MAINE SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

Law Court Docket No. KEN-14-192

In Re A.P.

ON APPEAL FROM THE MAINE DISTRICT COURT
(Seventh District)

BRIEF OF APPELLANT
Mother

Scott F. Hess, Esq., Bar # 4508
Law Office of Scott F. Hess, LLC
Attorney for Appellant Mother
72 Winthrop Street
Augusta, Maine 04330
(207) 430-8079

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Procedural History

On January 17, 2014 the Department filed a Petition for Child Protection and a Request for a Preliminary Protection Order seeking custody of A.P. (A. at 1-2.) They alleged that A.P. was in jeopardy in the custody of the Father, Father, due to his assault on A.P. which caused significant injury. (A. at 40.) In regards to the Mother, Mother the Department alleged that she failed to protect A.P. from Father, that she continued to maintain a relationship with Father, and that she is not able to care for A.P. due to the significant injuries that she sustained. (A. at 40.) The Department alleged an aggravating factor in regards to Father (A. at 39.) On January 22, 2014 the Department filed a Motion for Expedited Judicial Review seeking authority pursuant to *In re Matthew W.*, 2006 ME 67, 903 A.2d 333, to consent to a DNR order over the objections of Mother (A. at 46-47.)

A hearing on the Department's Motion was held on March 7th, March 14th, and April 8th, 2014. (A. at 5, 6.) On April 24, 2014 the Court entered an Order granting the Department's Motion. (A. at 21.) Mother filed a timely Notice of Appeal, Motion for Expedited Transcript Protection, Motion to Appoint Co-Counsel, and Motion to Stay on May 6, 2014. (A. at 7.) The Department filed an objection to Mothers Motion to Stay on May 16, 2014. (A. at 8.) On May 19, 2014 the Court granted Mothers Motion to Stay. On May 29, 2014 the parties entered a Jeopardy Order by agreement. (Supplemental Appendix ["SA"] at 1.) As part of the Order the parties agreed to fully incorporate the record and findings of the Court into the Jeopardy Order for the purposes of preserving

those issues for appeal. (A. at 5.) The Mother, Mother then filed a timely Notice of Appeal from that Order as well as a Motion to Consolidate the appeal. (SA. at 14, 15.)

Statement of Facts

Mother met Father when she was 16 years old, and moved in with him after being kicked out of her home where she lived with her grandparents, whom had adopted her. (Tr. II at 171-72.) She lived with Father in his apartment for several months until she became pregnant and they moved in with his parents. (Tr. II at 172-73.) Despite her youth, Mother approached the pregnancy as any responsible adult. She attended her prenatal appointments and ultrasounds with the doctor and took her prenatal vitamins. (Tr. II at 173.) There were several times when she did not feel A.P. moving and promptly went to the doctors. (Tr. at 174.) Father's parents were very supportive of Mother They helped take her to appointments and answered questions that Mother had during the pregnancy. (Tr. II at 175-176.) Mother described her as being the "mom I never really had." (Tr. II at 176.)

Mother went into labor on June 14, 2014 and A. P. was born the next day by C-section, following a difficult labor. (Tr. II at 178-180.) However, she was full term at her birth and the discharge summary from Maine General Medical Center noted no concerns for her health. (A. at 190-91.) Both parents were very excited to have their daughter in their life. Over the next six months, Mother was an involved and responsible parent. She took A.P. to her doctor's

appointments on a regular basis[1] where she received her immunizations. (A. at 145.) A.P. was meeting all her growth and developmental milestones as shown on the charts contained in her medical records. (A. at 148-151.) This was an extremely happy time for Mother who, despite her age, was demonstrating herself to be an exceptional mother. Mothers ambition to better herself for the sake of her family was demonstrated by her pursuing and receiving her GED several months after A.P. was born because she was unable to attend conventional classes. (Tr. II at 188.) Mother hopes to go on and study forensic science at the University of Maine at Augusta. (Tr. II at 189.)

