

CANADA / JUDGMENT

Horan v. Fraser Health Authority

2022 BCSC 1951

COURT

Supreme Court of British Columbia

DECIDED

8 November 2022

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2022 BCSC 1951 Horan v. Fraser Health Authority

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Horan v. Fraser Health Authority,

2022 BCSC 1951

Date: 20221108

Docket: S226683

Registry: Vancouver

Between:

Candice Elizabeth Horan

Appellant

And

Fraser Health Authority, Geoff McMartin, Public Guardian & Trustee of British Columbia and
Viola Horan

Respondents

And

The Attorney General of British Columbia

Pursuant to the Constitutional Question Act

- and -

Docket: S226684

Registry: Vancouver

Between:

Candice Elizabeth Horan

Petitioner

And

Fraser Health Authority

Respondent

- and -

Docket: S228374

Registry: Vancouver

Between:

Candice Elizabeth Horan

Petitioner

And

Fraser Health Authority, and Public Guardian and Trustee of British Columbia

Respondents

Corrected Judgment: The text of the judgment was corrected at paragraph 37 on November 23, 2022.

Before: The Honourable Justice Iyer

On appeal from: An Order of the Provincial Court, dated July 28, 2022

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

October 26, 2022

Place and Date of Judgment:

Vancouver, B.C.

November 8, 2022

OVERVIEW

[1] This appeal and application for judicial review arise out of the provisions of the Adult Guardianship Act, R.S.B.C 1996, c. 6 ("Act") governing support and assistance for adults experiencing abuse or neglect. Specifically, the Act provides that support and assistance may only be provided to such an adult if they consent or they have been found to be incapable of consenting. The central question in the appeal is whether or not the Act gives the Provincial Court jurisdiction to decide whether an adult is incapable of consenting. For the reasons that follow, I find that it does.

LEGISLATION

[2] The introductory sections of the Act set out its guiding principles, which presume and promote individual autonomy and decision-making capacity:

Guiding principles

2 This Act is to be administered and interpreted in accordance with the following principles:

- (a) all adults are entitled to live in the manner they wish and to accept or refuse support, assistance or protection as long as they do not harm others and they are capable of making decisions about those matters;
- (b) all adults should receive the most effective, but the least restrictive and intrusive, form of support, assistance or protection when they are unable to care for themselves or their financial affairs;
- (c) the court should not be asked to appoint, and should not appoint, guardians unless alternatives, such as the provision of support and assistance, have been tried or carefully considered.

Presumption of capability

3(1) Until the contrary is demonstrated, every adult is presumed to be capable of making decisions about the adult's personal care, health care and financial affairs.

(2) An adult's way of communicating with others is not grounds for deciding that he or she is incapable of making decisions about anything referred to in subsection (1).

[3] Part 3 of the Act addresses provision of support and assistance for abused and/or neglected adults who are unable to seek support and assistance themselves. Section 44 specifies this purpose:

44 The purpose of this Part is to provide for support and assistance for adults who are abused or neglected and who are unable to seek support and assistance because of

- (a) physical restraint,
- (b) a physical handicap that limits their ability to seek help, or
- (c) an illness, disease, injury or other condition that affects their ability to make decisions about the abuse or neglect.

[4] In *A.H. v. Fraser Health Authority*, 2019 BCSC 227, Justice Warren summarized the aim of the Act and particularly Part 3, as follows (at para. 108):

Thus, the AGA's purpose is to prioritize self-determination and autonomy for adults with disabilities and impose involuntary measures only as a last resort, in a manner as minimally intrusive as possible, and by court order.

[5] Part 3 enacts a scheme to achieve that objective. Sections 46-49 empower anyone with information that an adult is abused or neglected and unable to seek assistance to report the situation to a designated agency. The designated agency must inquire into the matter, first determining whether or not the adult needs support and assistance. If so, the designated agency may investigate to determine whether the adult is abused or neglected and unable to seek assistance.

[6] After completing its investigation, s. 51 empowers the designated agency to take various actions. These include preparing a support and assistance plan that specifies what services, such as health care, accommodation, social, legal and/or financial services, the adult needs (s. 51(1)(g)). The designated agency must involve the adult to the greatest extent possible in the preparation of the support and assistance plan and must explain it to the adult.

