

CANADA / JUDGMENT

Morrison (Re)

2020 BCSC 195

COURT

Supreme Court of British Columbia

DECIDED

18 February 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 195 Morrison (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Morrison (Re),

2020 BCSC 195

Date: 20200218

Docket: S84843

Registry: Nanaimo

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

and

In the Matter of Marion Gail Morrison, also known as Marion Gail Morrison-Swain

Before: The Honourable Mr. Justice A. Ross

Reasons for Judgment

Counsel for the Petitioner, Darren Gooding:

M. Buhler

Counsel for the Respondent Milton Swain:

P. Higgs

Place and Date of Trial/Hearing:

Nanaimo, B.C.

January 7-10, 2020

Place and Date of Judgment:

Nanaimo, B.C.

February 18, 2020

Table of Contents

Introduction. 3

Declaration of Incapacity. 4

Can Milton be appointed the committee?. 6

Background and Relationship of Milton and Darren. 11

Factors Regarding Suitability. 19

- a) Whether the appointment reflects the patient's wishes, when she was capable of forming such a wish. 19
- b) Whether immediate family members are in agreement with the appointment 20
- 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 20
- d) The level of previous involvement of the proposed committee with the patient, with preference usually going to family members. 21
- e) The level of understanding of the proposed committee with the patient's current situation, and whether that person will be able to cope with future changes of the patient 22
- f) Whether the proposed committee will provide love and support to the patient 22
- g) Whether the proposed committee is the best person to deal with the financial affairs and ensure the patient's income and estate are used for the patient's benefit 23
- 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. 24
- i) Who is best to advocate for the patient's medical needs?. 24
- 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 24
- 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 25

Conclusion. 25

Introduction

- [1] This matter arises from the decline in health of Marion Gail Morrison. She is known to her friends and family as Maggie, and I will use that name through these reasons. I also use first names for the petitioner and respondent. I mean no disrespect by doing so.
- [2] Since 2009, Maggie has been afflicted with early onset dementia. It began as forgetfulness and progressed to severe dementia.
- [3] Since October 2016, Maggie has resided at the Glacier View Lodge Seniors Facility ("GVL") in the Special Care Unit. She was placed there by her husband, the respondent Milton Swain.
- [4] The petitioner, Darren Gooding, is Maggie's son and Milton's step-son. He seeks two orders under the Patients Property Act, R.S.B.C. 1996, c. 349 [Act]. First, he seeks a declaration that his mother is incapable of managing herself and her affairs. Second, he seeks an order appointing himself as committee.
- [5] Milton opposes the petition. He agrees that Maggie is incapable of managing herself or her affairs. He seeks an order appointing himself as committee. As discussed below, Milton was Maggie's primary caregiver, and he has been in control of decisions regarding her care and finances for some years. He took those steps in his capacity as her spouse and, latterly, pursuant to a power of attorney ("POA") that Maggie executed in 2002.
- [6] The Public Guardian and Trustee ("PGT") filed responses to the petition. I describe its position below.
- [7] It is important to state that Milton and Darren are both acting out of love and commitment to Maggie. Where they differ, is on who should make the decisions.
- [8] To some extent, the dispute between Darren and Milton relates to the care plan for Maggie. As noted, Milton placed Maggie in a memory care facility in 2016. Darren's plan, if feasible, would see Maggie housed in her own home with caregivers.
- [9] Another reason for this litigation is the breakdown in the relationship between Milton and Darren. That breakdown was due, at least in part, to Darren's suspicions of Milton's handling of Maggie's finances. I discuss the origin of those suspicions below.
- [10] In addition, there is a procedural issue raised by the petitioner. Darren says that the Court cannot appoint a committee under the Act unless that person has commenced a petition or filed an application. Milton has not taken those steps.
- [11] The hearing of this petition proceeded based on the affidavits filed. In addition, Milton and Darren were cross-examined on their affidavits. Milton also called Ms. Effie Warden, a care coordinator at GVL.

