Suit No. AH 97-30-03479
Suit No. AH 97-30-03495

IN THE COURT OF APPEAL OF MANITOBA

Coram: Scott C.J.M., Twaddle and Lyon JJ.A.

B E T W E E N:

CHILD AND FAMILY SERVICES OF CENTRAL MANITOBA	)	
(Petitioner) Respondent	)	**S. N. Rosenbaum** for R. Lavallee
- and -	)	
RAYMOND LAVALLEE	)	
(Respondent) Appellant	)	**B. Christianson, Q.C.** for Child and Family Services of Central Manitoba
- and -	)	
SUSAN LORRAINE HAY	)	
Respondent	)	**D. A. Mayer** for S. L. Hay
- and -	)	
PATRICIA ANNE HAY and **HAROLD EDWIN HAY, JOHN NORBERT ALTENBURG** and **ANNETTE MARIE ALTENBURG**	)	Appeals heard and Decision pronounced: **November 4, 1997**
Intervenors	)	
A N D B E T W E E N:	)	Written reasons: **November 14, 1997**
CHILD AND FAMILY SERVICES OF CENTRAL MANITOBA	)	
(Petitioner) Respondent	)	

- and -	)
	)
SUSAN LORRAINE HAY	)
	)
(Respondent) Appellant	)
	)
- and -	)
	)
RAYMOND LAVALLEE	)
	)
Respondent	)
	)
- and -	)
	)
PATRICIA ANNE HAY and HAROLD EDWIN HAY, JOHN NORBERT ALTENBURG and ANNETTE MARIE ALTENBURG	)
	)
Intervenors	)

TWADDLE J.A.

The parents of an infant presently existing in a vegetative state appeal from an order authorizing the petitioner to provide a "Do Not Resuscitate" direction to the infant's health care providers. The question is whether an order authorizing such a direction falls within the scope of s. 25(3) of ***The Child and Family Services Act***, C.C.S.M., c. C80 (hereinafter "the ***Act***").

The infant was born in December, 1996. Three months later, he was admitted to hospital following a savage attack. Although the identity of his assailant or assailants had not been determined, the petitioner immediately apprehended the boy.

I quote now from the petitioner's factum:

> The injuries inflicted upon D have reduced him to a "persistent vegetative state". His brain has, quite literally, shrunk over the intervening months. His doctor says D is moving from one intermittent illness to another. Sooner or later he will be struck by a serious illness that will require intrusive heroic measures which, if successful, will only bring him back to his persistent vegetative state. D's doctor recommends that a Do Not Resuscitate Order be placed on D's chart so that D may "live and die with dignity."

Having considered the medical advice, the petitioner agreed that a "Do Not Resuscitate" direction was appropriate, but the infant's parents refused to consent. The petitioner then applied, pursuant to s. 25(3) of the ***Act***, for an order "authorizing medical treatment, specifically a Do Not Resuscitate Order, for the child ... ."

Insofar as it is material, s. 25(3) of the ***Act*** provides:

> **25(3)** An agency may apply to court for an order
> . . .
> (b) authorizing medical ... treatment for an apprehended child where

> (i) the parents ... of the child refuse to consent to such treatment ... .

The application came on for hearing before Cummings P.J. He was of the view that the court had jurisdiction under the section to authorize a negative as well as a positive treatment plan and, being convinced by the medical evidence that non-resuscitation was in the best interest of the infant, granted the order sought.

The parents appealed. At the conclusion of the hearing, we allowed the appeal with costs and set aside the order appealed from. These are our reasons for doing so.

I start with the observation that it seems somewhat oxymoronic that a court, considering the best interests of a child, should make an order permitting it to die. Nonetheless, I recognize that, philosophical arguments apart, it is in no one's interest to artificially maintain the life of a terminally-ill patient who is in an irreversible vegetative state. That is unless those responsible for the patient being in that state have an interest in prolonging life to avoid criminal responsibility for the death.

The question for us, however, is not whether the infant should be allowed to die, but whether s. 25(3) of the ***Act*** permits a court to authorize the placement of a "Do Not Resuscitate" direction

on a child's chart. To understand that question properly, one must understand why authority for medical treatment is necessary.

The treatment of a patient, whether surgically, with drugs or by other intrusive means, involves a touching of the patient's person. Unless done with the consent of the patient, such a touching would ordinarily amount to an assault. To avoid such a possible consequence, the patient's consent to treatment is usually sought. Such consent may be implicit in the patient's submission to the treatment, but is usually sought in writing for the more intrusive procedures.

The consent of the patient is not always required to avoid a touching becoming an assault. It may be dispensed with out of necessity in the case of an emergency and the consent of a guardian (by whatever name) may be substituted where the patient is under a legal incapacity.

In the case of an apprehended child, some doubt remained as to whether the agency or parents were the one or ones to give or withhold consent to medical intervention. To remove that doubt, the legislature provided in s. 25(3) of the ***Act*** for the court to authorize treatment if satisfied that the treatment was in the child's best interests. But such consent is needed only where the medical treatment without it would amount to an assault.

It follows, in my opinion, that the word “treatment” when used in s. 25(3) is used only in a positive sense. There is no need for a consent from anyone for a doctor to refrain from intervening.

There is no legal obligation on a medical doctor to take heroic measures to maintain the life of a patient in an irreversible vegetative state. Indeed, the opposite may be true. Consent to the use of heroic measures, they being necessarily intrusive, might technically be required to avoid the intervention amounting to a trespass. The only fear a doctor need have in denying heroic measures to a patient is the fear of liability for negligence in circumstances where qualified practitioners generally would have thought intervention warranted.

The question of whether a medical doctor can lawfully direct that resuscitation measures be withheld from a patient has not, as far as I am aware, been considered previously by a Canadian court. It was considered, however, by the Appeals Court of Massachusetts in ***Matter of Dinnerstein***, 380 N.E. 2d. 134 (1978). The patient in that case was in an essentially vegetative state and was irreversibly and terminally ill. The Court held that the law did not prohibit a course of medical treatment excluding attempts at resuscitation in the event of cardiac or respiratory arrest and that the

validity of a physician's order to that effect did not depend on prior judicial approval.

In delivering the opinion of the Court, Armstrong J. said (at p. 139):

> [The case] presents a question peculiarly within the competence of the medical profession of what measures are appropriate to ease the imminent passing of an irreversibly, terminally ill patient in light of the patient's history and condition and the wishes of her family. That question is not one for judicial decision, but one for the attending physician, in keeping with the highest traditions of his profession, and subject to court review only to the extent that it may be contended that he has failed to exercise "the degree of care and skill of the average qualified practitioner, taking into account the advances in the profession." *Brune v. Belinkoff*, 354 Mass. 102, 109, 235 N.E.2d 793, 798 (1968).

These views coincide with mine and support the conclusion that neither consent nor a court order in lieu is required for a medical doctor to issue a non-resuscitation direction where, in his or her judgment, the patient is in an irreversible vegetative state. Whether or not such a direction should be issued is a judgment call for the doctor to make having regard to the patient's history and condition and the doctor's evaluation of the hopelessness of the case. The wishes of the patient's family or guardians should be taken into account, but neither their consent nor the approval of a court is required.

For these reasons, I was of the view that the court's authorization of a non-resuscitation direction in this case should not have been given. The question of whether the direction should nonetheless be given is one to be answered by the responsible physician. The appeal was therefore allowed, the order appealed from set aside and the application of the petitioner dismissed. The petitioner must pay the parents' costs in both courts.

_____ J.A.

I Agree:

_____ C.J.M.

I Agree:

_____ J.A.