by Jonathan Rosenbloom
Friday, July 11, 2003 12:00 AM -

Â

Last New Year's Eve, a three-year-old child in Brooklyn suddenly collapsed, had a seizure and was rushed to Kings County Hospital in Brooklyn. The doctors inserted a tube in her throat to breathe, and another tube through to her stomach for nourishment.

The child never regained consciousness.

Thus was the beginning of a case that has resulted in a humane decision by Supreme Court Justice Doris Ling-Cohan, one that would not have been necessary if the New York State Legislature would pass a bill called the Family Health Care Decisions Act.

The Case

The doctors diagnosed the child as having suffered "massive loss of brain functioning" from an abnormal rate of heart muscle contractions. The child, the doctors concluded, would remain permanently unconscious, totally unaware of her environment, without the ability to think or interact - a vegetative state..The child was kept alive by a mechanical ventilator and the feeding tube.

The child's mother visited the unconscious child every day. Unwilling to continue to watch her daughter suffer without hope of recovery, the mother consulted the doctors, the hospital's medical ethics team, her family, and the child's father on whether to terminate life support. All parties agreed that ending life support was in the best interest of the child and the mother was fully capable of making that decision.

But the Health and Hospitals Corporation, the city agency that oversees the hospital, refused the mother's request.

Why The City Refused

In denying the mother's request, the Health and Hospitals Corporation cited its policy that prohibits staff from withdrawing or withholding care without the individual's consent.

The policy is rooted in the legal recognition that competent adults may refuse treatment. Children, however, cannot make this decision because they are not old enough. The question then arises, who can make that determination on behalf of a child in a vegetative state?

Most states, recognizing the care and love of family members, have left this determination to the family. New York, however, has not.

In 1981 the New York State Court of Appeals , the highest court in the State, ruled that the state is responsible for making the determination on behalf of a child and can supersede the wishes of the family. That case, Matter of Storar, found that the state serves as the omniscient parent for the public and may supercede a family's refusal to treat an individual.

Throughout the 1980's and 1990's most states began to recognize a parent's right to refuse unwanted medical care on behalf of their child in consultation with doctors without receiving court approval. In 1993 the first proposal in New York for family decision making to terminate life support was introduced in the Assembly. Every time the bill passed the Assembly it languished in the Senate..

Currently, New York and Missouri stand alone as the only two states that do not recognize that responsible parents, in conjunction with doctors and medical staff, are in the best position to determine whether to end a child's life support.

Justice Ling-Cohan's Decision

Earlier this year the mother filed suit to prohibit the continued languishment of her child. The mother sought to have the Health and Hospitals Corporation's policy declared void.

At trial, several doctors testified that the child had no hope of recovering and that the mother was a caring, devoted and loving parent. In addition, the doctors and a guardian appointed for the child testified that the mother made a fully informed decision.

Then the mother testified. The record is sealed as to what she said.

In May in a strongly worded decision, Justice Ling- Cohan ruled that "[a]bsent extraordinary circumstances such as incapacity, conflict of interest, or disagreement between parents, a parent of a minor child with an established diagnosis of persistent vegetative state should have the right to decide whether to terminate life support in the best interest of the child, without the necessity of judicial intervention."

The decision, Justice Ling-Cohan concluded, "to end the dying process of a minor child is a personal decision for the parents, in consultation with the child's medical providers, as they bear the legal, moral and ethical responsibility for their child. . . . [There is no] State interest great enough to compel [the child] to remain subjected to this extraordinary life-sustaining measure."

Conclusion

While the image of a three-year-old child lying in a persistent vegetative state is horrendous, it is hard to imagine how much pain her mother suffered watching her own child in that state and then being forced to testify about it.

A bill now pending in the Senate, the Family Health Care Decisions Act, would rectify this by making judicial intervention unnecessary when numerous safeguards are met. It would be irresponsible, particularly in light of the existence of these laws in 48 other states, for the Senate not to move on this bill.

Matter of AB, Index No. 401184/03 (Ling-Cohan, J.) (N.Y.Cty.Sup.Ct.) May 20, 2003 (N.Y.Cty.Sup.Ct.) (Attorneys: Elisabeth Benjamin, Samuel Davol, for AB; Salvatore Russo,

Stacey Mondschein, Kenneth R. Larywon, Michael Zhu, for HHC).