CANADA / JUDGMENT

McCoy (Re)

2020 BCSC 254

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2020 BCSC 254 McCoy (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McCoy (Re),

2020 BCSC 254

Date: 20200225

Docket: S196694

Registry: Vancouver

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

and amendments thereto

And: In the Matter of Brian Edward McCoy

-and-

Docket: S195442

Registry: Vancouver

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

Re: Brian Edward McCoy

Before: The Honourable Madam Justice Francis

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

January 16, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 25, 2020

Overview

[1] Brian McCoy is a 71 year old man who suffers from dementia. His family disagrees about who is best situated to act as his committee of person and estate. Mr. McCoy has no children and the dispute is primarily between his alleged common law spouse and his niece.

[2] Maryanne Csizmazia, who claims to be Mr. McCoy's common law spouse, and Silise Lebedovich, Mr. McCoy's niece, have brought separate petitions under the Patients Property Act, R.S.B.C. 1996, c. 349, seeking declarations that Mr. McCoy is incapable of managing his person and his affairs. Each also seeks to be appointed committee of Mr. McCoy's person and his estate.

[3] There is no dispute that Mr. McCoy is incapable of managing himself and his affairs. There are three medical opinions attesting to this. While Mr. McCoy is represented in this proceeding, it is not for the purposes of opposing the declaration of his incapacity. Rather, he seeks to weigh in on the primary issue in dispute in both petitions, which is the identity of the committee who will be responsible for Mr. McCoy's personal and financial affairs.

[4] Mr. McCoy supports Ms. Csizmazia's petition to be appointed his committee of person and estate. He has brought an application in both petitions. In the event that Ms. Csizmazia is not successfully appointed, Mr. McCoy seeks an order appointing his friend Moses Thrasher as his committee of person and estate.

Background

[5] Mr. McCoy has two sisters, Shelagh Brady and Maureen Hole. Ms. Lebedovich is Ms. Brady's daughter.

[6] Ms. Csizmazia claims to be Mr. McCoy's spouse, having lived with him in a marriage-like relationship almost continuously since March 2017. The spousal status of Ms. Csizmazia is disputed by Ms. Lebedovich and the other members of Mr. McCoy's family.

[7] Mr. McCoy moved to Hawaii from Vancouver approximately 40 years ago. He was trained as a goldsmith and gemologist. In Hawaii, he operated his own gem shop for a number of years.

[8] By all accounts, Mr. McCoy lived an unconventional life. Dr. Dian referred to Mr. McCoy as having a "counter culture" lifestyle. He appears to have spent much of his younger life travelling and in recent years, up until January 2017, he resided in a loft over a barn on a farm on Maui. It appears that he has not engaged in any paid employment, or filed any tax returns, for the past 20 years. Mr. McCoy's life choices, and the evidence of his friends and family, suggest that he is a fiercely independent spirit, and someone for whom a decline in cognitive capacity and the attendant loss of autonomy would be particularly upsetting.

[9] It is not contested that Mr. McCoy has been very close to his sisters and his niece for many years. They visited him regularly in Hawaii and always had a supportive and caring relationship with him. Ms. Brady, Ms. Hole and Ms. Lebedovich have looked after almost all of Mr. McCoy's health and financial issues in recent years.

[10] It is also clear that until recently, Mr. McCoy placed a great deal of trust in his sisters and his niece. On November 16, 2015, Mr. McCoy signed an enduring power of attorney, making Ms. Brady his attorney for his Hawaiian assets.

[11] On May 18, 2016, Mr. McCoy made a will that named Ms. Brady as his executor, and Ms. Lebedovich as his alternative executor. The will leaves his estate in equal shares to his two sisters.

[12] In early January 2017, Mr. McCoy had a stroke and was hospitalized. Ms. Brady and her husband flew to Maui and found a care home in which he could live after his stroke. On January 15, 2017, Mr. McCoy was transferred from hospital to Kalama Heights, a retirement community in Maui. Mr. McCoy's health care and living arrangements after his stroke were complicated by the fact that he has no health insurance in the United States.

