JUDGE SAYS AILING MAN, 85, MAY FAST TO DEATH

By DAVID MARGOLICK
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An 85-year-old former college president who has been fasting in a Syracuse nursing home to hasten his own death should be permitted to die, a state judge ruled yesterday.

After hearing testimony on the patient's competency from his doctor, psychiatrist and daughter, the judge, Justice Donald H. Miller of State Supreme Court in Syracuse, ruled that the nursing home was neither obligated nor empowered to force-feed him.

The man - the court ordered that his identity be kept secret - was said to be depressed over a series of illnesses. He has been fasting since Dec. 21.

The judge based his decision on the patient's constitutional rights of privacy under the First Amendment, as well as on a state public health law permitting patients knowingly to refuse medically necessary treatment.

"This court is heavily burdened by these questions, and although personally does not lend approval or approbation to the termination of life in this fashion, I will not, against his wishes, order this man to be operated upon and/or to be force-fed," Justice Miller wrote.

The ruling came in an action brought by the Plaza Health and Rehabilitation Center, where the patient has been confined since November. According to his doctor, the man may die within the next few days.

With all parties concurring in the court's decision, there was no immediate prospect of an appeal.

But Rita Kisil, vice president of the Syracuse Right to Life Foundation, called the decision "frightening" and said it would "open the door to euthenasia."

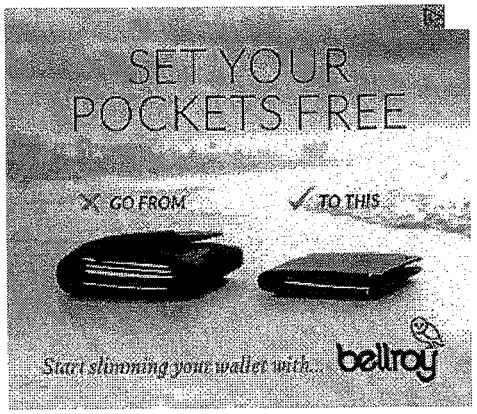
"Even if the family and doctor agree, it's still the sacred duty of the court to preserve life," Mrs. Kisil said. She said her organization was considering whether to enter the case.

Although a similar "right to die" case, involving a 26-year-old cerebral palsy victim, arose recently in California, lawyers in the Syracuse case said they believed it was the first of its kind in New York.

In 1982, an appellate court in Rochester ruled that a state psychiatric hospital was required to force-feed Mark David Chapman, John Lennon's assassin, who was then on a hunger strike.

That court grounded its decision, however, on the state's obligation to care for prisoners in its custody. Although licensed by the state, the Syracuse nursing home is privately owned.

On Jan. 20, the California Supreme Court let stand a lower court decision that Elizabeth



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Bouvia, a 26-year-old cerebral palsy patient, could not require the state to help her commit suicide.

Besides having a much shorter life expectancy than Miss Bouvia, the New York man still has control of his arms. Thus, as Justice Miller noted, he can be force-fed only by being physically restrained for the rest of his life.

The decision was made with the consent of the man's family and his court- appointed guardian. The man's daughter, identified only as Charlotte Doe, told Justice Miller that her father wanted to die because of his deteriorating physical condition, and that he had spurned the cookies, ice cream, and home-made soup his family had brought him.

Her father, the daughter asserted, had been a prominent electrical engineer and college president who had served as United States trade representative on technological matters to France and India. Confined to Wheelchair

He has been confined to a wheelchair for several months and suffers from a variety of ailments, including heart disease, arthritis and hardening of the arteries. Since starting his fast, he has lost nearly 40 pounds.

Dr. John Pipas, the man's doctor, testified that the patient had been fully competent at the time he began his fast and had expressed a wish to die.

"I know I don't have much time on this earth," Dr. Pipas quoted the patient as telling him.

'Caught in a Dilemma'

Early last month, the nursing home reported the patient's fast to the Syracuse Health Department. Late last week, as the patient's condition began to deteriorate, it asked Justice Miller to determine its rights and responsibilities in the matter.

"On the one hand, the home has an obligation to provide care for its patients, including adequate nutrition," said Daniel Berman, a lawyer for the nursing home. "On the other hand, it can't provide treatment if the patient has, after being informed of and understanding the consequences of refusing, refused to consent to any such treatment."

"We were caught in a dilemma," he continued. "The law doesn't seem to be clear, so we brought a proceeding in the court."

To force such treatment on an unwilling patient, Mr. Berman said, may subject the nursing home to liability for battery. Lawyers for the nursing home first met with Justice Miller on Monday. On Wednesday, the judge named Richard Aronson, a retired State Supreme Court justice, as the patient's guardian. Justice Miller issued his ruling yesterday afternoon, after hearing more than five hours of testimony.

Marilyn Ward of the Hutchings Psychiatric Center, who examined the patient, described his state as "groggy and lethargic."

"The patient was suffering from an adjustment disorder - essentially an overreaction to a life situation," she testified. "I asked the patient why he was not eating, and he told me in effect that was not something he wanted to discuss with me."

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At a Special Term of the Supreme Court of the State of New York held in and for the County of Onondaga at the County Court House located in Syracuse, New York on the day of January, 1984.

PRESENT: THE HONORABLE DONALD MILLER
Justice Presiding

SUPREME COURT
STATE OF NEW YORK COUNTY OF ONONDAGA

In the Matter of the Application of the Plaza Health and Rehabilitation Center.

