CANADA / JUDGMENT

(Re) Walsh

2015 BCSC 1992

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Supreme Court of British Columbia

DECIDED
30 October 2015

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2015 BCSC 1992 (Re) Walsh

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

(Re) Walsh,

2015 BCSC 1992

Date: 20151030

Docket: S154176

Registry: Vancouver

Re: Patients Property Act, R.S.B.C. 1979,

Chapter 313 and Amendments Thereto

And

Patricia Helena Walsh

Corrected Judgment: The text of the judgment was corrected at paragraphs 5, 20, 49 and 71 on November 16, 2015

Before: The Honourable Madam Justice Harris

In Chambers

Reasons for Judgment

Counsel for the Petitioner:

B. W. Lemer

Counsel for the Public Guardian of British Columbia:

D. L. Polley

Place and Date of Hearing:

Vancouver, B.C.

July 24, 2015

Place and Date of Judgment:

Vancouver, B.C.

October 30, 2015

Introduction

[1] The petitioner, Michael Walsh, is married to Patricia Walsh. He was appointed committee of her estate following a motor vehicle accident that left Ms. Walsh with a catastrophic brain injury.

[2] Mr. Walsh seeks the following orders under the Patients Property Act, R.S.B.C 1996, c. 349 (the "PPA"):

a. Approval of his accounts as committee for the period of January 2010 until December 31, 2014;

b. In the alternative, that the passing of accounts be granted following the accounts being audited and passed before the Registrar;

c. Approval of gifts of $100,000 from the estate of Ms. Walsh to each Sean and Debra Walsh;

d. Compensation of $60,000 per year, indexed at 2% per year payable to Mr. Walsh; and

e. Costs of the application paid from the estate on a full indemnity basis.

[3] Mr. Walsh asserts that there are sufficient funds in Ms. Walsh's estate to pay out the cash gifts which he proposes be paid to their adult children. He also asserts that he should be compensated for his work as committee and as a dependent spouse who is unable to work.

[4] The petition is opposed by the Public Guardian and Trustee of British Columbia ("the Public Guardian"). In addition, the Public Guardian has brought an application to remove Mr. Walsh as committee and to appoint the Public Trustee in his place. The Public Guardian also seeks legal expenses be paid from the estate of Ms. Walsh.

Background

[5] The facts giving rise to this matter are not substantially in dispute. To the extent there are significant differences, I will address them in the course of my reasons.

[6] The motor vehicle accident which resulted in Ms. Walsh suffering a traumatic brain injury occurred on January 12, 1991. Pursuant to s. 2 of the PPA, Ms. Walsh was declared incapable of managing herself and her affairs on May 10, 1991. The court appointed Mr. Walsh as her committee.

[7] A structured settlement was approved for Ms. Walsh in 1993. The agreement provided for $10,700 paid monthly, indexed at 3% per year, and a number of lump sum payments. The final lump sum payment of $400,000 occurs in 2021. As of January 2015, the monthly payments received by Ms. Walsh were $20,502.31. In 2013, the estate's assets totalled $1,303,553.83.

[8] Ms. Walsh resides in Avonlea Care Facility in Kelowna. She is 54 years of age. According to her rehabilitation management consultant, Ms. Janice Landy, Ms. Walsh cannot speak and is unable to move independently. Ms. Walsh suffers from seizures. She is totally dependent on others, requiring extensive full time care. Her injuries are regarded as permanent; there has been no significant improvement in her condition since 1993.

[9] Mr. and Ms. Walsh have two children, Sean Walsh ("Sean") and Debra Walsh ("Debra"). At the time of the accident, the children were 10 and 12 years old. They are now 32 and 34 years of age. They are both married and each have completed Masters degrees.

[10] Mr. Walsh is now 60 years old. He has been in a marriage like relationship with Ms. Line Chevalier since 1993. They live in Powell River and have a 19 year old son together. He claims that he has been disabled from physical work since 1996 and unable to obtain employment due to his physical disability, education, work experience and age. He was trained as an appliance technician and operated a basement dehumidifying business, which failed in 2009.

[11] Mr. Walsh has continued as committee for Ms. Walsh since he was first appointed in 1991.

[12] It is not disputed that Ms. Walsh has been provided with a high level of care at Avonlea Care Facility. Her current care costs are approximately $145,000 per year. The costs of care have been relatively stable over the last five years.

[13] Mr. Walsh deposed that he spends approximately 20 hours per month managing Ms. Walsh's affairs. These tasks include: telephone consultations with Avonlea, one to two annual visits, communications with family regarding her status and with professional advisers regarding her care and assets. He also arranges payment for her care.

[14] Mr. Walsh hired an accountant and investment manager to assist with asset management. He has also retained the rehabilitation management consultant to help facilitate Ms. Walsh's care.

[15] Mr. Walsh deposed that he authorized gifts of $5,000 to each child upon their marriage, and $10,000 each toward their weddings.

