THE CASE OF ELUANA ENGLARO
Court of Appeals, Milan

Translation by Rebecca Spitzmiller & Silvia DeConca

HOLDING:
In the light of the horizontal logic of reasonableness, in case of permanent, and, thus, irreversible, vegetative condition, it is possible to order the interruption of the treatment of artificial life support, where incompatibility emerges between one's own conception about the dignity of life and the total and irrecoverable loss of someone's own motor and mental faculties and with the only biological survival of the body in a state of absolute subjection to the will of others. ([1]) ([2]) ([3])

(1) Reading the excellent note of Giuseppe Buffone on point is recommended.
(2) On the subject of the right to life and euthanasia, see Cassazione civile 21748/2007.
(3) On the theme of euthanasia and the need of a guardian ad litem, see Cassazione civile 8291/2005, with a note by Viola.

Among the most recent contributions in the scholarly works, see:

- BALLARINO, ***Eutanasia e testamento biologico nel conflitto di leggi***, in Rivista di diritto civile, 2008, *n.* 1, CEDAM, part I, p. 69;
- CAVALLA, ***Diritto alla vita, diritto sulla vita. Alle origini delle discussioni sull'eutanasia***, in Diritto e società, 2008, n. 1, CEDAM, *p.* 1;
- PASSAGLIA, ***Eutanasia di un diritto (la triste parabola dell'asilo)***, in Foro italiano (Il), 2006, *n.* 10, ZANICHELLI, part I, p. 2851.

(Source: Altalex Massimario 27/2008. See also note of Giuseppe Buffone)

FULL TEXT

Court of Appeals

Milan

Section I Civil

Decree 9 July 2008

The Court of Appeal of Milan

First Civil Section

composed of the Honorable Judges:

1) Dr. Giuseppe Patrone ..…… President

2) Dr. Paolo Negri della Torre ……Counselor

3) Dr. Filippo Lamanna …Counselor Reporter Est.

Pronounced the following

DECREE

In the proceeding of the claim on appeal under article 739 Code of Civil Procedure, filed with the registry of voluntary jurisdiction above mentioned, issued, after cassation with remand pronounced by the Supreme Court of Cassation with decision no. 21748 on 16 October 2007, with resumption of the appeal filed on 5 February 2008, and regarding [the matter]

BETWEEN

Beppino Englaro, as guardian of his interdicted daughter Eluana Englaro,

Represented and defended by the attorneys Vittorio Angiolini and Marco Cuniberti and electively domiciled at their law firm, in Milan, Galleria del Corso n. 1, as shown in the power of attorney issued in the lower margin of the resumption of the appeal

Appellant in resumption – re-claimant

And

Att. Franca Alessio, as guardian ad litem of Eluana Englaro,
having her office in Lecco, via Roma n. 45

Respondent

and with the intervention

of the Public Attorney in the case, under the aegis of the Substitute Public Attorney Dr. Maria Antonietta Pezza

in facts and in law

1. Notes on the background facts and of proceedings and on the content of the decision of cassation with remand from which this decisional stage phase arises.

On 18 January 1992 an automobile accident occurred in which a 21 year old girl, Eluana Englaro, (born on 25 November 1970), was involved, who was diagnosed, following the accident, with a grave cranial-encephalic trauma with injuries to some cortical and sub-cortical cerebral, causing at first a condition of deep coma, and, after some time, a persistent Vegetative State with spastic tetraparesis and loss of any upper brain function, and thus of any perceptive and cognitive function and of the capability of having contact with the external environment.

After about 4 years from the accident, Eluana Englaro – having been confirmed to lack any modification of her condition - was declared incompetent [hereinafter “interdicted”] because of total incapacity with the decision of the Tribunal of Lecco of 19 December 1996. Her father, Beppino Englaro, was appointed guardian.

After about 3 years a long judicial case articulated in three main consecutive proceedings ensued, in which the guardian, deducing the impossibility of Eluana’s regaining consciousness, as well as the incurability/irreversibility of her pathology and the incompatibility of that state and of the treatment of forced support which artificially allowed her to survive (feeding/hydrating with nasal-gastric probe) with her previous beliefs on life and individual dignity, and in general with her personality, repeatedly requested, in the interest and on behalf of the ward, the issue of an order that would require the interruption of the therapy of vital aid.

In the first proceeding, brought with appeal under article 732 the Code of Civil Procedure, filed on

19 January 1999, the claim of the guardian was declared inadmissible by the Tribunal of Lecco (because it was considered incompatible with article 2 of the Constitution, read and interpreted as a provision implying the absolute and imperative right to life) with decree filed on 2 March 1999, then confirmed on appeal by the "Minors and Family" Section of the Court of Appeals of Milan with the decree of 31 December 1999 (this Judge believing that the situation of normative uncertainty did not allow the adoption of a specific decision of the claim on whether to interrupt the forced feeding/hydrating treatment).

In the second proceeding, brought by the appeal filed on 26 February 2002, the same claim was rejected by the Tribunal of Lecco with decree filed on 20 July 2002 (which repeated the principle of necessary and mandatory prevalence of human life regardless of the pathological condition and any contrary will of the patient), once again confirmed by the above mentioned Section of the Court of Appeal of Milan on appeal, with the decree of 17 October 2003 (deeming in any case it to be inappropriate to interpret in a supplementary way the carrying out of the principle of self-determination of the human being in the case of a "patient in PVS").

The latter decision was subsequently challenged by the guardian with extraordinary appeal to Court of Cassation (under art. 111 of the Constitution), declared inadmissible by the Supreme Court with order no 8291 of 20 April 2005 for the lack of a participation in the proceeding of the cross-examination identified in the person of the guardian ad litem of the incompetent ward, under article 78 Code of Civil Procedure.

In the third proceeding, begun following the above-mentioned order, with appeal filed on 30 September 2005, the guardian requested the above-mentioned appointment of a guardian ad litem, who was effectively appointed in the aegis of attorney Franca Alessio, who agreed with the claim of the guardian.

Such claim was, in any case, declared once again inadmissible by the Tribunal being appealed to with decree filed on 2 February 2006 (this time holding that the guardian was not legitimated, not even with the consent of the guardian ad litem, to make choices in the place of or in the interest of the incompetent, in the area of "extremely personal" rights and acts.

The decree was, however, reformed by the "Minors and Family" Section of the Court of Appeals of Milan, on appeal, with the order of 15 November/16 December 2006.

In that case, in fact, the Court, acting contrary to the opinion of the Tribunal, considered the appeal admissible because of the general power to care for the person vested in the legal representative of the incompetent under articles 357 and 424 of the Civil Code.

Nevertheless, examining and judging the guardians' claim on the merits, the Court considered it inadmissible, stating that the investigative activity that had been made did not allow the attribution of the ideas expressed by Eluana at the time in which she was fully conscious, effectiveness enough to make them appropriate today to constitute the "certain will of the girl, against the carrying out of the therapies and treatments that keep her alive now."

In the appeal again brought by Mr. Beppino Englaro in the Court of Cassation (filed on 6 March 2007) against that decision, and in addition, independently challenged by the guardian ad litem as well with an ["]incidental["] appeal substantially agreeing with the main one, the Supreme Court pronounced the decision no. 21748 on 16 October 2007, ordering the cassation of the challenged provision and the remand of the case for a new decision on the cassated parts (in accordance with the regime of articles 384, 392, 394 of the Code of Civil procedure), to another Section of the same Court of Appeal of Milan.

The Supreme Court, in particular, accepted the appeals issued by both Eluana Englaro's guardian and her guardian ad litem, in terms better explained in its opinion, holding, in sum, that:

o In situations where the right to life or the right to health is at stake, or, in general, where the doctor/patient relationship – the basis of every legal solution through which is exercised the recognition of a constitutionally governed law (in particular articles 2, 3, 13, 32 of the Italian Constitution) which places pre-eminent importance on the freedom of therapeutic self-determination – takes on critical importance;

o In addition the provision of the informed consent of the patient, which is tied to the ability to choose from among different possibilities or modalities of providing the medical treatment, but also the possibility to refuse the therapy and to willingfully decide to interrupt the life in any moment, is, usually, the element that legitimates and found any health care treatment;

o The recognition of the right to therapeutic self-determination cannot be denied even when the adult subject can no longer manifest his own will because of the condition of total incapacity, with the consequence that, as in the case here, in which – before falling into such a condition, he did not specifically indicate, through previous statements of will, which therapies he would have wanted to receive and which, instead, he would have refused in the case that he would come to be been in the state of unconsciousness – the legal representative (support guardian or administrator) in place of the incompetent person, is authorized to express that choice, and the latter shall also be able to request the interruption of the treatments that artificially keep the ward alive;

o Nonetheless, this power-duty vested in the legal representative of the incompetent person is not unconditioned, but has some limits "inherent" to the fact that health is an extremely personal right to anyone, even to the incompetent, and that the freedom to refuse care presupposes the resort to the evaluation of life and death whose foundations lie in ethical or religious conceptions that are, in any case, extra-juridical and exquisitely subjective, and thus must be always referred to the subject-patient, even if incompetent;

o A first limit, coexisting with the choice of the representative, must be particularly viewed in light of the need of such choice to be always bound, as a representative activity, and, in the concreteness of the event, with respect for the best interest of the person represented;

o Two more mandatory conditions are, furthermore, summed up in the following principle of law, with which the judge on remand must comply:

> "when the patient has been in PVS for many years (in this case more than 15), with the consequent radical incapability to relate with the external world, and is artificially kept alive with a nasal-gastric probe that feeds and hydrates him/her, on the request of the guardian who represents him/her with the opportunity of the guardian ad litem to be heard [in cross examination], the judge can authorize the deactivation of such medical provision (except the application of measures suggested by science and medical practice in the interest of the patient), only in the presence of the following presuppositions: a) when the condition of vegetative state is irreversible, on the basis of a strict clinical opinion, and there is no medical basis, following the scientific standards recognized at the international level, that allows the supposition that the person may have the minimum possibility of any, even if feeble, recovery of consciousness and return to a perception of the external world; and b) provided that such request truly expresses the voice of the represented, on the basis of clear, univocal and convincing evidence, obtained from his/her statements or from his/her personality, lifestyle and convictions, corresponding to his/her way of conceiving the very idea of personal dignity, before falling in the state of unconsciousness. If either one or the other of these assumptions is absent, the judge must deny the authorization, since the right to life must unconditionally prevail, regardless of the interested subject's level of health, autonomy and capacity to understand and express will and regardless of the perception that others might have of the quality of the life itself";

- In light of the above-mentioned principle, the challenged decree, issued by the Court of Appeals of Milan in a previous stage of the proceeding, does not escape the censure made by Eluana

Englaro's guardian and guardian ad litem, because, even if it "clearly shows from the documents of the case that Eluana Englaro is in the above described situation, that and lies in a persistent and permanent vegetative state after a grave cranial-encephalic trauma suffered in a car accident (which happened when she was twenty) and she did not issue, when she still had the capacity to understand and express [her] will, any previous declaration of treatment [living will]", the Court on the merits has in any case omitted to adequately investigate the existence of the other indispensable condition necessary to legitimate the choice of the representative to refuse the artificial feeding. In other words it did not reconstruct the "presumed will" of Eluana giving importance to the desires she previously expressed, or in general her personality, her lifestyle and her intimate beliefs; this finding must be made by the judge on remand, taking into account all the elements resulting from the investigation and the convergent position assumed by the parties in the trial (the guardian and guardian ad litem).