ORDER TO SHOW CAUSE

Upon the annexed Affidavit of Daniel B. Berman, Esq., the Affidavit of Edward A. Leone, Director of Plaza Health and Rehabilitation Center, and the Affidavit of John E. Pipas, M.D., let the following persons show cause at a special term of this Court to be held on the day of , 1984 at the Onondaga County Court House in Syracuse, New York on the day of January, 1984 at o'clock why this Court should not issue an Order allowing the Plaza Health and Rehabilitation Center its physicians or their designees to use medical procedures to feed [redacted], a patient at the Plaza Health and Rehabilitation Center:

[redacted]

Sufficient reason appearing therefore, let service of a copy of the Order together with the papers upon which it was granted upon [redacted], upon [redacted] through

, Esq., who is hereby appointed Guardian ad Litem to protect the rights and interests of said [redacted] and by certified mail, return receipt requested upon [redacted] be deemed sufficient service.

Dated: January 27, 1984.

Justice of the Supreme Court

E N T E R :

SUPREME COURT
STATE OF NEW YORK COUNTY OF ONONDAGA

In the Matter of the Application of
the Plaza Health and Rehabilitation
Center.

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

Daniel B. Berman, being duly sworn, deposes and says as follows:

1. I am an attorney associated with the firm of Hancock & Estabrook, attorneys for the Plaza Health and Rehabilitation Center.

2. I make this Affidavit in support of the Application for an Order allowing the Plaza Health and Rehabilitation Center, its physicians or their designees to use medical procedures for the feeding of [redacted]

3. As is more fully set forth in the annexed Affidavits of Edward A. Leone and John E. Pipas, M.D., it appears that [redacted] a patient at the Plaza Health and Rehabilitation Center has refused to eat for the last several weeks resulting in a loss of 42 pounds. As is more fully set forth in the Affidavit of John E. Pipas, M.D., [redacted] refusal to eat will result in his death within the next several weeks, and may cause irrepairable harm to his health at any time.

4. Again, as is more fully set forth in the Affidavit of John E. Pipas, M.D., there appears to be reason to believe that [redacted] physical and/or mental condition has impaired his judgment to an extent such that he is not capable of making a decision such as not to eat.

5. Your deponent respectfully submits that this Court has jurisdiction over the custody of a person who "is incompetent to manage himself. . . by reason of age, alcohol abuse, mental illness, or other cause. . . ," pursuant to Section 78.01 of the Mental Hygiene Law.

6. Your deponent further submits that although the appointment of a committee of the person is the customary devise used by the Court in exercising its jurisdiction pursuant to Section 78.01 such a procedure is not required by Section 78.01, and may be unnecessary and too time consuming to be used with respect to the instant application.

7. Your deponent understands that Frank Clark, Esq. has been retained to represent [redacted] Your deponent requests that the Court determine if the appointment of a Guardian ad Litem to protect [redacted]ights and interests is required. Your deponent would have no objection to the appointment of Frank Clark, Esq. should a Guardian ad Litem be required.

8. From the Affidavit of Edward A. Leone is appears that [redacted] only close relatives are his two daughters, [redacted]. In view of the

necessity for speedy proceedings, your deponent respectfully submits that the Court should allow said [redacted] to be served via certified mail, return receipt requested, or some other practicable method which would not cause undue delay.

WHEREFORE, your deponent respectfully requests that the Application of the Plaza Health and Rehabilitation Center for an Order allowing the Plaza Health and Rehabilitation Center, its physicians or their designees to use medical procedures to feed said [redacted]

Daniel B. Berman

Sworn to before me this
27th day of January, 1984.

Notary Public

LYNN LEVINE GREENKY
Notary Public, State of New York
Qual. Onondaga Co. No. 4780297
My Commission Exp Mar. 30,19[illegible]

SUPREME COURT
STATE OF NEW YORK COUNTY OF ONONDAGA

In the Matter of the Application of the
Plaza Health and Rehabilitation Center AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ONONDAGA)

EDWARD A. LEONE, being duly sworn, deposes and says as follows:

1. I am the Administrator of the Plaza Health and Rehabilitation Center.

2. [redacted] was admitted to the Plaza Health and Rehabilitation Center on or about the 11th day of May, 1983. [redacted] was admitted to Crouse-Irving Memorial Hospital on or about the 27th day of October, 1983, and returned to the Plaza Health and Rehabilitation Center on or about the 14th day of November, 1983. He has continued to be a patient at the Plaza Health and Rehabilitation Center from the 14th of November, 1983 through the present.

3. As is more fully set forth in the annexed affidavit of John E. Pipas, M.D., said [redacted] has refused to eat over the last several weeks, resulting in [redacted] loosing 46 lbs. of body weight.

4. Your deponent understands that [redacted] refusal to eat is likely to cause his death within the next several weeks, and your deponent understands that irreparable harm could result at any time.

5. There appears to be doubt with respect to whether or not [redacted] judgment has been impaired, so as to render him

incapable of making a decision of this magnitude, such as not eating. Under these circumstances the Plaza Health and Rehabilitation Center deems it only appropriate to ask the Court to exercise its powers pursuant to §7801 of the Mental Hygiene Law to determine if [redacted] is competent to make this decision, and if this decision is in his best interest.

6. [redacted] is a widower, and upon information and belief, his only close living relatives are two daughters: [redacted] and [redacted].

