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AN INCOMPETENT INDIVIDUAL'S RIGHT TO DIE

I. Introduction

Judge Cardozo once stated that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body."¹ This statement represents the common law right of an individual to refuse medical treatment.² For example, a doctor who performs medical treatment without the patient's consent may be guilty of assault³ even if the treatment is beneficial or necessary to keep the patient alive.⁴ Thus, the individual's right to determine the course of his medical treatment supersedes the doctor's obligation to treat the patient.⁵

1. *Schloendorf v. Society of New York Hosp.*, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914).

2. This common law right has been recognized repeatedly by the courts.

In 1891 . . . the United States Supreme Court stated, '[n]o 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.'

McConnell v. Beverly Enter., 209 Conn. 692, 701, 553 A.2d 596, 601 (1989) (citing *Union Pacific Co. v. Botsford*, 141 U.S. 250, 251 (1891)); *Rivers v. Katz*, 67 N.Y.2d 485, 492-93, 495 N.E.2d 337, 341, 504 N.Y.S.2d 74, 78 (1986); *Delio v. Westchester County Center*, 129 A.D.2d 1, 516 N.Y.S.2d 677 (2d Dep't 1987).

Many cases have held that a patient's right also arises from the constitutional right to privacy. The United States Supreme Court has recognized a right to privacy in the due process clause of the fourteenth amendment. *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989); *Roe v. Wade*, 410 U.S. 959 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). This constitutional right to privacy encompasses a patient's decision to decline medical treatment under certain circumstances. *Eichner v. Dillon*, 73 A.D.2d 431, 458-60, 426 N.Y.S.2d 517, 539-40 (2d Dep't 1980), *modified sub nom. In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981); *see also Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 738, 370 N.E.2d 417, 426 (1977); *Matter of Quinlin*, 70 N.J. 10, 40, 355 A.2d 647, 663 (1976), *cert. denied*, 429 U.S. 922 (1976). Recognizing the right to refuse medical treatment as based on common law, rather than on the right to privacy, many states have implied the right to refuse medical treatment in their state constitutions. *See, e.g., Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1137, 225 Cal. Rptr. 297, 301 (1986); *In re Guardianship of Barry*, 445 So. 2d 365 (Fla. Dist. Ct. App. 1984); *Quinlin*, 70 N.J. at 40, 355 A.2d at 663; *Matter of Welfare of Colyer*, 99 Wash. 2d 114, 660 P.2d 738 (1983); *Rasmussen v. Flemming*, 154 Ariz. 207, 215, 741 P.2d 674, 682 (1987); *Rivers*, 67 N.Y.2d at 492, 495 N.E.2d at 341, 504 N.Y.S.2d at 78.

3. The doctor may be liable in damages except in emergency cases in which the patient is unconscious and it is necessary to operate before consent can be obtained. *Schloendorf*, 211 N.Y. at 130, 105 N.E. at 93.

4. *Eichner*, 73 A.D.2d at 454, 426 N.Y.S.2d at 536.

5. Under certain circumstances, the individual's right to determine the course of his

In New York,⁶ the due process clause of the state constitution is the source of a patient's right to refuse medical treatment.⁷ The patient's choice, moreover, cannot be disregarded unless there is a compelling state interest.⁸ Before the medical treatment is terminated, the patient must be fully informed of, and understand the consequences of, such actions.⁹ This requirement of "informed consent" means that before exercising his right to refuse medical treatment, a patient must receive information from his physician regarding at a minimum, the specific procedure or treatment involved, the reasonably foreseeable risks involved, and alternatives for care or treatment.¹⁰ The individual's decision as to treatment is then made based on these objective factors, as well as any subjective values or beliefs.¹¹ This combination of subjective and objective factors results in a decision which reflects the "best interest" of the individual.¹²

An individual does not lose his right to refuse medical treatment even if he is adjudicated incompetent,¹³ or if he is found by his physi-

medical treatment may have to yield to superior state interests. *In re Storar*, 52 N.Y.2d 363, 377, 420 N.E.2d 64, 70, 438 N.Y.S.2d 266, 273, *cert. denied*, 454 U.S. 858 (1981).

6. Presently, each state may determine the scope of a patient's right to refuse treatment. The Supreme Court of the United States, however, has granted certiorari in a case involving an individual's constitutional right to remove a feeding tube. *Cruzan v. Harmon*, 760 S.W.2d 408, (1988), *cert. granted*, 109 S.Ct. 3240 (1989).

7. *Rivers v. Katz*, 67 N.Y.2d 484, 492-93, 495 N.E.2d 337, 341, 504 N.Y.S.2d 74, 78 (1986); N.Y. CONST. art. I, § 6; N.Y. PUB. HEALTH LAW §§ 2504(1), 2803-c(3), 2805-d, (McKinney 1985 & Supp. 1989); N.Y. COMP. CODES R. & REGS. tit. 10, § 405.25(a)(7) (1987).

8. See *infra* notes 37-41 and accompanying text.

9. Any decision involving medical treatment must be an informed one.

There are three basic prerequisites for informed consent: the patient must have the capacity to reason and make judgments, the decision must be made voluntarily and without coercion, and the patient must have a clear understanding of the risks and benefits of the proposed treatment alternatives or nontreatment, along with a full understanding of the nature of the disease and the prognosis.

Wanzer, Adelstein, Cranford, Federman, Hook, Moertel, Safer, Stone, Taussig & Van Eys, *The Physician's Responsibility Toward Hopelessly Ill Patients*, 310 NEW ENG. J. MED. 955, 957 (1984) [hereinafter *Physician's Responsibility*]; see also *Cruzan*, 760 S.W.2d 408; N.Y. COMP. CODES R. & REGS. tit. 10, §§ 405.25(a)(6), 414.14(a)(4), 414.14(b) (1987); Note, *Wrongful Birth Actions*, 17 FORDHAM URB. L.J., 27, 38 (1989).

10. N.Y. COMP. CODES R. & REGS. tit. 10, § 405.25(a)(6) (1987).

11. *Matter of O'Connor*, 72 N.Y.2d 517, 537-38, 531 N.E.2d 607, 617-18, 534 N.Y.S.2d 886, 896 (1988) (Hancock, J., concurring); *id.* at 551-552, 531 N.E.2d at 626, 534 N.Y.S.2d at 905 (Simons, J., dissenting).

12. *Id.*; Note, *A Patient's Last Rights—Termination of Medical Care—An Analysis of New York's In re Storar*, 46 ALB. L. REV. 1380, 1403 (1982) [hereinafter *A Patient's Last Rights*].

