

CERTIFIED FOR PARTIAL PUBLICATION\*

**COPY**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

----

Conservatorship of the Person of  
ROBERT WENDLAND

---

ROSE WENDLAND,  
  
Petitioner and Appellant,

v.

FLORENCE WENDLAND et al.,  
  
Objectors and  
Respondents;

ROBERT WENDLAND,  
  
Appellant.

C029439

(Super. Ct. No. 65669)

**APPEAL** from a judgment of the Superior Court of San Joaquin County. Bob W. McNatt, Judge. Reversed with directions.

Law Offices of Lawrence J. Nelson and Lawrence J. Nelson  
for Petitioner and Appellant Rose Wendland.

---

\* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of part II-A of the DISCUSSION (Supplemental Briefing).

Law Offices of James Braden, James Braden and James T. Diamond, Jr., for Appellant Robert Wendland.

Catherine I. Hanson and Alice P. Mead for California Medical Association as Amici Curiae on behalf of Appellants.

Vicki Michel, Terri D. Keville, Stanton J. Price, Ila Rothschild and Cynthia Fruchtman for Los Angeles County Medical Association and Los Angeles County Bar Association Joint Committee on Biomedical Ethics, and Los Angeles County Bar Association Bioethics Committee as Amici Curiae on behalf of Appellants.

Brown, Hall, Shore & McKinley and Janie Hickok Siess for Objectors and Respondents.

Wesley J. Smith for Coalition of Concerned Medical Professionals as Amici Curiae on behalf of Objectors and Respondents.

Rita L. Marker for Ethics and Advocacy Task Force of the Nursing Home Action Group as Amici Curiae on behalf of Objectors and Respondents.

Max Lapertosa and Stephen F. Gold for Not Dead Yet as Amici Curiae on behalf of Objectors and Respondents.

This is the hardest case.

A 1993 motor vehicle accident left 42-year-old Robert Wendland severely brain damaged and cognitively impaired. He is conscious and sometimes able to respond to simple commands, but he is totally dependent on others for his care and is unable to speak or otherwise communicate consistently. He receives life-sustaining nutrition and hydration through a feeding tube.

The probate court appointed Robert's wife, Rose,<sup>1</sup> as conservator of his person under the Probate Code and determined Robert lacks capacity to make his own health care decisions. (Prob. Code, § 1800 et seq.)<sup>2</sup> However, the court expressly withheld from Rose the authority to remove Robert's feeding tube.

Rose sought authorization from the court to remove the feeding tube, thereby allowing Robert to die (which Rose asserted is what Robert would choose if he were competent to make his own decision). Robert's counsel supported Rose's position. Robert's mother (Florence) and sister (Rebekah Vinson) objected.<sup>3</sup>

After presentation of Rose's and Robert's cases in chief, the probate court granted Florence's motion for judgment (Code Civ. Proc., § 631.8), concluding that although Robert had a right to refuse the feeding tube, a right which survives his incompetence, Rose had failed to show by clear and convincing

---

<sup>1</sup> Because several of the litigants share the same surname, we shall refer to all litigants by their first name. Robert and Rose have filed separate appellant's briefs. For editorial convenience, since their positions are aligned and a point in favor of one would redound to the benefit of the other, we sometimes refer to contentions as being made by "appellants."

<sup>2</sup> Further undesignated statutory references are to the Probate Code.

<sup>3</sup> Since Rebekah's position is the same as her mother's, for ease of reference, our reference to Florence's contentions shall include Rebekah.

evidence that Robert, if competent, would want the feeding tube removed, or that withdrawal of the tube was in his best interests.

Rose and Robert appeal, arguing the probate court failed to apply or erroneously construed the controlling statute--section 2355--and imposed too high a burden on Rose.<sup>4</sup> We shall conclude the probate court erred in requiring Rose to prove that Robert, while competent, expressed a desire to die in these circumstances and in substituting its own judgment concerning Robert's best interests, rather than limiting itself to a determination of whether the conservator considered Robert's best interests and met the other statutory

---

<sup>4</sup> Undesignated statutory references are to the Probate Code.

At the time of the hearing in the trial court, section 2355 provided in part: "(a) If the conservatee has been adjudicated to lack the capacity to give informed consent for medical treatment, the conservator has the exclusive authority to give consent for such medical treatment to be performed on the conservatee as the conservator in good faith based on medical advice determines to be necessary and the conservator may require the conservatee to receive such medical treatment, whether or not the conservatee objects. In any such case, the consent of the conservator alone is sufficient and no person is liable because the medical treatment is performed upon the conservatee without the conservatee's consent. . . ." Subdivision (b) of the statute addresses considerations of religion, which are not at issue in this case. (Stats. 1990, ch. 79, § 14, p. 575.)

New legislation in 1999 amended this provision. (Stats. 1999, ch. 658, § 12.) We allowed supplemental briefing concerning the 1999 legislation. We shall have more to say about this later.

requirements of section 2355.<sup>5</sup> We shall therefore reverse the judgment and remand for further proceedings in the probate court.

#### FACTUAL AND PROCEDURAL BACKGROUND

We preface our recitation of the facts with the caveat that this case comes to us on appeal from the grant of a motion for judgment (Code Civ. Proc., § 631.8); hence, respondents have not yet had an opportunity to present their case to the probate court.

Rose and Robert were married in 1978 and have three children. On September 29, 1993, Robert, then age 42, was involved in a single-vehicle accident. He was in a coma for 16 months, during which Rose visited him in the hospital every day.

In January 1995, Robert came out of the coma, but he remains severely cognitively impaired. He is paralyzed on the right side and is unable to communicate consistently, feed

---

<sup>5</sup> Appellants submitted a legislative history appendix and a supplemental legislative history appendix concerning statutory provisions of the Probate Code. We hereby accept those appendices for filing.

We allowed the filing of amici curiae briefs on behalf of appellants by (1) California Medical Association and (2) Los Angeles County Medical Association and Los Angeles County Bar Association Joint Committee on Biomedical Ethics, and Los Angeles County Bar Association Bioethics Committee. We also allowed the filing of amici curiae briefs on behalf of respondents by (1) Coalition of Concerned Medical Professionals, (2) the Ethics and Advocacy Task Force of the Nursing Home Action Group, and (3) Not Dead Yet.

himself, or control his bowels or bladder. He wears diapers. He receives food and fluids through a feeding tube. By late spring of 1995, he was interacting with his environment, but minimally and inconsistently. At his highest level of functioning, he has been able to do (with repeated prompting and cuing [pointing] by therapists) such activities as grasp and release a ball, operate an electric wheelchair with a "joystick," move himself in a manual wheelchair with his left hand or foot, balance himself momentarily in a "standing frame" while grabbing and pulling "thera-putty," draw the letter "R," and choose and replace requested color blocks out of several color choices. Each activity is performed only after excruciatingly repetitive prompting and cuing by the therapists. Robert never smiles. What little emotion he does show is negative and combative. Since he has cognitive function, he is *not* considered to be in a "persistent vegetative state" (hereafter PVS).<sup>6</sup>

---

<sup>6</sup> "A PVS patient has no mental functions. The eyes may be open at times, but the patient is 'completely unconscious, i.e., unaware of himself or herself or the surrounding environment. Voluntary reactions or behavioral responses reflecting consciousness, volition, or emotion at the cerebral cortical level are absent.' [Citation.] The patient is incapable of experiencing pain and suffering. [Citation.] PVS has been described as 'amentia, an absence of everything for which people value existence.' [Citation.]" (*Conservatorship of Morrison* (1988) 206 Cal.App.3d 304, 307.) Rose asserts recent professional terminology gives the label "permanent" (as opposed to "persistent") vegetative state, where the state has lasted long enough to justify that prognosis. (See *In re Fiori* (1996) 673 A.2d 905, 908, fn. 1 [Continued])

Between January and July 1995, Robert's feeding tube (which at the time was a "jejunostomy" tube surgically inserted through the abdomen wall and stapled or sewn to the inside of the small intestine) became dislodged several times. The first three times, Rose agreed to surgical reinsertion of the tube (a procedure requiring general anesthesia). The fourth time--in July 1995--Rose refused to consent to reinsertion of the tube, stating she believed Robert would not want to go through it again. The attending physician, Dr. Ronald Kass, nevertheless inserted a nasogastric feeding tube (later replaced with a "PEG" tube)<sup>7</sup> in order to maintain the status quo pending review by the hospital ethics committee.

The 20-member ethics committee determined it had no objection to Rose ordering withdrawal of the nutrition/hydration tubes.<sup>8</sup> Dr. Kass agreed. The San Joaquin

---

[543 Pa. 592, 598, fn. 1].) Since the distinction in terminology postdates the relevant case law and since Robert is not in a vegetative state at all, any distinction is not material to resolution of this appeal. Appellants state the most appropriate medical term for Robert's condition is "minimally conscious state." Respondents assert there is insufficient evidence that such label has been recognized by the medical community. We have no need to resolve this dispute.

<sup>7</sup> The parties do not mention or direct our attention to anything in the record explaining the meaning of "PEG." Apparently, "PEG" means a percutaneous endoscopic gastronomy, which inserts a feeding tube into the stomach and intestines. (*Matter of Christopher* (1998) 177 Misc.2d 352, 353 [675 N.Y.S.2d 807].)

<sup>8</sup> Florence complains the probate court, by granting a motion to quash her subpoenas, precluded her from commanding the  
[Continued]

County patient ombudsman (whose job it is to look after the rights of patients in long-term care facilities) supported Rose's decision, though she (the ombudsman) had not spoken to respondents.<sup>9</sup>

Florence learned through an anonymous telephone call of the plan to remove the tube, and she prevented it by obtaining a temporary restraining order from the probate court in early August 1995.

On August 8, 1995, Rose petitioned the court to be appointed conservator for the person of her husband due to his inability to provide for his own personal needs. (§ 1801.) The petition also asserted Robert lacked capacity to give informed consent concerning medical treatment. The petition sought express court authorization for Rose to have Robert's life-sustaining treatment (the nutrition/hydration tube) withdrawn. Respondents, as "objectors," opposed the petition.

On September 11, 1995, after a hearing, the probate court granted Rose's petition to be appointed conservator, but expressly denied her the authority to remove life-sustaining treatment from Robert. The court continued the matter.

---

appearance at trial of all members of the ethics committee, hence this court should not give any weight whatsoever to the committee's decision. Even assuming for the sake of argument the trial court erroneously quashed the subpoenas (a matter we do not decide), we see no basis for rejecting the evidence on this issue adduced at trial.

<sup>9</sup> Long-term care ombudsmen monitor long-term care facilities for potential abuse of residents. (E.g., Welf. & Inst. Code, §§ 9700 et seq., 15600 et seq.)

The probate court denied Florence's request that independent counsel be appointed for Robert. The matter came to this court for review, and we held in *Wendland v. Superior Court* (1996) 49 Cal.App.4th 44, that Robert was entitled to appointed counsel.

After counsel was appointed for Robert, Rose continued to pursue court approval to withdraw Robert's life-sustaining treatment. Robert's trial counsel and appellate counsel support Rose's position.

The probate court bifurcated the case. In the first phase, the court made the following legal rulings:

1. The evidentiary standard for the conservator's withdrawal of the feeding tube from a conscious but cognitively impaired conservatee should be "clear and convincing evidence," because a decision to end the life of a human being who is not PVS should require no less a compelling showing that that applied to other forms of involuntary medical treatment.

2. Where the incompetent person has left no explicit pre-incapacity instructions covering the situation, and family members disagree, the burden of producing evidence was on the parties seeking to terminate the life of the patient who is not PVS.

3. The appropriate test was the "best interests" test, but with consideration of subjective elements, such as the previously stated wishes of the patient.

