

CANADA / JUDGMENT

Clay (Re)

2016 BCSC 261

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 261 Clay (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Clay (Re),

2016 BCSC 261

Date: 20160204

Docket: S148620

Registry: Vancouver

IN THE MATTER OF THE PATIENTS PROPERTY ACT, R.S.B.C. 1996, C. 349 AND AMENDMENTS
THERE TO

And

IN THE MATTER OF MICHAEL GRAHAM CLAY

Before: The Honourable Madam Justice Duncan

Oral Reasons on Application for Directions

Counsel for the Bank of Nova Scotia Trust Company, Committee of the Estate of Dr. Michael
Graham Clay:

H.S. McLellan

Counsel for Jennifer Clay and Sarah McLeod:

A.D. Francis

Counsel for the Public Guardian and Trustee of British Columbia:

M.T. Wolf

Counsel for Dr. Michael Graham Clay:

J. Scouten

Place and Date of Hearing:

Vancouver, B.C.

January 12, 2016

Place and Date of Judgment:

Vancouver, B.C.

February 4, 2016

- [1] This is an application by the Bank of Nova Scotia Trust Company (the "Trust Company"), the committee of the estate of Dr. Michael Graham Clay, for directions concerning whether or not a representation agreement for health care created in 2004 under s. 9 of the Representation Agreement Act [RAA], R.S.B.C. 1996, c. 405 by Dr. Clay with the assistance of counsel, was terminated when Dr. Clay became a patient within the meaning of the Patients Property Act [PPA], R.S.B.C. 1996, c. 349. on December 22, 2014.
- [2] The Trust Company brought this application because decisions about Dr. Clay's personal care and health care, in particular his living situation, may be required in the near future. This could require the Trust Company to fund alternative care arrangements. The Trust Company wants to ensure it takes instructions from the person or persons with legal authority to make personal care and health care decisions for Dr. Clay.
- [3] Dr. Clay has three adult children: Greg Clay, Jennifer Clay and Sarah McLeod. I will refer to them by their first names to avoid surname confusion.
- [4] Dr. Clay appointed his wife, Edith Clay, as his primary representative in a representation agreement dated November 24, 2004 under s. 9 of the RAA. He appointed his daughters as alternates. The agreement was drafted with the assistance of counsel. The representation agreement became effective if and when Dr. Clay was declared mentally infirm. The mental infirmity was to be confirmed by a statutory declaration of his representative attaching a letter from a doctor confirming the mental infirmity.
- [5] Edith Clay is now in a care facility and unable to act under the representation agreement.
- [6] In October 2014, Jennifer and Sarah persuaded their father to move into a seniors' apartment complex because they were concerned about his continuing ability to live in his home. They thought he liked living there but Dr. Clay appears to have told others that he did not. Ultimately, he moved back to his home with the assistance of Greg.

- [7] In November 2014, Jennifer and Sarah brought a petition for a declaration that their father be declared incapable as to his person and his finances and for their appointment as committees. They brought the petition because of concerns about the financial exploitation of their father by Greg. Dr. Clay gave Greg money, generally several thousand dollars per month. Jennifer, Sarah and their uncle, Dr. Clay's brother, were also concerned about Dr. Clay's ability to take care of himself.
- [8] The lead-up to the hearing of the petition generated a number of affidavits from doctors, family members and even neighbours concerning Dr. Clay's day-to-day functioning. Dr. Amanda Hill, a geriatric specialist who has been Dr. Clay's physician since November 2012, provided an affidavit dated November 7, 2014. She explained that Dr. Clay had been diagnosed with Alzheimer's dementia. His chance of improvement was unlikely as the condition is progressive and without cure.
- [9] Dr. Hill said Dr. Clay had very poor memory, was unable to learn or recall well learned and important information, had poor judgment and could be unduly influenced in directions that are not in his best interests. Dr. Hill noted he had a longstanding relationship with his lawyer and trusted him yet grew suspicious of him and tried to seek other counsel. Dr. Hill also observed that he had become suspicious of his daughters, despite her belief that they were supportive of him and acting in his best interests.
- [10] Dr. Malcolm MacDonald has been Dr. Clay's doctor since March 30, 2010. On September 4, 2014, he noted Dr. Clay to be vague and confused with poor insight and no concept he had a dementing illness despite the fact that the diagnosis had been reviewed with him many times. Dr. Clay told Dr. MacDonald he was looking for a new lawyer but did not know the lawyer's name and planned to go downtown to find the building. As a result of his observations of Dr. Clay over four plus years and his review of Dr. Hill's report, Dr. MacDonald was of the opinion that Dr. Clay's ability to manage his person and affairs was profoundly impaired with recovery unlikely.
- [11] Dr. Clay's counsel retained another doctor, Dr. Sandi Ann Culo, also a geriatric specialist, to assess Dr. Clay. Dr. Culo's opinion dated November 27, 2014 was in stark contrast to the opinions of Dr. Hill and Dr. MacDonald. Dr. Culo acknowledged in her report that she did not speak with Dr. Clay's family doctor, or his daughters, or review any medical records. She interviewed him on only one occasion and in his own home. Dr. Culo noted that an individual's cognitive status and ability to make decisions is dynamic. Dr. Culo said "in my experience, it would be highly unlikely that someone with this mild degree of dementia would be incapable of directing their own care, designating substitute decision makers, and participating in financial management."
- [12] Dr. Clay swore an affidavit on December 16, 2014 expressing a desire for someone outside of the family to look after his person. He was concerned that his daughters were trying to shut out Greg, who is the youngest, and was adopted. Dr. Clay felt they resented him.

