FAMILY LAW—RIGHT TO DIE—VEGETATIVE PATIENT'S RIGHT TO SELF-DETERMINATION PERMITS SURROGATE DECISIONMAKER TO TERMINATE ARTIFICIAL FEEDING—*In re Jobes*, 108 N.J. 394, 529 A.2d 434 (1987).

An individual's right to self-determination is a long-established principle of law.[1] The essence of this right was succinctly captured by Judge Cardozo: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body."[2] Equally well established is the interest of society in the preservation of life.[3] Perplexing issues involving law, medicine and morality arise where these interests intersect: when may an individual refuse life-sustaining medical treatment? These issues are further complicated when the individuals involved are unable to speak for themselves.

In the absence of legislation, New Jersey courts have attempted to protect the rights of all individuals, competent or incompetent, by articulating principles and procedures by which these rights may be effected.[4] Recognizing the physician-patient relationship and the emotional nature of treatment decisions, the courts have also attempted to keep judicial intervention to a minimum in an area of law where a holding that is too broad or too narrow would be particularly unfortunate.[5] As such, the law has developed gradually and cautiously. The New Jersey Supreme Court's most recent development in the "right to die" area is the case of Nancy Ellen Jobes. In *In re Jobes*[6] the court held that the family or close friends of a non-elderly, non-hospitalized, persistently vegetative patient may make a substituted medical judgment regarding the termination of life-sustaining treatment when the patient did not, while competent, adequately express her atti-

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1 *In re* Conroy, 98 N.J. 321, 346, 486 A.2d 1209, 1221-22 (1985). *See also*, Perna v. Pirozzi, 92 N.J. 446, 460-63, 457 A.2d 431, 438-40 (1983) (unauthorized touching by surgeons "violated patient's right to control his own body").

2 *In re* Conroy, 98 N.J. at 346, 486 A.2d at 1222 (1985) (quoting Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914)).

3 *See*, e.g., *In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976), *cert. denied*, 429 U.S. 922 (1976); John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971).

4 *In re* Conroy, 98 N.J. at 344-46, 486 A.2d at 1220-21. For a brief discussion of bills pending in the New Jersey State Senate, *see infra* note 154 and accompanying text.

5 *See In re* Conroy, 98 N.J. at 343-44, 486 A.2d at 1220.

6 108 N.J. 394, 529 A.2d 434 (1987).

tude toward such treatment.[7]

On March 11, 1980, Nancy Ellen Jobes, a 25 year old married woman, was injured in an automobile accident and taken to Riverside Hospital for treatment.[8] Thereafter, doctors determined that her four and one-half month old fetus had died as a result of the collision.[9] While undergoing surgery on April 2, 1980 to remove the fetus, Mrs. Jobes suffered an acute cardiopulmonary collapse[10] that resulted in severe loss of oxygen to her brain causing massive damage to that portion of the brain which controls movement and thought.[11] She never regained consciousness.[12]

Mrs. Jobes was transferred from the hospital to the Lincoln Park Nursing and Convalescent Home on July 28, 1980.[13] As of June, 1987, her condition had not improved.[14] Although she could breathe without the aid of a respirator, Mrs. Jobes required a tracheostomy tube[15] to remove the mucous that collected in her lungs.[16] She could not swallow, speak, or make any type of sound.[17] She was incontinent and required routine enemas for bowel evacuation.[18] Her muscles had atrophied, causing her limbs to become rigid and immovable.[19] Mrs. Jobes was fed and hydrated through a jejunostomy tube (j-tube), that was surgically inserted directly into her small intestine through a hole in her abdominal cavity.[20] It was this tube that her husband and guard-

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7 *Id.* at 427, 529 A.2d at 451.

8 *Id.* at 401, 529 A.2d at 437.

9 *Id.*

10 Brief of the Respondent-Guardian, John H. Jobes III at 6, *In re* Jobes, 108 N.J. 394, 529 A.2d 434 (1987) (No. 26,041) [hereinafter Respondent's Brief]. Acute cardiopulmonary collapse is a sudden but severe weakening of the heart and lungs. *See* 1 J. SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE AND WORD FINDER, A-73, C-53, C-215 (1986).

11 *Jobes*, 108 N.J. at 401, 529 A.2d at 437-38.

12 *Id.*, 529 A.2d at 438.

13 *Id.* at 402, 529 A.2d at 438.

14 *See id.*

15 A tracheostomy tube is a metal or plastic tube that is inserted into an opening in the windpipe. 1 SCHMIDT, *supra* note 10, at T-109.

16 Brief of Appellant at 6, *In re* Jobes, 108 N.J. 394, 529 A.2d 434 (1987) (No. 26,041) [hereinafter Appellant's Brief].

17 *Jobes*, 108 N.J. at 402, 529 A.2d at 438.

18 *Id.*

19 *Id.* Atrophy is a withering away of muscle tissue or some other part of the body which can be due to inadequate blood supply to that part or injury to the nerves which control the part. 1 SCHMIDT, *supra* note 10, at A-370.

20 *Jobes*, 108 N.J. at 402, 529 A.2d at 438. Initially, Mrs. Jobes received nutrition and hydration intravenously, and then through the use of a nasogastric tube. *Id.* Difficulties associated with the frequent removal and reinsertion of the nasogastric

ian, John H. Jobes, III, sought to have withdrawn, despite the nursing home's morally-grounded objections.[21]

Subsequently, Mr. Jobes petitioned the chancery division to order the removal of the j-tube.[22] On behalf of Mrs. Jobes, the court appointed Richard Kahn, Esq., as guardian ad litem.[23] Upon the conclusion of his inquiry, Mr. Kahn filed a report supporting Mr. Jobes' decision.[24] The nursing home then unsuccessfully moved for the appointment of a "life advocate."[25]

The trial court concluded that it had been proved by clear and convincing evidence that Mrs. Jobes was in a persistent vegetative state[26] with no chance of recovery, and that if she was competent, she would not want, given her condition, to be sustained by the j-tube.[27] Although the court authorized Mr. Jobes to implement withdrawal of the j-tube, it held that the nursing home could refuse to participate.[28] Both Mr. Jobes and the nursing home successfully petitioned the New Jersey Supreme Court for direct certification,[29] and relief was stayed pending determination of the appeal.[30]

Although there was conflicting medical testimony,[31] the

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tube required the surgical insertion of a gastrotomy tube into Mrs. Jobes' stomach in December of 1980. Respondent's Brief, *supra* note 10, at 9. In June of 1985, the failure of the gastrotomy tube necessitated the insertion of the jejunostomy tube. *Id.* Water and a pre-digested, synthetic nutritional formula were continuously pumped through this tube. *Jobes*, 108 N.J. at 402, 529 A.2d at 438.

