

2005-2006
National Health Law
Moot Court Competition

Transcript of Record
Docket No. 05-1765

Supreme Court of the United States

October Term, 2005

SHEILA KRUZO,
Guardian of the Person of John Kruzo,
Petitioner,

v.

CAREWELL HOSPITAL SYSTEM, INC.,
Respondent.

SPONSORS:

Southern Illinois University School of Law

*Southern Illinois University School of Medicine,
Department of Medical Humanities*

American College of Legal Medicine

American College of Legal Medicine Foundation

IN THE CIRCUIT COURT OF COLE COUNTY

STATE OF FLORITAN

SHEILA KRUZO,)	
Guardian of the Person of John Kruzo,)	
)	
Plaintiff,)	
)	
v.)	No. 03-1006
)	
CAREWELL HOSPITAL)	
SYSTEM, INC.,)	
)	
Defendant.)	

OPINION AND ORDER

PEREZ, J.

Plaintiff Sheila Kruzo seeks an injunction requiring Defendant Carewell Hospital System, Inc. (Carewell) to terminate the supply of artificial nutrition and hydration to Plaintiff's husband, John Kruzo. This case requires consideration of profound issues of life, death, autonomy and medical ethics. Specifically, this court has been asked to decide whether Mrs. Kruzo, as her husband's legally appointed guardian and duly appointed proxy decision-maker, may require withdrawal of his medically supplied artificial nutrition and hydration despite the existence of a Floritan statute establishing a presumption against such withdrawal.

Both Carewell and Mrs. Kruzo have moved for summary judgment. Carewell asserts that Floritan's Incompetent Patient Protection Act, 7 Floritan Stat. §§ 711.20-711.22, prevents it from complying with Mrs. Kruzo's instructions to terminate Mr. Kruzo's medically supplied artificial nutrition and hydration. Mrs. Kruzo argues that the statute is unconstitutional. This court's task in deciding such motions is to determine whether there remain for trial any genuine issues of material fact and whether either movant is entitled to judgment as a matter of law. Because the Incompetent Patient Protection Act is unconstitutional, and because that statute is the only impediment to Carewell's compliance with Mrs. Kruzo's instructions, Mrs. Kruzo's motion for summary judgment is granted and Carewell's motion for summary judgment is denied.

I. FACTS

John Kruzo was 41 years old on April 4, 2000, when he suffered a cardiac arrest while jogging. He had no history of any heart condition, and he had never previously suffered a cardiac arrest. He had never even complained of chest pains, according to those who knew him. His cardiac arrest left him without oxygen for approximately 25 minutes, until another jogger happened upon his body, started cardiopulmonary resuscitation (CPR) and called for emergency assistance.

The other jogger's CPR efforts were only marginally successful, and emergency medical technicians were forced to intubate and ventilate Mr. Kruzo, administering a tracheotomy while on the way to the hospital. At the hospital, Mr. Kruzo initially existed in a coma, although he later entered a persistent vegetative state. He has existed in that state since mid-2000 and currently resides in a Carewell long-term-care facility.

According to affidavits submitted by neurologists for both parties, a persistent vegetative state (PVS) is "a clinical condition of complete unawareness of the self and the environment, accompanied by sleep-wake cycles with either complete or partial preservation of hypothalamic and brainstem autonomic functions." (Affidavit of Melinda Schlesinger ¶ 6 (hereinafter "Schlesinger Aff."); Affidavit of Theresa Coleman ¶10). Thus, Mr. Kruzo has periods of time in which his eyes might open and close, but he has no level of conscious interaction with others. He blinks and occasionally moans. He requires no ventilator support. Other than basic care such as bathing, turning, massage and/or stretching to prevent contractures, and occasional antibiotics or other treatments for transient infections, he requires only treatment in the form of medically supplied artificial nutrition and hydration. Physicians say that he can remain in this condition for another 30 or 40 years.

Plaintiff Sheila Kruzo is Mr. Kruzo's wife. The couple married in 1980, when both were 21 years old. When Mr. Kruzo entered the hospital after his cardiac arrest, Mrs. Kruzo was appointed his legal guardian. In addition, at that time, she began exercising her powers to make medical decisions for her husband pursuant to the health care proxy designation he had previously executed. The proxy designation states as follows:

I, John P. Kruzo, being of sound mind, hereby name my wife, Sheila L. Kruzo, as my proxy decision-maker, with the power to make medical decisions, including whether to consent to or to refuse life-sustaining treatment, including medically supplied artificial nutrition and hydration, for me should I become incapable of making medical decisions for myself.

