Approved March 17, 1986
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Robert Frey at
Chairperson

10:00 a.m. on March 4, 1986 in room 514-S of the Capitol.

All members present: Senators Frey, Hoferer, Burke, Feleciano, Gaines, Langworthy, Parrish, Steineger, Talkington, Winter and Yost.

Committee staff present:

Mary Hack, Revisor of Statutes
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

Ron Smith, Kansas Bar Association
Richard C. Hite, Kansas Bar Association
Judy Hollinger, State Department on Aging
Robert Runnels, Jr., Kansas Catholic Conference
Bill Gilfillan, Kansans for Life
Pat Goodson, Right to Life
Jim Clark, Kansas County and District Attorneys Association
Clark Owens, Sedgwick County District Attorney
Jessica Kunen, Appellate Defenders Office

Senate Bill 572 - Uniform rights of the terminally ill act.

The chairman explained this bill was requested by the National Conference of Commissioners on Uniform State Laws.

Ron Smith, Kansas Bar Association, was recognized to introduce Richard C. Hite, National Conference of Commissioners on Uniform State Laws.

Mr. Hite testified in the United States at the present time 87% of the deaths are from chronic disease and until death, it is about 27 months. This legislation was started in 1975, and California was one of the first states to follow suit in 1979. In 1983, 15 states had adopted such an act, and in 1985, 35 states had adopted this. He stated this is convincing evidence of the interest of the public on the subject matter of this act. The uniform law commissioners believe that uniformity is particularly desirable because of the mobile population, and some of the acts in the states at this time have fairly complex provisions. They believe if a uniform act is the same throughout the country it would be easier for doctors to understand the act. In the approach that has been taken, they believe that simplicity is very desirable. They tried to leave the practice of medicine to doctors. They also tried to take the approach, if an error is to be made, the error is made on the side of continuing life. A person is entitled to execute a declaration for the doctors and sign it. Mr. Hite explained the difference in existing Kansas law and the uniform act. A copy of his handout is attached (See Attachment I).

Judy Hollinger, State Department on Aging, testified the department supports the concept of advanced declarations. Because it may be difficult to talk about terminal illness, death and desired medical treatment, this simple document allows individuals to express their desire to die without unnecessary medical intervention. A copy of her testimony is attached (See Attachment II).

Senate Bill 572 continued

Robert Runnels, Jr., Kansas Catholic Conference, testified in opposition to the bill. A copy of his testimony is attached (See Attachment III).

Bill Gilfillan, Kansas for Life, testified they basically concur with the Kansas Catholic Conference. There are some problems they see with this particular legislation. He stated legislative purpose is a little narrowing. It is trying to control death by mandating life preserving technicalities. They have a problem with definitions in the bill concerning life sustaining procedures. They object to withdrawal of nutrition. They also have a problem with terminal condition, they feel it is too vague. Mr. Gilfillan stated the uniform act should permit patients to have the right to request and decline. It is a step forward in enthanasia.

Pat Goodson, Right to Life, testified in opposition to the bill. She stated, when the original natural death act was passed, they warned it is just a foot in the door, and this bill is an attempt to expand the natural death act. They agree with the statements made by Bob Runnels with the Kansas Catholic Conference. She pointed out in Section 1 (e), a corporation or a bank could be involved in that area. There is no need for present law to be changed.

During committee discussion, a committee member inquired of Mr. Runnels if the church accepts the termination of life under any set of circumstances. Mr. Runnels replied, they feel the current statute is acceptable.

Mr. Hite was recognized to respond to remarks that had been made. He explained this act applies only to competent adults. Concerning the definition of terminal condition, if irreversible condition then the act does not apply. Supervising food and hydration is left to the attending physician exactly as it is now in the existing Kansas act. The nature of the death declaration is compared to a will. The patient can talk to the doctor about this will.

The chairman requested Jerry Slaughter, Kansas Medical Society, to provide him information concerning who the attending physician is.

Senate Bill 605 - Appeals by prosecution in criminal cases.

Jim Clark, Kansas County and District Attorneys Association, testified his association had requested the bill be introduced. The bill amends the criminal appeal statute to allow prosecution to appeal to grant a new trial. A copy of his handout, State v. James T. Grimes is attached (See Attachment IV).

Clark Owens, Sedgwick County District Attorney, testified in support of the bill. He pointed out in regard to the case, State v. Grimes, prior to the new code the state would have a right to appeal. When a new criminal code came, that right was taken away. On occasion they feel a situation comes up the judge is substantially wrong in the law, and it is evident the state has to retrial the case. Their record on appeal is successful 60 to 70 percent of the time. They screen their cases very carefully. He said a provision is needed to prevent us from a speedy trial.

Senate Bill 605 continued

Jessica Kunen, Appellate Defenders Office, testified her office is concerned with what this will cost the state. In order for it not to cost the state more, you have to assume the judge will be wrong 51% of the time. Regarding the standard of review, a motion for new trial, she said she could not find one case where the court's decision was overruled. Regarding the State v. Grimes, she said the state made a wrong decision for taking the appeal. She said the state does have discretion in determining appeals.

Committee discussion followed the hearing on the bill.

The meeting adjourned.

Copy of the guest list is attached (See Attachment V).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 3-4-86 10:00 AM

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Bob Runnels	Leawood, KS	Ks Cath. Conf.
Judy Hellinger	Topeka KS	Dept. on Aging
[illegible] Kunz	Topeka, KS	Appellate Def.
KEITH R LANDIS	TOPEKA	CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR KANSAS
Ruth Wilkin	Topeka	AAUW
Clark Owens	WICHITA	DISTRICT ATTORNEY
Jim Clark	Topeka	KCDAA
EARL NEHRING	LAWRENCE	COMMON CAUSE/KS
B Johnson	Topeka	Press
Bill Bueffla	Topeka	Kansas For Life
Richard C Hite	Wichita	Kahrs Nelson - Kansas Bar Assn
Jerry [illegible]	Topeka	KNA
Tom Bell	Topeka	KHA
Marjorie Van Buren	Topeka	OJA

A-V

3-4-86

UNIFORM RIGHTS OF THE TERMINALLY ILL ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

Approved and Recommended for Enactment
in All the States

At its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-FOURTH YEAR
IN MINNEAPOLIS, MINNESOTA
AUGUST 2-9, 1985

With Prefatory Note and Comments

S. Jud.
3/4/86
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UNIFORM RIGHTS OF THE TERMINALLY ILL ACT

The Committee that acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Rights of the Terminally Ill Act was as follows:

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PHILLIP CARROLL, 120 East Fourth Street, Little Rock, AR 72201, Chairman, Executive Committee
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ROBERT C. ROBINSON, 12 Portland Pier, P.O. Box 568, Portland, ME 04112, Chairman, Division D (Member Ex Officio)

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Advisors to Special Committee on Uniform Rights of the Terminally Ill Act

RODNEY N. HOUGHTON, American Bar Association
JOHN J. LOMBARD, JR., American Bar Association, Section of Real Property, Probate & Trust Law

Final, approved copies of this Act are available on 8-inch IBM Displaywriter diskettes, and copies of all Uniform and Model Acts and other printed matter issued by the Conference may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
645 North Michigan Avenue, Suite 510
Chicago, Illinois 60611
(312) 321-9710

UNIFORM RIGHTS OF THE TERMINALLY ILL ACT

PREFATORY NOTE

The Rights of the Terminally Ill Act authorizes an adult person to control decisions regarding administration of life-sustaining treatment by executing a declaration instructing a physician to withhold or withdraw life-sustaining treatment in the event the person is in a terminal condition and is unable to participate in medical treatment decisions. As the preceding sentence indicates, the scope of the Act is narrow. It does not address treatment of persons who have not executed such a declaration; it does not cover treatment of minors; and it does not address treatment decisions by proxy. Its impact is limited to treatment that is merely life prolonging, and to patients whose terminal condition is incurable and/or irreversible, whose death will soon occur, and who are unable to participate in treatment decisions. Beyond its narrow scope, the Act is not intended to affect any existing rights and responsibilities of persons to make medical treatment decisions. The Act merely provides one way by which a terminally-ill patient's desires regarding the use of life-sustaining procedures can be legally implemented.

