our view, the General Assembly likely so intended. However, legislative clarification is warranted to make such legislative intent enforceable.

Law/Analysis

A good summary of the paid parental leave program is provided by South Carolina's Department of Administration. This summary reads in pertinent part as follows:

> [o]n May 13, 2022, Governor Henry McMaster signed into law S. 11 which added Section 8-11-150(A) and amends Section 8-11-155 of the South Carolina Code of Laws, to provide six weeks of paid leave at one hundred percent of the eligible state employee's base pay or two weeks of paid leave at one hundred percent of the state employee's base pay depending on the qualifying event. . . .
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> Qualifying events include the birth of a newborn biological child to an eligible state employee. . . . To qualify for Paid Parental Leave (PPL), the adoption, birth or foster care placement must occur on or after Oct. 1, 2022.

Adm.sc.gov/services/state-human-resoures/benefits-leave/parental-leave. As your letter indicates, a similar law was enacted for school district employees in 2023.

Section 8-11-150(B) simply states that eligible state employees who "give birth" are entitled to receive six weeks of paid parental leave. Neither §§ 8-11-150 nor 8-11-151 defines the word "birth." Both statutes define a "child" as "a newborn biological child or foster of a child in state custody and under the age of eighteen. No child can have more than two parents for paid parental leave." A "qualifying event" is defined as ". . . the birth of a newborn biological child to an eligible state employee. . . ."

However, even though "birth" is not defined in the statutes, in its ordinary sense, the word "birth" simply means "the emergence of a new individual from the body of its parent." Merriam Webster Dictionary. While one might assume a "newborn" relates only to a child born alive, it is not necessarily so. Even under the ancient common law, a child was spoken of as either "born living" or "born dead." See Sims Case, 75 Eng. Rep. 1075 (1601); see also Ex Parte Atkinson, 238 S.C. 521, 524, 121 S.E.2d 4, 5 (1961) [". . . on January 17, 1959, her child was born dead."]. It is common phraseology to say a woman "gave birth to a stillborn child." See e.g. Batts v. Capp, 191 S.E.2d 227, 228 (Va. 1972). Thus, under the Paid Parental Leave statutes, leave is granted for a "birth," without further explanation. The Legislature did not specify that the requirement for leave must be a "live birth." Nor did the Legislature indicate that a "newborn child" must be born alive.

A stillbirth is defined by the CDC as the loss of a pregnancy after 20 weeks and before birth. A miscarriage is usually defined as the loss of a fetus before the 20th week of pregnancy. www.cdc.gov/stillbirth/about/index.html#: ~ : text = CDC% 20 works % 20 to % 20 learn % 20 more services % 20 to % 20 help % 20 prevent % stillbirth. It has been reported that most states do not cover stillborn births as part of their paid family leave legislation, even though, according to the CDC, more than 20,000 babies are born still each year. Liacko, "Maternity Leave Benefits Unavailable to Moms Who Deliver Stillbirths," scrippsnews.com/science-and-tech/maternity-

leave-benefits-unavailable-to-moms-who-deliver-stillbirths. Typically, legislation has been deemed necessary in other states to make this clear. Thus, we must examine how our courts would likely approach the issue. We turn now to an interpretation of South Carolina's paid family leave legislation.

In reviewing your questions, several basic rules of statutory interpretation are pertinent. As we stated in Op. S.C. Att'y Gen., 2004 WL 2745669 (November, 22, 2004),

> [f]irst and foremost, is the cardinal rule of construction that the primary purpose in interpreting statutes is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statute must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers. Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948).
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> Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1990). However, the Court has cautioned against an overly literal interpretation of a statute which may not be consistent with legislative intent. Greenville Baseball, Inc. v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). As stated by our Supreme Court in Bearden,
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> > [i]t is a familiar canon of construction that a thing that is within the intention of the makers of the statute is as much within the intention of the makers of the statute is as much within the statute as if it were within the letter. It is an old and well established rule that the words ought to be subservient to the intent and not the intent to the words.
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> Id. at 368-369. A sensible construction, rather than one which leads to irrational results, is always warranted. McLeod v. Montgomery, 244 S.C. 308, 106 S.E.2d 778 (1964).