In its written decision underlying the foregoing order, the probate court stated, among other things, its belief that section 2355 when enacted did not contemplate the current state of medical science. The court recognized: "To bring about the death of an innocent person who still finds meaning and enjoyment in life would be barbaric. It would be equally cruel, however, to force someone who has lost all dignity and faces only an existence of constant pain or suffering and who would fervently seek death as a release to go on living merely on the presumption that life is always preferable to death."

In the second part of the bifurcated case, an evidentiary hearing took place between October and December 1997, during which appellants presented witnesses supportive of Rose's decision to withdraw life-sustaining treatment from Robert. The evidence included the following:

As already noted, Robert is sometimes able to perform simple tasks with repeated prompting.

Doctors testified that, to the highest degree of medical certainty, Robert will never be able to feed himself, bathe himself, control his bladder or bowels, or communicate verbally or in writing. Neurologist Dr. Donald Kobrin said Robert sometimes turns his head to look at the television, wipes his mouth, looks at people passing by, and repositions his left leg. Dr. Kobrin said Robert is not PVS, which the doctor defined as having no awareness of internal or external surroundings--no cognitive functioning--though the patient may look alert. Dr. Kobrin opined Robert does have a level of

functioning that allows him to decide whether to follow commands, because he cooperates more frequently with some caregivers than with others. The parties disagree as to whether or not Robert recognizes family members when they visit him.

On one occasion on April 29, 1997, treating physician Dr. Kass asked Robert a series of questions to which Robert responded by pointing or pushing bars designated "yes" or "no" on an "augmented communication device." That day, Robert answered most therapeutic questions (e.g., "are you sitting?") correctly. The doctor testified he then asked Robert the following questions and received the following answers:

"Do you have pain? [¶] . . . [¶] Yes.

"Do your legs hurt? No.

"Do[] your buttocks hurt? No.

"Do you want us to leave you alone? Yes.

"Do you want more therapy? No.

"Do you want to get into the chair? Yes.

"Do you want to go back to bed? No.

"Do you want to die? No answer.

"Are you angry? Yes.

"At somebody? No."

However, Dr. Kass testified he did not think Robert understood all the questions.

Lowana Brauer, Robert's speech pathologist, testified Robert has not been able to use the augmented communication device with consistent success. It is not fair to ask for

responses to questions unless the patient can use the board consistently in therapy.

Appellants' expert witnesses opined Robert would never be able to communicate meaningfully to express his needs or wants. Those experts acknowledged Robert at times engages in cognitive behavior, which is more than mere reflexive behavior (such as the kick of a knee upon being tapped with a rubber hammer) and more than a mere automatic action (such as scratching a nose that itches). However, those experts did not believe Robert can act on a volitional cognitive level, where people make a cognitive choice and develop a strategy to provide a motor response to stimuli. Rather, they viewed Robert's activity as "very low-level cognitive response"--like a trained response where an animal or child is trained on a primitive level to perform an action in response to a direct specific stimulus. It gives the appearance that the actor grasps the significance of what he is doing, but he does not understand at all. He has been trained to do it through visual cuing or other maneuvers. Robert is unable to think in the manner we conceive humans do, and his responses are simply a matter of rote response to an outside stimulus, or rote execution of exceedingly simple tasks. His attention and short-term memory and working memory are so poor that he needs constant and repeated prompting.

Robert could survive many years in his current condition,<sup>10</sup> but he is susceptible to dental problems and respiratory or bladder infections, some of which he has already experienced.

Rose testified she believes Robert would have refused life-sustaining treatment in his current circumstances if he were competent, based on the following:

Three months before Robert's accident, Rose's father died after his life support machine was turned off at the family's request. Robert assured Rose she made the right choice. Rose testified, "And he [Robert] told me at that point I would never want to live like that, and I wouldn't want my children to see me like that and look at the hurt you're going through as an adult seeing your father like that."

After Rose's father died, Robert resumed a past habit of drinking alcohol. Five days before Robert's accident, Rose and Mike Hofer (Robert's brother) expressed to Robert their fear that, while driving drunk, he would have an accident and hurt someone or be badly injured. Rose testified Robert, who had been drinking at the time, said: "If that ever a [sic] happened to me, you know what my feelings are. Don't let that happen to me. Just let me go. Leave me alone. [¶] . . . We

---

<sup>10</sup> Our reference to current condition refers to the time of the probate court hearing in late 1997, which is the subject of this review. We rejected a request to supplement the record with post-hearing medical reports.

talked about that with your father. I wouldn't want my children to ever see me like that."

Rose testified that during these conversations Robert never described the condition in which he now found himself, but he made "clear" to her that under no circumstances would he want to live if he had to have diapers or if he had to have life support or if he had to be kept alive with a feeding tube or if he could not be a "husband, father, provider." She delayed in attempting to implement his wishes because she hoped for his recovery. Since making her decision in the summer of 1995 and up to the time of the court proceeding in late 1997, Rose spends less time with Robert.

Rose testified at the October 1997 proceeding that she had viewed recent videotapes of Robert's therapy but did not think there was any significant improvement.<sup>11</sup>

Rose described her understanding of what would happen upon removal of the nutrition/hydration tube. She believed Robert would slip into unconsciousness and die peacefully.<sup>12</sup>

---

<sup>11</sup> This court has viewed the videotapes admitted into evidence.

<sup>12</sup> Florence describes a painful process of death by dehydration and asserts Rose's testimony reflects a lack of appreciation of the ordeal. There is evidence the doctors could control the pain with medication. We need not resolve this factual dispute at this point, given the procedural posture of this case which comes to us following the granting of a motion for judgment after presentation of only appellants' cases in chief. We assume that if the feeding tube is ultimately removed, the medical staff would offer  
[Continued]

Robert's brother, Michael Hofer, called as a witness on behalf of Robert, corroborated Rose's testimony that Robert indicated he would not want to be a vegetable. The brother believed Robert meant he did not want to be kept alive with tubes.

After presentation of Rose's and Robert's cases in chief, the probate court heard Florence's motion for judgment under Code of Civil Procedure section 631.8. The court granted the motion. The court then heard--and denied--Florence's motion to remove Rose as conservator.<sup>13</sup> In a written decision filed in March 1998, the probate court explained its decision to prohibit Rose from withdrawing Robert's feeding tube: "[Rose] has not met her duty and burden to show by clear and convincing evidence that conservatee Robert Wendland, who is not in a persistent vegetative state nor suffering from a terminal illness would, under the circumstances, want to die. Conservator has likewise not met her burden of establishing that the withdrawal of artificially delivered nutrition and

---

Robert food orally, since it has been known to happen that a doctor is surprised to learn after removal of a feeding tube that the patient has the ability to swallow food. (*Rasmussen v. Fleming* (1987) 154 Ariz. 207, 212, fn. 1 [741 P.2d 674, 679, fn. 1].)

<sup>13</sup> Florence filed a notice of appeal from that decision, but we later dismissed the appeal at her request.

hydration is commensurate with conservatee's best interests, consistent with California Law as embodied in [case law]."<sup>14</sup>

The court also found "the testimony adduced focuses upon two pre-accident conversations during which the conservatee allegedly expressed a desire not to live like a 'vegetable.' These two conversations do not establish by clear and convincing evidence that the conservatee would desire to have his life-sustaining medical treatment terminated under the circumstances in which he now finds himself. One of these conversations allegedly occurred when the conservatee was apparently recovering from a night's bout of drinking. The other alleged conversation occurred following the loss of conservatee's father-in-law, with whom he was very close. The court finds that neither of these conversations reflect an exact 'on all-fours' description of conservatee's present medical condition. More explicit direction than just 'I don't want to live like a vegetable' is required in order to justify a surrogate decision-maker terminating the life of the someone who is not in a PVS."

The court also said: "Evidence was presented which clearly and convincingly shows that the decision made by the

---

<sup>14</sup> Robert claims the probate court held there must be evidence of Robert's pre-accident wishes in order for the conservator to act. We do not read the court's decision to so hold. Rather, the court specified it was following case law which applied a "best interests" standard but included in the decisionmaking process subjective elements such as the patient's previously-expressed wishes.

conservator in July of 1995 [not to reinsert conservatee's feeding tube] was done in good faith, based on medical evidence and after consideration of conservatee's best interests, including his likely wishes, based on his previous statements." (Original brackets.) However, the court believed the standard to be applied must take into account that other conservators might have less noble motives.

The court then stated: "This court explicitly finds, based on the overwhelming body of evidence, that conservatee has no reasonable chance for the return to cognitive and sapient life. Although neither comatose nor persistently vegetative, he remains severely brain damaged, partially paralyzed, totally dependent upon others for all of his needs, unable to communicate, and reliant upon life support for nutrition and hydration." The court saw no reasonable hope for improvement.

The court concluded that, even though it had a "strong suspicion" that Robert would have desired to die under these circumstances, in the absence of clearer court precedent or legislative guidance, the court felt that if it must err, it must err on the side of caution.

Accordingly, the probate court granted Florence's motion for judgment and, while leaving Rose as conservator, prohibited her from having Robert's feeding tube removed.

This appeal followed.

## DISCUSSION

### I. Standard of Appellate Review

Code of Civil Procedure section 631.8 provides in part:

"(a) After a party has completed his presentation of evidence in a trial by the court, the other party, without waiving his right to offer evidence in support of his defense or in rebuttal in the event the motion is not granted, may move for a judgment. The court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party . . . ." The purpose of Code of Civil Procedure section 631.8 is "to enable the court, when it finds at the completion of plaintiff's case that the evidence does not justify requiring the defense to produce evidence, to weigh evidence and make findings of fact. [Citation.]" (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 424.)

"The standard of review after a trial court issues judgment pursuant to Code of Civil Procedure section 631.8 is the same as if the court had rendered judgment after a completed trial--that is, in reviewing the questions of fact decided by the trial court, the substantial evidence rule applies. An appellate court must view the evidence most favorably to the respondents and uphold the judgment if there is any substantial evidence to support it. [Citations.] However where, as here, we are called upon to review a conclusion of law based on undisputed facts, we are not bound by the trial court's decision and are free to draw our own conclusions of law. [Citation.]" (*Pettus v. Cole, supra*, 49

Cal.App.4th at pp. 424-425.) The interpretation of a statute presents a question of law for our independent review.

(*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699.)

Code of Civil Procedure section 631.8 expressly states that a motion under that statute does not waive the moving party's "right to offer evidence in support of his defense or in rebuttal in the event the motion is not granted . . . ." Where the grant of a section 631.8 motion is being reversed on appeal, "the situation is the same as if the motion had not been granted. [Citations.] Accordingly, defendants are entitled to present evidence in support of their defense or in rebuttal." (*Pinsker v. Pacific Coast Soc. of Orthodontists* (1969) 1 Cal.3d 160, 167.)

## II. Section 2355

As presented by the parties in the probate court and on appeal, the issue in this case concerns section 2355 (fn. 3, *ante*), which provides that if a conservatee has been adjudicated to lack the capacity to give informed consent for medical treatment, "the conservator has the exclusive authority to give consent for such medical treatment to be performed on the conservatee as the conservator in good faith based on medical advice determines to be necessary and the conservator may require the conservatee to receive such

medical treatment, whether or not the conservatee objects<sup>[15]</sup>.

