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Represented Adults and Solicitor-Client Privilege

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Case Considered:

Wayne v Wayne, 2012 ABQB 763

The *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2 (*AGTA*), applies to persons over the age of 18 who are unable to make personal or financial decisions for themselves, a person the statute calls a "represented adult." There has not been much judicial consideration of the statute which came into force on October 30, 2009; there appears to be fewer than a dozen cases interpreting only a relatively small number of the statute's provisions. That is one reason why *Wayne v Wayne* is of interest. Another reason is that the issue in *Wayne v Wayne* is intrinsically interesting, at least to the legal profession, because it is about the ability of a trustee appointed to manage the financial affairs of a represented adult to gain access to information otherwise protected by solicitor-client privilege from the file of a represented adult to whom a lawyer gave legal advice.

Facts

Doreen Margaret Wayne (Mrs. Wayne) suffers from dementia. She currently lives in Vancouver, but resided in Calgary until 2006. Two of her three children are still living: the Applicant, William, and John. On September 2, 2010, the British Columbia Supreme Court declared that Mrs. Wayne was mentally incapable of handling her own financial affairs — in Alberta, a "represented adult" — and appointed her son William as the committee of her estate — in Alberta, the trustee of her estate.

In 2003, Mrs. Wayne had appointed her other son, John, as her Attorney under an Enduring Power of Attorney and as her Agent under a Personal Directive. Four years later she appointed John as the executor of her new June 6, 2007 Will, which left John the residue of her estate. The Enduring Power of Attorney, Personal Directive and Will were drafted by Hugh A. McQueen, Q.C., formerly of the Calgary law firm of Stones Carbert Waite LLP, and now retired. Those documents and materials relevant to their preparation and execution made up the file that the court-appointed trustee, William, wanted access to — the "estate file."

Stones Carbert Waite LLP gave William copies of Mrs. Wayne's Will, Enduring Power of Attorney, and Personal Directive but took the position that it had a duty to claim solicitor-client privilege over the rest of her estate file.

Why did William want the rest of the estate file? Mrs. Wayne had owned a home in Calgary. It was sold for $300,000 in March 2009 when its assessed value was $659,000. The house was re-sold six months later for $542,000. No realtor was involved in the March 2009 sale by Mrs.

Wayne and we are not told who arranged it or who the buyer was. We are only told that William was concerned about Mrs. Wayne's capacity at the time of the sale.

William had already asked the Court of Queen's Bench for an order for production of the estate file, back in February 2011. Williams' request for the file was based on the fact that Stones Carbert Waite LLP acted as Mrs. Wayne's lawyer on her estate matters and may have provided her with advice about the house sale. The Court denied his request, however, on the basis of a lack of relevance between the estate file and the real estate transaction. William subsequently filed a statement of claim challenging the house sale, but this application was not brought as part of that action.

John was not opposed to a certified copy of the estate file being provided to William's lawyer, so long as a certified copy of the file was also provided to his lawyer at the same time. Justice Mahoney does not rely on this lack of opposition; nor, in the end, does he grant John the same access as he grants William.

Issue

The question was whether a trustee of a represented adult has full access to the material in a lawyer's file that is otherwise protected by solicitor-client privilege. Did *AGTA* sections 55 and 72(4) or the common law waive solicitor-client privilege between the represented adult and his or her solicitor? Does a trustee step into the shoes of a represented adult so as to be able to waive the privilege on their behalf?

Law

William relied on the provisions of the *AGTA*. Section 55 of that statute governs the property subject to a trusteeship order and the authority of the trustee with respect to that property. It is sweeping in its scope, excluding only real property outside Alberta, and expressly puts the trustee into the shoes of the represented adult for the purposes of dealing with the represented adult's financial matters.

AGTA section 72(4) governs a trustee's access to the represented adult's personal information and this is the statutory provision that turned out to be pivotal. Access under section 72(4) is conditional and must be determined on a case-by-case basis:

> 72(4) A trustee is entitled to access, collect or obtain from a public body, custodian or organization personal information about the represented adult that is relevant to the exercise of the authority and the carrying out of the duties and responsibilities of the trustee (emphasis added).

