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# Substituted Judgment: Does Pennsylvania Law Provide an Appropriate Standard for Withdrawal of Life Support in Non-Terminal Patients?

## A TRAGIC STORY

On February 25, 1990, Terri Schiavo collapsed in her St. Petersburg, Florida home.<sup>1</sup> According to physicians, a potassium imbalance had caused her heart to stop temporarily.<sup>2</sup> She was eventually revived, though her heart's inability to deliver oxygen to her brain left her with severe brain damage.<sup>3</sup> Although she was able to breathe on her own, most doctors believed Terri was left in what is known as a "persistent vegetative state" or "PVS."<sup>4</sup> She appeared conscious, but doctors concluded she was unable to chew or swallow her own food.<sup>5</sup> As such, a feeding tube was inserted to provide her with the nutrition required to sustain her life.<sup>6</sup>

The next fifteen years were marked by tumult for Terri Schiavo's husband Michael and her parents, Bob and Mary Schindler. Shortly after Michael Schiavo was awarded a large sum in a medical malpractice suit, the relationship between him and the Schindlers began to deteriorate rapidly.<sup>7</sup> Following this verdict, the Schindlers and Michael began to argue frequently over the money and regarding Terri's care.<sup>8</sup>

In May of 1998, Michael Schiavo petitioned to have Terri's feeding tube removed.<sup>9</sup> Although the court acknowledged that none of

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1. In re Guardianship of Schiavo, 780 So. 2d 176, 177 (Fla. App. 2 Dist. 2001).

2. *Schiavo*, 780 So. 2d at 177.

3. *Id.*

4. *Id.* According to the Supreme Court of Pennsylvania, the term "vegetative state" is defined as follows:

The term "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.

In re Fiori, 673 A.2d 905, 908 (Pa. 1996) (citing *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 267 (1990)).

5. *Schiavo*, 780 So. 2d at 177.

6. *Id.*

7. *Id.* at 178.

8. *Id.*

9. *Id.* at 177.

her medical problems were life threatening, Michael's request was granted.<sup>10</sup> The District Court of Appeal of Florida, Second District, affirmed this ruling on the basis that Terri Schiavo was in a persistent vegetative state and that her husband had proven by clear and convincing evidence that his wife would have chosen to discontinue the constant nursing care and medical support required to sustain her condition.<sup>11</sup>

Although the Supreme Court of Florida denied review of this decision,<sup>12</sup> this was only the beginning of the extensive legal battle between the Schindlers and Michael Schiavo. On April 26, 2001, the Schindlers, arguing that new evidence had come to light proving that Michael Schiavo had committed fraud in the prior proceeding, petitioned for an injunction to have Terri's life-sustaining measures restored.<sup>13</sup> The trial court granted the Schindler's request for an injunction and the feeding tube was re-inserted.<sup>14</sup>

This injunction, however, proved to be but a temporary stay. After hearing conflicting testimony from no less than five physicians, two of whom alleged that new treatment options could dramatically improve the quality of Terri's life, the trial court ruled that Terri Schiavo remained in a persistent vegetative state.<sup>15</sup> The Court of Appeal, Second District, affirmed.<sup>16</sup> The Supreme Court of Florida, once again, denied review and the feeding tube was removed.<sup>17</sup>

The next two years would prove even more remarkable than the prior five. A law was passed by the Florida Assembly granting Governor Jeb Bush the power to re-insert the feeding tube.<sup>18</sup> A

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10. *Schiavo*, 780 So. 2d at 177.

11. *Id.* at 180.

12. *Schindler v. Schiavo ex rel. Schiavo*, 789 So. 2d 348 (Fla. 2001).

13. *In re Guardianship of Schiavo*, 792 So. 2d 551, 555 (Fla. Dist. Ct. App. 2001).

14. *Id.* at 556.

