2008-2009 National Health Law Moot Court Competition

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Attached is the problem that I drafted for the Seventeenth Annual National Health Law Moot Court Competition at Southern Illinois University on November 7- 8, 2008. In 2009, it will be published in Volume 30, Issue 4 of the *Journal of Legal Medicine*.

Abstract

The problem involves a private hospital's use of a hypothetical state statute that establishes an internal, non-judicial mechanism for the resolution of medical futility disputes. This statute, like Texas Health & Safety Code section 166.046, gives final adjudicatory authority to a hospital's own health care ethics committee.

The problem addresses two constitutional questions. First, the problem addresses whether a private hospital's use of the state-sanctioned dispute resolution mechanism, to deny patients life-sustaining treatment, constitutes state action. Second, the problem addresses whether the state statute violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by failing to afford patients with sufficient notice and impartial review prior to the withdrawal of life-sustaining medical treatment.

The National Health Law Moot Court Competition

Southern Illinois University School of Law, the Department of Medical Humanities at the Southern Illinois University School of Medicine, the American College of Legal Medicine, and the American College of Legal Medicine Foundation have sponsored the National Health Law Moot Court Competition. The Competition is held annually at the Southern Illinois University School of Law in Carbondale, Illinois. The two-day Competition is one of the premier moot court experiences in the nation and attracts teams representing law schools from throughout the country.

Information regarding the Health Law Moot Court Competition is available at http://www.law.siu.edu/healthlawmootcourt/

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2008-2009
NATIONAL HEALTH LAW
MOOT COURT COMPETITION

Transcript of Record

Docket No. 08-1432

SUPREME COURT OF THE UNITED STATES

October Term, 2008

Rowan BENATZKY, by his agent Anika BENATZKY
Petitioner/Cross-Respondent,

v.

DANAUS MEMORIAL HOSPITAL,
Respondent/Cross-Petitioner

SPONSORS:

Southern Illinois University School of Law

Southern Illinois University School of Medicine,
Department of Medical Humanities

American College of Legal Medicine

American College of Legal Medicine Foundation

U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF RIDLEY

Rowan BENATZKY, by his agent Anika BENATZKY,	)	
Plaintiff,	)	
	)	**Civ. No. JAK-07-1002**
v.	)	
DANAUS MEMORIAL HOSPITAL,	)	
Defendant.	)	

Memorandum Opinion And Order Granting Plaintiff's Motion For Preliminary Injunction

KRONSTADT, District Judge.

This matter is before the Court on Plaintiff's Motion for Preliminary Injunction. Anika Benatzky, on behalf of and as next friend of her husband Rowan Benatzky (collectively "Plaintiff"), has brought this action alleging that Defendant Danaus Memorial Hospital violated Plaintiff's rights under the Due Process Clause of the Fourteenth Amendment to United States Constitution, made actionable by 42 U.S.C. § 1983.

Plaintiff argues that Defendant's unilateral decision to remove Rowan's life-sustaining medical treatment violates his constitutional rights, that he will be irreparably harmed by the removal, and that he is likely to succeed on the merits of his claims. Plaintiff seeks an injunction requiring Defendant to continue providing Rowan with life-sustaining treatment. Based on the evidence and arguments submitted, the Court finds in favor of Plaintiff and GRANTS the motion for preliminary injunction.

I. The Parties

This case involves the administration of life-sustaining medical treatment for Plaintiff Rowan Benatzky, a 72-year-old man who is an inpatient at Danaus Memorial Hospital. Rowan suffers from a number of different medical problems, including end-stage renal failure and severe, irreversible dysfunction of other organ systems. As the result of an earlier cardiac arrest, Rowan is in a persistent vegetative state. Consequently, at all times relevant to this case, Rowan has lacked decision making capacity. Health care decisions for Rowan have been made by his wife and appointed health care agent, Anika Benatzky.

Defendant Danaus Memorial Hospital is a private, non-religiously-affiliated hospital that is organized as a tax-exempt, nonprofit Ridley corporation. It operates 140

general acute care beds and offers comprehensive medical and surgical services. Because rural hospitals like Danaus usually have a case mix of more uninsured and less healthy patients, several have closed over the past six years. Danaus is now the only tertiary care hospital in the rural eastern sixteen counties of Ridley.[1]

II. Factual Background

Rowan was admitted to Danaus several times during March and April of 2007. He was again admitted, on June 12, 2007, suffering from respiratory distress and other conditions. Shortly after this latest admission, Rowan was intubated with an endotracheal tube and moved to the Intensive Care Unit (ICU), where he was placed on a ventilator and began receiving life-sustaining treatment. Rowan has remained in the ICU for more than three months. During this time, Rowan suffered a cardiac arrest which resulted in a prolonged lack of oxygen to his brain before circulation could be restored. This lack of oxygen caused serious and irreversible damage, leaving Rowan in a persistent vegetative state. Both the treating physicians and Anika's expert agree that Rowan will never regain consciousness.

In August 2007, a disagreement arose between Anika and Rowan's treating physicians concerning the appropriateness of continuing to administer life-sustaining treatment. Anika wanted Rowan's physicians to "do everything." She explained that Rowan has always been a "fighter" and had already lived longer than doctors had predicted. She also testified that Rowan was deeply religious, believing that life must be extended as long as possible and that we are not allowed to hasten death. Both Anika and her Rabbi testified that it would be "a sin" to remove Rowan's life support under their Orthodox Jewish beliefs.

Although Anika requested that Rowan's life-sustaining treatment be continued, Rowan's physicians, employees of Danaus, believed that this course of action was medically and ethically inappropriate. Anika contends that the decision to stop Rowan's treatment was prompted by his exhaustion of Medicare insurance coverage.[2] She cites a December 22, 2006, memorandum from the Danaus CFO that urges all managers to "tighten the tourniquet on costs." The memorandum stresses the importance of the hospital's financial strength both to ensure patient access to care and to provide a source of economic stability to eastern Ridley.

