IN THE CORONERS COURT
OF VICTORIA
AT MELBOURNE

Court Reference: COR 2012 567

FINDING INTO DEATH WITH INQUEST

Form 37 Rule 60(1)
*Section 67 of the **Coroners Act 2008***

Inquest into the Death of:	Jeffrey John McCarty
Delivered On:	29 July 2015
Delivered At:	Coroners Court of Victoria 65 Kavanagh Street, Southbank, Victoria, 3006
Hearing Date:	29 July 2015
Findings of:	Coroner Caitlin English
Police Coronial Support Unit:	Leading Senior Constable Amanda Maybury, assisting the Coroner

I, Caitlin English, Coroner having investigated the death of Jeffrey John McCarty

And having held an inquest in relation to this death on 29 July 2015
at Melbourne
find that the identity of the deceased was Jeffrey John McCarty
born on 27 July 1971
and the death occurred on 12 February 2012
at Austin Health, Heidelberg Repatriation Hospital
from:

1 (a) ASPIRATION PNEUMONIA

in the following circumstances:

1. Jeffrey McCarty was 40 years of age when he died. He suffered from cerebral palsy and severe intellectual disability, having been made a ward of the state at a young age. No administrative or guardianship order was in place at the time of his death. Mr McCarty had no known next of kin. Little is known of Mr McCarty's early life: it appears he was relinquished by his family at birth owing to his disabilities.

2. Mr McCarty resided at 36 Fairlie Avenue, Macleod, a supported residence managed by the Department of Human Services (DHS). The residence provides accommodation for up to five individuals with disabilities and is staffed 24 hours a day by disability developmental support workers who provide direct care and developmental support to residents. Staff members are not medically trained, and follow care plans provided by treating health practitioners.

3. Mr McCarty was bed bound, essentially non-verbal and could only respond to very limited, simple commands. He had a past medical history including; cerebral palsy, intellectual disability, hydrocephalus, epilepsy, recurrent aspiration pneumonia and dysphagia[1].

4. Mr McCarty was *'in care'* at the time of his death, in accordance with section 3(d) of the *Coroners Act 2008 (Vic)*(The Act). This provision covers the death of a person under the control, care or custody of the DHS in relation to services administered by DHS under the *Disability Act (2006)*.

[1] This means a difficulty in swallowing. Mr McCarty suffered from a chronic condition which resulted in the possibility of food or fluid entering his lungs which could cause infection, leading to pneumonia.

5. Due to Mr McCarty's '*in care*' status, his death is a reportable death to the coroner (section 11 of the Act). Further, his *'in care'* status mandates a coroner to hold an inquest into his death (section 52(2)(b) of the Act).

Police investigation

6. A police investigation was conducted into the circumstances surrounding Mr McCarty's death.

7. A brief prepared by Victoria Police for the coroner includes statements obtained from Mr McCarty's supported residence manager, the Director of Palliative Care Services at Austin Hospital, the Principal Legal Officer from the Office of the Public Advocate, the treating clinical ethicist at Austin Hospital and the coroners investigator.

Medical treatment prior to death

8. Mr McCarty had a total of six admissions to Austin Health between 21 September 2011 and his final admission on 5 February 2012.

9. The Director of Palliative Care Services at Austin Hospital, Dr Juli Moran, stated Mr McCarty had been admitted to the Austin on several occasions prior to his final admission with recurrent aspiration pneumonia:

"During one admission an advanced care plan was made suggesting that future admissions be directed to the Palliative Care Unit... rather than to the general medical wards for treatment."[2]

10. On 26 October 2011, Dr Karen Detering, clinical ethicist at Austin Hospital, attended a review of Mr McCarty with medical staff. She stated that;

"During this meeting his disability and medical condition were discussed. It was felt by several medical staff that insertion of a feeding tube would not be in his best interests...This man's prognosis was very poor, and he was at the end of his life.

