IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

IN RE JOHN COBB, [Deceased,] :
: No. 2011-0805
An Alleged Incapacitated Person :

MEMORANDUM OPINION

* * *

APPEARANCES:

Timothy Stevens, Esq.
Allentown, Pa.
--On behalf of Petitioner St. Luke's Hospital – Allentown

Steven Litz, Esq.
Allentown, Pa.
--On behalf of John Cobb

* * *

Reibman, J.

Petitioner, St. Luke's Hospital—Allentown (hereinafter, St. Luke's or, simply, "the Hospital") appeals the entry of a decision on August 22, 2012, which provided notice that its exceptions to an order dated May 13, 2011, and entered on May 16, 2011, had been denied by operation of law. St. Luke's now seeks relief from the May 16, 2011, denial of its request for the appointment of a guardian as well as the assessment of attorney's fees in the amount of $1,200.00. This memorandum opinion is being filed in accordance with Pa.R.A.P 1925 (a) to set forth the reasons for the judgment from which Petitioner now seeks appellate relief.[1]

[1] The order entered on May 16, 2011, contains a footnote opinion in support of the order, and it has been included as part of the record already transmitted to the Superior Court. The within

I.

On May 10, 2011, St. Luke's filed a Petition for Determination of Incapacity and Appointment of an Emergency Guardian Ad Litem Pursuant to 20 Pa.C.S.A. § 5513 and a Plenary Guardian of the Person and of the Estate of John Cobb Pursuant to 20 Pa.C.S.A. § 5511, *et seq*. Hearing was held before the undersigned on May 12, 2011.

The evidence adduced at hearing established that on April 29, 2011, John Cobb, then an inmate at Lehigh County Prison, was taken by ambulance to the Hospital's Emergency Department. According to the uncontradicted rendition of events provided by Mr. Cobb's court-appointed counsel, Mr. Cobb realized he had end-stage liver disease and made clear to the Hospital's staff and attending physicians that "[h]e wanted all measures to be utilized to keep him alive." (Notes of Testimony, "N.T.," 5/12/2012 at 4.[2]) From the time of his admission, the Hospital followed those instructions and treated him accordingly. That treatment included measures such as the placement of Mr. Cobb on mechanical ventilation and the insertion of a feeding tube for nutrition. (See id. at 3-10.)

Mr. Cobb was seen on May 2, 2011, by Ric Alan Baxter, M.D., a physician specializing in palliative care. Dr. Baxter concluded Mr. Cobb had end-stage liver disease and other medical conditions, and that his "overall condition met the criteria for an end stage medical condition, and that he would therefore be appropriate for hospice care, if he so chose." (Id. at 21-22.) However, despite an awareness of his end-stage condition, and in possession of his mental faculties, Mr. Cobb told Dr. Baxter that he "did not want to die." (See id. at 23.) Further, Dr.

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opinion is being filed pursuant to Pa.R.C.P. 1925 (a) to provide a fuller legal exposition of the underpinnings of the lower court's action in order to facilitate appellate review.

[2] The cover page of the transcript erroneously states the date of hearing as August 12, 2011; as correctly reflected on page 3 within the body of the transcript, the proceedings convened on May 12, 2011 at 4:10 p.m.

Baxter's "consultation sheet," indicated that Mr. Cobb expressly denied hospice care and, instead, "want[ed] everything done, including full code, intubation, and mechanical respiration." (Id. at 33-34.) Nevertheless, the Hospital petitioned for the appointment of an emergency guardian, with its sole witness, Dr. Baxter, explaining the reason for the request as follows:

> . . . I believe, as I did on the 2nd, that he has a[n] end stage medical condition which . . . in previous years would have been called terminal.
>
> I believe that he will die, and that any – that all additional medical treatments at this point will serve to simply prolong his dying, and increase the likelihood of physical suffering and additional complications.

(Id. at. 31.)

