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Decisions to withhold or withdraw medical hydration and nutrition are amongst the most difficult that confront patients and their families, medical and other health professionals all over the world. This article discusses two cases relating to lawful withdrawal and withholding of a percutaneous endoscopic gastrostomy tube (PEG) from incompetent patients with no hope of recovery. Victoria and Florida have statutory frameworks that provide for advance directives, however in both Gardner; Re BWV and Schindler v Schiavo; Re Schiavo the respective patients did not leave documented instructions. The article analyses the two cases and their outcomes from legal, medical and ethical perspectives.

Medical provision of hydration and nutrition not considered an obligatory component of palliative care: Gardner; Re BWV

On 29 May 2003, in Gardner; Re BWV [2003] VSC 173, Morris J of the Supreme Court of Victoria handed down an important decision relating to the withdrawal of life-sustaining treatment from incompetent patients. His Honour determined that the Public Advocate had the power under the Medical Treatment Act 1988 (Vic) to refuse further nutrition and hydration, administered via percutaneous endoscopic gastrostomy (PEG), to a 69-year-old woman (BWV) in the advanced stages of dementia, diagnosed clinically as Pick's Disease in 1988.

The importance of the judgment is twofold. Technically, it clarifies the meaning of the palliative care provisions in the context of the Medical Treatment Act 1988 (Vic). More generally, it acknowledges and articulates an evolving international view in medical ethics that the medical provision of hydration and nutrition is indeed medical treatment, subject to the same criteria of clinical appropriateness and process of consent as any other. It is therefore neither ethically nor legally required that "bottom-line" sustenance be initiated or continued in all circumstances regardless of the person's clinical condition, and in disregard of the patient's or family's wishes.

The judgment certainly acknowledges that in the practice of palliative medicine it is not the norm to provide these interventions for dying persons although oral sustenance is always offered, and thirst is treated orally, with occasional fluid infusion if needed. The narrow issue of statutory interpretation is addressed first, and then the wider implications of the BWV case.

Mrs BWV had been resident in a nursing home since 1999. Her husband had agreed to the PEG insertion in 1995 when she was still ambulant, but incompetent and unable to communicate with anyone apart from him, albeit in a very limited form. She subsequently progressed to a permanent vegetative state. Her husband stated that she had said to him earlier in their life together that she would not want to be kept alive in...
such a condition. He requested that feeding cease. The general practitioner and the nursing home management did not agree to this because they felt that there was uncertainty about the lawfulness of such an action under the *Medical Treatment Act 1988* in Victoria.

The *Medical Treatment Act* was enacted in 1988 to safeguard legislatively the right of adult patients of sound mind to refuse medical treatment, including life-saving treatment. In 1990 and 1992 amendments to the *Medical Treatment Act* enabled competent adults to appoint agents by an enduring medical power of attorney with the power "to make decisions about the medical treatment of the person if the person becomes incompetent". Guardians appointed under the *Guardianship and Administration Board Act 1986* (Vic) can make "decisions about medical treatment" on behalf of the represented person. Validly appointed agents and guardians can refuse either medical treatment generally, or treatment "of a particular kind" where "the medical treatment would cause unreasonable distress to the patient", or there are reasonable grounds for believing that the incompetent person, "if competent … would consider that the medical treatment is unwarranted".

Throughout the *Medical Treatment Act*, rights and obligations of agents, guardians and medical personnel are defined by reference to medical treatment. The term "medical treatment" itself is defined in s 3 as meaning:

(a) the carrying out of an operation; or
(b) the administration of a drug or other like substance; or
(c) any other medical procedure – but does not include palliative care.

The term "palliative care" in turn is defined to include:

(a) the provision of reasonable medical procedures for the relief of pain, suffering and discomfort; or
(b) the reasonable provision of food and water.

The *Medical Treatment Act* thus creates a distinction between "medical treatment" and "palliative care", with the latter excluded from the purview of the legislation by the amendment made in 1994, which states: This Act does not apply to palliative care and does not affect any right, power or duty which a registered medical practitioner or any other person has in relation to palliative care.

Likewise, according to Sch 1 and Sch 3 of the Act, "The refusal of palliative care is not covered by the *Medical Treatment Act 1988,*" Schedule 1 contains the refusal of treatment certificate, which includes provisions for refusal of medical treatment and "instructions as to palliative care". Thus, competent patients are able to provide instructions concerning palliative treatment. By contrast,

(2004) 11 JLM 282 at 284

Sch 3, containing the instrument for refusal of medical treatment by agents and guardians, has no "instructions as to palliative care".

