IN THE FLORIDA SUPREME COURT

IN RE: GUARDIANSHIP OF

ESTELLE M. BROWNING,

Incompetent

STATE OF FLORIDA and SUNSET POINT NURSING CENTER,

Petitioners, Appellees

vs.

DORIS F. HERBERT, as the Guardian on behalf of Estelle M. Browning, Incompetent,

Respondent, Appellant

Case No. 74,174
2d DCA #88-02887
Pinellas Probate Div.
#87-1176-6D-3

INITIAL MERITS BRIEF OF PETITIONER, APPELLEE STATE OF FLORIDA

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STATEMENT OF THE CASE

Mrs. Estelle Browning's legal guardian, Doris F. Herbert, her second cousin (R.46), filed a Petit on to Terminate Artificial Life Support, in the form of a gastric feeding tube (R.3-4). The Court notified the State Attorney of the hearing on the Petition (R.15) and also present at the hearing was counsel for the Sunset Point Nursing Home where Mrs. Browning had been cared for since discharge from Mease Hospital on November 21, 1986 (R.114,134), following a stroke which left her paralyzed on the left side. At the time of the hearing, Mrs. Estelle Browning was 88½ years (R.3,46) old and her guardian 80 (R.46).

In addition to the Exhibits introduced into evidence by Petitioner (R.86-391), the Court took judicial notice of the guardianship file number 87-1176-GD Div. 3 (R.66). Said file includes, in addition to items designated part of the record by Appellant, accountings of the estate showing that the guardian continues to live at Mrs. Browning's home (R.42) and maintains it at the expense of the estate, including $2,745.00 paid on March 12, 1987 for replacement of the air-conditioning, four months after Mrs. Browning's having been placed in the nursing home, plumbing, lawn care, and charitable contributions (Appendix hereto). The Second District granted the State's Motion that the record be supplemented with this judicially noticed file.

The Second District reversed the Circuit Court's denial of the guardian's Petition to Terminate Artificial Life Support and certified the following question as being of great public importance:

> "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?" 14 FLW at 962.

The Second District entered an Order on Motions for Clarification from both sides and added the requirement that the additional medical opinions be from two "'physicians with specialties relevant to the patient's condition.'" 14 FLW 1122. Additionally, this order clarified that the substituted decision would enjoy the same immunity from civil or criminal review and would satisfy the good faith standard of John F. Kennedy Memorial Hospital v. Bludworth, 452 So.2d 921 (Fla. 1984), if it satisfied the scope of review created in its opinion.

The undersigned Assistant State Attorney has agreed to amicus curiae brief by Society for the Right to Die, Inc. and Concern for Dying, and has no objection to any other amicus curiae brief permitted by the Florida Rules of Appellate Procedure.

STATEMENT OF FACTS

The 2d DCA Opinion recognized that Mrs. Browning is not terminally ill and not in a persistent vegetative state but created the right of a surrogate to make the decision to forego life-supporting procedures for such persons "in all cases of adult incompetency without regard to the patient's precise prognosis or mental status." 14 FLW at 959.

In addition to the facts set forth in the Opinion of the Second District, the State would stress the following.

The treating physician, Dr. Hayward, associated with the nursing facility, did not testify at the Circuit Court hearing held September 30, 1988, but his report of April 11, 1988 was introduced into evidence. A prior nursing facility treating physician, Dr. Abery, did not testify, but his prognosis notes were part of the record.

Dr. Abery's report of January 16, 1987, was that Mrs. Browning's physical condition was stable (R.132). His progress notes, concluding October 17, 1987, include several references to Mrs. Browning appearing more alert and responsive to verbal (sic) (R.138,139).

