IN THE
SUPREME COURT
OF THE UNITED STATES

No. C09-0115-1

OCTOBER TERM 2009

***MICHELLE KELLER & NEW AMSTERDAM CITY GENERAL HOSPITAL*, Petitioners**

v.

***TYLER & FLORENCE KELLER*, Respondents**

ORDER GRANTING WRIT OF CERTIORARI

PER CURIAM:

The petition for a writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit is hereby granted.

IT IS ORDERED that the above-captioned matter be set down for argument in the 2009 term of this Court, said argument to be limited to the following issues:

I. Whether federal abstention applies in cases where a state probate court holds that a minimally conscious, yet otherwise incompetent, person has a liberty interest in determining whether life-sustaining treatment and/or nutrition should be withheld, in direct contravention of state statute.

II. Whether a minimally conscious, yet otherwise incompetent, person has a liberty interest in determining whether life-sustaining treatment and/or nutrition should be withheld

UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

MICHELLE KELLER & NEW AMSTERDAM CITY GENERAL HOSPITAL, **Petitioners** v. ***TYLER & FLORENCE KELLER,*** **Respondents**	Case No. 09-1173

Decided October 1, 2009

Before Judges Bayless, Chiarello, and Lo

Bayless, Circuit Judge, for the Court.

The present appeal arises from a dispute regarding the decision to withdraw life-prolonging procedures from a minimally conscious patient, and the federal judiciary's role in intervening in such a decision.

In *Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990), the U.S. Supreme Court determined that competent persons are able to exercise the right to refuse medical treatment pursuant to the Due Process Clause of the Fourteenth Amendment. However, in the event that a person is deemed incompetent, states are permitted to set their own evidentiary standards to determine whether nutrition and/or medical treatment should be withheld.

In the wake of *Cruzan*, many states passed laws and even constitutional amendments setting evidentiary standards regarding incompetent people who have entered a coma or persistent vegetative state. Such people are clearly unable to express preferences regarding their medical care. However, in the event that a person is deemed to be in a minimally conscious state, it appears that he or she may be able to express an opinion regarding the potential

withholding of medical treatment. In these instances, it is unclear whether state probate courts may permit the minimally conscious person to decide whether nutrition and/or medical treatment should be withheld, in direct contravention of state statute.

Equally unclear is whether such a decision is in the purview of federal courts, or whether the doctrine of abstention, as outlined in *Burford v. Sun Oil Co*, 319 U.S. 315 (1943), applies. There are a limited number of instances where federal courts will abstain from a federal question intertwined with a state law question when federal intervention would result in an impairment of state policy.

For the reasons set out below, this Court holds that the federal abstention doctrine cannot be invoked in this case. Moreover, a minimally conscious, yet otherwise incompetent, person has a Due Process right to determine whether his nutrition and/or medical treatment should be withheld.

I. Factual background and procedural history

On a clear summer day in June 2007, Steven and Michelle Keller got married on the beach in an intimate ceremony attended by their closest friends. Photos of that day show a happy, healthy young couple in their mid-twenties without a care in the world and with a lifetime of happiness ahead of them. On that idyllic day, nobody could imagine that Steven and Michelle's lives would soon change in nearly inconceivable ways and that they would become the center of a national debate.

Steven Keller entered the New Amsterdam City Fire Department in 2001, shortly after completing high school. As a child, Steven[1] had always known he wanted to be a fireman, and his academy proficiency scores indicated that his abilities matched his enthusiasm. Steven was

[1] Since this involves a family situation where the parties all share the same last name, we will refer to the interested parties by their first names for clarity's sake.

assigned to work at Station 42 in downtown New Amsterdam City and quickly became an integral part of the station house. He was well-liked for his quick sense of humor, and well-respected for his work ethic.

Steven and Michelle met in 2004. It was Michelle's first year teaching special-needs children at a New Amsterdam City elementary school. Each year, local firemen attended a special assembly at the school, where they talked to the children about fire safety. As a special treat, the children were then permitted on a "real-life" fire truck. Steven was one of the firemen assigned to Michelle's school, and the two quickly started dating. After their first date, Michelle told her friends that she'd met the man she would marry.

After their 2007 wedding, Steven and Michelle decided to expand their family. Steven Jr. was born in September 2008. A few months later, the new family was preparing to celebrate the baby's first Christmas when tragedy struck.

On December 22, 2008, Steven was working an early-evening overtime shift at the fire station when a three-alarm fire was called in. Stations throughout New Amsterdam City responded to the multi-story office building fire. By the time Station 42 fire trucks arrived, the top floors of the office building were engulfed in flames, and attempts were underway to not only battle the fire, but also to rescue office workers trapped inside.

Once inside the office building, Steven worked tirelessly to further these ends. Unfortunately, the building had suffered major structural damage. According to witnesses, Steven was on the fourth floor of the office building when the ceiling above him collapsed. The ceiling, along with filing cabinets, desks, and other office equipment fell on Steven, causing extensive head trauma and internal injuries. By the time he could be rescued, second and third degree burns also covered twenty-three percent of his body.

When Steven arrived at the hospital, he was unconscious. Given the extensiveness and severity of his injuries, Steven was immediately placed in a medically-induced coma. He remained in this state for a little over six months, while doctors treated his burns and internal injuries. During this time, Steven received numerous body scans, intravenous feedings, surgeries, skin grafts, transfusions, laboratory tests, x-rays, prescriptions, and respiratory treatments. The total cost of Steven's medical care over this duration cost over $350,000.00.

Once Steven was revived from his medically induced coma, doctors determined he had entered into a minimally conscious state ("MCS"). Steven demonstrated primitive reflexes, could occasionally follow simple commands, and was aware of environmental stimulation. For example, when Michelle and Steven Jr. would visit, Steven would look at them and smile. Likewise, Steven could occasionally nod or shake his head when asked yes-or-no questions; however, this type of response occurred only rarely and at inconsistent intervals.

