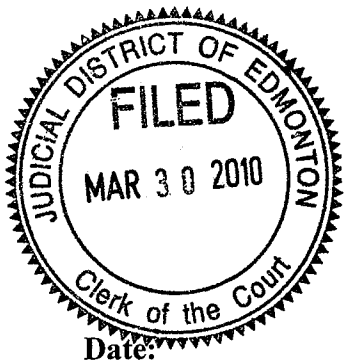
Court of Queen's Bench of Alberta



Citation: May v. Alberta Health Services, 2010 ABQB 213

Date:
Docket: 1003 00890
Registry: Edmonton

Between:

Rebecka May and Isaac May and Rebecka May and Isaac May as next friends of Isaiah James May, an infant

Plaintiffs

- and -

Alberta Health Services - Capital Health owning and operating a hospital known as the Stollery Children's Hospital and the University of Alberta Hospital

Defendants

Reasons for Judgment
of the
Honourable Madam Justice M.G. Crighton

I. Background

[1] During his birth at a rural Alberta hospital, Isaiah James May suffered severe neonatal encephalopathy. He was air lifted to the Stollery Children's Hospital, where he was treated in the neonatal intensive care unit and placed on a ventilator to assist his respiratory function.

[2] On January 13, 2010, the unit's clinical director informed Isaiah's parents his brain injuries were severe and irreversible and there was no hope he would recover. The parents were advised the treatment team intended to discontinue mechanical ventilation support after 2:00 p.m. on Wednesday, January 20, 2010.

[3] Isaiah's parents did not agree with that decision. Consequently, they commenced an action and brought an application for an injunction, which was heard by me in morning

chambers on January 19, 2010. An affidavit sworn by the infant's mother was filed in support of the application.

[4] At the hearing on January 19th, I expressed some reservations about the process employed and also about the appropriate test to be applied on an application for injunctive relief in the context of an end-of-life situation. Counsel for the parents acknowledged there was some confusion in the case law about the appropriate procedure to be followed to bring such an application before the Court.

[5] The parents sought an injunction for 90 days in order that their child could be observed, they could obtain independent medical opinions about his condition and prognosis, and they could explore whether there were other institutions that might take on Isaiah's medical care. They asked for a review of the injunction order at the end of that 90 day period.

[6] Counsel for the Stollery was not concerned about the framework in which the issues were resolved so long as the procedure that was adopted allowed for the expeditious resolution of those issues. The Stollery took the position that there should be a full hearing on the issues in order to allow the treatment providers to give oral evidence about Isaiah's condition, treatment and prognosis and to ensure the parents had a voice in the process. On the basis that such a hearing could be scheduled within 30 days, the Stollery indicated it was prepared to consent to a 30 day injunction.

[7] Counsel for the clinical director submitted that a trial of the issues was appropriate as it would allow for oral evidence to be given. He observed that it would have been more appropriate for the parents to seek relief in the nature of an order to maintain the *status quo* rather than an order for an injunction.

[8] All of the parties agreed the appropriate test for the application was not the traditional three-part test set out in ***RJR-MacDonald v. Canada (Attorney General)***, [1994] 1 S.C.R. 311 for granting an injunction, but rather was the "best interests of the patient" test.

[9] I had concerns about ordering the trial of an issue when the parties were not then in a position to define what the issue(s) ultimately might be. Accordingly, I advised the parties that the procedure set out in Part 30 of the *Rules of Court* would be adopted. I adjourned the matter for one week to allow Isaiah's parents to obtain information about a possible independent medical assessment. I was of the view that the information obtained might assist the Court in determining what issues remained and how those might be resolved in the most efficient way possible. In the interim, treatment and care were to continue.

[10] The matter returned to Court on two subsequent occasions while the parents arranged for independent medical assessments and those were completed. Ultimately, it was not necessary for me to decide any substantive issues as the initial injunction was allowed to expire and Isaiah's ventilator was removed on March 11, 2010. I understand that, on that date, he drew his last breath while held in his mother's arms, surrounded by his family.

