SCOPE AND LIMITS OF RIGHT TO REFUSE MEDICAL TREATMENT: THE CASE OF JEHOVAH'S WITNESSES

ARTICLE

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AS ONE OF THE FASTEST GROWING AND MOST REGULATED INDUSTRIES IN THE United States, the healthcare industry provides vast opportunities and challenges for the legal profession. In their day to day work, healthcare lawyers deal with different and sometimes extremely complex legal issues such as regulations from the United States Food and Drug Administration, the Department of Health and Human Services, antitrust regulations, insurance regulations, among others. However, lawyers advising hospital administrators, ethics committees, insurance companies, physicians and other healthcare providers need to be prepared to confront other types of legal matters, sometimes with serious constitutional implications. One of such issues is the right to refuse medical treatment and the implications it could have for patients, healthcare providers and other important players in the healthcare industry.

The right to refuse medical treatment can raise numerous concerns and questions for healthcare lawyers. For example, a healthcare lawyer should be prepared to answer questions such as: (1) what is the legal responsibility of physicians when confronted with a patient who refuses to receive a treatment that the medical professional believes is necessary for a proper care or even to save the patient's life?, and (2) how can he or she balance his ethical responsibility to save lives with his obligation to honor a patient's right to consent to any treatment? Similar questions can also be raised by members of a hospital ethics committee and other hospital administrators confronted with the decision of whether or not to order the continuation or termination of certain medical treatment, or even an insurance company that must decide whether such a

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treatment must be covered or not. Finally, a healthcare lawyer may be called by a patient or an organization to help defend and vindicate an individual's right to refuse certain treatment before an administrative body or a court.

One may think this is a very theoretical and abstract subject. However, it is a very pertinent issue which many healthcare industry players, particularly healthcare lawyers, confront very often. Moreover, the issue has reached the national healthcare reform debate. During the last presidential campaign it was at the center of many controversies and exchanges between the candidates. Referring to some proposals of the Obama campaign about ethics committees to make decisions related to end of life medical treatment, vice-presidential candidate Sarah Palin denounced what she called "death panels."[1] Similarly, Senator Chuck Grassley of Iowa assured that under the Obama proposal the government would be able to issue orders about "pulling the plug on Grandma."[2] Thus, who should make the decision about medical treatment for someone not able to communicate for himself – particularly when that decision has the potential to become a question of life or death – appears to be a principal concern for policy makers as well.

In this article we examine state and federal case law with the aim to have a general understanding of how state and federal courts handle these issues. The jurisprudence that we will analyze should allow us to draw some conclusions about the extent of the protections and limits of a patient's right to refuse medical treatment in the United States. Many of said jurisprudence relates to the followers of the Jehovah's Witnesses religion's refusal to receive blood transfusions. Thus, the purpose of this paper is analyzing the legal norms established by the courts in these types of particularly complex cases where the refusal to receive medical treatment is based on religious beliefs. In doing so, we will discuss some angles of a recently decided case by the Supreme Court of Puerto Rico, as an example of the difficulties that healthcare lawyers, healthcare providers and our judicial system confronts in trying to resolve a controversy involving the right to refuse medical treatment.[3]

The recognition of a patient's right to refuse medical treatment in our legal system is older than – and should not be confused with – the debate about the *right to die* that emerged to the national arena after the *Quinlan* case in 1976.[4] In fact, it has been recognized by our courts since the beginning of the twentieth century as an important element of the informed consent doctrine. In 1914, explaining the informed consent doctrine, Justice Cardozo – then a member of the New York State Court of Appeals – stated that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own

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1 Lepore Jill, *The Politics of Death: From Abortion to Health Care - How the Hysterical Style Overlook the National Debate*, THE NEW YORKER, November 30, 2009, http://www.newyorker.com/reporting/2009/11/30/091130fa_fact_lepore (last visited May 23, 2013).

2 *Id.*

3 Lozada Tirado v. Testigos de Jehová, 177 DPR 893 (2010).

4 *In re Quinlan*, 355 A.2d 647 (1976).

body; and a surgeon who performs an operation without his patient´s consent commits an assault, for which he is liable in damages."[5]

More recently – citing Justice Cardozo's opinion – the Supreme Court of the United States recognized that a patient's right to refuse medical treatment derives from the informed consent doctrine.[6] In the seminal case *Cruzan v. Missouri Dept. of Health*, the Court expressed that "the logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment."[7] Furthermore, and despite an obvious attempt to carefully select its words in order to limit its ruling, the Court recognized that the right to refuse medical treatment – even life – sustaining medical treatment, is protected by the due process clause of the United States Constitution.[8] In previous cases the Court had *assumed* or *suggested* such constitutional protection.[9]

However, the Court highlighted that what is protected by the Constitution is the patient's decision and not that of surrogates. In clarifying the scope of its decision, the Court expressed the following in a footnote:

> We are not faced in this case with the question whether a State might be required to defer to the decision of a surrogate if competent and probative evidence established that the patient herself had expressed a desire that the decision to terminate life-sustaining treatment be made for her by that individual.[10]

Notwithstanding, the Court recognized that in some circumstances an incompetent person may not be able to consent -or not to consent- to medical treatment and the only way to exercise her right to refuse medical treatment is through some sort of surrogate.[11]

Accordingly, our highest court ruled in *Cruzan* that a state may require clear and convincing evidence of the patient's wishes in a proceeding where a surrogate seeks the withdrawal or refusal of an incompetent's medical treatment. The standard of proof would be the same whether the state limits considerations of evidence to the prior expressed wishes of the incompetent individual or whether they

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5 Schloendorff v. Society of N. Y. Hosp., 211 N.Y. 125, 129-30 (1914).

6 Cruzan v. Missouri Department of Health, 497 U.S. 261 (1990).

7 *Id.* at 269-82.

8 In *Cruzan* Chief Justice Rehnquist wrote an opinion for the majority of the Court that, even if agreeing with the Court's decision to upheld the ruling of the Supreme Court of Missouri, had strong differences among themselves in terms of the debate about the right to die. *Id.* On one hand, Justice O'Connor expressed in her concurring opinion a much broader and liberal position that would recognize the right to delegate to someone else the responsibility to make decisions in her behalf to terminate certain treatment, even if that would result in the patient's death. *Id.* at 287 (O'Connor, J., concurring). On the other hand, we had Justice Scalia who believes that the federal courts should not get involved in the debate and stated in his concurring opinion that he would rather let the states set the norms to regulate a person's refusal to certain medical treatment. *Id.* at 292 (Scalia, J., concurring).

9 Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

10 *Cruzan,* 497 U.S. at 287 n.12.

11 *Id.* at 289.

allow a more general proof of what the individual's decision would have been. It is aimed at increasing the risk of an erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment.[12] Thus, according to the *Cruzan* decision, courts can require clear and convincing evidence that the decision of the surrogate conforms as best it may to the wishes expressed by the patient while competent. It is the patients' wishes what really matters.

In doing so, states "may properly decline to make judgment about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interest of the individual."[13] It is worth to mention that the Court reiterated that there is no constitutional protection to an assisted suicide and rejected traditional distinctions between actively hastening death by terminating treatment and passively allowing a person to die of a disease.[14] In this context, in his concurring opinion, Justice Scalia explained, in his typical straightforward style, the following:

> It would not make much sense to say that one may not kill oneself by walking into the sea, but may sit on the beach until submerged by the incoming tide: or that one may not intentionally lock oneself into a cold storage locker, but may refrain from coming indoors when the temperature drops below freezing.[15]

However, as many courts have clarified, the refusal to receive a particular medical treatment does not necessarily imply an intent of committing suicide, particularly when – like in the case of the Jehovah's Witnesses – the patient does not refuse other treatments and is not guided by a desire to die, but by an unequivocal resolution to remain loyal to her religious beliefs and her faith.[16]

Finally, the Supreme Court stated that – like other constitutional rights – the right to refuse medical treatment is not absolute and recognized that such a right must be weighed against some important State interests. Among those interests, the jurisprudence has recognized the preservation of life, the protection of the interests of innocent third parties, the prevention of suicide and the integrity of the medical profession.[17] Therefore, even if the patients' wishes are established by clear and convincing evidence the exercise of her right to refuse medical treatment could be prevented by some State's interests recognized in the jurisprudence.

In conformity with the Supreme Court decision many state courts have adopted some kind of *substitute judgment* proceeding to establish – by clear and convincing evidence – what the patient would have decided if competent. This

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12 *Id.* at 282-87.

13 *Id.* at 282.

14 *Id.* at 275. *See also Washington,* 521 U.S. at 702.

15 *Cruzan,* 497 U.S. at 296 (Scalia, J., concurring).

16 *See* Norwood Hosp. v. Muñoz, 564 N.E.2d 1017 (Mass., 1991); Fosmire v. Nicoleau, 551 N.E.2d 77, 80 (N.Y. 1990).

