

GUARDIANSHIP AND ADMINISTRATION BOARD
HOBART

Mr T.N. on the application of C.T., his enduring guardian

GAB No. XXXX of 2005

REASONS FOR DECISION

Anita Smith (President)
26 August 2005

Guardianship - enduring guardianship - consent to medical treatment - failure of medical practitioner to obtain consent of person responsible and/or enduring guardian before treating person with dementia - criticism of the terms 'next of kin' and 'doctor's orders' in medical notes - role of guardian including reporting breaches to Medical Council, Aged Care Complaints Resolution Scheme and Police
Guardianship and Administration Act 1995 (Tas), ss 4, 25, 27, 32, 35, 38 and 43
Guardianship and Administration Regulations reg 8

"26 August 2005

Dear C.T.

***Request for Advice and Directions by an Enduring Guardian
Enduring Guardianship No. xxxx – Mr T.N.***

Thank you for your request for advice and direction regarding Mr T.N. who has recently been a resident of X Nursing Home.

According to the document appointing you as enduring guardian for Mr N., you have been appointed as a full enduring guardian, which means that when Mr N. loses capacity to make reasonable judgments about his person and circumstances, he has appointed you as his legal substitute for such decisions¹. Included in the range of decisions that an enduring guardian can make are decisions to consent to or refuse medical treatment².

Once a guardian has been appointed for a person, their ability to make substitute decisions for that person is exclusive and there is no capacity to delegate decision-making functions except where an alternative guardian has been appointed, which has not occurred in this case.

On the basis of your evidence that (i) Mr N. had capacity to make the a valid appointment of an enduring guardian and (ii) that he has now lost the capacity to

¹ Section 32(5) of the *Guardianship and Administration Act 1995*

² Section 25(2)(e) of the *Guardianship and Administration Act 1995*

make reasonable decisions by reason of his disability, you have now assumed decision making responsibility for Mr N.

This letter of advice and directions is provided pursuant to section 35 of the *Guardianship and Administration Act 1995*. However, even if the enduring guardianship did not exist the following advice regarding consent or refusal of medical treatment would apply to one of yourself, your wife, V, or your sister in law, G, because of your role, deemed by the legislation, as ‘person responsible’ for T.

Explanation of Part 6 – Role of Person Responsible

A medical practitioner must obtain the consent of any patient before proceeding with medical treatment. A patient is incapable of giving consent when they are unable, because of their disability, to *understand* the general nature and effect of the proposed treatment, or because they are unable to *communicate* their consent or refusal to treatment³.

When a patient is incapable of giving that consent because of a disability the *Guardianship and Administration Act 1995* provides a scheme that allows for necessary treatment to occur while still observing the rights of all patients. That scheme provides for “substitute consent.” A ‘person responsible’ gives most often substitute consent for medical treatment.

A ‘person responsible’ for a person who does not have capacity to understand the nature and effect of medical treatment is deemed by the legislation to be, in order of priority⁴:

- (i) his or her guardian (including an enduring guardian);
- (ii) his or her spouse;
- (iii) the person having the care of the other person;
- (iv) a close friend or relative of the other person.

Before giving substitute consent, a person responsible must be certain⁵:

- That the person is incapable of giving consent to medical treatment
- That the treatment is in the best interests of the patient

To act competently in the role of ‘person responsible’, a person must understand⁶:

- What treatment is proposed?
- What are the risks of, and alternatives to, that treatment?

³ Section 36

⁴ Section 4

⁵ Section 43(1)

⁶ Section 43 (2)

- Whether the treatment is carried out *only* to promote the health and wellbeing of the person,
- That they can consent to or refuse treatment and that decision is binding unless there has been an alternative decision of the Board,
- That they can seek a second opinion before deciding, and
- That they can agree to treatment even when the patient refuses treatment, their consent will override the patient's refusal.

Any consent to medical treatment given by a person responsible or an enduring guardian must be recorded in writing⁷.

These safeguards are established to ensure that where a person lacks capacity, where possible, an independent person who represents the interests of the person with a disability is available to supervise medical management of that person. The scheme of legislation provides guidance for medical practitioners about where to obtain the requisite consent that makes medical treatment lawful.

Was valid consent given for treatment of Mr N.?

You have reported to the Board that Y Nursing Home, Z Nursing Home⁸ and X Nursing Home have prescribed and administered to Mr N. antipsychotic drugs, without the written consent of any person, whether person responsible or enduring guardian. Verbal requests were made by the family to cease the administration of anti psychotic drugs. It has also been reported that treatment has proceeded without you or other members of Mr N.'s family having an opportunity to ask questions about risks, side effects or alternative treatments.

The Board has requested information from X Nursing Home regarding written consent. X Nursing Home complied in a very timely fashion to that request, for which the Board is grateful.

It is clear from X Nursing Home's response that no written substitute consent to treatment has been recorded from any person. The notes that they have provided indicate discussions with V about ceasing Risperidone, and there as a subsequent change to another antipsychotic medication but it would appear that the discussion with V has not translated into valid consent for the purposes of section 43 *Guardianship and Administration Act 1995* and Regulation 8 of the *Guardianship and Administration Regulations*.

