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CONSTITUTIONAL LAW

Right to Privacy • Removal of Life-Support Systems

Leach v. Akron General Medical Center,

58 Ohio Misc. 1, 426 N.E. 2d 809 (C.P. Summit Co. P. Div. 1980)

THE DECISION IN *Leach v. Akron General Medical Center,*[1] marked Summit County's acceptance of the trend allowing the removal of life support systems from an incompetent terminally ill patient.[2] Technological advancements have enabled the medical profession to maintain a person indefinitely in a chronic vegetative state. These advancements have blurred traditional definitions of death and have raised legal, medical and ethical questions to be resolved within our court system. The *Leach* case was one of first impression in Ohio, and the decision should aid in establishing a framework from which members of the legal and medical professions, as well as the general public, can find support and guidance.

Mrs. Edna Marie Leach, an energetic seventy year-old women, developed marked weakness in her lower extremities. She was diagnosed as suffering from amyotrophic lateral sclerosis, a progressively deteriorating terminal disease of the nervous system.[3] Within two months of this diagnosis, she was admitted to Akron General Medical Center. Within two days, she suffered a cardiac arrest. Cardio-pulmonary resuscitation was administered and her heartbeat was restored, but Mrs. Leach failed to regain consciousness.[4] She was placed on a life support system consisting of a respirator, a nasogastric tube, and a catheter.[5]

Mrs. Leach was maintained on the life support system for over four months, in a semi-comatose, or chronic-vegetative state.[6] Attempts to wean her from

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[1]68 Ohio Misc. 1, 426 N.E.2d 809 (C.P. Summit Co. P. Div. 1980).

[2]*See* Satz v. Perlmutter, 362 So.2d 160 (Fla. App. 1978); Matter of Springs, 405 N.E.2d 115 (Mass. 1980); Supt. Belchertown State School v. Saikwicz, 373 Mass. 728, 370 N.E.2d 417 (1977); In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976), *modifying* 137 N.J. Super. 227, 348 A.2d 801 (1975), *cert. denied sub nom.* Garger v. New Jersey, 429 U.S. 922 (1976); In re Eichner, 73 A.D.2d 431, 426 N.Y. Supp.2d 517 (1980), *modified sub nom.* In re Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y. Supp.2d 266 (1981).

[3]68 Ohio Misc. at 2, 426 N.E.2d at 810.

[4]*Id.* at 3, 426 N.E.2d at 810.

[5]*Id.* "The respirator is for breathing and enters the body through a tube inserted in an incision in the trachea. The nasogastric tube is for feeding and consists of a tube entering the nose and extending into the stomach. The catheter is for bladder elimination." *Id.*

[6]68 Ohio Misc. at 3, 426 N.E.2d at 810. A chronic-vegetative state can include, as it did in this case, a lack of recognition of attempts to communicate with the patient, the patient's inability to move her extremities or to breathe on her own. Mrs. Leach did, however, respond to deep pain by grimacing, and did move her eyes. This eye movement was not associated with cognitive recognition, though. EEG scans

the respirator were futile.[7] Mrs. Leach's husband requested that the use of the respirator be terminated, but the treating physician refused to comply with this request.[8] Mr. Leach petitioned the Summit County Probate Court to be appointed Mrs. Leach's guardian due to her incompetency and was granted that request. Mr. Leach and the Leach's two adult children then instituted this action for and order allowing the discontinuation of the life support system.[9] A guardian ad litem was appointed by the court and evidentiary hearings were held.[10] After reviewing all of the testimony and evidence submitted by the respective parties, the court made the following findings of fact:

1) that Edna Marie Leach is suffering from amyotrophic lateral sclerosis, a terminal illness of the nervous system;
2) that she has suffered irreversible brain damage;
3) that she is in a permanent, chronic, vegetative state;
4) that she is not now cognitive and, within a reasonable medical certainty, it is highly unlikely and remote that her cognitive powers will be restored;
5) that there is no known treatment that can be administered with any expected success;
6) that Edna Marie Leach, in her present physical condition, if competent, would elect not to be placed on or continued on life supports; and
7) that [Mr. Leach and the children's] sole motive for bringing this action is to end their wife and mother's present vegetative condition.[11]

Based upon these findings of fact and a thorough analysis of the issues and the law, the court granted the guardian of Mrs. Leach the power to direct a discontinuation of her respirator, providing that certain procedures were followed.[12]

The issue of when death occurs, not answered in Ohio at the date of this decision, was not an issue that the court had to address.[13] Although modern

showed very low brain activity. *Id. See* 1C ATTORNEY'S TEXTBOOK OF MEDICINE 29 A-45, 29 A-46 (3d ed. 1980).