WHEREFORE, your deponent respectfully requests that the Court issue an Order allowing the Plaza Health and Rehabilitation Center, through its physicians or designated physicians to use medical methods for the purpose of providing nourishment to Mr. [redacted]

Edward A. Leone
EDWARD A. LEONE

Sworn to Before me this
27TH day of JANUARY, 1984.

Philip P. Kennedy
NOTARY PUBLIC

PHILIP P. KENNEDY
Notary Public in the State of New York
Qualified in Orange Co. No. 34-4520322
My Commission Expires Mar. 30, 1984

SUPREME COURT
STATE OF NEW YORK COUNTY OF ONONDAGA

In the Matter of the Application of
the Plaza Health and Rehabilitation Center.

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

John E. Pipas, M.D., being duly sworn, deposes and says:

1. I am a physician duly licensed to practice medicine in the State of New York, and I am the attending physician for Ross Henninger.

2. [redacted] is an 86 years old man suffering from cerebral vascular disease, as well as a possible stroke as a result of which he is suffering from confusion with respect to recent memory.

3. [redacted] was hospitalized at Crouse-Irving Memorial Hospital from March 23, 1983 through November 14, 1983.

4. Following his return to Plaza Health and Rehabilitation Center on November 14, 1983, [redacted] began to refuse to eat, as a result of which he has lost 42 pounds in the last several weeks.

5. It is my considered opinion that if [redacted] continues to refuse to eat, he will die within the next several weeks. It is also my considered opinion that irrepairable harm to his health could result at any time.

6. I have discussed this matter with [redacted], and

although he has told me that he understands that the consequences of his continued refusal to eat will be his death, I believe that his physical and mental condition may have impaired his judgment to an extent that he may not be competent to make such an important decision. Furthermore, I do not believe that this is a reasonable decision in light of the fact that the prognosis for Mr. Henninger's underlying medical problems is not terminal.

7. I requested a consultation from Dr. Marilyn Ward, a duly licensed psychiatrist with respect to [redacted] condition. A copy of the report is annexed hereto as Exhibit A.

John E. Pipas

Sworn to before me this
26th day of January, 1984.

Notary Public

DANIEL B. BERMAN
Notary Public, State of New York
Qual. Onondaga Co. No. 4780296
My Commission Exp. Mar 30, 1985

PLAZA NURSING HOME

REPORT OF CONSULTATION

To: Dr. M Ward

From: Dr. J Ryan

PATIENT NAME [redacted]
PATIENT NO. [redacted]
DATE OF BIRTH [redacted]
MEDICARE [redacted]
MEDICAID
OTHER INSURANCE —
DIAGNOSIS s/p (R) CVA

Reason for Consultation Pt not eating

Signature of attending physician _____ M.D.

REPORT

Findings 85 yo WOF w/ failure to eat especially over past 3 weeks. Pt insists he does not eat because food tastes bad; relates he will die as a consequence but says "that's my business" Became rather angry at my directed questions on subject. Mr [redacted] apparently sleeps adequately + attends OT. He has no known past Psych. Hx. He is oriented to place + situation roughly to time. Unable to complete further mental status testing due to pt's irritability + guardedness - "You're just trying to back me into a corner!!"

Diagnosis Adjustment Disorder, [redacted] Hospitalized - Pt seems well aware of what he is doing + does not have current sx of depression

Recommendation and/or Treatment 1) Would recommend getting legal counsel for opinion about feeding pt over his objections 2) Nursing notes to abdominal mass - ? could this intact be affecting appetite?

Date of Consultation 1/16/84 Dr. _____

Signature of Consultant

Return original copy with patient to Plaza Nursing Home, 614 S. Crouse Avenue

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STATE OF NEW YORK

SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Application of the Appointment of a Committee for the person of John Doe (a fictitious name) alleged incompetent person.

PETITIONER'S MEMORANDUM OF LAW

STATEMENT OF FACTS

Edward A. Leone, the Administrator of Plaza Health & Rehabilitation Center brought a petition for the appointment of a committee for the person of John Doe, alleged incompetent person, and, in the alternative, for a declaratory judgment and order allowing the Plaza Health & Rehabilitation Center, Mr. Doe's physicians or their designees to use medical procedures to provide said John Doe with nutrition. On the 30th day of January, 1984 the petitioner and respondent appeared before the Honorable Donald H. Miller, J.S.C. by their respective attorneys, Daniel B. Berman, Esq. and Frank Clark, Esq. The Court determined that the affidavits supporting the petition were insufficient for the commencement of an incompetency proceeding, and issued an order to show cause dated and entered the 30th day of January, 1984 by which a special proceeding for declaratory judgment and an order thereon was commenced.

Mr. Doe was admitted to the Plaza Health & Rehabilitation Center on May 11, 1983. He transferred to the Crouse Irving Memorial Hospital and was a patient at said hospital between October 27, 1983 and November 14, 1983. Following his treatment

at Crouse Irving Hospital, Mr. Doe was returned to the Plaza Health & Rehabilitation Center. It appears that since his return to the Plaza Health & Rehabilitation Center, Mr. Doe has embarked upon a course of action which, if he is allowed to continue, will result in his death. Specifically, Mr. Doe has refused to consume food for the past several weeks. As a result of his refusal to eat any food, Mr. Doe has lost 42 pounds and his very life is in jeopardy.

As is set forth in detail in the report of Doctor John E. Pippas, M.D., Mr. Doe's attending physician, although Mr. Doe is suffering from a number of infirmities, including cerebral vascular disease resulting in a state of confusion with respect to his recent memory, his condition is not terminal, nor has it rendered him incapable of cognitive thought or to speak or carry on conversations.

