

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

PHIPA DECISION 75

Complaint HA17-34

Corporation of the County of Oxford

August 30, 2018

Summary: The complainant sought access to his deceased father's records of personal health information. The custodian denied the complainant's access request because it was made without the consent of the complainant's brother, who, along with the complainant, was appointed estate trustee of his father's estate. The custodian's decision is upheld. Section 23(1)4 of the *Personal Health Information Protection Act* applies because the individual whose records are at issue is deceased. The deceased's Will does not give either estate trustee the authority to act independently. As a result, the consent of both estate trustees is required to exercise the right of access to the deceased's records of personal health information.

Statutes Considered: *Personal Health Information Protection Act, 2004*, section 23(1)4.

Decisions Considered: PHIPA Decisions 19, 20, 21, 22, 25 and 30.

Cases Considered: *MacLennan v Willcocks*, [1946] OJ No 153 (CA); *Kaptyn Estate (Re)*, (2009) CanLII 19933 (ON SC).

BACKGROUND:

[1] The complainant requested access under the *Personal Health Information Protection Act* (the *Act*) to certain "medical administration records" held by the Corporation of the County of Oxford (the custodian) relating to his deceased father. The custodian owned and operated the long-term care facility where the complainant's father resided from 2008 until his death in 2016.

[2] Along with his request, the complainant enclosed a copy of one page of his father's Will (the Will) and a Power of Attorney for Personal Care (the POA) for his father. The Will appointed the complainant and his brother executors of the father's estate. The POA appointed the complainant, his mother and his brother "or any one of them acting separately" as attorneys for the father in accordance with the *Substitute Decisions Act, 1992*.

[3] The custodian issued a decision denying the complainant access under the *Act* on the basis that the Will "stipulates that consent is required from both" the complainant and his brother for it to release information pertaining to the father. The custodian provided no other explanation for its denial.

[4] The complainant then filed this complaint with the Office of the Information and Privacy Commissioner (IPC) about the custodian's denial decision. The IPC attempted to mediate the complaint but a mediated resolution was not possible. The complaint was then transferred to the adjudication stage of the complaints process.

[5] As the adjudicator, I decided to conduct a review of the complaint under section 57(3) of the *Act*. During my review, I sought and received representations from the custodian and the complainant. I also invited representations from the complainant's brother, who did not provide submissions but did confirm that he does not consent to the complainant's access request. As there is no dispute that the custodian is in fact a custodian under section 3(1)4.ii of the *Act*, and the requested records contain personal health information as that term is defined in section 4(1) of the *Act*, I did not seek submissions on these two issues.

DISCUSSION:

[6] The sole issue in this complaint is whether the complainant, as one of the two estate trustees, has a right of access under the *Act* to his father's personal health information absent the consent of the other estate trustee. For the reasons that follow, I find that he does not and I issue no order.

[7] As noted in a number of previous IPC decisions on access to deceased individuals' personal health information, the *Act* does not provide a general right of access to information held by the organizations to which it applies. The only right of access established under the *Act* is the right under section 52 of individuals to obtain access to their own personal health information.¹

[8] On death, the individual's right of access may only be exercised by the estate trustee as set out in paragraph 4 of section 23(1) of the *Act*, which states:

¹ See PHIPA Decisions 19, 20, 21, 22 and 25 issued by Assistant Commissioner Sherry Liang.

If this Act or any other Act refers to a consent required of an individual to a collection, use or disclosure by a health information custodian of personal health information about the individual, a person described in one of the following paragraphs may give, withhold or withdraw the consent:

If the individual is deceased, the deceased's estate trustee or the person who has assumed responsibility for the administration of the deceased's estate, if the estate does not have an estate trustee.²

[9] The parties acknowledge that the complainant and his brother are both the estate trustees of their father's estate and that paragraph 4 of section 23(1) of the *Act* applies in the circumstances of this complaint.

The custodian's position

[10] The custodian notes that the Will appointing the complainant and his brother as co-executors of the estate does not state that they can act severally. The custodian also notes that the Will revokes all of the deceased's prior wills and other testamentary dispositions, including the POA dated 2004. The custodian states that it had to deny the complainant's access request because it was submitted without the consent of the complainant's brother.

