
CANADA / JUDGMENT

Struthers (Re)

2016 BCSC 794

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 794 Struthers (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Struthers (Re),

2016 BCSC 794

Date: 20160504

Docket: 99245

Registry: Kelowna

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 Minnie Isabel Struthers

Between:

Bradley George Struthers

Petitioner

And

Minnie Isabel Struthers

Respondent

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Counsel for the Petitioner:

T.M. McCaffrey

J.M. Boyle

Counsel for Kenneth Lawrence Steen

S.T. Rule

Place and Date of Hearing:

Kelowna, B.C.

April 20 and 21, 2016

Place and Date of Judgment:

Kelowna, B.C.

May 4, 2016

Introduction

- [1] This is a contested application for the appointment of a committee of the person and estate of Mrs. Minnie Struthers. The question is not whether Mrs. Struthers is incapable of managing her affairs - clearly she is not. The main issue is whether her grandson or her son-in-law should be the committee, and the difference between their positions comes down to the former's wish to convert Mrs. Struthers' house into cash and the latter's desire to keep the house as a base from which to facilitate his regular care of his mother-in-law.

The Facts

- [2] Mrs. Struthers was born on April 11, 1921. She is 95 years old. Since at least April 2013, Mrs. Struthers has been, by reason of advanced dementia, unable to manage her personal and financial affairs. I find that a committee must be appointed over her person and estate.
- [3] Mrs. Struthers was married to John. John passed away in 1997. On his death the couple's long-time family home on Cliff Place in Maple Ridge, B.C. went to Mrs. Struthers.
- [4] Mrs. Struthers and John had two children: Margret and a son whose name was not mentioned in the evidence. Their son, now deceased, had a son of his own: the petitioner Bradley Struthers. That makes the petitioner Mrs. Struthers' grandson.
- [5] Bradley Struthers is a long-time member of the RCMP. He is a constable in the force and is assigned to a unit that investigates commercial crimes. He lives in Kelowna, B.C. and is currently 50 years old. As a child, Mr. Struthers visited often with his grandparents. As an adult his time with his grandmother was somewhat limited by geographic distance and work and family commitments. He is nevertheless a devoted grandson.
- [6] In or around 1980, Mrs. Struthers' daughter Margret began a life-long relationship with Mr. Ken Steen. They lived together as man and wife for many years. They eventually married each other in 2003. In his professional life, Mr. Steen was a member of the RCMP for ten

years and then for 30 years he worked for a plastics company. Mr. Steen is now retired and lives on the income from several pensions. He is 64 years old. Throughout their lives together Margret and Mr. Steen were very close to Mrs. Struthers. They lived in close proximity to each other and, for a time, they all lived together in the Cliff Place house.

- [7] In 2009, Margret became ill with cancer. Sadly, she passed away in August 2011. Before Margret died, Mrs. Struthers made some estate planning arrangements. In July 2010, she executed a will leaving her entire estate to Margret but if Margret predeceased her, then leaving half of her estate to Bradley Struthers and the other half to Mr. Steen. The 2010 will provided that Mr. Steen was to have the care of the Cliff Place house until he decided to not live in it, at which time it would be sold and the proceeds of sale be divided equally between Bradley Struthers and Mr. Steen, or if Mr. Steen decided to buy the house himself, then Bradley Struthers would receive a "fair buy out" from Mr. Steen.
- [8] In April 2011, Mrs. Struthers signed a Power of Attorney giving Margret and Mr. Steen authority over her estate.
- [9] I will pause here to caution that my observations of wills and powers of attorney should not be taken to be findings of fact or comments on their validity. I refer to those documents only for the purpose of gleaning some indication of Mrs. Struthers' wishes for the management and disposition of her estate from time to time.
- [10] Shortly after Margret's death, Mrs. Struthers executed a will giving all of her estate to Mr. Steen. That will was dated September 28, 2011, and was prepared by Mr. Steen. In the course of the present application, Mr. Steen's counsel Mr. Rule advised that Mr. Steen had no confidence in the September 2011 will and, when the time comes, he will not attempt to propound it.
- [11] In the fall of 2011 and the spring of 2012, Mrs. Struthers suffered injuries from several falls in her home and in hospital. When he heard of these incidents Mr. Steen left his lake home near Clinton, B.C., and later his vacation home in Palm Springs, California, to attend to Mrs. Struthers' needs. Bradley Struthers came to his grandmother's assistance as well. Together, the two gentlemen discussed finding a placement for Mrs. Struthers in an assisted living facility. Over Bradley Struthers' objection, Mr. Steen arranged for a place for Mrs. Struthers at Holyrood Manor. That turned out to be a very good placement for her.
- [12] Mrs. Struthers moved into Holyrood Manor on May 25, 2012. Ten days earlier, on May 15, Bradley Struthers assisted Mrs. Struthers in making yet another will. The May 15, 2012 will divides the estate 75% and 25% to Bradley Struthers and Mr. Steen respectively. On the same day Mrs. Struthers executed another Power of Attorney. That document named Bradley Struthers and Mr. Steen as attorneys. Whether that Power of Attorney is effective is debatable - it may not have been properly witnessed. One might reasonably anticipate litigation arising out of the circumstances of the making of the May 2012 will.

