

MISSOURI HEALTH CARE DURABLE POWER OF ATTORNEY

In *Cruzan v. Director, Missouri Department of Health*,¹ the United States Supreme Court held that Missouri may require clear and convincing evidence of a patient's desire to withdraw nutrition and hydration when that patient is in a persistent vegetative state.² In response to this decision,³ the Missouri legislature passed Senate bill 148, The Durable Power of Attorney for Health Care Act,⁴ to enable Missouri citizens to designate others to make health care decisions on their behalf if they should subsequently become incapacitated.⁵ By authorizing advance planning for health care, Senate bill 148 seemingly alleviates the need for legally appointed health care proxies⁶ to prove to the courts that withdrawal is consistent with the patient's intent.⁷ Enacted on August 28, 1991, Senate bill 148 represents an important step in the development of laws protecting the rights of individuals to execute advance directives.⁸

1. 110 S. Ct. 2841 (1990).

2. 110 S. Ct. at 2854. Nancy Cruzan was severely injured in an automobile accident. As a result of brain injuries sustained in the accident, Cruzan existed for several years in a persistent vegetative state. *Id.* at 2845. During this time, the State of Missouri paid for her medical care. *Id.* at 2846. Cruzan's parents requested that the state terminate her artificial nutrition and hydration. *Id.* However, the State refused their request. *Id.*

3. See *Signing of Health Care Proxy Bill Caps Long Struggle*, MO. B. BULL., June 1991, at 4 [hereinafter *Signing of Health Care Proxy Bill*].

4. MO. REV. STAT. §§ 404.800-.865 (Supp. 1991). The Missouri Bar's Probate and Trust Law Committee began drafting health care proxy legislation in 1987. *Signing of Health Care Proxy Bill*, *supra* note 3, at 4. The subcommittee submitted drafts of the Health Care Surrogate Act which the Missouri General Assembly rejected in 1988, 1989, and again in 1990. *Id.* After *Cruzan*, the subcommittee not only reintroduced the Health Care Surrogate Act, but it also proposed to amend Missouri's general durable power of attorney statute. This proposal, Senate Bill 148, provided express authority for health care decision-making. Governor John Ashcroft signed Senate Bill 148 on May 17, 1991. *Id.*

5. In *Cruzan*, Justice O'Connor, in concurrence, suggested that states have a duty to honor the decisions of health care surrogates appointed under health care durable powers of attorney. *Cruzan*, 110 S. Ct. at 2857. See also Ilene V. Goldberg, *S. Ct. Case Shows When Living Wills Can Be Used to Carry Out a Client's Wishes*, EST. PLAN., Nov.-Dec. 1990, at 328, 331.

6. A health care proxy is the individual or corporation appointed by the patient to act as her agent in making health care decisions. See MO. REV. STAT. § 404.703(1) (Supp. 1991).

7. By authorizing the appointment of surrogate health care decision-makers, Senate Bill 148 enables patients to convey their intentions to withdraw or withhold nutrition and hydration under specified circumstances. A health care proxy legally appointed under the Durable Power of Attorney for Health Care Act is authorized and obligated to ensure that the patient's nutrition and hydration are withdrawn. MO. REV. STAT. § 404.820 (Supp. 1991). A health care proxy does not need to request the court's permission before withdrawing her nutrition and hydration.

8. Advance directives are written instructions, such as state recognized living wills or durable

In addition, the bill places new and significant responsibilities on health care providers.⁹

I. BACKGROUND

The issue of an individual's right to control prospective health care decisions first arose in the late 1970s with the highly publicized debates over the plight of a comatose car accident victim, Karen Quinlan.¹⁰ In *In re Quinlan*,¹¹ the New Jersey Supreme Court concluded that it could require the hospital to remove life-support equipment.¹² Following *In re Quinlan*, in 1976, California became the first state to enact a living will statute,¹³ which authorized terminally ill patients to execute advance directives informing health care providers of the patient's views regarding life support.¹⁴ Forty-two states followed California and passed legislation authorizing such living wills.¹⁵

powers of attorney for health care, which relate to the provision of care when an individual is incapacitated. 42 U.S.C. § 1396a(w)(4) (1991). See *infra* notes 60-72 and accompanying text.

9. See *infra* notes 80-82 and accompanying text.

10. *In re Quinlan*, 355 A.2d 647, 653-54 cert. denied, 429 U.S. 922 (1976). Karen Quinlan became irreversibly comatose after suffering severe brain damage in a car accident. Prior to her sudden catastrophic injury, Quinlan indicated to several friends that she disapproved of extraordinary life-sustaining medical procedures. *Id.* at 653. The New Jersey Supreme Court determined that Quinlan's statements were of little probative value. *Id.* Nevertheless, the court authorized Quinlan's health care providers to discontinue her life-support if her attending physicians determined that she would not recover and both her guardian and family consented. *Id.* at 671.

11. 355 A.2d 647, cert. denied, 429 U.S. 922 (1976).

12. *Id.* at 671.

