

Oklahoma Attorney General Issues Legal Opinion That Could Eliminate Barriers to POLST

Drew Edmondson, Oklahoma's Attorney General, has issued an advisory legal opinion on April 7, 2006, that supports the use of the *Five Wishes*[®] advance directive in Oklahoma, but also has very positive implications for the use of POLST in Oklahoma and potentially elsewhere. The most significant legal finding of the opinion is the conclusion that the state's advance directive statute (known as the Terminally Ill or Persistently Unconscious Act) is unconstitutional to the extent that it limits an individual's right to refuse artificially administered nutrition and hydration by means of an advance directive. The state's law limited that right to instances where the patient is diagnosed as terminally ill or persistently unconscious. The patient's right to refuse medical treatment through an advance directive cannot be limited to those two circumstances. As stated in the opinion:

If a person has clearly expressed his or her intentions to withhold or withdraw artificially administered hydration and nutrition in advance of incapacity, those wishes must be honored under the conditions specified by the individual – not limited to a terminal condition or persistent unconsciousness.

Edmondson reiterated in a press release that the statute runs afoul of the Fourteenth Amendment Due Process Clause:

In the 1990 Cruzan case, the U.S. Supreme Court ruled that a competent person has a constitutionally protected right to refuse lifesaving hydration and nutrition ...Oklahoma's law limits our constitutionally protected right to make decisions about our own medical care. That's unconstitutional.

The positive impact of the decision on the use of POLST arises from the fact that, in about half the states, the use of out-of-hospital DNR orders are similarly limited to circumstances in which the patient is either terminally ill or meets other limited medical circumstances. Using the Attorney General's analysis, those limitations are arguably unconstitutional where the patient has clearly expressed his or her intention to avoid resuscitation and that decision has been documented ahead of time through a process such as POLST. The analysis would apply similarly to any other medical treatment the patient may wish to refuse. If this analysis were adopted in other states, it would eliminate one of the major barriers to the adoption of POLST – legal restrictions on the process of creating and implementing DNR orders and other orders to limit treatment.

By way of background, Attorneys General opinions are advisory in nature, normally written in response to specific questions posed by another senior state official or by a representative of an organization directly affected by the law in question. The Oklahoma opinion addresses a series of questions posed by a state senator about the use of *Five Wishes*[®] in Oklahoma and the constitutionality of certain restrictions in the Oklahoma statute. While the opinion is advisory and does not carry the force of statute

or court decision, the practical response to most attorney general opinions is typically to treat it as law within the state. It has no formal effect outside Oklahoma, except to the extent that others are persuaded by the reasoning and choose to respect it as a credible precedent.

Attorney General Drew Edmondson has been a leader among Attorneys General in drawing attention to end-of-life care as a health care consumer protection issue. In his tenure as president of the National Association of Attorneys General, 2002-2003, he established a first-ever initiative to examine the role of attorneys general in improving care at the end of life, resulting in a ground-breaking report, and he continued efforts after his term by chairing an end-of-life care working group of Attorneys General that produced a best practices report in 2004.

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