

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

SIERRA KISNER *ex rel* REBECCA BENNETT,

Plaintiff,

v.

CIVIL CASE NO.:

**WEST VIRGINIA UNIVERSITY HOSPITALS,
d/b/a, RUBY MEMORIAL HOSPITAL,**

Defendant.

VERIFIED COMPLAINT AND MOTION

NOW COMES Sierra Kisner (hereinafter, "Plaintiff") as medical surrogate for and on behalf of her mother, Rebecca Bennett, an incapacitated person, and complains as follows:

VENUE

1. Venue is appropriate and not in dispute. Plaintiff is a resident of Monongalia County, West Virginia. Defendant West Virginia University Hospitals (hereinafter, "Defendant") is located and conducts business in Morgantown, Monongalia County, West Virginia.

PARTIES

2. The Plaintiff is the biological daughter of Rebecca Bennett and, on or about February 16, 2010, has been appointed by the Defendant as the medical surrogate for Rebecca Bennett.
3. The Defendant owns and operates a health care facility in Morgantown, Monongalia County, West Virginia.

UNDISPUTED FACTS

4. On or about February 14, 2010, Ms. Bennett was discovered unconscious by a member of her family. Upon her discovery, the family immediately contacted emergency services who arrived and transported Ms. Bennett to the Defendant's hospital for emergency care.
5. It is undisputed that Ms. Bennett has suffered from diabetes and from a variety of problems caused by diabetes, including kidney failure.
6. It is also undisputed that Ms. Bennett arrived at the hospital in an unconscious condition and has not fully regained consciousness since her admission.
7. Sierra Kisner is the biological daughter to Rebecca Bennett.
8. It is undisputed that Rebecca Bennett has never executed an advance medical directive, medical power of attorney, or living will.
9. Shortly after her arrival, the Defendant declared, in writing, Sierra Kisner to be the surrogate decision maker, or medical surrogate, for her mother, Rebecca Bennett. *See Exhibit 1.*
10. Further, it is undisputed that Ms. Bennett requires routine dialysis treatments to sustain her life.

STATEMENT OF LAW

11. West Virginia Code places a preference upon a person's medical treatment as outlined by the an individuals advance medical directive, medical power of attorney, or living will. *See W.Va. Code § 16-30-2(b)(4) (2010).*
12. In the event a person is incapacitated and has not expressed himself or herself though some form of advance medical directive, West Virginia code provides a process whereby a surrogate decisionmaker may be appointed. *See W.Va. Code § 16-30-8 (2010).*

13. Preference for selecting a surrogate is given to members of the incapacitated person's family and close friends, including, and pertinent to this proceeding, the person's adult children. *See* W.Va. Code § 16-30-8(a)(2) (2010).
14. It is clear that the health care facility and medical staff may choose the surrogate. *See* W.Va. Code § 16-30-8(a) and W.Va. Code § 16-30-8(b) (2010). However, it is equally clear, that at no time may the health care facility, treating physician, administrator of a health care facility, or someone employed by the health care facility qualify or serve as surrogate to an incapacitated person within their care. *See* W.Va. Code § 16-30-8(i) (2010).
15. In the absence of an advance medical directive, or sufficient reason to believe the decisions of the surrogate chosen by the health care facility are contrary to the incapacitated person's religious beliefs, "The surrogate is authorized to make health care decisions on behalf of the incapacitated person without court order or judicial involvement." *See* W.Va. Code § 16-30-8(c) (2010).
16. Importantly, the reliance on the surrogate's decisionmaking authority by the health care facility, attending physician, or advanced nurse practitioner is also dependent upon having, "not received actual notice of opposition to any health care decisions made pursuant to the provisions of [West Virginia Code § 16-30-8]." *See* W.Va. Code § 16-30-8(c)(4).
17. West Virginia Code does not define what is meant by "actual notice;" however, it does define "actual knowledge" to mean:

The possession of the person's wishes communicated to the health care provider orally or in writing by the person, the person's medical power of attorney representative, the person's health care surrogate or other individuals resulting in the health care provider's personal cognizance of these wishes. *Constructive*

notice and other forms of imputed knowledge are not actual knowledge. See W.Va. Code § 16-30-3(a) (2010). [emphasis added].

