

CANADA / JUDGMENT

Atchison v. Carlson et al

2006 BCSC 744

COURT

Supreme Court of British Columbia

DECIDED

9 May 2006

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2006 BCSC 744 Atchison v. Carlson et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Atchison v. Carlson et al,

2006 BCSC 744

Date: 20060509

Docket: L95144

Registry: New Westminster

Between:

Carol Atchison

Petitioner

And

Karen Joanne Carlson, the Public Guardian and Trustee for

British Columbia

and The Canada Trust Company

Respondents

Before: The Honourable Mr. Justice McKinnon

Reasons for Judgment

Counsel for the Plaintiff:

K. Deane-Cloutier

Counsel for the Defendant:

B. Curran

Date and Place of Trial/Hearing:

March 30, 2006

New Westminster, B.C.

- [1] The Petitioner is the mother of the patient, Karen Carlson. She asks; for the appointment of Canada Trust to manage the estate of the patient in place of the Public Guardian, that the patient be declared incapable of managing her person and that she be appointed committee of the patient.
- [2] All persons entitled to notice of these applications have been served, including the patient. Consents of the patient's two siblings to the relief sought have been filed. The Patient has not responded.
- [3] The Public Guardian does not oppose the appointment of Canada Trust as committee of the estate but argues that the patient is capable of managing herself and thus it is not appropriate to appoint a committee of the person. In the alternative, if the patient is found incapable, it submits the mother is not the appropriate person to be appointed.
- [4] The Petitioner also seeks production of documents in an effort to assess the management history by the Public Guardian. The Respondent contends this is merely a "fishing expedition" and in any event is an application that should be made by the committee of the estate, in this case, Canada Trust, if it has grounds for same.

THE HISTORY

- [5] Karen was severely injured in a motor vehicle collision in 1984 when she was 15 years-old. At that time Carole was her custodial parent, having been divorced from the father who now lives in Golden, B.C. but who has had little or nothing to do with Karen over the years.
- [6] Litigation resulted in a structured settlement which has been administered by the Public Guardian.
- [7] Much of the material in support of the application was devoted to alleged difficulties between the family and the Public Guardian. This was in support of the request to have the estate administered by Canada Trust. Ultimately, The Public Guardian accepted this request and thus I need not dwell upon the complaints of the family, save for how they relate to the issues of committee of the person and the appropriate person to discharge that duty.
- [8] On March 8, 1988, Lamperson L.J.S.C. (as he then was), made an order appointing Carol committee of the person and the Public Guardian committee of the estate. Ultimately it was determined that as Karen was not 19 years-old at the time of the order, the orders were not valid, see *Macdonald Estate v. British Columbia (Public Guardian & Trustee)* (2003), 17

B.C.L.R. (4th) 267(C.A.). Also, the medical opinions filed with the application failed to mention incapability of "the person", referring only to "the estate". Notwithstanding, all parties carried on for many years in their respective capacities with no complaint being made about the orders.

- [9] The Public Guardian rectified the effect of the Macdonald ruling respecting the estate by obtaining a Certificate of Incapability on September 9, 2004. This Certificate made the Public Guardian committee of the estate, but technically there has never been a valid appointment for committee of the person. The Public Guardian contends that this Court cannot rely upon the two affidavits filed in 1988 because they do not refer to any opinion respecting the inability of the person, only the estate. Nor says the respondent, can the court rely upon the extensive reports of Dr. Chan since he is a psychologist, not a medical practitioner whose opinion is required by statute.
- [10] The petitioner has obtained the opinion of two medical doctors, Dr. Madelaine Oosthuizen and Dr. E. Ries, that the patient is incapable of managing her person. These were obtained May 6 and June 9, 2005, respectively. The Public Guardian complains that these opinions do not set out any clinical observations to support the opinions. This, it is said, should be contrasted with the opinion of Dr. Chale, a psychiatrist who in April 1998 considered that Karen was capable of managing her affairs. I was not persuaded by Dr. Chale's report or his assessment.
- [11] Dr. Chale saw Karen once on December 1, 1997. She was then married to Ken Rhodes and living in Lillooet, although the examination took place in Kamloops. Dr. Chale relied upon Karen and her then husband for a history of events, some of which was not accurate. He commented about her being able to provide "an impressive amount of information". This "impressive amount of information" contained only a brief reference to Carole, and making no mention of the extensive role she had played to that point in Karen's life.
- [12] Dr. Chale performed some testing which appears to be somewhat perfunctory, such as naming vegetables and assembling a clock face. He also had a general discussion with her respecting children and her ability to appreciate risks and responsibilities. Ultimately he determined that she suffered "mild cognitive impairment" but that she "appeared to be capable of making her own decisions".
- [13] This assessment should be contrasted with the extensive information provided by Carol, Karen's sister Katherine McNabb, Dr. David Chan, a psychologist and the medical doctors who have acted as both specialists and general practitioners to the patient over the years. It is clear from those opinions that Karen suffered a severe brain injury in the collision, leading to extensive problems which could not be classified as "mild cognitive impairment".