. . . .<sup>16</sup>

A. Supplemental Briefing

We requested supplemental briefing as to whether section 2355 is the appropriate statute, and related matters not addressed in the appellate briefs. In our request for supplemental briefing, we observed that the formalities of conservatorship (formal court order of appointment, letters of conservatorship and written oath of conservator) were dated May 1998--after the March 1998 order in which the probate court applied a statute applicable only to conservators (§ 2355). We also noted that in our prior review (of the right to counsel issue), no one had disputed Florence's representation that the September 1995 order merely appointed Rose as "temporary" conservator, with the matter continued pending further inquiry by the court. "Temporary conservators" have lesser powers than the powers accorded "conservators" by

---

<sup>15</sup> We stress that on the record before us, we cannot say that Robert has expressed any objection to withdrawal of his nutrition/hydration. Although an amicus curiae urges consideration of a patient's present desire to live, no party argues or shows that Robert has expressed any such desire in this case. We do *not* decide whether or how section 2355 should apply to authorize a conservator to withhold life-sustaining treatment from a conservatee who objects to that action.

<sup>16</sup> Here, the probate court gave Rose the exclusive authority to make Robert's health care decisions, yet expressly withheld authority to remove the feeding tube.

section 2355. (§ 2252.) We requested supplemental briefing on the following questions:

1. What was the effect, if any, of the lack of formalities on the effectiveness of Rose's actions as conservator, in light of section 2300, which provides that appointment of a conservator is not effective until certain formalities are observed.

2. Was Rose a "temporary conservator" (§ 2252) at relevant times, subject to the reduced powers accorded by statute, rather than the plenary powers conferred by section 2355.

3. If Rose was subject to restricted powers, what effect did that have on the parties' arguments.

We received supplemental letter briefs.

Robert and Rose filed a joint supplemental letter brief, which went beyond the scope of our inquiry by (1) arguing the court order is an appealable order,<sup>17</sup> (2) arguing the notice of appeal did not divest the probate court of jurisdiction to issue the letters of conservatorship, (3) arguing the dispute is ripe, and (4) flushing out substantive arguments from their

---

<sup>17</sup> The grant of judgment pursuant to Code of Civil Procedure section 631.8 is clearly appealable. Technically, there is no judgment here, but only a written statement of decision/order granting the section 631.8 motion. A judgment should have been entered. (See *Modica v. Merin* (1991) 234 Cal.App.3d 1072.) However, while we generally compel parties to adhere to the requirement of having a proper judgment entered before appealing, under the unique circumstances of this case, we will treat the order as a judgment.

opening and reply briefs about which we did not inquire in our request for supplemental briefing. We disregard these extraneous arguments by Robert and Rose.<sup>18</sup>

With respect to our questions, the parties in their supplemental briefs agree Rose was never a "temporary conservator" (though respondents apparently believed she was). Accordingly, the conservatorship is governed by the broader powers conferred on conservators by section 2355. Although this was not made clear at the time of the September 1995 order, the court subsequently made clear at a hearing in October 1996 that it did not intend to make Rose a "temporary conservator." On appeal, respondents concede Rose was never a "temporary conservator."<sup>19</sup>

Concerning the lack of formalities (letters of conservatorship, written oath, etc.), it appears the documents were belatedly executed through inadvertence. Robert and Rose argue it should not make a difference. Florence argues

---

<sup>18</sup> We reject the suggestion in Florence's supplemental brief that the appeal is defective because appellants should have appealed from the May 1998 letters of conservatorship.

<sup>19</sup> An amicus curiae brief appears to argue that Rose was a "limited conservator," a term of art under the Probate Code which limits a conservator's powers. (§ 2351.) However, section 2351 does not appear to apply here, because it contemplates that powers withheld from the conservator will be reserved to the conservatee. (§ 2351, subd. (b).) No such reservation was made in this case. Moreover, no party contends Rose was a "limited" conservator. Hence, we need not discuss it further.

section 2355 cannot govern this case, since the formalities were not observed. However, nobody cites any authority. We note case law does exist for the proposition that the lack of some formalities does not necessarily invalidate conservator actions. (See e.g., *Southern T. & C. Bk. v. S. D. Sav. Bk.* (1919) 45 Cal.App. 294; see also, 52 West's Ann. Prob. Code, case annotations to § 2300.) Since Florence has not developed any argument or cited any authority requiring us to penalize Rose or Robert for the delay in formalities, we decline to do so. Florence does not suggest the lack of a written oath by Rose calls into question the integrity of Rose's testimony.

We will therefore review this appeal under the standard of section 2355.

B. Does Section 2355 Authorize A Conservator To Withhold Life Sustaining Nutrition/Hydration From A Non-PVS Conservatee?

Despite appellants' contentions that the "plain language" of section 2355 (fn. 4, *ante*) resolves this appeal, section 2355 on its face does not address even the basics of the situation we confront in this appeal--a conservator's decision to withhold life-sustaining nutrition/hydration from a conservatee.<sup>20</sup> On its face, section 2355 simply authorizes the conservator to give consent for necessary medical

---

<sup>20</sup> In this opinion, our reference to "withholding" treatment includes withdrawing treatment that has already been commenced.

treatment. Nevertheless, judicial construction of the statute reflects a broad interpretation. Thus, the statutory authority in section 2355 to "give consent" includes, by necessary implication, the authority to withhold consent. (*Conservatorship of Drabick* (1988) 200 Cal.App.3d 185, 200-201 (*Drabick*).)<sup>21</sup> "Medical treatment" in section 2355 includes artificial hydration/nutrition. (*Id.* at pp. 195-196, fn. 9, 218, fn. 40.) Section 2355's requirement that the conservator decide "based upon medical advice" does not mean the conservator must follow the medical advice; "the purpose of seeking advice is to obtain information enabling the conservator to formulate a judgment about what is in the patient's best interest." (*Conservatorship of Morrison* (1988) 206 Cal.App.3d 304, 309-310, fn. omitted.) A choice to withdraw medical treatment does not amount to assisting a suicide, because the cause of death is considered to be the underlying disease or medical condition, not the withdrawal of

---

<sup>21</sup> The cited authority, *Drabick, supra*, 200 Cal.App.3d at pages 201-202, cited cases from other jurisdictions. We note that in those cases from other jurisdictions, the state statutes did not specify (as does section 2355) that the conservator's decision will override any objections by the conservatee. (*Ibid.*) Presumably, the California statute contemplates that a conservatee's current objections will not be controlling because the conservatee will have been adjudicated to lack capacity to make the health care decision. We need not decide whether section 2355 would allow a conservator to withhold life-sustaining treatment from a conservatee who expresses a contemporaneous objection, because that situation is not present on this record in this appeal.

life-sustaining treatment. (E.g., *Bartling v. Superior Court* (1984) 163 Cal.App.3d 186, 196.)

This case presents a question of application of section 2355 to the withholding of life-sustaining nutrition/hydration from a conscious but impaired conservatee--an application which Florence claims would violate the conservatee's constitutional rights. No California case has applied section 2355 in these circumstances. The Sixth District in *Drabick, supra*, 200 Cal.App.3d 185, held section 2355 applied to authorize a conservator to withhold life-sustaining treatment from a PVS conservatee. We find guidance in that opinion's thoughtful analysis of section 2355 and will follow it here.

1. *Drabick*

In *Drabick, supra*, 200 Cal.App.3d 185, the conservator sought court approval to remove the nasogastric feeding tube of the PVS conservatee. No one opposed the action; the conservator simply wanted a court order to protect the health care providers. (*Id.* at p. 202.) A county public defender appointed to represent the conservatee agreed with the proposed termination of treatment. (*Id.* at p. 212.) The probate court denied the conservator's petition on the ground that continued feeding was in the patient's best interests. (*Id.* at p. 193.) The conservator appealed. The state public defender who represented the conservatee on appeal took the position that the county public defender had not adequately represented the conservatee's interests and was required to advocate continued treatment. (*Id.* at p. 212.)

The Sixth District reversed the probate court.

In California, each adult "has a right to determine the scope of his own medical treatment," which includes "the legal right to refuse medical treatment," including artificial nutrition/hydration. (*Drabick, supra*, 200 Cal.App.3d at pp. 206, 218, fn. 40.)

*Drabick* held "incompetent patients retain the right to have appropriate medical decisions made on their behalf. An appropriate medical decision is one that is made in the patient's best interests, as opposed to the interests of the hospital, the physicians, the legal system, or someone else." (*Drabick, supra*, 200 Cal.App.3d at p. 205.) "[C]ourts are not the primary decisionmakers in the area of medical treatment." (*Id.* at p. 197.) Other opinions echo this sentiment. Thus, "[A] practice of applying to a court to confirm such decisions would generally be inappropriate, not only because that would be a gratuitous encroachment upon the medical profession's field of competence, but because it would be impossibly cumbersome . . . . This is not to say that in the case of an otherwise justiciable controversy access to the courts would be foreclosed; we speak rather of a general practice and procedure.'" (*Barber v. Superior Court* (1983) 147 Cal.App.3d 1006, 1022, quoting *Matter of Quinlan* (1976) 70 N.J. 10 [355 A.2d 647, 669].) "Courts are not the proper place to resolve the agonizing personal problems that underlie these cases. Our legal system cannot replace the more intimate struggle that must be borne by the patient, those

caring for the patient, and those who care about the patient.' [Citation.] . . . [W]hen a conservator desires removal of life-sustaining treatment, courts should intervene only if there is disagreement among the interested parties, and the court's role is confined to ensuring the conservator has complied with . . . section 2355 by making a good faith decision based on medical advice. [Citation.] . . . [C]ourts should intervene only if there is disagreement among the conservator and other interested parties *and* they have exhausted all nonjudicial efforts to resolve the dispute." (*Conservatorship of Morrison, supra*, 206 Cal.App.3d at p. 312 [judicial intervention not appropriate where conservator failed to exhaust nonjudicial remedy offered by hospital of transferring patient to a facility which would comply with conservator's request to remove nasogastric feeding tube from vegetative conservatee].)

*Drabick* observed that under section 2355, the conservator did not need to obtain judicial approval, absent disagreement among interested parties. *Drabick* said section 2355 "gives the conservator the exclusive authority<sup>[22]</sup> to exercise the

---

<sup>22</sup> The common definition of "exclusive" authority refers to "sole, excluding others from participation, and vested in one person alone. (Webster's New Intern. Dict. (3d ed. 1986) p. 793; Black's Law Dict. (6th ed. 1990) p. 564, col. 1.)" (*Department of Social Services v. Superior Court* (1977) 58 Cal.App.4th 721, 733 [Legislature granted Department of Social Services exclusive custody, control and supervision of child referred for adoptive placement].)

conservatee's rights, and it is the conservator who must make the final treatment decision regardless of how much or how little information about the conservatee's preferences is available. There is no necessity or authority for adopting a rule to the effect that the conservatee's desire to have medical treatment withdrawn must be proved by clear and convincing evidence or another standard. Acknowledging that the patient's expressed preferences are relevant, it is enough for the conservator, who must act in the conservatee's best interests, to consider them in good faith." (*Drabick, supra*, 200 Cal.App.3d at pp. 211-212.)

The probate court will review a conservator's proposed decision if there is a dispute among interested parties, or if the conservator seeks confirmation of a proposed action. (§ 2359;<sup>23</sup> *Drabick, supra*, 200 Cal.App.3d at p. 204 [§ 2359 permits any interested person to invoke judicial oversight when there is reason to question the conservator's decision].) Thus, as a practical matter, the court will become involved only if, e.g., there is a family dispute, or a doctor demands

---

<sup>23</sup> Section 2359 provides in part: "(a) Upon petition of the guardian or conservator or ward or conservatee or other interested person, the court may authorize and instruct the guardian or conservator or approve and confirm the acts of the guardian or conservator. . . ."

Rose asserts this appeal arises from her petition for judicial confirmation under section 2359. While we see no such petition in the record, we shall accept Rose's assertion for purposes of this appeal.

judicial confirmation or a conservator seeks judicial confirmation as a precaution.

