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IN THE SUPREME COURT OF FLORIDA

IN RE: GUARDIANSHIP OF)
ESTELLE M. BROWNING,)
Incompetent.)

STATE OF FLORIDA,)
Petitioner, Cross Respondent,)
vs.)
DORIS F. HERBERT, as Guardian on behalf of Estelle M. Browning, Incompetent,)
Respondent, Cross Petitioner.)

Case No. 74,174
2d DCA Case No. 88-02887

ANSWER BRIEF OF RESPONDENT, CROSS PETITIONER

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TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Respondent, Cross Petitioner, is DORIS F. HERBERT, the duly appointed guardian and next-of-kin of ESTELLE M. BROWNING, incompetent, and is referred to as "Respondent" or "Guardian." Petitioner, Cross Respondent is JAMES T. RUSSELL, State Attorney, Sixth Judicial Circuit, and is referred to as "Petitioner" or "State." In this brief, the record on appeal is cited as "R", and the appendix to this brief is cited as "A".

Due to numerous omissions and errors in Petitioner's Statement of the Case and Statement of the Facts, Respondent disagrees with the same and submits a complete Statement of the Case and Statement of the Facts.

STATEMENT OF THE CASE

ESTELLE M. BROWNING, born March 14, 1900, was adjudged incompetent on February 24, 1987 (R 1). On the following day, DORIS F. HERBERT was appointed guardian of the person and property of ESTELLE M. BROWNING (R 2).

On September 2, 1988 the guardian filed in the Pinellas County Circuit Court, Probate Division, a Petition To Terminate Artificial Life Support. The petition, based upon Mrs. Browning's constitutional rights to refuse medical treatment, requested court approval to remove a nasogastric feeding tube, claiming that its use prevented the natural and imminent death of the ward (R 3; A 1).

Hearing was held on the Petition To Terminate Artificial Life Support on September 30, 1988, at which time testimony was taken and exhibits received into evidence (R 13-85, 86-391; A 3-21). The petition was argued, both in writing (R 9-12) and orally (R 68-69) on constitutional grounds. An Order Denying Petition to Terminate Artificial Life Support was entered on October 12, 1988, without reference to or reliance upon any statute (R 392-393; A 22-23). On October 12, 1988 the guardian appealed the Order Denying Petition To Terminate Artificial Life Support to the Second District Court of Appeal (R 394).

The court of appeal issued an opinion on April 10, 1989, 14 F.L.W. 956, affirming the order of the trial court,

holding that the trial court denied the petition exclusively on a statutory basis. The court of appeal further held that the guardian is entitled to decide for the patient, under article I, section 23, Florida Constitution, whether the feeding tube should be removed, and established a framework under which this decision is required to be made. The opinion, 14 F.L.W. at 962, "expressly construes a provision of the state Constitution," and certifies the following question to this Court:

> WHETHER 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 FOREGO SUSTENANCE PROVIDED ARTIFICIALLY BY A NASOGASTRIC TUBE?

On April 17, 1989 the Guardian served a Motion For Clarification (R 457-464) and the State served a Motion For Rehearing or For Clarification (R 465-470). By opinion of May 3, 1989, 14 F.L.W. 1122, the appellate court disposed of the motions. The State filed a Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court on May 15, 1989. The Guardian filed a Cross Notice to Invoke Discretionary Jurisdiction on May 30, 1989.

STATEMENT OF THE FACTS

Estelle M. Browning is 89 years of age (R 46). Her only son died at 18 years of age, and her husband died in 1978 (R 46, 43). Prior to 1986, Mrs. Browning lived in Dunedin, Florida, was in good health, functioned well and seemed to enjoy life (R 27). She went to movie theatres, dinner theatres, social functions and performed church related work (R 62, 27, 21).

Doris F. Herbert, 80 years of age, is Mrs. Browning's second cousin and only living relative (R 46, 47). Doris F. Herbert and Estelle M. Browning were close their entire lives, and in 1982, Mrs. Herbert gave up her home in Albany, New York to live with Mrs. Browning in Florida (R 46, 42-43).

In 1978, after her husband's death, Mrs. Browning wrote her cousin and said she was going to get a "living will." She had made visits to hospitals and, apparently, after seeing the condition of some patients, said that she hoped she would never be like that. (R 43.)

In 1980, Mrs. Herbert and a mutual friend visited Mrs. Browning. On that occasion Mrs. Browning presented her living will which Mrs. Herbert and the friend witnessed. (R 43-44.) In 1981 the friend who witnessed the Living Will died. Mrs. Browning apparently became concerned about the validity of the living will due to the death of the witness

and the fact that the remaining witness was her relative and mentioned in her testamentary will. Upon being told she would have to make out another, Mrs. Browning destroyed the first living will. (R. 44-45.)

In November 1985, Mrs. Browning, while on a visiting team from her church, went to a nursing home and saw one of her friends on life support. She relayed this incident to Mrs. Kings, her good friend and neighbor, stating: "Oh Lord, I hope this never happens to me." (R. 21.) Two days later Mrs. Browning returned to the home of Mr. and Mrs. Kings with a living will, which was filled in, except for her signature and that of witnesses (R. 21, 19). Mrs. Browning, while alert, competent, and having exact knowledge of what she was doing, executed the living will (R. 125; A. 3) in the presence of Mr. and Mrs. Kings, who contemporaneously witnessed Mrs. Browning's signature (R. 20-21, 19, 24, 25).

At the time she signed the living will, Mrs. Browning also related to Mr. Kings that she had seen a friend on life support systems. She told him she didn't want any life support systems whatsoever, and said: "I never want to be that way." (R. 24.) After signing the living will, Mrs. Browning was very relieved that she had everything all taken care of, and said to Mrs. Kings: "Thank God I've got this taken care of; I can go in peace when my time comes" (R. 21).

Mrs. Browning delivered a copy of the living will to Lois C. West, M. D., her family physician. Dr. West placed the living will in Mrs. Browning's records and apparently explained to her its implications. (R 27-28.)

The living will (R 125; A 3), recites Mrs. Browning's desire that her dying not be artifically prolonged, and provides for the withdrawal of life sustaining procedures where there can be no recovery from her condition and her death is imminent. The living will specifically states that nutrition and hydration **not** be provided by gastric tube or intravenously. Mrs. Browning designates her family physician, Dr. Lois C. West, to make medical treatment decisions for her in the event she becomes incompetent or otherwise unable to make such decisions for herself.

On November 9, 1986, Mrs. Browning suffered a stroke. She was brought to Mease Hospital in Dunedin, Florida. A CT head scan revealed a massive cerebral hemorrhage in the left parietal region, and revealed leukomalacia, a disease affecting the white matter of the brain, (the white matter connecting various parts of the brain together) (R 126-130, 91; A 17-21). The parietal region controls the higher functions of the brain such as thought and language, and also controls motor activity (R 29, 90-91). Mrs. Browning is right handed and therefore the

left side of her brain is dominant (R 29).

The brain damage in the hemorrhaged area is permanent. Further, due to Mrs. Browning's age and the leukomalacia there is no hope that unaffected areas of the brain can take over the functions of the damaged areas. (R 29, 30, 91-92.)

As an initial result of the stroke, Mrs. Browning suffered paralysis of the right side, was unable to talk or swallow, and was neurologically unresponsive (R 126-130; A 17-21). She was treated at Mease Hospital by Dr. West, who did not expect her to survive (R 29). After receiving acute care at the hospital, a feeding tube was surgically inserted directly into Mrs. Browning's stomach, and on the following day, November 21, 1986, she was discharged to Sunset Point Nursing Center, where she remains today (R 30, 128; A 19).

