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CANADA / JUDGMENT

## Stewart (Re)

2014 BCSC 2321

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Supreme Court of British Columbia

DECIDED

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2014 BCSC 2321 Stewart (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stewart (Re),

2014 BCSC 2321

Date: 20141210

Docket: 142813

### Registry: Victoria

In the Matter of the Patients Property Act, R.S.B.C. 1996, c. 349 and amendments thereto and the appointment of Committees for the person and affairs of Hazel Stewart

Between:

Maria Stewart

Petitioner

And:

Hazel Stewart

Respondent

Before: The Honourable Mr. Justice D.M. Masuhara

Reasons for Judgment

In Chambers

Counsel for the Petitioner:

J. Horton

L. Jozsa

Counsel for the Respondent:

C. Gordon

Place and Dates of Hearing:

Victoria, B.C.

November 26-27, 2014

Place and Date of Judgment:

Vancouver, B.C.

December 10, 2014

## Introduction

- [1] These Reasons deal with competing applications brought by the two children of Ms. Hazel Stewart over who should be her committee under the Patients Property Act, R.S.B.C. 1996, c.349 (the "Act"). The applicants are Ms. Hazel Stewart's twin daughters, Ms. Valerie Dimen and Ms. Maria Stewart. I will refer to each family member by their first names for convenience.
- [2] Each daughter seeks a declaration that Hazel is, by reason of mental infirmity arising from disease, age or otherwise, incapable of managing her person and affairs under s. 3 of the Act. Each also seeks to be appointed sole committee of Hazel. Neither has confidence or trust that the other has the best interests of their mother as their focus. Valerie, in the alternative, seeks to be appointed committee of the estate and that Maria be appointed committee of the person.
- [3] The key difference between the sisters is that Valerie believes that Hazel's best interests would be served by placing her in an assisted living facility; whereas, Maria is of the view that the current care plan of Hazel living in her home with Maria and attending adult daycare six days a week is in her best interest.

## Background

- [4] Hazel Stewart is 83 years old. She has been diagnosed with moderate cognitive impairment as a result of dementia, of mixed vascular and Alzheimer type. Hazel lives in her home on Carrick Street in Victoria, B.C. which she owns (the "Carrick Property"). Presently, she is able to dress and toilet herself but requires assistance with activities of daily living such as laundry, shopping, meal preparation and taking medications.

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- [5] The daughters are 54 years old. Valerie is married, has a child and resides on Salt Spring Island. She is a maintenance worker. She visits her mother once a month and assists her.
- [6] Between the years 1993 and 1998 and 2000 and 2005, Maria lived in Ottawa. She has lived in Victoria since 2005. Maria moved in with Hazel to care for her in 2009. Maria works full-time but cares for her mother in the evenings, nights, and weekends. Maria assists her mother with her daily living activities.
- [7] In July 2011, Hazel's needs increased and she was placed in a senior's day program three days a week. This was increased to four days a week in 2012. In 2013, this was increased to six days a week in day programs.
- [8] Hazel's condition requires supervision. Hazel originally owned the Carrick Property jointly with her sister who was 19 years her senior. Hazel and her sister understood joint tenancy as a way of avoiding probate expenses. When her sister died in 1993, Hazel became the sole owner of the property. Hazel continues to reside in the Carrick Property and attends adult day programs six days out the week. Four days are at the Oak Bay Lodge and two are spent in the Douglas Community Care program. The monthly cost of day care is approximately \$1,000.
- [9] On October 9, 1987, Hazel signed her will which appointed Valerie as executrix of her estate. She devised and bequeathed all of her estate to her daughters in equal shares.
- [10] On May 12, 1998, Hazel appointed Valerie as her attorney. This allowed for Valerie to manage the financial affairs of her mother.
- [11] During the mid to latter half of the 2000's, Hazel, Maria, and Valerie discussed putting the Carrick Property into a joint tenancy to avoid probate fees upon the death of Hazel. For some reason, Valerie did not wish to have her name registered as a joint tenant. In 2010, Hazel transferred her sole interest in the property into a joint tenancy with Maria. At some point, Valerie and Maria agreed that Maria would pay out Valerie's inheritance in the Carrick Property in advance for \$250,000, a value less than half of the then market price. It seems Maria wanted to have the Carrick Property and Maria commenced paying sums to Valerie which totalled \$20,000 and then stopped on legal advice.
- [12] In April 2013, Valerie was preparing Hazel's tax returns. She became aware of cash withdrawals via instant teller from Hazel's bank account that totalled \$6,300 in 2010; \$7,600 in 2011; and \$7,640 in 2012. The entire amount is \$21,540. Valerie deposes that all household expenses were paid by direct debit from Valerie's bank account and her daycare costs were by paid by individual cheque on her account. When Valerie questioned Maria on these withdrawals, as Valerie has not had access to Hazel's bank card since 2010, the relationship between the sisters deteriorated.
- [13] Subsequently, legal advice was obtained by each of the sisters. The payments by Maria to Valerie regarding the Carrick Property ceased and in July 2013, Maria executed a Bare Trust Agreement in which she declared that her interest in the Carrick Property was held on
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behalf of Hazel and that she has no interest in that property except as bare trustee for her mother. The agreement was backdated to September 28, 2010. This date was chosen to permit Maria to take advantage of the first time homeowner's exemption from paying certain taxes when she purchased her condominium. Valerie requested that Maria transfer title back to Hazel but Maria has refused.

