SB

250

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date : _____

REQUEST

Bill/Resolution No. : SB 250

Title : An Act giving effect to declaration of qualified patient during pregnancy.

Sponsor : Eliason

Requestor : _____

Date of Request : 4/9/87

FISCAL DETAIL

Agency Affected : none

BRU : _____

Components : _____

EXPENDITURES/REVENUES : (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING						
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE						

FUNDING : (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS :

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS : Attach a separate page if necessary

Prepared by : Hayden Kaden Phone : 465-3717

Division : Senate Judiciary Committee Date : 4/10/87

Approved by Commissioner : Senator Jay Kerttula Date : 4/14/87

Agency : Senate Judiciary Committee

Distribution (by Agency preparing fiscal note) :

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

9/16/86

BILL SHEFFIELD
GOVERNOR

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

The Honorable Don Bennett
President of the Senate
Alaska State Legislature
P. O. Box V
Juneau, AK 99811

Re: CCS SB 140 -- rights of the terminally ill

Dear Senator Bennett:

I have today signed CCS SB 140, on the rights of the terminally ill. I have signed it because I believe that the bill, based on the Uniform Rights of the Terminally Ill Act, as promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL), is a significant and worthwhile step in preserving an individual's right to die with dignity and to refuse life-sustaining treatment that would only prolong the agony of dying. The bill provides for what has been called a "living will."

However, during the Alaska Legislature's consideration of this bill, proposed AS 18.12.040(c) was amended to deny this right to a pregnant woman. By deleting the clause that appeared in the original version and in the Uniform Act as promulgated by the NCCUSL -- "unless the declaration provides otherwise" -- the Alaska Legislature has probably rendered the provision unconstitutional. I am advised, however, by the Department of Law that the provision is probably severable from the rest of the bill, so that if it is held invalid, the benefits provided by the rest of the bill could still be given effect.

I firmly support the general concept of this bill, and therefore, have signed it into law.

Sincerely,

Bill Sheffield
Governor

NATIONAL ORGANIZATION FOR WOMEN
STATE OF ALASKA

200 W. 34TH AVENUE, SUITE 844
ANCHORAGE, ALASKA 99503
(907) 562-3081, Ext. 844

February 21, 1987

The Honorable Steve Cowper
Governor of Alaska
Pouch A
Juneau, Alaska 99801

Dear Legislator:

I am writing you to ask for your support in the repeal of a provision in a bill that was passed last year: SB 140 - the Living Will bill. The legislation's intended purpose was to allow patients' legal rights to die (as specified in a prepared will) when natural death is imminent and only extra-ordinary life sustaining procedures would prolong existence. The provision needing repeal (now Alaska Statute 18.12.040 (c) pertains to a limitation on the right of a terminally ill pregnant woman to refuse life sustaining procedures. Since Article One, Sections One and Three upholds equal rights for all Alaskans, pregnant or not. This provision is most evidentally unconstitutional.

Governor Sheffield signed this bill into law last year with the promise that he would ask for a repeal of this section; attorneys in the Department of Law had advised the governor that the provision probably could not withstand a constitutionality challenge. We are hoping that the legislature will be wise enough to remove this odious clause and avoid any costly litigation on the matter.

In further explanation, what Section C does is to state that a pregnant woman does not have the right to die as do other people nor does she have the right to designate within her declaration a choice regarding the condition of pregnancy and how it will affect her living will. It suggests that in the event of impending natural death, a pregnant woman must first undergo an abortion in order to die. This asburdity piled on top of absurdity. This provision was added to the legislation last year at the suggestion of extremist Right to Life lobbyist who have been promoting other similar crazy initiatives such as funerals for fetuses.

The situation of a terminally ill pregnant woman is undoubtedly rare, however, there have been several infamous cases recently in other states which brought national publicity. The remoteness of the possibility should not constrain legislators from acting on a repeal. Passage of unconstitutional provisions have caused unecessary confusion and expenditure of many public dollars in

futile legal defenses.

We would request that you both sponsor and vote for a repeal of AS 18.12.040 (c). Support of this position was taken by our state executive board at the State Annual Convention in July. If you need additional information, please do not hesitate to write me at the above address.

With best regards, I remain,

Sincerely,

Jan Erickson
Vice President, Legislation

523 Harris St.
Juneau, Alaska 99801

May 6, 1986

Members of the SB 140 Conference Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99801

Dear Senators and Representatives:

I have already spoken with each of you at some length. The intent of this letter is to submit the attached information in support of my opinion that SB 140 and the HB amendment regarding the pregnant patient's right (non-right) to die is unacceptable. I have done extensive research into the evolution of this bill and specifically the amendment (section 18.12.040 c). I have sought legal and other counsel on several levels that overwhelming support this opinion.

