“THE CONSENSUS FOR HEALTH TREATMENT PROVIDED BY A SUPPORTIVE ADMINISTRATOR: FIRST CASES OF APPLICATION OF THIS INSTITUTION - Cristina AGENO

The institution of a supportive administrator was introduced to the order after a long and difficult parliamentary *iter* that regarded the law n. 6 of the 9th January 2004, and had the aim of protecting - with the minimum limitations possible on the capability to act - those subjects, either fully or partially deprived of conducting their normal daily functions, through the application of temporary or permanent supportive interventions (art. 1, l. n. 6/2004).

Today, this regulation covers a role of primary importance and foresees radical modifications of the disciplinary measures that regulate the protection of those subjects incapable of governing their personal interests, and in the future, will constitutes a fundamental element of the organisation of the entire system for disabled subjects.

On the basis of the above premise, it is underlined that the principal area of intervention of a supportive administrator, for those subjects with partially reduced capabilities, will be in the medical sector.

And indeed, when considering the high number of individuals with physical pathologies or mental illness who find themselves, even partially and/or temporarily, incapable of conducting their own affairs, the theme regarding consent to medical treatment by a supportive administrator, presents an interesting profile with great potential and a noteworthy number of applications.

The provisions in force consent that medical treatment can be delegated to a supportive administrator in the event that such medical intervention is deemed necessary and urgent and where the interested subject no longer possesses the necessary capacity to express either consent or a conscious refusal to surgery proposed by the health services or doctors, or in the event of the impossibility of the subject to regain, within a short period of time, the necessary capabilities to understand and make a conscious decision.

(Trib. Roma, 22.12.2004, GM, 2005, 11 2344)

With specific regard to informed consent to treatment in the case of an unautonomous individual, a recent doctrine observed:

Where the desires of the beneficiary are not conditioned or vitiated by a specific pathology or mental illness that impedes a correct understanding of the medical treatment proposed and the consequences of undergoing, or not undergoing such interventions, as a principal, intervention is not permissible against the will of the beneficiary (self-determination).

(...) Another hypothesis, is where the desires of the beneficiary have not been expressed (even in a "living will") and/or are not expressible. (...) However, in these cases I deem it necessary that the SA should and must express their informed consent when seeking medical aid, or invasive treatment, that may impair or ablate the individual; with the exception of the direct intervention of the Tutelary Judge according to art. 405, 4th paragraph of the Civil Code, with the urgent provision for the care of the interested subject".

(...) I must underline that as in all of these situations (...), the intervention of a Tutelary Judge must respect, as much as possible, not only the instructions (...) of the beneficiary, but also those of the family or common-law husband or wife (principle of subsidiarity). (...). And must always be applied in order to obtain the maximum involvement of the interested health services in the decisions involved (...).

(Trentanovi 2005, 11).

One of the most interesting cases regarding the order to use a supportive administrator for sick persons was in the decree emitted by the Modena Tribunal on the 15th September 2004, which regarded an individual who was affected by chronic delirium and a grave form of diabetes.

After having verified that the individual did not have any existing relations and that their clinical profile, which included delirious ideas with illusions of grandeur and the denial of their affliction with diabetes, the Tutelary Judge proceeded with the nomination of a supportive administrator as follows:

After having read article 405, n. 3, c.c., as an integration of the legislative decree of the 18th and 31st of August 2004, and in consideration of … inability to express valid consensus to receive indispensable cures and treatment for diabetes, I hereby authorise the Supportive Administrator to act in the name of and on behalf of the beneficiary and to carry out any initiatives necessary in order to place … in a protected structure of the district, where the same may undergo the treatment and any therapies, even dietary, that are absolutely necessary and vital; I also authorise the Supportive Administrator to express, in the name of and on behalf of the beneficiary, their informed consensus to therapeutic treatment proposed by the doctors, if and when requested and/or necessary, including all the actions that this will entail.
I hereby declare that from this instance the duration of the role as Administrator will be for a period of six months from today's date and order that the Administrator must report, in writing within one calendar month from today, on the state of health of the beneficiary, including the results of the study regarding the patrimony of the same and I hereby reserve the right, on evaluation the results, to entrust the Administrator, with the task of carrying out any further actions that are deemed necessary.

(Modena Tribunal, 15.9.2004, www.altalex.com).