Dr. Hayward's report of April 11, 1988, introduced without live testimony, included that Mrs. Browning is "alert and

follows people around the room with her eyes. She looks at you when you attempt to talk to her. She appears to understand but does not follow simple orders." (R.134). He described her condition as "medically stable." (R.134). His progress notes, commencing with the termination of those by Dr. Abery, report the patient talking and answering appropriately to simple questions on November 10, 1987 (R.143). On January 7, 1988, he reports her answering simple questions with a nod of the head, but not always correctly (R.144). He reports a case of the flu (R.144-145) and recovery (R.146). On March 27, 1988, Dr. Hayward's report is that Mrs. Browning's eyes are open and alert, follows persons around the room and looks straight at you when talked to (R.146). She makes some effort at speech (R.146). On May 11, 1988, he reports that she is following with the eyes and appears alert (R.147). On June 16, 1988, he reports that she is tolerating the feeding tube well (R.147). On September 6, 1988, his report is that she nods that she can hear him (R.150).

Dr. West, a general internist (R.26,38), testified that she had not been the treating physician since Mrs. Browning was discharged from Mease Hospital (R.31), which occurred on November 21, 1986 (R.114,134), and had turned that job over to Dr. Abery (R.35,130), and she believed that Dr. Hayward had since assumed the role of treating physician (R.36). Neither Dr. Hayward nor Dr. Abery testified. Dr. West testified that she saw Mrs.

Browning only twice after that, in March and on September 7th of 1988 between 1:00 and 2:00 p.m. and for approximately twenty (20) minutes each time (R.31,33,36). On the latter occasion, Mrs. Browning was on oxygen and was having labored breathing (R.32). Dr. West's report from the March visit included that "Estelle Browning was able to open her eyes and follow me around the room and did attempt to speak . . . [but her] words could not be understood." R.133). The report also included that: "Clearly, Mrs. Browning is not comatose or brain dead." (R.132).

Registered Nurse Marianne Hurt, charge nurse for the south wing at Sunset Point Nursing Home with 4½ years seniority (R.49), testified that Mrs. Browning speaks to her on occasion (R.50), as recently as two days before the court hearing (R.510), and this is confirmed in her daily progress notes for April 14, 1988, April 29, 1988, May 6, 1988 (R.277,278), and May 30, 1988 - speech usually garbled (R.284), July 13, 1988 - answers "yes" and "no" (R.284), and those of two other nurses who did not testify, E. Plum, for April 14, 1988 (R.277), May 27, 1988 (R.279), June 24, 1988 (R.284), July 29, 1988 - answers "yes, no and fine." (R.288), August 26, 1988 (R.292), September 6, 1988 - trying to talk (R.295), and A. Varz (?) for June 3, 1988 (R.279-280), June 18, 1988 - attempts to talk (R.282). The various attending nurses report a patient who is alert, smiles on occasion, including when an aide's 5-year-old son visits Mrs. Browning

(R.51), talks, and tried to talk, and they often note no distress, although one report is of the patient grumbling when they change her position (R.296). Nurse Hurt reported that Mrs. Browning's weight was up at the time of the court hearing to 111-3/4 lbs. from 110-1/2 lbs. in July (R.52). Mrs. Browning was on oxygen six days the beginning of September, which would have included Dr. West's second visit, but taken off of it at the direction of the attending physician (R.52). Mrs. Browning tells Nurse Hurt "don't do that" on occasion (R.50,56). She can move her left side, but stiffens up when someone touches her (R.51).

At the request of the Second District, the record was supplemented after oral argument by Affidavit of Nurse Hurt as to the more curent weight of Mrs. Browning. That weight was 125 lbs.

Dr. Barnhill, a neurologist who interned at Shands Hospital, was with the patient once for 15 to 20 minutes and spent 20 to 30 minutes reviewing her chart (R.105). He concluded that she is not brain dead (R.105). He stated that "death is not imminent" (R.114). "[s]he could easily live another year if maintained in this condition." (R.106). He agreed that attempts to speak would supply some degree of cognizance (R.110). He was hired for the examination and would be billing the Guardian's attorney, Mr. Felos, $200.00 an hour with three (3) hours invested before his deposition (R.115).

