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Proxy Puzzle & the Durable Power of Attorney for Health Care Act, The

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Notes

The Proxy Puzzle & The Durable Power of Attorney for Health Care Act

I. INTRODUCTION

The Missouri Durable Power of Attorney for Health Care Act[1] (the Health Care Act) is the latest development in Missouri concerning proxy health care decision making. The Health Care Act, the Living Will Statute,[2] and the Missouri Supreme Court's *Cruzan*[3] decision are the pieces which make up the puzzle known as Missouri proxy health care decision-making law. When the pieces are put together, however, it appears that some pieces are missing. This Note addresses the relationship of the Health Care Act to the other two pieces of Missouri law and searches for the pieces which seem to have been left out of the puzzle.

II. LEGAL BACKGROUND

The Health Care Act is the product of a combination of common law, constitutional law, and ideologies of various interest groups. The question of who should make medical decisions for incompetents has been brought to the fore by advances in medical technology over the past fifteen to twenty years. One commentator has stated that "[m]edical technology has effectively created a twilight zone of suspended animation where death commences while life, in some form, continues."[4] The issue of who decides how long to preserve this form of life has become the subject of much litigation.

A. History of Surrogate Medical Decision Making

The cases which preceded the Missouri Supreme Court's decision on the issue of the right to refuse medical treatment applied several different tests.

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1. MO. REV. STAT. §§ 404.800-.865 (Supp. 1991).

2. MO. REV. STAT. §§ 459.010-.055 (1986).

3. Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

4. *Choices: Dealing With Dying*, ESTATE PLANNING UPDATE, Vol. 1, Issue 1 (Special Courses, School of Law & University Extension, University of Missouri-Columbia), at 1 (citing Rasmussen v. Fleming, 741 P.2d 674, 678 (1987)).

These tests included a substituted judgment standard,[5] a net benefits and burdens test,[6] and a requirement of clear and convincing evidence of the patient's intent.[7] One court held "that the invasiveness of the treatment sought to be terminated is an important factor to be considered" but not a controlling factor.[8] Later courts abandoned their focus on the type of treatment and instead focused on the prognosis of the patient, his or her quality of life in view of the burdens of treatment, and the benefit to the patient of continued life.[9] The courts have also disagreed as to whether the right to refuse treatment is derived from the Constitution or the common law.[10]

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5. *See* Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 431 (Mass. 1977) (to apply the substituted judgment standard the court determines what decision "would be made by the incompetent person, if that person were competent, but taking into account the present and future incompetency of the individual as one of the factors which would necessarily enter into the decision-making process of the competent person."); *In re* Quinlan, 355 A.2d 647, 664 (N.J.), *cert. denied*, 429 U.S. 992 (1976) ("The only practical way to prevent destruction of the right [to refuse medical treatment] is to permit the guardian and family [of the patient] to render their best judgment . . . as to whether she would exercise it in these circumstances.").

6. *See In re* Conroy, 486 A.2d 1209 (N.J. 1985). When there is no trustworthy evidence of intent or no evidence of intent at all, the New Jersey Supreme Court applies a net benefits and net burdens test. *Id.* at 1232. If the net burdens of the patient's life clearly and markedly outweigh the benefits the patient derives from life such that administering life-sustaining treatment is inhumane, then the treatment may be terminated. *Id.*

7. *See In re* Storar, 420 N.E.2d 64 (N.Y.), *cert. denied*, 454 U.S. 858 (1981). The New York Court of Appeals rejected the concept of substituted judgment because when a person has never been competent "it is unrealistic to attempt to determine whether he would want to continue potentially life prolonging treatment if he were competent." *Id.* at 72. The court adopted a standard of clear and convincing evidence of the patient's intent. *Id.*

8. Brophy v. New England Sinai Hosp., Inc., 497 N.E.2d 626, 637 (Mass. 1986).

9. *See* Cruzan v. Harmon, 760 S.W.2d 408, 421 (Mo. 1988), *aff'd sub nom.*, Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990); Barbara Miltenberger, Comment, *The Dilemma of the Person in a Persistent Vegetative State: A Plea to the Legislature for Help*, 54 MO. L. REV. 645, 649 (1989).

10. *See Cruzan*, 110 S. Ct. 2841 (citing *In re* Quinlan, 355 A.2d 647, 662-64 (N.J.) *cert. denied*, 429 U.S. 992 (1976), where the court held that "[the patient] had a right of privacy grounded in the Federal Constitution to terminate treatment."); *see also* Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 424 (Mass. 1977) (court applied both the constitutional right to privacy and the common law right to refuse medical treatment.). *But cf. Storar*, 420 N.E.2d at 70 (the court did not fully accept that the constitutional right to privacy included a right to refuse

While courts have disagreed on the test to determine whether a third person could exercise the incompetent's right to refuse treatment and the basis of that right, they have identified four countervailing state interests which may limit that right.[11] Those interests are: (1) preserving life; (2) preventing suicide; (3) safeguarding the integrity of the medical profession; and (4) protecting innocent third parties.[12] According to one commentator, "the state's interest in preserving life has been the central focus when balancing the state's interest against a person's rights."[13]

In balancing these state interests against the individual's common law right to refuse treatment and constitutional right to privacy, "[n]early unanimously . . . courts have found a way to allow persons wishing to die, or those who seek the death of a ward, to meet the end sought."[14] The Missouri Supreme Court, however, is not one of those courts.

