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Advance Directives Containing Pregnancy Exclusions: Are They Constitutional?

by

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Joseph P. McCollum**

I. INTRODUCTION

Estate planning tends to focus on the distribution of assets and minimization of estate taxes upon an individual's death. While these are important objectives, it is equally important for individuals to plan for the possibility of incompetence. Every state has an advance directive statute that allows individuals to direct their health care in the event they become incompetent. Written into a majority of these statutes is a "pregnancy exclusion" that limits the effectiveness of the advance directive when the patient is a pregnant woman. The effect of the exclusion differs from state to state, and there is virtually no public awareness that pregnancy exclusions exist.

This article analyzes the various pregnancy exclusions and explores whether a state's interest in the fetus should take precedence over a woman's right to refuse or terminate life support.

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II. THE HISTORY OF ADVANCE DIRECTIVES

End-of-life issues have long been the cause of intense debate, focusing on questions concerning patient autonomy, quality of life, and the withholding or withdrawal of life-sustaining treatments. Advances in medical care and technology have blurred the boundaries between life and death and have challenged our expectations about how individuals should experience the end of life. In the 1960s the patient rights movement sought to free terminally ill patients from aggressive and ultimately futile life sustaining treatment.¹ This resulted in the earliest form of advance directive, the living will. Living wills are designed to maintain the patient's "voice" in medical decision making and empower individuals to dictate the terms of their own medical care at the end of life.²

Initially it was the states, rather than the federal government, that moved to give legal force to living wills. However there was no uniformity in the state statutes, and they were hard to compare because they often appeared under ambiguous or unrelated titles. The *Uniform Rights of the Terminally Ill Act*³ (*URTIA*) was drafted in 1985 by the Commissioners on Uniform State Laws to provide guidance to the states. *URTIA* only applies to living wills. Living wills specify the individual's wishes regarding life-prolonging treatment. *URTIA* does not apply to medical proxies, which allow individuals to name a surrogate to make medical decisions on their behalf. Furthermore, *URTIA* only applies when a person is in a terminal condition, not permanently comatose or in a vegetative state.

URTIA states, “Life sustaining treatment must not be withheld or withdrawn pursuant to a declaration from an individual known to the attending physician to be pregnant so long as it is probable that the fetus will develop to the point of live birth with the continued application of life-sustaining treatment.”⁴ The original *URTIA*, adopted by the conference in 1985, also included the phrase, “unless the declaration otherwise provides” but this phrase was removed and is not in the current provision.⁵ It was, therefore, the original intent of *URTIA* to limit statutory pregnancy exclusions only to those cases where a woman’s living will did not set forth her wishes in the event she was pregnant when her directions were to be carried out. While some states follow the current *URTIA* model, others do not; state statutes continue to lack uniformity.

After the landmark Supreme Court decision in *Cruzan v. Director, Missouri Department of Health*⁶ in 1990, the importance of advance directives became a national issue. Nancy Cruzan remained in a persistent vegetative state after suffering brain damage due to a lack of oxygen from a traumatic car accident, being kept alive by life-sustaining treatment. Her parents wished to discontinue the treatment, testifying that their daughter had previously expressed that she would not want to continue in such a state.⁷ The Court found that her parents had not met the required burden of proof of clear and convincing evidence, so the life-sustaining treatment could not be withdrawn.⁸ This was the first time the Court recognized that there exists a constitutionally protected right to refuse life-sustaining treatment. In an effort to inform the public of their right to determine the course of their treatment even after they become incompetent, Congress passed the *Patient Self-Determination Act* of 1990.⁹ This act requires

medical care providers receiving federal Medicare or Medicaid funds to inform all adult patients of their constitutional right to prepare an advance directive consisting of a living will and/or health care proxy. While the act helps to insure that people are informed of their right to create advance directives, it gives little guidance on the specific information that should be discussed with the patient, and completely fails to mention the existence of pregnancy exclusions.

III. PREGNANCY EXCLUSIONS

Currently thirty-one (31) states have pregnancy exclusions that limit the application of an advance directive if the patient is a pregnant woman. These exclusions can be classified into two categories:

1. Statutes that automatically invalidate a woman's advance directive if she is pregnant; and
2. Statutes that invalidate a pregnant woman's advance directive only if the fetus is viable and/or if the fetus could develop to the point of a live birth.

