

MEMORANDUM

DO YOU HAVE AN ADVANCE MEDICAL DIRECTIVE?

Imagine the following all too frequent scenario:

You are driving home late from work, ready to get home to your spouse and children. You look in your rearview mirror and notice that a car is approaching behind you too quickly. Within minutes, you are rushed to the emergency room, the innocent victim of a reckless drunk driver. Your family's worst nightmare has come true. The attending physicians inform your family that you are in a comatose state, severely disabled, with a chance of regaining consciousness but with no hope of recovering from physical and mental impairment. But troubles have only just begun. A few months later the hospital informs your family that they believe that the treatment you are receiving is and will continue to be medically ineffective,¹ and, as a result, they intend to discontinue all life-sustaining treatment and to place a "do not resuscitate order" (DNR) in your medical chart. Your family is entirely opposed to the hospital's proposed actions and they know that you have expressed strong feelings in the past against the idea of withdrawing life support. Specifically you mentioned to your spouse in a conversation about a year ago, around the time of the now famous Robert Wendland case, that should you ever be in such a predicament, you would want to die naturally with all measures taken until resuscitation is no longer possible. But you were still young and healthy and weren't planning to write a will for at least a few years, and you certainly hadn't thought about executing some type of a medical directive that outlined your desired course of medical treatment if you are in a state that renders you incompetent to give your own medical instructions.

How can a family like this one challenge the hospital's actions, and more importantly, what can be done in advance to prevent physicians from being able to take decisions about your life away from your loved ones and place them into their own hands?

1. CHALLENGING THE HOSPITAL'S ACTIONS

In trying to prevent a patient's healthcare provider from withdrawing treatment against the patient's and family's wishes, one might initially request the court to issue a temporary order prescribing the healthcare of the patient² and simultaneously file a petition to determine whether the hospital's acts or proposed acts are consistent with the patient's desires as expressed in an advance health care directive or otherwise made known to the court.³

California's current statutory law and the legislative intent behind it pay homage first and foremost to the patient's desires so that even

past informal directions or statements can have significant weight. A.B. 891, also known as the Health Care Decisions Law,⁴ effective in the year 2000, "gives competent adults extremely broad power to direct all aspects of their health care in the event they become incompetent."⁵ Most significantly, physicians shall comply with patient's individual health care instructions and with a reasonable interpretation of that instruction made by someone authorized by the patient to make medical decisions.⁶ An "individual health care instruction" is defined as "a patient's written or oral direction concerning a health care decision for the patient."⁷ The legislative intent behind the Health Care Decisions Law reinforces the notion of patients' decision-making rights. The California legislature has summarized its intent in its findings by stating that "in recognition of the dignity and privacy a person has a right to expect, the law recognizes that an adult has the fundamental right to control the decisions relating to his or her own health care. . . ."⁸

Though there are only a few published cases nationwide that have confronted the exact scenario described above, nevertheless, they exist and are crucial in a challenge against the hospital because they overwhelmingly reject the ability of physicians to unilaterally terminate life-sustaining treatment. In one case a court found that a husband's desire to keep his wife alive according to her stated wishes coupled with his love and support for her as spouse and guardian could override a physician's request to terminate treatment.⁹ Another court held that a mother's desire to keep her anencephalic baby alive is protected by the Emergency Medical Treatment and Active Labor Act (EMTALA).¹⁰ In a dispute implicating parental rights, a court enjoined a defendant hospital from reducing medical treatment, concluding that a DNR order cannot be forced upon a minor patient without parental consent.¹¹ And when confronted with a hospital's argument that life-sustaining treatment would be futile, a California court emphasized the importance of patient or family consent as a prerequisite to finding the withdrawal of treatment to be acceptable.¹²

There is an abundance of end-of-life case law that deals with withdrawal of life-sustaining treatment under the more typical reverse scenario in which a family petitions the court to discontinue treatment in accordance with the desires of the patient, but then is challenged either by the state or by the hospital which objects to the family's request. Of import to us is that these courts based their decisions on constitutional, common law, and policy

arguments which are equally applicable to the situation presented in our hypothetical. First, under both constitutional and common law principles, a patient has the right to direct the course of his or her medical treatment.¹³ Second, the privacy clause in the California Constitution has been interpreted in a way that further secures broad rights for patients regarding medical treatment.¹⁴ Third, there are several recognized interests that the state seeks to protect when confronted with life issues. These include an "unqualified interest in the preservation of human life,"¹⁵ "an interest in protecting the integrity and ethics of the medical profession" so as not to "undermine the trust that is essential to the doctor-patient relationship by blurring the time-honored line between healing and harming,"¹⁶ and "an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes."¹⁷

California courts have consistently applied these state interests.¹⁸ In cases where courts balanced the competing interests, death prevailed over life only because the families or surrogates approved the decision as representatives of the patient. But if a hospital wishes to end a patient's life contrary to the family's wishes, a balancing of interests seemingly doesn't apply since both the family's wishes and the state's interests are aligned.¹⁹ Once a hospital is allowed to unilaterally choose death over life, this effectively rejects all the established case law where patient autonomy reigns supreme.