There is sufficient evidence to warrant reassessment of this amendment as to define its validity and purpose. In lieu of the original intent of the bill which I felt to be the right of an individual to determine their own dignity in death, my concerns are founded on both legal and ethical grounds. First of all it appears that the present amendments violate basic rights provided by both the Federal and State Constitutions. Discussions to support this statement would be great in length and I wish to remain concise. None-the-less, constitutional validity of this amendment is questionable. Attached information can substantiate this argument.

The individual's right to die with dignity is personal and should be respected. So perhaps the true issue at hand is basically a question of judging that dignity. It seems to me as the present amendment would suggest is that it is not the dignity of the individual that has been considered but the judgment of 'potential indignity' of their choice. If this bill is truly a call for dignity in death, then we indeed need to redefine dignity itself, and to whom in the throes of death, that dignity belongs. I believe it belongs to the dying individual. To deny this is to refute the ideal for which this bill stands.

In conclusion a woman patient has equal rights to die with dignity as should be guaranteed by this bill. For if we are to maintain the intended integrity of Right-To-Die legislation this will be so. I trust these items will be thoughtfully considered and acted upon. At this date I am asking for deletion of this amendment.

Thank you for your attention.

Most sincerely,

Christina Loris
Lorraine Pitman

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

REPRODUCTIVE FREEDOM PROJECT

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April 22, 1986

Maryanne Butcher
Executive Director
Alaska Civil Liberties Union
P.O. Box 201844
Anchorage, Alaska 99520-1844

Dear Ms. Butcher:

I am writing with regard to the pending "right to die" legislation which we spoke about earlier this week. There are strong arguments that the proposed amendment, which would preclude a pregnant woman from declining certain medical treatment so long as the fetus is alive, is unconstitutional.

The only conceivable rationale for the amendment is a desire on the part of the legislature to protect and preserve the potential life of the fetus. In Roe v. Wade, 410 U.S. 113 (1973), the United States Supreme Court clearly held that such a state interest simply is not a compelling basis for state regulation before the point of fetal viability, that is, in the first or second trimester of pregnancy. Thus, to the extent that an individual's decision to decline life-prolonging medical measures is a constitutionally protected one, state restriction of that right in furtherance of the preservaton of potential human life is impermissible. A woman could not, under such circumstances, be compelled to prolong her own life solely for the purpose of carrying the fetus to term or to the point of viability.

Although the United States Supreme Court has never ruled on the question, numerous state courts have found the right to refuse life sustaining treatment to be constitutionally protected. See Foody v. Manchester Memorial Hospital, 40 Conn. Supp. 127, 482 A.2d 713, 717 (Sup. Ct. 1984); In re L.H.R., 253 Ga. 439, 321 SE.2d 716, 722 (Sup. Ct. 1984); In re Torres, 357 NW.2d 332, 339 (Minn. Sup. Ct. 1984); In re Colyer, 99 Wash.2d 114, 660 P.2d 738, 742-43 (Sup. Ct. 1983), overruled in part on other grounds, In re Guardianship of Hamlin, 102 Wash.2d 810, 689 P.2d 1372 (Sup. Ct. 1984); Severns v. Wilmington Medical Center,

Inc., 421 A.2d 1334 (Del. Sup. Ct. 1980); Satz v. Perlmutter, 362 So.2d 160, 162 (Fla. Dist. of App. 1978), aff'd, 379 So.2d. 359, 360 (Sup. Ct. 1980); Belchertown State School v. Saikewicz, 373 Mass. 728, 738-40, 370 NE.2d. 417, 424 (Sup. Ct. 1977); In re Quinlan, 70 NJ. 10, 355 A.2d 647, 663 (Sup. Ct. 1976); Bartling v. Superior Court, 163 Cal. App.3d 186, 209 Cal. Reptr. 220, 225 (1984); Leach v. Akron Medical Center, 68 Ohio Misc. 1, 426, A.2d 809, 814 (Comm. Pleas. 1980); In re Yetter, 62 D. & C.2d 619, 623 (Penn. Cty. Ct. Northampton Cty. 1972).* In addition one federal court has found the right to refuse treatment to be constitutionally protected in a federal hospital facility. See Tune v. Walter Reed Army Medical Hospital, 602 F.Supp. 1452, 1454-56 (D.D.C. 1985)(relying in part on state cases cited above).

