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# A CRITICAL ANALYSIS OF THE ARKANSAS DEATH WITH DIGNITY ACT

Harold H. Simpson II\*  
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Death has become an everyday topic of conversation. The Karen Ann Quinlan case<sup>1</sup> recently received prolonged national news coverage and, while medical and legal scholars argue as to whether there is a constitutional right to die,<sup>2</sup> countless families have discussed what they would want done under similar circumstances. Public acceptance of the general concept of withdrawal of artificial life support to permit a terminally ill patient to die is growing,<sup>3</sup> and several surveys of physicians confirm the wide acceptance of this concept in practice.<sup>4</sup> "Dear Abby" and the Euthanasia Educational Council<sup>5</sup> have promoted the "Living Will"<sup>6</sup> with the result that an increasing number of people are directing their attorneys to prepare such a document along with their regular wills.

In response to these developments, several states have attempted to pass legislation<sup>7</sup> giving clear legal effect to declarations

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1. *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), involved attempts by Miss Quinlan's family to have life-support systems withdrawn.

2. The New Jersey court analogized the Quinlans' situation to that involved in *Roe v. Wade*, 410 U.S. 113 (1973), the controversial abortion case, and said that the right of privacy also includes a patient's decision to decline medical care in some instances. *In re Quinlan*, 70 N.J. 10, 40, 355 A.2d 647, 663 (1976).

3. Comment, *The Living Will: Already a Practical Alternative*, 55 Tex. L. Rev. 665, 688-93 (1977).

4. *Id.* at 690-92. See also Steele & Hill, *A Plea For A Legal Right To Die*, 29 Okla. L. Rev. 328, 332 (1976) [hereinafter cited as Steele]; Comment, *Involuntary Passive Euthanasia of Brain-Stem-Damaged Patients: The Need for Legislation—An Analysis and a Proposal*, 14 U. San Diego L. Rev. 1277, 1280 (1977): "In 1974, testimony before a Senate Subcommittee pointed out that 'about ¾ of American physicians say they practice "passive" euthanasia regularly—that is they withdraw artificial life support and permit dying.'" (citing "*Medical Ethics: Hearings Before the Subcomm. on Health of the Comm. on Labor & Public Welfare*, 93 Cong., 2d Sess. 9 (1974)"). *Id.* n.20.

5. The Euthanasia Educational Council is a nonprofit organization located at 250 West 57th Street, New York, New York 10019. According to the Council, more than two million "Living Wills" have been distributed.

6. The "Living Will" is a widely circulated document, the form for which is printed in Appendix 1 *infra*.

7. A list of the proposed bills is contained in Kaplan, *Euthanasia Legislation: A Survey and Model Act*, 2 Am. J.L. & Med. 41, 55 n.47 (1976), and in Comment, *supra* note 3, at 667 n.5.

similar to the "Living Will." The California Legislature passed the first such act in 1976.<sup>8</sup> Other states followed California's example in rapid succession,<sup>9</sup> with Arkansas joining their ranks with Act 879 of 1977.<sup>10</sup>

Prior to Act 879 a competent adult already had the right to refuse consent to medical treatment or surgery, subject only to certain exceptions.<sup>11</sup> Also, under certain circumstances, minors could refuse treatment for themselves, and certain third persons could withhold consent to medical treatment for others.<sup>12</sup>

However, the exercise of these rights proved difficult in many practical situations. Frequently, a person was unconscious or otherwise unable to withhold consent. In certain emergency situations consent was implied by law,<sup>13</sup> and even if there had been a prior refusal, the law implied consent if there was a subsequent deterioration of the person's condition.<sup>14</sup> It was even possible for a person who was conscious and alert to be caught in a *Catch-22* competency situation:<sup>15</sup> he had to be competent in order to refuse consent, and he could not be competent if he refused consent to treatment which could save his life. Conflicts arose in situations where there was disagreement between persons authorized to consent for another.<sup>16</sup> Physicians were concerned with their civil liability both if they honored a refusal of consent and if they refused to honor it.<sup>17</sup> Even

8. Cal. Health & Safety Code §§ 7185-7195 (West Cum. Supp. 1978).

9. Idaho Code §§ 39-4501 to -4508 (Cum. Supp. 1977); N.M. Stat. Ann. §§ 12-35-1 to -35-11 (Int. Supp. 1976-1977); N.C. Gen. Stat. §§ 90-320 to -322 (Cum. Supp. 1977); Or. Rev. Stat. §§ 97.050-090 (1977); Tex. Rev. Civ. Stat. Ann. art. 4590h (Vernon Cum. Supp. 1978).