[16] The Public Guardian approved the committee's accounts for the period of May 10, 2004 to December 31, 2008 on January 29, 2009. At that time Mr. Walsh agreed to certain conditions for the better accounting of Ms. Walsh's trust funds. The accounts have not been passed since January 29, 2009.

[17] On July 24, 2009, the Public Guardian met with Mr. Walsh and Ms. Landy to review the management of Ms. Walsh's funds. Mr. Walsh raised the matter of a spousal allowance. The Public Guardian advised Mr. Walsh that as Sean and Debra no longer required financial assistance, Mr. Walsh would have to seek court approval for such an allowance. Mr. Walsh claims the Public Guardian agreed that an allowance representing one half of Ms. Walsh's monthly income "sounded reasonable".

[18] On September 20, 2009, Mr. Walsh sought the permission of the Public Guardian for the payment of a spousal allowance of $4,439.25 monthly, to be paid out of the estate funds. This sum represented half of Ms. Walsh's surplus monthly income.

[19] On September 28, 2011 the Public Guardian responded that it could not approve the allowance and requested that he obtain court approval for such an allowance. Mr. Walsh filed this petition on May 22, 2015.

[20] According to the evidence, Mr. Walsh has paid himself an allowance in the following amounts since 2010:

Monthly

Annual

2010

$4,439.25

$53,271.00

2011

$4,696.81

$56,355.72

2012

$4,972.69

$59,672.28

2013

$5,084.40

$61,012.80

2014

$5,365.84

$64,390.08

[21] Mr. Walsh is named as the primary beneficiary in Ms. Walsh's will. Sean and Debra are the secondary beneficiaries.

Legislative Framework

[22] The PPA prescribes the appointment, removal and authority of a committee. It also prescribes the supervisory role of the court.

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.

(2) On application by the Attorney General, the Public Guardian and Trustee or any other person, the court may, subject to section 13, rescind the appointment of a person appointed as committee...

Inventory, security and accounts

10 (1) If a committee other than the Public Guardian and Trustee has been appointed under this Act, the following rules apply:

...

(d) the committee must pass the committee's accounts before the Public Guardian and Trustee at the times directed by the Public Guardian and Trustee, including, if the Public and Guardian Trustee requires it, a true inventory of the whole estate of the patient, stating the estimated revenue of it and setting out the debts, credits and effects of the patient to the extent they have come to the knowledge of the committee;

(e) if required by the Public Guardian and Trustee, the committee must pass the accounts before the Supreme Court in the county in which the committee was appointed committee.

Passing of accounts

13 (1) If

(a) an application is made under section 12 for the discharge of a committee other than the Public Guardian and Trustee, or

(b) the court may, and must if requested by the Public Guardian and Trustee, order that the committee pass the accounts and may, in the order, specify the time and the manner of passing the accounts, and must adjourn the application until the carrying out of the order.

(2) If a committee fails to pass the accounts as ordered, or if the accounts are found to be incomplete or inaccurate, the committee may be required to attend before the court to explain why the accounts have not been passed or a proper proceeding in connection with them taken, and the court may give the direction it considers proper.

(3) After the order made under subsection (1) has been carried out, and the court is satisfied that no further passing of accounts is necessary, the court may order that the committee is discharged.

(4) If the Public Guardian and Trustee or a committee is discharged under this section, the Public Guardian and Trustee or the committee

(a) has no further powers or duties with respect to the estate of the person who has ceased to be a patient, and

(b) is released, except in respect of undisclosed acts, neglects, defaults or accounts or dishonest or unlawful conduct, from all actions, claims and demands for or concerning the Public Guardian and Trustee's or the committee's management or administration of the estate.

Compensation for acting as committee

14 (1) A person may be allowed reasonable compensation from the estate of a patient or from the estate of a person who has ceased to be a patient for services rendered as committee of the patient or of the person who has ceased to be a patient.

(2) The compensation, if any, to be paid to a person other than the Public Guardian and Trustee must be fixed on the passing of accounts.

...

Powers of committee

15 (1) Subject to section 16,

(a) the committee of a patient as defined in paragraph (a) or (a.1) of the definition of "patient" in section 1 has all the rights, privileges and powers with regard to the estate of the patient as the patient would have if of full age and of sound and disposing mind, and

(b) the committee of a patient

(i) declared to be incapable of managing his or her affairs has all the rights, privileges and powers with regard to the estate of the patient as the patient would have if of full age and of sound and disposing mind,

(ii) declared to be incapable of managing himself or herself has the custody of the person of the patient, and

(iii) declared to be incapable of managing himself or herself or his or her affairs has all the rights, privileges and powers with regard to the estate of the patient as the patient would have if of full age and of sound and disposing mind, and as well the custody of the person of the patient.

(2) For investing money, a committee is a trustee within the meaning of the Trustee Act.

Rights, powers and privileges included

17 The rights, powers and privileges vested in the committee include all the rights, powers and privileges that would be exercisable by the patient as a trustee, as the guardian of a person, as the holder of a power of appointment and as the personal representative of a person, if the person were of full age and of sound and disposing mind.

