

## Pregnancy food

Carlos Zoete Gomes da Costa<sup>1</sup>, Adriana Maia Lopes Gomes<sup>2</sup>.

### ABSTRACT

Law 11.804/2008 introduced Pregnancy Maintenance Allowances into the Brazilian legal system, guaranteeing pregnant women compulsory and irrevocable assistance to cover expenses from conception to childbirth. The aim of such maintenance is to protect the rights of the unborn child, based on the principle of human dignity and the right to intrauterine life.

**Keywords:** Pregnancy maintenance payments, Unborn child, Human dignity.

### INTRODUCTION

In force since 2008, Law 11. 804, inserted Pregnancy Maintenance in our legal system. This right guarantees the pregnant woman in favor of the child who is born alive, such right, converted into alimony, non-waivable and obligatory for both mother and father.

This law provided a foundation for the principles relevant to human dignity. This fact is that since the confirmation of pregnancy, that is, the conception of the unborn child, food must cover an insured amount sufficient to cover the additional expenses incurred during pregnancy and from conception to delivery, including expenses related to special food, medical care, among others.

Maintenance Law No. 5,478/68, taking into account the requirement of proof of kinship or maintenance obligation contained in article 2, creates an obstacle to the granting of maintenance to the unborn child. Although the responsibility of parents from conception is undeniable, the silence of the legislator has always created difficulty in providing support to the unborn.

Based on article 2 of the above-mentioned Maintenance Law, the bond of proof of the degree of kinship was unencumbered by the understanding of justice in recognizing, in special circumstances, the obligation to provide prenatal food, thus protecting the rights of unborn children and pregnant women, embodying the conceptionist theory of the Civil Code and the principle of human dignity.

### OBJECTIVE

The present work aims to investigate the main material and procedural effects of Law 11.804/2008 that regulates food during pregnancy.

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<sup>1</sup> Atlantic University of Spain, Barcelona – Spain

<sup>2</sup> State University of Minas Gerais – UEMG – Minas Gerais



The main objective is to support future mothers who have to wait until the birth of their child to be able to legally ask the father for child support, since their child has a certain paternity relationship, with the aim of ending the father's inability to pay child support cases. Refusal to provide the necessary assistance to the pregnant woman, alleging distrust in her alleged paternity.

The objective of this work is to present the changes and benefits of Law 11.804/08. List the amount and nature of pregnancy support, the burden of proof and the presumption of paternity to ensure that the personality rights of the unborn child are clearly recognised.

## **METHODOLOGY**

The approach adopted was a deductive approach, that is, a critical discussion of the facts to analyze how the pregnant woman was entitled to receive alimony from the father from the moment she became pregnant. Interpretative research was used because it was necessary to identify, analyze and study the importance and benefits of this law for Brazilian civil society. As a procedural approach, a monograph is adopted, which includes an in-depth study of the cases, since it is possible to explain how our Brazilian legal system uses this right through a specific study of its application.

Finally, as a research method, the research methods of direct and indirect documentary analysis were adopted.

## **DEVELOPMENT**

### **PREGNANCY MAINTENANCE AND THE BRAZILIAN LEGAL SYSTEM**

Food is provided to meet the basic needs of those who are unable to support themselves. It includes the necessities of a person's life, such as food, clothing, housing, medical care, transportation, entertainment, and, if the person being fed is a minor, funds for their guidance and education (article 1,701 of the Civil Code), including the portion intended for the burial of family members legally responsible for maintenance.

In the words of Silvio Rodrigues (2008):

Alimony, in law, is the provision provided to a person, in cash or in kind, so that he or she can meet the needs of life. The word food has a much broader connotation than in vulgar language, where it means what is necessary for sustenance. Here it is a question not only of sustenance, but also of clothing, housing, medical care, in case of illness, in short, of everything necessary to meet the necessities of life; and, in the case of children, it covers whatever is necessary for their instruction (Rodrigues, 2008).



Food in Brazilian legislation has a broader purpose than the meaning of the word itself, going far beyond food and must satisfy the basic needs of those who request it, such as clothing, leisure, medical care, and even learning.

#### REGULATION OF LAW 11.804/2008

Law 11.804/08, known as the Pregnant Woman Food Law, has been in force since its publication. The Law therefore regulates the payment of alimony to pregnant women and the way in which this right can be exercised.