The law firm relied upon their professional responsibility to assert solicitor-client privilege and obtain direction from the court whenever there was any uncertainty about the scope of the privilege or the trustee's authority. They also pointed to relevant provisions in the *Protection of Personal Information Act*, SA 2003, c P-6.5 (*PIPA*), but that statute allows the disclosure of personal information about an individual without the consent of the individual if the disclosure of the information is authorized or required by a statute of Alberta or of Canada" (section 20(b)(i)), and specifically provides in section 61(1)(e) that any right or power conferred on an individual by the Act may be exercised "if a guardian or trustee has been appointed for the individual under the *Adult Guardianship and Trusteeship Act*, by the guardian or trustee if the exercise of the right

or power relates to the powers and duties of the guardian or trustee..." (emphasis added). In the end the *PIPA* did not play a determinative role; it merely facilitated the determinative role of section 72(4) of the *AGTA*.

Analysis

Justice Mahoney began with a brief look at solicitor-client privilege (at para 29): "A communication made between a lawyer and a client, in the course of seeking or providing legal advice, and intended by the parties to be confidential, is protected by solicitor-client privilege." He noted that the solicitor-client privilege has been characterized as a "fundamental and legal right" (at para 29, quoting *Solosky v The Queen*, [1980] 1 SCR 821 at 839) and that "it must be as close to absolute as possible to ensure public confidence and retain relevance" (at para 30, citing *R. v McClure*, 2001 SCC 14 at para 35).

The main question was whether the *AGTA* overrides solicitor-client privilege. Justice Mahoney held that the intent to do so had to be clearly stated in the legislation (at para 33, citing *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, 2008 SCC 44 at para 11, [2008] 2 SCR 574).

As already mentioned, *PIPA* was not determinative of the issue (at paras 34-36). Justice Mahoney held that the net effect of sections 20 and 61(1)(e) of *PIPA* was that a law firm may, not must, disclose personal information about a represented adult to that person's trustee but only if, for example, the disclosure of information was authorized or required by the *AGTA*.

What did the *AGTA* authorize or require? The key provision is section 72(4) which states that a trustee is entitled to obtain from a law firm the personal information about the represented adult that is relevant to the exercise of the authority and the carrying out of the duties and responsibilities of the trustee. Justice Mahoney held (at para 38) that section 72(4) requires that the trustee demonstrate that there is a rational connection between the personal information sought and the trustee's exercise of authority and the carrying out of his or her duties and responsibilities. That is the test for access to material covered by a solicitor-client privilege.

Justice Mahoney found (at paras 39-42) that William had met that test. He had sued to challenge the March 2009 house sale at $240,000 less than its assessed value on the basis of his duty to exercise his authority in the represented adult's — or her estate's — best interests. William had therefore established that the estate file was relevant to the exercise of his trustee duties. However, we are not told exactly what linked the estate file with the house sale that allowed Justice Mahoney to conclude the former was relevant to the latter

That did not conclude the matter. Justice Mahoney then began to review some of the common law principles of solicitor-client privilege. Why he discusses solicitor-client privilege second is unclear, especially as the statutory scheme he analyzes first seems to have been written with solicitor-client privilege in mind. In particular, the point that the intent to override the privilege must be clearly stated in the legislation suggests that the reverse order would be more analytically coherent.

Justice Mahoney began (at para 43) with the principle that the privilege survives the client, even though Mrs. Wayne was not deceased. In the event of the client's death, according to Ronald Manes and Michael Silver, *Solicitor-Client Privilege in Canadian Law* (Markham: Butterworths, 1993) at 178, it is the executor or administrator of the deceased's estate who steps into the

deceased's shoes and asserts or waives the privilege, but, according to the Supreme Court of Canada in *Geffen v Goodman Estate*, [1991] 2 SCR 333 at para 58, confidentiality of communications between solicitor and client enures to the deceased's next of kin, heirs or successors in title. Rather confusingly, Justice Mahoney then quotes from *Bre-X Minerals Ltd (Trustee) v Verchere*, 2001 ABCA 255 at para 23, where the Court of Appeal noted that "[d]isclosure in estate cases has been allowed to promote the deceased client's wishes and true testamentary intentions through disclosure of privilege communications" but that the exception in *Geffen* "should not be misinterpreted as authority for a widespread, case-by-case assessment of requests for waiver of privilege by third parties... ." Unfortunately, there is no summary or reconciliation of these case authorities and it is difficult to understand what it is we are to take away from this part of the judgment.

