

**In the Court of Appeal of Alberta**

**Citation: Hughes (Estate) v. Brady, 2007 ABCA 277**

**Date:** 20070831

**Docket:** 0601-0169-AC

0601-0183-AC

0601-0275-AC

**Registry:** Calgary

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0601-0275-AC

**Between:**

**Lawrence Alexander Hughes, Administrator Ad Litem  
for the Estate of Bethany Abigail Hughes, Deceased,  
and Lawrence Alexander Hughes in his own right**

Appellants  
(Plaintiffs)

- and -

**Shane Heath Brady, David Miles Ghan, Merrill Morrell, Thomm Bokor,  
Watch Tower Bible and Tract Society of Canada, Dr. A. Robert Turner,  
Dr. Andrew Belch, Cross Cancer Institute, and Alberta Cancer Board**

Respondents  
(Defendants)

**Docket:** 0601-0169-AC

**Between:**

**Lawrence Alexander Hughes, Administrator Ad Litem  
for the Estate of Bethany Abigail Hughes, Deceased,  
and Lawrence Alexander Hughes in his own right**

Appellants  
Respondents in Cross-Appeal  
(Plaintiffs)

- and -

**Shane Heath Brady, David Miles Gnam**

Respondents  
Appellants in Cross-Appeal  
(Defendants)

- and -

**Merrill Morrell, Thomm Bokor, Watch Tower Bible and Tract Society  
of Canada, Dr. A. Robert Turner, Dr. Andrew Belch,  
Cross Cancer Institute, and Alberta Cancer Board**

Respondents  
(Defendants)

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**The Court:**

**The Honourable Mr. Justice Peter Martin  
The Honourable Mr. Justice Jack Watson  
The Honourable Mr. Justice Frans Slatter**

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**Memorandum of Judgment**

Appeal from the Orders by  
The Honourable Madam Justice P.A. Rowbotham  
Dated the 17<sup>th</sup> day of May, 2006  
The Honourable Mr. Justice G.C. Hawco  
Dated the 13<sup>th</sup> day of June, 2006  
The Honourable Mr. Justice G.C. Hawco  
Dated the 20<sup>th</sup> day of June, 2006  
(2006 ABQB 159, Docket: 0401-13156)

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## Memorandum of Judgment

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### The Court:

[1] These appeals arise from a number of interlocutory orders made in these proceedings. The underlying issues are the ability of the appellant Lawrence Alexander Hughes to maintain certain actions on his own behalf, and on behalf of the estate of his late daughter, Bethany Abigail Hughes.

### Facts

[2] In February of 2002 Bethany Hughes was diagnosed with leukemia. The conventional medical treatment of chemotherapy required blood transfusions, something that was resisted by the Hughes family because they were Jehovah's Witnesses. Bethany Hughes, who was at that time 16 years of age, refused to consent to the transfusions, initially with the support of her parents.

[3] After obtaining medical opinions, the Director of Child Welfare decided to apprehend Bethany in order to gain control of her medical treatment. On February 18, 2002 the Provincial Court granted an apprehension order, and medical treatment commenced, over the objections of Bethany: *Alberta (Director of Child Welfare) v. B.H.*, 2002 ABPC 39, 6 Alta. L.R. (4<sup>th</sup>) 34 (Jordan, J.). By that time Lawrence Hughes was supportive of the blood transfusion treatment, but Bethany Hughes and her mother Arliss Hughes still opposed it.

[4] The apprehension order was appealed to the Court of Queen's Bench, where the appeal was dismissed: *B.H. (Next Friend of) v. Alberta (Director of Child Welfare)*, 2002 ABQB 371, 3 Alta. L.R. (4<sup>th</sup>) 16 (Kent, J.). The Court of Queen's Bench determined that chemotherapy with blood transfusions was the appropriate treatment, and was in Bethany's best interests. While Bethany was found to be a mature minor at common law, and therefore entitled to be consulted, the Queen's Bench Justice concluded that Bethany was not in a position to make independent decisions about her medical care.

