LYTVYNNENKO ANATOLIY ANATOLIYOVYCH

PhD student in Law at Robert Gordon University of Aberdeen

THE RIGHT TO WITHDRAW LIFE-SUPPORTING TREATMENT AS A CONSTITUENT OF THE PATIENT'S RIGHT TO SELF-DETERMINATION: A COMPARATIVE ANALYSIS OF RESPECTIVE GERMAN AND ITALIAN CASE LAW

The progress of advanced medical care technologies allowing to sustain and prolong the life of severely morbid, or terminally ill people arose a legal dispute that formed a rather delicate issue: has a patient a right to refuse treatment even in spite of an apparent death as a consequence of it? With nearly no legislative or case-law background, a number of American courts came to different conclusions concerning prohibition of blood transfusion on basis of religious beliefs in a series of trials in the 1960s, though the issue of death was not stringently involved in them. As the life-sustaining machinery progressed, the courts faced more difficult lawsuits involving the withdrawal of treatment for terminally ill people being in permanent vegetative state, which featured the trials of Quinlan (1976), Saikewicz (1976) Eichner (1980), Leach (1980) and several subsequent trials, where American courts were the first to sanction an order to withdraw life-supporting treatment mostly upon medical report evidence suggesting no patient's recovery is expected. The fragility of such trials was apparently distinguished from trials where the courts dealt with withdrawal of life-support appliances for brain-dead people which was clearly determined even by the 1970s medical machinery. In a few decades, the given issue came into the view of German, Italian and English courts. The first two states, belonging to the continental system of law, apparently lacked any legislation on withdrawal of life-supporting treatment, which resulted in a number of controversial judgments by German land courts in the 1990s and 200s, as well as a decade-long trial of Englaro in Italy, and a resonant judgment of Welby, which arose the issue of assisted suicide as well. As the leg-

islatures were seemingly reluctant to elaborate passive euthanasia laws, all the burden of solving the issue was laid on the courts which managed to develop a body of case law on withdrawal of treatment enacting a number of principles so as to determine whether such a order to withdraw treatment is admissible, or it is not, and whether the court possesses subject matter to rule on similar issues. Herein, the advance healthcare directives (or living wills) designating the range of tolerable and intolerable invasive medical procedures and the powers of attorneys, predominantly known in English-speaking countries as “healthcare proxies”, play a substantial role as evidence, albeit their validity in fact may be challenged at trial. The given paper discusses the jurisprudence of German and Italian courts as well as the key principles which they have elaborated by adjudicating trials on withdrawal of treatment with an apparent subsequent death of the patient involved.

Key words: withdrawal of treatment, informed consent, passive euthanasia, living will, healthcare proxy, patientenverfügung, il testamento biologico, treatment termination.

Introduction. The term “euthanasia” has been primarily conceived as an assist of someone’s suicide or a “merciful” murder in the mid-20th century comments*, so it was viewed only in the embrace of criminal law, irrespective of being voluntary or involuntary**. The “humanitarian” motive to do so was (and mostly, still is) not a firm defence for a defendant who had committed a homicide of somebody terminally ill, expressing, so to say, mercy***. Generally speaking, this motive had been quite firmly rejected over a hundred years ago by the American jurisprudence****. The 20th century case-law of United States had a number of criminal trials, where defendants were prosecuted for assisting in suicide of their terminally ill relatives, though there were relatively few of them. In a 1920 case of *Roberts*, the Michigan Supreme Court faced a trial, where the victim’s husband was sentenced to prison for first-degree murder for poisoning his wife: she suffered from multiple sclerosis and herself requested to poison her by means of taking an ounce of paris green: the court found that it was not a suicide, but a murder, and condemned him to imprisonment*****. To wit, the said judgment was overturned seven decades later where the same Court found that assisting in suicide was not a murder under the common law*****. At least one American 19th century trial considered the issue of assisting

* H. Sylving, *Euthanasia: A Study in Comparative Criminal Law*, 103 U. Pa. L. Rev. 350, 364-368 (1954).

** E. J. Gurney, *Is There A Right to Die – A study of Law of Euthanasia*, 3 Cumb-Sandf. L. Rev. 235, 238-242 (1972).

*** T. Sachs, *Criminal Law – Humanitarian Motive As a Defense to Homicide – State v. Sander (N.H. 1950)*, 48 Mich. L. Rev. 1199, 1200-1201 (1950).

**** See, e.g. *Turner v. State [of Tennessee]*, 119 Tenn. 663, 670-672 (1907).

***** *People v. Roberts*, 211 Mich. 187, 190-192; 195-199 (1920).

***** *People v. Kevorkian*, 447 Mich. 436, 527 N.W. 2d. 714 (1994).

in committing suicide of a woman by her husband: as in the abovementioned trial, she was terminally ill and was also administered paris green – the Court said that suicide is not a crime in the state of Ohio, but instead, defendant was indicted on foundation of *administering poison**. These old trials, are, however quite far from the issue of withdrawing treatment on basis of a voluntary will of the patient, approved by a court order, though, in fact they may be accounted as a sort of their prototypes. However, the case law had not determined any time or circumstantial measures of the physician's duty of care after a terminally ill patient – as Kutner (1969) denotes, that literally meant the physicians and other hospital staff had to provide it before the natural death could occur, but the 20th century legislation and case law before the 1960s did not give any hints so as to how far should this treatment go**. However, at a partial solution was found by several United States courts in a number of 1960s trials where patients refused to undergo blood transfusion – in many instances, this type of invasive treatment may be considered as life-supporting. A US 1960s federal trial, encompassing a suit of Jehovah's Witnesses of Washington, D.C. against all state hospitals as well as the representatives of doctors and judges who gave orders for blood transfusion to the children of people associated with the abovesaid religious group, to preclude the abovementioned people and public bodies from ordering, or performing the same in compliance with the Washington, D.C. law as to the subject, claiming that the said statutes were unconstitutional; they lost the suit***. Several American courts came to a conclusion that upon the First Amendment plaintiff has a right to refuse medical treatment unless the state may justify the body interference in some way****; and in fact, a cascade of cases unveiled the fact that in each trial the right of the plaintiff not to be administered blood should be balanced against state interests, adopted by American courts as follows: 1) preservation of life; 2) protection of innocent third parties; 3) suicide prevention; 4) ethics preservation and maintenance*****. Some US decisions, mainly the earlier ones seemed to display a substantial prevailing of state interests against patient's religious beliefs in order to save life*****. In fact, such cases on blood transfusion could be complexified by the circumstance the patient is a minor and the

* *Blackburn v. State of Ohio*, 23 Ohio St. Rep. 146, 163-165 (1872).

** L. Kutner, *Due Process of Euthanasia: The Living Will: A Proposal*, 44 Ind. L. J. 538, 547-548 (1969).

*** *Jehovah's Witnesses of the State of Washington D.C. v. King County Hospital et. al.*, 278 F. Supp. 488, 495-496; 499-504; 505-508 (1967).

**** See. *In Re Boyd*, 403 A (2d) 744, 748-750 (1979) and cases cited therein.

***** See, for instance, *Public Health Trust of Dade County v. Wons*, 541 So. (2d) 96, 97; 100-101 (1989). Seemingly, the primary construction of the said state interests was at best expounded in *Satz v. Perlmuller*, 362 So. (2d) 160, 162 (1978).

***** See., for instance, *John F. Kennedy Memorial Hospital v. Heston etc.*, 58 N. J. 576, 279 A. (2d) 670, 672-673 (1971) [this case was repeatedly criticized thereafter in similar trials].

parents wouldn't let transfusion on basis of their religious beliefs*. In the trial of Holmes (1972), the US Federal District Court for the Northern District of Illinois acknowledged a right to refuse blood transfusion on basis or religious beliefs, had the plaintiff survived**. In some states, the hospitals applied for a court order to appoint a legal guardian who would allow administering blood to a person with its religious beliefs inhibiting the said***; or applied to the court to receive an order (an "emergency writ") to conduct it****; in some specimen, the relatives applied to the court to receive authorization for blood transfusion*****. In fact, the jurisdiction of the Courts to give such orders was attacked in the trial of Washington D.C. Jehovah's Witnesses against state hospitals and failed*****. Some courts agreed that there may be a multitude of circumstances that a court may consider when deciding whether to grant an order for blood transfusion, or not, such as existence of dependents*****; or plaintiff's fear of adverse reaction, or the calculation of future costs of treatment*****. However, the issue of subsequent and immediate death was not at the point of these trials, as well as the apparent *futility* of the treatment – which, in fact, became the key point in trials involving comatose, or brain-dead***** people in the 1970s case-law of the United States. A similar turn was taken by the English courts in a number of late 1980s and mid-1990s trials: in 1993, a pregnant woman was severely injured in a car crash, belonging to the religious group named "Jehovah's Witnesses"; she was also subjected to blood transfusion (though it was not emergent) and the Court recognized her right to withstand from such

* *Jehovah's Witnesses of the State of Washington D.C. v. King County Hospital et. al.*, 278 F. Supp. 488, 491-492; 499-504 (1967); Crouse Irving Memorial Hospital, Inc., 127 Misc. 2d 101, 103-104 (1985) and see authorities cited at p. 103.

** *Holmes v. Silver Cross Hospital of Joliet, Illinois*, 340 F. Supp. 125, 129-130; 132-136 (1972).

*** *Application of President and Directors of Georgetown College, Inc.*, 331 F.2d 1000, 1006-1010 (1964); *Public Health Trust of Dade County v. Wons*, 541 So. (2d) 96, 99 (1989).

**** See. *Application of President and Directors of Georgetown College, Inc.*, 331 F.2d 1000, 1006-1010 (1964); *Powell v. Columbian Presbyterian Medical Center*, 49 Misc. 2d 215, 267 N.Y.S.2d 450, 452 (1965); see also dictum in *Jehovah's Witnesses of the State of Washington D.C. v. King County Hospital et. al.*, 278 F. Supp. 488, 495-496; 499-502 (1967).

***** *Hamilton v. McAuliffe*, 277 Md. 336, 337-339, 341; 353 A.2d 634, 635-636, 638 (1976).

***** *Jehovah's Witnesses of the State of Washington D.C. v. King County Hospital et. al.*, 278 F. Supp. 488, 499-504; 505-508 (1967).

***** See. *Application of President and Directors of Georgetown College, Inc.*, 331 F.2d 1000, 1008 (1964); *In Re Osborne*, 294 A. 2d. 372, 374-376 (1972); *Holmes v. Silver Cross Hospital of Joliet, Illinois*, 340 F. Supp. 125, 129-130 (1972); *Mercy Hospital Inc. v. Jackson*, 306 Md. 556, 564 (1986).

***** *St Mary's Hospital v. Ramsey*, 465 So. 2d 666, 668-669 (1985).

***** *In Re Welfare of Bowman*, 94 Wash. 2d. 407; Wash., 617 P.2d 731, 734-737 (1980).

treatment on basis of religious beliefs*. From the 1980s and 90s decisions of the British Court of Appeal it may seem that the English courts truly approve maximal patient's right to autonomy, if not to say independence to patient's decision-making even in case he or a child in his custody would apparently die unless treatment is administered**; however, the British courts ruled that it is correct to preserve child's life unless the child's condition is evaluated to be condemned to death, and so, his further life would literally become intolerable and any amount of treatment would only postpone, but not avert death***. But at the same time, if the law calls a brain-dead person to be legally dead****, one would be wrong to call a comatose person to be legally dead – in fact, in Continental Europe, both Italian and German courts wisely denote in a number of respective trials, that the autonomy of the patient does not conclude with the fact of him being unable to express his wish***** for further treatment or stop it effectively*****. The advancement of medical technologies in the mid-20th century allowed to achieve considerable results to prolong the life of terminally ill people, occasionally aiding them to recover, or to at least lightening their death by diminishing their pain and suffering***** – this, in fact, became one of the key legal points of palliative care when the therapeutic obstinacy is proved*****.

