

CANADA / JUDGMENT

Amisano v. Amisano

2024 BCSC 1158

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1158 Amisano v. Amisano

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Amisano v. Amisano,

2024 BCSC 1158

Date: 20240628

Docket: S066055

Registry: Vancouver

Between:

Frank Amisano

Petitioner

And

Antoinette Amisano

Respondent

Before: The Honourable Justice Branch

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

May 15, 2024

Place and Date of Judgment:

Vancouver, B.C.

June 28, 2024

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I. INTRODUCTION

- [1] This is an application to remove Antoinette Amisano's son, Frank Amisano, as committee of his mother's estate.
- [2] The application is brought by the Public Guardian and Trustee ("PGT"), who is prepared to step into the role.
- [3] The PGT is concerned that the son is in a conflict of interest and has not properly fulfilled his duties. For the reasons expressed below, I agree that the son's appointment as committee of the estate should be rescinded.
- [4] Given that the key individuals share the same last name, I will refer to them by their first names, meaning no disrespect thereby.

II. BACKGROUND

- [5] Antoinette was in a motor vehicle accident on December 18, 2002. By order of Master Tokarek made October 5, 2006, Antoinette was declared incapable of managing herself or her affairs due to the traumatic brain injury sustained in the accident. Her son, Frank, was appointed committee of his mother and her estate.
- [6] Antoinette has four adult children: Frank, Sabrina, Rita and Enrico. Antoinette lives with Frank and her daughter, Sabrina. Antoinette is 69 years old.
- [7] By letter dated December 4, 2007, the PGT advised Frank of his responsibility to account to the PGT for the management of the funds under his control. The PGT noted that his accounts were overdue. Follow-up correspondence was sent on August 27, 2008.
- [8] On October 7, 2009, the PGT wrote to Frank confirming that the settlement of Antoinette's claim arising out of the accident should form part of any accounting. Frank advised the PGT that, other than the accident claim, Antoinette did not have any income or real estate but in fact owed her family for expenses paid on her behalf. It was agreed between the PGT and Frank that any accounting would be suspended until Antoinette's settlement funds were received. In that same letter, the PGT did request a breakdown of Antoinette's debts, and a plan for how the negotiated settlement funds would be used.
- [9] By letter dated February 9, 2010, the PGT made a "final request" for an accounting. In or around May 2010, Frank subsequently delivered the accounts to the PGT for the period 2006-2009. These accounts were reviewed and passed by the PGT on May 20, 2010.
- [10] The PGT determined that, going forward, any further accounting would only be required on a discretionary basis, i.e. at the request of the PGT.
- [11] By letter dated November 4, 2014, the PGT provided a questionnaire to Frank and asked that it be completed by December 31, 2014. On February 20, 2015, the PGT confirmed that the questionnaire was overdue. A further follow-up letter was sent on July 31, 2016. Frank delivered no response.
- [12] Antoinette's other son, Enrico, filed a petition on September 26, 2017, seeking a declaration consistent with the title, being that he owns 99 percent and Frank owns 1 percent of property located at 2772 East Hastings Street, Vancouver, BC (the "Hastings Property"). Frank is named as a respondent in this petition. In his response dated December 17, 2019, Frank alleges that he has a 50 percent interest in the Hastings Property. He acknowledges that Antoinette likewise seeks a "significant interest" in the Hastings Property, but does not define the extent of the interest that he is prepared to accept. However, in Frank's earlier Affidavit of Kindred and Fortune dated September 16, 2006, he had stated that Antoinette owned no real estate. Frank alleges that he did tell the PGT that Antoinette had a claim to the Hastings Property.

- [13] On October 31, 2017, Frank filed his own litigation against Rico regarding ownership of the Hastings Property. Notably, he does not name Antoinette as a defendant, or even as an interested party. This casts substantial doubt on whether Frank accepts that Antoinette has any interest in the property.
- [14] The Hastings Property was foreclosed upon in February 2019 by the mortgage holder, First West Credit Union. The property was sold by Order of this Court on May 7, 2020. This sale yielded excess funds after the mortgage was paid of about \$1,300,000. This amount was paid into court. Concerningly, more than four years later, these funds have yet to be distributed.
- [15] In August 2019, with Frank's assistance, Antoinette commenced an action against Frank and others to recover amounts she says are owed to her arising from the use and sale of certain properties, including the Hastings Property (the "Claim"). A litigation guardian, Dennis Barbisan, was appointed to manage the Claim on Antoinette's behalf. Counsel was retained. The Claim alleges that Antoinette is the sole beneficial owner of the Hastings Property. The Claim also alleges that Frank and others breached their duties to her.
- [16] In early April 2021, the PGT called Frank and left multiple voicemail messages. There was no response.
- [17] On April 16, 2021, the PGT emailed Frank and requested accounts for the period January 1, 2010 to March 31, 2021. The PGT also asked Frank to respond to the following questions:

How involved are you in Antoinette's affairs? What are her assets and income? How is she funding the litigation she has commenced against her children?