B. Missouri's Treatment of Surrogate Decision Making

The Missouri Supreme Court decision in *Cruzan v. Harmon*[15] was one of first impression, and the court thoroughly examined the history of the ability of a third person to exercise an incompetent's right to refuse treatment.[16] Nancy Cruzan was a young woman in a persistent vegetative state as the result of an automobile accident.[17] She was dependent upon artificial nutrition and hydration, but she was not diagnosed as terminally ill.[18]

The Missouri Supreme Court recognized no "unfettered right of privacy" under the Missouri Constitution which would "support the right of a person to refuse medical treatment in every circumstance."[19] The court then turned to the federal constitution. The court found that the United States Supreme Court had made no express application of the right to privacy to decisions to terminate nutrition and hydration.[20] The Missouri Supreme Court went on

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treatment, so it based its decision on the common law right to refuse treatment.).

11. *See* Miltenberger, *supra* note 9, at 650.

12. *Id.*

13. *Id.*

14. Cruzan v. Harmon, 760 S.W.2d 408, 412 (Mo. 1988), *aff'd sub nom.*, Cruzan v. Director, Mo. Dep't. of Health, 110 S. Ct. 2841 (1990).

15. 760 S.W.2d 408 (Mo. 1988), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

16. *Id.* at 412-16.

17. *Id.* at 411.

18. *Id.*

19. *Id.* at 417.

20. *Id.* at 418.

to state that because of the language in *Roe v. Wade*[21] and *Bowers v. Hardwick*,[22] which restricted the scope of the right to privacy, it had "grave doubts as to the applicability of privacy rights to decisions to terminate the provision of food and water to an incompetent patient."[23]

The Missouri Supreme Court did, however, recognize a competent person's common-law right to refuse medical treatment.[24] The court then determined that it was "definitionally impossible" for an incompetent person to give informed consent or to withhold consent.[25]

The court then addressed the four countervailing state interests,[26] but stated that only the interest in preservation of life was at issue.[27] The court divided this interest into two separate concerns: the prolongation of the life of the individual patient and the sanctity of life itself.[28] The court then stated that the interest in prolonging life decreases when the affliction "would soon cause death regardless of any medical treatment."[29] Turning to the state's interest in the sanctity of life, the court stated that "[t]he state's concern with the sanctity of life rests on the principle that life is precious and worthy of preservation without regard to its quality."[30] The court arrived at this conclusion by stating that the Missouri Living Will Statute[31] establishes a legislative policy to preserve life regardless of its quality.[32]

The court next balanced the individual constitutional privacy right and common law right to refuse treatment against the state's interest in life.[33] In applying the balancing test, the court reiterated that the individual's rights are not absolute and the state's interest in preserving life exists without regard to

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21. 410 U.S. 113, 154 (1973).

22. 478 U.S. 186, 194-95 (1986).

23. *Cruzan*, 760 S.W.2d at 418.

24. *Id.* at 416-17.

25. *Id.* at 417.

26. *Id.* at 419.

27. *Id.*

28. *Id.*

29. *Id.* (citing Commissioner of Corrections v. Myers, 399 N.E.2d 452, 456 (Mass. 1979)).

30. *Id.*

31. MO. REV. STAT. §§ 459.010-.055 (1986).

32. *Cruzan*, 760 S.W.2d at 419-20. *See* MO. REV. STAT. § 459.055(5) (1986) ("Sections 459.010 to 459.055 do not condone, authorize or approve mercy killing or euthanasia nor permit any affirmative or deliberate act or omission to shorten or end life.").

33. *Cruzan*, 760 S.W.2d at 421-24. The court seemed to assume that the constitutional right to privacy applied for the purpose of balancing interests, even though they expressed doubt that the right applied to decisions regarding the withdrawal of nutrition and hydration earlier in the opinion. *Id.* at 417-18.

life's quality.[34] The court determined that the state's interest in life outweighed Cruzan's right to refuse treatment.[35] Considering the interest in prolonging life, the court found that Cruzan was not terminally ill, and refused to consider her quality of life in a persistent vegetative state.[36] When the court addressed the state's concern with the sanctity of life, they stated the "issue is not whether the continued feeding and hydration of Nancy is medical treatment; it is whether feeding and providing liquid to Nancy is a burden *to her.*"[37] The court determined that the *continuation* of artificial nutrition and hydration is not a burden or "heroically invasive."[38] The court then determined that the evidence of Nancy's statements when competent was not "clear proof of a patient's intent."[39] Therefore, the evidence did not meet the requirements of informed consent.[40]

Finally, the court rejected the doctrine of substituted judgment.[41] The court reasoned that a third person could not exercise the incompetent's right to refuse treatment "in the absence of the formalities required under Missouri's Living Will statutes or the clear and convincing, inherently reliable evidence absent here."[42] The court then explained that "[a] guardian's power to exercise third party choice arises from the state's authority, not the constitutional rights of the ward."[43] This led the court to find that guardians must act consistently with the state's interest in the preservation of life and that state guardianship law[44] imposed a duty to continue the life-sustaining treatment.[45]

The Missouri Supreme Court looked to the legislature to establish the state's policy with regard to the preservation of life.[46] The court stated that

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34. *Id.* at 421-22.

