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Resolving conflict in the application of principles guiding the withholding and withdrawal of life-sustaining measures

Jennifer Butler, Central Queensland University, Rockhampton.

Abstract

A comprehensive statutory regime governs the withdrawal and withholding of life-sustaining measures when such decisions are made on behalf of incompetent adults. This regime contains two sets of principles which govern decisions to withhold or withdraw life-sustaining measures. However there can be conflict in the application of these principles which further complicate an already difficult decision. This paper explores the conflicts that can arise from the application of the principles governing the withholding and withdrawal of life-sustaining measures in Queensland with reference to the decisions of the Queensland Guardianship and Administration Tribunal.

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Guardianship, withholding and withdrawing life-sustaining measures

Introduction

The withholding and withdrawal of life-sustaining measures is a vexed topic as the issue invokes a passionate and emotional response from those who are involved in the making, and the process associated with the making, of such decisions. The emotional response is enhanced when people are faced with the decision to withhold or withdraw life-sustaining measures from an adult who is incompetent: an already difficult decision is made even more difficult. Queensland has a statutory regime that contains firm guidelines for those faced with making these decisions. These guidelines are in the form of principles that must be taken into account as part of the decision making process. In the case of a decision to withhold or withdraw life-sustaining measures the principles that must be taken into account are the general principles and the health care principle, contained within the *Guardianship and Administration Act 2000* (Qld) (the GAA) and the *Powers of Attorney Ac 1998* (Qld) (the PAA). While these principles contain guidelines to enable a decision to withhold and withdraw life-sustaining measures to be made there is some argument that the application of the principles can result in conflict (White & Willmott 2005). Conflict can arise due to conflict between the application of the general principles and the health care principle or conflict between the application of specific principles contained within the general

principles. The end result may be a confusing situation such that there may be a need for additional guidance to be contained within the legislation to clarify which of the principles should take priority in such a situation or which principles should be preferred over others in specific situations. This paper conducts an exploration of the application of the principles as they have been applied by the Queensland Guardianship and Administration Tribunal. Consideration is then given to the conflicts that may arise upon application of these principles. Finally, there is discussion as to methods that could be implemented to resolve future conflicts if they do occur.

Withholding and withdrawal of life-sustaining measures in Queensland

Withholding and withdrawal of life-sustaining measures is governed in Queensland by a regulatory regime contained in the *PAA* and the *GAA*. This regime covers decisions relating to ‘financial matters’ (Sch 2 Pt 1 *GAA*, Sch 2 Pt 1 *PAA*) and ‘personal matters’ (Sch 2 Pt 2 *GAA*; Sch 2 Pt 2 *PAA*). Decisions relating to personal matters can be made on behalf of an adult who lacks capacity to make these decisions on his/her own behalf. The types of decisions which can be made in relation to a personal matter are those relating to where an adult lives, with whom the adult lives, the type of work, education or training that is done by an adult, what an adult eats and the way an adult dresses, legal issues in relation to an adult, and the health care of an adult (Sch 2 s2 *PAA*). Health care is further defined to include the diagnosis, maintenance or treatment of an adult’s physical and mental condition which is carried out by a health provider (Sch 2 s5 *GAA*; Sch 2 s5 *PAA*). This can also include treatment carried out under the direction or supervision of a health provider (Sch 2 s5(1) *PAA*).

The concept of a health matter or special health matter is covered in Chapter 5 of the *GAA*. Section 61 *GAA* sets out the philosophy and purpose of the provisions in Chapter 5 as being:

> to strike a balance between ensuring an adult is not deprived of necessary health care only because the adult has impaired capacity for a health matter or special health matter and ensuring health care given to the adult is only health care that is necessary and appropriate to maintain or promote the adult’s health and wellbeing or health care that is, in all the circumstances, in the adult’s best interests.