Exercise of Powers

18 (1) A committee must exercise the committee's powers for the benefit of the patient and the patient's family, having regard to the nature and value of the property of the patient and the circumstances and needs of the patient and the patient's family.

Costs

27 The costs of all proceedings under this Act are in the discretion of the court.

Orders by court

28 If there is insufficient provision in this Act, the court may at any time, on the application of any person, make an order not in contradiction to this Act or the regulations that it considers necessary for or in the interests of the proper, honest and prudent management and administration of the estate of a patient.

[Emphasis added]

Issues

[23] The issues which are raised in this proceeding are as follows:

1. Is the payment of the proposed $100,000 gifts to each of the two adult children from the estate of Ms. Walsh justified under the PPA?
2. Is the payment of an annual allowance of approximately $60,000 for Mr. Walsh justified as compensation for his work as a committee? Is the allowance justified as spousal support? Is Mr. Walsh entitled to an allowance of some other amount?
3. Should Mr. Walsh be removed as committee of the estate of Ms. Walsh?
4. Should Mr. Walsh's accounts be passed as submitted?

Discussion

1. Should the payment of the proposed $100,000 gifts to each of the two adult children be approved?

[24] Mr. Walsh seeks court approval of gifts of $100,000 each to both Sean and Debra Walsh under ss. 14, 18 and 28 of the PPA.

[25] The legal framework applicable to the payment of gifts from an estate under the PPA was clarified by the BC Court of Appeal in the companion cases of British Columbia (Public Trustee) v. Bradley Estate, 2000 BCCA 78, and O'Hagan v. O'Hagan, 2000 BCCA 79. In considering whether the gifts which are proposed in the instant case are justified, it is helpful to briefly review the facts and conclusions of the court in those cases.

[26] In Bradley, the Public Guardian appealed the approval of a large gift from the estate of Ms. Bradley, a patient under the PPA. Her husband was the committee of the estate. At the time the appeal was heard, she was 65. There was little hope she would ever recover from her essentially comatose state.

[27] Mitigation of tax liability motivated the application to approve gifts from her estate. Ms. Bradley was an American citizen subject to U.S. estate tax upon her death. Professional advice to reduce tax liability formed the basis of the application. The gifts were to take place over several years, benefiting her three sons and the committee. The estate would be diminished from $2,600,000 to $809,000. The committee argued the residual investment portfolio of $809,230.76 would generate income in excess of the needs of Ms. Bradley.

[28] The Public Trustee opposed the application. They relied on case law decided under the Lunacy Act, R.S.B.C. 1960, c. 226 and the former Patients' Estate Act, S.B.C. 1962, c. 44 that required a "clear case of necessity" to carry out the gifts, in the absence of an unfilled intention. Upon review of these decisions and the statutory language of the legislation, the chambers judge rejected the standard of necessity argued by the Public Guardian. He considered that the new PPA had broadened the powers of a committee:

[41] In reviewing the decisions which have dealt with s. 18 of the Act, it is clear that it is prudent but not necessary for a committee to request court approval before making a gift to the family of the patient but that such gifts should be made only after a consideration of the nature and value of the property of the patient, the present and future circumstances and needs of the patient, and the circumstances and needs of the patient's family. On any such application, the court must be assured that the gifts are in accordance with the standard of care set out in Wood, supra. If court approval is not sought, then the same standards of care apply to the decision made by the committee.

[29] The chambers judge found that the applicable standard was not "necessity", but what a reasonable and prudent business person would do in the circumstances. He approved the gift in the circumstances, including that her long term needs were modest, the 'possibility' she will recover and the steps she might take if she did recover, the tax advice provided by the Seattle attorney, and the fact that a reasonable and prudent businessperson in her situation would take steps to reduce the tax payable by her estate.

[30] The BC Court of Appeal agreed with the conclusion of the chambers judge that a standard of "necessity in the traditional sense" should be rejected. In consideration of the legislative scheme, the Court of Appeal held that such a conclusion was in accordance with the language of the statute:

[16] . . . Section 18 states that a committee must exercise his or her powers for the "benefit" of the patient and the patient's family -- not simply to supply their needs. Similarly, s. 28 allows the Court to make an order that it considers "necessary for or in the interests of" the proper management and administration of the patient's estate. Again, the provision is not limited to orders considered necessary for the well-being of the patient or her family. Thus as stated in O'Hagan, the insistence on "necessity" in every case seems inconsistent with the wording and intention of the Act.

[Emphasis added]

[31] The Court of Appeal accepted the reasoning of the chambers judge that applications regarding gifts from a patient's estate should be governed by the standard of a reasonable and prudent business person:

[17] Moreover, given that committees are held to the standard of care of a "reasonable and prudent person of business" (Waters, Law of Trusts in Canada (2nd ed., 1984) at 758, quoted in Wood v. Public Trustee, supra, at 382), it is only logical to approach applications of this kind according to whether a reasonable and prudent businessperson would think that the proposal in question would be of benefit to the patient and his family, in light of the circumstances known at the time and that might arise in the future, and giving paramount importance to the patient's own interest, present and future. Making such a determination should not amount to "guesswork" as the Public Trustee suggests, and indeed is a matter on which professional advice can be sought.

