

CANADA / JUDGMENT

Cervo (Re)

2022 BCSC 703

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2022 BCSC 703 Cervo (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cervo (Re),

2022 BCSC 703

Date: 20220414

Docket: S-S-233551

Registry: New Westminster

In the Matter of the Patients Property Act, R.S.B.C. 1996, c. 349 and amendments thereto

Re: Dianna Albina Cervo also known as Dianna Cervo

Before: The Honourable Mr. Justice Branch

Oral Reasons for Judgment

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Counsel for the Respondent, Mari-Lynn Samra:

P. Roxburgh

Counsel for the Respondent, Kaila Rautenberg:

A. Cochrane

Place and Date of Hearing:

New Westminster, B.C.

April 7, 2022

Place and Date of Judgment:

New Westminster, B.C.

April 14, 2022

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I. INTRODUCTION

- [1] This is a petition to appoint a committee for Dianna Cervo, who is presently residing at the Hilton Villa Seniors Community. She has been diagnosed with moderate to severe dementia and delusional disorder.
- [2] There is no dispute that a committee is required. The requisite medical material has been filed. The only issue is who should be appointed committee.

- [3] The contest is between the petitioner, Ms. Cervo's daughter, and Ms. Rautenberg, Ms. Cervo's granddaughter and the petitioner's daughter. Ms. Rautenberg has brought her own application to be appointed committee. The Public Guardian and Trustee ("PGT") was asked to consider taking on the appointment, but declined. The petitioner is not proceeding with a request for the additional remedies requested in the petition at this time.

II. LEGAL FRAMEWORK

- [4] Section 6 of the Patients Property Act, R.S.B.C. 1996, c. 349 (the "Act"), provides that the court may appoint any person to be the committee of a "patient". A patient is defined as "one who is, because of mental infirmity arising from disease, age or otherwise, incapable of managing his or her affairs": Act, s. 1.
- [5] Under s. 18 of the Act, once appointed, a committee must exercise powers for the benefit of the patient and the patient's family.
- [6] Section 16 of the Act provides that the court may attach conditions or restrictions on the committee's exercise of their powers.
- [7] The factors to be considered on an application to appoint a committee were summarized by Justice Masuhara in *Stewart (Re)*, 2014 BCSC 2321:
- [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; see for example: *Vranic (Re)*, 2007 BCSC 1949; *Bowman (Re)*, 2009 BCSC 523; *Palamarek (Re)*, 2011 BCSC 563; *Re Matthews*, 2013 BCSC 1045; and *Sangha (Re)*, 2013 BCSC 1965. 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.
- [8] While the factors are non-exhaustive, I find it useful to apply them to frame my analysis below.

III. ANALYSIS

A. Wishes and Trust

- [9] I find that this factor provides slight support for the petitioner's appointment.
- [10] The petitioner was named as joint co-executor in Ms. Cervo's last known will, dated 2018 (the "Will"). This suggests that Ms. Cervo had a degree of trust in the petitioner. However, the weight of this factor is moderated by the fact that:
- a) the petitioner herself has raised concerns that Ms. Cervo may not have had capacity at the time that the Will was executed, thereby undercutting her own ability to rely upon it: Horton (Re), 2020 BCSC 87 at para.68; and
 - b) the petitioner's appointment was as co-executor, along with another of Ms. Cervo's daughters, Mari-Lynn Samra. While the petitioner's appointment suggests some level of trust, it is moderated by the fact that Ms. Cervo did not intend to allow the petitioner sole control of her estate.
- [11] Dr. John Sloan reports having a conversation with Ms. Cervo in which he asked her whom she wished to manage her affairs, and she responded with the petitioner's name. I accept that this statement should be admitted, as it is necessary given Ms. Cervo's present condition, and there is little question as to Dr. Sloan's reliability. Although this statement carries some weight, that weight is moderated by the fact that the conversation occurred on February 26, 2019, a date well past that which the petitioner, herself, suggests Ms. Cervo may have had capacity issues. It is also moderated by the fact that Ms. Rautenberg's name was not specifically put forward as an option for Ms. Cervo to consider.

B. Agreement among Family Members

- [12] This factor supports Ms. Rautenberg. Of the three family members that have taken a formal position on this petition, two support Ms. Rautenberg's appointment, being Ms. Rautenberg and Ms. Samra. The petitioner has no support, other than her own: *Welling (Re)*, 2018 BCSC 2402 at para. 55. I also note that the PGT has declared that it is not opposed to Ms. Rautenberg's appointment.