The purposes of the Act are (1) to present an Act which is simple, effective, and acceptable to persons desiring to execute a declaration and to physicians and health-care facilities whose conduct will be affected, (2) to provide for the effectiveness of a declaration in states other than the state in which it is executed through uniformity of scope and procedure, and (3) to avoid the inconsistency in approach which has characterized the early statutes.

The Act's basic structure and substance are similar to that found in most of the existing legislation. The Act has drawn upon existing legislation in order to avoid further complexity and to permit its effective operation in light of prior enactments. Departures from existing statutes have been made, however, in order to simplify procedures, improve drafting, and clarify language. Selected provisions have been reworked to express more adequately a specific concept (i.e., life-sustaining treatment, terminal condition) or to reflect changes in established procedure (i.e., the qualifications of witnesses). The Act's stylistic and substantive departures from existing legislation were pursued for the purposes of clarity and simplicity.

A-I

UNIFORM RIGHTS OF THE TERMINALLY ILL ACT

SECTION 1. DEFINITIONS.

As used in this [Act], unless the context otherwise requires:

(1) "Attending physician" means the physician who has primary responsibility for the treatment and care of the patient.

(2) "Declaration" means a writing executed in accordance with the requirements of Section 2(a).

(3) "Health-care provider" means a person who is licensed, certified, or otherwise authorized by the law of this State to administer health care in the ordinary course of business or practice of a profession.

(4) "Life-sustaining treatment" means any medical procedure or intervention that, when administered to a qualified patient, will serve only to prolong the process of dying.

(5) "Person" means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(6) "Physician" means an individual [licensed to practice medicine in this State].

(7) "Qualified patient" means a patient [18] or more years of age who has executed a declaration and who has been determined by the attending physician to be in a terminal condition.

(8) "State" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of

A-I

Puerto Rico.

(9) "Terminal condition" means an incurable or irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of the attending physician, result in death within a relatively short time.

COMMENT

The Act's definitions of "life-sustaining treatment" and "terminal condition" are interdependent and must be read together. This has caused drafting problems in many existing acts, and the Act has been drafted to avoid the problems detected in existing legislation.

Most of the "life-sustaining treatment" and "terminal condition" definitions in existing statutes were considered problematical in that they (1) were tautological, defining "terminal condition" with respect to "life-sustaining treatment" and vice versa, and (2) defined terminal condition as requiring "imminent" death "whether or not" or "regardless of" the application of life-sustaining treatment. Strictly speaking, if death is "imminent" even with the full application of life-sustaining treatment, there is little point in having a statute permitting withdrawal of such procedures. The Act's definitions have attempted to avoid these problems.

The "life-sustaining treatment" definition found in many statutes inserts the clause "and when, in the judgment of the attending physician, death will occur whether or not such procedure or intervention is utilized," after the phrase "will serve only to prolong the dying process" found in the Act's provision. Because the Act's life-sustaining treatment definition concerns only those procedures or interventions applied to "qualified patients" (i.e., those who have been determined to be in a terminal condition), and because a terminal condition is defined as "incurable or irreversible" with death resulting "in a relatively short time," the requirement that death be "inevitable" has been satisfied by the presence of "qualified patient" in the life-sustaining treatment definition. Therefore, this additional clause was excluded because it was considered repetitious and possibly confusing.

The Act defines "life-sustaining treatment" in an all-inclusive manner, dealing with those procedures necessary for comfort care or alleviation of pain separately in Section 6(b), where it is provided that such procedures need not be withdrawn or withheld pursuant to a declaration. Most existing statutes incorporate "comfort care" as an exclusion from the definition of life-sustaining treatment. Because many such

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procedures are life-sustaining, however, the Act avoids definitional confusion by treating them in a separate provision that reflects the Act's policy more clearly, and better reflects the fact that comfort care does not involve a fixed group of procedures applicable in all instances.

Subsection (9) of Section 1 is the "terminal condition" definition. The difficulty of trying to express such a condition in precise, accurate, but not unduly restricting language is obvious. A definition must preserve the physicians' professional discretion in making such determinations. Consequently, the Act's definition of terminal condition incorporates not only selected language from various state acts, but also suggestions from medical literature in the field.

The Act employs the term "terminal condition" rather than terminal illness, and it is important that these two different concepts be distinguished. Terminal illness, as generally understood, is both broader and narrower than terminal condition. Terminal illness connotes a disease process that will lead to death; "terminal condition" is not limited to disease. "Terminal illness" also connotes an inevitable process leading to death, but does not contain limitations as to the time period prior to death, or potential for nonreversibility, as does "terminal condition."

The terminal condition definition requires that the condition be "incurable or irreversible." These adjectives were chosen over the similar phrase, "no possibility of recovery," because of possible ambiguity in the term "recovery" (i.e., recovery to "normal" or to some other stage). A number of state statutes now use "incurable" and/or "irreversible," and the terms appear to comport with the criteria applied by physicians in terminal care situations. The phrase "incurable or irreversible" is to be read conjunctively when the circumstances warrant. A condition which is reversible but incurable is not a terminal condition.

Subsection (9) also requires that the condition result in the death of the patient within a "relatively short time ... without the administration of life-sustaining treatment." This requirement differs to some degree from the language employed in most of the statutes. First, the decision that death will occur in a relatively short time is to be made without considering the possibilities of extending life with life-sustaining treatment. The alternative is that required by a number of states--that death be imminent whether or not life-sustaining procedures are applied. The President's Commission for the Study of Ethical Problems in Medicine and Biomedical Research has noted that such a definition severely limits the group of terminally-ill patients able to qualify under these acts. It is precisely because life can be prolonged indefinitely by new medical technology that these acts have come into existence. Though the Act intends to err on the

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side of prolonging life, it should not be made wholly ineffective as to the actual situation it purports to address. The provisions which require that death be imminent regardless of the application of life-sustaining procedures appear to have that effect. Therefore, such provisions have been excluded in the Act.

The terminal condition definition of subsection (9) requires that death result "in a relatively short time." Rejecting the "imminency" language employed in a number of statutes, this alternative was chosen because it provides needed flexibility and reflects the balancing character of the time frame judgment. Though the phrase, "relatively short time," does not eliminate the need for judgment, it focuses the physician's medical judgment and avoids the narrowing implications of the word "imminent."

The "relatively short time" formulation is employed to avoid both the unduly constricting meaning of "imminent" and the artificiality of another alternative--fixed time periods, such as six months, one year, or the like. The circumstances and inevitable variations in disorder and diagnosis make unrealistic a fixed time period. Physicians may be hesitant to make predictions under a fixed time period standard unless the standard of physician judgment is so loose as to be unenforceable. Under the Act's standard, considerations such as the strength of the diagnosis, the type of disorder, and the like can be reflected in the judgment that death will result within a relatively short time, as they are now reflected in judgments physicians must and do make.

The life-sustaining treatment and terminal condition definitions exclude certain types of disorders, such as kidney disease requiring dialysis, and diabetes requiring continued use of insulin. This is accomplished in the requirement that terminal conditions be "irreversible," and that life-sustaining procedures serve "only to prolong the dying process." For purposes of the Act, diabetes treatable with insulin is "reversible," a diabetic person so treatable is not in the "dying process," and insulin is a treatment the benefits of which foreclose it serving "only" to prolong the dying process.

SECTION 2. DECLARATION RELATING TO USE OF LIFE-SUSTAINING TREATMENT.

(a) An individual of sound mind and [18] or more years of age may execute at any time a declaration governing the withholding or withdrawal of life-sustaining treatment. The

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declaration must be signed by the declarant, or another at the declarant's direction, and witnessed by two individuals.

(b) A declaration may, but need not, be in the following form:

DECLARATION

If I should have an incurable or irreversible condition that will cause my death within a relatively short time, and I am no longer able to make decisions regarding my medical treatment, I direct my attending physician, pursuant to the Uniform Rights of the Terminally Ill Act of this State, to withhold or withdraw treatment that only prolongs the process of dying and is not necessary to my comfort or to alleviate pain.

Signed this _____ day of _____, _____.

Signature _____

Address _____

The declarant voluntarily signed this writing in my presence.