15. *In re Guardianship of Schiavo*, No. 90-2908-GB-003, 2002 WL 31817960, at \*3-\*5 (Fla. Cir. Ct. Nov. 22, 2002). The court noted that one expert, Dr. Hammesfahr testified that a new technology known as vasodilatation therapy would have a positive effect on Terri's condition. *Schiavo*, 2002 WL 31817960, at \*4. A second expert, Dr. Maxfield, testified that hyperbaric therapy presented a significant chance of improvement in Terri's cognitive ability. *Id.* However, the court found the testimony of neither of these physicians to be credible. *Id.* at \*5.

16. *In re Guardianship of Schiavo*, 851 So. 2d 182, 187 (Fla. Dist. Ct. App. 2003).

17. *Schindler v. Schiavo*, 855 So. 2d 621 (Fla. 2003).

18. 2003 Fla. Laws ch. 418. The text of the law is provided by the Supreme Court of Florida in *Bush v. Schiavo*, as follows:

Section 1. (1) The Governor shall have the authority to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient if, as of October 15, 2003:

(a) That patient has no written advance directive;

year later, the Supreme Court of Florida struck the law down as unconstitutional.<sup>19</sup> The tube was removed once again.<sup>20</sup>

Even the U.S. Congress got involved, passing a law that allowed the tube to be re-inserted while a federal court reviewed the matter.<sup>21</sup> However, both the U.S. District Court for the Middle District of Florida and the Court of Appeals for the Eleventh Circuit declined to order the tube be re-inserted.<sup>22</sup> On March 24, 2005, the U.S. Supreme Court refused to hear the case.<sup>23</sup> Terri passed away on March 31, 2005.<sup>24</sup>

Once the debate over life and death issues sparked by the *Schiavo* case made its way into the national spotlight, the Florida judicial system found itself the target of harsh criticism. However, the case of Terri Schiavo is a relatively new type of dispute: a dispute caused largely by scientific advances which, in many ways, blur the line between life and death. Given this new scientific landscape, residents of many other states have no doubt been left to wonder whether their court system is, in fact, any better prepared to handle such a difficult situation. For residents of the small town of Southampton in Bucks County, Pennsylvania, the question probably seemed especially pertinent: "What if Terri had collapsed in Pennsylvania, rather than Florida?"

Although Terri Schiavo will undoubtedly be associated with the State of Florida and its judicial system well into the future, she was not a Florida native. Rather, Terri Schiavo was born in Hun-

(b) The court has found that patient to be in a persistent vegetative state;

(c) That patient has had nutrition and hydration withheld; and

(d) A member of that patient's family has challenged the withholding of nutrition and hydration.

(2) The Governor's authority to issue the stay expires 15 days after the effective date of this act, and the expiration of the authority does not impact the validity or the effect of any stay issued pursuant to this act. The Governor may lift the stay authorized under this act at any time. A person may not be held civilly liable and is not subject to regulatory or disciplinary sanctions for taking any action to comply with a stay issued by the Governor pursuant to this act.

(3) Upon issuance of a stay, the chief judge of the circuit court shall appoint a guardian ad litem for the patient to make recommendations to the Governor and the court.

Section 2. This act shall take effect upon becoming a law.

*Bush v. Schiavo*, 885 So. 2d 321, 337 (Fla. 2004).

19. *Schiavo*, 885 So. 2d at 337.

20. *Id.*

21. Pub. L. No. 109-3, 119 Stat. 15 (2005).

22. *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1237 (11th Cir. 2005).

23. *Schiavo ex rel. Schindler v. Schiavo*, 125 S. Ct. 1692 (2005).

24. *Friends, Family Attend Service for Terri Schiavo*, BUCKS COUNTY COURIER TIMES, Apr. 16, 2005, available at 2005 WLNR 6096515.

tingdon Valley, Pennsylvania.<sup>25</sup> She was confirmed and married in a small church in Southampton, Bucks County, Pennsylvania.<sup>26</sup> As fate would have it, Terri moved to Florida in 1986, two years after she was married and four years before her devastating collapse occurred.<sup>27</sup> What if she hadn't?

