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# When is Enough Simply Enough? Shining Light on Medical Futility Through *Bernstein v. Superior Court*

Phillip L. Kim\*

## I. INTRODUCTION

Medical futility is a highly controversial topic that tests the limits on personal autonomy at the end of one's life. One suggested definition of medical futility is "[an] intervention that [is] unlikely to produce any significant benefit for the patient."<sup>1</sup> A more authoritative and detailed characterization of medical futility is the conflict that arises "[w]hen the medical professional and the patient, through a surrogate, disagree on the worth of pursuing life."<sup>2</sup> Most often, the former considers medical intervention to be futile while the latter desires to delay the inevitable.

This issue is rarely litigated in courts for several reasons—the most obvious being the eventual death of the patient. In the case of *Bernstein v. Superior Court*, a state appellate court dealt with the issue of medical futility during a family dispute regarding the level of proper care that should be afforded to the patient.<sup>3</sup> The court found that the family member pursuing life-prolonging measures was not basing his decisions on medical advice and therefore failed to act in good faith or in the patient's best interest.<sup>4</sup>

## II. FACTUAL BACKGROUND

The 79-year-old conservatee patient, Karl Bernstein, had two sons, Ilya and Nicholas, through his second marriage with Olga Bernstein and one son, Scot Bernstein, by a prior marriage.<sup>5</sup> After years of suffering through degenerative symptoms, Karl was officially diagnosed with Alzheimer's Disease in April 1999.<sup>6</sup> Over the next few years, Karl's condition only worsened. He was transferred from one health care facility to another, only to return to one of the first hospitals he had visited—Los Robles Hospital.<sup>7</sup> At that point the

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1. Nancy S. Jecker, *Ethics in Medicine*, Apr. 11, 2008, available at <http://depts.washington.edu/bioethx/topics/futil.html>.

2. Causey v. St. Francis Med. Ctr., 719 So. 2d 1072, 1074-75 (La. Ct. App. 1998).

3. See *Bernstein v. Superior Court*, 2009 WL 224942, at \*1 (Cal. Dist. Ct. App. 2009).

4. *Id.* at \*12.

5. *Id.* at \*1.

6. *Id.*

7. *Id.*

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family members began to dispute the care Karl should receive and whether there should be orders to resuscitate—or not to resuscitate, otherwise referred to as “DNR.”<sup>8</sup>

Scot officially became Karl’s temporary conservator in April 2003, because Olga was unable to pay for the costs to oppose Scot while dealing with the stresses of litigation and Karl’s illness.<sup>9</sup> Scot and Olga’s agreement expressly stated “that Scot would adhere to physician recommendations.”<sup>10</sup> Soon after, Karl became “completely bedridden, non-communicative, fully contracted in a fetal position, incontinent, unable to eat or swallow, and . . . unable to undertake any volitional act.”<sup>11</sup> He was in a persistent vegetative state and was no longer able to consent to medical treatment, yet he underwent several invasive procedures to keep him alive for the last six years of his life.<sup>12</sup>

Karl suffered from a lack of any significant rest or sleep due to the distortion of his legs underneath him, and his body could not “process the nutrition provided through the feeding tube, rendering him extremely thin and wasted.”<sup>13</sup> He also contracted recurring infections—like pneumonia—because of the tracheostomy tube, and the physicians determined that the intramuscular antibiotic injections were “too painful to continue given their lack of therapeutic value.”<sup>14</sup>

Ilya and Nicholas “contended that Scot had abused his authority as conservator by . . . demanding a series of painful and invasive treatments having no medical or therapeutic value for Karl.”<sup>15</sup> They requested that the trial court change the conservator from Scot to Olga because Scot was not acting in the best interests of Karl, who wrote about his own death in his handwritten journal expressing his desire for “‘some pleasure and comfort out of life, as well as to add to the pleasure and comfort of others.’”<sup>16</sup>

Karl’s doctors unanimously concluded “that Karl [was] in a persistent vegetative state . . . [and] most if not all of the medical staff believed that Karl experience[d] some amount of pain.”<sup>17</sup> Furthermore, the court-ordered report showed “that the doctors ha[d] determined a number of procedures and treatments [were] futile [and] essentially all of the treatments Karl [was] re-

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8. *Id.*

9. *Bernstein*, 2009 WL 224942, at \*2.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Bernstein*, 2009 WL 224942, at \*2.