Witness _____
Address _____

Witness _____
Address _____

(c) A physician or other health-care provider who is furnished a copy of the declaration shall make it a part of the declarant's medical record and, if unwilling to comply with the declaration, promptly so advise the declarant.

COMMENT

Section 2 sets out the minimal requirements regarding the making and execution of a valid declaration. A "sample" declaration form is offered in this section. The form is not mandatory, as some acts require; it "may, but need not, be" followed. The form provided also is not as elaborate as others. The drafters rejected a more detailed declaration for two

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reasons. First, the form is to serve only as an example of a valid declaration. A more elaborate form may have erroneously implied that a declaration more simply constructed would not be legally sufficient. Second, the sample form's simple structure and specific language attempts to provide notice of exactly what is to be effectuated through these documents to those persons desiring to execute a declaration and the physicians who are to honor it.

The Act's provisions governing witnesses to a declaration have also been simplified. Section 2 provides only that the declaration be signed by the declarant in the presence of two witnesses. The Act does not require witnesses to meet any specific qualifications for two primary reasons. First, the interest in simplicity mandates as uncomplicated a procedure as possible. It is intended that the Act present a viable alternative for those persons interested in participating in their medical treatment decisions in the event of a terminal condition.

Second, the absence of more elaborate witness requirements relieves physicians of the inappropriate and perhaps impossible burden of determining whether the legalities of the witness requirements have been met. Many physicians understandably and rightly would be hesitant to make such decisions and, therefore, the effectiveness of the declaration might be jeopardized. It should be noted, as well, that protection against abuse in these situations is provided by the criminal penalties in Section 9. The attending physicians and other health-care professionals will be able, in most circumstances, to discuss the declaration with the patient and family and any suspicion of duress or wrongdoing can be discovered and handled by established hospital procedures.

Section 2(c) requires that a physician or health-care provider who is given a copy of the declaration record it in the declarant's medical records. This step is critical to the effectuation of the declaration, and the duty applies regardless of the time of receipt. If a copy of the same declaration is already in the record, its rerecording would not be necessary, but its receipt should be noted as evidence of its continued force. Section 2(c) is not duplicative of Section 5 which requires recording the terms of the declaration (or the document itself, when available, in the event of telephonic communication to the physician by another physician, for example) at the time the physician makes a determination of terminal condition. It was deemed important that knowledge of the declaration and its continued force be specifically noted at this critical juncture.

Section 2(c) imposes a duty on the physician or other health-care provider to inform the declarant of his or her unwillingness to comply with the provisions of the declaration. This will provide notice to the declarant that certain terms may be deemed medically unreasonable (Section 10(f)), or that a

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different provider who is willing to carry out the Act (Section 7) should be informed of the declaration.

SECTION 3. WHEN DECLARATION OPERATIVE.

A declaration becomes operative when (i) it is communicated to the attending physician and (ii) the declarant is determined by the attending physician to be in a terminal condition and no longer able to make decisions regarding administration of life-sustaining treatment. When the declaration becomes operative, the attending physician and other health-care providers shall act in accordance with its provisions or comply with the transfer provisions of Section 7.

COMMENT

Section 3 established the preconditions to the declaration becoming operative. Once operative, Section 3 provides that the attending physician shall act in accordance with the provisions of the declaration or transfer care of the patient under Section 7. This provision is not intended to eliminate the physician's need to evaluate particular requests in terms of reasonable medical practice under Section 10(f), nor to relieve the physician from carrying out the declaration except for any specific unreasonable or unlawful request in the declaration. Transfer of the patient under Section 7 is to occur if the physician, for reasons of conscience, for example, is unwilling to carry out the Act or to follow medically reasonable requests in the declaration.

SECTION 4. REVOCATION OF DECLARATION.

(a) A declaration may be revoked at any time and in any manner by the declarant, without regard to the declarant's mental or physical condition. A revocation is effective upon communication to the attending physician or other health-care provider by the declarant or a witness to the revocation.

(b) The attending physician or other health-care provider shall make the revocation a part of the declarant's medical

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record.

COMMENT

Section 4 provides for revocation of a declaration and is modeled after North Carolina's similar provision. Virtually every other statute sets out specific examples of how a declaration can be revoked -- by physical destruction, by a signed, dated writing, or by a verbal expression of revocation. A provision that freely allowed revocation and avoided procedural complications was desired. The simple language of Section 4 appears to meet these qualifications. It should be noted that the revocation is, of course, not effective until communicated to the attending physician or another health-care provider working under a physician's guidance, such as nursing facility or hospice staff. The Act, unlike many statutes, also does not explicitly require that a person relaying the revocation be acting on the declarant's behalf. Such a requirement could impose an unreasonable burden on the attending physician. The communication is assumed to be in good faith, and the physician may rely on it.

In employing a general revocation provision, it was intended to permit revocation by the broadest range of means. Therefore, for example, it is intended that a revocation can be effected in writing, orally, by physical defacement or destruction of a declaration, and by physical sign communicating intention to revoke.

SECTION 5. RECORDING DETERMINATION OF TERMINAL CONDITION AND DECLARATION.

Upon determining that the declarant is in a terminal condition, the attending physician who knows of a declaration shall record the determination and the terms of the declaration in the declarant's medical record.

COMMENT

Section 5 of the Act requires that an attending physician record the determination that the patient is in a terminal condition in the patient's medical records. The section provides that an attending physician must know of the declaration's existence. It is anticipated that knowledge may in some instances occur through oral communication between physicians. If the attending physician determines that the patient is in a terminal condition, and has been notified of the declaration, the physician is to make the determination of terminal condition, as

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defined in Section 1(8), part of the patient's medical records. There is no explicit requirement that the physician inform the patient of the terminal condition. That decision is to be left to the physician's professional discretion under existing standards of care. The Act also does not require, as do many statutes, that a physician other than the attending physician concur in the terminal condition determination. It appears to be the established practice of most physicians to request a second opinion or, more often, review by a panel or committee established as a matter of hospital procedure, and the Act is not intended to discourage such a practice. Requiring it, however, would almost inevitably freeze in a single process or set of processes for review in this evolving area of medicine. Because existing policies and regulations typically address the review issue, requiring a specific form of review in the Act was viewed as an unnecessary regulation of normal hospital procedures. Moreover, in smaller or rural health facilities a second qualified physician or review mechanism may not be readily available to confirm the attending physician's determination.

The physician must record the terms of the declaration in the medical record so that its specific language or any special provisions are known at later stages of treatment. It is assumed that "terms" of the declaration will be a copy of the declaration itself in most instances, although cases of an emergency character may arise, for example, in which the contents of a declaration can be reliably conveyed, and where obtaining a copy of the declaration prior to making decisions governed by it will be impracticable. In such cases, the terms of the declaration will suffice for recording purposes under Section 5.

SECTION 6. TREATMENT OF QUALIFIED PATIENT.

(a) A qualified patient may make decisions regarding life-sustaining treatment as long as the patient is able to do so.

(b) This [Act] does not affect the responsibility of the attending physician or other health-care provider to provide treatment, including nutrition and hydration, for a patient's comfort care or alleviation of pain.

(c) Unless the declaration otherwise provides, the declaration of a qualified patient known to the attending

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physician to be pregnant must not be given effect as long as it is probable that the fetus could develop to the point of live birth with continued application of life-sustaining treatment.

COMMENT

Section 6(a) recognizes the right of patients who have made a declaration and are determined to be in a terminal condition to make decisions regarding use of life-sustaining procedures. Until unable to do so, such patients have the right to make such decisions independently of the terms of the declaration. In affording patients a "right to make decisions regarding use of life-sustaining procedures," the Act is intended to reflect existing law pertaining to this issue. As Sections 10(e) and (f) indicate, qualifications on a patient's right to force the carrying out of those decisions in a manner contrary to law or accepted standards of medical practice, for example, are not intended to be overridden.

In Section 6(b) the Act uses the term "comfort care" in defining procedures that may be applied notwithstanding a declaration instructing withdrawal or withholding of life-sustaining treatment. The purpose for permitting continuation of life-sustaining treatment deemed necessary for comfort care or alleviation of pain is to allow the physician to take appropriate steps to insure comfort and freedom from pain, as dictated by reasonable medical standards. Many existing statutes employ the term "comfort care" in connection with the alleviation of pain, and the Act follows this example. Although the phrase "to alleviate pain" arguably is subsumed within the term comform care, the additional specificity was considered helpful for both the doctor and layperson.