Withholding and withdrawal of life-sustaining measures is subject to additional and more rigorous safeguards than decisions in relation to other matters. Undoubtedly, this is due to the fundamentally serious nature of such decisions (White & Willmott 2005). A life-sustaining measure is defined in both the *PAA* and *GAA* as ‘health care intended to sustain or prolong life and that supplants or maintains the operation of vital bodily functions that are temporarily or permanently incapable of independent operation’ (Sch 2 s5A *PAA*; Sch 2 s5A *GAA*). Thus, withholding and withdrawal of such a measure will likely result in the death of the person. Decisions made on behalf of an adult with impaired capacity must be made with reference to the general principles contained in the *Acts* (s11 *GAA*). In addition, where such decisions are made in relation to a health matter regard must be given to the health care principle. Schedule 1 of both the *PAA* and the *GAA* contain these principles. The general principles are a set of principles which must be taken into account when making decisions on behalf of an incompetent adult. The health care principle contains guidelines that must be taken into account when making a decision on behalf of an incompetent adult in relation to health matters.

Even where consent to withhold or withdraw life-sustaining measures has been given, the members of the health care profession are given the right of veto under s66A of the GAA. Such consent 'can not operate unless the adult's health care provider reasonably considers the commencement or continuation of the measure for the adult would be inconsistent with good medical practice.' The use of this additional measure constitutes an additional safeguard to ensure that any decisions made in relation to the withholding and/or withdrawing of life-sustaining measures are not taken lightly (White & Willmott 2005). The 'good medical practice' measure requires that regard be given to good medical practice for the medical profession in Australia (Sch 2 s 5A *PAA*; Sch 2 s5B *GAA*). Good medical practice is defined as 'having regard to the recognised medical standards, practices and procedures of the medical profession in Australia and the recognised ethical standards of the medical profession in Australia' (Sch 2 s5A *PAA*; Sch 2 s5B *GAA*). While this definition provides some vague guidance it is less than a definitive test or solution. This is on the basis that the medical profession in Australia does not have any firm guidelines on what constitutes good medical practice. However, it is useful in that the test has the capacity to involve another party external to those people directly responsible for the making of the decision. In this sense, the test has the capacity to inject a more objective perspective to the decision making process.

In addition to the statutory principles set out in the two Queensland *Acts* decision makers may have regard to the common law in this area. In other words, the statutory regime has not superseded the role of courts and tribunals. The common law position has been referred to in detail in Tribunal decisions on withholding and withdrawing life-sustaining measures (*Airedale NHS Trust v Bland* [1993] AC 789; *Auckland Area Health Board v Attorney-General (NZ)* [1993] 1 NZLR 235). Therefore, despite the extensive regulatory regime that now exists, reference back to the common law position may still be required. Reference to the common law has been made extensively to overseas decisions as Australia has had limited judicial consideration given to the area of withholding and withdrawing life-sustaining measures.

General principles

When making a decision on behalf of an adult with impaired capacity regard must be given to the general principles contained in the *Acts* Sch 1 pt 1 *PAA* and Sch 1 pt 1 *GAA*. As these principles apply to all decisions made under the *Acts* they are of a general nature and seek to have a broad application. When looking at the decision to withhold or withdraw life-sustaining measures it would seem that not all of the principles in each and every case would be of direct relevance. In the opinion of Dr White and Professor Willmott (2005) the principles that will be of most common relevance are as follows:

- An adult has the same basic human rights regardless of their capacity and this must be recognised and taken into account (Sch 1 s2 *PAA;* Sch 1 s2 *GAA*);
- An adult's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account (Sch 1 s3 *PAA*; Sch 1 s3 *GAA*);
- The principle of substituted judgement must be used so that if, from an adult's previous actions, it is reasonably practicable to work out what his or her views and wishes would be, a person in performing a function or

exercising a power under the legislation must take those views and wishes into account (Sch 1 s7 *PAA*; Sch 1 s7 *GAA*);

- Power for a matter should be exercised in a way that is appropriate to the adult's character and needs (Sch 1 s10 *PAA*; Sch 1 s 10 *GAA*);
- An adult's cultural and linguistic environment and set of values must be taken into account, including any religious beliefs that the adult may hold (Sch 1 s9 *PAA*; Sch 1 s9 *GAA*).

These principles have been used by the Tribunal in a number of decisions. The next part will examine how the principles have been applied by the Tribunal.

