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## SECTION 2

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### Decisional Capacity and the Right to Refuse Treatment

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#### State of Tennessee Department of Human Services v. Mary C. Northern

Court of Appeals of Tennessee, Middle Section, Feb. 7, 1978

On January 24, 1978, the Tennessee Department of Human Services filed this suit alleging that Mary C. Northern was 72 years old, with no available help from relatives; that Miss Northern resided alone under unsatisfactory conditions as a result of which she had been admitted to and was a patient in Nashville General Hospital; that the patient suffered from gangrene of both feet which required the removal of her feet to save her life; that the patient lacked the capacity to appreciate her condition or to consent to necessary surgery.

Attached to the complaint are identical letters from Drs. Amos D. Tackett and R. Benton Adkins, which read as follows:

Mrs. Mary Northern is a patient under our care at Nashville General Hospital. She has gangrene of both feet probably secondary to frostbite and then thermal burning of the feet. She has developed infection along with the gangrene of her feet. This is placing her life in danger. Mrs. Northern does not understand the severity or consequences of her disease process and does not appear to understand that failure to amputate the feet at this time would probably result in her death. It is our recommendation as the physicians in charge of her case, that she undergo amputation of both feet as soon as possible.

On January 24, 1978, the Chancellor appointed a guardian ad litem to defend the cause and to

receive service of process pursuant to Rule 4.04(2) T.R.C.P. On January 25, 1978, the guardian ad litem answered as follows:

The Respondent, by and through her guardian ad litem, states as follows:

1. She is 72 years of age and a resident of Davidson County, Tennessee.
2. She is presently in the intensive care unit of General Hospital, Nashville, Tennessee, because of gangrenous condition in her two feet.
3. She feels very strongly that her present physical condition is improving, and that she will recover without the necessity of surgery.
4. She is in possession of a good memory and recall, responds accurately to questions asked her, is coherent and intelligent in her conversation, and is of sound mind.
5. She is aware that the Tennessee Department of Human Services has filed this complaint, knows the nature of the complaint, and does not wish for her feet to be amputated.

On January 26, 1978, there was filed in this cause a letter from Dr. John J. Griffin, reporting that he found the patient to be generally lucid and sane, but concluding:

Nonetheless, I believe that she is functioning on a psychotic level with respect to ideas concerning her gangrenous feet. She tends to believe that her feet are black because of soot or dirt. She does not believe her physicians about the serious infection. There is an adamant belief that

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EDITORS' NOTE: The suit was filed under the state "Protective Services for the Elderly" Act, which permits a court to appoint a guardian for the purposes of consent to medical treatment if an elderly person is in imminent danger of death without treatment and lacks capacity to consent to it.

her feet will heal without surgery, and she refused to even consider the possibility that amputation is necessary to save her life. There is no desire to die, yet her judgment concerning recovery is markedly impaired. If she appreciated the seriousness of her condition, heard her physicians' opinions, and concluded against an operation, then I would believe she understood and could decide for herself. But my impression is that she does not appreciate the dangers to her life. I conclude that she is incompetent to decide this issue. A corollary to this denial is seen in her unwillingness to consider any future plans. Here again I believe she was utilizing a psychotic mechanism of denial.

This is a schizoid woman who has been urged by everyone to have surgery. Having been self-sufficient previously (albeit a marginal adjustment), she is continuing to decide alone. The risks with surgery are great and her lifestyle has been permanently disrupted. If she has surgery there is a tremendous danger for physical and psychological complications. The chances for a post-operative psychosis are immense, yet the surgeons believe an operation is necessary to save her life. I would advise delaying surgery (if feasible) for a few days in order to attempt some work for strengthening her psychologically. Even if she does not consent to the operation after that time, however, I believe she is incompetent to make the decision.

On January 28, 1978, this Court entered an order reciting the following:

From all of the above the Court finds:

1. That the respondent is not now in 'imminent danger of death' in the extreme sense of the words, but that her present condition is such that 'imminent danger of death' may reasonably be expected during her continued hospitalization.
2. That both feet of respondent are severely necrotic and affected by wet gangrene, an infection which probably will result in death unless properly treated by amputation of the feet.
3. That the probability of respondent's survival without amputation is from 5 percent to 10 percent and the probability of survival after amputation is about 50 percent, with possible severe psychotic results.
4. That, with or without amputation, the prognosis of respondent's condition is poor.

