

CANADA / JUDGMENT

Jagpal v. Samra

2024 BCCA 384

COURT

British Columbia Court of Appeal

DECIDED

20 November 2024

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2024 BCCA 384 Jagpal v. Samra

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Jagpal v. Samra,

2024 BCCA 384

Date: 20241120

Docket: CA49717

Between:

Rina Jagpal, also known as Ramenjit Kaur Jagpal and

Gulsharanjit Kaur Jagpal, also known as Gulsharanjit Kaur Dhaliwal

Appellants

(Respondents)

And

Sevina Samra

Respondent

(Petitioner)

And

Public Guardian and Trustee

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Abrioux

The Honourable Mr. Justice Grauer

The Honourable Justice Iyer

On appeal from: An order of the Supreme Court of British Columbia,
dated February 28, 2024 (Jagpal (Re), 2024 BCSC 343,
Vancouver Docket Nos. S236436 and E232905).

The Appellant, Rina Jagpal also known as Ramenjit Kaur Jagpal, appearing in person:

R. Jagpal

Counsel for the Respondent, Sevina Samra:

E.L. Clough

P. Storey

Place and Date of Hearing:

Vancouver, British Columbia

October 21, 2024

Place and Date of Judgment:

Vancouver, British Columbia

November 20, 2024

Written Reasons by:

The Honourable Justice Iyer

Concurred in by:

The Honourable Mr. Justice Abrioux

The Honourable Mr. Justice Grauer

Summary:

The appellant challenges the chambers judge's declaration that her mother is incapable of managing her person and affairs pursuant to the Patient's Property Act, and the appointment of the respondent as her mother's committee. The appellant seeks to adduce fresh evidence, and argues that her trial counsel's conduct and judicial bias created procedural unfairness. Held: Appeal dismissed. There is no basis to interfere with the chamber judge's declaration of incapacity or her exercise of discretion in appointing the respondent as committee. The

proceeding below was not procedurally unfair and the test for admission of fresh evidence is not satisfied.

Reasons for Judgment of the Honourable Justice Iyer:

OVERVIEW

- [1] This appeal concerns the appointment of a committee of the person and the estate under the Patient's Property Act, R.S.B.C. 1996, c. 349 [Act] for Gulsharanjit Jagpal, to whom I will refer as "Ms. Jagpal". The court below appointed the respondent, Sevina Samra, as committee of Ms. Jagpal's person and estate and dismissed the appellant's competing petition. Although the Public Guardian and Trustee ("PGT") is a named party, it did not participate in the appeal. The appellant was represented by counsel in the court below but represented herself in the appeal.
- [2] As the chambers judge explained, the petitions were filed against the background of a complex family dispute involving Ms. Jagpal, her husband, and their four children. After over 50 years of marriage, Ms. Jagpal had left the family home to live with the appellant and, some two months later, she filed a family law claim against Mr. Jagpal. In addition to his response, Mr. Jagpal filed a counterclaim, naming the appellant as a respondent. Other family members have been named in various applications, and the matter has yet to go to trial. I will refer to this proceeding as the Family Proceeding.
- [3] The present appeal relates to the Family Proceeding only in the sense that the person appointed as Ms. Jagpal's committee will have to make decisions in her best interests relating to the Family Proceeding. The issues before the court are confined to the review of the chambers judge's conclusion that Ms. Jagpal lacks capacity, and her exercise of discretion in appointing the respondent as Ms. Jagpal's committee.

BACKGROUND

General Context

- [4] Ms. Jagpal and her husband, Sadhu Jagpal, have four adult children: Sevina Samra (who is married with children), Rina Jagpal, Rajinder ("Raji") Jagpal, and Onkar Jagpal (who is married with children). Raji Jagpal has cognitive and intellectual disabilities and has always lived with her parents. Prior to August 2022, the Jagpal parents and Raji lived in the family home. Onkar Jagpal and his family live next door.
- [5] For clarity, and intending no disrespect, I refer to the adult children by their first names.
- [6] In May 2019, Mr. and Ms. Jagpal sold a substantial amount of real estate with sale proceeds of over \$6 million ("Proceeds"). Various payments were out of the Proceeds, but, as of late 2022, approximately \$3 million remained in Mr. Jagpal's lawyer's trust account.