- [13] The parties attended mediation in December 2014 and agreed to the appointment of the Trust Company as committee of finance. The appointment was achieved through the petition process that Jennifer and Sarah had commenced. In accordance with the position taken by the parties, Madam Justice Gray declared that "By reason of mental infirmity arising from disease, age or otherwise, Dr. Michael Graham Clay (the "Patient") is incapable of managing his affairs."
- [14] Consequent on that declaration, Gray J. ordered that:
1. The Bank of Nova Scotia Trust Company (the "Committee") be and is hereby appointed as the Committee of the estate of the Patient;
 2. The Committee shall provide monthly accounts to the Patient's three children, Sarah McLeod, Jennifer Clay and Gregory Clay;
 3. The Committee is authorized to make payments of \$3000 per month to Greg Clay from the assets of the Patient, which payments, along with the amount of \$435,000 received by Greg Clay to date, shall be accounted for in the final distribution Greg Clay receives from the Clay Asset Trust;
 4. The Petitioners' application to be appointed Committee of person of the Patient is adjourned generally; and
 5. The Petitioners be paid their reasonable costs and expenses of and incidental to this application out of the estate of the Patient.
- [15] The affidavit evidence before me indicates that at the time of the mediation, Sarah and Jennifer believed that upon their father's incapacity to take care of his person they would act as their father's representatives under the representation agreement. Greg and Dr. Clay, on the other hand, appeared to believe all of the disputes that had existed over Dr. Clay's decision making power had been resolved.
- [16] Neither position seems to reconcile with the general adjournment of the application of Sarah and Jennifer to be appointed committee of the person of Dr. Clay. It appears that everyone anticipated that an application would be made at some point. The representation agreement now relied on was not addressed before Gray J., although I understand Ms. Francis, counsel for Sarah and Jennifer, maintains it was left out as a condition of the mediated settlement.
- [17] After the appointment of the committee of the estate, Jennifer and Sarah grew increasingly concerned about their father's ability to care for himself. They arranged medical appointments but their efforts were thwarted by Greg's refusal to cooperate and take his father to the appointments. Greg was still living with Dr. Clay and Jennifer and Sarah feared he was exerting undue influence over their father.

- [18] On July 7, 2015, in accordance with the terms of the representation agreement, Sarah McLeod swore a statutory declaration and attached the opinion of Dr. Amanda Hill concerning Dr. Clay's incapacity. Greg and Dr. Clay were apparently surprised to learn about the existence of the representation agreement.
- [19] Greg still lives with Dr. Clay. Disputes continue between Greg and his sisters regarding Dr. Clay's living situation. As noted above, Dr. Clay no longer wants his daughters to act as his representatives. His counsel, Mr. Scouten, has communicated with the Trust Company and its counsel, as well as with counsel for Dr. Clay's daughters, asserting his view that the representation agreement terminated upon pronouncement of the committee order. Dr. Clay, through his counsel, opposes his daughters' efforts to make health care decisions on his behalf under the claimed authority of the representation agreement.
- [20] The relevant portions of the PPA are section 1, the definition section, and section 19.
- [21] In section 1 of the Act "patient" means:
- (b) a person who is declared under this Act by a judge to be
 - (i) incapable of managing his or her affairs,
 - (ii) incapable of managing himself or herself, or
 - (iii) incapable of managing himself or herself or his or her affairs;
- [22] Dr. Clay became a patient within the meaning of s. 1(b)(i) of the PPA when Gray J. declared he was incapable of managing his affairs and appointed the Trust Company as Committee. The question is whether this triggered termination of the representation agreement as described in s. 19 of the PPA:
- Effect on power of attorney or representation agreement of person becoming a patient by court order
- 19 On a person becoming a patient as defined in paragraph (b) of the definition of "patient" in section 1,
- (a) every power of attorney given by the person is terminated, and
 - (b) unless the court orders otherwise, every representation agreement made by the person is terminated.
- [23] The legislative history of representation agreements was discussed in detail by Ross J. in *Dawes v. Dawes*, 2012 BCSC 1323:

- [50] The statutory provisions providing for representation agreements that were in place when the agreement at issue in these proceedings was executed [in 2009] were in the Representation Agreement Act, R.S.B.C. 1996, c. 405 (the "Old Act"). The Old Act provided for standard agreements under s. 7 and enhanced agreements under s. 9. The agreement at issue is an enhanced agreement pursuant to s. 9.
- [51] The Old Act was amended in September 2011 (the "New Act"). One important change was that the enduring power of attorney was to be the instrument of financial guardianship, while the representation agreement was to be the instrument for health and personal guardianship. The exception would be that a s. 7 standard representation agreement would continue to cover both routine financial and personal guardianship. Section 39 of the New Act grandfathered the provisions of the Old Act for previous agreements. Section 39 provides:

Pre-existing agreements

39 An agreement that

- (a) was made before this Act authorized the making of a representation agreement, and
- (b) would have been a valid representation agreement if, at the time the agreement was made, this Act had authorized the making of a representation agreement,

is valid and is deemed for all purposes to have been made under this Act.

- [52] The purpose of the legislation was described in s. 2 of the Old Act as follows:

The purpose of this Act is to provide a mechanism

- (a) to allow adults to arrange in advance how, when and by whom, decisions about their health care, personal care, or financial affairs or about other matters will be made if they become incapable of making decisions independently, and
- (b) to avoid the need for the court to appoint someone to help adults make decisions, or someone to make decisions for adults, when they are incapable of making decisions independently.

- [53] The New Act contains similar language except that the reference to "health, personal care or financial affairs" was changed to "health, personal care, the routine management of their financial affairs" reflecting changes reflecting the other amendments dealing with financial guardianship.

- [54] Under both the Old and New Acts an adult is presumed to be capable of making a representation agreement. Sections 3 and 4 provide:

Presumption of capability

- 3 (1) Until the contrary is demonstrated, every adult is presumed to be capable of

- (a) making, changing or revoking a representation agreement,
 - (b) making decisions about personal care, health care and legal matters and about the routine management of the adult's financial affairs.
- (2) An adult's way of communicating with others is not grounds for deciding that he or she is incapable of understanding anything referred to in subsection (1).

Adult may make representation agreement unless incapable

4 An adult may make a representation agreement unless he or she is incapable of doing so.

[55] The test for the capacity required to make an enhanced representation agreement pursuant to s. 9 of the Old Act was set out in s. 10 as follows:

Test of incapability for other provisions

10. An adult may authorize a representative to do any or all of the things referred to in Section 9 unless the adult is incapable of understanding the nature of the authority and the effect of giving it to the representative.

[56] Section 29 in both the Old and New Acts provides for the ending of a representation agreement. Section 29 provides in part:

29 (1) A representation agreement ends as follows:

- (h) as provided in section 19 of the Patients Property Act.

The Position of the Trust Company

[24] Mr. McLellan, counsel for the Trust Company, did not express a firm position on the outcome of this matter. As noted earlier in these reasons, the Trust Company simply wants to know who is responsible for Dr. Clay's personal and health situation. Mr. McLellan submits that if the representation agreement was terminated by operation of s. 19 of the PPA, then Dr. Clay would be presumed capable and would have authority to make decisions about his personal and health care. That said, at least one physician has provided an opinion that he is not capable of making those decisions, which will necessitate a further application under the PPA to declare Dr. Clay incapable of managing his person and appointing a committee of person for him.

The Position of the Public Guardian and Trustee

[25] The Public Guardian and Trustee took no position on the application. As to the construction of the applicable legislation, however, Mr. Wolf maintains there is no ambiguity in the language of the PPA. Once the court declares a person to be incapable, regardless of whether the declaration concerns management of the person's affairs as opposed to management of himself or herself, that person is a patient for all purposes under s. 19 and every representation agreement is terminated unless the court orders otherwise.

The Position of Counsel for Dr. Clay

[26] Mr. Scouten, counsel for Dr. Clay, points out that Jennifer and Sarah did not raise the representation agreement or even mention it in connection with their committee application. That was the time and place for the issue to have been raised. Once counsel for Dr. Clay learned of the representation agreement, counsel asserted on Dr. Clay's behalf that it had terminated upon pronouncement of the committee order, in accordance with the plain wording of the sections in question.