STATEMENT OF LAW

Although a competent person may have the right to refuse extraordinary medical treatment, at least for a terminal condition, the Court clearly has the power to intercede and prevent him from committing suicide by starvation.

DISCUSSION

Advances in medical knowledge, technology and treatment of the past few years has presented a legal, moral, social and ethical dilemma of great dimensions. Our society is now confronted with not only the question of how to preserve life, but also under what circumstances should attempts to preserve

life be abandoned at the request of the patient involved. The present proceeding presents such a question. Specifically, the question presented is whether a non-terminal patient may elect to end his life by starvation. This question presents a direct conflict between patient's personal liberties and a compelling State interest in preserving life. Cf. Roe v Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (wherein the court recognized that although a pregnant woman's right to privacy encompass the right to have an abortion, it also recognized the propriety of some state regulation in accordance with the state's interest in safeguarding health, maintaining medical standards, and protecting potential life).

The State of New York has recognized the right of a competent person to accept or reject medical treatment so long as he has been fully informed of, and understands the consequences of his actions. See, N.Y. Public Health Law Section 2803-c(3)(e); Matter of Storar, 52 N.Y.2d 363, 438 N.Y.S.2d 266 (1981); Von Holden v Chapman, 87 A.D.2d 66, 450 N.Y.S.2d 623 (4th Dept. 1982); In the Matter of the Application of Lydia E. Hall Hospital, 116 Misc. 2d 477, 455 N.Y.S.2d 706 (Special Term, Nassau County, 1982). Nonetheless, it is equally clear, as stated by Justice Denman in Von Holden v Chapman, Supra.;

> "The fact that the State has a legitimate and compelling interest in preventing suicide as demonstrated by several statutes. A person may be involuntarily committed if he has a mental illness likely to result in serious harm to himself (Mental Hygiene Law, §§ 9.37, 9.39, 9.41). Aiding another to commit suicide is a felony (Penal Law, §125.15 [subd. 3]) as is promotion a suicide attempt (Penal Law, §120.30).

> Conversely, aperson is justified in using the physical force necessary to thwart a person who is about to commit suicide (Penal Law §35.10[subd. 4]." Id., at 68, 450 N.Y.S.2d at 625-626. See also, Matter of Storar, Supra; Ciuros v Dunbar, ___ A.D.2d ____, 463 N.Y.S.2d 743 (4th Department, 1983); Matter of Lydia E. Hall Hospital, Supra.

Thus, the present petition requires that the court strike a balance between Mr. Doe's right to refuse medical treatment and the State's compelling interest in preserving life and preventing suicide.

At the outset, it must be noted that Mr. Doe is not refusing treatment for a condition which will result in his demise if left untreated. In those cases where the court has held the patient's right to refuse medical treatment is superior to the State's interest in preserving life, the patient was terminally ill. [e.g., Matter of Storar, Supra (patient comatose with no hope of recovery); Matter of Lydia E. Hall Hospital, Supra.,(patient in the end stages of renal disease, suffering from diabetes mellitus, blindness and bi-lateral amputations due to gangreen); Matter of Quinlan, 70 N.J. 10, 355 A.2d 647 (1976)(patient in a persistent vegetative state); Superintendent of Belchertown State School v Saikewcz, 373 Mass. 728, 370 N.E.2d 417 (1977) (patient suffering from terminal leukemia)]. Mr. Doe, on the other hand, is attempting to commit suicide by starvation.

In her opinion in Von Holden v Chapman, Justice Denman distinguished between the right to refuse medical treatment and the right to refuse food:

> Even superficial comparison of the right to decline medical treatment with the right to take ones life illustrates their essential dissimilarity, and to argue because the State

> has recognized the former it must permit the latter would be to engage in the most specious reasoning." Von Holden v Chapman, 87 A.D.2d at 70, 450 N.Y.S. at 627.

The Von Holden case involved a petition brought by the Director of a State psychiatric facility to allow the facility to force feed Mark David Chapman, the convicted Killer of singer-songwriter John Lennon, after Chapman had been transfered to the facility when he began a hunger-strike. Judge Tenney granted the petition and issued an order allowing Chapman to be force fed. Noting "that the state has a legitimate and compelling interest in preventing suicide" the Fourth Department affirmed Judge Tenney's decision and order.

The fact that Chapman was a convicted felon serving a prison term, and that Mr. Doe is a voluntary patient at the Plaza Health and Rehabilitation Center would be a specious basis for distinguishing the two cases. In her decision, Justice Denman stated:

> "The preservation of life has a high social value in our culture and suicide is deemed 'a grave public wrong' (Stiles v Clifton Springs Sanitarium Co., 74 F.Supp 907,909; Hundert v The Commercial Travelers Mutual Accident Association Of America, 244 App. Div. 459, 279 N.Y.S.555). Even a perfunctory perusal of the case law of our states indicates the universality of that principle." Id., at 68-69, 450 N.Y.S.2d at 626.*

Clearly the decision in Van Holden was based upon the State's interest in preserving life and preventing suicide, rather than upon the fact that Chapman was a prisoner.**

*It should be noted that since the Fourth Department rendered its decision in Von Holden the California courts have been confronted with the Bouvia case. Unfortunately it has not been possible to obtain a copy of any of the decisions.

** Compare, Zant v Prevatte, 248 Ga. 832, 286 S.E.2d 715 (1982) (wherein the Georgia Supreme Court held that the State's interest in preserving life did not override a prisoner's right to refuse food).