- [14] On August 3, 2013, Hazel was taken by Maria to see a solicitor. On that date, Hazel signed a Representation Agreement, as described in Section 9 of the Representation Agreement Act, R.S.B.C. 1996, c. 405, which appointed Maria as her representative. On the same date, Hazel also signed a Nomination of Committee, nominating Maria as her committee.
- [15] In September 2013, Maria purchased a condominium in Victoria.
- [16] On September 3, 2014, Hazel was taken by Valerie to see a solicitor. On that date, Hazel signed a Representation Agreement as described in Section 7 of the Representation Agreement Act which appointed Valerie to be her representative and Maria as her alternative.
- [17] Hazel's assets are the Carrick Property which is valued at approximately \$534,400 and a bank balance of approximately \$24,800. She has no liabilities other than two outstanding invoices for respite care.
- [18] Hazel's annual net income is approximately \$32,400 and her annual expenses, which include daycare costs and respite care, are approximately \$20,000.
- [19] Mediation sessions to resolve issues between the sisters in regard to Hazel were conducted between October and December 2013; however, they were unsuccessful. Their opposing views as to the care program for Hazel could not be resolved. Valerie maintained her view that the professional caregivers supported the view that Hazel should be placed in full-time residential care and that Hazel's records would substantiate this. No such records were produced in this proceeding.
- [20] Maria's petition was filed in July 2014.
- [21] Valerie's petition was filed in November 2014.

## Medical Evidence

- [22] The opinions of two medical practitioners were obtained and produced in this case: Dr. Nuttall, a family physician with a special interest in the care of the elderly; and Dr. Montgomery, a geriatric specialist at Royal Jubilee Hospital. They both assessed Hazel in respect to her mental condition.
- [23] On July 11, 2014, Dr. Nuttall placed Hazel in the moderate phase of dementia. He opined that Hazel is unable to manage her financial affairs, or personal care and unable to make decisions about where she should be living or her health care. He also deposed that:

Hazel Stewart's current living arrangements are meeting her needs. At this time, I believe that Hazel Stewart should remain living in her own home, with her daughter, Maria, and continue to attend senior's day programs when Maria is at work.

[24] On November 19, 2013, Dr. Montgomery placed Hazel in the moderate phase of dementia. He opined that Hazel is unable to understand the nature and consequences of most medical procedures and unable to make independent decisions regarding her treatment, personal safety and health care. He further opined that Hazel is incapable of managing herself and her affairs. He also deposed that:

Hazel Stewart is managing well with her current living arrangements (at home with Maria) and with her current care plan. In general, it is in the best interest of a senior with dementia to remain at home as long as their needs are being met without undue burden and stress to the caregiver.

