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IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

IN THE MATTER OF	)	
L.M.R., d.p.	)	C.M. No. 4392-S-MG

MASTER'S REPORT

Date Submitted: January 8, 2008
Final Report Issued: January 24, 2008

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GLASSCOCK, Master

This is a contested guardianship matter that embodies in its facts both tragedy and inspiration, in near-equal measure. L.M.R. ("L.") was in August, 2006 an intelligent, healthy and beautiful young woman of twenty-two, with two loving parents, who was excited to be pregnant with her first child. She was also a heroin addict. On August 28, 2006 L. subjected herself to a heroin overdose which caused her breathing to stop. By the time she was resuscitated, anoxia had caused permanent and irreversible changes to her brain, leaving her in a persistent vegetative state. Through the heroic intervention of her doctors and the support of her parents, L.'s life was preserved by means of insertion of a feeding and hydration tube. Her breathing was done for her by a ventilator. Over the next several months despite many near-fatal crises, L.'s life was extended until she was able to give birth to a healthy daughter, E.

After the biological stresses of the pregnancy were concluded, the doctors were able to wean L. off the respirator and discharge her to Arbors nursing home. She remains in a persistent vegetative state. Without tube feeding and hydration, she would quickly die. L.'s parents divorced when she was an infant, and each has remarried. Before me are cross-petitions by her mother (the petitioner, E.T.) and her father (the respondent, R.R.) seeking guardianship over L. L., obviously, is profoundly dependent and in need of a guardian. Either of her parents is qualified to serve as guardian, and I am convinced that both of these individuals love their daughter deeply and wish what is best for her, in accordance with what they believe to be her wishes and in light of their own beliefs about

what course of treatment is proper for L. The differences between their perceptions, however, are stark: L.'s mother believes that L. strongly expressed her wishes not to live in a vegetative state, and seeks, if appointed guardian, to remove L. from the means which are artificially preserving her life, including the hydration and feeding via a tube. L.'s father wishes to take L. home and care for her there. He believes her best interest is represented by continuing artificial hydration and feeding and by providing her with medical treatment to prolong her life. Because I find both parties fit to be L.'s guardian, the question before me is essentially whether L.'s intent and best interest is better served by the treatment plan proposed by her mother, or by her father.

This matter came before me for a hearing on July 2 and 5, 2007. At the conclusion of the hearing, I appointed a guardian ad litem[1] to secure an independent neurological examination of L. which was conducted by Dr. Carunchio on August 29, 2007.[2] A follow-up examination was done by the same physician on October 17, 2007. All the medical evidence submitted by the physicians—by the independent neurologist and by L.'s own doctors—is in agreement: L. is not in a coma but is in a persistent vegetative state. A large portion of her brain was destroyed by lack of oxygen following the heroin overdose of August, 2006. She is unable to communicate or experience consciousness.

[1] I also appointed the Office of Public Guardian as L.'s guardian for the limited purpose of scheduling visitation between the various family members and L.

[2] I have placed Dr. Carunchio's reports in the record as Court exhibits.

Her continued existence is dependant upon tube feedings and hydration. She suffers from recurring infections, which have required two hospitalizations following her initial discharge to the Arbors nursing home following the birth of her daughter. She is at risk of skin breakdown and pressure sores. Given her current level of medical intervention, she could continue to survive for a number of years. No improvement in her condition can be expected. Both parties have accepted the diagnosis of persistent vegetative state.[3]

The Law

Under 12 Del.C. §3901, an adult is subject to a guardianship only where this Court determines that

> [b]y reason of mental or physical incapacity [such person] is unable properly to manage or care for their [sic] own person or property, or both, and, in consequence thereof, is in danger of dissipating or losing such property or becoming the victim of designing persons or, in the case where guardianship of the person is sought, such person is in danger of substantially endangering [that] person's own health, or becoming subject to abuse by other persons or becoming the victim of designing persons; …

