Combined vision needed on life decisio

EDITOR'S NOTE: This month's Insight *article is excerpted from the speech "The Fusion of Medicine and the Law for* In Extremis *Health and Medical Decisions — Does It Produce Energy and Light or Just Cosmic Debris?," delivered Oct. 21, 1989, by the Honorable Joseph W. Bellacosa to the American Academy of Psychiatry and the Law.*

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By Judge Joseph W. Bellacosa
New York State Court of Appeals

One of the biggest problems we face together may be described as: How do you physicians and psychiatrists, and how do we lawyers and judges, ensure that an individual's known and reliably expressed wishes about *in extremis* health and medical decisions ... will be faithfully implemented.

The critical corollary is how we all ensure the fulfillment of those wishes, especially — and this is more and more frequent — after the individual loses capacity to communicate, confirm and participate in those decisions and treatments. ...

... You might likely wish that abiding by the credos within your own orbit would insulate you from error and from the probing and second-guessings ... of all others. Sorry, no, for the fact is that the legal profession and the judicial participants in this complex multi-player solar system are centrifugally pulled into the vortex of these disputes by other direct participants.

Yet I candidly emphasize how ill-equipped courts generally are to make the emergency judgment calls of mind-boggling complexity, certainly from the medical-scientific standpoint. Even when we decide a particular case on specific evidence, we cannot pretend to the competence or basis for declaring a universal rule for many varied situations. ...

Traditionally and jurisprudentially, courts are also loathe to adopt scientific and medical technology and results until testing provides virtually certain reliability. Their adversarial and evidentiary nature are also not well suited to that end. We are bound to seek the correct, narrow, fair result; not the broad, big truth...

... Permit me to discuss several New York case illustrations ... to dramatize who make up the casts of characters in some cases, and why these cases symbolically and tragically find expression in judicial opinions at courthouses instead of in final, gentle and personal farewells at home, hospice or hospital.

The Brother Fox case, *Matter of Eichner v Dillon*, involved an 83-year-old member of a Roman Catholic order of religious friars. Brother Fox was placed on a respirator after lapsing into a coma during hernia surgery. When it was determined that Brother Fox had no reasonable chance of recovery, Father Eichner, the director of the religious order, asked the hospital to remove the respirator. The hospital refused to do so without court authorization, so Father Eichner applied to the court for authority to direct removal of the respirator.

Father Eichner based his case on repeated conversations ... in which Brother Fox had expressed his wish not to be kept alive by a respirator if he had no hope of recovery. The opposition party in the case was the local district attorney, who called medical experts to testify that Brother Fox's condition could improve. When the trial court granted Father Eichner's application, the district attorney appealed.

Brother Fox died while still on the respirator. The two appellate courts made an exception to the mootness doctrine, which generally has us forebear rendering a decision when the decree will have no practical consequence. The exception resulted in a ruling favoring Father Eichner's authority to have ordered the removal of the respirator. ...

More recently, the Court of Appeals had a case involving a 77-year-old stroke victim who — although conscious and not terminally ill for any diagnosed disease — required artificial nutrition and hydration. Her daughters objected to the physician's request to insert a nasogastric tube ... so the hospital sought court authorization to insert the tube. The lower courts denied the hospital's petition and directed cessation of the temporary intravenous feeding. But the Court of Appeals reversed, by divided vote, citing the lack of "clear and convincing evidence" that the patient had adequately expressed her wishes to decline artificial and hydration under these medical circumstances. ...

Once controversies of this kind ... hit the skids of what I will call Litigation Alley, they will almost invariably require a judicial resolution. A whole whirlwind of semantical labels, categories and concepts then also fly into action.

Here is where medicine and law merge or clash in a form of fusion. The problem is that less energy and light are produced from that physical phenomenon, metaphorically applied to us. Much heat is generated, to be sure, and I sense ... that much debris and even some long-lasting damage accrues as well.

It seems to me that the common good is not advanced one step when snared in the semantical traps of cataloguing the competing interests as, for example, Right to Life, or Right to Die, or Right to Refuse Medical Treatment, or Right to a Natural Death, or Right to a Dignified Death ... etc. These sample titles and almost all of their words are loaded with biases, predispositional winks and nods and result orientations. However, perception wins every time over reality in this business, and "Right to Die" it is, according to the media drumbeat...