Danaus vehemently denies that money played any role in its treatment decision. Rather, the physicians testified that continued treatment is just "bad medicine." They find it gruesome, distressing, and demoralizing to provide "futile and non-beneficial"

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[1] Tertiary care is specialized consultative care, usually by referral, by specialists working in a center that provides comprehensive, multidisciplinary care and has personnel and facilities for special investigation and treatment.

[2] Medicare provides only 90 days of inpatient hospital care for each benefit period as well as 60 "lifetime reserve" days. A benefit period begins the day an individual enters the hospital and ends when he has been out of the hospital for 60 days in a row. There is no factual dispute that, using this formula, Rowan's hospital (Part A) benefits were exhausted. Rowan has no private "Medigap" plan to supplement these coverage limits.

treatment that is very burdensome yet provides no prospect for the patient's recovery or improvement.

The physicians' testimony concedes that Rowan cannot feel pain and that stopping Rowan's ventilator and other life support will lead to his death in a matter of minutes. Nevertheless, the Danaus physicians do not consider the practice of medicine to include measures aimed solely at maintaining corporeal existence and biologic functioning. Since Rowan's condition is irreversible and since Rowan cannot experience or appreciate his environment (or regain that ability), the Danaus physicians consider continued aggressive interventions to be "inhumane, cruel, and degrading."

Over the next several weeks, the treatment team arranged a series of four patient care conferences with Anika. Failing to achieve consensus in these conferences, the treatment team and Anika next had several meetings with a bioethics mediator. The job of the mediator was not to make a decision but rather to explore the various options. Like mediators in litigation, the bioethics mediator makes attempts to build consensus by facilitating a discussion between and among the parties to the conflict.

Despite all these efforts, the parties were unable to resolve their disagreement informally. Rowan's physicians sought to resolve the impasse by invoking the procedures set forth in the Ridley Good Care Law. 14 Ridley Code § 4625 (2007).[3] Under this statute, after a physician's decision to withhold life-sustaining treatment has been reviewed and approved by the hospital's ethics committee, the hospital is required to make reasonable efforts to transfer the patient to another physician or facility that would honor the patient's (or his surrogate's) decision to administer life-sustaining treatment. The statute also requires the treating hospital and its physicians to continue providing life-sustaining treatment for a period of fourteen days after the patient's (or surrogate's) receipt of the final written decision issued by the hospital ethics committee. The statute provides that, on the fifteenth day, a hospital has criminal, civil, and disciplinary immunity to stop treatment consistent with the ethics committee decision. The ethics committee's decision is not judicially reviewable.

Pursuant to the Good Care Law, Danaus gave Anika 96-hours notice of the ethics committee meeting. 14 Ridley Code § 4625(b)(2). Specifically, at 3:30 p.m. on August 17th, a Danaus social worker handed Anika a copy of the statutory form notice of a meeting scheduled for August 21st at 3:30 p.m. The Danaus ethics committee convened at that time, though the record fails to reflect whether the full committee attended. The Danaus ethics committee has ten members all of whom are employees of Danaus (three physicians, two nurses, a lawyer, an administrator, a bioethicist, a chaplain, and a social worker). The committee chairman is the head of the hospital's risk management department.[4] Anika and her rabbi also attended the meeting. After a 45-minute discussion, the committee retreated to deliberate in private. At about 4:45 p.m., the committee returned to orally inform Anika that it agreed with the treatment team.

[3] The full text of this statute is set forth in the Appendix.

[4] A hospital's risk management program focuses on minimizing financial loss to the hospital, primarily through preventing, monitoring, and controlling areas of potential liability exposure.

Shortly after the close of the meeting, the ethics committee chairman handed Anika a written statement of decision and reasons. This written decision stated, consistent with the Good Care Law, that Danaus planned to stop Rowan's life-sustaining medical treatment on September 4, 2007. Pursuant to the Good Care Law, over the next several days, both Danaus discharge planners and Anika contacted hospitals and other health care facilities in Ridley and neighboring states. But these efforts to transfer Rowan to another institution had proven unsuccessful by the time this action was filed. Rowan remains alive in the Danaus ICU, dependent on dialysis, mechanical ventilation, and artificial nutrition and hydration.

III. Procedural Background

Plaintiff instituted this proceeding on August 30, 2007, with a single-count complaint alleging a violation of constitutional procedural due process under 42 U.S.C. § 1983, seeking a temporary restraining order, a preliminary injunction, and a permanent injunction ordering Danaus and Rowan's treating physicians to refrain from withholding or withdrawing life-sustaining treatment from Rowan.

This Court issued a temporary restraining order on August 31, 2007, and held a four-hour hearing concerning the preliminary injunction on September 9, 2007.

IV. Analysis

The movant must establish the following four prerequisites to prevail on a motion for preliminary injunction: (1) that it has a substantial likelihood of success on the merits; (2) that it will suffer irreparable injury unless the injunction is issued; (3) that the threatened injury to the movant outweighs the possible injury that the injunction may cause the opposing party; and (4) that, if issued, the injunction would not disserve the public interest. While a plaintiff has the burden of proving that all these factors support a decision to issue a preliminary injunction against a defendant, the parties stipulated that only prerequisite at issue, here, is Plaintiff's likelihood of success on the merits.

