The Right to Die: Florida Breaks through Legal Deadlock

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I. INTRODUCTION

In 1978, the Florida Fourth District Court of Appeal was forced to decide whether a competent, terminally ill individual has the right to refuse or discontinue medical treatment.\(^1\) In its well-reasoned opinion, that court sharply stated:

Abe Perlmutter should be allowed to make his choice to die with dignity, notwithstanding over a dozen legislative failures in this state to adopt suitable legislation in this field. It is all very convenient to insist on continuing Mr. Perlmutter’s life so that there can be no question of foul play, no resulting civil liability and no possible trespass on medical ethics. However, it is quite another matter to do so at the patient’s sole expense and against his competent will, thus inflicting never ending physical torture on his body until the inevitable, but artificially suspended, moment of death. Such a course of conduct invades the patient’s constitutional right of privacy, removes his freedom of choice and invades his right to self-determination.\(^2\)

Despite the obvious need for legislative guidance on natural death questions, the legislature did not speak determinatively on the issue until recently. Every session of the Florida legislature between 1969 and 1982 considered some variation of natural death legislation.\(^3\) However, with the exception of the 1973 legislative

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2. Perlmutter, 362 So. 2d at 164.
3. Law regarding the issues herein addressed has been referred to interchangeably as natural death, right to die, and death with dignity legislation. Regarding aborted attempts at legislation in Florida, see Fla. HB 841 (1982); Fla. SB 72 (1982); Fla. HB 574 (1981); Fla. SB 149 (1981); Fla. HB 463 (1980); Fla. SB 446 (1980); Fla. HB 740 (1979); Fla. HB 8 (1978); Fla. HB 374 (1977); Fla. HB 2463 (1976); Fla. HJR 2575 (1976); Fla. HB 3703 (1976); Fla. SB 513 (1976); Fla. HB 239 (1975); Fla. HJR 3007 (1974); Fla. HB 407 (1973); Fla. HB 2614 (1972); Fla. HB 2830 (1972); Fla. HB 68 (1971); Fla. HB 3184 (1970); Fla. HJR 91 (1969).
session, the proposals received no real consideration by either house and died in committee or on the calendars of the respective houses. Even in 1973, the proposal died in a Senate committee after having received considerable attention and having passed in the House of Representatives.

Because of this legislative inaction, the Fourth District Court of Appeal was called upon again in 1983 to decide the parameters of an individual's right to die naturally. As framed by the court, the issue in John F. Kennedy Memorial Hospital v. Bludworth was "one of life or death, or, more precisely, life without consciousness as opposed to death with dignity: Under what circumstances may artificial life sustaining procedures be terminated in the case of a comatose, terminally ill patient."5

In preface, the district court quoted extensively from the Florida Supreme Court's affirmance of Perlmutter years earlier:

Because the issue with all its ramifications is fraught with complexity and encompasses the interests of the law, both civil and criminal, medical ethics and social morality, it is not one which is well-suited for resolution in an adversary judicial proceeding. . . . Nevertheless, preference for legislative treatment cannot shackle the courts when legally protected interests are at stake.6

The district court in JFK Memorial held that artificial life-sustaining procedures can be terminated lawfully. However, it cautiously limited its holding to the case of a comatose patient who previously has evidenced an intention not to have life-sustaining procedures imposed, whose condition has been certified as terminal by two physicians, and whose interests are protected by a court appointed guardian.7 The district court then certified the following question to the Supreme Court of Florida as one of great public importance:

In the case of a comatose and terminally ill individual who has executed a so-called "living" or "mercy" will, it is [sic] necessary that a court appointed guardian of his person obtain the approval of a court of competent jurisdiction before terminating extraordinary life support systems in order for consenting family members,

4. John F. Kennedy Memorial Hosp. v. Bludworth, 432 So. 2d 611 (Fla. 4th DCA 1983), rev'd, 452 So. 2d 921 (Fla. 1984) [hereinafter referred to as JFK Memorial].
5. JFK Memorial, 432 So. 2d at 613.
6. Id. at 618.
7. Id. at 619.
On May 17, 1984 the Florida Senate passed unanimously the Life-Prolonging Procedure Act, which had already been approved by the House of Representatives. Then, on May 24, the Florida Supreme Court ruled on the Fourth District Court's certified question. In a liberal and far-reaching decision, the court held that relatives of incompetent and terminally ill patients can halt extraordinary medical treatment without first getting court approval. Five days after the high court ruling, Florida Governor Robert Graham signed into law the long-awaited Life-Prolonging Procedure Act.

This comment asserts that both the Fourth District Court of Appeal and the Florida Supreme Court misconstrued the issue presented by JFK Memorial. Therefore, the facts of that case and of the cases cited in support of the courts' respective holdings are set out in detail. The issue presented was whether an individual's written directive could be honored by health care providers once that individual became comatose. The question apparently decided was far broader—whether the substituted judgment doctrine could be applied and life support systems terminated without either the appointment of a guardian or judicial review of the decision. The author's view is that the supreme court's conclusions are laudable, but its analysis is unsound. The state of the law might be in confusion were it not for the legislature's enactment of the Life-Prolonging Procedure Act. Because of the Act's impact on natural death issues, its provisions are reviewed and the Act is compared to statutes of other jurisdictions. When appropriate, the Act's interrelation with the JFK Memorial decision is noted.

8. Id. at 620.
10. JFK Memorial, 452 So. 2d at 926. Although the decision was unanimous, Justices McDonald and Shaw concurred in the result only. Justice McDonald authored a concurring opinion.
11. Flaherty, Florida Court Endorses 'Living Will' Provisions, NAT'L L.J., June 11, 1984, at 4, col. 3. The article closes as follows:
   The Bludworth case "catapulted [the Florida law] out of committee," said John R. Day, a Shutts & Bowen partner who also represented Memorial Hospital. "After ten years they finally passed the mercy will law." But the . . . case still serves an important purpose, said Mr. Meyers [another Shutts & Bowen partner] because it takes the life-support decision out of the realm of "legislative grace."

Id.
II. John F. Kennedy Memorial Hospital v. Bludworth

In 1975, Francis B. Landy executed a "living will" directing that his life not be prolonged by artificial means and that he be allowed to die with dignity and without pain if he should become terminally ill. On April 10, 1981, at the age of seventy-nine, Mr. Landy was taken to the hospital. He was terminally ill and within a few days lapsed into a coma. On April 12, Mr. Landy stopped breathing and was placed on a mechanical ventilator in the intensive care unit. A tube was placed down his throat and was attached to a mechanical breathing apparatus. Nourishment was provided to Mr. Landy through a tube placed in his nose. At the time he was placed on the ventilator, Mr. Landy's heart was not functioning properly, fluid was backed up in his lungs, and he had chronic interstitial fibrosis and gastrointestinal bleeding in addition to respiratory failure. As a result of his respiratory arrest, Mr. Landy suffered permanent brain damage. He was unable to breathe for himself and unable to think or respond. It became obvious over the next few days that Mr. Landy would die if he were disconnected from the respiratory machine.

Mr. Landy's doctor, board certified in internal medicine and in pulmonary disease, diagnosed the condition as terminal on April 18th or 19th. A board-certified neurologist diagnosed Mr. Landy's condition as permanent and terminal on April 20th. Beginning on April 12th, Mrs. Landy urged her husband's treating physicians to remove all artificial means of life support in accordance with her husband's written directive. Fearing potential civil and criminal liability, the hospital refused her pleas and instead filed an action for declaratory relief.