* *In Re T (Adult: Refusal of Treatment)*, [1993] Fam. 95, 102-103; 112-116; the full facts, per Donaldson, L., at p. 103-106.

** *See. In Re T (A Minor)*, [1997] 1 W.L.R. 242 (herein, the parent appealing to withdraw medical treatment by liver transplantation); see other English cases on related subjects at p. 248-251.

*** *In Re J. (A Minor)* [1991] Fam. 33, 40-42.

**** *Lovato v. District Court, etc.*, No. 79SA407; 198 Colo. 419; 601 Pac. 2d 1072, 1079-1080 (1978).

***** The main criterion for e.g. German courts to reschedule the expression of patient's will is his inability to express it: *LG Duisburg*, 09.06.1999 – 22 T 22/29, para. 15. And it's not necessary for the patient to be comatose for this, but e.g. have health problems affecting intelligence for such a degree, the person could not fully conceive the consequences of withdrawal of treatment: *AG Siegen, Urt. v. 28.09.2007 – 33 XVII B710*, para. 22-23.

***** *See: Germany: OLG Karlsruhe, Urt. v. 29.10.2001 – Az.: 19Wx 21/01*, para. 17; *Italy: Piergiorgio Welby c. Associazione Onlus ed il. Dott. Giuseppe Casale*, Trib. Ordinario di Roma, Sezione I Civile, Ordinanza 16 dicembre 2006 No. N.R.G. 78506/2006, p. 5-7.

***** *See., C. E. Wasmuth, The Concept of Death*, 30 Ohio St. L. J. 32, 37-38 (1969).

***** The term “therapeutic obstinacy”, or “ostinazione terapeutica” (in original) is a term which is frequently used by Italian courts to designate a condition of a person being irreversibly ill, wherein all the medical treatment which is administered is aimed only at prolonging the patient's life who is otherwise facing a swift demise, see. *Piergiorgio Welby c. Associazione Onlus ed il. Dott. Giuseppe Casale*, Trib. di Roma, Sezione I Civile, Ordinanza 16 dicembre 2006 No. N.R.G. 78506/2006, p. 9-10; *P. Trib. Reggio Emilia, Decreto 24 Luglio 2012*, p. 5-6.

Legal basis for the jurisprudence

Therefore, we come to a concept which is called “withdrawal of treatment” which embraces a right of the patient to refute medical treatment regardless of his health condition and the consequences of the refusal, which, often opposed to trials on blood transfusion, lead to death, as the people demanding it at trial themselves, or via their guardians, are terminally ill, and at the point of trial, are unable to give their own directives for treatment. Campbell (1979), calls withdrawal of treatment as an «alternative to euthanasia» alongside with palliative care* – as it should be conceived from the generalized sense of this paper, the withdrawal of treatment has nothing to do with assisted suicides, and that’s why some courts in Italy stringently deny the relation between termination of life-supporting treatment and euthanasia at trial**. Much has been said about US and British case law on the subject, but little was said about continental law jurisdictions as Germany, or Italy, to which I dedicate this paper. Apparently, there has to be a legal basis for granting a court order to withdraw treatment – both in legislation and case law. In United States, in the trial of *Eichner v. Dillon* (1980), the basis of right to withdraw life-supporting treatment of an elderly priest being in a permanent vegetative state was laid down upon the *constitutional right to privacy****. *So held the Supreme Court of Massachusetts three years before in the trial of Saikewicz* (1977)****, and so held the Supreme Court of New Jersey in the leading “withdrawal of treatment” trial of *Quinlan* (1976)*****. The law of Germany and Italy does not have direct legislation on the subject, and that’s why the courts were very reluctant to give orders granting a withdrawal of life-supporting treatment: some courts said that there was a loophole in the provisions of Art. 1901 and 1904 of the German Civil Code, and termination of treatment is not embraced by the said provisions*****; some others held that Art. 1904 of the Civil Code deals with the giving the consent of the risk of death, but not some intervention with the *goal* of death*****, while the others held there is no loophole, as literature and the existing case law may perfectly rule out the issue of withdrawal of treatment without any precise legislation to be enacted*****. The 2003 judgment of the Federal Supreme Court held that the withdrawal of treatment was a case law-bred right*****, and Art. 1904 was

* T. Campbell, *Euthanasia and the Law*, 17 Alta L. Rev. 188, 193 (1979).

** P, Trib. Reggio Emilia, Decreto 24 Luglio 2012, p. 3.

*** *Eichner v. Dillon*, 426 N.Y.S. 2d 517; 73 A. 2d 431, 457-462 (1980).

**** *Superintendent of Belchertown v. Saikewicz*, 333 Mass. 728, 370 N.E. 2d 417, 424-426 (1977).

***** *In re Quinlan*, 355 A. 2d 647; 70 N.J. 10, 39-42 (1976).

***** *LG Munchen I*, Urt. v. 18.02.1999, 13 T 478/99, para 13 (or II (2) (b) (cc)).

***** *LG Augsburg*, Urt. v. 04.08.1999 – 5 T 2780/99, para. 9.

***** *OLG Karlsruhe*, Urt. v. 29.10.2001 – Az.: 19Wx 21/01, para. 35-36.

***** *BGH*, Urt. v. 17.03.2003 – XII ZB 2/03, para. 40-42.

unfit to be a legal basis for it, as termination of treatment is not a “medical procedure”, and Art. 1904 of the Civil Code dealt with delivering consent of the legal guardian on some life-threatening procedures*. And the Regional Court of Duisburg in a 1999 judgment granting the order to withdraw treatment assessed the provisions of Art. 1904 of the Civil Code and found that they are covering far more banal issues than withdrawal of treatment**. The Higher Regional Court of Schleswig in its 2002 judgment also considered the said provisions to be unsuitable, abstaining from giving an order to withdraw artificial nutrition holding there is no legislation for such procedure and that in terms of a withdrawal of treatment, it would be better to leave this matter to guardians and physicians themselves to decide***. However, such a position was not approved by other German courts****. At the same time, the provisions of Art. 1901 (extent of care, obligations of the supervisor) as well as Art. 1896 (legal guardianship appointment) are fit – as, the *Siegen* court emphasized that the «...well-being may understood not only objectively, but *subjectively*» (implying that in some way to withdraw treatment may also be “well-being”, and it doesn’t actually contradict Article 1896 of the Civil Code, as the legal guardian is simply executing the presumed will of the patient*****. Two years before the Federal Supreme Court’s 2003 judgment, the Higher Regional Court of Karlsruhe emphasized that the authorization of the supervisor’s consent to terminate treatment has an analogous application to Art. 1904*****. In its 2005 judgment, the Supreme Federal Court held that artificial nutrition, being an invasive procedure, if conducted against the will of the patient, gives rise for a civil action for damages analogously on basis of Art. 1004 of the Civil Code in conjunction with Art. 823*****. Besides, the Court held that is the artificial nutrition was not included in the contract between plaintiff (patient) and the hospital, and than it does not entitle them to perform it*****. In 2009, the civil code was amended by Art. 1901a of the Civil Code which introduced a provision named «*Patientenverfügung*». It legitimized «living wills», the content of which is expected to be performed by a legal guardian of the beneficiary*****; in fact, it was already done earlier by the courts with no actual statutory authority, which may be illustrated by

* BGH, Urt. v. 17.03.2003 – XII ZB 2/03, para. 15-18.

** LG Duisburg, 09.06.1999 – 22 T 22/29, para. 11-15.

*** OLG Schleswig, Urt. v. 12.12.2002, Az.: 2W 168/02, para. 11-12; 16-17.

**** OLG Karlsruhe, Urt. v. 29.10.2001 – Az.: 19Wx 21/01, para. 31-32.

***** OLG Karlsruhe, Urt. v. 29.10.2001 – Az.: 19Wx 21/01, para. 19-20; 26.

***** Piergiorgio Welby c. Associazione Onlus ed il. Dott. Giuseppe Casale, Trib. Ordinario di Roma, Sezione I Civile, Ordinanza 16 dicembre 2006 No. N.R.G. 78506/2006, p. 9-10.

***** BGH, Urt. v. 08.06.2006 – XII ZR 177/03, para. 9.

***** Ibid, para. 14.

***** Art. 1901a (1); (2) of the Civil Code.

the judgment of the Regional Court of Essen in 2007, where the court gave an order to withdraw the life-supporting treatment taking into account the living will of the beneficiary*.

The Italian courts were initially very reluctant to give orders to terminate the treatment arguing that there is no regulatory framework to do so, and moreover, were occasionally unwilling to appoint legal guardians for the people who desired to empower a relative to continue, or reversely, withdraw treatment in case they are incapable to give instructions themselves referring to the fact that the beneficiary was not yet incapacitated or was not even ill**. As of the judgment of the Italian Cassational Court of 2007, the principle of informed consent, elaborated way before the start of the 21st century***, embraces withdrawal of treatment by terminally ill people****. However, the Court of Rome found in the case of *Welby*, that the rules of informed consent are too vague to determine whether its involves the withdrawal of treatment*****. Italian courts cited various sources of the said right, primarily, Art. 404, 405 and 408 of the Civil Code (assistance of a guardian owing to disability; an appointment of the legal guardian by a tutelary judge to express the wishes of the beneficiary, that is, the patient; designation of the guardian)*****. The Court of Florence in its 2010 judgment, refers to the Italian Constitutional Court's 1990 judgment***** as a confirmation of the principle of patient's right to self-determination approved by a court of the highest instance, as well as Art. 13 and 32 of the Italian Constitution*****; the Court of Cagliari in its 2016 decision names Art. 3, 13, 32 of the Constitution, the 1978 law*****, previously citing several international-legal instruments on the patient's right to autonomy*****. In late 2017, the Italian Parliament enacted a law (Legge 22 dicembre, n. 219) on informed consent and advanced treatment provisions which summarized the key points on informed

* *LG Essen*, Urt. v. 29.11.2007 – Az.: 7T 385/07, para. 19-20 and further.

** X, Trib. Trieste, decreto del 3 luglio 2009 (no. 4202/2008), p. 3-4.

*** The leading case on the subject is the the judgment of the Cassational Court, Cass. 22 dicembre 1925, G.I. 1926 1, I 537. Several later decisions of the 20th century firmly approved it: *Stile c. Ospedale civile de Udine e Cecotto*, sent. 16 giugno 1975, n. 2439, Corte de Cassazione, 1976 Il Foro 746; *Negrini c. Migliavacca*, sent. 2 maggio 1995, Corte di Appello de Milano, 1996 Il. Foro 1418.

**** *Caso Englaro*, Corte di Cassazione, Sezione I Civ., Sentenza n.21748, del. 16 ottobre 2007, p. 8 (para. 6).

***** *Piergiorgio Welby c. Associazione Onlus ed il. Dott. Giuseppe Casale*, Trib. Ordinario di Roma, Sezione I Civile, Ordinanza 16 dicembre 2006 No. N.R.G. 78506/2006, p. 5-7.

***** Trib. de. Firenze, decreto 22 Dicembre 2010, p. 2-3; P, Trib. Reggio Emilia, decreto 24 Luglio 2012, p. 2.

***** Corte di Costituzione, Sentenza n. 471/1990, Il. Foro Italiano 1991 I 14.

***** Trib. de. Firenze, decreto del 22 Dicembre 2010, p. 2.

***** Legge 23 dicembre 1978, n. 833, «Istituzione del servizio sanitario nazionale».

***** Trib. di Cagliari, decreto del 16 luglio 2016, p. 2-3; 7-8.

consent to invasive treatment and provided a framework for the healthcare directives*.

