L.D. 2074

(Filing No. H-1059)

STATE OF MAINE
HOUSE OF REPRESENTATIVES
114TH LEGISLATURE
SECOND REGULAR SESSION

COMMITTEE AMENDMENT "A" to H.P. 1497, L.D. 2074, Bill, "An Act Concerning Living Wills"

Amend the bill by striking out everything after the enacting clause and before the statement of fact and inserting in its place the following:

'**Sec. 1. 18-A MRSA Art. V, Pt. 7** is enacted to read:

PART 7

LIVING WILLS

PREFATORY NOTE*

The [Uniform] Rights of the Terminally Ill Act is designed to provide various means by which an individual's preferences can be carried out with regard to administration of life-sustaining treatment. The Act permits an individual to execute a declaration that instructs a physician to withhold or withdraw life-sustaining treatment in the event the individual is in a terminal condition and is unable to participate in medical treatment decisions. In the alternative, the Act permits the individual to execute a declaration designating another individual to make decisions regarding the withholding or withdrawal of life-sustaining treatment. Finally, the Act authorizes an attending physician to withhold or withdraw life-sustaining treatment in the absence of a declaration upon the consent of a close relative if the action would not conflict with the known intentions of the individual.

The scope of the Act is narrow. Its impact is limited to

treatment that is merely life-prolonging, and to patients whose terminal condition is incurable and irreversible, whose death will soon occur, and who are unable to participate in treatment decisions. Beyond its narrow scope, the Act is not intended to affect any existing rights and responsibilities of persons to make medical treatment decisions. The Act merely provides alternative ways in which a terminally-ill patient's desires regarding the use of life-sustaining procedures can be legally implemented.

The purposes of the Act are (1) to establish a procedure which is simple, effective, and acceptable to persons who desire to execute a declaration, (2) to provide a statutory framework that is acceptable to physicians and health-care facilities whose conduct will be affected, (3) to provide for the effectiveness of a declaration in states other than the state in which it is executed through uniformity of scope and procedure, and (4) to avoid the inconsistency in approach that has characterized early state statutes in the area.

The Act's basic structure and substance has been drawn from existing legislation in order to avoid further complexity and to permit its effective operation in light of prior enactments. Departures from existing statutes have been made, however, in order to simplify procedures, improve drafting, and clarify language. Selected provisions have been reworked to express more adequately a specific concept (i.e., life-sustaining treatment, terminal condition) or to reflect changes in established procedure (i.e., the qualifications of witnesses). The Act's stylistic and substantive departures from existing legislation were pursued for the purposes of clarity and simplicity.

The 1989 Act reflects changes and additions to the original Rights of the Terminally Ill Act, approved by the Conference in 1985. The principal changes are noted in the Comments, but they can also be briefly listed. First, Section 2 [5-702] has been expanded to permit individuals to designate other persons to make decisions regarding the withholding or withdrawal of life-sustaining treatment. Second, under new Section 7 [5-707] consent to withholding or withdrawal of treatment may be obtained in the absence of a declaration. With few exceptions, changes in the original Act have been limited to Section 2 [5-702] and (new) Section 7 [5-707], so that states that have enacted the earlier version can easily incorporate the new provisions.

PREFATORY NOTE - MAINE REVISIONS

The Uniform Rights of the Terminally Ill Act has been adapted for inclusion in the Probate Code as a new Part 7 of Article V dealing with living will declarations. This Maine version contains 2 significant modifications of the Uniform Act. First, the definition of "life-sustaining treatment" in the Maine

Revised Statutes, Title 18-A, section 5-701, subsection (4) excludes artificially administered nutrition and hydration unless the declarant elects otherwise in the declaration itself. This is a change from the prior statute in Maine which excluded nutrition and hydration from the definition of life-sustaining treatment, regardless of what the declarant might say in the declaration. This revised definition of "life-sustaining treatment" is not intended to change the common law of Maine or to overrule or in any way undercut In re Gardner, 534 A.2d 947 (Me. 1987). The second significant modification of the Uniform Act is the elimination of Sections 6(c) and 7(e), dealing with pregnant patients, from the Maine version. These sections had been eliminated by the Maine Legislature when it enacted an earlier version of the Uniform Act in 1985.

§5-701. Short title and definitions

This Part may be cited as the "Uniform Rights of the Terminally Ill Act" and shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Part among states enacting this Act. As used in this Part, unless the context otherwise indicates, the following terms have the following meanings.

(1) "Attending physician" means the physician who has primary responsibility for the treatment and care of the patient.

(2) "Declaration" means a writing executed in accordance with the requirements of section 5-702, subsection (a).

(3) "Health-care provider" means a person who is licensed, certified, or otherwise authorized by the law of this State to administer health care in the ordinary course of business or practice of a profession.

(4) "Life-sustaining treatment" means any medical procedure or intervention that, when administered to a qualified patient, will serve only to prolong the process of dying.

(a) "Life-sustaining treatment" does not include artificially administered nutrition and hydration unless the declarant elects in the declaration to include artificially administered nutrition and hydration in the definition of life-sustaining treatment.

(b) The term "artificially administered nutrition and hydration" means the provision of nutrients and liquids through the use of tubes, intravenous procedures or similar medical interventions.

(5) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture,

government, governmental subdivision or agency, or any other legal or commercial entity.

(6) "Physician" means an individual licensed as a physician under Title 32, chapter 48 or an osteopathic physician under Title 32, chapter 36.

(7) "Qualified patient" means a patient 18 or more years of age who has executed a declaration and who has been determined by the attending physician to be in a terminal condition.

(8) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or insular possession subject to the jurisdiction of the United States.

(9) "Terminal condition" means an incurable and irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of the attending physician, result in death within a relatively short time.