21 *Jobes*, 108 N.J. at 400 & n.1, 529 A.2d at 437 & n.1. Mr. Jobes had been appointed the guardian of his wife during a prior malpractice action. *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *In re* Jobes, 210 N.J. Super. 543, 548, 510 A.2d 133, 136 (Ch. Div. 1986), *aff'd*, 108 N.J. 394, 529 A.2d 434 (1987).

26 Dr. Fred Plum, an expert on the vegetative state and the creator of that term, explained at trial:

> 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.

Jobes, 108 N.J. at 403, 529 A.2d at 438.

27 *Id.* at 400, 529 A.2d at 437.

28 *Id.* at 400-01, 529 A.2d at 437.

29 *In re* Jobes, 105 N.J. 532, 523 A.2d 173 (1986).

30 *Jobes*, 108 N.J. at 401, 529 A.2d at 437.

31 *See id.* at 402-07, 529 A.2d at 438-40. Neurologists Dr. Daniel J. Carlin and Dr. Henry R. Liss examined Mrs. Jobes in the nursing home on two occasions at the request of her husband and family. Respondent's Brief, *supra* note 10, at 7. They concluded that she was "in a chronic vegetative state characterized by a lack of

Supreme Court of New Jersey affirmed the trial court's finding that the evidence proved clearly and convincingly that Mrs. Jobes was in a persistent vegetative state.[32] The New Jersey Supreme Court observed, however, that since there was no clear and convincing proof of Mrs. Jobes' attitude toward her life-sustaining treatment, her family members were the proper parties to decide on her behalf, based on their best judgment as to how she would have decided under the circumstances.[33] Additionally, the court held that the nursing home could not discharge Mrs. Jobes if her family refused to consent to artificial feeding, because it would be very difficult to locate another health care facility that would accept her as a patient, and this would effectively deny Mrs. Jobes her right to self-determination.[34]

The right to die is not, in and of itself, a constitutional right.[35] At common law, attempting suicide was a crime,[36] and New Jersey law currently provides for the temporary hospitalization of a person who attempts suicide.[37] Courts have held, how-

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cognitive sapient awareness of self or surroundings and with no chance of her ever attaining a cognitive sapient state again." *Id.* At the request of the nursing home, Mrs. Jobes was examined by Dr. Maurice Victor and Dr. Alan H. Ropper. *Jobes*, 108 N.J. at 404, 529 A.2d at 439. Dr. Victor concluded that although Mrs. Jobes had sustained severe and irreversible brain damage, her condition could not be categorized as a persistent vegetative state. *Id.* at 405, 529 A.2d at 439. Dr. Ropper similarly concluded that her condition fell "slightly outside of [his] operational definition of the persistent vegetative state." *Id.* at 405-06, 529 A.2d at 439-40. Both of their conclusions were based upon an alleged elicitation of activities from Mrs. Jobes by verbal commands and reactions to stimuli. *See id.* Mrs. Jobes was then admitted to the New York Hospital-Cornell Medical Center where she was extensively examined over a four-day period by Dr. Fred Plum and Dr. David E. Levy. *Id.* at 402-04, 529 A.2d at 438-39. The findings of Drs. Plum and Levy confirmed the conclusions of Drs. Liss and Carlin. *See id.* While all of Mr. Jobes' medical experts observed the movements reported by Drs. Ropper and Victor, they concluded that these were reflexes or random movements, rather than volitional responses. *Id.* at 406, 529 A.2d at 440.

[32] *Id.* at 408, 529 A.2d at 441. Clear and convincing evidence is that which:

> produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the fact finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.

Id. at 407-08, 529 A.2d at 441. (quoting State v. Hodge, 95 N.J. 369, 376, 471 A.2d 389, 393 (1984) (citations omitted)).

[33] *Id.* at 420, 529 A.2d at 447.

[34] *Id.* at 425-26, 529 A.2d at 450.

[35] John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 580, 279 A.2d 670, 672 (1971).

[36] *Id.*

[37] *Id. See* N.J. STAT. ANN. § 30:4-26.3a (West 1981). From 1957 to 1972, attempted suicide was a disorderly persons offense. N.J. STAT. ANN. § 2A:170-25.6

ever, that the right to refuse life-sustaining medical treatment vests within other constitutional and common law rights.[38] Additionally, some states have enacted laws that recognize a qualified right to refuse treatment, even when the result of the refusal will be death.[39] In those states lacking both statutes and case law on the subject, the laws of informed consent[40] may provide grounds for refusing treatment.[41] Regardless of its basis, a patient's right to refuse treatment is not absolute.[42] Rather, it is limited by four generally recognized societal interests: the preservation of life, the prevention of suicide, the protection of the integrity of the medical profession, and the protection of innocent third parties.[43]

In 1971, the Supreme Court of New Jersey held in *John F. Kennedy Memorial Hospital v. Heston*[44] that a person may be compelled to submit to life-saving medical treatment.[45] Delores Heston, a twenty-two year old unmarried woman, was injured in an automobile accident and admitted to the hospital.[46] Doctors determined that death was imminent and that saving her life would require surgery and blood transfusions.[47] For religious reasons, consent to the transfusions was withheld.[48] The hospital then

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(West 1985). Prior to 1957, it was considered a crime under N.J. STAT. ANN. § 2A:85-1. *See also Heston*, 58 N.J. at 580, 279 A.2d at 672.

38 *See, e.g., In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976) (right to privacy); John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971) (freedom of religion). As of July 1985, 11 states have case law recognizing this right. SOCIETY FOR THE RIGHT TO DIE, THE PHYSICIAN AND THE HOPELESSLY ILL PATIENT 19 (1985).

39 SOCIETY FOR THE RIGHT TO DIE, *supra* note 38, at 19. As of July 1985, 35 states and the District of Columbia have enacted such laws. *Id.*

40 Informed consent is "[a] person's agreement to allow something to happen . . . that is based on a full disclosure of facts needed to make the decision intelligently." BLACK'S LAW DICTIONARY 701 (5th ed. 1979). Notably, medical treatment performed without consent is a tort. Perna v. Pirozzi, 92 N.J. 446, 461-62, 457 A.2d 431, 439 (1983).

41 SOCIETY FOR THE RIGHT TO DIE, *supra* note 38, at 19. *But see* John F. Kennedy Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (if consent is withheld, state's interest in preserving life may warrant appointment of guardian with authority to consent).

42 *In re* Conroy, 98 N.J. 321, 348, 486 A.2d 1209, 1223 (1985).

43 *Id.* at 348-49, 486 A.2d at 1223 (citations omitted).

44 58 N.J. 576, 279 A.2d 670 (1971).

45 *Id.* at 584-85, 279 A.2d at 674.

46 *Id.* at 578, 279 A.2d at 671.