13. The New York Public Health Law states that an individual does not lose his right to refuse medical treatment if the individual is adjudicated incompetent according to state law. N.Y. COMP. CODES R. & REGS. tit. 10, § 414.14(b) (1987).

cian to be medically incompetent.¹⁴ The state simply denies him the opportunity to exercise this right because an incompetent individual does not have the capacity to render an informed decision, and therefore cannot meet the requirement of "informed-consent."¹⁵ One solution to this dilemma is the appointment of a surrogate. A surrogate will step into the shoes of the incompetent individual and exercise his right to refuse medical treatment on his behalf after considering objective and subjective factors.¹⁶ The objective factors include those of informed consent, such as the medical condition of the patient, the nature of the treatment involved, the reasonably foreseeable risks, and the alternatives for care or treatment.¹⁷ The subjective factors include the patient's subjective values such as the particular patient's moral, ethical and religious beliefs.¹⁸ By considering both objective and subjective factors, the surrogate would make a decision as if there were informed consent, and as if the surrogate shared the patient's values and beliefs.¹⁹ The surrogate's decision, therefore, would reflect the best interest of the incompetent patient.²⁰

Presently, New York courts will not appoint a surrogate to make an informed decision on behalf of the incompetent individual.²¹ In-

14. *Id.*

15. While the right to refuse medical treatment extends to the incompetent individual, this right is qualified by the requirement that the individual be able to make an informed decision. N.Y. COMP. CODES R. & REGS. tit. 10, §§ 414.14(a)(4), 414.14(b); see also *Saunders v. State*, 129 Misc. 2d 45, 51, 492 N.Y.S.2d 510, 514 (Sup. Ct. Nassau County 1985).

16. *Matter of O'Connor*, 72 N.Y.2d 517, 540, 531 N.E.2d 607, 619, 534 N.Y.S.2d 886, 898 (1988) (Simons, J., dissenting).

17. See *supra* note 10 and accompanying text.

18. *O'Connor*, 72 N.Y.2d at 537-38, 531 N.E.2d at 617-18, 534 N.Y.S.2d at 896.

19. Allowing a surrogate to make the decision regarding additional medical treatment on behalf of an incompetent individual has been recognized by many state courts. See, e.g., *In re Jobs*, 108 N.J. 394, 414, 529 A.2d 434, 444 (1987); see also *Rasmussen v. Fleming*, 154 Ariz. 207, 219, 741 P.2d 674, 686 (1987); *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 186, 245 Cal. Rptr. 840, 841 (1988), *cert. denied*, 109 S. Ct. 399 (1988); *Foody v. Manchester Memorial Hosp.*, 40 Conn. Supp. 1277, 482 A.2d 713 (1984); *In re Severns*, 425 A.2d 156, 159 (Del. Ch. 1980); *John F. Kennedy Memorial Hosp., Inc. v. Bludworth*, 452 So. 2d 921, 926 (Fla. 1984); *Brophy v. New England Sinai Hosp., Inc.*, 398 Mass. 417, 442, 497 N.E.2d 626, 640 (1986); *In re Conservatorship of Torres*, 357 N.W.2d 332, 337-38 (Minn. 1984); *In re Conroy*, 98 N.J. 321, 365, 486 A.2d 1209, 1231 (1985); *In re Colyer*, 99 Wash. 2d 114, 128, 660 P.2d 738, 746 (1983), *modified sub nom. In re Guardianship of Hamlin*, 102 Wash. 2d 810, 689 P.2d 1372 (1984); *In re Guardianship of Grant*, 109 Wash. 2d 545, 554, 747 P.2d 445, 449 (1987).

20. *O'Connor*, 72 N.Y.2d at 552, 531 N.E.2d at 626, 534 N.Y.S.2d at 905 (Simons, J., dissenting).

21. *In re Storar*, 52 N.Y.2d 363, 382-83, 420 N.E.2d 64, 74, 438 N.Y.S.2d 266, 276, *cert. denied*, 454 U.S. 858 (1981). The New York Courts do allow for the appointment of a surrogate in very limited circumstances: if the individual is a child, or if the individ-

stead, New York courts invoke the subjective intent rule²² which seeks to ascertain what the incompetent individual actually desired when last competent.²³ In applying this rule, the courts examine past statements of the individual to determine what the specific patient would decide if he was capable of making an informed decision.²⁴ The subjective intent of the patient can be determined if the individual previously stated the particular procedure or treatment he wishes to avoid,²⁵ and the individual is in a medical condition "qualitatively similar"²⁶ to the condition contemplated at the time the past statements were made.²⁷ Once the subjective intent of the individual is determined, the court will order the treatment to be terminated absent a compelling state interest.²⁸

In applying the subjective intent rule the court does not consider the objective factors of informed consent.²⁹ As a result, the subjective intent rule does not adequately protect the person who is unable to articulate his post-illness desires, or did not have the knowledge or the foresight to make his subjective intentions known.³⁰ Furthermore, the incompetent individual is making a subjective, pre-illness, decision on less information than the individual capable of rendering an informed decision.³¹

This Note argues that in order to enable an incompetent individual to exercise an informed decision regarding the termination of medical treatment, a surrogate should be appointed who can determine the best interest of the patient by taking into account objective as well as subjective factors. Part II examines the subjective intent rule devised by the New York Court of Appeals, and reveals the problems with

ual has appointed his own surrogate before he became incapacitated, pursuant to the durable power of attorney statute. See *infra* notes 90, 144.

22. Matter of O'Connor, 72 N.Y.2d 517, 550, 531 N.E.2d 607, 616, 534 N.Y.S.2d 886, 895 (1988); see *infra* note 32.

23. Eichner v. Dillon, 73 A.D.2d 431, 470, 426 N.Y.S.2d 517, 546 (1980); *In re Storar*, 52 N.Y.2d 363, 378, 420 N.E.2d 64, 71, 438 N.Y.S.2d 266, 274.

24. *Eichner*, 73 A.D.2d at 470, 426 N.Y.S.2d at 546; *Storar*, 52 N.Y.2d at 378, 420 N.E.2d at 71, 438 N.Y.S.2d at 274.

25. *Storar*, 52 N.Y.2d at 379-80, 420 N.E.2d at 72, 438 N.Y.S.2d at 274.

26. *O'Connor*, 72 N.Y.2d at 550, 531 N.E.2d at 625, 534 N.Y.S.2d at 904. (Simons, J., dissenting).

27. *Id.* at 532-33, 531 N.E.2d at 614, 534 N.Y.S.2d at 893.

28. See, e.g., *O'Connor*, 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886; *Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266; *Elbaum v. Grace Plaza Great Neck*, 148 A.D.2d 244, 544 N.Y.S.2d 840 (2d Dep't 1989); *Delio v. Westchester County Center*, 129 A.D.2d 1, 516 N.Y.S.2d 677 (2d Dep't 1987).

29. *O'Connor*, 72 N.Y.2d at 530, 531 N.E.2d at 613, 534 N.Y.S.2d at 892.

30. See *infra* notes 85-118 and accompanying text.

31. See *supra* note 10 and accompanying text, setting forth the information a competent individual must receive before rendering a decision to terminate medical treatment.

this rule when applied to specific medical situations. Part III argues that because the subjective intent rule fails to adequately protect a patient who is incapable of rendering an informed decision, the rule should be supplemented by the appointment of a surrogate who will consider both the subjective factors of the subjective intent rule, and the objective factors of informed consent. Only in this way will the best interest of the incompetent patient be served. Part IV proposes a statute which would allow the appointment of a surrogate and would clarify the rights of an individual who is incapable of rendering an informed decision about his medical treatment.

