Indiana's Living Wills and Life-Prolonging Procedures Act

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> I esteem it the office of a physician not only to restore health, but to mitigate pain and dolours; and not only when such mitigation may conduce to recovery, but when it may serve to make a fair and easy passage.
>
> -Sir Francis Bacon (1561-1626)

I. INTRODUCTION

More than eight years after living will legislation was first introduced, Indiana has adopted the Living Wills and Life-Prolonging Procedures Act (the "Act").[1] Backed by state medical organizations, the legislation was ultimately successful when the Catholic Archdiocese of Indianapolis, after input to the Act, discontinued its opposition and Senate opponents compromised with the inclusion of a provision allowing an individual to request all possible life-prolonging treatment.[2] Indiana now joins numerous other states and the District of Columbia with similar legislation.[3]

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[1] IND. CODE §§ 16-8-11-1 to -22 (Supp. 1985).

[2] *Society for the Right to Die Newsletter* 4 (Spring 1985) (available in *Indiana Law Review* Office). The author is indebted to the Society for the Right to Die for the publications and materials provided to the public.

[3] *See, e.g.*, Alabama Natural Death Act, ALA. CODE §§ 22-8A-1 to -10 (1984); Arizona Medical Treatment Decision Act, 1985 Ariz. Sess. Laws chp. 199 (to be codified at ARIZ. REV. STAT. ANN. §§ 36-3201 to -3210); Arkansas Death with Dignity Act, ARK. STAT. ANN. §§ 82-3801 to -3804 (1977); California Natural Death Act, CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West 1976); Colorado Medical Treatment Decision Act, COLO. REV. STAT. §§ 15-18-101 to -113 (Supp. 1985); Delaware Death with Dignity Act, DEL. CODE ANN. tit. 16, §§ 2501-2509 (1982); District of Columbia Natural Death Act of 1981, D.C. CODE ANN. §§ 6-2421 to -2430 (Supp. 1985); Florida Life Prolonging Procedure Act, FLA. STAT. §§ 765.01-15 (Supp. 1985); Georgia Living Wills Act, GA. CODE §§ 31-32-1 to -12 (1984); Idaho Natural Death Act, IDAHO CODE §§ 39-4501 to -4508 (Supp. 1984); Illinois Living Will Act, ILL. ANN. STAT. ch. 110 1/2, §§ 701-710 (Smith-Hurd 1984); Indiana Living Will and Life-Prolonging Procedures Act, IND. CODE §§ 16-8-11-1 to -22 (Supp. 1985); Iowa Right to Decline Life-Sustaining Procedures Act, 1985 IOWA ACTS S.B. 25 chp. 3 (to be codified at IOWA CODE §§ 144 A.1-11); Kansas Natural Death Act, KAN. STAT. ANN. §§ 65-28, 101-109 (1979); Louisiana Natural Death Act, LA. REV. STAT. ANN. §§ 40:1299.58.1-.10 (West Supp. 1985); MISS. CODE ANN. §§ 41-41-101 to -121 (Supp. 1984); Montana Living Will Act, MONT. CODE ANN. §§ 50-9-101 to -104, § 50-9-111, §§ 59-9-202 to -206 (1983); Nevada Withholding or Withdrawal of Life-Sustaining Procedures, NEV. REV. STAT. §§ 449.540-690 (1977); New Hampshire Living Will Act, N.H. REV. STAT. ANN. ch. 137-H1:2-16 (1985); New Mexico Right to Die Act, N.M. STAT. ANN. §§ 24-7-2 to -10 (1977);

Living will laws are the legislative response to problems caused by improved medical capabilities to prolong life. Increasingly, courts have been called on to determine whether a certain medical treatment or procedure should be withheld or withdrawn even though death may result.[4] Relying on common law concepts of self-determination and, in some cases, constitutional guarantees of privacy,[5] the courts have made significant but conflicting contributions to this area of the law. To avoid a case-by-case analysis and judicial intervention in an emotionally charged area of the law, the courts have joined with organized groups in calling for a legislative response removing courts from this process.[6] Living will laws allow an individual to execute a written declaration which permits physicians and other health care providers, without prior court approval, to withhold or withdraw a specified medical treatment or procedure under certain circumstances without adverse legal consequences.