*Drabick, supra*, 200 Cal.App.3d 185, said:

"If the conservator or any other interested person does invoke judicial supervision, the court's role will be limited to determining whether the conservator's decision complies with . . . section 2355, subdivision (a). . . . [T]he section requires a conservator to decide (1) based upon medical advice (2) whether treatment is necessary; section 2355 also requires a decision made (3) in good faith.<sup>[24]</sup>

"The medical advice that will support a conservator's decision to forego life-sustaining treatment must include the prognosis that there is no reasonable possibility of return to cognitive and sapient<sup>[25]</sup> life. 'When dealing with patients

---

<sup>24</sup> As a general proposition, "Good faith, or its absence, involves a factual inquiry into the plaintiff's subjective state of mind. [Citations]: Did he or she believe the action was valid? What was his or her intent or purpose in pursuing it? A subjective state of mind will rarely be susceptible of direct proof; usually the trial court will be required to infer it from circumstantial evidence." (*Knight v. City of Capitola* (1992) 4 Cal.App.4th 918, 932.) "The phrase 'good faith' in common usage has a well-defined and generally understood meaning, being ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation. [Citations.]" (*People v. Nunn* (1956) 46 Cal.2d 460, 468.)

<sup>25</sup> Case law has not made clear whether "sapient" has any meaning distinct from "cognitive." In *Matter of Quinlan, supra*, 70 N.J. 10 [355 A.2d 647], the New Jersey Supreme Court quoted expert witness Dr. Fred Plum (who has been credited [Continued]

for whom the possibility of full recovery is virtually nonexistent, and who are incapable of expressing their desires,' this prognosis is "the focal point of decision." [Citation.] However, such a prognosis does not compel the conservator to forego life sustaining treatment. Instead, based on the medical advice, . . . section 2355 still requires the conservator to make a good faith decision whether treatment is necessary.

"The concept of good faith precludes a decision affected by a material conflict of interest. Good faith also requires the conservator to consider the available information relevant

---

with coining the PVS term), who in his testimony distinguished between sapience and a vegetative state: "We have an internal vegetative regulation which controls body temperature, which controls breathing, which controls to a considerable degree blood pressure, which controls to some degree heart rate, which controls chewing, swallowing and which controls sleeping and waking. We have a more highly developed brain which is uniquely human which controls our relation to the outside world, our capacity to talk, to see, to feel, to sing, to think. Brain death necessarily must mean the death of both of these functions of the brain, vegetative and the sapient. Therefore, the presence of any function which is regulated or governed or controlled by the deeper parts of the brain which in laymen's terms might be considered purely vegetative would mean that the brain is not biologically dead." (*Id.* 70 N.J. at p. 24 [355 A.2d at pp. 654-655].)

One of Rose's experts in his testimony defined "sapient life" as one which is "more awareness to the point of doing sapient, sagacious things in terms of higher cognitive functioning," and opined to a medical certainty that Robert would not come to sapient life.

We will conclude the point of inquiring about return to cognitive and sapient life is to determine whether the conservatee may regain the capacity to make his or her own decision.

to the conservatee's best interests. . . . Life-sustaining treatment is not 'necessary' under . . . section 2355 if it offers no reasonable possibility of returning the conservatee to cognitive life and if it is not otherwise in the conservatee's best interests, as determined by the conservator in good faith."<sup>26</sup> (*Drabick, supra*, 200 Cal.App.3d at pp. 216-218, fns. omitted.)

*Drabick* also indicated the patient's prior informal statements, made while competent, as to his wishes regarding medical treatment have some, but only "limited relevance."<sup>27</sup>

---

<sup>26</sup> Appellants state that under *Drabick* and *Morrison*, treatment would be necessary if the goal were mere maintenance of the conservatee's biological life, but treatment was not necessary in light of the goal of achieving a meaningful recovery.

<sup>27</sup> This standard appears to us to differ from *Barber v. Superior Court, supra*, 147 Cal.App.3d 1006, which said "any surrogate, court appointed or otherwise, ought to be guided in his or her decisions first by his knowledge of the patient's own desires and feelings, to the extent that they were expressed before the patient became incompetent. [Citations.] [¶] If it is not possible to ascertain the choice the patient would have made, the surrogate ought to be guided in his decision by the patient's best interests. Under this standard, such factors as the relief of suffering, the preservation or restoration of functioning and the quality as well as the extent of life sustained may be considered. Finally, since most people are concerned about the well-being of their loved ones, the surrogate may take into account the impact of the decision on those people closest to the patient. (President's Commission, ch. 4, pp. 134-135.)" (*Barber, supra*, 147 Cal.App.3d at p. 1021 [doctors could not be criminally prosecuted for terminating life support measures on a comatose patient in accordance with the wishes of the patient's immediate family].)  
[Continued]

(*Drabick, supra*, 200 Cal.App.3d at p. 210.) "While a conservator may consider the conservatee's known preferences together with all other information bearing on the conservatee's best interests, a conservator with no such information still has the right and duty to make treatment decisions." (*Ibid.*) The conservator "has the exclusive right and duty under section 2355 to determine in good faith whether medical treatment is necessary. Under *Barber*, "the focal point of decision" for a persistently vegetative patient "should be the prognosis as to the reasonable possibility of return to cognitive and sapient life, as distinguished from the forced continuance of that biological vegetative existence . . . ." (*Drabick, supra*, 200 Cal.App.3d at pp. 210-211.) "[T]he apparent role of the conservatee's prior statements under existing law is this: the conservatee's prior statements inform the decision of the conservator, who must

---

Meisel observed the California standard articulated in *Drabick* is unconventional in its elevation of the objective best interests standard over the subjective wishes of the patient: "The most unconventional approach taken to describe how the best interests standard should be applied to a particular case is that contained in the opinion of the California Court of Appeals in *Drabick*. In the absence of a formal advance directive, the court held that, at least when there was a statutorily appointed conservator, the conservator is required to apply a best interests standard. . . . The conservator is to be guided by his own conception of what is in the ward's best interests . . . . [R]egardless of how clear and convincing the evidence of the incompetent patient's wishes is, as long as those wishes are not contained in a statutorily binding advance directive, they do not compel the conservator's decision." (1 Meisel, *The Right to Die, supra*, § 7.25, p. 431, fns. omitted.)

vicariously exercise the conservatee's rights. Such statements do not in themselves amount to the exercise of a right [except where the statements are formal written documents under statutes providing for advance directive]. The statute [section 2355] gives the conservator the exclusive authority to exercise the conservatee's rights, and it is the conservator who must make the final treatment decision regardless of how much or how little information about the conservatee's preferences is available. There is no necessity or authority for adopting a rule to the effect that the conservatee's desire to have medical treatment withheld must be proved by clear and convincing evidence or another standard. Acknowledging that the patient's expressed preferences are relevant, it is enough for the conservator, who must act in the conservatee's best interests, to consider them in good faith." (*Drabick, supra*, 200 Cal.App.3d at pp. 211-212.)

*Drabick* summarized: "California law gives persons a right to determine the scope of their own medical treatment, this right survives incompetence in the sense that incompetent patients retain the right to have appropriate decisions made on their behalf, and . . . section 2355 delegates to conservators the right and duty to make such decisions." (*Drabick, supra*, 200 Cal.App.3d at p. 205.) "Acknowledging that the patient's expressed preferences are relevant, it is enough for the conservator, who must act in the conservatee's

best interests, to consider them in good faith."<sup>28</sup> (*Drabick, supra*, 200 Cal.App.3d at p. 212.)

*Drabick* expressly qualified its decision in a footnote:

"This opinion's reasoning is predicated upon its subject being a patient for whom there is no reasonable hope of a return to cognitive life. We have not considered any other case, and

---

<sup>28</sup> In general, courts and commentators have identified a hierarchy of tests for surrogate decisionmaking to withhold life-sustaining medical treatment for patients who lack capacity to make their own decisions. (See generally, President's Com. for Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment*, Rep. on Ethical, Medical and Legal Issues in Treatment Decisions, (Mar. 1983) ch. 5, p. 192, fn. 52 [hereafter cited as "Report of President's Commission"] 1 Meisel, *The Right to Die* (2d ed. 1995) §§ 7.2-7.3, pp. 343-352.) These tests include: (1) A purely subjective test which requires proof that the patient, if he were competent, would have made the same decision as the surrogate under the circumstances. (2) If there is not enough proof of the patient's direct wishes, a combined subjective and objective test would be applied, which combines indirect evidence of the patient's wishes with consideration of his best interests, i.e., there is some trustworthy evidence the patient would have refused treatment, and the decisionmaker is satisfied that the burdens of continued life outweigh the benefits for the patient. (3) If there is no evidence at all of the patient's wishes, a purely objective "best-interests" test applies, under which the decision is based on deciding whether the burdens of continued treatment outweigh the benefits. The best interests standard is grounded in the state's *parens patriae* power, rather than the individual's common law or constitutional right to self-determination. (See, *In re Martin* (1995) 450 Mich. 204, 221-222 [538 N.W.2d 399, 408]; Report of President's Commission, *supra*, at p. 135, fns. omitted.) The Michigan Supreme Court in *In re Martin, supra*, noted that in the cases that applied or endorsed a more objective test, the patient was generally comatose or PVS. (*Id.* 450 Mich. at p. 223 [538 N.W.2d at p. 408-409].)

this opinion would not support a decision to forego treatment if this factual predicate could not be satisfied." (*Drabick*, *supra*, 200 Cal.App.3d at p. 217, fn. 36.)

However, we agree with appellants that section 2355, as construed in *Drabick*, is not limited to PVS patients.<sup>29</sup> It applies (in the absence of objection by the conservatee) to a conservator's decision to withhold life-sustaining nutrition/hydration from a conservatee who has been adjudicated to lack capacity to make his own decision, but who is not terminally ill or PVS. Thus, section 2355 contains no limitation on the type of treatment or on the medical condition of the conservatee (beyond the qualification that the conservatee must have been adjudicated to lack capacity to make his own decision). Section 2356 does set limits, restricting a conservator in certain matters such as the use of experimental drugs, but none of those limitations is at issue here.

---

<sup>29</sup> We disagree, however, with appellants' position that the distinction between Robert and the vegetative Mr. Drabick is "de minimus."

Robert's reply brief asserts a Florida court indicated there was no significant legal distinction between a PVS patient and the non-PVS condition of the ward before the court. (*In re Guardianship of Browning* (1990) 568 So.2d 4.) However, *Browning* merely said that both PVS and incompetent non-PVS patients were entitled to have surrogates execute for them the wishes they expressed in written advance directives. (*Id.* at pp. 12-13)

Thus, when courts in section 2355 cases inquire whether there is a reasonable possibility the conservatee will return to "cognitive and sapient life" before allowing a conservator to withhold life-sustaining treatment (*Drabick, supra*, 200 Cal.App.3d at p. 217), the point of the inquiry is to determine whether there is a possibility the conservatee will regain capacity to make his or her own decision. Thus, while we recognize a distinction has been made between sapience and the vegetative state (see fn. 25, *ante*), we do not believe that any non-vegetative state of a conservatee removes from the conservator the statutory authority to make a decision to withhold life-sustaining treatment. We accordingly reject Florence's and amicus curiae's arguments that because courts sometimes omit the word "sapient" and speak of a return to "cognitive life," sapience has no separate meaning, and the existence of any cognitive function should remove the conservatee from the conservator's power to make a decision to withdraw life-sustaining treatment. Florence's position again assumes Robert wants to stay alive, an assumption we cannot share.

Moreover, the case of a non-PVS patient presents an equally compelling case for application of section 2355 as a PVS patient, because the non-PVS patient can feel pain and suffering, hence refusal to allow a surrogate to exercise the patient's right to refuse treatment may condemn the patient to prolonged suffering. (Of course, the prospect of pain after

removal of the treatment is a factor to be considered in these cases as well.)

