The Right To Die After *Cruzan*

by John A. Borron, Jr.

Pending the possibility of review by the United States Supreme Court, the *Cruzan* case is the law of the state of Missouri with respect to the right to die issue involving the withdrawal of nutrition and hydration. The process by which the Missouri Supreme Court reached its decision raises a host of questions for all those concerned with the care of severely incapacitated persons whose prospect for a sapient, cognitive life is nil. Two major questions were addressed: First, to what extent does an individual have the right to decide the conditions under which he or she may direct the discontinuance of efforts to sustain life? Second, to what extent may that right be exercised by a surrogate? Although these two questions are intertwined, this article will primarily address the second issue.

As a result of a head injury sustained in an auto accident, Nancy Cruzan is in a persistent vegetative state. She is oblivious to her environment except for reflexive responses. Respiration and circulation are not artificially maintained. She has no cognitive or reflexive ability to swallow food or water and is fed and hydrated through a gastrostomy tube attached to her stomach. She is neither brain dead nor terminally ill. She could live another thirty years.

Her parents were appointed co-guardians of her person. After the employees of Mt. Vernon State Hospital refused to discontinue nutrition and hydration at the parents' request, they sought a court order compelling the discontinuance of food and water. The trial court granted the parents' request concluding that no state interest outweighed Nancy's "right to liberty" and that to deny the guardians' authority to act under such circumstances would deprive Nancy of equal protection of the law. The trial court also found that she expressed thoughts in somewhat serious conversation that if sick or injured she would not wish to continue her life unless she could live at least halfway normally. In holding that the guardians could not legally require the withdrawal of nutrition and hydration, the Missouri Supreme Court concluded that there was no constitutional, statutory or common law authority permitting them to do so.

The law of Missouri, as well as that of other states, is made up of the state constitution, statutes and the common law. It is well established that a state constitution is a limitation upon the power of the legislature. If the constitution does not prohibit the adoption of a particular law, the legislature is free to act. Statutes are the expression of legislative policy. If the legislature adopts a statute which impermissibly impinges upon an individual's personal rights, that statute may be challenged in the courts as unconstitutional. The common law is that body of principles and rules relating to government and the security of persons and property which derives its authority from the usages and customs of antiquity and from the decisions of courts affirming such principles and rules. The enactment of a statute may confirm, supplement or change the common law rule. If an act is not prohibited by the constitution or a statute, the common law must be examined to determine whether or not the act is prohibited or permissible.

The Court rejected the argument that the "right of privacy," which had been found to exist in the Missouri and Federal Constitutions in other areas of the law in the past, had been or could be extended to a right to die decision made by a surrogate for an incapacitated person. The Court said, even if the right existed in Nancy Cruzan herself, it could not be exercised on her behalf by her guardians.

A guardian's authority is derived from the state's *parens patriae* authority. The guardian is a delegate of the state's power. The delegation is expressed in statutory form delineating the powers and duties of guardians. The Court observed that nothing was contained in the delegatory statute authorizing a guardian to **terminate treatment**. The delegatory statute speaks in affirmative terms, imposing a duty upon a guardian to provide for the ward's "care, treatment, habilitation, education, support and maintenance." The guardian is empowered to assure that the ward receives medical care and other services that are needed; to promote and protect the care, comfort, safety, health and welfare of the ward; and to provide required consents on behalf of the ward.

There is a substantial body of Missouri law which declares that certain rights are personally inviolable and cannot be delegated to a third party, except perhaps by legislative action. For example, it is held that a person is without authority to delegate to another the right to vote in an election. It is held that a person may not delegate to another the right to make a last will and testament for that person. Absent express statutory authority, a person may not be involuntarily sterilized to prevent procreation. There are many other examples of non-delegable common law rights.

The Court portrayed a guardian's statutory authority as rigid and inflexible. In other words, if the statute granting authority to the guardian does not specifically grant the guardian a particular power or authority, it may not be implied from circumstances or otherwise. This view is consistent with decisions of Missouri appellate courts prior to the Guardianship Code Revision of 1983 and the Probate Code Revision of 1980. Prior to the Constitutional Amendment of 1976, the authority of probate courts and of guardians was strictly limited by the State Constitution. It was repeatedly said that guardians were creatures of the law and statutory officers of the probate court. In the very nature of things they had no inherent power, but only such powers as was prescribed by statute, having no authority to act for their wards except as conferred by statute.