Declaration of Incapacity

- [12] As noted above, both petitioner and respondent agree that Maggie is incapable of managing herself or her affairs.
- [13] Maggie was born on July 27, 1944. She is 75 years old. She worked as a registered nurse before her retirement. She has three brothers, one of whom, Bill Morrison, is named as the executor of her will. Bill swore an affidavit in support of Milton's position in this proceeding.
- [14] Maggie has two sons, the petitioner, Darren, aged 53, and his brother, Sean, aged 49.
- [15] Maggie married Milton on September 5, 1998. It was her fourth marriage. The couple lived in Comox in the home that Maggie purchased in 1989 before she met Milton. In her will, she leaves a life estate in that property to Milton. On Milton's death, the house passes to her two sons. The will was executed in 2002. Also in 2002, Milton and Maggie each executed a POA in favour of the other. As discussed below, I consider that step to be an important determining factor in this case. There is no issue of Maggie's capacity in 2002.
- [16] This petition was filed on June 21, 2018. The medical affidavits describe Maggie's condition as of August 2017. It was apparent from the testimony at the hearing that Maggie's dementia has progressed since 2017. The deterioration in her health affects the decision on the appropriate care plan for Maggie.
- [17] The petitioner filed affidavits of two doctors, Dr. Stephan Schovanek, a geriatric psychiatrist, and Dr. Douglas Anderson, Maggie's general practitioner.
- [18] Dr. Schovanek's affidavit is dated August 16, 2017. He met with Maggie on April 19, 2017. He performed a Mini-Mental Status Examination on which she scored 3/30, indicating severe cognitive problems. She was not oriented to place or time. Her short-term memory was entirely lacking. She was unable to follow simple directions or instructions, and had no ability to perform simple financial calculations. Dr. Schovanek opined that she requires 24-hour care.
- [19] Dr. Anderson's affidavit, dated August 22, 2017, states that Maggie had been seeing him for approximately 15 months. Dr. Anderson agrees that the Maggie's short-term memory was very poor and severely impaired.
- [20] Dr. Anderson further opined that Maggie was able to manage some personal hygiene, but was unable to make informed health care decisions. He noted that GVL is a complex care facility that has a lockdown unit. He opined that Maggie requires 24-hour care.
- [21] Additional affidavits from friends and family confirm that Maggie's condition is severe.
- [22] In his first affidavit, dated June 21, 2018, Darren stated that, by his observation, the other patients in his mother's unit at GVL have "more severe cases of dementia". The inference from that statement was that his mother did not need to be in a locked unit. Regardless of whether or not that statement was an objective observation in June 2018 when the affidavit was sworn, it is clearly not accurate at present. In his testimony, Darren agreed that, in 2020, his mother cannot use utensils to feed herself, requires assistance using a straw, and has

become incontinent.

[23] Ms. Effie Warden, a care coordinator at GVL, testified that it provides seniors care for individuals with memory and cognitive issues. There are three separate units. Patients are admitted to the unit that is most appropriate for their conditions. GVL places patients with the most severe problems in the Special Care Unit. Ms. Warden testified that in October 2016, Maggie was admitted to the Special Care Unit on the recommendation of her treating practitioners. Hence, by October 2016, her condition placed her in the most secure ward with the most disabled patients.

[24] As of 2020, by any standard, Maggie has severe dementia and is severely impaired.

[25] Having reviewed the evidence and submissions of the counsel, pursuant to ss. 2-3 of the Act, I grant an order declaring that Maggie is incapable of managing herself and her affairs because of mental infirmity.

Can Milton be appointed the committee?

[26] As noted above, the petitioner argues that Milton cannot be appointed as committee because he has not filed an application or petition.

[27] Section 6 of the Act provides that, following a declaration of incapacity, if a committee is not appointed, the PGT is appointed committee by default (s. 6(3)). There is no allowance within the Act for a person to be incapable of managing herself or her affairs without the appointment of a committee.

[28] As noted above, the PGT filed an amended response to petition. The PGT does not wish to be appointed as committee.

[29] The petitioner's argument derives from s. 7 of the Act and the decision of Justice Sharma in McNally (Re), 2016 BCSC 1136.

[30] The facts in McNally involved a dispute between brother and sister. Each sought appointment as the committee of their mother. The brother commenced the petition. The sister filed a response but did not file a cross-petition nor an application to be appointed as committee.

[31] The brother argued that s. 7 of the Act required the court only to consider for appointment as committee, a person who has filed a petition. Section 7 states:

Service of notice of application to appoint committee

7 Notice in writing of an application to appoint a committee must be served, not less than 10 days before the date of the application, on

- (a) the Public Guardian and Trustee, and
- (b) the committee of the patient if one has been appointed.

[Emphasis added.]