[11] Difficult decisions such as these likely are made everyday by physicians and the families with whom they interact. However, there are occasions, as in this case, when the family and medical professionals, for various reasons, do not agree on the continuation or withdrawal of medical treatment. In those circumstances, the parties must have recourse to another forum in which to efficiently resolve their conflict. Understandably, the parties in such cases will be under considerable emotional stress and it would be helpful if there was some clarity about the procedures to be followed in bringing such matters before the Court and about the proper test to be applied. Notwithstanding there are other decisions of this Court which address both issues, counsel asked me to deliver my reasons for adopting the procedure I adopted.

II. What is the Proper Procedure to Employ for This Type of Application?

[12] As previously noted, counsel for the infant's parents advised the Court at the outset of the initial application on January 19, 2010 that the law was not entirely clear as to the proper procedure to be followed. She correctly observed there are no Alberta Court of Appeal decisions specifically addressing procedure or the appropriate test to be applied in end-of- life situations. Her clients elected to follow the usual adversarial process and to commence their action by statement of claim and to seek interim relief through a notice of motion with an affidavit in support.

[13] Counsel was aware of ***I.H.V. Estate (Re)***, 2008 ABQB 250, 449 A.R. 211, in which Germain J. directed an applicant for injunctive relief who had simply filed a notice of motion and an affidavit in support to file a statement of claim. Counsel also was aware of the decision in ***Sweiss v. Alberta Health Services***, 2009 ABQB 691, 15 Alta. L.R. (5th) 283. Ouellette J. in that case observed there was considerable confusion regarding the proper procedure to use when making an application for injunctive relief in the context of a medical urgency. He noted that in most cases proceedings were commenced by statement of claim pursuant to Rule 6 of the *Alberta Rules of Court*, Alta. Reg. 390/1968. However, he rejected that approach as being incompatible with the nature of such cases and their objectives, explaining at para. 28:

> ... I am of the opinion that requiring that an action be commenced by Statement of Claim does not account for the sensitive nature of applications in the context of medical urgency. Furthermore, the timeliness and formal processes described in the *Rules of Court* for actions commenced by Statement of Claim are inappropriate in these circumstances. Namely, the requirement that parties file a Statement of Defence and/or Counterclaims and Affidavit of Records, and further that Examinations for Discovery and eventually a trial be conducted, are inconsistent with the objectives which underlie the need for injunctions in this context. There is no intention that a trial of the action will follow. Rather, the injunction is generally sought to preserve the *status quo* in the interim while a final decision is reached between families and physicians.

[14] Ouellette J. considered that Part 30 of the *Rules of Court* was the proper procedure to be followed in the circumstances. Rule 394 under Part 30 applies where a statute or regulation gives

a judge authority to issue any certificate or make directions or orders, but no procedure for the application to the Court or judge is provided in that statute or regulation.

[15] He reviewed the requirements of Rule 394 and concluded that s. 13(2) of the *Judicature Act*, R.S.A. 2000, c. J-2 gives the Court the necessary authority to grant injunctive relief and the statute does not prescribe a particular procedure for bringing an application for such relief. Ouellette J. concluded that as both requirements of Rule 394 are met, applications for injunctions in the context of a medical emergency fall within the scope of Part 30 of the *Rules of Court*.

[16] I agree with his analysis.

[17] As Ouellette J. observed, in situations where Rule 394 applies, the procedure to be followed is set out in Rule 395, which confers on the presiding justice considerable discretion over the process, including the parties to whom notice should be given, the form and content of the notice and whether evidence should be given orally at the hearing. Subject to directions of the Court on such matters, the form and content of the notice and the procedure applicable is to be that provided in Part 33 of the *Rules of Court* (Rules 404 - 410). Under Rule 409, the Court has the power to summarily dispose of questions arising and may make orders or give directions as seem proper for the trial of any questions that arise on the application.

[18] I agree with Ouellette J. (***Sweiss*** at para. 42) that this procedure "is more consistent with the objectives associated with injunctions of this nature and allows the Court more flexibility and discretion when making determinations in these sensitive situations." Applications in circumstances such as those in the matter before me are not intended to preserve the *status quo* pending further litigation. As Ouellette J. commented (at para. 42), they are "akin to a final determination of the matter" because the Court's decision is fundamentally linked to life or death.

[19] Based on my review of the end-of-life cases from Alberta and elsewhere, the applicant, usually a family member, generally requires some time to challenge the prevailing medical opinions. The steps to be taken, how long they will take or what information may emerge if the request for time is granted are not certain at the outset. The procedure in Part 30 is flexible enough to accommodate that uncertainty and for consideration to be given to whatever competing interests might arise.

