

CANADA / JUDGMENT

Hambleton (Litigation Guardian of) v. Hambleton

2021 BCSC 1155

COURT

Supreme Court of British Columbia

DECIDED

14 June 2021

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2021 BCSC 1155 Hambleton (Litigation Guardian of) v. Hambleton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hambleton (Litigation Guardian of) v. Hambleton,

2021 BCSC 1155

Date: 20210614

Docket: S174038

Registry: Vancouver

Between:

Vale Blossom Hambleton by her litigation guardian

Arleigh Vale Hambleton

Plaintiff

And

Alice Leora Hambleton, Gerald Oscar Hambleton, and

Richard Arthur Hambleton

Defendants

Before: The Honourable Mr. Justice Mayer

Reasons for Judgment

Counsel for the plaintiff Vale Hambleton by her litigation guardian, Arleigh Vale Hambleton:

M. Armstrong

Counsel for Vale Hambleton in her own right:

V. Stewart

Counsel for the Defendant, Alice Hambleton:

P. Lightbody

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 9 and 27, 2021

Place and Date of Judgment:

Vancouver, B.C.

June 14, 2021

Introduction

- [1] Vale Hambleton, in her own capacity and on her own behalf, brings this application seeking an order for a declaration that a mental capacity evaluation, which I ordered her to undertake on June 18, 2018, has been satisfied by her participation in a mental capacity evaluation conducted on January 17, 2019 by Dr. Jenny Rogers, a geriatric psychiatrist.
- [2] The respondent to this application and plaintiff in the action, Arleigh Vale Hambleton in her capacity as litigation guardian for Vale Hambleton, opposes the relief sought. Instead, Arleigh Hambleton seeks an order that Vale Hambleton undergo a more extensive mental capacity evaluation than I ordered in June 2018, to be completed by Dr. Peter Chen, a geriatric psychiatrist, with the assistance of Dr. Rishi Bhalla, a geriatric neuropsychologist.

Background

- [3] In these reasons I will refer to Vale and Arleigh Hambleton by their first names for convenience.
- [4] The procedural history of this matter is tortured. Proceedings were commenced in May 2017 by Arleigh in her capacity as litigation guardian for Vale aged 91, who is her mother. Arleigh had previously obtained and filed a certificate of fitness from a lawyer who had not met Vale and Arleigh then commenced this action. Vale was not advised prior to Arleigh taking these steps. Arleigh alleges, amongst other things, that Vale is severely demented and subject to undue influence by Vale's other daughter, Alice Hambleton. What was and remains at issue is the validity of Vale's January 2017 decision to transfer title to her North Vancouver home to herself and Alice and to take out a reverse mortgage. Arleigh takes the position that Vale lacks the mental capacity to make decisions regarding her financial affairs and has been

subjected to undue influence by Alice.

- [5] Vale contends that she is capable of making her own decisions. With respect to the transfer of an interest in her home to Alice in 2017, she says this is consistent with the terms of her will made seven years earlier, in 2010, at a time when there was no suggestion of a lack of capacity on her part. In June 2017, she retained her own counsel and applied to strike the action commenced in her name by Arleigh - which included removing Arleigh as litigation guardian.
- [6] When the matter came before me in August 2017, Vale applied to strike the action commenced by Arleigh as an abuse of process and Arleigh applied for orders requiring production of Vale's medical records and for an order that Vale undergo a mental capacity assessment.
- [7] I ordered that Vale attend at a mental capacity examination at a time and place to be arranged by Inglewood Care Centre before any further steps were taken in the litigation commenced by Arleigh. I made the order that Vale undergo a mental capacity assessment, despite my concerns about overriding the presumption that Vale was mentally competent, because at that time there was medical evidence from late 2015 and early 2016, indicating that Vale had suffered a mental health event leading to her involuntary committal. I found the evidence submitted by the parties concerning the status of Vale's mental health to be insufficient. I ordered that Inglewood make the arrangements for Vale's mental capacity evaluation only because, at that time, Vale lived there and Inglewood had access to relevant medical records.
- [8] On June 11, 2018, Vale appeared before me and applied for an order seeking that the court accept testing completed by non-specialist family practitioners, including an MMSE and MOCA test, as being sufficient medical evidence of her capacity. I declined this application, but in order to provide further clarity regarding the nature of the mental capacity examination required I varied my August 2017 order to require that the evaluation be carried out by a specialist in geriatric psychiatry. It remained a requirement that this examination be arranged through Inglewood, unless the parties agreed otherwise.
- [9] In the balance of these reasons, I will refer to my orders of August 2017 and June 2018 collectively as the "2017/2018 orders".
- [10] For various reasons Vale refused to allow Inglewood to make arrangements for the mental capacity evaluation. Her reasons include, for example, a lack of trust resulting from Inglewood staff sharing Vale's medical records with Arleigh - which Vale alleges was done without her consent. Between July 2018 and January 2019, the parties unsuccessfully sought to come to an agreement on arrangements for Vale's mental capacity evaluation. Issues in dispute included the selection of a specialist, the nature of the opinion sought, the materials the specialist would review and whether anyone could attend with Vale.

