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Advance Directives Under State Law and Judicial Decisions (Medical Decision-Making and the 'Right to Die' After Cruzan)

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Advance Directives Under State Law and Judicial Decisions

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Three years ago I first surveyed state court decisions and laws governing the withholding or withdrawal of medical treatment.[1] The decision of the United States Supreme Court in *Cruzan v. Director, Missouri Department of Health*[2] on June 25, 1990, makes it timely to review again state law developments because a majority of the Court announced in *Cruzan* that it will leave to the states the question of what legal requirements may be imposed on decisions to discontinue treatment for incompetent patients.[3] Justice Rehnquist, writing for the majority, explained that the Court's deference to state decision-making is grounded in the fact that "state courts have available to them for decision a number of sources—state constitution, statutes, and common law—which are not available to us."[4] Although the opinion makes clear that Missouri might have authorized the family of Nancy Cruzan to decide to terminate medical treatment for her, a majority of the Supreme Court refrained from holding that Missouri is constitutionally required to do so. Missouri and all other states are thus free to impose a requirement that treatment cannot be withdrawn in the absence of "clear and convincing" evidence of the patient's wishes.

Nancy Cruzan, the young woman at the center of the Supreme Court case, lost control of the car she was driving one night in 1983 in Jasper County, Missouri. She was discovered lying face down in a ditch without detectable cardiac or respiratory function. Permanent brain damage generally results after six minutes without oxygen.[5] It was estimated that Cruzan was deprived of oxygen for 12 to 18 minutes. Ultimately, she was diagnosed to be in a persistent vegetative state.[6] Although a state trial court approved the request of the Cruzan family to terminate her artificial hydration and nutrition, the Supreme Court of Missouri by a divided vote reversed that decision. The trial court found that Cruzan's "expressed thoughts at age twenty-five in a somewhat serious conversation with a housemate friend that if sick or injured she would not wish to continue her life unless she could live at least halfway normally suggests that given her present condition she would not wish to continue on with her nutrition and hydration."[7] By contrast, the Missouri Supreme Court found the roommate's statement to be "unreliable for the purpose of determining [Cruzan's] intent" and held that her family was not entitled to direct the termination of her treatment in the absence of a living will or "clear and convincing, inherently reliable evidence absent here."[8]

Justice Scalia both joined the majority opinion and wrote a separate concurrence in which he praised states for beginning to grapple with the issue of terminating medical treatment through legislation. He also warned the other justices of the Supreme Court against confusing that effort "as successfully as we have confused the enterprise of legislating concerning abortion—requiring it to be conducted against a background of federal constitutional imperatives that are unknown because they are being newly crafted from Term to Term."[9] Five justices thus have made clear that this area is not to be constitutionalized. Like some limitations on abortion after *Webster's*[10] modification of *Roe* v. *Wade*,[11] decisions concerning withholding or withdrawing life-saving treatment are to be left to individual states for resolution.

There was one point of exception to the majority consensus in *Cruzan* on deference to the states. Justice O'Connor, one of the five, in a separate concurrence stated that states "may" be constitutionally required to give effect to the decisions of a surrogate decision-maker.[12] Justice Souter's views on this matter, as on most, are not known. It is thus not clear whether the Court has a majority of justices who would support

Justice O'Connor's position.

With a majority of the Supreme Court determined to withdraw from this area, we are left to discover the law in the statutes and judicial decisions of 50 states and the District of Columbia. That is never an easy matter—for a legislature is free to reverse itself at any time—just as it is free to ignore the position taken by all other states. The statute at issue in *Cruzan* illustrates the point. Only Missouri has to date erected as formidable a procedural barrier to termination of treatment decisions. New York, although it imposes a clear and convincing evidence standard,[13] also permits the delegation of authority to a proxy.[14] In Maine, a court decision adopting a clear and convincing evidence standard[15] was limited by legislation to permit family decision-making in all circumstances except those involving tube feeding. In those instances, the patient must have written out his or her intention to permit withdrawal.[16]

State judicial and legislative activity in this area can be organized into three general categories:

1.) states with living will statutes;

2.) states with statutes or court decisions authorizing proxy decision-makers; and

3.) states with statutes or court decisions authorizing family decision-making in the absence of advance directives.[17]

The general pattern with respect to living will legislation has not changed much in recent years. In 1987, 39 states and the District of Columbia had living will statutes.[18] Since then Minnesota and North Dakota have enacted statutes for a total today of 41 states and the District of Columbia.

