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BY DANIEL R. LEVY

New Jersey Enacts Law Requiring HIV Testing For Both Pregnant Women and Newborns

Privacy issues will likely be outweighed by the state's interest in health and welfare

On December 26, 2007, Senate president Richard J. Codey, in his capacity as acting governor, signed into a law a bill requiring health care providers to test pregnant women for Human Immunodeficiency Virus (HIV) unless the woman affirmatively refuses such testing after being advised by the provider that it will occur as part of routine prenatal care. The law requires health care providers to test a pregnant woman for HIV as early as possible in the woman's pregnancy, and again during the third trimester of the pregnancy. The law further requires the testing of newborns for HIV in cases where the HIV status of the mother is unknown. The law takes effect on June 23, 2008.

Four states (Arkansas, Michigan, Tennessee and Texas) have also enacted legislation requiring health care providers to test pregnant women for HIV. Three other states (Connecticut, Illinois and New York) require testing for

Levy is an associate in the Health Care and Life Sciences and Litigation group of Epstein Becker & Green in Newark.

all newborns for HIV. By enacting the law, New Jersey is the first state to require HIV testing for both pregnant women and newborns.

Prior to enactment, the law in New Jersey required health care providers only to offer HIV testing to pregnant women, but it wasn't mandatory. Under the new law, a physician or other health care provider who is the primary caregiver for a pregnant woman shall, in the absence of a specific objection to the testing by the woman, test the woman for HIV as early as possible in the pregnancy and again during the third trimester of the pregnancy. N.J.S.A. § 26:5C-16.

The law effectively provides for a requirement to test the newborn in the event that the mother had previously objected to testing during her pregnancy because the law requires each birthing facility in the state to test a newborn for HIV "if the HIV status of the mother of the newborn is unknown." N.J.S.A. § 26:2-111.2(a). Under the law, parents may only object to the testing of the newborn on the basis that the HIV test is "in conflict with their religious tenets

and practices." N.J.S.A. § 26:2-111.2(c). Parents who object to the test of the newborn for religious reasons must "provide the health care facility with a written statement of the objection, and the statement shall be included in the newborn's medical record."

In addition to requiring the testing of a pregnant woman, the law requires health care providers to inform the woman about HIV and AIDS, including an explanation of HIV infection and the meanings of positive and negative test results. Additionally, health care providers are required to inform the woman of: (1) the benefits of early testing for HIV; (2) the benefits of a second test during the third trimester; (3) the medical treatment available to treat HIV infection if diagnosed early; (4) the reduced rate of transmission of HIV to a fetus if an HIV-infected pregnant woman receives treatment for HIV; and (5) the interventions that are available to reduce the risk of HIV transmission to the fetus and newborn. The information may be provided orally or in writing, and the health care provider shall offer the woman an opportunity to ask questions.

The law further requires the health care provider to advise the woman that HIV testing is recommended for all pregnant women both early in their pregnancy and during the third trimester, and that she will receive HIV tests as part routine prenatal tests unless she specifically declines to be tested. In the event that the woman declines to be tested for HIV, the health care provider is required to document the declination in the woman's medical record. N.J.S.A. § 26:5C-16(a)(1).

Requiring health care providers to test pregnant women and certain new-

borns for HIV raises potential privacy concerns, in particular, the right for an individual to make his or her own medical decisions. Every competent individual has a constitutional right to make health care decisions, including the right to refuse medical treatment. *See In re Jobes*, 108 N.J. 394, 427 (1987) (a competent patient's right to make his or her own medical decisions generally will outweigh any countervailing state interests); *In re Peter*, 108 N.J. 365, 372 (1987) (a competent patient has the right to refuse medical treatment); *In re Conroy*, 98 N.J. 321, 348 (1995) (holding that a patient's right to refuse medical treatment, even at the risk of personal injury or death, is protected by the common law as well as by the federal and state constitutional right of privacy); *see also Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 278 (1990) ("a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment").

The issue of privacy may be implicated where a woman who previously refused to be tested for HIV during her pregnancy subsequently objects to the testing of the newborn when the birthing facility proceeds, pursuant to the law, to test the newborn because the HIV status of the mother of the newborn is unknown. It is reasonable to assume that the mother, who refused HIV testing during the pregnancy, may attempt to refuse to consent to the newborn being tested. It is well settled that the decision to provide or withhold medical treatment for a minor is generally left to the parents or legal guardian. *See Niemiera v. Schneider*, 114 N.J. 550, 564 (1989) (parent of a minor child is the one who makes the medical decisions); *In re Promulgation of Guardianship Servs. Regulations*, 103 N.J. 619, 640 (1986) (recognizing that parents are ordinarily the ones that make

critical decisions for the child in areas such as medical treatment); *see also Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972) (upholding parents' rights to assume primary role in making decisions that will affect their children).

A parent's authority in regard to making medical decisions for his or her child, however, is not absolute. *In re Farrell*, 108 N.J. 335, 348-49 (1987) (stating that the right to refuse medical treatment is not absolute and the state has countervailing interests in sustaining a person's life); *Parham v. J.R.*, 442 U.S. 584, 604 (1979) ("parents cannot always have absolute and unreviewable discretion"); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 74-75 (1976) (a parent cannot be given an absolute veto over the decision of the physician and minor patient to terminate the minor patient's pregnancy). Where a parental decision places the child in harm, courts may review and alter the parental decision by examining the best interests of the child. *See* Daniel R. Levy, "The Maternal-Fetal Conflict: The Right Of A Woman To Refuse A Cesarean Section Versus The State Interest In Saving The Life Of The Fetus," 108 W. Va. L. Rev. 97, 106 (2005) ("right to refuse medical treatment is not absolute in the situation where a parent refuses medical treatment for his or her minor child."); *see also In re L.H.R.*, 321 S.E.2d 716, 722 (Ga. 1984) (stating that the parents' right to make decisions for the child may be taken away where the parents assume a stance that in any way endangers the child).

Under the New Jersey law, unless the parent's objection to the HIV test on the newborn is based upon religious tenets, the parent's objection will likely be denied. Any potential argument that

the parent has the right to refuse the HIV test on behalf of the newborn because the parent has a privacy right to make medical decisions for the child would face formidable, and likely dispositive, challenge. Should the parent seek judicial intervention to oppose the HIV test, the state would likely argue that it may require such a test under its *parens patriae* power because the HIV test is in the best interests of the newborn. *See Bowen v. American Hospital Assn.*, 476 U.S. 610, 627 n.13 (1986) (infants fall under the *parens patriae* power of the state, and therefore, the state may supervene parental decisions to ensure that the choices made are not so detrimental to the child's interests); *Halderman v. Pennhurst State School & Children's Hospital*, 707 F.2d 702, 709-710 (3d Cir. 1983) (the right of parents to control medical decisions for their minor children can be overcome by a showing of abuse or neglect, or by a showing of a significant governmental interest, and the state, as *parens patriae*, may then intervene to protect the child. *Brzozowski v. Brzozowski*, 265 N.J. Super. 141, 147 (Ch. Div. 1993) (where a parent's decision is not in the best interests of the child the court may substitute its decision for that of the parent). The state's interest in health and welfare would likely outweigh any privacy interests of the parents.

Though the health care provider may ultimately proceed with the testing despite such challenges, such providers should prepare for such challenges, and educate themselves and their staff with how to respond to the questions that are sure to arise with and from patients once the law takes effect. Experienced counsel may shorten the learning curve and help avoid costly or time consuming missteps. ■