

## MISSOURI'S LIVING WILL LAW

Marcia J. Lamkin

Missouri's living will law became effective in September, 1985. The law allows competent adults to request that death prolonging procedures not be used, or be withdrawn, should they later become terminally ill and unable to make treatment decisions. The law would not allow the withdrawal of medical procedures that lessen pain and suffering, nor would it allow the withholding of food and water.

### Legal Requirements

The declaration must be in writing and dated, and must be signed by the individual, or by someone they direct to sign the document in their presence. When the patient is not the one signing the document, the person who does sign may not also be the witness. If the document is not entirely in the patient's handwriting, it must have been witnessed by two mentally competent adult persons.

The individual must be an adult of sound mind, able to receive information, make a decision, and

communicate that decision. The fact that the person signs the document may not be used as evidence when considering whether they are competent.

### Interpretation

The language of the law creates several problems. The feature that the document becomes effective only when the patient is found to be terminally ill and unable to make treatment decisions appears to limit application of the law. Due to this provision, its use will be limited to relatively extreme situations, such as when the individual becomes comatose or sustains serious brain injury. This is reinforced by the legislature's definition of terminally ill as a condition such that death will occur within a *short time* (emphasis added) regardless of the application of medical procedures. The term short time is vague and ambiguous, and as applied will vary among physicians. The act does not seem to apply to the terminally ill who are in pain but coherent.

In a provision common to several Natural Death Acts of other states, the Missouri statute does not allow a living will to be implemented during a pregnancy. That provision has potential constitutional difficulties. If a fetus is not yet viable, the mother has a constitutionally protected right to terminate the pregnancy. It may be argued that the mother's right to

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refuse to continue the pregnancy carries with it the right to refuse prolongation of her life, and therefore, the life of the fetus, when she becomes terminally ill.

### Revocation

The Declaration may be revoked at any time and in any manner. Mental condition, by legislative mandate, is irrelevant. This protects a patient's right to change his or her mind at any point. However, it also creates the potential for others to influence the patient's choice.

The Act also allows the physician to refuse to follow the Declaration upon finding serious reason to continue or to begin treatment, consistent with the patient's best interests. Serious reason is another vague and undefined term giving broad discretion to the physician to determine the patient's needs. It also allows for the possibility that the physician's beliefs might supersede those of the patient.

The law provides penalties for one who wrongfully blocks implementation of the Declaration. Anyone who willfully conceals or destroys the Declaration, or falsifies a revocation, is guilty of a Class A misdemeanor (subjecting him or her to a maximum sentence of ten to twenty years imprisonment). Anyone knowing of a Declaration who acts contrary to the



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# BEYOND THE LAW:

## A Philosophical Note

by Hans W. Uffelmann

patient's expressed wishes without serious reason consistent with patient's best interests loses any right to inherit under the patient's will. No civil or criminal liability will result if health care personnel follow the Declaration in good faith. However, if they do not follow the Declaration and do not have a serious reason, they may be accused of unprofessional conduct.

### Conclusion

The final paragraph of the act states that the act does not condone, authorize or approve mercy killing or euthanasia, and that affirmative or deliberate acts or omissions to shorten or end life are not permitted. Although it may be inferred that the Legislature intended to deny approval of actions which affirmatively shorten life, such as deliberate overdose of a pain killing drug, this language seems to contradict the purpose of the Act as a whole. Any withdrawal or withholding of treatment does in fact constitute an act or omission shortening the patient's life, the very acts this law allows.

The Death Prolonging Procedures Act does allow terminally ill patients to have a natural, dignified death. Admirably it moves Missouri into the group of states addressing this issue. Regrettably, it leaves the medical profession, the legal profession, and the citizens with a new set of questions and problems.

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The laws of society reflect its moral values. Therefore, an application of those laws to specific cases is a matter of both legal and ethical decision making. As a philosopher I shall comment on several ethical implications of Missouri's recently enacted law, Senate Bill 51, which took effect on September 28, 1985. The development and use of high technology in health care, including the ability to keep persons alive indefinitely while connected to life-support systems, has given rise to unprecedented dilemmas in ethics, law and public policy, as well as in religious thought. Also, the distinction between quantity and quality of life adds to the frequency and severity of the dilemmas encountered in decision making. Since the enactment of the California Natural Death Act in 1976, more than thirty states have passed similar statutes. This reflects a significant shift from the traditional paternalism on the part of individual health care providers and the courts towards a more enlightened philosophy that acknowledges the values of autonomy and beneficence. In doing so, legislatures are responding to the concerns of persons who, when faced with the inevitability of their own deaths, wish to maintain indirect control over the extent and the quality of their lives at a later time,

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when they will be unable to exercise such control directly. The value of beneficence is reflected in the best interest of the patient doctrine. It requires that physicians and others acting on behalf of the terminally ill patient (e.g., family members and attorneys in some jurisdictions) exercise judgment which they genuinely believe to represent the needs, desires, and wishes of the terminally

ill patient, including the decision to discontinue life-supports.

Following the precedent of over thirty other states, the Missouri Death Prolonging Procedures Act of 1985 is the beneficiary of the deliberation and experience of those states with this type of legislation. Unfortunately, however, the Missouri statute contains flaws inherent in those laws of other states, including the omission of the rights of incompetent patients, the thorny issue of the document's status concerning suicides, and the arbitrary distinction between therapeutic and palliative treatment and procedures, to name only a few difficulties found in almost all such statutes. Another difficulty which the Missouri law shares with others is the problem of definitions. Many key terms and phrases are ambiguous and provide decision makers with problems. For example, terminal illness means that the patient has a short time to live, but the law does not specify the meaning of short time. Also, the fact that a physician may override the wishes of a declarant for serious reasons leaves open discretionary options due to the lack of clarity in the definition. Examples of this kind are many and are certainly not unique to the Missouri law. Of course, such ambiguity may be looked upon favorably by most decision makers, including physicians and family members, because it provides flexibility and allows for wide latitude in the interpretation and implementation of the document. From a practical point of view, this is a positive feature favoring the decision makers. On the other hand, this plasticity in the law entails real danger for the abuse of power. It may allow decisions based on values contrary to the intentions of the terminally ill patient, undermining the very purpose of the law. Under certain circumstances, the altruistic aim of beneficence may be replaced by self-interest. Therefore, what

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