Unfortunately, like many young couples, Mother and Father were struggling financially. Several months after A.P. was born they moved into their own apartment. (Tr. II at 202.) After Father was terminated from his job working for a local distribution company, Mother took a job at a local restaurant to provide for her family. (Tr. II at 201-02.) On December 21, 2013, Father and A.P. dropped off Mother for work. (Tr. II at 203). Like she usually did, Mother told her daughter that she loved her and went into work. (Tr. II at 203.)

Four hours later Father came back to the restaurant and told Mother that there was an emergency and that they had to go across the street to the fire station. (Tr. II at 204.) Father told Mother that there was an accident with A.P. and that "they were working" on A.P. (Tr. II at 204). Upon hearing this Mother broke down and screamed. (Tr. II at 204.) Emergency personnel told Mother that they

[1] The medical records indicate that A.P. attended medical appointments on July 1, 2013, (A. at 152.), July 9, 2013 (A. at 156.), July 11, 2013 (A. at 161.), July 17, 2013 (A. at 163.) , July 30, 2013 (A. at 167.), August 30, 2013 (A. at 169), October 18, 2013 (A. at 173.), and December 20, 2013 at 177.) Several of these appointments were to check up on a bump that Mother discovered on A.P.'s head. (Tr. II at 193).

were taking A.P. to Maine General, and she left with Father to meet them at the hospital. (Tr. II at 205.) At the hospital, medical personnel performed CPR and provided A.P. with other medical attention. (A. at 139.) Father also told Mother that he had dropped A.P., which is how she was injured. (Tr. II at 209.) A.P. was then transported to Maine Medical Center in Portland. (A. at 140.)

Mother stayed with A.P. in the hospital, and was able to give her a bottle the first night. (Tr. II at 207.) She also asked Father what happened, to which he responded that it was all his fault, but did not elaborate. (Tr. II at 208.) The next day Mother and Father were interviewed by Dr. Lawrence Ricci. After speaking with Father, Dr. Ricci interviewed Mother and told her that he did not believe that A.P. was injured from being dropped. (Tr. II at 210.) Mother then confronted Father, who finally admitted to shaking A.P. (Tr. II at 210.) Mother then told Dr. Ricci that Father admitted to shaking A.P. and immediately called the Detective who had been investigating the case to tell her about Father's confession. Tr. II at 211.)

During the first few days at the hospital A.P. was in a deep coma and placed on a respirator. (A. at 11.) She suffered multifocal seizures, which subsided after several days. (A. at 11.) Attempts were made to remove A.P. from the ventilator with the hope that she would breathe on her own. (Tr. I at 114-115.) Unfortunately, both those attempts failed as A.P. was unable to breathe without assistance and she was again intubated. (Tr. I at 115.) Medical doctors informed Mother that A.P. was neurologically devastated and that she would not improve. (Tr. I at 122-23.) Additionally, based on A.P.'s inability

to breathe independently, medical doctors asked Mother and Father for authority to change A.P.'s code status to Do Not Resuscitate (DNR) and remove A.P. from the ventilator. (Tr. I at 116.) A DNR code status would prevent the use of CPR or a ventilator to keep A.P. alive, but would allow for other medical treatment including palliative care. (Tr. I at 43, Tr. I at 93.) The parents agreed to the DNR order. (Tr. I at 116.)

The doctors told Mother that they were going to "hand you your daughter, and she is not going to survive...And she is going to die in your arms within the next five to ten minutes." (Tr. II at 228.) And the doctors handed Mother her daughter. Miraculously, A.P. continued to breathe on her own and opened her eyes. (Tr. II at 229.) Minute by minute, hour by hour, day by day, A.P. continued to breathe on her own. Shortly afterward, Mother and Father withdrew their consent to the DNR. (Tr. I at 117.) A.P. also emerged from the coma, becoming more alert. (Tr. I at 118.) However, A.P.'s medical providers felt that A.P.'s prognosis was still very grim and that a DNR code status was appropriate given her condition. (Tr. I at 122-126.) The parents would not agree to a DNR order.

Several weeks later on January 17, 2014 the Department filed a Petition for Child Protection and request for a Preliminary Protection Order. (A. at 40-1.) On January 22, 2014 the Department filed a Motion for Expedited Judicial Review seeking court authority to consent to a DNR order. A hearing on the Department's Motion was held on March 7th, March 14th, and April 8th, 2014. (A. at 5, 6.) (Augusta, *Stanfill*, J.)