16. *Id.* at \*3.

17. *Id.* at \*4.

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ceiving [were] inappropriate and the family should withdraw support altogether [because] there [was] minimal, if anything, that [could] be done to change his condition.”<sup>18</sup>

### III. DESCRIPTION OF PETITIONER’S CLAIMS

Scot Bernstein petitioned that the trial court erred by ruling that Karl’s stated desires were not being met because his “present condition was uncomfortable and painful, not pleasurable for him, and his suffering cause[d] stress for all his family [while] the Bioethics Committee concluded there was no treatment that had therapeutic value for Karl’s condition.”<sup>19</sup> Respondents primarily focused on a request to “prohibit medical treatments that are painful and medically futile, such as intramuscular antibiotic injections, discontinue feeding methods that are painful and futile, and remove the tracheostomy tube.”<sup>20</sup>

Scot Bernstein argued that “the trial court confused the issue of removing him [as conservator with] the issue of whether Karl’s life should be terminated.”<sup>21</sup> He contended that “the only ‘harm’ articulated by the trial court was Scot’s actions in keeping Karl alive [yet there was] no evidence that his behavior negatively impacted Karl’s care.”<sup>22</sup> Furthermore, Scot argued that because of his diligence, Karl actually received “excellent care” when Scot made the decision as the conservator to ignore the medical advice of the treating physicians.<sup>23</sup>

### IV. PROCEDURAL AND SUBSTANTIVE HISTORY

The trial court denied Scot’s request and ruled in favor of the respondents, and the court also appointed Ilya as the conservator, while denying Scot’s request for further hearing on the issue.<sup>24</sup> Moreover, the trial court “rejected the ‘clear and convincing standard,’ stating that the ‘preponderance test’ applied in this case.”<sup>25</sup> In response to the trial court’s ruling, Scot appealed, contending that “the trial court abused its discretion in removing him as conservator.”<sup>26</sup>

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18. *Id.*

19. *Id.* at \*3.

20. *Id.*

21. *Bernstein*, 2009 WL 224942, at \*11.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

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## V. COURT HOLDING AND OVERVIEW OF RATIONALE

California's Second District Court of Appeal found that the trial court "applied the proper burden of proof and properly found that Scot was not acting in good faith or in Karl's best interests because Scot's judgment and objectivity were impaired."<sup>27</sup> The appellate court's basic rationale was based on the fact that Scot had acted contrary to the medical advice of the treating doctors, who unanimously agreed that "Karl ha[d] been in a persistent or chronic vegetative state for several years with no hope of recovery, the painful and futile medical procedures should be terminated, he should be placed on DNR, and he should be moved to a sub-acute care facility."<sup>28</sup>

## VI. COURT'S RATIONALE

The California appellate court refused to apply the clear-and-convincing standard used in *Conservatorship of Wendland* "in determining whether or not to allow removal of nutrition, hydration, and respiratory care" because Karl was not "conscious" and the evidence was undisputed that Karl was in a persistent vegetative state with no hope of recovery.<sup>29</sup> Although Karl did show some type of "awareness," any semblance of responsiveness was only "in response to certain medical treatments [and such a] showing of discomfort [did] not render Karl 'conscious' within the meaning of *Wendland*."<sup>30</sup> Moreover, the court rejected the theory that "a person could be both in a persistent vegetative state and conscious at the same time [because] the terms are mutually exclusive."<sup>31</sup>

The court denied Scot any request for a further hearing based on Probate Code § 2355, explaining that it "does not require a further hearing for the court to give its approval of a conservator's decision to withdraw medical treatment, or guarantee an interested party the right to have a hearing should the interested party take issue with a decision as the conservator."<sup>32</sup> The court further elaborated on its stance: "Courts have held that judicial intervention in 'right to die' cases should be minimal. Courts are not the proper place to resolve the agonizing personal problems that underlie these cases."<sup>33</sup>

Thus, the California appellate court agreed that "[n]ot only is there no useful purpose in having a further hearing on the subject of the removal of life sustaining treatment [but] such a hearing would only compound the dam-

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27. See *Bernstein*, 2009 WL 224942, at \*12.