Upon admission to the nursing center, Dr. West turned over Mrs. Browning's care to James A. Avery, M. D. (R 35). Dr. Avery treated the patient conservatively, ordering comfort measures only (R 140). In September, 1987, Mrs. Browning developed an infection secondary to a hip ulcer, which Dr. Avery instructed the nursing staff not to treat. A nurse reported this decision to Dr. Edward C. Hayward, the nursing center's Medical Director. (R 257.) Dr. Hayward, without consulting Dr. Avery, ordered antibiotics administered to Mrs. Browning (R 142). Dr. Avery disagreed

with the administration of antibiotics, basing his opinion upon the family's wishes, the patient's status, and Mrs. Browning's living will. Dr. Avery felt that the family's wishes should not be violated and objected to the treatment, especially without prior notification to either him or the family. As a result, Dr. Avery withdrew as treating physician. (R 141.) Dr. Hayward then assumed care of Mrs. Browning (R 134).

According to most recent evidence, Mrs. Browning requires total care (R 121; A 7). Her right side is contractured in flexion and her left side contractured in extension. Her limbs are essentially rigid, (although one nurse reports some movement in the left side). Her hands open and close. She is incontinent of bowel and bladder. The right side of her face is paralyzed. Her jaw is locked and she cannot swallow. She moves her head on occasion. She cannot move from side to side in her bed. (R 121-124, 31-32, 95-96, 51, 102-103, 53; A 7-10.) Her condition is slowly deteriorating (R 330, 329, 291, 289, 284, 357).

Mrs. Browning's life at the nursing center is consistently plagued with physical difficulties (R 385-391; A 11-16). She has suffered innumerable decubitus ulcers (bed sores) of varying degree (R 332-351). Some involve breaking of the skin, deep tissue involvement, necrotic tissue and foul purulent drainage (R 385-391, 332-351; A

11-16). She suffers bruises on her hand, blisters on her hands and feet, swollen hands, ingrown toenails, vaginal bleeding, vaginal discharge and irritation, labored respiration, rectal discharge, blockage of the catheter, mucous in urine, diarrhea, and other maladies **(R 385-391, 135-191, 191–331; A 11-16).**

In addition to the above, Mrs. Browning suffered continued complications in connection with the gastric tube feeding. Gastric juices oozed out around the tube, contents leaked from the tube, and there was drainage around the site of the tube incision **(R 385–391; A 11-16).** On May **18, 1988** the tube came out of Mrs. Browning's stomach, resulting in the insertion of a tube through her nostrils down into her stomach **(R 389, 278–279; A** 115**).** Mrs. Browning, as evidenced by her frequent vomiting **(R 385–391; A 11-16),** cannot tolerate enough sustenance through the tube to sustain her metabolism **(R 92-93, 57-58, 354).**

The level of Mrs. Browning's cognitive functioning is difficult to precisely assess. She opens her eyes and follows the movements of people around the room, but she cannot follow any simple commands or orders **(R 122, 133, 134;** A 8**).** She can blink her eyes spontaneously, but cannot blink in any consistent pattern in response to "yes" or "no" questions **(R 96-97, 122;** A 8**).** She often emits noises which Dr. Hayward and Dr. West characterized as an attempt or effort

to speak (R 146, 39). Dr. Hayward does not report Mrs. Browning "talking and answering" appropriately to simple questions, as stated by Petitioner (Initial Brief at 4). Precisely, Dr. Hayward states that she "appears to be answering" questions (R 143, emphasis added). Significantly, this entry of Dr. Hayward is the only one of thirty-three doctor entries, made over almost a two-year period, with any report of Mrs. Browning talking (R 135-150).

Likewise, regarding reports by nurses, Petitioner has culled from hundreds of record entries (R 131-3301, the small number of references to speech (Initial Brief at 5). However, the predominant and overwhelming majority of record entries don't mention speech, and those that do, characterize it as usually incoherent or garbled (R 271, 284, 268). Contrary to the nurses involved, visitors to the nursing center have never heard Mrs. Browning speak despite numerous visits (R 61-62, 64-66).

According to James H. Barnhill, M. D., a Board Certified Neurologist practicing at Mease Hospital in Dunedin (R 88), reflex-type actions of patients such as Mrs. Browning are commonly misinterpreted as cognitive or volitional responses. This dynamic occurs with family members or others who will "see" what they "look hard enough for." (R 100-101.) Nurse Hurt, who primarily attests to Mrs. Browning's speaking abilities, is admittedly

emotionally attached to her patients (R 54). Interestingly, the appellate court does not find that Mrs. Browning talks, but rather finds that Nurse Hurt believes she does. 14 F.L.W. at 957.

Mrs. Browning reacts to painful stimuli, but it is difficult or impossible to conclude whether there is any cognitive experience of these painful stimuli (R 108-109, 34, 58-59). Dr. Barnhill examined Mrs. Browning on September 25, 1988 and concluded that she is in a persistent vegetative state, which is defined as an absence of cognitive behavior, including the inability to communicate or to interact purposefully with the environment (R 123-124, 102-103; A 9-10). He considered Mrs. Browning's ability to follow with her eyes and grasp with her hand, to be reflex-type actions, not indicative of higher functioning (R 99-100). The appellate court, concerning whether Mrs. Browning was in a permanent vegetative state, concluded that the evidence is inconclusive and that her vegetative state may not be complete. 14 F.L.W. at 959, 960.

At the hearing on the Petition to Terminate Artificial Life Support, held September 30, 1988 (R 13-85), Dr. Barnhill's report (R 121-124; A 7-10) and deposition (R 86-120) were introduced into evidence along with Mrs. Browning's living will (R 125; A 3), her Mease Hospital records (R 126-130, A 17-21), the January 16, 1987 report of

Dr. Avery (R 132; A 4), the March 28, 1988 report of Dr. West (R 133; A 51, the April 11, 1988 report of Dr. Hayward (R 134, A 6), the Sunset Point Nursing Center records (R 135-3841, and a summary of physical complaints derived from the nursing home records (R 385-391; A 11-16). Testimony was received from Mr. and Mrs. Kings, (the witnesses to the living will), Dr. West, Mrs. Herbert, (the guardian and next-of-kin), and Nurse Hurt (R 13-85).

Dr. West testified that there is no likelihood that Mrs. Browning can recover (R 33). Dr. Barnhill states that recovery is totally impossible (R 1031, and in Dr. Hayward's opinion, chance for meaningful recovery is very small (R 134; A 6).

Both Dr. West and Dr. Barnhill agree that removal of the feeding tube would result in Mrs. Browning's imminent death, occuring within a week to ten days of removal (R 33-34, 103-104, 115-1161. Death would result from dehydration and electrolyte imbalance caused by Mrs. Browning's inability to naturally receive food or liquid (R 34).

If the feeding tube is not removed, Dr. West testified that she had no way of knowing when death would occur, but it would probably result from an overwhelming infection of some type (R 401. According to Dr. Barnhill, Mrs. Browning could easily survive another year with the

feeding tube in place, and therefore with the tube in place death was not imminent. However, this estimate of one year depends upon her avoidance of an untreatable infection. **(R 106-107, 104, 115-116.)**

Dr. West, the person designated by Mrs. Browning in her living will to make medical treatment decisions, agreed to remove the feeding tube if permitted by the court **(R 34-35).** She commented: "There are a lot of things worse than death in these particular situations" **(R 35).**

The trial court, in its oral opinion at the conclusion of the hearing, commented that food sustenance was not life support in the common sense. The court also stated it had a problem with "terminal and imminent." **(R 82-84.)**

In its written order **(R 392-393; A 22-23)**, the trial court found that: Mrs. Browning executed the living will while competent and in full possession of her faculties; her stroke left her totally unable to care for herself and totally unable to receive sustenance without the use of a feeding tube; removal of the feeding tube would result in death within four to nine days; Mrs. Browning may continue to live with artificial sustenance an indeterminate time, which may be measured in months or years; it is virtually impossible that Mrs. Browning can recover from her condition; and the death of Mrs. Browning is not imminent because she may, with continued artificial provision of

sustenance, exist for an extended period of time.