UNIFORM ACT COMMENTS*

Section 1 [5-701]. The Act's definitions of "life-sustaining treatment" and "terminal condition" are interdependent and must be read together. This has caused drafting problems in many existing acts, and the Act has been drafted to avoid the problems detected in existing legislation.

Most of the "life-sustaining treatment" and "terminal condition" definitions in existing statutes were considered problematical in that they (1) were tautological, defining "terminal condition" with respect to "life-sustaining treatment" and vice versa, and (2) defined terminal condition as requiring "imminent" death "whether or not" or "regardless of" the application of life-sustaining treatment. Strictly speaking, if death is "imminent" even with the full application of life-sustaining treatment, there is little point in having a statute permitting withdrawal of such procedures. The Act's definitions have attempted to avoid these problems.

The "life-sustaining treatment" definition found in many statutes inserts the clause "and when, in the judgment of the attending physician, death will occur whether or not such procedure or intervention is utilized," after the phrase "will serve only to prolong the dying process" found in the Act's provision. Because the Act's life-sustaining treatment definition concerns only those procedures or interventions applied to "qualified patients" (i.e., those who have been determined to be in a terminal condition), and because a terminal condition is defined as "incurable and irreversible" with death resulting "in a relatively short time," the requirement that

death be "inevitable" has been satisfied by the presence of "qualified patient" in the life-sustaining treatment definition. Therefore, this additional clause was excluded because it was considered repetitious and possibly confusing.

The Act defines "life-sustaining treatment" in an all-inclusive manner, dealing with those procedures necessary for comfort care or alleviation of pain separately in Section 6(b) [5-706, subsection (b)], where it is provided that such procedures need not be withdrawn or withheld pursuant to a declaration. Most existing statutes incorporate "comfort care" as an exclusion from the definition of life-sustaining treatment. Because many such procedures are life-sustaining, however, the Act avoids definitional confusion by treating them in a separate provision that reflects the Act's policy more clearly, and better reflects the fact that comfort care does not involve a fixed group of procedures applicable in all instances.

Subsection (9) of Section 1 [5-701] is the "terminal condition" definition. The difficulty of trying to express such a condition in precise, accurate, but not unduly restricting language is obvious. A definition must preserve the physicians' professional discretion in making such determinations. Consequently, the Act's definition of terminal condition incorporates not only selected language from various state acts, but also suggestions from medical literature in the field.

The Act employs the term "terminal condition" rather than terminal illness, and it is important that these two different concepts be distinguished. Terminal illness, as generally understood, is both broader and narrower than terminal condition. Terminal illness connotes a disease process that will lead to death; "terminal condition" is not limited to disease. Terminal illness also connotes an inevitable process leading to death, but does not contain limitations as to the time period prior to death, or potential for nonreversibility, as does "terminal condition."

The "terminal condition" definition requires that the condition be "incurable and irreversible." These adjectives were chosen over the similar phrase "no possibility of recovery" because of possible ambiguity in the term "recovery" (i.e., recovery to "normal" or to some other stage). A number of state statutes now use "incurable" and/or "irreversible," and the terms appear to comport with the criteria applied by physicians in terminal care situations. The phrase "incurable and irreversible" is to be read conjunctively as long as the circumstances warrant. A condition which is reversible but incurable is not a terminal condition.

Subsection (9) of Section 1 [5-701] also requires that the condition result in the death of the patient with a "relatively

short time ... without the administration of life-sustaining treatment." This requirement differs to some degree from the language employed in most of the statutes. First, the decision that death will occur in a relatively short time is to be made without considering the possibilities of extending life with life-sustaining treatment. The alternative is that required by a number of states -- that death be imminent whether or not life-sustaining procedures are applied. The President's Commission for the Study of Ethical Problems in Medicine and Biomedical Research has noted that such a definition severely limits the group of terminally-ill patients able to qualify under these acts. It is precisely because life can be prolonged indefinitely by new medical technology that these acts have come into existence. Though the Act intends to err on the side of prolonging life, it should not be made wholly ineffective as to the actual situation it purports to address. The provisions which require that death be imminent regardless of the application of life-sustaining procedures appear to have that effect. Therefore, such provisions have been excluded in the Act.

The "terminal condition" definition of subsection (9) requires that death result "in a relatively short time." Rejecting the "imminency" language employed in a number of statutes, this alternative was chosen because it provides needed flexibility and reflects the balancing character of the time frame judgment. Though the phrase "relatively short time" does not eliminate the need for judgment, it focuses the physician's medical judgment and avoids the narrowing implications of the word "imminent."

The "relatively short time" formulation is employed to avoid both the unduly constricting meaning of "imminent" and the artificiality of another alternative -- fixed time periods, such as six months, one year, or the like. The circumstances and inevitable variations in disorder and diagnosis make unrealistic a fixed time period. Physicians may be hesitant to make predictions under a fixed time period standard unless the standard of physician judgment is so loose as to be unenforceable. Under the Act's standard, considerations such as the strength of the diagnosis, the type of disorder, and the like can be reflected in the judgment that death will result within a relatively short time, as they are now reflected in judgments physicians must and do make.

The "life-sustaining treatment" and "terminal condition" definitions exclude certain types of disorders, such as kidney disease requiring dialysis, and diabetes requiring continued use of insulin. This is accomplished in the requirement that terminal conditions be "irreversible," and that life-sustaining procedures serve "only to prolong the dying process." For purposes of the Act, diabetes treatable with insulin is "reversible," a diabetic person so treatable is not in the "dying

process," and insulin is a treatment the benefits of which foreclose it serving "only" to prolong the dying process.