The legislator intends to fill a legal gap in which pregnant women are often helpless until after the birth of the child, unable to claim the food they need to support the pregnancy.

According to the wording of article 2 of the aforementioned law, it establishes that gestational food refers to the amount sufficient to cover the additional expenses incurred during pregnancy, from conception to delivery, including special food, medical assistance, medicines and other necessary items.

In the understanding of José Carlos Teixeira Giorgis (2008) "Pregnancy maintenance is the benefits necessary to support the expenses of pregnancy. That extends from conception to childbirth."

For Leandro Soares Lomeu (2008), pregnancy foods can be understood as those due to the unborn child, and, perceived by the pregnant woman, throughout pregnancy, synthesizing, such foods include the amounts sufficient to cover the additional expenses of the pregnancy period and that are resulting from it, from conception to delivery, including those related to special food, medical and psychological assistance, complementary exams, hospitalizations, childbirth, medications and other indispensable preventive and therapeutic prescriptions, at the doctor's discretion, in addition to others that the judge deems pertinent.

According to Rolf Madaleno:

The right to food is of public order, as the social interest prevails in the protection and preservation of life, and of the family, committing to associate its public order with the constitutional principle of article 3, item I, of the Federal Charter of 1988, when it points out that the fundamental objective of the Federative Republic of Brazil is to build a free, fair and solidary society.  
Right to food – The right to pregnancy food, recognized to the unborn child, must be considered in a broad sense, since this guarantee includes what is necessary for the support and adequate prenatal care of the mother, such as childbirth expenses (Paganini, 2008). It is a material aid provided by a person with more accessible financial conditions to another less favored, to guarantee their basic needs. This right is based on the dignity of the human person (Semião, 2000, apud Simão; Miranda, 2011).

Therefore, pregnancy foods are defined as the foods related to the unborn child and the foods received by pregnant women during pregnancy (from conception to delivery) with the objective of covering the additional costs normally incurred during pregnancy, which are directly derived from expenses during pregnancy.



The unborn child already had the right to food, before the law existed (Law 11.804/08), for the preservation of his life, regardless of legal personality, only starting to live after birth. Article 2 of the Civil Code "guarantees the rights of the unborn child from conception". In addition, this right is based on the provisions of the Federal Constitution, in its article 5, caput, which provides that "the right to life is inviolable", including intrauterine life.

The biggest difference between "food" and pregnancy food is the timing of use. "Food" is used after live birth, while pregnancy food is used during pregnancy.

There is controversy about the legality of the action to investigate the paternity of the unborn child cumulated with an action for alimony, since its personality is conditioned to the live birth and has legal personality. It is known that although the Pregnancy Food Law stipulates that they are food for pregnant women, the unborn child enjoys these benefits in a subsidized way because a healthy pregnancy is directly linked to it.

Also especially with regard to the feeding of the unborn child, valuable teachings of Caio Mário da Silva Pereira (2006):

If the law safeguards the rights of the unborn child from conception, it is to be considered that its main right consists of the right to life itself and to be compromised if the needy hand were refused the primary resources for the survival of the entity in formation in its womb.

In this sense, Pontes de Miranda (1995) comments that "the maintenance obligation can begin before birth, since there are expenses that are technically intended for the protection of the conceived child and the right would be inferior if such inter-human relationships, solidly based on the requirements of pediatrics, were refused."

Chinelato and Almeida (2000) recognize that the unborn child deserves food in the broadest sense – civic food – so that it can be nourished and develop normally, leading to a live birth.

Law 11.804/08 determines that the legitimacy to file a maintenance action is the pregnant woman's. Article 6, sole paragraph, of the aforementioned law, after live birth, pregnancy maintenance is converted into alimony in favor of the minor until one of the parties requests its review. This law gives the right to review or exoneration of alimony, if the defendant proves that he is not the father.

Law No. 11,804/2008 is of a legal and social nature and aims to protect pregnant women, ensuring a healthy pregnancy for them and their unborn child. It is believed that rights such as alimony are inalienable and obligatory for both the mother and the alleged father, proportional to the resources of both parties.

In the understanding of Almeida Junior (2009), the right to alimony is so relevant to the legislator that its accountability was determined at the level of constitutional imposition, according to article 229 of



the Federal Constitution/88: "[...] parents have the duty to assist, raise and educate their minor children, and adult children have the duty to help and support their parents in old age, need or illness".