We must struggle to shed the "spin doctoring" implicit in the use of these words and phrases, to try instead to embrace with analysis and sensitivity the root respect and knowledge which allows anyone else or any institution or government — however expert, professional or powerful — to so profoundly dare to affect the life, values and interests of another human being.

The refusal or refusal of *in extremis* medical treatment is elementally premised on the patient's most personal right to self-determination, which in some states is grounded in a common law or decisional law right, not on more sweeping constitutional grounds.

As early as 1891, the Supreme Court of the United States recognized that competent adults have the right to make their own health-care decisions. Indeed, unconsented-to medical treatment is cognizable in damages as an intentional tortious act.

More recently, some state and lower federal courts have begun to apply the penumbral constitutional right to privacy as a source of authority supporting a patient's or even a surrogate's decision to refuse to terminate certain kinds of medical treatment in certain situations.

Both the common law and constitutional invocations function well and fairly when the patient is competent to exercise and communicate the treatment or non-treatment decision.

But a Sequoian problem rises up when courts try to apply either doctrine with respect to the suddenly incompetent patient. If the right is so personal, one may legitimately ask: How can someone else, transported in time, accomplish this quintessentially unique choice on behalf of another, and to whose satisfaction and on what evidentiary basis and burden level?

Many courts employ the "substituted judgment" doctrine allowing a proxy to declare the choice of what the patient would have decided. The seminal and nationally known substituted judgment case is the *Karen Ann Quinlan* case, in which the New Jersey Supreme Court allowed a parent to exercise a choice where the then-incompetent patient had never expressed any treatment preference. The court allowed Karen's father to "substitute" his judgment based on his unique relationship with Karen, and his insight in knowing what she would want done. ...

... We have to honestly face up to the use of pretense or legal fiction in this "substituted judgment" approach. The premise or starting point is one of the most personal rights known to us from our form of government, yet it is transformed and transferred into someone else's best guess as to what is good for the right-possessing patient. And the choice is then governmentally enforced by state-action court decree. ...

... New York has specifically rejected the substituted judgment approach, but not unanimously and not without some critical commentary. New York courts also require clear and convincing proof of prior expressions and choices made while the patient was competent, which must be referable to the medical situation presented.

The New York experience has found expression in major cases at the highest court level, including *Matter of Eichener ... and Matter of O'Connor*, which underscores the kind of proof required to satisfy the "clear and convincing" standard:

(T)he "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 threshhold 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 those statements were made and the inf any, that may be drawn from the surro cumstances are among the facts which considered.

While the court recognized certain inh lems with meeting the standard, the m pressed its fundamental dissatisfaction substituted-judgment doctrine, because " sistent with our fundamental commitmen tion that no person or court should su judgment as to what would be an accepta of life for another. ..."

Some critics argue that New York's convincing" evidence standard is too meet. But if that standard is required to competents against undue involuntary mitment, can a lesser standard be justifie against a perhaps erroneously inflic death?

After all, we enforce rigorously the ru ing decedents' affairs and the execution sions of their wills, dead men's evidenti sions and the like. How anomalous it wo less with respect to the state's overrid and responsibility in protecting lives of pecially those incapable of protecting asserting their own present interests.

At bottom, we are dealing in these de certain death, which is different. It is a tion from which there is no return shou mistake, or change of mind, or cha cumstances. The mistaken exercise of t under a lesser standard would be oxymo

Even under the criticized high, tou mistakes manifest themselves. New Yo startled by one soon after the first appli *O'Connor* holding by a trial judge direc of a gastronomy tube.

The patient, an 86-year-old Albany woman, suffered a massive stroke. W mitted to the hospital, she was cogniti municative. She eventually lost her abil drink and a gastronomy tube was inserte nutrition and hydration.

As her condition deteriorated, her petitioned the court for ... authority to gastronomy tube. The hospital and treating physician opposed the applicat testimony established that while not c was in an "irreversible persistent vege In addition to the medical testimon testified that if the patient were able, say I led a happy life, a good life, and released from all this and go home to m

Based on this and other testimony, ordered the patient transferred to a h would remove the tube and, if none co the hospital she was in would have t tube.

Before the decree could be carried o became alert and communicative, an whether she wanted the tube remove plained to her by a nurse that if the fee mained, she could probably live a few without it, she would die in less than

Medicine and the law grope like lumberin very same societal members but often seeing maintain we will serve those people and ou Cyclops join eyes, bumpy as that may be synergistically a cooperative vision and spirit vice we owe every person we touch.