5. That respondent is an intelligent, lucid, communicative, and articulate individual who does not accept the fact of the serious condition of her feet and is unwilling to discuss the seriousness of such condition or its fatal potentiality.
6. That, because of her inability or unwillingness to recognize the actual condition of her feet which is clearly observable by her, she is incompetent to make a rational decision as to the amputation of her feet.
7. That respondent has no wish to die, but is unable or unwilling to recognize an obvious condition which will probably result in her death if untreated.

This Court is therefore of the opinion that a responsible individual should be named with authority to consent to amputation of respondent's feet when urgently recommended in writing by respondent's physicians because of the development of (symptoms) indicating an emergency and severe imminence of death.

[Appellant's first assignment of error states:]

Such actions by the Court were injurious to the appellant because they deprived her of her right to make her own decisions—regardless as to whether death might be a probable consequence—as to whether she was willing to surrender control of her own person and life.

This controversy arises from the fact that Miss Northern's attending physicians have determined that all of the soft tissue of her feet has been killed by frostbite, that said dead tissue has become infected with gangrene, and that the feet must be removed to prevent loss of life from spreading of gangrene and its effects to the entire body. Miss Northern has refused to consent to the surgery.

The physicians have determined, and the Chancellor and this Court have found, that Miss Northern's life is critically endangered; that she is mentally incapable of comprehending the facts which constitute that danger; and that she is, to that extent, incompetent, thereby justifying State action to preserve her life.

As will be observed from the bill of exceptions, a member of this Court asked Miss Northern if she would prefer to die rather than lose her feet, and her answer was "possibly." This is the most definitive expression of her desires in this record.

The patient has *not* expressed a desire to die. She evidences a strong desire to live and an equally strong desire to keep her dead feet. She refuses to make a choice.

If the patient would assume and exercise her rightful control over her own destiny by stating that she prefers death to the loss of her feet, her wish would be respected. The doctors so testified; this Court so informed her; and this Court now reiterates its commitment to this principle.

The appellant has filed three supplemental assignments of error, of which the first is:

1. The statute, T.C.A. §§ 14-2301, *et seq.*, is impermissibly vague; and, therefore, void and unconstitutional. The two phrases used in the statute, 'imminent danger of death' and 'capacity to consent' have not been defined in the statute nor is the Court given any assistance to determine when either standard has been met in the legal context, rather than a medical context.

In the judgment of this Court, the words "imminent danger of death" are no more vague than is consistent with the nature of the subject matter.

The words, "imminent danger of death" mean conditions calculated to and capable of producing within a short period of time a reasonably strong probability of resultant cessation of life if such conditions are not removed or alleviated. Such is undoubtedly the legislative intent of the words.

"Imminent danger of death" should be reasonably interpreted to carry out the purposes of the statute. For an authorization to mildly encroach upon the freedom of the individual, a relatively mild imminence or danger of death may suffice. On the other hand, the authorization of a drastic encroachment upon personal freedom and bodily integrity would require a correspondingly severe imminence of death.

In the present case, the Chancellor was not called upon to act until the imminence of death was moderately severe. By the time of the hearing before this Court, the imminence of death had lessened somewhat but remained real and appreciable. Accordingly this Court, recognizing a present real and appreciable imminence of death, made provision for drastic emergency measures to be taken only in event of severe and urgent imminence of death.

Appellant also complains of vagueness of the meaning of "capacity to consent." Capacity means mental ability to make a rational decision, which includes the ability to perceive, to appreciate all relevant facts, and to reach a rational judgment upon such facts.

Capacity is not necessarily synonymous with sanity. A blind person may be perfectly capable of observing the shape of small articles by handling them, but not capable of observing the shape of a cloud in the sky.

A person may have "capacity" as to some matters and may lack "capacity" as to others.

