
CANADA / JUDGMENT

Balducci v. Valeria

2016 BCSC 2333

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Supreme Court of British Columbia

DECIDED

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2016 BCSC 2333 Balducci v. Valeria

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Balducci v. Valeria,

2016 BCSC 2333

Date: 20161213

Docket: S162483

Registry: Vancouver

Between:

Roberta Jeanne Balducci

Petitioner

And:

Ernest Valeria and Borghild Maria Valeria

Respondents

Before: The Honourable Mr. Justice Smith

Reasons for Judgment

Counsel for the Petitioner:

J. Carpick

J. Zaitsoff

Counsel for the Respondent,

Ernest Valeria:

J. Bryant

Counsel for the Respondent,

Borghild Maria Valeria

B. Fogelberg

Place and Date of Hearing:

Vancouver, B.C.

October 20, 21 and

November 14, 2016

Place and Date of Judgment:

Vancouver, B.C.

December 13, 2016

- [1] A brother and sister hold a joint power of attorney for their 92-year old mother. The two siblings are now in conflict and have brought competing applications to be appointed as the mother's committee under the Patient's Property Act, R.S.B.C. 1996, c. 349 (the "Act").
- [2] Roberta Balducci ("Bobbie") seeks a declaration that her mother Borghild Maria Valeria ("Borghild") is incapable of managing herself and her affairs and applies to be appointed sole committee. Bobbie's brother, Ernest Valeria ("Ernie"), initially opposed the appointment of a committee, but has since filed his own petition asking that he be appointed or, in the alternative, that committee responsibilities be divided. I will refer to the parties by their first names because that is how counsel referred to them in their submissions. Appointment of a committee would void the existing power of attorney.
- [3] Bobbie and Ernie are two of Borghild's four adult children. One of their sisters, Donna Marie Scott ("Donna"), supports Ernie's application. The remaining sister, Patricia Louise Hawes ("Patricia"), takes no position. Borghild was represented by her own counsel and has sworn an affidavit stating that she still wants Bobbie and Ernie to jointly manage her financial affairs.
- [4] Borghild signed the power of attorney appointing Bobbie and Ernie on June 25, 2009. Later that year, she moved from her home in North Vancouver to Evergreen House, a residential care facility in North Vancouver, where she still lives. She receives income from two pensions, totalling about \$42,000 a year. The cost of her accommodation and care at Evergreen House, including about 10 hours of individual personal care each week, is approximately \$28,000 a year. Her only significant asset is the house that belonged to her and her late husband, and where Ernie still lives.

- [5] Although Bobbie and Ernie have been joint attorneys for more than six years, Bobbie admits that for most of that time she relied on and trusted Ernie to take most of the responsibility. She says she became concerned in 2014 when she learned that a bill from Evergreen House for fees was overdue. She demanded an accounting, including receipts for expenditures Ernie says he made on Borghild's behalf.
- [6] Bobbie says she has identified and sought explanations for a number of alleged irregularities going back to 2010. These include funds paid to Ernie's common-law spouse, Kim Wood ("Kim"), from Borghild's account, expenditures to unidentified recipients and cash payments for which there are no receipts.
- [7] Ernie says funds paid to Kim were used by her for Borghild's benefit, including cash payments to the personal care giver. He says the cash payments also include minor incidental purchases for Borghild. He has provided documents to Bobbie or her counsel when requested, but has been unable to recall what some of the unidentified expenditures were for. He says the late payment to Evergreen House that initially aroused Bobbie's concern resulted from the need to first pay a large property tax bill for Borghild's house.
- [8] In her affidavits, Bobbie accuses Ernie of "stealing" their mother's money. As best as I can determine from the hundreds of pages of conflicting affidavit evidence (and without pretending to be a forensic auditor), Ernie's record-keeping leaves much to be desired, but the evidence falls far short of establishing theft or deliberate misconduct. I also note that Ernie is placed at a disadvantage by being asked to provide explanations and proof for five years' worth of expenditures, all of which Bobbie could have questioned at or near the time they were made if she hadn't effectively abdicated her responsibility as co-attorney.
- [9] The conflicting evidence and allegations about specific expenditures are less important than the fact that Bobbie and Ernie are now in conflict and the impact of that conflict on their mother's interests. The issues are whether Borghild has become incapable of managing herself and/or her affairs and, if so, who should be appointed her committee.
- [10] Borghild's house is her only major asset and is a major source of conflict between Bobbie and Ernie. Ernie lives there rent-free, as he did for many years while Borghild still lived there. Kim and her adult son live there with him. Bobbie agrees that Ernie's ability to live in the house rent-free accords with Borghild's previously stated wishes, but says he has also benefitted from using Borghild's funds to pay for utilities that only he now benefits from. Ernie says he began paying the utilities himself in 2014.
- [11] Ernie says that in lieu of paying rent, he has been responsible for all repairs and renovations to the house and has spent approximately \$130,000, not including the value of his own labour, over the last 20 years. Bobbie says renovations to the house have been done without building permits, exposing Borghild to potential liability, but there is no evidence of any complaints or enforcement action by the municipality.

