Matter of Kahn v Kramer

[*1] Matter of Kahn v Kramer 2014 NY Slip Op 51894(U) Decided on October 29, 2014 Supreme Court, Kings County Martin, J. Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on October 29, 2014
Supreme Court, Kings County

In the Matter of the Application of Samuel Kahn, Petitioner,

against

Howard Kramer, as Guardian of the Person of the Person of Eileen Beth Kramer, Respondent.

13553/14

1.Morton Avigdor, Esq. for Petitioner Samuel Kahn2.Edward Weiner, Esq. of counsel to Maimonides Hospital 3.Rebecca S. Kittrell, Esq. of Mental Hygiene Legal Services on behalf of Eileen Beth Kramer4.Howard Kramer as Guardian, Respondent, pro se

Larry D. Martin, J.

The following papers numbered 1 to 6 read on this petition and cross motion:

Papers Numbered
Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed1-5
Opposing Affidavits (Affirmations)6
Other Papers

Petitioner Samuel Kahn ("petitioner") moves, by order to show cause, for an order: (1) enjoining Respondent Howard Kramer ("respondent") as Guardian of the person of patient K, any of his agents or Maimonides Hospital (the "Hospital") from withdrawing any life-sustaining treatment from patient K until the instant petition can be fully litigated and a decision rendered; and (2) granting the petition herein.

Background

The relevant facts from which the instant proceeding arises are noted in the Court's decision dated October 14, 2014 (the "prior decision") wherein the Court denied petitioner's application on the merits to the extent that he sought a permanent injunction enjoining respondent, any of his agents or the Hospital from withdrawing any life-sustaining treatment from patient K on the basis of her purported religious beliefs. That portion of petitioner's application for a permanent injunction enjoining respondent, any of his agents or the Hospital from withdrawing any life-sustaining treatment from patient K on the basis of a violation of her rights under New York law was held in abeyance pending submission of the necessary evidence, as set forth in the prior decision, pursuant to the provisions of Surrogate's Court and Procedure Act ("SCPA") § 1750-b. More specifically, respondent was directed to submit the following items, for the Court's review and consideration, at a further hearing to be held before the Court: (1) patient K's complete medical chart at the Hospital; (2) the minutes, if any, of the Bio-ethics Committee's Meeting assessing patient K's prognosis; and (3) any further evidence, including sworn statements, that demonstrate

compliance with SCPA § 1750-b (4). The Court further held that the gravity of the responsibility weighing on it in deciding whether to permit respondent to withhold patient K's life-sustaining treatment outweighed any inconvenience from the delay in making the necessary evidentiary submissions.

Subsequently, a further hearing was held in Part 41, Room 741 on October 21, 2014.

The October 21, 2014 Hearing

At the further hearing, Morton M. Avigdor, Esq., as counsel for the Hebrew Academy for Special Children [FN1] (the "residence"), Edward Weiner, Esq., as [*2]counsel for the Hospital, and Rebecca S. Kittrell, Esq., as counsel from Mental Hygiene and Legal Services ("MHLS")[FN2] on behalf of patient K, made oral arguments on the record. Respondent also testified on the record.

In accordance with the directives of the prior decision, patient K's entire medical chart at the Hospital was submitted for review by the Court. Patient K's medical chart includes, but is not limited to, the following items: (1) the Bio-ethics Review Notes generated by the Bio-ethics Committee Meeting (the "Bio-ethics Meeting") regarding patient K's prognosis conducted at the Hospital on September 18, 2014; (2) a "Certification" dated October 20, 2014 and signed by Kabu Chawla, M.D. ("Dr. Chawla"), an internist and patient K's attending physician, and Howard L. Berkowitz, M.D. ("Dr. Berkowitz"), a psychiatrist at the Hospital; (4) respondent's formal request [FN3] dated October 20, 2014 for the performance of palliative extubation on patient K by the Hospital; (5) a document entitled "Initial Consult Note Adult-Psychiatry" last updated on October 20, 2014 and prepared by Dr. Berkowitz; (6) a document entitled "Interim Note Adult Patient" last updated on October 20, 2014 and prepared by Dr. Chawla, issuing an order for the palliative extubation of patient K pending the Court's determination of the instant application; and (7) "Document Review Reports," from September 11, 2014, the date of patient K's admission to the Hospital, to October 20, 2014.

The Parties' Contentions and Arguments on the Record

Mr. Weiner, as the Hospital's counsel, pointed to the contents of patient K's medical chart and related documents in support of his contention that the procedural requirements of SCPA § 1750-b have been met by respondent and the Hospital. Mr. Weiner further argued that patient K's long-term care while on the ventilator would eventually necessitate the placement of a PEG tube for feeding and the performance of a tracheostomy. Mr. Weiner described both procedures as invasive and an undue burden to patient K.

Mr. Avigdor, as petitioner's counsel, argued that the residence did not have an opportunity to review patient K's medical chart that was submitted for the Court's review.[FN4] Mr. Avigdor also contended that there is no evidence that the performance of a tracheostomy and the placement of a PEG tube, as was proposed by the Hospital, would be an extraordinary burden to patient K. Instead, Mr. Avigdor was of the opinion that palliative extubation could cause pain to patient K. In addition, Mr. Avigdor maintained that patient K has a constitutional right to practice a religion of her choice and further claimed that there was no evidence that she ever gave respondent the right to decide her end-of-life care.