12 Del.C. §3901(a)(2).

In such a case, "the Court shall have the same powers, rights and duties respecting the disabled person that parent's [sic] have respecting their child, including the right to approve or reject medical treatment. In exercising these powers, the Court shall act in the

[3] Because both parties accept that L. is in a persistent vegetative state, I need not recite here the extensive medical and lay evidence in the record regarding her condition.

best interest of the disabled person." 12 Del.C. §3901(f). Thus, the Court, upon a determination of disability, becomes the "ultimate fiduciary of the [w]ard …." In Re Jacqueline B. Jones, Del.Ch. No. 10320, Parsons, V.C. (July 13, 2006)(Mem.Op.) at 5. In appointing a guardian, this Court appoints a fiduciary whose powers are derivative of the powers of this Court. 12 Del.C. §3922. Except as limited by the Court, the guardian of the person is empowered to act toward the ward as a parent would with respect to the parent's own unemancipated minor child. The guardian is entitled to custody of the ward and to establish the ward's place of abode. The guardian may consent or refuse professional or medical care, council, treatment or service as the guardian objectively believes to be in the best interest of the disabled person. 12 Del.C. §3922(b). In other words, the effect of the establishment of a guardianship is profound: in adjudicating any proposed ward as a disabled person, this Court is imposing the greatest diminution of an individual's autonomy and personal rights that any court may impose, short of a criminal conviction. Therefore, I, along with the other judicial officers of this Court, take the imposition of any guardianship as a matter of great seriousness. It hardly needs stating, then, that I undertake the consideration of this particular guardianship action, with its grave implications regarding the future of the ward, with the utmost seriousness.

Fundamental to human liberty is the right to autonomy over one's own body, including freedom to choose what medical treatment shall be imposed upon one's body. This basic liberty interest is protected by the due process guarantees of the United States

Constitution. Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 279 (1990). Our legislature has affirmed this liberty, in part, in Chapter 25 of Title 16 of the Delaware Code: "An individual, legally adult, who is mentally competent, has the right to refuse medical or surgical treatment if such refusal is not contrary to existing public health laws." 16 Del.C. §2502. Recognizing that health-care decisions must frequently be made at a time when the individual is no longer competent, the legislature provided in 16 Del.C. §2503 that a competent adult may make an advanced health-care directive providing what care the person is to receive. Where such an advance directive has been created it may effectively be used to decline the imposition of a "life-sustaining procedure"—including the administration of artificial nutrition, hydration, drugs or antibiotics—where the maker has so directed and upon a determination that the maker lacks capacity and has a "qualifying condition." 16 Del.C. §2501 (l); 2503 (c). There is no question in this case that L. is in a persistent vegetative state, a "qualifying condition" under 16 Del.C. Ch. 25; therefore, had she while competent made an advanced health-care directive declining the treatment she is now receiving, including artificial hydration and feeding, that direction would be respected. Of course, L. could also have made an advance health-care directive providing for other treatment options. L., however, did not create an advance health-care directive under Chapter 25.

L.'s mother, in advocating that she be appointed guardian for L. and be allowed to refuse artificial hydration and nutrition on L.'s behalf, argues that notwithstanding L.'s

failure to create an advance health-care directive, she has demonstrated her intent not to be artificially maintained in her current state. The creation of an advanced health-care directive under Chapter 25 is not the "*exclusive* method for deciding whether to withhold or withdraw medical treatment and life support from an incompetent person." In Re Tavel, Del.Supr., 661 A.2d 1061, 1068 (1995). An individual's fundamental right to self determination survives that individual becoming incompetent, and an incompetent person therefore does not lose his right to withhold or withdraw life-sustaining medical treatment. Id. This Court may vest a guardian of the person with the power to assert, vicariously, the right of a ward to accept or refuse medical treatment, such ward being unable to express a choice for himself. Severns v. Wilmington Medical Center, Inc., Del. Supr., 421 A.2d 1334, 1347 (1980).

