
CANADA / JUDGMENT

Korol (Re)

2013 BCSC 979

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Supreme Court of British Columbia

DECIDED

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2013 BCSC 979 Korol (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Korol (Re),

2013 BCSC 979

Date: 20130603

Docket: S149810

Registry: New Westminster

In the Matter of the Patients Property Act

R.S.B.C. 1996, Chapter 349 and amendments

Re: Violet Martha Korol

Wayne Darrell Korol, Petitioner

Before: The Honourable Mr. Justice Jenkins

Reasons for Judgment

Counsel for Petitioner:

K. Deane-Cloutier

Counsel for Allen Korol:

J. Dubas

Counsel for Public Guardian and Trustee:

P.A. Mazzone

Place and Date of Hearing:

New Westminster, B.C.

April 24, 2013

Place and Date of Judgment:

New Westminster, B.C.

June 3, 2013

[1] Wayne Darrell Korol ("Wayne") seeks:

1. A declaration under the Patients Property Act that his mother, Violet Martha Korol ("Violet") is, by reason of mental infirmity, incapable have managing herself and her affairs,
2. An order appointing Wayne as Committee of the person and affairs of Violet,
3. An order cancelling an order of Master Caldwell made December 1, 2011 in New Westminster action no. S138712 and finally,
4. An order discharging a Certificate of Pending Litigation ("CPL") currently filed against title to the West Vancouver property owned by Violet. The CPL has been filed by Violet's estranged husband, Allen Bruce Korol ("Allen").

[2] Allen does not oppose the order seeking a declaration that Violet is incapable of managing herself and her affairs but does oppose the application by Wayne to be appointed as Committee of the person and estate of Violet, the application to cancel the order of Master Caldwell and the application to cancel the CPL. Allen proposes that the Public Guardian and Trustee be appointed as Committee of both the person and estate of Violet. Allen's objections to Wayne being appointed Committee are rooted in Allen's distrust of Wayne and his allegations that Wayne has not been looking after his mother's best interests- both financially and in respect of her health.

[3] Two of Violet's adult children, Darla Mae De Gouveia ("Darla Mae") and Jonathan Korol ("Jonathan") have consented to the appointment of Wayne as Committee of the person and estate of Violet and the other relief sought by Wayne.

[4] The fourth adult child, Perry Allen Korol ("Perry") is currently an inmate in a California prison and is facing several counts of burglary from several hotel rooms in the Carlsbad, California area. Perry has had a history of problems with the law and it is possible that he could be facing many years in prison in California. A copy of the Petition and supporting materials in this matter were delivered to him in prison. Needless to say, Perry was not represented in this matter.

- [5] It is clear from the two affidavits of physicians who have recently assessed Violet that she is no longer capable of managing herself or her affairs and suffers a significant degree of mental impairment related to Dementia, which is not going to improve.
- [6] The Public Guardian and Trustee of British Columbia has responded to the petition and accepts that Wayne "appears to be the appropriate person to act as committee of the patient save and except for the fact that the petitioner is named as a respondent" in the action commenced by Allen (the "Family Law Claim") on October 11, 2011 and in which Allen has filed the CPL against the West Vancouver property as well as a townhouse owned by Violet and located in Langley, B.C. The Public Guardian and Trustee further states "The exact nature and extent of the claim of the petitioner in the Family Law Claim is unclear" and as a result finds it is "difficult to conclude that a conflict exists" between Wayne as petitioner of this proceeding and Violet. As a result, the Public Guardian and Trustee suggests that if Wayne is to be named as Committee of the person and affairs of Violet, protections should be in place respecting Wayne's authority concerning Violet's real estate and other investments.

Background

- [7] Violet and Allen were married in 1961. During the 1970s, the couple purchased the West Vancouver home which was registered in Violet's name and their four children were raised in that residence.
- [8] Violet and Allen separated in 1993. They have never been divorced, although Allen has deposed that he obtained an annulment of the marriage in Costa Rica in 1993. In 1999, Allen married Lorena Campos in Florida and on their application to marry Allen stated that his previous marriage had ended as a result of an annulment issued in 1993 based on the laws relating to annulment in Costa Rica. No certificate of annulment has been tendered in evidence and in the circumstances it is not clear whether or not Violet and Allen are still legally married. It is clear, however, that they have lived separate and apart for almost 20 years.
- [9] In addition to purchasing the West Vancouver home, a condominium in Langley, B.C. and a home in Phoenix, Arizona were also purchased and registered in Violet's name. All of the properties remain registered in Violet's name. In the Family Law Claim, Allen seeks a declaration that he is entitled to a 50% interest in all of the properties and assets.
- [10] Violet is currently 73 years of age and is living in the family home in West Vancouver, with the assistance of 24 hour care. For the last several years, the Dementia has progressively taken its toll on Violet's memory.

