“But I’m Brain-Dead and Pregnant”: Advance Directive Pregnancy Exclusions and End-of-Life Wishes

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ADVANCE DIRECTIVE PREGNANCY EXCLUSIONS
AND END-OF-LIFE WISHES

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Marlise Muñoz was approximately fourteen weeks pregnant when she suffered a pulmonary embolism, and two days later doctors declared her brain-dead. Knowing Marlise’s end-of-life wishes, her husband, Erick Muñoz, asked her doctors to withdraw or withhold any “life-sustaining” medical treatment from his brain-dead wife. The hospital refused, and it relied on a Texas statute that automatically invalidates a woman’s advance directive in the event she is pregnant. Ultimately, the trial court held that the Texas statute does not apply to a woman who is brain-dead and pregnant.

This tragic situation warrants action to ensure that a woman’s end-of-life wishes are honored by family members, health care providers, and the state. Louisiana has already taken action. In response

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to the Muñoz case, in June 2014 the Louisiana legislature amended the state’s advance directive statute. Yet, based on the plain language of the statutes in Texas and Louisiana, the pregnancy exclusions do not apply to a situation in which a woman is brain-dead and pregnant, and this holds true for other state statutory pregnancy exclusions. Even if the pregnancy exclusions do apply to a pregnant woman who is brain-dead, they arguably violate a woman’s constitutional rights, including the right to terminate a pregnancy and the right to refuse medical treatment.

Therefore, state legislatures should propose a statute or amend the language in current pregnancy exclusions to clarify the applicability to a woman who is brain-dead and pregnant. State legislatures should also amend any statutory forms that address a woman’s end-of-life wishes, and both attorneys and health care providers should be proactive and discuss the issue with their respective clients and patients.

INTRODUCTION

Erick Muñoz and Marlise Muñoz were married in 2013 and worked as paramedics in Fort Worth, Texas.1 As knowledgeable health care providers, they frequently discussed their end-of-life wishes with each other and also expressed their desires to family members and friends: they did not want to be on life support under any circumstance.2 Unfortunately, on November 26, 2013, Erick Muñoz awoke to find his wife unconscious on their kitchen floor.3 At the time, his wife was approximately 14 weeks pregnant with their second child.4 Despite attempts to save her life after she suffered a

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4. Plaintiff’s Petition, supra note 1, at 3.
suspected pulmonary embolism, doctors declared Marlise Muñoz brain-dead on November 28, 2013.

Marlise Muñoz’s husband and parents expressed her wish not to remain on life support or to receive any life-sustaining medical treatment. The hospital, however, refused to remove her from life support, citing Section 166.049 of the Texas Health and Safety Code as the basis for its refusal. This refusal to follow Marlise Muñoz’s end-of-life wishes prompted her husband to file suit against the hospital to force the doctors to remove her from life support.

In Muñoz v. John Peter Smith Hospital, Erick Muñoz opposed the doctors performing any further medical treatment on his wife’s body.


7. Plaintiff’s Petition, supra note 1, at 3 (explaining that medical records confirm that doctors declared Marlise Muñoz “brain dead since approximately November 28, 2013”).

8. Id. at 3–4.

9. Id. at 4; see also TEX. HEALTH & SAFETY CODE ANN. § 166.049 (West 2013) (“A person may not withdraw or withhold life-sustaining treatment under this [advance directive] subchapter from a pregnant patient.”).

10. See Plaintiff’s Petition, supra note 1, at 1–7. In a similar case in Texas in July 1999, Tammy Martin was pregnant and in a coma when she was admitted to a hospital in the Houston area. Emma Murphy Sisti, Die Free or Live: The Constitutionality of New Hampshire’s Living Will Pregnancy Exception, 30 VT. L. REV. 143, 143 (2005). Her family members wanted the doctors to discontinue the life-sustaining treatment, but the father of the fetus, who claimed to be Tammy Martin’s common-law husband, wanted to have the life-sustaining treatment continued indefinitely. Id. Initially, the court ordered the hospital to continue life-sustaining treatment for Tammy Martin. Id. A few weeks later, however, the court reversed its order after health care providers declared Tammy Martin brain-dead. Id.

11. Erick Muñoz wanted the court to issue an order requiring the hospital: (1) to immediately cease conducting any further medical procedures on his wife’s body, (2) to remove her from any respirators, ventilators, or other “life support,” and (3) to release her body to her family. Plaintiff’s Petition, supra note 1, at 3–4; see also Caplan & Pope, supra note 5 (“The only question in Fort Worth is who knows best what to do when a body is being used as an incubator for a nonviable and possibly damaged fetus: a woman and her family or the Legislature of Texas?”).
His lawsuit against the hospital included three basic arguments. First, he argued that the hospital misconstrued Section 166.049 of the Texas Health and Safety Code, which on its face disallows a doctor from withdrawing or withholding life-sustaining treatment from a pregnant patient. 12 Second, in the alternative, he argued that Section 166.049 constituted a violation of his wife’s right to privacy pursuant to the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Texas Constitution. 13 And third, in the further alternative, he asserted that the hospital’s interpretation of Section 166.049 constituted a violation of his wife’s right to equal protection of the law pursuant to the Fourteenth Amendment to the United States Constitution and the Equal Protection Clause of the Texas Constitution. 14

The hospital, on the other hand, maintained that the Texas legislature has expressed a strong interest in protecting the life of an unborn child. 15 More specifically, the hospital argued that “it is unlikely the Legislature contemplated only the welfare of the mother” when it enacted the statute prohibiting the withholding or withdrawal of life-sustaining medical treatment for pregnant patients. 16 In addition, the hospital contended that the pregnancy exclusion in Section 166.049 “is constitutional because the right of privacy is not

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12. Plaintiff’s Petition, supra note 1, at 5; see also TEX. HEALTH & SAFETY CODE ANN. § 166.049 (West 2013).
13. Plaintiff’s Petition, supra note 1, at 5.
14. Id. Under the Fourteenth Amendment, no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1; see also TEX. CONST. art. I, § 3. The basic argument is that Section 166.049 violates the Equal Protection Clause because it treats pregnant women differently from everyone else. Thus, because Marlise Muñoz was pregnant at the time her doctors declared her brain-dead, her health care providers treated her differently than a brain-dead woman who is not pregnant. See Timothy J. Burch, Incubator or Individual?: The Legal and Policy Deficiencies of Pregnancy Clauses in Living Will and Advance Health Care Directive Statutes, 54 MD. L. REV. 528, 551–52 (1995); Katherine A. Taylor, Compelling Pregnancy at Death’s Door, 7 COLUM. J. GENDER & L. 85, 145–46 (1997).
15. For example, the Texas Penal Code defines an “individual” as a “human being who is alive, including an unborn child at every stage of gestation from fertilization until birth,” TEX. PENAL CODE ANN. § 1.07(a)(26) (West 2013). This definition would potentially allow a person to be charged with the criminal offense of murder if an unborn child is killed. Id. §§ 19.02, 19.03. Of course, this aspect of the Texas Penal Code is constitutionally suspect.
16. Manny Fernandez, Judge Orders Hospital to Remove Pregnant Woman From Life Support, N.Y. TIMES (Jan. 24, 2014), http://www.nytimes.com/2014/01/25/us/judge-orders-hospital-to-remove-life-support-from-pregnant-woman.html, archived at http://perma.cc/DRT8-A67B (reporting that the hospital argued it was reasonable to infer that the statute was also meant to protect the unborn child); see also Defendant’s Brief in Response to Plaintiff’s Motion to Compel at 3, Muñoz v. John Peter Smith Hosp., No. 096-270080-14 (96th Judicial Dist. Court, Tarrant Cnty., Tex. Jan. 23, 2014) (“[I]f the legislature intended for life sustaining treatment to be withdrawn, allowing the unborn child to die, it could have expressed this intent by adding a second sentence to section 166.049 to the effect that, upon the mother’s death, the healthcare providers must withdraw life sustaining treatment and let the unborn child die.”).
absolute and must be balanced with the state’s interest to protect the life of an unborn child.”

