

CANADA / JUDGMENT

Cho (Re)

2020 BCSC 689

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DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cho (Re),

2020 BCSC 689

Date: 20200423

Docket: 225581

Registry: New Westminster

In the Matter of the Patients Property Act,

R.S.B.C. 1996, c. 349 and Amendments Thereto

and In the Matter of Hyun Re Cho

Before: The Honourable Mr. Justice Riley

Oral Ruling Re Application to Appoint a Committee

In Chambers

Counsel for Natalie Nobert, David Cho and Andrew Cho:

N. Davies

Counsel for Jimmy Cho:

D.K. Magnus

Place and Date of Hearing:

New Westminster, B.C.

April 23, 2020

Place and Date of Ruling:

New Westminster, B.C.

April 23, 2020

- [1] THE COURT: This is an oral ruling on a chambers application, and I am giving the ruling at the end of the day after having heard several hours of argument on what has been termed an urgent application.

Introduction

- [2] This is a chambers application arising from a petition for relief under the Patients Property Act, R.S.B.C. 1996, c. 349 [PPA]. The petitioner, Jimmy Cho, seeks: (i) a declaration that the patient, his 83-year-old mother, Hyun Cho, is incapable of managing her affairs; and (ii) an order appointing the petitioner, Jimmy Cho, as committee of Hyun Cho's estate and person, among other things.
- [3] The respondent, Natalie Nobert, is Hyun Cho's daughter. She does not oppose a declaration that her mother, Hyun Cho, is incapable of managing her affairs, but she does oppose the appointment of Jimmy Cho as committee. Natalie Nobert says she should be appointed as committee. She is supported in that position by Hyun Cho's two other adult children, David Cho and Andrew Cho.
- [4] The Public Guardian and Trustee ("PGT") has also filed a response. The PGT does not oppose the declaration that Hyun Cho is incapable of managing her affairs and takes no position on the committee issue. In considering this position, it should be noted that the PGT does not seek to be appointed as committee.
- [5] The two opposing parties, Jimmy Cho and Natalie Nobert, have also filed competing applications seeking the relief set out above and various other forms of relief in the alternative.
- [6] The matter has come before me in chambers on an urgent basis during a time when the court's regular operations are suspended in response to the COVID-19 public health emergency. The urgency has to do with the disagreement between the parties as to where Hyun Cho should be residing and what arrangements should be in place for her health care and medical care during the COVID-19 public health emergency.
- [7] Until recently Hyun Cho was residing in a long-term care home in the Vancouver area, but in early March of 2020 in recognition of the risk that Hyun Cho might face from exposure to COVID-19 in that facility and the potentially great consequences, one of Hyun Cho's other children, I believe it was David Cho, removed her from the care home and took her to Vancouver Island to reside at the residence of Natalie Nobert. Jimmy Cho does not agree with this approach, pointing out that until that time Hyun Cho was residing at the long-term

care facility in the Vancouver area under an arrangement where she had granted him a power of attorney over her financial affairs.

- [8] In this context with both parties appearing by telephone on relatively short notice and with only two hours of court time to argue the matter, both parties agree that the court should make an interim order only to deal with the urgent concerns, with the merits of the petition to be adjourned and scheduled for a full hearing at a later time.
- [9] In terms of the legal authority or jurisdiction to make interim orders, I am satisfied that I have authority to do so under the Rules and under the PPA. Under Rule 16-1(18) of the Supreme Court Civil Rules, the court can apply any other provision of the Rules to a petition proceeding. Rule 22-1(7)(a) gives the court power to grant relief claimed in whole or in part, which I interpret to contemplate relief on an interim basis. Under s. 28 of the PPA, the court has the power to make any order it considers necessary in the interests of proper management of the estate of a patient so long as the order is not in contradiction of the Act and the Regulations.

Declaration Under Section 2 of the PPA

Notice Requirements

- [10] Before dealing with the substance of the declaration, I must first address the notice requirements. Under s. 2(2) of the PPA where an order is sought declaring that a person is incapable of managing his or her person and affairs, notice of the time and place of the application must be served personally on the person with the subject of the application at least ten days before the hearing. The record in the case at bar shows that the patient Hyun Cho was served personally with a copy of the petition on March 17, 2020. The petition was also served on the PGT and all of Hyun Cho's four children.

