SUPREME COURT OF NOVA SCOTIA
Citation: *B.M. v. K.S.*, 2015 NSSC 105

Date: 20150409
Docket: Hfx No. 434621
Registry: Halifax

Between:

B. M.

Applicant

v.

K. S.

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge:	The Honourable Justice Denise M. Boudreau
Heard:	March 2, 2015, in Halifax, Nova Scotia
Counsel:	Richard S. Niedermayer, for the Applicant S. Clifford Hood, QC, for the Respondent

By the Court:

[1] The applicant B. M. seeks the following order pursuant to section 31 of the *Personal Directives Act*, SNS 2008, c.8 (the "*Act*"):

> a) providing advice and directions regarding the Personal Directive of J. M. L.;
> b) determining that part of the Personal Directive of J. M L. ceases to have effect; and
> c) granting any other order the court considers appropriate.

Facts

[2] The applicant resides in Halifax Nova Scotia. He is the son of J. M. L. who is presently 94 years of age and resides in her home at […], Nova Scotia, where she has lived since 1952. Mrs. L. lives alone with the assistance of full-time paid caregivers, 7 days/week and 24 hours/day. The assistance of caregivers commenced while she and her husband, G. L., lived in the home. Mr. L. died on September […], 2012, and the arrangement continued for Mrs. L..

[3] On March 1, 2012, Mrs. L. executed a Personal Directive, pursuant to the *Act*. The applicant was the named "delegate" in this Personal Directive. The document contained, *inter alia*, the following provisions:

> 3. Appointment
>
> I appoint my son, B. G. M., of Halifax, Nova Scotia, as my delegate.
>
> 4. Alternate
>
> If my initial delegate is unable, unwilling, or unavailable to act or to continue to act, I appoint K. S., of Nova Scotia, as my alternate delegate.
>
> 5. Second alternate
>
> If my alternate delegate is unable, unwilling or available to act or to continue to act, I appoint my son, D.P. L., of […], as my second alternate delegate.
>
> 8. Authority
>
> I give my delegate general authority to make decisions concerning my health care and personal care. My delegate has authority to do anything on my behalf with respect to my health care and personal care that I can lawfully authorize a delegate to do for me.
>
> 9. Home care
>
> I express the wish that my delegate (in conjunction with my attorney) ensure that I am able to live in my house for the remainder of my life, with appropriate care arranged, including the assistance of a full-time caregiver to allow me to remain in my house, no matter what my physical or mental condition might be.
>
> 10. Effectiveness
>
> This personal directive becomes effective when I lack capacity to make health care and personal care decisions. I confirm that any delegate appointed in this personal care directive who is not my spouse or my relative (as defined in clause 2 (j)) does not provide personal care services to me for compensation, unless such services for compensation are otherwise specifically authorized herein.

[4] The parties are in agreement that Mrs. L.' Personal Directive is a valid instrument created pursuant to the *Act*. The parties further agree that the Personal Directive is presently in effect, as Mrs. L. is incapable of making decisions for herself due to advancing dementia. In fact, this has been the case, in the view of the parties, since approximately her husband's death in September 2012.

[5] Dr. David Webster, Mrs. L.' family doctor, agrees. He testified at this hearing and produced an affidavit as an exhibit, attaching a document entitled "Form 1: assessment of capacity to make decisions about a personal care matter", dated February 18, 2015. Within that document Dr. Webster answered questions as follows:

> It is my opinion that J. M. L. has the capacity to make a personal care decision regarding the following:
>
> Healthcare "no"
>
> placement in a continuing care home "no"
>
> provision of home care services "no"
>
> leaving the province "no"
>
> other personal care "no"

[6] Dr. Webster goes on to state:

> Progressive loss of verbal skills. Cannot use a sentence now. Progressive loss of orientation, recall, orientation to time and place… . She clearly suffers a chronic progressive dementia with an Alzheimer's pattern.

