
CANADA / JUDGMENT

Janisch (Re)

2016 BCSC 2003

COURT

Supreme Court of British Columbia

DECIDED

9 September 2016

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2016 BCSC 2003 Janisch (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Janisch (Re),

2016 BCSC 2003

Date: 20160909

Docket: S167073

Registry: Vancouver

In the Matter of the Patients Property Act, R.S.B.C. 1996, c. 349

and amendments thereto

and

In the Matter of Alice Hastings Janisch

Before: The Honourable Madam Justice Griffin

Oral Ruling

In Chambers

Counsel for the Petitioner, Ellen Smith:

Gordon T. Behan

David Johnson:

Appearing in person

on his own behalf

Place and Date of Hearing:

Vancouver, B.C.

September 9, 2016

Place and Date of Ruling:

Vancouver, B.C.

September 9, 2016

- [1] THE COURT: This is a petition brought by Ellen Janisch Smith, who is the daughter of Alice Janisch. The petition is brought pursuant to the Patients Property Act, R.S.B.C. 1996, c. 349, and in summary, Ms. Smith is seeking to be made committee over the person and estate of Mrs. Janisch, who is her mother.
- [2] I note that one person opposing the application prefers to call Mrs. Janisch Ms. Arthur, but this is a legal proceeding and I am going to call her by her legal name.
- [3] I first want to refer to the law which governs a proceeding of this nature and which governs me, and that law is set out in the Patients Property Act at s. 3(1):

Hearing of application

3(1) If, on

- (a) hearing an application, and
 - (b) reading the affidavits of 2 medical practitioners setting out their opinion that the person who is the subject of the application is, because of
 - (i) mental infirmity arising from disease, age or otherwise, or
 - (ii) disorder or disability of mind arising from the use of drugs,incapable of managing his or her affairs or incapable of managing himself or herself, or incapable of managing himself or herself or his or her affairs,
- the court is satisfied that the person is, because of
- (c) mental infirmity arising from disease, age or otherwise, or
 - (d) disorder or disability of mind arising from the use of drugs,
- incapable of managing his or her affairs or incapable of managing himself or herself, or incapable of managing himself or herself or his or her affairs, it must, by order, declare the person
- (e) incapable of managing his or her affairs,
 - (f) incapable of managing himself or herself, or

- (9) incapable of managing himself or herself or his or her affairs.
- [4] In short it is mandatory on this court to declare a person incapable of managing her affairs or herself if there is evidence that satisfies me that the person because of mental infirmity is incapable of managing her affairs or herself. That really is the central issue.
- [5] The Act requires there be two affidavits from medical practitioners setting out their opinion in support of these conclusions. There are two such affidavits in evidence. In short they are from Dr. John Sloan, a family physician, who is well qualified as the past president of the BC Association of Geriatric Care Physicians; and Dr. Williard Johnston, a family physician with considerable experience conducting capacity assessments.
- [6] Each medical doctor has provided the opinion that Mrs. Janisch is by reason of mental illness, disease or age incapable of managing her financial affairs and personal care decisions and that improvement is unlikely. I note that both physicians provided very detailed examples of the cognitive difficulties they observed on the part of Mrs. Janisch when they assessed her. These detailed examples were compelling.
- [7] Dr. Sloan assessed Mrs. Janisch on June 13, 2016, at her home. Dr. Johnston assessed Mrs. Janisch on July 29, 2016. Dr. Sloan's evidence includes the fact that Mrs. Janisch scored only 4 out of 30 on a well-known dementia screening test. When asked about the value of her home, she did not know but doubted it was worth more than \$1,000, which was obviously incorrect. She also gave a grossly inflated estimate of her monthly income as being \$200,000.
- [8] When she was asked about her own independence, Mrs. Janisch did not know if she needed help dressing, showering or cooking her own meals, or whether she required assistance with medication. She gave an incoherent answer when asked about shopping for food. When asked about what to do in two scenarios, one involved waking up late, hearing a loud bang on her door, and the other smelling smoke, she was unable to provide coherent responses demonstrating she knew what to do to keep safe.
- [9] Dr. Sloan concluded that she has severe cognitive impairment that would disqualify her from making the most fundamental financial transactions, decisions about her health care and personal disposition in her best interests.
- [10] When Dr. Johnston assessed Mrs. Janisch she appeared even worse only a month later. She could not remember her last name. When asked about the date and season, she replied:
I do not pay much attention because no one looks at my car. I still drive but I borrow one.
- [11] Her reply was obviously not responsive. Mrs. Janisch could not name objects pointed out to her. She had significant problems finding words. She also demonstrated some physical impairments.