Mr. Landy died on April 24, 1981. Until his death, he continued to be attached to the breathing machine. Mr. Landy's treating physician wrote in the Death Summary, "It was [Mr. Landy's] strong desire in the will that he depart his life in peaceful dignity,

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12. A "living will" or "mercy will" is a document "executed by a person during his lifetime setting forth his wishes concerning medical treatment in contemplation of illness or death." Note, In re Living Will, 5 Nova L.J. 445, 445 n.1 (1981). Living wills have been in circulation for years. See, e.g., Newsletter From Concern For Dying 2 (May 1980) (announcing distribution of over four million copies of its version of a living will).
13. JFK Memorial, 452 So. 2d at 922.
14. Petitioner's Brief on the Merits at 2, JFK Memorial.
15. Id. at 3.
16. Id.
but as can be seen he was not allowed to do so.” 17

The hospital, joined by Mrs. Landy and the treating physician, continued in its action for declaratory relief, maintaining that the issue was not rendered moot by Mr. Landy’s death because it was likely to recur and again evade review. 18 The circuit court agreed and then held that in order to relieve the medical staff of criminal or civil liability for the removal of extraordinary life support systems from a terminally ill patient, a guardian must be appointed and a court order permitting termination of treatment obtained.

The Fourth District Court affirmed the trial court. 19 In contrast to the well-reasoned and sensitive Perlmutter opinion, the JFK Memorial opinion is unreasoned. Although the court did recognize Mr. Landy’s constitutional right to refuse or discontinue extraordinary medical treatment, it misapplied the privacy rights tests mandated by the United States Supreme Court, misconceptualized the facts before it, and misconstrued case law from other jurisdictions.

The United States Supreme Court has recognized the fundamental right of privacy as part of the penumbra of the Bill of Rights guarantees. 20 In Perlmutter, the Fourth District Court reviewed a line of cases from other jurisdictions and adopted the view that a terminally ill individual has the right to refuse or discontinue treatment based upon “‘the constitutional right to privacy . . . an expression of the sanctity of individual free choice and self-determination.’” 21 Significantly, the Perlmutter court recognized that

17. Id. at 4 n.6.
18. JFK Memorial, 452 So. 2d at 614. Counsel stated that at the time of oral argument in the trial court there were 40 comatose, terminally ill patients in JFK Memorial.
19. Id. at 620.
20. See Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Georgia, 394 U.S. 557 (1969); Terry v. Ohio, 392 U.S. 1 (1968); Griswold v. Connecticut, 381 U.S. 479 (1965); Meyer v. Nebraska, 262 U.S. 390 (1923). Florida also has recognized a right of privacy guaranteed by state law: “If there was any doubt . . . that Florida citizens enjoyed an explicit right of privacy it has been put to rest by the adoption of Article I, Section 3, Florida Constitution (1980), entitled ‘Right of Privacy.’” JFK Memorial, 432 So. 2d at 618-19.
21. Satz v. Perlmutter, 362 So. 2d 160, 162 (Fla. 4th DCA 1978), aff’d, 379 So. 2d 359 (Fla. 1980) (quoting Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 426 (Mass. 1977)). Because the majority of jurisdictions are deciding natural death cases on constitutional right to privacy grounds, the common law right to bodily self-determination has become less significant in this context. But see In re Storar, 420 N.E.2d 64 (N.Y. 1981). In Union Pacific Railway v. Botsford, the United States Supreme Court stated, “No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” 141 U.S. 250, 251 (1891). Recognition of the individual’s interest in preserving the “inviolability of his person,” Pratt v. Davis, 118 Ill. App. 161, 166 (1905), aff’d, 79 N.E. 562 (Ill. 1906),
the case before it did not involve the substituted judgment of a guardian for an incompetent patient and stressed that its holding was limited to the case of a competent adult patient. The court recognized that the case of an incompetent terminal patient would present more issues and refused to cross that "complex bridge" until it was required to do so.\textsuperscript{22}

The crossing came with \textit{JFK Memorial}. In first recognizing an incompetent's right to refuse medical treatment, the court stepped on solid ground, finding:

Every court that has considered a similar situation has concluded that a terminally ill comatose patient, like his fully conscious and competent counterpart, has a right to refuse medical treatment. Similarly, all agree that there must exist a corresponding capability "to exercise that right; were this not so the right would be an empty one, reduced to a meaningless 'form of words,' illusory and devoid of substance."\textsuperscript{23}

It was only in determining the manner by which the right may be exercised that the Fourth District Court stepped unwittingly into a quagmire.

To begin with, the district court's decision fails to reflect the restricted scope within which a state may limit an individual's fundamental right of privacy in medical care. Although the state may regulate the exercise of fundamental constitutional rights, limiting these rights may be justified only by a compelling state interest, and legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.\textsuperscript{24} Interference is impermissible if there exists a less restrictive alternative which would serve the same basic purpose.\textsuperscript{25} Moreover, even where the required state interests exist, state regulations may not have a significant impact on a person's exercise of his constitutional right to privacy.\textsuperscript{26} Requiring pretermination judicial review is overly restrictive where a

\begin{itemize}
\item \textsuperscript{22} Perlmutter, 362 So. 2d at 162.
\item \textsuperscript{23} JFK Memorial, 432 So. 2d at 615 (quoting Eichner v. Dillon, 426 N.Y.S.2d 517, 544 (App. Div. 1980)).
\item \textsuperscript{24} Roe v. Wade, 410 U.S. 113, 155 (1973).
\item \textsuperscript{25} Shelton v. Tucker, 364 U.S. 479, 488 (1960).
\item \textsuperscript{26} City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481, 2481 (1983).
\end{itemize}

became known at common law as the right to bodily self-determination. From this right developed the doctrine of informed consent, which recognized that every human being of adult years and sound mind has a right to determine what shall be done with his own body. Natanson v. Kline, 350 P.2d 1093, 1104 (Kan. 1960).
comatose patient previously has executed a directive in exercise of his constitutional rights; prolonging the individual's dying process significantly impacts upon his exercise of his right to privacy.

In *Perlmutter* the Fourth District Court examined the interests involved in the living death tragedies which have resulted from the incredible advances in scientific medicine.\(^{27}\) Citing a leading Massachusetts case,\(^ {28}\) the court identified four state interests that counterbalance an individual's right to refuse treatment, namely:

1. The interest in the preservation of life.
2. The need to protect innocent third parties.
3. The duty to prevent suicide.
4. The requirement that the court help maintain the ethical integrity of medical practice.\(^ {29}\)

The district court analyzed the facts before it and found that the state's interest in preserving life was not compelling because "the issue is not whether, but when, for how long and at what cost to the individual [his] life may be briefly extended."\(^ {30}\) Also, the court pointed out that Abe Perlmutter, at age seventy-three, would not be "abandoning" minor children and that family members were all in agreement with his wishes. Therefore, the state's interest in protection of third parties was not compelling.\(^ {31}\)

Third, the court determined that the disconnection of Mr. Perlmutter's respirator would not be suicide because, should he die, death would be the result of natural causes.\(^ {32}\) Furthermore, distinguishing the familiar blood transfusion cases,\(^ {33}\) the court concluded that because Mr. Perlmutter did have a right to refuse treatment in the first instance, he had a concomitant right to discontinue

\(^{27}\) *Perlmutter*, 362 So. 2d at 162.


\(^{29}\) *Perlmutter*, 362 So. 2d at 162 (citing *Saikewicz*, 370 N.E.2d at 425).