Even the right of a non-terminal patient to refuse medical treatment is unsettled. Although it does not appear that the New York courts have been confronted with a case where a patient seeks to refuse medical treatment necessary to preserve his or her life where the patient was not suffering a terminal illness, in such a case the New Jersey Supreme Court, the very same court that allowed Karen Ann Quinlan to be removed from a respirator, held that the patient did not have the right to refuse. John F. Kennedy Memorial Hospital vs. Heston, 58 N.J. 576, 279 Ad 2nd 670 (1971). In holding that a 22 year old Jehovah's Witness did not have the right to refuse blood transfussions following her addmission to the hospital after an automobile accident, Chief Justice Weintraub said:

> "Appellant suggest that there is a difference between passively submitting to death and actively seeking it. The distinction may be merely verbal as it would be if an adult sought death by starvation instead of a drug. If the State may interrupt one mode of self destruction, it may with equal authority interfere with the other. It is aruably different when an individual overtaken by illness, decides to let it run a fatal course. But unless the medical option is ladden with the risk of death or of serious infirmity, the State's interest in sustaining life in such circumstances is hardly distinguishable from its interest in the case of suicide." Id., at ___, 279 Ad 2nd 672-673 (emphasis added).

Although Ms. Heston was a vibrant and vital 22 year old woman, and Mr. Doe is an elderly man in need of care, his condition is not terminal. He is, or would but for the lact of food be, able to engage in cognative thought and take part in conversations. In sum, he has all of the attributes of a human being, and the value of human life should not be measured by a scale. It should also be noted that Dr. Ward, a psychiatrist who has examined Mr. Doe, has opined that he may be suffering from an

adjustment disorder which may abate. If this is the case, Mr. Doe like many other elderly people in our society, may wish to live as much as would any 22 year old.

CONCLUSION

In light of the 4th Department's holding in Von Holden vs. Chapman, 87 Ad 2nd 66, 450, N.Y.S. 2nd 623 (1982), it is clear that Mr. Doe has no right to commit suicide by starvation. Under these circumstances the Court has no choice but to grant the Petitioner Declaratory Judgment and an Order allowing Plaza Health and Rehabilitation Center, Mr. Doe's physician or his designees to use medical procedures to provide said John Doe with food.

Respectfully Submitted

HANCOCK & ESTABROOK
Attorneys for the Petitioner
Office & P. O. Address
One MONY Plaza
Syracuse, New York 13202
315-471-3151

By: Daniel B. Berman, Esq.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Application for the Appointment of a Committee for the Person of JOHN DOE (a fictitious name), an Alleged Incompetent Person

ANSWER

The Respondent, JOHN DOE, by his attorneys, Baker and Clark, makes the following answer to the Petition herein:

1. ADMITS the allegations of Paragraphs 4 and 5 of the Petition.

2. DENIES the allegations of Paragraph 2 of the Petition.

3. LACKS KNOWLEDGE AND INFORMATION SUFFICIENT TO FORM A BELIEF as to the allegations contained in Paragraphs 1, 3, 6, 7, 8 and 9.

4. DENIES each and every other allegation contained in the Petition.

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE

5. Respondent is and for all times relevant hereto has been legally competent and fully cognizant of the consequences of his refusal to eat.

6. Respondent has the right, under Section 2803-c(2)(e) of the Public Health Law and the common law of this State, to refuse medication and treatment for his condition, including force feeding and/or other medical procedures designed to feed

him involuntarily.

AS AND FOR A SECOND
AFFIRMATIVE DEFENSE

7. Respondent's right to privacy, guaranteed by and under the Constitution of the United States, includes the right to refuse otherwise appropriate medical care and treatment for his condition, including force feeding and/or other medical procedures designed to feed him involuntarily.

AS AND FOR A THIRD
AFFIRMATIVE DEFENSE

8. The Petition does not allege legally sufficient grounds for the relief requested.

AS AND FOR A FOURTH
AFFIRMATIVE DEFENSE

9. The Petitioner does not allege, and does not have, standing to bring this proceeding.

WHEREFORE, Respondent requests an order of this Court (1) denying the relief requested in the Petition; (2) declaring that he has the right to refuse otherwise appropriate medical care and treatment for his condition, including force feeding and/or other medical procedures designed to feed him involuntarily; (3) enjoining Petitioner from taking any further steps to compel him to eat; and (4) granting such other and further relief as to the Court may seem just and proper.

Dated: January 31, 1984

Yours, etc.
BAKER and CLARK
Attorneys for the Defendant
1104 State Tower Building
Syracuse, New York 13202
Telephone: (315) 471-3027

TO: HANCOCK & ESTABROOK
Attorneys for the Petitioner
Daniel B. Berman, Esq. of Counsel
One MONY Plaza
Syracuse, New York 13202

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Application for the Appointment of a Committee for the Person of JOHN DOE (a fictitious name), an alleged Incompetent Person

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ONONDAGA) ss.:

CONSTANCE DOE (a fictitious name), being first duly sworn, deposes and states the following:

1. I am the daughter of JOHN DOE, the respondent in this proceeding.

2. My father is eighty-five years of age. He is a widower, my mother having died in January, 1980. My father has been a patient at the Petitioner Nursing Home since May 11, 1983, following his discharge from a local hospital on the same date. He had spent the preceding two months in the hospital, for treatment of an apparent stroke suffered in early March, 1983. Prior to his hospitalization, he resided in a private residence located in Syracuse.