After that pronouncement, the previous appeals proceeding has been resumed by the guardian, the original re-claimant, with the appeal filed on 5 February 2008 and assigned – according to pre-determined docketing criteria in case of cassation of decisions issued by the "Minors and Family" Section of this First Civil Section.

In the proceeding the guardian ad litem appeared with her own memorial not opposing but agreeing with the claim of the guardian.

The Office of the Public Attorney, in the aegis of the Substitute Designated Public Attorney formulated its conclusions as well, requesting the refusal of the claim or, failing that, for a supplementary investigation.

Having heard the parties in chambers, having ordered and made a probative integration with the hearing of Mr. Beppino Englaro, which largely referred to the conception of life that Eluana expressed before falling in PVS and, in general, on her personality, this Court took the matter under consideration, and now is going to decide.

2. Confines of the finding submitted to the judge on remand. The intervening internal judgment on the "irreversible" nature of the Vegetative State: exclusion of the possibility of making new findings on this aspect.

In the case at bar, only the second of the two conditions that can legitimate the choice of the guardian to refuse the vital support treatments, according to the principle enunciated by the Supreme Court must still be verified by this bench; that is, [we must decide] the one regarding the correspondence of that choice to Eluana's "presumed will," and not the first one, concerning the irreversible nature of her Vegetative State.

On this aspect, in fact, a conclusive decision it has already been stated in the previous appellate phase, which, being by now covered by res judicata or by an equivalent endo-procedural preclusion, takes on definitive effectiveness in this proceeding.

The gravity, importance and delicateness of the decision to take requires documenting said conclusion - and the others which will be justified subsequently - with a reasoned opinion which is not concise, but analytically extensive regarding to each point relevant to the decision.

It is therefore noted that, based on the verifications of clinical and instrumental diagnostics made on

Eluana Englaro since her first hospitalization after the car accident in 1992, and then on subsequent periodical tests made the fact that she was in PVS and, as such irreversible, was always considered proven and "clear" in the various judicial phases.

It was believed to be of pre-eminent importance, first of all, the fact that, for the purpose of the declaration of incompetence, a very accurate finding – both diagnostic and prognostic – on Eluana's condition was already been made in 1996, which concluded with the certified persistence of her vegetative condition.

But conclusive importance was surely given to the fact that, in the subsequent development of the procedural phases brought by the guardian, updated documentation was acquired, which had the aim of both demonstrating the clinically reliable existence and irreversibility of such condition and of documenting the standards which - considering the most reliable medical studies at the international level on this subject - could scientifically justify that diagnosis-prognosis.

Regarding this type of documents, in particular, the guardian produced in court a copy of a technical report, of recognized scientific value, written by an interdisciplinary working Group made of experts, in relation to the cognitive objectives provided by Minister of Health decrees of 20.10.2000 protocol ssd/I/4.223.1 and 4 May 2001. This document was produced to justify the repeated claim to interrupt the vital support treatment after the first decisions refusing his requests.

The importance of said study was so significant that the presentation of the decision no. 21748/2007 of the Supreme Court of Cassation seems also literally to confirm, some suggestions and conclusions contained in it (such as the reference to the necessity, which is important for the point we are examining here, of evaluating the existence of a PVS "precisely based on" -as the report first, and the Supreme Court repeats - "prolonged observance, for the time necessary according to the scientific standards recognized on an international level").

On the Permanent and Persistent VS, the Report specifies that in it:

"the patient breathes, eyes can be open, pupils react, reflexes of the body and of the spine persist, but there is not any sign of mental activity and of taking part in the surroundings, and the only motor reflex responses are a redistribution of the muscular tone. It leads to the total destruction of the cortex or of the cortical- diencephalonic connection while the encephalic body survives and keeps functioning. The main neuro-pathological references are laminating necrosis of the cerebral cortex, a widespread damage to the sub-cortical passageways or the bilateral necrosis of the thalamus, where the projection of the cortex originates. The essence of the VS, as described by Jennet and Plum [note of the writer: in the text of the report there is a footnote with a citation] "lack of any adaptive response to the surroundings, the absence of every sign of a mind that receives and projects information, in a patient who manifests long periods of wakefulness." These patients are able to breathe spontaneously, and their cardiovascular, gastrointestinal and renal functions are maintained (usually not the sphincter functions, and the patients are incontinent). Sometimes they look asleep, with closed eyes; some others look awake, with open eyes. Intense sensorial stimulations can provoke acceleration of the breathing, opening of the eyes, change of facial expression or movements of the limbs. Sometimes there are without any stimulation, spontaneous automatic movements (chewing, swallowing but also smiles or crying expressions). The EEG can show a residual cortical electric activity. The VS is excluded by the presence of signs, even if minimal, of conscious perception or of voluntary movements, such as a response reproducible on a verbal or non-verbal command, even if limited to the simple blinking of the eyes. The concept of persistence and permanence must be separated. While the adjective "persistent" refers only to a past condition of long-term disability with an uncertain future, the adjective "permanent" implies irreversibility. It can be said, thus, that persistent VS is a diagnosis, while permanent VS is a prognosis. This distinction, made by the MultiSociety Task Force on PVS in the work published in the New England Journal of Medicine vol. 330, no. 21 and 22, is shared by this working group, which considers that work the best clinical and scientific synthesis available today [note of the

writer: in the text there is a footnote with some quotations]. The Task Force reached agreement on some points. One is that before declaring permanent, thus irreversible, the VS of traumatic origin in an adult subject, it is necessary to wait at least 12 months [note of the writer: in the text there is a footnote with quotation, in particular it is specified that "it is sufficient a lapse of three months for adults and children who are in PVS after injuries of non-traumatic origin"]. After that length of time, the probability of a recovery of superior functions is insignificant (…). The PVS indicates a both a clinical and legal situation totally different from the one that, under current Italian laws (and the laws of all the other countries), can lead to the certification of cerebral death. It is impossible, thus, that individuals in PVS do not meet the criteria for the ascertainment of the cerebral death. It is a matter of fact them mental activity will no longer be possible and that they definitively lost the function that identifies the human essence more than every other. They (…) are purely vegetative beings (…)". [N.B. graphical emphasis added here and now.]

Thus it is shown from the quotations of the Report of the above-mentioned Study group (which is a technical body of highest level, whose opinion regarding the state of the medical science on the subject of PVS can be compared to the one of CTU expert in the field), the "permanent" VS - in the terms specifically mentioned in the quoted sections of the Report - of traumatic origin lasting for more than 12 months, a length of time which clearly does not have an absolute value but a statistical one - must clearly be considered irreversible (since the two adjectives must be considered as equal).

The report is careful to then supply both the elements to define the VS at a clinical-diagnostic level, and the elements to characterize it, with the aim of formulating a prognostic judgment, in its temporal/functional evolution, going from Persistent State to Permanente/irreversible State.

On the first aspect, the report acknowledges studies that, at an international level, have come to achieve define the standards for defining PVS, using, in particular, the data base elaborated by the MultiSociety Task Force on PVS in the work published in the New England Journal of Medicine, vol. 330, n. 21 and 22, considered the "best scientific and clinical synthesis available today".

When the same Study group, concluding its report, states the necessity that the finding of the existence of the PVS should be made by doctors, in the various real cases, "on the basis of prolonged observation, for the time necessary according to scientific standards recognized at the international level", it seems to refer to the standards by itself given with the aim of illustrating, from a diagnostic point of view, the features that define the VS (the existence of injuries of the cortex or of the cortical-diencephalonic connection determining, on a functional side, the lack of any adaptive response to the surroundings and the absence of any sign of a mind that receives and projects information), and, from the prognostic point of view, the duration of such a condition without variations, and, thus, in a concomitant way, the necessary "time of observation" of the same, in order to define "Permanent" (as "Irreversible"), length of time equal to at least 12 months in case of PVS of traumatic origin in an adult.

At the presence of a diagnosis of this condition, specifies the report, and the time period having the lapsed, the prognosis is definitively negative regarding the possibility of a recovery of the perceptive and cognitive functions, since "the probability of a recovery of superior functions is insignificant" and mental activity "will never again be possible" (this conclusion is confirmed, additionally, by other authoritative studies; it must be specified that, in this specific pathology, its irreversibility must be considered together with the concept of incurability on the therapeutic side, meaning that any pharmacological treatment, surgery, radiotherapy, or any other kind of intervention can no longer modify the state of the pathology itself).

All the above leads to the unavoidable conclusion of excluding the influence of possible minority opinions, which are more or less skeptical of the possibility of a reliable prognostic evaluation of irreversibility.

Moving from the general level to the specific one, the documents the Court of Appeals had the possibility to consider in the previous procedural phase relating to the concrete diagnosis/prognosis made on the condition of Eluana Englaro, contained in a medical Report written by Prof. C.A. Defanti, renowned neurologist and Chief of Staff of the Neurology Department of Milan's Riguarda Ca' Grande hospital.