With regard to the aforementioned decree the doctrine observed:

The institution of supportive administration is applicable in the event a sick person must express there consensus to lifesaving medical treatment, exclusively in the event that after verifying the available evidence, even of a scientific nature, the conclusion is made that such dissent is not founded on a conscious and critical evaluation by the patient of the situation in hand and that they are not aware of the consequences of not taking medical action.

This was decided by the Modena Tribunal, in the decree of the 15th September 2004, affirming that from this day forward this support normative will be applied for the "care" of individuals (in their own "interests") and is not limited to their economical or patrimonial state, but also considers the needs and aspirations of each individual human being and every significant action of civil life as governed by law.

(Cendon 2004, 1).

Another interesting case where the use of a supportive administrator was applied occurred with a subject affected by a chronic form of psychosis, with illusions of persecution and hallucinations, who refused to undergo pharmacological treatment. In relation to this event the Tribunal of Cosenza passed a decree on the 24th of October 2004, which nominated a supportive administrator for a period of six months, disposing that:

On behalf and in the name of the beneficiary, the administrator, on a timely evaluation of the information, has the power to carry out, all the necessary acts that will ensure the care, assistance and rehabilitation of the beneficiary; in particular, the administrator is authorised - on agreement with the heads of the Mental Health Centre of the Health Facility of ... - to evaluate whether to express their consent to the postponement of hospital admission of the same, or request admission to an external structure from the hospital, stipulating the necessary conventions with public or private institutes for the care and assistance, maintenance of relations with the Health facilities and hospitals, and any other correlated activities.

The administrator is hereby obliged to report to the Tutelary Judge every three months with regard to the conditions of the personal and social life of the beneficiary. It is underlined that the latter reserves the right to Act in all other matters that do not require the exclusive representation or the assistance of the administrator, and that the same may carry out all acts deemed necessary in order to satisfy the requirements of their daily life.

(Trib. Cosenza, 24.10.2004, www.altalex.com).

With regard to this verdict the following observations were raised:

Unfortunately, it is increasingly more frequent that some subjects - maybe after receiving obligatory medical treatment - may become obstinate and refuse to undergo ulterior psychiatric therapies, which only serve to aggravate their pathology and compromise the safety of their family, who are often victims of particularly ferocious episodes (...).

As far as we can ascertain, this is the first case where a supportive administrator has been authorised to give their consent - on behalf and in the name of an incapacitated person affected by a grave form of mental illness- to the indispensable admission of the beneficiary to a rehabilitative structure.

(Copani 2004, 1).

Drug addiction has also been considered a form of handicap and, therefore, another possible field where the use of a supportive administrator could be applied.

Indeed, in a case that concerned two grandparents of a girl afflicted by drug addiction, the Tribunal of Modena, with decree on the 8th of February 2006, acknowledged in the subject an extreme state of partial incapacity to manage their personal interests, and therefore, the necessity for support, with particular reference to assistance and all operative initiatives for the care and protection of the personal health of the beneficiary.

With regard to this verdict the following was underlined:

> After the Tribunal examined the case of the beneficiary subject to the provisions, it emerged that although they were apparently orientated in time and space, due to their constant anomalous pathological behaviour, it emerged that they found themselves in concrete and grave difficulty to autonomously carry out the necessary actions...
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> The competent Magistrate affirmed that the nomination of a supportive administrator, could be individualised (...) in the trusted professional figure of the Tutelary Judge, with the aim of creating a supportive programme, and with the priority of protecting the health and the existential interests of the subject, before their patrimonial interests.
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> (Pavone 2006, 2).

Whereas, in a case examined by the Tribunale of Milano, in relation to a patient affected by a grave psycho-physical pathology, who since adolescence suffered from a serious form of borderline, personality disorder and chronic ethanol abuse — so much so, that they were under total and permanent cover for civil invalidity—the institution of a supportive administrator, requested by the subject's parents, was considered inadequate and in this case, more adequate, disqualification by judicial decree.