The Statute of the Child and Adolescent – ECA (Brasil, 1990) also establishes very personal rights for the unborn child, such as the right to life, health and food.

Diniz (2008) states that based on our legislation an impasse arises, because, although it does not have personality, which only begins with live birth, the unborn child can entitle rights, such as, for example, the search for pregnancy food (Civil Code, 2002).

Obviously, during pregnancy, in addition to emotional needs, the mother has to bear a lot of food, medical and pregnancy expenses, which puts a huge burden on her budget. If there is reasonable evidence of who the father is, it is only fair that he at least participate in the financial efforts resulting from the pregnancy.

Pregnancy food values include the additional foods during pregnancy "at the discretion of the doctor," that is, unless the mother is unable to feed herself, which can harm the developing fetus.

According to the new law, some of the criteria used to determine quantum numbers differ from those for foods specified in Article CC. 1,694 et seq., in the determination the reasoning is the same, that is, all expenses related to pregnancy (need) and the contribution of the father and mother (availability) are considered, resulting in the proportional fixation of both incomes, since the contributions do not come from only one of them.

The amount of child support that a judge sets in a regular child support case is not set in stone. The amount is arbitrated after properly weighing the needs of the person being fed and the financial suitability of the feeder, as well as circumstances that vary significantly in time and space.

In these conditions, they are fixed, there is a change in the financial life of the feeder, or the person being fed, both parties can file a claim in court, in view of the circumstances, exoneration, reduction or charges (Civil Code of 2002, art. 1.699).

According to Froés (2009, p. 25):

All these modifications may be requested through the special procedure for maintenance action, provided for in Law No. 5,478, of July 25, 1968, in accordance with its article 13. It is therefore worth noting the possibility of granting an injunction, as provided for in article 4 of the same law. [...] In short, the action for revision or modification is ensured by article 1,699 of the Civil Code of 2002.

## FOODS AND THEIR FUNDAMENTAL CHARACTERISTICS

The characteristics of foods are varied, it is important to highlight the fundamental ones.

Very personal: Food is intended for the survival of the person who feeds and, therefore, constitutes a personal and non-transferable right: "Its character as a right of personality is recognized by the fact that it is a right intended to guarantee the survival of the person who feeds, it is a natural right to the integrity



of the human being". Gonçalves (2009) adds that this characteristic is a manifestation of the right to life, and that in this sense ownership cannot be passed on to others by business or legal fact.

**Exempt from seizure:** As provided for in article 1,707 of the Civil Code, it establishes that maintenance claims "will not be transferred, indemnified or retained". By its very nature, it is inconceivable to usurp the right to alimony from a person, who cannot in any way answer for his debts, thus making alimony exempt from attachment.

**Imprescriptible:** Article 23 of Law No. 5,478/68 mentions the opportunity, stating that "it only affects the monthly installments, but does not affect the right to food." Although the right to food is imprescriptible, it has not been exercised for a long time. However, they prescribe that maintenance payments must be made within two years, once paid, there is no possibility of compensation or restitution, and will affect both provisional and definitive maintenance (article 206, paragraph 2 of the Civil Code of 2002).

**Unrepeatability:** As it is a moral obligation between the spouses, alimony is considered unrepeatability and, once paid, it is irreplaceable and affects both provisional and definitive alimony.

Carlos Roberto Gonçalves (2009) emphasized:

The obligation to provide maintenance is a matter of public policy and can only be raised in court proceedings and must continue until a final decision to the contrary is taken. Provisional or temporary alimony is not refundable, even if the action is dismissed. Whoever pays for the meal has a debt, and it is not a simple advance or loan (2010, p. 504).

Pontes de Miranda (1995) emphasizes that the food received is not refunded, even if the alimony falls from the action in the same instance, or at the appeal level. They will be compensated when the pregnant woman acts in bad faith.

## PREGNANCY MAINTENANCE AND ITS NATURE

The nature of maintaining pregnancy is special, combining elements of alimony and civil liability. From the first, it puts guardianship ahead of other obligations, while, from the second, the new law uses the rule of full patrimonial compensation.