[7] Based on the evidence before me, I agree that the Personal Directive is presently in effect, in that Mrs. L. does not have capacity to make personal and health care decisions.

[8] Also on March 1, 2012, Mrs. L. executed an Enduring General Power of Attorney. In that document she appointed BMO Trust Company and K. S. as co-attorneys. Paragraph 7 of that document provides:

> 7. Home care
>
> I express the wish that my attorney (in conjunction with my delegate) ensure that I am able to live in my house for the remainder of my life, with appropriate care arranged, including the assistance of a full-time caregiver, to allow me to remain in my house, no matter what my physical or mental condition might be.

[9] BMO Trust Company manages a trust fund for Mrs. L., from which payments are made to allow for Mrs. L.' continuing care in her home. Shari Craig, senior trust office with BMO, filed an affidavit and testified in this matter. She confirmed that the present arrangements have cost approximately $240,000 - $250,000 per year. As of the date of the hearing, she confirmed the account held $493.008. Ms. Craig agreed that as long as the market stayed strong, funds remaining would likely allow the present arrangement to continue for approximately 2 more years.

[10] Ms. Craig further confirmed a debt owing the estate by D.L. (son of J. L.), of approximately $495,000. Collection attempts have been made but recent information is that Mr. David L. has declared bankruptcy.

[11] The respondent is K. S.. He is the co-attorney, along with BMO Trust, named in Mrs. L.' Enduring Power of Attorney, (executed the same day as her Personal Directive). These documents reference each other. In the Personal Directive, when Mrs. L. references the wish to remain in her home as long as possible, she has provided that the "delegate" act "in conjunction with" the

"attorney"; the Power of Attorney provides that the "attorney" act "in conjunction with" the "delegate".

[12] The respondent testified that he has known and was friends with both G. and J. L. for many years. He further testified, and I accept, that prior to Mr. L.'s death, Mr. L. had asked him to act as attorney for both himself and his wife, and to protect their wish to remain in their home as long as possible. According to the respondent, Mr. L. was particularly concerned about his wife's welfare, if he himself passed away. (I should note that the parties had agreed to certain hearsay evidence being tendered, subject to an assessment of weight by the Court.).

Issues

[13] The applicant has brought this matter forward as his mother's Delegate, seeking instructions. It is the position of the applicant that it is no longer in his mother's best interests to stay in her home in […], Yarmouth County. He agrees that she is well cared for, from a physical perspective, by her full-time caregivers. His concern is with her quality of life; his concerns are laid out in paragraphs 17 to 20 of his affidavit, filed in support of his application :

> (17) Over the past few years I have become aware that due to my mother's medical conditions, she no longer recognized her personal caregivers and lacked quality of life in her current care situation.

> (18) I also became concerned that since the death of my father, her life had become very isolated, as she is located in […], Nova Scotia, and is unable to leave her home to visit others due to her medical conditions.
>
> (19) My wife, children and I live in Halifax Nova Scotia, and are therefore unable to make frequent visits to the home of Mrs. L.. My brother, David, her only other child, currently resides in […].
>
> (20) As a result of her advancing dementia, I believe that my mother now requires continuing care with socialization and stimulating activities, and would benefit from being located in close proximity to her family.

[14] The applicant further testified that it is his belief that his mother spends her days with very little stimulation or interaction with others, and that she spends her time watching television, "disconnected" from what she is watching. The applicant's brother D. L. spent time with Mrs. L. during the summer of 2014, and he provided this description of her lifestyle.

[15] The applicant is of the view that his mother should be removed from her home and placed in a long-term elderly care facility in the Halifax area, specifically St. Vincent's Nursing Home. He submits that this is in her best interests. He has spoken with representatives of that nursing home and they are prepared to accept her as a resident. D. L., Mrs. L.' only other child, is an agreement with the applicants proposal.

[16] The respondent opposes the applicants plan. He disagrees with the applicants characterization of Mrs. L. present life. In his view, Mrs. L. continues to enjoy living in her home, despite her mental and physical disabilities. He visits Mrs. L.

and has observed her interactions with caregivers. The respondent believes that a move from her home, would be very upsetting and disorienting for Mrs. L..

