IN THE FLORIDA SUPREME COURT

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IN RE: GUARDIANSHIP OF
ESTELLE M. BROWNING,
Incompetent

STATE OF FLORIDA,

Petitioner, Appellee

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

REPLY BRIEF OF PETITIONER, APPELLEE STATE OF FLORIDA

JAMES T. RUSSELL
State Attorney
Sixth Judicial Circuit

By: C. Marie King
Assistant State Attorney
Bar No. 154680

P.O. Box 5028
Clearwater, FL 34618
(813) 530-6221

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STATEMENT OF FACTS

In addition to Respondent Appellee's Statement of the Facts, the State adds the following:

The State disagrees with Respondent, Appellant's statement (Brief, p. 5), that "[t]he living will specifically states that nutrition and hydration not be provided by gastric tube or intravenously." As in any legal document, the context must be read to determine the meaning. The declaratory first paragraph, following the date in the first sentence of Mrs. Browning's living will states that it is her desire "that my dying shall not be artificially prolonged under the circumstances set forth below, ..." The following paragraph, concluding with the desire that nutrition and hydration not be provided by gastric tube or intravenously, commences with a condition procedent with five parts:

> [1] "If at any time I should have a terminal condition
> [2] and my attending physician has determined
> [a] that there can be no recovery from such condition
> [b] and my death is imminent,
> [3] where the application of life-sustaining procedures would serve only to artificially prolong the dying process, ..."

Only after these contingencies are met does the directive that follows come into effect. "I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally ...." The word "such" defining procedures refers to "life sustaining procedures" from the beginning of the same sentence. The next, and which is also the last, sentence of this paragraph

is additional directions as to nutrition and hydration, because they are not included as life-sustaining procedures in Secs. 765.01-.15, Fla.Stats., (1984), which statutes are specifically cited at the bottom of the living will. The contingencies of the prior sentence logically still apply as part of the immediate context.

The Second District noted that the provision of sustenance by artificial device is not a life-prolonging procedure under Florida statutory law. 14 FLW at 958, citing Corbett v. D'Alessandro, 487 So.2d 368 (Fla. 2d DCA), rev.den. 492 So.2d 1331 (19861, and Sec. 765.03(3), Fla.Stats. Mrs. Browning's living will cites Sec. 765.01-.15 (19841, indicating, contrary to Respondent, Appellant's position (Brief, p.17), that Mrs. Browning's living will is not applicable unless her death is imminent without considering artificial life supports other than nutrition and hydration. Concern for Dying, who prepares such living will forms admits in its amicus brief that "terminal" is undefined.

The Second District decision claims that the living will presents some ambiguity as it was apparently not written by Mrs. Browning but a form from Concern for Dying. Respondent, Appellee points out, however, that Dr. West "apparently explained to her its implications. (R.27-28)." (Appellee's Brief, p.5). Despite the treating physician's having explained the living will to Mrs. Browning, the Second District would allow parole evidence to contradict that Mrs. Browning intended the wording of her living will, that its terms are restricted by the condition precedent.

The record did not support the conclusions of Dr. West that the feeding tube provided insufficient sustenance to sustain Mrs. Browning's metabolism. Mrs. Browning was sustained on the feeding tube for two-and-one-half years in the nursing home. Dr. Barnhill stated that she might live another year or more on the feeding tube. R.106.

SUMMARY OF ARGUMENT

Nonterminal, nonvegetative patients do not have the right to commit suicide by refusing food and water. This Court should reconsider application of Art. I, sec. 23, Fla.Const., right of privacy to apply to decisions for medical treatment, including food and water, as not within the intent of the drafters. This issue is properly one for legislative resolution, and the legislature has not recognized food and water as life-sustaining treatments which a competent person may elect to forego on the eventuality of their future incompetence.

Competent persons retain the right to change their mind. Incompetents must retain the same right, especially as to matters of life and deth as is food and water. There are reported cases of unexpected "miraculous" recoveries from so-called terminal persistent vegetative states, and the patient opting thereafter to remain alive. Without court intervention, such cases might never be discovered.

