IN THE

SUPREME COURT OF VIRGINIA

Record No. _____

PATRICK B. LAWSON and
ALISON J. LAWSON,

Appellants,

v.

VCU MEDICAL CENTER, d/b/a
CHILDREN's HOSPITAL OF RICHMOND
AT VCU, and d/b/a VCU HEALTH SYSTEM,

Appellee.

IN RE: MIRRANDA GRACE LAWSON

Appeal From The
Circuit Court of the City of Richmond
Case No.: CL16-2358

PETITION FOR APPEAL

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PETITION FOR APPEAL

TO: THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

Appellants, Patrick E. Lawson and Alison J. Lawson ("the Lawsons"), respectfully state that they are aggrieved by an Order entered in favor of VCU Health System Authority, dba MCV Hospital, and also dba Children's Hospital of Richmond at VCU ("the Hospital"), in the Circuit Court of the City of Richmond on June 10, 2016, as amended by a Final Order in the same cause entered on June 14, 2016, the Honorable Melvin R. Hughes, presiding.

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT DID NOT HAVE THE AUTHORITY TO OVERRIDE THE LAWSONS' STATUTORY RIGHT TO MAKE ALL MEDICAL DECISIONS FOR THEIR DAUGHTER MIRRANDA.

II. THE HOSPITAL ERRONEOUSLY RELIED ON VIRGINIA CODE § 54.1-2972, WHICH MERELY DEFINES BRAIN DEATH AND DOES NOT PERMIT A HOSPITAL TO PERFORM TESTING AGAINST THE WISHES OF A MEDICAL DECISION-MAKER.

III. THE TRIAL COURT FAILED TO PROPERLY READ THE PROVISIONS OF THE HEALTH CARE DECISIONS ACT TOGETHER IN THE CONTEXT OF THIS CASE WHERE A TRANSFER OF THE PATIENT WAS NOT COMPLETED.

IV. THE TRIAL COURT ERRED IN REFUSING TO REQUIRE THE HOSPITAL TO CONTINUE TO PROVIDE "ANY LIFE-SUSTAINING CARE" TO MIRRANDA AS REQUIRED BY VIRGINIA CODE § 54.1-2990.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

The issue in this case was whether or not the trial court could declare that the Hospital may perform an apnea brain death test on its patient, two-year old Mirranda Grace Lawson ("Mirranda"), when Mirranda's parents, the Lawsons, objected to the test, which involves the removal of her life support.

Mirranda is a living patient who suffered a severe brain injury on May 11, 2016, and has since been a patient of the Hospital. Hospital physicians informed the Lawsons that they wanted to perform a medical procedure on Mirranda called an apnea brain death test. During the apnea test, Mirranda would be taken off her ventilator for ten to fifteen minutes to measure brain response to the poisonous buildup of carbon dioxide in Mirranda's body. The Lawsons objected verbally and in writing to the apnea test since it would be harmful to Mirranda and would not improve her condition in any way, and insisted that she remain on life support and be given all treatments that would be helpful to her.

After a temporary injunction obtained by Mirranda's father was dissolved, the Hospital petitioned the trial court for permission to perform the test and filed a motion for an emergency hearing on the petition. The trial court appointed a Guardian *ad litem* for Mirranda, and the Lawsons retained counsel. The trial court held a hearing on May 31, 2016, during which a Hospital physician testified. At the conclusion of the hearing, the trial court continued the case for ten days. Another hearing was held on June 9, 2016, at which a Hospital physician again testified and the Lawsons presented the testimony of their own expert physician. The trial court took the matter under advisement, and on June 10, 2016, entered an order permitting the Hospital to administer the apnea test on Mirranda, despite her parents' objection.

The Lawsons filed a Notice of Appeal, an appeal bond, and an emergency motion to approve the appeal bond and suspend the final order. On June 14, 2016, the trial court held a telephonic hearing on the appeal bond motion, and entered an Amended Final Order as well as an order approving the appeal bond. The Amended Final Order did not substantially change the previous order other than to note exceptions.

STATEMENT OF FACTS

On May 11, 2016, Mirranda choked on popcorn and suffered a severe brain injury. (Tr. 5/20, 10-11).[1] Prior to this event, she was a perfectly healthy two-year old girl. (Tr. 5/20, 10). Since then, she has been a patient in the Hospital's PICU. (Tr. 5/20, 13; Tr. 6/9, 7). She is reliant on a ventilator for breathing and is on various medications to support her heart and kidneys, and to assist her body in regulating blood pressure and water balance. (Tr. 5/31, 13-15.)

