INTRODUCTION

In *Cruzan v. Director, Missouri Department of Health*, the United States Supreme Court held that a state may require clear and convincing evidence of a patient's wish to terminate life-support. The court did not define the meaning of clear and convincing evidence and allowed the states to create their own standards. These standards allow a surrogate to exercise an incompetent individual's right to refuse medical treatment.

Several alternative standards have been created prior to *Cruzan* to facilitate an incompetent patient's exercise of that right. For instance, in 1976, the New Jersey Supreme Court, in *In re Quinlan*, determined that an incompetent patient retains the right to refuse unwanted medical treatment and allowed the incompetent patient's family to exercise this right. The New Jersey Supreme Court reasoned that incompetent patients should not lose that right because of their medical condition. In 1985, the New Jersey Supreme Court, in *In re Conroy*, used a subjective test and two best interests tests to help determine whether a surrogate may exercise the incompetent's right to refuse medical treatment, depending upon the circumstances. In 1987, the court determined when a surrogate may use a combination of the tests used in *Quinlan* and *Conroy*.

However, other courts have adopted different approaches to allow a surrogate to exercise the patient's right to discontinue life-support when the patient becomes incompetent. For instance, the New York Court of Appeals allows a surrogate to terminate an incompe-
tent's medical treatment when the incompetent had previously demonstrated that he would forego the treatment.13 Other courts have used either the substituted judgment test or best interests test depending upon whether the incompetent had demonstrated his intent to refuse medical treatment.14

This Comment discusses the various standards used by states to determine when life-support can be removed from an incompetent patient.15 First, this Comment reviews the circumstances of Cruzan in the Missouri Supreme Court and the United States Supreme Court.16 Next, this Comment focuses upon the different approaches that the New Jersey Supreme Court, the New York Court of Appeals and other state courts have used to determine the intent element of an incompetent patient's previously expressed desire to refuse or terminate medical treatment.17 Finally, this Comment concludes that the states should adopt the New Jersey approach because it allows a surrogate the greatest latitude to exercise the incompetent's right to refuse medical treatment18 and allows an incompetent more methods to demonstrate intent.19

FACTS AND HOLDING

Nancy Beth Cruzan was involved in a one car accident on January 11, 1983, in Jasper County, Missouri.20 A Missouri state trooper found Cruzan lying in a ditch about thirty-five feet from her car.21 Cruzan was unconscious and did not show any signs of respiratory or cardiac functions.22 Although paramedics were able to restore Cruzan's breathing and cardiac functions,23 Cruzan was comatose.24

The attending doctor at Freeman Hospital performed exploratory surgery and a CAT scan.25 The doctor found that Cruzan's liver

13. See infra notes 142-72 and accompanying text.
14. See infra notes 173-272 and accompanying text.
15. See infra notes 20-272 and accompanying text.
16. See infra notes 20-55 and accompanying text.
17. See infra notes 65-272 and accompanying text.
18. See infra notes 300-26 and accompanying text.
19. See infra notes 327-47 and accompanying text.
21. Id. at 410-11.
22. Id. at 411.
23. Id. Trooper Penn of the Missouri Highway Patrol was dispatched to the accident scene at 12:54 a.m. He arrived at the scene at 1:00 a.m. The paramedics were able to restore Cruzan's respiratory and cardiac functions by 1:12 a.m. Id. at 410-11.
24. Id. at 411.
25. Id. A computerized axial tomography ("CAT") scan "provides a graphic and readily interpretable display of deep-lying cerebral abnormalities" through the use of x-rays. 8A L. CHAPMAN, COURTROOM MEDICINE — HEAD AND BRAIN § 70.43 (1988).
had been lacerated. He also noted that the results of Cruzan's CAT scan showed no abnormalities of her brain. He diagnosed "a probable cerebral contusion compounded by significant anoxia . . . of unknown duration,"

Following the accident, Cruzan remained in a coma for three weeks. Cruzan recovered to the point that she could orally ingest her food. With the permission of her husband, a gastrostomy feeding tube was inserted to assist Cruzan with eating and to ease her recovery. Cruzan, however, never fully recovered from her accident. She was fed through the surgically implanted gastrostomy tube and she resided at Mount Vernon State Hospital in a persistent vegetative state.

Cruzan's parents requested that their daughter's artificial nutrition and hydration be terminated. However, the hospital staff refused to terminate Cruzan's life-support system without a court order. The parents, therefore, filed a petition in the Circuit Court of Jasper County, Missouri Probate Division at Carthage, asking for an order to terminate Cruzan's artificial life-support.

The trial

26. Harmon, 760 S.W.2d at 411.
27. Id.
28. Id. "Anoxia" is a deprivation of oxygen. The trial court stated that a person will sustain permanent brain damage if deprived of oxygen for six minutes. It was estimated that Cruzan was deprived of oxygen for twelve to fourteen minutes. Id.
29. Id.
30. Id. There is some dispute as to whether Nancy could orally ingest food by herself. The Cruzans stated that Nancy was never able to orally ingest food by herself. They stated that they would force feed Nancy by putting a chopped soft boiled egg in the back of her throat and massaging her throat so that the food would go down her throat. The doctors recommended this as part of Nancy's treatment. Also, the Cruzans stated that they started this process about three weeks after the feeding tube had already been put in place. The Cruzans believed that the reason the court stated that Nancy could orally ingest food was that a doctor at trial probably made the comment. Address by Joseph and Joyce Cruzan, Medical Decision-Making and the "Right to Die" After Cruzan (Sept. 14, 1990).
32. Harmon, 760 S.W.2d at 411.
33. Id. "[A] persistent vegetative state [is] generally, a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function." Cruzan v. Director, Missouri Dept. of Health, 110 S. Ct. 2841, 2845 (1990). Cruzan died on December 26, 1990, 12 days after the court allowed her parents to withdraw the feeding tube at the age of 33. The Daily Sentinel, December 26, 1990, at 1, col. 1.
34. Cruzan, 110 S. Ct. at 2846.
35. Id. Everyone involved agreed that terminating Cruzan's feeding would cause her death. Id.
37. Cruzan, 110 S. Ct. at 2846.
court granted the parent's request,\textsuperscript{38} holding that both the Missouri State Constitution and the United States Constitution grant a fundamental right to individuals to refuse or to terminate the use of "death prolonging procedures."\textsuperscript{39} The court stated that:

[Cruzan's] expressed thoughts at age twenty-five in somewhat serious conversations with a housemate friend that if sick or injured she would not wish to continue her life unless she could live at least halfway normally suggests that given her present condition she would not wish to continue on with her nutrition and hydration.\textsuperscript{40}

The court held that a third party cannot exercise an incompetent's choice to terminate medical treatment absent the requirements

\textsuperscript{38}Id.\textsuperscript{.}

\textsuperscript{39}Id. The trial court stated that:

There is a fundamental natural right expressed in our Constitution as the "right to liberty" which permits an individual to refuse or direct the withholding or withdrawal of artificial death prolonging procedures when the person has no more cognitive brain function than our Ward and all the physicians agree there is no hope of further recovery while the deterioration of the brain continues with further overall worsening physical contractures.


\textsuperscript{40}Cruzan, 110 S. Ct. at 2846.

\textsuperscript{41}Harmon, 760 S.W.2d at 410. The trial court appointed Thad C. McCance and David Mouton as Nancy's guardians ad litem. Pet. for Cert. at A96. The guardians ad litem appealed the case because this was a case of first impression in Missouri. Harmon, 760 S.W.2d at 410 n.1.

\textsuperscript{42}Id. at 411 n.3. Missouri law provides:

For all legal purposes, the occurrence of human death shall be determined in accordance with the usual and customary standards of medical practice, provided that death shall not be determined to have occurred unless the following minimal conditions have been met:

(1) When respiration and circulation are not artificially maintained, there is an irreversible cessation of spontaneous respiration and circulation; or

(2) When respiration and circulation are artificially maintained, and there is total and irreversible cessation of all brain function, including the brain stem and that such determination is made by a licensed physician.

MO. ANN. STAT. § 194.005 (Vernon 1986). The trial court found that Cruzan "is diagnosed as in a persistent vegetative state. She is not dead. She is not terminally ill. Medical experts testified that she could live another thirty years." Harmon, 760 S.W.2d. at 411.

\textsuperscript{43}Cruzan, 110 S. Ct. at 2846.
of the Missouri Living Will Act or clear and convincing evidence of

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44. Id. Section 1 of the Missouri Living Will Act provides:

459.010. Definitions

As used in sections 459.010 to 459.055, the following terms mean:

(2) "COMPETENT PERSON", a person eighteen years of age or older of sound mind who is able to receive and evaluate information and to communicate a decision;

(3) "DEATH-PROLONGING PROCEDURE", any medical procedure or intervention which, when applied to a patient, would serve only to prolong artificially the dying process and where, in the judgment of the attending physician pursuant to usual and customary medical standards, death will occur within a short time whether or not such procedure or intervention is utilized. Death-prolonging procedure shall not include the administration of medication or the performance of medical procedure deemed necessary to provide comfort care or to alleviate pain nor the performance of any procedure to provide nutrition or hydration;

(4) "DECLARATION", a document executed in accordance with the requirements of section 459.015;

(6) "TERMINAL CONDITION", an incurable or irreversible condition which, in the opinion of the attending physician, is such that death will occur within a short time regardless of the application of medical procedures.


459.015. DECLARATION, WHO MAY EXECUTE REQUIREMENTS OF DECLARATION-FORM-WITNESSES REQUIRED, WHEN-NOTICE TO PHYSICIAN-FILED-WHERE

1. Any competent person may execute a declaration directing the withholding or withdraw of death-prolonging procedures. The declaration made pursuant to sections 459.010 to 459.055 shall be:

(1) In writing;

(2) Signed by the person making the declaration, or by another person in the declarant's presence and by the declarant's expressed direction;

(3) Dated; and

(4) If not wholly in the declarant's handwriting, signed in the presence of two or more witnesses at least eighteen years of age neither of whom shall be the person who signed the declaration on behalf of and at the direction of the person making the declaration.