- [7] On August 14, 2022, Ms. Jagpal and Raji left the family home with Rina and stayed in with Rina in her home. On October 7, 2022, Ms. Jagpal commenced the Family Proceeding, seeking a divorce, child and spousal support, and division of assets, including the Proceeds. In her notice of family claim, Ms. Jagpal alleged that Mr. Jagpal had abused her.
- [8] In his response and counterclaim filed later that month, Mr. Jagpal alleged that Ms. Jagpal has dementia, did not leave the family home voluntarily, and that Rina is preventing other family members from having contact with Ms. Jagpal. As noted, the counterclaim names Rina as a respondent. As noted, numerous applications have been filed in the Family Proceeding. These include protection orders that have been made and later set aside against various family members. Ms. Jagpal has granted and revoked powers of attorney to Rina and has named Rina as her representative under a representation agreement.
- [9] Ms. Jagpal remained at Rina's home until mid-December 2022, when she moved in with Onkar and his family.
- [10] On December 30, 2022, Ms. Jagpal was admitted to hospital for an assessment following an incident in which she became aggressive with Sevina. Dr. Choong assessed Ms. Jagpal as presenting with an 18-month history of progressive cognitive decline with symptoms of dementia, including paranoia.
- [11] Ms. Jagpal continued to live with Onkar until March 2023. After an argument between Rina and Onkar on March 7, Rina took Ms. Jagpal to live with her again. That living arrangement continued to the time of the chambers hearing.
- [12] Sevina filed her petition to have Ms. Jagpal declared incapable by reason of mental infirmity and to have the court appoint her as committee of Ms. Jagpal's person and estate in September 2023. Rina filed her competing petition in November 2023.

Chambers Judgment

- [13] The chambers judge set out the applicable statutory provisions governing a declaration of incapacity, including the factors established in *Stewart (Re)*, 2014 BCSC 2321 to guide the court in deciding whom to appoint as a patient's committee. As the parties agreed that Ms. Jagpal was incapable of managing her affairs, the chambers judge focused on the questions of (a) whether Ms. Jagpal was incapable of managing her person and (b) who should be appointed as her committee.
- [14] On the question of capacity, the chambers judge reviewed the medical evidence. She rejected Rina's challenge to the admissibility of the affidavits of the two medical practitioners tendered by Sevina, those of Dr. Choong and of Dr. Sloan.

- [15] With respect to Dr. Choong, the chambers judge rejected Rina's argument that his evidence should not be admitted because it was prejudicial to her, finding that Dr. Choong's affidavit was served on Rina sufficiently in advance of the hearing. She also rejected Rina's suggestion that Dr. Choong was biased because of statements allegedly made by Onkar at the hospital in December 2022.
- [16] With respect to Dr. Sloan's evidence, Rina submitted that Sevina breached the implied undertaking rule by tendering his report in the petition proceeding when it had been prepared for the Family Proceeding. The chambers judge held that the implied undertaking was spent after Dr. Sloan's report was tendered in evidence in the Family Proceeding in September 2023. The chambers judge also noted that, when the parties appeared before Justice Loo and sought orders regarding the present proceeding, including that Rina disclose medical documents to Dr. Sloan, Rina did not object to Dr. Sloan's evidence being adduced in this proceeding.
- [17] Both Dr. Choong and Dr. Sloan opined that Ms. Jagpal was incapable of managing her person and affairs by reason of mental infirmity, specifically a major neurocognitive disorder or Alzheimer's disease.
- [18] Rina tendered evidence from Dr. Chen, who performed a mini-mental status exam at a health clinic on August 31, 2022, with positive results, and a "Certificate of Health Status" dated May 2023, stating, "patient is mentally intact to make her own decisions". The certificate was made by Dr. Gill, Ms. Jagpal's family doctor.
- [19] The chambers judge placed no weight on the evidence of Dr. Chen and Dr. Gill. With respect to Dr. Chen's assessment, the chambers judge found the testing circumstances "unclear" in light of Dr. Chen's note that the test was "documentation for Rina Jagpal". Similarly, the chambers judge referred to Dr. Gill's notes that the certificate he provided was not for formal or legal purposes, that Ms. Jagpal was not consulted, and that Dr. Gill had provided the certificate at Rina's insistence.
- [20] Rina also tendered the affidavit of Dr. Sztramko, based on his two-hour examination of Ms. Jagpal on December 1, 2023. The chambers judge noted that this evidence was delivered after the court-ordered deadline, and found that it did not contradict the opinions of Dr. Choong and Dr. Sloan.
- [21] Based on the opinions of Dr. Choong and Dr. Sloan, the chambers judge declared that Ms. Jagpal was incapable of managing her affairs and her person. She then considered whom to appoint as Ms. Jagpal's committee.
- [22] Applying the Stewart factors, the chambers judge considered the evidence of Ms. Jagpal's wishes tendered by each of Sevina and Rina. She found that the evidence demonstrated that Ms. Jagpal's wishes "wavered over time" and concluded she should not give weight to this factor.