Dr. Baxter also alluded to potential interventions, including surgery, re-intubation and ventilation support, that might be required if aggressive treatment remained the desired course of action for Mr. Cobb. Such interventions, he said, would require informed consent. (See id. at 31-32.) However, no testimony indicated that any of those procedures was imminent, nor did any evidence indicate a change in circumstances warranting a disregard of the directives issued by Mr. Cobb only days earlier on May 2, 2011, or otherwise demonstrate that his consent was not sufficient for any particular contemplated medical procedure. (Cf. id. at 10 (testimony indicating appointment of guardian at best premature).)

Indeed, Dr. Baxter admitted he was satisfied Mr. Cobb had adequate capacity when he instructed his healthcare providers at St. Luke's to withhold no life-sustaining measures:

> The Court: . . . [W]hen you met with him on May the 2nd, you concluded that he had adequate capacity in order to make decisions with regard to end of life decisions at that time?
>
> Dr. Baxter: . . . [H]e was very clear that he was not ready to die, and he wanted every effort to try and help him get better.
>
> The Court: And in your professional judgment, did he have capacity – adequate capacity at that time, to make that decision?
>
> Dr. Baxter: Yes, he did.

. . . .

The Court: Did you explain to him that he was at an end stage disease?

Dr. Baxter: I did explain that to him. And he did – As I said, he was able to grasp the fact that – that it would likely mean that he would die –

. . . .

The Court: And even with that knowledge, he expressed the preference that he be allowed to continue to live, and that all measures be taken to extend his life, or at least prolong his life?

Dr. Baxter: Correct.

(Id. at 25-28.)

Nevertheless, despite the lack of any advance directive, power of attorney, durable power of attorney or decision maker on his behalf requesting that Mr. Cobb be denied life-sustaining treatment, and no evidence of any desire on Mr. Cobb's part to be denied medical care in an end-state condition, the Hospital petitioned the orphans' court for a decree appointing a guardian to exercise what the Hospital characterized as an independent third-party assessment of the situation to make decisions on Mr. Cobb's behalf. (Id. at 8, 12.) That request was denied and the Hospital was directed to pay $1,200.00 in counsel fees for bringing a petition seeking relief diametrically opposed to Mr. Cobb's express wishes – instructions the Hospital had no problem comprehending until the Hospital concluded those wishes would be futile. Shortly thereafter, on May 15, 2011, Mr. Cobb passed away. In spite of the mootness of this matter -- in all respects except the award of $1,200.00 in attorney's fees -- which has resulted from the death of the alleged incapacitated person, the Hospital has pursued this appeal.[3]

[3] In noncompliance with the order entered on October 2, 2012, directing Petitioner to file and serve upon the undersigned a concise statement of matters complained of on appeal, the docket reflects no statement has been filed of record. Although a copy was served on the undersigned and apparently the legal director of the Orphans' Court, the cover letter did not indicate, through a "cc" designation or otherwise, that the statement had been forwarded to the Clerk of the

II.

At the outset of any legal inquiry respecting an action of the orphans' court, it is appropriate to bear in mind the special role such a court plays in our judicial system in safeguarding the interests of those who are unable to speak for themselves. See, e.g, Matter of Terwilliger, 450 A.2d 1376, 1380-81 (Pa.Super. 1982) (recognizing role of orphans' court in *parens patriae* role with "right and duty to protect [Commonwealth's] weaker members" "who cannot protect themselves"). It is further the public policy of this Commonwealth, as manifest in the decisional law, that in weighing considerations in respect to end-of-life decision-making, great significance attaches to the state's interest in preserving life. See In Re Fiori, 73 A.2d , 905, 910 (Pa. 1996).