Justice Mahoney then turned to judicial interpretation of British Columbia's *Patients Property Act*, RSBC 1996, c 349. There is no Alberta case law relevant to the issue of a trustee's access to materials otherwise covered by solicitor-client privilege, but there is some British Columbia case law on a trustee's ability to assert or waive privilege or otherwise gain access to the materials in represented adult's file under the *Patients Property Act*. In *Re: Elsie Jones Fawcett Estate*, 2009 BCSC 1306 at para 12, the Court held that a committee stands in the place of an incapable person and therefore has the authority to make decisions with respect to the patient's property, including legal files. However, this conclusion was based on section 15(1)(a) of the *Patients Property Act*, which gives a committee "all the rights, privileges and powers with regard to the estate of the patient as the patient would have if of full age and of sound and disposing mind... ." Access under section 72(4) of the Alberta statute, on the other hand, is conditional on the personal information being "relevant to the exercise of the authority and the carrying out of the duties and responsibilities of the trustee." In addition, a different British Columbia Supreme Court case had decided the same issue to the contrary. In *Re Palamarek*, 2010 BCSC 1894 at paras 40-41, the Court held that the common law principle that successors in title can receive and take ownership and control of solicitor-client privilege did not govern in all circumstances and that a committee "does not have an untrammelled right in all circumstances to deal with the privilege of the patient."

In the end (at para 52), the common law principles relating to solicitor-client privilege did not alter the result. Instead, Justice Mahoney found that section 72(4) of the AGTA governed, and it had conditioned a trustee's access to materials otherwise covered by solicitor-client privilege to material "that is relevant to the exercise of the authority and the carrying out of the duties and responsibilities of the trustee." Thus Justice Mahoney's finding (at para 42) that William had established that the estate file was relevant to the exercise of his trustee duties meant that William was granted access to Mrs. Wayne's estate file at Stones Carbert Waite LLP notwithstanding solicitor-client privilege.

Comment

Considered apart from the unusual factual background, Justice Mahoney's reasons seem to reflect an appropriate application of the governing statute in light of the principles of solicitor-client privilege. Justice Mahoney is correct to acknowledge that normally the communications at issue here would be privileged, and would remain privileged even after Mrs. Wayne's death. Privilege can be overridden by statute, but such statutes are to be narrowly construed. The result here, where the materials are made available to the trustee but only to the extent necessary for the discharge of the trustee's mandate, seems to be an appropriately narrow interpretation of the statutory scheme. It does not give every trustee an unfettered right to the represented adult's legal

files, but it does ensure that a trustee has access to those files to the extent necessary to represent the represented adult's interests. Justice Mahoney's decision provides a helpful precedent for Alberta trustees and lawyers, providing a test for trustee's access to material covered by a solicitor-client privilege: can the trustee demonstrate that there is a rational connection between the personal information sought and the trustee's exercise of authority and the carrying out of his or her duties and responsibilities?

The more challenging question is on the facts of this particular case. As noted, access to the file was denied to William by the court in the context of his action challenging the real estate transaction. Yet the reason for the access here seems to be almost the same as would have been asserted there – there is no other interest of Mrs. Wayne's that William seems to be pursuing here. It is therefore difficult to see quite why the file was not accessible in that litigation on the grounds of relevance, but was accessible here on the grounds of relevance. The only difference between the two applications is that William filed a statement of claim challenging the house sale after the court first turned down his access request, but this application was not brought as part of that action. But the estate file still appears to have been closed in June 2007 when the Will was signed and the house sale went through in March 2009. What connects the two? The judgment does not explain the difference between the two results. It is thus a less helpful example of the application of the relevant test to the facts.