CHAPTER 32

LEGAL ASPECTS OF DEATH AND DYING

I. INTRODUCTION

This chapter presents information that the nurse may find useful concerning the legal aspects of death and dying.

A. THE DEFINITION OF DEATH

Death occurs upon the irreversible cessation of circulatory and respiratory functions or upon the irreversible cessation of all brain functions including the brain stem. (Section 382.009(1), Florida Statutes.) While at one time the absence of vital signs such as heartbeat, pulse, and respiration were the main indicators of death, the recent development of machinery capable of sustaining an individual's circulatory and respiratory function has lead to the incorporation of brain function as an additional factor in determining the occurrence of death. This allows for a pronouncement of death for individuals being kept alive through the assistance of respiratory and circulatory machines but who have no indication of brain activity.

B. THE DETERMINATION OF DEATH

Death is determined in accordance with currently accepted reasonable medical standards by the patient's treating physician and a board-eligible or board-certified neurologist neurosurgeon, internist, pediatrician, surgeon, or anesthesiologist. (Section 382.009(2), Florida Statutes.) Brain death is indicated when EEG (electroencephalography) results show a complete lack of electrical activity in the entire brain. In comatose patients, EEGs are conducted periodically over a long time to ensure that the brain inactivity is permanent.

II. THE RIGHT TO DIE

The term right to die is used both popularly and in legal contexts to apply to an individual's right to refuse medical treatment, the refusal of which will cause his or her death. The right to die is an evolving concept, not a novel or revolutionary one. It is an outgrowth of the law of informed decision making limited by the constraints imposed by the criminal law.

A. U.S. CONSTITUTION

The Fourteenth Amendment of The United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." The United States Supreme Court has determined that a competent person has a "liberty interest" in refusing unwanted medical treatment. (Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (U.S. 1990), stating "The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.") Therefore, a State violates the United States Constitution when it deprives a competent person of his or her right to refuse unwanted medical treatment without first providing the person with due process of law. Due process of law, in its most general sense, mandates that the person whose rights are stake be provided the opportunity to present his or her legal arguments and controvert the facts before the judge prior to the judge making his or her decision.

In 1976, the constitutional right to privacy was the basis for the New Jersey Supreme Court's decision in the case of In the Matter of Karen Ann Quinlan, 355 A.2d 647 (N.J. 1976). The case centered on Karen Quinlan, a woman who was in an irreversible coma. Joseph Quinlan, Karen's father, wanted to be appointed as Karen's personal guardian in order to make health care decisions on her behalf. The New Jersey Supreme Court rendered a unanimous decision providing for the appointment of Mr. Quinlan as Karen's personal guardian. As Karen's guardian, Mr. Quinlan was free to take steps to take Karen off of life support systems, and he decided to shut off Karen's respirator. The New Jersey Supreme Court's decision drew upon federal constitutional precedents dealing with reproductive rights and thus with control of one's body. The Court concluded:

> Although the Constitution does not explicitly mention a right of privacy, Supreme Court decisions have recognized that a right of personal privacy exists and that certain areas of privacy are guaranteed under the Constitution . . . . Presumably this right is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances. (In re Quinlan, 355 A.2d at 663.)

B. COMPETENCY

1. Determining Competency

An understanding of the concept of competency is necessary prior to a discussion of the right to refuse treatment and the right to die because state and federal laws governing the decision to forgo life sustaining treatments differ depending on whether the patient is "capable or competent" verses "incapable or incompetent."

A patient is presumed to be capable of making health care decisions for himself or herself, unless he or she is determined to be incapacitated. (Section 765.204(1), Florida Statutes.) Section 765.101(8), Florida Statutes, states that "incapacity" or "incompetent" means the patient is physically or mentally unable to communicate a willful and knowing health care decision. When a patient's capacity to make health care decisions for himself or herself is in question, the patient undergoes evaluation by a physician. (Section 765.204(2), Florida Statutes.)

2. Competent Patients' Rights

A health care provider is obligated to follow the patient's wishes as long as the patient maintains his or her capacity to communicate his or her wishes. This is true even when the patient chooses to forgo life sustaining treatment. In fact, Florida law protects health care providers from criminal prosecution and civil lawsuits when the health care provider is simply carrying out the wishes of a competent patient. (Section 765.109(1), Florida Statutes.)

End of life treatment issues are complicated by the various options available to individuals with regard to treatment preferences. The Patient Self-Determination Act, 42 U.S.C. 1395cc(a)(1), provides that each individual has a right under state law to make decisions concerning his or her medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives.