II. New York's Subjective Intent Rule

The subjective intent rule is a judge-made rule consisting of an examination of past statements made by the patient when the patient was medically competent.³² The court analyzes these past statements to determine what this patient would decide regarding his current medical treatment.³³ First, the court determines if the patient, when competent, communicated his desire not to be sustained by a specific type of medical treatment.³⁴ Second, the court determines if the patient, when competent, specified the ultimate medical condition in which he would decline medical treatment.³⁵ If there is clear and convincing evidence³⁶ of these past intentions, the relief requested is balanced against four state interests:³⁷ (1) the protection of third parties;³⁸ (2) the prevention of suicide;³⁹ (3) the maintenance of the ethical integrity of the medical profession;⁴⁰ and (4) the preservation

32. *In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981).

33. *Id.* at 379-80, 420 N.E.2d at 72, 438 N.Y.S.2d at 274.

34. *Id.*

35. *Id.*

36. *Eichner v. Dillon*, 73 A.D.2d 431, 468-69, 426 N.Y.S.2d 517, 545-46. The *Eichner* court rejected the "beyond a reasonable doubt" standard used in criminal cases: "by no stretch of the imagination can the [s]tate be deemed to be 'taking life' in a matter analogous to the imposition of a death penalty in a criminal action." *Id.*

The *Eichner* court also rejected the "preponderance of the credible evidence" standard because the decision to terminate medical treatment involves weightier issues than does a dispute over money. The court ultimately chose the middle-tier standard of proof—"clear and convincing"—because it requires a finding of high probability. *See also Storar*, 52 N.Y.2d at 378-79, 420 N.E.2d at 71-72; 438 N.Y.S.2d at 274; *Addington v. Texas*, 441 U.S. 418, 424 (1979).

37. *Eichner*, 73 A.D.2d at 465, 426 N.Y.S.2d at 543.

38. *Id.*

39. *Id.* at 466, 426 N.Y.S.2d at 544.

40. *Eichner v. Dillon*, 73 A.D.2d 431, 466, 426 N.Y.S.2d 517, 544 (1980).

and sanctity of life.⁴¹

The weight accorded to protection of third parties will differ from case to case. Unless the state has asserted a substantial state interest, the patient's choice to refuse medical treatment will prevail. For example, in *Matter of Fosmire*,⁴² the New York Court of Appeals concluded that the state's interest in protecting a minor child will not overcome a patient's right to refuse medical treatment where the child is assured of parental support and care by the child's father and extended family.⁴³

The state's interest in preventing suicide will rarely overcome a patient's right to refuse medical treatment regarding termination of a medical procedure.⁴⁴ Suicide is the result of a self-inflicted injury which requires a specific intent to die, and the courts have held that the individual who desires to terminate medical treatment does not have the same intent as the individual who commits suicide.⁴⁵ A problem arises, however, where a person has attempted suicide and is subsequently being sustained by a medical procedure.⁴⁶ In this situation, the request to terminate medical treatment is an extension of a suicide attempt, and the state's interest in preventing suicide must be balanced against a patient's right to refuse medical treatment.⁴⁷

The third state interest is maintaining the ethical integrity of the medical profession.⁴⁸ In many situations, the health care facility will refuse to terminate medical treatment in order to maintain its per-

41. *Id.*

42. N.Y.L.J., Jan. 22, 1990, at 21, col. 1 (Ct. App. Jan. 18, 1990).

43. *Id.* In *Fosmire*, an adult Jehovah's witness refused to consent to blood transfusions following the cesarean birth of her child. The court rejected the hospital's argument that it is always in the child's best interest to have two parents, and held that, under the circumstances of this case, there was no substantial state interest which would overcome the patient's right to refuse blood transfusions. *Id.* Prior to the *Fosmire* decision, treatment had been ordered against expressed wishes when an innocent third party would suffer if the patient died. For example, a woman who was 18 weeks pregnant refused to consent to receiving a life-saving blood transfusion for religious reasons; the court held that the state's interest in protecting the life of a mid-term fetus outweighed the patient's right to refuse the transfusion. *In re Jamaica Hosp.*, 128 Misc. 2d 1006, 1008, 491 N.Y.S.2d 898, 900 (1985).

44. The state will intervene to prevent suicide. N.Y. PENAL LAW §§ 35.10[4], [5](b) (McKinney 1981). But, declining medical care is not a suicidal act. *Eichner*, 73 A.D.2d at 467, 426 N.Y.S.2d at 544; *Storar*, 52 N.Y.2d at 377 n.6, 420 N.E.2d at 71 n.6, 438 N.Y.S.2d at 273 n.6.

45. *Id.*; Byrn, *Compulsory Life Saving Treatment for the Competent Adult*, 44 FORDHAM L. REV. 1, 18 (1975) [hereinafter *Lifesaving Treatment*].

46. *Lifesaving Treatment*, *supra* note 45, at 17.

47. *Id.*; see also *Eichner*, 73 A.D.2d at 467, 426 N.Y.S.2d at 544. Courts have consistently held that where a patient's injury is not self-inflicted, the state's interest in preventing suicide will not overcome a patient's right to refuse medical treatment. *Id.*

48. *Eichner*, 73 A.D.2d at 466, 426 N.Y.S.2d at 544.

ceived ethical integrity.⁴⁹ The courts, however, have consistently ruled that a health care facility's interest in maintaining its ethical integrity is not compelling and will not override a decision to terminate medical treatment.⁵⁰ The courts recognize that this interest has been "overcome, or at least sufficiently lessened, by prevailing medical ethics which do not require medical intervention at all costs."⁵¹

The state's interest in preserving life is generally the most significant of the four interests because the state has a strong interest in protecting the lives of its citizens.⁵² If, however, a physician determines that this patient is in a condition in which he has no hope of recovery, additional medical treatment may not serve to advance that interest.⁵³

A. Determining An Individual's Subjective Intent

The New York Court of Appeals applied the subjective intent rule for the first time in *Matter of Storar*,⁵⁴ where the court consolidated two cases in which termination of medical treatment was sought on behalf of an individual incapable of rendering an informed decision regarding medical care.⁵⁵ In one case, a patient was in a persistent

49. Brief on behalf of Amicus Curiae N.Y. Medical College at 2, *Matter of O'Connor*, 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988). In this brief, N.Y. Medical College argued that the removal of a naso-gastric tube would conflict with the ethical standards of the college:

for over 128 years the [m]edical [c]ollege has educated countless numbers of medical students and physicians in accordance with the Hippocratic Oath and principles of common humanity to care for the sick and to preserve their lives and health from the effects of disease . . . never has the [m]edical [c]ollege been challenged to . . . teach . . . that physicians should stand by idly and observe a conscious, responsive patient disabled from making his or her own treatment decisions die from thirst and starvation.

Id.; *Elbaum v. Grace Plaza Great Neck*, 148 A.D.2d 244, 255, 544 N.Y.S.2d 840, 847 (2d Dep't 1989).

