

DETERMINING THE WISHES OF THE  
INCOMPETENT: *CRUZAN V. DIRECTOR,  
MISSOURI DEPARTMENT OF HEALTH*,  
110 S. Ct. 2841 (1990)

A competent individual's right to refuse medical treatment stems from the common law<sup>1</sup> rooted in the United States Constitution's fourteenth amendment.<sup>2</sup> Recently, courts have recognized a general right for all persons, including incompetent patients, to refuse medical treatment.<sup>3</sup> While acknowledging the incompetents' rights, state courts<sup>4</sup> face the difficult question of how to determine the "best interests" of those patients who cannot choose for themselves.<sup>5</sup> In *Cruzan v. Director, Missouri Department of Health*,<sup>6</sup> the United States Supreme Court

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1. See, e.g., *Washington v. Harper*, 110 S. Ct. 1028, 1041 (1990) (forcible injection of medication into a nonconsenting mentally ill state prisoner represents a substantial interference with that person's liberty); *Vitek v. Jones*, 445 U.S. 480, 494 (1980) (prisoner transferred to mental hospital not subject to involuntary psychiatric treatment without due process protections); *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (children, like adults, have a substantial liberty interest in not being confined unnecessarily for medical treatment); cf. *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905) (state's interest in preventing disease outweighed an individual's liberty interest in declining smallpox vaccination).

2. The fourteenth amendment provides in pertinent part: "No . . . State shall deprive any person of life, liberty, or property, without due process of the law. . ." U.S. CONST. amend. XIV. At least four Supreme Court Justices believe that no federal constitutional rights are implicated by the "right to die" cases. Mayo, *Constitutionalizing the "Right to Die"*, 49 MD. L. REV., 103, 106 (1990). See *infra* notes 26-34 and accompanying text for a discussion of states that base the right to refuse treatment on the constitutional right of privacy.

3. See, e.g., *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 427 (1977) (the court permitted the withholding of chemotherapy from a 67-year-old mentally retarded man suffering from leukemia).

4. See, e.g., *Saikewicz*, 373 Mass. at 732, 370 N.E.2d at 431. In *Saikewicz* the Supreme Judicial Court of Massachusetts used a "substituted judgment doctrine" in which both the guardian and the judge attempted to ascertain what the incompetent person would have decided if able to make a decision. *Id.*

5. See *infra* notes 26-59 and accompanying text for discussion of procedures other states use to ascertain the wishes of an incompetent patient.

6. 110 S. Ct. 2841 (1990). *Cruzan* is an incompetent living in a Missouri state hospital. *Id.* at 2845.

held that the Constitution does not preclude the State of Missouri from instituting a strict evidentiary standard when determining an incompetent's wishes to withdraw life sustaining treatment.<sup>7</sup>

In January, 1983, Nancy Beth Cruzan sustained severe injuries after her car overturned.<sup>8</sup> Upon arrival at a hospital, an attending neurosurgeon diagnosed her as having endured probable cerebral contusions compounded by significant anoxia.<sup>9</sup> Cruzan remained comatose for several weeks and then progressed to a state of unconsciousness.<sup>10</sup> Cruzan's husband allowed the surgeons to implant a gastrostomy feeding and hydration tube in order to ease feeding and further her recovery.<sup>11</sup> Because all rehabilitative efforts have failed, Cruzan remains in a "persistent vegetative state."<sup>12</sup> While she is not dead or terminally ill, little hope for improvement exists and medical experts testify that Cruzan could live another thirty years.<sup>13</sup>

After employees of the hospital refused to remove the nutrition and hydration tube without court approval, Cruzan's parents received authorization from a state trial court to have the life-sustaining equipment withdrawn.<sup>14</sup> On appeal, the Supreme Court of Missouri

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7. *Id.* at 2854. See *infra* notes 60-76 and accompanying text for additional discussion of the Supreme Court's rationale for deferring to Missouri's high evidentiary standards when determining the wishes of an incompetent.

8. *Cruzan*, 110 S. Ct. at 2845. Paramedics restored Cruzan's breathing and heart-beat at the accident site. *Id.*

9. *Id.* Anoxia results from the deprivation of oxygen. *Id.* The Missouri trial court found that permanent brain damage generally occurs after six minutes in an anoxic state. *Id.* Cruzan was deprived of oxygen for approximately 12 to 14 minutes. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* A persistent vegetative state (PVS) is defined as the "irreversible cessation of cognitive or higher functions of the brain stem. Patients may appear awake and may even have visual tracking movements. They go through sleep and wake cycles and may have facial grimaces and yawning. However, they fail to have any conscious interaction with their environment." Johnson, *Withholding Fluids and Nutrition: Identifying the Populations at Risk*, 2 ISSUES IN L. & MED. 189, 195 (1986).