- [23] Turning to the other factors, the chambers judge gave weight to the evidence that numerous extended family members and friends supported Sevina's appointment as Ms. Jagpal's committee and said they would continue to have contact with Ms. Jagpal. The chambers judge contrasted this with the degree of control Rina had exercised over Ms. Jagpal, including isolating her from other family members. She noted that orders made in the Family Proceeding had ended Ms. Jagpal's isolation.
- [24] The chambers judge compared Sevina's evidence of her experience in acting as Raji's fiduciary and working with special needs children, her stable income, and her suitability to act as a fiduciary, with the lack of any evidence from Rina on these matters. She noted Rina's failure to disclose any information about Ms. Jagpal's financial affairs, who was paying Ms. Jagpal's expenses, or whether Rina had exercised any powers under the power of attorney. The chambers also noted that Sevina had presented evidence of her proposed care plan for Ms. Jagpal whereas Rina had not.
- [25] The chambers judge concluded that appointing Sevina as Ms. Jagpal's committee would be in Ms. Jagpal's best interests:
- [182] What is before the Court is Sevina's sworn intention to act in her mother's best interests, while also facilitating contact between Sharan and Sharan's family and friends as is appropriate. She has demonstrated an ability to act as committee on both capacities. On the other hand, Rina has maintained a cloak of secrecy and non-disclosure that I find troubling, again suggestive of motivations that do not necessarily align with Sharan's best interests.
- [183] In all of the circumstances, I exercise my discretion to appoint Sevina as the committee of Sharan's person and estate. She is the more suitable choice, rather than Rina.
- [26] The chambers judge dismissed Rina's petition and granted Sevina's petition. However, she was alive to concerns that Sevina might exercise undue influence over Ms. Jagpal. She therefore included terms in the order addressing that concern. The order requires Sevina to provide updates to all of Ms. Jagpal's children on her health and medical conditions, to disclose Ms. Jagpal's residence and any proposed change of residence, to facilitate visits between Ms. Jagpal and all of her children, and to provide Ms. Jagpal with access to a telephone. Sevina is also required to file evidence about Ms. Jagpal's assets and liabilities, is subject to restrictions on the management of Ms. Jagpal's money, and cannot serve as Ms. Jagpal's litigation guardian in the Family Proceeding.

ISSUES ON APPEAL

- [27] The appellant's factum does not clearly frame the issues on appeal. I consider the issues are:
- Should the court receive fresh evidence?
 - Should this court disturb the chambers judge's determination of the merits of the petitions?
 - Was there procedural unfairness in the court below?

DISCUSSION

Fresh Evidence Application

- [28] Rina seeks to file two affidavits as fresh evidence. Her written submissions do not say why this court should receive that evidence, although the factual section of her factum reproduces much of it.
- [29] As affirmed in *Barendregt v. Grebliunas*, 2022 SCC 22 at para. 34, the test to determine whether additional evidence should be admitted in an appeal was established by the Supreme Court of Canada in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775, 1979 CanLII 8:
- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, [1964] S.C.R. 484, 1964 CanLII 43.
 - (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
 - (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
 - (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
- [30] The body of Rina's first affidavit consists of argument, and is inadmissible for that reason. There are two exhibits.
- [31] The first exhibit is a letter dated February 4, 2024, from Dr. Choong to the complaints and practice investigations committee of the College of Physicians and Surgeons, apparently responding to a complaint that I infer was made by Rina regarding his treatment of Ms. Jagpal. Dr. Choong's letter confirms his treatment of Ms. Jagpal and is consistent with the opinion expressed in his affidavit. As such, it could not affect the result in the court below and should not be admitted.
- [32] The second exhibit is a transcript of a 17-minute portion of a longer conversation between Dr. Gill and Rina dated May 30, 2023. Most of it appears to be about Dr. Gill's legal woes and the consequent need for him not to continue as Ms. Jagpal's and Rina's physician. In oral argument, Rina pointed to the following statement by Dr. Gill:
- And to be honest, your mom's totally fine. She's totally with it. She has no issues.
- [33] Rina did not explain why she failed to tender this evidence in the court below. Further, the context in which it is made raises doubts about whether it is a medical opinion. I would not admit it.

