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MEDICAL SELF-DETERMINATION DOCUMENT

House Bill 4174 as introduced
First Analysis (3-1-89)
Sponsor: Rep. Perry Bullard
Committee: Judiciary

THE APPARENT PROBLEM:

When important medical decisions have to be made, the patient is consulted and his or her preferences are followed so far as the law and medical ethics allow. However, when a patient is incapacitated by illness or injury medical decisions can be made which may be contrary to the wishes of the patient. Many people are concerned that the decisions regarding such matters as institutionalization and blood transfusions might be made for them during a period of incapacity without regard for their views, but the most common fear is that of mistaken judgments about the continuation or termination of medical treatment when death seems imminent.

Advances in medical technology have made it possible to preserve the vestiges of life in patients whose condition makes recovery impossible. Heart and lungs can be made to function even after brain activity has ceased. For many patients in critical condition medical intervention constitutes not so much the preservation of life as the prolongation of death. When death is imminent and inevitable a conscious and capable patient can inform physicians as to the extent of treatment he or she wishes to receive. When the patient is unconscious or incapacitated, however, the family and physicians are faced with a painful decision. People generally want to respect the views of the sick person, but family members have heavy emotional investments of their own in a patient's life, and doctors have both the duty to preserve life and the threat of civil or criminal liability for their actions to consider. Reluctance to give up hope is natural and proper, yet examples of people being kept alive well past the point of any hope of recovery are familiar. To most people the prospect of being so artificially sustained is dreadful, and many would like some assurance that when they have reached such a point, their wishes will be followed.

One way to provide such assurance is with a "living will," a document that articulates a person's wishes regarding medical treatment in the event that the person becomes unable to speak for himself or herself. However, without some sort of statutory provision for such a document, a person's wishes can be subordinated to the desires of family to keep a loved one alive or the ethical and legal considerations of doctors and hospitals. At least 38 states have enacted legislation that provides statutory recognition of living wills, and many believe that Michigan should do so, too.

THE CONTENT OF THE BILL:

The bill would create the Michigan Medical Self-Determination Act. A person 18 years of age or older who was of sound mind could execute a declaration authorizing some or all types of medical intervention, directing the withholding or withdrawal of some or all types of medical intervention, or authorizing some types and directing withholding or withdrawal of others. A declaration could designate a representative to ensure compliance with its terms. A declaration would have to be: executed voluntarily; in writing; dated; and signed by the person making it (or at the direction of the person and in his or her presence) plus two adult witnesses, at least one of whom would have to be someone other than a close relative of the person. A declaration executed prior to the bill's effective date would be valid if it met the bill's requirements.

A declaration would take effect if the attending physician had seen the declaration and determined that the person was terminally ill or permanently unconscious, and was unable to participate in medical treatment decisions. The determination of terminal illness or permanent unconsciousness would have to be confirmed by another physician. A person could revoke his or her declaration at any time and by any manner, but if the revocation was not in writing, someone witnessing the revocation would have to sign a written description of the circumstances of the revocation. A physician, health facility, or representative designated by the person making a declaration would be bound by a revocation upon receiving notice of it. A physician or health facility that was given a copy of a declaration would immediately make the declaration part of the person's medical record; a revocation also would be made part of the record.

Upon determining a person to be terminally ill, an attending physician who knew of a declaration would add that determination to the record, and attempt to communicate that determination to the person. If the determination was that the person was terminally ill and unable to participate in medical treatment decisions, the physician would add that information to the medical record and attempt to communicate to the patient that the declaration was about to take effect. A determination that a patient was permanently unconscious would be added to the patient's medical record.

An attending physician would have to either implement a declaration when it took effect, or take all reasonable steps to transfer the person to another physician or health facility willing to comply with the declaration. A person or health facility would not be subject to civil or criminal liability for providing or withholding treatment in accordance with a declaration and the bill.

A person making a declaration or his or her representative, spouse, parent, or child could seek injunctive relief to force compliance with the declaration.

The bill would prohibit a life insurer from doing any of the following because of the execution or implementation of a declaration: refuse coverage, raise premiums, offer different policy terms, consider a policy to have been breached or modified, or invoke a suicide exemption. No one could require that a declaration be executed for any reason.

The bill could not be construed to impair any right to consent to or refuse medical intervention.