2. ADVANCE PRECAUTIONS

Though legislation in California and case law around the nation support patients' rights in medical decisionmaking, the hospital could still potentially prevail against the patient's family. One change the Legislature did make in enacting the Health Care Decisions Law which could disadvantage a patient was that it removed the statutory scheme that allowed a hierarchy of representatives, starting with the closest family members and moving down, to make decisions for the patient. This effectively removed the guarantee that a relative could make decisions for the patient. The hospital could thus argue that a dispute between the hospital and the family should be settled by the hospital's bioethics committee, which would base its decision on hospital policy and not on the patient's or family's desires. A further potential roadblock to consider is that there is always uncertainty as to how a judge will rule in a particular case.

We must not throw up our hands too quickly, however, and capitulate to these hospitals who place their concerns over proper allocation of

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resources before their concern for patients and the grievous effect that removal of life-sustaining treatment would have on family members. Though the Legislature tinkered with the statutory scheme, it could not erase established jurisprudence and recognized public policy ideals, protecting family rights and preserving life, that have withstood the test of time. Nevertheless, an advance directive specifying one's desires for medical treatment, particularly coupled with the designation of a family member or other specified person as a surrogate decisionmaker to deal with unforeseen contingencies, can be crucial in preventing a battle between hospital and family over such decisions and thereby saving needless anguish. Preparing an advance directive is simple and can

even be done without an attorney. For more information and to obtain the necessary Protective Medical Decisions Document packet, which can be ordered in a version tailored to California law, go to the Anti-Euthanasia Task Force website at www.internationaltaskforce.org

¹ See Cal. Prob. Code §§4735–36 (giving health care providers the ability to ignore an individual medical instruction or decision on the grounds that treatment would be futile).

² Cal. Prob. Code §4770.

³ Cal. Prob. Code §4766(c).

⁴ Cal. Prob. Code §§4600–4805.

⁵ *Conservatorship of Wendland*, 26 Cal. 4th 519, 534 (2001).

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⁶ Cal. Prob. Code §4733 (emphasis added).

⁷ Cal. Prob. Code §4623 (emphasis added).

⁸ Cal. Prob. Code §4650(a).

⁹ *In re Conservatorship of Wanglie*, No. PX-91-283 (Minn. Dist. Ct. July 1, 1991).

¹⁰ *In the Matter of Baby K*, 832 F. Supp. 1022 (1993), *aff'd*, 16 F.3d 590 (4th Cir. 1994), cert. denied, 513 U.S. 825 (1994).

¹¹ *In re Jane Doe*, No. D-93064, slip op. (Super. Ct. Fulton County, Ga. Oct. 17, 1991), *aff'd*, 418 S.E.2d 3 (Ga. 1992).

¹² See, e.g., *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 1018–21 (Ct. App. 1983) (absolving two physicians from any criminal wrongdoing for removing life-sustaining treatment from a terminally ill patient as requested by the patient's family, the court made clear that it was not sanctioning a doctor's ability to unilaterally terminate treatment: ". . . whenever possible, the patient himself should . . . be the ultimate decisionmaker.").

¹³ See, e.g., *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 280 (1990); *Bouvia v.*

Superior Court, 179 Cal. App. 3d 1127, 1145 (Ct. App. 1986); *Bartling v. Superior Court*, 163 Cal. App. 3d 186, 195 (Ct. App. 1984); *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 1022 (Ct. App. 1983); *Thor v. Superior Court*, 5 Cal. 4th 725, 855 (1993); *Cobbs v. Grant*, 8 Cal. 3d 229, 242 (1972)

¹⁴ *Wendland*, 26 Cal. 4th at 532.

¹⁵ *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (quoting *Cruzan*, 497 U.S. at 282).

¹⁶ *Glucksberg*, 521 U.S. at 730; see also *In re Conroy*, 486 A.2d 1209, 1225 (N.J. 1985) (noting that where the doctor's advice and the patient's wishes regarding medical treatment conflict, the patient's decision must be accorded respect).

¹⁷ *Glucksberg*, 521 U.S. at 731.

¹⁸ See, e.g., *Wendland*, 26 Cal. 4th at 532–33.

¹⁹ *Id.* (finding that a court need only engage in balancing when the state is potentially infringing on a patient's liberty interests).

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