Testimony regarding A.P.'s medical condition was given by a number of pediatric doctors and neurologists. (A. at 10.) In regards to the medical testimony offered at the hearing, the Court made detailed findings regarding A.P.'s dire medical prognosis. In summary, the Court found that A.P. had suffered devastating neurological injuries. (A. at 11.) As a result of these injuries she is unable to suck or swallow. (A. at 12.) She is fed through a GI-Tube. (A. at 12.) She will never be able to walk, talk, see, or hear. (A. at 12.) Due to spasticity and arching, it is likely that she may require orthopedic surgeries in the future. (A. at 12.) A.P. exhibits a high-pitched "neurological cry" 80-85% of the time. (A. 12.) The court also found that A.P. is uncomfortable most of the time and may be in significant pain "much of the time." (A. at 12.)

The testimony from the medical providers also indicated that they were faced with a dilemma in this case because they felt that A.P.'s condition was dire enough that they should be focusing on palliative care, making A.P.'s comfort the first priority. (A. at 14.) However, the medications that would be provided to ease A.P.'s discomfort "increase the likelihood for aspirations of fluids and significant respiratory depression and distress. When she experiences that respiratory distress, she is likely to need intubation and CPR." (A. at 14-15.) Providers further explained that resuscitation methods themselves would likely not be successful, but if they were they would likely cause A.P. additional pain and discomfort, resulting in additional deterioration of her condition. (A. at 15.) Thus, to summarize, medical providers

recommended the DNR be put in place so that they could provide A.P. with medical treatment that would both ease her pain and result in a cascading series of events that would inevitably lead to her death.

The parents called pediatric ethicist Dr. John Lantos[2] to offer testimony regarding the widely accepted ethical framework that dictates when a decision to withdraw or withhold life-saving medical care is appropriate. (A. at 15.) Dr. Lantos testified that cases fall into three different categories. The first category is when "life-sustaining treatment is clearly indicated regardless of the parents' wishes..." (A. at 15.) The second category of cases includes those situations where the medical outcome for the child is "ambiguous or uncertain." (A. at 15.) In those cases the wishes of the parents should generally be honored unless circumstances exist that require their decisions to be scrutinized more closely. (A. at 15.) The last category includes those cases where a DNR would be obligatory because the child is in intractable pain and suffering, and attempting to provide life sustaining care would be futile or inhumane (A. at 15.)

Dr. Lantos testified that this case fell into the second category because it was ambiguous or uncertain that providing life-sustaining medical treatment through full code status would be futile or inhumane. (Tr. III at 11-12.) The Court concurred, finding that that medically A.P.'s condition "must be viewed as one in which a DNR order is permissible and appropriate, but not necessarily obligatory." (A. at 16.)

[2] The CV of Dr. Lantos is found in the appendix at page 90. Dr. Lantos is one of the leading, if not the premier pediatric bioethicists in the country.

In regards to the facts of this case, Dr. Lantos testified that it would be appropriate to scrutinize Mothers medical decisions for A.P. due to her conflicting emotions regarding the father, who was indicted for Aggravated Assault. (Tr. III at 20.) However, Dr. Lantos also testified that "...it would be bizarre and unprecedented to take away [the parents'] rights to make a decision about life-sustaining medical treatment without taking away other parental rights." (Tr. III at 38.) Ethically, Dr. Lantos testified that the Department should not be given the authority to consent to a DNR over the parent's objection without a termination of their parental rights. (Tr. III at 32.)

There was also testimony that focused on Mothers ability to make decisions for A.P. Dr. Gunnoe testified that in his experience, parents often made medical decisions based on their perception of the child's condition, rather than based upon medical advice. (Tr. I at 142.) Mother herself testified that this period has been a horrible, depressing, and a painful time for her. (Tr. II at 226.) She also stated that she has been very confused about whether to consent to a DNR, both because of her emotions and because of conflicting information from the Department and medical information that has proven to be incorrect. (Tr. II at 227.) In her own words, Mother stated that "I just --- I don't necessarily want her put on a breathing tube and all that stuff again, but I don't think that they should give up and just pump in the medication and watch my child die." (Tr. II at 232.)