Most of these statutes include fairly rigorous standards for preparing a binding directive. Many statutes provide, for example, that a directive becomes binding only if and when the patient is determined to be terminally ill—and typically that determination must be by more than one physician. In some states, a directive is legally binding only if, after the onset of terminal illness but before the onset of incompetence (a fleeting moment for some patients), the patient reaffirms the directive. Increasingly, physicians and lawyers alike have criticized these statutory models both for their procedural obstacles and for failing to make clear which forms of care are to be foregone and in what circumstances. Part of the problem, many have come to believe, is that it is difficult to anticipate the full range of treatment decisions that may have to be made for a specific patient. An increasingly attractive choice for many individuals, therefore, is to delegate to a proxy decision-maker the legal authority to make health care decisions in the event the patient is unable to make decisions himself or herself. In 1987, only three states had statutes specifically directed to health care decision-making, although all states had general durable power of attorney statutes that are probably adequate authority to empower a health care proxy decision-maker.[19] Today 39 states and the District of Columbia have enacted statutes that either specifically authorize such delegation or have general proxy statutes that have been specifically interpreted to apply to health care decisions. The expansion of authority is not as great as the total number of states involved may suggest. Only 19 of the jurisdictions specifically authorize the proxy to withdraw or withhold life-saving treatment. Maine, Minnesota and New York specify that the agent will have authority to withdraw artificial hydration or nutrition only if the authority is expressly delegated by the patient.

Almost every state now recognizes some form of written advance directive, be it living wills or appointments of proxy decision-makers. The problem with directives is thus increasingly not legal as much as it is practical: very few people prepare advance directives. In her concurring opinion in *Cruzan*, Justice O'Connor reported that only 15 percent of Americans surveyed in 1988 had a living will, although 56 percent had told family members their wishes concerning the use of life-sustaining treatment.[20] Professor Peggy Davis of New York University Law School has underscored the economic bias inherent in the data by noting that "few of us can pick up the phone and instruct our trusts and estates lawyer to draw up a living will."[21]

Congress has now enacted legislation designed to inform patients about their legal rights to execute advance directives. Under the Patient Self Determination Act,[22] all health care institutions are required as of December, 1991, to provide each patient with written information about his or her rights under state law (whether statutory or as recognized by the courts of the state) to make decisions concerning medical care including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives. Health care providers are further required to document in the individual's medical record whether or not the individual has executed an advance directive.

Even when the Act is in force, it is likely that many individuals will still not prepare advance directives. For one thing, the new Act is triggered only when someone becomes a patient in a hospital-type setting. Particularly for young accident victims like Nancy Cruzan, that may be too late to prepare an advance directive. Fortunately, a growing number of states have adopted legislation directed to the problem of how best to make treatment decisions for patients who have no advance directives. The statutes generally authorize specified family members to make health care decisions, including termination of treatment. In 1987, only 16 states empowered families to act (11 by statute and five by court decision).[23] Today, there are 20. Interestingly, neither the majority opinion nor the dissenters in *Cruzan* discussed these statutes, although several of the state court decisions were men-