- [13] From approximately mid-2011 through to early 2013, Mr. Steen managed Mrs. Struthers' money. Bradley Struthers has examined the bank records from that time and has identified a number of transactions that, to him, look suspiciously like Mr. Steen taking advantage of Mrs. Struthers' trust in him. Mr. Steen has offered explanations for the majority of those transactions. Those explanations are, by and large, that Mr. Steen used Mrs. Struthers' bank card to buy things for her and to get cash for her to spend or that he reimbursed himself for his own money that he spent for her benefit. For example, he has deposed that he paid for caregivers to look after Mrs. Struthers and for her transportation to and from her care home. Mr. Steen candidly admits that he did not keep all of the invoices and receipts for those transactions. He submits that he was naïve about the duties that he owed to Mrs. Struthers. He says, though, that being naïve is not the same as being dishonest. He denies the latter.
- [14] Mr. Steen has spent approximately \$10,000 of Mrs. Struthers' money on renovations to the Cliff Place house. These renovations took place after Mrs. Struthers moved into Holyrood Manor. Mr. Steen says that the renovations were necessary to address defects and dated fixtures in two bathrooms. Bradley Struthers maintains that the renovations were not necessary because his grandmother was not living in the house. Bradley Struthers argues that Mr. Steen carried out the renovations to make the house more comfortable for his use and that, again, Mr. Steen spent Mrs. Struthers' money for his own benefit.
- [15] From May 2012 to the present, Mr. Steen has regularly stayed in the Cliff Place house. Typically, he stays there for several weeks in the summer months and three to four months in the fall. The rest of the year he lives in his house near Clinton and he winters in California and Mexico. When he does stay in the house he spends time visiting with Mrs. Struthers at Holyrood Manor. He brings her treats and reading materials. He takes her on walks around the grounds and elsewhere. Mr. Steen attends meetings of Mrs. Struthers' care team. He attends to preparation and filing of her income taxes. He keeps a calendar marking birthdays and other special occasions important to Mrs. Struthers and helps her send out cards and greetings as those anniversaries and holidays approach. Mr. Steen currently pays the house's taxes, insurance, and utilities out of his own pocket.
- [16] Bradley Struthers has not had such regular contact with his grandmother. He visits her four to six times per year. His visits may be as short as one day or as long as six days. Recently, Bradley Struthers has brought his two sons to see their great grandmother. On that occasion they bought birthday cards and Mrs. Struthers made a present of some money to the boys.
- [17] Holyrood Manor charges approximately \$25,000 per year. Mrs. Struthers' pension incomes total approximately \$30,000 per year. As Bradley Struthers was careful to point out in his affidavits, by his estimation Mrs. Struthers income exceeds her bed and board expense by about \$800 per month.
- [18] When she moved into Holyrood Manor, Mrs. Struthers' estate comprised the house and its contents on Cliff Place, and three accounts at the Bank of Montreal. They were: \$13,700 in a chequing account, \$39,500 in a savings account, and \$16,300 in a term deposit. As noted, in

2011, 2012, and early 2013, Mr. Steen made use of funds in these accounts. Bradley Struthers is convinced that Mr. Steen has taken some of those funds for himself. Mr. Steen has offered rational and exculpatory explanations for many of the transactions Bradley Struthers has questioned, and has 'fallen on his sword' with respect to others - saying that he does not recall why certain transactions occurred.