On April 24, 2014, the Court issued an order granting the Department authority to consent to a DNR after consultation with the mother, Mother (A. at

21.) In doing so, the Court found by clear and convincing evidence that A.P. would be in circumstances of jeopardy in the care of Mother and that a DNR was in her best interest. (A. at 18.) The Court acknowledged the issue raised by the parents that case law in Maine was silent as to whether the Court must make a finding of unfitness before authorizing a DNR where the Department only had temporary custody of a child. (A. at 16.) The Court held that it was required to make a finding of parental unfitness by clear and convincing evidence before authorizing a DNR, and in turn made that finding. However, the Court declined to find that these circumstances were unlikely to change within a timeframe reasonably calculated to meet the child's needs pursuant to 22 M.R.S.A. §4055(1)(B)(2), stating that '[s]uch a temporal requirement...would be premature and not an appropriate finding at this state of the case." (A. at 17, n. 1.) The court also noted that "...[the mother] does have the ability to reunify with [A.P.]. She has the opportunity to be intimately involved in her care and indeed to be her primary caregiver. If she decides to do this, she may also earn back the right to make decisions for [A.P.]. (A. at 20.) The Mother then filed a timely Notice of Appeal from that order and the subsequent Jeopardy Order that incorporated the findings from the Judicial Review.

Issue Presented for Review

I. Did the trial Court err as a matter of law by granting the Department authority to consent to withhold life-sustaining treatment of a child temporarily in its custody, over the Mother's objection, in the absence of findings sufficient to terminate her parental rights?

Summary of the Argument

The Mother in this case is challenging the legal standard applied by the trial Court in granting the Department of Health and Human Services the authority to consent to withhold life-sustaining medical treatment through a DNR order. The trial Court found by clear and convincing evidence that A.P. would be in circumstances of jeopardy if she were in the care of her mother. The trial Court also found by clear and convincing evidence that it was in A.P.'s best interest to vest authority to consent to a DNR to the Department. However, the trial Court acknowledged that it could not find that these circumstances were unlikely to change within a timeframe reasonably calculated to meet the child's needs. This latter finding is a statutory requirement that must be met prior to the termination of parental rights.

There can be no dispute that vesting the Department with the authority to withhold life-sustaining treatment over the objections of a parent who has lost temporary custody is tantamount to an involuntary termination of ones' parental rights. As such, Mother contends that a court must be able to satisfy all

statutory requirements for a termination of parental rights, indeed actually terminate her rights, before it may grant the Department lawful authority to authorize a DNR order over her objection.

Standard of Review

The Mother asserts that when the Department seeks authority to authorize that life-sustaining medical treatment be withheld from a child in the temporary custody of the State, that the Department bears the burden of proving parental unfitness by clear and convincing evidence on one of the grounds set forth in 22 M.R.S.A. §4055 (1)(B)(2)(b) (2001). Furthermore, the Court must also find by clear and convincing evidence that withholding life-sustaining treatment is in the best interests of the child based upon the standard set forth in *In re Matthew W.*, 2006 ME 67, 903 A.2d 333.

This Court has stated "[w]here clear and convincing evidence is required, the appropriate standard of appellate review is whether the District Court could reasonably have been persuaded that the required factual findings were proved to be highly probable." *In re Michaela C.*, 2002 ME 159, ¶ 17, 809 A.2d 1245. A trial court's findings on parental unfitness are reviewed for clear error. *In re Marcus S.*, 2007 ME 24, ¶ 6, 916 A.2d 225. Its findings regarding the child's best interest involves a two-fold review: clear error is the standard for the trial court's factual findings, and its ultimate conclusion regarding the child's best interest is reviewed for abuse of discretion. *In re Thomas H.*, 2005 ME 123, ¶ 16, 889 A.2d 297. This Court reviews questions of law *de novo*. *In re M.B.*, 2013 ME 46, ¶ 26, 65 A.3d 1260.