Summary of Relevant State Laws[1]
October 1990

	Living Will Legislation	Durable Power of Attorney, Health Care Agents, Proxy Appointments Legislation and Court Decisions	Court Decisions and Legislation Authorizing Family Members to Withhold or Withdraw Treatment
Alabama	Alabama Natural Death Act, Ala. Code 22-8A-1 to 22-8A-10.		
Alaska	Alaska Rights of the Terminally Ill Act, Alaska Stat. 18.12.010 to 18.12.100.	Alaska Statutory Form Power of Attorney Act, Alaska Stat. 13.26.332 to 13.26.353.	
Arizona	Arizona Medical Treatment Decisions Act, Ariz. Rev. Stat. Ann. 36-3201 to 36-3210.	Arizona Powers of Attorney Act, Ariz. Rev. Stat. Ann. 14-5501 to 5502 as interpreted by *Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 674 (1987).	*Rasmussen v Fleming*, 154 Ariz. 207, 741 P.2d 674 (1987).
Arkansas	Arkansas Rights of the Terminally Ill or Permanently Unconscious Act, Ark. Stat. Ann. 82-3801 to 82-3804.	LIVING WILL STATUTE AUTHORIZES PROXY APPOINTMENTS.	Arkansas Rights of the Terminally Ill or Permanently Unconscious Act, 20-17-214.
California	California Natural Death Act, Cal. Health & Safety Code 7185-7195.	California Statutory Form Durable Power of Attorney for Health Care Act, Cal. Civil Code 2430 to 2444.	*In re Conservatorship of Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840 (Cal. Ct. App. 1988).
Colorado	Colorado Medical Treatment Decision Act, Colo. Rev. Stat. 15-18-101 to 15-18-113.	Colorado Powers of Attorney Act, Colo. Rev. Stat. 15-14-501 to 502 as interpreted by *In re Rodas*, No. 86PR139 (Colo. Dist. Ct. Mesa County Jan. 22, 1987, *as modified*, April 3, 1987).	
Connecticut	Connecticut Removal of Life Support Systems Act, Conn. Gen. Stat. Ann. 19a-570 to 19a-575.		Connecticut Removal of Life Support Systems Act, Connecticut General Stat. 19a-571.
Delaware	Delaware Death with Dignity Act, Del. Code Ann. tit. 16, 2501-2509.	LIVING WILL STATUTE AUTHORIZES PROXY APPOINTMENTS.	

1. Prepared by Judith Areen, Dean and Professor of Law, Georgetown University Law Center, Jenifer Hartog, and Kathryn WilberGeorgetown Law Center Class of 1992. We are grateful to the Society for the Right to Die for providing much of the background legal material used in compiling this summary.

	Living Will Legislation	Durable Power of Attorney, Health Care Agents, Proxy Appointments Legislation and Court Decisions	Court Decisions and Legislation Authorizing Family Members to Withhold or Withdraw Treatment
District of Columbia	District of Columbia Natural Death Act of 1981, D.C. Code Ann. 6-2421 to 2430.	District of Columbia Health Care Decisions Act, D.C. Code Ann. 21-2201 to 2213.	D.C. Health Care Decisions Act, D.C. Code Ann. 21-2201.to 2213.
Florida	Florida Life Prolonging Procedure Act, Fla. Stat. Ann., 765.01 to 765.15.	LIVING WILL STATUTE AUTHORIZES PROXY APPOINTMENTS.	Florida Life Prolonging Procedure Act, Fla. Stat. Ann. 765.07.
Georgia	Georgia Living Wills Act, Ga. Code Ann. 31-32-1 to 31-32-12.	Georgia Durable Power of Attorney for Health Care Act, Ga. Code 31-36-1 to 31-36-36.	
Hawaii	Hawaii Medical Treatment Decisions Act, Haw. Rev. Stat. 327D-1 to 327D-27.	LIVING WILL STATUTE AUTHORIZES PROXY APPOINTS; Hawaii Uniform Durable Power of Attorney Act, Haw. Rev. Stat. 551D-1 to 551D-7.	
Idaho	Idaho Natural Death Act, Idaho Code 39-4501 to 39-4509.	LIVING WILL STATUTE AUTHORIZES PROXY APPOINTMENTS.	
Illinois	Illinois Living Will Act, Ill. Ann. Stat. ch. 110.5, 701-710.	Illinois Powers of Attorney for Health Care Act, Ill. Ann. Stat. ch. 110 1/2, 804-1 to 804-11.	2
Indiana	Indiana Living Wills & Life Prolonging Procedures Act, Ind. Code Ann. 16-8-11-1 to 16-8-11-22.	LIVING WILL STATUTE AUTHORIZES PROXY APPOINTMENTS.	
Iowa	Iowa Life-Sustaining Procedures Act, Iowa Code Ann. 144A.1 to 144A.11.	LIVING WILL STATUTE AUTHORIZES PROXY APPOINTMENTS; Iowa Power of Attorney Act, Iowa Code 633.705 to 633.706.	Iowa life Sustaining Procedures Act, Iowa Code Ann. 144A.7.
Kansas	Kansas Natural Death Act, Kansas Stat. Ann. 65-28, 101-128.	Kansas Durable Power of Attorney for Health Care Act, Kansas Stat. Ann. 58-625-632.	
Kentucky	Kentucky Living Will Act, Ky. Rev. Stat. Ann. 311.622-644.	Health Care Surrogate Act of Kentucky, Ky. Rev. Stat. Ann. 311.970-986.	
Louisiana	Louisiana Life-Sustaining Procedures Act, La. Rev. Stat. Ann. 40:1299.58.1 to 40:1299.58.10.	LIVING WILL STATUTE AUTHORIZES PROXY APPOINTMENTS.	Louisiana Declarations Concerning Life-Sustaining Procedures Act, La. Rev. Stat. Ann. 40:1299.58.5.

