

# The Necessity of a Court Approval in Civil Proceedings on the Withdrawal of Life-Supporting Treatment for Terminally Ill Patients

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The paper presents a comparative analysis of the positions of the courts in respect with the necessity of a court's authorization to terminate life-support. Some courts hold that it is mandatory in any case, while the other reduce the role of the tribunals only to disputes arising from the decision to withdraw life-support.

**Keywords:** withdrawal of treatment, passive euthanasia, family law, judicial approval, terminally ill patients.

## Būtinybė gauti teismo leidimą civilinėse bylose dėl nepagydomai sergančių pacientų gyvybės palaikymo nutraukimo

Straipsnyje pateikiama lyginamoji teismų pozicijų analizė dėl būtinybės gauti teismo leidimą nutraukti gyvybės palaikymą. Kai kurie teismai mano, kad tai yra privaloma bet kuriuo atveju, o kiti sumažina teismų vaidmenį tik ginčiuose, kylančiuose dėl sprendimo atsisakyti gyvybės palaikymo.

**Pagrindiniai žodžiai:** gydymo nutraukimas, pasyvi eutanazija, šeimos teisė, teismo leidimas, nepagydomai sergantys pacientai.

## Introduction

“In current medicine, there is an advance in the treatment of the terminally ill [patients] or [their] serious pathologies, in order to give the patient not necessarily more years of [his] life, but mainly [his] survival with quality. Medicine therefore leaves a paternalistic era, an over-protective one, which channeled its attention only to the disease and not to the patient, in a real obsession with healing it at any cost, and goes on to a phase of greater concern for the well-being of the human being”. Such was the wording of the 14<sup>th</sup> Federal court of the Federal District (Brasilia) in Brazil in the 2007 public civil action to

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challenge the legitimacy of a 2006 resolution by the Federal Medical Council allowing an omission of acts by physicians concerning a terminally-ill patient refusing to undergo life-supporting treatment<sup>1</sup>. In fact, the Brazilian federal court has reiterated the main tendency in medical law over the last decades: both the law and the judiciary came to a conclusion that the dignity of the patient concerned and his right to autonomy in decision-making should prevail over the intentions of his close relatives or physicians, regardless of the fact its non-application could result in subsequent demise. In the same way, this principle was applied in the already abovementioned Brazilian jurisprudence in the case of *Ferreira* (2013), wherein a public prosecutor's office applied for a court order to authorize the amputation of a necrotic foot of an elderly man who refused to consent to such an operation despite the risk of death. The Court of Justice of Rio Grande do Sul (an appellate court of a state) ruled to reject the appeal, finding that the he cannot be compelled to undergo surgery (*Ministerio Publico c. Joao Carlos Ferreira...*, 2013, p. 3–7). Such examples may be observed in various civil law and common law states where either the law or judge-made law recognizes the right to withdraw life-supporting treatment. Various courts recognize that a decision to terminate life-supporting treatment is a highly-personal matter (*OLG Karlsruhe...*, 2001, para. 15–16 (Germany); *RB Zeeland-West-Brabant...*, 2014, section 3.3 (Netherlands)), life and health are “very personal rights”<sup>2</sup>, but that should not mean that such a decision is entirely a matter of the patient himself and the hospital staff, to whom appropriate directives are given. As the paper will show later, many courts find that a judicial intervention in the decision-making process in order to approve or reject withdrawal of treatment is either ultimately necessary, or necessary at least in all kinds of legal disputes arising from it (not even mentioning the essential role of the courts in making up the substituted judgment to determine the “best interests of the patient”). In this paper, I will contend that the judicial approval of every withdrawal of treatment is necessary in order to prove the legitimacy of the patient's wish from one side, and to cassate conjectural fraud and undue influence by any third parties from another, as well as to alleviate suspicion in manslaughter (*OLG Karlsruhe...*, 2001, para. 31–32). Thus, court authorization for the withdrawal of life-supporting treatment is a legitimization of the patient's will, and matters of life and death should be resolved by a state body with substantial judicial powers and a high moral authority in the society, which apparently is the court.

The position of the tribunals in this respect is very far from being uniform – some courts believe that the intervention of the judiciary is essential, while other ones think that their role should be limited to disputes in relation to the patient's decision-making process. The problem is complexified by the circumstance that euthanasia-related law either does not exist in some countries at all, and that one or another type of euthanasia is recognized by courts (certainly, if it is actually recognized), or the existing law does not specify the role of the courts in decision-making. Another problem is evoked by the fact that the issue of judicial approval of termination of treatment is still under-investigated in the field of academic literature. Little legacy is devoted to the role of courts concerning the necessity of judicial approval in case of termination of life-supporting treatment. For instance, *Ann Massie* (1993), in her paper on withdrawal of treatment in respect with minors, mentioned that some US courts found that decision-making should be handled by physicians and families of the respective patient, but mentioned that in the late 1980s, an American hospital in Chicago was reported to be unwilling to dislodge a respirator of a severely ill, six-month-old infant upon request of his father, anticipating civil or criminal liability for acting without a court order (Massie, 1993). Ethicists occasionally suggested

<sup>1</sup> The court apparently came to a conclusion that “passive euthanasia” is legitimate, see *Ministerio Publico Federal c. Concelho Federal de Medicina...*, 2010, p. 13–15. The translation to English from Portuguese is custom.

