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A Response to Irwin Kramer's Reply, 23 J. Marshall L. Rev. 585 (1990)

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A RESPONSE TO IRWIN KRAMER'S REPLY

JUDGE PECCARELLI B.S. J.D.*

INTRODUCTION

Life and death decisions for withholding or withdrawing nutrition and hydration should be determined by an individual judge or panel of judges according to Mr. Kramer. He concludes that "[a]lthough judges are not perfect, they may be the best society has to answer this difficult question."[1] I have suggested a process of dialogue, discussion, debate and decision in an open forum of elected representatives in a legislative body to determine whether a person lives or dies. It is a process that could include the judiciary, but would preclude a procedure that leaves the decision to one person or group of three, five, seven or nine persons to decide by majority vote what they believe to be the will of society.

My suggestion is that the legislature should address the issue and establish a statutory paradigm or procedure to determine whether to withhold or withdraw nutrition and hydration from a comatose person in a persistent vegetative state who is not terminally ill and has not previously expressed an opinion whether to live or die. Mr. Kramer makes an eloquent emotional reply opposing my suggestion and asserts a theory of a judge or panel of judges making the decision.

COMMENTARY

The legal fictions of "substituted judgment" and "best interests" favored by Mr. Kramer were created by innovative judges who earnestly, intellectually and honestly believe that when a problem exists, when there is a difficult decision to make, when people are unwilling to make the decision or when people refuse to make the decision, then a judge must decide and solve the problem. Mr. Kramer suggests that when there is no one willing to resolve a diffi-

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1. Kramer, "Life and Death Decisions: A Reply to Judge Peccarelli" 23 J. MARSHALL L. REV. 569, 571, (1990).

cult issue of social significance, it is appropriate for a judge to decide. I suggest such legal fictions are inadequate to support a resolution of the ambiguity in determining the intent to withhold or withdraw nutrition and hydration of an incompetent person.[2]

Mr. Kramer appears to lack confidence in the tripartite system of government and the checks and balances on excessive government intrusion into the private lives of its citizens. He lacks confidence in the legislative process. He infers that a judge or panel of judges at the reviewing stage of a judicial system, sitting as a super legislature, should impose their individual or collective moral decision upon whether a person lives or dies. He suggests this is appropriate even if the decision is less than unanimous by a panel of reviewing court justices. He concludes that ". . . judges have for years done an outstanding job of decision-making in this difficult area and have made these decisions through a process that is far superior to that used by politicians sitting in the legislature."[3]

I have no quarrel with the concept and the law that a competent person can decide whether to withhold or withdraw extraordinary medical life support procedures, including nutrition and hydration, provided there is sufficient proof of a prior affirmative act or affirmative authorization made while competent, and such a person later becomes incompetent. A method to express that decision has been statutorily authorized in many states.[4] For example, the Illinois Living Will Act[5] specifically provides for a written declaration of instructions concerning death delaying procedures but specifically excludes withdrawal or withholding of nutrition and hydration if death would result solely from starvation or dehydration and not from the existing underlying terminal condition.[6] The Illinois Durable Power of Attorney Law[7] makes no specific reference to withholding or withdrawing nutrition and hydration. The Living Will Act and the Durable Power of Attorney are expressions of society through the legislative process by politicians responding to their constituents. Each involves written declaration by competent persons.

However, the narrow problem addressed here is how and by

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2. Cruzan v. Harmon, 760 S.W.2d 408, 413 n. 5 (Mo. 1988), *aff'd sub nom*, Cruzan v. Director Missouri Dep't of Health, 110 S. Ct. 2841 (1990) (Missouri Supreme Court finds precedents from other states "wanting" as support for a resolution of the issues).

3. Kramer, *supra* note 1, at 571.

4. *See* Decisionmaking Regarding Life-Sustaining Medical Treatment (DRLMT) Project, National Center for State Courts (NCSC), State Justice Institute (SJI), Briefing Paper Number Two, Review of Statutory Materials, Appendix A (January, 1990) for a list of legislative enactments on this issue,

5. ILL. ANN. STAT. ch. 110 ½ paras. 701-10 (1988).

6. *Id.* at para. 702(d).