2. It shall be the responsibility of the declarant to provide for notification to his attending physician of the existence of the declaration. Upon the request of the patient, the declaration shall be placed in the declarant's medical records as maintained by his attending physician and the medical records of any health facility of which he is a patient.

3. The declaration may be in the following form, but it shall not be necessary to use this sample form. In addition, the declaration may include specific directions. Should any of the other specific directions be held invalid, such invalidity shall not affect other directions of the declaration which can be given effect without the invalid declaration, and to this end the directions in the declaration are severable.

DECLARATION

I have the primary right to make my own decisions concerning treatment that might unduly prolong the dying process. By this declaration I express to my physician, family and friends my intent. If I should have a terminal condition it is my desire that my dying not be prolonged by administration of death-prolonging procedures. If my condition is terminal and I am unable to participate in decisions regarding my medical treatment, I direct my attending physician to withhold or withdraw medical procedures that merely prolong the dying process and are not necessary to my comfort or to alleviate pain. It is not my intent to authorize affirmative or deliberate acts or omissions to shorten my life rather only to permit the natural process of dying.
the incompetent's intent. The court determined that Cruzan's statements did not meet the clear and convincing evidence standard, thus, her parents should not be allowed to terminate her nutrition and hydration. The Missouri Supreme Court specifically rejected the trial court's conclusion that an individual's right to privacy under the Missouri State Constitution extended the right to privacy to an individual to allow the refusal of medical treatment in all circumstances. The court also held that the United States Constitution did not extend the right to privacy this far.

The United States Supreme Court affirmed the decision of the Missouri Supreme Court in a five-to-four decision. Chief Justice Rehnquist delivered the majority opinion of the Court in which he stated that (1) the United States Constitution does not prohibit a state from requiring a standard of clear and convincing evidence of an incompetent's desire to terminate medical treatment; (2) the

MO. ANN. STAT. § 459.015 (Vernon Supp. 1991). Section 10 of the Missouri Living Will Act provides:

459.055 PURPOSES OF DECLARATION
Sections 459.010 to 459.055 shall be interpreted consistent with the following:

(1) Each person has the primary right to request or refuse medical treatment subject to the state's interest in protecting innocent third parties, preventing homicide and suicide and preserving good ethical standards in the medical profession.

(2) Nothing in Sections 459.010 to 459.055 shall be interpreted to increase or decrease the right of a patient to make decisions regarding use of medical procedures so long as the patient is able to do so, nor to impair or supersede any right or responsibility that any person has to effect the withholding or withdrawal of medical care in any lawful manner. In that respect, the provisions of sections 459.010 to 459.055 are cumulative.

(3) Sections 459.010 to 459.055 shall create no presumption concerning the intention of an individual who has not executed a declaration to consent to the use or withholding of medical procedures.

(4) Communication regarding treatment decisions among patients, the families and physicians is encouraged.

(5) 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.


45. Cruzan, 110 S. Ct. at 2846.
46. Id. "The court found that Cruzan's statements to her roommate regarding her desire to live or die under certain conditions were 'unreliable for the purpose of determining her intent, ... and thus insufficient to support the co-guardians claim to exercise substituted judgment on Nancy's behalf.'" Id. (citations omitted).
47. Id.
48. Id.
50. Id. at 2852.
Missouri Supreme Court had not committed constitutional error when it held that the evidence used at trial did not meet the clear and convincing standard,¹¹ and (3) the due process clause of the United States Constitution does not require a state to accept “the 'substituted judgment' of close family members even in the absence of substantial proof that their views reflect the views of the patient.”¹²

The majority assumed that a competent person has a constitutional right to refuse life-saving medical treatment under the United States Constitution.¹³ The Court, however, then stated that a state may require a specific burden of proof when the state allows a surrogate to exercise an incompetent's right to refuse life-sustaining medical treatment, reasoning that a state “may permissibly place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment.”¹⁴ The majority allowed the states to determine their own standards for clear and convincing evidence.¹⁵

BACKGROUND

A surrogate is a person who steps into the shoes of the incompetent patient to make decisions when the patient lacks the capacity to make decisions.¹⁶ The state courts use the best interests test,¹⁷ the substituted judgment test¹⁸ or combinations of both tests¹⁹ to permit a surrogate to exercise an incompetent individual's right to refuse or withdraw medical treatment.²⁰ The best interests standard is a generic title for an objective test.²¹ Under the best interests test:

the surrogate decisionmaker assesses what medical treatment would be in the patient’s best interests as determined by such objective criteria as relief from suffering, preservation or restoration of functioning, and quality and extent of sustained life. . . . "An accurate assessment will encompass consideration of the satisfaction of present desires, the opportunities for future satisfaction, and the possibility of de-

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¹¹. Id. at 2855.
¹². Id.
¹³. Id. at 2852.
¹⁴. Id. at 2852 and 2854.
¹⁵. Id. at 2852-54.
¹⁸. See infra notes 176-219 and accompanying text.
¹⁹. See infra notes 220-72 and accompanying text.
²⁰. See infra notes 220-272 and accompanying text.
²¹. See infra notes 76-77 and 90-97 and accompanying text.
veloping or regaining the capacity for self-determination."\(^6\)

The substituted judgment test requires that a surrogate substitute himself "as nearly as possible for the incompetent, and . . . [act] on the same motives and considerations as would have moved him. . . . In essence, the doctrine in its original inception called on the court to 'don the mental mantle of the incompetent.'"\(^6\) The essential difference between the best interests test and the substituted judgment test "is that under the best interests standard the surrogate is to do what is best for the patient in the surrogate's own judgment, whereas under the substituted judgment standard the surrogate is to attempt to replicate what the patient would have decided if competent to do."\(^6\)

**THE NEW JERSEY APPROACH**

The New Jersey Supreme Court has, in a series of cases, established standards which allow a surrogate decisionmaker to terminate an incompetent's life-support.\(^6\) The court's underlying policy is to treat competent and incompetent patients the same,\(^6\) by allowing them to refuse or terminate life-support when they meet either the substituted judgment test applied by the Court in *In re Quinlan,*\(^6\) the triple option test used in *In re Conroy,*\(^6\) or a combination of the two.\(^6\)

**Quinlan and Conroy Tests**

The substituted judgment test used in *Quinlan* allows the guardian and the patient's family to terminate the life-support of a patient who is in a persistent vegetative state.\(^7\) There are four steps which

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\(^{64}\) A. MEISEL, *supra note* 56, at 270 (footnote omitted).


\(^{66}\) *Peter*, 108 N.J. at —, 529 A.2d at 422-23 (footnote omitted).


\(^{68}\) 98 N.J. 321, 486 A.2d 1209 (1985). The *Conroy* court determined that life-support could be terminate if one of these tests is met. For clarity, this will be referred to as a "triple option test." See *infra* notes 76-97 and accompanying text.

\(^{69}\) See *infra* notes 132-41 and accompanying text.

\(^{70}\) *Quinlan*, 70 N.J. at 41-42, 355 A.2d at 664.
must be satisfied. First, the guardian and family must determine that the patient, if competent, would terminate the treatment.\textsuperscript{71} The guardian and family do not need clear and convincing evidence of the patient’s intentions; they need only “render their best judgment” as to what medical decision the patient would want them to make.\textsuperscript{72} Next, the treating physician must determine if the patient’s life-support should be discontinued.\textsuperscript{73} Third, the treating physician and hospital prognosis committee must verify the patient’s medical condition.\textsuperscript{74} Finally, if all conditions are met, the guardian will be allowed to terminate the patient’s life-support.\textsuperscript{75} Under the triple option test used in Conroy, the surrogate need satisfy only one of three tests: (1) a subjective test, (2) a limited-objective test, or (3) a pure-objective test.\textsuperscript{76} Both the limited-objective test and the pure-objective test are best interests tests.\textsuperscript{77} A surrogate will be allowed to terminate an incompetent patient’s life-support when one of the three tests is met.\textsuperscript{78}

The first part of the triple option test used in Conroy is the subjective test.\textsuperscript{79} The subjective test is used to determine if a surrogate may exercise an incompetent’s right to refuse or terminate medical treatment when the surrogate can determine that the patient would have refused the treatment in that particular set of circumstances.\textsuperscript{80} This subjective test focuses upon what the patient would want under these circumstances.\textsuperscript{81} The surrogate needs to determine if there is any evidence which would demonstrate the incompetent patient’s intent to refuse the medical treatment.\textsuperscript{82} This intent could be demonstrated by the use of a living will,\textsuperscript{83} prior oral communications,\textsuperscript{84} use of a durable power of attorney,\textsuperscript{85} opinions of the incompetent about

\textsuperscript{71} Peter, 108 N.J. at ——, 529 A.2d at 425 (quoting Quinlan, 70 N.J. at 41, 355 A.2d at 664).
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Conroy, 98 N.J. at ——, 486 A.2d at 1229-32.
\textsuperscript{77} Id. at ——, 486 A.2d at 1232.
\textsuperscript{78} Id. at ——, 486 A.2d at 1229-32.
\textsuperscript{79} Id. at ——, 486 A.2d at 1229.
\textsuperscript{80} Id. at ——, 486 A.2d at 1229.
\textsuperscript{81} Id. at ——, 486 A.2d at 1229.
\textsuperscript{82} Id. at ——, 486 A.2d at 1229.
\textsuperscript{83} Id. at ——, 486 A.2d at 1229. A living will is a written document which is used to specify what types of medical treatment a person would wish to undergo under the particular circumstance. Id. at ——, 486 A.2d at 1229.
\textsuperscript{84} Id. at ——, 486 A.2d at 1229. A person may express his intent to refuse medical treatment to his family, friends, or doctor. Id. at ——, 486 A.2d at 1229.
\textsuperscript{85} Id. at ——, 486 A.2d at 1229-30. This would allow the person to continue to make decisions while he is competent and allow a person to exercise this right to re-
medical treatment regarding himself or someone else,\textsuperscript{86} the religious beliefs of the individual,\textsuperscript{87} or past patterns of the person's medical care.\textsuperscript{88} The surrogate must also evaluate the medical status of the patient based upon the particular treatment the patient can receive and is receiving.\textsuperscript{89}