13. See CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West 1970 & Supp. 1992).

14. George Alexander, *Time for a New Law on Health Care Advance Directives*, 42 HASTINGS L.J. 755, 758 (1991).

15. Alexander, *supra* note 14, at 758. See also ALA. CODE § 22-8A-1 (1981); ALASKA STAT. § 18.12.010 (1990); ARIZ. REV. STAT. ANN. § 36-3201 (1986); ARK. CODE ANN. § 20-17-201 (Michie 1987); COLO. REV. STAT. § 15-18-101 (1989); CONN. GEN. STAT. ANN. § 19a-570 (West 1990); DEL. CODE ANN. tit. 16, § 2501 (1983); D.C. CODE ANN. § 6-2421 (1989); FLA. STAT. ANN. § 765.01 (West 1986); GA. CODE ANN. § 88-4101 (Harrison 1986); HAW. REV. STAT. § 327D (Supp. 1989); IDAHO CODE § 39-4501 (Supp. 1990); ILL. REV. STAT. ch. 110 1/2, par. 701 (1988); IND. CODE ANN. § 16-8-11-1 (Burns 1990); IOWA CODE ANN. §§ 144A.1-144A.11 (West 1989); KAN. STAT. ANN. § 65-28,101 (1985); LA. REV. STAT. ANN. § 40:1299:58.1 (West Supp. 1990); ME. REV. STAT. ANN. tit. 22, § 2921 (West Supp. 1989); MD. HEALTH-GEN. CODE ANN. § 5-601 (1990); MINN. STAT. ANN. §§ 145B.01-145B.17 (West Supp. 1990); MISS. CODE ANN. § 41-41-101 (Supp. 1990); MO. ANN. STAT. § 459.010 (Vernon Supp. 1990); MONT. CODE ANN. § 50-9-101 (1989); NEV. REV. STAT. ANN. § 449.540 (Michie Supp. 1989); N.H. REV. STAT. ANN. § 137-H:1 (Supp. 1989); N.M. STAT. ANN. § 24-7-1 (Michie 1986); N.C. GEN. STAT. § 90-320 (1989); N.D. CENT. CODE § 23-06.4-01 (Supp. 1989); OKLA. STAT. ANN. tit. 63, §§ 3101-3111 (West Supp. 1990); OR. REV. STAT. § 127.605 (Supp. 1990); S.C. CODE ANN. § 44-77-10 (Law Co-op. Supp. 1989); S.D. CODIFIED LAWS ANN. § 34-12C-1 (Supp. 1990); TENN. CODE ANN. § 32-11-101 (Supp.

Some states improved their living will legislation by enacting health care durable power of attorney statutes,¹⁶ which authorize the appointment of health care proxies.¹⁷ Under most durable power of attorney for health care provisions, appointed proxies are entitled to receive all relevant health care information from health care providers.¹⁸ Additionally, appointed proxies are empowered to make any health care decisions affecting an incapacitated patient.¹⁹

An individual's right to make prospective health care decisions is further protected at the federal level by the Patient Health Care Self Deter-

1990); TEX. HEALTH & SAFETY CODE ANN. § 672.001 (West Supp. 1990); UTAH CODE ANN. § 75-2-1101 (Supp. 1989); VT. STAT. ANN. tit. 18, § 5251 (1987); VA. CODE ANN. § 54.1-2981 (Michie Supp. 1990); WASH. REV. CODE ANN. § 70.122.010 (West Supp. 1990); W. VA. CODE § 16-30-1 (1985); WIS. STAT. ANN. § 154.01 (1989); WYO. STAT. § 35-22-101 (1988).

For a comparison of living will statutes, see Christopher J. Condie, *Comparison of the Living Will Statutes of the Fifty States*, 14 J. CONTEMP. L. 105 (1988).

16. Alexander, *supra* note 14, at 759. See also ARK. STAT. ANN. § 20-17-20 (Michie 1989); DEL. CODE ANN. tit. 16, § 2052 (1983); D.C. CODE ANN. § 21-2201 (1989); 1990 Fla. Laws 223; GA. CODE ANN. § 31-36-1 (Harrison 1990); IDAHO CODE § 39-4505 (1990); ILL. ANN. STAT., ch. 110 1/2, para. 802-1 (Smith-Hurd Supp. 1990); IND. CODE ANN. § 16.8-12-5 (Burns 1990); IOWA CODE ANN. § 144A.7(1)(a) (West 1989); 1989 Kan. Sess. Laws 181; 1990 KY. ACTS 123; LA. REV. STAT. ANN. § 40:1299.58.1 (West Supp. 1990); ME. REV. STAT. ANN. tit. 18-A, § 5-501 (West Supp. 1990); MD. EST. & TRUSTS CODE ANN. § 13-601 (1981); MINN. STAT. ANN. § 145(B).01 (West Supp. 1990); MISS. CODE ANN. § 41-41-151 (Supp. 1990); NEV. REV. STAT. ANN. § 449.810 (Michie Supp. 1989); 1990 N.Y. Laws 752; OHIO REV. CODE ANN. § 1337.12 (Baldwin Supp. 1989); OR. REV. STAT. § 127.510 (Supp. 1990); R.I. GEN. LAWS § 23-4.10-1 (1989); S.D. CODIFIED LAWS ANN. § 59-7-2.5 (Supp. 1990); TENN. CODE ANN. § 34-6-202 (Supp. 1990); TEX. REV. CIV. STAT. ANN. art. 4590h-1 (Vernon Supp. 1990); UTAH CODE ANN. §§ 75-2-1105-1106 (Supp. 1989); VT. STAT. ANN. tit. 14, § 3453 (1989); VA. CODE ANN § 54.1-2986(2) (1988); WASH. REV. CODE ANN. § 11.94.046 (West Supp. 1990); W.VA. CODE § 16-30A-3 (Supp. 1990); 1989 Wis. Laws 200; WYO. STAT. § 35-22-102 (1988).