	Living Will Legislation	Durable Power of Attorney, Health Care Agents, Proxy Appointments Legislation and Court Decisions	Court Decisions and Legislation Authorizing Family Members to Withhold or Withdraw Treatment
Maine	Maine Uniform Rights of the Terminally Ill Act, Me. Rev. Stat. Ann., tit. 18-A, 5-701 to 5-714.	Maine Powers of Attorney Act, Me. Rev. Stat. Ann. tit. 18-A, 5-501.	Maine Uniform Rights of the Terminally Ill Act, Me. Rev. Stat. Ann. tit. 18-A, 5-707.
Maryland	Maryland Life-Sustaining Procedures Act, Md. Health-Gen. Code Ann. 5-601-614.	Maryland Durable Power of Attorney Act, Md. Est. & Trusts Code Ann. 13-601 to 603, as interpreted by 73 *Opinions of the Attorney, General* [No. 88-046, 1988].	
Massachusetts			3
Michigan			
Minnesota	Minnesota Adult Health Care Decisions Act, Minn. Stat. 145B.01 to 145B.17.	LIVING WILL STATUTE AUTHORIZES PROXY APPOINTMENTS.	4
Mississippi	Mississippi Withdrawal of Life-Saving Mechanisms Act, Miss. Code Ann. 41-41-101 to 41-41-121.	Mississippi Durable Power of Attorney for Health Care Act, Miss. Code Ann. 41-41-151 to 41-41-183.	
Missouri	Missouri Life Support Declarations Act, Mo. Rev. Stat. 459.010 to 459.055.		
Montana	Montana Living Will Act, Mont. Code Ann. 50-9-101 to 50-9-104, 50-9-111, 50-9-201 to 50-9-206.		
Nebraska			
Nevada	Nevada Withholding and Withdrawal of Life-Sustaining Procedures Act, Nev. Rev. Stat. 449.540 to 449.690.	Nevada Durable Power of Attorney for Health Care Act, Nev. Rev. Stat. Ann. 449.800 to .860.	
New Hampshire	New Hampshire Living Wills Act, N.H. Rev. Stat. Ann. ch. 137 H.		
New Jersey		New Jersey Act, N.J. Stat. Ann. 46:2B-8, as interpreted by *In re Peter*, 108 N.J. 365, 529 A. 2d 419 (1987).	*In re Jobes*, 108 N. J. 394, 529A. 2d. 434 (1987).
New Mexico	New Mexico Right to Die Act, N.M. Stat. Ann. 24-7-1 to 24-7-11.	New Mexico Act, N.M. Stat. Ann. 45-5-501 to 45-5-502.	New Mexico Right to Die Act, N.M. Stat. Ann. 24-7-8.1.