If the intent element of the subjective test cannot be met, then the surrogate may apply either the limited-objective test or the pure-objective test.\textsuperscript{90} The limited-objective test requires a surrogate to determine, by trustworthy evidence, that the patient would have declined the medical treatment and that the burdens imposed by the treatment, while sustaining the patient, outweigh the benefit of continuing the patient's life.\textsuperscript{91} This test is used when the continuation of the treatment would only serve to prolong the patient's suffering.\textsuperscript{92} The decision-maker must consider all medical evidence relevant to the patient's treatment, including "the patient's life expectancy, prognosis, level of functioning, degrees of humiliation and dependency, and treatment options."\textsuperscript{93}

The pure-objective test is used when a patient is unable to satisfy the trustworthy evidence standard of the limited-objective test.\textsuperscript{94} As with the limited-objective test, the guardian must determine that the benefits of living with the treatment are outweighed by the burdens that the patient must endure.\textsuperscript{95} To use this test, the amount of pain that the patient must endure due to the treatment must be inhumane.\textsuperscript{96} However, this test cannot be used if the patient, while competent, had previously expressed his wishes to undergo the treatment.\textsuperscript{97}

\footnotesize{\textsuperscript{86} fuse medical treatment in the event that he becomes incompetent. Id. at ---, 486 A.2d at 1229-30.\textsuperscript{87} Id. at ---, 486 A.2d at 1230.\textsuperscript{88} Id. at ---, 486 A.2d at 1230. See infra notes 151-60 and accompanying text.\textsuperscript{89} Conroy, 98 N.J. at ---, 486 A.2d at 1230.\textsuperscript{90} Id. at ---, 486 A.2d at 1231.\textsuperscript{91} Id. at ---, 486 A.2d at 1231-32.\textsuperscript{92} Id. at ---, 486 A.2d at 1232. The trustworthy evidence required under the limited-objective test could be satisfied by use of the same types of evidence used in the subjective test. Evidence which was too vague, remote, or casual under the subjective test still could meet the limited-objective test. Id. at ---, 486 A.2d at 1232.\textsuperscript{93} Id. at ---, 486 A.2d at 1232.\textsuperscript{94} Id. at ---, 486 A.2d at 1232. The court also stated that the decision-maker must consider the "degree, expected duration, and constancy of pain with and without treatment, and the possibility that the pain could be reduced by drugs or other means short of terminating the life-sustaining treatment." Id. at ---, 486 A.2d at 1232.\textsuperscript{95} Id. at ---, 486 A.2d at 1232. Subjective evidence that the patient would have declined the treatment is not required under the pure-objective test. Id. at ---, 486 A.2d at 1232.\textsuperscript{96} Id. at ---, 486 A.2d at 1232.\textsuperscript{97} Id. at ---, 486 A.2d at 1232.}
New Jersey Case Law

In 1976, the Supreme Court of New Jersey, in Quinlan, recognized Karen Ann Quinlan's right to privacy under the United States Constitution and the New Jersey Constitution. Quinlan, who had inexplicably stopped breathing on two separate occasions for fifteen minutes, had suffered brain damage. As a result, she was in a coma, fed by a feeding tube, and breathing with the aid of a respirator. Quinlan's father had petitioned the New Jersey Superior Court, Chancery Division, to become Karen's legal guardian so that he would be able to discontinue all of Karen's life-support. The court denied Quinlan's father guardianship of Karen. The New Jersey Supreme Court, however, reversed and allowed Karen's father to become her legal guardian in order to exercise Karen's rights.

In addition to the guardianship issue, the New Jersey Supreme Court also analyzed six other issues on appeal, the primary issue being the right to privacy. The court granted Quinlan the right to refuse medical treatment under the New Jersey Constitution and the United States Constitution, as interpreted by the United States Supreme Court's right to privacy decisions of Griswold v. Connecticut.

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99. Id. at 23, 355 A.2d at 653-54.
100. Id. at 23-25, 355 A.2d at 654-55.
101. Id. at 18, 355 A.2d at 651.
102. Id. at 34, 355 A.2d at 660.
103. Id. at 55, 355 A.2d at 671-72.
104. Id. at 35-53, 355 A.2d at 661-71. The New Jersey Supreme Court also addressed several other issues: (1) the free exercise of religion, (2) cruel and unusual punishment, (3) the medical factor, (4) alleged criminal liability, and (5) the guardianship of the person. Id. The New Jersey Supreme Court agreed with the trial court, that Quinlan's father does not have a right based upon religious belief to override the interest of the state in preserving life. Id. at 37, 355 A.2d at 661-62. The New Jersey Supreme Court stated that the eighth amendment ban against the use of cruel and unusual punishment did not apply in this case. It only applies when the state is imposing penal sanctions. The state did not impose this on Quinlan as a punishment. Id. at 37-38, 355 A.2d at 662. The New Jersey Supreme Court held that declaratory relief could not be granted in this case. The court determined that the focus of the inquiry should be Quinlan's possibility of recovering from the persistent vegetative state, instead of the life Quinlan would have if the respirator was not removed. Id. at 51, 355 A.2d at 669. The New Jersey Supreme Court stated that the criminal law would not apply in this case. First, Quinlan would die of natural causes and this would not be held to be murder. Second, a person will not be prosecuted for murder if he is exercising a constitutional right. Id. at 51-52, 355 A.2d at 669-70. The New Jersey Supreme Court overruled the trial court's decision to disallow Quinlan's father guardianship. The Supreme Court held that N.J. STAT. ANN. § 3A:6-36 creates a statutory presumption that guardianship should be given to the next of kin. The court determined that Mr. Quinlan would be able to carry out his function as Karen's guardian. Id. at 53, 355 A.2d at 670-71.
The New Jersey Supreme Court stated that the interest of the state in preserving life did not override Quinlan’s right to privacy. Therefore, the court allowed Quinlan’s guardian and family to use their “substituted judgment” to exercise her right to privacy so that her right would not be lost due to her present condition. The court also stated that in order to use substituted judgment the family, surrogate, and physicians must agree that the patient will not return to a cognitive sapient state.

In Conroy, the New Jersey Supreme Court set up the triple option test to allow a surrogate to exercise an incompetent’s right to terminate medical treatment. The court specifically dealt with previously competent elderly nursing-home patients who suffered from permanent and serious physical impairments which would most likely cause them to die within a year, regardless of medical treatment. The court determined that an elderly patient who meets one of the three tests will be allowed to either refuse the use of life-support or have the life-support withdrawn.

In In re Farrell, the New Jersey Supreme Court examined for the first time a terminally-ill competent adult patient’s right to voluntarily withdraw from life-support. The court set up guidelines under which a competent adult will be able to discontinue life-sustaining medical treatment. First, there must be a determination of competency. The patient must be informed about his prognosis, the availability of alternative treatments, and the risk of withdrawing the medical treatment. Next, there must be a determination that

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105. 381 U.S. 479, 484-85 (1965) (creating the right to privacy through the penumbras of the Bill of Rights); Quinlan, 70 N.J. at 38-40, 355 A.2d at 662-63.

106. 410 U.S. 113, 164-65 (1973) (extending the right to privacy granting a woman a constitutional right to have an abortion); Quinlan, 70 N.J. at 40, 355 A.2d at 663.

107. Quinlan, 70 N.J. at 40-41, 355 A.2d at 663-64.

108. Id. at 42, 355 A.2d at 664. The guardian and family had to exercise Quinlan’s right to privacy under the guidance of the Supreme Court’s decision. Id. at 42, 355 A.2d at 664.

109. Id. at 50-51, 355 A.2d at 669.


111. Id. at ——, 486 A.2d at 1219.

112. Id. at ——, 486 A.2d at 1229-32.


114. Id. at ——, 529 A.2d at 408.

115. Id. at ——, 529 A.2d at 413.

116. Id. at ——, 529 A.2d at 413. “A competent patient has a clear understanding of the nature of his or her illness and prognosis, and the risks and benefits of the proposed treatment, and has the capacity to reason make judgments about that information.” Id. at ——, 529 A.2d at 413, n.7 (citing Conroy, 98 N.J. at 347, 486 A.2d at 1222 (citing Wanzer, Adelstein, Cranford, Federman, Hook, Moertel, Safar, Stone, Tarssig & Van Eys, The Physician’s Responsibility Toward Hopelessly Ill Patients, 310 New Eng. J. Med. 955, 957 (1984))).

117. Farrell, 108 N.J. at ——, 529 A.2d at 413.
the patient's choice was voluntary and not coerced. Finally, the patient's choice must be weighed against four countervailing state interests: preventing suicide, preserving life, protecting innocent third parties, and preserving the integrity of the medical profession. The court pointed out that under Conroy, a competent informed individual's "interest in freedom from nonconsensual invasion of her bodily integrity would outweigh any state interest." In In re Jobs, the Supreme Court of New Jersey set up guidelines "under which life-sustaining medical treatment may be withdrawn from a non-elderly nursing home patient in a persistent vegetative state who, prior to her incompetency, had not adequately expressed her attitude toward such treatment." The court held that the Quinlan substituted judgment test should be used when trying to exercise an incompetent's right to refuse medical treatment if the incompetent is in a persistent vegetative state. The court also held "that the surrogate decisionmaker who declines life-sustaining medical treatment must secure statements from at least two independent physicians knowledgeable in neurology that the patient is in a persistent vegetative state and that there is no reasonable possibility that the patient will ever recover to a cognitive, sapient state." The court then implied that absent disagreement between the family, surrogate, and doctors as to the course of treatment, the decision to withdraw life-support should not be addressed in a court of law.

In In re Peter, the New Jersey Supreme Court set up guidelines for a surrogate to terminate an incompetent patient's life-support. In Peter, the patient resided at a nursing home in a persistent vegetative state and was expected to live more than a year. The court determined that the Conroy subjective test should be applied if the patient left clear and convincing evidence of his medical preference. If patients who are in a persistent vegetative state do not leave clear and convincing evidence of their desire, then the substituted judgment test used in Quinlan and clarified in Jobs

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118. Id. at ——, 529 A.2d at 413.
119. Id. at ——, 529 A.2d at 413, 410-11 (citations omitted).
120. Id. at ——, 529 A.2d at 413 (quoting Conroy, 98 N.J. at 355, 486 A.2d at 1226).
122. Id. at ——, 529 A.2d at 436.
123. Id. at ——, 529 A.2d at 451.
124. Id. at ——, 529 A.2d at 448.
125. Id. at ——, 529 A.2d at 451.
127. Id. at ——, 529 A.2d at 421-22.
128. Id. at ——, 529 A.2d at 421-22.
129. Id. at ——, 529 A.2d at 429. See supra notes 79-89 and accompanying text.
should be applied. The court held that the Conroy limited-objective and pure-objective tests should be abandoned in this situation because a person in a persistent vegetative state “do[es] not experience any of the benefits or burdens that the Conroy balancing tests are intended or able to appraise.”