After only eight days, without informing the Lawsons of the risks or obtaining their consent, the Hospital attempted to perform the apnea brain death test on Mirranda. (Tr. 5/31, 20). The Lawsons objected to the test, as documented twice in Mirranda's medical record. (R. 6-8, Tr. R. 98.) The Hospital's policy requires informed consent from the patient or the legal decision maker for any test that carries with it risks. (Tr. 6/9, 25.)

The physicians believed that she had no reasonable hope of recovery, expected her to "fail" this apnea test, and upon failure, would declare Mirranda to be deceased and stop treating her. (Tr. 5/20, 11-13).

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[1] Citations to the Record shall be referred to as "R." and shall cite the page listed in the Record Table of Contents. Citations to the transcripts shall cite the page number therein. The hearing on May 20, 2016, shall be referred to as "Tr. 5/20". The hearing on May 31, 2016, shall be referred to as "Tr. 5/31". The hearing on June 9, 2016, shall be referred to as "Tr. 6/9".

The physicians believed other tests performed were consistent with loss of brainstem function, but could not say so definitively. (T. 6/9, 10, 22-24).

The Hospital argued that the apnea test was appropriate under the guidelines that they follow, called “Guidelines for the determination of brain death in infants and children: An update of the 1987 Task Force Recommendations” (hereinafter “Guidelines”). (R. 72-88; Tr. 5/31, 18, 54-56.). These Guidelines were published in 2011 and were endorsed by numerous medical societies. (R. 72.)

The apnea test is inherently dangerous and carries serious health risks. (Tr. 6/9, 55-57.) The test requires the removal of the patient's ventilator for ten to fifteen minutes and the test is done on two separate occasions. (Tr. 5/31, 29-30.) During the test, excess carbon dioxide in the patient’s body results in “side effects” such as acidosis, brain swelling, possible additional brain damage, heart irregularity, hypotension, and other risks. (Tr. 5/31, 47-48; Tr. 6/9, 55-57).

The dangers of the apnea test were described by the Hospital’s physician, Dr. Jesse C. Bain in his testimony on May 31, 2016:

> [W]e create an environment prior to the test being done so as to mitigate - identify the potential risks associated with the apnea test…. We utilize medications to help mitigate some of the blood pressure issues that can be caused in the setting of performing an apnea test. So, in addition to that, the presence of acidosis, or acid levels, was another complication. In fact, based on the apnea testing it's a brief

> short-term requirement…. Because we're not allowing that patient to breathe during that test period, the body can incur some degree of acidosis or acid level.

(Tr. 5/31, 28-29.) "[I]n the acute setting such as this where we allow the carbon dioxide to climb, the carbon dioxide in itself is converted to acid, for simplistic explanation, in the body." (Tr. 5/31, 47.) "[I]ncreasing cerebral blood flow is associated with increased carbon dioxide levels." (Tr. 5/31, 47.) Dr. Bain admitted that Mirranda could suffer additional brain swelling. (Tr. 5/31, 47-48.) Addressing a question as to whether the increase in brain swelling would risk more brain damage, Dr. Bain stated "In our estimation and opinion the side effects that you're speaking of won't change Mirranda's outcome in that we don't believe that she has functioning brain left to damage." (Tr. 5/31, 48.) He agreed that "Theoretically, yes, those side effects could happen." (Tr. 5/31, 49.) However, Dr. Bain stated that measures would be in place to make the test as safe as possible. (Tr. 5/31, 45-46.)

Many in the international medical community have recommended a thorough re-evaluation of the safety and appropriateness of the apnea test, as published in numerous medical journals. (R. 32-47, 99-108; Tr. 6/9, 79-80.) An article written in 2010 by Dr. Ari R. Joffe and others titled "The Apnea Test: Rationale, Confounders, and Criticism" published in the

Journal of Child Neurology reviews potential confounding conditions that can affect the validity of an apnea test. (R. 99-108.) The author reviews the conditions that are commonly corrected before the apnea test, and then identifies other conditions that are not typically considered or corrected but should be, including endocrine dysfunction. (R. 101-102.) The brain injury suffered by the patient affects the hypothalamus and/or pituitary gland, which results in adrenal and thyroid deficiency, which in turn can cause coma and apnea. (R. 101.) He concludes that the adrenal and thyroid function should be tested and treated prior to conducting the apnea test. (R. 101.)