\(^{30}\) *Perlmutter*, 362 So. 2d at 162 (citing *Saikewicz*, 370 N.E.2d at 425-26).

\(^{31}\) *Perlmutter*, 362 So. 2d at 162. The protection of third parties by the state as parens patriae is classically exemplified in *In re President & Directors of Georgetown College*, 331 F.2d 1000 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964), where the court ordered treatment to prevent the patient from "abandoning" a minor child. One wonders whether this state interest would be compelling in natural death cases where the patient does have a minor child. Where death is imminent, abandonment is imminent and the state can only prolong the suffering of all those involved.

\(^{32}\) *Perlmutter*, 362 So. 2d at 162.

\(^{33}\) "In the blood transfusion cases, the patient is either incompetent to make a medical decision, equivocal about making it . . . or it is a family member making the decision for an inert or minor third party patient." *Id.* at 163 (footnote omitted).
treatment.\textsuperscript{34}

As to the ethical integrity of medical practice, the court observed that the prevailing practice is to recognize that the dying are more often in need of comfort than treatment.\textsuperscript{35} The court stated that "if the doctrines of informed consent and right of privacy have as their foundations the right to bodily integrity . . . and control of one's own fate, then those rights are superior to the institutional considerations."\textsuperscript{36} The court concluded that when the state's interests are weighed against the rights of a terminally ill competent individual, the latter must and should prevail.\textsuperscript{37}

In \textit{JFK Memorial} the Fourth District Court reaffirmed the constitutional analysis in \textit{Perlmutter} but found "significant distinctions" between the case before it and the earlier case.\textsuperscript{38} By tortuous reasoning, the court determined that in \textit{Perlmutter} the individual himself was the direct beneficiary of the request to die with dignity and the benefit was cessation of pain and suffering, but in \textit{JFK Memorial} the direct beneficiary of the request was the family of the patient and the benefits were financial savings and cessation of the emotional drain occasioned by awaiting the medico-legal death of a loved one.\textsuperscript{39}

The court's perceived distinction is illusory. On \textit{JFK Memorial}'s facts, the patient himself is the direct beneficiary because his constitutional right of privacy is vindicated. The benefit is the patient's ability to exercise his desire to die by natural causes and not be subjected to a prolonged death which may denigrate his quality of life. His family may be relieved of extended trauma and overwhelming financial strain as a consequence of his choice, but the benefit is no less the patient's if he chooses to spare his family.

The district court found that the perceived distinction between \textit{Perlmutter} and \textit{JFK Memorial} required a change in focus from safeguarding the interests of the state to protecting the interests of the terminally ill comatose individual, reasoning: "One need not go so far back in history as Cain and Abel to recognize that the interests of various family members are not always synonymous nor

\begin{itemize}
  \item \textsuperscript{34} \textit{Id.}
  \item \textsuperscript{35} \textit{Id.}
  \item \textsuperscript{36} \textit{Id.} at 163-64 (citation omitted).
  \item \textsuperscript{37} \textit{Id.} at 164.
  \item \textsuperscript{38} \textit{JFK Memorial}, 432 So. 2d at 618.
  \item \textsuperscript{39} \textit{Id.} The court assumed that a comatose individual suffers no pain. Based on the volume of testimony showing otherwise in natural death cases as well as on disagreement within the medical community, it seems that pain of comatose individuals is beyond the scope of judicial notice.
\end{itemize}
even harmonious.\textsuperscript{40}

Apparently, the court ultimately determined that a procedure including prior judicial review is a prerequisite to the termination of life-prolonging treatment in the case of a comatose individual because it misinterpreted cases from other jurisdictions. As framed by the Fourth District, the \textit{JFK Memorial} issue is synonymous with the issue confronted by other jurisdictions, including New Jersey, Delaware, Ohio, and Massachusetts.\textsuperscript{41} The court stated, "One of the primary tasks confronting a court upon an application for termination is to apply the so-called 'substituted judgment rule' to determine from the known facts and circumstances what the individual would want done if he were conscious and competent."\textsuperscript{42} The court then referred to the variety of methods of determining intent used by other jurisdictions.

However, the facts of \textit{JFK Memorial} did not raise an intent question; therefore, substituted judgment was not an issue. Mr. Landy had made his intent clear in his living will, executed at a time when he was competent. Language in the cases relied on by the Fourth District Court would lead to a finding that prior judicial review is not required where substituted judgment is not involved. A review of the cited cases is enlightening.

The general facts of \textit{In re Quinlan}\textsuperscript{43} are well known. Karen Quinlan fell comatose and was placed on a respirator. Her physicians determined she would never return to a cognitive or sapient life. Karen's father eventually petitioned the lower New Jersey court for authority to order the respirator disconnected.\textsuperscript{44} The New Jersey Supreme Court granted the authority to exercise Karen's

\textsuperscript{40} \textit{Id.} The court went even further and contradicted itself by stating, "The newspaper is a daily reminder that murderers are often related to their victims." \textit{Id.} Previously, the court acknowledged that death would occur, if at all, from natural causes. Murder requires that the causal connection between the act (presumably disconnection of the support systems) and ensuing death be established beyond a reasonable doubt.


\textsuperscript{42} \textit{JFK Memorial}, 432 So. 2d at 619.


\textsuperscript{44} \textit{In re Quinlan}, 355 A.2d at 651.
privacy right to Karen’s father as her guardian.\textsuperscript{45}

The court determined that the least intrusive and least burdensome way of balancing individual against state interests was to allow Karen’s family to use its best judgment as to whether Karen would have exercised the right had she been competent. If the family determined she would reject extraordinary life-sustaining treatment, then upon both a determination by her physicians that there was no reasonable possibility of Karen emerging from the coma and a consultation with the hospital ethics committee, the respirator could be removed.\textsuperscript{46}

Notably, the New Jersey court stated: “We consider that a practice of applying to a court to confirm such decisions would generally be inappropriate, not only because that would be a gratuitous encroachment upon the medical profession’s field of competence, but because it would be impossibly cumbersome.”\textsuperscript{47}

Mr. Landy was seventy-three years old and had lived a full life; Karen was twenty-one years old. Mr. Landy had executed a “living will” expressly directing that his imminent death not be prolonged by life-sustaining apparatus; Karen had not. The Fourth District Court of Florida required judicial review prior to the exercise of Mr. Landy’s constitutional right; New Jersey does not require judicial review even where substitute judgment is required.

In \textit{In re Storar},\textsuperscript{48} Brother Joseph Fox had indicated orally that if his prognosis were hopeless he would not want his life prolonged by artificial means. At age eighty-three, he suffered a cardiac arrest during surgery which resulted in severe and irreversible brain damage. Brother Fox’s superior instituted proceedings to have him declared incompetent and to obtain judicial approval to withdraw the respirator to which Brother Fox was connected. New York’s lower appellate court affirmed that part of the trial court’s decision which approved the removal of the respirator based on both the common law right of bodily self-determination and a constitutional privacy right. The lower appellate court then devised a legal framework for the exercise of this right, holding that judicial approval was required in order to terminate extraordinary medical treatment of a terminally ill and comatose patient.\textsuperscript{49}

On appeal, New York’s highest court, the New York Court of

\textsuperscript{45} \textit{Id.} at 671.

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} \textit{Id.} at 669.

\textsuperscript{48} 420 N.E.2d 64 (N.Y. 1981).