3. My father has always been an extremely active individual, who has devoted his life to a wide range of personal and professional interests. [redacted]

[redacted]d. Although he retired in the late 1960s, he remained, at least up to the time of his stroke, an active member of various professional associations and an avid reader of professional journals. In addition to his professional endeavors, my father has pursued life-long interests in carpentry, genealogy, stamp collecting and other non-professional matters. He actively pursued these interests, and was almost entirely self-sufficient in terms of his personal living arrangements, until his stroke.

4. Following the stroke, my father's life underwent a profound change for the worse. Not only did he sustain residual loss of mobility, requiring his confinement to a wheelchair or bed, but the stroke left him with a significant short-term memory impairment. Although this does not seem to affect his intellectual functioning, it has made it virtually impossible for him to do any serious reading in his professional field or to pursue the other interests which have occupied much of his time following retirement. His physical condition is such that he cannot even control his bladder, and is compelled to urinate through a catheter which is inserted in him for the purpose of drawing off urine.

5. Notwithstanding these problems, my father told me during the months immediately following his placement at the nursing home that he hoped to be able to rehabilitate himself to

the point of being able to return home and resume life on his own. However, in October, 1983, he had to be readmitted to the hospital for treatment of a urinary infection, apparently caused by a problem with his catheter. He remained in the hospital until mid-November, 1983, when he returned to the nursing home.

6. At about this time, my father told me that he realized he would never be able to return home or resume, in any meaningful way, the interests to which he has devoted his life. He told me that the prospect of spending the rest of his life in a nursing home, wholly dependent upon others for his most basic personal needs, was intolerable and seemed to him to be a fate worse than death.

7. For the next several weeks, my father and I talked about his future. He repeatedly told me that he preferred to die now, with dignity, than to have his life prolonged in the nursing home. He gradually began to cut down on the food he would eat and eventually ceased taking any solid food whatsoever.

8. I have discussed with my father the inevitable consequences of his refusal to eat. He has told me that he knows what he is doing and understands it will result in his death. He refuses all effort to feed him on the part of the nursing home staff and has told me that he is unwilling to be force fed or undergo other medical treatment designed to preserve or prolong his life.

9. My father's attorney informs me that the Petitioner has failed, to date, to present legally sufficient evidence that

my father is incompetent, as that word is used in the Mental Hygene Law, or, for that matter, that he does not fully understand the consequences of his actions. He further informs me that, as a consequence, there may be no legal basis for the relief sought by the Petitioner herein.

10. During the past few days, I have had increasing difficulty arousing my father to speak to me when I visit him. I understand his attending physician believes he may slip into a coma at any time, following which he will not be able to speak for himself in this matter. For this reason, I believe a guardian ad litem should be appointed to act on my father's behalf for the remainder of these procedings.

11. I have discussed my father's condition with my sister, who is his only other surviving next of kin. She and I are in accord in our desire that his decision on this matter be respected and accommodated.

12. Several years ago, my mother told me that she and my father had discussed their wishes in regard to medical care and treatment in the event either of them became afflicted with a terminal illness or otherwise became substantially incapacitated. My mother told me that they agreed they would not want to go on living under those circumstances and would be opposed to the administration of medical procedures designed to prolong their lives. I believe that my father's decision to refuse further medical care at this point in his life is consistent with the decision he and my mother made at that time, and I hope the Court

will permit him the final dignity of having his way on the matter.

/s/ Constance Doe
Constance Doe*

Sworn to Before me this

1st day of February, 1984.

FRANK A. CLARK
Notary Public in the State of New York
Qualified in Onondaga Co. No. 4615354
My Commission Expires March 30, 1985

*Constance Doe is a fictitious name employed by the affiant as a means of preserving her father's right to privacy. The affiant has read the contents of this affidavit and is prepared to swear to the truth of the matters contained herein in an appropriate proceeding.

JOHN E. PIPAS, M. D.
404 UNIVERSITY AVENUE
SYRACUSE, NEW YORK 13210
478-3121

January 31, 1984

Daniel Berman, Atty.
One MONY Plaza
Syracuse, NY 13202

Dear Sir:

Regarding [redacted] as per your request, I will try and summarize this man's complicated state in as succinct a manner as possible.

[redacted] is an 85-year-old gentleman (date of birth: 5-22-98) who first entered Plaza Nursing Home 5-11-83 with a diagnosis of status post right stroke with mild left hemiparesis. He was admitted to Plaza Nursing Home primarily for physical and occupational therapy. In addition to his stroke, he has had a diagnosis of hypertension, degenerative disc disease and old myocardial infarction.

[redacted] biggest problem at Plaza seemed to be the fact that he was mildly confused. He did have trouble remembering certain things but was active, alert and oriented. He did well until 10-27-83 when he developed urosepsis, an infection that originated from a bladder infection. He was admitted to the hospital for treatment of the infection on 10-27-83 and returned to Plaza on 11-14-83 with the same diagnoses as above. It was approximately one month after admission, that is, around 12-21-83, when he began to stop eating and drinking; that is, he significantly cut back on all intake. His refusal to eat and drink is now to the point where he has been eating nothing for the past several weeks and takes in only minimal amounts of liquids (100-300 ccs. per day). As a result of this, he has developed significant weight loss as evidenced by the fact that in May, 1983, he weighed 161, in November, 1983, he weighed 149, and now he weighs 118; that is, he has had a weight loss of some 31 pounds.