	Living Will Legislation	Durable Power of Attorney, Health Care Agents, Proxy Appointments Legislation and Court Decisions	Court Decisions and Legislation Authorizing Family Members to Withhold or Withdraw Treatment
New York		New York Pub. Health Law 2980-2994.	
North Carolina	North Carolina Right to Natural Death Act, N.C. Gen. Stat. 90-320 to 90-322.	North Carolina Power of Attorney Act, N.C. Gen. Stat. 32A-8 to 14.	North Carolina Right to Natural Death Act, N.C. Gen. Stat. 90-322.
North Dakota	North Dakota Uniform Rights of the Terminally Ill Act, N.D. Cent. Code 23.06.4-01 to 23.06.4-14.		
Ohio		Ohio Power of Attorney for Health Care Act, Ohio Rev. Code Ann. 1337.11 to 1337.17.	
Oklahoma	Oklahoma Natural Death Act, Okla. Stat. tit. 63, 3101-3111.		
Oregon	Oregon Rights with Respect to Terminal Illness Act, Or. Rev. Stat. 97.050 to 97.090.	Oregon Durable Power of Attorney for Health Care Act, Or. Rev. Stat. 127.505 to 127.585.	Oregon Rights with Respect to Terminal Illness Act, Or. Rev. Stat. 97.083.
Pennsylvania		Pennsylvania Durable Powers of Attorney Act, Pa. Stat. Ann. tit. 20, 5604 to 5607.	
Rhode Island		Rhode Island Health Care Power of Attorney Act, R.I. Gen. Laws 23-4.10.1-2.	
South Carolina	South Carolina Death with Dignity Act, S.C. Code Ann. 44-77-10 to 44-77-160.		
South Dakota		South Dakota Durable Powers of Attorney Act, S.D. Codified Laws Ann. 59-7-2.1 to 4.	
Tennessee	Tennessee Right to Natural Death Act, Tenn. Code Ann. 32-11-101 to 32-11-110.	Tennessee Durable Power of Attorney for Health Care, Tenn. Code Ann. tit. 34, ch. 6.	
Texas	Texas Natural Death Act, Tex. Rev. Civ. Stat. Ann. art. 4590h.	LIVING WILL STATUTE AUTHORIZES PROXY APPOINTMENTS; + Texas Durable Power of Attorney for Health Care Act, Tex. Rev. Civ. Stat. art. 4590h-1.	Texas Natural Death Act, Tex. Rev. Civ. Stat. Ann., art 4590h- 4(c).

	Living Will Legislation	Durable Power of Attorney, Health Care Agents, Proxy Appointments Legislation and Court Decisions	Court Decisions and Legislation Authorizing Family Members to Withhold or Withdraw Treatment
Utah	Utah Personal Choice and Living Will Act, Utah Code Ann. 75-2-1101 to 75-2-1118.	LIVING WILL STATUTE AUTHORIZES PROXY APPOINTMENTS.	Utah Personal Choice and Living Will Act, Utah Code Ann. 75-2-1105(2).
Vermont	Vermont Terminal Care Document Act, Vt. Stat. Ann. tit. 18, 5251-5262 and tit. 13, 1801.	**Vermont Durable Power of Attorney for Health Care Act, Vt. Stat. Ann. tit. 14, 3451 to 3467.**	
Virginia	Virginia Natural Death Act, Va. Code 54.1-2981 to 54.1-2992.	LIVING WILL STATUTE AUTHORIZES PROXY APPOINTMENTS; Virginia Durable Powers of Attorney for Health Care Act, Va. Code 11-9.1 to 11-9.4.	Virginia Natural Death Act, Va. Code 54:1-2986.
Washington	Washington Natural Death Act, Wash. Rev. Code Ann. 70.122.010 to 70.122.905.	LIVING WILL STATUTE AUTHORIZES PROXY APPOINTMENTS; Washington Durable Power of Attorney - Health Care Decisions Act, Wash. Rev. Code Ann. 11.94.010.	*In re Guardianship of Grant*, 109 Wash 2d. 545, 747 P. 2d 445 (1987), modified, 757 P. 2d 534 (1988).
West Virginia	West Virginia Natural Death Act, W.Va. Code 16-30-1 to 16-30-10.	**West Virginia Medical Power of Attorney Act, W.Va. Code 16-30A-1 to 16-30A-20.**	
Wisconsin	Wisconsin Natural Death Act, Wisc. Stat. Ann. 154.01 to 154.15.	**Wisconsin Power of Attorney for Health Care Act, 1989 Wisc. Act. 200.**	
Wyoming	Wyoming Act, Wyo. Stat. 33-22-101 to 33-22-109.	LIVING WILL STATUTE AUTHORIZES PROXY APPOINTMENTS.	

Note: Bolded material specifically includes or has been interpreted by a judicial decision to include decisions to withdraw or withhold life support.

Table References

2. Family consent honored with judicial approval. *In re Estate of Longeway*, 133 Ill. 2d 33, 549 N.E. 2d. 292 (1989).

3. Family consent honored with judicial approval. *Brophy v.* New England Sinai Hospital, Inc., 398 Mass. 417, 497 N.E. 2d 626 (1986).