[7] Importantly, s. 53 provides that the designated agency must not provide the proposed services unless the adult consents to them. However, if there is a concern about the adult's ability to consent, s. 53(5) provides:

If the adult decides not to accept the services proposed in the support and assistance plan and the adult appears to be incapable of making that decision, the designated agency may ask the Public Guardian and Trustee to arrange for an assessment of whether the adult is incapable.

- [8] Where an assessment concludes that the adult is incapable of consenting to the proposed services, the designated agency may apply to the Provincial Court for a support and assistance order. Section 54(2) and (3) set out in detail what the application must include and who must be notified:
- (2) At least 7 days before the date set for hearing the application, the designated agency must serve a copy of the application on the following:
- (a) the adult who is the subject of the application;
 - (b) the adult's spouse or, if the adult has no spouse, a near relative of the adult;
 - (c) the person in charge of any hospital, facility or residence where the adult may be residing or receiving care;
 - (d) the Public Guardian and Trustee;
 - (f) the adult's attorney, representative or guardian;
 - (h) any person against whom an order is sought under section 56 (3);
 - (i) any other person that the court may direct.
- (3) The application must be accompanied by
- (a) a support and assistance plan that is prepared by the designated agency and includes a statement of the adult's wishes if known, and
 - (b) a report of the assessment under section 53 (5).
- [9] Pursuant to s. 55, anyone served is a full participant at the hearing, and the designated agency must prove on a balance of probabilities that the adult needs and would benefit from the proposed services.
- [10] Section 56 sets out what the court must do:
- (1) On hearing the application for the provision of services to the adult, the court must consider whether or not the adult
 - (a) is abused or neglected,
 - (b) is unable to seek support and assistance because of an illness, disease, injury or other condition that affects his or her ability to make decisions about the abuse or neglect, and
 - (c) needs and would benefit from the services proposed in the support and assistance plan.

- (2) When considering the things referred to in subsection (1), the court must take into account the information in the documents mentioned in section 54 (3).
- (3) If the court is satisfied about the matters set out in subsection (1), the court may
 - (a) make an order for the provision of support and assistance to the adult without his or her consent,
 - (e) make any other order the court thinks is appropriate and in the best interests of the adult.
- (4) In an order under subsection (3) (a), the court must specify the kinds of support and assistance that are to be provided for the adult, including any of the following:
 - (a) admission to an available care facility, hospital or other facility for a specified period of up to one year;
 - (b) the provision of available health care;
 - (c) the provision of available social, recreational, educational, vocational or other similar services;
 - (d) supervised residence in a care home, the adult's home or some other person's home, for a specified period of up to one year;
 - (e) the provision, for a specified period of up to one year, of available services to ensure that the adult's financial affairs are properly managed and protected, including any services that may be offered by the Public Guardian and Trustee.
- (5) In an order made under this section, the court must choose the most effective, but the least restrictive and intrusive, way of providing support and assistance.
- (6) If an order is made under this section, the designated agency must serve a copy of the order on the persons who were served with the application under section 54 (2).
- (7) An order made under subsection (3) (a) terminates one year after it is made or on an earlier date specified by the court.
- [11] Section 57 requires the designated agency to review the need for an order granted under s. 56(3)(a) in certain circumstances and permits it to apply to court to vary or cancel the order. Under s. 57(5), the court may only renew an order granted under s. 56(3)(a) once. That means that the longest such an order can last is two years.
- [12] Finally, s. 60 provides a right of appeal of orders made by the Provincial Court under part 3, including s. 56(3)(a) orders, to this court.

