

# Advanced Directives: What Direction Does Kansas Allow?

By Emily A. Donaldson, Stevens & Brand, Lawrence

The recent thunderstorm of political and media attention garnered by the Terry Schiavo case has made one point saliently clear: lawyers should be increasingly diligent in counseling clients on the use and importance of advanced directives. Given the wide spectrum of personal opinions fueled by moral/religious values and political views (both from the patient's and the physician's perspectives), the need for a written expression regarding medical decisions, treatment, and care is vital in the event of one's incapacity. Although for most clients the concern manifests from the thought of "being kept alive by machines," the planning process of discussing and executing advanced directives provides a comfort, albeit a modicum of control over an unknown future, both for the client and the attorney.

Three documents fall under the umbrella of advanced directives: a living will, power of attorney for health care decisions, and a do not resuscitate (DNR) directive. A living will provides an express direction of a patient's wishes regarding certain types of medical treatment in the event of certain circumstances, while a power of attorney for health care decisions appoints an agent to act on behalf of a principal for the

sole purpose of making medical decisions. Although Kansas provides separate statutory provisions governing these documents, it is possible to combine both documents into one, as long as all statutory requirements are met. In addition, Kansas law provides that a DNR directive may be executed by an individual, or a DNR order made by a physician, for the purpose of preventing any medical procedure being used to restart breathing or heart functioning.<sup>1</sup>

Kansas' statutory scheme must be viewed first in the context of the applicable federal law. One of the most famous cases in this area, the Nancy Cruzan case, held that every competent person has a constitutionally protected liberty interest, under the due process clause of the 14th Amendment, in refusing life-sustaining medical treatment, including artificially supplied hydration and nutrition.<sup>2</sup> In addition to this constitutional protection, Congress enacted the Patient Self-Determination Act of 1991, which provides that every Medicare and Medicaid provider furnish written information to each patient concerning his or her rights under state law to make decisions concerning medical care, including the right

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## FOOTNOTES

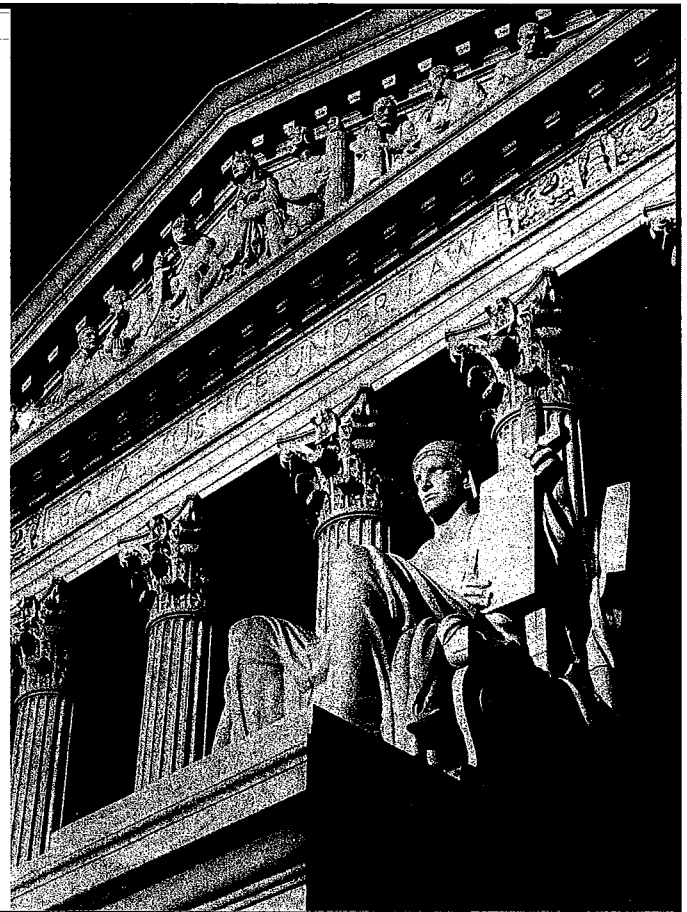
1. K.S.A. 65-4941, -4948.

2. *Cruzan ex rel. Cruzan v. Director, Mo. Dep't. of Health*, 479 U.S. 261 (1990).

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## Advanced Directives

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to accept or refuse medical or surgical treatment and the right to formulate advanced directives.<sup>3</sup> In other words, health care providers must notify a patient of his or her right to execute advanced directives, but should not require a patient to execute advanced directives upon entering the facility. Furthermore, the medical provider must document in a prominent part of the individual's current medical record whether the individual has executed an advance directive.<sup>4</sup>

In 1979 the Kansas Legislature enacted its statutory version of a living will provision, known as the Kansas Natural Death Act. The act states that "adult persons have the fundamental right to control the decisions relating to the rendering of their own medical care, including the decision to have life-sustaining procedures withheld or withdrawn in instances of a terminal condition."<sup>5</sup> The Legislature further stated that "in order that the rights of patients may be respected even after they are no longer able to participate actively in decisions about themselves, the Legislature hereby declares that the laws of this state shall recognize the right of an adult person to make a written declaration instructing his or her physician to withhold or withdraw life-sustaining procedures in the event of a terminal condition."<sup>6</sup> This statute codifies the common law living will, but is more restrictive in its definition of when the declaration is invoked.