- [11] In November 2018, Vale took another MMSE test with her new family doctor and obtained a score of 25/30, which I understand indicates that she was not demonstrating symptoms of dementia. In addition, Vale's family doctor signed a medical scope of treatment form (MOST) indicating that Vale was capable of making her own medical decisions.
- [12] On January 17, 2019, Vale unilaterally proceeded with a mental capacity assessment conducted by Dr. Rogers. She was accompanied to the appointment with a friend of her daughter Alice, Kim Benson. In summary, Dr. Rogers concluded that Vale had mild cognitive impairment but was capable of personal financial decision-making, and had the testamentary capacity to sign legal documents. Dr. Rogers noted in her report that Vale was able to describe the circumstances leading to her 2017 decision to consign a portion of her house to Alice and that she denied feeling pressure to do so.
- [13] In January and February 2020, the parties brought two further applications. First, in January 2020 Arleigh brought an application before Justice Francis seeking leave to apply for production of Vale's medical records. Justice Francis adjourned this application pending the hearing of an application to determine whether Arleigh should be removed as litigation guardian and replaced with a temporary replacement. Vale then applied to remove Arleigh as litigation guardian but in February 2020, Justice Baker adjourned Vale's application requiring that Vale first undergo the mental capacity assessments required by the June 2017/2018 orders, or could first bring an application to determine whether Dr. Roger's January 2019 assessment satisfied these orders.
- [14] Vale and her husband Arthur Hambleton made requests to be discharged from Inglewood and were discharged unconditionally on March 25, 2020 and moved back into their North Vancouver home. Arthur Hambleton passed away on December 8, 2020 at the age of 94 after contracting COVID-19.
- [15] On December 8, 2020, the same day that Arthur died, Arleigh brought an application before Justice Warren to have Vale attend for capacity evaluations over two days before two separate doctors. Justice Warren adjourned this application and ordered that an application first be brought to determine whether the evaluation conducted by Dr. Rogers in January 2019 satisfied the terms of the 2017/2018 orders.
- [16] On February 23, 2021, the parties appeared before Justice Crossin who declined to hear Vale's application regarding the sufficiency of Dr. Roger's capacity evaluation, on the basis that he considered this to be a request to vary the 2017/2018 orders requiring Vale to undergo a mental capacity assessment. He ordered that the parties appear before me to seek to vary the terms of the 2017/2018 orders.
- [17] Clearly it is time to put the issue of whether my 2017/2018 orders have been complied with, or are still required, to rest so that the application for removal of Arleigh as litigation guardian can finally be heard some four years after it was initially brought.

Position of the Parties

- [18] Neither party seeks an order that Inglewood make arrangements for a mental capacity assessment, given that Vale no longer resides there.
- [19] Vale submits that it is within my discretion to vary the terms of 2017/2018 orders by finding that the mental capacity assessment conducted by Dr. Rogers satisfied the spirit and intent of those orders. She submits, in essence, that the evidentiary gap regarding Vale's mental capacity, which existed when I made my first order in August 2017 no longer exists. She submits that there is nothing further to be gained by subjecting her to another mental capacity evaluation.
- [20] Arleigh contends that the mental capacity assessment completed by Dr. Rogers is inadequate and does not meet the test for an acceptable mental capacity evaluation. Her principle complaints regarding Dr. Rogers' assessment include the following: Alice Hambleton's friend Kim Benson accompanied Vale to Dr. Roger's office in January 2019 and it is not known what collateral information she provided - which it is inferred may have influenced Dr. Roger's capacity assessment; at the time that Dr. Rogers completed her assessment she did not have copies of relevant medical records of Vale, including those from the Hope Center/Lions Gate Hospital made when Vale was involuntarily committed in late 2015 and early 2016; and, that the nature of the mental capacity assessment carried out by Dr. Rogers was insufficient.

Issues

- [21] I am not here to rule on whether Vale has the mental capacity to make her own decisions and therefore whether Arleigh should be removed as litigation guardian or the action commenced by Arleigh should be struck. That is the subject of a further application. In this application, the principle issue is whether the mental capacity evaluation carried out by Dr. Rogers satisfies the 2017/2018 orders and if not, whether a further mental capacity is required for the purposes of Vale's application to strike the claim commenced by Arleigh and to remove her as litigation guardian.

