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IN THE SUPREME COURT OF FLORIDA

- X

IN RE: GUARDIANSHIP OF
ESTELLE M. BROWNING, Incompetent

STATE OF FLORIDA, and SUNSET
POINT NURSING CENTER,
Petitioner, Appellees :
:
v. DORIS F. HERBERT, as the :
Guardian on behalf of :
ESTELLE M. BROWNING, Incompetent :
Respondent, Appellant :
- X

2d DCA No. 88-02887
Pinellas Probate Div.
No. 87-1176-6D-3

BRIEF ON BEHALF OF AMICUS CURIAE SOCIETY FOR THE RIGHT TO DIE

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PRELIMINARY STATEMENT

The central issue in this case is whether Florida law enables a duly appointed guardian to protect the wish of a previously competent person, who is now incurably and irreversibly ill, to forgo artificial alimentation and die a natural death. Because Florida law extends the right of privacy to persons, not feeding tubes, amicus respectfully requests that this Court answer the certified question in the affirmative.

STATEMENT OF THE FACTS

Amicus adopts the respondent's statement of the facts.

ARGUMENT

I. ACCORDING TO SOUND PRINCIPLES OF COMMON LAW, STATUTORY LAW AND CONSTITUTIONAL LAW, PATIENTS MAY NOT BE FORCED TO UNDERGO TREATMENT AGAINST THEIR WISHES

A person's interest in freedom from uninvited contact deserves the greatest protection available under the law. The common law action of trespass for battery preserved the individual's fundamental right to "a reasonable sense of personal dignity." Restatement of Torts, section 18 (1934); Restatement (Second) of Torts, sections 18 and 19 (1965); Prosser, Torts, 34-37 (1971 ed.). Absent evidence of the actual consent or assent of the individual, the person initiating or authorizing the contact was liable for damages. Restatement supra, sections 49-54; Restatement 2d supra, section 892.

Within the context of health care decisionmaking, the common law's protection of personal dignity and integrity expresses itself through the doctrine of informed consent, which states that treatment may not be rendered absent a patient's consent or in violation of the patient's known wishes and preferences. As relevant now as it was when first uttered seventy-five years ago is Justice Cardozo's succinct pronouncement.

> [Every person] of adult years and sound mind has a right to determine what shall be done with his body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages. Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914).

Florida courts have embraced the view that treatment rendered without express or implied consent, or in a manner contrary to the patient's express instructions, constitutes an unlawful trespass to the person. Chambers v. Nottebaum, 96 So.2d 716, 718 (Fla. 3rd DCA 1957); Valcin

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BRIEF ON BEHALF OF AMICUS CURIAE
SOCIETY FOR THE RIGHT TO DIE

PRELIMINARY STATEMENT

At issue in this appeal is whether Estelle Browning's carefully made plans about the kind of treatment she would want at the end of her life should be respected, now that she can no longer speak herself. Put another way, the issue of this appeal is whether the State of Florida's interest in protecting the lives of its citizens means that it can force unwanted medical treatment on them when they are helpless, ignoring their clearly expressed wishes.

The court below recognized that Mrs. Browning's right to make her own decisions about medical treatment, and to have them carried out on her behalf, is a constitutionally protected right that may not be tampered with by the State, regardless of the motivation. The rights at issue here are personal rights of Mrs. Browning's; she is an individual, not the symbol of a cause. The fact that other nursing home residents have been (and in the future, could, again be) the subject of abuse, is not a justification for abusing Mrs. Browning by ignoring her

wishes. Sanctioning one form of abuse will not protect against others. Reiteration of her constitutional rights is the best protection, not only for her, but for all Florida residents. A procedure to honor these rights is needed to ensure that the right to privacy is respected in private. The decision below must be affirmed.

INTEREST OF AMICUS CURIAE

The Society for the Right to Die, Inc. ("the Society") submits this brief in support of Mrs. Browning's right to privacy which includes the right to forgo medical treatment that takes the form of the insertion and utilization of tubes to carry liquid feeding formula. The Society is a national not-for-profit educational organization founded in 1938. It advocates recognition of the individual's right to control medical treatment, including the right to choose to reject life-sustaining treatment and avoid the futile prolongation of the dying process.

The Society is probably the most consulted single source of information on all aspects of the right to refuse treatment. It distributes "living wills," educates people about their rights, and works toward enacting "natural death" legislation. The Society has some 150,000 supporters and contributors nationwide, more than 14,000 of whom live in Florida.

The Society has filed amicus briefs in leading cases throughout the country supporting the rights to privacy and

self-determination. The Society is also involved in nationwide counseling of families confronted by treatment decisions. The Society's doctor, social worker and attorneys provide mediation services and advice on decisionmaking to hospitals, doctors, patients and their loved ones on a daily basis. This role gives the Society a broad perspective on the various procedures used in decisionmaking throughout the country.

STATEMENT OF FACTS

The evidence of Mrs. Browning's current medical condition may be limited, In re Guardianship of Browning, No. 88-02887, (Fla. Dist. Ct. App. April 10) slip op. at 7 (hereinafter "Browning, slip op."), but it is clear that it is one in which there is no hope of recovery. In November 1986, she suffered a massive stroke which caused major, permanent and irreversible damage to her brain. (Browning, slip op. at 4). The condition itself, and her age of 89 years, preclude recovery. She is maintained by tube feeding (currently a nasogastric tube) and catheters. (Browning, slip op. at 5; Transcript, September 30, 1988, p. 19, hereinafter "Tr.") She suffers from nausea, bed sores and other "unpleasant chronic maladies." (Browning, slip op. at 5) Her limbs are contracted and essentially rigid. (Tr. 19.) She is turned every two hours and requires total body care. (Tr. 20.)