Thus was the state of the law in 1983. However, the present delegatory statute under which *Cruzan* was decided contains other language not mentioned by the Court. Before enumerating the powers of the guardian with respect to medical care and other services, quoted by the Court, the statute

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expressly states that the guardian's "powers and duties shall include, **but not be limited to**, the following:..." Furthermore, the statute expressly requires that a guardian of an incapacitated person "shall act in the best interest of the ward." The Court chose to ignore these phrases. The legislative revision of the Codes under which the *Cruzan* case was decided recognizes the vast social changes which have taken place after World War II. The "not limited to" language of the delegatory statute is a legislative expression of the fact that, in modern times, the legislature cannot effectively identify and act upon every facet of the problems which may confront an individual ward. The Supreme Court, in a 1985 decision involving the 1980 Probate Code Revision, recognized those social changes. In that decision, Judge Blackmar noted that one of the purposes of the Revision was to allow greater flexibility in the administration of estates. "We should not take a myopic view of the court's powers because of inappropriate and outmoded analysis."

In 1986, Judge Robertson, who wrote the majority opinion in the *Cruzan* case, in considering the changes in the guardianship laws regarding trial procedures for an adjudication of incapacity or disability, stated: "It is presumed that the legislature was aware of the interpretation placed upon existing statutes by the courts, and that in amending a statute, the intent was to effect some change in the existing law." Thus, the *Cruzan* court could have employed the "but not limited to" language of the delegatory statute to come to a different result.

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The Court's interpretation of the concept of "informed medical consent" risks the danger of rendering a guardian a mere functionary. The Court seems to imply that a guardian must consent to recommended medical treatment regardless of whether or not such treatment is perceived to be in the ward's best interests. The guardian becomes a mere conduit to formally execute a physician's recommendations. Consultation by the guardian with another physician seemingly would have no meaning because, extending the Court's decision to its logical conclusion, the guardian is without discretion to veto a recommended procedure even if that procedure may entail a high risk of disability or even death. Such an interpretation of the law by the Court is contrary to prior appellate decisions which have allowed parents to reject specifically recommended treatment for a child and to pursue other treatment even though the alternative chosen is not regarded as the most effective course to follow. Implicit in the medical consent statute contained in Chapter 431 of the Revised Statutes is a legislative recognition of the right to refuse to give consent. The right to refuse by a competent adult is virtually absolute. As applied to a surrogate, however, a refusal must be based on the best interests of the patient. It seems that the *Cruzan* decision provides no latitude to a guardian to decide not to consent to recommended treatment on the basis that the refusal is in the best interests of the ward.

The Court found that there was no clear, convincing and inherently reliable evidence of Nancy's wishes as to what **she** would want done under the present circumstances. In many areas of the law, resolution of the legal issue turns on ascertaining the intent of the individual. Conviction for the commission of certain crimes cannot be effected absent proof of the intent of the accused to commit the crime. Conservators may not arbitrarily dispose of an adult protectee's property and thereby alter his estate plan. Determining what is the estate plan is a matter of determining the protectee's intent from his oral and written declarations and by his actions. The Court's limitation on the guardian's authority to make a substituted decision is consistent with these principles.

In a 1984 Massachusetts case, the court was confronted with the problem of an elderly, mentally ill patient who had been nourished via a gastrostomy tube. Because of her psychotic behavior, she had repeatedly pulled the tube out and her abdomen was scarred from the surgery necessary to reimplant the tube. The attending physicians feared that to reattach the tube would merely result in the patient pulling it out again. A point would be reached when the tube could not be replaced because of the surgical scarring. The court ordered the insertion of a temporary femoral tube and the administration of antipsychotic medication in an effort to eliminate her psychotic behavior. Although that case ended with that order, what if that alternative does not work? What if surgical reimplantation becomes impossible? *Cruzan* is, of course, factually different from the Massachusetts case and this aspect of nutrition and hydration was not considered by the Missouri court. However, the *Cruzan* Court need not have addressed the authority of the guardians. It could have limited its decision to a finding that since there was no evidence of Nancy's personal wishes or intentions in the circumstances, that a surrogate may not make substituted judgment for Nancy's.

The *Cruzan* decision does not resolve the broad scope of right to die questions in Missouri. Clearly reserved for another case is the extent of a guardian's authority to act on behalf of an incapacitated person where clear evidence of the ward's wishes not to prolong life exists.

The *Cruzan* Court's position that a right to die decision is not delegable ignores other state court decisions which have held that if the right exists in a competent person, incompetency does not eliminate the right and if the right cannot be exercised by that person's guardian, the right is lost. Implicit in the *Cruzan* decision is that a right to die may be made by a competent adult. Other state courts have held that where there is clear and convincing evidence of the wishes of the patient made while competent, as was the situation with Brother Fox in the *Eichner* case discussed by the *Cruzan* Court, a surrogate should be empowered to act. The refusal to recognize such a right even though the patient had not executed a Living Will Declaration is arguably tantamount to a violation of the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution. The *Cruzan* Court, in stating that "no person can assume that choice for an incompetent in the absence of the formalities required under Missouri's

Living Will statutes or the clear and convincing inherently reliable evidence absent here" may have recognized that future possibility. It is, of course, conceded that such inherently reliable evidence was not present in Nancy's case.