- [32] Justice Sharma agreed with the brother's submission and found that it was necessary for a person seeking appointment to provide notice to the PGT. Justice Sharma noted that obtaining the approval of the PGT is not a formality. The PGT must have an opportunity to provide comment on the suitability of the candidate for the role. Justice Sharma wrote:
- [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.
- [33] The petitioner argues that McNally is binding authority and that the Court cannot consider Milton as a potential committee because he did not file a cross-petition nor an application to be appointed as committee with the PGT ten days before this hearing as required by s. 7 of the Act.
- [34] I note that McNally is the only decision to consider this s. 7 argument. Further, counsel in McNally did not refer the court to any authorities supporting the restrictive interpretation of s. 7. The s. 7 issue from McNally has not been considered or applied in any subsequent decisions of this Court.
- [35] Milton's counsel argues that the decision in *Re Grav*, 2007 BCSC 123 is an example of a case where the court did appoint a respondent as the committee without a petition or application. However, the court in *Grav* did not consider the s. 7 issue. It is simply an example of an instance where the court appointed a non-petitioner as committee.

- [36] I am left with a situation wherein the McNally decision did not consider Grav and the procedural argument from McNally was not made in Grav. As a result, there are two (very short) streams of decisions that are inconsistent.
- [37] I find that I do not need to resolve the inconsistency between those two cases because I find the McNally decision to be distinguishable on the facts. Justice Sharma is correct that it is important, if not necessary, for the PGT to have the chance to provide comment on the suitability of any person who seeks to appointment as committee. Further, the court must have evidence of the suitability of the candidate.
- [38] The distinguishing feature in this case is that both the PGT and the Court have had that opportunity to review Milton's suitability, even though he did not make a formal application. In this proceeding, Milton swore an affidavit of kindred and fortune confirming that he meets the requirements to be appointed as a committee. That affidavit was filed and served with this petition and is in the possession of the PGT.
- [39] Further, the PGT has knowledge of Milton and his handling of Maggie's finances. In 2015, Darren was suspicious of Milton's handling of Maggie's finances. Darren asked the PGT to investigate Milton. The PGT investigated between February and August 2016 and then closed its file without taking any further action or providing any direction to Milton. The PGT's letter to Milton, closing its file, was tendered as evidence.
- [40] The petitioner submits that I should not put any stock in the result of the PGT's investigation of Milton. He argues that it is possible that the PGT did not have full disclosure from Milton.
- [41] Regardless of whether or not I can infer anything from the PGT closing its investigation of Milton's handling of Maggie's finances, I do take into account the PGT's position in this proceeding. In an amended response to petition, filed on January 3, 2020, the PGT set out several positions. One of the PGT's positions was that if the Court determines that it is not appropriate to appoint Darren as the committee, then no declaration of incapacity should be made, and Milton should continue to manage Maggie's affairs pursuant to the 2002 POA discussed above. Further, the PGT's position is that, as Maggie's spouse, Milton is in the best position to make health care and admission to care facility decisions.
- [42] Counsel for Darren argues that the PGT's position is incorrect in law, noting the mandatory wording of ss. 6 and 9 of the Act. Section 6 requires that the court appoint a committee if the declaration of incapacity is made. Section 9 provides that the POA terminates upon the declaration of incapacity.
- [43] While I accept Darren's positions on these points are correct in law, I still find the PGT's position informative: The PGT does not have any reason to oppose Milton managing his wife's affairs.

- [44] Putting two and two together: the PGT investigated Milton's handling of Maggie's finances in 2016. The PGT closed its investigation without requiring Milton to take any corrective steps. Now, in 2020, the PGT suggests that I should order that Milton continue to manage Maggie's finances pursuant to that same POA.
- [45] Hence, in contrast to McNally, the PGT has already had a chance to vet Milton's appropriateness for the role and has tacitly approved him.
- [46] I further note that the decision in McNally found that the sister was not a suitable candidate as committee. Hence, the better candidate was the petitioner in that case.
- [47] Finally, on this topic, I note that the provisions of the Act are internally inconsistent. Despite the mandatory wording of s. 7, there are other provisions that would lead to a different result. For example, s. 6(1) provides:

Appointment of committee

6 (1) Subject to section 13, on application by the Attorney General or any other person, the court may appoint any person to be the committee of the patient.

[Emphasis added.]