18. West Virginia Code also provides a clear procedure should the surrogate and “the person’s best interests as determined by the attending physician when the person’s wishes are unknown.” *See W.Va. Code § 16-30-5(d) (2010).*

19. In the event of such a conflict,

[T]he attending physician shall attempt to resolve the conflict by consultation with a qualified physician, an ethics committee or by some other means. *If the attending physician cannot resolve the conflict with the medical power of attorney representative, the attending physician may transfer the care of the person pursuant to subsection (b), section twelve of this article. Id. [emphasis added].*

20. A court may grant a temporary restraining order, without notice to the adverse party only if,

(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party’s attorney can be heard in opposition, and (2) the applicant’s attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. *W. Va. R.C.P. 65(b) (2010).*

21. If granted, granted, the temporary restraining order will issue for a period of ten (10) days. Following which, the matter will be set for a hearing upon a permanent injunction. *Id.*

22. A temporary restraining order shall be secured by a bond, “in such sum as the court in its discretion deems proper.” *Id.* at (c).

COMPLAINT and MOTION FOR TEMPORARY RESTRAINING ORDER

23. The Defendant has instructed the Plaintiff that, in their judgment, it is medically “futile” to continue life-sustaining treatment to Ms. Bennett.

24. Over Ms. Bennett’s understandable objections, the Defendant has indicated to the Plaintiff that they wish to discontinue dialysis treatments to Ms. Bennett. If that is accomplished, the Plaintiff will suffer immediate and irreparable harm in that her mother, for whom she is surrogate, will die in a period a few days.

25. Moreover, the Defendant has indicated that it intends to remove the Plaintiff as surrogate decisionmaker, citing the provision of W.Va. Code § 16-30-8(c)(4). In other words, the Defendants claim “actual notice of opposition” to the decisions the Plaintiff has made as surrogate to her mother.

26. In support of this claim, the Defendants claim that members of their staff have been told by members close to the Plaintiff, including Ms. Bennett’s fiancé, her biological sister, her aunt by marriage, and a coworker, that, in their estimation, Ms. Bennett would refuse the level of medical intervention and course of treatment decided by the Plaintiff.

27. However, Ms. Bennett’s fiancé, James Whitehead; her biological sister, Caroline Goodwin; her aunt by marriage, Caroline Martin; and her coworker, Becky Johnson, have each executed an affidavit to the contrary. *See Exhibits 2-5.*

28. In fact, each have affied that they are in support of the Plaintiff, do not wish to have her removed as surrogate, have not opposed the Plaintiff’s decisions as to standard of care, and have provided neither actual nor constructive notice to the Defendant in opposition to the Plaintiff’s decisions. *Id.*

29. Even assuming the Defendant could, over the objection of family members and the duly selected, qualified surrogate, remove and replace the Plaintiff, the Plaintiff would challenge the selection of the new surrogate. Thus, she would invoke the procedures outlined in W.Va. Code § 16-30-8(e), requiring the Defendant defend that decision in court. *See* W.Va. Code § 16-30-8(e) (2010).
30. But, as subsection (e) makes clear, we need not reach that level, if for no other reason than that subsection makes clear, “There is a rebuttable presumption that the selection of the surrogate was valid and the person who is challenging the selection shall have the burden of proving the invalidity of that selection.” *Id.*
31. In this case, the Defendants are challenging *their own selection* of the Plaintiff as surrogate. At a minimum, therefore, the rebuttable presumption afforded the Plaintiff under the afore referenced subsection applies.
32. More importantly, there exists no “actual notice of opposition” whereby the Defendants can claim to be excused from following the Plaintiff’s wishes as to the medical care of her mother, Rebecca Bennett.
33. At best, the Defendant may object conscientiously and seek to have Ms. Bennett transferred to another facility. *See* W.Va. Code §§ 16-30-5(e), 16-30-10(e), and 16-30-12(b).


PRAYER FOR RELIEF

THEREFORE, the Plaintiff MOVES this Court issue a temporary restraining order to PREVENT the Defendant from discontinuing life-sustaining care, including dialysis, to Ms. Rebecca Bennett, consistent with the wishes of her surrogate, the Plaintiff, and ENJOINS the Defendant against any and all attempts to remove the Plaintiff as a duly qualified and appointed surrogate under the laws of the State of West Virginia.

MOREOVER, the Plaintiff MOVES this Court to ORDER the Defendants to cooperate with the Plaintiff in the continued care or transfer of Ms. Rebecca Bennett, as per the wishes of her surrogate, the Plaintiff.

FINALLY, the Plaintiff MOVES this Court to REQUIRE nominal security for the issuance of a temporary restraining order. In support whereof, the Plaintiff avers that she is proceeding *in forma pauperis*. Moreover, her attorney appears on her behalf *pro bono*.