Despite both Italian and German courts already recognize right to withdrawal of treatment, they may use different terms to designate the said right. For instance, Italian courts do not account this right as an “euthanasia”: in the case of Englaro, the Cassational Court of Italy denoted: “*The rejection of medical-surgical therapies, even when it leads to death, cannot be mistaken for a hypothesis of euthanasia, that is, for a behavior that intends to shorten life, positively causing death, expressing rather this refusal as an attitude of choice from the part of the patient – that the disease follows its natural course*”**. Several years later, the court of Reggio Emilia in its 2012 judgment emphasized, that withdrawal of treatment is not euthanasia and cannot be accounted as such***. The Court of Cagliari in its 2016 judgment simply calls it “*right to withdrawal of sanitary treatment*” (It. “*il diritto del rifiuto del trattamento sanitario*”)****. In fact, German courts also did not designate this right with a uniform name, though sometimes, the name «passive euthanasia» was occasionally used in the court reports – it was called as such in the judgment of the Higher Regional Court of Frankfurt am Main in 1997*****. Mostly, the German courts use the expression «Einstellung der...» e.g. «Ernahrung» (meaning, «feeding» in German), or any other procedure which is actually life-supporting*****. In a 2005 judgment on withdrawal of treatment, the Supreme Court said that «*...The criminal limits of euthanasia in the broader sense [...] to which the plaintiff's desire aims, seemingly have not yet been sufficiently clarified by the Senate*»*****.

Necessity of a court order

Courts also came to a following issue: is it necessary to issue an order so as to withdraw the further treatment, or it is a personal matter? If we look into a number of earlier trials on “passive euthanasia”, than the American courts

* See descriptions by the following authors: F. Giardini, *Living Will and Provisions Concerning the End of Life: the Role of the Family Members in the Matter of Advance Provisions of Treatment (DAT) in the Italian legal system*, XXII (22) Interdisciplinary Journal of Family Studies [2/2017] 1, 3-8 (2017); G. R. Gristina, L. Busatta, M. Piccinni, The Italian law on informed consent and advance directives: its impact on intensive care units and the European legal framework, 85.4 Minerva Anestesiologica 401, 403-406 (2018); M. Di Paolo, F. Gori, L. Papi, E. Turilazzi, *A review and analysis of new Italian law 219/2017: 'provisions for informed consent and advance directives treatment'*, BMC Medical Ethics 20:17 (2019), p. 5-7.

** *Caso Englaro*, Corte di Cassazione, Sezione I Civ., Sentenza n.21748, del. 16 ottobre 2007, p. 10 (para. 6.1).

*** *P*, Trib. Reggio Emilia, Decreto 24 Luglio 2012, p. 3.

**** *Trib. de Cagliari*, decreto del 16 luglio 2016, p. 3, 8.

***** *OLG Frankfurt am Mein*, 15.07.1998 – 20 W 224/98, para. 8.

***** *LG Essen*, Urt. v. 29.11.2007 – Az.: 7T 385/07, para. 1-6 (facts).

***** *BGH*, Urt. v. 08.06.2005 – XII ZR 177/03, para. 16.

held that it surely is: in the *Matter of Spring* (1980), the Supreme Court of Massachussetts, deciding on an application to terminate a hemodialysis life-prolonging treatment* held, that there may be a multitude of circumstances regarding the treatment of an incompetent patient that may be subject to a court approval**; the Court also said that actions that were done without judicial authority may be a subject of civil and criminal liability though the Court confessed of very little amount of precedents in similar cases. It held that “...When a court is properly presented with the legal question, whether treatment may be withheld, it must decide that question and not delegate it to some private person or group...”, approving the necessity of a court order***. In *Leach*, a 1980 trial decided by the Ohio Court of Common Pleas (Probate Division) upheld a motion of the husband of a woman in a permanent vegetative state finding it was decently proved by the facts and witness testimony being well-founded, granting the order; besides, in this trial, the court used a fourfold test**** holding that there is no actual state interest in artificially prolonging the life, the interests of the third parties is not affected, does not contradict the modern (70s) medical ethics concerns and found that a dislodgement of the respirator, upon the facts of the case, are not considered by the court as a prosecutable case for suicide, issuing the order to withdraw further treatment*****. In the same fashion, in 1985, the Supreme Court of Florida, following the judgments of *Leach* (1980) and *Spring* (1980) held that withdrawal of treatment of a comatose and permanently ill patient necessitates a court approval before the procedures are terminated: the court applied a judicial analogy of a requirement for commencement of judicial proceedings before a person's property may be in some way disposed by his guardian or other people, sanctioned by the law

* See facts of the case in *In The Matter of Earle N. Spring*, 8 Mass. App. Ct. 831, 832-833 (1979).

** In *The Matter of Spring*, 380 Mass. 629, 637-638 (1980), citing the court decision, aligned customly: “...Among them are at least the following:

- 1) the extent of impairment of the patient's mental faculties;
- 2) whether the patient is in the custody of a State institution
- 3) the prognosis without the proposed treatment, the prognosis with the proposed treatment;
- 4) the complexity, risk and novelty of the proposed treatment, its possible side effects;
- 5) the patient's level of understanding and probable reaction;
- 6) the urgency of decision;
- 7) the consent of the patient, spouse, or guardian;
- 8) the good faith of those who participate in the decision;
- 9) the clarity of professional opinion as to what is good medical practice;
- 10) the interests of third persons;
- 11) ...and the administrative requirements of any institution involved...”

*** *Ibid*, p. 637; 639.

**** See. *Satz v. Perlmuller*, 362 So. (2d) 160, 162 (1978).

***** *Leach v. Akron General Medical Center*, 68 Ohio Misc. 1, 10-13 (1980) (No. C80-10-20).

of Florida. So, the Court held as underwritten: «*Since life itself is of infinitely greater value to an individual than his property, it seems only reasonable that at least equal safeguards be employed before life and death decisions are placed in the hands of others*»*. In the late 90s, the jurisprudence of Germany faced some positions of the courts that the withdrawal of treatment does not need a judicial approval by a court** (though, in the historically first civil suit in Germany on withdrawal of treatment, decided by the Higher Regional Court of Frankfurt am Mein in 1998, the Court held it does***). The later court decisions from Germany clearly indicate it does. The Regional Court of Essen in its 2007 judgment, deciding upon a claim to terminate the treatment of a half-paralyzed and severely ill woman after a stroke expressed a view, that at least under circumstances of the given trial, the court order is mandatory (however, the court intimated there may be some instances when it won't be, but didn't name them****). Italian courts did not resolve the issue of necessity of a court order and this issue was not directly mentioned in the existing jurisprudence; however, there were trials concerning a "preventive" appointment of a legal guardian for the people, who were objectively concerned about themselves once becoming incapacitated owing to their past ailments. Art. 404 of the Italian Civil Code, upon which the guardian is appointed by a tutelary judge, presupposes the beneficiary must be incapacitated, at least partially. However, in recent case law Italian courts, held that in order to appoint a legal guardian upon Art. 404 of the Civil Code, it is not obligatory for the beneficiary to be partially or fully incapacitated, but he (the beneficiary) must bring in evidence (e.g. medical reports of past illnesses) which, if occurring again, may impair him much enough to render him incapable of deciding on his own concerning his further treatment or its withdrawal, and henceforward, they concluded that the appointment of the guardian is necessary to express his wills on his behalf in the future*****. Basically, it was the point of a judgment by the Court of Trieste in 2009: there, a 66-year-old man, being in a relatively decent health desired to appoint his wife as a legal guardian so as she could refuse to prolong artificial life-prolonging treatment once he falls so ill as to become unable to express his consent in a legally valid form. Plaintiff introduced various medical records confirming he had had been suffering from various heart problems over the last years. The Court found that the request to appoint the guardian should be accepted, as irrespective of the fact the elderly man was not incapacitated, he had a foundation he might become terminally ill one day in the future, and so the appointment would be necessary to express his wills*****.

* *John F. Kennedy Memorial Hosp. v. Bludworth*, 432 So. 2d 611, 615-617; 619 (Fla. Dist. Ct. App. 1983).

** *LG Munchen I*, 18.02.1999, 13 T 478/99, para. 12.

*** *OLG Frankfurt am Mein*, 15.07.1998 – 20 W 224/98, para. 9-10; 12-13.

**** *LG Essen*, 29.11.2007 – 7 T 385/07, para. 16.

***** See. X, Trib. Trieste, decreto del 3 luglio 2008 (no. 4202/2008), p. 4-5.

***** Ibid, p. 3-6.

Evidence. Living wills, presumed wills and preventive powers of attorney as evidence

As the District Court of Siegen (Germany) held in its 2007 judgment – an order to withdraw treatment is *irreversible* (herein, the court obviously meant, that the consequences of it are irreversible, as you cannot reverse the person's death, had the court erred in its findings)*, so the trial on withdrawal of treatment is a very delicate thing and that's why judges need to deal with various evidence to prove the patient's irreversible state of health as well as the accuracy of his wish and the living will, if such had ever been commenced by him**.

In terms of evidence, specific legal documents were introduced to illustrate the wishes of patient if being unable to express his consent or make any decisions on further treatment. A legal document, designated as «living will» by a US lawyer, *Louis Kutner* (1969), was initially compared to a revocable trust***. At such point, as *Strand* (1976) denoted that this type of document might be, a reflection of informed (and weighted) consent or refusal of further treatment which would toll in doctor's civil liability for battery****. Quite much has been said about the informed consent in the United States, but so little was said about Germany. If we reckon up some older German case law, in a 1908 judgment, where a physician unconsentedly operated a 6-year-old boy suffering from a congenital elevation of the right shoulder as well as a spine curvature (the operation failed and damaged his health), the German Empire Court (the *Reichsgericht*) held that a physician causing a body harm by performing an operation without a right to do so lodged from a contract or implication, is liable for damages, which the Court considered as «a deliberate assault»*****. In the mid-20th century, German courts qualified the doctor's failure to “educate” the patient on the risks and hazards of treatment upon the breach of duty*****, or negligence*****. Besides, if we turn to contemporary German case law, the Higher Regional Court of Karlsruhe in its 2001 judgment (which we're going to discuss below) held that if the patient refuses to undergo a surgery, without which he will decease, and the procedure is performed without consent, this will accounted as a bodily injury (assault/battery)*****. As *Strand* (1976) proceeds, «living wills», which were mainly elaborated in United States in the 1970s were

* AG Siegen, Urt. v. 28.09.2007 – 33 XVII B710, para. 58.

** LG Duisburg, 09.06.1999 – 22 T 22/29, para. 11-15.

*** L. Kutner, *Due Process of Euthanasia: The Living Will: A Proposal*, 44 Ind. L. J. 538, 550-551 (1969).

**** J. H. Strand, *The Living Will: The Right to Death with Dignity?*, 26 Case W. L. Rev. 485, 488-489; 493-494 (1976).

***** RG, Beschluss von 27.05.1908 – Rep. VI 484/07, para. 3; 10-14.

***** BGH, 16.01.1959, VI ZR 179/57, para. 14-16.

***** See. e.g., BGH, Urt. v. 10.07.1954 – VI ZR 45/54, para. 19-22; 25.

***** OLG Karlsruhe, Urt. v. 29.10.2001 – Az.: 19Wx 21/01, para. 17.

not authorized by the US states statutory provisions*. In 1976, California was the first state to recognize the validity of living wills: the toll of states recognizing it increased to around thirty in the next decade by 1985, rising to 48 by 1991**. In the mid-to-late 1980s, over 20 US states adopted code provisions on durable powers of attorney empowering an appointed person to act on his behalf***, which is an alternative to a «living will». If talking about Germany or Italy, living wills and preventive powers of attorneys have been known there presumably for around three decades. In Italy, the concept of living will and term «*testamento biologico*» was introduced in March 1990 by an Italian lawyer named Guido Alpa (born 1947) on a conference on bioethics****. The conditions of finding this legal document valid were decently laid down in a judgment by the Court of Cagliari in 2016, which we're going to discuss below*****. The «*testamento biologico*» in Italy has not received a big coverage in Italian case law, though Italian courts started considering living wills as evidence to appoint a legal guardian who might implement the patient's living will by applying for a court order to terminate medical treatment. For instance, it a trial before the Court of Modena, a 53-year-old man suffering from ALS, immobilized and unable to communicate «dictated» his will in a using a Low-Tech E-TRAN table indicating the letters by eyelids: he «stated» in his living will he would not desire further treatment in case of full incapacity. The tutelary judge wrote the will for him, which was approved by the disabled man. The Court, finding that there is no legislation on living wills, considered this document as an important instrument representing the patient's right to self-determination and acknowledged that it would be legitimate for the guardian to ask for withdrawal of treatment, and confirmed that patient's cognitive abilities exercised by him are full and adequate; so, the legal guardian, asking to withdraw treatment, performs the wish of the poor man, but not his own one. Thus, the Court appointed the guardian and gave him the proper instructions to act in case of the patient's incapacity – like withdrawing treatment in case of full incapacity*****. That is, the Italian courts apply an “advanced” court order to appoint a guardian who will be authorized to terminate life-supporting treatment. A similar judgment appeared before the Court of Cagliari in 2012, which also considered the conditional validity of the living will of a dying patient. There, the patient (plaintiff) also suffered from ALS incapacitated in a similar way as in the abovementioned trial. He

* Strand, *supra* at p. 509-512.