Upon the above findings, the trial court on October 12, 1988, denied the Petition for Termination of Artificial Life Support (R 392-393; A 22-23).

The court of appeal first held that no remedy was provided Mrs. Browning under Chapter 765, Florida Statutes (1984), the "Life-Prolonging Procedure Act of Florida," (or under any other statute), because a nasogastric tube is excluded as a "life-prolonging procedure" which may be withdrawn under the Act. The court also observes that, had the feeding tube been a removable device under the Act, Mrs. Browning's condition would be terminal, because the terminal nature of a condition should be determined as if the life prolonging procedure was absent. 14 F.L.W. at 958.

The court of appeal then finds that Mrs. Browning has a right to refuse medical treatment based upon her constitutional right of privacy, and that this right is not lost because of her incompetency, (irrespective of the degree of her incompetency or the exact nature of her condition). 14 F.L.W. at 958-959. The court then fashions a remedy to protect this right, based upon the patient's right to make a personal and private decision and not upon other interests. Therefore, the surrogate's decision must be that "which the patient personally would choose," and must be based upon clear and convincing evidence of the intentions

of the patient. The surrogate decision maker must be "confident" that the decision is in accordance with the patient's wishes. The surrogate cannot substitute his or her opinions or values for that of the patient. 14 F.L.W. at **959, 961.** The surrogate must have adequate up-to-date evidence, including sworn medical certificates the surrogate "must rely upon," on the following issues: would the patient be permitted to forego the life sustaining medical treatment if competent; is there any reasonable probability that the patient will regain competency; is there sufficiently clear evidence of the patient's personal decision so substituted judgment can be made; and, is the patient's right outweighed by state interests under the Satz standards. The decision may be made by a close family member or legally appointed guardian, and can typically be made outside of court, although an interested party may seek circuit court review if in doubt as to the lawfulness of the decision. 14 **F.L.W.** at **960-962.**

Having set forth the standards and procedures under which the decision should be made, the court defers that decision to the guardian, expressing "no opinion **as** to the decision she should reach." 14 **F.L.W.** at **962.**

On the Motions for Clarification and Rehearing, the court held that the supporting medical certificates should be from physicians "with specialities relevant to the

patient's condition." It also held that persons proceeding pursuant to the court's decision would not be civilly or criminally liable if acting in good faith. 14 F.L.W. at 1122.

The Statement of the Facts and numerous other portions of Petitioner's brief are replete with "matters" transpiring in connection with this case subsequent to the opinions of the appellate court (Initial Brief at 7, 8, 17 and 24). These matters are ~~de hors~~ the record. Respondent considers it inappropriate to comment on any question of fact outside the record on appeal, and therefore does not respond to these non-record references of Petitioner.

SUMMARY OF ARGUMENT

A competent person possesses, as an integra expression of his or her fundamental freedom of self-determination, the common law and constitutional right to refuse unwanted medical treatment. While this right of the individual is not absolute, competing interests of the State generally give way to the patient's much stronger interest in directing the course of his or her own life, especially (as here) where there is no hope of recovery from the patient's affliction.

An incompetent person possesses the same right to refuse medical treatment as does a competent person, because, constitutional rights are not lost or diminished upon a person's incapacity. Therefore, there must be satisfactory procedures to fulfill this right for persons no longer capable of making their own decisions.

Promptness is a vital consideration in any procedure established to fulfill the right, because, too often, the right to refuse treatment is "granted" only after the patient has expired. Most courts have concluded that judicial intervention in decisions of this nature are unduly cumbersome. Thus, the appellate court necessarily and correctly provided for a private decision making process which allows the decision to be made by the persons best suited to make it--the patient's family.

The appellate court adopts a pure "subjective intent" test, which allows the surrogate to make only that decision which clear and convincing evidence establishes the patient would have made for himself or herself. This contrasts with the "objective" or "best interest" test which allows the surrogate to consider factors other than the patient's expressed intent in reaching the decision. The appellate court's rejection of the objective/best interest test is contrary to the doctrine of "substituted judgment" as expressed in Florida law. The subjective intent test utilized by the appellate court should be modified to include, in certain circumstances, elements of the objective/best interest test.

Mrs. Browning's living will is limited to situations where her condition is terminal. "Terminal condition" is described in her living will (and by statute) as a condition for which there is no recovery and which makes death imminent. The correct definition of "imminent death" is: imminent death without considering the possibilities of extending life with artificial life support. To hold otherwise would render living wills virtually useless. Mrs. Browning's death, within five to nine days without artificial life support, is imminent. Because there is no hope that she can recover, she suffers from a terminal condition as defined in her living will.

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[1] CONDITION, MAY EXERCISE THE PATIENT'S RIGHT OF SELF-DETERMINATION TO FOREGO SUSTENANCE PROVIDED ARTIFICIALLY BY A NASOGASTRIC TUBE.

This case again presents to the court the difficult, perplexing and (perhaps) unwanted task of deciding the life and death issues which arise as medical technology inevitably advances. While the courts have recognized the limitations on their ability to comprehensively address these issues, they are nevertheless always open to hear these matters, especially against the backdrop of legislative inaction. Satz v. Perlmutter, **379** So.2d **359, 360-361** (Fla. 1980).

In arguing the certified question, the State first contends that the patient has no right to forego artificially provided sustenance. If such right does exist, the State then argues that the procedures set forth by the appellate court to effectuate said right are insufficient.

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[1] "Not terminal," as used in the certified question, is descriptive of the fact that Mrs. Browning, with continued tube feeding, may live for an extended period of time. However, as argued infra by Respondent at **43-52**, for purposes of construing Mrs. Browning's living will as evidence of her intent, Mrs. Browning has a "terminal" condition because her death, without continued tube feeding, is imminent.

In order to determine if the patient has such a right, an appropriate beginning is to analyze whether the patient, if competent, is entitled to remove the feeding tube. If Mrs. Browning could miraculously become lucid and competent for a few minutes and instruct that the feeding tube be removed, would her choice be legally enforceable? Certainly, if she is not entitled to remove the tube when competent, there would be no greater right to refuse treatment conferred upon incompetency. Conversely, if she has the right to remove the tube while competent, (as is argued infra), this right should not be diminished or restricted upon her incompetency.

Thus, Respondent will, in order, argue that a competent patient possesses this right, such right is not lost or limited upon incompetency, and the procedures established by the appellate court to fulfill said right are sufficient.

A. A COMPETENT PERSON WHO SUFFERS FROM AN INCURABLE, BUT NOT TERMINAL CONDITION, HAS A RIGHT TO FOREGO SUSTENANCE PROVIDED ARTIFICIALLY BY A NASOGASTRIC TUBE.

The common law has long recognized, as part of the right of self-determination, an individual's right to be free of unwanted bodily interference and intrusion. Union Pacific Railway Co. v. Botsford, 141 U.S. **250**, 251, 11 S.Ct. 1000, 1001, **35** L.Ed. **734, 737** (1891). As also stated by

Justice Cardozo:

> "Every human being of adult years and sound mind has a right to determine what shall be done with his own body..."

Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914). As a result, a physician who operates upon a patient without his or her consent is guilty of a trespass to the person. Chambers v. Nottebaum, 96 So.2d 716 (Fla. 3d DCA 1957). Thus, a competent adult person generally has the right to decline to have any medical treatment initiated or continued. In re Conroy, 98 N.J. 321, 486 A.2d 1209, 1222 (1985).