Respectfully submitted,


Sierra Kisner, by and through her attorney,
Jeremiah G. Dys, Esq.,
WV Bar #: 9998.

VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF MONONGALIA, to-wit:

Sierra Kisner, a credible person, being first duly sworn, upon her oath does hereby depose and say that she is a plaintiff in the foregoing *Verified Complaint and Motion*; that she has read the foregoing Complaint and that the facts contained therein are true, except insofar as they are therein stated to be upon information and belief, and, insofar as they are therein stated to be upon information and belief, she believes them to be true.

Sierra Kisner

Taken, subscribed and sworn to before me this _____ day of March 2010.

My commission expires _____.

Notary Public

State of West Virginia,
County of Monongalia

Affidavit of James Whitehead

Before me, the undersigned notary, PAULA K. WILLIAMS, on this 25th day of March, 2010, personally appeared James Whitehead, known to me to be a credible person and of lawful age, who being first duly sworn, on his oath, deposes and says:

1. I am in a committed relationship with Rebecca Bennett.
2. I am aware of Rebecca Bennett's severe medical condition and understand the level of medical treatment and intervention that she is receiving from WVU Ruby Memorial Hospital, its physicians, and staff (hereafter, "Hospital").
3. I understand that Sierra Kisner, the biological daughter of Rebecca Bennett has been appointed by the Hospital as Ms. Bennett's medical surrogate.
4. It is also my understanding that I have been considered as a potential medical surrogate, but Ms. Kisner was selected by the Hospital to be Ms. Bennett's medical surrogate because she ranks higher in priority than I do in relationship to Ms. Bennett.
5. Therefore, I do hereby affirm and declare the following:
 - a. That I support the selection of Ms. Sierra Kisner as the medical surrogate to Rebecca Bennett.
 - b. That I do not wish that Ms. Sierra Kisner be removed as the medical surrogate to Rebecca Bennett.
 - c. That I do not oppose any of the decisions that Ms. Kisner has made on behalf of Ms. Bennett in regards to her standard of care at the Hospital, and
 - d. That I have not provided actual or constructive notice to the Hospital that I am in opposition to any health care decisions made by Ms. Kisner as Ms. Bennett's medical surrogate.

Signed: James E. Whitehead
James Whitehead

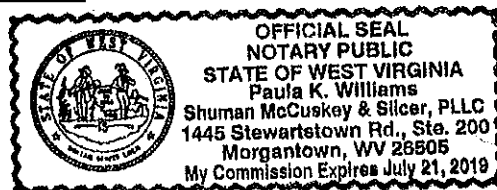
Date: March 25, 2010

Subscribed and signed before me this 25th day of March, 2010.

Notary: Paula K. Williams

My commission expires: July 21, 2019

Seal:

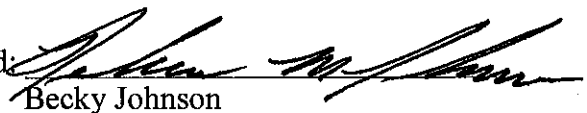


State of West Virginia,
County of Monongalia

Affidavit of Becky Johnson

Before me, the undersigned notary, PAULA K. WILLIAMS, on this 25th day of March, 2010, personally appeared Becky Johnson, known to me to be a credible person and of lawful age, who being first duly sworn, on his oath, deposes and says:

1. I am a coworker of Rebecca Bennett.
2. I am aware of Rebecca Bennett's severe medical condition and understand the level of medical treatment and intervention that she is receiving from WVU Ruby Memorial Hospital, its physicians, and staff (hereafter, "Hospital").
3. I understand that Sierra Kisner, the biological daughter of Rebecca Bennett has been appointed by the Hospital as Ms. Bennett's medical surrogate.
4. I have been present with Ms. Kisner and representatives of the Hospital when Ms. Bennett's care has been discussed and medical decisions have been made by Ms. Kisner.
5. Therefore, I do hereby affirm and declare the following:
 - a. That I support the selection of Ms. Sierra Kisner as the medical surrogate to Rebecca Bennett.
 - b. That I do not wish that Ms. Sierra Kisner be removed as the medical surrogate to Rebecca Bennett.
 - c. That I do not oppose any of the decisions that Ms. Kisner has made on behalf of Ms. Bennett in regards to her standard of care at the Hospital, and
 - d. That I have not provided actual or constructive notice to the Hospital that I am in opposition to any health care decisions made by Ms. Kisner as Ms. Bennett's medical surrogate.