Plaintiff's only claim is a violation of procedural due process under 42 U.S.C. § 1983, which provides a remedy for constitutional violations committed by individuals acting under color of state law. *Blessing v. Freestone*, 520 U.S. 329, 340 (1997). Accordingly, to set forth a claim under § 1983, Plaintiff must satisfy a two-pronged test. She must establish: (1) that Defendant is a person acting under color of state law; and (2) that Plaintiff has been deprived of a constitutional or federally protected right. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 930 (1982). The color of state law element is a threshold issue; there is no liability under Section 1983 for those not acting under color of law. Once it has been established that the Defendant acted under color of state law, the Court must identify the federal right that the Defendant allegedly violated. Here, Plaintiff alleges that Danaus violated Rowan's right to procedural due process under the Fourteenth Amendment.

A. *State Action*

The purpose of section 1983 is to deter state actors from using their positional authority to deprive individuals of their constitutionally guaranteed rights and to provide a remedy to victims if such deterrence fails. To prevail on a section 1983 claim, a plaintiff must prove that, while acting under the color of state law, the defendant deprived her of a right secured by the Constitution or laws of the United States. *West v. Atkins,* 487 U.S. 42, 48 (1988). Accordingly, the only proper defendants in a section 1983 claim are those who represent the state in some capacity, whether they act in accordance with their authority or misuse it.

To determine whether challenged conduct occurs under color of state law, a two-part test applies. There is state action either (a) where the state exercises coercive power over, is entwined in the management of control, or provides significant encouragement to a private actor; or (b) where the private actor operates as a willful participant in a joint activity with the state, is controlled by an agency of the state, or has been delegated a public function by the state. *Tancredi v. Metropolitan Life Ins. Co.,* 316 F.3d 308, 312 (2d Cir. 2003).

Anika first contends that the Defendant is a state actor because of its extensive dealings with the state and federal government. Specifically, she demonstrates that Danaus: (i) receives most of its income from Medicare and Medicaid; (ii) receives an exemption from federal, state, and local taxes; (iii) operates pursuant to a state hospital license; and (iv) is subject to extensive federal and state agency oversight.

But all this evidence is inapposite in light of *Blum v. Yaretsky*, 457 U.S. 991 (1982), in which the Supreme Court held that a privately owned nursing home that received ninety percent of its funding from the state and was subject to significant state regulation was, nevertheless, not a state actor. *See also Rockwell v. Cape Cod Hosp.*, 26 F.3d 254, 258 (1st Cir. 1994) (holding that "government regulation, even extensive regulation, and the receipt of federal funds, such as Medicare, Medicaid and Hill-Burton funds, are insufficient to establish that a hospital or other entity acted under color of state law").

More relevant is *American Mfrs. Mutual Ins. Co. v. Sullivan*, 526 U.S. 40 (1999). In 1993, Pennsylvania created an extrajudicial dispute resolution mechanism. Specifically, Pennsylvania created a "utilization review" procedure under which a worker's compensation insurer could seek private review of the reasonableness and necessity of an employee's past, ongoing, or prospective medical treatment before having to pay a medical bill.

Under the Pennsylvania system, if an insurer disputes the reasonableness or necessity of the treatment provided, it may request utilization review by filing a one-page form with the Workers' Compensation Bureau of the Pennsylvania Department of Labor and Industry. *Id.* at 45. After reviewing the form, the Bureau forwards the request to a randomly selected "utilization review organization," a private organization consisting of physicians who determine whether the treatment under review is reasonable or necessary

for the medical condition of the employee in light of "generally accepted treatment protocols." *Id.* at 46. The Supreme Court held that since it was statutorily specified, the decisions of the Pennsylvania private utilization review organization constituted state action. *Id.* at 54.

The instant case is closely analogous to *American Manufacturers.* Just as Pennsylvania statutorily created an extrajudicial dispute resolution mechanism, so did Ridley. In 2004, the Ridley legislature observed that while Ridley and many other states have statutes that permit physicians and health care institutions to refuse a "medically inappropriate" request for life-sustaining medical treatment, physicians remained unwilling to use these statutes. S. 204, 2d Sess., at 19 (Ridley 2004). During the 1990s, neither physicians nor the broader community could reach consensus on precise clinical measures of medical inappropriateness. So, the earlier Ridley statute gave physicians discretion to refuse treatment where it would not provide "significant benefit" or would be contrary to "generally accepted health care standards." Refusal of Treatment Act, ch. 14, § 4610, 1992 Ridley Laws ch. 4, 32-33 (repealed 2004). But the flip side of this broad discretion was chilling uncertainty. Not knowing the exact requirements for safe harbor protection, physicians were reluctant to utilize those statutes because of the risk of either prosecution for murder or liability for tortuous abandonment or malpractice.

In 2004, the Ridley legislature then enacted the Good Care Law, to permit physicians to provide medical treatment in the manner that they thought professionally appropriate. 14 Ridley Code § 4625 (2007). Unlike the prior statute which specified vague substantive standards such as "significant benefit," the Good Care Law is defined solely in terms of an extra-judicial process. Ridley physicians and institutions that follow the Good Care Law's prescribed notice and meeting procedures are immune from disciplinary action and from civil and criminal liability.

The Ridley ethics committee is analogous to the Pennsylvania utilization review organization. Like the URO, the ethics committee determines appropriate medical treatment. Like the URO, the ethics committee is provided for in a state statute. And like the URO, the ethics committee issues binding decisions. Accordingly, just as the Pennsylvania organization was a state actor, the Danaus ethics committee is also a state actor.

It is clear that Plaintiff is likely to succeed in establishing that the Danaus ethics committee acted under the color of state law in adjudicating Defendant's dispute with Plaintiff under the Ridley the Good Care Law. Therefore, Danaus, as a state actor, was obligated to comply with due process in depriving Rowan of his protected rights.