<sup>2</sup> Accord the wording of the Supreme Court of Nation of Argentine in the judgment of *D., M.A. s/ Declaración de Incapacidad...*, 2015, at para. 22 (original page 23).

that such decision-making should better be a subject of discussion or an ethical, but not judicial review (Doyal, Larcher, 2000, p. 61). Hopefully, some bioethics specialists highly appreciate the role of courts in protecting healthcare service employees from prosecution (Larcher, Lask, McCarthy, 1997; p. 249), since the hospital staff, in fact, is directly involved in the technical procedure of withdrawal of treatment. Obviously, it is by far not the only role of the courts in the decision-making process, but the aim of this paper is to conduct an analysis of the courts' positions considering the judicial approval of termination of life-supporting treatment.

The paper analyses the current jurisprudence of Italy, the Netherlands, USA, Canada and Germany. These states have been selected by the fact that the given countries provide the largest and the most comprehensive case-law in respect with termination of life-supporting treatment. The states of Latin America, such as Brazil or Argentine, still possess relatively little case-law in respect of the topic.

## The positions of the courts in various states: pro and contra the judicial intervention in the end-of-life decision-making process

### 1. Italy

An unfortunate Italian artist, named Piergiorgio Welby, has led a baffling life, combatting fasciocapulo-humeral muscular dystrophy for the major part of his being. However, in the mid 1990s Welby collapsed due to a severe respiratory failure and was thereafter tube-fed, and was breathing by means of an automatic respirator. The unfortunate painter was in a clear mind, being able to communicate by means of a computer and even write a book about his torment<sup>3</sup>. By the mid-2000s, Welby has repeatedly expressed his wish to die, including the statements in his book. However, his treating physician withstood from removing the life-support machinery, despite Welby repeatedly asked him to do so. Welby's ordeal at the Court of Rome finished unsuccessfully: the Court, despite having acknowledged that there may be cases where a plea to withdraw futile treatment may be approved, the Court said that Italian law did not introduce any legal definitions of such medical law conceptions as "futile treatment", "quality of life", when the life-supporting treatment becomes "disproportionate", or "therapeutic obstinacy"<sup>4</sup> and claimed that physicians at that time had no comprehensive (if any<sup>5</sup>) guidelines on how to deal in such

<sup>3</sup> See facts stated by the Court of Rome in the trial against the physician who decided to plug off Welby's life-support machines: *Nei confronti di Riccio Mario...*, 2007, p. 6–8.

<sup>4</sup> This concept was dealt with in a case before the Court of Reggio-Emilia (Italy) in 2012. Upon the facts, it could be deduced that therapeutic obstinacy may be conceived as a state of patient's health which supposes that prolongation of his life is entirely dependant upon life-support machinery, wherein no signs of a return to average life are indicated. In the abovementioned case, a woman was suffering from diabetes and multiple sclerosis, being practically unable to communicate by the time of the proceedings. Upon the witness testimony, the tutelary judge (It. giudice tutelare), who visited the patient, decided to authorize the guardian to consent to palliative care therapies., see *Trib. Reggio Emilia...*, 2012, p. 4–6. This judgment was observed and commented in one of my recent papers, see Lytvynenko, 2020.

<sup>5</sup> In fact, the Court cited provisions of the code of medical ethics. However, nothing there dealt with the condition of P. Welby. The provisions dealt only with withdrawing treatment of terminally ill patients, who suffered brain damage (I should emphasize here, that the code's provisions did not hint. As it was acknowledged by the same Court in the trial against R. Mario, Welby's intelligence was beyond doubt, see *Nei confronti di Riccio Mario...*, 2007, p. 6. It should be said, that the patient's mental capacity to decide concerning his further treatment (and his fate) must not be confused with his inability to speak or deliver a will in handwriting. For instance, in the case of *Giovanni Nuvoli* (2007), well-known among Italian lawyers, a wife of a man suffering from Amyotrophic Lateral Syndrome, being immobilized and unable to speak himself, asked the court to give authorization, inter alia, to express his will (which presumably could be connected with terminating his life-support treatment) for him. However, a public prosecutor intervened to the proceedings and claimed that the patient (Nuvoli) was, in fact, absolutely able to express his wish by means of a speech synthesizer. The

situations, and that the right to passive euthanasia was not exactly safeguarded by the legal system, thus abstaining to give an order to withdraw Welby's life-supporting treatment and subsequently not letting him die, as he desired to (*Piergiorgio Welby c. Associazione Onlus ed il. Dott. Giuseppe Casale...*, 2006, p. 7–10). Being devastated by the rejection of his application to the court, Welby soon asked a physician named Mario Riccio to dislodge the automatic respirator, who performed his request. As a result, he was soon prosecuted for assisting in a suicide, but was acquitted, as the Court of Rome found that he merely did what Welby asked him (*Nei confronti di Riccio Mario...*, 2007, p. 58–60). As we may deduce from the given case and its outcome, the patient practically committed a suicide (though, assisted – in fact, such it was classified by the Court of Rome (*Nei confronti di Riccio Mario...*, 2007, p. 59)), being dissatisfied that the court did not authorize the termination of his life-supporting treatment.