At the present time, he is virtually, completely bedridden. He has become weak and clinically is dehydrated; that is, his lips and mucous membranes are dry. He has been taking medications, but this recently has become a problem. Currently his medications are Persantine (to prevent further stroke), Tylenol as needed, Mellaril only for sedation when he becomes agitated and ascorbic acid. He is also taking Sulfa daily, Dulcolax suppositories as needed and Tigan suppositories for nausea.

As a result of this weakened condition that now exists, he frequently becomes very lethargic and has difficulty responding to questions, requests, etc. However, when I saw him yesterday, he was able to answer questions and was quite emphatic that he was aware of the fact that he was not eating and drinking and that this would result in his death. I specifically asked him if he desired to be in the hospital, and he answered with an emphatic "no." I think he is fully aware of the implications of these questions.

We have obtained frequent lab work on him, that is, weekly; and, in fact, he had lab work yesterday that was, surprisingly, all within normal limits. (This is not surprising, since people who are dehydrated and in this state may obtain essentially normal laboratory work which may not reflect the seriousness of the condition.)

As mentioned above, prior to his current fast, he was alert, albeit confused, and a pleasant gentleman, who was able to walk with help and get around by wheelchair. He currently is completely bedridden and in a preterminal state.

I would expect that if he continues as he is now that he probably will not survive more than a week or two. As he becomes weaker, he will probably slip into a coma.

It appears now that our only options are to force-feed him either in the form of a gastrostomy tube inserted into the stomach or some other method of administering nourishments. This would pose a significant dilemma because he would, of necessity, need to go in the hospital to have further procedures performed, and if it did come to surgery, I am not sure that he would be able to be cleared medically; that is, the risk of surgery would probably outweigh its benefit and would probably not be approved. If, in fact, some sort of feeding device were carried out, he would either need to be sedated heavily or restrained in order to prevent him from removing such a device or devices.

The question comes down to really whether this gentleman has the right to continue to refuse nourishment in our institution. If we decide that he does not have the right, he will have to be force-fed (that is, means will have to be devised to provide him with nourishment and then arrangements will have to be made to prevent him from removing such devices, i.e., pulling out a G tube or an NG tube or whatever tube or device is implanted.)

I hope that this meets with your request.

Very truly,

J.E. Pipas, MD

John E. Pipas, M. D.

JEP:kk

At a Special Term of the Supreme Court, held in and for the County of Onondaga, at the Court House in the City of Syracuse, New York, this _____ day of February, 1984.

PRESENT: HON. DONALD H. MILLER,

Justice Presiding

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Application for the Appointment of a Committee for the Person of JOHN DOE (a fictitious name), an alleged Incompetent Person

ORDER

The parties hereto, by their respective attorneys, having jointly moved for an order (1) appointing a guardian ad litem on behalf of the respondent, and (2) regulating the disclosure of these proceedings; and the Court having duly considered the matter and determined the appropriateness of appointing a guardian ad litem and the need to regulate the disclosure of the proceedings in order to preserve the privacy of respondent and his family; it is

ORDERED, that Hon. Richard Aronson be and hereby is appointed guardian ad litem for respondent; and it is further

ORDERED, that all further proceedings herein shall be closed, for the present, to the news media and disinterested third parties, except that there be reserved to all a request to be heard in this regard.

DATED: February 1, 1984
Syracuse, New York

Donald H. Miller

Donald H. Miller, J.S.C.

At a Special Term of the Supreme Court, held in and for the County of Onondaga, at the County Courthouse in Syracuse, New York, this 1st day of February, 1984.

PRESENT: HON. DONALD H. MILLER,
Justice Presiding

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

In the Matter of the Application for the Appointment of a Committee for the Person of [redacted]R, an alleged Incompetent Person.

ORDER

The parties hereto, by their respective attorneys, having orally moved for an order changing the title of these proceedings and sealing the record thereof, in order to preserve the privacy rights of the respondent and his family, and the Court having duly considered the matter and determined the appropriateness of the relief requested; it is

ORDERED, that the name of the respondent shall be deleted from the title of this action and all papers heretofore filed herein, and replaced by the fictitious name "JOHN DOE"; and it is further

ORDERED, that the papers filed herein shall be retained by the Court as confidential and shall not be disclosed to third parties except as may hereinafter be ordered by the Court.

DATED: February 1, 1984
Syracuse, New York

/s/ Donald H. Miller
Donald H. Miller, J.S.C.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN THE MATTER OF THE APPLICATION

of ORDER

PLAZA HEALTH AND REHABILITATION CENTER

TO THE COUNTY CLERK, COUNTY OF ONONDAGA, NEW YORK:

YOU ARE HEREBY ORDERED to seal all of the records filed pertaining to the above entitled matter, also entitled as follows:

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN THE MATTER OF THE APPLICATION FOR THE APPOINTMENT OF A COMMITTEE FOR THE PERSON OF [redacted] AN ALLEGED INCOMPETENT PERSON

- and -

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN THE MATTER OF THE APPLICATION FOR THE APPOINTMENT OF A COMMITTEE FOR THE PERSON OF JOHN DOE (A FICTITIOUS NAME), AN ALLEGED INCOMPETENT PERSON

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and it is further

ORDERED, that these records will remain sealed until further order of this Court.

DATED: Syracuse, New York,
February 16, 1984.

Donald H. Miller, J.S.C.