[Emphasis added]

[32] Applying that approach, the Court of Appeal disagreed with the chambers judge that the proposed gifts were ones a reasonable and prudent business person would find in the best interests of Ms. Bradley and her family. The court found the chambers judge did not give adequate consideration to the needs of Ms. Bradley that could arise over the remainder of her life:

[19] In Mrs. Bradley's case, however, those "possibilities" are quite different and the costs and benefits of the planned gifts present less clear a choice. Mrs. Bradley is only 65, not 89, and she may live for many years hereafter, notwithstanding her doctor's prediction. During that time, her condition might improve or it might deteriorate, necessitating much more expensive care than she is now receiving. The committee's plan is for gifts over the next several years that will diminish Mrs. Bradley's estate from over $2,600,000 to $809,000 -- a sizeable diminution. If Mrs. Bradley were to recover her mental faculties, she would find her estate in life much reduced.

[Emphasis added]

[33] O'Hagan involved different facts, but analogous legal issues. The committee in that case sought approval of an "estate freeze" of a company where his father, the 89 year old patient, was the sole shareholder. The estate had significant assets, including approximately ten million dollars in real estate and shares in the company the patient owned.

[34] The requested estate freeze would not diminish the estate. Instead, it was a corporate reorganization with clear tax benefits. The chambers judge rejected the application. He found there was nothing in the PPA that permitted the court to approve a "tax avoidance scheme of [that] degree of complexity and sophistication".

[35] The application was granted on appeal. Justice Newbury concluded, at para. 9, that "the plan [was] . . . one that a prudent businessman of advanced years would see fit to undertake in order to minimize tax on his death and maximize the passing to his heirs".

[36] On appeal the Public Guardian had argued in favour of the necessity standard. As in Bradley, that standard was rejected on the basis that the necessity requirement was contrary to the language of the statute. While the standard was not necessity, Madam Justice Newbury cautioned that it is still a high threshold:

[23] That being said, I would suggest that in most cases where a gift or other diminution of the patient's estate is being proposed, a committee should be very reluctant to agree in the absence of some compelling reason (such as necessity). Strictly speaking, the case at bar does not involve a gift or diminution of the patient's estate: it is simply proposed that Mr. O'Hagan's common shares in HIL be exchanged for other (redeemable preferred) shares and that the future appreciation of the company accrue to a trust of which Mr. O'Hagan will be the sole beneficiary during his lifetime. The transaction is not "necessary", but will be of clear benefit to the patient's family and is something that a reasonable businessperson of advanced years would consider prudent. What is most unusual about the case is that the transaction can be accomplished, and the tax benefits realized, without in any way jeopardizing or diminishing the patient's estate during his lifetime or the ability to regain control should he recover suddenly and miraculously. In my view it would be unreasonable to withhold approval on the ground that "necessity" had not been shown.

[Emphasis added]

[37] The Court made it clear that the test is not subjective, nor should it amount to guess work: para. 24. Madam Justice Newbury emphasized the importance of the patient's interest as well as considerations of the costs of future care:

[25] In making such a decision, the patient's own interests, present and future, must be given paramount importance. Obviously, one of the future possibilities that must be considered is the contingency that the patient will recover his faculties. Where that possibility is in fact extremely small or does not exist, it should not overshadow the more realistic considerations of cost and benefit that lie at the heart of ss. 18 and 28. Another possibility that must be considered is the likelihood the patient's condition will change for the worse at some point, requiring considerably greater funds for his personal care than is now the case. Again, one of the fortunate circumstances present here is that there is and will continue to be more than whatever sum could conceivably be necessary in this regard.

[38] In my view, the following principles can be distilled from Bradley and O'Hagan:

a. The language of the PPA requires that a committee exercise his or her power for the benefit of the patient and the patient's family, and not simply for the provision of bare necessities. Bradley at para. 16, O'Hagan at para. 22.

b. The test for approval of a gift is whether a reasonable and prudent businessperson would view the gift as beneficial to the patient and his family, given the circumstances that are known at the time and the possibilities that might arise in future. Bradley at para. 17, O'Hagan at para. 24.

c. While the statutory language contemplates benefit to the patient's family, paramount importance should be given to the patient's own interest, present and future. Adequate consideration must be given to the needs that could arise in the remaining years of a patient's life. Bradley, para.19, O'Hagan at para 25.

d. A committee should be very reluctant to diminish a patient's estate. There must be a compelling reason to do so. O'Hagan, para. 23.

e. Professional advice can be of assistance in determining whether a particular proposal is sound. In both O'Hagan and Bradley, professional advice formed the basis of the proposals. Guesswork should not govern whether a gift is approved. Bradley, para. 17, O'Hagan para. 24

[39] Applying these principles, should the proposed gift by Mr. Walsh for the adult children be approved?