13. *Cruzan*, 110 S. Ct. at 2845 n.1. Nancy Cruzan's highest cognitive brain function consists of grimacing in response to painful stimuli, and her arms and legs are contracted with irreversible muscle and tendon damage. *Id.*

14. *Id.* at 2846. The trial court cited two reasons for its decision: (1) a person in Cruzan's condition had a fundamental right under the State and Federal Constitutions to refuse or direct the withdrawal of "death prolonging procedures"; and (2) Cruzan expressed thoughts at age twenty-five in a somewhat serious conversation with a friend that if sick or injured she would not wish to continue her life unless she could live at least halfway normally. That conversation suggests that given her present condition she would not wish to continue with her nutrition and hydration. *Id.*

reversed by a divided vote.<sup>15</sup> The United States Supreme Court affirmed in a 5-4 decision<sup>16</sup> holding that the United States Constitution permits Missouri to apply a clear and convincing standard for evidence of an incompetent's desire to withdraw life-sustaining treatment.<sup>17</sup>

The common law doctrine of informed consent<sup>18</sup> developed from the principle that a battery occurs when a physician performs a medical procedure without the consent of the patient.<sup>19</sup> The logical corollary to informed consent is the patient's right to refuse treatment.<sup>20</sup> In the last twenty years, courts have adopted the belief that competent adults have the right to refuse any kind of medical treatment, even if treatment could prolong the patient's life.<sup>21</sup>

Most of the refusal of treatment cases prior to 1976 involved patients who refused blood transfusions forbidden by their religious beliefs.<sup>22</sup> Of those courts allowing medical treatment over the patient's objection,<sup>23</sup> only two have looked at the state's interest in preserving human

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15. *Cruzan v. Harmon*, 760 S.W.2d 408, 408-09 (Mo. 1988) (en banc). Judge Robertson wrote the majority opinion for the court. Chief Judge Billings, Judge Rendlen, and Special Judge Reinhard concurred. Judges Blackmar, Higgins, and Welliver filed dissenting opinions.

16. Chief Justice Rehnquist delivered the majority opinion. Justices O'Connor and Scalia filed separate concurring opinions. Justice Brennan filed a dissenting opinion, in which Justices Marshall and Blackmun joined. Justice Stevens also filed a dissenting opinion.

17. *Cruzan v. Director, Mo. Dept. of Health*, 110 S. Ct. 2841, 2854 (1990).

18. *See, e.g., Bang v. Charles T. Miller Hosp.*, 251 Minn. 427, 88 N.W.2d 186 (1958) (doctor severed patient's spermatic cords when consent was given only for an exploratory examination).

19. *Cruzan*, 760 S.W.2d at 417 (quoting *Hershley v. Brown*, 655 S.W.2d 671, 676 (Mo. Ct. App. 1983)). Justice, then Judge, Cardozo described informed consent as follows: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Id.* at 2847 (quoting *Schloendorff v. Society of N.Y. Hosp.*, 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914)).

20. *Cruzan*, 760 S.W.2d at 417. "If one can consent to treatment, one can also refuse it." *Id.*

21. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1363 (2d ed. 1988) (discussing limits of government control over medical treatment decisions).

22. Peters, *The State's Interest in the Preservation of Life: From Quinlan to Cruzan*, 50 OHIO ST. L.J. 891, 894-95 (1989).

23. For cases where patient refuses lifesaving blood transfusion on religious grounds, but court allows treatment to be administered, *see*, *Application of President and Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); *United States v. George*, 239 F. Supp. 752 (D. Conn. 1965); John F.

life.<sup>24</sup> With the advance of medical technology, however, the cases involving the withdrawal of life sustaining treatment have increased steadily.<sup>25</sup>

The landmark case evaluating the right to refuse medical treatment is *In re Quinlan*.<sup>26</sup> In *Quinlan*, Karen Quinlan's parents sought to have the respirator that assisted her breathing removed; Quinlan, like Cruzan, persisted in a vegetative state.<sup>27</sup> The Supreme Court of New Jersey found the constitutional right to privacy sufficiently broad to encompass a person's right to decline medical treatment under certain circumstances.<sup>28</sup> In making its determination, the court first examined the strong state interest in the preservation and sanctity of human life.<sup>29</sup> Next, the court explained that the state's interest grows weaker and the patient's right to privacy grows stronger "as the degree of bodily invasion increases and the prognosis dims."<sup>30</sup> Devising a proce-

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Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964). See also *Holmes v. Silver Cross Hosp.*, 340 F. Supp. 125 (N.D. Ill. 1972) (civil rights action for unauthorized blood transfusion); Annotation, *Power of Courts or Other Public Agencies, in the Absence of Statutory Authority, to Order Compulsory Medical Care for Adult*, 9 A.L.R. 3d 1391 (1966).

24. *Georgetown College*, 331 F.2d at 1008-09 (suicide is essentially analogous to the refusal of medical treatment in the eyes of the state); *Heston*, 58 N.J. at 581-82, 279 A.2d at 672-73 (court finds no difference between passively submitting to death and actively seeking it).