II. Overview of the Living Will Act

While a living will declaration is something that every individual should consider and that many individuals will execute, the actual use

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North Carolina Right to Natural Death Act, N.C. Gen. Stat. §§ 90-320 to -322 (1983); Oklahoma Natural Death Act, Okla. Stat. tit. 63, §§ 3101-3111 (1985); Oregon Rights with Respect to Terminal Illness Act, Or. Rev. Stat. §§ 97.050-.090 (1983); Tennessee Right To Natural Death Act, Tenn. Code Ann. §§ 32-11-101 to -110 (1985); Texas Natural Death Act, Tex. Stat. Ann. art. 4590th (Vernon 1983); Utah Personal Choice and Living Will Act, Utah Code Ann. §§ 75-2-1101 to -1118 (1985); Vermont Terminal Care Document, Vt. Stat. Ann. tit. 18, §§ 5251-5262 (Supp. 1985); Virginia Natural Death Act, Va. Code §§ 54-325.8:1-12 (Supp. 1985); Washington Natural Death Act, Wash. Rev. Code Ann. §§ 70,122.010-.905 (Supp. 1985); West Virginia Natural Death Act, W. Va. Code chap. 16 art. 30, §§ 1-10 (1984); Wyoming Act, Wyo. Stat. §§ 33-26-144 to -152 (1984).

[4]*See, e.g.*, Bartling v. Superior Court, 103 Cal. App. 2d 186, 209 Cal. Rptr. 220 (1984); Foody v. Manchester Memorial Hospital, 40 Conn. Supp. 127, 482 A.2d 713 (1984); Severns v. Wilmington Medical Center, Inc., 421 A.2d 1334 (Del. 1980); Tune v. Walter Reed Army Medical Hospital, 602 F. Supp. 1452 (D.C. 1985); John F. Kennedy Memorial Hospital, Inc. v. Bludworth, 452 So. 2d 921 (Fla. 1984); Satz v. Perlmutter, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978); *In re* Barry, 445 So. 2d 365 (Fla. Dist. Ct. App. 1984); *In re* L.H.R., 253 Ga. 439, 321 S.E.2d 716 (1984); *In re* Spring, 380 Mass. 629, 403 N.E.2d 115 (1980); Superintendent of Belchertown State Schools v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re* Dinnerstein, 6 Mass. App. Ct. 466, 380 N.E.2d 134 (1978); *In re* Torres, 357 N.E.2d 332 (Minn. 1984); *In re* Conroy, 188 N.J. Super. 523, 457 A.2d 1232 (1983), *rev'd*, 190 N.J. Super. 453, 464 A.2d 303 (1983), *rev'd*, 90 N.J. 321, 486 A.2d 1209 (1985); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976), *cert. denied*, Garger v. New Jersey, 429 U.S. 922 (1976); *In re* Storar, 438 N.Y.2d 266, 420 N.E.2d 64 (1981); and *In re* Colyer, 99 Wash. 2d 114, 660 P.2d 738 (1983).

[5]*See, e.g., Severns*, 421 A.2d 1334 (Del. 1980); *Barry*, 445 So. 2d 365 (Fla. Dist. Ct. App. 1984); *Spring*, 380 Mass. 629, 405 N.E.2d 115 (1980); and *Colyer*, 99 Wash. 2d 114, 660 P.2d 738 (1983).