Signed: John P. Kruzo
Dated: August 1, 1992

Mr. Kruzo did not leave a written instruction directive, such as a living will, to be used as a guide regarding his wishes with respect to refusal of or consent to any particular treatments under any particular circumstances. Rather, he executed only this proxy directive.

As the years passed and Mr. Kruzo continued in a PVS, Mrs. Kruzo became convinced that Mr. Kruzo would not have wished continuation of the medically supplied nutrition and hydration that was keeping him alive. The nutrition and hydration, a liquefied mixture of nutrients, is administered through a percutaneous endoscopic gastrostomy (PEG) tube. According to a physician's affidavits, "percutaneous" means through the skin, and a "gastrostomy" is "[t]he establishment of a new opening into the stomach." (Schlesinger Aff. ¶ 7). Physicians use an endoscope to facilitate placement of a tube through the skin using a technique that "requires only two small incisions into the abdominal wall." *Id.* A physician implanting a PEG tube may be guided in proper placement by either a light shining through the patient's skin from the inside of the patient's stomach or the directions of an observer viewing the inside of the patient's stomach walls through a camera. The camera or light is located on the end of an endoscope, a flexible tube inserted through the patient's mouth, down the esophagus and into the patient's stomach. The endoscope is removed after the PEG procedure, and the PEG tube remains protruding from the patient's stomach to be used for direct introduction of nutrition and hydration. At one time, all tube feeding was accomplished through nasogastric (NG) tubes inserted through the nose and down the esophagus into the stomach, but gastrostomy tubes have supplanted NG tubes for long-term feeding.

Mrs. Kruzo became convinced that Mr. Kruzo would not have wanted the PEG tube to remain in place because of a number of remarks he previously had made to her, to friends and to other family members. Shortly after their marriage, Mr. Kruzo told Mrs. Kruzo that he "didn't want to live hooked up to a machine." (Affidavit of Sheila Kruzo ¶ 20 (hereinafter "Kruzo Aff.")). He said this after having seen a television movie about Karen Ann Quinlan, whose family won the right to remove her ventilator support in 1976. *See In re Quinlan*, 355 A.2d 647 (N.J. 1976). Three friends submitted affidavits that Carewell did not contest stating that, at the 1989 funeral of Mr. Kruzo's freshman-year college roommate, Mr. Kruzo told them that he thought the decision of his former roommate's family to maintain the roommate on ventilator and PEG tube support for three months before withdrawing it was "degrading" and "demeaning" to his friend, and that it was "a poor use of resources." (Affidavit of Mark Sharp ¶ 4; Affidavit of Kevin O'Connell ¶ 6; Affidavit of Keanu Johnston ¶ 5). In 1990, while reading a *New York Times* account of the story of Nancy Beth Cruzan, Mr. Kruzo told Mrs. Kruzo that he thought "it was a shame that the protesters were trying to interfere with Nancy's treatment wishes." Kruzo Aff. ¶ 21). *See generally Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990). Uncontroverted affidavits from Mr. Kruzo's parents and two brothers indicated that Mr. Kruzo had expressed such wishes for most of his life; in 1970, when he was only 11 years old, he told his parents that, while he was sad that he would no longer see his grandfather (who had just passed away), he thought death "should happen when God wants it to happen, without doctors standing in the way." (Affidavit of Ronald Kruzo ¶ 4; Affidavit of Mary Ann Kruzo ¶ 4). Significantly, he and

his brothers had been reminiscing as recently as the Kruzo family reunion in July, 1999, and Mr. Kruzo told his brothers that he still held the same beliefs about death as he had when he was 11, at the time of that remark.

In January, 2003, Mrs. Kruzo asked Mr. Kruzo's physicians to withdraw the PEG tube delivering artificial nutrition and hydration to him, but they refused. Instead, the physicians said they would ask the ethics committee at the Carewell facility in which Mr. Kruzo was a patient to review the matter. Mrs. Kruzo, the physicians, and other members of Mr. Kruzo's care team met with the facility's ethics committee in February, 2003. At that meeting, the physicians explained that they believed it would be appropriate, from a medical ethical standpoint, to withdraw the PEG tube, but that they believed that such a withdrawal would violate Floritan law. Specifically, they referred to the Incompetent Patient Protection Act, 7 Floritan Stat. §§ 711.20-711.22, which appears in the Appendix to this opinion. In essence, this statute establishes a presumption against the withdrawal of medically supplied artificial nutrition and hydration unless one of three exceptional situations exists. The physicians, and the ethics committee as it turned out, believed that Mr. Kruzo's case did not fall within any one of the three exceptions, so they determined that the facility could not cooperate with Mrs. Kruzo's request to terminate his medically supplied artificial nutrition and hydration.

