

CANADA / JUDGMENT

Jundi v. Jundi

2024 BCSC 1439

COURT

Supreme Court of British Columbia

DECIDED

22 July 2024

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2024 BCSC 1439 Jundi v. Jundi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jundi v. Jundi,

2024 BCSC 1439

Date: 20240722

Docket: E063118

Registry: New Westminster

Between:

Haissam Jundi also known as Haissam Abdallah Jundi

Claimant

And

Keshni Lata Jundi also known as Keshni Lata Gopal

Respondent

And

Mohammad Jundi

Respondent

by Way of Counterclaim

Corrected Judgment: The text of the judgment was corrected at paragraph 39 on August 16, 2024

Before: The Honourable Justice Schultes

Oral Reasons for Judgment

In Chambers

(Via MS Teams for all participants)

Counsel for the Claimant:

S. Ahuja

Counsel for Respondent:

B. Danaei

Place and Date of Hearing:

New Westminster, B.C.

May 10 and June 11, 2024

Place and Date of Judgment:

New Westminster, B.C.

July 22, 2024

Introduction

- [1] This is an application by the claimant in this family law matter, pursuant to Rule 20-3(10) of the Supreme Court Family Rules, for the appointment of a litigation guardian. The catalyst for the application is a deterioration in the claimant's physical condition due to chronic illness, which his counsel says has made it impossible for him to communicate effectively with her. He proposes that his nephew fill the role of litigation guardian.
- [2] The respondent opposes the application, on the basis that there is insufficient evidence the claimant has become mentally incompetent, as the rule requires and as that term has been defined in the authorities.

Evidence

- [3] The claimant is currently 64 years old. He and the respondent began living together in 2005, were married in 2007, and separated in 2021. They have one child together, who is now 17, and the claimant has adult children from previous relationships.
- [4] He began the family law proceeding in August 2021. The respondent filed her response in September of that year and at the same time filed a counterclaim that added the claimant's adult son as a respondent. The significance of adding the son for current purposes is that as a party he is precluded from acting as a litigation guardian.

- [5] The claimant and respondent both filed financial statements in 2022 but the litigation does not seem to have advanced very far overall. The court file contains an application from April 2023 for an order that the family home be sold, to which some of the current affidavits pertain, but that application did not result in any orders being made.
- [6] The current application was filed in December 2023, although it was not able to be heard until May of this year. The claimant's counsel advises there were some difficulties in obtaining early available dates from the respondent's counsel.
- [7] The claimant deposes that he began exhibiting signs of dementia approximately five years ago. He says that he also has "some signs" of cognitive impairment and depression. He describes his suspected condition as progressive supranuclear palsy, also known as PSP, which is a neurological condition that affects speech, mobility, and swallowing.
- [8] He deposes that after separation he lived at his auto repair shop for a brief period before he realized that he could not care for himself. He then moved in with his sister and brother-in-law, who are the parents of his proposed litigation guardian, and lived with them for about 14 months. Then, following a hospitalization due to the daily falls that his condition was causing, he was admitted to a long-term care facility, where he currently lives. His nephew deposes that after the claimant came to live with them, he needed their assistance in all of his activities of daily living.
- [9] The primary medical evidence that the claimant relies on to support his diagnosis is from his doctor, who is the medical director of the long-term care facility. The doctor's initial letter was written in January 2023. In it, the doctor describes the claimant's comorbidities as including dementia and PSP, which were diagnosed before he was admitted to the facility. He added that the claimant requires "24/7 nursing care for health reasons". An updated letter was provided by the doctor in January of this year. In it, he explained that the PSP is now "in advanced stages, majorly interfering with his physical dexterity, ambulation, and ability to speak." The claimant required full care for all activities of daily living and his condition was expected to worsen over time.
- [10] On the crucial issue for our purposes of the claimant's cognitive function he wrote as follows:
- [The claimant] also has minor neurocognitive disorder with poor insight into his own physical and mental capabilities despite having a good working memory and a normal score of his recent Mini-Mental Status Exam (MMS score 30 out of 30 - 9/24/2023).
- [11] The claimant's records also indicate that during a hospital attendance following a fall in May of 2022, when he was still living with his sister's family, the attending doctor recorded, presumably based on a history provided by his family, that he had been diagnosed with PSP for three years, with a progressive decline in his function over that period, that his speech was worsening, his family had difficulty understanding him, and there was an issue about him being able to chew food and swallow it.

