JACQUELINE BETANCOURT,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003849-08 T2
Plaintiff/Respondent,	Chancery Action
vs.	On Appeal from a Final Decision of the Superior Court of
TRINITAS HOSPITAL,	New Jersey, Chancery Division Docket No. UNN-C-12-09
Defendant/Appellant.	Sat Below: Hon. John Malone, J.S.C.

REPLY BRIEF ON BEHALF OF DEFENDANT/APPELLANT, TRINITAS HOSPITAL

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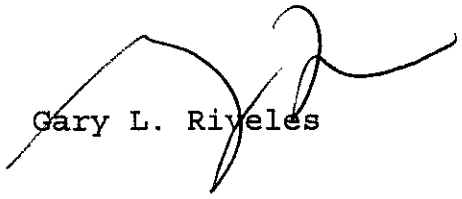

Gary L. Riveles

Date: September 28, 2009

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendant/Appellant will rely upon the Statement of Facts and Procedural History portions contained within the merits brief previously filed.

LEGAL ARGUMENT

POINT I

THIS APPEAL MUST BE DECIDED ON THE MERITS.

Plaintiff devotes an enormous amount of time and energy arguing that this appeal is moot and should be dismissed without consideration of the important questions presented. Relying on a fallacy that because this is a matter of first impression, that it is unlikely to reoccur, plaintiff suggests that not only are the questions presented without sufficient importance to warrant review, but further there is no support for the proposition that a similar situation could or would likely reoccur. Plaintiff's arguments are misdirected and untenable. The issue at controversy here is exceedingly important and presents New Jersey courts an opportunity to make a decision that could be influential throughout the country on an issue that has come up in several other states and will continue to occur unless an appropriate framework is provided to resolve these types of end-of-life disputes.

Conveniently, plaintiff dismisses the "right to die" cases as being irrelevant to the issues at hand in this matter in the mootness section of the brief but relies extensively on these same cases to argue that only a family has a right to

dictate the care received. This type of duplicitous reliance cannot be condoned.

As set forth in defendant's supplemental brief, New Jersey courts have repeatedly held that in situations of public importance or when a controversy is capable of repetition but evades review because of the short duration of any single party's interests, the appeal should go forward notwithstanding mootness as to the original parties. (SBT, 4-5) (citations omitted). Several of the "right to die" cases support this position. See In re Conroy, 190 N.J. Super. 453 (App. Div. 1983); see also Matter of Farrell, 108 N.J. 335, 347 (1987). While the factual settings of those cases were different, they presented the converse of this situation in the matter *sub judice*. Certainly, the converse of those situations is as weighty, if not more weighty, than the original cases themselves.

With the continuing crisis in health care and the closure of numerous New Jersey hospitals, this issue is one of grave importance that deserves to be heard.

Accordingly, defendant/appellate, Trinitas Hospital, respectfully requests that this Court consider the merits of this appeal and render an appropriate decision.

POINT II

THE TRIAL COURT IMPROPERLY DETERMINED THAT THE HEALTH CARE PROVIDERS WERE REQUIRED TO CONTINUE TO PROVIDE TREATMENT WHICH WAS BELOW THE STANDARD OF CARE, INHUMANE, AND WOULD ONLY SERVE TO PROLONG A PAINFUL DEATH.

In opposition to this appeal, plaintiff wrongly asserts that the Trial Court found that the administration of dialysis was within the standard of care. Plaintiff relies exclusively on the testimony of Dr. Goldstein, a physician who examined the patient once at the behest of the plaintiff and who was not a treating physician. Further, there was no competing testimony offered by the plaintiff that Mr. Betancourt was in a permanent vegetative state. Dr. Goldstein did not opine on this issue, and plaintiff presented no other expert testimony. Rather, plaintiff's only support was from family member perceptions and ambiguous hearsay statements contained within the medical record. Additionally, plaintiff and plaintiff's *amici* suggest that prior precedent concerning surrogate decision making is unlimited in scope and must always be respected notwithstanding the circumstances presented. Plaintiff's arguments in this regard are without merit.

Multiple physicians from Trinitas testified at length that not only was Mr. Betancourt in a permanent vegetative state but that he was dying and that the treatments being rendered

were below the prevailing standard of care and would only serve to prolong the dying process. Dr. McHugh, the Medical Director of Trinitas Hospital, described the situation as "hopeless." (2T:67). In contrast, Dr. Goldstein acknowledged that withdrawal of dialysis from a patient who is in a permanent vegetative state may be appropriate under certain situations, but that his **personal** opinion was that physicians are in the service of the family and should continue dialysis if the family so desires. (3T:51-22 to 25; 56:21 to 24; 58:22 to 59:1).

The overwhelming testimony at the trial was that the treatment being rendered did not comport with the standard of care. This is supported by the Clinical Guidelines set forth by the American Society of Nephrology and the Renal Physicians Association. (Da-33). These guidelines state that it is:

> Appropriate to withhold or withdraw dialysis from patients with either A[cute Renal Failure] or E[nd Stage Renal Disease] in the following situations . . . patients with irreversible, profound neurological impairment such that they lack signs of thought, sensation, purposeful behavior, and awareness of self and environment.

Id. Consistent with that view, the treating physicians and members of the Prognosis Committee of Trinitas Hospital determined that continuation of dialysis would be below the standard of care and should be properly withdrawn. The only opposition offered at trial was the personal opinion of

Dr. Goldstein. The Trial Court's decision was, therefore, erroneous. Further, based upon the written decision, it is unclear whether the Trial Court ever even considered the issue of the standard of care in reaching the determination.

