

ESTATE LITIGATION 2011: CONTESTED COMMITTEESHIP APPLICATIONS

I. Introduction

Despite many years of anticipating the introduction of new incapacity legislation in Part 2 of the *Adult Guardianship Act*, we are still utilizing the *Patients Property Act*.

As of September 1, 2011, however, S.20 of the *Patients Property Act* was repealed and a new provision of the *Adult Guardianship Act*, R.S.B.C. 1996, c.6, s.60.2 enacted which deals with transfers by incapable adults without consideration.

60.2 (1) If an adult transfers an interest in the adult's property while the adult is incapable, the transfer is voidable against the adult unless

(a) the interest was transferred for full and valuable consideration, and that consideration was actually paid or secured to the adult, or

(b) at the time of the transfer, a reasonable person would not have known that the adult was incapable.

(2) In a proceeding in respect of a transfer described in subsection (1), the onus of proving a matter described in subsection (1) (b) is on the person to whom the interest was transferred.

Cases that considered s.20 of the *Patients Property Act* would be applicable, I would suggest even though the wording is somewhat different. The use of "voidable" vs. "fraudulent and void" is an obvious difference. The onus is clearly placed on the recipient of the property to satisfy the Court that actual consideration was paid or that a reasonable person would not have known the adult was incapable. Another change is with respect to timing – the transaction, under the former legislation was deemed fraudulent and void if the adult was or later became a "patient" pursuant to the *Patients Property Act*. The new legislation follows the common law that if incapable at the time of the transfer, the transfer is voidable. The common law is set out in *Fyckes v. Chishom* (1911), 10 O.W.R. 977 at 980:

The contract of a lunatic or person mentally incapable of managing his affairs is not per se void, but only voidable on its being shewn that the other party had knowledge, actual or constructive, of such lunacy or mental incapacity, failing which such contract, if fair and *bona fide*, is binding...

which has been cited with approval in *Canou v. King* (1968), 70 D.L.R. (2d) 141.

II. Recent Case Law Update

A recent review of the case law was undertaken in my paper "Patients Property Act Update" which was prepared for the June 2011 CLE Incapacity Planning . A copy of that paper is attached to this paper.

III. Effect of Nomination of Committee

An adult may nominate a committee pursuant to s.9 of the *Patients Property Act*, and that person so nominated must be appointed unless there is “good and sufficient reason for refusing the appointment”. The nomination of committee must be executed in accordance with the requirements for the making of a Will under the *Wills Act*.

The capacity to nominate a committee is thought to be lower than the capacity to manage one’s finances: *Fraser v. Fraser*, 2008 BCSC 1733, 45 E.T.R. (3d) 285.

If there is some question about the person’s capacity to nominate a committee at the time of execution, it might be wise to obtain a physician’s opinion to support the nomination of committee. Given the weight the Court is supposed to afford the nomination of committee, if there is a chance that a client might have feuding family members battle over a committee application, executing a nomination of committee would be advised.

IV. Costs

The award of costs, on a special costs basis, while in the discretion of the Court pursuant to s.27 of the *Patients Property Act*, typically are awarded out of the adult’s estate to the applicant given the Court process is engaged to assist the adult with the management of the adult’s finances and or person: *Royal Trust Corp. of Canada v. Clarke* (1989), 35 B.C.L.R. (2d) 82, 32 E.T.R. 171 (C.A.) In contested committee applications, the Court has the discretion to award some costs out of the adult’s estate but may not award costs that were incurred in the dispute that amounts to sibling rivalry and was not in the adult’s best interests.

Even where the application fails or an applicant is not chosen by the Court, the Court may still award that losing party his or her special costs if the Court perceives that party to be acting out of a sense of duty and in the best interests of the adult: *Re Atwal*, 2005 BCSC 660; *Re: Bush* (1995), 8 E.T.R. (2d) 293 (BCSC)

The lawyer who acts for the adult ought to have his or her legal fees paid from the adult’s estate: *Re: Marczak*, 2007 BCSC 684, 33 E.T.R. (3d) 309. The adult’s lawyer need not have an award of costs made at the hearing of the committee application in order for the lawyer to have his/her accounts reviewed under the *Legal Profession Act*: *Watson Goepel Maledy LLP v. Watson*, 2009 BCSC 149.

