

EJC/JSR

Dominic Cudmore

From: Richard J d'Apice [rdapice@makdap.com.au]
Sent: Monday, 24 February 2003 1:32 PM
To: DCudmore@ado.syd.catholic.org.au
Subject: Health Records of a Retired and Ill Diocesan Priest

Dear Dominic,

I acknowledge your email of 21 February.

If the priest is "because of a disability partially or totally incapable of managing his person" then he will not be legally capable of consenting to any of the courses of action proposed and the power to do so will vest in a guardian appointed under the Guardianship Act either by the priest before he lost capacity (through a Form of Appointment of Guardian) or by the Guardianship Tribunal.

What I understand to have happened is that the PSO has become involved under Towards Healing and is being asked to advance the matter in the usual fashion under that document. Clearly the accused has a place in the TH process and clearly he cannot participate in it if he lacks capacity in a relevant legal sense.

I believe that the PSO is, in effect the Tribunal and the respondents are the Church Authority and the Accused. If the Tribunal has some doubt as to the legal capacity of the accused to participate in the process, it should satisfy itself on that subject before proceeding further. Alternatively the Tribunal could arrange for the Accused to be provided with independent legal advice (under the provisions of par. 40.5 and presumably at the expense of the Archdiocese if the Accused is unable to pay) and allow that legal representative to assess his client's capacity with, if necessary, specialist medical advice. That legal representative could have the proper assessment made if he has doubt as to the capacity of the Accused to provide instructions or participate meaningfully in the TH process.

It would be desirable for the Church Authority to stand at some remove from that assessment other than in facilitating it. The Complainant clearly does not accept that the Accused lacks capacity and the process should not be undermined in his eyes by the Church Authority (a party to the complaint) taking the active role in the assessment. It would be best left to the PSO or an independent legal representative of the accused if this can be achieved. The process will stand little success in providing healing for the victim if he believes that the Tribunal and the Church Authority are conspiring to block the process for reasons which are not genuine.

The privacy concerns are a separate issue. Clearly the capacity of the Accused is already in the public domain and, to that extent, there has already been a breach of the privacy of the Accused. If the matter were before a civil court, the privacy issue would count for little. But this is not a civil court process and (in the absence of an appointed attorney or guardian) the assessment process will occur without the informed consent of the Accused. I believe that the decision is one which should not be taken by the Church Authority but should be left to an attorney, guardian or independent legal adviser of the Accused.

Please do not hesitate to contact me if I can be of further assistance.

Regards,

Richard d'Apice

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