C. Likelihood of Conflict and Consultation

- [13] I find that there is a strong likelihood of conflict if the petitioner is appointed, and a legitimate concern that any required consultations with immediate family members will be troubled. In such circumstances, the court may look for an alternative other than the persons involved in the dispute: *Horton (Re)*, at paras.53, 69; *Yu (Re)* 2021 BCSC 1793, paras. 82-83, 97-100, 105, 109. The conflict here exists largely due to the fact that the petitioner has already taken steps to attack the March 21, 2018 transfer made by Ms. Cervo to Ms. Samra of a one-half interest in a condominium she and Ms. Samra owned as joint tenants (the "Transfer").
- [14] I note that, when Ms. Cervo transferred her ½ interest to Ms. Samra, she did receive independent legal advice. Nonetheless, the petitioner believes the Transfer should be unwound. Although the petitioner does not obtain an immediate benefit from attacking and unwinding the Transfer, her potential prospective benefit is clear. Under either the most recent known Will, or a potential intestacy, the petitioner will directly benefit from the enhancement of Ms. Cervo's estate--an enhancement that would be achieved if the Transfer were undone. In my view, this incentive and dynamic assures poor relations between the petitioner and Ms. Samra. Indeed, this conflict has already revealed itself. Beyond the Transfer conflict, Ms. Samra also alleges that the petitioner took money from their mother for her own purposes. Without commenting on the relative merits of either parties' allegations, their existence demonstrates the strained nature of the relationship, and the likelihood of conflict if the petitioner is appointed as Ms. Cervo's committee.
- [15] The petitioner alleges that Ms. Rautenberg is now wrapped up in the conflict as well, as she has made at least one statement suggesting that she favours Ms. Samra's position with respect to the Transfer. In particular, Ms. Rautenberg wrote a letter stating that she believes that Ms. Samra did not steal the property. However, Ms. Rautenberg signaled a willingness to take fresh advice on this dispute. I find that this would diminish any conflict concerns that could be raised about Ms. Rautenberg. On the other hand, the conflict in which the petitioner finds herself with Ms. Samra cannot be avoided or diminished.
- [16] The petitioner also has poor relations with Ms. Rautenberg. Ms. Rautenberg describes a troubled upbringing. The petitioner and Ms. Rautenberg have not spoken much since 2017. While this evidence also means that Ms. Rautenberg has had poor relations with the petitioner, I find that her affidavit material suggests a greater willingness to work on

repairing the relationship going forward. On the other hand, the petitioner seems to be more inclined to attribute blame to Ms. Rautenberg, and suggest that Ms. Rautenberg is the source of their problems. For example, in her 3rd affidavit, dated March 31, 2022, the petitioner concludes as follows:

38. I am hopeful that [Ms. Rautenberg] is address[ing] her issues with her counsellor and remain hopeful that we will repair our relationship.
- [17] I find that this factor favours Ms. Rautenberg.

D. Previous Involvement with the Patient

- [18] This factor favours the petitioner. As Ms. Cervo's daughter, she has had long and steady contact with Ms. Cervo. As a resident care aide, she has been involved in managing Ms. Cervo's care decisions to date, along with Ms. Samra.
- [19] Ms. Rautenberg's relationship with her grandmother has also been good, but it understandably has not been as deep and substantial as that with the petitioner. Further, it has been difficult for Ms. Rautenberg to maintain contact over the course of the COVID-19 pandemic, given the restrictions that have been imposed by Ms. Cervo's care home.

E. Coping with Future Changes

- [20] Ms. Rautenberg does not expect a change in the care or maintenance that her grandmother is presently receiving. Nonetheless, she has deposed that she is willing to consider changes if necessary or recommended, in consultation with family and professionals.
- [21] Although the evidence from the petitioner is less direct on this point, I have every confidence that someone with her employment background would be able to cope with changes in her mother's condition. I view this factor as neutral.

F. Willingness to Provide Love and Support

- [22] The parties generally agreed that this is a neutral factor, as they both care deeply for Ms. Cervo. I agree.