HISTORY OF THE PROCEEDINGS

- [13] In January 2022, Fraser Health Authority ("FHA") proposed a support and assistance plan ("Plan") to the appellant, Candice Horan. The Plan included confining her in a locked facility. Ms. Horan rejected the Plan. Although FHA proposed some modifications, the provision for confinement in a locked facility was not changed and Ms. Horan rejected the modifications.
- [14] FHA asked the Public Guardian and Trustee ("PGT") to arrange an assessment of Ms. Horan's capability under s. 53(5) of the Act. The two assessors, Dr. O'Connor and Dr. Mead-Wescott, gathered information and interviewed Ms. Horan several times. Their report, dated March 1, 2022 ("Assessment"), concluded that Ms. Horan was incapable of deciding to reject the Plan. FHA then applied to the Provincial Court under s. 54(1) to authorize the Plan.
- [15] The Provincial Court hearing occurred over five days in July 2022. Ms. Horan testified, as did Dr. Krausz, an expert psychiatrist retained by Ms. Horan, who had prepared a report opining that Ms. Horan was capable of deciding whether to consent to the Plan. Dr. O'Connor and Dr. Mead-Wescott also testified.
- [16] In its submissions to the Provincial Court, FHA argued that Ms. Horan's incapacity had been determined conclusively by the Assessment and that the Provincial Court was bound to accept it. In her decision dated July 28, 2022, the Provincial Court judge agreed with FHA that the Act required her to accept the Assessment's conclusion that Ms. Horan was incapable, and did not give her jurisdiction to make that determination based on the evidence tendered at the hearing before her.
- [17] The Provincial Court judge issued an order imposing the Plan on July 28, 2022 for 60 days. On September 26, 2022, she modified the earlier order in some respects, but did not alter the confinement requirement. I am told that the matter is coming before the Provincial Court again in November.
- [18] In the proceedings before me, Ms. Horan appeals these orders on the ground that the judge erred in finding that she had no jurisdiction to review the Assessment. She also applies for judicial review of the Assessment on the basis that, if the Assessment is binding on the Provincial Court, it amounts to a decision that restricts her liberty. As such, she says that it attracts the procedural fairness protections found in administrative law and under s. 7 of the Charter.
- [19] In addition to Ms. Horan and FHA, the PGT and the Attorney General of British Columbia ("AGBC") appeared at the hearing. The AGBC appeared because the PGT had filed a notice of constitutional question as the judicial review application might raise a constitutional issue under s. 7 of the Charter. Under the Constitutional Question Act, R.S.B.C. 1996, c. 68, the AGBC is entitled to notice and has a right to make himself a party to proceedings where there is a notice of constitutional question.

- [20] At the outset of the hearing, all parties submitted that I should hear and decide the appeal before considering the judicial review. This was because if I allow the appeal, the Assessment is not binding. I agreed and adjourned the judicial review.
- [21] Most unusually, all the parties agreed that the Provincial Court judge erred in concluding that she did not have jurisdiction to decide Ms. Horan's capability and was bound by the Assessment's determination. This represents a reversal by FHA of the position it took before the Provincial Court.
- [22] I considered whether appointment of an amicus was appropriate, but I have concluded that the reasons of the Provincial Court judge provide me with sufficient appreciation of the argument that the Assessment binds the Provincial Court.

THE DECISION

- [23] The Provincial Court judge's conclusion on jurisdiction was based on a comparison of Part 3, which provides for support and assistance for abused and neglected adults, with Part 2.1, which provides for the appointment of statutory property guardians for adults who are incapable of managing their financial affairs. She observed that s. 35(1) of the Act expressly permits an adult who has been determined to be incapable of managing their financial affairs to apply to Provincial Court to review that determination. Since there is no equivalent to s. 35(1) in Part 3 of the Act, the Provincial Court judge concluded that she did not have jurisdiction to review the Assessment (at para. 69):

Section 3 of the AGA sets out a presumption of capacity. F.H.A. says the finding of incapability in the February 2022 assessment of C.H. rebuts that presumption. I find a plain reading of the AGA allows only one conclusion - under Part 3, there is no authority for the court to review a s. 54 assessment. The fact [sic] Part 2.1 provides a specific mechanism for such a review is compelling in coming to that conclusion. This, despite the evidence of both C.H. and Dr. Krausz, this court does not have jurisdiction to re-visit the incapability finding of Dr. O'Connor and Dr. Mead-Wescott.

ANALYSIS

- [24] As this is a statutory appeal on a question of law, the standard of review is correctness. As I have said, the issue before me is whether s. 56 of the Act confers jurisdiction on the Provincial Court to decide that an adult is incapable of making decisions about their support and assistance or whether it is bound by the capability determination in an assessment conducted under s. 53(5).
- [25] The Supreme Court of Canada reaffirmed how courts must approach statutory interpretation in *Michel v. Graydon*, 2020 SCC 24 at para. 21:

It is now trite law in Canada that statutory interpretation entails discerning legislative intent by examining statutory text in its entire context and in its grammatical and ordinary sense, in harmony with the statute's scheme and objects.

