Consent and Capacity Board
Commission du consentement et de la capacité
Ontario

18-2640-01
18-2640-02

IN THE MATTER OF
the ***Health Care Consent Act, 1996***
S.O. 1996, c.2, Sch. A
as amended

AND IN THE MATTER OF
SW
A PATIENT AT
HÔTEL-DIEU GRACE HEALTHCARE – TAYFOUR CAMPUS
WINDSOR, ONTARIO

REASONS FOR DECISIONS

PURPOSE OF THE HEARING

A panel of the Board convened a hearing at Hôtel-Dieu Grace Healthcare – Tayfour Campus ("Hôtel-Dieu Grace" or the "Hospital") at the request of Dr. R. Ray, the health practitioner who was treating SW. Dr. Ray asked that the Board provide Directions regarding a wish made by SW in a Power of Attorney for Personal Care (a "Form D" application under section 35, *Health Care Consent Act*). An application to the Board under section 35 is deemed, pursuant to section 37.1 of the *Act*, to include an application to the Board under section 32 of the *HCCA* by SW with respect to her capacity to consent to the proposed treatment.

DATES OF THE HEARING, DECISIONS AND REASONS

The hearing took place on November 22, 2018. The panel released its Decisions November 23rd. We determined that SW was not capable of consenting to the proposed plan of treatment and that she had made a prior capable wish that was applicable to the circumstances, binding the

substitute decision-makers. Dr. Ray requested Reasons for Decisions and those Reasons, contained in this document, were released on November 6, 2018.

LEGISLATION CONSIDERED

The *Health Care Consent Act* ("*HCCA*"), including s. 1, 2, 4, 21, 32, 35 and 37.1.

PANEL MEMBERS

Lora Patton, senior lawyer member
Henry Pateman, public member
Gary Strang, public member

PARTIES & APPEARANCES

Deemed Form A Application

SW, the patient, was represented by counsel, Mr. G. Klein.
Dr. Ray, the health practitioner, represented herself.

Form D Applications

SW, the patient, was represented by counsel, Mr. G. Klein.
Dr. Ray, the health practitioner, represented herself.
KW, a substitute decision-maker, was represented by counsel, Mr. N. Jomaa.
EW, a substitute decision-maker, represented himself.

PRELIMINARY MATTERS

The Proposed Treatment:

Dr. Ray was taking no position as to the appropriateness of treatment for SW but required clarity on how to proceed with re-insertion/ removal of both the feeding tube and supportive ventilation

as the substitute decision-makers could not agree. At the time of the hearing SW was dependent on both a feeding tube (for nutrition and hydration) and ventilation (via tracheostomy).

Exclusion of Witnesses:

As a number of witnesses were expected to give evidence about disputed facts, the witnesses were excluded, on the panel's own motion, prior to their testimony.

THE EVIDENCE

The evidence at the hearing consisted of the oral testimony of seven witnesses, Dr. Ray, Mr. T. Bourgard (SW's former lawyer), LW (SW's daughter), MD (SW's sister), KD (SW's brother-in-law), KD and ED. Ten Exhibits taken into evidence:

1. Power of Attorney of SW, dated December 5, 2007;
2. Consultation Report, signed by Dr. Mar, dated, July 30, 2018;
3. Email from KW, dated July 22, 2018;
4. Email from EW, dated April 3, 2018;
5. Email from Shannon Tompkins, dated August 10, 2018;
6. CCB Summary, completed by Dr. Ray, dated October 19, 2018;
7. Article titled, "Vegetative State & Minimally Conscious State." Maiese et al 2017 December;
8. Article titled, "Hypoxic-ischemic Brain Injury in Adults: Evaluation and Prognosis." Weinhouse & Young 21 April 2015 (last updated);
9. Email from EW, dated January 18, 2018; and
10. Email from LW, dated January 16, 2018.

INTRODUCTION

SW was a 76 year-old woman. She had been a wife and mother and an active participant in her community and her church. She particularly enjoying offering her hospitality and was a committed teacher to her bible group. Her faith was centre-most in her life.