The case of *Maddess v. Estate of Johanne Gidney*, 2011 BCCA 165 provides that where the committee participates in an Appeal on behalf of the adult or the adult’s estate, the committee ought to be entitled to special costs from the adult’s estate.

The unsuccessful challenge by the adult’s son of an appointment of a Representative was followed by an award to the Representative of special costs payable by the son: *Lindberg v. Lindberg*, 2011 BCSC 296, 66 E.T.R. (3d) 5. Wilcock, J. considered the effect the award of special costs out of the patient’s estate would have on the adult’s testamentary intentions.

V. Division of Responsibility Between Committee of Estate and Person

A. Committee of Estate

The committee of estate is responsible for the legal and financial affairs of the adult. This includes paying bills, filing income tax returns, reinvesting or investing assets, renewing mortgages, and prosecuting or defending law suits. The committee of estate is also responsible for keeping proper accounts and must present these accounts to the Public Guardian and Trustee on an annual basis. If the accounts are not passed by the PGT then the committee will have to do so before the Court (s.13 of the *Patients Property Act*).

With respect to investing money, a committee of estate is considered a trustee within the meaning of the *Trustee Act* (s.15(2) of the *Patients Property Act*). A trustee is not bound, however, to convert the adult's existing assets to investments authorized by the *Trustee Act*: *Re: Zurif* (1983), 46 B.C.L.R. 175 (S.C.). New investments, however, made by the committee must comply with the *Trustee Act*: *Re: Potter*, 2000 BCSC 628, 32 E.T.R. (2d) 256. A committee ought to only change the nature of the assets if necessary for the maintenance of the adult: *Rootman Estate v. British Columbia (Public Trustee)* (1997), 46 B.C.L.R. (3d) 317, 20 E.T.R. (2d) 48 (S.C.) reversed on other grounds (1998), 60 B.C.L.R. (3d) 187, 24 E.T.R. (2d) 287 (C.A.)

A committee of estate may not make a Will for an adult (*Allen v. Bennett* (1994), 96 B.C.L.R. (2d) 280, 6 E.T.R. (2d) 176 (S.C.)) but a committee does have the right to obtain the adult's Will and records (*Derlago v. Derlago* (1994), 93 B.C.L.R. (2d) 307, 2 E.T.R. (2d) 315 (S.C.)).

A committee cannot, without establishing it is in the adult's best interests, commence divorce proceedings: *Beadle v. Beadle* (1984), 56 B.C.L.R. 386 (C.A.) and *MacKay Estate v. MacKay* (1999), 28 E.T.R. (2d) 256, 48 R.F.L. (4th) 163 (S.C.). A recent case, *British Columbia (Public Guardian and Trustee) v. Zhang*, 2011 BCSC 1205 did not consider this particular point given the divorce was adjourned but did make orders with respect to the division of assets, only allowing the spouse 10% of the "family" assets given the circumstances of that case. Any litigation commenced on behalf of the adult must be done by the committee of estate as litigation guardian (s.22 of the *Patients Property Act*). The Court may choose another litigation guardian, however, if the committee and the adult are in a conflict: *Re: Gackowski* (9 October 1996), New Westminster S031943 (S.C.) and *Callender v. Callender Estate* (1999), 29 E.T.R. (2d) 152, 178 D.L.R. (4th) 269 (S.C.) affirmed 2001 BCCA 413 (see also Rule 20-2(6)).

A committee is a fiduciary and has all of the duties and responsibilities of a fiduciary: *Re: Taylor* (1982), 13 E.T.R. 168 (S.C.) and *Greenhalgh v. Greenhalgh* (1999), 27 E.T.R. (2d) 246 (S.C.).