[5] The respondents David Gnam and Shane Brady are lawyers, and they represented Bethany Hughes and her mother on the appeal from the original Provincial Court apprehension order. They were also at the time the lawyers for the Watch Tower Bible and Tract Society, and are themselves Jehovah's Witnesses and Elders of the Jehovah's Witness congregation. At the appeal of the apprehension order to the Court of Queen's Bench, an unsuccessful attempt was made by the appellant to have them removed as counsel for Bethany, based on allegations of conflict of interest: *B.H. (Next Friend of) v. Alberta (Director of Child Welfare)*, 2002 ABQB 371, 3 Alta. L.R. (4<sup>th</sup>) 16 at paras. 9-10. One allegation was that their religious connection undermined their professional objectivity and representation of Bethany. The Queen's Bench Justice held that there is a presumption that counsel will carry out their duties in accordance with their professional obligations.

Given the urgency of resolving the medical issues, she indicated that she was not prepared “to embark on a long investigation to determine if that presumption should be overturned”.

[6] A further appeal to the Court of Appeal was dismissed: ***B.H. (Next Friend of) v. Alberta (Director of Child Welfare)***, 2002 ABCA 109, 3 Alta. L.R. (4<sup>th</sup>) 44. The Court of Appeal found no reviewable error in the decision that at the critical points in time Bethany was unable to exercise independent judgment about her medical care. Leave to appeal to the Supreme Court of Canada was refused: ***B.H. (Next Friend of) v. Alberta (Director of Child Welfare)***, [2002] S.C.C.A. No. 196 (QL).

[7] Following the apprehension order, the Director of Child Welfare applied for a Temporary Guardianship Order for Bethany, as required under the *Child Welfare Act*, R.S.A. 2000, c. C-12. By July 2, 2002, Bethany had received some 80 transfusions, but unfortunately the treatment was not effective. The appellant wanted the blood transfusions and chemotherapy to continue despite the medical opinions that they were no longer medically indicated. By the summer of 2002, Bethany was in palliative care. On July 2, 2002, Vickery, J. dismissed the application for the Temporary Guardianship Order because the doctors had decided no further blood transfusions would be administered, and Bethany and her mother were not resistant to other forms of treatment: see para. 46, *infra*.

[8] Bethany was discharged from the Alberta Children’s Hospital in Calgary on July 13, 2002. She was placed under the care of the defendant doctors Turner and Belch at the Cross Cancer Institute in Edmonton. They tried treatments (arsenic trioxide and Vitamin C) that did not involve blood transfusions. Further treatment at the Cross Cancer Institute was unsuccessful, and Bethany died on September 5<sup>th</sup>, 2002.

[9] The death of Bethany marked the beginning of the present litigation. The appellant Lawrence Hughes had abandoned his membership as a Jehovah’s Witness, and divorced his wife. The divorce proceedings between Lawrence Hughes and Arliss Hughes were resolved at a trial in October of 2003: ***L.A.H. v. A.C.H.***, [2003] A.J. No. 1396 (QL) (Nation, J.).

[10] Before she died, Bethany had executed a putative will naming her mother as her executor. This will was legally ineffective in light of her age and s. 9 of the *Wills Act*, R.S.A. 2000, c. W-12. Around October 9, 2002, Bethany’s mother applied for a grant of administration of the estate on Court of Queen’s Bench File No. 94486. The appellant opposed her application, taking the position at that time that the Public Trustee and Public Guardian should be appointed. Bethany’s mother discontinued her application in March, 2003.

[11] On August 25, 2004 Lawrence Hughes applied *ex parte* to be appointed administrator *ad litem* of the estate of his daughter. That order was granted by LoVecchio, J. The appellant’s affidavit

in support alleged “inadequate medical treatment and other wrongful acts”. Counsel had the draft Statement of Claim with him when making the application and told LoVecchio, J. that this was a “rather significant action against The Watchtower Society and others”. An application by Bethany’s mother to set aside that order was heard on February 23, 2005, with Reasons for Judgment issued on February 25, 2005: **B.A.H. Estate v. A.C.H.**, 2005 ABQB 125, [2005] A.J. No. 506 (QL) (Hawco, J.). Justice Hawco declined to set aside the order, noting that LoVecchio, J. had the Statement of Claim before him, and that LoVecchio, J. must have been persuaded that the imminent expiry of the limitation period made it urgent enough to proceed on an *ex parte* basis. Hawco, J. was not then persuaded that any material non-disclosure was sufficient to set aside the appointment of the appellant, even if he “may not be as unbiased as an Administrator *ad litem* might generally be considered to be”.