47 *Id.*

48 *Id.* Miss Heston was a Jehovah's Witness, a faith which forbids blood transfusions. *Id.* Miss Heston recalled that she explicitly refused to accept a blood transfusion but the evidence presented at trial indicated that she was in shock upon arrival at the hospital, and shortly thereafter she became incoherent and disoriented. *Id.* Miss Heston's mother refused to consent on her behalf. *Id.*

successfully sought the court appointment of a guardian with express authority to consent to blood transfusions as needed.[49] Although she recovered and was subsequently discharged from the hospital, Miss Heston moved to vacate the court order.[50] After the trial court's denial of her motion but prior to argument in the appellate division, the New Jersey Supreme Court granted certification.[51]

The court held that although religious beliefs are absolute, an individual's conduct pursuant to those beliefs may be restrained.[52] In the case of a terminally ill patient, the court maintained that unless the medical option was itself laden with grave risk, a decision to let the illness run its fatal course would conflict with the state's interests in preserving life and preventing suicide.[53] The court also noted that the hospital and staff had an interest in pursuing their responsibilities in accordance with their professional standards and permitting them to do so furthered the state's interest in preserving life.[54] Thus, the court concluded that since the dangers associated with the medical procedure were minimal in this case, the interests of the state, hospital and staff warranted the transfusion over the patient's objections.[55]

In 1976, the New Jersey Supreme Court expanded the principles espoused by the *Heston* court in the landmark case of *In re Quinlan*.[56] In that case, Joseph Quinlan sought to be appointed the guardian of his twenty-one year old daughter Karen, who was in a persistent vegetative state.[57] He requested the express authority to terminate the use of the respirator that was maintaining her vital functions.[58] Mr. Quinlan urged that through the doctrine of substituted judgment, the court could effectuate Karen's best interests by granting the relief he sought.[59] He also claimed

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49 *Id.* at 579, 279 A.2d at 671.

50 *Id.*

51 *Id.* Although the controversy was moot, the Supreme Court of New Jersey determined that the public interest nonetheless warranted resolution of the issue. *Id.* (citation omitted).

52 *Id.* at 580, 279 A.2d at 672 (citations omitted).

53 *See id.* at 582, 279 A.2d at 673.

54 *Id.* at 583, 279 A.2d at 673.

55 *See id.* at 582, 584-85, 279 A.2d at 673, 674.

56 70 N.J. 10, 355 A.2d 647 (1976), *cert. denied*, 429 U.S. 922 (1976).

57 *In re* Quinlan, 137 N.J. Super. 227, 236, 348 A.2d 801, 806 (Ch. Div. 1975), *rev'd*, 70 N.J. 10, 355 A.2d 647 (1976). For a definition of "persistent vegetative state," see *supra* note 26.

58 *Quinlan*, 137 N.J. Super. at 236, 348 A.2d at 806.

59 *Id.* at 251, 348 A.2d at 814.

that Karen had, by virtue of her constitutional right to privacy, a right to self-determination that would encompass a decision to cease the continuance of extraordinary life-sustaining measures.[60] The defendants, relying on *Heston*, asserted that there is no constitutional right to die and cited the state's interests in preserving life and protecting the integrity of the medical profession.[61] They also maintained that by all medical and legal standards Karen was alive, and to disconnect the respirator would be homicide and euthanasia.[62]

In a unanimous opinion authored by Chief Justice Hughes, the court held that the constitutional right to privacy encompassed a decision to withdraw life-sustaining treatment under the circumstances.[63] The court distinguished *Heston* by stating that Delores Heston was capable of resuming a normal and healthy life, while Karen Quinlan was not.[64] Thus, the court concluded that there was no state interest sufficient to compel Karen to submit to medical treatment that would not heal her, but merely prolong her slow deterioration and inevitable death.[65] Because Karen was incompetent and her supposed choice regarding treatment could not be determined, the court reasoned that the only way to effectively preserve her right of privacy would be to permit her guardian to exercise that right on her behalf.[66]

Since the focal point of the decision was the prognosis regarding the patient's probable return to a cognitive and sapient state, the court sought to relieve treating physicians from self-protection concerns that might inhibit the free exercise of their

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60 *Id.* As additional grounds for withdrawing treatment, Mr. Quinlan asserted the constitutional rights of freedom of religion and protection against cruel and unusual punishment. *Id.* The court dismissed both arguments. *Quinlan*, 70 N.J. at 35-38, 355 A.2d at 661-62.

61 *See Quinlan*, 137 N.J. Super. at 251, 348 A.2d at 814. The defendants were Karen's doctors, the hospital, the county prosecutor, her guardian ad litem and the State of New Jersey. *Quinlan*, 70 N.J. at 18-19, 355 A.2d at 651.

62 *Quinlan*, 137 N.J. Super. at 251, 348 A.2d at 814.

63 *Quinlan*, 70 N.J. at 40, 355 A.2d at 663 (discussing Griswold v. Connecticut, 381 U.S. 479 (1965)).

64 *Id.* at 39, 355 A.2d at 663.

65 *See id.* at 41, 355 A.2d at 664. The court stated, "[w]e think that the [s]tate's interest *contra* weakens and the individual's right to privacy grows as the degree of bodily invasion [associated with the medical treatment] increases and the prognosis dims. Ultimately there comes a point at which the individual's rights overcome the [s]tate interest." *Id.* at 41, 355 A.2d at 664.

66 *Id.* The court held that the basis of the decision should be whether, in the best judgment of the family and guardian, Karen would have exercised the right under these circumstances. *Id.*

medical judgments in these cases.[67] As such, the court held that once the attending physicians have concluded that there is no reasonable hope for the patient's return to a cognitive, sapient life and that withdrawal of life-sustaining treatment is appropriate, they should notify the hospital's ethics committee[68] or similar consultative body.[69] If the ethics committee concurs in the prognosis and the treating physicians, family and guardian of the patient agree treatment should be withdrawn, the court concluded that the decision may be implemented without liability to any participant.[70]

The principles articulated in *Quinlan* were applied to a different situation in the 1978 case of *In re Quackenbush*.[71] Robert Quackenbush was a seventy-two year old patient at Morristown Memorial Hospital.[72] As a result of an advanced gangrenous condition, doctors determined that amputation of both legs and other medical treatment were required to sustain his life.[73] When Quackenbush refused to consent, the hospital petitioned the Morris County Court to appoint a guardian with the authority to consent to the operation.[74] The hospital, relying on *Heston*, argued that withholding consent was tantamount to suicide and asserted that the state had a compelling interest in preventing a patient from refusing vital medical treatment.[75] Relying on *Quinlan*, Quackenbush asserted his rights to privacy and self-

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67 *Id.* at 49, 51, 355 A.2d at 668, 669.