The Merits of the Request for an Interim Declaration

- [11] All parties to this proceeding agree that there is a basis on which to make a declaration that the patient Hyun Cho is not capable of managing herself or her affairs as provided for in s. 2(1) of the PPA. I have been presented with affidavits from two certified medical doctors, both attesting to the fact that Hyun Cho is incapable of managing her person or affairs. Both affidavits indicate that Hyun Cho suffers from schizophrenia and Alzheimer's-related dementia. On the basis of the evidence and the positions of the parties, I am satisfied that it is appropriate to make an order under s. 2(1) on an interim basis that Hyun Cho is not capable of managing herself or her affairs.
- [12] I expect that the situation is not likely to change in the future, but I am nonetheless going to make this an interim order because, as noted above, the parties are only seeking interim relief and it seems that an interim order will suffice for this purpose. I am not prepared to make what is in effect a final ruling on any aspect of the merits of the petition at this stage.

Committeeship Under Section 6 of the PPA

- [13] The parties disagree about whether or more specifically who should be appointed as committee pursuant to s. 6 of the PPA. Jimmy Cho says he should be the committee and has filed a petition and application to that effect. Those materials were served on the PGT. Natalie Nobert says she should be the committee. She has filed a response to the petition but has not filed her own petition. She has also filed a notice of application seeking appointment as committee, which materials were served on the PGT several days ago but not ten days before the hearing as required.
- [14] The PGT takes no position on whether Jimmy Cho should be appointed as committee but does point out in its response to the petition that after a prior investigation, the PGT chose not to intervene. I note that under s. 6(3) of the PPA, the PGT is by default the committee if no one else is appointed to that capacity. The PGT does not seek to be appointed as committee.

Notice Requirements

- [15] Before dealing with the merits of the committeeship question, I will deal with the procedural objection raised by Jimmy Cho, which says that Natalie Nobert cannot obtain an order of committeeship because she has not complied with the notice requirement in the PPA. In particular Jimmy Cho cites s. 7 of the PPA, which says that notice in writing of the application to appoint a committee must be made at least ten days before the hearing, and that notice must be given to the PGT. Jimmy Cho says in this case Natalie Nobert has not filed a petition and has not served notice of her application for appointment as committee on the PGT at least ten days before the hearing and as such, it is submitted that Natalie Nobert has not complied with the basic statutory requirements to obtain an order for committeeship.
- [16] Jimmy Cho relies on McNally (Re), 2016 BCSC 1136, in which one sibling, Mr. McNally, filed a petition seeking committeeship and another sibling, Ms. Moyer, filed a petition response but not a formal petition for committeeship. Justice Sharma held that Ms. Moyer's request to be appointed as a committee could not be considered because she had not met the requirements of the PPA by filing a petition and giving the necessary ten days' notice to the PGT.
- [17] There is a more recent case, Morrison (Re), 2020 BCSC 195, involving a somewhat similar situation where one sibling had filed a petition and the other filed a response to that petition but did not file and serve his own petition. Justice Ross was not prepared to rule that the latter sibling was disentitled to consideration as committee by virtue of a failure to file his own petition or give the statutory ten days notice. Justice Ross found McNally (Re) distinguishable on the basis that in the case before her the PGT in fact had previous dealings with the sibling and thus had at least some opportunity to vet his propriety to act in the role of a committee. Justice Ross also cited certain sections in the PPA suggesting that the

requirement for a second proposed committee to give a further ten days notice to the PGT might not always be necessary. In particular Justice Ross cited s. 6(1) of the PPA, which states that on application for appointment of a committee the court may appoint "any person," not just the applicant. Justice Ross also cited s. 28 of the PPA, which as noted above states that the court may make any order not in contradiction of the Act and Regulations.

- [18] In the case at bar I conclude that McNally (Re) is distinguishable for another reason. Namely, that what is being sought here by both parties is an interim order of committee ship. In these circumstances I am satisfied that it is appropriate to consider the proposals of both Jimmy Cho and Natalie Nobert to serve as committees on their merits. Any concern about notice to the PGT with respect to such an interim order can be dealt with by way of terms requiring the interim order to be served on the PGT within five business days with leave of the PGT to apply to set it aside on five business days notice to each party. See also Rule 22-1(8) (c), which deals with granting orders where there has been non-compliance with a notice provision.