[7]68 Ohio Misc. at 3, 426 N.E.2d at 810.

[8]*Id.*, 426 N.E.2d at 810-11.

[9]*Id.*, 426 N.E.2d at 811. An Ohio probate court is given equity jurisdiction to act in all matters relating to guardians and to make inquests respecting persons unable to manage their affairs due to physical illness or disability. OHIO REV. CODE ANN. § 2101.24(D), (F) (Page 1976).

[10]68 Ohio Misc. at 3-5, 426 N.E.2d at 811. The general consensus of the testimony was that Mrs. Leach had expressed the desire not to be placed on a life support system if ill. Religious testimony revealed no violation of her faith if removed from the respirator. Medical testimony concluded that Mrs. Leach was not dead under accepted medical standards but that she was not cognitive and that it was very unlikely that she would ever regain consciousness. *Id.*

[11]68 Ohio Misc. at 5, 426 N.E.2d at 811-12.

[12]*Id.* at 12, 426 N.E.2d at 816. Judge Willard F. Spicer delivered the opinion of the court. *See infra* notes 53 to 55 and text accompanying for a discussion of the procedures.

[13]68 Ohio Misc. at 6, 426 N.E.2d at 812. *See* Comment, *Quinlan Under Ohio Law,* 10 AKRON L. REV. 145, 146-50 (1976). Since the date of the *Leach* decision, the Ohio legislature, joining the majority trend, has enacted Ohio Rev. Code section 2108.30, effective March 3, 1982, defining death as follows:

An individual is dead if he has sustained either irreversible cessation of circulatory and respiratory

medicine has shifted away from solely basing a determination of death on the cessation of the heart and lungs, and has moved towards brain wave criteria,[14] the *Leach* court recognized that the patient's brain was not dead.[15]

> While she cannot be classified as dead, she can be classified as being very near death, and that is the crux of the problem.
>
> The problem before this court is not life or death. That question has already been decided. Edna Marie Leach is going to die. She is on the threshold of death, and man has, through a new medical technology, devised a way of holding her on that threshold. The basic question is how long will society require Mrs. Leach and others similary situated to remain on the threshold of certain death suspended and sustained there by artificial life supports.[16]

Relying upon the decision reached in *Quinlan* and *Eichner,* the *Leach* court based its decision on the constitutional right to privacy.[17] The *Quinlan* court also based its decision on the right to privacy and was the first to find the fundamental right to privacy "broad enough to encompass a patient's decision to decline medical treatment under certain circumstances. . . ."[18]

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functions or irreversible cessation of all functions of the brain, including the brain stem, as determined in accordance with accepted medical standards. If the respiratory and circulatory functions of a person are being artificially sustained, under accepted medical standards a determination that death has occurred is made by a physician by observing and conducting a test to determine that the irreversible cessation of all functions of the brain has occurred.

OHIO REV. CODE ANN. § 2108.30 (Page Supp. 1982). Some of the first states to adopt similar brain death definitions include Alaska: ALASKA STAT. § 09.65.120 (Supp. 1981); Kansas: KAN. STAT. ANN. § 77-202 (Supp. 1981); Maryland: MD. HEALTH CODE ANN. § 54(F) (1980); Virginia: VA. CODE § 54-325.7 (1982).

