

2013 DRAFTING REQUEST

Bill

Received: **1/31/2014** Received By: **tdodge**
 Wanted: **As time permits** Same as LRB:
 For: **Terese Berceau (608) 266-3784** By/Representing: **Traci Peloquin**
 May Contact: Drafter: **tdodge**
 Subject: **Health - advance decisions** Addl. Drafters:
 Extra Copies:

Submit via email: **YES**
 Requester's email: **Rep.Berceau@legis.wisconsin.gov**
 Carbon copy (CC) to: **tamara.dodge@legis.wisconsin.gov**
michael.duchek@legis.wisconsin.gov

Pre Topic:

No specific pre topic given

Topic:

Eliminate pregnancy exclusions from advance directives

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	tdodge 2/5/2014			_____			
/P1	tdodge 2/13/2014	scalvin 2/12/2014	jfrantze 2/12/2014	_____	mbarman 2/12/2014		State
/1		scalvin 2/13/2014	rschluet 2/13/2014	_____	sbasford 2/13/2014	mbarman 2/13/2014	State

FE Sent For:

↳ At
Intro.

<END>

FE Sent For:

<END>

Dodge, Tamara

From: Rep.Berceau
Sent: Friday, January 31, 2014 2:06 PM
To: Dodge, Tamara
Subject: RE: Email from LRB Website

Thank you. It's not a rush job, but we'd like to introduce it relatively soon while the news about the woman in Texas is still fresh. Terese is also interested in knowing when that provision was put into the statutes.

Thank you!

From: Dodge, Tamara
Sent: Friday, January 31, 2014 1:36 PM
To: Rep.Berceau
Subject: RE: Email from LRB Website

Traci,

I can do that draft for Representative Berceau. Do you know what her timeline is in expecting a draft from me?

Thanks,
Tami

Tamara J. Dodge

Attorney
Wisconsin Legislative Reference Bureau
P.O. Box 2037
Madison, WI 53701-2037
(608) 267 - 7380
tamara.dodge@legis.wisconsin.gov

From: Rep.Berceau
Sent: Friday, January 31, 2014 12:18 PM
To: Dodge, Tamara
Subject: Email from LRB Website

Hi Tamara,

Representative Berceau would like to have a bill drafted to eliminate our current pregnancy exclusion in living wills and advance directives. (Statute section 154.03 – I don't know if there are other cross references in the statutes that would also need to be addressed.)

http://www.nytimes.com/2014/01/08/us/pregnant-and-forced-to-stay-on-life-support.html?hp&_r=1

http://www.centerwomenpolicy.org/programs/health/statepolicy/documents/REPRO_PregnancyExclusionsinStateLivingWillandMedicalProxyStatutesMeganGreeneandLeslieR.Wolfe.pdf

Thank you in advance for your assistance.

Traci Peloquin, Research Assistant
Office of State Representative Terese Berceau

Dodge, Tamara

From: Rep.Berceau
Sent: Friday, January 31, 2014 12:18 PM
To: Dodge, Tamara
Subject: Email from LRB Website

Hi Tamara,

Representative Berceau would like to have a bill drafted to eliminate our current pregnancy exclusion in living wills and advance directives. (Statute section 154.03 – I don't know if there are other cross references in the statutes that would also need to be addressed.)

http://www.nytimes.com/2014/01/08/us/pregnant-and-forced-to-stay-on-life-support.html?hp&_r=1

http://www.centerwomenpolicy.org/programs/health/statepolicy/documents/REPRO_PregnancyExclusionsinStateLivingWillsandMedicalProxyStatutesMeganGreeneandLeslieR.Wolfe.pdf

Thank you in advance for your assistance.

Traci Peloquin, Research Assistant
Office of State Representative Terese Berceau

U.S.

Pregnant, and Forced to Stay on Life Support

By MANNY FERNANDEZ and ERIK ECKHOLM JAN. 7, 2014

FORT WORTH — The diagnosis was crushing and irrevocable. At 33, Marlise Munoz was brain-dead after collapsing on her kitchen floor in November from what appeared to be a blood clot in her lungs.

But as her parents and her husband prepared to say their final goodbyes in the intensive care unit at John Peter Smith Hospital here and to honor her wish not to be left on life support, they were stunned when a doctor told them the hospital was not going to comply with their instructions. Mrs. Munoz was 14 weeks pregnant, the doctor said, and Texas is one of more than two dozen states that prohibit, with varying degrees of strictness, medical officials from cutting off life support to a pregnant patient.

More than a month later, Mrs. Munoz remains connected to life-support machines on the third floor of the I.C.U., where a medical team monitors the heartbeat of the fetus, now in its 20th week of development. Her case has become a strange collision of law, medicine, the ethics of end-of-life care and the issues swirling around abortion — when life begins and how it should be valued.

“It’s not a matter of pro-choice and pro-life,” said Mrs. Munoz’s mother, Lynne Machado, 60. “It’s about a matter of our daughter’s wishes not being honored by the state of Texas.”

Mrs. Munoz’s father, Ernest Machado, 60, a former police officer and an Air Force veteran, put it even more bluntly. “All she is is a host for a fetus,” he said on Tuesday. “I get angry with the state. What business did they have delving into these areas? Why are they practicing medicine up in Austin?”

Mrs. Munoz’s parents said they wanted to see the law overturned, but they have not sought any legal action against the hospital, though they have not ruled it out either.

The hospital maintains that it is following the law, although several experts in medical ethics said they believed the hospital was misinterpreting it. A crucial issue is whether the law applies to pregnant patients who are brain-dead as opposed to those in a coma or a vegetative state. The law, first passed by the Texas Legislature in 1989 and amended in 1999, states that a person may not withdraw or withhold “life-sustaining treatment” from a pregnant patient.

Mr. and Mrs. Machado said the hospital had made it clear to them that their daughter was brain-dead, but hospital officials have declined to comment on Mrs. Munoz’s care and condition, creating uncertainty over whether the hospital has formally declared her brain-dead.

A spokeswoman for the J.P.S. Health Network, the publicly financed hospital district in Tarrant County that runs the 537-bed John Peter Smith Hospital, defended the hospital’s actions. “In all cases, J.P.S. will follow the law as it applies to health care in the state of Texas,” the spokeswoman, Jill Labbe, said. “Every day, we have patients and families who must make difficult decisions. Our position remains the same. We follow the law.”

Ms. Labbe said that neither she nor the doctors could answer questions about Mrs. Munoz’s condition because her husband had not signed the paperwork allowing them to speak to the news media about his wife’s care.

At least 31 states have adopted laws restricting the ability of doctors to end life support for terminally ill pregnant women, regardless of the wishes of the patient or the family, according to a 2012 report from the Center for Women Policy Studies in Washington. Texas is among 12 of those states with the most restrictive such laws, which require that life-support measures continue no matter how far along the pregnancy is.

Legal and ethical experts, meanwhile, said they were puzzled by the conflicting accounts of her condition. Brain death, an absence of neurological activity, can be readily determined, they said. It is legally death, even if other bodily functions can be maintained.

“If she is dead, I don’t see how she can be a patient, and I don’t see how we can be talking about treatment options for her,” said Thomas W. Mayo, an expert on health care law and bioethics at the Southern Methodist University law school in Dallas.

Arthur L. Caplan, director of medical ethics at NYU Langone Medical Center in Manhattan, agreed. “The Texas Legislature can’t require doctors to do the impossible and try to treat someone who’s dead,” Mr. Caplan said. “I don’t think they intended this statute the way the hospital is interpreting it.”

Critics of the hospital’s actions also note that the fetus has not reached the point of viability outside the womb and that Ms. Munoz would have a constitutional right to an abortion.

The restrictive measures were largely adopted in the 1980s, with the spread of laws authorizing patients to make advance directives about end-of-life care like living wills and health care proxies, said Katherine A. Taylor, a lawyer and bioethicist at Drexel University in Philadelphia. The provisions to protect fetuses, she said, helped ease the qualms of the Roman Catholic Church and others about such directives.

“These laws essentially deny women rights that are given others to direct their health care in advance and determine how they want to die,” Ms. Taylor said. “The law can make a woman stay alive to gestate the fetus.”