[6]*See, e.g., Severns*, 421 A.2d 1334 (Del. 1980); *Satz*, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978); *Dinnerstein*, 6 Mass. App. Ct. 466, 380 N.E.2d 134 (1978); *Storar*, 438 N.Y.2d 266, 420 N.E.2d 64 (1981); and *Colyer*, 99 Wash. 2d 114, 660 P.2d 738 (1983).

of the declaration is only permitted under limited and well-defined circumstances. Indiana's living will declaration applies when:

(1) a competent adult[7]

(2) executes[8]

(3) a declaration substantially the same as set out in the statute,[9]

(4) notifies the attending physician of the existence of the declaration,[10]

(5) does not revoke the declaration,[11]

(6) becomes incompetent, but is not pregnant,[12]

(7) is certified in writing by the attending physician as a qualified patient,[13] and

(8) is attended by a physician who will withhold the medical treatment.[14]

The Living Will Act describes the legal consequences resulting from compliance with the Act and the legal penalties for its violation.[15] Indiana's Living Will Act also addresses issues outside the typical living will concerns. For example, the Act allows individuals to execute a declaration requiring that all possible life-prolonging procedures be used.[16] In addition, the Act expressly allows competent individuals to control their medical treatment, including the withholding of medical treatment without a living will declaration.[17]

III. Individual Components of the Living Will Act and Living Will Declaration

A. Those Who May Make a Living Will Declaration

A person who is of sound mind and at least eighteen years old may execute a living will declaration.[18] The execution must be voluntary.[19]

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[7] Ind. Code § 16-8-11-11(a) (Supp. 1985).
[8] *Id.* § 16-8-11-11(b).
[9] *Id.* § 16-8-11-12.
[10] *Id.* § 16-8-11-11(e).
[11] *Id.* § 16-8-11-13.
[12] *Id.* § 16-8-11-11(d).
[13] *Id.* § 16-8-11-14.
[14] *Id.*
[15] *See* Ind. Code §§ 16-8-11-15 to -22 (Supp. 1985).
[16] *Id.* § 16-8-11-12(c).
[17] *Id.* § 16-8-11-1.
[18] *Id.* § 16-8-11-11(a).
[19] *Id.* § 16-8-11-11(b).

The Living Will Act allows the hospital or physician, in the absence of actual notice to the contrary, to presume that the declarant was of sound mind when the declaration was executed and that the execution was valid.[20] The fact that the individual signs a living will declaration will not be considered as an indication of a declarant's mental incompetency.[21]

Obviously excluded from making a living will declaration are those who are legally incompetent. The expanding common law and, in some states, legislation[22] may provide some relief from those excluded individuals: infants,[23] adults who were never competent,[24] and formerly competent adults now incompetent.[25]

B. Execution

Specific rules govern the execution of the living will declaration. The declaration must be signed and dated by the declarant or someone who at the declarant's express direction signs in the declarant's presence.[26] There must be two witnesses to the execution of the living will declaration, both of whom are at least eighteen years old and legally competent.[27] The witness may not be:

> (1) the person who signed the declaration on behalf of and at the direction of the declarant,
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> (2) a parent, spouse, or child of the declarant;
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> (3) entitled to any part of the declarant's estate whether the declarant dies testate or intestate, including whether the witness could take from the declarant's estate if the declarant's will is declared invalid; [a person is not considered to be entitled to any part of the declarant's estate solely by virtue of being nominated as a personal representative or the attorney of the estate in the declarant's will]; or

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[20] *Id.* § 16-8-11-15.

[21] *Id.*

[22] *See, e.g.*, N.M. STAT. ANN. §§ 24-7-2 to -10 (1977).

[23] *See, e.g., Barry*, 445 So. 2d 365 (Fla. Dist. Ct. App. 1984) and *L.H.R.*, 253 Ga. 439, 321 S.E.2d 716 (1984).

[24] *See, e.g., Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977); *Storar*, 438 N.Y.2d 266, 420 N.E.2d 64 (1981).

[25] *See, e.g., Foody*, 40 Conn. Supp. 127, 482 A.2d 713 (1984); *Severns*, 421 A.2d 1334 (Del. 1980); *Spring*, 380 Mass. 629, 405 N.E.2d 115 (1980); *Dinnerstein*, 6 Mass. App. Ct. 466, 380 N.E.2d 134 (1978); *Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), *cert. denied*, Garger v. New Jersey, 429 U.S. 922 (1976); and *Colyer*, 99 Wash. 2d 114, 660 P.2d 738 (1983).