The Position of Dr. Clay's Daughters

[27] Ms. Francis advances the position that properly interpreted, s. 19(b) of the PPA does not automatically invalidate the representation agreement. In the alternative, if it does, Ms. Francis urges me to exercise my discretion under s. 19(b) to uphold the representation agreement or to act on my *parens patriae* jurisdiction in Dr. Clay's best interests.

[28] Ms. Francis submits that s. 19(b) gives the court the flexibility to declare a person incapable in one capacity, i.e. of managing their affairs, while not declaring them incapable in all capacities and undoing previously drafted planning instruments. This is said to be consistent with all incapacity legislation in British Columbia which strives to balance the autonomy of the individual against the state's protective jurisdiction over incompetent adults.

[29] Counsel submits that the proper approach to statutory interpretation comes from *Rizzo v. Rizzo Shoes*, [1998] 1 S.C.R. 27 where Iacobucci J. said:

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

[30] Further on in his reasons in *Rizzo*, Iacobucci J. considered statutory interpretation in the context of a legislative provision which, if read literally, would lead to an absurd result:

27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40a of the ESA are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

[31] Ms. Francis submits that interpreting s. 19 without considering the scheme and object of the act to ensure the provisions in question are interpreted in a way that is harmonious with the overall framework of the legislation would lead to an absurdity. She cites two excerpts from Hansard in 1999 at second reading of the bill, of which s. 19 was part, to illuminate the legislative intent. Minister Dosanjh said:

In summary, if people have planned for the future, either through the use of an enduring power of attorney or by making a valid representation agreement, their wishes will be honoured.

The Patients Property Act will contain a number of new provisions to ensure that pre-existing representation agreements prevail over a certificate issued under the Patients Property Act during this transition period, as long as the representative has been given adequate authority by the adult who made the agreement. This will ensure that an adult's wishes, contained in a representation agreement, will be honoured wherever possible. Of course, where a court order is necessary under the Patients Property Act, that order will prevail over all agreements. Together, these technical and clarifying amendments will ensure that the adult guardianship legislation will work smoothly with the partial proclamation and with the current legislation until it's repealed. [my emphasis]

[32] Counsel says these comments demonstrate that the legislature never intended s. 19 to undermine properly executed planning documents absent a declaration of incapacity relevant to that particular planning document. Reading sections 1 and 19 of the PPA literally would undermine the RAA, which was enacted to empower individuals by providing tools to plan in advance of incapacity. Advance planning in relation to health care decisions would be wiped out by a declaration of incapacity as to financial matters.

- [33] Ms. Francis submits that Dr. Clay no longer has capacity to appoint a representative and if the representation agreement is terminated, he will have no option to choose his own representative notwithstanding his advance planning in 2004. To avoid such a result, counsel submits that s. 19(a) should be read to refer only to the reference in s. 1(b)(i) to incapacity concerning affairs and s. 19(b) must be interpreted to refer only to the reference in s. 1(b)(ii) concerning incapacity to manage self.

Analysis

- [34] On a plain reading of s. 1(b) and s. 19 of the PPA, when a judge declares a person to be incapable of managing himself or herself or of managing his or her affairs, or both, every power of attorney given by the person is terminated and every representation agreement is terminated, unless the court orders otherwise. In my view, this result is not absurd. It provides for a single inquiry to determine who will be committee of finance and, if a representation agreement exists, whether that agreement should be preserved.
- [35] This approach is consistent with Minister Dosanjh's Hansard comments, reproduced above, where he noted that where a court order is necessary under the PPA, that order will prevail over all agreements. It is also consistent with s. 29(h) of the RAA which provides that a representation agreement ends as provided in s. 19 of the PPA.
- [36] The approach advanced by Ms. Francis would require replacement of the word "and" between s. 19(a) and (b) with the word "or" to support her interpretation that the two different incapacities are to be viewed in isolation within the context of that section. In my opinion, this would amount to judicial legislation.
- [37] Not all representation agreements are the same. Some are effective when created, others, such as the one in this case, only became effective upon a triggering event. The wording of s. 19(b) permits a court to examine an existing representation agreement in the context of a finding that a person is a patient for either, or both, of the reasons expressed in s. 1(b), and if appropriate, uphold the agreement.
- [38] When the parties appeared before Gray J., the issue of a representation agreement was not raised. Mr. Scouten maintains it should have been; Ms. Francis says her clients were estopped from doing so by the terms of the mediated agreement. That is unfortunate but by the language of the legislation, the declaration that Dr. Clay was incapable of managing his finances terminated the representation agreement.

