PATIENTS PROPERTY ACT UPDATE

This is an update from the paper I did for CLE Elder Law in 2009. Please refer to other *Patients Property Act* ("PPA") Update papers contained in the following CLE publications: Elder Law 2009, Elder Law 2004, Incapacity 1993 as well as the papers prepared by Hugh McLellan/Mark Perry and June Laker/Sandra Balance (as she then was) for Incapacity 1988.

I. Passing of Accounts & Costs

Upon the death of a patient, a residual beneficiary has standing to participate in the committee's passing of accounts: *Re: Hall Estate*, 2010 BCSC 1510.

The adult may also retain a lawyer to defend the PPA petition and, if the petition is successful, the lawyer's accounts should be paid from the patient's estate. Further, the lawyer does not require an order for costs at the hearing of the petition in order to have his or her accounts reviewed pursuant to the *Legal Profession Act* (*Watson Goepel Maledy LLP v. Watson (Committee of)*, 2009 BCSC 149).

For a discussion of costs payable to the applicant, see *Re: Sear*, 2010 BCSC 339 where the Court found that the efforts of counsel for the applicant were such that the applicant ought to be indemnified for the legal fees and disbursements of approximately $30,000 incurred since:

> [39]… the task of counsel was to enquire into difficult and contentious circumstances surrounding Ms. Sear, to deal with urgent and reasonably justified concerns about Ms. Sear's physical and financial welfare, and to protect those interests. Her financial situation alone involved some $1,000,000.00 worth of assets. In those circumstances I consider the fees entirely proportionate and justified.

II. Termination or continuation of powers of attorney and representation agreements

If there is a valid, effective and continuing Representation Agreement in place, the Court may dismiss a committee petition as being unnecessary absent any evidence of a significant change in circumstances that would mitigate against the Representation Agreement: *Lindberg v. Lindberg*, 2010 BCSC 1127. See also *Re: Mesley*, 2010 BCSC 934.

Once the Public Guardian and Trustee has determined, pursuant to s.19.1 of the PPA that it is necessary or desirable for the Public Guardian and Trustee to manage the Patient's property, then the Power of Attorney that was previously suspended is terminated and at an end and cannot be the subject of further review by the Court to "reinstate" the POA: *Vukmanovic v. Public Guardian and Trustee*, Vancouver Registry 20100429, April 29, 2010 (BCSC)[I have not attached this decision as it is a conversation between the Court and the applicant and ultimately the only "reasons for judgement" state that the Petition was dismissed.

III. Odds & Ends

a. Production of documents or records

The Court may also look behind an adult's solicitor client priviledge and review the solicitor's file or an audiotape recorded in the solicitor's office in an effort to determine the adult's wishes and preferences regarding who should care for the adult and where the adult wishes to live: *Re: Kathleen Palamarek*, 2010 BCSC 1894.

Where there has not yet been a declaration of incapacity (in *Palamarek,* Ms. Palamarek had already been declared incapable and an interim committee appointed), the Court in *Brunette v. Bryce*, 2010 BCSC 1681 determined that until an order is made declaring a person incapable, there is no ability of the Court to order documents produced which is within the control or the adult or the attorney appointed by the adult in an enduring Power of Attorney.

b. Choice of Committee

The capacity to nominate a committee is lower than the capacity to manage one's affairs - the patient need only know what his or her wishes are (*Fraser v. Fraser*, 2008 BCSC 1733).

In *Re: Bowman*, 2009 BCSC 523 Dardi, J. considers the factors the Court is to consider when choosing a committee and cites with approval the case of *Re: Farquhar* (19 June 2008), Vancouver S081503 (B.C.S.C.), where the court provided guidance as to additional considerations as follows at para. 63:

> Additional significant factors the court is to consider are the proposed committee's previous involvement with the patient or his family, the proposed committee's knowledge and understanding of the patient's situation and needs, the proposed committee's level of experience and capability in performing the duties of committee, any kind of a plan of the proposed committee for the management of the patient, and any potential conflict of interest between the proposed committee and the patient. [Internal citations omitted]

Where an applicant has demonstrated characteristics such as: an unwillingness to accept the reality of the Patient's circumstances, persisted in advancing views that were no longer sustainable, undertaken irresponsible actions, had high-handed dealings with professionals and had undermined the good faith of other family members, the Court will choose another to be committee for the Patient: *Re: Palamarek*, *supra*. The committee chosen, however, must keep the other family members informed of the Patient's medical status. This is in contrast to the decision in *Re: Mesley, supra,* where the Court found that although the one daughter had a difficult personality, wanted to move the Patient because she had found it impossible to deal with the care home staff, and had previously moved the patient without telling other family members, the Court never-the-less appointed her as committee.

The Court has consistently been of the view that the question of where the Patient should live should be left to the committee to decide: *Parlamarek & Re: Mesley.*

Palamarek at par. 207 also considers the question of the a Patient's choice of committee or representative and cites *Lindberg*, *supra,* with approval in concluding that

unless there are good reasons to disregard the wishes of a Patient from a time when they were clearly capable, those wishes should be honoured.