Unfortunately, the *Cruzan* decision does not resolve the broad scope of right to die questions in Missouri. *Cruzan* prohibits the withholding or withdrawal of nutrition or hydration from incapacitated persons either under a Living Will Declaration or otherwise. *Cruzan* leaves unanswered the question of whether or not a competent adult may refuse nutrition and hydration as was the situation in the *Bouvia* case. The decision seemingly would permit a competent adult to decline to accept a procedure which is clearly "medical treatment." The decision appears to prohibit a guardian from making any right to die decision on behalf of an incapacitated ward. If the ward, while competent, had executed a Living Will Declaration, such a declaration apparently supersedes the guardian's authority. Clearly reserved for another case on another day is the extent of a guardian's authority to act on behalf of an incapacitated person where clear and convincing evidence of the ward's wishes not to prolong life exists.

By ignoring the "but not be limited to" language of the delegatory statute, the Court has unnecessarily obscured the extent of a guardian's authority in connection with an ordinary medical consent situation. This hiatus presents perplexing problems for the guardian and physician alike. If the guardian declines to consent to a medical treatment recommendation, is the physician justified in relying on that refusal, or is he required to ignore the refusal and risk a charge of battery in a subsequent malpractice action? Obviously, a Hobson's choice should not be permitted to exist in these cases. Absent legislative action clarifying this problem, a physician confronted with such a dichotomy could only resort to court action for guidance. Since it is assumed that medical treatment is recommended only when it is imminently necessary, the delay encountered by even the most expeditious court hearing cannot be in the patient's best interests. Because the personal welfare of the individual is at risk, this problem should be given prompt legislative attention.

Competing philosophies of interest groups involved with the right to die question have made "Right to Die" legislation in Missouri difficult to accomplish. Nevertheless, the difficulties of the question should not be a deterrent to an effort by all concerned persons and organizations to arrive at a consensus which meets the needs and desires of a substantial and growing elderly population in this State while, at the same time, preserving the right to life involving those persons whose desires and intentions cannot be clearly established by acceptable evidence. If, indeed, the United States Supreme Court ultimately finds that a constitutional right of privacy to make a right to die decision is vested in all persons, competent or otherwise, it is the duty of the legislature to find a workable procedure for implementing such a decision where the individual is presently unable to express his or her wishes.

The Reason of the Reasons in *Cruzan*

by Patrick D. Kelly

This article is intended to focus on the **legal** issue underlying the principal basis for the *Cruzan* majority decision, its ruling that Nancy's constitutional right of privacy, and her common-law right to refuse treatment, did not outweigh the State's interest in "the preservation of life" and in "the sanctity of life." The basis in law for the right of one to refuse treatment is detailed elsewhere in this issue (Mahoney article). The separately raised legal issue as to whether a guardian has the lawful power to issue a directive resulting in termination of life also is discussed elsewhere in this issue (J. Borron article). Still another legal question inherent in the decision, whether the appellate court acted properly in rejecting the trial court's explicit findings as to what would have been the patient's wishes, if competent, will not be discussed, in the belief that an issue as to the scope of appellate review would be of little interest outside the legal community.

Before directly discussing the majority's exposition of a controlling State interest in the preservation and sanctity of life, technical commentary on some of the court's language seems desirable. In its statement of the issue, the Court several times declared the State's interest to be "unqualified." Such ascription adds nothing, and incurs the risk of being interpreted to mean "absolute." Since the majority opinion also goes on to consider whether Nancy's rights outweighed the State's interest, it necessarily follows that the majority did not intend "unqualified" to mean "absolute." And, of course, the Court has never considered the interest in the preservation of life to have no exceptions; in the same term it entered an opinion which condemned a death row inmate to capital punishment.

Some people will be disappointed in the Court's disposition of the issue as to the constitutionality of that portion of the Missouri Living Will statute which excluded from applicability in a person's own Living Will any directive as to withholding nutrition or hydration. The majority did summarily declare error in the trial court's finding of unconstitutionality, but apparently in the sense of error because "...that statute is not at issue in this case" (necessarily so where it was enacted after the onset of incompetency of the patient).

Still, the majority opinion does quote that statutory provision as pronouncing "the policy of this State with regard to the sanctity of life." More exactly, what is stated in the Living Will statute is the particular policy of the State about actions or conduct as to which absolute immunity from criminal prosecution or civil suit shall be extended. Public policy as to sanctity of life would more directly be expressed in a statute

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