[13] Mr. McCoy and Ms. Csizmazia met at Kalama Heights. It appears that Mr. McCoy's family was not aware of the relationship at first. According to both Mr. McCoy and Ms. Csizmazia, a fairly serious romantic relationship started shortly after they met in February 2017, and they moved into the same unit at Kalama Heights in March 2017.

[14] Meanwhile, during the first half of 2017, Mr. McCoy's sisters and niece were working to find a way to get him back to Canada where he could qualify for government health insurance and receive the care that he needed. This process was complicated by the fact that Mr. McCoy had let his passport, green card and all other forms of identification expire. Ms. Brady was eventually able to obtain a special passport for him on compassionate grounds. This enabled her to bring Mr. McCoy to Vancouver in late July 2017, where she arranged for him to reside in the Wellness Centre at Amica Arbutus Manor ("Amica"), an assisted living facility. The plan was to keep Mr. McCoy at the Wellness Centre until he had resided in British Columbia long enough to re-qualify for membership in the BC Medical Services Plan, and then move him into some form of subsidized long-term care. In the meantime, Ms. Brady advanced the funds to pay for his rent and living expenses.

[15] On July 26, 2017, Mr. McCoy granted an enduring power of attorney with respect to his British Columbia assets to Ms. Lebedovich. On the same day, he signed a representation agreement that made Ms. Lebedovich, Ms. Hole and Robert Hole III (Ms. Hole's son) his representatives.

[16] In or about late August 2017, Ms. Csizmazia arrived in Vancouver from Hawaii. She briefly stayed with Mr. McCoy at Amica before departing to Canmore, Alberta to visit her daughter. She returned to Vancouver in September 2017 and she and Mr. McCoy resumed living together at Amica. They lived together in a unit at Amica until April 2019.

[17] In April 2019, Mr. McCoy was transferred from Amica to the Good Samaritan Delta View Care Centre ("Delta View"), a long-term nursing care facility for patients with complex care needs. The circumstances of this move were unfortunate and have led to much of the anger and mistrust that has fueled this dispute. Ms. Lebedovich, Ms. Brady and Ms. Hole made the decision not to inform either Mr. McCoy or Ms. Csizmazia of their plan on the day Mr. McCoy was taken to Delta View. Ms. Lebedovich told Ms. Csizmazia that she was taking Mr. McCoy for a walk, then she drove him to Delta View and he never returned to Amica.

[18] For 48 days after Mr. McCoy was removed from Amica, the family refused to tell Ms. Csizmazia where he was. Even once counsel became involved, and Ms. Csizmazia's lawyers wrote letters to counsel for Ms. Lebedovich asking to be advised of Mr. McCoy's location, this information was not disclosed. It appears that Mr. McCoy's sisters and niece were so focussed on their mistrust of Ms. Csizmazia that they lost sight of how traumatizing it would be for Mr. McCoy to be suddenly and without explanation separated from the woman he saw as his wife.

[19] Mr. McCoy now mistrusts his sisters and his niece. In his interview with Dr. Chan in August 2019, he referred to his family having "kidnapped" him when they moved him to Delta View and said that he suspects that they are "attracted to getting my property." Interestingly, this is the same charge that Mr. McCoy's sisters and niece levy against Ms. Csizmazia. The suspicion on both sides may be misplaced, since the likelihood of Mr. McCoy having much, if any, property at the end of his life appears to be low.

[20] Mr. McCoy's income consists solely of Canada Pension Plan benefits in the amount of $50 per month. His assets are modest. His only asset of value, property in Hawaii, has been liquidated and the net value of his assets at the time of hearing was approximately $420,000. Given his relatively young age and significant care needs, it is quite possible that Mr. McCoy's limited resources will be insufficient to pay for his care for the rest of his life.

Declaration of Incapacity

[21] Dr. Dian examined Mr. McCoy on February 23, 2018 and found him incapable of managing himself or his affairs. He examined him again on August 13, 2018 and noted no interval changes. Dr. Chung examined Mr. McCoy on March 29, 2019 and found him incapable of managing himself or his affairs. Dr. Chan conducted a geriatric psychiatric assessment of Mr. McCoy on August 30, 2019 and also found Mr. McCoy incapable of managing his person or his affairs.

