

Investigation on fetal civil capacity- from the perspective of Article 16 of the Civil Code

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Abstract: The Protection of Fetal Interest is reflected in Article 16 of China's Civil Code through an enumerated form, which endows the fetus with certain legal capacity and rights. At the same time, the scope of fetal legal capacity and rights is expanded by using the word "and" to include material personality rights and damage compensation claims, etc. In addition, a but clause is established to restrict the legal capacity and rights of the fetus. This article takes Article 16 of China's Civil Code as the perspective, discusses the related issues of fetal legal capacity and rights. By defining the legal concept of the fetus, combining relevant theoretical research, exploring the legal nature and scope of fetal civil rights and obligations, in order to better protect the interests of the fetus.

Keywords: Protection of fetal interests; civil capacity; scope of civil rights.

1. Question Proposal

1.1. Context in which the problem arises

The occurrence of accidents such as traffic accidents and medical disputes has led to frequent infringement of the rights of unborn fetuses, and with the continuous development of modern civil law centered on human beings and the protection of rights, issues related to the protection of the rights and interests of the fetus have also attracted the attention of the public.

China's General Principles of Civil Law considers that the time when a natural person enjoys civil rights and capacity is between birth and death, and that the fetus is part of the mother's body before birth and has no civil rights and capacity. It can be seen that China's legislation at this time does not agree with the status of the civil subject of the fetus, but there is no specific response to the civil rights capacity of the fetus, the lack of direct provisions. The protection of the interests of the fetus directly or indirectly dispersed in various areas of the law, such as the former "inheritance law" stipulates that the unborn fetus should retain a specific share of the property system; "criminal law" stipulates that the death penalty shall not be applied to pregnant women, indirectly protects the fetus in the womb of the right to life; "labor law" stipulates that pregnant women shall not be required to do the corresponding grade of physical labor, indirectly protects the fetus's right to physical health. In conclusion, during the period of the General Principles of Civil Law, there were certain loopholes in the protection of the interests of the foetus in China's laws.

The General Principles of the Civil Code has closed this legal loophole and begun to provide a legal response to the civil rights capacity of the fetus, indicating that China's civil legislation has taken a further step on the road to protecting the interests of the fetus. Article 16 of the Civil Code recognizes that the fetus has the capacity for civil rights, clarifying the specific protection of the interests of the fetus at the legislative level, reflecting the protection of life in China's civil legislation.

However, Article 16 does not clarify the legal concept of the fetus, the existence or otherwise of the capacity of the

fetus to incur obligations, and the scope of the civil rights of the fetus. These issues are of great significance to the investigation of fetal civil rights capacity, and there are some controversies in theory and practice. Under this background, this paper takes article 16 of the civil code as the perspective, combines the relevant theories and doctrines, and explores the civil rights capacity of the fetus, and tries to provide new ideas for the protection of the interests of the fetus.

1.2. Interpretation of article 16 of the Civil Code

Article 16 of the Civil Code provides that "the fetus shall be deemed to have civil rights capacity", and there are different views in the academic community on the interpretation of this paragraph and whether the fetus has civil rights capacity. The first view is that this paragraph implies that the fetus has general civil rights capacity, because the legislative model of the General Principles of the Civil Law is generalism, which grants general civil rights capacity to the fetus in general, and the Civil Code and the General Principles of the Civil Law are consistent in the expression of this paragraph. The second argues that the paragraph, although not expressly created, in fact grants the fetus a portion of civil capacity, and that this capacity "refers to an intermediate state of civil capacity that exists between full civil capacity and no civil capacity." The third view is that the civil capacity is a "preparatory capacity", which holds that the fetus does not have the same civil capacity as a natural person because it cannot enjoy civil capacity if it is dead at birth. The fourth view is that the civil rights capacity of the fetus is a kind of mimetic provision, that is, it does not have civil rights capacity itself, but it will be regarded as having civil rights capacity under certain conditions, and most of the scholars in our country have adopted this kind of understanding of Article 16.