Argument

I. The Trial Court Erred as a Matter of Law by Granting the Department Authority to Consent to Withhold Life-Sustaining Treatment Over the Mother's Objection Prior to a Termination of Her Parental Rights

In this case, the Court is called upon to decide whether Mothers parental rights must be terminated before the Court may authorize the Department to withhold life-sustaining medical treatment from a child who is temporarily in its custody. It is well settled law that parents have a fundamental liberty interest to direct the care, custody, and control of their children. *Troxel v. Granville,* 530 U.S. 57, 65 (2000); *Rideout v. Riendeau,* 2000 ME 198, ¶ 18, 761 A.2d 291; *Davis v. Anderson,* 2008 ME 125, ¶ 18, 953 A.2d 29. This fundamental right is protected by the Due Process Clause of the Fourteenth Amendment and Article I, section 6-A of the Constitution of the State of Maine. *Matthew W.*, 2006 ME 67, ¶ 7, 903 A.2d 333, 336. "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v. Kramer,* 455 U.S. 745, 753 (1982). Accordingly, these rights may not be terminated, except after a finding by clear and convincing evidence that a parent is unfit, which is supported by adequate factual findings. *Id.* at 769. In this case the mother asserts that granting the Department authority to withhold life-sustaining

medical treatment from her child amounts to a *de facto* termination, and therefore violates her constitutional rights as a parent.

The most appropriate starting point for this analysis begins with a review of *In re Matthew W.*, 2006 ME 67, 903 A.2d 333, the underlying factual basis of which is unfortunately nearly identical to the case at bar. In that case, following a preliminary protection order, the Department approved DNR status pursuant to 22 M.R.S.A. §4037 over the parent's objection. *Id.*, at ¶ 4. Following an expedited judicial review that was held several days later, the Court authorized the Department to consent to a DNR. *Id.* The parents filed a Notice of Appeal from the Judicial Review Order. Following a jeopardy hearing in which the Court reaffirmed the Department's authority to consent to a DNR, the parents filed a second notice of appeal. *Id.* at ¶5.

The parents appealed on the basis that granting the Department authority to consent to a DNR was a *de facto* termination of their parental rights, and thus they must be afforded the same procedural protections. *Id.* at ¶10. This Court agreed with the parents and stated that:

> [A]pproval of the DNR, without their consent, could have the effect of terminating their parental rights...Exercise of a DNR over the parents' objections not only infringes upon the fundamental rights of parenthood, but could have the effect of conclusively preventing parents from raising their child or ever again exercising their fundamental rights...Thus, due process requires that parents be afforded the same procedural protections before approval of a DNR for their child as they are afforded prior to the termination of their parental rights.

Id. at ¶ 11-12. The Court went on to outline minimum standards that must be considered in the best interest prong of the analysis. *Id.* at ¶ 12. However, the opinion is silent as to the parental fitness prong, which is a constitutional

prerequisite for a termination of ones' parental rights. *See Santosky v. Kramer*, 455 U.S. 745, 760, 102 S.Ct. 1388, 1398 (parental unfitness must be determined before a Court can terminate a parent's parental rights). As granting authority to the Department to consent to a DNR is the functional equivalent of a termination, it follows that before that authority to consent is granted the parents' rights must be terminated. Although there is no binding precedent in this State, the majority of states that have weighed the constitutional implications of allowing the government to authorize a DNR over the parents objections reached the natural and logical conclusion that a termination of rights is a prerequisite.

In the case *In re Guardianship of Stein*, 105 Ohio St.3d. 30, 821 N.E.2d 1008 (2004) the government sought to obtain authority to consent to a DNR of a child who had been severely injured due to being violently shaken. A petition for guardianship was filed, and over the parent's objections, the probate court appointed a guardian vested with the authority to consent to a DNR. *Id.* at ¶29, 821 N.E. 2d at 1012. The parents appealed on the grounds that their parental rights had not been terminated, and thus granting authority to a guardian to consent to a DNR infringed upon their Constitutional Rights. *Id.* The Supreme Court of Ohio agreed and held that:

> [T]he probate court's order authorizing the guardian to withdraw life-supporting treatments has the effect of terminating parental rights. We, therefore, hold that the probate court exceeded its statutory authority in granting the guardian the power to withdraw life-supportive treatments Before (sic) the parents' rights were *permanently terminated.*

Id. at ¶37, 821 N.E. at 1013 (emphasis added). Relevant to the case at bar, the Court in *Stein* found it noteworthy that reunification with the mother was still a possibility. *Id.* at ¶35, 821 N.E. at 1012.

