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Court sets aside MAiD injunction despite alleged breach of Alberta Health Services policy

By **Anosha Khan**

Law360 Canada (March 27, 2024, 2:43 PM EDT) -- The Alberta Court of King's Bench has allowed a 27-year-old woman to receive medical assistance in dying (MAiD), despite its finding that her father brought serious issues to be tried surrounding the woman's medical assessments.

"The case will have an impact on the rights of others to the extent that it clarifies what it means for a MAiD assessor to be independent," wrote Justice Colin Feasby in the decision.

In *WV v MV*, 2024 ABKB 174, released March 25, M.V. was approved by two doctors to receive MAiD. W.V. is her father, who believed that she "is vulnerable and is not competent to make the decision to take her own life."

An ex-parte interim injunction ordered on Jan. 31 prevented M.V. and Alberta Health Services (AHS) from going ahead with the appointment where she would have received MAiD. M.V. brought the present application to set aside the interim injunction. Her date of death was first scheduled for Jan. 19, then Feb. 1, which was prevented by the injunction.

She did not identify her condition or provide information contesting the facts brought forth by W.V. She said, rather, that W.V. had no standing to contest doctors' decisions and her decision to seek MAiD was not reviewable by the court. She asked the court to "respect her autonomy and her right to die with dignity."

W.V. brought additional arguments in support of sustaining the interim injunction, which he said should be continued while a judicial review of the doctors' MAiD assessments and AHS's administrative actions is conducted. He said the doctors erred in concluding that M.V. met MAiD criteria and that AHS erred in selecting or permitting one of the doctors to provide a tie-breaking MAiD assessment because he was not independent.

In the MAiD framework dealing with cases where natural death is not reasonably foreseeable, there is a temporary exclusion for individuals whose only condition is mental illness or disability. Parliament extended this exclusion until March 2027. W.V. argued that M.V.'s condition was mental and not physical in nature.

Justice Feasby explained that the court is unable to review the doctors' clinical judgment in the MAiD assessment or the MAiD applicant's decision-making. He said that medical assessments involve the application of specialized professional judgment, something the court cannot undertake.

This case surrounded M.V.'s second attempt to receive MAiD. When two doctors had opposing conclusions on M.V.s MAiD eligibility, a doctor identified as Dr. P acted as a tie-breaking doctor, appointed by an AHS navigator. However, Dr. P was also the doctor who previously found M.V. to be eligible for MAiD in her first attempt to receive it.

W.V. alleged that Dr. P lacked objectivity since he had already formed an opinion on M.V.'s eligibility for MAiD and questioned AHS's acceptance of him as a tie-breaker. Whether the navigator followed the policy was found to be a justiciable issue.

Justice Feasby concluded that there was an arguable case that Dr. P "was not independent and that he provided a MAiD assessment contrary to the AHS MAiD Policy," and that the AHS navigator

"arguably decided the outcome of the process" by permitting him to be the tie-breaker despite knowing his previous assessment.

M.V.'s evidence did not address her medical condition, why she wants MAiD or any suffering she may be experiencing. During questioning, she also refused to answer questions about her medical condition and refused to produce documents concerning the MAiD assessments.

Justice Feasby said that the assertion that M.V. does not have the capacity to choose MAiD "could not be determined by the Court in the proceeding as it is currently framed." He said M.V. is "an adult and has capacity," unless determined otherwise by the court in the proper proceeding.

He further cited *Sorenson v Swinemar*, 2020 NSCA 62, which "rejected the idea that allegations of mental illness permitted a person to challenge the MAiD approval of a family member." He said the court may grant an injunction to protect a person who cannot protect themselves, but there was no compelling evidence of incompetence on M.V.'s part before the court.

Also, the Supreme Court and other appellate courts "have sided with individuals and their treatment choices over the wishes and concerns of others, including in the context of MAiD."

He found that W.V. did not have a legal interest in M.V.'s medical decision-making or AHS's administrative actions regarding M.V.'s medical care. He also did not have private interest standing as medical assessments are private between patient and doctor.

However, W.V. was found to have a genuine interest in the proceeding and was granted public interest standing. While he was not a "typical litigant" — like an interest group or service organizations — W.V. was the appropriate plaintiff to advance the proposed judicial review proceeding, the court found.

Justice Feasby noted that provisions of the *Criminal Code* on MAiD are still relatively new, with little judicial consideration so far, and even less judicial consideration has been given to provincial health authorities' policies surrounding MAiD.

W.V. argued that the court should grant an injunction to prevent the harm of M.V.'s death as there would then be a statutory cause of action for wrongful death against AHS and the doctors regarding the potential negligence around the administrative conduct involved in the tie-breaking. The court found this raised serious issues to be tried.

Justice Feasby acknowledged that W.V. would experience irreparable harm in the form of grief if M.V. suffered a wrongful death. However, this was outweighed by M.V.'s irreparable harm in the loss of autonomy and dignity in her choice of living or dying.

She would also be put in a position "where she would be forced to choose between living a life she has decided is intolerable and ending her life without medical assistance," putting her at increased risk of pain, suffering and lasting injury.

"Though I have determined that the balance of harms weighs in favour of M.V., nothing that I have written should be taken to minimize or diminish W.V.'s potential loss," wrote Justice Feasby.

He added, speaking to M.V., "[m]y decision recognizes your right to choose a medically assisted death; but it does not require you to choose death."

The interim injunction was set aside. The decision was stayed for 30 days to allow W.V. to commence an appeal. The interim injunction would remain for the duration of the stay.

Counsel for W.V. were Sarah Miller and Emily Amirkhani of JSS Barristers.

Counsel for M.V. were Austin Paladeau and Evan Jovanovic of Macleod Law LLP.

Counsel for Alberta Health Services were John Siddons and Amanda Cramm.

Counsel for Dr. P was Tim Ryan of Gowling WLG.

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