General principle 2 (1)

General principle 2 (1) refers to an adult's right to the same basic human rights as others regardless of their capacity. This principle was given consideration by the Tribunal in the case of *Re HG* [2006] QGAAT 26. This case involved a 58-year-old man with Wernicke's encephalopathy and Korsakoff's psychosis. These conditions arose as a result of excessive alcohol consumption over an extended period of time and resulted in short term memory deficit, ataxia, peripheral neuropathy and double incontinence. The consequence of his condition meant that his capacity to make decisions in relation to his own health care was impaired. HG suffered a stroke and was unable to swallow. Further, he was completely paralysed, except for the ability to move his eyes up and down and blink. Due to HG's inability to swallow he was unable to take food or hydration either orally or via a naso-gastric tube. To enable HG to receive nutrition and hydration a percutaneous endoscopic gastrostomy (PEG) could be inserted. The insertion of a PEG amounts to a life-sustaining measure because the operation of vital bodily functions such as the ability to remain hydrated are maintained where they would otherwise be incapable of independent operation.

HG was receiving artificial hydration. As HG did not have any family the Adult Guardian was asked to make a decision as to whether it was appropriate for a PEG to be inserted or whether the artificial hydration that was being received should be withdrawn so that HG would be able to die. Workers from the 'in home' care service that had been caring for HG requested a review of the decision. This request was made on the basis of their belief that HG could still communicate and was therefore able to make his own decisions about health care.

The Tribunal considered in its decision that general principle 2 (1) needed to be applied and had relevance to the issue before the Tribunal. The Tribunal considered that whilst the drafting of general principle 2 (1) is in 'very broad terms' it may still have relevance in cases such as HG's because 'an adult does not lose the right to have life-sustaining measures withheld or withdrawn because that adult has lost capacity to make the decision for himself or herself' (Re HG [2006] QGAAT 26). This case demonstrates how the principles do not and cannot stand alone given their general nature. The Tribunal referred to the common law in this area in making its decision. In particular, the Tribunal made reference to the following quote in relation to the rights of persons who are incapacitated as contained in the decision in *Airedale NHS Trust v Bland* [1993] AC 789 at 856. Lord Goff stated in his judgment that:

> … I am of the opinion that there is nevertheless no absolute obligation upon the doctor who has the patient in his case to prolong his life, regardless of the circumstances. Indeed, it would be most startling, and it could lead to the most adverse and cruel effects upon the

> patient, if any such absolute rule was held to exist. It is scarcely consistent with the primacy given to the principle of self-determination in those cases in which the patient of sound mind has declined to give his consent that the law should provide no means of enabling treatment to be withheld in appropriate circumstances where the patient is in no condition to indicate, if that was his wish, that did not consent to it. The point was put forcibly in the judgement of the Supreme Court of Massachusetts in *Superintendent of Belchertown State School v Saikewicz* (1977) 37O Mass 728 at 747 as follows:
>
> > To presume that the incompetent person must always be subjected to what many rational and intelligent persons may decline is to downgrade the status of the incompetent person by placing a lesser value on his intrinsic worth and vitality.

This quote has been used a number of times in Tribunal cases indicating the obvious agreement of the Tribunal with the principles espoused within the quote.[1]

General principle 3

General principle 3 reads as follows:

> An adult's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account.

In many Tribunal decisions general principle 3 has been acknowledged without entering into discussion of what the principle really means. However, the concept of the adult's human worth and dignity has been discussed in the Tribunal decisions of *Re HG* [2006] QGAAT 26 and *Re MC* [2003] QGAAT 13. In *Re HG* the Tribunal recognised the principle of maintaining the adult's human worth and dignity and also recognised the sanctity of human life. The Tribunal also noted the following statement of the Court in *Airedale NHS Trust v Bland* [1993] AC 789 at 826:

> … the sanctity of human life is only one of a cluster of ethical principles which we apply to decisions about how we should live. Another is respect for the individual human being and in particular for his right to choose how he should live his own life. We call this individual autonomy or the right to self-determination.

The Tribunal again noted that whilst this principle again 'is drafted in very broad terms'(*Re HG* [2006] QGAAT 26) it may have relevance in some cases such as the case of *Re HG* [2006] QGAAT 26. As will be recalled the Tribunal was asked to consent or not consent to the withholding of a PEG or to give advice, directions and recommendations in relation to the decision about HG's healthcare under s138 of the GAA. This principle allows those making the decision to withhold or withdraw life-sustaining measures to take into account factors that will impact the privacy and dignity of the adult. Factors taken into account in HG's case were the fact that he was a proud and private person who would no longer be able to live alone and complete small acts of independence that were of value to him such as being able to dress himself and make himself a cup of coffee (*Re HG* [2006] QGAAT 26). These were regarded by the Tribunal as important matters deserving of consideration.