Giovanni Nuvoli, the ward in the case of *Nuvoli*, adjudicated by the Court of Sassari, suffering from ALS, whose wife was appointed as a guardian for limited purposes in February 2007 (*Caso Giovanni Nuvoli...*, 2007), died from starvation several month later, refusing to intake any food and drink after the physicians abstained from withdrawing his life-supporting treatment (under the pressure of the authorities). However, proceedings on his hypothetical plea to withdraw life-supporting treatment were apparently never commenced. As we may notice, two terminally ill citizens committed suicides because of being unable to “die with dignity”, as the legal system did not provide such a right those days. But does that mean that a firm decision to terminate life-supporting treatment should not require a judicial approval (unless some dispute arises (*Woods v. Commonwealth...*, 2004, 49–50)), as, for instance, such proceedings may be cumbersome, lengthy, “intrusive and expensive”<sup>6</sup>, or could cause additional harm and suffering to a dying patient? No, it generally does not, despite that courts in the United States in the late 1970s chose to adhere to the position that the termination of life-supporting treatment is an entirely “medical” decision<sup>7</sup>, which would not require a judicial approval, at least under ordinary circumstances (in the *Matter of Shirley Dinnerstein*, 1978, 466, 473–474) (meaning, e.g. there are no disputes concerning the actual wishes of the patient, there is no need to appoint a guardian or an ad litem guardian, there are no suspicions in frauds, or evidence of the patient's will to terminate treatment under certain circumstances is “clear and convincing”<sup>8</sup>, or there is no need to define a “substituted judgment” – where the court has to define, what is in the “best interests of the patient” upon the

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Court summoned a group of medical experts and the tutelary judge interrogated the man at his home. The man gave clear answers to the judge's interrogations, inter alia, expressing a wish to die. The judge, after the verification of the veracity of the equipment by experts, made a conclusion that Nuvoli was competent to make wishes on his own, affirming that a vocal synthesizer was an appropriate device for expressing the will, and thus authorized the wife to be Nuvoli's guardian for limited purposes (as the patient, in fact, asked to do so himself within the communication with the judge), and stated that Nuvoli could pronounce his will alone, see *Caso Giovanni Nuvoli...*, 2007. What is interesting, this is not the only case where the patient had to express his wishes (or draw up a living will) by means, other than orally or by handwriting. In a decision from Modena (2009), a wife of severely disabled 52-year-old man (suffering from ALS, as Nuvoli) applied for an authorization to become his guardian (officially – *amministratore di sostegno* in Italian law). The patient drew up a living will by means of an E-Tran table, claiming he would choose to suspend his assisted ventilation and artificial nutrition in case of his total mental incapacity, for instance, caused by progressive dementia. The living will was recorded by the tutelary judge, who came to visit him. Later, the Court fully affirmed that the patient's mental abilities were full and adequate, regardless of his state of health. The Court gave authorization to appoint the guardian, empowering him to instruct the medical staff to comply with the living will, ensure palliative care and inform the office of the Tutelary Judge on the patient's condition, *Trib. de Modena...*, 2009, p. 2–6.

<sup>6</sup> See the position of the Supreme Court of Kentucky in *DeGrella By and Through Parrent v. Elston...*, 1993.

<sup>7</sup> Such wording could be found in Canadian case-law. See, for instance *Child and Family Services of Central Manitoba v. Lavalee et. al...*, 1997.

<sup>8</sup> Using the wording of the Court of Appeals of New York in *Matter of Westchester County Medical Center on Behalf of Mary O'Connor...*, 1988.

existing evidence, as it is in US (see, for instance *Brophy v. New England Sinai Hosp., Inc.*..., 1986), or a twin concept of “presumed will” in Germany (*OLG Karlsruhe*..., 2001, para. 30)). But if we may presuppose that it would be, using the wording of the Supreme Court of the State of Kentucky, United States, in the case of *Woods v. Commonwealth* (2004), that said it would be “logistically impossible” to sanction every case of withdrawal of treatment, that does not mean that the hospital staff may act however it would choose, taking into account the condition of the patient and the documents approving that the patient would not desire to prolong their life-sustaining treatment, becoming terminally ill, unconscious, severely demented or as otherwise indicated in their living will or another document. Concerning Italian courts and the issue of whether a court approval is necessary to stop life-support, this question is quite tricky. Italian courts granted orders for appointing a guardian who was to be authorized to terminate life-supporting treatment, either in advance (meaning the ward was in relatively good health and is competent, but wishes to appoint a guardian who could authorize to terminate his life-support once he becomes incapacitated)<sup>9</sup>, or at the time where the person concerned was close to death (Trib. de Modena, decreto 14 Maggio 2009, p. 4–7). In the outstanding decision upon the case of *Englaro* (2007, the first one by the Cassational Court), the Court deduced that the legal construction concerning the withdrawal of treatment is not merely to ask the judge to authorize the performance of a medical manipulation, but to affirm the legitimacy of such a decision; therefore, the Court may authorize to withdraw treatment (if the constituents for such decision are met – the fatality of the patient’s condition is proved by evidence; the patient did not contradict the withdrawal of treatment) (*Caso Englaro*..., 2007, p. 8, 15–17). Upon such position, the court order seems to be apparently necessary.

