STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF VAN BUREN

In the matter of:

File No. 20032114GA

HAZEL WAGNER

_____/

ORDER DENYING PETITION TO REMOVE FEEDING TUBE AND MECHANICAL VENTILATION

At a session of said Court held in the Courthouse, in the Village of Paw Paw, in said County and State, this 24th day of April, 2006.

PRESENT: HONORABLE FRANK D. WILLIS

On April 11, 2006 this Court received a petition from Doctor Brian Drozdowski of Allegan General Hospital, treating physician for Hazel Wagner.

Dr. Drozdowski alleged in this petition that Hazel Wagner was suffering from kidney failure, was recovering from a heart attack and was being kept alive by a feeding tube and a ventilator. Dr. Drozdowski requested that the feeding tube be removed, that any artificial breathing apparatus be removed *and her care code be dropped from "full code" to "respite care".

FILED
APR 24 '06
VAN BUREN COUNTY
PROBATE COURT
FRANK D. WILLIS
JUDGE OF PROBATE

20032114 M 5/1/2006

Dr. Drozdowski justified his request by stating that in his opinion 97 year old Hazel Wagner had "almost no chance of meaningful recovery".

Initially the Court would note that the fact that a Petition to Withdraw Medical Treatment having been filed by the treating physician of Hazel Wager is of considerable concern. Petitions filed by guardians or relatives are understandable but a treating physician, while guiding the family and guardian by giving his or her best medical advice on the medical future of the patient and therefore allowing the loved ones to make their own decision on whether to withdraw feeding tubes or ventilator, should not place himself up as an advocate for the withdrawal of a life-saving apparatus. The job of the treating physician is to advise and not advocate.

The concern is not to place the hospital or treating physician in a conflict of interest position where the public questions whether the request to withdraw life sustaining treatment is based upon the best interests of the patient or based upon a financial and time savings for the hospital and the physician.

As this Court prepares to address the very solemn issue of the "right to die", the words of the Michigan Supreme Court are worth repeating

> As we begin our analysis, we are mindful that the paramount goal of our decision is to honor, respect and fulfill the decisions of the patient, regardless of whether the patient is currently competent. The decision to accept or reject life-sustaining treatment has no equal. We enter this arena humbly acknowledging that neither law, medicine nor philosophy can provide a wholly satisfactory answer to this question.
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> To err either way has incalculable ramifications. To end the life of a patient who still derives meaning and enjoyment from life or to condemn persons to lives from which they cry out for release is nothing short of barbaric. If we are to err however, we must err in preserving life. In Re Martin, 450 Mich 204, (1995)

Hazel Wagner is a 97-year-old lady that has been adjudicated by this Court to be a Legally Incapacitated Individual (LII). As such she has been determined to be "impaired to the extent of lacking sufficient understanding or capacity to make or communicate informed decisions" and she has been appointed a guardian.

The court file reflects that Hazel Wagner's only known relative is a nephew by marriage. Therefore Hazel Wagner has no known living blood relatives.

Initially this Court would point out that by law, this Court cannot grant the physician or the hospital the right to withdraw feeding and breathing tubes from a person who is under a guardianship. If such a right is available under the law it could only be granted to a court appointed guardian.

Michigan Law at Michigan Compiled Laws (MCL) 700.5301 - 700.5318 describes the powers and duties of a guardian. MCL 700.5314 states that;

(c) A guardian may give the consent or approval that is necessary to enable the ward to receive medical or other professional care, counsel, treatment or service.

(b) …The guardian shall secure services to restore the ward to the best possible state of mental and physical well being so that the ward can return to self-management at the earliest possible time.

While section (c) of MCL 700.5314 has broad language that would appear to allow the guardian to consent to most any medical care both (c) and (b) are couched in terms that direct the guardian to seek care for their ward so as to restore the ward to mental and physical well-being. A withdrawal of feeding and breathing tubes is not compatible with "returning the ward to self-management".

This section of the law has also been commented on as follows;

"The language of MCL 700.5314 (c), while authorizing a full guardian to give consent and approval as necessary to enable the ward to receive medical care and treatment, falls short of authorizing a guardian to make all medical or mental health treatment decisions for the ward..."

Estates and Protected Individuals Code with Reporter's Commentary by John H. Martin, 2006 Supplemental, Pg. I-369.

It is also noteworthy that as recently as January 2005, the Michigan Legislature dealt with the issue of whether an individual who is not under guardianship could, while they are competent, authorize another person known as a "patient advocate" to make health care decisions for the individual including the withdrawal of life sustaining treatment.

