CANADA / JUDGMENT

Rodsgaard Estate (Re)

2009 BCSC 891

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2009 BCSC 891 Rodsgaard Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rodsgaard Estate (Re),

2009 BCSC 891

Date: 20090702

Docket: S117242

Registry: New Westminster

Between:

In the matter of the Patients Property Act,

R.S.B.C. 1996, c. 349

And

In the matter of Mary Lillian Rodsgaard

Before: The Honourable Madam Justice E.A. Arnold-Bailey

Reasons for Judgment

Counsel for the Petitioner, Janice Louise Melody:

Alan J. Benson

Counsel for the Respondent, Sonia McLennan:

Kerry Deane-Cloutier

Place and Date of Hearing:

New Westminster, B.C.

June 9, 2009

Place and Date of Judgment:

New Westminster, B.C.

July 2, 2009

Introduction

[1] In this application Janice Louise Melody ("the Petitioner") seeks to be appointed the committee of the person and affairs of her mother, Mary Lillian Rodsgaard ("the patient") pursuant to s. 6 of the Patients Property Act, R.S.B.C. 1996, c. 349.

[2] The Petitioner and her half-sister, Sonia McLennan ("the Respondent") agree that their mother is incapable of managing her person or her affairs, as is deposed to by two physicians, Dr. Dale Magnuson and Dr. Ronald R. Davidson.

[3] The patient is 88 years old and suffers from an Alzheimer's type of dementia that the physicians regard as untreatable and irreversible.

[4] Therefore, the Petitioner and Respondent agree that a committee ought to be appointed. However, the Respondent seeks to be a joint committee with the Petitioner, as opposed to permitting the Petitioner to act alone.

[5] In response, the Petitioner states that she has always been very close to her mother and has made arrangements for her mother's care for years. Based on the information before the Court, the patient is of very modest financial means.

[6] The Petitioner deposes that the Respondent, a daughter from her mother's first marriage, is a virtual stranger to her and was not close to their mother, so as to make a joint committee appointment unworkable, and not in the patient's best interests. The Petitioner states that the Respondent has visited their mother relatively rarely over the years, particularly since she has been in several care facilities, and that the Respondent has not involved herself in matters relating to their mother's health and care, whereas the Petitioner visits weekly, and has attended to her mother's varying needs over the years. The Petitioner also deposes that she enjoys visiting her mother, who recognizes her, and that she maintains regular communication with her mother's caregivers.

[7] Until 1998 when the Petitioner's only sibling, a brother named Randy Rodsgaard, died, he assisted the patient with her financial affairs. From 1998 to 2008 the patient entrusted most of her financial affairs by power of attorney to a close friend named Lynne Swerhun, who died in a motor vehicle accident in May 2008. The Petitioner seeks to step in now as committee.

[8] The Respondent is concerned that someone has taken advantage of the patient and misappropriated her assets, and she wishes to investigate her mother's financial affairs. She expresses concern that if the Petitioner is the only committee and some ill befalls the Petitioner it would be best for the patient if she too was familiar with her mother's financial affairs and personal circumstances. The Respondent also deposes that she views it as the Petitioner's responsibility to keep her and her siblings apprised of their mother's circumstances, which she states the Petitioner has failed to do in the past. The Respondent seeks to be a joint committee with the Petitioner, and also volunteers a brother, Orest (Ernie) William Kotyk, to serve as well, although he has not participated in these proceedings.

[9] The Petitioner deposes that her mother lived well, liked to travel, and in all likelihood used up her own assets. The Petitioner indicated that in her mother's present will she expressly excluded the five Kotyk children from her first marriage, of which the Respondent is the eldest, from sharing any part of her estate because of their failure to show any interest in her, and leaves her estate to the Petitioner. It follows that it is also in the Petitioner's interest for her to follow up on the activities of the now-deceased Lynne Swerhun to determine if the latter exercised the power of attorney granted to her in a reasonable and proper way.

[10] The Public Trustee has acknowledge service of the present application and indicated by notice filed on November 13, 2008, that it was not opposed to the relief sought in paragraphs 1, 2, and 3 of the petition, and did not wish to attend the hearing.

[11] When the Court is considering the appointment of a committee for a patient, the authorities are to the effect that the best interests of the patient are paramount: Re Leeming (1984), 14 D.L.R. (4th) 315 (B.C.S.C.) at 319; Stubban v. Stubban, 2002 BCCA 398. The factors to consider include who can best deal with the financial affairs of the patient and ensure that the patient's income and estate are applied to the patient's benefit. Additionally, the committee will be the person who can best provide love and support: Re Pineo, [1985] B.C.J. No. 1171 (S.C.)

Background

[12] Some additional background information is relevant to this application.