G. Financial Affairs

- [23] Ms. Rautenberg is well suited to manage the financial affairs of her grandmother. Ms. Rautenberg dealt with finances as part of her employment as a payroll assistant with Vedder Transport, starting in 2015. She now holds a similar position with the City of Abbotsford. She has a Business Associate Certificate from the British Columbia Institute of Technology. She has achieved financial independence. Ms. Rautenberg also deposes that she would like to help her grandmother financially as a reflection of her natural love and affection. In response, the petitioner raises past poor behaviour by Ms. Rautenberg. But Ms. Rautenberg explains that any poor conduct occurred in the past. For example, her marijuana use ended when she was 21 and she has affirmed that she did not, and does not, use other drugs. She

did fall asleep once at work, but this was not due to drugs or alcohol, but to exhaustion from working at three part time jobs while going to school.

[24] On the other hand, there are concerns raised in the evidence regarding the petitioner's management of financial matters. Specifically, the parties have brought forward some evidence showing that the petitioner has, among other things:

- a) accepted monetary support from Ms. Samra's family during times of financial stress;
- b) declared bankruptcy in 1999 (a fact that was not disclosed in her first affidavit of kinship and fortune, but was later included in her second affidavit, after the issue was raised in the proceedings);
- c) initially transferred Ms. Cervo's vehicle into her name, after Ms. Cervo had made it clear it was to go to another of Ms. Cervo's granddaughters, Amy Rautenberg; and
- d) told Ms. Samra that she takes money out of Ms. Cervo's accounts in order to "get by".

[25] The Petitioner largely denies these allegations. I would note the following regarding these denials:

- a) There is undeniably a \$1,000 cheque from Ms. Samra's family to the petitioner, but the petitioner suggests it was gift and was not reflective of her having financial problems.
- b) The 1999 bankruptcy does create some lingering concerns about the petitioner's money management skills, although this is mitigated somewhat by the fact that the petitioner was going through a divorce at the time.
- c) The petitioner accepts that Ms. Cervo was upset that the car had not been transferred to her granddaughter.
- d) The petitioner denies taking money for her own benefit and she has provided a number of receipts which she says show that any withdrawals were for Ms. Cervo's benefit. Whether to accept the petitioner's alleged admission about using Ms. Cervo's funds for her own benefit cannot be finally resolved on this petition in the face of the petitioner's denial. However, this allegation still carries sufficient weight to create a concern about appointing the petitioner.

[26] The fact that the petitioner has since been entrusted with other people's money through her appointment as treasurer of several organizations reduces the weight of the concerns engaged by the above issues. Nonetheless, I find that this factor favours Ms. Rautenberg's appointment, by a thin margin.

H. Fiduciary Duty

[27] There is insufficient evidence showing that either party has a history of breaching a fiduciary duty. I find this factor to be neutral.

I. Medical Advocacy

[28] I am confident that Ms. Rautenberg would work hard to ensure that her grandmother is well cared for. However, given the petitioner's recent responsibilities in this respect, and her broader experience as a care worker, I find that this factor favours the petitioner.

J. Plan of Care and Management

[29] Ms. Rautenberg has outlined a detailed plan of care and management for her grandmother, which includes:

- a) maintaining regular contact with Ms. Cervo and her care team;
- b) increasing the frequency of her phone calls and visits to Ms. Cervo, and bringing her newborn daughter for more visits, which appears to positively impact Ms. Cervo;
- c) asking questions of medical professionals, including questions about diagnoses, treatments, medications, and the rationale behind the various options;
- d) considering changes to Ms. Cervo's care if the need arises or if recommendations change;
- e) consulting with family members, and providing them with updates; and
- f) regularly assessing Ms. Cervo's financial needs and desires as they relate to her health, comfort and wellbeing, and otherwise.

[30] The petitioner has not provided as detailed a plan, but I am reasonably confident that she would be able to provide care for Ms. Cervo, as she has done to date. However, the effort that Ms. Rautenberg has put into developing a plan shows a level of care and commitment that justifies her receiving the benefit of this factor.

K. Division of Responsibilities

[31] In Stewart, Justice Masuhara canvassed the possibility of a co-committeeship between two applicants. However, there was evidence of "significant tensions" between the two applicants in that case. As such, he concluded as follows:

[38] During the course of the hearing I explored with counsel the idea of a co-committeeship where the responsibilities could be divided between the sisters; as this at least on the surface would reflect the wishes of Hazel. Maria would look after the health and care aspects and Valerie would look after at the financial aspects.

[39] The difficulty is that the responsibilities can overlap and given the discord between the sisters there is a good likelihood that there will be a struggle for supremacy between the sisters, resulting in uncertainty in the care of Hazel. A co- committeeship would not be in the best interests of their mother whose capacity is diminishing.

