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COMMENT

LIVE AND LET DIE: THE STATUS OF THE "RIGHT TO DIE" IN WYOMING

Medical science's miraculous technological advances have enabled doctors to prolong the physical being beyond what many would consider "living."¹ Many believe that death in America "is too often controlled by machines rather than nature."² Until quite recently, Americans usually died at home. Now, an estimated 80% will die in hospitals or some type of nursing home, surrounded by a maze of tubes and life-extending machines.³ Many Americans feel that death should be one of life's most private moments and resent or fear invasion of this privacy by medical technicians or machines.

Our society is struggling to keep up with the ethical and legal dilemmas caused by these medical advances. The so-called "right to die" is a relatively new phenomenon. While the United States Supreme Court in *Cruzan v. Director, Missouri Department of Health*⁴ declined to unequivocally give people the "right to die," the Court did state that for purposes of that case they would assume that such a constitutionally protected right exists.⁵

While *Cruzan* is the first United States Supreme Court opinion on the subject, since 1976 there has been a rich body of caselaw developing in the state courts.⁶ In the majority of cases, state courts have allowed the individuals or their surrogate decision-makers (in the case of incompetents) to remove life-sustaining equipment.⁷ The United States Supreme Court's recent decision in *Cruzan* may check this trend by allowing the states to impose their own procedural requirements, limiting an individual's ability to prove that he or she would want withdrawal of life-sustaining treatment. This comment will examine the balance of individual

1. In 1986, there were an estimated 10,000 Americans existing in "a hopeless twilight known to doctors as a 'permanent vegetative state.'" Wallis, *To Feed or Not to Feed?*, TIME, Mar. 31, 1986, at 60. In addition to the mental anguish suffered by the families involved, the financial burdens are extremely high—often as much as \$100,000 per year. *Id.*

2. *Id.*

3. *Id.*

4. *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841 (1990).

5. *Id.* at 2852. One wonders why the Supreme Court of the United States would say "for the purposes of this case we assume . . ." when they could decide the issue. Perhaps the Court is not yet ready to take a definitive stand on whether a competent person has a constitutionally protected right to refuse lifesaving nutrition and hydration.

6. The Missouri Supreme Court in *Cruzan ex rel. Cruzan v. Harmon*, cited in a footnote all the state court cases since 1976 which addressed initiation or removal of life-sustaining medical treatment. The list showed a total of 64 cases in 17 states. *Cruzan ex rel. Cruzan v. Harmon*, 760 S.W.2d 408, 412 n.4 (Mo. 1988) (en banc), cert. granted 109 S. Ct. 3240 (1989).

7. *Id.* at 412-13.

and state interests discussed in state caselaw dealing with withdrawal of life-sustaining treatment; it will analyze what the *Cruzan* decision actually decided (and perhaps more importantly, what it did not decide); and then it will focus on the current state of the law in Wyoming. While as yet there is no caselaw on the "right to die" in Wyoming, there are statutes providing for living wills⁸ and durable powers of attorney.⁹ These documents can declare an individual's intent as well as assign another to make the actual decision to withdraw life-sustaining treatment. Since *Cruzan*, many health care providers are hailing living wills as the vehicle for individuals to ensure that their lives are not indefinitely prolonged by artificial means. However, close analysis will show that the living will in Wyoming, contrary to what many people expect when they execute one, may not legally afford them the "right to die."

BACKGROUND

Individual Rights

The judicial system recognizes the constitutional right of patients to refuse medical treatment. The constitutional right to privacy allows an individual to make fundamental decisions regarding one's own body.¹⁰ While the constitution does not specifically mention privacy, a series of Supreme Court decisions recognize a personal right of privacy.¹¹ In *Griswold v. Connecticut* the Court held there was a constitutional right of privacy in the penumbra of certain guarantees of the Bill of Rights. The right to privacy was found "formed by emanations from those guarantees that help give them life and substance."¹² One federal district court held specifically that "[a] person has the right. . .to control fundamental medical decisions that affect his or her own body. This right. . .is properly grounded in the liberties protected by the Fourteenth Amendment's due process clause."¹³ That same court unequivocally stated that a patient's "right to privacy encompasses the same right to refuse life-sustaining medical treatment."¹⁴

The common law right to be free from nonconsensual invasions of

8. WYO. STAT. §§ 35-22-101 to -109 (1977).

9. WYO. STAT. §§ 3-5-101 to -103 (1977).

10. *Roe v. Wade*, 410 U.S. 113 (1973). These decisions include activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* at 152-53.

11. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

12. *Griswold*, 381 U.S. at 484.

13. *Gray v. Romeo*, 697 F. Supp. 580, 585 (D.R.I. 1988). In *Gray*, Marcia Gray was unconscious and in a persistent vegetative state. Her husband sought removal of an artificial feeding tube and life support. In ordering removal of the treatment, the District Court of Rhode Island held that Marcia's right to deny medical treatment was protected by due process, that her interests overrode any state interests, and further, that Marcia would want to have the life prolonging treatment removed. *Id.* at 586-91.

14. *Id.* at 586.

one's bodily integrity is another foundation for the individual's right to forego life-sustaining treatment. The law recognizes the individual's right to the possession and control of one's body, free from interference by others.¹⁵ Under common law, if an individual merely touches another without consent or legal justification, it is considered a battery.¹⁶ Almost one hundred years ago the Supreme Court indicated that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."¹⁷

This common law proposition has led to the development of a doctrine of informed consent required for the rendering of medical treatment.¹⁸ The logical extension of the doctrine of informed consent is that the individual also has a right not to consent to treatment. A physician may commit a tort if she performs medical therapy the patient has not authorized.¹⁹

Competing State Interests

Individual rights, however, are often balanced against competing state interests. The state interests most often discussed in the context of "right to die" cases are: preservation of life, prevention of suicide, protection of third parties, and maintenance of the ethical integrity of the medical profession.²⁰

The state's interest in the preservation of life is legitimate and compelling. This state interest has justified, on many occasions, court-ordered medical intervention in situations where treatment would allow an otherwise dying patient to lead a normal, healthy life.²¹ However, as the individual's prognosis dims and the chances for actual recovery lessen, the state's interest in preserving life weakens and the individual's right to privacy strengthens. The Massachusetts Supreme Court in *Superintendent of Belchertown v. Saikewicz*, noted that the

15. *Foody v. Manchester Memorial Hosp.*, 40 Conn. Supp. 127, 482 A.2d 713 (1984).

16. W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, *PROSSER AND KEETON ON LAW OF TORTS* § 9, at 39-42 (5th ed. 1984).

17. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

18. *In re Conroy*, 98 N.J. 321, 346, 486 A.2d 1209, 1222 (1985). Under the doctrine of informed consent, "no medical procedure may be performed without a patient's consent, obtained after explanation of the treatment, substantial risks, and alternative therapies." *Id.* (citing Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228, 237 (1973)).

19. *Canterbury v. Spence*, 464 F.2d 772, 782-83 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

20. *Conroy*, 98 N.J. at 348-49, 486 A.2d at 1223.

21. *Commissioner of Correction v. Myers*, 379 Mass. 255, 399 N.E.2d 452 (1979) (dialysis); *Application of President & Directors of Georgetown College*, 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964) (blood transfusion); *John F. Kennedy Memorial Hosp. v. Heston*, 58 N.J. 575, 279 A.2d 7670 (1971) (blood transfusion).

state's interest in preserving life should be harmonized with the individual's right to reject the high cost of prolonging life.²² The *Saikewicz* court maintained a distinction between a state's interest in saving a human life where recovery is expected versus a situation where recovery is not expected and the issue is for how long and at what cost life may be briefly extended.²³ In such cases, the state's interest in the preservation of life is often outweighed by the individual's right to self-determination.²⁴ The law recognizes a person's right to preserve his humanity, even if it means allowing the natural processes of a disease to bring about "a death with dignity."²⁵

Considering the issue of the state's interest in preventing suicide, cases often distinguish between deliberately ending life and allowing nature to take its course.²⁶ An individual's decision to exercise his right to privacy and discontinue medical treatment does not constitute suicide.²⁷ A person who refuses treatment may not have a specific intent to die from denying themselves medical care. Even if a person knew they would die without treatment "to the extent [that the] death resulted from natural causes, the patient did not set the death producing agent in motion with intent to cause his own death."²⁸ The American Medical Association's Statement on Tube Feeding expresses this philosophy. "Withholding artificial hydration and nutrition from a patient. . . does not induce a new fatal pathology; rather, it allows an already existing fatal pathology to take its natural course."²⁹

States appropriately consider whether any innocent third party could be adversely affected by the patient's decision to be allowed to die. The state has a valid reason to determine whether there are any small children who might suffer emotionally from the decision, or become wards of the state.³⁰ This consideration is usually limited to situations where the patient has dependents whose interest could be adversely affected, and often is not a factor because the patient is an older person whose children are adults.³¹

The state's interest in maintaining the ethical integrity of the medical profession has not precluded an individual's right to forego

22. *Superintendent of Belchertown v. Saikewicz*, 373 Mass. 742, 370 N.E.2d 417 (1977).

