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HEALTH LAW

Unilateral Termination of Life-Sustaining Treatment in Neonatal Care: A Legal Overview

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Physicians regularly use medical technology to prolong and improve the quality of their patients' lives. There often comes a point, however, when treating the illness no longer affords the patient any benefit, and aggressive measures are needed merely to sustain life. At this point physicians routinely shift the goal of care toward comfort and closure [1].

In many such situations, a surrogate must speak for the patient. This is always true in the case of newborns; physicians interact with the surrogate decision maker or decision makers who are legally empowered to act in the infant's best interest. Typically this is the infant's parent or parents, and most often the physician and surrogates come to an agreement about what is best for the infant [2]. There are times in a futile care situation, however, when surrogates and physicians cannot agree on the decision to terminate life-sustaining treatment. When this occurs, the physician's first duty is to advise the surrogates of alternatives; that is, they may transfer the care of the infant to another physician or to another health care institution [1]. If the infant's surrogates are unwilling or unable to take advantage of the alternatives, a physician is acting ethically if he or she decides to withdraw life-sustaining treatment [1]. Is the physician's unilateral decision to terminate life-sustaining treatment legal? What legal consequences may occur as a result of this action?

Once the primary physician makes it clear to the infant's surrogate that he or she is unwilling to continue aggressive life-sustaining treatment and intends to withdraw it, several courses of action are available. The surrogate may seek to force the hospital to continue treatment. The physician can attempt to gain custody of the child in states that have temporary protective custody statues. A statutory process may exist to handle the dispute, or, if the physician withdraws treatment unilaterally, the surrogate can attempt to punish the physician through retributive litigation.

Preventive Litigation

The surrogate who disagrees with the physician's decision to terminate life-sustaining treatment for a neonate can seek a declaration from a court to force treatment. Historically, the judicial system is as likely to grant this kind of injunction as not [3]. This type of litigation has produced odd and inconsistent results. In the Baby K case, a judge invoked the Emergency Medical Treatment and Active Labor Act (EMTALA) perhaps inappropriately to prevent the physician from withdrawing

treatment [4]. In a controversial Michigan case (Baby Terry), the court had the mother declared incompetent in order to appoint a state guardian who eventually went along with the physician's decision to cease life-sustaining measures [4].

The intent of preventive litigation—to protect and advocate for the rights of the surrogate—is certainly worthy. But the infant must be kept on aggressive life-sustaining medical treatment throughout the legal procedure, a situation that is clinically and ethically offensive to the health care team. This type of litigation subjugates the rights and ethical duties of the physician and hospital to those of the surrogate, often not in the best interest of the patient.

Temporary Protective Custody

In states that permit law-enforcement officers or physicians to take temporary protective custody of a child at risk for abuse or neglect (Illinois and Iowa, for example), a physician may be able to gain custody of an infant if he or she believes the parents are not acting in the baby's best interest [5]. It is debatable that gaining custody from a parent in order to end the life of the child is encompassed by the purpose of these statutes. The potential gray area of statutory interpretation coupled with the effect of depriving the surrogate of his or her rights is likely to lead to retributive litigation replete with significant disadvantages.

Legislative Remedies: Advance Directives Acts

Because judicial decisions have been inconsistent and potentially unethical, several state legislatures have enacted statutory guidance. Maryland, Virginia, and Texas have all passed statutes that attempt to address the unilateral removal of life-sustaining medical treatment [6-8]. The Maryland and Virginia laws do not define terms like, "ethically inappropriate treatment" or "medically ineffective," nor do they provide any type of process or instruction [9]. As of today these two laws are untested by the judicial system [10]. I will say more about the Texas law after discussion of the fourth course of action—retributive legislation.

Retributive Litigation: Asking For Forgiveness

The idiom, "it is better to ask for forgiveness than to seek permission," comes to mind when reviewing the case law that has dealt with this situation. In these cases, the surrogate did not seek legal intervention, the physician unilaterally withdrew life-sustaining treatment without the permission of the surrogate, and the infant died. The recourse for the surrogate is to sue for damages in a tort claim or file a medical malpractice claim [11]. Historically physicians have prevailed in these cases [12]. Judges are reluctant and typically unwilling to punish physicians who acted in accordance with the appropriate established standard of care [13]. Even in jury cases, the tendency to favor the physician's decision is evident [14]. As long as the physician did not make unrealistic promises and clearly described the consequences of the action he or she was about to take, he or she is unlikely to be found legally liable to the surrogate for the death of the baby [15].

Retributive litigation, however, ignores the rights of the surrogate, who is legally empowered to make medical decisions for the child and is supposed to work with the physician to achieve the desired treatment. The subjugation of the surrogate's rights will most likely invite a legal battle after the death of the patient. The time and money spent on this kind of litigation help neither patients nor physicians. A physician can end up in court and possibly in the news. Patients can risk significant amounts of money in the form of legal fees and lose more often than not.

Texas Advance Directives Act

In 1999 the American Medical Association adopted an opinion detailing the ethics of futile care [1]. The Texas legislature incorporated much of that opinion in the Texas Advance Directives Act (TADA). TADA clearly defines procedures for the physician, surrogate, and judicial system to follow when resolving impasses over termination of life-sustaining medical treatment [5]. The act states that, once the primary care physician makes the determination that continuing life-sustaining treatment is futile and inappropriate, he or she must notify the hospital and infant's surrogate [8]. If the surrogate disagrees, the physician and surrogate meet with an ethics committee to determine whether withdrawal of life-sustaining treatment is justified [8]. If the ethics committee agrees with the physician's judgment, the hospital gives the surrogate 10 days to find a health care institution that is willing to continue the treatment [8]. The surrogate can appeal for an extension in court [8]. At the appeal, the judge decides whether granting more time would make it possible for the surrogate to find a willing health care provider [8]. If the surrogate does not seek an extension, or the judge rules against it, the life-sustaining medical treatment may be withdrawn by the physician against the wishes of the surrogate with immunity from civil or criminal prosecution [8].

The law allows a physician to feel more comfortable when confronted with this situation [10]. When physicians have a clear, legally approved process, they are willing to use it openly [10].

While physicians and health care providers in Texas are required to follow this law, it has some definite shortcomings. Of primary concern is the fact that surrogates are not required to demonstrate that they fully understand the course of events that the committee and physicians end up implementing [5]. It is important that there is a reasonable attempt to make sure that surrogates are adequately informed and can understand the gravity of the situation to the fullest extent possible; if they do not, the hospital and physicians will most likely face retributive litigation.

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