In Texas, the law and the hospital’s efforts to abide by it have drawn support among opponents of abortion. “The unborn child should be recognized as a separate person,” said Joe Pojman, executive director of Texas Alliance for Life. He added, “I would say that, even if she were brain-dead, I would favor keeping treatments going to allow the child to continue to survive, with the hope the child could be delivered alive.”

Jeffrey P. Spike, professor of clinical ethics at the University of Texas medical school in Houston, said there were some known examples of fetuses having been kept alive while a terminally ill or brain-dead mother was on a respirator. But in every case he knew of, he said, those steps were in line with the family’s wishes.

Mrs. Munoz’s parents and her husband, Erick Munoz, 26, remain in limbo, even as they and other relatives help care for the Munozes’ 15-month-old son, Mateo. Mr. Munoz has returned to his job as a firefighter but continues to sit by his wife’s side at the hospital. She had been due to give birth in mid-May, but the hospital’s plans for the fetus — as well as its health and viability — remain unknown. Mr. Machado said he had been told by the hospital’s medical team that his daughter might have gone an hour or longer without breathing before her

husband woke and discovered her, a situation he believes has seriously impaired the fetus. “We know there’s a heartbeat, but that’s all we know,” he said.

Mrs. Machado said the doctors had told her that they would make a decision about what to do with the fetus as it reached 22 to 24 weeks, and that they had discussed whether her daughter could carry the baby to full term to allow for a cesarean-section delivery. “That’s very frustrating for me, especially when we have no input in the decision-making process,” Mr. Machado added. “They’re prolonging our agony.”

On Tuesday afternoon, in the rural community about 30 minutes outside downtown Fort Worth where they live, Mr. Machado and his wife took care of Mateo while the boy’s father was at work in Crowley. As he held Mateo in his arms, Mr. Machado recalled touching his daughter’s skin as she lay in the hospital.

“She felt more like a mannequin,” Mr. Machado said. “That makes it very hard for me to go up and visit. I don’t want to remember her as a rubber figure.”

Correction: January 9, 2014

An article on Wednesday about a Texas woman kept on life support because she was pregnant misspelled the given name of a lawyer and bioethicist at Drexel University who discussed the ethics of the hospital’s decision. She is Katherine A. Taylor, not Katharine.

Manny Fernandez reported from Fort Worth and Erik Eckholm from New York.

A version of this article appears in print on January 8, 2014, on page A1 of the New York edition with the headline: Pregnant, and Forced to Stay on Life Support.



**Center for Women
Policy Studies**

**REPRODUCTIVE LAWS FOR THE 21ST CENTURY PAPERS
CENTER FOR WOMEN POLICY STUDIES**

August 2012

Pregnancy Exclusions in State Living Will and Medical Proxy Statutes
by
Megan Greene and Leslie R. Wolfe

Preface: After the landmark Supreme Court decision in *Cruzan v. Director, Missouri Department of Health*, the importance of advanced directives was brought center stage as a patients' rights issue. Presently, every state in the United States has a statute regarding an individual's right to create an advance directive. However, many of these laws strip women of the constitutional rights embedded in lines of precedent developed by the Court. Because of pregnancy clauses present in 31 states' laws (as of 1992), terminally ill women may have been forced to merely exist as human incubators and have their wishes, as declared in a living will or advance directive, cast aside. Even if a woman's advance directive states that she does not want life-prolonging treatment, if she is pregnant at the time it is to be executed, pregnancy exclusions require that her directive be ignored and that she be forced to carry the fetus to term.

In 1992, The Center for Women Policy studies published a groundbreaking report on pregnancy exclusions and their effect on women's rights. The report concluded that these laws violate both a woman's right to refuse life-sustaining treatment, as well as her right to abortion guaranteed under *Roe v. Wade*. Since publication of that report, new Supreme Court rulings and changes to state laws call for an update on the status of these statutes and their consequences for women. However, despite changes, those state laws that allow these exclusions set a dangerous precedent that diminishes a woman's legal rights the moment she becomes pregnant or incapacitated.

Background: In its 1990 decision in *Cruzan*, the Supreme Court drew national attention to the ways in which advance directives are handled in the United States. An advance directive is a legal document that allows a person to declare her/his wishes regarding the scope and duration of life-sustaining medical treatment before the treatment is needed. After suffering brain damage due to oxygen deprivation from a traumatic car accident, Nancy Cruzan remained in a persistent vegetative state, kept alive by life-sustaining treatment. Her parents requested that this treatment be withheld, as they testified that their daughter had verbally expressed a desire not to continue in such a state before she was injured. While the Court determined that life-sustaining treatment could not be withheld from Cruzan because her parents did not meet the required burden of proof to show that their daughter would not want such treatment, for the first time, the Court did determine that there exists a constitutionally protected right to refuse life-

sustaining treatment that must be honored by medical facilities and the state, more commonly known as a "right to die."

The Supreme Court's 1973 decision in *Roe v. Wade* found that the right to privacy under the Due Process Clause of the 14th Amendment ensured the right for women to have an abortion, making abortion a fundamental right. The ruling in *Roe v. Wade* established a trimester framework which attempted to balance the interest of the state in prenatal life and maternal health with the woman's right to control over her own body. The Court ruled that the State's interest increased as prenatal life advanced and established that a woman may seek an abortion freely in her first trimester, in an authorized clinic during the second trimester, and that states may forbid abortions during the third trimester. This issue came before the Court again in 1992 in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which challenged the constitutionality of several Pennsylvania state regulations under *The Pennsylvania Abortion Control Act*, including: an informed consent rule requiring women to receive information about health risks associated with the procedure; a spousal notification rule requiring women to give prior notice to their husbands; a parental consent rule requiring minors to receive consent for the procedure from a parent/guardian; a required 24 hour waiting period; and, the imposition of certain reporting requirements on facilities providing abortion services.

The Supreme Court upheld the essential holding of *Roe* in that it reaffirmed the right to abortion as constitutionally protected under due process. However, the plurality eliminated the trimester framework established by *Roe*, finding that a fetus might be considered viable at 22 or 23 weeks rather than at the 28 weeks that was more common at the time of *Roe*. The plurality recognized viability as the point at which the state interest in the life of the fetus outweighs the rights of the woman and abortion may be banned entirely "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." Finally, *Casey* also replaced the "strict scrutiny" standard previously used to assess abortion laws with the "undue burden" test. A legal restriction posing an undue burden was defined as one having "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."

Moving from the judicial to the legislative, the National Conference of Commissioners on Uniform State Laws drafts model legislation addressing areas of law that are under state jurisdiction but where uniformity of the law among states is desirable (for example, the Uniform Commercial Code). These model laws are not at all binding on states, but serve as suggestions or starting points for legislation. The *Uniform Rights of the Terminally Ill Act (URTIA)* was drafted by the Commissioners, but only covers living wills, not medical proxies, and only applies to situations where a person is in a terminal condition, not a permanently comatose or vegetative state. It states that: "Life sustaining treatment must not be withheld or withdrawn pursuant to a declaration from an individual known to the attending physician to be pregnant so long as it is probable that the fetus will develop to the point of live birth with the continued application of life-sustaining treatment." The original URTIA, adopted by the conference in 1985, also included the phrase "unless the declaration otherwise provides" but this phrase was removed and is not in the current provision.

Following *Cruzan* in 1990, the Congress passed the *Patient Self-Determination Act* of 1991, which requires hospitals, nursing homes, home health agencies, and hospices receiving federal Medicare or Medicaid funds to inform all adult patients of their constitutional right to prepare an "advance directive," which is a written legal document, made in advance of a serious illness, stating an individual's choices for health care or naming someone else to make these

decisions for her/him if the individual is unable to do so. Advance directives can take two forms: a living will or a medical proxy (also known as a “durable medical power of attorney”). Living wills specify the kind of life-prolonging medical treatment the individual wishes to be carried out in the event it is needed. A medical proxy is a person named to make health care decisions for the individual in the event that she/he is unable to do so, and may include guidelines about the type of treatment desired under different circumstances. While the law requires that patients be informed about their right to issue an advance directive, it does not specify the amount of detail or specific facts that should be included when information is provided to patients. Therefore, for women who live in states whose advanced directive statutes include pregnancy exclusions, there is no requirement for medical professionals to inform them that their wishes may be ignored if they are pregnant.