[26] IND. CODE § 16-8-11-11(b) (Supp. 1985).

[27] *Id.* Witnesses are required to sign in the presence of the testator and each other in the execution of a testamentary will. *See* IND. CODE § 29-1-5-3 (1982).

(4) directly financially responsible for the declarant's medical care.[28]

One problem not addressed in the above provisions may occur if a witness, who at the time of the execution of the living will declaration was a qualified witness, should later become unqualified. For example, a disinterested friend at the time of the execution of the living will declaration may later become a beneficiary under the declarant's will. The statute fails to address the question as to what time the qualifications for the witness must be met. Another problem may occur with living declarations executed before the effective date of September 1, 1985. The Act is silent with regard to the treatment of these prior declarations.

C. The Form of the Declaration

The executed declaration must be substantially in the form as set forth in the Act.[29] The Act allows the declaration to include additional specific directions regarding medical care with the declaration retaining its validity even if the additional specific directions are invalid.[30] This provides the declarant with important planning opportunities.

The declaration set out in the Act allows only for the withholding or withdrawal of life-prolonging procedures and specifically requires the provision of appropriate nutrition and hydration, the administration of medication, and the performance of any medical procedure necessary to provide the declarant with comfort care or to alleviate pain.[31] The Act further defines life-prolonging procedures so as not to include these requirements.[32] As a result, the scope of the living will declaration is narrower than relief provided under the common law which has sanctioned the removal of nutrition and hydration administered through painful and intrusive feeding tubes.[33]

The declarant may wish to provide specific directions to the attending physician concerning the application of certain objectionable medical treatment, such as feeding tubes, respirators, or other similar devices which create great pain and discomfort to the living will declarant. There are many other medical procedures which the declarant may require to be

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[28]IND. CODE § 16-8-11-11(c) (Supp. 1985).

[29]*Id.* § 16-8-11-12(a).

[30]*Id.*

[31]*Id.* § 16-8-11-12(b).

[32]*Id.* § 16-8-11-4.

[33]*See* Lynn & Childress, *Must Patients Always Be Given Food and Water*, 13 HASTINGS CENTER REPORT 17 (1983); Wanzer, *The Physicians Responsibility Towards Hopelessly Ill Patients*, 310 NEW ENG. J. OF MEDICINE 955 (1984).

withheld, including surgery or cardiac resuscitation.[34]

Even if the specific instructions are invalid, they will not invalidate the living will declaration.[35] Furthermore, it is specifically provided that the Act does not impair or supersede any legal right or legal responsibility that any person may have to effect the withholding or withdrawal of life-prolonging procedures in any lawful manner.[36] Even if not considered valid under the Living Will Act, the request could possibly be honored under common law principles concerning the patient's right to self-determination or under a constitutional right of privacy.[37]

Another addition to the living will declaration could be the specific appointment of an attorney-in-fact by the declarant to make health care decisions for the declarant, including the withholding or withdrawing of certain medical treatment. Such an appointment is implicitly recognized in the Act, though the legal ramifications are not fully known at this time.[38] The appointment could also be made in a general durable power of attorney executed by the declarant.

D. Notification of Declarant's Attending Physician

An important aspect of the living will declaration is the notification of the declarant's "attending physician" of the existence of the declaration.[39] "Attending physician" is defined as the physician who "has the primary responsibility for the treatment and care of the patient."[40] Though no time is specified for the notification, the attending physician should probably be notified upon the execution of the living will declaration. The attending physician is required to make the declaration or a copy of the declaration a part of the declarant's medical records.[41] A lawyer involved in the preparation of the living will declaration may wish to consider sending a copy of the declaration to the physician to make sure that this requirement is met.

E. Revocation

A living will declaration may be revoked by the declarant at any time by:

(1) A signed, dated writing;

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[34]IND. CODE § 16-8-11-12(a) (Supp. 1985).