The complainant's position

[11] The complainant asserts that the custodian erred in its interpretation of the Will. He argues that his father intended that the arrangement set out in the POA – that any of the appointed attorneys could act "separately" in matters related to personal care – continue after death. In his opinion, given that his father specified in the POA that he and his brother could act "separately" in matters of personal care, his father gave implied consent for the same arrangement in the Will. To support his assertion the complainant explains that his father would not have foreseen the situation in which his brother, as a co-trustee, would refuse to give him consent to access his father's medical records. Along with his representations, the complainant provides a copy of most of the remaining pages of the Will.

[12] In the remainder of his representations, the complainant questions the ability of one estate trustee to limit the right of another the way his brother has by refusing to consent to his access request. He asserts that he and his brother have equal rights in managing the assets of their father's estate. He notes that paragraph 4 of section 23(1)

² As noted in footnote 4 of PHIPA Decision 30, section 23(1)4 of the *Act* sets out the authority of a deceased person's estate trustee to exercise powers with respect to a deceased person's personal health information. These powers include the authority to make a request for access to the personal health information of the deceased person (sections 25, 52 and 53 of the *Act*).

does not address situations where there are two trustees and does not specify that both estate trustees must consent when one of the trustees wishes to access the medical records of a deceased person.

Representations on the law

[13] After reviewing the parties' initial representations, I invited them to provide further representations on the need for both estate trustees to consent to the access request. I did this because the custodian did not fully address, in its decision or its initial representations, the legal basis for its position that the consent of the complainant's brother was needed for it to process the access request. I sent copies of two decisions, *MacLennan v Willcocks*³ and *Kaptyn Estate (Re)*⁴, to the parties and invited them to comment on the decisions' relevance to this complaint. I also highlighted two passages from the decisions: paragraph 10 of the *MacLennan* decision, which states:

If there are several executors of a will, one alone is not entitled to act on behalf of the others in connection with the sale of property forming part of the assets of an estate which is in their hands for administration.

and the following passage from paragraph 16 of the *Kaptyn Estate* decision:

John Kaptyn's Wills appointed both Simon and Henry to act as the executors of the Wills. No provision was made for either executor to make decisions without the concurrence of the other. Accordingly, they are subject to the general principle that if there are several executors of a will, their decisions must be unanimous; one alone is not entitled to act on behalf of the others in connection with the administration of the estate.

[14] The complainant did not provide representations on the relevance of the court decisions.

[15] The custodian provides representations stating that the court decisions are a clear precedent for its decision to deny access. It reiterates that its position is based on the fact that the Will does not state that either executor could act severally in connection with the administration of the estate. It explains that in making this decision, it statutorily interpreted the wording of the Will with emphasis on the word "and" where the Will appoints the complainant "and" the complainant's brother as executors of the estate. It notes that the Will also states, "In this Will and in any Codicil to it, I refer to my...Executors as my "Trustee"." It submits that this language indicates the executors, in plural, are authorized to act as "trustee" of the estate, and one of them is not entitled to act on behalf of the other for matters related to the administration of the estate.

³ [1946] OJ No 153 (CA). (*MacLennan*)

⁴ (2009) CanLII 19933 (ON SC). (*Kaptyn Estate*)

Analysis and finding

[16] I agree with the custodian. The Will appoints the complainant “and” his brother to act as “trustee.” Unlike the POA, there is no language in the Will granting either the complainant or his brother the authority to act separately in respect of their father’s estate. In the face of clear language in the Will appointing both sons as estate trustees, I cannot accept the complainant’s argument that his father intended the Will to say what it plainly does not. The two brothers, as estate trustee for the purposes of paragraph 4 of section 23(1) of the *Act*, must therefore act unanimously, in accordance with the legal principle confirmed in the *MacLennan* and *Kaptyn Estate* decisions noted above. In the circumstances of this complaint, the consent of both estate trustees is required to request access to the deceased’s records of personal health information. Because one of the two estate trustees has withheld his consent, the custodian was right to deny the complainant’s access request.

NO ORDER:

For the foregoing reasons I issue no order.

Original Signed by: _____

Stella Ball
Adjudicator

August 30, 2018