In 44 C.J.S. *Insane Persons* § 2, pp. 17, 18, partial insanity is defined as follows:

*Partial insanity.* Although it is hard to define the invisible line that divides perfect and partial insanity, the law recognizes a state of mind called 'partial insanity,' that is, insanity on a particular subject only, sometimes denominating it 'insane delusion' or 'monomania.' The use of the term, however, has been criticized. Partial insanity has been said to be the derangement of one or more of the faculties of the mind, which prevents freedom of action. Ordinarily it is confined to a particular subject, the person being sane on every other. The degree of insanity, as partial or total, is to be measured by the extent and number of the delusions existing in the mind of the person in question. . . .

In the present case, this Court has found the patient to be lucid and apparently of sound mind generally. However, on the subjects of death and amputation of her feet, her comprehension is blocked, blinded, or dimmed to the extent that she is incapable of recognizing facts which would be obvious to a person of normal perception.

For example, in the presence of this Court, the patient looked at her feet and refused to recognize the obvious fact that the flesh was dead, black, shriveled, rotting, and stinking.

The record also discloses that the patient refuses to consider the eventuality of death which is, or ought to be, obvious in the face of such dire bodily deterioration.

As described by the doctors and observed by this Court, the patient wants to live and keep her dead feet, too, and refuses to consider the impossibility of such a desire. In order to avoid the unpleasant experience of facing death and/or loss

of feet, her mind or emotions have resorted to the device of denying the unpleasant reality so that, to the patient, the unpleasant reality does not exist. This is the "delusion" which renders the patient incapable of making a rational decision as to whether to undergo surgery to save her life or to forgo surgery and forfeit her life.

The physicians speak of probabilities of death without amputation as 90 to 95 percent and the probability of death with surgery as 50-50 (1 in 2). Such probabilities are not facts, but the existence and expression of such opinions are facts which the patient is unwilling or unable to recognize or discuss.

If, as repeatedly stated, this patient could and would give evidence of a comprehension of the facts of her condition and could and would express her unequivocal desire in the face of such comprehended facts, then her decision, however unreasonable to others, would be accepted and honored by the Courts and by her doctors. The difficulty is that she cannot or will not comprehend the facts.

The first supplemental assignment of error is respectfully overruled.

The second supplemental assignment of error is as follows:

2. The Chancellor erred by denying the Appellant her rights to substantive and procedural due process. The entire legal proceedings involved in this case and on appeal are unprecedented; the order of the Chancellor granting the appeal but refusing the automatic stay of thirty days allowed by the Rules is one example of the procedural wrongs which was not in accordance with the established legal practice, and contrary to the expected procedure to be followed. The proposed amputation will not only permanently deprive the Appellant of her two limbs, but most likely will significantly and irreparably alter her personality for the worse, and make her mentally and physically dependent upon the State.

Whatever the propriety or impropriety of the action of the Chancellor in attempting to effectuate his action in spite of the appeal, the error, if any, has been rendered harmless by the action of this Court, after appeal, in reviewing and modifying his actions.

This Court does not recognize that it has been guilty of any improper deviation from correct procedure. The gravity of the condition of the patient and

the resultant emergency in time required the unusual action of the Court under § 27-327 T.C.A. and the unusual acceleration of hearings and actions taken.

This Court is painfully and acutely aware of the possible tragic results of amputation. According to the doctors, the patient has only a 50 percent chance of surviving the surgery; and, if she survives, she will never be able to walk and may suffer severe mental and emotional problems.

On the other hand, the doctors testified, and this Court finds, that the patient's chances of survival without amputation are from 5 percent to 10 percent—a rather remote and fragile chance. Moreover, as testified by the doctors and found by this Court, even if the patient should survive without amputation, she will never walk because the dead flesh will fall off the bones of her feet leaving only bare bones.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that

1. Mary C. Northern is in imminent danger of death if she does not receive surgical amputation of her lower extremities and she lacks the capacity to consent or refuse consent for such surgery.
2. That Honorable Horace Bass, Commissioner of Human Services of the State of Tennessee or his successor in office is hereby designated and authorized to act for and on behalf of said Mary C. Northern in consenting to surgical amputation of her lower extremities and of exercising such custodial supervision as is necessarily incident thereto at any time that Drs. Amos D. Tackett and R. Benton Adkins join in signing a written certificate that Mary C. Northern's condition has developed to such a critical stage as to demand immediate amputation to save her life. The previous order of this Court is likewise so modified.