- [12] Ernie has now rented part of the house to tenants, which Bobbie says he did without her knowledge or permission and possibly in violation of municipal bylaws. Borghild says in her affidavit that she knows the tenants as friends of the family and has no objection to them renting a suite in the house. The tenants' rent cheques are made payable to Kim, but Ernie and Kim say the money is put toward Borghild's expenses. Bobbie says the use of the money is not completely or properly documented.
- [13] Bobbie says Ernie should pay rent if he is going to continue living in the house or alternatively, the house should be sold. She denies that she has any immediate plans or desire to sell the house, but suggests that may prove to be in Borghild's best interest. I infer from her affidavits and her counsel's submissions that if she becomes committee, her preference would likely be to sell the property sooner rather than later.
- [14] Ernie and Kim say they are Borghild's primary caregivers and Kim says she visits Borghild every day. That evidence is supported by one of the other sibling's evidence, namely Donna. Donna says that Borghild "depends on [Ernie and Kim] always being there to brighten her day" and "would be totally lost and emotionally devastated without them being such an important part of her daily life".
- [15] Borghild gives similar evidence in her own affidavit. That affidavit was sworn before counsel, who also appeared for Borghild at the hearing. Although Borghild's competence is in issue, I assume that counsel fulfilled her responsibility as an officer of the court and satisfied herself that Borghild was competent enough to give instructions for that affidavit.
- [16] Borghild says she sees Ernie and Kim several times a week and they accompany her to her appointments. She says she also sees Kim's son regularly and adds:
- Ernie and Kim are the family members I see on an almost daily basis and I rely on them totally for their company and concern. Bobbie lives in Sechelt on the Sunshine Coast and is simply not available to me. I see her once in a while. Donna lives in Cranbrook and Patricia lives in White Rock. However, Patricia suffers from chronic health problems and pain.
- [17] Borghild further said that she would not have been able to remain in her house as long as she did without Ernie's help and she would not consider asking him to pay rent now.
- [18] Ernie says that if the house is sold, he and Kim would no longer be able to play a daily role in Borghild's life because they would not be able to afford other accommodation in greater Vancouver. Although Borghild would be prepared to consider selling the house, she is concerned about the problems Ernie and Kim would encounter in finding alternate accommodation and its impact on her own well-being. She said:

The fact that they live very close to me is an important factor contributing to my physical and emotional well being and selling the Residence would put their close proximity in jeopardy.

- [19] Counsel for Bobbie suggests that proceeds from the sale of the house could increase the funds available to be used for Borghild's benefit. However, there is no evidence of any current needs or wants that her present income is not sufficient to pay for. Ernie also says that Borghild's rent at Evergreen House is based on her income. If she had increased income from invested sale proceeds, a portion of it would simply be paid to Evergreen House in increased rent.
- [20] The Court is not being asked on this application to rule on whether the house should or should not be sold, but there certainly does not appear to be any immediate need to sell it.
- [21] Borghild says in her affidavit that she granted Bobbie and Ernie a joint power of attorney with the intention that they work together to manage her finances. She does not agree to Bobbie assuming sole control. She is also "very upset" about the possibility that control over day-to-day decisions will be taken from her. She says she understands her health needs and can tell care providers "what I want and when I want it". Although she says she relies on Ernie to assist her in financial matters, she still discusses those things with him and wants to continue to be consulted "about all aspects of my financial life and the state of the Residence".