Three independent neurologists from other hospitals were called in to consult on Steven's case, but all the doctors agreed on the diagnosis. Steven would remain in a MCS for the remainder of his life; there was no possibility of his regaining full neurological functioning. Moreover, Steven's other doctors and specialists stated that he would require additional surgeries and would experience additional complications, including great pain, for the remainder of his life. Doctors could not indicate whether Steven would live for days, months, or even years. Michelle was advised by the hospital social worker that given the severity of Steven's medical condition, it was unlikely he could ever be moved into a nursing home.

Doctors indicated that under the circumstances, three treatment options were available. First, nutrition could be withheld, effectively allowing Steven to die of starvation. Second, even though Steven received extensive treatment for burns and internal injuries from December 2008

– July 2009, he was being treated for infections when he emerged from his medically induced coma. Consequently, doctors could allow Steven's current and future infections to go untreated, effectively allowing him to eventually die of the resulting illness(es). Finally, feedings and other treatments could be continued to preserve Steven's life indefinitely.

When Steven first entered the New Amsterdam City Fire Department, he signed paperwork regarding his preferences regarding medical treatment. This document, entitled "New Amsterdam Directive to Physicians and Family or Surrogates" ("the Directive") is attached as Appendix "A". In relevant part, the Directive states:

> If, in the judgment of my physician, I am suffering in a coma or persistent vegetative state, so that I cannot care for myself or make decisions for myself and am expected to die without life-sustaining treatment provided in accordance with prevailing standards of care…, (Steven's initials) I request that all treatments other than those needed to keep me comfortable be discontinued or withheld and my physician allows me to die as gently as possible....

The Directive was dated September 15, 2001. It was signed by Steven and witnessed by two members of Steven's fire academy classmates. At the time the Directive was signed, Steven also completed a document listing his father, Tyler Keller, as his Medical Power of Attorney. On March 13, 2006, following his engagement to Michelle, Steven revised his Medical Power of Attorney form, listing Michelle as his designated Medical Power of Attorney. In the event that Michelle could or would not act as his designated Medical Power of Attorney, Steven named Tyler Keller as his secondary designee.

After receiving a number of medical opinions and weighing Steven's options and quality of life, Michelle concluded that Steven would not want to live in an irreversible MCS. In making her decision, Michelle consulted with Steven's friends. They all agreed that Steven, who had been so proud of the physical nature of his work and had engaged in a vigorous diet-and-exercise regiment, would not want to waste away in a hospital bed for years to come. Some of

Steven's friends also remembered discussing the Terri Schiavo case at the fire station, with Steven clearly stating he would never want to be a "burden" or "live like that."

Steven's parents, Tyler and Florence Keller, disagreed with Michelle's assessment of their son's wishes. After the December 22nd fire, Tyler and Florence had come to the hospital to support Steven and had maintained an almost constant presence at the hospital ever since. Although they had been estranged from their son since he graduated from high school and decided not to take over the family business, Tyler and Florence maintained that they still loved their child and argued that someone who chose to save lives for a living would never choose to voluntarily end his. Tyler and Florence told doctors they would be willing to have Steven transferred to a hospital closer to their home, and eventually moved to their house when medically permissible, so that they could care for him the remainder of his life. Florence indicated she would be in a much better position to be able to do this than Michelle, since she was a housewife and did not have an infant to care for. Moreover, Tyler and Florence stated that ending any type of nutrition or medical treatment would clearly violate their religious beliefs. Tyler and Florence maintained that although he had not attended religious services since he moved to New Amsterdam City after high school, Steven would not have turned his back on his fundamental religious beliefs.

Regardless, Michelle felt that allowing Steven to die comfortably and quickly would be what he truly wanted. Consequently, once the final medical opinion confirmed Steven's irreparable MCS on August 10, 2009, Michelle informed doctors that the Directive Steven signed while in the fire academy should be enforced.

Tyler and Florence immediately sought judicial intervention. That same day, their attorneys filed for an injunction with New Amsterdam County Probate Court No. 231 (Judge

Anita Lo, presiding), asking the court to stop any action to remove Steven's nutrition on the grounds that a MCS was not the same as a persistent vegetative state, so the Directive did not apply. They also argued that Michelle's Medical Power of Attorney should not apply because Steven had actually expressed a preference regarding his treatment options after emerging from the medically induced coma. Consequently, although Steven might not be able to make complex decisions regarding his medical care, he was competent enough to make a decision regarding his literal life-or-death.

In support of their argument, Tyler and Florence showed the probate court a videotape they took of Steven at the hospital. On the video, Steven is shown in bed. He is awake and looks straight ahead. Tyler and Florence sit on the side of his bed. The following dialogue takes place:

Florence: Steven, do you know who I am?

Steven: (pause) Nods

Florence: So you know I'm your momma?

Steven: Nods

Florence: Your poppa's here too. We love you.

Tyler: Son, is there anything we can do for you?

Steven: (pause) Shakes head

Tyler: Son, the doctors say that you're not going to get much better. But once you can go home, Momma and I want to take you home with us. It'd be easier on Maddie & little Stevie. They can come, too, or come visit you. Whatever they want; we love them too. Before that can happen, though, there's something really important we need to know. Son, they want to stop your feeding tube and let you starve to death. Wouldn't you rather come home with us or do you want to die?

Steven: (pause) Shakes head

Florence: I knew it, Poppa. (Cries)

(Tape ends)

After viewing the videotape and reviewing the doctors' affidavits, the Directive, and the Medical Power of Attorney form, Judge Lo issued an injunction preventing doctors from removing Steven's nutrition tube or withholding medical treatment, pending a hearing on Steven's competency and condition.