The policies of the remaining nineteen (19) states plus the District of Columbia can also be classified into two categories::

1. Statutes that allow women to write their own wishes regarding pregnancy into their advance directives, and guarantee that their instructions will be followed; and

2. States where the law is silent with regard to advance directives and pregnancy.

State laws make it clear that the rights of a pregnant woman vary greatly depending upon the state in which she is receiving treatment.

AUTOMATIC INVALIDATION OF ADVANCE DIRECTIVE

Currently twelve (12) states have statutes that automatically invalidate a woman's advance directive if she is pregnant. These states are: Alabama¹⁰, Connecticut¹¹, Idaho¹², Indiana¹³, Kansas¹⁴, Michigan¹⁵, Missouri¹⁶, South Carolina¹⁷, Texas¹⁸, Utah¹⁹, Washington²⁰, and Wisconsin²¹. These states have the most restrictive pregnancy exclusion statutes. They require that pregnant woman be placed on or continue receiving live-sustaining treatment, regardless of the progression of the pregnancy, until she gives birth. None of these statutes makes an exception for patients who will be in prolonged severe pain that cannot be alleviated by medication, or those who will be physically harmed by continuing life-sustaining treatment. It appears that these states place the interest of the unborn child above those of the mother.

Having an advance directive does not guarantee that a person's wishes will be followed, but it makes allowing death less controversial. Both health care providers and family members are more likely to know exactly what the dying person wants. In general, even if there is no legal advance directive, life support can be removed if the health care team and family members all believe that it is the right course of

action for the dying person. This rule, however, does not apply if that person is a pregnant woman.

The New York Times published an article about 33-year-old Marlise Munoz, who collapsed on her kitchen floor from what appeared to be a blood clot in her lungs. Marlise and her husband, Erick, were the parents of a toddler, and Marlise was 14 weeks pregnant with their second child at the time she collapsed.²² Doctors at the Fort Worth, Texas, hospital pronounced her brain dead and her family confirmed that she did not want her body to be kept alive by machines. Hospital officials argued, however, that state law required them to maintain life-sustaining treatment for a pregnant patient, and refused to discontinue treatment.

Marlise did not leave any written directives regarding end-of-life care. But Erick Muñoz had no doubt concerning what his wife wanted. They were both paramedics, and it was something they had talked about many times. Long before she was hospitalized her husband and parents had made Marlise a promise to honor her wishes, and they were determined to keep it.²³ The family filed a lawsuit in the 96th District Court in Tarrant County, Texas, requesting that Marlise's life support be removed.

At the time of the hearing Marlise was 22 weeks pregnant. The hospital acknowledged that she had been brain dead for eight weeks and the fetus she carried was not viable. The judge sided with the family, ordering the hospital to remove any artificial means of life support from Marlise.²⁴ The hospital did not appeal, and stated that they had kept Marlise

on life support because they believed they were following the demands of the state statute.

Although the Court's decision allowed the termination of Marlise's life support, it did little to alter the interpretation or application of the Texas statute. The judge's ruling was based on the fact that Marlise Munoz had been declared "brain dead" by the hospital.²⁵ Since she was legally dead, she was no longer a "patient" whom the hospital was required to treat, and therefore the statute did not apply to her. If instead Marlise had been in a coma or persistent vegetative state, the hospital would have been required by law to continue life-sustaining treatment.

INVALIDATION IF A LIVE BIRTH COULD RESULT

Nineteen (19) of the thirty-one (31) pregnancy exclusion states have statutes requiring that life-sustaining treatment be administered to a woman who is known to be pregnant if the fetus is viable and/or if the fetus could develop to the point of a live birth with the continuation of treatment: Alaska²⁶, Arkansas²⁷, Colorado²⁸, Delaware²⁹, Florida³⁰, Georgia³¹, Illinois³², Iowa³³, Kentucky³⁴, Minnesota³⁵, Montana³⁶, Nebraska³⁷, Nevada³⁸, New Hampshire³⁹, North Dakota⁴⁰, Ohio⁴¹, Pennsylvania⁴², Rhode Island⁴³, and South Dakota⁴⁴.