How State Advance Directive Statutes Address Pregnancy: At the time of the Center’s previous report, 37 states had pregnancy exclusions in their advance directive statutes. In assessing them, the Center placed the statutes into four major categories:

1. The law states that pregnancy at any stage automatically invalidates the advance directive;
2. The law contains pregnancy restrictions similar to those in the model *Uniform Rights of the Terminally Ill Act*;
3. The law uses a viability standard to determine enforceability of the declaration; or
4. The law is silent with regard to pregnancy.

There is now an additional category of statutes which explicitly explain that a woman has the option of writing into her advanced directive what type of medical treatment she desires if she is pregnant at the time her advance directive should be executed, thus giving women the option to decide for themselves what medical treatment they want without intrusion from the state.

State laws vary in their treatment of pregnancy and pregnant women’s rights are variously protected, depending on the state in which they live.

Automatic Invalidation of A Pregnant Woman’s Advance Directive: Currently, 12 state statutes (**Alabama, Idaho, Indiana, Kansas, Kentucky, Michigan, Missouri, South Carolina, Texas, Utah, Washington, and Wisconsin**) automatically invalidate a woman’s advance directive if she is pregnant, as compared to 22 states with such provisions at the time of the Center’s 1992 report. These are the most restrictive of the pregnancy exclusion statutes, stating that, regardless of the progression of the pregnancy, a woman must remain on life-sustaining treatment until she gives birth.

Most of these statutes are brief declarations; for example, **South Carolina**’s law states that: “If a declarant has been diagnosed as pregnant, the Declaration is not effective during the course of the declarant’s pregnancy.” None of these statutes makes an exception for patients who will be in prolonged severe pain or who will be physically harmed by continuing life-sustaining treatment.

The Uniform Rights of the Terminally Ill Act (URTIA): The number of states following the URTIA model increased from 10 (**Alaska, Arkansas, Illinois, Minnesota, Nebraska, Nevada, Pennsylvania, Rhode Island, and South Dakota**) in 1992 to 14 (**Alaska, Arizona, Arkansas, Illinois, Iowa, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Ohio, Pennsylvania, Rhode Island, and South Dakota**) in 2011. URTIA requires that a pregnant woman be given life-sustaining treatment if she is pregnant and if it is “probable” that the fetus will develop to the point of “live birth.”

The original intent of URTIA in regard to pregnancy was to limit statutory pregnancy exclusions only to those cases in which a woman's living will was silent on her wishes. However, the original introductory phrase, "unless the declaration otherwise provides," was removed. This modification makes it clear that life-sustaining treatment may not be withdrawn from a woman who is known to be pregnant if it is probable that the fetus will develop to live birth with continuation of treatment, regardless of the woman's expressed desires to the contrary. The **New Hampshire, North Dakota, Pennsylvania, and South Dakota** statutes stipulate that an exception may be made if continuing treatment will be physically harmful to the woman or prolong severe pain which cannot be alleviated by medication.

Viability Standard to Determine Enforceability of Declaration: As was the case in 1992, when the original Center report was published, four states use a viability standard to determine the enforceability of an advance directive. However, the actual states have changed. Previously, **Colorado, Georgia, Iowa and Ohio** followed a viability standard statute. Currently, **Colorado, Delaware, Florida and Georgia** use the viability standard. Essentially, viability standard statutes slightly modify the language of the URTIA model, making the relevant point of development of the fetus slightly different. For example, the **Delaware** statute states: "A life-sustaining procedure may not be withheld or withdrawn from a patient known to be pregnant, so long as it is probable that the fetus will develop to be viable outside the uterus with the continued application of a life-sustaining procedure." The **Georgia** statute states that, to remove life-prolonging treatment, the fetus must not be viable and the woman must have written into her advance directive that the directive should be carried out in the event the fetus is not viable. If both of these criteria are not met, any directive stating that she should be removed from life-sustaining treatment will be ignored.

Statutes That Are Silent In Regard to Pregnancy: When The Center prepared its report in 1992, 11 states (**Louisiana, Maine, Massachusetts, New Mexico, New York, North Carolina, Oregon, Tennessee, Vermont, Virginia and West Virginia**) and the **District of Columbia** lacked statutory language regarding the validity of advance directives in the case of pregnancy. As of June 2011, 14 states fell into this category (**California, Hawaii, Louisiana, Maine, Massachusetts, Mississippi, New Mexico, New York, North Carolina, Oregon, Tennessee, Virginia, West Virginia, and Wyoming**) and the **District of Columbia**. In these states, it may be left to the courts to determine how to proceed. As going through the court system takes significant time, a pregnant woman may be forced to endure prolonged treatment -- for weeks or even months -- before the provisions of her advance directive can be carried out. Further, most states that are silent on the issue do include "conscience clauses," which allow medical professionals or institutions to opt out of withholding life-sustaining treatment. For example, the **Hawaii** advance directive statute states:

A health-care provider may decline to comply with an individual instruction or health-care decision for reasons of conscience. A health-care institution may decline to comply with an individual instruction or health-care decision if the instruction or decision is contrary to a policy of the institution which is expressly based on reasons of conscience and if the policy was timely communicated to the patient or to a person then authorized to make health-care decisions for the patient. (HRS § 327E-7).

Statutes That Offer A Clear Option Regarding Pregnancy: As of June 2011, laws in five states (**Maryland, Minnesota, New Jersey, Oklahoma, and Vermont**) clearly allowed women to write their wishes regarding pregnancy into their advance directives and to guarantee that their instructions will be followed. **New Jersey's** statute states that: "A female declarant

may include in an advance directive executed by her, information as to what effect the advance directive shall have if she is pregnant.” Most of these statutes provide sample forms which direct women to explain what type of treatment they would like to receive if their advance directives need to be carried out while they are pregnant. **Maryland**, for example, provides a sample advance directive which includes a section that states: “F. In case of pregnancy: (Optional, for women of child-bearing years only; form valid if left blank) If I am pregnant, my decision concerning life-sustaining procedures shall be modified as follows:”

These statutes give a woman control over her body under all circumstances and protect her rights as a patient. Moreover, they inform women that a pregnancy could complicate the execution of their advance directive – a fact of which most women are unaware – and provide women with an avenue to assure that their wishes are followed.

Constitutional Issues: The Center’s 1992 report explored multiple constitutional issues arising from pregnancy clauses, addressing ways in which these exclusions violate what the Court has ruled is a fundamental right to a natural death. In addition, the 1992 report analyzes how pregnancy exclusions may violate the right to abortion assured to women through a long line of legal precedent. In the intervening years, this has become an even more pressing issue.

In 1992, *Roe v. Wade* was the authoritative law on abortion rights in the United States. Using their balancing test, the Court ruled in *Roe* that during the first trimester of pregnancy, the state may not impose any significant restrictions on abortion procedures. However, this understanding was slightly altered after *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992). Here, the Court threw out the trimester framework established in *Roe*, determining that viability may occur earlier than the third trimester.

The Court declared that viability was the point at which a compelling state interest in the fetus outweighs the rights of the woman to have an abortion. This understanding diminished abortion as a fundamental right, and instead replaced the standard that laws must meet with the “undue burden” test. A legal restriction posing an undue burden was defined as one having “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.” Thus, while still upholding the right to abortion, the Court’s ruling in *Casey*, made it easier for states to impose restrictions on women’s access to abortion.

However, pregnancy exclusions so blatantly trample on the right to abortion that even in light of the restrictions set forth in *Casey*, the exclusions are still in conflict with women’s constitutional rights. Those that automatically invalidate are the clearest and most direct violation as the undue burden test requires that a law not have the effect of imposing a substantial obstacle in the path of a woman seeking to abort a fetus that has not yet reached viability. Pregnancy exclusions which automatically invalidate an advance directive at any stage of pregnancy wholly prevent a woman from exercising her right to abortion whether the fetus is developed to 22 weeks or simply two days. These laws have two effects: first, women already in an incapacitated state cannot communicate their choice to have what, in other circumstances, would be a perfectly legal abortion; second, women who are capable of voicing their decision are still ignored because the law prohibits any termination of the pregnancy if that termination is done to carry out the removal of life-sustaining treatment. In other words, there is no way for a woman seeking to withdraw life-prolonging treatment to obtain an abortion in these states.