[35]*Id.*

[36]*Id.* § 16-8-11-18(e).

[37]*See supra* notes 4 and 5 and accompanying text for cases where courts, acting solely within their discretion, allowed the removal of life-prolonging procedures.

[38]*See* IND. CODE § 16-8-11-14(g) (Supp. 1985), requiring the attending physician to consult with such an agent if the physician believes that the declaration was executed invalidly.

[39]*See* IND. CODE § 16-8-11-11(e) (Supp. 1985).

[40]*Id.* § 16-8-11-2.

[41]*Id.* § 16-8-11-11(e).

(2) physical cancellation or destruction of the declaration by the declarant or another in the declarant's presence and at the declarant's direction; or

(3) an oral expression of intent to revoke.[42]

Revocation is effective when communicated to the attending physician.[43] There is no legal liability imposed upon a person who fails to act on the revocation unless the person had actual knowledge of the revocation.[44]

If a revocation is intended, all copies of the living will declaration should be gathered and destroyed and a similar document, signed and dated, should be sent to everyone in possession of the prior declaration. Although an oral expression of intent to revoke is expressly allowed, it is subject to the same difficulty of proof as are all other oral expressions.

F. Effect of Incompetency and Pregnancy

As will be discussed in more detail, the Living Will Act allows competent adults to control decisions relating to their own medical care, including the decision to have medical means to prolong their lives provided, withheld, or withdrawn.[45] The intent of the living will declaration is to cover those circumstances and problems which may arise if the declarant should later become incompetent and unable to direct the withdrawal or withholding of medical treatment. If the declarant is competent, there is no need for a living will declaration. One very important exception to the living will declaration arises when the declarant is pregnant. In that case, the declaration has no effect until the pregnancy is over.[46]

G. Certification of Qualified Patient

If the declarant has executed a living will declaration in accordance with the Living Will Act and was of sound mind at the time of execution and the attending physician has diagnosed that patient as having a terminal condition and determined that the patient's death will occur from the terminal condition, whether or not life-prolonging procedures are used, the attending physician will immediately certify in writing that a person is a qualified patient.[47] The attending physician will include a

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[42] *Id.* § 16-8-11-13(a).
[43] *Id.* § 16-8-11-13(b).
[44] *Id.* § 16-8-11-13(c).
[45] *See* § 16-8-11-1 (Supp. 1985).
[46] *Id.* § 16-8-11-11(d).
[47] *Id.* § 16-8-11-14(a).

copy of the certification in the patient's medical records.[48] Based on this certification, the physician or health care provider may legally withhold or withdraw life-prolonging procedures without being subject to criminal or civil liability, or to charges of unprofessional conduct.[49]

It is presumed that the declarant was of sound mind at the time of execution in the absence of actual notice to the contrary.[50] Further, if the declarant is incompetent, at the time life-prolonging procedures are withdrawn, a valid execution of the living will declaration will be presumed.[51] If evidence contrary to these presumptions surfaces, it is unclear who must make the determination that the declarant was of sound mind at the time of execution or that the declaration was validly executed. Because it is the attending physician who must certify in writing that the person is a qualified patient, it is presumably the attending physician's duty. While the presumptions may be reassuring, it is unclear what new liability may fall on the attending physician who decides these legal issues.

The attending physician must diagnose the declarant as having a "terminal condition," which is defined as a "condition caused by injury, disease, or illness from which, to a reasonable degree of medical certainty: (1) there can be no recovery; and (2) death will occur from the terminal condition within a short period of time without the provision of life-prolonging procedures."[52] A key issue raised by this definition is whether death will occur from the terminal condition within a relatively short period. For example, Karen Ann Quinlan lived for another ten years upon the removal of life support systems other than nutrition and hydration. Literally applied, the Living Will Act may not cover a patient in a similar "vegetative state," because death may not occur within a short period of time.[53]

The attending physician must also find that the patient's death will occur from the terminal condition whether or not life-prolonging pro-

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[48]*Id.* § 16-8-11-14(b).