On April 1, 2003, Mrs. Kruzo filed suit in the Circuit Court of Cole County, seeking an injunction requiring Carewell to comply with her instructions to withdraw Mr. Kruzo's PEG tube, which would result in termination of his medically supplied artificial nutrition and hydration and, eventually, in Mr. Kruzo's death. On May 21, 2003, Carewell moved for summary judgment based upon the Incompetent Patient Protection Act. The next day, Mrs. Kruzo cross-moved for summary judgment arguing that the statute was unconstitutional.

II. ANALYSIS

This case presents no factual disputes. While, as described further below, we are inclined to agree with Carewell that an application of the Incompetent Patient Protection Act to the undisputed facts here leaves no genuine issue of material fact, we are forced to deny Carewell's motion for summary judgment and grant Mrs. Kruzo's motion for summary judgment because that statute is unconstitutional.

A. *The Statutory Scheme*

Informed consent is a bedrock of medical law. Before a physician undertakes a medical procedure, that physician must obtain the informed consent of either a patient with the capacity to make medical decisions (a competent patient) or a substitute decision-maker for a patient without capacity to make medical decisions (an incompetent patient). Floritan has a well-developed statutory scheme intended to give effect to both medical decisions that competent patients make and medical decisions made on behalf of

incompetent patients by those patients' proxy or surrogate decision-makers.¹ This statutory scheme appears in Title 7, chapter 711 ("Health Care Decisions"), of the Floritan Statutes.

A number of Floritan's statutory provisions are designed to ensure that a patient does not lose the ability to have his or her wishes carried out merely by losing decision-making capacity. For example, a proxy, "in accordance with the principal's [patient's] instructions, unless such authority has been expressly limited by the principal," has "authority to act for the principal and to make all health care decisions for the principal during the principal's incapacity." 7 Floritan Stat. § 711.2. The proxy's decisions "are to have the effect of the principal's own decisions." *Id.* 7 Floritan Stat. § 711.4 provides that if a patient, when competent, executed a living will specifying treatment preferences, the patient's physicians and proxy or surrogate decision-makers must carry out the patient's treatment preferences as expressed in his or her living will. In the absence of a living will, a proxy is charged under Floritan law with consulting with the patient's physicians and with "mak[ing] health care decisions for the principal which he or she believes the principal would have made under the circumstances if the principal were capable of making such decisions. If there is no indication of what the principal would have chosen, the proxy may consider the patient's best interest in deciding that proposed treatments are to be withheld or that treatments currently in effect are to be withdrawn." 7 Floritan Stat. § 711.3.

There are two major exceptions to the proxy's charge, in the absence of a living will, to act in accordance with what the patient would have wanted in most cases. 7 Floritan Stat. § 711.5 provides: "In the absence of a living will, the decision to withhold or withdraw life-prolonging procedures from a patient may be made by a health care proxy designated by the patient, unless the designation provides otherwise or unless the proxy's authority is limited by section 711.21." In this case, Mr. Kruzo's health care proxy designation did not prevent the proxy, Mrs. Kruzo, from deciding to withhold or withdraw medical care. In fact, it provided precisely the opposite: the proxy was specifically authorized to withhold or withdraw medical care in the course of executing her duties. The parties thus agree that section 711.21, part of the Incompetent Patient Protection Act, is the statutory provision at the heart of this case.

