In the Court of Appeal of Alberta

Citation: Alberta (Child, Youth and Family Enhancement Act, Director) v D.L., 2012 ABCA 275

Date: 20120919
Docket: 1203-0209-AC
Registry: Edmonton

Between:

Director (Child, Youth and Family Enhancement Act)

Respondent
(Applicant)

- and -

D.L. and M.B.

Appellants
(Respondents)

Restriction on Publication: Identification Ban – See the *Child, Youth and Family Enhancement Act*, section 126.2.

No one may publish the name or photograph of a child, or of the child's parent or guardian, in a manner that reveals that the child is receiving, or has received, intervention services.

NOTE: This judgment is intended to comply with the restriction so that it may be published.

The Court:

The Honourable Mr. Justice Keith Ritter
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Myra Bielby

Memorandum of Judgment
Delivered from the Bench

Appeal from the Order by
The Honourable Madam Justice J.M. Ross
Dated the 14th day of September, 2012
(2012 ABQB 562, Docket: FL03-35163)

Memorandum of Judgment
Delivered from the Bench

Slatter J.A. (for the Court):

[1] This appeal concerns the fate of M., a two and a half year old permanently comatose child in the Pediatric Intensive Care Unit at the Stollery Children's Hospital. The physicians unanimously agree that the child's condition is irreversible, and that no further medical intervention is warranted. M. will never be able to regain consciousness, nor interact in any way with her environment. The chambers judge directed that she be provided only with palliative care, and that life-extending treatment be withdrawn: ***Alberta (Child, Youth and Family Enhancement Act, Director) v D.L.***, 2012 ABQB 562.

[2] The parents have appealed the order of the chambers judge. The Director supports the assumption of jurisdiction by the chambers judge, but takes no position on the merits of the decision. Independent counsel appointed to represent the child supports the order granted.

[3] The parents have been charged with aggravated assault and other related offences, and if M. dies their jeopardy may be enhanced. They initially gave a "do not resuscitate" order, but because of their incarceration they have been unable to communicate with each other or with the medical team for several months. As a result, they have not been as involved in the decisions regarding baby M.'s care as would ordinarily be the case. The father deposed that his love for M. and his religious beliefs preclude him from accepting the doctors' recommendation that life sustaining medical treatment be withdrawn.

[4] The appellants argue that the chambers judge had no jurisdiction to grant the order. They argue that the withdrawal of care does not fall within "essential treatment" in the statute: *Child, Youth and Family Enhancement Act*, RSA 2000, c. C-12, s. 22.1(2). There is much to be said for the argument that "essential treatment" is the care that is essential for the best interests of the patient, and that may be palliative care. But if the appellants are correct that withdrawing life sustaining treatment is not included, there is a gap in the legislative scheme, and the chambers judge was entitled to invoke her *parens patriae* jurisdiction. The exercise of that inherent jurisdiction is warranted whenever the best interests of the child are engaged.

[5] The sanctity of human life is one of the core values of our society and our legal system. But life is not without end. The issue before us is whether M.'s life should be artificially extended by modern medical technology, or whether matters should be allowed to take their course without further human intervention.

[6] The medical team is aware of the difficult moral and ethical issues it faces. The chambers judge also faced those ethical issues, as well as the consequent difficult legal issues. After careful reflection, including a consideration of the parents' religious beliefs, the chambers judge made a decision. The medical condition of M. is such that the decision to provide only palliative care would

be the same, whether the parents were said to be responsible for her injuries or not. Upon review, we cannot see any error of principle in that decision which would warrant interference by this Court.

[7] The appeal is therefore dismissed.

[8] In relation to the parents' request for a final visit with M., we request that the Edmonton Police Service or the Correctional Service, within the next 24 hours, if resources are available, escort each of them separately to the hospital where she is located for a visit of a maximum of 20 minutes duration with her. The parents are not to be present at the same time as each other for any portion of these visits. Medical personnel and the police escort may remain in the room with the parent and M. for the duration of each visit.

[9] Whether and how these visits occur is in the discretion of the Edmonton Police Service or the Correctional Services. In making this direction we are not varying the terms of any existing bail order. Each parent will continue to remain in custody at all times throughout transport to and from the hospital and for the duration of each visit.

(application for a stay)

[10] The appellant parents now seek a further stay, pending an application for leave to appeal to the Supreme Court of Canada. That application could be made to the Supreme Court, but it can also be made to this Court: *Supreme Court Act*, RSC 1985, c. S-26, s. 65.1.

[11] This matter has now been before the courts for several months. Baby M. has been in intensive care that whole time, and if treatment is to continue she will require some invasive medical procedures. There are no legal issues of sufficient uncertainty to warrant overriding the best interests of M. There is nothing further that the legal system can do to improve the situation. While it is true that refusing a stay might render the appeal moot, the Supreme Court has the authority to consider moot appeals when the issue is important and elusive of review.

[12] The application for a stay is dismissed.

Appeal heard on September 19, 2012

Memorandum filed at Edmonton, Alberta
this 19th day of September, 2012

Slatter J.A.

Appearances:

R.R. Callioux
for the Respondent

L. Bubel
for the Appellant (D.L)

A.C. Kellett
for the Appellant (M.B.)

J.T. Quinn
for the Child (M)