

CANADA / JUDGMENT

## Marzec v. Nemi

2022 BCSC 178

### COURT

Supreme Court of British Columbia

### DECIDED

4 February 2022

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2022 BCSC 178 Marzec v. Nemi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Marzec v. Nemi,

2022 BCSC 178

Date: 20220204

Docket: S142398

Registry: Vancouver

Between:

Gerald Edward Marzec

Plaintiff

And

The Bank of Nova Scotia Trust Company, as executor of the will of Jean Irene Nemi also known as Jean Irene Niemi, Deceased

WRA Wildlife Rescue Association of British Columbia

The Parish of St. Philip's Vancouver

Critter Care Wildlife Society

Heart and Stroke Foundation of B.C. And Yukon

The Valhalla Wilderness Society

The Arthritis Society - La Societe D'arthrite

Knowledge Network Corporation

Vancouver Hospice Society

British Columbia Lung Association

The Canadian Red Cross Society

British Columbia Society for The Prevention of Cruelty to Animals

(BC SPCA Provincial Office)

The Nature Trust of British Columbia

Northern Lights Wildlife Society

Union Gospel Mission

Van Dusen Botanical Garden Association

The Salvation Army British Columbia Division

The Bloom Group Community Services Society

SPCA Vancouver Hospital Trust Fund

The Jane Goodall Institute for Wildlife Research, Education and Conservation/L'institut Jane Goodall Pour La Recherche,

L'education Et La Conservation De La Faune

Doctors Without Borders Canada Medecins Sans Frontiers Canada

Save The Children Canada/Aide A L'enfance Canada

Covenant House Vancouver Stephen Lewis Foundation

Defendants

Corrected Judgment: The text of this judgment was corrected at paragraphs 34, 49, 83, and 93 on February 22, 2022.

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

Counsel for Plaintiff:

## **J. Peterson**

Counsel for Defendants British Columbia Society for The Prevention of Cruelty to Animals (BC SPCA Provincial Office), SPCA Vancouver Hospital Trust Fund, The Arthritis Society - La Societe D'arthrite, The Bloom Group Community Services Society, The Salvation Army British Columbia Division, The Valhalla Wilderness Society, Union Gospel Mission:

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K.A. Kuntz

Counsel for the Defendant The Bank of Nova Scotia Trust Company:

A.A. Mortimore

Place and Date of Hearing:

Vancouver, B.C.

August 5, 2021

Place and Date of Judgment:

Vancouver, B.C.

February 4, 2022

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## I. Introduction

- [1] The Stephen Lewis Foundation, Covenant House Vancouver, and Doctors Without Borders Canada/Médecins Sans Frontières Canada (the "Applicants") apply to dismiss the notice of civil claim ("NOCC") of Gerald Marzec for want of prosecution.
- [2] The Applicants also seek a declaration that the certification of fitness of Mr. Marzec's counsel, Mr. Edmonds (the "Certificate") and consent to act as Mr. Marzec's litigation guardian of Trevor Todd (the "Consent") are without force and effect.
- [3] Under the NOCC, Mr. Marzec seeks maintenance from the estate of his mother, Jean Irene Nemi (the "Deceased"), under the Wills Variation Act, R.S.B.C. 1996, c. 490. The Applicants and other Defendants to the NOCC are the beneficiaries under the Deceased's will (the "Will").
- [4] All of the responding Defendants, other than the Bank of Nova Scotia Trust Company ("Scotiustrust"), consent to the orders sought under the application. Scotiustrust is the executor under the Will and takes no position.
- [5] Mr. Marzec opposes all of the relief sought.

