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## OGC Issues Roundtable

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# OGC ISSUES ROUNDTABLE

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Among the myriad of contemporary “pro-life” issues, the issue of health-care proxy legislation merits discussion because of the increased attention it is currently receiving in the courts and legislatures.

Health-care proxy legislation seeks to set up a mechanism whereby an individual (the “declarant”) can execute a written declaration appointing another to decide for the declarant, when he or she is unable, whether to withhold or withdraw life-sustaining treatment under certain specified medical conditions. Health-care proxy laws are an outgrowth of the living will legislation which states began to enact in 1976. Today, there are over thirty-nine states which have living will laws. Some states are enacting separate health-care proxy laws, while others are engrafting health-care proxy amendments on to already existing living will statutes. Note here, that with respect to the latter type of laws, it is particularly important to understand the terminology of the underlying living will statutes, since it will also usually apply to any new proxy provision.

Very influential upon the shape of the emerging health-care proxy legislation will be the National Commissioners on Uniform State Laws’ health-care proxy amendment to the existing Uniform Rights of the Terminally Ill Act (URTIA). In March of this year, the Committee, charged by the National Commissioners on Uniform State Laws with drafting this amendment, met for a two-day conference in Chicago to complete a preliminary draft of the amendment. Evaluated from the perspective of the United States Catholic Conference’s stance on issues concerning termination of treatment, the deliberations and conclusions of the members of this Committee are disturbing because of their potential for fostering euthanasia and disrespect for human life, especially weakened or disabled life.

Specific recommendations of the Committee are set forth below. First, it proposes to expand the coverage of section 2 of the URTIA to permit not only the execution of a living will, but also the execution of a declaration appointing another person as “health-care proxy” to make decisions regarding the withdrawal or withholding of life-sustaining treatment. This is the central operative provision of the proposed amendment.

Second, the Committee proposed a new section 7 to the URTIA which addresses health-care "surrogates" as opposed to "proxies." While a proxy is one designated in writing by a declarant to make health-care decisions, a surrogate is one designated by operation of law to make the same kinds of decisions as a proxy makes, in the absence of a proxy declaration. In the absence of a written "surrogate" law, it is common practice for doctors to consult family members in a certain order of priority to determine how to handle a patient's life-sustaining medical treatment. The proposed uniform law merely formalizes and prioritizes this list of persons. The proposed section applies equally when the patient is a minor.

One of the persons empowered by section 7 to act as a surrogate is an individual previously appointed by the patient as an attorney-in-fact. Presently, neither the Uniform Durable Power of Attorney Act, the Model Health-Care Consent Act, nor most state durable power-of-attorney acts enable the appointee to decide termination of treatment questions when the executor is unable. The Committee members intend the language of section 7 to provoke state legislatures to amend their existing durable power-of-attorney statutes to specifically include the power to withhold or withdraw the executor's life-sustaining treatment under prescribed circumstances.

Third, the Committee attached a pregnancy protection provision to section 7, which provides that a doctor must not withhold or withdraw treatment if the patient is pregnant and there exists the probability that the fetus could develop to a live birth with continued treatment. Fortunately, this provision controls even in the face of a surrogate's contrary directions. This protection mirrors existing section 6(c) of URTIA which applies in a proxy situation, save that section 7 provides even stronger protection for unborn children since section 6(c) is prefaced with the caveat, "Unless the declaration otherwise provides."

Fourth, with regard to the controversial nutrition and hydration problem, the Committee was content to draft no new language, but instead to allow URTIA's relevant language to apply also to health-care proxies and surrogates. Presently the URTIA asserts that it does not speak to the necessity of nutrition and hydration for either comfort, care or the alleviation of pain. In practical terms, this means that if a legal conflict arises over the propriety of withdrawal or withholding of sustenance, a court will most probably be governed by the more than thirty existing cases which hold that nutrition and hydration are like other "medical treatment" and may be removed under similar circumstances.

The United States Catholic Conference sees numerous problems both with the concept of legally enforceable health-care proxies, and with the finer details of proxy legislation. First, a basic policy problem—health-care proxy legislation extends into incompetency the already existing po-

tentialities for euthanasia present in living will laws.

Second, definitions of "terminal condition" which will be incorporated into proxy legislation from existing living will laws are much too broad and ambiguous. What is important here is whether a statute considers a patient "terminal" if he or she will die soon *without* the treatment at issue, or *with* it.

Third, some proposed proxy statutes would permit one minor to appoint another as proxy. Only adults should have the ability to execute a declaration or be appointed as proxy.

Fourth, some standards of care should govern the proxy's or surrogate's decision making. The proposed uniform health-care proxy amendment has none whatsoever. Proposed section 7 contains only a minimal safeguard prohibiting a surrogate from contravening the known and expressed wishes of the dying patient.

Fifth, one or two doctors should be involved in evaluating the patient's competency to make decisions concerning life-sustaining treatment. There is too much room for over-reaching if only family or friends have this responsibility.

Sixth, patients should be able to revoke existing declarations by merely tearing them up or orally renouncing them. No declarant should be required to contact his or her doctor to announce a revocation if, for example, he or she is slipping into incompetency.

Seventh, physicians who disagree with the terms of a declaration or with a surrogate's instructions must be able to transfer the patient out of their care. This ability should not hinge upon the physician's previous disapproval of a patient's declaration since this document may not indicate the specific action (*i.e.*, maintenance or withdrawal of one or more types of treatment) that will be taken by the proxy; the declaration may not even contain any *operative* terms other than the proxy appointment.

Eighth and finally, safeguards concerning pregnancy and sustenance should be incorporated into every health-care proxy law. The law should recognize at the very least that provision of nutrition and hydration is unlike "medical treatment," and thus, cannot be withheld or withdrawn on the same basis.