The Second District's balancing test to be used by surrogates for substituted decisions is insufficient in not requiring that the scales more than tip the balance in determining the patient's physical condition "between a totally healthy human body and a body upon the brink of death." 14 FLW at 959. Although noting the necessity for court review to preserve State interests, the Second District does not permit such review to occur by permitting the substituted decision to be made in a private setting, without notice to the court or State.

Because Mrs. Browning died naturally on July 16, 1989, (a fact admittedly outside the record on appeal), this case is now before this Court purely on the abstract issues of law presented by her situation and as expressed in the Second District's certification of question of great public importance. Both the State and Respondent/Appellant place much emphasis on contested facts of Mrs. Browning's condition, her living will and the guardian. The Second District's opinion would allow a surrogate decision on terminating a life to be made in private, without opportunity for questioning the guardian's consideration of these factors. It makes little sense to remove the forum for resolving the State interests set forth in Satz v. Perlmutter, 379 So.2d 359 (Fla. 1980), adopting Satz v. Perlmutter, 362 So.2d 160 (Fla. 1978), until after the death of the patient.

The lack of hope of recovery should not be a factor, as urged by Respondent, Appellant, because of its medical uncer-

tainty. A surrogate sould not be permitted to decide for a patient on the basis of the patient's hope of recovery without at least those safeguards for due process afforded a criminal under sentence of death. The opinion of two doctors who observed the patient for 20 minutes in a two-year period should be insufficient as a matter of law to support a surrogate's decision to forego life supporting medical treatment, including nutrition and hydration, without court review.

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. Respondent agrees with the State that this is a case of first impression in Florida. Neither the right of a competent nor incompetent, nonterminal person to refuse food and water has been reported in Florida appellate decisions. Respondent analogizes to case law establishing the right to refuse medical treatment and for a terminal patient in a persistent vegetative state to refuse food and water. Section 765.02, Fla.Stats. precludes such analogy based on Florida legislation. The provision of sustenance is specifically exempted from the definition of "life-prolonging procedures" for which a competent person is permitted in ch. 765 to declare his intentions prior to becoming

incompetent or otherwise incapable of making a decision as to medical treatment. Respondent contends that Florida's constitutional right of privacy, Art. 1, Sec. 23, includes the right of a non-terminal, non-vegetative patient to refuse life-prolonging medical treatment, including the right to refuse food and water in the form of a feeding tube.

No such extention to non-terminal patients had been made in Florida prior to the Second District's decision in the instant case.

Other jurisdictions have split on whether the U.S. Constitution's penumbral right of privacy encompasses the right to refuse life-sustaining medical treatment in the form of food and water. California has decided that it does, as does the California Constitution, and that the right is absolute, regardless of medical capabilities and regardless of State's rights to preserve life or prevent suicide. Bouvia, infra. New Jersey has decided that it and its own Constitution does, but has adopted elaborate safeguards in the form of legislation creating an Ombudsman for the institutionalized elderly and case law creating tests to be satisfied before a surrogate decision may be made on behalf of a patient. Matter of Jobes, 529 A.2d 434 (N.J. 1987). In re Conroy, 486 A.2d 1209 (N.J. 1985); Matter of Peter, 529 A.2d 419 (N.J. 1987). To the contrary, Missouri in Arizona v. Harmon, 760 S.W.2d 408 (Mo. 1988) (en banc), found

that neither their state nor the U.S. Constitution had either a specific or implied right of privacy to permit the withdrawal of food and water. Citing Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973), and Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), the Missouri Court concluded that:

> "we carry grave doubts as to the applicability of privacy rights to decisions to terminate the provision of food and water to an incompetent patient." Cruzan at 418.

Those doubts seemed well-supported by the Court's reliance on and quote from Roe:

> "'The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court also has refused to recognize an unlimited right of this kind in the past.'" Cruzan at 418 citing Roe 410 U.S. at 154, 93 S.Ct. at 727.

The Court's refusal in 1986 to extend the right-of-privacy to homosexual conduct in Bowers v. Hardwick was interpreted in Cruzan to be a refusal to extend the right of privacy beyond the focus of prior cases on "procreation and relationships within the bonds of marriage, ..." Cruzan at 418.