7. ILL. ANN. STAT. ch. 110 ½ para. 801-1 (1988).

whom is the decision to be made for comatose patients who are neither terminally ill nor imminently dying who have not indicated a preference for their care by prior clear and convincing evidence, either oral or written. There is little practice guidance for trial courts throughout the United States when the decisions involve these persons.

The recent decisions in the divided Missouri Supreme Court[8], and the divided United States Supreme Court[9], and the divided Illinois Supreme Court in two cases[10] require the burden of proof of the incompetent's intent to be sustained by "clear and convincing" evidence. Although Mr. Kramer sees the adversarial nature of a judicial proceeding as a means of protecting the patient's interest, in reality, these cases are often less than adversarial in nature. Frequently, the family, the guardian *ad litem*, and the hospital agree on the course of treatment, and resort to the courts simply to immunize those involved from any civil or criminal liability. Such a proceeding hardly protects the patient's interest to the extent Mr. Kramer envisions. Furthermore, the burden of "clear and convincing" in such cases is substantially below the burden of proof and procedure in an adversarial process to invoke the death penalty, which requires the concurrence of the fact finder and the judge. There is no such protection in a judicial decision to withdraw nutrition and hydration from an incompetent person.

Since 1976 when the New Jersey Supreme Court decided *In re Quinlan* [11] medical technology has developed strategies and techniques to sustain life and deny death. These developments have left the legal rules and procedures behind in coping with the technology. The published decisions of those courts that have dealt with the subject are less than unanimous.[12] For example, the several justices of the Illinois Supreme Court disagree as to the consequences of withholding or withdrawing nutrition and hydration. Justice Stamos writing for the majority in *In re Greenspan*[13] states "[w]hen as a result of incurable illness, a patient cannot chew or swallow and a

8. Cruzan v. Harmon, 760 S.W.2d 408 (1988) (4-3 decision).

9. Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841 (1990) (5-4 decision).

10. *In re* Estate of Longeway, 133 Ill. 2d 33, 549 N.E.2d 292 (1989) (4-2 decision), and *In re* Estate of Greenspan, No. 67903 (Ill., May Term, 1990) (4-2 decision); *see also In re* Gardner, 534 A.2d 947 (Me. 1987) (4-3 decision), Brophy v. New England Sinai Hospital, Inc., 398 Mass. 417, 497 N.E.2d 626 (1986) (4-2 decision), *In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985) (6-1 decision), *In re* Grant, 109 Wash. 2d 545, 747 P.2d 445 (1987) (5-4 decision), *In re Hamlin*, 102 Wash. 2d 810, 689 P.2d 1372 (1984) (7-2 decision), and *In re* Colyer, 99 Wash. 2d 114, 660 P.2d 738 (1983) (*en banc*) (7-2 decision), *modified*, 102 Wash. 2d 810, 689 P.2d 1372, (1984).

11. *In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976).

12. *See, e.g.* cases cited *supra* note 10.

13. *In re* Estate of Greenspan, No. 67903 (Ill., May Term, 1990).

death-delaying feeding tube is withdrawn in scrupulous accordance with law, the ultimate agent of death is the illness and not the withdrawal."[14] Justice Ward in the same case in his dissent states "[i]f the nasogastric tube is removed and he is not otherwise supplied with nutrition and hydration, Mr. Greenspan will die of starvation and dehydration as a direct result of the decision not to feed him."[15] When a person is denied nutrition and hydration, whether it is or is not medical treatment, the ultimate result is death regardless of the condition of that person prior to withholding or withdrawing food and water.