17. A court is not required to participate in the appointment. Rather, a court considers a health care proxy appointed once the durable power of attorney documents are properly executed. MO. REV. STAT. § 404.705(3) (Supp. 1991).

18. See, e.g., MO. REV. STAT. § 404.822 (Supp. 1991).

19. See, e.g., MO. REV. STAT. § 404.825 (Supp. 1991). A few states enacted legislation to further protect an individual's right to execute advance directives. See Alexander, *supra* note 14, at 759-60. These states passed laws that specifically authorize a court to appoint a patient's family members as health care proxies in the absence of her written advance directives. Similar to proxies selected by individuals who execute durable powers of attorney for health care, court appointed proxies have the power to make health care decisions for incapacitated family members. *Id.* See, e.g., FLA. STAT. ANN. § 744.304 (West 1986 & Supp. 1990).

One commentator has criticized the provisions adopted in Florida which enable family members to act as health care surrogates for incapacitated patients. Robert C. Waters, *Florida Durable Power of Attorney Law: The Need For Reform*, 17 FLA. ST. U. L. REV. 519, 533 (1990) (arguing that the provisions limiting surrogacy to specific family members prevent immediate action on behalf of incapacitated patients because the court must search for family members). Nevertheless, family consent laws offer additional protection to incapacitated patients with particular health care concerns.

mination Act ("Self Determination Act").²⁰ The Self Determination Act requires health care providers²¹ to maintain written policies and procedures to: (1) furnish written information to each individual concerning both the individual's rights, under state law, to make medical treatment decisions and the provider's policies concerning implementation of such rights;²² (2) document in the patient's medical record whether the patient has executed an advance directive;²³ (3) ensure compliance with state laws respecting advance directives;²⁴ and (4) educate staff and the community on advance directives.²⁵ While the statutory protections contained in the Self Determination Act are important, they do not protect an individual's right to make prospective health care decisions. The Self Determination Act only protects the right to make prospective health care decisions when state courts or state legislatures previously created such rights.²⁶ Consequently, state laws authorizing advance directives are critical to the protection of an individual's right to make treatment decisions.

II. MISSOURI LAW

In Missouri, all competent citizens have a right to execute a living will,²⁷ but these advance directives do not govern all medical situations. Under the statutory provisions, a living will does not become operative unless the patient has an incurable or irreversible condition in which

20. 42 U.S.C. § 1396a(w) (Supp. 1991).

21. The Act includes hospitals, nursing facilities, hospice programs, home care providers, and health maintenance organizations among the regulated care providers. 42 U.S.C. § 1396a(w) (Supp. 1991).

22. 42 U.S.C. § 1396a(w)(1)(A) (Supp. 1991).

23. 42 U.S.C. § 1396a(w)(1)(B) (Supp. 1991).

24. 42 U.S.C. § 1396a(w)(1)(D) (Supp. 1991).

25. 42 U.S.C. § 1396a(w)(1)(E) (Supp. 1991). Community education is arguably the most important mandate of the Self Determination Act because many disputes over withdrawal arise when a patient has not executed an advance directive. *See, e.g., In re Busalacchi*, No. 59582, slip op. (Mo. Ct. App., E.D. Mar. 5, 1991) (denying the transfer of a patient in a persistent vegetative state to another state to enable the withdrawal of life-sustaining care); *Cruzan v. Director, Missouri Dept. of Health*, 110 S. Ct. 2841 (1990) (denying parents' request to remove artificial nutrition and hydration from their comatose daughter). Better information may encourage more patients to execute advance directives and avoid the need for judicial intervention.

The Self Determination Act also requires that each state write a description of its laws on advance directives to distribute to hospitals, nursing homes, and health maintenance organizations. For a discussion of the effect of these requirements on practitioners, see John E. Bos, *Living Wills*, 70 MICH. B. J., 444, 444 (May 1991).

26. 42 U.S.C. § 1396a(w)(1)(A)(i) (Supp. 1991).

27. MO. REV. STAT. § 459.015 (1986).

death will occur within a short time despite medical care.²⁸ Thus, Missouri's living will statute leaves incompetent Missouri citizens, who are not terminally ill, without any means of controlling health care decisions.