On August 13, 2009, a hearing was held in Judge Lo's court. Michelle, Tyler, and Florence Keller, some of Steven's friends and co-workers, and medical personnel from the hospital testified. After hearing the testimony and reviewing additional medical records, Judge Lo held that even though there was clear and convincing evidence that Steven would not want to exist in a persistent vegetative state or a coma, a MCS was decidedly different. Consequently, the Directive did not apply. Judge Lo then cited the New Amsterdam statute regarding proxy decisions. This statute states in relevant part that "a proxy's decision to withhold or withdraw life-prolonging procedures must be supported by trustworthy evidence of what the patient would have chosen had he been competent, and evidence that the burden of the patient's continued life with treatment outweighs the benefit of life for that patient." New Amsterdam Probate Code § 294.60(3) (Appendix "B"). The videotape was the only evidence that indicated whether Steven would want to live in a MCS, so nutrition and treatment could not be withdrawn.

Judge Lo concluded that although Steven could not be deemed to be competent to control his medical treatment on a day-to-day basis, he was clearly able to express a preference regarding his life-or-death. Even though Michelle could continue as Steven's Medical Power of Attorney with respect to daily decisions, Steven was sufficiently competent to determine whether his nutrition and/or medical treatments should be discontinued.

Michelle immediately appealed to the New Amsterdam Supreme Court. They reviewed the evidence previously presented to the probate court, as well as supplemental briefs provided by both sides regarding MCS. On August 31, 2009, the New Amsterdam Supreme Court decided *en banc* that a persistent vegetative state and MCS were sufficiently close for the Directive to apply. Moreover, even though Steven indicated he did not want to die on the videotape, it was unclear whether Steven truly understood the questions being posed to him. On the other hand, there was a large amount of credible witness testimony to indicate Steven would not want to spend the reminder on his life in an excruciatingly painful MCS. Consequently, even if there were medical evidence to indicate that a persistent vegetative state and MCS are sufficiently different to overcome the Directive, there was no trustworthy evidence to indicate Steven would want to continue feeding and medical treatment.

Steven's case became a media sensation, gaining national attention and becoming a *cause célèbre*. Copies of the video have been widely distributed on the television and internet. On www.youtube.com alone, the video has been viewed over 5,000,000 times. Profiles on Steven's case have been featured on practically every network and cable channel. Right-to-life groups have set up national protests regarding Steven's case.

Days after the New Amsterdam Supreme Court's decision, state representative John Roubichon presented a bill entitled "The Steven Keller Act," which would differentiate MCS from a persistent vegetative state. Moreover, the Act set a distinct evidentiary standard for patients in a MCS. Patients in a MCS would have to be evaluated by a panel of five independent doctors to be named by the treating hospital's ethics committee. This panel would be responsible for determining whether the patient was capable of understanding his/her diagnosis and prognosis. If the patient were deemed capable of understanding these factors, the panel would

then determine whether the patient wanted to continue or withdraw treatment. If the patient were not deemed capable of understanding these factors, "clear and convincing evidence" that the patient would want to die would have to be presented to the panel before treatment could be discontinued or withdrawn. The Act has already passed in the New Amsterdam state legislature; it is unknown whether Governor Bourdain plans to sign the bill.

On September 1, 2009, Tyler and Florence filed suit in the Eastern District of New Amsterdam, claiming that pursuant to the Fourteenth Amendment, Steven has a fundamental liberty interest in his decision whether to continue life-preserving nutrition and medical treatment. They requested that the injunction regarding Steven's nutrition and medical treatment be reinstated, pending final resolution of these matters.

The Honorable Timothy English, United States District Judge for the Eastern District of New Amsterdam, granted the injunction. However, on September 10, 2009, Judge English held that pursuant to *Burford v. Sun Oil Co*, 319 U.S. 315 (1943), federal courts currently should abstain from cases regarding MCS. Any decision regarding Steven's case would ultimately impair New Amsterdam state law and policy. A timely appeal to the Fourteenth Circuit of Appeals followed.

II. Federal abstention doctrine, as outlined in *Louisiana Power & Light Co. v. Thibodaux* and *Burford v. Sun Oil Co.*, does not apply.

Although it is undisputed that federal courts have jurisdiction to resolve Constitutional issues, there are instances in which courts will abstain from hearing cases or controversies. *See* U.S. Const. art. 3, § 2 (specifying that "[t]he judicial power shall extend to all cases, in law and equity, arising under this Constitution…."). Specifically, federal courts may abstain from cases arising from diversity jurisdiction if the division of power between varying state entities is

unresolved and local courts have special, expert knowledge regarding the state issue. *La. Power & Light Co. v. Thibodaux*, 360 U.S. 25 (1959).

Louisiana Power & Light Company v. Thibodaux concerned a takings dispute between the City of Thibodaux, Louisiana, and a Florida-based utilities company. *Id*. The Florida corporation removed the case from state to federal court on the basis of diversity jurisdiction. *Id*. *Sua sponte*, the district judge of the Eastern District of Louisiana stayed further proceedings until the Supreme Court of Louisiana could be given the chance to interpret the specific state statute under which the takings had been based. *Id*. at 26. After the Fifth Circuit reversed the district court, holding that abstention was not appropriate in a takings case, the U.S. Supreme Court granted certiorari. *Id.* The Court indicated that although the federal court unquestionably entertained diversity jurisdiction over the case, there was "wisdom" in staying federal actions pending the resolution of "decisive issues of state law," due to underlying federalism issues. *Id*. at 27–28. In the *Thibodaux* case, Louisiana courts had not yet had the opportunity to interpret the statute that allegedly permitted the takings at issue. *Id*. at 30. Consequently, the Court held that the district judge had acted correctly in staying any action in the federal court system, pending a "prompt ascertainment of [the statute's] meaning" by the Louisiana Supreme Court. *Id*.