*Application of the Quinlan Substituted Judgment Test and Conroy Triple Option Test*

In New Jersey, the Quinlan substituted judgment test is used when an incompetent patient is in a persistent vegetative state and is unable to meet the requirements of the Conroy subjective test. In those situations, the surrogate must use the substituted judgment test in order to effectuate the incompetent’s right to refuse medical treatment.

The Conroy triple option test may be used when an incompetent elderly-nursing home patient will likely die within one year. In those situations, the surrogate should first use the subjective test to determine if the patient left sufficient evidence of his intent to refuse or terminate medical treatment. If the patient had not, then the surrogate may apply the limited-objective test and balance the relevant factors. If the incompetent patient is unable to meet that test, then the surrogate applies the pure-objective test.

A combination of the Conroy subjective test and Quinlan substituted judgment test is used when an incompetent patient is in a persistent vegetative state. If there is sufficient evidence of intent to demonstrate that the incompetent would forego or withdraw medical treatment, then the Conroy subjective test is used. However, if the incompetent patient does not meet the Conroy subjective test, then the Quinlan substituted judgment test is applied. The Conroy limited-objective test and pure-objective test cannot be used, because a patient in a persistent vegetative state does not experience the benefits and burdens used in those tests.

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131. *Id.* at —, 529 A.2d at 425. *See supra* notes 90-97 and accompanying text.
133. *Id.* at —, 529 A.2d at 451.
134. *Conroy*, 98 N.J. at —, 486 A.2d at 1219.
135. *Id.* at —, 486 A.2d at 1229.
136. *Id.* at —, 486 A.2d at 1231-32.
137. *Id.* at —, 486 A.2d at 1232.
139. *Id.* at —, 529 A.2d at 425-26.
140. *Id.* at —, 529 A.2d at 429.
141. *Id.* at —, 529 A.2d at 425.
RIGHT TO DIE

THE NEW YORK APPROACH

The New York Court of Appeals has adopted a test which allows a surrogate to terminate an incompetent patient's medical treatment when the patient had expressed a desire to refuse the treatment. The court requires clear and convincing evidence that the incompetent individual had demonstrated this intent. The court reasoned that:

The clear and convincing evidence standard requires proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented. As a threshold matter, the trier of fact must be convinced, as far as is humanly possible, that the strength of the individual's beliefs and the durability of the individual's commitment to those beliefs makes a recent change of heart unlikely. The persistence of the individual's statements, the seriousness with which those statements were made and the inferences, if any, that may be drawn from the surrounding circumstances are among the factors which should be considered.

The court specifically rejected the substituted judgment test, reasoning that "it is inconsistent with our fundamental commitment to the notion that no person or court should substitute its judgment as to what would be an acceptable quality of life for another."

Application of the New York Test

In In re Storar, the Court of Appeals of New York handled two cases that were consolidated on appeal: In re Eichner and In re Storar. In Storar, the issue presented was whether a guardian may withdraw life-saving technology from an incompetent patient who had always been incompetent. In Eichner, the court concerned itself with the issue of whether a person who had expressed

143. Id. at 530-31, 531 N.E.2d at 613, 534 N.Y.S.2d at 892.
144. Id. at 531, 531 N.E.2d at 613, 534 N.Y.S.2d at 892 (citations omitted).
145. Id. at 530, 531 N.E.2d at 613, 534 N.Y.S.2d at 892 (citations omitted).
149. Storar, 52 N.Y.2d at 369, 420 N.E.2d at 66, 438 N.Y.S.2d at 268.
the wish to refuse life-saving treatment while competent may have that wish granted after becoming incompetent.\textsuperscript{150}

In \textit{Eichner}, Brother Joseph Fox underwent an operation to correct a hernia.\textsuperscript{151} During the surgery, he had a heart attack and suffered brain damage which rendered him incompetent.\textsuperscript{152} Prior to his surgery, Brother Fox had stated that he did not want to be sustained by a respirator if he were in a vegetative state.\textsuperscript{153} Therefore, his guardian petitioned the court to allow the hospital to remove the respirator.\textsuperscript{154} The trial court granted this request, reasoning that a competent person has a common-law right to refuse medical treatment.\textsuperscript{155} The court found that Brother Fox's expressed statements prior to becoming incompetent were sufficient to allow the respirator to be removed.\textsuperscript{156}

The New York Court of Appeals affirmed, reasoning that an adult has the common-law right to refuse unwanted medical treatment.\textsuperscript{157} The court adopted the trial court's holding that the correct standard of evidence that should be used in this area is "clear and convincing" rather than a "preponderance of the evidence."\textsuperscript{158} The court of appeals reasoned that this higher standard should be used because the factfinder should be impressed with the magnitude of the decision.\textsuperscript{159} The court of appeals held that Brother Fox's statements met the clear and convincing standard of evidence.\textsuperscript{160}

In \textit{Storar}, John Storar, a fifty-two-year-old retarded man, suffered from terminal cancer and from a bleeding lesion in his bladder.\textsuperscript{161} The hospital sought permission from Storar's legal guardian to give Storar a blood transfusion.\textsuperscript{162} The guardian first refused to authorize the transfusion, but later consented to it.\textsuperscript{163} A month later,

\begin{itemize}
\item \textsuperscript{150} Id.
\item \textsuperscript{151} Id. at 370-71, 420 N.E.2d at 67, 438 N.Y.S.2d at 269.
\item \textsuperscript{152} Id. at 371, 420 N.E.2d at 67-68, 438 N.Y.S.2d at 269-70.
\item \textsuperscript{153} Id. at 371, 420 N.E.2d at 68, 438 N.Y.S.2d at 270.
\item \textsuperscript{154} Id. at 371, 420 N.E.2d at 67-68, 438 N.Y.S.2d at 269-70.
\item \textsuperscript{155} Id. at 372, 420 N.E.2d at 68, 438 N.Y.S.2d at 270.
\item \textsuperscript{156} Id.
\item \textsuperscript{157} Id. at 376-77, 420 N.E.2d at 70, 438 N.Y.S.2d at 272-73.
\item \textsuperscript{158} Id. at 379, 420 N.E.2d at 72, 438 N.Y.S.2d at 274. The New York Court of Appeals stated that clear and convincing evidence should be required when the surrogate tries to exercise the incompetent patient's right to refuse medical treatment. \textit{Id.}
\item \textsuperscript{159} Id. at 376-79, 420 N.E.2d at 72, 438 N.Y.S.2d at 274 (citations omitted).
\item \textsuperscript{160} Id. at 380, 420 N.E.2d at 72, 438 N.Y.S.2d at 274.
\item \textsuperscript{161} Id. at 373, 420 N.E.2d at 68-69, 438 N.Y.S.2d at 270-71.
\item \textsuperscript{162} Id. at 373, 420 N.E.2d at 69, 438 N.Y.S.2d at 271. John Storar's mother was his legal guardian. \textit{Id.} at 373, 420 N.E.2d at 68, 438 N.Y.S.2d at 271.
\item \textsuperscript{163} Id. at 373, 420 N.E.2d at 69, 438 N.Y.S.2d at 271. The mother had previously given consent for radiation therapy which allowed John's cancer to go into remission. Later, John was diagnosed as having terminal cancer. \textit{Id.} at 373, 420 N.E.2d at 68, 438 N.Y.S.2d at 270-71.
\end{itemize}
the guardian requested that the hospital terminate the blood transfusions, arguing that John wanted them discontinued.\textsuperscript{164} The New York Supreme Court of Monroe County allowed the hospital to discontinue the transfusions, holding that another person may exercise an incompetent’s right to refuse unwanted medical treatment.\textsuperscript{165}

The New York Court of Appeals reversed the New York Supreme Court’s decision.\textsuperscript{166} Due to his mental capacity and incompetency, the court treated Storar as if he were a child and based its decision upon the common-law principle that a parent cannot deprive a child of medical aid.\textsuperscript{167} The court stated that the right of a state to protect children outweighs the guardian’s right to decline medical treatment.\textsuperscript{168}

In \textit{In re Westchester County Medical Center},\textsuperscript{169} the New York Court of Appeals allowed a hospital to insert a feeding tube into an incompetent patient.\textsuperscript{170} The court held that the patient had not met the clear and convincing standard of evidence to assert her right to decline this particular type of medical treatment.\textsuperscript{171} The court stated that under the circumstances, the patient’s wishes could not be carried out because it is possible that the patient could regain the ability to eat and drink without the aid of medical assistance.\textsuperscript{172}

