Touro Law Review

Volume 16 | Number 2 Article 23

2000

Due Process

Kimberly Lumpee

SUPREME COURT
NASSAU COUNTY

In the Matter of Joseph A. Diurno[1]
(decided September 2, 1999)

The present matter involves a grant to a guardian of the power to consent to or refuse routine or major medical treatment to an individual found incompetent, pursuant to §81.22 [a] [8] of the Mental Hygiene Law ["MHL"].[2]

The issue in the instant case is the constitutionality of Article 81 of the MHL with respect to the *Rivers*[3] due process requirement.[4] The Court analyzed the issue in light of a recent New York Supreme Court decision,[5] which called into question the

---

[1] 696 N.Y.S.2d 769 (Nassau County Ct. 1999).

[2] *Id.* MENTAL HYG. LAW §81.22 [a] [8] provides:

> Consistent with the functional limitations of the incapacitated person, that person's understanding and appreciation of the harm that he or she is likely to suffer as the result of the inability to provide for personal needs, and that person's personal wishes, preferences, and desires with regard to managing the activities of daily living, and the least restrictive form of intervention, the court may grant to the guardian powers ecessary and sufficient to provide for the personal needs of the incapacitated person.
>
> Those powers which may be granted include, but are not limited to, the power to:
>
> 8. Consent to or refuse generally accepted routine or major medical or dental treatment; the guardian shall make treatment decisions consistent with the findings under section 81.15 of this article and in accordance with the patients wishes, including the patient's religious and moral beliefs...in accordance with the person's best interests...and such other concerns and values as a reasonable person in the incapacitated person's circumstances would wish to consider. *Id.*

[3] Rivers v. Katz, 67 N.Y.2d 485, 504 N.Y.S.2d 74, 495 N.E. 337.

[4] *Diurno,* 696 N.Y.S.2d at 771. *See also infra* notes 16-18 and accompanying text.

[5] In the Matter of New York Presbyterian Hospital, 693 N.Y.S.2d 405 (Sup. Ct. Westchester County 1999). The Supreme Court of Westchester County

constitutionality and effectiveness of the Court's grant of such a power under the MHL.[6] The Court concluded that it is not unconstitutional to grant such a power to the guardian under the Mental Hygiene Law. Article 81, providing for the approval and use of this power, is presumed to satisfy the due process requirements of the Constitution and as a result, medical facilities and health care providers may administer drugs based on a guardian's consent without the need for judicial intervention.[7]

Mr. Saverio Conticchio is a diagnosed schizophrenic, who also suffers from dementia as a result of a head injury sustained in a 1995 car accident in Florida.[8] A Florida court committed him involuntarily to a hospital due to his mental illness on February 27, 1996, and his mother was appointed, by the court, as his guardian.[9] In April of 1997, Mr. Conticchio and his mother moved to Nassau County and the present proceeding for guardianship in New York was brought.[10] Because Mr. Conticchio was prescribed medication for his condition in 1995 and the Supreme Court of Nassau County determined him to be incapacitated as a result of that condition,[11] the court granted guardianship to Joseph Diurno, over the person and property of Saverio Conticchio.[12] Mr. Diurno was granted the power to consent to or deny medical treatment on Mr. Conticchio's behalf.[13] The court took the position that a proper guardian's consent is adequate to allow the "administration of medication to a nonconsenting incapacitated person without the need for additional

---

questioned the constitutionality of the Supreme Court of Nassau County's decision to grant the power to make decisions regarding medical treatment to the guardian under MHL art. 81. *Id.* at 410

[6] *Diurno,* 696 N.Y.S.2d at 770.

[7] *Id.* at 776. To the contrary, *New York Presbyterian* held that due process considerations are not fulfilled at an Article 81 hearing. *New York Presbyterian,* 693 N.Y.S.2d at 409.

[8] *Diurno,* 696 N.Y.S.2d at 771.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at 770.

[13] *Id. See* MHL §81.03[i] (1999) (providing that "major medical or dental treatment" includes the administration of psychotropic medication).

court proceedings or review."[14] The court supported its findings with the Florida court's involuntary commitment of Mr. Conticchio and the evidence presented.[15]

The court centered its constitutional discussion around *Rivers v. Katz,* a New York Court of Appeals decision.[16] *Rivers* held that a mental patient, who is involuntarily committed, has a constitutional right to refuse treatment under the due process clause of the New York State constitution.[17] The Court of Appeals also held that in circumstances in which the police power of the state is not involved, and the patient declines to consent to accept antipsychotic medication, a judicial determination is required.[18] The purpose of this judicial hearing is to decide whether the patient has the necessary capacity to form a reasoned decision regarding the treatment prior to administration of the drugs pursuant to the state's parens patriae power.[19] After the completion of the administrative review process, the judicial hearing should be held de novo, and the patient has the right to be represented by counsel.[20] It is the state's burden to demonstrate, by the standard of clear and convincing evidence, that the patient is incapable of making decisions regarding treatment.[21]

Other courts have disregarded the guardian's consent to medication under MHL Article 81.[22] In this case, the Supreme

---

[14] *Diurno* at 770.

