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By: Simone Shuman

Advance directives enable patients to specify which medical treatment they do and do not want to receive ahead of time if they cannot make such a determination, including the refusal or ending of life support when the time to act on such a decision arises.[1] There are two types of advance directives: (1) living wills where a patient lists their treatment preferences and (2) creating a health care power of attorney which vests the decision-making authority in a proxy.[2]Since the creation of advance directives in 1976, all fifty states have adopted their own laws on advance directives.[3]

One situation where advance directives are determinative is when a patient is diagnosed as brain dead. The Uniform Determination of Death Act (UDDA) states that "[a]n individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead."[4] Forty-four states[5] have adopted a version of the UDDA, thus making brain death a legal death throughout most of the country.

Starting in the 1980's states across the country began adopting pregnancy exception statutes to advance directives.[6] To date, more than thirty states have adopted such exceptions, most of which either prohibit entirely or significantly restrict doctors from removing life support from pregnant patients.[7] Scholarship has differed in how the levels of severity and nuances of each state's pregnancy exception law are distinguished.[8] For ease of understanding, the different policies can be broken down in the following ways: (1) eleven states completely invalidate a pregnant patient's advance directives without exception;[9] (2) sixteen states with an exception require a woman to be kept on life support if "it is probable the fetus could develop to the point of live birth with the continued application of life-sustaining treatment;[10](3) four states invalidate advance directives if it is probable that the fetus will reach the point of viability due to being kept on life support.[11] Therefore, the advance directives of a pregnant brain-dead patient to end life support would be nullified in its entirety or subject to significant limitations depending on the state.

Only two states have adjudicated pregnancy exceptions for brain-dead patients. First, in *University Health Services v. Piazzi*, Piazzi was rendered brain dead while pregnant without any advance directive.[12] While the biological father of the fetus wanted Piazzi to remain on life support, her husband and immediate family wanted to take her off life support.[13] Although Piazzi did not make any advance directives, the Georgia Natural Death Act would have invalidated them because Piazzi was pregnant.[14] Therefore, the Georgia Court held that Piazzi was unable to terminate life support and that life support must be maintained for pregnant women as long as there is a possibility that the fetus would develop and survive.[15]

More recently, in 2013, Marlise Muñoz suffered a pulmonary embolism and was declared brain dead at the hospital.[16] Muñoz's husband and immediate family claimed that although no advance directive was made, Ms. Muñoz did not want to remain on life support and thus requested the hospital to terminate.[17] In this case, the hospital refused to take Muñoz off of life support because she was fourteen weeks pregnant, and Texas law bars pregnant women from being taken off life support until a fetus is non-viable.[18] The Court did not think the relevant Texas pregnancy exception applied to brain-dead individuals and thus ordered the hospital to take Ms. Muñoz off life support.[19]

Neither Texas nor Georgia rested their decision on constitutional grounds. Similarly, the United States Supreme Court has not had the opportunity to rule on the constitutionality of pregnancy exceptions and is unlikely to ever get the chance to. The reality is that very few women have been both pregnant and brain dead. From 1982-2010 there were only thirty reported cases of brain-dead pregnant women.[20]

Compare the situation in the United States to that of Ireland. In Ireland, a fetus has the same right to life as people do.[21] In the U.S., the state interest in protecting the future life of the fetus does not vest until viability.[22] Viability is reached between twenty-three and twenty-four weeks of pregnancy.[23] So already, this is a significant difference.

Naturally, it would appear that in Ireland, an advance directive of a brain-dead pregnant patient would always be nullified because a fetus has an equal right to life as the mother. In 2014 this issue came to a head when N.P. was admitted to the hospital while fifteen weeks pregnant and later was declared brain dead.[24] N.P.'s father wanted N.P. to be taken off life support, but the medical provider refused to in fear of being sued due to the legal uncertainty about the status of the fetus' life.[25] The High Court, based on medical testimony, held that the fetus had no chance of reaching a point where live birth was possible rather "while the unborn child is not yet in distress, it is facing into a 'perfect storm' from which it has no realistic prospect of emerging alive. It has nothing but distress and death in prospect" and therefore life support for N.P. must be terminated.[26]

Since *P.P.*, the legal scene has changed in Ireland. In 2018 the 36th Amendment was passed, which opened the door to legal abortions in Ireland.[27] Even with this change, the advance directives of pregnant women are not inherently valid. Irish law requires such advance directives to be sent to the High Court if honoring the decision would have a "deleterious effect on the unborn."[28] In such a case, the Court must consider (1) the impact on the fetus of ceasing/withholding treatment and (2) the invasiveness and duration of intervention and the risks the intervention poses to the woman.[29] In the same vein, there is a presumption in favor of life support where the woman has not stated that the refusal should apply in pregnancy.[30]

While no case has been brought under this law, it will be very interesting to see how the Irish High Court decides. There is no presumption in favor of intervention in the United States. Additionally, Irish law seems to take the position of both the patient and the fetus into account, whereas U.S. laws do not. This subjective approach to advanced directives is something to keep an eye on should a case come to the High Court.