Florence fails to show any basis for reading the broad provision of section 2355 as containing implied exclusions for the circumstances at issue in this case. We disagree with Florence's unsupported position that, until recently, no one could have imagined that anyone would ever try to terminate artificial nutrition/hydration of a conscious patient. Case law reflects that the current situation (medicine maintaining life with artificial means) was not beyond the ken of the Legislature when it enacted section 2355 in 1979 (Stats. 1979, ch. 726, § 3). (E.g., *Matter of Quinlan*, *supra*, 70 N.J. 10 [355 A.2d 647] [respirator and feeding tube].) We reject Florence's argument that, because the father in the *Quinlan* case sought to remove a respirator, no one would have envisioned a surrogate trying to remove only a feeding tube.<sup>30</sup>

---

<sup>30</sup> Appellants assert the probate court ruled it had discretion not to apply section 2355 because the court did not believe the Legislature contemplated this type of case when it wrote the law, and the court believed a life-or-death decision should not be left to the plenary authority of the conservator as the statute requires. We note the question of applicability of section 2355 was complicated in the unique procedural posture of this case, in that the probate court always expressly withheld from Rose section 2355 powers with respect to terminating nutrition/hydration--powers for which Rose requested express authorization in her petition to the probate court, but which she now claims were automatically conferred on her when the court ruled Robert lacked capacity to make his own health care decisions.

In holding that section 2355 applies to non-PVS conservatees, we do not rely on the out-of-state cases cited by appellants because, as Florence observes, the out-of-state cases cited by appellants are distinguishable, e.g., they involved patients who were PVS or permanently unconscious (*In re Estate of Longeway* (1989) 133 Ill.2d 53 [549 N.E.2d 292] [patient would never regain consciousness<sup>31</sup>]; *Matter of Tavel* (Del. 1995) 661 A.2d 1061, 1069 [patient in "coma vigil," a form of PVS where patient is capable of some reflexive movement which gives the appearance of awareness<sup>32</sup>]), or a patient who had signed a written advance directive before becoming incompetent (*In re Guardianship of Browning* (1990) 568 So.2d 4), or a patient in an advanced stage of a terminal and incurable illness (*In re Guardianship of Grant* (1987) 109 Wash.2d 545, 551 [747 P.2d 445, 448]).

---

<sup>31</sup> Robert's reply brief claims the patient in *Longeway*, though characterized as "unconscious," could open her eyes and respond to pain and verbal command--activities inconsistent with PVS. However, the *Longeway* court expressly stated that in order for a surrogate to withhold artificial hydration/nutrition from an incompetent patient, the "patient must be diagnosed as irreversibly comatose, or in a persistently vegetative state." (*In re Estate of Longeway, supra*, 133 Ill.2d at p. 47 [549 N.E.2d at p. 298].)

<sup>32</sup> Robert's reply brief says one expert witness in *Tavel* opined the patient was *not* PVS (because she was capable of some movement and had normal breathing and kidney function). However, the trial court rejected this witness's testimony--a determination undisturbed on appeal. (*Matter of Tavel, supra*, 661 A.2d at p. 1066.)

Florence claim Robert's case is similar to *In re Martin*, *supra*, 450 Mich. 204 [538 N.W.2d 399], a Michigan case where the wife/conservator of an incompetent but conscious, severely-impaired patient was not allowed to withdraw life-sustaining treatment over the objections of the patient's mother and sister. The Michigan Supreme Court there held that "in the absence of clear and convincing evidence of the conscious incapacitated individual's preinjury statement expressing his decision to refuse life-sustaining medical treatment under the present circumstances, [Michigan] courts will not authorize the removal of life-sustaining medical treatment." (*Id.* at p. 234 [538 N.W.2d at p. 413].) Florence cites the Michigan court's statement that if the court errs, it must err in preserving life. (*Id.* at p. 208 [538 N.W.2d at p. 402].)

However, *Martin* did not cite any Michigan statute similar to the California statute, which gives "exclusive authority" to a conservator. (§ 2355; fn. 3, *ante.*) *Martin* cited a Michigan statute governing surrogates designated by persons before becoming incompetent, but noted the patient in the case before the court had been injured before enactment of the statute. (*In re Martin, supra*, 450 Mich. at pp. 217-218 [538 N.W.2d at p. 406], citing M.C.L. § 700.496.) We note the Michigan statute provides in part: "A patient advocate may make a decision to withhold or withdraw treatment which would allow a patient to die only if the patient has expressed in a clear and convincing manner that the patient advocate is

authorized to make such a decision, and that the patient acknowledges that such a decision could or would allow the patient's death." (M.C.L. § 700.496, subd. (d).) No such qualification appears in the California statute under consideration (§ 2355) or any other California statute cited by the parties in the appeal before us. Thus, given the difference in statutory schemes, we do not consider *Martin* helpful to the case before us.

Florence cites *Matter of Edna M.F.* (1997) 210 Wis.2d 557, 561 [563 N.W.2d 485, 487], which denied a guardian's petition to allow withdrawal of artificial nutrition from a 71-year-old woman with Alzheimer's disease. *Edna* held that if the patient is not PVS, it is not in the best interests to withdraw life-sustaining treatment unless the ward has executed an advance directive or other statement clearly indicating her desires. *Edna* indicated the guardian *could* withdraw life-sustaining treatment if she demonstrated by a preponderance of the evidence a clear statement of the ward's desire for withdrawal of treatment under the circumstances in which the ward found herself. (*Id.* at p. 569 [563 N.W.2d at p. 490].) The court held a statement made by the ward 30 years earlier, that she would rather die than lose her mind, was insufficient. (*Id.* at p. 570-571 [563 N.W.2d at p. 491].) Additionally, the court noted a Wisconsin statute prohibited withdrawal of nutrition/hydration if it would cause pain or discomfort, unless the pain and discomfort could be alleviated. (*Id.* at

p. 570, fn. 7 [563 N.W.2d at p. 490, fn. 7].) Accordingly, *Edna* is distinguishable from the case before us.

We conclude the appropriate substantive standard in this case is that set forth in *Drabick*: The court's role is limited to determining whether the conservator's decision complies with section 2355, i.e., that the conservator has acted in "good faith" and decided "based upon medical advice," that treatment is "necessary," after consideration of the conservatee's prior wishes and best interests. Thus, the conservator is not required to prove that the conservatee, while competent, expressed a desire to die in these circumstances. Moreover, it is not for the court to decide independently whether the conservator's decision is in the conservatee's best interests; the court is merely to satisfy itself that the conservator has considered the conservatee's best interests in good faith and has met the other requirements of section 2355.

In this case, as we have noted, the trial court found upon clear and convincing evidence that Rose's decision to remove the feeding tube was done in good faith, based upon medical evidence and after considering the conservatee's best interests, including his likely wishes. These findings were sufficient to satisfy the requirements of section 2355.<sup>33</sup> To

---

<sup>33</sup> Florence contends no substantial evidence supports these findings. However, our review of the record discloses the findings are supported by substantial evidence.

the extent the trial court required Rose to prove that Robert, while alive, would have wanted the feeding tube removed, the trial court exceeded the requirements of the statute. Similarly, the statute did not authorize the trial court to undertake its own independent examination of Robert's best interests--that was a task delegated to the conservatee, provided only that she acted in good faith.

In short, the trial court erred in its application of section 2355. One remaining question is whether the result achieved by the trial court (continuation of the feeding tube) is mandated by constitutional considerations. We shall conclude no constitutional rule stands in the way of application of the statute in this case.

### III. Constitutional Considerations

Florence argues application of section 2355 to a non-PVS conservatee interferes with the conservatee's constitutional right to life. According to Florence, allowing a conservator to withhold nutrition/hydration from a severely cognitively impaired person without adequate safeguards will push us onto a slippery slope where disabled people will be denied life-sustaining treatment because someone else decides they are too much of a burden on the family or on society.

Appellants argue the *Drabick* holding should apply to conservatees, such as Robert, who are not PVS but who are severely cognitively impaired, in order to preserve the conservatee's constitutional right to refuse treatment.

The crux of the dispute in this case revolves around the parties' different perspectives concerning what rights are at issue. Appellants appear to see this case as a matter of balancing the conservatee's right to refuse treatment against the state's abstract interest in preserving life, with the result that the individual's right outweighs the state's abstract interest. (*Drabick, supra*, 200 Cal.App.3d at p. 209, fn. 25 [state's interest in preserving life is not superior to the individual's right to control his own medical treatment].) Florence, on the other hand, appears to see this case as a matter of the state (through the court) protecting the conservatee's right to life. Thus, appellants' arguments assume Robert, if competent, would want to die; respondents' arguments assume he would want to live.

The patient's right to refuse medical treatment "is grounded both in the constitutional right of privacy and in the common law. [Citations.]"<sup>34</sup> (*Drabick, supra*, 200 Cal.App.3d at p. 206, fn. 20.)

---

<sup>34</sup> The common law right derives from the principle that even the touching of one person by another without consent and without legal justification is a battery, and a doctor who performs an operation without consent commits an assault. (*Cruzan v. Director, Mo. Health Dept.* (1990) 497 U.S. 261, 269 [111 L.Ed.2d 224, 236] [Missouri requirement that incompetent's wishes as to withholding of life-sustaining treatment be proved by clear and convincing evidence did not violate due process].) The logical corollary of the doctrine of informed consent is the right not to consent, i.e., to refuse treatment. (*Ibid.*) The deference to the patient's right of control over bodily integrity derives principally [Continued]

The constitutional basis for the individual's right to determine the scope of his or her own medical treatment derives in California from the privacy provision of California Constitution, article I, section 1, which provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."<sup>35</sup> (See *Drabick, supra*, 200 Cal.App.3d at p. 206, fn. 20.) *Drabick* cited *Bouvia v. Superior Court* (1986) 179 Cal.App.3d 1127, 1137-1138, which in turn cited both the state and federal Constitutions. However, the United States Supreme Court has recently indicated its preference to regard the right to make health care decisions as a Fourteenth Amendment liberty interest, rather than a privacy interest under the federal Constitution. (*Cruzan v. Director, Mo. Health Dept.* (1990) 497 U.S. 261, 279, fn. 7 [111 L.Ed.2d 224, 242, fn. 7].) *Cruzan* assumed, without deciding, that the liberty interest in refusing medical treatment includes the right to refuse life-sustaining nutrition and hydration. (*Id.* at p. 279 [111 L.Ed.2d at p. 242] [Missouri requirement that

---

from "the long-standing importance in our Anglo-American legal tradition of personal autonomy and the right of self-determination." [Citations.]" (*Thor v. Superior Court* (1993) 5 Cal.4th 725, 734-735 [competent quadriplegic prison inmate had right to refuse medical treatment, including sustenance].)

<sup>35</sup> It appears to us that the circumstances of this case also fall within the provision's right to enjoy and defend life.

incompetent's wishes as to withholding of life-sustaining treatment be proved by clear and convincing evidence did not violate due process].) We need not decide any question of a liberty interest, because we resolve this case as a matter of privacy interest under the California Constitution, and although appellants refer to the liberty interest, they do not show that it adds anything helpful to their position, beyond the privacy interest under the California Constitution.

The California Legislature has also recognized the right to control one's own medical treatment as a fundamental right, by declaring it so, in connection with the Natural Death Act, Health and Safety Code, section 7185.5, which authorizes advance directives for health care decisions (an enactment not at issue in this case).<sup>36</sup> (*Drabick, supra*, 200 Cal.App.3d at p. 206.)

