Court of Queen's Bench of Alberta

Citation: Re L.I.C. (Dependent Adult), 2006 ABQB 130

Date: 20060214
Docket: DA10-5696-S
Registry: Red Deer

Court File Number	DA10-5696-S
Court	Court of Queen's Bench of Alberta (Surrogate Matter)
Judicial District	Red Deer
Dependent Adult Name	L.I.C.
Procedure	Application for Advice and Directions
Applicant (Plaintiff)	The Public Guardian, former guardian of the person L.I.C.

Restriction on Publication: No one may disclose information about the personal history or records of a dependent adult that was obtained by the Public Guardian or Public Trustee under the *Dependent Adults Act*. See the *Dependent Adults Act*, s. 68. This judgment complies with the Act.

Reasons for Decision
of the
Honourable Madam Justice L.Darlene Acton

I. Introduction

[1] This matter came before me on July 21, 2004 as an application for advice and directions. The Public Guardian sought direction as to whether it has the legal authority, pursuant to a guardianship order under the *Dependent Adults Act*, R.S.A. 2000, c. D-11, to give substituted consent to the withdrawal of life sustaining medical treatment or care.

[2] During the application, I heard submissions from counsel for the Public Guardian and from counsel for the Calgary Health Region.

[3] On the date of the application, I provided an oral decision in which I held that the Public Guardian has the authority to consent to the withdrawal of medical treatment or care. The Dependant Adult in question has since passed away; nonetheless, the parties have requested written reasons, which I now provide.

II. Facts

[4] At the time of the application, the Dependent Adult was 47 years old. The Public Guardian had been her guardian since 1980. The Dependent Adult had a long-standing brain injury and had been a spastic quadriplegic all her life. She also had a seizure disorder.

[5] The Dependent Adult had resided at a long term care facility since 1954. On July 2, 2004, she suffered a cardiac arrest and was transported to a hospital in Calgary.

[6] Three doctors diagnosed the Dependent Adult with a severe lack of oxygen-related brain injury, which was superimposed on her pre-existing brain injury. The doctors advised that there was no reasonable likelihood that the Dependent Adult would recover to her pre-cardiac arrest neurological status. Rather, she would remain in a permanent vegetative state, which would ultimately lead to her death by infectious complications.

[7] The Dependent Adult was intubated, but was breathing on her own. The doctors recommended removal of the endotracheal tube, but noted there was a significant chance that this would lead to another cardiac arrest or a respiratory arrest. The doctors recommended that the endotracheal tube be removed and that, in the event of arrest, no further life-sustaining treatment be undertaken. In other words, the tube would not be re-inserted in the event of respiratory arrest and the Dependent Adult would not be resuscitated in the event of cardiac arrest. Any continuing medical care would focus on comfort and supportive measures only.

[8] The Dependent Adult had limited contact with her family over the preceding ten years. The Public Guardian contacted the Dependent Adult's brother to notify him of her circumstances. The brother provided a letter dated July 15, 2004 in which he writes that he and his two brothers have "complete faith and trust" in the Dependent Adult's treating physician and the Public Guardian to make decisions with the Dependent Adult's best interests in mind.

[9] During the application, I was advised that the Dependent Adult's treating physician had concluded that the endotracheal tube was no longer necessary and that there was no longer any significant risk associated with its removal. The tube was removed on July 20, 2004. In addition, counsel for the Calgary Health Region advised that several days before the application, the Dependent Adult's doctors had placed a level two "do not resuscitate" (DNR) order on her chart, meaning that the Dependent Adult would continue to be fed through a nasal gastric tube and would receive hydration and ordinary medical care, but would not be resuscitated in the event of an arrest.

[10] Although the Dependent Adult passed away after I provided my oral decision on July 21, 2004, the Public Guardian requests a written decision addressing the Public Guardian's legal authority to consent to the cessation of medical treatment that could ultimately result in the death of a dependent adult.

III. Legislation and the Order Appointing a Public Guardian

[11] Guardians are appointed pursuant to s. 7 of the *Dependent Adults Act*, which states:

> 7(1) When the Court is satisfied that a person named in an application for an order appointing a guardian is
>
> (a) an adult, and
>
> (b) repeatedly or continuously unable
>
> (i) to care for himself or herself, and
> (ii) to make reasonable judgments in respect of matters relating to his or her person
>
> the Court may make an order appointing a guardian.
>
> (2) The Court shall not make an order under subsection (1) unless it is satisfied that the order would
>
> (a) be in the best interests of, and
>
> (b) result in substantial benefit to
>
> the person in respect of whom the application is made.