Because of her condition Mrs. Browning, like most patients similarly situated, will probably develop infections which can

be repeatedly treated but which will eventually become resistant to antibiotics. Eventually one will develop that will lead to death. (Deposition, September 27, 1988, p. 19 hereinafter "Dep.") Antibiotic treatment and continued provision of liquid formula by use of the nasogastric tube can prolong Mrs. Browning's dying for "easily another year." (Dep. 21.)

In 1985, Mrs. Browning executed a document described as a Florida Declaration (Browning, slip op. Appendix). It states:

> If at any time I should have a terminal condition and my attending physician has determined that there can be no recovery from such condition and my death is imminent, where the application of life-sustaining procedures would serve only to prolong the dying process, I direct that such procedures be withheld or withdrawn...

By putting an "X" in a box, Mrs. Browning indicated that she did "not desire that nutrition and hydration (food and water) be provided by gastric tube or intravenously if necessary" (Browning, slip op. Appendix), even though this language is not included in the standard form suggested by the legislature in the Florida Life-Prolonging Procedures Act, Fla. Stat. Ann. § 765.01(i) (1987). The record contains no evidence of Mrs. Browning's personal understanding of the term "terminal condition" as used in her Declaration, but execution of the amended Declaration was part of a continuing process in which Mrs. Browning thought and spoke about her wishes about life-sustaining treatment. Her guardian testified that she would not want to be kept alive in this way, in the condition in

which she now finds herself. (Tr. **36).**

Mrs. Browning's views on the subject of life support were thought out and consistent over **a** number of years. She had earlier executed a similar document **(Tr. 32),** but one witness died and she was told that she should make out another. (Tr. **32.)** She went **so** far as to destroy the previous document (Tr. 32) and execute another with witnesses who were not related to her (Tr. **33)** in order to be certain that the document was enforceable. (Browning, slip op. at 7.) After doing all this she was satisfied that she had done everything necessary to protect her rights. (Tr. **33.)**

In addition, Mrs. Browning spoke to her guardian (who is also her closest living relative) and to two neighbors and close friends. She told them, after a visit to someone in a nursing home, that she never wished to be in such a condition and that she was thankful that her Living Will had taken care of this problem. (Browning, slip op. at 7.) Despite all her care, Mrs. Browning has been maintained for nearly three years in precisely the circumstances her guardian says she wished to avoid.

ARGUMENT

I.

THE GUARDIAN OF A PATIENT WHO IS INCOMPETENT BUT NOT IN A PERMANENT VEGETATIVE STATE AND WHO SUFFERS FROM AN INCURABLE, BUT NOT TERMINAL CONDITION, MAY EXERCISE THE PATIENT'S RIGHT OF SELF-DETERMINATION TO FORGO SUSTENANCE PROVIDED BY A NASOGASTRIC TUBE.

A) Mrs. Browning has a constitutional right of privacy which requires that decisions made by her about her own medical condition be honored by those responsible for her care.

Mrs. Browning's constitutional right of privacy, grounded

in both the state and federal constitutions, requires recognition of her right to have medical treatment withheld or withdrawn, if to do *so* is consistent with her previously enunciated wishes, value systems and patterns of belief. Her constitutional rights are not conditional on a finding that she is in a particular medical condition, and are not reduced by the form of medical treatment she is receiving.

The federal constitutional basis for refusal of treatment has been recognized by this jurisdiction and numerous others. See, e.g., Public Health Trust of Dade Countv v. Norma Wons, 541 So. 2d 96 (Fla. 1989); John F. Kennedy Memorial Hospital, Inc. v. Bludworth, 452 So. 2d 921 (Fla. 1984); Satz v. Perlmutter, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978), aff'd, 379 So. 2d 359 (Fla. 1980); Corbett v. D'Alessandro, 487 So. 2d 368 (Fla. Dist. Ct. App.), review denied, 492 So. 2d 1331 (Fla. 1986); In re L.H.R., 253 Ga. 439, 321 S.E.2d 716 (1984); Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 497 N.E.2d 626 (1986); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977); In re Quinlan, 70 N.J. 10, 355 A.2d 647, cert. denied sub nom. Garaer v. New Jersey, 429 U.S. 922 (1976), gverruled in part, In re Conroy, 98 N.J. 321, 486 A.2d 1209 (1985).

In Florida, the right of privacy is also specifically guaranteed by Article I, Section 23, Florida Constitution. This state constitutional right is broader in scope than that of the federal constitution. Public Health Trust of Dade County v. Norma Wons, 541 So. 2d 96, 102 (Fla. 1989).

There is no question in Florida that the right to refuse treatment exists as much for permanently unconscious adult patients, John F. Kennedy Memorial Hospital, Inc. v. Bludworth, 452 So. 2d 921 (Fla. 1984); Corbett v. D'Alessandro, 487 So. 2d 368 (Fla. Dist. Ct. App.), review denied, 492 So. 2d 1331 (Fla. 1986) as it does for those who are currently able to voice their wishes. Public Health Trust of Dade County v. Norma Wons, 541 So. 2d 96 (Fla. 1989); Satz v. Perlmutter, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978), aff'd, 379 So. 2d 359 (Fla. 1980).