17 *Cruzan,* 497 U.S. at 271.

kind of proceeding was first applied by the Supreme Court of New Jersey, even before the *Cruzan* decision, in the seminal case *In re Quinlan*.[18] In the *Quinlan* case, after a twenty one year old female suffered brain damages as a result of anoxia and entered a persistent vegetative state, her parents petitioned the court to disconnect her respirator. The *Quinlan* court ruled that the patient had a right of privacy protected by the Federal Constitution to terminate her treatment and concluded that the only practical way to prevent the loss of Karen Ann Quinlan's right to refuse medical treatment due to her incompetence was to allow her father – as the court appointed guardian – to decide whether she would exercise it in these circumstances.[19]

In order to address these cases the court stated the following:

> [T]he court does the "mental mantle of the incompetent" and substitutes itself as nearly as possible for the individual in the decision making process . . . . [T]he court does not decide what is necessarily the best decision but rather what decision would be made by the incompetent person if he or she were competent.[20]

The court must take into account, first, any decision made by the patient when competent, his or her religious beliefs, and the potential impact on other family members.[21] Once the court has established what would the patient do if competent, and assuming it is convinced that it would be to refuse the medical treatment, then the court should consider whether the State can prove an interest powerful enough to override the patient's constitutional right to refuse treatment.

On many occasions it is the hospital that recurs to the court to obtain an order allowing it to conduct the transfusion against the patient's wishes. Therefore, courts have had to address the question whether a hospital or a care provider has standing to invoke a State interest against the constitutional right of every patient to consent or not to consent to medical treatment. In addressing such question, some courts have refused to allow hospitals to act on behalf of the State in asserting the interest of the State against the patient's expressed wishes. In this context, the Florida Supreme Court has stated that "[d]espite concededly good intentions, a health care provider's function is to provide medical treatment in accordance with the patient's wishes and best interests, not as a 'substitute parent' supervening the wishes of a competent adult."[22] Accordingly, the Florida Supreme Court requires any hospital or care provider trying to override a

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18 *In re* Quinlan 355 A.2d 647 (1976).

19 *Id*. at 664.

20 *In re* Care and Protection of Sharlene, 840 N.E.2d 918, 927 (Mass. 2006). *See also Fosmire*, 551 N.E.2d at 879.

21 *In re Care and Protection of Sharlene*, 840 N.E.2d at 927.

22 In re Dubreuil, 629 So.2d 819, 823 (Fla. 1993).

patient's refusal to certain medical treatment to notify the State Attorney presiding in the circuit when the controversy arises.[23]

Other courts, however, despite their refusal to allow a hospital to assert any State interest in these situations, have recognized that hospitals and care providers might be able to prove some interests in participating in such proceeding and, thus, have granted standing.[24] The Connecticut Supreme Court has enumerated the circumstances under which a hospital might have standing to invoke its own interests in a court proceeding related to a patient's refusal to receive medical treatment. In a case where a hospital tried to override a Jehovah's Witnesses refusal to a blood transfusion, the Court expressed:

> We conclude that a private health care facility may not assert the state's interests in opposing a patient's refusal of medical treatment, because to permit such a facility to do so would: (1) contravene the usual rule against vicarious third party standing and (2) place the facility in an inherently conflicted position of opposing its patient's competently expressed desires. Nonetheless, these considerations lead us to conclude that the hospital has standing in its own right to invoke the judicial process in order to seek determinative guidance regarding its obligations in this difficult position.[25]

According to various courts decisions, hospitals have an interest in ensuring that the integrity and ethical standard of the medical profession be maintained. This is so because most of the time a patient's decision to refrain from treatment runs contrary to the training and recommendations of health professionals. Secondly, courts have recognized hospitals' interest in receiving official guidance in how to resolve the dilemma between practicing the medicine by attempting to save its patient's life or whether to practice it according to the patient's wishes to refuse treatment, even if such refusal leads to death. In addition, courts have expressed that practical considerations advise in favor of recognizing standing to hospitals and care practitioners. According to them, in case of emergency it would not be practical to require some state official to appear in front of court and represent the State.[26]

In terms of the State's interests that must be weighed against the patient's constitutional right to refuse medical treatment it is well established that the State has an interest in preventing suicides.[27] However, as we mentioned before, the exercise of a patient's right to refuse medical treatment does not necessarily implied an attempt suicide.[28] Similarly, the State's interest in the protection of life diminishes when the life which the State is trying to protect is that of a com-

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23 *Id.* at 824.
24 The Stamford Hosp. v. Vega, 674 A.2d 821 (Conn. 1996).
25 *Id.* at 830 (quotations omitted).
26 *Id.*
27 Washington v. Harold Glucksberg, 521 U.S. 702, 720.
28 Norwood Hosp. v. Muñoz, 564 N.E.2d 1017 (Mass. 1991); Fosmire v. Nicoleau, 551 N.E.2d 77, 80 (N.Y. 1990).

petent patient that voluntarily -and fully informed of the risks involved in such a decision- has refused medical treatment and when it does not involve innocent third parties.[29] In this context, addressing a case where a Jehovah's Witness refused a blood transfusion because of her religious beliefs, the Massachusetts Supreme Judicial Court:

> In this case, the patient, a fully competent adult, determined for herself that she could not consent the administration of blood or blood products because to do so would violate a sacred religious belief. The patient decided that she would rather risk death than accept the blood transfusion. We can assume that, for this patient, death without receiving a blood transfusion is preferable to life after receiving the transfusion. The quality and integrity of this patient´s life after a blood transfusion would be diminished in her view. Therefore, we conclude that the State´s interest in protecting the sanctity of life must give way to the patient´s decision to forgo treatment.[30]

In addition, courts have refused the assertion that to respect a patient's decision to refuse medical treatment could jeopardize the integrity and ethic of the medical profession. Care providers must administrate medical treatment in accordance with the patient's wishes and desires.[31]

However, the interest most commonly invoked in courts is that of protecting minors from been abandoned by their parents. It is a variant of what the jurisprudence has recognized as the State's interest in protecting innocent third parties. In the context of cases involving Jehovah's Witnesses refusing blood transfusions many times the hospital, a espouse, or a representative of the State asks the court to force the patient to receive blood alleging that his or her children would, effectively, be abandoned. Thus, courts have had to balance the patient's constitutional right to refuse medical treatment with the interest invoked by the State in avoiding the abandonment of the patient's children. In the vast majority of occasions, courts have concluded that there was no abandonment and thus has not made such a direct balance.

In *Norwood Hospital v. Muñoz*,[32] after her admission to a hospital due to a bleeding condition, a Jehovah's Witness patient signed a document expressing her determination not to accept blood transfusion. Notwithstanding, the hospital recurred to court and requested an order to conduct the blood transfusion. During the judicial proceeding the hospital argued that the blood transfusion was necessary to save Ms. Muñoz's life and that her death would leave her child abandoned. The trial court ruled in favor of the hospital and ordered the blood transfusion. After analyzing the circumstances of the case, the Massachusetts Supreme Judicial Court vacated the decision. The Court pointed out that in case

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29 *Norwood Hospital*, 564 N.E.2d at 1022-23.

30 *Id.* at 1023.

31 *See In re* Dubreuil, 629 So.2d 819 (Fla. 1993); Superintendent of Belchertown State School v. Saikewicz, Mass., 370 N.E.2d 417 (1977).

32 *Norwood Hosp.*, 564 N.E.2d at 1017.

Ms. Muñoz died as a result of her decision to refuse a blood transfusion, her husband could take care of their son, despite the fact that Mr. Muñoz was an old person with limited academic background and did not speak English. In addition, the Court highlighted that Mr. Muñoz's sister was willing to help her brother in taking care of the minor. The Court concluded that, absent strong evidence of a total abandonment, the interest of the State in a minor's well-being cannot override the right of a competent adult to refuse treatment.

The Florida Supreme Court and the New York State Court of Appeals have arrived to similar conclusions. . In *In re Dubreuil*, the Floridian courts addressed the case of a women belonging to the Jehovah's Witness religion that refuse a blood transfusion after she lost a considerable amount of blood as a result of a caesarean section.[33] The bleeding left the patient unconscious and the hospital contacted her husband – who was not a Jehovah's Witness – and sought his authorization for the blood transfusion. Once the first blood transfusion was conducted, Ms. Dubreuil awoke from her unconsciousness and refused additional transfusions. The hospital decided to seek a court order arguing that her death would result in the abandonment of her four children. The Florida Supreme Court vacated the inferior court's decision and, like the Massachusetts Supreme Judicial Court, it concluded that as long as someone could take care of the children the State cannot validly argue that a total abandonment would occur. According to the Court, abandonment in these cases cannot be presumed and the party trying to override a patient's decision to refuse medical treatment must provide clear and convincing evidence that her death would leave her children abandoned. The highest court of Florida concluded that to authorize the transfusion in that case would violate Ms. Dubreuil privacy and self-determination rights as well as her right to freedom of religion.[34]

The New York Court of Appeals has expressed – in *dictum* –that even if abandonment was found the right to refuse medical treatment would prevail. According to the Court, a patient's constitutional right to refuse treatment cannot be conditioned to her status as parent.[35] However, this does not seem to be the position of most state courts. As we have mentioned, the majority of courts have avoided addressing what would happen if abandonment effectively occurs. The analyzed jurisprudence shows that, as long as someone can take care of the minors, there is no abandonment and once courts conclude that abandonment would not occur they usually abstain from predicting what would be their decision in the face of abandonment. Some of them seem to suggest that in that scenario the interest of the State in protecting innocent third parties could override that patient's right to refuse medical treatment.[36]

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33 *In re Dubreuil*, 629 So.2d at 824.

34 *Id.* at 824. *See also* The Stamford Hosp. v. Vega, 674 A.2d 821 (Conn. 1996).

35 Fosmire v. Nicoleau, 551 N.E.2d 77, 80 (N.Y. 1990).

36 *The Stamford Hosp.*, 674 A.2d at 830.; *In re Dubreuil*, 629 So.2d at 819; *Norwood Hosp.*, 564 N.E.2d at 1023.