\textbf{OTHER APPROACHES}

State courts have adopted various approaches to allow a surrogate to exercise an incompetent patient’s right to refuse medical

\begin{itemize}
  \item \textsuperscript{164} \textit{Id.} at 373-75, 420 N.E.2d at 69-70, 438 N.Y.S.2d at 271-72. Storar’s guardian believed that her son was in pain and did not want to undergo any more transfusions. \textit{Id.} at 375-76, 420 N.E.2d at 70, 438 N.Y.S.2d at 272.
  \item \textsuperscript{165} \textit{Id.} at 375-76, 420 N.E.2d at 70, 438 N.Y.S.2d at 272.
  \item \textsuperscript{166} \textit{Id.} at 381-82, 420 N.E.2d at 73, 438 N.Y.S.2d at 275.
  \item \textsuperscript{167} \textit{Id.} at 380, 420 N.E.2d at 73, 438 N.Y.S.2d at 275. The court stated that Storar was incompetent at all times; therefore, the court proceeded from the cases involving parent-child relations. \textit{Id.} at 380-81, 420 N.E.2d at 72-73, 438 N.Y.S.2d at 274-75. See \textit{In re Sampson}, 29 N.Y.2d 900, ——, 278 N.E.2d 918, 919, 328 N.Y.S.2d 686, 687 (1972) (disallowing parents the right to refuse blood transfusion for child based upon religious beliefs); \textit{In re Santos v. Goldstien}, 16 A.D.2d 755, ——, 227 N.Y.S.2d 450, 450-51, motion for leave to appeal dismissed, 12 N.Y.2d 672, 185 N.E.2d 904, 233 N.Y.S.2d 485 (1962) (stating that the parents neglected their child by refusing to consent to a blood transfusion for their child due to their religious beliefs); \textit{In re Vasko}, 238 A.D. 128, ——, 263 N.Y.S. 552, 553-55 (1933) (where the parents neglected child when they refused to allow the child to undergo surgery when the guardian deemed it necessary to correct a defect of the eye).
  \item \textsuperscript{168} \textit{Storar}, 52 N.Y.2d at 380-81, 420 N.E.2d at 73, 438 N.Y.S.2d at 275.
  \item \textsuperscript{169} \textit{Id.} at 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988).
  \item \textsuperscript{170} \textit{Id.} at 522, 531 N.E.2d at 608, 534 N.Y.S.2d at 887. The patient had become incompetent due to several strokes. \textit{Id.}
  \item \textsuperscript{171} \textit{Id.}
  \item \textsuperscript{172} \textit{Id.} at 533, 531 N.E.2d at 615, 534 N.Y.S.2d at 894.
\end{itemize}
Some courts apply the substituted judgment test. Other courts use a combination of the substituted judgment test and the best interests test depending upon the particular circumstances.

Substituted Judgment Test Jurisdictions

In the 1983 case In re Colyer, Bertha Colyer had suffered brain damage due to anoxia from a heart attack. She had been admitted to St. Luke's Hospital in Bellingham, Washington in a persistent vegetative state and was kept alive with the aid of a respirator. Her husband was appointed guardian and petitioned the Superior Court, Whatcom County, for authorization to remove the respirator. The court granted the guardian's petition, reasoning that Colyer had a right to privacy, that the family had demonstrated that Colyer would refuse the life-support, and that she would not return to a cognitive sapient state.

The Supreme Court of Washington affirmed the trial court, holding that an incompetent patient has the right to refuse life-support grounded in the doctrine of informed consent and the constitutional right to privacy. The Washington Supreme Court stated that the guardian should use his best judgment of the incompetent's wishes in exercising the incompetent's right to refuse medical treatment. The court reasoned that the law governing guardianship "enables a guardian to use his best judgment and exercise, when appropriate, an incompetent's personal right to refuse life sustaining treatment." The court stated that the use of the best judgment standard provides both competent and incompetent patients the right to refuse medical treatment. The court also stated that the guardian should use prior statements of the incompetent when trying to determine the in-

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173. See infra notes 176-272 and accompanying text.
174. See infra notes 176-219 and accompanying text.
175. See infra notes 220-72 and accompanying text.
177. Id. at ----, 660 P.2d at 740. See supra note 28.
178. Colyer, 99 Wash. 2d at ----, 660 P.2d at 740.
179. Id. at ----, 660 P.2d at 740.
180. Id. at ----, 660 P.2d at 741-44.
181. Id. at ----, 660 P.2d at 747-48. The Quinlan court stated that the guardian should "render his best judgment" when exercising an incompetent's right to refuse medical treatment. Quinlan, 70 N.J. at 41, 355 A.2d at 670. The approach used in Quinlan is known as the substituted judgment test. See supra notes 70-75 and accompanying text.
182. Id. at ----, 660 P.2d at 746 (interpreting WASH. REV. CODE § 11.92.040(3) (1987)) (citations omitted).
183. Id. at ----, 660 P.2d at 744.
competent's wishes.185

In John F. Kennedy Memorial Hospital, Inc. v. Bludworth,186 Francis B. Landy suffered permanent brain damage and was sustained with the aid of a ventilator in a Florida hospital.187 Landy's doctor believed that Landy would not be able to survive without the ventilator.188 Landy's wife delivered a living will to Landy's doctor in which he had clearly stated that he "did not wish to be kept alive through the use of extraordinary life support equipment such as a respirator."189 The Superior Court, Palm Beach County, declared Mr. Landy incompetent and appointed Mrs. Landy to be his guardian.190 Mrs. Landy then requested that the ventilator be removed.191 After this request, the hospital filed for declaratory relief, asking the probate court to determine the possible liability and rights of the hospital.192

The superior court held that "in order to avoid potential criminal and civil liability for termination of life support systems under the facts of this case, appointment of a guardian to act on the incompetent patient's behalf, the filing of a petition for authority to order termination, and court approval were required."193 The District Court of Appeals, Fourth District, affirmed the superior court, holding that court approval is needed to terminate an incompetent's life-support even though the incompetent had demonstrated an intent to refuse this treatment with a living will.194

The Supreme Court of Florida reversed the district court, stating that a guardian should use the substituted judgment test when exercising the incompetent's right to refuse medical treatment.195 The court reasoned that this method allows an incompetent to exercise the right to refuse medical treatment.196 The court stated that the substituted judgment test allows legal guardians or close family members to substitute their judgment and decide what the incompetent patient would have decided in these circumstances.197 The court also stated that a living will is persuasive evidence which demon-

185. Id. at ——, 660 P.2d at 748.
186. 452 So. 2d 921 (Fla. 1984).
187. Id. at 922.
188. Id.
189. Id.
190. Id.
191. Id.
192. Id. at 922-23.
193. Id. at 923.
194. Id.
195. Id. at 926. See In re Guardianship of Browning, 586 So. 2d 4, 13 (Fla. 1990), aff'd, 543 So. 2d 258 (Fla. Dist. Ct. App. 1989)(following the reasoning of Bludworth).
196. Bludworth, 452 So. 2d at 926.
197. Id.
strates that the incompetent would forego the treatment.\textsuperscript{198} The court adopted the approaches of the New Jersey and Washington Supreme Courts.\textsuperscript{199} The Florida Supreme Court thus held that a family or guardian may exercise a patient’s right to refuse medical treatment when the patient is “in an irreversibly comatose and essentially vegetative state.”\textsuperscript{200}

In \textit{Leach v. Akron General Medical Center},\textsuperscript{201} Edna Marie Leach suffered from a terminal disease of the nervous system.\textsuperscript{202} She was admitted to the Akron Medical Center in Ohio where she was sustained by a respirator, feeding tube, and catheter.\textsuperscript{203} The Court of Common Pleas of Ohio, Summit County, Probate Division, held that an incompetent patient who is terminally ill and in a persistent vegetative state has the right to refuse medical treatment under the right to privacy.\textsuperscript{204} The court based its reasoning upon the New York Court of Appeals decision in \textit{Eichner} that the incompetent’s specific intent should be determined.\textsuperscript{205} If this is not possible, then the Ohio court determined that the substituted judgment test should be applied.\textsuperscript{206} The court also stated that to exercise this right it must be determined that the incompetent would have declined life-support if competent.\textsuperscript{207} The court also stated that a licensed neurologist and physician selected by the surrogate must certify that the incompetent will continue in a persistent vegetative state, and that “there is no reasonable medical possibility that [the incompetent] will regain any sapient or cognitive function.”\textsuperscript{208}

In \textit{Brophy v. New England Sinai Hospital, Inc.},\textsuperscript{209} Paul E. Brophy, was in a persistent vegetative state and fed through a gastrostomy tube in a Massachusetts hospital.\textsuperscript{210} Brophy’s wife, his legal guardian, petitioned the Probate Court for Norfolk County for an order to discontinue life-support.\textsuperscript{211} The court determined that Brophy, who was then incompetent, would have declined the artificial delivery of food and water if he had been competent.\textsuperscript{212} How-

\textsuperscript{198} \textit{Id.}
\textsuperscript{199} \textit{Id.} \textit{See supra} notes 98-109, 176-85 and accompanying text.
\textsuperscript{200} Bludworth, 452 So. 2d at 926.
\textsuperscript{201} 68 Ohio Misc. 1, 426 N.E.2d 809 (1980).
\textsuperscript{202} \textit{Id.} at 421, 497 N.E.2d 626 at 910.
\textsuperscript{203} \textit{Id.} at 421, 497 N.E.2d at 810.
\textsuperscript{204} \textit{Id.} at 422, 497 N.E.2d at 809, 816.
\textsuperscript{205} \textit{Id.} at 421, 497 N.E.2d at 813-14.
\textsuperscript{206} \textit{Id.} at 422, 497 N.E.2d at 814.
\textsuperscript{207} \textit{Id.} at 422, 497 N.E.2d at 816.
\textsuperscript{208} \textit{Id.} at 422, 497 N.E.2d at 816.
\textsuperscript{209} 398 Mass. 417, 497 N.E.2d 626 (1986).
\textsuperscript{210} \textit{Id.} at 421, 497 N.E.2d at 628.
\textsuperscript{211} \textit{Id.} at 422 n.5, 497 N.E.2d at 628 n.5.
\textsuperscript{212} \textit{Id.} at 422, 497 N.E.2d at 628-29.
ever, the court denied the guardian’s request.213

The Supreme Judicial Court of Massachusetts reversed the trial court, holding that the guardian had the right to transfer Brophy to another facility which would honor Brophy’s wishes to remove the feeding tube.214 The court determined that a patient has the right to refuse medical treatment under the common-law and the constitutional right to privacy.215 The court then stated that a surrogate may use the substituted judgment test in order to exercise the incompetent’s right to refuse medical treatment.216 The court reasoned that the substituted judgment test best serves to honor the individual’s privacy and dignity.217 The court stated that the substituted judgment test is used “to determine with as much accuracy as possible the wants and needs of the individual involved.”218 The court determined that a surrogate should focus on what the individual wanted, instead of taking “a paternalistic view of what is ‘best’ for a patient.”219

Jurisdictions that Apply a Combination of the Substituted Judgment Test and the Best Interests Test

