
CANADA / JUDGMENT

Frazer v. Frazer

2008 BCSC 545

COURT

Supreme Court of British Columbia

DECIDED

1 May 2008

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2008 BCSC 545 Frazer v. Frazer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Frazer v. Frazer,

2008 BCSC 545

Date: 20080501

Docket: 07-3972

Registry: Victoria

Between:

Donald Frazer

Petitioner

And:

Christina Frazer

Respondent

Before: The Honourable Madam Justice Dorgan

Reasons for Judgment

Counsel for the Petitioner:

S. W. Farquhar

Counsel for the Respondent:

R. C. Di Bella

Dates and Place of Trial/Hearing:

January 29, 2008

and February 1, 2008

Victoria, B.C.

- [1] Two children of the respondent Christina Bernice Frazer ("Mrs. Frazer") bring cross applications to be appointed her committee under the Patients Property Act, R.S.B.C. 1996, c. 349. It is common ground that the evidence supports a finding that the respondent, now 84 years old, be declared incapable of managing herself and her affairs. The Public Guardian and Trustee has no objection to that declaration being made and that office takes no position on the appointment of a committee.
- [2] Mrs. Frazer and her husband, now deceased, have six children. Her son, Donald Frazer, applies to be appointed as committee. His application is supported by one of those children. Her daughter, Linda Wheaton, also applies to be appointed as committee. Her application is supported by the other three children.
- [3] On the application of Linda Wheaton and by consent, the following relief in respect of the pleadings is granted:
1. Linda Wheaton be added as a respondent.
 2. The style of cause will be amended to reflect the full legal name of the respondent, namely, Christina Bernice Frazer.
- [4] Section 6 of the Patients Property Act reads:
6. (1) Subject to section 13 [re passing of accounts], on application by the Attorney General or any other person, the court may appoint any person to be the committee of the patient.

The Act is silent as to the purposes for which the committee is to be appointed relevant to the management of the estate. Furthermore, it does not set out criteria for the selection of an appropriate committee.

- [5] Section 18 of the Act reads:

A committee must exercise the committee's powers for the benefit of the patient and the patient's family, having regard to the nature and value of the property of the patient and the circumstances and needs of the patient and the patient's family.

- [6] In the case of *Mawdsley v. Austin* (1984), 14 D.L.R. (4th) 315, where competing applications for appointment were before the court, Murphy L.J.S.C. noted that the authorities are to the effect that the best interests of the patient, rather than the wishes of family members, are paramount.

- [7] In considering who is best able to provide ongoing support for the patient, and who possesses the ability to deal with her financial affairs, the history of contact between and among the applicants and the patient is of some import.
- [8] Mrs. Frazer suffers from dementia. She is a long-time resident of Victoria. Since June 21, 2007 she has lived at Mount St. Mary Hospital. As I understand the submissions, all agree the facility is highly regarded and that there are no issues arising in respect of her care at that facility. On the evidence of Dr. Conway, a general practitioner and Mrs. Frazer's physician for the past 11 years, Mrs. Frazer is comfortable in her present surroundings. Dr. Conway states he does not believe it would be in her best interests for her to move from that facility. Further, Dr. Conway deposes that over the past 11 years, Donald Frazer has attended virtually all of Mrs. Frazer's appointments with her and has shown himself to Dr. Conway to be "an excellent and very interested caregiver of his mother". Dr. Conway supports Donald Frazer's application.
- [9] Donald Frazer lives in Victoria and is employed as a commissionaire. The evidence shows that over the years he has regularly attended to the needs of his parents. Mr. Frazer Sr. died on September 13, 2007. During his lifetime, he granted Donald Frazer his power of attorney. Since approximately 2006, Mrs. Frazer's bank account, with a present balance of approximately \$65,000, has been held in the joint names of Donald Frazer and Mrs. Frazer.
- [10] Linda Wheaton is retired and lives in Cumberland. Over the years she has visited her parents and latterly her mother, in Victoria from time to time. On her evidence, in late 2006, she became concerned about the level of care her parents received while living independently in their condominium. She is critical of Donald Frazer in this regard. Then, in late 2006, Mr. Frazer Sr. fell and as a consequence was unable to continue to provide care for himself and his wife. Mr. Frazer Sr. was eventually moved to the Mount St. Mary Hospital. At that point, Mrs. Frazer was moved to Cumberland where she lived with Linda Wheaton for approximately six months until Mrs. Frazer, too, was transferred to Mount St. Mary Hospital. On Ms. Wheaton's application, her initial position was that if appointed committee, she intended to move her mother to Cumberland to live in the Wheaton home until Ms. Wheaton was able to arrange for an appropriate care facility for her in the Cumberland area.
- [11] As I understand Ms. Wheaton's opposition to the appointment of Donald Frazer as committee, as well as the opposition to that appointment voiced by three other siblings, it is that Donald Frazer has not been open and transparent about his dealings with their mother's assets, particularly her bank account. Furthermore, Ms. Wheaton is concerned that it has now come to light that Donald Frazer has used funds from their mother's bank account to insure and repair their late father's vehicle (which is used at times to take Mrs. Frazer to appointments and on outings generally), has transferred nominal amounts of money to one of the siblings (for example \$200 to Dianne Frazer), and on one occasion spent some \$80 to purchase Christmas presents from Mrs. Frazer to his two daughters.