These states could be further classified as follows: Twelve (12) states (Alaska, Colorado, Delaware, Florida, Kentucky, Montana, Nebraska, Nevada, Ohio, Pennsylvania, Rhode Island, and South Dakota) require that it is "probable" or there is a "reasonable degree of medical certainty" that

continued treatment will result in a live birth. These states follow the *URTIA* model. The remaining seven (7) states (Arkansas, Georgia, Illinois, Iowa, Minnesota, New Hampshire and North Dakota) call for continuing treatment when the fetus is “viable”, or if it is “possible” that the fetus could develop to the point of a live birth.

There are five (5) states (Kentucky, New Hampshire, North Dakota, Pennsylvania and South Dakota) that stipulate that an exception may be made if continuing treatment will be “physically harmful” to the woman or prolong “severe pain” which cannot be alleviated by medication.

While statutes falling into this category are less harsh than those that automatically invalidate a pregnant woman’s advance directive, her expressed wishes will still be ignored if a live birth could result. Also, as previously stated, only five (5) states consider the physical well-being of the mother when deciding whether to continue treatment; the remaining fourteen (14) states focus solely upon the fetus’s development and survival.

Turning back to the Munoz case, what if Marlise Munoz had not been declared brain dead? Under Texas’s statute the continuation of life support would have been required. This is true even though the hospital acknowledged that the fetus was not viable and suffered from hydrocephalus (an abnormal accumulation of fluid in the cavities of the brain) as well as a possible heart problem and deformed lower extremities⁴⁵. Regardless of the fact that in all probability the fetus would not have survived until birth, or would have died

shortly after birth, the Texas hospital would be required to continue life-sustaining treatment. This would not be true if Marlise was receiving treatment in one of the nineteen (19) states that considered whether a live birth was likely before continuing treatment.

STATUTES THAT ALLOW WOMEN TO WRITE THEIR OWN WISHES REGARDING PREGNANCY

Five (5) states clearly allow women to write their wishes regarding pregnancy into their advance directives and guarantee their instructions will be followed: Arizona⁴⁶ Maryland⁴⁷, New Jersey⁴⁸, Oklahoma⁴⁹ and Vermont⁵⁰. These statutes give a woman control over her body under all circumstances and protect her rights as a patient. Moreover, they inform women that a pregnancy could complicate the execution of their advance directive, a fact of which most women are unaware, and provide women with an avenue to assure that their wishes are followed.⁵¹

The language in the statutes passed in these five (5) states is explicit and expressly requires a woman to consider whether she would choose to continue life support to sustain an existing pregnancy, or terminate life support despite the pregnancy.

STATES WHERE THE LAW IS SILENT WITH REGARD TO ADVANCE DIRECTIVES AND PREGNANCY

The remaining fourteen (14) states, plus the District of Columbia, do not address pregnancy in their advance directive statutes. These states are: California, Hawaii, Louisiana,

Maine, Massachusetts, Mississippi, New Mexico, New York, North Carolina, Oregon, Tennessee, Virginia, West Virginia and Wyoming. In these states it may be left to the courts to determine how to proceed. Since going through the court system takes significant time, a pregnant woman may be forced to endure prolonged treatment before the provisions of her advance directive can be carried out.⁵² Furthermore, the majority of these states have “conscience clauses,” which allow medical professionals or institutions to opt out of withholding life-sustaining treatment if the direction to withhold treatment is contrary to a policy of the medical professional or institution.⁵³

VI. STATISTICAL FINDINGS

In this section we will analyze the pregnancy laws by region. First let us introduce some abbreviations that will be used throughout this section:

AIAD = Automatic Invalidation of Advance Directive – 12 states

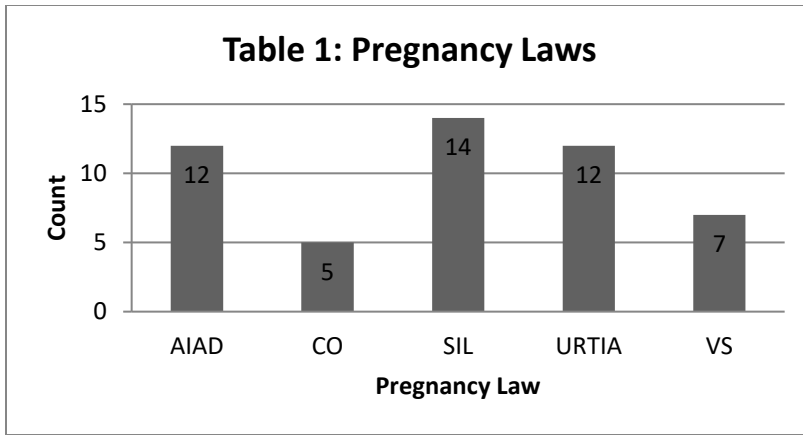
URTIA = Uniform Rights of the Terminally Ill Act– 12 states

VS = Viable Status – 7 states

ILB = Invalidation if Live Birth can Result = URTIA and VS – 19 states

CO = Clear Options – 5 states

SIL = Law is Silent– 14 states



In Table 1 we see that the CO (Clear Options) statute for pregnancy issues only exists in 5 states. In 10% of the states a woman can clearly articulate her wishes regarding pregnancy and these wishes will be guaranteed. In contrast, we see that in Table 1 the laws that are in the group called SIL (Law is Silent) are the most common choice among the states. Hence in 28% of our states if a pregnancy issue comes to light then this matter will be settled in the court system.

A natural comparison to make with Pregnancy Laws is the Region that a state lies in. It would be reasonable to assume the region might have impact on which law a state uses for pregnancy issues. In Table 2 we see that in the Midwest region the majority of states, $5/12 = 41.7\%$, use AIAD; this means that in the Midwest region many of the states have statutes that automatically invalidate a woman's advance directive if she is pregnant. Additionally, if you add the Midwest and the Southern regions together then you have $2/3 = 66\%$ of the states that use AIAD. Correspondingly, none of the states in the Midwest region follow the CO or SIL laws. It is

also interesting to see that in the Northeast and Western region $4/7 = 57.1\%$ of these states use the SIL option and so any pregnancy issues will be decided by the court system. These statistics point to a clear connection between region and views on pregnancy laws.

Table 2 : Pregnancy Laws by Region						
	Pregnancy Laws					
Region	AIAD	CO	SIL	URTIA	VS	Grand Total
Midwest	5	0	0	3	4	12
Northeast	1	2	3	2	1	9
South	3	2	6	3	2	16
West	3	1	5	4	0	13
Total	12	5	14	12	7	50

V. CONCLUSION

Why would states pass laws prohibiting the removal or withholding of life support from pregnant women? One reason is that states may be concerned that, when the woman indicated her wishes regarding life support, she did not anticipate that she would be pregnant at the time her wishes were to be carried out.

It is possible pregnancy exclusions were enacted to represent the actual intent of the woman had she thought about the situation in advance. Many rights and obligations arise by operation of law when individuals fail to set forth their wishes. Nevertheless this is a weak argument. States could easily include

language in their statutes requiring women to indicate their wishes in the event they are pregnant. Five states already have statutes that do just that, thereby providing clear and convincing evidence of the woman's wishes. If all states incorporated such language into their statutes, pregnancy exclusions could be limited to those cases where the woman's wishes cannot be adequately determined.

The Supreme Court recognized the right to refuse life-sustaining treatment in *Cruzan*⁵⁴. The right of anyone, pregnant or not, to refuse or terminate life support is a fundamental right. No matter how beneficial a treatment might be for the patient, she still has the right to refuse it. It follows that the government may not compel a person to receive unwanted medical treatment in order to promote the interests of another person, even if that "person" is the woman's unborn child. Yet even when the Supreme Court recognizes the existence of a fundamental right, that right is not absolute.