4. Family consent honored if approved by hospital ethics committee. *In re Torres*, 357 N.W. 2d 332 (Minn. 1984).

tioned in the Court's review of cases involving the right to refuse life-saving treatment. The statutes and court decisions empowering families to provide consent vary considerably from state to state. Four aspects of the new standards are worth consideration.

1. Qualifying Characteristics of the Patient

First, states differ as to which patients are covered. Of the 13 states with statutes, ten specify that the patient must be "terminally ill" or in a "terminal condition." The nine court decisions, by contrast, apply to patients who are comatose or in a persistent vegetative state. Nancy Cruzan, who was in a persistent vegetative state, was not considered terminally ill because she might have been maintained in that state for many years. Thus even if Nancy Cruzan had prepared a living will, in most states the will would not have provided authority for terminat-

ing her artificial nutrition.

2. *Treatments that May Be Withheld or Withdrawn*

Second, states vary with respect to the treatment that may be withdrawn by families. Connecticut prohibits withdrawing nutrition or hydration. Florida, Iowa and Utah prohibit the withdrawing of "sustenance." Oregon mandates "the usual and typical provision of nutrition which in the medical judgment of the attending physician a patient can tolerate."

The court decisions, by contrast, have generally held that no distinction should be drawn between stopping artificial hydration and nutrition and stopping any other life-prolonging medical procedure.

3. *Eligible Family Members*

States also differ as to which family members are empowered to make decisions. Most establish a priority list to be followed in obtaining consent from family members. Typically, the statutes direct turning first to the court-appointed guardian, if there is one, then to the patient's spouse, then to the adult child (or a majority of adult children if there are more than one), then to either parent. Louisiana and Utah are careful enough to specify that to be eligible the spouse must not be judicially separated, and Texas adds that the spouse must be an adult. Six of the states authorize turning as a last resort to the patient's "nearest living relative." Iowa adds an adult sibling to the list, Louisiana either a sibling or the patient's other ascendant or descendants. Utah directs resorting to parents before adult children. Connecticut requires only the informed consent of the "next of kin, if known."

Of the nine court opinions, only a handful have grappled specifically with the problem of which family members are authorized to make decisions for the patient. The Washington State Supreme Court specified the patient's immediate family must be consulted, and all family members must agree with the decision.[24] Florida specified that only close family members such as a spouse, children, or parents are empowered to decide.[25] Connecticut empowers next of kin. In New Jersey, those family members close enough to decide are a spouse, parents, adult children or siblings. But if another relative, i.e. a cousin, aunt, uncle, niece or nephew, functions in the role of a patient's nuclear family, then that relative can and should be treated as a close and caring family member.[26]

4. *Restraints on Abuse by Family Members*

Most of the states that have adopted a form of family decision-making have considered the risk that family members might abuse their authority. Arkansas and Louisiana, for example, direct that a family member is to act "on behalf of the patient." Florida and Iowa mandate family members are to be guided by the express or implied intentions of the patient. Courts, too, have grappled with the issue. In California, a family member should be guided first by his knowledge of the patient's desires and feelings to the extent they were expressed, and only as a last resort by the patient's best interests. All courts have limited the harm that could be done by restricting the authority of families to situations in which the attending physician has determined that the person is terminally ill or irretrievably comatose. Texas specifies that two of the priority categories of eligible family members must agree. In Washington State and New Mexico, all available family members must agree.

In California the courts also require that there be no evidence that the family were motivated in their decisions by anything other than love and concern for the dignity of their husband and father.[27]

In summary, most states today honor at least one form of advance directives, either living wills or durable powers of attorney; many recognize both. For patients without advanced directives, however, court authorization must be sought to terminate treatment except in those jurisdictions that authorize families to decide.

Justice Brennan in his dissent in *Cruzan* addressed the discomfort some members of the Court felt on this point by acknowledging that there is no automatic assurance that the view of close family members will necessarily be the same as the patient's would have been had she been confronted with the prospect of her situation while competent. Brennan added, "I cannot quarrel with this observation. But it leads to another question. Is there any reason to suppose that a state is more likely to make the choice a patient would have made than someone who knew the patient intimately? To ask this is to answer it." Brennan also noted that there are strong reasons why someone who knew they would end up in Nancy Cruzan's situation might want to forego artificial hydration and nutrition:

> Dying is personal. And it is profound. For many, the thought of an ignoble end, steeped in decay, is abhorrent. A quiet, proud death, bodily integrity intact, is a matter of extreme consequence.[28]

To the extent reliance on families means faster and less expensive decision-making with no diminution in the quality of the decision made, family consent statutes should be welcomed by patients, health care providers and society alike. Family members are generally likely to be in the best position to know the patient's views on treatment even if no explicit statements were made. More formal procedural mechanisms including court hearings would probably rely primarily on the family for data

about the patient's values and beliefs, moreover, thus adding to the cost of decision-making with little if any increase in quality.