10. 1977 Ark. Acts 879 (codified in Ark. Stat. Ann. §§ 82-3801 to -3804 (Cum. Supp. 1977)).

11. Ark. Stat. Ann. § 82-364.1 (Cum. Supp. 1977) provides for consent by a court to emergency treatment when there has been a refusal of consent for a pregnant female in the last trimester, minors, and others unable to understand the nature and consequences of such refusal, and parents of minor children dependent on them for support. *See also In re Presidents & Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir. 1968), *cert. denied*, 377 U.S. 978 (1964).

12. Ark. Stat. Ann. § 82-363(b)-(i) (Repl. 1976).

13. Ark. Stat. Ann. § 82-364 (Cum. Supp. 1977).

14. *Id.* § 82-364(b).

15. *See J. Heller, Catch-22*, at 47 (New Dell ed. 1975), where, in discussing an allegedly insane military pilot who wanted to avoid having to fly dangerous bombing missions, it is said, "Catch-22. . . specified [that if] he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to."

16. Miss. Code Ann. § 41-41-5 (1972), on which Ark. Stat. Ann. § 82-363 (Repl. 1976) was patterned, contains language not in the Arkansas statute providing that consent by one person authorized to consent is sufficient notwithstanding the fact that another authorized person has refused consent or protested against the proposed treatment. *See also In re Nemer*, 51 Misc. 2d 616, 273 N.Y.S.2d 624 (Sup. Ct. 1966).

17. *See Comment, Informed Consent for the Terminal Patient*, 27 Baylor L. Rev. 111, 114-18 (1975).

criminal liability was a possibility, albeit remote.<sup>18</sup> And while they expressed a person's wishes and desires and perhaps had some moral effect on family and physicians, the "Living Will" and similar documents had no certain legal effect.<sup>19</sup>

In response to these practical difficulties, Act 879 was enacted. It permits a person to execute a document expressing his refusal of consent to certain medical procedures and grants immunity to medical personnel who honor this refusal. A properly executed declaration under Act 879 will speak for a patient who is unconscious or otherwise incapacitated and can prevent consent from being implied by law. Act 879 permits the decision to withhold treatment to be made in advance of a medical crisis and therefore provides a method of avoiding the *Catch-22* competency predicament. It also allows certain persons to execute a declaration for others under limited circumstances. But most importantly, it provides an additional, legally sanctioned mechanism whereby a person can express his desires concerning his own body.

### *Scope of Act 879.*

Act 879 states that "every person shall have the right to die with dignity"<sup>20</sup> and to refuse the use of "artificial, extraordinary, extreme or radical medical or surgical means or procedures calculated to prolong his life."<sup>21</sup> Although the Arkansas General Assembly chose to use the phrase "prolong his life" at five separate points in the Act, it did not define it. The legislature also left the phrase "artificial, extraordinary, extreme or radical medical or surgical means or procedures"<sup>22</sup> without definition.

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18. The potential criminality of euthanasia is unclear. There are very few reported cases in which the issue has been raised. An early case, *People v. Kirby*, 2 Park Cr. 28 (N.Y. 1823), involved a father who had drowned his children so that they might go directly to Heaven. The court refused to recognize that defense. Later cases involving killing or assisting in the suicide of loved ones suffering from terminal illnesses and pain resulted in acquittals. See *The Law of Euthanasia*, 6 N.C. Researcher 159, 161 (1975); Steele, *supra* note 4, at 337-38; Foreman, *The Physician's Criminal Liability for the Practice of Euthanasia*, 27 Baylor L. Rev. 54 (1975).