The Supreme Court's decisions in *Roe v. Wade*⁵⁵ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁵⁶ recognize abortion as a fundamental right, but they also recognize that states have an interest in the potential life of the fetus. In *Casey* the Court held that the viability of the fetus is the point at which the states' interest in potential life outweighs the rights of the woman. Once the fetus is viable abortion may be banned unless it is necessary for the preservation of the life or health of the mother. Prior to viability state laws restricting abortion cannot place a "substantial obstacle" in the path of a woman seeking an abortion.⁵⁷

Applying this standard to pregnancy exclusions, those that automatically invalidate a woman's advance directive if she is pregnant, regardless of the progression of the pregnancy, would appear to be unconstitutional. They place the state's interest in a non-viable fetus above the woman's fundamental right to refuse or terminate life support. But is this a proper comparison? Do the standards established in abortion precedents apply? A live woman has an interest in terminating her pregnancy so she can continue living her life unencumbered, but a dying woman enjoys no similar interest.⁵⁸ It can be argued that a pregnant woman's right to terminate life support, thereby terminating her own life and the life of her fetus, seems far less compelling than the state's interest in the potential life that resides in the fetus. Unfortunately, until a tragic set of events occur causing a case of this nature to be heard by the Supreme Court, these questions will remain unanswered.

ENDNOTES

¹ Wilkinson, A, N. Wenger, and L. Shurgarman, (2007) *Literature Review on Advance Directives*. Prepared for the Office of the Assistant Secretary of Planning and Evaluation, U.S. Department of Health and Human Services. Available at <http://aspe.hhs.gov/daltcp/reports/2007/advdirlr.pdf>.

² *Id.*

³ UNIF. RIGHTS OF THE TERMINALLY ILL ACT, 9B U.L.A. (1987) [hereinafter URTIA].

⁴ *Id.*

⁵ Green, M. and L. R. Wolfe (2012) *Pregnancy Exclusions in State Living Will and Medical Proxy Statutes*. Prepared for the Center for Women Policy Studies.

⁶ *Cruzan v. Director, MO Dept. of Health*, 497 U.S. 261 (1990).

⁷ *Id* at 265.

⁸ *Id.* at 286-287.

⁹ Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§4206, 4751, 104 Stat. 1388, 1388-115 to -117, 1388-204 to -206 (codified in scattered sections of 42 U.S.C.).

¹⁰ Natural Death Act §4, ALA. CODE §22-8A-4(e) (LexisNexis 1197 & Supp. 2004) (indicating that the advance health care directive of a pregnant patient does not have effect when the doctor knows the patient is pregnant).

¹¹ An Act Concerning Death With Dignity §5 CONN. GEN. STAT. ANN. § 19a-574 (West 2003) (making the protections of a living will inapplicable to pregnant women).

¹² Natural Death and Medical Consent Act, IDAHO CODE ANN. § 39-4510 (2005) (providing a form that must be used when writing a living will that includes a provision that does not give effect to the directive if the declarant is pregnant, but also allows for the use of an alternate form, as long as all of the elements of the form are included).

¹³ Living Wills and Life-Prolonging Procedures Act §11(d), IND.CODE ANN. §16-36-4-8(d) (LexisNexis 1993) (nullifying the effect of a living will declaration by a pregnant patient).

¹⁴ Natural Death Act §3, KAN.STAT.ANN. §65-28, 103(a) (2002) (prohibiting the living will of a pregnant patient, as diagnosed by the attending physician, to be given effect).

¹⁵ Estate and Protected Individuals Code Act of 1998, MICH. COMP. LAWS §700.5507(4)(3) (disallows patient advocate to make a decision to

withhold or withdraw treatment from a patient who is pregnant that would result in the pregnant patient's death).

¹⁶ MO. ANN. STAT. §459.025 (West 1992) (stating that the declaration will have no effect if the patient is pregnant).

¹⁷ Death with Dignity Act §5(B), S.C. CODE ANN. §44-77-70 (2002) (rendering ineffective a pregnant patient's declaration for the entire course of the patient's pregnancy).

¹⁸ TEX. HEALTH & SAFETY CODE ANN. §166.049 (Vernon 2001) (stating that life support cannot be removed from a pregnant patient).

¹⁹ UTAH CODE ANN. §75-2a-123 (2008) (voiding the directive of a pregnant patient to be removed from life support).

²⁰ WASH. REV. CODE. ANN. §70.122.030(1) (West 2002) (setting forth in the form suggested for living wills a provision that the directive will have no effect if the declarant's physician knows the declarant is pregnant).