Similarly, Missouri's general durable power of attorney²⁹ and guardianship statutes provide only limited protection of an individual's right to make prospective health care decisions. The general durable power of attorney statute expressly denies appointees the power to make any health care decisions,³⁰ and the guardianship provisions prevent family members of incapacitated adults from consenting to medical treatment for the incapacitated individual.³¹ Thus, with the exception of guardianship provisions authorizing parents and guardians to make health care decisions for minors,³² no statute granting family members or designated proxies the right to make health care decisions for incompetent or incapacitated persons existed in Missouri until the enactment of Senate bill 148.³³

III. THE RIGHT TO DECIDE

The United States Supreme Court has suggested that an individual possesses the right to refuse unwanted medical treatment, including the right to refuse death-prolonging nutrition and hydration.³⁴ Historically,

28. MO. REV. STAT. § 459.025 (1986).

29. Missouri's general durable power of attorney statute authorizes the appointment of an attorney in fact to act in a fiduciary capacity on behalf of the principal. MO. REV. STAT. § 404.710(1) (Supp. 1991).

30. MO. REV. STAT. § 404.710(6) (Supp. 1991).

31. MO. REV. STAT. § 431.061 (1986).

32. In Missouri, a family member may not consent to medical treatment for a patient unless that family member is a guardian of a minor child. MO. REV. STAT. § 431.061 (1986).

33. In *Steele v. Woods*, the Missouri Supreme Court suggested that families have the right to make medical treatment decisions for an incompetent family member. 327 S.W.2d 187, 198 (Mo. 1959). In *Steele*, the court noted, in dicta:

Depending upon the circumstances of the case, the seriousness of the need, and the urgency of the situation, perhaps the time or interval of the patient's mental incapacity, the circumstances may require and make it [the physician's] duty to communicate with and advise the husband or other members of the family who are available and competent to advise with or speak for the patient or take other steps to bring understanding of the need home to the [patient].

Id. (emphasis added).

Despite the inference in *Steele*, courts have refused to grant family members any common law right to act as surrogate decision makers for incapacitated persons. See R. Edward Murphy, *A New Form of Medical Malpractice? Missouri's "Living Will" Statute*, J. MO. BAR., Jan.-Feb. 1986, at 11, 12.

34. *Cruzan v. Director, Missouri Dept. of Health*, 110 S. Ct. 2841, 2843 (1990).

incompetent patients have had difficulty exercising this right.³⁵ Legislatures have responded to this difficulty by enacting two different types of statutes: living will statutes and durable powers of attorney for health care acts.³⁶

A. *Inadequacies of Living Wills*

States initially enacted natural death acts or living will statutes to allow incompetent patients the right to refuse unwanted medical treatment. While living wills enable patients to execute advance directives providing for the withdrawal of nutrition and hydration, most living will statutes fail to adequately protect the patient's right to decide. First, living wills are unable to address every potential medical decision.³⁷ Second, living wills become effective only when a patient is terminally ill.³⁸ Third, living wills may lapse if not re-executed.³⁹ Finally, in practice, physicians have refused to follow the directives in the living wills.⁴⁰

B. *The Durable Power of Attorney for Health Care Alternative*

Thirty-two states have enacted durable power of attorney for health care statutes as a solution to the inadequacies of living wills.⁴¹ Advance

35. See, e.g., *id.*; *In re Busalacchi*, No. 59582, slip op. (Mo. Ct. App., E.D. Mar. 5, 1991).

36. See *supra* note 19. One commentator believes family consent laws offer an important alternative to durable powers of attorney for health care. *Id.* By allowing family members to make medical decisions in the absence of a durable power of attorney document, family consent laws promote implementation of a patient's health care decision. *But cf.* Waters, *supra* note 19, at 533.

37. Mark A. Fowler, *Appointing an Agent to Make Medical Treatment Choices*, 84 COLUM. L. REV. 985, 999 (1984).

38. *Id.*

39. *Id.* at 1000.

40. Several problems arise from the vague terminology and the conflicting language contained in Missouri's living will statute. First, the statute provides that only a person who is able to receive and evaluate information and communicate a decision may execute a living will. Murphy, *supra* note 33, at 15. The statute does not indicate what information should be evaluated, nor does it define communication. Second, physicians are obligated to comply with the patient's declaration even though they are not required to be present when the declaration is communicated. *Id.* Third, the statute provides that a declaration may be signed at the declarant's direction. *Id.* Thus, a direction may be verbal despite another requirement that the will be written. Fourth, the statute authorizes revocation without regard to the patient's mental condition. *Id.* Also, the declaration does not become effective until the declarant is unable to make treatment decisions. *Id.* at 15-16. Fifth, a patient's condition is not deemed terminal until a physician determines that death will occur within a "short amount of time." However, the statute fails to define whether this term means days or years. *Id.* at 16. Finally, the statute allows withdrawal of death-prolonging procedures, but these procedures do not include the withdrawal of nutrition and hydration. *Id.* at 17.