Section 6(b) does not set out a separate rule governing the provision of nutrition and hydration. Instead, each is subject to the same considerations of necessity for comfort care and alleviation of pain as are all other forms of life-sustaining treatment. If nutrition and hydration are not necessary for comfort care or alleviation of pain, they may be withdrawn. This approach was deemed preferable to the approach in a few existing statutes, which treat nutrition and hydration as comfort care in all cases, regardless of circumstances, and exclude comfort care from the life-sustaining treatment definition.

It is debatable whether physicians or other professionals perceive the providing of nourishment through intravenous feeding apparatus or nasogastric tubes as comfort care in all cases or whether such procedures at times merely prolong the dying process. Whether procedures to provide nourishment should be considered life-sustaining treatment or comfort care appears to depend on the factual circumstances of each case

and, therefore, such decisions should be left to the physician, exercising reasonable medical judgment. Declarants may, however, specifically express their views regarding continuation or noncontinuation of such procedures in the declaration, and those views will control.

Section 6(c) addresses the problem of a qualified patient who is pregnant. The states which address this issue typically require that the declaration be given no force or effect during the pregnancy. Because this requirement inadvertantly may do more harm than good to the fetus, Section 6(c) provides a more suitable, if more complicated, standard. It is possible to hypothesize a situation in which life-sustaining treatment, such as medication, may prove possibly fatal to a fetus which is at or near the point of viability outside the womb. In such cases, the Act's provision would permit the life-sustaining treatment to be withdrawn or withheld as appropriate in order best to assure survival of the fetus. Also, for example, if the qualified patient is only a few weeks pregnant and the physician, pursuant to reasonable medical judgment, determines that it is not probable that the fetus could develop to a point of viability outside the womb even with application of life-sustaining treatment, such treatment may also be withheld or withdrawn. Thus, the pregnancy provision attempts to honor the terminally-ill patient's right to refuse life-sustaining treatment without jeopardizing in any respect the likelihood of life for the fetus. The declaration can, however, specifically address this issue, and should control the treatment provided, whether it calls for continuation of life-sustaining treatment in all cases, or in none.

SECTION 7. TRANSFER OF PATIENTS.

An attending physician or other health-care provider who is unwilling to comply with this [Act] shall as promptly as practicable take all reasonable steps to transfer care of the declarant to another physician or health-care provider.

COMMENT

Section 7 is designed to address situations in which a physician or health-care provider is unwilling to make and record a determination of terminal condition, or to respect the medically reasonable decisions of the patient regarding withholding or withdrawal of life-sustaining procedures, due to personal convictions or policies unrelated to medical judgment called for under the Act. In such instances, the physician or health-care provider must promptly take all reasonable steps to

transfer the patient to another physician or health-care provider who will comply with the applicable provisions of the Act.

SECTION 8. IMMUNITIES.

(a) In the absence of knowledge of the revocation of a declaration, a person is not subject to civil or criminal liability or discipline for unprofessional conduct for carrying out the declaration pursuant to the requirements of this [Act].

(b) A physician or other health-care provider, whose actions under this [Act] are in accord with reasonable medical standards, is not subject to criminal or civil liability or discipline for unprofessional conduct with respect to those actions.

COMMENT

Section 8 provides immunities for persons acting pursuant to the declaration and in accordance with the Act. Immunities are extended in Section 8(a) to physicians as well as persons operating under the physician's direction or with the physician's authorization, and to facilities in which the withholding or withdrawal of life-sustaining procedures occurs. Section 8(b) serves both to immunize physicians from liability as long as reasonable medical judgment is exercised, and to impose "reasonable medical standards" as the criterion that should govern all of the specific medical decisions called for throughout the Act. Section 8(b), in conjunction with Section 10(f), therefore, avoids the need to restate the medical standard in each section of the Act requiring a medical judgment.

SECTION 9. PENALTIES.

(a) A physician or other health-care provider who willfully fails to transfer in accordance with Section 7 is guilty of [a class _____ misdemeanor].

(b) A physician who willfully fails to record the determination of terminal condition in accordance with Section 5

is guilty of [a class _____ misdemeanor].

(c) An individual who willfully conceals, cancels, defaces, or obliterates the declaration of another without the declarant's consent or who falsifies or forges a revocation of the declaration of another is guilty of [a class _____ misdemeanor].

(d) An individual who falsifies or forges the declaration of another, or willfully conceals or withholds personal knowledge of a revocation as provided in Section 4, is guilty of [a class _____ misdemeanor].

(e) A person who requires or prohibits the execution of a declaration as a condition for being insured for, or receiving, health-care services is guilty of [a class _____ misdemeanor].

(f) A person who coerces or fraudulently induces another to execute a declaration under this [Act] is guilty of [a class _____ misdemeanor].

(g) The sanctions provided in this section do not displace any sanction applicable under other law.

COMMENT

Section 9 provides criminal penalties for specific conduct that violates the Act. Subsections (a) and (b) provide that a physician's failure to transfer a patient or record the diagnosis of terminal condition constitutes a misdemeanor. Subsection (c) makes certain willful actions which could result in the unauthorized prolongation of life a misdemeanor. Subsection (d) governs acts which are intended to cause the unauthorized withholding or withdrawal of life-sustaining treatment, thereby advancing death. Subsections (e) and (f) concern situations that may be coercive, and therefore are against public policy.

Some of the criminal penalties -- particularly subsection (d) -- depart significantly from most existing statutes. Most statutes provide penalties for intentional conduct that actually causes the death of a declarant, and define such

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conduct as murder or a high degree felony. The Act does not take this approach. Assuming that such conduct will already be covered by a state's criminal statutes, the Act only addresses the situations in which the actor willfully falsifies or forges the declaration of another or conceals or withholds knowledge of revocation. To be criminally sanctioned as a misdemeanor under the Act the circumscribed conduct need not cause the death of a declarant. The approach taken by most states, that of providing a felony penalty for those acts that actually caused death, was considered unnecessary, as existing criminal law will also apply pursuant to Section 9(g). A specific penalty for the conduct described in Section 9(d), however, was deemed appropriate, as existing criminal codes may not adequately address it.

SECTION 10. MISCELLANEOUS PROVISIONS.

(a) Death resulting from the withholding or withdrawal of life-sustaining treatment pursuant to a declaration and in accordance with this [Act] does not constitute, for any purpose, a suicide or homicide.

(b) The making of a declaration pursuant to Section 2 does not affect in any manner the sale, procurement, or issuance of any policy of life insurance or annuity, nor does it affect, impair, or modify the terms of an existing policy of life insurance or annuity. A policy of life insurance or annuity is not legally impaired or invalidated in any manner by the withholding or withdrawal of life-sustaining treatment from an insured qualified patient, notwithstanding any term to the contrary.

(c) A person may not prohibit or require the execution of a declaration as a condition for being insured for, or receiving, health-care services.

(d) This [Act] creates no presumption concerning the intention of an individual who has revoked or has not executed a

declaration with respect to the use, withholding, or withdrawal of life-sustaining treatment in the event of a terminal condition.

(e) This [Act] does not affect the right of a patient to make decisions regarding use of life-sustaining treatment, so long as the patient is able to do so, or impair or supersede any right or responsibility that a person has to effect the withholding or withdrawal of medical care.

(f) This [Act] does not require any physician or other health-care provider to take any action contrary to reasonable medical standards.

(g) This [Act] does not condone, authorize, or approve mercy-killing or euthanasia.

SECTION 11. WHEN HEALTH-CARE PROVIDER MAY PRESUME VALIDITY OF DECLARATION.

In the absence of knowledge to the contrary, a physician or other health-care provider may presume that a declaration complies with this [Act] and is valid.

SECTION 12. RECOGNITION OF DECLARATION EXECUTED IN ANOTHER STATE.

A declaration executed in another state in compliance with the law of that state or of this State is validly executed for purposes of this [Act].

COMMENT

Section 12 provides that a declaration executed in another state, which meets the execution requirements of that other state or the enacting state (adult, two witnesses, voluntary), is to be

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treated as validly executed in the enacting state, but its operation in the enacting state shall be subject to the substantive policies in the enacting state's law.