19. See Comment, *supra* note 3, at 669.

20. Ark. Stat. Ann. § 82-3801 (Cum. Supp. 1977).

21. *Id.*

22. Ordinary medical procedures have been described as "[a]ll medicines, treatments and operations which offer reasonable hope for benefit, in which it can be obtained and used without excessive expense, pain or other inconvenience." Conversely, extraordinary means are those which do involve these factors or which, if used, would not offer reasonable hope or benefit. Kelly, *The Duty to Preserve Life*, 12 Theological Studies 550 (1951), cited in 57 B.U.L. Rev. 148, 150 (1977). See also Comment, *supra* note 4, at 1285:

An often quoted guideline between ordinary and extraordinary care is the statement

This lack of precise definitions could present problems. For example, certain nonextraordinary life-prolonging procedures such as kidney dialysis or the use of a pacemaker could be considered "artificial," "extreme," or "radical" and therefore subject to a declaration in spite of the fact that the patient, if given the treatment, would be likely to recover. However, such an interpretation would be inconsistent with the spirit of Act 879. A more reasonable interpretation of the scope of Act 879 would be one similar to those given to other states' acts,<sup>23</sup> limiting the use of directives to the situations in which (1) the patient has been diagnosed as being afflicted with an incurable and terminal condition caused by injury, disease, or illness; (2) mechanical or artificial means are being used to sustain, restore, or supplant a vital function; and (3) death is imminent whether such procedures are utilized or not, and such procedures serve only artificially to prolong the actual moment of death.

### *Incorporation of Probate Code*

Act 879 provides that a directive may be executed with the same formalities as are required for the execution of a will.<sup>24</sup> In contrast, other jurisdictions detail procedures for execution and also prescribe the form for the directive.<sup>25</sup>

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of Pope Pius XII that a doctor is not obligated to provide care "which cannot be obtained by or used without excessive expense, pain, or other inconvenience, or which, if used, would not offer a reasonable hope of benefit" (footnotes omitted) (citing "Papal allocation to a congress of anaesthetists, 24 November 1957. *Acta Apostolicae Sedis* 1027-33 (1957)").

*Id.* nn.52 & 53. However, "artificial," "extreme," and "radical" have acquired no such accepted definitions, and their use in the disjunctive adds uncertainty to the scope of Act 879 of 1977.

23. Cal. Health & Safety Code § 7188 (West Cum. Supp. 1978); Idaho Code § 39-4504 (Cum. Supp. 1977); Or. Rev. Stat. § 97.055 (1977); Tex. Rev. Civ. Stat. Ann. art. 4590h § 3 (Vernon Cum. Supp. 1978). See also *Legislating Death*, 49 State Gov't 130, 133 (1976).

24. Ark. Stat. Ann. § 82-3802 (Cum. Supp. 1977).

25. The California act is illustrative:

Any adult person may execute a directive directing the withholding or withdrawal of life-sustaining procedures in a terminal condition. The directive shall be signed by the declarant in the presence of two witnesses not related to the declarant by blood or marriage and who would not be entitled to any portion of the estate of the declarant upon his decease under any will of the declarant or codicil thereto then existing or, at the time of the directive, by operation of law then existing. In addition, a witness to a directive shall not be the attending physician, an employee of the attending physician or a health facility in which the declarant is a patient, or any person who has a claim against any portion of the estate of the declarant upon his decease at the time of the execution of the directive. . . .

Cal. Health & Safety Code § 7188 (West Cum. Supp. 1978). The Act further provides a form in which "[t]he directive shall be." This form is printed in Appendix 2 *infra*. New Mexico also incorporates its Probate Code into its Right to Die Act. N.M. Stat. Ann. § 12-35-3 (Int. Supp. 1976-1977).

Under the Arkansas Probate Code,<sup>26</sup> the declaration may take one of two forms. It may be entirely in the handwriting of the declarant (holographic) if three credible disinterested witnesses attest to the genuineness of the handwriting.<sup>27</sup> Alternatively, it may take a form other than holographic and be executed by the declarant's signature or mark, acknowledgment of his signature already made, or having someone sign his name for him.<sup>28</sup> Further, the declarant must state the nature of the document and have it witnessed by two persons over eighteen and otherwise competent to be witnesses.<sup>29</sup> While other states require that witnesses to a declaration may not be related by blood or marriage nor be entitled to any share of the declarant's estate,<sup>30</sup> Arkansas law contains no such restriction.<sup>31</sup>