In Barber v. Superior Court,220 Clarence Herbert suffered brain damage when he went into cardiac arrest shortly after surgery in a California hospital.221 His physician, Neil Barber, told his family that Clarence’s chance of recovery was poor.222 The hospital granted the family’s request to terminate Clarence’s life-support.223 The doctors were then charged with murder and conspiracy to commit murder.224

The California Court of Appeals held that the physician’s failure to continue treatment under these circumstances did not constitute an unlawful failure to perform a legal duty.225 The court stated that the surrogate should be guided “by his knowledge of the patient’s

213. Id. at 422, 497 N.E.2d at 629.
214. Id. at 422-23, 497 N.E.2d at 629.
215. Id. at 430, 497 N.E.2d at 633.
216. Id. at 430-33, 497 N.E.2d at 633-35.
217. Id. at 431, 497 N.E.2d at 633.
218. Id. at 433, 497 N.E.2d at 634-35 (quoting Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 750, 370 N.E.2d 417, 430 (1977)).
219. Id. at 430-31, 497 N.E.2d at 633.
221. Id. at 1010, 195 Cal. Rptr. at 486.
222. Id.
223. Id.
224. Id. at 1011, 195 Cal. Rptr. 486. See also CAL. PENAL CODE §§ 182, 187 (West 1988) (stating that conspiracy is when two or more persons conspire to commit a crime, and defining murder as the unlawful killing of a human being or a fetus with malice aforethought).
own desires and feelings, to the extent that they were expressed before the patient became incompetent." The court then stated that if the surrogate is unable to determine what choice the patient would have made, then the surrogate should be guided by the patient's best interests. The court determined that Mr. Herbert had expressed his desire to refuse this type of medical treatment; therefore, the court determined that his guardian had acted correctly by allowing the doctors to discontinue Mr. Herbert's medical treatment. The court then determined that absent legislative guidance, there is "no legal requirement that prior judicial approval is necessary before any decision to withdraw treatment can be made."

In *Foody v. Manchester Memorial Hospital*, Sandra Foody was admitted to a Connecticut hospital where she was sustained in a semicomatose state by a respirator. She had suffered from multiple sclerosis for twenty-four years, leading her doctors to believe that her condition was permanent. Foody's conservator petitioned the Superior Court of Connecticut, Judicial District of Hartford-New Britain at Hartford, to discontinue Foody's respirator.

The court held that Foody's family could act as her substitute decisionmaker. The court stated that the decisionmaker should first apply the substituted judgment test to determine if the incompetent patient would forego medical treatment. If the incompetent patient had not expressed the desire to refuse treatment, then the best interests test should be used. The court reasoned that the best interests test should be used in this situation because this test would allow Foody the right to refuse life-support. The court stated that under the best interests test the surrogate must consider the patient's relief from suffering, quality of life, and restoration or preservation of functioning. The court determined that the patient has a right to refuse medical treatment under the constitutional right

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226. *Id.* at 1021, 195 Cal. Rptr. at 493 (citations omitted).
227. *Id.*
228. *Id.*
229. *Id.*
231. *Id.* at —, 482 A.2d at 716.
232. *Id.* at —, 482 A.2d at 716.
233. *Id.* at —, 482 A.2d at 717.
234. *Id.* at —, 482 A.2d at 713, 717.
235. *Id.* at —, 482 A.2d at 721.
236. *Id.* at —, 482 A.2d at 720-21.
237. *Id.* at —, 482 A.2d at 721.
238. *Id.* at —, 482 A.2d at 721.
239. *Id.* at —, 482 A.2d at 721 (quoting PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 135 (1983)).
to privacy and the common-law right of self-determination. The court allowed her family to exercise her right to refuse medical treatment even though Sandra had not stated that she would want the treatment terminated.

In *In re Conservatorship of Torres*, Mr. Torres became incompetent when he suffered brain damage due to anoxia. He was later placed on a respirator in a Minnesota hospital. The Hennepin County Medical Center petitioned the Hennepin County Probate Court for an order determining the appropriate medical care for Torres. The court appointed a conservator for Torres and granted the conservator's request to disconnect the respirator based upon the conservator's belief that this was in the best interests of Torres.

The Supreme Court of Minnesota affirmed the trial court, holding that a conservator may use the best interests test in order to exercise the conservatee's right to refuse medical treatment. The court followed other jurisdictions which allow a guardian "to assert the right of the incompetent to order disconnection of life supports." The court determined that this right is grounded in Minnesota law and in the constitutional right to privacy.

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240. *Id.* at ——, 482 A.2d at 717.
241. *Id.* at ——, 482 A.2d at 721.
242. 357 N.W.2d 332 (Minn. 1984).
243. *Id.* at 334. See supra note 28 and accompanying text.
244. *Torres*, 357 N.W.2d at 334.
245. *Id.* at 333-34.
246. *Id.* at 333-34, 336.
247. *Id.* at 340-41. The order of the court stated "that the conservator had the right to issue his substituted judgment for that of the comatose conservatee." *Id.* at 341.
248. *Id.* at 339. See, e.g., Severns v. Wilmington Medical Center, Inc., 421 A.2d 1334, 1347-49 (Del. 1980) (allowing the guardian to invoke the incompetent's constitutional right to privacy to disconnect life-support after an evidentiary hearing before the court); John F. Kennedy Memorial Hosp., Inc. v. Bludworth, 452 So. 2d 921, 926 (Fla. 1984) (allowing an incompetent's family or guardian to exercise the incompetent's right to refuse or terminate life-support); Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, ——, 370 N.E.2d 417, 434 (1977) (allowing the incompetent's guardian to discontinue the incompetent's life-support following court approval); *In re Quinlan*, 70 N.J. 10, 42, 355 A.2d 647, 664 cert. denied sub nom. Garger v. New Jersey, 429 U.S. 922 (1976) (allowing the incompetent's guardian or family to exercise the incompetent's constitutional right to refuse life-support); *In re Storar*, 52 N.Y.2d 363, 378-80, 420 N.E.2d 64, 71-72, 438 N.Y.S.2d 266, 274 (1981), cert. denied, 454 U.S. 858 (1981) (allowing the guardian to discontinue the incompetent's life-support, when the guardian demonstrated by clear and convincing evidence that the incompetent would refuse the treatment); Leach v. Akron General Medical Center, 68 Ohio Misc. 1, ——, 426 N.E.2d 809, 816 (1980) (allowing the guardian to terminate the incompetent's life-support, if the incompetent would have terminated life-support while competent); *In re Colyer*, 99 Wash. 2d 114, ——, 660 P.2d 738, 751 (1983) (en banc) (allowing the incompetent's guardian to discontinue the incompetent's life-support, if the incompetent would have chosen to have life-sustaining treatment removed while competent).
In *In re Grant*, a Washington case decided five years after *Colyer*, Barbara Grant suffered from Batten's disease, an incurable neurological disorder. Grant was declared incompetent and admitted to the Rainier State School in Buckley, Washington. The guardian, Barbara's mother, petitioned the Pierce County Superior Court for an order to authorize the withdrawal of Grant's life-support. The trial court denied the guardian's request, reasoning that the issue was premature.

The Supreme Court of Washington reversed the trial court, holding that "in the absence of countervailing state interests, a person has the right to have life sustaining treatment withheld where he or she (1) is in an advanced stage of a terminal and incurable illness, and (2) is suffering severe and permanent mental and physical deterioration." The court determined that the incompetent's rights are based upon the doctrine of informed consent, the common-law right to be free from bodily invasion, and the right to privacy. The court then allowed Grant's guardian to exercise her right to refuse medical treatment.

The court stated that the guardian may terminate medical treatment for an incompetent when the patient's immediate family members, physicians, and the guardian agree that such treatment should be withheld. The court further stated that the guardian must first determine if the incompetent would have refused the treatment. If this cannot be accomplished, then the guardian must determine if terminating the treatment is in the best interest of the patient.

In the Arizona case of *Rasmussen v. Fleming*, the Pima County Public Fiduciary petitioned the Pima County Superior Court to become guardian of a seventy-year-old patient who resided at the

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251. Id. at 547, 747 P.2d at 446.
252. Id. at 548, 747 P.2d at 447.
253. Id. at 550, 747 P.2d at 448.
254. Id. at 551, 747 P.2d at 448.
255. Id. at 556, 747 P.2d at 451. There were four asserted countervailing state interests: "(1) the preservation of life; (2) the protection of interests of innocent third parties; (3) the prevention of suicide; and (4) the maintenance of the ethical integrity of the medical profession." Id. (citations omitted).
256. Id. at 533, 747 P.2d at 449.
257. Id. at 566, 747 P.2d at 456.
258. Id.
259. Id.
260. Id. at 556-57, 747 P.2d at 456. The court cited the standards used in the *Conroy* limited-objective and pure-objective tests. *Grant*, 109 Wash. 2d at 567-68, 747 P.2d at 457. See *supra* notes 90-97 and accompanying text.
Posada Del Sol Nursing Home in Tucson. The public fiduciary sought to terminate Rasmussen's artificial nutrition and hydration because three strokes had destroyed Rasmussen's ability to care for herself. The trial court found that Rasmussen was in a persistent vegetative state; therefore, the court granted the public fiduciary's petition and allowed the public fiduciary to exercise Rasmussen's right to terminate medical treatment. The court stated that the guardian should use the substituted judgment approach so that the guardian's "decisions are guided by the ward's prior acts, writings, and statements concerning medical care." The court also stated that when the guardian is unable to apply the substituted judgment test, then the guardian should use the best interests test. The court stated that the public fiduciary could exercise Rasmussen's right under the best interests test, because Rasmussen, while competent, had not expressed any desire regarding life-sustaining medical treatment. This holding was affirmed by the Arizona Court of Appeals. The court of appeals held that the best interests test should be used when there is no evidence that the incompetent would have declined the medical treatment.

The Supreme Court of Arizona affirmed in part and reversed in part the court of appeals, holding that absent reliable evidence that the incompetent would forgo the treatment, the guardian must use the best interests test to exercise the incompetent's right to refuse medical treatment. The Arizona Supreme Court followed the approaches of the Minnesota and Washington Supreme Courts and allowed a surrogate to exercise the incompetent patient's right to refuse unwanted medical treatment. The Arizona Supreme Court based the incompetent patient's right on the doctrine of informed consent, and the right to privacy as guaranteed by both the Arizona and United States Constitutions.