As modified, the order of the Chancellor is affirmed. The cause is remanded for further appropriate proceedings.

Modified, Affirmed, and Remanded.\*

\*On May 1, 1978, Mary Northern died in a Nashville hospital as a result of a clot from the gangrenous tissue migrating through the bloodstream to a vital organ. Because of complications rendering surgery more dangerous, the proposed surgery was never performed.

## Transcript of Proceedings: Testimony of Mary C. Northern

January 28, 1978

*Testimony of Mary Northern:* [The following interview took place at the bedside of Mary Northern in the Intensive Care Unit of the Nashville General Hospital. Present were Judge Todd, Judge Drowota, and the Reverend Palmer Sorrow, a friend and frequent visitor of the patient. Eds.]

JUDGE TODD: Now, Mrs. Mary, you know that there have been some proceedings in court about you, and that's the reason why the judges are here. And we wanted to see you and talk to you.

MISS NORTHERN: Yes.

JUDGE TODD: And give you a chance to talk to us.

MISS NORTHERN: Yeah.

JUDGE TODD: I understand that you had a little problem of getting too cold out there at your house.

MISS NORTHERN: Yes.

JUDGE TODD: That's right.

MISS NORTHERN: Yes. Well, now, it's a point of this, the swelling of my foot was—was very dangerous looking.

JUDGE TODD: Yes ma'am.

MISS NORTHERN: And so that's what caused most of the trouble, and the—it's starting to go down. Give it a chance, it is starting to go down, and it's almost . . . Well, these—these ankles and the—along on these legs have gone down wonderfully.

JUDGE TODD: Yes, now, Mrs. Mary, these doctors have been talking to us at great length about the condition of your feet.

MR. SORROW: I think it's okay.

MISS NORTHERN: Okay.

JUDGE TODD: —and they tell us this about your feet. Now, mind you . . . we don't know whether it's so or not, but I want you to know what they have told us. . . . They tell us that your feet have been frostbitten before, and that they got well.

MISS NORTHERN: Yes.

JUDGE TODD: What they tell us, that your feet were frostbitten a great deal worse this time than they were . . . before.

MISS NORTHERN: Yes.

JUDGE TODD: And they tell us this,—now I am going to say some things to you that might be a little uncomfortable, but I want—I don't believe these doctors have told it to you just like they told it to us.

MISS NORTHERN: Yeah.

JUDGE TODD: So I want to give it to you just like they have given it to us. They tell us that this time every bit of the flesh on your two feet is completely dead.

MISS NORTHERN: I know—No, it isn't, it will revive.

JUDGE TODD: I understand.

MISS NORTHERN: Four or five days ago it started to go down.

JUDGE TODD: All right. Now they tell us this, that when you came in . . . here that your feet were swollen. . . . And they tell us that the swelling has gone down.

MISS NORTHERN: Yes.

JUDGE TODD: But they tell us that your feet are shriveling up like a dead person's feet—

MISS NORTHERN: Unh-unh.

JUDGE TODD: —rather than a live person's feet.

MISS NORTHERN: No, no. . . . I can get and walk all the way down to the shopping places.

JUDGE TODD: Now they tell us—We questioned them very, very thoroughly about this thing, and they tell us that you can move your toes. And then I asked them how could a person move his toes if his foot was dead? You see? And here's what they tell us. They tell us that the ligaments that move the toes . . . are dead, but they are still just like strings,—

MISS NORTHERN: Yeah.

JUDGE TODD: —and that the muscles that move the toes are up here where they are still alive, and therefore a dead foot can move its toes.

MISS NORTHERN: Well, they are not going to—they are not going to take my legs away. They are not going to take my legs away from me, you understand this?

JUDGE TODD: Yes, ma'am.

MISS NORTHERN: And they are not going to—I think it's rather silly, because they all—all of em have gotten viable.