This is also the case in states that follow the URTIA model. The language in the URTIA states that “life-sustaining treatment must not be withheld or withdrawn pursuant to a declaration from an individual known to the attending physician to be pregnant so long as it is probable that

the fetus will develop to the point of live birth with the continued application of life-sustaining treatment.” The term, “probable live birth” is extremely vague and can easily be stretched to encompass any stage of pregnancy. A fetus will “probably” develop to live birth from any point in development as long as the woman carrying it continues to receive life-prolonging treatment, barring severe complications. This creates the same problem that arises with statutes that invalidate advance directives for pregnant patients altogether. No doctor, judge or legislative body can possibly determine with any certainty when a fetus has reached a point in development at which it will “probably” reach live birth.

States that use a viability standard pose a somewhat different problem to reproductive rights. Currently, the term “viability” is a hotly contested issue and one that has no specific definition. Where “probable live birth” has theoretical breadth and vagueness, “viability” continues to be debated within the scientific community, especially with the advancement of reproductive technologies. In fact, the term is so disputed that the courts have yet to specifically define viability by putting a specific number to it. This may explain why so few states use this terminology in their statutory language for pregnancy exclusions. It is also part of what makes this statutory phrasing so dangerous to reproductive rights. In addition to encompassing the threats previously discussed, the term “viability” also is susceptible to the influence of politics. Its definition varies among political agendas. and is malleable by the individual, including the doctors who are in charge of determining the fate of their patients. Further, it is impossible for doctors to avoid relying on their own ideological beliefs to some extent, particularly as the definition of “viability” is fluid and deliberated within science and medicine. However, no individual right, especially one with a history of constitutional protection, should be subject to the ever-changing landscape of politics and public opinion.

Further, where no law exists to protect the reproductive rights of terminally ill women, their fate rests almost entirely in the hands of the judicial system. While we often rely on the courts to apply rational, even-handed justice that protects our rights, the uniqueness of this situation virtually eliminates a woman’s ability to speak on her own behalf. Clearly, if she is in a situation in which she is already reliant on life support, a court appearance is practically impossible. There have been several cases in which a woman has tried to bring this problem before the courts while she is still able to advocate for herself, but it was determined that she did not have standing because she was neither pregnant, nor terminally ill, so she was not injured by the existing law.

Additional Issues: Women and their families and physicians also may face additional difficulties, including lack of notice and awareness of pregnancy exclusions, public policy requirements, and potential “parent-child” conflict.

Lack of Notice: One of the biggest problems with pregnancy exclusions is that there is virtually no public awareness that they even exist, in part because there is no uniformity in the way in which pregnancy exclusion clauses are written into state statutes and they often appear under ambiguous or unrelated titles. For example, **Alabama** lists its statutes that deal with advance directives under the chapter dealing with “Health Care,” while **Alaska** organizes these statutes under the chapter entitled “Descendants’ Estates, Guardianships, Transfers, and Trusts.”

In addition, there is inconsistency in the actual content of statutes among the states. **Kentucky**, for example, has different pregnancy exclusion standards for living wills (in which pregnancy invalidates the directive) and medical proxies (in which pregnancy invalidates the directive if it is probable that the fetus will develop to live birth). Further, most of the “sample forms” provided by states do not include any language about pregnancy, even if the state’s laws

are not silent on the subject. Therefore, the woman who is attempting to write an advance directive does not receive notice that, in the case of her pregnancy, her directive might be invalidated.

Public Policy: As they stand, pregnancy exclusions place an unreasonable responsibility on physicians. By writing statutes that contain purposefully vague language, lawmakers require doctors to take the place of the Legislature in determining the meaning of such terms as “probable” and “viability.” There are few options to correct this issue, as it is impossible to craft a statute that is not vague. Both legal and public understanding of the stages of fetal development are hotly contested and constantly evolving. Essential wording, in fact the entire crux of the standard, rests on words that are indefinable. This creates policy that can neither be followed nor enforced. If doctors cannot understand what the law means, they certainly cannot obey it; and, if judges cannot consistently interpret the language of the law, there is no way to distribute even-handed justice. The harm to pregnant women whose preferences as stated in their advance directives are therefore at risk remains a serious problem – not only for women and their families, but also for physicians who seek to honor their patients’ wishes.

Maternal/Fetal Conflict: Such laws also set a dangerous and never before seen precedent for legal demands on the parent/child relationship, as it values placing a child’s rights above the rights of its parents. This is particularly difficult when the fetus is thereby extended the rights of a born-alive child. As clarified in *Roe v. Wade*, a fetus, up to a certain developmental stage, is not considered a person in the eyes of the law, with a full set of rights. Yet many of these laws are placing the rights of a fetus above those of a woman.

This situation raises further questions of parent/child rights and responsibilities and the extent to which we can or should enforce this ideology on parents whose children are born and have a full set of functioning rights. For example, could a parent whose child needs a transplant and is a donor match be forced to give up an organ? This completely rails against our legal system which has never forced one person to give up their own rights or safety to save another.

Recommendations

Law Reform: States should follow the examples of laws such as those passed in **Maryland** and **New Jersey**, where the language is explicit and allows a woman to make the decision in her advance directive as to how she would like the condition of her pregnancy to be handled. Language should follow those already in existence to promote uniformity and clarity, such as that in the **Vermont** statute, which states: (a) An adult may do any or all of the following in an advanced directive: (8) direct which life sustaining treatment the principal would desire or not desire if the principal is pregnant at the time an advance directive become effective; (18 V.S.A. § 9702). At least 45 states still require such legislative reform.

Modification of the *Patient Self-Determination Act of 1990*: Until all 50 states have enacted laws that protecting women’s rights, the *Patient Self-Determination Act* should be updated to require health care providers to inform women of the pregnancy stipulations in their state laws on advance directives in their states. As of 2006, 29 percent of adults reported having an advance directive, more than doubling the number from 1990,¹ before the Act was passed. While the law is helping to inform people on their right to create an advance directive, it gives little guidance on the specific information that should be discussed with the patient and it nowhere covers information on pregnancy exclusions.

With the vagueness and complex structure of how advance directive legislation is written, it is important that patients are informed of the particulars in a way that is clear and easy to understand. This is especially true for women, who may have no idea that a pregnancy may

invalidate her declared wishes. Thus, the *Patient Self-Determination Act* must be amended to include the requirement that women are informed of these issues so that they may make the most well-informed decisions possible and take whatever actions are necessary to protect their right to control over their bodies.



State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-4185(?)

TJD:(.....)

RMR Sac

In: 2/5

Due
soon

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

- 1 **AN ACT** ^{gen cast}; **relating to:** effect of advance directives and powers of attorney for
 2 health care during pregnancy.

Analysis by the Legislative Reference Bureau

Current law allows an individual to execute a declaration to physicians that specifies whether that individual chooses to withhold or withdraw life-sustaining procedures or feeding tubes if that individual has a terminal condition or is in a vegetative state. The Wisconsin form to be prepared by the Department of Health Services specifies that the individual, if he or she has a terminal condition, does not want his or her dying to be artificially prolonged and does not want life-sustaining procedures to be used. Under current law the physician must follow the wishes in the declaration unless the physician believes that withholding or withdrawing life-sustaining procedures or feeding tubes would cause the patient pain or reduced comfort and that the pain or discomfort cannot be alleviated through pain relief measures. Under current law, the declaration to physicians has no effect during the pregnancy of a woman the physician knows to be pregnant. This bill eliminates the prohibition on giving effect to the declaration during a woman's pregnancy.

Under current law, a physician may issue a do-not-resuscitate order if all of the following apply: the patient has attained age 18 and has a terminal condition; the patient has a medical condition in which resuscitation would be unsuccessful in restoring cardiac or respiratory function or the patient would experience repeated cardiac or pulmonary failure within a short period before death; the patient or the patient's guardian or health care agent requests, consents to, and signs the order; the order is in writing; and the physician does not know the patient to be pregnant.