- [48] Hence, the court has the power to appoint "any person" to be the committee of the patient. This provision is inconsistent with s. 7.
- [49] Section 9 provides that if the patient, while competent, had nominated a committee (in the prescribed manner), then the court "must" appoint that person as committee unless there is good and sufficient reason not to do so. Given that wording, it is not reasonable to conclude that the failure to file an application to the PGT should be fatal to that person's appointment.
- [50] I further note that the provisions of s. 28 of the Act provide that the court may make any order "not in contravention to this Act or the regulations that it considers necessary for the interests of the proper, honest and prudent management and administration of the estate of a patient."
- [51] It is evident from the entirety of the Act and the jurisprudence that the primary considerations for the court are the best interests of the patient. Those considerations must outweigh the procedural requirements of s. 7 in cases where the PGT has substantively approved the candidate in question.
- [52] To paraphrase Sharma J., it would be inimical to the purposes of the Act and to Maggie's best interests, not to consider all candidates for the position of committee. Assuming that the PGT and the court have had a chance to vet the candidates, it could never be in the best interests of the patient to restrict the potential number of candidates for the role of committee. That step could lead to the appointment of a person who satisfies the requirements, but is not the best candidate.

- [53] For those reasons, I distinguish the facts of this case from the decision in McNally. I consider that both men can be considered as candidates for the role as committee.

Background and Relationship of Milton and Darren

- [54] Milton is a retired paramedic. He is 72 years old and receives a pension. He married Maggie in 1998. As her health started declining in 2009, he became her primary care provider. Despite her dementia, he continued to take her on vacations until 2016, including a trip to England and Spain. He testified that he decided that they would travel as much as possible, knowing that Maggie's health would decline. Milton also described the difficulties that he had while travelling with Maggie. It is evident that travelling with Maggie was not easy, and Milton took on extra burdens in order to allow Maggie to travel.
- [55] Milton made the decision to have Maggie admitted to GVL in October 2016. Since that time, he has visited her four to five times per week. Everyone should be so lucky in their lives as to find a partner who is as dedicated and caring as Milton is to Maggie.
- [56] Darren is 53 years old. He is a carpenter. He resides in New Westminster in an apartment. He is in a long-term relationship. He has an adult daughter.
- [57] By all accounts, leaving aside the dispute with Milton, Darren is a loving and committed son to Maggie. He describes Maggie as his best friend, and he says that he would do anything for her. Prior to her admission to GVL, he would travel to Comox several times per year to visit Maggie. When Milton needed respite from caring for Maggie, Darren volunteered to care for her. He is a devoted and caring son.
- [58] Before commencing a comparison of the attributes of Milton and Darren, I discuss below the history of the dispute between the two men.
- [59] A brief description of Maggie and Milton's finances is necessary at this point. Milton receives a municipal pension of approximately \$3,723 per month (after taxes). Maggie also receives a municipal pension as well as some other investment income. Her annual income is in the range of \$53,000 (before taxes). In other words, their pension incomes are similar.
- [60] Maggie's income is deposited to an account in her name. Milton's income is deposited to an account in his name. They both deposit a set amount into a joint account on a monthly basis.
- [61] In addition, as noted, Milton and Maggie lived in the home that Maggie owned before she met Milton. Milton continues to reside in that home. Maggie's will provides for a life estate in the home to Milton.
- [62] Darren's concerns with Milton began in 2013 as Maggie's dementia progressed. He convened a meeting with Milton and Maggie's other son Sean.

- [63] At that meeting, the men discussed Maggie's care and finances. Darren proposed that Milton and Darren jointly oversee Maggie's finances, and that Milton and Sean oversee her care. Darren felt that Sean and Milton should provide the oversight of her care because they lived in Comox, whereas he lived in New Westminster. With respect to finances, Darren testified that he wanted "some oversight" over Milton's handling of Maggie's money. It is clear that, at the time, Darren was suspicious of Milton spending his mother's funds improperly. There was no reason for him to want oversight at the time, other than not trusting Milton. As of 2013, Milton and Maggie had been married for 15 years.
- [64] Milton did not agree to joint management of Maggie's finances.
- [65] In January 2015, Milton travelled to Cuba by himself for respite. Darren cared for his mother during Milton's absence. Darren noted that there was a pile of Maggie's clothes on the floor and there was no fresh produce in the house. Also during Milton's absence, Darren reviewed Maggie's bank statements.
- [66] When Milton returned, Darren confronted him with these three issues. He told Milton that it seemed like he had "checked out from his relationship" with Maggie. Darren stated that when he confronted Milton about Maggie's finances, "Milton seemed to me to be uncomfortable and defensive". To be frank, any person in Milton's position would be uncomfortable and defensive when addressed in that manner.
- [67] Milton explained that, as a symptom of her dementia, Maggie often spent time removing clothes from her closet and piling them on the floor. He allowed her to do that because it gave her a sense of accomplishment. He would later re-hang the clothes. With respect to the groceries, Milton stated that Maggie was always healthy and if there were no groceries, Darren should have bought some. I note that all of the medical records admitted into evidence indicate that Maggie was physically healthy and well-nourished. At the hearing of the petition, Darren did not advance the argument that Milton's care of Maggie was deficient before October 2016.
- [68] Darren visited the home again in April and June 2015. His visits coincided with times when Milton and Maggie were on vacation.
- [69] While visiting the home in 2015, Darren copied Maggie and Milton's separate bank statements. As noted above, in early 2016, Darren asked the PGT to investigate Milton's handling of Maggie's finances. The PGT found no irregularities.
- [70] Starting in early 2016, the relationship between Darren and Milton became strained. Darren says that Milton started to isolate Maggie from him. Milton explained that he was upset and concerned that Darren had reviewed his (Milton's) bank statements and involved the PGT. Milton told Darren that he was not welcome in the home any more.