SECTION 13. EFFECT OF PREVIOUS DECLARATION.

An instrument executed before the effective date of this [Act] which substantially complies with Section 2(a) must be given effect pursuant to the provisions of this [Act].

SECTION 14. UNIFORMITY OF CONSTRUCTION AND APPLICATION.

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

SECTION 15. SHORT TITLE.

This [Act] may be cited as the Uniform Rights of the Terminally Ill Act.

SECTION 16. SEVERABILITY.

If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 17. EFFECTIVE DATE.

This [Act] takes effect on _____.

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SECTION 18. REPEAL.

The following acts and parts of acts are repealed:

(1)

(2)

(3)

3-4-86

TESTIMONY ON SB-572
UNIFORM RIGHTS OF THE TERMINALLY ILL ACT
KANSAS DEPARTMENT ON AGING
MARCH 4, 1986

Bill Brief: Enacts the Uniform Rights of the Terminally Ill Act.

Bill Provisions: Allows an individual 18 years of age or older to execute a declaration governing the withholding or withdrawing of life-sustaining treatment. The declaration must be witnessed by two individuals.

The bill outlines a sample declaration, conditions necessary for the declaration to become operative, and how revocation may be made. Immunity from civil or criminal liability or discipline for unprofessional conduct is also outlined.

Six sub-sections of Class A misdemeanors have been proposed, including coercion or fraudulent inducement to execute a declarations; falsification or forgery of a declaration; and willful concealment, cancellation, or defacement of another person's declaration.

Declarations executed in another state in compliance with the laws of Kansas or the other state will be considered validly executed.

Nutrition and hydration have been specifically mentioned as possible treatment for a patient's comfort care or alleviation of pain.

Background: In 1979 the Kansas Legislature enacted the Natural Death Act. This law gave legal recognition to an individual's advance declaration directing the withholding of life-sustaining medical measures in the event of terminal illness or injury.

Testimony:

As a replacement for the Natural Death Act, SB-572 would expand and clarify provisions of current statutes.

The Department on Aging supports the concept of advanced declarations. Because it may be difficult to talk about terminal illness, death, and desired medical treatment, this simple document allows individuals to express their desire to die without unnecessary medical intervention.

Older Kansans continue to request information about the so-called "living will;" i.e., its validity in Kansas and other states, procedures to execute a valid document, and copies of the declaration outlined in the Natural Death Act.

S. Jud.
3/4/86
A-II

The provisions outlined in SB-572 would answer some of the questions asked by the senior citizens. While no legislation can address every issue associated with advance declarations, simplicity and uniformity is a step in the right direction.

Recommendation:

The Department on Aging encourages favorable action on SB-572. Advanced declarations perform a valuable function: providing written evidence of the individual's wishes to die without unnecessary medical intervention.

JH:bms

3-4-86

TESTIMONY - S.B. 572

SENATE JUDICIARY COMMITTEE

Tuesday, March 4, 1986 - 10:00 a.m.

KANSAS CATHOLIC CONFERENCE
BY: Robert Runnels, Jr., Executive Director

Mr. Chairman, members of the Senate Judiciary Committee, my name is Bob Runnels, I am Executive Director of the Kansas Catholic Conference and speak under the authority of the Roman Catholic Bishops of Kansas.

I appreciate the opportunity to be with you today and give testimony in opposition to S. B. 572.

The following will outline basic flaws in the proposed model act.

> "If I should have an incurable or irreversible condition that will cause my death within a relatively short time, and if I am no longer able to make decisions regarding my medical treatment, I direct my attending physician, pursuant to the (Uniform Rights of the Terminally Ill Act), to withhold or withdraw treatment that only prolongs the dying process and is not necessary to my comfort or to alleviate pain."

The apparent simplicity of this statement is deceptive. This simple declaration triggers the requirements of the uniform act, which provides that: if a patient is declared to be in a "terminal condition" and is "no longer able to make decisions" regarding his or her medical treatment, and he has signed a "living will," "life prolonging treatment" will not be provided to the patient.

Each of these phrases, as defined in the uniform act, have meanings which go far beyond the intentions of the average patient. There are 12 such areas of concern.

1. "Terminal Condition" is defined as an "incurable or irreversible condition that, without the administration of life sustaining treatment, will, in the opinion of the attending physician, result in death within a relatively short time."

This definition has unexpected consequences for patients. Most signers of living wills are concerned about receiving life prolonging treatment even though they will die with or without this treatment in a relatively short time. They want to refuse futile treatments which may be costly or painful when they are going to die anyway.

S. Jud.
3/4/86
A-III

But in the uniform act, a patient is terminal if he will die without life sustaining treatment. A patient with diabetes has an "incurable" condition and would die within a relatively short time without insulin (a life sustaining treatment). If a Diabetic declarant becomes incompetent, insulin may be withdrawn under the uniform act.

2. Most patients regard "life sustaining treatment" as involving the use of advanced technological equipment. An image is conjured of the sick person attached to myriad tubes and machines.

Under the uniform act, "life sustaining treatment" also means providing food and water - even spoon feeding. So once an incurable condition is diagnosed, and the living will is put into effect, food and water can be withdrawn, assuring death in a relatively short time. Rather than allowing a natural death to occur as a result of the terminal illness, the patient suffers an intentional death brought on by the ommission of food and water.

3. Again, most patients think "a relatively short time" mean hours or days before inevitable death. But under the uniform act "a relatively short time" is not limited to the last stages of a terminal illness. It may vary from doctor to doctor and could mean a period of weeks, months or longer.

4. Most patients would perceive the "attending physician" as the family doctor. But under the uniform act, the "attending physician" is defined as the physician responsible for the care of the patient at any given moment. So since a patient may have several attending physicians during the day, its possible that the doctor who puts the living will into effect could be a total stranger.

5. Further there is no requirement that a second physician confirm the diagnosis of terminal condition or the patient's inability to make decisions.

6. In addition there is no objective criteria for determining when a patient is no longer able to make a decision. Most signers of living wills probably visualize being in a comatose state when this decision is made. But under the uniform act such judgment might be made based on an assumption of senility for persons over a certain age.

7. Chances are the patient probably expects to be told of the diagnosis of a terminal condition, so that he can revoke the will if he no longer wants to put it into effect. But under the uniform act, there is no requirement that the patient be informed of the diagnosis. Moreover, the doctor is permitted to execute the will, withholding food and water from the patient without the patient's knowledge.

8. Other essential safeguards are missing. When a person draws up a will disposing of property, there are substantial requirements to insure his wishes are carried out and to protect him from fraud and undo influence. Even in view of the utter finality of withdrawing life sustaining treatment, the uniform act provides no similar safeguards.

When the drafting committee was asked if a declaration signed under pressure would be invalid, the response was that "it would not be ineffective."

9. The physician isn't even required to see proof that the patient has signed a living will prior to withdrawing food and water from him. A telephone call from someone conveying the terms of the declaration is sufficient.

10. And anyone may be a witness to the declaration - family members, beneficiaries, even the people burdened with providing medical care.

11. Penalties are defined for the doctor who fails to honor the execution of the living will. But no penalties are defined for failing to honor the revoking of that will.

12. Finally, most living will laws provide a pregnancy exclusion which invalidates the declaration if the patient is pregnant. But the uniform act says that the pregnancy exclusion shall not be effective if the declarant provides otherwise. Thus it allows the patient to end the life of the developing baby along with her own.

Besides that, before the pregnancy exclusion is valid, the doctor must determine that it is "probable" that the baby could develop to the point of live birth with continued life sustaining treatment. So a woman who may never have chosen abortion, may have her life sustaining treatment withdrawn or withheld -- thus ending the life of her unborn child, if in the opinion of an attending physician it isn't "probable" that the child will be born alive.

The uniform act is therefore shrouded in deception. Jim Bopp, attorney for National Right to Life, said of it: "it is not assuring death for those that will soon die that is behind the uniform act, but causing death for those who will not die soon enough."

Because of the natural revulsion of people to the thought of having their life artificially prolonged through advanced technology, there is a general acceptance of living wills in our society.

