SUPREME COURT OF NOVA SCOTIA
Citation: ***D.B. v. J.M.J.***, 2010 NSSC 137

Date: 20100422
Docket: Hfx No. 310421
Registry: Halifax

IN THE MATTER OF: An application for the appointment of a guardian of the person and estate of H. M. R. E. under the provisions of the *Incompetent Persons Act*, R.S.N.S., 1989, c. 218, as amended.

Between:

D. B.

Applicant

v.

J. M. J.

Respondent

Editorial Notice

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

Judge: The Honourable Justice Peter Bryson

Heard: April 1, 2010, in Halifax, Nova Scotia, in Chambers

Written Decision: April 22, 2010

Counsel: Lisanne M. Jacklin, for the Applicant
J. M. J., Self-represented Respondent

By the Court:

[1] This is an application by D. B. to be appointed guardian of the person and estate of H. M. R. E., pursuant to the *Incompetent Persons Act*, R.S.N.S. 1989, c. 218. Ms. B. is a daughter of Ms. E.. Her application is supported by all her siblings and her father. It is opposed by J. J. as Ms. E.'s attorney.

[2] The application was initially filed on April 24, 2009 and heard in Chambers on May 12, 2009. It was adjourned pending filing of additional documentation. It was heard again on June 3, 2009, but was then adjourned without day.

[3] There were previous document deficiencies which I am satisfied have now been addressed. The affidavit evidence, including that of two medical practitioners, clearly establishes that Ms. E. is not competent within the meaning of the *Act* and is incapable of managing her affairs.

[4] In addition to the material usual in a guardianship application, I received submissions in support of the application from counsel, from Ms. D. B. herself, and from her brother, W. E.. I also heard in reply from Ms. E.'s attorney, J. J..

[5] The evidence and submissions clearly establish that Ms. E. is presently well cared for at *. She is regularly visited by Ms. B. and Ms. J.. There seems to be no restriction on who may visit and when. Moreover, all parties appear to agree that Ms. E. is where she should be and that she is well looked after.

[6] The problem for the applicant is that her mother executed an enduring power of attorney in favour of her friend, Ms. J. (mistakenly referred to in the applicant's brief as a non-enduring power of attorney).

[7] In advancing the application, Ms. E.'s family do not allege inappropriate treatment of their mother by Ms. J.. They do not complain of their mother's present circumstances. Rather, they allege that they have not been kept fully informed and have not been given an accounting of her estate. Ms. J. denies this. In any event, there is no evidence that the family has no access to their mother and can't find out on a daily basis how she is doing. They can visit and provide her with gifts and spend time with her as much as they like. Moreover, there is no evidence of misappropriation of significant property. Indeed, it would seem that Ms. E. does not now have and never has had significant property of which to

dispose. Concern has been raised about the sale of her mobile home. Ms. J. says that there was a loss on the sale. The family thinks that may be inaccurate. Likewise, there is a suggestion from counsel that there are some unaccounted for casino winnings.

[8] Generally speaking, on a guardianship application, the court's obligation is to ensure that the best interests of the incompetent are paramount. In *Slayter (Re)*, [1992] N.S.J. No. 341, Justice Goodfellow discussed the criteria for determination of an appropriate guardian and said that the court must appoint the best possible person to fulfill the duties and responsibilities under the *Act*. He also referred to six non-exclusive factors to be considered as follows:

> (1) the ability of the applicant to meet the duties and responsibilities by Statute;
>
> (2) the wishes of the incompetent to the extent that such can be ascertained;
>
> (3) the history of the relationship of each applicant to the incompetent;
>
> (4) the probable result of the appointment of one applicant over the other;
>
> (5) the independent views of the personnel in the health care field; and
>
> (6) the concerns and views of other relatives of the incompetent.

[9] Keeping the foregoing criteria in mind, the evidence suggests that Ms. B. would make a good guardian. Equally, however, there is no evidence that Ms. J. has not acted in Ms. E.'s best interests to date. Moreover, Ms. E. clearly anticipated and planned for the present eventuality by appointing her friend, Ms. J., as her attorney. There is no suggestion that Ms. E. was not competent when she did so. In the absence of reasons or other evidence indicating that the current arrangements are not in Ms. E.'s best interests, the court should be reluctant to make a change.

[10] In *Re Isnor Estate*, 2001 CarswellNS 551, Justice LeBlanc considered a guardianship application under the *Incompetent Persons Act*, R.S.N.S. 1989, c 218, s.1, in the context of an existing enduring power of attorney. He found that while there was an apparent contradiction between the two *Acts*, the *Powers of Attorney Act*, R.S.N.S. 1989, c. 352, should prevail on the statutory interpretation principle of the "implied repeal" rule of paramountcy, (¶ 45). This was more consistent with

respecting the independence of the individual by honouring her choice of "substitute decision-maker," as embodied in the appointment of the an attorney. Justice LeBlanc went on to consider whether the attorney should be removed "for cause" as set out in the *Powers of Attorney Act*. Absent cause, no change should be made. *Isnor* is persuasive. I would add only two caveats. In some instances a power of attorney may not grant all the authority necessary or desirable to see to an incompetent's needs, in the same fashion as a guardianship may. Second, where an incompetent person is concerned, I think that the court's *parens patriae* jurisdiction always allows the court to do what is in the incompetent's best interests, although considerable deference should be given to the incompetent's own choice.