50. See *infra* notes 78-80 and accompanying text.

51. *Elbaum*, 148 A.D.2d at 255, 544 N.Y.S.2d at 847. According to decisions in cases where medical ethics conflicted with a patient's wishes regarding medical treatment, the patient's wishes prevailed. *Rivers v. Katz*, 67 N.Y.2d 485, 493, 495 N.E.2d 337, 341, 504 N.Y.S.2d 74, 78 (1986); *Delio v. Westchester County Medical Center*, 129 A.D.2d 1, 25, 516 N.Y.S.2d 677, 693 (2d Dep't 1987); *Elbaum*, 148 A.D.2d at 255, 544 N.Y.S.2d 840 at 847 ("[i]f the patient's right to informed consent is to have any meaning at all, it must be accorded respect even when it conflicts with the advice of the doctor or the values of the medical profession as a whole")(citations omitted).

52. *Eichner*, 73 A.D.2d at 465, 426 N.Y.S.2d at 543.

53. *Id.* The state's interest in preserving life weakens as the patient's prognosis becomes hopeless. *Id.*

54. 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981).

55. *Id.*

vegetative state, and was thus medically incompetent.⁵⁶ A couple of months before his final hospitalization, when competent, he had expressed his desire not to be sustained by a respirator in the event that he was in a vegetative state.⁵⁷ The court authorized discontinuance of the respirator, holding that the patient's intentions were proven by clear and convincing evidence, and that the patient was in the exact condition contemplated at the time he expressed the statements.⁵⁸ In determining whether the state had a compelling interest which would weigh against discontinuance of the respirator, the court concluded that there were no compelling state interests that outweighed the patient's right to refuse medical treatment.⁵⁹ Specifically, the court noted that there was no state interest in protecting third parties because the patient had no dependents.⁶⁰ Furthermore, there was no state interest in preventing suicide since the requisite intent to die was not present; rather, the patient's intent was to forego extraordinary measures of medical technology, thus allowing nature to run its course.⁶¹ The court also found that the integrity of the medical profession was not at issue because medical ethics permits the termination of life support for a terminally ill patient in a persistent vegetative state if the patient so desires.⁶² Finally, the patient's right to be removed from the respirator was not outweighed by the state's interest in preserving life.⁶³ The court concluded that a person in a permanent vegetative state with no hope of recovery has "no health . . . for the [s]tate to protect."⁶⁴

The Appellate Division of the New York Supreme Court applied the subjective intent rule to a case involving the removal of a nasogastric tube in *Delio v. Westchester County Medical Center*.⁶⁵ A naso-

56. *Id.* at 371, 420 N.E.2d at 67, 438 N.Y.S. at 270.

57. *Eichner v. Dillon*, 73 A.D.2d 431, 444, 426 N.Y.S.2d 517, 529 (1980). The *Eichner* court defined a vegetative state as "a state where the individual is partially responsive . . . but . . . has no significant cognitive functions," and has only a remote possibility of regaining any cognitive functions. *Id.* The New York Court of Appeals found that the patient was in this condition. *Storar*, 52 N.Y.2d at 379-80, 420 N.E.2d at 72, 438 N.Y.S.2d at 274.

58. *In re of Storar*, 52 N.Y.2d 363, 380, 420 N.E.2d 64, 72, 438 N.Y.S.2d 266, 274 (1981).

59. *Id.* at 377, 420 N.E.2d at 71, 438 N.Y.S.2d at 273.

60. *Eichner v. Dillon*, 73 A.D.2d 431, 466, 426 N.Y.S.2d 517, 544 (1980).

61. *Id.* at 467, 426 N.Y.S.2d at 544.

62. *Id.* at 466, 426 N.Y.S.2d at 544.

63. *Id.* at 465, 426 N.Y.S.2d at 543.

64. *Id.*; see *infra* notes 85-96 for a discussion of the second consolidated case in this opinion.

65. 129 A.D.2d 1, 516 N.Y.S.2d 677 (2d Dep't 1987). The Appellate Division stated that common law principles apply since the New York Court of Appeals declined to

gastric tube, also known as a feeding tube, is a commonly used method of administering artificial nutrition and hydration when the patient is no longer capable of swallowing.⁶⁶ In *Delio*, the patient, in a persistent vegetative state, was medically incompetent and was being sustained by feeding tubes.⁶⁷ When the patient's wife sought removal of the feeding tubes, the court granted the requested relief, finding clear and convincing evidence⁶⁸ of the patient's intent that medication and nutrition be withheld.⁶⁹ In its opinion, the court emphasized that this patient had a doctoral degree in physiology and had received extensive scientific training in medically related subjects.⁷⁰ The patient had expressed repeatedly to his relatives and professional colleagues that he felt it was "'horrible' and 'appalling' to keep a person alive in a vegetative state by artificial infusions of medication and nutrition."⁷¹ He asked his wife and mother to promise that they would not allow him to live for even one day in a chronic vegetative state.⁷² The patient urged his mother to execute a living will,⁷³ and intended to execute one himself, but felt that since he was only thirty-three years old, he had plenty of time to do so.⁷⁴

The court further held that there was no compelling state interest which would override the decision to remove the feeding tubes: there were no dependents involved to create a state interest in protecting third parties,⁷⁵ and since the injury was not self-inflicted there was no

reach the constitutional issue in previous right to die cases. *Id.* at 14, 516 N.Y.S.2d at 686.

66. "A tube is inserted into the nose, down the back of the mouth, down the length of the esophagus, into the stomach." Artificial Nutrition & Hydration, SOCIETY FOR THE RIGHT TO DIE at 6 (available at the Fordham Urban Law Journal office).

67. *Delio v. Westchester County Medical Center*, 129 A.D.2d 1, 4, 516 N.Y.S.2d 677, 680 (2d Dep't 1987). The court extended prior law by holding that nutrition and hydration constituted medical treatment that could be removed. *Id.* One month prior to *Delio*, the New York Supreme Court granted a petition which requested that a gastrostomy not be performed on a comatose patient in a persistent vegetative state. See *Workmen's Circle Home v. Fink*, 135 Misc. 2d 270, 273-74, 514 N.Y.S.2d 893, 896 (Sup. Ct. Bronx Co. 1978). Although the court reasoned that this was an active surgical procedure, the court would not authorize removal of antibiotics and nutrition through intravenous feeding. *Id.*

68. *Delio*, 129 A.D.2d at 22, 516 N.Y.S.2d at 691.

69. *Id.* at 7, 516 N.Y.S.2d at 682. Nutrition and hydration by artificial means was viewed by the court as being the same as a respirator, and therefore was evaluated as another form of artificial life support. *Id.* at 19, 516 N.Y.S.2d at 689.

70. *Id.* at 19, 516 N.Y.S.2d at 689.

71. *Id.* at 7, 516 N.Y.S.2d at 682.

72. *Delio v. Westchester County Medical Center*, 129 A.D.2d 1, 4, 516 N.Y.S.2d 617, 680 (2d Dep't 1987).

73. See *infra* notes 132-42 and accompanying text for an explanation of living wills.

74. *Delio*, 129 A.D.2d at 7, 516 N.Y.S.2d at 682.