Palamarek also discusses the question of whether an applicant is in a conflict or not with the Patient over a financial issue: here one of the sons lived in the Patient's home. Initially he paid rent to the Patient while she was capable and then she told him not to do so anymore. After the interim appointment as committee, he began to pay rent. The Court found at par. 277 that:

> It cannot be the case the every potential conflict of financial interest disqualifies a family member from acting as a committee. It is inherent in family relationships that there will be potential financial conflicts of interest between a child who is appointed committee and a parent. This conflict arises because monies spent caring for the patient deplete the patient's estate and reduce the inheritance of the child/committee. Yet the policy of the law is to prefer a family member as committee, even though these kinds of conflicts must be common.

With respect to the appointment of battling applicants and appointing them co-committees, the Court in *Re: Rodsgaard,* 2009 BCSC 891 at para. 23 was 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.

c. Experts

The Court of Appeal ordered that the adult in question in a committee proceeding be examined pursuant to s. 5(1)(b) of the *Patients Property Act* as it was not satisfied with the opinions regarding the adult's capacity (*Kartsonas v. Kartsonas*, 2009 BCCA 218).

Parlamarek, supra, reviews competing medical opinions by physicians and a toxicologist/pharmacist and cautions about advocacy by experts and experts who don't consult with the treating physicians and rely too heavily on information supplied by the

party retaining them. The Court was also very critical of holding back expert opinion from treating physicians where the expert thought that a course of care was ill-advised.

The Court in *Re: Eronen*, 2010 BCSC 1943 analyzed the expert opinion and was critical of the physician not obtaining direct evidence from care providers or doing a functional assessment of capacity as opposed to relying on the information provided by the party retaining him. The Court preferred the evidence of the long-time family physician over the "hired gun" [my term].

d. Section 20

In *Re: Jones*, 2009 BCSC 1723 the Court considered a gift of a condo to a daughter of the Patient. With respect to capacity to gift *inter vivos* the Court concluded at par. 99:

> In my opinion, in a case such as this, it makes no sense to say that an *inter vivos* transfer is valid if the donor "understands" the nature and the effect of the transaction but is under an unfounded or insane delusion that influenced or precipitated the transfer. In other words, in a case where there are unfounded or insane delusions, it is not sufficient for a court to find merely that the donor understands the nature and the effect of the transaction in some abstract sense.
>
> [100] The court must also be satisfied that the donor was not operating under the unfounded or insane delusion at the time. This particularly so when a donor acts late in life to dispose of a substantial amount of their estate: *Re: Beaney* [1979] 2 All E.R. 595 (Ch.) at 601; *Halsbury's Law of England,* 4th ed., Vol. 20(1), at 10-11; see also *Re Rogers*, (1963) 42 W.W.R. 200, 39 D.L.R. (2d) 141, [1963] B.C.J. No. 133 at para. 31 (C.A.).

e. S.19.2 & 20 of the PPA repealed

Bill 7, *Miscellaneaous Statutes Amendment Act*, 2011 repeals s.19.2 which provided that a valid Representation Agreement, on approval by the *Public Guardian and Trustee*, would terminate a certificate of incapability.

Bill 7 also repeals s.20 of the PPA which a protective measure for adults who have transferred assets at a time when they were not capable. A similar provision will be found in the *Adult Guardianship Act*, effective September 1, 2011:

Transfer of property by incapable adult

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.

f. Duties

A committee of the patient 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. Here, the patient's daughter wanted her mother to receive treatment that the doctors felt would not help and might be harmful: *Rotaru v. Vancouver General Hospital Intensive Care Unit*, 2008 BCSC 318 (Chambers) To set aside a certificate of incapability, a patient must proceed under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, or s. 28 of the *Patients Property Act* (*Hanlon v. Nanaimo (District)* (19 December 2008), CA035177; CA036414 (B.C.C.A., unreported)).

g. Procedure

In terms of when a matter should be referred to the trial list – the *Palamarek* case had 60 affidavits filed amount to over 1,000 pages of material. The hearing of the Petition took 13 days. There were a number of interlocutory applications. Cross-examination occurred. Much of the affidavit evidence was conflicting. The parties wanted to resolve it without a referral to the trial list and the Court found that it could make a decision despite the difficulties.

h. Appeals

Kong v. Kong, 2010 BCCA 298 – confirms *Re: Stubban* and in considering a *Patients Property Act* appeal, refers not to insufficient weight, but rather to "no sufficient weight":

> In reviewing a discretionary order, this court may not substitute its discretion for that of the chambers judge, or otherwise interfere with the order, unless it reaches the clear conclusion that the discretion has been wrongly exercised, in that no sufficient weight has been given to relevant considerations, or that on other grounds it appears that the decision may result in an injustice: (see *Creasy v. Sweny*, [1942] 2 D.L.R. 552 (B.C.C.A.), quoting *Osenton & Co. v. Johnston* (1941), 57 T.L.R. 515; *Taylor v. Vancouver General Hospital*, [1945] 3 W.W.R. 510 at 517 (B.C.C.A.) per Sidney Smith J.A.).