Ms. Kittrell, as counsel for MHLS on behalf of patient K, argued that respondent met the statutory requirements of SCPA § 1750-b so as to be able to make a health-care decision in patient K's best interests. Ms. Kittrell represented that MHLS is in agreement with respondent and the Hospital that patient K lacked the capacity to make medical decisions on her own behalf. Indeed, Ms. Kittrell contended that there is nothing in patient K's medical records to suggest otherwise. Additionally, Ms. Kittrell maintained that MHLS had no opposition to respondent's request to withhold life-sustaining treatment to patient K.

Respondent reiterated his position that, as patient K's brother and appointed guardian, he has the authority to make health-care decisions on her behalf, including a withdrawal of life-sustaining treatment.

Legal Analysis

As the Court of Appeals held in Matter of M.B., where the guardian of a mentally retarded person is seeking to withdraw or withhold life-sustaining treatment,

[t]he threshold requirement is that the mentally retarded person's physician confirm to a reasonable degree of medical certainty, after consultation with another physician or a licensed psychologist, that the person currently lacks the capacity to make health care decisions (SCPA 1750-b [4] [a]). The attending physician and another concurring physician must further attest that the mentally retarded person has one of three types of conditions: a terminal condition, permanent unconsciousness or [*3]"a medical condition other than such person's mental retardation which requires life-sustaining treatment, is irreversible and which will continue indefinitely," and life-sustaining treatment imposes or would impose an extraordinary burden of the patient in light of the patient's medical condition and the expected outcome of the life-sustaining treatment (SCPA 1750-b [4] [b] [i], [ii]). . . . These conclusions by medical professionals are a condition precedent to any valid decision to end life-sustaining treatment-without them life-sustaining treatment must be afforded to the patient (6 NY3d 437, 442 [2006]).

Contrary to petitioner's contentions at the October 21 hearing, patient K's constitutional right to practice religion is not at issue here. Notably, in the prior decision, the Court held that petitioner failed to establish that patient K's religious beliefs were "reasonably known or ascertainable with reasonable diligence" as required by the statute (see SCPA § 1750-b [2] [a]), so as to become a factor to be considered when making health-care decisions.[FN5] Furthermore, to the extent that the aforementioned medical records and documents submitted constitute new evidence for the Court's consideration, the Court finds that there is nothing contained therein that would change its determination on this issue.

Upon oral arguments and the testimony of the parties' respective experts on the record, as well as a review of the papers submitted, including patient K's entire medical chart and the related documents, the Court finds that the statutory requirements of SCPA § 1750-b have been met. Moreover, it is evident that respondent has a genuine interest in his sister's welfare as demonstrated by his constant involvement in her care even prior to her admission to the Hospital. Here, respondent's request for the performance of palliative extubation on patient K was made after consulting with the medical professionals providing care to her at the Hospital and discussing at length with them alternative options for her long-term care. In this regard, the Court finds that respondent has taken patient K's best interests into account in making a request for the performance of palliative extubation (see Matter of M.B., 6 NY3d at 445; see also SCPA § 1750-b [2] [a]).In addition, a review of the medical records submitted in accordance with the directives of the prior decision indicates that the procedural steps of SCPA §1750-b have been satisfied by respondent (see Matter of M.B., 6 NY3d at 445; [*4]see also SCPA § 1750-b [4] [b] [i], [ii]). In light of the foregoing, the Court finds that petitioner's objection to respondent's request and the application to enjoin respondent and the Hospital from withholding life-sustaining treatment to patient K on the grounds of a violation of her rights under New York law are without merit.

Conclusion

Accordingly, to the extent that petitioner seeks an order enjoining respondent, or any of his agents or the Hospital from withdrawing any life-sustaining treatment from patient K on the basis of a violation of her rights under New York law is denied and the petition is dismissed in its entirety.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,

J. S. C.

Footnote 1:Prior to her admission to the Hospital on September 11, 2014, patient K had been a patient at the residence for the past 40 years.

Footnote 2:Pursuant to SCPA § 1750-b (4) (e) (ii), Mental Hygiene and Legal Services is entitled to notification of the decision of a guardian of a mentally retarded person to withhold life support treatment at least 48 hours prior to the implementation of said decision. Here, MHLS was notified of the instant proceeding subsequent to a hearing held before the Court on September 30, 2014.

Footnote 3:Respondent's October 20, 2014 formal request for the performance of palliative extubation was specifically addressed to James Wernz, M.D. ("Dr. Wernz," patient K's consulting physician at the Hospital who testified, via telephone, on behalf of the Hospital, at the prior hearing held before the Court on September 30, 2014), Dr. Chawla, Sina Khasani, M.D. ("Dr. Khasani," a neurologist at the Hospital) and Benjamin Lifshitz, M.D. ("Dr. Lifshitz," patient K's treating internist who testified before the Court, on behalf of the residence, at the prior hearing held on September 30, 2014).

Footnote 4:With respect to petitioner's request to review patient K's medical records, the Court notes that the first time petitioner made this request to the Hospital was on the day before the hearing held on October 21, 2014. Notably, Dr. Lifshitz, on behalf of the residence, was present at and participated in the Bio-ethics Meeting where patient K's medical records were reviewed and her prognosis and palliative care treatment options were discussed. Thus, there has been no prejudice to the Hospital by its submission to the Court.

Footnote 5:In the prior decision, this Court held that respondent, as patient K's appointed guardian, has the authority to make health care decisions on her behalf (see SCPA §1750-b [2] [a]). When making such medical decisions, respondent is required to do so based "on the best interests of [patient K] and, when reasonably known or ascertainable with reasonable diligence, on [her] wishes, including moral and religious beliefs" (see Matter of M.B., 6 NY3d at 445; see also SCPA § 1750-b [2] [a]).