Different interpretations of article 16 may lead to different understanding of the civil rights capacity of the fetus, the author has a different understanding of article 16. In the author's view, "deemed to have civil rights capacity" does not mean that the fetus does not have civil rights capacity, but the fetus has civil rights capacity, but the civil rights capacity and the natural person's civil rights capacity there are certain

differences, and is subject to certain limitations, is not a complete state. To clarify the civil rights of the fetus, first of all should be clear with the fetus related to a series of problems. This paper mainly through the civil code does not specify, but in the judicial practice of the problems encountered in conjunction with article 16 of the civil code to do a brief discussion.

2. Legal concepts relating to the “fetus”

2.1. Definition of the legal concept of the fetus

There is no clear definition of the term “fetus” in our current legislation, and interpretations vary from discipline to discipline; the definition of the fetus is not only a biological issue, but also includes ethical and legal considerations. To define the concept of the fetus, it is first necessary to determine the period of existence of the fetus and the period of termination.

First, the period in which the fetus begins to exist. The Civil Code provides for a system of reserving a share of inheritance for the posthumous child, which means that the protection of the interests of the fetus under our law begins at the time of conception. According to the theory of natural law, the human capacity for rights begins to be enjoyed at the time of conception, and the conception of the mother marks the beginning of the life of the fetus, so the law should protect the interests of the fetus starting from the time of conception.

Second, the period of fetal termination. A natural person begins at birth, and a fetus becomes a natural person by birth and enjoys the civil rights capacity of a natural person. The period of time during which the fetus is dependent on the mother's body from the time of conception is the “fetal” period, and when the fetus is completely separated from the mother and begins to breathe on its own, it becomes a natural person. Birth means the normal end of the fetal period, which may also be terminated abnormally due to miscarriage and the delivery of a stillborn baby. In this case, the fetal period is from the time of conception to the time of miscarriage or delivery of a stillborn baby.

In conclusion, a fetus is an embryo from the time of conception to the time of birth, while a miscarriage or stillbirth is the period from the time of conception to the time of the occurrence of the special circumstance. Since in vitro fertilization, frozen embryos, etc. are not universal phenomena and the law cannot be accused of making all adjustments to special cases, this article only discusses ordinary cases and does not discuss the fetus in special cases.

2.2. The fetus is not the subject of a civil legal relationship

The subject of a civil legal relationship is a person who is qualified to participate in a certain legal relationship and enjoys civil rights and assumes civil obligations in accordance with the law. In China, a natural person is the subject of a civil legal relationship, has civil rights capacity and enjoys the qualification of actually acquiring rights and assuming obligations. The civil rights capacity of a natural person is actually acquired by birth and can become the subject of a legal relationship.

In contrast, the fetus is a form of embryo from the beginning of conception to the birth or before the occurrence of special circumstances, connected with the mother and not

actually born, does not satisfy the actual conditions of the natural person to obtain the capacity of civil rights; in addition to this, the fetus can not interact with people, actually participate in various legal relations, and can not become the subject of civil legal relations.

Although the fetus is not the subject of civil legal relations, but it does enjoy certain interests, such as inheritance, acceptance of gifts and other interests, if not the corresponding protection of its interests, may result in the loss of the interests of the fetus, and the civil law respect for life is contrary to the concept. Although the fetus is not born and is not a complete human being, it is already a form of life and its interests should be protected by law.

3. Rationale for the protection of the interests of the fetus

3.1. Extended Habeas Corpus Claims

This doctrine was proposed by Professor Yang Lixin, who argued that such extended protection is a forward extension of the protection of the personal rights and interests of natural persons, prohibiting others from infringing on such rights and interests, rather than a protection of the rights themselves. Civil law's extension of the protection of personal rights to the fetus, which does not satisfy the requirements for birth as a natural person but is a necessary part of the process of becoming a natural person, is the main manifestation of the protection of the interests of the fetus. This doctrine extends the protection of personal law interests as objects. A natural person becomes a civil subject by birth and enjoys civil rights. The fetus is in an unborn state, and the legislator does not recognize the status of the fetus as a civil subject, but because the fetus has already possessed the conditions of a competent life. Therefore the prior personal interest of the fetus has objectively existed, and this prior personal interest is considered to be a legal interest, which should be protected by the law.

According to this doctrine, the fetus is not an eligible civil subject, and certainly does not have the corresponding civil power capacity and enjoy civil rights. The protection of the interests enjoyed by the fetus is merely an extension of the law's protection of the pre-existing personal interests that existed objectively before the birth of the civil subject.