---

<sup>36</sup> The Natural Death Act, insofar as it authorizes written advance directives for health care, is not at issue here, because Robert made no written directive, and the statutes do not provide the exclusive means for exercising the right to refuse medical treatment. (*Drabick, supra*, 200 Cal.App.3d at pp. 214-216.) Nevertheless, the legislative findings and declarations are of interest, in that the Legislature found "prolongation of the process of dying for a person with a terminal condition or permanent unconscious condition for whom continued medical treatment does not improve the prognosis for recovery may violate patient dignity and cause unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the person." (Health & Saf. Code, § 7185.5, subd. (c).) The Legislature further declared "in the absence of controversy, a court normally is not the proper forum in which to make decisions regarding life-sustaining treatment." (Health & Saf. Code, § 7185.5, subd. (e).)

It has been said "the typically human characteristics of  
[Continued]

"[W]hile fundamentally compelling, the right to be free from nonconsensual invasions of bodily integrity is not absolute. Four state interests generally identify the countervailing considerations in determining the scope of patient autonomy: preserving life, preventing suicide, maintaining the integrity of the medical profession, and protecting innocent third parties. [Citations.]" (*Thor v. Superior Court, supra*, 5 Cal.4th at p. 738 [competent, quadriplegic prison inmate has right to refuse medical treatment including sustenance].)

Generally, the state's interest in preserving life does not outweigh the individual's right to choose. "[T]he state

---

procrastination and reluctance to contemplate the need for such arrangements" make the advance directive a tool which will often go unused. (*Barber v. Superior Court, supra*, 147 Cal.App.3d at p. 1015.) The same might be said of the "tool" of a written will to dispose of property upon death (except the law provides a default disposition in case of no will, so that a person only has to make a will if he wants to deviate from the statutory disposition of property). In the case before us, the probate court noted the disparity between the Legislature requiring a written will to dispose of property upon death, but not requiring a writing for the more important decision of whether to terminate life-sustaining procedures. Nevertheless, the Legislature has determined that written instruments are not the exclusive means of accomplishing a decision regarding life-sustaining procedures. (See *Drabick, supra*, 200 Cal.App.3d at p. 215.) Contrary to an assertion raised on appeal, the probate court did not deny Rose the authority to remove life-sustaining treatment because of the lack of a written document in this case. The court merely said, since a writing is required to dispose of property, the court believed something more "explicit" was required than a "few non-specific or casually chosen words" in order to terminate life. Thus, the court was looking for something "explicit," not necessarily "written."

has not embraced an unqualified or undifferentiated policy of preserving life at the expense of personal autonomy.

[Citation.] As a general proposition, '[t]he notion that the individual exists for the good of the state is, of course, quite antithetical to our fundamental thesis that the role of the state is to ensure a maximum of individual freedom of choice and conduct.' [Citation.]" (*Thor v. Superior Court*, *supra*, 5 Cal.4th at p. 740.) "The fact that an individual's decision to forego medical intervention may cause or hasten death does not qualify the right to make that decision in the first instance. [Citations.] Particularly in this day of sophisticated technology, the potential medical benefit of a proposed treatment is only one of the factors a patient must evaluate in assessing his or her perception of a meaningful existence. Since death is the natural conclusion of all life, the precise moment may be less critical than the quality of time preceding it. Especially when the prognosis for full recovery from serious illness or incapacitation is dim, the relative balance of benefit and burden must lie within the patient's exclusive estimation: 'That personal weighing of values is the essence of self-determination.' [Citations.]" (*Thor v. Superior Court*, *supra*, 5 Cal.4th at p. 739.)

*Drabick* said the case before it presented a conflict between two important rights. "Both the fundamental right to life--to continue receiving treatment--and the right to terminate unwanted treatment deserve consideration. Someone acting in [the conservatee's] best interests can and must

choose between them." (*Drabick, supra*, 200 Cal.App.3d at p. 210.) *Drabick* made no further mention of the right to life and did not identify the source of the fundamental right to life, but one obvious source is California Constitution, article I, section 1, which provides "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life . . . ."

*Drabick* acknowledged the patient's noncognitive state prevented him from choosing anything. "Thus, to claim that his 'right to choose' survives incompetence is a legal fiction at best. While [the patient's] condition may prevent conscious choice, however, it does not by any means follow that he has no protected, fundamental interest in the medical treatment decisions that affect him." (*Drabick, supra*, 200 Cal.App.3d at p. 208, fn. omitted.) "[I]t is still possible for others to make a decision that reflects his interests more closely than would a purely technological decision to do whatever is possible. Lacking the ability to decide, he has a right to a decision that takes his interests into account." (*Ibid.*)

The *Drabick* court also said: "To delegate an incompetent person's right to choose inevitably runs the risk that the surrogate's choices will not be the same as the incompetent's hypothetical, subjective choices. Allowing someone to choose, however, is more respectful of an incompetent person than simply declaring that such a person has no more rights. Thus, by permitting the conservator to exercise vicariously [the

conservatee's] right to choose, guided by his best interests, we do the only thing within our power to continue to respect him as an individual and to preserve his rights. As another court has observed, '[w]e do not pretend that the choice of the incompetent's parents, her guardian *ad litem*, or a court is her own choice. But it is a genuine choice nevertheless--one designed to further the same interests she might pursue had she the ability to decide herself. We believe that having the choice made in her behalf produces a more just and compassionate result than leaving her with no way of exercising a constitutional right.' [Citation.]" (*Drabick, supra*, 200 Cal.App.3d at p. 209.)

We agree with *Drabick*. We further believe there is no constitutional impediment to application of section 2355.

Thus, the constitutional right to life--under either the California Constitution or the Fourteenth Amendment to the United States Constitution--is not infringed by allowing a surrogate to exercise a person's right to refuse medical treatment. Thus, even assuming there is "state action," we agree with the Wisconsin Supreme Court which said in *Matter of Guardianship of L.W.* (1992) 167 Wis.2d 53 [482 N.W.2d 60], that a guardian's withdrawal of life-sustaining treatment from a ward does not constitute a deprivation of life; rather it allows the disease to take its natural course. (*Id.* at p. 71 [482 N.W.2d at p. 66].) Moreover, the Wisconsin court said due process is accorded through the statutory procedures for appointment of a guardian and determination of incompetency.

(*Ibid.*) The same applies here. "The state does not deprive an individual of life by failing to ensure that every possible technological medical procedure will be used to maintain . . . life." (*Id.* at p. 83 [482 N.W.2d at p. 71].)

We see no constitutional impediment to the application of section 2355 to the circumstances of this case.

#### IV. Standard of Proof

Appellants argue the evidentiary standard of proof under section 2355 is preponderance of the evidence, rather than "clear and convincing evidence." Florence responds the clear and convincing evidence standard is necessary to protect the conservatee's constitutional right to life. Since we will remand the case for consideration of respondent's evidence, we will resolve this dispute. We shall conclude the standard compelled by due process is that the probate court must find by clear and convincing evidence that the conservator has, in good faith and based upon medical advice, determined whether treatment is necessary, after having considered the conservatee's prior wishes and best interests.<sup>37</sup>

---

<sup>37</sup> We agree with respondents that Robert's appellate position conflicts with his position in the probate court, where he agreed clear and convincing evidence was the proper standard. Robert's reply brief claims his counsel's comments in the probate court were confused and did not really advocate the clear and convincing evidence standard. Having reviewed the transcript, we disagree with Robert. We note the statement of decision (Phase I) stated Robert's position was that the clear and convincing evidence standard applied. We therefore conclude Robert has waived the evidentiary burden of proof issue on appeal. However, we shall consider his arguments, [Continued]

Section 2355 does not expressly specify any particular standard of proof for a conservator's decision to withhold life-sustaining treatment from a conservatee. Since section 2355 does not specify a standard, the "preponderance of evidence" standard applies by default, unless the courts find some constitutional compulsion for a higher standard. (Evid. Code, § 115 ["Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence"]; Evid. Code, § 160 [the "law" referred to in Evid. Code, § 115 includes not only statutory law, but also constitutional law and case law].) Hence, appellants are incorrect in arguing that imposition of a clear and convincing evidence standard must be accomplished, if at all, by the Legislature.

The standard of proof represents "an attempt to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."

[Citation.] As the seriousness of the consequences resulting from an erroneous judgment increases, a stricter standard of

---

because of the significance of the issue and because the matter is properly at issue, by virtue of Rose's consistent position in the probate court and on appeal that the standard should be preponderance of the evidence.

We disagree with appellants' assertion that this court need not reach the standard of proof question because the probate court found facts supporting Rose's decision even under the heightened standard of clear and convincing evidence. The case is not over but will be remanded to the probate court to allow respondents to present their case (as we discuss *post*). Hence, our discussion of the evidentiary burden will provide guidance to the probate court on remand.

proof is required to mitigate against the possibility of error." (*Conservatorship of Sanderson* (1980) 106 Cal.App.3d 611, 619.) The California Supreme Court in *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, cited the United States Supreme Court's statement that the evidentiary standard of proof "reflects the weight of the private and public interests affected as well as a societal judgment about how the risk of error should be distributed between the parties. [Citation.] In a civil dispute over monetary damages the preponderance of the evidence standard reflects society's minimal concern with the outcome and a conclusion that the parties should bear the risk of error in roughly equal fashion. [Citation.] . . . [O]n the other hand, . . . the standard of proof required in an action to terminate [fundamental liberty] rights requires a balancing of the private interests affected, the risk of error created by the state's chosen procedure, and the countervailing governmental interest supporting the procedure.<sup>[38]</sup> [Citation.]" (*Cynthia D. v. Superior Court*, *supra*, 5 Cal.4th at p. 251, [discussing standard of proof for termination of parental rights], citing *Santosky v. Kramer*

---

<sup>38</sup> "'Clear and convincing" evidence requires a finding of high probability.' [Citation.] Such a test requires that the evidence be "so clear as to leave no substantial doubt;" "sufficiently strong to command the unhesitating assent of every reasonable mind.'" [Citation.] [¶] A preponderance of the evidence standard, on the other hand, 'simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence. . . ."' [Citation.]" (*Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 320.)

(1982) 455 U.S. 745 [71 L.Ed.2d 599]; see also, *Cruzan v. Director, Mo. Health Dept.*, *supra*, 497 U.S. at pp. 343-344 [111 L.Ed.2d at pp. 282-283] [state may require clear and convincing evidence standard in proceedings to withdraw life-sustaining treatment from incompetent patient].)

By the time the conservator makes the decision to withhold life-sustaining treatment, the clear and convincing evidence standard will already have been applied to other issues. Thus, *Conservatorship of Sanderson*, *supra*, 106 Cal.App.3d 611, held that, in the absence of any statutory direction, the standard of clear and convincing evidence was required in adjudicating a petition for appointment of a conservator, because the conservatee is significantly deprived of liberty and a stigma attaches to a determination that a person is unable to take care of himself or herself. The court's selection of a conservator is to be guided by what appears to be for the best interests of the proposed conservatee. (§ 1812.) Since *Sanderson* was decided, the Legislature has imposed by statute the standard of clear and convincing evidence for adjudication of petitions to appoint conservators. (§ 1801, subd. (e); Stats. 1995, ch. 842, §7.)

Additionally, *Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, held the clear and convincing evidence standard is to be used in deciding whether a conservatee lacks capacity to consent to or refuse medical treatment (there, convulsive treatment). Amicus curiae California Medical Association (CMA) disputes that this was the holding of

*Lillian F.* However, appellants agree the clear and convincing evidence standard is the appropriate standard for adjudication of whether a conservatee lacks capacity to make health care decisions. Therefore, we assume for purposes of this appeal that the probate court applied a clear and convincing evidence standard to its determination that Robert lacked capacity to give informed medical consent.