** S. J. Steinle, *Living Wills in the United States and Canada: A Comparative Analysis*, 24 Case W. Res. J. Int'l L. 435, 438-441 (1992).

*** G. J. Alexander, *Death by Directive*, 28 Santa Clara L. Rev. 67, 92-93 (1988).

**** G. Ferrando, *Guido Alpa e il testamento biologico, Dialoghi con Guido Alpa*. Un volume offerto in occasione del suo LXXI compleanno (Uni. Roma), 179, p. 179-183 (2018).

***** Trib de Cagliari, decreto del 16 luglio 2016, p. 4-5; 7-8.

***** Trib. de Modena, decreto 14 Maggio 2009, p. 1-2, 4-6, 7.

was also in full mental capacity, and in 2012 he «wrote» a living will wishing not to prolong treatment in case he is «done». He updated the will several times hallmarking the decay of his health and in 2014 he asked to appoint a guardian so as he could ask to terminate his treatment. In 2016 patient was nearly unable to communicate, and within a visit of the tutelary judge (he stayed at home), he asked to terminate his treatment without hesitation*. The Court said that upon the view of Cagliari Prosecutor's Office, there are several guiding principles in the attitude to the patient's choice to withdraw treatment that will result in predictable death:

Informed consent is a basis of any therapeutic treatment;

The Constitution of Italy protects not only the person's health, but his right to self-determination as well;

The physician cannot treat the dying patient in case of a documented refusal if the patient is fully understanding and willing it;

The refusal of treatment shall be a result of a free and effective choice of the patient, which embrace: a) this choice must be personal (if the beneficiary is incapacitated, than this consent is given by a legal guardian); b) it should be free; c) it should be current and corresponding the present day; d) concrete: it should touch exact types of treatment, but not like e.g. it was illustrated in the judgment of the Regional Court of Siegen in 2007**; e) informed – that is, the patient has to be acknowledged in the consequences of the termination of the treatment, and the physicians have to prepare medical records which are to display his actual clinical condition; f) revocable – the patient may be permitted to alter his decisions – generally, the court said, that the demands to the principles of withdrawal of treatment should be generally the same as to consent to invasive treatment***.

The Cagliari court ruled to appoint the guardian****.

The German equivalents of «living wills» and the «durable power of attorney» are «*Patientenverfugung*» and «*Vorsorgevollmacht*». They were initially introduced around 1987*****, though not widely known before early 2000s. The latter one, as it was clearly depicted in the trial from Siegen, wherein the beneficiary filed a power of attorney which contained, apart from representing her personal and property matters, a passage on a wish not to receive life-supporting treatment if no adequate survival was expected*****. The content of the living will is more strict and represents only the directives on healthcare – its contents were unveiled in the 2003 judgment of the

* Trib. de Cagliari, decreto del 16 luglio 2016, p. 3-6.

** AG Siegen, Urt. v. 28.09.2007 – 33 XVII B710, para. 28-43; 46.

*** Ibid, p. 7-8.

**** Ibid, p. 8-9; 10.

***** Concerning this, see. M. Eidenschink, *Die Patientenverfügung in der öffentlichen Debatte: Die Akzente der neuen Discussion in Deutschland, ausgehend von dem Fall Theresa Schiavo*, Lit Verlag Dr. Kopf Berlin 2009, p. 15-17.

***** AG Siegen, Urt. v. 28.09.2007 – 33 XVII B710, para. 1-8.

Supreme Court* as well as the judgment of the Regional Court of Essen**, as well as several newer judgments (which are too volumetric to be discussed in the given paper). However, regardless of the type of documents, living will is performed by the guardians, as they are appointed upon the Civil Code provisions***.

Overall, the courts accept various documentary evidence (primarily medical reports – occasionally, from independent medical centers), as well as testimony of physicians, psychiatrists, lawyers, court experts, the relatives and people who may be acquainted to the person concerned. In Italy, the tutelary judges also may visit the patients****. Living wills and durable powers of attorney which have been already mentioned above, are frequently used as evidence at trial, and are already a firm foundation for the courts to grant an order to withdraw further treatment if the presupposed condition of the patient which has been anticipated in the «living will», corresponds to his actual condition at the time of the trial*****. The German courts also tried to answer the question: what if neither an actual, nor a presumed will are possible to be found? The Higher Regional Court of Munich said, that in such case, it is quite arguable to what extent the protection of patient's life will be balanced against the personal ideas of the physician, the relatives, or others – it has to be determined by the «general values»*****. Seemingly, it is even more arguable what are those values and how should the court conceive them (e.g. the person's «well-being» – the Regional Court of *Siegen* said, it could be conceived both objectively and *subjectively******). *The same court of Siegen* thought, that in case the guardian has some discretion, but the termination of treatment has to be based on the factual findings of doctors who would believe there is no indication for further treatment*****. The testimony of physicians concerning the state of patient's health which has to be proved to be irreversible, is used in the United States since the late 1970s – the courts consider the prognosis testified by physicians, especially neurologists and neurosurgeons, as, e.g. it was in *Leach* (1980)***** or *Eichner v. Dillon* (1980)*****. Courts also give significant respect on testimony concerning the lifestyle and quality of life of the patient before he was incapacitated*****.

* *BGH*, Urt. v. 17.03.2003 – XII ZB 2/03, para. 3-6.

** *LG Essen*, 29.11.2007 – 7 T 385/07, para. 1.

*** *Ibid*, para. 14-17.

**** *Trib. de Cagliari*, decreto del 16 luglio 2016, p. 5-6.

***** *LG Essen*, 29.11.2007 – 7 T 385/07, para. 16-20.

***** *OLG Munchen*, Urt v. 25.01.2007 – 33 Wx 6/07, para. 34.

***** *AG Siegen*, Urt. v. 28.09.2007 – 33 XVII B710, para. 18.

***** *AG Siegen*, Urt. v. 28.09.2007 – 33 XVII B710, para. 57.

***** *Leach v. Akron Medical Center*, 68 Ohio Misc. 1, 4-5 (1980) (No. C80-10-20).

***** *Eichner v. Dillon*, 73 A.D.2d 431, 436-444; 426 N.Y.S.2d 517, 524-529 (1980).

***** *Foody v. Manchester Memorial Hospital*, 40 Conn. Supp. 127, 129-132 (Conn.

Sup. Ct. 1984).

Far not all courts (as, for instance, the judgment of the Siegen court in 2007) found that a living will (though encompassed in an ordinary power of attorney to empower an another person to represent the beneficiary's personal and property matters) is unconditionally valid*. Indeed, at least one recent Italian judgment tends to show that the validity of the said living will (or a document which replaces it) is conditional** and has to correspond some criteria which we're going to discuss in the undergoing chapters. Since living wills are not always (if not seldom) available as evidence of the incapacitated patient's wishes for treatment***, both Italian**** and German***** courts recognize that presumed wills are difficult to be reconstructed and henceforth require extensive witness testimony. What are presumed wills? If we reckon up *Cruzan v. Harmon* (1988), we may receive a precise response: "*A second test, designated the limited objective test, is applied in the absence of clear and convincing evidence of the patient's wishes, but where there is a measure of trustworthy evidence that the patient would have refused the treatment*"*****. If we take the case of *Englaro*, where the Italian Cassational Court considered the views of the courts in other jurisdictions (e.g. Germany, England), we may conceive that the «presumed will» is a hypothetic desire of the patient which is to be deduced upon his life, habits, and his own values and beliefs; a very similar approach was adopted by the Court of Reggio-Emilia in a 2012 trial, where the it expressed a similar view, adding religious and philosophical views*****. In *Englaro* (2007), the Cassational Court emphasized on the necessity of utmost precision of such witness testimony*****. The Court of Sigen, speaking on presumed wills, denoted that the findings of both direct (documented) wills, or «presumed wills» may never be ultimately accurate*****. The presumed will, as the Higher Regional Court of Karlsruhe said in its 2001 judgment, is established upon the following: a) testimony of the family and of the physicians; b) direct living will or a power of attorney (as it was mentioned above, in Germany it is called a "preventive" power of attorney – a «*Vorsorgevollmacht*»), if such exists, c) the judge's impression of the patient*****.

* AG Siegen, Urt. v. 28.09.2007 – 33 XVII B710, para. 20-23.

** Trib. de Cagliari, decreto del 16 luglio 2016, p. 7-8.

*** See e.g. the statement in *LG Duisburg*, 09.06.1999 – 22 T 22/29, para. 11.

**** *P*, Trib. Reggio Emilia, Decreto 24 Luglio 2012, p. 3-5.

***** AG Siegen, Urt. v. 28.09.2007 – 33 XVII B710, para. 29-37; 56-58.

***** *Cruzan v. Harmon*, 760 S.W.2d 408, 415 (Mo. 1988).

***** *P*, Trib. Reggio Emilia, Decreto 24 Luglio 2012, p. 3.

***** *Caso Englaro*, Corte di Cassazione, Sezione I Civ., Sentenza n. 21748, del. 16 ottobre 2007, p. 15 / para. 7.5.

***** AG Siegen, Urt. v. 28.09.2007 – 33 XVII B710, para. 59.

***** *OLG Karlsruhe*, Urt. v. 29.10.2001 – Az.: 19Wx 21/01, para. 30.

Germany

Earlier judgments (1998-2000)

In a decision by the Higher Regional Court of Frankfurt am Main, the patient's right to withdrawal of treatment was recognized for the first time in Germany. The facts of this trial proceed as follows. In 1997, a woman aged 84 was hospitalized to a Frankfurt hospital with an extensive cerebral infarction rendering her unconscious with no ability to move or communicate, being PEG-fed and incapable of any self-determination. In 1998 her daughter was appointed as her guardian, who applied to the court in order to request the suspension of PEG-feeding, stating her mother would not wish to deacease slowly, being recommended by the doctor. A May 1998 report stated that the state of the patient is irreversible. The Court intimates, that the process of dying must be several weeks as after the artificial nutrition without plugging of liquid nutrition, but it is unknown, is it supposed to be painless. The Court says, that in case the liquid nutrition is administered, and the presumed will is considered, the measures are justified* The court approved the thigh amputation owing to tissue necrosis, but disapproved the termination of treatment. The Court said that «*assisted suicide*» is not «*passive euthanasia*» (withdrawal of treatment), and the increased demands of «right to self-determination» to end the life must be accepted by a «declared or presumed will» of the patient, and it must be considered that doctors or relatives may be eager to end the life of the patient by their own considerations**. Therefore, the Court held that there is a necessity to put an equipoise between the: a) preservation of life and b) right to self-determination. *In para. 8, the Court held, that the application of Art. 1904 CC for both consent to interventions and consent to termination of treatment, is analogous.* The Court also said that the decision on withdrawal of treament has nothing to do with national-socialist atrocities of the 1930s, as it is based on the presumed will of the patient, but not to «annihilate liveable life»***. The Court said, that the living wills are to be considered in similar cases and apparently will increase their importance in the future****. The Court stressed, that in absense of stringent evidence for terminating the treatment, the presumption of preservation of life prevails over considerations to terminate it. The Court authorized to terminate the treatment*****. However, not all courts accepted this position – there were judgments strongly condemning this decision. For instance, in a trial in *Munich* a man suffered from a cerebral infarction rendering him unresponsive and incapacitated, suffering from psychoorganic brain syndrom ever since, fed through a PEG-tube and urinating via a special transurethral catheter. In 1998, his was appointed by a district court of Ingolstadt to take

* *OLG Frankfurt am Mein*, 15.07.1998 – 20 W 224/98, para. 3.