68 The court observed that an ethics committee, consisting of doctors, theologians, social workers, and attorneys, would provide a forum for input and dialogue to review the circumstances of ethical dilemma in individual situations. *Id.* at 49, 355 A.2d at 668 (quoting Teel, *The Physician's Dilemma: A Doctor's View: What the Law Should Be*, 27 BAYLOR L. REV. 6, 8-9 (1975)).

69 *Id.* at 54, 355 A.2d at 671. The court also granted Mr. Quinlan the authority to replace Karen's attending physicians with others that would share his view regarding termination of treatment. *See id.*

70 *Id.*

71 156 N.J. Super. 282, 383 A.2d 785 (Morris County Ct. 1978).

72 *Id.* at 283, 383 A.2d at 786.

73 *Id.*

74 *Id.* Initially, the hospital alleged that Quackenbush was mentally incompetent and petitioned for the appointment of a guardian. *Id.* After the court appointed a guardian *ad litem*, Quackenbush filed an answer in which he asserted his competency. *Id.* After hearing testimony on the issue, the court concluded that Quackenbush was competent. *Id.* at 288, 383 A.2d at 788.

75 *Id.*, 383 A.2d at 788-789 (citing John F. Kennedy Memorial Hosp. v Heston, 58 N.J. 576, 279 A.2d 670 (1971)). The court noted that "[t]he probability of recovery from the amputation [was] good and the risks involved were limited." *Id.* at 286, 383 A.2d at 787.

determination.[76]

The court distinguished *Heston* in the same way as the *Quinlan* court, stating that "Mr. Quackenbush [was] confronted with a significant bodily invasion and [did] not have the long life and vibrant health potential" of Delores Heston.[77] The court observed that the *Quinlan* decision suggested the need for both a dim prognosis and a significant bodily invasion before an individual's right to privacy would overcome the state's interest in preserving life.[78] The court concluded that the degree of bodily invasion in this case was so great that the state's interest in preserving life had to yield to Mr. Quackenbush's privacy interest, regardless of the lack of a dim prognosis.[79]

In 1985, the case of *In re Conroy*,[80] the Supreme Court of New Jersey confronted the issue of whether life-sustaining treatment may be withdrawn from an institutionalized, incompetent, elderly patient with a limited life expectancy and severe and irreversible mental and physical impairments.[81] Claire Conroy was an eighty-four year old, bedridden, nursing home resident who suffered from organic brain syndrome, arteriosclerotic heart disease, diabetes mellitus, hypertension, a gangrenous leg, and severe bed sores.[82] She was incontinent and had an eye condition that required irrigation.[83] Ms. Conroy could not speak, and when her ability to swallow deteriorated to the point where she was unable to consume sufficient quantities of food and water to sustain herself, a nasogastric feeding tube was inserted.[84] Although her intellectual capacity was severely and permanently impaired, she could interact with her environment to a very limited degree and she was not comatose, brain dead or in a persistent vegetative state.[85] Thomas C. Whittemore, Conroy's guardian,[86] nephew

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76 *Id.* at 288, 383 A.2d at 789 (citing *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976)).

77 *Id.* at 288-290, 383 A.2d at 789 (discussing *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976); John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971)).

78 *Id.* at 290, 383 A.2d at 789 (citing *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976)).

79 *Id.*

80 98 N.J. 321, 486 A.2d 1209 (1985).

81 *Id.* at 335, 486 A.2d at 1216.

82 *Id.* at 335, 336, 337, 486 A.2d at 1216, 1217.

83 *Id.* at 337, 486 A.2d at 1217.

84 *Id.* at 337, 486 A.2d at 1216.

85 *See id.* at 337-38, 486 A.2d at 1217. One doctor who examined Ms. Conroy "characterized her as awake, but . . . severely demented, . . . unable to respond to verbal stimuli," and incapable of higher functioning or consciousness. *Id.* at 338,

and only living relative, petitioned the court for authorization to remove the feeding tube.[87] Conroy's guardian ad litem opposed the petition.[88]

The court held that Conroy's common law right to self-determination would, in these circumstances, embrace a decision to have the feeding tube withdrawn and would not be outweighed by any countervailing societal interest in preservation of life or protection of the integrity of the medical profession.[89] The court stated that the goal of substitute decisionmaking for an incompetent patient is to effectuate what the patient, if competent, would have decided.[90] In view of this, the court articulated a subjective standard: "life-sustaining treatment may be withheld or withdrawn from an incompetent patient when it is clear that the particular patient would have refused the treatment under the circumstances involved."[91]

The court recognized that in some cases the patient's desires

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486 A.2d at 1217. In contrast, another physician testified that although Ms. Conroy was unaware and confused, "she respond[ed] somehow." *Id.*

86 *Id.* at 335-36, 486 A.2d at 1216. Mr. Whittemore was appointed Ms. Conroy's guardian in 1979 when she became periodically confused due to an organic brain syndrome. *Id.* at 336, 486 A.2d at 1216.

87 *Id.* at 335-36, 486 A.2d at 1216. Although doctors testified that if the tube was removed, a painful death would result in approximately one week, they could not agree upon whether Ms. Conroy was able to experience pain. *Id.* at 338, 486 A.2d at 1217.

88 *Id.* at 335, 486 A.2d at 1216. On January 26, 1983, John J. DeLaney, Jr. was appointed Ms. Conroy's guardian *ad litem*. *In re* Conroy, 188 N.J. Super. 523, 526, 457 A.2d 1232, 1234 (Ch. Div. 1983).

89 *Conroy*, 98 N.J. at 355, 486 A.2d at 1226. The court characterized the essence of the right of self-determination as follows: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . . ." *Id.* at 346, 486 A.2d at 1222 (quoting Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914). The court expressly declined to determine whether the constitutional right of privacy would encompass a decision to withdraw the feeding tube. *Id.* at 348, 486 A.2d at 1223. *Accord In re* Storar, 52 N.Y.2d 363, 376-77, 420 N.E.2d 64, 70, 438 N.Y.S. 2d 266, 272-73, *cert. denied*, 454 U.S. 858 (1981). *Cf. In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976), *cert. denied*, 429 U.S. 922 (1976); *In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785 (1978).