Consequently, our Conference sees serious need for education in the following 2 areas: first, regarding the unsuspected dangers of living wills in general. For example, Dr. Bebak, a

member of our Human Life Commission, has shared with our Conference that when he explains to a patient that according to the living will they have signed, if they stop breathing during surgery, he can't revive them. The usual reaction is total shock. He says they immediately tear it up. Second, in regard to the confusion over what in fact constitutes extraordinary means. Is an IV used to administer nutrition and hydration extraordinary? Certainly not by today's standards.

In conclusion, then, the Kansas Catholic Conference respectfully recommends that S.B. 572 not be passed out of the Senate Judiciary Committee.

1. SPECIFIC PROBLEMS WITH THE UNIFORM ACT

Morally significant ways in which this Act differs from some previous "living will" legislation:

a) Scope of the Act: Includes not only patients who will inevitably die in a short time, but also patients who will die soon without treatment but could live a long time with some easily provided form of treatment or care. That is, it includes not only the "terminal" patient but also the patient who is irreversibly debilitated in some way. This renders more problematic the broad discretion established by the Act regarding means to sustain life.

b) Nutrition and Hydration: The statute suggests these may be used for comfort, but grants a broad power to remove them as means to sustain life. This problem is aggravated by the broad scope of the Act itself, and by the failure to alert a patient signing a document as to how broad is the power he/she is giving a physician.

c) Pregnancy: The Act explicitly gives a pregnant woman the right to refuse life-saving treatment for her child whenever she herself fulfills the definitions of the Act. The State is placed in the position of ratifying and facilitating a right to end the life of the unborn child. Legal analysis suggests that no constitutional provision requires the State to facilitate destruction of the unborn in this manner.

2. GENERAL PROBLEMS WITH "LIVING WILL" APPROACH

In addition to these specific problems the Uniform Act again raises the questions prompted by "living will" legislation generally:

a) While presented as advancing patient autonomy and "rights of the terminally ill" generally, it facilitates exercise only of the right to refuse treatment, specifically of treatment which can prolong life. Is there still too strong a link to the agenda of the "right-to-die" movement?

b) The Act treats the signing of a "form-letter" type of advance declaration as equivalent to informed consent, even if the declaration was signed years in advance and without any knowledge of the patient's future condition and treatment options; it renders this declaration legally binding on the physician and family. Does this procedure really provide for an informed consent which deserves to be given this kind of force?

3-4-86

4. That this act occurred on or about the 5th day of August, 1979, in Douglas County, Kansas." (See PIK Crim. 56.-31, 1979 Supp.)

"No. 11. A person is criminally responsible for the conduct of another when, either before or during the commission of a crime, and with the intent to promote or assist in the commission of the crime, he intentionally aids or advises the other to commit the crime." (See PIK Crim. 5405, 1979 Supp.).

"No. 12. A person who intentionally aids another to commit a crime is responsible for any other crime committed in pursuance of the intended crime, if the other crime was reasonably foreseeable." (See PIK Crim. 54.06, 1979 Supp.)

"No. 14. Voluntary intoxication is not a defense to a criminal charge, but when a particular intent or other state of mind is a necessary element of the offense charged, intoxication may be taken into consideration in determining whether the accused was capable of forming the necessary intent or state of mind." (See PIK Crim. 54.12.)

"Aggravated Robbery is not a specific intent crime, nor is felony murder based upon Aggravated Robbery."

Defendant contends that the jury may have found him guilty of aggravated robbery as an aider and abettor; that aiding and abetting requires a specific intent; that this was not specifically pointed out to the jury in Instruction No. 14; and that the net result was to remove the defense of voluntary intoxication from the jury's consideration. We do not agree.

[2] Instruction No. 11 specifically sets forth the intent required of one who aids or abets. Instruction No. 14 says that "when a particular intent ... is a necessary element ... intoxication may be taken into consideration ...." Defendant relies upon *State v. McDaniel & Owens*, 228 Kan. 172, 179, 612 P.2d 1231 (1980), but that reliance is misplaced. We reversed the judgment of conviction as to Owens because in that case the evidence was sufficient to support his conviction *only* as an aider and abettor, and the trial court did not give PIK Crim. 54.12, the instruction which was given to the jury as Instruction No. 14 in the case now before us. Further, the evidence here was sufficient to support Knoxsah's conviction of aggravated robbery either as a principal or as an aider and abettor.

The instructions given in this case were not incomplete, misleading, or otherwise defective. We find no error.

The judgment is affirmed.

229 Kan. 143

STATE of Kansas, Appellant,

v.

James T. GRIMES, Appellee.

No. 52164.

Supreme Court of Kansas.

Jan. 17, 1981.

In criminal prosecution for aggravated battery, the Rice District Court, C. Phillip Aldrich, J., granted defendant's motion for new trial, and State appealed. The Supreme Court sustained defendant's motion for involuntary dismissal of appeal and remanded. Trial court then sustained defendant's motion for discharge, and State appealed. The Supreme Court, Miller, J., held that: (1) State's earlier appeal from order granting new trial was not upon a question reserved and was therefore unauthorized; (2) 180-day period within which State must bring a defendant to trial continued to run during first unauthorized appeal; and (3) defendant was not chargeable with 30-day extension of time which he sought and was granted in which to file brief in appellate court during earlier appeal.

Affirmed.

S. ct.
3/4/86
A-IV

McFarland, J., dissented and filed an opinion in which Herd, J., joined.

1. Criminal Law ⇐1024(7)

Order granting new trial in criminal prosecution does not provide basis for interlocutory appeal as of right upon question reserved by prosecution. K.S.A. 22–3602(b).

2. Criminal Law ⇐577.12(1)

Time during which an appeal by prosecution is pending does not count, for purpose of determining whether defendant is entitled to discharge for failure to be brought to trial within 180 days, only while state takes interlocutory appeal in limited circumstances. K.S.A. 22–3402(2), 22–3604.

3. Criminal Law ⇐577.12(1)

Period of 180 days within which defendant in criminal prosecution must be brought to trial continued to run during unauthorized interlocutory appeal by state of trial court's granting of motion for new trial. K.S.A. 22–3402(2), 22–3604.

4. Criminal Law ⇐577.10(8)

Where State took unauthorized interlocutory appeal from trial court's granting of new trial in criminal prosecution, and 180-day period within which defendant had to be brought to trial continued to run during appeal, 30-day continuance granted defendant in appellate court did not delay trial, and could not be charged against defendant in computation of 180-day period. K.S.A. 22–3402(2).

Syllabus by the Court

1. When a question in a case has been decided once on appeal and is final that decision becomes the law of the case.

2. Questions reserved under K.S.A. 1980 Supp. 22–3602(*b*)(3) may be appealed by the State only when the case has been terminated.

3. Inherent in appeals as a matter of right by the prosecution under K.S.A. 1980 Supp. 22–3602(*b*) is the element that the trial court has entered final judgment in the case.

4. If motion for new trial is granted, there is no appeal by either State or defendant since the order granting a new trial is not a final order.

5. K.S.A. 1980 Supp. 22–3602(*b*)(3) does not authorize interlocutory appeals by the State; an order granting a new trial may not provide the basis for an interlocutory appeal as of right upon a "question reserved."

6. K.S.A. 22–3604 is intended to apply, and does apply, only to interlocutory appeals pursuant to K.S.A. 1980 Supp. 22–3603.

7. The time that an unauthorized interlocutory appeal by the State is pending in the Supreme Court, including extensions of time secured by the defendant in order to respond in that matter, does not delay trial of the accused in the district court, and such time should not be charged against the accused in computing the 90 and 180-day time periods fixed by K.S.A. 1980 Supp. 22–3402.

James G. Kahler, County Atty., argued the cause, and Robert T. Stephan, Atty. Gen., and Mark A. Hannah, legal intern, were with him on the brief for the appellant.

A. Jack Focht, of Smith, Shay, Farmer & Wetta, Wichita, argued the cause and was on the brief for the appellee.

MILLER, Justice:

The State appeals from an order of the Rice district court discharging the defendant in this criminal case, James T. Grimes, due to the State's failure to comply with the Kansas speedy trial statute, K.S.A. 1980 Supp. 22–3402. A chronological statement of the facts is necessary to an understanding of the issues.