Florida law provides for an individual's right to refuse life sustaining treatment. Section 765.102, Florida Statutes, states "every competent adult has the fundamental right of self-determination regarding decisions pertaining to his or her own health, including the right to choose or refuse medical treatment. The right to die is subject to certain interests of society, such as protection of human life and preservation of ethical standards in the medical profession." (Section 765.102(1), Florida Statutes.)

The purpose of this section of Florida Statutes, as stated by the Legislature is as follows:

> the legislature declares that the laws of this state recognize the right of a competent adult to make an advance directive instructing his or her physician to provide, withhold, or withdraw life-prolonging procedures, or to designate another to make the treatment decision for him or her in the event that such person should become incapacitated and unable to personally direct his or her medical care. (Section 765.102(3), Florida Statutes.)

Health care facilities, including hospitals, home health agencies, skilled nursing facilities, psychiatric facilities, health maintenance organizations and hospices are required to provide each person upon admission with rights concerning advance directives and facility's policies with respect to those rights. (Sections 765.110(1) and 765.101(6), Florida Statutes.)

In 1990, the Florida Supreme Court decided the case known as In re Guardianship of Browning. (In re Guardianship of Browning v. Herbert, 568 So.2d 4 (Fla. 1990).) In this case, the patient, Estelle M. Browning, wrote a declaration stating her desire not to have nutrition and hydration provided by gastric tube or intravenously. She also desired withdrawal of life-prolonging procedures in the event that her physician determined she could not recover from the condition and death was imminent. Ms. Browning suffered a stroke at eighty-six years of age which resulted in permanent brain damage making her unable to swallow. Ms. Browning was not "brain dead." Her neurologist diagnosed her as being in a "persistent vegetative state." Moreover, her condition was not terminal. Ms. Browning's physicians believed she could live for an indeterminate period of time with artificial nutrition. Ms. Browning's guardian sought to exercise the declaration written by Ms. Browning prior to her stroke by forgoing the artificial nutrition.

The Florida Supreme Court held that Ms. Browning's guardian could legally withdraw the artificial nutrition which would result in Ms. Browning's death within a few days.

The Court's decision allowed Ms. Browning to refuse life-sustaining medical treatment for her incurable, but not terminal, condition. The Court stated its reasoning as follows:

> Recognizing that one has the inherent right to make choices about medical treatment, we necessarily conclude that this right encompasses all medical choices. A competent individual has the constitutional right to refuse medical treatment regardless of his or her medical condition. In re Guardianship of Browning v. Herbert, 568 So.2d 10.

In holding that this right includes all relevant decisions about one's health, the court noted that no reason exists to qualify the right based on type of medical procedure - that is, whether the procedure is life-prolonging, life-maintaining, or life-sustaining. (In re Guardianship of Browning v. Herbert, 568 So.2d 11-12.) In fact, the court quoted a passage from Bouvia v. Superior Court, 179 Cal.App.3d 1127 (Cal.App. 2d Dist. 1986), in which the Court of Appeals of California reasoned that the individual's perception of the quality of her life overrides any physician's estimate of the remaining quantity of her life.

The Court also discussed the four state interests identified in Satz v. Perlmutter, 379 So.2d 359 (Fla. 1980). It began by stating that "the state has a duty to assure that a person's wishes regarding medical treatment are respected." The court's discussion of the state's interest in preserving life (which it called the strongest interest) somewhat contradicts its earlier discussion of the breadth of the right to refuse treatment as well as its decision in Wons v. Public Health Trust, 541 So.2d 96 (Fla. 1989) (holding that a competent, thirty-eight-year-old practicing Jehovah's Witness could exercise her constitutional right to refuse an emergency blood transfusion, without which her death was certain to follow shortly). The court also implied that the state has a greater interest if the patient's disease is curable than if it is not which indicates that the Court may be retreating from its earlier position. But, given the very strong terms it used in granting a broad right to refuse treatment and its use of Bouvia, this is not likely.

Finally, the Browning court discussed the procedures for decision making. The court reaffirmed its earlier position that a judicial proceeding is not necessary. Further, the court recognized that not all patients will appoint surrogates to carry out their written instructions and held that, in those cases, a close family member or friend may do so. Although at first glance this appears to be a minor point, it is not because Florida's current advance directive statute does not specifically provide for written instructions without an appointed surrogate except in a decision concerning the artificial prolongation of life.