Appointment of a Committee

- [22] Section 2(1) of the Act states that an application may be made to the court for an order declaring that a person is incapable of managing his or her affairs or of managing himself or herself. The section reads:

Application and service of notice

2 (1) The Attorney General, a near relative of a person or other person may apply to the court for an order declaring that a person is, because of

- (a) mental infirmity arising from disease, age or otherwise, or
- (b) disorder or disability of mind arising from the use of drugs,

incapable of managing his or her affairs or incapable of managing himself or herself, or incapable of managing himself or herself or his or her affairs.

- [23] Section 3(1) states that the court must make a declaration of incapacity if it is satisfied, on the affidavit evidence of two medical practitioners, that the statutory criteria for incapacity have been met.
- [24] Once a declaration has been made, the person who is the subject of the declaration becomes a "patient" within the meaning of the Act, and s. 6 provides that the court may appoint a person to be committee of the patient. The powers of a committee are set out in ss. 15(1)(b) and 16(1):

Powers of committee

15 (1) Subject to section 16,

...

(b) the committee of a patient

(i) declared to be incapable of managing his or her affairs has 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,

(ii) declared to be incapable of managing himself or herself has the custody of the person of the patient, and

(iii) declared to be incapable of managing himself or herself or his or her affairs has 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, and as well the custody of the person of the patient.

Special direction limiting powers of committee

16 (1) On the appointment of a committee, the court may, by the same order, attach conditions or restrictions on the committee's exercise of certain rights, privileges or powers specified in the order, including requiring the written consent of the Public Guardian and Trustee prior to the committee's exercise of any right, privilege or power.

[25] The first issue therefore is whether the evidence supports a declaration of incapacity in regard to Borghild.

[26] In support of her petition, Bobbie filed affidavits of Dr. Peter Schwarz, a general practitioner who has treated Borghild since 2008, and Dr. Paul Sugar, who specializes in symptom management and palliative care. Both doctors say that Borghild suffers from symptoms of "mild Alzheimer-type dementia" and is incapable of managing herself and her affairs. However, each affidavit consists of only seven short paragraphs.

[27] As required by s. 7 of the Act, Bobbie's petition was served on the Public Guardian and Trustee ("PGT"). In its response, the PGT said that the affidavits of Dr. Schwarz and Dr. Sugar did not indicate how they reached their conclusion and did not detail their clinical findings.

[28] Counsel for Bobbie and Ernie therefore agreed to obtain a more detailed report from Dr. John Sloan, who has particular expertise and extensive experience in performing such assessments. In Dr. Sloan's opinion, Borghild has mental performance deficiencies, including impairment of short-term memory, that are "virtually diagnostic" of dementia. He describes the dementia as being on the borderline between mild and moderate. However, he says she retains important assets, including "much substantially correct information about her family and finances".

- [29] Dr. Sloan concluded that Borghild is incapable of managing her financial affairs but capable of managing her person and capable of stating a preference for who should act as her financial and personal guardian.
- [30] In considering this question of incapacity, I must have regard to Borghild's own stated opposition to losing her autonomy and her wish for at least some continued involvement in financial matters. However, that evidence must be weighed in light of Dr. Sloan's opinion that she has lost some insight and judgment, as is common in her present stage of dementia.
- [31] Relying primarily on the evidence of Dr. Sloan, I find that Borghild is incapable of managing her affairs and that an appointment of a committee for that purpose, with the powers set out in s. 15(1)(b)(i), is necessary. She remains capable of managing herself, however, and there is no need for a committee with the powers set out in s. 15(1)(b)(ii).

Identity of the Committee

- [32] The question then becomes who should be appointed committee?
- [33] When this matter was first argued, the only person seeking appointment as committee was Bobbie; Ernie simply opposed her petition. At the end of argument, the matter was adjourned for a week so that counsel for Bobbie could take instructions and respond to certain new matters that were raised. It was during that period of adjournment that Ernie filed his own petition to be appointed as committee.
- [34] Counsel for Bobbie objects to Ernie's petition being heard, saying that it was filed after argument was concluded and was not part of the case Bobbie had to meet. However, counsel conceded that I had jurisdiction to consider Ernie's petition.
- [35] I have concluded that Ernie's petition should be considered. It relies on the evidence already before the Court and the arguments already made. It also raises no new issues. Indeed, the test for selecting an appropriate committee requires the Court to determine who will serve the patient's best interests, having regard to the fact that the appointment of a committee has a fundamental and far-reaching effect on the patient's liberties: *Vranic (Re)*, 2007 BCSC 1949 at para. 91. In determining what is in Borghild's best interests, this Court should have all reasonable options before it.
- [36] The factors to consider in selecting an appropriate committee were summarized in *Stewart (Re)*, 2014 BCSC 2321 at paras. 29 and 30:
- [29] As has been observed in other cases, the Act does not prescribe criteria for the selection of an appropriate committee. However, cases have identified various considerations They include:
- (a) whether the appointment reflects the patient's wishes, obviously when he or she was capable of forming such a wish;
 - (b) whether immediate family members are in agreement with the appointment;