[12] His nephew describes the claimant's current symptoms as:

- limited mobility and requiring assistance to walk;
- having to eat only soft foods under supervision to avoid choking;
- slurred and slow speech, loss of bladder control; and,
- hand tremors and weakness of grip.

[13] The nephew adds that the care facility has encouraged the claimant to use a walker and to wear a helmet and hip protectors to protect him in the event of falls.

[14] According to the nephew, the claimant's condition has continued to deteriorate. His speech has become increasingly slurred and difficult to understand and his writing has become "unclear". It appears that these are due to the decline in his motor skills. His attention span has also been impacted, the nephew observes. He is able to convey that he understands by nodding or shaking his head in response to direct questions, but the reduction in his attention span means that such questioning is limited to 15-minute periods. Overall it is becoming increasingly difficult to communicate with the claimant.

[15] Dealing more specifically once again with cognitive issues, which are of primary concern for our purposes, the nephew deposes that the claimant's "recall of long-term events is fairly preserved but his short-term memory and recall of recent events is worsening." He is unaware of when the claimant's memory was last tested in a formal way.

[16] The claimant's son has a power of attorney and is named as his representative under a representation agreement. Both documents are in evidence and neither authorizes the conduct of legal proceedings on the claimant's behalf.

[17] His son deposes, as of February of this year, that the claimant had been suffering from PSP for about the last five years. He describes his father being unable to carry on conversations, but able to give single-syllable answers to questions. Members of his family must communicate with him "through a combination of yes and no answers to questions, and basic gestures such as nodding or pointing to a chart with various words on it." The claimant is unable to type, so communicating by keyboard does not appear to be a viable option. However, he adds that he has "no reason to believe that the claimant is not mentally competent."

[18] Finally, although it is not in evidence, the claimant's counsel indicates in her submissions that the effect of the communication difficulties that are described in the affidavits is that she is unable to receive instructions about the conduct of the litigation, to an extent that she may have to consider ceasing to act for him if no remedy is found.

- [19] In contrast, the respondent deposes that, up until the time of separation, the claimant did not demonstrate any difficulties performing physical tasks, including maintenance, repairs and renovations around the family home, and that he continued to carry on his auto repair business until 2022. She also did not observe any deficiencies in his memory, and he never discussed any significant medical diagnoses of the kind that he now refers to.
- [20] As a more recent example, she describes bringing their daughter to visit him at the care facility on her daughter's birthday in February 2023. According to the respondent, the claimant asked her several questions and also engaged in a lengthy conversation with the daughter.
- [21] She also notes the absence of any medical records in the claimant's application material that contain an actual diagnosis of PSP, which his current doctor describes as having been made before his admission to the current care facility. Nor is there material from the neurologist who the claimant's notice of application referred to him as seeing at that time.
- [22] The respondent's counsel also reviewed the medical records that the claimant has provided and pointed out that some of the entries tend to undermine the extent of the difficulties that the claimant describes. For example:
- during a hospital admission in July 2023 following a fall at the care facility, an attending doctor described that the claimant's speech "got better" over the course of his stay;
 - a neurologist who dealt with him during that admission did not believe that he had suffered a transient ischemic attack, which is also known as a mini stroke, or "any type of cerebrovascular event; and,
 - although his speech was described as quite slurred by the attending physician, he was able to pass on information to his attending doctors on matters such as his ongoing dysuria, his ability to transfer from his wheelchair independently, and his wish to have a do not resuscitate order in the event of more serious medical issues arising.
- [23] The respondent's counsel also points out that in order to participate in the mental state examination that his doctor refers to, the claimant would have had to provide his doctor with verbal answers.

