

## Law

## Legal Trends in Bioethics

Suzan Onel and Sigrid Fry-Revere

## Advance Directives

On 8 June 1992, Arizona Governor Fife Symington signed legislation concerning living wills and health-care directives. Among the statute's provisions are: (1) an amendment to the state's law governing abuse of children and vulnerable adults, to clarify that a health-care provider withholding care in compliance with instructions in a health-care directive is not in violation of the abuse law; (2) a delineation of the authority of a health-care surrogate to make decisions for a patient; (3) a grant of immunity for health-care providers who make good-faith decisions in reliance on an apparently genuine health-care directive; (4) a provision for judicial proceedings to determine the validity of a health-care directive; (5) a reiteration that the law does not approve or authorize suicide, assisted suicide, or mercy killing; and (6) sample language for health-care powers of attorney or for advance directives (Arizona Healthcare Directive Act, H.B. No. 2247).

In January 1992, a Minnesota advance directive law, the Mental Health Advance Declaration

*Suzan Onel, JD, practices bioethics and food and drug law at the Washington, DC, firm of Hyman, Phelps and McNamara, PC. Sigrid Fry-Revere, JD, PhD, is an independent bioethics consultant in Washington, DC.*

(MHAD), became effective (S.F. 187). This law gives Minnesotans who believe they are at risk for incapacity due to mental illness the right to declare whether they wish to have antipsychotic medication or electroshock treatments when they become incapacitated. A declaration that favors therapy will, in essence, simplify the court procedures necessary to administer the treatments. A declaration against therapy would not change the status of those who do not want treatment; court proceedings would be carried out as before. Like a living will, the MHAD allows a patient to name the proxy decision makers and to change the declaration at any time, as long as the patient retains competency.

On 23 March 1992, Virginia Governor Douglas Wilder signed into law a bill that allows physicians to refuse to provide treatment they consider to be "medically or ethically inappropriate" (S. 360). Under the terms of the legislation, a physician who disagrees with the treatment decisions requested in a patient's advance directive or by a designated proxy must make a reasonable effort to transfer the patient to another physician. The bill also provides that do-not-resuscitate declarations be followed by emergency medical personnel.

On 31 March 1992, Governor Booth Gardner of Washington State

signed legislation expanding the state's Natural Death Act, thereby making it easier to withdraw life support from terminally ill patients (H.B. 1481, effective 11 June 1992). The legislature approved the measure just a few months after the defeat of State Initiative 119, which would have allowed physicians to give lethal injections or suicide assistance to certain patients. The new legislation will allow people to sign advance directives authorizing the withholding or withdrawal of life support, including artificial nutrition, if they are terminally ill, in an irreversible coma, or in a persistent vegetative state. It also includes a provision that suggests that signers note whether they would wish artificial feeding to be continued if terminally ill or permanently unconscious. Physicians or other providers unwilling to carry out a patient's request would have to tell the patient or his/her representative at the time they become aware of the directive.

## AIDS

On 30 June 1992, the Seventh Circuit Court found that a former soldier was not barred from bringing a tort claim against the US Army for failing to notify her of the results of a second blood test indicating she did not test positive for human immunodeficiency virus (HIV) (*M.M.H. v. United States*, No. 91-3130 [7th Cir.]). The plaintiff, M.M.H., formerly an active duty member of the armed services, asserted two tort claims against the government: that the army mistakenly determined she was infected with HIV, and that after a second blood test that indicated she was not infected, the army failed to inform her of this fact. The lower court held that since the initial misdiagnosis occurred while she was in active duty, her claims were barred

under the *Feres* doctrine (*Feres v. United States*, 340 US 135 [1950]), an exception to the federal waiver of immunity under the Federal Tort Claims Act.

On 1 July 1992, the US District Court for the District of Columbia held that the city's refusal to hire an asymptomatic HIV-positive applicant as a firefighter violated Section 504 of the Rehabilitation Act (*Doe v. District of Columbia*, No. 91-1642 [D.D.C.]). Doe had met all the requirements for the position of firefighter and had voluntarily disclosed his HIV-positive status. In this opinion, the court found that Doe would be wearing protective clothing that would prevent transmission of blood from him to persons he might rescue. In addressing the standards in Section 504, the court concluded: (1) Doe was an individual with handicaps; (2) he did not pose a direct threat to others; (3) he was otherwise qualified for the position, in light of the fact that he had passed the fire department's pre-employment physical; and (4) the fire department had discriminated against Doe solely because of his handicap.