A decision to refuse life-sustaining treatment is accorded constitutional protection because it is, by its very nature, fundamental. In re Guardianship of Grant, 109 Wash. 2d 545, 747 P.2d 445 (1987), modified on other grounds, 757 P.2d 534 (1988). It affects the person who makes it more profoundly than any other decision that will ever be made. A decision to refuse medical treatment is quintessentially a decision to follow one's own beliefs and must, of necessity, be free from unreasonable governmental interference. As this court has recently held, "it is difficult to exaggerate this right because it is, without exaggeration, the very bedrock on which this country was founded.'' Public Health Trust of Dade County v. Norma Wons, 541 So. 2d 96, 98 (1989).

A decision to refuse treatment will be made in widely varying situations by many different people for many different reasons. The degree of illness that can be tolerated, the amount of pain that can be suffered and the person's own

feelings about the force of life and the acceptance of death, are highly personal. It is inconceivable that our country would wish to impose uniform standards on its citizens in these matters, no matter that those standards are cloaked in rhetoric about the sanctity of life. The court below held that "the constitutional right of privacy... is not lost when the person's mental or physical status changes." Browninq, slip op. at 19. The individuality of personal privacy is precisely what is sought to be protected.[1]

B) No state interest outweiahs Mrs. Browninq's right to have her wishes respected.

The constitutional right to refuse treatment is not absolute. As this and other jurisdictions have previously recognized, it may be outweighed in some situations by countervailing interests the State may have that would permit it to legitimately require that treatment be continued. Public Health Trust of Dade County v. Wons, 541 So. 2d 96 (Fla. 1989); John F. Kennedy Memorial Hospital. Inc. v. Bludworth, 452 So. 2d 921, 924 (Fla. 1984); Satz v. Perlmutter, 362 So. 2d 160, 162 (Fla. Dist. Ct. App. 1978), aff'd, 379 So. 2d 359 (Fla.

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1. The right to refuse treatment is also embodied within the common-law right to self-determination. See, e.g., In re Conroy, 98 N.J. 321, 348, 486 A.2d 1209, 1223 (1985). This court has already, however, recognized the constitutional protection afforded to the right, John F. Kennedy Memorial Hospital, Inc. v. Bludworth, 452 So. 2d 921, 924 (Fla. 1984) and the Court of Appeals below expressly stated that it was "creating a remedy to fulfill a constitutional right rather than some broader statutory or common law right." (Browninq, slip op. at 19, fn.12).

1980). As noted by the court below, the State's interests include the preservation of life, the duty to prevent suicide, the maintenance of ethical integrity within the practice of medicine and the protection of third parties. Browning, slip op. at 18; see also, Public Health Trust Of Dade Countv v. Norma Wons, 541 So. 2d 96 (Fla. 1989); Satz v. Perlmutter, 362 So. 2d 160, 162 (Fla. Dist. Ct. App. 1978), aff'd, 379 So. 2d 359 (Fla. 1980).

Mrs. Browning knowingly exercised her right of privacy while competent, before she became sick, with the clear and full intent that her wishes should be carried out later. Her right cannot be outweighed by countervailing interests of the State in preserving her life.

On this record, the wording of her written declaration could be said to be unclear, in a legally technical sense, since no evidence was adduced as to Mrs. Browning's personal understanding of the meaning of the word "terminal". Nonetheless, Mrs. Browning thought that her writing would cover her current condition. The fact of its execution is significant, especially in light of the fact that it was the second time she had written one out. As the New York Court of Appeals recently stated:

> The existence of a writing suggests the author's seriousness of purpose and ensures that the court is not being asked to make a life-or-death decision based upon casual remarks. Further, a person who has troubled to set forth his or her wishes in a writing is more likely than one who has not to make sure that any subsequent

> changes of heart are adequately expressed, either in a new writing, or through clear statements to relatives and friends.

In re Westchester County Med. Center (O'Connor), 72 N.Y.2d 517, 531, 534 N.Y.S.2d 886, 892-893, 631 N.E.2d 607, 613-614 (1988).

If Mrs. Browning's guardian, who is also her closest living relative, guided by the document and the other oral evidence, is able to determine what her ward would have wanted in her present medical circumstances, the State has no conceivable legitimate interest in continuing her life against her wishes. "This is because the life that the state is seeking to protect...is the life of the same person who has competently decided to forgo the medical intervention; it is not some other actual or potential life that cannot adequately protect itself." In re Conroy, 98 N.J. 321, 349, 486 A.2d 1209, 1223 (1985). The State's indirect and abstract interest "...gives way to the patient's much stronger, personal interest in directing the course of [her] own life." Id., 98 N.J. at 350, 486 A.2d at 1223. There can be no benefit to the State in prolonging a patient's existence in circumstances the patient would find "demeaning and degrading to his humanity and which would serve merely to lessen the value of his life by denying him the right to choose the course of his medical treatment." Delio v. Westchester County Medical Center, 129 A.D.2d 1, 24, 516 N.Y.S.2d 677, 692 (2d Dep't 1987).

(i) Mrs. Browning's medical condition does not preclude exercise of the right to refuse treatment.

When treatment is being withheld or withdrawn consistent

with the patient's known directions or wishes, the State's interest in preserving life does not outweigh the patient's desire regardless of the patient's condition. As the New Jersey Supreme Court held:

> The privacy that we accord medical decisions does not vary with the patient's condition or prognosis. The patient's medical condition is generally relevant only to determine whether the patient is or is not competent, and if incompetent, how the patient, in view of that condition, would choose to treat it were she or he competent."