In addition, remedial statutes, such as §§ 8-11-150 and 8-11-151, should be broadly construed in order to effectuate their purpose. S.C. Dept. of Mental Health v. Hanna, 270 S.C. 210, 241 S.E.2d 563 (1978). Moreover, the "'court will reject the ordinary meaning of words used in a statute' and apply the rule of construction according to the spirit of the law when to accept the ordinary meaning of such words 'would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature.'" Soil Remediation Co. v. Nu-Way Environmental, Inc., 317 S.C. 274, 276, 453 S.E.2d 253, 254-55 (Ct. App. 1994) (quoting S.C. Bd. of Dental Examiners v. Breeland, 208 S.C. 469, 480, 38 S.E.2d 644, 650 (1946)).

Against this backdrop, we first note that the South Carolina Supreme Court has repeatedly held that a viable fetus is a "child" or a "person" for various purposes. In State v. McKnight, 352 S.C. 635, 650, 576 S.E.2d 168, 175-76 (2003), for example, the Court reviewed

these decisions in the context of a mother ingesting crack cocaine which caused her child to be born stillborn:

> [i]n numerous cases dating since 1960, we have held that a viable fetus is a person. Hall v. Murphy, 236 S.C. 257, 113 S.E.2d 42 (1964); State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984); In [Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997)] . . . we reiterated the fact that a viable fetus is a child within the meaning of the child abuse and endangerment statute. Most recently, we held that a viable fetus is both "person" and "child" as used in statutory aggravating circumstances which provide for death penalty eligibility. State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998).

On the other hand, in Crosby v. Glasscock Trucking Co., 340 S.C. 626, 532 S.E.2d 856 (2000), our Supreme Court held that a nonviable, stillborn fetus may not maintain a wrongful death action. The majority distinguished the situation of "a nonviable but born-alive fetus" as "fundamentally different from a case such as this where the fetus is not born alive." 340 S.C. at 628, 532 S.E.2d at 857. Thus, the Supreme Court in Glasscock concluded:

> [c]onsistent with our decision in [West v. McCoy, 233 S.C. 369, 105 S.E.2d 88 (1958)], the majority of courts have held a nonviable stillborn fetus cannot maintain an independent wrongful death action [cases cited]. . . . Courts addressing this issue have invariably deferred to the legislature in rejecting a wrongful death action by a nonviable stillborn fetus. . . .

Justices Toal and Burnett strongly dissented, however. Justice Toal cited Fowler v. Woodward as being entirely consistent with the dissent's position:

> . . . When Fowler was decided in 1964 we departed from the majority view which held that the stillbirth of a viable fetus did not give rise to a wrongful death action. The fact that we were in the minority did not prevent the Court from refusing to follow the illogic of requiring that a fetus be born alive before a cause of action could be brought for prenatal injuries. And, in fact, this view has now become one shared by the majority of jurisdictions. Thus, it is in keeping with this reasoning that I would decline to allow a defendant to escape liability when a nonviable fetus dies in the womb, but not when the fetus is injured and later born alive.

340 S.C. at 639, 532 S.E.2d at 863 (Toal and Burnett, JJ., dissenting). In short, the Glasscock dissent refused to draw an artificial line between a fetus which "dies in the womb" and a fetus which "is injured and later born alive." In the dissent's view, a nonviable, stillborn fetus is a "person" for purposes of the wrongful death statute, notwithstanding that the fetus was not born alive. It is important to note that, even in this case, the Court referred to a child being "born" alive and one being "born" not alive.

Since Glasscock, much has changed in South Carolina law regarding protection of the unborn. More recently, pertinent to our analysis are our Supreme Court's decisions in the Planned Parenthood abortion cases. In Planned Parenthood S. Atl. v. State, 445 S.C. 600, 614-

15, 916 S.E.2d 299, 306-07 (2025), the State Supreme Court held that the General Assembly's abortion ban is one of six weeks, not one prohibited after nine weeks. According to the Court,

> [e]veryone – particularly the members of this Court – consistently and exclusively discussed the 2021 Act in terms of being a six-week abortion ban. If the General Assembly intended, in defining "fetal heartbeat" in the 2023 Act exactly as it defined it in the 2021 Act, that the 2023 Act would ban most abortions at a "biologically identifiable moment in time" other than when electrical impulses are detectable on an ultrasound – which even Planned Parenthood acknowledges occurs at approximately six weeks of pregnancy. . . – it is inconceivable that no member of the House or Senate made any effort to point out that the members of this Court misunderstood the General Assembly's intent.