** *Ibid*, para. 6-7.

*** *Ibid*, para. 10.

**** *Ibid*, para. 11.

***** *Ibid*, para. 11-12.

care of him. But in December 1998 he decided to terminate the treatment of his father. The Court, however, finds that the application should not be approved regardless of the state of health of the patient, or his presumed will* (para. 6; or II (2)(a)). The court says that the «goal» of the guardian may not be «death», and has «nothing to do with healthcare». The court, however, did not object that the patient's wish to die in a handicapped state may be true, but this decision may not be given to the guardian upon the view of the Munich court (same). The Court also finds, that the decision of death *does not equate* with something like sterilization, owing to the fact they are not comparable. The Court rejected any analogy with the «healthcare provisions» of Art. 1904 CC**, augmenting that the life-terminating measures are 1) not to be delegated to a guardian, so it doesn't need a court authorization***. The court also interpreted the provisions of Art. 1904 CC as: «*Medical treatment with the risk of death, as regulated by Art. 1904 CC, is something other than a medical intervention with a goal of death, as it does not serve for the health of the person concerned*»****. Thus, the claim was rejected.

In a one more 1999, the Regional Court of Augsburg also rejected the claim to withdraw treatment in a similar style. The patient suffered a basal stroke in 1995, which later resulted in a development of hematocele (testicle blood stroke), right-stressed tetraspastics as well as severe and permanent brain damage remaining him in vegetative state being totally unable to communicate. He was receiving artificial nutrition by means of a PEG-tube. The guardian, the daughter of the patient, was appointed by a court in 1996. In June 1998, the plaintiff contacted the guardianship court to consent for withdrawal of treatment, and the court expert approved the improvement of patient's condition is in vain to expect, as well as the fact he was absolutely incapable in decision-making and suffering pain from ongoing infections. The court expert admitted that in case of withdrawal of nutrition, it would obviously result in death, but in painless death. The court also appointed two mediators – the husband of the patient and the son. The nurse objected their wish to stop treatment finding this procedure «not approvable»*****. Plaintiff appealed on grounds that the treatment would only delay the future apparent death and the mother used to refuse medical help to lead a normal life, telling it is not «acute euthanasia». The court expressed doubt whether a court is allowed to approve a consent to withdraw treatment. The Court of Augsburg found that prolonging treatment, or not doing it – is a highly personal matter; the doctors and the relatives, upon the court's view, could decide it on their own responsibility, and the caregiver may not be delegated to do it*****. The task of «health care» is not about euthanasia;

* *LG Munchen I*, 18.02.1999, 13 T 478/99, para. 6; or II (2)(a).

** *Ibid*, para. 7; or II (2) (b).

*** *Ibid*, para. 11; or II (2) (b) (bb).

**** *Ibid*, para. 12.

***** *LG Augsburg*, 04.08.1999 – 5 T 2780/99, para. 2.

***** *Ibid*, para. 5.

and the construction of Art. 1904 is about consent to invasional treatment. Despite a Frankfurt court gave a decision on non-prolongation of treatment, the Augsburg court held that it wouldn't follow it, holding the guardian does not necessitate a court approval for his actions*. The court emphasized that Art. 1904 CC only deals with consent with the intervention with risk of death, but not an intervention with a goal of death and so termination of nutrition is *not a preservation of life, but a termination of life*. The Court concludes that if it would authorize withdrawal of treatment upon the given provision, it would be responsible for patient's death. Thus the Court rejected the appeal**.

The Regional Court of *Duisburg*, however, ruled on withdrawal of treatment in a 1999 trial, giving the second case of approving «passive euthanasia». The patient, a 67-year-old woman, had been suffering from epilepsy since 1973 and had suffered a brain tumor with a multitude of operations. In the early 1990s, she had been completely paralyzed and fed with a PEG-tube. For years, she had also been unable to communicate and unable to react on speech. Her daughter is the legal guardian of the woman, appointed in 1993. In 1998 she applied to the court to stop artificial nutrition. The district court representatives visited the patient and affirmed she was unable for contact. In early 1999 the court gave the order. In the daughter's plea, it was stated that her mother repeatedly said she wouldn't like to live in such condition and this was her presumed will. The procedural lawyer filed an appeal. The Court found that the plaintiff may apply to the court to authorize him to stop the treatment, that is «authorize the guardian's consent» to stop treatment***. The court holds that intensive care measures, irrespective of their application, *require consent*, and if the patient is incapable to decide, it falls within the competence of the supervisor****. The court admits, that people who are seriously ill often do not write any actual «living wills» upon which it may be clear what the guardian should do, which would lead to the situation that the patients will suffer from senseless treatment and doctors/relatives won't have a right to stop treatment – otherwise they may be prosecuted for homicide. The Court, however says, that the provisions of art. 1904 CC are covering banal issues of medical caregiving, but *not* withdrawal of treatment. Therefore, it is up to the courts to determine the criteria upon which the guardian may be authorized to withdraw treatment. The are basically two of them: 1) an «infamous prognosis» with an inability of the patient to express his will, as well as, 2) the proven presumed will of the patient not to be treated***** The Duisburg court also denotes that neither full unconsciousness is not decisive, nor a comatose state is required for the guardian to give consent to stop treatment, *as the main criterion is illness-inability to decide******. Reverse,

* *LG Augsburg*, 04.08.1999 – 5 T 2780/99, para. 6-7.

** *Ibid*, para. 8-10.

*** *LG Duisburg*, 09.06.1999 – 22 T 22/29, para. 1-9.

**** *Ibid*, para. 11.

***** *Ibid*, para. 15.

***** *Ibid*, para. 17.

abortion of treatment is illegal without the expressed or presumed will of the patient (same). The court says, that the prognosis for incurability has to be accurate and precise (criterion 1), upon which «the patient can never again lead a conscious or self-determined right*». The court expert affirmed the said, describing it as a massive disturbance of intelligence functions in the sense of «severe dementia» with additional severe motor deficits, caused probably with encephalopathy. Therefore, after determining that the state is irreversible and death the court said that death is only a matter of time as it will happen as a matter of future complexifications. The first criterion was achieved. The second is the presumed will of the patient**. It has to be built upon the statements that the patient desired before. Moreover, the Supreme Federal Court in the 1994 decision*** found that statements done ten years before losing capacity – seemingly, he has to know that he is already impaired or predicts he may, or will relatively soon become handicapped with an inability to communicate so his statements should be recognized as sufficient. The given case displayed there was such evidence, as the mother being already ill in 1989 before an another operation which deteriorated her condition****. The witness approved it mentioning the husband of the patient died in a similar way and she was reluctant to repeat the same end of life; another witness approved it stating she repeatedly had suicidal thoughts owing to her weakening health. Thus the court upholds that the evidence is sufficient*****. Finally, the Court wanted to emphasize that the plug-off has to be as *painless as possible*, saying that painkillers and neuroleptic drugs or sedatives will be suitable. This, however, was a pure recommendation and is not binding for intensive care physicians*****. Judgment affirmed.

Judgment of the Higher Regional Court of Karlsruhe, 2001

Plaintiff's husband, a 65-year old man, suffered a pulmonary embolism with a cardiovascular arrest. His life was saved, but he was rendered comatose and his condition was stable since then for five years. Being able to hear and breathe, he is unable to communicate or feed himself, nutrition was delivered via a stomach tube. Plaintiff was appointed as official legal guardian in 1996, and in four years, she applied for a court order to withdraw her husband's treatment*****. The judge himself checked the husband's condition and affirmed that he was unable to communicate. Both the sister and the children of plaintiff suggested he would decide to die rather than continue living on an artificial diet as a vegetable. The court dismissed their petition, as it found that withdrawing

* *LG Duisburg*, 09.06.1999 – 22 T 22/29, para. 17.

** *Ibid*, para. 17.

*** *BGH*, Urt. v. 13.09.1994 – 1 StR 357/94.

**** *LG Duisburg*, 09.06.1999 – 22 T 22/29, para. 18-20.

***** *Ibid*, para. 26.

***** *Ibid*, para. 27.

***** *OLG Karlsruhe*, Urt. v. 29.10.2001 – Az.: 19Wx 21/01, para. 1-2.

his artificial diet with the aim of causing him die is not covered by a guardian and cannot be transferred, as a task*. The appeal stated a claim that their intentions are not against his presumed will, but the appeal was dismissed as the appellate court also found that withdrawal of treatment which causes death is not covered by Art. 1904 CC**.

The Court said, speaking on the right to withdraw treatment, that the «wish to die» is a very personal matter, and the guardian simply enforces his direct or presumed will*** The Court reminded, that right to self-determination of the patient invokes refusal of treatment (not taking into account intensive care, but e.g. an operation withdrawal of which may lead to death) – and an unconsented surgery, in fact, is a battery; the court added that the *autonomy does not end if the patient falls into coma*****. Therefore, the guardian does not enforce any other's will to terminate treatment, except from the patient's one****. The court held, that organ donation – is something different, as it is in the benefit of a third party and not of the person receiving care, and it is not admissible to consent on such things on behalf of the incapacitated person*****. The Court agreed that consent to treatment discontinuation still falls in the sphere of health-care*****. The Court says that the plaintiff would not violate the provisions of legal guardianship appointment (Art. 1896-1 of the Civil Code) as he is carrying out the will of the patient*****. The Court also commented on if an actual court approval is necessary for it, and whether the judge who decides to grant an order to withdraw treatment, as he «alone becomes the master of life and death». The court stated that there are objections as «the legal system is unfamiliar with deciding in advance whether it is permissible to let a person die». *The court concluded as of the following: this decision (of life and death) is made neither by the court, nor by the guardian. It is simply made by the patient himself.* And the only thing they do is perform his plea, despite it would result in apparent death. The Court came to the question, what is it supposed to do with the «presumed will» and how it has to be determined by the judge?***** The Court said that investigations ex officio may be made to determine what is the «presumed will»: 1) testimony of the family and doctors; 2) living will / preventive power of attorney; 3) the judge's personal impression of the patient concerned*****. The Court adds, that the court order is precisely necessary to

* OLG Karlsruhe, Urt. v. 29.10.2001 – Az.: 19Wx 21/01, para. 1-4.

** Ibid., para. 6.

*** Ibid, para. 15-16.

**** Ibid, para. 17.

***** Ibid, para. 18.

***** Ibid, para. 20.

***** Ibid, para. 25-26.

***** Ibid, para. 26.

***** Ibid, para. 30.

***** Ibid, para. 30.

avoid any suspicion of manslaughter from the side of the prosecution*. The Court said, that the «*Eutanasia*» reference to the 1930s did not have anything similar with patient's right to self-determination**. The Court paid attention on «loopholes» in legislation and said that there is no actual loophole, as literature and case law could rule it out perfectly without any legislation to be enacted***. The court reversed and remanded the judgment, stating that there needs to be much more proof of the irreversibility of patient's condition which needs to be confirmed by present-day medical reports. Further medical reports disclosed that the patient did not improve in the last several years and there were permanent signs of brain damage****.