In re Peter, 108 N.J. 365, 373, 529 A.2d 419, 423 (1987); see also, In re Conroy, 98 N.J. 321, 355, 486 A.2d 1209, 1226 (1985). Even an excellent prognosis does not justify overriding the patient's desires. Public Health Trust of Dade County v. Wons, 541 So. 2d 96 (Fla. 1989). The Wons case has been mischaracterized by the State as solely a religious refusal case, when in fact this Court expressly recognized the privacy interest in "one's religion or view of life" and the Court properly deferred "to the individual's right to make decisions initially affecting his private life according to his own conscience." Wons, 541 So. 2d at 98. This right is not limited to the dictates of religion. If a patient's condition could, in some other circumstances, justify unwanted treatment, any such State interest wanes as the patient's prognosis dims, *so* that the State cannot justify requiring treatment of patients in Mrs. Browning's condition. See e.g., John F. Kennedy Memorial Hospital, Inc. v. Bludworth, 452 So. 2d 921, 924 (Fla. 1984); In re Quinlan, 70 N.J. 10, 355 A.2d 647, cert. denied sub nom, Garaer v. New Jersey, 429

U.S. 922 (1976), overruled in part, In re Conroy, 98 N.J. 321, 486 A.2d 1209 (1985). Mrs. Browning's prognosis is meagre; the duration of her life may be extended by continued treatment, but her condition will not improve, and there is no hope of her ever recovering to cognitive or sapient life. The issue in this case, as much as in John F. Kennedy Memorial Hospital, "is not whether a life should be saved. Rather, it is how long, and at what cost, the dying process should be prolonged." John F. Kennedy Memorial Hospital, Inc. v. Bludworth, 452 So. 2d 921, 924 (Fla. 1984).

The label to attach to Mrs. Browning's current medical condition is uncertain; the Second District Court of Appeals felt that the evidence in the record was "limited and troubling." Browning, slip op. at 7.[2] She may be neither terminally ill nor permanently unconscious. If that is the case, her suffering could be great, alleviated neither by the hope of imminent release, nor the certainty that she is beyond feeling and awareness of her condition. But objective determinations about whether Mrs.

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2. The procedure required by the court below, certification of her condition by her primary treating physician and two others, Browning, slip op. at 31, will provide the precise medical information needed. The question will then be what Mrs. Browning herself would want in the condition she now finds herself. The certificate should include a summary of the patient's condition, including descriptions of the level of mental and physical functions and the degree of pain currently experienced and expected in the future. Browning, slip op. at 31. The court also required the certificate to include a statement of the medical treatment at issue and a description of its benefits, risks, invasiveness, painfulness and side effects, and a statement of prognosis, as well as a statement of the medical ethical issues involved. Browning, slip op. at 32. This information will be necessary to enable the surrogate decision-maker to determine what the patient would have wanted in these circumstances.

Browning is worse or better off than the terminally ill and the permanently unconscious, should play no part in this analysis. The only legitimate question to ask, in recognition of her right to privacy, is whether she would wish to be maintained in this condition. "There is no practical or logical reason to limit the exercise of the right of self-determination with respect to one's body to terminally ill patients...The ultimate decision to refuse treatment is for the patient alone to reach." Delio v. Westchester County Medical Center, 129 A.D.2 1, 22 516 N.Y.S.2d 677, 691 (2d Dep't 1987) (approving of withdrawing tube-feeding from a permanently unconscious patient). Put another way, the question is ..."whether or not the State can insist that a person... whose condition is irreversible, may be required to submit to medical care under circumstances in which the patient prefers not to do so." Gray v. Romeo, 697 F. Supp. 580, 584 (D.R.I. 1988).

In Gray, and in many other recent cases, the patient was in a vegetative state, incapable of any sensation. To permit the State to enforce treatment on an unwilling patient, because she may still be minimally conscious, or is not terminally ill, is to make impermissable, objective quality of life determinations. As the California Court of Appeal, Second District wrote in the case of Elizabeth Bouvia, a competent patient:

> She, as the patient, lying helplessly in bed, unable to care for herself, may consider her existence meaningless. She cannot be faulted for so concluding. If her right to choose may not be exercised because there remains to her, in the opinion of a court, a physician or some committee,

> a certain arbitrary number of years, months, or days, her right will have lost its value and meaning.
>
> Who shall say what the minimum amount of available life must be? Does it matter if it be 15 to 20 years, 15 to 20 months, or 15 to 20 days, if such life has been physically destroyed and its quality, dignity and purpose gone? As in all matters lines must be drawn at some point, somewhere, but that decision must ultimately belong to the one whose life is in issue.

Bouvia v. Superior Court, (Glenchur), 179 Cal. App. 3d 1127, 1142-1143, 225 Cal. Rptr. 297, 304-305 (Ct. App. 1986), review denied, (Cal. June 5, 1986) (citations omitted).

Overriding a person's known wishes is inconsistent with the State's duty to protect its vulnerable, incompetent elderly citizens. Such a course of action is clearly an abuse of the person, when she is helpless, and a gross example of unwarranted governmental intrusion in a private area. It is a situation which echoes the historical events which led to the adoption of a constitutional form of government in this country, precisely to protect the individual against the state.

As stated in the concurring opinion of Justice Erlich recently, "Sweeping claims [about the need to protect the elderly against abuse] have an emotional appeal that facilely avoids both the constitutionally required scrutiny of the state's authority to act and the search for less restrictive alternatives." Public Health Trust of Dade County v. Norma Wons, 541 So. 2d 96, 99 (Fla. 1989).