Even if the law does not explicitly use the Civil Code of 2002 as a complementary rule as in Law No. 5,478/68, since the scope of this rule is to protect the pregnant woman and the future child, the Civil Code of 2002 can be applied, under the terms of article 1,698:

Article 1,698. If the relative, who owes maintenance first, is not in a position to fully bear the burden, those of immediate degree will be called to compete; If several people are obliged to provide maintenance, all of them must compete in proportion to their respective resources, and, if an action is brought against one of them, the others may be called to join the litigation.



However, there are controversies about food during early pregnancy. In the bill that gave rise to the law, it was expected that its initial deadline was the summons, and even if it was a presidential veto, the rules would technically be the same as those that were decided in the Code of Civil Procedure. But explained from a systemic perspective, as it is a specific rule, its structure determines that feeding during pregnancy is an additional cost including "from conception to delivery", it may be required that the initial terminology be given at conception, before the lawsuit is filed.

Obviously, this position will be contested by the proceduralists, but in the context of the new rules that defend the adequate protection of mothers and minors, these rules must be relativized, since an analogy can be made. The starting point for rules and even for indemnification for civil liability is the triggering event for civil liability. Article 398 of the CC stipulates: "In obligations arising from an unlawful act, the debtor is considered to be in default, since he has committed it.

In addition to the presumption of paternity in judicial cases provided for in article 1,597 et seq. of the Civil Code, the burden of proof fell on the mother. While the father may request a DNA test as a defense, the mother still has to provide legally required "proof of paternity" through photographs, witnesses, and many other legal proofs. It may be noted, taking into account that, contrary to what some think, the mere allegation of the mother, although there is a greater need in the case, the reversal of the burden of proof cannot be admitted on the father, because he must present evidence to the contrary, excessively difficult to produce, under the terms of the jurisprudence. Lomeu (2008) emphasized:

(...) The new legislation, combined with the social reality, facilitates the evaluation of requests for support to the unborn child, but the pregnant woman must convince the judge that there are indications of paternity. From then on, the judge will establish the maintenance of the pregnancy, which, as already emphasized, will last until the birth of the child, as a way to meet the plaintiff's needs and based on the defendant's probability.

The rules of art need to be applied. 373. I, of the CPC, informs the plaintiff that he has the burden of proving the facts constituting his rights. Even without a DNA test, your alleged father can provide some evidence, such as evidence of vasectomy.

Articles 1,597 to 1,602 of the Civil Code list the possibility of presuming or not paternity based on circumstances such as betrayal, vasectomy, impotence, remarriage, etc. Although the above rules were introduced in the context of marriage, there is no obstacle to their broad interpretation in the context of stable unions.

The law provides that the determination of the maintenance of pregnancy maintenance will be based on the judge's conviction that "there are indications of paternity", as established in article 6 of the aforementioned rule; the law for the protection of the rights of the unborn child from conception.

Indications of paternity and the agreement that can be reached at a mediation hearing do not require that the alleged father responsible for pregnancy support be identified as the father of the child



who owes support, unless the purpose of the agreement is a voluntary recognition of paternity. At birth, the entire paternity test procedure must be carried out, remembering that if there is voluntary admission, but based on a defect of will, it may be claimed in an autonomous process, under the terms of the understanding of the Courts in this regard.

It is a presumption of paternity, that is, valid until proven otherwise. Given that paternity cannot be proven directly, it is considered a legal relationship between parents and children, since article 1,597 of the Civil Code establishes that in the paternity of the unborn child, the relationship between father and child is presumed.

In this sense, Pereira (2006) recalls:

Since the relationship between father and child cannot be directly proven, the entire Western civilization bases the concept of the father-child relationship on a series of assumptions and then on probability: marriage is based on the sexual relationship of the spouse and the fidelity of the woman; feminine fidelity is predicated; The father of a child conceived during marriage is the mother's husband. Therefore, a child is considered to be one conceived during the marriage of the parents. While all authors affirm the relative nature (*iuris tantum*) of this presumption, it should be emphasized that evidence to the contrary is limited.

From conception, the unborn child is legally considered a "being that is part of the family", that is, even if it does not legally have personality. Therefore, the recognition of paternity cannot be excluded.