As a result of this discussion, and follow up discussions with his general practitioner, and the staff caring for him in the community, it was agreed that a conservative management course was appropriate, Mr McCarty was discharged without insertion of the feeding tube. There

[2] Statement of Dr Juli Moran, 10 May 2012, 1.

was also documentation as to the plan of management which included the use of oral antibiotics, but not IV antibiotics should he again develop aspiration pneumonia..."[3]

11. Notes made by Dr Chrisopher Crew in the Austin Hospital admission discharge summary on 27 October 2011, refer to a; '*multidisciplinary meeting ...with medical, social work and Respecting Patient Choices staff, along with Jeff's Carers to discuss advance care planning...In the event that Jeff's medical management cannot be managed in the community, presentation to the Austin Hospital is appropriate and at that point in time discussion will be made for management under the Palliative Care Team.*'[4]

12. On 5 February 2012, at approximately 9pm, Mr McCarty was admitted to the Austin Hospital following an ongoing cough.

13. On 6 February 2012, he was not tolerating oral intake. Dr Detering stated that;

"he had deteriorated further and I was contacted by his medical team, and a further discussion occurred regarding his ongoing management... I explained that in my opinion Mr McCarty would not benefit from any further active management, including intravenous fluid, IV antibiotics, or consideration of tube feeding. I discussed this the following day again with Dr Moran, Mr McCarty was subsequently transferred to the palliative care unit, and received appropriate symptom management...". [5]

14. On 7 February 2012, Mr McCarty was reviewed by the palliative care consultation team and put onto the palliative care unit waiting list. On 8 February 2012, Mr McCarty was moved to the palliative care unit. He was not able to take in oral fluids. Mr McCarty was administered medication to ease discomfort in the days preceding his death via a sub-cutaneous cannula.

15. Mr McCarty died on 12 February 2012 at approximately 7.35pm.

Post mortem inspection report

16. Forensic Pathologist Dr Michael Bourke from the Victorian Institute of Forensic Medicine conducted an inspection and examination of Mr McCarty on 13 February 2012.

17. Dr Bourke concluded his report with a finding of the medical cause of death as aspiration pneumonia. I accept Dr Bourke's opinion.

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[3] Letter of Dr Karen Detering, 27 June 2014, 1-2.

[4] Dr Christopher Crew, Austin Hospital Admission Summary, 20 to 27 October 2011.

[5] Letter of Dr Karen Detering, 27 June 2014, 1-2.

Decision to palliate – S42K notification

18. Mr McCarty was a patient with a disability who was not capable of giving consent to medical treatment pursuant to section 36 of the *Guardianship & Administration Act 1986*. In addition, he had no 'person responsible' pursuant to section 37 of the *Guardianship & Administration Act 1986*.

19. Workers at his residence were unable to make discretionary medical decisions in regards to medical matters concerning Mr McCarty.

20. As Mr McCarty could not give consent, and had no 'person responsible,' a question arose as to the decision making process for him to be palliated.

21. A 'person responsible' is a substitute decision maker for medical or dental treatment for a person who is incapable of giving valid consent to their own treatment. The 'person responsible' must act in the best interests of the incapable person and take a number of matters into account when making decisions, see section 38 *Guardianship and Administration Act 1986.*

22. Medical treatment can be provided pursuant to s 42K of the *Guardianship and Administration Act 1986* where there is no 'person responsible' if:

> (a)The [registered] practitioner believes on reasonable grounds the treatment is in the best interests of the patient; and,
>
> (b)The practitioner, before carrying out, or supervising the carrying out of, the medical [or dental] treatment, gives notice to the Public Advocate in accordance with subsection (2).

23. The question arose as to whether Mr McCarty was provided with medical treatment. Medical treatment is defined in the *Guardianship & Administration Act (1986)* and includes palliative care within the definition.[6]

24. As Mr McCarty was a patient unable to consent to treatment, the definition of medical treatment in section 3 of the *Guardianship & Administration Act 1986* applies.[7]

25. Section 3 of the *Guardianship & Administration Act 1986* states;

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[6] It is noted there are different definitions of medical treatment in other legislation, for example, the *Medical Treatment Act 1988* excludes palliative care from the definition of medical treatment.