Judgment of the Federal Supreme Court, 2003

A man suffers from a heart stroke in 2001 and receives irreparable hypoxia brain damage, remaining in an active coma (apallic syndrome), being unable to feed himself (tube-fed by a PEG-tube), and being completely unable to communicate. The son of the man is appointed as a legal guardian of the man*****. In early 2002 he applied for a county court to obtain an order to stop the PEG-nutrition, but the court rejected his application. The plaintiff, the man's son, considered that his father's condition is not likely to improve*****, and moreover the man filed a «living will»***** wherein he stated, that in case he doesn't have ability to make decisions on his treatment, he would withstand most of treatment, including no intensive care. The son, the wife of the man and the plaintiff's sister were listed as confidants of the will. The lower court rejected the plea for order for lack of legal basis*****. The Court examines the case law on whether the appointment of legal guardian and his firm consent is necessary for achieving an order to stop treatment*****. The court assessed the derivation of termination of treatment as a «dark side» of guardian's consent to treatment – if it is vigorous to do it, as the consent would help restore the patient's health, it's the «darker side» of the former, as the termination of treatment will definitely lead to death and thus a «termination of life» needs a different legal consideration***** thus the court finds that it's *not* a consent to an actual medical procedure, as termination of treatment is *not a medical procedure in the strict sense of the word* (practically meaning para. 1 Art. 1904 of the Civil Code doesn't cover the issue of consent to medical treatment

* *OLG Karlsruhe*, Urt. v. 29.10.2001 – Az.: 19Wx 21/01, para. 31-32.

** *Ibid*, para. 33.

*** *Ibid*, para. 35-36.

**** *Ibid*, para. 51-56.

***** *BGH*, Urt. v. 17.03.2003 – XII ZB 2/03, para. 1-2.

***** *Ibid*, para. 3.

***** *Ibid*, para. 6-7; 7-10.

***** *Ibid*, para. 10-11.

***** *Ibid*, para. 15.

***** *Ibid*, para. 18.

withdrawal. The court noted* that there must be some criteria for which the decision may be issued, which is hard to define, as they must meet «general values», and various factors (e.g. ethical or religious) may be assessed.

The court found that the plaintiff's appeal is well-founded. *The nutrition via a naso-gastric tube is an actual intervention into a body, and so, is a manipulation which requires consent*. The court said that if the patient is not able to consent to this type of treatment at the time it is applied than the hospital personnel have to consider his «*living will*»** where the patient has to declare to which operations or interventions he would consent and to which he would not. In case there is a manipulation which is not prescribed by the «*living will*», than the personnel has to act upon the presumed will of the patient, before the guardian is appointed by a guardianship court. When the guardian is appointed, the alleged will is void and may not justify any further interventions. When the guardian is appointed, he acts for the incapacitated person and bears all the responsibility on his own; thus the hospital personnel should consider what the guardian says as he is the person who is a legal representative and has a *right to express any of his wishes*. Now it is clear that the son, being his legal representative, doesn't consent to such intervention, he basically refuses it***.

The Court admitted that some courts have stated that a guardian has no right to terminate the life-sustaining treatment; but this doesn't make contradiction with the «*living will*» of the patient; and moreover, it will be a correct implementation of the will. The court also added that the decision must be based at least on some facts; for instance, if we say «*against*», than there has to be some *argument* for continuing the life-prolonging treatment, or otherwise this must be a conclusion of a learned physician and the patient's relatives, *at best, upon a determination of an actual and presumed will of the patient*. The Court also interrogates whether appointment of one who is «*caring for the health of the person concerned*» does coincide with the actual aims of the guardian [to terminate treatment], finding that generally, yes, as the sense of the words may be understood not only in a restricted way but a literal one****. One of the Appellate's Court's arguments were that there were that no criteria so as to determine where «*passive euthanasia*» is permissible. In fact, although the appellate court said so, this was not actually true. For instance, in a criminal action (1994)*****, the Court noted that one of those is in case the death is irreversible and very close in time, it may justify the physician to turn off the life supporting systems. But this is not the same in case there is no death process though the disease is irreversible and there is no actual

* BGH, Urt. v. 17.03.2003 – XII ZB 2/03, para. 19.

** Ibid, para. 24.

*** Ibid, para. 25-26.

**** Ibid, para. 30-32.

***** Herein, the court referred to the decision of the Supreme Federal Court in 1994 (BGH, Urt. v. 13.09.1994 – 1 StR 357/94).

prognosis of death though it may be presupposed*. That is, the civil law «will not allow what criminal law (as an assisted suicide) forbids» – that means there may be no order to terminate the treatment in case there is not «fatal» condition. At the same time, the physician is to respect the self-determination of the patient and may not induce him to any operation or treatment against his will – even if it is vital for life support; and so, it may override his obligation to preserve his life**. The court supposes that if it has to examine the issue of granting an «euthanasia» order, then the thanatoid condition is the decisive factor, and the presumption to give the order to ***withdraw treatment will be negative******. The court addresses the issue of «living will»****, stating that the «will» has to be respected as the criterion, and his «choice» has to be respected even if he lost capacity to act; the legal representative cannot change the «living will» if he wants, unless the patient himself changed his mind or the situation considerably changed*****. The Court denotes that there is no basis for withdrawal of treatment upon Art. 1904 CC***** upon which only the issue of consent to treatment is covered. The Court, however, finds that the absence of exact legal provision does not mean that plaintiff has no right to apply to the court for treatment refusal*****. The Court also states that guardianship courts in fact could decide on this case but rejected to perform a judicial examination of facts*****.

Judgment of the Regional Court of Essen, 2007

After the judgment of the Supreme Court, an interesting suit occurred before the Regional Court of Essen in 2007, where the content of the living will (referred to in the trial report as («*Patientenverfügung*»)) became a firm foundation of the order on the withdrawal of treatment, irrespective of the fact the patient had not been comatose or in a vegetative state. In this case a woman later incapacitated, wrote a «living will» in early 2004, being in full mental health stating she would not tolerate life-sustaining treatment in case no prospects of recovery are expected. Concerning the procedures, she hallmarked the following specifications: resuscitation, artificial ventilation, dialysis, artificial nutrition. Eventually she had a stroke, rendering her half-side paralyzed. After being treated in late 2005 in two hospitals, her condition improved and she managed to start breathing independently and maintained eye contact, though she was still fed with a PEG-tube. However, later, the woman, her treating physician and her children, agreed to «start implementing

* *BGH*, Urt. v. 17.03.2003 – XII ZB 2/03, para. 33-34.

** *Ibid*, para. 35.

*** *Ibid*, para. 36.

**** *Ibid*, para. 37.

***** *Ibid*, para. 37.

***** *Ibid*, para. 40.

***** *Ibid*, para. 42.

***** *Ibid*, para. 53.

her living will» (despite she was definitely not comatose though her condition was quite bad), so they applied to the court*. The Court asked a municipal health authority to assess whether the person went into the stage of dying, and a medical expert stated to the court in a phonecall, that it had not. However, a late 2006 medical opinion by another doctor stated that no improvement was expected, as an irreversible loss of brain damage had started which is a sign of the start of dying process. An updated version of the report (February 2007) found the judge to be confused, as on one hand, the cardio-vascular system was stable, but on the other hand, brain damage was supposed to hallmark the starting the process of demise. The court asked for clarification and interrogated at what period of time death under present condition is expected. The medical expert said, that patient, suffering from a diabetic coma, would rather die suddenly from complexifications than survive for a long time fragmenton in such condition under various life-supporting machinery. And for such reasons, it's complicated to say concerning death proximity**. The lower court rejected plaintiff's claim to discontinue life supporting treatment, arguing that the «civil law cannot grant what criminal law prohibits», and stating that the patient's condition was, in fact, stable***. They filed an appeal. The attending physician stated that no signs of improvement existed or any prospects of improvement occurred. Another medical expert concluded that the stroke brought to substantial brain damage which affected the woman's swallowing and speaking function as well as fatally damaged the motor functions of her right side but at the same time, some functions still remained preserved. She was unable to formulate words, or sounds, but she was able to interact, make some gestures – she smiled to the court expert brought to the trial. *The medical expert concluded she was not in a permanent vegetative state*****. In his appeal, the guardian desired to receive a court order to terminate artificial nutrition which obviously would lead to death*****.

The court denoted that irrespective of the vagueness of determination of “the dying process”, it would be correct to approve withdrawal of treatment even if the process has not yet started as such, as it basically corresponds the living will of the person. Upon the construction of her living will, the court says, that she expressed a wish to withdraw further treatment in case the doctors would conclude that no signs of improvement will ever appear. The court confirms, that the state in which she is now is the state she depicted in her living will*****. The court goes on to assess the condition of the patient, and holds, that despite the stroke consequences, the patient is 1) stable; 2) relatively responsive to physical attention; 3) does not find herself feeling unbearable

* LG Essen, 29.11.2007 – 7 T 385/07, para. 1-6 (trial facts).

** Ibid, para. 7-8.

*** Ibid, para. 9.

**** Ibid, para. 11.

***** Ibid, para. 14.

***** Ibid, para. 18-19.

pain and does not literally suffer. *However, the court said it is not conclusive as the living will condition corresponded to her actual condition at the time of the trial**. The Court outlined that the withdrawal of treatment has got nothing criminal in itself and the criminal law permitted such type of «euthanasia», if it corresponds to the person's will, and the medical treatment may not be once more commenced or carried out further against the will of the patient concerned. The last observation showed, that the person was already unable to make a will and the last report said that the person's condition did not alter within the last years**. The court gave the order.

Judgment of the Regional Court of Siegen, 2007

An outstanding trial occurred before the Regional Court of Siegen in 2007, where the issue of the living will validity and conditionality was challenged. There, plaintiff, the legal guardian of an incapacitated person, intended to terminate the intake of food and fluids (conducted via a PEG-tube) from a handicapped person under his care. The woman, who was not comatose, was suffering from dementia. Upon a doctor, a witness, the woman would not desire to receive life-prolonging treatment in case of being seriously ill. In 2000, the woman filed a power of attorney empowering her daughter to represent her personal and property matters, involving a passage stating she would not desire to receive any life-sustaining treatment if no adequate survival is expected. The advisory report stated that the woman was ill with an Alzheimer dementia in a moderate-to-severe form. She was kept at home. Another report in 2006 indicated that her mental abilities were gradually reducing. Despite she was still able to speak or walk, the report indicated that this moderate-to-severe dementia is incurable***. In late 2006 – early 2007 her condition became even worse, as she was already unable to eat and drink herself. The doctor insisted for her to install a PEG-tube, but the guardian refused. However, the woman was definitely not comatose. She expressed her wish to die. The doctor tried to contact her guardian, but he failed. His representative went to the court holding letters from the guardian which stated they would reject the installation of a PEG-tube. As it was unable to contact the guardian, the court decided to give an order to install the tube****. Then, the guardian asked to dismiss the order; after being hospitalized, the woman felt better and was able to feed herself independently. However, the Court ruled to submit to the installation of the PEG-tube as long as it is necessary. Within a few days, on May 30, 2007, the woman was hospitalized again where the tube was installed***** On June 30, 2007, the woman herself attended the court sitting where she herself said she wanted to die and the

* *LG Essen*, 29.11.2007 – 7 T 385/07, para. 20.

** *Ibid*, para. 21-24.

*** *AG Siegen*, Urt. v. 28.09.2007 – 33 XVII B710, para. 1-8 (trial facts).

**** *Ibid*, para. 11.

***** *Ibid*, para. 12-13.

guardian said, that tube-feeding is not the thing she would want*. Then, the court heard several different witnesses.