- [71] Darren's affidavit sworn June 21, 2018, outlines his concerns with Milton's handling of Maggie's funds. He noted the balance in Maggie's personal account declined from \$42,753 in December 2013 to \$34,733 in November 2015. That constitutes a decline of \$8,000 over two years. In addition, he noted that the balance of Milton's personal account had increased during the same period.
- [72] While Milton could not explain the exact reason for the decline in Maggie's personal account, he noted that he had taken Maggie on several vacations during that period including the trip to England and Spain.
- [73] The financial concerns of 2015, which led Darren to report Milton to the PGT, did not form any part of his arguments at the hearing of the petition. Instead, at the hearing, he argues that Milton's actions have demonstrated that he has not met the standard required of a person who is acting under a POA. He pointed to seven areas where, he says, Milton has fallen below the standard:
- (1) During cross-examination, Milton conceded that managing money is not his strength.
 - (2) Milton conceded that he does not regularly review Maggie's bank statements to ensure their accuracy.
 - (3) Milton conceded (during cross-examination in 2020) that he could not recall or identify the reason for two withdrawals from Maggie's account totalling \$19,000. Those withdrawals occurred in January 2016.
 - (4) In his testimony, on several occasions, Milton described Maggie's funds as his own or as "their" funds.
 - (5) He admitted that he had used Maggie's funds to pay for his own lawyer during the course of this litigation.
 - (6) Prior to 2012, when Maggie had the capacity to make the decision, Maggie decided to defer paying municipal property tax on her home. Pursuant to a municipal program, seniors can defer payment of that tax until their property is sold. The only tax statement in evidence was from 2012. When cross-examined, Milton did not know the total amount of the deferred taxes as of 2019.
 - (7) In December 2015, while on a vacation with Maggie to Las Vegas, Milton decided to purchase a time-share for approximately \$20,000. The purchase price was split between Maggie and Milton. There are annual fees for that time-share. The petitioner says that that was a poor financial decision and that Maggie will not receive any benefit from it.
- [74] With respect to Milton's care of Maggie's person, the petitioner notes that Maggie was assaulted by another patient within a week of being admitted to GVL. The petitioner submits that, in his testimony, Milton trivialized that incident and he did not investigate it fully.

- [75] Second, the petitioner argues that Milton's evidence displayed that he did not know what Maggie was doing at GVL. Milton testified that she was in a swimming program. Another witness testified that Maggie had not been swimming in almost two years.
- [76] I have considered all of the petitioner's concerns regarding Milton's suitability to be appointed as committee of Maggie's affairs. The only one that causes me any amount of concern is the fact that Milton has used Maggie's funds to pay his counsel in this proceeding. Petitioner's counsel correctly argues that Maggie is not a party who is responding to this petition. In response, Milton testified that, in his opinion, Darren's plan to move Maggie back into the house would be a poor decision and not in Maggie's interests. Hence, his position is that, when necessary, he used Maggie's funds to defend Maggie's interests.
- [77] While it was improper for Milton to use Maggie's funds for that purpose, I do not consider that act to be determinative of Milton's suitability as committee. It does not diminish my opinion of Milton as the appropriate committee. I have outlined below the many attributes that, in my opinion, make Milton the preferable committee for Maggie's affairs.
- [78] Turning to the two concerns that the petitioner raises with respect to Milton acting as the committee of Maggie's person, I note he raised no concerns (at the hearing) regarding the period when Milton was Maggie's primary caregiver over a period of more than six years. The only two concerns relate to episodes when Maggie was a resident at GVL. Dealing with the first event, the assault, Milton testified that his primary concern was that Maggie was not injured. He was aware that other patients with severe dementia may not act rationally. The second issue is a minor one. Milton testified that Maggie is involved in a swimming program at GVL. However, Effie Warden testified that Maggie has not participated in that program for two years. The evidence is clear that Milton visits Maggie four to five times per week. However, he is not Maggie's primary caregiver. He does not live with her. He cannot be expected to know everything about her care at GVL.
- [79] It follows from my review of the criticisms of Milton that I do not have concerns that go to the core of his suitability to be appointed as the committee of Maggie's person.
- [80] The petitioner's original affidavit material criticized the care that Milton provided to Maggie before her admission to GVL. It also criticized the care and facilities at GVL. I have considered those comments, and I dismiss them. I find that there is no basis for criticism of Milton's care of Maggie prior to October 2016. I further find that GVL is a suitable, regulated facility for persons with dementia.
- [81] There is one other aspect of the case to outline before entering into an analysis of the two candidates: the care plan proffered by the petitioner. Darren's plan proposes that Maggie would move back to her house with live-in support. He argues that if Maggie lived at home, she would get 24-hour care on a "one-on-one" basis. In contrast, he notes that at GVL, she is one of 26 patients on the ward. He believes that this is what his mother would want if she had the choice.