The Incompetent Patient Protection Act, 7 Floritan Stat. §§ 711.20-711.22, was enacted into law in response to *Cruzan* not long before Mr. Kruzo executed his health care proxy directive in 1992. Section 711.20 establishes a presumption that "[e]ach incompetent person" has "directed his or her health care provider to supply him or her with the nutrition and hydration necessary to sustain life." 7 Floritan Stat. § 711.21(1). It

¹ A proxy decision-maker is a person who, like Mrs. Kruzo here, was appointed by a patient when the patient was competent, to make medical decisions for him or her if he or she were to become incompetent. If a patient is incompetent but did not previously appoint a proxy decision-maker, the law sets forth a list of persons who can serve as surrogate decision-makers for purposes of making medical decisions for the patient. In Floritan, for example, the list of persons to whom medical providers should turn for consent to or refusal of treatment for a patient who did not designate a proxy, in order of priority, is as follows: legally appointed guardian, spouse, majority of adult children, parents, siblings, any other adult relative, or a close friend of the patient. 7 Floritan Stat. § 711.10.

also provides that, as proxy, Mrs. Kruzo “may not decide on behalf of [Mr. Kruzo] to withhold or withdraw hydration or nutrition from [him] except in the circumstances and under the conditions specifically provided in section 711.22.” 7 Floritan Stat. § 711.21(2). As discussed further below, section 711.22 enumerates three situations in which the presumption in favor of administration of artificial nutrition and hydration will not control.

One further provision of Floritan’s statutory scheme is important to this case. 7 Floritan Stat. § 711.15, titled “Preservation of Existing Rights,” provides as follows:

The provisions of this chapter are cumulative to the existing law regarding an individual’s right to consent, or to refuse to consent, to medical treatment and do not impair any existing rights or responsibilities which a health care provider, a patient, including a minor, competent or incompetent person, or a patient’s family may have under the common law, the federal Constitution, the Floritan Constitution, or the statutes of Floritan, except that this section may not be constructed to authorize a violation of section 711.21.

B. Application of the Incompetent Patient Protection Act to Mr. Kruzo’s Situation

Mr. Kruzo did not do enough here to permit Mrs. Kruzo to authorize withdrawal of medically supplied artificial nutrition and hydration on his behalf. The Incompetent Patient Protection Act clearly states that he will be presumed to direct administration of such nutrition and hydration unless one of the three exceptional situations described in section 711.22 are present. None are present on these facts.

First, section 711.22(1) permits refusal of medically supplied artificial nutrition and hydration despite the presumption against such refusal when, “in reasonable medical judgment,” certain medical facts are present. No medical evidence supports the existence of any of those facts here.

Second, section 711.22(2) permits refusal of medically supplied artificial nutrition and hydration despite the presumption against such refusal when the patient executed “a written advance directive or proxy designation specifically authorizing the withholding or withdrawal of nutrition or hydration in the applicable circumstances” – in other words, when a patient has previously executed a specific instruction directive. As noted, Mr. Kruzo executed no such directive here; the statement in his proxy directive defining the term “life-sustaining medical treatment” to include “medically supplied artificial nutrition and hydration” does not “specifically” authorize withdrawal of that treatment “in the applicable circumstances” as required by section 711.22(2).

Finally, section 711.22(3) permits refusal of medically supplied artificial nutrition and hydration despite the presumption against such refusal when “[t]here is clear and convincing evidence that the incompetent person, when competent, gave express and

informed consent to withdrawing or withholding nutrition or hydration in the applicable circumstances.” This section does not apply because, first, neither the proxy directive nor Mr. Kruzo’s oral statements referred to “the applicable circumstances” here. Second, it does not apply because the statute defines “express and informed consent” as meaning “consent voluntarily given with sufficient knowledge of the subject matter involved,” requiring that Mr. Kruzo had to have known and considered, at the time of his prior statements regarding refusal of treatment, information such as the identity of the treatment or procedure he eventually would require, the condition for which he would require that treatment or procedure, alternative and risks. 7 Floritan Stat. § 711.20(1). There is no indication here that he did so.

In sum, if the Incompetent Patient Protection Act is constitutional under the federal constitution,² then Carewell should be granted summary judgment based upon that statute. Although there is strong evidence of Mr. Kruzo’s wishes, neither his statements nor the proxy directive he signed in 1992 are sufficient to meet the statutory requisites.

C. The Unconstitutionality of the Incompetent Patient Protection Act

The central issue in this case is a constitutional one, asserted pursuant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution. As Mr. Kruzo’s legally appointed guardian and designated proxy decision-maker, Mrs. Kruzo argues that the Incompetent Patient Protection Act deprives Mr. Kruzo of his constitutional liberty interest in directing his own medical treatment. That substantive due process issue breaks into two sub-inquiries: (1) Does a person such as Mr. Kruzo, who is incompetent but who designated a proxy decision-maker before becoming incompetent, have a constitutional right to refuse medically supplied artificial nutrition and hydration via that proxy? (2) If so, does the Floritan statute impermissibly infringe upon that constitutional right?

