

CITATION: Furfari et al. v. Furfari et al., 2015 ONSC 1157
COURT FILE NO.: 03-18/15
DATE: 20150223

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MARIO FURFARI and JOEY FURFARI, Applicants

AND:

TONY FURFARI and ROCCO FURFARI, Respondents

BEFORE: Justice T. McEwen

COUNSEL: *Lorne Silver*, for the Applicants

Justin Devries, for the Respondent Tony Furfari

David Delagran, for the Respondent Rocco Furfari

Marshall Swadron, Section 3 counsel for Erminia Furfari

Andrew McCutcheon, counsel for Dr. Maida

HEARD: February 19, 2015

ENDORSEMENT

Overview

[1] This matter first came before me on an emergency basis on February 11, 2015. On that day the applicants Mario Furfari (“Mario”) and Joey Furfari (“Joey”) (collectively “the applicants”) brought an application against Tony Furfari (“Tony”) and Rocco Furfari (“Rocco”) seeking, amongst other things, an order removing Tony as power of attorney for personal care for Erminia Furfari (“Erminia”) and replacing him with Mario, Joey and/or Rocco. The applicants also sought injunctive relief which included a mandatory order that the administration of food, water and medication be reinstated to Erminia.

[2] After hearing submissions that day I granted the injunction to restore Erminia’s “PEG feeds” (essentially providing Erminia with nutrition) and appointed Section 3 counsel on behalf of Erminia who was unrepresented at that hearing. On an interim basis the parties were also able to agree on a number of issues with respect to Erminia’s care which were incorporated into my order of February 11, 2015.

[3] On February 19, 2015 the parties re-attended before me since the PEG feeds had once again been discontinued as a result of Erminia having aspirated. Once again, time was of the essence. Mr. Swadron had been appointed as Section 3 counsel. Dr. Vincent Maida, who is providing palliative care for Erminia, also attended with Mr. McCutcheon for the purpose of giving viva voce evidence with respect to Erminia's care and whether she should continue with PEG feeds.

[4] It was agreed between counsel that Dr. Maida would be examined by Mr. McCutcheon in-chief and later cross examined by counsel for the parties. Thereafter, counsel agreed that they conference with me, with clients present, and make submissions as to whether the PEG feeds should continue and/or what alternative forms of care should be implemented. At that time the parties were also given the opportunity to speak as to how they best felt Erminia's care should be carried out.

[5] Upon the conclusion of the hearing I agreed to provide a brief endorsement, with reasons to follow. I provided the parties with the endorsement on February 20 lifting the injunction, discontinuing the PEG feeds and allowing Tony to exercise his rights under the power of attorney for personal care.

[6] I am now providing the parties with those reasons so that they can understand the reasoning behind the difficult decision that I had to make.

History

[7] It bears noting that the parties, four brothers, have endured a fractious relationship over the years which has included estrangement and litigation. According to the affidavit evidence Tony and Erminia were locked in litigation with Mario, Joey and Rocco over a family business.

[8] In any event, on April 21, 2009, Erminia granted Tony power of attorney for personal care which included the following term:

Authority – I authorize my Attorneys to make any personal care decision for me that I am incapable of making for myself, particularly decisions with respect to the following aspects of personal care, the enumeration of which does not in any way limit the general powers conferred, namely – nutrition, shelter, clothing, hygiene, safety and health care, including, consistent with my wishes as expressed in this document:

- (a) the giving or refusing of consent to treatment to which the *Health Care Consent Act*, 1996 (Ontario) or any successor legislation thereto may apply; and
- (b) cessation or continuation of measures whereby my life may be artificially prolonged.

[9] Erminia, unfortunately, has suffered from Alzheimer's Disease for several years. Since May 2014 she has been under the care of Dr. Maida. Dr. Maida specializes in palliative medicine and complex wound management and is currently the head of the Supportive and Palliative Care Program, William Osler Health System, Etobicoke General Hospital. Since taking on Erminia as a patient he has visited her at her home on eight occasions.

[10] Throughout this timeframe, and in fact for several years, Tony has provided and overseen care for Erminia. She currently has end-stage Alzheimer's Disease. In May 2012, or so, she lost the ability to feed herself. She is currently in an inactive vegetative state and relies on caregivers on a 24-hour basis.

[11] In or about February 7, 2015, after consulting with and obtaining the agreement of Dr. Maida, Tony disconnected the PEG feeds that were being provided to Erminia. The applicants objected to this which started the proceedings before me.

