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## HEALTH CARE LAW

### Appellate Division Implies Medical Providers May Refuse Treatment Based Upon Futility of Care

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New Jersey's Appellate Division, in the course of dismissing a case on procedural grounds, suggested how it might address the issue of whether a health care provider may refuse to continue life sustaining treatment where such treatment would be futile. Dismissing the case as moot, the court in *Betancourt v. Trinitas Hospital*, 415 N.J. Super. 301 (App. Div. 2010), left open the issue of medical futility and implied that resolution of the issue is best left for the New Jersey Legislature.

In *Betancourt*, the patient underwent surgery at Trinitas Hospital to remove a malignant tumor from his thymus gland. The tumor was excised but, while in the post-operative intensive care unit, the ventilation tube supplying the patient with oxygen somehow became dislodged, and as a result, the patient was deprived of oxygen and he developed anoxic encephalopathy, a condition that caused the patient to lapse into a persistent vegetative state. The patient was eventually discharged

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from the hospital and admitted to other facilities for rehabilitative treatments. He was re-admitted to the hospital for kidney dialysis treatment secondary to a diagnosis of renal failure. At the time of his surgery and re-admittance to the hospital, the patient did not have an advanced directive.

On several occasions after the patient was re-admitted to the hospital, the hospital's administration requested the patient's family to place a Do-Not-Resuscitate ("DNR") order and to cease kidney dialysis treatment, but the patient's family refused. The hospital made efforts to transfer the patient to another facility, but no other facility was willing to accept him. Subsequently, the hospital unilaterally placed a DNR order in the patient's chart and removed a dialysis port, thereby halting dialysis treatments. Representatives of the hospital opined that the patient was in an unresponsive, irreversible vegetative state and that any further treatment would be futile. Consequently, the medical providers opined that all mechanical life support treatment should be discontinued.

Plaintiff, the daughter of the patient, filed suit in Superior Court of New Jersey, Chancery Division, Union County. Plaintiff sought the court to enter a temporary restraining order enjoining the hospital from discontinuing treatment.

Plaintiff requested that the court appoint her as guardian of the patient and permit her to make all medical decisions for her father. The hospital, however, argued that "continuation of treatment is contrary to the standard of care where, as here, it is futile," and argued that it should not be required to continue treatment. The issue to be determined by the court was whether a medical provider is required to provide medical care to a patient where the treatment is considered to be futile.

In an unpublished decision, the Chancery Division rejected the arguments of the hospital, stating that the Supreme Court of New Jersey has instructed that "it is not the role of the trial court to decide whether treatment should be removed from a comatose patient but rather to establish criteria that respect the right to self-determination and protect incapacitated patients." See *Betancourt v. Trinitas Regional Medical Hospital*, UNN-C-12-09, at \*7 (citing *Matter of Jobs*, 108 N.J. 394 (1987)). The Chancery Division explained that New Jersey courts would not take the role as a surrogate decision-maker, essentially rejecting any notion that a medical provider may withdraw treatment on the basis that such treatment would be futile. The court appointed plaintiff as the patient's guardian, ordered the hospital to re-

establish the level of treatment that had been provided to the patient prior to the discontinuation of dialysis and further instructed that the DNR order be removed from the patient's chart. The hospital appealed, but the patient died while the appeal was pending. As a result of the patient's death, the Appellate Division dismissed the appeal as moot.

Although related to "right-to-die" cases, medical futility cases actually seek an exception to the right-to-die issue. In a trilogy of cases, the state Supreme Court recognized that patients and their families have a right to refuse or terminate life-sustaining treatment. See *Jobes*, supra, 108 N.J. 394; *In re Conroy*, 98 N.J. 321 (1985); *In re Quinlan*, 70 N.J. 10 (1976). The right-to-die cases address the issue of where a patient, or a patient's family member or representative, seeks to have the hospital or medical provider withdraw life-sustaining treatment. Medical futility cases, however, typically involve the hospital or medical provider, as opposed to the patient, seeking to withdraw the treatment. In those circumstances, the hospital seeks, in certain matters where the health care providers believe that the care provided would be medically inappropriate to carve out an exception to the right-to-die cases.

The medical futility argument is based on the simple notion that a physician need not be required to provide treatment that will not have an effect on the diagnosis. In its simplest form, a physician would not be required to give a patient an ice pack to treat a heart attack simply because the patient requested the ice pack as treatment for the heart attack. Such treatment would be seen as futile because it would have no effect on the heart attack, and it would be medically inappropriate for the physician to provide the ice pack.

As explained above, the Appellate Division did not resolve the substantive issue of whether a health care provider

may withdraw care based upon futility as the court dismissed the appeal as moot. The court seemed unwilling to rule on the issue because such a ruling would be "whole-cloth legislation from the bench." The court did, however recognize that the debate on medical futility would continue and should be addressed "in thoughtful consideration by the Legislature as well as Executive agencies and Commissions charged with developing the policies that impact on the lives of all."

Although at first glance it may appear that the Appellate Division side-stepped on an important issue with possibly nationwide consequences, the suggestion that the issue is best left for proper legislation may be the best course of action. The hospital sought an open-ended exception to the right-to-die doctrine for whenever a health care provider deems treatment to be unnecessary. While an exception that would allow some ability for a health care provider to refuse to continue treatment that is deemed unethical may be appropriate in certain circumstances, accepting such an argument might have led to an overbroad exception.

The Legislature may in general be better to craft a medical futility statute that would set the requirements for when a health care provider can refuse to continue providing treatment that would be considered futile. Such a direction has already been implemented by the Legislature in the New Jersey Advanced Directives for Health Care Act, N.J.S.A. 26:2H-53, et seq. (the "Advanced Directives Act"). That Advanced Directives Act specifies that consistent with the terms of an advance directive, "life-sustaining treatment may be withheld or withdrawn from a patient ... [w]hen the life-sustaining treatment ... is likely to be ineffective or futile in prolonging life, or is likely to merely prolong an imminent dying process." N.J.S.A. 26:2H-67(a)(1). The Legislature has already recognized that a health care provider may deviate

from the terms of an advanced directive where the health care provider determines the life-sustaining treatment to be futile. Nevertheless, the Legislature has also expressed its intent that "decisions to maintain life-sustaining treatment must take precedence." Moreover, the Advanced Directives Act states that while the right of individuals to forego life-sustaining measures is not absolute and is subject to certain societal interests, "[t]he most significant of these societal interests is the preservation of life." N.J.S.A. 26:2H-54(d).

The Legislature, therefore, may better determine whether to expand the ability of a health care provider to refuse to continue futile treatment from being limited to advanced directives to all aspects of health care. Other states, such as Texas and Virginia, have enacted such statutes that allow health care providers to refuse to render medical treatment that is medically or ethically inappropriate. The New Jersey Legislature can consider and debate such a law and also include certain checks and balances, such as requiring judicial review before the treatment is stopped or requiring the health care provider to transfer the patient to a facility that would agree to continue the care.

The subject of medical futility is an issue that is likely to be raised again as medical technology continues to improve. Until a statute is enacted in New Jersey or the courts issue an opinion that decides a case on the merits, the medical futility issue may remain unresolved in New Jersey. Although advocates for not allowing an exception to the right-to-die cases will point to the Chancery Division's opinion in *Betancourt*, that opinion is unpublished and therefore not binding on any other New Jersey court. Hospitals and health care providers in New Jersey should consult experienced counsel before engaging in efforts to stop care on the basis that such care is futile or medically unethical. ■