Pennsylvania law differs from Florida law, in that the State of Florida requires a surrogate or guardian seeking to remove a feeding tube to prove to a state court by clear and convincing evidence that the patient would have wanted such treatment withdrawn. The Commonwealth of Pennsylvania, on the other hand, allows close family members to make the crucial decision based on their understanding of what they believe the patient would have wanted.

This comment seeks to explore the development of these two standards, as well as their ethical implications, in a manner designed to pose several key questions. First, is Pennsylvania's substituted judgment approach<sup>28</sup> an appropriate standard for the withdrawal of life support in non-terminal patients? Second, could the Schiavo case have been resolved in a more efficient manner within the Commonwealth, and, if so, would the outcome have differed?

### THE "RIGHT TO DIE"

Driving the Schiavo controversy was a dispute over what is commonly referred to as the "right to die." However, reference to the right in question as "the right to die" exhibits a misunderstanding of what, in fact, the right truly seeks to protect. It is, perhaps, best described as the "right to self-determination in regard to the acceptance or rejection of life sustaining medical treatment."<sup>29</sup> As such, it is truly the patient's right to autonomy that is at issue in these cases, not the right to die in a manner of her own choosing.

The right to autonomy has a long tradition, with a basis in both the common-law and the United States Constitution.<sup>30</sup> The constitutional support for such a right is found in the Fourth Amend-

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25. *Id.*

26. Sandy Bauers, *Friends Mourn Schiavo at Bucks Service*, PHILADELPHIA INQUIRER, Apr. 16, 2005, at B05 available at 2005 WLNR 22976263.

27. *Schiavo*, 780 So. 2d at 177.

28. Adopted in *In re Fiori*, 673 A.2d 905, 909 (Pa. 1996), discussed *infra*.

29. *In re Fiori*, 673 A.2d 905, 909 (Pa. 1996).

30. *Fiori*, 673 A.2d at 909.

ment's unwritten right to privacy.<sup>31</sup> This right is best stated as a patient's right to refuse "intrusions upon his person," regardless of whether they are purportedly in his best interest.<sup>32</sup>

The common law basis for such a right also developed from a person's right of control over his own person.<sup>33</sup> This fundamental common-law right has existed for over a century.<sup>34</sup> In the health-care context, such a right has manifested itself in the requirement that physicians obtain patients' informed consent prior to commencing treatment.<sup>35</sup> Necessarily, as a physician is required to obtain consent, patients are given the right to refuse or withdraw such consent, even if such a decision leads to the patient's death.<sup>36</sup>

Perhaps the most remarkable development with respect to this right, however, is the finding that it extends to incapacitated patients as well.<sup>37</sup> As such, the courts have been placed in the difficult position of developing a reasonable mechanism for the exercise of an incompetent patient's right to autonomy in health care decisions. This issue has become particularly important within the context of cases involving the refusal, or withdrawal, of life-sustaining measures from patients mired in a non-terminal persistent vegetative state.

## THE TWO STANDARDS

It is certainly not surprising that courts have not been uniform in their handling of the very difficult issue of withdrawal of life support in non-terminal PVS patients. As such, two distinct standards have developed within American jurisprudence to deal with this issue. The first, the clear and convincing evidence standard, was held to be constitutional in perhaps the seminal case in this area, *Cruzan v. Director, Missouri Department of Health*.<sup>38</sup>

Nancy Cruzan, the subject of this landmark litigation, was incapacitated as a result of injuries she sustained in a car accident.<sup>39</sup>

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31. *Lane v. Candura*, 376 N.E.2d 1232, 1233 (Mass.App. 1978). See also *Zant v. Prevatte*, 286 S.E.2d 715 (Ga. 1982); *In re Quinlan*, 355 A.2d 647 (N.J. 1976).

32. *Zant*, 286 S.E.2d at 717.

33. *Fiori*, 673 A.2d at 909-10.

34. See *Union Pac. Ry. Co. v. Bostford*, 141 U.S. 250, 251 (1891).

35. *Gray v. Grunnagle*, 223 A.2d 663, 668-70 (Pa. 1966).