Discussion

- [24] Because the claimant began this action before any suggestion of legal disability arose, his application is governed by Rule 20-3(10) which provides:

If a party to a family law case becomes a mentally incompetent person, the court must appoint a litigation guardian for him or her unless:

- (a) a committee has been appointed for the party, or
- (b) the party has a litigation guardian under section 35(1) of the Representation Agreement Act.

[Emphasis added.]

[25] Since Rule 1-1(2) incorporates the Interpretation Act definitions unless a contrary intention appears, a "mentally incompetent person" means a "person with a mental disorder" as defined in section 1 of the Mental Health Act. In turn, that legislation defines a person with a mental disorder as:

a person who has a disorder of the mind that requires treatment and seriously impairs the person's ability

- (a) to react appropriately to the person's environment, or
- (b) to associate with others...

[26] The term "the person's environment" contemplates "the larger community of which the person is a part and in which the person interacts with others. It is not the environment of the court system and process alone": *E.M.E. v. D.A.W.*, 2003 BCSC 1878, at paragraph 39. This was adopted both by a single justice in chambers and a panel upholding that Justice's reasoning in *Holland (Guardian Ad Litem of) v. Marshall*, 2009 BCCA 311, at paras. 28 to 30, and 2009 BCCA 582, at paras. 49 and 50.

[27] The term "person under disability", which is used generally in the litigation guardian rule, is meant to include both mentally incompetent persons and infants: *E.M.E.* at para. 16.

[28] The claimant has also referred to the comments by Justice Chiasson in *Walker v. Manufacturers Life Insurance Company*, 2015 BCCA 143, at para. 12, that the applicant for leave in that case had conceded that "under existing jurisprudence, 'legal disability'" means that the person is not capable of conducting litigation, exercising judgment in relation to the claims in issue and possible settlement or instructing counsel." These principles were traced in the description by Lord Denning in *Kirby v. Leather*, [1965] 2 All E.R. 441 (C.A.), of the ability "to instruct counsel and to exercise judgment in relation to the claims in issue and the possible settlement, as a reasonable person would be expected to do". Justice McDonald reconciled these disparate strains in the law in *Karrington v. Morrisonn*, 2023 BCSC 570, at paragraph 32:

[32] Despite different articulations in *Walker* and *Holland*, I conclude that the overarching test, as described in *Holland*, is whether a person is significantly impaired in their ability to conduct their affairs in the broader environment of their community. According to *Walker*, one factor to consider is whether the person is capable of instructing counsel and exercising judgment in relation to the claims at issue.

[29] The particular value of the language endorsed in *Walker*, from the claimant's point of view is that, in theory, it leaves open the possibility of a finding of disability based solely on the inability of the litigant to instruct counsel in the literal sense of being unable to communicate their preferences and decisions verbally, or in some equivalent form. That is the kind of disability that is being relied on here.

- [30] While I sympathize with the difficult situation in which counsel finds herself, I do not think this argument is tenable. First of all, when subrule (10) is engaged, as it is here, the specific question is whether the litigant is a mentally incompetent person, and it is not possible to avoid the application of the Interpretation Act and the statutory definition of mental disorder that it imports. This involves a disorder of the mind that drives the resulting difficulties, not a degenerative disorder that undermines the motor functions but leaves cognition largely or substantially intact.
- [31] While the material contains references to dementia, memory impairment, and decline in attention span when describing the claimant, none of them has been linked to a disorder of the mind of this nature. There is not even a primary diagnosis or specific mental capacity assessment before the court, which would presumably have explained the cognitive effects of PSP that the claimant experiences, if any, and their present state of progression.
- [32] The ability to interact with one's environment and associate with others read in the context of the statute as a whole obviously derives its meaning from the disorder of the mind that gives rise to those difficulties, not the inability to interact or associate solely due to an impairment of the ability to communicate verbally.
- [33] I also question, despite McDonald J.'s able reconciliation of the two decisions, whether the language in Walker actually applies to situations under subrule (10), in which the specific statutory definition of a mentally incompetent person must be applied. Walker was about the authority of the trial court to order a mental capacity assessment of an unwilling litigant who might potentially have needed a litigation guardian. Even if the language in Walker is preferred, it also clearly describes the mental processes required in order to interact with one's legal representative, not the literal physical ability to impart one's views.
- [34] Therefore, I conclude that the claimant's situation, at least as it is described in the current evidence, does not bring him within this definition of subrule (10). The medical evidence that has been provided, which is limited in scope and inadequate for an application of this nature, actually establishes that as of the various dates that it was obtained the claimant has meaningful residual mental functioning, and although there are some declines in his attention span and short-term memory, it is mainly the mechanical impediments to speech described by his son in his affidavit that stand in the way of communicating with his counsel.
- [35] The remaining question is whether this kind of situation should nonetheless lead to the appointment of a litigation guardian even if it does not fall within the established definitions. Claimant's counsel has invited me to find that a situation in which a litigant cannot verbally express their instructions adequately should also be considered a proper basis for the appointment of a litigation guardian.