[11] There is nothing to suggest that the status quo does not serve Ms. E.'s best interests. The real concern of the applicant and her family is a failure of Ms. J. to account to *them* with respect to their mother's estate and at an earlier stage when her current living arrangements were made, to keep them informed. Ms. J. protests that she did so or tried to do so. In any event, that criticism is not relevant now.

[12] The applicant acknowledges that *Isnor* governs the present situation but argues that under s. 5 of the *Powers of Attorney Act*, the court has the discretion to remove an attorney for cause. The applicant argues that failure to consult with and account to her or her siblings constitutes misfeasance or misconduct such that Ms. J. should be displaced. Alternatively, she submits that pursuant to s. 5 of the *Powers of Attorney Act*, the court can direct an accounting.

[13] In advancing her argument the applicant relies upon two decisions. In B.(E.) v. B.(S.), 2010 Carswell Man. 29 (M.B.Q.B*)*, three brothers were in a dispute over the removal of an attorney for their uncle. The power of attorney contained a provision that an annual accounting should be provided. This had never occurred in part because the person to whom an accounting was supposed to be made did not request one. The court found that the power of attorney was not being observed because a regular accounting as contemplated by the donor was not taking place. The court ordered the attorney to provide an accounting, and replaced the attorney with the Public Trustee.

[14] In B.(E.), the court quoted from the Alberta decision of *Brown v Lefebvre,* [2007] A.J. 614 (Alta.Q.B.), which noted that an attorney administering assets was a fiduciary with an obligation to act in the best interest of the donor of the power.

Such an attorney cannot permit a conflict between his interests and that of his beneficiary. An attorney's duties include an obligation to account to the court and ultimately to the beneficiaries of the estate. Specifically, an attorney must:

(1) keep proper accounts of the trust estate;

(2) keep trust accounts distinct from other accounts;

(3) preserve receipts or cancelled cheques;

(4) produce accounts to the donor or the court and to any beneficiary; and

(5) ensure the accounts clearly show all monies and assets received are accounted for.

[15] The foregoing principles are unexceptional. But they are not abstract obligations; rather they arise in concrete circumstances. In this case the *Powers of Attorney Act*, only requires an accounting "for cause". The only cause alleged here is a failure to consult and keep the applicant and her siblings informed - an accusation which Ms. J. denies. In any event, it is not a requirement of Ms. E.'s power of attorney (as it was in B. (E.)) to provide an accounting to anyone in particular. Accordingly the only obligation that arises is the one imposed by the legislation. I am also mindful that there is no evidence before the court that Ms. E. had substantial assets. Her resources seem to be very limited and her present care is subsidized by the province. Last, but by no means least, Ms. J. was not served with an application for an accounting under s. 5 of the *Powers of Attorney Act*, and was not prepared to meet that claim on this occasion.

[16] Ms. E.'s family may bring a subsequent application requiring Ms. J. to account under s. 5 of the *Powers of Attorney Act*, (*if they can establish cause within the meaning of that section*). Alternatively, Ms. J. may be able to placate the family and address their concerns by providing them with an informal accounting which would set out the property that came into her hands when she started to act as attorney, together with Ms. E.'s income and expenses since then. She may also want to provide copies of bank account and other financial statements to Ms. B., which she can share with the family. She is not obliged to do so unless and until a successful application is brought under the *Powers of Attorney Act*, but doing so informally may go some distance to meeting the concerns of the family. However it is important that Ms. J. understand that she can be required by

Ms. E.'s beneficiaries to account to them when Ms. E. dies. Such an accounting would include:

(1) demonstrating how Ms. J. kept her property and the property of Ms. E. separate and apart;

(2) disclosing what property of Ms. E. initially came into Ms. J.'s hands;

(3) providing copies of all receipts, cancelled cheques, and bank account statements for Ms. E. from the time that Ms. J. began acting as her attorney;

(4) providing a detailed list of all payments made on behalf of Ms. E. from her funds; and

(5) providing a closing summary of Ms. E.'s property upon her death so that her beneficiaries would know what the estate then consisted of.

[17] In the result, the application is dismissed. Ms. J. need not account to the applicant and her siblings unless and until they bring a successful application for an accounting under s. 5 of the *Power of Attorney Act.* Otherwise she may volunteer to provide an accounting, but is not required to do so. There will be no costs.

Bryson, J.