The author notes that it is known that "high partial pressure of arterial carbon dioxide" suppresses brain function and the effect on a recently damaged brain is unknown, but it "can be speculated that this can suppress the function of the respiratory center of the brain and increase the threshold for stimulation of breathing." (R. 102.) The author next asserts that the apnea test can be very dangerous for "a recently injured brain that has high intracranial pressure. ***Indeed, it is reasonable to suggest that the apnea test itself can result in failing the apnea test, creating a self-fulfilling prophecy***." (R. 102, emphasis added.)

The Guidelines for determining brain death being used by the Hospital require the physicians to treat and correct metabolic disturbances before proceeding with an apnea test. (R. 72.) The Hospital has not tested Mirranda's thyroid levels, so Dr. Bain could not definitively state that Mirranda is suffering from hypothyroidism (i.e., when the thyroid is not producing the proper amount of hormones). (Tr. 5/31, 42-43.) However, their "suspicions are that [thyroid levels] would be abnormal". (Tr. 5/31, 42.) Dr. Bain agreed that hypothyroidism is a type of metabolic disturbance. (Tr. 5/31, 57.) Dr. Bain reiterated that they only give thyroid treatments to patients who are organ donors. (Tr. 5/31, 57.)

Dr. Bain stated that such thyroid treatments are "not medically indicated" because "it would be ineffective" for "a patient who has brain death". (Tr. 5/31, 43.) Thyroid treatments are helpful and utilized for keeping organs healthy for organ donation. (Tr. 5/31, 41-42.) Dr. Bain stated that "administering her thyroid hormone may help preserve or maintain organs for a prolonged period of time". (Tr. 5/31, 44.) When the Lawsons first requested these treatments, he agreed. (Tr. 5/31, 45.)

The Lawsons have sought numerous alternative options, and obtained medical advice from physicians outside of the Hospital, including Dr. Paul Byrne. (Tr. 5/20, 25; Tr. 5/31, 9). The Lawsons were advised that

several simple treatments would improve Mirranda's condition. (Tr. 6/9, 58-60.) Mirranda is still breathing through an endotracheal tube, when a tracheostomy is standard treatment after about ten days for better long-term breathing. (Tr. 6/9, 27, 60-61.) Also, as mentioned above, the Lawsons requested thyroid testing and hormone treatment, and a gastrostomy (PEG feeding tube) for additional nutrition, among other things. (R. 21-22; Tr. 6/9, 58-60, 66-67). The Hospital's physicians refused to utilize such treatments. (Tr. 5/31, 52-54; Tr. 6/9, 28).

The Hospital contacted four other hospitals to ask if they would accept a transfer of Mirranda to their facility, but all declined. (Tr. 6/9, 16-18.) Dr. Bain stated that one facility "felt that our management and the setting was appropriate and that they wouldn't be able to offer anything different or above and beyond what we were able to offer them." (Tr. 6/9, 17.) The Hospital contacted several home health care agencies, but none felt they were capable of caring for Mirranda. (Tr. 6/9, 18-19.)

Mirranda's condition is stable and has not deteriorated. (Tr. 6/9, 7;71-27). There is no evidence of her organs failing. (Tr. 6/9, 30, 21-22.)[2] She

[2] The undersigned counsel can proffer to this Court that since the last hearing in the trial court, Mirranda's condition has not deteriorated, and in fact has improved in some ways; for example, she is now completely off the norepinephrine medication that supported her heart and blood pressure.

responds to her parents' voices. (Tr. 5/20, 21). The Guardian *ad litem* agreed the apnea test should not be performed since her organs were not failing, and the test had potential complications and could lead to Mirranda's death. (Tr. 5/31, 72-76; Tr. 6/9, 91).

Authorities and Argument

Because the issues before this Court are ones of statutory interpretation, such are questions of law which this Court reviews *de novo*. *Henderson v. Ayres & Hartnett, P.C.*, 285 Va. 556, 561 (2013).

I. THE TRIAL COURT DID NOT HAVE THE AUTHORITY TO OVERRIDE THE LAWSONS' STATUTORY RIGHT TO MAKE ALL MEDICAL DECISIONS FOR THEIR DAUGHTER MIRRANDA.

There is no statute that authorizes the hospital, physicians, or trial court to override the decision of the Lawsons. The apnea test and any other test can only be performed when the Lawsons consent to it according to Virginia Code § 54.1-2986. The Hospital had no legal authority to override and ignore the Lawsons' decision to forego the apnea test for their daughter, because the Lawsons' consent is required in order to proceed.

In granting the Hospital permission to override the Lawsons' decision, the trial court improperly ignored these Virginia laws.