[12] Section 10(1) of the Act dictates that the Court is to grant to the guardian only the powers and authority necessary for the guardian to make or assist in making reasonable judgments in respect of matters relating to the person of the dependent adult. Section 10(3) sets out the potential powers and authority that may be given to the guardian, including:

> (a) to decide where the dependent adult is to live, whether permanently or temporarily;
>
> (b) to decide with whom the dependent adult is to live and with whom the dependent adult is to consort;
>
> (c) to decide whether the dependent adult should engage in social activities and, if so, the nature and extent of them and related matters;

(d) to decide whether the dependent adult should work and, if so, the nature or type of work, for whom the dependent adult is to work and related matters;

(e) to decide whether the dependent adult should participate in any educational, vocational or other training and, if so, the nature and extent of it and related matters;

(f) to decide whether the dependent adult should apply for any licence, permit, approval or other consent or authorization required by law;

(g) to commence, compromise or settle any legal proceeding that does not relate to the estate of the dependent adult and to compromise or settle any proceeding taken against the dependent adult that does not relate to the dependent adult's estate;

(h) to consent to any health care that is in the best interests of the dependent adult;

(i) to make normal day to day decisions on behalf of the dependent adult including the diet and dress of the dependent adult;

(j) any other matters specified by the Court and required by the guardian to protect the best interests of the dependent adult.

[13] The guardianship order in this case was reviewed and renewed on September 4, 2002. At that time, Sirrs J. ordered that the Public Guardian continued to be the appointed guardian of the Dependent Adult with power and authority relating to the following matters:

-to decide where the dependent adult is to live, whether permanently or temporarily (section 10(3)(a) of the Act)

-to decide whether the dependent adult should engage in social activities and, if so, the nature and extent of them and related matters (section 10(3)(c) of the Act)

-to decide whether the dependent adult should participate in any educational, vocational or other proceeding training and, if so, the nature and extent thereof and related matters (section 10(3)(e) of the Act)

-to commence, compromise or settle any legal proceedings that does not [*sic*] relate to the estate of the dependent adult and to compromise or settle any proceedings taken against the dependent adult that does not [*sic*] relate to the dependent adult’s estate (section 10(3)(g) of the Act)

-to consent to any health care that is in the best interests of the dependent adult (section 10(3)(h) of the Act)

-to make normal day to day decisions on behalf of the dependent adult including the diet and dress of the dependent adult (section 10(3)(i) of the Act)

[14] For the purposes of this application, it is particularly noteworthy that the Public Guardian was expressly given the power, under s. 10(3)(h) of the Act, to consent to any health care that is in the best interests of the Dependent Adult.

[15] The term "health care" is defined in s. 1(j) of the Act:

> (j) "health care" includes
>
> (i) any examination, diagnosis, procedure or treatment undertaken to prevent any disease or ailment,
>
> (ii) any procedure undertaken for the purpose of preventing pregnancy,
>
> (iii) any procedure undertaken for the purpose of an examination or a diagnosis,
>
> (iv) any medical, surgical, obstetrical or dental treatment, and
>
> (v) anything done that is ancillary to any procedure, treatment, examination or diagnosis;

[16] The parties point out that in this definition, the legislators use the word "includes" as opposed to the word "means". It is the only definition in the Act that does so. I agree that the legislators' deliberate use of the term "includes" indicates that the definition of health care is not exhaustive. I also agree that the term "health care" should be read as broadly as necessary to achieve the best interests and substantial benefits purposes of guardianship articulated in s. 7(2) of the Act.

IV. Discussion

The Case Law

[17] There is a dearth of authority on this point; nonetheless, it is worth reviewing the case law that does exist.

[18] As noted by the Public Guardian, this issue has only been addressed once by the Alberta Courts. In ***Re Durksen*** (16 September 1999), Lethbridge DA06-02070 (A.B.Q.B.), a 47 year old R.C.M.P. officer was involved in a plane crash and was left in a permanent vegetative state. The Public Guardian was appointed as his guardian. The doctors recommended withdrawing Mr. Durksen's intravenous support, which recommendation was supported by the family.

[19] The Public Guardian sought advice and direction on a number of points, including whether the Public Guardian and the doctors could "lawfully discontinue all life-sustaining treatment and medical support measures" and "lawfully discontinue and thereafter not furnish medical treatment to Mr. Durksen" except as necessary to enable Mr. Durksen to die peacefully with the greatest dignity and the least pain and suffering.