- [82] In his first affidavit, Darren's care plan involved one person "volunteering" to provide full-time care for Maggie, with weekend respite relief. He also proposed that he would make the necessary renovations to the home. He proposed that the main caregiver would be paid \$1,500 per month.
- [83] By the time of the hearing of the petition, Darren's plan had evolved. It involved further respite and other care. However, in my opinion, Darren's plan was and is woefully unconsidered. His prospective live-in caregiver is a 72-year-old retired nurse. Based on Darren's plan, she would be available 24 hours a day, although there would be another caregiver for some hours during the day. There would be other "volunteer" respite care on the weekends.
- [84] Darren's plan is a proposal that he has not investigated fully. He has not consulted with any medical or elder-care professionals, apart from the people who would be part of the team. In Darren's defence, Maggie's doctors have declined to consult with him because he does not have a POA and is not her spouse. Further, there is little impetus to pursue those consultations unless or until his petition is successful.
- [85] However, as noted above, since he proposed his initial plan in 2018, Maggie's health has declined. At present she is incontinent, and cannot use utensils to feed herself. She has little memory. Her gait has devolved into a "shuffle", and she needs assistance with stairs. By any definition, she has very advanced dementia.
- [86] In addition to all other potential problems with moving Maggie back to her home, that residence has flights of stairs. I consider Darren's continued proffering of the concept of moving Maggie back into her house, as a negative indication of his suitability as committee.
- [87] I also find fault with Darren's history of questioning Milton's handling of the couple's finances. During the entire period of her declining cognitive functioning, Milton was Maggie's primary care provider. Despite that taxing role, Darren questioned Milton's efforts with her care and serially sought to investigate his financial dealings. Those suspicions, which I find to be unwarranted, are the reason that the parties ended up before this Court. Given Maggie's cognitive decline, there would be nothing wrong with approaching Milton and expressing concern regarding the management of her finances as Darren did in 2013. However, it is evident that Darren was not able to make those inquiries in a delicate or tactful manner. As of 2013, the couple had been married for 15 years. Milton was not a roué or gold-digger seeking to bilk Maggie. Searching Milton's banking records, reporting Milton to the PGT, and commencing this petition have had the unfortunate effect of alienating two people who love and care for Maggie from each other.
- [88] On this topic, I note Sharma J.'s analysis in McNally where respondent sister sought to have her mother live at home with support. The petitioner brother sought to place the patient in a care home. Justice Sharma wrote:

- [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.
- [89] In my reasoning below, I have kept in mind Maggie's "practical and real needs", not only the emotional pull of having Maggie live in her own home. As a starting point, I find that placing Maggie at GVL was the correct decision for her care and any attempt to remove her from that care would not be in her best interests.