[49]*Id.* § 16-8-11-14(c).

[50]*Id.* § 16-8-11-15.

[51]*Id.*

[52]*Id.* § 16-8-11-9. (Related to the issue of determination of death is the Uniform Determination of Death Act, H.B. 1476, which was introduced into the Indiana Legislature in 1985, but not enacted. Indiana, presently, has no statutory definition of death.).

[53]Karen Ann Quinlan was in a persistent vegetative state as a result of respiratory arrest in April, 1975. "Vegetative state" commonly means loss of cerebrum functioning, vision, hearing, taste, smell, voluntary movement, speech, memory, reasoning, judgment and intelligence, cerebellum functions, balance, posture, and coordination. It was also believed that Karen Ann Quinlan lost brain stem functions, such as voluntary breathing. Her parents requested removal of her respirator, but insisted that Karen receive nutrition and hydration. Karen Ann Quinlan lived for ten years after the removal of the respirator until her death in the summer of 1985.

cedures are used.[54] The apparent intent of this requirement is to preclude euthanasia. Certainly, some doctors may find it difficult to certify to a reasonable degree of medical certainty that there can be no recovery.

H. The Attending Physician's Options

The Living Will Act gives the attending physician many options ranging from the simple to the absurd. Confronted with a certified qualified patient, the attending physician is under no duty to withhold or withdraw any life-prolonging procedure.[55] However, the attending physician who refuses to withhold or withdraw life-prolonging procedures from a qualified patient must transfer the qualified patient to another physician who will honor the patient's living will declaration.[56] While this transfer to another physician appears mandatory, there are two exceptions.

The first exception occurs when, after reasonable investigation, the attending physician finds no other physician willing to honor the patient's declaration.[57] In that case, the attending physician may refuse to withhold or withdraw life-prolonging procedures and refuse to transfer the patient.[58] An obvious problem for the physician in this situation is in deciding what constitutes a reasonable investigation. Accordingly, all such efforts should be well documented.

The second exception is much more complex and of dubious value. Under the Act, the attending physician is not required to transfer a qualified patient to another physician if the attending physician has reason to believe the declaration was not validly executed. The physician may also refuse to transfer such a patient when evidence exists that the patient no longer intends for the original declaration to be enforced and the patient is presently unable to invalidate the declaration.[59] An attending physician wishing to avail himself of this second alternative must:

> . . . attempt to ascertain the patient's intention and attempt to determine the validity of the declaration by consulting with any of the following individuals who are reasonably available, willing, and competent to act:
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> (1) The judicially appointed guardian of the person of the patient if one has been appointed. This subdivision

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[54]IND. CODE § 16-8-11-14(a)(1)(B) (Supp. 1985).
[55]*Id.* § 16-8-11-11(f).
[56]*Id.* § 16-8-11-14(e).
[57]*Id.* § 16-8-11-14(f).
[58]*Id.*
[59]*Id.* § 16-8-11-14(e).

> shall not be construed to require the appointment of a guardian in order that a treatment decision can be made under this section.
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> (2) The person or persons designated by the patient in writing to make the treatment decision for the patient should the patient be diagnosed as suffering from a terminal condition.
>
> (3) The patient's spouse.
>
> (4) An adult child of the patient or, if the patient has more than one (1) adult child, by a majority of the children who are reasonably available for consultation.
>
> (5) The parents of the patient.
>
> (6) An adult sibling of the patient or, if the patient has more than one (1) adult sibling, by the majority of the siblings who are reasonably available for consultation.
>
> (7) The patient's clergy or others with firsthand knowledge of the patient's intention.[60]

An attending physician must list the names in the declarant's medical records of the individuals interviewed and the information received.[61]

If the information obtained indicates that the qualified patient intended to execute a valid living will declaration, the physician then may choose among two more options. The physician may either "withhold or withdraw the life-prolonging procedures, with the concurrence of one other physician, as documented in the patient's medical records; or request a court of competent jurisdiction to appoint a guardian for the patient to make the consent decision on behalf of the patient."[62] The Act is silent as to what the attending physician should do if, from the information received, it is determined that the qualified patient did not intend to execute a valid living will declaration. Presumably, the attending physician would be under no obligation to transfer the qualified patient to a physician who would carry out the living will declaration.