- [12] It bears noting that Donald Frazer also withdrew modest sums of money from his mother's bank account for the benefit of one or other of the siblings who now oppose his appointment. For example, \$200 and \$300 respectively to defray the costs of travel and attendance at their father's funeral. Furthermore, while Mrs. Frazer lived with Ms. Wheaton for six months in early 2007, he also withdrew sums from the account and paid them to Ms. Wheaton. While much is made of the manner in which Donald Frazer has, from time to time, exercised his judgment and control over his parents' assets, and particularly those of Mrs. Frazer, his conduct in that regard falls far short of constituting dishonest acts or even breaches of a fiduciary duty as was suggested and as those descriptions are utilized by Thackray J. (as he then was) in *Szpradowski (Guardian ad litem of) v. Szpradowski Estate*, [1992] B.C.J. No. 94. It also bears noting that the siblings who oppose Donald Frazer's appointment make no complaint about the funds which he transmitted to them. However, concern is expressed about the \$200 he transmitted to the sibling who supports his application.
- [13] The evidence before the court overwhelmingly supports a conclusion that for many years, Donald Frazer, who is employed and is raising a family, has done his best to care for and manage the affairs of his parents when both were alive and to care for and manage the affairs of his mother since the death of Mr. Frazer Sr. At worst, his withdrawal of modest sums from Mrs. Frazer's bank account, on which he is a joint signatory, might be described as somewhat ill-advised; the actions of a caring but somewhat naive caregiver.
- [14] On the evidence before me, I am satisfied that Donald Frazer is the appropriate person to be appointed as committee without bond of the estate and person of Mrs. Frazer. In particular, I have considered the following:
1. For many years, Donald Frazer, while not the only Frazer child living in Victoria, consistently attended to his parents' needs to the best of his ability.
 2. Mr. Frazer Sr. clearly trusted Donald Frazer's ability to manage the Frazer Sr.'s assets by giving him his power of attorney.
 3. Likewise, Mrs. Frazer's only bank account has been held jointly with Donald Frazer for at least two years and there is nothing in the evidence to suggest that anything untoward gave rise to the creation of that joint bank account.
 4. Mrs. Frazer's estate is modest: a bank account as earlier referred to, jointly held with Donald Frazer, with an approximate balance of \$65,000, a condominium which will doubtless be sold, an older vehicle, once owned by Mr. Frazer Sr. and now presumably by Mrs. Frazer as executor of her late husband's estate, and monthly income of slightly under \$500 per month.

The periodic use of Mrs. Frazer's bank account by Donald Frazer and his management of the other assets is consistent with assisting various needy members of the family to a modest extent as, in this case, a mother might do for her children were she capable of making those decisions, and inconsistent with use of the bank account for his own benefit or for the purpose of "short-changing" his siblings.

5. The complained-of lack of transparency of Donald Frazer in respect of his mother's assets fails to consider that to-date, he has been under no legal obligation to account to his siblings for the manner in which his mother's assets have been used.
6. Clearly, the medical evidence supports a conclusion that Mrs. Frazer's needs are best served by her remaining in Victoria at Mount St. Mary Hospital and that a move to a different community and a different institution is contrary to her best interests. Donald Frazer, as a resident of Victoria, is the logical person to continue managing her affairs.
7. Any further concerns about Donald Frazer's ability to act as committee are best addressed by including in the order those provisions suggested in the application and notice of motion of Ms. Wheaton.

[15] I note that while it might once have been desirable to name Linda Wheaton and Donald Frazer as joint committees of the patient's estate, I have concluded that the antipathy between them and among the various siblings which has come to the fore on this application (and perhaps before) makes that option entirely unworkable.

[16] In conclusion:

1. The order earlier referred to amending the pleadings is granted.
2. I declare the respondent Christina Bernice Frazer is incapable of managing herself and her affairs.
3. Donald Frazer is appointed committee of the estate and person of Christina Bernice Frazer without bond.
4. The provisions of the notice of motion of Linda Wheaton, dated January 18, 2008, paragraphs 6 through 11 inclusive, by consent as I understand it, will form part of the order of appointment naming Donald Frazer.

[17] I am satisfied that each of the applicants came to the court with the best interests of their mother in mind. Accordingly, it is appropriate that the costs of and incidental to this proceeding, for both the petitioner Donald Frazer and the applicant Linda Wheaton, be assessed as special costs and be paid from the estate of the patient, Mrs. Frazer, on notice to the Public Guardian and Trustee of British Columbia or the written approval of the Public Guardian and Trustee.

"J. L. Dorgan, J."

The Honourable Madam Justice Dorgan

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