"Permanently unconscious" would be defined as a state reasonably expected by the attending physician to last

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indefinitely without improvement, in which all awareness of self or environment beyond simple reflex or reaction to noxious stimuli is absent. "Terminally ill" would be a state in which an incurable, irreversible, and uncontrollable disease or condition will, in the opinion of the attending physician, likely result in death within one year.

FISCAL IMPLICATIONS:

According to the Department of Social Services, the bill may lead to some fiscal savings by preventing unwanted health care (2-28-89).

ARGUMENTS:

For:

There is a great need for a clear statutory mechanism whereby a person can be assured that his or her lawful desires with regard to medical decisions will be observed if he or she should be unable to communicate them. Whether one dreads being kept alive in a vegetative state or fears that medical efforts may not be energetic enough, a person should be able to know that his or her wishes will be given the same respect during a period of incapacity that they would be accorded if he or she were capable.

The bill would assure that a person's wishes are honored not only by establishing procedures for the execution of a medical self-determination document, but also by requiring an attending physician to either implement a declaration or transfer the patient to someone who will, by granting immunity from liability for complying with a document, and by authorizing relatives or a person's representative to seek a court order to ensure compliance.

Response: The bill is insufficient to ensure that a person's wishes with regard to medical treatment are followed. What is needed in addition to the bill is legislation along the lines of House Bill 4016: probate code amendments that provide for the naming of a trusted individual with durable power of attorney who can make medical decisions for a person if that person becomes incapacitated. House Bill 4174 provides for a piece of paper that expresses what a person wants done. The use of durable power of attorney provides a way to establish who will make decisions in the event that the principal cannot; it provides for a human being who can act to ensure compliance with the medical self-determination document, and offers flexibility for unforeseen circumstances in a way that a living will cannot.

Against:

Many fear that instead of promoting respect for life, the bill will express a devaluation of life. A young healthy person, whether a physician or declarant, may have an altogether different perspective of the value of a life affected by age or infirmity than an older person would. Nonetheless, a declaration made by an adult, however young, would last until revoked. The bill should at least limit the duration of a living will. Requiring periodic renewal would ensure that the document reflected a person's current wishes in light of changing circumstances and technological advancements.

In addition, it would be too easy under the bill for life support to be discontinued prematurely. There are many stories of patients confounding doctors and recovering from "irreversible" comas. The bill's definitions of "terminally ill" and "permanently unconscious," upon which implementation of a living will hinges, are too broad to prevent hasty action.

Finally, the bill lacks protections against abuse. There is no guarantee that a declaration was not signed under duress. There is no prohibition against the withdrawal of food and water, to ensure that death is by disease, rather than starvation and dehydration. Finally, there is no exception made for pregnant women, which means that two lives could be lost upon implementation of a living will.

Response: Rather than making a person more vulnerable to pressure from others, the bill would recognize an individual's rights to self-determination at a time when a person is most vulnerable to the decisions of others. The bill provides for an incontrovertible document that stands as a statement of a person's wishes when he or she can no longer express them. Like an ordinary will, a "living will" can be modified at any time, and there is no need to limit its duration. In fact, if its duration were limited, a living will could expire at a time when the person was no longer capable of renewing it, and the document's purpose could be circumvented. Further, that purpose could as easily be to urge life-sustaining measures as to forego them.

Special exceptions regarding nutrition and hydration and pregnant women would be inappropriate, and not only because they would conflict with the bill's basic premise of an individual's right to self-determination and autonomy. The provision of nutrition and hydration can be as artificial a death-prolonging procedure as technologically supplied respiration. Prohibiting a declaration from being implemented for a pregnant woman could lead to the absurdity of pregnancy testing virtually every woman for whom a declaration was to take effect. The bill should remain as it is, offering adequate flexibility to accommodate individual situations.

POSITIONS:

The Department of Social Services supports the bill. (2-28-89)

The American Association of Retired Persons (AARP) of Michigan supports the bill. (2-28-89)

Lutheran Social Services of Michigan supports the bill. (2-28-89)

The Probate and Estate Planning Council of the State Bar of Michigan supports the bill. (2-28-89)

The Area Agencies on Aging Association of Michigan supports the principle of living will legislation. (2-28-89)

The Michigan Senior Advocates Council supports the principle of living will legislation. (2-28-89)

The Michigan State Medical Society supports the concept of the bill. (2-28-89)

The Michigan Hospital Association has no formal position at this time. (2-28-89)

Right to Life of Michigan opposes the bill. (2-28-89)