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Katie Rinkus

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FEATURE ARTICLE

**THE PREGNANCY EXCLUSION
IN ADVANCE DIRECTIVES:
ARE WOMEN'S
CONSTITUTIONAL RIGHTS
BEING VIOLATED?**

by KATIE RINKUS

Advance directives, frequently known as living wills, are common and necessary safeguards in the United State's health care system that allow for someone to prepare for the rare possibility that he or she will suffer a serious illness or injury resulting in brain death.¹ The issue of controversial interpreta-

tions of someone's advance directive and/or conflicting familial views has come to the media forefront numerous times, including the stories of Terry Schiavo in 2005 and Marlise Muñoz in early 2014.² The media story usually plays out like this: an individual is declared "brain dead," and his or her advance directive is unclear on that person's wishes. For example, it does not cover this specific medical instance, or an individual's family members have differing views as to what care should be provided.³ This issue becomes even more complicated and controversial when that individual suffering a brain injury is a pregnant woman, as many state statutes indicate that advance directives are not applicable if a woman is pregnant.⁴

THE CASE OF MARLISE MUÑOZ

In January 2014, a Texas court ordered John Peter Smith Hospital to remove Marlise Muñoz, a 33 year-old woman who was 14 weeks pregnant, from a ventilator and other "life-sustaining" treatment.⁵ Her family members, including her husband and her parents, said that Marlise never wanted to be kept alive via life-support, yet the hospital refused to adhere to her wishes, as the Texas statute precluded them from doing so.⁶ The Texas Advance Directive Act states, "A doctor may not withdraw or withhold life-sustaining treatment from a pregnant patient."⁷ However, the authors of the statute stated that the intent behind this provision was to keep a pregnant woman who was in a persistent vegetative state on a ventilator until she could deliver her baby, but not to keep a dead pregnant woman alive via life-support indefinitely.⁸ The Texas law apparently did not anticipate the all-too often case of brain death in a pregnant woman. This leads to the question of whether other states have similar provisions and, as a result of such provisions, if situations like Marlise Muñoz's are apt to happen again.

ILLINOIS LAW

According to a statement of Illinois law on advance directives published by the Illinois Department of Public Health, an advance directive is a "written statement you prepare about how you want your medical decisions to be made in the future, if you are no longer able to make them for yourself."⁹ Illinois law allows for three types of advance directives, two of which are relevant to the discussion at hand: health care power of attorney and a living will.¹⁰ A health

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care power of attorney allows an individual to choose someone else to make health care decisions on his or her behalf in the future, if that person is no longer able to make decisions him or herself.¹¹ Further, a living will tells a health care provider whether one wants death-delaying procedures in the event the person suffers a terminal condition and is unable to state his or her preferences.¹² A terminal condition means an incurable and irreversible condition such that death is imminent and the application of any death delaying procedures serves only to prolong the dying process.¹³ “A common misconception with advance directives among people is that if someone is ever not competent to make decisions, that is when the advance directive will apply. In reality, an advance directive doesn’t kick in unless you meet the criteria the statute carves out,” explains Nadia Sawicki, assistant professor at the Beazley Institute for Health Law and Policy at Loyola University Chicago School of Law.¹⁴ “It’s a lot more limited than people think.”¹⁵



THE “PREGNANCY EXCLUSION” THROUGHOUT THE UNITED STATES

The use of advance directives becomes even more complex when a pregnant woman suffers brain injury and wishes to end life-sustaining treatment. In many states, including Illinois, the fact that a woman is pregnant essentially renders her advance directive null.¹⁶ Illinois law states, “if you are pregnant and your health care professional thinks you could have a live birth, your living will cannot go into effect.”¹⁷

According to a 2012 research study conducted by the Center for Women Policy Studies, thirty-seven states had pregnancy exclusions in their advance directive statutes.¹⁸ Twelve states, including Michigan, Indiana, and Wisconsin, automatically invalidate a pregnant woman’s advance directive, with no exceptions, making these the most restrictive pregnancy exclusion statutes.¹⁹ Statutes in fourteen states, including Illinois, require life support when it is probable the fetus will develop to the point of “live birth” or viability outside the uterus.²⁰ Further, only five states allow pregnant women to include their wishes regarding pregnancy in their advance directives, which guarantees that their instructions will be followed.²¹ Thus, there is no uniform guideline and states have varying statutory guidelines regarding pregnant women and their advance directives. These variations often lead to a dissonance between the law, individual rights (and, in this context, women’s rights), and family opinions. This is where the controversy surrounding the use and interpretation of advance directives emerges.