[12] The appellant then commenced this action on his own behalf, and on behalf of his daughter’s estate. The action alleges inappropriate treatment of his daughter by the doctors at the Cross Cancer Institute, a conspiracy to prevent her from getting the proper treatment, and undue influence of his daughter causing her to withhold her consent to appropriate medical treatment. His former wife Arliss (Bethany’s mother) was originally included as a defendant, but the action was discontinued against her. The action continued against various healthcare professionals, the Watch Tower Society, and its lawyers Brady and Gnam.

[13] In February 2006 the Watch Tower Society and its elders and lawyers brought an application to strike out the statement of claim. The court struck out all of the claims by Lawrence Hughes in his personal capacity, and many of the claims brought on behalf of the Estate of Bethany Hughes: **Hughes Estate v. Hughes**, 2006 ABQB 159, 57 Alta. L.R. (4th) 257 (Rowbotham, J.). The order striking out large parts of the claim is the subject of one of these appeals.

[14] The chambers judge categorized the claim as being largely one in tort. There are several discrete allegations. The claim alleges that the Watch Tower Society and its elders had imposed their system of belief on Bethany, and taken away her ability to form an independent judgment about her medical care. The chambers judge concluded that there is no independent tort of undue influence, although undue influence is relevant to some recognized actions, and struck out this claim.

[15] The statement of claim also alleges that the Watch Tower Society and its elders misrepresented the nature and quality of the chemotherapy and blood transfusion treatment to Bethany. The chambers judge concluded that the essence of this pleading was that the Jehovah’s Witness’s beliefs regarding blood transfusions are wrong and contrary to scientific knowledge. Based on the assertions of the appellant in his brief, she concluded that the appellant was grounding these elements of the case on disputes over religious doctrine and its effect on personal choices. The chambers judge concluded that such issues are not justiciable under the principles in **Syndicat Northcrest v. Amselem**, [2004] 2 S.C.R. 551, 2004 SCC 47, and struck them out.

[16] The claim against the Watch Tower lawyers alleges that at the time they represented Bethany and her mother, they were also lawyers for and employees and members of the Watch Tower Society. As such it is alleged that they were in a conflict of interest. It further alleges that because of their own beliefs they were unable to give Bethany fully informed and impartial advice, which would enable her to provide an informed consent to medical treatment. The chambers judge concluded that these allegations did disclose a cause of action, and declined to strike them out. The Watch Tower lawyers cross-appeal this portion of the judgment.

[17] The claim against the various healthcare professionals and institutions alleges medical treatment without proper consent. The chambers judge concluded that these allegations disclose a cause of action, and that they could not be struck out. The healthcare professionals were not parties to the application to strike, and so have not appealed this ruling. The defendant lawyers however argue that these allegations should also be struck or summarily dismissed.

[18] The chambers judge struck out a claim based on an alleged breach of the *Child Welfare Act*, on the basis that the *Child Welfare Act* does not create any separate civil remedy for failure to report a child in need of protection. This issue was not raised by the appellant on appeal.

[19] The statement of claim also alleges a conspiracy by all of the defendants to commit wrongful acts to ensure that Bethany did not receive appropriate medical treatment, resulting in her death. The chambers judge concluded that the conspiracy was not pleaded with particularity, and that in any event the plea of conspiracy was essentially a repeat of the other specific allegations. The chambers judge struck out the conspiracy plea as an abuse of process.

[20] The appellant also pleaded certain claims on his own behalf. He alleged that the defendants had conspired to alienate his daughter from himself, and to conceal her whereabouts from him. The chambers judge found that it was contrary to public policy to extend tort principles into family law. She concluded that many of the claims were ones that should have been made in the divorce proceedings. The chambers judge concluded that the Watch Tower lawyers owed no duty to the appellant, as he was not their client. She accordingly struck out all the personal claims of the appellant. The appellant appeals those portions of her order.