Should the Representation Agreement be Upheld under the Discretionary Power in s. 19(b)?

- [39] In the alternative, Ms. Francis submits that I should exercise my discretion to uphold the representation agreement. While s. 19(b) does not contain specific language circumscribing the exercise of discretion, the jurisprudence has developed a number of factors to consider.

- [40] In *Lindberg v. Lindberg*, 2010 BCSC 1127, Willcock J., as he then was, considered whether to uphold a representation agreement under s. 19(b):
- [49] The law permits the representation agreement to continue to be effective, despite the onset of disability, and recognizes the autonomous choice of a representative by a patient. The difficulty is that s. 19 of the PPA permits a representation agreement to be saved but does not establish the criteria which should be considered in determining whether or not to exercise that discretion. In the absence of further explicit direction in the legislation, I consider the following factors to be appropriate criteria:
- (a) the circumstances in which the representation agreement was executed;
 - (b) the scope of the representation agreement; and
 - (c) the basis for the application to set it aside.
- [50] The representation agreement in this case was entered into with the assistance of counsel at a time when there appears to have been no indication of any disability on the part of Mrs. Lindberg. There is no cause in the case for any concern with respect to the circumstances of the execution of the agreement. There is no suggestion of undue influence, and no indication that Mrs. Lindberg was acting out of any motive other than reasonable foresight in relation to her own needs and abilities.
- [51] The representation agreement is broadly worded. It was executed shortly after the execution of a will that also appointed the representative as executor and trustee, and the enduring power of attorney. The execution of these documents demonstrates broad faith in the abilities of the representative.
- [52] The petition is brought, apparently, as a result of the representative's decision to sell property rather than as a result of any concern with respect to the propriety of the conduct of the representative generally. The representative did not act precipitously or inappropriately upon being able to do so, but acted only upon being contacted by the police and upon being asked to take measures to protect Mrs. Lindberg. The representative appears to have acted without regard for her own interests or any apparent motive other than to assist Mrs. Lindberg. There is no evidence of a significant change in circumstances that would militate against the continuation of the representation agreement. There was no apparent falling out between Mrs. Lindberg and Ms. Shoemaker and no significant change in Mrs. Lindberg's relationship with her son or other family members between the execution of the agreement and the onset of Mrs. Lindberg's incapacity.
- [53] For these reasons I am of the opinion the representation agreement appointing Ms. Shoemaker should be saved pursuant to s. 19(b) of the PPA

Application of the Lindberg Factors to this Case

- [41] Ms. Francis submits the representation agreement was made in 2004, when there was no indication Dr. Clay was suffering from any incapacity. It was drafted with the involvement of counsel and confers broad authority on Dr. Clay's representatives to look after his interests. Jennifer and Sarah have always looked after their parents. They wish to continue to do so and their father trusted them to do so when he drafted the representation agreement.
- [42] Mr. Scouten, counsel for Dr. Clay, maintains I should not exercise my discretion to uphold the representation agreement. His position is that the validity of the representation agreement is a matter that requires proper notice and a proper opportunity for him to respond on behalf of Dr. Clay. In the present context, which is an application for directions by the financial committee and no formal application with notice to affected parties concerning the validity of the representation agreement, I should not decide the matter.
- [43] While I have no reason to doubt that Jennifer and Sarah are acting in their father's best interests, the proceeding before me is framed as an application for directions by the Trust Company. In light of the fact that Dr. Clay has counsel who is prepared to act for him and who will likely advance the position that Dr. Clay is not incapable as to his person, this matter should proceed by way of petition as anticipated at the conclusion of proceedings before Gray J.
- [44] Finally, I decline to exercise my *parens patriae* jurisdiction in the circumstances before me. There are remedies available at law for the affected parties concerning the appointment of a committee of Dr. Clay's person. It is not for the court to fill a gap that does not exist, regardless of the valid concerns that Jennifer and Sarah have about their father's wellbeing.
- [45] Unless there are matters of which I am not aware, the parties' costs for the application for directions and for reasonable expenses associated with preparation for the hearing are to be paid on a special costs basis out of Dr. Clay's estate. This case falls within the first category of cases identified by Kekewich J. in *Re Buckton*, [1907] Ch. 406 (Eng. Ch. Div.). The application for directions was necessary for the benefit of Dr. Clay's trustee in the administration of its committee'ship and in relation to the necessity of future applications for the committee'ship of the person of Dr. Clay. Ms. Scouten has leave to raise the issue of reimbursement for other costs incurred in his representation of Dr. Clay.

"Duncan J."

The Honourable Madam Justice Duncan

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