Dr. James T. Grimes discovered his wife, Gloria, sitting with Kevin McClure in McClure's car in Lyons on November 17, 1978. Grimes suspected that his wife was romantically involved with McClure. Grimes was armed; he ran to the window

A-IV

of McClure's car and confronted him; a shot was fired; McClure was slightly injured. Grimes was then charged with aggravated battery of McClure and with aggravated assault of Gloria. On July 25, 1979, a jury found Grimes guilty of aggravated battery but acquitted him of aggravated assault. Defendant filed a motion for a new trial, alleging among other things that the trial court erred in its jury instruction on presumption of intent, which followed PIK Crim. 54.01. He contended that the instruction was unconstitutional under the rationale of the recently announced decision of the United States Supreme Court in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). The trial judge granted the motion for new trial on that ground on September 14, 1979.

The State then filed its notice of appeal to this court from the order "made on September 14, 1979, granting Defendant a new trial." After the State's brief was filed, Grimes was granted an extension of 30 days in which to file his brief. Within that time he filed a motion for involuntary dismissal, contending that K.S.A. 1978 Supp. 22-3602(*b*) does not authorize an appeal by the State upon the granting of a new trial. The State responded, alleging that the State was challenging the propriety of the order granting a new trial as a "question reserved" under K.S.A. 1978 Supp. 22-3602(*b*)(3). On January 25, 1980, we summarily sustained defendant's motion and dismissed the appeal.

Grimes, on March 26, 1980, filed a motion in the trial court alleging that the State's failure to bring him to trial within 180 days after a new trial was granted was in violation of K.S.A. 1980 Supp. 22-3402. The trial court sustained that motion on March 31, 1980, and discharged the defendant; the State appeals, raising three issues:

(1) that its earlier appeal from the order granting a new trial qualified as a "question reserved" under K.S.A. 1979 Supp. 22-3602(*b*)(3).

(2) that the earlier appeal was "pending" and pursuant to K.S.A. 22-3604(2) the time that proceeding was pending should not be counted for the purpose of computing the 180-day period fixed by K.S.A. 1979 Supp. 22-3402.

(3) that the defendant should be charged with the 30-day extension of time which he sought and was granted in which to file his brief in this court during the earlier appeal.

The four sections of the Kansas Statutes Annotated which are involved in this case were all enacted, substantially in their present form, when our code of criminal procedure was revised in 1970. See Laws of Kansas, 1970, chapter 129, §§ 22-3402, 22-3602, 22-3606, and 22-3604. The first three sections have since been amended, but the substance of the 1970 enactments remain. Throughout the remainder of this opinion we will cite the first three sections as they now appear in the 1980 supplement, since the provisions as contained therein were applicable throughout this proceeding. The parts of these statutes applicable here are as follows:

K.S.A. 1980 Supp. 22-3402(2):

"If any person charged with a crime and held to answer on an appearance bond shall not be brought to trial within one hundred eighty (180) days after arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged, unless the delay shall happen as a result of the application or fault of the defendant . . . ."

K.S.A. 1980 Supp. 22-3602(*b*):

"Appeals to the supreme court may be taken by the prosecution from cases before a district judge or associate district judge as a matter of right in the following cases, and no others:

"(1) From an order dismissing a complaint, information or indictment;

"(2) From an order arresting judgment;

"(3) Upon a question reserved by the prosecution."

K.S.A. 1980 Supp. 22-3603:

"When a judge of the district court, prior to the commencement of trial of a

A-IV

criminal action, makes an order quashing a warrant or a search warrant, suppressing evidence or suppressing a confession or admission an appeal may be taken by the prosecution from such order if notice of appeal is filed within ten (10) days after entry of the order. Further proceedings in the trial court shall be stayed pending determination of the appeal."

K.S.A. 22-3604:

"(1) A defendant shall not be held in jail nor subject to an appearance bond during the pendency of an appeal by the prosecution.

"(2) The time during which an appeal by the prosecution is pending shall not be counted for the purpose of determining whether a defendant is entitled to discharge under section 22-3402 of this code."

The first issue is whether the State's attempted appeal from the order of September 14, 1979, granting the defendant a new trial, qualified as a "question reserved" under K.S.A. 1980 Supp. 22-3602(*b*)(3). Since that was the only issue argued in the motion to dismiss, the grant of that motion should resolve the issue. As we said in *State v. Hutchison*, 228 Kan. 279, 285, 615 P.2d 138 (1980):

"When a question in a case has been decided once on appeal and is final that decision becomes the law of the case."

However, since we did not write a formal opinion upon our dismissal of the earlier appeal, we wish to state our reasons for that dismissal. When the State filed its notice of appeal in September of 1979, the case was pending. A new trial had been ordered. The appeal was interlocutory, one taken between the commencement and termination of the action in the trial court. The order did not terminate the case; it directed that a *trial* be held. The legislature provided for interlocutory appeals by the State by K.S.A. 1980 Supp. 22-3603. This appeal, however, did not fit within the confines of that statute; the trial court made no order quashing a warrant or search warrant, no order suppressing evidence or a confession or admission. Thus the attempted appeal was not one authorized by 3603.

The appellant wants us to hold that an order of a trial court granting a new trial may form the basis for an appeal "upon a question reserved by the prosecution" under K.S.A. 1980 Supp. 22-3602(*b*)(3). To do so would invite a plethora of interlocutory appeals by the prosecution. If orders granting new trials are appealable as a matter of right as questions reserved, then every ruling adverse to the prosecution, made by the trial court prior to final disposition of the case, could become the subject of appeal by the prosecution! Conceivably the State could drag the case on for years without a trial.

K.S.A. 1980 Supp. 22-3602(*b*)(1) and (2) provide for appeals by the State when the trial court has terminated the case (1) by dismissing the charging document—complaint, information or indictment; or (2) by entering an order arresting judgment. An order arresting judgment requires a finding that "the complaint, information or indictment does not charge a crime" or that "the court was without jurisdiction of the crime charged." See K.S.A. 22-3502. By dismissing or by arresting judgment, the trial court has ended the case.

We have held, since the 1970 code was enacted, that questions reserved under K.S.A. 1980 Supp. 22-3602(*b*)(3) may be appealed only when the case has been terminated. In *State v. Puckett*, 227 Kan. 911, 610 P.2d 637 (1980), the State sought to appeal as a question reserved the propriety of an order of the trial court allowing the defendant to withdraw his pleas of nolo contendere. We said:

"Alternatively, the State contends the appeal herein is proper, pursuant to K.S.A. 1979 Supp. 22-3602(*b*), as a question reserved.... Inherent in appeals as a matter of right by the prosecution is the element that the trial court has entered final judgment in the case. An appeal on a question reserved is permitted to provide an answer which will aid in the correct and uniform administration of the criminal law. A question reserved by

A-IV

the State will not be entertained on appeal merely to demonstrate errors of a trial court in rulings adverse to the State .... Questions reserved presuppose that the case at hand has concluded, but that an answer is necessary for proper disposition of future cases which may arise. No final judgment has been entered in the case before us.

"It is clear that the appeal herein is interlocutory in character and, accordingly, is governed by K.S.A. 1979 Supp. 22–3603 ....

. . . . .

"The appeal herein does not come within any of the situations set forth in 22–3603 and, accordingly, an interlocutory appeal is not available to the State. Inasmuch as no statutory basis for the appeal is shown, this court is without jurisdiction to hear the appeal and the appeal must be dismissed." 227 Kan. at 912–913, 610 P.2d 637.

In *State v. Gustin*, 212 Kan. 475, 481, 510 P.2d 1290 (1973), Justice Owsley, speaking for a unanimous court, said:

"If a criminal defendant's motion for judgment of acquittal is granted after a jury verdict of guilty, there is no appeal by the state and no need for an alternative or accompanying motion for new trial by defendant. If defendant's motion for judgment of acquittal is denied, defendant should move for a new trial. If motion for new trial is granted, there is no appeal by either state or defendant since that is not a final order. If defendant's motion for new trial is denied, defendant may then appeal."