[14]As recently as 1968, BLACK'S LAW DICTIONARY followed the classical definition of death: "defined by physicians as a total stoppage of the circulation of the blood, and a cessation of the animal and vital functions consequent thereon, such as respiration, pulsation, etc." BLACK'S LAW DICTIONARY, 488 (4th ed. 1968). *See also* Evans v. Halterman, 31 Ohio App. 175, 165 N.E.2d 869 (Fayette Co. 1928). Since then, however, the definition has shifted towards acceptance of the proposed criteria for brain death as reported by the Ad Hoc Committee of Harvard Medical School in 1968: 1) lack of receptivity and response to painful stimuli; 2) no spontaneous movements or breathing; 3) no reflexes; and a flat EEG, indicating a total absence of brain activity (these tests must then be repeated with the same results twenty-four hours later). *Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death Report: A Definition of "Irreversible Coma,"* as construed in THE DILEMMAS OF EUTHANASIA 161 (J BEHNKE & S. BOK eds. 1975). *See also* 205 J. AMER. MED. ASSOC. 337,338 (1968); Comment, *Quinlan Under Ohio Law, supra* note 13 at 146-50.

[15]68 Ohio Misc. at 6, 426 N.E.2d at 812. There is some support that a person incapable of regaining cognitive functions should be declared legally dead. Skegg, *Irreversibly Comatose Individuals: "Alive" or "Dead"?,* 33 CAMB. L.J. 130, 134-44 (1974); Olinger *Medical Death,* 27 BAYLOR L. REV. 22, 24-26 (1975).

[16]68 Ohio Misc. at 6, 426 N.E.2d at 812. As one writer aptly stated, the "ultimate horror is not death but the possibility of being maintained in limbo, in a sterile room, by machines controlled by strangers." Steel, *The Right to Die: New Options in California,* 93 CHRISTIAN CENTURY 996 (July-Dec. 1976), as quoted in Comment, *North Carolina's Natural Death Act: Confronting Death With Dignity,* 14 WAKE FOREST L. REV. 771, 771 (1977).

[17]68 Ohio Misc. at 9,12, 426 N.E.2d at 814-16. A fundamental right to privacy was first recognized by the United States Supreme Court in Griswold v. Connecticut, 381 U.S. 479 (1965).

[18]In re Quinlan, 70 N.J. at 40, 355 A.2d at 633. The United States Supreme Court has never specifically addressed the issue of an incompetent terminally ill patient. *See* Cantor, *Quinlan, Privacy, and the Handling of Incompetent Dying Patients,* 60 RUTGERS L. REV. 243, 245 (1977). Some members of the Court have advocated that the right to privacy assures self-autonomy and control over one's own body. Doe v. Bolton, 410 U.S. 179, 219 (1973) (Douglas, J., concurring) (decided the same day as Roe v. Wade, 410 U.S. 113 (1973)); Kelley v. Johnson, 425 U.S. 238, 251-53 (1976) (Marshall, J., dissenting). This right was first

Expanding the principles of autonomy and self-determination as articulated by the Supreme Court, the *Leach* court, citing the closely related *Eichner* decision, reasoned that

> the constitutional right to privacy, . . . encompasses the freedom of the terminally ill but competent individual to choose for himself whether or not to decline medical treatment where he reasonably believes that such treatment will only prolong his suffering needlessly, and serve merely to denigrate his conception of the quality of life.
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> . . . .
>
> We further conclude that by standards of logic, morality and medicine the terminally ill should be treated equally, whether competent or incompetent.[19]

It is generally recognized that if a patient is competent, he may exercise his right as to the type and duration of medical treatment.[20] Likewise, an incompetent person who *has* expressed a prior choice should not be denied his rights simply because he is no longer capable of asserting those rights. The state should afford the same rights and choices to the incompetent individual as it does to the competent individual.[21]

In order for an incompetent person to exercise his constitutional rights, a court must recognize either an individual's specific intent, as expressed orally or in a living will, or a substitute judgment made by the court or by the individual's guardian.[22] Substituted judgment allows the court to step into the

articulated, although not fully realized, as the right of "every individual to the possession and control of his own person." Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891). The strongest support for the *Quinlan* and *Leach* holdings is found in Roe v. Wade, 410 U.S. 113 (1973), where the Court found that the right to privacy extends to a woman's decision to terminate a pregnancy within her first trimester.

