

NOTES

1 Public Law 101-508, sec. 4207 and 4751.

2 For these purposes, "advance directive" means a document such as a living will, as well as a durable power of attorney, to the extent recognized under applicable state law. *Ibid.*, sec. 4207(a) for health care.

3 As of March 1991, HHS was reportedly working through various state organizations to coordinate this effort.

4 J. Katz, *The Silent World of Doctor and Patient*, (New York: Free Press, 1984).

5 US Congress, Senate, Committee on Finance, *Patient Self-Determination Act: Hearing before the Subcommittee on Medicare and Long Term Care*, 101st Cong., 2nd sess., 20 July 1990.

6 *Ibid.*

7 *Ibid.*

8 *Ibid.*

9 *Ibid.*

10 An institution will, of course, be responsible if its physicians or other independent practitioners, who are employees of the institution, fail in their respective duties in that regard. This responsibility is based on the doctrine of *respondet superior*, which makes the employer vicariously responsible for the tortious acts of the employee. W.L. Prosser and P. Keaton, *Prosser and Keaton on Torts: Lawyers' Edition*, 5th ed. (St. Paul: West Publishing, 1984), 499-501.

11 For example, *Harnish v. Children's Hospital Medical Center*, 387 Mass. 152, 439 N.E. 2d 240 (1982).

12 *Darling v. Charlestown Community Memorial Hospital*, 33 Ill. 2d 326, 211 N.E. 2d 253 (1965), *cert. denied*, 383 U.S. 946 (1966).

13 *Fiorentino v. Wenger*, 19 N.Y. 2d 407, 280 N.Y.S. 2d 373 (Ct. App. 1967).

14 Even though the *Fiorentino* court opened the door for arguments that hospitals "should know" when decision making is faulty, plaintiffs generally have not prevailed in the reported cases following the *Fiorentino* decision. See for example, *Scaria v. St. Paul Fire and Marine Insurance Co.*, 227 N.W. 2d 647 (Wis. 1975); *Cox v. Haworth*, 283 S.E. 2d 392 (N.C. Ct. App. 1981); but see *Karibjanian v. Thomas Jefferson University Hospital*, 717 F.Supp. 1081 (E.D. Pa. 1989).

15 See *Canterbury v. Spence*, 464 F.2d 772, 782 (D.C. Cir. 1972).

16 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment* (Washington, DC: GPO, March 1983), 106.

17 National Conference of Commissioners on Uniform State Laws, & *Uniform Laws Annotated* (1983); enacted in some form in all fifty states.

18 *Cruzan v. Director, Missouri Department of Health*, 58 U.S.L.W. 4916 (25 June 1990); C.C. Obade, "Cruzan and Its Sequelae: The Supreme Court Decides Its First 'Right-to-Die' Case," *The Journal of Clinical Ethics*, 1 (Fall 1990): 242-244.

Legal Trends in Bioethics

Sigrid Fry-Revere

Advance Directives

The Patient Self-Determination Act (H.R. 5067), introduced by Representative Sander Levin (D-Michigan) to require health-care facilities, as a condition of participation in the Medicare program, to inform adult patients of their right to participate in health-care decision making, including their right to execute advance directives, passed on October 26, 1990 as part of the Budget Reconciliation Act of 1990 [42 U.S.C. 1395cc(a)(1): Medicare Provider Agreements Assuring the Implementation of a Patient's Right to Participation in and Direct Health Care Decisions Affecting the Patient]. This law does not require that all states have laws recognizing advance directives, nor does it require that institutions have bioethics committees as did the original version of the Patient Self-Determination Act (S. 1766) introduced by Senators John C. Danforth (R-Missouri) and Daniel Patrick Moynihan (D-New York). On January 30, 1991, Brian Donnelly (D-Massachusetts) introduced a bill (H.R. 566) amending the act. Most significantly, if passed, the act would no longer apply to skilled nursing facilities. Further, it would allow hospitals to request exemption from the act's requirements and require all physicians to comply with the act's provisions.

