

Termination of Pregnancy Pre-Viability and the Dilemma of Maternal Artificial Life Support: An Examination of Texas State Law and Advance Directives

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Under Texas law, women are stripped of their ability to choose expressly by an advance directive whether to terminate artificial life support and thus end their pre-viability pregnancy. This means that a pregnant woman who is kept alive only through the means of artificial medical support is not entitled to the same Fourteenth Amendment right to privacy and substantive due process to terminate her pregnancy pre-viability as any other pregnant woman in Texas. Instead, State law acts to keep these women alive as a means of incubating their fetuses until they reach viability often against the judgment of these women, their families and their physicians.

Part of the difficulty of cases confronting maternal artificial life support and the life of a pre-viable fetus is that these cases are rare.¹ The technological ability to keep a body alive keeps improving thus making this an issue that increasingly will have to be confronted. In Texas, a woman will be kept on life-sustaining support unless declared dead by a physician. Death occurs only when the declaration is made and artificial means of support are terminated. But, it is against the law to take a pregnant woman off of life support even if she has an advance directive. There is a statutory incentive for medical practitioners to withhold making the death determination in the case of pregnant women because they do not wish to violate the statute.

This article will discuss the facts, issues, laws and the outcomes of such cases in the context of Texas law and suggest that a fundamental change must occur in the way pregnant women are treated. The fundamental conclusions are that: 1) under the

¹ 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, 402 (2010) (citing to less than a dozen cases on the subject of women being kept alive to benefit a developing fetus).

appropriate circumstances, a pregnant woman may be removed from artificial support even if that results in the death of her pre-viable fetus, and that her right to choose cannot be unduly burdened by a State law; 2) a pregnant woman who has chosen to reject artificial means to extend her bodily functions either in writing or by oral declarations cannot have that right taken away by the State of Texas simply on the basis of her status as a pregnant woman; and 3) there is a compelling ethical and moral policy to allow families and physicians the ability to determine what to do about the medical and personal decisions at issue.

Under Texas State Law, Artificial Means of Support May Not Be Withdrawn from A Pregnant Woman Even If the Woman Has an Advance Directive

There are three Texas statutes at issue. The first allows an abortion only up to 20 weeks from fertilization.² Effective October 2013, Texas enacted the “Preborn Pain Act” that states that an abortion is defined as an “action” with “the intent to terminate a clinically diagnosable pregnancy of a woman and with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the woman’s unborn child.”³ Texas Health and Safety Code § 171.001 further provides that “... a person may not perform or induce or attempt to perform or induce an abortion on a woman if it has been determined, by the physician performing, inducing, or attempting to perform or induce the abortion or by another physician on whose determination that physician relies, that the probable post-fertilization age of the unborn child is 20 or more weeks.” It is important to note that the Texas Legislature included both the standard of viability and also a new standard that is the point at which “substantial medical evidence recognizes that an unborn child is capable of experiencing pain by not later than 20 weeks after fertilization.”⁴ This statute supports Texas’ long-standing and strong belief

² TEX. HEALTH & SAFETY CODE ANN. § 171.061(1)(West 2013).

³ *Id.*

⁴ This new standard of fetal pain under which an abortion may become subject to state laws may be inapposite to the viability standard adopted by the Supreme Court. *See, e.g., Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013) (holding that state law setting age of viability at 20 weeks was constitutionally invalid).

in its religious, ethical, moral and legal right to protect the rights of the unborn.⁵ But the State does not have a right to unduly burden a woman's right to terminate a pregnancy up to 20 weeks into the pregnancy.

The second statute provides that a person is not to be taken off of life-support until a physician or hospital has made the mandated determination. Texas Civil Code states that: "(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 a physician, according to ordinary standards of medical practice, there is irreversible cessation of all spontaneous brain function. Death occurs when the relevant functions cease. (c) Death must be pronounced before artificial means of supporting a person's respiratory and circulatory functions are terminated."⁶ In essence, a pregnant woman is dead only when declared to be so by her physician. But, as seen below, a pregnant woman with an advance directive may not be declared dead by her physician and have artificial support removed without the fear of violating a third Texas law.

The third statute is the exception to the Texas law on advance directives that states: "[a] person may not withdraw or withhold life-sustaining treatment under this subchapter from a pregnant patient."⁷ In Texas, a pregnant woman's directive **is followed** if she instructs physicians to provide life support. However, her otherwise binding directive instructing people on her care automatically is invalidated by the action of the statute if she chooses **not** to receive artificial support and to possibly die. These types of invalidating provision are often called pregnancy exclusions to advance

⁵ Teresa Stanton Collett, *Whose Life is It Anyway? Texas Public Policy and Contracts to Kill Embryonic Children*, 50 S. Tex. L. Rev. 371 (2009); Aaron Wagner, *Texas Two Step: Serving up Fetal Rights by Sidestepping Roe v. Wade Has Set the Table for Another Showdown on Fetal Personhood in Texas and Beyond*, 32 Tex. Tech L. Rev. 1085 (2001).

⁶ TEX. HEALTH & SAFETY CODE ANN. § 671.001 (West).