A year before the hearing SW had been the victim of a serious assault and had been admitted to hospital with a significant head injury and fractures to a vertebrae and rib. She was stabilized and eventually moved to Hôtel-Dieu Grace for on-going care. She had been in a persistent vegetative state likely since her admission but certainly since January 2018 following a necrotizing infection and surgery in the area of her head wound.

Dr. Ray had applied to the Board to seek directions with regard to SW's future care. The hospital had reviewed SW's Power of Attorney for Personal Care ("POA") which contained a statement about SW's wishes but Dr. Ray was unclear whether the statement applied to the current circumstances and whether it called for specific actions.

The named attorneys (appointed severally after the death of SW's husband), KW and EW (SW's sons) were unable to agree to a plan of treatment. KW sought to remove SW's feeding and ventilation tubes, feeling that this was consistent with SW's wish. EW felt that SW was largely stabilized and that it would be inappropriate to take steps to shorten her life.

The application sought to resolve the impasse and provide direction such that a plan of treatment could be set out for SW.

THE LAW

Capacity to Consent to Proposed Treatment

Under the *HCCA*, a person is presumed to be capable to consent to treatment (Section 4(2)) and the onus to establish otherwise, in this case, rested with Dr. Ray.

The test for capacity to consent to treatment is set forth in s. 4(1) of the *HCCA*, which states:

> A person is capable with respect to a treatment, admission to a care facility or a personal assistance service if the person is able to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service, as the case may be, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Application for Directions

Section 35 states:

> A substitute decision-maker or a health practitioner who proposed a treatment may apply to the Board for directions if the incapable person expressed a wish with respect to the treatment, but,
>
> (a) the wish is not clear;
>
> (b) it is not clear whether the wish is applicable to the circumstances;
>
> (c) it is not clear whether the wish was expressed while the incapable person was capable; or
>
> (d) it is not clear whether the wish was expressed after the incapable person attained 16 years of age.

After hearing such an application, "the Board may give directions and, in doing so, shall apply section 21" (Section 35(3)).

SW's CAPACITY TO CONSENT TO THE PROPOSED TREATMENT

Did the evidence establish that SW was unable to understand the information relevant to the treatment decision? Did the evidence establish that SW was unable to appreciate the reasonably foreseeable consequences of making a decision about the proposed treatment?

Dr. Ray's evidence was that SW was in a neuro-vegetative state secondary to a traumatic brain injury caused by an assault. The doctor had conducted a thorough review of SW's condition a week prior to the hearing and a shorter assessment the day prior to the hearing; SW's condition was unchanged throughout her admission to the hospital. It was Dr. Ray's evidence that, on examination of SW, "there [was] no awareness of self or environment elicited…there [was] no evidence of language comprehension or any expression" (Exhibit 6, page 1).

Dr. Mar provided a consultation in July 2018 and her findings were consistent with those of Dr. Ray:

> Upon examination, the patient is non-verbal. The patient was unable to open eyes upon command, and even with noxious stimuli. No posturing noted on examination. No tone was also noted… No purposeful movement was observed… (Exhibit 2, page 1).

Dr. Ray provided two scholarly articles that set out the diagnosis and prognosis of someone in SW's condition. Her evidence was that SW was in a persistent vegetative state (diagnosed after

6 months, deemed to be permanent after one year in the case of traumatic injury) and showed no signs of being in a minimally conscious state, a higher level of consciousness. It was Dr. Ray's evidence, based on these journal articles, that a person in SW's condition was not likely to recover in 97% of cases; in the 3% of cases in which there was evidence of recovery, the recovery was not clinically significant and was preceded by clinical indicators (higher Glasgow Coma Scale numbers, observable changes in consciousness). The articles established that most people in SW's condition died within 2-5 years from complications arising from the underlying brain injury.

All of the evidence established that SW was non-responsive and unaware of herself or her environment. Although she demonstrated some reflexes, there was no evidence of higher brain functioning or, in fact, anything beyond brain stem function. Dr. Ray's evidence was that SW had sustained a significant brain injury which prevented SW from being able to understand or appreciate information relevant to her treatment. This evidence was corroborated by that of Dr. Mar. There was no dispute about SW's consciousness. For these reasons, the panel found that SW was incapable of making decisions about her treatment.