[26] The Provincial Court judge's conclusion that the Provincial Court has no jurisdiction to review a s. 54 assessment is based on a "plain reading" of the Act, specifically, the absence of an equivalent in Part 3 to s. 35(1). That section provides:

If an adult has been determined to be incapable of managing the adult's financial affairs under section 33 (3) or 34, the adult may apply to the court for a review of that determination.

[27] Inferring an interpretation from the absence of an equivalent provision (sometimes called the doctrine of implied exclusion), may be appropriate where it is reasonable to expect an express reference to something in a statute, but the statute is silent: *Li v. Rao*, 2019 BCCA 265 at para. 74. However, the Court of Appeal cautioned (at para. 76):

Although courts often rely on implied exclusion reasoning, they also often reject it. The force of the implication depends on the strength and legitimacy of the expectation of express reference. As noted by the Saskatchewan Court of Appeal, its application calls for "a considerable measure of caution lest too much be made of it": *Dorval v. Dorval*, 2006 SKCA 21 at paras. 13-14.

[28] In order to assess whether it is appropriate to reason from the absence of an equivalent to s. 35(1) in Part 3 of the Act that the legislature intended the Provincial Court to be bound by the conclusion in a s. 54 assessment, one must ask whether the schemes set out in Parts 2.1 and 3 of the Act are sufficiently similar that implied exclusion reasoning is appropriate.

[29] In my view, they are not.

[30] Section 32(1) in Part 2.1 provides that where there is reason to believe that an adult is incapable of managing their financial affairs, the PGT may arrange for an assessment of the adult's capability by a qualified healthcare provider. If that assessment concludes that the adult is incapable of managing their financial affairs, this is reported to the health authority designate. The health authority designate then decides whether to issue a certificate of incapacity. If it does, the PGT immediately becomes the adult's statutory property guardian. The adult may apply to a court to review that decision under s. 35.

[31] The determination, under Part 3, of an adult's capacity to make decisions about their support and assistance also starts with an assessment under s. 53(5) that is comparable to the assessment in s. 32(1). However, the resemblance ends there. Under Part 2.1, the entity that determines the consequences of the assessment is the health authority designate, which is an administrative body not a court, and it does so by issuing a certificate. Under Part 3, the designated agency does not make that determination. Rather, s. 54 requires it to apply to the court for an order.

- [32] Since the initial determination that an adult is incapable of managing their financial affairs under Part 2.1 is made by an administrative body, a statutory right to review by a court makes sense, particularly when considered in light of the guiding principles of the Act and the presumption of capability. However, since it is the court that makes the initial determination of an adult's capability under Part 3, review of that decision by another hearing in the same court would be very odd. In this situation, the usual procedure is an appeal, which the Act provides in s. 60.
- [33] Part 2.1 and Part 3 are similar in that the assessment is not determinative in either scheme. However, the statute specifies a different decision-maker for the capability determination in the case of an adult who may not be able to manage their financial affairs than it does in the case of an adult who may not be able to make decisions about their support and assistance.
- [34] That is reasonable because the consequences of finding that an adult is incapable of making decisions about their support and assistance can be severe (for example, confining Ms. Horan to a locked facility). The Act reflects the potentially more serious consequences of finding that an adult is incapable of making decisions about their support and assistance by imposing a more stringent decision-making framework than under Part 2.1, which is only concerned with one's ability to manage one's financial affairs. The proceeding before the Provincial Court under Part 3 of the Act attracts the full complement of procedural fairness protections, including notice of the case against the person, an opportunity to obtain legal assistance, and full participation rights.
- [35] The text of s. 56 strongly supports this interpretation. It requires the court to "take into account" both the s. 54 assessment and the proposed support and assistance plan when deciding the questions set out in s. 56(1). The statutory language presumes the court will decide capability because otherwise there would be no point in directing it to consider the assessment report and the support and assistance plan.
- [36] In summary, reading the text of s. 56 together with related provisions and in light of the legislature's purposes leaves no doubt that the Provincial Court must determine the adult's capability to make decisions about their support and assistance. The conclusion of the s. 54 assessment is relevant at the s. 56 hearing, but not binding on the Provincial Court.

CONCLUSION

- [37] I allow the appeal. The orders of the Provincial Court dated July 28, 2022 and September 26, 2022 are rescinded.
- [38] As the parties all requested, there shall be no order as to costs.

"Iyer J."

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