pennlive.com

The Patriot-News

PENNSYLVANIA FOCUS

Law probably won't provide safe harbor to hospitals

THADDEUS MASON POPE, J.D., Ph.D., a graduate of the University of Pittsburgh, is a professor at the University of Memphis School of Law.

Sunday, December 24, 2006

BY THADDEUS MASON POPE

Due to an incurable brain tumor, Brianna Rideout, 3, needed a mechanical ventilator to breathe. But in July 1992, despite her parents' vehement opposition, physicians at Penn State Milton S. Hershey Medical Center turned off that ventilator.

Her physicians thought that medicine had nothing left to offer Brianna. The ventilator was merely prolonging her death. On all accounts, the physicians' withdrawal of treatment was carefully reasoned and consistent with responsible medical practice. Nevertheless, the Rideouts sued the medical center for compensatory and punitive damages. In 1995, Dauphin County Court ruled the hospital should have sought court intervention to withdraw life support. Because it had not done so, the court allowed the Rideouts to pursue their lawsuit.

Since the Rideout case, Pennsylvania health care providers have been reluctant to unilaterally withdraw life-sustaining treatment, even when they determine that stopping treatment is medically appropriate and consistent with generally accepted health care standards.

This chilling effect from the fear of litigation was addressed recently when Gov. Ed Rendell signed Senate Bill 628, which will become effective on Jan. 28. The law provides a framework governing health care decision-making for incompetent patients. It also creates a legal safe harbor for health care providers to take the sort of action that Hershey Medical Center took and that other Pennsylvania hospitals have wanted to take.

In the overwhelming majority of cases, health care providers and families agree about life-sustaining medical treatment for the terminally ill. But sometimes conflicts between families and health care providers are irreconcilable. In such cases, because of the Rideout decision, Pennsylvania hospitals typically, though often reluctantly, accede to family wishes.

A section of SB 628 purports to change that. It provides that a health care provider "may not be subject to criminal or civil liability, discipline for unprofessional conduct or administrative sanctions" for refusing to comply with a request for life-sustaining medical treatment if the provider believes that compliance with such a request either would be "unethical" or would, "to a reasonable degree of medical certainty, result in medical care having no medical basis in addressing any medical need or condition of the patient."

With SB 628, Pennsylvania joins a growing list of states that have sought to create legal safe harbors for health care providers refusing to provide inappropriate treatment. However, other states have discovered the safe harbors are not navigable. The authorization to decline to comply with family treatment requests is not clear enough.

SB 628 also will probably fail to achieve the intended objective. Its standards are vague and imprecise. What is "unethical?" What is a "reasonable degree" of medical certainty? While this vagueness seems to provide health care providers with broad discretion in determining the circumstances under which they may refuse to comply with treatment requests, it also leaves them uncertain as to whether they satisfy the law's requirements.

It is society's duty to grapple with the limits of patient autonomy. Other values are at stake in the health care calculus. Against patient autonomy we must balance both the integrity of the medical profession and the prudent stewardship of limited medical resources. Health care providers must not be forced to provide every treatment that a patient or family demands.

SB 628 is a move in the right direction. But it is insufficient. It will remain unworkable until health care providers develop policies and data to more precisely define "unethical" and "reasonable degree of medical certainty." Experience with similar statutes in other states suggests that this level of specificity is unattainable. The statutory language simply cannot be made any more concrete.

So what can we do? Look to Texas. Rather than specifying substantive standards, the Texas statute outlines a process with which health care providers must comply. The decision lies with an ethics or medical committee. As long as the family is given proper notice of the review committee meeting, the committee agrees with the treating physician, the committee properly notifies the family of its decision, and the family is given 10 days to try to transfer to another facility, then the hospital may stop treatment with impunity.

Texas' approach is not perfect. Ten days may not be sufficient time to find a facility willing to provide the requested treatment. The decisions of hospital ethics committees to which the statute demands judicial deference are often under-informed and biased due to conflicts of interest.

The Texas Legislature is to address these problems when it goes back into session next month. Pennsylvania lawmakers and health care providers should follow that debate for lessons on possible changes to SB 628.