The Court held that the guardian is obliged to perform his care as long as the medical indication requires him to do so, and should not abstain from it** this, upon the Court, should be analogous to all the actions concerning the discontinuation of treatment as well***. However, the court denoted, that the well-being is not only objective, but *subjective*, meaning is an opportunity to shape his life according to his ideas and desires (*referring to the Federal Supreme Court's 2003 judgment – BGH, 17.03.2003 – XII ZB 2/03*). The court, however, found that the statements of the person concerned in her current condition, can not be conceived with enough certainty. And this intention (to die and henceforth refusing to consumpt food and drink) is not legally binding by the fact the elderly woman told this to the guardian, to the doctor, or to the court in 2007****. To do so, said the court, the person has to, at least, be *mentally able to assess such prognosis and behold the alternatives, if any exist******. The fresh report (2007) stated, that the person was in severe dementia, and thus, as the medical expert concluded, the «wish to die» is not a rationally justified intention. The Court consents with this fact*****. The Court also acknowledges that the person may have a right to withdraw her or his treatment even in case the medical treatment is still indicated, as well as approves the fact that the person's right to self-determination does not vanish with the fact of capacity loss*****. The Court, upon the judgment of the Federal Supreme Court says: the legal system of Germany, upon this judgment, lets a court to give an order to discontinue life-prolonging treatment where the patient is comatose, this condition is irreversible and is proved to be fatal. The court would also recognize a «wish to die» even in case the death process has not yet started***** – *but still this applies, seemingly only in cases when the person is completely unable to consent or make adequate decisions*. The court says, that the «patient decrees», or «living wills», have to leave no room for doubts or for other persons' wishes*****. The living will, which was inserted into the power of attorney, was vague in its sense. That meant, that «life-sustaining measures» or «dignified survival» have to be clearly specified – as nobody would for sure answer what did the elderly woman mean by this*****. The Court says, that it is actually, from one hand, a PEG-tube falls under life-sustaining treatment, but

* AG Siegen, Urt. v. 28.09.2007 – 33 XVII B710, para. 14.

** Ibid, para. 17.

*** Ibid, para. 18.

**** Ibid, para. 20-21.

***** Ibid, para. 22.

***** Ibid, para. 23.

***** Ibid, para. 24.

***** Ibid, para. 25.

***** Ibid, para. 26.

***** Ibid, para. 27.

on the other hand, there is nothing dignified in dying in starvation and thirst, which is considerably painful; and moreover, there was no evidence of what were these terms meant to be*. The court considered, that there were no actual statements of the woman's «wish to die» in the past. Only the doctor, as one of the witnesses, said, that the woman confirmed her rejection of life-support, but she had never discussed it's modalities in detail**. A «decent survival», says the court, may be interpreted in a multitude of different ways, but there needs to be far more evidence to determine it – there were no clear statements of what did she mean by these terms***. The presumed will (as opposed to a healthcare directive) based on the 2000 power of attorney was considered vague – the presumed will should be cleansed from all the third parties' observations or thoughts, it should directly express entirely the patient's will****. The Court denoted, that the testimony of the relatives does not indicate verifiable signs of attitude to dying*****. Later, the Court denoted it is generally not impossible that the person concerned had never expressed any statement concerning dying*****. What is more, the living will, does not directly mention the end of life of the patient. The Court said that the living will itself does not indicate in which way the person expresses the idea of ending its life. The Court hinted that there may be situations where neither a living will, nor a presumed will is available. Then, in such case, the Court supposes that the guardian should act on his behalf for the well-being of the beneficiary. However, in short, he surely has to be cautious. The Court thought, that the admissibility of treatment termination depends on the medical indication of its necessity (same)*****. The Court said that the right to self-determination of the patient involves the right to wish termination of life-supporting treatment, and treatment against his will, regardless of 1) state of health; 2) actual reasonableness of his will. At the same time, the German courts******, and so the Siegen court applied the rule that there is a positive presumption of continuing life support – that means the patient presumably would wish to continue his life, unless there is evidence he does not. The Court held that unless this presumption is invoked, than, the constitutional guarantee of the state to protect life is apparently *senseless* – that would otherwise mean that only the one's life who once clearly expressed their wish for further treatment, would be definitely preserved. Therefore, a presumption of a court order for withdrawal of treatment is negative unless

* *AG Siegen*, Urt. v. 28.09.2007 – 33 XVII B710, para. 28-29.

** *Ibid*, para. 36.

*** *Ibid*, para. 37-43.

**** *Ibid*, para. 46.

***** *Ibid*, para. 48-52.

***** *Ibid*, para. 53-56.

***** *Ibid*, para. 57-58.

***** See the judgment of the Federal Supreme Court of 2003, *BGH*, Urt. v. 17.03.2003 – XII ZB 2/03, para. 38.

firm evidence justifies it*. Henceforth, the Court concluded that all the factual findings must indicate that the condition in which the affected person is, is *really unworthy of life* – as in fact, the findings of both direct or presumed will may never one may be ultimately precise**. The legal guardians are also expected to be guided by medical expert judgments and trust the doctors – if the physician already does not find that the life-supporting treatment is *appropriate* anymore, the guardian's duty fades. The Court did not give an order to withdraw treatment***.

Italy

Trial of Welby, Rome, 2006

The trial of *Welby* was one of the most resonant cases that Italian courts have faced to day. Plaintiff, Piergiorgio Welby (1945-2006), a painter, photographer and an activist, was diagnosed with fasciocalpohumeral muscular dystrophy when he was 18 years old (in 1963)**** and over the next two decades, it gradually progressed, despite in the 1970s and 80s he was still capable of painting, photographing and speaking to people and being able to walk, though not much*****. He collapsed in May 1997, having a severe respiratory failure, indicating that his disease came to the last stage. Since then, plaintiff was tube-fed and was capable of breathing by means of an automatic respirator. Welby was in totally clear mind and his intelligence was not anyhow damaged. Welby was able to communicate by a computer and repeatedly stated (including in his book) that he would definitely not wish to live anymore like that*****. In 2006, P. Welby asked the treating physician to dislodge his pulmonary ventilator under sedation (upon the court's findings, he was in conscious and clear mind and he was fully conceiving his decision to refuse treatment). He expressed his will on November 24, 2006, but his doctor made an official written refusal. Plaintiff lodged a lawsuit to the Court of Rome and stated, that the refusal is unjustified as: 1) any treatment has to be conducted under informed consent; 2) it dervies from his constitutional rights, inter alia, to refuse medical treatment; 3) the reconsideration of therapeutic treatment and preservation of life against natural events of «qualified demise» – meaning that death will nevertheless occur in such situation earlier or later; 4) the right to refuse treatment deriving from the right to self-determination of the patient upon which he is the arbiter of the scope and limits of treatment he would undergo, which is completely conscious, when he does not desire to undergo

* AG Siegen, Urt. v. 28.09.2007 – 33 XVII B710, para. 58.

** Ibid, para. 59.

*** Ibid, para. 60.

**** *Nei confronti di Riccio Mario*, Tribunale di Roma, Sentenza 23 luglio 2007, No. G.I.P. 2049/07, p. 3.

***** Ibid, p. 6-7.

***** Ibid, p. 6.

intolerable treatment*. Defendants claimed that there was no legislation to allow his wish to die. The Court, speaking on informed consent, said that it is true that informed consent, deriving from the constitutional guarantees, is a thing prohibiting any invasive act of therapeutic or non-therapeutic nature without consent of the patient**. The Court said, that upon the Code of Medical Ethics, upon which, the doctor should desist if the patient refuses, and his right to autonomy does not parish with the fact he cannot consent; and the rules of deontology require supporting treatment as long the physician indicates is reasonably necessary. At the same time, the Court admitted, however, that the principles of informed consent in Italy are not very concrete concerning the refusal to life-supporting treatment which apparently leads to death***. The Court acknowledged that in case of irreversible brain loss the treatment may truly be stopped in accordance with the said code. The Court says, that in case of withdrawal of treatment, a lot of things have to be considered, such as respect of human dignity, quality of such life and the futility of such treatment****. Finally, the Court said, that the doctor's duty to continue life-prolonging treatment stops in front of the apparent incurability, futility of the treatment, transforms the patient from the subject of the treatment to the object, violates his dignity, which can therefore be interrupted being incompatible with constitutional, ethical and moral principles of respect, the dignity of the human person and of his solidarity*****. The Court, though acknowledging there may be some situation where withdrawal of treatment should be approved, said that there was no precise legal definition of what is «futile treatment», when life support looks «disproportionate», what are «qualities of life», and when «the person turns from a subject – to an object of treatment» – the Court admitted, that there were yet no actual guidelines of the doctors behaviors in such situations*****. The Court also said, that right to withdraw treatment is not concretely protected by Italian law, and reckoned up the fact that defendant Giuseppe Casale found that his respirator was definitely not «futile»*****. The court also outlined, that there was no regulatory provision to determine what is «therapeutic obstinacy» and abstained from granting the order*****. In a couple of days, Riccio Mario, the anaesthesiologist of the hospital where P. Welby stayed in, dislodged the automatic respirator from Welby under sedation upon his wish, which caused

* *Piergiorgio Welby c. Associazione Onlus ed il. Dott. Giuseppe Casale*, Trib. Ordinario di Roma, Sezione I Civile, Ordinanza 16 dicembre 2006 No. N.R.G. 78506/2006, p. 3.

** Ibid, p. 5.

*** Ibid, p. 7.

**** Ibid, p. 7.

***** Ibid, p. 8.

***** Ibid, p. 9.

***** Ibid, p. 9.

***** Ibid, p. 9-10.

him die on December 20, 2006 at 11:40 PM*. The official cause of death was a cardiac arrest owing to heavy respiratory failure. In March 2007 the doctor was prosecuted for assisting in Welby' suicide**. Mario defended himself as having acted in compliance with the wish of P. Welby***. The Court of Rome found that he truly acted within the wishes of the deceased plaintiff in and acquitted the doctor****. The Court classified the case as «assisted suicide»*****.

Trial of Englaro, Court of Cassation, 2007

The trial of Englaro is the first case of the Italy's highest judiciary instance that recognized the patient's right to withdrawal of treatment (not in the particular case) and which has one of the largest trial histories in similar trials which lasted a decade. Shortly, a father of one Eluana Englaro, being in a permanent vegetative state since 1992 owing to a traffic accident, was appointed as a her guardian, and applied to the Court of Lecco in early 1999 to receive an order to stop compulsive feeding. The coma was found to be irreversible and permanent since 1992. A court curator joined him. Their application was rejected, as the Lecco court said it was unfounded as it contradicted the fundamental principles of the law of Italy, in particular, Article 2 of the Italian Constitution*****. The appellate court did not consider the woman legally dead (as her brain was not obviously dead, as the vegetative state is not death of brain). The Court of Appeal of Milan abstained from granting the order and added that the legal and ethical debate on withdrawal of treatment was still ongoing in many countries of the world*****. In 2002-2006, plaintiff repeatedly lodged the same lawsuits (all rejected), until finally, by 2007, it was not brought before the Court of Cassation. The court found that since 1992, she had been in permanent vegetative state for 14 (then) years and the plug-off of forced nutrition would toll in death in a couple of days*****. Being young, the patient seemingly never gave any suggestions on «life and death» (or if she gave – these were not mature or conscious), and never remained a power of attorney named «living will». The appellate court found that no actual indignity to the patient was imposed and – 1) technically she was alive as not being brain-dead; 2) withdrawal of treatment would lead to imminent death; the court also held that there is no worthy and worthless lives so as to subjectively assess is it good to remain her leaving, or, roughly speaking, let her die. Moreover, this

* *Nei confronti di Riccio Mario*, Tribunale di Roma, Sentenza 23 luglio 2007, No. G.I.P. 2049/07, p. 15-20.