## 2. Netherlands

The Netherlands were arguably the first country where ethical guidelines suggested not to prolong the (allegedly) pointless medical treatment of dying patients, even regardless of the fact that the law did not tolerate such an approach, which resulted in criminal trials since the early 1970s (see judgment of the trial court of Leeuwarden: *Rechtbank Leeuwarden*..., 1973, p. 3–5). Though not being practically de-criminalized in law (before the law legalizing euthanasia went into force in 2001), physicians who assisted in suicide often received lesser prison sentences than if they would commit an intentional murder under any other circumstances (for instance, see *Rechtbank Rotterdam*..., 1981, 63; *Rechtbank Utrecht*..., 1982, 264; *Hof Amsterdam*..., 1983, 43). In the Netherlands, there is no actual requirement to ask for a court approval to terminate one’s life-supporting treatment, though occasionally guardians of incompetent and terminally ill patients sought court orders to issue a no-CPR order (an analogue of a Do-Not-Resuscitate Order), though such an order may not be decided by a guardian instead of an adult incompetent patient upon the view of Dutch courts (*Rechtbank Zeeland-West-Brabant*..., 2014, Section 3.1–3.2; 3.3–3.7). In an early 2000s judgment of the Court of Breda, in an action to impugn a physician’s decision of not resuscitating a severely morbid neonatal child, the court said it would intervene in case “the physician could not reasonably reach a decision [concerning whether resuscitation is pointless] while exercising his profession” (*1, 2 wettelijke vertegenwoordigers van Ester t. Stichting Amphia Ziekenhuis*..., 2003, Section 3.7). However, it does not mean no-CPR orders may not

<sup>9</sup> See, for instance *X*, 2008, p. 3–5. What is interesting, under Art. 404 of the Italian Civil Code, the guardian has to be appointed by a tutelary judge to a person who is partially or fully incapacitated, but upon the case-law interpretation of several Italian courts, the guardian may be appointed if the future ward introduces sufficient evidence that his past ailments could render him incapacitated in the future and incapable on deciding on his own – this is clearly depicted in the judgment of the court of Trieste.

be impugned in a courtroom: they may be, if plaintiffs introduce sufficient proof of errors of physicians or, e.g., bring a report of independent medical experts upon which it may be deduced that hospital physicians could be wrong in their conclusions (*Rechtbank Hertogenbosch...*, 2011, Section 3.1.–3.2; 4.1–4.3). At the same time, plaintiffs will not prevail in an action to compel the hospital staff to prolong medical treatment, unless proving that the medical staff is wrong in their inferences, suggesting that further medical treatment of a patient is pointless from a medical point of view (1,2,3, 4 t. *Stichting Nijmeegs Interconfessioneel Ziekenhuis Canisius Wilhelmina...*, 2018, Section 4.5–4.7).

It is true that Dutch physicians may also come to a conclusion that at some point life-supporting treatment becomes pointless, but that apparently does not mean the hospital staff could withdraw life-supporting procedures once they find that their efforts seem to be fruitless – it is not uncommon for them to seek a “second opinion” concerning the possibility of the patient’s recovery from other hospitals or medical institutions, and the relatives of the patient concerned are not prevented to bring an action before the court to compel hospital staff to prolong life-supporting measures (*Rechtbank Hertogenbosch...*, 2011, Section 2.7–2.8; 2.9–2.10; 3.1–3.2; 4.1–4.4). Recent actions brought before the disciplinary courts<sup>10</sup> of Netherlands also depict that the relatives of terminally-ill patients may sue the hospitals for issuing no-CPR orders, believing that the hospital staff has forged the documents which approve the future futility of patient’s treatment (*Regionaal Tuchtcollege voor de Gezondheidszorg Den Haag...*, 2019, Section 3). Despite Dutch courts declined approving no-CPR orders for incompetent patients, claiming that it is too personal for anybody to draft such a document acting as a surrogate (*Rechtbank Zeeland-West-Brabant...*, 2014, Section 3.3), it may be alleged to be different in case a mentally-retarded person would plead for an active euthanasia (*Rechtbank Rotterdam...*, 2020, Section 2.1.4). Besides, informing on drugs that could induce death with necessary details does not count as assistance in suicide: in a 2003 trial before the first-instance court of Hertogenbosch, a physician was acquitted, being previously prosecuted for informing a woman (who claimed she had wished to die) concerning drugs that could cause death, their quantity and manner of consumption. Later on, when the woman (designated as “victim”) bought all the necessary drugs, the physician conducted two telephone conversations and provided moral support for her. The woman apparently died from toxic shock and the suspect was charged for assisting in suicide. The court found that the physician should be acquitted, as he did not actively participate in the woman’s suicide. As the court said, he only made informative statements and provided moral support, and no evidence of influence existed, and was not anyhow actively involved at the woman’s suicide. The court did not consider the doctor’s acts to be within the scope of Art. 294 of the Criminal Code (in fact, giving an instruction of committing a suicide *is* indictable, but the court did not find that he gave any *actual* instructions). The court also held that the physician has to be acquitted of alternative charges for not providing help to a person in a mortal danger owing to specific circumstances of the case – the “victim” expressly wished to die, indicating she did not want to be treated, which was clearly known by the suspect. The physician was acquitted (*Rechtbank Hertogenbosch...*, 2003).

