[2023] JMSC Civ 16

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FAMILY DIVISION

CLAIM NO. SU2023FD00182

IN THE MATTER OF The Child Care And Protection Act

A N D

IN THE MATTER OF an Application for the Medical Treatment and Care and Protection of a minor Child RW.

BETWEEN	**THE CHILDREN'S ADVOCATE**	**CLAIMANT**
A N D	**R.H.**	**1ST DEFENDANT**

IN CHAMBERS (HELD IN PERSON)

Mrs. Kaye-Anne Parke Attorney-at-Law for the Claimant

The 1st Defendant in Person

HEARD: January 26 and 31 and February 2, 2023

Family Law – Section 14(1) (a) of Schedule 1 of the Child Care and Protection Act – Medical Treatment in the absence of parental consent – the Court's *parens patriae* jurisdiction – an order making a child a ward of the Court – Section 27 of the Judicature (Supreme Court) Act – child's best interest – balancing exercise

D. STAPLE J (Ag)

BACKGROUND

[1] Parenting is a difficult job even in the best of times. It is that much harder when events take a turn for the worse and one has to make difficult decisions concerning the health, safety and welfare of one's child. Compounding the problem is when one parent has to act alone with no other parent present to lean on for support, advice or encouragement.

[2] Such is the state of affairs that RH (full name withheld for privacy) has now found herself in with her son of tender age RW (full name withheld for privacy).

[3] RW, as set out in the Fixed Date Claim Form that has commenced this action, has been diagnosed with stage 1 left Wilms Tumour. Wilms Tumour is a malignant (meaning very infectious) and particularly aggressive form of cancer with 5 stages.

[4] According to the affidavit of Dr. Michelle Reece-Mills, who I am prepared to accept as an expert in paediatrics, has testified that RW presented to the University Hospital of the West Indies on the 17th November 2022 with a 1 month history of abdominal pain and intermittent fever associated with significant weight loss, pallor, easy fatigability and exertional dyspnoea (difficult breathing).

[5] He was examined and noted to have generalized lymphadenopathy (disease or swelling of the lymph nodes) and an irregular mass palpated to the left upper quadrant with extension to the flank and back.

[6] When he came to the hospital he had with him an ultrasound from another facility with an impression of a left renal mass suspected to be Wilms Tumour.

[7] I find and accept that this was the state of affairs as was presented to the UHWI when RW came to the hospital on November 17, 2022. Given this finding, RW was in pretty bad shape to say the least.

[8] When admitted, RW had “remarkably elevated” blood pressure. It was suspected that this was due to the renal mass kinking the blood supply to the kidney.

[9] A month later, on the 18th December 2022, a CT Scan was done and revealed a hypo-dense mass arising from the left upper pole of the left kidney measuring 12.8 x 10.7 x 9.5 cm (H x AP (anterior to posterior) x W) with an impression of Left Wilms Tumour Stage 1.

[10] The recommended course of treatment was a combination of chemotherapy to shrink the tumour and then surgery to remove same.

[11] According to the evidence of Dr. Reece-Mills, the 1st Defendant, RW’s mother, refused to consent to the treatment as she was of the view that divine intervention would save RW.

[12] RH received psychological counselling and had many meetings with the team of physicians treating RW.

[13] So far, based on the best available medical evidence, the prognosis for RW is good. According to paragraphs 9 and 10 of the Affidavit of Dr. Reece-Mills, if treated quickly with chemotherapy and surgery, RW has an “excellent change of a good outcome once treatment is completed”. However, if not treated with expedition, because Wilms Tumour is malignant and aggressive, the tumour could spread to distal areas far away from the kidney (where it is presently confined) and worsen his chance of a good outcome. As such time is of the essence.

THE ABILITY OF THE OFFICE OF THE CHILDREN'S ADVOCATE TO BRING THESE PROCEEDINGS.