35. *Id.* at 424.

36. *Id.* at 422.

37. *Id.* at 423.

38. *Id.* The court did concede that the surgical insertion of a gastrostomy tube is invasive but seemed to rule that the invasiveness of the tube ends once it is inserted and functioning. *Id.* at 422-23.

39. *Id.* at 424 (citing *In re* Jobes, 529 A.2d 434, 443 (N.J. 1987)).

40. *Id.*

41. *Id.* at 425.

42. *Id.* The court found that Nancy Cruzan's statements prior to her incompetency were "informally expressed reactions to other people's medical condition and treatment" and did not meet the clear and convincing, inherently reliable evidence standard. *Id.* at 424.

43. *Id.* at 425.

44. MO. REV. STAT. § 475.120.3 (1986).

45. *Cruzan*, 760 S.W.2d at 424-26.

46. *Id.* at 426.

"[i]f there is to be a change in that policy, it must come from the people through their elected representatives."[47] Like other courts faced with this issue, the court invited the state legislature to take up the issue.[48] Because *Cruzan* broke with prior case law in this area, the decision was ripe for review by the United States Supreme Court.

C. The United States Supreme Court's View of Missouri's Decision

The sole issue on appeal to the Court was whether the Constitution prohibited Missouri from requiring a clear and convincing, inherently reliable evidence standard in cases that addressed the right to refuse treatment.[49] In a five to four decision, the Court found that under the Fourteenth Amendment,[50] "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment *may* be inferred from . . . prior decisions."[51] The Court then based its decision upon the assumption that the Constitution "would grant a competent person a . . . right to refuse lifesaving hydration and nutrition."[52] The Court, however, affirmed the state's standard of clear and convincing evidence of intent to refuse life-sustaining medical treatment.[53] The Court found that Missouri can assert an unqualified interest in the preservation of human life.[54] To further

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47. *Id.*

48. *Id.* The Missouri Supreme Court stated:

> Broad policy questions bearing on life and death issues are more properly addressed by representative assemblies. These have vast fact and opinion gathering and synthesizing powers unavailable to the courts; the exercise of these powers is particularly appropriate where issues invoke the concerns of medicine, ethics, morality, philosophy, theology and law. Assuming change is appropriate, the issue demands a comprehensive resolution which courts cannot provide.

Id. *See also* Miltenberger, *supra* note 9, at 653-54 (listing similar cases decided in other states calling for legislative action).

49. Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841, 2851 (1990).

50. U.S. CONST. amend. XIV, § 1 ("No State . . . shall . . . deprive any person of life, liberty, or property, without due process of law.").

51. *Cruzan*, 110 S. Ct. at 2851 (emphasis added). *See id.* at 2859-60 (Justice Scalia is the only justice who denies the existence of a constitutional right to refuse unwanted medical treatment).

52. *Id.* at 2852.

53. *Id.* at 2854.

54. *Id.*

this interest, the state can require heightened evidentiary requirements to safeguard the personal element of choice between life and death.[55]

Justice O'Connor's concurrence emphasized the narrowness of the decision: "Today we decide only that one State's practice does not violate the Constitution; the more challenging task of crafting appropriate procedures for safeguarding incompetents' liberty interests is entrusted to the 'laboratory' of the States."[56] This challenge led the Missouri General Assembly into the laboratory.

D. Legislative History of the Durable Power of Attorney for Health Care Act

The publicity surrounding the *Cruzan* decisions heightened the concern of Missouri citizens with respect to these issues. Many citizens were concerned with how they could meet the clear and convincing evidence standard which the Missouri Supreme Court enunciated in *Cruzan*.[57]

The Missouri Living Will Statute "was inadequate for this purpose because it contained strict limitations" on the use of the living will.[58] The Living Will Statute's two most important restrictions are: (1) the requirement that the patient be in a "terminal condition," and (2) the exclusion of artificial nutrition and hydration from the definition of "death-prolonging procedures" which may be withheld or withdrawn from a patient in a terminal condition.[59] A terminal condition is defined by the Living Will Statute as "an incurable or irreversible condition which . . . is such that death will occur within a short time regardless of the applications of medical treatment."[60] This definition prohibits a person in a persistent vegetative state, like Nancy Cruzan, from having her living will honored. A person who executed a living will would be unable to invoke it, because the Living Will Statute excludes the withdrawal of nutrition and hydration from the definition of death-prolonging procedures. Because of the inadequacies in the Living Will

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55. *Id.* at 2853. The Court based its decision upon Missouri's ability to make a societal judgment and place the risk of an erroneous decision upon those seeking to terminate an incompetent individual's life-sustaining treatment. *Id.* at 2854. The Court also stated that Missouri "may choose to defer to only those wishes [previously expressed by the patient], rather than confide the decision to close family members." *Id.* at 2856.

56. *Id.* at 2859.

57. Catherine J. Barrie, *Legislative History of Missouri Senate Bill 148, Durable Power of Attorney for Health Care*, 11 ST. LOUIS U. PUB. L. REV. 453, 454 (1992).

58. *Id.*

59. *Id.* at 455. *See* MO. REV. STAT. § 459.010, .025 (1986).