Hearing was held in Circuit Court on June 19, 1989, on the State's Motion and the Circuit Court appointed a guardian ad litem to report to the Court on the contested circumstances surrounding the substituted decision by the guardian to withdraw Mrs. Browning's nasogastric feeding tube.

SUMMARY OF ARGUMENT

Mrs. Browning expressed in her "living will" her desire for "the performance of any medical procedure deemed necessary to provide me with comfort care or to alleviate pain." She requested that she not be provided sustenance and hydration by gastric tube or intravenously should she have a terminal condition from which her attending physician has determined both that she cannot recover and that her death is imminent (R.125).

Her attending physician has made neither determination. The reports of three other doctors presented by the Guardian at the hearing do not include that Mrs. Browning is suffering from a terminal condition as defined in Sec. 765.03(6), Fla.Stats. (1987). They all agree that her death is not imminent from her condition of having suffered a stroke two years ago, and that she will probably live at least another year in the continued good care of the Sunset Point Nursing Home.

The Circuit Court denied the guardian's petition to terminate the gastric feeding tube because both Sec. 765.03(3), Fla.Stats., and Mrs. Browning's "living will" did not support the termination.

The Second District's Opinion has created a constitutional right for a guardian to make a substituted decision to refuse medical treatment, including a feeding tube, for non-vegetative, nonterminal patients who cannot make their own decision. Because the Second District's Opinion permits such decision to be made in a "private setting", the State will have little or no opportunity to raise for review the issues of State interest set forth in Satz v. Perlmutter, 379 So.2d 359 (Fla. 19801, adopting Satz v. Perlmutter, 362 So.2d 160 (Fla. 1978), and found applicable by the Second District to the substituted decision as well, unless, as here, the guardian notifies the State in advance. No such requirement was made by the Second District.

The Second District opined that the patient would most likely be in a nursing or hospital setting, with the likelihood of such medical supervision being a check-and-balance on the substituted decision. However, even in the instant case the guardian has chosen to remove the patient from the nursing home to remove the feeding tube and planned to do so without prior notice to the nursing home.

The Second District has allowed parole evidence to supersede a living will or evidence that the living will has been orally revoked. Such evidence from a guardian will not be easily subject to question even if it is wholly untrue and created by a guardian who is not acting in the best interests of the ward.

Euthanasia on the facts of an elderly, nonvegetative, nonterminal patient with an incurable condition should not be allowed because it actually constitutes genocide of the elderly. Society owes its nonterminal elderly an unbiased guardian if it is going to allow a substituted decision to forego medical treatment that will result in death. Such a substituted decision should not be permitted at all, because a nonterminal, nonvegetative person does not have the right to forego sustenance to assist suicide is a crime, and it is only a legal fiction that someone else can ever presume to assume that another human being prefers death to life at a specific time.

ARGUMENT

ISSUE I: "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?" 14 FLW at 962.

A. A guardian of an incompetent, nonterminal, nonvegetative patient may not exercise the patient's right to forego artificially provided sustenance because the patient has no simi-

lar right. The right of a nonterminal, nonvegetative person to forego life-prolonging procedures has not, before this decision, been extended in Florida to include sustenance. See Corbett v. D'Alessandro, 487 So.2d 1331 (Fla.2d DCA), rev.den. 492 So.2d 1331 (1986). It should not be extended to include sustenance because of the State's interest in preventing suicide. The right of a nonterminal patient to forego life prolonging procedures other than sustenance has not been recognized in Florida in the absence of an additional constitutional right besides the right of privacy. Public Health Trust of Dade County, Florida v. Wons, So.2d _____ (Fla. March 16, 1989) 14 FLW 112, competent patient's right to refuse blood transfusion for religious convictions; cf. John F. Kennedy Memorial Hospital, Inc. V. Bludworth, 452 So.2d 921 (Fla. 1984), terminally ill, incompetent patient's right to refuse mechanical ventilator.

Florida law on the right for a competent person to forego "life-prolonging procedures" specifically exempts from that term the provision of sustenance. Sec. 765.02(3), Fla.Stats.