Perhaps because both New Jersey and Missouri relied on Roe v. Wade in reaching opposite conclusions as to the

Constitutional right of privacy and because the Court has recently construed Roe v. Wade, the U.S. Supreme Court, on July 3, 1989, granted review of the Cruzan case. Cruzan v. Director, Missouri Department of Health, U.S. _____, 57 LW 3852 (July 3, 1989), case no. 88-1503. Cruzan's balancing test is discussed infra.

Florida differs from Missouri in having, since November 1980, a specific Constitutional right of privacy in Art. I, Sec. 23. It states:

> "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."

This Constitutional right of privacy has been construed as not intending an absolute guarantee against all government intrusion. See for i.e., Winfield v. Division of Pari-Mutual Wagering, Dept. of Business Regulation, 477 So.2d 544 (Fla. 1985), compelling state interest in investigtating pari-mutual industry took precedence over right of privacy in banking records; Florida Board of Examiners Re: Applicant, 443 So.2d 71 (Fla. 1983), compelling state interest in determining fitness to be attorney justified requirement for release of all records, medical and otherwise, in balancing right of privacy; In re Getty, 427 So.2d 380 (Fla. 4th DCA 1983), state attorney's investigative witness subpoena took precedence over Constitutional right of privacy; Maisler v.

State, 425 So.2d 107 (Fla. 1st DCA 1982), rev.den. 434 So.2d 888 (Fla. 1983), private possession of marijuana not permitted by Constitutional provision for right of privacy.

Language in Winfield established the shifting burdens presented by this less-than-absolute right of privacy.

> "The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." Winfield at 547.

The court established in Winfield the threshold requirement for invoking the right of privacy of the existence of a "reasonable expectation of privacy." Thus, applied to the instant case, the threshold question would be whether the law recognizes an individual's legitimate expectation of privacy in starving or dehydrating oneself to death.

Winfield dictated that the right to privacy is to be "interpreted in accordance with the intent of its drafters." Winfield at 548. This Court should reconsider whether Florida's right of privacy was even intended by its drafters to apply to refusal of medical treatment. The intent of the drafters would appear from statements of Florida Constitution Revision Commission member, and then Chief Justice, Ben F. Overton, reported in the law review article by Cope, To Be Let Alone

Florida's Proposed Right of Privacy, 6 Fla.St.L.Rev. 673, 722 (1978), to be the protection of the use and disclosure of private information.

Prior to adoption of its own right of privacy in Act. I, sec. 23 in November 1980, Florida had recognized a Constitutional right of privacy for a competent, terminally ill adult patient to refuse medical treatment in the form of a mechanical respirator. In Satz v. Perlmutter, 362 So.2d 160 (Fla. 4th DCA 1978), the Furth District adopted this position from the Massachusettes case of Superintendent of Belchertown v. Saikewicz, 370 NE.2d 417 (Mass. 1977), without analysis or further citation. The Florida Supreme Court then adopted that position with no further analysis or discussion of the Constitutional issue. Satz v. Perlmutter, 379 So.2d 359 (Fla. 980). The Fourth District in Satz stressed that its decision was limited to the facts of that case, and the Florida Supreme Court, too, announced its preference for legislative resolution, but its intention to continue addressing the problem on a case-by-case basis "[a]s people seek to vindicate their constitutional rights, ..." Satz at 360.

The Court in John F. Kennedy Memorial Hospital, Inc., v. Bludworth, 452 So.2d 921 (Fla. 1984) agreed with the Fourth District's ruling in John F. Kennedy Memorial Hospital, Inc. v. Bludworth, 432 So.2d 611 (Fla. 4th DCA 1983), that terminally ill, incompetent patients have the same right, based on the

Constitutional right of privacy, as competent, terminally ill patients "to refuse to be held on the threshold of death ...." Kennedy Hospital at 926. The Florida Supreme Court's decision did not mention Florida's new Constitutional right of privacy. The Court in Kennedy Hospital recited with apparent approval the similar case of In re Barry 445 So.2d 365 (Fla. 2d DCA 19841, which had agreed with the Fourth District's Kennedy Hospital conclusion that an incompetent should have the same right of privacy as a competent to refuse medical treatment (a respirator and terminally ill patient was at issue in both cases). The Second District did briefly cite Art. I, sec. 23 as affording a Constituional right of privacy.