[17] Furthermore, in the submission of the respondent, the issue before the court is not an assessment of Mrs. L. "best interests"; the issue is the respect of her wishes. The respondent believes that the written instructions laid out by Mrs. L. are clear: to remain in her home as long as possible.

[18] The respondent submits that the reference to the "delegate" and "attorneys" working together, in the Personal Directive, is an acknowledgement that it may not be financially possible for Mrs. L. to be cared for in her home until her death. These financial realities issues must be discussed and considered by the delegate along with those persons managing the finances.

[19] The respondent acknowledges that the present arrangement will not be financially possible forever. When the day comes that it is not, the respondent submits, the circumstances will be different. At the present time, it remains possible and Section 9 of the Personal Directive should be respected.

Law

[20] The *Act* is a relatively new statute in Nova Scotia. The relevant sections of the Act, for our purposes, are as follows:

> 3(1) a person with capacity may make a personal directive
>
> > (a)setting out instructions or an expression of the maker's values, beliefs and wishes about future personal-care decisions to be made on his or her behalf; and
> >
> > (b)authorizing one or more persons who, except in the case of a minor spouse, is or are of the age of majority to act as delegate to make, on the maker's behalf, decisions concerning the maker's personal care.
> >
> > …
> >
> > (5) a personal directive that appoints two or more delegates must assign to each of the delegates authority with respect to different matters.
>
> 5(1) a personal directive is subject to the conditions and restrictions that are contained in the personal directive and this Act.
>
> 5(2) In a personal directive the maker may
>
> > (a) identify persons with whom the delicate is to consult in making a personal care decision;
> >
> > (b) identify any persons who are to be notified and any persons who are not to be notified of the coming into effect of the personal directive;
> >
> > (c) identify any nearest relatives or other relatives who are not to act under section 14.
>
> 9 A personal directive is in effect whenever the maker lacks capacity to make a personal care decision.
>
> 15 (1) Subject to the Hospitals Act and the Involuntary Psychiatric Treatment Act, all decisions made by a delegate must be made in accordance with subsection (2).
>
> (2) In making any decision, a delegate shall
>
> > (a) follow any instructions in a personal directive unless
> >
> > > (i) there were expressions of a contrary wish made subsequently by the maker who had capacity,

> (ii) technological changes or medical advances make the instruction inappropriate in a way that is contrary to the intentions of the maker, or
>
> (iii) circumstances exist that would have caused the maker to set out different instructions had the circumstances been known based on what the delegate knows of the values and beliefs of the maker and from any other written or oral instructions;
>
> (b) in the absence of instructions, act according to what the delegate believes the wishes of the maker would be based on what the delegate knows of the values and beliefs of the maker and from any other written or oral instructions; and
>
> (c) where the delegate does not know the wishes, values and beliefs of the maker, make the personal care decision that the delegate believes would be in the best interests of the maker.

[21] This application is brought pursuant to s. 31 of the *Act*. I note the following ss. 29 and 31 of the Act:

> 29 A maker, person represented or any other interested person may apply to the court for any one or more orders referred to in section 31.
>
> 31 (1) The court may, on hearing an application under section 29, to any one or more of the following:
>
> …
>
> (f) provide advice and directions;
>
> …
>
> (i) order that all or part of a personal directive ceases to have effect;
>
> …
>
> (k) make any other order that the court considers appropriate.
>
> …
>
> 31 (3) in making a decision under subsection (1), the court may not add to or alter the intent of instruction contained in a personal directive unless the court is satisfied that the maker's instruction or wishes changed subsequent to the making of the instruction.

[22] The applicant acknowledges Mrs. L.' wish to remain in her home, as contained in her Personal Directive. However, it is his submission that a "wish" is not binding in the way that an "instruction" would be.