General principle 3 was also taken into account in the case of *Re MC* [2003] QGAAT 13 where the loss of Mrs MC's dignity was one of the factors taken into

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account in the decision to withhold artificial hydration and nutrition via a PEG. Again, there was evidence given that Mrs MC was a very private person whose dignity was compromised by the invasive nature of the treatment to which she was subjected. The Adult Guardian in this case referred to the right to have artificial nutrition and hydration removed as 'a basic expression of her autonomy' (*Re MC* [2003] QGAAT 13).

General principle 7

General principle 7 wraps a number of rights together as it refers to the adult's rights to maximum participation, minimal limitation and substituted judgement in the following terms:

General principle 7 Maximum participation, minimal limitations and substituted judgement

1. An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life, including the development of policies, programs and services for people with impaired capacity for a matter, must be recognised and taken into account.
2. Also, the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.
3. So, for example-
   (a) the adult must be given any necessary support, and access to information, to enable the adult to participate in decision affecting the adult's life; and
   (b) to the greatest extent practicable, for exercising power for a matter for the adult, the adult's views and wishes are to be sought and taken into account; and
   (c) a person or other entity in performing a function or exercising a power under this Act must do so in the way least restrictive of the adult's right.
4. Also, the principle of substituted judgement must be used so that if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be, a person or other entity in performing a function or exercising a power under this Act must take into account what the person or other entity considers would be the adult's views and wishes.
5. However, a person or other entity in performing a function or exercising a power under this Act must do so in a way consistent with the adult's proper care and protection.
6. Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.

The principle of substituted judgement as espoused in general principle 7 (4) is of particular relevance to the decision to withhold or withdraw life-sustaining treatment. The principle of substituted judgement is discussed in a number of Tribunal cases (*Re TM* [2002] QGAAT 1; *Re MC* [2003] QGAAT 13; *Re HG* [2006] QGAAT 26). In *Re MC* [2003] QGAAT 13 this principle was considered alongside that of Mrs MC's human worth and dignity. Mrs MC was an 80-year-old woman who was in a minimally responsive state following multiple strokes. Clinical indications were that the condition of Mrs MC was not going to improve. Mrs MC had a PEG inserted but was suffering difficulties with feeding via the PEG

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and her sons were asking the tribunal to consent to the withdrawal of artificial nutrition and hydration via the PEG. A number of interested parties, including Mrs MC's sons gave evidence as to what Mrs MC's views were in relation to the circumstances in which she now found herself. This evidence tended towards the conclusion that Mrs MC would not have wanted the treatment to continue. The Tribunal took this evidence into account in deciding whether to withdraw the artificial nutrition and hydration being provided to Mrs MC. The Tribunal ultimately decided to withdraw artificial hydration and nutrition via the PEG because the treatment was 'intrusive, futile and burdensome'.

Similarly, in *Re TM* [2002] QGAAT 1 the Tribunal took into account evidence given that Mrs TM's views were able to be ascertained. In *Re TM*, Mrs TM was a 62-year-old woman with a five year history of Alzheimer's disease. Her swallowing reflex had deteriorated to the extent that it was no longer considered to be safe to feed her orally. It had been recommended by her speech therapist that oral feeding be discontinued and a PEG be inserted to enable artificial nutrition and hydration. Mrs TM's children and sister gave evidence that Mrs TM had a history of going against medical orders and rejecting medical treatment. On the basis of this evidence the Tribunal found that Mrs TM would have considered the current level of medical intervention to be 'abhorrent'. The Tribunal considered that on the basis of the evidence that they had heard the insertion of a PEG 'would not have accorded with her views, wishes and philosophies.' This accords with a statement referred to in the Tribunal decision from the British Medical Association Guidelines at page 1:

> For every proposed or actual medical intervention, a judgement should be made about whether the intervention would be worthwhile, in the sense of providing some benefit to the individual patient, recognising that each patient has her own values, beliefs, wishes, and philosophies.