> To give effect to an incompetent person's rights, [the Delaware Supreme Court] has held that the guardian of the person has standing to invoke and vicariously assert the constitutional right of an incompetent ward to accept medical care or to refuse it. The term "substituted judgment" is commonly used to describe that process. The purpose of the "substituted judgment" doctrine is ensure that the surrogate decision-maker effectuates the decision that the incompetent patient would have made if he or she were competent.
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> Under the "substituted judgment" doctrine, where an incompetent's wishes are not clearly expressed, a surrogate decision-maker considers the patient's personal value system for guidance. The surrogate considers the patient's prior statements about reactions to medical issues, and all the facets of the patient's personality that the surrogate is familiar with—with, of course, particular reference to his or her relevant philosophical, theological, and ethical values—in order to extrapolate what course of medical treatment the patient would choose.

Tavel, at 1068-69 (internal citations omitted).

Therefore, even where a decision made during a period of competency has not been expressed to statutory standards by a ward, a guardian of the person may, under the "substituted judgment" doctrine, decline medical treatment. That includes a substituted judgment to refuse life-sustaining hydration and nutrition. Tavel, at 1069-70, *citing* Cruzan, at 279. This is true notwithstanding the countervailing interest which the State may have in preserving the life of its citizens. Cruzan, 497 U.S., at 273. However, in order to protect the interests of the State to ensure that the decision of the guardian-as-surrogate to terminate life-sustaining treatment truly represents the wishes of the ward, any decision of this Court that the ward would wish to refuse such treatment must be supported by evidence that is clear and convincing. Tavel, 661 A.2d at 1070. The evidence considered should include all factors relevant to the ward's "personal value system," including prior statements relevant to the ward's current medical condition and "all facets" of the personality of the ward, particularly with regard to the ward's philosophy, theology and ethics. Tavel, 661 A.2d at 1069.

Discussion

Evidence in this matter was presented over a period of two days. At the end of the evidentiary hearing (because the last neurological examination was several months old and because some of the lay testimony indicated a possible improvement in L.'s condition), I directed a subsequent neurological examination and report by an independent neurologist. At the suggestion of the neurologist, the examination was repeated a second time. I then allowed counsel, including the attorney ad litem,[4] to make a closing argument on the evidence as supplemented by the independent neurologist's report, and to submit post-trial memoranda. L.'s mother and father, the petitioner and respondent here, have set forward what they believed to have been L.'s wishes with great force and emotion. It is clear to me that both L.'s parents love L. deeply, wish to respect her life and her wishes and seek only the opportunity to do what is best for her, as each sees it. Each valiantly fought for that perceived best interest at what is undoubtedly great personal expense, not only in money but, more fundamentally, in expenditure of

[4] The attorney ad litem for L., Jason Powell, Esquire, was appointed because of his experience in guardianship matters and because of his willingness to undertake this particular matter on an expedited basis. On behalf of the Court, I thank him for his service both to the Court and to his client here. It is the attorney ad litem's position that either petitioner would be a fit guardian for L. The attorney ad litem takes no position with respect to the withholding or continued provision of life-sustaining medical treatment.

emotional capital. Taking into account the facts as presented at the hearing and by the report of the independent neurologist, I make the following findings of fact:

(1) L. suffered severe and irreversible brain injury which leaves her in a persistent vegetative state from which she will not recover.

(2) that condition leaves her unable to communicate with or experience other people or her environment; in other words, she is without consciousness.[5]

(3) L. is unable to take nutrition or hydration, and absent the maintenance of a feeding/hydration tube and administration of water and food through this implanted tube, L.'s medical condition is such that she will die.

The remaining question, therefore, is a limited one. Has L.'s mother demonstrated by clear and convincing evidence that, in such a situation, L. would not wish her life to be maintained via the implanted tube? If so, then a guardian should be appointed to substitute her judgment for L.'s, and direct withdrawal of the artificial means of sustaining L.'s life. If, on the other hand, L.'s mother has failed to make such a demonstration, her father is the appropriate guardian, and he should be permitted to consent on L.'s behalf to continued medical treatment including hydration and nutrition via the tube.[6]

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[5]According to the medical testimony, despite a lack of consciousness, it is not known whether L. experiences pain at some level.