[13] The Petitioner, age 52 years, is the only surviving child of the patient from the latter's second marriage to Christian Holm Rodsgaard, which occurred in 1955. She had a brother, the only other child of the patient and Christian Rodsgaard, named Randy Rodsgaard, who died in 1998. Earlier, the patient had five children from her first marriage to William Kotyk, from whom she became divorced in 1952: Sonia Maxine McLennan (the Respondent); Vera Jean Johnston; Lucia (Lucy) Mary Ford; Orest (Ernie) William Kotyk; and Betty Ann Hill. For whatever reason after her divorce the patient did not maintain meaningful contact with the Kotyk children from her first marriage. The Respondent blames the patient's second husband, Christopher Rodsgaard, for this lack of contact between the Kotyk children and their mother. The Petitioner disputes this but, in any event, points out that even after her

father, Christopher Rodsgaard, died in 1971, contact between her mother and the Kotyk children was not re-established in any enduring or meaningful way. The evidence indicates that the Respondent visited her mother at most infrequently and has not been involved in her mother's life in any significant way for a long time, if ever.

[14] The patient, Mary Lillian Rodsgaard, born July 22, 1920, is currently residing at the Delta View Life Enrichment Centre ("Delta View"), which was previously the Ladner Private Hospital. She obtained a bed there on July 1, 2004, and has resided there since. She had previously lived with her son, Randy, until his death in 1998 and remained living in his house until November 2000, when she was hospitalized for a possible "mini-stroke" and was, thereafter, unable to live on her own. Initially the Petitioner arranged for her to go to Concorde House in White Rock and arranged home support for her. The Petitioner took her mother to all her medical appointments and looked after her medications and personal needs as she continued to deteriorate. The patient was diagnosed with Alzheimer's disease in 2003 by a gerontologist at Peace Arch District Hospital, and then came to be placed at the Ladner Private Hospital.

[15] The Petitioner also states that she and her brother have had little or no contact with the Kotyk children over the last 50 years. She regards the Respondent as a stranger and recalls a visit in the past where her mother expressed some discomfort about being in the Respondent's company. The Petitioner stated that she did not meet the Respondent until the funeral of William Kotyk in 1985 and after that there was infrequent contact, if any, between the Kotyk children, herself, her brother, and her mother.

[16] As indicated, the Respondent is the eldest of the Kotyk children and is presently 68 years old. The main thrust of her position is that she estimates that the patient disposed of at least $375,000 between May 1999 and May 2008 and she suggests that it seems unlikely that her mother's living expenses and travelling consumed that amount. She expresses concern that the Petitioner, while she indicates that she will make every effort to compile a complete inventory of assets of the patient, has not expressed any intention to try to find out what happened to these funds, or to seek to recover assets that have been wrongfully disposed of. If the Petitioner did have a role in the dissipation of the patient's assets, then the Respondent points out that she is in a conflict of interest that would disqualify her from being the patient's committee. The Respondent further submits that as she is excluded from the patient's will she has no financial interest and her sole interest in this matter is the welfare of the patient.

[17] In her affidavit, sworn May 22, 2009, the Respondent deposes that she was about 12 years old, and her siblings ranged in age from 2.5 to 10.5 years old, when her mother left her father and the children. After her parents' divorce, and upon her mother's remarriage to Christopher Rodsgaard, the Respondent states that their mother had very little to do with her five Kotyk children, who remained living with their father, despite invitations that were extended to her to attend various events in their lives. The Respondent stated that after the death of Randy Rodsgaard she did visit her mother in her home at least a dozen times and

called her every two to three weeks to see if she needed anything. The Respondent says she visited her mother twice in hospital after her mother fell. Once her mother moved into Concorde House the Respondent states that she visited her mother every second or third month and called her every three weeks. She took her small things like cabbage rolls, personal care items and pictures, and would act as the driver when her mother's sister came from Nanaimo to visit.

[18] The Respondent deposes that she only visited her mother twice after her mother moved into Delta View, as the second time she visited her mother did not recognize "any of us", and thought that the Respondent's husband was a priest, and wanted the Respondent and her sister to leave, so she could speak with him. The Respondent further deposes that she "found it very distressing" to see her mother in this state of mental health and has not visited since. Although she has asked the Petitioner to keep her informed of her mother's condition, she has found that the Petitioner has "made very little effort to do so."

Analysis & Findings

[19] I have carefully reviewed the materials filed with this application, including the affidavits filed by both the Petitioner and Respondent. I note that it was the now-deceased friend of the patient, Lynne Swerhun, and not the Petitioner, who had control of the patient's finances until her death in May 2008. Based on the contents of the Affidavit of Kindred and Fortune, sworn by the Petitioner, the patient held one joint account with Lynne Swerhun, which has a balance of $1,724.51, upon Swerhun's death. Otherwise the patient has a net annual income of $13,247.28 derived from the Old Age Pension and the Canada Pension, which results in a monthly income of approximately $1,103.94. The cost of her care at the Delta View is $32.40 per day. Therefore, her income just covers her expenses.

[20] Also attached to the same affidavit is a letter dated July 10, 2008, from Maxine Watson, BSW, a social worker associated with Delta View. She supports the Petitioner's application for committee. Ms. Watson writes that the patient has been a resident of that facility since July 1, 2004, and "Janice [the Petitioner] is devoted to her mother and visits her weekly." She also states that "Clearly, I would have no concerns about Mary's daughter Janice having Commonteeship [sic] for her mother Mary."