Courts, more recently, have held that these rights are also constitutionally emanated:

> "[T]he right to refuse or discontinue treatment [is] based upon 'the constitutional right to privacy...an expression of the sanctity of individual free choice and self-determination.'" Satz v. Perlmutter,

362 So.2d 160, 162 (Fla. 4th DCA 1978), approved, 379 So.2d 359 (Fla. 1980). See also In re Barry, 445 So.2d 365, 370 (Fla. 2d DCA 1984); Corbett v. D'Alessandro, 487 So.2d 368, 370 (Fla. 2d DCA 1986), review denied, 492 So.2d 1331 (Fla. 1986); and, Wons v. Public Health Trust of Dade County, 500 So.2d 679, 87 (Fla. 3d DCA 1987), approved, No. 69,970 (Fla. Mar. 16, 1989) [14 F.L.W. 112]. As the Florida Constitution in article I, section 23, specifically guarantees this right of privacy, Floridians have a strong right of privacy much broader in scope than

that of the Federal Constitution. Winfield v. Div. of Pari-Mutuel Wagering, 477 So.2d 544, 548 (Fla. 1985).

The right to refuse medical treatment is not absolute, however, and is tempered by the state's: interest in preserving life; need to protect innocent third parties; duty to prevent suicide; and, duty to help maintain the ethical integrity of medical practice. Satz v. Perlmutter, 362 So.2d at 162. Thus, in determining whether to enforce a person's decision to refuse treatment, the interests of the state are weighed against the rights of the individual.

The weight given to the state's interest in preserving life is sometimes linked with the individual's prognosis for recovery:

> "[T]here is a substantial distinction in the State's insistence that human life be saved where the affliction is curable, as opposed to the State interest where, as here, the issue is not whether, but when, for how long and at what cost to the individual his life may be briefly extended." Satz v. Perlmutter, 362 So.2d at 162, quoting from Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977).

Where there is no hope of recovery, (as in the case of Mrs. Browning), the issue is not whether a life should be saved, but how long and at what cost the dying process should be prolonged. John F. Kennedy Hosp. v. Bludworth, 452 So.2d 921, 924 (Fla. 1984).

Further, in cases that do not involve protection of

the actual potential life of someone other than the decision maker, the state's indirect and abstract interest in preserving the life of the competent patient generally gives way to the patient's much stronger personal interest in directing the course of his own life. In re Conroy, 486 A.2d at 1223.

The decision to remove the feeding tube by a competent patient in Mrs. Browning's condition, would be paramount to any state interest in insisting that the patient's life continue. A decision otherwise would not preserve the sanctity of life, but would destroy the "sanctity" of free will and determination, which are fundamental constituents of life. Id. at 1223-1224.

There is no need here to protect innocent third parties, as was the primary issue in Wons. Mrs. Browning has no living relatives other than Mrs. Herbert, her guardian, who has requested the feeding tube be removed.

Also, declining life sustaining medical treatment may not properly be viewed as an attempt to commit suicide. Refusing medical intervention merely allows the disease to take its natural course; if death were eventually to occur, it would be the result, primarily, of the underlying disease, and not the result of a self-inflicted injury. In re Conroy, 486 A.2d at 1224. Disconnecting an artificial

life prolonging device does not cause death by a "death producing agent," but allows nature to take its course. It is not self-infliction or self-destruction, but self-determination. Satz v. Perlmutter, 362 So.2d at 162; Bouvia v. Superior Court, 179 Cal.App.3d 1127, 225 Cal.Rptr. 297, 306 (1986); In re Conroy, 486 A.2d at 1224.

The State fails to appreciate the distinction between the natural intake of sustenance and tube feeding. Intentionally foregoing the former, (starving oneself to death), may, under some circumstances, constitute suicide. The latter may be properly and legally refused, because it is medical treatment:

> "While no Florida case has previously addressed the termination of artificial feeding devices to sustain life or prolong the moment of death, we see no reason to differentiate between the multitude of artificial devices that may be available to prolong the moment of death." Corbett v. D'Alessandro, 487 So.2d at 371;

> "Although an emotional symbolism attaches itself to artificial feeding, there is no legal difference between a mechanical device that allows for a person to breathe artifically and a mechanical device that artifically allows a person nourishment."

Gray v. Romeo, 697 F.Supp. 580, 587 (D.R.I. 1988). Numerous other jurisdictions recognize that artificial provision of sustenance is medical treatment which can be withheld or

withdrawn.[2] Mrs. Browning did not self-induce her horrible condition. She wanted to live under her own power, without being tethered to a machine administering formula through a tube placed into her stomach through her nasal passages and esophagus. There is no question of suicide.

Finally, it is not necessary to deny a right of self-determination to a patient in order to recognize the interest of doctors, hospitals, and medical personnel in attendance on the patient. If the doctrines of informed consent and right of privacy have as their foundations the right to bodily integrity and control of one's fate, then those rights are superior to the institutional considerations. Satz v. Perlmutter, 362 So.2d at 163-164. Recognition of the right to refuse necessary treatment in appropriate circumstances is consistent with existing medical mores. Id. at 163. Medical ethics do not require intervention in disease at all costs. In re Conroy, 486 A.2d at 1224;

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[2] Rasmussen v. Fleming, 154 Ariz. 207, 741 P.2d 674 (1987); Bouvia v. Super. Ct., 225 Cal.Rptr. 297 (1986); McConnell, et al. v. Beverly Enterprises, et al., 209 Conn. 692, 553 A.2d 596 (1989); Severns v. Wilmington Medical Center, 425 A.2d 156 (Del. Ch. 1980); In re Hier, 18 Mass.App. 200, 464 N.E.2d 959 (1984); Brophy v. New England Sinai Hosp., 398 Mass. 417, 497 N.E.2d 626 (1986); In re Gardner, 534 A.2d 947 (Me. 1987); In re Conroy, 486 A.2d 1209 (1985); In re Requena, 213 N.J.Super. 475, 517 A.2d 886 (1986); In re Peter, 108 N.J. 365, 529 A.2d 419 (1987); In re Jobes, 108 N.J. 394, 529 A.2d 434 (1987); Workmen's Circle Home v. Fink, 135 Misc.2d 270, 514 N.Y.S.2d 893 (Sup.

Corbett v. D'Alessandro, **487** So.2d at **371** n. 1. Given the fundamental nature of the constitutional rights involved, protection of the ethical integrity of the medical profession alone could never override those rights. Public Health Trust of Dade County v. Wons, **14** F.L.W. at **115** (Ehrlich, C.J., concurring).

The State cites Chapter **765** to support its claim that competent persons cannot forego artificial sustenance. The Act does not pertain to the rights of competent persons to forego treatment, but to the rights of competent persons to make declarations which will be recognized in the event of their incompetency or inability to give directions. Further, any reliance upon Chapter **765** is misplaced because, as held in Corbett, the constitutional right to refuse medical treatment cannot be limited by the statute:

> "Therefore, Chapter **765** appears to have been enacted to apply in certain specified situations and was not intended to encompass the entire spectrum of instances in which these privacy rights may be exercised.
>
> As evidence of that intent, Section **765.15** provides that Chapter **765** is 'cumulative to the existing law...and do[es] not impair any

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Ct. **1987)**; Delio v. Westchester County Medical Center, 129 App.Div.2d 1, **516** N.Y.S.2d **677** (1987); Gray v. Romeo, **697** F.Supp. **580** (D.R.I. **1988)**; In re Grant, **109** Wash.2d **545, 747** P.2d **445** (1987); cf. Cruzan v. Harmon, **760** S.W. 2d **408** (Mo. **1988)**, finding no state or federal constitutional right of privacy; and In re O'Connor, 72 N.Y.2d **517, 534** N.Y.S.2d **886** (1988), finding that patient might regain ability to eat without mechanical assistance.