The U.S. Supreme Court has not relied on *Thibodeaux* abstention since *Thibodeaux* itself. Lower courts also rarely invoke *Thibodeaux*. Rather, courts tend to rely on the federal abstention doctrine outlined in the subsequent case of *Burford v. Sun Oil Co*. In *Burford*, the U.S. Supreme Court held in a plurality opinion that federal courts acting pursuant to diversity jurisdiction could abstain from a case when state courts had greater expertise in a complex, unclear area of state law. *Burford v. Sun Oil Co*., 319 U.S. 315, 334 (1943). This area of state law would need to be

significant to the state. *See id*. at 320 (noting the numerous, important state interests at stake). Moreover, for federal abstention to apply, states would have to have a comprehensive system (i.e. – administrative, regulatory, or judicial) to resolve the issue. *Id*. at 332. While the state issue was being resolved, federal court would continue to retain jurisdiction over the underlying federal question. *Id*. at 334.

Although there are indeed cases where the doctrine of federal abstention may apply, this is not such a case. It should be noted that both *Thibodeaux* and *Burford* involved disputes arising out of federal diversity jurisdiction. *Thibodeaux*, 360 U.S. at 25; *Burford*, 319 U.S. at 317. While the *Burford* Court indirectly acknowledged that abstention may be applicable in non-diversity cases, it has yet to apply the abstention doctrine when the underling issue is a Constitutional one. Financial damages are not being sought in this case. Rather, Tyler and Florence Keller sought injunctive relief.

Regardless of the type of relief being sought, the underlying reasons the Court invoked the abstention doctrine in both *Thibodeaux* and *Burford* are absent. There is no unresolved division of power between state entities; this matter lies entirely in the New Amsterdam Probate Court. *Thibodaux*, 360 U.S. at 25. Although there is legislation pending in the New Amsterdam state legislature regarding minimally conscious patients such as Steven Keller, the introduction and passage of such legislation is clearly within state congressional power. Should the Act become New Amsterdam law, there is no question that the state's probate courts would have to follow it accordingly.

In addition, federal abstention does not apply because this case does not involve a complex, unclear area of state law. *Burford*, 319 U.S. at 334. This court acknowledges that whether the Directive applies to patients in a MCS, rather than a persistent vegetative state or a

coma, is solely an issue of New Amsterdam state law. Likewise, questions of fact such as Steven's pre-December 22 opinions regarding life in a MCS are best left to the New Amsterdam courts. Although it is arguable that there is a complex, unclear area of New Amsterdam law with respect whether MCS patients are competent or incompetent for purposes of deciding whether to continue or withhold life-sustaining treatment and/or nutrition, the underlying question is a Constitutional one. The fundamental issue in this case is whether a MCS patient has a liberty interest in determining whether to continue or discontinue life-supporting nutrition and/or medical treatment. This Constitutional issue falls clearly within federal jurisdiction. Consequently, the federal abstention doctrine does not apply.

III. People in a minimally conscious state may have a liberty interest in determining whether to continue or discontinue life-sustaining nutrition and/or medical treatment.

In *Cruzan v. Missouri Department of Health*, the U.S. Supreme Court implied that competent individuals have a liberty interest, pursuant to the Due Process Clause of the Fourteenth Amendment, in refusing life-sustaining treatment. *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 277-79 (1990). Although *Cruzan* concerned an incompetent patient who was in a persistent vegetative state, this underlying assumption has been adopted by courts and commentators alike. *See e.g. Browning v. Herbert*, 568 So. 2d 4, 10 (Fla. 1990) (stating that regardless of his medical condition, a competent person has the Constitutional right to refuse medical treatment).

In the event that a patient is deemed to be incompetent, the *Cruzan* Court held that states entertain broad leeway in determining the procedural rules that should be followed in determining whether his life-sustaining treatment should be withheld. *Cruzan*, 497 U.S. at 284.

Although many states require "clear and convincing evidence" of an incompetent person's treatment preferences, a state may set lower evidentiary standards if they so choose. *Compare In re* O'Connor, 531 N.E.2d 607, 613 (N.Y. 1988) (requiring clear and convincing evidence of a patient's wishes before discontinuing life-sustaining treatment), *with In re Lawrence*, 579 N.E.2d 32, 39 (Ind. 1991) (permitting family members or guardians to decide on an incompetent patient's behalf whether to continue or withhold life-sustaining medical treatments). Regardless of state statute or case law, a previously executed advance directive will control the patient's health-care decisions. *See e.g.* Fla. Civ. Rights Code § 765.401 (stating that health care decisions for an incapacitated or developmentally disabled patient will be made by a proxy unless the patient had previously executed an advance directive, or designated a surrogate to execute an advance directive).

New Amsterdam statute specifies that "a proxy's decision to withhold or withdraw life-prolonging procedures must be supported by trustworthy evidence of what the patient would have chosen had he been competent, and evidence that the burden of the patient's continued life with treatment outweighs the benefit of life for that patient." New Amsterdam Probate Code § 294.60(3). However, the proxy's decision-making power would be invalidated if the patient had previously executed an advance directive regarding the decisions at issue. *Id*. at § 294.60(1).

Steven Keller properly executed an advance directive prior to the December 22nd fire. The Directive specifies that if Steven were to enter into a coma or persistent vegetative state, he wanted all treatments, other than those to make him comfortable, withheld and to die as gently as possible. Although Steven was in good health at the time of the fire, it should be noted that his directive also indicated that medical treatment should be withheld if he suffered from a terminal illness.