[22] On the basis of the unanimous medical evidence, I am prepared to make the declarations of incapacity sought by both petitioners.

Appropriate Committee of Person and Estate

[23] In Stewart (Re), 2014 BCSC 2321 at para. 29, Mr. Justice Masuhara set out the following non-exhaustive list that may inform the court's inquiry in determining an appropriate committee:

(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.

[24] It is a very serious thing to deprive someone of the power to make decisions about their own personal and financial affairs. Because of this, the law requires a court hearing a contested committeeship proceeding to take a nuanced approach that considers the "best interests" test in the fact specific context of the individual whose personal liberty is about to be relinquished.

[25] While the paramount consideration in a contested committeeship application is the best interests of the patient, it can be challenging to apply the best interests test, a concept that has developed mostly in relation to children, to adults. In Vranic (Re), 2007 BCSC 1949, Madam Justice Ballance helpfully distinguished the best interests test in the adult guardianship context from the best interests of the child test as applied in family law:

[92] For sound reasons, [the best interests of the child] standard quite properly reflects the protective approach of the court in dealing with matters which affect children. Although the test by the same name applies in considering the appointment of a committee for a mentally incapacitated adult, its application requires a more nuanced approach which acknowledges and takes into consideration issues concerning the adult's autonomy, his personal dignity, his idiosyncrasies and the way he has chosen to live his life while capacitated. It also takes into account most assuredly any wishes he has validly expressed while mentally competent or lucid about who he would like to act as his committee or otherwise make decisions on his behalf.

[26] It is critical, therefore, for this Court to consider the patient's individual circumstances, which may include choices the patient made while capable that appear idiosyncratic or unconventional to others. The best interests test as applied to incapable adults must account for the different ways adults choose to live their lives, and must balance the protective aims of the legislation against the dignity and autonomy to which every member of our society is entitled.

[27] A patient's wishes are always an important consideration, even if there are concerns about the reasonableness of those wishes. As Madam Justice Fisher noted in Re Matthews, 2013 BCSC 1045 at para. 28:

This issue is not without difficulty. The patient's wishes may be unreasonable or irrational. Where a patient does not wish a particular individual to look after her, whether or not this is grounded in reality, the court must take care to assess what effect an order contrary to that wish would have on her health.

[28] This is not to say that a committee appointment in accordance with a patient's wishes will always be in his or her best interests. To the contrary, there will be a number of circumstances in which the other relevant factors will outweigh the significance of the expressed wishes of the patient such that it is in the best interests of the patient to make an order that departs from his or her expressed wishes. Each case must turn on its facts.

[29] Mr. McCoy's sisters and his niece are concerned that Ms. Csizmazia does not comprehend Mr. McCoy's need for complex care. They believe that, if she were committee of person, she would move him back to Amica, where his complex care needs cannot be met. They also appear to be concerned that she may move him back to Hawaii, where he has no health insurance.

[30] Ms. Lebedovich points out that she, her mother and her aunt have done all the hard work in looking after Mr. McCoy. They cleaned up his house in Hawaii and arranged to get him back to Canada. They looked after getting him into Amica and then Delta View. They have arranged every doctor's appointment and taken care of all of his financial arrangements. They argue that Ms. Lebedovich is the obvious choice under almost all the criteria set out in Stewart.

[31] Ms. Csizmazia, on the other hand, argues that she is Mr. McCoy's spouse and thus best placed to provide him with the loving care he requires. She argues that not only does Mr. McCoy wish for her to be his committee of person and estate, but as the person closest to him, she has an understanding of his current situation and abilities that Ms. Lebedovich lacks.

[32] Ms. Csizmazia also argues that the other family members' denial of her spousal status in the face of Mr. McCoy's sworn testimony that she is his wife mitigates in favour of her application.

[33] The question of whether or not Ms. Csizmazia is a common law spouse is a hotly contested one. However, no one has sought a declaration as to spousal status in the petitions before me. In light of that, I do not propose to make a spousal status determination in this committeeship proceeding that could impact the rights and obligations of the parties in the future. Irrespective of whether Ms. Csizmazia is or is not Mr. McCoy's common law spouse, I must determine on the evidence before me who is best placed to look after Mr. McCoy's financial and care needs.