## II. Facts

### A. Background

- [6] The Deceased died on July 24, 2013. A grant of probate was issued to Scotiustrust on January 14, 2014.
- [7] Mr. Marzec (or the "Plaintiff") is the Deceased's only child.
- [8] The Deceased's entire estate was left to charities. The Will states that no provision is made for Mr. Marzec "as I have had no communication from him for a long time, and do not even know his whereabouts".
- [9] The NOCC was filed on March 28, 2014. It was filed by Mr. Edmonds as the Plaintiff's legal counsel.
- [10] Scotiustrust filed a response to civil claim on July 18, 2014.
- [11] The British Columbia Society for the Prevention of Cruelty to Animals (BC SPCA Provincial Office), Union Gospel Mission and The Salvation Army British Columbia Division jointly responded on December 30, 2014.
- [12] The Valhalla Wilderness Society, The Arthritis Society - La Societe D'Arthrite and The Bloom Group Community Services Society jointly responded on January 20, 2015.
- [13] The NOCC was served on the Applicants on or about March 26, 2015.

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- [14] The Stephen Lewis Foundation and Covenant House Vancouver jointly responded on April 14, 2015.
- [15] Doctors Without Borders Canada/Médecins Sans Frontières filed a response to civil claim on May 8, 2015.
- [16] On October 16, 2015, Mr. Edmonds sent a without prejudice communication (the "Communication") to then counsel for Scotiatrust in an attempt to resolve the litigation.
- [17] After receiving the Communication, counsel for the Applicants, Ms. Kuntz, sought further information from Mr. Edmonds on January 19, 2016.
- [18] Having received nothing further by May 16, 2016, Ms. Kuntz followed up with Mr. Edmonds. On or around May 19, 2016, Mr. Edmonds advised Ms. Kuntz that he could not provide the information sought as he did not know Mr. Marzec's whereabouts and had been unable to reach him for months.
- [19] On September 23, 2019, Mr. Edmonds provided Ms. Kuntz with some of the information she had requested.
- [20] On October 25, 2019, Scotiatrust wrote all counsel asking whether there had been any progress and offering to help move matters forward. On July 16, 2020, Scotiatrust wrote again about moving things forward and asked whether Mr. Edmonds could advise whether a litigation guardian would be necessary.
- [21] On September 3, 2020, Scotiatrust wrote again suggesting a conference to set timelines to move forward.
- [22] On August 31, 2020, Mr. Edmonds filed the Certificate and Consent.
- [23] On September 3, 2020, Mr. Edmonds advised all counsel that litigation guardian documents had been filed and that Mr. Todd would act as litigation guardian.
- [24] On January 8, 2021, Scotiabank wrote Mr. Edmonds asking if a litigation guardian appointment had been made and reiterating its desire to complete the estate administration.
- [25] On February 18 and 22, 2021, counsel for Scotiabank followed up with Mr. Edmonds confirming next steps, after a phone call they had on the afternoon of February 18, 2021. On February 24, 2021, Ms. Kuntz followed up with Mr. Edmonds.
- [26] On February 25, 2021, Mr. Edmonds delivered to all counsel filed copies of the Certificate and Consent.
- [27] On May 18, 2021, Ms. Kuntz wrote Mr. Edmonds saying she would be applying to dismiss Mr. Marzec's claim for want of prosecution. Later that day, Mr. Edmonds advised all counsel that Mr. Marzec had been located by the Thunder Bay Police Services ("TBPS") and saying this could be verified by googling Mr. Marzec's name.

- [28] On May 19, 2021, Ms. Kuntz wrote Mr. Edmonds saying that "proof of life" was insufficient, and that Mr. Edmonds needed to confirm that he was still retained or that he was able to satisfy the Court that Mr. Marzec required a litigation guardian.
- [29] On May 28, 2021, Ms. Kuntz wrote Mr. Edmonds noting that she had not received the information sought. She asked him to confirm these facts:
- a) To date, Mr. Edmonds had not been in contact with Mr. Marzec;
  - b) To date, Mr. Edmonds had no confirmation from Mr. Marzec that Mr. Marzec wished to proceed with the NOCC or considered Mr. Edmonds still retained; and,
  - c) To date, Mr. Edmonds did not have confirmatory, or any, evidence from Mr. Marzec's doctor that Mr. Marzec was now incapable and needed a litigation guardian.
- [30] As of the filing this application, Mr. Edmonds had not responded to Ms. Kuntz's requests for confirmation.