B. ***Procedural Due Process***

Section 1983 does not itself create substantive rights but instead provides a remedy for the violation of rights created by the Constitution or other federal laws. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002) (noting that Section 1983 merely provides a mechanism for enforcing individual rights "secured" elsewhere).

Here, the only right that Plaintiff alleges Danaus has deprived Rowan is his right to procedural due process. The Due Process Clause of the Fourteenth Amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV, § 1. "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). Procedural due process ensures that the state will not deprive a party of life, liberty, or property without engaging fair procedures to reach a decision.

To establish a procedural due process violation, Plaintiff must prove: (1) the existence of an interest encompassed within the Fourteenth Amendment's protection of life, liberty, and property, (2) a deprivation of that protected interest, and (3) that state remedies for redress of the alleged deprivation were inadequate. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Hudson v. Palmer*, 468 U.S. 517, 530-36 (1984). In the instant case, only the third requirement is at issue. Therefore, the due process inquiry narrows to whether Rowan received constitutionally adequate pre-deprivation procedures.[5]

The gravamen of Plaintiff's complaint is that the process was inadequate because: (1) Danaus failed to provide sufficient advance warning prior to the ethics committee meeting; and (2) the Danaus ethics committee was not an impartial arbiter.[6] I agree that the lack of notice and impartiality were procedural due process violations.

1. Type and Amount of Due Process

As for the type and amount of process owed, courts consider the following three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). A court must use a sliding scale to determine the required nature of the notice and the required quality of the hearing. *Goss v. Lopez*, 419 U.S. 565, 579 (1975). A more formal hearing is demanded when a more significant interest is impacted. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

The level of due process depends, in part, upon the nature of the deprivation. In *Goldberg v. Kelly*, the Supreme Court held that a recipient of public funds has a "brutal

[5] Since removing the disputed treatment would lead to Rowan's death, post-deprivation procedures are plainly not adequate.

[6] Because Danaus precisely complied with the Ridley statute, it is unnecessary to separately analyze Plaintiff's claim as a facial and as an as-applied challenge.

need" for health benefits. 397 U.S. 254, 260-61 (1970). The disenrolled are at risk for poor medical outcomes, including reduced preventative care, reduced medical services, reduced medication, the threat of financial ruin, and an increased number of deaths. Therefore, the termination of those benefits had to be preceded by full notice and opportunity for hearing. *Id.* at 266. Since the deprivation, here, leads to certain death, the full panoply of due proces is required.

2. Sufficient Notice

"An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Bd. of Educ*, 470 U.S. at 542. "Due process, at a minimum, requires that a person be given notice of impending action and afforded a hearing." *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 313 (1950).

Danaus argues that the statutorily-prescribed notice that it provided Anika is of such a nature "as reasonably to convey the required information." *Mullane*, 339 U.S. at 314. But while the notice has some detail and specificity regarding the deprivation process, it included no individualized, non-boilerplate reasons for its action with respect to Rowan in particular. Constitutionally sufficient notice is notice that will "permit adequate preparation for an impending hearing." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978). Without any precise and definite specification of Danaus' medical and ethical reasons for stopping Rowan's life support, Anika could not adequately prepare for the ethics committee meeting.

Moreover, Anika's opportunity to defend the impending deprivation was impaired not only by the form of the notice but also by its timing. A deprivation hearing must be held at a meaningful time and in a meaningful manner. *Goldberg*, 397 U.S. at 267. The hearing must be held so to enable the subject of the deprivation (or his representative) to appear personally before the final decisionmaker, to present evidence orally, and to confront and cross-examine adverse witnesses. *Id.*

The Ridley Good Care Law affords only 96 hours notice. This is hardly sufficient time to prepare for a final and unreviewable life or death hearing. This is hardly sufficient time to get a copy of the patient's medical record, to have an independent medical expert review the record, to obtain counsel, to have counsel to prepare for the hearing, or to otherwise prepare. Moreover, here, Danaus gave Anika notice on a Friday afternoon at 3:30 p.m. for a hearing to be held the following Tuesday at 3:30 p.m. Thus, Anika, effectively got only one day's notice.

3. Independent and Neutral Decision Maker

A fundamental tenet of due process is a hearing by an independent decision maker. *Goldberg*, 397 U.S. at 271 ("[O]f course, an impartial decisionmaker is essential."); *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (involving an M.D. complaining of a biased Medical Board which had the potential to revoke his license); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 59-60 (1972). This requirement of

neutrality and fairness ensures "that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance the arbiter is not predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

A hospital ethics committee is hardly an independent and impartial decision maker. Quite the opposite. Ethics committees have been described as a "due process wasteland." Susan M. Wolf, *Ethics Committees and Due Process: Nesting Rights in a Community of Caring*, 50 Md. L. Rev. 798, 831 (1991). The analog of ethics committee in the research context, the Independent Review Board (IRB), has been similarly described. *See, e.g., Grimes v. Kennedy Krieger Inst.*, 782 A.2d 807, 817 (Md. 2001). And most notably, while not yet judicially analyzed on constitutional grounds, a Texas statute, on which the Ridley statute is loosely based, has been criticized on just this basis. *See, e.g.*, Maureen Kwiecinski, *To Be or Not to Be, Should Doctors Decide?* 7 Marq. Elder's Advisor 313 (2006).

Since all the members of the Danaus ethics committee, like the members of most hospital ethics committees, are economically dependent on the hospital, they cannot be sufficiently neutral and impartial. Their institutional loyalty is ample temptation not to hold the balance nice, clear and true. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 537-38 (2004); *Parham v. J. R.*, 442 U.S. 584, 600 (1979). This is especially true, here, since the hospital itself had a financial conflict of interest. *See Schweiker v. McClure*, 456 U.S. 188, 195-97 (1982); *Ward*, 409 U.S. at 61-62.