Here, consistent with the command for vigilance on behalf of the lesser endowed, the court exercised circumspection in regard to the potential for inadequate attention being paid to the expressed desires of an indigent person. As the testimony at hearing revealed, the *parens patriae* concerns of the court were quickly piqued by the unusual posture of this proceeding. In short, the court was presented with a healthcare institution seeking the appointment of a guardian ostensibly to obtain "informed consent," despite evidence that raised the specter of an ulterior purpose to override the express wishes that the alleged incapacitated person had provided only days earlier when his capacity was not in doubt. (See N.T., 5/12/2012, at 3-15.) As recounted above, the testimony in this matter revealed no dispute as to Mr. Cobb's manifest desires: He did not want to die and wanted to receive all available life-sustaining treatment. In view of that

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Orphans' Court for filing. Aside from waiver on this basis, in view of the moot nature of the case as it concerns the late Mr. Cobb, the Orphans' Court of Lehigh County cannot financially justify an authorization for the expenditure of resources in the form of court-appointed counsel in respect to an appeal concerning fees of $1,200.00, unless so directed by the Superior Court.

express intention, no basis existed in law or fact to appoint a guardian to override those wishes, which were conveyed so close in time and in the very same course of treatment for which a guardian was purportedly required.

Nevertheless, in ascribing error to the court in this matter, the Hospital makes reference to the idea of "substituted judgment." This concept has been explained by our Supreme Court in Fiori, *supra*, 673 A.2d 905. There, the Court held that when two physicians confirm a patient to be in an irreversible persistent vegetative state (PVS), a close family member may effectuate *what the patient would have desired* regarding the withdrawal of life-sustaining treatment even without an advance directive. Id. at 913. In arriving at that holding, the Court offered the following observations.

> . . . In exercising "substituted judgment," the surrogate decision maker:
>
> > considers the patient's personal value system for guidance. The surrogate considers the patient's prior statements about and reactions to medical issues, all the facets of the patient's personality that the surrogate is familiar with-with, of course, particular reference to his or her relevant philosophical, theological, and ethical values-in order to extrapolate what course of medical treatment the patient would choose. *Jobes*, 108 N.J. at 414-415, 529 A.2d at 444 (footnote omitted). The substituted judgment approach "is intended to ensure that the surrogate decision maker effectuates as much as possible the decision that the incompetent patient would make if he or she were competent." *Id.* at 414, 529 A.2d at 444. Even where the individual has not expressed thoughts concerning life-sustaining treatment, the patient's preferences can still be ascertained by referring to all of the aspects of his or her personality. *See Estate of Longeway*, 133 Ill.2d at 49-50, 139 Ill.Dec. at 787-788, 549 N.E.2d at 299-300.

Id. at 911.

Critically, however, in addressing the concept in respect to a person in a persistent vegetative state (PVS), the Pennsylvania Supreme Court took pains to differentiate "substituted judgment" from a "best-interests" approach:

> . . . We also note that in addition to the substituted judgment and clear and convincing evidence standards, some courts have also adopted a standard known as the "best interests" analysis. *See, e.g.*, Rasmussen, 154 Ariz. at 222, 741 P.2d at 689. This analysis allows a decision maker to determine if withdrawal of life support would be in the best interests of the PVS patient. The analysis is an objective one, one which considers the patient's relief from suffering, the preservation or restoration of functioning, and the quality and extent of sustained life. The President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment*, at 135 (1983) ("President's Commission Report").
>
> As discussed herein, we decide today that a close family member of a once competent adult who is now in a permanent vegetative state may effectuate substituted judgment on the patient's behalf. We determine that where there is enough data for the decision maker to ascertain what the patient would have desired, the decision maker *must* effectuate substituted judgment. Where the patient's desires can be discerned via substituted judgment, it would be improper to employ instead the objective best interests standard to make that decision. Thus, in cases such as Fiori's, where a relative of a once competent adult, now in a permanent vegetative state, can effectuate a substituted judgment, a best interests analysis may not be employed.
>
> We recognize, however, that there will be situations where there is simply no basis to effectuate a substituted judgment. An example of this situation is where the patient is an infant, and thus never developed a personal ethical code or views on life. We are not here confronted with such a circumstance, and are loathe [*sic*] to determine now whether we will adopt the best interests standard for those types of situations. Thus, we leave for another day the issue of whether this jurisdiction will adopt the best interests standard where there is no basis to make a substituted judgment.