[14] The Office of the Children's Advocate has now intervened on behalf of RW in light of the objection of RH to the procedure. They purport to do this under their powers under the **Child Care and Protection Act**[1].

[15] For these purposes, I am willing to say that s. 14(1)(a) of Schedule 1 of the Child Care and Protection Act does allow for the Office of the Children's Advocate to bring these proceeding as this is a matter involving law or practice concerning the best interest of RW who I find and accept is a child within the meaning of the Child Care and Protection Act.

THE LAW

[16] A parent has primary responsibility for the care of their child. In this context, what the parent enjoys, in relation to their child(ren), are certain rights and privileges **attendant and incidental to the execution of their responsibilities** above anyone else including the state. It is, in a sense, the right and privilege to parent (as a verb) to the exclusion of anyone else except the other parent (in certain circumstances).

[17] But the parent is not at large in the exercise of their responsibilities. The manner in which one exercises those rights and responsibilities are governed by the law. It starts with the Charter of Fundamental Rights and Freedoms guaranteed by the State to all of its citizens. There is next ordinary legislation such as the

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[1] See Child Care and Protection Act Schedule 1, s. 14(1)(a). Subject to the provisions of this paragraph, the Children's Advocate may in any court or tribunal -

(a) bring proceedings, other than criminal proceedings, involving law or practice concerning the rights or best interests of children…

Maintenance Act, **The Child Care and Protection Act**, **The Children (Guardianship & Custody) Act**, **The Adoption Act**, etc. Then there are common law principles and rules of equity. We also have to consider our international treaty obligations (especially those we have ratified) such as the **UN Convention on the Rights of the Child**.

[18] The upshot of all of this is that the parent is not free to do with their child as they please. The parent's conduct must always be guided by what is in the best interest of the child recognizing the fact that the child is an individual whole and inviolable unto itself.

[19] The Court's powers to intervene on behalf of children are established in what is known as its *parens patriae* jurisdiction. This is based on the principle that the Sovereign is deemed to be the legal protector of all citizens unable to protect themselves. The Sovereign exercised this power through the Chancellor and this devolved to the Courts of Equity. So the Courts of Equity exercised this power of Sovereign protection on behalf of the Monarch.

[20] By virtue of s. 27 of the **Judicature (Supreme Court) Act,** this jurisdiction, which was handed down to our Supreme Court, was preserved upon Independence.

[21] I will set out the provisions here:

> *27. Subject to subsection (2) of section 3 the Supreme Court shall be a superior Court of Record, and shall have and exercise in this Island all the jurisdiction, power and authority which at the time of the commencement of this Act was vested in any of the following Courts and Judges in this Island, that is to say*
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> *The Supreme Court of Judicature*
> *The High Court of Chancery,*
> *The Incumbered Estates Court,*
> *The Court of Ordinary,*
> *The Court for Divorce and Matrimonial Causes,*
> *The Chief Court of Bankruptcy, and*
> *The Circuit Courts, or*
> *Any of the Judges of the above Courts, or*
> *The Governor as Chancellor or Ordinary acting in any judicial capacity, and*

All ministerial powers, duties, and authorities, incident to any part of such jurisdiction, power and authority.

[22] This jurisdictional issue was confirmed by our Court of Appeal in the case of *B & C*[2]*.* In this authoritative decision, Brooks JA (as he then was) explained the history of the Court's jurisdiction as protector.

[23] He expressly adopted and incorporated into Jamaican common law the principle set out in the case of ***The Queen v Gynall***[3]. In the ***Gynall*** case, Lord Esher MR confirmed that the Court's equitable jurisdiction allowed the Court to supersede a parent's common law rights where the manner in which the rights were being exercised would conflict with the best interests of the child.

[24] In the earlier decision of the Court of Appeal in ***Panton v Panton***[4], President Harrison said that, the Supreme Court should be slow to decline to exercise such power whenever the occasion arises because of its all encompassing interest in the welfare of the child.