[7] Letter from Phil Grano, Principal Legal Officer, Office of the Public Advocate, 19 March 2015, 4.

"medical treatment (including any medical or surgical procedure, operation or examination and any prophylactic, palliative or rehabilitative care) normally carried out by, or under, the supervision of a registered practitioner; ...but does not include—

(g) the administration of a pharmaceutical drug for the purpose and in accordance with the dosage level..."

26. 'Palliative care' is 'medical treatment' for the purposes of the *Guardianship & Administration Act 1986.*

27. Austin Health was asked to advise the coroner what consideration had been given to compliance with s 42K of the *Guardianship & Administration Act 1986* regarding the decision to palliate Mr McCarty.

28. The response by Austin Health, through Dr Detering was that where palliative care consists of the administration of pharmaceutical drugs, it is excluded from the definition of 'medical treatment' in accordance with section 3(g).

29. Dr Detering stated that she;

"...did not believe it was necessary to submit a section 42K notification in this case and I believe it would have inappropriately and unnecessarily delayed the provision of appropriate palliative care to Mr McCarty."[8]

30. Dr Detering explained that;

"it was not considered necessary to provide a section 42K notification to the Office of the Public Advocate in relation to Mr McCarty's care preceding his death because-

a. *Following careful consideration by Mr McCarty's treating team, it was concluded that there was no medical treatment that could reasonably be offered to him...*

b. *in palliating Mr McCarty, he was not provided with 'medical treatment' under the Guardianship and Administration Act 1986."*[9]

Inquiries with the Office of the Public Advocate

31. The Victorian Public Advocate is empowered by law to promote and safeguard the rights and interests of people with a disability. The Public Advocate was established under section 14 of the *Guardianship & Administration Act 1986.* The functions, powers and duties of the Public

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[8] Letter of Dr Karen Detering, 27 June 2014, 1-2.

[9] Additional Letter of Dr Karen Detering, undated, 1.

Advocate are set out in sections 15 and 16 of the Act. One of the major functions of the Public Advocate is arranging, co-ordinating and promoting informed public awareness and understanding of the Act and any other legislation dealing with or affecting people with disability. Section 16 of the Act outlines the powers and duties of the Public Advocate, including; giving advice on any aspect of the Act.

32. The Office of the Public Advocate was asked to advise the coroner how it educated the medical profession about the definition of palliative care, and whether, for example, the insertion of a canula in order to administer medication, would be 'medical treatment' under the *Guardianship and Administration Act 1986.*

33. The Office of the Public Advocate[10] stated that it viewed palliative care as medical treatment for the purposes of the *Guardianship and Administration Act 1986.* However it took the view that where the palliative care consists of the administration of pharmaceutical drugs, it would be caught by the exclusion provision section 3 (g) and so fall outside the definition.

34. With respect to the insertion of a cannula, the Office of the Public Advocate was of the view that :

'The insertion of a cannula itself is 'medical or dental treatment' and cannot be described as the administration of a pharmaceutical drug although it facilitates the provision of the pharmaceutical drug. The administration of the pharmaceutical drug via the cannula is not 'medical or dental treatment.'[11]

35. The Office of the Public Advocate also noted that the medical profession's understanding of medical treatment was that the insertion of a cannula was part of the administration of the pharmaceutical drug and so would not be medical treatment.

Finding

36. I find that Jeffrey McCarty died from aspiration pneumonia.

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[10] Letter from Phil Grano, Principal Legal Officer, Office of the Public Advocate, 19 March 2015

[11] Letter from Office of the Public Advocate, 19 March 2015, 3.

Comments

Pursuant to section 67(3) of the **Coroners Act 2008**, I make the following comments connected with the death:

37. The clinical treatment of Mr McCarty prior to his death appears reasonable. However, it is unclear whether the process of notification to the Public Advocate, in accordance with s42K of the *Guardianship & Administration Act 1986* should have been followed.