Ultimately, the trial court held that Section 166.049 of the Texas Health and Safety Code does not apply when a health care provider has declared a pregnant patient to be brain-dead and thus ordered the hospital to remove Marlise Muñoz’s body from all life-sustaining equipment. Pursuant to the trial court’s order, the doctors withdrew Marlise Muñoz’s life-sustaining equipment on January 26, 2014, when the fetus was twenty-two weeks old.

The situation the Muñoz family faced is not the first of its kind.


18. Judgment, Muñoz v. John Peter Smith Hosp., No. 096-270080-14 (96th Judicial Dist. Court, Tarrant Cnty., Tex. Jan. 24, 2014) [hereinafter Court’s Order]. In making its decision, the trial court looked to the statutory death standards as set forth in Section 671.001 of the Texas Health and Safety Code. Id. And, because the court held that Section 166.049 did not apply to Marlise Muñoz’s situation, the court did not rule on the constitutionality of the state law. Id.

19. Id. By the time of the court hearing in late January 2014, the Muñoz family disclosed that ultrasound exams “had revealed significant fetal abnormalities.” Ecker, supra note 6, at 890. In addition, during the pendency of the case, the hospital also acknowledged that Marlise Muñoz’s fetus was not viable. See Chappell, supra note 3.


22. Medical literature between 1982 and 2010 reveals thirty cases of brain-dead pregnant women who received continued life support in order to facilitate development of the fetus. Majid Esmaeilzadeh, et al., One Life Ends, Another Begins: Management of a Brain-Dead Pregnant Mother—A Systematic Review, BMC MEDICINE 8 (2010), available at http://www.biomedcentral.com/content/pdf/1741-7015-8-74.pdf, archived at http://perma.cc/7PSW-4CZ9. Of the reported cases, only twelve viable infants survived the neonatal period. Id. The mean gestational age at the time of the mother’s brain death was twenty-two weeks, and the mean gestational age at delivery was 29.5 weeks. Id. Since 2010, other cases involving a brain-dead pregnant woman have occurred. See Abuhasna Said, et al., A Brain-Dead Pregnant Woman With Prolonged Somatic Support and Successful Neonatal Outcome: A Grand Rounds Case With a Detailed Review of Literature and Ethical Considerations, 3 INTL J. OF CRITICAL ILLNESS AND INJURY SCI. 220, 220 (2013) (reporting a case where somatic support for 110 days lead to the delivery of a viable child.
and considering the advances in medical technology, it leads to a discussion of the treatment of a pregnant woman who has been declared brain-dead. So the legal question remains: should a pregnant woman who is legally and medically dead be forced to be kept on life support for the sake of her non-viable fetus? Arguably, the answer is no. In reaching this answer, Part I of this Article examines the current state legislation that governs withdrawing or withholding lifesustaining medical treatment from a pregnant woman, with a focus on both the Texas pregnancy exclusion that affected the Muñoz case and on a recent 2014 statutory amendment in Louisiana, neither of which adequately address the situation when a woman is brain-dead and


23. With advances in medical technology, another consideration is the expense for maintaining a woman’s body in order to deliver a fetus. In the Muñoz case, the hospital bill for continuing to carry the fetus and for post-birth hospital care could have totaled anywhere from $439,500 to $984,500. Sarah Wickline, A Brain-Dead Mother, a Million-Dollar Baby, MEDPAGE TODAY (Jan. 10, 2014), http://www.medpagetoday.com/OGBYNPregnancy/43736; archived at http://perma.cc/56XA-FW4Y. In this regard, “[i]nsurance coverage for a woman that has been declared brain dead is a gray area.” Id.; see also Robert Wilonsky, John Peter Smith Says Hospital Still Trying to Determine Who Will Pay for Brain-Dead Woman’s 62-Day Stay, DALLAS MORNING NEWS (March 14, 2014, 12:42 PM), http://thescoopblog.dallasnews.com/2014/03/john-peter-smith-says-hospital-still-trying-to-determine-who-will-pay-for-brain-dead-womans-62-day-stay.html; archived at http://perma.cc/W8EP-SDWE.

24. Situations in which a woman who is on life support can communicate her desire for the life support to be withdrawn and situations in which a pregnant woman with an advance directive is in a terminal condition or in a comatose or vegetative state are both beyond the scope of this Article. This Article addresses only the situation in which a woman is brain-dead and pregnant with a non-viable fetus. Although this situation may be rare, due to the Muñoz case state legislatures have started amending their advance directive statutes to address the situation. See infra Part I.B.
pregnant. In the event a statutory pregnancy exclusion applies to a woman who is brain-dead and pregnant, Part II addresses a woman’s constitutional rights that are relevant to this issue, including a woman’s right to abortion and a woman’s right to refuse life-sustaining treatment. Finally, Part III recommends changes to the state statutory schemes to expressly address a pregnant woman who has been declared brain-dead before her fetus is viable and also proposes language that should be included in a woman’s end-of-life decision-making documents. By making these necessary changes, health care providers will be able to honor a woman’s end-of-life wishes in the unfortunate event that she is brain-dead and pregnant.

I. STATE LEGISLATION GOVERNING LIFE-SUSTAINING MEDICAL TREATMENT FOR PREGNANT PATIENTS

In general, a medical advance directive allows a competent person to express his or her wishes concerning medical treatments in the event he or she can no longer communicate those wishes at the end of life, and all fifty states and the District of Columbia have

25. See supra note 14; see also infra notes 66–75.
26. A woman’s equal protection rights are also implicated. See supra text accompanying note 14.
28. Because the terminology used in state statutes varies from state to state, in this Article I use the phrase “advance directive” to globally refer to any end-of-life document that expresses a person’s wishes and desires in regard to medical treatment, e.g., a living will, a medical power of attorney, and a Do Not Resuscitate order. Further, “[w]hile advance directives typically apply to the living yet incompetent, they are arguably triggered by brain death as well” because the patient, while competent, expressed his or her desires as to what would happen when he or she can no longer communicate those desires. Alexis Gregorian, Post-Mortem Pregnancy: A Proposed Methodology for the Resolution of Conflicts over Whether a Brain Dead Pregnant Woman Should Be Maintained on Life-Sustaining Treatment, 19 ANNALS HEALTH L. 401, 412 (2010), available at http://lawecommons.luc.edu/annals/vol19/iss2/6, archived at http://perma.cc/UP4W-PHN7; see also Janice MacAvoy-Snitzer, Note, Pregnancy Clauses in Living Will Statutes, 87 COLUM. L. REV. 1280, 1284 (1987). In fact, although Marlise Muñoz’s death differs from the typical situation in which an advance directive is operative, i.e., when she did not have a written advance directive and when her death was impending, the hospital still applied the pregnancy exclusion in Section 166.049 of the Texas Health and Safety Code.
29. MacAvoy-Snitzer, supra note 28, at 1280 (“Living will statutes provide legislatively defined mechanisms for exercising the constitutional right to bodily integrity, which encompasses the right of competent individuals to designate the course of their medical
Many states, however, have included a pregnancy clause, or pregnancy exclusion, to their advance directive statutes to disallow the application of a woman’s advance directive when she is pregnant. In this regard, the Center for Women Policy Studies categorizes state statutes addressing pregnancy in this situation into four major categories. This Article will consider the following five categories:

1. The pregnancy exclusion automatically invalidates a woman’s advance directive, regardless of the stage of her pregnancy;
shall have no effect during the course of the declarant’s pregnancy.”); S.C. CODE ANN. § 44-77-70 (West 2014) (“If a declarant has been diagnosed as pregnant, the Declaration is not effective during the course of the declarant’s pregnancy.”); TEX. HEALTH & SAFETY CODE ANN. § 166.049 (West 2013); UTAH CODE ANN. § 75-2a-123 (West 2014) (“A health care directive that provides for the withholding or withdrawal of life sustaining procedures has no force during the course of the declarant’s pregnancy.”); WASH. REV. CODE ANN. § 70.122.030(1)(d) (West 2014) (“If I have been diagnosed as pregnant and that diagnosis is known to my physician, this directive shall have no force or effect during the course of my pregnancy.”); Wis. STAT. ANN. § 154.03 (West 2013) (“If you [the attending physician] know that the patient is pregnant, this document has no effect during her pregnancy.”).