A committee of estate is also responsible for providing maintenance to spouses or dependants of the adult pursuant to s.18 of the *Patients Property Act* but must have regard for the nature and value of the property and the circumstances and needs of the adult and family. The primary responsibility is to ensure, however, that the needs of the adult are met first.

If a committee plans to make payments out of an adult's estate for which the committee might benefit, the committee ought to first obtain the Court's approval given the inherent conflict of interest: *Dragvik v. British Columbia (Public Trustee)*, [1995] BCJ No. 1807. Similarly, if a committee is thinking of estate planning on behalf of an adult, Court approval ought to be sought: *O'Hagan v. O'Hagan*, 2000 BCCA 79, 72 B.C.L.R. (3d) 100, 31 E.T.R. (2d) 3 and *Re: Bradley*, 2000 BCCA 78, 73 B.C.L.R. (3d) 112, 31 E.T.R. (2d) 6. A committee cannot distribute the adult's estate to the adult's beneficiaries even after the adult has died: *Re: Langford*, 2000 BCSC 721, 33 E.T.R. (2d) 152 and *Re: Goodman* (1998), 61 B.C.L.R. (3d) 261, 24 E.T.R. (2d) 194 (S.C.).

B. Committee of Person

The committee of person is responsible for making all personal and health care decision making for the adult. This includes deciding which doctor to see, where the adult should live and even, who the adult can visit with. Any pre-expressed wishes of the adult concerning health care ought to be taken into account by the committee of person: *Fleming v. Reid* (1991), 82 D.L.R. (4th) 298, 48 O.A.C. 46 (C.A.). The *Health Care (Consent) and Care Facility (Admission) Act*, R.S.B.C. 1996, c.181 s.12.1 provides that emergency care cannot be given if the adult had expressed wishes not to receive that particular care in those circumstances.

The Court, however, maintains its *parens patriae* jurisdiction with respect to the decisions being made on behalf of the adult: *Re Eve*, [1986] 2 S.C.R. 388, 31 D.L.R. (4th) 1.

The committee of person cannot compel or obtain a Court order to require a medical practitioner to act contrary to the fundamental duty which that practitioner owes to his or her patient: *Rotaru v. Vancouver General Hospital Intensive Care Unit*, 2008 BCSC 318.

While the division of responsibility between a committee of estate and a committee of person are quite different, it can be the case that the committee of person's abilities to manage the adult's personal and health care decision making is limited by the committee of estate in terms of financial assistance. If, for example, there are limited funds, while the committee of person might like to have 24/7 care put in place for the adult, the committee of estate may refuse on the basis that there are not enough monies available from the adult's estate to pay for such case. It could also be the case, however, that there is a philosophical dispute between the committee of estate and the committee of person – one believes institutional care should be avoided at all costs and the other believes that the adult would receive better care in a facility. This could lead to further Court appearances if the committee of the estate and committee of person do not share the same vision of care for the adult.

The committee of person must coordinate purchases with the committee of estate. In other words, before committing to the purchase of an expensive hospital bed, the committee of person ought to check that funds are available and obtain the consent of the committee of estate.

VI. Contested Committee Practice Points

- Be mindful of the evidence you lead; look for, where possible, non-interested parties to swear affidavits in support of your client; doctors, bank personnel, caregivers, friends/siblings of the adult
- Don't put argument in your affidavits;
- Court will consider what is in the adult's best interests – your affidavit material should try to address this consideration as to why your client becoming committee is in fact in the adult's best interests (is your client not going to take a fee?, does the adult so distrust the other applicant that knowing they were involved would cause them significant upset, the adult's well-being will be best served by your client's involvement – what is your client's "plan")
- Address conflicts your client has or may have with the adult – does your client wish to be paid as a caregiver from the adult's estate – if so put that in your material so that the Court and the PGT are aware of this.