There is no showing that the reliability of that Report has ever been doubted by any procedural cross examination of the guardian (neither by the Public Attorney, nor by the guardian ad litem; the latter, on the contrary, confirmed, as far as she knows, the current effective lack of variation in Eluana's condition with regard to the clinical results contained in the report of Prof. Defanti).

It must be added that that document does not lack any potential formal requirement, taking into account that the Supreme Court did not establish by which evidence or means of evaluation of the evidence the Judge on the merits should use, who, in the case at bar, already in the first phase could have based his judgment on all those that he deemed, in reality, the most appropriate, even more so considering that there is no prescriptive legislative provision on the possible need of the opportunity to consult institutional technical bodies or specific medical commissions.

This report first of all states a reconstruction of the way the pathology started, on the basis of the existing clinical documents.

It states, in particular, that, after the car accident that occurred on 18 January 1992, Eluana suffered the above-mentioned cranial-encephalic trauma with frontal fracture, fracture of the epistropheus E and anterior dislocation of said vertebra; that Eluana was hospitalized the Intensive Care Unit at the Hospital of Lecco, where she arrived with a score of 3-4 on the "Glasgow Coma Scale"; that the CT scan showed the presence of intraparenchymal blood in the left frontal temporal lobe and hyper density, signs of suffering at the bilateral thalamic level; that the patient was intubated and artificially ventilated; that in the following days she showed signals at the transtentorial level with a posture of decerebration and vegetative crisis; that at the same time a CT scan showed the appearance of a hemorrhage at the mesencephalic level; that then the condition was gradually stabilizing and, about one month after the injury, the patient started again to open her eyes, entering, from that moment on, into a Persistent Vegetative State; that in 1996 she was hospitalized at the Neurology Department [Organizational Unit] of the "Reuniti" Hospitals of Bergamo, where the diagnostic and prognostic evaluation of post traumatic vegetative state was confirmed; that the successive evolution confirmed the diagnosis-prognosis then formulated, since there has not been in the following years any significant modification of the clinical state or recovery of contact with the environment, not even during the subsequent testing made in 2002 after a hospitalization specifically for this purpose at the Hospital Niguarda of Milan; that, thus, " notwithstanding an extremely accurate observation, prolonged in time, it was not possible to show signs of contact of the patient with the environment around her."

Regarding the neurological objectivity to which Prof. Defanti documented there is first of all a description of Eluana's condition which can be summarized a s follows: young woman in good general and nutritional condition, with eyes more or less open, skewed deviation of the ocular bulbs, aniscoria due to mydriasis established in the right eye; rhythmic mioclonia affecting the lips, the tongue, the jaw and to a lesser extent the eyelids and the eyeballs themselves (with nystagmus type shaking); spastic tetraparesis with flexion positioning in the fingers and talipes equinus: spontaneous and valid breathing, without tracheal-bronchial obstacles; feeding induced through nasal-gastric tube; regular bowel function with autonomous urination and incontinence.

Prof. Defanti then documented the various instrumental tests carried out also in 2002 (routine laboratory exams, EKG, chest ex-ray) and in particular, with the following results:

- Of the EEG: «track characterized by a monotonous activity in alfa band and10 HZ, with

insuppressible artificial tracks of muscular and ocular origin superimposed. No reactivity to algetic stimulus. The track is compatible with an “alfa coma”»;

- Also particularly eloquent [is this description] from a magnetic resonance of the encephalon: «test carried out in pharmacological sedation. In the posterior fossa there is a marked widening of the fourth ventricle and of the cisterns of the pontecerebellar angle and of the cortical spaces with important atrophy of the structures of the posterior fossa. In particular, the mesencephalon is extremely atrophied, which is characterized by a clear, hyperintense alteration of signal in FFE T2, from hemosiderinic residuals of previous hemorrhages (Duret type). Marked alteration of the hyper intense signal in both the echoes affecting the periventricular white substance around the medium cells and extended to affect the radiated crown on both sides until reaching the cortical –subcortical of wide-spread chronic axonal damage. Massive atrophy of the callous body with alteration of signal with axonal damage. Small signs of altered signals are recognizable in the internal capsule of both sides with hemosiderinic residuals; other small similar focuses with resulting contusive focuses appear localized in the neocapsular bilateral and left temporal areas, in the knee of the callous body, in the parasagital and front left posterior cortical and sub-cortical area».

Summarizing the instrumental and symptomatological examinations made, Prof Defanti confirmed the diagnostic and prognostic conclusion, dating to 1996, according to which: “the patient is in a Permanent, thus irreversible Vegetative State. No recovery of cognitive life is any longer possible. The examinations made, and in particular the magnetic resonance corroborates the hypothesis of widespread axonal damage as a physio-pathological mechanism of the cerebral damage that led to the tragic current outcome».

Such conclusion, of a clinical nature, totally responded to, and still does, in its long inferential-scientific elaboration, precisely to those criteria – distilled in light of the studies and of the international standards - to which both the Report of the above-mentioned work group and the Supreme Court in the decision of cassation on remand referred to, stressing how Eluana’s Vegetative State, so considered because of the objectively ascertained irreparable cerebral injury (because of consolidated alteration/atrophy of some cortical and sub-cortical tissue of the mesencephalon and of the axons, or of the white substance that affects the encephala and cerebral stem with consequent disconnection between these two parts, without any evidence of consciousness of herself or of the environment, of intentional and voluntary behavioral responses to external stimulations, of comprehension or expression of the language, even in the presence of conserved reflexes of the brain stem), is surely irreversible because of its extraordinary length, to which corresponds the parallel and necessary prolongation of the period of medical observation (that goes far beyond the limit of the twelve months necessary and sufficient, as already seen, for a reliable prognosis of Permanent/irreversible Vegetative State of traumatic aetiology) which supplements one of the parameters - together with the nature of the cerebral injuries and to the loss of perceptive, cognitive and emotional functionalities - to which are referred to evaluate the correspondence of the diagnosis-prognosis (in the concrete case) to “scientific standards recognized at international level."

The very long and unchanged length of the state described, moreover, seems to exceed those already considered in other well-known judicial precedents as suitable to establish the irreversibility of the pathology herein (e.g. among others mentioned in the acts of the proceedings, in France, in the case Hervé Pierra, one of the longest PVS events, it the interruption of feeding through nasal-gastric probe of a woman in PVS for 8 years was ordered while in Great Britain, in the case Toni Blands, the PVS lasted for only 3 years).

In any case, the Court of Appeals has already taken notice of all the above-mentioned cognitive elements in the previous procedural phases, and in particular it took notice of the prognostic conclusion now referred to, according to which “no recovery of the cognitive life functions is now possible,” arriving to the conclusion that those elements were sufficient to attest both the fact that

Eluana was in Vegetative State and that such condition was irreversible.

The reasoning of the opinion adopted in the matter is unambiguous.

Already in the decree pronounced on 17 October/10 December 2003, not challenged on that point with appeal to the Supreme Court, the Court of Appeals noted that, even if it felt, during the preceding, the need to acquire a specific clinical profile of Eluana's pathology, technical consulting should be considered totally "superfluous," since according to the results of the proceedings there are no doubts as to the diagnosis, prognosis and Eluana's current clinical condition, as a patient in PVS with the prognostic framework of irreversibility described by scientific literature".

It was, in any case, a finding made apparently, in a merely incidental way, in the context of a decision that was limited to confirm the decree of refusal issued by the Tribunal of Lecco.

The situation was different, instead, in the case of the pronouncement of the following decree on 15 November/16 December 2006.

In that case the Court of Appeals did not confirm the order of inadmissibility of the claim of the guardian given by the Tribunal of Lecco on the basis of the opinion according to which the legal representative of the incompetent person was not legitimated (not even with the consent of the guardian ad litem) to express choices in place of or in the interest of the ward; on the contrary it held that the claim was inadmissible because of the general power to care for the person vested in the legal representative of the incompetent person under articles 357 and 424 Italian Civil Code.

For this reason the Court reformed the challenged decree and examined and judged the well-foundedness on the merits of the guardian's claim, dealing with the problem of the existence, in reality, of both the two conditions of legitimacy of the guardian's choice, to which the Supreme Court itself referred later.

As to the first one, the one of the irreversibility of the Vegetative State, the Court of Appeals had to examine it first, it being logically prior to the other, since, without it, it would be illogical to verify the further condition of the reconstructability of a previous or presumed will of Eluana's oriented towards a refusal of a life-aid treatment.

After resolving positively the first issue, the Court dealt with the second one, in this case resolving it negatively, affirming that the investigative activity carried out did not allow the attribution of enough effectiveness to the ideas expressed by Eluana when she was still fully conscious to be valid as the "sure expression of her will contrary to the carrying out of therapies and treatments that now keep her alive."

Only this second holding of the decision has been challenged before the Cassation Court, and only on it the Supreme Court pronounced a decision of annulment, ordering the renewal of the ascertainment on the merits on remand.

The subject to decide is, thus, presented again in this court exactly in such state and with the above-mentioned content: on the one hand, the finding of the irreversibility has already been made and it has become definitive and un-modifiable in this proceeding since it has not been challenged; on the other hand, the finding of the reconstruction of Eluana's "presumed will" must be renewed, since it has been challenged before the Supreme Court and annulled by the latter because it had not been made correctly by the trial Court on the merits.

That the determination of the state of irreversibility had already been made, and, with an examination carried out even as a main objective, it is clearly inferred from the reasoning of the opinion of the decree issued on 15 November/16 December 2006.

Having noted also the acquired documentation of a clinical nature, the Court deemed as having been proven that, precisely, Eluana is in "PVS, a clinical condition that, according to medical science, is typical of a subject who "breathes, whose eyes can be open, pupils react, body and spinal reflexes

persist, but in whom there is no sign of mental activity and of taking part into the surroundings and the only reflex motor response is a redistribution of the muscular tone." This state (…) is characterized by a "prognosis of irreversibility"(…). It is verified that Eluana's vegetative state has not changed since 1992, that it is irreversible and that the termination of the feeding through nasal-gastric probe, requested by the guardian and by the guardian ad litem, would lead her to certain death in a very few days".