90 *Id.* at 360, 486 A.2d at 1229. The court stated that "[i]deally, both aspects of the patient's right to bodily integrity—the right to consent to medical intervention and the right to refuse it—should be repeated. *Id.*

91 *Id.* The court overruled that portion of its decision in *Quinlan* that disregarded evidence of the patient's statements concerning prolonging the lives of those who were terminally ill. *Id.* at 362, 486 A.2d at 1230. Rather, the court held that all types of evidence bearing upon the patient's intent were appropriate considerations regarding what treatment the patient would have desired including written documents, oral directives, reactions to the medical treatment of others, religious beliefs, and consistent behavior patterns regarding prior medical care. *Id.* at 361-62, 486 A.2d at 1229-30.

cannot be clearly determined.[92] For such cases, the court posited two "best interests" tests, the first of which was a "limited-objective" test.[93] Under this test, medical treatment may be withdrawn or withheld from an incompetent patient if "there is some trustworthy evidence that the patient would have refused the treatment, and the decision-maker is satisfied that it is clear that the burdens of the patient's continued life with the treatment outweigh the benefits of that life for him.[94] The second "best interests" test, a pure-objective standard, would be used when there is no evidence that the patient would have refused treatment.[95] Under this test, treatment may be withdrawn or withheld if the burdens of life with treatment significantly outweigh life's benefits and administering life-sustaining treatment would cause the patient severe, recurring and inhumane suffering.[96]

The court stressed that for any of the tests to apply, there must be clear medical evidence that the patient is similar to Claire Conroy: "an elderly, incompetent nursing-home resident with permanent and severe physical and mental impairments and a life expectancy of approximately one year or less."[97] Recognizing the particular vulnerability of incompetent, elderly nursing home residents, the court required that the Office of the Ombudsman for the Institutionalized Elderly be notified prior to the contemplated action, and that the ombudsman, after performing an investigation, concur in the decision to withdraw or

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92 *Id.* at 364, 486 A.2d at 1231. The court recognized that in such cases the patient's right to self-determination could not realistically provide the basis for substituted decisionmaking. *Id.* Since incompetents are wards of the state, the court noted that the state's *parens patriae* power would allow the court to authorize a guardian "to withhold or withdraw life-sustaining treatment from an incompetent patient if it is manifest that such action would further the patient's best interests." *Id.* at 364-65, 486 A.2d at 1231.

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

94 *Id.*, 486 A.2d at 1232. The court clarified this further by stating:

> By this we mean that the patient is suffering, and will continue to suffer throughout the expected duration of his life, unavoidable pain, and that the net burdens of his prolonged life (the pain and suffering of his life with the treatment less the amount and duration of pain that the patient would likely experience if the treatment were withdrawn) markedly outweigh any physical pleasure, emotional enjoyment, or intellectual satisfaction that the patient may still be able to derive from life.

Id.

95 *Id.* at 366, 486 A.2d at 1232.

96 *Id.* The court added that "even in the context of severe pain, life-sustaining treatment should not be withdrawn from an incompetent patient who had previously expressed a wish to be kept alive in spite of any pain that he might experience." *Id.* at 366-67, 486 A.2d at 1232.

97 *Id.* at 363, 365, 486 A.2d at 1231-32.

withhold treatment from the patient.[98] In Ms. Conroy's case, the court concluded that there was insufficient evidence to permit withdrawal of the feeding tube under any of the tests.[99]

Despite the court's restriction of its holding to patients who are similar to Ms. Conroy, the chancery division subsequently applied the *Conroy* tests in distinguishable cases.[100] *In re Visbeck*[101] concerned the surgical implantation of a feeding tube into the stomach of an incompetent, ninety year-old, hospitalized woman who had suffered a severe stroke.[102] The trial court observed that although *Conroy* was not applicable to hospitalized patients, "[a] New Jersey trial court judge is obliged to give close attention to the views expressed by the [New Jersey] Supreme Court in *Conroy* and to reflect upon them conscientiously in deciding cases which are broadly similar."[103] Finding none of the *Conroy* tests satisfied, the court held that the feeding tube should be implanted.[104]

Approximately two months after *Visbeck*, the *Conroy* holding was again applied expansively in the case of *In re Clark*.[105]

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98 *Id.* at 381, 383-84, 486 A.2d at 1240, 1241-42. Pursuant to N.J. STAT. ANN. § 52:27G-7.2a (West 1986), the court stated that the ombudsman would respond to the notification as a potential abuse of the elderly, institutionalized patient requiring an investigation and report within 24 hours to the Commissioner of Human Services and the facility's regulating agency. *Id.*

99 *Id.* 385-87, 486 A.2d at 1242-43. The court did not remand the case for further proceedings because Claire Conroy had passed away. *Id.* at 388, 486 A.2d at 1244. Justice Handler concurred in the majority's articulation of the moral dilemma which faced the court, but dissented from its solution. *Id.* at 389, 486 A.2d at 1244 (Handler, J., concurring in part and dissenting in part). He maintained that by giving determinative weight to personal pain, the best interests tests negated many other relevant factors, and therefore denied relief to people who may strongly object to an artificial prolongation of life despite the lack of pain. *Id.* at 395, 486 A.2d at 1248 (Handler, J., concurring in part and dissenting in part). He contended that a more appropriate standard, would consider the factors that shape moral values and weigh and balance these factors from the patient's point of view. *Id.* at 399, 486 A.2d at 1250 (Handler, J., concurring in part and dissenting in part).

100 *In re* Farrell, 212 N.J. Super. 294, 514 A.2d 1342 (Ch. Div. 1986), *aff'd*, 108 N.J. 335, 529 A.2d 404 (1987); *In re* Clark, 210 N.J. Super. 548, 510 A.2d 136 (Ch. Div. 1986); *In re* Visbeck, 210 N.J. Super. 527, 510 A.2d 125 (Ch. Div. 1986).

101 210 N.J. Super. 527, 510 A.2d 125 (Ch. Div. 1986).

102 *Id.* at 529, 510 A.2d at 126. "As a result of the stroke, Mrs. Visbeck lost much of her mental capacity, was paralyzed on the right side, was unable to speak, became incontinent . . . could not walk and lost the ability to swallow food or fluids." *Id.* at 530, 510 A.2d at 126-27. The litigation arose when Mrs. Visbeck's son refused to consent to the surgical implantation of a life-sustaining feeding tube. *Id.* at 531, 510 A.2d at 127.

103 *Id.* at 533-34, 510 A.2d at 128.

104 *See id.* at 534-42, 510 A.2d at 129-33.

105 210 N.J. Super. 548, 510 A.2d 136 (Ch. Div. 1986).

George Clark was a forty-five year old, incompetent, hospitalized man who suffered from organic brain damage and partial paralysis due to a stroke.[106] When Clark was no longer able to swallow food and water, the hospital sought authorization to perform a life-saving enterostomy.[107] Unlike the individuals in *Conroy* and *Visbeck*, Mr. Clark had an indefinite life-expectancy with the proposed treatment because his other medical problems were not life-threatening.[108] The trial court acknowledged that Mr. Clark's medical condition did "not place him squarely within the *Quinlan* or the *Conroy* categories."[109] Nonetheless, the court determined that the situations of Mr. Clark and Mrs. Conroy were sufficiently comparable to justify the application of the *Conroy* standards.[110] Finding none of these tests satisfied, the court held that the enterostomy should be performed.[111]

Shortly after *Clark*, the inauspicious situation of Nancy Ellen Jobes arose.[112] Since Mrs. Jobes was under the age of sixty, the

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106 *Id.* at 550, 510 A.2d at 137. Although his cognitive level was very low, Mr. Clark was not comatose. *Id.*

107 *Id.* An enterostomy is a permanent, surgical opening of the intestine through the abdominal wall, similar to a colostomy. SCHMIDT, *supra* note 10, at E-92.