23. *Id.* at 742, 370 N.E.2d at 426.

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

25. *Brophy v. New Eng. Sinai Hosp., Inc.*, 398 Mass. 417, 431, 497 N.E.2d 626, 635 (1986).

26. *Gray*, 697 F. Supp. at 589.

27. *Foody*, 40 Conn. Supp. at 137, 482 A.2d at 720 (citing *In re Quinlan*, 355 A.2d 647 (N.J. 1976)).

28. *Id.* (citing *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 743 n.11, 370 N.E.2d 417, 426 n.11 (1977)).

29. O'Rourke, *The A.M.A. Statement on Tube Feeding: An Ethical Analysis*, 155 Am. 321, 322 (1986).

30. *Foody*, 40 Conn. Supp. at 137-38, 482 A.2d at 720.

31. *Gray*, 697 F. Supp. at 589 (citing *Tune v. Walter Reed Army Medical Hosp.*, 602 F. Supp. 1452, 1455 n.8. (D.D.C. 1985)).

medical treatment.³² Medical ethics do not require intervention at all costs.³³ Prevailing ethical concerns generally recognize that the dying are more often in need of comfort than treatment, and that the right to refuse treatment is consistent with existing medical mores.³⁴ However, medical technology is advanced to where it can often sustain life (or at least the functions of breathing and obtaining nourishment) far beyond the point where certain death would have occurred fifty years ago. These advancements have brought with them new moral dilemmas. In addition they have caused a tremendous increase in "right to die" cases facing the courts in the last fifteen years.

Major Cases in the State Courts

The seminal decision among "right to die" cases is *In re Quinlan*,³⁵ decided by the New Jersey Supreme Court in 1976. In *Quinlan*, twenty-one year old Karen Quinlan suffered severe brain damage and was in a persistently vegetative state.³⁶ Her father sought appointment as guardian of his daughter and wanted express permission to disconnect her respirator and let his daughter die.³⁷ Karen's doctors, the hospital, the county prosecutor, Karen's guardian ad litem, and the State of New Jersey all opposed her father's request.³⁸ The court, however, approved removal of the respirator after balancing Karen's right to privacy against the competing state interests.³⁹ Karen had previously made statements indicating she would not want to be kept alive by extraordinary life-sustaining procedures.⁴⁰ Even though the court decided that these statements were remote and lacked probative value,⁴¹ the court allowed her father to substitute his judgment for Karen's and exercise her right to privacy by discontinuing the

32. *Conroy*, 98 N.J. at 352, 486 A.2d at 1224.

33. O'Rourke, *supra* note 29, at 322.

34. *John F. Kennedy Memorial Hosp. v. Bludworth*, 452 So. 2d 921, 924 (Fla. 1984).

35. *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

36. *Id.* at 24, 355 A.2d at 654. The classic definition of a "persistent vegetative state" has been suggested by Dr. Fred Plum, who coined the term and who is a renowned expert in the field. It is as follows:

Vegetative state describes a body which is functioning entirely in terms of its internal controls. It maintains temperature. It maintains heart beat and pulmonary ventilation. It maintains digestive activity. It maintains reflex activity of muscles and nerves for low level conditioned responses. But there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner.

Cruzan, 110 S. Ct. 2841, 2845 n.1 (quoting *In re Jobes*, 108 N.J. 394, 403, 529 A.2d 434, 438 (1987)).

37. *Quinlan*, 70 N.J. at 22, 355 A.2d at 653.

38. *Id.*

39. *Id.* at 55, 355 A.2d at 671.

40. *Id.* at 21, 355 A.2d at 653. Karen made statements while competent concerning her desire not to be kept alive by extraordinary medical procedures. Karen's statements were made in the context of discussions with others regarding use of heroic measures on the terminally ill. *Id.*

41. *Id.*

respirator.⁴²

The next year the Supreme Judicial Court of Massachusetts adopted the "substituted judgment" standard.⁴³ The *Saikewicz* court reasoned that an incompetent person should have the same rights as one who is competent.⁴⁴ In this case a 67-year-old profoundly-retarded man suffering from leukemia was allowed to forego chemotherapy and die naturally. The court found that Mr. Saikewicz would not have understood the discomforts and problems of chemotherapy. Because "the value of human dignity" should extend to the incompetent as well as the competent, the Supreme Judicial Court of Massachusetts decided to allow the probate judge to determine what Saikewicz, an incompetent, would have done under the circumstances.⁴⁵

In 1981, the New York Court of Appeals decided *In re Storar*.⁴⁶ The New York court required that one seeking to withhold or withdraw treatment must prove by clear and convincing evidence that is what the patient would have wanted.⁴⁷ Since Mr. Storar was profoundly retarded, the court reasoned that it would be unrealistic to try to decide whether or not he would want to continue life-prolonging treatment. The treatment here involved continuing blood transfusions. Unlike the chemotherapy in *Saikewicz*, this treatment was not painful. Because the court was unable to determine what Mr. Storar might have wished, the court mandated that the treatments continue.⁴⁸ The court refused to apply the substituted judgment standard and overturned its application by the lower courts.⁴⁹

In the Matter of Eichner, the companion case to *Storar*, involved Brother Joseph Fox, a member of a Catholic religious order.⁵⁰ At the age of eighty-three, Brother Fox underwent surgery for a hernia. While in surgery, Brother Fox went into cardiac arrest resulting in loss of oxygen to the brain and significant brain damage. Brother Fox was placed on a respirator and maintained in a persistent vegetative state.⁵¹

The physicians involved informed Father Philip Eichner, the director of the order, that Brother Fox would not recover from the vegetative state. Father Eichner asked the hospital staff to remove the res-

42. *Id.* at 55, 355 A.2d at 671.

43. *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977).

44. *Id.* at 748-49, 370 N.E.2d at 429.

45. *Id.* at 753, 370 N.E.2d at 431.

46. *In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981).

47. *Id.* at 378-79, 420 N.E.2d at 72.

48. *Id.*

49. *Id.* at 383, 420 N.E.2d at 74.

50. *In re Eichner*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981).

51. *Id.* at 371, 420 N.E.2d at 67.

pirator. The hospital refused.⁵² Father Eichner produced evidence of formal discussions which had been held by the members of the order regarding the *Quinlan* case.⁵³ In these discussions Brother Fox had stated that he did not want any "extraordinary business" done to him if he were in circumstances such as Karen Quinlan's.⁵⁴ Ultimately, the New York Court of Appeals ordered Brother Fox disconnected from the respirator because he had clearly and convincingly expressed his desire not to be maintained by a respirator.⁵⁵

The Supreme Court of New Jersey, the same court that decided *Quinlan*, was again faced with a right to die issue in 1985 with *In re Conroy*.⁵⁶ This time the court faced the issue of whether to allow removal of a nasogastric feeding tube from an 84-year-old bedridden, incompetent woman with irreversible physical and mental impairments and a limited life expectancy. The trial court decided to permit removal of the feeding tube.⁵⁷ The guardian ad litem appealed. The New Jersey Supreme Court granted the guardian's petition for certification.⁵⁸

The court reaffirmed that the individual's right to self-determination should outweigh any countervailing state interests, and that this

52. *Id.*

53. *Id.* at 371-72, 420 N.E.2d at 68. These discussions were given great weight because they were formal discussions prompted by the order's mission to teach and promulgate Catholic moral principles. *Id.*

54. *Id.*

55. *Id.* at 72. Note that the New York Court in *Eichner* and *Storar* looked at the substituted judgment standard differently than the Massachusetts court had in *Saikewicz*. In *Saikewicz*, the mentally retarded patient had never been competent so could never have proved by clear and convincing evidence what his wishes would have been. The surrogate was allowed to decide what the individual would have wanted had he been competent. In contrast, the substituted judgment standard was only permitted in New York when there was clear and convincing evidence as to what the individual would have wanted.