In re Dubreuil, 629 So.2d 819 (Fla. 1993), is one of the more recent Supreme Court of Florida case regarding the right of a competent individual to refuse unwanted medical care in a non-terminal situation. Although the primary holding of this case merely reaffirms Wons, the court's language in getting to that point may be its broadest yet.

The court not only opined that the state must not interfere with a person's health care decisions, it went further and asserted that ""the state has a duty to assure that a person's wishes regarding medical treatment are respected.'" Discussing the hospital's role when a third party questions the patient's wishes, the court reasoned that "a health care provider's function is to provide medical treatment in accordance with

the patient's wishes and best interests, not as a "substitute parent' supervening the wishes of a competent adult. Accordingly, a health care provider must comply with the wishes of a patient to refuse medical treatment unless ordered to do otherwise by a court of competent jurisdiction." In this regard, the court receded from its holding in Wons by placing the burden on the state to assert its interests where the state chooses to intervene rather than the hospital.

In summary, a competent adult in Florida has the right to refuse medical treatment for essentially any reason regardless of whether his condition is terminal. This right also applies to incompetent patients who, while competent, expressed their wishes in writing or appointed a surrogate to speak for them. The state has three, arguably four, interests that, depending on the facts, may override the patient's wishes: preserving life (weakened by the courts' decisions almost to the point of nonexistence); protecting innocent third parties; preventing suicide; and, arguably, maintaining the ethical principles of the medical profession (again, so weakened as to be of questionable significance).

3. Incompetent Patients' Rights

The same is not true for patients who lack the capacity to communicate their health care decisions to their health care providers. In such situations, legal tools called "advance directives" are necessary to carry out the patient's wishes. Section 765.101(1) states "Advance Directive" means a witnessed written document or oral statement in which instructions are given by a principle or in which the principle's desires are expressed concerning any aspect of the principle's health care, and includes, but is not limited to, the designation of a health care surrogate, a living will, or an anatomical gift made pursuant to part V of this chapter. (Section 765.101(1), Florida Statutes.) Florida law recognizes the right of a competent individual to create advance directives. (Section 765.102, Florida Statutes.)

C. EUTHANASIA AND SUICIDE

Euthanasia refers to the practice of ending a life in a painless manner. Euthanasia can be voluntary or involuntary, depending upon the presence or absence of consent. It can also be further categorized as "passive" (withholding necessary treatments) or "aggressive" (administering pain medication in large doses knowing it will cause death) or "non-aggressive" (withdrawing life support).

According to Sections 458.326(4) and 765.309(1), Florida Statutes, aiding or assisting the suicide of another is illegal and constitutes the commission of a felony. (Section 782.08, Florida Statutes.) The prohibition encompasses all forms of euthanasia.

In Vacco v. Quill, 521 U.S. 793 (1999), several physicians and terminally ill patients sued New York State's Attorney General claiming that an assisted suicide ban violated the Fourteenth Amendment's Equal Protection Clause. The district court disagreed, but the Second Circuit reversed on the grounds that the State treat unequally competent, terminally ill persons who wish to direct the removal of life support systems and those who wish to hasten their deaths by self prescribed drugs. The ban, the Second Circuit concluded, was not rationally related to any legitimate state interest.

The Supreme Court held that New York's prohibition on assisted suicide did not violate the Equal

Protection Clause because the assisted suicide statute and the statute permitting patients to refuse medical treatment did not treat similar persons differently. They reasoned that every competent individual, regardless of physical condition was entitled to refuse unwanted life-saving medical treatment, while no one is permitted to assist a suicide. The Court saw a rational, important, and logical distinction between allowing a patient to die and making a patient die.

Referring to its decision in Cruzan v. Director, Mo. Dent. of Health, 497 U.S. 261 (1990) which concluded that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment, the Court explained that the right to refuse treatment was not grounded "on the proposition that patients have a general abstract 'right to hasten death . . .' but on well established traditional rights to bodily integrity and freedom from unwanted touching."

III. FLORIDA BOARD OF NURSING DECLARATORY STATEMENTS ON DEATH AND DYING

The Florida Board of Nursing has issued several declaratory statements involving nursing and death or dying patients. You should review these and be familiar with them. Copies of these are contained in Appendix I of this Manual. Basically, declaring a patient's death and the time of death are medical determinations that a physician must make. A nurse is not allowed to do this.

For additional information and guidance on these issues, be sure to consult the declaratory statements in the Appendix.