[21] As previously noted, an application to set aside the appointment of the appellant as administrator *ad litem* was heard by Justice Hawco. He issued reasons dismissing that application on February 25, 2005: 2005 ABQB 125. The appellant's appointment as administrator was therefore still in force one year later (Feb. 24, 2006) when Rowbotham, J. issued her decision on the application to strike the pleadings. On June 13, 2006, an application was brought by the respondents asking Hawco, J. to reconsider his previous decision. That application was granted: *Hughes Estate v. Hughes*, [2006] A.J. No. 819 (QL). Hawco, J. held that there had been inaccurate information

given on the application resulting in the decision at 2005 ABQB 125 that justified a reconsideration, because the formal order had never been entered. The inaccurate information related to whether LoVecchio, J. had been given a full explanation of the nature of the litigation, its prospect of success, and the opposition of Arliss Hughes and Bethany Hughes to any such suit. Hawco, J. expressed concern about what he felt was a misrepresentation to himself in February, 2005 that LoVecchio, J. had been fully informed about the issues in the lawsuit, although he accepted that any inaccurate representations were inadvertent. He also accepted that LoVecchio, J. would have had the statement of claim and the appellant's affidavit before him at the time of the motion. However, he opined that none of what was given to LoVecchio, J. would have made him aware of the "legal battles that had occurred". He also felt that Bethany's mother should have been given notice of the application to appoint an administrator.

[22] Hawco, J. concluded that the appellant was not an appropriate person to be the administrator *ad litem*, because he had personal objectives that prompted him to pursue the action, only nominally on behalf of his daughter's estate. He also concluded that the claim was one which "the very person, the estate, for whom he wished to act, would have absolutely rejected any claim which he wished to put forward": *Hughes Estate v. Hughes*, [2006] A.J. No. 819 (QL) at para. 25. In other words, Bethany Hughes, if she were alive, would not have wanted to sue on the basis that she was not able to make an informed decision about her medical care. The appellant now appeals this order.

[23] When the ex-parte order appointing the appellant as administrator *ad litem* of his daughter's estate was struck out, his counsel (not the counsel on this appeal) applied for a stay of the order to permit time to find a more suitable administrator. A one week stay was granted. When the matter was heard again on June 20, 2006, it was reported that the Public Trustee's office had declined to become the administrator *ad litem*. The appellant then applied again to be appointed as the administrator *ad litem*, notwithstanding the order made one week earlier: *Hughes Estate v. Hughes*, [2006] A.J. No. 820 (QL) (Hawco, J.). The chambers judge referred to his observations of a week earlier, and said:

[48] In this particular case, Mr. Hughes is seeking to pursue an action on behalf of his daughter which she clearly would not pursue if she had any say in the matter. She has made that clear throughout. He is seeking throughout her actions while she was alive [sic]. Mr. Hughes is seeking damages for wrongful actions by the people who she trusted and relied upon. She is the one who made the decision not to accept any transfusions. She is the one who decided what treatment she would receive, and a court has previously determined that she was entitled to choose her treatments and that indeed the treatments that she was receiving were reasonable in Judge Vickery's view and Justice Nation's view.

The chambers judge reiterated that in his view Mr. Hughes “is pursuing his interests as opposed to the interests of his daughter”: *Hughes Estate v. Hughes*, [2006] A.J. No. 820 (QL) at para. 49. The chambers judge declined to reconsider or further stay his previous order. The effect of this ruling was to effectively terminate the whole lawsuit. The appellant appeals this order as well.

[24] By order of the Court all three of the subsisting appeals were consolidated: *Hughes Estate v. Hughes*, 2006 ABCA 391.

### ***Administrator Ad Litem***

[25] The respondents argue that the appellant is disqualified from acting as administrator of the estate of his daughter because he is in a conflict of interest. No one challenged the standing of the respondents (as potential defendants) to object to the status of the administrator, and we say nothing on that issue. Obviously a person in a conflict of interest should not be appointed as administrator. Therefore a potential defendant in an action by the estate, or someone who has a claim to estate assets inconsistent with the claim of the estate itself, cannot act on behalf of the estate. There is no disqualifying interest of that type here.