Analysis and Disposition

- [22] It is not contested that the specific requirements of my 2017/2018 orders have not been complied with. I note in particular the requirement that the mental capacity assessment be arranged through Inglewood or otherwise as agreed between the parties. Given the passage of time, it is no longer possible or practical for Inglewood to make the necessary arrangements given that since March 2020, Vale has not resided at this facility. The parties have been unable to jointly agree on arrangements for such an assessment.

- [23] To the extent that Vale may have breached the terms of the 2017/2018 orders, I do not have a contempt application before me. If Arleigh wishes to bring such an application, she has the right to do so. I will not comment on the merits of such a potential application.
- [24] In the applications before me both parties seek to vary the 2017/2018 orders. Vale seeks an order that the January 2019 mental capacity assessment conducted by Dr. Rogers satisfies the terms of those orders. Arleigh seeks an order requiring a further mental capacity assessment by Dr. Chen with the assistance of Dr. Rishi Bhalla.
- [25] This Court relied on its *parens patriae* powers when the 2017/2018 orders were granted. That is, the court relied on this power to override the presumption in the common law that Vale had the capacity to manage her own affairs. *Parens patriae* powers to make orders protecting persons under disability or potential disability, are related to the court's inherent jurisdiction to make orders which are in all of the circumstances in the interests of justice.
- [26] It is an invasion of the rights of an individual to require them to attend at a mental capacity assessment, an invasive process, and the court should not do so without a sufficient evidentiary basis for doing so. That said, where there is a reasonable possibility that an individual may, because of mental infirmity, be unable to make decisions on their own behalf and may be subject to undue influence by others it may be in the interests of justice to have an objective assessment of their mental capacity completed.
- [27] At the time that the 2017/2018 orders were made the available medical evidence concerning Vale's involuntary committal in late 2015 through into early 2016 established a reasonable possibility that Vale was unable to make decisions for herself in August 2017. It was for that reason that I ordered that Vale undergo what eventually became a mental capacity assessment by a doctor with a specialization in geriatric psychiatry - before she could proceed further with her application to strike the claim commenced by Arleigh as her litigation guardian and to set aside Arleigh's appointment as litigation guardian.
- [28] I am satisfied that Dr. Rogers had the requisite expertise in geriatric psychiatry to conduct the mental capacity assessment I ordered to be completed. Dr. Rogers indicates in her report that after her in person assessment of Vale's mental capacity in January 2019, she requested and then reviewed medical records from the Hope Centre/Lions Gate Hospital related to Vale's mental health episode in late 2015 and early 2016, and considered these records when she came to a conclusion that Vale is capable of managing her own affairs. In addition Dr. Rogers indicated in her report that although Kim Benson accompanied Vale to her office, she met with Vale on her own and carried out her assessment without interference or outside interruption.

- [29] In this application, Arleigh has tendered an expert report from Dr. Chen in which he provides an opinion that although Dr. Rogers' capacity assessment was adequate in the clinical context, it was not adequate in the medico/legal context. Dr. Chen was unsure if Dr. Rogers had reviewed and considered relevant medical history and expressed the opinion that her report lacked sufficient detail in some areas. In Dr. Chen's opinion Dr. Rogers did not address specific details concerning undue influence.
- [30] The 2017/2018 orders did not contemplate preparation of a detailed medico/legal report. I ordered that a mental capacity assessment be completed by a geriatric psychiatrist and this has now been done - although not in strict compliance with the terms of the orders previously made.
- [31] I note that since the 2017/2018 orders were pronounced Vale has undergone further testing from her family Doctors and from Dr. Rogers, was unconditionally discharged from Inglewood, and has been living in private accommodation and there is no evidence that she has suffered further mental health episodes. All of this suggests that the mental health event in 2015 has resolved. It will be for the judge hearing Vale's application to strike Arleigh's claim to determine whether they have a sufficient evidentiary basis to conclude that Vale is capable of managing her own financial affairs.
- [32] Requiring that Vale undergo a further mental capacity assessment, due to a failure to abide by the specific terms of the 2017/2018 orders, would be an exercise in preferring form over function. This would in my view be stretching the court's *parens patriae* jurisdiction too far.

Conclusion

- [33] I order that my order made June 18, 2018 be varied as follows:
- a) The words "at a time and place to be arranged by Inglewood Care Centre" be removed from paragraph 19(a); and
 - b) The words "If the parties agree to do so," be removed from paragraph 1(b).
- [34] I declare that the January 2019 mental capacity assessment of Vale Hambleton, completed by Dr. Rogers in January 2019, satisfies the terms of the 2017/2018 orders.
- [35] I dismiss Arleigh Hambleton's application for an order that Vale undergo a further mental capacity assessment to be completed by Dr. Chen and Dr. Bhalla.
- [36] Vale Hambleton may proceed to reset her application to remove Arleigh Hambleton as litigation guardian and appointing someone else who is not adverse in interest to her, as temporary litigation guardian.

"Mayer J."

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