*

medical

3 medical

Current law requires emergency ~~medication~~ technicians, first responders, and emergency health care facility personnel to follow a do-not-resuscitate order except if the do-not-resuscitate order is revoked, if the patient's do-not-resuscitate bracelet appears to have been tampered with or removed, or if the emergency personnel know the patient to be pregnant. The bill removes the restriction to obtaining a do-not-resuscitate order when the patient is pregnant. The bill also removes the prohibition on following do-not-resuscitate orders when the patient is pregnant.

*

on

Under current law, an individual may execute a power of attorney for health care, which allows the designation of a health care agent to make health care decisions on behalf of the individual while the individual is incapacitated. Current law and the Wisconsin form for the power of attorney for health care allow the individual who is executing the power of attorney for health care to specify certain decisions that the agent may make. Specifically, the individual may designate by checking "yes" or "no" whether the agent may make health care decisions when the individual is pregnant. If the individual does not check either "yes" or "no" on the form, the form specifies that the agent may not make health care decisions when the individual is pregnant. The bill changes the default such that if an individual does not check either "yes" or "no" on the form, the agent may make health care decisions when the individual is pregnant.

so

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

↳

1 SECTION 1. 154.03 (2) of the statutes is amended to read:

2 154.03 (2) The department shall prepare and provide copies of the declaration
3 and accompanying information for distribution in quantities to health care
4 professionals, hospitals, nursing homes, county clerks and local bar associations and
5 individually to private persons. The department shall include, in information
6 accompanying the declaration, at least the statutory definitions of terms used in the
7 declaration, statutory restrictions on who may be witnesses to a valid declaration,
8 a statement explaining that valid witnesses acting in good faith are statutorily
9 immune from civil or criminal liability, an instruction to potential declarants to read
10 and understand the information before completing the declaration and a statement

1 explaining that an instrument may, but need not be, filed with the register in probate
2 of the declarant's county of residence. The department may charge a reasonable fee
3 for the cost of preparation and distribution. The declaration distributed by the
4 department of health services shall be easy to read, the type size may be no smaller
5 than 10 point, and the declaration shall be in the following form, setting forth on the
6 first page the wording before the ATTENTION statement and setting forth on the
7 2nd page the ATTENTION statement and remaining wording:

8 DECLARATION TO PHYSICIANS

9 (WISCONSIN LIVING WILL)

10 I,...., being of sound mind, voluntarily state my desire that my dying not be
11 prolonged under the circumstances specified in this document. Under those
12 circumstances, I direct that I be permitted to die naturally. If I am unable to give
13 directions regarding the use of life-sustaining procedures or feeding tubes, I intend
14 that my family and physician honor this document as the final expression of my legal
15 right to refuse medical or surgical treatment.

16 1. If I have a TERMINAL CONDITION, as determined by 2 physicians who
17 have personally examined me, I do not want my dying to be artificially prolonged and
18 I do not want life-sustaining procedures to be used. In addition, the following are
19 my directions regarding the use of feeding tubes:

20 YES, I want feeding tubes used if I have a terminal condition.

21 NO, I do not want feeding tubes used if I have a terminal condition.

22 If you have not checked either box, feeding tubes will be used.

23 2. If I am in a PERSISTENT VEGETATIVE STATE, as determined by 2
24 physicians who have personally examined me, the following are my directions
25 regarding the use of life-sustaining procedures:

1

Witness signature

Date signed

2

Print name

3

4

Witness signature

Date signed

5

Print name

6

DIRECTIVES TO ATTENDING PHYSICIAN

7

1. This document authorizes the withholding or withdrawal of life-sustaining procedures or of feeding tubes when 2 physicians, one of whom is the attending physician, have personally examined and certified in writing that the patient has a terminal condition or is in a persistent vegetative state.

11

2. The choices in this document were made by a competent adult. Under the law, the patient's stated desires must be followed unless you believe that withholding or withdrawing life-sustaining procedures or feeding tubes would cause the patient pain or reduced comfort and that the pain or discomfort cannot be alleviated through pain relief measures. If the patient's stated desires are that life-sustaining procedures or feeding tubes be used, this directive must be followed.

17

3. If you feel that you cannot comply with this document, you must make a good faith attempt to transfer the patient to another physician who will comply. Refusal or failure to make a good faith attempt to do so constitutes unprofessional conduct.

20

~~4. If you know that the patient is pregnant, this document has no effect during her pregnancy.~~

22

* * * * *

1 The person making this living will may use the following space to record the
2 names of those individuals and health care providers to whom he or she has given
3 copies of this document:

4

5

6

7 **History:** 1983 a. 202; 1985 a. 199; 1991 a. 84, 281; 1995 a. 27 s. 9126 (19); 1995 a. 168; 2007 a. 20 s. 9121 (6) (a).

SECTION 2. 154.07 (2) of the statutes is amended to read:

8 154.07 (2) EFFECT OF DECLARATION. The desires of a qualified patient who is
9 competent supersede the effect of the declaration at all times. If a qualified patient
10 is adjudicated incompetent at the time of the decision to withhold or withdraw
11 life-sustaining procedures or feeding tubes, a declaration executed under this
12 subchapter is presumed to be valid. ~~The declaration of a qualified patient who is~~
13 ~~diagnosed as pregnant by the attending physician has no effect during the course of~~
14 ~~the qualified patient's pregnancy.~~ For the purposes of this subchapter, a physician
15 or inpatient health care facility may presume in the absence of actual notice to the
16 contrary that a person who executed a declaration was of sound mind at the time.

17 **History:** 1983 a. 202; 1991 a. 84; 1995 a. 200, 2003 a. 290; 2005 a. 387.

SECTION 3. 154.19 (1) (e) of the statutes is repealed.

18 **SECTION 4.** 154.19 (3) (b) 3. of the statutes is repealed.

19 **SECTION 5.** 155.20 (6) of the statutes is amended to read:

20 155.20 (6) If the principal is known to be pregnant, the health care agent may
21 make a health care decision on behalf of the principal that the power of attorney for
22 health care instrument authorizes, unless the power of attorney for health care
23 instrument specifies otherwise.

24 **History:** 1989 a. 200; 1991 a. 84, 269, 281; 1995 a. 200; 1997 a. 206; 2007 a. 106, 153; 2011 a. 126.

SECTION 6. 155.30 (3) of the statutes is amended to read:

1 155.30 (3) The department shall prepare and provide copies of a power of
 2 attorney for health care instrument and accompanying information for distribution
 3 in quantities to health care professionals, hospitals, nursing homes, multipurpose
 4 senior centers, county clerks, and local bar associations and individually to private
 5 persons. The department shall include, in information accompanying the copy of the
 6 instrument, at least the statutory definitions of terms used in the instrument,
 7 statutory restrictions on who may be witnesses to a valid instrument, a statement
 8 explaining that valid witnesses acting in good faith are statutorily immune from civil
 9 or criminal liability and a statement explaining that an instrument may, but need
 10 not, be filed with the register in probate of the principal's county of residence. The
 11 department may charge a reasonable fee for the cost of preparation and distribution.
 12 The power of attorney for health care instrument distributed by the department
 13 shall include the notice specified in sub. (1) and shall be in the following form:

14

POWER OF ATTORNEY FOR HEALTH CARE

15 Document made this.... day of.... (month),.... (year).

16 CREATION OF POWER OF ATTORNEY
17 FOR HEALTH CARE

18 I,.... (print name, address and date of birth), being of sound mind, intend by this
 19 document to create a power of attorney for health care. My executing this power of
 20 attorney for health care is voluntary. Despite the creation of this power of attorney
 21 for health care, I expect to be fully informed about and allowed to participate in any
 22 health care decision for me, to the extent that I am able. For the purposes of this
 23 document, "health care decision" means an informed decision to accept, maintain,
 24 discontinue or refuse any care, treatment, service or procedure to maintain, diagnose
 25 or treat my physical or mental condition.

