Fetal personhood rulings could nullify a pregnant patient's wishes for end-of-life care

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The Alabama Supreme Court handed down an unprecedented decision in February 2024, holding that stored frozen embryos created for in vitro fertilization, known as IVF, were "minor children" under a state wrongful death law.

The impact on the medical community was immediate and acute. Fearing newfound civil or criminal legal liability if embryos were now considered "persons" under Alabama law, IVF clinics had to make an overnight choice between providing patient care and risking that liability. As a result, multiple IVF clinics across the state immediately suspended IVF procedures. And the most direct impact, of course, was on patients.

As reproductive rights law and policy researchers—and women of reproductive age—we fear that, as fetal or embryonic personhood debates continue, medical providers will face an increasing number of new situations in which they have to balance legal liability and patient welfare.

These conflicts are already playing out in the abortion context, but another looming example is flying under the radar: whether a doctor will be able to honor a patient's end-of-life wishes if she is pregnant.

In many states, the answer is likely no.

Doctors assessing legal liability

The Supreme Court's Dobbs v. Jackson decision in June 2022 ended the fundamental right to access abortion care, throwing the question of abortion access back to the states and reopening policy debates about fetal personhood. Doctors who treat pregnant patients are now operating

under a patchwork of abortion bans and restrictions that vary from state to state.

Many OB-GYNs navigating this maze now practice with the looming fear of civil or criminal liability if they run afoul—even unwittingly—of rapidly changing state laws and judicial or prosecutorial interpretation of those laws. These fears are not unfounded: States' attorneys general have threatened to prosecute doctors who provide medically necessary abortion care or who help a patient in a state with an abortion ban obtain an out-of-state abortion. Indeed, pregnant women have been criminally charged for miscarriage.

These balancing acts are even playing out when pregnant patients are in emergency situations.

A January 2024 study detailed these conflicts across 13 states. It found that following the Dobbs decision, OB-GYNs delayed providing clinical care to pregnant patients—even in emergency situations—for fear of liability under newly ambiguous state laws.

Advance directive and pregnancy exclusions

The abortion and IVF examples illustrate the fraught and uncertain legal landscape medical professionals must navigate in time-sensitive and emergency situations. In short, there is no playbook, and risk abounds.

We predict that we will see doctors forced to weigh these same uncertainties and risks in the most traumatic of situations: treating a patient who has no hope of survival. In such situations, doctors typically endeavor to honor any end-of-life wishes a patient may have made clear in advance, such as those contained in advance directives. These directives can include decisions about life-sustaining treatments and designation of a health care proxy.

Simply put, advance directives are a way for patients to communicate to their loved ones and doctors how they would like to be medically treated if they are later incapacitated, such as in a state of coma. All 50 states plus Washington D.C. recognize the validity of advance directives.

But not if you're pregnant. As of early 2024, more than half of U.S. states also have laws on the books that automatically invalidate an incapacitated patient's previously expressed end-of-life wishes if the patient is pregnant. Law professor Joan Krause terms these "pregnancy restrictions" and finds that they exist in at least 30 states. In some states, these advance directive nullifications only apply at the point of fetal viability or the possibility of a live birth. In 12 states, however, these advance directive "pregnancy exclusions" kick in at any stage of pregnancy.

This means that, even if a pregnant patient had a prior written, notarized advance directive stating that they would not want to be kept on organ support if they weren't likely to ever recover, a doctor could be required under 30 state laws to ignore those wishes and keep her alive to sustain the pregnancy. And in 12 of those states, that requirement would be in place even if the pregnancy was not viable. These exclusions would, in essence, require doctors to continue organ-sustaining care so that the pregnant patient's body could be used as an incubator for a fetus.

There are currently few reported cases of pregnant patients' advance directives being nullified, though there are some heartbreaking examples.

A well-publicized 2014 case detailed how Marlise Muñoz, a Texas woman who was 14 weeks pregnant when she was declared brain-dead, was kept alive on life support for three months despite her and her family's clearly expressed wishes that her life not be artificially continued.

The reason? The Texas hospital stated that they were prohibited by the Texas advance directive law from removing life support because Muñoz was pregnant and they had a duty to preserve fetal life.

We suspect, however, that scenarios like the one the Muñoz family faced are underreported. Families in crisis will often not pursue legal options or make their trauma public. We also predict that these situations will become more common in a post-Dobbs world as doctors continue to grapple with emerging uncertainties and fear of legal liability in the context of providing end-of-life care for pregnant patients.

Legislative labyrinths

Clearly, advance directives will not be immune from the personhood debate, since a primary goal of pregnancy exclusions is to protect fetal life.

Just as abortion restrictions vary state to state, so do advance directive laws. The laws are highly complex and often require intricate piecing together of various sections of state laws. It is thus likely that, even if a patient has an advance directive, few will understand that these pregnancy exclusions even exist, let alone their full import.

Moreover, many states have not yet reconciled their advance directive laws with their abortion laws.

Arkansas, where abortion is currently banned at any point in pregnancy, offers an illustrative example.

When it comes to end-of-life care, Arkansas law mandates that physicians "shall" act in accordance with a qualified patient's health care directives.

However, if the patient is pregnant, Arkansas law dictates that the same directive should not be followed "as long as it is possible that the fetus could develop to the point of live birth with continued application of life-sustaining treatment."

An Arkansas doctor attempting to honor a pregnant patient's advance directive and end organ-sustaining care—and thus the pregnancy—would therefore face numerous questions: When is it "possible" that a fetus could develop to the point of live birth? Is this a question of clinical fetal viability, which the American College of Obstetricians and Gynecologists states is highly case-specific and impossible to "definitively declare"? And how does a doctor square the Arkansas abortion ban with the advance directive law that seems to allow removal of treatment up until "fetus could develop to the point of live birth"?

Being specific in advance directives

Recent abortion and IVF cases have highlighted the constantly changing landscape of medical decision-making and what that means for medical care. Given this shifting terrain, it is impossible to predict with any degree of certainty how a pregnant person's end-of-life care directives will be interpreted—even in the handful of states that allow patients to explicitly state their wishes in the event of pregnancy.

That said, it would be wise practice for pregnant patients—or those who may one day become pregnant—to attempt to understand the complexities of their state law and to put a clear and specific advance directive in place that directly addresses wishes in the event of pregnancy.

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