3.2. Protection of Legal Interests in Life

German scholar Planck advocates that the interest of the fetus is a kind of life legal interest rather than a right. The legal interest in life is an interest guaranteed by natural law, which cannot be taken away, and the law should recognize and protect such a legal interest, which naturally exists by virtue of the existence of life. The fetus is a form of life that exists, and its legal interest in life shall be protected by law, and no one shall be deprived of it at will. This doctrine holds that an offense against the fetus is a nuisance to the process of development of life. In a case where the mother's blood transfusion was infected with syphilis and the fetus was similarly infected, the German court adopted this doctrine and ruled in favor of the fetal party's claim for damages. The famous jurisprudent Wilzer considered it as a kind of natural law revival. This doctrine provides a certain theoretical basis for the legislative protection of the interests of the fetus in terms of ethics, but limiting the legal protection of the interests of the fetus to natural rights and interests only, and

relying on morality as the basis for law, hinders the precise implementation of legal norms, which in turn negatively affects the protection of the civil rights of the fetus.

3.3. Theory of protection of legal capacity

This theory is proposed in response to the theory of protection of legal interests in life above, which advocates that the protection of the rights and interests of the fetus should not rely solely on natural law, but should seek the basis for the fetus to enjoy the capacity of rights from the substantive law. This theory asserts that capacity for rights is a kind of legal qualification, and that a natural person's capacity for civil rights is a prerequisite for his or her enjoyment of civil rights and assumption of civil obligations. The reason why the civil law to protect the rights of the fetus, because the fetus has the civil rights capacity, based on this theory has produced two different views: the legal discharge conditions and the legal cessation of conditions.

Article 16 of China's Civil Code is consistent with the viewpoint of the statutory cessation doctrine, which stipulates the statutory cessation condition of the civil rights capacity of a fetus, i.e., being a dead body at the time of birth. In contrast to the statutory cessation doctrine, the dissolution doctrine protects the interests of the fetus equally regardless of whether it was born alive or not, and is more consistent with the philosophy of civil law.

The theory of the two points of view of the civil rights of the fetus, that the civil law of the protection of the interests of the fetus is because it has the civil rights of the ability, compared to the statutory release is more eclectic, and the value of China's civil law is more compatible with the release of the civil law of the interests of the fetus to a certain extent for the protection of the civil law of the jurisprudence of the civil law of the protection of the interests of the fetus basis.

4. Legal nature of the civil capacity of the fetus

4.1. Fetal civil rights capacity does not include capacity for obligations

In China, in order to become the subject of a civil legal relationship, it is necessary to have the qualification that constitutes the subject of a civil legal relationship, that is, to have civil rights capacity. Civil rights capacity refers to the legal qualification of being able to participate in certain legal relations, enjoy certain civil rights and undertake certain civil obligations according to the law, which is the prerequisite for the rights and obligations actually acquired by the subject of civil legal relations.

The civil rights capacity of a natural person contains the qualification of rights and obligations, but the civil rights capacity of a fetus cannot be simply the same as that of a natural person. Giving the unborn fetus the capacity of obligation is obviously not in line with the legislative intent of our civil legislation. The fetus does not have the capacity to assume obligations in fact, so the civil rights capacity of the fetus can only include the capacity to enjoy rights, but not the capacity to assume obligations. This is with the civil rights capacity itself there is a certain difference between the provisions of the even in a sense contrary to the principle of consistency of rights and obligations, but does not affect the fetus as a special subject only civil rights capacity, because the establishment of the civil rights capacity of the fetus is to

protect the interests of the fetus, has the legitimacy of the legislation.

4.2. Rights manifestations of the civil capacity of the fetus

By interpreting Article 16 of China's Civil Code, it can be found that the Article provides for the scope of civil rights of the fetus in the form of a combination of generalization and enumeration. The enumeration of the civil rights of the fetus in the two areas of inheritance and acceptance of gifts reflects the protection of the property interests of the fetus in the Civil Code of China. The word "etc." provides space for the development of the scope of the civil rights of the foetus in general terms, but this space for development should be limited; that is to say, the foetus only enjoys civil rights but does not have civil obligations, and the foetus does not enjoy all civil rights enjoyed by natural persons, such as human dignity and other civil rights that belong exclusively to natural persons.