[26] The mere fact that the administrator might strongly believe in the merits of the cause of action being advanced by the estate does not create a conflict of interest. Nor does the fact that the administrator may have concurrent or parallel interests. For example, the administrator and the estate may have a similar cause of action against the same defendants arising out of the same tort or other breach of legal duty. Concurrent interests of this sort will generally not create a conflict of interest, although that might be the case, for example, if there was insufficient insurance coverage to meet all the claims. There is nothing in this record to suggest that the appellant would fail to zealously represent the interests of Bethany’s estate because he might harbour some *animus* against the persons he believes have caused harm to Bethany. Ironically, the respondents contend that it is *because* the appellant would be zealous in his pursuit of what he believes to be the interests of Bethany’s estate that he should be disqualified. There is also nothing on this record to suggest the appellant would prefer his own interests to the interests of the estate, especially since his personal claims have been struck out.

[27] It is suggested that the appellant is “pursuing his own agenda”, but that is not the same thing as a conflict of interest. The chambers judge held that the appellant wishes to pursue claims that his deceased daughter would never have wanted to pursue. The essence of the claims is however that Bethany was influenced by misrepresentations, and that if she had received proper and independent advice her views would have been different. In concluding that Bethany would not have wanted to pursue these claims the chambers judge assumed away the very basis of the claims.

[28] Assuming that the estate has valid claims, it is appropriate for an administrator to be appointed. An application to strike the administrator should not be used as a form of summary

judgment of those claims. Rowbotham, J. concluded (2006 ABQB 159) that there are known causes of action disclosed in the statement of claim. Bethany's mother was at one time a defendant in the action, and in any event is not interested in pursuing any claims the estate may have. The Public Trustee has declined to act. The only person who has shown an interest in advancing the causes of action the estate may have is the present appellant. He is one of only two beneficiaries of the estate, Bethany's mother being the other. Since there is no extant conflict of interest, and since he is willing to act as administrator, the appellant should not have been disqualified.

[29] The respondents allege that there is too much animosity between the beneficiaries of the estate to allow one of them to be the administrator, citing *Gronnerud (Litigation Guardians of) v. Gronnerud Estate*, 2002 SCC 38, [2002] 2 S.C.R. 417. It is unclear why this factor should be of any concern to the respondents. Mrs. Hughes opposes the litigation, and if she was the administrator she would presumably discontinue the action. There is however no ongoing disagreement about day-to-day management of the estate and litigation as there was in *Gronnerud*, nor any actual conflict of interest as was found there. The appellant is the only one who has expressed a willingness to pursue the claims of the estate. If there was another more neutral administrator in the wings, that might be an important factor. In the circumstances, animosity is not a sufficient factor to prevent the appointment of the appellants.

[30] The respondents rely on the finding that there was material non-disclosure or misrepresentation on the original *ex parte* application. The particular non-disclosure was that a copy of the statement of claim was not actually read by the Court prior to the granting of the order, and the details of the claim were not fully explained, although a draft copy of the statement of claim was available in court. That non-disclosure arguably justified a re-examination of the order, and it also arguably justified a re-opening of the issue once the non-disclosure was discovered. However even if the original *ex parte* order was properly set aside for non-disclosure, there was still a need to examine whether an order appointing the appellant was justified. An appointment of an administrator to prevent the expiry of the limitation period is usually reasonable, given that there will be an opportunity to review the order on notice after the fact.

[31] What is a material non-disclosure, and its effect, depends on the context. An application to appoint an administrator is not a summary judgment application, and the merits of the litigation are not determinative unless the claim is clearly without any merit. That the proposed defendants would prefer not to get sued is irrelevant (and raises the standing issue previously mentioned). Given that there are some viable issues deserving of adjudication disclosed in the statement of claim, the limitation period has expired, and there is no other administrator willing to act, the non-disclosure was not sufficiently egregious to leave the estate without any way to pursue those viable claims.

[32] Appeals No. 0601-0183 and 0601-0275 should accordingly be allowed, and the appellant should be restored as the administrator *ad litem* of his daughter's estate.

### **Application to Strike**

[33] An application to strike a proceeding on the basis that it does not disclose a cause of action assumes that the facts as pleaded are true. In order to strike the pleading it must be demonstrated that it is plain and obvious that the statement of claim discloses no reasonable cause of action: *Hunt v. T & N, P.L.C.*, [1990] 2 S.C.R. 959. The novelty of the claim is not a reason to strike it.

### **Undue Influence**

[34] The learned chambers judge concluded that there is no independent tort of undue influence recognized in Canadian law, citing *Khaper v. Canada* (1999), 178 F.T.R. 68. We agree that there is no such cause of action, and the pleadings with respect thereto were properly struck.