1 In addition, I may, by this document, specify my wishes with respect to making
2 an anatomical gift upon my death.

3 DESIGNATION OF HEALTH CARE AGENT

4 If I am no longer able to make health care decisions for myself, due to my
5 incapacity, I hereby designate.... (print name, address and telephone number) to be
6 my health care agent for the purpose of making health care decisions on my behalf.
7 If he or she is ever unable or unwilling to do so, I hereby designate.... (print name,
8 address and telephone number) to be my alternate health care agent for the purpose
9 of making health care decisions on my behalf. Neither my health care agent nor my
10 alternate health care agent whom I have designated is my health care provider, an
11 employee of my health care provider, an employee of a health care facility in which
12 I am a patient or a spouse of any of those persons, unless he or she is also my relative.
13 For purposes of this document, "incapacity" exists if 2 physicians or a physician and
14 a psychologist who have personally examined me sign a statement that specifically
15 expresses their opinion that I have a condition that means that I am unable to receive
16 and evaluate information effectively or to communicate decisions to such an extent
17 that I lack the capacity to manage my health care decisions. A copy of that statement
18 must be attached to this document.

19 GENERAL STATEMENT OF AUTHORITY GRANTED

20 Unless I have specified otherwise in this document, if I ever have incapacity I
21 instruct my health care provider to obtain the health care decision of my health care
22 agent, if I need treatment, for all of my health care and treatment. I have discussed
23 my desires thoroughly with my health care agent and believe that he or she
24 understands my philosophy regarding the health care decisions I would make if I

1 were able. I desire that my wishes be carried out through the authority given to my
2 health care agent under this document.

3 If I am unable, due to my incapacity, to make a health care decision, my health
4 care agent is instructed to make the health care decision for me, but my health care
5 agent should try to discuss with me any specific proposed health care if I am able to
6 communicate in any manner, including by blinking my eyes. If this communication
7 cannot be made, my health care agent shall base his or her decision on any health
8 care choices that I have expressed prior to the time of the decision. If I have not
9 expressed a health care choice about the health care in question and communication
10 cannot be made, my health care agent shall base his or her health care decision on
11 what he or she believes to be in my best interest.

12 **LIMITATIONS ON MENTAL HEALTH TREATMENT**

13 My health care agent may not admit or commit me on an inpatient basis to an
14 institution for mental diseases, an intermediate care facility for persons with an
15 intellectual disability, a state treatment facility or a treatment facility. My health
16 care agent may not consent to experimental mental health research or
17 psychosurgery, electroconvulsive treatment or drastic mental health treatment
18 procedures for me.

19 **ADMISSION TO NURSING HOMES OR**

20 **COMMUNITY-BASED RESIDENTIAL FACILITIES**

21 My health care agent may admit me to a nursing home or community-based
22 residential facility for short-term stays for recuperative care or respite care.

23 If I have checked "Yes" to the following, my health care agent may admit me for
24 a purpose other than recuperative care or respite care, but if I have checked "No" to
25 the following, my health care agent may not so admit me:

1 1. A nursing home — Yes.... No....

2 2. A community-based residential facility — Yes.... No....

3 If I have not checked either “Yes” or “No” immediately above, my health care
4 agent may admit me only for short-term stays for recuperative care or respite care.

5 **PROVISION OF A FEEDING TUBE**

6 If I have checked “Yes” to the following, my health care agent may have a
7 feeding tube withheld or withdrawn from me, unless my physician has advised that,
8 in his or her professional judgment, this will cause me pain or will reduce my comfort.

9 If I have checked “No” to the following, my health care agent may not have a feeding
10 tube withheld or withdrawn from me.

11 My health care agent may not have orally ingested nutrition or hydration
12 withheld or withdrawn from me unless provision of the nutrition or hydration is
13 medically contraindicated.

14 Withhold or withdraw a feeding tube — Yes.... No....

15 If I have not checked either “Yes” or “No” immediately above, my health care
16 agent may not have a feeding tube withdrawn from me.

17 **HEALTH CARE DECISIONS FOR**

18 **PREGNANT WOMEN**

19 If I have checked “Yes” to the following, my health care agent may make health
20 care decisions for me even if my agent knows I am pregnant. If I have checked “No”
21 to the following, my health care agent may not make health care decisions for me if
22 my health care agent knows I am pregnant.

23 Health care decision if I am pregnant — Yes.... No....

1 If I have not checked either "Yes" or "No" immediately above, my health care
2 agent may not make health care decisions for me if my health care agent knows I am
3 pregnant.

4 STATEMENT OF DESIRES,
5 SPECIAL PROVISIONS OR LIMITATIONS

6 In exercising authority under this document, my health care agent shall act
7 consistently with my following stated desires, if any, and is subject to any special
8 provisions or limitations that I specify. The following are specific desires, provisions
9 or limitations that I wish to state (add more items if needed):

- 10 1) -
- 11 2) -
- 12 3) -

13 INSPECTION AND DISCLOSURE OF
14 INFORMATION RELATING TO MY PHYSICAL
15 OR MENTAL HEALTH

16 Subject to any limitations in this document, my health care agent has the
17 authority to do all of the following:

- 18 (a) Request, review and receive any information, oral or written, regarding my
19 physical or mental health, including medical and hospital records.
- 20 (b) Execute on my behalf any documents that may be required in order to obtain
21 this information.
- 22 (c) Consent to the disclosure of this information.

23 (The principal and the witnesses all must sign the document at the same time.)

24 SIGNATURE OF PRINCIPAL

25 (person creating the power of attorney for health care)

1 Signature.... Date....

2 (The signing of this document by the principal revokes all previous powers of
3 attorney for health care documents.)

4 STATEMENT OF WITNESSES

5 I know the principal personally and I believe him or her to be of sound mind and
6 at least 18 years of age. I believe that his or her execution of this power of attorney
7 for health care is voluntary. I am at least 18 years of age, am not related to the
8 principal by blood, marriage, or adoption, am not the domestic partner under ch. 770
9 of the principal, and am not directly financially responsible for the principal's health
10 care. I am not a health care provider who is serving the principal at this time, an
11 employee of the health care provider, other than a chaplain or a social worker, or an
12 employee, other than a chaplain or a social worker, of an inpatient health care facility
13 in which the declarant is a patient. I am not the principal's health care agent. To
14 the best of my knowledge, I am not entitled to and do not have a claim on the
15 principal's estate.

16 Witness No. 1:

17 (print) Name.... Date....

18 Address....

19 Signature....

20 Witness No. 2:

21 (print) Name.... Date....

22 Address....

23 Signature....

24 STATEMENT OF HEALTH CARE AGENT] AND

25 ALTERNATE HEALTH CARE AGENT

1 I understand that.... (name of principal) has designated me to be his or her
2 health care agent or alternate health care agent if he or she is ever found to have
3 incapacity and unable to make health care decisions himself or herself. (name of
4 principal) has discussed his or her desires regarding health care decisions with me.

5 Agent's signature....

6 Address....

7 Alternate's signature....

8 Address....

9 Failure to execute a power of attorney for health care document under chapter
10 155 of the Wisconsin Statutes creates no presumption about the intent of any
11 individual with regard to his or her health care decisions.

12 This power of attorney for health care is executed as provided in chapter 155
13 of the Wisconsin Statutes.

14 ANATOMICAL GIFTS (optional)

15 Upon my death:

16 I wish to donate only the following organs or parts: (specify the organs or
17 parts).

18 I wish to donate any needed organ or part.

19 I wish to donate my body for anatomical study if needed.

20 I refuse to make an anatomical gift. (If this revokes a prior commitment that
21 I have made to make an anatomical gift to a designated donee, I will attempt to notify
22 the donee to which or to whom I agreed to donate.)

23 Failing to check any of the lines immediately above creates no presumption
24 about my desire to make or refuse to make an anatomical gift.



State of Wisconsin
2013 - 2014 LEGISLATURE



LRB-4185/P1

TJD:sac:ff

RMR

In: 2/13

Due soon

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

-gen case

1 AN ACT *to repeal* 154.19 (1) (e) and 154.19 (3) (b) 3.; and *to amend* 154.03 (2),
2 154.07 (2), 155.20 (6) and 155.30 (3) of the statutes; **relating to:** effect of
3 advance directives and powers of attorney for health care during pregnancy.