The implication is that while the *Medical Treatment Act* allows competent persons to give instructions concerning palliative care (but not refuse it outright), agents and guardians have no corresponding statutory rights concerning palliative care, as
opposed to refusal of medical treatment. This leaves the issue of palliative care to the
common law alone. The Medical Treatment Act specifically provides for the
continuation of any common law rights. The common law right to self-determination,
including the right to refuse unwanted treatment or palliative care, has not been tested
in the High Court of Australia, but has been articulated by the House of Lords in
Airedale NHS Trust v Bland [1993] AC 789; by the Supreme Court of Canada in
Rodriguez v Attorney General of Canada [1994] 2 LRC 136; by the Supreme Court of
the United States in Vacco v Quill 521 US 793 (1997) and Washington v Glucksberg
521 US 702 (1997); and by the European Court of Human Rights (Fourth Section) in
Pretty v United Kingdom (Application No 2346/02, Strasbourg, 29 April 2002).
However, while vesting an absolute right to determine what should be done with one's
own body can be justified on bioethical and legal grounds of personal self-
determination, it is much more difficult to justify the grant of such powers to third
parties without effectively nullifying the principle of sanctity of life, which is the
cornerstone of all common law systems. Morris J noted in Gardner; Re BWV [2003]
VSC 173 [at 44] that the Medical Treatment Act, combined with the Guardianship
and Administration Board Act 1988 (Vic), has sought to achieve "an appropriate
accommodation" between the principle of sanctity of life and the right to self-
determination.

The dilemma before the court was one of both moral and legalistic construction.
Agents and guardians are powerless to make decisions relating to palliative care under
the Medical Treatment Act, since this Act only gives agents and guardians of
incompetent persons the right to refuse "medical treatment". Yet at common law, a
power of attorney lapses after the donor becomes legally incompetent, leaving the
guardianship or agency as a strictly statutory institution.
Thus the case sought to clarify the term "medical treatment" as opposed to "palliative
care" in order to delineate the scope of the decision-making powers of agents and
guardians. In particular, the question before the court was whether feeding and
hydration via a PEG tube constituted "medical treatment" (which an agent can refuse)
or palliative care (which an agent cannot refuse), for the purposes of the Medical
Treatment Act.

Morris J first determined (at [76]) that "the use of a PEG for artificial nutrition and
hydration, or for that matter any form of artificial feeding, is a 'medical' procedure"
involving "protocols, skills and care which draw from, and depend upon, medical
knowledge", and "inevitably require careful choice of and preparation of materials to
be introduced into the body, close consideration to dosage rates, measures to prevent
infection and regular cleaning of conduits". His Honour then found (at [78]) that the
administration of artificial nutrition (Osmolite) via a PEG fell within the meaning of
the definition of "medical treatment" as described in s 3(b), namely the administration
of a substance like a drug.

Morris J found that the statutory definition of palliative care as "the provision of
reasonable medical procedures for the relief of pain, suffering and discomfort" did not
provide a clear principle for a distinction between the purpose of palliative care and
medical treatment. He determined that such a principle could be discerned from the
articulation of the natural meaning of "palliative care" in the Victorian Parliament's
Report of the Inquiry into Options for Dying with Dignity.12 According to the Report,
the aim of palliative care is "not to treat or cure a patient, but to alleviate pain or
suffering when a patient is dying. Indeed, palliative care extends to care for the relatives of the dying patient (at [80]). Consequently, his Honour found (at [81]) that "the administration of artificial nutrition and hydration, via a PEG, cannot be regarded as palliative care, where that expression is used in its natural sense" because "[s]uch a procedure is, in essence, a procedure to sustain life; it is not a procedure to manage the dying process, so that it results in as little pain and suffering as possible".


Morris J further found that para (b) of the definition of palliative care as "the reasonable provision of food and water" refers to "ordinary feeding by mouth", which may be carried out either by the patient or by non-medical personnel. As such, the "palliative care" definition was not intended to overlap with the statutory definition of "medical treatment". Only the latter includes medical procedures for the provision of artificial nutrition and hydration. According to his Honour (at [85]):

[T]he intent of parliament in excluding the provision of food and water from the concept of medical treatment was to ensure that a dying person would have food and water available for oral consumption, if the person wished to consume such food or water. It can hardly have been the parliament's intention that dying patients would be forced to consume food and water.

Extending the meaning of "food and water" to include artificial nutrition and hydration "would produce odd results" and be contrary to the stated purpose of the legislation, namely "to allow patients, or agents or guardians on their behalf, to choose to refuse medical treatment and to die with dignity". Morris J noted (at [93]) that what is "reasonable" in paras (a) and (b) of the definition of palliative care "must be determined in the context that such provision is for the purpose of palliative care". This will depend on circumstances, and on "the everyday judgment of a fair-minded person".

