Alberta Doctors' Digest

Alberta court limits parental interference in MAiD decision

It seems like we are placing a disproportionate focus on issues related to medical assistance in dying (MAiD) in the last few *ADD* editions, but this most recent decision focuses on a very different issue: the right of a third party (in this case a parent) to dispute the decision of a person to seek MAiD.

The facts of this rather tragic case are somewhat complex. M.V. (identity protected by court order) is a young adult person who successfully sought and obtained approval for MAiD in accordance with AHS guidelines. Her father, W.V., objected to the approval and successfully obtained an injunction preventing the procedure from occurring, pending a full hearing of the issues he had raised. As W.V.'s application for an injunction was brought on an emergency basis (without notice to M.V.), there was a court-directed right for an immediate review to allow M.V. to present her side of the case.

The review application forms the basis of the decision in W.V. versus M.V., AHS and others.

At the root of the decision was W.V.'s belief that M.V., his daughter, was vulnerable and could not have given consent to the procedure as she was incapable because of her disability which he claimed was largely rooted in mental health issues.

While various clickbait articles have alluded that M.V.'s autism was a particular factor in being approved for MAiD, it is important to understand that M.V. had surpassed all the procedural hurdles that AHS presented in its comprehensive and well-thought-out MAiD application process and had received the approval of two unrelated physicians.

Moreover, as identified in our March-April ADD Article, MAiD is not yet available in Canada for a "grievous and irremediable medical condition" solely related to mental health diseases. M.V.'s underlying physical ailment was not disclosed.

Readers will recall that in order to seek MAiD, an applicant must meet certain criteria established in the *Criminal Code of Canada* in order to prevent the physician or health care provider from facing criminal charges for assisted suicide (which is still a criminal offence in Canada). Those criteria are as follows:

- The applicant is eligible for health services funded by a government in Canada.
- The applicant is at least 18 years of age and capable of making decisions with respect to their health.
- They have a grievous and irremediable medical condition.
- They have made a voluntary request for MAiD that, in particular, was not made as a result of external pressure.
- They have given an informed consent to receive MAiD after having been informed of the means that are available to relieve their suffering, including palliative care.

The application to set aside the injunction proceeded on a curious fact basis: there was no evidence put before the court as to the exact nature of M.V.'s condition, the

physicians' rationales for their approval or how the applicant met the criteria in question. (As an aside, there was evidence that of the two original physicians consulted, one agreed and one did not, so a regulated "tie-breaking" formula involving a third independent physician was invoked, which led to the approval.) However, the fact that the physicians had made a determination in accordance with the principles of the AHS process, and that the court was not in a position to "second guess" physician decisions was important. Additionally, W.V. presented no independent medical information contradicting these physicians' opinions.

The first objection that W.V. had to meet, of course, was whether he even had the standing or jurisdiction to raise these issues given that he was not her legal guardian nor was he a physician or medical expert with relevant knowledge of her condition. On that point, the court erred on the side of caution and granted him standing to make his arguments.

The court then went on to consider the application for removal of the injunction on the same basis as was relied on in the original application. That is to say, the classic three-part test for whether an injunction was applicable in the circumstances. To meet the test, the applicant must demonstrate that there is a serious issue to be addressed; there would be irreparable harm resulting to the applicant if the injunction is not granted; and the balance of (in)convenience between the parties favours the granting of the injunction. All three branches are essential to obtain an injunction.

Suffice it to say, it is very difficult for an applicant to meet these tests, especially the second dealing with irreparable harm, as the courts have repeatedly indicated that any harm compensable with damages (i.e. money) is not "irreparable."

Naturally, the court was satisfied that there was a serious issue to be addressed at the outset.

On the issue of "irreparable harm," the court was prepared to accept that the death of M.V. would cause W.V. irreparable harm as the loss of a daughter was not compensable with just monetary awards (in spite of legislation in Alberta that puts a limit on monetary damage awards for death of a child).

The case turned on the issue of the balance of convenience. First, the court found the expression "balance of convenience" to be "distasteful" in the context of the facts before it and preferred to use the words "balance of harms." The chambers judge found the harm to W.V. to be substantial if the injunction was not granted – he would lose his daughter. However, the court went on to say that the harm to M.V. if the injunction was granted went to the "core of her being." It would deny her the right to choose between living or dying with dignity. Further, he found that an injunction would put her in the position where she would be forced to choose between living a life she described as intolerable and ending her life without medical assistance. He felt that was a "… terrible choice that should not be forced on M.V. as attempting to end her life without MAiD would put her at increased risk of pain, suffering and lasting injury."

(While this argument makes sense in this context, a case could be made that the same argument applies to any applicant seeking MAiD, regardless of whether or not they meet all the criteria.)

The final comment the judge made was this: "The importance of individual autonomy in medical decision-making, even over life and death, is well-established; the balance of

harms in the present case favours M.V. The choice to live or die with dignity is M.V.'s alone to make."

The judge making this difficult decision clearly struggled. The written decision was 31 pages and very carefully reasoned. He was clearly cognizant of the applicant/father's angst but also careful to reference and rely on legal precedent and process. He ended his decision by volunteering advice to M.V. to continue to navigate the health care system to ensure that she was getting the best possible treatment available before invoking her right to seek MAiD.

As a postscript, in a final attempt to save his daughter, W.V. filed an appeal to overturn the ruling. An Order was subsequently filed by both parties agreeing to Stay the Court's Order that entitled M.V. to assisted suicide. In a tragic twist, however, in response to the Stay being granted, on May 28, M.V. began to stop eating or drinking, and her counsel quickly applied to lift the stay to prevent M.V. suffering from starvation and to continue with MAiD. After 14 days of M.V.'s voluntary stoppage of eating and drinking, W.V. discontinued his appeal.

As of the date of publication of this article, M.V. may have already pursued her decision to seek MAiD.

This is truly a legal battle where there were no winners.

Editor's note: The views, perspectives and opinions in this article are solely the author's and do not necessarily represent those of the AMA.