60. MO. REV. STAT. § 459.010.

Statute, the Missouri legislature introduced several different versions of Health Care Surrogate and Durable Power of Attorney Acts.[61]

These acts were debated fiercely and the current Health Care Act is the result of "considerable negotiation and compromise between various interest groups."[62] Those who believed that state intervention in family health care decisions invaded privacy were at odds with those in the pro-life movement who believed the state had an unqualified interest in the preservation of life.[63] Initially the pro-life movement maintained the greatest influence.[64] The publicity of the *Cruzan* decision shifted the balance of influence in favor of those groups supporting advance directive legislation.[65] Many portions of the bill, however, resulted from compromise. While controversies raged over many parts of the Act, the main controversies concerned the issue of withholding or withdrawing nutrition and hydration[66] and issues of euthanasia, mercy killing, and assisted suicide.[67]

According to one commentator, "[t]he issue of artificially supplied nutrition and hydration was one of the most controversial aspects" of the Health Care Act.[68] A conflict was sure to follow, because

> pro-life activists wanted an extremely strict definition of the circumstances under which artificially supplied nutrition and hydration could be withdrawn. They viewed this procedure not as medical treatment but rather as a "basic necessity of life." In contrast, those groups lobbying in support of the bill generally wanted broad authority for a designated agent to withdraw artificially supplied nutrition and hydration in appropriate medical circumstances.[69]

This conflict led to many compromises.

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61. Barrie, *supra* note 57, at 455-56.

62. *Id.* at 455.

63. *Id.*

64. *Id.* The pro-life movement's early influence and success led to the "repeated rejection of the Health Care Surrogate Act as drafted by the Bar Committee." *Id.*

65. *Id.* at 456.

66. *Id.* at 464-69.

67. *Id.* at 469-71. Some of the smaller controversies were over definitions used in the Act. *Id.* at 458-59. Some groups argued that the definitions in the new law should be based upon the state's guardianship law. *Id.* at 458. The references to guardianship law were avoided by the legislature because the Missouri Supreme Court expressly found that guardians could not consent to withdrawal or termination of treatment. *Id.* at 458-59.

68. *Id.* at 464.

69. *Id.* (footnote omitted).

First, it led to the requirement that a patient must specifically grant authority to withhold or withdraw nutrition or hydration in the power of attorney document.[70] Second, because of a concern that spoon feeding might be construed as "medical treatment," the Act prohibited the withdrawal of nutrition and hydration which could be ingested naturally.[71] There were several attempts to amend the Act and restrict the withdrawal or withholding of artificial nutrition and hydration to specific medical situations.[72] Many groups fiercely opposed these amendments.[73] It appeared, however, that the Missouri governor would veto the bill if it did not contain what he termed as additional "safeguards."[74] The legislature did not want to delay implementation by using a referendum to bypass the governor.[75] This led to a compromise in the final days of the legislative session, requiring particular procedures to be followed in all cases before artificial nutrition and hydration could be withheld or withdrawn.[76]

The grant of authority to withhold or withdraw artificial nutrition and hydration is restricted in the following ways: (1) the principal must specifically grant this authority; (2) the attorney in fact cannot order the withdrawal of nutrition and hydration which are ingested through natural means; (3) the attorney in fact must consider appropriate measures in accord with current standards of medical practice; (4) before the attorney in fact or physician can authorize the withdrawal of artificial nutrition and hydration, the physician must explain to the patient the intention to withdraw nutrition and hydration and its consequences.[77] This provides the patient an opportunity to refuse the withdrawal. If the patient is somehow incapacitated, the physician must certify that it is impossible for the principal to understand the intention to withdraw nutrition and hydration and the consequences thereof.[78]

The other major controversy in the Health Care Act concerned the issues of euthanasia, mercy killing, and assisted self-murder.[79] Opponents of the bill felt enactment would lead to state-sanctioned euthanasia, mercy killing, and assisted self-murder.[80] Efforts to include language prohibiting these

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70. *Id.* *See* MO. REV. STAT. § 404.820.1 (Supp. 1991).
71. Barrie, *supra* note 57, at 464-65. *See* MO. REV. STAT. § 404.820.2.
72. Barrie, *supra* note 57, at 465.
73. *Id.* at 465-66.
74. *Id.* at 468.
75. *Id.*
76. *Id.* The required procedures are found in MO. REV. STAT. § 404.820.4 (Supp. 1991).
77. Barrie, *supra* note 57, at 464-69.
78. *Id.* at 469.
79. *Id.* at 469-71.
80. *Id.* at 469.

practices were defeated "because of the absence of any objective definition" of those terms.[81] A compromise was achieved, however, and language was added which required "the attorney in fact making any health care decision to 'seek and consider information concerning the patient's medical diagnosis, the patient's prognosis and the benefits and burdens of the treatment to the patient . . . to the extent possible within prevailing medical standards.'"[82] This provision was added to avoid the use of "emotionally loaded terms" and to prevent arbitrary decision making and abuse of power by an attorney in fact.[83]

The controversies surrounding the act were resolved in the final weeks of the 86th General Assembly. Senate Bill 148, the Health Care Act, was signed by the governor on May 17, 1991 and went into effect August 28, 1991.[84]

III. ANALYSIS AND COMMENT

The law concerning the ability of a third person to exercise an incompetent individual's right to refuse medical treatment can be evaluated on three tiers. The first tier is where a competent adult makes a directive regarding appropriate medical treatment before incompetency occurs.[85] The second tier is where a competent adult fails to make an advance directive of his or her wishes regarding medical treatment and later becomes incompetent. The final tier represents minors and adults who have never become competent under the law.[86] Missouri's law addresses the first two tiers, and they will be the focus of this analysis.