The enrolled legislation amending the act relating to life-prolonging procedures (C.S. for H.B.'s 494 & 1084) will, unless vetoed by the Governor, permit, in Sec. 3 creating 765.075, withholding or withdrawing of sustenance administered through an invasive medical procedure, on specific guidelines set forth in

the amendment. This amendment, to be effective October 1, 1989, if becoming a law, will, however, continue to require that the incompetent be terminal. Life-prolonging procedure will continue to be defined as not including provision of sustenance except for the provisions of Sec. 765.075 (as created in this legislation).

Section 1 of the newly created Sec. 765.075 will, if becoming a law, permit persons to forego sustenance "~~as~~ a life-prolonging procedure ... ~~if~~ the attending physician and at least one other [examining] physician ... determine ... that the provision of sustenance is a life-prolonging procedure for that patient ...." In Sec. 3, "Life-prolonging procedure," as used the second time in Section 3, is to be defined as in Section 1 to exclude sustenance as a medical procedure which "[w]hen applied to a patient in a terminal condition, serves only to prolong the process of dying." Otherwise, meaning cannot be given to both the definitional provisions and proposed Sec. 765.075. Otherwise the wording of Sec. 765.075 requiring the physician's finding that "the provision of sustenance is a life-prolonging procedure for that patient" has no meaning, since the provision of sustenance is life-prolonging for all persons.

Therefore, the statutory definition of life-prolonging procedure does not now and would not even if amended effective October 1, 1989, permit withdrawing or withholding sustenance

unless the patient is otherwise terminal. The legislative amendment to Ch. 765 thereby recognizes that the provision of sustenance is always life-prolonging.

For the Second District to find a constitutional right that sustenance could be refused by an incompetent through a surrogate's decision, without the requirement that the patient be otherwise terminal, is to eliminate the State's right to prevent suicide and euthanasia.

B. Even if a nonterminal, nonvegetative but incompetent patient were found on facts of an appropriate case to have the right to refuse artifically provided sustenance as a right of privacy independent of any other constitutional right (cf. Public Health Trust, etc. v. Wons, supra), the right should not be extended to permit a substituted decision because of the State's right to prevent, not just suicide but euthanasia. It can never be established that the incompetent had not had a change of mind, even if it could be sufficiently established that they had previously desired to reject intrusive sustenance provisions.

The substituted judgment of the parents, for their terminally-ill, non-cognitive, ten-month old son with no remaining

independant respiratory function and who had always been in a vegetative coma, to withdraw the mechanical ventilator in In Re Barry, 445 So.2d 365 (Fla. 2d DCA 1984), was approved by the Court only after hearing testimony of three physicians and the parents and obtaining the report of a guardian ad litem which concurred with the conclusions of the three physicians and recommended that the parents' petition be granted. The Court's order granting the petition to withdraw the ventilator specifically required the continuation of nutrition, after finding that the child's right of privacy, based on the "substituted judgment and in the absence of any evidence of intention," (Barry at 368) outweighed the interests of the State. Unlike the child in Barry, Mrs. Browning is not terminal nor brain dead, and her condition and awareness have improved since she was placed in the nursing home following her stroke.

ISSUE 11: WHETHER THE SECOND DISTRICT'S PROCEDURE FOR SUBSTITUTED DECISION IS SUFFICIENT TO PREVENT ABUSE EVEN IF THE INCOMPETENT, NONTERMINAL, NONVEGETATIVE PATIENT HAS THE RIGHT TO FOREGO SUSTENANCE BASED SOLELY ON THE RIGHT OF PRIVACY.

The possibility of abuse by the surrogate decisionmaker in exercising the Second District's procedure for substituted decision to forego artificial sustenance is a due process violation of the patient's constitutional right to life. Although

admitting that it is within the State's interest to prevent both suicide and that euthanasia is a crime, the Second District's opinion provides that the surrogate's substituted decision be made in a private, informal setting, without requirement of notice to the State or approval by the Court. Although any interested person may seek the Court's intervention, notice may arrive too late for meaningful review. The Second District's creation of the private forum "until we see evidence of some abuse by this informal forum" could mean the death of some incompetent, nonterminal, nonvegetative person who did not wish to die at all but whose guardian assumed, in good faith or otherwise, that the incompetent patient did not want to continue in the condition of incompetence.