Danaus contends that its inability to transfer Rowan to another health care facility serves as an independent check on and confirmation of its decision to stop treatment. Danaus contends there was impartial review when other hospitals refused to provide Rowan with the treatment that Anika demands. But this argument is unpersuasive. That other institutions refused to accept the transfer does not reduce the risk of error in Danaus' decision. These other institutions may have looked at neither the process nor the medical basis of Danaus' decision. It is likely that they are simply unwilling to accept a case that is expensive, uncompensated, and fraught with conflict.

V. Conclusion

In depriving Rowan of his protected rights, Danaus acted under the color of state law, yet the Hospital failed to satisfy Rowan's pre-deprivation due process rights. Accordingly, Plaintiff's motion for preliminary injunction is GRANTED.

IT IS SO ORDERED

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James A. Kronstadt, U.S. District Judge

Dated: September 15, 2007

Statutory Appendix to the District Court Opinion

RIDLEY CODE, CHAPTER 14
RIDLEY HEALTH CODE

§ 4620 (2007)

In this chapter:

(1) “Advance directive” means a written statement of a patient’s instructions and directions for health care in the event of future decision making incapacity.

(2) “Agent” shall mean an individual, designated in a power of attorney for health care or an advance directive, to make a health care decision for the individual granting the power.

(3) “Artificial nutrition and hydration” means the provision of nutrients or fluids by a tube inserted in a vein, under the skin in the subcutaneous tissues, or in the stomach (gastrointestinal tract).

(4) “Attending physician” means a physician selected by or assigned to a patient who has primary responsibility for a patient's treatment and care.

(5) “Cardiopulmonary resuscitation” means any medical intervention used to restore circulatory or respiratory function that has ceased.

(6) “Competent” means possessing the ability, based on reasonable medical judgment, to understand and appreciate the nature and consequences of a treatment decision, including the significant benefits and harms of and reasonable alternatives to a proposed treatment decision.

(7) “Ethics committee” means a committee established under Section 4622.

(8) “Health care or treatment decision” means consent, refusal to consent, or withdrawal of consent to health care, treatment, service, or a procedure to maintain, diagnose, or treat an individual's physical or mental condition.

(9) “Incompetent” means lacking the ability, based on reasonable medical judgment, to understand and appreciate the nature and consequences of a treatment decision, including the significant benefits and harms of and reasonable alternatives to a proposed treatment decision.

(10) “Irreversible condition” means a condition, injury, or illness:

(A) that may be treated but is never cured or eliminated;

(B) that leaves a person unable to care for or make decisions for the person's own self; and

(C) that, without life-sustaining treatment provided in accordance with the prevailing standard of medical care, is fatal.

(11) “Life-sustaining treatment” means treatment that, based on reasonable medical judgment, sustains the life of a patient and without which the patient will die. The term includes both life-sustaining medications and artificial life support, such as mechanical breathing machines, kidney dialysis treatment, and artificial nutrition and hydration. The term does not include the administration of pain management medication or the performance of a medical procedure considered to be necessary to provide comfort care, or any other medical care provided to alleviate a patient's pain.

(12) “Terminal condition” means an incurable condition caused by injury, disease, or illness that according to reasonable medical judgment will produce death within six months, even with available life-sustaining treatment provided in accordance with the prevailing standard of medical care.

§ 4622 (2007)

(a) Each hospital shall establish an ethics committee.

(b) Each ethics committee shall consist of at least six members, including:
- (1) A physician;
- (2) A registered nurse;
- (3) A social worker;
- (4) An ethical advisor or chaplain;
- (5) A lawyer; and
- (6) A nonvoting member appointed by the CEO with the approval of the Secretary of the Department of Health.

(c) The ethics committee may consist of as many other individuals as the hospital may choose.

§ 4624 (2007)

(a) Except as provided in (b), (c), and (d), a health care provider or health care institution providing care to a patient shall do the following:
- (1) Comply with an individual health care instruction of the patient and with a reasonable interpretation of that instruction made by a person then authorized to make health care decisions for the patient.
- (2) Comply with a health care decision for the patient made by a person then authorized to make health care decisions for the patient to the same extent as if the decision had been made by the patient while having capacity.

(b) A health care provider or health care institution may decline to comply with an individual health care instruction or health care decision for reasons of conscience.

(c) A health care provider or health care institution may decline to comply with an individual health care instruction or health care decision that requires medically inappropriate health care.

(d) A physician or health care professional acting under a physician or a health care facility is not criminally or civilly liable or subject to discipline by the appropriate licensing authority, if the person has complied with the procedures in Section 4625.

§ 4625 (2007)

(a) If an attending physician refuses to honor a patient's advance directive or a health care or treatment decision made by or on behalf of a patient, the physician's refusal shall be reviewed by an ethics committee. The attending physician may not be a member of that committee. The patient shall be given life-sustaining treatment during the review.

(b) The patient, or the person responsible for the health care decisions of the patient, who has made the decision regarding the directive or treatment decision:
- (1) shall be given a written description of the ethics committee review process and any other policies and procedures related to this section adopted by the health care facility;
- (2) shall be informed of the committee review process not less than 96 hours before the meeting called to discuss the patient's directive or treatment decision, unless the time period is waived by mutual agreement;
- (3) at the time of being so informed, shall be provided a copy of the appropriate statement set forth in Section 4626; and
- (4) is entitled to:
  - (A) attend the meeting;
  - (B) participate in the meeting;
  - (C) bring up to five representatives, including counsel to the meeting; and
  - (D) receive a written explanation of the decision reached during the review process.