The Law

[12] The parties agree that the test that I am to employ is that which considers the best interests of Erminia, either pursuant to the provisions of the *Health Care Consent Act*, S.O. 1996, c2, or the *Substitutes Decision Act*, 1992, S.O. 1992, c30.

[13] The parties also do not dispute the fact that Erminia is incapable of managing her own personal care. Mr. Swadron, Section 3 counsel, met with her at her home and was unable to make any meaningful contact or obtain instructions.

[14] In analyzing this matter I have considered, to the best of my ability, Erminia's best interests as well as whether Tony is acting in accordance with her wishes or instruction.

Analysis

[15] In April 2009, Erminia made a choice to have Tony act as her power of attorney for personal care. As noted, the document authorizes him to give, or refuse, consent to treatment and to cease or continue measures whereby Erminia's life could be artificially prolonged.

[16] When the matter first came before me I was concerned that I did not have sufficient evidence to determine this issue and for that reason I issued the injunction reinstating the PEG feeds. Since that time, however, with the benefit of testimony from Dr. Maida, a review of his notes, and a review of the affidavits that have been filed, I have come to the conclusion that Tony can exercise his rights under the power of attorney for personal care and continue with his decision to end the PEG feeds.

[17] I have come to this conclusion for a number of reasons, primarily as follows:

- Against the backdrop of family disharmony and dysfunction Erminia made a choice to make Tony her power of attorney for personal care.

- During Erminia's decline, as a result of suffering from Alzheimer's Disease, Tony has arranged for overseeing her care which according to Dr. Maida has been exemplary. Dr. Maida described that it is the standard for which all Canadians should hope for. No one disputes the high standard at which care has been provided.
- Up until the discontinuance of the PEG feeds neither the applicants nor Rocco took any issue with the care Erminia was receiving.
- Erminia is at the end of life.
- According to Dr. Maida:
 - (a) the PEG feeds are not prolonging life;
 - (b) given Erminia's Alzheimer's Disease, which is terminal, she does not at this time feel hunger or thirst;
 - (c) the PEG feeds have no effect on Erminia's function, performance, hunger or thirst there is no benefit to them at this stage of life. Given Erminia's unfortunate demise she is now suffering from growing spasticity in her limbs and has had episodes of aspiration, likely as a result of the PEG feeds;
 - (d) by removing the PEG feeds Erminia will not suffer from any form of starvation and she will die from Alzheimer's Disease as her body is not seeking food or hydration at this time;
 - (e) stopping PEG feeds is a common occurrence at the end of care;
 - (f) Tony is acting in the best interests of his mother;
 - (g) the PEG feeds have become burdensome to Erminia;
 - (h) stopping the PEG feeds would allow Erminia to have a natural, dignified and peaceful death within her own residence.

[18] The applicants and Rocco submit that, notwithstanding some reported incidents of aspiration, 24-hour care with a registered nurse could provide a reasonable quality of life. Based on the above I cannot agree with this submission.

[19] Second, they submit that discontinuing the PEG feeds would contradict their mother's religious wishes. I am very sensitive to this argument. I am also aware of the fact that Erminia's priest signed a letter with several family members supporting the applicants' position. I am of the view, however, that in light of Dr. Maida's testimony that removing the PEG feeds cannot be construed as a withdrawal of Erminia's right to life. Further it constitutes a withdrawal of artificial medical measures which Erminia specifically declined when she completed her power of attorney for personal care and put her faith in Tony. In this regard, based on the materials

filed concerning the teachings of the Catholic faith, the end of life treatment recommended by Dr. Maida would not violate those teachings.

[20] Lastly, the applicants have filed affidavit materials that certain family members have heard Erminia ask for food or drink. I am satisfied by Dr. Maida's explanation in this regard that, given her mental capacity and medical condition, that this is not an indication of either hunger or thirst. Her statements could mean many things and must be considered in the context of other sporadic incoherent statements that Erminia makes at the last stages of her life.

Disposition

[21] Based on the foregoing, as indicated in my February 20, 2015 endorsement, I am lifting the temporary injunction requiring PEG feeding. I further order that Tony can exercise his rights under the POA with respect to his care of Erminia which would include discontinuance of the PEG feeds in accordance with the opinion of Dr. Maida.

[22] This has been an extremely difficult decision. Even though the applicants, who are generally supported by Rocco, were unsuccessful I accept that they only desired what was best for Erminia and that their motives, as were Tony's, were borne out of love for their mother.

[23] In my view this is likely not an appropriate case for costs but if any of the parties wish to make submissions to me they may do so in writing not to exceed three pages, to be received within two weeks.

Justice T. McEwen

Date: February 23, 2015