Connecticut passed, on May 4, 1990, a law creating a short power of attorney form for health-care decisions (Public Act No. 90-711). The act, however, explicitly disallows proxies to decide to withdraw life support.

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Florida amended its Life-Prolonging Procedure Act in early 1990 to clarify the definition of life-prolonging procedures so that nutrition and hydration could be withdrawn. The act allows the next of kin to negate a patient's explicit expression of a desire to forgo nutrition and hydration. The act also clarifies that Florida will recognize declarations validly executed in accordance with the laws of other states.

Maryland amended Section 13-708 of its Estates and Trusts Code in early 1990 to require court authorization before a guardian can decide to withhold or withdraw medical care from a disabled person if the decision involves a substantial risk to the life of the disabled person. Clearly, the cessation of any form of life-prolonging treatment would fall into this category.

Minnesota passed a law on April 15, 1990 that makes it possible to designate on one's driver's license whether or not one has a living will.

Oklahoma repealed in early 1990 those sections of its Hydration and Nutrition for Incompetent Patients Act that required artificial feeding under most circumstances. Oklahoma also amended its Natural Death Act to allow individuals to indicate in advance if they would not want artificial nutrition and hydration administered.

With these additions, the number of states with some form of advance directive laws totals forty-seven. (Pennsylvania, Nebraska, and New Jersey are the remaining exceptions.)

AIDS

The US Court of Appeals for the Fifth Circuit ruled on August 28, 1990 that a hospital can discharge a nurse for refusing to reveal the results of his

AIDS test [*Leckelt v. Board of Commissioners of Hospital District No. 1*, 909 F.2d 820 (5th Cir. 1990)]. After learning that the nurse in question, who was known to be a homosexual, was a roommate of a person who had AIDS, the Louisiana hospital where he worked asked him to take an HIV antibody test for his own protection and the protection of patients in accordance with Centers for Disease Control guidelines and hospital policy. After refusing to disclose results, the nurse was discharged.

The California Supreme Court temporarily stayed on September 11, 1990 a 1989 law that required AIDS testing for convicted prostitutes (no citation available).

The US Center for Disease Control (CDC) is reconsidering its current guidelines for HIV-infected health-care workers in light of reports in Florida that a dentist who died of AIDS had infected three or more patients. The CDC is considering mandatory testing and/or requiring that health-care workers disclose their infection to patients and employees. These are only possible revisions, and as yet no action has been taken to implement these suggestions.

The New York State Public Health Council has decided not to apply its requirement that AIDS patients receive condoms and be counseled on safe sex to nursing homes run by the Catholic Church.

Confidentiality of Records

Representative John Conyers (D-Michigan) has announced that he plans to introduce a bill (H.R. 5612) that will protect genetic information about individuals from being disclosed without the individual's written consent. The bill would give individuals some control over what type of information about them is collected and maintained and set privacy standards for such information. Exceptions to the consent requirement are made in cases involving disclosure within the agency to personnel who need the information to carry out their duties, disclosure to medical professionals if needed in connection

with the medical care of a particular individual, disclosure to assist in the identification of dead individuals, disclosure in health or safety emergencies, disclosure in clinical care and adoption situations, and disclosure to law officials upon a showing of probable cause that such information is relevant to the identification or location of a suspect or fugitive in a law enforcement inquiry.

Discontinuation of Treatment

The Florida Supreme Court ruled on September 13, 1990 that the Florida Constitution's right to privacy includes the right to refuse medical treatment through a surrogate or proxy decision maker who may withdraw life-support systems, including nutrition and hydration, from incompetent patients without obtaining prior court approval [*In re Guardianship of Browning*, No. 74, 174 (Fla. Supreme Ct., 13 September 1990)]. The court did not distinguish between the terminally ill or the non-terminally ill or between those in a persistent vegetative state or not. The decision to terminate life support must, however, be supported by the certification of three physicians that the patient has no reasonable probability of regaining competency, and by clear and convincing evidence of the patient's wishes. If a decision is challenged in court, a challenger must overcome the presumption that any written declaration meets the clear and convincing standard, but if there is no written declaration, those wishing to terminate life support bear the burden of proof.