4.3. Limitations on the protection of the civil capacity of the fetus

The proviso to article 16 of the Civil Code shows that the legislation does not confer civil rights capacity on the fetus without any conditions, and that the fact that the fetus is alive at the time of its birth is a prerequisite for the enjoyment of its rights; if the fetus is dead at the time of its birth, its civil rights capacity does not exist, and of course, it is not entitled to the rights to inheritance and to acceptance of gifts as stipulated in article 16, paragraph 1. This proviso is in fact a limitation of the scope of civil rights of the fetus, compared with article 16, paragraph 1, which focuses on the protection of the interests of the fetus, but the proviso focuses on the protection of the interests of other people, reflecting the equal protection of civil law for all subjects.

5. Legal nature of the civil capacity of the fetus

5.1. Scope of the civil rights of the fetus in the personal sphere

5.1.1. Material personality rights

The right to life is the most basic guarantee for human beings, and since the fetus depends on the mother for its survival, the life of the fetus is closely linked to the mother. The infringement of the right to life of a natural person, i.e., causing death, leads to the termination of the life of the fetus either by the pregnant woman's own decision to abort or by the infringement of another person's act, which leads to the abortion of the pregnant woman. If the fetus enjoys the right to life, it means that the pregnant woman loses the right to abortion, which is contrary to the view that our laws support the right of pregnant women to terminate pregnancy. In judicial practice, the fetal life is infringed upon the case is generally by the mother of the fetus to their own physical health is damaged to bring the corresponding request for damages. Therefore, it is clear both in theory and in judicial practice that the fetus does not enjoy the right to life.

The main difference between the right to health and the right to physical integrity and health and the right to life above is that these two rights have the possibility of being restored to full health after they have been violated, whereas the right to life is irreversible and cannot be restored to full health after

it has been violated. When the physical integrity and health of the foetus is jeopardized, there may be a defect in the right, but there is also a high probability that the foetus will be born alive. In reality, most infringements on the physical integrity and health of the foetus can only be detected after birth. Regardless of whether the result of the infringement occurs before or after birth, the right to body and health should be guaranteed by law when the infringement occurs during the fetal period.

5.1.2. Moral personality rights

The object of the right to spiritual personality is the spiritual personality interests of the civil subject, and the right is intended to protect such personality interests from infringement. Some scholars suggest that the reason why the fetus should have legal personality is determined by human dignity. But the characteristics of the fetus and the natural person there are essential differences, so the personality of the fetus and the personality of the natural person should not be directly equated, some scholars will be the personality of the fetus called "quasi-personality". The fetus is different from the natural person in terms of capacity and lacks the basis for the creation of the right to spiritual personality, and should not enjoy the right to spiritual personality.

5.1.3. The right of identity

The right to identity is a right based on a certain social identity, and the fetus, while still in the mother's womb, does not have the capacity for meaning and practice, and is unable to interact with others to form social relations, thus losing the prerequisites for the right to identity to arise. However, identity relations such as parental authority and guardianship by blood cannot be deprived of the right to identity because the fetus does not have the prerequisites for the right to identity, and the fetus shall have the right to claim compensation for damages based on the right to identity if the right to maintenance, which is the right to identity, is infringed upon due to a third party.

5.2. Scope of the civil rights of the fetus in the field of property

5.2.1. Rights expressly enumerated in legislation

The Civil Code of China clearly stipulates that the fetus has the civil right to receive a gift. Gift is a typical famous contract in traditional civil law, belonging to the two parties' legal behavior. The establishment of gift needs both parties to reach a consensus, and unilateral legal behavior has the essential difference. The fetus is not born, does not belong to the natural person, does not have the ability to express, usually by the parents of the fetus for the acceptance of the gift of the intention, and the effect is attributed to the fetus. When the parents of the fetus on behalf of the acceptance of the gift, the gift contract is established, the fetus is the donee. If the fetus cannot be born successfully, it is clear that the purpose of the gift contract cannot be achieved, and in order to protect the interests of the donor, the parents of the fetus shall return the gifted property to the donor.

