

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
JOHN F. MALONE
PRESIDING JUDGE, CHANCERY



COURTHOUSE
ELIZABETH, NEW JERSEY 07207

March 8, 2011

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RE: IN THE MATTER OF MARIE FECOSKAY
DOCKET NO. P-5245

FECOSKAY v. KEY PRIVATE BANK
DOCKET NO. C-40-09

Dear Counsel:

This letter is the court's decision with respect to the referenced matter. Marie Fecoskay is an 87 year old woman who is currently an in-patient at Morristown Memorial Hospital. Mrs. Fecoskay had been admitted to the hospital on January 3, 2011 suffering from a urinary tract infection. On January 5 she went into cardiac arrest and although resuscitated suffered loss of oxygen to her brain. Mrs. Fecoskay went into a coma as a result of oxygen deprivation and was placed on a ventilator with feeding tube.

The matter came before the court on application of Joseph Margeton, who holds a power of attorney for Mrs. Fecoskay seeking an order from the court preventing the removal of Mrs. Fecoskay from life support. Mr. Margeton was prompted to act when he learned that Gladys Grasso, one of Mrs. Fecoskay's daughters, discussed discontinuation of life support with Mrs. Fecoskay's physician. The Order entered by the court essentially directed the hospital to do all things necessary to keep Mrs. Fecoskay alive. The court also approved a *guardian ad litem* for Mrs. Fecoskay. Mrs. Fecoskay has remained on life support since January 6.

In cases such as this, the decision to withhold or continue treatment is that of the patient or his surrogate decision maker. In Re Quinlin, 70 N.J. 10 (1976); In Re Conway, 98 N.J. 321 (1985). It is the role of that surrogate to determine and effectuate what the patient would have chosen if she were able.

The case law is clear that the decision to continue or terminate life support systems is not left to the court. In Matter of Jobes, 108 N.J. 394 (1987) the court held that it is not the role of the trial court to decide whether treatment should be removed from a comatose patient but rather to establish criteria that respect the right to self determination and protect incapacitated patients.

Notice of this case was provided to the Office of the Ombudsman for the Institutionalized Elderly. That office has jurisdiction in cases involving the withholding or withdrawing of life-support of residents of long term care facilities unless the matter is before a court of competent jurisdiction. The office in recognition of the facts that a guardian ad litem had been appointed and that the matter was pending before the court has not participated in these proceedings.

Testimony was presented to the court at three hearings. The witnesses included three physicians: Robert Solomon, MD, Mrs. Fecoskay's treating physician for a period of 3 to 4 years between 2007 and 2010; Peter Roytman MD, who was involved in treating Mrs. Fecoskay at Morristown Memorial following her admission in January 2011 and Michel Gerardi, MD, co-chair of the hospital's bioethics committee and author of the committee report.

Dr. Solomon indicated that he began treating Mrs. Fecoskay in 2007 and throughout the period of his treatment she exhibited signs of dementia. Dr. Solomon has not been involved in her treatment in Morristown. He is not able to make a recommendation regarding what Mrs. Fecoskay would wish to do about continuation of life support.

Dr. Royton testified as to Mrs. Fecoskay's current condition. He indicated that she has no cognitive functions, was unresponsive to most stimuli and would not live for long without life support. Due to the lack of oxygen to the brain suffered during the cardiac arrest, Mrs. Fecoskay has lost brain function and is no longer able to breathe on her own. It was Dr. Roytman's opinion that it was highly unlikely that Mrs. Fecoskay's condition would be reversed.

Dr. Gerardi as co-chair of the bioethics committee reviewed Mrs. Fecoskay's records and discussed her case with members of the medical staff involved in her treatment. He testified that her neurological report indicates that she has only lower brain stem function. It was Dr. Gerardi's opinion that there is no reasonable possibility of regaining any cognitive function.

Two of Mrs. Fecoskay's daughters, Gladys Grosso and Nancy Baxter, testified in connection with this matter. Both daughters acknowledged that they had not discussed the matter of life support or issues related to death with their mother. Neither, Ms. Grosso nor Ms. Baxter have had much contact with their mother in recent years. They both testified that Mrs. Fecoskay did not have strong religious beliefs. Each daughter also described Mrs. Fecoskay as being a vibrant well groomed woman.

Ms. Grosso and Ms. Baxter expressed the opinion that their mother would not wish to remain on life support in her current condition. In voicing their opinion each daughter referred to the past that in 1985 when their father was terminally ill Mrs. Fecoskay authorized termination of life support for her husband.