28. *Id.*

29. *Id.* (citing *Conservatorship of Wendland*, 28 P.3d 151 (Cal. 2001)).

30. *Bernstein*, 2009 WL 224942, at \*13.

31. *Id.* at \*13 n.2.

32. *Id.* at \*13 (citing *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 196-97, 200, 202-03 (1998)).

33. *Id.* at \*14 (citing *Conservatorship of Morrison*, 206 Cal. App. 3d 304, 312 (1988)).

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age done to [Karl] and this family . . . by Scot.”<sup>34</sup> Moreover, the court acknowledged that the Bernstein family simply “suffered enough.”<sup>35</sup>

### VII. CRITIQUE OF THE COURT’S APPROACH

California’s Second District Court of Appeal was rather deferential to the trial court’s opinion—it simply borrowed the language from the lower court to explain its holding.<sup>36</sup> The facts of this case happened to be advantageous for the respondents; they had the benefit of “undisputed and overwhelming evidence presented at the evidentiary hearing” in their favor.<sup>37</sup> The court even admitted that it wanted to remain deferential and relatively quiet on this highly sensitive “right to die” issue.<sup>38</sup>

The court’s level of silence on medical futility is disappointing at best. The state appellate court did well to cite to past cases within its own jurisdiction to determine perspectives and definitions regarding the topic.<sup>39</sup> But the court missed a golden opportunity to enhance the dialogue regarding medical futility. This court could have had a greater impact on the rarely litigated subject of medical futility. Not only would courts within the state of California benefit, but several courts across the nation could have looked to this decision for guidance due to the lack of case law on the issue. Regrettably, the California appellate court chose the minimalist route in articulating its opinion.<sup>40</sup>

The court failed to refer to cases like *Causey v. St. Francis Medical Center*, even though a simple footnote could have shined more light on the topic of medical futility.<sup>41</sup> California likely would have been well-served had this court emulated the sensitive rendering of the futility problem provided by the *Causey* court.<sup>42</sup> In the *Causey* decision, the Louisiana court looked to the “subjective value judgments” used to determine futility “in terms of personal values, not in terms of medical science.”<sup>43</sup> The *Causey* court seemed to understand the very sensitive nature of such a “conflict over values, i.e.,

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34. *Id.*

35. *Id.*

36. *See Bernstein*, 2009 WL 224942, at \*13-14.

37. *Id.* at \*15.

38. *Id.* at \*14.

39. *See id.* at \*12-14; *supra* note 28, 31-32.

40. *See generally id.* at \*14.

41. *See generally Causey v. St. Francis Med. Ctr.*, 719 So. 2d 1072 (La. Ct. App. 1998).

42. *See id.*

43. *Id.* at 1074.

whether extra days obtained through medical intervention are worth the burden and costs.”<sup>44</sup>

This is in stark contrast to the *Bernstein* court, which took the less controversial route by choosing to look narrowly to the specific situation at hand, where the facts paint a picture of an end-of-life patient in great pain and without hope.<sup>45</sup> The *Causey* court addressed a myriad of issues, such as a “physician’s obligation to obtain informed consent [which] is both an ethical requirement and a legal standard of care derived from principles of individual integrity and self-determination.”<sup>46</sup> In contrast, the *Bernstein* court merely stated that “judicial intervention in ‘right to die’ cases should be minimal”<sup>47</sup>—effectively shying away from addressing persuasive cases from other jurisdictions, which might be of benefit to future medical futility cases in the state and country.

The court could have also chosen to examine statutes from other states dealing with medical futility, such as the Texas Advance Directives Act of 1999, “the first of its kind in the country.”<sup>48</sup> Also known colloquially as the “Texas Futility Statute,” this landmark act has been influential in the surrogate decision-making process when there is a dispute over end-of-life treatment for an incapacitated patient.<sup>49</sup>

Litigation in these types of circumstances can only make the process more difficult for the family—which is perhaps one reason there is little case law on the issue—so statutes (such as the one in Texas) have clarified a blurry issue, providing a specific number of days that a medically futile patient may receive life-sustaining treatment.<sup>50</sup> During this allotted period of ten days, there are several situations which can arise: the family’s eventual acquiescence to the doctors’ opinions, the death of the patient, or a continued impasse period. Although it is far from an ideal statute, it seems to be a step in the right direction as it provides the proper procedure if not effectuating a directive or treatment decision.<sup>51</sup>

As discussed above, the topic of informed consent providing a discussion on the issue of individual autonomy is also lacking in the *Bernstein* court’s decision.<sup>52</sup> *Cruzan by Cruzan v. Director, Missouri Dept. of Health*

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44. *Id.*

45. *See generally Bernstein*, 2009 WL 224942, at \*4.