There is also considerable controversy within the medical profession concerning whether withholding or withdrawing nutrition and hydration is medical treatment. The Illinois Supreme Court has observed that the American Medical Association and the American Academy of Medical Ethics disagree on whether withdrawal of nutrition and hydration is ethically sound.[16]

Mr. Kramer's reply would lead a reader to believe that I propose that judges refuse to decide cases on withholding or withdrawing nutrition and hydration until the legislatures of the several states act. "[W]hile the court sympathizes with Jane and her parents, it holds that they must await action by the state legislature before their personal dilemma can be addressed."[17] My point is simply that the court is the wrong place to make these decisions which so strongly implicate society's moral, religious, medical, philosophical, and ethical beliefs. Mr. Kramer proposes that "adversarial court proceedings provide an ideal focal point for collective decision making which incorporates the views of family, friends, physicians, clergy, and other interested members of society. . . . [C]ourts may "provide a forum where different groups are able to coordinate their concerns and their input of information."[18] In our tripartite system of government, this is the function of the legislature, not the courts.

This author does not advocate "wholesale abdication of judicial responsibilities," as Mr. Kramer phrases it, nor has that been the position of other courts faced with these decisions.[19] More often than not these courts, while deciding the cases before them, have expressed the view that the issues of these decisions are more properly resolved by the legislature as elected representatives of the peo-

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14. *Id.* slip op. at 10 (citing *In re* Longeway, 133 Ill. 2d 33, 549 N.E.2d 292 (1989)).

15. *Id.* slip op. at 21.

16. *Greenspan*, *supra* note 8, slip op. at 3.

17. Kramer, *supra* note 1, at 571.

18. *Id.* (citations omitted).

19. According to a recent article, there have been 130 litigated right-to-die cases since the Quinlan case in 1976. Gasner, *Right to Dies Lives Locally*, Nat'l L.J, July 23, 1990 at 14, col. 2.

ple, and have urged the legislatures of their several states to act.[20]

CONCLUSION

The most that can be said for decisions in the situations that have been presented to the various state courts, few of which have been decided by state courts of last resort, and now the only decision in the United States Supreme Court, is that the law is unclear. If there were a broad consensus there would not be such anguish in resolving limited alternatives. The several courts that have addressed the issue of withholding or withdrawing nutrition and hydration suggest it is a decision that should be reached by the family in consultation with medical personnel and considering the beliefs and attitudes of the incompetent. I concur.

What is needed is a legislative determination of a procedure to be employed to reach the decision: the factors to be considered, the persons to participate in the decision-making process, and under what circumstances the decision can be implemented or contested. A legislative paradigm could relieve some of the distress of family members and other interested persons. The legislative process could provide a uniform systematic procedure to reach a just result from the trial court to a court of last resort, without the delay sometimes occasioned by the adversary truth seeking process to a final judicial determination. It could further immunize individuals and organizations concerned with liability for other than negligence or willful and wanton misconduct. It could attempt to provide some uniformity and reduce the ambiguity in the process and procedure for making a decision to withdraw or withhold nutrition and hydration.

There is an old maxim widely accepted for its intrinsic worth by trial lawyers and often prominently displayed in a trial lawyer's handbook: "If the law is against you, argue the facts. If the facts are against you, argue the law." I would add to that axiom that if you have neither the law nor the facts you should attack your opponent in an eloquent emotional exposition of a philosophy which is unacceptable to a widely diverse segment of society.

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20. *In re* Estate of Longeway, 133 Ill. 2d 33, 52-53, 549 N.E.2d 292, 301 (1989) (majority opinion), *citing* Rasmussen v. Fleming, 154 Ariz. 207, 741 P.2d 674 (1987), *In re* L.H.R., 253 Ga. 439, 321 S.E.2d 716 (1984), *In re* P.V.W., 424 So.2d 1015 (La. 1982), *In re* Farrell, 108 N.J. 335, 529 A.2d 404 (1987), *In re* Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981), *cert. denied*, 454 U.S. 858 (1981) and *In re* Grant, 109 Wash. 2d 545, 747 P.2d 445 (1987). Justice Clark, dissenting in *Longeway*, agreed with the majority on this point. *Id.* at 66-67, 549 N.E.2d at 307, *citing In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985), *In re* Jobes, 108 N.J. 394, 529 A.2d 434 (1987), *In re* Grant, 109 Wash. 2d 545, 747 P.2d 445 (1987), *In re* O'Connor, 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988), and Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988).