[1] We hold that K.S.A. 1980 Supp. 22–3602(*b*)(3) does not authorize interlocutory appeals by the State, and that an order granting a new trial may not provide the basis for an interlocutory appeal as of right upon a "question reserved." We have not overlooked earlier cases wherein we entertained appeals by the State of orders granting new trials as "questions reserved" under former statutes, including *State v. Clark*, 171 Kan. 734, 237 P.2d 255 (1951) and *State v. Hess*, 178 Kan. 452, 289 P.2d 759 (1955), but we find those cases no longer controlling or persuasive on the issue. Under our present code, the State may take interlocutory appeals only as authorized by K.S.A. 1980 Supp. 22–3603. K.S.A. 1980 Supp. 22–3602(*b*) authorizes the State to appeal as of right only in cases which have been terminated.

The second point raised is whether the time the earlier appeal was pending in this court should be counted in computing the 180 days, or whether that time should not be counted pursuant to K.S.A. 22–3604. As we have noted earlier, the legislature authorized the State to appeal in *terminated* cases by K.S.A. 1980 22–3602(*b*). No protection for the State, such as is provided by –3604(2) is necessary during –3602(*b*) appeals, since the case has already been terminated when those appeals are taken. The defendant has already been either sentenced or discharged from custody. He would not be held in jail or be released on bond for his appearance at trial, as contemplated by –3604(1), after the case has been terminated.

[2] In the case before us, it appears that the defendant's bond was reduced by the trial court at the time the new trial was granted—but he was not granted an outright release. He was retained on an appearance bond—contrary to –3604(1) *if that section applies.* We hold that it does not. K.S.A. 22–3604 was new to Kansas criminal practice when it was enacted in 1970. It follows –3603, also new, which authorized interlocutory appeals in limited circumstances. We conclude that –3604 is intended to apply, and does apply, only to interlocutory appeals pursuant to –3603.

The protection of –3604(2) is necessary to protect the State from the limits of the speedy trial statute, K.S.A. 1980 Supp. 22–3402, while the State takes an interlocutory appeal; the interlocutory appeals authorized by –3603 concern matters which often will relate directly to the prosecution's ability to pursue the pending criminal case.

[3] The issue which the State attempted to raise in its earlier appeal in this case was

Digest

A-IV

not one which needed to be resolved in order for the prosecution to proceed with trial and to prove its case. It was not hampered by suppressed evidence or the like. A similar situation arose in the second appeal in the *Hess* case, the sequel to the one cited above. Hess was granted a new trial, but the State neglected to provide him with a trial while it appealed the order granting a new trial. More than three terms of court passed, contrary to G.S. 1949, 62–1432; the defendant filed a motion for discharge for want of a speedy trial, the trial court granted the motion, and this court affirmed. We adopted the decision of the trial court, and it comprises the bulk of our opinion. See *State v. Hess*, 180 Kan. 472, 473–479, 304 P.2d 474 (1956). The language of that opinion is particularly applicable here:

> "When the State appealed there was on file a sufficient information upon which the defendant had joined issue by his plea of not guilty. This Court had ordered a new trial; there were terms of court at which such trial might have been had; the appeal did not, of itself, prevent a retrial; there was no stay order. What prevented the prosecution from proceeding to try the defendant again? There was no obstacle which prevented it; the only thing which may explain the delay is that such retrial would have been effort wasted if the State's appeal had been successful. But in the face of the peremptory commands of the Bill of Rights and Section 62–1432, considerations of expediency can have no weight. The alternative would have been to secure defendant's consent to the delay or to force him to apply for a stay order, but neither of these was done." (p. 477, 304 P.2d 474.)

We conclude that –3604 is inapplicable to unauthorized interlocutory appeals attempted by the State, and that the 180-day period continued to run during the first appeal.

[4] We now turn to the final issue: should the defendant be charged with the 30-day continuance which he requested and was granted in this court during the State's initial appeal? K.S.A. 1980 Supp. 22–3402(2) says that if the accused is not brought to trial within the 180-day period, the accused shall be discharged "unless the delay shall happen as a result of the application or fault of the defendant . . . ." The time defendant sought in this court in no wise delayed his trial in the district court. He sought no delay of his trial. He made no motion in the trial court for a continuance, a stay, a delay of trial. The State could have brought him to trial *at any time* during the 180-day period. The obligation to bring the defendant to trial within the 180 days is on the prosecution, not the defendant. *State v. Warren*, 224 Kan. 454, 456, 580 P.2d 1336 (1978); *State v. Higby*, 210 Kan. 554, 556, 502 P.2d 740 (1972); *State v. Sanders*, 209 Kan. 231, 234, 495 P.2d 1023 (1972).

We conclude that the continuance in this court did not delay trial, and should not be charged against defendant in the computation of the 180-day period.

We should note also that the State did not raise the matter of the 30-day extension in the trial court, but presents it for the first time in this court. Issues which are not raised or presented to the trial court will not be considered on appeal. *In re Waterman*, 212 Kan. 826, 835, 512 P.2d 466 (1973).

An accused has the right to trial within the time fixed by the legislature, and when the State fails to commence trial within the time limit, the accused is entitled to be discharged. That is the situation which the trial court found. We find no error in its order.

The judgment is affirmed.

McFARLAND, Justice, dissenting:

My concern is the present case arises primarily from the majority opinion's application of K.S.A. 22–3604. For convenience, the statute is repeated herein:

> "(1) A defendant shall not be held in jail nor subject to an appearance bond during the pendency of an appeal by the prosecution.
>
> "(2) The time during which an appeal by the prosecution is pending shall not be

A-IV

counted for the purpose of determining whether a defendant is entitled to discharge under section 22-3402 of this code."

Section (2) of the statute states when an appeal by the prosecution is pending the time shall not be counted for purposes of the speedy trial statute. Section (1) prohibits bonding and incarceration of the defendant during an appeal by the prosecution. I do not read Section (1) as a limitation upon Section (2).

Further, although not expressly so stating, the majority opinion infers that an unauthorized appeal is not an appeal within the purview of Section (2). The statute speaks of *an* appeal. Whether authorized or not, *an* appeal is still *an* appeal.

If the appeal by the State from the order granting a new trial had been merely to harass the defendant or to gain time I would have no quarrel with the result reached.

In hindsight, the trial court's granting of a new trial was clearly an erroneous decision. PIK Crim. 54.01 has repeatedly been upheld since the decision in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), was announced (starting with *State v. Egbert*, 227 Kan. 266, 606 P.2d 1022, *cert. denied* —— U.S. ——, 101 S.Ct. 379, 66 L.Ed.2d 232 [1980]). At the time the trial court made its decision, however, the appellate courts of Kansas had not had the issue before them.

The issue of the effect of the *Sandstrom* decision upon what was a stock instruction across Kansas was of concern in this case and in many criminal cases across the state. The issue was certainly one of significant statewide interest—particularly as to the validity of convictions obtained under the PIK instruction.

State v. Puckett, 227 Kan. 911, 610 P.2d 637 (1980), cited in the majority opinion, was decided subsequent to the order appealed from in the case before us. The State, accordingly, cannot be faulted for failure to know the *Puckett* determination that the prosecution is not authorized to appeal from an order granting a new trial.

For the reasons expressed herein I would reverse the trial court's discharge of the defendant.

HERD, J., joins the foregoing dissenting opinion.

5 Kan.App.2d 630

CITY OF NEW STRAWN, Kansas, A Municipal Corporation, Appellant,

and

Kansas Gas and Electric Company, A Corporation,

v.

The STATE CORPORATION COMMISSION of the State of Kansas: G. T. Van Bebber, William G. Gray and R. C. Loux, as the constituent members of the State Corporation Commission; Coffey County Rural Electric Cooperative Association, Inc., A Corporation; and Kansas Electric Cooperatives, Inc., A Corporation, Appellees.

No. 51450.

Court of Appeals of Kansas.

Jan. 16, 1981.

City appealed from decision of the Coffey District Court, Floyd H. Coffman, J., affirming an order of the State Corporation Commission denying electric company's application for certificate of convenience and necessity wherein electric company sought to provide its service to city. The Court of Appeals, Meyer, J., held that: (1) fact that city has granted franchise does not affect authority of State Corporation Commission to deny application for certificate of convenience and necessity; (2) State Corporation Commission was correct in denying certificate of convenience and necessity to electric

A-IV