In conclusion, the finding of the existence of a Permanent/Irreversible Vegetative State has already been made in the previous phase of the proceeding, principally and not merely incidentally. It appears now to be covered by internal res judicata, or, in any case, by a preclusive endoprocedural effect establishing stability/unmodifiability comparable to res judicata (having only to recall on this subject that the concept of internal res judicata is broader than the concept or external res judicata, since it is not only about rights or facts, which moreover have been subjected only to statements of acceptance of the claim, but also about all the simple facts and all the possible substantive and procedural issues which can arise during the proceedings and be subject to the examination of the judge with ascertainment of a positive or negative result).

This res judicata – or an equivalent preclusionary – effect is compatible (maybe it is appropriate to specify this, even if it might seem unnecessary) is not even incompatible with the formal structure of this proceeding, although it may appear to be based on the so called "Chamber" model, considering the terminative nature of the decision to which the proceeding tends: it implicates, in fact, a decision on a subjective right (constitutionally granted, moreover, such as the right to life, to therapeutic self-determination, to personal freedom), appropriate to assume definitive effectiveness (both because of the lack of further challenges available on the merits and also - as an effect tied to the nature of the subject - the definitive effectiveness that an order to interrupt the life-support on Eluana's residual life expectancy would have; considering also that the fact that the extraordinary appeal made under to article 111 of the Italian Constitution had been believed admissible by the Supreme Court only because it is a case predicated on rights, against a decision capable of becoming definitive), so as to be substantively comparable to a judgment.

This excludes that such an ascertainment, which has already become definitive and unmodifiable, can be newly verified, since it would be unnecessary and procedurally inadmissible.

It is perhaps appropriate to stress that the existence of the internal res judicata is furthermore unquestionable since, in the light of the rationale of decision 21748/2007, the Supreme Court itself seems to have documented that effect, and it is consolidated jurisprudential principle that, when the interpretation of an internal res judicata is considered totally or partially rendered by the Court of Cassation (in the decision of cassation with remand), it binds and conditions, irreversibly, the powers of the judge on remand (Court of Cassation, United Sections, 23 April 1971 no. 1175; 11 July 1969 no. 2433).

The Supreme Court, in fact, openly recognized how it emerges "clearly from the pleadings of the trial that Eluana Englaro is in such situation, lying in persistent and permanent vegetative state after a heavy concussion due to a car accident (which occurred when she was twenty)".

The Supreme Court also described the condition of Eluana as a given objective fact, underlining the features of her PVS: "because of her condition, even if Eluana is able to breathe spontaneously, and even if she maintains the cardiovascular, gastro-intestinal and renal functions, she is radically incapable to live cognitive and emotive experiences, and thus to have any contact with the surroundings: her brain stem and spinal reflexes are persistent, but in her there is no sign of mental activity and of taking part in the environment, nor any capability of behavioral response to the external sensorial stimulations (visual, auditory, tactical, pain), her only motor reflex activity being a redistribution of the muscular tone .

It is clear from the taking of judicial notice of the ascertainment already contained in the above-

mentioned decree of the Court of Appeals, an ascertainment which, not being appealed (as, instead, was the one regarding the impossibility to reconstruct Eluana's will), could only be considered definitive by the Supreme Court as well.

It is not by chance that, to indicate on which assumptions the Judge can authorize the choice of the legal representative of the incompetent person to terminate the artificial support treatment, it began from the ascertainment - based on what concretely emerged from the outcomes of this trial - that Eluana had been lying "for many years (more than fifteen) in PVS, with the consequent radical incapacity to relate with the external world".

Now it is completely evident that, in noticing that in the event that the patient - Eluana Englaro - was in reality in PVS from more than fifteen years (at the moment in which the Court of Cassation wrote its decision, but now it has been more than sixteen years), the Supreme Court necessarily recognized that such state, lasting an extra ordinary length of time (and in any case far more than the twelve months term recognized as suitable, statistically and scientifically, to formulate a prognosis of irreversibility according to the standards and the international studies mentioned above), in the case of Eluana it became definitive and as such no longer subject to regression or healing, not even partial, the adjective "Permanent" - surely used by the Supreme Court with full awareness of the scientific data - being equivalent, as we have already seen, to the adjective "Irreversible" (which, in turn, by definition, has the meaning of absolute immodifiability/ non-recoverability/ incurability), excluding, per se, "the even minimal possibility of any, even feeble, recovery of the consciousness and of any return to a perception of the external world" which, if possible, would contradict *in re ipsa* the notion of irreversibility).

It would, thus, also be logically contradictory, consequently, beyond just contrary to the substantive and procedural res judicata effect (or to the analogous one of stability/preclusion thereby produced), to hypothesize now that such a presumption - the irreversibility - may not exist.

And with this the Public Attorney agreed, in the aegis of the Substitute State Attorney General present at the trial, even if he asked for the refusal of the claim - as it was within his full rights by virtue of his personal evaluation of the trial documents which he was called upon to express - he in any case recognized in his concluding opinion that "according to medical knowledge Eluana is in a PVS, since her coma, caused by the injuries she had in a car accident that occurred in 1992, has not evolved", [N.B. emphasis added] a conclusion with which this bench can only agree, in light of the cognitive elements acquired, even if the res judicata effect had not had the occasion to be formed and it would have been called upon to express ex novo the judgment already previously expressed by the same Court of Appeals, since it undoubtedly deserves, in fact, to be shared.

Finally, it must be stressed that once the Supreme Court recognized the principle of law to be applied to the case, expressly cassated only the decree issued by the "Minors and Family" Section of this Court referring to the lack of ascertainment of the existence of the second condition, the subjective one, regarding the reconstruction of Eluana's "presumed will," giving to another Section (to be designated) of the same Court, the task of making this sole remaining finding.

The Supreme Court, in fact, according to the limitative and specific content of the appeals made by the guardian and the guardian ad litem, exclusively sanctioned the fact that the trial court, even if it took note of the beliefs and declarations previously expressed by Eluana, such as emerged in the discovery phase, did not "verify whatsoever whether such declarations - whose reliability they did not doubt -, and believed unsuitable as a testament of life [living will], could serve in any case to outline, together with the results of the investigative phase, the personality, her way to conceive, before falling in the state of unconsciousness, the very idea of dignity of the human being."

The Supreme Court thus concluded that "such finding should be made by the judge on remand."

All the above thus authorizes, without any remaining doubt, the proceeding to the examination of the only issue remanded by the Supreme Court: the one regarding the reconstruction of Eluana's "presumed will."

3. Opportunity and dutifulness of a preliminary and incidental examination on the possible existence of plausible doubts of constitutional legitimacy of the principle stated by the Supreme Court.
The Court believes that, before focusing on that issue, it cannot be considered as exempt from one further preliminary and incidental examination.

This need arises from the fact that, a short time after the issuing of decision no. 21748/2007, the Supreme Court, with another extensively detailed opinion (Cass. 21 December 2007 no. 27082), abandoning a previous trend apparently in contrast with that of the Constitutional Court, made a firm about-face on the issue of whether the judge on remand can point out aspects of suspected unconstitutionality of the principle of law that, after a decision of cassation with remand, he is held to apply.

In particular it held that the principle of law – at least in cases and within the limits in which the Court of Cassation came to state it without examining specific aspects of its conformity to the Constitution – should also be considered still subject to an independent examination of constitutionality by the judge on remand.

This has always been the interpretation of the Constitutional Court, according to which the contrary interpretation would be in contrast "with the clear statement of the Constitutional Law no. 1 of 1948 and the law no. 87 of 1953, article 23, which provide that those questions can be raised during the trial, without any limitation (…) otherwise, the Constitutional Court could not pronounce itself on issues of constitutional legitimacy regarding provisions that should still be applied on remand, with consequent violation of the above-mentioned constitutional provision (Constitutional Court nn. 138/1977, 11/1981, 21/1982, 2/1987, 345/1987, 30/1990, 138/1993, 257/1994, 321/1995, 58/1995, 78/2007).

The opposing trend of the Supreme Court (according to which it would not be possible to make such finding on remand, notwithstanding that the principle of law is, in substance, an ordinary law, thus subject to incidental evaluation of constitutional legitimacy by the Judge appointed to apply it) is therefore now -at least for the moment- superseded by force of above-mentioned decision no. 27082 of December 2007, with the consequence that this Court of Appeals too, in this case, has not only the possibility, but *a priori* also the duty to evaluate, even *ex officio* (*a fortiori* after the many comments and critics on the level of constitutional legitimacy, that took place after the decision of cassation on remand hereto, of the extreme delicacy of the topic and of the enormous importance of the interests and values involved), if the principle of law stated by the Supreme Court - in the absence, as of today, of a *jus superveniens* opposing to it - is not against possible constitutional provisions, since it does not appear that any examination of it has been made by the Supreme Court in that matter, or in any case, in the part in which it has not explicitly carried out such an examination.

Such examination can be done, virtually, on both the issues that can be found in the reasoning developed by the Supreme Court: that of the legal basis of the right to therapeutic choice exercised by the incompetent through his/her guardian in refusing the compulsory feeding treatment; and that of the limits - believed to be coexisting ("inherent") - with the expression of such choice by the guardian.

It is an examination whose results, however, seem indeed negative.

With respect to the first holding of the Supreme Court, any contrast with the constitutional principles is indeed not very plausible, at least because the main assumptions from which it sets out to sustain the full right of therapeutic self-determination of the patient, even if incompetent, is framed the valorization, on a legal field, of the superiority of the human being and of his/her power to of therapeutic self-determination, which find a direct legal basis in provisions of the constitutional (articles 2,3,13 and 32 of the Italian Constitution).

The Supreme Court does not separate the human value (by virtue of its being "given" and "presumed" as "a per se ethical value") in its reading of the constitutional provisions (but which, of course, is consistent also from a logical point of view regarding the relationship between a person and his legal predicates) from those rights that the republican [Italian] legal order recognizes in it.

Such a correlation is also expressed with respect to the right to health and life; this clarification is certainly nothing new, being of Copernican importance in the interpretation of article 2 of the Constitution, which is a fundamental provision in our legal order of the recognition of inviolable human rights, and extremely clear in referring such rights, as predicates of the person to which they belong.

The Supreme Court wanted to eliminate any possible misunderstanding, rejecting the opposite idea, which considers the right to health or to life in a certain sense as an entity external to a person [man], and which can impose itself, through this objectified, hypostatized autonomy, even against the will of the person [man].

