

Parental-Provider Conflict & Calling in the Law... Trump or Wild Card?

An Analysis of Montalvo v. Borkovec
647 N.W.2d 413 (Wis. App. 2002)

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Montalvo Facts:

- Pre-term labor symptoms
- Ultrasound: 23 3/7 weeks & 679 gm infant
- Informed consent for Cesarean procedure
- Unable to stop labor
- Cesarean section delivery
- Life-saving measures by neonatologist
- Infant lives
- Parents sue

Parents' Claim:

- MD's violated Wisconsin's Informed Consent statute
- MD's did not advise parents of the risks r/t premature birth
- Extraordinary care decisions should be made by parents, not MD's

Note: No allegation of harm or disability

Montalvo Holding

- No obligation to obtain informed consent because no viable alternative existed:
 1. WI case law (Edna MF)
 2. Federal Law (Child Abuse Protection & Treatment Act or CAPTA)
- Emergency exception applicable
- Public policy
- Claim dismissed

Montalvo Decision:

- “Thus, in Wisconsin, in the absence of persistent vegetative state, the right of a parent to withhold life-sustaining medical treatment from a child does not exist.”
- Because Montalvo infant was not in PVS the “alternative of withholding life-sustaining treatment did not exist.”

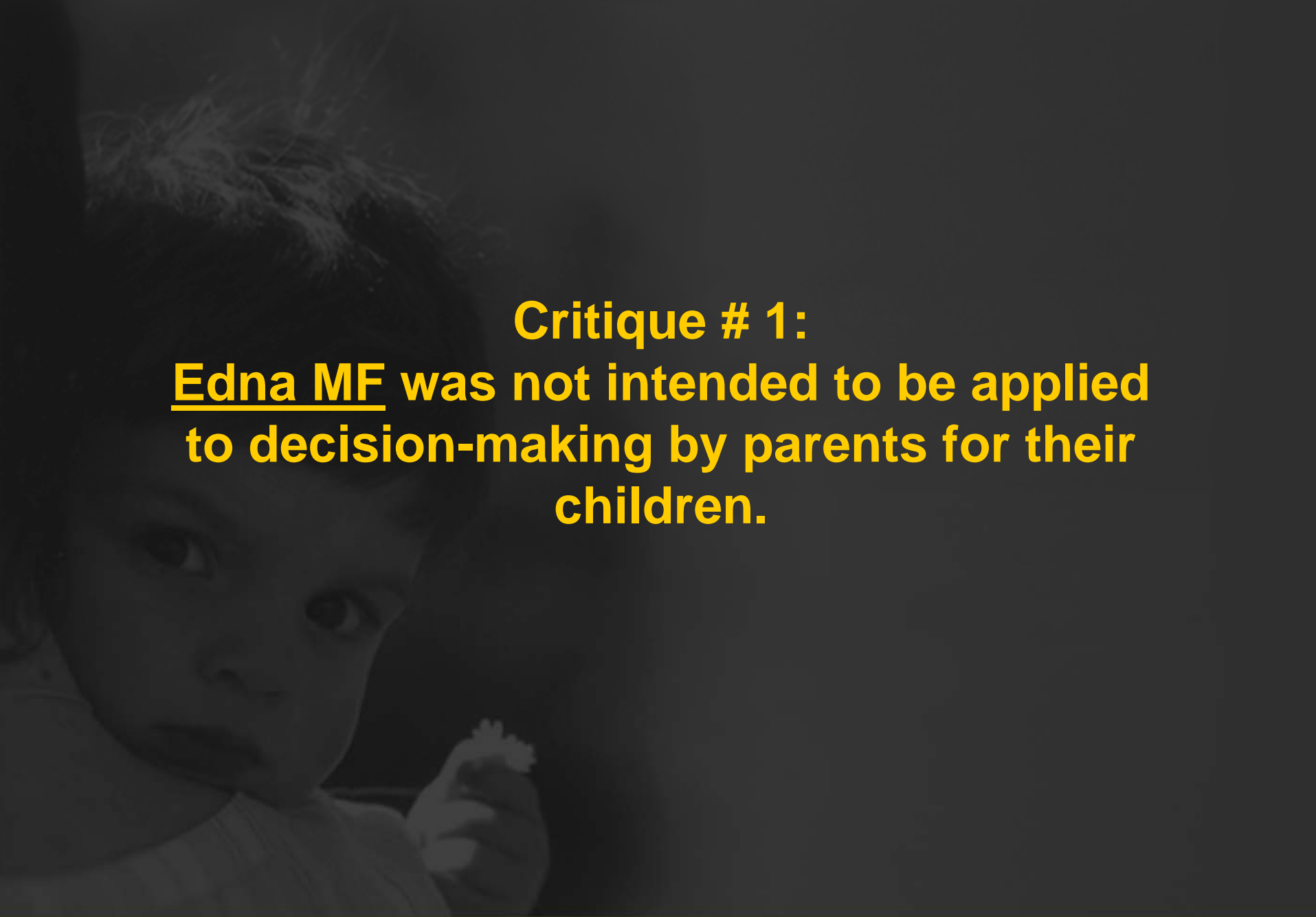
Impact On Practice:

- No option of withholding or withdrawal of life-sustaining medical treatment (LSMT) for infants and children unless they are in a persistent vegetative state (PVS)
- Infants/children are rarely in PVS
- Best interests decision for infants/children may include option of treatment withholding or withdrawal
- How to advise families?



Difficulties With The Montalvo Decision:

- WI Supreme Court case law interpretation
- Federal law application
- Informed consent analysis
- Public policy rationale
- Best interests of the child

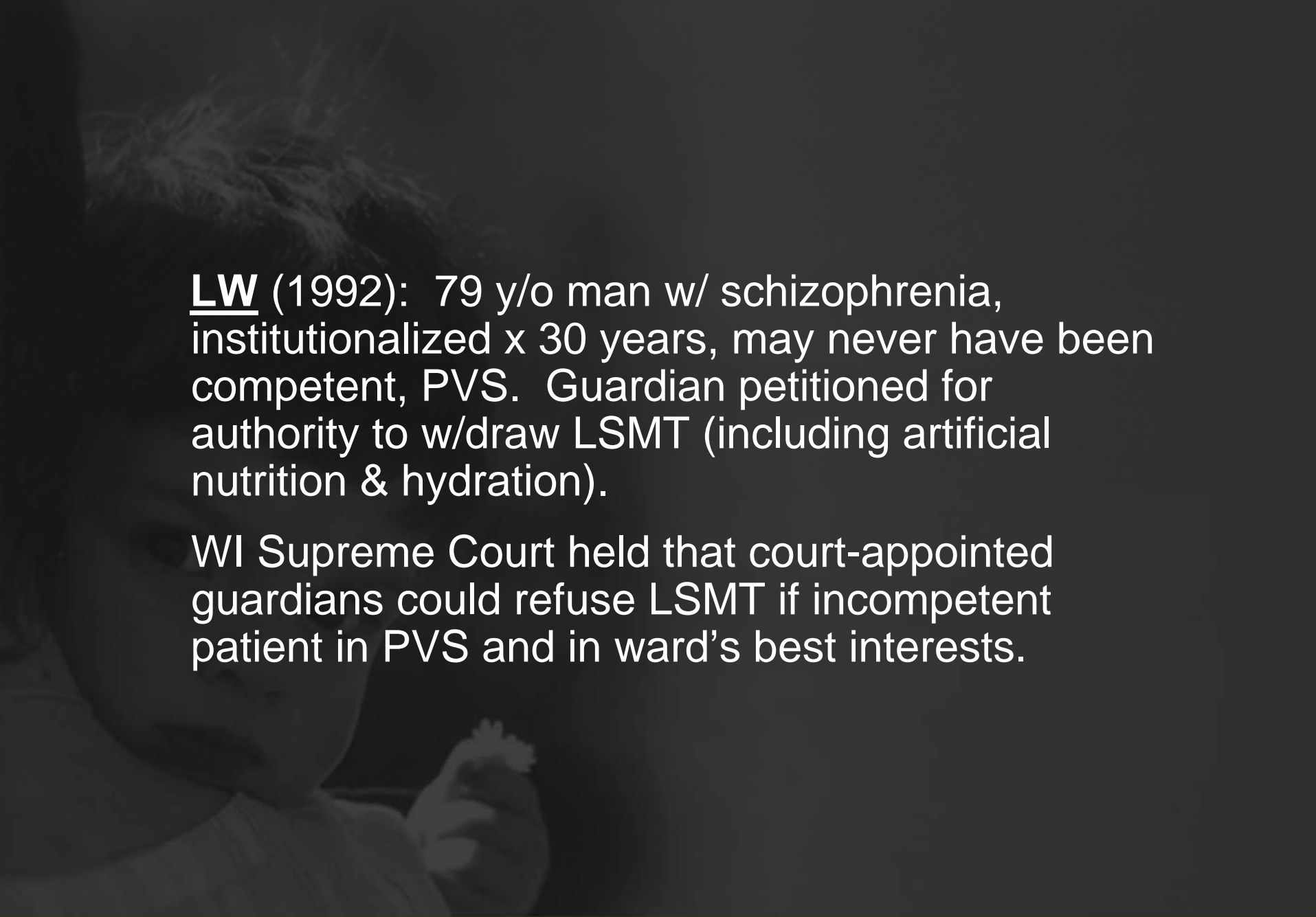


Critique # 1:
**Edna MF was not intended to be applied
to decision-making by parents for their
children.**

Edna MF (1997): 71 y/o woman w/ dementia, bedridden, no purposeful responses. Request by guardian to remove feeding tube.