41. See *supra* note 16 and accompanying text.

planning through the appointment of proxy decision-makers allows both flexibility and certainty which may be unachievable through a living will.⁴² Although some argue that agency is not the best solution to the problem of treating incapacitated patients, many advantages to durable powers of attorney for health care exist.⁴³

First, health care durable power of attorney provisions alleviate the need to anticipate medical conditions and treatment choices.⁴⁴ Second, a proxy ("attorney in fact")⁴⁵ can enforce treatment preferences and ensure that physicians or family members do not disregard the patient's intentions.⁴⁶ Finally, the attorney in fact will be faithful to the patient's preferences; thus, the patient avoids potentially unreliable decision-making by a physician or, alternatively, a court appointed guardian.⁴⁷ While certain risks remain,⁴⁸ a health care durable power of attorney provides certainty for physicians and courts, which is impossible to achieve through simple living will and guardianship provisions.⁴⁹

The drafters of durable power of attorney statutes should include a number of provisions to adequately protect a patient's right to make medical choices and to ensure that the treatment decisions are followed by family members, physicians, and the courts. First, a legislature should enact a durable power of attorney statute that is consistent with the state's living will and guardianship provisions.⁵⁰ Second, the health care durable power of attorney law should authorize advance directives addressing routine, as well as life-threatening situations and the with-

42. See *infra* notes 44-49 and accompanying text.

43. See generally Fowler, *supra* note 37.

44. *Id.* at 1001.

45. Attorney in fact is the legislative term for the party appointed by the patient to make health care decisions under the durable power of attorney for health care if the patient is unable to decide herself. MO. REV. STAT. § 404.703(1) (Supp. 1991).

46. See generally Fowler, *supra* note 37.

47. *Id.* at 1002.

48. *Id.* at 1005. The risks include the possibility that: (1) the surrogate decision-maker will make an irrational decision; (2) the health care provider will hastily classify the patient as incapacitated; (3) the patient will select an untrustworthy proxy; or (4) the patient may change her choice of appointee over time. *Id.* at 1007-08. None of these risks warrants eliminating surrogacy as a means of protecting a patient's right to make health care decisions in advance of incapacitation.

49. *Id.* at 1008. Without certainty, physicians will refuse to follow directives; third parties will not agree to appointment; and finally, courts will be unable to protect patients who select advance directives as a method of controlling health care decisions.

50. See Wendy A. Kronmiller, Comment, *A Necessary Compromise: The Right to Forego Artificial Nutrition and Hydration Under Maryland's Life-Sustaining Procedures Act*, 47 MD. L. REV. 1188, 1215 (1988). See also Fowler, *supra* note 37, at 1025.

drawal of all procedures.⁵¹ Third, drafters should include provisions for educating the public and informing physicians of advance directives.⁵² Fourth, the statute should provide restrictions for persons who may be appointed attorneys in fact.⁵³ Fifth, the legislature should specify the powers of health care proxies.⁵⁴ Sixth, the statute should list the types of decisions which an attorney in fact is not authorized to make.⁵⁵ Seventh, any durable power of attorney for health care law should address the potential liability of a health care attorney in fact.⁵⁶ Eighth, the law should prevent health care providers from conditioning treatment upon the patient's execution of a durable power of attorney.⁵⁷ Ninth, a durable power of attorney for health care should include a provision for automatic re-execution.⁵⁸ Finally, the drafters should address the importance of extending advance directives beyond death to enable the health care proxy to enforce a patient's medical directives.⁵⁹

51. P. Jaye Rippley & Carol Warnick, Comment, *Live and Let Die: The Status of the "Right to Die" in Wyoming*, 26 LAND & WATER L. REV. 279, 300 (1991); Kronmiller, *supra* note 50, at 1215.

52. Alexander, *supra* note 14, at 771.

53. To prevent conflicts of interest, the statute should preclude both health care providers and witnesses from acting as health care surrogates. Waters, *supra* note 19, at 542-43.

54. These powers should include access to medical, employment and financial records of the incapacitated patient. *Id.* at 543. Such access ensures that proxies will be able to make informed decisions regarding care and related matters, such as insurance and benefits. *Id.*

55. One commentator has suggested that this list should include: commitment to a mental health care facility, convulsive therapy, sterilization, abortion and lobotomy, or any surgery altering the structure or function of the brain. *Id.* at 544. Waters also included decisions about withholding life support in this category. *Id.* If a patient articulates her opinion about withholding life support in a clear and convincing manner in the power of attorney document, the statute should authorize attorneys in fact to make such decisions.

56. One commentator has asserted that statutes should not subject health care surrogates to criminal or civil liability for reasonably prudent health care decisions made under a legal durable power of attorney document. Waters, *supra* note 19, at 544. The legislature should determine and articulate the liability standard in the state durable power of attorney law. *Id.*

Similarly, the durable power of attorney law should include provisions for judicial review. *Id.* First, courts should have authority to review both the acts and fitness of attorneys in fact. *Id.* Courts should defer to a patient's selection of an attorney in fact and should not remove her in the absence of a clear violation of the patient's best interests, as outlined in the patient's power of attorney document. Second, courts should ensure that health care providers comply with the directions of health care surrogates by cooperating in transfers or by following the directions of surrogates themselves. *Id.* at 544-45.