In relation to para (b), Morris J gave an example of reasonable withholding of the provision of food and water from a dying patient in circumstances where it is not being requested and, when provided on previous occasions, has not been consumed. His Honour quoted the following passage from Somerville:

[I]f we think of the terminally ill person as suffering from a failed alimentary system and the withdrawal of artificial hydration and nutrition as withdrawal of artificial alimentary system support, [then] respecting a refusal of this type of treatment is no different from accepting a person's refusal of respiratory support for a failed respiratory system.

It is important to note, however, that a person may die with a normal alimentary tract. In the persistent vegetative state and similar situations resulting from severe brain damage, although all oral food and fluid intake is impossible the alimentary tract itself may remain both anatomically and physiologically intact. During the dying process, the body's physiological systems tend to fail progressively (and the failure may be inter-connected) but at variable rates depending on the disease or injury in question. Respiration, renal function, feeding and hydration can all be maintained indefinitely almost regardless of the patient's condition or level of consciousness, or prospects of recovery. The question is whether they ought to be. The answer to this question will depend on the considered opinion of the medical professionals regarding diagnosis,
prognosis and treatment options as well as the documented wishes of the patient or the legally empowered surrogate decision-maker.

While Morris J's judgment provides a wide interpretation of "medical treatment", its definition of what constitutes "provision of food and water" is literal and narrow. This approach is deliberate. Morris J's explication of "medical treatment" as consisting of "protocols, skills and care which draw from, and depend upon, medical knowledge" encompasses "medical procedures for the relief of pain, suffering and discomfort", such as the provision of opioid medication, which the Parliament intended to exclude from the operation of the statutory right to refuse.

The narrow interpretation of "food and water" is in line with the South Australian statutory definition of "palliative care", which refers to "the natural provision or natural administration of food and water". Nor can such care be refused under the South Australian legislation.

The national implications of the judgment in Gardner; Re BWV are twofold. First, the judgment will be of particular importance in the Australian Capital Territory, where the Medical Treatment Act 1994 (ACT) contains very similar definitions of "medical treatment" and "palliative care". (2004) 11 JLM 282 at 286

Moreover, the clarified definitions will serve as guidance for decisions on withdrawal and withholding of medical treatment at the end of life in other States and Territories. Second, the judgment is significant because it advances the legal understanding of the dying process. Morris J pointed out that, although the law has recognised that the dying process often involves progressive respiratory failure (hence, the recognition that provision of mechanical ventilation or resuscitation is often inappropriate at the end of life), the law has been slow to acknowledge that the dying process also involves impairment of other physiological systems, such as feeding. The judicial notice of this medical fact will be of importance when courts decide the issue of withholding of artificial hydration and alimentation at common law.

It is to be hoped that the medical and nursing professions, the legislators, health policy-makers and hospital managers in Australia will incorporate the findings of Gardner; Re BWV in both practice and policy, as the General Medical Council and the British Medical Association have sought to do in the United Kingdom. There is no longer any reason for professionals, patients or patients' families to believe that the letter of the law or professional ethics in Australia requires dying patients to be tube-fed.

Nevertheless, withdrawing or withholding of artificial nutrition and hydration remains a sensitive issue with ethical, cultural, social and religious dimensions which found a rather unfortunate expression in Schindler v Schiavo (Re Schiavo).

Judicial and legislative wrangle over withdrawal of hydration and nutrition in Florida: Schindler v Schiavo (Re Schiavo)
Like Gardner; Re BWV, the factual issue in Schindler v Schiavo (Re Schiavo) 780 So 2d 176 at 176; 26 Fla L Weekly D305 (2001) essentially concerns withdrawal of hydration and alimentation tubes from an incompetent patient who did not leave documented advance directives. The Florida litigation illustrates the inability of even well-drafted legislation to deal effectively with the power of family hatred fuelled by financial, religious and political considerations.

On 25 February 1990, at the age of 27, Mrs Theresa Schiavo had suffered a cardiac arrest as a result of a potassium imbalance. Since that time she has lived in nursing homes with constant care, being fed and hydrated by tubes. The staff change her diapers regularly (at 177). In 2001 the court found (at 177) "overwhelming" evidence that Theresa is in a permanent or persistent vegetative state, and that:

> [O]ver the span of this last decade, Theresa's brain has deteriorated because of the lack of oxygen it suffered at the time of the heart attack. By mid-1996, the CAT scans of her brain showed a severely abnormal structure. At this point, much of her cerebral cortex is simply gone and has been replaced by cerebral spinal fluid. Medicine cannot cure this condition.