[6]The petitioner argues that, even absent any evidence of L.'s intent, a "best interest" analysis should lead to a decision to withdraw life support, given her "bleak prognosis." Given

Testimony of L.'s mother provides the clearest window into L.'s wishes in this situation. According to her testimony, in 2005 she and L. were watching a program about another individual in a persistent vegetative state, Terri Shiavo. I take judicial notice of the fact that Terri Shiavo was a Florida resident reported to be in a persistent vegetative state, who was the subject of a struggle between her guardian and other relatives over withdrawal of nutrition and hydration in conditions similar to L.'s. The matter became one of national interest and was widely reported in news media several years ago. One of L.'s physicians, Dr. Goodill, testified that L.'s current condition is similar to that suffered by Ms. Shiavo. According to L.'s mother, after watching the program on Terri Shiavo, she and L. expressed that they would wish never to be maintained artificially as Terri Shiavo was at that time, given nutrition and water through a tube prolonging a persistent vegetative state. According to the petitioner, L. and her mother made reciprocal promises that they would ensure that neither would endure such a fate.[7] Because of the similarity

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my decision here, I need not reach this issue.

[7]The petitioner testified that:

> One time we were watching TV. We were watching news coverage about the Terri Shiavo case, and we both felt very sad about what we were hearing and we were seeing, and I had stated that I had a living will that stated exactly that; that, you know, that no one would have to worry about that. . . .
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> She says, 'Well, I know what I want. Don't ever, ever leave me hooked up to life support. I would not want that. I think its horrible. I think that I do not ever want to be kept on life support if the doctors say there's no hope,' and I promised her, and I said, 'Promise me you won't do that to me either,' and it was a very matter of fact conversation.
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> She also went into further detail talking about, 'I know that my drug use could kill me at any time.' She was very honest about that.

of the circumstances involving Terri Shiavo discussed by L. and her mother, and L.'s current condition, I find this very compelling evidence that L. would wish to refuse the treatment that is preserving her in a persistent vegetative state today.

L.'s father argues that the mother's testimony is not credible because, according to him, L. was living with him during that period, and was unlikely to have been watching a television program with her mother. He also points out that he and his wife watched news coverage of the Shiavo case with L., and that L. did not make such a statement to either of them. After reviewing the evidence, it is clear to me that L. was a loving, and loved, but troubled young woman once she became addicted to heroin. As a result of the inevitable troubles between L. and her parents that resulted from her inability or unwillingness to stop her use of illegal drugs and associated misbehavior, she would move from her father's household to her mother's (and sometimes to her grandparents' households, or in with friends) when relationships at her current place of abode grew too strained. However, she never became estranged from either of her parents and I do not find it implausible that the conversation L.'s mother testified to took place. The respondent also points out that the petitioner was being treated for depression during this period, and suggests that this fact makes her testimony less credible. Nothing in the record indicates to me that the petitioner was unable to perceive and understand her conversations with L., however.

The petitioner and L.'s uncle, K.W., also testified to a separate conversation in which L. represented that she would never want to live with her life artificially supported and that surviving on life support, with others caring for her, would be "gross." While less specific than the first conversation testified to by L.'s mother, Mr. W.'s testimony is corroborative of that account. Finally, L.'s boyfriend, N.C., testified via deposition that L. once told him that she would not want to live on artificial life-support. He also testified, however, that she was intoxicated and depressed at the time, so I put little weight into this testimony.