### **Misrepresentation and Deceit**

[35] The statement of claim pleads misrepresentation and deceit, which are well established causes of action. The particular misrepresentation is alleged to be that the defendants told Bethany that “blood transfusions . . . would not help cure her cancer and intentionally misstated to Bethany that a chemotherapy/blood transfusion treatment protocol for her leukemia was experimental when in fact it was not” (Statement of Claim, para. 27(a)). The chambers judge concluded that the law does not permit the adjudication of the validity of religious beliefs, citing *Syndicat v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47. The chambers judge concluded:

[40] Here, the crux of the statement of claim is that the beliefs of the Jehovah’s Witness regarding blood transfusions are wrong and contrary to scientific knowledge. This is the very inquiry that Iacobucci, J. warns the court not to pursue. Mr. Hughes asks this court to interpret the content of a religious precept. This request is not justiciable and those portions of the statement of claim which raise those allegations are struck.

In our view the chambers judge erred in striking these pleadings on this basis.

[36] The *Charter* cases on Freedom of Religion, including *Amselem*, have made it clear that the test for religious belief is subjective. In a *Charter* analysis, the threshold issue is whether the applicant truly believes in a particular religious doctrine. The courts will not examine whether the belief is objectively true, or even whether the majority of the members of that religion accept the doctrine as stated by the applicant. The *Charter* cases however concern the right of the religious adherent to believe and worship as he or she wishes. This is a very personal and subjective right. Freedom of religion does not include any right to impose religious beliefs on third parties.

[37] Freedom of religion is subject to those limitations that are justifiable in a free and democratic society. The boundaries of freedom of religion are too unclear to warrant striking out this pleading. It is not at all clear to what extent a religious adherent can convince another person to take actions for religious reasons that will cause him or her bodily harm or even death, even if the religious belief is sincerely held. Assume, as an example, that a religious adherent persuades a third party diabetic that he or she should stop taking insulin, and that divine intervention will cure him or her. Assume further that the diabetic follows this advice and dies as a result. Can it be said that the estate of the deceased would have no cause of action against the religious adherent? If the religious adherent withheld antibiotics from a sick person, either in favour of a divine healing, or in favour of traditional herbal remedies, is the religious adherent immune from an action if the patient dies? Cases such as *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at paras. 86, 107, 114, 212-7, 225-6; *R. v. Tutton*, [1989] 1 S.C.R. 1392; *R. v. Canhoto* (1999), 127 O.A.C. 147, 140 C.C.C. (3d) 321; *B. (V.) v. Cairns* (2003), 65 O.R. (3d) 343 at para. 139; *Rex v. Elder*, [1925] 3 D.L.R. 447, [1925] 2 W.W.R. 545, 35 Man. R. 161, 44 C.C.C. 75 (C.A.); *R. v. Brooks* (1902), 9 B.C.R. 13, 5 C.C.C. 372 (Ct. Crim. App.); and *R. v. Lewis* (1903), 6 O.L.R. 132, 7 C.C.C. 261 (C.A.) show that the answer to these questions is far from clear.

[38] It might be that the *Charter* protected right of freedom of religion would protect actions of this sort if they are honestly held. It might be argued at trial that there is no reasonable limit that would be recognized in a free and democratic society that would prevent the religious adherent from giving such medical advice. It is not, however, appropriate to decide such difficult questions in a motion to strike out pleadings. Whether religious views provide a defence to or justification for misrepresentations that cause bodily harm or death should only be decided on a full factual record. It is not “plain and obvious” that a sincerely held religious belief would be an answer to a claim where application of the religious doctrine is said to have caused a death.

[39] In any event, the pleadings will not require any examination of the “truth” of the respondents’ beliefs about blood transfusions. The misrepresentations pleaded are that it was falsely represented (i) that blood transfusions are an experimental treatment, and (ii) that blood transfusion treatment is ineffective. There is no indication on the record that either of these topics are the subject of any religious belief of the respondents. The record indicates that the respondents are opposed to transfusions as a matter of faith, not because they are experimental or ineffective.