According to Florida statutes, the husband of an incompetent patient is recognised as legal guardian and surrogate decision-maker. In November 1992, Theresa's husband, Michael Schiavo, successfully sued doctors in negligence, claiming that they misdiagnosed his wife's condition. The jury returned an award of more than US$700,000 for Theresa's care, and Michael received an additional US$300,000. Following the settlement of the malpractice lawsuit, a "bitter dispute" ensued between Michael and Theresa's parents, the Schindlers. If his wife died, Michael Schiavo would inherit the fund money under the Florida laws of intestacy. However, if he divorced Theresa (or was replaced as her guardian), the fund remaining at the end of Theresa's life would presumably go to the Schindler family (at 178). Whether for financial or other reasons, within six months of the malpractice settlement in July 1993, the Schindlers filed a petition to have Michael Schiavo removed as Theresa's guardian. The case was dismissed. Since the late 1990s, Michael Schiavo has apparently been in a new relationship with another woman.

As Theresa's guardian, Michael could have exercised his legal power to file a petition for a court order to have her "life-prolonging procedures" withdrawn. However, eight years after Theresa's cardiac arrest, it became clear that the husband and the Schindlers could not agree on the proper course for Theresa, and that the inheritance issue perpetuated the appearance of conflict. Consequently in May 1998, Michael Schiavo, as the legal guardian, invoked the Guardianship Court's jurisdiction to serve as the surrogate decision-maker on the question of whether artificial sustenance should be withdrawn from Theresa on the grounds that while competent, she indicated a wish not to be kept alive through medical life-prolonging measures (at 178).

Since Theresa never executed a document expressing these wishes, the question arose whether there was clear and convincing evidence of her wishes. In 2003 in Re Guardianship of Schiavo 851 So 2d 182 at 186 (2003) the court emphasised that under Florida statutes.
It is the trial judge's duty not to make the decision that the judge would make for himself or herself or for a loved one. Instead, the trial judge must make a decision that the clear and convincing evidence shows the ward [incompetent patient] would have made for herself.

In the event, the Florida Guardianship Court accepted her husband's evidence regarding Theresa's wishes,\textsuperscript{29} and on 11 February 2000, Greer J of the Guardianship Court, Pinellas County, made a final order authorising the guardian "to proceed with the discontinuance of … artificial life support for Theresa Marie Schiavo". The Schindlers appealed, but the District Court of Appeal affirmed Greer J's decision on the ground that:

1. Mrs Schiavo's medical condition was the type of end-stage condition that permits the withdrawal of life-prolonging procedures as defined under §765.101(4) of Florida Statutes (2000);\textsuperscript{30} 
2. she did not have a reasonable medical probability of recovering capacity so that she could make her own decision to maintain or withdraw life-prolonging procedures;\textsuperscript{31} 
3. the trial court had the authority to make such a decision when a conflict within the family prevented a qualified person from effectively exercising the responsibilities of a proxy; and 
4. clear and convincing evidence at the time of trial supported a determination that Mrs Schiavo would have chosen in February 2000 to withdraw the life-prolonging procedures.\textsuperscript{32}

On 29 March 2001, Greer J directed that the bio-medical life-prolonging measures be removed on 20 April 2001. On 18 April 2001, the Florida Supreme Court refused to intervene in the case.\textsuperscript{33} However, on 20 April 2001, United States District Judge Lazzara granted the Schindlers a stay until 23 April 2003 to exhaust appeals. This last avenue was exhausted when on 23 April 2003 the United States Supreme Court refused to intervene.

On the following day, the nasogastric tube was withdrawn, but on 26 April 2001, Quesada J of the Circuit Court, Pinellas County, ordered the treatment to be reinstated while the Schindlers pursued a lawsuit against Michael Schiavo, accusing him of committing perjury and intrinsic fraud by saying his wife did not want to be kept on life-support. On 30 April 2001 lawyers for Michael Schiavo filed an emergency motion with the Court of Appeal asking it to order the removal of the nasogastric tube. The temporary injunction imposed by Quesada J was reversed by the Second District Court of Appeal on 11 July 2001, and the case was sent back to the Guardianship Court.\textsuperscript{34}

On 18 July 2001, the Schindlers filed before Greer J a "Petition for Independent Medical Examination" and a motion to remove Michael Schiavo as guardian and a motion to disqualify Greer J. The petition and both motions were denied on 10 August 2001. The Schindlers appealed to the Second District Court of Appeal of Florida for relief from Guardianship Court's judgment. On 17 October 2001, the Court of Appeal affirmed the denial of the motion to disqualify the trial judge and the petition for removal of the guardian, but granted the petition to permit discovery and an evidentiary hearing by the Guardianship Court.\textsuperscript{35} In their petition for independent
medical examination, the parents relied on a claim by Dr Fred Webber, an osteopathic physician, "that Mrs Schiavo is not in a persistent vegetative state and that she exhibits 'purposeful reaction to her environment'". Dr Webber promised to restore Theresa's cognitive function, including "speech recovery", by enhancing "her speech clarity and complexity", releasing contractures in her arms and other limbs, as well as making the patient better aware of her surroundings through his new "cardiovascular medication style of therapy".