The case of *In re Interest of Tabatha R.*, also involved a child who suffered serious injuries after being shaken by one of her parents such that she "can feel nothing, do nothing, and will do nothing for the rest of her life." 252 Neb. 687, 693, 564 N.W.2d 598, 604 (1997). Following an adjudication hearing, the court found by a preponderance that the child came into the jurisdiction of the court[3] and that by *clear and convincing evidence* it was in the best interest of the child that "she not be resuscitated..." *Id.* at 691, 564 N.W. at 602 (emphasis added). The parents appealed the decision on the basis that the granting of such authority was the functional equivalent of a termination of their parental rights, and as such they must be afforded with those same protections. *Id.* at 695, 564 N.W. at 604. The Supreme Court of Nebraska agreed, holding that before the department can consent to a DNR, the parent's rights must be terminated. 252 Neb. at 696-97, 564 N.W. at 605 ("Such a request necessarily requires as a first prerequisite that all rights of the parents to the child be terminated.") (concurring opinion).

The case *Commonwealth v. Cabinet for Health and Family Services*, 221 S.W.3d 382 (Ky.App. 2007) also involves a case where a child suffered debilitating injuries due to child abuse. The State requested and received authorization to consent to DNI (Do Not Intubate) and DNR (Do Not

[3] Presumably the statutory reference in the opinion reference to an initial finding of jeopardy or parental unfitness.

Resuscitate) orders over the objection of the parents. *Id.* at 384. The mother appeal on the grounds that the order had the effect of "impermissibly usurping her outstanding, intact parental right to direct the course of medical treatment of her son. *Id.* This court, too, agreed with the parents and the matter was reversed and remanded the matter to the trial court "for an adjudication of termination of the parental rights of D.K." *Id.* at 385.

All of these cases share several unfortunate parallels with the case before this Court. In each case the child's medical condition was a direct result of abuse by a parent, which resulted in the child being taken into custody by the State. The dynamics between the parents themselves and the best interest of the child in *Stein* were also very similar to this case in that the court recognized a conflict existed in the sense that if the child died, then the father would likely be charged with murder. *Stein*, 105 Ohio St. 3d at 32. Nonetheless, these courts all held that the termination of the parents' rights must be adjudicated prior to granting the government with the authority to consent to withhold or withdraw life-sustaining medical treatment because such a decision was tantamount to a termination of parental rights.[4]

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[4] The trial Court cited a number of opinions for the proposition that a finding of parental unfitness is a necessary prerequisite to granting the government with the authority to consent to a DNR. (A. at 16.) However, the majority of those cases do not directly address the question of whether a judicial finding sufficient to terminate parental rights is necessary before the government can be granted the authority to withhold or withdraw life sustaining treatment. The case of *In re Christopher I* primarily discusses the best interest analysis, summarily dismissing the rights of the parents (which had not been terminated), stating that "[the parents], by their actions forfeited their rights to determine what is and is not in Christopher's best interest." 106 Cal. App. 4th 533, 556 (2003). *In the matter of AMB* the Court acknowledged the parents fundamental liberty interest as parents, but did not decide whether a termination was a prerequisite for the court to approve a DNR. 248 Mich. App. 144, 158-62, 640 N.W. 2d 262, 298 (2001). *See also JN v. Superior Court,* 156 Cal. App. 4th 523, 533-34 (focus upon best interest test of dependent minor); *In re K.I.*, 735 A.2d 448 (D.C. 1999) (holding, contrary to Maine law, that best interests supersedes parental rights).

