

**GUARDIANSHIP AND ADMINISTRATION BOARD
TASMANIA**

CITATION:	ER (Consent to Medical Treatment) [2021] TASGAB 17
HEARING DATE(S):	30 March 2021
DATE OF ORDERS:	30 March 2021
DATE OF STATEMENT OF REASONS:	1 April 2021
BOARD:	Ms R Holder, President Ms M Duvnjak, Member Dr M McArthur, Member
APPLICATION	Application for Medical Treatment
CATCHWORDS:	Medical treatment, COVID-19 vaccination, meaning of necessary treatment
LEGISLATION CITED:	<i>Guardianship and Administration Act 1995</i> (Tas), Part 6, ss 36, 41, 43, 44 and 45
CASES CITED:	UI (Consent to Special Medical Treatment) [2020] TASGAB 48
PUBLICATION RESTRICTION:	The decision has been anonymised for the purpose of publication

STATEMENT OF REASONS

Background

1. ER is a 70 year old widowed lady who transferred from Milbrook Rise Centre in 2012 to [the aged care facility], where she continues to reside.
2. The Board received an Application for Consent to Medical Treatment from XU, Care Manager at [the aged care facility], seeking consent for a COVID-19 vaccination to be administered to ER ('the Application').

3. ER is subject to an Administration Order made by the Board on 17 June 2020, which appointed the Public Trustee as the administrator of her estate. She is therefore a 'Represented Person' for the purpose of the Application, and as referred to in section 36 of the *Guardianship and Administration Act (1995)* ('the Act') .
4. Accessible on the Australian Government website is information pertaining to the consent process and clinical governance requirements for the COVID-19 vaccine rollout. As part of the consent process, residential aged care facilities ('RACF') are required to determine the suitability of residents to participate and to seek consent from residents and/or substitute decision makers on behalf of residents. It provides that the RACF is responsible for facilitation, seeking and recording informed consent for all residents assessed as suitable to receive the vaccine, including residents that have a substitute decision maker and those who do not have a substitute decision maker. Evidence of the resident's consent must be made available to the immunisation provider on the day. A consent package forms part of the documentation to be completed.

The Hearing

5. The Board heard the Application on 30 March 2021.
6. In attendance at the hearing by telephone were:
 - a. ER, the Proposed Represented Person ('the PRP');
 - b. GX, Substitute Applicant; and
 - c. Dr Martin Neuberger, General Practitioner.
7. The Board had before it the following documents:
 - a. The Application dated 1 March 2021;
 - b. Health Care Professional Report ('HCPR') of Dr Martin Neuberger dated 2 March 2021;
 - c. Comirnaty COVID-19 Vaccine Consumer Medicine Information (CMI) summary published by Pfizer Australia;

- d. Administration Order dated 17 June 2020;
 - e. HCPR of Dr Martin Neuberger dated 26 March 2020; and
 - f. Public Trustee Report dated 15 May 2020;
8. The Board has produced this Statement of Reasons of its own motion.

Legislation

9. Part 6 of the Act applies to a person with a disability who is incapable of giving consent to the carrying out of medical and dental treatment, whether or not the person is a represented person.
10. Under section 36 of the Act a person is incapable of giving consent to the carrying out of medical treatment if the person –
- (a) is incapable of understanding the general nature and effect of the proposed treatment; or
 - (b) is incapable of indicating whether or not he or she consents or does not consent to the carrying out of the treatment.
11. A person who the Board is satisfied has a proper interest in the matter may make application to the Board for the carrying out of medical treatment on a person to whom Part 6 applies (section 44 of the Act).
12. Section 45 of the Act provides:
- (1) On hearing an application for its consent to the carrying out of medical or dental treatment the Board may consent to the carrying out of the medical or dental treatment if it is satisfied that –
 - (a) the medical or dental treatment is otherwise lawful; and
 - (b) that person is incapable of giving consent; and
 - (c) the medical or dental treatment would be in the best interests of that person.