57. Waters, *supra* note 19, at 544.

58. The statute should require periodic re-execution. Alternatively, the drafters could require that the patient be in a terminal condition at the time of execution. Alexander, *supra* note 14, at 772-73.

59. Alexander, *supra* note 14, at 776. For example, many people have specific opinions about funeral arrangements. The statute should empower a health care surrogate to ensure that these wishes are followed. Waters, *supra* note 19, at 543.

C. *The Inadequacies of Senate Bill 148*

Senate bill 148 addresses some, but not all, of the above concerns.⁶⁰ Under Senate bill 148, a Missouri citizen may appoint an attorney in fact for health care decisions by executing a durable power of attorney for health care document.⁶¹ The patient must sign and notarize the document.⁶² The durable power of attorney becomes operative only after at least two licensed physicians have certified the patient's incapacity.⁶³ Additionally, the durable power of attorney for health care document must specifically refer to hydration and nutrition if the patient intends the attorney in fact to have authority to withhold or withdraw either.⁶⁴

Although Senate bill 148 grants the right to appoint health care proxies, it limits this right by regulating the persons who may be appointed as

60. See *infra* notes 61-73 and accompanying text.

61. MO. REV. STAT. §§ 404.800-.865 (Supp. 1991).

62. MO. REV. STAT. § 404.705(1)(3) (Supp. 1991). This requirement is included in the bill to ensure that the signatures are authentic. Eliminating notarization or attestation requirements would enable care providers or family members to execute directives affecting the patient after the patient became incapacitated and without the patient's approval.

63. MO. REV. STAT. § 404.825 (Supp. 1991). Additionally, before withdrawal of nutrition and hydration, two physicians must certify that the patient is consistently in a condition making her unable to understand any consequences of withdrawal. MO. REV. STAT. § 404.820(4) (Supp. 1991).

Because a conscious patient, with the capacity to understand the implications of treatment decisions, can exercise the right to decide without a third party, incapacitation serves as the trigger for durable powers of attorney. When a patient is incapacitated, her right to decide is jeopardized, triggering the need for a third party decision-maker to act on her behalf. Likewise, the limitations on withdrawal of nutrition and hydration ensure that the patient is unable to make the decision herself, necessitating third party intervention.

One commentator has argued quite forcefully that incapacitation, as defined in the Missouri statute, is not the proper standard for decision-making. See Kevin P. Quinn, *The Best Interests of Incompetent Patients: The Capacity for Interpersonal Relationships as a Standard for Decisionmaking*, 76 CAL. L. REV. 897 (1988). Quinn asserted that standards involving incompetency are unsatisfactory because they fail to include important quality of life considerations. *Id.* at 901. He further commented that the incapacity for interpersonal relationships should trigger surrogate decision-making. *Id.* Missouri should consider Quinn's standard for incapacity as an alternative to the definition in the Durable Power of Attorney for Health Care Act. MO. REV. STAT. § 404.805(2) (Supp. 1991).

64. MO. REV. STAT. § 404.820 (Supp. 1991). By requiring a patient to include an express provision for withdrawal, the legislature ensured that clear and convincing evidence of a patient's intent to withdraw exists before such action is implemented.

Before withdrawing nutrition and hydration, in order to give the patient an opportunity to reject withdrawal, a health care provider must attempt to explain any consequences to the patient regardless of the patient's condition. *Id.* Consequently, despite the appointment of an attorney in fact, a patient has one last opportunity to demonstrate decision-making capacity and oppose the withdrawal. This protection is undoubtedly an outgrowth of the paternalistic *Cruzan* standard requiring clear and convincing evidence of an intent to withdraw nutrition and hydration. See *supra* note 2 and accompanying text.

attorneys in fact under the Durable Power of Attorney for Health Care provisions. Under Senate bill 148, an attending physician or an employee of a health care facility may not be appointed as an attorney in fact unless she is related to or is a member of the same religious order as the patient.⁶⁵ Thus, Senate bill 148 avoids any potential conflicts of interest which may arise from a physician participating in the decision-making process as both healer and promoter of patient autonomy.

The Senate bill also places restrictions on the actions of parties who are appointed as attorneys in fact. For example, an attorney in fact must consider measures to make the patient comfortable.⁶⁶ She must also seek and consider information concerning the patient's medical care, prognosis, and the advantages and disadvantages of treatment.⁶⁷ The attorney in fact may not delegate her decision-making power unless the patient expressly provided for such delegation in the power of attorney document.⁶⁸ This ensures that the wishes of the incapacitated patient are followed rather than those of the appointed proxy or some third party. In addition to granting the right of appointment and regulating the actions of appointees, Senate bill 148 requires health care providers to provide the attorney in fact access to information and medical records.⁶⁹ Thus, the attorney in fact has the same opportunity as the patient to make a fully informed medical care decision.