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[1] Uniform Health-Care Decisions Act §§ 2(A)--(B).
[2] *Advance Directives: Definitions*, Patients Rts. Council (2013), http://www.patientsrightscouncil.org/site/advance-directives-definitions/ [https://perma.cc/SUL4-FMB8].
[3] Bretton J. Horttor, *A Survey of Living Will and advance Health Care Directives*, 74 N.D. L. Rev. 233, 233-40 (1998) (surveying state advance directives).
[4] Uniform Determination Of Death Act § 1, 12A U.L.A. 593 (1980).
[5] *Id.*
[6] Elizabeth Villarreal, *Pregnancy and Living Wills: A Behavioral Economic Analysis*, 128 Yale L. J. F. 1052 (2019).
[7] Shea Flanagan, *Decisions in the Dark: Why "Pregnancy Exclusion" Statutes are Unconstitutional and Unethical*, 114 Nw. U. L. Rev. 969, n. 56 (2020).
[8] *Id.*; *See also* Hannah Schwager, *The Implications Of Exclusion: How Pregnancy Exclusions Deny Women Constitutional Rights,* 13 Cardozo Pub. L. Pol'y & Ethics J. 595, 600-607 (2015).
[9] Those states are Alabama, Idaho, Indiana, Kansas, Michigan, Missouri, South Carolina, Texas, Utah, and Wisconsin. Ala. Code § 22-8A-4(e) ("The advance directive for health care of a declarant who is known by the attending physician to be pregnant shall have no effect during the course of the declarant's pregnancy."); Idaho Code Ann. § 39-4510 ("If I have been diagnosed as pregnant, this Directive shall have no force during the course of my pregnancy."); Ind. Code § 16-36-4-8(d) ("The living will declaration of a person diagnosed as pregnant by the attending physician has no effect during the person's pregnancy."); Kan. Stat. Ann. § 65-28, 103 ("The declaration of a qualified patient diagnosed as pregnant by the attending physician shall have no effect during the course of the qualified patient's pregnancy."); Mich. Comp. Laws § 700.5512(1) ("A patient advocate cannot make a medical treatment decision . . . to withhold or withdraw treatment from a pregnant patient that would result in the pregnant patient's death."); Mo. Ann. Stat. § 459.025 ("The declaration to withdraw or withhold treatment by a patient diagnosed as pregnant by the attending physician shall have no effect during the course of the declarant's pregnancy."); S.C. Code. Ann. § 62-5-507 ("If a principal has been diagnosed as pregnant, life-sustaining procedures may not be withheld or withdrawn pursuant to the health care power of attorney during the course of the principal's pregnancy."); Tex. Health & Safety Code Ann. § 166.049 ("A person may not withdraw or withhold life-sustaining treatment under this subchapter from a pregnant patient."); Utah Code Ann. § 75-2a-123(1) (2018) ("A health care directive that provides for the withholding or withdrawal of life sustaining procedures has no force during the course of a declarant's pregnancy."); Wis. Stat. § 154.03(2) ("If you know that the patient is pregnant, this document [Declaration To Physicians] has no effect during her pregnancy.").