When, in particular, the Supreme Court emphasized that the continuation of life through artificial treatments can not be imposed on any patient if the patient himself freely decides to refuse them, not even when the patient lies in total incapacity, it delineated an interpretation that seems able to carry out – rather than to contradict – the principle of equality stated in article 3 of the Constitution, which clearly must not be considered only for its aim to grant material aid to weaker individuals or those in trouble, such as the incompetent , but also for the aim to grant free expression of their personality, dignity and values.

And such a right can only be expressed – necessarily – through the mediation of "someone else," in the instant case not unreasonably found in the legal representative (moreover "institutional" representative), such as the guardian or the administrator, since without a "mediator" able to express the "voice" of the incompetent-patient, that "extremely personal" right to therapeutic self-determination that must be recognized can not be carried out.

It is also clear that the decisions of the Supreme Court do not grant any absolute right to die (conceived of as denying or contradicting the right to live), but only recognize the existence of a right of constitutional origin – which, first of all, embodies the need to allow an inevitable biological destiny – to allow the life to follow its "natural" course till death without external, "artificial" interventions when they are more harmful than useful for the patient, or disproportionate, or intolerable to him; this right cannot be confused with the other one, as of today surely not recognized by our legal system, that of euthanasia.

From the above derives the consequence that, paradoxically, possible features of constitutional incongruence could be imagined, even if only abstractly, not because of recognition of the incompetent patient's right to therapeutic self-determination, but, if at all, rather because of the

limits imposed by the Supreme Court on the guardian to exercise such right on his behalf, since said limits could potentially bring about disparate treatment harming the incompetent patient (with respect to one who is fully competent and conscious), in violation of article 3 of the Constitution.

However, not even in that case can a doubt of constitutionality concretely arise, at least in the judgment of this Bench, and within the limits allowed by a merely incidental and summary recognition, since, in the pronouncement of the Supreme Court, at most a simple, partial defect in enunciating the logical basis that justifies the limits of its conditions might be identified, and not a lack of conformity to the constitutional standards. Said logical basis, however, as will now be stated, appear to be identifiable precisely because said limits have been deemed by the Supreme Court as "inherent" in the necessity to refer to the will of the incompetent person.)

Thus, where the Supreme Court believed that the guardian's choice aimed at refusing of the medical treatment is not totally free, but must in any case be the expression of the real feeling and of the "voice" of the incompetent to be reconstructed through assumptions, it placed a limit. This limit was placed, moreover, without explaining its general, logical basis. Nor is its legal basis completely clear, since citing article 5 of the legislative decree no 211 of 2003, which requires that the guardian's consent to the clinical testing – and thus, necessarily in special circumstances – be consistent with the "presumed will" of the incompetent person, seems misplaced. Nonetheless this limit must exist within the sphere of the principle of free therapeutic self-determination of the patient, since it aims to rebuild completely the will of the incompetent person which is necessary to effectuate the right of self-determination.

It is, in fact, a limit that coexists with the expression of an "extremely personal" (as specified by the Supreme Court, which linked it within the limits originating in the "functionality of the power of representation") right of willed self-determination aiming to refuse treatment, and thus within the constitutional protection of such right cited above. From this point of view, such limit seems not to contradict the principle of equality, but to achieve it.

Similarly, where it is believed that only the irreversible character of the patient's vegetative state can in principle legitimate the guardian's refusal of treatment, also in this case, said limit seems to lie within the logical sphere of self-determination.

The Supreme Court did not have occasion to explain the logical basis of such limit, but it can reasonably be considered as having begun from the implicit but evident assumption that, if the guardian could express the will to refuse even in the case of reversible pathology, as it is believed that a competent patient can do *motu proprio* (herein lying the possible doubt of non-equal treatment), the guardian would end up denying the patient the possibility of recovering his mental faculties (i.e. those possible in reversible pathologies), and of the power to someday autonomously express, directly and personally, his will about that choice; such a denial would logically contradict the right to therapeutic self-determination under articles 2, 3, 13 and 32 of the Constitution (and for this reason, such a right can be translated, instead – without undegraded residuals of that right into the valid expression of will of the guardian in the case of irreversible pathology which excludes, *re ipsa*, the possibility of a future restoration of self-determination).

In that case, therefore, the extrapolation of the condition of irreversibility of the pathology that determines the different way of working of the will, depending on whether the patient is able to express it validly and directly regarding the interruption of medical therapies, does not seem to be an unjustified discrimination; that discrimination, furthermore, is not relevant in this proceeding to decide the feature of irreversibility of the vegetative state of the incompetent person, which the Supreme Court considered necessary. This is especially true considering that - as the

permanent/irreversibility of the vegetative state in which the incompetent person lies has already been evaluated - in this case - with a previously effectuated and definitive determination, according to the ascertainment made in an earlier phase of the proceedings, already exists.

It must, in the end, be considered, that a plausible doubt of constitutional defect for disparity of treatment is not found even regarding this last, and more general, element in the current state of the legal debate – involving this investigation: the one concerning the inversion of the perspective caused by the principle stated by the Supreme Court when it states that, whereas for the competent patient it is always necessary to give and express and informed consent to the medical treatment, on the contrary for the incompetent patient such treatment can be considered per se legitimate, unless the guardian expresses a valid and motivated refusal to issue it (only if such refusal conforms to the above mentioned limits).

In fact, this distinction responds to the evident difference between the objective situations of those who fall into not just any situation of incapacity, more or less total and more or less transitory, from those who fall into that completely special condition-limit defined as Permanent Vegetative State.

Where this state exists, the forced feeding support treatment is always self-legitimated and, in the immediate time frame, even without explicit consent, and not only for an elementary principle of precaution, but first for its nature as obligatory medical care from the outset, aimed at respecting the right to life of the incompetent patient.

However, for the same reason, the legitimacy of the treatment can't fail *sic et simpliciter* subsequently, at least until the issuance of a valid expression of an opposing will of the guardian (in the terms and conditions described above) or another reason that is legally recognized as suitable to bring about the termination of the therapy.

The possibility to consider a guardian's claim aimed at terminating vital support treatment as legitimate can't be excluded (at least now, when a specific legal provision has not been issued yet on this matter) even in cases where it is impossible to reconstruct the supposed will of the incompetent person to refuse the treatments (the case of impossibility - of carrying out the "substituted judgment" of subjective/voluntary nature – with respect to which the incompetent patient's right to individual dignity can appear unjustly deprived of protection since, on the one hand, it can be neither affirmed nor excluded that the patient would have been contrary to the treatments, and, on the other hand, running the risk of being indefinitely subjected to treatments that could even be – without considering a subjective opinion - objectively degrading) even if this solution might at first appear inconsistent with the opinion of the Supreme Court, where it, in denying the wishes of the guardian, stated that compulsory feeding treatment by means of nasal-gastric probe can not be considered a form of therapeutic obstinacy per se, thus giving rise to the possibility of inferring that the interruption of the treatment itself could never be considered as in the "best interest" of the incompetent patient.

The beliefs expressed by the Supreme Court about the objective impossibility to constitute a case of therapeutic obstinacy seems to regard only, in the concrete situation examined (and, thus, on the basis of the evaluation of the facts more than of the law), the specific therapy of feeding by means of nasal-gastric probe given to a patient who can receive it without difficulties or physical intolerance, and not any other kind of vital medical support treatment concretely made in an intolerably invasive way according to the many different practices of the medical science (continuously evolving in this field).

This belief seems to be reflected in a restrictive way in the enunciation of the principle of law (as long as this is formulated as if there were no possibility for an objective disproportionate judgment of the therapy when it is not possible to reconstruct the supposed will of the incompetent patient); nevertheless, since the stated principle binds only this Judge in this case, and only regarding the believed non-disproportionality of the specific forced feeding therapy that the appellants to the Court of Cassation considered and asked to be considered therapeutic obstinacy (the forced feeding/hydrating of Eluana by means of nasal-gastric probe), it is possible to infer that the expressive form used by the Supreme Court to formulate said principle goes beyond its own intentions, and that nothing can in any case impede thinking that the guardian can appeal to the Judicial Authority when, even if it's not possible to reconstruct the previous personal profile of the incompetent person being represented who is now in PVS, and be able to demonstrate that the (different) medical treatment given is objectively contrary to the dignity of any man and thus of any incompetent patient, or which is *aliunde* disproportionate, and as such a disallowed therapeutic obstinacy, and therefore contrary to the best interest of the represented person, that this criterion can be used as a surrogate element for a determining factor regarding the decision of interrupting treatment.

On the one hand, in fact, in examining the entire decision, it emerges how the Supreme Court in any case maintained use of the general criteria of the "best interest," which, as just noted, always referring to the usefulness to the patient, can't be confined in the merely subjective sense only to the area of an investigation regarding will/personality.

On the other hand, then, the reference to the specific kind of alimentary support treatment seems to assume a secondary value in the enunciation of the rule of law and to the value given to the investigation on the presumed will of the incompetent person: the Supreme Court, in fact, is careful to clarify that the forced feeding is not therapeutic obstinacy, but asks to the Judge on remand, before evaluating whether Eluana would have accepted said treatment in particular, to evaluate rather whether, by reason of her conception of life and in particular of dignity of life, whether she would in any case have accepted surviving in a condition of total physical and mental impairment and no longer having the possibility of recovery of perceptive and cognitive functions.

Therefore, with this principle of law in question, the Supreme Court seems more hesitant to stress this logical relationship than to exclude on principle and with reference to any other hypothesis the importance that the nature of objectively degrading or disproportionality that a single treatment of vital aid can assume (not by chance, moreover, did the Supreme Court itself underline that, even when said treatment still consists of the feeding through nasal-gastric probe, which, normally, should not be considered in its opinion, a form of therapeutic obstinacy, it can in any case assume such a connotation in some special situations, in turn indicated by the Supreme Court, but clearly only as examples, referring to two cases in which, in the imminence of death: a) the organism can no longer absorb the substances given; or b) there is a state of intolerance, clinically detectable, linked to the particular kind of feeding; these are cases which – even if controversial – are referred to in the above-mentioned Report written by the Group of Experts of the Ministry of Health, and it is supposed that, in such cases, an order of interruption of the treatment can be given even with a lack of possibility to reconstruct the presumed will of the patient).