Factors Regarding Suitability

- [90] I now consider the candidacy and suitability of Darren and Milton to be appointed as the committee. Each tendered an affidavit of kindred and fortune indicating that they met the requirements for appointment. Based on those affidavits, and the other evidence, I find that both men would be suitable for the role. Although I have noted factors that I consider to be negative indicators of Darren's suitability, those do not rise to the level of unsuitability. This is not a case where one candidate is suitable and the other is not. The discussion below addresses the issue of which candidate is more suitable.
- [91] Prior cases have delineated a number of criteria that the court should consider. I have set out below, as headings, the non-exhaustive list of criteria mentioned in *Stewart (Re)*, 2014 BCSC 2321. I have set out my analysis regarding the better candidate under each heading.
- a) Whether the appointment reflects the patient's wishes, when she was capable of forming such a wish
- [92] Maggie executed a POA in 2002 that appointed Milton as her attorney. Obviously, at that time, she had the opportunity to name one of her sons to that position, but chose her husband. At that point, Milton and Maggie had been married for four years. The fact that they were still married when Maggie's cognitive abilities started began declining indicates that she was correctly confident in her marriage. The fact that Milton took all the steps that he did after the onset of her dementia indicates that he was the correct choice. The fact that he visits GVL regularly is further confirmation of his continued commitment.

- [93] In this case, I consider the POA to be the most important indicator of Maggie's wishes and the most important consideration for my analysis. I noted above the provisions of s. 9 of the Act, which requires the court to appoint the patient's nominee unless there are good reasons to reject that person. While the execution of a POA is not the same as the nomination of a committee, it is analogous. It clearly indicates that Maggie's wish was to have Milton manage her financial affairs. This factor strongly favours Milton.
- b) Whether immediate family members are in agreement with the appointment
- [94] Maggie's immediate family includes her husband, Milton, and her two sons, Darren and Sean. Sean did not provide any evidence.
- [95] Maggie's brother, Bill, is named as the executor of her estate in her will. Bill supports Milton's position and Maggie's continued residence at GVL.
- [96] Maggie's granddaughter, Darren's daughter, swore an affidavit in favour of Darren's position. That affidavit was critical of Milton's care of Maggie before October 2016. For the reasons discussed above, I place no weight on those criticisms.
- [97] Based on this factor, the only immediate family member who is not a party, Bill Morrison, is in agreement with Milton's appointment. This factor favours Milton.
- 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
- [98] There is no conflict between Maggie and either of the candidates. As discussed above, there is conflict between Darren and Milton. I have found that Darren was the cause of that conflict by requesting the PGT investigation and commencing this petition.
- [99] With respect to consultation between family members, it is evident that Darren's plan to care for his mother in her home does not fit with either Milton's or Bill's understanding of Maggie's best interests.
- [100] Darren points to a meeting that he had with Milton and Sean in September 2016, one month before Maggie was admitted to GVL. At that meeting, Milton proposed that Maggie would continue to live with him in the family home. Without consulting Darren or Sean, Milton admitted Maggie to GVL in October 2016. Milton explained that Maggie's care workers had deemed her situation to be "urgent" in that month. He received a call from GVL indicating that there was a space available for Maggie, but that Milton had to make the decision promptly. In his testimony, Milton described it as the most difficult decision of his life. Hence, although he did not consult with Darren or Sean regarding that important decision, he made the choice in Maggie's best interests. There was a good reason for making the decision without consulting Maggie's sons.
- [101] This factor favours Milton.

- d) The level of previous involvement of the proposed committee with the patient, with preference usually going to family members
- [102] Milton was Maggie's primary caregiver until October 2016, when he made the decision to admit her in GVL. Apart from respite that was provided by care workers and Darren, Milton was responsible for Maggie's care 24 hours a day, 7 days per week. In stating that, I note that during the last years before her admission to GVL, Maggie had a tendency to get up and wander at night. According to Milton's testimony, her admission to GVL was urgent, in part because the burden of caring for Maggie was causing negative health effects on him. He was, to use his own words, "burned out".
- [103] Due to no fault of his own, Darren had less involvement with his mother. He lives in New Westminster and works on construction jobs around British Columbia and Alberta. He was living his own life. As noted, he would come to visit Maggie somewhere between two and six times per year. He also provided respite care for Milton.
- [104] While Darren is to be commended for the care that he did provide to Maggie, it does not compare to the sum of the care provided by Milton. As a result, this factor favours Milton.
- e) The level of understanding of the proposed committee with the patient's current situation, and whether that person will be able to cope with future changes of the patient
- [105] The evidence establishes that Milton visits Maggie four to five times per week. Darren continues to visit his mother when he can.
- [106] The underlying foundation of this factor seeks the court's analysis on appointing the person who best understands the patient's condition and will be able to deal with changes in the future. The evidence regarding Maggie's condition is clear. She has severe dementia and requires 24-hour care. Maggie will continue to reside at GVL. Sadly, there is no reasonable hope that her condition will improve. As noted, the Special Care Unit houses the most serious dementia patients. As a result, it is unlikely that Maggie's committee will have to deal with "future changes" in her condition. There will be no future decisions requiring an assessment of whether she should be moved to another facility or unit.
- [107] Although Darren tempered and adjusted his original position and proposal at the hearing of the petition, it is evident that he would like to explore the prospect of having Maggie move back home. I find, however, that Maggie's condition was so severe in October 2016 that she was admitted to the Special Care Unit at GVL. Her condition has deteriorated since then. It would be inadvisable to move her at this point.
- [108] While Milton clearly understands Maggie's current condition, it is not clear to me that Darren understands the extent of her problems or her care requirements. This factor favours Milton.
- f) Whether the proposed committee will provide love and support to the patient