- (c) whether there is any conflict between family members or between the family and the patient, and whether the proposed committee would be likely to consult with immediate family members about the appropriate care of the patient;
 - (d) the level of previous involvement of the proposed committee with the patient, usually family members are preferred;
 - (e) the level of understanding of the proposed committee with the patient's current situation, and will that person be able to cope with future changes of the patient;
 - (f) whether the proposed committee will provide love and support to the patient;
 - (g) whether the proposed committee is the best person to deal with the financial affairs and ensure the income and estate are used for the patient's benefit;
 - (h) whether a proposed committee has breached a fiduciary duty owed to the patient, or engaged in activity which diminishes confidence in that person's abilities to properly handle the patient's affairs;
 - (i) who is best to advocate for the patient's medical needs;
 - (j) whether the proposed committee has an appropriate plan of care and management for the patient and his or her affairs and is best able to carry it out; and
 - (k) whether a division of responsibilities such as between the patient's estate and the patient's person to different persons would serve the best interests of the patient, or would such a division be less than optimal for the patient.
- [30] The above listing is of course non-exhaustive or in any particular order. The inquiry is fact specific and a particular factor may or may not be applicable and may attract different weight depending on the circumstances of a case.
- [37] The paramount consideration is the best interests of the patient. In *Reisinger (Re)*, [2002] B.C.J. No. 3162 (S.C.), the court said at para. 30:
- [30] In deciding whom to appoint as a property guardian, the Court will consider a number of factors: The paramount consideration is the patient's best interests. Preference is usually given to members of the patient's family, subject to the best interests of the patient. The Public Trustee will usually only be appointed where the Court finds that no other applicant is suitable. While the Court will consider the patient's own preference as to an intended appointee, the Court must exercise care in giving weight to such expressed wishes where the patient suffers from a mental infirmity. The Court will consider the proposed committee's previous involvement with the patient and her affairs, his or her knowledge and understanding of the patient's situation and needs; and his or her level of expertise and ability to perform the duties of a committee. Finally, the court must consider whether the proposed committee has or may have a conflict of interest with the interest of the patient. (see *Robertson G.B., Mental Disability and the Law in Canada*, 2d ed. (1994), pp. 43-52.)

[Emphasis added]

- [38] As was pointed out in Vranic (Re), the "best interests" test is one with which the court is familiar in relation to issues concerning children, but additional considerations arise in its application when making an order that has such a far-reaching effect on an adult's liberties. The court said at para. 92:
- [92] For sound reasons, that standard quite properly reflects the protective approach of the court in dealing with matters which affect children. Although the test by the same name applies in considering the appointment of a committee for a mentally incapacitated adult, its application requires a more nuanced approach which acknowledges and takes into consideration issues concerning the adult's autonomy, his personal dignity, his idiosyncrasies and the way he has chosen to live his life while capacitated. It also takes into account most assuredly any wishes he has validly expressed while mentally competent or lucid about who he would like to act as his committee or otherwise make decisions on his behalf.
- [39] In Dr. Sloan's opinion, Borghild is capable of expressing a preference. The importance of the patient's wishes, where the patient is capable of expressing them, was discussed in Re Matthews, 2013 BCSC 1045 at paras. 27 and 28:
- [27] The wishes of the patient are an important consideration. A declaration of incapability and the appointment of a committee brings an end to the patient's autonomy to make her own decisions. Particularly with respect to a committee of the person, such decisions are very personal in nature. Where the patient is capable of expressing her wishes, they must be considered carefully.
- [28] This issue is not without difficulty. The patient's wishes may be unreasonable or irrational. Where a patient does not wish a particular individual to look after her, whether or not this is grounded in reality, the court must take care to assess what effect an order contrary to that wish would have on her health.
- [40] Borghild's expressed preference is that Bobbie and Ernie continue to jointly manage her affairs. That would be the ideal solution, but is simply not possible in light of the current state of the relationship between Bobbie and Ernie.
- [41] Borghild was not asked to make a choice between Bobbie and Ernie, but I infer from the portions of her affidavit quoted above that if pressed to make such a choice, she would likely prefer Ernie, who, in fact, is the person she has come to rely most upon. That reliance and more frequent day-to-day contact arises at least in part from their physical proximity. Counsel for Bobbie suggests that Borghild could move to a facility near Bobbie's home in Sechelt, but the evidence indicates that she is well-settled at Evergreen House and I am not persuaded that a move at this stage in her life would be in her best interests.