108 *Clark*, 210 N.J. Super. at 550, 510 A.2d at 137.

109 *Id.* at 553, 510 A.2d at 138.

110 *Id.* at 553-54, 510 A.2d at 139 (citing *In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985); *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976)).

111 *Id.* at 566, 510 A.2d at 146.

112 Decided the same day as *In re* Jobes were the cases of *In re* Farrell, 108 N.J. 335, 529 A.2d 404 (1987) and *In re* Peter, 108 N.J. 365, 529 A.2d 419 (1987). *Farrell* concerned the right of a competent, thirty-seven year-old, terminally-ill patient living at home to refuse life-sustaining treatment. *Farrell*, 108 N.J. at 341, 529 A.2d at 407. The court noted that although *Quinlan* and *Conroy* concerned incompetent, institutionalized patients, those cases recognized a competent patient's rights, subject to countervailing societal interest, to give an informed refusal to medical treatment. *Id.* at 344, 529 A.2d at 408 (citing *In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985); *In re* Quinlan, 70 N.J. 101, 355 A.2d 647 (1976)). The court held that those state interests, as interpreted in *Conroy*, did not outweigh Mrs. Farrell's rights of privacy and self-determination. *Id.* at 348-49, 529 A.2d at 410-11 (citing *In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985)). To assist in future cases, the court set forth the following procedure to apply to competent, terminally-ill patients, living at home who chose to forego life-sustaining treatment: first, it must be shown that the patient is competent, fully informed regarding the prognosis, the risk of foregoing treatment, and alternate courses of treatment; second, it must be determined that the patient's decision was voluntarily made; third, this finding must be confirmed by two non-attending physicians; lastly, the patient's right must be balanced against the four countervailing state interests. *Id.* at 353-54, 356, 529 A.2d at 413, 415.

The *Peter* case involved a sixty-five year old resident of a nursing home in a persistent vegetative state but who did not have a limited life expectancy. *Peter*, 108 N.J. at 370, 529 A.2d at 421-22. Ms. Peter's friend and guardian sought to remove her life-sustaining nasogastric tube. *Id.* at 370-71, 529 A.2d at 422. The court held

ombudsman for the Institutionalized Elderly lacked jurisdiction to consider her case,[113] and unlike Claire Conroy, Mrs. Jobes had an indefinite life-expectancy.[114] Nonetheless, the trial court determined that the evidence showed clearly and convincingly that Mrs. Jobes would have refused treatment under the circumstances, and thus held that the *Conroy* limited-objective test had been satisfied and authorized the removal of the feeding tube.[115] The Supreme Court of New Jersey affirmed the trial court's authorization, but did so for substantially different reasons.[116]

Writing for the *Jobes* majority, Justice Garibaldi noted that cases involving patients in a persistent vegetative state presented unique decisionmaking problems.[117] Thus, the majority asserted that these cases had to be distinguished from cases involving other types of patients.[118] Accordingly, the court held that unless a persistently vegetative patient had clearly expressed his or her intentions regarding treatment,[119] *Quinlan* should provide the guiding principles.[120]

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that the evidence, including Ms. Peter's execution of a durable power of attorney authorizing her friend to make medical decisions on her behalf, satisfied the *Conroy* subjective test and permitted withdrawal of the feeding tube. *Id.* at 378, 380, 529 A.2d at 426, 427. The court also held that the *Conroy* subjective test was "applicable in every surrogate-refusal-of-treatment case, regardless of the patient's medical condition or life-expectancy." *Id.* at 377, 529 A.2d at 425. The court asserted, however, that the *Conroy* limited-objective and pure-objective tests should not be applied to cases involving patients in persistent vegetative states because such patients "do not experience any of the benefits or burdens that the *Conroy* balancing tests are intended or able to appraise." *Id.* at 376-77, 529 A.2d at 425. The court noted that if a hospitalized patient in a persistent vegetative state has not clearly indicated his or her intentions regarding treatment, the *Quinlan* procedures should be applied. *Id.* at 377, 529 A.2d at 425.

113 *In re* Jobes, 108 N.J. 394, 422, 529 A.2d 434, 448 (1987).

114 *See id.* at 454, 529 A.2d at 465 (O'Hern, J., dissenting).

115 *See id.* at 400, 529 A.2d at 437; Appellant's Brief, *supra* note 16, at 18.

116 *See Jobes*, 108 N.J. at 428, 529 A.2d at 452.

117 *Id.* at 413, 529 A.2d at 443. Chief Justice Wilentz and Justice Stein joined in Justice Garibaldi's opinion. *Id.* at 454, 529 A.2d at 465. Justice Clifford joined in the separate concurring opinions of Justice Handler and Pollock, and Justice O'Hern filed a dissenting opinion. *Id.*

118 *Id.* at 413, 529 A.2d at 443.

119 If a patient in a persistent vegetative state had clearly expressed his or her intentions regarding treatment, the *Conroy* subjective test should be applied. *See supra* note 112 (discussing *In re* Peter, 108 N.J. 365, 529 A.2d 419 (1987)).

120 *See Jobes*, 108 N.J. at 413, 529 A.2d at 443. Although *Quinlan* involved the removal of a respirator, the court affirmed the position taken in *Conroy* that there is no meaningful distinction between the withdrawal of a nasogastric feeding tube and withdrawal of other life-sustaining medical treatment. *Id.* at 413 n.9, 529 A.2d at 444 n.9. Notably, however, Mr. Quinlan never sought to remove Karen's feeding tube. *In re* Conroy, 190 N.J. Super. 453, 462 n.5, 464 A.2d, 303, 307 n.5 (App. Div. 1983) (citing Ramsey, *Prolonged Dying: Not Medically Indicated*, 6 HASTINGS CTR. REP.

