

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:)	
)	
RAYMOND JOHN MARSH)	REASONS FOR JUDGMENT
)	
PLAINTIFF)	
)	
AND:)	OF THE HONOURABLE
)	
NATIONAL TRUST COMPANY and)	
ANNE MacDONALD MARSH, Executors)	
of the Estate of GEORGE ERNEST)	MR. JUSTICE BAUMAN
TERRY MARSH, ANIMAL WELFARE)	
FOUNDATION OF CANADA,)	
ASSOCIATION FOR THE PROTECTION)	
OF FUR-BEARING ANIMALS, and the)	
said ANN MacDONALD MARSH)	(IN CHAMBERS)
)	
DEFENDANTS)	

Date and place of hearing: August 13, 1996
Vancouver, British Columbia

Counsel for the plaintiff/applicant: F.G. Potts

Counsel for the Public Trustee: R.A. Porszt

I. Overview

1 The petitioner is a 58 year old medical doctor who is presently engaged in a proceeding under the Wills Variation Act, R.S.B.C. 1979, c. 435, seeking to vary the provisions of his late father's will. George Marsh died on March 14, 1993.

2 The petitioner's mother, both in her capacity as co-executor of her husband's estate and as a beneficiary under the will, is a defendant in the variation action.

3 Regrettably, the petitioner's mother, Anne MacDonald Marsh, suffers from Alzheimer's disease and she is under institutional care. A certificate in respect of Mrs. Marsh was issued under s. 1(a) of the Patients Property Act, R.S.B.C. 1979, c. 313 on March 14, 1995. Upon issuance of the certificate, the Public Trustee commenced committeehip of Mrs. Marsh's estate.

4 Under his will, the estate of George Marsh, valued in 1993 at \$610,000, devolves in this manner:

- (i) A bequest of \$10,000 to the Association for the Protection of Fur-Bearing Animals;
- (ii) A life estate in the income from the capital to Anne MacDonald Marsh;
- (iii) On her death, a bequest of \$50,000 to the Association for the Protection of Fur-Bearing Animals with the residue going to the Animal Welfare Foundation of Canada.

5 The petitioner takes nothing directly under the will of his father.

6 In the fall of 1993, Anne MacDonald Marsh filed a statement of defence in the variation action in her capacity as co-executor and she took no position with respect to the petitioner's claim.

7 On December 3, 1993, through her then counsel, Mrs. Marsh filed a statement of defence in her personal capacity. She sought a dismissal of the petitioner's claim.

II. The Applications

8 That background leads to the applications now before the court. The petitioner, for reasons which are not absolutely clear but which need not detain us, applies under ss. 18 and 28 of the Patients Property Act for an order causing:

. . . the Public Trustee to take certain steps on behalf of Anne MacDonald Marsh who is incompetent to manage her own affairs In particular, the petitioner seeks an order that the Public Trustee, in its capacity as committee for Anne MacDonald Marsh, make an application on her behalf under the Wills Variation Act to vary the will of the late George Ernest Terry Marsh

9 In the alternative, the petitioner seeks an order appointing him as guardian ad litem for Anne MacDonald Marsh in order to advance the Wills Variation Act claim on her behalf.

III. The Public Trustee's Position

10 The Public Trustee notes that as of June 1995 the assets of Anne MacDonald Marsh totalled approximately \$524,000. Her total monthly income was \$7,023.15 and her monthly expenses were \$2,808.52 leaving a net monthly surplus of \$4,214.63. Mrs. Marsh is 78 years old, and as indicated, is in permanent care.

11 The Public Trustee considered launching a Wills Variation Act proceeding on behalf of Mrs. Marsh but concluded that success was uncertain and that the needs of the patient were well met from her existing resources.

IV. The Petitioner's Position

12 The petitioner, relying upon the Supreme Court of Canada decision in *Tataryn v. Tataryn Estate* (1994), 93 B.C.L.R. (2d) 145, argues that his mother enjoys a significant chance of receiving a full 50% share of her husband's estate in a Wills Variation Act proceeding.

V. Jurisdiction

13 This application raises a troubling threshold question of the court's jurisdiction to make the requested orders.

14 In effect, the petitioner seeks an order quashing the initial decision of the Public Trustee against proceeding on behalf of the patient and an order directing that he commence and, presumably, diligently pursue litigation on her behalf, taking certain positions advantageous to Mrs. Marsh before the trial judge. The remedy recalls the pleading for *mandamus* with *certiorari* in aid in the administrative law context.

15 As noted, this proceeding invokes ss. 18 and 28 of the Patients Property Act. They provide:

18. A committee shall exercise his powers for the benefit of the patient and his family, having regard to the nature and value of the property of the patient and the circumstances and needs of the patient and his family.

28. Where there is insufficient provision in this Act, the court may at any time, on the application of any person, make an order not in contradiction to this Act or the regulations that it considers necessary for or in the interests of the proper, honest and prudent management and administration of the estate of a patient.

16 These provisions were considered by MacKinnon J. in *Meade*

v. The Public Trustee and Meade (1979), 12 B.C.L.R. 366.

17 In Meade, the patient's father sought an order restraining the Public Trustee from entering into a maintenance agreement with the patient's wife. MacKinnon J. struck out the petition as disclosing no reasonable claim, holding at p. 373:

It is clear the legislature intended to grant a committee the exclusive jurisdiction over the conduct of the affairs of the patient. Where the powers executed are administrative, as they were in this case, then the court has no right to review that administrative act. Section 30 (now s. 28 of the Patients Property Act) of the Patients Estates Act cannot, as sought by the petitioner, be invoked as the requisite power to confer jurisdiction upon the court so as to review the Act of the Public Trustee. To do so would be in contradiction of the provisions of the Act and would, in my view, have the result of usurping jurisdiction already conferred by the legislature.