As always with legislation, the language used requires definition. A "life-sustaining procedure" means any medical procedure or intervention that would only serve to prolong the dying process and where, in the judgment of the attending physician, death will occur whether such procedure or intervention is utilized.<sup>7</sup> It does not include the administration of medication or the performance of any medical procedure deemed necessary to provide comfort and care or to alleviate pain.<sup>8</sup>

In order to be a "qualified patient," one must have executed a declaration in accordance with this act and been diagnosed and certified in writing to be afflicted with a terminal condition by two physicians who have personally examined the patient, one of whom shall be the attending physician (the physician primarily responsible for treatment and care). Interestingly enough, "terminal condition" is not defined in the act, but instead is presumably left to the medical profession to define according to its standard terms.

It is questionable whether nutrition and hydration, commonly referred to as feeding tubes, are included in the definition of "life-sustaining procedure." As the act does not specifically address nutrition and hydration, lawyers should include this topic in their discussion with clients and, if appropriate, expressly specify in the declaration the clients wishes regarding nutrition and hydration. Since the act requires the patient to be diagnosed in a "terminal condition" before the

declaration is invoked, it does not necessarily cover a patient diagnosed in a persistent vegetative state. However, nothing precludes a person from making a declaration broader in scope covering circumstances such as persistent vegetative state. This express direction will further assist an agent under the power of attorney for health care decisions in making decisions when the patient is incapacitated, but not in a terminal condition.

The formal requirements for execution of the declaration are as follows:

- must be an adult (18 or over),
- must be in writing, and
- must be signed by declarant (or by another person in declarant's presence and by declarant's expressed directions).
- May either be signed in the presence of two or more witnesses at least 18 years old.

But the witnesses cannot be:

- the person who signed the declaration on behalf of or at the direction of the declarant,
- related to the declarant by blood or marriage,
- heirs at law or under declarant's will, and
- person directly financially responsible for declarant's medical care.
- May be acknowledged by a notary public.<sup>9</sup>

After the declaration is executed, it is the declarant's responsibility to notify his/her attending physician and, once notified, the physician must comply with the declaration. When the patient is diagnosed in a terminal condition, the burden is on the attending physician to take the necessary steps so that a declarant becomes a "qualified patient."<sup>10</sup> If the physician does not comply, his action will be deemed to be a refusal to comply.<sup>11</sup> This places a further burden on the attending physician by requiring that, if they refuses to comply, they must transfer the qualified patient to another physician. If they do not, they have committed an act of unprofessional conduct as defined under the Kansas Healing Arts Act.<sup>12</sup>

The act also carries criminal penalties for any person who intentionally destroys, conceals or falsifies a declaration, or conceals a revocation.<sup>13</sup> However, the declaration may be revoked at any time by being destroyed, through written revocation by the declarant, or through a verbal expression of intent to revoke the declaration (in presence of adult witness who signs a writing confirming the expression).<sup>14</sup>

The Legislature was very clear in stating that compliance with the act does not equal suicide.<sup>15</sup> Further, compliance is not mercy killing and is for no purpose other than to permit the natural process of dying.<sup>16</sup> Finally, the declaration of a pregnant woman shall have no effect during the course of pregnancy.<sup>17</sup>

As indicated above, a power of attorney for health care decisions allows an individual (the principal) to designate an agent to govern all medical decisions. Kansas law provides that an

3. 42 U.S.C.A. § 1395(f)(1)(A).

4. 42 U.S.C.A. § 1395(f)(1)(B).

5. K.S.A. 65-28, 101.

6. *Id.*

7. K.S.A. 65-28, 102.

8. *Id.*

9. K.S.A. 65-28, 103.

10. K.S.A. 65-28, 105.

11. K.S.A. 65-28, 107.

12. K.S.A. 65-2837.

13. *Id.*

14. K.S.A. 65-28, 104.

15. K.S.A. 65-28, 108.

16. K.S.A. 65-28, 109.

17. K.S.A. 65-28, 103.

individual can execute a "durable" power of attorney by using the following magic words:

"This power of attorney for health care decisions shall not be affected by subsequent disability or incapacity of the principal" or "this power of attorney for health care decisions shall become effective upon the disability or incapacity of the principal" or similar words showing the intent that the power survives the principal's subsequent disability or incapacity.<sup>18</sup> This provision overrides the common law principle that a power of attorney is void upon the disability or incapacity of the principal.

The statute also provides for portability of a power of attorney, meaning that if the document was valid when signed under the laws of the state in which the principal was a resident, it will be valid under Kansas law.<sup>19</sup> Under a durable power of attorney for health care decisions, an agent may have the following authority, paraphrased from the statute:

1. To consent, refuse consent, or withdraw consent to any medical care, including decisions about organ donation, autopsy, and disposition of the body;

2. To make all necessary arrangements at or with a medical provider, including admission to long-term care facilities; and

3. To access any medical information belonging to the principal.<sup>20</sup>

An agent may not invoke or invalidate a Natural Death Act declaration and cannot exceed the powers established in the power of attorney. An agent also has an express duty to act consistently with the expressed desires of the principal.<sup>21</sup> This provision clearly exemplifies the importance of the declaration, or living will, since the declaration manifests the expressed desires of the principal. The living will declaration, power of

attorney for health care decisions, and DNR directive are useful tools to help clients manage and control medical decisions in the event of incapacity, especially given the medical advancements that, although they might continue life, might not continue the type of life the client desires. ■

*About the Author*



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18. K.S.A. 58-625.  
19. K.S.A. 58-630.

20. K.S.A. 58-629(a).  
21. K.S.A. 58-629(b), (c).

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