The Court of Appeal expressed some scepticism about Dr Webber's claims, and stipulated that the purpose of the hearing was to assess Theresa's then current medical condition, as well as the nature, scientific acceptability and probable efficacy of the new medical treatments described in the Schindlers' affidavits.36 At the evidentiary hearing the parents would have to prove on the balance of probabilities ("preponderance of the evidence") that new medical treatment "offered such promise of increased cognitive function that Theresa would have elected to undergo this treatment".37 The Schindlers and Michael Schiavo were allowed to designate two physicians each, while the Guardianship Court was to nominate a board-certified physician in neurology or neurosurgery, with expertise "in the treatment of brain damage and in the diagnosis and treatment of persistent vegetative state".38

Instead of Dr Webber, the Schindlers nominated one physician certified in radiology and nuclear medicine and one board-certified neurologist. Two board-certified neurologists were selected by Michael Schiavo. The Guardianship Court selected a clinical professor of neurology at Case Western Reserve University with board-certification in neurology. Each expert witness was provided with Theresa's current medical information, including high-quality brain scans, and each could review her medical records, view all videotapes, and personally conduct a neurological examination of the patient.39 The Court of Appeal commented: "[I]t is likely that no guardianship court has ever received as much high-quality medical evidence in such a proceeding."40

Predictably, at the evidentiary hearing, which began 12 October 2001 and concluded on 22 October 2002 in the Guardianship Court, all physicians agreed that the brain scans showed extensive permanent damage to Theresa's brain. However, while three physicians, including the court appointee, testified that Theresa had no living tissue in her cerebral cortex and was in a persistent vegetative state with no hope of recovery, the two doctors selected by the Schindlers claimed she had a small amount of isolated living tissue in her cerebral cortex and was not in a persistent or permanent vegetative state. The Guardianship Court's opinion of the videotapes, which may be familiar to Journal readers following their broadcast by the worldwide media, was as follows: At first blush, the video of Terry Schiavo appearing to smile and look lovingly at her mother seemed to represent cognition. This was also true for how she followed the Mickey Mouse balloon held by her father. The court ... does find that these actions were neither consistent nor reproducible. For instance, Terry Schiavo appeared to have the same look on her face when Dr Cranford rubbed her neck... Also, Mr Schindler tried several more times to have her eyes
follow the Mickey Mouse balloon but without success. Also, she clearly does not consistently respond to her mother… Dr Hammesfahr testified that he felt that he was able to get Terry Schiavo to reproduce repeatedly to his commands. However, by the court's count, he gave 105 commands to Terry Schiavo and, at his direction, Mrs Schindler gave an additional 6 commands. Again, by the court's count, he asked her 61 questions and Mrs Schindler, at his direction, asked her an additional 11 questions. The court saw few actions that could be considered responsive to either those commands or those questions.41

On the Schindlers' behalf, Dr Hammesfahr claimed that a vasodilation and hyperbaric therapy (aimed at increasing blood and oxygen supply to damaged brain tissue and thus facilitating repair of such tissue) would be efficacious,42 and Dr Maxfield stated that "there was a significant probability that hyperbaric therapy would improve Theresa's condition".43 Unfortunately, both doctors were extremely short on specifics, leading the court to conclude that the therapies they proposed "are experimental insofar as the medical community is concerned with regard to patients like Terry Schiavo which is borne out by the total absence of supporting case studies or medical literature".44 The three other physicians testified that, given the extensive permanent damage to her brain, there was no treatment available to improve Theresa's condition, and that neither vasodilation therapy nor hyperbaric therapy can replace dead tissue.45

(2004) 11 JLM 282 at 290

On 22 November 2002,46 Greer J, having analysed the medical evidence presented at the October hearing, held that the Schindlers failed to establish the existence of a new "treatment that offered such promise of increased cognitive function in Mrs Schiavo's cerebral cortex that she herself would elect to undergo it at this time".47 Since the evidence did not support reversing the prior decision ordering the guardian to withdraw life-support, he ordered that "Michael Schiavo, as Guardian of the Person of Theresa Marie Schiavo, shall withdraw or cause to be withdrawn the artificial life-support (hydration and nutrition tube)" from her at 3 pm on 3 January 2003. This order was stayed on 13 December 2002, pending review by the Second District Court of Appeal.48 On 6 June 2003, the Second District Court of Appeal, having examined all the evidence on record of the Guardianship Court, including medical testimony, brain scans and videotapes ("not merely watching short segments but carefully observing the tapes in their entirety"), upheld the Guardianship Court's ruling.49 The Court of Appeal stated that Theresa Schiavo:

[A]fter ten years in a persistent vegetative state that has robbed her of most of her cerebrum and all but the most instinctive of neurological functions, with no hope of a medical cure but with sufficient money and strength of body to live indefinitely, … would wish to permit a natural death process to take its course.50

The Court of Appeal then ordered the Guardianship Court to schedule another hearing solely for the purpose of entering a new order for the date of the removal of the nutrition and hydration tube. On 15 July 2003, the Second District Court of Appeal refused the Schindlers' motion to rehear the case, and on 22 August 2003, the Florida Supreme Court denied a review of the Appeal Court's decision affirming the Guardianship Court's order to remove sustenance and hydration on 17 September 2003.51
The Schindlers then challenged the validity of Florida's laws on life-prolonging procedures. However, on 10 October 2003 District Judge Lazzara ruled that he did not have jurisdiction to intervene in the case, and the Federal Court dismissed the Schindlers' action. The Guardianship Court set 15 October 2003 as the date for the withdrawal order to come into effect. The nasogastric tube was removed on that day. In the wake of their unsuccessful appeals, the Schindlers turned to politicians, proposing changes to the laws relating to the authority of health care surrogates and proxies to consent to removal of life-prolonging measures. They also sought political intervention in their fight to reinstate sustenance and hydration to their daughter. When, on 3 October 2003, the Attorney General, Charlie Crist, refused to get involved in the case, the Schindlers requested on 7 October 2003 that the


Governor of the State of Florida, Jeb Bush, enter a stay prohibiting the withholding or withdrawal of nutrition and hydration from Theresa.

Then, on 20 October 2003, five days after the withdrawal of nutrition and hydration from Theresa, the Advocacy Center for Persons with Disabilities made an unsuccessful request for a Federal Court injunction on the ground that removal of the nasogastric tube from Theresa Schiavo would constitute abuse and neglect. However, on 21 October the Florida State legislature passed the Starvation and Dehydration of Persons with Disabilities Prevention Act, which declared that an incompetent person is presumed to have directed health care providers to provide necessary nutrition and hydration to sustain life. The new provision states:

(1) The Governor shall have the authority to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient if, as of October 15, 2003: (a) That patient has no written advance directive; (b) The court has found that patient to be in a persistent vegetative state; (c) That patient has had nutrition and hydration withheld; and (d) A member of that patient's family has challenged the withholding of nutrition and hydration. (2) The Governor's authority to issue the stay expires 15 days after the effective date of this Act [21 October 2003], and the expiration of that authority does not impact the validity or the effect of any stay issued pursuant to this Act. The Governor may lift the stay authorized under this Act at any time. A person may not be held civilly liable and is not subject to regulatory or disciplinary sanctions for taking any action to comply with a stay issued by the Governor pursuant to this Act. (3) Upon the issuance of a stay, the chief judge of the circuit court shall appoint a guardian ad litem for the patient to make recommendations to the Governor and the court.

The Bill was signed into law later that day by Governor Bush who issued an Executive Order which directed all medical facilities and personnel providing medical care for Theresa Schiavo, and all those acting in concert or participating with them: to immediately provide nutrition and hydration to Theresa Schiavo by means of a gastronomy tube, or by any other method determined appropriate in the reasonable judgment of a licensed physician.

On 21 October 2003, Michael Schiavo requested the Guardianship Court to enjoin the Governor's stay on the basis that the Florida Constitution specifically provides for
separation of powers, which makes it unconstitutional for a legislature to overturn a court ruling. The court rejected the request, allowed the nasogastric tube to be reinserted, and requested briefs on the constitutional arguments against the new law. Thus the sad saga continues …

Gardner; Re BWV and Schindler v Schiavo (Re Schiavo) provide further evidence of a growing international consensus, in medicine and the law, that the medical provision of hydration and alimentation should be considered medical treatment. As such, it has to be subject to the same criteria for implementation as any other medical procedure. Emotive images of "starving to death" and of suffering due to hunger and thirst are wrong and misleading in relation to patients who are under appropriate multidisciplinary palliative care. Morris J in BWV found that the medical provision of hydration and alimentation is neither a defining nor required part of palliative care, and that each case of withdrawal or withholding of a percutaneous endoscopic gastrostomy tube must be treated on its merits.

