



7154 Liberty

The State of South Carolina  
**OFFICE OF THE ATTORNEY GENERAL**

CHARLES M. CONDON  
ATTORNEY GENERAL

May 4, 2001

The Honorable Jim Burnett  
Coroner, Spartanburg County  
366 N. Church Street  
Spartanburg, South Carolina 29303

**Re: Your Letter of May 3, 2001  
Cremation of a Viable Fetus**

Dear Coroner Burnett:

In your above-referenced letter, you request an opinion from this Office concerning the application of SC Code Ann. § 17-5-310 to a "20-plus week old fetus." Section 17-5-310 provides as follows:

When the body of any dead person who died in the county is to be cremated, whoever required the cremation shall secure a permit for the cremation from the county medical examiner or the medical examiner's deputy or the coroner or the deputy coroner, and a person who wilfully fails to secure a permit for cremation is guilty of a misdemeanor and, upon conviction, must be fined not less than twenty dollars and not more than five hundred dollars. A permit for cremation promptly must be acted upon by the county medical examiner or the examiner's deputy or the coroner.

South Carolina has long recognized that viable fetuses are persons holding certain legal rights and privileges. In fact our Supreme Court has held a viable fetus to be a person in all contexts in which the issue has been considered including civil law, criminal law and the Children's Code. Whitner v. State, 328 S.C. 1, 492 S.E.2d 777 (1997). In describing a viable fetus' status as a person the Court in Whitner stated in broad and certain terms:

Our [previous holdings] that a viable fetus is a person rested primarily on the plain meaning of the word "person" in light of existing medical knowledge concerning fetal development. We do not believe that the plain and ordinary meaning of the word "person" has changed in any way that would now deny viable fetuses status as persons.

*Request Letter*

The Honorable Jim Burnett

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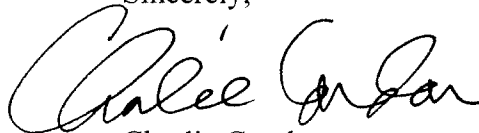
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Just as the Whitner Court found in the context of the Children's Code, this Office does "not see any rational basis for finding a viable fetus is not a 'person' in the present context." This is particularly true in light of the general tenet of law that the Legislature has knowledge of judicial decisions interpreting acts of legislation. See Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760 (1993). Accordingly, had the Legislature intended that the word "person" used in Section 17-5-310 not include viable fetuses, it should have specifically stated so.

The question of viability is one of medical fact. However, the United States Supreme Court has upheld medical testing of a fetus beginning at 20 weeks of gestation. The Court in Webster v. Reproductive Health Services, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) found that there is up to a four week margin of error in determining gestation age. Moreover, in the present state of medical technology, the fetus may become viable as early as 20 weeks into the pregnancy. Planned Parenthood of Wisconsin v. Doyle, 162 F.3d 463, 466 (7th Cir. 1998) Finally, there could be the possibility of liability for the destruction of a human body without following the procedures required under State law.

Accordingly, this Office would advise you and all others to err on the side of life. As Coroner, the law requires you to treat this situation as the death of a human being, not as the disposition of a blob of tissue. This means you should satisfy yourself, using the criteria which you typically apply concerning the issuance of a cremation permit with respect to the death of any other human being.

Sincerely,

A handwritten signature in black ink, appearing to read "Charlie Condon". The signature is fluid and cursive, with the first name "Charlie" being more prominent than the last name "Condon".

Charlie Condon  
Attorney General

CC/an