LETTER OPINION
94-L-314

November 14, 1994

Honorable Jennifer Ring
State Representative
District 42
8 North l9th Street, #1
Grand Forks, ND 58203

Dear Representative Ring:

Thank you for your letter inquiring whether certain provisions in North Dakota's Uniform Rights of Terminally Ill Act, North Dakota Century Code (N.D.C.C.) ch. 23-06.4, and the Durable Power of Attorney for Health Care Act, N.D.C.C. ch. 23-06.5, are constitutional. You specifically inquire whether a statutory provision in a living will under N.D.C.C. ? 23-06.4-03(3)(e) making a woman's living will ineffective during her pregnancy is constitutional. You also inquire whether N.D.C.C. ? 23-06.5-03(5) prohibiting an agent under a durable power of attorney for health care from consenting to an abortion without prior court approval is constitutional.

In enacting a statute, it is presumed that the Legislative Assembly intended to comply with the constitutions of the state and of the United States, and any doubt must be resolved in favor of the enactment's validity. N.D.C.C. ? 1-02-38(1); State ex rel. Johnson v. Baker, 21 N.W.2d 355, 357 (N.D. 1945). This presumption is conclusive unless the statute clearly contravenes the state or federal constitution. State v. Hegg, 410 N.W.2d 152, 154 (N.D. 1987); State ex rel. Lesmeister v. Olson, 354 N.W.2d 690, 694 (N.D. 1984). Furthermore, a legislative enactment may be declared unconstitutional only upon the concurrence of four out of five justices of the North Dakota Supreme Court. N.D. Const. art. VI, ? 4. The opinion of an Attorney General is not binding on the judiciary. Therefore, it has been this office's policy to refrain from calling into question the constitutionality of a statute unless it is clearly and patently unconstitutional. It has also been this office's long-standing policy not to knowingly give an opinion on an issue involved in pending litigation, because this office may be required to defend the constitutionality of the statutes in question. See N.D.C.C. ? 32-23-11; First Bank of Buffalo v. Conrad, 350
N.W.2d 580, 584 (N.D. 1984). Nevertheless, with the foregoing

caveat I can generally address the concerns you raise.

You question the constitutionality of the pregnancy provisions on the grounds that they interfere with a woman's right to terminate her pregnancy and her right to forgo lifesaving medical treatment. In assessing the constitutionality of N.D.C.C. chs. 23-06.4 and 23-06.5, it is important to clarify the function of these statutes first, rather than go directly to the constitutional issues implicated by a pregnant women's choice to forgo life-prolonging treatment and necessarily terminate her pregnancy. This is particularly true because there are no reported judicial opinions interpreting these statutes.

"Every competent adult has the right and the responsibility to control the decisions relating to the adult's own medical care, including the decision to have medical or surgical means or procedures calculated to prolong the adult's life provided, withheld, or withdrawn." N.D.C.C. ?? 23-06.4-01. N.D.C.C. ch. 23-06.4 gives effect to an incapacitated terminally-ill patient's prior written directions regarding the use of life-prolonging treatment. This chapter does not affect, impair, or supersede the right of a competent patient to make decisions regarding the use of life-prolonging treatment or the withdrawal of medical care. N.D.C.C. ?? 23-06.4-07(1), 23-06.4-11(5). A living will is operative only if a person is terminally ill and "no longer able to make decisions regarding administration of life-prolonging treatment." N.D.C.C. ? 23-06.4-04.

N.D.C.C. ? 23-06.4-03(3) sets forth a statutory form which "must be substantially" followed for a living will to be a "declaration" as defined in N.D.C.C. ? 23-06.4-02(2). A "declaration" functions as "presumptive evidence of the declarant's desires concerning the use, withholding, or withdrawal of such [life-prolonging] treatment and must be given great weight by the physician in <u>determining the intent of the incompetent declarant</u>." N.D.C.C. ? 23-06.4-04 (emphasis added). Thus, a patient's intent is the appropriate standard under the living will statute for withdrawing or withholding life-prolonging treatment.