> In other words, one could say that the intervention of the Supportive Administrator might also be sufficient for those subjects who are totally incapable of making a decision or acting, and where necessary, pass this power to a third party in substitution of the incapable subject, allowing them to satisfy the recurring personal or patrimonial needs of the beneficiary. Whereas, it is pointless to extend the substitution to those acts that the incapable person will never be able to carry out, as they are materially unable to do so, and therefore, it is unnecessary to grant disqualification where these actions are autonomously carried out. The intervention of a Supportive Administrator could however represent an insufficient protective measure for those subjects with the capacity to relate to others, but vitiated from a conscious or wilful point of view, causing them to carry out actions which could incur damaging juridical consequences that cannot be immediately annulled, unless included in the list of the Administrators powers.
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> In the case of Z, with regard to the above, not only do they present highly compromised intellectual and volitive capabilities, which impede their ability to relate to reality in a conscious and discerning manner and to make the most suitable decisions for the management of their person and patrimony, but also, as a result of their pathology, they have an uncooperative, passive and oppositional attitude towards those who suggest treatment. Their capacity for external relations are vitiated, exposing them to the circumvention of other individuals with the intent of obtaining undue personal or patrimonial advantages.
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> (Trib. Milan, 21.3.2005, n. 3289, www.altalex.com, 4).

After having cited some of the more significant cases of the application of a supportive administrator, it is duly right to underline a few considerations, even only in brief, with regard to the *iter* foreseen and the procedures of the trial.

Firstly, it must be underlined that the nomination of a supportive administrator (usually chosen by the beneficiary or their parents), is effected by the tutelary judge in the place of residence or at the address of the beneficiary who:

> Will provide, within 60 days from the date of the request for the nomination of a supportive administrator, which will be immediately enforced by a motivated decree (...).
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> (art. 404, 1st paragraph, Civil Code).

The Civil Code then specifies the other points that must be indicated in the nomination decree, which is also revocable, amendable and may be integrated at any time, in accordance with the evolution of the human conditions of the beneficiary.

The decree for the nomination of a supportive administrator must contain the following indications:

1) The personal particulars of the beneficiary and the supportive administrator;
2) The duration of the role that can also be for an indeterminate period of time;
3) The objectives of the role and the acts that the supportive administrator has the power to carry out in on behalf of and in the name of the beneficiary;
4) The objectives of the role and the actions that the beneficiary can take only with the assistance of a supportive administrator;
5) The limitations, even periodical, of the expenses that the supportive administrator may sustain with the use of the sums available, or that will be made available to the beneficiary;
6) The time period in which the supportive administrator must report to the judge on the activities carried out, including information on the personal and social conditions and welfare of the beneficiary.

(art. 405, 5th paragraph, Civil Code).

The following observations were also made on the nature of the role:

In order to adequately apply the protective measures to satisfy the needs of the interested subject, art. 405, paragraph 5, of the Civil Code, foresees that the decree in which the judge stipulates the objectives of the role must indicate the actions that the supportive administrator has the power to execute on behalf of and in the name of the beneficiary, and the actions that the beneficiary may take only with the assistance of the supportive administrator. Thus, also allowing for the possibility of the co-existence of a substitute supportive administrator with an essential one (inspired, although not explicitly, by the model of guardianship).

With regard to the roles conferred to the administrator, it is important to underline (when considering the clause formulated in art. 1, l. n. 6 of 2004), how the same may also, but not exclusively, be extended to the patrimonial interests of the subject involved, whereby the tutelary judge may also delegate (to the same supportive administrator) the task of taking care of the beneficiaries person.

(Venchiarutti 2004, 9).

This simple and rapid nomination procedure, inspired by the principle of maximum simplification, is elastic, unburdensome and requires a minimum of bureaucracy, and therefore, compatible with the inspiring ratio of the measures employed to increasing and improving the potential and capabilities of the beneficiary.

Therefore the procedure can be passed before the competent tutelary judge without the assistance of a lawyer, in the light of the fact that unlike legal disqualification, such a procedure is not of a contentious nature as it is inspired by the principles of improving the conditions of a subject who is not completely autonomous.

The appeal for the institution of a supportive administrator in accordance with the amended art. 406 of the Civil Code, can be made by the same beneficiary, their spouse, their common-law husband or wife, by 4th grade relatives and 2nd grade relatives in law, by their tutor, carer, or public minister.

Whereas, paragraph 3 of the cited art. 406 of the Civil Code, foresees that the heads of the social services and health facilities of both public and private organisations, must immediately report the neccessity for such an intervention.