Appeals, based its ruling on the common law right of bodily self-determination and held that Brother Fox had the right to have the apparatus removed. Furthermore, the court found that Brother Fox had made the decision to forego treatment for himself, based on the oral statements he made prior to incompetency. Consequently, the decision did not address the substituted judgment issue. Moreover, the court of appeals modified the lower appellate court's legal framework regulating the exercise of the right by "deleting everything but the authorization to the petitioner to discontinue use of the respirator."

Therefore, under Storar, so long as there is even an oral expression of intent by a terminally ill patient prior to his incompetency, that directive may be followed without judicial intervention. Mr. Landy had not only expressed his intent orally, but had memorialized his directive in a living will.

The development of natural death case law in Massachusetts has been more confusing than in other states. Superintendent of Belchertown State School v. Saikewicz involved a sixty-seven-year-old man suffering from acute myeloblastic monocytic leukemia. With a mental age of approximately three years, Saikewicz had lived in state institutions for over fifty years. The superintendent, along with a staff attorney at Belchertown, filed a motion for the appointment of a guardian ad litem with authority to make the necessary decisions concerning Saikewicz's care and treatment. The appointed guardian ad litem filed a report with the court recommending that the medically indicated treatment, chemotherapy, not be given. After a hearing, the probate court entered an order essentially agreeing with the guardian's recommendation and reporting two questions that were allowed direct appellate review by the supreme judicial court. The first question addressed the probate court's authority to order withholding of medical treatment and the second asked if the probate court was correct in ordering that no treatment be administered in Saikewicz's case. The supreme judicial court answered both questions in the affirmative and stated:

[W]e now reiterate the substituted judgment doctrine as we apply

50. Storar, 420 N.E.2d at 74.
51. Id. at 72.
52. Id. at 74.
54. Id. at 419 & n.2.
it in the instant case. We believe that both the guardian ad litem in his recommendation and the judge in his decision should have attempted (as they did) to ascertain the incompetent person's actual interests and preferences. In short, the decision in cases such as this should be that which would be made by this incompetent person, if that person were competent, but taking into account the present and future incompetency of the individual as one of the factors which would necessarily enter into the decision-making process of the competent person.\textsuperscript{55}

Although the \textit{Saikewicz} decision did require judicial intervention, that case can be distinguished from \textit{JFK Memorial}. Mr. Landy was competent when he executed his living will; Mr. Saikewicz was severely mentally retarded and never had expressed an intent that he not be subjected to extraordinary medical treatment. Mr. Landy had the support of family members. Mr. Saikewicz was a ward of the state and had no family willing to become involved.\textsuperscript{56} The interests in the two cases are clearly diverse. It is also pertinent to note that the \textit{Saikewicz} decision has been criticized in both the legal and medical communities and has caused much confusion in Massachusetts.\textsuperscript{57}

A lower Massachusetts appellate court following on the footsteps of \textit{Saikewicz} tried to narrow and contain its impact in \textit{In re Dinerstein}.\textsuperscript{58} First, the court interpreted \textit{Saikewicz} to require judicial approval only where life-saving or life-prolonging treatment is to be withheld as opposed to administered.\textsuperscript{59} Second, the court stated:

As it cannot be assumed that legal proceedings such as the present one will be initiated in respect of more than a small fraction of all terminally ill or dying elderly patients, the \textit{Saikewicz} case, if read to apply to the natural death of a terminally ill patient by cardiac or respiratory arrest, would require attempts to resuscitate dying patients in most cases, without exercise of medical

\textsuperscript{55} \textit{Id.} at 431.

\textsuperscript{56} Two of his sisters, the only family members that could be located, "preferred not to attend" the hearing or otherwise become involved. \textit{Id.} at 420.


\textsuperscript{59} \textit{Id.} at 137.
judgment, even when that course of action could aptly be characterized as a pointless, even cruel, prolongation of the act of dying.\textsuperscript{60}

Third, the court concluded that the life-prolonging treatments required by \textit{Saikewicz} are meant to be, at the very least, treatments administered with some reasonable expectation of effecting a remission of symptoms enabling a return toward a normal functioning, integrated existence.\textsuperscript{61}

The Massachusetts Supreme Judicial Court approved the \textit{Dinnerstein} result in \textit{In re Spring}.\textsuperscript{62} Earle Spring, seventy-nine, was suffering from end-stage kidney disease, which required him to undergo hemodialysis treatment three days a week, five hours a day. He also suffered from senility and was completely confused and disoriented. Without the dialysis treatment, Earle would die; with it, he might survive for months.

In the petition of his wife and son, who was his temporary guardian, a probate court found that Spring would, if competent, choose not to receive treatment and ordered that Spring's attending physician, wife, and son together decide whether to terminate treatment. The appeals court affirmed the judgment, but the Massachusetts Supreme Court concluded it was error to delegate the decision to the attending physician and Spring's wife and son.\textsuperscript{63}

Nevertheless, the court pointed out that neither \textit{Saikewicz} nor \textit{Spring} "presented any issue as to the legal consequences of action taken without court approval."\textsuperscript{64} It went on to caution that its "opinions should not be taken to establish any requirement of

\textsuperscript{60} Id. \\
\textsuperscript{61} Id. at 137-38. \\
\textsuperscript{62} 405 N.E.2d 115 (Mass. 1980). \\
\textsuperscript{63} The court stated, "[W]e disapprove shifting of the ultimate decision-making responsibility away from the duly established courts of proper jurisdiction." \textit{Id.} at 120. \\
\textsuperscript{64} \textit{Id.} at 119. Initially the court seemed to limit its discussion to action taken in cases of "brain death." In brain death, the entire brain, including the cerebral cortex, which is responsible for cognition, and the brain stem, which is responsible for reflex or automatic control of vital involuntary bodily functions, has ceased to function. \textit{See} \textit{FLA. STAT.} \S 382.085 (1983). However, the court eventually incorporated irreversible vegetative coma into its discussion by acknowledging and approving the holding of \textit{Dinnerstein}. For a persistent vegetative coma, only extensive injury to the upper portion of the brain need occur. So, although the brain is incapable of cognitive function, there may be persistence or return of brain waves, cephalic reflexes, and spontaneous breathing because some brain regions are not damaged. Patients in a vegetative state may move, groan, blink, and react to light and sound. Greenbaum, \textit{Current Standards of Practice in Medicine: The Medical, Judicial and Legislative Roles}, 7 W. St. U.L. Rev. 3, 14 (1979).
prior judicial approval that would not otherwise exist."\textsuperscript{65}

The court then listed the following circumstances that should be taken into account in deciding whether there should be an application for a prior court order with respect to medical treatment of an incompetent patient:

The extent of impairment of the patient's mental faculties, whether the patient is in the custody of a State institution, the prognosis without the proposed treatment, the prognosis with the proposed treatment, the complexity, risk and novelty of the proposed treatment, its possible side effects, the patient's level of understanding and probable reaction, the urgency of the decision, the consent of the patient, spouse or guardian, the good faith of those who participate in the decision, the clarity of professional opinion as to what is good medical practice, the interests of third persons, and the administrative requirements of any institutions involved.\textsuperscript{66}

The facts of the \textit{Spring} case did not compel the court to decide what combination of circumstances would make prior court approval necessary. That decision was left to be made upon the particular facts of future cases.