34. The National Conference of Commissioners on Uniform State Laws drafted the Uniform Rights of the Terminally Ill Act and suggested a model law covering living wills where a person is in a terminal condition, and the suggested model law states that “[l]ife-sustaining treatment must not be withheld or withdrawn pursuant to a declaration from an individual known to the attending physician to be in a terminal condition 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.” UNIFORM RIGHTS OF THE TERMINALLY ILL ACT § 6(c) (1989), available at http://www.lawandbioethics.com/demo/Main/Media/Resources/UniformRightsOfTerminallyIllAct.pdf, archived at http://perma.cc/A3UR-GP3W. States taking this approach to pregnancy include the following: ALASKA STAT. ANN. § 13.52.055 (West 2014); ARIZ. REV. STAT. ANN. § 36-3262 (West 2014); ARK. CODE ANN. § 20-17-206(c) (West 2014); IOWA CODE ANN. § 14A.6(2) (West 2014); LA. REV. STAT. ANN. §§ 40:1299.58.10(E), 40:1299.64.6(D) (West 2014); MINN. STAT. ANN. § 145B.13(3) (West 2014); MONT. CODE ANN. § 50-9-106(7) (West 2014); NEB. REV. STAT. ANN. § 20-408 (West 2014); REV. STAT. ANN. § 449.624 (West 2014); N.H. REV. STAT. ANN. § 137-J:10 (West 2014); N.D. CENT. CODE ANN. § 23.06.5-09 (West 2013); OHIO REV. CODE ANN. § 1337.13 (West 2014); 20 PA. CONS. STAT. ANN. § 5429 (West 2014); R.I. GEN. LAWS ANN. § 23-4.11-6 (West 2014); S.D. CODIFIED LAWS § 34-12D-10 (West 2014).

35. COLO. REV. STAT. ANN. § 15-18-104 (West 2014); DEL. CODE ANN. tit. 16, § 2503(1) (West 2014); FLA. STAT. ANN. § 765.113(2) (West 2014); GA. CODE ANN. § 31-32.9(a)(1) (West 2014).

36. MD. CODE ANN. HEALTH-GEN. § 5-603 (West 2014); MINN. STAT. ANN. § 145B.13 (West 2014); N.J. STAT. ANN. § 26:2H-56 (West 2014) (“A female declarant may include in an advance directive, information as to what effect the directive shall have if she is pregnant.”); OKLA. STAT. ANN. tit. 63 § 3101.4 (West 2014); VT. STAT. ANN. tit. 18 § 9702(8) (West 2014).

A. Texas Advance Directive Pregnancy Exclusion

The seminal point in regard to the advance directive pregnancy exclusions explained above is that many state statutes arguably do not apply when the woman is brain-dead and pregnant with a non-viable fetus.38 This was the first argument made by Marlise Muñoz’s husband,39 and the court held that the advance directive pregnancy exclusion set out in Section 166.049 of the Texas Health and Safety Code did not apply to her situation because she was no longer a “patient” when brain-dead.40 Thus, the court in Muñoz v. John Peter Smith Hospital is the first Texas court to hold that a pregnancy exclusion does not apply to a woman who is brain-dead and pregnant.41 Accordingly, Section 166.049 of the Texas Health and Safety Code is the prime example to illustrate how the pregnancy exclusions categorized above should not apply when woman is brain-dead and pregnant with a non-viable fetus.42 It also reiterates the need for state legislatures to take action to clarify the applicability of their current pregnancy exclusions when a woman is brain-dead and pregnant.43

In Texas, the Texas Advance Directives Act (the “Texas Act”) sets out the statutory procedures by which a person may provide an “advance directive”44 to his or her physician regarding life-sustaining medical procedures in the event he or she has a terminal or irreversible condition.45 Under the Texas Act, a person may take three means...
First, a competent person may execute an advance directive, or living will, to physicians and family members to retain some control over medical decisions in the event of a terminal or irreversible condition. Second, a person may execute an out-of-hospital “Do Not Resuscitate” (DNR) order. And third, a person may execute a medical power of attorney, or healthcare proxy. If a person has not taken

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46. TEX. HEALTH & SAFETY CODE ANN. § 166.002(1)(a)–(c) (West 2013).
47. Id. § 166.002(4) (defining “competent” as “possessing the ability, based on reasonable medical judgment, to understand and appreciate the nature and consequences of a treatment decision, including the significant benefits and harms of and reasonable alternatives to a proposed treatment decision”).
48. Id. §§ 166.031–166.051. A “directive,” or living will, refers to an instruction to “administer, withhold, or withdraw life-sustaining treatment in the event of a terminal or irreversible condition.” Id. § 166.031(1). A person also may identify specific treatments that he or she does or does not want in specific circumstances. Id. § 166.033. In addition, in the directive a person may designate another person to make treatment decisions on his or her behalf in the event he or she becomes incompetent or otherwise incapable of communication. Id. § 166.033(c); see also TEX. HEALTH & SAFETY CODE ANN. § 166.038(b).

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49. TEX. HEALTH & SAFETY CODE ANN. §§ 166.081–166.101, 166.082(a) (DNR instructs health care professionals acting in an out-of-hospital setting to withhold some life-sustaining medical treatments). A statutory DNR form is provided, and like a person’s living will, a DNR may be unwritten. See id. §§ 166.083, 166.084.
50. Id. §§ 166.151–166.166. (medical power of attorney permits the designated agent to make health care decisions on behalf of the incompetent person’s behalf that the person
one of these steps to express his or her wishes, medical decisions regarding the withholding or withdrawing of life-sustaining treatment are entrusted a relative... guardian, or agent.51

Specifically in regard to a living will, under Section 166.049 of the Texas Health and Safety Code52 “[a] person may not withdraw or withhold life-sustaining treatment under this subchapter from a pregnant53 patient.”54 Thus, Texas is one of the states that automatically invalidates a pregnant woman’s end-of-life directive, regardless of the stage of pregnancy, and the statute does not allow any exception to the umbrella directive that doctors may not withdraw or withhold life-sustaining treatment when the patient is pregnant.55

The result is that pregnancy completely suspends the operation of an advance directive during the course of the pregnancy.56 Section 166.049, however, arguably does not apply to a woman who is brain-dead and pregnant and thwarts the stated wishes of the woman.57

could make if he or she was competent); see also id. § 166.152 (listing out certain exceptions to the health care decisions that a designated person can make, including the decision to abort a fetus); id. § 166.164 (providing a statutory form for a medical power of attorney).

51. See TEX. HEALTH & SAFETY CODE ANN. §§ 166.039, 166.088 (West 2013).

52. The sub-chapter addressing living wills states that it “does not impair or supersede any legal right or responsibility a person may have to affect the withholding or withdrawal of life-sustaining treatment in a lawful manner . . . .” Id. § 166.051. Thus, the Texas Act is nonexclusive and leaves other legal structures in place for situations not addressed in the Act. And arguably, because Marlise Muñoz did not have an effective written or non-written advance directive pursuant to Sections 166.023 and 166.034 of the Texas Health and Safety Code, the hospital should not have employed the pregnancy exclusion in Section 166.049 in the first place.

53. This raises the question: Must a health care provider be required to perform a pregnancy test on every patient of child-bearing years? The pregnancy exclusion suspends the effectiveness of an advance directive for a patient who is pregnant, not for a patient who knows she is pregnant. Id. §166.049 (referring only to a “pregnant patient”). Thus, a physician or health care provider would need to perform a pregnancy test on every patient of child-bearing years, whether or not she has the capacity to answer questions about her health status. See Anne E. Malley, TEX. FAM. L. SERV. § 52:26, Pregnancy (West 2010); see also Ecker, supra note 6, at 890 (explaining that the Muñoz’s attorney argued that “if the hospital’s approach were taken to its utilitarian conclusion, paramedics arriving at accident scenes would need to do on-site pregnancy tests to know which bodies to ventilate.”).