Analysis by the Legislative Reference Bureau

Current law allows an individual to execute a declaration to physicians that specifies whether that individual chooses to withhold or withdraw life-sustaining procedures or feeding tubes if that individual has a terminal condition or is in a vegetative state. The Wisconsin form to be prepared by the Department of Health Services specifies that the individual, if he or she has a terminal condition, does not want his or her dying to be artificially prolonged and does not want life-sustaining procedures to be used. Under current law the physician must follow the wishes in the declaration unless the physician believes that withholding or withdrawing life-sustaining procedures or feeding tubes would cause the patient pain or reduced comfort and that the pain or discomfort cannot be alleviated through pain relief measures. Under current law, the declaration to physicians has no effect during the pregnancy of a woman the physician knows to be pregnant. This bill eliminates the prohibition on giving effect to the declaration during a woman's pregnancy.

Under current law, a physician may issue a do-not-resuscitate order if all of the following apply: the patient has attained age 18 and has a terminal condition; the patient has a medical condition in which resuscitation would be unsuccessful in restoring cardiac or respiratory function or the patient would experience repeated cardiac or pulmonary failure within a short period before death; the patient or the patient's guardian or health care agent requests, consents to, and signs the order; the

order is in writing; and the physician does not know the patient to be pregnant. Current law requires emergency medical technicians, first responders, and emergency health care facility personnel to follow a do-not-resuscitate order except if the do-not-resuscitate order is revoked, if the patient's do-not-resuscitate bracelet appears to have been tampered with or removed, or if the emergency personnel know the patient to be pregnant. The bill removes the restriction on obtaining a do-not-resuscitate order when the patient is pregnant. The bill also removes the prohibition on following do-not-resuscitate orders when the patient is pregnant.

Under current law, an individual may execute a power of attorney for health care, which allows the designation of a health care agent to make health care decisions on behalf of the individual while the individual is incapacitated. Current law and the Wisconsin form for the power of attorney for health care allow the individual who is executing the power of attorney for health care to specify certain decisions that the agent may make. Specifically, the individual may designate by checking "yes" or "no" whether the agent may make health care decisions when the individual is pregnant. If the individual does not check either "yes" or "no" on the form, the form specifies that the agent may not make health care decisions when the individual is pregnant. The bill changes the default so that if an individual does not check either "yes" or "no" on the form, the agent may make health care decisions when the individual is pregnant.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 154.03 (2) of the statutes is amended to read:
2 154.03 (2) The department shall prepare and provide copies of the declaration
3 and accompanying information for distribution in quantities to health care
4 professionals, hospitals, nursing homes, county clerks and local bar associations and
5 individually to private persons. The department shall include, in information
6 accompanying the declaration, at least the statutory definitions of terms used in the
7 declaration, statutory restrictions on who may be witnesses to a valid declaration,
8 a statement explaining that valid witnesses acting in good faith are statutorily
9 immune from civil or criminal liability, an instruction to potential declarants to read
10 and understand the information before completing the declaration and a statement

1 explaining that an instrument may, but need not be, filed with the register in probate
2 of the declarant's county of residence. The department may charge a reasonable fee
3 for the cost of preparation and distribution. The declaration distributed by the
4 department of health services shall be easy to read, the type size may be no smaller
5 than 10 point, and the declaration shall be in the following form, setting forth on the
6 first page the wording before the ATTENTION statement and setting forth on the
7 2nd page the ATTENTION statement and remaining wording:

8 DECLARATION TO PHYSICIANS

9 (WISCONSIN LIVING WILL)

10 I,...., being of sound mind, voluntarily state my desire that my dying not be
11 prolonged under the circumstances specified in this document. Under those
12 circumstances, I direct that I be permitted to die naturally. If I am unable to give
13 directions regarding the use of life-sustaining procedures or feeding tubes, I intend
14 that my family and physician honor this document as the final expression of my legal
15 right to refuse medical or surgical treatment.

16 1. If I have a TERMINAL CONDITION, as determined by 2 physicians who
17 have personally examined me, I do not want my dying to be artificially prolonged and
18 I do not want life-sustaining procedures to be used. In addition, the following are
19 my directions regarding the use of feeding tubes:

20 YES, I want feeding tubes used if I have a terminal condition.

21 NO, I do not want feeding tubes used if I have a terminal condition.

22 If you have not checked either box, feeding tubes will be used.

23 2. If I am in a PERSISTENT VEGETATIVE STATE, as determined by 2
24 physicians who have personally examined me, the following are my directions
25 regarding the use of life-sustaining procedures:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

Witness signature

Date signed

Print name

DIRECTIVES TO
ATTENDING PHYSICIAN

1. This document authorizes the withholding or withdrawal of life-sustaining procedures or of feeding tubes when 2 physicians, one of whom is the attending physician, have personally examined and certified in writing that the patient has a terminal condition or is in a persistent vegetative state.

2. The choices in this document were made by a competent adult. Under the law, the patient's stated desires must be followed unless you believe that withholding or withdrawing life-sustaining procedures or feeding tubes would cause the patient pain or reduced comfort and that the pain or discomfort cannot be alleviated through pain relief measures. If the patient's stated desires are that life-sustaining procedures or feeding tubes be used, this directive must be followed.

3. If you feel that you cannot comply with this document, you must make a good faith attempt to transfer the patient to another physician who will comply. Refusal or failure to make a good faith attempt to do so constitutes unprofessional conduct.

~~4. If you know that the patient is pregnant, this document has no effect during her pregnancy.~~

* * * * *

The person making this living will may use the following space to record the names of those individuals and health care providers to whom he or she has given copies of this document:

.....

1
2

3 **SECTION 2.** 154.07 (2) of the statutes is amended to read:

4 154.07 (2) EFFECT OF DECLARATION. The desires of a qualified patient who is
5 competent supersede the effect of the declaration at all times. If a qualified patient
6 is adjudicated incompetent at the time of the decision to withhold or withdraw
7 life-sustaining procedures or feeding tubes, a declaration executed under this
8 subchapter is presumed to be valid. ~~The declaration of a qualified patient who is~~
9 ~~diagnosed as pregnant by the attending physician has no effect during the course of~~
10 ~~the qualified patient's pregnancy.~~ For the purposes of this subchapter, a physician
11 or inpatient health care facility may presume in the absence of actual notice to the
12 contrary that a person who executed a declaration was of sound mind at the time.

13 **SECTION 3.** 154.19 (1) (e) of the statutes is repealed.

14 **SECTION 4.** 154.19 (3) (b) 3. of the statutes is repealed.

15 **SECTION 5.** 155.20 (6) of the statutes is amended to read:

16 155.20 (6) If the principal is known to be pregnant, the health care agent may
17 make a health care decision on behalf of the principal that the power of attorney for
18 health care instrument authorizes, unless the power of attorney for health care
19 instrument specifies otherwise.

20 **SECTION 6.** 155.30 (3) of the statutes is amended to read:

21 155.30 (3) The department shall prepare and provide copies of a power of
22 attorney for health care instrument and accompanying information for distribution
23 in quantities to health care professionals, hospitals, nursing homes, multipurpose
24 senior centers, county clerks, and local bar associations and individually to private
25 persons. The department shall include, in information accompanying the copy of the

1 instrument, at least the statutory definitions of terms used in the instrument,
2 statutory restrictions on who may be witnesses to a valid instrument, a statement
3 explaining that valid witnesses acting in good faith are statutorily immune from civil
4 or criminal liability and a statement explaining that an instrument may, but need
5 not, be filed with the register in probate of the principal's county of residence. The
6 department may charge a reasonable fee for the cost of preparation and distribution.
7 The power of attorney for health care instrument distributed by the department
8 shall include the notice specified in sub. (1) and shall be in the following form:

9 POWER OF ATTORNEY

10 FOR HEALTH CARE

11 Document made this.... day of.... (month),.... (year).

12 CREATION OF POWER OF ATTORNEY

13 FOR HEALTH CARE

14 I,.... (print name, address and date of birth), being of sound mind, intend by this
15 document to create a power of attorney for health care. My executing this power of
16 attorney for health care is voluntary. Despite the creation of this power of attorney
17 for health care, I expect to be fully informed about and allowed to participate in any
18 health care decision for me, to the extent that I am able. For the purposes of this
19 document, "health care decision" means an informed decision to accept, maintain,
20 discontinue or refuse any care, treatment, service or procedure to maintain, diagnose
21 or treat my physical or mental condition.