75. *Id.* at 25, 516 N.Y.S.2d at 693.

state interest in preventing suicide.⁷⁶ The court also indicated that the state's interest in maintaining the integrity of the medical profession was not compelling.⁷⁷ Although the medical center which housed the patient claimed that the removal of artificial nutrition and hydration was a violation of its ethical standards,⁷⁸ the court did not find this interest compelling enough to deny relief because prevailing medical ethics do not require medical intervention for a patient with no hope of improvement.⁷⁹ Instead, the court ordered the medical center to transfer the patient to a suitable facility or to his home so that his stated wishes could be fulfilled.⁸⁰ Finally, the state interest in preserving life did not outweigh the individual's right to refuse medical treatment because, according to the court, the state's interest in preserving the life of a patient in a persistent vegetative condition with no hope of improvement is not compelling.⁸¹

New York courts, therefore, have set up a limited scenario where a patient, before becoming incompetent, may provide for discontinuance of treatment in egregious situations.⁸² If the patient has the sophistication, foresight and ability to express the type of medical treatment and the ultimate medical condition that he seeks to avoid before he becomes medically incompetent, the patient's subjective intent can be determined and his choice will prevail.⁸³

B. Consideration of Objective Factors

The individual who could not make his subjective intentions known before he became incompetent will be forced to have medical treatment administered, even if it offers no reasonable hope of improve-

76. *Id.* at 24, 516 N.Y.S.2d at 692.

77. *Id.* at 26, 516 N.Y.S.2d at 693.

78. *Id.*

79. *Delio v. Westchester County Medical Center*, 129 A.D.2d 1, 516 N.Y.S.2d 677 (2d Dep't 1987).

80. *Id.* at 26, 516 N.Y.S.2d at 693-94.

81. *Id.* at 22, 516 N.Y.S.2d at 691. The court in *Delio* stated:

Although the absence of a terminal illness may implicate the [s]tate's concern to preserve life, this interest is outweighed by the individual's right to avoid being preserved in a vegetative condition which, when he was mentally competent, he considered degrading and without human dignity.

Id. (citations omitted). The court concluded that the use of a feeding tube for a patient in a permanent vegetative state did not serve to advance the state's interest in protecting life.

Id. at 24, 516 N.Y.S.2d at 692.

82. *In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 848 (1981); *Delio*, 129 A.D.2d 1, 516 N.Y.S.2d 677.

83. *Delio*, 129 A.D.2d 1, 516 N.Y.S.2d 677. See also *Elbaum v. Grace Plaza of Great Neck*, 148 A.D.2d 244, 544 N.Y.S.2d 840 (1989). The Appellate Division held that the patient's past declarations met New York's clear and convincing standard.

ment and causes needless pain and suffering.⁸⁴ The second case in *Matter of Storar*⁸⁵ involved a mother who sought to discontinue the blood transfusions being performed on her retarded adult son.⁸⁶ This patient had irreversible cancer of the bladder and the lungs, giving him an estimated lifespan of three to six months.⁸⁷ The court denied the mother's request, and held that the intent of the patient could not be determined.⁸⁸ Because the subjective intent rule evaluates only the subjective intentions of the patient while he was competent, and this patient was born incompetent, the court could not apply the subjective intent rule.⁸⁹ The court ordered the transfusions to continue, reasoning that the patient had the mentality of an infant, and that although a parent has a right to consent to medical treatment on behalf of his child,⁹⁰ the state has a compelling interest in protecting the health and welfare of the child.⁹¹

Because the patient's subjective intentions in *Matter of Storar* could never be known, the court disregarded the subjective intent rule.⁹² The fifty-two year-old patient was evaluated as an infant, and the state's interest in protecting the health and welfare of children outweighed any decision to terminate medical treatment.⁹³ Moreover, the court's reasoning in refusing to apply the subjective intent rule to an adult whose subjective intent could not be known would logically extend to children as well.⁹⁴

Since the subjective intent rule could not apply in this situation, the court should have appointed his mother as surrogate to make an informed decision on her son's behalf. By considering the objective factors associated with informed consent—her son's medical condition, the nature of the prescribed transfusions (including both the benefits and the pain and suffering), the risks involved with the procedure (including her son's prognosis with and without the treatment) and any available alternatives—the best interest of this individual could have

84. See *infra* notes 85-96 and accompanying text.

85. 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 858 (1981).

86. *Id.* at 369, 420 N.E.2d at 66, 438 N.Y.S.2d at 268.

87. *Id.* at 381, 420 N.E. 2d at 71, 438 N.Y.S.2d at 273.

88. *In re Storar*, 52 N.Y.2d 363, 369, 420 N.E.2d 64, 66, 438 N.Y.S.2d 266, 268 (1981).

89. *Id.*

90. *Id.* at 380, 420 N.E.2d at 73, 438 N.Y.S.2d at 275; N.Y. PUB. HEALTH LAW § 2504(2) (McKinney 1985 & Supp. 1989).

91. *Storar*, 52 N.Y.2d at 380, 420 N.E.2d at 73, 438 N.Y.S.2d at 275.

92. *Id.* at 380, 420 N.E.2d at 72, 438 N.Y.S.2d at 274.

93. *Id.* at 381, 420 N.E.2d at 73, 438 N.Y.S.2d at 275.

94. *Matter of O'Connor*, 72 N.Y.2d 517, 541, 531 N.E.2d 607, 620, 534 N.Y.S.2d 886, 899 (1988) (Simons, J., dissenting).

been determined.⁹⁵ The effect of not applying a best interest approach in this situation was to compel a procedure which only prolonged the patient's pain and suffering.⁹⁶

If a patient does not possess the sophistication and foresight to make his exact intentions known, the subjective intent of the patient cannot be determined.⁹⁷ In *Matter of O'Connor*,⁹⁸ a seventy-seven year-old incompetent, but conscious⁹⁹ woman was being sustained by intravenous feeding.¹⁰⁰ When her daughters sought to withhold the insertion of a feeding tube,¹⁰¹ the New York Court of Appeals denied relief because the patient did not clearly and convincingly articulate her specific desire not to be sustained by feeding tubes.¹⁰²

Testimony established that the patient had previously expressed a desire to refuse artificial life support in the event that she was unable to care for herself.¹⁰³ Although the patient was in a condition in which she was unable to care for herself, the court denied the petition

95. See *supra* notes 17-20.

96. *A Patient's Last Rights*, *supra* note 12, at 1395.

97. See *infra* notes 98-120 and accompanying text.

98. 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988).

