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Introduction: The Right to Die After Cruzan

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INTRODUCTION: THE RIGHT TO DIE AFTER *CRUZAN*

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On January 11, 1983, Nancy Beth Cruzan, a 25 year old woman, lost control of her car as she travelled down a back road in a small town in Missouri. The car overturned and Nancy was found by a state trooper lying face down in a ditch. The trooper examined her and determined that she was not breathing. Paramedics were able to restore her breathing but estimated that her brain had been deprived of oxygen for between twelve and fourteen minutes. Nancy "remained in a coma for approximately three weeks and then progressed to an unconscious state" in which she was able to take some food by mouth. However, to ease her feeding and insure that she was ingesting enough nutrients, a gastrostomy feeding tube was surgically implanted on February 7, 1983, with the consent of her (then) husband.

Although significant efforts were taken to rehabilitate Nancy following the accident, these efforts were unsuccessful. She was eventually transferred to a Missouri state hospital. Her medical condition was described as follows:

> [H]er respiration and circulation are not artificially maintained and are within the normal limits of a [woman her age]; (2) she is oblivious to her environment except for reflexive responses to sound and perhaps painful stimuli; (3) she suffered anoxia of the brain resulting in a massive enlargement of the ventricles filling with cerebrospinal fluid in the area where the brain has degenerated and [her] cerebral cortical atrophy is irreversible, permanent, progressive and ongoing; (4) her highest cognitive brain function is exhibited by her grimacing perhaps in recognition of ordinarily painful stimuli, indicating the experience of pain and apparent response to sound; (5) she is a spastic quadriplegic; (6) her four extremities are contracted with irreversible muscular and tendon damage to all extremities; (7) she has no cognitive or reflexive ability to swallow food or water to maintain her daily essential needs and . . . she will never recover her ability to swallow sufficient [sic] to satisfy her needs. In sum, Nancy is diagnosed as in a persistent vegetative state. She is not dead. She is not terminally ill. Medical experts [believed] that she could live another thirty years.[1]

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1. Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988)(en banc).

After it became clear that their daughter would not regain her mental capabilities, Mr. and Mrs. Cruzan, requested that hospital employees terminate Nancy's artificially administered feeding. The state employees refused to comply with the request and the Cruzans took the case to court. The trial court authorized the termination of tube feeding finding that a person in Nancy Cruzan's position had a fundamental right under the State and Federal Constitutions to refuse "death prolonging" procedures and that she had expressed in "somewhat serious conversation" that if sick or injured she would not want to continue her life unless she could live "halfway normally." Based on this conversation, the trial court concluded that "she would not wish to continue with nutrition and hydration."[2]

The Supreme Court of Missouri reversed. Judge Robertson characterized the case not as one in which the court was being asked to let someone die but rather a case in which the court was being asked to "allow the medical profession to make Nancy die by starvation and dehydration."[3] In its analysis, the court first declined to find a broad based right to privacy in either the State or Federal Constitution. Although the court recognized a right to refuse treatment in the common law doctrine of informed consent, it expressed skepticism that the doctrine would apply because Nancy lacked the capacity to reason and make judgments. The court went on in its analysis, stating that even if there were a federal constitutional right to privacy that encompassed the right to refuse medical treatment or the common law doctrine of informed consent applied in this case, the state's interest in preserving life, as set forth in the state Living Will statute, would override these individual rights. The court distinguished cases holding that the state interest in preservation of life does not override an individual's interest in refusing life-sustaining treatment. The court concluded that such decisions viewed the state's interest as inappropriately waning as the patient's quality of life diminished. The court determined that Nancy's statements, on which the trial court relied, were "unreliable for the purpose of determining her intent," and "thus insufficient to support" her parents claims that they be permitted to exercise substituted judgment on her behalf.[4]

The court next addressed the claim of Nancy's parents that as her legal guardians they should be able to refuse medical treatment for her. The court found that state law required that the guardian of an incapacitated ward must provide for the ward's "care, treatment, habilitation, education support and maintenance" and that the statute

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2. *Id.* at 409.
3. *Id.*
4. *Id.* at 424-26.

made no provision for the termination of medical treatment.[5] The court concluded that without the formalities required under Missouri's Living Will statute[6] or without clear and convincing evidence of the patient's wishes, no person can refuse life sustaining treatment on behalf of another.

On July 3, 1989, the U.S. Supreme Court granted certiorari to consider the question of whether Missouri's prohibition on third parties terminating life support on behalf of an incompetent patient absent the patient having prepared a valid living will or other clear and convincing evidence of the patient's wishes, violates a constitutional right of the patient to refuse medical treatment. There was considerable speculation about how the Court would rule. According to the press, the case commanded more "public attention than any other matter on the Court's docket since the Justices agreed to hear the family's appeal . . ."[7]

On June 25, 1990, when Nancy Cruzan was 32 years old and had been in a persistent vegetative state for over seven years, the Supreme Court issued its opinion.[8] The Justices ruled by a vote of 5 to 4, that the state of Missouri could sustain the life of a comatose woman without clear and convincing evidence that she would want life support withdrawn without violating the constitution.