The Health Care Decisions Act (the "Act") and related regulations provide only the Lawsons with the authority to make medical decisions for Mirranda, and in particular decisions involving her life-sustaining treatments. Virginia Code § 54.1-2986(A) states:

> A. Whenever a patient is determined to be incapable of making an informed decision and (i) has not made an advance directive in accordance with this article…, the attending physician may, upon compliance with the provisions of this section, provide, continue, withhold or withdraw health care upon the authorization of any of the following persons, in the specified order of priority, if the physician is not aware of any available, willing and capable person in a higher class:
>
> 1. A guardian for the patient. This subdivision shall not be construed to require such appointment in order that a health care decision can be made under this section; or
>
> 2. The patient's spouse except where a divorce action has been filed and the divorce is not final; or
>
> 3. An adult child of the patient; or
>
> 4. A parent of the patient; ….

The Lawsons are the sole persons authorized to consent or refuse consent to the provision, continuance, withholding, or withdrawal of health care for Mirranda. They have a duty to "undertake a good faith effort to ascertain the risks and benefits of, and alternatives to any proposed health care" and to base their decisions "on the patient's best interests". Virginia Code § 54.1-2986.1(B).

Virginia Code § 54.1-2982 provides the definition of "health care" for purposes of the Act:

> the furnishing of services to any individual for the purpose of preventing, alleviating, curing, or healing human illness, injury or physical disability, including but not limited to, medications; surgery; blood transfusions; chemotherapy; radiation therapy; admission to a hospital, nursing home, assisted living facility, or other health care facility; psychiatric or other mental health treatment; and life-prolonging procedures and palliative care.

The definition of "life prolonging procedures" is also set forth in this statute, in pertinent part, as "any medical procedure, treatment or intervention which (i) utilizes mechanical or other artificial means to sustain, restore or supplant a spontaneous vital function…."

The apnea test constitutes "health care" for two reasons. First of all, like any medical diagnostic test, it allows physicians to gain knowledge of the patient's condition in order to determine how to proceed with their care. The physicians advised the trial court that if the apnea test revealed evidence of brainstem function, they would provide a tracheostomy and "additional therapy as appropriate". (Tr. 6/9, 94-95.) Secondly, the medical procedures involved in the apnea test constitute the withdrawal of a life prolonging procedure, namely the ventilator. Therefore, it is evident that the apnea test constitutes "health care" under the Act.

The Hospital requires informed consent from the patient or the legal decision maker for any test that carries risks. Virginia regulations also require informed consent, in particular 18VAC85-20-28, which states, in pertinent part:

> 3. Before surgery or any invasive procedure is performed, informed consent shall be obtained from the patient in accordance with the policies of the health care entity. Practitioners shall inform patients of the risks, benefits, and alternatives of the recommended surgery or invasive procedure that a reasonably prudent practitioner in similar practice in Virginia would tell a patient.
>
> a. In the instance of a minor or a patient who is incapable of making an informed decision on his own behalf or is incapable of communicating such a decision due to a physical or mental disorder, the legally authorized person available to give consent shall be informed and the consent documented.
>
> b. [exception for an emergency situation]
>
> c. For the purposes of this provision, "invasive procedure" means any diagnostic or therapeutic procedure performed on a patient that is not part of routine, general care and for which the usual practice within the health care entity is to document specific informed consent from the patient or surrogate decision maker prior to proceeding.

Contrary to the argument of the Hospital, the apnea test is certainly an invasive procedure, since it is a diagnostic procedure that is not part of "routine, general care", and the Hospital admitted that it customarily obtains consent from patients or their decision-makers to tests that carry risk.

The Lawsons are clearly within their rights and are in fact properly fulfilling their statutory duties to seek out alternatives for Mirranda's best interests, in the face of the Hospital's actions. The Hospital has refused to perform a tracheostomy to support long-term breathing, when such is indicated after ten days of a patient's use of a ventilator with an endotracheal tube. The Hospital has refused to screen and treat for hypothyroidism, which the Hospital's physician admitted was a "metabolic disturbance", and under their own Guidelines, such must be corrected before an apnea test. The Hospital's physician testified that thyroid treatments are given to organ donors to preserve their organs, but not for living patients such as Mirranda. Other treatments requested by the Lawsons have also been refused.

The Hospital wishes to utilize a selective application of its policy of obtaining informed consent, and when it is inconvenient or difficult, will choose to forego it. Such a practice is contrary to Virginia laws and regulations and cannot be approved or validated in the courts of this Commonwealth. There was no statutory basis for the trial court to allow the Hospital to ignore the Lawsons' explicit wishes to not perform an apnea test on Mirranda, and therefore the trial court must be reversed.