The court affirmed its determination in *Quinlan* that the only way to preserve the rights of incompetent patients to decline treatment would be to permit surrogate decisionmakers to render their best judgment as to what the patients would have wanted under the circumstances.[121] The court emphasized as it had in *Quinlan*, "that a patient's family members [are] the proper parties to make a substituted medical judgment," because they are better acquainted with the patient's general opinions and medical attitudes.[122] The court asserted that the patient's parents, spouses, siblings or adult children would typically be close enough to effect substituted judgment.[123] The court acknowledged, however, that on some occasions the patient may not have close family, or the patient's family may not act in the patient's best interest.[124] In these cases, the court asserted that a guardian must be appointed prior to the termination of life-supporting treatment.[125] Because Mrs. Jobes was fortunate enough to have a caring family, the court asserted that there was no reason to disturb their decision.[126]

The *Jobes* majority noted the *Quinlan* court's requirement that a hospital prognosis committee must concur in the patient's prognosis before the withdrawal of life-sustaining treatment.[127] Although Mrs. Jobes was a resident of a nursing home rather than a hospital patient, the majority stated that location should not affect the patient's right to self-determination.[128] Therefore, the court reasoned that in the case of a non-hospitalized, non-elderly, persistently vegetative patient, the concurrence of two independent neurolgical physicians in the patient's prognosis would effectively substitute for the opinion of the hospital prog-

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14 (1976)). When asked if he would want the tube removed, he reportedly stated in amazement, "Oh no. That is her nourishment." *Id.*

121 *Jobes*, 108 N.J. at 414, 529 A.2d at 444 (quoting *In re* Quinlan, 70 N.J. 10, 41, 355 A.2d 647, 664 (1976)).

122 *Id.* at 415, 529 A.2d at 444-45.

123 *Id.* at 419, 529 A.2d at 447. The court noted that a distant relative may "be treated as a close and caring family member" if health care professionals find that that person functions as part of the patient's nuclear family. *Id.*

124 *Jobes*, 108 N.J. at 419, 529 A.2d at 447. The assessment as to the improper motivations of a patient's family members is to be made by the health care professionals, who will not be held liable for incorrect determinations made in good faith. *Id.*

125 *Id.*

126 *Id.* at 419-20, 529 A.2d at 447.

127 *Id.* at 420-21, 529 A.2d at 447-48.

128 *Id.* at 421, 529 A.2d at 448.

nosis committee.[129] This requirement, the court noted, would maintain the procedural safeguards against inappropriate withdrawal of treatment established by *Quinlan*, without unduly burdening the patient's rights to privacy and self-determination.[130] In the instant case, the court concluded that the testimony of Mr. Jobes' neurological experts provided the required concurrence in the prognosis that Mrs. Jobes was in an irreversibly vegetative condition.[131]

The court also ruled that because the nursing home had failed to inform the Jobes family of its policy not to participate in the withholding or withdrawal of artificial feeding until the family requested the removal of the j-tube, the nursing home could not discharge Mrs. Jobes if her family refused to consent to artificial feeding.[132] The majority reasoned that in light of the difficulty of finding another facility to accept Mrs. Jobes, allowing the nursing home to enforce its policy would frustate Mrs. Jobes' right to self-determination.[133]

In a separate opinion, Justice Handler concurred in both the majority's reasoning and result.[134] The justice expressed concern, however, over the "inevitable uncertainty" surrounding the use of self-determination as the basis for a medical treatment decision on behalf of an incompetent.[135] Justice Handler maintained that the court should provide guidelines for decisionmaking when excessive doubt rendered the self-determination rationale illusory.[136] Justice Handler suggested that a court should consult with the persons frequently involved in decisions regarding life and death so that a "best interest" or "objective" standard for decisionmaking could be developed for

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129 *Id.* at 421-22, 529 A.2d at 448. For patients at least sixty years old, the Office of the Ombudsman for the Institutionalized Elderly must concur in the decision to terminate life support. *See Conroy*, 98 N.J. at 379-84, 486 A.2d at 1239-42. *See also* N.J. STAT. ANN. 52:27G-1 to -G16 (West 1986).

130 *Jobes*, 108 N.J. at 427, 529 A.2d at 451.

131 *Id.* at 409, 529 A.2d at 441.

132 *Id.* at 425, 529 A.2d at 450. The court specifically declined to decide whether a nursing home that gives notice of its policy at the time of the patient's admission would be permitted to enforce such a policy. *Id.*

133 *Id.*

134 *Id.* at 428, 529 A.2d at 452 (Handler, J., concurring).

135 *Id.* at 436-37, 529 A.2d at 455-56 (Handler, J., concurring).

136 *Id.* at 437, 529 A.2d at 456 (Handler, J., concurring). When such doubt exists, the self-determination approach is an "imaginative effort" on the part of the decisionmaker, expressing "concerns and sympathy for the patient, rather than actually divining that person's unknown wishes." *Id.* at 439, 529 A.2d at 457 (Handler, J., concurring) (quoting Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 U. MICH. J.L. REF. 933, 972-73 (1985)).

those situations in which a self-determination standard is inappropriate.[137]

Justice Pollock authored a separate opinion in which he concurred with the opinions of the majority and Justice Handler.[138] Justice Pollock urged that health care facilities make available the services of institutional ethics committees to provide advice to patients, families and physicians who are trying to make educated and informed treatment decisions.[139] The ethics committee, as envisioned by Justice Pollock, differed from the *Quinlan* prognosis committee in that the former's function would be to educate and advise on all aspects of terminating life-sustaining treatment, as opposed to only reviewing the patient's prognosis.[140]

In a dissenting opinion, Justice O'Hern criticized the majority for espousing principles that were "based upon the intact family status" and maintained that the court should instead adopt principles that are applicable in all circumstances.[141] Concerned with compelling health-care professionals to act contrary to their medical standards, Justice O'Hern advanced that the court may frustrate the privacy interests of these professionals.[142] Lastly, Justice O'Hern maintained that the majority's holding was contrary to *Conroy* in that the evidence did not satisfy any of the *Conroy* tests.[143]

Recognizing the dangers of an overbroad ruling, the court has attempted to confine its right-to-die decisions to narrowly drawn factual circumstances.[144] This inevitably results in cases whose varying factual circumstances preclude the application of established procedural safeguards to the patients involved. Such was the case of Nancy Ellen Jobes, whose location and age did not afford her the protections established in *Quinlan* and *Conroy*.[145] Building primarily upon the foundation laid in *Quinlan*,

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137 *Id.* at 444-45, 529 A.2d at 460 (Handler, J., concurring). Justice Handler indicated that such persons should include doctors and health care professionals, government and institutional representatives, such as persons with ethical and religious training. *Id.* at 444, 529 A.2d at 460.

138 *Id.* at 447, 529 A.2d at 461 (Pollock, J., concurring).

139 *Id.* at 450, 529 A.2d at 463 (Pollock, J., concurring).

140 *See id.* at 450-53, 529 A.2d at 463-64 (Pollock, J., concurring).

141 *Id.* at 453, 529 A.2d at 464 (O'Hern, J., dissenting).