The Illinois Supreme Court ruled on July 9, 1990 that the state's Living Will Act allowed the removal of artificial nutrition and hydration from a permanently unconscious patient [*In re Greenspan*, No. 97903 (Ill. Supreme Court, 9 July 1990)]. The court found that the nasogastric tube keeping Mr. Greenspan alive was the only factor delaying his death, and that under such conditions the Living Will Act's requirement that a patient be "terminally ill" was met, because upon removal of

the nasogastric tube Greenspan's death would be imminent.

The Indiana Appeals Court ruled on February 5, 1990 that a physician can be held liable for issuing a do-not-resuscitate order shortly before a patient died that was based on the patient's sister's request but without consulting the patient [*Payne v. Marion General Hospital*, 549 N.E.2d 1043 (Ind. App. 1990)]. Because there was an issue of fact as to whether the patient was competent, the lower court should not have granted the physician's motion to dismiss the case, and the appeals court returned the case to the trial court for further proceedings.

The Hawaii Family Court for the First Circuit found on April 26, 1990 that a nasogastric feeding tube can be withdrawn from an incompetent patient who has suffered severe brain damage but is not in a persistent vegetative state. [*In re Guardianship of Crabtree*, No. 86-0031 (Hawaii Fam. Ct. 1st Cir., 26 April 1990)]. The patient had no living will or other advance directive. The court held that withdrawing the nasogastric feeding tube in this case is justified under Hawaii's living will law, because the statute states that, in the absence of a declaration, ordinary standards of current medical practice should be followed. The court concluded that it was current ordinary medical practice in Hawaii to allow the patient's family and physician to consider what the patient would have wanted and to come to a decision on their own. In this case the decision to withdraw the nasogastric feeding tube, based on the patient's active life-style prior to her debilitating accident and her comments to close friends that she would not want to be kept alive if she ever became totally disabled, was well within the accepted, ordinary, and current medical standards in Hawaii. The court also grounded its decision on a privacy right under the state constitution that it held encompassed the right to refuse medical treatment and could be exercised by the guardian of an incompetent person.

The Court of Common Pleas in Philadelphia County allowed on April

26, 1990 a hearing at the bedside of a patient who sought the removal of her respirator to be closed to the public and media out of respect for the privacy of the patient and her family [*Neumann Medical Center v. Popowich*, No. 5663 (Court of Common Pleas of Philadelphia County, 26 April 1990)]. Unfortunately, it is not at all uncommon for judicial hearings about the withdrawal of life-sustaining treatment to be public.

The American Bar Association (ABA) is working on developing comprehensive legislation dealing with the termination and withdrawal of medical treatment to serve as a model state law.

Fetal Protection

The US Supreme Court heard oral argument on October 10, 1990 in one of the most important sex discrimination cases in years [*Auto Workers v. Johnson Controls Inc.*, 89-1215]. The case is on appeal from the Seventh Circuit, which held that a private employer, who is unable to shield unborn children from the occupational hazards to which pregnant employees would be exposed, may have a policy not to hire females of childbearing capacity for positions involving risks to fetuses without violating any federal civil rights laws. *Johnson Controls* involved a battery manufacturer's policy not to hire females of childbearing capacity for jobs involving exposure to high levels of lead, but the principle that concerns over fetal protection can legitimately lead to the nonhiring of women whether or not they are, or plan to become, pregnant is applicable in all job contexts.

