
CANADA / JUDGMENT

McNally (Re)

2016 BCSC 1136

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Supreme Court of British Columbia

DECIDED

10 June 2016

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2016 BCSC 1136 McNally (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McNally (Re),

2016 BCSC 1136

Date: 20160610

Docket: S1510437

Registry: Vancouver

Re: The Patients Property Act, R.S.B.C. 1996,

c. 349 and Amendments thereto

And

In the Matter of Evangeline Alexina McNally,

also known as Eve McNally

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

Counsel for the Petitioners:

T. Louman-Gardiner

Counsel for the Public Guardian and Trustee:

no appearance

Counsel for the Attendee, Lynn Moyer:

C.J. Greta Airhart

Place and Date of Hearing:

Vancouver, B.C.

June 1, 2016

Place and Date of Judgment:

Vancouver, B.C.

June 10, 2016

[1] The petitioner, Greg McNally, seeks to be appointed as the committee of the person and estate of his mother, Evangeline McNally pursuant to the Patients Property Act, R.S.B.C. 1996 c. 349 (the "Act"). His sister, Elynn Moyer, opposes his appointment but their brother Grant McNally does not. Ms. Moyer asks the court to appoint her as committee.

Declaration of Incapacity

[2] The petition also seeks a declaration that Ms. McNally is incapable of managing herself and her own affairs. No one opposes that order being granted.

[3] Section 2(1) of the Act stipulates that the Attorney General, a near relative or other person may apply for a declaration that a person is incapable of managing herself and her affairs because of, among other things, "mental infirmity arising from disease, age or otherwise". Section 2(2) requires that notice of such an application must be served personally on the proposed patient at least 10 days before the court hearing.

[4] Section 3(1) of the Act states that at the hearing of the application, the court must be provided with affidavits from two medical practitioners providing their opinion about the incapacity of the proposed patient. If upon reviewing those and hearing the application, the court is satisfied that the proposed patient is incapable of managing herself and her affairs for reasons specific in the Act, the court must grant the declaration sought; in other words, the section is mandatory when sufficient evidence is provided.

[5] The petitioner has submitted the December 7, 2015 affidavit of Dr. Kevin Merth who confirmed his opinion that Ms. McNally lacks capacity to manage her financial affairs and her capacity to manage herself is limited but likely to decline. In her December 15, 2015 affidavit, Dr. Richa Sharan deposed: "[i]t is clear to me that Ms. McNally is not competent to make decisions about her personal care or her financial affairs" but added that Ms. McNally was capable of making her wishes known.

[6] I understand that all parties agree the expected decline noted by Dr. Merth has manifested and there is no dispute that Ms. McNally is incapable of managing both herself and her financial affairs.

- [7] Having reviewed the evidence, taken into account the submissions of the Public Guardian and Trustee and Greg McNally, and acknowledging Ms. Moyer's and Grant McNally's agreement that the declaration be granted, I grant a court order declaring that Ms. McNally is incapable of managing herself or her affairs because of mental infirmity arising from disease or age.

Procedural Issue

- [8] What remains in dispute is whether I should appoint Greg McNally as his mother's committee. Ms. Moyer submits she is more suitable to be her mother's committee. Greg McNally raises a preliminary objection. He submits the court has no jurisdiction to appoint Ms. Moyer as committee because she has not filed a petition pursuant to the Act.
- [9] Sections 6 and 7 of the Act address applications to be appointed as a committee. Section 6 says "subject to s. 13 (which addresses accounting), on application by the Attorney General or any other person, the court may appoint any person to be the committee of the patient". Section 7 requires that notice in writing of an application to appoint a committee must be served on the Public Guardian and Trustee no less than 10 days before the hearing.
- [10] Mr. McNally's position is that the requirement to serve the Public Guardian and Trustee cannot be met in the absence of a petition which precludes the court from considering whether to appoint Ms. Moyer.
- [11] Ms. Moyer submits it was not necessary for her to file and serve a petition in order for the court to grant an order appointing her as committee. She says that s. 6 of the Act can be read independently and it explicitly allows the court to appoint as committee "any person". She also says that her response in opposition to the petition was delivered to the Public Guardian and Trustee and therefore that office had effective notice such that I could treat the statutory requirement for service in s. 7 as being met. Finally, she submits that regardless of the wording of the statute, the court can rely on its *parens patriae* jurisdiction to appoint the person it finds most suitable to be committee based on the evidence presented.
- [12] Ms. Moyer has presented no authority to support her position, nor was I directed to any decision that explicitly considered the issue of the court's jurisdiction to appoint a person a committee absent a petition filed by that person.
- [13] There can be no doubt (and Ms. Moyer did not suggest) that had Mr. McNally not brought a petition, Ms. Moyer could not be appointed committee; without a petition she would not be able to appear before the court. The question is whether she can be relieved of that obligation in the circumstances of this case.
- [14] In my view, she cannot.
- [15] The court cannot rely on its inherent or *parens patriae* jurisdiction to dispense with mandatory provisions in the statute. Unlike s. 2(4) of the Act which grants the court authority to dispense with service of an application seeking a declaration that a person is

