Court of Queen's Bench of Alberta

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Court	Court of Queen's Bench of Alberta (Surrogate Matter)
Judicial District	Edmonton
Estate Name	I.H.V.
Applicant (Plaintiff)	S.C.
Respondent (Defendant)	Capital Health Authority

Oral Reasons for Judgment
of the
Honourable Mr. Justice A. W. Germain

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[1] This case is tragic. I.H.V., who has a loving caring and supporting family is dying.

[2] She has been diagnosed with terminal cancer and it has affected her lungs and some of her current health care issues are reflective and confirmatory of the normal course and outcome of that illness and it's treatment.

[3] In addition she has failing kidneys and other organs. Circulation is being reduced to her feet and as a result her lower extremities are dying, even as she struggles for survival her feet are turning black, gangrenous and giving off an odour.

[4] Overlaying on this unhappiness is that a dispute has now developed between some but not all of her immediate family and the health care givers who are attempting to do what is best for her, the patient, that they can.

[5] This application came before me today in ordinary chambers. In ordinary chambers we deal with routine interlocutory procedure matters that are not expected to take a long time. They are not intended to deal with the course of health care to prolonging one's life or the dignity with which one faces death. Those matters at least require a special chambers application and may indeed require a trial.

[6] As a result, this matter was adjourned to 2:00 p.m. this afternoon at which time I heard wide reaching argument from legal counsel on various issues. All of the parties I think are in agreement that I.H.V. requires a guardian. One of the proposed guardians and the applicant is her daughter S.C.. S.C. provided an extensive affidavit and has the support of much of her family. One other daughter does not support S.C. for the same reason that the health care authorities do not support S.C.. That is that she has lost objectivity and maintains hope against hope that her mother will recover and that perhaps her mother does not even have cancer. The health care authorities would have a difficult time working with such a guardian because their proposal is that the active treatment be discontinued and that I.H.V. be given comforting care of a palliative nature until her inevitable death.

[7] I indicated earlier that this case is tragic on many fronts; one is the compassion the Court has for I.H.V. and her obvious health issues. The second is the compassion for her family because it is clear that this dispute is a schism that is tearing apart the family.

[8] I must deal today with two issues, the first is whether a guardian should be appointed, the second is whether an injunction should be granted requiring the various health care units entrusted with the care of I.H.V. to pursue a course of treatment which they and their outside objective consultants believe is hopeless and unnecessarily cruel.

[9] I have concluded that it is appropriate with the benefit of the afternoon argument that I should make the hard decisions that have to be made in this case and make those hard choices that family members will not make.

[10] In addition, I have decided that because of the urgent circumstance this brief oral Judgment must serve instead of detailed written Reasons. I have also determined that I will be making no new law in this case and therefore to reserve to develop more comprehensive express reasons puts an additional stress on the family members and the health care units that is not warranted.

[11] There is another reason that I wish to deliver an oral Judgment here today. First, a large bulk of the family members have taken time from their business affairs and from time that they would be visiting with their mother and loved one to attend in court. It is appropriate that the judge delivering the decision be able to look them directly in the eye when the decision is rendered.

[12] The last reason that I am able to deliver an oral Judgment today is because I have been assisted greatly by four exceedingly competent legal counsel who have handled this very sensitive and troubling issue in a mature and appropriate way. In doing so they have acted in the proudest traditions of our profession and it was an honour for me to have them in court with me today.

[13] Having said all of that I do want to indicate that it is inevitable that my Reasons for Judgment will likely be transcribed, perhaps for further appellate review, perhaps for some historic value, perhaps for precedential value and if that be the case I do reserve the right to make small editions to my oral comments today. These edits will not change the tone and the direction and the Judgment that I make today, but I will add to some cases that I have mentioned the formal case cite, where they can be found, I will correct typing and "slip of the lip" type of errors and I will perhaps add a small phrase or two to make more clear that which I am trying to convey today.

[14] I now want to turn to the evidence which I heard. Evidence was basically supplied from three sources; one was the comprehensive affidavit of S.C. who I assess as a loving compassionate and caring daughter. The type of daughter that any parent would be proud of. She is fighting desperately for the well-being of her mother and maintains the belief, honestly held, that her mother wishes her to fight for her long life as opposed to quality of life and wishes her to be put in the position of authority to attempt to argue, encourage or persuade the health authority to provide a higher level of care than they may wish to provide. The second source of evidence came from D.F., another daughter. She too exhibited great courage and great compassion in making that affidavit. In S.C.'s affidavit she has recited many of the relevant and undisputed facts.

[15] First she points out that her mother is 68 years of age and normally resides on the Peavine Metis Settlement. She has an extended family, including a common-law spouse and the family consists of three sisters, brothers and a granddaughter.