II. THE HOSPITAL ERRONEOUSLY RELIED ON VIRGINIA CODE § 54.1-2972, WHICH MERELY DEFINES BRAIN DEATH AND DOES NOT PERMIT A HOSPITAL TO PERFORM TESTING AGAINST THE WISHES OF A MEDICAL DECISION-MAKER.

The Hospital cited the Virginia statute defining brain death in support of its petition to perform the brain death test at issue. The trial court in its final order cited the same statute in declaring what the Hospital may do with respect to Mirranda. However, this statute merely defines brain death and does not grant to any hospital or physician the right to complete testing to obtain evidence of brain death. The trial court misconstrued this statute and erred in sustaining the Hospital's petition that relied on it.

Virginia Code § 54.1-2972(A) states as follows:

> A person shall be medically and legally dead if:
>
> 1. In the opinion of a physician duly authorized to practice medicine in the Commonwealth, based on the ordinary standards of medical practice, there is the absence of spontaneous respiratory and spontaneous cardiac functions and, because of the disease or condition that directly or indirectly caused these functions to cease, or because of the passage of time since these functions ceased, attempts at resuscitation would not, in the opinion of such physician, be successful in restoring spontaneous life-sustaining functions, and, in such event, death shall be deemed to have occurred at the time these functions ceased; or
>
> 2. In the opinion of a physician, who shall be duly licensed to practice medicine in the Commonwealth and board-eligible or board-certified in the field of neurology, neurosurgery, or critical care medicine, when based on the ordinary standards of medical practice, there is irreversible cessation of all functions of the entire brain, including the brain stem, and, in the opinion of such physician, based on the

> ordinary standards of medical practice and considering the irreversible cessation of all functions of the entire brain, including the brain stem, and the patient's medical record, further attempts at resuscitation or continued supportive maintenance would not be successful in restoring such functions, and, in such event, death shall be deemed to have occurred at the time when all such functions have ceased.

In construing Virginia Code § 54.1-2972, "we must apply its plain meaning, and we are not free to add [to] language, nor to ignore language, contained in [it]." *Andrews v. Richmond Redevelopment & Housing Authority*, 787 S.E.2d 96, 100; 2016 Va. LEXIS 70, at *9 (No. 150977, June 2, 2016) (finding that under the statute at issue the circuit court lacked subject matter jurisdiction).

This statute only describes when a person is "medically and legally dead". Neither this statute nor any other statute confers upon any physician or hospital the right to force anyone to undergo brain death testing. There is no Virginia case that agrees with the trial court and Hospital's misinterpretation of Virginia Code § 54.1-2972 that would allow a physician to override a decision-maker's directive in order to seek evidence of brain death. Neither this statute nor any other statute supersedes the authority granted to the Lawsons in Virginia Code § 54.1-2986.

The only relief requested by the Hospital in its petition is that the trial court "enter an Order permitting its health care providers to proceed with

and complete testing to determine if brain death has occurred in Mirranda ... and to act on the results in compliance with Virginia Code Section 54.1-2972". (R. 7.) The trial court's Amended Final Order affirms that the Hospital may complete its testing and "make a determination of death as provided by law pursuant to Va. Code § 54.1-2972."

Under the plain meaning of this statute, there is no grant of authority to any physician to obtain evidence of a patient's suspected brain death contrary to the wishes of the patient's decision-maker. If the General Assembly wishes to grant this power to physicians when conducting brain death testing, it is free to do so, but it has not done this yet. This statute is merely declarative of what constitutes brain death in Virginia.

There is no legal basis for using this statute to override the Lawsons' decision to forego the apnea brain death test for their daughter. When the lower court imposed the will of the Hospital in direct contravention of the will of the Lawsons, such constituted adding language to Virginia Code § 54.1-2972. This is a clear misapplication of the law that must be corrected.

III. THE TRIAL COURT FAILED TO PROPERLY READ THE PROVISIONS OF THE HEALTH CARE DECISIONS ACT TOGETHER IN THE CONTEXT OF THIS CASE WHERE A TRANSFER OF THE PATIENT WAS NOT COMPLETED.

The Heath Care Decisions Act provides some guidance for situations in which a medical decision-maker and a physician disagree. However, these statutes do not contemplate the situation in the case at hand, and are at best ambiguous in the context of a case where a transfer of a patient was not completed after a dispute between a physician and the patient's decision-maker. In this case, the trial court wrongly emphasized some statutory provisions while ignoring other explicit provisions of the Act.