[25] Therefore the jurisdiction, power and authority of the Supreme Court to intervene to protect the welfare of the child, even as against the wishes and above the common law rights of their own living parents is well established.

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[2] [2016] JMCA Civ 48

[3] [1893] 2 QB 232

[4] SCCA No. 21/2006 (November 29, 2006)

[26] Indeed, this Court would argue that in light of the Constitutional rights of every individual in Jamaica, which includes minor children, the Court now has a Constitutional duty to intervene to protect those rights, where they might be violated. But an authoritative pronouncement on this area has to be made by the Constitutional Court so comprised and seized of such a matter.

THE POWER TO INTERVENE IN MEDICAL CASES

[27] In Jamaica, there has not been any decision which I have come across where a written judgment on the exercise of the Court's *parens patriae* jurisdiction in the area of intervention on behalf of a child concerning medical care has been handed down. However, there have been decisions of the Supreme Court in this area in the past. Consequently, the orders being sought in the instant claim are not altogether novel.

[28] There are a plethora of authorities dealing with guardianship, but none relating to medical care and intervention.

[29] In the United Kingdom, however, this is an area of law that is rapidly developing with decisions stretching back as far as to the nineties.

[30] In the case of ***Re X (a child) An NHS Foundation Trust v MX and others***[5], Ms. Justice Russel opined that,

> *"There is no dispute as to the law: the decision is one of best interests. The court is being asked by the applicant to make an order that certain treatment is to be withheld. In principle it is the responsibility of parents to make decisions on behalf of their child, including any consent to medical treatment or, as in this case*

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5 [2020] EWHC 1958 (Fam) para 25

> *agreeing for some treatment to be withheld. When, as here, parents do not agree with the proposed treatment or withdrawal of treatment proposed by the clinicians responsible for their child's care, the court can intervene and overrule their refusal even if it could not be said to be unreasonable (Re T (Wardship: Medical Treatment) [1997] 1 WLR 242"*

[31] The above case concerned an application by the NHS Foundation Trust to seek an order for the child to receive palliative care over and above the wishes of the child's parents who wished for the child to receive additional treatment for a terminal medical condition. The medical evidence, which the learned Judge accepted, was that the child's position would not improve with any further treatment and the best course of action was for the child to receive palliative care. The parents of the child had refused this course of action and wanted the child to receive further advanced treatment in circumstances where there would be no likelihood of significant improvement in the child's condition.

[32] The learned Judge ruled that the child should receive the treatment Optiflow, but under strict terms and conditions and subject to monitoring. This way, she was able to accommodate both the wishes of the parents as well as taking into consideration the medical view of the doctors.

[33] In the decision of the England and Wales Court of Appeal in ***Wyatt v Portsmouth NHS Trust***[6] their Lordships said as follows,

> ***"****In our judgment, the intellectual milestones for the judge in a case such as the present are, therefore, simple, although the ultimate decision will frequently be extremely difficult. The judge must decide what is in the child's best interests. In making that decision, the welfare of the child is paramount and the judge must look at the question from the assumed point of view of the* ***patient*** *[emphasis mine] (Re J).* ***There is a strong presumption in favour of a course***

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[6] [2005] EWCA Civ 1181 at para 87

> ***of action which will prolong life*** *[emphasis mine], but that presumption is not irrefutable (Re J) The term best interests encompasses medical, emotional and all other welfare issues (Re A). The court must conduct a balancing exercise in which all the relevant factors are weighed (Re J) and a helpful way of undertaking this exercise is to draw up a balance sheet (Re A)"*

[34] Russel J, in the case of *Re X* above, went on to confirm that the legal authority for the Court to exercise such power comes from s. 19 of the UK Senior Courts Act (1981). This legislation is in similar terms to our section 27 of the **Judicature (Supreme Court) Act.**

[35] There have been other decisions on the topic[7]. I would only cite the summarization of the principles involved by Baroness Hale in the UK Supreme Court case of *Aintree University Hospital NHS Foundation Trust v James*[8],