JUDGE TODD: Yes, ma'am. Yes, ma'am. Now here is the thing that disturbs us. The doctors tell us that you have a very heavy infection which they are keeping in control by antibiotics, but that your temperature has started to rise, that you have a hundred and one temperature . . . which indicates that the infection is increasing. And we questioned them very closely now, we have been a long time—

MISS NORTHERN: You understand they are going to do it. Now, does this have something to do with the Metropolitan Government, has it not? Well, the Metropolitan Government can't take anything—do me this way, you know?

JUDGE TODD: Yes, sir. Now, here is what I want to present to you. You are a very intelligent woman for your age. I want to compliment you on that, you really are. I said you were like my mother, but you do circles around my mother as far as talking and thinking.

Now, you are educated, and you know this business of "if," and I want to ask you an "if" question. If your feet, the flesh of your feet, really is dead, and if you have one chance in ten of living without surgery, that it is, if—if the feet are left on, that nine chances to one that you will not live, it will kill you,—

MISS NORTHERN: I am not going to have—

JUDGE TODD: —would you still say, "I want that one chance?"

MISS NORTHERN: Well, of course,—

JUDGE TODD: Ma'am?

MISS NORTHERN: —this is not going to do anything like this. All—All of these thing,—

JUDGE TODD: Yes, ma'am.

MISS NORTHERN: —and my feet have gone down.

JUDGE TODD: Yes, ma'am.

MISS NORTHERN: My ankles are—

JUDGE TODD: Yes, ma'am. Now, let me ask you one more question.

MISS NORTHERN: I am not going to—Let me tell you something. I am not going to argue any more with you, because I know you have a multiple of opinions.

JUDGE TODD: No, I haven't formed any opinions, that's the reason I came up to talk to you. I haven't decided.

MISS NORTHERN: It's an opinion you formed, and I am not going to let you tell me—

JUDGE TODD: I am just telling you what they told me. Now let me ask you one more little thing.

If the time comes that this infection gets so bad that you are practically unconscious and can't talk to anybody, would you then be willing for the doctors to go ahead and do what they think should be done? . . .

MR. SORROW: That's an "if"—That's an "if" question.

JUDGE TODD: "If."

MISS NORTHERN: I think that's an understandable idea.

JUDGE TODD: Yes, ma'am.

MISS NORTHERN: An amongst your—your own opinion former—opinion former.

JUDGE TODD: Yes. Now, if the time comes that you are so sick that you can't make the decision, are you willing for the doctors to make the decision for you then?

MISS NORTHERN: Well, I think that that's an unreasonable way to look at it because you want an opinion.

JUDGE TODD: Yes, ma'am.

MISS NORTHERN: And you see, that's—that—Groundhog Day and the—all the weather and everything else, now, it's an opinion.

JUDGE TODD: Judge, is there anything you would like to ask?

JUDGE DROWOTA: Well, I have the same questions, though, with the "if." And as Reverend Sorrow has said, if in fact at some day there is a feeling that—and you are unconscious and we can't ask you—

MR. SORROW: It's a question of whether to let you die.

JUDGE DROWOTA: —should we let you die, or would you rather live your life without your feet?

MISS NORTHERN: I am giving my feet a chance to get well.

MR. SORROW: Right, right. Okay. Let's say we have given it a chance to get well, and if the infection didn't get out of your system and you became unconscious, he is saying, would you rather—

MISS NORTHERN: I am not making any further . . . statement.

JUDGE TODD: In other words, you are not willing to admit that you might get unconscious?

MISS NORTHERN: No.

JUDGE TODD: I see. All right.

MISS NORTHERN: You are pretty handsome; it's rather nice to have all you handsome men come at you this morning.

MR. SORROW: Can they look at your feet?

MISS NORTHERN: No, no. Can you see me?

JUDGE TODD: I think maybe you better see your feet.

MISS NORTHERN: You know where they are? . . . They are there.

JUDGE TODD: I need to ask you this, Miss Mary. . . . When have you seen your feet?

MR. SORROW: Have you seen them recently? Have they let you see your feet real close?

MISS NORTHERN: They let me see my feet. I can see my feet.