But the trend toward reliance on families is not without problems. The term "family" is certainly not precise. When relatives disagree about the patient's views, the dispute will probably require court resolution in the absence of a statute that specifies which relative's judgment is to be given priority. In some instances, the family will not include the most knowledgeable proxy decision-maker. Fortunately, individuals who wish to ensure that a nonrelative speaks on their behalf have the option in most states of preparing an advance directive that designates the nonrelative as their proxy decision-maker. Finally, there is the problem of protecting patients from those few families who may act on the basis of bad faith or ignorance. Some have suggested that all families should be required to justify any decision to terminate treatment to a hospital ethics committee or to a court. A more respectful approach is to direct health care providers to accept family decisions, as a growing number of states have done, except in those few instances where there is reason to suspect that the family is acting in bad faith or out of ignorance. Only these family decisions should be referred to a hospital ethics committee or to court.

To date, those state courts and legislatures that have addressed the issue have not only supported advance directives, they have, with the exception of Missouri, been very deferential to family decision-making even in the absence of written directives. *Cruzan* means this issue will not be resolved by the Supreme Court as a matter of federal constitutional law, but will be left to the state courts and to the political process in state legislatures. It appears likely that few, if any, states will follow Missouri's lead, but it may be a number of years before most states explicitly authorize family decision-making in the absence of written directives.

In the meantime, individuals can maximize the likelihood that their wishes concerning treatment will be followed whether they are at home or traveling away from their home state, by preparing a written advance directive. The directive should specify the patient's wishes concerning termination of hydration and nutrition in the event that they are either terminally ill or irretrievably comatose. Ideally, the directive should also specify a preferred proxy decision-maker and several alternative decision-makers in the event that the preferred proxy is unavailable. The procedural requirements in most states will be satisfied if the document is witnessed by two adults unrelated to the patient. Copies of the document should be given to one's physician and to family members in order to maximize the chance that health care providers will learn of the document even if the patient is stricken away from home.

The Supreme Court in *Cruzan* has left patients and families to face the uneven standards of state law concerning decisions to terminate treatment for incompetent patients. For many, the prospect of ending up like Nancy Cruzan raises not only the possibility of the invasiveness of life-sustaining systems, like nasogastric tubes, upon the integrity of one's body, it also presents in the words of one court "the utter helplessness of the permanently comatose person, the wasting of a once strong body, and the submission of the most private bodily functions to the attention of others."[29] As Justice Brennan observed,"such conditions are, for many, humiliating to contemplate, as is visiting a prolonged and anguished vigil on one's parents, spouse, and children."[30] Change will come only slowly, for the matter must be weighed in the legislature of each state. In the meantime, the best available alternative for those who do not want their families to face the situation of the Cruzan family, is to prepare an advance directive designed to be effective in most jurisdictions.

References

1. J. Areen, "The Legal Status of Consent Obtained from Families of Adult Patients to Withhold or Withdraw Treatment," 258 *J.A.M.A.* 229 (1987).

2. ___ U.S. ___, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990).

3. Justice Brennan filed a dissenting opinion in *Cruzan* in which Justices Marshall and Blackmun joined. Justice Stevens also filed a dissenting opinion. With the resignation of Justice Brennan and the elevation of David Souter to the Supreme Court, the number of justices who prefer to leave these issues to the states is unlikely to decrease.

4. 110 S. Ct. 2841, 2851, 111 L. Ed. 2d 224, 241 (1990).

5. *Ibid.*

6. Dr. Fred Plum, who coined the term "persistent vegetative state" and is an acknowledged expert on the subject states:

> vegetative state describes a body which is functioning entirely in terms of its internal controls. It maintains temperature. It maintains heartbeat and pulmonary ventilation. It maintains digestive activity. It maintains reflex activity of muscles and nerves for low level conditioned response. But there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner. In re Jobes, 108 N.J. 394, 403, 529 A.2d 434, 438 (1987).