[20] Power J. held that the Court holds the inherent jurisdiction to direct that the recommendations set out by Mr. Durksen's doctors be carried out. The Public Guardian, however, lacks the power and jurisdiction to consent to cessation of medical treatment without Court intervention (at pp. 10-11).

[21] Similar issues have arisen, at least tangentially, in other jurisdictions. ***Airedale NHS Trust v. Bland***, [1993] 1 All E.R. 821 (H.L.) involved an application for a declaration regarding the legality of the withdrawal of life support services for a young man in a persistent vegetative state. The House of Lords concluded that the withdrawal of life support was not illegal without a Court order, but it also held that at least for a time following the decision, applications should be made seeking Court approval. In his reasons, Lord Keith stated: "the decision whether or not the continued treatment and care of a PVS. [persistent vegetative state] patient confers any benefit on him is essentially one for the practitioners in charge of his case" (at p. 862). Lord Keith also recognized, however, that Court endorsement of medical decisions can protect the patients and doctors, while at the same time providing reassurance for both the patients' families and the public (at p. 862).

[22] In ***London Health Sciences Centre v. R.K. (Guardian ad litem of)***, [1997] O.J. No. 4128 (Ct. Just. Gen. Div.), R.K. was hospitalized in a persistent vegetative state. His spouse refused to consent to the withdrawal of artificial life support, prompting the applicants to seek an order declaring that they could lawfully discontinue life support and granting them immunity from criminal and civil prosecution for doing so. After the application was commenced, the spouse consented to the relief requested and the applicants sought approval of a judgment declaring that their actions were lawful for the purposes of all civil, criminal, professional and other legal liability. The Court ultimately held that it had no jurisdiction to grant immunity from criminal prosecution and that civil immunity could not be granted in the circumstances of this case.

[23] In ***Child and Family Services of Central Manitoba v. R.L. and S.L.H.*** (1997), 123 Man. R. (2d) 132 (C.A.), a three month old child was left in a persistent vegetative state following an attack. The child was apprehended by Child and Family Services. The child's doctors recommended that a DNR order be placed on the child's file, but the parents refused to consent. Child and Family Services applied under s. 25(3) of the *Child and Family Services Act*, which allows an agency to apply to the Court for an order authorizing medical treatment for an apprehended child where the parents refuse to consent to the treatment. The chambers judge granted the order, but the Court of Appeal allowed the appeal and set the order aside.
[24] Twaddle J.A. recognized that "philosophical arguments apart, it is in no one's interest to artificially maintain the life of a terminally-ill patient who is in an irreversible vegetative state" (at para. 8). He went on to hold that Court consent under s. 25(3) is only required where without

it, the medical treatment would constitute an assault. No consent is required for a doctor to refrain from intervening. Whether or not a DNR order should be imposed is a judgment call for the doctor to make "having regard to the patient's history and condition and the doctor's evaluation of the hopelessness of the case. The wishes of the patient's family or guardians should be taken into account, but neither their consent nor the approval of a court is required" (at para.17).

[25] The final case cited by the parties is ***Sawatzky v. Riverview Health Centre Inc.***, [1999] 6 W.W.R. 298 (Man. Q.B.). Mr. Sawatzky had Parkinson's disease. He and his wife, who was also a plaintiff in the action, refused to consent to certain procedures. The defendant obtained an order of supervision appointing the Public Trustee as Mr. Sawatzky's guardian, thereby giving the Public Trustee the authority to consent to medical procedures and treatments on Mr. Sawatzky's behalf. Mr. Sawatzky's condition deteriorated and one of his doctors placed a DNR order on his file, without the consent of Mr. Sawatzky or his wife.

[26] When the plaintiffs learned of the order, they brought an action against the defendant health centre for injunctive and declaratory relief. They also brought an application for an interim injunction, seeking to prevent the defendant from imposing the order or any other similar health care directive against Mr. Sawatzky until the trial.