- [12] As for her background, Mrs. Janisch was born on August 15, 1941, and is currently 74 years old. She married Hudson Janisch in 1968, and together they had one child, the petitioner, Ellen Smith, who is currently 45.
- [13] Mrs. Janisch has one brother, Mr. Arthur, who is eight years older than her.
- [14] Ms. Smith has provided evidence that she had a close and good relationship with her mother throughout her entire life. She lived with her parents until she moved to Vancouver to attend UBC in 1989. Even after she moved, her parents, who were living in Toronto, would regularly have visits with her.
- [15] In 2003 Ms. Smith's parents moved to Vancouver for a year and during that time they helped plan her wedding. After that they moved back to Toronto for a year before moving to Sechelt in 2005. Her parents told Ms. Smith that part of the reason they were moving to Sechelt was to be closer to her. There is no suggestion they have other family ties in British Columbia.
- [16] In 2009 Mrs. Janisch and Mr. Janisch separated. That year Ms. Smith had a son.
- [17] Ms. Smith visited her mother regularly. In 2012 Mrs. Janisch purchased a property and built a home in Sechelt. Ms. Smith continued to visit back and forth with her mother.
- [18] In 2013 Ms. Smith had another child, a daughter, who would also travel with her to visit Mrs. Janisch in Sechelt.
- [19] In 2012 Mrs. Janisch appointed her daughter, the petitioner, as her enduring power of attorney. Ms. Smith has been acting under that document since a few days after Dr. Sloan concluded that Mrs. Janisch was incapable of managing her affairs in June of 2016.
- [20] The evidence is uncontradicted that Ms. Smith has had a strong relationship with her mother throughout her entire life. Ms. Smith has provided her petition materials to her uncle, who is Mrs. Janisch's only sibling, Mr. Arthur. He has reviewed the materials and signed a consent of next of kin consenting to Ms. Smith's appointment as committee.
- [21] The Public Guardian and Trustee, who has been served with these materials, takes no position but has indicated that the medical evidence does indeed indicate that Mrs. Janisch is incapable of managing herself and her affairs, that the Public Guardian and Trustee does not oppose the appointment of Ms. Smith as committee without bond and that Ms. Smith should receive her reasonable costs payable from the estate of Mrs. Janisch as special costs.
- [22] There is one party who has come to court opposing the application, and that is David Johnson. He did not file materials in time, but I allowed him to present his materials and make submissions. Mr. Johnson's evidence is that he met Mrs. Janisch in September 2014. According to the uncontradicted evidence of the petitioner, Mrs. Janisch was already experiencing signs of dementia by that time.