⁷ TEX. HEALTH AND SAFETY CODE ANN. § 166.049 (West 1989).

directive statutes.⁸ Found in a majority of the states, these exclusions effectively invalidate a pregnant woman's otherwise legally binding advance directive leaving a pregnant woman subject to the asserted interests of the state in the life of the fetus she carries. And, in the event that she does not have an advance directive, the statute bars the removal of artificial support regardless of any prior wishes expressed to family and friends.

While distinguishable on some of their facts because of the absence of advance directives, there have been two widely reported cases in Texas that confront the ambiguous language of these statutes and the issue of the right to terminate artificial life support to pregnant woman. In 1989, the common-law husband of a brain-dead pregnant woman claimed that he was the alleged biological father of the baby. Relying on the advance directive statute, he wanted to keep pregnant Tammy Martin on artificial medical support until her 14-week-old fetus became viable. Martin did not have an advance directive but Ms. Martin's parents said that their daughter would not have wanted to be kept on machines. Doctors warned that Martin, an alcoholic and cocaine addict, would likely have a baby with severe deformities when it could be removed from the womb at 25-28 weeks.⁹ Ultimately, at 17-18 weeks, the mother and fetus were both declared dead and Ms. Martin was taken off of artificial support.¹⁰

Though briefly discussed in the media, Tammy Martin's story did not have the sympathetic impact of the recent case of Marlise Munoz in 2014. The case of the Munoz family attracted a significant amount of national and international public scrutiny and brought the debate of the rights of pregnant women to the forefront. The Munoz case was the story of a pregnant young woman whose family alleged was legally dead at the

⁸ Megan Greene & Leslie R. Wolfe, *Pregnancy Exclusions in State Living Will and Medical Proxy Statutes*, CENTER FOR WOMEN POLICY STUDIES (August 2012), http://www.centerwomenpolicy.org/programs/health/statepolicy/documents/REPRO_PregnancyExclusionsinStateLivingWillandMedicalProxyStatutesMeganGreeneandLeslieR.Wolfe.pdf.

⁹ Ron Nissimov, *Life-Changing Decisions/Comatose woman's fetus focus of battle*, HOUSTON CHRONICLE (July 28, 1999.)

¹⁰ Associated Press, *Mother, Fetus both dead, doctors find*, AMARILLO GLOBE NEWS (Aug. 14, 1999).

time she was 14 weeks pregnant.¹¹ The hospital initially disagreed and she was placed on artificial life support for 8 weeks while the family, the hospital and the courts argued and ultimately litigated over whether to remove the machines that were keeping her body functioning.¹² As with Tammy Martin, Ms. Munoz did not have an express advance directive but her family asserted that she would not have wanted to be kept alive under those circumstances.¹³ At 22 weeks and 5 days into her pregnancy, her fetus was declared non-viable and the court ordered that Ms. Munoz be disconnected from the mechanisms keeping her dead body functioning.

Current Language of Texas Statutes Relating to Pregnant Women and the Constitutional Right to Choose a Pre-Viability Termination of Pregnancy¹⁴

The Fourteenth Amendment protects individuals from unlawful government intrusion.¹⁵ Substantive due process rights under the Fourteenth Amendment of Constitution exist but have not been clearly defined or applied by any court of the United States. This ambiguity is especially true in cases involving women and the unborn. While there has been much discussion, there is no consensus on the scope of privacy rights particularly the ones that confront life, death and the bearing of children. Generally, no privacy right is absolute and each alleged right must be balanced in varying degrees with the interests of the States.

The Supreme Court has affirmed the “recognized protection according to the liberty relating to intimate relationships, the family, and decisions about whether or not

¹¹ Def’s Br. Resp. to Pl’s Mot. Compel, 2014 WL 285056 (Tex. 96th Dist. January 23, 2014).

¹² Pl’s First Am. Mot. Compel Def’s Remove Marlise Munoz from “Life Sustaining” Measures and Appl. Unopposed Expedited Relief, 2014 WL 2855054 (Tex. Dist. 96th Dist. January 23, 2014).

¹³ *Id.*

¹⁴ The issue of terminating a fetus is a complex legal and emotional question that has created volumes of legal, ethical, religious and moral debate in the United States. This article acknowledges the immense complexity of the abortion debate and that the issue remains unclear and unresolved.

¹⁵ U.S.C.A. Const. Amend. XIV§ 1.

to beget or bear a child.¹⁶ There is also a recognized constitutional liberty interest in the right to refuse medical treatment.¹⁷ Additionally, the central tenet of the Supreme Court's holding in *Planned Parenthood v. Casey* is that a woman has the right to terminate her pregnancy before the viability of the fetus.¹⁸ Only after viability may a state step in via legislative action to regulate a woman's right to terminate a pregnancy if the state can show that the proposed regulation will not impose an undue burden on a woman's ability to make this decision.¹⁹ An undue burden is defined as a regulation that has a purpose or the effect of placing "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."²⁰