25. See *Cruzan v. Harmon*, 760 S.W.2d 408, 412 n.4 (Mo. 1988) (discussing 54 reported decisions from 1976-88).

26. 70 N.J. 10, 355 A.2d 647, cert. denied, 429 U.S. 922 (1976). At the request of her parents, the court permitted the removal of a respirator believed to have been keeping Karen Quinlan alive. *Id.* at 54, 355 A.2d at 671.

27. *Id.* at 25, 355 A.2d at 655. See *supra* note 12 for the definition of a persistent vegetative state. Unlike Quinlan, Cruzan does not depend on a respirator for breathing. *Cruzan v. Director, Mo. Dept. of Health*, 110 S. Ct. at 2841, 2845 (1990).

28. *Quinlan*, 70 N.J. at 40, 355 A.2d at 663. The court described the constitutional right to privacy as broad enough to encompass refusal of medical treatment in much the same way it is used in a woman's decision to terminate pregnancy. *Id.* See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (holding state abortion law unconstitutional based on the right to privacy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding state law forbidding use of contraceptives unconstitutional based on the right to privacy).

29. *Quinlan*, 70 N.J. at 40, 355 A.2d at 663. The court further discussed the state's interest in defending the physician's right to administer medical treatment according to his best judgment. *Id.* at 41-51, 355 A.2d 664-69.

30. *Id.* at 41, 355 A.2d at 664. The court further declared that eventually the individual's rights will overcome the state's interest. *Id.* Because the degree of Quinlan's

ture for Quinlan's family to assert the right to privacy on her behalf,<sup>31</sup> the court permitted the family to render their best judgment of what treatment Quinlan would choose if capable of making the decision.<sup>32</sup> Accordingly, the court upheld the family's decision to remove the artificial life support.<sup>33</sup> Thus, the New Jersey Supreme Court's explication of the state's interest in the preservation of human life against the individual's right to privacy represented a significant step in the development of the law concerning the withdrawal of life support.<sup>34</sup>

*In re Conroy*<sup>35</sup> afforded the New Jersey court an opportunity to build upon the principles established in *Quinlan*. In *Conroy*, the court decided whether to authorize the removal of a feeding tube from an 84-year-old bedridden woman suffering from an organic brain syndrome.<sup>36</sup> The court held that incompetent individuals retain their right to refuse medical treatment and that such a right could be exercised by a surrogate decision maker.<sup>37</sup> Although acknowledging that a

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bodily invasion was very great and her prognosis extremely poor, the court maintained that her rights prevailed over the interests of the state. *Id.*

*Cf. Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977). In *Saikewicz*, the court surveyed case law from 1840 to 1977 and distilled four state interests involving the refusal of medical treatment: (1) preserving life, (2) protection of innocent third parties, (3) preventing suicide, and (4) maintaining medical ethics. *Id.* at 741, 370 N.E.2d at 425. The state can assert an interest in the preservation of life only when the patient is curable. *Id.* at 742, 370 N.E.2d at 425.

31. *Quinlan*, 70 N.J. at 41, 355 A.2d at 664.

32. *Id.* at 41-42, 355 A.2d at 664.

33. *Id.*

34. One commentator noted, however, that *Quinlan* merely provided the "first step" for a sweeping "judicial reorientation of values." Peters, *The State's Interest in the Preservation of Life: From Quinlan to Cruzan*, 50 OHIO ST. L.J. 891 (1989).

35. *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985).

36. *Id.* at 336, 486 A.2d at 1216-17. At the time of trial Ms. Conroy was also unable to move, remained in a semi-fetal position, could not control her bowels, and suffered from heart disease, hypertension, and diabetes. *Id.* at 337, 486 A.2d at 1217. On the other hand, she did interact with her environment by moving her head, her eyes sometimes followed individuals in the room, and she smiled on occasion when others combed her hair.

37. *Id.* at 361, 486 A.2d at 1229-30. The court set up two standards for the decision maker to use: (1) a "subjective standard" when there is clear evidence that the incompetent person would have exercised it, and (2) an "objective standard" for when such evidence was lacking, including two variations of the "best interests" approach: (a) a "limited-objective" test which allows surrogate decisionmakers to expand on insufficient evidence of the patient's wishes, and (b) "pure objective" test which allows surrogate decisionmakers to make treatment decisions in the absence of any subjective evidence. *Id.* at 362-67, 486 A.2d at 1230-32. *Cf. supra* note 4 discussing the approach to substituted judgment taken by the *Saikewicz* court.

federal right of privacy might apply, the court based its decision on the common law right of self-determination and informed consent.<sup>38</sup> The court reasoned that if the burden of pain and suffering outweighed any pleasure derived from living, treatment could be terminated under a "limited-objective" standard.<sup>39</sup> Unlike prior refusal of treatment cases, the *Conroy* analysis rejected distinctions<sup>40</sup> between artificial nutrition and hydration and other forms of medical treatment.<sup>41</sup>

Following the *Conroy* common law rationale, the Supreme Court of Illinois in *In re Estate of Longeway*<sup>42</sup> allowed the refusal of treatment on the basis of the common law doctrine of informed consent. The *Longeway* court extended the *Conroy* analysis by additionally relying

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38. *Conroy*, 98 N.J. at 348, 486 A.2d at 1223. *Accord In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981) (court refused to base the "right to die" on constitutional right to privacy, but instead chose informed consent doctrine); *see also* Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417(1977) (court relied on both right to privacy and the right to informed consent in finding that the state has no interest sufficient to counterbalance a patient's decision to decline life-prolonging treatment); *cf.* *Bowers v. Hardwick*, 478 U.S. 186 (1986)(basing its argument upon liberty interests and rejecting the implied Constitutional right to privacy, the Supreme Court refused to find the right of homosexuals to engage in sodomy).