- [14] Dr. Gertjan Simons describes her as suffering from, among other things, "severe cognitive impairment". Dr. R. Behrens commented upon the devotion and care given by Carol to Karen over the years. He was of the opinion that Karen required very close supervision and care, and he doubted anyone but Carol could provide it. This was particularly so at times when Karen suffered from various illnesses.
- [15] Dr. K.G. Atkinson who performed an ileostomy and colectomy on Karen in 1995 to treat a severe colitis attack, commented upon the excellent healing process that followed, mostly because of the care provided to Karen by her mother.
- [16] As indicated, the Public Guardian submits that I cannot rely upon Dr. Chan for a medical opinion respecting incapacity of the person and that the two more recent opinions proffered in this regard do not contain any clinical observations to support the opinions.
- [17] The Patients Property Act, R.S.B.C. 1996, c. 349, provides in Sec. 3 (1) that a court may make a declaration respecting the capacity of a person on
- (a) hearing an application (requesting incapacity), and (b) reading the affidavits of 2 medical practitioners setting out their opinion that the person who is the subject of the application is incapable of managing herself.
- [18] There is no provision respecting the form of opinion required by the medical practitioners nor does the section contemplate that evidence must be limited to these practitioners. Rather it requires, as a minimum, that there be two medical opinions expressing incapacity. It seems to me that reference to a "hearing" contemplates the ability and perhaps the need to proffer as much information about the patient as one can muster.
- [19] In this case I have extensive affidavit evidence from many persons associated with Karen over the years, particularly her mother and sister. Dr. Chan has had a great deal of association with her and while I accept that I cannot rely upon his assessment as one of two "medical practitioners", I certainly can consider his opinion as part of the "hearing".
- [20] Dr. Chan deposed to having "seen the patient for assessment over the years" and to having had "an opportunity to meet with the patient's family as well, in particular, her mother Carol Atchison." He last assessed her on February 21, 2005, producing a report dated May 6, 2005.
- [21] He has opined that the patient "is not capable of making decisions about herself." He did not specifically state this in his May 6 report rather he stated this in an affidavit given February 24, 2006. However, the omission of this specific opinion from his earlier report seems more an oversight than anything else. Indeed in his affidavit he repeated this opinion several times, stating that she is "incapable of caring for herself or her baby" and that she "requires homemaker services and nanny services on a full time, 24 hours a day basis."
- [22] In May 2001, Dr. Chan considered that Karen's "medical records and previous assessments indicate she has suffered from a severe brain injury." In his May 2005 assessment, he cited the general difficulties such injured persons have with change and their (in)ability to cope.

In preparation for his 2005 report, Dr. Chan interviewed Karen, her sister Katherine, and her mother Carol. He also conducted twelve specific tests. These were done over a period of three days in February 2005. The report encompasses twelve pages and cites the results of both the testing and the clinical observations.

- [23] Dr. Chan leaves no doubt that he considers Karen incapable of managing her person. I was impressed with both the extent of his association with Karen and his extensive testing. This opinion tends to explain why Drs. Oosthuizen and Ries came to their conclusions respecting incapacity of the person. It also offers some insight into the medical doctors' opinions that the prognosis for improvement is "poor" and "zero". It is also Dr. Chan's opinion that the best person to manage the patient would be her mother Carol.
- [24] In addition to the report of Dr. Chale, The Public Guardian provided affidavit evidence from case workers that Karen was capable of managing herself. None of these were persuasive.
- [25] Marianne Nyland deposed that she was the case manager from July 1997 to March 1998 during which time she visited with Karen once in August of 1997. This was in Lillooet and just after Karen's marriage. According to Ms. Nyland, Karen expressed a desire to manage her own person and affairs. Curiously, Ms. Nyland told Karen that the Public Guardian would rely upon Dr. Chan for his opinion in the matter although they never did follow up on that position. Based upon this visit and upon Karen's apparent desire to manage her affairs, the witness concluded that she felt Karen was able to do so.
- [26] Ann Holinworth was Karen's case manager from March 1998 to December 1999. She deposed that Karen told her in 1998 that she didn't want her mother as committee of her person and that she "wanted her rights back". When told that she needed a doctor's opinion to this effect, Karen apparently made her own arrangements to see Dr. Chale. Ms. Holinworth deposed that later, on May 28, 1998, Karen told her that her mother threatened to impoverish her if she proceeded to have her removed as committee. While I don't doubt that Karen made this statement to Ms. Holinworth, I doubt that Carol ever made such a threat, which, in any event, she denied. It simply is not consistent with the enormous effort and energy Carol has expended upon Karen over the years and the obvious commitment she has made at the expense of her own happiness and independence.
- [27] Chris Brettell, Karen's case manager from January 2001 to September 2004 (save for about nine months) considered that Carol used her appointment "as a tool to limit Karen's ability to do things". He considered Carol to be "stubborn and domineering". He also complained about Carol's "inappropriate comments about Karen's sexual behaviour". His comments struck me as puritanical, smug and devoid of any appreciation as to the difficulties of managing Karen on a daily basis. I much prefer the response to this opinion by Carol in an answering affidavit.