The argument that the right to refuse life sustaining treatment is a constitutional one, rests upon several lines of clear federal constitutional precedent. First, in Roe v. Wade, the Court "proceeded upon the premise that [the right to privacy gives] a competent adult ...[the] paramount right to control the disposition to be made of his or her own body, absent a compelling countervailing governmental interest..." Tune, 602 F.Supp. at 1454. Second, several Supreme Court cases in other contexts have noted the fundamental constitutional importance of "liberty from bodily restraint," Youngberg v. Romeo, 457 U.S. 307, 316 (1982), freedom from "unjustified intrusion on personal security," Vitek v. Jones, 445 U.S. 480, 492 (1980)(quotation omitted) and the right not to be subjected to invasive medical procedures in search of evidence in a criminal case absent a compelling state reason, see Winston v. Lee, 470 U.S. _____, 84 L.Ed.2d 662 (1985).

Finally, several courts have found that mental patients have a constitutional right to refuse antipsychotic drugs on these and other grounds. See, e.g., Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980), vacated and remanded on other grounds sub. nom., Mills v. Rogers, 457 U.S. 291 (1982), on remand, 738 F.2d 1 (1st Cir. 1984); Rennie v. Klein, 653 F.2d 836, vacated and remanded for further consideration, 458 U.S. 1119 (1982), on remand, 720 F.2d 266 (3d Cir. 1983)(en banc); Bee v. Greaves, 744 F.2d 1387 (10th Cir. 1984).

In sum, there are strong arguments that the right to refuse life sustaining treatment is constitutionally protected against governmental intrusion and that it may not be infringed by state legislation absent a compelling state interest, which the pre-viability preservation of potential life clearly is not under Roe v. Wade.

Furthermore, even in the absence of heightened consti-

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* These cases appear to rely on federal constitutional law with the exception of Bartling and Colyer which rely on both federal and state constitutions.

tutional protection, an argument can be made that in light of Roe v. Wade the proposed amendment is irrational in many situations. In Alaska and elsewhere, a woman has a constitutional right to decide to terminate her pregnancy at any time prior to the point of fetal viability as well as to do so post-viability if it would preserve her life or health. Thus in many situations, pregnant women in Alaska will have a constitutional right to decide to terminate fetal life entirely by aborting but a statutory prohibition against jeopardizing fetal life by declining certain medical care.

In these circumstances, only the fortuitous absence of the woman's competence to give informed consent will preclude her from circumventing the Alaska amendment by obtaining an abortion. In short, a comatose woman in her first or second trimester of pregnancy could be compelled to endure painful life prolonging treatment despite her "living will" to the contrary, solely to perpetuate the life of her fetus. This would be so even though any mentally competent woman similarly situated would have a constitutional right to abort first, thereby enabling her to choose not to endure the pain, discomfort, and degradation of such treatment. If a pregnant woman's right of personal choice regarding her body supercedes a state's interest in potential life pre-viability, then it should do so in all circumstances. The state's interest in fetal life should not become more important simply because the pregnant woman is terminally ill.

As to the application of the proposed amendment in the third trimester context, although the pregnant woman may have no right to abort, she may retain her right of bodily integrity so as to permit her to resist invasive and perhaps even non-invasive medical treatment even though the state's interest in protecting fetal life may then be compelling. No court has passed upon this question.

I hope I have been of some help. Keep us posted.

Sincerely yours,

Rachael Pine

Rachael Pine
Staff Attorney

ALASKA WOMEN'S LOBBY
POST OFFICE BOX 10-1571, ANCHORAGE, ALASKA 99510

March 18, 1986

Senator Richard Eliason
Alaska State Senate
P.O. Box V
Juneau, Alaska 99811

Dear Senator Eliason:

The Alaska Women's Lobby would like to thank you for the introduction of SB 140. We support this important piece of legislation which is intended to allow persons in this state the right to make decisions regarding their own death should they become terminally ill.

We are very much opposed, however, to sec.18.12.040(c) which was amended on the House floor to invalidate the declaration of a qualified patient if that patient is found to be pregnant and the fetus is alive. We believe this amendment causes equal protection problems as the declarations of women will be treated differently than those of men.

Since a conference committee has been called on SB 140 we thought this would be an appropriate time to express our objection to the House amended language. We would strongly support the deletion of sec. 18.12.040(c).

Thank you for your consideration.

Sincerely,

Sherrie Goll

Sherrie Goll
Alaska Women's Lobby

American Association of University Women
Alaska State Division

Susan R. Clark
Chair, Committee on Women
1109 C Street
Juneau, AK 99801

Members of the Conference
Committee for SB 140
Alaska State Legislature
Pouch V
Juneau, AK 99811

May 4, 1986

Dear Committee Members,

The Alaska Division of AAUW believes in a woman's right of individual choice in the determination of her reproductive life. Ammendments that have been added to SB 140 take away that freedom of choice, and mandate that all pregnancies in women impacted under this bill must be carried to term. We believe that a woman should be given the opportunity, when filling out the right-to-die form, to specify her intent should she be pregnant at the time her declaration is considered.

Sincerely,

Susan R. Clark
Chair, Committee on Women
Alaska Division of AAUW