An account submission package was attached. Frank was advised that as Committee he is required to report to the PGT's office when requested. He was asked to complete the package for the period January 1, 2010 to March 31, 2021. The account submission requires Frank to submit balances of Antoinette's assets and liabilities as of March 31, 2021, and to provide tax returns for the most recent three years. Frank was asked to provide bank statements etc. in support of the declared assets and liabilities.

Do you believe your mother to be capable of managing her own affairs? Does she plan on going to court to be declared capable which would render committeeship void?

In her legal action, Antoinette is represented by her litigation guardian Dennis Barbisan. Who is Mr. Barbisan?

Antoinette's legal action states she is beneficial owner of properties purchased by her but placed in her children's names and subsequently mortgaged. What was your involvement in these arrangements and mortgages?

It appears that you are named as defendant in a claim filed by Antoinette. This places you in conflict of interest. Can you continue to act as Committee when you are in conflict of interest?

- [18] The PGT did not receive a response from Frank.

- [19] At the end of April 2021, the PGT received a telephone call from Antoinette, who was distressed about the status of her Claim. She sought legal advice. The PGT officer made efforts to arrange a telephone call with Frank. On May 12, 2021, there was a telephone conversation between Frank and two PGT representatives, Vincent Tan and John Harjula. A number of questions were asked of Frank regarding Antoinette's capacity, the identity of her litigation guardian, possible conflicts with respect to the Claim, and the need for an accounting. According to the PGT, Frank advised that (1) Antoinette had no assets, (2) he had directed "his lawyer" to take Frank off the Claim, (3) if Antoinette did get money out of the Hastings Property, this would be reported to the PGT, and (4) the litigation guardian, Mr. Barbisan, was no longer involved with the Claim. The PGT requested accounts within two to three weeks. Frank allegedly agreed to this timetable, but he sounded hesitant. He expressed that a lot was going on in his life.
- [20] Frank's version of this meeting differs somewhat. Most notably, he understood that the meeting itself satisfied all of the PGT's requirements for information. He alleges that the PGT staff told him he did not have to provide an accounting because he had already answered all their questions. Further, he says that he told the PGT that Dennis Barbisan is still Antoinette's legal guardian. This uncertainty as to whether anyone is in control of the litigation over the main asset in Antoinette's estate is also of concern. Finally, Frank says that he advised that his mother agrees with his 50 percent ownership. However, this again raises a concern, as that assertion, if true, is inconsistent with her own litigation.
- [21] Not having received the further information they were expecting, on March 3, 2022, the PGT called Frank with the intention of informing him that the PGT was planning to take the legal steps necessary to rescind his appointment as committee. The call went to voicemail. No message was left because the voicemail greeting was generic. The PGT did follow up the same day with an email to Frank, requesting that he respond with the required information by March 9, 2022. No response was received.
- [22] On March 8, 9 and 10, 2022, the PGT made additional telephone calls to Frank. In each case, the call went to voicemail. On or about March 10, 2022, the PGT sent a communication to Frank's legal representative advising that the PGT would be applying to rescind Frank's appointment. This application to rescind was served on June 29, 2022. Frank did not provide any further information to the PGT until his affidavit was filed in this proceeding on September 7, 2022.
- [23] On June 12, 2023, Justice Milman made orders in this proceeding requiring that Frank provide an update on the litigation regarding the Hastings Property, as well as a statement of the monies received into the estate. His response to these orders was very perfunctory.
- [24] More recently, Frank has alleged that Antoinette has "recovered substantially" from the injuries she sustained. On his cross-examination on affidavit, he suggested that his mother was largely managing her own affairs. Given that this is inconsistent with the extant court orders, this raises an additional concern. Further, Frank has not applied to rescind his

committeeship on this basis. Frank also asserted privilege in relation to many questions, stating that the basis was that his mother "does not want [him] to discuss "certain topics"". This is arguably inconsistent with his appointment as committee.

III. LEGAL FRAMEWORK

[25] What is the test for removing a committee? The Court's power to rescind an appointment of a person is found in the Patients Property Act, R.S.B.C. 1996, c. 349 [the Act], which states:

Appointment of committee

6 (1) Subject to section 13, on application by the Attorney General or any other person, the court may appoint any person to be the committee of the patient.