Id. at 912 n.11 (emphasis original, alteration added).

Review of that explanation from our Supreme Court renders it apparent that what the Hospital was actually seeking was not a substitute decision-maker to effectuate the desires of Mr. Cobb but, instead, a surrogate who could choose what he, she, or the Hospital deemed to be in the best interests of Mr. Cobb, notwithstanding his express directive communicated only days

earlier. (See N.T., 5/12/ 2011, at 8 (wherein, despite acknowledging Mr. Cobb had only days earlier unequivocally expressed a desire to receive all medical treatment necessary to sustain his life, the Hospital's counsel sought appointment of a guardian "to make medical – you know, make medical decisions on behalf of the patient, based not only on what he said, but also take into consideration the complete medical scenarios")). Confronted with a query resembling the precise distinction addressed by the Supreme Court in Fiori, *supra*, the Hospital's counsel revealed the erroneous "best-interests" premise of the Hospital's request for a guardianship:

The Court:	Whoa. That's pretty dangerous. You mean to tell me, somebody expresses their preferences, and then they deteriorate, and the hospital is going to come in and say, let's disregard those preferences, because we can't have that. We just have to – This is a terminal condition now, and let's have somebody else come in and use – and use independent judgment?
[Petitioner's Counsel]:	No. I think what they are asking for is to have an independent third party come in and assess the complete situation. . . .

(Id. at 12, see also id. at 13- 15.)

The Hospital's request, seeking a third-party appointee to invoke an "independent," best-interests analysis, to "assess the complete situation" was plainly not appropriate. In the circumstances herein confronted, it was not necessary to appoint a guardian to effectuate the patient's desires because, unlike the circumstances confronted in Fiori and, as the testimony in this matter established, Mr. Cobb's desires had been clearly communicated in the hospital to his attending physician only days previous. (See id. at pp. 3-9.) As the Supreme Court underscored in Fiori, "the right to self-determination does not cease upon the incapacitation of the individual." 673 A.2d at 910. And although the decisional law recognizes that the right to self-determination, of necessity, entails the patient's right to refuse treatment, no Pennsylvania case

stands for the proposition that a patient's manifest directive to a health-care provider in favor of life-sustaining treatment can be eschewed through the appointment of a guardian to re-consider and withhold treatment in diametric opposition to the patient's wishes communicated only days previous. Cf. Fiore, *supra,* 673 A.2d at 910 (determining strong interest of state in preserving life outweighed by patient's interest in *self-determination,* not mere best interests of patient as determined by third-party appointee).

Moreover, the testimony of the Hospital's sole witness, Dr. Baxter, indicated no imminent medical procedures necessitating an informed consent in conflict with or beyond the scope of the directive provided by Mr. Cobb as of May 2, 2012. As such, the circumstances of this case did not implicate a decision-fork between two viable medical alternatives in which the patient's previous directive proved to be an insufficient guide, and no opinion is rendered as to the appropriateness of an emergency guardian in those or similar circumstances. Further, it is worthwhile to note as something of an epilogue, that even without a conscious disregard of Mr. Cobb's express wishes about his receipt of medical treatment, the subsequent course of events, with Mr. Cobb's passing only three days after the denial of the petition, witnessed no inordinate period of extended suffering or the onset of a persistent vegetative state.

III.

Accordingly, on this record, particularly where there was no evidence of the patient lapsing into a persistent vegetative state or another change in circumstances so as to render the patient's previous *self-determined* directive to his treatment providers inoperative, no basis existed for the appointment of a guardian solely to act in contravention of the patient's express wishes. Because the petition appeared frivolously asserted, without an intent to benefit the

alleged proposed incapacitated person, and little more than a vexatious attempt to override his express wishes, the Court deemed it appropriate to place the burden of counsel fees on the progenitors of the meritless petition, pursuant to 42 Pa.C.S. § 2503, as opposed to being borne by the County under 20 Pa.C.S. § 5511.