## THE PRINCIPLE OF THE DIGNITY OF THE HUMAN PERSON

With regard to the law analyzed, the principle of human dignity is the full foundation that governs legal relations, it is undeniable the need to maintain the life of the unborn child in development through the provision of pregnancy food, it serves to regulate full pregnancy until the birth of the child with life, the human dignity of the child in full potential, it is

of the State's responsibility to materialize, thus, makes the application of fundamental rights under the terms of the Federal Constitution effective.

In addition, the central idea of the "Food Law" is to protect life effectively, pay attention to the minimum necessary to ensure survival and combine the principles of human dignity and family solidarity, to clarify Silvio de Salvo Venosa (2010) says:

In a fundamental line, those who cannot provide for their own subsistence should not be relegated to misfortune. Young age, old age, illness, lack of work or any disability can put a person in a state of food need. Society must help him. The State designates the relatives to do so in the first place, partially relieving their social burden. Relatives may demand maintenance from each other and spouses owe each other mutual assistance. The woman and her husband, not being relatives or affinities, maintenance is due based on the marital bond. Also partners in stable unions are in the same situation today. This also follows from the public interest in food. As we can see, the maintenance obligation is in the interest of the State, society and the family.





It is possible to speak of human dignity when a person has real conditions to become a full citizen worthy of his existence. If we cannot provide even the most basic dignified life, we cannot speak of human dignity.

The principle of human dignity recognizes the inherent worth of every human being and states that all people should be treated with respect, equality, and freedom. It guides the protection of human rights and the search for a just and inclusive society, regardless of personal characteristics.

## CIVIL PERSONALITY OF THE UNBORN CHILD

In Brazilian law, the issue of the unborn child continues to be one of the most important controversies in the current legal system. Knowing this, we will discuss the beginning of the legal personality of the unborn child through a clear and objective analysis of the theories adopted by the different schools of doctrine.

Initially, life begins in the mother's womb. After fertilization, the embryo will be called a fetus. *Nasciturus* is a term of Latin origin, derived from the word *nasciturus*, that is, it refers to a person who has not yet been born, but will be born. The meaning of the word is synonymous with expectation, that is, an entity that was conceived, but not yet born (Simon; Miranda, 2011).

In Brazil, there are three theories about the beginning of civil personality, which will directly affect the legal protection of the unborn child: nativity theory, conception theory, and preconception theory. The Brazilian Civil Code discusses this issue in its opening article 2. This is because some theories suggest that the unborn child is not a person and therefore has no rights or duties, while other theories explain that the rights of the unborn child are protected during pregnancy.

The natalist theory states that "the unborn child acquires personality only after being born alive". It can be said that the verification of legal existence can only be achieved through live birth, and the

Live birth is determined by breathing. The unborn child does not have the right itself, but only the expectation of the right. The doctrine of birth, apparently accepted by the legislators of the Code

Civil Code of 1916 and the Civil Code of 2002, provides that the beginning of legal personality begins with live birth, more precisely at the precise moment of the expulsion of a person from the beginning of the mother's life (uterus), as soon as it begins to exchange oxycarbon with the environment, the cardiovascular system begins to function, as proven by the *docimasia* operation. This is based on the evidence that after the fetus breathes, the lungs are filled with air, the lungs are immersed in water, and if there is breathing, the lungs become supernatant. Although modern medicine has made other means of examination available (Gonçalves, 2009).

In defense of this theory, Venosa (2005) states that the legal protection of the conceived person does not imply conferring any personality, but only the capacity to perform certain actions, a situation that



is only analogous to personality, and for the author only from the moment of live birth. The author adds that it is possible to benefit an individual not yet conceived by means of a will, extending the circumstances of the unborn child beyond what is simply intended by law. Finally, he states that "from a perspective of final rights, the rights of the unborn child are subject to conditions of suspension" (Venosa, 2005, p. 161). The theory thus defines the unborn child as a mere spectator of rights precisely because he is not considered a human being.

Finally, natalists argue that if the unborn child is considered a person, then there is no need to tax his rights under the current Civil Code of 2002 because, for people, their rights are automatically conferred (Simão; Miranda, 2011).

The Conceptionist Theory is influenced by French law and believes that the rights of the unborn exist from the moment of conception, that is, the personality comes into existence before birth, instead of being alive from birth, because from the moment of conception, the rights of the unborn child were protected in a timely manner. That is, personality begins in the period of intrauterine life (Chinelato; Almeida, 2000), during which the conceived person already enjoys the privileges of a specific person with legal personality and has potential property, that is, from the moment of conception, the unborn child already has specific legal personality. They already have subjective rights and survival interests.