- [11] Allen has deposed that between 1999 and 2006 he provided Violet with payments of approximately \$1,200,000 for the upkeep of the properties including a major renovation of the West Vancouver home. Allen also claims in the Family Law Claim to have sent over \$3 million to Violet over several years and claims return of those funds or a tracing order against assets allegedly purchased by Wayne and Violet. Wayne denies that such payments were made. Violet is not able to respond to those allegations due to her infirmity.
- [12] In order to pay for Violet's living expenses, in August of 2002, after Allen ceased making payments towards her living expenses, Wayne arranged for a line of credit to be secured by a registered mortgage against the West Vancouver home. It is Wayne's evidence that Violet has lived off of funds advanced under the line of credit since August of 2002 as she had no source of income. Currently, there are two lines of credit secured by mortgages on the West Vancouver home and the total owing is approximately \$550,000.
- [13] There is also a line of credit secured by a mortgage which is registered against the Langley property. Funds advanced under that line of credit have been used to maintain the Langley and Phoenix properties. A total of approximately \$55,000 is currently outstanding on that line of credit.
- [14] There is very little remaining to be drawn on the lines of credit secured by mortgages on the West Vancouver home. Approximately \$70,000 could be drawn on the Langley property mortgage. The bank has advised Wayne that it can no longer extend credit on a secured line of credit due to the fact that Violet's income is very low. Therefore, it will not be possible to continue to pay Violet's expenses from the lines of credit.
- [15] Wayne obtained a consent order from Master Caldwell on December 1, 2011 prohibiting Violet or any person purporting to have authority to deal with the West Vancouver and Langley properties from transferring, encumbering or otherwise dealing with those properties, and limited any increases in the lines of credit registered against West Vancouver and Langley properties, subject to further order of the court. The order followed a visit by Allen to West Vancouver between October 2011 to December 2011 during which, according to Wayne, Allen had Violet's BMW vehicle placed into Allen's name. Allen was also attempting to obtain a new passport for Violet to allow her to travel to Costa Rica and Violet expressed concerns to Wayne that she feared Allen. Allen left the West Vancouver home after the West Vancouver police were advised of the concerns and asked Allen to leave the house.
- [16] It is clear from the evidence that Wayne has assisted Violet for many years in her dealings with the three properties and her other business and personal affairs. In January of 2008, Violet granted a Power of Attorney to Wayne and in her will executed April 1, 2010, Violet named Wayne as executor. It was under the powers granted him under the Power of Attorney that Wayne, concerned about the return of Allen and fearing that Allen may go after Violet's assets, that Wayne obtained the order granted by Master Caldwell.

- [17] Wayne has also been the primary caregiver to Violet over several years and has assisted her, not only on financial matters, but also in her personal care. It was he who made the arrangements for 24 hour care so that Violet could remain in her home. It is also clear that he has been concerned about Allen's intermeddling in Violet's affairs and his efforts to obtain an interest in Violet's assets. On the advice of Violet's doctor, Wayne had Allen's phone number blocked at Violet's residence following the incident in 2011 when Allen was asked to leave the home by the West Vancouver police.
- [18] In *Pineo (Re)*, [1985] B.C.J. No. 1171, Mr. Justice Spencer discussed considerations in the choice of committee as follows:
- [6] The choice of a committee must be based upon the best interests of the patient. That will include a consideration of who best can deal with his financial affairs, nurture his estate and see that his income and estate are applied for his greatest benefit. The choice of committee of his person will include a consideration of who best can provide the love and support which he will need in his few remaining years.
- [19] In *Mawdsley v. Austin*, [1984] B.C.J. No. 3048, (1984), 14 D.L.R. (4th) 315, [1985] 1 W.W.R. 369, Murphy L.J.S.C. referred to several decisions which repeated the paramount factor of the best interests of the patient and also that: "all things being equal, a member of the family should be appointed as opposed to an outsider."
- [20] The words of Mr. Justice Hood in *Lee (Re)*, [2002] B.C.J. No. 1266, 2002 BCSC 838 are also of assistance:
- [81] it is to be remembered that the issue here is what is in the best interests of Nellie Lee, and whether the Petitioners are qualified to act as her Committees and will properly discharge their duties as such. And in this case we have the petitioner's track record of having looked after Nellie Lee's finances and her person most adequately and prudently over a period of seven years, and in a manner akin to that expected of Committees. . . .
- [87] . . . And in my opinion, the appointment of the Public Trustee would not be in the best interests of the patient if in fact a loving, caring and qualified member of the family was willing to be the Committee.
- [88] It seems to me that in order to displace a caring, and otherwise qualified, member of the family as property Guardian or Committee, some disqualifying conflict of interest must be shown between the interests of the Guardian or Committee and the interests of the dependent patient, which results in a lack of objectivity on his or her part. While in most cases the conflict is financial, personal conflict might be sufficient in a given case.
- [21] Having reviewed all of the affidavits filed in support of and opposing the appointment of Wayne as Committee, the conflicts of interest that would be significant would be any conflicts as between Wayne and his mother, Violet. Allen points to an allegation on his part that Wayne has "taken money from me and Violet" in an amount of at least \$5,000 and that Wayne considers the properties as belonging to him and his siblings and not Allen and