MAINE COMMENT

Sections 15 and 16 of the Uniform Act have been incorporated into the beginning of the Maine Revised Statutes, Title 18-A, section 5-701 as a means of fitting this Uniform Act into the format of the Probate Code. All references throughout the Uniform Act to Sections 1 to 14 have been revised to refer to sections 5-701 to 5-714.

The definition of "life-sustaining treatment" in section 5-701, subsection (4) has been altered to treat artificially administered nutrition and hydration as a special category of medical treatment that will constitute life-sustaining treatment only if so elected by the declarant in the declaration. This is a change from the prior statute in Maine which excluded nutrition and hydration from the definition of life-sustaining treatment, regardless of what the declarant might say in the declaration. The revised definition of "life-sustaining treatment" is not intended to change the common law of Maine or to overrule or in anyway undercut In re Gardner, 534 A.2d 947 (Me. 1987). The term "artificially administered nutrition and hydration" is intended to include all tube and intravenous methods, or similar medical interventions, for providing nutrients and liquids to patients. The focus is on the inability of the patient to receive nourishment through spoon-feedings or any other method considered by most people as "ordinary." Any method which, under normal circumstances, requires the actions of a physician or other licensed health care professional to initiate or maintain life-sustaining treatment, such as inserting a nasogastric tube, is not "ordinary" and should be considered a method of artificially administered nutrition and hydration.

A patient reliably diagnosed to be in a "persistent vegetative state" with no realistic prospect of a return to a cognitive, sapient state may be considered to be in a "terminal condition" as that term is defined in section 5-701, subsection (9).

§5-702. Declaration relating to use of life-sustaining treatment

(a) An individual of sound mind and 18 or more years of age may execute at any time a declaration governing the withholding or withdrawal of life-sustaining treatment. The declarant may designate another individual of sound mind and 18 or more years of age to make decisions governing the withholding or withdrawal of life-sustaining treatment. The declaration must be signed by the declarant, or another at the declarant's direction, and witnessed by 2 individuals.

(b) A declaration directing a physician to withhold or withdraw life-sustaining treatment may, but need not, be in the following form:

DECLARATION

If I should have an incurable and irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of my attending physician, cause my death within a relatively short time, and I am no longer able to make or communicate decisions regarding my medical treatment, I direct my attending physician, pursuant to the Uniform Rights of the Terminally Ill Act of this State, to withhold or withdraw such treatment that only prolongs the process of dying and is not necessary for my comfort or to alleviate pain.

Optional: I direct my attending physician to withhold or withdraw artificially administered nutrition and hydration which only prolongs the process of dying.

Signature _____

NOTE: This optional provision must be signed to be effective.

Signed this _____ day of _____, _____.

Signature _____

Address _____

The declarant voluntarily signed this writing in my presence.

Witness _____
Address _____

Witness _____
Address _____

NOTE: Maine law provides that artificially administered nutrition and hydration does not constitute a life-sustaining treatment that may be withheld or withdrawn pursuant to a living will declaration unless the declarant elects otherwise in the declaration itself.

(c) A declaration that designates another individual to make decisions governing the withholding or withdrawal of life-sustaining treatment may, but need not, be in the following form:

DECLARATION

If I should have an incurable and irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of my attending physician, cause my death within a relatively short time, and I am no longer able to make or communicate decisions regarding my medical treatment, I appoint _____ or, if he or she is not reasonably available or is unwilling to serve, _____, to make decisions on my behalf regarding withholding or withdrawal of such treatment that only prolongs the process of dying and is not necessary for my comfort or to alleviate pain, pursuant to the Uniform Rights of the Terminally Ill Act of this State.

Optional: If the individual(s) I have so appointed is not reasonably available or is unwilling to serve, I direct my attending physician, pursuant to the Uniform Rights of the Terminally Ill Act of this State, to withhold or withdraw such treatment that only prolongs the process of dying and is not necessary for my comfort or to alleviate pain.

Signature _____

NOTE: This optional provision must be signed to be effective.

Optional: I direct my attending physician to withhold or withdraw artificially administered nutrition and hydration which only prolongs the process of dying.

Signature _____

NOTE: This optional provision must be signed to be effective.

Signed this _____ day of _____, _____.

Signature _____

Address _____

The declarant voluntarily signed this writing in my presence.

Witness _____
Address _____

Witness _____
Address _____

Name and address of designees.

Name _____
Address _____

NOTE: Maine law provides that artificially administered nutrition and hydration does not constitute a life-sustaining treatment that may be withheld or withdrawn pursuant to a living will declaration unless the declarant elects otherwise in the declaration itself.

(d) The designation of a judicially appointed guardian or an attorney-in-fact appointed under a medical power of attorney pursuant to Part 5, constitutes for purposes of this Part a declaration designating another pursuant to subsection (a).

(e) A physician or other health-care provider who is furnished a copy of the declaration shall make it a part of the declarant's medical record and, if unwilling to comply with the declaration, promptly so advise the declarant and any individual designated to act for the declarant. This subsection does not affect the duty of a physician or other health care provider under section 5-708.

UNIFORM ACT COMMENTS*

Section 2 [5-702]. Section 2 [5-702] sets out the minimal requirements regarding the making and execution of a valid declaration. "Sample" declaration forms are offered in this section. The forms are not mandatory, as some acts require; they "may, but need not, be" followed. The forms provided also are not as elaborate as others. The drafters rejected more detailed declarations for two reasons. First, the forms are to serve only as examples of a valid declaration. More elaborate forms may have erroneously implied that a declaration more simply constructed would not be legally sufficient. Second, the sample forms' simple structure and specific language attempt to provide

notice of exactly what is to be effectuated through these documents to those persons desiring to execute a declaration and the physicians who are to honor it.