APPLICATION ABOUT WISHES

In December 2005, SW had prepared a POA with the assistance of her lawyer, Mr. Bourgard. That document named her two sons severally as attorneys (they were substitute attorneys following the death of SW's husband). Paragraph 3 of that POA set out specific instructions relevant to SW's healthcare:

> **SPECIFIC INSTRUCTIONS**
> In the event that my medical condition deteriorates to the extent that there is no realistic, reasonable or medically sound possibility of my recovery from life threatening, physical or mental incapacity, I direct my attorneys to allow nature to take its course and to withdraw or withhold any artificial life sustaining or life supporting measures including but not limited to heroic, extraordinary or experimental medical intervention or procedures or the administration of drugs or medication, except as such is required for the relief of pain and suffering. It is not my intent to authorize specific acts of commission or omission or shorten my life but rather only to permit the natural process of dying" (Exhibit 1, page 2).

Mr. Bourgard, the lawyer who had drafted the POA testified. He acknowledged that he did not recall many specifics about his meetings with SW and largely relied on his notes and his usual practice. He stated that SW's choice to include the specific instruction clause meant that she did not want artificial life sustaining treatment if her condition was "terminal and irreversible:" language that he felt should be interpreted as a layman would. He described having used the example with his clients of being brain dead and asking whether they would want a machine keeping them alive or if they would want their families to watch them in that condition. On questioning, Mr. Bourgard believed that most of his clients would find that a persistent vegetative state would trigger the specific instructions in the POA, set out above.

KW testified that he was aware of his mother's wishes in such circumstances before he read her POA. He stated that he had spoken about her wishes "1/2 a dozen times" in the last decade. It was his evidence that SW had told him that if something happened to her and she could not be "who I am" then she wanted him to "let her go." He described her saying that she wanted "no tubes, no wires" and that she had been focused most on losing her sense of herself. He recalled her saying that she was ready to die, that she was not afraid and that she didn't want to linger but wanted to be with God. KW understood SW's wishes to be that if she was no longer able to interact as an "identifiable me" or "I" with "no chance of returning to me" then she should be allowed to die by removing life sustaining treatments.

KW described that he and his sister, LW, had spoken with their mother's pastor following SW's injury so that they could understand her faith and, in particular, if her wishes were consistent with her faith. It was his recollection that the Pastor was personally opposed to removing the feeding tube but that he had acknowledged that there was no consensus within the church and that such choices were personal.

LW's evidence was that her mother would not want to be in the state she was in at the time of the hearing. She had not had specific conversations with SW about her wishes but explained that SW felt strongly about not being a burden, about passing out of life easily and of being with God. LW felt that how her mother lived demonstrated that she would not want to continue to receive life sustaining treatments and that she would want to be with God.

MD and KD spoke about their shared faith with SW. Each acknowledged, separately, that in their faith, generally only God could take life away. However, both thought that the removal of the feeding and breathing tubes would be consistent with SWs values and beliefs. KD in particular stated that if God had intended to heal SW, he would have done so sooner. Both supported removal of the feeding and breathing tubes.

EW stated that he had not had conversations with his mother about her wishes. He had not been aware of the POA before his mother's injury. EW stated that when SW was initially in hospital and a decision was necessary to perform the tracheostomy, he would not have done so, allowing her to die at that point, as he felt that she was in the process of dying then but being "propped up" by machines and interventions. He did not feel that the SW's current circumstances were such that they triggered these wishes: it was his view that she was physically stable. It was his position that SW be allowed to die in the event of a critical event (infection, arrest) but that removal of the tubes was not warranted. It was his view that the specific instructions in the POA prohibited a hastening of death (in the last sentence).