As the aforementioned cases show, following the *Cruzan* decision, courts have been willing to recognize a constitutional right to refuse medical treatment and, in order to protect said right for incompetent parties, sometimes the court would have to undertake a judicial proceeding to try to determine what would be the patient's decision if competent.[37] In such a proceeding courts can take into account the testimony of family members and friends, and can require clear and convincing evidence that their views correspond to what would be the wishes of the patient regarding the treatment. Finally, courts have recognized that some State interests must be weighed against the patient's right to refuse medical treatment.

Despite the vast jurisprudence produced on the subject, the issue is far from settled and many courts still confronting the difficult task to decide whether to order a particular treatment to be administrated to a patient that refuses it. This is by no means an easy task for any judge because it involves the balance of important conflicting interests. In addition, judges know that the possibility of error could be fatal and no one likes to carry such a heavy burden.[38]

While we were writing this article a very interesting case was decided by the Supreme Court of Puerto Rico.[39] It is the first time that the court rules on this kind of cases. In the case, an adult male that belonged to the Jehovah's Witness religion executed a living will expressing his firm decision not to accept blood under any circumstances, even if his life was at risk and physicians believe that a blood transfusion was necessary. In the living will he executed a power of attorney designating a friend – Jehovah's Witness believer as well – to make medical decisions on his behalf if he was not competent to do so. Additionally, he designated an alternate person in case the first one was not able to fulfill his duties. The living will was executed under oath.[40]

After the living will was executed the man suffered an accident and was brought to the hospital unconscious. Because of a serious bleeding the medical staff communicated the family the need to conduct a blood transfusion. However, the patient's friend designated in his living will to make medical decisions for him appeared at the hospital with a copy of the living will and opposed any treatment involving blood transfusion. The wife – who was not a Jehovah's Witness believer – , procured a court order for the blood transfusion but was unable to convince the medical staff. It was not until she obtained a second court order that the hospital acceded to conduct the blood transfusion. In fact, despite the patient's wishes clearly expressed in his living will and timely presented to the

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37 Cruzan v. Missouri Department of Health, 497 U.S. 261 (1990).

38 For example, in the case of Karen Ann Quinlan she did not die in 1976 when the Court allowed the hospital to disconnect the respirator. To everyone's surprise, she was able to breathe on her own. Thus, one could argue that the argument presented to the court that she was basically dead and that the respirator was artificially prolonging her physical presence in this world was inaccurate and could lead the court to the wrong decision. She died of pneumonia in 1985. *See* Jill, *supra* note 1, at 66.

39 Lozada Tirado v. Testigos de Jehová, 177 DPR 893 (2010).

40 *Id.* at 901-02.

hospital by the person that receive the power of attorney to do so, the blood transfusion was conducted but the patient died afterward.

In granting its order the trial court took into account a minor who was apparently adopted by the patient and his wife. The minor was the patient's grandson adopted by him after his father – the patient's son – was killed in an accident. The Court stated that because of the patient's wife limited economic resources and low intellectual capacity she was not able to care for the minor by herself and concluded that if the patient died as a result of his refusal to a blood transfusion the minor would be effectively abandoned. The designee had unsuccessfully argued that the Court order would violate the patient's constitutional right to refuse medical treatment and freedom of religion.

Unsatisfied with the trial court decision the designee appealed. However, the Court of Appeals dismissed for lack of jurisdiction arguing that he had no standing. According to the Court, although Law No. 160 of November 17, 2001 authorizes the execution of living wills including directives regarding the patient's medical treatment in case of unconsciousness, such living will become effective only after the patient is diagnosed with a terminal condition or a permanent vegetative state.[41] In this case no evidence was presented to the Court that the patient had been diagnosed with either condition. Thus, the Court of Appeals restrictive interpretation of Law No. 160 would mean that under Puerto Rican law only a person diagnosed with a terminal condition or a permanent vegetative state can refuse medical treatment.

As the Supreme Court correctly expressed in its opinion, the problem with the Court of Appeals decision is that it contrast with the case law previously discussed that recognized the right of every competent adult to refuse medical treatment and establishes some judicial proceedings to protect said right in the case of an incompetent patient.

The Supreme Court of Puerto Rico had various options in deciding this case. In the first place, the Court could have made a broader reading of Law No. 160 and conclude that, although such statute governs the decision of a person in a permanent vegetative state or diagnosed with a terminal condition, it does not bar someone not suffering from one of these two medical conditions from exercising his or her constitutional right to refuse medical treatment. The Court could rule that such a right is not dependent of Law No. 160, but it is on both the United Sates and the Puerto Rico's Constitution.