The Second District, in Corbett v. D'Alessandro, 487 So.2d 368 (Fla. 2d DCA 1986), extended what it perceived to be the state and federal constitutional rights of privacy to afford a husband the right to decide to remove his wife's nasogastric feeding tube when she was an incompetent, terminally ill patient in a persistent vegetative state and with no prospect of regaining cognitive brain function.

Unlike California in Bouvia v. Superior Ct., 225 Cal.Rptr. 297, 179 Cal.App.3d 1127 (Cal.App. 2d Dist. 19861, Florida has not had to face a case that presented facts of the question of the right of a competent nonterminal patient to commit suicide by starvation or dehydration. Although California

decided that Bouvia, born quadriplegic from cerebral palsey and suffering painful, crippling arthritis, but with an intelligent mind, could require the state hospital to permit her to discontinue the nasogastric feeding tube,[1] other states have, to the contrary, decided to force feed prisoners who had similarly opted to die of starvation rather than continue in their circumstances of confinement in a state facility. Van Holden v. Chapman, 87 A.D. 2d 66, 70, 450 N.Y.S. 2d 623, 627 (1982); In re Caulk, 125 N.H. 226, 480 A.2d 93 (1984); contra, Zant v. Prevatt, 286 S.E.2d 715 (Ga. 1982). Although prisoners are not patients, a life or death sentence may seem as hopeless as a permanent medical condition such as Ms. Bouvia's, and the right to die with dignity is as appropriately espoused by a prisoner as a patient, if with less sympathy. Society's interests in keeping either alive may be based on different realities but, at least until the execution of a death sentence, both are encompassed in the right to preserve life.

Competency to make a voluntary decision is always at issue in election of a constitutional choice. As noted in one law review article, Ms. Bouvia was still alive at the time of its

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[1] Contrary to Respondent's statement (Brief, p.27), Ms. Bouvia never "lost the ability to swallow" or take in sustenance. She was spoon fed, as any quadriplegic would have to be, but refused to take in and swallow a sufficient amount of nourishment to sustain her weight. Bouvia 225 Cal.Rptr. at 300, 179 Cal.App.3d at 1135.

being written, nine months after California had given her the right to die. Matthews, Suicidal Competence and the Patient's Right to Refuse Life-Saving Treatment 75 Ca.L.R. 707 at 709, n.21, (1987). The decision for a competent, non-terminal patient, even one in as much pain and hopelessness as was Ms. Bouvia, is not that easy. Because they might choose to change their mind, could one who makes the decision to starve ever be said to be in their right mind and competent to make the voluntary decision to end life?

The extension in Browning to permit a competent non-terminal patient to refuse food and water is dicta in the Second District's decision since no such person is involved on the facts of this case. The Second District suggests that a decision to end life based merely on the quality of the life is a suicidal decision that would lose in the balance with the State's interest in preserving life, Browning, 14 FLW at 960. The Second District avoids the problems of analyzing when a competent patient's refusal of food and water is impermissibly suicide by failing to distinguish, as does the legislature, between the right to refuse medical treatment and the right to refuse food and water. The Court does refer to a law review article which makes such an analysis when it admits that:

> [a]nalyzing the distinction between a legitimte right to forego medical treatment and a suicide to avoid a serious medical problem seems far more difficult. See Matthews, Suicidal Competence and the Patient's Right to Refuse Life-Saving Treatment, 75 Cal.L.Rev. 707 (1987)." Browning, 14 FLW at 963, n.17.

In noting that Bouvia was still alive nine months after her court victory and had not exercised her right to commit suicide by refusing nasogastric feeding, the author of that law review article proposed a cooling-off period and the Court's careful consideration of the seriousness of the patient to die. The State's right to preserve life and to prevent unintentioanl, non-serious suicides is to be balanced against the patient's constitutional right to be let alone, according to this law review proposal. By finding the abstract right to refuse food and water as included within the right to refuse life-sustaining medical treatment, the Second District does not provide any answers for protection of the State's right to avoid suicide.