A. Tier I - The Competent Designating Adult

The purpose of the Durable Power of Attorney for Health Care Act is to allow "a person to designate another to make health care decisions for him—including the withdrawal or withholding of nutrition and hydration—if the person becomes incapacitated."[87] A durable power of attorney for health care may, however, reflect two separate intents of the patient. First, the

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81. *Id.* at 469-70.

82. *Id.* at 470 (quoting MO. REV. STAT. § 404.822 (Supp. 1991)).

83. *Id.*

84. *Id.* at 453.

85. Such an advance directive would be the execution of a living will or durable power of attorney for health care.

86. This group is by definition unable to execute a valid advance directive.

87. Jennifer B. Furla, *New Law Ensures Right to Name Proxy for Health Care Decisions*, MO. LAW WKLY., May 27, 1991, at 1, 20.

durable power of attorney for health care reflects the patient's intent to designate a surrogate decision maker. Secondly, it may be evidence of the patient's intent regarding withholding and withdrawing medical treatment.

If a durable power of attorney for health care is not executed properly and is invalid as a means for designating a surrogate decision maker, it may still meet the *Cruzan* clear and convincing evidence standard to allow the patient's wishes to be carried out.[88] Similarly, if the person is incapacitated in another state which does not recognize the Missouri Durable Power of Attorney for Health Care, the document could be offered as evidence of the person's intent with regard to medical decisions.[89] Whether the durable power of attorney provides evidence of intent regarding withholding and withdrawing medical treatment is a question of drafting.

A simple durable power of attorney for health care merely appoints an attorney in fact without providing any specific guidance for decision making other than the restrictions of the Health Care Act. The document may go further, however, and authorize the attorney in fact to order the withholding or withdrawal of certain specific medical treatments, such as artificial nutrition and hydration.[90] A sophisticated durable power of attorney for health care would direct the attorney in fact to make specific decisions regarding the withdrawal of specific medical treatments, such as artificial hydration and nutrition, in certain situations. While it is unclear how specific the directions must be to satisfy the *Cruzan* standard, a sophisticated document should provide adequate evidence of intent.

Despite the benefits of executing a sophisticated durable power of attorney for health care, some commentators suggest that a competent designating adult still needs to execute a living will to insure that her wishes are carried out.[91] Furthermore, a person who is uncomfortable choosing a particular surrogate decision maker and seeks more control of his future may wish to execute a living will and not a durable power of attorney for health

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88. *See* Justice O'Conner's concurrence in *Cruzan*. She stated that, with regard to whether a state must respect the decisions of appointed surrogates, "a duty may well be constitutionally required to protect the patient's liberty interest in refusing medical treatment." Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841, 2857 (1990). She further stated that "procedures for surrogate decision making, which appear to be rapidly gaining in acceptance, may be a valuable additional safeguard of the patient's interest in directing his medical care." *Id.* at 2858.

89. *Id.*

90. *See* MO. REV. STAT. § 404.820.1 (Supp. 1991) (This section requires a patient to specifically grant the authority to withhold or withdraw artificial nutrition or hydration in the Durable Power of Attorney for Health Care document.).

91. *See New Health Care Durable Power Law*, EST. PLAN. UPDATE, vol. 1, issue 2 (Special Courses, School of Law and University Extension, University of Missouri-Columbia), at 2.

care.[92] Persons who execute a living will are not required to designate a particular individual to make decisions for them.[93] Their living will simply tells physicians that they want to die naturally and want medical treatment withheld if they are in a terminal condition.[94] Other commentators suggest that a durable power of attorney for health care's directions to the attorney in fact can be made specific enough to have the same effect and eliminate the need for a living will.[95]

In addition to seeming redundant, portions of the Living Will Statute conflict with the Health Care Act. Both acts have a conscience clause.[96] Under the Living Will Statute, attending physicians or health care facilities which are unwilling to honor the living will's directions must take all reasonable steps to transfer the patient to a physician or facility which will honor the document.[97] The Health Care Act requires a physician or health care provider to honor a durable power of attorney if the hospital receives a copy of the document before beginning treatment.[98] The Act merely forbids the physician or health care facility to impede efforts by the attorney in fact to transfer the patient if they refuse to honor the document.[99] While these provisions appear to reach the same result, there is some uncertainty as to which act controls when a patient has executed both documents.[100]

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92. This is especially true for those patients who would only trust their doctors to be their attorney in fact. In that case the living will may be more appropriate because the Health Care Act prohibits personal physicians and other immediate health care providers from serving as the attorney in fact. MO. REV. STAT. § 404.815 (Supp. 1991). There is a limited exception to that rule if the physician is closely related to the patient or if the patient and the physician are both members of certain religious groups. *Id.*

93. *New Health Care Durable Power Law, supra* note 91, at 2.