[16] The medical records reveal that I.H.V. was treated for some years now for cancer but most recently on January 20, 2008 entered the Sturgeon Community Hospital in St. Albert via their emergency room because of difficulty in breathing. She was diagnosed with pneumonia and admitted. She was treated and ultimately released on February 2. On February 6 she entered the Slave Lake Hospital complaining of shortness of breath and on February 8 was transferred to High Prairie from Slave Lake where apparently, according to her daughter, she responded well to treatment. On February 12 complications and difficulties occurred of some type. It was suggested she may have suffered perhaps a stroke or some type of coma. In any event, I.H.V. was intubated and transferred first to Grand Prairie on February 12 and then to the Sturgeon Hospital on February 13.

[17] After returning to the hospital facilities in the Edmonton area I.H.V. has received extensive medical treatment and one can only characterize her care, based on the records that I have reviewed, as optimal. S.C. believes that there has been some improvement. It is fair to say

that in contrast the collective view of the health care authorities and their experts is that I.H.V.'s cancer and related organ failures and the course of her life is predictable and that she is in the final period of her life.

[18] The other source of evidence was a lengthy affidavit prepared by L.C.. L.C.'s evidence is a summation of health care reports and authorities and one views her affidavit as compassionate and authoritative. She attaches to her affidavit medical reports and progress notes from several independent sources, all of which point out that I.H.V.'s condition is terminal.

[19] As a judge, I again wish to express my sympathies to the family members as in the face of this overwhelming medical evidence it appears clear that I.H.V. has limited time left on earth and to be with her loved ones. Judges are given much power but that power does not include the ability to turn back medical or scientific reality. In particular, I.H.V.'s husband has been with her nearly 50 years, that is a long time and he and all of his family members have my sympathies. S.C. expresses in her materials deep spiritual belief that higher beings will protect, look after and heal her mother. It is my sincere hope, expressed to her and to all of her family members, that she is correct.

[20] However, I must deal with this case on a legal plain. The first issue that I must decide is whether I.H.V. needs a guardian. The medical evidence suggests that there is a need. I.H.V. is no longer capable of making her own care decisions and therefore a guardian is appropriate.

[21] Normally, when there is a fraction and a dispute between family members we would point to the Public Guardian to act as an objective third party referee in these matters. However, the Public Guardian, represented with great sensitivity and humility here today by Ms. Henderson, points out that that is not a good program in a case such as this because they would have to come back in the dispute between the family and seek Court directions for virtually every decision that had to be made. They would prefer not to be appointed as the guardian. Therefore, in their absence the appropriate guardian is the person who has the support of the largest group of family members, in this case that is S.C.. So that when S.C. herself decides when it is time to let go the rest of the family will support her because they support her now.

[22] During the course of the argument today counsel for Capital Health offered to provide pursuant to this court order a copy of the medical records in their possession without cost to the guardian so that they may get yet another independent medical opinion as to whether other steps should be taken or other medical opinions sought as to their mother's condition. I direct the Capital Health authority to provide the health care records in their possession from January 1, 2008 to the current date, without cost, and provide as many of them as they are able to assemble by 12:00 noon on Wednesday, April 9, 2008. The delivery of these records to learned counsel for the guardian S.C., will be considered satisfactory compliance with that order.

[23] I wish to turn to the request for injunctive relief. There is a preliminary objection to the injunctive relief and that is that no Statement of Claim outlining the requisite facts upon which an injunction can be granted has been filed. For me to support that technical narrow preliminary

objection would leave unanswered issues in this dispute. I therefore conclude that it is appropriate for me to deal with this matter on the basis of its merit and therefore I dismiss the preliminary application that the documentation is not appropriate and I deal with the issue on its merit due to the emergency nature of it. I do direct, however, that if the appointed guardian wishes to pursue relief or remedy against the health care unit and or any of the doctors involved they must file a Statement of Claim in this action. To save them the filing fee I will direct that the Statement of Claim be either accepted by the Clerk of the Court without additional fee if they assign a new action number to it, or otherwise it is to be filed as a Statement of Claim in this Notice of Motion documentation. The defendants so named will, of course, have the usual time to respond to it.

[24] S.C. in her affidavit supporting this injunction wants positive and aggressive medical steps to be taken to prolong her mother's life while the health care authorities suggest that the proper medical course is palliative care only. I.H.V.'s daughter D.F. also filed an affidavit. In her affidavit she urged the Court to accept the medical advice and to allow her mother to die with dignity and peace. I have mentioned earlier that I hope the disputes between this family and its members are resolved and I point to all of the parties who filed affidavits on behalf of family members that I recognize how courageous that those steps were.