Sections 2(a) and (c) [5-702, subsections (a) and (c)] of the Act authorize an individual by a declaration to designate another person to make decisions governing the withholding or withdrawal of life-sustaining care. The designated person must be an adult of sound mind, but no other restrictions are placed on the designation other than the requirements of form contained in Section 2(a) [5-702, subsection (a)]. The designated person may be an attorney-in-fact who is so designated in the declaration or in another writing that conforms with the applicable requirements of each state for durable powers of attorney.

Section 2(c) [5-702, subsection (c)] provides a model form of declaration by which the designation of another decision-maker may be accomplished. The bracketed language in the Section 2(c) [5-702, subsection (c)] form of declaration is intended to allow a declarant two choices when designating another person to make treatment decisions. First, by striking the bracketed language, an individual may make an exclusive designation of another decision-maker, and if that person is not available to fulfill the responsibility, the declaration will have no effect. It is intended, in such an event, that the substituted decision-makers who are authorized to make treatment decisions in Section 7 [5-707] will be able to exercise decision-making authority pursuant to the terms of Section 7 [5-707]. The execution of a declaration exclusively designating another person to make treatment decisions, in other words, should not itself be construed as an "expressed intention of the individual" not to have life-sustaining treatment withheld or withdrawn under Section 7(d) [5-707, subsection (d)].

The second choice available in the Section 2(c) [5-702, subsection (c)] form of declaration would make the declaration directly effective by its terms in the event that the substituted decision-maker were unavailable. This would be accomplished by not striking the bracketed language.

Other than the requirement that designees be adults of sound mind, no limitation is placed in Section 2 [5-702] on the person(s) who may be designated to make decisions about the withholding or withdrawal of treatment for the declarant. It is specifically anticipated, for example, that some people may choose to appoint their physician to make such decisions and, absent any ethical restrictions on such an appointment, Section 2 [5-702] anticipates that the physician may act in the appointed capacity.

Persons may be appointed to make decisions for a declarant

through a declaration in substantially the form contained in Section 2(c) 5-702, subsection (c)], through appointment of an attorney-in-fact pursuant to a durable power of attorney, or through a judicially appointed guardian. In all cases, the designee has full power to make the relevant decisions called for in the Act, and functions as the agent of the declarant. No specific standards, other than good faith, apply to decisions of the designee. Designation of another to make decisions pursuant to a durable power of attorney or judicially appointed guardianship is treated as a declaration under the Act, so that, for example, decisions of the designee "govern" treatment decisions by the physician, and a physician who is unwilling to abide by such decisions (if medically reasonable) must transfer the patient to the care of another physician.

Designation by a durable power of attorney or judicially appointed guardianship must be based on a sufficiently specific reference to health care or terminal care treatment decisions, as required by state law governing such appointments, to trigger application of the Act. No specific formulation of the terms of appointment is required, however. If appointment for purposes of health-care decisions would be sufficient under state law to include withholding or withdrawal of treatment for a person in a terminal condition, that will suffice under the Act.

The Act's authorization for specific decisions does not in any way restrict authority that exists under state law. The Act is in this respect additive only. Thus, for example, if an attorney-in-fact would have the authority independent of this Act to authorize withdrawal of treatment for a person in a persistent vegetative state not covered by the terms of the Act, the Act's limitations would not circumscribe the attorney-in-fact's authority under other law.

In designating another person to make treatment decisions, it is assumed that a declarant will identify only a single decision-maker. In view of this assumption, Sections 2(a) and (c) [5-702, subsections (a) and (c)] permit designation of an individual, rather than individuals, as the problems associated with identifying, locating, and communicating with multiple decision-makers are substantial and the drafters did not want to encourage the practice.

The Act does not expressly prohibit multiple designees, however, and a declaration containing a multiple designation is not invalid under the Act. The absence of any provision permitting a majority of such designees to act in the case of a disagreement, however, means that the refusal of one member of a designee group to agree to direct the withholding or withdrawal of treatment will foreclose any action under the Act unless the declaration specifically provides otherwise. Because of the difficulties associated with multiple designees under the Act,

declarants should be discouraged from the practice and, if such designations are made and any result other than the one stated above is desired, the declaration should so specify.

The Act's provisions governing witnesses to a declaration are simplified. Section 2 [5-702] provides only that the declaration be signed by the declarant in the presence of two witnesses. The Act does not require witnesses to meet any specific qualifications for two primary reasons. First, the interest in simplicity mandates as uncomplicated a procedure as possible. It is intended that the Act present a viable alternative for those persons interested in participating in their medical treatment decisions in the event of a terminal condition.

Second, the absence of more elaborate witness requirements relieves physicians of the inappropriate and perhaps impossible burden of determining whether the legalities of the witness requirements have been met. Many physicians understandably and rightly would be hesitant to make such decisions and, therefore, the effectiveness of the declaration might be jeopardized. It should be noted, as well, that protection against abuse in these situations is provided by the criminal penalties in Section 10 [5-710]. The attending physicians and other health-care professionals will be able, in most circumstances, to discuss the declaration with the patient and family and any suspicion of duress or wrongdoing can be discovered and handled by established hospital procedures.

Section 2(e) [5-702, subsection (e)] requires that a physician or health-care provider who is given a copy of the declaration record it in the declarant's medical records. This step is critical to the effectuation of the declaration, and the duty applies regardless of the time of receipt. If a copy of the same declaration is already in the record, its re-recording would not be necessary, but its receipt should be noted as evidence of its continued force. Section 2(e) [5-702, subsection (e)] is not duplicative of Section 5 [5-705] which requires recording the terms of the declaration (or the document itself, when available, in the event of telephonic communication to the physician by another physician, for example) at the time the physician makes a determination of terminal condition. It was deemed important that knowledge of the declaration and its continued force be specifically noted at this critical juncture.