- [109] The two candidates will provide love and support. This factor is neutral.
- g) Whether the proposed committee is the best person to deal with the financial affairs and ensure the patient's income and estate are used for the patient's benefit
- [110] Milton concedes that he is not a money person. I discussed above the petitioner's criticisms of Milton's dealing with Maggie's finances. I have found that they are minor and do not disqualify him or diminish my view of his suitability.
- [111] There is no evidence that Darren is either a good or a bad manager of funds. He has not been in control of Maggie's finances.
- [112] However, I do have concerns with Darren's candidacy to be Maggie's committee based on the lack of consideration for the financial aspects of the care plan that he proposed.
- [113] Darren's plan for Maggie's care originated with his concept that she could live in her own home with live-in care attendants. He arranged for a retired nurse who would "volunteer" to provide care to Maggie in exchange for free room and board and payment of \$1,500 per month. Darren's plan evolved to include daily respite care and weekend relief workers.
- [114] It was evident at the hearing that Darren had not considered whether the payment of the "volunteer" would be an employment relationship. He had not considered workers' compensation issues. He had not considered taxation issues. He had not considered employment standards issues, such as minimum wage and maximum allowable hours worked. He had not considered the contingencies of the live-in care giver becoming sick or quitting.
- [115] Darren's original plan for Maggie's care appeared to be designed to save money. Saving Maggie's money is not a consideration for this Court. Maggie's funds should be paid toward obtaining the best possible care for her.
- [116] Any properly implemented, full-time care plan would require the employment of persons performing three eight-hour shifts. At minimum wage, leaving aside all other considerations, the total yearly cost would be in excess of \$115,000. It would not be in Maggie's best interests to consider any plan that sought to cut corners on the formal requirements of employment relationships and relied on the largesse of friends and volunteers to care for her. Any such plan would result in a potential gap in her care.
- [117] Assuming that Maggie stays in GVL, her finances will not be complicated. She owns a house. She leaves a life estate to Milton in her will. Her intention in that regard is clear. She has a pension and a small investment account that pays dividends. The charge for housing, food, and care at GVL is 80% of her income. Hence, the only discretion with respect to her finances relates to the home and the remaining 20% of Maggie's income.
- [118] For these reasons, although Milton conceded that his strength was not in finances, this factor tips toward Milton.

- 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

[119] I discussed above Darren's stated concerns with Milton's handling of Maggie's funds. I find that it does not diminish any confidence that Milton will properly handle her affairs in future. This factor is neutral.

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

[120] This factor is balanced. Milton sees Maggie more often and, as a result, is able to communicate with staff more regularly. He is on good terms with the staff at GVL. Darren's evidence suggests that he is more likely to raise concerns with Maggie's care. As a result, this factor is neutral.

- 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

[121] Milton's care plan is currently in place. It is successful.

[122] I have outlined above my concerns with Darren's proposed plan.

[123] This factor favours Milton.

- 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

[124] There is no need to divide the responsibilities.

Conclusion

[125] Having considered all of the factors set out above, I find that Milton Swain will exercise committee powers in Maggie's best interests. I find him to be the most suitable candidate.

[126] The PGT made recommendations regarding appropriate security to be posted by the committee. The PGT recommends the posting of a bond with a corporate surety in the amount of \$900,000. Alternatively, there should be a restriction placed on the ability of the committee to access Maggie's assets. Subject only to Milton Swain agreeing to one of the two forms of surety set out in the amended response to petition of the PGT, Milton Swain is appointed as the committee of Maggie's person and estate.

[127] Counsel requested that the issue of costs be adjourned. I make no order for costs, and I will hear submissions if necessary.

"A. Ross J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/01/2020BCSC0195.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/morrison-re-2020>

Prepared on 25 October 2026 · Esheria