WI Supreme Court held that a guardian may only direct the w/drawal of LSMT if the incompetent ward is in PVS and the decision to w/draw is in ward's best interests (unless advance directive or clear statement of wishes).

Affirmed LW.



LW (1992): 79 y/o man w/ schizophrenia, institutionalized x 30 years, may never have been competent, PVS. Guardian petitioned for authority to w/draw LSMT (including artificial nutrition & hydration).

WI Supreme Court held that court-appointed guardians could refuse LSMT if incompetent patient in PVS and in ward's best interests.

Did Montalvo Accurately Interpret Wisconsin Case Law?

Montalvo:

“It [the Edna Ct] thus concluded that either withholding or withdrawing life-sustaining medical treatment is not in the best interests of any patient who is not in a persistent vegetative state.”
(citing Edna MF)

Edna MF:

“[W]e hold that a *guardian* may only direct the withdrawal of life-sustaining medical treatment, including nutrition and hydration, if the *incompetent ward* is in a persistent vegetative state and the decision to withdraw is in the best interests of the *ward*.”

LW Expressly Excluded Family Member Decision-making:

“We do not decide today whether a family member may consent to the withholding or withdrawal of life-sustaining medical treatment from a patient, because that question is not before us. *Our review is limited to whether a court appointed guardian, where there can be no familial decisional process, may consent to the withholding or withdrawal of such treatment from a patient in a persistent vegetative state.*”

[FN 16 - Emphasis added]



Critique # 1: Summary

- Prior WI case law was limited to state actors: Court-appointed guardians & incompetent wards
- Montalvo Court expanded scope of prior case law, to include parents and children, without providing explanation or legal rationale

Critique # 2: Application Of Federal Law

Montalvo:

“The implied choice of withholding treatment... is exactly what CAPTA prohibits”

CAPTA:

- Federal funding statute
- All states receiving federal child abuse and neglect funds must have procedures for handling a report of possible medical neglect of an infant
- Fact intensive
- Charges rare

Critique # 3: Emergency Exception Sufficient

- Consent not necessary *not because lack of alternatives but because it was an emergency*
- Emergency exception to Wisconsin Informed Consent Statute applied and would have been sufficient to dismiss the claim
- “The physician’s duty to inform the patient under this section does not require disclosure of...
[i]nformation in emergencies where failure to provide treatment would be more harmful to the patient than treatment.” (WI Stat. 448.30 (5))



Critique # 4: Public Policy- Preserving Life

Montalvo:

[T]he interest in preserving life is of paramount significance.
(citing LW)

LW:

“The state does not deprive an individual of life by failing to ensure that every possible technological medical procedure be used to preserve life.”

Public Policy - Preserving Life (Continued)

Montalvo:

“[T]here is a presumption that continued life is in the best interests of the patient.”
(citing LW)

LW:

“An unqualified state interest in preserving life irrespective of... the patient’s best interests transforms human beings into unwilling prisoners of medical technology.”



Critique # 5: *Best Interests Of The Child*

- Montalvo Court did not consider “best interests of the child” in analysis
- Mandate of treatment for children without diagnosis of PVS contradicts well-established medical ethical policies & guidelines
- Best interests consideration should include benefit/burden analysis

How To Proceed After Montalvo?

- Follow letter of the law
 - » If no PVS, continue treatment
- Ignore the law/Civil Disobedience
 - » No changes in practice
 - » AAP & other professional and ethical guidelines
- Encourage colleagues and parents to serve as test case (?)
- Lobby Wisconsin legislature for statutory correction

Summary

- Emergency exception was sufficient to dismiss Montalvo claim
- Care for premature infants, like all children, must incorporate ethical principles and respect for parental perspective, medical prognosis and professional standards
- Montalvo subjects children to treatment without balancing benefits/burdens as part of a best interests evaluation
- Montalvo creates confusion regarding the law because of misapplication of precedent and federal statute



**Questions?
Comments?**

Thank You!