#### B. Plaintiff's Evidence on Application

- [31] Mr. Edmonds swore an affidavit in response to the application.
- [32] In or about September 2013, Mr. Edmonds' firm, Paine Edmonds, was retained by Mr. Marzec for the subject litigation. At that time, Mr. Marzec told Mr. Edmonds that he had been charged with assault in 2012, found not criminally responsible, and committed to the Thunder Bay Regional Health Sciences Centre (the "Centre") for treatment. He said he had been residing in the Centre's forensic unit since November 2012 (and before that in the Thunder Bay District Jail).
- [33] Mr. Edmonds attaches two medical reports about Mr. Marzec. The reports state on their face that they are psychiatric reports prepared for judicial assessment orders and both are addressed to the presiding justice at the Ontario Court of Justice. The reports are dated June 13, 2012, and August 2, 2012 respectively, and both are signed by Dr. R.R. Sheppard in his capacity as Director of Forensic Mental Health Services for the Centre.
- [34] The June 2012 report addresses fitness to stand trial. It notes Mr. Marzec's lengthy history of serious mental illness and many previous admissions to psychiatric facilities. It provides a diagnosis of paranoid schizophrenia and notes a long-standing refusal to take antipsychotic medication. Dr. Sheppard describes Mr. Marzec as having most likely suffered from mental illness for 20 years or more. He comments that Mr. Marzec has reasonably intact cognitive functioning, but his thinking is dominated by delusional beliefs. He also observes that he has suffered general decline in social functioning.
- [35] The August 2012 report addresses criminal responsibility. It notes Mr. Marzec's historical refusal to take any treatment, observing that he has gone "untreated for many years". Dr. Sheppard describes him as socially isolated and chronically delusional, in a longstanding psychotic state and lacking insight about his illness.

- [36] Mr. Marzec's October 3, 2012 warrant of committal to the Centre's forensic unit is also attached to Mr. Edmond's affidavit.
- [37] Mr. Edmonds attests that while Mr. Marzec was residing in the Centre, Mr. Marzec demonstrated a keen memory, the ability to apply logic and reason, and a good understanding of legal issues. He had no difficulty obtaining instructions from Mr. Marzec at that time, including about settlement.
- [38] In January 2016, Mr. Edmonds' assistant attempted and was unable to reach Mr. Marzec at the Centre's forensic unit.
- [39] Mr. Edmonds made extensive efforts after that to locate Mr. Marzec, including engaging a skip-tracer and a private investigator. The efforts were not fruitful.
- [40] Mr. Edmonds then contacted the Office of the Public Guardian and Trustee ("PGT") in Ontario and BC to see if either could assist with the NOCC litigation. The Ontario PGT advised it could not as the matter was BC litigation, and the BC PGT advised it could not because Mr. Marzec resided in Ontario.
- [41] Mr. Marzec's whereabouts remained unknown to Mr. Edmonds until July 18, 2019. At that time, he was contacted by Milja MacFayden. Ms. MacFayden identified herself as Mr. Marzec's cousin and said she was responding to a letter sent out during the earlier investigations. Ms. MacFayden advised that Mr. Marzec was living with her at her home near Thunder Bay. Mr. Edmonds asked to speak with Mr. Marzec, but Ms. MacFayden told him that Mr. Marzec had refused.
- [42] In or about the spring of 2020, Ms. MacFayden updated Mr. Edmonds, advising she had the police remove Mr. Marzec from her home because he was throwing her possessions into the garbage. She advised that she had lost touch with Mr. Marzec after he was removed. She informed Mr. Edmonds that Mr. Marzec had not (to her knowledge) seen a doctor or taken medication while living with her.
- [43] In May 2021, Mr. Edmonds reported Mr. Marzec as a missing person to the TBPS. He was subsequently advised by Deputy Constable Saunders of the TBPS that Mr. Marzec had been located residing in a Thunder Bay extended care hospital, and had been there since December 2020 because of mental health issues. Mr. Edmonds was unable to contact Mr. Marzec at the hospital.
- [44] On June 18, 2021, Ms. MacFayden advised Mr. Edmonds that Mr. Marzec had been arrested and was in jail. On July 9, 2021, she advised he remained in jail.