It should be noted that the Australian Medical Association does not have similar guidelines in place.

In *Re HG* [2006] QGAAT 26 the Tribunal also tried to find out what the wishes of the patient would have been if he were able to communicate his wishes to those caring for him. The Tribunal found that on the basis of HG's history he would not have wanted the treatment that he was undergoing. The Tribunal also stated that in this regard they would take account of another principle espoused in *Airedale NHS Trust v Bland* [1993] AC 789 at page 829 being the statement of Lord Hoffman:

> Anthony Bland therefore has a recognisable interest in the manner of his life and death which help the Court to apply the principles of self-determination and the value of the individual. We can say from what we have learned of Anthony Bland from those closest to him that, forced as we are to choose, we think it is more likely that in his present state he would choose to die than to live … We can also say that in allowing him to die, we would be showing him more respect to him as an individual than by keeping him alive.

Thus, the Tribunal has clearly shown that in cases where it has been possible to ascertain the wishes of the patient that these views have been taken into consideration in accordance with general principle 7 and in particular the principle of substituted judgement in general principle 7 (4).

General principle 10

General principle 10 requires that power for a matter should be exercised in a way that is appropriate to the adult's needs and character. It is recognised that this principle may have some relevance in a decision to withhold or withdraw life-sustaining measures (Willmott & White 2005). To date, this principle has not been specifically discussed in the Tribunal cases; however, it is submitted by Professor Willmott and Dr White (2005) that this issue may be of relevance in discussion on substituted judgement under general principle 7 (4) and in discussions on health care principle 12 as to what is necessary and appropriate to maintain or promote an adult's health and wellbeing.

General principle 9

General principle 9 requires that in the making of any decision an adult's cultural and linguistic environment is taken into account as well as any values that are held by that adult, including religious beliefs. In the case of *Re TM* [2002] QGAAT 1 there was some discussion as to whether Mrs TM was a practicing Catholic and would therefore want to be treated in accordance with the Catholic Code of Clinical Standards. The Tribunal, however, decided that they did not have to take this issue into account as Mrs TM's family indicated their agreement with the Catholic Code of Clinical Standards. It does illustrate, however, that the religious beliefs of an adult may be taken into account in deciding the outcome of the case. This would particularly be relevant where an adult's religious beliefs would preclude some forms of treatment (Willmott & White 2005).

Health care principle

When making a decision in relation to a health care matter, the health care principle must be taken into consideration in addition to the general principles discussed above (s11 *GAA*). Withholding and withdrawing life-sustaining measures constitutes a health care matter, therefore the health care principle must be taken into account when making such a decision.

The health care principle states the following:

> Health care principle 12
> (1) The ***health care principle*** means that power for a health matter for an adult should be exercised by an attorney
> (a) in the way least restrictive of the adult's rights; and
> (b) only if the exercise of power-
> (i) is necessary and appropriate to maintain or promote the adult's health and wellbeing; or
> (ii) is, in all the circumstances, in the adult's best interests.
>
> *Example of exercising power in the way least restrictive of the adult's rights*
> If there is a choice between a more or less intrusive way of meeting an identified need, the less intrusive way should be adopted.
> (2) In deciding whether the exercise of a power is appropriate, the attorney must, to the greatest extent practicable
> (a) seek the adult's views and wishes and take them into account; and
> (b) take the information given by the adult's health provider into account.

> (3) The adult's views and wishes may be expressed orally, in writing (for example, in an advance health directive) or in another way, including, for example, by conduct.
> (4) The health care principle does not affect any right an adult has to refuse health care.