China's Civil Code provides that a fetus has the civil right of legal succession. One of the points of contention in Supreme Court Guiding Case No. 50, which dealt with the inheritance rights of a foetus, was whether an unborn foetus was entitled to inherit a share of its father's estate in the event that the father had left a suicide note explicitly allocating the property (without reserving a share for the foetus). The court that rendered the judgment invoked article 28 of the former

Inheritance Law to determine the share of the inheritance reserved for the fetus, and ruled that the residual property of the deceased father could only be inherited in accordance with the will after deducting the share of the inheritance reserved for the fetus. Article 28 of the original Inheritance Law, by reserving a specific share of the inheritance for the fetus, denied the fetus the possibility of being eligible for legal succession before birth, reflecting the negative attitude of China's law at the time towards the civil rights capacity of the fetus. Article 16 of the Civil Code, on the other hand, gives the fetus civil rights capacity from the legislative level. There is a fundamental difference between the two approaches to the existence or otherwise of the civil rights capacity of the fetus, but both have the proviso that the fetus loses the relevant rights if it is delivered dead. Fetus because of inheritance of property acquired by law, before its birth should be its legal guardian for the custody, the guardian should be fetal property into the proper custody of the obligation; if due to the fault of the guardian caused by the interests of the fetus has been infringed upon, the guardian shall bear the corresponding damages liability.

5.2.2. Right to claim compensation for damages

The right to claim damages is a secondary right derived by the right holder from the damage to his or her fundamental right, which may be a personal right or a property right. When the rights and interests of a fetus are infringed upon by a third party, the fetus is entitled to the right to claim damages.

The fetus has the right to receive gifts and legal inheritance, if a third party infringes on the property interests of the fetus, and the fetus as the infringer is not yet born at this time, and is unable to exercise the right to claim for damages, at this time, the parents as the guardians of the fetus can file a request for damages to the third party in the name of the fetus; if it is the parents of the fetus as the infringers infringe on the fetus's property interests, the residential (village) Committee or the civil affairs department as a substitute for the fetus to file a claim for damages against its parents, in order to protect the interests of the fetus.

Some scholars suggest that because the fetus's material personality rights are infringed upon, often not found in time, or the fetus is not the subject of civil litigation, etc., there is no need to give the fetus the corresponding right to claim for damages. The author holds the opposite point of view, although the fetus's material personality right is infringed upon will not be found out immediately, and often will not be found out until it is born or grows up, but the damaging behavior has already happened, the damaging result has already existed, and the protection of the fetus's interests can not be neglected because of the long time. Although the fetus can not enjoy the corresponding litigation capacity, become the subject of civil litigation; but its guardian can be in the name of the fetus to exercise the right to claim damages, in order to ensure that the interests of the fetus.

The above suggests that the fetus can enjoy the right of dependency and other identity rights arising from blood relationship, and if the death of the fetus's dependant is caused by the infringement of a third party, the fetus loses the corresponding identity rights and should enjoy the right to claim damages against the third party. In our country's judicial practice, the court for the fetus because of the right to support the infringement of the damages requested by the positive protection attitude. Such as wang mou in the fetal period, because his father was hit by yang mou car died and lost the

right to support, after his birth by his mother filed a lawsuit on his behalf, the court supported the plaintiff's claim, the court's decision reflects the practice of the fetal right to enjoy the protection of the right to claim damages. However, the exercise of this type of claim for damages presupposes the successful birth of the fetus, and if the fetus is born dead, it will not be entitled to this right from the beginning.

6. Concluding remarks

By analyzing the relevant theories and the jurisprudence of Article 16 of China's Civil Code, it can be concluded that the fetus is not a civil subject, but enjoys the capacity of civil rights. This capacity only includes the capacity to enjoy rights, but not the capacity to assume obligations; the civil rights capacity of a fetus that is dead at birth does not exist from the beginning. In addition, the scope of civil rights of the fetus is not limited to the two kinds listed in article 16, the fetus also enjoys the right of material personality, identity rights and the right to claim for damages. In conclusion, the author believes that article 16 of the civil code embodies the legislation of China's protection of the interests of the fetus, to a certain extent to make up for the legal loopholes of the general principles of the civil law, at the same time with the proviso of the provisions of the grant contract protects the rights of the civil subject such as the opposite party, embodies the civil law of the respect for the life of the civil law also embodies the humanistic concern of the civil law.

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