The case of Theresa Schiavo in Florida shows that, despite medical and legal agreement, the power of religious, political and social forces can derail due judicial process with potentially negative consequences for end-of-life care that might result in prolongation of the dying process of incompetent patients who have no hope of gaining any benefit from PEG placement.

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1 See, eg, a study by Angus F and Burakoff R, "The Percutaneous Endoscopic Gastrostomy Tube: Medical Placement" (2003) 98 (8) Am J Gastroenterol 1904, which concluded that where: "no physiologic benefit; placement (anorexia-cachexia syndrome), the health care team has no obligation to offer or perform a principle would apply if an intervention improves physiologic states but has no effect on quality of life (vegetative state)." See also Freckelton I, "Withdrawal of Artificial Life Support", above at 265; Roth BWV: Resolved and Unresolved Issues at End of Life", below at 292.


5 Medical Treatment Act 1988 (Vic), s 1(c). This situation will arise where the patient has not executed certificate for a current condition.

6 Medical Treatment Act 1988 (Vic), s 5A(b).

7 Medical Treatment Act 1988 (Vic), s 5B(1)(d).

8 Medical Treatment Act 1988 (Vic), s 5B(2)(a).

9 Medical Treatment Act 1988 (Vic), s 5B(2)(b).

10 It should be noted that neither the medical provision of hydration nor the provision of alimentation is any internationally accepted definitions of palliative medicine, although it is an area of concern to the Australian Association of Palliative Care, "Guidelines on Artificial Nutrition Versus Hydration in Terminal Cancer and Nutrition 169.

11 Medical Treatment Act 1988 (Vic), s 4(2).

12 Parliament of Victoria, Social Development Committee, "Second Report and Final Report upon Inquir...
with Dignity" (April 1987) pp 201-204.


14 Consent to Medical Treatment and Palliative Care Act 1995 (SA), s 8(7)(b)(i).

15 Medical Treatment Act 1994 (ACT), s 3, defines "medical treatment" as: ",(a) the carrying out of an operation; (b) the administration of a drug; or (c) the carrying out of any other medical procedure."

16 Medical Treatment Act 1994 (ACT), s 3, defines "palliative care" as: "(a) the provision of reasonable medical procedures for the relief of pain, suffering and discomfort; and (b) the reasonable provision of food and companionship."

17 For example, although Queensland does not have an equivalent statutory scheme to Victoria or South Australia, the Criminal Code (Qld) provides protection for persons who, in the course of providing palliative care, intend to kill another person's death. "Palliative care" is defined in s 282A(5) as "doing an act directed at maintaining or improving comfort of a person who is, or would otherwise be, subject to pain.

18 Natural Death Act 1989 (NT), s 4(1).


22 Fla Stat §765.401 (2000): where "an incapacitated patient … has not executed an advance directive, or refusal, to execute an advance directive …, health care decisions may be made for the patient by … (a) the court, and (b) the patient's spouse."

23 The Court of Appeals stated: "When a living will or other advance directive does not exist, the fact that the patient maker may ultimately inherit from the patient should not automatically compel the appointment of a guardian…" Schindler v Schiavo (Re Schiavo) 780 So 2d 176 at 178 (2001); review denied, 789 So 2d 216 (2001). In the absence of a husband, the Schindlers, as Theresa's parents, would have been able to act as guardians or surrogates for their daughter: Fla Stat §765.401 (2000).

24 The trial court discounted (at 178) any concern that monetary gain was involved in the parties' dispute: "The fact that there may be occasions when an inheritance could be a reason to question a surrogate's ability to make a decision": Schindler v Schiavo (Re Schiavo) 780 So 2d 176 at 178 (2001); review denied, 789 So 2d 216 (2001).

25 In the absence of a husband, the Schindlers, as Theresa's parents, would have been able to act as guardians or surrogates for their daughter: Fla Stat §765.401 (2000).

26 Fla Stat §765.101(10) defines a "life-prolonging procedure" as "any medical procedure, treatment, or therapy that is intended to sustain, restore, or otherwise provide artificially provided sustenance and hydration, which sustains, restores, or supplants a spontaneous vital function. Life-prolonging procedures does not include the administration of medication or performance of medical procedure, when such medication or performance of medical procedure is deemed necessary to provide comfort care or to alleviate pain."


29 In the United States, there exists a constitutionally protected right of privacy, which encompasses the right to be free from life-prolonging procedures. The right to privacy is not lost or diminished by the patient's later physical condition: (Florida Constitution, Art I, s 23). Florida courts have affirmed this right in Re Guardianship of Broward: "End-stage condition" means "an irreversible condition that is caused by injury, disease, or illness which, to a reasonable degree of medical probability, is progressively severe and permanent deterioration, and which, to a reasonable degree of medical probability, would be ineffective": Flm Stat §765.101(4) (2000).