36. *Fiori*, 673 A.2d at 910 (citing *Mack v. Mack*, 618 A.2d 744, 755 (Md. 1993)).

37. See *Mack*, 618 A.2d 744; *Fiori*, 673 A.2d at 910; *In re Colyer*, 660 P.2d 738 (Wash. 1983).

38. 497 U.S. 261 (1990).

39. *Cruzan*, 497 U.S. at 265.

She lost control of her car, and it overturned.<sup>40</sup> She was found lying face-down in a ditch, with no detectable heartbeat, and she was not breathing.<sup>41</sup>

Although physicians were able to revive Ms. Cruzan, she had severe and permanent brain damage and remained in a coma for three weeks.<sup>42</sup> Despite her eventual emergence from the coma, she remained in a persistent vegetative state.<sup>43</sup> She was able to breathe on her own and "orally ingest some nutrition."<sup>44</sup> However, given the strained nature of such feeding, surgeons felt it necessary to implant a feeding tube, which they did with the consent of Ms. Cruzan's husband.<sup>45</sup>

When it became clear that Ms. Cruzan's condition would not improve, her parents asked hospital employees to remove the feeding tube.<sup>46</sup> They refused, stating that they would not do so without prior court approval.<sup>47</sup> As such, the case wound up in Missouri State Court and was eventually appealed to the Supreme Court of Missouri.<sup>48</sup>

The standard espoused by Missouri's highest court for withdrawal of a feeding tube in such a situation required those moving for withdrawal to prove by clear and convincing evidence that the incapacitated patient would have wanted such treatment removed.<sup>49</sup> At trial, Ms. Cruzan's parents presented evidence of discussions she had had with a roommate in which she stated she "would not wish to continue her life unless she could live at least halfway normally . . . ."<sup>50</sup> The trial court found such language sufficient to carry this difficult burden.<sup>51</sup> However, the Supreme Court of Missouri disagreed and refused to order the termination of medical treatment.<sup>52</sup>

The Cruzans appealed the ruling of the Supreme Court of Missouri, arguing that the clear and convincing evidence standard imposed by the court violated Ms. Cruzan's right under the U.S.

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40. *Id.* at 266.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Cruzan*, 497 U.S. at 266.

45. *Id.*

46. *Id.* at 267.

47. *Id.* at 268.

48. *Id.*

49. *Cruzan*, 497 U.S. at 268-69.

50. *Id.* at 268.

51. *Id.*

52. *Id.*

Constitution to withdraw such treatment.<sup>53</sup> The U.S. Supreme Court granted certiorari to determine whether the clear and convincing evidence standard did, in fact, violate the Fourth Amendment's right to privacy.<sup>54</sup>

Chief Justice Rehnquist, in delivering the opinion of the majority, began by noting that, "with the advance of medical technology capable of sustaining life well past the point where natural forces would have brought certain death in earlier times, cases involving the right to refuse life-sustaining treatment have burgeoned."<sup>55</sup> Within this context, the importance of determining the constitutionality of such a standard could not be overstated.

The majority noted the long tradition within the common-law respecting a person's right to refuse medical treatment.<sup>56</sup> However, it concluded that the only issue properly before the Court was whether the Fourteenth Amendment had been violated by Missouri's implementation of such a strict standard.<sup>57</sup> Such a determination, the Court held, required the balancing of the State's interests in sustaining life against the liberty interests of the patient involved.<sup>58</sup>

Given that situations will no doubt occur where family members, or other surrogate decision-makers, will not keep the best interests of the patient in mind, the Court reasoned that the State's interest in protecting these most vulnerable patients from abuse was quite strong.<sup>59</sup> With this interest in mind, the Court held that the clear and convincing evidence standard is a constitutionally acceptable standard for withdrawal of life support in these situations.<sup>60</sup>

While acceptable, "clear and convincing evidence" is not the only standard that may be implemented by the courts. In fact, the "clear and convincing evidence" standard is not even the majority rule.<sup>61</sup> Rather, most state courts have chosen to implement the more lenient "substituted judgment" rule.<sup>62</sup>

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53. *Id.* at 279.