Three common and persistent misunderstandings are repeated in the notes supplied by X Nursing Home. The first relates to your role as enduring guardian. It is referred to in the notes as an 'enduring power of attorney,' which, in Tasmania, is a purely financial role with no effect upon consent to medical treatment. This misnomer is

⁷ Regulation 8 of the *Guardianship and Administration Regulations 1997*

⁸ This advice and direction relates to X Nursing Home because it is Mr N.'s most recent place of residence. Issues relating to Y Nursing Home and Z Nursing Home may be similar, but please bear in mind that the Board has only sought input from X and if these directions were to relate to all three institutions, we would need to seek responses from Y Nursing Home and Z Nursing Home as well. Equally, you are not limited to the directions given and may take additional action.

common in the general community, but I suspect that it reveals a lack of understanding of enduring appointments and what they entail.

The second misunderstanding is a continued reference to a doctor's "orders" for medication. This is inherent in the pro forma drug charts and a term of ordinary parlance. However it is completely incorrect to assert that a doctor's prescription and recommendation of a drug is an "order" that binds the patient or any staff members of allied health professionals.

Authority to accept drug treatment lies with the patient. If the patient is incapable of validly exercising that authority, then it lies within the scheme, partly outlined above, for substituted consent. There are of course exceptions where a doctor need not seek consent for minor treatment (e.g. treatment with non-prescription drugs⁹) and emergency life-saving treatment¹⁰. But the ongoing treatment with an antipsychotic drug does not fit into either of those categories.

The third misunderstanding relates to the use of term "next of kin" which is mentioned in admission forms. The term next-of-kin is, at best, a genealogical term and has no weight in law and, in particular, no weight in the giving of consent to medical treatment unless a person who is next-of-kin is also, by reason of that relationship, the person responsible.

There is *prima facie* evidence that while Mr N. has been at X there has not been valid consent to his treatment with anti psychotic medication from either a person responsible or an enduring guardian.

It must also be said that there has been an attempt at compliance, in that family member's views have been recorded in the nursing notes and acted upon to the extent of changing drugs, and that this attempt at compliance would probably commonly understood to be the required level. The fact that the misunderstanding as to the required levels of compliance with consent procedures is industry wide makes it all the more important that the issues are properly investigated and an authoritative determination made.

It is possible that the treatment administered to Mr N. may constitute a breach of section 38 of the *Guardianship and Administration Act 1995*. The maximum penalty for a breach of section 38 is imprisonment for up to one year or a fine of up to \$1000.00.

The question of whether or not there has been a breach is not a question for the Board. Tasmania Police have the authority to investigate an alleged breach. If they proceed to lay charges under section 38, the Magistrate's Court will determine those charges.

There is a live issue as to whether the medication prescribed is the appropriate medication. This advice and direction is limited to issues of authority to treat. Overmedication or inappropriate medical treatment are essentially questions of medical professional responsibility and are best dealt with by seeking independent

⁹ Section 3 *Guardianship and Administration Act 1995* – definition of medical and dental treatment

¹⁰ Section 40 *Guardianship and Administration Act 1995*

legal advice or taking proceedings with complaints to Aged Care Complaints Resolution Scheme or the Medical Council. It would appear that a comprehensive medical report about Mr N.'s general health and what lead to his present conditions and hospitalisation would assist in deciding how to proceed with respect to that issue.

Mr N.'s present circumstances:

You have indicated that Mr N. is presently at Calvary Hospital being treated for dehydration, aspiration pneumonia, Jaundice and over sedation and is not receiving any antipsychotic medication.

While Mr N.'s place at X Nursing Home remains available, you are also looking for alternative accommodation.

Responsibilities of an Enduring Guardian:

Section 27 of the *Guardianship and Administration Act 1995* dictates that a guardian must at all times act in the best interests of the person under guardianship. It specifies that part of that responsibility is to act as far as possible in such a way as to protect that person from neglect or abuse¹¹.

It is therefore your responsibility to ensure that Mr N. is not placed in a position where he may be abused or neglected. Being dehydrated or over-sedated might reasonably be considered evidence of neglect or abuse.

Whether he has been overmedicated is a matter of medical opinion and should be the subject of an appropriate medical enquiry as discussed above.

Further, being exposed to medical treatment without appropriate consent could also be abusive. It is part of your duty as a guardian to ensure that, if there has been abuse, preventive measures are put in place to ensure that it not continue.

Directions to the Enduring Guardian:

You are hereby directed pursuant to section 35(5) of the *Guardianship and Administration Act 1995* to:

1. Seek a written medical opinion from the practitioner presently treating Mr N. at Calvary Hospital to report upon the:
 - (i) General condition of Mr N.'s physical and mental health
 - (ii) Likely causes of these conditions
 - (iii) Current treatment regime and recommended future regime

¹¹ Section 27(2)(e)

2. Contact Tasmania Police to report a potential breach of section 38 of the *Guardianship and Administration Act 1995*.

I also advise that a failure to comply with these directions may result in summary conviction with a penalty of up to \$2000.00.

Please note these actions described in the directions are available to you both in your role as enduring guardian and as a person responsible in the absence of the directions. It is also consistent with both roles to pursue the current complaint with the Aged Care Complaints Resolution scheme and to pursue the issues of overmedication or inappropriate medical treatment.

If you require further advice about the future accommodation for Mr N., please do not hesitate to contact the Board or the Public Guardian for further advice or information.

Yours faithfully

Anita Smith
PRESIDENT

Cc: X Nursing Home Inc.

Enc. X Nursing Home response"