Section 2(e) [5-702, subsection (e)] imposes a duty on the physician or other health-care provider to inform the declarant of his or her unwillingness to comply with the provisions of the declaration. This will provide notice to the declarant that certain terms may be deemed medically unreasonable (Section 11(f) [5-711, subsection (f)]), or that the declarant should decide whether to select another attending physician who is willing to carry out the Act (Section 8 [5-708]).

MAINE COMMENT

The words "or communicate" are added to the suggested forms of declaration to provide for the situation when a declarant may be mentally capable of making a decision regarding medical treatment but physically unable to communicate that decision.

The sample forms are amended to provide for the declarant's signature when optional language is chosen. It is necessary, therefore, for a declarant to sign the provision which includes artificially administered nutrition and hydration as a form of life-sustaining treatment which may be withheld or withdrawn.

The Maine Revised Statutes, Title 18-A, section 5-702, subsection (d) provides that the judicial appointment of a guardian, or the designation by an individual of an attorney-in-fact under a medical power of attorney, constitutes for purposes of this Part a declaration designating another under subsection (a). Thus, when such a guardian or attorney-in-fact has been so designated, there is an effective declaration in place for purposes of this Part and section 5-707, subsections (a) and (b) would not apply.

§5-703. When declaration operative

A declaration becomes operative when it is communicated to the attending physician and the declarant is determined by the attending physician to be in a terminal condition and no longer able to make or communicate decisions regarding administration of life-sustaining treatment. When the declaration becomes operative, the attending physician and other health-care providers shall act in accordance with its provisions and with the instructions of a designee under section 5-702, subsection (a) or comply with the transfer requirements of section 5-708.

UNIFORM ACT COMMENTS*

Section 3 [5-703]. Section 3 [5-703] establishes the preconditions to the declaration becoming operative. Once operative, Section 3 [5-703] provides that the attending physician shall act in accordance with the provisions of the declaration or transfer care of the patient under Section 8 [5-708]. This provision is not intended to eliminate the physician's need to evaluate particular requests in terms of reasonable medical practice under Section 11(f) [5-711, subsection (f)], nor to relieve the physician from carrying out the declaration except for any specific unreasonable or unlawful request in the declaration. Transfer of the patient under Section 8 [5-708] is to occur if the physician, for reasons of conscience, for example, is unwilling to carry out the Act or to follow medically reasonable requests in the declaration.

§5-704. Revocation of declaration

(a) A declarant may revoke a declaration at any time and in any manner, without regard to the declarant's mental or physical condition. A revocation is effective upon its communication to the attending physician or other health-care provider by the declarant or a witness to the revocation.

(b) The attending physician or other health-care provider shall make the revocation a part of the declarant's medical record.

UNIFORM ACT COMMENTS*

Section 4 [5-704]. Section 4 [5-704] provides for revocation of a declaration and is modeled after North Carolina's similar provision. Virtually every other statute sets out specific examples of how a declaration can be revoked -- by physical destruction, by a signed, dated writing, or by a verbal expression of revocation. A provision that freely allowed revocation and avoided procedural complications was desired. The simple language of Section 4 [5-704] appears to meet these qualifications. It should be noted that the revocation is, of course, not effective until communicated to the attending physician or another health-care provider working under a physician's guidance, such as nursing facility or hospice staff. The Act, unlike many statutes, also does not explicitly require that a person relaying the revocation be acting on the declarant's behalf. Such a requirement could impose an unreasonable burden on the attending physician. The communication is assumed to be in good faith, and the physician may rely on it.

In employing a general revocation provision, it was intended to permit revocation by the broadest range of means. Therefore, for example, it is intended that a revocation can be effected in writing, orally, by physical defacement or destruction of a declaration, and by physical sign communicating intention to revoke.

§5-705. Recording determination of terminal condition and declaration

Upon determining that a declarant is in a terminal condition, the attending physician who knows of a declaration shall record the determination and the terms of the declaration in the declarant's medical record.

UNIFORM ACT COMMENTS*

Section 5 [5-705]. Section 5 [5-705] of the Act requires

that an attending physician record the determination that the patient is in a terminal condition in the patient's medical records. The section provides that an attending physician must know of the declaration's existence. It is anticipated that knowledge may in some instances occur through oral communication between physicians. If the attending physician determines that the patient is in a terminal condition, and has been notified of the declaration, the physician is to make the determination of terminal condition, as defined in Section 1(9) [5-701, subsection (9)], part of the patient's medical records. There is no explicit requirement that the physician inform the patient of the terminal condition. That decision is to be left to the physician's professional discretion under existing standards of care. The Act also does not require, as do many statutes, that a physician other than the attending physician concur in the terminal condition determination. It appears to be the established practice of most physicians to request a second opinion or, more often, review by a panel or committee established as a matter of hospital procedure, and the Act is not intended to discourage such a practice. Requiring it, however, would almost inevitably freeze in a single process or set of processes for review in this evolving area of medicine. Because existing policies and regulations typically address the review issue, requiring a specific form of review in the Act was viewed as an unnecessary regulation of normal hospital procedures. Moreover, in smaller or rural health facilities a second qualified physician or review mechanism may not be readily available to confirm the attending physician's determination.

The physician must record the terms of the declaration in the medical record so that its specific language or any special provisions are known at later stages of treatment. It is assumed that "terms" of the declaration will be a copy of the declaration itself in most instances, although cases of an emergency character may arise, for example, in which the contents of a declaration can be reliably conveyed, and where obtaining a copy of the declaration prior to making decisions governed by it will be impracticable. In such cases, the terms of the declaration will suffice for recording purposes under Section 5 [5-705].