JUDGE TODD: When did you see them, do you remember?

MISS NORTHERN: I seen them two or three times. Don't look at the feet. Let's don't look at the feet.

JUDGE TODD: I tell you what let's do.

MISS NORTHERN: Don't look at the feet.

JUDGE TODD: Let's don't look at the feet. I tell you what let's do. . . . Let's you and I look at them together at the same time and see what we can.

MISS NORTHERN: They are down there.

JUDGE TODD: I want you to look at them with me. Would you do it?

MISS NORTHERN: Isn't—I just don't understand, it's sadism about it. I can't understand it.

A NURSE: Let's all look at your feet.

MISS NORTHERN: Okay. All right, General.

A NURSE: All of us together. Let's get your gown down. There we go. Now—

MISS NORTHERN: That's all peeling off of that. It's all getting well. It's all going down.

JUDGE DROWOTA: Do you have feeling in your feet?

MISS NORTHERN: Oh, yes, they were knocking all around, and they're banging up against this thing and everything.

MR. SORROW: Can you feel it when you do that?

MISS NORTHERN: Yeah.

MR. SORROW: Is there feeling?

MISS NORTHERN: Yeah. . . .

JUDGE TODD: —Would you—would you just bear with us just for one more thing?

MISS NORTHERN: You want to establish your point.

JUDGE TODD: No, we don't. I am asking you—

MISS NORTHERN: You got your points all in writing and established it, according to your own—

JUDGE TODD: Yes, ma'am. If the time comes that you have to choose between losing your feet and dying, would you rather just go ahead and die than lose your feet? If that time comes?

MISS NORTHERN: It's possible—It's possible only if I—Just forget it. I—You are making me sick talking.

JUDGE TODD: I know. I know. And I am sorry. Would you be willing to say to me that you just don't want to live if you can't have your feet? Is that the way you feel?

MISS NORTHERN: I don't understand why it's so important to you people, why it's so important. . . .

JUDGE TODD: Mrs. Mary, you see a judge has to see both sides of the thing, and these people have come and told us something, and now we want you to tell us what you want to tell us so we can decide.

MISS NORTHERN: A billion of you have been here.

JUDGE TODD: I understand. And that's the reason we came out to see you, so we could let you—

MISS NORTHERN: I don't want to discuss it any more. I made my point.

JUDGE TODD: I believe, Mrs. Mary, that you have made your point that you would rather—that you don't want to live if you can't have your feet; isn't that about it?

MISS NORTHERN: That's possible. . . . It's possible to see it that way, to have that opinion. I don't want you all to change your opinion.

JUDGE TODD: No. I want you to tell me if you really feel that way. Tell me because I want to know it. I want to consider how you feel.

JUDGE DROWOTA: Or if you would rather live and have your feet. I mean, without your feet. See, you have got me confused, Miss Mary.

JUDGE TODD: She wants to live and have her feet.

MR. SORROW: That's exactly what she wants.

MISS NORTHERN: This is ridiculous. I am tired. And ridiculous, you know it is.

MR. SORROW: I think they are trying to look at your side of it and understand how you feel, and, of course, somebody else in your position, we don't know what we would do, and so I guess they are saying so many people have told these judges so much they want to see Miss Mary and say, "How do you feel, how do you feel?"

MISS NORTHERN: It's gotten a little roll.

MR. SORROW: Like a snowball.

MISS NORTHERN: This is—Let's leave it alone. Let's leave it alone. And you keep your opinions. I am through with it.

JUDGE TODD: I wish I could be through with it. Let me leave you with a little thought, Miss Mary.

MISS NORTHERN: All right. . . .

JUDGE TODD: Did you ever read the Sermon on the Mount?

MISS NORTHERN: Yes.

JUDGE TODD: You remember one thing the Good Lord said?

MISS NORTHERN: What?

JUDGE TODD: If thy eye offend thee,—

MISS NORTHERN: Oh, yes, take the eye out.

JUDGE TODD: —cast it out. If thy hand offend you, cut it off. Now, if and when your feet begin to offend you, maybe, maybe, you will remember that little verse.

MISS NORTHERN: I thank you.