In \textit{Custody of a Minor},\textsuperscript{67} the Massachusetts Supreme Judicial Court tried to clarify the Saikewicz-Dinnerstein-Spring trilogy. In that case, a baby with terminal heart disease had been abandoned by his family and was under the supervision of a public welfare agency. The hospital sought to "no code" the child's medical chart. A "no code" order directs hospital staff not to apply extraordinary resuscitative measures in the event of cardiac or respiratory failure.\textsuperscript{68}

\textsuperscript{65} In re \textit{Spring}, 405 N.E.2d at 120. The court's discussion regarding the need for a court order, particularly its comment on the scarcity of precedent addressing criminal liability and the more fully developed law governing civil liability for health care providers acting without judicial approval, is enlightening.

\textsuperscript{66} Id. at 121.

\textsuperscript{67} 434 N.E.2d 601 (Mass. 1982).

\textsuperscript{68} Id. The terms "no-code" or "DNR" (do not resuscitate) derive from a hospital practice utilizing teams of nurses and physicians trained in cardiopulmonary resuscitation (CPR). When a patient goes into cardiac or respiratory arrest, a code word and room number are sounded, signaling the team of the emergency. When a no-code order is given, the team is not alerted. The no-code order conforms with current medical standards. "Basic life support is not indicated for a victim who is known to be in the terminal stages of an incurable condition." \textit{Standards for Cardiopulmonary Resuscitation (CPR) and Emergency Cardiac Care (ECC)}, 227 J. A.M.A. 837, 864 (1974). The "partial" or "slow-code," responding to a code slowly or not using every available lifesaving measure, is more controversial. See
The supreme judicial court noted that *Dinnerstein* permits a "no code" without prior judicial approval and that *Spring* approved *Dinnerstein* as consistent with *Saikewicz*. The court distinguished *Dinnerstein* and *Saikewicz* based on state custody and the prognosis without treatment versus the prognosis with the proposed treatment. The court compared *Dinnerstein* and *Saikewicz* as raising the same issue of "whether and by what means a person has the right to refuse the invasion of his or her bodily integrity by refusing extraordinary medical treatment." The court then applied the *Spring* analysis and determined that a prior court order was necessary in *Custody of a Minor*. The court reasoned, "Absent a loving family with whom physicians may consult regarding the entry of a 'no code' order, the issue is best resolved by requiring a judicial determination in accordance with the substituted judgment doctrine enumerated in *Saikewicz*."

Ultimately, the state of the law in Massachusetts regarding substituted judgment appears to be that if the incompetent's intent is not known but there is a loving family familiar with his character and beliefs, then the family, in consultation with the physicians, can exercise the patient's right of privacy without prior judicial approval. Again, it is crucial to note that *JFK Memorial* did not involve the special considerations present where substituted judgment is exercised.

The Supreme Court of Delaware decided the procedural issue of an incompetent's right to have life-prolonging treatment discontinued upon certification from the Court of Chancery in *Severns v. Wilmington Medical Center*. Mary Reeser Severns, aged fifty-five, sustained serious brain injury in a car accident. For all practical purposes, she had been in a coma since the accident. Mrs. Severns's husband filed for an order appointing him guardian of her person. He asked for authorization to discontinue the use of the respirator, tracheotomy, and drugs and to have a "no code" order entered.

The Delaware court held that although enabling legislation was

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69. Custody of a Minor, 434 N.E.2d at 607.
70. Id.
71. Id. at 608.
72. Id.
73. 421 A.2d 1334 (Del. 1980).
74. Id. at 1336-39.
not essential to recognition of Mrs. Severn's constitutional right, an evidentiary hearing was a prerequisite to relief. The court explained:

We are sensitive to the need for a prompt adjudication of the issues presented in the lawsuit and of the additional grief which uncertainty may bring to the Severns family. But we cannot undertake to rule on these life-and-death matters—which are of transcendent importance to all of us—on the basis of a stipulation of facts. The problems are too large, the precedent too significant and the stipulation is too vague.

Mrs. Leach had not executed a living will. Thus, the circumstances of that case are significantly different from those of JFK Memorial.

The Probate Division of the Court of Common Pleas of Ohio, faced with the case of an incompetent who had not executed a living will, also determined that judicial review was a prerequisite to relief. *Leach v. Akron General Medical Center* involved a seventy-three-year-old woman suffering from amyotrophic lateral sclerosis. Her treating physician informed her of the disease and told her it would be terminal within three to five years. Mrs. Leach's health deteriorated as expected and she eventually was admitted to the hospital in a stuporous condition. After some improvement, she suffered a cardiac arrest. Cardiopulmonary resuscitation was administered and her heartbeat was restored. She then was placed on a life support system consisting of a respirator, nasogastric tube, and catheter. After four months of observing his wife's chronic vegetative condition, Mrs. Leach's husband asked the treating physician to terminate use of the respirator. The physician refused to do so without court order and so the familiar judicial process began.

75. *Id.* at 1349.
76. *Id.* (footnote omitted).
77. 426 N.E.2d 809 (Ohio C.P. 1980).
78. *Id.* at 810. In many instances, terminally ill patients are subjected to CPR where the treating physician has failed to chart a no-code or DNR order. See supra note 68. When the patient goes into cardiac or respiratory arrest and the treating physician is not immediately available, a nurse or a physician unfamiliar with the patient's history is likely to administer CPR.
79. *Leach*, 426 N.E.2d at 811. The Ohio Court of Common Pleas pointed out that Mrs. Leach was being kept alive at a cost of approximately $500 per day. Indeed, judicial review is costly in terms of both time and expense. The Brother Fox case (*In re Storar*) continued long past the patient's death. His medical care during the legal battle cost $87,000 and the
At the evidentiary hearing, a total of seventeen witnesses testified. In numerous conversations with family and friends, Mrs. Leach had expressed her desire not to be placed on a life support system. Only two days prior to her hospitalization, she had told a friend: "That's the one thing that terrifies me. I don't want to be put on life support systems. I don't want to live if I have to be a vegetable." Thus in Leach, as in Storar, the incompetent had expressed orally the specific desire to forego life-prolonging treatment and therefore there was no written directive to evidence this intent. But in JFK Memorial Mr. Landy had made his intent clear by executing a living will.

In sum, the Fourth District Court rightly looked to the above mentioned cases in determining that an individual, competent or incompetent, has the right to forego life-sustaining treatment. However, the court erred in relying on those cases in deciding to require judicial review prior to termination of treatment. Conspicuous in all the cited decisions is the absence of a directive executed by the patient while he was competent.

Given the facts of JFK Memorial and the obvious flaws in the Fourth District Court of Appeal's analysis, the Florida Supreme Court could have handed down a narrow, conservative decision on the "right to die." The supreme court might have held, for example, that doctors and hospitals do not need court permission to honor an incompetent patient's written directive so long as a requisite number of qualified physicians had certified that the patient's condition was terminal.

Instead, the Florida Supreme Court ruled that, even in the absence of a living will, doctors may withhold medical treatment of a comatose patient at the request of the family or a legal guardian without court permission so long as at least two physicians other than the treating physician agree that there is no reasonable medical expectation that the patient will recover.

Writing for the court, Chief Justice James Alderman first concluded that an individual, competent or incompetent, has the constitutional right to privacy and freedom of choice to terminate his life-sustaining treatment. The court stated that terminally ill pa-

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80. Leach, 426 N.E.2d at 811.
81. Id.
82. JFK Memorial, 452 So. 2d at 926.
83. Id. at 924.
tients' constitutional rights should not be lost when they suffer irreversible brain damage, become comatose, and are no longer able to express their wishes to discontinue the use of extraordinary life support systems. Further, the court found applicable to the facts before it the *Perlmutter* principle that the state's interest against termination of extraordinary life support weakens and the individual's right to privacy increases as the bodily invasion becomes greater and the prognosis dims. "The issue in these cases is not whether a life should be saved. Rather, it is how long and at what cost the dying process should be prolonged."