The Second District surmised that a guardian could have a conflict of interest and that, for example, "economic considerations, family pressures, or other factors of undue influence could cloud a surrogate's judgment." 14 FLW at 962. The guardian is not, however, required to do more than follow the Second District's procedure, which does not include notice to the court or State, to enjoy complete immunity and good faith protection (Second District's Order on Motions for Clarification, 14 FLW 1122) from both civil and criminal liability.

The Second District's procedure has inadequate safeguards to afford the incompetent, nonterminal patient due process

protection of the constitutional right of life. The guardian need only pay three doctors, from the patient's estate, to provide the requisite information to include at least:

> 1. A summary of the patient's current medical condition, including the level of mental and physical functioning.
>
> 2. The degree of pain and discomfort experienced currently by the patient and expected by the physician in the future.
>
> 3. The nature of the medical treatment which is to be withheld or withdrawn, including its benefits, risks, invasiveness, painfulness, and side effects.
>
> 4. The prognosis of the patient with and without the medical assistance, including life expectancy, suffering, and the possibility of recovery.
>
> 5. Whether the physician believes it is appropriate within medical ethics to remove withdraw the proposed treatment.

The Second District goes on, however, to permit the surrogate decisionmaker to ignore this medical information since the only relevant function of the surrogate is to make the decision that the patient, if competent, would have made.

The surrogate is required to "have adequate, up-to-date evidence" not only of the medical condition but the probability of the patient regaining competency, whether the patient's personal decision is sufficiently clear to permit the substituted

judgment, and whether State interests under Satz v. Perlmutter, 362 So.2d 160 (Fla. 4th DCA 19781, approved 379 So.2d 359 (19801 outweigh the patient's right to forego medical treatment. 14 FLW at 961. The surrogate need not exercise formal rules of evidence, but must "carefully consider all evidence which is relevant in reaching this decision." Id. The decision must be made on clear and convincing evidence, which may, however, be inconsistent. Browning, 14 FLW at 962.

The surrogate's decision is, however, described as only a "balancing test" and the substituted decision need only tip the scales on "a continuum of conditions between a totally healthy human body and a body upon the brink of death." Browning, 14 FLW at 959. The Second District permits the medical certificates to be based on the same balancing test. With a person's life at stake, the Second District permits imprecision from which a guardian may draw to reach whatever conclusion he or she likes.

> "By utilizing a balancing test, we do not force physicians to make fine distinctions in areas where diagnosis can be difficult, ...
>
> . . . .
>
> Likewise, the lines separating competence, incompetence, permanent vegetative state, and coma are frequently difficult. . . . Other degrees of mental limitation [than coma or a permanent vegetative state1 may not justify the removal of life-sustaining treatment but rather may merely be a factor requiring a decision by a surrogate. ...

> Again, it is preferable to allow physicians the flexibility to fully describe a patient's mental status rather than to pressure them into a diagnostic opinion which either permits or prohibits a surrogate's decision. Especially in light of the rapid advance of medical technology, it seems more appropriate for this state to create a balancing test which the surrogate decision-maker can utilize in all cases of adult incompetency, without regard to the patient's precise prognosis or mental status."
>
> Browning, 14 FLW at 959.

The Second District urges surrogate decisionmakers, but without creating a requirement therefore, to err on the side of life and adds that: "In cases of doubt, we must assume that a patient would choose to defend life in exercising his or her right of privacy." Browning 14 FLW at 962.