A directive executed outside Arkansas in accordance with the law of the place of its execution or the laws of the place of the declarant's domicile at the time of execution will be given the same effect in Arkansas as if executed in compliance with Arkansas law.<sup>32</sup> This provision, incorporated in Act 879, places a burden on Arkansas physicians and hospitals receiving such declarations by requiring them to determine whether a declaration was executed in compliance with Arkansas law, and, if not, whether it was executed in compliance with other states' laws. Other states make no such provision.<sup>33</sup>

Presumably, Act 879 incorporates the revocation provisions of the Arkansas Probate Code and would permit a declaration to be revoked by a subsequent declaration or by destruction of the declaration itself.<sup>34</sup> Other states specifically provide for revocation of declarations,<sup>35</sup> and in some jurisdictions specific provision is made for

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26. Ark. Stat. Ann. §§ 60-401 to -417 (Repl. 1971).

27. Ark. Stat. Ann. § 60-404 (Repl. 1971).

28. Ark. Stat. Ann. § 60-403 (Repl. 1971).

29. Ark. Stat. Ann. §§ 60-402, -403 (Repl. 1971).

30. See Cal. Health & Safety Code § 7188 (West Cum. Supp. 1978).

31. While a declaration would not be invalidated because of attestation by an interested witness, it is arguable that Ark. Stat. Ann. § 60-402 (Repl. 1971) could cause an interested witness to forfeit any excess left him in the declarant's will over that which he would have received had the declarant died intestate, particularly if the will and declaration are contained in the same document.

32. Ark. Stat. Ann. § 60-405 (Repl. 1971).

33. See statutes cited note 9 *supra*.

34. Ark. Stat. Ann. § 60-406 (Repl. 1971). The revocation by subsequent declaration demonstrates a crucial difference between the probating of a will and the use of a directive in a hospital setting. While the probate process leaves ample time to produce and analyze conflicting wills as to which will is in fact the testator's last will and testament, the urgencies of medical practice may not leave ample time to search for subsequent declarations, and a physician may rely on one that has been revoked.

35. See, e.g., Cal. Health & Safety Code § 7189 (West Cum. Supp. 1978).

oral revocations.<sup>36</sup> However, Act 879 and the Arkansas Probate Code are silent on the subject of oral revocation.

Neither the Arkansas Probate Code nor Act 879 permits a minor to execute a declaration on his own behalf.<sup>37</sup> However, this fact should not affect the right of a married minor,<sup>38</sup> a minor female in connection with pregnancy or childbirth,<sup>39</sup> an emancipated minor,<sup>40</sup> or an unemancipated minor capable of understanding and appreciating the consequences of the proposed procedure<sup>41</sup> to consent or refuse to consent to medical or surgical treatment other than by the execution of an Act 879 declaration.

### *Execution of Declaration by Others*

Act 879 is unique in permitting one person to execute a declaration for another.<sup>42</sup> This can only be done for a minor or for a physically or mentally incapacitated adult.<sup>43</sup> Such a declaration may be executed by either parent of a minor;<sup>44</sup> by a person's spouse;<sup>45</sup> and, under certain circumstances, by a person's children,<sup>46</sup> parents,<sup>47</sup> nearest living relative,<sup>48</sup> or legally appointed guardian.<sup>49</sup> A declaration executed by another must contain a signed statement by two physicians that extraordinary means would have to be utilized to prolong life.<sup>50</sup>

An unnecessary element of confusion is injected into the law because the persons authorized to execute a declaration for another are not the same persons authorized to consent to medical treatment.<sup>51</sup> For example, Act 879 provides that a person's spouse may

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36. *Id.* § 7189(a)(3). The Texas provision requires that when the patient revokes the declaration, the physician shall write "VOID" on each page of it in the patient's medical records. Tex. Rev. Civ. Stat. Ann. art. 4590h, § 4(a)(3) (Vernon Cum. Supp. 1978).

37. Ark. Stat. Ann. §§ 60-401 (Repl. 1971); 82-3803 (Cum. Supp. 1977).

38. Ark. Stat. Ann. § 82-363(c) (Repl. 1976). This statute recognizes the right of certain classes of persons to consent to medical or surgical procedures.