One of the earliest cases of the Queensland Guardianship and Administration Tribunal was that of *Re RWG* [2000] QGAAT 2 which was decided soon after the Tribunal was established. This case involved a 73-year-old man with an acquired brain injury who was admitted to hospital with septicaemia. Mr RWG's wife lodged an application with the Tribunal to withhold antibiotics and cardiopulmonary resuscitation should a similar infection occur in the future. The Tribunal discussed the meaning of the health care principle at length, in particular, the extent to which the common law should influence the operation of this principle. The Tribunal also discussed the meaning of the wording in Section 12 (1) of Schedule 1 of the *GAA* and the *PAA*. The legislation states that power for a health matter should only be exercised in a way least restrictive of an adult's rights and only if the exercise of the power is necessary 'to maintain or promote the adult's health and well being' (Sch 1 s12 (1)(b)(i) *PAA*; Sch 1 s12 (1)(b)(i) *GAA*). After extensive examination of the common law the Tribunal decided that 'this term cannot mean simply that a power can only be exercised if it improves the person's life. This term must be read to mean if the health care will be of some benefit to the person and therefore in the person's best interests'. They concluded therefore that 'the common law principles are essentially the same as the basic principle espoused in section 12 (1)'.

The meaning of what is in the best interests of a patient in this context is discussed at length in *Airedale NHS Trust v Bland* [1993] AC 789 at 869. The Tribunal has referred to this case in most of their decisions when discussing the meaning of what constituted best interests. Reference is made repeatedly by the Tribunal to the following statement by Lord Goff:

> … the question is not whether it is in the best interests of the patient that he should die. The question is whether it is in the best interests of the patient that his life should be prolonged by the continuance of this form of medical treatment or care.
>
> The correct formulation of the question is of particular importance in a case such as the present, where the patient is totally unconscious and where there is no hope whatsoever of an amelioration of his condition. In circumstances such as these, it may be difficult to say that it is in his best interests that treatment should be ended. But if the question is asked, as in my opinion it should be, whether it is in his best interests that treatment which has the effect of artificially prolonging his life should be continued, the question can sensibly be answered to the effect that his best interests no longer require that it should be.

Therefore, it is clear the Tribunal recognises that the best interests of the patient will depend on the circumstances that present in each particular case. In particular, it appears that choosing to continue treatment that is of no benefit to a patient will not be regarded as being in the best interests of the patient.

Recognition of whether a treatment provides a benefit and is therefore in the best interests of the patient was discussed in *Re TM* [2002] QGAAT 1. In this case it was submitted by one of the expert witnesses that if it was decided to provide treatment in this case that would provide a precedent for other cases that would

present difficulties in residential care facilities throughout Queensland. The Tribunal noted that this was not an appropriate position from which to examine the case. The Tribunal regarded the appropriate test for decision-making as that which is in the best interest of the patient: not the impact such a decision would have on the health care system. The Tribunal again referred to the common law position in making this statement. They noted the comments made by Justice O'Keefe in *Northridge v Central Area Health Service* [2000] NSWSC 1241 in relation to the setting of precedents for the health care system as being influential in their decision on this aspect. Justice O'Keefe commented that the exercise of jurisdiction is confined to the person in question and 'should not be for the benefit of others, including a health care system that is intent on saving costs'.

The decision in *Re TM* [2002] QGAAT 1 provides clear discussion of the interaction between the sections of the health care principle and the general principles. While there is some conflict in this case between the views of the nursing home staff and that of Mrs TM's family, the application of all the principles seems to give clear guidance to the Tribunal as to where the answer should lie. While there was some conflict in this case between the health care providers and the family the application of the principles mostly indicated that the treatment should be withheld. The conflict therefore did not arise out of the application of the principles.

A lengthy discussion of best interests also occurred in the Tribunal decision in *Re HG* [2006] QGAAT 26. The Tribunal stated that they attribute the meaning of the term to that meaning which is given to it by the 'common law as it evolves'. Regard is given to the discussion of best interests in the New South Wales Supreme Court case of *Isaac Messiha (by his tutor Magdy Messiha) v South East Area Health* [2004]NSWSC 1061 and the decision in *Public Advocate v RCS (Guardianship)* [2004] VCAT 1880 . The Tribunal indicated that from the common law in current English Court of Appeal cases they have determined that to work out what is in a patient's best interest they 'must weigh up a series of factors and essentially decide which side of the balance sheet has the greatest number of entries'. The factors which the Tribunal considers to be relevant are:

(a) What is regarded as good medical practice in the circumstances of the case which would require a consideration of matters including:
  (i) the seriousness of the adult's medical condition;
  (ii) the adult's prospect of recovery;
  (iii) whether the proposed treatment is of therapeutic value to the adult;
  (iv) a consideration of the benefits versus the burdens of treatment;
  (v) the effect of treatment on the adult's dignity; and
  (vi) the views and wishes of the adult.