If statutory language is subject to more than one interpretation, "we must apply the interpretation that will carry out the legislative intent behind the statute." *Blake v. Commonwealth*, 288 Va. 375, 383 (2014) (citations omitted). Statutory language is construed in the context of the entire statute: "A cardinal rule of statutory construction is that a statute be construed from its four corners and not by singling out a particular word or phrase." *Id*. "[S]tatutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogenous system, or a single and complete statutory arrangement." *Id*. "[E]very part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary." *Id*. Where multiple sections of a statute are inconsistent or ambiguous when read together, courts "are required to harmonize any ambiguity or inconsistency in the statute to give

effect to the General Assembly's intent without usurping 'the legislature's right to write statutes.'" *Id*.

These interrelated Health Care Decisions Act statutes must be read together and not in isolation. "It is a cardinal rule of construction that statutes dealing with a specific subject must be construed together in order to arrive at the object sought to be accomplished." *Alston v. Commonwealth*, 274 Va. 759, 769 (2007), quoting *Prillaman v. Commonwealth*, 199 Va. 401, 406 (1957).

> Under the rule of statutory construction of statutes *in pari materia*, statutes are not to be considered as isolated fragments of law. . . . [T]hey should be so construed as to harmonize the general tenor or purport of the system and make the scheme consistent in all its parts and uniform in its operation, unless a different purpose is shown plainly or with irresistible clearness.

Id.

In this case, the Lawsons requested that the Hospital forego the apnea test and instead, to provide Mirranda with a tracheostomy, feeding tube, additional nutrition, and to conduct thyroid and adrenal testing and treat the expected deficiencies. Since the Hospital refused to perform the requested treatments and insisted on the apnea test, we must look to Virginia's Health Care Decisions Act for the correct procedure.

There is no statute that requires a brain death test. Rather, the most applicable statute governing a dispute between a decision-maker and a physician is Virginia Code § 54.1-2987, which states:

> An attending physician who refuses to comply with (i) a patient's advance directive or (ii) the health care decision of a patient's agent or (iii) the health care decision of an authorized person pursuant to § 54.1-2986 shall make a reasonable effort to transfer the patient to another physician and shall comply with § 54.1-2990.
>
> This section shall apply even if the attending physician determines the health care requested to be medically or ethically inappropriate.

Virginia Code § 54.1-2990(A) refers to situations where physicians disagree with decisions of patients, advance care directive agents, and persons authorized to make decisions pursuant to § 54.1-2986 (such persons are referred to herein as "decision-maker"). This statute states:

> Nothing in this article shall be construed to require a physician to prescribe or render health care to a patient that the physician determines to be medically or ethically inappropriate. However, in such a case, if the physician's determination is contrary to the request of the [decision-maker], the physician shall make a reasonable effort to inform the [decision-maker] of such determination and the reasons for the determination. If the conflict remains unresolved, the physician shall make a reasonable effort to transfer the patient to another physician who is willing to comply with the request of the [decision-maker]. The physician shall provide the [decision-maker] a reasonable time of not less than fourteen days to effect such a transfer. During this period, the physician shall continue to provide any life-sustaining care to the patient which is reasonably available to such physician, as requested by the [decision-maker].

It is clear from the record in this case that the Hospital never really attempted to resolve its conflict with the Lawsons, instead it merely tried to impose its will upon them. The Hospital was provided with sound medical advice from the Lawsons' medical expert regarding the necessity to perform a tracheostomy and attempt other treatments. Yet the Hospital had already become entrenched in its insistence on the apnea test and refused to consider any alternative. There was no assertion by the Hospital that it was unable to perform additional treatments and the Lawsons obviously consented to the treatments knowing that there are some risks.

This statute plainly requires a physician in this scenario to make a "reasonable effort" to transfer the patient to a physician who is willing to comply with the request of the [decision-maker]". The reasonableness of the efforts required to transfer a given patient is relative to the given case. A patient hospitalized with a minor condition can disagree with their hospital's course of action, and the efforts required to effect a transfer would need only be minor in order to be reasonable. For a patient hospitalized with a more serious condition such as Mirranda, the efforts required by the hospital must be more substantial in order to be reasonable. In this case, in order to transfer Mirranda, it was necessary for the Hospital to provide at least a tracheostomy (a common procedure), and

also test and begin standard thyroid and adrenal treatments for Mirranda to make a transfer to another facility or to her home possible.