Fetal Research

On April 26, 1990 the US District Court for the Northern District of Illinois struck down a never-enforced law prohibiting fetal experimentation as unconstitutionally vague and violative of the reproductive freedoms protected under *Roe v. Wade* [*Lifchez v. Hartigan*, 735 F.Supp. 1361 (N.D. Ill. 1990)].

Representative Henry Waxman (D-California) introduced on September

18, 1990 a bill (H.R. 5661) that, among other things, would end the current moratorium on federally funded fetal tissue research and take the responsibility for regulating such research out of the hands of the Secretary of Health and Human Services and give it to ad hoc review boards convened by the secretary.

Organ Procurement

A Tennessee Appeals Court held on August 23, 1990 that an eye bank that removes a deceased patient's eye, believing in good faith that an authorized person had given consent, cannot be found in violation of the Uniform Anatomical Gift Act [*Hinze v. Baptist Memorial Hospital*, No. 27253 T.R. (Tenn. Court of Appeals, Western Section, 23 August 1990)]. The court held that the eye bank had no obligation to verify the consenting person's authority to consent and that, in absence of any notice that persons authorized to consent to the gift objected, the eye bank was entitled to a good faith defense as a matter of law.

New York's Governor Mario Cuomo signed into law on July 18, 1990 an amendment to the state's organ and tissue procurement laws. The aim of the new law is to ensure equitable access to donated organs and tissues, to establish public oversight and standards for procurement and distribution for transplantation, and to create a special state council to consider the ethical and social issues regarding transplant technologies.

Reproductive Issues

Abortion

The US Supreme Court has accepted *certiorari* in *Rust v. Sullivan*, Nos. 89-1391, 1392. In November 1989, the Second Circuit upheld federal regulations implementing Title X of the Public Health Service Act, 42 U.S.C. 300, that prohibit family planning services receiving Title X funding from mentioning abortion as an option. The Second Circuit pointed out that, while the fed-

eral government has an obligation to protect free choice, it has no obligation to inform citizens of their right to an abortion.

The US District Court for the Eastern District of Pennsylvania ruled on August 24, 1990 that several of the state's 1988 and 1989 amendments to its Abortion Control Act violated Pennsylvania's state constitution [*Planned Parenthood of Southeastern Pennsylvania v. Casey*, No. 88-3228 (U.S. District Court for the Eastern District of Penn., 24 August 1990)]. Among the provisions found unconstitutional were the state's twenty-four-hour waiting period, the definition of "medical emergency," the husband notification provision, the requirement that certain forms be made available to the public, and certain reporting requirements.

The US District Court for the District of Louisiana refused to reinstate laws criminalizing abortion that were enjoined from enforcement in 1976 after the US Supreme Court decision in *Roe v. Wade* [*Weeks v. Connick*, Nos. 73-469, 74-2425 and 74-3197 (U.S. District Court for the District of La., 23 January 1990)]. The court found the laws criminalizing abortion repealed by implication through later legislation regulating abortion. Soon after this decision, Louisiana's governor Buddy Roemer vetoed legislation that would have made the performance of an abortion a felony punishable by jail.

The American Bar Association has changed its position on abortion. In February 1990, the ABA's House of Delegates had voted more than two-to-one to recognize a woman's right to an abortion. Pressure from Pro-Life challengers brought the House of Delegates to change their position to one of

neutrality on the abortion issue when they reconsidered the issue at the ABA's August convention.

Other

The Seventh Circuit Court of Appeals held on April 17, 1990 that if a health insurance carrier covers the cost of infertility counseling it must also

cover the cost of in vitro fertilization [*Egert v. Connecticut General Life Insurance Co.*, 900 F2d. 1032 (7th Cir. 1990)].

The Kansas Supreme Court ruled on August 31, 1990 to allow wrongful birth suits against physicians who fail to diagnose fetal defects that, if discovered, would have resulted in the parents deciding to abort [*Arche v. U.S. Department of the Army*, No. 64,252 (Kan., 31 August 1990)]. With this decision Kansas recognizes for the first time the right to bring suit for wrongful birth.