> *[22]; "Hence the focus is on whether it is in the patient's best interests to give the treatment rather than whether it is in his best interests to withhold or withdraw it. If the treatment is not in his best interests, the court will not be able to give its consent on his behalf and it will follow that it will be lawful to withhold or withdraw it. Indeed, it will follow that it will not be lawful to give it. It also follows that (provided of course they have acted reasonably and without negligence) the clinical team will not be in breach of any duty toward the patient if they withhold or withdraw it."*

> *At [39] she continued; "The most that can be said, therefore, is that in considering the best interests of this particular patient at this particular time, decision-makers must look at his welfare in the widest sense,* ***not just medical but social and psychological*** *[perhaps a nod to the earlier decision of Re T]; they must consider the nature of*

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[7] See for example *Re S (a minor) (wardship: medical treatment)* [1993] 1 FLR 376. *Re B (a minor) (wardship: medical treatment)* [1981] 1 WLR 1421; and *Re J (a minor) (wardship: medical treatment)* [1990] 3 All ER 930 CA.

[8] [2013] UKSC 67

> *the medical treatment in question, what it involves and its prospects of success; they must consider what the outcome of that treatment for the patient is likely to be; they must try and put themselves in the place of the individual patient and ask what his attitude towards the treatment is or would be likely to be; and they must consult others who are looking after him or are interested in his welfare, in particular for their view of what his attitude would be."*

[36] The decision is not always a clear cut one. There have been instances where the Court has ruled in favour of the parent's decision on treatment vs the view of the medical staff. *Re X* is an example of a mid-ground between the two. A case where the parent's position was favoured is *Re T (a minor) (wardship: medical treatment)*[9].

[37] In this case, T was a child born with biliary atresia and a liver transplant was the only available treatment. The parents refused to consent to transplantation as they felt it was not in the child's best interests. The advice of another paediatrician was sought who also urged the parents to consent. When a liver became available an approach was made to the court to intervene under the Children Act. While the initial ruling held that the parents' view was unreasonable, the Court of Appeal overturned this decision. The determining reason the judges cited in their decision was a consequential one. An expert witness stated that the effects on the mother of being forced to continue to care for her child having undergone treatment to which she had not consented would not be in the best interests of the child. Therefore, despite medical opinion being unanimous in its recommendations for surgery, which involved relatively minor risk when compared to the long term benefit of the child, the court supported the views of the parents.

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[9] [1997] 1 WLR 242 CA.

[38] These cases involved an actual firm position taken by a parent. But equally, where the parent is unable to decide for reason of some incapacity, someone has to step in to make the decision in their stead. Often times, persons are simply paralysed and overwhelmed because of the difficult choice that faces them. It's not their fault; it is just the nature of the human reaction to powerful external stimuli that simply causes them to mentally and/or physically freeze. The weight of the consequences of the decision may also throw them into a panic. One never knows how they will respond until faced with the crisis. It is easy to play armchair quarterback. And, to paraphrase Mike Tyson, everyone has a plan until they get punched in the mouth.

[39] This is where the Court, as protector, is obliged to intervene.

THE SITUATION OF RW

[40] I acknowledge that there was no other medical opinion presented in this case other than those provided by the staff at the UHWI. This is because time would not allow for same and, as the last ultrasound from Dr. Racquel Reid-Stultz from Centre for Diagnostic Imaging dated January 30, 2023 shows, the mass is growing. Therefore, time was of the essence if a successful outcome was to be achieved.

[41] The medical evidence, which I accept, shows conclusively that RW has an aggressive malignant tumour that has been steadily growing in size. This view was confirmed by repeated ultrasounds. In the first ultrasound dated November 16, 2022 (obtained from the Morant Bay Health Centre), mentioned in the medical report dated December 22, 2022, the left renal mass was 14.8cm x 11.1cm x 9.5cm.