The New York Courts still apply that standard as evidenced by their most recent decision of import on the "right to die" issue, *In re Westchester County Medical Center ex rel. O'Connor* [hereinafter *O'Connor*]. 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988). Mary O'Connor was an elderly widow who suffered brain damage in a series of strokes. Her daughters transferred her to a long term geriatric care center and submitted a document to be included in her medical file. This document was signed by the daughters and stated that their mother had many times expressed the request that she not be maintained on artificial life support. Mrs. O'Connor's condition worsened and when she could no longer swallow, her physician ordered a nasogastric tube. Her daughters objected to this procedure. The hospital began this proceeding for an order seeking authorization by the court to use a nasogastric tube. The court, after finding that Mrs. O'Connor's prior expressions concerning her desire not to be kept alive by artificial means were not clear and convincing evidence, ordered insertion of the tube. *Id.* at 532-35, 531 N.E.2d at 614-15.

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

57. *Id.* at 340-41, 486 A.2d at 1218-19.

58. *Id.* During the pendency of the appeal Ms. Conroy died while still connected to the nasogastric tube. The appellate division decided to resolve the case anyway, citing the expectation that this issue was capable of repetition but would frequently elude review due to the patient's death during the litigation. The New Jersey Supreme Court agreed. *Id.*

right should not be lost merely because someone is incompetent.⁵⁹ If there was clear and convincing evidence of an individual's wishes, the court held that a surrogate decision-maker could exercise that individual's rights. This was called the "subjective test."⁶⁰ When there was not clear and convincing evidence, the court still allowed a surrogate decision-maker to invoke another individual's rights if the patient met the requirements for either of two other tests.⁶¹ Under the "limited objective test," if there was trustworthy evidence that a patient would refuse treatment and the decision-maker was satisfied that the burdens of continued life with the treatment outweighed the benefits of life (i.e. extreme suffering, unavoidable pain), then the treatment could be withdrawn.⁶² The "pure objective test" could be used to withdraw treatment when there was no trustworthy evidence as to the patient's wishes, but the continuation of life-sustaining treatment would be inhumane (i.e. due to the severity of the pain).⁶³ Interestingly, the *Conroy* court went further than the New York and Massachusetts courts in explaining and extending the types of circumstances where life-sustaining medical treatment could be withdrawn. However, Ms. Conroy did not meet the standards of any of these tests and had she not died anyway, the nasogastric tube would not have been withdrawn.⁶⁴

The most recent major "right to die" case that the New Jersey Supreme Court decided is *In the Matter of Jobes*.⁶⁵ In March of 1980, Nancy Ellen Jobes was admitted to Riverside Hospital for treatment of injuries she received in a car accident. Mrs. Jobes was four and one-half months pregnant at the time. The fetus was killed in the accident. During an operation to remove the fetus, Mrs. Jobes sustained a severe loss of blood flow and oxygen to the brain and suffered irreversible brain damage. Mrs. Jobes never regained consciousness and a specialist in neurology declared that she was in a persistently vegetative state.⁶⁶

Among her other maladies, Mrs. Jobes could not swallow on her own, and was fed through a j-tube, a device inserted directly into the jejunum of her small intestine. Mrs. Jobes' husband and her parents asked the nursing home where she was being maintained to remove the j-tube. The nursing home refused, and Mr. Jobes filed suit to compel removal.⁶⁷ The New Jersey Supreme Court eventually allowed re-

59. *Id.* at 355, 486 A.2d at 1229.

60. *Id.* at 360, 486 A.2d at 1229.

61. *Id.* at 365, 486 A.2d at 1231-32.

62. *Id.* at 365, 486 A.2d at 1232.

63. *Id.*

64. *Id.* at 365-68, 486 A.2d at 1231-33.

65. *In re Jobes*, 108 N.J. 394, 529 A.2d 434 (1987).

66. *Id.* at 403, 529 A.2d at 438.

67. *Id.* at 400, 529 A.2d at 437. The New Jersey Supreme Court in *Jobes* distinguished between cases where patients are in a persistent vegetative state versus when they are not. The court held that the balancing tests as set out in *Conroy* were not appropriate for a persistently vegetative patient such as Mrs. Jobes. Thus, the court

removal of the tube under a substituted judgment theory, after they found that Mrs. Jobs' prior assertions concerning the removal of artificial life support did not meet the clear and convincing standard.⁶⁸

ANALYSIS

The Supreme Court Decides—Or Does It?

The United States Supreme Court speaks to the "right to die" issue in *Cruzan v. Director, Missouri Department of Health*.⁶⁹ In the majority opinion, Chief Justice Rehnquist attempts to limit the holding of the case by stating that the "question is simply and starkly whether the United States Constitution prohibits Missouri from choosing the rule of decision which it did."⁷⁰ The Court holds that a state may utilize a clear and convincing evidentiary standard "where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state."⁷¹ With such a narrow holding, the Court seems to be inviting further cases on the subject. Chief Justice Rehnquist even quotes from an 1897 Supreme Court case where the court said that in deciding a case of significant magnitude and importance "it is the [better] part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject."⁷² The *Cruzan* decision stays well within that guideline.

The facts of the case reveal that Nancy Cruzan was rendered incompetent as a result of injuries suffered in an automobile accident. Her parents sought a court order directing the hospital to withdraw Nancy's gastrostomy tube⁷³ after it became apparent she would never regain any cognitive ability.⁷⁴ The Missouri Supreme Court refused because there was no clear and convincing evidence that Nancy would desire such life-sustaining treatment withdrawn under the circumstances.⁷⁵ The United States Supreme Court granted certiorari⁷⁶ and

looked to *Quinlan* and the substituted judgment test for guidance in this instance. *Id.* at 413, 529 A.2d at 443.

68. *Id.* at 427, 529 A.2d at 451. The New Jersey court interpreted the substituted judgment standard to allow a surrogate decision-maker to decide for the patient where the patient had not previously expressed clear intentions regarding life-sustaining procedures. *Id.*

69. *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841 (1990).

70. *Id.* at 2851.

71. *Id.* at 2854.

72. *Id.* at 2851 (quoting *Twin City Bank v. Nebeker*, 167 U.S. 196, 202 (1897)).

73. A gastrostomy tube is a tube surgically implanted in the stomach through the abdominal wall. *Cruzan*, 110 S. Ct. at 2866 (O'Connor, J., concurring). The tube is not without complications. Justice O'Connor indicates that the tube may "obstruct the intestinal tract, erode and pierce the stomach wall or cause leakage of the stomach's contents into the abdominal cavity. . . [t]he tube can cause pneumonia from reflux of the stomach's contents into the lung." *Id.*

74. *Id.* at 2845 (Rehnquist, J., writing for the majority).

75. *Id.*

76. *Cruzan ex rel. Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988) (en banc), cert. granted, 109 S. Ct. 3240 (1989).

affirmed.⁷⁷

The 5-4 decision leaves unanswered more questions than it resolves, and contains one majority opinion, two concurrences, and two dissents.⁷⁸ The Rehnquist majority opinion finds no constitutional problem with Missouri's restrictive requirement of clear and convincing evidence of the patient's desires prior to incompetency. The opinion stops short of finding that the right to refuse artificial feeding as well as other life-sustaining procedures is constitutionally protected and merely says that "for purposes of this case we assume" the Constitution grants such a right.⁷⁹ The opinion specifically rejects a constitutional right to privacy as the home for a right to refuse life-sustaining medical treatment and instead prefers to analyze "in terms of a Fourteenth Amendment liberty interest."⁸⁰ Chief Justice Rehnquist advises that the state has a legitimate interest in the preservation of life which has to be balanced against the individual liberty interest.⁸¹ He uses the severe penalties for homicide and assisting suicide as examples of the state's commitment to life. Preservation of life is the only one of the four typically-mentioned state interests⁸² which he discusses. Chief Justice Rehnquist anchors the preservation of life interest in the due process clause.⁸³

Justice O'Connor goes beyond the majority opinion by stating that the Constitution affords the right to refuse any type of medical treatment, "including the artificial delivery of food and water."⁸⁴ She also goes beyond the majority opinion in attempting to hold on to the concept of substituted judgment. She states:

I also write separately to emphasize that the Court does not today decide the issue whether a State must also give effect to the decisions of a surrogate decision-maker. . . . In my view, such a duty may well be constitutionally required to protect the patient's liberty interest in refusing medical treatment.⁸⁵

Justice Scalia, after expressing his agreement with the Court's analysis, voices his disgust at even having to deal with this case and states that the federal courts have no business making decisions in

77. *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2856 (1990).