This is a useful statement by the Tribunal insofar as it gives additional guidance to those who are charged with making the decision to withhold or withdraw life-sustaining measures as to what factors should be taken into consideration in determining what is in the best interest of an adult. Whilst the statement is useful conflict can still arise between the application of the differing principles.

Conflicts in the application of principles

It is foreseeable that conflicts may arise when applying the general principles and the health care principle as required when making a decision to withhold or withdraw life-sustaining measures (Willmott & White 2005). Such conflicts may

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arise when the application of one principle indicates resolution in one manner while the application of another principle indicates that the situation should have an alternate resolution. If this is the case, how should those charged with making the decision make a choice as to which principle will take precedence? The legislation does not provide any guidance as to which of the principles is more important or should have priority in the decision making process. The legislation simply provides that most of the principles mentioned must be taken into account when making the decision. It would therefore fall to those making the decision to attribute their own 'weight' to the principles as required by the particular set of circumstances in each individual case. Will this give rise to situations where there is difficulty in applying the principles and should additional guidance be given to clarify the order in which the principles are applied?

There are a number of ways in which the principles may conflict depending on the particular circumstances of any given case. One such example could be: Melva has had a stroke which has left her unable to speak or otherwise communicate. Her ability to swallow has also been affected and the doctors want to insert a PEG to allow her to receive artificial nutrition and hydration. Melva's family inform the doctors that Melva had always been of the strong opinion that she would not want to be a burden on her family. They say that she had said when watching television programs where people have been unable to talk that 'she would rather be dead than not be able to talk to people'. They believe that she would not want to continue living if she is unable to communicate. However, the doctors believe that Melva has some slight chance of improvement in her condition and that, in any case, she has a number of years left to live, despite the fact that she is unable to communicate. The doctors believe that it is in Melva's best interest to have the PEG inserted so that they can give her some time to see whether her condition will improve.

In this case, the substituted judgement test, as provided for by the legislation and interpreted by the Tribunal, may indicate that Melva, if her wishes were able to be ascertained, would not wish to have the PEG inserted and continue living in a state where she is unable to communicate. However, in effect, it may be in her medical best interests to have the PEG inserted so that the doctors can ascertain whether there may be any improvement at some time in the future. The legislation does not give any guidance in this situation as to which of these principles should take precedence or whose view (i.e., expert or familial) is to be preferred. It would be open for a Tribunal to decide that the best interests of the patient indicate that more time is needed for Melva's condition to stabilise. This would result in insertion of the PEG to enable Melva to have additional time in which to ascertain whether there is any improvement in her condition. It would be argued that this would be on the basis there is some slight chance of improvement for the patient. In terms of the substituted judgement test, precedent would indicate that the PEG should be withheld.

Alternatively, a situation may arise where there is a different sort of conflict between the substituted judgement test and the best interests test. For example, say in Ted's case, Ted has an acquired brain injury that he received when he fell off a horse. This brain injury has left Ted in a minimally responsive state. Ted also suffers breathing difficulties which require him to receive artificial ventilation. Ted has always believed that families should look after each other no matter what the situation and that those who allow their parents to die when something could be done are being disrespectful. The doctors in Ted's case want to remove the artificial respiration without which Ted will die. Ted's family have communicated Ted's attitudes to the doctors and they are fearful of being seen as disrespectful if

they agree to this request. Again, there are no guidelines in the legislation as to which of these principles should take priority.

The substituted judgement test would indicate that Ted should stay on the artificial respiration as long as possible. However, it may not be in Ted's best interests to maintain artificial respiration. Decided cases have shown that the best interests of the patient are not necessarily served by keeping them alive indefinitely when the only way this can be achieved is by way of invasive medical treatment (*Airedale NHS Trust v Bland* [1993] AC 789). Does this indicate that the best interests test necessarily takes into account the views and wishes of the patient?