It is important to highlight that the Constitution of Puerto Rico expressly recognizes the right to privacy and freedom of religion.[42] In addition, the Puerto Rican jurisprudence has recognized – like most of the jurisdictions previously mentioned – the informed consent doctrine. As stated by the Supreme Court of Puerto Rico, citing previous decisions, the informed consent doctrine guarantees

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41 Advanced Statement of Will Regarding Treatment in the Event of a Terminal Health Condition of Persistent Vegetative State Act, Law. No. 160 of Nov. 17, 2001, 24 LPRA §§ 3651-3663 (2011).

42 P.R. CONST. art. II, § 1.

a patient's right to consent or refuse medical treatment once the physician has provided the necessary information to take such an important decision.[43] This was even stronger if we take into account that the Bill of Rights and Responsibilities of the Patient – among other things – recognizes the right of every patient to leave advance directives regarding medical treatment and the right to designate someone to take medical decisions in case the patient becomes incompetent or somehow unable to communicate.[44] The Supreme Court mentioned the Patient's Bill of Rights in its opinion but decided not to rely on that statute.

However, given the Court of Appeals interpretation of the Law No. 160, the Supreme Court decided to address the constitutionality of this in light of *Cruzan* and its progeny. In order to do so the Court first decided whether the patient had a constitutional right to refuse blood transfusions by expressing his wishes in an advance directive included in a living will. Secondly, it answered if the language of the Law No. 160, apparently limiting the effectiveness of such a document to circumstances where the patient has been diagnosed with a terminal condition or a permanent vegetative state, did not violate the patient's constitutional right to refuse medical treatment. Finally, even if the patient had a constitutionally protected right to refuse medical treatment and that Law No. 160 impermissibly limit such right, it undertook a balance between that right and any State's interest, including the right to avoid the abandonment of a minor.

As we have mentioned before, in *Cruzan* the Supreme Court validated the standard of clear and convincing evidence required by the state of Missouri in order to allow relatives of an incompetent patient to refuse medical treatment in her behalf.[45] However, as the Court clarified in *Cruzan,* the patient left no living will or any directive relating to her wishes about medical treatment. That is, the clear and convincing evidence required by the state of Missouri and followed by many other states is aimed to ensure that the relatives' decision conform to what would be the wishes of the patient if competent. Thus, the *Cruzan* court was dealing with an incompetent patient that failed to leave any clear evidence of what would be her wishes regarding her consent or refusal of medical treatment under the circumstances presented to the Court.

The *Cruzan* court assumed that the Constitution protects the right of a competent person to refuse medical treatment.[46] Furthermore, most of the aforementioned jurisprudence clearly establishes that when courts recur to the *substitute judgment* rule it is only when there is no direct evidence of the patient's wishes about medical treatment and such wishes would have to be established by family members or any person designated by the patient for those purposes. In every one of those proceedings the principal aim was to ensure that

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43 *See* Sepúlveda de Arrieta v. Barreto, 137 DPR 735, 742 (1994); Santiago Otero v. Méndez, 135 DPR 540, 557 (1994); Rodríguez Crespo v. Hernández, 121 DPR 639, 663-68 (1988).

44 Carta de Derechos y Responsabilidades del Paciente, Ley Núm. 194 de 25 de agosto de 2000, 24 LPRA §§ 3041-3058 (2011).

45 Cruzan v. Missouri Department of Health, 497 U.S. 261, 269-82 (1990).

46 *Id.*

whatever decision was made, conform as best as it can to what would had been the patient's decision if competent. As a consequence of that, no one – even a relative or family member – can make medical decision on behalf of the patient, unless there is clear and convincing evidence that such decision conforms, as best it can, to what would be the patient decision if competent.

Therefore, we agree with the Supreme Court of Puerto Rico that the logical implication of *Cruzan* and its progeny is that once the court has found direct evidence about the patient's wishes and desires regarding the medical treatment the court need not recur to the substitute judgment rule. It needs only to examine the validity of the document or veracity of the evidence about the patient's decision and then balance such decision or exercise of the patient's right to consent – or not to consent medical treatment – against any interest that the State may have in the case.

In the case under its analysis,[47] the Supreme Court of Puerto Rico found no need to apply any substitute judgment. Accordingly, there was no need to make any decision for the patient because he expressed his desires unequivocally in a valid document.[48] The court needed not to make any mental mantle and substitutes itself as nearly as possible for the individual in the decision making process.[49] In this case, the patient executed a living will expressing, under oath, his firm resolution to refuse blood transfusion in any circumstance. Thus, the only responsibility left to the person designated by the patient in the living will was to present the document to the hospital's medical staff and to make sure the desires of the patient were honored. He did not need to make any decision regarding the blood transfusion. The decision was made by the patient himself while competent.