incapable. There is no mechanism in the statute to relieve against the requirement to serve the Public Guardian and Trustee. In my view, service of an application to be appointed a committee on the Public Guardian and Trustee is a precondition to the court considering anyone's application.

- [16] It also seems to me that it would be inimical to the fundamental purpose of the office of the Public Guardian and Trustee to disregard that statutory requirement. Service on that office is not merely for the purpose of informing it of the fact that someone is applying to be a committee. Rather, the Public Guardian and Trustee exercises oversight and reviews the petition and supporting material. The ability of the Public Guardian and Trustee to exercise its oversight is not subject to the court's discretion.
- [17] Besides serving the Public Guardian and Trustee, the more obvious flaw in Ms. Moyer's position is that the court has no petition from her. Commencing a petition is not a mere formality. By filing a petition, the person wanting to be appointed a committee is forced to substantiate her own suitability by articulating the specific facts and the legal basis supporting her appointment, accompanied by supporting affidavits.
- [18] For those reasons, I agree with the petitioner that Ms. Moyer's failure to commence a petition disentitles her to be appointed committee.

Does the evidence support the appointment of Greg McNally?

- [19] The sole issue before me is whether Greg McNally is suitable to be appointed his mother's committee. Based on all the evidence I find that he is.
- [20] Although I have concluded Ms. Moyer has not properly brought an application to be appointed, I note that in the event I am wrong on that point, and this court has jurisdiction in this case to consider Ms. Moyer's appointment in the absence of a petition filed by her, I find she is not suitable based on the evidence presented.
- [21] I am satisfied that it would be in the best interest of Ms. McNally and her family that Greg McNally be appointed the committee of her person and her estate. As noted in *Re Kirkwood*, 2016 BCSC 673, there are no statutory criteria relating to who should serve as committee beyond the obligation of that person to only exercise powers for the greatest benefit of the patient. There is nothing else that describes qualifications to be appointed committee.
- [22] In *Kirkwood*, the Master also refers to *Re Bowman*, 2009 BCSC 423 and *Re Stewart* which both address the applicable legal principles. I can do no better than quote the same passages relied upon by Master Keighley which state:
- [29] In the case of *Re Bowman* 2009 BCSC 523, Dardi J, provided the following useful summary of the applicable principles:
- [32] On an application for either the appointment or removal of a committee, the test for determining who is appropriate to act as a committee invokes the *parens patriae* jurisdiction of this court and is governed by an assessment of who will serve the patient's best interests:

British Columbia (Public Trustee) v. Pollen (1996), 15 E.T.R. (2d) 154, [1997] B.C.W.L.D. 042; Re Poon, 2005 BCSC 254, 14 E.T.R. (3d) 29; and s. 28 of the Act. This inquiry includes a consideration of who can best deal with the patient's financial affairs, nurture her estate, and see that her income and estate are applied for her greatest benefit: Re Pineo, [1985] B.C.J. No. 1171, [1985] B.C.W.L.D. 1982.

- [33] In Re Farquhar (19 June 2008), Vancouver S081503 (B.C.S.C.), the court provided guidance as to additional considerations as follows at para. 63:

Additional significant factors the court is to consider are the proposed committee's previous involvement with the patient or his family, the proposed committee's knowledge and understanding of the patient's situation and needs, the proposed committee's level of experience and capability in performing the duties of committee, any kind of a plan of the proposed committee for the management of the patient, and any potential conflict of interest between the proposed committee and the patient. [Internal citations omitted]

- [34] In the result, the overriding principle that I must consider in this inquiry is the best interests of the patient

In the case of Re Stewart, Masuhara J, dealt with the competing applications of the patient's two children. At para.29, the learned judge sets out what I regard as a useful list of considerations to be taken into account. I found this list, although not exhaustive, to be quite helpful in the context of this case:

- [23] The Master then embarks on a review of the evidence under 10 headings that arose from the Shaw decision. I accept those factors are important, although I prefer not to structure my reasons under the 10 headings.