39. *Id.* § 82-363(d).

40. *Id.* § 82-363(f).

41. *Id.* § 82-363(g).

42. Ark. Stat. Ann. § 82-3803 (Cum. Supp. 1977). See N.M. Stat. Ann. § 12-35-4 (Int. Supp. 1976-1977), which allows for execution of a document for a terminally ill minor through court procedures.

43. Ark. Stat. Ann. § 82-3803 (Cum. Supp. 1977).

44. *Id.* § 82-3803(a).

45. *Id.* § 82-3803(b).

46. *Id.* § 82-3803(c), (d).

47. *Id.* § 82-3803(e).

48. *Id.* § 82-3803(f).

49. *Id.* § 82-3803(g).

50. Ark. Stat. Ann. § 82-3803 (Cum. Supp. 1977).

51. Ark. Stat. Ann. § 82-363 (Repl. 1976).

execute a declaration for him under the circumstances described in the previous paragraph.<sup>52</sup> The Act also provides for the execution of a declaration by a child over eighteen for his parent when the parent's spouse is either unwilling or unable to act.<sup>53</sup> There is no comparable provision under Arkansas law authorizing a spouse or child<sup>54</sup> to consent to medical treatment for another. This discrepancy presents a situation in which persons who are not authorized to consent to medical treatment for another person are authorized to refuse extraordinary measures calculated to prolong his life. Another incongruity is that while the father of an illegitimate child is prohibited from consenting to medical treatment for the child solely on the basis of parenthood,<sup>55</sup> Act 879 contains no such limitation.

Possible conflicts between the various persons authorized to consent for another are expressly dealt with by Act 879. A parent of a minor<sup>56</sup> or a person's spouse<sup>57</sup> has first priority in executing a declaration for the incapacitated person. If his spouse is unwilling or unable to execute the declaration, his child of at least age eighteen<sup>58</sup> or a majority of his children of that age<sup>59</sup> have next priority. Only if there is no spouse and no child eighteen or older do the person's parents acquire the right to execute the declaration.<sup>60</sup> Only if the person has no parent living (and presumably no spouse or children eighteen or older) can his next living relative execute the declaration.<sup>61</sup> A legally appointed guardian may execute a declaration for a mental incompetent.<sup>62</sup>

52. Ark. Stat. Ann. § 82-3803(b) (Cum. Supp. 1977).

53. *Id.* § 82-3803(c). The choice of language allowing the child to execute a declaration when the spouse is "unwilling" to act is unfortunate, as this would apparently allow children to override the wishes of one parent who refuses to execute a declaration on behalf of the other.

54. See Ark. Stat. Ann. § 82-363 (Repl. 1976). The statute was modeled after Miss. Code Ann. § 41-41-3 (1972), which permits any married person, whether an adult or a minor, to consent for his spouse of unsound mind and permits only an adult to consent for his parent of unsound mind. The Mississippi statute defines "unsound mind" as

a state of mind during which the person affected is unable to understand and appreciate the consequences of the proposed surgical or medical treatment or procedures so as to intelligently determine whether or not to consent to the same, regardless of whether such state of mind is only temporary or has existed for an extended period of time or occurs or has occurred only intermittently and whether or not it is due to natural state, age, shock or anxiety, illness, injury, drugs or sedation, intoxication or other cause of whatever nature.

The reasons for omitting these provisions from the Arkansas statute are unclear.

55. Ark. Stat. Ann. § 82-363(b) (Repl. 1976).

56. Ark. Stat. Ann. § 82-3803(a) (Cum. Supp. 1977).

57. *Id.* § 82-3803(b).

58. *Id.* § 82-3803(c).

59. *Id.* § 82-3803(d).

60. *Id.* § 82-3803(e).

61. *Id.* § 82-3803(f).

62. *Id.* § 82-3803(g).



Unfortunately, Act 879 does not resolve all possible conflicts. For example, it is possible for one parent to execute a declaration refusing treatment and the other to execute a declaration demanding treatment. A similar conflict could arise between a minor's parent and his spouse, between a minor's parents and the minor himself,<sup>63</sup> or between a legally appointed guardian and others authorized to execute the declaration.