The Supreme Court then proceeded to balance the patient's right to refuse medical treatment with the State's interest in protecting minors from been abandoned by their parents. As we had previously discussed, the jurisprudence produced by state courts has recognized that the constitutional right to refuse medical treatment could be override if the State prove its interest in protecting the life of innocent third parties. Specifically, the issue has been addressed by many courts in the context of Jehovah's Witnesses refusal to blood transfusions. In many occasions, the hospital itself or a state representative has argued that the patient's death – as a consequence of his or her refusal to receive blood – can result in the abandonment of minors and had petitioned the court to order the blood transfusion against the patient's expressed wishes to the contrary. However, courts are reluctant to consider that abandonment has occurred unless there is clear evidence that absent the parent refusing the medical treatment the other parent or any other person could not take care of the minor. Therefore, courts have required prove of total abandonment and, if no such evidence is presented,

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47 Lozada Tirado v. Testigos de Jehová, 177 DPR 893 (2010).

48 *Id.* at 931-34.

49 *In re* Care and Protection of Sharlene, 840 N.E.2d 918, 927 (Mass. 2006). *See also* Fosmire v. Nicoleau, 551 N.E.2d 77, 80 (N.Y. 1990).

the right to refuse medical treatment must prevail. That was exactly what the Supreme Court of Puerto Rico did.

The trial court had ruled that because of her limited intellectual capability and scarcity of economic resources the patient's wife was unable to take care of her son by herself and concluded that in those circumstances the minor would been effectively abandoned. Accordingly, the Court ordered the blood transfusion. However, the Supreme Court concluded that the mere fact that the patient's wife had limited intellectual capacity and scarce economic resources is not evidence enough to conclude that a total abandonment could occur and vacated the opinion of the Court of Appeals.[50]

We believe it was the right decision. When balancing the right to refuse medical treatment with any State interest in preventing the exercise of such right the court must not forget that we are dealing with a constitutionally protected right. Thus, the matter cannot be taken lightly. The party opposing the treatment refusal must prove a total abandonment. In this case, -apparently- the evidence does not support that conclusion. In the first place, the mere fact that the patient's wife – according to the court – had limited intellectual capacity and scarce economic resources does not constitute incapacity to care for her child and, thus, does not prove a total abandonment. In fact, if limited intellectual capacity and scarce economic resources would be enough evidence of people incapacity to care for their children, the State would have to become the guardian of many minors whose parents fit those characteristics. We cannot endorse such a rationale.

A similar argument was dismissed by the Massachusetts Supreme Judicial Court in *Norwood Hospital v. Muñoz* where the Court concluded that Ms. Muñoz's husband could take care of their son in case she die as a result of her refusal to a blood transfusion despite the fact that he had very limited formal education and was not able to speak English.[51] In addition, the Court in *Norwood* considered the willingness of Mr. Muñoz's sister to assist him in taking care of the minor as further proof that the minor would not be abandoned.[52] Other courts have arrived to similar conclusions under parallel circumstances refusing to find a total abandonment as long as the other parent or other person can take care of the minor.[53] In the case decided by the Supreme Court of Puerto Rico, the trail court did not considered whether one of the minor's brothers or sisters could assist his mother in his care. In this case, the fact the court had before it an expressed refusal of a person to receive certain medical treatment based on his religious beliefs moved the court to impose a heavy burden on the parties opposing the exercise of said right. In such circumstances, the State must prove an

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50 *Lozada Tirado*, 177 DPR at 931-34.

51 Norwood Hosp. v. Muñoz, 564 N.E.2d 1017 (Mass. 1991).

52 *Id.* at 1017, 1022 (Mass. 1991).

53 *See* Stamford Hosp. v. Vega, 674 A.2d 821 (Conn. 1996); *In re* Dubreuil, 629 So.2d 819 (Fla. 1993); *Fosmire,* 551 N.E.2d at 77.

interest greater enough to override the exercise of a right protected by both the Federal and the Puerto Rican constitution.

There is no doubt about the transcendental importance of the decision reached by the Supreme Court of Puerto Rico. Notwithstanding, we believe it is necessary not only to highlight what the Court decided, but also to clarify what was not decided. First of all, this was not a case about the First Amendment but one limited to the right to refuse medical treatment protected – according to the Supreme Court of Puerto Rico – by the due process clause of the Federal Constitution and the Constitution of Puerto Rico, as well as the informed consent doctrine. However, one cannot underestimate the role played by the freedom of religion claim in this case. The fact that the patient's refusal to receive blood transfusions was based on his religious beliefs and that he did not object to other treatments was of paramount importance for the court's determination that it was not a suicide attempt or a case of euthanasia.[54] The latter are clearly not protected by the decision of the Supreme Court and are expressly prohibited by Law No. 160.[55]

Moreover, the Supreme Court did not declare Law No. 160 unconstitutional as a whole, but only its article 6 to the extent that it limited the right to refuse treatment to patients in a terminal condition or a permanent vegetative state. Thus, the rest of the statute still valid. That includes article 4(b) that in its pertinent part requires –among other formalities- the living will to be in writing, signed and sworn before a notary public by means of a document or testimony, or before a person authorized to authenticate signatures in the Commonwealth of Puerto Rico.[56] In the case decided by the Supreme Court the living will complied with all the formalities required by Law No. 160.