[19]68 Ohio Misc. at 7,8, 426 N.E.2d at 813, *quoting* In re Eichner, 73 A.D.2d at 458,59,64, 426 N.Y. Supp.2d at 539,42. On appeal, however, the New York Court of Appeals modified the lower courts' opinions by indicating that the relief granted to the petitioner was adequately supported by common law principles, and that the right to privacy issue need not be addressed. 52 N.Y.2d at 376-77, 420 N.E.2d at 70, 438 N.Y. Supp.2d at 272-73. The court also modified the lower courts' opinions by deleting the elaborate procedures set forth below (to seek approval from and give notice to various individuals). Holding that these mandatory procedures should come from the legislature, the court allowed the authorization for the discontinuation of the respirator by the petitioner (even though the case had really become moot due to the death of the patient) to remain as the only necessary procedure. *Id.* at 382-83, 420 N.E.2d at 74, 438 N.Y. Supp.2d at 276.

[20]*See* Canturbury v. Spence, 464 F.2d 772, 780 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972); Holmes v. Silver Cross Hospital, 340 F. Supp. 125 (N.D. Ill. 1972); Schloendorff v. Society of the New York Hospital, 211 N.Y. 125,129,30, 105 N.E. 92,93 (1914), *overruled on other grounds,* Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y. Supp.2d 3 (1957). *See also* Byrn, *Compulsory Lifesaving Treatment for the Competent Adult,* 44 FORDHAM L. REV. 1 (1975). *But see* situations where the state interest overrides the interest of the individual: Jacobson v. Massachusetts, 197 U.S. 11 (1905) (where an individual had no due process right to refuse a vaccination where the refusal represented a threat to the community at large); Application of President & Directors of Georgetown College, Inc., 331 F. 2d 1000 (D.C. Cir.), *reh'g. en banc denied,* 331 F.2d 1010, *cert. denied,* 377 U.S. 978 (1964) (where a young mother was not permitted to refuse treatment on religious grounds when she was responsible for the support of her minor child).

[21]*See* Supt. Belchertown State School v. Saikwicz, 373 Mass. at 739, 370 N.E.2d at 428; In re Eichner, 73 A.D.2d at 464-69, 426 N.Y. Supp.2d at 542-45. *See also* Cantor, *supra* note 18, at 252.

[22]68 Ohio Misc. at 8, 426 N.E.2d at 813-14. The *parens patriae* doctrine of substitute judgment had its origin over 150 years ago in the administration of the estate of an incompetent person. Ex parte Whit-

shoes of the incompetent and make decisions based on what the individual would have done if competent.[23] The *Leach* court, in explicitly finding that Mrs. Leach had unequivocably expressed a desire not to have her life continued by artificial means, was able to base its decision on her specific intent.[24] This determination appears to be pivotal in the court's decision to grant an order for the removal of the respirator; in contrast, the *Quinlan* court found that the specific intent of the individual was not adequately expressed and therefore was unnecessary.[25] The *Quinlan* court stated that the right could be exercised on her behalf by her guardian and family under the circumstances then present.[26] The *Leach* court, on the other hand, felt that it received sufficiently probative evidence to establish that Mrs. Leach, while competent, expressed her preferences as to medical treatment; therefore, self-determination was promoted by allowing the guardian to implement her wishes.[27]

The ability of the individual to exercise (or to have exercised for him or her) the right to discontinue life support systems is not absolute. A court must utilize the traditional balancing test of weighing an individual's fundamental right to privacy against the right of the state to protect its citizens.[28] The state is permitted to deny or infringe upon that right only with a showing of a compelling interest.[29] As distilled from the cases, the state has a claimed interest in: 1) the preservation of life; 2) the protection of innocent third parties; 3) the prevention of suicide; and 4) the maintenance of the ethical integrity of the medical profession.[30]

The most important of the state's interests is preservation of life. As defined in the Ohio Constitution, "[a]ll men . . . have certain inalienable rights, among which are those of enjoying and defending life and liberty. . . ."[31] The court's response to "the preservation of life" interest was to afford it less weight when

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bread in re Hinde, a Lunatic, 35 Eng. Rep. 878 (1816). The doctrine was utilized to authorize a gift from the estate of an incompetent person to an individual when the incompetent owed no duty of support. *See also,* City Bank Farmers Trust Co. v. McGowan, 323 U.S. 594 (1945).