There is scant evidence in this case that the Hospital complied with Virginia Code § 54.1-2990(A) in making "a reasonable effort to transfer [Mirranda] to another physician who is willing to comply with the [Lawsons'] request". The Hospital physician testified that he spoke to four other hospitals who declined to take the transfer. It is unclear (and doubtful) that the Hospital made any serious attempt to provide to these other hospitals and home care agencies a fair and balanced explanation of the Lawsons' requests. Instead, the Hospital actually impeded the Lawsons efforts to transfer Mirranda by refusing to provide at least a tracheostomy. Without the tracheostomy, or the stabilizing effects of thyroid treatments, the difficult task of arranging a transfer to another facility or to home care became much more difficult, if not impossible.

The trial court never made any finding on whether or not the Hospital carried its burden of proof in making reasonable efforts to complete a transfer. Rather, based on the statements from the trial judge, it appears that the trial judge erroneously misplaced the burden of accomplishing a transfer of the patient onto the patient's family. During closing arguments at the second hearing, the judge stated:

> I think the parents get to call the shots. If they don't agree with the hospital and the staff about how the treatment should go, then they should go – I hate to be blunt, but they should go someplace else. They should find a facility that will treat this child in accordance with some medical opinion, which they have, and their views about how this child should be treated. I don't think the hospital should be burdened with this child….

(p. 97). The trial court failed to properly determine if the Hospital had made reasonable efforts as necessitated in this case, as required by Virginia Code § 54.1-2990.

There was no assertion by the Hospital that it would be harmed by providing the Lawsons additional time, or that the Hospital was unable to provide care to Mirranda without thereby denying the same health care to another patient. Rather, the Hospital repeatedly asserted that they believed there would be ***no purpose*** to such additional treatments, and that such was contrary to what they believed to be proper from their medical and ethical standpoint solely because they suspected Mirranda was brain dead. The Hospital routinely performs tracheostomies and was fully able to provide thyroid testing and treatment in order to assist in transferring her to another physician's care.

Even assuming *arguendo* that the Hospital did meet its burden of proof that it had made reasonable efforts to transfer the patient to another physician, the statute at issue is silent on what to do when a transfer is not

completed. Virginia Code § 54.1-2990 does not say what happens when a transfer is not completed after a physician has made reasonable efforts to transfer a patient and a reasonable amount of time has passed without making such a transfer. The General Assembly could have explicitly allowed the physician to override the decision-maker's request, but it did not. Therefore, we must read this statute in context with the rest of the Health Care Decisions Act, including the exclusive authority of the parent of an infant according to Virginia Code § 54.1-2986.

The statutes in the Health Care Decisions Act must be read together to assist this Court in resolving these difficult issues. For example, the Court may consider the clear statement made in Virginia Code § 54.1-2987.1(B) that:

> If the patient is a minor or is otherwise incapable of making an informed decision and the Durable Do Not Resuscitate Order was issued upon the request of and with the consent of the person authorized to consent on the patient's behalf, then the expression by said authorized person to a health care provider or practitioner of the desire that the patient be resuscitated shall so revoke the provider's or practitioner's authority to follow a Durable Do Not Resuscitate Order.
>
> When a Durable Do Not Resuscitate Order has been revoked as provided in this section, a new Order may be issued upon consent of the patient or the person authorized to consent on the patient's behalf.

It is clear that the legislature intended that the authorized decision-maker, especially one for a minor, must have plenary authority over end-of-life issues.

These statutes contained in the Health Care Decisions Act are at the heart of the issues in this case. These sections apply "even if the attending physician determines the health care requested to be medically or ethically inappropriate." Virginia Code § 54.1-2987. The trial court failed to read these statutes together and instead put undue emphasis on the Lawsons' failure to effect a transfer, without examining the reasonableness of the Hospital's efforts in context. Even still, the silence of these statutes in the event of an impasse requires this Court to default to the explicit authority of Mirranda's parents.

The trial court erred in interpreting these statutes in a manner that allowed the Hospital to override the wishes of the Lawsons. The obligation to improve these statutes falls upon the legislature, not the trial court. While we await further legislative advancements, the trial court is not authorized to add substance to any one statute in a manner that directly contradicts another statute on the same subject. For these reasons, the trial court must be reversed.

IV. THE TRIAL COURT ERRED IN REFUSING TO REQUIRE THE HOSPITAL TO CONTINUE TO PROVIDE "ANY LIFE-SUSTAINING CARE" TO MIRRANDA AS REQUIRED BY VIRGINIA CODE § 54.1-2990.

The Lawsons requested that the trial court include in the ongoing "life sustaining care" being provided to Mirranda the tracheostomy and additional treatments they requested. However, the trial judge expressly stated that he was "real reluctant to tell the hospital what treatment to provide". (Tr. 5/31, 67). In failing to require the Hospital to provide "all life-sustaining care" or even to examine what treatments constituted "life-sustaining care", the trial court erroneously failed to enforce the requirements of Virginia Code § 54.1-2990.