From this derives the overcoming of the risk of identifying a normative void in the protection of the incompetent patient (which can potentially damage the concept of article 3 of the Constitution) in the cases in which it is impossible to rebuild the supposed will clearly indicating the refusal of the treatment at least if, and to the extent that, the opinion of the Supreme Court is received, as seems most correct, in the terms just described, and therefore with an interpretation consistent to its dictum and also with the Constitution.

The enunciation of the principle of law seems to place no particular doubt on the level of constitutional validity, finally, where, in light of the reasoning of the Supreme Court, it must be considered as certain by now – on the basis of an interpretation that, even if not properly "nomophilaptic" [deriving from the Greek for "norm," or "law" and "protected by guarding," *nomofilattica* is a function of the Supreme Court of Cassation under article 65 of the law on the Italian court system (R.D. 30 January 1941 n.12) which "guarantees the exact observance and the uniform interpretation of the law, the unity of the objective national law, RSpitzmiller] in any case clarifies the issue in this proceeding – that the artificial feeding/hydrating by means of nasal-gastric probe is a medical treatment, notwithstanding the contrary opinion expressed by the "Minors and Family" Section of the Court of Appeal in the decree issued in the previous stage of this proceeding.

Regarding this point, it must just be accepted that the verification of the Supreme Court is established in this court and thus can no longer be reviewed.

Therefore, there being no further obstacle identified which can impede proceeding, the topic of the conformity of the assumed will of Eluana with the claims of the guardian aiming to refuse the vital support treatment must be considered.

4. The remaining verification assigned to the Judge on remand: the evaluation of the reliability of the reconstruction made by the guardian on the "presumed will" of Eluana aimed at the refusal of the vital support treatment. Standards to refer to for the evaluation of the facts.

Regarding this matter, moreover, three elements of judgment contained in the opinion of the decision no. 21748/2007 and another contained in the decree of this Court dated 15 November/16 December 2006 make this investigation partially already completed, relieving in no small measure the decisional responsibility of this Bench.

The Supreme Court, indeed, specifying the condition of the necessity of reconstructing the presumed will, stated (see paragraph 9 of the judgment):

a) that in the preliminary investigation already done in the previous phase of the proceeding it was "verified, by witnesses, that Eluana, expressing herself on a situation similar to the one in which she now finds herself, manifested the opinion that she would have preferred dying rather than living an artificial life in a coma";

b) that in this way Eluana's convictions and statements "whose reliability [the Court of Appeal] didn't doubt" were obtained;

c) that the verification referred to the Judges on remand has to be done considering all the elements that emerged from the preliminary investigation, including the "converging opinion held by the parties in the case (guardian and guardian ad litem) in reconstructing the girl's personality";

In light of this triple clarification, leading to - and being for this same reason a connotative and constituent part of - the principle on which is based the judgement of the Court of Cassation with remand, it must be considered therefore already "verified, by witnesses, that Eluana (…) expressed the opinion that she would have preferred dying instead of living an artificial life in a coma"; that however there has been already been expressed a judgment about Eluana's ideas and declarations considering them reliable without any doubt; and that in order to evaluate conclusively the conformity of the guardian's interpretation of Eluana's presumed will, also the fact that the guardian ad litem as a matter of fact completely confirmed and endorsed this same interpretation, adhering

totally to the tutor's assertions and instances - gains emphasis.

Referring to the decree of this court, dated November 25th /December 26th, it was therein stated, referring to the testimony of Eluana's friends, that its content, "although revealing Eluana's personality as strongly independent, intolerant of rules and norms, fond of freedom and of a dynamic life, with unfaltering beliefs, cannot be utilized in order to evince Eluana's sure will contrary to the carrying out of the treatments that today keep her alive".

As already stated, the Supreme Court considered the conclusion of this reasoning erroneous, but not its evaluative premise, which therefore also takes on in this phase of the proceedings the value of a non-controversial opinion, since the testimonial proof was already considered as "revealing Eluana's personality as strongly independent, intolerant of rules and norms, fond of freedom and dynamic life, with unfaltering beliefs."

It can therefore be believed that, in this case as well, also referring to the specific investigation concerning the "presumed will", the decision of fact referred to this Court is somewhat more limited than it appears from a first perfunctory reading of the principle of law enunciated by the Supreme Court.

In any case it is helpful to remember that this kind of decision, according to the principle stated by the Supreme Court, must be understood to be aims generally to wholly ascertain (including, i.e., the aforesaid facts already verified):

1) what is – in its essential aspects – the reconstruction of Eluana's presumed will carried out by the guardian;

2) if this reconstruction, presuming that Eluana's hypothetical decision would have been the rejection of the life sustaining treatment, could be considered as reliable and therefore not an expression of her representative's opinion about the quality of life, nor in any way conditioned by the peculiar irksomeness of the situation;

3) if the reconstruction of the hypothetical will is confirmed in the various cognitive elements that emerged from the preliminary investigation, which must connote themselves as clear, univocal and convincing proof;

4) if and to what extent the guardian ad litem assumed a position convergent with that of the guardian;

5) if the guardian's reconstruction, compared with the above indicated proof, takes into consideration, (referring to Eluana's past) [the following]:

5a) her personality;

5b) her overall identity;

5c) her lifestyle and the character of her life;

5d) her sense of integrity;

5e) her critical and experiential interests;

5f) her wishes;

5g) her previous statements;

5h) her way of conceiving of the idea of human dignity (in light of her basic values and ethical, religious, cultural and philosophical beliefs that guided her volitional determinations).

4.1. Salient points of the guardian's reconstruction of Eluana's "presumed will"; converging points in the guardian ad litem's opinion.

Beginning from the first point, concerning the content of the guardian's reconstruction of Eluana's will, the sources of it are a large amount of written documents of the defendants, several specific declarations expressed in certain documents, and the declarations recorded during depositions.

This Court indeed thought it right to again and directly question Mr. Englaro during today's Court hearing, posing him many questions and requests for clarifications, being convinced not only that the preliminary investigation, in this rescissory phase of the proceeding, regarding the part still to be evaluated, must be extended – as far as possible – to receive every further and helpful information beyond the already acquired evidence, but also that part of the evaluation of reliability of the guardian's reconstruction depended on the way in which he was able to orally set forth in person and convincingly Eluana's experiences and life beliefs and how he personally stated the reasons of his appeal for authorization to proceed with the interruption of treatment.

On this occasion Mr. Englaro gave a comprehensive description of Eluana's personality, which appeared to this Judge lucid and accurate, fully agreeing with the personality picture already manifested in the previous written texts of the defense.

He in particular described – referring also to helpful specific episodes – a girl with a precocious and subtle intelligence and a very sensitive, responsible, independent person, never coming to compromises, not a hypocrite, wishing to live her life with intensity, a sincere and outgoing girl, wishing to travel and see the world, a true "thoroughbred of freedom" (this definition was given from her parents also in a joint written declaration dated 12-15-2005).

Mr. Englaro narrated – among the episodes most indicative of Eluana's precociousness – that, when she was less than ten years old, she attracted and capture, during a long walk, the attention of her old grandfather (entrepreneur and teacher in a technical school, and surely able to give a culturally appropriate opinion) for how she had engaged in dialogue with him about life and death in general, surprising her grandfather for her already acquired great maturity of thought and her manifestation of herself as a "free spirit."

He said that the intensity of Eluana's wish for freedom always impressed him, which demonstrated "her will to be so free and responsible that she resisted with strength whenever she was feeling to be forced to do or say something" against her own will.

In this regard he also mentioned – among others – another very meaningful episode which happened when Eluana was about thirteen years old, when, while on holidays at the seaside ("she adored the sea"), she reacted in a "surprisingly intense" manner to the prohibition imposed by her father to go out of the house after a certain hour: she began to perspire so profusely that her grandmother, present at the scene, worried at this kind of reaction, "shot the father a glare" so that he would withdraw his prohibition.

Moreover, is necessary to point out that Mr. Englaro, talking about this and other peculiar episodes, didn't show the desire to draw from them any general conclusion about Eluana's behavioural honesty, or to boast Eluana's "rebellious" way to behave, but he showed the desire to give the most truthful picture possible of his daughter's "independent" personality and her beliefs about life, that he, essentially, feels "bound" to respect and to enforce now that Eluana is not able to do it by herself.

In this respect Mr. Englaro pointed out also the state of unease and of sufferance that accompanied part of Eluana's school experience - when after completing the Italian middle school in a public school, she spent five years in a private "liceo" specialized in foreign languages run by nuns in her hometown (a school that – in her words – she was "forced" to attend because there was no other state school specialized in foreign languages, and not for particular religious motivations, since Eluana wasn't a practising catholic, but rather she was against every rule imposed from any institution), being compelled to adapt herself to surroundings and to teachers who, in Eluana's opinion, were totally refractory to dialogue and the exchange of views, while she considered them

of the utmost importance.

This experience caused such a strong rejection and intolerance to persuade her, after three years, to try to be admitted in a state school, but she was still impeded from doing so because the recently founded state school didn't provide courses for the fourth and fifth years.

Mr. Englaro pointed out that not even Eluana's matriculation to the Law School of the Università Statale di Milano (Milan State University), even if totally of her own choice, succeeded in satisfying her restless spirit, insomuch as after a while she changed course shifting to a tourist management and linguistic faculty, because she wished to open herself to a career that could allow her to travel as much as possible and to improve her linguistic skills to the maximum so that she could multiply her possibilities of exchanging points of views and contact with others; in her father's opinion this change of major points out her "irrepressible explosiveness," that lets her feel satisfied only through " the constant confrontation, free and profound, with all life experiences."

Mr. Englaro considers this way of interpreting life totally incompatible with Eluana's present condition and with the choices she would have most likely made if she were able to decide.

In confirmation of this opinion there are other episodes too, more extensively discussed in the defensive written documents, referring to Eluana's reactions to tragic occurrences leading to a coma, or anyhow to a condition of inability to move or to be aware, in friends or even celebrities (Mr. Englaro reported the episode of the skier of the national team Leonardo David, whose similar tragedy, led him after some year of "coma" – a word generically used at that time – to death in 1985; according to Mr. Englaro in the hearing also with regard to that time frame, Eluana made a lot of comments about this event, also because the well-known skier lived for a while in Lecco, the town where the girl lived).