Furthermore, Senate bill 148 defines the right of a patient to appoint a health care proxy in a manner consistent with Missouri's living will and guardianship provisions.⁷⁰ The bill authorizes proxy decision-making in routine situations as well as in life-threatening ones.⁷¹ Finally, the health care decision-making power of proxies extends beyond death to enable the execution of pre-death directives.⁷²

Although the authorization of attorneys in fact represents a significant

65. MO. REV. STAT. § 404.815 (Supp. 1991).

66. MO. REV. STAT. § 404.820(3) (Supp. 1991).

67. MO. REV. STAT. § 404.822 (Supp. 1991).

68. MO. REV. STAT. § 404.865 (Supp. 1991).

69. MO. REV. STAT. § 404.840(2) (Supp. 1991).

70. Senate Bill 148 restates that a patient must specifically refer to withdrawal of nutrition and hydration if she intends for the surrogate to have authority to pursue such actions. MO. REV. STAT. § 404.820(1) (Supp. 1991).

71. MO. REV. STAT. § 404.822 (Supp. 1991). Because the Act does not specifically refer to the decisions which surrogates are authorized to make, surrogates seemingly have the right to make routine decisions for incapacitated patients. *Id.*

72. MO. REV. STAT. § 404.710(6) (Supp. 1991). Powers to make post-mortem decisions depend upon express enumeration in the power of attorney document. *Id.*

step toward protecting the rights of individuals to allow health care providers to execute advance directives, Senate bill 148 offers incomplete protection and regulation. The Missouri legislature should amend the bill to include an explanation of the extent to which patients and family members may hold health care surrogates liable. First, although agency law binds agents to act in the principal's best interest, statutory provisions outlining the penalties for violating the patient's directives are important protective devices.⁷³ Second, the drafters should amend the bill to include educational mandates. Unless the average patient is aware of the durable power of attorney for health care, the protections the attorney in fact offers are inaccessible to her. Third, provisions authorizing family consent enable a citizen, who has not had notice of the right to execute an advance directive, to have family members who are most familiar with her beliefs about death-prolonging care, make medical decisions on her behalf. Absent these provisions, Senate bill 148 cannot adequately protect the rights of individuals to make health care decisions.

IV. THE RIGHTS AND DUTIES OF A HEALTH CARE PROVIDER

A health care provider is the only party empowered to carry out medical care decisions.⁷⁴ Consequently, the health care provider plays a vital role in protecting the patient's right to make medical decisions. A health care durable power of attorney statute would be incomplete if it did not address the rights and duties of health care providers.

A. Rights

A health care provider should have the right to refuse to withdraw or

73. While the statutory language is mandatory, the law does not impose civil penalties for noncompliance.

A copy of a power of attorney for health care decisions *shall* be made a part of the patient's medical record when the existence of the power of attorney becomes known to the patient's health care provider and prior to the provider's [sic] taking any action pursuant to the decision of the attorney in fact.

MO. REV. STAT. § 404.840(1) (Supp. 1991) (emphasis added).

Without penalties, no state enforcement of these reporting duties exists. States must follow the federal government's initiative and include enforcement provisions in durable power of attorney statutes. At the federal level, failure to comply with the reporting provisions of the Self Determination Act results in a loss of any rights a health care provider may have as a Medicaid contracting institution. 42 U.S.C. § 1396a(w) (Supp. 1991).

74. The health care provider is just that — the party who physically provides care. Without the health care provider, a patient would have no access to medicine and treatment. Consequently, the health care provider plays a vital role in protecting the patient's right to control when and what care is provided.

withhold medical treatment based on moral or religious beliefs.⁷⁵ A health care provider should also be authorized to follow the instructions of an attorney in fact without incurring liability to the patient or the patient's family.⁷⁶ In addition, a durable power of attorney for health care should include a provision addressing whether a health care provider is liable for damages arising out of failure to fulfill duties prescribed under the statute.⁷⁷

B. Duties

The statute should enumerate the duties under a durable power of attorney for health care. The law should include: (1) the duty to educate patients and employees about health care advance directives; (2) the duty to cooperate with health care proxies; and (3) the duty to include advance directives in medical records. By informing patients and medical personnel about state laws on advance directives, health care providers may assist in eliminating any confusion arising from ignorance of the law.⁷⁸ By cooperating with health care proxies, health care providers may further protect a patient's right to decide. Finally, by including all advance directives in a patient's record, health care providers may protect the patient's interests, as well as insulate themselves from potential liability.⁷⁹

75. Because of the controversial nature of discontinuing medical treatment and the apparent conflict between discontinuation of care and the Hippocratic Oath, health care providers should have the option to refuse to withdraw treatment. However, physicians should also be under a duty to transfer patients to a facility which will comply with the patient's wishes. *See* MO. REV. STAT. § 404.830 (Supp. 1991) (allowing such a religious exemption).

76. Waters, *supra* note 19, at 544. Protection against liability to the patient and the patient's family is one plausible means of ensuring that physicians follow the attorney in fact's instructions.

77. David E. Fowler, *Durable Powers of Attorney for Health Care Decisions*, TENN. BAR J., Jan.-Feb. 1991, at 20, 23.

78. If medical patients and personnel are not cognizant of the purpose, availability, requirements, and scope of durable powers of attorney, undoubtedly some confusion will result.