[42] They next did a CT Scan of the chest, abdomen and pelvis at the UHWI on the 18th November 2022 which showed the same mass as being now 12.8cm x 10.7 cm x 9.5 cm.

[43] They started treatment of RW to reduce his blood pressure and consulted with RH to work out a treatment plan for the tumour. The evidence is that she initially agreed to this treatment. A repeat ultrasound was done on the 24th November 2022 at the UHWI which showed a 14.0 x 11.2 x 7.9 left renal mass. The volume was 632 mLs.

[44] According to the report submitted by Dr. Orville Morgan (exhibit MR-M-2) the chemotherapy was to start on November 29, 2022, but then RH objected. When asked, RH said to the Court that the reason the chemotherapy did not start was that the hospital could not find a catheter to administer the chemotherapy treatment through his neck as initially proposed. She therefore denied that she refused to have them administer the treatment on the day it was to start.

[45] But the Court must note as well that at the time the hospital had proposed to start chemotherapy, I am not sure that RW was in a proper state, physically, to receive it. According to Dr. Morgan's report, when RW came to UHWI, he was undernourished with his weight for age being below the 5th percentile, he had stage 2 hypertension, had hypochromic, microcytic moderate anaemia (10.8 g/dL) (this is a condition that impairs the normal transport of iron in cells). So bad was he that a dietician and paediatric consult were requested.

[46] What this suggests to me is that by the time RW had come to the UHWI, his situation had been deteriorating rapidly at home and wherever he was being cared for before.

[47] To their credit, according to Dr. Morgan's report, the clinical team recognised that administering chemotherapy to RW in this state was not ideal and they implemented a high calorie diet as recommended by the dietician along with an oral multivitamin. I have no evidence of what his state was at the time the chemotherapy was to start. But it must be that the medical experts deemed it safe to start.

[48] It must be said that the clinical team, based on the report of Dr. Morgan, did all that they reasonably could to involve RH in the decision making process at all critical stages of the process. They provided her with the images upon which they were relying to make their diagnoses and recommendations at each step of the process; she was consulted about the treatment options and prognoses; she was allowed to have an elder from her church, Ms. Joan Taylor (who was also present at these hearings), with her; she was offered to meet with a clinical psychiatrist, but refused; she was offered support through a social worker. This meeting was held on the 9th December 2022 and RH maintained her position on refusing to consent to the treatment.

[49] Unfortunately, there were some information gaps. For example, RH did not know that RW was on three medications for his hypertension. She was only aware of one. RH said that when she visits RW, and the nurse is administering the medication, the nurse only mentions one thing for the hypertension. RH also said that she was not aware of all of the ultrasounds being done on her son. Now, whilst routine tests are conducted without the parent knowing every single detail, there is no doubt in my mind that better communication with RH would have helped significantly.

[50] On the 14th December 2022 they did another abdominal ultrasound at the UHWI which showed renal mass with measurements 18L x 14w x 9.6 AP. The volume had also nearly doubled to 1234 mLs.

[51] On the 16th January 2023 another ultrasound was performed. This showed the mass at 17.0 x 11.7 x 13.9 cm. A slight decrease in some dimensions, but greater in other areas. So it was growing. The last ultrasound done on the 30th January 2023 shows it now back to 18 x 13.4 x 14.8.

[52] Dr. Reece-Mills is of the view that without the proposed intervention, i.e. to have the chemotherapy and then the surgery, RW will die. However, if he does get the treatment, he is highly likely to survive and have a favourable outcome.

THE POSITION OF RH – THE SINGLE PARENT

[53] In fairness to RH, she is not a sophisticated person by any means. She loves her son, about this there is no doubt. In my interaction with her she seems earnest and her overarching concern was for how her son was being treated at the UHWI.

[54] I had asked her if she was open to the possibility of the procedure being done elsewhere, such as at the Bustamante Children's Hospital. She said she was, but that was not agreeable to her as the Children's Hospital, unlike the UHWI, did not allow parents to stay overnight and she was not comfortable with that.