(c) If the attending physician, the patient, or the person responsible for the health care decisions of the individual does not agree with the decision reached during the review process under Subsection (b), the physician shall make a reasonable effort to transfer the patient to a physician who is willing to comply with the directive. If the patient is a patient in a health care facility, the facility's personnel shall assist the physician in arranging the patient's transfer to:
(1) another physician;
(2) an alternative care setting within that facility; or

(3) another facility.

(d) If the patient or the person responsible for the health care decisions of the patient is requesting life-sustaining treatment that the attending physician has decided and the review process has affirmed is inappropriate treatment, the patient shall be given available life-sustaining treatment pending transfer under Subsection (c). The patient is responsible for any costs incurred in transferring the patient to another facility. The physician and the health care facility are not obligated to provide life-sustaining treatment after the 14th day after the written decision required under Subsection (b) is provided to the patient or the person responsible for the health care decisions of the patient unless ordered to do so under Subsection (f).

(e) If during a previous admission to a facility a patient's attending physician and the review process under Subsection (b) have determined that life-sustaining treatment is inappropriate, and the patient is readmitted to the same facility within six months from the date of the decision reached during the review process conducted upon the previous admission, Subsections (b) through (d) need not be followed if the patient's attending physician and a consulting physician who is a member of the ethics committee of the facility document on the patient's readmission that the patient's condition either has not improved or has deteriorated since the review process was conducted.

(f) At the request of the patient or the person responsible for the health care decisions of the patient, the appropriate superior court shall extend the time period provided under Subsection (d) only if the court finds, by a preponderance of the evidence, that there is a reasonable expectation that a physician or health care facility that will honor the patient's directive or treatment decision make on the patient's behalf will be found if the time extension is granted. No court shall have any other authority or jurisdiction to review the merits of an ethics committee decision made pursuant to this Section.

(g) Reporting requirements:

(1) Each health care facility utilizing the procedures in Section 4625 shall file reports with, and in the form and frequency specified by, the Department of Health, indicating:

(A) The number of patients, if any, who have been denied desired life-sustaining treatment based on the procedures in Section 4625, including their age, race, gender, ethnicity, and medical condition; and

(B) The composition of its ethics committee, including the number of members, and the professional background and affiliation of each member.

(2) The Department of Health shall generate and make available to the public an annual statistical report of information collected under Subsection (g)(1).

§ 4626 (2007)

(a) In cases in which the attending physician refuses to honor an advance directive or treatment decision requesting the provision of life-sustaining treatment, the statement required by Section 4625(b)(3) shall be in substantially the following form:

ATTENTION: You have been given this information because you have requested life-sustaining treatment (medications and artificial life support that sustains the life of a patient such as mechanical breathing machines, kidney dialysis treatment, and artificial nutrition and hydration treatment), which the attending physician believes is not appropriate. This information is being provided to help you understand state law, your rights, and the resources available to you in such circumstances. It outlines the process for resolving disagreements about treatment among patients, families, and physicians. It is based upon Section 4625 of the Ridley Health Code.

When an attending physician refuses to comply with an advance directive or other request for life-sustaining treatment because of the physician's judgment that the treatment would be inappropriate, the case will be reviewed by an ethics committee. Life-sustaining treatment will be provided through the review.

You will receive notification of this review at least 96 hours before a meeting of the committee related to your case. You are entitled to attend and participate in the meeting. You may bring up to five representatives to the meeting, including an independent medical expert, an attorney, or a disability rights advocate. With your agreement, the meeting may be held sooner than 96 hours, if possible.

You are entitled to receive a written explanation of the decision reached during the review process.

If, after this review process, both the attending physician and the ethics committee conclude that life-sustaining treatment is inappropriate and yet you continue to request such treatment, then the following procedure will occur:

1. The physician, with the help of the health care facility, will assist you in trying to find a physician and facility willing to provide the requested treatment.
2. The patient will continue to be given life-sustaining treatment until he or she can be transferred to a willing provider for up to 14 days from the time you were given the committee's written decision that life-sustaining treatment is not appropriate.
3. If a transfer can be arranged, the patient will be responsible for the costs of the transfer.
4. If a provider cannot be found willing to give the requested treatment within 14 days, life-sustaining treatment may be withdrawn unless a court of law has granted an extension.

5. You may ask the appropriate superior court to extend the 14-day period if the court finds that there is a reasonable expectation that a physician or health care facility willing to provide life-sustaining treatment will be found if the extension is granted.

In the
United States Court of Appeals
For the Sixteenth Circuit

No. 08-275

DANAUS MEMORIAL HOSPITAL,
Defendant-Appellant

v.

ROWAN BENATZKY, by his agent **ANIKA BENATZKY**
Plaintiff-Appellee.

Appeal from the United States District Court for the Western District of Ridley.
No. JAK-07-1002 - James A. Kronstadt, *Judge.*

ARGUED OCTOBER 29, 2007 – DECIDED JANUARY 4, 2008

Before: BENDIX, YAFFEE, COFFEE, *Circuit Judges.*

BENDIX, *Circuit Judge.*

Danaus Memorial Hospital appeals the imposition of a preliminary injunction that would force its physicians to provide medical treatment to Rowan Benatzky that they have unanimously determined is medically inappropriate and even harmful. Danaus is challenging the District Court's findings under the likelihood of success prong of the preliminary injunction test.

We conclude that this injunction should be vacated because the District Court erred in finding that plaintiff would succeed on the merits. The state of Ridley's decision to permit Ridley health care institutions to withhold or withdraw life-sustaining treatment after following a statutorily-defined process transformed Danaus' use of that permission or process into state action. But while procedural due process applies obligations apply, they were satisfied by the Ridley statute.