²¹ WIS. STAT. ANN. §154.07(2) (West 1997 & Supp. 2004) (voiding the declaration of a pregnant patient).

²² N.Y. Times, Jan 8, 2014, at 1A (city ed.).

²³ *Id.*

²⁴ N.Y. Times, Jan. 27. 2014, at 9A (city ed.).

²⁵ *Id.*

²⁶ Health Care Decisions Act §1, ALASKA STAT. §13.52.055(b)(4) (2004) (prohibiting the living will of a pregnant woman from taking effect if "it is probable that the fetus could develop to the point of live birth if the life-sustaining procedures were provided").

²⁷ Arkansas Rights of the Terminally Ill Act or Permanently Unconscious Act §6(c), ARK. CODE ANN. §20-17-206 (c) (2000 & Supp. 2003) (prohibiting the living will of a pregnant patient to be given effect if "the

fetus could develop to the point of live birth with continued application of life-sustaining treatment”).

²⁸ Colorado Medical Treatment Decision Act §1, COLO. REV. STAT. §15-18-104(2) (2004) (prohibiting a pregnant woman’s living will from being given effect if a medical examination shows the fetus to be viable and, to a reasonable degree of certainty, capable of developing to a live birth if the mother is given continued life support).

²⁹ Delaware Death with Dignity Act §1 DEL. CODE ANN. tit. 16 §2503(j) (2003) (prohibiting life-sustaining treatment from being withdrawn from a pregnant woman if “it is probable that the fetus will develop to be viable outside the uterus with the continued application of a life-sustaining procedure”).

³⁰ 2 FLA. STAT. ANN. §765.113(2) (West 2005) (a surrogate or proxy may not provide consent for withholding or withdrawing life-prolonging procedures from a pregnant patient if the life of the unborn child may, with a reasonable degree of medical probability, be continued indefinitely outside the womb).

³¹ GA. CODE ANN. §31-32-8(a)(1) (2001) (treatment preferences have no force and effect if patient is pregnant and the fetus is viable; if fetus is not viable living will must expressly provide for removal from life support).

³² Illinois Living Will Act§3(c), 755 ILL. COMP. STAT. ANN. 35/3-3(c) (West 1992) (giving the living will of a pregnant woman no effect if the physician determines “it is possible that the fetus would develop to the point of live birth with the continued application of death delaying procedures”).

³³ Life-Sustaining Procedures Act §7, IOWA CODE ANN. §144A.6(2) (West 1997) (refusing to give effect to a living will if the patient is pregnant and “the fetus could develop to the point of live birth with continued application of life-sustaining procedures”).

³⁴ Kentucky Living Will Directive Act §5 KY. REV. STAT. ANN. §311.629(4) (LexisNexis 2001) (requiring a pregnant patient to remain on life support regardless of whether she had executed a living will “unless, to

a reasonable degree of medical certainty,” the attending physician and one other physician have certified that “the procedures will not maintain the women in a way to permit the continuing development and live birth of the unborn child, will be physically harmful to the woman or prolong severe pain which cannot be alleviated by medication”).

³⁵ Montana Rights of the Terminally Ill Act §12, MONT. CODE ANN. §50-9-106(6) (2004) (Prohibiting life support from being removed from a pregnant patient “so long as it is probable that the fetus will develop to the point of live birth with continued application of life-sustaining treatment”).

³⁶ Rights of the Terminally Ill Act §8(3), NEB. REV. STAT. §20-408(3) (1997) (requiring pregnant patients to remain on life support “so long as it is probable that the fetus will develop to the point of live birth with continued application of life-sustaining treatment”).

³⁷ Uniform Act on Rights of the Terminally Ill §9(4), NEV. REV. STAT. ANN. §449.624(4) (LexisNexis 2005) (requiring pregnant patients to remain on life support if “it is probable that the fetus will develop to the point of live birth with continued application of life-sustaining treatment”).

³⁸ An Act Relative to Living Wills N.H. REV. STAT. ANN. §137-J:5(V)(c) (2010) (Agent cannot withdraw life-sustaining treatment from a pregnant patient unless to a reasonable degree of certainty a medical professional concludes such treatment will not permit the fetus to develop to the point of a live birth or that such treatment will cause the patient physical harm or prolong severe pain that cannot be alleviated by medication).