IV. The Life-Prolonging Declaration

Indiana's Living Will Act is unique because it provides that a life-prolonging declaration may be executed requesting the use of life-prolonging procedures that would extend the declarant's life. In addition,

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[60] *Id.* § 16-8-11-14(g).
[61] *Id.* § 16-8-11-14(h).
[62] *Id.* § 16-8-11-14(i)(1) and (2).

competent adults may also request that all possible life-prolonging procedures be taken. A physician is obligated to comply with that request.[63] These provisions were apparently included in the Act to secure passage of the Act in the Indiana Senate.[64] At this stage, it is difficult to anticipate how frequently this life-prolonging procedures declaration will be used.

Basically, the requirements for the life-prolonging procedures declaration are the same as those outlined above for the living will declaration with regard to competency, execution, form, delivery, revocation, and subsequent incompetence of the declarant.[65] However, it is unclear what duties such a declaration creates for the attending physician and health care facility given the ever expanding horizon of medical technology and the ability to prolong human life.

Though, on its face, a life-prolonging procedures declaration is nothing but a fair counterpart to a living will declaration, the living will declaration is aimed at a specific problem increasingly confronted by the courts, and it falls within a definite framework. The life-prolonging procedures declaration, on the other hand, is a solution in search of a problem and could possibly create many problems when applied. Such problems, should the procedure be widely used, could be the increased cost of medical care, the crowding of facilities, and the inestimable liability of health care providers who fail to use all possible life-prolonging procedures.

V. Rights of Competent Individuals

The Act goes beyond most living will legislation and specifically states that competent adults have the right to control the decisions relating to their own medical care, including the decision to have medical or surgical means or procedures calculated to prolong their lives provided, withheld, or withdrawn.[66] At common law, a competent adult, under the doctrine of self-determination, had similar rights subject, however, to the interests of the state. These state interests include:

(1) the prevention of suicide;

(2) maintaining the ethical integrity of the medical profession;

(3) the protection of the interest of innocent third parties; and

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[63] *Id.* § 16-8-11-11(g).

[64] Senate opponents to the Act withdrew their opposition when the life-prolonging declaration language was included. *See Society for the Right to Die Newsletter* 4 (Spring 1985) (available in *Indiana Law Review* Office).

[65] Ind. Code §§ 16-8-11-1 to -13 (Supp. 1985).

[66] *Id.* at § 16-8-11-1.

(4) The preservation of life.[67]

It is unclear whether this part of the Act is a restatement of the common law, or whether state interests are no longer a consideration. For example, the living will declaration of a pregnant individual has no effect until the pregnancy is over. However, no similar exemption is made under the Act for pregnant competent adults who expressly request removal of life-prolonging procedures. It would be unthinkable for the legislature to allow a competent individual to have medical treatment withheld if the individual was pregnant and the fetus could survive. Undoubtedly, such state interests must survive the statute.

VI. Legal Ramifications

The Act specifically addresses certain legal ramifications of a living will declaration. A death caused by the withholding or withdrawal of life-prolonging procedures in accordance with the Act does not constitute a suicide.[68] The execution of a declaration does not affect the sale or issuance of any life insurance policy or modify the terms of a policy in force when the declaration is executed.[69] A policy of life insurance cannot be invalidated as a result of the withholding or withdrawal of life-prolonging procedures from an insured qualified patient, notwithstanding any term of the policy to the contrary.[70] A person may not require another person to execute a living will declaration as a condition for being insured or receiving health care services.[71] The Act does not impair or supersede any legal right or legal responsibility that any person may have to effect the withholding or withdrawal of life-prolonging procedures in any lawful manner.[72] The Act creates no presumption concerning the intent of a person who has not executed a living will declaration.[73]

Further, any revocation of a living will declaration or a life-prolonging procedures declaration creates no presumption regarding the declarant's intentions in the event of a terminal condition.[74] Nothing in the act is to be construed to authorize euthanasia or to authorize any affirmative or deliberate act or omission to end life, other than to permit

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[67]Hodgmen and Frazer, *Withholding Life Support Treatment In Illinois-Part I*, 73 Ill. B.J. 107 (1984).