79. Placing advance directives in the patient's record serves two purposes: (1) it protects the patients by making the document permanently available to the medical personnel responsible for the patient's health care, and (2) it protects health care providers by serving as authority for reliance on instructions from an attorney in fact. Once a health care provider learns that a patient revoked a power of attorney for health care, she should include the revocation as part of the patient's medical record. MO. REV. STAT. § 404.850(2) (Supp. 1991). Thus, future physicians will not inadvertently follow the instructions of a party who no longer has decision-making authority.

Senate bill 148 does not require a health care provider to ask about advance directives. *See* MO. REV. STAT. § 404.840(1) (Supp. 1991). The duty to make directives a part of a patient's record begins only after the durable power of attorney for health care "becomes known" to the provider.

C. *The Inadequacies of Senate Bill 148*

Senate bill 148 addresses some of these rights and duties in depth. It allows health care providers to transfer a patient if the health care provider morally or religiously objects to the instructions given by a health care proxy.⁸⁰ Senate bill 148 requires health care providers to include any durable power of attorney document in a patient's medical record.⁸¹ Further, Senate bill 148 requires health care providers to give attorneys in fact access to information, medical records, and diagnosis.⁸²

One of the most important sections in Senate bill 148 establishes the potential liability of third parties.⁸³ Specifically, as long as the third party acts in good faith, she may rely on and proceed to act according to the instructions of the attorney in fact without incurring any liability to the patient or her successors in interest.⁸⁴ In addition, the bill provides that it is unlawful for any health care provider or health insurance company to require a patient to execute a health care durable power of attorney document as a condition for the provision of health care.⁸⁵

While these potential liability sections provide important assurances of health care provider compliance, they are incomplete. Senate bill 148 demands that physicians and other health care providers cooperate with proxy decision-makers in transferring patients, but the bill imposes no duty on providers to honor the instructions of the attorney in fact if such instructions are contrary to the physician's religious or moral beliefs.⁸⁶ Consequently, if a transfer is not executed, a patient's wishes may be

Id. Without a duty to inquire, the reporting provisions do not provide necessary protection for patients or health care providers.

80. MO. REV. STAT. § 404.830 (Supp. 1991).

81. MO. REV. STAT. § 404.840 (Supp. 1991).

82. *Id.*

83. MO. REV. STAT. § 404.855 (Supp. 1991).

84. *Id.*

85. MO. REV. STAT. § 404.835 (Supp. 1991).

86. MO. REV. STAT. § 404.830(1) (Supp. 1991). The bill simply requires that a health care provider cooperate with any effort to transfer a patient to a facility which will follow the attorney in fact's instructions. Thus, if a transfer is not executed, health care providers who harbor different opinions of death-prolonging care may disregard a patient's right to make health care decisions. Consequently, the patient should seek medical care at a facility which will honor the attorney in fact's treatment and withdrawal decisions. Missouri should enact a provision similar to the federal Self Determination Act which requires health care facilities to provide written information to patients about policies regarding the implementation of the right to refuse treatment, thus enabling patients to determine whether a facility will follow advance directives. 42 U.S.C. § 1396a(w)(1)(A) (Supp. 1991).

ignored.⁸⁷ Furthermore, the liability provisions do not address the penalty for noncompliance with reporting requirements. The legislature should determine appropriate sanctions for failure to include advance directives in a patient's medical record. In addition, the Durable Power of Attorney for Health Care Act should incorporate sanctions if a health care provider fails to make a mandatory inquiry into whether a patient executed advance directives.

By reorganizing and clarifying the sanctions for any failures to fulfill duties under the Act, the legislature may provide more accurate and fair notice to health care providers concerning potential sanctions and avoid unnecessary litigation over noncompliance.⁸⁸ Without sanctions, durable power of attorney documents will not protect the patient's right to make medical treatment choices.

V. CONCLUSION

While Missouri Senate bill 148 is an important step in protecting an individual's right to make prospective health care decisions, the bill falls far short of providing complete protection. For example, the bill includes no provisions for educating patients, physicians, and the community about the purpose and availability of advance directives. The drafters also failed to provide guidelines for substituted consent by family members. Although the bill contains penalties for falsification and destruction of durable powers of attorney for health care, appointed proxies and health care providers are not liable for failing to implement the wishes of the patient or for failing to record durable powers of attorney in the patient's record.

Missouri has recognized the right to execute advance directives. Now, Missouri must reorganize and expand the statute to reflect the legislature's intent to protect an individual's right to make prospective medical care decisions. The legislature should amend the statute to assure Missourians that attorneys in fact, doctors, and the courts will have both the authority and the incentive to act on the patient's behalf and at the patient's direction.

Catherine M. Sheafor

87. See *supra* note 86 and accompanying text.

88. Penalties could include: withholding compensation for medical services provided to patients with improperly recorded advance directives; civil fines; disciplinary action for unprofessional conduct; and revocation of a provider's license. *Condie, supra* note 15, at 119-20.