> existing rights...a patient...may have...under the common law or statutes of the state.' We must construe section 765.15 to protect all constitutional rights a patient might have or else the statute would be unconstitutional." 487 So.2d at 370.[3]

There is no reported Florida appellate decision which addresses the right of a competent person (or a person in the condition of Mrs. Browning) to remove a feeding tube. While most feeding tube cases from other jurisdictions present incompetent patients, two reported cases involve competent persons. In re Requena, 517 A.2d 886, presented a fifty-five year old woman suffering from amyotrophic lateral sclerosis, who was about to lose her natural ability to receive sustenance. Without the introduction of nutrition through artificial means, death would occur in a matter of weeks. The court affirmed the right of Ms. Requena to refuse nasogastric feeding, even though she may live several years being artifically fed. In Bouvia v. Superior Court, 225 Cal.Rptr. 297, a competent twenty-eight year old

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[3]The State further argues that if the amending legislation becomes law, (which, of course, is not now the case), artificial sustenance can only be withdrawn if the patient is "terminal." Yet, the appellate court, despite referring to Mrs. Browning as "not terminal" in the certified question, finds that under the Act, "Mrs. Browning's condition would be terminal if a nasogastric tube were a statutory life-prolonging procedure." 14 F.L.W. at 958 n. 7.

suffering from severe cerebral palsy lost the ability to swallow and thus was unable to take in sustenance. Despite a prognosis of an additional fifteen to twenty years of life with artificial feeding, the court granted the patient's request to remove a nasogastric tube which had previously been inserted against her will.

Mrs. Browning's condition is remarkably similar to that of the patient in In re Conroy, (the court's extensive and detailed description in **486** A.2d at 1217; see **A** 24). The Supreme Court of New Jersey concluded that, if competent, Ms. Conroy was entitled to removal of the nasogastric tube:

> "[W]e have no doubt that Ms. Conroy, if competent to make the decision and if resolute in her determination, could have chosen to have her nasogastric tube withdrawn. Her interest and freedom from nonconsensual invasion of her bodily integrity would outweigh any state interest in preserving life or in safeguarding the integrity of the medical profession. In addition, rejecting her artificial means of feeding would not constitute attempted suicide, as the decision would probably be based on a wish to be free of medical intervention rather than a specific intent to die, and her death would result, if at all, from her underlying medical condition, which included her inability to swallow. Finally, removal of her feeding tube would not create a public health or safety hazard, nor would her death leave any minor dependents without care or support.
>
> It should be noted that if she were competent, Ms. Conroy's right to self-determination would not be affected by her medical condition or

> prognosis. ...A competent person's common law and constitutional rights do not depend on the quality or value of his life." 486 A.2d at 1226.

The importance and breadth of a Floridian's right to refuse medical treatment is unmistakably evident in Wons. Contrary to the State's assertion, the right to refuse treatment in Wons is not dependent upon the religious beliefs of the patient, because a fully competent adult patient may refuse on religious **or** other grounds to receive a life saving blood transfusion. 500 So.2d at 686. Further, both the Third District, id. at 685, and this Court, 14 F.L.W. at 113, cite with approval St. Mary's Hospital v. Ramsey, 465 So.2d 666 (Fla. 4th DCA 1985), which held that **a** practicing Jehovah's Witness:

> "has the right to refuse a transfusion regardless of whether his refusal to do so arises from fear of adverse reaction, religious belief, recalcitrance or cost." 465 So.2d at 668,

emphasis added.

Mrs. Wons, with minor children, having a condition which, if not curable can at least be put in remission, is entitled to refuse a single blood transfusion which will result in her death. If the State cannot articulate an interest sufficient to override Mrs. Wons' decision, there is no interest sufficient to override the competent decision of a patient such as Mrs. Browning, whose incurable and horrible affliction is prolonged by a continuing, intrusive

medical procedure. Thus, in this case, a patient such as Mrs. Browning, in the exercise of her free will and right to self-determination, would be entitled, upon her competent decision, to remove the nasogastric feeding tube which invades her body.

B. THE RIGHT OF A COMPETENT PERSON TO FOREGO SUSTENANCE PROVIDED BY A NASOGASTRIC TUBE IS NOT LIMITED OR RESTRICTED UPON THE PERSON BECOMING INCOMPETENT.

For many unfortunate Floridians, illness or incapacity has resulted in loss of control over their own lives. The fundamental rights of ESTELLE BROWNING, like the rights of such persons, "should not be discarded solely on the basis that her condition prevents her conscious exercise of choice." In re Quinlan, 70 N.J. 10, 41, 355 A.2d 647, 664 (1976). An incompetent's right to refuse treatment should be equal to a competent's right to do so. In re Colyer, 99 Wash.2d 114, 124, 660 P.2d 738, 744 (1983). To hold otherwise would relegate incompetent citizens to second-class status.

This principle was affirmed by this Court in John F. Kennedy Hosp. v. Bludworth, 452 So.2d 921, 923 (Fla. 1984):

> "[T]erminally ill incompetent persons being sustained only through use of extraordinary artificial means have the same right to refuse to be held on the threshold of death as terminally ill competent persons." Emphasis

added. The patient in Bludworth was in a vegetative or comatose condition; yet logically, if these rights are enjoyed by incompetent persons, the particular degree or state of incompetency is irrelevant:

> "All patients, competent or incompetent, with some limited cognitive ability or in a persistent vegetative state, terminally ill or not terminally ill, are entitled to choose whether or not they want life sustaining medical treatment." In re Peter, **529** A.2d at 423,

as cited by the appellate court, 14 F.L.W. at **959.**

Courts of other states have recognized the rights of incompetent persons, who are neither in a vegetative nor comatose condition, to refuse or have withdrawn nasogastric and gastric feeding tubes. In re Hier, 464 N.E.2d **959,** In re Grant, 747 P.2d **445,** and Conroy. In Hier, a psychotic ninety-two year old woman, (otherwise in physically stable condition for her age), was unable to ingest food due to a obstruction in her esophagus. Mrs. Hier had expressed previous dislike for artificial feeding by pulling out feeding tubes, and by physically resisting attempts to reinsert them. The court ruled, over the objection of the temporary guardian appointed, that Mrs. Hier was not required to undergo a life-saving gastrostomy. In Grant, a twenty-two year old incompetent, who had not yet degenerated into an irreversibly comatose or vegetative state, was afforded, by action of her guardian, the right

to refuse introduction of a nasogastric tube.

The State argues that, if an incompetent person under the facts of this case has a constitutional right to refuse treatment, this right cannot be exercised because "it can never be established that the incompetent had not had a change of mind" (Initial Brief at 12). It is true that no surrogate can ever be absolutely certain that the incompetent person has not altered their desire, expressed while competent, to refuse treatment. But a right without an exercisable remedy is no right at all:

> "[T]he constitutional right of privacy would be an empty right if one who is incompetent were not granted the right of a competent counterpart to exercise his rights." In re Barry, 445 So.2d at 370.

In her living will, Mrs. Browning requests that we honor her refusal of medical treatment, and states that she will "accept the consequences for such refusal." Mrs. Browning and any other person making such a declaration, undertake a certain risk that they may change their mind yet be unable to communicate this change. Mrs. Browning, as an essential expression of her personal freedom, decided to accept this risk by signing the declaration. The State, by seeking to obstruct Mrs. Browning's freedom of choice, is not "protecting" her should she change her mind, but is stripping Mrs. Browning of her individual liberty.

C. THE PROCEDURE ESTABLISHED BY THE APPELLATE COURT TO FULFILL MRS. BROWNING'S RIGHT TO FOREGO ARTIFICIALLY PROVIDED SUSTENANCE IS SUFFICIENT.

Petitioner's primary objection to the procedure set forth by the appellate court is that it does not require notice to the State and court approval of the decision to terminate medical treatment. Such a requirement advanced by the State fails for two primary reasons: first, judicial intervention or other procedural overlay is often ill-suited in decisions to remove life prolongation devices; and second, such a requirement takes the decision away from the persons best suited to make the decision--the patient's family.