N.D.C.C. ch. 23-06.4 departs from the language proposed in the model act. <u>See</u> Uniform Rights Of The Terminally Ill Act, 9B U.L.A. 611 (1985). The sample declaration in the model act does not mention pregnancy, but the statutory form includes a provision stating: "If I have been diagnosed as pregnant and that diagnosis is known to my

physician, this declaration is not effective during the course of my pregnancy." N.D.C.C. ? 23-06.4-03(3)(e). In enacting the pregnancy provision in N.D.C.C. ? 23-06.4-07(3), the State Legislature also omitted the provision of the model act "Unless the declarant otherwise provides, the qualified declaration of a patient known . . . to be pregnant must not be given effect," 9B U.L.A. at 617, and inserted "Notwithstanding a declaration executed under this chapter, medical treatment must be provided to a pregnant patient. . . ." (Emphasis added.) Based on these significant departures from the model act, I believe the State Legislature intended N.D.C.C. ? 23-06.4-03(e) to be a material element of a valid "declaration."[1] Therefore, a living will that does not include the required pregnancy provision does not substantially follow the statutory form, is not a valid "declaration" under the statute, and, therefore, is not "presumptive evidence" of a patient's intent regarding life-prolonging treatment.

Although the pregnancy provision in N.D.C.C. ? 23-06.4-03(3)(e) must be included for a living will to be a presumptive declaration of a patient's intent, nothing in this required provision precludes a woman from adding a "specific directive" expressing her intent that life-prolonging treatment be withheld even if doing so would terminate a potentially-successful pregnancy. I interpret subsection (3)(e) as simply an acknowledgment that under N.D.C.C. 23-06.4-07(3), a living will "is not effective" as presumptive evidence of an incapacitated pregnant patient's intent to refuse treatment that could successfully maintain her fetus to viability. Because this acknowledgment is not a statement of intent, a woman can adopt a valid "declaration" that includes the required pregnancy provision and also expresses her intent that treatment be withheld even if she is pregnant.

A specific directive to withhold treatment even if pregnant is not prohibited by N.D.C.C. ? 23-06.4-07(3). The section clearly prevents "a declaration executed under this chapter" from being presumptive evidence of a pregnant patient's intent to withdraw treatment, but it does not specifically require that treatment be continued notwithstanding a patient's wishes. Interpreting the statute to give it meaning while avoiding doubtful constitutional application, I believe the statute simply indicates that a

[1]A different result was reached in DiNino v. State ex rel Gorton, 684 P.2d 1297 (Wash. 1984). In that case, the state conceded that a person could delete the pregnancy exclusion of its model directive or draft an abortion provision. However, unlike North Dakota's requirement that a living will "substantially" follow the statutory form, the Washington living will statute simply provides that a valid directive may be in the model form, but may also include other specific directions. Wash. Rev. Code. 70.122.030.

"declaration" is not presumed to be sufficient evidence of a pregnant patient's intent to refuse life-prolonging treatment even if such treatment might maintain her fetus to viability. A court order is required. This interpretation is also consistent with N.D.C.C. ?? 23-06.5-03(5), 23-12-13, and 30.1-28-12(4), which require a court order before a substitute decision maker can consent to certain other serious uncontemplated medical procedures or treatments.

As the United States Supreme Court held in Cruzan v. Director, Missouri Dept. of Health, the right to refuse medical treatment is an aspect of liberty that exists without statutory authority. 497 U.S. 261 (1990). A "declaration" under the statute is simply one method for an incapacitated patient to exercise that right, and the unavailability of a presumptive pregnancy provision does not make a living will meaningless.

In making a determination of the patient's wishes based upon a written document (e.g., a living will, durable health care power of attorney), the court should determine whether that document meets the legal requirements, if any, for such documents to be considered bona fide. If such document does not meet these requirements, that may reduce the weight given to that document, but it should not preclude the parties from introducing such document as evidence of the patient's wishes.

Guidelines for State Court Decisionmaking in Life-Sustaining Medical Treatment Cases 81-82 (West 2d ed. 1992). As a practical matter, a "declaration" containing a non-presumptive specific pregnancy directive will still be the most persuasive evidence of a pregnant patient's intent regarding life-prolonging treatment, and should be sufficient evidence to obtain a court order in the vast majority of cases.

The Legislature has also enacted the Durable Power of Attorney for Health Care Act, N.D.C.C. ch. 23-06.5, which is another mechanism for making health care decisions on behalf of an incapacitated patient. "The purpose of [N.D.C.C. ch. 23-06.5] is to enable adults to retain control over their own medical care during periods of incapacity through the prior designation of an individual to make health care decisions on their behalf." N.D.C.C. ? 23-06.5-01. Included in this statute is a requirement that an appointed agent obtain court approval before consenting on behalf of the incapacitated principal to admission to a mental health facility for more than 45 days, psychosurgery, abortion, or sterilization. N.D.C.C. ? 23-06.5-03(5). Decisions regarding these serious and irreversible matters implicate personal liberty, autonomy, and bodily integrity. However, court approval is not required prior to consent for withdrawal of life support or withholding treatment under N.D.C.C. ? 23-06.5-03.