### 3. United States

American courts are far from being uniform concerning the role of courts in the process of withdrawal of treatment. The earlier judgments usually indicated that courts would not tolerate unauthorized with-

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<sup>10</sup> A «Tuchtcollege» is a disciplinary court in the Netherlands dealing with actions for professional negligence. Such courts may not indict or fine the defendants, but may issue “cautions”. The plaintiffs are in full capacity to bring an action to a court of general jurisdiction after the decision of a disciplinary court to recover damages or receive another remedy.

drawal of treatment. In the matter of Spring (1980), brought before the Supreme Court of Massachusetts, the court had to decide whether to grant an order to terminate the treatment of an elderly dying man who was subjected to hemodialysis owing to kidney failure. Therein, the Court held there could be a multitude of circumstances concerning treating incompetent patients that require an approval of the court, and stressed that unauthorized acts could be subject of civil and criminal liability (though this approval could not make one immune from liability on other grounds). In this case, the Court held a position that such acts need an approval of the court (in the *Matter of Spring...*, 1980). However, in case from Washington D.C., *In re Colyer* (1983), the Court held that the decision of life-support termination made by the guardian does not routinely necessitate a court approval, even regardless of the fact the motives of such acts may be far from humanistic ones, such as an interest in the incompetent's estate, or to mere desire to put down the burden of financial aid to the patient – the court was convinced that the guardianship laws of Washington D.C. would let avoid such “dangers” (in the *Matter of Welfare of Bertha Colyer...*, 1983). The District Court of Appeals of Florida in the case of *Bludworth* (1983) held that a judicial approval to terminate life-supporting measures is necessary by a legal analogy to commence legal proceedings to dispose a person's property by the guardians (*John F. Kennedy Memorial Hospital, Inc. v. D. Bludworth...*, 1983). However, a year later this court held that the withdrawal of life-support for a minor does not necessitate a prior court approval, the courts must be open to hear the matter upon the request of the party. In all the cases, where any doubt exists, or where there is no concurrence between the patient's family and the hospital, or if the party simply applies for a judicial order – the court should consider the matter (in *Re Guardianship of Barry...*, 1984). In *Storar* (1981), the Court held that there is no actual requirement to ask a court order to terminate treatment of terminally-ill patients, it anticipated that the legislature could enact such a kind of procedure. The position of a partially-dissenting judge in this case stood that despite no actual requirement exists, the patients' relatives could ask for authorization of a court, and courts have jurisdiction over such cases (*Matter of Storar...*, 1981).

In the next decades, a variety of court positions based on legislation and case-law could be found in United States jurisprudence. If no “firm and convincing evidence” concerning a patient's will exists, the guardians, appropriately appointed by a tribunal, could seek a court authorization for withdrawal of treatment, which is apparently necessary in the said situation (*Mack v. Mack...*, 1993). Some US courts adopted a position that court approval is necessary in case there is a dispute among the trial parties (which is, in fact, quite frequent): for instance, it is up to the court to determine what is in the “best interests” of the patient, and it is up to the court to assemble the “substituted judgment” (that is, the presumed will of the patient concerned) (*Rasmussen by Mitchell v. Fleming...*, 1987); *DeGrella By and Through Parrent v. Elston...*, 1993). Vice-versa, hospitals may seek court authorization to *prolong*, not to terminate treatment, having a firm belief it would be for the benefit of the patient (for instance, see *Matter of Westchester County Medical Center on Behalf of Mary O'Connor etc...*, 1988). In some jurisdictions, the courts are authorized to approve withdrawal of treatment or give consent to no-CPR (or do-not-resuscitate) orders concerning minors under a statute (in *re C.A...*, 1992), while other courts have jurisdiction to authorize termination of treatment for minors at common law (*Custody of a Minor...*, 1982). However, if the patients are *not* terminally ill, courts may refuse to authorize terminating treatment which could save the life of the patient (*Brophy v. New England Sinai Hosp., Inc...*, 1986). In some states as New York, the ordinary powers of the guardian in respect with the ward *do not* involve issuing do-not-resuscitate orders, and the court will not authorize the expansion of the guardian's powers unless there is strict evidence approving that withdrawal of treatment in this or those method would be in the best interests of the patient (*Application of Barsky...*, 1995). Therefore, as we may

deduce, disputes concerning the withdrawal of treatment, which are very frequent, with the absence of a living will or other firm evidence of the patient's wishes, must always be resolved in a courtroom.

Generally speaking, this dispute arose in the very first cases concerning a right to withdraw life-supporting treatment in the mid-1970s: *Quinlan* and *Saikewicz*. The Supreme Court of New Jersey, concerning the role of the courts, said the following: "We consider that a practice of applying to a court to confirm such decisions would generally be inappropriate, not only because that would be a gratuitous encroachment upon the medical profession's field of competence, but because it would be impossibly cumbersome. Such a requirement is distinguishable from the judicial overview traditionally required in other matters such as the adjudication and commitment of mental incompetents. This is not to say that in the case of an otherwise justiciable controversy access to the courts would be foreclosed; we speak rather of a general practice and procedure" (in *Re Quinlan...*, 1976).

