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Recent Developments: The Right to Die

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vinced that the rule has become unsound in the circumstances of modern life." *Id.* at 27, 405 A.2d at 254.

The practical effect of *McGarvey* is that an attesting witness with a criminal conviction will not render a will void *ab initio*. If such a will is contested, the administrator will have an opportunity to prove the will in court. "Any other result would be a needless trap for the unwary testator who, by failing to discover an attesting witness' prior criminal record, risks having his will declared void." *Id.* at 28, 405 A.2d at 255.

However, pursuant to the Maryland *Evidence Acts*, an attesting witness with a conviction of perjury is incompetent to testify to prove the will. *McGarvey*; MD. CTS. & JUD. PROC. CODE ANN. §9-104 (1980). The administrator must rely on secondary evidence. Maryland case law provides two alternatives regarding the next best evidence in such a case. In *Greenhawk v. Quimby*, 170 Md. 280, 184 A. 485 (1936), the court held that an attesting witness' signature was properly proved, in his absence, by the other subscribing witnesses, and by others, testifying that they each saw the absent witness sign the document in the decedent's presence. In *Keefer v. Zimmerman*, 22 Md. 274 (1864), the court held that proof of an attesting witness' handwriting is admissible where the testimony of the subscribing witness cannot be procured by reason of absence, death, interest or other disqualification.

An administrator proving a will should try to keep the absent attesting witness' perjury conviction from the jury. It is well settled in a civil case that failure of a party to produce a witness who could testify on a material issue gives rise to an inference that the testimony would be unfavorable. *Hitch v. Hall*, 42 Md. App. 260, 399 A.2d 953 (1979); *Critzer v. Shegogue*, 236 Md. 411, 204 A.2d 180 (1964); (opposing counsel's right to a jury instruction); *Hoverter v. Patuxent*, 231 Md. 608, 188 A.2d 696 (1963), (opposing counsel's right to comment to the jury during argument). Therefore, the administrator should file a pre-trial motion *in limine* based on two

grounds: that reference to an attesting witness' perjury conviction would serve no other purpose except to arouse the prejudice of the jury, and that such a comment is not allowed when the reasons for not calling a witness are reasonable and proper. In this situation it would be unethical for the administrator to call an incompetent witness to the stand; thus his failure to produce the attesting witness is both proper and reasonable.

Even though the *McGarvey* Court relaxed the standard of competency for attesting witnesses in Maryland, most attorneys would prefer to follow stricter standards so that the wills for which they are responsible would be sufficient under the strict-

est standards of all states. Attorneys should keep in mind that it is very dangerous for the testator to call upon subscribing witnesses who are not acquainted with him. Certainly, attesting witnesses with criminal records, who are minors or who have a psychiatric disability should be avoided. Finally, the fact that an attesting witness is also an executor, guardian named in the will or a beneficiary does not affect his competency. *Estep v. Morris*, 38 Md. 417 (1873); *Leitch v. Leitch*, 114 Md. 336, 79 A. 600 (1911). Nonetheless, when choosing attesting witnesses, common sense should direct the wise attorney to also avoid interested parties. *Harris v. Pue*, 29 Md. 535 (1874).

Recent Developments

The Right to Die

by Lynn K. Caudle

The right to die, the constitutional right to privacy, voluntary euthanasia, rational suicide, terminal care, natural death acts, self deliverance, self determination. . . are all terms which courts are increasingly confronting as people seek to have a voice in determining whether their lives must be artificially prolonged where there is no hope for cure and death is imminent. In recent years, courts have been called upon to determine if a terminally ill person has the right to refuse or discontinue medical treatment. This issue arises in two contexts. The most frequent situation involves an incompetent patient for whom a third party is seeking to be appointed guardian for the purpose of making the patient's medical decisions. The question has also been raised in instances where the patient is competent to make his own decisions.

A competent individual has the right to refuse medical treatment unless the state can demonstrate a compelling interest that would justify



overriding that individual's choice. *In Re Osborne*, 294 A.2d 372 (D.C. 1972). The state has an interest in the preservation of life, the protection of third parties such as dependent children, the prevention of suicide and in maintaining the ethical integrity of the medical profession.

"Rational suicide" is a concept by which a terminally ill patient decides to take his or her own life by choosing not to prolong life by medical means in an instance where there is no hope of restoring health. This concept raises legal, medical and moral issues. The rational suicide theory is not meant to encourage people to die, but to point out that if for medical reasons life becomes unbearable, self deliverance is a right patients should have.