30 "End-stage condition" means "an irreversible condition that is caused by injury, disease, or illness which, to a reasonable degree of medical probability, is progressively severe and permanent deterioration, and which, to a reasonable degree of medical probability, would be ineffective": Flm Stat §765.101(4) (2000).

31 Fla Stat §765.305(2)(a) (2000): "Before exercising the incompetent patient's right to forego treatment, the physician must first satisfy that: (a) The patient does not have a reasonable medical probability of recovering capacity so as to exercise the patient. (b) The patient has an end-stage condition, the patient is in a persistent vegetative state, and the patient's physical condition is terminal."

32 Schindler v Schiavo (Re Schiavo) 800 So 2d 640 at 641 (2001); rehearing denied 1 November 2001. 
petition for review dismissed 14 March 2002: see 2002 Fla LEXIS 460; review denied by Re Schiavo 127: 2002 Fla LEXIS 460 (Fla, 2002); appeal after remand at Remanded by Re Schiavo 2003 Fla App Ct App 2d Dist, 6 June 2003).

34 Schindler v Schiavo (Re Schiavo) 792 So 2d 551 (2001).
35 Schindler v Schiavo (Re Schiavo) 800 So 2d 640 (2001).
36 Schindler v Schiavo (Re Schiavo) 800 So 2d 640 at 644 (2001). Michael Schiavo, as his wife's guardian, prohibited Schindlers' doctors to physically examine Mrs Schiavo or conduct any diagnostic tests.
37 Schindler v Schiavo (Re Schiavo) 800 So 2d 640 at 646 (2001).
38 Schindler v Schiavo (Re Schiavo) 800 So 2d 640 at 646 (2001).
40 Re Guardianship of Schiavo 851 So 2d 182 at 185 (2003).
42 Dr Hammesfahr testified that since 1994 he has treated about 50 patients in the same condition as, or similar to, Mrs Schiavo but offered no names, no case studies, no videos and no tests results to support his claim that one of them: Re Guardianship of Schiavo (Schiavo v Schindler) Case No 90-2908-GB-003, 2002 WL 31817960 (Re Guardianship of Schiavo (Schiavo v Schindler) Case No 90-2908-GB-003, 2002 WL 31817960 (Re Guardianship of Schiavo (Schiavo v Schindler) Case No 90-2908-GB-003, 2002 WL 31817960 at 22 November 2002) at [4].
43 Re Guardianship of Schiavo (Schiavo v Schindler) Case No 90-2908-GB-003, 2002 WL 31817960 at 22 November 2002) at [5].
44 Re Guardianship of Schiavo 851 So 2d 182 at 185 (2003).
46 Re Guardianship of Schiavo (Schiavo v Schindler) Case No 90-2908-GB-003, 2002 WL 31817960 (Re Guardianship of Schiavo (Schiavo v Schindler) Case No 90-2908-GB-003, 2002 WL 31817960 (Re Guardianship of Schiavo (Schiavo v Schindler) Case No 90-2908-GB-003, 2002 WL 31817960 (Re Guardianship of Schiavo (Schiavo v Schindler) Case No 90-2908-GB-003, 2002 WL 31817960 (Re Guardianship of Schiavo (Schiavo v Schindler) Case No 90-2908-GB-003, 2002 WL 31817960 at 22 November 2002). The Guardianship Court found: "Evidence supported finding that incapacitated ward was in persistent vegetative state, as would support ordering guardian to withdraw life-support; although ward appeared to gaze lovingly at her mother and seemed to track a moving balloon with her eyes, and could swallow with her own, three of five doctors testified that ward was in persistent vegetative state, one of those doctors described agony and soul searching which he underwent to arrive at opinion, video with mother and tracking of balloon were neither consistent nor reproducible, and majority of doctors displayed startle reflexes."

47 On 12 November 2002, the Schindlers' attorney announced that Theresa's medical records suggested that her death may have been brought on by physical abuse, and asked for more time to get more evidence. This story was published by Johnson J, "Doctor Says Terri Schiavo Likely Victim of "Some Kind of Trauma"", CNSNews.com, 2003: http://www.newsmax.com/archives/articles/2003/10/29/100629.shtml (accessed on 3 December 2003). For this organisation's involvement in the case see http://www.newsmax.com/archives/articles/2003/
54  FS 1, Ch 2003-418.
55  Florida, 105th Regular Session; Executive Order 201 (2003 FL EO 201).
56  Florida Constitution, Art II, s 3.