While it is unquestionable that a MCS is not the same as a persistent vegetative state or a coma, Steven's advance directive is telling evidence of Steven's preferences prior to the December 22nd fire. Also telling was the witness testimony presented August 13, 2009 hearing. Steven's wife and friends unanimously opined that Steven would not want to be a burden to his family or suffer as Terri Schiavo did. Although Florence and Tyler Keller testified that Steven would not want to discontinue medical treatment because of his religion, it was also shown that Steven had been estranged from his parents for approximately a decade. While there is no question that Florence and Tyler Keller deeply love their son, they are not as familiar with Steven's thoughts or beliefs regarding issues such as religion or medical treatment as his wife and friends. Consequently, there is trustworthy evidence to indicate that prior to the December 22nd fire, Steven would not have wanted to continue nutrition or medical treatment in the event he entered a MCS.

With respect to Steven's quality of life, medical testimony was presented at the August 13th hearing that Steven would continue to experience pain through the duration of his life. Moreover, there would most likely be additional complications requiring additional surgeries and procedures. On the other hand, there is no hope that Steven will regain neurological function. He will remain in a MCS and will require constant care through the duration of his life. Unfortunately, nursing homes do not support cases such as Steven's, so long-term care would be extremely costly and difficult to support. Given these factors, if Steven is deemed not to have a Due Process right to make decisions with respect to the withholding of nutrition and medical treatments, Michelle Keller has presented sufficient evidence to comply with New Amsterdam's statutory requirements.

The Fourteenth Amendment guarantees individuals the right to life, liberty and property. U.S. Const. amend. XIV. In this case, the issue is whether individuals in a MCS have a liberty interest in determining whether their nutrition and/or medical treatments are discontinued. As stated earlier, although not explicitly held by the U.S. Supreme Court, it is widely accepted that a competent person has a liberty interest in determining whether to continue medical treatment. *See Cruzan*, 497 U.S. at 277-79*; see e.g., State v. Pelham*, 824 A.2d 1082, 1087 (N.J. 2003) (stating that the U.S. Supreme Court had recognized a person's liberty interest in discontinuing life-sustaining medical treatment). Once a person is deemed incompetent, he loses the ability to make this life-or-death decision; the decision whether to discontinue treatment is left to a proxy, pursuant to a state's evidentiary requirements. *See e.g.* Fla. Civ. Rights Code §§ 765.401, 765.404 (outlining Florida's statutory requirements regarding medical proxies in general and patients in a persistent vegetative state).

A patient's competency is measured by numerous factors, including whether: (1) the patient expresses a preference regarding his treatment; (2) the patient's decision is rational; (3) the reasoning behind the decision is rational; and (4) the patient has the ability to understand or has demonstrated that he understands. Loren Roth et. al, *Tests of Competency to Consent to Treatment*, 134 Am. J. Psychiatry 279 (1977). Courts have focused on the final component—that of understanding—when determining a patient's competency. *E.g. In re Farrell*, 529 A.2d 404, 413 n.7 (N.J. 1987) (discussing what a patient needs to understand to be deemed competent). The New Jersey Supreme Court specified that a competent patient can not only understand the characteristics of his illness, his prognosis, and the potential benefits and detriments of treatment, but also reason and form conclusions regarding this information. *Id.*

While all these factors are relevant if a patient is to make decisions regarding specific medical treatment, they are not necessarily relevant if the only decision to be made is whether to withhold life-sustaining nutrition and/or treatment. Unlike patients in a vegetative state or coma, patients in a MCS are aware of their environment and can sometimes follow simple commands. Joseph T. Giacino & Nathan D. Zasler, *Outcome After Severe Traumatic Brain Injury: Coma, the Vegetative State, and the Minimally Responsive State*, 10 J. Head Trauma Rehab. 42 (1995). MCS patients appear to have a sense of being that is somewhat lacking in patients in a persistent vegetative state. This apparent awareness, a direct product of the medical differences between MCS patients and persistent vegetative state patients, is the key in determining whether an MCS patient should be deemed competent enough to determine whether their nutrition and/or medical treatments should be withheld.

In any given moment, on any given day, an individual's desire to live or die may change. This desire may transcend logic or reason. For example, a ninety year-old man with no family or close friends is told that he has inoperable cancer and only has a few months to live, unless he undergoes chemotherapy and radiation. He is told that this treatment is expensive and excruciatingly painful, and at best will only extend his life. Despite the fact that a cure is impossible and that the duration of his life will be spent in agony, the man may choose to fight his cancer. There is not necessarily logic or reason or understanding behind his decision—at its core, the fundamental question is: given how he feels that day, does the man want to continue living. On this day, the answer is yes. Of course, once chemotherapy and radiation begin, the man may decide that an extended life is not worth the pain he is enduring. He may decide that he no longer wants to continue treatment. On this day, the answer is no.

Because a person's desire to continue living may not be rational, reasoned, or even fully understood, the only remaining measurement of a patient's competency with respect to the decision to withhold life-sustaining nutrients and/or medical treatments is whether the patient can—and does—express a preference. A minimally conscious person who is self-aware and has the ability to express a preference regarding the continuation or withholding of life-sustaining medical treatment is sufficiently competent to have a Constitutional right under the Due Process Clause to make such a decision.

In the case at bar, there is evidence that Steven answered questions regarding the withholding of life-sustaining nutrients and medical treatment. However, given the length and nature of the home video, it is undetermined whether Steven is, in fact, truly self-aware and, if so, whether he is able to truly express preferences regarding his medical care. For example, no medical personnel were present when the video was taken. In addition, there were no preliminary questions asked to ascertain the parameters of Steven's understanding or ability to answer. Finally, since the final question posed to Steven was an either/or question, rather than a yes/no question, it is unknown which portion of the question Steven was responding to (assuming he was responding at all). Given these unresolved issues, additional fact-finding is necessary before a final determination can be made regarding the continuation or withdrawal of Steven's nutrition and/or medical treatments.

