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STATEMENT IN OPPOSITION TO

HOUSE BILLS 4356, 4482 & 5050

JOINT COMMITTEE ON THE JUDICIARY

March 22, 1982

Mr. Chairman and Honorable Members of the Joint Committee on the Judiciary:

My name is Gerald D'Avolio. I am an attorney and the Executive Director of the Massachusetts Catholic Conference which represents the four Roman Catholic Dioceses of Massachusetts.

I make the following statement with the knowledge and approval of the Massachusetts Catholic Conference headed by, His Eminence, Humberto Cardinal Medeiros, Archbishop of Boston; Most Reverend Bernard J. Flanagan, Bishop of Worcester; Most Reverend Daniel A. Cronin, Bishop of Fall River; Most Reverend Joseph F. Maguire, Bishop of Springfield. On their behalf I speak with reference to House Bills 4356, 4482, and 5050.

From the very outset of these remarks, I wish to make it very clear that the Massachusetts Catholic Conference is in no way opposed to the opinion that each and every person has the right to decline life-prolonging treatment in certain specific instances. Our unalterable opposition is directed, rather, to the enactment of such a right into so-called "Living Will" legislation.

Before stating the reasons for the Conference's opposition to the legislation proposed by House Bills 4356, 4482 and 5050 I would like to articulate the Roman Catholic position on this right of a dying person to decline life-prolonging procedure. It is set forth by the so-called Vatican Declaration

on Euthanasia issued on May 5, 1980. I would bring to your attention three direct quotations from this document:

1. "One cannot impose on anyone the obligation to have recourse to a technique which is already in use but which carries a risk or is burdensome. Such a refusal is not the equivalent of suicide; on the contrary, it should be considered as an acceptance of the human condition, or a wish to avoid the application of a medical procedure disproportionate to the results that can be expected or a desire not to impose excessive expense on the family or the community."

2. "When inevitable death is imminent in spite of the means used, it is permitted in conscience to take the decision to refuse forms of treatment that would only secure a precarious and burdensome prolongation of life, so long as the normal care due to the sick person in similar cases is not interrupted."

3. "In numerous cases, the complexity of the situation can be such as to cause doubts about the way ethical principles should be applied. In the final analysis, it pertains to the conscience either of the sick person, or of those qualified to speak in the sick person's name, or of the doctors, to decide, in the light of moral obligations and of the various aspects of the case."

It should be noted that the Vatican document covers the situations of both the competent and incompetent dying patient. In the case of the former, the decision to terminate life-prolonging procedures belongs to none other than the dying patient while in the case of the latter, the decision belongs to those who are qualified to speak in the patient's name.

As you know, this same issue was addressed in a very competent fashion in the case of In the Matter of Earle N. Spring, (Mass. Adv. Sh. (Mass. Adv. Sh. [1980] 1209). Therein, the Supreme Judicial Court of this Commonwealth stated that a competent person has the general right to refuse medical

treatment in appropriate circumstances. These circumstances are to be determined by balancing his or her interest against the Commonwealth's interest in the preservation of life. In striking this balance, the patient's prognosis and the magnitude of the proposed medical treatment ought to be considered. Furthermore, this same right is extended to incompetent patients through the exercise of the "substituted judgment" rule. It might be added here that the Spring case further stated that once "brain death" occurs, a physician making that determination no longer has a duty to administer medical treatment and that, in the absence of a directive from the decedent, a surviving spouse or the next of kin have the right to determine what is to be done.

These points being made, I would like to set forth some of the major objections which the Massachusetts Catholic Conference has to the proposed legislation.

1. Any attempt to draft a law concerning an incompetent person's rights to decline life-prolonging medical treatment can and will create more problems than it solves. Two examples from the proposed bill are relevant:

- a. It is stated that the physician who is notified of the existence of the declaration shall, without delay after the diagnosis of a terminal condition, take the necessary steps to provide the certification. This seems to impose a requirement on the physician which could serve to endanger the patient especially when provisional diagnoses are made which is the usual case when a patient is admitted to the hospital.

- b. When speaking of immunity, the phrase "unless negligent" is included. What negligence is being referred to here? Is the legislation referring to negligence in the diagnosis of the terminal condition or to negligence which may well exist in the physician's using other than ordinary standards of care because he or she

is so directed by the declarant of the living will?

2. In spite of the fact that the proposed legislation creates no presumption for those who have not composed a living will, many conscientious physicians will be still extremely reluctant to make decisions to withhold life-prolonging treatment from incompetent patients who have not executed such a document. This could place a burden, most usually, on poor people, elderly people and less educated people who might not be sophisticated enough or might not have access to advisors who could assist them in drafting such a document.

3. The introductory language in the document would give the impression that the legislature is creating a right to refuse life-prolonging treatment. As you well know, this right has already existed as a natural right and, as I have indicated above, it has been declared as such by our own Supreme Judicial Court.

4. Unlike traditional wills which allow for a slow and considered process of probate, a living will regarding the termination of treatment does not give the doctors or courts sufficient time to determine whether the instrument was properly executed or to determine what the exact wishes of the declarant were or whether those wishes have in fact changed since the execution was declared. Any "presumed validity" in this matter can be severely challenged.

In the meetings which the Massachusetts Catholic Conference has had with the proponents of living will legislation, we have often been asked to suggest an alternate proposal given the fear which causes many physicians to refrain from acting in these cases. We have replied that if a legislative approach is to be made at all (something which we feel is not necessary at this time in Massachusetts even though such may be the case in other states), it would seem much better to focus in on recognition of the patient's right

to establish a proxy to make such decisions on his or her behalf in the event that he or she is unable to make them in the future. However, in all frankness, I must admit that the Massachusetts Catholic Conference would be very leary even of this type of legislation and would prefer to leave the matter in the hands of those who have been traditionally recognized as the proper agents to make such decisions on behalf of an incompetent patient.

It would be very wrong for the Massachusetts Catholic Conference to deny that there are some real problems in this matter of the rights of dying incompetents to decline life-prolonging procedures. However, we are sincerely concerned about attempts to solve these problems simply by means of civil legislation. We recognize the fact that this might be the only possibility in some other states of the Union; however, here in the Commonwealth of Massachusetts, there is no need to write into legislation something which has already been made clear in the jurisprudence set forth by the Supreme Judicial Court. To do so would further complicate the issue, multiply law suits and remove the issue from the area in which it belongs; normally between the physician and the incompetent's spouse or next of kin, or in the case of one with no relatives, in the "substituted judgment" rule recognized in the Spring case.

When our committee was researching this issue, it was directed to consult with members of the legal and medical professions. One reply which it received from an extremely competent lawyer familiar with hospital situations is worth noting. With tongue in cheek he wrote: "I have reviewed the proposed legislation....and as a trial lawyer, I would welcome the enactment of this proposed legislation because I believe that it will give rise to innumerable lawsuits." Then, in a more serious vein, he added: "This legislation is unnecessary and will only serve to complicate an issue which has been resolved for the moment. As an attorney, I think that it

is unwise and that it can only create more heartache and pain for the very persons whom it presumably seeks to benefit."

The Massachusetts Catholic Conference shares the sentiments of this lawyer. We too are of the opinion that the proposed legislation is unnecessary in this Commonwealth and we believe that it will only complicate an issue which has already been solved by the decisions of our own Supreme Judicial Court. For these reasons, as well as for those mentioned earlier in this testimony, the Massachusetts Catholic Conference is unalterably opposed to the legislation proposed by House Bills 4356, 4482 and 5050.