78. Chief Justice Rehnquist wrote the majority opinion in which Justices White, O'Connor, Scalia, and Kennedy joined. Justice O'Connor and Justice Scalia each filed a concurring opinion. Justice Brennan filed a dissenting opinion in which Justice Marshall and Blackman joined. Justice Stevens also filed a dissenting opinion. *Id.* at 2844.

79. *Id.* at 2852.

80. *Id.* at 2851 n.7.

81. *Id.* at 2852.

82. The four are: preservation of life, prevention of suicide, protection of third parties, and maintenance of the ethical integrity of the medical profession. See *supra* note 20 and accompanying text.

83. *Cruzan*, 110 S. Ct. at 2853. He also cites the due process clause as the home for an individual's liberty interest in refusing life-sustaining medical treatment. *Id.*

84. *Id.* at 2856-57 (O'Connor, J., concurring.)

85. *Id.* at 2857.

this field.⁸⁶ He views the "right to die issue" as one within the jurisdiction of the states, not the federal government. He further states that the answers to such questions as presented here are "neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory. . . ."⁸⁷

Justice Brennan and Justice Stevens both write impassioned dissents which argue for the rights of the individual to outweigh the state interests. Justice Brennan makes a telling point when he wonders whether by this decision the Supreme Court might cause health care providers to decide not to begin a life-sustaining treatment in a close case. They would decide to refrain from initiating the treatment because they fear they will not be able to terminate it if it proves to be of little benefit, or in fact burdens the patient.⁸⁸ He agrees that the states have interests. However, he argues that since there is a fundamental individual right involved, safeguards must be designed to provide accuracy.⁸⁹

Justice Stevens questions whether individuals who have no chance of recovery and who lie unconscious experience "life" as the word is used in our great documents of freedom, the Constitution and the Declaration of Independence. He disagrees with the majority's application of the clear and convincing standard. He argues that the courts should look to the best interests of the patient. In that vein the court could require clear and convincing evidence that Nancy Cruzan will never recover, is oblivious to her environment, has no cognitive or reflexive ability to swallow food or water, and that her brain damage is irreversible, progressive, and permanent. This, he argues, makes more sense than requiring clear and convincing evidence that she would not want to continue to live in her current circumstances.⁹⁰

The many variations in the case law leading up to the *Cruzan* case, coupled with the Supreme Court's reluctance to deal with the issue head on leave many unanswered questions in the minds of judges, doctors, hospitals, and individuals themselves as to what they can and cannot do. The answers to these questions require an in-depth analysis of what *Cruzan* probably does and probably does not decide.⁹¹

86. *Id.* at 2859 (Scalia, J., concurring). Scalia views refusal of life-prolonging medical treatment as suicide. He says, "Starving oneself to death is no different from putting a gun to one's temple as far as the common law definition of suicide is concerned." *Id.* at 2861.

87. *Id.*

88. *Id.* at 2870 (Brennan, J., dissenting),

89. *Id.* at 2876.

90. *Id.* at 2879 (Stevens, J., dissenting).

91. The word "probably" is used here because until other cases are decided based on *Cruzan* any forecast is purely speculative.

Issues Cruzan Probably Does Decide

1. States May Impose Procedural Safeguards

Perhaps the clearest statement *Cruzan* makes is that states may impose procedural safeguards in "right to die" cases.⁹² Justice Brennan, writing for himself and Justices Blackmun and Marshall, concedes "[t]he choice, in largest part, is and should be left to the States, so long as each State is seeking, in a reliable manner, to discover what the patient would want."⁹³ Justice Brennan's quarrel with the majority is with its assumption that if there is no clear and convincing evidence of the patient's wishes, then the state automatically makes the decision that the patient will live. He disputes that the court is more likely than family members to make the choice that the individual would have made.⁹⁴

2. There Is Probably a Constitutionally Protected Liberty Interest in Refusing Life-Saving Medical Treatment

In the majority opinion, Chief Justice Rehnquist states that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."⁹⁵ He then narrows the statement by declaring that before determining that a person's constitutional rights have been violated, the individual's liberty interest has to be balanced against the relevant state interests.⁹⁶ In a footnote, the majority specifically rejects the notion of a privacy interest and directs that this issue is "more properly analyzed in terms of a Fourteenth Amendment liberty interest."⁹⁷

3. Artificial Food and Hydration Are Probably Life-Saving Medical Treatment

The majority holds that "for purposes of this case" they assume there is a constitutional right for a competent person to refuse lifesaving hydration and nutrition.⁹⁸ Justice O'Connor states that "artificial feeding cannot readily be distinguished from other forms of medical treatment."⁹⁹ Justice O'Connor clarifies her view that a person's right to refuse unwanted medical treatment also encompasses the right to refuse "artificially delivered food and water."¹⁰⁰ She cites numerous

92. *Cruzan*, 110 S. Ct. at 2852 (Rehnquist, J., writing for the majority).

93. *Id.* at 2876 (Brennan, J., dissenting).

94. *Id.* at 2877.

95. *Id.* at 2851 (Rehnquist, J., writing for the majority).

96. *Id.* at 2851-52.

97. *Id.* at 2851 n.7.

98. *Id.* at 2852.

99. *Id.* at 2857 (O'Connor, J., concurring).

100. *Id.* at 2856.

medical authorities for her proposition that artificial feeding is not readily distinguishable from other forms of medical treatment.¹⁰¹ She discusses the invasiveness and complications of such procedures as she equates them with other forms of life-sustaining medical treatment.

Feeding a patient by means of a nasogastric tube requires a physician to pass a long flexible tube through the patient's nose, throat, and esophagus and into the stomach. Because of the discomfort such a tube causes, "[m]any patients need to be restrained forcibly and their hands put into large mittens to prevent them from removing the tube."¹⁰²

Justice Brennan, in his dissent in which Justices Blackmun and Marshall join, also regards the artificial delivery of food and hydration as medical treatment. He comments that the medical profession and the federal government do also¹⁰³ and notes that "the Missouri court appears to be alone among state courts to suggest otherwise."¹⁰⁴

Issues Cruzan Probably Does Not Decide

1. *Cruzan Does Not Decide Whether to Give Effect to the Decision of a Surrogate*

Justice O'Connor writes separately to emphasize that the court did not decide whether a state may honor the decision of a surrogate. She states her view that such a duty "may well be constitutionally required to protect the patient's liberty interest in refusing medical treatment."¹⁰⁵

Justice Brennan argues that the court should still protect a patient's liberty interest, even if it cannot discern what the patient's wishes would be. In such a case, the state should entrust the decision to the person whom the patient would most likely have appointed as a

101. *Id.* at 2857 (O'Connor, J., concurring, citing: Council on Ethical and Judicial Affairs, American Medical Association, AMA Ethical Opinion 2.20, Withholding or Withdrawing Life-Prolonging Medical Treatment, Current Opinions 13 (1989); THE HASTINGS CENTER, GUIDELINES ON THE TERMINATION OF LIFE-SUSTAINING TREATMENT AND THE CARE OF THE DYING 59 (1987)).

102. *Id.* at 2857 (quoting: MAJOR, THE MEDICAL PROCEDURES FOR PROVIDING FOOD AND WATER: INDICATIONS AND EFFECTS, IN BY NO EXTRAORDINARY MEANS: THE CHOICE TO FORGO LIFE-SUSTAINING FOOD AND WATER 25 (J. Lynn ed. 1986)).

103. *Id.* at 2867 (Brennan, J., dissenting).