As an initial matter, this court notes that the Floritan Legislature’s attempt, in section 711.15, to insulate section 711.21 from constitutional challenge must be ineffective. A state legislature cannot shield its statutes from constitutional review in this manner.

1. Existence of a Right

The United States Constitution grants a competent patient a constitutional right, based in the Fourteenth Amendment’s guarantee of liberty, to refuse life-sustaining medical treatment, especially of the invasive type at issue here. *See Cruzan*, 497 U.S. at 278-79. A careful reading of the opinions in *Cruzan*, moreover, leads us to conclude that medically supplied artificial nutrition and hydration constitutes medical treatment. *Cruzan*, 497 U.S. at 288 (O’Connor, J., concurring). *See also* 7 Floritan Stat. § 711.1(10) (defining “life-prolonging procedure” as being “any medical procedure, treatment, or

² There exists no potentially applicable state constitutional right that may provide Mr. Kruzo with protections more extensive than the federal constitution.

intervention, including artificially provided sustenance and hydration, which sustains, restores, or supplants a spontaneous vital function”).

Whether an incompetent patient possesses such a constitutional right is less clear. The Court deciding *Cruzan* did not address this point, instead noting that the instance in which a competent patient makes his or her own health care decision differs from the instance in which an incompetent person “is not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment or any other right.” *Cruzan*, 497 U.S. at 280. Certainly, however, in this situation, an incompetent person has expressly stated that his wife is to make health care decisions on his behalf, and has expressly stated that those decisions may include decisions to withhold or withdraw life-sustaining treatment, including medically supplied artificial nutrition and hydration. It seems to us that this case involves consideration of “whether a State might be required to defer to the decision of a surrogate if competent and probative evidence established that the patient [himself] had expressed a desire that the decision to terminate life-sustaining treatment be made for her by that individual.” *Cruzan*, 497 U.S. at 287 n.12.

This is especially true when Floritan (as noted above) has provided that the proxy’s decisions “are to have the effect of the principal’s own decisions.” Many courts have stated that competent patients should not lose their rights to direct their own medical treatment simply by virtue of becoming incompetent. *See generally* Alan Meisel & Kathy L. Cerminara, *The Right to Die: The Law of End-of-Life Decisionmaking*, § 2.05 (3d ed. Aspen 2004).

If a patient’s right to refuse treatment when competent has constitutional status, and that patient has indicated through a proxy designation that a particular person will take over for him in terms of treatment decision-making when he becomes incompetent, then that patient has a constitutional right to have the proxy’s decisions honored as his own. Moreover, such a right is fundamental, even if considered a liberty “interest” rather than a “right,” for we see a long history of respect for such rights articulated in many of the opinions in *Cruzan*.

2. Unconstitutional Infringement of That Right

That a constitutional right (even a fundamental one) exists does not, of course, mean that the state must refrain from all regulation. Even constitutional rights are subject to some state regulation, as long as that regulation does not step over permissible lines. *See Cruzan*, 497 U.S. at 279. A balancing of individual and state interests is appropriate. *Id.* When, as here, a fundamental right is at stake, we strictly scrutinize the Floritan statute to see whether it is narrowly tailored to serve a compelling state interest. *Reno v. Flores*, 507 U.S. 292, 302 (1993).

Here, the Floritan legislature passed this statute in the wake of *Cruzan* to express its “strong commitment to the state interest in preservation and protection of human life.” *See* S.202, 2d Sess., at 24 (Floritan 1991). The state indeed does have a strong interest in the preservation and protection of human life. *See Cruzan*, 497 U.S. at 280-81. In

Cruzan, the Court was willing to permit the state of Missouri to assert an “unqualified interest in the preservation of human life” and to erect strong procedural barriers to the refusal of treatment on behalf of an incompetent patient. This case, however, is quite different, for the proxy decision-maker here, unlike the decision-maker before the Court in *Cruzan*, was chosen personally by the patient. There is no compelling need for a state to erect substantial barriers to “safeguard the personal element” of a choice between life and death when, as here, the person making the decision has been designated by the patient himself precisely to make decisions regarding the type of medical treatment at issue.