- [32] At the hearing, Ms. Rautenberg offered that she would not oppose a joint committee where she would become the committee of the estate, and the petitioner would be the committee of the person. Over a pause in the proceedings, counsel for Ms. Samra also obtained instructions to proceed in this fashion. The PGT indicated that they would have no opposition to such a structure. However, the petitioner refused to accept this option.
- [33] Although there would undoubtedly be challenges with a co-committee, there certainly would have been a benefit to this option here, as it would ensure that a relatively neutral party was standing between Ms. Samra and the petitioner in relation to the internecine battles on financial issues, while preserving the status quo and acknowledging the petitioner's expertise in relation to Ms. Cervo's care. The fact that the petitioner rejected this compromise outright notwithstanding its potential benefits, only heightens my concern about the extent of the conflict that would occur were the petitioner appointed as committee.
- [34] I do not find that a co-committee is advisable here, but only given the petitioner's hostility to it. I conclude that this factor favours Ms. Rautenberg, given how she was open to an option that would have been optimal for the patient if the parties had been willing to cooperate. Unfortunately, such cooperation was unavailable due to the position of the petitioner.

IV. CONCLUSION

- [35] Of the 11 factors identified in Stewart, five favour Ms. Rautenberg, three favour the petitioner, and three are neutral. However, it must be acknowledged that the balance on many of these factors was very close.
- [36] This list of factors is non-exclusive, but I find that they cover the field in terms of what was relevant in this case.
- [37] Stepping back and approaching the issue more holistically, I find that the key concern is that the petitioner has ongoing conflict with both Ms. Samra and, to a lesser extent, Ms. Rautenberg. Conversely, Ms. Rautenberg has greater objectivity regarding the battle between the sisters--as she does not have the same vested financial interests--and she has illustrated a greater willingness to minimize and mitigate any personal issues with the petitioner.
- [38] On this basis, I find that Ms. Rautenberg should be the sole committee.
- [39] I declare that Dianna Cervo is, because of mental infirmity arising from disease, age or otherwise, incapable of managing both her affairs and her person.
- [40] I appoint Ms. Rautenberg as committee (the "Committee") of the estate and person of Dianna Cervo.

- [41] In terms of conditions, Ms. Rautenberg agrees to the inclusion of additional terms proposed by the PGT, being:
- a) The Committee is prohibited from drawing on the line of credit at the Toronto Dominion Bank, Surrey Centre Branch, 10435 King George Blvd., Surrey, B.C., #9280-3228309, without the prior written permission of the PGT or further order of the court on notice to the PGT.
 - b) Upon conclusion of any litigation regarding the Property, should Ms. Cervo be entitled to any damages, costs, or other funds, the Committee must apply to Court, on notice to the PGT, to address the issue of security for their management.
 - c) The Committee shall immediately determine the full value of the estate, including all assets, liabilities and income, and that, within 90 days of the date of the Order, or at a later date as agreed upon between the Committee and the PGT in writing, the Committee shall file with the Court and deliver to the PGT a further affidavit fully describing all of the assets, liabilities and income of Ms. Cervo then known.
- [42] I would also impose certain further conditions, being that the Committee:
- a) shall obtain advice from appropriate professionals on whether to pursue any challenge to the Transfer;
 - b) shall advise the PGT as to her decision in this respect; and
 - c) shall not take steps to discontinue or commence litigation in relation to the Transfer until the PGT has provided comments, or has indicated that they do not intend to comment.

[Submissions on Costs]

- [43] I find that the appropriate costs order is that Ms. Rautenberg be awarded her costs from Ms. Cervo's estate on a special costs basis: Yu, paras 115-116. I find that the application was brought in good faith and that Ms. Rautenberg will receive no obvious benefit from her appointment. Further, the evidence did not suggest that she has received any significant financial gifts from Ms. Cervo's estate: Yu, para 118.
- [44] The petitioner also seeks her costs of this application from Ms. Cervo's estate on a special costs basis. However, I am concerned that awarding two sets of special costs, would be an unnecessary drain on what is not a large estate. Given that petitioner was not successful, but did act in good faith, I find that a more appropriate order is that the petitioner be paid her costs from Ms. Cervo's estate at Scale B.
- [45] Ms. Samra did not make a request for costs.

"The Honourable Mr. Justice Branch"

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