No non-terminal patient should be said to have a Constitutional right to refuse even medically supplied food and water, because it is necessarily suicide; and the State should not assist a suicide by permitting such refusal. **A** competent person may always, while still alive, change his/her mind, as did Ms. Bouvia, and decide to live. The State has an interest in the patient's remaining alive and being around to be able to make that decision to live. A non-terminal, competent patient should have no right to refuse medically provided food and water because of the State's right to prevent suicide. To refuse medical treatment is to let an illness run its course. To refuse food and water, by contrast, is to inflict an independent cause of death -- starvation.

B. Just as a competent patient may have a change of mind and decide to live, an incompetent must have the same right to continue living despite a surrogate's belief that the patient wants to die.

The amicus Brief of The American Geriatrics Society contradictorily first claims that "adopting one ordering and weighting of goals [concerning life and death wishes] for all patients would ignore the diversity of value commitments among people, an outcome that is to be disdained in a society that values freedom and pluralism" (Brief, p.16), but then eschews individuality as to patients who "left no credible evidence" (Brief, p.20) on medical care preferences. "[T]hen the choice must be made as the 'usual' patient in such a circumstance would choose, and certainly the usual patient would choose to forego some kinds of life-extending treatment." (Brief, p.20). The American Geriatrics Society offers no citation of authority for the latter conclusion.

The New York Times reported earlier this year the case of an 86-year-old woman's suddenly and unexpectedly regaining consciousness after a stroke placed her in a four-and-a-half-month coma. The court withdrew its Order granting the patient's 88-year-old sister's Petition for removal of the gastrostomy (feeding) tube after hearing a doctor's testimony of the patient's recovery and refusal, on awakening, to say that she wanted the feeding tube removed. "These are difficult decisons,"

she is quoted as having responded to the doctor's question of what she wanted done about removing the feeding tube. Her court-appointed lawyer reported that she told him she wanted to wait as to her decision on its removal. The patient's sister had convinced the court of her sister's current wishes to have the tube removed, based on prior statements to her and another witness that the patient was opposed to life-support systems and that she did not want to be kept alive that way. N.Y. Times, April 13, 1989, p.13; N.Y. Times, April 30, 1989, p.8E; Gazette (N.Y.), March 3, 1989, p.33; The Times Union (Albany, N.Y.), March 3, 1989, p.A1, copies attached as Appendix Exhibit 1-4.

People Magazine featured a story late in 1986 of a 44-year old stroke and heart-attack victim's sudden and unexpected recovery from a deep coma and persistent vegetative state only six days after her loving, reverend husband and children had asked the court to terminate the respirator and other life-support treatment as something she would not have wanted. The court had refused only because the woman was not completely brain dead and it had been only one-and-a-half months since her stroke, although she had had the heart attack and double pneumonia while in the hospital during that time. People Magazine, Oct. 13, 1986 p. 43; and Associated Press articles in The Free Lance Star (Fredericksburg, Va.), for Sept. 22, 1986, p.9, and the Minneapolis Star and Tribune, Sept. 23, 1986, p.6D, copies attached as Appendix Exhibit 5-7.

If the relative or guardian is to be permitted to make this decision without court review as proposed by the Second District in Browning, both of these people would be dead. The State has no means of raising its right to preserve life, and the right to prevent suicide, and guard against euthanasia when these decisions are made in a private forum, as provided in Browning. Browning recognized that the State's interest to prevent suicide is stronger when the patient is non-vegetative, but left no possibility for the State to exercise that right, without notice before the substituted decision to terminate is made.

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 Second District's Browning decision appears to be modeled on New Jersey's developing law from Quinlan, through Conroy, to Peter and Jobes, but lacks the safeguards established therein, including New Jersey's legislatively created Ombudsman for elderly institutionalized.