[25] Dr. Montgomery's consultation report of the same date states that Hazel was aware that Valerie had power of attorney and she could describe what this meant; and that she was aware that Maria had a Representation Agreement. Dr. Montgomery noted that Hazel reported that "that is the way she would like those arrangements to be made." I take this to mean that Hazel wished the medical and health care decisions to be the responsibility of Maria; and that financial matters be handled by Valerie. Dr. Montgomery in his report states:

I do not believe that this woman would have full competency either to make financial or medical decisions, particularly if these were particularly complex, and it would be appropriate for the various family members to make the decisions, based upon the aforementioned legal arrangements.

At this point, this woman [Hazel] is well supported by her family and home care arrangements, and there is a VIHA [Vancouver Island Health Authority] case manager in place.

[26] In June 2014, Hazel's treating physician, Dr. Prendergast recorded in his notes Hazel stating to him that "she does not want to move to assisted living and that she wants Maria in her home to care for her."

## Law

[27] The application for an appointment invokes the *parens patriae* jurisdiction of the court and is governed by an assessment of who will serve the patient's best interest.

[28] Section 18 of the Act states that:

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.

- [29] As has been observed in other cases, the Act does not prescribe criteria for the selection of an appropriate committee. However, cases have identified various considerations; see for example: Vranic (Re), 2007 BCSC 1949; Bowman (Re), 2009 BCSC 523; Palamarek (Re), 2011 BCSC 563; Re Matthews, 2013 BCSC 1045; and Sangha (Re), 2013 BCSC 1965. They include:
- (a) whether the appointment reflects the patient's wishes, obviously when he or she was capable of forming such a wish;
  - (b) whether immediate family members are in agreement with the appointment;
  - (c) whether there is any conflict between family members or between the family and the patient, and whether the proposed committee would be likely to consult with immediate family members about the appropriate care of the patient;
  - (d) the level of previous involvement of the proposed committee with the patient, usually family members are preferred;
  - (e) the level of understanding of the proposed committee with the patient's current situation, and will that person be able to cope with future changes of the patient;
  - (f) whether the proposed committee will provide love and support to the patient;
  - (g) whether the proposed committee is the best person to deal with the financial affairs and ensure the income and estate are used for the patient's benefit;
  - (h) whether a proposed committee has breached a fiduciary duty owed to the patient, or engaged in activity which diminishes confidence in that person's abilities to properly handle the patient's affairs;
  - (i) who is best to advocate for the patient's medical needs;
  - (j) whether the proposed committee has an appropriate plan of care and management for the patient and his or her affairs and is best able to carry it out; and
  - (k) whether a division of responsibilities such as between the patient's estate and the patient's person to different persons would serve the best interests of the patient, or would such a division be less than optimal for the patient.
- [30] The above listing is of course non-exhaustive or in any particular order. The inquiry is fact specific and a particular factor may or may not be applicable and may attract different weight depending on the circumstances of a case.

## Discussion

- [31] The materials make it clear that there exists significant tension between the sisters. Things appear to have come to a head when Valerie questioned Maria about "missing" funds from Hazel's bank account.