The Supreme Judiciary Court of Massachusetts in *Saikewicz* (1977) expressed a contrary view:

"We do not view the judicial resolution of this most difficult and awesome question – whether potentially life-prolonging treatment should be withheld from a person incapable of making his own decision – as constituting a 'gratuitous encroachment' on the domain of medical expertise. Rather, such questions of life and death seem to us to require the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch of government was created. Achieving this ideal is our responsibility and that of the lower court, and is not to be entrusted to any other group purporting to represent the 'morality and conscience of our society', no matter how highly motivated or impressively constituted" (*Superintendent of Belchertown State School & Another v. Saikewicz...*, 1977).

#### 4. Canada

Similarly, Canadian courts have also faced the issue of deciding on the role of courts in authorizing withdrawal of treatment, which is also far from uniform. The Canadian jurisprudence in this issue is "younger" than its American counterpart, but still, views concerning the necessity of a judicial approval (or the absence of it) have been not once expressed by Canadian courts. In the first-ever case on withdrawal of treatment (case of *Lavalee*) in 1997, a severely injured infant was issued a DNRO by the hospital personnel, which was impugned by the forbearers of the child. Because of this, the hospital itself applied to the court to receive an authorization, grounding the claim upon Sec. 25 (3) of Child and Family Services Act, C.C.S.M. c. 80 of 1985, upon which the healthcare agency could apply for a court order to authorize medical treatment of a minor, and inter alia, in case the forbearers or guardians disagree to assent to it. The Court, however, found that the given provision carries the positive sense of "treatment", but not refraining from medical intervention. The Court based its position upon the American case of *Shirley Dinnerstein* (1978) and concluded that neither a court approval, nor the consent of the close relatives is necessary for issuing a do-not-resuscitate order (*Child and Family Services of Central Manitoba v. Lavalee et. al...*, 1997). The said case occurred in Manitoba. Another case, *Sawatzky* (1998), expressed a position that the court approval is necessary in case some dispute concerning the decision to withdraw treatment occurs. This case involved a patient suffering from Parkinson's disease, pneumonia and some other ailments. The patient was issued a do-not-resuscitate order, to which his relatives did not consent, and filed an injunction action to restrain the defendant hospital from doing so. Considering the role of the court, the judge stated that regardless courts do not have expertise in medical decisions, they definitely have it regarding determining the legality (or the illegality) of the disputed decision before a patient deceases. The court granted an interlocutory injunction to restrain the hospital from issuing a do-not-resuscitate order in that case (*Sawatzky v. Riverview Health Centre Inc...*, 1998, para. 6–13, 33–36).



The judgment of *Golubchuk* (2008), involved a man who sustained a severe head injury, whose condition deteriorated thereafter. Later, he experienced heart problems and a kidney failure, and soon was totally dependent on artificial feeding and other life-supporting measures. The staff of the hospital suggested withdrawing treatment of the patient, but family members strongly opposed it and filed an injunction action to restrain the defendant hospital from terminating treatment. The Court of Queen's Bench of Manitoba affirmed its own position (as *Sawatzky* was adjudicated by it as well), adding that the role of the court could once be broader than assessing the legality or illegality of decisions for terminating life-support. The Court also added that a dispute regarding withdrawal of treatment is triable and not frivolous. In respect with the remedies, the Court said that repaying damages will not be an adequate remedy, as no relief would actually compensate the loss of a human life, finding that injunction restraining a healthcare unit from non-consensually terminating life-support is adequate for plaintiffs (*Golubchuk v. Salvation Army Grace Hospital...*, 2008, para. 4–6, 9, 16–19, 26–28).

## 5. Germany

German courts have repeatedly approached the question of necessity of a court authorization to withdraw life-supporting treatment. The earliest decisions concerning “passive euthanasia” in Germany occurred in the 1990s. In the earlier case-law, courts believed that the decision to withdraw life-support does not require a court approval (*LG Munchen I...*, 1999, para. 6 or II (2) (a); *LG Augsburg...*, 1999, para. 5), though this position was not uniform, and other land courts decided that a guardian had a right to apply to the court to be authorized for such procedure, as withdrawal of life-supporting treatment (*LG Duisburg...*, 1999, para. 1–9). Of such a position was the land regional court (*Landsgericht*) of Duisburg in 1999, where a plaintiff, the daughter of an immobilized elderly woman that was unable to communicate and react, asked for a court order to terminate life-support. The land regional court of Duisburg said that plaintiff has a right to apply to the court for it, and claimed that it is up to the courts to draw up the criteria upon which withdrawal may be authorized, contemplating a few of them (see my comment concerning this case in Lytvynenko, 2020, p. 75–76). In that case, the court authorized to withdraw treatment (*LG Duisburg...*, 1999, para. 11, 15, 17–20).

Another firm support of the position of the strict necessity of a court order to withdraw the life-support was demonstrated by the higher regional land court of Karlsruhe (OLG, Oberlandesgericht Karlsruhe) in 2001. According to the facts of the case, an elderly man suffered a pulmonary embolism with a cardiovascular arrest rendering him comatose. The spouse, the plaintiff, being his legal guardian since 1996, and applied to the court to authorize her to terminate treatment (see the full description of the case in Lytvynenko, 2020, p. 76–78). The Court has agreed that deciding on stopping life support is delicate and stated that the legal guardian does enforce only the patient's will to withdraw treatment, not his own. Concerning the necessity of a court order, the court said that neither the court, nor the guardian decides – it is a decision [previously] actually made by the patient himself. The court augmented that a court approval is necessary to avoid any suspicion in manslaughter (*OLG Karlsruhe...*, 2001, para. 15–20, 25–26, 30, 31–32), while regarding the “legislative loopholes” (the German civil code does not provide exact provision on withdrawal of treatment, currently only concerning living wills and the standard of their clarity upon Art. 1901 (a) of the *Bürgerliches Gesetzbuch*) finding that courts and academic literature could rule out the issue without enacting respective legislation. In this case, however, the Court did not authorize withdrawal of treatment, stating that more proof concerning the irreversibility of the patient's condition is needed, remanding the case (*OLG Karlsruhe...*, 2001, para. 51–56).