[40] Mr. Walsh submits that the gifts are a permissible exercise of his power to act for the benefit of the patient's family. He submits this case is distinguishable from Bradley as the gifts will not jeopardize Ms. Walsh's current and future care. Mr. Walsh contends that Ms. Walsh will not be deprived if she recovers. She had no significant income at the time of the accident and now has substantial assets. Further, testamentary disposition would not be negatively affected.

[41] The Public Guardian's submission is that the gifts should not receive court approval. The Public Guardian does not take the position that the gifts would endanger the estate, rather it emphasizes there is no objective basis in these circumstances to grant a gift. The Public Guardian argues there is no support for a pattern of gifting and the fact that family members will be the main beneficiary of an estate is not sufficient for the court to approve the payment. The Public Guardian submits the interests of the patient must be paramount over the interests of the family.

[42] In considering whether a reasonable and prudent business person would consider the expenditures justifiable, I accept that Ms. Walsh has more than sufficient funds to provide for her current level of care. However, the fact that she has more funds than currently required cannot, by itself, support the payment of gifts of the magnitude proposed by the committee. In my view, a prudent business person would also need to be satisfied that the gifts do not jeopardize her future care costs and that the expenditure is itself justified as being of benefit to Ms. Walsh and her family.

[43] Madam Justice Newbury indicated in O'Hagan that a committee should be very reluctant to agree to a gift in absence of some compelling reason like necessity: para. 23. In O'Hagan, the court was presented with professional advice which indicated the proposed corporate reorganization would provide significant tax relief. The estate freeze had a clear and undeniable benefit, and the estate would not be diminished in any way. In other words, a compelling reason existed to grant the application.

[44] I find no compelling reason exists in this case for the payment of the $100,000 gifts to the adult children. I note that there is no evidence that the adult children have a particular need for the gift, other than the money would be of assistance to them as they start their families. According to Mr. Walsh, both children have post-graduate degrees and good jobs. While I accept Mr. Walsh's desire to provide for the children, who are two hardworking young people, a general desire to gift a large sum of money for an unspecified purpose is not a compelling reason to diminish Ms. Walsh's estate.

[45] The proposed $100,000 gifts are distinguishable from the wedding gifts previously made to the children. The previous, more modest gifts of $5,000 and $10,000, were for a specific purpose, and were in keeping with what a reasonable and prudent business person would approve to benefit the family, having regard to the size of the estate and the established tradition of parents contributing to their children's weddings and buying gifts to celebrate the marriage. In my view, in the absence of specified purpose or an established tradition of giving gifts to adult children of the magnitude proposed, I am not satisfied that a reasonable and prudent business person would approve the payment of these gifts.

[46] I also find the present circumstances distinguishable from O' Hagan and closer to the facts in Bradley. It is of particular relevance that Ms. Walsh is only 54 years old. She may require many years of care in the future. In Bradley, the patient was in similar circumstances. Doctors had given Ms. Bradley slim, basically non-existent chances of recovery. Yet in declining the gift, it was still persuasive to the court that Ms. Bradley, at 65 years of age, could continue to live for many years, even though such an outcome was unlikely.

[47] While Mr. Walsh deposed that her life has exceeded doctor's expectations, I find that Ms. Walsh's life span is uncertain. The court observed in Bradley that "[Ms. Bradley's] condition might improve or it might deteriorate, necessitating much more expensive care than she is now receiving." In the instant case, even though the possibility of Ms. Walsh recovering may be remote, in light of my duty to consider the interests of the patient as of paramount importance, the potential change in the costs of her future care, as well as the possibility that she will recover enough to utilize the settlement funds set aside for her, are circumstances which militate against granting the gifts of this magnitude. In that regard, I also observe there is no report from an actuary or accountant as to future care costs or the impact of the gifts on her estate.

[48] I, therefore, decline to approve the gifts to Sean and Debra Walsh of $100,000 each.

2. Is Mr. Walsh entitled to compensation?

[49] As noted above, Mr. Walsh asks the court to approve an annual allowance between $53,000 and $64,000, for the years 2010 to 2014, and approval of an annual $60,000 allowance, indexed at 2% annually, going forward. Mr. Walsh says this allowance is justified on the basis of his services as a committee and on the basis that he no longer is able to work.

[50] The allowance Mr. Walsh has drawn is referred to in a variety of ways in the materials: as a "spousal allowance", "compensation and other payments", "annual remuneration for his work as committee" and support given his "inability to work". It appears the allowance sought is for some combination of spousal support and compensation for acting as a committee.

[51] The Public Guardian objects on the basis that the amounts from 2010 to 2014 were taken without the consent of the Public Trustee, after it had advised Mr. Walsh he would require court approval for the payment of such payments. It also objects on the basis that he is not entitled to spousal support, given that he is separated from Ms. Walsh and is in a marriage-like relationship with Ms. Chevalier.

[52] In my view, the claim of Mr. Walsh to compensation for his services in administering the estate should be separately considered from his claim that he is entitled to spousal support, as different legal considerations apply.