- [36] Although the equivalent of this rule in the Supreme Court Civil Rules was found to be "a complete code" for the appointment of a litigation guardian (Walker at para. 11), contrary to that specific comment, the Rules as a whole have described recently as procedural and not a complete code that would oust the potential exercise of the court's inherent jurisdiction: *MacLennan v. The Owners, Strata Plan VR456*, 2023 BCCA 401 at para. 40.
- [37] Despite this potential scope for the exercise of inherent jurisdiction, I am hard put to characterize the legislature's explicit choice of mental incompetence as the threshold for invoking this subrule as having left a gap for personal challenges that fall short of it. It does not appear to be a case, as MacLennan explained, in which the Rules did not contemplate this particular situation. It is simply a situation that falls short of what the legislature has decided should be required.
- [38] More importantly, it is questionable whether there is in fact any practical gap that needs to be filled, so that there would otherwise be an injustice if the order sought is refused. Rule 20-3 provides that if a person has a litigation guardian under section 35(1) of the Representation Agreement Act (that is, a representative who is authorized to make decisions on legal matters) that person is a litigation guardian for the purposes of the family proceeding, and counsel only needs to file a certificate to that effect pursuant to subrule (9). Numerous different kinds and degrees of incapacity could lead to a party's decision to enter into such an agreement, including the kind that is in issue here.
- [39] The claimant's counsel expressed her hesitancy to have the claimant enter into such a significant agreement in the current situation, because of the same difficulty in obtaining his clear instructions and the concern that he may not actually have the capacity to enter into it. I respect her views, informed as they are by actual interactions with the claimant, but section 8 of the Representation Agreement Act allows a person to make an agreement even if they are incapable of:
- (a) making a contract,
 - (b) managing their healthcare, personal care, or legal matters, or
 - (c) the routine management of their financial affairs.
- [40] Given that low bar, I fail to see how signifying his assent to the standard language in section 35(1) authorizing legal representation, which could obviously be done by non-verbal means, risks formulating an agreement that the claimant is not competent to enter into.
- [41] Finally, even if there is a gap, and such a process of supplementing it could be contemplated, I do not think that the current record supports it. It is quite appropriate for counsel to explain in their submissions the nature of their interactions with the client, as a means of explaining the motivation underlying an application. But where those interactions themselves form the basis for the application, there needs to be admissible evidence with respect to it, which can be assessed by the court and tested by the opposing party in the usual way.

- [42] I am able to understand from the claimant's son's affidavit how in basic terms communication with him is carried out, but there is no admissible evidence from the perspective of counsel, whose struggles are the entire basis of this application, about how that falls short of what is necessary to obtain the claimant's assent to steps in the litigation that she recommends. As I have said, on the evidence currently presented I am not convinced that it is the absolute bar that she describes.
- [43] Accordingly, the application must be dismissed.
- [44] The respondent's counsel has indicated that he wishes to address costs once the outcome is known. In the absence of submissions, my preliminary view is that the respondent should have her costs in any event of the cause, at the ordinary scale of difficulty. If counsel wish to submit that a different award is appropriate, they may arrange to make written submissions, according to whatever schedule for exchanging and filing those submissions they arrange.

"Schultes J."

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