The US District Court for the Eastern District of Pennsylvania on 2 July 1992 upheld a state court's decision to set a high bail for a sex crimes suspect with AIDS (*United States ex rel. Savitz v. Gallagher*, No. 92-3198 [E.D. PA]). The suspect challenged the constitutionality of the bail by means of a *habeus corpus* petition. Under Pennsylvania law, bail is to be set to ensure the presence of the defendant at trial. The court may also consider the nature of the offense charged, the likelihood of conviction, the risk of future criminal conduct, and whether the defendant has strong ties with the community or is likely to flee the jurisdiction. The district court found that it was not unreasonable or arbitrary for the state court to

find that suspects who cannot control their sexual behavior should not be released on bail without external controls, and accepted the magistrate's recommendation to deny *habeus corpus* relief.

On 30 June 1992, a Binghamton, New York, court of claims judge ordered the state to pay \$5.4 million to a nurse who was infected by the AIDS virus in 1988 when she struggled to subdue an infected prisoner while prison guards ignored her cries for help (*Doe v. New York*, No. 82265). During the struggle, the nurse was stabbed with a hypodermic needle containing the prisoner's blood.

#### Assisted Suicide

On 3 August 1991, a Michigan county circuit judge dismissed two murder charges against Dr. Jack Kevorkian for helping terminally ill or severely debilitated people commit suicide (*Michigan v. Kevorkian*, No. 92-115-190FC). The court held that since suicide is not a crime in Michigan, assisting suicide cannot be prosecuted.

#### Discontinuation of Treatment

On 8 September 1992, the Michigan Court of Appeals ruled that the parents of a minor child who is in a coma may order life-support systems turned off if the child is not expected to recover (*Rosebush v. Oakland County Prosecutor*, No. 111082 [1992 WL 217994]).

On 5 August 1992, the Superior Court of New Jersey, Appellate Division, reversed a lower court ruling to remove life support from a retarded resident of a state hospital (*In the Matter of Marie Moorhouse*, 593 A.2d 1256, 250 NJ Super. 307). The court found that this case was the first involving a person who, retarded since birth, never had been legally competent and was a

resident of a state hospital. These circumstances heightened the interest of the state in protecting the patient's rights. The court found the lower court did not conduct a sufficiently thorough inquiry to ensure that: (1) the patient is, in fact, in a persistent vegetative state; (2) the patient's interests have been sufficiently protected; and (3) the family member or friend speaking for the patient is a proper guardian.

#### Fetal Research

On 23 June 1992, President George Bush vetoed H.R. 2507, the National Institutes of Health authorizations bill, and the House of Representatives was unable to override the veto. The bill would have, among other things, lifted the current ban on federal funding of research that uses tissue from aborted fetuses. In light of this action, the tissue bank created by Executive Order 12806 will be limited to fetal tissue that comes from ectopic pregnancies and spontaneous abortions.

#### Patients' Rights

On 1 June 1992, the US District Court for the Western Division of Arkansas dismissed in part a suit by the mother and sibling of a child who died in foster care from lack of medical care (*Norfleet v. Arkansas Department of Human Services*, No. LR-C-91-745 [D.C. Ark, W. Div.]). The child, who had a history of severe asthma, had been in the care of a neighbor while his mother was out of town. During this time, the child was hospitalized for an asthma attack and placed in the custody of the Department of Human Services (DHS), since the neighbor was arrested for an unrelated offense. The social worker assigned to the case by DHS failed to obtain proper medical information before putting

the child in a foster home. As a result, the foster mother did not realize the seriousness of the child's condition until it was too late. The court ruled that DHS and its employees in their official capacities could not be sued for monetary damages, although the individual defendants could be sued in their official capacities for prospective relief. The court added that when a child is in the state's custody, the state's deliberate indifference to a child's serious medical needs violates the child's due process rights.