DATE: December 5, 2012

EDWARD D. REIBMAN, J.

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

In re:

JOHN COBB : File No. **2011-0805**
An Alleged Incapacitated Person:

ORDER

NOW, this 13th day of May, 2011, upon consideration of the *Petition for Determination and Appointment of Emergency Guardian ad Litem* [sic.] *Pursuant to 20 Pa.C.S.A. §5513 and a Plenary Guardian of the Person and Estate Pursuant to 20 Pa.C.S.A. §5511,* filed on May 10, 2011 by Timothy T. Stevens, Esquire on behalf of St. Luke's Hospital, and after hearing held on May 12, 2011 attended by counsel for the petitioner and by Steven A. Litz, Esquire, court-appointed counsel for John Cobb, at which hearing the Court received the expert medical testimony of Dr. Rick A. Baxter, Board Certified in Family Medicine and in Hospice and Palliative Care, and the May 11, 2011 report of St. Luke's psychiatrist, Dr. David W. Daley,

IT IS ORDERED that the oral motion of Steven A. Litz, Esquire is granted and the petition for appointment of a §5513 emergency guardian of the person is dismissed with prejudice[1].

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[1] John Cobb is a 41 year old single male diagnosed with end-stage renal disease, who was admitted to petitioner hospital on April 29, 2011 from Lehigh County Prison. Upon admission, medical personnel were satisfied with his ability to direct the course of his care and treatment, and at his direction, classified him as a "full code". It was apparently in reliance on his instructions that Mr. Cobb was placed on a ventilator for respiration and a PEG tube was inserted for delivery of nutrition. During the course of his hospital stay his condition, though remaining terminal, has vacillated in terms of his ability to communicate with care providers. Seemingly miraculously, Mr. Cobb was weaned from the vent on the evening of May 10, 2011, after this petition was filed, and was referred to psychiatry for an evaluation of his competency that was performed on May 11, 2011. Dr. Daley determined that Mr. Cobb was cognizant of his surroundings and conditions and reported that he affirmed his earlier treatment instructions; in Dr. Daley's words, he "...would still like to have everything done". Notwithstanding the consistently clear directions given by its patient regarding the level of care he wanted, petitioner hospital chose to proceed with its petition for appointment of an emergency guardian of the person. At the outset of the hearing on May 12, 2011, Mr. Cobb's counsel made a motion to dismiss the petition on the grounds that his client had been unambiguous as to the type and quality of the medical treatment he wanted and there was thus no need for a surrogate decision-maker, even if hospital counsel is correct that Mr. Cobb will likely become unresponsive in the near future. In the alternative, Attorney Litz argued that if a guardian were appointed, he or she would be

IT IS FURTHER ORDERED that petitioner, St. Luke's Hospital shall pay the sum of $1,200 to Steven A. Litz, Esquire as compensation for legal services rendered to its patient, John Cobb regarding this petition.[2]

BY THE COURT:

Edward D. Reibman, A. J.

duty-bound to follow the express desires of the ward regarding end-of-life treatment, and thus it was of no benefit to **Mr. Cobb** that such a guardian be appointed; in other words failure to appoint an emergency guardian would not result in irreparable harm to John Cobb. It was due only to the insistence of hospital counsel that the Court agreed to hear the testimony of Dr. Baxter and did not immediately grant that motion. The hospital physician's testimony did nothing more than corroborate the facts as recited by Attorney Litz. Thus, after completion of his cross-examination of Dr. Baxter, when Attorney Litz renewed his motion to dismiss the petition it was granted from the bench.

[2] Hospital counsel's reliance upon the theory of substituted judgment as authority for the appointment of an emergency guardian is entirely misplaced **because the patient himself has clearly and consistently provided directions regarding his medical care and treatment for the exact condition from which he is dying**. Given the facts of this case, it is inexplicable to the Court why the hospital and its counsel doggedly pursued this petition in contravention of the well-established law of this Commonwealth. It is for this reason that we have required the petitioner to pay the legal fees of its patient.