J. Skelly Wright, Chief Judge of the United States Court of Appeals for the District of Columbia, feels that there is growing acceptance of the right to die concept. The Vatican Declaration on euthanasia, though repeating the Roman Catholic Church's stand against euthanasia, recognized the patient's right to terminate treatment. Podgers, 'Rational Suicide' Raises Patients Rights Issues, 66 American Bar Association Journal 1499 (Dec. 1980). In view of these changing attitudes, "right to die" bills will be brought up in many state legislatures in the near future. Presently ten states and the District of Columbia have enacted such statutes. Such so called "natural death acts" allow people to draw up documents instructing physicians concerning the circumstances under which they become incompetent to make further decisions. *Battiata, Va. Judge Rules Patient Can Shut Off Life Support*, Washington Post Jan. 12, 1982 at 1, col. 1. Maryland and Virginia have yet to enact similar legislation.

Furthermore, state laws classifying attempted suicide as a crime have been largely eliminated and there have been recent reforms in laws against aiding and abetting suicide. Aside from suicide clauses common to most life insurance policies, legal barriers to the settlement of estates of persons who have committed suicide have also been eliminated.

The case of Karen Quinlan brought

the right to die issue to the forefront. In that case, the New Jersey Supreme Court held that a patient could choose to discontinue use of a mechanical respirator based upon the constitutional right to privacy, and in cases where the patient is incompetent, such right could be asserted by his or her court-appointed guardian. The Court reached its ruling by analysis of the state's interests, the foremost of which was the state interest in the preservation and sanctity of life. The Court found the state's interest diminishes as the magnitude of bodily invasion involved in the treatment increases and the prognosis decreases. *In Re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976).

The Supreme Judicial Court of Massachusetts analogized the "right to die" situation to that of abortion, stating that as the constitutional right to privacy protects a woman's right to terminate pregnancy under certain conditions, it also encompasses the right of a patient to preserve his or her right to privacy against unwanted infringements of bodily integrity in appropriate circumstances. The Court found this right to exist regardless of whether a patient is incompetent or competent. In cases of incompetency, the court would appoint a guardian. It was emphasized that there is a great difference between the weight accorded the state's interest in preserving life when the proposed treatment will cure the illness, and the weight given when the treatment can only be expected to briefly extend the life of the patient. *Superintendent of Beichertown v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977), McGinley, *The Right to Privacy and Terminally Ill Patient: Establishing the "Right to Die,"* 31 Mercer L.Rev. 603, (Winter 1980).

In 1980, a New York court held that a terminally ill, comatose patient is free to exercise his or her common law right of bodily self determination and 14th Amendment rights to withdraw from a life-sustaining respirator. The holding was based upon the constitutional right to privacy. The Court reasoned that as a matter of established fact, such a patient has no health and, in the true sense, no life,

for the state to protect. It was emphasized that the ultimate decision in such cases remains with the court rather than the hospital involved or guardian of the patient in question. The Court insulated the individuals involved in that particular case and in further cases from criminal liability providing court procedures are followed, thus seeking to prevent unsound determinations of life-support systems, while facilitating judicial review of all such cases. *Eichner v. Dillon*, 426 N.Y.S.2d 517 (1980).

On January 11, 1982, the Alexandria Circuit Court of Virginia ruled that a 72 year old patient must be allowed to remove himself from life sustaining equipment although it would surely result in the patient's death. Judge Albert H. Grenadier said that the patient was "legally competent and sufficiently informed" to make the decision and that a patient "has the unfettered right to control his own destiny." In this instance, the court found that the patient's constitutional right to privacy and his right to individual free choice and self determination outweighed the state's interests. The hospital stated that it would not appeal the decision. Jeff Stryker of the President's Commission for the study of Ethical Problems in Medicine said that "under the general doctrine of informed consent, a patient has control over his own body." *Battiata, Va. Judge Rules Patient Can Shut Off Life Support*, Washington Post, January 12, 1982 at 1, col. 1.

In "right to die" cases, the issue of competency is crucial. The critical factor in determining incompetence is the patient's comprehension of the choice between death and treatment. Factors the courts have considered to determine the weight of the state's interest in "right to die" cases are age of the patient, prognosis, expense of treatment and pain.

Despite growing acceptance of "right to die" statutes, natural death acts and the "rational suicide" concept, resistance remains strong. Such resistance comes from the fear that acceptance could lead to abuse and even advocacy of euthanasia.