94. *Id.*

95. Interview with Chris Kelly, Member, Missouri General Assembly, in Columbia, Mo. (Sept. 9, 1991). The argument is that a durable power of attorney for health care can be drafted to include specific instructions such that the attorney in fact has no discretion in making certain decisions with regard to the withdrawal of certain types of medical treatment. The only role the attorney in fact serves under such a document would be to communicate the patient's advance directions. Because of the specificity of the directions in the durable power of attorney for health care, it serves the same purpose as a living will: it is as an advance directive directly to the physician or care giver. *Id.*

96. *See* MO. REV. STAT. §§ 404.830 (1991 Supp.), 459.030 (1986).

97. MO. REV. STAT. § 459.030.

98. MO. REV. STAT. § 404.830.

99. *Id.*

100. *Compare* MO. REV. STAT. §§ 459.010-.055 (1986) *with* MO. REV. STAT. §§ 404.800-.865 (1991). Neither the Living Will Act or the Durable Power of Attorney

Similarly, in the event that a person has executed both a living will and a durable power of attorney for health care, both statutes are silent as to which document controls medical treatment decisions.[101] The Missouri Bar suggests that in the event both documents are executed, the durable power of attorney for health care should control.[102] The Missouri Bar Durable Power of Attorney Sample Form includes language to the effect that the patient wishes the attorney in fact to act in accordance with the directions in the living will.[103] The bar form, however, also contains an exception which authorizes the attorney in fact to make decisions contrary to the directions in the living will if the decision is in the patient's best interest.[104] Missouri law, however, does not require the patient executing both documents to make such a distinction.[105] This gap in the law could create confusion as to whether a living will's specific direction controls or whether the judgment of the attorney in fact controls under the durable power of attorney for health care.

The most striking conflict is that the Living Will Statute does not allow the withdrawal of nutrition and hydration.[106] If one executes a living will which exceeds this restriction by ordering the withdrawal of nutrition and hydration, it would probably satisfy the clear and convincing evidence standard of *Cruzan*.[107] The Living Will Statute's exclusion of artificial nutrition and hydration from the definition of death-prolonging procedures may be an unconstitutional restriction upon the Fourteenth Amendment

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for Health Care Act contain a provision which indicates which document controls in the event of conflicting statutory commands.

101. *See* MO. REV. STAT. §§ 459.010-.055; 404.800-.865. Both the Living Will Act and the Health Care Act are also silent as to which controls when the specific directions of the living will and the judgment of the attorney in fact are in conflict.

102. *See* DURABLE POWER OF ATTORNEY FOR HEALTH CARE AND HEALTH CARE DIRECTIVE, QUESTIONS AND ANSWERS, INSTRUCTIONS AND SAMPLE FORM 13 (Mo. Bar July 19, 1991). Part three of the Missouri Bar sample form contains language establishing the "Relationship between Directive and Durable Power of Attorney." *Id.*

103. *Id.*

104. *Id.*

105. *See* MO. REV STAT. §§ 459.010-.055, 404.800-.865.

106. *Compare* MO. REV. STAT. § 459.010(3) *with* MO. REV. STAT. § 404.820 (1991). The Living Will Statute allows the terminally ill incompetent patient to direct the withdrawal of "death-prolonging procedures" in advance of his or her incompetency. MO. REV. STAT. § 459.015. Procedures for providing nutrition or hydration, however, are expressly excluded from the statutory definition of "death-prolonging procedures." *Id.* § 459.010. *See also supra* notes 59 - 61 and accompanying test.

107. *See Cruzan*, 110 S. Ct. at 2857 (O'Connor, J., concurring) (referring to "individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water.").

"liberty interest in refusing unwanted medical treatment" which the United States Supreme Court inferred from its prior decisions in *Cruzan*.[108]

Because of the inconsistencies between the Health Care Act and the Living Will Statute and the uncertainty created for persons wishing to make an advance directive, the legislature should take steps to amend the Living Will Statute so that it is consistent with the Health Care Act. The effect of the Health Care Act is to grant informed competent adults the ability to avoid Nancy Cruzan's dilemma and exercise their right to refuse treatment despite incapacity. The Health Care Act does not appear, however, to aid those persons who were not informed of their options or simply lacked the foresight to plan for the event of incapacity.

B. Tier II - The Nondesignating Competent Adult

The second tier of evaluation concerns the situation in which a competent adult never makes an advance directive, and there is no competent evidence of intent before he or she becomes incompetent. The question of who will make medical decisions for this class of persons remains unanswered.

This question was the focus of the Missouri Supreme Court's decision in *Cruzan v. Harmon*. Although the court found that a guardian has an affirmative duty to provide medical treatment and the power to consent to such treatment, the court found that there was no statutory basis for a guardian to order the termination of medical treatment.[109] The court then announced that there must be clear and convincing evidence of the incompetent's intent to have medical treatment withheld or withdrawn.[110] It seems odd that the guardian has a duty to consent to the surgical insertion of a gastronomy tube, which the court conceded was a heroically invasive procedure, but cannot act on behalf of the patient to have it removed.[111] In sum, the guardian has the power and *duty* to consent to invasive medical treatment, but once consent is given, there must be clear and convincing evidence that the incompetent would order the medical treatment to be withheld or withdrawn. The benefits and burdens to the patient are not taken into account. The United States Supreme Court affirmed Missouri's ability to develop its own standard without endorsing it as the proper standard.[112] The Supreme Court recognized that "[s]tate courts have available to them for decision a number of sources—state

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108. *Id.*, at 2851. *See also* Barrie, *supra* note 57, at 455; *supra* note 51 and accompanying text.