[68]Ind. Code § 16-8-11-18(a) (Supp. 1985).

[69]*Id.* § 16-8-11-18(b).

[70]*Id.* § 16-8-11-18(c).

[71]*Id.* § 16-8-11-18(d).

[72]*Id.* § 16-8-11-18(e).

[73]*Id.* § 16-8-11-19.

[74]*Id.* § 16-8-11-13(d).

the natural process of dying, including the withholding or withdrawing of life-prolonging procedures.[75] The use of the living will declaration is not to be construed as an intervening force to affect the chain of proximate cause.[76] Any physician or health care provider withholding medical or life-prolonging procedures in compliance with this Act will not be subject to any criminal or civil liability nor any charges of unprofessional conduct.[77]

The Living Will Act does not specifically address some legal issues which could arise. For example, it is silent as to whether a physician, under the constraints of a living will declaration, may be held liable, civilly or criminally, for battery, if the physician refused to withhold the medical treatment and continues to insert tubes and invade the body of the declarant to provide such treatment.[78] The extent to which the physician must provide life prolonging procedures is also not addressed by the Act. Though technologically able to prolong life, should the physician be required to do so given the extremely high cost of medical facilities, services, and personnel assigned to keep an individual alive?

VII. Penalties

The Living Will Act authorizes various penalties in order to enforce compliance with the Act. A physician who knowingly violates the Act is subject to disciplinary sanctions under the Medical Licensing Board provisions.[79] A person who knowingly or intentionally destroys or cancels a living will declaration or forges a living will declaration commits a Class D felony.[80] A person who knowingly or intentionally forges a living will declaration with the intent to have life-prolonging procedures withheld or withdrawn or conceals a revocation commits a Class C felony.[81] In addition, the Class C felon, if a beneficiary of the declarant, will be subject to the provision of the Probate Code which disinherits him and places his interest into a constructive trust as though he predeceased the declarant.[82]

VIII. Conclusion

The opportunity of making either a living will declaration or life-prolonging declaration is provided by the Living Will Act and should

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[75] *Id.* § 16-8-11-20.
[76] *Id.* § 16-8-11-21.
[77] *Id.* § 16-8-11-14(d).
[78] *See, e.g.*, Leach v. Shapiro, 13 Ohio App. 3d 393, 469 N.E.2d 1047 (1984).
[79] Ind. Code § 16-8-11-22 (Supp. 1985).
[80] *Id.* § 16-8-11-16.
[81] *Id.* § 16-8-11-17.
[82] *Id.* § 16-8-11-18(f) (citing Ind. Code § 29-1-2-12.1 (Supp. 1985)).

be considered by every individual. The key to understanding the Act is to recognize the well-defined and limited situations to which it applies. Where the Act does not apply, there is an expanding body of common law which may provide relief. Accordingly, individuals executing living will declarations should take the opportunity to include specific directions to the physician regarding abhorrent medical practices and appoint a trusted individual with power to make medical decisions for the individual.

In order to remove the courts from "right to die" questions, the Living Will Act places a substantial burden on physicians. Though not obligated to comply with the living will declaration, the physician nevertheless is given the duties of certifying qualified patients and searching for a physician who will comply unless other exceptions apply. The Act contains broad exoneration provisions; however, a physician or health care facility refusing to remove life supports may still face battery charges by a representative of the declarant.

As the technology of medicine advances, the Living Will and Life-Prolonging Procedures Act can only be the first step. In the future, Indiana must address the many other problems raised by life-prolonging procedures not covered by the Living Will Act.