[53] With respect to his claim for compensation for his services as a committee, in Canada Permanent Trust Co. v. British Columbia (Public Trustee), 9 D.L.R. (4th) 468, the Court of Appeal determined that what was reasonable compensation under s. 14 the PPA should be determined on a case by case basis, taking into account such factors as the value of the estate's assets, the nature of the assets being administered, the degree of ability exhibited by the trustee, and the time expended by the committee in care and management of the estate.

[15] The chambers judge, in addition, made reference to a decision of Hinds J. in Re Pedlar (1982), 34 B.C.L.R. 185, and in particular to the factors set out by the judge at page 189. These are practical matters to guide the Registrar, who in that case was fixing a remuneration under the Trustee Act, but, in my opinion, of equal application to the fixing of reasonable compensation under the provisions of the Patients Property Act. Mr. Justice Hinds said, to begin with: "Each application must be decided upon its own facts", with which I agree. Then he went on to enumerate the various factors to be taken into account:

'(a) the value of the estate assets being administered;

(b) the nature of the estate assets being administered -- such as an active business, a farm, real property held for investment or appreciation, a portfolio of investments and the type of such investments;

(c) the degree of responsibility imposed upon the trustee by the terms of the will or other instrument, '

(In this case by the court order under the Patients Property Act.)

' including the length or duration of the trust; '

(In this case it would be the length or duration of the appointment)

'(d) the time expended by the trustee in the care and management of the estate;

(e) the degree of ability exhibited by the trustee in the care and management of the estate;

(f) the success or failure of the trustee in the care and management of the estate;

(g) whether or not some extraordinary service has been rendered by the trustee in the care and management of the estate.'

"While the foregoing list of factors is not intended to be exhaustive, it has been derived, ...

from the cases to which he makes reference. And then he said:

"It is recognized that there may be other factors deserving of consideration depending upon the circumstances involved in a particular application.'

[54] According to the calculations of the Public Guardian, Mr. Walsh has drawn for the period 2010 to 2014, approximately $201,386 in excess of what he would be entitled to under its remuneration policy. The policy of the Public Guardian is to set remuneration for

committees performing financial administration at 5% of the adult's income plus .4% of the adult's assets for an asset management fee. I accept that the Public Guardian's compensation policy is a useful guideline in determining what appropriate compensation is, but it is not determinative. I must consider the particular circumstances of the case, including such factors as noted above.

[55] In this case, Mr. Walsh had retained professionals to assist him with the administration of the estate, including an accountant, an investment manager and a rehabilitation management consultant. Mr. Walsh deposed that Ms. Walsh's monthly settlement payment and disability benefits are paid directly into her bank account and he pays for her expenses by cheque or credit card. According to Mr. Walsh he spends 20 hours a month on matters pertaining to her care and estate.

[56] Based upon the evidence before me, I am not persuaded that the activities reported by Mr. Walsh would take 20 hours per month. In that regard, I note that the records he personally maintained were minimal. He recorded less than 10 transactions in respect of her estate on most months. He did not make timely reports to the Public Guardian. Although I accept that he has contact with the staff at Avonlea Care Facility and other professionals regarding her care, there is no evidence as to the frequency or duration of the communications, apart from his annual visits to Avonlea. Further, I note that his attendance in respect of Ms. Walsh's 25% interest in the Powell River property would coincide with his own interest in the property.

[57] However, even accepting that he spent 20 hours a month personally on matters pertaining to her estate, I am unable to conclude that this would justify the amount of compensation which he has claimed, given the size of the estate, the relatively stable needs of Ms. Walsh, and his use of professional advisors.

[58] That said, Mr. Walsh deposed that the Public Guardian did not oppose his receiving an allowance when he met with Ms. Leyshon-Hughes of the office of the Public Guardian in 2009. His recollection is supported by Ms. Landy's recollection and by his letter to the Public Guardian of September 29, 2009, in which he asked permission to divide the surplus monthly income to provide him with a spousal allowance. It appears, based upon the affidavit of Ms. Wong of the office of the Public Guardian, that the Public Guardian did not respond to this correspondence until September 28, 2011, a period of two years, at which time it advised Mr. Walsh that he must seek court approval.

[59] It then took until 2015 for the matter to be heard in court. This is most unfortunate. I note that the Public Guardian does not suggest Mr. Walsh has been dishonest in his dealings with this matter. While it was Mr. Walsh's responsibility to make the court application, I accept that he did not intentionally delay in bringing the application and that there were a number of circumstances which contributed to the delay. Mr. Walsh explained difficulties he had with his former accountants in getting the requisite financial information for the estate account.

[60] Nevertheless, the extent of the delay in bringing the petition was longer than can be justified for him to obtain and prepare the necessary materials to have the matter determined in court. Accordingly, while I allow compensation claimed for his service as a committee from January 1, 2010 until the hearing of the end of 2012, in the amounts set out in paragraph 20 above, on the basis that he believed that this amount of compensation was justified and was not informed otherwise in a timely manner, I find that as of January 1, 2013 reasonable compensation for the administration of the estate is $20,000 per year.