54. *Cruzan*, 497 U.S. at 269.

55. *Id.* at 270. Chief Justice Rehnquist delivered the opinion in which Justices White, O'Connor, Scalia, and Kennedy joined.

56. *Id.* at 269-77.

57. *Id.* at 277.

58. *Id.* at 280.

59. *Cruzan*, 497 U.S. at 280.

60. *Id.*

61. *In re Fiori*, 673 A.2d 905, 911-12 (Pa. 1996).

62. *Fiori*, 673 A.2d at 911-12.



Unlike the "clear and convincing evidence" approach which requires the presentation of evidence of the patient's intent to the court, the "substituted judgment" mechanism relies solely on the judgment of a surrogate decision-maker. The role of such a surrogate was described by the Supreme Court of New Jersey in *Matter of Jobes*<sup>63</sup> as follows:

Under the substituted judgment doctrine, where an incompetent's wishes are not clearly expressed, a surrogate decisionmaker considers the patient's personal value system for guidance. The surrogate considers the patient's prior statements about and reactions to medical issues, and all the facets of the patient's personality that the surrogate is familiar with – with, of course, particular reference to his or her relevant philosophical, theological, and ethical values – in order to extrapolate what course of medical treatment the patient would choose.<sup>64</sup>

As such, the substituted judgment rule places the decision, not in the hands of the courts, but rather in the hands of family members. The court in *Jobes* felt this was proper, as family members would have the best understanding of the patient's approach to life and would also, presumably, be the persons most concerned for the well-being of the patient.<sup>65</sup>

One issue left unresolved by the *Jobes* ruling, however, was how this system is to operate when close family members disagree with respect to termination of medical treatment. The *Jobes* court stated that surrogate decision-makers are to be close family members, such as "a spouse, parents, adult children, or siblings."<sup>66</sup> However, it provided no clear hierarchy with regard to such decision-making. Nor did the court provide any clear mechanism for resolving such disputes among family members. In fact, the court held that if proper procedures were followed, "judicial review of such decisions is not necessary or appropriate."<sup>67</sup> As such, if acting in good faith and under the direction of a close family member, a physician could presumably remove life-sustaining measures, even over the objection of other members of the patient's family.

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63. 529 A.2d 434 (N.J. 1987).

64. *Jobes*, 529 A.2d at 443-44.

65. *Id.* at 445.

66. *Id.* at 447.

67. *Id.* at 449.

## PENNSYLVANIA CONFRONTS THIS DIFFICULT ISSUE

In 1972, when Daniel Fiori was approximately twenty years old, he suffered severe head injuries as the result of an accident.<sup>68</sup> He regained consciousness, but his cognitive abilities had been greatly affected.<sup>69</sup> In 1976, while being treated at a Veterans Administration hospital, he suffered a second head injury.<sup>70</sup> He never regained consciousness following this second injury.<sup>71</sup>

Mr. Fiori was diagnosed as being in a persistent vegetative state.<sup>72</sup> Although he could breathe on his own, his cognitive brain functions were said to have been destroyed.<sup>73</sup> According to physicians, he could feel no pleasure or pain and he was unable to communicate with others.<sup>74</sup> The nutrition required to keep Mr. Fiori alive was administered through a feeding tube.<sup>75</sup> Although Mr. Fiori's condition was not terminal, there was no hope that he would recover.<sup>76</sup>

In February 1992, Mr. Fiori's mother, Rosemarie Sherman, asked nursing home employees to remove her son's feeding tube.<sup>77</sup> The home refused to do so in the absence of a court order.<sup>78</sup> Thus, Ms. Sherman petitioned the Court of Common Pleas, Bucks County, to have the tube removed.<sup>79</sup>

During proceedings at the trial court level, Ms. Sherman testified that she had never spoken to her son regarding his wishes for what should be done in such a situation.<sup>80</sup> She based her opinion that her son would wish the tube removed on his general "love of life."<sup>81</sup>

The trial court granted Ms. Sherman's motion to have the tube removed.<sup>82</sup> In affirming this decision, the superior court held that "consent of a close family member along with approval of two qualified physicians is sufficient to terminate life sustaining

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68. *Fiori*, 673 A.2d at 908.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Fiori*, 673 A.2d at 908.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Fiori*, 673 A.2d at 908-09.