- [42] The other sibling who takes a position in this matter, Donna, says that the appointment of Ernie would be more consistent with Borghild's wishes and in her best interests.
- [43] I cannot ignore the fact that Ernie has a potential conflict of interest. Should circumstances arise in which it may be in Borghild's interest that her house be sold, Ernie would face the loss of the accommodation benefits that he now enjoys. However, that conflict is, at least for now, more apparent than real. As said above, Borghild's income is more than enough to meet her living and care expenses and her interests are unlikely to require the sale of the property in the near future. Ernie's continued rent-free residence in the house is also consistent with Borghild's present wishes and her conduct while she still had full capacity.
- [44] While I have not accepted Bobbie's accusations of misconduct, she has raised valid concerns about Ernie's accounting with respect to how he has managed Borghild's funds. I am satisfied that Ernie has tried to use Borghild's funds for her benefit, but his record keeping, which he admits has not always been adequate, has made it impossible for him to fully demonstrate that.
- [45] Nonetheless, if Ernie is appointed as committee, he will have no choice but to improve his records and retain evidence of how Borghild's funds are spent. That is because s. 10(1)(d) of the Act will require him to pass accounts before the PGT. It must also be remembered that Borghild's financial affairs are not particularly complicated. There is a fixed stream of income and a single, ongoing cost - for accommodation and care at Evergreen House - on which the majority of that income must be spent.
- [46] Finally, I am concerned about the possible emotional effects on Borghild if Bobbie is imposed upon her as committee contrary to her stated wishes.
- [47] In all of the circumstances, including the present inability of Bobbie and Ernie to act jointly and considering the factors listed in Stewart (Re) and the other noted authorities, I find Ernie to be the more appropriate person to be committee of Borghild's financial affairs, subject to certain conditions. Those conditions will include the conditions proposed by the PGT and other conditions similar to those imposed by Mr. Justice Masuhara in Stewart (Re).

Decision and Order

- [48] I accordingly declare that Borghild Maria Valeria is, by reason of mental infirmity arising from disease, age or otherwise, incapable of managing her affairs under s. 3 of the Act and appoint Ernest Valeria as committee over her estate without bond.
- [49] The committee will not dispose of or encumber the real property owned by Borghild Maria Valeria without further order, on notice to the PGT, or without prior written consent of the PGT. Roberta Jeanne Balducci, Donna Marie Scott and Patricia Louise Hawes will receive written notice of any such application to the Court or the PGT.

- [50] The net proceeds of any sale of the real property will be deposited in a financial institution where the committee has established an investment in compliance with the Trustee Act, R.S.B.C. 1996, c. 464. The committee will have no access to the capital of that investment, other than for re-investment purposes, without prior written consent of the PGT.
- [51] Ernest Valeria, as committee, will file an annual accounting to the PGT in the form prescribed by the PGT and at the same time, deliver copies of that accounting to Roberta Jeanne Balducci, Donna Marie Scott and Patricia Louise Hawes.
- [52] Ernest Valeria is to consult with Roberta Jeanne Balducci before making any significant decisions regarding Borghild's residence or finances, recognizing that consultation does not mean agreement but must be carried out in good faith and with sincere effort to reach agreement.
- [53] All funds received for the benefit of Borghild, including rental income from property, will be deposited into Borghild's bank accounts and Ernest Valeria will provide Roberta Jeanne Balducci with monthly banking statements related to those accounts.
- [54] Ernest Valeria will retain receipts for all funds expended from Borghild's accounts or on her behalf and will make such receipts available for Roberta Jeanne Balducci's review on her request, with such requests to be no more frequent than once a month.
- [55] Counsel may make written submissions on costs if they are unable to agree.

"N. Smith J."

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