109. Cruzan v. Harmon, 760 S.W.2d 408, 424 (Mo. 1988), *aff'd sub nom.* Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

110. *Id. See also supra* notes 39-40 and accompanying text.

111. *See supra* notes 38, 45 and accompanying text.

112. *Cruzan*, 110 S. Ct. at 2852-54.

constitutions, statutes, and common law—which are not available to us."[113] Based upon this observation, the Court left the development of procedures to protect the incompetent's liberty interests to the laboratory of the states.[114]

The Missouri Supreme Court recognized the importance of state policy enunciated by the state legislature in its decision.[115] The Missouri Supreme Court stated that "broad policy decisions bearing on life or death issues are more appropriately addressed by representative assemblies."[116] The Missouri General Assembly has taken up these issues, and the adoption of the Health Care Act might result in a different outcome of *Cruzan v. Harmon* today. The decision in *Cruzan v. Harmon* was based heavily upon the Missouri Supreme Court's interpretation of legislative policy as enunciated in the Living Will Statute.[117] The court found that the restrictive language of the Living Will Statute established an interest in the preservation of life without regard to its quality.[118] The Health Care Act may signal a shift in that policy.

The Missouri Living Will Statute is very narrow in application because it requires that the patient be in a terminal condition and excludes the provision of nutrition and hydration from the definition of death-prolonging procedures which may be withheld or withdrawn.[119] These restrictions were the basis of the court's interpretation of the state's unqualified interest in the preservation of life.[120] The Health Care Act does not include either of these restrictions.

The Health Care Act does provide certain procedural steps an attorney in fact must follow if the request is to withdraw or withhold artificial nutrition or hydration. The Act, however, is consistent with legal decisions throughout the country in characterizing the procedure as medical treatment.[121] This characterization should abolish any reason for basing state policy upon

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113. *Cruzan*, 110 S. Ct. at 2851.

114. *Id.* at 2854. *See also supra* note 56 and accompanying text.

115. *Cruzan*, 760 S.W.2d at 426; *see also supra* notes 46-48 and accompanying text.

116. *Cruzan*, 760 S.W.2d at 426.

117. *Cruzan*, 760 S.W.2d at 419-20.

118. *Cruzan*, 760 S.W.2d at 420.

119. *See supra* note 59; *see also Cruzan*, 760 S.W.2d at 419-20 (comparing Missouri's Living Will Statute and the Uniform Rights of the Terminally Ill Act upon which the Missouri statute is modeled and explaining why Missouri modifications of the model enunciate an interest in the preservation of life without regard to quality).

120. *Cruzan*, 760 S.W.2d at 419-20.

121. *See, e.g., Cruzan*, 110 S. Ct. at 2857 (O'Conner, J., concurring) ("Artificial feeding cannot readily be distinguished from other forms of medical treatment" and "the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water.").

distinctions between medical treatment and procedures to provide artificial nutrition or hydration.

The Health Care Act requires the attorney in fact to consider "the patient's medical diagnosis, the patient's prognosis and the benefits and burdens of the treatment to the patient."[122] This is similar to the net burden and net benefit test enunciated by the New Jersey Supreme Court in *In Re Conroy*.[123] Although the attorney in fact does not consider only the net burdens placed upon life by the preexisting condition *and* the treatment, the attorney in fact makes decisions about the treatment's effect upon the principal's quality of life. This test also seems similar to the one enunciated in *Cruzan v. Harmon*.[124] The Missouri Supreme Court's formula in *Cruzan*, however, "denies equal recognition to quality of life considerations arising out of the patient's disease."[125]

In addition to considering the benefits and burdens of the treatment, the Health Care Act requires the attorney in fact to consider the medical diagnosis and prognosis of the patient. Diagnosis is defined as "the nature of a case of disease."[126] Prognosis is defined as "a forecast of the probable course and outcome of an attack of disease and the prospects of recovery as indicated by the nature of the disease and the symptoms of the case."[127] By definition, these terms include the consideration of the burdens of a disease upon a patient as manifested through the disease's nature and symptoms. This additional concern for the patient's medical diagnosis and prognosis implies that quality of life considerations arising out of the patient's disease are part of the formula for the attorney in fact. This section could be viewed as a statement of the people of Missouri through the legislature: when weighing the state's interest in the preservation of life, some inquiry should be given to the patient's quality of life as affected by the disease and the treatment.

While *Cruzan* states that a guardian may consent to treatment but may not withhold or withdraw treatment,[128] the Health Care Act recognizes the ability of a third person to consent to the withholding or withdrawal of medical treatment.[129] The Missouri court, however, rejected the ability of a third person to exercise the rights of the incompetent in absence of the strict

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122. MO. REV. STAT. § 404.822 (Supp. 1991).

123. 486 A.2d 1209 (N.J. 1985); *see supra* note 6 and accompanying text.

124. *Cruzan*, 760 S.W.2d at 424.