142 *Id.* Justice O'Hern stated that the *Quinlan* standard, which permitted the nonconsenting physician to withdraw from the case, was more appropriate. *Id.* at 453-54, 529 A.2d at 464-65 (O'Hern, J., dissenting) (citing *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976)).

143 *Id.* at 454, 529 A.2d at 465 (O'Hern, J., dissenting).

144 *See In re* Conroy, 98 N.J. 321, 343-44, 486 A.2d 1209, 1220 (1985).

145 *See Jobes*, 108 N.J. at 420-22, 529 A.2d at 447-48.

the court observed that patients like Mrs. Jobes would be adequately protected by requiring the concurrence of two independent physicians in the patient's prognosis before life-sustaining treatment may be withheld or withdrawn.[146]

While this may prevent a life-support decision based upon a premature or inaccurate prognosis, it does not prevent a life-support decision based upon the improper motivations of the surrogate decisionmaker. The court did not provide for independent review of the surrogate's judgment as to what the patient would have decided under the circumstances. Though the court required that a guardian should be appointed when health care professionals suspect improper motivations, the court offered no guidance as to how such determinations are to be made. Rather, the court simply stated that health care professionals shall not be liable for an incorrect determination made in good faith. Such a standard hardly protects the incompetent patient, since a surrogate decisionmaker is unlikely to objectively manifest any impropriety in the presence of the treating professionals. Additionally, the court has apparently overlooked the possibility of a self-serving decision on behalf of the health care professional. Such considerations do not seem necessary in view of all the loving, caring people who surrounded Nancy Ellen Jobes.[147] As Justice O'Hern recognized, however, principles of law should not be developed upon the assumption of an intact family status.[148]

There has also been concern that the *Jobes* decision is another step along the "slippery slope."[149] Such arguments maintain that permitting the termination of life-supporting treatment from patients who cannot speak for themselves may eventually lead to the involuntary euthanasia of the senile, the insane and other physically and mentally defective patients, carried out under the euphemistic ruse of medical treatment that is in the patient's best interest.[150] This criticism, however, seems unjustified in light of the court's distinction between passively submitting to a fatal illness and actively hastening death.[151] Additionally, since the holding in *Jobes* was premised upon the

146 *Id.* at 422, 529 A.2d at 448.

147 *Id.* at 419-20, 529 A.2d at 447.

148 *Id.* at 453, 529 A.2d at 464 (O'Hern, J., dissenting).

149 *See* Brief and Appendix on Behalf of the National Association of Prolife Nurses Amicus Curiae at 6-7, *In re* Jobes, 108 N.J. 394, 529 A.2d 434 (1987) (No. 26,117).

150 *See id.*

151 *In re* Quinlan, 70 N.J. at 43, 355 A.2d at 665.

patient's rights to self-determination and privacy, the involuntary euthanasia of a patient would have to be justified in similar terms, and the court has repeatedly stated that there is no right to commit suicide.[152]

In its recent decisions, the Supreme Court of New Jersey has demonstrated its unwillingness to recognize a legal difference between artificial feeding and other types of life-sustaining medical treatment.[153] Nonetheless, some proposed legislation would require that life-sustaining nourishment and hydration never be withheld or withdrawn from any patient, competent or incompetent, if the result of such action would be death by starvation or dehydration.[154] The bills also provide that since food and water are essential human needs, they should be excluded from the definition of life-sustaining medical treatment.[155]

Although the court has invited legislation in this area,[156] it seems that such laws would be invalidated as unconstitutional limitations on the right to privacy as recognized by the New Jersey and federal constitutions. Additionally, in attempting to strike food and water from the definition of life-sustaining medical treatment, these bills focus on the incorrect aspect of artificial feeding. Food and water in and of themselves are not medical treatment. Similarly, air in and of itself is not medical treatment, and it is certainly as essential to human life as food or water. The *Quinlan* court, however, determined that forcing oxygen into a patient's lungs via a respirator was a medical procedure subject to patient refusal. It is thus difficult to discern a medical or legal basis for maintaining that the passage of liquids and pre-digested nutrients directly into the jejunum of the patient's small intestine via a surgically implanted plastic tube is not medical treatment subject to the patient's refusal.

The goals of medical treatment may be either curative (to heal or restore health), ameliorative (to prevent additional deterioration), or palliative (to relieve pain and provide comfort).[157]

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152 *E.g.*, John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 580, 279 A.2d 670, 672 (1971).

153 *In re* Jobes, 108 N.J. 394, 413 n.9, 529 A.2d 434, 444 n.9.

154 *See* N.J. S.2445, 202d Leg., 1st Sess. (1986); N.J. A.2830, 202d Leg., 1st Sess., (1986); N.J. S.3439, 201st Leg., 2nd Sess., (1985) (reintroduced in the 1986 Session at S.1409).

155 *See supra* note 154 and accompanying text.

156 *Jobes*, 108 N.J. at 428, 529 A.2d at 452.

157 Brief for Amicus Curiae American College of Physicians New Jersey Chapter at 16, *In re* Jobes, 108 N.J. 394, 529 A.2d 434 (1987) (No. 26,041) [hereinafter Physician's Brief].

In the context of artificial feeding, these goals may be to preserve a patient's life while attempting to identify or cure a reversible medical condition, to sustain patients with incurable feeding problems when they so wish, or to alleviate hunger or thirst in patients experiencing those symptoms.[158] In the case of Mrs. Jobes, the medical testimony showed that she was in a persistent vegetative state with no hope of recovery.[159] Neurological evidence has shown that persistently vegetative patients, by the nature of their disease, are not capable of experiencing pain, hunger or thirst.[160] Thus the court's decision seems reasonable from a medical standpoint, since to require continued feeding in Mrs. Jobes situation would not further any legitimate medical goal but only prolong the process of dying.

The very nature of a medical treatment decision mandates that the individual's personal choice and preferences be given the highest degree of deference. Substituted judgment, exercised within the framework of procedural safeguards, is an effective way of implementing the personal choice of those who are unable to speak for themselves. The right to die cases recognize the limits of medicine and the temporality of human existence. As Justice Handler wisely observed, "[w]hen cherished values of human dignity and personal privacy, which belong to every person living or dying, are sufficiently transgressed by what is being done to the individual, we should be ready to say: enough."[161]

Guy J. Lanza

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158 *Id.*

159 *Jobes*, 108 N.J. at 409, 529 A.2d at 441.

160 Physician's Brief, *supra* note 157, at 16.

161 *In re* Conroy, 98 N.J. 321, 399, 486 A.2d 1209, 1250 (1985) (Handler, J., dissenting in part and concurring in part). At 1:30 a.m. on August 7, 1987, Nancy Ellen Jobes died at Morristown Hospital, several days after the j-tube had been removed. N.Y. Times, Aug. 8, 1987, § 1, at 30, col. 1. She was 32 years old. *Id.*