- [32] Through the submissions of counsel serious negative assertions are made against the other in respect to each's ability to meet their mother's best interests (particularly by Maria's counsel).
- [33] The discord between the daughters is most unfortunate. A review of the materials indicates that their mother has had confidence in each daughter over the years. It is evident that the daughters have more recently placed their mother in a difficult situation with their serial appointments for Hazel with lawyers and requirements to sign documents; she should not have been placed in such a situation. Each daughter bears responsibility in this.
- [34] In making my determination here, I do not do so based on reasoning advanced by Maria that Valerie has displayed a lack of good faith towards her mother by seeking in essence to take Hazel's assets from her to preserve the value of her inheritance. I reject it. Maria's view is that Valerie is only interested in protecting the value of her inheritance by pointing to Valerie's participation in having the Carrick Property transferred into joint tenancy (between Maria and Hazel) as well as Valerie's comment that consideration should be made of a government subsidized care home. That perspective is in my view inaccurate. First, the transfer of the property only added Maria to the title of the property, not Valerie. Second, it appears that Maria was an equal participant in coming up with the idea to preserve value for herself in Hazel's estate. Third, the communications from Valerie to Maria, while discussing inheritance and the property, indicate that Valerie was attempting to ensure that there was sufficient funds to pay for Hazel's ongoing care. . The record shows that Valerie has attended to the needs of her mother over the years. She managed Valerie's financial affairs. She continues to come to Victoria to take her mother to medical appointments, sought out adult day programs for Hazel, and took Hazel to look at residential care facilities. She carried the weight of the responsibilities in actually assisting Hazel for many years while Maria lived in Ottawa, though Hazel's needs were not as great then as they are now. The financial analysis provided by Valerie to Maria regarding the approach to care costs for Hazel in my view show a reasoned approach to ensuring that Hazel's expenses do not exceed her income and not the dark motive which Maria attributes to Valerie.
- [35] The clear problem is that there is a power struggle between the sisters including where Hazel should best reside.
- [36] In terms of the medical evidence, while Valerie's counsel urged me to place little weight upon comments supporting the current living arrangement and program in place for Hazel, I see them as helpful; the physicians are qualified to make the comments, and the comments make sense.
- [37] Further, the care professionals involved with Hazel report that Hazel is "happy" in her adult daycare programs, benefits from them, and that Hazel states that she wishes to continue to live at home with Maria.

- [38] During the course of the hearing I explored with counsel the idea of a co-committeeship where the responsibilities could be divided between the sisters; as this at least on the surface would reflect the wishes of Hazel. Maria would look after the health and care aspects and Valerie would look after at the financial aspects.
- [39] The difficulty is that the responsibilities can overlap and given the discord between the sisters there is a good likelihood that there will be a struggle for supremacy between the sisters, resulting in uncertainty in the care of Hazel. A co-committeeship would not be in the best interests of their mother whose capacity is diminishing.
- [40] With the best interests of Hazel Stewart being the paramount focus governing this determination, I conclude that Maria Stewart be appointed committee over both the estate and person of Hazel Stewart.
- [41] The determining factors taken as a whole are:
- (a) the conflict between the sisters;
  - (b) that Hazel wishes to reside in her home for as long as she is capable;
  - (c) that Maria supports the wish of Hazel to continue to live in her home and presently Hazel is capable of doing so;
  - (d) that Maria enjoys living with her mother and is happy to care for her when she is not at work;
  - (e) that Maria has been Hazel's primary caregiver for the past five years during which time Hazel's needs have increased considerably and acknowledges that at some point Hazel may require residential care;
  - (f) that Maria has a fuller view regarding the program of care needed for Hazel and as part of this lives with Hazel and assists her with activities of daily living;
  - (g) that Maria has a positive and regular relationship with the adult daycare personnel involved with Hazel;
  - (h) that Hazel is happy in her daycare programs and she is doing well in them;
  - (i) that the medical opinions support the present care program in place for Hazel;
  - (j) that the medical opinions support Hazel remaining in her home for so long as she can manage;
  - (k) that Valerie believes that Hazel should to be placed in a residential care facility and wishes the home to be sold
  - (l) that Valerie has not adduced evidence that recommends Hazel be placed in residential care, though she has been qualified for such care;