Of course, states such as New Amsterdam may set their own evidentiary procedures to determine whether a MCS patient is sufficiently competent to have an opinion regarding the continuation or withholding of life-sustaining nutrition and/or medical treatments. Ideally, these procedures would involve periodic reviews to determine whether the patient's condition and/or

wishes had changed. It is, however, up to individual states to set the parameters of the medical and/or witness evidence necessary to establish when a patient in a MCS is deemed competent.

IV. Conclusion

For the foregoing reasons, we reverse the judgment of the District Court and remand the matter for further proceedings consistent with this opinion.

Chiarello, Circuit Judge, dissenting:

I must respectfully dissent from the majority's disposition of this case with respect to both issues on appeal.

I. Given the New Amsterdam courts' expertise in determining the competency of its citizens, federal abstention applies.

The Federal abstention doctrine is invoked in cases involving significant, complex issues of state law, when the state has a comprehensive system to resolve the issue. *Burford v. Sun Oil Co*, 319 U.S. 315, 334 (1943). In *Louisiana Power & Light Company v. Thibodaux*, Justice Frankfurter recognized that the U.S. Supreme Court had "increasingly recognized the wisdom of staying actions in federal courts pending determination by a state court of decisive issues of state law." *La. Power & Light Co. v. Thibodaux*, 360 U.S. 25, 27 (1959). Federal abstention may be applicable in a case, regardless of the underlying jurisdictional grounds. *Burford*, 319 U.S. at 317–18. Diversity jurisdiction is not required in order to invoke federal abstention. *Id*. In fact, the U.S. Supreme Court specified that a federal court may invoke the doctrine "whether its jurisdiction is invoked on the ground of diversity of citizenship *or otherwise*." *Id.* (emphasis added).

Although the potential complexities of state laws normally do not justify federal abstention, when a case hinges on a previously uninterpreted state statute of "questionable constitutionality," district courts are required to stay the case "pending the submission of the state law to state determination." *Thibodeaux*, 360 U.S. at 28. At the time federal abstention is invoked, the state must already have administrative, regulatory, and/or judicial agencies in place that can thoroughly examine and interpret the state law. *Burford*, 319 U.S. at 332.

In this case, federal abstention is required. The New Amsterdam Supreme Court found that the Directive Stephen had executed applied to a MCS, as well as a coma and persistent vegetative state. In addition, the court indicated that there was not sufficient evidence to indicate that Steven would have wanted to live in a MCS or that the benefits of continuing his life would outweigh the pain and suffering he would endure. In its holding, the New Amsterdam Supreme Court did not reach an opinion regarding Steven's competency. Rather, it discussed whether the evidentiary burden of New Amsterdam Probate Code section 294.60 had been met by Tyler and Florence Keller. In so doing, the court *assumed* that Steven was incapacitated and incompetent to make decisions regarding the continuation or withholding of life-sustaining treatments and/or nutrition. It did not interpret the statute to determine whether a MCS patient may be deemed competent and did not discuss Judge Lo's findings of fact with respect to this issue in its opinion. Therefore, the New Amsterdam Supreme Court clearly has not yet interpreted section 294.60 with respect to its applicability to MCS patients. As noted by the majority in this case, section 294.60 has potential Constitutional implications with respect to a MCS patient's liberty interest in self-determination. Consequently, this case is precisely the type of case envisioned by the *Thibodaux* Court and federal abstention doctrine applies. Although federal courts will continue to retain jurisdiction over this matter, the New Amsterdam Supreme Court must first have the opportunity to interpret its own state statute.

II. Because people in a minimally conscious state are not competent, they do not have a liberty interest in making health-care decisions on their own behalf.

Assuming, *Arguendo,* that the doctrine of federal abstention does not apply in this case, I would still dissent with the majority in this case. It is an accepted tenet of law that the Fourteenth Amendment grants competent individuals the right to refuse medical treatment on

their own behalf. *Cruzan v. Mo. Dept. of Health*, 497 U.S. 261 (1990). A competent individual may even choose to discontinue life-sustaining nutrition and/or medical treatments if he so desires.[2] *Id*. Consequently, the threshold issue in this case is whether a minimally conscious person is competent. If a minimally conscious person is, in fact competent, as the majority held, then he has a liberty interest in determining whether to withhold or continue life-sustaining medical treatments and/or nutrition.

In ascertaining whether a patient is competent, fact-finders attempt to weigh evidence regarding the patient's mental processes. Loren Roth et. al, *Tests of Competency to Consent to Treatment*, 134 Am. J. Psychiatry 279 (1977). Relevant factors may include whether the patient has expressed a preference regarding treatment, whether the preference is based on rational reasons, whether the decision itself is reasonable and/or rational, and whether the patient can demonstrate understanding. *Id*. Traditionally, when exploring the limits of a patient's competence, courts use the word "understanding" to determine whether the patient knows the nature of his illness and his prognosis, as well as the risks and benefits of treatment. *In re Farrell*, 529 A.2d 404, 413 n.7 (N.J. 1987). In part, "understanding" is based on whether the patient has a rational reasoning process. Wilen Berg *et. al, Constructing Competence: Formulating Standards of Legal Competence to Make Medical Decisions*, 48 Rutgers L. Rev. 345 (1996).

In performing their analysis of whether a minimally conscious patient is competent, the majority focused on only one of these factors—namely, whether the patient expresses a preference regarding treatment. The majority patently rejected the importance traditionally given

[2] There is an exception in the event that a prisoner decides to refuse life-sustaining nutrition and/or medical treatment in order to end his life for reasons related to their incarceration. *In re Caulk*, 480 A.2d 93 (N.H. 1984). However, if a prisoner is acting for the same reasons a competent, non-incarcerated individual might (e.g. the prisoner has a terminal illness), he may discontinue life-sustaining nutrients and/or medical treatments. *Id*.

to the rationality of both the patient's decision making process and the decision itself. And finally, the majority substituted the concept of "understanding" with that of "self-awareness." Thus, the majority rejects every known standard of determining legal competence.