While the legislature continued such a right for a competent individual "the requirements for creating a valid patient designation are more rigid and onerous than for any other document in this code". (Estates and Protected Individuals Code with Reporter's Commentary by John H. Martin, 2006 Supplemental, Pg. I-358

In order for a second person "patient advocate" to be allowed to make medical decisions for another that includes the

right to make the decision to withdraw life support, the legislature has stated that

> " A patient advocate may make a decision to withhold or withdraw treatment that would allow the patient to die only if the patient has expressed in a clear and convincing manner that the patient advocate is authorized to make such a decision, and that the patient acknowledges that such a decision could or would allow the patient's death. MCL 700.5509 (I)(e).

Now, if these very rigorous standards have been instituted for a competent person to make their own decision, it appears unlikely that a lesser standard would be allowed for an incompetent person that is under a guardianship. When the legislature was considering the right of a person to authorize the removal of life sustaining treatment they easily could have very clearly authorized a guardian to withdraw life sustaining treatment but they quite obviously refused to address this issue. Perhaps the reason is that when a person appoints a patient advocate it is a personal decision and designation and a person should be allowed to make their own decisions regarding their own health care. Such a right preserves individual dignity.

However, as in many cases that come before the Court, Hazel Wagner has had a guardian appointed for her by the Court. The guardian is not related and prior to the guardian's appointment in 2003, had never met Ms. Wagner.

Therefore it appears the legislature believed that the volunteer guardian, who has not known Hazel Wagner for the first 94 years of her life, should not now be thrust in the position of making quality of life decisions for Hazel Wagner. It appears the legislature felt this was not fair to Hazel Wagner or the guardian.

Although the legislature has not spoken in clear terms, the Appellate and Supreme Courts have provided some guidance.

In the case of In RE Martin 450 Mich 204, 1995, the Michigan Supreme Court addressed the issue of whether a person or a surrogate decision maker should be allowed to consent to having life sustaining treatment removed where the person is not currently competent.

In reversing the Court of Appeals, because the evidence presented did not constitute clear and convincing evidence that Mr. Martin, while competent, ever expressed a concise and clear conviction to decline life-sustaining medical treatment the Court set up the following standard;

" We hold that once it is determined that the individual was competent at some time before his present injuries were sustained, a surrogate decision maker cannot make a decision for or in place of a conscious incapacitated individual regarding his decision to waive the right to continue life-sustaining medical treatment. However, where the surrogate decision maker can establish by clear and convincing evidence that the conscious incapacitated individual, while competent, made a statement of his desire to refuse life sustaining medical treatment under these circumstances, then the surrogate must be allowed to effectuate the incapacitated individual's expressed preference. In the absence of clear and convincing evidence of the conscious incapacitated individual's pre-injury statement expressing his decision to refuse life-sustaining medical treatment under the present circumstances, Courts will not authorize the removal of life sustaining medical treatment." In Re Martin, 450 Mich 204, (1995)

In summary, it is important to point out that in Michigan the withdrawal of life-sustaining treatment does not always have to involve the decision of a Court.

First of all, any adult person has the right to provide for the withdrawal of life-sustaining treatment if they are competent and clearly and convincingly advise the doctor and hospital that they want all feeding and breathing tubes etc. removed.

Second, the legislature has allowed any competent adult to appoint a patient advocate to make decisions to continue or withdraw life-sustaining medical treatment should the individual become incompetent.

Third, the Michigan Court of Appeals in the case of In Re Rosebush, 195 Mich App 675 (1992) has stated;

> "After trial court's decision in this case, our Legislature enacted MCL 700.496;MSA 27.5496, which allows competent adults to appoint a patient advocate to make medical treatment decisions, including the withdrawal of life-sustaining treatment, on their behalf. While the statute provides for judicial intervention under certain limited circumstances, we believe that this legislation demonstrates that the overriding public policy of this state is to respect the roles played by the patient, family, physicians and spiritual advisors in the making of decisions regarding medical treatment, as well as the policy that Courts need not delve into that decision-making

process unless necessary to protect the patient's interests. Although the legislation applies only to competent adults, we are satisfied that the public policy of judicial nonintervention also extends to decisions concerning the medical treatment of incompetent persons and minors. *In re LHR, supra.* We therefore hold that, in general, judicial involvement in the decision to withhold or withdraw life-sustaining treatment of behalf of a minor or other incompetent patient need occur only when the parties directly concerned disagree about treatment or other appropriate reasons are established of the court's involvement. See *Guidelines for State Court Decision Making, supra,* pp 101-122.

This case therefore stands for the proposition that the decision to end life-sustaining treatment even for an incompetent adult does not require judicial involvement unless the relatives or "the parties directly concerned disagree about treatment."

The fourth way that life-sustaining treatment can be withdrawn is if evidence can be presented to a Court by clear and convincing evidence that the person, while competent, clearly and concisely and with careful consideration made a

statement that they desired to refuse life-sustaining treatment under these circumstances.

Since the petition before this Court does not allege that facts are present to prove any one of the four alternatives, this Court must deny the petition.

IT IS SO ORDERED.

Dated 4/24/2006

FRANK D. WILLIS, Probate Judge