- (m) that Maria is best positioned to advocate for the medical needs of Hazel, given that she lives with Hazel whereas Valerie lives on Salt Spring Island and visits only once or twice a month;
  - (n) in respect to the conflict asserted by Valerie that Maria lives in Hazel's home "rent free", I think this is over stated and needs to be viewed in light of the assistance that she receives from Maria; including laundry, shopping, meal preparation, administering medication and paying for food, gas, entertainment, medications and repairs to the home. There is also considerable benefit in having a family member residing with Hazel.
  - (o) that while there appears to be the wish of Hazel to divide responsibilities, the tensions between her daughters will lead to less than optimal results for Hazel. Valerie's refusal to approve the respite care cost for the two-week period when Maria took some vacation, Maria's refusal to transfer title in the Carrick Property back to Hazel, Valerie's refusal to return \$20,000 to Maria, and each daughter taking Hazel to lawyers to sign competing Representation Agreements are examples. In my view, the medical evidence indicates that Hazel does not appreciate the difficulties which would be visited upon her in a contest for control over her affairs, though I think she understands that there is discord between her daughters. This is also evident in the two Representation Agreements she signed in which there are overlapping responsibilities. Moreover, the finances of Hazel are simple and can be managed by Maria.
  - (p) the Public Guardian and Trustee supports the appointment of Maria without bond or restriction. I accept the Public Guardian and Trustee's position based on its support of Maria's plan for Hazel's ongoing care.
- [42] I recognize the concerns identified by Valerie regarding the lack of accounting of funds withdrawn from Hazel's bank account and the failure of Maria to transfer her interest in the property back to Hazel. In terms of the "missing funds", without deciding this, I note that during this period Hazel went into the community on her own to attend to personal things. If she was going to the coffee shop regularly, having hair appointments, and buying personal things, the amounts identified by Valerie could be consistent with this. While in some cases a division between the estate and the person is found to be in the best interests of a patient, in this case the estate of the patient is simple and does not require the separate attention of a person with greater financial skill and acumen. Valerie's concerns can be addressed with appropriate terms imposed on Maria in respect to her duties as committee which are set out below.

## Conclusion

- [43] Accordingly, I declare that Hazel Stewart is, by reason of mental infirmity arising from disease, age or otherwise, incapable of managing her person and affairs under s. 3 of the Act.

- [44] I appoint Maria Stewart committee over the estate and person of Hazel Stewart without bond.
- [45] Maria Stewart is to file annually an accounting to the Public Guardian and Trustee in the form prescribed by the Public Guardian and Trustee and deliver at the same time a copy of such accounting to Valerie Dimen.
- [46] Maria Stewart is to transfer her interest in the home back to her mother, including the removal of her name from title within 30 days of this ruling. Written confirmation of such transfer, including the documentation from the Land Title Office, is to be provided to Valerie Dimen.
- [47] The disposition of any future interest in the property is to be approved in advance by the Public Guardian and Trustee. Valerie is to be provided written notice of any such application to the Public Guardian and Trustee.
- [48] Maria is also to consult with Valerie before making any significant decision regarding the health, medical, residence, or finances of Hazel Stewart. Consultation does not mean agreement; rather, it means discussion with a hope that the best interest of Hazel could be arrived at through it.
- [49] Maria is to provide the accounting she deposed she had made of the monies identified by Valerie as "missing" plus any supplemental information to the Public Guardian and Trustee with copy to Valerie. The Public Guardian and Trustee is requested to review the documentation. The results of the review and any recommendations are to be provided to me for any further steps if needed.
- [50] Maria Stewart is to ensure that Valerie is not prohibited from visiting with her mother and speaking to those involved in Hazel's care.
- [51] Valerie is to sign all documents required to transfer authority over Hazel's bank accounts to Maria. She is also to provide Maria with all of the financial documents she has in respect to Hazel's financial affairs, including income tax documents and filings in 30 days of this ruling.
- [52] Maria is to provide Valerie copies of all monthly banking statements relating to all of Hazel's bank accounts on an ongoing and regular basis. Further, Maria is to refrain from making cash withdrawals from Hazel's bank account; to the extent such withdrawals are necessary she is to provide explanations and documentation such as receipts regarding cash withdrawals at the end of each month.
- [53] Maria is to use reasonable efforts to keep Valerie current on the state of care for Hazel, including meetings with physicians, daycare professionals, activities undertaken by Maria, and when respite care is scheduled.

[54] If required the parties may address costs by scheduling an appearance through court scheduling.

"The Honourable Mr. Justice Masuhara"

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