22 In addition, I may, by this document, specify my wishes with respect to making
23 an anatomical gift upon my death.

24 DESIGNATION OF

25 HEALTH CARE AGENT

1 If I am no longer able to make health care decisions for myself, due to my
2 incapacity, I hereby designate.... (print name, address and telephone number) to be
3 my health care agent for the purpose of making health care decisions on my behalf.
4 If he or she is ever unable or unwilling to do so, I hereby designate.... (print name,
5 address and telephone number) to be my alternate health care agent for the purpose
6 of making health care decisions on my behalf. Neither my health care agent nor my
7 alternate health care agent whom I have designated is my health care provider, an
8 employee of my health care provider, an employee of a health care facility in which
9 I am a patient or a spouse of any of those persons, unless he or she is also my relative.
10 For purposes of this document, “incapacity” exists if 2 physicians or a physician and
11 a psychologist who have personally examined me sign a statement that specifically
12 expresses their opinion that I have a condition that means that I am unable to receive
13 and evaluate information effectively or to communicate decisions to such an extent
14 that I lack the capacity to manage my health care decisions. A copy of that statement
15 must be attached to this document.

16 GENERAL STATEMENT

17 OF AUTHORITY GRANTED

18 Unless I have specified otherwise in this document, if I ever have incapacity I
19 instruct my health care provider to obtain the health care decision of my health care
20 agent, if I need treatment, for all of my health care and treatment. I have discussed
21 my desires thoroughly with my health care agent and believe that he or she
22 understands my philosophy regarding the health care decisions I would make if I
23 were able. I desire that my wishes be carried out through the authority given to my
24 health care agent under this document.

1 If I am unable, due to my incapacity, to make a health care decision, my health
2 care agent is instructed to make the health care decision for me, but my health care
3 agent should try to discuss with me any specific proposed health care if I am able to
4 communicate in any manner, including by blinking my eyes. If this communication
5 cannot be made, my health care agent shall base his or her decision on any health
6 care choices that I have expressed prior to the time of the decision. If I have not
7 expressed a health care choice about the health care in question and communication
8 cannot be made, my health care agent shall base his or her health care decision on
9 what he or she believes to be in my best interest.

10 LIMITATIONS ON
11 MENTAL HEALTH TREATMENT

12 My health care agent may not admit or commit me on an inpatient basis to an
13 institution for mental diseases, an intermediate care facility for persons with an
14 intellectual disability, a state treatment facility or a treatment facility. My health
15 care agent may not consent to experimental mental health research or
16 psychosurgery, electroconvulsive treatment or drastic mental health treatment
17 procedures for me.

18 ADMISSION TO NURSING HOMES OR
19 COMMUNITY-BASED
20 RESIDENTIAL FACILITIES

21 My health care agent may admit me to a nursing home or community-based
22 residential facility for short-term stays for recuperative care or respite care.

23 If I have checked “Yes” to the following, my health care agent may admit me for
24 a purpose other than recuperative care or respite care, but if I have checked “No” to
25 the following, my health care agent may not so admit me:

1 1. A nursing home — Yes.... No....

2 2. A community-based residential facility — Yes.... No....

3 If I have not checked either “Yes” or “No” immediately above, my health care
4 agent may admit me only for short-term stays for recuperative care or respite care.

5 **PROVISION OF A FEEDING TUBE**

6 If I have checked “Yes” to the following, my health care agent may have a
7 feeding tube withheld or withdrawn from me, unless my physician has advised that,
8 in his or her professional judgment, this will cause me pain or will reduce my comfort.

9 If I have checked “No” to the following, my health care agent may not have a feeding
10 tube withheld or withdrawn from me.

11 My health care agent may not have orally ingested nutrition or hydration
12 withheld or withdrawn from me unless provision of the nutrition or hydration is
13 medically contraindicated.

14 Withhold or withdraw a feeding tube — Yes.... No....

15 If I have not checked either “Yes” or “No” immediately above, my health care
16 agent may not have a feeding tube withdrawn from me.

17 **HEALTH CARE DECISIONS FOR**

18 **PREGNANT WOMEN**

19 If I have checked “Yes” to the following, my health care agent may make health
20 care decisions for me even if my agent knows I am pregnant. If I have checked “No”
21 to the following, my health care agent may not make health care decisions for me if
22 my health care agent knows I am pregnant.

23 Health care decision if I am pregnant — Yes.... No....

1 If I have not checked either “Yes” or “No” immediately above, my health care
2 agent may not make health care decisions for me if my health care agent knows I am
3 pregnant.

4 **STATEMENT OF DESIRES, SPECIAL**
5 **PROVISIONS OR LIMITATIONS**

6 In exercising authority under this document, my health care agent shall act
7 consistently with my following stated desires, if any, and is subject to any special
8 provisions or limitations that I specify. The following are specific desires, provisions
9 or limitations that I wish to state (add more items if needed):

- 10 1) –
- 11 2) –
- 12 3) –

13 **INSPECTION AND DISCLOSURE OF**
14 **INFORMATION RELATING TO MY**
15 **PHYSICAL OR MENTAL HEALTH**

16 Subject to any limitations in this document, my health care agent has the
17 authority to do all of the following:

- 18 (a) Request, review and receive any information, oral or written, regarding my
19 physical or mental health, including medical and hospital records.
- 20 (b) Execute on my behalf any documents that may be required in order to obtain
21 this information.
- 22 (c) Consent to the disclosure of this information.

23 (The principal and the witnesses all must sign the document at the same time.)

24 **SIGNATURE OF PRINCIPAL**

25 (person creating the power of attorney for health care)

1 Signature.... Date....

2 (The signing of this document by the principal revokes all previous powers of
3 attorney for health care documents.)

4 **STATEMENT OF WITNESSES**

5 I know the principal personally and I believe him or her to be of sound mind and
6 at least 18 years of age. I believe that his or her execution of this power of attorney
7 for health care is voluntary. I am at least 18 years of age, am not related to the
8 principal by blood, marriage, or adoption, am not the domestic partner under ch. 770
9 of the principal, and am not directly financially responsible for the principal's health
10 care. I am not a health care provider who is serving the principal at this time, an
11 employee of the health care provider, other than a chaplain or a social worker, or an
12 employee, other than a chaplain or a social worker, of an inpatient health care facility
13 in which the declarant is a patient. I am not the principal's health care agent. To
14 the best of my knowledge, I am not entitled to and do not have a claim on the
15 principal's estate.

16 Witness No. 1:

17 (print) Name.... Date....

18 Address....

19 Signature....

20 Witness No. 2:

21 (print) Name.... Date....

22 Address....

23 Signature....

24 **STATEMENT OF HEALTH CARE AGENT**

25 **AND ALTERNATE HEALTH CARE AGENT**

1 I understand that.... (name of principal) has designated me to be his or her
2 health care agent or alternate health care agent if he or she is ever found to have
3 incapacity and unable to make health care decisions himself or herself. (name of
4 principal) has discussed his or her desires regarding health care decisions with me.

5 Agent's signature....

6 Address....

7 Alternate's signature....

8 Address....

9 Failure to execute a power of attorney for health care document under chapter
10 155 of the Wisconsin Statutes creates no presumption about the intent of any
11 individual with regard to his or her health care decisions.

12 This power of attorney for health care is executed as provided in chapter 155
13 of the Wisconsin Statutes.

14 ANATOMICAL GIFTS (optional)

15 Upon my death:

16 I wish to donate only the following organs or parts: (specify the organs or
17 parts).

18 I wish to donate any needed organ or part.

19 I wish to donate my body for anatomical study if needed.

20 I refuse to make an anatomical gift. (If this revokes a prior commitment that
21 I have made to make an anatomical gift to a designated donee, I will attempt to notify
22 the donee to which or to whom I agreed to donate.)

23 Failing to check any of the lines immediately above creates no presumption
24 about my desire to make or refuse to make an anatomical gift.

25 Signature....

Date....

Barman, Mike

From: Peloquin, Traci
Sent: Thursday, February 13, 2014 1:15 PM
To: LRB.Legal
Subject: Draft Review: LRB -4185/1 Topic: Eliminate pregnancy exclusions from advance directives

Thank you!

Please Jacket LRB -4185/1 for the ASSEMBLY.