Signed: 
Becky Johnson

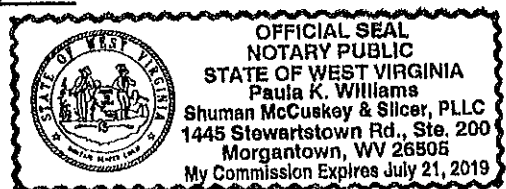
Date: 3.25.2010

Subscribed and signed before me this 25th day of March, 2010.

Notary: Paula K. Williams

My commission expires: July 21, 2019

Seal:



State of West Virginia,
County of Monongalia

Affidavit of Carolyn Goodwin

Before me, the undersigned notary, PAULA K. WILLIAMS, on this 25th day of March, 2010, personally appeared Carolyn Goodwin, known to me to be a credible person and of lawful age, who being first duly sworn, on his oath, deposes and says:

1. I am this biological sister of Rebecca Bennett.
2. I am aware of Rebecca Bennett's severe medical condition and understand the level of medical treatment and intervention that she is receiving from WVU Ruby Memorial Hospital, its physicians, and staff (hereafter, "Hospital").
3. I understand that Sierra Kisner, the biological daughter of Rebecca Bennett has been appointed by the Hospital as Ms. Bennett's medical surrogate.
4. It is also my understanding that I have been considered as a potential medical surrogate, but Ms. Kisner was selected by the Hospital to be Ms. Bennett's medical surrogate because she ranks higher in priority than I do in relationship to Ms. Bennett.
5. Therefore, I do hereby affirm and declare the following:
 - a. That I support the selection of Ms. Sierra Kisner as the medical surrogate to Rebecca Bennett.
 - b. That I do not wish that Ms. Sierra Kisner be removed as the medical surrogate to Rebecca Bennett.
 - c. That I do not oppose any of the decisions that Ms. Kisner has made on behalf of Ms. Bennett in regards to her standard of care at the Hospital, and
 - d. That I have not provided actual or constructive notice to the Hospital that I am in opposition to any health care decisions made by Ms. Kisner as Ms. Bennett's medical surrogate.

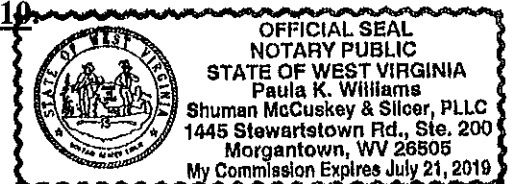
Signed: Carolyn Goodwin
Carolyn Goodwin

Date: 3-25-2010

Subscribed and signed before me this 25th day of March, 2010

Notary: Paula K. Williams

Seal:



My commission expires: July 21, 2019

State of West Virginia,
County of Monongalia

Affidavit of Caroline Martin

Before me, the undersigned notary, PAULA K. WILLIAMS, on this 25th day of March, 2010, personally appeared Caroline Martin, known to me to be a credible person and of lawful age, who being first duly sworn, on his oath, deposes and says:

1. I am related to Rebecca Bennett through marriage.
2. I am aware of Rebecca Bennett's severe medical condition and understand the level of medical treatment and intervention that she is receiving from WVU Ruby Memorial Hospital, its physicians, and staff (hereafter, "Hospital").
3. I understand that Sierra Kisner, the biological daughter of Rebecca Bennett, has been appointed by the Hospital as Ms. Bennett's medical surrogate.
4. I have been present with Ms. Kisner and representatives of the Hospital when Ms. Bennett's care has been discussed and medical decisions have been made by Ms. Kisner.
5. Therefore, I do hereby affirm and declare the following:
 - a. That I support the selection of Ms. Sierra Kisner as the medical surrogate to Rebecca Bennett.
 - b. That I do not wish that Ms. Sierra Kisner be removed as the medical surrogate to Rebecca Bennett.
 - c. That I do not oppose any of the decisions that Ms. Kisner has made on behalf of Ms. Bennett in regards to her standard of care at the Hospital, and
 - d. That I have not provided actual or constructive notice to the Hospital that I am in opposition to any health care decisions made by Ms. Kisner as Ms. Bennett's medical surrogate.

Signed: Caroline Martin
Caroline Martin

Date: 3-25-2010

Subscribed and signed before me this 25th day of March, 2010.

Notary: Paula K. Williams

Seal:

My commission expires: July 21, 2019