[23]*See* Robertson, *Organ Donations by Incompetents and the Substituted Judgment Doctrine,* 76 COLUM. L. REV. 48, 57-78 (1976). The difficulties in making a decision that the incompetent would have made if competent are obvious.

[24]68 Ohio Misc. at 12, 426 N.E.2d at 816.

[25]70 N.J. at 41, 355 A.2d at 664.

[26]*Id.* Because the court could not discern a supposed choice previously made by Karen Quinlan, "the only practical way to prevent destruction of the right is to permit the guardian and family of Karen to render their best judgment . . . as to whether she would exercise it in these circumstances." *Id.*

[27]68 Ohio Misc. at 4-5, 426 N.E.2d at 811-12. It should be noted that the results reached in this decision are inapposite to prior cases which have held that the right of privacy is so personal that even a parent or legal guardian cannot absolutely exercise a right for another. *See* Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 75 (1976); Young v. That Was The Week That Was, 423 F.2d 265, 266 (6th Cir. 1970); John F. Kennedy Memorial Hospital v. Heston, 58 N.J. 576 583-84, 279 A.2d 670, 674 (1971); In re Clark, 21 Ohio Op.2d 86,89,90, 185 N.E.2d 128,132 (C. P. Lucas Co. 1962). 68 Ohio Misc. at 9, 426 N.E.2d at 814.

[28]68 Ohio Misc. at 9, 426 N.E.2d at 814.

[29]*Id. citing Griswold,* 381 U.S. at 484 and Eisenstadt v. Baird, 405 U.S. 438,453 (1972).

[30]68 Ohio Misc. at 9, 426 N.E.2d at 814, *citing Eichner,* 73 A.D.2d at 465-67, 426 N.Y. Supp.2d at 542-44.

[31]OHIO CONST. art. I § 1.

there was no reasonable possibility that the patient would return to a cognitive and sapient condition.[32] The *Quinlan* opinion noted: "[w]e think that the State's interest *contra* weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims."[33] The *Leach* court's granting of the right to have the respirator removed appears to support the premise that, in determining the weight to be given the state's interest in preserving life, the emphasis should not be on life itself, but on the quality of that life.[34]

In allowing the removal of life support equipment in the instant case, the court limited its holding to the discontinuation of the respirator that was assisting Mrs. Leach.[35] This seems to raise the issue of whether the respirator was treatment that would have been medically defined as ordinary or extraordinary. Ordinary treatment has been defined as all treatment which offers a "reasonable hope of benefit."[36] Extraordinary treatment refers to all treatment which, "if used, would not offer a reasonable hope of benefit."[37]

Following these guidelines, one can infer that the *Leach* court felt that the use of the respirator to sustain Mrs. Leach was, in fact, extraordinary when it referred to *Quinlan* and *Eichner*.[38] And since prevailing medical ethics did not demand that all efforts to prolong life had to be made in extraordinary treatment,[39] the physician would not be violating any professional standards.[40]

The *Leach* court was aware that allowing the removal of a life support system was not without civil and criminal implications.[41] Although Ohio has

[32]68 Ohio Misc. at 9, 426 N.E.2d at 814.

[33]70 N.J. at 41, 355 A.2d at 664. *See also* Cantor, *supra* note 18, at 248.