³⁹ Health Care Directives §10, N.D. CENT. CODE §23-06.5-09(5) (Supp. 2005) (prohibiting removal of life support from a pregnant woman unless “such health care will not maintain the principal in such a way as to permit the continuing development and live birth of the unborn child or will be physically harmful or unreasonably painful to the principal or will prolong severe pain that cannot be alleviated by medication”).

⁴⁰ Modified Uniform Rights of the Terminally Ill Act §1, OHIO REV. CODE ANN. §2133.06 (B) (LexisNexis 2010) (requiring that life support not be withdrawn from a pregnant patient unless the attending physician,

“to a reasonable degree of medical certainty”, determines “the fetus would not be born alive”).

⁴¹ Advance Directive for Health Care Act §5, 20 PA. CONS. STAT. ANN. 5429(a) (West Supp. 2005) (voiding a pregnant woman’s health care directive unless it can be determined “to a reasonable degree of certainty” that prolonged life-sustaining measures “(1) will not maintain the pregnant woman in such a way as to permit the continuing development and live birth of the unborn child; (2) will be physically harmful to the pregnant woman; or (3) would cause pain to the pregnant woman which cannot be alleviated by medication”).

⁴² Rights of the Terminally Ill Act §1, R.I. GEN. LAWS §23-4.11-6(c) (2001) (voiding the declaration of a pregnant patient if “it is probable that the fetus could develop to the point of live birth with continued application of life sustaining procedures”).

⁴³ An Act to Provide for Living Wills §10, S.D. CODIFIED LAWS §34-12D-10 (2004) (requiring life sustaining treatment to continue for pregnant patients with directives unless, “to a reasonable degree of medical certainty,” the attending physician and one other physician determine that “such procedures will not maintain the woman in such a way to permit the continuing development and live birth of the unborn child or will be physically harmful to the woman or prolong severe pain which cannot be alleviated by medication”).

⁴⁴ N.Y. Times, Jan. 27. 2014, at 9A (city ed.).

⁴⁵ ARIZ. REV. STAT. ANN. §36-3262 (2003) (providing the declarant with the option of making specific decisions if she is pregnant).

⁴⁶ Health Care Decision Act §2, MD. CODE ANN., HEALTH-GEN. §5-603 (LexisNexis 2005) (providing language in the sample forms that allows for specific instructions should the declarant be pregnant)

⁴⁷ Adult Health Care Decisions Act (Minnesota Living Will Act) §13 §1, MINN. STAT. ANN. § 145B (West 2011) (providing that if the patient is

pregnant she can provide specific instructions regarding the continued application of life-sustaining treatment)

⁴⁸ New Jersey Advance Directives for Health Care Act §4, N.J. STAT. ANN. §26:2H-56 (West 1996) (permitting “[a] female declarant [to] include in an advance directive executed by her, information as to what effect the advance directive shall have if she is pregnant”).

⁴⁹ Oklahoma Advance Directive Act, OKLA. STAT. ANN. tit. 63, §3101.8(C) (2006) (pregnant patient will be provided with life-sustaining treatment unless she has specifically authorized that during a course of pregnancy, life-sustaining treatment shall be withheld or withdrawn).

⁵⁰ Advance Directive for Health Care and Disposition of Remains, Chapter 231, VT. STAT. ANN. tit 18 §9702(a)(8) (2005) (principal can direct which life sustaining treatment the principal would desire or not desire if the principal is pregnant at the time an advance directive becomes effective).

⁵¹ Green, M. and L. R. Wolfe (2012) *Pregnancy Exclusions in State Living Will and Medical Proxy Statutes*. Prepared for the Center for Women Policy Studies.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Cruzan v. Director, MO Dept. of Health*, 497 U.S. 261 (1990).

⁵⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

⁵⁶ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

⁵⁷ *Id.* at 877.

⁵⁸ Colb, S. F. (2014). *Excluding Pregnant Women from the Right to Terminate Life Support*. Available at: <http://verdict.justia.com/2014/01/22/excluding-pregnant-women-right-terminate-life-support#sthash.68ZluS17.dpuf>