### *Legal Effect of a Declaration*

While a casual reading of Act 879 may lead to the conclusion that it creates some supreme right to die that overrides all considerations to the contrary, this is not the case. Act 879 creates no right to demand affirmative action to cause death.<sup>64</sup> It does create an additional mechanism for withholding consent to treatment, and it does provide for immunity for medical personnel and institutions. However, a properly executed Act 879 declaration should have only the same legal effect as an oral refusal of consent under the same circumstances. In fact, an Act 879 declaration is somewhat more limited than an oral refusal since it is only effective for such procedures and under such circumstances as it describes, and then only if the procedures qualify as artificial, extraordinary, extreme, or radical life-prolonging measures.

A section of the Arkansas Probate Code providing that a will cannot be revoked merely by a change in the circumstances, condition, or marital status of the testator<sup>65</sup> is presumably incorporated by Act 879. A properly executed Act 879 declaration will override the statute which provides that in an emergency situation in which there has been a refusal of consent and a subsequent material and morbid change in the condition of the patient, the law will imply consent to medical treatment.<sup>66</sup>

An Act 879 declaration which anticipates such a change in the patient's condition should still prevent consent being implied by law, since the effect of the implied consent statute<sup>67</sup> is limited to situations in which no one is available who may consent, and the Act 879 declaration should continue to speak for the declarant.

63. Presumably such a conflict would be resolved in favor of the minor child. See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

64. Ark. Stat. Ann. § 82-3801 (Cum. Supp. 1977). Most statutes have a separate provision that mercy killing is not condoned. Tex. Rev. Civ. Stat. Ann. art. 4590h, § 10 (Vernon Cum. Supp. 1978). See also Steele, *supra* note 4, at 341.

65. Ark. Stat. Ann. § 60-407 (Repl. 1971).

66. Ark. Stat. Ann. § 82-364 (Cum. Supp. 1977).

67. *Id.*

While it may be argued that Act 879 is in conflict with and therefore repeals the provisions of title 82, section 364.1 of the Arkansas Statutes Annotated,<sup>68</sup> a close analysis reveals that the two Acts are not in conflict. Section 364.1, signed into law only days before Act 879, recognizes the state's interest in consenting to emergency treatment of certain persons: pregnant females in the last trimester, minors, and others unable to understand the nature and probable consequences of refusal of such treatment, and parents of minor children dependent on them for support. It permits a court to grant injunctive and declaratory relief directing that the necessary treatment be rendered in instances where there is "an immediate or imminent necessity for medical or surgical treatment or procedures." Such a situation should be clearly distinguished from situations contemplated by Act 879 in which artificial, extraordinary, extreme, or radical procedures merely calculated to prolong a person's life are contemplated.

#### *Affirmative Declaration*

Arkansas is the only state presently to provide that a person may execute a document that requests that all means be utilized to prolong his life to the extent medically possible.<sup>69</sup> Although Act 879 is by no means clear on this point, apparently this right to request extraordinary treatment is not on par with the right to refuse treatment. For example, section 1 of the Act states that "[e]very person shall have the right . . . to refuse and deny [extraordinary treatment],"<sup>70</sup> while it provides that "[a]lternatively, every person shall have the right to request [extraordinary treatment]"<sup>71</sup> (emphasis added). Similarly, section 2 provides for the execution of a declaration "exercising such right and refusing and denying [extraordinary treatment],"<sup>72</sup> while it provides that "any person may request in writing that all means be utilized to prolong life."<sup>73</sup> Further, while Act 879's immunity provisions apply to situations in which extraordinary treatment is withheld pursuant to a declaration, they do not extend to situations in which liability arises out of rendering extraordinary treatment pursuant to a declaration.<sup>74</sup>

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68. Ark. Stat. Ann. § 82-364.1 (Cum. Supp. 1977).

69. Ark. Stat. Ann. § 82-3801 (Cum. Supp. 1977).

70. *Id.*

71. *Id.*

72. Ark. Stat. Ann. § 82-3802 (Cum. Supp. 1977).

73. *Id.*

74. Ark. Stat. Ann. § 82-3804 (Cum. Supp. 1977).

The interpretation of an affirmative declaration as merely expressing the wish or desire of the declarant is also consistent with prior law and practical considerations. While a person has the right to refuse consent to treatment and may thereby prevent it, it does not follow that by consenting to treatment, the person can require it to be given regardless of whether it is needed. An additional consideration is the financial effects a binding affirmative declaration would have on the declarant's family. The costs of rendering all treatment which would serve only to prolong life could be staggering.