ANALYSIS

In *Cruzan v. Director, Missouri Department of Health*, the
United States Supreme Court implied that an individual has a constitutional right to refuse medical treatment. The Court also held that a state may require clear and convincing evidence of an incompetent's intent to allow a surrogate to exercise the right to refuse medical treatment. The Court did not define the meaning of clear and convincing evidence and allowed the states to determine their own standard. The Court allowed the states to determine which standard should be applied when a surrogate exercises an incompetent individual's right to refuse medical treatment.

The Missouri approach limits a surrogate's authority to terminate an incompetent patient's life-support by requiring that the incompetent must have demonstrated an intent to refuse medical treatment by clear and convincing evidence. Absent a living will comporting with the Missouri Living Will Act, the Missouri Approach requires clear and convincing evidence of an incompetent's desire to terminate medical treatment. This approach denies the incompetent's right when the incompetent patient has not adequately demonstrated his intent to refuse life-support.

An incompetent patient's right to refuse medical treatment stems from a competent individual's right to refuse medical treatment. The New Jersey Supreme Court has stated that a competent person has a right to refuse medical treatment and that the subjective test used in *In re Conroy* should be used to demonstrate an incompetent individual's intent to refuse medical treatment. The New Jersey approach treats competent and incompetent individuals the same by granting to them identical rights. This approach preserves the incompetent patient's right to refuse medical treatment by using the substituted judgment test of *In re Quinlan*, the *Conroy* triple option test, and a combination of the two.

The New Jersey Supreme Court uses the *Quinlan* substituted
judgment test, Conroy triple option test, and a combination of both to allow a surrogate to exercise an incompetent patient's constitutional right to terminate medical treatment. Some state courts apply the substituted judgment test to effectuate the incompetent's rights. Other state courts apply either the substituted judgment test or best interests test, depending on whether or not the incompetent demonstrated his intent to refuse medical treatment. The New Jersey approach encompasses both approaches.

The states should adopt the New Jersey Supreme Court's approach, rather than the Missouri approach, because the New Jersey approach creates a better legal standard for a surrogate to use in order to exercise the incompetent's constitutional right. The New Jersey approach allows a surrogate to exercise the incompetent's constitutional right to refuse treatment in all situations. The New Jersey approach also provides opportunities for an incompetent to demonstrate an intent to refuse medical treatment. This standard would create uniformity among the states and allow the incompetent to exercise his right to refuse medical treatment. Without a uniform application of standards, the incompetent's family may be forced to move the incompetent to another state which honors the constitutional right of the incompetent to effectuate the incompetent's wishes in a less restrictive way. For incompetent patients who do not have a family, the incompetent will be at the mercy of the state in which he currently resides.

The New Jersey approach uses two different methods to allow the surrogate to exercise the incompetent's right to refuse medical treatment. This allows a surrogate to exercise the broadest discretion when exercising the patient's right because the surrogate has the ability to execute the incompetent's desires or determine what would be in the best interests of the incompetent in that particular circum-

288. See supra notes 176-219 and accompanying text.
289. See supra notes 220-72 and accompanying text.
290. See supra notes 70-97, 132-41 and accompanying text.
291. See infra notes 300-28 and accompanying text.
293. Conroy, 98 N.J. at —, 486 A.2d at 1229-30. See supra notes 83-88 and accompanying text.
295. Id.
The New Jersey approach has been adopted by a number of state courts which have determined that an incompetent should not lose his right to refuse medical treatment just because he is incompetent. In 1987, the New Jersey Supreme Court, in a trio of cases, determined the circumstances under which a surrogate may use a combination of the Quinlan substituted judgment test and the Conroy triple option tests.

**Greater Flexibility Under The New Jersey Approach**

The New Jersey approach allows a surrogate to exercise the broadest discretion when exercising an incompetent’s constitutional right to refuse medical treatment. In Quinlan, the court used the substituted judgment test, allowing the surrogate to determine what the incompetent would have wanted under these circumstances. The court expanded a surrogate’s authority to make decisions on behalf of the incompetent in Conroy. In Conroy, the court used a subjective test and two best interests tests which allowed the surrogate to exercise the incompetent’s best interests when the incompetent had not expressed an intent to refuse medical treatment.

The Missouri approach limits a surrogate’s authority to terminate an incompetent patient’s life-support. The Missouri approach requires that the incompetent demonstrate his intent to refuse life-support by clear and convincing evidence. This evidence may be demonstrated by the use of a living will. However, the Missouri Supreme Court does not allow a surrogate to use either the substituted judgment test or the best interests test when the clear and convincing evidence standard is not met. The court denies the incompetent’s right to terminate life-support and instead defers to the state’s policy of erring on the side of life.

The incompetent patient would be best served by the adoption of the New Jersey approach because it would neutralize the inherent problems when a surrogate is limited to one test. For example, the

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298. See supra notes 220-72 and accompanying text.
299. See supra notes 132-41 and accompanying text.
301. Quinlan, 70 N.J. at 41-42, 355 A.2d at 664.
303. Id. at ——, 486 A.2d at 1228-32.
304. Harmon, 760 S.W.2d at 425.
305. Id.
306. Id.
307. Id. at 425-26.
308. Id. at 426.
substituted judgment test does not apply when the incompetent patient had not previously expressed his desire to refuse medical treatment.\textsuperscript{309} The best interests test is similarly limited because it is paternalistic in nature and infringes upon the incompetent patient’s autonomy and dignity.\textsuperscript{310} However, when the tests are used in conjunction, the surrogate first determines the subjective desire of the incompetent patient.\textsuperscript{311} If the incompetent had failed to express his desire to forego the medical treatment, then the surrogate may predict what the patient would want to have done.\textsuperscript{312}

The New Jersey approach takes these factors into consideration by providing various tests.\textsuperscript{313} For example, the \textit{Conroy} subjective test is used in every situation to effectuate the incompetent’s wish to terminate life-support.\textsuperscript{314} However, when the surrogate lacks sufficient evidence that the incompetent patient would decline medical treatment, then either the \textit{Quinlan} substituted judgment test or the \textit{Conroy} best interests tests are used, depending upon the particular circumstances.\textsuperscript{315} The \textit{Quinlan} substituted judgment test is used for incompetent patients who are in a persistent vegetative state.\textsuperscript{316} The \textit{Conroy} best interests tests are used when an incompetent patient is not in a persistent vegetative state.\textsuperscript{317} By using a combination of these tests, the surrogate is able to avoid the inherent problems that the substituted judgment test and the best interests tests create when they are used separately.

There are inherent problems when a court tries to apply only the best interests test in this area. In \textit{Brophy v. New England Sinai Hospital, Inc.},\textsuperscript{318} the Supreme Judicial Court of Massachusetts pointed out that the best interests test is unduly paternalistic because it accords little respect for the patient’s bodily integrity and autonomy.\textsuperscript{319} The court then stated that the substituted judgment test honors the dignity and privacy of the individual by determining what the person would want under the circumstances.\textsuperscript{320} In addition, few courts have

\begin{itemize}
\item \textsuperscript{309} Rasmussen v. Fleming, 154 Ariz. 207, ——, 741 P.2d 674, 689 (1987) (en banc).
\item \textsuperscript{311} \textit{Conroy}, 98 N.J. at ——, 486 A.2d at 1228-32; \textit{Peter}, 108 N.J. at ——, 529 A.2d at 429-30.
\item \textsuperscript{312} \textit{Conroy}, 98 N.J. at ——, 486 A.2d at 1228-32; \textit{Peter}, 108 N.J. at ——, 529 A.2d at 429-30.
\item \textsuperscript{313} See supra notes 70-97, 132-41 and accompanying text.
\item \textsuperscript{314} \textit{Peter}, 108 N.J. at ——, 529 A.2d at 429.
\item \textsuperscript{315} \textit{Id.} at ——, 529 A.2d at 429.
\item \textsuperscript{316} \textit{Id.} at ——, 529 A.2d at 429.
\item \textsuperscript{317} \textit{Id.} at ——, 529 A.2d at 429.
\item \textsuperscript{318} 398 Mass. 417, 497 N.E.2d 626 (1986).
\item \textsuperscript{319} \textit{Id.} at 430-31, 497 N.E.2d at 633.
\item \textsuperscript{320} \textit{Id.} at 431, 497 N.E.2d at 633.
\end{itemize}
adopted the best interests test, while other courts have rejected the test. Most courts use the best interests test as a backup when there is insufficient evidence to use the substituted judgment test.

The substituted judgment test also has problems when a court tries to apply only that test. In Rasmussen, the Arizona Supreme Court pointed out that where there is no reliable evidence of an incompetent patient's intent, the substituted judgment test "provides little, if any, guidance to the surrogate decisionmaker and should be abandoned in favor of the 'best interests' standard."

The New Jersey approach is a well reasoned approach because it allows the surrogate to first use the Conroy subjective test when the incompetent patient demonstrates his intent to forego treatment. If the incompetent patient did not leave clear and convincing evidence of his intent, then the surrogate is given flexibility because the surrogate is allowed to use either the Quinlan substituted judgment test or the Conroy limited-objective or pure-objective tests.

Six Methods For Demonstrating Patient's Intent

The New Jersey approach allows an incompetent six different methods to demonstrate a desire to refuse medical treatment.

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322. See In re Guardianship of Browning, 543 So. 2d 258, 273 (Fla. Dist. Ct. App. 1989), aff'd, 568 So. 2d 4 (Fla. 1990) (rejecting objective or best interest approach); Harmon, 760 S.W.2d at 424 (stating that the Missouri Guardianship statute requires a guardian to act in the incompetent's best interests and those interests do not include terminating medical treatment); In re Westchester County Medical Center, 72 N.Y.2d 517, 529-30, 531 N.E.2d 607, 613, 534 N.Y.S.2d 886, 892 (1988) (rejecting the best interests approach).