The Tennessee Court of Appeals on September 13, 1990 granted joint custody to seven frozen embryos of a divorced couple [*Davis v. Davis* (case number unavailable), earlier proceeding, *Davis v. Davis*, No. E-14496, Blount County Circuit Court, Maryville, Equity Div, 1989 Tenn. App. Lexis 641 (21 September 1989)]. The court overturned an earlier decision by the trial court to award custody of the embryos to the wife. The court held that it would be repugnant and offensive to constitutional principles to order either parent to have a child against his or her will.

The Orange County Superior Court in Santa Anna, California on October 22, 1990 awarded temporary custody of a newborn to the genetic parents of the child over the objections of the surrogate mother who carried the child to term [*Johnson v. Calvert*, Nos. 63-3190, AD-57638 (Orange County Superior Ct. of Cal., 22 October 1990)]. This is the first case where a surrogate who is not genetically related to the baby she carried has claimed parental rights. In the Baby M case, Marybeth Whitehead was the child's genetic mother. Since the Baby M case was decided in 1988, at least eleven states have restricted the use of commercial surrogacy (Arizona, Florida, Indiana, Kentucky, Louisiana, Michigan, Nebraska, Nevada, North Dakota, Utah, and Washington) and at least another eleven (California, Hawaii, Illinois, Kansas, Michigan, Minnesota, New Jersey, New York, Pennsylvania, Vermont, and Wisconsin) are

presently considering such restrictions.

The San Francisco RU 486 Medical Review Group plans to submit to the Food and Drug Administration an Investigational New Drug Application seeking to study and compare the use of RU 486 combined with progesterone with surgical abortions in early pregnancy.

Treatment Refusals

The US Supreme Court accepted *certiorari* on March 5, 1990 in *Perry v. Louisiana*, 89-5120 (U.S. 5 March 1990).

The case involves an Eighth Amendment challenge to Louisiana's forcible medication of a mentally ill death row inmate in order to maintain his competency for execution.

A Texas Court of Appeals ruled on May 24, 1990 that it was within a trial court's discretion to appoint a conservator to consent to a blood transfusion for a sixteen-year-old Jehovah's Witness if such a transfusion should become necessary over the objection of the youth and his parents [*O.G. v. Baum*, No. 01-90-00370-CV (Tex. Court of Appeals, First District, 24 May 1990)].

LETTERS

Hydranencephalic Children and the Ability to Suffer

To the Editor.--I found the article by John Lachs ("Active Euthanasia," vol. 1, no. 2) insightful and cogent. However, there is one part of his article with which I take exception. When Lachs speaks of hydranencephalic children who have no cerebral hemispheres, he says that their lives bring them "more than their share of misery."

I do not think it is clear that such children can experience misery without cerebral hemispheres. With an intact brain stem and thalamus they may experience and react to painful stimuli, but misery, I would argue, requires more brain tissue than the hydranencephalic child possesses. It is true that their lives may bring a great deal of misery to their families, but not to themselves.

Misery is eloquently described by Chekhov in a short story of the same name.

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Non-MD Ethics Consultants?

To the Editor.--In a recent article urging ethics consultants to see the patient, John La Puma and David L. Schiedermayer write: "We wish to make it clear that we believe nonphysicians may perform ethics consultation."¹ Nevertheless, the content of their article does not seem to reflect this belief.

In the description of the case report, the authors dedicate a long segment to the findings of the physical examination, presumably part of the consultant's visit to the patient's bed. Another full paragraph is dedicated to a description of the laboratory evaluation, without a hint given as to the significance of the results and their special relevancy to the ethics consultation.

This emphasis on the patient's physical condition continues to find its expression in the consultant's final recommendations. Among the three recommendations that the ethics consultant makes, the first is:

continue to work up the anemia, looking for a lower gastrointestinal x-ray or endoscopy within