[10] Uniform Rights of the Terminally Ill Act § 5(d); *See* Alaska Stat. Ann. § 13.52.055 ("An advance health care directive by a patient … may not be given effect if (1) the patient is a woman who is pregnant and lacks capacity; … (4) it is probable that the fetus could develop to the point of live birth if the life-sustaining procedures were provided."); Ariz. Rev. Stat. Ann. § 36-3262; Ark. Code Ann. § 20-17-206("The declaration of a qualified patient known to the attending physician to be pregnant must not be given effect as long as it is possible that the fetus could develop to the point of live birth with continued application of life-sustaining treatment."); 755 ILCS 35/3 ("The declaration of a qualified patient diagnosed as pregnant by the attending physician shall be given no force and effect as long as in the opinion of the attending physician it is possible that the fetus could develop to the point of live birth with the continued application of death delaying procedures."); Iowa Code Ann. § 144A.6 ("The declaration of a qualified patient known to the attending physician to be pregnant shall not be in effect as long as the fetus could develop to the point of live birth with continued application of life-sustaining procedures."); Ky. Rev. Stat. Ann. § 311.629 ("Notwithstanding the execution of an advance directive, life sustaining treatment and artificially-provided nutrition and hydration shall be provided to a pregnant woman unless, to a reasonable degree of medical certainty, as certified on the woman's medical chart by the attending physician and one (1) other physician who has examined the woman, the procedures will not maintain the woman 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."); Minn. Stat. Ann. § 145B.13; Mont. Code Ann. § 50-9-106 ("Life-sustaining treatment cannot be withheld or withdrawn pursuant to this section from an individual known to the attending physician or attending advanced practice registered nurse to be pregnant so long as it is probable that the fetus will develop to the point of live birth with continued application of life-sustaining treatment."); Neb. Rev. Stat. § 20-408; Nev. Rev. Stat. Ann. § 449.624; N.H. Rev. Stat. Ann. § 137-J:10; N.D. Cent. Code Ann. § 23-06.5-09; Ohio Rev. Code Ann. § 2133.08; 20 Pa. Cons. Stat. Ann. § 5429 ; R.I. Gen. Laws Ann. § 23-4.10-5; S.D. Codified Laws § 34-12D-10.

[11] See Colo. Rev. Stat. Ann. § 15-18-104 ("In the case of a declaration of a qualified patient known to the attending physician to be pregnant, a medical evaluation shall be made as to whether the fetus is viable. If the fetus is viable, the declaration shall be given no force or effect until the patient is no longer pregnant."); Del. Code Ann. tit. 16, § 2503 ("A life-sustaining procedure may not be withheld or withdrawn from a patient known to be pregnant, so long as it is probable that the fetus will develop to be viable outside the uterus with the continued application of a life-sustaining procedure."); Fla. Stat. Ann. § 390.0111 ("If a termination of pregnancy is performed during viability, no person who performs or induces the termination of pregnancy shall fail to use that degree of professional skill, care, and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted."); Ga. Code Ann. § 31-32-9.

[12] Univ. Health Servs. Inc. v. Piazzi, No. CV86-RCCV-464, 1986 WL 1167470 (Ga. Super. Ct. Aug. 4, 1986).

[13] *Id.*

[14] *Id.*; Ga. Code Ann. § 31-32-2 (stating that the directive "shall have no force and effect during the course of pregnancy").

[15] *Piazzi*, No. CV86-RCCV-464.

[16] Muñoz v. John Peter Smith Hospital, No. 096-270080-14, 2014 WL 285057 (96th Jud. District Tex. Jan. 24, 2014).

[17] *Id.*

[18] *Id.*

[19] *Id.*; Tim Madigan & Elizabeth Campbell, *Judge Orders that Life Support be Ended for Brain-Dead Pregnant Woman*, Star-Telegram, http://www.star-telegram.com/2014/01/24/5511776/fetus-in-munoz-case-is-not-viable.html?rh=1.

[20] Majid Esmaeilzadeh, Christine Dictus, Elham Kayvanpour, Farbod Sedaghat-Hamedani, Michael Eichbaum, Stefan Hofer, Guido Engelmann, Hamidreza Fonouni, Mohammad Golriz, Jan Schmidt, Andreas Unterberg, Arianeb Mehrabi & Rezvan Ahmadi, *One Life Ends, Another Begins: Management of a Brain-Dead Pregnant Mother--A Systemic Review*, 8 B.M.C. Med. 74 (2010).

[21] Constitution of Ireland 1937 amend. 8, https://www.irishstatutebook.ie/eli/1983/ca/8/enacted/en/print#sched-part2.

[22] Roe v. Wade, 410 U.S. 113, 163 (1973).

[23] Planned Parenthood v. Casey, 505 U.S. 833, 860 (1992).

[24] P. P. v. Health Serv. Exec. [2014] IEHC 622 (Ir.).

[25] Mary Carolan, *HSE Admits Partial Liability Over Brain-dead Pregnant Woman Kept on Life Support*, Irish Times (Sept. 7, 2019), https://www.irishtimes.com/news/health/hse-admits-partial-liability-over-brain-dead-pregnant-woman-kept-on-life-support-1.4010364 [https://perma.cc/5UFW-BQZN].

[26] P. P. v. Health Serv. Exec. [2014] IEHC at 622.

[27] Constitution of Ireland 1937 amend. 36.

[28] Assisted Decision-Making (Capacity) Act 2015 (Act. No. 64/2015) (Ir.), https://www.irishstatutebook.ie/eli/2015/act/64/enacted/en/print.html.

[29] *Id.* 85(6)(c)(i)-(ii).

[30] *Id.* 85(6)(a).