The appellate court held that it is important that the decision be prompt, 14 F.L.W. at 960, because the procedure under which it is made "must not be so cumbersome so as to effectually eliminate it." Bludworth, 452 So.2d at 925. One need only look to the plethora of cases where arguments were heard or opinions were issued long after the patient had died, to conclude that judicial intervention in decisions of this nature can indeed be unduly cumbersome. Rasmussen v. Fleming, 741 P.2d at 691. See also In re Grant, 747 P.2d at 456, and In re Quinlan, 355 A.2d at 669. The list of cases in which courts "grant" a right of privacy only after the patient has expired, grows longer every day. Browning, 14 F.L.W. at 960. Further, the mere prospect of a

cumbersome, intrusive and expensive court proceeding, during such an emotional and upsetting period in the lives of the patient and his or her loved ones, would undoubtedly deter many persons from deciding to discontinue treatment. In re Farrell, 108 N.J. 335, 357, 529 A.2d 404, 415 (1987). Thus, in balancing the competing interests in these delicate cases, the appellate court necessarily and correctly provided for a private decision-making process.[4]

Close family members, such as a spouse, child, parent or sibling most commonly will act as the surrogate in this private decision-making process. Petitioner would require State intervention and judicial review to assure that the surrogate doesn't have a conflict of interest. However, Petitioner fails to realize that a conflict of interest of some sort will exist in almost every case to remove life support involving a surrogate family member. Such family members may feel the financial burden of the continued life of the patient, unless, (in the increasingly rare event), all the medical bills and associated costs are

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[4] The State's reliance on In re T.W., No. 89-893 (Fla. 5th DCA May 12, 1989) (14 F.L.W. 1192), is misplaced. There, the statutory procedures fail because they do not protect the pregnant minor against a circuit judge's arbitrary denial of the petition for waiver of consent. Meaningful appellate review is not to safeguard the fetus or the minor's parents, but to safeguard the minor's constitutional right of privacy. 14 F.L.W. at 1194.

covered by insurance. These persons will also be the natural and expected beneficiaries of the patient's estate.[5] Aside from financial considerations, the continued existence of the patient through a severe and debilitating illness may be a significant emotional stress and trauma on the family members. Conceivably, many family members in such a circumstance may feel, at one time or another, that their own lives may be made easier by the passing away of the loved one.

Thus, in order to protect the patient from his or her own family, the State would require its own review of the decision, and court approval. Such a devaluation of family values was rejected by this court in Bludworth, where the court stated that the decision to remove life support could be made by family members, without the appointment of a guardian, and without court approval. 452 So.2d at **926.** See also Barry.[6]

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[5] **Petitioner,** (Initial Brief at 1), refers to certain expenditures by the guardian from the ward's estate, which Petitioner presumably contends evidence a conflict. Yet, every such expenditure is listed on the guardianship accounting, which, as shown on its face was reviewed and approved by the court on April 4, **1988** (R 423-427). Petitioner's contention that the guardian "will inherit" the ward's estate (Initial Brief at 22), is unsupported by the record.

[6] **Contrary** to the State's assertion, appointment of a guardian or guardian ad litem was not required in Barry. There,

The opinion of the appellate court allowing a private decision-making process is fully in accord with Bludworth, and the best interests of the patient. Most other courts also agree that:

> "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 a 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." In re Jobes, 529 A.2d at 445, and cases cited therein at 446.[7]

It is the established policy of this state to encourage family unity and protect family harmony. Horton v. Uniguard Ins., Co., 355 So.2d 154 (Fla. 4th DCA 1978), Orefice v. Albert, 237 So.2d 142 (Fla. 1970). To decide, as the State has, that the family is too motivated by self-serving interests to render a proper decision for the

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the court, in holding that the parents' decision was sufficient without court approval, states:

> "We must remember that the conscience of society in these matters is not something relegated to the exclusive jurisdiction of the court." 456 So.2d at 372.

[7]While most cases to remove medical treatment deal with patients who are comatose or in a persistent vegetative state, In re Grant permits family decision making where the

patient, undermines this public policy. Others, however, continue to believe that the family unit remains the foundation of our society and societal values. The appellate court, in providing for a private forum, rejects the notion that surrogates have "abandoned their faith in the value and sanctity of life." 14 F.L.W. at 961.

Further, family members are not the only parties with potential conflicts of interest:

> "The emotional power of the right-to-die cases comes in part from our ability to identify with the actors in the legal drama. Judges as individuals bring to bear their own personal experiences and feelings to these cases and to the various parties involved...Because we identify with the actors, judges may by their own experiences be pulled too deeply into the drama of the situation. There is some justified belief that judges cannot in these cases achieve evenhandedness and impartiality."

In re Jobes, 529 A.2d at 460 (Handler, J., concurring) (citation omitted). A health care facility may be swayed by economic interest. A state attorney, in addition to being a prosecutor, is also a politician. Who can state with certainty that the "review" the State demands for itself in

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patient is neither comatose nor vegetative. There, immediate family members, upon medical certification of the patient's condition, may exercise substituted judgment without court review. If the doctors or health care facility object to the decision, the family can transfer the patient to another health care provider or seek judicial resolution. 747 P.2d at 456.

these cases could not become clouded by improper considerations, especially in light of the emotionally charged public debate on this issue?

What does the State intend upon its notice of a surrogate's decision to remove medical treatment: a review of the medical records; an investigation; an interview of family members? State officials routinely policing family decisions which accord loved ones their wish to die with dignity, presents a chilling governmental intrusion into the private lives of citizens. There is no valid reason to permit the State to intrude in most cases upon the deathbeds of citizens refusing medical treatment. Acceptance of the State's argument, that exercise of the constitutional right to refuse treatment must be taken away from the patient and the patient's family, would mark an ominous trend toward the erosion of our civil liberties. See dissent of Judge Blackmar in Cruzan v. Harmon, 760 S.W.2d at **428**.

Petitioner also minimizes the safeguards contained in the procedures formulated by the appellate court. The right of interested persons to seek judicial review of the surrogate's decision provides a substantial check. Medical decisions to remove artificial life support are not made in a vacuum. Doctors, nurses, health care facilities and

family members are intimately involved in the care of the patient, and would necessarily be aware of an impending decision to remove a life prolonging device. It is near unbelievable that a surrogate can secrete a patient, attached to mechanical life support devices, from a facility in an attempt to improperly remove said devices, without triggering immediate concern and attention.

The physician certificates required by the court of appeal are much more extensive than those required under Bludworth. The surrogate "must rely" on the certificates, 14 F.L.W. at 961, (contrary to the State's assertion otherwise). The State's suggestion that one "need only pay three doctors" to provide whatever statement is desired, (Initial Brief at 15), is a cynical and unwarranted view of the medical profession rejected by this Court in Bludworth. According to this view of the State, the Bludworth procedure for physician certification must also be flawed.

Petitioner also objects that the balancing test formulated by the court leads to "imprecision" in the medical certificates. By the court creating one procedure which balances the various factors influencing decisions to withdraw artificial life support, doctors are not forced to fit the facts into conclusory labels which procedurally trigger certain decisions. The court's approach provides the needed physician flexibility which will allow the

surrogate to receive the most unbiased, comprehensive, descriptive and factual medical information concerning the patient's condition. This can only facilitate the decision-making process.

Potential for criminal liability, according to the State, provides no safeguards because, once the crime is committed, the victim can't be protected (Initial Brief at 20-21). Such logic treats as non-existent the role of deterrence in the criminal law. A surrogate must not just follow procedures, but act in good faith to be relieved of liability. Those acting with intent to harm the patient are criminally responsible. Proving intent is required in prosecuting many types of crimes, and such a necessity here makes prosecution no more difficult or cumbersome for the State than in other cases.

Finally, the appellate court's requirement for clear and convincing evidence of the incompetent's actual intent to refuse treatment does not remove "safeguards," as argued by Petitioner, but greatly restricts the situations in which treatment can be removed or withdrawn from the incompetent.