As the case-law of Germany developed (especially after the decision of the Federal Supreme Court in 2003, which concluded in its judgment that courts have cognizance over claims to withdraw treatment and the absence of legal basis in the Civil Code is no actual obstacle for applying for a court authorization to terminate treatment) (*Bundesgerichtshof...*, 2003, para. 40–42), the courts agreed that the legal system of Germany permits giving an order to discontinue life-supporting treatment under the circumstances that the patient's condition is irreversible and proven to be thanatoid (*AG Siegen...*, 2007, para. 25–27). In the 2010s case-law of the Federal Supreme Court (*Bundergerichtshof*) the position concerning the necessity of a court order was clarified, leaving little room to perform it without commencing civil proceedings. The decisions of the Federal Supreme Court of 2014 (*Bundesgerichtshof...*, 2014, para. 13, 15), 2017 (*Bundesgerichtshof...*, 2017, para. 14–15) and 2018 (*Bundesgerichtshof...*, 2018, para. 17–18) held that court approval is not necessary in the situation where the patient has drafted a living will upon the standards set out in the Civil Code, and his current health condition corresponds to a determined life situation (for example, permanent vegetative state, coma etc.). In other situations, e.g. the requirements of the living will set up in the Civil Code are not met; the “living will”-presupposed end-of-life situation does not correspond to the current condition of the patient, or the treatment proposed, so the judicial approval is necessary. Apparently, if the caregiver has to determine treatment requests of the ward himself or deduce the presumed will of the patient, and decides to consent to terminate life support, court approval is also necessary (*Bundesgerichtshof...*, 2017, para. 15).

## Conclusions

As it may be deduced from the paper, there is no uniform position concerning the role of tribunals in decision-making regarding the withdrawal of life-supporting treatment. The said problem is aggravated by the fact that issues of euthanasia are quite novel for most countries of the world and the legal systems frequently do not possess any legislation regarding it. Against such background, some courts may be eager to determine the issue in the field of case-law, while the others may be quite reluctant to authorize termination of treatment without appropriate legislation. The courts have also no uniform position in respect of their role in decision-making. In such countries as the United States, courts mostly tend to reduce their role to disputes arising from potential decision-making and forming substituted judgments regarding the presumed will of the patient or determining his “best interests”, but they would rather abstain from simply authorizing withdrawal of treatment if no dispute arises from this decision-making process: some American courts not once designated such proceedings (with no actual dispute) to be cumbersome. Some courts, however, did emphasize that the right to refuse medical treatment involves a conflict between the constitutional (or the common-law-based) rights, namely the right to life and the right to self-determination (*D., M.A. s/ Declaración de Incapacidad...*, 2015, para. 19–22 (original page 22–23)) (or the state's interest to preserve life (*Re JS...*, 2014, para. 6), which itself may be considered disputable. Some courts, as, for instance, the Manitoba Court of Queen's Bench in the case of *Golubchuk* (2008), clearly indicated that withdrawal of treatment violates the patient's right to life, and thus the Court's task is to define if it is compatible with the principles of fundamental justice, stating that the case is triable and not frivolous (*Golubchuk v. Salvation Army Grace Hospital...*, 2008, para. 19). We may also sum up the issue with the wording of the Supreme Court of Massachusetts in the *Matter of Spring* (1980): “When a court is properly presented with the legal question, whether treatment may be withheld, it must decide that question and not delegate it to some private person or group”. I contend this position to be the most appropriate. I would also adhere to the view of the District Court of Appeals of Florida in the case of *Barry* (1984), that the courts should consider cases on withdrawal

of treatment on both occasions of doubts, or lack or uniformity of the position of patient's family and the hospital personell, or upon the request of the affected party.

The current position of the German courts is more strict, as the contemporary case-law indicates that the only situation when a court approval is not necessary is when a person has drafted a will (*Patientenverfügung*) which corresponds the standards set out in the Civil Code and their health condition corresponds to the contents of the will (and apparently, no disputes regarding this issue exist, as all possible disputes in respect to this will be resolved in a court). The position of Canadian courts is not uniform, as some of the provincial courts find that the role of courts could be potentially broader than in solving disputes concerning decision-making. The position of Italian courts seems to confirm the position of necessity of a court order. As we may behold from numerous disputes regarding euthanasia-related decision-making, a judicial review of the issue is essential to abort fraud and conspiracy, though it really may be cumbersome. But matters of life and death are always controversial to be decided upon, and it seems that there is no ideal solution of the question, as on the one hand, proceedings in regard with termination of life-supporting treatment may be lengthy, but on the other, it is impossible to exclude the malicious intents of the persons, immediate to the patient concerned. Upon the author's view, a decent solution would be lodging emergency petitions in case of suffering patients (for instance, in analogy to petitions of blood transfusion) so the court could issue an emergency order within reasonable time (as an example, see facts of the given Dutch case: *1, 2, 3, 4 t. Stichting Nijmeegs Interconfessioneel Ziekenhuis Canisius Wilhelmina...*, 2018). At the same time, the length of proceedings concerning patients in a permanent vegetative state does not seem to be decisive in such case.