(2) On application by the Attorney General, the Public Guardian and Trustee or any other person, the court may, subject to section 13, rescind the appointment of a person appointed as committee.

[26] In *Pineo (Re)*, [1985] B.C.J. No.1171 (S.C.), [1985] B.C.W.L.D. 1982, the Court stated:

[6] The choice of the committee must be based upon the best interest of the patient. That will include consideration of who can best deal with [their] financial affairs, nurture [their] estate and see that [their] income and estate are applied for his greatest benefit...

[27] In *Dziuk v. The Public Trustee*, [1998] B.C.J. No. 523, 1998 CanLII 4549 (S.C.), the Court stated:

[6] A relative of a patient who seeks to be appointed committee will generally be favoured over the Public Trustee unless there are circumstances which make it contrary to the interests of the patient.

[28] In *Taylor (Re)*, [1982] B.C.J. No. 1458 (S.C.), 13 E.T.R. 168, the Court discussed the duties owed by a committee:

[9] The committees here stand in a significant fiduciary relationship to the patient. In summing up the matter of loyalty or fiduciary, in such circumstances, Rand, J. in his dissenting judgment in *Midcon Oil & Gas Ltd. v. New British Dominion Oil Company and Brook* [1958] S.C.R. 314 12 D.L.R. (2nd) 705, said at page 716:

"The loyalty of the fiduciary declared by these authorities means that he must divest himself of all thought of personal interest or advantage that impinges adversely on the interest of the beneficiary or that results from the use, in any matter or degree by the fiduciary, of the property, interest or influence of the beneficiary.

Equity, in applying the rule as one of fundamental public policy, does so ruthlessly to prevent its corrosion by particular exceptions; by an absolute interdiction it puts temptation beyond reach of the fiduciary by appropriating its fruits".

[10] In *Bray v. Ford* (1896) A.C. 44 at p. 51, 65 L.J.Q.B. 213, Lord Herchell stated:

"It is an inflexible rule of equity that a person in a fiduciary position is not, unless otherwise provided, entitled to make a profit; he is not entitled to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles or morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding the fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule."

[29] There was further discussion of a committee's duties in *British Columbia (Public Guardian and Trustee) v. MacDougall*, 2016 BCSC 457, another case in which the PGT sought an order rescinding the appointment of a committee. The Court noted that a committee should act like a "reasonable and prudent person of business". Although a committee of a patient's property may not be a trustee in the strictest sense, they are a fiduciary and a trustee in a more general sense: para. 17. The Court noted that the question in relation to the removal of a trustee is whether the acts or omissions endanger the trust property or show a want of honesty or reasonable fidelity or proper capacity to execute their duties: para. 18. After noting that applications to remove a trustee and applications to rescind a committee's appointment are closely analogous, the Court articulated the following standard for rescinding a committee's appointment:

[19] Not every mistake or error should result in the rescission of committee's appointment. In my opinion there are sufficient grounds to rescind a committee's appointment if the committee's acts or omissions are (1) shown to endanger the patient's estate; or (2) show a want of honesty or reasonable fidelity or proper capacity to execute the duties of a committee if a committee has committed this type of act or omission, then the committee is sufficiently wayward that they do not measure up as a reasonable and prudent person of business or as having acted or likely to act in the best interests of the patient.

[30] Further discussion of the need to avoid conflicts of interest is found in *Gronnerud (Litigation Guardians of) v. Gronnerud Estate*, 2002 SCC 38:

[24] The requirement that the property guardian not be in conflict of interest is a proxy for ensuring that the property guardian protect the best interests of the dependent adult. Similar to the requirement that a litigation guardian be "indifferent", at minimum a property guardian must be able to handle the finances of the represented party in a disinterested, unbiased manner. Although the statute is clear in stating that being a family member or a potential beneficiary is insufficient by itself to prove a disqualifying conflict, in some cases of family members or potential beneficiaries, there is evidence of other factors indicating a lack of objectivity. It is the unusual case where a family member or potential beneficiary in a troubled estate can demonstrate an absence of conflict and thus act as property guardian.