7. 110 S. Ct. 2841, 2846, 111 L. Ed. 2d 224, 235 (1990).

8. *Ibid.* The Cruzan family continued to pursue their goal of allowing Ms. Cruzan to die a dignified death. Citing new evidence of Ms. Cruzan's wishes, the family's lawyer sought a new trial. "Family Yet Hopes 'to Set her Free'," *N.Y.Times*, June 26, 1990, at A18, col.4. In response, the State of Missouri, which had previously opposed the removal of the feeding tube, requested that it be permitted to withdraw from the new proceedings. Belkin, "Missouri Seeks to Quit Case of Comatose Patient," *N.Y. Times*, Oct. 12, 1990, at A15, col. 3. The State's

withdrawal left no remaining party to object to the removal of the feeding tube. On November 1, 1990, three friends of Ms. Cruzan testified to specific conversations with her in which she said she would never want to live "like a vegetable" on medical machines. Malcolm, "Missouri Family Renews Battle Over Right to Die," *N.Y. Times*, Nov. 2, 1990, at A14, col. 1. On Dec. 14, 1990, Judge Charles E. Teel Jr., a county probate judge, authorized the Cruzan family to stop Ms. Cruzan's feeding by tube. The judge ruled that clear and convincing evidence existed of Ms. Cruzan's intent to terminate her feeding; there was no evidence that she would desire to continue in her present state; and that her parents were authorized to direct the removal of nutrition and hydration from Ms. Cruzan. Malcolm, "Judge Allows Feeding-Tube Removal," *N.Y. Times*, Dec. 15, 1990, at 1, 10, col.1. Ironically, Judge Teel had also presided over the family's original request to withdraw their daughter's nutritional support in 1987. His decision then to grant their request was appealed and eventually overturned by the Supreme Court. With her family at her bedside, Nancy Beth Cruzan died on December 16, 1990. Lewin, "Nancy Cruzan Dies, Outlived by a Debate Over the Right to Die," *N.Y. Times*, Dec. 27, 1990, at A1, col. 1.

9. 110 S. Ct. 2841, 2859, 111 L. Ed. 2d 224, 251 (1990).

10. Webster v. Reproductive Health Services, 492 U.S. 490 (1989).

11. 410 U.S. 113 (1973).

12. 110 S. Ct. 2841, 2857, 111 L. Ed. 2d 224, 249 (1990).

13. In re Westchester County Medical Center on behalf of O'Connor, 72 N.Y.2d 517, 534 N.Y.S.2d 886, 531 N.E.2d 607 (1988).

14. N. Y. Pub. Health Law 2981 (Consol. 1990).

15. In re Gardner, 534 A.2d 947 (Me. 1987).

16. Uniform Rights of Terminally Ill Act, Me. Rev. Stat. Ann. tit. 18-A, 5-702 (1989).

17. See appendix, *infra*.

18. Areen, *supra* note 1.

19. Areen, *supra* note 1.

20. 110 S. Ct. 2841, 2857 n.1, 111 L. Ed. 2d 224, 249 n.1 (1990).

21. Davis, "Right to Die Ruling Curtails Individual Liberty," *N.Y. Times*, July 12, 1990, at A20, col. 4.

22. Omnibus Reconciliation Act of 1990, P.L. 101-508 secs. 4206, 4751, 104 Stat. 1388.

23. Areen, *supra* note 1.

24. In re Guardianship of Grant, 109 Wash. 2d 545, 747 P. 2d 445, modified, 757 P.2d 534 (1988).

25. John F. Kennedy Hospital v. Bludworth, 452 So. 2d 921 (Fla. 1984).

26. In re Jobes, 108 N.J. 394, 419, 529 A.2d 434, 447 (1987).

27. Barber v. Superior Court, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484, (1983).

28. 110 S. Ct. 2841, 2868, 111 L. Ed. 2d 224, 262 (1990).

29. In re Gardner, 534 A. 2d 947, 953 (Me. 1987).

30. 110 S. Ct. 2841, 2869, 111 L. Ed. 2d 224, 263 (1990).