We believe due process dictates that clear and convincing is the appropriate standard for review of a conservator's decision to withhold life-sustaining treatment because, even though section 2355 gives the conservator exclusive authority, the conservator's exercise of decisionmaking power for the conservatee concerning life-sustaining treatment creates a tension between the conservatee's fundamental right to life and the conservatee's right to refuse medical treatment, and the consequences of error are grave and irrevocable.

Appellants claim *Drabick, supra*, 200 Cal.App.3d 185, rejected a clear and convincing evidence standard for section 2355. We disagree.

Thus, confusion has resulted in the case law, due to a failure to distinguish between (1) the substantive standard of proof (what facts must be proven), and (2) what evidentiary burden of proof governs (clear and convincing evidence or preponderance of the evidence). As one commentator observed: "Discussions of the appropriate standard of proof have been thrown into a state of considerable confusion by the habit of courts and commentators of failing to distinguish between the

standard of proof and the substantive standard for forgoing life-sustaining treatment. Discussions of these two standards are generally intermingled so that it is not always easy to discern the difference between them." (1 Meisel, *The Right to Die*, *supra*, § 5.62, p. 276.)

*Drabick* engaged in this intermingling of concepts, when it stated: "Some courts have taken the position that an incompetent patient's hypothetical desire to forego life-sustaining treatment must be proved by clear and convincing evidence or some other standard and, when so proved, is conclusive."<sup>39</sup> (*Drabick*, *supra*, 200 Cal.App.3d at p. 211.) *Drabick* rejected the stated approach (*ibid.*), which leads appellants in the case before us to argue that *Drabick* rejected imposition of any clear and convincing evidence standard under section 2355. However, *Drabick's* next sentences demonstrate that the court did not reject a clear and convincing evidence standard, but rather rejected a substantive standard that would have made evidence of the patient's previously stated wishes indispensable and

---

<sup>39</sup> One court has said of this type of intermingling: "[T]he term 'clear and convincing evidence' in this context refers to the requirement that the individual in question must have stated in an explicit fashion the exact treatment desired were the patient to lapse into various medical conditions. The term 'clear and convincing evidence' is used more commonly, however, as a burden of proof. In that context, the standard refers to that quantum of evidence necessary for a party to establish a point." (*In re Fiori*, *supra*, 543 Pa.2d at p. 604, fn. 9 [673 A.2d at p. 911, fn. 9].)

controlling. Thus, *Drabick* criticized the stated approach because: "First, we have found no authority--other than cases on the subject of life-sustaining treatment--to support the idea that a person can exercise (or waive) a fundamental constitutional and common law right unintentionally through informal statements years in advance. It would be a dangerously unpredictable precedent. Second, if one bases the treatment of persistently vegetative patients not on the statutory delegation of rights to a conservator but on the theory that an evidentiary hearing can reveal the patient's own hypothetical choice, one is left with no consistent basis for a decision when a patient has been silent on the matter. Third, the approach is contrary to the apparent intent of . . . section 2355, which is to give the conservator 'exclusive' authority for medical treatment decisions. This authority is so absolute that section 2355 validates the conservator's decisions 'whether or not the conservatee objects.'" (*Drabick, supra*, 200 Cal.App.3d at p. 211, fn. omitted.)

Thus, we do not read *Drabick* as rejecting the clear and convincing evidence standard as an evidentiary burden.

Appellants argue that once a person qualifies to be appointed conservator under the "tough" clear and convincing evidence standard, that person becomes the conservatee's voice, and thereafter requiring the conservator to justify his or her health care decision by clear and convincing evidence would interfere with the exercise of the conservatee's freedom

of choice and constitutionally protected interests. However, the statement that the right to choose survives incompetence is "a legal fiction at best." (*Drabick, supra*, 200 Cal.App.3d at p. 208, fn. omitted.) The delegation of choice to the conservator "inevitably runs the risk that the surrogate's choices will not be the same as the incompetent's hypothetical, subjective choices. Allowing someone to choose, however, is more respectful of an incompetent person than simply declaring that such a person has no more rights. Thus, by permitting the conservator to exercise vicariously [the conservatee's] right to choose, guided by his best interests, we do the only thing within our power to continue to respect him as an individual and to preserve his rights. As another court has observed, '[w]e do not pretend that the choice of [the incompetent's] parents, her guardian *ad litem*, or a court is her own choice. But it is a genuine choice nevertheless--one designed to further the same interests she might pursue had she the ability to decide herself. We believe that having the choice made in her behalf produces a more just and compassionate result than leaving her with no way of exercising a constitutional right.' [Citation.]" (*Id.* at p. 209.)

Appellants cite the concurring opinion of Justice Raye in this court's opinion concerning appointment of counsel for Robert--*Wendland v. Superior Court, supra*, 49 Cal.App.4th 44-- for the proposition that clear and convincing evidence is not required. However, Justice Raye merely said in dictum that a

decision to remove Robert's feeding tube does not hinge on judicial efforts to divine his unarticulated wishes. (*Id.* at p. 53, conc. opn. of Raye, J.) That is a view with which we wholeheartedly agree.

We do not base our conclusion concerning the standard of proof on *Cruzan v. Director, Mo. Health Dept.*, *supra*, 497 U.S. 261 [111 L.Ed.2d 224] which held a state did not violate due process by requiring clear and convincing evidence of an incompetent's wishes to withdraw treatment, because *Cruzan* did not hold due process *required* this or any other particular standard. We therefore need not address all of appellants' arguments as to why *Cruzan* does not apply here. We note appellants claim *Cruzan* implicitly held due process does not require proof by clear and convincing evidence, because *Cruzan* cited *Drabick*, and the United States Supreme Court must have been aware that *Drabick* rejected a clear and convincing evidence standard. However, as we have explained, *Drabick* did not reject an evidentiary standard but rather a substantive standard. Moreover, we do not read United States Supreme Court decisions as implicitly endorsing every point in every case it cites.

Appellants misquote a dissenting opinion in *Cruzan*, *supra*, for the proposition that an evidentiary rule of clear and convincing evidence will not adequately ensure that the wishes of incompetent persons will be honored. However, apart from the fact a dissenting opinion is not authoritative, the dissenter was referring to a rule requiring *written* advance

directives, not a rule requiring clear and convincing evidence. (*Cruzan v. Director, Mo. Health Dept., supra*, 497 U.S. at p. 323 [111 L.Ed.2d at p. 270].)

Appellants argue a clear and convincing evidence standard will negate the “‘exclusive’ authority” conferred on the conservator by statute. We disagree. As indicated, judicial review is limited to determining that the conservator has met the statutory requirements for surrogate decisionmaking.

That the Legislature specified a clear and convincing evidence standard in other statutes (e.g., § 2356.5 [Legislature imposed clear and convincing evidence standard in connection with forcible confinement or administration of medications to people with dementia, noting dementia patients need special protection because of abuse by caregivers]), while remaining silent in section 2355, does not render this court incapable of deciding that the clear and convincing evidence standard is constitutionally compelled in the circumstances of this case. Nor are we bound by the fact the Legislature has considered but declined to amend section 2355 to impose a clear and convincing evidence standard.

We recognize section 1958 now requires proof beyond a reasonable doubt before a conservator may have a developmentally disabled conservatee sterilized. However, that heightened standard is not called for in this case. The reason for the heightened standard is that the power to sterilize is subject to abuse and, historically, has been abused. (§ 1951; see also, *Conservatorship of Valerie N.*

(1985) 40 Cal.3d 143, 148, fn. 4 [noting "eugenic sterilization" was an early application of Mendelian genetics to what were then perceived to be hereditary mental and physical defects].) *Conservatorship of Valerie N.* held a statute which prevented sterilization of wards/conservatees denied incompetent persons rights which were accorded to competent persons, in violation of constitutional privacy rights. (*Id.* at p. 168.) The statute was overbroad, and a guardian/conservator should be allowed to consent to sterilization upon proof by clear and convincing evidence of the need for the sterilization. (*Id.* at pp. 165, 168.) The Legislature later created section 1958, with its standard of beyond a reasonable doubt.

The Legislature has not declared any particular potential for abuse in connection with a conservator's decision to withhold life-sustaining treatment from a conservatee. Certainly, the "concept of good faith precludes a decision affected by a material conflict of interest," but a financial interest need not disqualify a potential conservator in all cases. (*Drabick, supra*, 200 Cal.App.3d at p. 217 and fn. 38.)

Appellants claim courts in other states have rejected the clear and convincing evidence standard. However, the citations provided by appellants do not reflect any rejection of the evidentiary standard of proof, but other matters, such as the notion that there must be some evidence of the patient's wishes expressed while the patient was competent. (*In re Fiori* (1996) 543 Pa. 592, 603-605 [673 A.2d 905, 911-

912]; *Matter of Lawrance* (Ind. 1991) 579 N.E.2d 32, 39; *Rasmussen v. Fleming* (1987) 154 Ariz. 207 [741 P.2d 674, 682-683]; *Matter of Hier* (1984) 18 Mass.App.Ct. 200, 208-209 [464 N.E.2d 959, 963-964].) Appellants have confused the intermingling of concepts--substantive and evidentiary standards.

Appellants argue a clear and convincing evidence standard would penalize people for not having the prescience or sophistication to express their wishes clearly before becoming incompetent. However, as we have explained, under section 2355, in the absence of wishes expressed by the patient while competent, the conservator may still withhold treatment if he or she decides in good faith that the decision is in the best interests of the conservatee.

Amicus curiae CMA argues the clear and convincing evidence standard will likely lead to health care providers insisting on judicial confirmation of all medical treatment decisions. We are not persuaded. First, we emphasize that we do not hold the clear and convincing standard applies to all decisions made upon the authority of section 2355. Rather, it is the gravity of the particular decision at issue here--the withdrawal of life-sustaining treatment--that dictates the higher standard as a matter of due process. Moreover, CMA fails to persuade us that providers would be any more likely to demand judicial confirmation under the clear and convincing evidence standard than under a preponderance of evidence standard. CMA construes "life-sustaining treatment" to mean

any procedure which carries a risk of death, such as a decision not to amputate a gangrenous limb or the provision of antibiotics to treat a bacterial infection. However, our opinion in this appeal is limited to a decision to withhold or withdraw life-sustaining treatment which is directly keeping the patient alive--artificial nutrition/hydration.

We conclude the proper standard to be applied in this case is clear and convincing evidence. We emphasize our decision to apply the clear and convincing evidence standard of proof applies *only* where it is expected that withdrawal of medical treatment will certainly lead to death. We do not decide or suggest what standard should apply to other, less final decisions.

V. Burden of Producing Evidence/Abuse Of Discretion

The probate court imposed on Rose the burden of producing evidence to support her decision to withhold Robert's feeding tube. Appellants argue the court erred because, since section 2355 gives the conservator "exclusive authority," the conservator's decision is presumptively valid, and the burden must be on the person challenging the conservator's decision, to show an abuse of discretion by the conservator. Respondents, in turn, believe the burden should be on the person seeking to terminate life-sustaining treatment, which will lead to the loss of life for the conservatee. We agree with respondents.

While the parties characterize this as a question of the burden of producing evidence, it implicates the burden of

proof. Thus, Evidence Code section 550 provides the burden of producing evidence as to a particular fact is on "the party against whom a finding on that fact would be required in the absence of further evidence," and the burden is initially on "the party with the burden of proof." Evidence Code section 500 provides: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

The Law Revision Commission Comment to Evidence Code section 500 states in part: "Under Section 500, the burden of proof as to a particular fact is normally on the party to whose case the fact is essential. . . .

"Section 500 does not attempt to indicate what facts may be essential to a particular party's claim for relief or defense. The facts that must be shown to establish a cause of action or a defense are determined by the substantive law, not the law of evidence.