[23] Furthermore, and in the alternative, the applicant submits that the exception found in ss. 15(2) (a) (iii) should be applied, in that circumstances now exist that would have caused Mrs. L. to make different instructions in her Personal Directive. Specifically, had Mrs. L. known that she would experience the loss of her husband, (and anticipated her present state of advancing dementia), she would not have chosen to remain in her home alone. It is the applicant's view, given what he knows of his parents' relationship, that the wish to remain in the home was in fact his father's, and that his mother merely went along with her husband's wishes.

[24] It would appear that the Act has not yet been judicially considered. In relation to the question of "wishes" vs. "instructions", the applicant has referred the court to the Alberta CQB decision *Sweiss v. Alberta Health Services*, 2009 ABQB 691. That case dealt with a "Do Not Resuscitate" order that had been put in place by a doctor, and supported by a hospital and provincial health service, in relation to Mr. Sweiss. Mr. Sweiss had previously signed a declaration indicating

his wish that "all Islamic law be followed" in his care; the DNR order referred to above was contrary to Islamic law.

[25] The court in *Sweiss* found that the declaration did not meet the requirements of the Alberta *Personal Directives Act*; and therefore was not a valid Personal Directive. It did, however, provide clear indication of Mr. Sweiss' wishes.

[26] I note the following statements by the Alberta court in relation to this issue:

> [45] Although it was not argued before the Court, it is important to review the law relating to personal directives which would meet the requirements of the *Personal Directives Act*. What implications with such a directive have on the medical personnel or service providers as defined under the *Personal Directives Act*? Section 19(1) of the Act provides that service providers, which includes doctors, "must" follow any clear instructions that may be contained in a personal directive. If the personal directive does not designate an agent, the service provider must follow any clear instructions in the personal directive that are relevant to the decision being made: *Personal Directives Act*, s. 19(1) (b).
>
> [46] Section 14(3) of the act provides assistance in determining the intent of the maker of the personal directive where the directive does not contain clear instructions. The primary consideration relates to what is believed to be the decision of the maker in the circumstances, taking into account the knowledge of the wishes, beliefs and values of the maker of the personal directive: *Personal Directives Act*, s. 14(1) (3) (a). Section 14 (1)(3)(b) of the act goes on to provide to that if those wishes, beliefs and values are not known, then the instructions should be interpreted with reference to it is believed to be, in the circumstances, in the best interest of the maker.
>
> [47] It should further be noted that any interested person may apply to the court by way of Originating Notice for hearing to determine different issues as provided for in s. 27(1): *Personal Directives Act*, s. 25. However, the court cannot add or alter the intent of the instructions contained in a personal directive: *Personal Directives Act*, s. 27(3). Thus, in summary, it is clear from a reading of these provisions that a high level of importance is placed on the wishes of the individual taking the personal directive.
>
> [48] Given the mandatory wording of s. 19(1) of the *Personal Directives Act*, it appears that where a personal directive with clear instructions conflicts with

> recommended medical treatment, the wishes, directions and instructions of the patient will prevail. In my view, this drafting reflects the fact that the Legislature only contemplated that personal directives with state that no extraordinary measures taken to keep the patient alive. The Legislature does not appear to have anticipated that some directives would provide for indefinite life support. Thus, as the law currently stands, it appears that if a personal directive directs that all possible measures be taken to keep the patient alive, whether or not he is brain-dead or no longer breathing on his own, the direction must be followed despite the fact that life support may be required for an indefinite period of time.

[27] Given that the document signed by Mr. Sweiss was not a valid Personal Directive, these conclusions did not apply. The court agreed that the question to be answered in the *Sweiss* case was the patients "best interests". Crucially, I note the final paragraph of this decision:

> [74] Although I have held that no one factor should be treated as paramount, this conclusion may not apply where a valid personal directive exists which runs contrary to the proposed medical treatment program. In cases where a personal directive is found to exist, it would appear that, pursuant to the authority in the *Personal Directives Act*, the wishes, beliefs and values of the patient "must" be followed. [Emphasis is mine]

[28] I disagree with the applicant's submissions as to this case. I see nothing in it which leads me to the conclusion that a court should treat a clearly stated "wish", in a valid personal directive, as anything different from an "instruction".