I. PROCEDURAL HISTORY

The facts in this case are set forth in the District Court opinion and are not restated here. On September 15, 2007, the District Court imposed a preliminary injunction ordering Danaus Memorial Hospital to continue life-sustaining medical treatments for Rowan Benatzky. On October 1, 2007, the District Court denied Danaus' application to vacate or stay the preliminary injunction. On October 4, 2007, Danaus made an emergency motion to this Court for a stay of the preliminary injunction. This Court denied the stay but expedited the appeal.

II. ANALYSIS

A preliminary injunction is an "extraordinary and drastic remedy." 11A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2948 (2d ed. 1995). Accordingly, in order to obtain a preliminary injunction we have repeatedly held that the moving party must demonstrate, among other things, "a likelihood of success on the merits." *Gonzales & Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 428 (2006). The District Court clearly erred in finding that Plaintiff-Appellee could satisfy this requirement.

A. State Action

In finding state action, the District Court rightly looked at the scope and nature of Ridley's affirmative actions affecting the Danaus ethics committee. *See Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001). But also relevant, in this case, is Ridley's inaction.

The Ridley Good Care Law set aside then-existing law which required physicians to obtain informed consent before imposing or removing life-sustaining treatment. The statute was intended to authorize, and does authorize, involuntary death-causing conduct. Ridley may not have gotten entwined with the operation of ethics committees. But without the Good Care Law, those ethics committees would not be adjudicating these disputes. Nor would Ridley physicians and hospitals be relying on those ethics committee decisions. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991). While the adjudication of disputes is not an exclusively public function, but for the Ridley statute, Mr. Benatzky could have sought review in the Ridley courts. Ridley has, in effect, changed the legal landscape by substituting hospital ethics committees for courts with respect to end-of-life treatment disputes. *See Reitman v. Mulkey*, 387 U.S. 369, 380-81 (1967). Danaus' actions were those of a state actor, requiring us to consider the procedural due process claim.

B. Procedural Due Process

The District Court's due process analysis is fundamentally flawed. The Ridley statute affords both sufficient notice and a sufficiently neutral decision maker.

1. Adequate Notice

The Ridley Good Care Law does not deprive the patient or the patient's decision maker of due process. Anika Benatzky got written explanatory information before the meeting, apprising her of its time, place, and purpose. She was able to and did attend. At the meeting, she was able to confront the ethics committee or any member of the committee to ask questions and/or to provide her comments and opinions.

In *Washington v. Harper*, 494 U.S. 210 (1990), the Supreme Court held that 24 hours was sufficient notice of a hearing to determine involuntary medical treatment. *See also Unger v. Sarafite*, 376 U.S. 575, 590 (1964) (holding that "five days notice . . . was not a constitutionally inadequate time"); *Marcotte v. Kansas Animal Health Dept.*, Nos. 90,311 & 90,318, 2004 WL 235470 (Kan. App. 2004) (four days is sufficient notice). In this case, Anika Benatzky got four times as much notice. Plus, implementation of the ethics committee decision is delayed by at least two weeks. If the ethics committee determines that care should ultimately be withdrawn and the decision maker still disagrees, the decision maker can turn to the court system for relief.

2. Impartial Tribunal

Benatzky argues that since the Danaus ethics committee is comprised entirely of Danaus staff and employees, it is not a neutral tribunal. Certainly, permitting an adverse party to serve on a tribunal may violate impartiality. *See, e.g., Hillside Productions, Inc. v. Duchane*, 249 F. Supp. 2d 880, 896 (E.D. Mich. 2003) (finding lack of impartiality where City Planner, "met with Planning Commission members outside the hearing to review the evidence with them" and effectively "became the prosecutor"). But that is not the case here. The treatment dispute is between Benatzky and his treatment team. Since the Ridley statute specifically forbids the treating physician from participating in the ethics committee deliberations, it preserves the required impartiality. *See* 14 Ridley Code § 4625(a).

The mere fact that the ethics committee is comprised of Danaus employees is not enough to show a lack of the requisite impartiality. The Supreme Court has specifically rejected such a proposition. In *Schweiker v. McClure*, the Court rejected a procedural due process challenge to a rule that made Medicare reimbursement decisions by private insurance companies reviewable only by hearing officers selected by the insurance companies themselves. 456 U.S. 188, 195-200 (1982). Consequently, Benatzky must make a more specific showing of bias.

Notably, the Supreme Court approved the use of an intramural committee for medical treatment disputes. In *Harper,* the Court upheld a Washington regulation that allowed for the involuntary treatment of mentally ill inmates with anti-psychotic drugs. The due process issue in *Harper*, as in the instant case, was whether Washington's non-judicial mechanism for determining whether a prisoner was to be involuntarily medicated was sufficient. *Id.* at 220.

The Washington regulation specified that if an inmate and his physician disagreed about the necessity for medication, then a hearing committee composed of disinterested medical and prison personnel would decide whether medication were necessary. Specifically, the committee was comprised of a psychologist, a psychiatrist, and the associate administrator of the special offenders unit. None of these individuals could be involved in the prisoner's treatment or diagnosis at the time of decision.

The plaintiff, a prisoner who was subject to involuntary medication at a state prison facility, asserted that only a court should decide whether to medicate an inmate against his will. *Id.* at 229. The Supreme Court rejected this argument, deciding that the state regulation provided adequate protection of the inmate's rights. The Court further held that judicial review of the hearing committee's decision was not necessary to comply with due process requirements. The Court even stated that inmates were not only "adequately protected" but even "better served" by having medical professionals rather than a judge make the decision to medicate. *Id.* at 231.

The Supreme Court's language in *Harper* cuts against Anika Benatzky's claims that the ethics committee did not provide her and Rowan with adequate due process. The Ridley Good Care Law, like the Washington regulation at issue in *Harper*, will likely pass constitutional muster. The statute sets out a procedure by which the patient and his physicians may be heard by an ethics committee if there is a disagreement concerning the appropriateness of the life-sustaining treatment requested by the patient. As in *Harper*, the committee is comprised of representatives from the institution, with the limitation, as in *Harper*, that the patient's treating physicians cannot be members of the committee. If the Washington process is sufficiently impartial, then so is the Ridley process.