- [28] Carol deposed that, "various affidavits refer to my comments on the patient's sexuality. She is brain injured, and perhaps as a result is a highly sexual person. I will not ignore the facts of life. It does not bother Karen to discuss sex, no matter who is around. In fact she will discuss sexual matters when it is totally inappropriate to do so. It would not bother her if I said she would give her money to any guy who would fuck her. It happens to be true".
- [29] Those comments strikes me as simply recognizing a problem that Carol has had to deal with over the years. Karen is a highly sexual person who has to be monitored closely to avoid problems. Even with the close scrutiny of her mother she has got herself into one failed marriage and a pregnancy. It is prudish in the extreme to complain about Carol talking openly about these problems.
- [30] My sense of the matter is that friction has built up over the years between Carol and the various managers for the Public Guardian, mostly over monetary issues and that this has clouded the managers' assessment of Carol. It is not necessary to determine who is right, but rather to simply recognize that there were personality conflicts.
- [31] I don't doubt that Carol might be a difficult person to deal with but most people who believe passionately about things, can be "difficult" from the perspective of others who are distanced from the problem and not as committed to resolving it.
- [32] Katherine McNab is, as indicated earlier, Karen's sister. She resides in Port Coquitlam, B.C. Katherine deposed to the problems associated with the various case managers which she described in the following terms: "Case mangers have come and gone (over the years). Some have been easier to deal with, some more difficult." Clearly Katherine loves her sister and is actively engaged in decisions respecting her care, although distance limits the extent of her involvement.
- [33] Katherine speaks of Karen's oft-held views that she is capable of managing herself but explains why that is not a valid assessment. In paragraphs 3 and 4 of her March 8, 2006, affidavit she states:
3. The Patient has almost always felt that she is capable of handling decisions regarding both herself and her finances. Her attitude is similar to a stubborn child: it is my money, I can do what I want. She does not recognize that as an adult, she would be responsible for all aspects of her care. She believes that she should be able to decide things like where she lives, who she lives with, and how much money she can spend.
 4. However, regarding medical decisions, she relies completely on our mother, Carol Atchison ("Carol"). She has never said anything about her care, except if she does not want to do physiotherapy or if she does not like a care giver, she will fight that. It would never occur to her to seek medical advice to get something checked up. Most of the time she is unaware of physical changes in her body. For example recently she ended up in the hospital. The first symptoms were sores. She did not mention them, but Carol saw them on one of her routine examinations. Carol took her to the GP and followed treatment advice. The sores would heal

then come back. The Patient fainted in the kitchen, and Carol took her to the hospital, resulting in a month long stay. The Patient had not said anything to indicate that she was getting worse, and I do not think she was aware. The Patient is not capable of understanding what the doctors say about her health care needs. She would routinely remove the dressings from the sores, and she would not have stayed in the hospital if she had been given the choice. Even now, she is on a soft food and liquid diet, mainly Boost.

[34] Carol Atchison provided a history for Karen from the time of her injury to the present.

[35] There are three siblings; Katherine, Michael and Karen. Karen's father James lives in Golden, B.C. Katherine resides in Port Coquitlam and Michael in Kamloops. Karen has a son, Justin, born June 18, 2004. Although married in 1997, she was divorced in October of 2002.

[36] Carol deposed that from the time of Karen's injury at age 15, she (Carol) has had the responsibility of caring first for Karen and latterly her grandson Justin as well. At paragraph 23 of her April 5, 2005, affidavit, she stated:

In order to care for her, I gave up the opportunity to go back to work. Caring for the Patient is a full-time job. The Patient was almost bedridden in the beginning. She had to be taught to walk, eat and care for herself.

And in paragraph 24 and 25 she says:

24. Prior to the settlement, (I) was attending college to advance my education and obtain better employment, but I had to give that up to care for the Patient.

25. The job of caring for her has become more difficult since the birth of the Patient's son. The Patient loves her son deeply, but she is not able to care for him. I care for my grandson as well as the Patient.

[37] To that I say, "Amen".

[38] Carol deposed to the need for routine and certainty in Karen's life and set out the many instances where this did not occur with troubling results. In particular she cited the different "We Care" workers provided over time to assist the family and how their approach adversely affected Karen when they failed to follow Carol's advice as to routine.

[39] I can appreciate that some of these workers felt slighted or upset over criticism levelled at them by Carol. I reiterate that others, unfamiliar with Karen's need for routine, close supervision and constant medical intervention, probably find Carol "difficult". However, it is clear to me that Karen is incapable of managing her person and that Carol is not only the best person to act as committee but really the only person who can properly discharge that onerous role. I therefore, find the patient incapable of managing her person and appoint Carol as committee of the person.

[40] I am not prepared to accede to the request for documentation. The complaints advanced by Carol may no longer be in issue, given the appointment of Canada Trust. In any event, I accept the position of the Public Guardian that the proper applicant for such relief would be the committee of the estate, in this case, Canada Trust. If, upon obtaining all of the relevant material from the Public Guardian, Canada Trust believes it has grounds for such an application, it can proceed accordingly.

"R.A. McKinnon, J."

The Honourable Mr. Justice R.A. McKinnon

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Prepared on 29 October 2026 · Esheria