New Jersey attempted an all-encompassing approach to the problem of substituted decisions for medical treatment for the elderly in Matter of Conroy, 486 A.2d 1209 (N.J. 1985). Multiple safeguards were required for such a substituted decision. In

Jobes, the court said that "[n]ormally those family members close enough to make a substituted judgment would be a spouse, parents, adult children, or siblings." Jobes 529 A.2d 434,447. (N.J. 1987). The patient may, while competent, have specifically designated someone to make such medical decisions. For a designated other relative or person to make the substituted decision for the patient, requires clear and convincing evidence that the patient intended the other "to make surrogate medical decisions in the case of his or her incompetency, ..." Jobes, 529 A.2d at 447. The court in Conroy noted that a general appointment of a guardian for an incompetent does not meet due process requirements for appointment of a guardian to make medical decisions. "The inability to 'govern' one's self and manage one's other affairs does not necessarily preclude the ability to make a decision to forego further medical treatment." Conroy, 486 A.2d at 1241. In the case of a general guardian, the court must intervene, hear medical evidence of the patient's capabilities, and inquire into an existing "guardian's knowledge of the patient and motivations or possible conflicts of interest." Id.

Under Conroy safeguards, anyone believing that withdrawing or refusing life-sustaining medical treatment complies with the patient's wishes or is in his/her best interest must initially notify the Office of the Ombudsman. Anyone with opposing information likewise is to report this to the Ombudsman. The court wrote in Conroy that the "Ombudsman should treat every

notification that life-sustaining treatment will be withheld or withdrawn from an institutionalized elderly patient as a possible 'abuse'." Conroy, 486 A.2d at 1242.

The Ombudsman is to then investigate, including obtaining evidence from the attending physician (who may be changed by the guardian to obtain the desired opinion) and nurses and from two other physicians appointed either by the Ombudsman or the court, "to confirm the patient's medical condition and progress." Conroy, 486 A.2d at 1242. Further procedural safeguards for the substituted decision for the persistently vegetative patient in a hospital are "confirmation of a hospital prognosis committee that there is no reasonable possibility that the patient might recover to a cognitive sapient state." Jobes, 529 A.2d at 447-448. Only if the Ombudsman concurs may the decision to withhold or withdraw life-sustaining medical treatment be approved. If either of the objective tests (discussed infra) are utilized, the patient's close family members or next of kin must also concur. Conroy, 486 A.2d at 1242.

New Jersey established in Conroy three possible tests to be met by a surrogate exercising the patient's right to refuse life-sustaining medical treatment, including food and water. The "subjective test," first recognized and applied in Quinlan, supra, was extended in Conroy beyond patients who are in a "chronic, persistent vegetative or comatose state," Conroy, 486

A.2d 1228, to "an elderly, incompetent nursing home resident with severe and permanent mental and physical impairments and a life expectancy of approximately one year or less." Conroy, 486 A.2d at 1231. The "subjective test" requires clear and convincing proof of the patient's wishes as to life-sustaining medical treatment. Id.; Matter of Peter, 529 A.2d 419, 425 (1987). In Matter of Jobes, supra, the court repeated its finding in Conroy, supra, that "'informally expressed reactions to other people's medical condition and treatment' do not constitute clear proof of a patient's intent." Jobes, 529 A.2d at 443. The Court warned in Conroy that "[p]articular care should be taken not to base a decision on a premature diagnosis or prognosis." Id.

If the patient's intent cannot be clearly established, the decision may still be made on the patient's behalf by using either the "limited objective" test, if the wishes were expressed but remotely nor clearly, or the "objective" test, if the wishes are unknown. The objective tests use a "best interest" standard for the patient by balancing pain and suffering against the benefits being experienced by the patient. Conroy, 486 A.2d at 1232. The former must "clearly and markedly outweigh the benefits that the patient derives from life." Id.

> "Further, the recurring unavoidable and severe pain of the patient's life with the treatment should be such that the effect of administering life-sustaining treatment would be inhumane....

> ... [W]e expressly decline to authorize decision-making based on assessments of the personal worth or social utility of another's life, or the value of that life to others. We do not believe that it would be appropriate for a court to designate a person with the authority to determine that someone else's life is not worth living simply because, to that person, the patient's 'quality of life' or value to society seems negligible. The mere fact that a patient's functioning is limited or his prognosis dim does not mean that he is not enjoying what remains of his life or that it is in his best interests to die." Conroy, 486 A.2d at 1233.