[40] While the claims in misrepresentation cannot be struck, it must be made clear that the objective validity of the belief of the respondents that blood transfusions are prohibited by scripture is not an issue in this litigation, will not be the subject of discovery or production, and will not be an issue at trial. This is so even though the respondents may raise their sincerely held religious beliefs as a defence or justification.

[41] The chambers judge also struck the allegations of misrepresentation on the basis that no particulars were provided as required by Rule 115. A pleading that discloses a cause of action, but

is perhaps deficient through a lack of particulars, should not be struck out under Rule 129 without giving the plaintiff an opportunity to provide particulars. In any event, it is not clear what particulars are missing. The substance of the misrepresentations is well stated. The pleading deposes that the misrepresentations were made between February 15<sup>th</sup>, 2002 and July 29<sup>th</sup>, 2002. If the respondents believe other particulars are required, and that they are prejudiced by any alleged lack of particulars, the appropriate application can be brought.

### **Conflict of Interest Claims**

[42] The statement of claim alleges that the respondents Brady and Gnam are lawyers employed by the defendant Watch Tower Bible and Tract Society of Canada. The statement of claim pleads in paragraph 8:

The Society has an in-house legal department which operates out of Bethel-Canada, in which the Society employs lawyers and support staff to serve, protect and represent the Society's interest. Although the said legal department sometimes uses the name "W. Glen How and Associates, Barristers and Solicitors", it is a department of, and is controlled, directed and overseen by, the Society.

For the purpose of the motion to strike, these allegations are taken as being true. The statement of claim alleges that the respondent lawyers purported to act both for Bethany and for the Watch Tower Society at the same time. It is alleged that they were in a conflict of interest, in that their advice to Bethany could not be free and independent of the instructions they were given by the Society.

[43] The chambers judge concluded that these allegations potentially disclose a cause of action in Bethany's estate for breach of fiduciary duty. The respondent lawyers cross-appeal this conclusion, but the reasons of the trial judge disclose no error. The matter is not sufficiently clear to warrant striking the pleading. The chambers judge concluded however that the respondent lawyers owed no duty to the appellant in his personal capacity, and struck out his personal claims against them. This conclusion also discloses no error.

[44] The lawyer respondents argue that they were not counsel for Bethany after July 2002. That is a question of fact, but in any event the statement of claim (paras. 19(a), 27 (a) and (f)) alleges misrepresentations as early as February 2002. The exact scope of the allegations (especially considering the possibility of amendment to clarify the remaining allegations now that large portions have been struck) is not sufficiently clear to justify striking these pleadings. If the misrepresentations started in February, 2002, and continued through the period of transfusions, their effect in the period following the end of the transfusions is not plain and obvious.

## Claims against the Healthcare Defendants

[45] The healthcare defendants did not bring an application to strike the pleadings. The other defendants however applied to have the claim struck against the healthcare defendants as well. Since the chambers judge correctly held that the claim against the healthcare defendants discloses a cause of action, it is not necessary to discuss whether one defendant has standing to apply to strike the claim against another defendant.

## Issue Estoppel

[46] The respondents argue that the doctrines of issue estoppel or abuse of process prevent any claim that assumes that blood transfusions were an appropriate treatment for Bethany after July 2002. On July 2nd, 2002 Vickery, J. refused a Temporary Guardianship Order, effectively putting an end to the apprehension of Bethany under the *Child Welfare Act*. The order was refused because the premise of the apprehension was that Bethany needed blood transfusions, and that she and her mother would refuse them. By July all the doctors agreed that the transfusion therapy had not worked, and that there was no point in continuing it. Vickery, J. ruled (A.B. Vol. 4, pp. 113-4):

... the decision to make the section 26(2) order was based on the medical testimony. I believe that we're right back in that position again. Right now we have different medical testimony. The health of this young girl has not improved, in fact is in a serious state at this point, and the medical recommendation is palliative care which does not require blood transfusions.

The reason that, as I understand it from the evidence that I have heard today and previously, is – the reason that the Director was involved was because of the necessity for blood transfusions. Since there is no longer any necessity for blood transfusions then it's necessary to dismiss the application for a temporary guardianship order. The matter is simply ended, in my mind. And that, in effect, is my order.

The respondents argue that this ruling creates an issue estoppel over whether blood transfusions were an appropriate treatment after July.