Both the "Uniform Rights Of Terminally Ill Act" and the "Durable Power Of Attorney for Health Care" statute contemplate a non-judicial decision regarding the treatment a currently-incapacitated patient would want to receive. This decision would normally be made by either a physician aware of a living will, N.D.C.C. ? 23-06.4-04, or a properly appointed agent after consulting with the attending physician and other health-care providers. N.D.C.C. ? 23-06.5-03(2). The effect of the pregnancy provisions in N.D.C.C. ?? 23-06.4-07(3) and 23-06.5-03(5) is not to prohibit an incapacitated pregnant patient from having life-prolonging treatment withheld, but to require a formal court order when the declaration or appointment would otherwise be sufficient evidence of intent by itself. The question then becomes whether this regulation is within the authority of the state or is an improper infringement on women's rights.

Both the right to terminate a pregnancy and the right to refuse unwanted medical treatment have been held by the Supreme Court to be inherent in the Fourteenth Amendment guarantee of liberty protected by due process. In Roe v. Wade, the Supreme Court recognized a "guarantee of personal privacy" implicit in the Due Process Clause of the Fourteenth Amendment which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. 113, 152-53 (1973). The Court has also recognized that the right of a competent adult to refuse unwanted life-saving medical treatment is a constitutionally-protected liberty interest. Cruzan, 497 U.S. at 278-79.

Most recently, the Court reaffirmed the central holding of Roe that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." Planned Parenthood of Southeastern Pennsylvania v. Casey, U.S., 112 S.Ct 2791, 2821 (1992). The Court in Casey interpreted the decision in Roe as "a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State." 112 S.Ct. at 2804. The Casey Court also advised that:

> Roe . . . may be seen not only as an exemplar of . . . liberty but as a rule . . . of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since Roe accord with Roe's view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims.

112 S.Ct. at 2810, citing Cruzan v. Director, Missouri Dept. of

Health, 497 U.S. 261, 278 (1990).

These rights are not unlimited. The Court in Roe recognized the state's "important and legitimate interest in protecting the potentiality of human life." 410 U.S. at 162. This interest in the potential life of the fetus continues throughout pregnancy. Casey, 112 S.Ct. at 2820. After viability, the state may "regulate, and even proscribe, abortion" with few exceptions. Id. at 2821. Even before viability, "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." Id. North Dakota can also ensure that a woman's decision to terminate her pregnancy before viability is informed, and can prohibit most abortions after viability. See N.D.C.C. ch. 14-02.1; Fargo Women's Health Org. v. Schafer, 18 F.3d 526 (8th Cir. 1994).

The Court in Cruzan identified the state's additional interest in assuring that health care decisions made in living wills and by surrogate decisionmakers were in accordance with an incapacitated person's wishes. 497 U.S. at 280-81. This assurance can be provided "through the imposition of heightened evidentiary requirements." 497 U.S. at 281. The Court also recognized that "a State is entitled to consider that a judicial proceeding to make a determination regarding an incompetent's wishes may very well not be an adversarial one. . . ." Id. The Court in Cruzan concluded that, because the choice made by a competent person to refuse medical treatment is so obviously different than the choice made for an incapacitated person by someone else, "the State is warranted in establishing rigorous procedures for the latter class of cases which do not apply to the former class." 497 U.S. at 287 n.12.

Court approval of medical treatment has been affirmed in other contexts as well to protect individuals from being involuntarily subjected without due process to certain invasive actions. See O'Connor v. Donaldson, 422 U.S. 563, 580 (1975); Vitek v. Jones, 445 U.S. 480, 492-93 (1980) (requiring a due process hearing before involuntary commitment for mental illness); Washington v. Harper, 494 U.S. 210 (1990) (requiring due process before involuntarily administering unwanted antipsychotic medication); Skinner v. Oklahoma ex. rel. Williamson, 316 U.S. 535 (1942) (recognizing the right to procreate and rejecting forced sterilization).

Whether a woman's "constitutional rights have been violated must be determined by balancing [her] liberty interests against the relevant state interests." Cruzan, 497 U.S. at 279 (citations omitted). In Casey, a plurality held that a state can regulate a woman's right to terminate her pregnancy as long as it does not unduly burden the exercise of that right. 112 S.Ct. at 2820. Because the right to

refuse medical treatment is similar and has the same constitutional source, the same undue burden standard probably would be applied to state regulations affecting that right.