### *Immunity*

Act 879 provides immunity for any person, hospital, or medical institution that "acts or refrains from acting in reliance on and in compliance with [a declaration] from liability otherwise arising out of such failure to use or apply artificial, extraordinary, extreme or radical medical or surgical means or procedures calculated to prolong such person's life."<sup>75</sup> Unfortunately, this immunity provision leaves several grey areas.

Since the immunity provision is limited to the failure to use or apply procedures, the use of procedures requested in an affirmative declaration would not be covered. Similarly, the administration of drugs which effectively relieve pain but accelerate the process of dying is not covered.<sup>76</sup>

It is questionable whether immunity will be available if the declaration has not been properly executed. Other states' acts provide that the physician has the burden of determining that a directive has been lawfully executed before carrying it out.<sup>77</sup> However, some jurisdictions provide for a presumption that the physician is acting in good faith when carrying out the wishes in the directive.<sup>78</sup> Act 879 is silent on the matter.

Act 879 makes no distinction as to civil or criminal liability. Presumably the immunity would extend to both. Other states specifically include immunity from criminal liability.<sup>79</sup>

Immunity is not available in the situation in which a physician ignores a declaration refusing treatment and does treat the patient. The physician will be responsible for unauthorized treatment.<sup>80</sup>

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75. *Id.*

76. See Mannes, *Euthanasia v. The Right to Life*, 27 *Baylor L. Rev.* 68 (1975).

77. See, e.g., Or. Rev. Stat. § 97.075(1) (1977).

78. See, e.g., N.M. Stat. Ann. § 12-35-7 (Int. Supp. 1976-1977).

79. See, e.g., Cal. Health & Safety Code § 7190 (West Cum. Supp. 1978).

80. See Kutner, *The Living Will—Coping with the Historical Event of Death*, 27 *Baylor*

Other states' acts extend immunity to cover such a situation and provide only that a physician is guilty of unprofessional conduct if he does not follow a directive.<sup>81</sup> Further, Act 879 should not be interpreted to extend immunity to a physician who erroneously diagnoses the declarant's condition as terminal and withholds treatment. The physician should still be responsible for his own negligence in such a situation.

### *Conclusion and Practice Pointers*

The following procedures, many of which are not required by the Act itself, are suggested to avoid uncertainties as much as possible:

1. The declaration should be reexecuted on a regular basis by the declarant and specifically should be reexecuted, if possible, after diagnosis of a terminal illness and explanation by a physician of possible course of treatment and consequences.
2. The declaration should be witnessed by persons other than family members and other persons interested in the declarant's estate.
3. The location of the declaration should be known to close family members.
4. An affirmative declaration should not be executed.
5. The declaration should be a separate document and should not be incorporated into a will.
6. The declaration should specifically delineate situations in which it will have effect.
7. The declaration should provide that it is not to become effective so long as the declarant is able to consent or refuse consent for himself.
8. The declaration should expressly permit the administration of pain-killing drugs despite the fact that they may hasten death.
9. The declaration should provide that it is the declarant's intent that any person relying on the declaration in good faith is to be relieved of any criminal or civil liability which would otherwise arise from honoring the declaration.
10. The declaration, like any document, should be carefully drafted.<sup>82</sup>

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L. Rev. 39, 47 (1975); Comment, *Informed Consent for the Terminal Patient*, 27 Baylor L. Rev. 111 (1975).

81. See, e.g., Tex. Rev. Civ. Stat. Ann. art. 4590h, § 7(b) (Vernon Cum. Supp. 1978).

82. A declaration form patterned after forms prescribed in the acts of other states, the "Living Will," and the form suggested in Comment, *supra* note 3, is recommended for use in Arkansas. Such a form is printed in Appendix 3 *infra*.

Act 879 is far from perfect. Many of the ambiguities and uncertainties of the Act have been discussed above, and the Act is undoubtedly ripe for substantial amendment. However, given reasonable interpretation and judicious application, the Act can be used in the interim to meet some of the needs which prompted its passage.