- (2) For the purposes of determining whether any medical or dental treatment would be in the best interests of a person to whom this Part applies, matters to be taken into account by the Board include –
 - (a) the wishes of that person, so far as they can be ascertained; and
 - (b) the consequences to that person if the proposed treatment is not carried out; and
 - (c) any alternative treatment available to that person; and
 - (d) whether the proposed treatment can be postponed on the ground that better treatment may become available and whether that person is likely to become capable of consenting to the treatment; and
 - ...
 - (f) any other matters prescribed by the regulations.

13. The Board must also balance the principles in section 6 of the Act for every function or power conferred by the Act, and these are:
- (a) the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted; and
 - (b) the best interests of a person with a disability or in respect of whom an application is made under this Act are promoted; and
 - (c) the wishes of a person with a disability or in respect of whom an application is made under this Act are, if possible, carried into effect.

Person with a proper interest

14. The Applicant, an employee of [the aged care facility] where ER resides, made Application to the Board. The Applicant is the Care Manager and she has oversight of the clinical care needs of residents at [the aged care facility], including the care needs of ER. The Board is satisfied that for the purposes of section 44(1) of the Act, the Applicant has a 'proper interest' in this Application.

Medical treatment is lawful

15. The proposed treatment being sought is a COVID-19 vaccination, namely the Pfizer vaccination, by way of two intramuscular injections, three weeks apart ('the proposed treatment').
16. The Board finds for the purpose of section 45(1)(a) of the Act, that where consent exists, the proposed medical treatment is 'lawful treatment.'

Capacity to give consent

17. The Board considered whether ER is a person to whom Part 6 of the Act applies, and in particular whether, pursuant to section 36 of the Act, ER is capable of giving consent to the proposed medical treatment in that she 'understands the nature and effect of the treatment.' The Board has previously considered and set out the limited superior court authority and quasi-judicial case law considering the meaning of 'nature and effect' in its decision of UI (Consent to Special Medical Treatment) [\[2020\] TASGAB 48](#).
18. Dr Neuberger, General Practitioner who has known ER for over eight years and sees her at least every three months states ER has a diagnosis of schizophrenia, which has been evident for more than 20 years. Dr Neuberger states in his opinion her disability impacts on her planning and reasoning skills, receptive communication, impulse control and susceptibility to influence/suggestibility. Dr Neuberger gave oral evidence that as a consequence of her disability, ER cannot hold ideas long enough to make decisions as to the proposed treatment and does not understand the risks COVID-19 poses to her or to others. Dr Neuberger stated ER does not understand the benefits to her and to others in the residential aged care facility of having the vaccination, and does not understand the possible side effects of the proposed treatment. Dr Neuberger stated in his opinion ER is incapable of giving consent to the COVID-19 vaccination as she does not understand the nature and effect of the treatment. No medical evidence to the contrary was submitted.
19. The Board finds that ER lacks capacity to consent to the proposed treatment, in that she is unable to comprehend and retain the information which is

material to the decision and unable to use and weigh the information in order to make an informed decision.

Whether treatment can be provided under Part 6 of the Act without an Order

20. Before the Board considers whether it should make an order, the Board needs to be satisfied that there is no other consent mechanism under Part 6 of the Act that could apply.
21. The Board heard evidence from the Applicant that ER does not have a Person Responsible who may consent to the proposed treatment.¹
22. It was not suggested by anyone at hearing that section 40 of the Act applies, which allows for urgent medical treatment to be carried out on a person without consent so as to save the person's life; prevent serious damage to the person's health; or to prevent the person from suffering or continuing to suffer significant pain or distress.
23. Section 41 allows medical treatment to be provided without consent.
 - (1) Where –
 - (a) it is proposed to carry out any medical or dental treatment which is not special treatment on a person to whom this Part applies; and
 - (b) there is no person responsible for that person; and
 - (c) the treatment is necessary and is the form of treatment that will most successfully promote that person's health and well-being; and
 - (d) that person does not object to the carrying out of the treatment –it is lawful, subject to subsection (2), for the medical or dental treatment to be carried out on that person without consent under this Division.
 - (2) The regulations may provide that in such cases as are specified in the regulations medical or dental treatment may not be carried out on a person to whom this Part applies without consent under this Division.

¹ *Guardianship and Administration Act 1995* (Tas), s43.