An undue burden was defined in Casey as a "substantial obstacle in the path of a woman seeking" to exercise her rights. 112 S.Ct. at 2821. In applying this standard, courts must measure the constitutionality of a statute "by its impact on those whose conduct it affects." Id. at 2829. N.D.C.C. ? 23-06.4-07(3) only affects incapacitated terminally-ill pregnant women who wrote a living will while competent and whose pregnancy could result without unreasonable pain or physical harm in a live birth if life-prolonging treatment were provided. N.D.C.C. ? 23-06.5-03(5) only affects incapacitated pregnant women who have appointed an agent to make health-care decisions.

A strong argument can be made that North Dakota's durable power of attorney for health care and living will statutes are not clearly an undue burden to the exercise of a woman's right to terminate her pregnancy or refuse medical treatment. These rights must be balanced with two relevant state interests. First, the state has an "important and legitimate interest" ln the life of the unborn fetus, which continues throughout the pregnancy and becomes greater after viability. Casey, 112 S.Ct. at 2817. The Court in Casey observed that this interest has "been given too little acknowledgment or implementation" after its decision in Roe. Id. Second, the Court in Cruzan held that a state can adopt procedural safeguards to ensure that the non-judicial decision contemplated under the statute accurately reflects the patient's wishes if stated, or the patient's best interests.

The court proceedings required under N.D.C.C. ? 23-06.5-03(5) and as a result of N.D.C.C. ? 23-06.4-07(3) do not prohibit an incapacitated pregnant woman from having an abortion or refusing life-prolonging treatment, but are "reasonable measure[s] to implement the State's interests" in protecting fetal life and assuring that the proposed procedure or course of treatment conforms with the patient's wishes if known or with the patient's best interests. Casey, 112 S.Ct. at 2825.

The interests that are balanced under these statutes are similar to those in Casey. The state's interest in the life of a potentially-viable fetus does not diminish when the pregnant mother is incapacitated or terminally ill. Absent incapacity or terminal illness, this interest generally becomes greater after viability. The questions yet to be answered by the Supreme Court are whether a woman's liberty interest is greater when she decides to refuse medical treatment than when she decides to obtain it, and whether that interest is diminished when the woman is incapacitated and terminally ill. MacAvoy-Snitzer, Pregnancy Clauses in Living Will

Statutes, 87 Colum. L. Rev. 1280, 1291 (1987) (Supreme Court "has not spoken specifically on whether a state's interest in fetal life is sufficiently compelling to override a pregnant woman's right to refuse medical treatment.").

These constitutional issues do not need to be resolved here, because these statutes do not override a patient's wishes or best interests. The hearings required by these statutes are simply the state's method of assuring that health care decisions made for an incapacitated pregnant woman comply with the woman's wishes or her best interests.

You question whether the requirement of court approval under N.D.C.C. ? 23-06.5-03(5) is to protect the state's interest in fetal life, or simply to assure that health care decisions are consistent with a pregnant and incapacitated woman's wishes and religious or moral beliefs if known, or her best interests. Court approval is required for the same procedures under N.D.C.C. ?? 23-12-13 and 30.1-28-12(4). A similar hearing would also be held for incapacitated pregnant patients as a result of the pregnancy provision in N.D.C.C. ? 23-06.4-07(3).

The function of these hearings is constitutionally compatible with the direction provided by the Court in Cruzan and reflects a policy of the North Dakota Legislature to provide for a hearing "with the added guarantee of fact finding that the adversary process brings with it" to assure that an incapacitated patient's wishes or best interests are followed with respect to medical treatment significantly affecting the patient's liberty interest. See Cruzan, 497 U.S. at 281.

With respect to your inquiry about what court procedure is required to secure court approval of an abortion or withholding or withdrawal of life prolonging treatment for a pregnant woman, an action in the nature of a declaratory judgment should suffice. See N.D.C.C. ch. 32-23; In re McMullen, 470 N.W.2d 196, 198-99 (N.D. 1991). A court proceeding would also be required regarding an agent's consent to admission to a mental health facility or state institution for more than 45 days or to psychosurgery or sterilization. N.D.C.C. ? 23-06.5-03(5). It would be appropriate for the court to appoint a guardian ad litem for an incapacitated principal. N.D.R. Civ. P. 17(b); N.D.C.C. ? 28-03-04; Bucholz v. Harthun, 239 N.W. 161 (N.D. 1931).

Sincerely,

Heidi Heitkamp

ATTORNEY GENERAL

tam\jcf\vkk