54. TEX. HEALTH & SAFETY CODE ANN. § 166.049 (West 2013); id. § 166.098 (“A person may not withhold cardiopulmonary resuscitation or certain other life-sustaining treatment . . . from a person known by the responding health care professionals to be pregnant.”). In regard to the drafting of Section 166.049, Thomas Mayo, an associate professor who assisted in its drafting, stated that “[i]t never would have occurred to us that anything in the statute applied to anyone who was dead. The statute was meant for making treatment decisions for patients with [only] terminal or irreversible conditions.” Jacque Mingle, States Differ on Whether Living Wills Are Followed During Pregnancy, BOGUTZ & GORDON (Jan. 31, 2014), http://bogutzandgordon.com/states-differ-on-whether-living-wills-are-followed-during-pregnancy/, archived at http://perma.cc/A7ZF-TBN5.

55. See TEX. HEALTH & SAFETY CODE ANN. § 166.049 (West 2013).

56. Id.

57. Id.
In this regard, a consideration of basic statutory construction leads to the conclusion that Section 169.049 requires that only a living pregnant woman be kept alive; it does not require that a woman who is both brain-dead and pregnant be subjected to treatment.

Because an advance directive refers to an instruction to "administer, withhold, or withdraw life-sustaining treatment in the event of a terminal or irreversible condition," several other definitions are relevant to construing the Texas pregnancy exclusion and determining whether or not it applies to a woman who is brain-dead and pregnant. As defined in the Texas Act, "life-sustaining treatment' means treatment that, based on reasonable medical judgment, sustains the life of a patient and without which the patient will die."

58. In determining the legislative intent behind a statute, the court should first examine the plain language of the statute. Hernandez v. Ebrom, 289 S.W.3d 316, 318 (Tex. 2009). Thus, where the language of the statute is unambiguous and its meaning is clear, the court should give effect to the statute according to its literal terms. Id. If the court cannot discern legislative intent from the plain language of the statute, then the court may utilize the canons of construction and other extrinsic aids for guidance in determining the statute's meaning. See, e.g., Texas Lottery Comm'n v. First State Bank of DeQueen, 325 S.W.3d 628, 637–38 (Tex. 2010). Yet, when the application of the statute's plain language would lead to absurd consequences that the legislature could not possibly have intended, a court should not apply the literal language. Ex parte Noyola, 215 S.W.3d 862, 866–67 (Tex. Crim. App. 2007). In addition to common-law canons, Texas has statutory guidelines for statutory construction. See TEX. GOV'T CODE ANN. § 311.023 (West 2013).


60. TEX. HEALTH & SAFETY CODE ANN. § 166.031(1) (West 2013).

61. Id. § 166.002(10) (emphasis added). Further, "[t]he term includes both life-sustaining medications and artificial life support, such as mechanical breathing machines, kidney dialysis treatment, and artificial nutrition and hydration. The term does not include the administration of pain management medication or the performance of medical procedure considered to be necessary to provide comfort care, or any other medical care provided to alleviate a patient’s pain." Id. (emphasis added).
In addition, "‘terminal condition’ means an incurable condition caused by injury, disease, or illness that according to reasonable medical judgment will produce death within six months, even with available life-sustaining treatment provided in accordance with the prevailing standard of medical care." Furthermore:

irreversible condition means a condition, injury, or illness: (A) that may be treated but is never cured or eliminated; (B) that leaves a person unable to care for or make decisions for the person’s own self; and (C) that, without life-sustaining treatment provided in accordance with the prevailing standard of medical care, is fatal.

Moreover, the Texas pregnancy exclusion uses the terms "life-sustaining treatment" and "patient," so the literal language of the exclusion itself requires that the person must be living in order for him or her to be subjected to life support.

Thus, based on the express language of the statutory definitions relevant to Section 166.049 and based on the plain language of Section 166.049, the pregnancy exclusion does not apply when a woman is legally dead under Texas law and pregnant with a non-viable fetus. Indeed, the concept of "life support" for someone who has been declared brain-dead is an oxymoron because the life of the "patient" can no longer be sustained; he or she is legally and medically dead and is not a "patient." Accordingly, the Texas pregnancy exclusion does not apply to a situation in which a woman is brain-dead and pregnant. Similarly, comparable pregnancy exclusions across the country also should not apply to such a situation.

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62. Id. § 166.002(13) (emphasis added).
63. Id. § 166.002(9) (emphasis added).
64. Id. § 166.049.
65. MacAvoy-Snitzer, supra note 28, at 1281 (explaining that in a typical statute, life-sustaining treatment refers to treatment that only "prolongs the dying process").
66. Section 671.001 of the Texas Health and Safety Code states, in relevant part:
(a) A person is dead when, according to ordinary standards of medical practice, there is irreversible cessation of the person’s spontaneous respiratory and circulatory functions. (b) If artificial means of support preclude a determination that a person’s spontaneous respiratory and circulatory functions have ceased, the person is dead when, in the announced opinion of the physician, according to ordinary standards of medical practice, there is irreversible cessation of all spontaneous brain function. Death occurs when the relevant functions cease.
TEX. HEALTH & SAFETY CODE ANN. § 671.001 (West 2013). In the Muñoz case, there was no dispute that Marlise Muñoz was brain-dead as of November 28, 2013. Plaintiff’s Petition, supra note 1, at 3.
67. TEX. HEALTH & SAFETY CODE ANN. § 166.002(10).
68. See infra Part II.B.
69. The outcome of issues surrounding the Louisiana pregnancy exclusion statute
**B. Louisiana’s 2014 Statutory Amendment**

In response to the issues raised by the case in Texas involving Marlise Muñoz,\(^{70}\) in early 2014 the Louisiana legislature acted swiftly to address the exceptional situation in which a pregnant woman is declared brain-dead.\(^{71}\) House Bill 1274, passed by the Louisiana state legislature in early June\(^ {72}\) and signed into law by the Governor on June 23, 2014,\(^ {73}\) “essentially prohibits withdrawing life support for a pregnant woman if the obstetrician has determined that the fetus is at least 20-weeks gestation and that the pregnant woman’s bodily functions can reasonably be maintained to support the continued development and live birth of the fetus.”\(^ {74}\)

In general, under Louisiana’s advance directive law “all persons have the fundamental right to control the decisions relating to their own medical care.”\(^ {75}\) In this regard, “[a]ny adult person may, at any time, make a written declaration directing the withholding or withdrawal of life-sustaining procedures in the event such person should have a terminal and irreversible condition.”\(^ {76}\) Furthermore, the

showcases why pregnancy exclusions should not apply to the situation in which a woman is brain-dead and pregnant. See infra Part II.B.


72. The House passed the bill 87 to 1, and the Senate passed it 31 to 2. Id.

73. The effective date of the statute was June 23, 2014, which is the day Governor Jindal signed the law. Id.

74. Imani Gandy, *Vague Louisiana Bill Would Force Brain-Dead Pregnant Women to Serve as Incubators*, RH REALITY CHECK (June 9, 2014, 4:59 PM), http://rhrealitycheck.org/article/2014/06/09/vague-louisiana-bill-force-brain-dead-pregnant-women-serve-incubators, archived at http://perma.cc/S27K-APF8. Senator J.P. Morrell “proposed an amendment to the bill that would have allowed [the patient’s] family members to make end of life decisions.” Kim, supra note 70. The amendment passed in the Senate, but it was then rejected by a conference committee comprised of both House and Senate legislators. Id.


76. Id. § 40:1299.58.3(A). Similar to the definition in the Texas Advance Directive Act, a “life-sustaining procedure” is one that “within reasonable medical judgment, would serve only to prolong the dying process for a person diagnosed as having a terminal and irreversible condition . . . .” Id. § 40:1299.58.2(8) (emphasis added). In addition: “terminal and irreversible condition” means a continual profound comatose state with no reasonable chance of recovery or a condition caused by injury, disease, or illness which, within reasonable medical judgment, would produce death and for which the application of life-sustaining procedures would serve only to postpone the moment of death.