39. *In re Conroy*, 98 N.J. at 365, 486 A.2d at 1232. The court also reasoned that if the life-sustaining treatment was clearly inhumane, a "pure-objective" standard could be used to terminate treatment. *Id.* at 366-67, 486 A.2d at 1232. Only when none of the conditions are met did the court find that it was better to err in favor of preserving life. *Id.* at 367, 486 A.2d at 1232-33.

40. The distinctions included: (1) the distinction between actively hastening death by terminating treatment and passively allowing a person to die of a disease, (2) the distinction between ordinary versus extraordinary care, (3) the distinction between treating individuals initially versus withdrawing treatment later, and (4) the distinction between treatment by artificial feeding versus other forms of life-sustaining medical procedures. *Id.* at 369-74, 486 A.2d at 1233-37.

41. *Id.* In three later cases, the New Jersey Supreme Court stated that the guidelines set up in *Conroy* are limited to elderly, incompetent patients with limited life expectancies. The New Jersey court established alternative approaches to deal with each situation. *See In re Farrell*, 108 N.J. 335, 529 A.2d 404 (1987) (37-year-old competent mother with terminal illness had right to removal of respirator based on common law and constitutional principles which override competing state interests); *In re Peter*, 108 N.J. 365, 529 A.2d 419 (1987) (65-year-old woman in a persistent vegetative state had the right to removal of a feeding tube); *In re Jobs*, 108 N.J. 394, 529 A.2d 434 (1987).

In *Jobs*, a 31-year-old woman who remained in a persistent vegetative state was allowed to have the feeding tube removed. *Jobs*, 108 N.J. at 395, 529 A.2d at 434. Notably, the court declared the hearsay testimony regarding the patient's intent insufficient to meet the clear and convincing standard of evidence. *Id.* at 413, 529 A.2d at 443. Nevertheless, under *Quinlan*, family members are entitled to make a substituted judgment. *Id.* at 415, 529 A.2d at 444.

42. 133 Ill.2d 33, 549 N.E.2d 292 (1989).

upon the provisions in the Illinois Probate Act.<sup>43</sup> In *Longeway*, Bonnie Keiner, the daughter and guardian of 76-year-old Dorothy Longeway sought court permission to withdraw artificially administered nutrition and hydration sustaining her mother.<sup>44</sup> The court held that the Illinois Probate Act implies the right of a guardian to refuse artificial life support on behalf of the incompetent ward when the incompetent has been diagnosed as terminally ill and irreversibly comatose.<sup>45</sup> In reaching its conclusion, the court applied guidelines to determine when the guardian's right of refusal attaches:<sup>46</sup> (1) identify what kind of patient is eligible for surrogate exercise of the right to refuse artificial life support,<sup>47</sup> (2) balance the patient's right to refuse medical treatment against the state interest,<sup>48</sup> (3) detail the procedure for ascertaining the patient's wishes by employing the "substituted judgment" theory<sup>49</sup> instead of

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43. 133 Ill.2d at 46, 549 N.E.2d at 297. The court found that the right to privacy in the federal constitution was uncertain. *Id.*

44. *Id.* at 43, 549 N.E.2d at 293. Dorothy Longeway suffered a series of strokes which rendered her incompetent. *Id.* Longeway had lost all personality, memory, purposeful action, social interaction, thought and emotion, due to severe brain damage. *Id.* Cf. *McCConnell v. Beverly Enterprises-Connecticut, Inc.*, 209 Conn. 692, 705, 553 A.2d 596, 603 (1989) (right to remove artificial feeding tubes in Connecticut Removal of Life Support Systems Act).

45. *Longeway*, 133 Ill.2d at 46, 549 N.E.2d at 298. Section 11a-17 of the Illinois Probate Act outlines the powers of a guardian. The guardian can make provisions for her ward's "support, care, comfort, health, education and maintenance." *Id.* (quoting ILL. REV. STAT. ch. 110 1/2, ¶ 11a-17 (1987)). The Act also permits a patient who previously executed power of attorney under the Powers of Attorney for Health Care Law (ILL. REV. STAT. ch. 110 1/2, ¶ 804-10 (1987)) to authorize her agent to terminate the food and water that keep her alive. *Id.* The Probate Act expressly provides that the guardian has "no power, duty or liability with respect to any . . . health care matters covered by the agency." *Id.* (quoting ILL. REV. STAT. ch. 110 1/2, ¶ 11a-17(c)(1987)). The court reasoned that "if only an agent can terminate food and water under a power of attorney, the Probate Act would not have precluded a guardian from interfering with this prerogative, unless the guardian also would have this power." *Id.*

46. 133 Ill.2d at 47-53, 549 N.E.2d at 298-300.