79. *Id.*

80. *Id.* at 910.

81. *Id.*

82. *In re Fiori*, 17 Pa. D. & C.4th 558, 565 (C.P. Bucks County 1993).

treatment to a person in a long-term persistent vegetative state without court involvement."<sup>83</sup>

The Attorney General, who had opposed the motion, filed a petition for allowance of appeal with the Supreme Court of Pennsylvania.<sup>84</sup> However, while the parties waited for such an allowance to be granted, Mr. Fiori died of pneumonia.<sup>85</sup>

The Pennsylvania Supreme Court acknowledged that the death of Mr. Fiori rendered the case technically moot.<sup>86</sup> However, the court was understandably eager to rule on such an important and difficult issue. As such, the court held that "because this case raises an issue of important public interest, an issue which is capable of repetition yet apt to elude review, we have decided to hear this appeal."<sup>87</sup>

Thus, the issue of determining the proper "procedures and guidelines for removal of life sustaining treatment from a PVS patient where the patient, prior to his incompetency, failed to express his desires on such treatment," was before the Commonwealth's highest court.<sup>88</sup>

The majority opinion began by deciding that Pennsylvania would rely on the common-law, rather than the federal or state constitutions, in determining the autonomy rights of Mr. Fiori.<sup>89</sup> The court based its decision on the principle that "courts should avoid constitutional issues when the issue at hand may be decided upon other grounds."<sup>90</sup> Thus, one key issue had been resolved. The court had made clear that, within the Commonwealth of Pennsylvania, a patient's right to autonomy was rooted in the common-law tradition.

The more important question remained, however. Namely, a decision as to which of the two popular standards for withdrawal of life support Pennsylvania would choose. The Attorney General suggested the more stringent approach, the "clear and convincing

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83. *In re Fiori*, 652 A.2d 1350, 1351 (Pa. Super. Ct. 1995).

84. *Fiori*, 673 A.2d at 909.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Fiori*, 673 A.2d at 909. Justice Cappy wrote the majority opinion, in which Chief Justice Flaherty and Justices Nix and Castille joined.

90. *Id.*

evidence rule."<sup>91</sup> Not surprisingly, counsel for Ms. Sherman argued for the application of the doctrine of "substituted judgment."<sup>92</sup>

In handling this difficult question, the court found it proper to rely, not only on the arguments of the parties, but also on Briefs of Amici Curiae as well. As such, briefs were filed by several interested parties. The Pennsylvania Medical Society and Choice in Dying filed briefs in support of Ms. Sherman.<sup>93</sup> The Hospital Association of Pennsylvania, the Pennsylvania Catholic Conference, and the Ethics and Advocacy Task Force of the Nursing Home Action Group filed briefs in support of the Attorney General.<sup>94</sup> The University of Pittsburgh Center for Medical Ethics and University of Pennsylvania Medical Center filed, together, an amicus brief espousing their independent position as well.<sup>95</sup>

Given the volume of outside participation, the court clearly understood the delicate interests at stake in resolving this question. After careful deliberation, a unanimous court decided that the substituted judgment approach was a more appropriate process for dealing with such situations.<sup>96</sup>

In so holding, the Pennsylvania Supreme Court found the clear and convincing evidence approach to be "overly restrictive."<sup>97</sup> According to the court, "Were this test to be applied, all of those patients who did not have the prescience or sophistication to express clearly and unmistakably their wishes on this precise matter would not be able to have life support removed."<sup>98</sup> The court held

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91. *Id.* at 911.

92. Brief of Appellee Rosemarie Sherman, Guardian of the Person of Daniel Joseph Fiori at 43-46, 673 A.2d 905 (Pa. 1996) (No. 6 EAP 1995).