- [19] In or around early January 2013, Bradley Struthers arranged for \$45,000 to be transferred out of an account held jointly by him, his grandmother, and Mr. Steen. The money went into an account controlled by Bradley Struthers alone. Several days after the transfer, Bradley Struthers says that he had a conversation with a Ms. Kambo of the office of the Public Guardian and Trustee. He maintains that Ms. Kambo authorized him to go ahead and use the transferred money to fund his application to become Mrs. Struthers' committee. Bradley Struthers' affidavit describing that conversation came too late to allow time for a response from Ms. Kambo or anyone on behalf of the Public Guardian and Trustee. To date, Bradley Struthers has spent approximately \$33,000 of his grandmother's money to pay for this litigation. He has averred that he is not willing to spend his own money on this endeavour.
- [20] Mr. Steen has funded his part of the litigation out of his own pocket.
- [21] The Cliff Place house is currently held in joint tenancy by Mrs. Struthers, Bradley Struthers, and Mr. Steen. Bradley Struthers and Mr. Steen do not consider themselves entitled to a beneficial interest in the house. They both say that the house belongs to Mrs. Struthers alone. The same is true of the bank accounts now held jointly by the three. Bradley Struthers acknowledges that what remains of the \$45,000 he transferred out of Mrs. Struthers' accounts belongs to her as well. He acknowledges, too, that he must account to her estate for his use of those funds.

Parties' Positions

- [22] Bradley Struthers says he should be committee of his grandmother's person and estate. His argument did not touch upon his capacity to make proper decisions concerning Mrs. Struthers' health and welfare. Instead, his focus was on preserving and maximizing the value of her estate. He says that he has the financial acumen to deal with the estate properly and, because he is a member of the RCMP, he can be trusted to act honestly in his management of its affairs. His central concern is to sell the Cliff Place house and to put the net proceeds into trust approved investments. It does not concern Bradley Struthers that a likely consequence of selling the house will be that Mrs. Struthers will have less frequent contact with Mr. Steen.
- [23] Mr. Steen says that he should be committee because history has shown him to be more closely affiliated with Mrs. Struthers. It is he, for example, and not Bradley Struthers, who attends meetings of Mrs. Struthers' care team, and takes her for walks and outings.

- [24] Mr. Steen acknowledges that his management of Mrs. Struthers' money in 2011, 2012 and the early part of 2013 was not up to the standard expected of a fiduciary. He attributes that to his unfamiliarity with such matters. He says, however, that he did not take her money for his own purposes.
- [25] As for the house, Mr. Steen proposes to not sell it but to continue to use it as a base from which to make regular visits with Mrs. Struthers. Mr. Steen points out that Mrs. Struthers' pension income is sufficient to pay for her care and accommodation at Holyrood Manor and that her cash savings are adequate to fund whatever extras might add to her quality of life. Put another way, Mr. Steen says that it is not necessary to sell the house so that money will be available to provide for Mrs. Struthers' needs, be those needs necessities or luxuries.
- [26] In his submissions, Bradley Struthers' counsel argued that if the house is converted into money then additional funds will be available to provide for his grandmother's care. Counsel did not suggest what it might be that money from the house could provide that her estate cannot already afford.

The Law

- [27] The power to appoint a committee of the estate and person is found in the Patients Property Act, RSBC 1996 c. 349, s. 3. The factors to consider when assessing competing applications for appointment 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.