On 6 January 1992, the South Carolina Supreme Court upheld a lower court's ruling sentencing a defendant to death after he plead "guilty but mentally ill" (GBMI) (*South Carolina v. Wilson*, 413 S.E.2d 19, 1992 WL 1947). The GBMI plea is distinct from the "insanity plea" in that defendants who invoke this plea are not relieved of their culpability for the crime but may receive treatment for their illness during the period of incarceration. In contrast, under a plea of "not guilty by reason of insanity," defendants may escape the blame for their action altogether if they can show that, at the time of the crime, they could not tell right from wrong or they could not appreciate the nature or consequences of their actions. The defendant, in this case, had been accused of nine instances of assault with intent to kill and two counts of murder. In reaching its conclusion, the court dismissed the argument that a GBMI defendant is, by definition, lacking the blame necessary to justify execution.

On 10 June 1992, the Illinois Appeals Court for the First District held that an illegitimate medical exam on a female patient amounted to criminal sexual assault (*People v. Quintan*, No. 1-90-0255 [Illinois Appellate Court, 1st Dist.]). Although the court noted that the legislature expressly exempted le-

gitimate medical tests from the criminal sexual assault statute, it found that there was clear legislative intent to cover illegitimate exams. Since the defendant's acts as a respiratory therapist were not part of a legitimate medical exam, and consent was obtained through deceit, the court found him guilty.

### Reproductive Issues

#### Abortion

On 17 July 1992, the US Supreme Court, in a *per curiam* opinion, with two justices dissenting, refused to vacate a Second Circuit order staying a trial court's order to the Federal Food and Drug Administration (FDA), requiring it to return a supply of an abortion-inducing drug to a woman who imported it for her own use (*Benten v. Kessler*, No. A-40 [US Sup. Ct.]; No. CV-92-3161 [E.D.N.Y.]). The trial court had granted a preliminary injunction ordering the FDA to return the drug--Mifepristone, or RU-486--to Benten, since she demonstrated a substantial likelihood of success on the merits of her challenge to the validity of the RU-486 ban and showed that she would suffer irreparable injury in that she would have to undergo a surgical abortion to terminate her pregnancy. When the Second Circuit stayed the trial court's order, Benten petitioned the Supreme Court to vacate the stay.

A federal judge in Arizona ruled on 14 September 1992 that a 1989 state law that requires parental consent before a minor can receive an abortion is unconstitutionally vague (*Planned Parenthood v. Neely*, No. CV-89489 [1992 US Dist. LEXIS 14084]). This ruling was issued despite the fact that the US Supreme Court upheld a Pennsylvania parental consent law in June (*Planned Parenthood v. Casey*, No. 91-744 and 91-902 [US Sup. Ct.

1992]). (See volume 3, number 3, for a discussion of this case).

On 9 June 1992, the Michigan Supreme Court upheld a state law denying Medicaid funding for abortions (*Doe v. Director of the Michigan Department of Social Services*, Nos. 91092 and 91093 [Mich. Sup. Ct.]). Plaintiffs Doe and her minor daughter sued the director of the Michigan Department of Social Services (DSS), seeking Medicaid benefits to pay for a first-trimester abortion for the daughter. DSS denied the benefits relying on Section 109a of the Michigan Social Welfare Act, which prohibits the use of public funds for abortions except when necessary to save the mother's life. The Does argued that the statute violated the equal protection guarantee in Michigan's constitution, in that Medicaid benefits were available to provide medical care to indigent women who exercised their right to carry a pregnancy to term but not to those who exercised their right to terminate a pregnancy. The state supreme court held that the state equal protection clause was intended to duplicate the federal guarantee, and that Section 109a did not impinge on a woman's right to choose to have an abortion.

In contrast, the West Virginia Supreme Court held on 19 June 1992 that the state may fund abortions for Medicaid recipients that do not qualify for federal reimbursement under the Hyde Amendment (*Boley v. Miller*, No. 20158 [WV Sup. Ct. App.]). In support, the court turned to *Harris v. McRae*, 448 US 297 (1980), which held that states are not compelled to fund Medicaid recipients' medically necessary abortions for which federal reimbursement is unavailable, but may choose to do so.

For the third time in two years, the American Bar Association (ABA) voted on the association's

position on abortion. In February 1990, the delegates voted 238 to 106 to oppose governmental restrictions on a woman's right to terminate a pregnancy before fetal viability. However, in August of that year, the ABA adopted a neutral position on abortion. In August of 1992, the delegates decided to revert to the earlier pro-choice position by a vote of 276 to 168.