CONSTITUTIONAL CONSTRAINTS AND THE MEANING OF “DEATH”

The fact that most states do not allow pregnant women much, if any, say in how they will be treated in the event of a traumatic brain injury leads to the question of whether these statutes, including Illinois’ statute, contravene a woman’s right to control her body. Critics of these laws and the “pregnancy exclusion” discussed above argue that in these situations, women’s bodies are essentially being used as incubators without regard to their rights. As a result, critics argue that the state is controlling pregnant women’s bodies by refusing to adhere to their advance directives.²²

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On the other hand, proponents of this “exception” believe that if the fetus is viable, it should be able to be born as if its mother was still alive.²³ In the 1973 seminal United States Supreme Court case, *Roe v. Wade*, the Court held that the determinative “test” in whether a state has the right to exercise control over a woman’s body is a balance between the woman’s interest in protecting reproductive choice versus the state’s interest in preserving life.²⁴ “The way I read the [Illinois] statute, a woman’s right to choose is a lot less relevant here, as the argument would be that the state’s interest in protecting reproductive choice is diminished, and it is increased with regard to the viability of the fetus. The woman in this case is not coming back to express her wishes,” explains Professor Sawicki.²⁵ However, in order to fully understand women’s rights, and whether these rights are being violated by state statutory standards, it is important to look to the meaning of “death” and how the media has portrayed death in these situations.

Professor Sawicki notes that the media often portrays brain death as something different than actual, physical death.²⁶ However, from a medical and legal standpoint, brain death *is* physical death.²⁷ “When a woman is dead, the state’s interest in keeping a fetus viable would not exist, since the woman is deceased,” says Professor Sawicki.²⁸ “When a person dies, the family essentially gets property rights over the body. This becomes confusing when a woman is pregnant and dead, and there is no useful law to address this situation.”²⁹ Professor Sawicki notes that people often confuse brain death with actual, physical death because of preconceived notions of what death looks like. “When a body is being maintained on a ventilator, the body doesn’t look like it is dead. It’s understandable for a family to not understand, and the development of medical technology has made this even more complicated,” says Professor Sawicki.

IS THERE ANY WAY TO AVOID THESE CONFLICTS?

Notice, with regard to the pregnancy exclusion, is a large problem, as there is little to no public awareness that these pregnancy exclusions exist.³⁰ Furthermore, there is also no uniformity in the way in which these clauses are written within statutes, as states have very differing stances on this same issue.³¹ However, the underlying point to take away is that the laws that govern the use of advance directives, and the situations in which they are applicable, are meant to be used as a default, and should only be utilized as a last resort.³² “Many

statutes are very vague and, since these are tough situations, there is a limit on what the law can do,” explains Professor Sawicki.³³

Professor Sawicki notes that, in the end, the most important thing someone can do to protect himself or herself should a situation like this arise is to communicate their wishes with their families.³⁴ “States can set standards for what a family needs to prove in order for a person to establish their wishes, but in the end, it comes down to what the family knows about a person’s wishes,” says Professor Sawicki. In the case of Marlise Muñoz, the state law was just not clear enough, and did not anticipate the situation that ultimately arose. Unless and until states come up with clear and unambiguous statutes that address advance directive use with pregnant women, it is imperative that the public know of their rights, or lack thereof, and also that they continue to communicate their wishes with their friends and family.

NOTES

1 Illinois Department of Public Health website, *Statement of Illinois Law on Advance Directives and DNR Orders*, available at <http://www.idph.state.il.us/public/books/advdir4.htm> (last visited Mar. 19, 2014) [hereinafter *Statement of Illinois Law*].

2 Wade Goodwyn, *The Strange Case of Marlise Munoz and John Peter Smith Hospital*, National Public Radio Website, (Jan. 28, 2014), available at <http://www.npr.org/blogs/health/2014/01/28/267759687/the-strange-case-of-marlise-munoz-and-john-peter-smith-hospital>. [hereinafter *Strange Case of Marlise Munoz*].

3 *Id.*

4 Find Law website, *Living Wills: State Laws*, available at <http://estate.findlaw.com/living-will/living-wills-state-laws.html> (last visited Mar. 19, 2014) [hereinafter *Find Law*].

5 *Strange Case of Marlise Munoz*, *supra* note 2.

6 *Id.*

7 *Id.*

8 *Id.*

9 *Statement of Illinois Law*, *supra* note 1.

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 Interview with Nadia Sawicki, assistant professor at the Beazley Institute for Health Law and Policy at Loyola University Chicago School of Law (Feb. 25, 2014) [hereinafter Sawicki interview].

15 *Id.*

16 *Find Law*, *supra* note 4.

17 *Statement of Illinois Law*, *supra* note 1.

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18 Reproductive Laws for the 21st Century Papers Center for Women Policy Studies, Pregnancy Exclusions in State Living Will and Medical Proxy Studies, Megan Greene & Leslie R. Wolfe, Aug. 2012, *available at* <http://www.centerwomenpolicy.org> [hereinafter *Center for Women Policy Studies*].

19 *Id.*

20 *Id.*

21 *Id.*

22 *Center for Women Policy Studies, supra* note 18.

23 *Id.*

24 *Roe v. Wade*, 410 U.S. 113, 164-65 (1973).

25 Sawicki interview, *supra* note 14.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *Center for Women Policy Studies, supra* note 18.

31 *Id.*

32 Sawicki interview, *supra* note 14.

33 *Id.*

34 *Id.*