

Understanding the Practical and Legal Issues with End-of-Life Medical Decisions

by Atty. Joe Helm

I. Introduction:

A. Liberty: (Personal autonomy)

Originates with the concept of divine or natural freedom, limited only by the most compelling state or societal interests. (i.e. protecting life and liberty of others)

However, the once compelling and revered state's interest in protecting life is rapidly giving way to secular pragmatism, selfish expediency, and economic efficiency.

B. Laws:

Affirm. Commands (you will do)

Protective Prohibitions (you cannot do)

Regulatory Rules (you can, but you must follow)

Permissive Conduct (you can, but you are responsible if)

II. Competent Patient:

A. Common Law - personal autonomy/due process liberty

- patient has right to refuse any treatment

B. Statutory Limitations: (state's interest in protecting life)

- patient must be terminal (no suicide, no euthanasia)

- patient not pregnant (protect the unborn life)

III. Incompetent Patient - No Advance Directives

Regulatory Law - the state's interest in protecting life and the patient's failure to legally establish his/her wishes, requires society to set the rules through legislators and judges.

A. Without Legal Guardianship:

1. Default surrogates (by statute):

- | | |
|----------------|------------------|
| a. spouse | c. parent |
| b. adult child | d. adult sibling |

2. Informal consultation with family members is common

3. In the event of disagreement?

- Tendency to proceed with treatment
- But, growing resistance to "futile" treatment (cost and/or "quality of life" grounds)
- Dependable, prior statements of patient are crucial

4. Family often underestimates the extent of care the patient desires.

B. With Legal Guardianship

1. Guardian's authority to refuse treatment for ward

- Persistent vegetative state (PVS)
- Terminal condition with death being imminent

2. If judicial review required, courts generally require:

- Prior, clear statement of intent by patient, or
- Patient in PVS or terminal condition (imminency)

C. Problems With or Without Legal Guardianship

1. Patient has NO control

2. Potential conflicts with unethical or disinterested surrogate.

- D. Most states still require highest civil standard of evidence before withholding or withdrawing life sustaining treatment

IV. Incompetent Patient With Advanced Directives

A. In General

1. Issue: what kind of document does the patient have?
(all 50 states have advance directive laws)
 - a. DNR order (do not resuscitate order)
 - b. Living will (declaration to physicians)
 - c. Health care power of attorney
2. Issue: is document portable or state specific?
3. Issue: what if doctor refuses to follow?
4. Issue: what if patient's wishes changed after signing?
5. Issue: what if patient is pregnant? (child protection?)
 - a. 34 states have pregnancy provisions in their statute
 - b. majority rule: advance directive void if pregnant
 - c. other states have varying levels of protection

B. "DNR" Order (do not resuscitate order)

1. Issue: inappropriately vague and over broad
2. Issue: create a presumption against treatment
3. Legal status:
 - a. 42 states have procedures for their use (Sept. '99)
 - b. 21 of those require terminal condition
 - c. 39 of those allow surrogate to consent to its use
(including guardian & stat. surrogate in over half the 39)

C. "LIVING WILL" (declaration to physician)

1. Limited to terminal conditions or PVS.
2. Issues: How are terms defined or interpreted ?
Who defines or interprets ?
Terms are often vague and over broad.
3. Problems with Living wills:
 - a. does not appoint a surrogate
 - b. establishes set directives
 - c. presumption against treatment

D. "Durable Power of Attorney for Health care"

1. Generally preferable to living wills:
 - a. Avoids problems of:
 - foresight and lack of flexibility
 - limited scope of DNR and living will
 - conflicts between interested parties
 - b. Usually more authoritative w/ medical personnel
 - c. Usually trumps living will legally
2. Agent's responsibilities:
 - a. "substituted judgment" - follow patient's wishes or probable wishes, if known
 - b. "best interests" - if patient's wishes not known

V. Other Issues Regarding Medical Decisions

A. Defining Terms:

1. Are water & feeding tubes "medical treatment" ? YES
2. Are ventilators "medical treatment" ? YES

3. When is death “imminent” ? (some cases: up to 1 year)

4. What is distinction b/w “ordinary” & “extraordinary”?

5. What constitutes “futile” treatment and who decides ?

6. “Persistent vegetative state” may be a malleable term.

7. What constitutes death ?

a. “Higher brain” death (i.e. consciousness)

b. “Whole brain” death (currently accepted by UDDA)

c. “Destruction” of brain, circulatory, respiratory systems
- favored by most pro-life groups
- avoids “irreversible cessation of function test”
- But, would hamper organ donation

B. “Palliative Care” (pain management)

1. “Pain Relief Promotion Act”

Claims to shield doctors from liability for aggressive pain treatment, while simultaneously prohibiting physician assisted suicide.

Pro-life groups argue that pain can be effectively treated, and that chronic pain is, therefore, not a justification for euthanasia.