[15] *Id.*

[16] *Id.* at 771-776. In *Rivers*, appellants were patients in a psychiatric center, each being involuntarily retained. Appellants brought a declaratory judgement action to enjoin the forceful administration of antipsychotic medication without consent. *Rivers, 67* N.Y.2d 485, 490-491, 495 N.E.2d 337, 339-340, 504 N.Y.S.2d 76-77.

[17] *Rivers.*, at 492, 495 N.E.2d 337, 341, 504 N.Y.S.2d 74. *See* N.Y. CONST. art 1, § 6.

[18] *Id.* at 497, 495 N.E.2d at 344, 504 N.Y.S.2d at 81.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *See, e.g., New York Presbyterian*, 693 N.Y.S.2d 405 (1999) in which the Court ignored the MHL provision that a legal guardian is judicially authorized to give consent for administration of medical treatment and ordered a *Rivers* hearing as if there were no guardian and no consent given by him.

Court, Nassau Countuy sought to distinguish and reconcile the apparent *Rivers* due process requirement with Article 81 of the MHL. The court notes that in *Rivers* the Court of Appeals outlined procedures to follow in circumstances where an involuntarily committed patient refuses to consent to antipsychotic medication.[23] *Rivers* did not hold that these procedures are required in different circumstances.[24] The *Rivers* Court specified that the decision regarding incapacity was a judicial determination, not a medical one.[25] However, the Legislature has since concluded that the decision regarding capacity could first be determined by a committee, subject to judicial review under the standard of substantial evidence.[26]

Further distinguishing the present case from *Rivers,* is the fact that it did not involve a circumstance where there is a statutorily authorized substitute present to make the decision.[27] The Court in *Rivers* had to choose between itself and the doctors of the state as to who should make the decision regarding the proposed treatment.[28] In this aspect, the Court of Appeal's disapproval of the then existing administrative review process and the lack of standards for the doctors to follow in making the decisions on treatment is notable.[29] In a case in which a guardian has been chosen pursuant to Article 81, a court has already made the necessary determination of capacity in compliance with due process requirments.[30] In addition, specified standards as to the determination of the treatment protocol are in place, which are to govern a judicially appointed guardian who is more informed with respect to the incapacitated patient than the court.[31] In light of

---

[23] *Id.* at 774.
[24] *Id.*
[25] *Id.*
[26] *Id. See* MHL § 80.03[b] (providing that "functional level" means being able to provide to the personal needs or with respect to property management); §80.09 (providing for the appointment of a court evaluator for appointment of a guardian for personal needs or property management).
[27] Diurno, 696 N.Y.S.2d 769, 774.
[28] *Id.*
[29] *Id.*
[30] *Id.* at 775.
[31] *Id.*

these important factual differences, the *Diurno* Court holds that the decision in *Rivers,* which arguably directs a court to make another determination, is not a conclusion that MHL §81.22(a)(8) is

unconstitutional.[32] The Legislature has implied that it does not give credence to the idea that *Rivers* formulated a constitutional requirement that only a court may make treatment protocol decisions.[33]

When *Rivers* was decided, legislation existed which "expressly provided that a patient's right to refuse medication and treatment, inter alia, 'shall' be exercised by the patient's committee or conservator where there is one."[34] Guardians are subject to this provision as well, and the provision does enunciate the State's public policy.[35] This statute supports the Court's reading of MHL Article 81 and the conclusion that *Rivers* does not apply when a properly appointed guardian is present, at the very least, as far as treatment protocol decisions are concerned.[36] The *Diurno* Court concluded that a guardian appointed in accordance with the standards of due process, appropriately informed of the medical conditions, with exceptional familiarity with the patient and performing fiduciary obligations required by mandatory standards is as qualified, if not more so, than the Court to make medical decisions.[37]

---

[32] *Id.* (viewing the provision under the presumption of constitutionality). *See Rivers,* 67 N.Y.2d 485, 497-498, 504 N.Y.S.2d 74, 495 N.E. 337.

[33] *Diurno* at 775 (explaining that the Legislature's reenactment of Article 80 and enactment of Article 81 evidenced its intent).

[34] *Id. See* Public Health Law § 2803-c[3][e], [j].

[35] *Diurno* at 775.

[36] *Id.*

[37] *Id.* (concluding that *Rivers* does not require the court to find a guardian's power under MHL §81.22(a)(8) to consent to medical treatment over the objections of an incapacitated patient is unconstitutional).

The Court held that the Legislature's intent was appropriately provided in Article 81 of the MHL, which allows judicially authorized guardians to make decisions regarding the administration of antipsychotic drugs to incapacitated individuals.[38] The provisions of Article 81, which authorize the guardian to use this ability, meet required due process standards and as a result, medical institutions and providers may administer drugs based on a guardian's consent with no need for further judicial action.[39]

Kimberly Lumpee

---

[38] *Diurno* at 776.

[39] *Id.* (providing to the extent that *Presbyterian Hospital* or other cases may be read differently, they are inconsistent with the provisions and legislative intent of MHL Article 81.)