Financial Affairs

- [24] With regard to the management of Ms. McNally's finances, Greg McNally deposed that on December 16, 2008 his mother executed a power of attorney appointing her three children as joint attorneys to manage her affairs if necessary. That power of attorney required all three siblings to make decisions jointly, but in the event they could not agree, two of the three would be legally sufficient to effect a decision. At first, the three siblings had no difficulty coming to joint decisions, but disputes have recently arisen between him and his sister, culminating in her opposition to his appointment. I will refer to those disputes later in this decision. However, the power of attorney supports a finding that Ms. McNally did desire that her children be involved with managing her affairs.

- [25] In his affidavit, Mr. McNally outlined Ms. McNally's financial status. She earns a pension which amounts to approximately \$33,274 each year. She has no debt. The only major asset is a home which he deposed does not have a value exceeding \$900,000, although counsel acknowledged given the reality of the current real estate market, that value may be low. There are also some bank accounts which total approximately \$80,000 and vehicle worth

under \$2,000. As of December 7, 2015, Mr. McNally estimated his mother's monthly living expenses to be about \$1,450.

- [26] The Public Guardian and Trustee noted that since Ms. McNally entrusted Greg McNally with a power of attorney that militated against requiring security against him. The Public Guardian and Trustee relied on *Public Trustee of BC v. Macht* (1991), 53 BCLR (2d) 390 (A.C.) for that proposition. However, the Public Guardian and Trustee does recommend that the order granting committee ship restrict that person from disposing of, or encumbering the real property owned by Ms. McNally, and that any net sale proceeds would be transferred to an investment established in compliance with the Trustee Act. Greg McNally accepts these recommendations and consents to orders being granted to give them effect.
- [27] Mr. McNally confirmed he is not an undischarged bankrupt, he has not been found guilty of any financial or physical offenses pursuant to the Criminal Code of Canada and that he has not been held liable for fraud, breach of trust or any other form of financial mismanagement in a civil proceeding.
- [28] Ms. Moyer raised an issue about how Ms. McNally's railway pension was diverted to cast suspicion on Mr. McNally's integrity in handling their mother's finances. But I find on a balance of probabilities that Mr. McNally took measures necessary to preserve that pension. That is an apt illustration of his capacity to act in his mother's best interest to preserve her assets. I am satisfied that Mr. McNally has demonstrated he is trustworthy to handle his mother's finances in her best interest.

Committee of the Person

- [29] There is no dispute that since at least August 2015, Ms. McNally's mental capacity has deteriorated. She was admitted to Eagle Ridge Hospital on August 21, 2016 exhibiting signs of confusion. Ms. McNally has been in the hospital or care facility since that time. The family was informed of the medical diagnosis of vascular dementia on October 7, 2015. Prior to her hospital admission, she was living independently in her own home in Coquitlam. No one disagrees that presently Ms. McNally requires near 24 hour care and cannot live alone.
- [30] On January 15, 2016, staff at Eagle Ridge Hospital indicated a residential care bed opened up for Ms. McNally at Baillie House in Maple Ridge. Greg McNally then described in his affidavit what I understand to be the standard operating procedure with regard to placing patients in care facilities, whether publically or privately financed (all fall under the administrative authority of the relevant health authority). There is a waiting list and if a room at a facility offering the appropriate level of care for the patient becomes available, it is offered to the patient at the top of the waiting list. If that person does not take that spot, she is moved to the bottom of waiting list. Mr. McNally also understood that if Ms. McNally refused the space she would be required to pay for her hospitalization at the rate of \$1,000 per day.