93. Brief of the Pennsylvania Medical Society as Amicus Curiae Supporting Appellee Rosemarie Sherman, Guardian of the Person of Daniel Joseph Fiori, 673 A.2d 905 (Pa. 1996) (No. 6 EAP 1995); Brief of Amicus Curiae Choice in Dying in Support of Appellee, 673 A.2d 905 (Pa. 1996) (No. 6 EAP 1995).

94. Brief of Amicus Curiae Hospital Association of Pennsylvania in Support of Respondent, 673 A.2d 905 (Pa. 1996) (No. 6 EAP 1995); Brief of Amicus Curiae Pennsylvania Catholic Conference in Support of Petitioner, 673 A.2d 905 (Pa. 1996) (No. 6 EAP 1995); Amicus Curiae Brief of the Ethics and Advocacy Task Force of the Nursing Home Action Group in Support of the Commonwealth of Pennsylvania, Attorney General, 673 A.2d 905 (Pa. 1996) (No. 6 EAP 1995).

95. Brief for Amici Curiae University of Pittsburgh Center for Medical Ethics and University of Pennsylvania Medical Center, 673 A.2d 905 (Pa. 1996) (No. 6 EAP 1995). The brief of these two university medical centers espoused an independent view, not necessarily in support of either party, arguing for judicial involvement only where irresolvable disagreement existed, either among family members or between family members and physicians.

96. *Fiori*, 673 A.2d at 912.

97. *Id.*

98. *Id.*

that it could not tolerate what amounted to the automatic administration of whatever treatment happened to be available at the time.<sup>99</sup>

Instead, the court reasoned that such a decision is to be made by a "close family member."<sup>100</sup> The court, however, chose not to define what constitutes a "close family member."

Despite its decision to implement the more lenient of the two standards, the court did impose one additional requirement on surrogates who wish to have life support removed. Before withdrawal of life-sustaining measures may take place, the surrogate is required to obtain the written certification of two qualified physicians that the patient is, in fact, in a persistent vegetative state.<sup>101</sup>

Further, the court also appeared to provide for the possibility of judicial intervention when families do not agree with respect to these significant healthcare decisions. As the court stated, "where the physicians and the close family member are in agreement and *there is no dispute between 'interested parties,'* there is no need for court involvement."<sup>102</sup> In a very important footnote, the court further explained what was meant by the term "interested parties." According to the court, "[i]nterested parties may include, but is not limited to, close family members, the guardian of the incompetent, attending physicians, or the care facility in which the patient is located."<sup>103</sup> As such, the court made it clear that one family member, well-intentioned or otherwise, cannot effectuate the withdrawal of a feeding tube from a PVS patient over the objections of other family members, attending physicians, or the facility administering the patient's care.

#### SUBSTITUTED JUDGMENT: AN APPROPRIATE CHOICE FOR THE COMMONWEALTH?

One common criticism of the substituted judgment approach, and one raised by the Attorney General in *Fiori*, is that by allowing families to determine whether life support may be withdrawn, the court is abandoning what is, essentially, a judicial function.<sup>104</sup>

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99. *Id.*

100. *Id.*

101. *Fiori*, 673 A.2d at 912.

102. *Id.* at 913.

103. *Id.* at 913 n.13.

104. Brief of Amicus Curiae Pennsylvania Catholic Conference in Support of Petitioner at 4, 673 A.2d 905 (Pa. 1996) (No. 6 EAP 1995).

The court quickly, and properly, dismissed this argument in *Fiori*.<sup>105</sup>

In most situations, it is clear that close family members are in a better position to know a patient's wishes than any court. As such, when a family is entirely in agreement, both among themselves and with treating physicians, judicial intervention would most likely prove to be an unnecessary burden in an already difficult time.