** Ibid, p. 22, 24-26.

*** Ibid, p. 22-23.

**** Ibid, p. 58-60.

***** Ibid. p. 59.

***** *Trib. di Lecco*, decreto del 19.01.1999, p. 1-2.

***** *Corte di Appello de Milano*, Camera di Consiglio, decr. del. 26/11/1999, p. 4-9.

***** *Caso Englaro*, Corte di Cassazione, Sezione I Civ., Sentenza n.21748, del. 16 ottobre 2007, para. 3.2 (p. 2).

is not contradict the right to self-determination meaning if an able person could determine what he should or should not undergo even under the risk of death, but I guess one could not call a comatose person «able», and that's the problem. The appellate court also cited *Pretty v. United Kingdom** in the context of balancing of right to die and live, and seemingly totally drove off any cases for granting a passive euthanasia order.

Though the Cassational court also did not grant this order, it was not because withdrawal of treatment causing imminent death is illegal, as it is not actually so (in fact, the court found there evidence of an existing living will or other facts the daughter would tolerate passive euthanasia). This treatment, as the court said is an intervention into a human body to prolong her life and one may consent to it's continuation or ask to terminate it**. The Court touched the issues of informed consent, referring to sentence of the Constitutional Court no. 471/1990. Several emergency cases***, were seemingly not in the point either; and the court affirmed that informed consent in fact, definitely dealt with withdrawal of treatment even on terminal stages****. The Italian Cassational Court said, that in case a person does not wish to be kept permanently (and obviously – artificially) alive, in a permanent vegetative state, and expressed it either on a legal document, or just by any other unwritten implications, may have a right to have «its voice heard» to deactivate the prolonging treatment. The Court of Cassation also said, that legal guardians were initially appointed by courts to protect the person's health, but not, generally speaking, to make him «die in peace». But there may be exceptions. Therefore, the interruption of care which is herein portrayed in the shape of withdrawal of life-supporting treatment is permitted only in several occasions: 1) the vegetative state is irreversible, approved by a physicians' concillium as well as a thorough medical examination, and when it shows that there's no medical basis for even the slightest recovery; 2) and in case the will of the person before falling into unconscious and unresponsive state does not contradict the intention of the guardian to withdraw treatment by a court order*****. The Court said it's much harder to find the «alleged will» if there is no documentary evidence to confirm it, and thought it would be suitable to seek the response in the past habits and lifestyle of the patient which are familiar to his family and closest friends. Therefore, upon a compound of family-like assessments, the guardian has to think out his presumed decision, but it has to be as genuine and authentic as possible. So, the court concluded that in case there are no signs of regress of the pathology, the clinical picture is irreversible – than, upon the representative's

* *Pretty v. United Kindgom*, [2002] ECHR 427, (2002) 66 BMLR 147.

** *Caso Englaro*, Corte di Cassazione, Sezione I Civ., Sentenza n.21748, del. 16 ottobre 2007, at page 4.

*** Ibid, at page 8.

**** Ibid, at page 8 (para. 6).

***** Ibid, p. 15, para. 7.5, 8.

application the court's order to terminate the treatment should be announced*. In the same fashion, as the Federal Supreme Court of Germany in its 2003 judgment, the Italian court finds that life-support is *invasive treatment*, and so, even if performed by non-medical staff nevertheless necessitates consent**. The Italian court, however, finds that the legal construction is not to actually ask the judge to let to e.g. take out a nasogastric tube, but to affirm the *legitimacy* to stop treatment***. *Therefore, the Court may authorize «passive euthanasia», keeping in mind that «life is supreme good*. If one of the two constituents lacks, the Court will reject the application. The Court found that point «2» lacks as the plaintiffs didn't reconstruct the alleged will (or had her «living will» commenced). The court found that albeit the young woman who once said she would rather die than to live in a vegetative state, she said the abovegiven statement being in full health. As the two conditions are not met, the Court did not give the order to withdraw treatment****. The trial history did not end by the judgment of the Cassational Court: the father managed to obtain a court order to withdraw treatment by the Court of Appeal of Milan on the following year*****, being reversed by the Cassational Court*****. Finally, the European Court of Human Rights found the Englaro's appeal inadmissible*****. The woman died in early 2009, after her father brought her to a private nursing home, where the treatment was discontinued and she died at age 39.

Decision of the Court of Reggio-Emilia, 2012

Another notable withdrawal of treatment trial occurred before the court of Reggio Emilia in 2012, designated as «P». There, the patient, a woman, was suffering from diabetes and progressive multiple sclerosis with (at the time of trial) minimal contact or movement, and PEG-fed since 2008. She also suffered from progressive respiratory problems. The legal guardian submitted to the court that the patient was already unable to express his wish for further treatment, which was confirmed by the patient's medical records. The patient was kept at home, and when the tutelary judge visited her, he found out that the incapacitated person was indeed hardly able to mark her name and the year of birth, showing very little communication*****. The patient did not express any wish to prolong, or not to prolong the treatment. So, to resolve the issue, the court called a number of relatives to give testimony. The court found that

* Ibid, p. 15, para 7.5.

** Ibid, p. 15, para. 7.6.

*** Ibid, p. 15-16, para. 8.

**** Ibid, p. 16-17, para. 10.

***** Englaro, La Corte d'Appello di Milano, I Sez. Civ. Decr. del. 25 giugno – 9 luglio 2008.

***** *Caso Englaro*, Corte di Cassazione, Sezione I Civ., Sentenza n. 27145 del 11 novembre 2008.

***** *Ada Rossi et al. c. Italie*, App. No. 55185/08.

***** *P*, Trib. Reggio Emilia, Decreto 24 Luglio 2012, p. 3-4.

the woman used to be quite active in her younger years being fond of singing, occasionally visited a church though not being stringently a religious person, fought her disease as much she could manage to, and believed she would recover once again; she tried extracorporeal impregnation to have a child and never directly claimed any exact attitude of dying (but perhaps only in emotions)*. The Court also found from the testimony that once she discussed therapeutic obstinacy concerning her father, stating she would be against such treatment (in the view of his suffering from hepatocellular carcinoma), where she agreed it would be «...better letting him go». The Court found this to be enough persuasive to believe she would not tolerate further treatment, which was approved by the statements of two of her friends. Therefore, the Court says that it authorizes the legal guardian to withdraw further medical treatment, and continue to perform palliative care therapies (practically, it is only a supporting therapy which would let the woman die not with much pain and suffering)**.

Conclusions. The paper dealt with the legal aspects of a right to terminate life-supporting treatment with a particular view on its application by tribunals in various cities of Italy and Germany, including the higher judiciary instances. Around two dozens of trials were analyzed with the most outstanding ones being written out in details in the second part of the paper. The author chose two countries representing the continental law family – Germany and Italy: these jurisdictions do possess a substantial body of jurisprudence on the subject which may be compared with some common-law jurisdictions like England or United States. As to the aspects that have been covered, the author deliberately omitted deontological ones, focusing rather on the principles of adjudicating trials on withdrawal of treatment by the courts. So, as the jurisprudence shows, both German and Italian courts recognize the patient's right to withdraw treatment and apply similar principles of determining the condition of the patient, his wishes apply a wide variety of evidence, including the living wills, which are also challenged on their validity. Before any legislation on withdrawal of treatment was adopted by German and Italian legislature, the tribunals in both of the countries elaborated a robust body of case law upon which court orders on the termination of life-supporting procedures were announced upon the application of the legal guardians. Moreover, Italian courts also elaborated «advanced» orders for withdrawal of treatment, by appointing guardians who would be authorized to act respectively upon this order; as well as letting the patients to appoint guardians to care about them who are anticipating future incapacity. Italian and German courts have elaborated the patient's right to withdrawal of treatment on basis of various civil code provisions on guardianship, provisions of the constitution and case-law on informed consent. The judgments clearly display that the tribunals have elaborated it as a case-law-originating right and did not abstain to recognize their jurisdiction over such contraversive

* Ibid, p. 5.

** Ibid, p. 6.

subject, as a passive euthanasia. Being concerned about the constitutional guarantees of right to life and its parity with the right to autonomy, which, as both German and Italian courts held, the right to withdrawal of treatment, both courts of Germany* and Italy** recognize a «negative presumption» in a trial for a termination of life-supporting procedures, which literally means that the tribunal will not issue the order unless there is evidence of the patient's irreversible condition or it is stably morbid without prospects of improvement, and the patient's documented or presumed wish not to prolong it. The given paper also discusses a variety of other aspects of the issue, such as a necessity of a court approval in order to terminate treatment, and the use of living wills as evidence at trial in Germany and Italy.

Литвиненко А. А.

Право пацієнта на припинення життєзабезпечувального лікування як складова права пацієнта на самовизначення: компаративний аналіз практики судів Німеччини та Італії

З розвитком передових технологій життєзабезпечення, що дає змогу значно подовжити життя невиліковно хворих пацієнтів, постало складне юридичне запитання: чи має пацієнт право відмовлятися від життєзабезпечувального лікування за умови, що смерть буде очевидним наслідком відмови від нього. Майже не маючи правових підстав у законодавстві та практиці судів, американські суди в 60-х роках ХХ ст. доходили різних висновків у справах, де позивачі відмовлялися від переливання крові на підставі релігійних переконань, хоча аспект скорої смерті не завжди супроводжував процес. Життєзабезпечувальна апаратура з роками сягнула нового рівня, і в 70-х роках судам довелося вирішувати більш складні справи стосовно припинення життєзабезпечувального лікування невиліковно хворих пацієнтів, які перебували у перманентному вегетативному стані, а саме справи Quinlan (1976); Saikewicz (1977); Eichner (1980); Leach (1980), і ще низку подібних справ. Американські суди вперше в історії санкціонували у цих справах припинення лікування пацієнтів переважно на підставі доказів, узятих з медичної документації, висновки з якої не залишали шансів на одужання. Очевидно, що такі справи суттєво відрізняються від справ, у яких суди ухвалювали рішення про вимкнення апаратів життєзабезпечення пацієнтів на підставі смерті мозку, визначити яку могла й апаратура 70-х років виробництва. Через два десятиліття подібні справи з'явилися у практиці італійських і німецьких судів. Правові системи Італії та Німеччини як країн, що належать до континентальної сім'ї, на той час не мали відповідного законодавства для вирішення подібних

* *BGH*, Urt. v. 17.03.2003 – XII ZB 2/03, para. 36; AG Siegen, Urt. v. 28.09.2007 – 33 XVII B710, para. 57-58.

** See. *Caso Englaro*, Corte di Cassazione, Sezione I Civ., Sentenza n.21748, del. 16 ottobre 2007, p. 15-17.

проблем, що призвело до низки суперечливих рішень судів нижчих інстанцій Німеччини у 90-х і на початку XXI ст. Прикладами можуть слугувати процес у справі Енглари в Італії, що тривав майже десятиліття, а також справа Уелбі (2006), яка, водночас, порушила питання «активної» еутаназії. Оскільки законодавчі органи цих країн у край неохоче бралися за розробку законів щодо «пасивної» еутаназії, тягар вирішення проблеми ліг на суди, яким довелося у своїй практиці вирішувати питання про допустимість надання рішення стосовно припинення життєзабезпечувального лікування та існування у суду предметної юрисдикції ухвалювати таке рішення. На допомогу судам прийшли так звані «адванс-директиви», або «заповіти за життя», які визначали обсяги тих процедур, які пацієнт вважає допустимими для збереження власного життя, а також так звані «healthcare proxies» (більше знані у Великій Британії), які є довіреностями для опікунів недієздатних або частково дієздатних пацієнтів (перший тип документів призначений для працівників лікарні, але так чи інакше, опікун для такого пацієнта призначається за рішенням суду, і він є учасником процесу в цих країнах, незалежно від того, який з двох документів підписав пацієнт). Перелічені документи відіграють важливу роль доказів у процесі, хоча їх дійсність суди можуть піддати сумніву. Описані практика судів Німеччини та Італії та вироблені нею основні принципи вирішення подібних справ.

Ключові слова: Відмова від лікування; інформована згода; пасивна еутаназія; прижиттєве волевиявлення; представник у сфері охорони здоров'я; (наступні два словосполучення – це те саме, що прижиттєве волевиявлення, але німецькою та італійською); припинення лікування.

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