Having recognized the right to discontinue treatment, the court went on to analyze the means by which the right may be exercised. As had the Fourth District Court of Appeal, the supreme court erroneously found the substitute judgment doctrine applicable to *JFK Memorial*. The high court acknowledged the district court's discussion of decisions from other jurisdictions and specifically addressed *Quinlan*, as well as two cases not discussed in the district court's opinion. One of the two, *In re Colyer*, is a Washington Supreme Court case. The other, *In re Guardianship of Barry*, is out of Florida's Second District Court of Appeal.

*Colyer* involved a sixty-nine-year-old woman who had been without oxygen for approximately ten minutes as a result of a cardiopulmonary arrest. The hospital was keeping her alive by artificial support mechanisms, but she had suffered massive brain damage, required a respirator to breathe, and remained in a persistent vegetative state. Two physicians agreed that the most optimistic prognosis was that she might be able to breathe on her own, but would persist in an infantile state, unable to speak or communicate and requiring maintenance of all bodily functions.

Mrs. Colyer's husband was appointed guardian over her person and estate. He petitioned the Washington Superior Court to authorize removal of the life support systems. A guardian ad litem was appointed to represent Mrs. Colyer's interests. After an evidentiary hearing, the judge ordered the support systems withdrawn. The trial court stayed its order, pending review by the

84. Id.
85. Id.
86. Id.
87. Id. at 925-26.
89. 445 So. 2d 365 (Fla. 2d DCA 1984).
90. *Colyer*, 660 P.2d at 740.
Washington Supreme Court.91

The Washington Supreme Court heard oral argument and affirmed the trial court's order. Mrs. Colyer died peacefully soon after the support system was removed, and eventually the court published its opinion on the natural death issue.92 That opinion specifically noted that the state's natural death act did not govern the case before it because the act speaks to the situation where a directive has been signed, and Mrs. Colyer had not signed a directive.93 Faced, therefore, with the question of who may exercise an incompetent's right to refuse life-sustaining treatment where no directive exists, the supreme court held that, as a general principle, a decision to terminate life sustaining treatment in the circumstances presented by Colyer does not require judicial intervention.94 Specifically, the court stated: "In cases where physicians agree on the prognosis and a close family member uses his best judgment as a guardian to exercise the rights of the incompetent, intervention by the courts would be little more than a formality."95

Again, the point must be made that JFK Memorial did not involve substituted judgment. Mr. Landy had signed a directive, witnessed by two people. Had he been under Washington's jurisdiction, his case would have been governed by that state's natural death act and the directive would have been effectuated in good faith, with no civil or criminal liability attaching.96

Barry was a model case of substituted judgment. Andrew James Barry was only ten months old. Since birth he had been in a vegetative state, supported by a ventilator system. Eventually his natural parents were appointed as legal guardians and they petitioned for approval to terminate the life support system. The court appointed a guardian ad litem, who recommended the parents' petition be granted. The state attorney, however, sought to have the petition dismissed.97

At the conclusion of an evidentiary hearing the trial court took the matter under advisement. Three days later that court entered an order authorizing the parents to have the system withdrawn and to instruct the attending physicians not to furnish life-sus-
taining procedures thereafter, except for the limited purposes of alleviating the child's pain and suffering, keeping him comfortable, and providing normal nutrition.\textsuperscript{98}

The trial court's holding was based on detailed findings of fact that the child was terminally ill and could not reasonably be expected to live much beyond two years even if the life support system was retained.\textsuperscript{99} A neonatologist had testified that, in layman's terms, Andrew had a hole where a large part of the brain would normally have been, and that the child's condition was incurable and irreversible. Another neonatologist as well as a child neurologist had concurred in that diagnosis and prognosis.\textsuperscript{100}

The state appealed and the trial judge's order was stayed pending resolution by the Second District Court of Appeal. The district court specifically recognized that Barry addressed the removal of life support systems from a minor and therefore was not controlled by legal precedent allowing a competent individual to order removal of life support systems.\textsuperscript{101} Notably, the court cited the Perlmutter and JFK Memorial district court opinions.\textsuperscript{102} The Second District concluded that there was clear and convincing evidence to support the trial judge's findings, that Andrew's interests outweighed those of the state, and that his parents could assert a privacy interest on his behalf. The court furthermore found that the trial court had applied correctly the doctrine of substituted judgment.\textsuperscript{103}

Addressing the procedural issue, the court held: "A decision by parents supported by competent medical advice that their young child suffers from a permanent, incurable and irreversible physical or mental defect likely to soon result in the child's death should ordinarily be sufficient without court approval."\textsuperscript{104} Nevertheless, courts must be open to hear natural death matters when judicial intervention is solicited by the family, guardian, affected medical personnel, or the state.\textsuperscript{105}

In JFK Memorial, the supreme court agreed with the analysis of Quinlan, Colyer, and Barry, each holding that as a general rule,

\textsuperscript{98} Id. at 369.
\textsuperscript{99} Id. at 368.
\textsuperscript{100} Id. at 368, 370.
\textsuperscript{101} Id. at 369.
\textsuperscript{102} Id. at 370 & n.3.
\textsuperscript{103} Id. at 371.
\textsuperscript{104} Id. at 372. The issues raised and lines drawn where the patient is an infant are especially perplexing. See, e.g., President's Commission, supra note 68, at 197-229.
\textsuperscript{105} Barry, 445 So. 2d at 372.
natural death decisions are to be made without judicial intervention and within the patient-doctor-family relationship. However, the court rejected Quinlan's requirement that a hospital's ethics committee concur in the decision and Colyer's implicit requirement that a guardian be appointed in all cases.\textsuperscript{106} The court held that the right of a patient in an irreversibly comatose and essentially vegetative state to refuse extraordinary life-sustaining measures may be exercised by his family or by a guardian. If there are close family members willing to exercise the right on behalf of the patient, a guardian of the person need not be judicially appointed. As illustrated by the court, "close family members" encompasses the patient's spouse, adult children, or parents.\textsuperscript{107} Finally addressing the certified question before it, the court relied upon the substituted judgment doctrine and stated:

Under this doctrine close family members or legal guardians substitute their judgment for what they believe the terminally ill incompetent persons, if competent, would have done under these circumstances. If such a person, while competent, had executed a so-called "living" or "mercy" will, that will would be persuasive evidence of that incompetent person's intention and it should be given great weight by the person or persons who substitute their judgment on behalf of the terminally ill incompetent.\textsuperscript{108}

Under the supreme court's holding, guardians, consenting family members, physicians, hospitals, or their administrators need only act in good faith to avoid potential liability.\textsuperscript{109} Justice McDonald wrote a concurring opinion in which he appeared to acknowledge that JFK Memorial did not involve substituted judgment. His concern was that although the certified question should have been answered in the negative, the court should not have suggested answers to factual questions which were not before it. He also indicated that had the case involved substituted judgment, he would have required that a guardian be appointed to

\textsuperscript{106} JFK Memorial, 452 So. 2d at 926.
\textsuperscript{107} Id.
\textsuperscript{108} Id. Some jurisdictions define the substituted judgment doctrine as involving the court's determination of what treatment the incompetent would have chosen, based on the evidence presented. See, e.g., Colyer, 660 P.2d at 745 (citing Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417 (Mass. 1977)).
\textsuperscript{109} JFK Memorial, 452 So. 2d at 926. For them to be held civilly or criminally liable, there must be a showing that their actions were intended to harm the patient.
act for the incompetent.  