No judicial review is required, however, to hold the surrogate decisionmaker to these standards. The Second District supposed, in footnote 16, that "[m]ost patients to whom this opinion applies will be in hospitals or other health care facilities." There is nothing to prevent, however, a guardian from removing a patient from such facility before exercising the patient's right to forego the artificially provided sustenance in the private forum of the home, as the guardian in the instant case now intends to do. Thus, the health care facility is no additional safeguard to raise the question of the substituted decision for judicial review.

The Second District's extension of constitutional rights to refuse medical treatment to an incompetent but nonvegetative and nonterminal patient is not even as strict as the requirements previously adopted by the Florida Supreme Court for competent, terminal patients, in Satz v. Perlmutter, supra, and for incompetent, terminal patients in John F. Kennedy Hospital v. Bludworth, 452 So.2d 921 (Fla. 1984). In the former, the Court adopted the Fourth District's opinion which noted that:

> "[i]t is all very convenient to insist on continuing Mr. Perlmutter's life so that there can be no question of foul play, no resulting civil liability and no possible trespass on medical ethics. However, it is quite another matter to do so at the patient's sole expense and against his competent will, thus inflicting never ending physical torture on his body until the inevitable, but artificially suspended, moment of death." 379 So.2d at 164, emphasis added.

In the latter, the Court required that before the "irreversibly comatose and essentially vegetative" patient's right could be exercised by the permitted, close family member or court-appointed guardian,

> "the primary treating physician must certify that the patient is in a permanent vegetative state and that there is no reasonable prospect that the patient will regain cognitive brain function and that his existence is being sustained only through the use of extraordinary life-sustaining measures. This certification should be concurred in by at least two other physicians with specialities relevant to the patient's condition." Bludworth, at 926. See also Corbett v. D'Alessandro, 487 So.2d 368 (Fla. 2d DCA 1986), adopting the safeguards of Satz, Bludworth and Barry.

Contrary to the requirements of the Bludworth decision, the Second District's guidelines would permit a guardian to ignore the physician's certification by permitting the doctors to forego the precise medical diagnosis required by Bludworth.

> "[i]t is preferable to allow physicians the flexibility to fully describe a patient's mental status rather than to pressure them into a diagnostic opinion which either permits or prohibits a surrogate decision." Browning at 959.

The Second District clearly envisions the guardian's decision of life or death over the patient "without regard to the patient's precise prognosis or mental status." Id. Yet, unlike in Satz v. Perlmutter, supra, this patient is not suffering physical torture of the body, and death is not being artificially suspended through any miracle means except that of supplying food and water.

The Second District's opinion would make it easier to kill someone that the State has less right to decide for, someone

whose death is not imminent. The Second District mistakenly characterizes this case as one "in which the patient wishes to discontinue medical treatment because the quality of her life is so poor that she prefers the death which would naturally occur in the absence of the artificial feeding." Browning at 14 FLW 960. However, it is the guardian's wish to discontinue the patient's life that is advanced on this record.

The patient's living will was to the contrary, and as expressed in Satz v. Perlmutter, "the problem is less easy of solution when the patient is incapable of understanding (as far as anyone can determine of a patient who is not brain dead but non-communicative)." Perlmutter at 162. The Second District's opinion appears to be that the State's interests described in Satz v. Perlmutter, weigh greater in the balance when mere quality of life considerations are, as here, advanced. Yet, the Second District then goes on to allow the guardian to make the decision to starve the patient to death, and provides a private "forum" without necessity for judicial review unless abuses later arise. Browning at 14 FLW 961. Such a standard is a clear abuse of this patient's constitutional right to life and a deprivation thereof without due process of law.

B. The State's right to conduct a criminal investigation, should it learn of such a death, is of no protection to the

incompetent, nonvegetative, nonterminal patient once he or she is dead. Additionally, the Second District's recommended procedure, which when followed affords immunity, would make it difficult, if not impossible, for the State to ever show that a guardian either intentionally or negligently killed the patient, even if the guardian has a conflict as contemplated by the Second District. The Second District's procedure does not prevent a guardian with such a conflict from utilizing the recommended procedure.