The Federal Government permits the cost of the medical devices and formulas used in enteral feeding to be reimbursed under Medicare. See Pub.L. 99-509, § 9340, note following 42 U.S.C. § 1395u, p. 592 (1982 ed., Supp. V). The formulas are regulated by the Federal Drug Administration as "medical foods," see 21 U.S.C. § 360ee, and the feeding tubes are regulated as medical devices, 21 CFR § 876.5980 (1989).

Id.

104. *Id.* at 2867 n.7.

105. *Id.* at 2857 (O'Connor, J., concurring).

surrogate decision-maker, or to the patient's family.¹⁰⁶

2. *Cruzan* Never Delineates What Would Constitute Clear and Convincing Evidence

Cruzan holds that a state may require clear and convincing evidence of a patient's desire to withdraw artificial life support in situations where a guardian seeks to discontinue hydration and nutrition of a ward in a persistent vegetative state.¹⁰⁷ There was evidence which suggested that Nancy Cruzan would not want to be kept alive by artificial means. She had told her roommate in "somewhat serious conversation" that she would prefer to be allowed to die unless she could live "halfway normally."¹⁰⁸ In fact, the trial court held that this evidence was sufficient and concluded that no state interest outweighed her individual rights.¹⁰⁹ However, the Supreme Court says that this evidence did not reach the clear and convincing standard of proof.¹¹⁰

The Court further states that Cruzan's comments did not specifically indicate that she would want nutrition and hydration withdrawn.¹¹¹ In footnote eleven the Court accepts the definition of clear and convincing evidence which was used by the New York Court in *O'Connor*¹¹² and quotes that "[clear and convincing evidence is] 'proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented.'"¹¹³ The last phrase of this definition makes it difficult for an individual to meet the clear and convincing standard of proof. By requiring such a fact-specific standard the Court is precluding most oral statements from providing clear and convincing proof. Most people are not educated enough regarding current medical technology to know exactly what can be done to keep them alive. Therefore, they are not likely in conversation to express a clear and convincing desire to have any specific technology removed.¹¹⁴

106. *Id.* at 2877 (Brennan, J., dissenting).

107. *Id.* at 2854 (Rehnquist, J., writing for the majority).

108. *Cruzan*, 760 S.W.2d at 411.

109. *Id.*

110. *Cruzan*, 110 S. Ct. at 2855.

111. *Id.*

112. *In re Westchester County Medical Center ex rel. O'Connor*, 531 N.E.2d 607 (N.Y. 1988), see *supra* note 55.

113. *Cruzan*, 110 S. Ct. at 2855 n.11.

114. Several earlier cases in the state courts have held oral statements to be clear and convincing evidence.

In *Eichner*, the Court of Appeals of New York found that Brother Fox had expressed his desire not to be kept alive by a respirator, clearly and convincingly. *In re Eichner*, 52 N.Y.2d 363, 420 N.E.2d 64. See *supra* notes 50-54 and accompanying text. Brother Fox had first expressed his antipathy toward artificial life support in a "formal academic setting" when the *Quinlan* case was receiving much publicity. Years later, but only a short time before he was hospitalized, Brother Fox again stated that would not want to be kept alive by extraordinary measures, if there were no hope for recovery. *Id.* at 372, 420 N.E.2d at 68. The New York Court found these two expres-

Justice O'Connor, in her concurrence, brings up the issue of living wills and durable powers of attorney. She discusses whether there is a presumption of clear and convincing evidence when such documents exist.¹¹⁵ Justice O'Connor assumes that a living will is sufficient and encourages the states to also accept a patient's appointment of a proxy to make health care decisions through a durable power of attorney. She calls this an "equally probative source of evidence."¹¹⁶ She states that the *Cruzan* decision is narrow and does not preclude a "future determination that the Constitution requires the States to imple-

sions by Brother Fox to meet the clear and convincing standard of proof. The court stated that Brother Fox carefully reflected on the subject and that his remarks were "obviously solemn pronouncements." *Id.* at 380, 420 N.E.2d at 72. Perhaps the court in this instance was swayed by the fact that Brother Fox was a Catholic Priest, and had the full support of the Papacy behind him. In addition, since this issue is of such grave importance, the court projected that a Catholic Priest would give it grave consideration. *Id.*

In *Conroy*, the New Jersey Supreme Court held that when it is clear that an incompetent patient would have refused the treatment, then life-sustaining treatment may be withheld or withdrawn. *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985). See *supra* notes 55-63 and accompanying text. The *Conroy* court went on to suggest that such an intent may be evidenced by a living will stating what treatments and under what circumstances a person would decline life sustaining treatments. The intent may also be shown by way of oral directive from patient to friend or family member. A patient may give a durable power of attorney, or a proxy to make health care decisions to another person, so that person can make the patient's health care decisions. Finally, the patient's wishes may also be deduced from his or her religious beliefs or from persistent patterns of conduct. The court stated that the probative value of the evidence of the patient's intent concerning medical treatment varied depending on thoughtfulness, remoteness, consistency and specificity of the patient's statements. *Id.* at 361-62, 486 A.2d at 1229-30.

115. *Cruzan*, 110 S. Ct. at 1256-58 (O'Connor, J., concurring). If in fact a living will or durable health care power of attorney are the only methods of establishing clear and convincing evidence of a person's intent to forego life sustaining medical treatment, then some very real socio-economic limitations are being placed on the "right to die." The people who think about having a living will done are often older, more affluent people. There is immediacy driving them. They are concerned with dying with dignity and retaining the money that they have worked all of their lives to earn. Young, healthy people do not often think about the fact that they may be lying in a hospital some day wasting away in a vegetative state. As a result, they generally do not ever even consider drawing up a living will.

If clear and convincing evidence requires a living will, then the vast majority of young adults would be precluded from exercising their "right to die" if the situation ever arose. Presumably, minors would never be able to exercise the "right to die" since they do not have the capacity to execute a living will. Justice Stevens expresses the concern that the "Court's decision affords no protection to children [or] to young people who are victims of unexpected accidents or illnesses. . ." but only to those who "had the foresight to make an unambiguous statement of their wishes while competent." *Cruzan*, 110 S. Ct. at 2882-83 (Stevens, J., dissenting).

The impact upon the rights of those in lower socio-economic groups would be even more profound than upon young people. People who barely have enough money to put food on the table will not go to an attorney to have a living will drawn up nor are they likely to take advantage of the free forms which are provided by many groups dealing with the elderly. Many upper middle class caucasians, let alone the poor and minorities, have never even heard of a living will. If the only consistent way to show clear and convincing evidence is through a written instrument such as a living will then the "right to die" becomes a right of the affluent. The lesser privileged, even if they strive to be equal in life, are being effectively prohibited from being equal in death.

116. *Cruzan*, 110 S. Ct. at 2857 (O'Connor, J., concurring).

ment the decisions of a patient's duly appointed surrogate."¹¹⁷

Justice Brennan's dissent also assumes that a living will will meet the clear and convincing standard, and laments that too few people actually execute or are even aware of such documents.¹¹⁸ He also indicates his concern that the absence of a living will should not warrant a presumption that the patient would not want medical treatment terminated.¹¹⁹

3. *Cruzan* Does Not Decide What Kinds of Procedural Safeguards a State May Impose Nor How Restrictive They May Be

The one concurring theme through *Cruzan* in its compilation of opinions is that the states can set up some type of procedure or mechanism to allow individuals to make "right to die" decisions. The court leaves open the question of how restrictive the states can be. The opinion never divulges at what point an individual's constitutional liberty interests might override a restrictive state statutory or judicial requirement.

THE LAW IN WYOMING

Living Wills

Many states, including Wyoming, have enacted living will and durable power of attorney statutes.¹²⁰ The Wyoming living will statute is narrowly drawn.¹²¹ It specifies that an adult may execute a "declaration directing the withholding or withdrawal of life-sustaining procedures in a terminal condition."¹²² However, if Nancy *Cruzan* lived in Wyoming she would not legally be able to exercise her "right to die" even if she had a living will. Two different portions of the Wyoming statute would prevent it.

First, the statute is clear and unequivocal in its restriction to "terminal" cases.¹²³ It defines a "terminal condition" as one caused by "injury, disease or illness from which, to a reasonable degree of medical certainty, there can be no recovery and death is imminent."¹²⁴ The words "death is imminent" clearly exclude a situation such as Nancy *Cruzan's* from coverage by this statute. In *Cruzan*, the consensus was

117. *Id.* at 2858.