More important, the majority also ignores the fact that it is medically unclear whether patients in a minimally conscious state have the capacity to express a preference regarding treatment. Studies have shown that doctors experience difficulty in correctly diagnosing whether a patient is in a persistent vegetative state or a minimally conscious state. Caroline Schnakers et. al, *Diagnostic Accuracy of the Vegetative and Minimally Conscious State: Clinical Consensus Versus Standard Neurobehavorial Assessment*, BMC Neurology 9:35 (2009). In fact, approximately forty percent of patients diagnosed as being in a persistent vegetative state are actually in a MCS. *Id.* Despite changes in technology, this frightening statistic has not significantly changed in the past fifteen years. *See* NL Childs et. al, *Accuracy of Diagnosis of Persistent Vegetative State*, 43(8) Neurology 1465–67 (1993) (stating that thirty-seven to forty-three percent of patients diagnosed with being in a [vegetative state] demonstrated signs of awareness). These results indicate that although there unquestionably are medical differences between patients in a persistent vegetative state and patients in a MCS, even doctors experience great difficulty in correctly diagnosing patients.

It is well-established that patients in a persistent vegetative state are not deemed to be competent for purposes of making the decision whether to continue or discontinue life-sustaining nutrition and/or medical treatments. *Cruzan*, 497 U.S. at 261. If almost half of the patients diagnosed as being in a persistent vegetative state are, in fact actually in a MCS, then the line between the two states is not readily discernible. This indicates that MCS patients are much closer to being incompetent than competent.

The majority's holding that all MCS patients who appear to have a semblance of "self-awareness" are competent will result in a flood of litigation. Any time a patient without an advance directive is diagnosed as being in a persistent vegetative state, family members, friends, and/or medical personnel may disagree with the designated proxy's decision to terminate life-sustaining nutrition and/or medical treatments. They could then go to the probate court alleging that the patient is instead in a MCS. Probate courts would need to hold evidentiary hearings, which would be expensive and time-consuming.

Rather than identifying a liberty interest for a new classification of citizens, the majority should defer to individual state law. In the event that a proxy wants to discontinue life-sustaining nutrition and/or medical treatments for an incompetent or incapacitated patient, he must fulfill a specific evidentiary burden. This is the case whether the patient is in a persistent vegetative state, MCS, or otherwise. There is no reason to contravene states' laws or policies with respect to their citizens. As the Supreme Court of New Amsterdam has stated in dicta that even if a MCS did not qualify for purposes of the Directive, Michelle Keller had met the evidentiary burden with respect to her decision, this court should defer to the state court on its interpretation of state law.

III. Conclusion

For the aforementioned reasons, I cannot join the majority's opinion and must respectfully dissent.

APPENDIX "A"

NEW AMSTERDAM DIRECTIVE TO PHYSICIANS AND FAMILY OR SURROGATES

Instructions for completing this document:

This is an important legal document known as an Advance Directive. It is designed to help you communicate your wishes about medical treatment at some time in the future when you are unable to make your wishes known because of illness or injury. These wishes are usually based on personal values. In particular, you may want to consider what burdens or hardships of treatment you would be willing to accept for a particular amount of benefit obtained if you were seriously ill.

You are encouraged to discuss your values and wishes with your family or chosen spokesperson, as well as your physician. Your physician, other health care provider, or medical institution may provide you with various resources to assist you in completing your advance directive. Brief definitions are listed below and may aid you in your discussions and advance planning. Initial the treatment choices that best reflect your personal preferences. Provide a copy of your directive to your physician, usual hospital, and family or spokesperson. Consider a periodic review of this document. By periodic review, you can best assure that the directive reflects your preferences.

DIRECTIVE

I, Steven Keller, recognize that the best health care is based upon a partnership of trust and communication with my physician. My physician and I will make health care decisions together as long as I am of sound mind and able to make my wishes known. If there comes a time that I am unable to make medical decisions about myself because of illness or injury, I direct that the following treatment preferences be honored:

If, in the judgment of my physician, I am suffering with a terminal condition from which I am expected to die within six (6) months, even with available life-sustaining treatment provided in accordance with prevailing standards of medical care:

SK I request that all treatments other than those needed to keep me comfortable be discontinued or withheld and my physician allow me to die as gently as possible; OR

_____ I request that I be kept alive in this terminal condition using available life-sustaining treatment. (THIS SELECTION DOES NOT APPLY TO HOSPICE CARE)

If, in the judgment of my physician, I am suffering in a coma or persistent vegetative state so that I cannot care for myself or make decisions for myself and am expected to die without life-sustaining treatment provided in accordance with prevailing standards of care:

__SK__ I request that all treatments other than those needed to keep me comfortable be discontinued or withheld and my physician allow me to die as gently as possible; OR

_____ I request that I be kept alive in this irreversible condition using available life-sustaining treatment. (THIS SELECTION DOES NOT APPLY TO HOSPICE CARE)

Additional requests: (After discussion with your physician, you may wish to consider listing particular treatments in this space that you do not want in specific circumstances, such as artificial nutrition and fluids, intravenous antibiotics, etc. Be sure to state whether you do or do not want the particular treatment. If needed, attach additional pages to this document.)

_____

_____

After signing this directive, if my representative or I elect hospice care, I understand and agree that only those treatments needed to keep me comfortable would be provided and I would not be given available life-sustaining treatments.