Id. § 40:1299.58.2(14) (emphasis added). If a woman, however, has experienced an irreversible total cessation of brain function, she will be considered “dead” in Louisiana, and thus the terms used in the amendment are inapplicable. See id. § 9:111.A.
Proposed by State Representative Austin Badon, House Bill 1274 amended Section 40:1299.58.10 of the Louisiana Code and states:

It is the policy of the state of Louisiana that human life is of the highest and inestimable value through natural death. When interpreting this Part, any ambiguity shall be interpreted to preserve human life, including the life of an unborn child if the qualified patient is pregnant and an obstetrician who examines the woman determines that the probable postfertilization age of the unborn child is twenty or more weeks and the pregnant woman’s life can reasonably be maintained in such a way as to permit the continuing development and live birth of the unborn child, and such determination is communicated to the relevant classes of family members and persons designated in R.S. 40:1299.58.5.

Arguably, as with the Texas pregnancy exclusion, this recent amendment in Louisiana does not apply to a woman who is brain-dead and pregnant. First, the added language is qualified by the pre-existing language “[w]hen interpreting this Part, any ambiguity shall be interpreted to preserve human life . . . .” Because a person can make a written declaration as to when to withhold or withdraw life-sustaining equipment, the amendment would apply only when a

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77. LA. REV. STAT. ANN. § 40:1299.58.3 (2014).
78. House Bill 1274 also amends § 40:1299.64.6(D) of the Louisiana Code. See H.B. 1274, supra note 71.
79. Id. Incorporating a reference to twenty weeks gestation makes the law similar to a twenty-week abortion ban, which is currently the legal cutoff for abortion in Louisiana. LA. REV. STAT. ANN. § 40:1299.30.1.E (2014). In addition, the amended statute permits “the continuing development and live birth of the unborn child” regardless of the wishes of the mother’s spouse and other immediate family. H.B. 1274, supra note 71.
80. LA. REV. STAT. ANN. § 40:1299.58.10.E (amending the statute by adding all of the language after “shall be interpreted to preserve human life”).
woman has not expressed her wishes in an end-of-life document or when her fetus is twenty or more weeks old. In other words, under any circumstance a woman could override the amended statute if: (1) she expresses her wishes in writing in an end-of-life document, or (2) the fetus is under twenty weeks old. Second, the amendment expressly refers to a “qualified patient” and explains that an obstetrician must examine the woman and determine that her “life can reasonably be maintained.” But, after a physician or other health care provider declares a pregnant woman “brain-dead,” the woman’s “life” cannot be maintained because she would be legally dead. As a result, although the Louisiana legislature took action in response to the Muñoz case, the amended statute does not provide any clarity when a woman is brain-dead and pregnant.

II. CONSTITUTIONAL RIGHTS IMPLICATED IF THE PREGNANCY EXCLUSIONS APPLY TO A WOMAN WHO IS BRAIN-DEAD AND PREGNANT

As described above, although the state pregnancy exclusions should not be applicable to a woman who is brain-dead and pregnant, the impact of these statutes would be substantial if they are broadly interpreted to encompass a brain-dead and pregnant woman. Accordingly, a thorough analysis of the state pregnancy exclusions necessitates an examination of the long line of legal precedent that has established certain women’s constitutional rights. First, a woman’s

83. See id.
84. However, nothing “shall be construed to be the exclusive means by which life-sustaining procedures may be withheld or withdrawn.” Id. § 40:1299.58.1.A(4). Thus, when a woman does not have a written advance directive that includes specific instructions in the event she is pregnant, she should be able to express her wish in some other way, e.g., by telling her spouse or another family member.
85. See Kim, supra note 70.
86. A “qualified patient” refers to “a patient diagnosed and certified in writing as having a terminal and irreversible condition by two physicians who have personally examined the patient, one of whom shall be the attending physician.” La. Rev. Stat. § 40:1299.58.11(1) (2014).
87. Id. § 40:1299.58.10.E.
88. To date, no state or federal court has addressed the specific issue of whether or not pregnancy exclusions can withstand constitutional scrutiny.
constitutional right to have an abortion\textsuperscript{90} is implicated in the situation when a woman is brain-dead and pregnant. Second, a woman’s fundamental right to refuse medical treatment is implicated under these circumstances.\textsuperscript{91}

A. Right to Terminate a Pregnancy

Certain fundamental rights are protected despite the lack of express language in the Constitution or Bill of Rights.\textsuperscript{92} One such right is the right to privacy, which is “founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action.”\textsuperscript{93} The scope of this constitutional right likely determines the constitutionality of statutory pregnancy exclusions, and thus Roe and Casey must be analyzed in order to provide context for dealing with the situation in which a woman is brain-dead and pregnant.\textsuperscript{94}

In Roe v. Wade, the United States Supreme Court held that a fundamental right to privacy under the Due Process Clause of the Fourteenth Amendment ensured a woman’s right to privacy, which is broad enough to encompass a woman’s right to have an abortion.\textsuperscript{95} The Court used a temporal framework in order to balance the state’s


\textsuperscript{91} See Cruzan v. Dir., Missouri Dep’t of Health, 497 U.S. 261 (1990). In addition to a woman’s constitutional right to terminate a pregnancy and her right to forego medical treatment, a woman’s equal protection rights may be implicated if the pregnancy exclusions apply to a woman who is brain-dead and pregnant. See supra note 14 and accompanying text.


\textsuperscript{93} Roe, 410 U.S. at 153; see also Griswold, 381 U.S. at 485–86 (recognizing the right to privacy in regard to procreation and invalidating a state provision that prohibited a married couple’s use of contraceptives).

\textsuperscript{94} See, e.g., Johnson, supra note 89, at 218.

\textsuperscript{95} Roe, 410 U.S. at 152–53; see also Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (recognizing that “[i]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”). But see Webster v. Reprod. Health Servs., 492 U.S. 490, 517–20 (1989) (holding that a state statute limiting the use of public employees and facilities for abortions is not an unconstitutional burden on a woman’s right to an abortion and allowing the state to regulate abortions during the second trimester).
interest in a fetus and the mother’s right to control her own body. The Court explained that the state’s interest increased as prenatal life advanced. Roe, 410 U.S. at 163–66. If a woman is less than one trimester into her pregnancy, the state does not have a legitimate interest to interfere with her decision to continue with the pregnancy or to terminate her pregnancy. Id. at 162–63.

97. Id. at 164–65.

98. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 872-73 (1992). In general, the plaintiff in Casey challenged several provisions under The Pennsylvania Abortion Act, including a spousal notification rule requiring a woman to give prior notice to her husband, a required 24-hour waiting period, and an informed consent rule requiring a woman to receive information about the health risks related to the abortion procedure. Id. at 844–45.

99. Id. at 860–61; City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 428 (1983) (quoting Roe, 410 U.S. at 163) (defining “viability” as “the point at which the fetus ‘has the capability of meaningful life outside of the mother’s [uterus]’”); Burch, supra note 14, at 545 n.111 (quoting Mary Mahowald, Beyond Abortion: Refusal Caesarean Section, 3 Bioethics 106, 111 (1989)) (viability means that “the fetus’s condition is such that it can survive after birth with help from neonatal intensive care”).

100. Casey, 505 U.S. at 870–71.

101. Id. at 860.

102. Id. at 874–77 (explaining that the strict scrutiny standard no longer applied to abortion law and defining the “undue burden” standard as “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus”).