Only two years later, New Jersey severely modified application of these tests to hold that the objective tests are never applicable to a patient, like Quinlan, in a persistent vegetative state. Matter of Peter, 529 A.2d 419, 425 (N.J. 1987). Also, the court withdrew application of the one-year life-expectancy test, created in Conroy, to persons who are pertistently vegetative. Matter of Peter, 529 A.2d at 424. New Jersey, thus, gave up one legal fiction, that pain and suffering of a non-responsive, persistently vegetative patient could ever be determined, in favor of another legal fiction, that permanent vegetative state has any real meaning. In Conroy, the court placed no emphasis on permanent vegetative state, citing in a footnote that one authority and the President's Commission Report concluded that there was a lack of medical concensus on the meaning and that "physicians are unable to determine with medical certainty whether any such condition is irreversible." (See section I-b herein). Conroy 486 A.2d at 1228, n.5. The same day it

decided Matter of Peter, supra, the New Jersey court defined in Matter of Jobes, 529 A.2d at 438, the term "persistent vegetative state" as created by its inventor, Dr. Fred Plum, Chairman of Cornell's Department of Neurology, to mean that "'[p]ersonality, memory, purposive action, social interaction, sentience, thought, and even emotional states are gone. Only vegetative functions and reflexes persist....'"

New Jersey persisted, however, in its legal fiction that the objective balancing tests could be applied to marginally cognitive but non-responsive patients like Conroy, despite repeating from Conroy that "it is often unclear whether and to what extent a patient such as Claire Conroy is capable of, or is in fact, experiencing [physical] pain.'" Matter of Peter, 529 A.2d at 425, elipsis by the court. Both the Peter and Jobes decisions were distinguishable from Conroy in that the former had left clear and convincing evidence of his intentions and the latter was persistently vegetative. The court's statement in Conroy continues to be New Jersey's position on the "objective" tests for non-vegetative, i.e., even "marginally cognitive patients like Claire Conroy, ..." Peter, 529 A.2d at 425. In Conroy the court said of the "objective" tests:

> "When the evidence is insufficient to satisfy either the limited-objective or pure-objective standard, however, we cannot justify the termination of life-sustaining treatment as clearly furthering the best interests of a patient like Ms. Conroy." Conroy, 486 A.2d at 1233.

Under the <u>Conroy</u> decision, the <u>Browning</u> decision presents a due process violation in permitting a general guardian to make medical decisions, including life and death decisions, without a court's determination of the patient's incompetency to make medical decisions, and without the court's inquiry into the guardian's "motivation or possible conflicts of interest." <u>Conroy</u>, 486 A.2d at 1241.

The amicus brief of The American Geriatrics Society urges adoption of procedures that permit resolution of factual issues about a particular case to include judicial inquiry into such issues as whether the patient "communicates and evidences pain or pleasure." (Brief, p.30). Contradictorily, on the same page, the Society adds that courts should not be involved in routine cases. The Society agrees that vulnerable patients should be protected from "overwhelming conflict that precludes good faith in decision-making," (Brief, p.18), but does not suggest how this is to be accomplished absent court review.

Rather than treating every notification of a desire to terminate or refuse life-sustaining treatment of an elderly patient as a possible abuse, as required in <u>Conroy</u>, the Second District in <u>Browning</u>, requires no notification to anyone and assumes no abuse unless there is later proof to the contrary.

By eliminating the "objective" tests for patients in less than a persistent vegetative state (as defined in <u>Jobes</u> and

as applied in Conroy to a patient awake and possibly aware), the Second District has eliminated safeguards such as the one-year life expectancy test that was recognized in Peter to be a safeguard to elderly senile and Alzheimer's patients. Peter, 529 A.2d at 425. The Second District's substituted balancing test for determining the patient's medical condition and prognosis. (14 FLW at 959) does not require, as in Conroy, that the scales more than tip the balance. Conroy requires that pain and suffering "clearly and markedly outweigh the benefits" to permit the substituted decision in the patient's best interests.