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## The necessity of a court approval in civil proceedings on the withdrawal of life-supporting treatment for terminally ill patients

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### S u m m a r y

Some terminally ill patients may wish not to prolong life-supporting treatment and draw legal documents, such as living wills or the so-called “do-not-resuscitate” declarations, which are supposed to affirm their wish not to be subjected to futile, and frequently physically-devastating treatment, which will artificially prolong their life for some time. However, the practical application of such documents is complex, as matters of life or death are often connected with fraud and machinations, which may involve even a forgery of “living testaments” or other illicit means, applied by an interested party for mercantile purposes. Therefore, “matters of life and death” are ideally solved by justice, as alleged fraud or disputes between guardians are far from seldom to be faced in a court room. A judicial approval, from the one side, is essential to affirm the wishes of an affected person upon the foundation of given persuasive documentary and testimonial evidence, and to cassate any conjectural fraud, intended by a guardian, a physician or any other party. An alternate point of view contemplates that a judicial approval of a withdrawal of life-supporting treatment may be burdensome, as civil proceedings on passive euthanasia may be, in fact, quite lengthy, suggesting reducing the role of tribunals only to resolving disputes between the relatives of the patient concerning his treatment (or non-treatment) or assembling a “substituted judgment” of what is in the “best interests” of the patient. The courts around the world support different views concerning the necessity of a court order to authorize the withdrawal of life-supporting treatment: some suggest it is necessary always, some suggest that passive euthanasia is an entirely “medical” decision, not requiring judicial review and approval, while some suggest that the court approval is always necessary unless a living will of the patient fits the Civil Code requirements (such fact may apparently be impugned in a court). In this paper, I will to discuss the pro- and contra positions of courts in Anglo-American and civil law jurisdictions that will help form an explicit picture of the current attitude of the judges towards this tricky issue in civil proceedings on life-support termination.

## Būtinybė gauti teismo leidimą civilinėse bylose dėl nepagydomai sergančių pacientų gyvybės palaikymo nutraukimo

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### S a n t r a u k a

Kai kurie nepagydomai sergantys pacientai gali nenorėti tęsti gyvybę palaikančio gydymo ir pageidauja parengti teisinius dokumentus, pavyzdžiui, testamentus ar vadinamąsias *nepradėk reanimuoti* deklaracijas, kurie turėtų patvirtinti jų norą atsisakyti tuščių vilčių ir dažnai fiziškai niokojančio gydymo, kuris kažkiek laiko dirbtinai pailgins jų gyvenimą. Tačiau praktinis tokių dokumentų taikymas yra sudėtingas, nes mirties atvejai dažnai yra susiję su sukčiavimu ir machinacijomis, kurios gali būti susijusios net su „gyvųjų testamentų“ klastojimu ar kitomis neteisėtomis priemonėmis, kurias suinteresuota šalis naudoja merkantiliniams tikslams. Todėl „gyvybės ir mirties reikalus“ idealiai išsprendžia teisingumas, nes įtariamai sukčiavimai ar globėjų ginčai teismo salėje toli gražu nėra reti. Vienos pusės teisminis sutikimas yra būtinas, norint patvirtinti nukentėjusio asmens norus, pagrįstus įtikinamais dokumentiniais ir liudijimo įrodymais, ir užfiksuoti bet kokį spėjamą sukčiavimą, kurį ketino atlikti globėjas, gydytojas ar kuri kita šalis. Alternatyviu požiūriu svarstoma, kad teismo sprendimas patvirtinti gyvybę palaikančio gydymo nutraukimą gali būti apsunkinantis, nes civilinės bylos dėl pasyviosios eutanazijos iš tikrųjų gali būti gana ilgos, o tai rodo, kad reikia sumažinti teismų vaidmenį tik sprendžiant ginčus tarp paciento artimųjų dėl jo gydymo (ar negydymo) arba surašant „pakeistą sprendimą“, kas atitinka paciento „interesus“. Viso pasaulio teismai pritaria skirtingoms nuomonėms dėl teismo nutarties leisti nutraukti gyvybę palaikantį gydymą būtinybės: vieni mano, kad tai būtina visada, kitų nuomone, pasyvioji eutanazija yra visiškai „medicininis“ sprendimas, nereikalaujantis teisminės peržiūros ir pritarimas, o kai kurie mano, kad teismo leidimas visada būtinas, nebent gyvo paciento valia atitinka Civilinio kodekso reikalavimus (toks faktas, matyt, gali būti ginčijamas teisme). Šiame darbe aptariamos *pro* ir *contra* teismų pozicijos Anglijos ir Amerikos bei civilinės teisės jurisdikcijose, kurios padės susidaryti aiškų vaizdą apie dabartinį teisėjų požiūrį į šį keblų klausimą civiliniame procese dėl gyvybės palaikymo nutraukimo.

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