118. *Id.* at 2875 (Brennan, J., dissenting).

119. *Id.*

120. Justice O'Connor notes 13 states and the District of Columbia. *Id.* at 2857 n.2 (O'Connor, J., concurring).

121. WYO. STAT. §§ 35-22-101 to -109 (1977). For purposes of this Comment, the Wyoming Living Will Statute will be analyzed as a model to point out the deficiencies in many comparable state statutes.

122. WYO. STAT. § 35-22-102(a) (1977).

123. *Id.*

124. *Id.* § 35-22-101(vi).

that Nancy could live another thirty years.¹²⁵ It is easy to envision a circumstance where a patient suffers a traumatic injury, is stabilized, and is expected to live for many years.¹²⁶ However, the injuries are such that the individual is in a persistent vegetative state or in an irreversible coma. Because the condition is not "terminal," the restriction in the living will statute will prevent withdrawal of treatment.

In addition, the statute authorizes a declaration directing the withholding or withdrawal of life-sustaining procedures.¹²⁷ It then defines "life-sustaining" procedures as any medical procedure which will only serve to prolong the dying process and death will occur whether or not the procedure or intervention is utilized.¹²⁸ The definition goes on to specifically exclude "the administration of nourishment, medication or the performance of any medical procedure deemed necessary to provide comfort care or to alleviate pain."¹²⁹ Nancy Cruzan would not legally be allowed to die in Wyoming even if she had a living will because the treatment her parents seek to withdraw is food and hydration, or in the language of the Wyoming statute—nourishment.

Presumably, the legislature inserted this exemption in the statute because there are additional problems associated with the withdrawal or withholding¹³⁰ of artificial nutrition and hydration.¹³¹ The emotional trauma involved in making a decision to forego food and hydration can be extremely difficult. Most of us equate providing food and water with the expression of love and compassion. Living will statutes generally contemplate that by withholding life-sustaining procedures, the patient will be allowed to die of natural causes. However, since all living things require nutrition and hydration in order to stay alive, it is hard to reconcile the deprivation of food and water as being consistent with dying of natural causes.¹³² Withdrawal of nourishment is always fatal, whereas the withdrawal of other types of medical procedures, such as a respirator, might not be.¹³³

125. *Cruzan*, 760 S.W.2d at 411.

126. This was true in *Quinlan*, the first "right to die" case. *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, cert. denied, 429 U.S. 922 (1976).

127. WYO. STAT. § 35-22-102(a) (1977).

128. *Id.* § 35-22-101(iii).

129. *Id.*

130. For purposes of this comment, withdrawing and withholding any type of treatment are considered the same. Historically that has not always been the case. Comment, *A Necessary Compromise: The Right to Forego Artificial Nutrition and Hydration Under Maryland's Life Sustaining Procedures Act*, 47 MD. L. REV. 1188 (1988) [hereinafter *A Necessary Compromise*] (citing the PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 141 (1983)) [hereinafter PRESIDENT'S COMMISSION].

131. Ascertaining legislative history in Wyoming is difficult because often the only source is the memory of the legislators. More often than not laws are a result of compromises and no one knows why certain provisions are included or excluded.

132. *A Necessary Compromise*, 47 MD. L. REV. 1188, 1191 (1988).

133. A stunning example is Karen Ann Quinlan. She survived for 10 years after being removed from the respirator. Wikler, *Not Dead, Not Dying? Ethical Categories and Persistent Vegetative State*, 18 HASTINGS CENTER REP. 41 (Feb.-Mar. 1988).

Another source of controversy is the disagreement among experts regarding how painful it might be to die from termination of artificial food and hydration. A judge on the Supreme Judicial Court of Massachusetts, in his dissent in the *Brophy* case, declared that the withdrawal of food and water would lead to a "particularly difficult, painful and gruesome death."¹³⁴ On the other hand, the Council on Ethical and Judicial Affairs of the American Medical Association (AMA) issued a statement in 1986 which declared that artificial nutrition and hydration could be ethically withheld from a non-terminal patient in an irreversible coma.¹³⁵ The AMA argues that there is no medical indication that individuals in such a medical condition can feel pain. In some hospices and similar type facilities, where caring compassionately for the dying individual is the primary focus, artificial food and hydration has not been routinely given after the dying person has lapsed into a coma.¹³⁶ Courts that have granted individuals the "right to die" have based their decisions on the supremacy of an individual's constitutional and common law rights to forego medical treatment. The analysis changes, however, when there is a living will statute in place which conflicts with the exercise of these rights by specifically excluding the withholding of food and hydration. The argument could be made that the individual knew of the exclusion in the statute, but because she made no attempt to specifically override it in her living will she must agree with the exclusion. Wyoming's living will statute speaks specifically to exclude removal of artificial nutrition and hydration by a living will. This could lead to the presumption that a person executing a living will under the Wyoming statute would agree with and desire that exclusion.

The Wyoming statute provides a basic form to use.¹³⁷ However, there is a possibility that persons living in a state like Wyoming may have their constitutional and common law rights contracted rather than expanded by their living wills because of the presumptions which

134. *Brophy v. New Eng. Sinai Hosp., Inc.*, 398 Mass. 417, 444, 497 N.E.2d 626, 641 (1986) (Lynch, J., dissenting). He described in a footnote what he believed the likely effects to be:

Brophy's mouth would dry out and become caked or coated with thick material. His lips would become parched and cracked. His tongue would swell, and might crack. His eyes would recede back into their orbits and his cheeks would become hollow. The lining of his nose might crack and cause his nose to bleed. His skin would hang loose on his body and become dry and scaly. His urine would become highly concentrated, leading to burning of the bladder. The lining of his stomach would dry out and he would experience dry heaves and vomiting. His body temperature would become very high. His brain cells would dry out, causing convulsions. His respiratory tract would dry out, and the thick secretions that would result could plug his lungs and cause death. At some point within five days to three weeks his major organs, including his lungs, heart, and brain, would give out and he would die. . . .The [trial court] judge could not rule out the possibility that Paul Brophy could experience pain in such a scenario.

Id. at 444 n.2, 497 N.E.2d at 626 n.2.

135. O'Rourke, *supra* note 29, at 321.

136. *Id.* at 331.

137. WYO. STAT. § 35-22-102(d) (1977). See APPENDIX A for the text of the form.

may be attached to a restrictive statute. An individual who wished to be allowed to die might be better off legally in a state which had no living will statute than in one with a restrictive statute.¹³⁸

However, recent case law immediately preceding *Cruzan* seems to go the other direction. Cases in Florida and Maine provide examples of how courts integrated living will statutes into the decision-making process.¹³⁹ In 1986 the Florida Court of Appeals, in *Corbett v. D'Alessandro*,¹⁴⁰ held that an individual's constitutional rights cannot be limited by legislation.¹⁴¹ The legislation was Florida's living will statute, which like Wyoming's statute, excluded food and sustenance from its list of life-sustaining procedures.¹⁴² The Court of Appeals held that the statute applied to specific fact situations only and was not intended to encompass the "entire spectrum of instances in which these privacy rights may be exercised."¹⁴³ Mrs. Corbett had not executed a living will so the court looked to other ways in which her intent could be established and her rights exercised.¹⁴⁴

The Maine court's decision in *In re Gardner* also held that a restrictive living will statute did not have any effect in the case of a persistently vegetative patient who had not executed a living will.¹⁴⁵ The *Gardner* court's holding goes slightly beyond the holding in *Corbett* in that *Gardner* holds the living will statute irrelevant in the application of Maine's "common law of informed consent."¹⁴⁶ The *Gardner* court did not expect that the provisions of the living will statute would apply had Mr. Gardner written one.¹⁴⁷

In light of the recent United States Supreme Court's holding in *Cruzan*,¹⁴⁸ we in Wyoming cannot expect that our supreme court would reach a conclusion similar to those reached by the Maine and Florida courts. The holding in *Cruzan* allows the State of Missouri to set the standards and constitutionally require clear and convincing evidence of an incompetent patient's desire to have life-prolonging treatment withdrawn.¹⁴⁹ Under such an analysis, it is likely that there

138. Since *Cruzan* basically allows the states to set the standards, the effect may well be to place even more emphasis on the state statutes and less on the constitutional and common law individual rights which proved the basis for decisions in the past.