§5-706. Treatment of qualified patients

(a) A qualified patient may make decisions regarding life-sustaining treatment so long as the patient is able to do so.

(b) This Part does not affect the responsibility of the attending physician or other health-care provider to provide treatment, including nutrition and hydration, for a patient's comfort care or alleviation of pain.

UNIFORM ACT COMMENTS*

Section 6 [5-706]. Section 6(a) [5-706, subsection (a)] recognizes the right of patients who have made a declaration and are determined to be in a terminal condition to make decisions regarding use of life-sustaining procedures. Until unable to do so, such patients have the right to make such decisions independently of the terms of the declaration. In affording patients a "right to make decisions regarding use of life-sustaining procedures," the Act is intended to reflect existing law pertaining to this issue. As Sections 11(e) and (f) [5-711, subsections (e) and (f)] indicate, qualifications on a patient's right to force the carrying out of those decisions in a manner contrary to law or accepted standards of medical practice, for example, are not intended to be overridden.

In Section 6(b) [5-706, subsection (b)] the Act uses the term "comfort care" in defining procedures that may be applied notwithstanding a declaration instructing withdrawal or withholding of life-sustaining treatment. The purpose for permitting continuation of life-sustaining treatment deemed necessary for comfort care or alleviation of pain is to allow the physician to take appropriate steps to insure comfort and freedom from pain, as dictated by reasonable medical standards. Many existing statutes employ the term "comfort care" in connection with the alleviation of pain, and the Act follows this example. Although the phrase "to alleviate pain" arguably is subsumed within the term "comfort care," the additional specificity was considered helpful for both the doctor and layperson.

Section 6(b) [5-706, subsection (b)] does not set out a separate rule governing the provision of nutrition and hydration. Instead, each is subject to the same considerations of necessity for comfort care and alleviation of pain as are all other forms of life-sustaining treatment. If nutrition and hydration are not necessary for comfort care or alleviation of pain, they may be withdrawn. This approach was deemed preferable to the approach in a few existing statutes, which treat nutrition and hydration as comfort care in all cases, regardless of circumstances, and exclude comfort care from the life-sustaining treatment definition.

It is debatable whether physicians or other professionals perceive the providing of nourishment through intravenous feeding apparatus or nasogastric tubes as comfort care in all cases or whether such procedures at times merely prolong the dying process. Whether procedures to provide nourishment should be considered life-sustaining treatment or comfort care appears to depend on the factual circumstances of each case and, therefore, such decisions should be left to the physician, exercising reasonable medical judgment. Declarants may, however, specifically express their views regarding continuation or

noncontinuation of such procedures in the declaration, and those views will control.

MAINE COMMENT

Section 6(c) of the Uniform Act, dealing with a qualified patient who is pregnant, is not included in this statute. This is consistent with the policy judgment made by the Maine Legislature when it enacted an earlier version of this Uniform Act in 1985.

§5-707. Consent by others to withdrawal or withholding of treatment

(a) If written consent to the withholding or withdrawal of the treatment, witnessed by 2 individuals, is given to the attending physician, the attending physician may withhold or withdraw life-sustaining treatment from an individual who:

(1) Has been determined by the attending physician to be in a terminal condition and no longer able to make or communicate decisions regarding administration of life-sustaining treatment; and

(2) Has no effective declaration.

(b) The authority to consent or to withhold consent under subsection (a) may be exercised by the following individuals, other than an individual disqualified under subsection (g), in order of priority:

(1) The spouse of the individual;

(2) An adult child of the individual or, if there is more than one adult child, a majority of the adult children who are reasonably available for consultation;

(3) The parents of the individual;

(4) An adult sibling of the individual or, if there is more than one adult sibling, a majority of the adult siblings who are reasonably available for consultation; or

(5) The nearest other adult relative of the individual by blood or adoption who is reasonably available for consultation.

(c) If a class entitled to decide whether to consent is not reasonably available for consultation and competent to decide, or declines to decide, the next class is authorized to decide, but an equal division in a class does not authorize the next class to decide.

(d) A decision to grant or withhold consent must be made in the best interest of the individual consistent with the individual's desires, if known, and in good faith. A consent is not valid if it conflicts with the expressed intention of the individual.

(e) A decision of the attending physician acting in good faith that a consent is valid or invalid is conclusive unless otherwise determined by a court of competent jurisdiction.

(f) Any person with a significant personal relationship with the individual may petition a court of competent jurisdiction to determine whether a decision made by a person authorized to consent or to withhold consent under this section was made in the best interest of the individual consistent with the individual's desires, if known, and in good faith.

(g) An individual may disqualify others from consenting to the withdrawal or withholding of life-sustaining treatment from the individual by any writing, signed by the individual, which designates those disqualified. An attending physician who knows of a written disqualification may not accept a consent from a disqualified individual. A disqualified individual may not consent for another under subsection (a).

UNIFORM ACT COMMENTS*

Section 7 [5-707]. Section 7 [5-707] provides a procedure by which an attending physician may obtain consent to the withholding or withdrawal of life-sustaining treatment in the absence of an effective declaration. It draws upon the definitions of the Act, as well as those sections bearing on the process for and the legal effect of withholding or withdrawal of treatment, but in most other respects it is free-standing. It can therefore simply be inserted as a new section in existing statutes that follow the original 1985 Uniform Act. For states that might want to adopt the Section 2 [5-702] amendments, but not the Section 7 [5-707] amendments, Section 7 [5-707] can simply be deleted.

The purpose of Section 7 [5-707] is to authorize persons other than the patient who are in a close familial relationship to the patient to consent to the withholding or withdrawal of life-sustaining treatment when the patient has no prior declaration, or when a prior declaration is not effective. Prior declarations might not be effective for a variety of reasons, including, for example, the expiration of a time limit, the failure to have the declaration properly witnessed, or the absence of a condition precedent contained in the declaration, such as the death or disability of a designated decision-maker.