[25] The affidavit of L.C. attaches to it an independent letter expressing the medical opinion of Dr. Christopher James Doig. I am confident that Dr. Doig did not enjoy writing that letter, but Dr. Doig prefaces his letter with the following:

> . . . a patient with chronic disease, including a terminal illness, now critically ill and at the end of her life - is not uncommon. A loved one dying always results in some moral psychological, and spiritual distress in family. There is also distress on hospital staff caring for a dying patient where treatment offers no hope of recovery, where treatment is not directed to pain relief and comfort and where ongoing treatment is not only not helping, but may be causing distress or pain to the patient. Although it is easy to sympathize with the family, sympathy should not compromise what is medically appropriate for I.H.V..

[26] That expressed point of view on the part of Dr. Doig coincides with my thinking and will be the compass that guides me in this decision. Dr. Doig's medical report outlines the significant review of the medical history and is given on an independent basis. Dr. Doig has accepted from the nursing notes and charts that many of the family members have lost independent objectivity in relating to this condition of their mother. That loss of objectivity is completely understandable given the clear family attachment between I.H.V. and all of her family members, including those that do not agree with life prolonging decisions. Dr. Doig's conclusion in his summary is fivefold, but it concludes, however, that a decision to proceed with palliative care and the discontinuance of other ICU interventions is not only medically appropriate based on her acute and chronic illnesses, it is consistent with her previously expressed wishes.

[27] I have concluded in this particular case that it is inappropriate for the courts to injunctively prescribe a course of treatment for a patient that may be contrary to the unanimous view of the health care authorities. They have the expertise, the experience and the compassion to deal with this.

[28] I have concluded therefore that I will not grant the plaintiffs' application for any type of injunctive relief in this case. There is nothing in the medical record to indicate that the health care authorities are acting in any way other than in the best interests of their patient. If they conclude that the best interests of their patient is to begin the careful and slow withdrawal of some of the medical treatment presently being engaged, then there will be nothing in my Judgment to prevent them from doing so other than that which I now mention.

[29] I am aware that a key piece of medical equipment presently in use in this patient's care is the use of a ventilator. I will therefore interfere with their medical treatment only to this extent, that if they do plan to discontinue the ventilator, they may not do so until they have supplied the medical records to the guardian that I have referred to earlier and then they must also give the guardian a minimum of 72 hours' notice of their intention to do so to allow the applicant time to apply to stay this decision.

[30] This direction that I impose on the health care authorities, however, will have no force and effect 30 days from today. In other words, the notice requirement and the like is only for the next 30 days.

[31] It is also appropriate for me to outline very briefly at this time my reasons for denying the request for interim injunction. This type of case does not fit well and does not accord well with the normal injunction analysis that we embark on in Canada. It will always be in the patient's best interests if we look only at the issue of sustaining life v. quality-of-life, that herculean medical efforts take place. I am not satisfied that we as judges should be replacing our opinion with that of the medical community that has obtained extensive, unbiased third party analysis, including opinions from medical ethicists and an intensive care specialist, not associated with this health region as to the appropriateness of involving the care of their patient in palliative care.

[32] I am aware of the ***Jin*** case, ***Jin v. Calgary Health Region*** [2007] A.J. No. 1100 ABQB 593, a recent case of our Alberta Court of Queen's Bench in which a colleague of mine granted a positive order against disconnecting a ventilator and other relief which was granted on an interim basis. The cases are distinguishable. In ***Jin*** the outcome was not determinable and care was yet in its early stages and the health care unit applying to disconnect the ventilator was the very one that had applied the treatment just a short time earlier. There Justice Martin saw fit to grant a type of interim injunction applying the case of ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1994] 1 S.C.R. 311, a case from the Supreme Court of Canada and the case ***American Cyanamid Co. (No. 1) v. Ethicon Ltd.*** [1975] 1 All E. R. 504, that counsel are very familiar with. Here I.H.V.'s health care is changeable instantly and her condition terminal.

[33] I should not add to the stress of the situation additional stress on the health care workers to apply treatment that no medical practitioner in her health care team feels appropriate or beneficial. In this regard and in the context of this analysis the case from the English Court of Appeals cited to me in ***re J. (A Minor) (Child in Care: Medical Treatment)*** [1992] 3 W.L.R. 507, and also reported at [1992] 4 All E.R. 614 seems to me to reflect better the public policy concerns that should be engaged in circumstances such as this.

[34] In conclusion, I appoint S.C. the guardian of her mother but I do not grant the interim injunctive relief today requested by her. I direct that a copy of this order be placed in a conspicuous spot on the patient's chart at the hospital and travel with her if she is transferred to any other health care facility.

Heard on the 4th day of April, 2008.
Dated at Edmonton, Alberta this 18th day of April, 2008.

A. W. Germain
J.C.Q.B.A.

Appearances:

Kim D. Watamaniuk/Nathan J. Whitling
for the Plaintiffs

Michael A. Waite
Stones Carbert Waite LLP
for Capital Health Authority

J. David D. Steele
Bennett Jones LLP
for Dr. Norris, Dr. Fahoum and Dr. Reddy

Patricia M. Henderson/Brenda E. Feehan
for Office of the Public Guardian