The Merits of the Request for Interim Committee ship

- [19] That brings me to the merits of the competing committee ship applications. Here I am guiding by the list of factors set out in Stewart (Re), 2014 BCSC 2321, at para. 29, which reads as follows:

As has been observed in other cases, the Act does not prescribe criteria for the selection of an appropriate committee. However, cases have identified various considerations; see for example: Vranic (Re), 2007 BCSC 1949; Bowman (Re), 2009 BCSC 523; Palamarek (Re), 2011 BCSC 563; Re Matthews, 2013 BCSC 1045; and Sangha (Re), 2013 BCSC 1965. They include:

- (a) whether the appointment reflects the patient's wishes, obviously when he or she was capable of forming such a wish;
- (b) whether immediate family members are in agreement with the appointment;
- (c) whether there is any conflict between family members or between the family and the patient, and whether the proposed committee would be likely to consult with immediate family members about the appropriate care of the patient;
- (d) the level of previous involvement of the proposed committee with the patient, usually family members are preferred;
- (e) the level of understanding of the proposed committee with the patient's current situation, and will that person be able to cope with future changes of the patient;
- (f) whether the proposed committee will provide love and support to the patient;
- (g) whether the proposed committee is the best person to deal with the financial affairs and ensure the income and estate are used for the patient's benefit;

- (h) whether a proposed committee has breached a fiduciary duty owed to the patient, or engaged in activity which diminishes confidence in that person's abilities to properly handle the patient's affairs;
- (i) who is best to advocate for the patient's medical needs;
- (j) whether the proposed committee has an appropriate plan of care and management for the patient and his or her affairs and is best able to carry it out; and
- (k) whether a division of responsibilities such as between the patient's estate and the patient's person to different persons would serve the best interests of the patient, or would such a division be less than optimal for the patient.

[20] In the interests of efficiency, I am simply going to recount each of these factors and then discuss the evidence that has been brought to my attention in the matter before me that bears upon those factors.

A) Whether the appointment reflects the patient's wishes, obviously when he or she was capable of forming such a wish.

[21] Here I can say that in the era before there were any clearly identifiable issues with respect to Hyun Cho's mental capacity, she had executed a last will and testament and a power of attorney document appointing her husband as executor and decision maker and naming Natalie Nobert to stand in those roles in the event of her husband's passing. That is suggestive that at least at some point before Ms. Cho's mental capacity was an issue, she was of the view that Ms. Nobert would be an appropriate person to make decisions on her behalf.

[22] There have since then been powers of attorney executed on a number of occasions, but issues have been raised about Hyun Cho's mental capacity at the time of those documents having been executed, and both parties have made arguments about those issues which I am unable to resolve on the application materials before me in the context of this two-hour hearing over the telephone.

B) Whether immediate family members are in agreement with the appointment.

[23] There have been shifting views over time in this case. At certain points in time, Natalie Nobert indicated she was agreeable or acquiesced to Jimmy Cho having a power of attorney if it meant peace in the family. Also at certain points in time other siblings, I believe most notably David Cho, appeared to accept that it would be appropriate for Jimmy Cho to have a power of attorney. However, the most recent evidence indicates that as of the current times, Natalie Nobert, David Cho and Andrew Cho do not support Jimmy Cho acting as committee.

[24] Natalie Nobert seeks to be appointed as committee, and the other siblings, David Cho and Andrew Cho, are supportive of this. I do not see anything in the affidavit materials of either party that would suggest that the positions taken by any of these parties are a function of self-interest. It appears to me rather that Natalie Nobert, David Cho and Andrew Cho are all

of the view that it would be in Hyun Cho's best interest for Natalie Nobert to be the committee. As a matter of what would be basically the best arrangement for her. This is obviously not dispositive, but given that these parties know the relationships and dynamics of the family much better than I will be able to know in the brief time that I have been given to study this matter, it is certainly some indication of what the parties who know the situation consider to be the best arrangement.

C) Whether there is any conflict between members of the family or between the family and the patient and whether the proposed committee would be likely to consult with immediate family members about the appropriate care of the patient.

[25] There is evidence of considerable conflict and disagreement as to who should make decisions on behalf of Hyun Cho, to the point where police, medical officials, government ministry officials and lawyers have been involved. However, I see in evidence in the affidavit that at various points in time Natalie Nobert has made efforts to seek consensus and has shown a willingness to consult with others regarding decisions to be made in Hyun Cho's best interests.

D) The level of previous involvement of the proposed committee with the patient, usually family members are preferred.