[34]68 Ohio Misc. at 9, 426 N.E.2d at 814. Even though the *Leach* court found no state interest overriding Mrs. Leach's prior desire to terminate life supports, in some cases the state's interest to preserve life has prevailed over a competent individual's refusal of medical treatment. In the case of, *Application of the President & Directors of Georgetown College, Inc.*, a mother with a seven month-old infant was ordered to submit to an emergency blood transfusion over her objections to such treatment due to religious beliefs. The court reasoned that the state's interest in preserving her life based on her duty to support and protect her minor child outweighed the individual's right to refuse treatment. 331 F.2d 1000,1008 (D.C. Cir.), *reh'g. en banc denied,* 331 F.2d 1010, *cert. denied,* 377 U.S. 978 (1964). *See also* John F. Kennedy Memorial Hospital v. Heston, 58 N.J. 576, 279 A.2d 670 (1971); In re Davis, No. C82-3-4 (C.P. Summit Co. P. Div. 1982). *See generally,* Byrn, *supra* note 20, at 25-28.

[35]68 Ohio Misc. at 12, 426 N.E.2d at 816.

[36]Louisell, *Euthanasia and Biathanasia: On Dying and Killing,* 22 CATH. U.L. REV. 723, 736 (1973), *citing* Kelly, *The Duty of Preserve Life,* 12 THEOLOGICAL STUDIES 550 (1951). *See also* Comment, *Quinlan Under Ohio Law, supra* note 13, at 151. Other criteria used to define ordinary treatment are custom and the expectations of the patient. Gurney, *Is There a Right to Die?,* 3 CUM.-SAM. L. REV. 235, 247 (1972).

[37]Louisell, *supra* note 36, at 736.

[38]68 Ohio Misc. at 10, 426 N.E.2d at 814-15.

[39]*See* Collins, *Limits of Medical Responsibility in Prolonging Life,* 206 J. AMER. MED. ASSOC. 389 (1968); Lewis, *Machine Medicine and Its Relation to the Fatally Ill,* 206 J. AMER. MED. ASSOC. 387 (1968); Williamson, *Life or Death — Whose Decision?,* 197 J. AMER. MED. ASSOC. 793 (1966), which indicate that many commentators in the medical community have come to recognize that the terminnaly ill, particularly those in irreversible comas, need care and comfort, but not extraordinary life-sustaining therapy. *Id.*

[40]68 Ohio Misc. at 10, 426 N.E.2d at 814-15.

[41]*Id.* at 12-13, 426 N.E.2d at 816. Since Mrs. Leach was not herself making the decision to terminate her life support system, one could speculate that the acting physician could have been liable for failing to receive her informed consent. *See e.g.* Natanson v. Kline, 186 Kan. 393,405-07, 350 P.2d 1093,1101-03

no penalties for suicide,[42] criminal prosecution could theoretically have been brought under Ohio's homicide,[43] assault,[44] and/or complicity statutes.[45] A distinction can be drawn, however, between killing, which requires a specific intent, and the withdrawal of extraordinary life supports, which evinces only an intent to permit the "processes of nature to run their course."[46] Furthermore, as stated by the court in *Quinlan,* if termination represents implementation of a constitutional right to privacy, it cannot be deemed criminal conduct.[47] This protection also extends to third parties who merely effectuate the right of the individual.[48] With such strong precedent on point, the *Leach* court appeared to have little difficulty in ruling that the termination of the respirator, should such action result in death, would "not give rise to either civil or criminal liability on the part of any participant, guardian, physician, hospital, or others."[49]

Before coming to its final conclusions, the *Leach* court responded to questions raised by the guardian ad litem concerning the standard of proof to be used in weighing the evidence.[50] Aligning itself closely with the appellate court decision in *Eichner,* the *Leach* court adopted the highest possible civil standard of proof — clear and convincing evidence.[51] When the issues are, by their

(1960); Woods v. Brumlop, 71 N.M. 221,227-28, 377 P.2d 520,524-25 (1962). As Justice Cardozo asserted: "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages." Schloendorff v. Soceity of the New York Hospital, 211 N.Y. 125,129-30, 105 N.E. 92,93 (1914), *overruled on other grounds,* Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y. Supp.2d (1957).

[42]68 Ohio Misc. at 10, 426 N.E.2d at 815.

[43]*Id.* OHIO REV. CODE ANN. §§ 2903.01-.05 (Page 1982).

[44]OHIO REV. CODE ANN. §§ 2903.11-.14 (Page 1982).