47. *Id.* at 47-48 The court lists three requirements for the patient: (1) the patient must be "terminally ill" as defined by the statute, (2) the patient "must be diagnosed as irreversibly comatose, or in a persistently vegetative state", and (3) the patient's diagnosis must be confirmed by the attending physician and at least two other physicians. *Id.* at 47-48, 549 N.E.2d at 298-99.

48. *Id.* at 48, 549 N.E.2d at 299. See *supra* notes 24-41 and *infra* notes 54-59 and accompanying text for discussion of state interests versus individual right to refuse medical treatment.

49. *Longeway*, 133 Ill.2d at 48-51, 549 N.E.2d at 299-300. See *supra* note 4 and accompanying text for discussion of the "substituted judgment" theory.

The *Longeway* court found the "expressed intent" standard utilized in *O'Connor* too rigid, and believed that other clear and convincing evidence of the patient's intent could

the "best interest" theory,<sup>50</sup> and (4) determine the court's role.<sup>51</sup> Nonetheless, the court invited the legislature to "streamline, tailor, or overrule" the aforementioned procedures.<sup>52</sup> Until such time, however, the *Longeway* guidelines must be followed for a guardian to exercise the common law right to refuse life-sustaining treatment on the incompetent's behalf.<sup>53</sup>

Although *Conroy* and its progeny established a set of objective standards for instances where no clear evidence of the patient's wishes existed, the New York Court of Appeals in *In re Westchester County Medical Center ex rel. O'Connor (O'Connor)*,<sup>54</sup> refused to accept anything less than the patient's "expressed wishes."<sup>55</sup> In *O'Connor*, Mary

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be considered. *Longeway*, 133 Ill.2d at 49, 549 N.E.2d at 300. Nonetheless, Justice Ward, dissenting, did not like the majority's "substituted judgment" standard and instead would institute a "clear and convincing" standard. *Id.* at 63, 549 N.E.2d at 306 (Ward, J., dissenting). However, Justice Clark unequivocally declared that the court should not resolve the right to die issue at all. Rather the legislature is the proper forum for that determination. *Id.* at 65, 549 N.E.2d at 306 (Clark, J., dissenting).

50. *Id.* at 48-49, 549 N.E.2d at 299. The "best interests" test enables the surrogate decision maker to choose for the incompetent patient the medical procedures which would be in the patient's best interest. *Id.* "Relief from suffering, preservation or restoration of functioning, and quality and extent of sustained life" represent the criteria used in the decision making process. *Id.* The court cited several cases applying the "best interests" standard to surrogate decision-making on behalf of incompetent patients. See, e.g., *Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 674 (1987); *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840, cert. denied, 488 U.S. 958 (1988); *In re Torres*, 357 N.W.2d 332 (Minn. 1984).

51. *Longeway*, 133 Ill.2d 33, 51-52 549 N.E.2d 292, 300 (1989). A court order is not required by the majority of courts discussing this issue. *Id.* at 51. Nonetheless, the *Longeway* court views judicial intervention proper in light of the nature of the decision. *Id.* The court first reasons that the state presumption favoring life justifies judicial scrutiny. *Id.* Second, the court states that intervention protects against the slight chance of greed tainting the surrogate's judgment. *Id.* Finally, the court's "parens patriae" power protects the estate and the incompetent person. *Id.* at 52, 549 N.E.2d at 301.

52. *Id.* at 53

53. *Id.*

54. 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988). Mary O'Connor suffered from a series of strokes which left her severely debilitated. *Id.* at 523, 531 N.E.2d at 608-09, 534 N.Y.S.2d at 887-88. O'Connor was stuporous and virtually unresponsive, but her physicians agreed that she was not unconscious or comatose. *Id.* at 524-25, 531 N.E.2d at 609-10, 534 N.Y.S.2d at 888-89. The doctors also agreed that O'Connor sustained substantial and irreparable brain damage and that she would never regain significant mental capacity. *Id.* at 525, 531 N.E.2d at 609, 534 N.Y.S.2d at 889. O'Connor's daughters refused to give the hospital permission to insert a nasogastric tube when their mother developed an inability to swallow. *Id.* at 527, 531 N.E.2d at 611, 534 N.Y.S.2d at 890.

55. *Id.* at 530, 531 N.E.2d at 613, 534 N.Y.S.2d at 892 (Simons, J., dissenting). The



O'Connor's daughters refused to give the hospital permission to insert a nasogastric tube when their mother developed an inability to swallow.<sup>56</sup> The *O'Connor* court declared it inconsistent with the fundamental commitment of the court that a person or court should decide what an acceptable quality of life is for another human being.<sup>57</sup> The court held that the record lacked the requisite clear and convincing evidence of the patient's expressed intent to withhold life-sustaining treatment.<sup>58</sup> While admitting that it had created a demanding standard and a rigorous burden of proof, the court deemed it appropriate to err on the side of preserving life.<sup>59</sup> Consequently, the *O'Connor* court limited the decision to refuse life-sustaining medical treatment to only those cases in which clear evidence of the patient's wishes was established.