(ii) The form of medical treatment Mrs. Browning is receiving does not Preclude exercise of her right to refuse it.

The State's interest in continuing to preserve life is

neither decreased nor increased by the kind of procedure at issue. Feeding undeniably has special symbolic and emotional connotations, but attitudes about feeding do not define a procedure as either "basic, humane care" or "medical treatment:"

> Analytically, artificial feeding by means of a nasogastric tube or intravenous infusion can be seen as equivalent to artificial breathing by means of a respirator. Both prolong life through mechanical means when the body is no longer able to perform a vital bodily function on its own.
>
> Furthermore, while nasogastric feeding and other medical procedures to ensure nutrition and hydration
> are usually well tolerated, they are not free from risks and burdens; they have complications that are sometimes serious and distressing to the patient.

In re Conroy, 98 N.J. 321, 373, 486 A.2d 1209, 1236 (citations omitted). Unwanted treatment is an invasion of the individual's privacy right regardless of the form it takes. Feeding tubes have been found to be "intrusive treatment as a matter of law." Brophy v. New England Sinai, 398 Mass. 417, 435, 497 N.E.2d 626, 636 (1987).

Tube provision of feeding formula is acknowledged by the medical profession, and the courts, as a form of medical treatment that may be legally and ethically withdrawn if to do so is in accordance with the patient's wishes. Almost every court to have considered the issue has held that tube feeding is medical treatment that may be withdrawn. See e.g., Corbett v. D'Alessandro, 487 So. 2d 368 (Fla. Dist. Ct. App.), review denied, 492 So. 2d 1331 (Fla. 1986); Conservatorship Of Drabick, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840 (Cal. Ct.

App. 1988), review denied (Cal. July 28, 1988), cert. denied, 109 S. Ct. 399 (1988); McConnell v. Beverly Enterprises, 209 Conn. 692, 553 A.2d 596 (1989); In re Gardner, 534 A.2d 947 (Me. 1987); Brophy v. New Enaland Sinai Hosp., Inc., 398 Mass. 417, 497 N.E.2d 626 (1986); In re Conroy, 98 N.J. 321, 486 A.2d 1209 (1985); Gray v. Romeo, 697 F. Supp. 580 (D.R.I. 1988).

The courts, holding that artificial feeding should be treated like other medical procedures, have relied on the wide range of medical and ethical authorities which also conclude that it is appropriate to withhold or withdraw artificially supplied nutrition and hydration, when to do so is consistent with the patient's wishes. See, e.g., Hastings Center, Guidelines on the Termination of Life-Sustaining Treatment and the Care of the Dying 61 (1987); American Medical Association Council on Ethical and Judicial Affairs, Withholding Or Withdrawins Life-Sustaining Medical Treatment, in Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association 12-13 (1986) (quoted in the Corbett case, 487 So. 2d at 371, n. 1); President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Foreao Life-Sustaining Treatment: A Report on the Ethical, Medical and Legal Issues in Treatment Decisions 90 (1983).

Some of these statements specifically address the terminally ill and permanently unconscious or irreversibly comatose. See, e.g., American Medical Association Council on

Ethical and Judicial Affairs, Withholding or Withdrawing Life-Prolonging Medical Treatment. Others are concerned with the "dying" patient, See, e.g., President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Deciding to Forego Life-Sustaining Treatment (1983) or specifically address severely and irreversibly demented patients. In a statement on the latter group, the Alzheimers' Disease and Related Disorders Association, Inc. stated:

> Patients in this category, most of them elderly, are at the end of the spectrum of decreasing mental capacity. They do not initiate purposeful activity or communication but passively receive nourishment or bodily care.
>
> When the severely demented patient has previously made his or her wishes known and when there is intercurrent illness, it is ethically permissible for the physician to withhold treatment that would serve mainly to prolong the dying process. When there is no prior expression or living will, responsible family members or the patient's guardian should indicate their wishes regarding treatment. When no family or advocate is available, the physician should be guided by the need to provide the most humane kind of treatment and the need to carry out the patient's wishes insofar as they are ascertainable.
>
> Severely and irreversibly demented patients need only care given to make them comfortable. If such a patient rejects food and water by mouth, it is ethically permissible to withhold nutrition and hydration artificially administered by vein or gastric tube. Spoon feeding should be continued if needed for comfort. It is ethically appropriate not to treat intercurrent illness except with measures required for comfort. For this category of patients, it is best if decisions about the handling of intercurrent illness are made prospectively, before the onset of an acute illness or threat to life. The

> physician must always bear in mind that perpetuation of the status quo is decision by default. Alzheimer's Disease and Related Disorders Association, Inc., Guidelines for the Treatment of Patients with Advanced Dementia (Approved, October, 1988).

Arguments that tube feeding is "normal care" which for undefined reasons must always be provided, have very little factual basis. Indeed, the very small number of nursing home patients who in fact receive tube feeding, is an indication of how unusual, and therefore, contra-normal this form of treatment is. Available estimates are that 2%-5% of nursing home residents receive tube feeding. U. S. Congress: Office of Technology Assessment, Life Sustaining Technolosies and the Elderly, 12, 197 (1987). Data from the 1985 National Nursing Home Survey indicates that approximately 26,000 nursing home residents were tube fed (2% of the total nursing home population). Industry estimates were slightly higher: 53,400 (about 4%). U. S. Congress: Office of Technology Assessment, Life Sustaining Technolosies and the Elderly 297 (1987). Thus, somewhere between 26,000 and 54,000 nursing home residents are receiving tube feeding at any given time, .01% to .02% of the total U.S. population.