(3) A medical practitioner or dentist who carries out or supervises any medical or dental treatment under subsection (1) without the consent of the relevant person must certify in the clinical records relating to the treatment that –

(a) the treatment is necessary and is the form of treatment that will most successfully promote that person's health and wellbeing; and

(b) the person does not object to the carrying out of the treatment.

24. The proposed treatment, is not special treatment. ER does not have a Person Responsible. At hearing ER did not object to the carrying out of the proposed treatment. The question therefore is whether the treatment is 'necessary' and is the form of treatment that will most successfully 'promote ER's health and well-being.'

25. 'Necessary' is not defined in the Act, nor has there been judicial or quasi-judicial consideration of its meaning in the context of section 36 of the Act. The ordinary plain English meaning of the word 'necessary' offers a number of alternatives. See, for example Macquarie Dictionary (online edition):

1. something necessary or indispensable.

2. the fact of being necessary or indispensable; indispensableness.

3. an imperative requirement or need for something: necessity for a decision.

4. the state of fact of being necessary or inevitable.

5. an unavoidable compulsion to do something.

6. a state of being in difficulty or need; poverty.

26. The Substitute Applicant submitted that the treatment is 'necessary' because ER is at high risk herself and there is a high risk of transmission of COVID-19 within a residential aged care facility. The Board does not accept these risk factors make the treatment 'necessary'.

27. The Australian Government has stated every adult in Australia will be offered the COVID-19 vaccination. All adults with decision making capacity can consent to or not consent to having the COVID-19 vaccination. The same right should equally apply to a person with disability who is incapable of consenting to it but has a substitute decision maker who can consider the person's wishes and whether the vaccine would be in the person's best interests to have. The COVID-19 vaccine cannot be described as 'indispensable' that is 'not dispensable; absolutely necessary or requisite' or an 'imperative requirement.' This would not allow for individual choice and therefore be contrary to a person's human rights.
28. Further, while this vaccination may reduce the likelihood of ER getting COVID-19 and therefore reduce the likelihood of being unwell with the virus or even dying, there is no evidence before the Board that the vaccine would be lifesaving, and in this respect 'necessary.' There is no compelling medical evidence before the Board that indicates the treatment is necessary.
29. The Board finds in relation to the Application, the COVID 19 vaccination is not 'necessary treatment.' As it is not 'necessary' treatment, section 41 of the Act does not apply.

Is the proposed treatment in the best interests of ER?

30. The Board needs to apply the criteria in section 45(2) of the Act, that is, whether the proposed treatment is in ER's best interests.

The wishes of ER

31. There was evidence that ER agreed to have the COVID-19 vaccination when discussing it with staff at [the aged care facility] but refused to have it when it was discussed with Dr Neuberger. Dr Neuberger confirmed that ER had objected to the proposed treatment when he discussed it with her. At the hearing ER indicated she wanted to have the proposed treatment and 'would line up with other residents for it.'
32. The Application states that ER has had recommended vaccinations in the past, including the flu injection last year. Dr Neuberger states that she has

'mostly refused flu vaccinations in the past.' The substitute Applicant stated ER had her flu injection last year. While it is not necessary to make a finding as to whether ER had the flu injection last year, the Board makes the observation that it is unclear where consent came from for this treatment if it was given to ER.

Consequences to ER if the treatment is not carried out

33. The Application states that if the proposed treatment is not carried out the consequence is that ER would have 'reduced immune response to COVID-19 resulting in possible serious unwanted health outcomes'.
34. Dr Neuberger gave evidence that in his opinion ER is at risk if she does not have the proposed treatment, as she is over 70 years of age, she lives in an aged care facility, and she has advanced 'active' breast cancer and diabetes. Dr Neuberger opined ER is a high risk person with a significant risk of morbidity if she was to get COVID-19.