[26] I am satisfied that both parties, Jimmy Cho and Natalie Nobert, have had significant involvement in caring for and looking after the affairs of Hyun Cho. Day-to-day visitation, it seems to me, has been to some extent a function of where Hyun Cho has been residing and the distance between where she has been residing and the residences of Jimmy Cho and Natalie Nobert respectively. When Hyun Cho and her now deceased husband resided at a care home on Vancouver Island, Jimmy Cho did not see them as frequently as he did when Hyun Cho resided at a care home closer to him in the Greater Vancouver area. By contrast or by parity of reasoning, when Hyun Cho resided at a care home in Vancouver, Natalie Nobert did not see her as frequently as she used to see her when Hyun Cho was residing at a care home on Vancouver Island. I can say that the current arrangement where Hyun Cho is residing at the home of Natalie Nobert involves a situation where she has daily contact with Natalie Nobert and with her son David Cho, who is also residing at the same home.

E) The level of understanding of the proposed committee with the patient's current situation, and will that person will able to cope with future changes of the patient?

[27] I see no evidence that either party has a failure to understand or appreciate Hyun Cho's current needs. I will say that the current arrangement in which Hyun Cho is residing at the home of Natalie Nobert on Vancouver Island was obviously motivated by a concern to get her out of the long-term care facility during the currency of the COVID-19 public health crisis.

F) Whether the proposed committee will provide love and support to the patient.

[28] I see no evidence that either party lacks the ability or willingness to provide love and support.

G) Whether the proposed committee the best person to deal with the financial affairs, ensure the income and the estate are used for the patient's benefit.

[29] I see little objective evidence that either party has acted in their own self-interest or has taken advantage of Hyun Cho for personal financial gain. Natalie Nobert alleges that Jimmy Cho has mishandled or not properly accounted for Hyun Cho's estate assets, but I cannot see any compelling evidence of this. At least on a very superficial assessment of the records as I have been able to undertake in the time that I have been given to deal with this case, and in view of the amounts of money involved. Jimmy Cho was arguably imprudent in failing to reinvest certain GIC investments, meaning he did not necessarily seek to maximize the value of Ms. Cho's estate by ensuring the maximum possible return on her assets, but this is not a particularly telling concern to me, at least at this stage, given the urgency of the other issues that I have been asked to consider.

H) Whether a proposed committee has breached a fiduciary duty owed to the patient or engaged in activity which diminishes confidence in the person's abilities to properly handle the patient's affairs.

[30] There is no evidence of breach of fiduciary duty or improper conduct that diminishes confidence. Any concern about the value of Hyun Cho's estate can be addressed by proper conditions as urged by the PGT to ensure that the capital value of the estate is not impaired or drawn upon except for the purposes of reinvestment.

I) Who is the best to advocate for the patient's medical needs?

[31] Both parties have expressed concern about the other party's position with respect to Hyun Cho's medical need and in particular her use of medications. For his part Jimmy Cho says Natalie Nobert has an agenda of wanting to remove or deny medically necessary drug treatments that have been prescribed by Hyun Cho's doctors. Natalie Nobert denies this, and I largely agree with her counsel that Jimmy Cho's complaints are general and unsubstantiated by any objective evidence.

[32] For her part Natalie Nobert says Jimmy Cho denied Hyun Cho access to her prescription medications by refusing to provide more than five days of drugs after Hyun Cho was moved to Vancouver Island to live at Natalie Nobert's residence. I do find some objective support for this allegation in this sense that Hyun Cho indicated that she was expected to stay on Vancouver Island with Natalie Nobert for two weeks, and despite this Jimmy Cho appears to have intervened to block Hyun Cho receiving more than a five-day supply of her prescription medications. That situation persisted for a number of weeks until an arrangement was worked out where the prescriptions could be filled on Vancouver Island.

[33] I will say there is also evidence that in the past, Natalie Nobert has attempted to obtain consensus as far as Hyun Cho's medical treatment and the course of medication is concerned. I refer here to an email between siblings in which Natalie Nobert proposed a change of doctor but then asked each sibling to express their view in the matter in an effort to obtain consensus.

J) Whether the proposed committee has an appropriate plan of care and management for the patient and his or her affairs and is best able to carry it out.