APPENDIX 1: "Living Will"

*Living Will*

To my family, my physician, my lawyer, my clergyman.

To any medical facility in whose care I happen to be.

To any individual who may be responsible for my health, welfare or affairs:

Death is as much a reality as birth, growth, maturity and old age—it is the one certainty of life. If the time comes when I, \_\_\_\_\_, can no longer take part in decisions for my own future, let this statement stand as an expression of my wishes while I am still of sound mind.

If the situation should arise in which there is no reasonable expectation of my recovery, I request that I be allowed to die and not be kept alive by artificial means or "heroic measures." I do not fear death itself as much as the indignities of deterioration, dependence and hopeless pain. I therefore ask that medication be mercifully administered to me to alleviate suffering even though this may hasten the moment of death.

This request is made after careful consideration. I hope you who care for me will feel morally bound to follow its mandate. I recognize that this appears to place a heavy responsibility upon you, but it is with the intention of relieving you of such responsibility and of placing it upon myself in accordance with my strong convictions that this statement is made.

Signed \_\_\_\_\_

Date \_\_\_\_\_

Witness \_\_\_\_\_

Witness \_\_\_\_\_

Copies of this request have been given to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

APPENDIX 2: Directive Form Prescribed in California

*Directive to Physicians*

Directive made this \_\_\_\_ day of \_\_\_\_\_ (month, year).

I \_\_\_\_\_, being of sound mind, willfully, and voluntarily make known my desire that my life shall not be artificially prolonged under the circumstances set forth below, do hereby declare:

1. If at any time I should have an incurable injury, disease, or illness certified to be a terminal condition by two physicians, and where the application of life-sustaining procedures would serve only to artificially prolong the moment of my death and where my physician determines that my death is imminent whether or not life-sustaining procedures are utilized, I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally.

2. In the absence of my ability to give directions regarding the use of such life-sustaining procedures, it is my intention that this directive shall be honored by my family and physician(s) as the final expression of my legal right to refuse medical or surgical treatment and accept the consequences from such refusal.

3. If I have been diagnosed as pregnant and that diagnosis is known to my physician, this directive shall have no force or effect during the course of my pregnancy.

4. I have been diagnosed and notified at least 14 days ago as having a terminal condition by \_\_\_\_\_, M.D., whose address is \_\_\_\_\_, and whose telephone number is \_\_\_\_\_. I understand that if I have not filled in the physician's name and address, it shall be presumed that I did not have a terminal condition when I made out this directive.

5. This directive shall have no force or effect five years from the date filled in above.

6. I understand the full import of this directive and I am emotionally and mentally competent to make this directive.

Signed \_\_\_\_\_

City, County and State of Residence \_\_\_\_\_

\_\_\_\_\_  
The declarant has been personally known to me and I believe him or her to be of sound mind.

Witness \_\_\_\_\_

Witness \_\_\_\_\_

APPENDIX 3: Suggested Declaration for Use Pursuant to Act 879 of 1977.

*Declaration*

Made this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

I, being of sound mind and over the age of 18, voluntarily make known my desire that my life not be artificially prolonged under the circumstances set fort below:

1. If at any time I should have an incurable injury, disease or illness certified to be a terminal condition by two physicians, one of whom is my attending physician, and where the application of life-sustaining procedures would serve only artificially to prolong the moment of my death and where my physician determines that my death is imminent whether or not life-sustaining procedures are withheld or withdrawn, I request that I be permitted to die naturally. However, I do request care that relieves pain or distress, even if it may hasten the moment of death.

2. In the absence of my ability to give directions regarding the use of such life-sustaining procedures, it is my intention that this declaration shall be honored by my family and physicians as the final expression of my legal right to refuse medical or surgical treatment and to accept the consequences of such refusal.

3. It is my intention to relieve all persons from any and all civil and criminal liability for good faith reliance on this declaration in carrying out these instructions.

Signed \_\_\_\_\_

We witnessed the person named above sign these directions in our presence. The signer was of sound mind and willingly and voluntarily signed. We do not know of any pressure whatsoever being brought on him to sign.

Witness \_\_\_\_\_

Witness \_\_\_\_\_