[29] In the case of Mrs. L.' Personal Directive, the expressed wish to remain in her home was, in fact, the only specific request she made of her delegate. She repeated it in the Power of Attorney executed on the same day. It was clearly an important and fundamental request.

[30] I note that the *Act* is imprecise as to this question. Section 3(1)(a) mentions "setting out instructions or an expression of the maker's values, beliefs and wishes"; this is a distinction without a difference. Section 15 states: "in making any decision, a delegate shall (a) follow any instructions in a personal directive…" but later states: "in the absence of instructions, [the delegate must] act according to what the delegate believes the wishes of the maker would be…". Section 31(3) of the Act again uses both words "wishes" and "instruction" without any differentiation.

[31] In my view, in this particular case, it is not material that Mrs. L. used the word "wish" instead of "instruct" in respect of the request at section 9 of her Directive. It was a clear, important, and unequivocal direction. Pursuant to section 15 of the *Act*, the delegate must follow directions.

[32] I agree with the submission of the respondent that the reference to the delegate and attorney working "in conjunction", acknowledged that the wish to remain home, was dependent on having the financial ability to do so. It therefore required, at the very least, the input of those persons having control of her finances. In my view, this is the only logical interpretation of these provisions.

[33] I have also considered the applicants submission in relation to s. 15(2)(a)(iii). Do circumstances now exist that would have caused Mrs. L. to make different instructions, had those circumstances been known at the time the document was signed?

[34] This document was signed in March 2012. The applicant confirmed, during cross-examination, that at that time his father already required full-time, 24/7 in-home care. He was undergoing dialysis. Mr. L. died six months after signing the documentation. Those same caregivers also looked after Mrs. L. during that time. While it is difficult to pinpoint when, exactly, she began to require 24/7 care, it is acknowledged that she was physically and mentally declining during this entire period. Following her husband's death, the full-time care continued for her.

[35] I find it difficult to accept the argument that, at the time she signed this document, Mrs. L. did not foresee the death of her husband as a possibility. Mr. and Mrs. L. were both elderly and, to a great extent, disabled at the time they executed these documents. Mr. L. himself expressed concern about his wife's situation after his death. I am unconvinced that at the time she gave these directions, Mrs. L. did not anticipate the possibility of living without her husband.

[36] I do not agree that her present disabilities were unknown or unanticipated circumstances. The Personal Directive is clear that Mrs. L.' wishes remained the same, no matter her health status:

> I express the wish that my delegate (in conjunction with my attorney) ensure that I am able to live in my house for the remainder of my life, with appropriate care arranged, including the assistance of a full-time caregiver to allow me to remain in my house, no matter what my physical or mental condition might be. (emphasis is mine)

[37] The applicant and respondent have provided the court with their beliefs as to what Mrs. L. would now want, under the present circumstances. While I have considered all of their submissions, I find that the greatest weight is to be given to Mrs. L.' Personal Directive. It clearly sets out what she wants.

[38] I have heard nothing that persuades me that her feelings are different today, or that she would have felt differently back in March 2012 if she had known what her future held.

Conclusion

[39] I find that Mrs. L. executed a Personal Directive on March 1, 2012. The document expresses clear directions to her delegate. She is presumed to have been

competent when she signed this document. I find that the Personal Directive is now in force, as she lacks capacity to make health care and personal care decisions.

[40] Paragraph 9 of the Directive is clear. Mrs. L. wished to remain in her home, so long as it was possible. As matters presently stand, it remains possible. Whether this is, or is not, in her "best interests" is not for this court to determine. This is her express wish and I order that this provision of her Directive be respected by her delegate. J. L. is to remain in her home under the present caregiving and financial arrangements, for so long as it remains possible.

Boudreau, J.