SUPREME COURT
STATE OF NEW YORK COUNTY OF ONONDAGA

IN THE MATTER OF THE APPLICATION

of

PLAZA HEALTH AND REHABILITATION CENTER

PROCEEDINGS conducted on February 2, 1984 at the Supreme Court, Onondaga County Court House, Syracuse, New York, before the Honorable Donald H. Miller, Supreme Court Justice.

APPEARANCES:

For the Petitioner: HANCOCK & ESTABROOK
By: Daniel B. Berman, Esq.

For the Respondent: FRANK A. CLARK, ESQ.

John Keough
Supreme Court Reporter
Onondaga County Court House
Syracuse, New York 13202

THE COURT: Because of the urgency of the situation, I will issue my opinion immediately.

I have reviewed all of the available facts, listened to the testimony. I have looked at the case law involved and the circumstances surrounding the petition.

It is my opinion that the individual in question was competent at the time he elected to discontinue eating in December of 1983; that he knowingly and willingly made that decision with the full understanding of the consequences, a hastened death. The individual continues to express the wish not to eat, and he has so refused. He refuses to go to the hospital for surgery or resume eating, requests which have been made repeatedly, according to the testimony, even up to the present time.

Taking into consideration that there was no showing that this man was incompetent at the time of his election to withdraw from eating, nor is there a showing that he is incompetent at this time, the record reflects

that well over 40 days have passed since he made his decision and the immediate family is supportive of his right to make his own decision, as well as to his competency.

I know that is a hard decision that they have made. The only procedure available to begin feeding would, according to the doctor, or expert testimony, require hospitalization.

As I said, this man does not wish to eat, does not wish to be treated, fed or be hospitalized. His attorney has further based that individual decision inter alia on this man's federal and state constitutional and civil rights and upon the right of an individual to reject medical treatment pursuant to the public health law, section 2803C, Subdivision 3E. We heard that it would require surgery to force feed this man the way that the doctor felt it should be done.

Under the public health law he has a right to refuse that.

The record should further reflect that the testimony of this man's attending physician, also the physician for the Plaza, is that this doctor believes this patient to be competent, and that the doctor would not recommend forced feeding in this particular situation, but rather he said continue the nursing care, supply this patient with normal medication and offer him food, if the same would be voluntarily accepted.

This would mean, of course, no surgery.

The guardian ad litem has conferred with the Court, and in his official report he concurs with the doctor.

He, too, has spent a lot of time on this, and a lot of thought.

Now, as I said before, if I haven't already put it on the record, this Court is heavily burdened by these questions, and although personally does not lend approval or approbation to the termination of life in this fashion, however, I will not, against his wishes, in effect order this 85 or 86 year

old person to be operated upon and/or to be force fed in any manner, or to be restrained for the rest of his natural life.

Now, I will further rule that the health care facility involved herein is not obligated or responsible to attempt to perform such medical procedures nor will this Court allow them to do so.

This is the order of the Court. We stand adjourned.

C E R T I F I C A T E

This is to certify that I am one of the Official Reporters of the Supreme Court, Fifth Judicial District; that I attended and reported the above-entitled proceedings; that the foregoing is a true, accurate and correct transcript of the proceedings had therein, to the best of my knowledge and ability.

John Keough,
Supreme Court Reporter.

DATED: February 8, 1984

Syracuse, New York

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Onondaga at the County Court House in the City of Syracuse on February 16, 1984.

PRESENT:

HON. DONALD H. MILLER,
Justice Presiding

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

IN THE MATTER OF THE APPLICATION

of ORDER

PLAZA HEALTH AND REHABILITATION CENTER

Petitioner, Plaza Health and Rehabilitation Center, through its attorneys, Hancock & Estabrook, having commenced a special proceeding pursuant to an Order to Show Cause dated and entered January 30, 1984, for a Declaratory Judgment and Order allowing the Plaza Health and Rehabilitation Center, its physicians or their designees, to use medical procedures to provide a patient to be known as John Doe with nourishment;

NOW, upon reading and filing the Order to Show Cause dated January 30, 1984; the Verified Petition; the Affidavit of Edward A. Leone in support thereof; the Affidavits of John E. Pipas, M.D.; the Affidavit of Marilyn S. Ward, M.D.; the Answer and Affidavit of the patient's daughter, to be known as Constance Doe, in opposition thereto; and the Court having

taken evidence and heard testimony herein, including a report by the Honorable Richard Aronson, Guardian ad Litem for said John Doe, at a hearing held at Syracuse, New York, on February 2, 1984; and after hearing Daniel B. Berman, Esq., in support of the Petition, and Frank A. Clark, Esq., in opposition thereto, and after due deliberation having been had, the Court having delivered all decisions from the bench on February 2, 1984, it is

ORDERED, that the Petition with respect to a Declaratory Judgment is granted, as follows:

ORDERED, that the Petitioner Plaza Health and Rehabilitation Center be and hereby is directed to continue regular nursing care and medical treatment to said John Doe, including the offering of food and drink, but is hereby ordered not to undertake force feeding or use any other medical procedures designed to compel John Doe to eat or drink or to provide him with nourishment; and it is further

ORDERED, that the Petitioner's request for an Order allowing its physicians or their designees to use medical procedures to provide said John Doe nourishment be and the same is hereby denied; and it is further

ORDERED, that the Guardian ad Litem's fee shall be $500, payable in one-half shares by each of the parties.

DATED: Syracuse, New York,
February 16, 1984.

Donald H. Miller

Donald H. Miller, J.S.C.