Section 7 [5-707] authorizes binding consent to the withholding or withdrawal of life-sustaining treatment for qualified patients. Members of the patient's family in designated priority order may consent to withholding or withdrawal of life-sustaining treatment, and such consent will be treated as if the individual had given it. Consent by the designated family members, however, must be given in good faith, and is not valid if it would conflict with the expressed intention of the patient.

The consent provision of Section 7 [5-707] differs from the designation of another to make decisions under Section 2 [5-702]. Because the "consent" does not constitute a declaration under the Act, provisions that impose an obligation on the physician to seek out a designee under a declaration, that make the designee's decisions "govern" treatment, and that require transfer by a physician under Section 8 [5-708], do not apply. Section 7 [5-707], in short, is not a full alternative to a declaration, but is rather a means by which the attending physician can obtain legally reliable consent to the withholding or withdrawal of treatment for individuals in a terminal condition, should that be needed in the circumstances. Section 7 [5-707] neither constitutes a de jure appointment of family to make such decisions in all cases, nor does it limit treatment authority authorized under other law.

MAINE COMMENT

The Maine Revised Statutes, Title 18-A, section 5-707, subsection (d) is changed by adding the words "in the best interest of the individual consistent with the individual's desires, if known, and" to provide a higher standard.

Section 5-707, subsection (e) is amended by adding the words "unless otherwise determined by a court of competent jurisdiction" in order to make clear that a decision of the attending physician, while conclusive as between other interested parties, nonetheless is subject to appropriate judicial review.

Section 7(e) of the Uniform Act, dealing with an individual who is pregnant, is not included in this statute. This is consistent with the policy judgment made by the Maine Legislature when it enacted an earlier version of this Uniform Act in 1985.

A new subsection (f) of section 5-707 is added to provide other adults not listed in the priority listing with an opportunity to challenge another individual's decisions regarding a loved one.

A new subsection (g) is added to allow an individual to specifically exclude persons from the ranks of who may consent to the withdrawal or withholding of life-sustaining treatment from that individual.

§5-708. Transfer of patients

An attending physician or other health-care provider who is unwilling to comply with this Part shall take all reasonable steps as promptly as practicable to transfer care of the declarant to another physician or health-care provider who is willing to do so.

UNIFORM ACT COMMENTS*

Section 8 [5-708]. Section 8 [5-708] is designed to address situations in which a physician or health-care provider is unwilling to make and record a determination of terminal condition, or to respect the medically reasonable decisions of the patient or designee regarding withholding or withdrawal of life-sustaining procedures, due to personal convictions or policies unrelated to medical judgment called for under the Act. In such instances, the physician or health-care provider must promptly take all reasonable steps to transfer the patient to another physician or health-care provider who will comply with the applicable provisions of the Act.

§5-709. Immunities

(a) In the absence of knowledge of the revocation of a declaration, a person is not subject to civil or criminal liability, or discipline for unprofessional conduct, for carrying out the declaration or the instructions of a designee under section 5-702, subsection (a) pursuant to the requirements of this Part.

(b) A physician or other health-care provider, whose action under this Part is in accord with reasonable medical standards, is not subject to criminal or civil liability, or discipline for unprofessional conduct, with respect to that action.

(c) A physician or other health-care provider, whose decision about the validity of consent under section 5-707 is made in good faith, is not subject to criminal or civil liability, or discipline for unprofessional conduct, with respect to that decision.

(d) An individual designated pursuant to section 5-702, subsection (a) or an individual authorized to consent pursuant to section 5-707, whose decision is made or consent is given in good faith pursuant to this Part, is not subject to criminal or civil liability, or discipline for unprofessional conduct, with respect to that decision.

UNIFORM ACT COMMENTS*

Section 9 [5-709]. Section 9 [5-709] provides immunities for persons acting pursuant to the declaration and in accordance with the Act. Immunities are extended in Sections 9(a) to (c) [5-709, subsections (a) to (c)] to physicians as well as persons operating under the physician's direction or with the physician's authorization, to facilities in which the withholding or withdrawal of life-sustaining procedures occurs, and to designees or persons authorized to consent under Sections 2 or 7 [5-702 or 5-707]. Section 9(b) [5-709, subsection (b)] serves both to immunize physicians from liability as long as reasonable medical judgment is exercised, and to impose "reasonable medical standards" as the criterion that should govern all of the specific medical decisions called for throughout the Act. Section 9(b) [5-709, subsection (b)], in conjunction with Section 11(f) [5-711, subsection (f)], therefore, avoids the need to restate the medical standard in each section of the Act requiring a medical judgment.

§5-710. Penalties

(a) A physician or other health-care provider who willfully fails to transfer the care of a patient in accordance with section 5-708 is guilty of a Class E crime.

(b) A physician who willfully fails to record a determination of terminal condition or the terms of a declaration in accordance with section 5-705 is guilty of a Class E crime.

(c) An individual who willfully conceals, cancels, defaces, or obliterates the declaration of another individual without the declarant's consent or who falsifies or forges a revocation of the declaration of another individual is guilty of a Class E crime.

(d) An individual who falsifies or forges the declaration of another individual, or willfully conceals or withholds personal knowledge of a revocation under section 5-704, is guilty of a Class B crime.

(e) A person who requires or prohibits the execution of a declaration as a condition for being insured for, or receiving, health-care services is guilty of a Class E crime.

(f) A person who coerces or fraudulently induces an individual to execute a declaration is guilty of a Class E crime.

(g) The penalties provided in this section do not displace any sanction applicable under other law.