[34] However, I do find that in one respect, the position of the parties concerning spousal status gives rise to an important consideration regarding the appropriate committee. While I will not determine spousal status in these petitions, the fact that Mr. McCoy's two sisters and his

niece have all sworn affidavits stating that they "do not agree that Maryanne is Brian's common law spouse" does speak to one of the relevant factors in identifying an appropriate committee for Mr. McCoy: whether the proposed committee would be likely to consult with immediate family members about the appropriate care of the patient.

[35] Mr. McCoy's other family members have refused to accept that Ms. Csizmazia is a family member at all, despite Mr. McCoy's position that she is his wife. It seems unlikely based on her denial of the relationship, and past history, that Ms. Lebedovich, if she were committee, would treat Ms. Csizmazia as a close family member or consult with her about Mr. McCoy's care. Without making a finding about spousal status, I do find that it is in Mr. McCoy's best interest for Ms. Csizmazia to be consulted and apprised about his care, and to be involved in his life in a meaningful way.

[36] While I am satisfied that Mr. McCoy's sisters and niece have his best interests at heart, and that they wish to protect him from what they see as an exploitative relationship, the approach they have taken to date can only be characterized as heavy handed. The fact that Mr. McCoy is no longer capable of managing his affairs or his person does not mean that his family is at liberty to disregard a relationship that is clearly of enormous importance to him.

[37] Mr. McCoy has expressed his opposition to his niece, or any member of his family other than Ms. Csizmazia, being appointed his committee. While he once trusted his sisters and his niece, as evidenced by his will, power of attorney and representation agreement, that trust has been eroded since those documents were executed.

[38] Mr. McCoy's mistrust of his niece and sisters is not misplaced. They used deception to separate him from someone he loves. They continue to interfere with Mr. McCoy and Ms. Csizmazia spending time together. I have no doubt that Mr. McCoy's sisters and niece were genuinely attempting to protect Mr. McCoy's best interests in taking these steps. However, I also find it is reasonable for Mr. McCoy to have lost confidence and trust in them, and I must respect his wish, which is neither unreasonable nor irrational, not to have Ms. Lebedovich as his committee of person or estate.

[39] I am satisfied that Mr. McCoy loves and trusts Ms. Csizmazia and views her as his spouse. His wish to have her act as committee of his person and estate must be given due consideration by the Court. However, I must balance this against the alleged shortcomings of Ms. Csizmazia as a caregiver. The fact is that Ms. Csizmazia and Mr. McCoy did not live together for long and as such, there is very little basis on which I could determine one way or another whether Ms. Csizmazia has the skills or the judgment to make important financial and personal care decisions for Mr. McCoy. It does appear on the evidence that she has had trouble accepting Mr. McCoy's limitations and may have previously taken an unduly optimistic view of his capacity to live independently.

[40] I am not persuaded that the alternative candidate suggested by Ms. Csizmazia and Mr. McCoy, Mr. Thrasher, is an appropriate committee of person or estate. Mr. Thrasher resides in Hawaii. He is far removed from Mr. McCoy's day to day life. He has sworn an affidavit

saying he is prepared to act, but he has not supplied sufficient evidence that would enable this Court to determine whether he is well placed to protect Mr. McCoy's best interests. For example, it is unknown whether he would consult with family members with respect to Mr. McCoy's health care decisions. It is also not clear what, if anything, Mr. Thrasher knows about Mr. McCoy's present circumstances.

[41] I have considered the option of appointing the Public Guardian and Trustee of British Columbia (the "PGT") as committee of estate and person in this case, particularly because of the level of conflict between Ms. Csizmazia and the other family members. The PGT has filed a response saying that she is prepared to act as committee of person and estate if the court determines that the appointment of a family member is not in Mr. McCoy's best interest. None of the parties who appeared before me were supportive of the appointment of the PGT as committee of person and estate, mostly because of the attendant cost of paying the PGT's fees.

[42] There are many cases where the PGT is the only available option for committee, due to the lack of a suitable family member to act. This is not one of those cases. In this case, I find an order can be made on appropriate terms that appoints an individual close to Mr. McCoy, protects Mr. McCoy financially and attenuates the family conflict.