On the one hand, the supreme court holding goes too far by allowing family members to substitute their judgment for the patient's without requiring the appointment of a guardian. Requiring a guardian in such cases would provide adequate safeguards for the incompetent without overly restricting the exercise of his constitutional privacy rights. Moreover, the court invited further controversy by inadequately describing who is a "family member" for purposes of the rule and by failing to set out a priority among those members.

On the other hand, the supreme court takes a step backwards in the protection of an individual's personal choice to forego life-sustaining treatment. An individual who asserts his constitutional right by memorializing his intent in a living will while competent has no assurance his constitutional right will be exercised should he fall into a coma. At that point, the right is handed over to close relatives or guardians. The individual's living will, a clear and definite expression of his intent to exercise his right to forego treatment, disintegrates into only persuasive evidence of his intent. The living will should be conclusive evidence of the patient's intent.

III. Florida's Life-Prolonging Procedure Act

The Florida legislature may have eliminated the confusion created by the supreme court in *JFK Memorial* by enacting the Life-Prolonging Procedure Act. The Act clearly sets out the procedure for making declarations instructing physicians to provide, withhold, or withdraw life-prolonging treatment\(^\text{111}\) or for designating a

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110. *Id.* at 927 (McDonald, J., concurring).

111. Ch. 84-58, § 4, 1984 Fla. Laws 136, 137, sets forth the procedure for making a declaration (alternatively referred to as a directive or living will in other jurisdictions) as well as the procedure for providing notice to the physician and incorporation of the declaration into the drafter's medical records:

1. Any competent adult may, at any time, make a written declaration directing the withholding or withdrawal of life-prolonging procedures in the event such person should have a terminal condition. A written declaration shall be signed by the declarant in the presence of two subscribing witnesses, one of whom shall be neither a spouse nor blood relative of the declarant. If the declarant is physically unable to sign the written declaration, his declaration may be given orally, in which event one of the witnesses shall subscribe the declarant's signature in the declarant's presence and by his direction.

2. It shall be the responsibility of the declarant to provide for notification to his attending physician that a declaration has been made. In the event the declarant is comatose, incompetent, or otherwise mentally or physically incapable, any other person may notify the physician of the existence of a declaration. An attend-
substitute to make the treatment decision.\textsuperscript{112} Generally, the Act assures that an individual's written directive will be followed without judicial intervention if it meets statutory guidelines. Therefore, it would seem that having a "living will" may become as common and legally advisable as having a will passing property at death. Furthermore, the Act clearly distinguishes between situations where an individual himself makes the choice to terminate treatment and those where another specified individual is permitted to make that choice for an incompetent.\textsuperscript{113}

Apparently, passage of the Act was a major political accomplishment in Florida.\textsuperscript{114} In this state and others, there have been four primary reasons that legal recognition of the right to die naturally has been opposed: (1) organized religion is opposed to euthanasia; (2) the medical profession traditionally has deplored euthanasia; (3) recognition could open the door to mass euthanasia; and (4) there is a possibility of incorrect diagnosis or that new medical discovery would have cured a patient who chose euthanasia.\textsuperscript{115} An examination of recent opinions voiced by religious leaders, doctors,
and lawyers suggests that these arguments against right to die legislation may not be valid.

In Florida, the strongest opposition to previous efforts to pass natural death legislation came from the Roman Catholic Church. Yet, curiously enough, the concepts of brain death and voluntary passive euthanasia do not violate the espoused principles of major Protestant religions, orthodox Judaism, and the Catholic Church. For example, in 1980 the Sacred Congregation for the Doctrine of the Faith set forth the Catholic Church's teaching on euthanasia:

Life is a gift of God, and on the other hand death is unavoidable; it is necessary therefore that we, without any way hastening the hour of death, should be able to accept it with full responsibility and dignity. It is true that death marks the end of our earthly existence, but at the same time it opens the door to immortal life. Therefore all must prepare themselves for this event in the light of human values, and Christians even more so in the light of faith.

As to those who work in the medical profession, they ought to neglect no means of making all their skill available to the sick and the dying; but they should also remember how much more necessary it is to provide them with the comfort of boundless kindness and heartfelt charity.

Additionally, the medical profession has practiced and explicitly endorses passive euthanasia. Although health care providers increasingly have sought judicial review of decisions to forego life-sustaining treatment, the impetus has been legal responsibility, not medical ethics. Some are prompted by a professional disagreement with or conflict among the patient's relatives. More often, though, the physician is comfortable with the decision but fears criminal or civil liability.

117. Ufford, supra note 57, at 240.
118. SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION ON EUTHANASIA FROM ROME (May 5, 1980); see also Pope Pius XII, Prolongation of Life, 4 AM. Q. PAPAL DOCTRINE 393 (1958); Survey, Euthanasia: Criminal, Tort, Constitutional and Legislative Considerations, 48 NOTRE DAME LAW. 1202, 1209 (1973).
120. Although criminal actions are rare, criminal liability is a serious threat. See gener-
In answer to the third contention, Luis Kutner, Chief Justice of the World Court of Human Rights, stated:

That legalized voluntary euthanasia might soon lead to involuntary euthanasia ignores the main difference between the two: informed consent—a greater difference than exists between active or passive euthanasia (act *vis-a-vis* omission). So, the legal definition of euthanasia could be limited to include only those terminal patients who gave their informed consent, thus preventing mercy killing of any non-consenting terminal patients.¹²¹

The fourth argument against natural death legislation is the most persuasive, for always there is some hope of a miracle, some possibility, however remote, that tomorrow’s medical breakthrough will provide a cure. The response to this argument is simply this: “We stand in awe of the life preserving power of modern technology; yet we also fear that we may be losing control of the technological monsters we have created.”¹²² Adoption of the fourth argument requires society to demand that the individual surrender his dignity to technology on the tenuous proposition that a cure might be found.

Although the Florida legislature recently determined that the above arguments were not persuasive enough to block natural death legislation, language in the Act makes it clear the drafters were sensitive to opposition. Given the experience of fifteen state “laboratories” where natural death laws already had been enacted, Florida was well-equipped to draft provisions to reflect the interests of all concerned.¹²³

Noticeably, the Florida statute is carefully drawn to avoid the problems generated by other states’ statutes. Specifically, the stat-

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ute does not operate to exclude common law and constitutional rights held by individuals who have not executed a declaration.\(^\text{124}\) On the other hand, section 11 states that nothing in the Act shall be construed to condone, authorize, or approve mercy killing or euthanasia, or to permit any affirmative or deliberate act or omission to end life other than by natural process.\(^\text{125}\)

Generally, terms used in the Act have been defined so as to avoid ambiguity and consequent generation of questions of fact.\(^\text{126}\) However, the legislature failed to learn from the California experience that defining "terminal condition" as a condition where death is "imminent" is unsatisfactory.\(^\text{127}\) As California has found, the effective legal definition of "imminent" conflicts with medical standards. A definition specifying a time frame in which death is expected to occur may have been less controversial.