Germany has recently passed legislation that leaves the decision to have an abortion to women during the first twelve weeks of pregnancy. The legislation, which requires women to participate in a nonbinding medical counseling session prior to the procedure, passed the Bundestag by a vote of 357 to 284.

#### Other

In a case of first impression, the Sixth Circuit Court of Appeals held on 15 September 1992 that surrogacy brokers, lawyers, and doctors involved in surrogate-parent contracts may be liable for negligence if they fail to affirmatively protect the child, the surrogate mother, and the contracting father from foreseeable harm caused by the undertaking (*Stiver v. Parker*, No. 90-1624). Named as defendants in the case were a Michigan lawyer and a prominent surrogacy broker. A surrogate mother with whom the broker had contracted to have a baby sued for negligence after giving birth to a boy who was infected with cytomegalovirus (CMV) and suffered from mental retardation, severe muscular disorders, and hearing loss. She maintained that she contracted the virus through the donor's sperm. Neither the sperm nor the mother were tested for CMV, although a waiver she signed informed her of the risk of CMV.

On 8 May 1992, a district judge for the Eastern District of Virginia sentenced fertility specialist Dr. Cecil

B. Jacobson to five years in prison without parole and ordered him to pay \$116,805 in fines. Jacobson was convicted of fifty-two counts of fraud and perjury in March for falsely telling women they were pregnant and using his own semen to impregnate women who thought that he was using anonymous sperm donors from established programs. Jacobson will be allowed to remain free while his case is under appeal.

California surrogate mother Elvira Jordan, who won joint custody of her child with the child's genetic father, is now suing her therapist for malpractice, claiming negligence and infliction of emotional distress (*Jordan v. Kellog*). Jordan alleges that her therapist ought to have known she was susceptible to mental distress at the time she recommended Jordan for surrogacy.

#### Right to Treatment

On 3 August 1992, US Department of Health and Human Serv-

ices Secretary Louis W. Sullivan rejected Oregon's request for a waiver of its Medicaid rationing plan, on grounds that it would violate the Americans with Disabilities Act. Oregon sought to expand its Medicaid rolls by 50 percent, by eliminating coverage for services at the bottom of its list of medical priorities. Among those left uncovered were treatment for AIDS in the last six months of life, chronic bronchitis, liver transplants for alcoholics, and life supports for premature babies weighing less than eighteen ounces. Oregon Health Services Commission plans to resubmit its application for a waiver by November 30.

*The Journal of Clinical Ethics* welcomes information regarding events for inclusion in this column. Please send suggestions to Sigrid Fry-Revere, *The Journal of Clinical Ethics*, 12 S. Market St., Ste. 301, Frederick, MD 21701.

### Instructions for Contributors

Manuscripts should be addressed to The Editor, *The Journal of Clinical Ethics*, 12 S. Market St., Ste. 301, Frederick, MD 21701 USA. Specify the address to which a typescript proof copy and correspondence should be sent, and a telephone number. The submission of a paper carries with it the understanding that the paper is original and has not been submitted for publication elsewhere. Submit an original, double-spaced typewritten copy of good quality and one original set of illustrations, if appropriate.

Each contribution is subject to peer review. Once accepted, every contribution is subject to editorial revision. The author will receive a proof copy of the article and will have approximately one week in which to read it and submit corrections.

Authors are encouraged to submit word-processed text on a 3.5" or 5.25" IBM-compatible disk, when possible. The journal uses WordPerfect 4.2. Authors using a later

version of WordPerfect have the capability to convert their document to a WordPerfect 4.2 file using the "Text In/Text Out" function key (Ctrl + F5). Those authors using another IBM-compatible word-processing program should submit an ASCII-compatible file. Do not use "footnote function" keys to enter notes—enter them as regular text at the end of the article.

Submissions that do not arrive on a computer disk will be scanned. Please provide clean typed or word-processed copy. Do not use right-justified margins; do not use running heads. Do not write on the pages. The journal does not accept faxed articles.

Authors must include full citations for any source they reference. Number references with superscript numbers consecutively through the text. References should be written following the *Chicago Manual of Style*.