
CANADA / JUDGMENT

Tompkins (Re)

2009 BCSC 1968

COURT

Supreme Court of British Columbia

DECIDED

19 August 2009

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2009 BCSC 1968 Tompkins (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tompkins (Re),

2009 BCSC 1968

Date: 20090819

Docket: S094465

Registry: Vancouver

In the Matter of the Patients Property Act,

R.S.B.C. 1996, c. 349 and amendments thereto

Re: Isabelle Tompkins

Before: The Honourable Mr. Justice Cullen

Oral Reasons for Judgment

In Chambers

Counsel for Isabelle Tompkins:

S.K. Sheena-Nakai

Counsel for Colleen Tompkins:

H.S. McLellan

Place and Date of Hearing:

Vancouver, B.C.

August 13, 2009

Place and Date of Judgment:

Vancouver, B.C.

August 19, 2009

- [1] THE COURT: This petition is brought by one of the respondent Isabelle Tompkins' two daughters, Colleen Tompkins, seeking a declaration that Isabelle is incapable of managing her affairs and an order that the petitioner, Colleen, be appointed as Committee of the Estate of Isabelle.
- [2] Isabelle's other daughter, Kelly Tompkins, does not oppose the application that Isabelle is incapable of managing her own affairs, but opposes the appointment of Colleen as Committee of her mother's estate.
- [3] It is Kelly's position that the Public Guardian and Trustee should be appointed as Committee of their mother's estate as there is evidence justifying a conclusion that there is conflict between the two daughters which would prevent them from effectively acting as Co-Committees in connection with the estate.
- [4] Both women assert that each other's interest in the well-being of Isabelle is subordinate to their respective interest in preserving her estate against an eventual inheritance.
- [5] There is no real issue that Isabelle is incapable of managing her own affairs. She is 82 years old and resides at a care facility called the Royal Arch Masonic Home at 7850 Champlain Crescent. She has been diagnosed as suffering from dementia. Two doctors, Dr. Amin and Dr. Sloan, have deposed to their respective examinations and assessments of Isabelle and to their respective opinions that, by reason of medical infirmity due to dementia, she is incapable of managing her own affairs.
- [6] The mother's estate consists of investments of approximately \$271,000, real estate assessed at \$634,100, and an income from several sources of approximately \$40,000 a year. Her present monthly expenses are approximately \$3,360, which allows her to live within her income.
- [7] The mother has three bank accounts. Both daughters presently have a Power of Attorney. Colleen is a joint account holder with her mother on all three accounts: her ING account, which is her main savings account; she also has a Vancity account jointly with both daughters, which is comprised of a chequing/savings, investment and RRIF account; she also has an account with the North Shore Credit Union, which she holds jointly with Colleen.
- [8] Kelly has expressed concern with her sister's involvement in all three accounts and questions whether, on her mother's death, Colleen will have a right of survivorship in the accounts.

- [9] There are two main friction points between the daughters. Colleen wishes to sell the house and to invest the funds to use in support of Isabelle. Kelly, initially at least, wanted to keep the house and rent it. The other point of friction between the sisters is a payment of \$100,000 made by Isabelle to Kelly in July 2006 to enable Kelly to make a down payment on her present home.
- [10] Colleen takes the position that that \$100,000 payment was a loan, which was evidenced by a document signed by Isabelle and Kelly titled "Loan Contract" calling for repayment with 2 percent interest at \$423.85 a month for 25 years and supported by a loan calculator payment schedule and records of monthly payments of \$423.85 from Kelly to Isabelle from October 2006 to June 2009. There is also a May 7th, 2009 e-mail from Kelly to Colleen which refers to the \$100,000 payment as a loan.
- [11] Kelly, on the other hand, takes the position that the \$100,000 was a gift based on an undated document signed by her mother and herself titled "Declaration of Gift" asserting that the entire \$100,000 was indeed a gift.
- [12] Kelly deposed that the loan agreement, the repayment schedule, and even the record of payments were designed to make the gift appear to be a loan so as to prevent Colleen from interfering with her mother's desire to loan her that amount. She deposed that some of the monies paid by her to her mother on a monthly basis were paid back by her mother in other forms.
- [13] There is some evidence through a handwritten payment schedule and notes and interlineations on the loan calculator payment schedule that at least some portion of the payment was regarded by Isabelle as a loan and the rest as a gift. It is Kelly's contention that her mother wanted to give her money for a down payment as she had sometime earlier for Colleen.
- [14] There is a suggestion based on the handwritten schedule of payments and the notes on the loan calculator payment schedule that it was contemplated that Kelly would only repay that portion of the \$100,000 payment in excess of the amount she claims her mother earlier gifted to Colleen. There clearly is significant contention about whether and to what extent Kelly owes money to Isabelle's estate.
- [15] Kelly deposes that she no longer is opposed to the house being sold, but is concerned that if the Colleen is the Committee, she will use her position to enforce repayment of the balance of the \$100,000 owing or otherwise preserve that amount for her own eventual inheritance from Isabelle's estate.
- [16] There are other areas of conflict between the sisters. Each points to evidence of her own involvement and relationship with Isabelle over the years and each points to their own ability to deal with the issues that arise on her incapacity.