99. *Matter of O'Connor*, 72 N.Y.2d 517, 523, 531 N.E.2d 607, 608, 534 N.Y.S.2d 886, 887 (1988). The testimony established that O'Connor would not recover significant mental capacity. She was, however, neither terminally ill, comatose, nor in a persistent vegetative state, but rather, was awake and conscious, could feel pain, and responded sporadically to simple questions. *Id.* at 533, 531 N.E.2d at 615, 534 N.Y.S.2d at 894. *O'Connor* was the first right to refuse treatment case before the Court of Appeals which involved a patient who, while incompetent, was not comatose, terminally ill, or in a permanent vegetative state. See, e.g., *In re Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, *cert. denied*, 454 U.S. 848 (1981) (involving a terminally ill retarded man); *Eichner v. Dillon*, 73 A.D.2d 431, 426 N.Y.S.2d 517 (1980) (involving a patient in a persistent vegetative state). Furthermore, there was no case before the New York Supreme Court Appellate Division involving a patient in the same medical condition as O'Connor. See, e.g., *Delio v. Westchester County Medical Center*, 129 A.D.2d 1, 516 N.Y.S.2d 677 (2d Dep't 1987); *Elbaum v. Grace Plaza Great Neck*, 148 A.D.2d 244, 544 N.Y.S.2d 840 (2d Dep't 1989); see also Goldberg & Liptak, *High Court Limits "Right-To-Die" Decisions*, MEDPRO UPDATE 9 (Dec. 1988) (stating that the *O'Connor* case was the first decision in New York involving an individual who was neither comatose, in a vegetative state, nor terminally ill).

100. *O'Connor*, 72 N.Y.2d at 524, 531 N.E.2d at 609, 534 N.Y.S.2d at 888. The patient suffered from a diminished gag reflex which made her unable to swallow. Since intravenous feeding works only for several weeks, a naso-gastric tube was required to provide the patient with the nourishment needed to keep her alive. *Id.*

101. *Id.*

102. The patient's statements were too general to imply that she would object to a feeding tube. *Id.* at 535, 531 N.E.2d at 616, 534 N.Y.S.2d at 895. (Hancock, J., concurring).

103. *Id.* at 527, 531 N.E.2d at 611, 534 N.Y.S.2d at 890. The patient's daughter testified that her mother, when competent, stated that she did not want to continue living if she could not "take care of herself and make her own decisions." *Id.* The patient's former co-worker confirmed this, remarking that the patient "felt that nature should take

and ordered the insertion of the feeding tube.¹⁰⁴ The court did not find clear and convincing evidence that while still competent, the patient had made "a firm and settled commitment"¹⁰⁵ to decline this specific type of medical assistance under these particular circumstances.¹⁰⁶ The court noted that the patient had repeated statements over a number of years regarding her desire to decline life-saving treatments, but the court treated the statements as "immediate reactions to the unsettling experience of seeing or hearing about another's unnecessarily prolonged death."¹⁰⁷ The court further noted that this patient was neither in a coma nor in a vegetative state, but was conscious, could feel pain and responded sporadically to simple questions.¹⁰⁸ The court concluded that there was no evidence suggesting that she contemplated declining medical treatment for her current condition.¹⁰⁹

The requirement that a prospective patient articulate the type of life support and the medical condition which he seeks to avoid further restricts a person's right to refuse treatment.¹¹⁰ A lay person is generally unfamiliar with the constant technological advances in medicine, and therefore, cannot accurately predict the precise form of treatment he may one day wish to terminate, or the precise condition he will suffer from.¹¹¹ For example, in *O'Connor*, because the patient did not contemplate that she would be sustained by feeding tubes, the court could not determine her intent.¹¹² As physicians learn of new methods for prolonging life, the courts, applying the subjective intent rule,

its course and not use further artificial means." *Id.* at 526, 531 N.E.2d at 611, 534 N.Y.S.2d at 890.

104. *Id.* at 527, 531 N.E.2d at 611, 534 N.Y.S.2d at 890.

105. *Id.* at 531, 531 N.E.2d at 613, 534 N.Y.S.2d at 892.

106. *Id.* at 534, 531 N.E.2d at 615, 534 N.Y.S.2d at 894. The patient's daughters testified that they did not know the patient's view on artificial nutrition and hydration. *Id.* at 527, 531 N.E.2d at 611, 534 N.Y.S.2d at 890. The court held that since the patient's views did not include termination of a feeding tube, the patient's subjective intent could not be determined. *Id.*

107. *Id.* at 532, 531 N.E.2d at 614, 534 N.Y.S.2d at 893.

108. *Id.* at 533, 531 N.E.2d at 615, 534 N.Y.S.2d at 894.

109. *See supra* note 102.

110. *Matter of O'Connor*, 72 N.Y.2d 517, 550, 531 N.E.2d 607, 625, 534 N.Y.S.2d 886, 904 (1988).

111. *Id.*

112. *Id.* at 542, 531 N.E.2d at 621, 534 N.Y.S.2d at 900. (Simons, J., dissenting). While the court admitted that the patient cannot foresee the future, the procedure and condition must be qualitatively similar to those now presented. The Court did not suggest a way to determine when a person's past expression is qualitatively similar to the circumstances at issue. To ensure termination of life support, a patient must communicate the nature of the procedure and condition with utmost specificity. *Id.* at 551, 531 N.E.2d at 626, 534 N.Y.S.2d at 905 (Simons, J., dissenting).

are less likely to permit the removal of life support; if a patient did not know about a method of treatment in the first place, he could not have explicitly rejected it.¹¹³

A patient will also have difficulty anticipating a specific future condition.¹¹⁴ For a patient to forsee his ultimate medical condition would require him "to exercise foresight [he does] not possess."¹¹⁵ O'Connor specified that in the event she could not care for herself, she did not want machinery sustaining her life.¹¹⁶ She stated to her daughters and friends that she would never want to lose her dignity before she passed away, and that nature should take its course in the event that she was being sustained by life support machinery.¹¹⁷ The court, however, could not determine whether the inability to care for herself included her present condition, and thus could not determine her subjective intent.¹¹⁸

If the court had allowed one of O'Connor's family members to be appointed as her surrogate, this family member could have considered O'Connor's subjective beliefs and values as well as her medical condition, the nature of the treatment, the risks involved with the procedure, and whether any other alternatives were available.¹¹⁹ In this way, the objective factors of informed consent would be considered along with the subjective factors of the intent rule, and the best interest of O'Connor could have been determined.¹²⁰

III. The Appointment of a Surrogate

New York law should require that a surrogate be designated who would exercise the right to refuse medical treatment on behalf of the incompetent individual.¹²¹ The surrogate, however, should consider not only the individual's past statements, but also any subjective intentions of the patient that fall outside the scope of the subjective in-

113. *See id.* at 552, 531 N.E.2d at 626, 534 N.Y.S.2d at 905 (Simons, J., dissenting). The only way to ensure that a patient's wish will be carried out is to communicate any desires with the greatest degree of specificity; *see, e.g.*, *Elbaum v. Grace Plaza Great Neck*, 148 A.D.2d 244, 544 N.Y.S.2d 840 (2d Dep't 1989) (patient had pleaded repeatedly to family members that no machines, feeding tubes or antibiotics be administered if she were ever in a vegetative state).

114. *O'Connor*, 72 N.Y.2d at 549, 531 N.E.2d at 625, 534 N.Y.S.2d at 904. (Simons, J., dissenting).

115. *Id.*

116. *See supra* note 103 and accompanying text.