A more compelling argument against the substituted judgment approach, however, is that it fails to provide access to the courts in times of dispute among family members or physicians. The gravity of this problem was, perhaps, most artfully described in a hypothetical question posed by Judge McEwen, who filed a concurring opinion at the Superior Court level in *Fiori*. As asked by Judge McEwen, "[W]hat values does a society reflect when it permits its legal system to require careful judicial scrutiny of decisions affecting the property of an incompetent, but precludes the similar judicial scrutiny of a decision to terminate the life of the incompetent?"<sup>106</sup>

Clearly the Pennsylvania Supreme Court in *Fiori* was aware of this inconsistency. As such, the ruling allowed for the possibility of judicial intervention when "interested parties" disagree regarding the withdrawal of life-sustaining treatment. The court was obviously trying to walk a fine line between placing an unnecessary burden on families of PVS patients and cutting off access to the courts altogether. Although the *Fiori* court provided no clear mechanism for how such disputes are to be resolved, it did seem to present a practical compromise aimed at allowing intervention, but only when necessary.

One of the most difficult criticisms of the substituted judgment approach to defend, however, is more philosophical in nature. Simply put, under the substituted judgment approach, a family member decides what he feels the patient would have wanted. While the patient's external manifestations of his wishes are considered, they are not conclusive. The family member is encouraged, under the substituted judgment approach, to consider what

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105. *Fiori*, 673 A.2d at 913.

106. *Fiori*, 652 A.2d at 1364 (McEwen, J., concurring). See also Brief of Amicus Curiae Pennsylvania Catholic Conference in Support of Petitioner at 6, 673 A.2d 905 (Pa. 1996) (No. 6 EAP 1995), which asked in response to Judge McEwen's quote "If one would say 'more is at stake with property.' Can that possibly be the case when life itself hangs in the balance?"

he knows of the patient's values, goals, and philosophy, before making his decision. However, in the end, it is still the family member who decides whether or not treatment should continue.

Given that the right in question is, in fact, a right to *autonomy*, this seems an inherent contradiction. While the clear and convincing evidence standard is often attacked for being impractical, at least it properly places the focus on the actual statements and wishes of the patient. In enforcing a patient's right to autonomy, the judgment of a patient's family seems utterly irrelevant.

In allowing such a contradiction, the court appears to be endorsing a presumption that most people would not wish to continue life in a persistent vegetative state. Any inherent contradictions are, as such, ignored in order to achieve this apparently desired end. Otherwise, there could be no justification for the proposition that a person's right to autonomy may be exercised through the substituted judgment of a third party, particularly absent any form of judicial scrutiny.

Clearly, there are no easy answers to these questions. It appears the only sure way to make certain that a patient's wishes are properly carried out is to mandate that every person execute an advanced health care directive. This is obviously not practical. Given these limitations, the Supreme Court of Pennsylvania has created a framework to help deal with these crises on a case-by-case basis. While the court's approach is not perfect, no system ever will be. There is simply no way a court, a family member, or a physician will ever truly be able to ascertain the wishes of an incapacitated patient lost to a persistent vegetative state.

#### SCHIAVO REVISITED

The question remains, would Pennsylvania courts have been better prepared to handle the most difficult case presented by the bitter division between the parents and husband of Terri Schiavo?

Unfortunately, it appears that the answer is no. While the clear and convincing evidence approach clearly has some deficiencies, one practical advantage it possesses is its conclusive reliance on the patient's expressed wishes. As such, the motives of the individuals involved should not be terribly relevant.

Under Pennsylvania's substituted judgment approach, the motives of close family members would be quite relevant in determining the surrogate's ability to properly effectuate a patient's wishes. Thus, the personal attacks that grew to dominate the Schiavo con-

trovsky would necessarily be encouraged by the judicial processes of the Commonwealth.

Furthermore, as mentioned above, there is no clear mechanism for dealing with disputes among family members under Pennsylvania law. As a result, the procedures themselves would be issues of first impression.

One can only hope that the Supreme Court of Pennsylvania took note of this prolonged controversy and, in its wake, is better prepared to deal with these challenging ethical dilemmas. Perhaps more importantly, however, one must hope that the citizens of Pennsylvania paid attention as well, and began preparing for the possibility that they too could be in this situation someday.

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