



Healthcare Law Information Memo

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COURT OF APPEALS HOLDS THAT ARTICLE 17-A GUARDIANS OF MENTALLY RETARDED PERSONS, WHENEVER APPOINTED, MAY HAVE POWER TO MAKE DECISIONS REGARDING LIFE-SUSTAINING TREATMENT

Under the Health Care Decisions Act for Mentally Retarded Persons (“HCDA”), a guardian can make health care decisions for a mentally retarded person, including the decision to terminate life-sustaining medical treatment, under carefully prescribed circumstances. Recently, the New York Court of Appeals held that the HCDA applies not only to guardians appointed after its effective date (March 17, 2003), but to all guardians regardless of when appointed. In *the Matter of M.B. (Anonymous)* (March 23, 2006).

The case before the Court of Appeals involved a challenge by the New York Mental Hygiene Legal Services (“MHLS”) to the Richmond County Surrogate’s order permitting the guardian of a severely mentally retarded individual to decide to withhold life-sustaining treatment. The MHLS argued that because the guardian had been appointed before the effective date of the HCDA, the powers granted under the Act did not extend to him. The Appellate Division agreed with the MHLS and reversed the Surrogate’s order. Ultimately, the Court of Appeals reversed the Appellate Division and reinstated the Surrogate’s order. The guardian, despite having been appointed before the HCDA’s effective date, could, following the HCDA procedures, make a decision to withhold life-sustaining treatment.

The HCDA amended Article 17-A of the Surrogate’s Court Procedure Act (“SCPA”), which governs guardians of mentally retarded and developmentally disabled persons. The HCDA, however, applies only to health care decisions for mentally retarded persons. SCPA § 1750-b(1). A guardian of the person may be appointed when appropriate medical personnel have certified that a mentally retarded person is “incapable to manage him or herself and/or his or her affairs by reason of mental retardation and that such condition is permanent in nature and likely to continue indefinitely.” SCPA § 1750(1). Until the passage of the HCDA, the full scope of a guardian’s authority in this area was unclear. The State Court of Appeals, in the *Storar* decision, 52 N.Y.2d 363, *cert. denied* 454 U.S. 858 (1981), had held that a guardian did not have the authority to end life-sustaining treatment for a mentally retarded person. In enacting the HCDA, the Legislature granted that authority.

Under the HCDA, a guardian must base all health care decisions “solely and exclusively on the best interests of the mentally retarded person and, when reasonably known or ascertainable with reasonable diligence, on the mentally retarded person’s wishes, including moral and religious beliefs.” SCPA § 1750-b(2). Factors a guardian must

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consider when determining the mentally retarded person's best interests include:

- the dignity and uniqueness of the individual;
- the preservation, improvement or restoration of the person's health;
- the relief of the individual's suffering by means of palliative care and pain management;
- the effect of treatment, including artificial nutrition and hydration, on the mentally retarded person; and,
- the patient's overall medical condition.

In no event may a health care decision be based on financial considerations or upon a negative presumption due to the person's mental retardation.

The HCDA sets strict procedures before a guardian can make a decision to have life-sustaining treatment withheld or withdrawn. First, the mentally retarded person's physician, after consultation with another physician or licensed psychologist, must confirm to a reasonable degree of medical certainty that the person currently lacks the capacity to make his or her own health care decisions. Either the attending physician or consulting physician or licensed psychologist must be qualified in accordance with Article 17-A. The attending physician and a concurring physician must attest that the mentally retarded person has one of the three conditions:

- a terminal condition;
- permanent unconsciousness; or,
- a condition, other than mental retardation, that requires life-sustaining treatment, is irreversible, will continue indefinitely, and that life-sustaining treatment imposes an extraordinary burden on the patient.

In the case of withholding artificial nutrition or hydration, the two physicians must also confirm that "there is no reasonable hope of maintaining life" or that the artificial nutrition or hydration itself is an extraordinary burden on the patient. SCPA § 1750-b(4)(b)(iii).

If the requisite medical conclusions are made, the guardian must express his or her intent to decide to withhold life-sustaining treatment, in writing, signed by a witness, or orally in the presence of the attending physician and another witness. The guardian's decision must be documented in the patient's chart. A decision to withhold life-sustaining treatment

cannot be implemented for at least 48 hours. The physician must notify the following parties of the guardian's decision to withhold life-sustaining treatment:

- the mentally retarded person (in some instances);
- the director of the residential facility if the patient was a resident;
- the MHLS if the patient was a resident at a residential facility;
- the Commissioner of the Office of Mental Retardation and Developmental Disabilities ("OMRDD") if the patient was not a resident of a residential facility.

Any of those parties, or the physician, can object to the guardian's decision to withdraw treatment. A parent or adult sibling of the mentally retarded person and any other health care practitioner providing services to the patient can also object to the guardian's decision.

If any of the above parties objects within 48 hours, the guardian's decision to end life-sustaining treatment is suspended while a judicial proceeding is conducted. If no objection occurs within the 48-hour period, the guardian's decision is put into effect.

So long as the statutory procedures are followed, any guardian appointed under Article 17-A of the Surrogate's Court Procedure Act, whenever appointed, can make decisions regarding life-sustaining treatment. Health care providers and guardians hold immunity under the HCDA for their reasonable actions taken in good faith pursuant to Article 17-A.

If you have any questions, please contact any of the following members of our Healthcare Practice Group.

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