Tribunal cases have shown evidence that the wishes of the patients showed that they would not have wished to live the state that they are in. What would happen if the evidence was to the contrary and the patient had indicated that they would not like to have treatment discontinued such as in Ted's case? Would it still be in the patient's best interests that the treatment be discontinued? It is submitted that the best interests of the patient are necessarily decided by having regard to the views of the patient. Indeed, at common law the test of best interests has taken the adult's views and wishes into account (*Airedale NHS Trust v Bland* [1993] AC 789). The Tribunal in *Re HG* [2006] QGAAT 26 set out a number of factors that they believe should be taken into account when deciding best interests and one of these factors was the views and wishes of the adult. However, as it is impossible to foresee what lies in the future and without being able to comment on the specific details of the current situation the patient who is suffering from incapacity cannot possibly comment on the actual situation in which they find themselves.

Therefore, any general comments in relation to what they would do in any given situation are diluted by the fact that they cannot comment on the specific situation. Whereas it can be determined by all the current facts and circumstances what would be in the best interests of a patient at the current time by consideration of the other factors that are taken into account.

Resolution of conflicts

Would the situation outlined above be helped if additional guidance was given in the legislation as to which principle should take priority where there is a conflict? It is submitted that it would help. However, each case is different and must rest on the facts and circumstances presented. This will mean that it would be difficult to give guidance that would have universal application to every circumstance. However, simply giving the health care principle priority over the operation of the general principles in matters relating to withholding and withdrawing life-sustaining measures would allow some measure of certainty in application of the principles. Where there is conflict in the application of the general principles and the health care principle at least decision makers could be guided to give weight to one principle over another.

Will the laws in other jurisdictions give any additional guidance as to which principles should take priority? Queensland has a relatively comprehensive regime in place for substitute decision making in the case of incompetent persons who require medical treatment. This regime allows for an attorney to be appointed in relation to health care matters but also contains a comprehensive list of persons who can perform this role on behalf of an incompetent adult if no attorney has been otherwise appointed. Certainly, the requirement that substitute decision makers

follow a set of defined principles in making their decision is one that is unique to Queensland.

The position in Queensland whereby a set of principles are set out that must be taken into account when making a decision on behalf of incompetent adults is unique. The legislation in other States does not provide any guidance as to how conflicts between the principles should be resolved as they do not provide principles or guidelines that are similar to those contained in the Queensland legislation.

How should any conflicts between the principles be resolved? It is submitted that the health care principle should be given priority in application of the principles. As the withholding and withdrawal of life-sustaining measures is a health care matter and the health care principles applies specifically to health care matters this would indicate the health care principle should be given weight. Specifically, priority should be given to the best interests test which covers a broad range of current considerations and has been discussed at common law. This takes advantage of the evolutionary process of the common law in providing a flexible and current interpretation of the test. Use of the best interests test also allows consideration to be given to current factors affecting the patient including consideration of the patient's condition. The principles set out in the *GAA* and the *PAA* contain excellent guidance as to what factors need to be taken into account when making decisions in relation to withholding and withdrawing life-sustaining measures. Giving priority to the health care principle as a tie-breaker will also give some guidance as to which of these principles should be given weight when a conflict arises between the principles. This alleviates the need for decision makers to arbitrarily decide which principles should take precedence when there is a conflict. This will provide additional certainty for those using the principles to make a decision in relation to the withholding and withdrawing of life sustaining measures.

Conclusion

When making a decision to withhold or withdraw life-sustaining measures regard must be given to the general principles and the health care principle contained in the *GAA* and the *PAA*. However, application of these principles may result in a conflict where some principles lead to a particular conclusion but other principles lead to a different conclusion. This can result in a confusing and difficult task in determining which principle should take priority or be given weight in order to resolve the conflict. Such conflicts would make a difficult decision even more difficult. Legislators therefore need to legislate that the health care principle should take priority in application in decisions concerning withholding and withdrawing of life-sustaining measures. In addition, the best interests test should be given priority within the health care principle as this will allow recourse to the body of common law that is available in this area. These measures will improve clarity of the application of the general principles and health care principle when applying these principles to the specific area of withdrawing and withholding life-sustaining measures.

Footnotes

1. The quote is contained within the Tribunal decisions in *Re HG* [2006] QGAAT 26 at 12, *Re TM* [2002] QGAAT 1 at 28 and *Re RWG* [2000] QGAAT 2 at 17.

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