(Re: Stewart 2014 BCSC 2321 at para. 29)

Discussion

- [28] In my view, this comes down to a fairly simple calculus: which of the two parties is best suited to manage Mrs. Struthers' person and estate; of the two, which is most clearly focussed on identifying her best interests and is best able to attend to those interests; and which of these two gentlemen can be best trusted to carry out the duties of a committee?
- [29] I am impressed by the evidence relating to Mr. Steen's devotion to Mrs. Struthers' welfare. He clearly has a close bond with her. His plan is to continue to use the Cliff Place house as a base from which to maintain frequent contact with her.
- [30] I am also impressed but less so by Bradley Struthers' care and concern for his grandmother. It worries me that Bradley Struthers does not see value to Mrs. Struthers of keeping the Cliff Place house so as to facilitate regular contact with Mr. Steen. It is telling that Bradley Struthers does not wish to use the house himself for that purpose.
- [31] To be blunt: the tenor of Bradley Struthers' evidence in this matter strongly suggests that his main concern is to preserve and maximize Mrs. Struthers' estate. His purpose does not appear to be to improve the quality of Mrs. Struthers' life. Instead, his purpose appears to be to ensure that the estate - and not incidentally his eventual inheritance - is as large as possible.
- [32] Bradley Struthers' affidavits reveal that he thinks very poorly of Mr. Steen. He thinks that Mr. Steen is a crook. Were Bradley Struthers to become committee my sense is that he would devote himself to holding Mr. Steen to account for perceived misdeeds. I am certain that he would not be willing to spend his own money in that effort. The result, I am afraid, would be a squandering of estate funds in a bootless attack on Mr. Steen.
- [33] In my view, the person most interested in Mrs. Struthers' welfare is Mr. Steen and the person most interested in the welfare of Mrs. Struthers' estate is Bradley Struthers. I am cognizant of the fact that Mrs. Struthers is still alive and would certainly benefit from continued regular contact with her family. I am left with the sense that Mrs. Struthers will see more of her family if Mr. Steen can continue to use the house than if Bradley Struthers sells the house and prosecutes claims against Mr. Steen. Overall, I am left with the conclusion that at this stage of her life, what is best for Mrs. Struthers is an arrangement that will maximize

Mr. Steen's opportunities to give regular care to her.

- [34] I am confident that having passed through the crucible of Bradley Struthers' accusations following his forensic examination of the bank records, Mr. Steen will henceforth be scrupulous in his management of Mrs. Struthers' money. I am equally confident that he will continue to care for Mrs. Struthers' person as he has done in the past and that having the Cliff Place house available to him will facilitate that care. For these reasons and under these particular circumstances I find that it would be in Mrs. Struthers' best interest for Mr. Steen to act as committee of her person and estate.

Conclusion

- [35] An order will go that Mr. Steen be appointed as committee without bond of Mrs. Struthers' person and estate. The accounts now held jointly by Bradley Struthers, Mr. Steen, and Mrs. Struthers will be transferred to Mr. Steen's control as committee. Bradley Struthers will transfer what remains of the \$45,000 under his control to Mr. Steen in his capacity as committee. Mr. Steen and Bradley Struthers will transfer their legal interests in the Cliff Place house to Mrs. Struthers. Mr. Steen will pass his accounts before the Registrar of this Court on an annual basis and on notice to the Public Guardian and Trustee and to Bradley Struthers.
- [36] So long as the estate owns the Cliff Place house, Mr. Steen will ensure that the property is adequately insured and maintained, and will cause the estate to keep current all insurance premiums, taxes, utilities, and other expenses incidental to the house.
- [37] Mr. Steen may not encumber or dispose of the real estate without first obtaining prior written consent of the Public Guardian and Trustee or, absent such consent, by court order on notice to the Public Guardian and Trustee. The net proceeds of any sale of the property must be invested in accord with the provisions of the Trustee Act, RSBC 1996 c. 464. Mr. Steen may not have access to the capital from the sale of the house except for reinvestment without first obtaining prior written consent of the Public Guardian and Trustee or, absent such consent, by court order on notice to the Public Guardian and Trustee.

Costs

- [38] Bradley Struthers and Mr. Steen may recover their costs from the estate on an indemnity basis. Any legal accounts included in their costs must be provided to the Public Guardian and Trustee for review and, if recommended by the Public Guardian and Trustee, those accounts must be assessed by a Registrar of this Court as a review of legal fees and disbursements pursuant to Part 8 of the Legal Profession Act, SBC 1998 c.9.
- [39] In the event that the legal fees charged to Bradley Struthers are reduced on review, he will be obliged to reimburse the estate for the difference between that reduced amount and the fees that the estate actually paid.

"Rogers J."

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