103. Id. at 860. In this regard, currently forty-two states have enacted abortion restrictions at different stages of pregnancy. State Policies in Brief: An Overview of Abortion Laws, Guttmacher Institute (Aug. 2014), http://www.guttmacher.org/sections/abortion.php, archived at http://perma.cc/P25H-8FHR. Although, state gestational limits that are less than viability are constitutionally suspect under both Roe and Casey. See, e.g., Ark. Code Ann. § 20-16-1304 (West 2013) (banning abortion at twelve weeks of pregnancy, when a fetal heartbeat can typically be detected); N.D. Cent. Code Ann. § 14.02.1-05.1 (West 2012) (banning abortion as soon as a heart beat is detectable). Of course, both the Arkansas and North Dakota laws have been challenged in court as being unconstitutional, and the courts have prevented them from going into effect while the cases move through the appellate court system. See MKB Mgmt. Corp. v. Burdick, 954
Accordingly, a state cannot impose an “undue burden” on a woman’s ability to make a decision to terminate her pregnancy without violating her Due Process rights.104 A state may, however, enact laws to ensure “informed consent.”105

B. Right to Refuse Medical Treatment

It is also well established in common law that a competent or incompetent person has the right to refuse or forego medical treatment,106 and this right “usually parallels analysis of the privacy rights found in Griswold and Roe.”107 This right is based on the doctrine of informed consent and generally encompasses “the right of a competent individual to refuse medical treatment.”108

For example, in Cruzan v. Director, Missouri Department of Health, Nancy Cruzan suffered brain damage due to oxygen deprivation after she was involved in a car accident.109 The hospital used
life-sustaining equipment because she was in a persistent vegetative state.110 Prior to the accident, she had verbally expressed her wish not to be on life support in the event she was injured; therefore, her parents requested that the doctors withdraw the life-sustaining medical treatment.111 In its decision, the Court recognized that a person has a constitutionally protected liberty interest to refuse life-sustaining medical treatment and also suggested that living will statutes are constitutional.112 Further, the Court held that the State could require clear and convincing evidence proving that the patient had a desire to have life-sustaining medical treatment withheld or removed.113

C. University Health Services, Inc. v. Piazzi

Although a woman has the constitutional right to terminate a pregnancy and the right to refuse medical treatment, the existence of a pregnant woman’s privacy interests is less clear in the instance where an advance directive is triggered by a doctor declaring her brain-dead.114 The main case that addresses this specific issue is University Health Services, Inc. v. Piazzi, in which the hospital filed
a petition for a declaratory judgment asserting that life support systems should be maintained for Donna Piazzi to preserve the life of her unborn child. 115 In late June of 1986, Donna Piazzi, who was pregnant at the time, was transported to the hospital in an unconscious condition, and at some point after her condition deteriorated, her physician declared her brain-dead. 116 Unfortunately, her end-of-life wishes were unknown. 117 And, by July 25th the fetus was 20½ weeks, but her physician determined that the fetus was not viable because it was not capable of surviving outside of her womb. 118 A dispute arose because Donna Piazzi’s husband, who was undisputedly not the father of the unborn child, requested that the hospital withhold life-sustaining medical treatment, which would render death to the fetus. 119 The unborn child’s father, however, “requested that the hospital maintain life support systems for Donna Piazzi in order that the fetus [could] be given the opportunity to develop and survive.” 120

In its findings of fact, the court explained that “[t]here exists a reasonable possibility that with continued life support Donna Piazzi’s body can remain functioning until the point that the fetus would be viable and could be delivered with a reasonable possibility of survival.” 122 Further, the findings of fact stated that “[i]f the fetus is delivered and survives there is a possibility it will suffer from abnormalities such as mental retardation, but it was and is impossible to determine the existence of such abnormalities prior to birth.” 123

In general, the Piazzi court held that any constitutional privacy rights Donna Piazzi possessed were extinguished by her death. 124


117. Sperling, supra note 115, at 336.

118. Piazzi Order, supra note 116, at 416.

119. Id. at 416. Also, the Division of Family and Children Services argued that the court did not have jurisdiction in the case because the decision should be a medical decision and not a legal decision. Id. The court, however, held that it did have “jurisdiction to decide whether the life of the unborn fetus should be protected.” Id. at 416–17.

120. Id. at 416.

121. Piazzi Order, supra note 116, at 416. The court appointed a guardian ad litem to “represent the interest of the unborn child. The guardian ad litem request[ed] that life support systems be maintained.” Id.

122. Id.

123. Id.

124. Id. at 417–18 (citing Roe v. Wade for the proposition that a “state may assert interest in protecting potential life,” but not providing any authority for concluding that Donna Piazzi did not have any interest at all).
other words, the court decided that she no longer had any interests, so her wishes (had she expressed any) were irrelevant.125 The court also looked to case law and the Georgia statute that specifically restricted the effect of a living will when a woman is pregnant and found that the State supported the policy of protecting life.126 The court explained that the “public policy in Georgia requires the maintenance of life support systems for a brain dead mother so long as there exists a reasonable possibility that the fetus may develop and survive.”127 The court, however, failed to cite any specific authority for the proposition that a woman’s constitutional privacy rights, e.g., the right of a woman to abort a non-viable fetus, are extinguished upon brain death.128 And, at no point did the court address any other legally recognized interests that remain after death129 or how the State could have a compelling interest in a non-viable fetus.130 Moreover, the court implied that even if Donna Piazzi did have a right to privacy under these circumstances, any interest she had would be irrelevant under the Georgia living will statute.131 Of course, the applicability of a

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125. Some scholars have argued that upon death, a patient ceases to be a person “in the eyes of the law,” and thus his or her right to determine what happens no longer exists. Gregorian, supra note 28, at 404 (citing Nicola S. Peart et al., Maintaining a Pregnancy Following Loss of Capacity, 8 MED. L. REV. 275, 291 (2000)); Sperling, supra note 115, at 479; David R. Field, et al., Maternal Brain Death During Pregnancy: Medical and Ethical Issues, 260 JAMA 816, 821 (1988); Norman Post & Laura M. Purdy, Case Study: The Baby in the Body, 24 HASTINGS CTR. REP. 31, 32 (1994)). Others argue that “a constitutional right to make future directives that bind oneself directly or through an agent has no constitutional precedent and poses many problems.” John A. Robertson, Advance Directives, Rights, and Brain Death Pregnancies, BILL OF HEALTH (Mar. 24, 2014), http://blogs.law.harvard.edu/billofhealth/2014/03/24/advance-directives-rights-and-brain-death-pregnancies/, archived at http://perma.cc/3EPX-WDF7 (arguing that “there is no constitutional right to make a directive at Time 1 that binds at Time 2”). Yet, the American legal system promotes other interests that are protected after death, and the right to refuse medical treatment should apply after death as well. See MacAvoy-Snitzer, supra note 28, at 1297–98. For example, a parent’s interest in child rearing also can transcend death in the case of guardianship appointments. Id. at 1298.


127. Id. at 418.

128. Id.

129. See MacAvoy-Snitzer, supra note 28, at 1297–98; Sperling, supra note 115, at 480 (“[T]he view that a brain-dead patient is deprived of rights or interests, and exists solely as a corpse . . . goes against most of our societal norms, which accord great respect and reverence for the dead and sanctity for their bodies.”); Jordan, supra note 89, at 1165 (“Brain death does not extinguish the rights of a woman over her body, because a statutory standard of death cannot arbitrarily limit a fundamental constitutional right, and because her bodily control also derives from a posthumous property right in her own cadaver.”); Kirsten Rabe Smolensky, Rights of the Dead, 37 HOFSTRA L. REV. 763, 771–72 (2008) (discussing that courts have recognized that persons who are medically dead still have certain constitutional rights).

