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BILL ANALYSIS

Senate Fiscal Agency

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Senate Bill 135 (Substitute S-1 as reported)

Sponsor: Senator Jack Faxon

Committee: Judiciary

Date Completed: 6-5-89

**RATIONALE**

When important medical decisions have to be made, the patient usually is consulted and his or her preferences are followed to the extent that the law and medical ethics will allow. When a patient is incapacitated by illness or injury, however, certain medical decisions may be contrary to the wishes of the patient. Many people are concerned that decisions regarding the continuation or termination of medical treatment when death seems imminent may be contrary to the patient's desires if the patient is incapacitated to the extent that he or she can not communicate those wishes.

Advances in medical technology have made it possible to preserve the vestiges of life in patients whose condition makes recovery impossible. For example, the heart and lungs can be made to function even after all brain activity has ceased. To many people the prospect of being artificially sustained is dreadful, and they would like to have some assurance that when they have reached such a point their wishes regarding the termination of medical treatment will be recognized and respected.

**CONTENT**

The bill would create the "Natural Death Act" to permit a person to execute a declaration to withhold or withdraw life-sustaining procedures if the person had an incurable injury, disease, or illness that was certified as a terminal condition by two physicians who had personally

examined the person, and had consulted with his or her immediate family, and the person's death was imminent and would occur whether or not life-sustaining procedures were used. A declaration would be void three years after it was made. The declaration would direct that life-sustaining procedures be withheld or withdrawn and the person be permitted to die naturally with only the administration of medication, food, and water, and the performance of any medical procedure necessary to provide comfort or alleviate pain. The bill also would:

- Specify the language of a declaration and the requirements for its execution, including witnessing by two disinterested parties.
- Require the attending physician, who would have to be personally acquainted with the declarant, to implement a declaration promptly if the declarant were a "qualified patient", unless the declaration had been revoked or the declarant were pregnant.
- Establish civil and criminal immunity for emergency personnel who rendered care or assistance in good faith, and for a person who in good faith withheld or withdrew life-sustaining procedures.
- Specify actions an insurer could not

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take because of a declaration.

- Include provisions for the proposed Act's construction.

"Life-sustaining procedure" would mean any medical procedure, treatment, or intervention that uses mechanical or other artificial means to sustain, restore, or supplant a spontaneous vital function of a patient or is otherwise of such a nature as to afford a patient no reasonable expectation of recovery from a terminal condition, but not including the administration of nutrition and hydration. "Terminal condition" would mean an incurable condition of a patient caused by injury, disease, or illness that makes death imminent and from which, despite the application of life-sustaining procedures, there can be no recovery.

#### Declaration

A person qualified to execute a will under the Revised Probate Code (i.e., a person 18 years of age or older who is of sound mind) could execute a declaration to withhold or withdraw life-sustaining procedures. The declaration would have to be in writing, dated, and executed voluntarily. It would have to be signed by the declarant or, if signed at his or her direction and in his or her presence, by another individual in the declarant's name. The declaration also would have to be signed by two witnesses who were at least 18 years old and who witnessed either the signing or the declarant's acknowledgment of the signature. A witness could not be a person who:

- Signed the declaration in the declarant's name and at his or her direction.
- Was within the fourth degree of consanguinity or affinity (related by blood or marriage) to the declarant.
- Was a creditor of the declarant.
- Was knowingly entitled to any portion of the declarant's estate under any existing testamentary instrument (will or codicil) of the declarant.
- Was or was employed by a person who was financially or otherwise responsible for the declarant's medical care.

The declarant's portion of the declaration would substantially have to state the following:

#### DECLARATION

If at any time I should have an incurable injury, disease, or illness certified to be a terminal condition by two physicians who have personally examined me, 1 of whom shall be my attending physician, and the physicians have determined along with my immediate family that my death is imminent and will occur whether or not life-sustaining procedures are utilized, I direct that life-sustaining procedures be withheld or withdrawn, and that I be permitted to die naturally with only the administration of medication, the administration of food and water, and the performance of any medical procedure that is necessary to provide comfort or alleviate pain. In the absence of my ability to give directions regarding the use of life-sustaining procedures, it is my intention that this declaration shall be honored by my family and physician as the final expression of my right to control my medical care and treatment.

A declaration would have to include a provision specifying that it would be null and void three years after being made and could include additional provisions that were not inconsistent with the proposed Act. If an additional provision were declared invalid by a court, the invalidity would not affect the remaining portions of the declaration that could be given effect without the invalid provision.

A declarant would be responsible for notifying the attending physician of the existence of the declaration. After being notified, the physician would have to place the declaration in the declarant's medical records.

A declarant could revoke a declaration at any time and in any manner by which he or she was able to communicate an intent to revoke. If the revocation were not in writing, a person who witnessed the revocation would have to describe the circumstances of the revocation in writing and sign the writing.

### Implementation

The attending physician of a declarant in a terminal condition would be required promptly to take the necessary action to provide for the certification required for the declarant to become a "qualified patient" (a declarant diagnosed within a reasonable degree of medical certainty to be in a terminal condition, as certified in writing by two physicians, both of whom had personally examined the declarant, and at least one of whom was the declarant's attending physician). If a declarant were a qualified patient, the attending physician would be required to implement the declaration promptly. An attending physician who did not comply with these requirements would have to make every reasonable effort to transfer the care of the declarant to another physician.

If an attending physician knew or had a reasonable basis for believing that a declaration had been revoked, these requirements would not apply. The physician would have to place in the declarant's medical records the evidentiary basis for his or her conclusion or reasonable belief that the declaration had been revoked.