- [34] Rina's second affidavit attaches three exhibits. The first is the chambers judge's reasons for her award of costs; the second is a consent order in the Family Proceeding; the third is an independent medical examination ("IME") of Ms. Jagpal dated July 15, 2024 (after the date of the decision on appeal) that was sought by Sevina.
- [35] The reasons on costs and the consent order in the Family Proceeding are not evidence and they are not relevant to this appeal. As the IME is generally consistent with the diagnoses of Dr. Choong and Dr. Sloan, it could not have affected the result below.
- [36] I would dismiss the fresh evidence application.

Merits of the Decision Below

- [37] Rina does not take issue with the chambers judge's statement of the law governing assessment of Ms. Jagpal's capacity under s. 3 of the Act nor with the factors to be considered in exercising her discretion to appoint a committee for Ms. Jagpal, as set out in s. 6(1) and in Stewart. Those decisions attract a deferential standard of review: *Mok v. Wong*, 2022 BCCA 418 at para. 20.
- [38] Section 3(1) of the Act provides that a judge must make a declaration of incapacity if, upon reading the affidavits of two medical practitioners opining that the person is incapable, the judge is satisfied that this is the case:

3 (1) If, on

- (a) hearing an application, and
 - (b) reading the affidavits of 2 medical practitioners setting out their opinion that the person who is the subject of the application is, because of
 - (i) mental infirmity arising from disease, age or otherwise, or
 - (ii) disorder or disability of mind arising from the use of drugs,incapable of managing his or her affairs or incapable of managing himself or herself, or incapable of managing himself or herself or his or her affairs,
- the court is satisfied that the person is, because of
- (c) mental infirmity arising from disease, age or otherwise, or
 - (d) disorder or disability of mind arising from the use of drugs, incapable of managing his or her affairs or incapable of managing himself or herself, or incapable of managing himself or herself or his or her affairs, it must, by order, declare the person
 - (e) incapable of managing his or her affairs,
 - (f) incapable of managing himself or herself, or

- (g) incapable of managing himself or herself or his or her affairs.
- [39] This determination attracts a deferential standard of review.
- [40] The chambers judge considered all of the medical evidence before her. She gave reasons for preferring the affidavit evidence of Dr. Choong and Dr. Sloan, who opined that Ms. Jagpal is incapable of managing her affairs and her person, over the evidence of Dr. Chen and Dr. Gill, neither of whom provided a considered medical opinion. The chambers judge also considered the affidavit of Dr. Sztramko, finding that it was generally consistent with the diagnoses of Dr. Choong and Dr. Sloan. The appellant has identified no palpable and overriding error in the chambers judge's reasons on this issue.
- [41] Deciding who to appoint as a committee is a discretionary decision, because the statutory scheme does not dictate a specific outcome. Rather, the decision-maker must decide what to do, based on an established set of boundaries: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 52, 1999 CanLII 699. An appeal court's power to overturn a discretionary decision is limited to situations where the lower court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27. Disagreeing with the decision does not satisfy this test.
- [42] The chambers judge stated the governing legal principles and considered the factors guiding the exercise of her discretion in appointing a committee. She gave reasons grounded in the evidence for appointing Sevina as Ms. Jagpal's committee. She did not misdirect herself.
- [43] The appellant submits that the chambers judge failed to consider evidence in the Family Proceeding, including allegations about conflict within the family, domestic violence, and the treatment of the Proceeds. The chambers judge referred to those matters as forming the context for the proceedings before her, but properly declined to comment on allegations advanced but not yet decided in the Family Proceeding.
- [44] I see no basis for disturbing either of the chambers judge's conclusions on the substantive issues.

Procedural Unfairness

- [45] The appellant submits that the proceeding below was procedurally unfair for two reasons. First, she says that her counsel failed to follow her instructions, did not present evidence that she considered important, and missed filing deadlines. Allegations such as these are referred to as "ineffective assistance of counsel". Second, the appellant submits that there was bias or a reasonable apprehension of bias on the part of the chambers judge.