In addition to L.'s statements, the petitioner points to the fact that L., shortly before her final overdose, spent a great deal of time reading a book, Adventures of a Psychic, by Silvia Browne.[8] The evidence makes it clear that in her final months L. spent a great deal of time reading and re-reading, and talking to others about, this book. The book sets forth a spiritual regime the author refers to as "Novus Spiritus," Tenet XVIII of which is that "Death is the act of returning home; it should be done with grace and dignity. You may preserve that dignity by refusing prolonged use of artificial life support systems. Let God's will be done." Ms. Browne's gloss on Tenet XVIII provides the following "Avoid prolonged use of artificial life-support systems. Allow the spirit to leave when the body is spent. Death is never an accident." While the evidence does not

[8]Adventures of a Psychic, Sylvia Browne, Hay House, Carlsbad, CA (1990). The relevant excerpts are photocopied and in the record as joint exhibit 9.

demonstrate whether L. adopted this particular Tenet, her enthusiasm for Browne's philosophy does demonstrate L.'s receptiveness to a philosophical/theological system not inconsistent with the refusal of life-sustaining treatment.

The evidence submitted by both parties with respect to L.'s personality indicates that she was a private, clean and independent individual, who loved life. None of these personality traits conflict with her stated intent not to exist in a vegetative state. After consideration of the evidence presented by L.'s mother, including L.'s prior statements regarding treatment for medical conditions similar to that from which she now suffers, and testimony regarding her personality, philosophy, theology and ethics, I find that evidence a clear and convincing demonstration that L. would not wish her life to be artificially extended via tube feeding and hydration in her current persistent vegetative state, were she competent to make such a decision.

The evidence presented by L.'s father does not change this conclusion. He argues that L., being only twenty-two years of age, would not have thought deeply about questions of life and death. The evidence, however, shows otherwise; L. did discuss this topic with her mother and her uncle. In addition, L. was not a "typical" twenty-two-year old. She was a drug addict who had experienced life-threatening heroin overdoses in the past, which had lead to several hospitalizations. The evidence persuades me that she realized she was at risk of severe medical consequences as a result of her continuing drug use. L.'s father also points out that L. loved life and was excitedly contemplating the

birth of her child. A love of life, however, is not, to me, inconsistent with a wish to avoid a prolonged existence in a persistent vegetative state. L.'s father and his family visit her at Arbors nursing home each day. His desire is to take his daughter from the nursing home and into his own home, where he could lavish her with care and attention, prolonging her life through the use of artificial feeding and hydration and medical treatment. He proposes to take L. into a household with minor children and with a wife who is also ailing. The selflessness and love demonstrated by L.'s father in this matter are, to me, admirable and frankly awesome in their scope. Since I have found, however, that L.'s wishes, expressed while she was competent, were that she not receive the treatment which her father proposes to give her, and since my duty, having so found, is to permit the guardian to substitute her judgment for the ward's in a manner consistent with what the ward would choose if competent, it is clear to me that L.'s mother, E.T.,[9] is the appropriate guardian for the person of L.

Conclusion

I find by clear and convincing evidence that, while a competent adult, L. expressed her wish not to be artificially sustained by medical treatment, including hydration and nutrition, in a persistent vegetative state. The record regarding her personality and beliefs

[9]The petitioner has remarried during the pendency of this action; she filed under the name of E.H.

is not in conflict with such an intent. The petitioner has demonstrated her fidelity to her daughter's wishes, therefore, Mrs. T. is the appropriate guardian of L.'s person.[10] The attorney for the petitioner should provide me with an appropriate form of order. The form of order should provide for the retention of the Public Guardian as co-guardian of the person for the limited purpose of scheduling visitation, and also that all reasonable measures will be taken to preserve the access of L.'s father and his family to L. in the future. No part of this report shall be implemented during the period for taking exceptions to the report, and if exceptions are taken, any order consistent with this report shall be automatically stayed.

/s/ *Sam Glasscock, III*
Master in Chancery

[10]At the hearing, both the cross-petitions were amended to request a guardianship of the property as well as the person. It is not clear that L. has property which needs to be the subject of a guardianship, however, to the extent the petitioner seeks a guardianship over L.'s property, she should submit a supplement to the petition setting forth the property involved and proposing disposition of that property.