The Second District purports to eliminate the weighing of pain and suffering versus benefits but, in requiring the surrogate to make the decision which the patient would have made, requires similar consideration of whether the patient is "suffering from a medical condition which would permit the patient, if competent, to forego life-sustaining medical treatment" and whether there is "any reasonable probability that the patient will regain competency so that this right could be self-exercised by the patient ...." 14 FLW at 961.

Lacking the equivalent of a legislatively created Ombudsman, Florida should require notice to the court before a decision is made to discontinue or refuse life-sustaining medical treatment for an incompetent patient, regardless of the persistent vegetative state. The court (in the absence of a state

Ombudsman) must determine whether there is clear and convincing evidence of the patient's wishes, and if not, determine that attending physicians agree with the close family member or designated person that the patient is in such a state and that the surrogate is in good faith making the decision on behalf of the patient. Although rejected by this Court in Kennedy for a comatose, terminally ill patient, the necessity for court review for non-terminal, non-comatose patients has not been addressed in Florida before Browning.

New Jersey permits these reviewing decisions to be made by the state Ombudsman, in the absence of conflict from concurring decisions of the close family or guardian and attendant medical staff. The Second District has eliminated any state protection in Florida. Although claiming that the Circuit Court, as a representative of the State, "should be satisfied that the State's interests do not outweigh the individual's right of privacy," and that "the State's interest should be most carefully analyzed," including, when necessary, requiring "additional evidence, including expert testimony, to protect the State's interests," (14 FLW at 962, emphasis added), the Second District makes it impossible for the court to afford such review by permitting the surrogate, who is not necessarily a guardian, to make the substituted decision in a private setting. The due process rights of the elderly, and the State's rights including preserve life, are being subrogated to the right of privacy, which is being exercised by a surrogate with insufficient safeguards to

assure that it is really the patient's right that is being espoused. The State s being given no chance to meet its burden in overcoming the right of privacy as set forth in Winfield, supra.

The amicus brief of the Society for the Right to Die proposes eliminating even some of the safeguards required in Browning, as unnecessary for the surrogate's decision. The Society conveniently ignores the State's interests, such as preserving life and preventing suicide, which Florida has always recognized may prevail over the right to refuse medical treatment. The Society also ignores the possibility of improper motives or conflict which may cause a surrogate's decision to be not in the best interest of the patient.

A criminal under sentence of death is afforded by Florida law a direct appeal; post-conviction proceedings pursuant to Rule 3.580, Fla.R.Crim.P., or coram nobis, for two-years after conclusion of the direct appeal; and habeas corpus or motion to correct illegal sentence pursuant to Rule 3.800, Fla.R.Crim.P., at any time. The direct appeal proceeds regardless of the wishes of the convicted murderer to have his sentence executed without review. The Second District's decision would not afford similar court review of the surrogate's decision to impose a death sentence on the patient.

CONCLUSION

This Court should answer the certified question in the negative, find that no person has the right to refuse food and water, or at least that a substituted decision may not be made to refuse food and water to another.

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, Esq., attorney for Doris F. Herbert, Guardian, 380 Main Street, Suite 200, Dunedin, Florida 34698; Michael Markham, Esq. and Larry J. Gonzales, Esq., 911 Chestnut Street, Clearwater, Florida 34617-1368; Giles R. Scofield, 111, Concern for Dying, 250 West 57th Street, New York, New York 10107; and William Trickel, Jr., Esq., 39 West Pine Stret, Orlando, Florida 32801; Fenella Rouse, Esq., M. Rose Gasner, Esq., and Richard Wasserman, Esq., Society for the Right To Die, Inc., 250 W. 57th St., New York, N.Y. 10107; James K. Stewart, Esq. and Anna Mastroianni Boe, Esq., American Geriatrics Society, 2600 Virginia Avenue, N.W., Suite 1111, Washington, D.C. 20037; this 9 day of August, 1989.

Respectfully submitted,

JAMES T. RUSSELL, State Attorney
Sixth Judicial Circuit of Florida

By C. Marie King

C. Marie King
Assistant State Attorney
Bar No. 154680

P.O. Box 5028
Clearwater, Florida 34618
(813) 530-622

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