[61] With respect to Mr. Walsh's claim for a spousal allowance on the basis that he was and is unable to work, I am not satisfied that he is entitled to a spousal allowance from Ms. Walsh in circumstances where he has been living with Ms. Chevalier in a marriage-like relationship in a different community since 1993. I note that Mr. Walsh did not seek to rely on the Family Law Act or the Family Relations Act, nor did he demonstrate a basis for spousal support on compensatory, non-compensatory, or contractual principles.

[62] As Mr. Walsh based his entitlement to spousal support under the PPA, he was not required to found his claim for support on the principles which apply in family law. However, he still must satisfy the court that there is a proper basis for a claim for spousal support. In that regard, I am not satisfied that he has established that he was disabled for working from 2009. Mr. Walsh's affidavit appended a brief medical note from his family physician that he is not capable of working in a physically demanding job due to injuries suffered in a 1996 motor vehicle accident. However, I note that Mr. Walsh stated that he operated a business until it failed in 2009. While Mr. Walsh asserted that he sought other employment, there is no evidence beyond this assertion as to the steps he took to seek other employment or business opportunities. I observe that in 2009 Mr. Walsh was approximately 54 years of age. His claim for spousal support was coincidental with the failure of his business.

3. Should Mr. Walsh be removed as committee of the estate of Ms. Walsh?

[63] The Public Guardian seeks the removal of Mr. Walsh as committee of the estate of Ms. Walsh and requests to be appointed as committee of the estate. At the hearing of the petition, the Public Guardian clarified that it does not seek removal of Mr. Walsh as committee of her person.

[64] The allegations the Public Guardian makes to support the removal of Mr. Walsh as committee of the estate include: Mr. Walsh has been unresponsive to communications from the Public Guardian; he has not passed his committee accounts since July 29, 2009; and he has used estate funds for his benefit since 2009 without prior approval. As such, the Public Guardian asserts that Mr. Walsh is in a conflict of interest in respect of the administration of the account.

[65] In response, Mr. Walsh submits that he has met the standard of conduct required of a committee. Mr. Walsh says Ms. Walsh has received exemplary care and that she has exceeded expectations in terms of her life expectancy. Mr. Walsh maintains that there has been no suggestion of misappropriation of funds and the Public Guardian has passed his

accounts up until 2009. As noted above, he attributes the delay in passing accounts to problems with his accountant and the Public Guardian's two year delay in responding to his 2009 letter requesting approval of his spousal allowance. He deposed he was given verbal approval for the allowance by the Public Guardian.

[66] Section 6(2) of the PPA provides that the court may rescind the appointment of a person appointed as a committee. Section 6(2) does not stipulate the criteria to guide this decision. However, in assessing the conduct of the committee, s. 18 provides that a committee must exercise his powers for the benefit of the patient and the patient's family.

[67] Madam Justice Dardi in Bowman (Re), 2009 BCSC 523, referred to Re Farquhar (19 June 2008), Vancouver S081503 at para. 63 (S.C.) as to factors to be considered in determining who will serve a patient's best interests:

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 his, 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)

[68] In considering whether Mr. Walsh should be removed from his position as committee, as noted, one of the claims of the Public Guardian is that "the committee has not been responsive to the communications from the Public Guardian". The Public Guardian does not specify the time period to which it is referring.

[69] I find there is insufficient evidence upon which to conclude that Mr. Walsh was unresponsive to communications from the Public Guardian. It was the Public Trustee that delayed in replying to Mr. Walsh's requests of September 20, 2009. If there was further communication with the Public Guardian between 2009 and 2011, it is not in the evidence before me. With regard to the period after 2011, the affidavit of Ms. Wong describes a series of communications between the Public Guardian and Mr. Lemer, counsel for Mr. Walsh, regarding the status of the petition.

[70] With respect to the Public Guardian's assertion that Mr. Walsh did not pass the accounts for the estate in a timely manner, Mr. Walsh received approval of his accounts from May 10, 2004 to December 31, 2008 in 2009. At that time, the Public Guardian set the date for the next passing of accounts to be January 31, 2010. This deadline was not met. Mr. Walsh's accounts have not been passed by the Public Guardian since 2009. Mr. Walsh explained the difficulties he has with his accountants and the Public Guardian's delay in responding to his letter. However, the result has been that there have been no accounts passed for a lengthy period: during which period he paid himself a significant amount of compensation.

[71] Section 10(1)(d) of the PPA requires submission of accounts to the Public Guardian at the times directed by the Public Guardian. The committee must also act as a reasonable and prudent business person would in their estate management. In assessing whether Mr. Walsh has properly discharged his duties as committee, I conclude that a reasonable and prudent business person would not miss a deadline imposed with statutory authority by a matter of years, as Mr. Walsh has, without obtaining the express approval of the Public Guardian for any anticipated delay.

[72] Mr. Walsh should have submitted his accounts in 2010, despite the lack of a response from the Public Guardian on one aspect of those accounts. I also find a reasonable business person would have taken steps to retain an accountant capable of preparing accounts in a timely manner. This dilatory conduct in passing accounts is a factor in favour of his removal as committee.