*Cruzan v. Director, Missouri Department of Health*<sup>60</sup> presented the United States Supreme Court its first opportunity to examine an incompetent's right to refuse medical treatment under the United States Constitution.<sup>61</sup> In *Cruzan v. Harmon*,<sup>62</sup> the Missouri Supreme Court

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heightened evidentiary standard imposed by the majority in practical effect has denied any possibility that an incompetent patient will be able to refuse unwanted medical treatment. *Id.* at 539, 531 N.E.2d at 619, 534 N.Y.S.2d at 898. O'Connor's wishes were clearly stated, but failed under the majority's clear and convincing standard because they were not sufficiently specific. *Id.* at 549, 531 N.E.2d at 624, 534 N.Y.S.2d at 903. *Cf. Eichner ex rel. Fox v. Dillon*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (the New York Court of Appeals allowed the withdrawal of a respirator when compelling proof was offered that a patient in a persistent vegetative state would have wanted the life support removed), *cert. denied*, 454 U.S. 858 (1981).

56. *O'Connor*, 72 N.Y.2d at 527, 531 N.E.2d at 611, 534 N.Y.S.2d at 890.

57. *Id.* at 530, 531 N.E.2d at 613, 534 N.Y.S.2d at 892-94. *Cf., supra* notes 4, 37 and accompanying text discussing different approaches toward substituted judgment.

58. *O'Connor*, 72 N.Y.2d at 530-34, 531 N.E.2d at 613-15, 534 N.Y.S.2d at 892-94. The court noted that O'Connor had never specifically discussed the subject of nutrition and hydration. *Id.* at 527, 531 N.E.2d at 611, 534 N.Y.S.2d at 890. When one of the daughter's stated that she did not know what choice her mother would make, the court found that there was no "clear and convincing" evidence on behalf of O'Connor in the matter. *Id.* See *Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 674 (1987) (the court implied that when there is a dispute between the physician and the family or among the family about the treatment, the "clear and convincing" standard should be used).

59. *O'Connor*, 72 N.Y.2d at 531, 531 N.E.2d at 613, 534 N.Y.S.2d at 892.

60. 110 S. Ct. 2841 (1990). See *supra* notes 8-14 and accompanying text for a detailed outline of the facts.

61. *Cruzan*, 110 S. Ct. at 2851. In *Cruzan*, the life sustaining treatment was artificial nutrition and hydration. *Id.* Many courts recognize a distinction between artificial hydration and nutrition and other forms of medical treatment. This distinction often arises from the perception that hydration and nutrition are actually food and water and

established a heightened evidentiary standard when evaluating a patient's wishes for continuation of medical treatment.<sup>63</sup> In *Cruzan v. Director, Missouri Department of Health*, the Court determined that whether Missouri's clear and convincing evidentiary standard falls within the scope of the Constitution depends upon what interests the state seeks to protect.<sup>64</sup> Writing for the majority, Justice Rehnquist determined that the state need not make a judgment about the "quality" of the individual's life, but simply can assert an unqualified interest in the preservation of human life.<sup>65</sup> The Court further recognized that because states demonstrate their commitment to life by treating homicide as a serious crime, the state is not required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death.<sup>66</sup> Next, the Court applied a balancing test to determine if Missouri's unqualified interest in preserving human life outweighed Nancy Cruzan's liberty interest under the fourteenth amendment.<sup>67</sup> The majority held that the Constitution does not forbid Missouri from establishing a "clear and convincing" standard to assure

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therefore distinct from medical treatment. See *In re Estate of Longeway*, 133 Ill.2d 33, 40-42, 549 N.E.2d 292, 294-95 (1989). See *supra* notes 27-59 and accompanying text for discussion of state court approaches to balancing state interests against individual's right to refuse life sustaining medical treatment.

62. 760 S.W.2d 408 (Mo. 1988) (en banc).

63. *Id.* While acknowledging that the right to refuse medical treatment via the informed consent doctrine exists, the court did not apply it here because of the impossibility of an informed decision. *Id.* at 417. The court also refused to read the right to privacy in the Missouri Constitution such that it would support the right of a person to refuse medical treatment in every circumstance. *Id.* at 417. In discussing the state's unconditional interest in prolonging life as embodied in the Missouri Living Will statute, MO. REV. STAT. §§ 459.010-459.055 (1986), the court found Cruzan's conversation with her roommate regarding her wish not to continue life if sick or injured unreliable for the purpose of determining her intent. *Cruzan*, 760 S.W.2d at 424. Moreover, the court prohibited Nancy's parents from exercising "substituted judgment" on her behalf. *Id.* at 426. The court stated that "[N]o person can assume that choice for an incompetent in the absence of the formalities required under Missouri's Living Will statutes or the clear and convincing, inherently reliable evidence absent here." *Id.* at 425.