- [23] Mr. Johnson moved into Mrs. Janisch's house, according to him, in October 2014, only one month after they met. He admits that he and Mrs. Janisch spoke to her doctor in December 2014 about what he describes as her "light dementia" and that it was progressive.
- [24] Mr. Johnson appears to have three points to make in his submissions. One, that he was in a loving relationship with Mrs. Janisch and that she would be better off to live with him than to live in a care facility. Two, he mistrusts the petitioner's motives and doubts that she has had a historically strong and loving relationship with her mother. Three, he appears to blame the petitioner for Mrs. Janisch's steep decline in her mental abilities.
- [25] Let me deal with the first point. Mr. Johnson is not seeking to be appointed the committee of Mrs. Janisch. Presumably he knows that if he was seeking to be her committee he would have to provide a judge of this court with evidence that he is capable of taking care of Mrs. Janisch's needs and that it would be in her best interests to appoint him as a committee rather than her daughter. He avoids having to prove his ability to be a committee this way and instead concentrates on attacking Mrs. Janisch's daughter.
- [26] It is not enough that someone loves a patient to qualify to be a committee. A person has to be trustworthy, financially responsible, have an ability to provide or supervise the provision of medical care, and show willingness to submit themselves to judicial oversight. Mr. Johnson avoids putting in evidence on all of these points.
- [27] There is some evidence filed by Ms. Smith which raises serious questions about Mr. Johnson's capability to be a committee. It is not necessary to decide those issues, but just to point out that Mr. Johnson's position is disingenuous. He wants to have the right to look after Mrs. Janisch, but he does not want to be subject to any rules or oversight and does not want to go to the trouble of proving his abilities. This position raises red flags in and of itself.
- [28] There are several indications in the evidence that Mr. Johnson would not be seen as a suitable committee even if his evidence was accepted that he was loving towards Mrs. Janisch. He has to appreciate that he has only known her for approximately less than two years, during which time Mrs. Janisch was already suffering from dementia. He cannot truly expect a court to consider that a relative newcomer would be more concerned about the long-term care of Mrs. Janisch than her own daughter. There is a natural tendency for friendships to fail under stress, but the notion that one has a familial duty to look after one's own sick parent runs very deep through our culture.
- [29] I turn to Mr. Johnson's suspicions regarding Ms. Smith's motives. His suspicions are not grounded in evidence. He scandalously attacks the petitioner, including publicly defaming her on the internet.
- [30] Mr. Johnson fails to acknowledge that if he is relying on things that Mrs. Janisch told him, she had a failing memory from the very beginning of the relationship. Furthermore parents can complain about children and vice versa without ever intending it to mean that there is a serious breach in the relationship or that they would not be there for each other if needed.

- [31] There is no reason to doubt the evidence that Ms. Smith has a long-term good relationship with her mother and has her best interests at heart. The petitioner has acted responsibly in taking steps to make sure her mother is safe and well cared for. She had no other alternatives than to bring this petition.
- [32] I will next address Mr. Johnson's third focus in his submissions. He seems to believe that Mrs. Janisch only deteriorated because of the petitioner's interference. I have to say I find this argument to be malicious, hurtful and unfair. One cannot really expect that Mrs. Janisch, if she was mentally capable, would be happy about her daughter being put through these attacks and through these suggestions that her daughter caused her to fail in her health.
- [33] There is absolutely no medical opinion to support Mr. Johnson's notion. The fact is that Mr. Johnson understood soon after he met Mrs. Janisch that she had health problems, she had dementia and it was progressive. Mr. Johnson's view of things fails to appreciate that the very fact of having this condition and being confused about the future is extremely stressful on the patient and on the patient's loved ones, including of course her daughter.
- [34] The materials set out in extensive detail the steps taken by Ms. Smith to arrange for proper care for her mother. I note Ms. Smith's evidence that she places considerable importance on having her mother nearby so that her children can visit with her regularly. It is important to her that her mother remains an important part of her family no matter how poor her mental condition is or becomes. Ms. Smith is hoping that through this experience her children will be able to learn the importance of standing by a family member even when this situation is difficult.
- [35] I am satisfied that the steps taken by Ms. Smith to date with respect to her mother have been in the best interests of her mother. I have no doubt whatsoever on the material that Ms. Smith will continue to act in her mother's best interests and has only her mother's best interests in mind in seeking to be appointed as committee.
- [36] I note, in fact, Ms. Smith has continued to pursue what is best for her mother even though this has made herself vulnerable to public abuse by Mr. Johnson. This is some additional evidence that she has a strong sense of loyalty, duty and love for her mother.
- [37] I am satisfied on the materials that the petitioner should be granted the relief sought. I declare that Mrs. Janisch is, by reason of mental infirmity arising from disease, age or otherwise, incapable of managing herself or her affairs, that is term 1 in the petition. I am prepared to grant the terms in the petition at terms 1, 3, 4 and 5. I see that is all set out in the draft order. So I will endorse the form of order.

"The Honourable Madam Justice Griffin"

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