[43] In all the circumstances, I must give considerable weight to Mr. McCoy's wishes. In my view, it would be extremely distressing to Mr. McCoy if Ms. Lebedovich was appointed committee. Not only is she unlikely to support his relationship with Ms. Csizmazia, which is very important to him, but it is unlikely that she will be able to rebuild the trust that has been eroded between her and her uncle. As a result, I dismiss her petition to be appointed Mr. McCoy's committee.

[44] I am satisfied that it is in the best interests of Mr. McCoy for Ms. Csizmazia to be appointed his committee of person and estate. However, I must give weight to the considerable evidence before me which suggests that Mr. McCoy needs to reside in a complex care facility and the fact that, to date, Ms. Csizmazia has not always appreciated the level of care Mr. McCoy requires. As such, while I am prepared to appoint Ms. Csizmazia as committee of person and estate, the order I make is intended to ensure that, in her decision making, Ms. Csizmazia governs herself in accordance with the advice of professionals.

[45] At the close of hearing, I asked the parties for submissions about order terms that would provide for an assessment of Mr. McCoy's present care and living needs. All parties agreed that it was in Mr. McCoy's best interests to be assessed by an occupational therapist and the parties made joint submissions on the terms that would govern an assessment of Mr. McCoy's needs. I have incorporated those terms into my order. I have also adopted the submission of the PGT with respect to securing Mr. McCoy's assets.

[46] Accordingly, I make the following orders:

a) Brian Edward McCoy is, by reason of mental infirmity arising from disease, age or otherwise, incapable of managing himself or his affairs;

b) Maryanne Csizmazia (the "Committee") is appointed committee of the person and the estate of Mr. McCoy, with the following restrictions:

i. In lieu of a bond, the Committee shall transfer the sum of $310,000 from Mr. McCoy's TD Canada Trust account to a financial institution where an investment has been established by her in compliance with the Trustee Act, R.S.B.C. 1996, c. 464 (the "Financial Institution"). The Committee shall have no access to the capital of the investment other than for reinvestment purposes, without prior written consent of the PGT or a court order.

ii. The Financial Institution and any successor institutions shall be served with a copy of this order and the Committee shall provide proof of service of this order to the PGT.

iii. The Committee will forthwith obtain an assessment from a qualified occupational therapist that will consider Mr. McCoy's functional and care needs. Specifically the occupational therapist must consider and opine on:

(1) What level of residential care Mr. McCoy requires in order to have his needs met and whether it is possible and practical (both in terms of his needs but also in terms of available facilities) for Ms. Csizmazia to live with him;

(2) What assistance Mr. McCoy needs with respect to his activities of day to day living beyond what Ms. Csizmazia can provide if they are living together;

(3) For so long as Mr. McCoy is not living with Ms. Csizmazia, whether he is able to safely stay with her for overnight visits and whether any modifications are needed to accommodate overnight visits in Ms. Csizmazia's home.

iv. Upon receiving the report of the occupational therapist, the Committee will provide a copy of the report to Ms. Lebedovich, Ms. Brady and Ms. Hole.

v. If the occupational therapist recommends that Mr. McCoy be moved from Delta View, the Committee may place Mr. McCoy in a facility that meets the recommendations of the occupational therapist.

vi. Unless and until so recommended by an occupational therapist, the Committee shall not move Mr. McCoy from his current residence at Delta View (other than for the purpose of receiving care in a hospital if required), except by further order of the court.

vii. The Committee shall not take Mr. McCoy outside the province of British Columbia except by further order of the court.

viii. The Committee shall keep Ms. Lebedovich, Ms. Brady and Ms. Hole informed in writing of all medical appointments and all medical and health care decisions made on behalf of Mr. McCoy.

ix. The Committee must facilitate regular private visits and regular communication between Mr. McCoy and his other family members.

[47] At the close of the hearing, I was informed that the parties wished to argue costs after the matters in issue had been determined. If the parties cannot agree on costs, they may make arrangements via Supreme Court Scheduling to appear before me to speak to costs. Such arrangements should be made no later than 30 days from the date of this decision.

"Francis, J."

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