323. See, e.g., Rasmussen, 154 Ariz. at ——, 741 P.2d at 689 (holding that absent reliable evidence that the incompetent would forego the treatment, the guardian must use the best interests test to exercise the incompetent's right to refuse medical treatment); Barber v. Superior Court, 147 Cal. App. 3d 1006, 1021, 195 Cal. Rptr. 484, 493 (1983) (stating that if the surrogate is unable to determine what choice the patient would make, then the surrogate should be guided by the patient's best interests); Foody v. Manchester Memorial Hosp., 40 Conn. Supp. 127, ——, 482 A.2d at 713, 720-21 (1984) (stating that if the incompetent patient did not express his or her desire to refuse treatment, then the best interests test should be used); Conroy, 98 N.J. 321, ——, 486 A.2d 1209, 1229-30 (1985) (allowing a surrogate to use the limited-objective test or pure-objective test when the incompetent patient did not express a desire to refuse medical treatment); In re Grant, 109 Wash. 2d 545, 556-67, 747 P.2d 445, 457 (1987), modified by, —— Wash. 2d ——, 757 P.2d 534 (1988) (allowing a surrogate to first determine if the patient would decline the treatment, and if the incompetent did not demonstrate his intent, then allowing the surrogate to act in the patient's best interests).

324. Rasmussen, 154 Ariz. at ——, 741 P.2d at 689.

325. See Peter, 108 N.J. at ——, 529 A.2d at 429.

326. Id. at ——, 529 A.2d at 429.

327. Conroy, 98 N.J. at ——, 486 A.2d at 1229-30. See supra notes 83-88 and accompanying text.
These methods include the use of oral and written communication by the incompetent and past behavioral patterns in which the incompetent's intent may be inferred.\textsuperscript{328} The New Jersey approach does not force a person to write out his desire to refuse medical treatment in order to demonstrate his intent.\textsuperscript{329}

In \textit{Cruzan}, Justice O'Connor, in her concurring opinion, pointed out methods by which a person would be able to provide information to a surrogate in the event that the person would become incompetent.\textsuperscript{330} Justice O'Connor noted that at least thirteen states have enacted "durable power of attorney statutes that specifically authorize an individual to appoint a surrogate to make medical treatment decisions."\textsuperscript{331} Further, Justice O'Connor stated that "[s]ome state courts

\textsuperscript{328} Conroy, 98 N.J. at —, 486 A.2d at 1229-30.
\textsuperscript{329} Id. at —, 486 A.2d at 1229-30.
\textsuperscript{330} \textit{Cruzan}, 110 S. Ct. at 2857 (O'Connor, J., concurring). The right to refuse medical treatment and nutrition and hydration is a protected liberty interest. \textit{Id.} at 2856 (O'Connor, J., concurring).
\textsuperscript{331} \textit{Cruzan}, 110 S. Ct. at 2857 n.2 (O'Connor, J., concurring). See \textit{Alaska Stat.} § 13.26.335 (Supp. 1990) (authorizing a person to appoint an agent to make health care decisions); \textit{Cal. Civ. Code} § 2502 (West Supp. 1990) (authorizing a person to appoint an agent to make health care decisions regarding withholding or withdrawal of life-prolonging treatment); \textit{D.C. Code Ann.} § 21-2205 (1989) (authorizing a competent adult to designate a person to make health care decisions regarding the ability to refuse or withdraw consent for medical treatment); \textit{Idaho Code} § 39-4505 (Supp. 1990) (authorizing a competent person to appoint an adult to make health care decisions including withholding or withdrawal of life-prolonging care, treatment, services, and procedures); \textit{Ill. Ann. Stat.} ch. 110\textsuperscript{1/2}, para. 804-3 (Smith-Hurd Supp. 1990) (authorizing a person to appoint an agent who may refuse or withdraw any type of health care including withholding or withdrawal of life-sustaining or death-delaying procedures); \textit{Kan. Stat. Ann.} § 58-625 (Supp. 1989) (authorizing a person to appoint an agent to make health care decisions including consent, refusal of consent, or withdrawal of consent to any care, treatment, service or procedure to maintain); \textit{Me. Rev. Stat. Ann.} tit. 18\textsuperscript{A}, § 5-501 (Supp. 1990) (authorizing a person to appoint an agent to make medical treatment decisions including the power to consent to, withhold consent to or approve on behalf of the person); \textit{Nev. Rev. Stat.} § 449.810 (1989) (authorizing an adult to appoint an attorney in fact to make health care decisions including the power to consent, refusal of consent, or withdrawal of consent to any care, treatment, service or procedure to maintain, diagnose, or treat a physical or mental condition); \textit{Ohio Rev. Code Ann.} § 1377.12 (Baldwin Supp. 1989) (authorizing a person to designate any competent individual who is eighteen years or older to make health care decisions including withdrawal of nutrition and hydration when two physicians go on record stating that the patient will not receive comfort from it); \textit{Ore. Rev. Stat.} § 127.510 (1989) (authorizing a person to designate a competent adult to make health care decisions excluding the withholding or withdrawal of life-sustaining procedures or nutrition and hydration, unless the person specifically so states pursuant to §§ 127.540(6)(a) and 127.590(a)); \textit{Pa. Stat. Ann.} tit. 20, § 5603(h) (Purdon Supp. 1990) (authorizing a person to appoint an attorney in fact to make medical decisions); \textit{R.I. Gen. Laws §§ 23-4.10-1 to 23-4.10-2} (1989) (authorizing a resident of the state who is eighteen years or older to appoint an agent to make health care decisions including withholding or withdrawal of life-prolonging care, treatment, services, and procedures); \textit{Tex. Rev. Civ. Stat. Ann.} art. 4590h-1 (Vernon's Supp. 1990) (authorizing a person who is eighteen years or older to appoint an adult agent to make health care decisions including withholding or withdrawal of life-prolonging treatment); \textit{Vt. Stat. Ann.} tit. 14, §§ 3451, 3453 (1989) (authorizing an
have suggested that an agent appointed pursuant to a general durable power of attorney statute would also be empowered to make health care decisions on behalf of the patient.”332 Nevertheless, she observed, few people actually leave written instructions or provide oral instructions in the event that they would not want medical treatment.333


The Missouri approach demonstrates some of the problems addressed by Justice O'Connor.\textsuperscript{334} The Missouri approach requires an incompetent patient to demonstrate an intent to refuse medical treatment by clear and convincing evidence.\textsuperscript{335} This approach may be satisfied by the use of a living will.\textsuperscript{336} However, most people do not take time to draft a living will to plan for these situations.\textsuperscript{337} Absent a living will, the Missouri approach allows an incompetent patient to demonstrate intent through the use of oral communication.\textsuperscript{338} However, the court may determine that the incompetent’s statements did not meet the clear and convincing evidence standard.\textsuperscript{339}

In Conroy, the New Jersey Supreme Court listed six different types of evidence which demonstrate the incompetent’s intent, including the use of oral communication.\textsuperscript{340} As in Conroy, the New York Court of Appeals in In re Storar\textsuperscript{341} allowed an incompetent to use oral communications to show intent.\textsuperscript{342} Therefore, both the New Jersey Supreme Court and the New York Court of Appeals allow oral communications to be used to demonstrate the incompetent’s in-

\begin{itemize}
\item[334.] Cruzan, 110 S. Ct. at 2857 (O’Connor, J., concurring).
\item[335.] Harmon, 760 S.W.2d at 425.
\item[336.] Id.
\item[337.] Cruzan, 110 S. Ct. at 2857 (O’Connor, J., concurring). See supra notes 330-33 and accompanying text.
\item[338.] Harmon, 760 S.W.2d at 424.
\item[339.] Id. at 424-25.
\item[340.] Conroy, 98 N.J. at ——, 486 A.2d at 1229-30. See supra notes 83-88 and accompanying text.
\item[342.] Id. at 379-80, 420 N.E.2d at 72, 438 N.Y.S.2d at 274.
\end{itemize}
tent to terminate life-support.\textsuperscript{343} If state courts or legislatures adopt the New Jersey approach, an incompetent would be able to use the six available methods listed by the New Jersey courts.\textsuperscript{344}

As the court in \textit{In re Colyer}\textsuperscript{345} pointed out, the guardian should take into consideration statements made by the incompetent when the guardian exercises substituted judgment as used in the substituted judgment test.\textsuperscript{346} An incompetent's statements would be sufficient for a surrogate to exercise the incompetent's right to refuse medical treatment under the New Jersey approach, as illustrated by Quinlan, Colyer, and \textit{John F. Kennedy Memorial Hospital, Inc. v. Bludworth}.\textsuperscript{347}

\textbf{CONCLUSION}

In \textit{Cruzan v. Director, Missouri Department of Health},\textsuperscript{348} the United States Supreme Court held that a state may adopt standards which allow an incompetent to exercise the constitutional right to refuse medical treatment.\textsuperscript{349} New Jersey takes the approach that surrogates should be allowed broad flexibility to exercise incompetent patients' right to refuse medical treatment. The states should adopt the New Jersey approach because it provides greater options to the surrogate to exercise the incompetent's rights. The New Jersey approach also provides greater flexibility to the surrogate to demonstrate an incompetent's intent to refuse medical treatment.

Several states have enacted either living will statutes or health care durable power of attorney statutes to allow incompetent patients to express their desire to refuse life-support. However, these statutes only solve the problem of determining the patient's intent when the patient takes advantage of these statutes.

The New Jersey approach fills the void that is left when the incompetent patient has neither drafted a living will nor left clear and convincing evidence of his intent. The problem with adopting the Missouri approach, which requires an incompetent patient to either draft a living will or provide clear and convincing evidence of his intent, is that the surrogate is restricted in exercising the incompetent patient's right to refuse life-support. Therefore, the states should adopt the New Jersey approach because it more effectively protects

\textsuperscript{343} See supra notes 83-88, 160 and accompanying text.
\textsuperscript{344} See supra notes 83-88 and accompanying text.
\textsuperscript{345} 99 Wash. 2d 114, 660 P.2d 738 (1983) (en banc).
\textsuperscript{346} See supra notes 181-85 and accompanying text.
\textsuperscript{347} 452 So. 2d 921 (Fla. 1984). See supra notes 98-109, 176-200 and accompanying text.
\textsuperscript{348} 110 S. Ct. 2841 (1990).
\textsuperscript{349} Id. at 2852-54.
the rights of incompetent patients to withdraw life-sustaining treatment.

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