Joseph Margeton has been a friend of Mrs. Fecoskay's for more than 40 years and at one time had a romantic relationship with her. He indicated that in 2007 Mrs. Fecoskay signed 3 documents appointing him to serve as her agent. On June 27, 2007 Mrs. Fecoskay signed a Power of Attorney. She also signed a Durable Power of Attorney for Health Care (Proxy Directive) dated March 9, 2007 and an Instruction Directive dated July 9, 2007. Mr. Margeton indicated that the Instruction Directive was signed by Mrs. Fecoskay in his presence after he read the entire form to her and she selected the category of treatment she wished to receive. Although the Instruction Directive does not comply with the requirements of N.J.S.A. 26:2H-56 since it lacks the signature of a witness other than Mr. Margeton, he contends that it acts as an expression of her wishes to be kept alive under all circumstances. Mr. Margeton acknowledged that he and Mrs. Fecoskay did not discuss the contents of the form, did not discuss what "medically appropriate" treatment meant to her or discuss her wishes in the event of particular circumstances. He indicated that Mrs. Fecoskay never wished to talk about death or related issues. It was his testimony that Mrs. Fecoskay told him that she wanted to live and it was his opinion that she would want to live at all costs. He acknowledged however, that he did not discuss whether or under what circumstances she would wish to be left on life support.

Mr. Margeton pointed out that Mrs. Fecoskay's daughters had very little contact with her and thus had no basis for the opinion that she would wish to be removed from life support. He argues that the situation involving Mrs. Fecoskay's husband is not instructive since he, unlike Mrs. Fecoskay, was in considerable pain. Mr. Margeton argues that the only direct evidence of Mrs. Fecoskay's wishes is his testimony and the 2 signed directives. He contends that the decision in Conway establishes a subjective test that life sustaining treatment may be withdrawn or withheld when there is clear and convincing evidence that the patient would decline treatment if she were able. Mr. Margeton suggests that the conjecture by the daughters of what their mother would want does not meet this standard.

As to the Directives Mr. Margeton urges the Court to conclude that the Instruction Directive although not in compliance with the statute should be honored. He further contends that under the Proxy Directive he was delegated responsibility to make health care decisions on behalf of Mrs. Fecoskay when she lacks decision making capacity.

Following the completion of testimony in this matter Andrew M. Epstein, Esq., the *guardian ad litem* issued his report and recommendation. In a thorough and thoughtful report the G.A.L. indicated what he believed Mrs. Fecoskay would wish to do under the current circumstances if she were able to make the choice. It is the conclusion of Mr. Epstein that Mrs. Fecoskay would decide against the continuation of life support. The G.A.L. reasoned that in the absence of any realistic hope for recovery Mrs. Fecoskay would not continue life support. Mr. Epstein noted that as a woman who loved life and did not ever wish to talk about death she would not want to have her life prolonged by artificial means. Such a choice would be consistent with the decision she made for her late husband in similar circumstances.

It is clear that the Instructive Directive and Proxy Directive are invalid since the designated representative is the sole witness. Mr. Margeton as agent argues that the documents are evidence of Mrs. Fecoskay's intent. The court concludes however that the documents which do not meet statutory requirements have little value. There is no evidence to confirm Mrs. Fecoskay's execution of the documents other than the testimony of Mr. Margeton, the one person prohibited by law from being the witness.

The evidence before the court is that Mrs. Fecoskay did not wish to discuss issues of death with anyone. As a result there is no testimony regarding what Mrs. Fecoskay felt about the use of life sustaining equipment, what she believed was appropriate medical treatment for a person whose condition was terminal or matters related to the quality of life for the terminally ill. Mrs. Fecoskay enjoyed an active life, her daughters relate her love of dancing and she was concerned about her appearance. In the only instance where Mrs. Fecoskay expressed her thoughts about end-of-life medical treatment, was when her husband suffered from cancer, she chose to terminate life support.

It is clear that if able to express her desires regarding the continuation of life support when to do so was almost certainly futile Mrs. Fecoskay would not chose to do so. She stated that she wished to live, not merely to be sustained as an unconscious body with no awareness of life. In her present condition Mrs. Fecoskay is not living as she understood the life she wished to continue. In dealing with her husband's death, she recognized that there is a point at which medicine has provided all that can be done and the return to even minimal health is no longer possible. In that situation Mrs. Fecoskay chose to accept the inevitable and allow nature to take its course.

The court concludes that the existing Order requiring Morristown Memorial Hospital to utilize all measures to keep Mrs. Fecoskay alive and the Order designating G.A.L. Andrew B. Epstein, Esq. as the individual authorized to make health care decisions on behalf of Mrs. Fecoskay are vacated. The court further concludes that Mrs. Fecoskay's daughter is appointed as guardian for Mrs. Fecoskay and is authorized to be her surrogate decision maker regarding the continuation of life support treatment. Mrs. Grosso is authorized to approve the removal of life support systems from Mrs. Fecoskay.

Counsel for Ms. Grosso is to submit an Order consistent with this decision.

Very truly yours,

A handwritten signature in black ink, appearing to read "John F. Malone", is written over a horizontal line.

John F. Malone, P.J. Ch.