Broadly painted pictures suggesting that permitting the removal of tube feeding in isolated cases will lead to widescale abuse of the vulnerable elderly, have no basis in reality.

(iii) A person's right to refuse treatment cannot be outweighed by the state's interest in preventing suicide.

Appellate courts that have addressed the issue have unanimously held that refusal of treatment, including tube

feeding, may not properly be viewed as an attempt to commit suicide. See e.g., Satz v. Perlmutter, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978), aff'd, 379 So. 2d 359 (Fla. 1980); Bartling v. Superior Court (Glendale Adventist Medical Center), 163 Cal. App. 3d 186, 209 Cal. Rptr. 220 (Ct. App. 1984); Brophy v. New England Sinai Hosp., Inc,, 398 Mass. 417, 497 N.E.2d 626 (1986); In re Eichner (In re Storar), 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, cert. denied, 454 U.S. 858 (1981); In re Farrell, 108 N.J. 335, 529 A.2d 404 (1987); In re Conroy, 98 N.J. 321, 350-51, 486 A.2d 1209, 1224 (1985). Indeed, a state interest in protecting people from direct and purposeful self-destruction is "motivated by, if not encompassed within, the state's more basic interest in preserving life. Thus, it is questionable whether it is a distinct state interest worthy of independent consideration." In re Conroy, 98 N.J. 321, 350, 486 A.2d 1209, 1224 (1985).

(iv) Withdrawing tube feeding from Mrs. Browning is consistent with her wishes and does not challenge the ethical integrity of the medical Profession.

As indicated by the statements of medical associations referred to in Point I (B)(ii), a person's desire to decline medical treatment does not conflict with the state interest in preservation of the ethical integrity of the medical profession. See also, Public Health Trust of Dade County v. Norma Wons, 541 So. 2d 96 (Fla. 1989); Satz v. Perlmutter, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978), aff'd, 379 So. 2d 359 (Fla. 1980); Corbett v. D'Alessandro, 487 So. 2d 368 (Fla. Dist. Ct. App.), review denied, 492 So. 2d 1331 (Fla. 1986); In

re Conroy, 98 N.J. 321, 486 A.2d 1209 (1985); In re Quinlan, 70 N.J. 10, 355 A.2d 647, cert. denied sub nom. Garger v. New Jersey, 429 U.S. 922 (1976), overruled in part, In re Conroy, 98 N.J. 321, 486 A.2d 1209 (1985). Indeed, medical ethics require physicians to determine and honor their patients' wishes. When there is a conflict between the patient's directions and the individual physician's preferred course of treatment, it is not a challenge to medical ethics. The ethics are clear: physicians cannot treat a patient without informed consent. "...[I]f the patient's right to informed consent is to have any meaning at all, it must be accorded respect, even when it conflicts with the advice of the doctor, or the values of the medical profession as a whole." Public Health Trust of Dade County v. Norma Wons, 541 So. 2d 96, 98 (Fla. 1989). Mrs. Browning's current medical condition is not clear in the current record, but the procedure required by the court below will provide the information necessary for physicians to be sure of the patient's diagnosis and prognosis and, in the light of that, to know what her wishes would be in those circumstances.

(v) No third parties are adversely effected by the exercise of Mrs. Brownins's right to refuse treatment.

The final State interest, which other courts have sometimes found to outweigh a person's right to refuse treatment is the interest in protecting innocent third parties who might be harmed by the patient's treatment decision. Thus, curative treatment has been ordered to preserve an adult's life when

there is no one else available to care for her children. Northwood Hospital v. Munoz, No. 89:E0024-GI (Mass. Prob. & Fam. Ct. Norfolk Div. May 11, 1989). This court has narrowly construed the circumstanes in which this interest may prevail. Public Health Trust of Dade County v. Norma Wons, 541 So. 2d 96, 98 (Fla. 1989). Clearly, no such State interest is implicated in this case.

C) Mrs. Brownins's suardian is the most appropriate spokesperson and decisionmaker for her incompetent ward.

The remedy developed by the Court of Appeals below (decisionmaking by a surrogate based on the patient's clear personal decision that she would not want treatment in the condition three physicians have certified her to be in), appropriately permits the effective fulfillment of Mrs. Browning's constitutional right of privacy.[3] The aim, when decisions must be made for a currently incompetent person is to effectuate as far as possible the decision the individual herself would have made. In re Jobes, 108 N.J. 394, 414, 529 A.2d 434, 444 (1987). The decision must be made with great care, guided closely by the incompetent person's actual expressions and general values and beliefs. In re Jobes, 108

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3. The court below stated that the surrogate must have information, inter alia, on whether the patient is suffering from a condition in which, if competent, she would be permitted to forgo life-sustaining treatment. Browning, slip op. at 31. As demonstrated in Point I(B)(i), competent patients may refuse treatment, resardless of their condition. The same right exists for patients who made a clear decision when they were competent with the intention that it be carried out later, after their loss of competency, if the stated circumstances arose.

N.J. at 414, 529 A.2d at 444 (1987). To err too much on either side would be deeply unfortunate.