And, in Planned Parenthood South Atlantic v. State, 440 S.C. 465, 474, 892 S.E.2d 121, 126-27 (2023), Chief Justice Kittredge noted that "[i]t is apparent the South Carolina General Assembly carefully crafted the 2023 Act in an effort to demonstrate that its policy decision . . . 'took into consideration the interests of the pregnant woman and balanced them against the legitimate interest of the state to protect the life of the unborn,' the latter interest of which the Legislature characterized as 'compelling.'" Thus, a far more recent indicator of the intent of the General Assembly – that abortions are prohibited after the detection of a fetal heartbeat or at approximately six weeks – is consistent with the question raised here – that a stillborn fetus represents a "person" or a "child." Viability is no longer the principal consideration for there to be a "child" or "person," in the view of the South Carolina General Assembly.

In addition, legislation is currently pending in the Legislature (H. 3457) entitled "The Human Life Protection Act" which bans all abortions, with exceptions for medical emergencies. The premise of the Bill is that human life begins at conception. Even before the Supreme Court overruled Roe v. Wade, 410 U.S. 113 (1973) in Dobbs v. Jackson Women's Health, 597 U.S. 215 (2022), the United States Supreme Court had noted that Roe implied "no limitation on the authority of a state to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." Maher v. Roe, 432 U.S. 464, 474 (1977). See also, Op. S.C. Att'y Gen., 2005 WL 774133 (March 30, 2005) ("personhood" bill is facially constitutional). Then, as the Court held more recently in Dobbs, "[i]t is time to heed the Constitution and return the issue of abortion to the people's elected representatives." 597 U.S. at 232. Thus, each state may determine for itself when life begins. Accordingly, H. 3457 is further indication that the intent of the South Carolina General Assembly tilts strongly in favor of protection of the unborn, including the stillborn.

A recent Fact Sheet issued by the Wage and Hour Division of the United States Department of Labor regarding the parallel Family and Medical Leave Act (FMLA) confirms that FMLA allow Family Leave for stillbirths. Fact Sheet # 28 Q states that "[a]n employee may take leave to recover from childbirth, including to recover from a stillbirth, or may take leave to care for a spouse recovering from childbirth." See dol.gov/agencies/whd/fact-sheets/28 q-taking-leave-for-birth-placement-child.

It is important to emphasize also that the trauma suffered by parents of a stillborn child is vastly underappreciated and understated. As one authority has explained:

> "[b]ut to parents, still birth is no different than infant death." [P]arents describe the grief of stillbirth as being just as deep, painful, and significant as it would be to lose an infant who is born and survives a few weeks in intensive care. When asked what "they most wanted the general public to know about stillbirth and how it affects families," parents overwhelmingly answered that "a stillbirth is a death in the family." Plainly stillbirth is the death of your child. Whether the child – who has a name, who "is real and will always be remembered as a part of the [ ] family" took a breath outside of womb is irrelevant to the extent of the parents' loss.

Lens, "Tort Law's Devaluation of Stillbirth," 19 Nev. L.J. 955, 979 (2019). Thus, parents of a stillborn child strongly feel the grief of their child's death. And, it is recognized that a stillborn child leaves the parent in a severe state of confusion:

> "[t]he death of a child by itself is transformative because it obliterates the parental role in regard to that child." . . . This transformation is especially drastic after stillbirth – "[t]he parents of a still born child probably have one of the hardest times of any bereaved adult dealing with the reality of death and the permanence of changed expectations that it entails." . . . Research shows that the parents, especially mothers, question their parenthood after stillbirth . . . "even if they have older living children, the full scope of their parenthood is ambiguous because most people will not acknowledge the child who died at birth as a member of the family." . . . After the baby's death, "there are no tangible signs of parenthood. . . ." Unlike a growing child or an adult, who leave behind a trail of existence, an unborn child lacks the material traces of social life . . . If a stillborn baby is not a member of the family, then the parent is not really a parent. "Researchers have been keen to point out that parents will question how many children they have and, for the first-time parent, there is also the doubt about whether they are a mother or father at all." Parents are "rob[bed] of their identity as parents, based on the fact that their baby did not survive."