[20] In this case, there was a possibility the independent medical opinion might have agreed with the opinions already expressed, in which case, arguably, there would have been no medical issue to be tried and no need for oral evidence from any of the medical experts. In that event, if the only issues remaining to be addressed were legal ones, such as the right of parents to insist that medical treatment be given to their child or the jurisdiction of the Court to direct medical professionals to provide treatment, these might well have been resolved following a combination of written and oral submissions. Again, Part 30 offers the flexibility that would be required in cases where the issues develop or crystallize over time. In my view, it sets out the proper procedure that should be followed in cases involving end-of-life or urgent medical situations.

[21] Applications involving end-of-life, urgent medical treatment or similar circumstances require immediate attention to resolve what often are diametrically opposed positions. Rule 395 provides that "an applicant shall, on an affidavit of the facts, apply *ex parte* to a judge." The Rule accommodates those very pressing cases where circumstances do not allow for notice or where notice would have the effect of defeating the purpose for which the order is sought. In most cases of this type, however, applicants will have been in close communication with and already will have given some notice (either formal or informal) of the initial application to those who potentially might be affected by the order sought.

III. What is the Appropriate Test to be Applied in the Context of End-of-Life or Urgent Life-Threatening Applications?

[22] There was no real issue about the test to be applied in the circumstances of this case. The parties agreed with my observation that the traditional three-part test in ***RJR-MacDonald*** was inappropriate in this context and that the more appropriate test was that of "best interests of the patient."

[23] There are Alberta cases in which the courts have applied the traditional three-part test to arrive at a decision, but in fairness to the decision-makers in those cases, it appears that was the test counsel agreed was appropriate in the circumstances. The judges in those cases had no opportunity to consider any authority that suggested there might be a better test.

[24] I have benefited on this issue from Ouellette J.'s analysis in ***Sweiss*** and Germain J.'s analysis in ***I.H.V.***. I adopt their rationale in concluding that the proper approach is one that places the best interests of the patient at the forefront of the Court's analysis. In exercising its inherent jurisdiction, the Court should consider whatever options are available in determining what orders would be in the best interests of the patient.

[25] In ***I.H.V.*** (at para. 27), Germain J. stated that it would be "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." I do not take him to mean that the medical opinions in all cases will determine the best interests of the patient, but rather that on the facts of that case, when all other factors were considered, the patient's best interests were consistent with the medical opinions available. Obviously, concerns will arise where a court is asked to make directions that may be contrary to medical judgment. However, depending on the particular facts, there may be other available and viable options that not only are in the patient's best interests but also accommodate medical judgments and opinions.

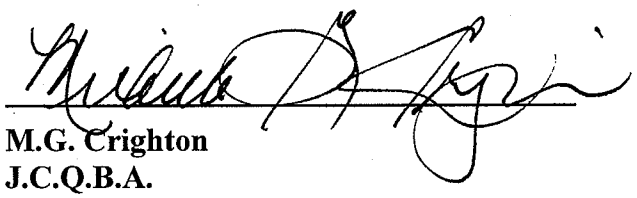
[26] I agree with Ouellette J. in ***Sweiss*** (at para. 63) that medical opinions are one of several factors to be considered in determining what is in the patient's best interests. No one factor is necessarily determinative on its own.

[27] I also agree that the list of factors to be considered cannot be stated exhaustively and will depend on the circumstances of a particular case. It would be inappropriate for me to add to or detract from the list of factors provided by Ouellette J. in ***Sweiss*** at para. 63 as the matter before me

did not proceed on the substantive issue of what was in the infant's best interests. My decision is confined to matters of procedure.

[28] I wish to commend counsel and the parties for the manner in which this case was handled. The events here can be described as nothing short of unimaginably devastating. The procedure that was adopted allowed Isaiah's parents to do what they felt compelled to do for their child, and to do so in the most compassionate and expeditious manner possible.

Heard on the 19th day of January, 2010.
Dated at the City of Edmonton, Alberta this 29th day of March, 2010.



M.G. Crighton
J.C.Q.B.A.

Appearances:

Rosanna M. Saccomani, Q.C.
for the Plaintiffs

Brent F. Windwick, Q.C.
for the Defendants

J. David D. Steele
for Dr. Ernest Phillipos