Conduct of the Appellant's Counsel

- [46] An appellant arguing that a civil appeal should be allowed because of ineffective assistance of counsel will succeed only in extraordinary circumstances. That is because the lawyer's competence is really an issue between the lawyer and the client. It does not involve the respondent at all. Allowing the appeal because of the conduct of the appellant's counsel effectively penalizes the respondent for something with which they were not involved. The appellant may obtain a remedy by pursuing a civil claim against their lawyer: *Nguyen v. 110891 B.C. Ltd.*, 2024 BCCA 48 at paras. 34-36.
- [47] In *Nguyen*, the Court quoted a passage from *D.W. v. White*, [2004] 189 O.A.C. 256, 2004 CanLII 22543 (Ont. C.A.) describing those circumstances:
- [37] A common description of what might constitute such extraordinary circumstances is found in *White*. There, the court said:
- [55] ... I would not be prepared to close the door to the viability of ineffective assistance of counsel as a ground for a new trial in a civil action. But... I would limit the availability of that ground of appeal to the rarest of cases, such as (and these are by way of example only) cases involving some overriding public interest or cases engaging the interests of vulnerable persons like children or persons under mental disability or cases in which one party to the litigation is somehow complicit in the failure of counsel opposite to attain a reasonable standard of representation. The present action is not such a case.
- [48] There are no extraordinary circumstances in this case. While Ms. Jagpal is a vulnerable person, the appellant is not. In oral submissions, Rina indicated that she was unclear whether Mr. Slater was acting for her or for her as Ms. Jagpal's representative. This is an issue between Rina and Mr. Slater; it is not a basis for finding ineffective assistance of counsel in this case.

Judicial Bias

- [49] The test for bias, regardless of whether a reasonable apprehension of bias or actual bias is alleged, is well-settled: Would a reasonable and informed person, with knowledge of all relevant circumstances, viewing the matter realistically and practically, think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly? That question must be answered with due regard for the strong presumption of judicial impartiality: *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at para. 26.
- [50] The appellant submits that the chambers judge demonstrated bias (or a reasonable apprehension of bias) by referring to "Stockholm syndrome" in relation to Ms. Jagpal, and by failing to distinguish between the appellant and her counsel, effectively blaming her for the conduct of her lawyer.

- [51] The appellant characterizes the chambers judge's reference to "Stockholm syndrome" as a finding of fact unsupported by the evidence. That is not a fair reading of the chambers judge's remarks.
- [52] In the course of setting out the history of conflict within the family, the chambers judge expressed concern about the degree of control Rina had exercised over Ms. Jagpal: at para. 126. After referring to certain incidents, the chambers judge said:
- [132] The statements by Sharan to Dr. Sztramko would suggest that [Ms. Jagpal] feels a deep dependence on Rina, no doubt born from Rina's imposition of restrictions on her mother's movements which have resulted in Rina being the sole source of support for [Ms. Jagpal]. This is almost akin to [Ms. Jagpal] having "Stockholm syndrome" where she identifies with Rina and supports Rina as her "captor", not realizing that these extreme measures are not necessarily in her best interests.
- [53] The chambers judge was not making a finding of fact, she was drawing an analogy. Throughout her reasons, the chambers judge expresses her concern, grounded in the evidence, that Ms. Jagpal's mental condition makes her vulnerable to accept direction from others upon whom she relies. This group includes Rina, upon whom Ms. Jagpal was dependent for some time, but the chambers judge also expressed concern that Ms. Jagpal was vulnerable to influence from other family members, including Sevina:
- [175] I agree with the PGT that this is a complicated and nuanced matter. The family dynamics are such that the impartiality of all family members is potentially in issue, including both Sevina and Rina to a degree (although perhaps varying degrees). There is a distinct distrust among many family members, which is overlaid with the substantial amount of money involved, again invoking the suggestion of motivations toward securing those sums.
- [176] In the middle of this family drama stands [Ms. Jagpal], who has, as I noted above, significant capacity issues.
- [54] The terms of the order were crafted to address the possibility that Sevina might exercise undue influence over Ms. Jagpal.
- [55] It is clear that the appellant finds the chambers judge's characterization of her hurtful and inaccurate. However, those remarks are grounded in the evidence. The chambers judge was required to explain why she appointed Sevina as Ms. Jagpal's committee rather than Rina in the face of competing petitions.
- [56] The appellant's concern that the chambers judge conflated the appellant with her counsel is also misplaced. When people engage lawyers to represent them, the lawyer stands in the place of the client in the courtroom. The lawyer is the client's agent or "voice" and the court does not distinguish between them. In this regard, the chambers judge conducted herself in the same way as every other judge. As I have observed, any alleged deficiencies in the conduct of the appellant's counsel are a matter between the two of them.

[57] In my view, the appellant has not demonstrated any procedural unfairness.

CONCLUSION

[58] I would dismiss the appeal.

[59] With respect to costs of the appeal, Sevina is entitled to recover her costs from the estate on a full indemnity basis. Rina shall pay the estate the ordinary costs of the appeal.

"The Honourable Justice Iyer"

I AGREE:

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Mr. Justice Grauer"

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