With regard to privately or publicly "structured" services (e.g. Hospitals), the head of the service who has the responsibility of addressing the specific treatment/assistance to one or more beneficiaries of the service, is the individual who coordinates the eventual activities of diversely qualified third parties (doctors, health professionals, social assistants, psychologists) solely with the role of carrying out single activities or the execution of the service based on the programmes of the health facility and therefore not subordinated by the same ("operators").

(Trentanovi 2005, 38).

In the event that the tutelary judge agrees on the verdict, and after appropriate verification, the request for the nomination of a supportive administrator proceeds according to the nomination procedures contained in art. 407, u.c., of the Civil Code.

Paragraph 2° comma of art. 407 of the Civil Code, also foresees that the Tutelary Judge personally hears the person to whom the procedure refers: a nomination decree passed by the Tribunal of Modena on the 21st of March 2005, actually went ahead without the hearing of the beneficiary, in the presence however, of just motivations.

And indeed, in the said case, the beneficiary of the procedure was not heard by the Judge for the following reasons:

> The subject is easily impressionable when they come into contact with strangers that are not part of their family group; a situation that justifies the absence of an hearing and the examination of the case by the court technical expert, with supplementary expert evidence...
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> Therefore, on the basis of the evidence provided by the court technical expert, the beneficiary of the procedure, Giseppe. A's. disability consists in "a degenerative hereditary condition, with a pathology of "senile involution"; therefore "with a deficit of mental stimulation that puts the subject in a position of relational and emotional dependency" In other words, the subject, and the expert appointed by the judge concluded in a written report that the subject is "easily plagiarised". Even during juridical examination, A. was decisively disorientated in time and space. Therefore, the person is "mentally limited" (art. 404 of the Civil Code).
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> (Trib. Modena 21.3.2005, www.personaedanno.it).

With regard to the criteria for choosing a supportive administrator, art. 408 of the Civil Code states:

> The selection of a supportive administrator occurs with the exclusive aim of safeguarding the welfare and the interests of the beneficiary. In preview of an eventual incapability to act in future, a supportive administrator may be appointed by the interested subject, through an authenticated public, or privately written act. In absence of, or rather, in the presence of grave circumstances, and with just motivation, the tutelary judge may pass a decree that appoints a different supportive administrator. Where possible, the tutelary judge will give preference to the spouse (when not legally separated), or the common-law husband or wife, father, mother, their children or brother or sister, or 4th generation relatives, or the individual designated by the surviving parent through a testament, public act or a written and authenticated private agreement.
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> (...)
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> The operators of public or private services who care for the beneficiary may not be appointed as a supportive administrator.
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> Where opportune, in the event of designation of the interested subject for grave reasons, the tutelary judge may call upon the assistance of a supportive administrator, or other suitable individuals, or more precisely, one of the subjects mentioned in Title II as a legal representative, or call upon a person who will have the faculty, after a formal enquiry at the office of the Tutelary Judge, to carry out all the duties and powers foreseen in the present paragraph.
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> (art. 408 Civil Code).

As we can see, the affects of the use of a supportive administrator are so great that instead of limiting, they actually increase the beneficiaries potential, who reserves the right, in accordance with art. 409 of the Civil Code to take action in all acts that do not require the exclusive representation or necessary assistance of the supportive administrator; and in any event, the beneficiary may carry out all acts considered necessary to satisfy the needs of their daily life.

Bibliografia

M. Pavone, Anche il tossicodipendente ha diritto all'amministrazione di sostegno, (8.2.2006), in www.altalex.com
S. Trentanovi, La protezione delle persone prive di autonomia (17.6.2005), in www.altalex.com
P. Cendon, Amministrazione di sostegno e consenso informato ai trattamenti terapeutici (Tribunale di Modena, decreto 15.9.2004), in www.altalex.com
C. Copani, Amministratore di sostegno e potere di disporre cure e ricoveri per l'incapace (Tribunale di Cosenza, decreto 24.10.2004), in www.altalex.com
A. Venchiarutti, Amministrazione di sostegno, interdizione e inabilitazione dopo la legge 6/2004 (22.11. 2004), in www.altalex.com

Giurisprudenza

Trib. Milano, 21.3.2005, n. 3289, www.altalex.com
Trib. Modena 21.3.2005, www.personaedanno.it
Trib. Roma, 22.12.2004, Giurisprudenza di merito, 2005, 11 2344
Trib. Modena, 15.9.2004, www.altalex.com
Trib. Cosenza, 24.10.2004, www.altalex.com