46. *Causey*, 719 So. 2d at 1075.

47. *Bernstein*, 2009 WL 224942 at \*14.

48. Robert L. Fine, *Medical Futility and the Texas Advance Directives Act of 1999*, BAYLOR UNIVERSITY MEDICAL CENTER, Apr. 13, 2000, available at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1312296>.

49. *See generally* TEX. HEALTH & SAFETY CODE ANN. § 166.046 (Vernon 2003).

50. *Id.* at § 166.046(e).

51. *Id.* at § 166.046(a).

52. *See generally Bernstein*, 2009 WL 224942.

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is a binding decision by the U.S. Supreme Court that this court could have referred to for a discussion on individual autonomy.<sup>53</sup> Although the facts in *Cruzan* are different from those in *Bernstein*, *Cruzan* is beneficial in terms of examining the constitutional rights associated with permitting a state to create a high evidentiary barrier for an incompetent patient's right to die.<sup>54</sup>

In *Cruzan*, the patient suffered a massive brain injury from an automobile accident, which eventually led to her entering into a persistent vegetative state.<sup>55</sup> The evidence showed that "Cruzan's expression to a former housemate that she would not wish to continue her life if sick or injured unless she could live at least halfway normally suggested that she would not wish to continue on with her nutrition and hydration."<sup>56</sup> However, the Missouri Supreme Court disagreed with the idea that her surrogate decision-makers were ultimately permitted to determine her end-of-life choices, "concluding that no person can assume that choice for an incompetent in the absence of the formalities required by the Living Will statute or clear and convincing evidence of the patient's wishes."<sup>57</sup>

The debate hinged on the question of whether the Fourteenth Amendment of the U.S. Constitution allowed a state to create a high clear and convincing evidence standard in determining an incompetent patient's right to die.<sup>58</sup> The petitioners in *Cruzan* "insist[ed] that under the general holdings of [the Court's] cases, the forced administration of life-sustaining medical treatment, and even of artificially delivered food and water essential to life, would implicate a competent person's liberty interest."<sup>59</sup> They also argued that "an incompetent person should possess the same right [of refusing life-saving hydration and nutrition] as is possessed by a competent person."<sup>60</sup>

The majority of the justices assumed that the right to die is a protected liberty interest of a competent patient.<sup>61</sup> Although even the nation's Supreme Court has proven to be somewhat elusive in these controversial "right to die" cases, this does not excuse this California court from addressing medical futility to the fullest—because a healthy discussion in an opinion would be more beneficial to all.

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53. See generally *Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990) [hereinafter "Cruzan"].

54. See *Cruzan*, 497 U.S. at 286-87.

55. *Id.* at 261.

56. *Id.*

57. *Id.*

58. *Id.* at 263.

59. *Id.* at 279.

60. *Id.*

61. See *id.*



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### VIII. CONCLUSION

It is fair to say that the topic of medical futility is quite nebulous. As medical technology continues to advance, the question of whether medical intervention is ever medically futile will increasingly become a heated subject of debate. Texas remains as one of only a small number of states with such a specific statute concerning medical futility. But even the Texas Health & Safety Code section 166.046 is lacking in many regards, as it leaves open many situations where a person with neither an irreversible nor terminable condition can have the statute used against them.<sup>62</sup> Society as a whole can only benefit when there is greater dialogue on controversial topics such as medical futility. Unfortunately, cases like *Bernstein* provide very little guidance when much is needed. There seems to be little regard for foresight in the opinions of such important state cases that rarely exist for review. Simply put, the *Bernstein* court fell short when there was a great opportunity to shine.

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62. See generally TEX. HEALTH & SAFETY CODE ANN. § 166.046 (Vernon 2003).