139. *Corbett v. D'Alessandro*, 487 So. 2d 368 (Fla. Dist. Ct. App.), review denied, 492 So. 2d 1331 (1986); *In re Gardner*, 534 A.2d 947 (Me. 1987). These are both pre-*Cruzan* decisions. The analysis might be different now due to the Court's reasoning in *Cruzan*.

140. *Corbett v. D'Alessandro*, 487 So. 2d 368 (Fla. Dist. Ct. App. 1986).

141. *Id.* at 372.

142. FLA. STAT. ANN. §§ 765.01 to -.15 (West 1986).

143. *Corbett*, 487 So. 2d at 370.

144. *Id.*

145. *Gardner*, 534 A.2d at 952 n.3.

146. *Id.* at 952.

147. *Id.*

148. *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841 (1990).

149. *Id.* at 2856.

would be even more emphasis given to the voice of the state legislature in its exclusion of food and hydration from the list of life-sustaining procedures that can be withdrawn.

However, there is a good argument that a person's ability to decline life-sustaining medical treatment, or food and hydration, is a fundamental, constitutional right.¹⁵⁰ If that is the case, then a living will statute like Wyoming's which exempts withdrawal of food and hydration may be unconstitutional, unless there is another way for an individual to clearly make his or her wishes known.

Health Care Durable Power of Attorney

In Wyoming, another way exists. Justice O'Connor calls durable power of attorney statutes a "valuable additional safeguard of the patient's interest in directing his medical care."¹⁵¹ Wyoming has a durable power of attorney statute which allows for a power of attorney. However, neither the word "medical" nor anything like it is mentioned in the statute.¹⁵² In 1989 the Attorney General of Wyoming issued an opinion stating that medical treatment, as well as other personal decision-making powers, could be transferred under the Durable Power of Attorney Statute.¹⁵³ The Attorney General's opinion is not binding on the courts and could be rendered useless by a vote of the legislature,¹⁵⁴ but it is a well-reasoned opinion which looks at caselaw in other states with similar statutes.¹⁵⁵

Written by Attorney General Joseph B. Meyer, the opinion directly addresses whether personal medical decisions can be delegated under the durable power of attorney statute. The opinion reasons that an affirmative answer is supported by the "statutory language; by the general history of durable powers statutes; by case law in other state jurisdictions; by uniform and model codes; and by the conclusions contained in the reports of the President's Commission for the Study of Ethical Problems in Biomedical and Behavioral Research" (The Commission).¹⁵⁶

According to the opinion, the absence of any statutory language limiting the authority of the agent supports a plain language interpretation. The attorney general reasons that the statute clearly contemplates the use of the proxy after incompetency because this is what

150. See *supra* notes 10-17 and accompanying text.

151. *Cruzan*, 110 S. Ct. at 2858 (O'Connor, J., concurring).

152. WYO. STAT. §§ 3-5-101 to -103 (1985).

153. 014 Op. Att'y Gen. 1 (Jun. 22, 1989).

154. The Attorney General is empowered by the Wyoming Statutes to "give written opinions upon questions submitted to him by elective and appointive state officers and by either branch of the legislature, when in session." WYO. STAT. § 9-1-603(a)(vi) (1987). The authors could find no Wyoming case law on the effect of Attorney General opinions.

155. 014 Op. Att'y Gen. 1 (Jun. 22, 1989).

156. *Id.*

makes it "durable." He argues the statute further implies that any limitation on an agent's authority which might preclude medical decisions would be incorporated into the instrument at the discretion of the parties.¹⁵⁷

Attorney General Meyer compares Wyoming's durable power of attorney statute with New Jersey's. The language is almost identical except for the fact that Wyoming's law does not define "disability."¹⁵⁸ New Jersey, since deciding *Quinlan* in 1976, has a long history of upholding an individual's "right to die" and so it is no surprise that there are several cases interpreting the durable power of attorney statute so as to authorize the conveyance of durable authority to make medical decisions.¹⁵⁹ Mr. Meyer argues that since Wyoming's statute is virtually the same it should be interpreted in the same fashion.¹⁶⁰

Looking at The Uniform Probate Code (UPC) and the Uniform Durable Power of Attorney Act (UDPOA Act), the attorney general again argues the plain language of the statute should apply. He notes the absence from these two model acts of any language limiting the extent of the powers delegated. He notes that if the drafters of the UPC had intended to restrict the durable power of attorney delegation, they would have rephrased the language of these model laws. He states, "Wyoming's Durable Power of Attorney statute should be interpreted as not restricting the purposes for which an agency can be created. Wyoming statute § 3-5-101 should be read as authorizing the delegation of durable power to make medical and personal decisions."¹⁶¹

Mr. Meyer quotes The Commission's conclusion which was based on the principle of informed consent. The Commission suggests appropriate policies for both competent and incompetent patients and in fact suggests the use of durable powers of attorney to make the incompetent's decisions. While noting that these statutes are not expressly enacted to enable incompetents to make health care decisions, the Commission contends they can accommodate such usage.¹⁶²

For the Wyoming Lawyer

Since *Cruzan*, the term "right to die" has come to the forefront of American life, especially among the elderly.¹⁶³ While many individuals

157. *Id.* at 2.

158. Compare WYO. STAT. §§ 3-5-101 to -103 (1977) with N.J. STAT. ANN. §§ 46:2B-8 to -9 (West Supp. 1989).

159. 014 Op. Att'y Gen. 1, 2 (Jun. 22, 1989).

160. *Id.*

161. *Id.* at 4.

162. *Id.* at 4 (citing Title III of Public Law 95-622, enacted on Nov. 9, 1978, codified at 42 U.S.C. ch. 5A; PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, SUMMING UP, 2-3 (1983)).

163. Anyone reading the Casper Star Tribune regularly will spot "right to die"

will simply write out a do-it-yourself living will or durable power of attorney,¹⁶⁴ a good number will seek their attorney's advice. The attorney should question an individual closely to determine if she wants food and hydration withdrawn or withheld if she is in a persistent vegetative state such as Nancy Cruzan.¹⁶⁵ The attorney should ask the client about whether she wants to be in a terminal condition before being allowed to die or if she would want to live for thirty years should she be in a persistent vegetative like Nancy Cruzan. If she disagrees with the restrictions in the living will statute and wants to have food and hydration withdrawn even in a nonterminal situation, a durable power of attorney would be a better instrument to ensure that her wishes are met. There should be a very specific statement in the document that the durable power of attorney is giving the agent the power to terminate all life-sustaining procedures, including but not limited to food and hydration. The durable power of attorney should also specifically state that the condition need not be terminal. Similar statements could also be written into a living will. The legal effect of such statements is questionable given the restrictions in the statute, however, the statements would clearly establish the individual's intent.¹⁶⁶ In addition, if a client wishes to execute both a living will and a "health care" durable power of attorney, the attorney should name the same person as surrogate decision-maker in both documents.

If one chooses to execute a durable power of attorney, it is advisable to write a separate "health care" durable power of attorney strictly for the purpose of giving another the power to make medical decisions, including the withdrawal of treatment.¹⁶⁷ By having a separate document for health care purposes, no one could argue that the individual did not intend to authorize decisions for medical treatment but only intended a general durable power of attorney for the purpose of allowing someone else to manage her financial affairs in case of incompetency.

Note one caveat regarding the durable power of attorney. The attorney needs to remember the support for using these instruments to

editorials or letters to the editor on almost a weekly basis.

164. The Wyoming Society on Aging provides forms free of charge by simply calling 1-800-442-2766.

165. Nancy Cruzan lies totally and permanently disabled. Her arms and her legs are severely contracted and her fingernails cut into her wrists. She is incontinent of bowel and bladder. *Cruzan*, 110 S. Ct. at 2869 n.10 (Brennan, J., dissenting). She is not dead. She is not terminally ill. Medical experts testified that she could live another thirty years. *Id.* at 2845 n.1.

166. If the attorney includes statements in the living will regarding the individual's wish to die whether they are terminal or not, or when the treatment withdrawn is artificial nutrition or hydration, the attorney should probably include a savings clause. The savings clause may read: If any portion of this living will is invalid under the laws of the State of Wyoming or any other state in which medical care is being provided to me, I express my wish that the balance of this living will be given effect and the invalid portion deemed stricken.