[55] I therefore find that RH's position was not an objection to the course of treatment. At least that is not the stance she adopted in Court. Rather, her difficulty is with the UHWI staff and how she says they treat her son. She said she is unhappy with what she perceives is the "lying" from them and how poorly they are treating her child. As an illustration, she cited an episode where RW had been crying out in pain for his mother and the nurse, on the evidence of RH, treated RW roughly by asking him why he didn't call to her (the nurse) as opposed to RH. It is fair to say that RH was just, frankly, highly suspicious and distrustful of the medical staff of the UHWI. She did not (and does not to this blessed day) believe they have her son's best interest at heart.

[56] I have no evidence that the medical team involved in the treatment of RW do not have his best interest at heart. On the evidence presented, I find that they are doing the best for him with all their skill and expertise. Could there be better bedside manner? Certainly. The Court hopes things improve in the days and months of treatment to come.

[57] The Court is not unsympathetic to a parent seeing their child in distress and wanting everyone to handle them with the same tender love and care as they would. But I am not prepared to make a judgment on what the nurse did or did not do in the absence of evidence from the nurse to defend herself. It would not be fair.

[58] However, RH is still a parent. With parenting comes responsibilities. In the exercise of those responsibilities a parent has to make decisions. These decisions are sometimes as easy as deciding what clothes the child is to wear. At other times, unfortunately, the parent has to make some tough decisions. The parent also has to be willing to accept the consequences of such decisions. It is part and parcel of being an adult and a parent of a minor. Accepting responsibility. Being accountable. No one ever said this is easy.

[59] So it is true that a parent has certain rights above all others when exercising their responsibilities. But all parents must act in the best interest of their children. If the parent is not going to do so, or abdicate, then someone else has so to do.

[60] I had twice adjourned these proceedings to allow RH to consult with independent counsel and get her own independent Ultrasound. It was this independent ultrasound which was obtained from Centre for Diagnostic Imaging which showed the increased size of the mass. When I asked RH on the 31st January 2023 if she was now willing to consent, her position was that she would leave it to the Court to decide as that would be demonstrative of God's will.

[61] In my respectful view, this was a cop out on her part. It was an attempt to absolve herself of any responsibility for the decision, should things go ill. The Court does not have such luxuries.

APPLICATION OF THE PRINCIPLES

[62] Following the principles set out by Baroness Hale (as highlighted above), I am of the view that, in the balance, it is in the best interest of RW for him to receive chemotherapy and then surgery to hopefully remove the tumour completely. I am satisfied on the balance of probabilities, on the medical evidence before me, that this gives him the best chance of living and having a much improved quality of life than he was enjoying before intervention.

[63] I am satisfied that he had been enduring serious medical strife for at least one month, including being undernourished, and that it was the intervention of the medical team at the UHWI that saw him steadily improve. He has a potentially fatal ailment that I am satisfied only medical intervention as outlined in the evidence, can resolve.

[64] Divine intervention works in many ways. Including through doctors.

DISPOSITION

[65] I therefore grant the relief sought in the Fixed Date Claim Form as follows:

1 The Consent of RW's mother is dispensed with on the basis that her consent has been unreasonably withheld.

2 The medical team at the University Hospital of the West Indies is permitted to act in accordance with the best interest of RW based on the medical diagnosis and the most appropriate course of treatment and care.

3 The University Hospital of the West Indies is permitted to administer chemotherapy treatment to child RW as long as it is deemed medically necessary by the doctors.

4 The University Hospital of the West Indies is permitted to perform surgical operation(s) to remove the tumour arising from the left kidney in RW.

5 The Defendant is prohibited from discharging RW from the University Hospital of the West Indies whilst he is being treated for Left Wilms Tumour.

6 The child RW, for these purposes only, is made a ward of the Court.

7 This matter shall be reviewed in 6 months from today's date.

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Dale Staple
Puisne Judge (Ag)