This test adopted by the court is truly one of "subjective intent," allowing the surrogate to make only that decision the evidence establishes the patient would

have made for himself or herself. 14 F.L.W. at 961. In re Conroy, 486 A.2d at 1229. The court of appeal, 14 F.L.W. at 961-962, specifically rejects the "objective" or "best interest" test which allows the surrogate to consider objective criteria, (factors other than the patient's expressed intent), in reaching the decision that is in the best interests of the patient. See the concurring opinion of Justice Handler in In re Jobes, 529 A.2d at 452-461, for a detailed analysis of both tests.

The two approaches each have benefits and drawbacks. The subjective intent test assures that the decision to refuse treatment is the patient's, and no other's. Yet, it prevents the withdrawal of artificial life support where the intent of the patient is unknown or unclear, or where intent has never been formulated, such as with infants, minors, and adults who were never competent. The objective/best interest test allows for decisions to be made in such cases, but might allow a decision to remove treatment based upon the surrogate's values, said values and decision one cannot assure were shared by the patient.

In Florida, medical decisions to withdraw or withhold artificial life support are made under the "substituted judgment" doctrine, where surrogates substitute their judgment for what they believe the patient, if competent, would have done under the circumstances.

Bludworth, **452** So.2d at **926.** The appellate court concludes, erroneously, that substituted judgment in Florida is a test only of subjective intent. **14** F.L.W. at **961.** In Corbett, despite no living will nor other evidence of the patient's intent presented, Mr. Corbett's decision to remove the nasogastric tube from his wife is approved by the appellate court. Likewise, in Barry, exercise of substituted judgment was proper even absent evidence of intention of the incompetent person. **445** So.2d at **371.**

In actuality, substituted judgment in Florida incorporates elements of both the subjective intent test and the objective/best interest test. If the patient's wishes are well known, they must be followed. Yet, if intent is unclear, decisions may still be made in the patient's best interest. There is, in essence, in Bludworth, Corbett and Barry, recognition of a societal concensus that, artificially sustaining the bodily functions of an irreversibly comatose or permanently vegetative patient in and of itself can, without evidence of intent, give rise to a decision to withdraw treatment:

> "At some point, such a course of treatment upon the insensate patient is bound to touch the sensibilities of even the most detached observer. Eventually, pervasive bodily intrusions, even for the best motives, will arouse feelings akin to humiliation and mortification for the helpless patient. When cherished values of human dignity and personal privacy, which belong to every person living or dying, are sufficiently

transgressed by what is being done to the individual, we should be ready to say: enough." In re Conroy, 486 A.2d at 1250 (Handler, J., concurring in part and dissenting in part). This court should overrule that portion of the appellate opinion which recedes from Bludworth or Corbett, or which imposes a pure subjective intent test in cases where the patient is in a coma or permanent vegetative state.

This court, also, should carefully consider whether elements of the objectivelbest interest test may be utilized in other cases of adult incompetency, (notwithstanding the appellate court's disavowal of the same). Other courts, in cases where the incompetent is neither comatose nor in a vegetative state, "hesitate...to foreclose the possibility of humane actions, which may involve termination of life sustaining treatment, for persons who never clearly expressed their desires.," In re Conroy at 486 A.2d at 1231. See also In re Grant, 747 P.2d at 457, In re Hier, 464 N.E.2d at 964; cf. In re O'Connor, 534 N.Y.S.2d 886. These courts have established standards incorporating elements of the objective/best interest test where there is insufficient evidence to reach a decision under the subjective intent test. This court, as well, should not foreclose exercise of substituted judgment for such patients who may be suffering under conditions of extreme pain or severity, merely because they are not technically comatose or vegetative.

II. MRS. BROWNING SUFFERS FROM A TERMINAL CONDITION FOR PURPOSES OF CONSTRUING HER LIVING WILL UNDER A CONSTITUTIONAL PETITION TO WITHDRAW MEDICAL TREATMENT.

Mrs. Browning's living will, by its language, only applies should she have a "terminal condition." This living will is the primary (although not exclusive) indicator of Mrs. Browning's intent for purposes of a constitutional petition to withdraw treatment, and, as stated by the appellate court, "should be accorded great weight." **14** F.L.W. at **961.** Therefore, absent parole evidence to the contrary, Mrs. Browning must be found to suffer from a terminal condition as defined in her living will, in order for the feeding tube to be removed. Thus, defining what "terminal condition" means in Mrs. Browning's living will is essential to the disposition of her constitutional petition.

Mrs. Browning's living will, (absent its provision for removal of sustenance), is almost identical to the widely used statutory suggested living will form, **§765.05,** Florida Statutes (1984). Her living will therefore incorporates the concept of "terminal condition" provided in the statute. **§765.03(6)** of the Life-Prolonging Procedure Act states:

> "'Terminal Condition' means condition caused by injury, disease, or illness from which, to

> a reasonable degree of medical certainty, there can be no recovery and which makes death imminent."

As a result of this provision and the statutory suggested form of written declaration, most living wills (as is Mrs. Browning's), are limited by their language to situations where there can be no recovery from a condition which also makes death imminent.

In this case, the evidence showed, and both the trial court and appellate court found, that it is virtually impossible that Mrs. Browning can recover from her condition **(R 392-393; A 22-23)**, which is "incurable" and "irreversible," 14 F.L.W. at **956.** Thus, Mrs. Browning's condition is terminal if her death is imminent.

Mrs. Browning has survived over two years with tube feeding, and perhaps can survive another year being mechanically sustained. This the trial court found, presented a "problem" concerning the imminence of her death, (and thus whether her condition was terminal). The court held that, (despite death within five to nine days without the feeding tube), Mrs. Browning's death was not imminent because she may exist for an extended period with artificial feeding. For this reason, the Petition For Termination of Artificial Life Support was denied. **(R 392- 393; A 22-23.)**

The trial court obviously construed imminent death to mean, "imminent death with continued use of the feeding

tube." If the opposite standard is employed, ("imminent death without the feeding tube in place"), death within five to nine days under such circumstances is assumed to be imminent, 14 F.L.W. at 958. Application of the first standard artificially prolongs Mrs. Browning's death indefinitely, application of the second one entitles her to die naturally within days.

Logic and common sense suggest that the standard used for determining imminence of death must be that which considers the artificial life prolongation device absent. It is Mrs. Browning's underlying condition, brain damage caused by stroke, leaving her unable to swallow, and unable to take in sustenance, which makes her death imminent. The feeding tube artificially prolongs an otherwise imminent death. The standard used by the trial court in this case is illogical because it determines imminence of death by the effectiveness of the life prolongation device, rather than the effect of the underlying condition. Often now, and more so in the future, medical technology may be able to keep us technically alive for indefinite periods of time, notwithstanding the underlying illness or condition. Does this mean that the underlying disease or condition, no matter how severe or death producing without medical technological intervention, will never make death imminent? This analysis raises the

grim specter of persons involuntarily wedded to sophisticated machines which stave off death from disease or illness, keeping people minimally alive until the natural aging process, or some other factor causes death. Such a prospect is as undesirable as it is dehumanizing.

The trial court has held in effect that, in order to have a life prolongation device removed, one must show the underlying condition will cause imminent death with the device in place. Under those circumstances, the appellate court finds no need to create a procedure for their withdrawal, because: "In most cases, death would occur before the decision to withdraw life prolonging procedures could take place." **14 F.L.W.** at **958.**

In discussing the definition of "terminal condition" in Chapter **765,** the appellate court states that requiring imminent death under conditions where all medical treatment is continued, "effectively renders the statute useless." The court then analyzes the possibilities of defining imminence of death, and concludes that the only reasonable alternative is to determine whether a condition would be terminal, "in the absence of statutory life prolonging procedures." **14 F.L.W.** at **958.**

The appellate court held that "Mrs. Browning's condition is not a 'terminal' condition for purposes of Chapter **765"** solely because tube feeding is not a procedure

which can be removed under the statute. 14 F.L.W. at 958. Mrs. Browning's death was not considered imminent under Chapter 765 because the statute requires that her prognosis be evaluated with continued artificial provision of sustenance. The court further held that Mrs. Browning's condition would be terminal if tube feeding were a procedure which could be removed under the statute. 14 F.L.W. at 958 n. 7.