Mrs. Browning is one of an estimated 9% of adult Americans who have executed a Living Will. Emanuel & Emanuel, The Medical Directive, 261 J.A.M.A. 3288 (1989). Her living will is a strong expression of her treatment preferences, but the writing does not indicate what Mrs. Browning personally meant when she used the phrase "terminal condition."[4] When Mrs. Browning's current medical condition is confirmed by the procedure provided by the court below, the writing may speak for itself. If interpretation of Mrs. Browning's written directive in light of that condition is necessary, it is a task best, and most safely, performed by

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4. Accepted definitions of terminal illness or condition vary widely. Florida law, for instance, has at least three: 1) that included in the Florida Life Prolonging Procedure Act (an injury, disease or illness from which to a reasonable degree of medical certainty, there can be no recovery and which makes death imminent) Fla. Stat. Ann. § 765.03(6)(1986); 2) the statutory definition for purposes of hospice care, Fla. Stat. Ann. § 400.601(9) (1987) (which does not require that death be imminent) Browning, slip op. at 17, fn. 10, 17; and 3) that used by the Court of Appeals in Guardianship of Barry (cited by this Court with approval in John F. Kennedy Memorial Hospital) when a child who "even if life support was maintained...was not expected to live much beyond two years" was described as "terminally ill." John F. Kennedy Memorial Hospital, Inc. v. Bludworth, 452 So. 2d at 925. In practice, accurate prognosis is extremely difficult; a terminal illness or condition is not always identifiable and most patients who are dying have not been declared terminally ill. U. S. Congress: Office of Technology Assessment, Life Sustaining Technologies and the Elderly, 7 (1987). "It is easy enough, of course, to designate a patient as terminal or as dying retrospectively but an entirely different matter to do so prospectively....Today, predicting imminent death with any degree of certainty is difficult in the case of most patients, and predicting death 12 or 6 or even 3 months in advance well-nigh impossible." U. S. Congress: Office of Technology Assessment, Life Sustaining Technologies and the Elderly, 67 (1987).

those who knew Mrs. Browning well and were closely involved with her in recent years.

When deciding who should be assigned the task of determining the incompetent patient's wishes (when interpretation is needed) the aim should be to permit the exercise of the person's right to refuse treatment with the least amount of "chilling" or cumbersome procedure.[5] While protection of vulnerable individuals is obviously a major concern, this court and the majority of those in other jurisdictions have previously found that court intervention is not an effective form of protection. As this court held in J.F.K. v. Bludworth:

> ...[T]he procedure for implementing it must not be so cumbersome so as to effectually eliminate it. To require court approval for termination of life support systems in this type of case is too burdensome, is not necessary to protect the state's interest or the interests of the patient and could render the right of the incompetent a nullity.

John F. Kennedy Memorial Hospital, Inc. v. Bludworth, 452 So. 2d 921, 925 (Fla. 1984).

The majority of courts in other jurisdictions have also concluded that either the patient's family or duly appointed guardian is best placed to determine and carry out the

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5. There is no need to identify another decisionmaker when the patient has given an unambiguous directive. Unambiguous patient directives are controlling and not merely to be given weight in third party decisions. There is no justification for substituted judgment when the individual's express judgment is available. Brooks v. U.S., 837 F.2d 958 (11th Cir. 1988); Kirby v. SPivey, 307 S.E.2d 538 (Ga. Ct. App. 1983); Foster v. Tourtellottee, No. CV-91-5046-RMT (C.D. Cal. Nov. 18, 1983), discussed in 704 F.2d 1109 (9th Cir. 1983).

patient's wishes or best interests. See, e.g., Conservatorship of Drabick, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840 (Cal. Ct. App. 1988), review denied (Cal. July 28, 1988), cert, denied, 109 S. Ct. 399 (1988); Barber v. Superior Court, supra, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (Ct. App. 1983); In re L.H.R., 253 Ga. 439, 321 S.E.2d 716; In re Quinlan, 70 N.J. 10, 355 A.2d 647; In re Colyer, supra, 99 Wash. 2d 114, 660 P.2d 738; In re Guardianship of Hamlin, 102 Wash. 2d 810, 689 P.2d 1372 (1984); In re Torres, 357 N.W.2d 332 (Minn. 1984).

As the New Jersey Supreme Court stated:

> Almost invariably the patient's family has an intimate understanding of the patient's medical attitudes and general world view and therefore is in the best position to know the motives and considerations that would control the patient's medical decisions...Family members are best qualified to make substituted judgments for incompetent patients not only because of their peculiar grasp of the patient's approach to life, but also because of their special bonds with him or her. Our common human experience informs us that family members are generally most concerned with the welfare of the patient. It is they who provide for the patient's comfort, care, and best interests, and they who treat the patient as a person, rather than a symbol of a cause. Where strong and emotional opinions and proponents exist on an issue involving the treatment of an incompetent, extreme care must be exercised in determining who will as his or her surrogate decisionmaker. We believe that a family member is generally the best choice.

In re Jobes, 108 N.J. 394, 415-416, 529 A.2d 434, 445 (1987) (citations omitted). There is no indication that Mrs. Browning's guardian, her closest living relative is not the best choice.

II.

THE PROCEDURAL REQUIREMENTS OF THE COURT BELOW SHOULD BE ADAPTED AND ADOPTED

The procedural requirements outlined in the opinion below should be endorsed by this Court, with some modification. The underlying principle which guided the remedy must be remembered:

> First, the remedy exists to fulfill a right of privacy. Thus, the procedures to invoke and enforce this right should be as private as the state's competing interests can permit for such a delicate decision. We obviously do a poor job of protecting Mrs. Browning's right of privacy by discussing the details of her medical condition and the nature of her family structure in a highly publicized decision which will be preserved for posterity. For the Floridians who follow Mrs. Browning, we hope to create a more private decisionmaking process.