This lack of any requirement for judicial review is beyond even the lack of appellate review of the substituted decision which was held in In Re: T.W., _____ So.2d _____ (Fla. 5th DCA, May 12, 1989), 14 FLW 1192, *to* render Sec. 390.001(4)(a), Fla.Stats., unconstitutional. In T.W., the appellate court found that the inadequacy of the statutory procedure for judicial review of the minor's petition for waiver of parental consent for abortion presented: "a clear danger that trial judges will render a decision on the basis of their own moral, religious or political beliefs regarding abortion rather than on a constitutionally permissible basis."

The Second District's opinion similarly recognized the possibility of abuse of its own procedure for the guardian's substitute decision, but instead of requiring a record for appellate review as in T.W. as a check on such abuse, the Second

District opinion permits a private, substituted decision without even the notice as provided by the petition in T.W. that is required to be filed with the court by Sec. 390.001 (4)(a). If the Circuit judge cannot be trusted to make the unbiased substituted decision in 390.001(4)(a), why should the surrogate decisionmake for a patient be so trusted, especially when, as here, that person will inherit the patient's remaining estate?

For the State through the courts to permit one, especially one with a conflict of interest, to exercise the right to life of another, without adequate safeguards of disinterested review, is a deprivation of life without due process of law. Only if notice to the State or court is required before a substituted judgment can be made for a nonterminal patient will the State interests be able to be safeguarded.

C. The Second District's rejection of the "objective" and "best interest" approaches of other states ignores that they are useful, court-fashioned safeguards for exercising a substituted decision when it is not clear, as it is not here, that a particular patient would have refused treatment under the circumstances. New Jersey courts have fashioned both an "objective" and "limited-objective" test, either of which can justify that state's legislatively created Ombudsman's substituted decision if the patient's wishes are not clear. Both require balancing bur-

dens, pain and suffering, against benefits, "any physical pleasure, emotional enjoyment or intellectual satisfaction, the patient may still be able to be experiencing.!! In re Matter of Peter, 529 A.2d 419, 423 (N.J. 1987). New Jersey has legislatively created an Ombudsman for persons 60 years of age and older in nursing homes to assure a disinterested decisionmaker "to guard against abuse of elderly nursing home patients." Id. Such balancing tests are necessary to assure that the substituted judgment is not unfairly terminating the life of another. See the appointment of a guardian ad litem in In Re Barry, supra. Rather than a State interest in eliminating life, as characterized by the Second District (Browning at 14 FLW 961-962 and Note 26), this is a State interest in assuring that the person making the substituted judgment is not unfairly and unconstitutionally eliminating the life of another whose wishes are not clear. The Second District's decision would leave to another the decision on life or death medical treatment, even when the patient's own wishes are not clear, with no consideration for the balancing of the pain or continued existence against the possibility of enjoying life. This new approach ignores the four tests of Satz V. Perlmutter which were fashioned to assure society's interest in life.

CONCLUSION

WHEREFORE, the Second District's certified question should be answered in the negative because a nonterminal, non-vegetative patient has no right to forego sustenance regardless of competency. If this Court finds that a patient does have such a right, the Second District's opinion must be severely modified to afford an incompetent the constitutional right to life. Notice to the Court and the State should be required, accompanied by the evidence that the surrogate decisionmaker is relying on. (In the instant case, the guardian has refused to provide the State with copies of doctors' reports that she intends to rely on to support her substituted decision.) Additionally, the opinion of a guardian ad litem should be required as in In re Barry to assure the Court of the intent of the guardian. Ideally, the State of Florida would create an Ombudsman, as was done in New Jersey, to assure a disinterested decisionmaker for this question of the death of a human being.

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the above has been furnished by U.S. mail to George J. Felos, Esquire, 380 Main Street, Suite 200, Dunedin, Florida 34698; Robert Merkle, Esquire, 1401 Court Street, Clearwater, Florida 34616; Michael Markham, Esquire, 911 Chestnut Street, Clearwater, Florida