The appellate court's conclusion that Mrs. Browning is "not terminal" involved its analysis of Chapter 765. However, in the certified question, and in other parts of the court's decision not pertaining to Chapter 765, Mrs. Browning is referred to as "not terminal" and "not necessarily terminal." The context in which the court makes these other references is not precisely known, resulting then in three possible interpretations: they refer to Mrs. Browning's condition under Chapter 765; they refer to Mrs. Browning's condition under her living will for purposes of a constitutional petition: or, they do neither of the above, but merely are descriptive phrases to express the fact that Mrs. Browning, with continued tube feeding, may live for an extended period of time.

This confusion, (which, despite the guardian's request (R 459-4641, the court declined to clarify, 14 F.L.W. at 11221, could result in the defeat of Mrs. Browning's right to withdraw treatment. The circuit

court, upon review of a decision by the guardian to remove the feeding tube, may, as urged by the State, simply overrule the decision because it determines the appellate court's reference to mean that Mrs. Browning is "not terminal" under her living will, for purposes of a constitutional petition.

If defining imminent death under conditions where all medical treatment is continued would effectively render Chapter 765 useless, as the appellate court held, such a definition of imminent death would also effectively render Mrs. Browning's living will useless for purposes of her constitutional right to refuse treatment. Unlike Chapter 765, tube feeding is a procedure which may be withdrawn under a constitutional petition. Logically then, in utilizing the above analysis of the appellate court to review Mrs. Browning's living will as an expression of her intent for constitutional purposes, it appears that her death is imminent and she thus has a terminal condition. Therefore, the appellate court's references to Mrs. Browning as "not terminal" do not pertain to her constitutional petition, but pertain to Chapter 765 or are merely descriptive of the fact that she may live an indeterminate time with tube feeding.

No other reported Florida court decision has been found which specifically interprets "imminent death" in the context of a living will or termination of artificial life

support. However, this Court, and other Florida courts, have found a condition to be terminal by apparently considering the patient's prognosis without life support in place, because:

> "[i]t is now possible to hold such persons on the threshold of death for an indeterminate period of time by utilizing extraordinary mechanical or other artificial means to sustain their vital bodily functions." Bludworth, 452 So.2d at 923.

In Barry, parents sought removal of a ventilator from their ten-month old child who was in a permanent vegetative coma. Removal of the ventilator would cause the infant's death within one hour, while, with continued use of the device, the child would live anywhere from one to five years. The appellate court found the infant to be terminally ill, notwithstanding the contrary contention of the state. With life support, his death was not imminent. The court, therefore, necessarily considered the child's prognosis without life support in concluding he was terminally ill.

In Perlmutter, the patient, adjudged to be terminal, was unable to move or breathe, and was being sustained by a respirator. Without the respirator, death would result within an hour, with the respirator he might survive, at longest, for a few months. The court held that forcing Mr. Perlmutter to stay alive, just for a short time,

would inflict "never ending physical torture on his body" against his competent will. 362 So.2d at 164. If, hypothetically, medical technology could have kept Mr. Perlmutter alive for years rather than months, the court obviously was not going to insist that he remain alive *so* he can endure "never ending physical torture" for a greater period of time. Logically then, the imminence of Mr. Perlmutter's death and the terminal nature of his condition were not determined by the period of time he could survive with life support.

It is essential that this Court define "terminal condition" and "imminent death" in order to properly construe Mrs. Browning's living will. However, as previously mentioned, because the definition of terminal condition in Mrs. Browning's living will is almost identical to the statutory definition, this Court's decision will assume greater importance. Countless Floridians who have executed living wills, especially the elderly, have invested great thought and effort to assure that, should they become incompetent, their medical treatment decisions will be honored. The relief accorded to them under the Florida Life- Prolonging Procedure Act, or under a constitutional petition, will be vastly different depending upon how terminal condition and imminent death are defined.

If living wills, drafted in accordance with the

language suggested in the Life-Prolonging Procedure Act, require that death must be imminent with the application of artificial life prolonging devices, the act is nothing more than an empty promise and cruel hoax upon the countless citizens of this state who have relied upon the act, and sought comfort from it.[8] The Second District concluded that Chapter 765 should not be so construed. Its finding that a terminal condition, under Chapter 765, be determined in the absence of life prolonging procedures, should be specifically affirmed by this court.

Further, when construing a living will under a constitutional petition, the prior decisions of the courts of this state, the statutory analysis of the appellate court, logic and common sense all indicate that "imminent death," as included in the definition of terminal condition, must mean imminent death without considering the possibilities of extending life with artificial life

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The Acts of some states, such as Missouri, specifically require that death occur within a short time "regardless of the application of medical procedures." Section 459.010(6) RSMo. Justice Welliver, in his dissent in Cruzan v. Harmon, calls the statute "a fraud upon the people of Missouri." 760 S.W.2d at 441. By contrast, the Uniform Rights of the Terminally Ill Act requires that death occur within a relatively short time "without the administration of life sustaining treatment." §1(9). The comment to §1 states that utilizing a contrary definition, as done in Missouri, renders the Act "wholly ineffective as to the actual situation it purports to address."

prolongation devices. To hold otherwise may condemn Mrs. Browning to a fate "worse than death," and render virtually meaningless the uncounted living wills utilizing the statutory suggested form.

This court should specifically rule that Mrs. Browning suffers from a terminal condition which makes her death imminent, for purposes of construing her living will under a constitutional petition to refuse medical treatment.

CONCLUSION

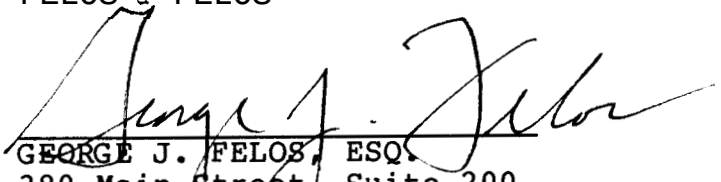
But for the intrusion of a mechanical device, Mrs. Browning would have naturally and peacefully died over two years ago, according to her wish. Instead, her body (and perhaps her mind and spirit) has borne almost constant pain and suffering as it struggles against the continued efforts to keep it functioning. Eventually, with a tube implanted in her, Mrs. Browning will die from a massive infection which cannot be treated, or from the slow deterioration of her bodily systems. There is no legal, moral or ethical principle which can justify or require this result.

Respondent requests this court to: answer the certified question in the affirmative; approve the procedures promulgated by the appellate court insofar as they pertain to patients who are neither irreversibly comatose nor in a persistent vegetative state; adopt additional procedures for such patients incorporating elements of the objective/best interest test in cases where evidence is insufficient to meet the subjective intent test; affirm the appellate court's definition of terminal condition and imminent death made in regard to Chapter 765; and, rule that Mrs. Browning suffers from a terminal condition which makes her death imminent for purposes of construing her living will under a constitutional petition.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail to Michael Markham, Esq., Attorney for Sunset Point Nursing Center, 911 Chestnut Street, Clearwater, Florida, 34617-1368; Marie King, Esq., Office of James T. Russell, State Attorney, P. O. Box 5028, Clearwater, Florida, 34618; Giles R. Scofield, 111, Esq., Concern For Dying, 250 W. 57th Street, New York, N. Y., 10107; and, Fenella Rouse, Esq., Society For the Right to Die, Inc., 250 W. 57th Street, New York, N. Y., 10107, this 17th day of July, 1989.

FELOS & FELOS



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