38. Mr McCarty was a vulnerable person, profoundly disabled, unable to consent and without a 'person responsible' to make decisions on his behalf according to his best interests.

39. It appears there is uncertainty surrounding the interaction between the definition of medical treatment, palliative care, administration of pharmaceutical drugs and section 42K of the *Guardianship and Administration Act 1986* as to when notice should be given to the Public Advocate.

40. Dr Detering stated she did not want to unnecessarily delay the provision of care to Mr McCarty. This position appears to misconstrue the process: having given the notice under section 42K, the treating doctor [or dentist] may then carry out the treatment.[12]

41. The definition of 'medical treatment' in the *Guardianship & Administration Act 1986*, includes palliative care. Palliative care is not separately defined in the Act. The Australian Medical Association definition states 'palliative care' to mean:

> *'Care provided for people of all ages who have a life-limiting illness, with little or no prospect of cure, and for whom the primary treatment goal is quality of life. Palliative care integrates physical, psychological, emotional, and spiritual care for patients, their families, and other carers.'*[13]

42. Palliative care is an end of life medical treatment that can take a variety of forms. The administration of a pharmaceutical drug is one of the means of effecting palliative care. A

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[12] Advice from the Office of the Public Advocate indicates the section 42K process is akin to a 'registration' process rather than an approval process. Staff from the Office of the Public Advocate check the form is completed appropriately by the registered practitioner and contains the information referred to in section 42K (2) and the form is then 'registered.'

[13] Australian Medical Association, *The role of the Medical Practitioner in End of Life Care – 2007* (August 2007) Australian Medical Association <http://ama.com.au/node/2803>.

broader interpretation of the definition of medical treatment is that it includes palliative care, regardless of the method by which it is to be medically effected. This would mean the decision to palliate falls within the definition of medical treatment and requires compliance with s 42K.

43. In Mr McCarty's case there was no application by the treating doctor at Austin Hospital under section 42K of the *Guardianship & Administration Act 1986* to notify the Public Advocate of the decision to palliate or to insert a cannula for medications to be administered, when Mr McCarty was palliated on 8 February 2012.

44. Dr Detering stated that the treatment was not medical treatment for which section 42K notification is required. The Office of the Public Advocate view was that whilst the administration of a pharmaceutical drug is not medical treatment under the *Guardianship & Administration Act 1986*, the insertion of a cannula is medical treatment and, as such, requires notification.

45. It is apparent there is confusion in relation to this area of law and its interpretation among medical practitioners. A broad interpretation of the meaning of medical treatment enlivens the section 42K process.

46. The section 42K process is not onerous or highly prescriptive. In the absence of consent however it does act as an important procedural check with respect to the oversight of medical treatment provided for people in Mr McCarty's position, who cannot consent and do not have a person responsible.

47. The *Charter of Human Rights and Responsibilities Act 2006* section 10(c) states that a person must not be *'subjected to medical... treatment without his or her full, free and informed consent'.*[14]

48. The Charter requires that statutes be interpreted in a manner consistent with human rights.

49. Human rights are to be interpreted in the broadest possible way. A broad interpretation of the meaning of medical treatment acts as a protection for those such as Mr McCarty through section 42K and compliance with the *Guardianship & Administration Act 1986.*

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[14] Charter of Human Rights and Responsibilities Act 2006 section 10.

I direct that a copy of this finding be provided to:

Senior Constable Shane Lynch

Ms Lynette Russell, Austin Health

Ms Heather Kelly, State Trustees

The Hon. Jill Hennessy MP, Minister for Health

Chief Executive Officer, Dr Zena Burgess, Royal Australian College of General Practitioners

President Laureate Professor Nick Talley, Royal Australasian College of Physicians

The Public Advocate, Ms Colleen Pearce

Signature:

Caitlin English
Coroner

Date: 29 July 2015