Although virtually all courts that had addressed the issue of whether there was a constitutional right to refuse medical treatment began their analysis with an assumption that the right would be housed in the constitutional right to privacy, the Supreme Court side stepped this question and based any constitutional grounding of the right in the Fourteenth Amendment's Due Process clause. With little explanation, the Court stated 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."[9] The Court, however, had difficulty with the notion that the interest extended to incompetent patients, stating that such a "'right' must be exercised for [these patients], if at all, by some sort of surrogate."[10] Given this difficulty, the Court concluded that a strict evidentiary burden on such surrogates to show that the patient would not want to continue to receive life sustaining treatment was constitutionally permissible. The Court reasoned that "[a]n erroneous decision not to terminate results is a maintenance of the status

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5. *Id.* at 419-20 (citations omitted).

6. MO. REV. STAT. § 459.010 (1986).

7. *Justices Find Right-To-Die, But Majority Sees Need for Clear Proof of Intent,* N.Y. Times, June 26, 1990, A1, col. 6.

8. 110 S. Ct. 2841 (1990).

9. *Id.* at 2851.

10. *Id.* at 2852.

quo," while a "decision to discontinue hydration and nutrition of a patient such as Nancy Cruzan" would result in her death.[11]

After the decision by the Supreme Court, two individuals who had worked briefly with Nancy Cruzan at a school for deaf-blind children came forward with new evidence that shed light on what Nancy would have wanted if ever in a vegetative state. In discussing the care of a student who required tube feeding, Nancy agreed that she never would have wanted to be "force fed" or placed on a respirator. Based on this new evidence, Mr. and Mrs. Cruzan re-initiated their case with the Missouri probate court that initially heard the case. The probate judge determined that this new evidence was "clear and convincing" and ordered the feeding tube removed. There was no appeal to the decision as the state had withdrawn its participation in the case and therefore did not seek to block the Cruzan's efforts. On December 14, 1990, Nancy's feeding tube was removed. She died twelve days later.

Although the Supreme Court's decision in *Cruzan* was long awaited and many pronounced that the case would alter the direction of the debate in this area, it remains to be seen just what impact the case will have on jurisprudence, legislation and medical practice. In this issue of the *Maryland Journal of Contemporary Legal Issues*, the authors have taken on this question. In the first article, Grant and Cleaver provide a painstakingly detailed analysis of the *Cruzan* litigation and the direction of state and federal law in the aftermath of *Cruzan*.

In its ruling, the Court did not address the rights of a patient who seeks assistance in committing suicide, an issue that had received wide publicity only a month before the opinion was issued when a Michigan doctor helped an Alzheimer's patient kill herself with a "suicide machine." Chief Justice Rehnquist, however, did note in passing that as part of their policies for protecting human life, "the majority of states in this country have laws imposing criminal penalties on one who assists another to commit suicide."[12] Both the articles by Grant and Cleaver and by Marker, Stanton, Recznik and Fournier, deal with the difficulty of drawing a line between allowing death and causing death or between *benemortasia* and *passive euthanasia* and the dangers of crossing the line. Market, *et. al.,* provide a historical overview of euthanasia, illustrating that the issue is not a new one and warns of pressures to permit a new medical service --"aid-in-dying." Both the articles point to what their authors see as a dangerous trend in society toward acceptance of suicide in the face of suffering from terminal illness.[13]

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11. *Id.* at 2855.

12. *Id.* at 2852.

13. This trend was identified shortly after the *Cruzan* opinion in a nationwide public opinion poll. *Reflections of the Times: The Right-To-Die,* Times Mirror Center for the People and Press (Wash., D.C. 1990).

The article by Howe is written primarily from a medical perspective and addresses the question of how *Cruzan* may affect medical practice. Howe begins by hypothesizing that the Supreme Court's decision is likely to increase interest in advance directives. Anecdotal evidence in Maryland supports this hypothesis. Within three weeks after the *Cruzan* decision was announced and two weeks after a newspaper article appeared in the *Baltimore Sun* discussing the value of living wills,[14] the Attorney General's Office in Maryland received over 5,000 requests for copies of the state durable power of attorney forms. At the national level, in the month after the ruling, the Society for the Right to Die answered almost 30,000 requests for advance directive forms.[15] Howe points out that most studies show that patients appreciate the opportunity to express their preferences about medical treatment, in some cases, questioning patients about what type of treatment they would want under various conditions may be more harmful than beneficial.

In the last article of the issue, Judge Byrnes critiques the *Quinlan* and *Cruzan* opinions and argues that although both have influenced legal thinking in this area, they leave many questions unanswered and leave judges faced with these cases without clear guidance on how to proceed. Judges, he argues, who attempt to apply "the evolving law associated with the right to die must often rely on their own ingenuity." Given that the *Cruzan* decision simply held that the law applied in Missouri was not unconstitutional, other states are left to ponder their own course in this developing area. Judge Byrnes begins to ponder the course that might be taken in Maryland by analyzing a number of state statutes and inquiring as to their relevancy to future case law involving the termination or withholding of life support.

The articles taken collectively provide thought provoking reading for those interested in where we are headed in this controversial and wrenching area of the law.

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14. Kobren, *In Maryland, "Living Will" May Not Assure Right-To-Die,"* Baltimore Sun, July 8, 1990, 1A, col.1, 13A, col.3.

15. Lewin, *Nancy Cruzan Dies, Outlived by a Debate Over the Right to Die*, N.Y. Times, Dec. 27, 1990, A1, col. 1., A15, col.1.