- [31] Greg McNally acknowledged that visiting Baillie House is inconvenient for him and Ms. Moyer because it is some distance from both of them, (although Grant is now closer to his mother). But he deposed given the quality of care he had observed at the facility and his belief that his mother has now settled into that accommodation, the accommodation is suitable for her.
- [32] Mr. McNally acknowledged that he understood his mother's wish to live at home prior to her admission to hospital, but he deposed that his mother had expressed to him on a number of occasions since her diagnosis a desire to remain in a care facility. This is echoed in Grant McNally's affidavits. Dr. Merth attached to his affidavit a questionnaire on which he reported that Ms. McNally told him she does not want to live at home, but wants to live in a care facility.
- [33] Ms. McNally's living arrangement was an issue of dispute between Ms. Moyer and her brothers. I accept that when asked by Ms. Moyer, Ms. McNally did state on occasion that she wanted to live with her daughter and it is true that her wishes are important. I note however that perhaps not unexpectedly, the parties agreed that Ms. McNally would tend to agree with what one of her children suggested to her in order to avoid confrontation or dispute. Given that, I think it would be unwise to place too much weight on what any one person says her wishes are; that expression may simply reflect Ms. McNally's appeasing whomsoever she was speaking with. However, if I were to assess the evidence about Ms. McNally's wishes since she has been admitted, I am satisfied on a balance of probabilities that the evidence supports that it was her wish to remain in a care home.
- [34] More importantly, the overriding concern of this Court, and any committee, is what is in the best interest of the patient. I find the evidence overwhelmingly supports Greg McNally's position that the only suitable place for his mother given her cognitive and physical capabilities, is in a care facility. I find the congruence between the evidence about what is best for Ms. McNally and Greg McNally's proposed plan for her care to support his appointment.
- [35] Ms. Moyer's position was that her mother could move in and live with her and her husband, although that position may have been tempered somewhat during submissions. In any event, the main thrust of her evidence and submissions was related to her desire to have Ms. McNally live with her. Despite that, Ms. Moyer presented no evidence about the necessary arrangements, the cost or availability of supportive care. In short, there was no evidence that she had turned her mind to how she would handle her mother living with her given Ms. McNally's cognitive and physical needs. I recognize that Ms. Moyer is motivated by her belief in her mother's wishes and her love and affection for her mother. But a very important task of a committee is to make decisions in the best interest of the patient regardless of what might be the most desirable arrangement from an emotional point of view. In contrast, Mr. McNally based his decision on the practical and real needs of his mother. On that basis, I find Mr. McNally is not only suitable, he is preferable to Ms. Moyer to be Ms. McNally's committee.

- [36] I am also satisfied that Greg McNally has been involved with and supporting his mother for many years and thus there is a strong emotional bond between them. It is notable that he credited his sister for the amount of care she provided to Ms. McNally. This balanced and fair evidence supports a conclusion that Mr. McNally will communicate with his siblings important information about Ms. McNally. This is buttressed by Greg McNally's uncontradicted evidence that despite difficulties between him and his sister, he nonetheless attempted to include her in decisions about their mother.
- [37] It is equally clear that Ms. Moyer has provided a significant amount of care, including personal care to her mother. But that is only one factor to consider in deciding who should be committee.
- [38] I am troubled by the evidence about some of Mr. and Ms. Moyer's behaviour towards Ms. McNally. In my view, the evidence does establish on a balance of probabilities that Mr. and Ms. Moyer do not have an understanding or appreciation of Ms. McNally's condition. This was demonstrated by the fact that as late as May 17, 2016 Ms. Moyer was exploring the possibility of Ms. McNally leaving the care facility to live with her. I hasten to add that even if Ms. Moyer's motivation was sound, and I find it was, the issue is not the feelings she has for her mother, but her ability to make decisions in her mother's best interest.
- [39] I am concerned that certain conduct by Mr. and Ms. Moyer diminished the confidence I have in their ability to manage Ms. McNally's affairs in the way most beneficial to her. Specifically, I refer to their violating hospital and/or care home policy in the amount of time they took Ms. McNally out of the facility. Ms. Moyer deposed with regard to one such incident she was "unaware" of the policy. That unawareness itself is problematic.
- [40] More troubling is the evidence that Mr. and/or Mrs. Moyer took Ms. McNally out of the hospital on extended excursions, and on a few occasions attempted to get her to sign legal documents, including in the few days leading up to her diagnosis. It is difficult to imagine that someone diagnosed with dementia on October 7, 2015 was not exhibiting symptoms in the preceding week. I find it alarming that they would attempt to have Ms. McNally sign legal documents when her competence was compromised. I also question why it was appropriate for Mr. Moyer to have any independent role in these matters. I am sure his bond to Ms. McNally is strong, but there is no indication in the evidence that Ms. McNally understood or desired that any responsibility taken on by her daughter would be exercised, in fact, by her son-in-law without her daughter's presence.
- [41] Because Ms. McNally will remain in a care home, it would not be feasible to appoint different committees for her person and her estate. This is especially important in this case. It is in Ms. McNally's best interest that one person be in charge of all of her affairs. I note that the evidence demonstrates Greg McNally had a good relationship with care staff which is an important component of managing her affairs.

[42] In conclusion, there is strong support in the evidence that Mr. Greg McNally will exercise committee powers in his mother's best interest. I am satisfied that Mr. McNally has provided sufficient evidence for him to meet the legal test to be appointed his mother's committee. Subject only to the Public Guardian and Trustee's recommendation about how to handle the real property, Mr. McNally is appointed as the committee of Ms. McNally's person and estate.

COSTS

[43] The petitioner is entitled to his costs calculated as special costs to be paid from his mother's estate.

"Sharma J."

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Prepared on 29 October 2026 · Esheria