"The general rule allocating the burden of proof applies 'except as otherwise provided by law.' . . . In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: the knowledge of the parties concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the fact. In determining the

incidence of the burden of proof, 'the truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations.' [Citation.]" (7 Cal. Law Revision Com. Rep. (1965) p. 89.)

With respect to section 2355 cases, *Drabick, supra*, 200 Cal.App.3d 185, said the court's role should be limited to determining whether the conservator's decision complies with section 2355, and *Drabick* described the type of evidence that will support the conservator's decision. (*Id.* at p. 217.) This suggests *Drabick* contemplated that the conservator would bear the initial burden, rather than require any objectors to prove abuse of discretion by the conservator. *Drabick* did not consider or decide the issue, since there were no objectors in the probate court in that case.

Nevertheless, we consider it appropriate to place the burden on the conservator, at least under the circumstances of this case, where the conservator proposes to terminate life-sustaining treatment of a conservatee who appears incapable of expressing an objection.

Thus, with respect to a surrogate's decision to withdraw life-sustaining treatment, the Arizona Supreme Court said, "The consequences of a decision to terminate medical treatment will often be irreversible. Therefore, the court in any dispute will assume that the patient wishes to continue receiving medical treatment, and the burden to prove otherwise will rest on the party or parties desiring to terminate the

treatment." (*Rasmussen v. Fleming, supra*, 154 Ariz. at p. 224 [741 P.2d at p. 691].) We agree the burden is appropriately placed on the person seeking to terminate life-sustaining treatment of another, not because of any presumption favoring life, but because the consequences of a decision to terminate life-sustaining treatment are expected to be irreversible. (See also, 2 McCormick on Evidence (5th ed. 1999) Burden Of Proof And Presumptions, § 337, p. 412 [plaintiff who generally seeks to change present state of affairs should be expected to bear risk of failure of proof or persuasion].) That the California statute gives the conservator exclusive authority to make decisions does not alter our conclusion that the conservator who decides to terminate life-sustaining treatment has the initial burden of producing evidence that he or she has met section 2355's requirements.

Moreover, as a practical matter, facts material to judicial resolution of the case, e.g., whether the conservator is acting in good faith and based upon medical advice, are peculiarly within the knowledge of the conservator, and it is not unfair to impose the initial burden on the conservator to produce evidence on these matters. (See *People v. Montalvo* (1971) 4 Cal.3d 328, 334 [noting rule of necessity and convenience, whereby initial burden of producing evidence may be placed on the party who has more ready access to proof of a fact peculiarly within his knowledge]; 7 Cal. Law Revision Com. Rep., *supra*, pp. 89-90.)

Appellants complain the probate court improperly imposed a presumption in favor of continued existence, at the expense of the liberty interest to decide--or have a surrogate decide--to end such existence. Florence suggests the presumption should be in favor of continued life for the conservatee to prevent abuse and because where a conservator is exercising the decisionmaking power, the state's interests--in protecting the incompetent person from potential conflicts of interest, protecting due process rights, and fulfilling its parens patriae duty to safeguard incompetent persons--and the patient's interests are no longer in opposition. However, we are mindful that excessive judicial control of a surrogate's decisionmaking power may interfere with the exercise of the individual's right to refuse treatment, condemning the patient to prolonged suffering.

We thus conclude there should be no presumption in favor of continued existence. "[T]he state has an interest in protecting [the incompetent's] right to have appropriate medical treatment decisions made on his behalf. The problem is not to preserve life under all circumstances but to make the right decisions. A conclusive presumption in favor of continuing treatment impermissibly burdens a person's right to make the other choice." (*Drabick, supra*, 200 Cal.App.3d at p. 209.) However, there should also be no presumption in favor of death, because the conservatee has a right to life.

We conclude the probate court properly placed the burden of producing evidence on Rose.

## VI. 1999 Legislation

We allowed supplemental briefing on the effect, if any, of new legislation amending section 2355, enacted in October 1999, while this appeal was pending.<sup>40</sup> (Stats. 1999, ch. 658, § 12.) The parties argue whether the new version of section 2355 should apply. We shall conclude the new legislation does not go into effect until July 1, 2000, hence it does not control this appeal, but it may be a factor upon remand.

The new legislation contains transitional provisions (Stats. 1999, ch. 658, § 39 [adding § 4665<sup>41</sup> to the Probate

---

<sup>40</sup> The 1999 amended version of section 2355 provides in part: "(a) If the conservatee has been adjudicated to lack the capacity to make health care decisions, the conservator has the exclusive authority to make health care decisions for the conservatee that the conservator in good faith based on medical advice determines to be necessary. The conservator shall make health care decisions for the conservatee in accordance with the conservatee's individual health care instructions, if any, and other wishes to the extent known to the conservator. Otherwise, the conservator shall make the decision in accordance with the conservator's determination of the conservatee's best interest. In determining the conservatee's best interest, the conservator shall consider the conservatee's personal values to the extent known to the conservator. The conservator may require the conservatee to receive the health care, whether or not the conservatee objects. In this case, the health care decision of the conservator alone is sufficient and no person is liable because the health care is administered to the conservatee without the conservatee's consent. For the purposes of this subdivision, 'health care' and 'health care decision' have the meanings provided in Sections 4615 and 4617, respectively. . . ." (Stats. 1999, ch. 658, § 12.)

<sup>41</sup> Section 4665 provides in part: "Except as otherwise provided by statute: [¶] (a) On and after July 1, 2000, this division applies to all advance health care directives, [Continued]"

Code]) giving a July 1, 2000, effective date for a certain division, which does not include section 2355 but does include definitions of health care and health care decisions (§§ 4615, 4617) which are mentioned in the new version of section 2355. (Stats. 1999, ch. 658, §§ 12, 39 [adding § 4617].) Although the transitional provision does not specify section 2355, we conclude the July 1, 2000, date also applies to section 2355, because section 2355 refers to sections 4615 and 4617, which do not go into effect until July 1, 2000. Moreover, the Legislative Counsel's Digest indicates the bill becomes operative July 1, 2000.

Since our conclusions regarding the pre-1999 statute will lead to remand, and the new legislation may become an issue for Robert, we will comment on the new legislation for the guidance of the parties and in the interests of judicial economy.

---

including, but not limited to, durable powers of attorney for health care and declarations under the Natural Death Act . . . regardless of whether they were given or executed before, on, or after July 1, 2000. [¶] (b) This division applies to all proceedings concerning advance health care directives commenced on or after July 1, 2000. [¶] (c) This division applies to all proceedings concerning written advance health care directives commenced before July 1, 2000, unless the court determines that application of a particular provision of this division would substantially interfere with the effective conduct of the proceedings or the rights of the parties rights and other interested persons, in which case the particular provision of this division does not apply and prior law applies. . . ."

The new legislation repeals prior provisions concerning advance directives and durable powers of attorney for health care decisions, and replaces them with uniform rules applicable to both. (Legis. Counsel's Dig., Assem. Bill No. 891, Stats. 1999, ch. 658.) The new legislation also revises section 2355 to conform. (*Ibid.*) New section 2355 still gives the conservator "exclusive authority," still requires the conservator to determine whether treatment is necessary in good faith based on medical advice, and still allows the conservator to act over the conservatee's objections. (Stats. 1999, ch. 658, § 12.) The new revision specifies that "health care decision" includes the withholding or withdrawal of artificial hydration and nutrition. (Stats. 1999, ch. 658, §§ 12, 39 [§ 4617].) The new revision also adds a direction that the conservator make his or her decision "in accordance with the conservatee's individual health care instructions, if any, and other wishes to the extent known to the conservator. Otherwise, the conservator shall make the decision in accordance with the conservator's determination of the conservatee's best interests. In determining the conservatee's best interest, the conservator shall consider the conservatee's personal values to the extent known to the conservator." (Stats. 1999, ch. 658, § 12.)

Thus, the 1999 amendment to section 2355 makes it even more clear that section 2355 is intended to apply to the withholding of artificial nutrition/hydration from a

conservatee who lacks capacity to make his own health care decisions.

Appellants cite a comment by the bill's sponsor, the California Law Revision Commission, that the evidentiary standard applicable to section 2355 is preponderance of the evidence, not clear and convincing evidence. (See *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 980 [reports of commissions which have proposed statutes that are subsequently adopted are entitled to substantial weight in construing the statutes].) However, as we have discussed *ante*, constitutional considerations may compel a clear and convincing evidence standard despite the Legislature's view.

Appellants argue the new amendment to section 2355 is consistent with *Drabick*. We agree, with one exception.

As we have noted, the new statute mandates that the conservator shall make health care decisions "in accordance with the conservatee's individual health care instructions, if any, *and other wishes to the extent known to the conservator.*" (§ 2355, italics added.) This language places greater emphasis on the wishes of the conservatee than does the calculus approved in *Drabick*, but only to the extent that those wishes are actually known to the conservator.

In the initial respondents' brief on appeal, Florence argues the new legislation supports her position because section 2355 was amended "to make clear" that the statute covers the withholding of life-sustaining treatment. According to Florence, this means that up until now, section

2355 did not include the withholding of life-sustaining treatment, because otherwise there would be no need for the amendment. We disagree. Florence cites nothing in the legislative history indicating an intent to change rather than clarify the law as it had already been judicially construed. In any event, while the new 1999 legislation reinforces our conclusion, even without considering the new legislation, we conclude a conservator's powers include the withholding of artificial nutrition/hydration of a conservatee who lacks the capacity to make his own health care decisions.

We conclude the 1999 legislation does not affect the outcome of this appeal.

#### VII. Conclusions

The trial court properly placed the burden of producing evidence on Rose and properly applied a clear and convincing evidence standard. However, the court erred in requiring Rose to prove that Robert, while competent, expressed a desire to die in the circumstances and in substituting its own judgment concerning Robert's best interests rather than merely determining whether Rose had taken Robert's best interests into consideration and had satisfied the other substantive standards we describe *ante*. Accordingly reversal is required.

#### VIII. Remand

Appellants ask that we direct entry of judgment in their favor, rather than remand to case for further proceedings, pursuant to Code of Civil Procedure section 43 (reviewing court may direct entry of judgment) and Code of Civil

Procedure section 909 (reviewing court may make factual determinations).

However, as indicated, Code of Civil Procedure section 631.8 expressly states that a section 631.8 motion does not waive the moving party's "right to offer evidence in support of his defense or in rebuttal in the event the motion is not granted . . . ." Where the grant of a Code of Civil Procedure section 631.8 motion is being reversed on appeal, "the situation is the same as if the motion had not been granted. [Citations.] Accordingly, defendants are entitled to present evidence in support of their defense or in rebuttal." (*Pinsker v. Pacific Coast Soc. of Orthodontists, supra*, 1 Cal.3d at p. 167.) Thus, appellants are incorrect in their claim (unsupported by any authority) that respondents have waived the right to put on evidence by failing to inform the probate court that they had evidence. Also, *Pinsker* makes clear that reversal does not require starting the trial or hearing all over again; in the discretion of the trial court, it can be picked up where it left off.

Appellants cite no apposite authority for depriving respondents of their right to present a defense. That respondents had the right to cross-examine Rose and appellants' other witnesses does not mean they put on their entire case-in-chief during cross-examination. Appellants are obviously incorrect in their assertion that respondents could have introduced any evidence they wished, in order to impeach

Rose. They could not do so, because it was not yet their turn. Respondents should be allowed to present their case.

We conclude it is not appropriate for this court to direct entry of judgment in favor of appellants.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion. Appellants shall recover their costs on appeal.

(See rule 26(a), Cal. Rules of Court.)

**(CERTIFIED FOR PARTIAL PUBLICATION.)**

\_\_\_\_\_  
SIMS, J.

We concur:

\_\_\_\_\_  
SCOTLAND, P.J.

\_\_\_\_\_  
MORRISON, J.