130. MacAvoy-Snitzer, supra note 28, at 1298; Piazzi Order, supra note 116, at 418.

pregnancy exclusion to a pregnant woman who has been declared brain-dead would vary from state to state.132

D. Application to Pregnancy Exclusions

Based on legal precedent establishing a woman’s rights, certain categories of statutory pregnancy exclusions arguably violate a woman’s constitutional right to terminate a pregnancy and to refuse medical treatment.133 First, pregnancy exclusions that automatically invalidate a woman’s advance directive impose a substantial obstacle in the path of a woman seeking to terminate her pregnancy when the fetus is non-viable, and thus likely violate the “undue burden” test set forth in Casey.134 Moreover, these overly broad exclusions create a problem when a woman is brain-dead and pregnant: the woman is obviously unable to communicate her current wish to have what could be a legal abortion.135 This is the same result for those states that have a statute with suggested language from the Uniform Rights of the Terminally Ill Act (URITA).136 The terms “probable” and “live birth” are vague and overbroad because any stage of pregnancy may fall under this umbrella language.137 In other words, doctors could consider a woman who is only four weeks pregnant to have a fetus that will reach the “probable live birth” stage.138 As a result, denying enforcement of an advance directive when a brain-dead woman is pregnant with a nonviable fetus appears to be an “undue burden” on both her right to terminate a pregnancy and her right to refuse

132. GREENE & WOLFE, supra note 32, at 3–5.
133. See supra notes 33, 34 (listing state statutes that automatically invalidate an advance directive and listing state statutes that follow the potential for “live birth” approach).
134. GREENE & WOLFE, supra note 32, at 5. In other words, the statutes that automatically invalidate a pregnant woman’s living will or advance directive and the statutes that may invalidate a woman’s wishes when her fetus is not viable arguably violate both a woman’s right to terminate her pregnancy and her right to refuse life-sustaining treatment.
135. Id. In addition, the pregnancy exclusion in twelve states does not distinguish between being a day pregnant and being eight months pregnant. This creates a problem because “[t]reating all instances of pregnancy as voiding a woman’s right not to be treated is far too broad an intrusion on her autonomy, privacy and liberty,” and “even when applied correctly, [the law] affords no choice in the face of uncertainty and doubt about the health of the fetus, which reasonable people might have.” Caplan & Pope, supra note 5.
136. Id. at 5–6.
137. Id.; see also supra note 33 (listing states that follow the URTIA approach).
138. This also creates uncertainty in the medical field because doctors cannot determine when a non-viable fetus has developed to the point in which it will have a “probable live birth.” GREENE & WOLFE, supra note 32, at 6.
medical treatment. Indeed, only when a fetus has become viable may the state’s interest in the fetus become compelling.\textsuperscript{139}

Furthermore, the few states that use the term “viability” in pregnancy exclusions may also have an inherent problem with the application of the law.\textsuperscript{140} The problem is that society continues to debate what the term “viability” actually means.\textsuperscript{141} Courts are reluctant to define “viability,”\textsuperscript{142} and the scientific community continues to disagree about when a fetus becomes viable.\textsuperscript{143} In addition, this language puts doctors in the position of having to determine viability on a case-by-case basis, thus putting them “in charge of determining the fate of their patients.”\textsuperscript{144}

Finally, in states where the laws do not address a woman’s rights in the event she is pregnant when doctors declare her brain dead, women are left even more uncertain about whether their end-of-life wishes will be honored.\textsuperscript{145}

\textbf{III. RECOMMENDATIONS}

The current state advance directive statutes are inadequate in addressing the dilemma posed by the \textit{Muñoz v. Joseph Peter Smith Hospital} case. A woman should not have to forfeit her end-of-life decision-making power to the state when doctors have declared her brain-dead, as she deserves to have her wishes honored and her constitutional rights respected in the event she suffers brain death when pregnant with a nonviable fetus.\textsuperscript{146}

The changes that are necessary to clarify the current pregnancy exclusions involve a two-step process. First, each state legislature should pass a statute or amend the current pregnancy exclusion.\textsuperscript{147} Second, legislatures should amend any statutory forms that relate to end-of-life decisions. Similarly, attorneys who draft end-of-life documents for their female clients who are of child-bearing age should include specific language addressing the situation in which a woman

\begin{itemize}
\item \textsuperscript{140} Greene & Wolfe, \textit{supra} note 32, at 6.
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Id.
\item \textsuperscript{143} Id.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Id.
\item \textsuperscript{146} Gregorian, \textit{supra} note 28, at 419.
\item \textsuperscript{147} See Burch, \textit{supra} note 14, at 565–70.
\end{itemize}
is brain-dead and pregnant. In addition, health care providers should discuss the issue with their female patients.148

A. Changes to Pregnancy Exclusions

State legislatures first need to propose legislation proactively to create or amend pregnancy clauses to clarify what doctors and hospitals should do when a woman is brain-dead and pregnant.149 The specific solution for each state legislature will depend, of course, on the state’s current approach to the effect of pregnancy on a woman’s advance directive.150

To clear up any potential ambiguity about whether the pregnancy exclusion applies to a brain-dead woman, a simple solution is to add a line into the provision that nullifies it if the woman has been declared brain-dead.151 Using the current Texas pregnancy exclusion as an example, the revised statute could readily be amended by adding a new subsection (b):

(a) A person may not withdraw or withhold life-sustaining treatment under this subchapter from a pregnant patient.

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148. Some health care providers are required to discuss advance directives in general with their patients. See GREENE & WOLFE, supra note 32, at 2–3 (explaining that following Cruzan Congress passed the Patient Self-Determination Act of 1991, which requires certain health care providers receiving federal Medicare or Medicaid funds to discuss an advance directive with all adult patients).

149. See Burch, supra note 14, at 566–70; see also Jordan, supra note 89, at 1159–60.

150. States should not, however, take the Louisiana approach when drafting or revising statutory language. The Louisiana amendment in 2014 did not clarify the application of the law to a woman who is brain dead and pregnant. See discussion supra Part I.B. And, legislatures should be mindful that the constitutionality of pregnancy exclusions when applied to a woman who is pregnant in a coma or in a permanent vegetative state is also highly questionable. See discussion supra Part II.

151. Two Texas representatives plan to review the pregnancy exclusion during the 2015 legislative session. See Muñoz Case Could Bring Changes to Texas Health Code, WFAA (Jan. 27, 2014, 8:04 PM), http://www.wfaa.com/news/health/2014/08/20/14162268, archived at http://perma.cc/C2HJ-5QK2. Representative Garnet Coleman (D-Houston) thinks the simple fix is to add a line into the statute that nullifies it if the pregnant woman has already been declared dead. Id. On the other hand, Representative Matt Krause (R-Fort Worth) wants to add more protections for the fetus and prefers to have a guardian appointed to protect the interest of the fetus. See H.B. 1901, 84th Leg. Reg. Sess. (Tex. 2015); see also Jason Wheeler, Fort Worth End-of-Life Case May Weigh on Legislation, WFAA (Nov. 16, 2014, 12:36 PM), http://www.wfaa.com/story/news/local/tarrant-county/2014/11/17/marli-munoz-case-may-spur-legislation-in-next-session-in-austin/19155891/, archived at http://perma.cc/J4TD-F83L (explaining on Inside Texas Politics that the bill would require a special legal guardian be appointed in future pregnancy life support situations to represent the fetus). Yet, if the woman is pregnant with a non-viable fetus, the State probably does not have a “compelling interest” in the potential life of the fetus. See discussion supra Part II.A.
(b) Subsection (a) does not apply to a woman who has been declared brain-dead pursuant to section 671.001 of this Code.152

This proposed language is explicit so that neither the doctor nor the hospital will question the applicability of the pregnancy exclusion to a woman who is brain-dead.153

If a state legislature prefers to apply the pregnancy exclusion to a woman who has been declared brain-dead, the statutory language must still comport with the woman’s rights.154 Thus, one potential approach is to include language that hinges on the viability of the fetus.155 The viability approach would balance the pregnant woman’s interests and rights against the state’s interests in the woman’s fetus and would make the pregnancy exclusion consistent with the viability distinction in the abortion context.156

Finally, as an alternative to using viability language, at a minimum, a state legislature should make the applicability of the pregnancy exclusion consistent with the state’s abortion law.157 For example, if a state allows a woman to have an abortion up to 22 weeks, then the pregnancy exclusion provision should allow the woman’s advance directive to be effective if the woman is less than 22 weeks pregnant.158 Overall, this approach will promote uniformity of laws. By crafting a statute that includes language that is consistent with the temporal framework of the state’s abortion law,159 the legislatures would lift the burden from doctors because they will have an objective

152. See TEX. HEALTH & SAFETY CODE ANN. § 166.049 (West 2013). And, because the proposed language in subsection (b) would also apply to a brain-dead woman who is pregnant with a viable fetus, a state legislature may choose to add additional language to narrow its application.

153. This proposed language solves the issue when a woman is brain-dead and pregnant. As previously discussed, the constitutionality of the actual pregnancy exclusion may still be questioned. See discussion supra Part II.

154. See discussion supra Parts II.A, II.B.

155. Admittedly, the “viability” standard may still pose problems, see supra Part II.A, but using viability as a benchmark would at least make the pregnancy exclusion constitutional when it comes to the application to a woman who is brain-dead and pregnant.