Virginia Code § 54.1-2990(A) states that during the period when a conflict exists between a decision-maker and a physician and efforts are being made to effect a transfer of the patient, "the physician shall continue to provide any life-sustaining care to the patient which is reasonably available to such physician, as requested by the [decision-maker]." Subsection (B) of this statute defines "life-sustaining care" as "any ongoing health care that utilizes mechanical or other artificial means to sustain, restore or supplant a spontaneous vital function, including hydration, nutrition, maintenance medication, and cardiopulmonary resuscitation."

During the conflict with the Hospital, the Lawsons sought to prevent irreparable harm to Mirranda. The Lawsons' medical expert testified that the tracheostomy, thyroid treatments, and other recommendations were necessary to sustain and restore Mirranda's respiratory and other normal organ function. The Hospital's physician admitted that patients should be given the tracheostomy after about ten days, in order to promote better long-term breathing function. Failure to treat Mirranda's hypothyroidism could be lethal. The Hospital refused and indicated it would only provide the same health care that it had been providing. Clearly the tracheostomy is necessary to sustain Mirranda's "vital function" of breathing. Further, the thyroid and other treatments are necessary "maintenance medication" for Mirranda and help to sustain her vital functions.

The failure to test and treat Mirranda's abnormal thyroid condition has two devastating results. First, her organs are not receiving the normal hormones needed for regular health. Secondly, if these treatments are not done, then one cannot be medically certain, in the event an apnea test is performed and results in failure, whether such a failure is due to a lack of brain function or a lack of thyroid function.

Reviewing Dr. Bain's testimony on the Hospital's refusal to provide the requested additional treatments, it is clear that the Hospital had already

concluded that Mirranda was dead, even though he admitted that they had not completed their brain death testing and could not say definitively that she had suffered brain death. On the one hand, the risks and side effects associated with the apnea test were acceptable because such "would not change her outcome"; and on the other hand, the additional treatments requested by the Lawsons were rejected in part because they carried risks.

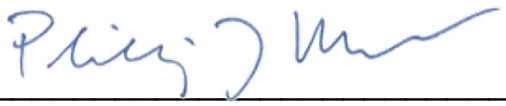
Clearly the treatments requested by the Lawsons were included in the statutory definition of "any life-sustaining care". The Lawsons requested the trial court to order the Hospital to provide these treatments pending a transfer, and the trial court erred in failing to even entertain the idea. The trial judge is not a medical professional, and so it is understandable that he was reluctant to examine the Lawsons' requests. However, it was the trial court's responsibility to ensure the Hospital was following the requirements of Virginia Code § 54.1-2990.

The trial court erred in failing to ensure the Hospital provided all life-sustaining care for Mirranda. The trial court revealed a double-standard when it came to judicial interference with Mirranda's medical care: ordering a test be performed that was not required by statute; while assuming it was unqualified to direct the care sought by the Lawsons that was required by statute. For these reasons, the trial court must be reversed.

Conclusion

Due to the failure of the trial court to abide by Virginia's statutes concerning the rights of the Lawsons to determine the medical care of their daughter Mirranda, the Amended Final Order of the trial court must be reversed. In addition, the Hospital must be ordered to provide the treatments requested by the Lawsons in order to comply with the Virginia law that compels them to provide life sustaining care pending a transfer of Mirranda. The Hospital cannot be allowed to perform an apnea brain death test on Mirranda in direct contravention to the instructions of her parents.

Respectfully Submitted,
Patrick and Alison Lawson,
By Counsel,



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CERTIFICATE

The undersigned counsel for appellants states the following:

(1) the names of the appellants are Patrick and Allison Lawson, and their counsel is:

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(2) the name of the appellee is VCU Health System Authority, dba MCV Hospital, and also dba Children's Hospital of Richmond at VCU, and its counsel are:

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(3) the name of the Guardian *ad litem* for Mirranda Grace Lawson, a minor, is:

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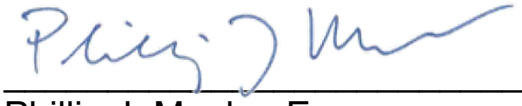
(4) a copy of the petition for appeal has been mailed and emailed on September 12, 2016, to the above referenced counsel for appellee and the above referenced Guardian *ad litem*; and

(5) appellants do desire to state orally to a panel of this Court in person the reasons why the petition for appeal should be granted.



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