It is true that, as Carewell argues, section 711.22 of the Floritan statutes lists three exceptional situations in which the presumption requiring maintenance of a patient on medically supplied artificial nutrition and hydration would not apply. Those exceptions to the statutory presumption against refusal of treatment do not, however, save the statute from unconstitutionality, for they are far from narrowly tailored.

As noted above, the first situation to which section 711.22 does not apply the presumption that medically supplied nutrition and hydration must be provided to incompetent persons is when “[i]n reasonable medical judgment[,] (a) the provision of nutrition or hydration is not medically possible; (b) the provision of nutrition or hydration would hasten death; or (c) the medical condition of the incompetent person is such that provision of nutrition or hydration would not contribute to sustaining the incompetent person’s life or provide comfort to the incompetent person.” 7 Floritan Stat. § 711.22(1). The number of instances in which this exception would apply to safeguard a patient’s constitutional right to be free of invasive medical procedures is vanishingly small, especially when considering that subsection (c) is extremely unlikely ever to apply.

Second, section 711.22(2) does not require administration of medically supplied nutrition and hydration to incompetent persons who have executed written advance directives “specifically authoriz[ing] the withholding or withdrawal of nutrition or hydration.” Of importance here is the unrealistic expectation that many patients will have executed advance directives. *See generally* Angela Fagerlin & Carl E. Schneider, *The Failure of the Living Will*, 34 *Hastings Center Report* 30, 32 (March-April 2004). Advance directives undoubtedly are valuable and constitute the best evidence of what a patient would have or would not have wanted done once that patient becomes incompetent to make medical decisions. To require that an advance directive be executed in order for those who know the patient to prevent that patient’s being subjected to unwanted medical treatment, however, is to deprive the vast majority of the public of their bodily integrity.

Finally, section 711.22(3) exempts from the presumption of administration of medically supplied nutrition and hydration persons who, as shown by clear and convincing evidence, “when competent, gave express and informed consent to withdrawing or withholding nutrition or hydration in the applicable circumstances.” On the surface, this seems like a reiteration of current case law providing that the patients’ wishes be demonstrated by clear and convincing evidence. If that indeed were the point

of this provision, then this section would be unremarkable. In reality, however, because of the cramped definition provided for “express and informed consent” under section 711.20, this exception from the presumption would in fact apply to no one.

In sum, the exceptions are not narrowly tailored so as to save the statute from unconstitutionality.

III. CONCLUSION

For the foregoing reasons, the Incompetent Patient Protection Act is unconstitutional because it unduly infringes upon the liberty interest of Mr. Kruzo in having his wife and designated proxy decision-maker refuse the medical administration of artificial nutrition and hydration on his behalf. Mrs. Kruzo’s motion for summary judgment is hereby GRANTED, and Carewell’s motion for summary judgment is DENIED. Because Carewell has articulated no objection to complying with Mrs. Kruzo’s directive other than the statute, Carewell is hereby ordered to remove the PEG tube in accordance with Mrs. Kruzo’s instructions.

IT IS SO ORDERED.

Judge Jorge Perez
Dated: July 3, 2003

APPENDIX

Text of the Incompetent Patient Protection Act 7 Floritan Stat. §§ 711.20-711.22

Section 711.20. Definitions.

As used in this part, the term:

- (1) Express and informed consent” means consent voluntarily given with sufficient knowledge of the subject matter involved to enable the person giving consent to make a knowing and understanding decision without any element of force, fraud, deceit, duress, or other form of constraint or coercion. Sufficient knowledge of the subject matter involved includes a general understanding of:
 - a. The proposed treatment or procedure for which consent is sought.
 - b. The medical condition of the person for whom consent for the proposed treatment or procedure is sought.
 - c. Any medically acceptable alternative treatment or procedure.
 - d. The substantial risks and hazards inherent if the proposed treatment or procedure is carried out and if the proposed treatment or procedure is not carried out.
- (2) “Nutrition” means sustenance administered by way of the gastrointestinal tract.
- (3) “Reasonable medical judgment” means a medical judgment that would be made by a reasonably prudent physician who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.

Section 711.21. Presumption of Nutrition and Hydration Sufficient to Sustain Life.

- (1) Each incompetent person shall be presumed to have directed his or her health care providers to supply him or her with the nutrition and hydration necessary to sustain life.
- (2) A proxy, surrogate, or court may not decide on behalf of an incompetent person to withhold or withdraw hydration or nutrition from that person except in the circumstances and under the conditions specifically provided in section 711.22.