- [17] Kelly has filed affidavits from a friend of her mother's and her mother's family doctor attesting to her ongoing contact with and care of her mother, and Colleen has provided evidence of her competence in financial affairs (she is an accountant) and her independence financially from her mother. It is Colleen's suggestion that Kelly has been somewhat financially dependent on her mother, while Colleen and her husband have achieved greater autonomy through their earning ability.
- [18] In an affidavit sworn August 10th, 2009, Donna Leclerc, a long time friend of Isabelle's, expressed the view that Isabelle wanted both daughters to be involved in looking after her affairs but that if they could not communicate effectively, then a third party should be appointed to avoid a sense of unfairness being allowed to develop.
- [19] It is apparent by the fact that both daughters have Power of Attorney that Isabelle did want their joint involvement in her affairs. It is apparent, however, and both sisters candidly agree, that they do not get along and could not work together. Moreover, given the controversy over the question of the \$100,000 payment and whether Kelly should be repaying it or some portion of it, it would not be possible for her to act as Committee, as it would put her in a conflict of interest.
- [20] As I see it, the circumstances here require the appointment of the Public Guardian and Trustee to manage the estate. It is clear the two daughters cannot be appointed as Co-Committees, given their inability to communicate and given their contending views on the \$100,000 payment. While Colleen would no doubt be a capable manager of her mother's affairs, the conflict between her and Kelly is likely to be exacerbated by her sole administration of her mother's estate and by any steps she took in relation to the issue of the \$100,000 payment on the estate's assets.
- [21] I conclude that although the circumstances are different, the observations of Lamperson J. in *Re Newton*, 2005 BCSC 677 at paras. 7 and 8, are apposite to the case at bar:
- [7] The test that is used in deciding who to appoint as committee is "the best interest of the patient". Generally, this requirement is best met by appointing a competent and caring family member, who, as opposed to an institutional trustee, is more in tune with the immediate needs of the patient. Account must be taken of the fact that there may well be merit to Richard Newton's assertion that the public trustee has not been particularly responsive to Dorothy Newton's immediate personal needs, or attending to measures that must be taken to preserve her estate.
- [8] Unfortunately, there is a major rift in the family. Each side questions the motives of the other. This court is not in a position to comment on the sincerity or integrity of any person involved in these proceedings, but given the division within the family, the appointment of Richard Newton or Robert Newton as committee, would inevitably invite further difficulties, acrimony and expense. Dorothy Newton is in an extended care home where most of her needs are met. None of the petitioners are prevented from concerning themselves with their stepmother's needs, even if the public trustee is the committee. Thus, in the circumstances,

it seems best to preserve the status quo.

- [22] In the result, I declare that Isabelle Tompkins is, by reason of mental infirmity arising from disease, age or otherwise, incapable of managing her affairs. I decline to appoint Colleen Tompkins as Committee or Colleen and Kelly Tompkins as Co-Committees, but rather appoint the Public Guardian and Trustee as Committee of the Estate of Isabelle Tompkins.
- [23] I conclude that this application was justifiably brought by Colleen for the benefit of Isabelle and not for her own ends, and I award special costs against the estate in keeping with the ratio in *Re Atwal*, 2005 BCSC 660, paras. 23 and 24, where Ralph J. held as follows:
- [23] Rule 57(9) of the Rules of Court provides the general rule that "costs of and incidental to a proceeding shall follow the event unless the court otherwise orders". Section 27 of the Patients Property Act applies to these circumstances specifically, and states that "the costs of all proceedings under this Act are in the discretion of the court."
- [24] In *Bush (Committeeship of)* (1995), 8 E.T.R. (2d) 2993, [1995] B.C.J. No. 1343 (S.C.), Master Chamberlist awarded special costs to the petitioners, who were unsuccessful in having their mother declared incapable of managing herself and her affairs. The intentions of the petitioners are thus described:

The petition was commenced not to advance the interests of the petitioners but to protect the interest of the patient. The petitioners were not advancing some right or some interest or even some perceived right or interest that had vested in them as would be the case in a wills variation application or in the case of inter-party litigation. There was no benefit to be obtained by them at law. [The petitioners] were simply acting in what they perceived to be in the best interest of their mother, the proposed patient.

The court cites *Royal Trust Corporation of Canada v. Clarke* (1989), 2692 (BC CA), 35 B.C.L.R. (2d) 82, [1989] 4 W.W.R. 319, and finds that although this case concluded that the successful petitioner for a committeeship should be awarded special costs, this ratio could also be extended to unsuccessful petitioners whose actions were motivated by concern for the best interests of the proposed patient. In the specific circumstances of that case, the special costs were limited in time to exclude certain expenses.

- [24] In this case, I have no hesitation in concluding that Colleen Tompkins was motivated by a concern for the best interests of her mother. It is simply the fact of the conflict and the potential for exacerbation of the conflict that has driven me to the conclusion that the Public Guardian and Trustee must be appointed as an independent and objective third party and not anything else about Colleen Tompkins' application under this petition. I therefore make the orders as I have set out.
- [25] Is there anything further that needs to be dealt with, counsel?
- [26] MS. SHEENA-NAKAI: Just the issue of whether Kelly Tompkins is also entitled to costs, because it was necessary for her to respond to this application?

[27] THE COURT: Mr. McLellan, what do say about that?

[28] MR. MCLELLAN: My Lord, I don't have the authority here, but there is some authority that says that when someone opposes it they don't get special costs, they get the regular costs. So there is some authority to that. There is also cases that have awarded special costs to all the parties in these sort of disputes. In this particular case, the only thing that might be a little different is that there was a personal interest of Kelly in that she is saying that the \$100,000 was a gift, which perhaps makes it a little more of a personal interest as opposed to the patient's interest.

[29] THE COURT: Yes. She was not actively seeking to be made Committee herself on this application as I see it. It was more a question of trying to preserve the peace by having a third party appointed, which is what I am driven to conclude is appropriate. So I think in the circumstances I will similarly make an order of special costs in her case against the estate.

[30] It is unfortunate that it has come to this, but I think it happens in all sorts of situations and that is just the way it is. Thank you to both counsel for your helpful submissions.

"A.F. Cullen J."

The Honourable Mr. Justice Cullen

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