[34] In my view at this point in time this is one of the most significant factors militating in favour of granting committeeship to Natalie Nobert. In particular, in early March with the emergence of the coronavirus public health emergency, Natalie Nobert expressed concern about Hyun Cho continuing to stay in a long-term care facility where she was at risk of infection and possibly death. Jimmy Cho was opposed to the proposal for Hyun Cho to live with Natalie Nobert on Vancouver Island, offering as at least one of the reasons for his opposition a concern that Natalie Nobert might keep Hyun Cho there for six months or more. In my view this reasoning shows more of a concern about the strategic impact of the move rather than the medical best interests of Hyun Cho.

[35] Also, the future plan articulated by Natalie Nobert seems more consistent with the best interests of Hyun Cho plan the plan articulated by Jimmy Cho. Natalie Nobert proposes that Hyun Cho will continue to live in her house until the COVID-19 public health emergency subsides.

[36] By contrast, Jimmy Cho proposes to relocate Hyun Cho back to the Lower Mainland to have her stay with him at his residence in quarantine for two weeks and then to re-evaluate in consultation with Hyun Cho's treatment providers where she should stay at that point forward. This proposal appears to leave open the possibility that Hyun Cho might return to the long-term care facility before the COVID-19 crisis subsides.

[37] Of course we cannot public what will happen in the future or what developments may unfold as far as the COVID-19 crisis is concerned, but in my view the concrete proposal of Natalie Nobert to keep Hyun Cho with her at her residence on Vancouver Island until the public health crisis subsides is a more realistic and reliable plan than the more open-ended plan suggested by Jimmy Cho as I understand it.

K) Whether a division of responsibilities such as between the patient's estate and the patient's person to different persons would serve the best interests of the patient, or would such a division be less than optimal for the patient?

[38] I do not think a division of responsibilities is workable on the facts of this case. Although I would be inclined to impose conditions on the committeeship to ensure that consultation is undertaken for significant decisions or changes.

Conclusion

- [39] So subject to input from the parties, this would be my ruling. First, an interim declaration is made under s. 6 of the PPA that Hyun Cho is incapable of managing her person and affairs.
- [40] Second, on an interim basis, Natalie Nobert is appointed committee over the person and affairs of Hyun Cho subject to the following conditions. I will hear submissions as to whether there should be other conditions, but what I have in mind is the following, and there are four of them:
- a) With respect to finances, Natalie Nobert shall not access or impair the capital value of Hyun Cho's estate. Here I do not have the language at my fingertips, but I am thinking of the language that is expressed by the PGT in its response to the petition as to that limitation.
 - b) With respect to medical treatment and decision making, Natalie Nobert shall take reasonable steps to ensure is that Hyun Cho takes all medications prescribed to her by treating physicians or health care professionals, and Natalie Nobert shall not take any steps for Hyun Cho to change treating physicians or her health care treatment team without first seeking input from and obtaining a consensus from all of her siblings, Jimmy Cho, David Cho and Andrew Cho.
 - c) In the event that Natalie Nobert cannot obtain consensus or alternatively in the event that Jimmy Cho disagrees with any changes in the course of Hyun Cho's medical treatment, either party will be at liberty to apply to the court for directions on that matter on five business days' notice to the opposing party and Hyun Cho.
 - d) The PGT shall be served with a copy of this order within five business days of its being made and will be at liberty to apply to set it aside on five business days' notice to either party, Jimmy Cho or Natalie Nobert.
- [41] So those are the four conditions I was suggesting, and there may well be others. At this point I will call upon counsel to tell me whether there should be other conditions that I should be making.

[SUBMISSIONS RE CONDITIONS]

- [42] THE COURT: I can add to term 2(b), which is the medical treatment term, a phrase at the end that says in the event that Natalie Nobert does make a change to Hyun Cho's treatment, or intends a change to Hyun Cho's treatment, she shall notify Jimmy Cho of that decision in writing forthwith. Okay.
- [43] So what that means is if there is going to be any change to the medical plan, after all this dialogue and if a consensus is reached or Ms. Nobert thinks she has a consensus, at the end of it she will say in writing based on everything we have discussed I have decided to do X, Y or Z with respect to medical treatment. Then if Mr. Cho disagrees with that, he can bring an application.

[SUBMISSIONS RE TERMS AND COSTS]

[44] THE COURT: It seems that both parties are ad item on that, and will make that a term of the order as well, that both parties have to have their costs on a solicitor/client basis paid out of the estate. I think that concludes matters.

"Riley J."

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