167. See APPENDIX B for a suggested form for a Health Care Durable Power of Attorney.

direct such health care decisions may be tenuous. At the present time, with the backing of the attorney general's opinion, the durable power of attorney is a better vehicle for an individual to use if she wants to get around the terminal and the food and hydration restrictions in the living will statute. However, that situation could change drastically if the legislature changed either the living will or the durable power of attorney statutes¹⁶⁸ or if the United States Supreme Court ruled adversely on the issue of surrogate decision-makers. It behooves any practitioner who drafts such instruments to advise her clients of the potential for change in these laws.

CONCLUSION

Since the seminal *Quinlan* decision in 1976, courts have been faced with deciding the emotional as well as the legal issue of when there is a "right to die." While the United States Supreme Court in *Cruzan* tries to structure its holding as narrowly as possible, one can draw many inferences from the decision. It is clear that states may impose procedural safeguards upon the individual's "right to die." The Court infers that there is a constitutionally protected liberty interest in refusing life-saving medical treatment and that artificial food and hydration is a life-saving medical treatment. The Court in *Cruzan* does not decide whether to allow a surrogate to make "right to die" decisions nor does it decide how restrictive the procedural safeguards imposed by the states may be.

At the present time and with proper planning, an individual in Wyoming can probably be allowed her "right to die." However, if she wants food and hydration withdrawn or if she wants these procedures withdrawn when the condition is not terminal, she will need to execute a durable power of medical attorney. Then the surrogate decision-maker will have to make the decision. A living will in Wyoming will not legally enable an individual to die when she is being maintained by artificial nutrition and hydration or is not terminal.¹⁶⁹ In fact, a living will without any specific declaration of intent regarding nourishment might be construed as a desire not to have food and hydration withdrawn because of the restriction in the statute.

Many people believe that living wills allow them the right to die under any circumstances. This is far from the truth. In fact, Nancy Cruzan would not have been legally allowed to die in Wyoming even if she had executed a living will. She probably would have been legally

168. The authors are aware that there may be attempts in the next legislative session to alter either or both of these statutes. One can not predict whether these attempts will actually occur or whether they will be successful.

169. One wonders if there is a difference between what an individual would "legally" be allowed to do and what actually happens if the individual, the family and the doctors are all in agreement. In such a situation, a decision might be implemented and the court system would never become involved at all.

allowed to die, however, if she had executed a durable power of medical attorney and her surrogate decision-maker decided that withdrawal of life-sustaining procedures was in her best interest.

These are emotional issues. There is some interest among members of the bar in attempting to change the Wyoming living will statute to remove the restrictions regarding a terminal condition and the food and hydration exception. In addition, there has been some interest in adopting a durable medical power of attorney statute so that there is stronger authority than the attorney general's opinion. Whatever the future may bring, what is crucial is that attorneys and the public as a whole understand what the laws will and will not do for them. Only by careful planning and executing the proper documents can an individual legally exercise his constitutionally protected "right to die."

Postscript

Following completion of this comment, in December of 1990, Nancy Cruzan was allowed to die. At a hearing in Jasper County Circuit Court, following the United States Supreme Court decision, Nancy's parents informed the court that three new witnesses had come forward with evidence indicating that Nancy would not wish to be kept alive by life-sustaining medical treatment. Unexpectedly, Missouri's Attorney General William Webster asked the court to drop the state from the case, saying the state had "no interest in the outcome of this litigation."¹⁷⁰

The county judge ruled that there was clear and convincing evidence, that the intent of Nancy Cruzan, if she were able to express it, would be to terminate her nutrition and hydration.¹⁷¹ Nutrition and hydration were removed; twelve days later Nancy Cruzan died.

Finally, mercifully, Nancy Cruzan was allowed to die, but the analysis doesn't change, the issues and the uncertainties remain for others who meet the same unfortunate fate.

P. JAYE RIPPLEY
CAROL WARNICK

170. Health Lawyer's News Rep., Nov. 1990, Vol. 18, No. 11, at 3-4.

171. N.Y. Times, Dec. 15, 1990, § 1 at 10, col. 1.

APPENDIX A

DECLARATION

Declaration made this . . . day of (month, year).

I, . . . , being of sound mind, willfully and voluntarily make known my desire that my dying shall not be artificially prolonged under the circumstances set forth below, do hereby declare:

If at any time I should have an incurable injury, disease or other illness certified to be a terminal condition by two (2) physicians who have personally examined me, one (1) of whom shall be my attending physician, and the physicians have determined that my death will occur whether or not life-sustaining procedures are utilized and where the application of life-sustaining procedures would serve only to artificially prolong the dying process, I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally with only the administration of medication or the performance of any medical procedure deemed necessary to provide me with comfortable care.

If, in spite of this declaration, I am comatose or otherwise unable to make treatment decisions for myself, I HEREBY designate . . . to make treatment decisions for me.

In the absence of my ability to give directions regarding the use of such life-sustaining procedures, it is my intention that this declaration shall be honored by my family and physician(s) and agent as the final expression of my legal right to refuse medical or surgical treatment and accept the consequences from this refusal. I understand the full import of this declaration and I am emotionally and mentally competent to make this declaration.

Signed _____

City, County and State of Residence _____

The declarant has been personally known to me and I believe him or her to be of sound mind. I did not sign the declarant's signature above for or at the direction of the declarant. I am not related to the declarant by blood or marriage, entitled to any portion of the estate of the declarant according to the laws of intestate succession or under any will of declarant or codicil thereto, or directly financially responsible for declarant's medical care.

Witness _____

Witness _____

APPENDIX B

HEALTH CARE

DURABLE POWER OF ATTORNEY

I, . . . , of . . . , Wyoming, being over the age of majority, appoint . . . as my attorney-in-fact to do any of the acts set forth below that I could do if mentally competent. If he is unable to serve for any reason, I appoint . . . , to serve as alternate attorney-in-fact.

I grant my attorney-in-fact full power and authority to exercise, do or perform any act, right, power, duty or obligation that I now have or may acquire in connection with, arising out of, or relating to medical treatment of any sort, including the power and authority to authorize medical treatment, refuse medical treatment or discontinue medical treatment. It is my intention that my attorney-in-fact have the authority to refuse or direct the withdrawal of any life-sustaining procedure, including, but not limited to, the administration of nourishment, medication or other comfort care. It is my desire that the directions of my attorney-in-fact be followed. I hereby absolve any person or other provider of medical or health services from liability for following such directives.

This instrument is a Health Care Durable Power of Attorney. It shall become effective at such time as I am, for whatever reason, not able to make decisions regarding medical treatment. I shall be deemed unable to make such decisions whenever my attorney-in-fact has received a written opinion or certificate from at least two (2) medical professionals stating that I am unable to make medical treatment decisions for myself. A medical professional may be any licensed physician or psychiatrist. I hereby authorize any medical professional to examine me and waive any privilege I have as a patient so as to allow such medical professional to disclose his or her opinion and prognosis of my condition to my attorney-in-fact.

This instrument shall remain in effect until revoked by me by a written instrument which expressly refers to this instrument. The execution of any other power of attorney, whether durable or not, shall not, in itself, constitute a revocation. It shall not be revoked if I regain my capacity, but my attorney-in-fact shall not act thereafter until my subsequent incapacity is established by any two (2) medical professionals as provided above.

THIS HEALTH CARE DURABLE POWER OF ATTORNEY SHALL NOT BECOME INEFFECTIVE BY MY DISABILITY.

IN WITNESS WHEREOF, I sign this instrument on the . . . day of . . . 19

STATE OF _____)
) ss.
COUNTY OF _____)

The above and foregoing Health Care Durable Power of Attorney was acknowledged to before me by . . . this . . . day of . . . 19

Witness my hand and official seal.

Notary Public

My commission expires:

CONSENT OF ATTORNEY-IN-FACT

I, . . . , by these presents, hereby acknowledge that I am familiar with the provisions of the within and foregoing Health Care Durable Power of Attorney and hereby specifically consent and agree to serve as . . . 's attorney-in-fact.

CONSENT OF SUCCESSOR ATTORNEY-IN-FACT

I, . . . , by these presents, hereby acknowledge that I am familiar with the provisions of the within and foregoing Health Care Durable Power of Attorney and hereby specifically consent and agree to serve as . . . 's attorney-in-fact.