The theoretical basis of the conceptionist theory is that when the law protects the rights of the unborn, the legal system already considers them as persons, so that, according to the systematization of private law, only people are considered subjects of law. Thus, they have legal personality.

Thus, the theory of preconception maintains that from the moment a child acquires a personality, in the womb, meeting all the conditions for the new being to exist, that is, to exist legally.

The Brazilian Civil Code adopted the naturalist theory, as provided for in its article 2. Guaranteeing certain rights to an unborn child does not confer personality on it. The rights of the unborn child are duly protected by law, but in the Brazilian legal system they do not have extensive rights because it is only about life expectancy. In the current Brazilian legislation, the unborn child, although not considered a person, is protected by law from conception, despite the enormous theoretical differences in the theories adopted on the acquisition of personality. The main arguments in favor of the natalist current:

- Without rightholders, there are no subjective rights, just like rightholders without legal personality;
- Birth is the fact that confers personality to a being;
- The entire Brazilian legal system is based on this rule.

Article 2 of the Civil Code states: "The civil personality of the person begins from birth with life; but the law safeguards, from conception, the rights of the unborn child". But it only protects the rights of the conceived person.



This understanding is very coherent, so that the personality of the unborn child is not acquired before birth. In fact, some rights can only be exercised by people who already exist. It is concluded that, in this theory, live birth is a legal fact necessary for the creation of the human being under civil law.

It does not require viability, it is enough to be born alive, the rights are only acquired after birth, it is enough to breathe and separate from the mother's body. He only takes possession of the right after birth.

The stillborn child does not take possession of the personality because he does not breathe. Therefore, after being born alive and then dying, personality is acquired because personality begins at birth (Tepedino, 2003).

## **FINAL CONSIDERATIONS**

One of the matters regulated by family law is the issue of alimony, understood as pecuniary benefits, arising from kinship relations, which is, in fact, the way the law provides conditions for those who are unable to provide them. Based on this, as highlighted in this study, pregnancy foods can be understood as foods that are offered to the unborn child throughout pregnancy and perceived by the pregnant woman.

This is a new legal institute introduced by Law 11.804/2008 to address issues related to the feeding of unborn children, who often have difficulty effectively accessing this right. This is because the so-called Food Law (Law No. 5,478/68) requires the production of evidence to

guarantee this right. In addition, the legality of paternity and maintenance proceedings initiated by the unborn child is another issue encountered when considering such an action in favor of the plaintiff, considering that the personality of the unborn child is determined by its birth alive.

To face this problem, the Food Institute for Pregnant Women emerged in the Brazilian legal system, with the objective of providing protection to the unborn child from conception to birth. In other words, to be more precise, article 2 of Law No. 11,804 guarantees that the woman, from conception to delivery, may claim food capable of covering her "additional expenses" as long as there is proof of paternity, based on the binomial possibility/need.

Thus, in the light of this legislation, the pregnant woman may request pregnancy support to cover her expenses, taking into account the financial possibilities of the future father, the needs and proportion of the future mother, as a way of balancing the two classic commandments of the right to food.

The judge will grant and establish, when demonstrated by the pregnant woman, elements that prove paternity, that is, that there was an affective relationship with the alleged parent, admitting all evidence in law, ensuring in Law No. 11,804 itself.

Thus, we can conclude that the aforementioned law came to fill the gap left by the previous legislator, and the right to alimony was only recognized when the paternity of the child was



uncontroversial. Otherwise, a legal dispute arose, which affected the unborn child, the weakest part of the legal battle.

Law No. 11,804, on pregnancy alimony, guarantees pregnant women without any doubt, sustains the guarantee of pregnant women the unborn child having the gestation period without mishap, this guarantee will only occur with a patrimonial subsidy from the alleged father.

As we all know that the unborn child has legal personality and, although the Food Law clearly stipulates that it is food for a pregnant woman, the unborn child also enjoys such benefits in the form of subsidies, because a healthy pregnancy is directly related to the child.

It is evident that the guarantee of food during pregnancy represents an important advance in the search for responsible fatherhood, a responsibility shared between the parent, from conception to live birth.



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