Other than the use of the ambiguous term "imminent," Florida has profited from the experience of other jurisdictions and has defined clearly the terms contained in the Act. Under the Florida statute, a terminal condition means "a condition caused by injury, disease, or illness from which, to a reasonable degree of medical certainty, there can be no recovery and death is imminent."\(^\text{128}\) Except for the word "imminent," this definition is clear and understandable. Moreover, "life-prolonging procedure" is painstakingly defined to include any medical procedure, treatment, or intervention that utilizes mechanical or other artificial means to sustain, restore, or supplant a spontaneous vital function and would serve only to prolong the dying process of a terminally ill patient.\(^\text{129}\)

The Act specifically excludes from the definition of life-prolonging procedure the provision of sustenance or the administration of medication or performance of any medical procedure deemed necessary to provide comfort care or to alleviate pain.\(^\text{130}\) The executive director of the Florida Catholic Conference opined that this provision avoids abuses inherent in legislation adopted in other states and referred to a recent California case, presumably that of Eliza-

\(^{124}\) Ch. 84-58, § 13, 1984 Fla. Laws 136, 140-41.
\(^{125}\) Id. § 11, 1984 Fla. Laws at 140.
\(^{126}\) Id. § 3, 1984 Fla. Laws at 136-37.
\(^{127}\) Id. § 3(6), 1984 Fla. Laws at 137; Winslade, supra note 122, at 38; see, e.g., President's Commission, supra note 68, at 24-26; Comment, The California Natural Death Act: An Empirical Study of Physicians' Practices, 31 Stan. L. Rev. 913, 933 (1979).
\(^{128}\) Ch. 84-58, § 3(6), 1984 Fla. Laws 136, 137.
\(^{129}\) Id. § 3(3).
\(^{130}\) Id.
However, an individual such as Miss Bouvia, permanently disabled but otherwise healthy, would not be allowed to refuse nourishment under the Florida Act even absent the sustenance provision because the condition must be terminal.\textsuperscript{132}

The California act requires the attending physician to determine the validity of the directive.\textsuperscript{133} Likewise, the act delegates judicial responsibility to the physician in the case where the declarant becomes a qualified patient after executing a directive and has not subsequently reexecuted a directive.\textsuperscript{134} The physician is made to act as the trier of fact.

Under the Florida Act the attending physician is not required to determine the declaration's validity. Furthermore, under Florida law, only when the declaration is oral must it be made subsequent to the time the terminal condition is diagnosed.\textsuperscript{135} A written declaration may be made by any competent adult at any time and retains its validity until it is revoked.\textsuperscript{136} The Florida approach is preferable because it relieves physicians of unnecessary administrative burdens.

Several statutes subject a person who falsifies or forges the declaration of another or who willfully conceals or withholds personal knowledge of revocation to prosecution for unlawful homicide.\textsuperscript{137} By treating the declaration as any other legal paper or document for purposes of forgery penalties, the Florida legislature avoided the contradiction of declaring on the one hand that termination of treatment is not the cause of death and on the other hand that forging the document that permitted termination of treatment is homicide.\textsuperscript{138}

Several statutes specify that a directive is nullified by pregnancy.\textsuperscript{139} The Florida legislature apparently bowed to the Florida Catholic Conference in providing that the declaration of a qualified

\textsuperscript{131} Palm Beach Post, May 18, 1984, at A16, col. 1.
\textsuperscript{132} Ch. 84-58, § 3(6), 1984 Fla. Laws 136, 137.
\textsuperscript{133} CAL. HEALTH & SAFETY CODE § 7191(a) (West 1984).
\textsuperscript{134} Id. § 7191(c). See generally Comment, supra note 127 (discussing physician's responsibility).
\textsuperscript{135} Ch. 84-58, § 3, 1984 Fla. Laws 136, 136-37.
\textsuperscript{136} Id. § 4(1), 1984 Fla. Laws at 137. See PRESIDENT'S COMMISSION, supra note 68, at 310-11, for a comparison of complicated and complicating restrictions set by other jurisdictions.
\textsuperscript{137} See, e.g., CAL. HEALTH & SAFETY CODE § 7194 (West 1984); TEX. REV. CIV. STAT. ANN. art. 9 (Vernon 1984); WASH. REV. CODE ANN. § 70.122.090 (1984).
\textsuperscript{138} Ch. 84-58, § 10, 1984 Fla. Laws 136, 140. See FLA. STAT. § 831.01 (1983).
\textsuperscript{139} See, e.g., legislation in Alabama, California, Delaware, Kansas, Nevada, Texas, and Washington listed supra note 123; PRESIDENT'S COMMISSION, supra note 68, at 310-11.
patient or the written agreement made in accordance with the substituted judgment provision has no effect during the course of a pregnancy. In light of Roe v. Wade, this provision may be unconstitutional. Under Roe and subsequent cases, a woman has unfettered discretion in determining whether to abort during the first trimester of her pregnancy. The Act works as an automatic nullification of choice throughout pregnancy, including the first trimester. Despite widespread criticism of the Roe decision, Roe is still the state of the law to which legislatures are bound. A constitutional attack on the Life-Prolonging Procedure Act’s pregnancy provision is possible. However, it will be a rare situation for someone to have both the standing and the desire to make such a challenge.

A positive aspect of the Florida legislation is that it clearly sets out the physician’s responsibility under the Act. If a treating physician refuses to comply with a declaration or treatment decision made in accordance with the Act, he must make a reasonable effort to transfer the patient to another physician. In addition, health care facilities and other persons acting under the direction of a physician are clearly immunized from criminal and civil liability as long as they comply with the provisions of the Act in good faith.

The Act also addresses the insurance issue generated by termination of life-sustaining treatment and declares that the withholding or the withdrawal of procedures in accordance with the Act shall not constitute a suicide. The Act states that the failure to make a declaration may not have insurance coverage implications.

The valid declaration of any patient made prior to the effective

140. Ch. 84-58, § 12(2), 1984 Fla. Laws 136, 140.
141. 410 U.S. 113 (1973). Roe holds that under the fourteenth amendment to the United State Constitution, a state may not regulate the abortion procedure at all during the first trimester of pregnancy and may not regulate it during the second trimester except insofar as such regulation constitutes measures taken to protect maternal health. During the third trimester, a state may regulate and prohibit abortions, except those necessary to preserve the life or health of the mother.
142. Ch. 84-58, § 8, 1984 Fla. Laws 136, 139. Alabama, Arkansas, Delaware, Idaho, Nevada, New Mexico, North Carolina, and Virginia do not specify penalties for physicians who refuse to follow a declaration. The Florida Act does not specify a penalty, but does offer direction.
143. Ch. 84-58, § 9, 1984 Fla. Laws 136, 139-40. Should litigation be brought under this section, courts are likely to require a showing that the health care provider acted with the intent to harm the patient. See supra note 109.
144. Ch. 84-58, § 12, 1984 Fla. Laws 136, 140.
145. Id.
date of the Act, October 1, 1984, is to be given effect as provided in the Act.\textsuperscript{146}

IV. CONCLUSION

Following years of inertia, both the Florida Supreme Court and the Florida legislature recently decided the natural death issue in favor of an individual’s right to terminate life-sustaining procedures under specified conditions. The Florida Supreme Court failed to distinguish between “living will” cases and substituted judgment cases and failed to maintain adequate procedural safeguards in its determination that a guardian need not be appointed where substituted judgment is in fact required. The Florida legislature could have avoided the use of ambiguous language and should not have left the pregnancy provision vulnerable to constitutional attack. Overall, though, both branches of government acted admirably in addressing the natural death issue, balancing the sensitive interests involved, and setting out for health care providers, families, and individuals the scope of their respective liabilities, responsibilities, and rights.

\textsuperscript{146} Id.