64. 110 S. Ct. at 2852-53. The Court cited both *In re Jobes*, 108 N.J. 394, 529 A.2d 434 (1987), and *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990). See *supra* notes 54-59 and accompanying text for application of clear and convincing evidentiary standards.

65. 110 S. Ct. at 2853.

66. *Id.* at 2852.

67. *Id.* at 2855. See *infra* note 63 discussing the Court's finding that evidence did not amount to "clear and convincing" proof of the patient's desire to refuse life-support treatment.

that the action of the surrogate decision maker conforms to the wishes expressed by the patient while competent.<sup>68</sup> The Court affirmed the Supreme Court of Missouri's findings that the evidence uncovered at trial did not amount to clear and convincing proof of the patient's desire to have artificial hydration and nutrition withdrawn.<sup>69</sup>

Justice Brennan, in his dissent, accepted the majority's position that an individual's liberty rights must be weighed against any state interests.<sup>70</sup> However, he disagreed with the majority's opinion that Missouri's interests outweighed those of Nancy Cruzan.<sup>71</sup> While the right to refuse medical treatment may not be absolute,<sup>72</sup> Justice Brennan stated that no state interest could outweigh the rights of someone in Nancy Cruzan's position.<sup>73</sup>

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68. *Cruzan*, 110 S. Ct. at 2855. The Court noted that many courts have a "substituted judgment" standard that requires "clear and convincing" evidence. *Id.* at 2854-55. See, e.g., *McConnell v. Beverly Enterprises-Connecticut Inc.*, 209 Conn. 692, —, 553 A.2d 596, 604-05 (1989); *In re Estate of Longeway*, 133 Ill.2d 33, 51, 549 N.E.2d 292, 300 (1989); *In re Jobes*, 108 N.J. 394, 407, 529 A.2d 434, 452-53 (1987).

69. *Cruzan*, 110 S. Ct. at 2855. The Court found that Cruzan's statements made to a housemate a year before her accident indicating that she would rather die than live as a "vegetable" did not apply to the cessation of medical treatment or of hydration and nutrition. *Id.*

Justices O'Connor and Scalia filed concurring opinions. Justice O'Connor noted that the Court was not deciding whether the state must also recognize the decisions of surrogate decisionmakers. *Id.* at 2857 (O'Connor, J., concurring). Justice Scalia wrote separately to point out that states have unquestioned authority to prevent suicide and that, in his opinion, the federal courts and the Constitution do not address the subject. *Id.* at 2859, 2863 (Scalia, J., concurring).

70. *Id.* at 2864, 2869 (Brennan, J., dissenting). Justice Brennan concluded that the right to refuse unwanted medical treatment is more than a liberty interest. *Id.* at 2865. Rather, it is a fundamental right deserving examination at a heightened level of scrutiny. *Id.*

71. *Id.* at 2869.

72. *Id.* See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

73. *Cruzan*, 110 S. Ct. at 2869. See *supra* notes 12-13 and accompanying text for discussion of Nancy Cruzan's physical and mental condition. Justice Brennan observed that:

Whatever a state's possible interests in mandating life support treatment under other circumstances, there is no good to be obtained here by Missouri's insistence that Nancy Cruzan remain on life-support systems if it is indeed her wish not to do so . . .

. . . [T]he State's general interest in life must accede to Nancy Cruzan's particularized and intense interest in self-determination in her choice of medical treatment. There is simply nothing legitimately within the State's purview to be gained by superseding her decision.

*Id.* at 2869-70 (Brennan, J., dissenting).

Moreover, Justice Brennan found that the Missouri Supreme Court's application of the "clear and convincing" standard created biased procedural obstacles which impermissibly burdened Cruzan's fundamental right to die with dignity.<sup>74</sup> While the majority acknowledged that a patient's living will would meet the evidentiary standard, Justice Brennan noted that it failed to specifically define what other types of evidence it would find clear and convincing.<sup>75</sup> Finally, Justice Brennan would have found the Missouri rule unconstitutional because it lessens the likelihood of accurate determinations of the incompetent's wishes.<sup>76</sup>

The majority's decision sustaining Missouri's adoption of a "clear and convincing" evidentiary standard when determining the wishes of an incompetent patient was incorrect. By deferring to the states,<sup>77</sup> the Court has allowed the states to institute heightened evidentiary standards that can operate as an obstacle to the execution of the incompetent patient's true wishes.<sup>78</sup> Thus, *Cruzan* illustrates the Court's belief

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74. *Id.* at 2864. Justice Brennan noted the asymmetry in Missouri's evidentiary standard by requiring clear proof of the patient's wishes to terminate life-sustaining treatment on the one hand, and by not requiring any proof of the patient's wishes to continue such medical treatment on the other. *Id.* at 2871.

75. *Id.* at 2874-75. Justice Brennan noted that "too few people execute living wills or equivalently formal directives for such an evidentiary rule to ensure adequately that the wishes of incompetent persons will be honored." *Id.* at 2875.