Section 711.22. Presumption of Nutrition and Hydration; When Inapplicable.

The presumption in section 711.21 does not apply if:

- (1) In reasonable medical judgment:
 - a. The provision of nutrition or hydration is not medically possible;
 - b. The provision of nutrition or hydration would hasten death;
or
 - c. The medical condition of the incompetent person is such that provision of nutrition or hydration would not contribute to sustaining the incompetent person's life or provide comfort to the incompetent person;
- (2) The incompetent person has executed a written advance directive or proxy designation specifically authorizing the withholding or withdrawal of nutrition or hydration in the applicable circumstances; or
- (3) There is clear and convincing evidence that the incompetent person, when competent, gave express and informed consent to withdrawing or withholding nutrition or hydration in the applicable circumstances.

**IN THE SUPREME COURT
FOR THE STATE OF FLORITAN**

CAREWELL HOSPITAL)	
SYSTEM, INC.,)	
)	
Petitioner,)	
)	
v.)	No. 04-007
)	
SHEILA KRUZO,)	
Guardian of the Person of John Kruzo,)	
)	
Respondent.)	

Direct Petition from the Circuit Court of Cole County, Floritan

Argued November 16, 2004 – Filed March 31, 2005

CHARLES, C.J.

This direct petition seeking review of an order of the Circuit Court of Cole County, Floritan, concerns the constitutionality of Floritan’s Incompetent Patient Protection Act, 7 Floritan Stat. §§ 711.20-711.22. Judge Perez in the Circuit Court ruled that the statute was unconstitutional but later stayed the effect of his order pending this appeal. Because the case, although involving private parties, involves the constitutionality of a state statute, the Attorney General for the State of Floritan was notified of the case’s pendency before us. The Attorney General’s office has notified us that it will rely on petitioner Carewell Hospital System, Inc. (Carewell) to assert its interest in arguing in favor of its statute’s constitutionality.

We granted the petition for review on January 13, 2004, and we have jurisdiction pursuant to 42 Floritan Stat. § 174.05(b) (permitting direct petition for review of a trial court order when the trial court has held a state statute unconstitutional). Our standard of review is *de novo*.

For the reasons that follow, we hereby reverse the Order of the Circuit Court of Cole County. We hold that the Incompetent Patient Protection Act represents a constitutional balancing of an individual’s interest in refusing

medical treatment and the state's compelling interest in the preservation and protection of human life. In light of that holding, because we agree with the trial court's determinations that this case presents no genuine issue of material fact and that Carewell is entitled to judgment as a matter of law if the statute applies, we will remand with instructions to enter judgment for Carewell.

I. FACTS

The Circuit Court's opinion completely and accurately recounts the facts underlying this dispute between Carewell and the wife of one of its patients, John Kruzo. Mrs. Sheila Kruzo is both the legally appointed guardian and the patient-designated proxy decision-maker for Mr. Kruzo. She approached the Floritan courts seeking an injunction ordering Carewell to comply with her request that the percutaneous endoscopic gastrostomy (PEG) tube providing artificial nutrition and hydration to her husband be removed from him because he would have wished that the tube be removed. Such removal would shortly cause Mr. Kruzo's death because Mr. Kruzo cannot eat or drink due to his existence in a persistent vegetative state (PVS).

The trial court held that the Incompetent Patient Protection Act unconstitutionally infringed upon the liberty interest of Mr. Kruzo in having his wife and designated proxy decision-maker refuse the medical administration of artificial nutrition and hydration. Thus, although it agreed with Carewell that the statute would prohibit Mrs. Kruzo from authorizing withdrawal of Mr. Kruzo's medically supplied artificial nutrition and hydration, it granted summary judgment for Mrs. Kruzo.

II. ANALYSIS

As the trial court correctly found, if the statute applies to Mr. Kruzo's situation, Mrs. Kruzo would be unable to authorize withdrawal of Mr. Kruzo's PEG tube. Mrs. Kruzo prevailed in the trial court with an argument that the Incompetent Patient Protection Act unconstitutionally infringed upon Mr. Kruzo's right to have her, his designee, make a medical decision to withdraw medically supplied nutrition and hydration in accordance with his previous oral indications that he would not want such treatment. We disagree both that Mr. Kruzo had such a constitutional right and that the Floritan statute unconstitutionally infringes upon any such right were it to exist. Instead, we hold that the statute is constitutional.