If, in the judgment of my physician, my death is imminent within minutes to hours, even with the use of all available medical treatment provided within the prevailing standards of care: I acknowledge that all treatment may be withheld or removed except those needed to maintain my comfort.

__SK__ I request that treatment be withheld or removed except those needed to maintain my comfort; OR

_____ I request that all treatment and measures possible be taken to prolong my life. (THIS SELECTION DOES NOT APPLY TO HOSPICE CARE)

If I do not have a Medical Power of Attorney, and I am unable to make my wishes known, I designate the following person(s) to make treatment decisions with my physician compatible with my personal values:

1. _____

2. _____

(If a Medical Power-of-Attorney has been executed, then an agent has already been named and you should not list additional names in this document.)

If the above persons are not available, or if I have not designated a spokesperson, I understand that a spokesperson will be chosen for me following standards specified in the laws of New Amsterdam. I understand that under New Amsterdam law, this directive has no effect if I have been diagnosed as pregnant. This directive will remain in effect until I revoke it. No other person may do so.

Declarant (Print Name): Steven Keller

Signature: /s/ Steven Keller Date: September 15, 2000

City, State of Residence: New Amsterdam City, New Amsterdam

Two competent adult witnesses must sign below, acknowledging the signature of the declarant. The witness designated as Witness 1 may not be a person designated to make a treatment decision for the declarant and may not be related to the declarant by blood or marriage. This witness may not be entitled to any part of the estate and may not have a claim against the estate of the declarant. This witness may not be the attending physician or an employee of the attending physician. If this witness is an employee of a health care facility in which the declarant is being cared for, this witness may not be involved in providing direct patient care to the declarant. This witness may not be an officer, director, partner, or business office employee of a health care facility in which the declarant is being cared for or of any parent organization of the health care facility.

Witness 1 (Print Name): Bryan Jennings

Witness 1 (Signature): /s/ Bryan Jennings

Witness 2 (Print Name): Joseph Jones

Witness 2 (Signature): /s/ Joseph Jones

DEFINITIONS

"Artificial nutrition and hydration" means the provision of nutrients or fluids by a tube inserted in a vein, under the skin in the subcutaneous tissues, or in the stomach (gastrointestinal tract).

"Coma" means that the patient;

1. Has entered a state of unconsciousness from which he/she cannot be awakened;
2. Has minimal or no response to stimuli; and
3. Does not initiate voluntary activity/activities.

"Life-sustaining treatment" means treatment that, based on reasonable medical judgment, sustains the life of a patient and without which the patient will die. The term includes both life-sustaining medications and artificial life support such as mechanical breathing machines, kidney

dialysis treatment, and artificial hydration and nutrition. The term does not include the administration of pain management medication, the performance of a medical procedure necessary to provide comfort care, or any other medical care provided to alleviate a patient's pain.

"Terminal condition" means an incurable condition caused by injury, disease, or illness that according to reasonable medical judgment will produce death within six (6) months, even with available life-sustaining treatment provided in accordance with the prevailing standard of medical care.

"Persistent vegetative state" means that the patient;

1. Demonstrates some arousal and general responses to pain; and
2. Has sleep-wake cycles, respiratory functions and digestive functions; *but*
3. Does not have the ability to interact with his/her environment.

APPENDIX "B"

New Amsterdam Probate Code § 294.60

The Proxy

(1) If an incapacitated or developmentally disabled patient has not executed an advance directive, or designated a surrogate to execute an advance directive, or the designated or alternate surrogate is no longer available to make health care decisions, health care decisions may be made for the patient by any of the following individuals, in the following order of priority, if no individual in a prior class is reasonably available, willing, or competent to act:

(a) The judicially appointed guardian of the patient or the guardian advocate of the person having a developmental disability, who has been authorized to consent to medical treatment, if such guardian has previously been appointed; however, this paragraph shall not be construed to require such appointment before a treatment decision can be made under this subsection;

(b) The patient's spouse;

(c) An adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;

(d) A parent of the patient;

(e) The adult sibling of the patient or, if the patient has more than one sibling, a majority of the adult siblings who are reasonably available for consultation;

(f) An adult relative of the patient who has exhibited special care and concern for the patient and who has maintained regular contact with the patient and who is familiar with the patient's activities, health, and religious or moral beliefs; or

(g) A close friend of the patient.

(h) A clinical social worker licensed pursuant to chapter 462, or who is a graduate of a court-approved guardianship program. Such a proxy must be selected by the provider's bioethics committee and must not be employed by the provider. If the provider does not have a bioethics committee, then such a proxy may be chosen through an arrangement with the bioethics committee of another provider. The proxy will be notified that, upon request, the provider shall make available a second physician, not involved in the patient's care to assist the proxy in evaluating treatment. Decisions to withhold or withdraw life-prolonging procedures will be reviewed by the facility's bioethics committee. Documentation of efforts to locate proxies from prior classes must be recorded in the patient record.

(2) Any health care decision made under this part must be based on the proxy's informed consent and on the decision the proxy reasonably believes the patient would have made under the

circumstances. If there is no indication of what the patient would have chosen, the proxy may consider the patient's best interest in deciding that proposed treatments are to be withheld or that treatments currently in effect are to be withdrawn.

(3) A a proxy's decision to withhold or withdraw life-prolonging procedures must be supported by trustworthy evidence of what the patient would have chosen had he been competent, and evidence that the burden of the patient's continued life with treatment outweighs the benefit of life for that patient. If there is no indication of what the patient would have chosen, the hospital's medical ethics committee of the facility where the patient is located should consult with the patient's guardian and attending physician(s) to determine whether the decision to withhold or withdraw life-prolong procedures is in the patient's best interest. If there is no medical ethics committee at the facility, the facility must have an arrangement with the medical ethics committee of another facility of another facility or with a community-based ethics committee approved by the New Amsterdam Bio-ethics Network.