[47] Once an issue has been finally decided the privies to that decision may not again litigate it. Even where the principles of issue estoppel do not strictly apply, the parallel doctrine of abuse of process may prevent the re-litigation of the issue: *Ernst and Young Inc. v. Central Guaranty Trust Co.*, 2006 ABCA 337, [2007] 2 W.W.R. 474, 66 Alta. L.R. (4th) 231, 397 A.R. 225; *Toronto (City) v. Canadian Union of Public Employees, Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 at paras. 35-37.

[48] In the child welfare proceedings, the style of cause was “In the matter of Bethany Hughes”: no parties were actually named. It seems likely that the Director of Child Welfare, Mr. and Mrs. Hughes (as guardians) and Bethany (and therefore her estate) were parties, and subject *inter se* to any issue estoppel arising from the proceedings. The transcript (A.B. Vol. 4, pg. 11) shows that the respondents Brady and Gnam were present as counsel for Bethany and Mrs. Hughes. Issue estoppel that binds the clients does not bind counsel. The other Watch Tower defendants were not represented or present. Counsel appeared for the Calgary doctors (not the defendant doctors), and also for the Calgary Health Region. It is unlikely that issue estoppel binds mere witnesses in the proceedings. Shortly put, it is unclear which if any of the present litigants are bound by any issue estoppel, or subject to the doctrine of abuse of process. The claim cannot be struck out on this basis.

### **Breach of Statutory Duty**

[49] The chambers judge concluded that there is no separate cause of action for failing to comply with the provisions of the *Child Welfare Act*, R.S.A. 2000, c. C-12. The appellant has not demonstrated any error in this conclusion.

### **Claim of Conspiracy**

[50] In addition to the discreet complaints previously discussed, the statement of claim also includes a claim for conspiracy by the various defendants, which essentially overlaps with all of the other causes of action. The chambers judge concluded that the claim of conspiracy to commit the torts added nothing to the allegations that the torts themselves were committed. The chambers judge also concluded that the tort of conspiracy should not be extended into the family law area, citing *Frame v. Smith*, [1987] 2 S.C.R. 99. The appellant has not demonstrated any error in the analysis of the chambers judge on this issue.

### **Personal Claims of Lawrence Hughes**

[51] The appellant launched claims in his capacity as administrator of the estate of his daughter, and also in his own right. The chambers judge concluded that he had not pleaded any cause of action that accrued to himself personally.

[52] To the extent that the appellant has personally launched claims arising out of the custody, access to, and parenting of his daughter, we agree with the trial judge that the doctrine in *Frame v. Smith* prevents such actions. These claims were also largely an impermissible collateral attack on the divorce proceedings. We also agree that in the circumstances the defendant lawyers owed no duty to the appellant in his personal capacity: *Performance Industries Ltd. v. Hancock*, 2007 ABCA 6 at para.13; *D. (B.) v. Syl Apps Secure Treatment Centre*, 2007 SCC 38 at paras. 31-34. The appellant has not demonstrated any error in this portion of the judgment.

**Conclusion**

[53] In conclusion, the orders striking the appellant as the administrator *ad litem* of the estate of Bethany Hughes are set aside. Appeals 0601-0183AC and 0601-0275AC are allowed.

[54] Appeal No. 0601-0169AC concerning the striking of the pleadings is allowed in part. The pleadings of deceit and misrepresentation are restored, but the appeal is otherwise dismissed. Paragraphs 10, 11, 16, 19 (except the words between “these Defendants” in the 3rd and 4th lines, and “these Defendants” in the 9th line), 26, 27(a) (except the words between “these Defendants” in the 4th line and “intentionally misstated” in the 6th line), 27(c), 27(d) (except the words “undue influence of and”), 27(i), 38, and 44 of the Statement of Claim (that were struck by the chambers judge) should be restored. The cross-appeal is dismissed.

Appeal heard on June 29, 2007

Memorandum filed at Calgary, Alberta  
this 31st day of August, 2007

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Martin, J.A.

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Watson, J.A.

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Slatter, J.A.

**Appearances:**

J. Pollock  
for the Appellant

Shane Heath Brady and  
David Miles Gnam  
Respondents, on own behalf

A. Ludkiewicz  
for the Respondents, Merrill Morrell, Thomm Bokor, Watch Tower Bible and Tract  
Society of Canada