Violet. Wayne completely denies those allegations, which are nothing more than generalizations and lack any supporting evidence. Supposedly, the \$5,000 was used to pay tuition fees for Wayne's daughter, which if true, may well have been a gift from Violet. As well, the amount involved is not significant in light of the cumulative value of the assets.

- [22] The conflicts of significance in this matter are as between Violet and her estranged husband, Allen, assuming, for the sake of argument, that he still is her husband. In the Family Law Claim, Allen is claiming a one-half interest in all of the properties registered in the name of Violet which puts Allen clearly in conflict with Violet and to a lesser degree, the couple's children, including Wayne. In addition, Allen claims damages and an accounting of the funds he purportedly sent to Violet over several years, however, I agree with counsel for the Public Guardian and Trustee that "the nature and extent of the claims is unclear and it is difficult to conclude that a conflict exists between the petitioner and the patient."
- [23] Violet is no longer capable of providing evidence of any agreements regarding the properties as alleged by Allen, of funds allegedly provided by Allen over the past 20 years save for those payments that may be reflected in bank statements and other financial records and if she did receive funds or property from Allen in those 20 years, she is not capable of testifying as to how such funds were spent. The person in the best position to provide evidence and instructions to counsel to defend the Family Law Claim is Wayne, who has been managing Violet's financial affairs for several years, at least since 2002 when Allen appears to have stopped sending funds to Violet.
- [24] Therefore, even if there were to be a conflict between Wayne and his mother, the extent of the same is minor in relation to the amount involved in the possible estate and Wayne is the best person to defend Violet's estate.
- [25] Liberty is given to any party to apply to this Court to substitute the Public Guardian and Trustee as committee if a conflict does become apparent between the committee and the person or estate of the patient.
- [26] Regarding the other considerations in who to appoint as Committee, Wayne has managed Violet's personal and financial affairs for several years and has been her primary caregiver. Violet was obviously expressing her confidence in Wayne by appointing him her attorney and executor of her estate and Wayne has agreed to act without fee whereas the Public Guardian and Trustee charges a fee to act as Committee. By having Wayne act as Committee, the fees of the Public Guardian and Trustee will be avoided. Also, Wayne also lives in West Vancouver, he is trusted by his brother and sister who have consented to his appointment as Committee and the Public Guardian and Trustee has stated "the petitioner appears to be the appropriate person to act as committee..." subject to the alleged conflict; items which I have found are not significant in light of the reasons favouring Wayne's appointment.

- [27] The Public Guardian and Trustee has recommended what I understand to be standard terms in the appointment in lieu of Wayne providing a bond as security for his obligations as Committee. Those terms, which should form part of the order, are:
- a) the Committee is restrained from disposing of or encumbering the real property specified in the Schedule to the Affidavit of Kindred and Fortune without further order on notice to the Public Guardian and Trustee or without the prior written consent of the Public Guardian and Trustee.
 - b) If the Committee sells any of the real property, the net sale proceeds shall be transferred from the conveyancing lawyers' trust account to a financial institution where an investment has been established by the Committee in compliance with the Trustee Act. The Committee shall have no access to the capital of the investment, other than for reinvestment purposes, without the prior written consent of the Public Guardian and Trustee. The financial institution and any other successor institutions shall be served with a copy of the order and proof of service of the order shall be provided to the Public Guardian and Trustee forthwith thereafter.
- [28] With the foregoing precautions in place I am satisfied that the Certificate of Pending Litigation should be discharged as it relates to the West Vancouver property.
- [29] The Public Guardian and Trustee shall have its costs of this application as against the estate.
- [30] The order of Master Caldwell of December 11, 2011 is hereby set aside in its entirety subject to the terms of this order as set out in paragraph 27 of these reasons for judgment.

"Jenkins J."

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