[45]OHIO REV. CODE ANN. § 2923.03 (Page 1982). In fact, before this opinion was rendered, the Summit County Coroner did threaten to prosecute anyone who disconnected the respirator. Akron Beacon Journal, December 30, 1980, A-1 at col. 1. Following this opinion, however, that threat was not carried out.

[46]68 Ohio Misc. at 10, 426 N.E.2d at 815. Professor Louisell has observed that it would be legally unreasonable to convert an act of omission into one of commission "by the mere fact that the machine is turned off when it fails to be effective, rather than not turned on in the first place." Louisell, *supra* note 36, at 736-37.

[47]70 N.J. at 51-52, 335 A.2d at 669-70. The *Quinlan* court also noted that the Supreme Court has indicated that the exercise of a constitutional right is protected from criminal prosecution. Stanley v. Georgia, 394 U.S. 557,559 (1969).

[48]Eisenstadt v. Baird, 405 U.S. 438,445-46 (1972); Griswold v. Connecticut, 381 U.S. 479,481 (1965).

[49]68 Ohio Misc. at 13, 426 N.E.2d at 816. However, in December, 1981, Mr. Gifford Leach filed a suit in Federal District Court against the physician who refused to disconnect the respirator and Akron General Medical Center for damages resulting from their refusal to discontinue life support systems from the time of the family's request until the court order was rendered. Estate of Leach v. Shapiro, No. C81-2559-A (N.D. Ohio, filed December 23, 1981). This action was dismissed with prejudice at plaintiff's costs on June 29, 1982.

[50]68 Ohio Misc. at 11, 426 N.E.2d at 815. The guardian ad litem suggested that the court apply the standard of beyond a reasonable doubt. *Id.*

[51]68 Ohio Misc. at 11, 426 N.E.2d at 815. The *Eichner* court, rejecting the reasonable doubt standard said:

> Under the circumstances present herein, by no stretch of the imagination can the State be deemed to be "taking life" in a manner analogous to the imposition of the death penalty in a criminal action. This judicial proceeding is not directed towards the imposition of a penalty for criminal activity but, rather, towards the furtherance of the best interests of the comatose and terminally

very nature, of utmost importance and consequence, the highest standard of civil proof, clear and convincing evidence, is applicable.[52]

In contrast to the *Eichner* and *Quinlan* decisions, which set out specific procedures to provide for future similarly situated petitioners,[53] the procedures mandated by *Leach* were tailored to encompass only the instant fact situation.[54] Of course, those courts, being appellate in nature, were in a better position to establish state or jurisdictional precedent than the *Leach* court. Still, the *Leach* court did not foreclose the application of similar procedures in future cases.

CONCLUSION

Although the court has taken steps to alleviate the moral, medical, and legal dilemma that recent medical technology has brought about, many of the questions and problems remain. Among those questions left unanswered: Are medications or food part of a life support system?[55] If there is disagreement between interested persons who are competent to make a responsible judgment in the matter, how is that to be resolved? How is the medical profession affected by such a decision, and what is their role in the decision-making process?[56]

A more effective solution to the problems is legislation which clearly defines the rights of the terminally-ill patient and provides remedies for the patient,

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ill patient.

Id. citing In Re Eichner, 74 A.D.2d at 468, 426 N.Y.Supp.2d at 545.

[52]68 Ohio Misc. at 11, 426 N.E.2d at 815. *See* Merrick v. Ditzler, 91 Ohio St. 256, 110 N.E. 493 (1915).