Even if Nancy Cruzan signed an instrument directing the withholding or withdrawal of "death-prolonging procedures," MO. REV. STAT. § 459.010(3) (Missouri Living Will Statute) (1986) does not include the performance of any procedure to provide nutrition or hydration. See *infra* note 63 for discussion of the Missouri Living Will Statute.

76. *Id.* at 2876. Justice Brennan stated that there is no reason to suppose that a state is better suited to make the patient's choice than someone who knew the patient intimately. *Id.* at 2877.

Justice Stevens also filed a dissent. In his dissent, Justice Stevens accepted the majority's approval of Missouri's clear and convincing standard. *Id.* at 2889 (Stevens, J., dissenting). Nevertheless, Justice Stevens would uphold the best interests of the patient when supported by third party interests over any general state policy ignoring them. *Id.* at 2889.

77. Although the Supreme Court approved the Missouri "clear and convincing" evidentiary standard, both the United States Supreme Court and the Missouri Supreme Court failed to give explicit direction as to statements which would satisfy the requirement. The Missouri Living Will Statute specifically excludes artificial nutrition and hydration from the life-sustaining procedures which a patient can prospectively refuse. MO. REV. STAT. § 459.010(3) (1986). Therefore, both the courts and the legislature have failed to create or describe a vehicle for a patient to overcome the procedural obstacles to exercise the refusal of medical treatment.

78. 110 S. Ct. at 2873. See *supra* note 55 discussing the practical effect of the heightened evidentiary standard.

that states possess an unqualified interest in preserving life.<sup>79</sup>

Justice Brennan, in contrast, correctly pointed out in his dissent that Cruzan previously expressed her desire never to live as a "vegetable."<sup>80</sup> Yet, because the Missouri Supreme Court feared the risk of an erroneous decision, it installed a safeguarding mechanism requiring "clear and convincing" evidence,<sup>81</sup> a standard perhaps insurmountable absent a formal document of the patient's intentions.<sup>82</sup> Similarly, Missouri's living will statute does not allow a patient to direct withholding or withdrawal from artificial nutrition and hydration.<sup>83</sup> Therefore, Missouri has erected an evidentiary barrier prohibiting the removal of life-sustaining treatment. In practical effect, this severe evidentiary standard takes away an individual's power to refuse medical treatment.<sup>84</sup> Unfortunately for Cruzan and other patients who live in a persistent vegetative state, even evidence evincing their desire not to exist in this condition will consistently fail to meet the "clear and convincing" state-erected barrier.<sup>85</sup> As a result, Nancy Cruzan could lie in the same hospital bed completely oblivious to her surroundings for the next thirty years.<sup>86</sup>

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79. The Court discussed and approved a variety of state approaches and evidentiary standards. *Cruzan*, 110 S. Ct. at 2847-51. See *supra* notes 2, 26-59 and accompanying texts for discussion of the state's latitude in the decision making process.

80. *Cruzan*, 110 S. Ct. at 2863. See *supra* note 63 and accompanying text discussing the pertinent evidence considered by the Court.

81. *Cruzan*, 110 S. Ct. at 2852-53.

82. *Id.* In her concurrence, Justice O'Connor suggested that the outcome may be different if the patient appointed a proxy decision maker while competent. *Id.* at 2857 (O'Connor, J., concurring). She raised the possibility that a state may be constitutionally required to give effect to the patient's direction of a specific decision maker. *Id.* In a footnote, the majority stated that the *Cruzan* opinion does not address this point, leaving the door open for future litigation on this specific issue. *Id.* at 2856 n.12.

83. MO. REV. STAT. § 459.010(3) (1986). See *supra* note 73 and accompanying text discussing the Missouri Living Will Statute.

84. See *supra* notes 1-3 and accompanying text for discussion of individual rights.

85. See *supra* note 14 for discussion of Cruzan's expressed wishes.

86. See *supra* note 13 and accompanying text discussing Nancy Cruzan's prognosis. Cruzan's family returned to state court in Missouri to seek a new trial based on new evidence of Nancy's wishes regarding life-sustaining medical treatment. N.Y. Times, Nov. 3, 1990, at A12, col. 3. The State of Missouri, however, withdrew from the case, having achieved its objective of clarifying the law on this issue. *Id.* Cruzan's guardian is the only remaining party to have objected to the removal of Nancy's feeding tube. *Id.* The guardian, however, sided with the family believing Cruzan's right to die should

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prevail. *Id.* On December 14, 1990, based upon a finding of clear and convincing evidence, a county probate judge issued a ruling authorizing the Cruzan family to remove Nancy's feeding tube. N.Y. Times, Dec. 15, 1990, at 1, col. 2. Subsequently, protestors filed petitions in the Missouri Courts. N.Y. Times, Dec. 22, 1990, at 10, col. 4. All such petitions were denied. *Id.* Thus, after an extended battle in court, Nancy Cruzan will finally be allowed to die with dignity.

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