IV. ANALYSIS

A. The Conflict of Interest Problem

- [31] At the hearing of the application, Frank accepted that there was a conflict of interest created by Antoinette's Claim against him. The conflict can be outlined as follows:
- a) There is ongoing litigation in which Antoinette is suing Frank alleging misconduct and seeking recovery of property in which Frank also claims an interest.
 - b) In his own proceeding, Frank asserts a 49 percent interest in the Hastings Property in which his mother Antoinette seeks a 100 percent interest in the Claim. They cannot both succeed without undercutting the claim of the other.
 - c) At a practical level, Frank has indicated an intention to try to have himself removed from his mother's litigation. Presumably the Claim was brought against Frank in good faith by the litigation guardian on the advice of counsel. As such, I am concerned that Frank's efforts to remove himself from the Claim may not be in Antoinette's best interests.
- [32] Frank raised that the PGT has been aware of the Claim since 2019, but did nothing to seek his removal until 2022. There are two responses to this argument:
- a) The PGT was trying throughout this period to extract further information from Frank; and
 - b) The fact that the PGT may have (temporarily) acquiesced to a conflict does not mean that the Court can (or should) ignore an active conflict.
- [33] In acknowledging the conflict, Frank suggested that perhaps someone other than the PGT could be appointed as committee of the estate. However, the reality is that no one has come forward indicating a willingness to serve in that role other than the PGT.
- [34] Frank also suggested that he could perhaps remain as committee of the estate and person, with the PGT only being appointed as the litigation guardian to manage the Claim. I find that this suggestion is neither practical nor advisable:
- a) According to Frank, the chose in action represented by the Claim represents Antoinette's only asset. As such, appointing the PGT to manage the only asset in the estate, but not appointing it as committee of the estate, comes very close to being a distinction without a difference.
 - b) When asked why he wishes to remain committee of the estate in the face of the conflict, Frank raised that he has been incurring expenses for Antoinette's benefit, and that his intention is to claim those against any proceeds from the Hastings Property. This raises a possible concern that Frank may be hoping that he, as committee, would be able to pay his expenses without the same level of scrutiny that the PGT might apply.

[35] Finally, Frank suggested that the Court could still apply s. 16 of the Act to place limitations on the scope of the PGT's new role as committee. However, it is not clear to me what restriction could be imposed that does not leave the conflict issue extant. Furthermore, the conflict issue is not the only concern that exists in relation to leaving Frank as committee of the estate. I turn next to the information problems that have arisen.

B. The Accounting Information Problem

[36] From the review of the history above, it is clear that Frank has not been as responsive as he should have been:

- a) From 2006-2010, Frank failed to provide the necessary accounting;
- b) There was a further period of silence from Frank from 2014-2021, silence in the face of multiple inquiries by the PGT;
- c) Even if Frank initially believed that the 2021 meeting met the PGT's information requirements, he could not have been left with that view after the PGT started taking steps to advance the present litigation. Yet he still did not provide a fulsome response to their requests for information; and
- d) Frank asserts that he has been incurring expenses for Antoinette and that he eventually intends to claim from any amounts paid to Antoinette. Yet he has failed to provide an accounting for those expenses.

[37] Frank's poor responsiveness to the PGT's inquiries is an additional factor in my decision to remove him as committee. Egregious failures to respond to the PGT can form part of the basis for rescinding the appointment of a committee: *Anand (Re)*, 2018 BCSC 34 at paras. 139-140.

[38] Antoinette herself expressed concerns at the hearing about Frank's potential removal. The wishes of the patient should be considered on such an application: *Anand (Re)* at para. 44. However, I find that these wishes carry reduced weight here given that (1) her chief concern was that she may be removed from her home, which no one suggested was the case, and (2) Frank will remain as the committee of Antoinette's person in any event, allowing him to continue to provide the care he has offered to her for all these years. No one questions Frank's love and devotion to his mother or his competence to continue to serve in this important role.

[39] While the standard for committee conduct is not perfection, the conflict of interest, coupled with Frank's responsiveness problems, are collectively sufficient to meet the PGT's onus to justify any removal: *Davis (Re)*, 2014 BCSC 1140 at para. 34.

C. Costs

- [40] The final issue is that of costs. The PGT seeks an order requiring that Frank pay its costs rather than the costs being paid out of the estate. The PGT accepted that this was an extraordinary order, but argued that the circumstances warranted same.
- [41] I do not find that it is appropriate to make such an extraordinary costs order. It is quite possible that the conflict of interest arose innocently, i.e. both Antoinette and Frank may have believed in good faith that they are entitled to an interest in the Hastings Property. Secondly, I find that the failure to account in a timely way is the result of the reality that Frank may not be up to the task, not that he has been acting in bad faith. The PGT shall be entitled to its costs from Antoinette's estate: *Bua v. Clegg*, 2006 BCSC 802 at para. 24.

V. CONCLUSION

- [42] The PGT's application to remove the son and replace him as guardian of the estate is granted. The PGT's costs may be paid from the estate.

"The Honourable Mr. Justice Branch"

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