[21] I also note that the four other Kotyk children have signed consents in relation to this matter consenting to the Petitioner and the Respondent being appointed as joint committees, or in the alternative, the Petitioner being appointed committee of the person of the patient, and the Respondent being appointed committee of the estate of the patient.

[22] In the present case, having considered the evidence and the submissions of counsel in light of the relevant law I am of the view that the Petitioner, acting alone, is the most appropriate committee appointment for the patient. I find that there are many reasons that support this decision. The Petitioner is the person who is the closest emotionally to the patient and has been for many years. As the patient's health began to decline it was the Petitioner who

helped her mother with medical appointments, home care, and then involved herself in finding suitable living and care arrangements when her mother's health deteriorated to the point that she could no longer live independently. The Petitioner has continued to visit her mother on a very regular basis and states that she enjoys the visits. The social worker at Delta View knows the Petitioner and in her letter recognized her enduring devotion and commitment to her mother. Knowing that her mother has the most modest of incomes, which just barely cover her expenses, and no assets, the Petitioner has acted over an extended period of time in a manner motivated by love and loyalty in term of her continuing care and attention to her mother. As the person most familiar with her mother's financial affairs, her former life and spending habits when she was healthy, and now as the sole beneficiary of the patient's will, the Petitioner is the best informed and the best equipped to manage the patient's financial affairs. If there is an issue to be investigated in relation to the now-deceased Lynne Swerhun and the earlier power of attorney, the Petitioner is the person best suited to conduct those inquiries.

[23] Furthermore, I am of the view that to appoint both the Petitioner and the Respondent as joint committees of the patient would be to set up an arrangement that in all likelihood would not function well and one that would clearly not be in the patient's best interests. It is evident that the Respondent does not see "eye-to-eye" with the Petitioner and still feels, understandably so, abandoned by their mother. Any dissention of this sort would be decidedly unproductive and most certainly not in the patient's best interests.

[24] I note that whatever the reason for the estrangement between the patient and the Kotyk children, including the Respondent, it was not substantially resolved over time. While the Respondent was no doubt well-intentioned when she visited the patient in the past, when it became upsetting for the Respondent she put her own interests, in terms of not being further upset, ahead of whatever she usefully could have done for her mother to continue to contribute to the latter's well being.

[25] At present there is very little to be managed in relation to the patient, either in terms of her person or her affairs, but whatever the tasks and responsibilities are or may become, I find that an appointment of the Petitioner as sole committee is in the best interests of the patient. The evidence before me indicates that she can best deal with the financial affairs of the patient and ensure that the patient's income and estate are applied to the patient's benefit. Additionally, she is clearly the person who can best provide love and support. It is also unlikely that she will find herself in a conflict of interest as she did not previously have a power of attorney in relation to the patient's financial affairs.

[26] I find that the present case is similar in some respects to Rempel (Re), 2001 BCSC 735, in which Bennett J. stated at ¶50:

I have read all of the affidavits and reports, and considered the submissions of counsel. It is clear that the person who will look after the best interests of Mrs. Rempel is her son, Brian. He has looked after her for ten years. He has been her advocate with health authorities who were prepared to consider her palliative. He has looked after her finances, her home, and her person.

[27] Although it is generally considered that a committee who is willing to consult the rest of the family about decisions that will affect the patient is to be preferred over one who will not (Re Garrett-Jones (Patients Property Act), 2006 BCSC 234), I note that the circumstances of that case were decidedly different. There, the dynamic of a larger family involved and interested in the well-being of the patient militated towards the choice of the person more likely to consult other persons with a real interest in her well being. I do not regard that to be the case here.

Conclusion

[28] For the foregoing reasons, I find that it is in the patient's best interests that the Petitioner alone be appointed as committee of the patient's person and her estate.

[29] In terms of the relief sought in the petition I declare that the patient, Mary Lillian Rodsgaard, is by reason of mental infirmity arising from disease and age incapable of managing herself and her affairs (Paragraph 1). I appoint the Petitioner, Janice Louise Melody, to be the sole committee of the person and the estate of Mary Lillian Rodsgaard (Paragraph 2), and if such an order has not previously been made, I order that service of Notice of this Petition and Application on Mary Lillian Rodsgaard be dispensed with pursuant to s. 2(3) of the Patients Property Act.

[30] I order that the Petitioner is entitled to her costs of this application to be paid out of the patient's estate as special costs with the approval of the Public Guardian and Trustee or upon assessment, although I have been advised that it is unlikely that the patient's estate will ever have the resources available to pay this order for costs. I find that the Respondent is not entitled to an order for payment of her costs in relation to this application from the patient's estate because I am not satisfied that she engaged in this litigation with the genuine goal of protecting and promoting the best interests of the patient.

"The Honourable Madam Justice Arnold-Bailey"

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