In various circumstances Eluana was said to have stated that in her firm conviction those to live in those conditions would not be a real life for her, because only a full life, or in any case one in which you can move, think, communicate and interact with other people, would have been worth being lived, while a merely biological life would not be.

Often her guardian stated that, in any case, Eluana would not have tolerated surviving in a condition of constant dependence on someone's care or being a simple object submitted to someone else's will; her father stated that she herself on various occasions expressed this idea.

Mr. Englaro eventually concluded that "It would have been for her inconceivable to have someone else to manage her life against her will and choices" (…) and he pointed out that the very respect of this opinion inspired his legal initiative: "the whole vicissitude leading to the current proceeding is born from Mr. and Mrs. Englaro's opinion that Eluana has the right to assert her way to be and to think".

Thus premised, it is important to note out that Mr. Englaro's statements at today's hearing appear reliable first of all, as already stated earlier, for the way in which they were expressed, as the Court was able to notice his calm, but firm and exact, behaviour while outlining Eluana's character.

Particularly, didn't transpire from his words, in spite of the many solicitations given in order to analyze thoroughly his statements, any propensity to put his own words into Eluana's mouth, that instead Mr. Englaro often pointed out that certain statements and expressions he used to describe Eluana's personality were those truly that had been pronounced by the latter.

Another further and important element of comfort regarding the reliability of Mr. Englaro's statements derives from the already mentioned guardian ad litem's "converging opinion".

In this connection it is noteworthy that, according to the interpretative instruction of the Supreme Court, this converging opinion plays a very important role not only from a probative point of view, but, even first and foremost, for the actual intrinsic reliability of the incompetent person's presumed

will reconstructed by her guardian, because in addition to that kind of "authentic interpretation" of Eluana's will, wishes and personality which were asked to be furnished, and which were in fact provided by her guardian as an institutional "delegate," there is in addition her guardian ad litem's converging identical version, the latter appointed precisely in order to eliminate every possible risk deriving from a possible conflict of interests between the representative and the represented.

Integration – of evaluation and of will – which can only be of particular significance for the decision, due the function of warranty and control that the guardian ad litem was given as impartial subject, with the specific aim to verify the genuineness and the transparency of the intentions and aims that could have motivated the guardian, to clear them from any risk of egoistic interest.

A risk moreover that, in this case, seems almost to necessarily be excluded in *re ipsa* from a purely economic-materialistic-logistic point of view, considering the kind of care that Eluana has had (without any problems of the above named sort, admitted in a hospital which doesn't require the continuous domiciliary aid of relatives, and with all costs borne by the National Health System) and taking into account that, since we are dealing with a person unquestionably without property, there are no hereditary interests of the parents (towards which it is difficult to even suppose a generic interest to free possible other children, with respect to the future, from the "burden" of Eluana, since she was, and remains, an only child).

The guardian ad litem furthermore confirmed in its contents the genuineness and trustworthiness of the reconstruction made by the guardian, based on the investigations made by her personally, expressly excluding that, in her opinion, that choice could have been conditioned by particular selfish interests.

It might be useful to remark, in a secondary way, that the statements of the guardian are agreed to by Eluana's mother too, Mrs. Saturna Minuti, who signed two letters sent to institutional Authorities with which both parents agreed in reconstructing the long human and judicial vicissitude and described her free personality and her belief of the impossibility of living in a state of total impairment and subjection in their essential features.

Finally, the genuineness of the feeling that motivated the guardian to make his decision is confirmed by a letter – acquired among the documents of the proceeding and never contested – written by Eluana to her parents close to the last Christmas holidays before the car accident in which she was involved. In it Eluana affirmed the intention to transfuse in the mother and in the father all the trust and the love she had for them, and the thankfulness for what they were as persons, for the way they had always had dialogue with her and how they had always been close to her, had they had taken care of, raised and treated her, and for what they had made of her.

These are expressions that help to decrease the doubt regarding the possibility that the choice in defense of Eluana, as outlined by the guardian, could have been polluted or fogged by interests or secondary aims, instead of having been dictated simply by love and respect.

4.2 The examination of witnesses. Final evaluation and consequences of the investigation.

The most reliable evidence is, in the opinion of this Court, the confirmation of the reconstruction made by the guardian emerging from the statements made by some friends of Eluana (Francesca Dall'Osso, Laura Portaluppi and Cristina Stucchi) on the facts pointed out as topics of evidence that the guardian ad litem (and not the guardian) made after her own investigations regarding Eluana's past.

This Court believes that the witnesses offered a fundamental contribution that can be trusted since they have all known Eluana since childhood (and thus had the chance to know her deeply) and did not refer to single episodes, but set forth a sort of persona-logical model of Eluana.

In any case it is precisely in relationships with people of the same age, perhaps even more than in relationships with parents or sibling, that each of us expresses most of our own beliefs, anxieties, and our true way of being. From this derives the inevitably very important value that those statements from friends (and from relatives) possess, especially since many years have passed from the moment Eluana had the chance to express herself, because only the image that is in the memory of the people who were close to her can help to avoid – at least in part – the eroding effects of time and separation.

It must also be considered that, as already underlined, at least part of the evaluation on the reliability of the witnesses' testimonies and on their meanings (both on Eluana's independent, rebellious and unyielding personality and on her belief regarding the dignity of human life only if lived with full mental and motor capacities) has already carried out by the Section "Minor and Family" of this Court with the decree of 15.11/16.12.2006 as taken note of by the Supreme Court.

In any case, with regard to Eluana's "Weltanshauung" [world view], – in a concise way – the following statements, extracted from the comprehensive witness depositions, present considerable interest.

The witness Francesca Dall'Osso said:

"Eluana was very lively, always happy, with thousands of interests (...). She would have wanted to have a job related to traveling. She wanted a career that allowed her to travel. Her independence did not allow her to be restrained by rules, for example at school. Eluana gave great value to life that however, according to her, had to be lived at the deepest level. She would have never accepted a life with any mental or physical limitations (...). Going to the school of the nuns was a forced choice, it was the only linguistic high school of that area (...). Eluana's accident happened to her when she was twenty and thus almost one year after she had changed university, no, rather, a few months after it, because the university began in October and the accident happened in January. Eluana had changed majors from Law to Languages."

The witness Laura Portaluppi added:

"Eluana had the dream to work with me and travel all around the world with our work, a dynamic activity and certainly not a sedentary one. Eluana was not extremely athletic, but always in movement and very, very lively."

Finally, the witness Cristina Stucchi:

"Eluana was extremely lively – she never stopped – she always had to be doing something – she went crazy at the idea of staying home in the afternoon – she was always planning and livening up our group of friends."

Those statements are consistent with the description of some features of Eluana's personality that Mr. Englaro made and confirm without any doubt the marked sense of Eluana's freedom and independence, and her intolerance of any restrictions.

The reliability of the references to the desire of freedom and independence is confirmed by the contextual references to Eluana's nature, described as “extremely lively,” such as being a girl who “never stopped” and who did not want to be “restrained by rules,” and references to her desire of movement and travel.

Particularly important is also the importance that, in Eluana's beliefs, as was stated by the first witness, should be given to life: “Eluana gave great value to life that however, according to her, had to be lived at the deepest level” and without limits.

There thus emerges from these excerpts a girl who, first in her most intimate being, and then also in her beliefs, was the expression of an inborn, genuine spirit of freedom and independence, which loved to be always in movement, and which wanted to live intensely.

Her sense of life, then, does not appear merely abstract or metaphysical, but concrete. Precisely her great love for life expressed a limitation on the meaning of life: it could be loved and was loved only if lived deeply.

Therefore the evaluation made by the “Minor and Family” Section of this Court with the decree of 15.11/16.12.2006, with specific reference to the fact that the content of these testimonies was and is “indicative of Eluana's personality, characterized by a strong sense of independence, intolerance of rules and preconceived plans, a lover of freedom and of a dynamic life, very firm in her beliefs,” appears – beyond being a conclusive evaluation and by now a definitive one since it was not specifically appealed – to be the result of an investigation fully consistent with the acquired proof.

Regarding the way Eluana reacted to problems regarding life and death and, particularly the choice she would have made in case of subjection to forced feeding treatment in a situation of total loss of her movement, perception and cognitive capacities, it has already been said that the previous decree also definitively recognized that Eluana expressed many times the idea that it would have been better for her to die rather than to be constrained to an indefinite, merely biological survival.

And, in fact, the choice of the refusal of the carrying out of the treatment expressed by the guardian, and confirmed and agreed to by the guardian ad litem, find a precise and unambiguous confirmation in other statements of Eluana's friends.

On this matter, witness Dell'Osso said:

“Eluana told me about Alessandro, a friend of her, we were already at university. Alessandro had a motorbike accident and was in coma. Eluana went to the hospital to visit him and she was shocked by his situation, and she confessed to me she believed it was [would have been] better for him to die, because that could not be considered life. I don't know how Alessandro's situation evolved then. Eluana repeated me many times the sentence she had told me regarding the fact that that was not life, both referring to Alessandro and to other people that had similar circumstances. I particularly remember two episodes. One of them, about Filippo, a friend of ours, who had a car accident and died immediately. It was the last year of high school. I remember that Eluana told me that Filippo, in his misfortune, had been lucky, because he died immediately and was not in coma, or anyway paralyzed or unconscious. The other episode is about a story told by the Maria Ausiliatrice sisters where we attended high school. The story was about a girl who lived inside of an iron lung and the sisters told us about the bravery of this girl that, even if she was living in such conditions, could console others and enjoy life. Me, Eluana and other mates were very impressed, and wondered how it was possible to live in those conditions (...)”.

Witness Laura Portaluppi said that:

“When Eluana lost one year at university because she had first studied Law, she found me as a classmate during the first year of the Languages department. In those years we had several friends who had had car accidents, such as Filippo and Stefano, who died immediately. We were impressed, but did not comment. When instead one of her friends (only of Eluana’s), Alessandro, nicknamed Furio, was in a coma in the hospital after an accident, she was shocked after visiting him. She told me that after the visit she had gone to the church to light a candle for him, to ask the grace to die instead of living in that way. This impressed me because Eluana, lighting the candle, did not think to ask for him to recover. She did not even think that he could improve or be cured. I went to visit Eluana for many years, especially when she was hospitalized in Sondrio. I was struck deeply by the fact that every time she had to be moved, a hoist was necessary a hoist, that is, a slinging device. I thought it was not dignified, especially for Eluana, who would have smashed the world and would have never accepted such a situation.”