UNIFORM ACT COMMENTS*

Section 10 [5-710]. Section 10 [5-710] provides criminal penalties for specific conduct that violates the Act. Subsections (a) and (b) provide that a physician's failure to transfer a patient or record the diagnosis of terminal condition constitutes a misdemeanor. Subsection (c) makes certain willful actions which could result in the unauthorized prolongation of life a misdemeanor. Subsection (d) governs acts which are intended to cause the unauthorized withholding or withdrawal of life-sustaining treatment, thereby advancing death. Subsections (e) and (f) concern situations that may be coercive, and therefore are against public policy.

Some of the criminal penalties -- particularly subsection (d) -- depart significantly from most existing statutes. Most statutes provide penalties for intentional conduct that actually causes the death of a declarant, and define such conduct as murder or a high degree felony. The Act does not take this approach. Assuming that such conduct will already be covered by a state's criminal statutes, the Act only addresses the situations in which the actor falsifies or forges the declaration of another or willfully conceals or withholds knowledge of revocation. To be criminally sanctioned as a misdemeanor under the Act the circumscribed conduct need not cause the death of a declarant. The approach taken by most states, that of providing a felony penalty for those acts that actually caused death, was considered unnecessary, as existing criminal law will also apply pursuant to Section 10(g) [5-710, subsection (g)]. A specific penalty for the conduct described in Section 10(d) [5-710, subsection (d)], however, was deemed appropriate, as existing criminal codes may not adequately address it.

§5-711. Miscellaneous provisions

(a) Neither the decision to withhold or withdraw nor the actual withholding or withdrawal of life-sustaining treatment in accordance with this Part which results in the death of an individual shall be deemed to constitute, for any purpose, a suicide or homicide.

(b) The making of a declaration pursuant to section 5-702 does not affect the sale, procurement, or issuance of a policy of life insurance or annuity, nor does it affect, impair, or modify the terms of an existing policy of life insurance or annuity. A policy of life insurance or annuity is not legally impaired or invalidated by the withholding or withdrawal of life-sustaining treatment from an insured, notwithstanding any term to the contrary.

(c) A person may not prohibit or require the execution of a declaration as a condition for being insured for, or receiving, health-care services.

(d) This Part creates no presumption concerning the intention of an individual who has revoked or has not executed a declaration with respect to the use, withholding, or withdrawal of life-sustaining treatment in the event of a terminal condition.

(e) This Part does not affect the right of a patient to make decisions regarding use of life-sustaining treatment, so long as the patient is able to do so, or impair or supersede a right or responsibility that a person has to effect the withholding or withdrawal of medical care.

(f) This Part does not require a physician or other health-care provider to take action contrary to reasonable medical standards.

(g) This Part does not condone, authorize, or approve mercy-killing, euthanasia or suicide.

MAINE COMMENT

The Maine Revised Statutes, Title 18-A, section 5-711, subsection (a) is rewritten to make clear that neither the decision to withhold or withdraw, nor the actual withholding or withdrawal of, life-sustaining treatment may be deemed to be a suicide or homicide. Subsection (g) is amended to be consistent with the prior living wills law in stating that the Act does not condone suicide.

§5-712. When health-care provider may presume validity of declaration

In the absence of knowledge to the contrary, a physician or other health-care provider may assume that a declaration complies with this Part and is valid.

§5-713. Recognition of declaration executed in another state

A declaration executed in another state in compliance with the law of that state or of this State is valid for purposes of this Part.

UNIFORM ACT COMMENTS*

Section 13 [5-713]. Section 13 [5-713] provides that a declaration executed in another state, which meets the execution requirements of that other state or the enacting state (adult, two witnesses, voluntary), is to be treated as validly executed in the enacting state, but its operation in the enacting state shall be subject to the substantive policies in the enacting state's law.

§5-714. Effect of previous declaration

An instrument executed before the effective date of this Part which substantially complies with section 5-702, subsection (a) is effective under this Part.

Sec. 2. 22 MRSA c. 710-A, as amended, is repealed.

FISCAL NOTE

If enacted, this legislation may result in an increase in the number of cases filed within the court system. The Judicial Department has indicated it can absorb the additional costs which may be incurred as a result of this legislation within its budgeted resources.'

STATEMENT OF FACT

This amendment replaces the bill.

This amendment incorporates the bulk of the Uniform Rights of the Terminally Ill Act as adopted by the Commissioners on Uniform State Laws in 1989. There are several changes which also reflect input from a subcommittee on advance directives of the Maine State Bar Association.

The amendment moves the living wills provisions from the Maine Revised Statutes, Title 22 to the Probate Code, Title 18-A, and makes several language revisions to more closely follow the new Uniform Act. The amendment differs from the Uniform Act in 2 significant areas:

1. Restrictions on the right of a pregnant patient to have an effective living will declaration are omitted, as was done when Maine enacted an earlier version of the Uniform Act in 1985; and

2. The definition of life-sustaining treatment is amended to allow artificially administered nutrition and hydration to be considered life-sustaining treatment only if the person indicates that desire in the living will.

The amendment provides for the designation of a person to make life-sustaining treatment decisions for another person in a living will form.

The amendment establishes a priority system to help the physicians and other health-care providers determine whose consent is necessary if no living will exists for a person in a terminal condition, and there is no durable power of attorney for health care and no judicially appointed guardian.

COMMITTEE AMENDMENT "A" to H.P. 1497, L.D. 2074

The comments of the uniform law commissioners and of the Joint Standing Committee on Judiciary are included in the amendment immediately following the sections to which they pertain.

Reported by the Committee on Judiciary
Reproduced and distributed under the direction of the Clerk of the House
4/4/90

(Filing No. H-1059)