[73] The Public Guardian also seeks the removal of Mr. Walsh as trustee on the basis that Mr. Walsh has a conflict of interest because Mr. Walsh has been paying himself a "spousal allowance".

[74] In Gronnerud (Litigation Guardians of) v. Gronnerud Estate, 2002 SCC 38, the Supreme Court of Canada considered an alleged conflict of interest in the context of Saskatchewan's adult guardianship legislation. The court emphasized the requirement that a property guardian be able to handle the financial matters of the estate in a disinterested and unbias manner:

[24] The requirement that the property guardian not be in conflict of interest is a proxy for ensuring that the property guardian protect the best interests of the dependent adult. Similar to the requirement that a litigation guardian be "indifferent", at minimum a property guardian must be able to handle the finances of the represented party in a disinterested, unbiased manner. Although the statute is clear in stating that being a family member or a potential beneficiary is insufficient by itself to prove a disqualifying conflict, in some cases of family members or potential beneficiaries, there is evidence of other factors indicating a lack of objectivity. It is the unusual case where a family member or potential beneficiary in a troubled estate can demonstrate an absence of conflict and thus act as property guardian.

[75] In the 2015 Annotated British Columbia Incapacity Planning Legislation, Adult Guardianship Act and Related Statutes (Toronto: Thomson Reuters, 2015), the authors commented on the importance of avoiding conflict of interest in these circumstances at para. 431:

Every effort should be made to avoid appointing someone with a conflict of interest. Problems will most likely occur with persons appointed to make decisions about the financial affairs, etc., of adults and especially when they are dependants, or individuals who are otherwise receiving support from the adults, and consequently pay themselves from the assets they are managing. A conflict of interest is good grounds for the removal of the committee.

[76] In this case, Mr. Walsh has drawn funds well in excess of the amount the Public Guardian compensates committees and was aware, at least by the end of 2011, that the Public Guardian was not approving such expenditures without court approval. I accept that Mr. Walsh believed that he should be entitled to such compensation. I also accept he has done much over the years to benefit Ms. Walsh and, of course, their children. I do not underestimate the difficult position he found himself as a result of Ms. Walsh's catastrophic injuries. However, at least since 2010, I find that his personal interest in receiving the amount of compensation he sought, which included a claim that he was entitled to a spousal allowance because he could not work, placed him in a conflict of interest as a fiduciary. Given his claimed dependency, he was no longer indifferent to the outcome of this proceeding. His interest stands in opposition to the interest of a fiduciary responsible for the prudent management of Ms. Walsh's estate.

[77] I conclude that, in all the circumstances, the best interests of Ms. Walsh are served by the removal of Mr. Walsh as a committee of the estate and the appointment of the Public Guardian. I would add that I do not discount the possibility that Sean or Debra Walsh, as family members, may be suitable candidates for the position of committee at a future point in time, should they wish to seek appointment.

4. Should Mr. Walsh's accounts be passed as submitted?

[78] Mr. Walsh requests approval of his accounts from January 2010 until December 31, 2014. In the alternative, he requests that his accounts are passed by the Registrar.

[79] Rule 18-1 of the Supreme Court Civil Rules provides as follows:

Direction for inquiries, assessment or accounts

(1) At any stage of a proceeding, the court may direct that an inquiry, assessment or accounting by held by a master, registrar or special referee.

Certificate as to result

(2) The court may direct that a result of an inquiry, assessment or accounting be certified by the master, registrar or special referee and, in that event, the certificate, if filed under sub-rule (9), is binding on the parties to the proceeding.

Report and recommendation

(3) If the court does not direct that the result of an inquiry, assessment or accounting be certified, the result of the inquiry, assessment or accounting must be stated in the form of a report and recommendation to the court.

[80] In accordance with my findings above and pursuant to Rule 18-1(1) and (2), I direct that the accounts in respect of the estate of Ms. Walsh be referred to the registrar for an accounting. The registrar may certify the accounting.

Conclusion

[81] In summary, I have concluded as follows:

1. The requested gifts of $100,000 to Sean and Debra Walsh are not approved.
2. Mr. Walsh was entitled to compensation for the administration of the estate in the amount of $20,000 per annum. I nevertheless allow the compensation he has claimed in paragraph 20 above for the years 2010, 2011 and 2012.
3. Mr. Walsh's appointment as committee of the estate of Ms. Walsh is rescinded effective November 1, 2015.
4. The Public Guardian and Trustee is appointed as committee of the estate of Ms. Walsh effective November 1, 2015.
5. The accounts for the period of January 2010 until December 31, 2014 are referred to the registrar for accounting.

Costs

[82] As the Public Guardian asked that Mr. Walsh bring the petition, it is appropriate that the costs of Mr. Walsh and the Public Guardian in respect of the petition and application be indemnified from the Estate.

"Madam Justice Harris"

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Prepared on 30 October 2026 · Esheria