117. *O'Connor*, 72 N.Y.2d at 527, 531 N.E.2d at 611, 534 N.Y.S.2d at 890.

118. *See supra* notes 104-09 and accompanying text.

119. *See supra* notes 16-17.

120. *See supra* notes 18-20.

121. *See supra* note 21.

tent rule.¹²² These more "general" subjective intentions consist of the patient's moral, ethical, religious or other values which are relevant to the termination of life support.¹²³ In addition, the surrogate, after consulting with the attending physician, should consider a number of objective factors.¹²⁴ These objective factors include the medical condition of the patient (including the patient's mental and physical functioning),¹²⁵ the nature of the prescribed medical assistance (including both the benefits and the pain and suffering),¹²⁶ the risks involved (including the patient's prognosis—the patient's life expectancy and possibility of recovery), and any alternatives which are available.¹²⁷ The surrogate can determine the best interest of the patient by considering, at a minimum, the subjective factors of the intent rule and the objective factors of informed consent.¹²⁸ As a further safeguard of the patient's best interest, a hospital ethics committee should be formed¹²⁹ to consult with the attending physician and give the surrogate its opinion as to the best interest of this patient.¹³⁰ If the surrogate decides to terminate medical treatment, and the matter is subsequently disputed, a court will determine whether there exists a compelling state interest which overrides the surrogate's decision.¹³¹

A. Making Subjective Intentions Known

A patient may make his subjective values and beliefs known by expressing them in writing. This writing may be in the form of a living will, which consists of an individual's intention to terminate specific types of medical treatment in the event that he is in a specific situation.¹³² A living will provides a written directive to family, physicians and hospital authorities of the patient's desire regarding medical

122. *O'Connor*, 72 N.Y.2d at 537, 531 N.E.2d at 617, 534 N.Y.S.2d at 896 (Hancock, J., concurring); *A Patient's Last Rights*, *supra* note 12, at 1403.

123. *O'Connor*, 72 N.Y.2d at 537, 531 N.E.2d at 617, 534 N.Y.S.2d at 896 (Hancock, J., concurring).

124. *See supra* note 17 and accompanying text.

125. *O'Connor*, 72 N.Y.2d at 537, 531 N.E.2d at 617, 534 N.Y.S.2d at 896 (Hancock, J., concurring).

126. *Id.*

127. *Matter of O'Connor*, 72 N.Y.2d 517, 537, 531 N.E.2d 607, 617, 534 N.Y.S.2d 886, 896 (1988).

128. *See supra* notes 19-20 and accompanying text.

129. *See A Patient's Last Rights*, *supra* note 12, at 1403; Stone, *The Right to Die: New Problems for Law & Medicine & Psychiatry*, 37 EMORY L.J. 627, 637 (1988) [hereinafter *The Right to Die*].

130. Rhoden, *Litigating Life and Death*, 102 HARV. L. REV. 375, 440 (1988).

131. *Id.* at 441.

132. Note, *Living Wills in New York: Are They Valid?*, 38 SYRACUSE L. REV. 1369, 1372-75 (1987) [hereinafter *Living Wills*].

treatment.¹³³ Although New York does not have legislation declaring a living will valid, the New York courts have honored an individual's living will as evidence of an informed decision exercised by the patient, when competent.¹³⁴

The New York Court in *Saunders v. State*¹³⁵ honored the patient's living will, holding that the document was evidence of "the most persuasive quality," and thus satisfied the clear and convincing evidence standard.¹³⁶ The patient stated in writing the specific conditions in which she would not desire to be sustained by a respirator.¹³⁷

Every competent person can complete a standard living will which will specify the various types of medical treatment and possible medical conditions in which the medical support may be used.¹³⁸ Moreover, these standard living wills reflect the most recent advances in medical technology.¹³⁹

Although a living will may not solve the problem of a change in mind, once in writing, any subsequent change of mind is more likely to be corrected than if it had been an oral statement made to a friend

133. *Id.* at 1374.

134. Forty states and the District of Columbia have legislation recognizing that living wills are valid. In New York, courts have recognized the validity of living wills. N.Y. Times, Sept. 21, 1989, at B20, col.1; see *A Patient's Last Rights*, *supra* note 12, at 1382. The living will must satisfy the *Eichner* "clear and convincing" standard for the patient's desire to be honored. *Id.* at 1381.

135. 129 Misc.2d 45, 47, 492 N.Y.S.2d 510, 512 (Sup. Ct. Nassau County 1985). The living will provided in paragraph B:

[i]f, due to injury or illness, sudden or gradual, I become incompetent, and my condition becomes such that: (1) I am in irreversible coma, in the opinion of my treating physician; or (2) I have been continuously unconscious for a period of one (1) week, and in the opinion of my treating physician, I have suffered severe irreversible brain damage which will permanently render me incompetent (or that even partial physical recovery would be accompanied by severe, irreversible brain damage rendering me incompetent); or (3) my condition is terminal and hopeless and death is imminent; then, as of that time, I withdraw my actual and implied consent to and substitute this REFUSAL of all further treatment of me by artificial means and devices (such as the use of a respirator) and all further therapeutic or emergency care; and I direct that all further treatment of me or my condition by such artificial means and devices or the rendition of such further therapeutic or emergency care shall cease.

Id. at 57, 492 N.Y.S.2d at 512; see also *Living Wills*, *supra* note 132, at 1380 n.91.

136. *Saunders*, 129 Misc.2d at 54, 492 N.Y.S.2d at 517.

137. *Id.*

138. These forms are available without charge to those who request in writing to the Society For The Right To Die, located at 250 West 57th Street, New York, NY, 10107. The living will must be signed, dated and countersigned by two witnesses; one copy should be given to the individual's physician to be included in medical records. N.Y. Times, Sept. 21, 1989, at B20, col. 1.

139. *Id.*

or relative.¹⁴⁰ In addition, one's expressed intention in a living will may not accurately reflect the current medical procedure being used on the patient, or the ultimate condition of the patient.¹⁴¹ If the intentions expressed in the living will do not accurately reflect the individual's current medical situation, the surrogate can use the living will as evidence of the patient's subjective intention regarding his medical care.¹⁴²

B. Personal Designation of a Surrogate

As discussed above, New York courts will not appoint a surrogate to make an informed decision on behalf of the incompetent individual.¹⁴³ Through New York's "durable power of attorney" statute,¹⁴⁴ however, New York courts do allow an individual to personally designate a surrogate to make medical decisions. Although powers of attorney have traditionally been used to delegate authority over financial matters, the legislature enacted a statute permitting individuals to create "springing powers of attorney," which apply to decisions regarding medical care.¹⁴⁵ When the individual has become incompe-

140. *Matter of O'Connor*, 72 N.Y.2d 517, 531, 531 N.E.2d 607, 613-14, 534 N.Y.S.2d 886, 892-93 (1988).

[A] person who has troubled to set forth his or her wishes in a writing is more likely than one who has not to make sure that any subsequent changes of heart are adequately expressed, either in a new writing or through clear statements to relatives and friends. In contrast, a person whose expressions of intention were limited to oral statements may not as fully appreciate the need to 'rescind' those statements after a change of heart.