Finally, witness Cristina Stucchi said:

“(...) we were close friends and had friends in common. We both had known Filippo (Rota) because he was in the same elementary school, even if in a different class. On a Sunday morning in December 1988 we went to the mass with Filippo and then we planned to spend the afternoon in a discotheque in Valsassina. But in the end I did not go. In the evening I knew Filippo died in a car accident. I saw Eluana on Monday morning because she passed to my house before school to talk about what happened to Filippo. She was shocked. I remember particularly one of her sentences that shocked me: she said that it was better for him to die instead of lying in hospital, subject to others and connected to tubes – so it was better to die. (...) that Monday I tried to tell her that for me life was important but she was firm in her opinion. This is how Eluana was. There was no way to make her change her mind – she was very determined in her beliefs (...).”

In the light of those witnesses’ testimonies, there is no doubt of the correctness of the interpretation set forth by the guardian regarding the choice (oriented to interrupt the vital support treatment) that Eluana would have presumably made or would make in the tragic condition she is in, if she could have done so or if she could express herself directly and freely.

Substantially, it is shown that Eluana gave the utmost importance to both the possibility to move freely and independently, and to express a conscious will, interacting with the world through her intellectual-perceptive-cognitive capabilities. Those capabilities were, for her, the only means that could give sense to life.

It is a personal conception, but certainly not rare and not new in any case, being an ancient result of medical science: “And man must know that only from the brain derive happiness, pleasures, serenity and jokes, sadness, pains, frustration and crying. And thanks to it we acquire wisdom and knowledge, and we see and hear and judge and learn what's right and what's wrong, what's sweet and what's bitter...>> (Hippocrates, “On sacred illness,” about 400 B.C.).

It can be believed that, thus, for Eluana it would have been inconceivable to live without being conscious and able to have experiences and contact with others.

It would not be consistent with the reality of the facts not to recognize that the witnesses on this point are clear, univocal, in agreement and rich in details, so that there cannot be any doubt.

The opinion expressed by the “Minors and Family” Section of this Court cannot be shared (nor

however can it obviously be any longer considered effective according to the pronouncement of the Supreme Court) regarding this particular topic in the decree dated 15th November / 16th December 2006, where it argued that the testimony "nevertheless cannot be used in order to infer her sure expression of will opposed to carrying out the therapies and treatments that now keep her alive."

After agreeing to the admission in the proceeding of all the evidences so far re-examined, and in particular of the testimonies of Eluana's friends, that moreover (as the Supreme Court pointed out) have been considered reliable (and there are no reasons to consider them otherwise), is not understandable how these testimonies could be denied being considered probative, after their acquisition. The "Minors and Family" Section itself already acknowledged the testimonies' inevitable importance for the purpose of deciding [this case], at least in an abstract and potential sense, when it admitted some parts of the guardian ad litem's testimony referring to those episodes which were later confirmed by Eluana's friends.

Moreover, the Supreme Court sanctioned the decision precisely due to this conclusive denial of the importance of the acquired testimonies, and, judging it incoherent (regarding the premise by which the content of the testimony were, in fact, "indicative of Eluana's personality), pointed out that in order to annul these testimonies neither was the opinion that Eluana's ideas, as reported in these testimonies, were "not suited to be considered as a living will" enough, because the real point in question is to ascertain if they "were of use in order to reconstruct, together with the other results of the preliminary investigation, Eluana's personality and her very idea, before being unconscious, of human dignity, in light of her basic values and ethical, religious, cultural and philosophical beliefs that oriented her own volitional determinations."

In light of this it is evident that, in order to structure and to state the legal principle, the Supreme Court did not consider it indispensable to directly reconstruct a sort of effective living will for Eluana, containing her clear "advance directives" regarding treatment, even if made informally; but rather it considered necessary and sufficient "to ascertain if her father, in his capacity as guardian, mirrors his daughter's orientation towards life."

We can also infer that the opinion included in the previous decree of this Court regarding the irrelevance/unimportance of Eluana's statements could not and cannot be considered suitable to lessen the relevance of these declarations, because they were in any case concurrent informative elements suitable to define in a univocal way Eluana's persona-logical framework, identity and "Weltanshauung," as the "Minors and Family" Section itself already acknowledged.

But in reality what results from the completed preliminary investigation is not only what has been previously stated; it is something more because Eluana's statements and remarks, directly referring to tragic incidents that happened to young friends (but also to celebrities, as the previously mentioned skier, Leonardo David), indicate unmistakably not only that Eluana would never have wanted to be been a mere passive object of a treatment aimed at the mere artificial support for her biological survival, but also the reasons "why" she would never have permitted this possibility: in particular because she considered a pathological condition of total motor incapability and absolute sensory deprivation (immobility due to tetraplegia and unconsciousness due to brain lesions – the state in which she actually lies) that prevented her to move, feel and think, being simply a passive "object" depending on someone's will – as radically incompatible with her life idea.

This is why then, when faced with her friend Alessandro's destiny, who'd fallen into a coma, Eluana confides that in her opinion it would have been "better if he had died, because that wasn't life"; because a life to be spent in a bed, unable to think or feel, "was not life, both referring to Alessandro and to other persons in similar conditions."

These considerations – clearly excluding that Eluana was minimally inclined to receive whatever medical treatment in a situation of sensory deprivation such as that defined as Permanent Vegetative Condition, and that she therefore could have considered, in her life conception, also the artificial

feeding and the other treatments she undergoes as not injurious to her personal dignity (given "the per se unacceptability of the idea of a body destined to survive the mind, thanks to medical care" according to the concise summary rendered by the Supreme Court) – consistently come out in multiple occasions, reported by the witness-friends, in which Eluana expressed always the same opinion that is not possible to live "motionless into coma, or paralyzed or unconscious" or like a girl in an "iron lung"; she also stated that it would be better to die "instantly."

It could not be more touching, and dense with meaning for the purpose of the decision, the plastic and vivid imagine of Eluana who lights a candle praying for... the death of her friend who was paralyzed from a car accident, without even imagining it could be better for him to live in conditions of total impairment.

Finally, it is helpful to note the incompatibility between Eluana's disposition and beliefs on one hand, and a state of subjection due to the incapacity to feel, think, communicate and act on the other, also referring to the scene that one of her friends in the hospital where Eluana is hospitalized witnesses, when she's impressed by the "fact that every time she had to be moved, a hoist was necessary a hoist, that is, a slinging device. I thought it was not dignified, especially for Eluana, who would have smashed the world and would have never accepted such a situation."

It is true that this is a subjective evaluation of Eluana's friend, but in the context of the reconstruction of a presumed will personal assumptions made by those who were closest to Eluana must have their space, obviously if and to the extent they can be referenced to specific facts and experiences, which is precisely what happens here.

In this scheme of things it thus has a relevant value, indirectly useful to layout the state of total subjection and constriction that Eluana would never accept, the imagine of the body wrapped up like an object in an "sling" and lifted up by a "hoist" every time they need to move, wash, massage or manipulate it.

It is difficult to doubt, in the light of the personal profile of Eluana laid out up to now with the evidence acquired, that she would have ever accepted – not even for a short lapse of time, let alone for more than sixteen years - just as her friend thought, to be nailed into in such condition objectively unchangeable and without hope.

Thus, the "authentic interpretation" of the assumed will of Eluana given by the guardian seems to be confirmed, where he stressed that for Eluana it would be unconceivable to be subject not only to an invasive treatment with the aim of keeping her artificially alive in conditions of total subjection to other's will, with the inevitable implication of being subjected to the oversight and manipulation of other people, but more in general to be blocked immobilized in bed like an "object," indefinitively deprived of the possibility to fully live her life, a condition which, by definition, is incompatible with her conception of personal dignity, the conditions of mere biological survival not being considered "worthy of her," due to her conception of dignity and of a dignified life.

From this point of view it emerges how the choice of the guardian is consistent with the best interest of the incompetent patient, as she intended it, in the context of a conception of life so deeply rooted – also because of her temperament and disposition – in the generalities outlined here, to appear not easily subject to possible changes of mind that might make it out-of-date because of the passing of time and of experiences (that is why even if her friend Cristina Stucchi tried to change her opinion that "it was better die than stay subject to others, connected to tubes," telling her that "life was important," she could only remark that "she was firm in her opinion. This is how Eluana was. It was impossible to make her change her mind – she was very determined in her

beliefs"; unyieldingness that was already proven in the mentioned decree of 15 November/16 December 2006).

Faced with this conception the fact, beyond doubt, that feeding and hydrating non self-sufficient and totally incompetent patients is a legally binding obligation and an irremissible duty of social solidarity, clearly loses importance, whilst, instead, what acquires maximum importance is the fact that Eluana, when she was still conscious, showed a personality, a lifestyle, beliefs and desires, clearly stating that she would have never been treated at all in case of a state of total immobility/mental-physical incapability (and thus not even through that basis-support therapy constituted by feeding/hydration), preferring to be allowed to die, since she saw every external intervention that could interfere in the natural evolution towards the termination of a merely biological life as a violence or an injury degrading her personal dignity.

Not against such evidence – that in the appraisal of the facts demands

F(or) T(hese) R(easons)

the Court of Appeals of Milan

-First Civil Section-

1) **accepts the complaint filed by Mr. Beppino Englaro, as guardian of Eluana Englaro, with which the guardian ad litem of the latter, attorney Franca Alessio, agreed, and due to it, in the reform of the decree no. 727/2005 issued by the Tribunal of Lecco on 20th December 2005 and filed on 2nd February 2006, grant the request – concurrently filed by both the legal representatives of Eluana Englaro –to authorize the ordering of the interruption of the artificial vital support treatment of the latter, carried out through feeding and hydrating her by means of nasal-gastric probe;**
2) **remands for the other provision regarding the concrete accomplishment of such order to the points contained in the conclusive part (point 5) of the opinion above;**
3) **charges the office of the court's clerk for the communication to all the parties of the proceeding;**

So stated in Milan, on 25th June 2008
The writer Lord
The President
(Doc. Filippo Lamanna)

(Doc. Giuseppe Patrone)