When the Interests of the Mother Conflict with Those of the State

The laws discussed above place an undue burden on a woman's right to terminate her pregnancy pre-viability. This constitutional right must hold even in the event of irreversible maternal brain injury and possible death. Up to twenty weeks from fertilization, a woman has a right to terminate her pregnancy especially if she has expressed her desire not to be kept alive by artificial means. Barring physicians from withdrawing life-sustaining treatment to a pregnant woman at any time during the pregnancy from fertilization onward violates the woman's right to terminate her pre-viability pregnancy under the law.²¹ The state places an undue burden on women by mandating that their bodies be kept alive simply to promote protect the unborn fetus **until it reaches viability** and falls within the state's protective interest. Texas State law as drafted is unconstitutional and should be revised to include a clear exclusion to allow

¹⁶ *Planned Parenthood v. Casey*, 505 U.S. 849, 857 (1992) citing, *inter alia*, *Carey v. Population Services International*, 431 U.S. 678, 684-686 (1977) and *Griswold v. Connecticut*, 381 U.S. 479, 481-482 (1965).

¹⁷ *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 278 (1990).

¹⁸ The Court states that this right to terminate is "a rule of law and a component of liberty we cannot renounce." *Cruzan*, 505 U.S. at 871.

¹⁹ *Casey*, 505 U.S. 874-877.

²⁰ *Casey*, at 877; see also *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) citing *Casey* at 878.

²¹ As seen in the *Martin* and *Munoz* cases, the pregnant women ultimately were determined to dead at the time their fetuses were still within the state's abortion viability time limit.

for women to be removed from artificial life support if they have an advance directive and so long as they have not reached a point of fetal viability.

Additionally, the Texas advance directive pregnancy exclusion provision is unconstitutional because it again ignores a woman's right to terminate her pregnancy pre-viability. There is no greater undue burden on a woman's right to choose than a law that mandates that her body be kept functioning for the sake of a pre-viability fetus when that woman has chosen to die in an advance directive.²² That is the plight of every woman who executes an advance directive because it is ultimately meaningless if she becomes pregnant. The law substitutes the state's judgment about when a pregnant woman should refuse life-supporting treatment for the woman's own previously expressed wishes. Moreover, from a policy perspective, it should be revised or repealed because it acts to invalidate a woman's express end of life decision.

Finally, to the extent the woman's preferences are unknown and the pregnancy has reached viability, the state should allow the family and the physicians the decision-making right to decide what should be done. The ambiguous language of both of these Texas statutes as a whole is that they leave the door open for physicians to wonder whether allowing a natural death or withholding artificial support is (a) in violation of the advance directive exclusion provision or (b) tantamount to performing an abortion. This places the physicians in a difficult and conflicted position about what steps to take. In the Munoz case, the physicians erred on the side of keeping her body on artificial support because of their concerns about the statutes. From a policy and ethics perspective, families should never be pitted against the state when it comes to the removal of artificial means of support. These cases, though rare, place an apparent emotional and financial toll on the families, physicians and the courts. Everyone was placed in an untenable position by the ambiguity of the law. In future cases such as the

²² The outcome under current Texas law would have been the same for Tammy Martin and Marlise Munoz because even if they had executed advance directives instructing family and physicians about the end-of-life wishes, they would still have been kept alive until their fetuses had achieved viability.

Martin and the Munoz situations, stakeholders such as the family and the physicians should be allowed the liberty to identify and resolve the medical, ethical, religious issues before resorting to the strictures of state law and the court system.

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The original law states that, if a minor wants to terminate her pregnancy, written consent from the guardian is required. This extension would allow termination of pregnancy in cases where some anomaly in the foetus is reported after 20 weeks. The law will help the rape victims, ill and under-age women to terminate the unwanted pregnancy lawfully. Significantly, the Bill also applies to unmarried women and therefore, relaxes one of the regressive clauses of the 1971 Act, i.e., single women couldn't cite contraceptive failure as a reason for seeking an abortion. Thus, late termination of pregnancy may get in conflict with the viability of the foetus. The preference for a male child keeps sex determination centres in business in spite of their illegal status. Sometimes, during pregnancy, unexpected events threaten the life of the fetus or the mother. While these conditions do not always result in a pregnancy loss, there is a possibility you will not want to, or be able to, continue your pregnancy. Amniotic Band Syndrome. Maternal Health Conditions. For people with certain severe medical problems, the biological stress of pregnancy can be dangerous or deadly. These situations could include a severely compromised heart or a new diagnosis of dangerous cancer requiring immediate treatment. Continuing a pregnancy with severe pre-eclampsia can lead to seizures, kidney failure, stroke, liver complications, and death. Making the Decision to Terminate. Medical termination of pregnancy is a procedure of doing an abortion. This procedure does not need any significant surgery or anesthesia in an office or at home. It is a completely legitimate process and as well as safer during the first quarter period of pregnancy. Generally, these terms placenta and fetus are taken into consideration after the 8th week of pregnancy. Well, the coalescence of an egg and sperm lead to the pregnancy tissue and conception products which occur prior to the eight weeks. The diverse terms of abortion include induced abortion, termination of pregnancy, elective abortion, and therapeutic abortion. What Is It Used For? In order to concatenate an unplanned Medical Termination of Pregnancy, abortion is done.