Id.

141. *See Saunders*, 129 Misc. 2d at 54, 492 N.Y.S.2d at 517.

142. *Id.*

143. *See supra* note 21 and accompanying text.

144. N.Y. GEN. OBLIG. LAW §§ 5-1601, -1602 (McKinney 1989)

There is . . . no longer any reason in principle why those wishing to appoint another to express their specific or general desires with respect to medical treatment, in the event they become incompetent, may not do so formally through a power of attorney.

Matter of O'Connor, 72 N.Y.2d 517, 528, 531 N.E.2d 607, 612, 534 N.Y.S.2d 886, 891, n.2 (1988). A standard power of attorney automatically ends when the donor becomes incapacitated. Durable powers of attorney, however, are authorized in all states and the District of Columbia, and remain in effect even when the principal is incompetent, and thus unable to make an informed decision regarding medical treatment. N.Y. GEN. OBLIG. LAW §§ 5-1601, -02 (McKinney 1989). N.Y. Times, July 8, 1989, at B48, col. 3.

145. A springing durable power of attorney is now recognized in 20 states, including New York and New Jersey. Springing powers "spring" into effect when a specified event occurs, such as physical or mental incapacity, disappearance, or entry into a nursing home. A springing power of attorney is often signed when a person is reluctant to give others wide powers while he or she can still act personally. *Id.*

tent, the "springing power of attorney" will come into effect.¹⁴⁶

An individual can receive a standard New York Medical Power of Attorney form, where he can state who is to be appointed as his decision maker in the event that he is unable to do so, and what specific or general decisions they may decide on his behalf.¹⁴⁷

IV. Proposed Statute

On April 1, 1988, Article 29-B of New York Public Health Law became effective.¹⁴⁸ This statute allows a patient or a surrogate to consent in writing to a Do Not Resuscitate Order (DNR Orders).¹⁴⁹ The DNR Order prevents a physician from reviving a patient by administering cardiopulmonary resuscitation.¹⁵⁰

This statute provides guidelines concerning such issues as what constitutes legal capacity¹⁵¹ and the specific procedures by which a patient may consent to such an order.¹⁵² In addition, the statute sets forth the procedures by which a surrogate may be appointed for a patient who is medically incompetent.¹⁵³ This surrogate can order the hospital to refrain from administering cardiopulmonary resuscitation on the patient's behalf.¹⁵⁴ New York Public Health Law does not provide the means by which an incompetent individual may exercise his right to refuse medical treatment.¹⁵⁵ The following is a proposed addition to Article 29-B of the New York Public Health Law. This proposal encompasses the right to refuse medical treatment for the individual incapable of making an informed decision.¹⁵⁶

Right To Refuse Medical Treatment

(1) Purpose:

A patient has the right to refuse medical treatment. A patient

146. All powers of attorney become void when the principal dies; thus, a power of attorney can never be substituted for a will. *Id.*

147. A standard form can be bought in an office supply store for the typical power of attorney. In New York, the Statutory Short Form of General Power of Attorney covers most situations. To ensure that it will cover incapacitation, however, the document must state that the power of attorney will remain valid and effective even in the event of incapacitation. N.Y. GEN. OBLIG. LAW § 5-1602 (McKinney 1989); N.Y. Times, July 22, 1989, at C32, col.1.

148. N.Y. PUB. HEALTH LAW art. 29-B (McKinney Supp. 1989).

149. *Id.*

150. *Id.*

151. *Id.* § 2961(3).

152. *Id.* § 2964.

153. *Id.* § 2965.

154. *Id.*

155. See *Saunders v. New York*, 129 Misc.2d 45, 54, 492 N.Y.S.2d 510, 515 (1985).

156. N.Y. Pub. Health Law does not provide for a means in which an incompetent individual may exercise his right to refuse medical treatment.

may exercise this right after being fully informed, at a minimum, of his medical condition, the nature of the procedure, the reasonably foreseeable risks involved, and alternatives for care and treatment.

If the patient is adjudicated incompetent according to state law or is found by his physician to be medically incapable of understanding the nature of the procedure, the reasonably foreseeable risks, or the alternatives for care or treatment, a surrogate will be appointed by the court to make an informed decision on his behalf.

(2) Surrogate

(a) A surrogate, to act on behalf of the individual, will be appointed by the court if the patient is adjudicated incompetent according to state law, or is medically incapable of making an informed decision and has not appointed his own surrogate according to the "Durable Power of Attorney" statute.¹⁵⁷

(b) The surrogate shall make a decision based upon any known beliefs or values of the patient based on the patient's past expressions, or his moral, ethical, religious, or other deeply held belief as it relates to his desires regarding termination of medical treatment. If the patient had drafted a living will, the surrogate will use this as evidence of the patient's subjective intent.

(c) The surrogate shall consider objective factors by consulting with the attending physician in order to become fully informed of and understand the condition of the patient, the nature of the procedure, the reasonably foreseeable risks involved, and alternatives for care and treatment.

(3) Hospital Ethics Committee

Each hospital shall establish a hospital ethics committee.¹⁵⁸ The Committee shall consult with the attending physician and give to the surrogate an opinion regarding a decision to terminate medical treatment.

(4) The State's Interest

If the surrogate has decided to terminate medical treatment, and the matter is brought to court, the court must determine if there exists a compelling state interest which will override this decision.

These state interests include:

- i) an interest in protecting third parties;

157. N.Y. PUB. HEALTH LAW § 2965 (McKinney Supp. 1989). If the individual, when competent, has not designated a person to make decisions regarding medical treatment, or does not have a guardian appointed pursuant to article 17-A of the Surrogate's Court Procedure Act, a surrogate is chosen from a list of family members pursuant to N.Y. PUB. HEALTH LAW § 2965 (McKinney Supp. 1989).

If no surrogate is available, an attending physician or a hospital may commence a special proceeding in a court of competent jurisdiction for a judgment directing the physician to act as a surrogate. *Id.* § 2966.

158. See *A Patient's Last Rights*, *supra* note 12, at 1403; Stone, *The Right to Die*, *supra* note 129, at 637.

- ii) an interest in preventing suicide;
- iii) an interest in maintaining the ethical integrity of the medical profession; and
- iv) an interest in preservation and sanctity of life.

V. Conclusion

Before a patient can refuse medical treatment, he must be fully informed of, and understand the consequences of such actions so that any decision is the result of informed consent. If a patient is medically incapable of giving informed consent, a surrogate should be designated who would make an informed decision on behalf of this patient.

Currently, the New York courts apply the subjective intent rule, seeking to ascertain the subjective intentions of the patient before he lost capacity to render an informed decision by becoming medically incompetent. Unfortunately, in the event that an individual does not have the ability, or does not possess the sophistication or foresight to make his intentions known, his subjective intention cannot be determined. A surrogate, therefore, should be appointed who would stand in the shoes of this medically incompetent individual, and consider the subjective factors of the intent rule as well as the objective factors of informed consent, so that a decision regarding medical treatment would reflect the best interest of this individual.

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