Any alternative treatment available to ER

35. Dr Neuberger gave evidence that there is no cure for the COVID-19 virus. He stated there is no other alternative treatment to receiving a vaccination for COVID-19. Dr Neuberger stated there are currently two COVID-19 vaccinations available in Australia, that is the Pfizer/BioNTech and the AstraZeneca. The AstraZeneca requires 2 injections, 3 months apart. The evidence at hearing was that ER would receive the Pfizer vaccine. Dr Neuberger indicated Public Health have recommended the Pfizer vaccination be used for the high risk group which includes residents of the RACF as he understands this vaccination creates a better immune reaction to better prevent serious consequences from the virus should she come in contact with it.
36. The Applicant attached the Pfizer Australia COVID-19 Vaccine Consumer Medicine Information (CMI) which outlines the possible risks and complications of the COVID-19 vaccination. The CMI outlined a number of very common side effects including pain/swelling at injection site, tiredness,

headache, muscle pain, chills, fever, joint pain, and common side effects such as redness at injection site and nausea, to uncommon side effects such as enlarged lymph nodes, feeling unwell, pain in limbs, insomnia, itching at injection site and more rare side effects such as temporary one-sided facial drooping and a severe allergic reaction. The CMI also stated there could be other side effects not listed here which may occur in some people. Dr Neuberger stated ER is not on any medications such as steroids or immunosuppressants and was at low risk of experiencing an acute or severe allergic reaction to the vaccine. He believed ER would tolerate well the vaccination but noted the localised side effects may be greater than what would be experienced from a flu vaccination.

Whether the proposed treatment can be postponed on the ground that better treatment may become available and whether that person is likely to become capable of consenting to the treatment

37. Dr Neuberger opined at some stage there is likely to be a better treatment available to treat the COVID-19 virus but it is unlikely to be any time soon. Dr Neuberger was of the view that the treatment should not be postponed.
38. There was no medical evidence before the Board which indicated any likelihood that ER is likely to become capable of consenting to the proposed treatment.

Findings as to section 45(2) of the Act

39. ER was able to express and communicate her wishes at hearing as to the proposed treatment. A person who is found to lack the capacity to understand the nature and effect of the treatment does not lose their right to express their wishes and, in this way, contribute to medical decisions about them. It is required by virtue of section 45(2)(a) and section 6 of the Act that the person's wishes are, if possible, carried into effect. Accordingly the Board gives weight to ER's wishes. The Board also gives weight to the fact no one present at the hearing was against the proposed medical treatment proceeding.

40. The Board finds that the proposed treatment has the potential of some risk and side effects, but accepts Dr Neuberger's evidence that the risk to ER of having an adverse reaction is considered small and her risk of a serious reaction like an allergic reaction would be rare or unlikely. Further, the Board accepts the medical evidence that if ER is not vaccinated she remains at risk of getting COVID-19 and experiencing symptoms which could make her very unwell, and given her pre-existing medical conditions and age increases her risk of mortality should she come in contact with the virus.
41. The Board accepts the medical evidence of the Applicant that there is no benefit in postponing treatment as it is not likely better treatment will become available in the foreseeable future. No alternate treatment is available now.
42. Further, for the reasons set out above as to ER's understanding of the nature and effect of the proposed treatment, the Board does not find that ER is likely to become capable of consenting to the proposed treatment. Additionally, postponement of the proposed treatment would be contrary to ER's stated wishes of 'lining up with the other residents for the vaccine' when Public Health attend [the aged care facility] on the 8 and 20 April 2021.
43. The Board needed to consider whether the treatment should be provided immediately pursuant to section 45(4) of the Act or whether it be postponed to allow for the period of appeal. The substitute Applicant gave evidence that [the aged care facility] had been advised that COVID-19 vaccinations would be administered to residents on site on the 8 and 29 April 2021. COVID-19 vaccinations would only be administered to those who could give consent or who had a substitute decision maker, which is in Tasmania a Person Responsible or Board appointed guardian or Enduring Guardian. The substitute Applicant stated that if ER is unable to receive the vaccine on the 8 and 29 April it is more likely than not that she would have to attend a public health clinic or other site away from [the aged care facility] which would cause her agitation and distress, particularly as she rarely came out of her room at [the aged care facility]. There was also concern expressed that the number of the Pfizer vaccines received by the State were limited and this vaccine was

deemed more suitable for those likely to experience serious illness due to COVID-19. The Board gives weight to these reasons.

Decision

The Board consents:

1. To medical treatment being provided to ER comprising of COVID-19 vaccination in the form of two intramuscular injections, three weeks apart.
2. To the medical treatment being provided immediately, pursuant to section 45(4) of the *Guardianship and Administration Act 1995*.