Plaintiff also takes the position that prior Supreme Court precedent mandates that the family has an unlimited right as surrogate decision makers to compel treatment. This is an unfair mischaracterization of the applicable "right to die" cases. While it is not disputed that the Court in the relevant decisions determined that a surrogate decision maker in the absence of a living will is the appropriate designee to make decisions regarding health care, never did the Court say that the right was unlimited and should not be balanced with competing interests. Trinitas Hospital does not dispute that a component of the discussion is the family's desire; however, that desire cannot, by itself, be the judicial talisman that controls in a situation like that presented here.

In In re Farrell, 108 N.J. 335, 351-52 (1987), the New Jersey Supreme Court stated:

> Health care standards are not undermined by the medical authorities that support the right to self-determination that we recognize today. Even as patients enjoy control over their medical treatment, health care professionals remain bound to act in consonance with specific ethical criteria. We realize that these criteria may conflict with some concepts of self determination.

> In the case of such a conflict, a patient has no right to compel a health care provider to violate generally accepted professional standards.

This statement certainly serves to limit the scope of the patient's right to compel treatment. This statement is consistent with the view espoused by the governing medical associations as well as legislative enactments in New Jersey and other statutes throughout the country. Public policy supports limitations on a patient's or proxy's rights to compel treatment.

Similarly, in Couch v. Visiting Home Care Services, 329 N.J. Super. 47 (App. Div. 2000), this Court reversed an Order requiring home nursing care for an indefinite period of time where the nursing professionals were of the view that the continued care was medically inappropriate. Relying on Matthies v. Mastromonaco, 310 N.J. Super. 573 (App. Div. 1998), affirmed 160 N.J. 26 (1999), the Court stated:

> If the patient selects a course, even among reasonable alternatives, which the physician regards as inappropriate or disagreeable, the physician is free to refuse to participate and to withdraw from the case upon providing reasonable assurances that basic treatment and care will continue.

329 N.J. Super. at 52 (quoting Matthies, *supra* at 598).

Plaintiff and her *amici* suggest that Couch mandates that at a minimum transfer be required in order to cease

services. That is a distortion of the reasoning in Couch. Certainly, the Court held that the physicians provide reasonable assurances that "basic treatment and care will continue."

In the instant matter, defendant sought to withdraw dialysis treatments. Certainly, other basic treatments and care would have continued. The Couch court continued:

> If defendants or either of them, feel that in the professional judgment of the nurses who must manage the case, they cannot properly and ethically continue their care, provisions must be made to furnish plaintiff with appropriate alternative inpatient 24-hour care or to furnish plaintiff with a reasonable time in which to make his own alternative arrangement. The ultimate decision is for him.

329 N.J. Super. at 54.

Here, Trinitas Hospital attempted to arrange transfer, but no other facility was willing to accept the patient under these circumstances. In this situation, Trinitas and its affiliated physicians should have been free to withdraw dialysis if no other facility was willing to accept the patient. This is consistent with this Court's decisions in Couch and Matthies. Plaintiff was certainly free to attempt to arrange for alternative care arrangements herself. That apparently was never attempted.

What remains clear, however, is that basic care would have continued consistent with the Couch decision. Defendant

sought to terminate dialysis services, extraordinary treatments in this situation that only served to prolong the dying process. A patient's right to self determination must have limits, and the Trial Court erred in not setting those limits under the circumstances presented. That improvident decision should be reversed. Otherwise, health care providers facing similar situations would be chilled in their conduct.

POINT III

THE TRIAL COURT IMPROPERLY APPOINTED JACQUELINE BETANCOURT AS GUARDIAN.

Plaintiff argues that pleading deficiencies in the plaintiff's Verified Complaint should not have barred the guardianship of Jacqueline Betancourt. Plaintiff also argues that under prior precedent, Jacqueline Betancourt was the appropriate individual to serve as the guardian. Plaintiff's arguments are misdirected.

The rules governing appointment of a guardian require certain specificity and affidavits of two physicians. Even during trial, plaintiff did not come forward with evidence of two separate physicians. The appointment, therefore, did not comply with the rules.

Further, Ms. Betancourt, while seemingly appropriate under prior precedent to serve as the guardian, had a pecuniary motivation to maintain her father alive. In such circumstances, the Court should have considered an unbiased surrogate decision maker. Even plaintiff's *amici*, Mr. Pope, has argued for surrogate selection and replacement in these contexts. See HTTP:\\medicalfutility.blogspot.com\2009\2006\betancourt-v-trinitas-hospital-appeal.html.

In these types of circumstances, when a court is confronted with legal, moral, ethical, and medical dilemmas,

there must be confidence in the individual chosen to be the surrogate decision maker in the absence of a living will. Ms. Betancourt was not properly qualified under the rule and, while no one disputes her sincerity or love, her motivations can be questioned.

Therefore, defendant respectfully posits that the Trial Court erred in appointing Jacqueline Betancourt as the guardian of her father, Ruben Betancourt.

CONCLUSION

For the foregoing reasons, Defendant/Appellant, Trinitas Hospital, respectfully requests that this Court enter a decision on the merits of this appeal and reverse the improvident decision entered by the Trial Court compelling the affiliated physicians of Trinitas Hospital to continue to provide care when it is below the standard of care and inhumane and further appointing Jacqueline Betancourt as guardian. Defendant and its *amici* request that this Court set guidelines which will assist future health care providers and families in resolving these types of end-of-life disputes.

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Date: September 28, 2009