This point was also highlighted in testimony in this case by a nationally renowned pediatric ethicist, Dr. John Lantos, who testified on the ethics of balancing the right to make decisions regarding life-sustaining medical treatment with the rights of the parents. He opined that either Mother was so overwhelmed that her parental rights should be terminated or she should be "supported to carry out her parental responsibilities." (A. at 22.) He perhaps best summarized the matter stating that it would "be bizarre and unprecedented to take away [the parents'] rights to make a decision about life sustaining medical treatment without taking away their other parental rights." (Tr. III at 38.) Dr. Lantos testified that he could not think of a situation where the Department should be given the authority to consent to a DNR prior to a termination of parental rights. (Tr. III at 32.)

In addition, the trial Court found that reunification was still possible and that Mother still has an opportunity to "earn back the right to make decisions for A.P. ." (A. at 20.) It is impossible to reconcile that on one hand the Court has granted the Department authority to make a medical decision that will very likely result in A.P.'s death, but on the other hand found a legal basis only to temporarily suspend Mothers parental rights, not terminate them.

As discussed *supra*, the case of *In re Guardianship of Stein* held that a termination of parental rights *was* required before the government could consent to a DNR. 105 Ohio St.3d 30, 821 N.E.2d 1008. In *State ex rel. Juv. Dept. v. Smith* the child had been in foster care since birth (the child was three and one half years old at the time of the opinion) and the mother had never been a caregiver to her child. 205 Or.App. 152, 155, 133 P.3d 924, 925 (2006). The court concluded that it was not a violation of the mother's fundamental right to appoint a medical guardian with the authority to consent to a DNR. 205 Or.App. at 169, 133 P.3d at 933. The case at bar is distinguished simply by the facts. Given the guidance offered by the termination statute in Maine, 22 M.R.S.A. § 4055, it is highly unlikely that the Department would wait three and a half years to initiate termination proceedings against a parent who had failed to reunify in that timeframe, as was the case in *Smith*. Second, Mother was not, and is not, an absentee parent. She was A.P.'s primary caretaker until this tragedy and continued to engage with the child.

The Child and Family Services and Child Protection Act does not guarantee every parent a right to reunify. If the Court finds an aggravating factor, the Court may order the department to cease reunification. 22 M.R.S.A. §4036(1)(G-2)(1997). An aggravating factor includes subjecting the child to aggravated assault. 22 M.R.S.A. §4002(1-B)(2001). Also, the Department can act expeditiously to terminate the rights of a parent under circumstances where "the parent has acted toward a child in a manner that is heinous or abhorrent to society or has failed to protect a child in a manner that is heinous or abhorrent to society..." 22 M.R.S.A. §4055(1-A)(A)(1995).[5] The Department chose not to attempt to terminate Mothers parental rights, presumably because there were no legal grounds to do so.

This Court has already recognized that granting the Department authority to consent to a DNR amounts to an involuntary termination of parental rights. *Matthew W.*, 2006 ME at ¶ 11, 903 A.2d at 333. There is also no question that Mothers parental rights are fully intact. In addition, unlike the father who is subject to a cease reunification based on an aggravating factor, Mother has a legal right and the opportunity to reunify with A.P. (A. at 20.) There is also no question that A.P. will need life-sustaining treatment in the very near future. (A. at 14.)

The Mother is asking this court to adopt a simple and logical bright line rule. If the facts of a particular case dictate that a person's parental rights should be terminated, then pursuant to the statute they should be terminated.

[5] The Court found that the father Father had subjected A.P. to "treatment that is heinous or abhorrent to society," but not the mother (A. at 17.)

But where the statutory grounds for termination do not otherwise exist, the Department should not be granted the authority to make medical decisions regarding life-sustaining treatment for a child. To do so would constitute a *de facto* termination of her parental rights without due process.

WHEREFORE the Respondent Mother, Mother prays that this Honorable Court will reverse this matter and remand the case for further proceedings not inconsistent with this opinion.

Respectfully Submitted,

Scott F. Hess, Esq., Bar No. 4508
Law Office of Scott F. Hess, LLC
Attorney for Appellant Mother
72 Winthrop Street
Augusta, Maine 04330
(207)430-8079