Most importantly -and perhaps controversial- is article 9 that express that in the event that the person refusing treatment is a pregnant woman the living will shall remain ineffective until the pregnancy has ended.[57] As it was the case with article 4, this part of the Law No. 160 was not declared unconstitutional by the court and thus remains valid. It would be interesting to see how the Court would decide a constitutional challenge to this part of the law. However, given the court's emphasis and recognition of the interest of the State in protecting innocent third parties as a valid objection to someone's decision to refuse treatment, an argument can be made that an unborn child – if considered an innocent third party – could prevent a pregnant woman from refusing treatment until the pregnancy has ended. At least in the case of a viable fetus such an argument finds strong support in the federal jurisprudence, which recognizes that in the viable

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54 *Lozada Tirado*, 177 DPR at 916-17.

55 Ley de Declaración Previa de Voluntad sobre Tratamiento Médico en Caso de Sufrir una Condición de Salud Terminal o de Estado Vegetativo Persistente, Ley Núm. 160 de 17 de noviembre de 2001, 24 LPRA § 3662.

56 *Id.* § 3653.

57 *Id.* § 3658.

stage the State has a compelling interest in protecting the life of the unborn child.[58]

Finally, the Supreme Court of Puerto Rico was clear that physicians should not be put in the position to defend the State's interests when they are in conflict with the desires of his patient in terms of the treatment that she is willing to accept. The court wanted to protect the integrity of the medical profession and lessen the potential for a State's intervention with his medical judgment. In addition, the court recognized that medical providers such as hospitals and physicians can recur to the judicial system to receive guidance in cases where they are unsure on how to act in the face of a patient's refusal to receive treatment. However, in the absence of a clear statement as the one in controversy in the recent case decided by the Supreme Court of Puerto Rico, the physician does not need court guidance to apply his professional judgment. He must act according to the applicable standard of care under the particular circumstances.[59]

The case decided by the Supreme Court of Puerto Rico demonstrates that the legal questions related to the right to refuse medical treatment are far from settled. As we continue to witness new advances in medical technology and the development of new treatments capable of prolonging people's lives, the chances of a clash between those developments and people's personal values and religious beliefs increases. Thus, players in the healthcare industry need to be aware of this dilemma and its implications not only for healthcare lawyers but also for healthcare providers themselves. Medical providers, hospital administrators, and member of the judiciary must understand that they need to balance the conflicting interests involved in these type of cases and must realize that despite what they think to be the best course of action, they should honor people's right to decide what kind of medical treatment they receive and that includes the right to decide to receive no medical treatment.

This right must not be confused with the so called *right to die*. Not everyone that refuses medical treatment is opting for death. In fact, like in the case of the Jehovah's Witnesses many people that refuse a particular medical treatment – based on their religious beliefs or other reasons – do not necessary refuse other treatments that even if less effective could be sufficient to save the patient's life. Moreover, when that refusal is based on a religious belief as long as there is no threat to innocent third parties and there is no suicide attempt, an action to prevent the exercise of such right would not only be unconstitutional but fundamentally unfair. People should not be forced to choose between their faith and personal values and their life. Thus, we should honor the decision of a person that validly refuses medical treatment even if that refusal could potentially result in his or her death.

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58 Planned Parenthood v. Casey, 505 U.S. 833 (1992).

59 *See* Hall v. Hilbun, 466 So.2d 856 (Miss. 1985). *See also* BARRY R. FURROW ET AL., HEALTH LAW: CASES, MATERIALS AND PROBLEMS 327-61, 381-421 (6th ed. 2008).

In conclusion, healthcare industry players must be aware of the jurisprudence related to the right to refuse medical treatment. They need to understand that the duty of medical providers and hospital is to provide medical treatment in conformity with the patient's desires, once the patient has been adequately informed of the alternatives in terms of treatment and he or she is able to make an informed decision. Finally, they should know what are the limits of the right to refuse medical treatment and under what circumstances the State may be able to prove an interest in preventing the exercise of such right. Courts have recognized that consequences to innocent third parties might be a proper base for the State to oppose the exercise of said right. However, what consequences to innocent third parties might be enough to effectively override the right to refuse medical treatment is still not clear and courts continue to struggle in their attempt to find the proper balance between the interest of the State and the individual's constitutional right to refuse treatment.