Legal and Ethical Issues in Medical Futility

The civil rights movement of the late 1960’s and early 1970’s brought with it recognition that patients, as a group, lacked the power to direct their own health care. This drive towards patient self-determination or autonomy coincided with significant advances in medical technology which made it possible to reliably restart beating hearts as well as indefinitely extend the lives of people in permanent vegetative states who lacked consciousness and would never leave their beds. The issue was brought to the public’s attention with the dramatic case of Karen Quinlan in 1976 in which a family sought and against the state’s objections, was allowed to remove their daughter’s breathing tube. Matter of Quinlan, 70 N.J. 10, 355 A.2d 647 (N.J. 1976). The 15 years after Quinlan saw a substantial but uneasy compromise emerge in most states as supporters of patient autonomy advocated that people fill out “living wills” stating their wishes should they find themselves in a state like Ms. Quinlan’s and increasingly these documents, often now called, advanced directives, were honored.

The disputes which arose after that only strengthened the principle that any competent individual had the right to refuse life sustaining medical treatment and a doctor who honored that request would not be legally or ethically responsible for the patient’s death. The Supreme Court has made clear that in evaluating disputes over withdrawal of life sustaining medical treatment it would “assum[e]…that the United States Constitution would grant a competent person a constitutionally protected right to refuse [any medical] lifesaving [intervention including] hydration and nutrition.” Washington v. Glucksberg, 521 U.S. 702,723 (1997).

The issue of a doctor or hospital’s legal authority to withhold life sustaining treatment against the wishes of a patient or her surrogate which is in front of us today rests on this legal and ethical foundation in a way that it would have been difficult to anticipate in 1976 or even 1996. The complaint now is not that doctors are providing too much care at the end of life but rather too little.

Doctors have no legal obligation to provide health care they believe is medically unnecessary, but outside of Texas there is no established procedure which can provide comprehensive protection from civil or criminal liability for a doctor or hospital who withdraws treatment in the face of a patient’s objection. Tex. Health & Safety Code §166.046, et seq. which took effect in 2001 does have that protection and although not perfect, it works. Hudson v. Texas Children’s Hosp., 177 S.W.3d 232 (Tex. Ct. App. 2005). Hospitals in Texas that have followed the procedures set out in the act, which the law describes as “refusing to follow” an Advanced Directive, have avoided legal liability. Fine, Robert L., and Thomas W. Mayo. (2003) Resolution of futility by due process: early experience with the Texas Advanced Directives Act. Annals of Internal Medicine 128: 743-746.

The workings of the Texas Law are quite straightforward. The legislature has created a process that starts with a doctor or hospital being required to give the patient 48 hours notice that the decision to
terminate will be reviewed by a statutorily undefined entity called an “Ethics Committee.” If the Ethics Committee agrees that further care is inappropriate, the patient must be given ten days to find another doctor or hospital willing to undertake the life sustaining treatment and after that, the hospital may terminate treatment. To promote quick resolution, the statute has a very unusual feature; the family cannot challenge the decision of the Ethics Committee in court. Miller, Geoffrey, Futility by Any Other Name. The Texas 10 Day Rule, Bioethical Inquiry (2008) 5:265-270.

California and several other states have a statute which recognizes a doctor or hospital’s right to withdraw treatment in the face of a patient’s objection. Calif. Prob. Code § 4734 (a)-(b) provides that “[F]or reasons of conscience” or because the instruction is “contrary to a policy of the institution that is expressly based on reasons of conscience” or “requires medically ineffective health care or health care contrary to generally accepted health care standards” §4735. But neither California, nor any other State, provides specific procedures which, if followed, can offer comprehensive protection.

It is therefore not surprising that doctors and hospitals in California are reluctant to proceed in the face of strong family opposition and that these decisions when made are often the subject of debate and concern within the medical facility. While no legal innovation is going to make the decision to withhold life sustaining treatment in the face of a patient or his family’s objection easy, a law like the one in Texas which provides a procedure for the hospital to follow would provide a predictable and reliable method for making those decisions.