125. Philip G. Peters, *The State's Interest in the Preservation of Life: From Quinlan to Cruzan*, 50 OHIO ST. L.J. 893, 948 (1989).

126. BENJAMIN F. MILLER & CLAIRE B. KEANE, ENCYCLOPEDIA AND DICTIONARY OF MEDICINE, NURSING, AND ALLIED HEALTH 349 (4th ed. 1987).

127. *Id.* at 1015.

128. *Cruzan*, 760 S.W.2d at 424.

129. *See* MO. REV. STAT. § 404.822 (Supp. 1991); *Cruzan*, 760 S.W.2d at 424.

formalities of the Living Will Statute assigning that right.[130] The Health Care Act, however, is not as rigid as the Living Will Statute. The Health Care Act allows the attorney in fact to make medical decisions for the incompetent as long as his decision is "within prevailing medical standards."[131] The courts could place a similar restriction upon the family or guardian with equal force.

By allowing an attending physician or another health care provider who is closely related to the patient to act as attorney in fact, the Missouri Legislature establishes a policy of deference towards family decision makers.[132] The court in *Cruzan* did not have the benefit of such an expression of policy when it rejected the substituted judgment of family members and the guardian. Furthermore, the concerns which the Missouri court expressed about the motives of family members are the same when the decision maker is an attorney in fact.[133] These concerns can be addressed by requiring family members or the guardian to perform a diagnosis, prognosis, and analysis of the benefits and burdens of treatment, similar to the requirements for an attorney in fact under the Health Care Act.[134] The pro-family policy, the broad decision making powers of the attorney in fact, and the diagnosis, prognosis, and benefits and burdens of treatment analysis might lead the court to change its decision when no advance directive exists, and defer to family or guardian decision making.

While the adoption of the Health Care Act appears to reverse the policy established by the Living Will Act, the Living Will Act still remains in force and unchanged. A court could interpret this as evidence that the state wishes to cling to its old policy as enunciated in *Cruzan v. Harmon.* The Living Will Statute should be amended to make the policy statements of the Missouri Legislature clear and consistent. The negotiations and compromises in drafting the Durable Power of Attorney Act may signal, however, that the legislature is unsure of its policy.[135]

The Missouri Supreme Court noted that "[r]epresentative bodies generally move much more deliberately than do courts; [courts] are a bit slow and ponderous."[136] The court further recognized that changes in policy with regard to "issues of life and death" are best made by the "surefooted"

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130. *Cruzan*, 760 S.W.2d at 425.

131. MO. REV. STAT. § 404.820 (Supp. 1991).

132. *See* MO. REV. STAT. § 404.815(1) (Supp. 1991) (the Act allows an attending physician or employee of the health care provider to serve as attorney in fact if related to the patient within the second degree of consanguinity).

133. *See Cruzan*, 760 S.W.2d at 424-27.

134. *See* MO. REV. STAT. § 404.822 (Supp. 1991).

135. *See supra* notes 62-84 and accompanying text.

136. *Cruzan*, 760 S.W.2d at 426.

decisions of the legislature.[137] The court, therefore, may wait for a more clear statement of policy from the Missouri Legislature before it departs from the reasoning of the *Cruzan v. Harmon* decision.

C. *Tier III - The Never Competent Person*

The third tier of analysis, applied to minors and adults who have never become competent, has not been addressed by the legislature, but may be addressed by the Missouri Supreme Court in *In re Busalacchi.*[138] Christine Busalacchi is in much the same position as Nancy Cruzan. Christine, however, was only a minor when she entered into a persistent vegetative state and received a gastronomy tube.[139] Christine's father and guardian is seeking to move her to Minnesota for further testing.[140] The state alleges that his only purpose is to move Christine to a state which will allow the removal of her gastronomy tube.[141] The Missouri Court of Appeals viewed the central issue as defining "the guardian's duty as it relates to his obligation to provide for the health care of his ward."[142] The case has been transferred to the Missouri Supreme Court, and oral arguments were heard in September 1992. Other issues the supreme court might address are the guardian's rights as the natural parent of the incompetent and whether a person is considered a minor based upon the age at which she became incapacitated or upon chronological age.[143] The Missouri Supreme Court's decision in this case will shed light not only on this third tier of analysis but also upon the first two tiers.

V. CONCLUSION

Missouri proxy health care decision-making law is a puzzle which is still incomplete. The pieces do not seem to fit together, and it appears some of the pieces are missing. In light of the adoption of the Health Care Act, it appears that the legislature should amend the Living Will Statute in order to achieve conformity in this area of law.

The Health Care Act seems to have confused the issues concerning the competent nondesignating adult. The legislature may have created a new

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137. *Id.* at 426-27.

138. The Missouri Supreme Court heard oral arguments on September 1, 1992.

139. *In re* Busalacchi, No. 59582, 1991 WL 26851, at *1 (Mo. Ct. App. Mar. 5, 1991).

140. *Id.*

141. *Id.*

142. *Id.* at *3.

143. *See id.*

problem to which *Cruzan* might apply. The legislature has yet to address the situation of minors and adults who have never been competent. Perhaps the Missouri Supreme Court's upcoming decision in *In re Busalacchi* will provide guidelines for this situation or inspire the legislature to act.[144]

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144. *See supra* note 138.