157. This approach assumes that the state’s abortion law is constitutional.

158. Louisiana’s recent amendment does take this approach to the age of the fetus, but other problems with the added statutory language render it inapplicable to a woman who is brain-dead and pregnant. See discussion supra Part I.B.

159. This forces the question: Do the requirements for a valid living will satisfy the informed-consent requirements? See Sperling, supra note 115, at 486–90; see also Sisti, supra note 10, at 164. To ensure that any potential problem with informed consent is addressed, it would be prudent to include a provision in the advance directive that the woman has complied with the informed consent laws of the state, and a woman could also sign her advance directive after she has waited for the required time period to comply with any informed consent law. Sisti, supra note 10, at 164.
way of determining whether to withhold or withdraw the woman’s life-sustaining treatment when she has been declared brain-dead.  

In any event, state legislatures should endeavor to either express that a pregnancy exclusion (1) does not apply to a woman who is brain-dead and pregnant, (2) applies only if the brain-dead woman is pregnant with a viable fetus, or (3) applies only if the brain-dead woman is less than a certain number of weeks pregnant, consistent with the state’s abortion law. The failure to make changes to the current statutory schemes will result in a woman’s end-of-life wishes not being honored and will leave doctors and hospitals second-guessing the intent of the pregnancy exclusion.  

B. Changes to Language in Advance Directives

In addition to the state legislatures enacting changes to their pregnancy exclusions, specific language in a woman’s end-of-life documents should be included to express her end-of-life wishes in the event she is pregnant when she is declared brain-dead. Accomplishing this change will require statutory changes to suggested or mandatory advance directive forms as well as changes to the way attorneys and health care providers proactively discuss the rare and unfortunate situation with their respective clients and patients.

First, for further consistency, any advance directive forms in a state’s statutory scheme should be amended to include language addressing the potential for brain death and pregnancy.  

In this regard, the statutory forms should include a special provision contemplating pregnancy and expressing the woman’s wish for life-sustaining treatment to be withheld or withdrawn even if she were pregnant. Such language in the forms should be consistent with the overall approach the state legislature takes; for example, if a state takes the viability approach discussed in Part III.A, the language in the statutory form could read as follows:

If a physician should declare my brain death while I am pregnant, and if at the time of my brain death a physician determines that

160. See Burch, supra note 14, at 566 n. 231.
161. See supra text accompanying note 151.
163. See Burch, supra note 14, at 565–68 (explaining a broader proposal that would address the effect of an advance directive during pregnancy).
to a reasonable degree of medical certainty the fetus is not viable,
then I wish that life-sustaining medical treatment be withheld
or withdrawn and that the fetus be allowed to die naturally in
my body.

Second, attorneys and health care providers need to be proactive
when communicating with a woman of child-bearing age when she
plans her end-of-life documents.\textsuperscript{164} Attorneys should include a ques-
tion on their advance directive checklist and discuss the issue during
the initial interview with any woman of child-bearing age.\textsuperscript{165} Simi-
larly, because advance directives instruct health care providers about
medical care that a person would or would not want to have in the
event he or she becomes incompetent, health care providers should
discuss the issue during their standard prenatal interview. By dis-
cussing a woman’s wishes in the event she is declared brain-dead
when pregnant and then having the woman execute the appropriate
end-of-life documents, no one will have to question her wishes later.\textsuperscript{166}

\textsuperscript{164.} See Greene & Wolfe, supra note 32, at 7 (suggesting an amendment to the Patient
Self-Determination Act in order to require health care providers to inform a woman of
her rights when creating her advance directive, as the Act provides no guidance on the
issue of pregnancy exclusions).

\textsuperscript{165.} As previously mentioned, an attorney may want to include a provision in the ad-
vance directive that the woman has complied with the informed consent laws of the state,
to the extent she can considering she may not be pregnant when she executes the advance
directive. See supra text accompanying note 159.

\textsuperscript{166.} Unfortunately, the large majority of the population does not have a written, ad-
vance directive. Glenn Cohen, Negotiating Death: ADR and End of Life Decision-Making,
9 Harv. Negot. L. Rev. 253, 283 (2004). In the event the woman does not express her
wishes in an advance directive, the woman’s decision to withhold or withdraw life-sus-
taining treatment should still be honored. Of course, having a written advance directive,
even without language specifically addressing a potential pregnancy, could still constitute
“clear and convincing” evidence of the woman’s intent to be removed from life-sustaining

Furthermore, the common law doctrine of substituted judgment is a means by which
the courts may address a brain-dead, pregnant woman without an effective advance di-
rective. Burch, supra note 14, at 563–65. Courts typically apply a “substituted judgment
standard” when a woman is no longer competent and she did not express her wishes. Id.;
see, e.g., Tex. Health & Safety Code Ann. § 166.039(b) (West 2013) (explaining the
priority of persons who may make a treatment decision, including a decision to withhold
or withdraw life-sustaining treatment, include the following: “(1) the patient’s spouse,
(2) the patient’s reasonably available adult children, (3) the patient’s parents, or (4) the
patient’s nearest living relative”).

For example, in the case of In re A.C., the issue involved a woman’s right to decline
medical treatment, i.e., a caesarean section for a cancer-associated death at twenty-six
weeks of gestation. 573 A.2d 1235, 1237–38 (D.C. 1990). The court identified the follow-
ing factors to be considered when determining how to proceed with a woman who is no
longer competent: (1) the person’s written and oral directions concerning treatment to
family, friends, and health care providers; (2) the person’s past decisions concerning
medical treatment; and (3) the person’s value system. Id. at 1249–51; see also Mary R.
Conclusion

The tragic situation in which a woman is pregnant at the time she is declared brain-dead is rare circumstance, but it warrants action to ensure that a woman’s end-of-life wishes are honored and respected by her family, health care providers, and the state. Current state statutes addressing the effect of an advance directive on a pregnant woman’s wishes arguably do not apply in the event of a woman’s brain death, as the plain language of the statutes dictate that they apply to a living woman, not a woman who is brain-dead.167

Moreover, even if the statutory pregnancy exclusions are deemed to apply to a woman who is brain-dead and pregnant, then the exclusions arguably violate a woman’s constitutional rights.168 A woman’s right to terminate her pregnancy when the fetus is non-viable is violated, and her right to refuse medical treatment is also violated.169

To remedy these problems, state legislatures first should either draft a statute or amend the language in their pregnancy exclusions to clarify the applicability to a woman who is brain-dead and pregnant. In addition, end-of-life planning documents need to include clear language that expresses the woman’s wishes in the event she is declared brain-dead when she is pregnant. Correspondingly, state legislatures also need to amend the statutory forms for advance directives, and both attorneys and health care providers should be proactive and discuss the issue with their respective clients and patients. Not taking such measures will lead to repeats of the Muñoz v. John Peter Smith Hospital case and place a woman’s important end-of-life decisions in the hands of the courts.

(Aug. 12, 1999), http://www.law.uh.edu/healthlaw/perspectives/Reproductive/990812EOL Decisions.html, archived at http://perma.cc/3C77-R7PK. If uncertainty remains, the court should then consider “what most [people] would likely do in a similar situation . . . [including] the viability of the fetus . . . .” In re A.C., 573 A.2d at 1251; see also Benton, supra note 89, at 1826 (“[R]isk of psychological harm to the woman’s partner and family must [also] be considered when a pregnant woman’s body is maintained against her express wishes.”).

Moreover, it has been suggested that when the woman’s post-mortem wishes are in dispute or cannot be determined, the biological father’s interests and role should be given greater weight. Gregorian, supra note 28, at 422 (“When the mother’s wishes are unknown and cannot be determined, her judgment cannot be substituted and her interests cannot be protected over the interest of the biological father. At that point, courts should defer to the judgment of the biological father, giving his preference priority.”). But see Sperling, supra note 115, at 491 (arguing that the biological father should be allowed to “reflect” on the woman’s wishes, but not be able to “determine this understanding”).

168. See discussion supra Parts II.A, II.B.
169. See discussion supra Parts II.A, II.B.