Lens, Id. at 985.

In short, in enacting the Paid Parental Leave statutes, the Legislature did not limit the "birth" of a child to one "born alive," but instead referenced a "birth." Such a broad word choice is consistent with South Carolina's recognition that even an unborn is a "person" or a "child." This being the case, we conclude that the General Assembly intended in the Paid Parental Leave statutes to include a stillborn child within the word "birth," even though not born alive.

Conclusion

While the question is a close one, based upon the foregoing authorities, it is our opinion that a court would likely conclude that South Carolina's Paid Parental Leave statutes encompass stillbirths. In our view, the fact that the Legislature did not define the word "birth" as limited to being born alive is telling. Instead, the General Assembly simply used the word "birth," without further explanation. In addition, the statutes do not exclude stillbirths from coverage. Moreover, while these statutes authorizing Paid Parental Leave literally do not mention stillbirths, we are of the view that, based upon the body of South Carolina case law concluding that an unborn fetus is a "person" or "child," as well as the recently enacted statutes banning abortions after approximately six weeks, it was the General Assembly's intent to include any "birth" – whether born alive or not. This would mean that stillbirths were intended to be included within the Paid Parental Leave statutes, consistent with the fact that South Carolina has long recognized that an unborn is a "person" or "child." Otherwise, the General Assembly would have made a specific exception to exclude stillbirths. It did not.

Our Supreme Court has consistently recognized that legislative intent is controlling over the words used, and that "a sensible construction, rather than one which leads to irrational results, is always warranted." The spirit of a law must be given effect when to do otherwise would produce an absurd result. We believe it would produce an absurd result if stillbirths are not included in the Paid Parental Leave statutes.

Stillbirth has been described by parents whose child was stillborn as "a death in the family." Lens, "Tort Law's Devaluation of Stillbirth," supra. One authority has noted that "'[g]iving birth to a stillborn child is physiologically identical to giving birth to a living child, although more traumatic.'" Lens, "The WNBA's Collective Bargaining Agreement: A Slam Dunk for Working Women and Mothers," 110 Ky. L.J. 333, 376-78 (2022). And, as was stated in dissent in Coleman v. Ct. Appeals of Md., 566 U.S. 30, 57 (2012), "[i]t would make scant sense to provide job-protected leave for a woman to care for a newborn, but not for her recovery from delivery, a miscarriage, or the birth of a stillborn baby." Further, as one court has found, "[w]e determine that the legislature knew that a birth could be live or not live and it would have used the term "live birth" if that is what the legislature meant." Accordingly, in our view, the General Assembly's use of the broad term "birth," without definition, or further elaboration, was intentional and meant not to be limited to those born alive.

Therefore, we conclude the word 'birth' [in the Paid Parental Leave statutes] includes a 'still' birth. Strzelczyk v. Jett, 870 P.2d 730, 733 (1994). In short, it would defy logic for the Legislature to have included within paid parental leave live births – even if living for a short period of time – yet have excluded stillborn births. It is well recognized that a statute must be interpreted in a common sense, logical manner. Hay v. S.C. Tax Comm., 273 S.C. 269, 255 S.E.2d 837 (1979). And, a court will construe a word used in a statute in a broad sense, with all the variations thereof, where such is consistent with legislative intent. Gaud v. Walker, 214 S.C.

451, 471, 53 S.E.2d 316, 325 (1949). Here, the Paid Family Leave statutes must be read with common sense, and not in an arbitrary manner.

Of course, our opinion is advisory only. It does not bind those who are required to apply or enforce the Paid Parental Leave statutes. Our opinions do not mandate. However, the General Assembly's intent, set forth in the Planned Parenthood cases, and in H. 3457, points to the recognition that human life must be protected. This intent, coupled with the General Assembly's use of the broad term "birth," indicates to us that stillbirths were intended to be included within Paid Parental Leave. A stillborn child is as much a "birth" as a child born alive, who then quickly dies. Nevertheless, while we may provide you with our legal analysis – which is based upon the General Assembly's intent to protect the unborn or those born "still" – clarification by the Legislature is warranted. Such clarification would be especially desirable, in our view, so that parents of a stillborn child are mandated to receive Paid Parental Leave.

Sincerely,

Robert D. Cook
Solicitor General Emeritus