He did not dispute that SW had had conversations about her wishes with KW and, in fact, stated that he believed KW and all of the evidence that supported the fact that SW had a wish to end supportive, life sustaining measures in circumstances such as these. He felt that a person could not choose to end their life in such a way as this was a role only for God. He asked that the panel remove him as substitute decision-maker if it found that SW's wish applied to the circumstances and required removal of the feeding and breathing tubes. EW stated that he could not resign as attorney as this would be tacit approval of the next steps.

ANALYSIS

In considering SW's specific instructions as set out in her POA, the panel found that SW was in a "life threatening, physical or mental incapacity" from which there was no realistic, reasonable or medically sound possibility" of recovery. The evidence of Dr. Ray was clear that after more

than one year post-injury, SW had not shown any signs of improving and she would likely remain in a persistent vegetative state. All of the medical evidence supported the fact that SW would most likely die of her underlying diffuse brain injury within the next few years.

A review of the POA in its entirety and, to some degree Mr. Bourgard's evidence, made clear that the final sentence of paragraph 3 was not contradictory with the balance of the paragraph and, instead, spoke to euthanasia or other active steps to end life rather than the removal of life sustaining treatments where recovery was not realistic. The panel did not find that the particular subsections of paragraph 2 to provide assistance in interpreting SW's wishes as these were more general statements about the role of the attorneys rather than part of a prior capable wish.

To the extent that the specific instructions lacked specificity or were ambiguous, the panel found that SW's ongoing discussions about her life with KW to be critical in interpreting paragraph 3. SW had carefully considered what she wanted her last days to look like. She considered her possible loss of "self" and came to a decision about what that would mean for her. She stated, more than once, that she would not want to have her body sustained if she was unable to be herself, that she did not want tubes, did not want to linger but wanted to be allowed to die and be with God. KW's credibility was not in dispute – none of the other witnesses questioned his accounts of his discussions with SW. EW, who had a contrary view on the application, stated that he completely believed that these conversations had occurred. KW's statements were also reliable: he recalled specific instances, turns of phrase and these were consistent with the values and beliefs described by LW. KW had taken the further step of speaking with SW's Pastor to understand how these statements and SW's specific instructions could be consistent with her faith. This additional step showed the care to which KW took in trying to enact his mother's wishes.

The panel determined that SW's specific instruction, as set out in paragraph 3 of her POA, was a prior capable wish. We found that it applied to SW's current circumstances and that it was clear in requiring the substitute decision-makers to discontinue life supporting treatments, specifically feeding and breathing tubes. In so finding, the panel determined that the attorneys were bound to

follow SW's prior capable wish, and to consent to the removal of the feeding and breathing tubes in accordance with section 21 of the *HCCA*.

The panel found that EW was sincere in his wish to act appropriately on behalf of his mother. Although EW raised a number of issues throughout the hearing, including the interpretation of the POA itself, ultimately, he agreed that SW had made a prior capable wish. EW spoke about the fact that his mother had knowingly selected him to be an attorney even though he was very much a black and white thinker – and that he believed that only God could end life. He stated that he could not, in good conscience, consent to the removal of the feeding and breathing tube because, even though his mother may have made a wish to that effect, she was not at liberty to do so. He asked that if the panel were to direct that the feeding and breathing tube be removed, that the panel remove him from the position of having to consent to that treatment.

The panel did not have the authority to remove EW as a substitute decision-maker in this application. Although a substitute decision-maker may be disqualified from acting in that role if he failed to comply with an order of the Board in a Form G application (an application to determine compliance with the law by a substitute decision-maker), this was not the application before us. Dr. Ray had specifically declined to bring a Form G application in the prehearing of this matter, believing that if the Board gave directions, EW and KW would be able to reach consensus about the next steps in SW's treatment. A Form G remains a means of resolving the dispute if this application has not.

RESULT

We found that SW was not capable of consenting to her treatment. We also determined, unanimously, that SW had made a prior capable wish that was applicable to her current circumstances and which bound the substitute decision-makers. As such, we directed the substitute decision-makers to consent to the removal of the feeding tube and tracheostomy while also consenting to the administration of medications to provide relief of any pain and suffering.

Dated: November 6, 2018

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Lora Patton
Presiding Member