18 Meade was expressly disapproved of by the Court of Appeal in Wood v. Public Trustee and Freedy (1986), 70 B.C.L.R. 373.

19 However, before one dismisses Meade's jurisprudential value, one should look closely at the facts in Wood.

20 There, the recovered patient sued the Public Trustee, acting as committee, for damages for negligence in the administration of his estate.

21 Esson J.A. (as he then was) dealt at length with Meade and held at p. 385:

It is unnecessary to decide whether Meade v. Pub. Trustee was wrongly decided on its particular facts. Insofar as the reasoning and conclusions support the contention that no action lies against the Public Trustee for any want of care or other breach of duty in acting as committee, except such actions as are permitted after discharge by s. 13(5), I cannot regard it as a correct decision.

The Public Trustee in acting as committee is not acting in a legislative, judicial or executive capacity; nor is it exercising discretion within the policy or planning spheres of government. In relation to those spheres, the scope of judicial review is limited. But it has long been held that the negligent exercise of a statutory power can give rise to liability

22 Importantly, Esson J.A. was refusing to apply Meade to create an immunity for the Public Trustee from suits in negligence arising out of his or her administration of patients' property.

23 Esson J.A. did not, it seems, definitively opine on whether there can be (in effect) judicial review of a Public Trustee's decision when acting in the capacity of committee: (at p. 385)

It is doubtful that the Public Trustee, in acting as committee, is exercising a statutory power in the sense which gives rise to the issue considered in those authorities. In acting as committee of Mr. Wood's estate, the Public Trustee was not exercising an authority directly conferred by statute, but rather one conferred by court order. The order, of course, is made under a statute but the status conferred by the order is one which can be conferred on any person. So the whole

discussion of statutory powers may be irrelevant but, if that area of law applies, it does not apply so as to protect the Public Trustee from liability for breach of the standard of care applicable to all committees.

(Emphasis mine)

24 This view of Wood was not, apparently, considered in later cases reviewing the conduct of the Public Trustee acting as committee.

25 Mitchell v. Mitchell (November 2, 1995, Victoria Registry No. 3097/93 B.C.S.C.) squarely raised the question of whether the Supreme Court had jurisdiction to review a decision of the committee appointed by court order under the Patients Property Act. Melvin J. held that Wood was directly on point and that the Supreme Court enjoyed the jurisdiction to review.

26 Mitchell, of course, is binding on me unless it can be distinguished on the ground that there the committee was appointed by court order and thus, the argument goes, he or she is always amenable to the court's supervisory jurisdiction. While, in the case at bar, the Public Trustee acts as a committee solely by virtue of the statute through the combined operation of ss. 1(a) and 6(3) of the Act.

27 If there is to be review of the committee's conduct in the former case, it would hardly be fair that there not be a review in the latter, especially when one recalls that the Public Trustee could be a court ordered committee of a s. 1(a) patient or a "default" statutory committee of the same person under s. 6(3). The law on this point should not be fickle.

28 Nor should I overlook s. 28 of the Act which, on its face, gives the court a broad jurisdiction to make orders necessary for or in the interests of the proper, honest and prudent management and administration of the estate of the patient. That section does not distinguish between patients with a court appointed committee and those whose committee acts solely by virtue of the statute.

29 I conclude that the court enjoys the jurisdiction to consider the applications. Because of the view I take of the merits, it is not necessary that I express a view on the deference, if any, I should accord the decision of the Public Trustee in my review.

VI. The Merits

30 Assuming, without deciding, that the standard of review of the Public Trustee's decision herein is one of correctness, I conclude that the Public Trustee was correct in deciding not to pursue the litigation. Its outcome is uncertain; its fruits are not needed by Anne MacDonald Marsh.

31 As well, it is one thing to say that the court may review and set aside a committee's decision in a particular matter, it is quite another to suggest that this court should direct the committee to embark on litigation and take certain (one presumes, specified) positions on behalf of a patient. Such an order is virtually impossible to draft or, at least, to superintend.

32 Finally, on this aspect of the matter Re Price (June 6, 1996, Victoria Registry No. 94/4824 B.C.S.C.) is authority for the proposition that in considering an order directing the payment of a benefit to a family member under s. 18 of the Patients Property Act, one should look for evidence to show that the patient would have made the payment himself if he were competent.

33 On that test, this petitioner fails as well because we know that before her incapacity Mrs. Marsh, through counsel, filed a defence on her own behalf praying that the petitioner's action be dismissed.

34 Turning to the petitioner's alternative application to be appointed guardian ad litem for Mrs. Marsh to advance the Wills Variation Act claim on her behalf, I accept the Public Trustee's submission to the effect that:

- (i) The petitioner has not made out a case for the removal of the Public Trustee as guardian ad litem; and in any event
- (ii) The petitioner's serious conflict of interest would exclude him as a candidate for appointment.

35 In dismissing the petitioner's applications I note that he remains fully able to advance all of the arguments available to him in the variation action and that the dismissal of these applications in no way impedes his ability to do so on his own behalf.

VII. Conclusion

36 In the result, the petitioner's applications are dismissed with costs on Scale 3 to the respondent, the Public Trustee.

"Bauman J."

August 30, 1996
Vancouver, British Columbia