

Withdrawing and withholding life-sustaining measures – the Law

Powerpoint 1

My role here tonight is to talk about what the law in Queensland is regarding decisions to withdraw or withhold life-sustaining measures.

Powerpoint 2

I'll talk about -

- What we mean by “life-sustaining measures”
- Who can make decisions about these matters; and
- What the decision maker must consider in coming to a decision.

I thought it might be helpful to consider all of these issues in some context, rather than in the legal abstract. So I thought I'd tell you about a case that was considered by the Qld Guardianship and Administration Tribunal last year. The Tribunal is a statutory body that, in some circumstances, makes decisions about health care for a person who can't make those decisions for themselves.

Powerpoint 3

- The case is called *Re MC*.

- Mrs C was 80 years old when her case went to the Tribunal. She had been living in a nursing home since February 2000. (She was admitted after suffering a minor stroke.) She was diagnosed with dementia in June the same year.
- In October 2001, Mrs C suffered another stroke and was hospitalised. C had difficulty swallowing so a naso-gastric tube was inserted to provide her with food and water. (For those of you who don't know, this is a tube that goes through the nose and into the stomach.) Problems arose with the tube so a PEG was fitted in December 2001. (A PEG is a tube that goes directly into the stomach.)

Powerpoint 4

- In June 2003 (around 18 months after the PEG was inserted), Mrs C's sons applied to the Tribunal for its consent to stop giving their mother artificial nutrition and hydration through the PEG.
- At the time of the application, Mrs C was in a permanent vegetative state. She had been in this condition for many months and the prognosis was that she would not improve. Mrs C was completely dependant on others for all essential body functions, and she suffered from many other medical conditions.¹

¹ Cerebral lymphoma, myocardial infarction, hypothyroidism, diverticulitis and osteoporosis.

- The Tribunal appointed the Adult Guardian as Separate Representative of Mrs C to ensure that her interests were protected.
- After hearing all the evidence (including evidence about the likely wishes of Mrs C and expert medical evidence), the Tribunal consented to stopping the hydration and nutrition through the PEG.

Two of the speakers tonight, Dr Mark Deuble (a palliative care physician) and Ms Paula Scully (Adult Guardian) were involved in this case and will provide their perspective on the case.

So, what is the law that governs whether the treatment that was being provided to Mrs C can be lawfully withdrawn?

Well – that depends.

Powerpoint 5

If Mrs C had capacity to decide treatment for herself, the position is clear. She could choose to stop treatment, even if that decision resulted in her death. Indeed, if she continues to be treated against her stated wishes, the medical staff will be committing an assault on her and can be liable to civil or criminal prosecution.²

If Mrs C lacked capacity (which she did in this case), the legal position is governed by the *Powers*

²*Re B (Adult: Refusal of Treatment)* [2002] 2 AllER 449.

of Attorney Act 1998 and Guardianship and Administration Act 2000.

So, what was the nature of the treatment being given to Mrs C?

The reason that we have to ask this question is because Qld legislation deals with “life-sustaining measures” differently from other kind of health care.

Powerpoint 6

Under the legislation, life-sustaining measure is defined very widely. Some people tonight might be interested in the legal definition. If that is the case, it is on the powerpoint and can be downloaded from our site after the lecture.

It is clear though that the definition includes -

- Artificial nutrition and hydration via a PEG (as in Mrs C’s case)
- Cardiopulmonary resuscitation (CPR)
- Assisted ventilation; and
- (Possibly) provision of antibiotics

Who then can decide to withdraw or withhold life-sustaining measures? Again, that is set out in the legislation.

Powerpoint 7

It is the first of the following options to apply in the particular case³ –

- adult under an AHD – If an adult has completed an AHD, the decision has already been made. If the AHD operates, it is **legally binding** and (in most cases) **must** be followed by the health providers.
- guardian appointed by the Tribunal to make a decision; or an order by the Tribunal on the matter has been made (as in *Re MC*)
- attorney appointed under an EPA or under an AHD

Or, if none of these apply –

- a statutory health attorney

[In the case of *Re MC*, she had in fact appointed one of her sons as attorney under an EPA. The doctor in that case, though, wanted the consent of the Tribunal before withdrawing the PEG.]

Who then is a statutory health attorney? Again, the answer is set out in the legislation and it is likely to be a person who is close to the adult.

Powerpoint 8

The SHA is the first in the list who is readily available and culturally appropriate to make the decision⁴ –

- spouse of the adult (if the relationship is close and continuing)

³ Section 66 GAA 2000.

⁴ Section 63 PAA 1998.

- the adult's carer (if the person is 18 years or over and not a paid carer)
- close friend or relation of the adult (who is 18 or more and not a paid carer)
- Adult Guardian

So, for those in the audience who are caring for someone who can no longer make decisions for themselves, you may be that person's statutory health attorney.

If that is the case, how do you make a decision about whether to withdraw or withhold a life-sustaining measure?

Powerpoint 9

The legislation provides guidance for decision makers. Schedule 1 sets out a number of principles which will be relevant. They are called "general principles" and the "health care principle". I have extracted the principles that are likely to be particularly relevant to a decision to withdraw or withhold life-sustaining measures.

As you can see, emphasis is placed on –

- The adult's dignity
- Their views and wishes (if they're known)
- Whether the decision is "least restrictive of the adult's rights"
- What is the adult's best interests

In the case of *Re MC*, the Tribunal referred to all of these principles but seemed to place considerable emphasis on the invasive nature of the treatment (or whether the treatment would be least restrictive of Mrs C's rights), a consideration of what Mrs C would have wanted and what would be in Mrs C's best interests.

So, you (as SHA) have considered these principles and have decided to withdraw or withhold treatment.

The legislation contains a further safeguard before life-sustaining treatment can be withdrawn.

Powerpoint 10

The health provider cannot act on that consent unless he or she reasonably considers that the commencement or continuation of the measure is inconsistent with good medical practice.

“Good medical practice” is defined in the legislation by reference to recognised medical standards, practices and procedures of the medical profession in Australia, as well as recognised ethical standards.⁵

Dr Mark Deuble will talk about “good medical practice” in his address.

⁵ Schedule 2, s5A.

[For completeness, I should mention that the position is slightly different if the adult has made the decision and included it in their AHD. In this case, generally the requirement of good medical practice will not apply. However, there are other requirements that must be satisfied before the treatment can be withdrawn or withheld. The adult must suffer from a serious condition that is set out in the legislation and has no reasonable prospect of regaining capacity for health matters. I will say no more about this though. Paula Scully will be mentioning this in her address.]

So that, in brief, is the legal framework that governs how decisions to withdraw or withhold life-sustaining measures are made.

Powerpoint 11

As I've mentioned, a number of issues are relevant to a decision to withdraw or withhold treatment of this kind. Particularly important though are –

- Who can make the decision? [Remembering that if a person has completed an AHD, the decision has already been made.]
- Factors relevant to the decision –
 - “best interests” of the adult
 - views and wishes of the adult
 - (Generally) what constitutes “good medical practice”