[53]The intermediate appellate court in *Eichner* outlined the following procedures for the withdrawal of extraordinary life-sustaining measures from the terminally ill and comatose patient: 1) the physicians attending the patient must certify that he is "terminally ill and in an irreversible, permanent or chronic vegetative coma, and that the prospects of his regaining cognitive brain function are extremely remote"; 2) a family member or someone having a close personal relationship with the patient may present the prognosis to an appropriate hospital committee, whereupon the committee shall approve or reject the prognosis. Upon confirmation of the prognosis, the Attorney General and District Attorney shall be given notice and have an opportunity to have examinations conducted by their own physicians. Finally, a guardian ad litem shall be appointed to assure that the interests of the individual are protected. (These procedures were modified by the New York Court of Appeals, which required only the authority granted to the guardian. All other procedures were deemed unnecessary.) 73 A.D.2d at 476-77, 426 N.Y.Supp.2d at 550, *modified sub nom.* In re Storar, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.Supp.2d 266 (1981). The *Quinlan* court also established procedures whereby a physician attending a patient must determine that the patient is in a permanent comatose condition with no reasonable possibility of regaining a cognitive sapient state. The physician must then consult with the hospital "Ethics Committee" or like body of the institution; the committee shall then approve or reject the prognosis. 70 N.J. at 54-56, 335 A.2d at 671-72.

[54]68 Ohio Misc. at 12, 13, 426 N.E.2d at 816. The following conditions must be complied with prior to the act of discontinuation:

> (1) A licensed physician and neurologist selected by the guardian must examine and then certify that Edna Marie Leach continues in a permanent vegetative state, and that there is no reasonable medical possibility that she will regain any sapient or cognitive function.
>
> (2) A forty-eight hour notice of the examination must be given to the Summit County Coroner and Prosecutor. [They] may have a witness or witnesses present at the examination.
>
> (3) When the examination is complete, a forty-eight hour notice of the [intended discontinuation] must be given to the Summit County Coroner's Office and the Prosecutor's Office.

The respective offices may have witnesses present at the discontinuation. *Id.*

[55]The *Leach* order authorizing the discontinuation of life supports extended "only to the removal of the respirator and to no other life supports." 68 Ohio Misc. at 13, 426 N.E.2d at 816.

[56]*See generally* authorities cited *supra* note 39.

his or her family, and the medical profession. To encourage medical conformity with a patient's wishes, enactment of "living wills," would provide directives for competent persons to expressly establish their intent regarding medical treatment were they to become incompetent.[57]

Presently, the Ohio Legislature has before it House Bill 137,[58] which would recognize the right of a competent adult to affect, by directive or living will, the commencement or discontinuation of life-prolonging measures if that person should become terminally ill. [59] The proposed act would also grant health-care personnel and facilities immunity from criminal or civil liability for acting pursuant to a directive or living will.[60] Finally, the proposed act states that the failure to make a living will does not create a presumption as to a person's intent.[61] Thus, if enacted, this bill would not preclude a person failing to make a will from seeking similar relief.[62]

Until such time that this or a similar bill is passed, individuals must continue to seek relief for the enforcement of their rights through the court system. Although requiring prior judicial approval may be both difficult and cumbersome in jurisdictions where living will statutes are not in effect, it is presently the only means whereby persons similarly situated can have their rights determined with courage, compassion, and objectivity.

STEPHANIE A. ZEMBAR

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[57]*See* Kutner, *The Living Will,* 27 BAYLOR L. REV. 39 (1975); Comment, *North Carolina's Natural Death Act: Confronting Death with Dignity,* 14 WAKE FOREST L. REV. 771 (1978). States presently recognizing living wills include: Arkansas: ARK. STAT. ANN. §§ 82-3801-3804 (Supp. 1981); California: CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West Supp. 1982); Idaho: IDAHO CODE §§ 39-4501-4508 (Supp. 1982); Nevada: NEV. REV. STAT. §§ 449.540-449.690 (1979); New Mexico: N.M. STAT. ANN. §§ 24-1-1 - 24-7-11 (1981); North Carolina: N.C. GEN. STAT. §§ 90-320-322 (Supp. 1981); Texas: TEX. REV. CIV. STAT. ANN. art. 4590h (Vernon Supp. 1981).

[58]Ohio H.B. 137, 114th Gen. Assembly, Reg. Sess. (1981-82), to amend OHIO REV. CODE ANN. § 4731.22 and to enact §§ 2108.30-.37.

[59]Proposed OHIO REV. CODE ANN. §§ 2108.31-.33.

[60]*Id.* at §§ 2108.35-.36.

[61]*Id.* at § 2108.33(B).

[62]*Id.* at §§ 2108.33-34.