A. Existence of a Constitutional Right

Mrs. Kruzo first argues, and the trial court held, that Mr. Kruzo, an incompetent patient, had a constitutional right to have her, the person he specifically designated, make medical decisions for him, including a decision to withdraw medically supplied artificial nutrition and hydration. We disagree.

Such a constitutional right does not readily arise from a review of the case law and literature. The United States Supreme Court has not even determined that a competent person has a constitutional right to refuse medical treatment; it has only presumed that such a liberty interest exists for purposes of reaching conclusions on other issues. See *Cruzan v. Missouri Dept. of Health*, 497 U.S. 261, 278-79 (1990); *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). To both accept that assumption as a holding that a right exists and extend that right beyond the competent patient to the incompetent patient is to stretch the boundaries of the Constitution too far. We must look to history and tradition to determine the existence of constitutional rights. *Glucksberg*, 521 U.S. at 710. Such history is not apparent when one searches for a right for incompetent patients. Even if the right were to exist, this lack of deep roots in our nation's history and tradition would invalidate any argument that the asserted right is fundamental and thus deserving of the highest protection our Constitution can offer.

B. Lack of Unconstitutional Infringement Even If The Right Exists

Moreover, even if such a constitutional right were to exist, we are convinced that the crucial import of the state's interest in the preservation and protection of human life justifies the Floritan statute's regulation of that right. See *Cruzan*, 497 U.S. at 280-81. Floritan understandably desires to assure that incompetent patients really would have desired withdrawal of medically supplied artificial nutrition and hydration before it permits others to authorize such withdrawal on their behalf. Although arguably qualifying as medical treatment when provided through means such as PEG tubes, artificial nutrition and hydration also constitute a basic form of care without which any of us would die. See *Cruzan v. Harmon*, 760 S.W.2d 408, 423 (Mo. 1988), *aff'd* 407 U.S. 261 (1990); see also Pope John Paul II, *Life-Sustaining Treatments and Vegetative State: Scientific Advances and Ethical Dilemmas*, 20 *Issues in L. & Med.* 167, 168-69 (2004). When a PEG tube is withdrawn, a patient will die not from the disease process but from starvation and dehydration. Thus, it is understandable that the state of Floritan would wish to erect additional procedural protections when a proxy or surrogate decision-maker attempts to authorize withdrawal of such a treatment.

Here, the state of Floritan has not entirely prohibited withdrawal of medically supplied nutrition and hydration on behalf of incompetent patients. All a person needs to do to assure that his or her proxy or surrogate decision-maker will be able to refuse the medical administration of artificial nutrition and hydration on his or her behalf once incompetency arises is set forth that wish in a written instruction directive or otherwise make clear his or her wishes. We require informed consent (or refusal) when a patient is competent; it is not unconstitutional to do so when a patient is incompetent.

III. CONCLUSION

For the foregoing reasons, we hereby REVERSE the Order of the Circuit Court of Cole County and hold that the Incompetent Patient Protection Act, 7 Floritan Stat. " 711.20-711.22, is constitutional. This case is REMANDED for entry of judgment for Carewell.

IT IS SO ORDERED.

Amanda Charles, Chief Justice
Antonio Allen, Justice
Marietta Bradley, Justice
Samuel Mansfield, Justice
Maribel Sanchez, Justice
Joseph Johnson, Justice
Samuel Silverman, Justice

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

SHEILA KRUZO,)	
Guardian of the Person of John Kruzo,)	
)	
Petitioner,)	
)	
v.)	No. 05-1765
)	
CAREWELL HOSPITAL)	
SYSTEM, INC.,)	
)	
Respondent.)	

ORDER GRANTING CERTIORARI

Upon consideration of the Petition for Certiorari filed by Sheila Kruzo, the Court hereby grants the petition as to the following issues:

1. Whether an incompetent patient who, when competent, designated a health care-proxy decision-maker with the power to authorize withholding or withdrawal of medically supplied artificial nutrition and hydration, has a constitutional right to have that proxy do so on his behalf?
2. Whether, if such a right exists, the Incompetent Patient Protection Act, 7 Floritan Stat. §§ 71.20-711.22, is narrowly tailored to advance a compelling state interest in accordance with the Fourteenth Amendment to the United States Constitution?

IT IS SO ORDERED.

Date: June 20, 2005