Browning, slip op. at 24. The other factors which the lower court sought to take into account were that the decisionmaking process involve all relevant participants, that it be prompt, that the surrogate decisionmaker be guided by the patient's wishes, and that the surrogate decisionmaker acknowledge the state's interests. Id., at 24-25.

To a large extent, the lower court's procedures effectuate the goal of preserving the privacy rights of Floridians, but at the same time safeguarding the decisionmaking process *so* as to avoid potential abuses. Nonetheless, there are some difficulties with procedural requirements concerning these decisions in health care settings, which this court has acknowledged in the past. As in John F. Kennedy Memorial Hospital v. Bludworth, 452 ***So.*** 2d 921 (Fla. 1984), some elements of the procedure set forth below are unnecessarily burdensome

and should be deleted or clarified.

For example, the requirement of certification of the medical condition by three physicians is appropriate, and consistent with J.F.K. Hospital, but the added requirement that the certification be a formal sworn statement is unnecessarily burdensome. Moreover, the requirement of evidence on the issue of the likelihood of regaining competency is understandable, but decisions should not be postponed until recovery of competency when the patient was given unambiguous directions, such as in the Wons case. The fifth requirement of the doctor's certificate is a statement as to whether the physician believes withdrawing medical treatment in these circumstances is consistent with medical ethics. Browning, slip op. at 32. This is useful information for the surrogate, but is not directly relevant for a determination of what the patient would have wanted. If the patient wishes are known, treatment consistent with those wishes is required. See Point I (B)(i). "Best interests" determinations, which would be more influenced by prevailing medical standards, are not at issue in this case.

As to the exercise of substituted judgment by the surrogate decisionmaker, it is important to stress that where there is an unambiguous patient directive, no substituted judgment is needed, since such a directive should simply be honored. See fn. 5, supra. Moreover, when substituted judgment is necessary, a decisionmaker who was close to the patient should not be required to conduct a broad, quasi-judicial fact finding mission before making a substituted judgment. Such a far-reaching

inquiry as that mandated by the court should only be necessary when the decisionmaker lacks personal knowledge of the patient's desires.

The Court of Appeals' certification requirements provide a level of accountability which, especially in institutional settings, will safeguard against abuse. Judicial review is always available for those cases where there is a dispute. Requiring court review or notice to the State of decisions to implement a patient's wishes casts an impermissible chill on the exercise of a constitutionally protected right.

Experiments with mandating bureaucratic involvement in other states have not proved successful. The New Jersey Ombudsman Office, which had strictly interpreted its state law to require reporting and review of every proposal to withhold or withdraw treatment withdrew its interpretation after a storm of protest. Representatives of the New Jersey Medical Society were reported as describing the Ombudsman's retraction as "a victory for people in nursing homes who can now make probably the most personal of decisions without interference by the state." Newark Star-Ledger, April 21, 1989. The President of the New Jersey Hospital Association said that his organization "has always supported the belief that medical decisionmaking should be left in the hands of the patient/family/doctor triad, as established by case law. The Ombudsman's reaction reaffirms the appropriateness of that process." Trenton Times, April 21, 1989. Senior citizen advocates and members of the health care community had claimed that the Ombudsman's presumption of abuse

in every case had created a climate of fear and mistrust in nursing homes. Trenton Times, April 21, 1989.

The state's suggestion that life-support can never be ended because any person could have changed her mind at any time (Appellant's brief p. 12) is simply another way of requiring treatment in all cases, and effectively vitiating constitutional rights. As the U.S. Supreme Court recently held in another context, forcing life support on Mrs. Browning because she or other patients might have changed their minds is tantamount to "burn[ing] up the house to roast the pig." Sable Communications of California, Inc. v. Federal Communication Commission, 57 U.S.L.W. 4920, 4924 (July, 1989). It would constitute the destruction of all rights to refuse treatment in the name of offering protection to some.

CONCLUSION

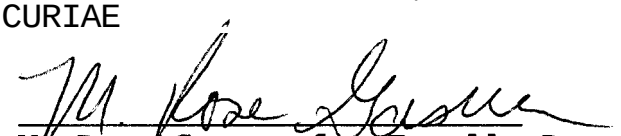
For all the reasons stated above, the certified question should be answered in the affirmative: The guardian of a patient who is incompetent, but not in a permanent vegetative state, and who suffers from an incurable, but not terminal condition, may exercise the patient's right of self-determination to forgo sustenance provided artificially by a nasogastric tube. The guardian should be guided by clear evidence of the patient's wishes regarding the kind of treatment the patient would wish to receive in her current medical condition which must be certified

by her treating physician and two other.

Dated: July 15, 1989
New York, New York

Respectfully submitted,

SOCIETY FOR THE RIGHT TO DIE, INC.
AMICUS CURIAE

By: 
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was furnished to C. Marie King, Esq., Asst. State Attorney, P. O. Box 5028, Clearwater, Florida 34616; George J. Felos, Esq., 380 Main Street, Suite 200, Dunedin, Florida 34698; Robert Merkle, Esq., 1401 Court Street, Clearwater, Florida 34616; Larry J. Gonzales, Esq., 911 Chestnut Street, Clearwater, Florida 34617-1368; Giles R. Scofield, 111, Esq., Concern for Dying, Room 831, 250 West 57th Street, New York, New York 10107; William Trickel, Esq., 39 West Pine Street, Orlando, Florida 32801; and Mary Nimz, Esq., Chief Staff Counsel, National Legal Center for the Medically Dependent & Disabled, Inc., P.O. Box 441069, Indianapolis, Indiana 46244 by U.S. Mail this 15th day of July 1989.

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