A declaration could not be implemented by the denial of food, water, or such medication and medical procedures as were necessary to provide comfort and to alleviate pain, or if the qualified patient were pregnant.

### Liability/Immunity

A person who had notice of a valid declaration and caused a failure to comply with the requirements for certifying a declarant's condition and implementing a declaration could be held civilly liable for the resulting damages.

If the aid, care, or assistance were rendered in good faith and in accordance with the applicable professional standard of care, a paid or volunteer fire fighter or an ambulance attendant, emergency medical technician, emergency medical technician specialist, or advanced emergency medical technician would not be subject to criminal or civil liability for aid, care, or assistance given contrary to a qualified patient's declaration and in an emergency.

A person who in good faith, pursuant to applicable professional standards of care and in accordance with the proposed Act, caused or participated in the withholding or withdrawal of life-sustaining procedures from a qualified patient would not be subject to civil or criminal liability or professional misconduct charges.

It would be a misdemeanor, punishable by a maximum fine of \$1,000, to forge a declaration or a revocation of a declaration or willfully conceal or withhold personal knowledge of a revocation.

### Insurers

A life insurer could not do any of the following because of the execution or implementation of a declaration:

- Refuse to provide or continue coverage to the declarant.
- Consider the terms of an existing policy of life insurance to have been breached or modified.
- Invoke any suicide or intentional death exemption or exclusion in any policy covering the declarant.

### Construction of Act

The bill specifies the following:

- The provisions of the proposed Act would be cumulative and could not be construed to impair or supersede any legal right or responsibility that any person could have to effect the withholding or withdrawal of life-sustaining procedures.
- The Act would not create a presumption concerning the intention of an individual who was in a terminal condition and who had not executed a declaration regarding the withholding or withdrawal of life-sustaining procedures.
- The Act would not permit any affirmative or deliberate act or omission to end life other than to permit the withholding or withdrawal of life-sustaining procedures from a declarant in a terminal condition.

### Other Provisions

A person or other legal entity could not require

execution of a declaration or require an individual to state whether a declaration existed as a condition for providing shelter, insurance coverage, or health care benefits or services, or for any other reason.

If a declaration that was executed outside of this State by a nonresident were in compliance with the proposed Act, the declaration would have to be given effect in Michigan.

In the absence of evidence to the contrary, a declaration that on its face satisfied the requirements of the Act would be presumed valid.

The bill specifies that an act authorized by the proposed Act could not for any purpose be considered to be a suicide or a violation of any criminal law or standard of professional conduct.

### **FISCAL IMPACT**

The bill would have no fiscal impact on State or local government. Minimal workload increases to the courts would depend on the number of violations and convictions under this bill.

### **ARGUMENTS**

#### **Supporting Argument**

There is a great need for a clear statutory procedure 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. For many patients in critical condition, artificial life-sustaining measures constitute not so much the preservation of life as the prolongation of dying. 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 may be faced with a difficult decision. People generally want to respect the views of the incapacitated person, but doctors have to consider both their duty to preserve life and the threat of civil or criminal liability for their actions. Reluctance to give up hope is natural and proper, yet examples of patients' being kept alive well past the point of any hope of recovery are common. A person

who does not wish to be kept alive in a vegetative state should be able to feel reassured 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 provide a mechanism for such assurances while also providing adequate safeguards (e.g., certification of a terminal condition by two physicians, mandatory consultation with the patient's family, and a three-year expiration on the effectiveness of a declaration) against hasty decisions to withhold treatment.

#### **Opposing Argument**

A declaration should be allowed to request the withholding of nutrition and hydration as well as life-support measures. Testimony on a similar bill (Senate Bill 293) from physicians and others experienced in hospice care indicated that the very ill differ from the healthy in their need or desire for food and water. It is natural and common for the dying to reduce or stop their intake of foods and fluids. Artificially provided nutrition and hydration can increase a dying person's discomfort, not only by the use of tubes but also by taxing an altered digestive system or exacerbating problems with secretions in the throat or lungs. Discomfort created by drying tissues can be relieved, at least to some degree, by moisturizing the mouth and skin. Nutrition and hydration decisions are best made on a case-by-case basis, to ensure that an individual's wishes and comfort are paramount. The bill should not prohibit the withdrawal of nutrition or hydration, any more than it should prohibit the withdrawal of artificial respiration or heartbeat.

**Response:** Allowing the withdrawal of food and water would be wrong. The withdrawal of nutrients and water from a seriously ill person is all too likely to increase suffering and cause death, rather than allow a "natural" death. A compassionate respect for life demands that nutrients and fluids continue to be administered, especially when it is impossible to determine whether withholding food and water would allow death or cause it.

#### **Opposing Argument**

The bill would discriminate against women by limiting the exercise of a patient's declaration if she were pregnant. It could lead to the absurdity of pregnancy testing virtually every

woman for whom a declaration were to be exercised, and, worse, it would establish in the law a procedure allowing the rights of an embryo or fetus of any term to supercede those of an adult woman. Rather than allowing a pregnant woman the same death with dignity afforded others, the bill would equate a woman with a womb. The dehumanization and the possible consequences of this way of thinking are dramatically illustrated by recent reports of a case in which a terminally ill woman's pain apparently was increased and death hastened by a court-ordered Caesarian section.

**Response:** The bill would not imbue a fetus with rights that superceded a woman's. Rather, it would require an examination of each individual case in which the withdrawal or withholding of treatment could be detrimental to a fetus. To do otherwise would mean the loss of two lives, one of which had no say in the execution of the declaration.

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