[27] Beard J. ultimately determined that the injunction was appropriate. She also considered the role of the Public Trustee, who despite being given notice of the application, filed no materials and took no part in the proceedings, based primarily on the Public Trustee's interpretation of Twaddle J.A.'s comments in ***Child and Family Services of Central Manitoba v. R.L. and S.L.H.***. Beard J. characterized this as "the complete abdication of her [the Public Trustee's] responsibility to Mr. Sawatzky, for whom she is responsible" (at para. 52). Beard J. stated (at para. 59):

> Surely the role of the Public Trustee as committee and her duty to her wards extends past consenting to active treatment and encompasses participating in decisions leading to death even if, at the end of the consultation process, the doctor can act contrary to the wishes of the ward as they are expressed by the Public Trustee. She is still to express the ward's wishes to the doctor. In many cases, if she refused to do so, there will be no vehicle for those wishes to be expressed. Surely, those who are not competent to speak on their own behalf deserve at least this level of representation in the decision to end their lives. I cannot believe that the Court of Appeal ever intended their decision to be used by the Public Trustee in this manner.

Decision

[28] Many of the foregoing authorities deal with whether doctors have the authority to make life and death decisions for their patients. That is not the question to be determined on this application. Rather, I must determine whether the Public Guardian has the legal authority to consent to the cessation of medical treatment when that cessation could lead to the death of a dependent adult.

[29] The only authority that directly addresses this point is ***Re Durksen***, in which Power J. concluded that the Public Guardian does not have that legal authority. Unfortunately, there is little analysis in the decision to reveal the basis on which Power J. reached this conclusion and, while I respect the views set out by my colleague, his decision is not binding on me.

[30] I have closely reviewed the legislation under which the Public Guardian operates and in my opinion, it is broad enough to support the legal authority of the Public Guardian to consent to the withdrawal of life-sustaining medical treatment in appropriate circumstances.

[31] Section 7(2) of the Act reveals that guardianship is intended to be in the best interests of and provide a substantial benefit to the dependent adult. Section 10 of the Act then goes on to list the various powers and authority that can be granted to a Public Guardian in any given situation, including the ability to consent to any health care that is in the best interests of the dependent adult.

[32] "Health care" is a defined term in the Act, but as I already noted above, the definition is not exhaustive. In my opinion, the term "health care" as it is used in the Act is broad enough include anything that is necessary to achieve the best interests and substantial benefits purposes of guardianship articulated in s. 7(2) of the Act.

[33] I am aware that under the Act, the Public Guardian is only authorized to consent to health care "that is in the best interests of the dependent adult". At first glance, one might wonder whether the withdrawal of life sustaining care can ever be in a dependent adult's best interests. I am persuaded, however, by the reasoning of Lord Goff in ***Airedale NHS Trust v. Bland***, who stated: "...the question is not whether it is in the best interests of the patient that he should die. The question is whether it is in the best interests of the patient that his life should be prolonged by the continuance of this form of medical treatment or care" (at p. 869).

[34] The decision to withdraw life sustaining treatment is a medical decision. As a result, it is entirely possible that the consent of the Public Guardian is not necessary. Nonetheless, in my opinion, where a Public Guardian who has the authority to consent to health care under s. 10(3)(h) of the Act is faced with a medical opinion stating that the withdrawal of life support or the making of a DNR order is in the best interests of a dependent adult, then that Public Guardian, like any other guardian, has the requisite authority to consent to the recommended course of action.

[35] This decision is not intended to restrict, in any way, the Public Guardian's ability to seek advice and directions from the Court. Indeed, I believe that in certain circumstances, it may be

prudent to seek Court approval before proceeding, including cases where the dependent adult's family does not agree or where there are differing medical opinions. In those cases, Court approval would, in my view, address the issues raised by Lord Keith in ***Airedale NHS Trust v. Bland***, protecting the doctors and the Public Guardian while at the same time giving all interested persons an opportunity to be heard.

V. Conclusion

[36] Based on case law cited above, it appears that the decision of whether or not to withhold or withdraw life sustaining medical care is inherently a medical decision, within the sole purview of a patient's treating doctors. Nonetheless, I have been asked to provide a ruling on the authority of the Public Guardian to provide its consent to the cessation of treatment.

[37] In my opinion and pursuant to the provisions of the *Dependent Adults Act*, the Public Guardian has the requisite legal authority to consent to any health care that is in the best interests of the dependent adult. In appropriate circumstances, this may include the authority to consent to the withdrawal of life sustaining treatment or care. In determining whether to provide its consent, it is reasonable for the Public Guardian to rely on the advice of doctors and, where the case is not clear, the Public Guardian is encouraged to seek advice and directions from the Court.

Heard on the 21st day of July, 2004.
Dated at the City of Edmonton, Alberta this 13th day of February, 2006.

L.Darlene Acton
J.C.Q.B.A.

Appearances:

Tanya Kuehn
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