IV. CONCLUSION

For the foregoing reasons, we vacate the preliminary injunction and remand this case to the District Court for further proceedings consistent with this opinion. Because Rowan Benatzky remains on life support and because we anticipate that the Appellee will apply to the Supreme Court for a writ of certiorari, we stay this decision pursuant to Federal Rule of Appellate Procedure Rule 41(d)(2). Each party shall bear its own costs.

VACATED AND REMANDED

YAFFEE, *Circuit Judge*, concurring in the judgment:

I concur in the judgment because I agree that since the requirements of procedural due process were met, the District Court's order must be reversed. I write separately because I believe that the there was no state action. An appropriate resolution of the state-action issue would be sufficient, by itself, to reverse the judgment of the District Court. Therefore, we need not have even reached the due process issue.

State action may be found only if there is such a "close nexus between the State and the challenged action" that seemingly private behavior "may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). There is no such nexus here.

The District Court's reliance on *American Mfrs. Mutual Ins. Co. v. Sullivan*, is misplaced. The Supreme Court held that Pennsylvania's mere "authorization" or even "encouragement" of using the utilization review process did not mean that an insurer's use of the process constituted state action. 526 U.S. 40, 54 (1999); *see also Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 485 (1988) ("Private use of state-sanctioned private remedies or procedures does not rise to the level of state action"); *Flagg Bros. Inc. v. Brooks*, 436 U.S, 149, 157-66 (1978) (holding no state action where, pursuant to a state statute, a warehouseman sold customer goods to cover unpaid storage charges).

Benatzky argues that the instant case is different because Danaus not only "used" but also actually "was" the dispute resolution forum. This matters, contends Benatzky, because although the Supreme Court held that a private party's use of the Pennsylvania process was not state action, it held that the decision of a utilization review organization itself "may properly be considered state action." *Sullivan*, 526 U.S. at 54.

I do not find this argument convincing. Key to the Supreme Court's conclusion was Pennsylvania's "role in creating, supervising, and setting standards for the utilization review process." *Id.* Here, in contrast, Ridley had no comparable role. First, Ridley has merely authorized the use of a private dispute resolution process. Hospitals are not even required to use the process. Second, Ridley has no role in the selection of an ethics committee's members. Danaus (or any Ridley hospital) determines the number and identity of committee members. Third, Ridley has no role in the operation of an ethics committee. Danaus alone determines quorum, voting, and other meeting standards. Fourth, Ridley has no role in the execution of an ethics committee decision. Danaus does not use a sheriff or a court to carry out the ethics committee decision. In short, the Ridley Good Care Law does not entwine the state with ethics committee decisions. If anything, it takes the state out of and away from private health care decision making.

COFFEE, *Circuit Judge*, concurring in part and dissenting in part:

I concur with Judge Bendix that Danaus' use of the Ridley Good Care Law constituted state action and join that part of the opinion. But I respectfully dissent from the reversal of the District Court. I would find that Danaus' use of the Ridley Good Care Law violated the requirements of due process.

The majority's reliance on *Washington v. Harper,* 494 U.S. 210 (1990), is misplaced. The fundamental purpose of due process is to prevent mistaken deprivations. *Marshal v. Jerricco, Inc.*, 446 U.S. 238, 242 (1980). In *Harper,* reliance on an intramural committee was held sufficient because, since the issue to be decided was objective and scientific, it was best left to experts. In this respect, *Harper* is consistent with other due process cases leaving decisions to medical professionals." *See Matthews v. Eldridge,* 424 U.S. 319, 343 (1976).

Here, in contrast, there is far greater risk for error and abuse. Therefore, more independence is required. Because dialysis and mechanical ventilation sustain Rowan's life, they are "life sustaining treatment." 14 Ridley Code § 4620(11). There is no question that they are effective. The issue facing the Danaus ethics committee was whether that treatment was beneficial or worthwhile. This is a subjective inquiry incorporating value judgments. *See Causey v. St. Francis Med. Center,* 719 So. 2d 1072, 1075 (La. App. 1998). It was the enormous difficulty of answering this worth/benefit question that prompted the Ridley legislature to enact Section 4625 in the first place. The statute did not make the question go away; it just posed it to an ethics committee instead of to a court.

Furthermore, the notice period was too short, especially since it did not apprise Anika Benatzky of the specific bases for the treatment team's recommendation. Danaus did not afford Anika Benatzky with a meaningful opportunity to gather relevant facts and to prepare a defense. *See Goldberg v. Kelly,* 397 U.S. 254, 268 (1970) (more than seven days notice may be required); *Walker v. United States,* 744 F.2d 67, 70 (10th Cir. 1984) (five days notice not sufficient).

Accordingly, I would affirm the District Court.

Supreme Court of the United States

Rowan BENATZKY, by his agent
Anika BENATZKY, Petitioner/Cross-Respondent

v.

DANAUS MEMORIAL
HOSPITAL, Respondent/Cross-Petitioner.

No. 08-1432
June 16, 2008

Petition for writ of certiorari to the United States Court of Appeals for the Sixteenth Circuit GRANTED limited to the following Questions presented by the petition:

1) Does a private hospital's use of the non-judicial dispute resolution mechanism in 14 Ridley Code § 4625, to deny a patient life-sustaining treatment, constitute state action?

2) Does 14 Ridley Code § 4625 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution by failing to afford patients with sufficient notice and impartial review prior to the withdrawal of life-sustaining medical treatment?