### C. The NOCC

- [45] The NOCC alleges that the Deceased failed to make adequate provision for the maintenance and support of the Plaintiff. Mr. Edmonds attests that Mr. Marzec provided the following factual information to him for purposes of the NOCC.

- [46] Mr. Marzec's last contact with the Deceased was when he was about 11 years old, at which time the Deceased left him and his father. Shortly after her departure, Mr. Marzec was sent live with his maternal grandparents on their farm in Thunder Bay. He largely resided there with his grandparents up until their deaths, and afterward continued on for a period with his uncle who inherited the farm. In 2005, his uncle asked Mr. Marzec to move out.
- [47] Mr. Marzec graduated from high school late. He has physical disabilities and qualified for the Ontario Disability Support Program in or about 1986. He has only ever earned minimal employment income (less than \$10,000 a year), and has mainly survived on disability benefits, limited support from his maternal grandparents and uncle, and small inheritances he received from those family members.
- [48] As of 2013, Mr. Marzec had about \$160,000 in savings and owned a small (about 550 square feet) dilapidated dwelling on a small lot in Thunder Bay. The property was bought in 2009 for about \$20,000.

### III. Analysis

#### A. Hearsay Evidence

- [49] The Applicants object to the hearsay in Mr. Edmond's affidavit. As is evident from the summary above, it contains abundant hearsay. The position of Plaintiff's counsel in response to that objection could be described as a bare assertion of entitlement. Plaintiff's counsel expressly objects to any hearsay in the Applicants' materials.
- [50] Rule 22-2 of the Supreme Court Civil Rules, B.C. Reg 168/2009 [Rules], deals with affidavits. Rule 22-2(12) and (13) read:

#### Limitation on contents of affidavit

- (12) Subject to subrule (13), an affidavit must state only what a person swearing or affirming the affidavit would be permitted to state in evidence at a trial.

#### Exception

- (13) An affidavit may contain statements as to the information and belief of the person swearing or affirming the affidavit, if
- (a) the source of the information and belief is given, and
  - (b) the affidavit is made
  - (i) in respect of an application that does not seek a final order, or
  - (ii) by leave of the court under Rule 12-5(71)(a) or 22-1(4)(e).

- [51] Rule 22-1(4)(e) provides:

#### Evidence on an application

- (4) On a chambers proceeding, evidence must be given by affidavit, but the court may
- (e) receive other forms of evidence.

[52] It is clear that the Applicants cannot rely on hearsay evidence to have the NOCC dismissed, as this would be a final order: *Tundra Helicopters et al. v. Allison Gas Turbine et al.*, 2002 BCCA 145 at para. 32 [Tundra Helicopters]. I am inclined, however, to agree with the Plaintiff that he should be entitled to rely on hearsay in response. The Plaintiff does not seek a final order - he seeks to dissuade the Court from making one.

[53] *Progressive Construction Ltd. v. Newton* (1980), 25 B.C.L.R. 330, 117 D.L.R. (3d) 591 (S.C.) [Progressive], involved an application for summary judgment (under what is now Rule 9-6). Justice Esson (as he then was) said:

[17] It was also held in cases decided under O. 14 that information and belief affidavits were not admissible in answer to a motion for summary judgment: *W. H. Malkin Ltd. v. Jackson* (1963), 44 W.W.R. 63 (B.C.). It may no longer be necessary to prohibit a respondent to a R. 18 application from relying upon information and belief. It is obviously right that an applicant who invokes this extraordinary procedure should not be allowed to rely upon anything but direct evidence. But to apply the same rule to respondents may be unfair. The respondent, at that stage, need only raise a doubt as to whether it is manifestly clear that his case is bad. There are two bases on which he might now be permitted to rely on affidavits deposing to statements by others as to material facts. One is that, by a combination of RR. 40(42) and 51(9), there is a discretion to permit statements on information and belief. The other possible basis is that an affidavit testifying to what somebody else has said may be direct evidence of a fact which, on the application, is material for the respondent to prove, i.e., that he has knowledge of a potential witness. Often it is impractical, by reason of constraints of time or distance, to obtain affidavits from potential witnesses, and sometimes it is impossible -- there being no power equivalent to the subpoena which can require a person to swear an affidavit.

[Emphasis added.]

[54] *Anhalt v. Flowers*, 2013 BCSC 1378, also involved a Rule 9-6 application, in that case to strike a third party notice. There, Justice Hyslop cited *Progressive* and granted the application respondent leave to rely on hearsay evidence in response (see paras. 35-40 and 54).

[55] The basis for leave discussed in *Progressive* and granted *Anhalt* does not hinge on the facts of the cases nor the particular facts sought to be established by hearsay. It was considered appropriate to permit the application respondent to rely on hearsay due to the nature of the application - that is, an application that, if successfully opposed, would enable the respondent to have a trial hearing on the matter.

- [56] An application to dismiss for want of prosecution shares that characteristic. Mr. Marzec is opposing the application in order to have the NOCC determined on the merits. As in *Progressive and Anhalt*, I conclude that the nature of an application to dismiss for want of prosecution renders it fair and appropriate to permit Mr. Marzec to rely on hearsay evidence in response. While the Plaintiff neither pled Rule 22-1(4) nor sought leave in his submissions, the leave flows from the nature of the application itself.
- [57] Leave is granted. The evidence in Mr. Edmond's affidavit based on information and belief is admissible on the application.
- [58] That said, Mr. Edmond's affidavit contains unattributed hearsay and double hearsay. That evidence remains inadmissible despite the leave granted: *Albert v. Politano*, 2013 BCCA 194 at paras. 19-22; *Shaver v Mallinckrodt Canada ULC*, 2021 BCSC 404 at para. 53. I have disregarded the unattributed and double hearsay.

#### B. Want of Prosecution

- [59] Rule 22-7(7) of the Rules reads:

- (7) If, on application by a party, it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed.

- [60] The test to be applied is well-established: *Tundra Helicopters* at para. 15; *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535 at para. 27 [*Country West*].

- [61] In *Country West*, Justice Low, writing for the Court, articulated the relevant considerations as follows:

- [27] [A] chambers judge charged with the hearing of an application for dismissal of an action for want of prosecution is bound to consider the following:

- (1) the length of the delay and whether it was inordinate;
- (2) any reasons for the delay either offered in evidence or inferred from the evidence, including whether the delay was intentional and tactical or whether it was the product of dilatoriness, negligence, impecuniosity, illness or some other relevant cause, the ultimate consideration being whether the delay is excusable in the circumstances;
- (3) whether the delay has caused serious prejudice to the defendant in presenting a defence and, if there is such prejudice, whether it creates a substantial risk that a fair trial is not possible at the earliest date by which the action could be readied for trial after its reactivation by the plaintiff; and
- (4) whether, on balance, justice requires dismissal of the action.

- [28] I consider the fourth question to encompass the other three and to be the most important and decisive question.

- [29] I would not attempt to state what reasons for the delay might serve as an excuse for the plaintiff. In some cases, for example, negligence of the plaintiff's lawyer might amount to an excuse, in others it might not. Whether the reason for the delay amounts to an excuse will depend on the circumstances of the particular case.
- [62] The Applicants contend that they have responded promptly and have tried to move the matter forward, while the Plaintiff has delayed inordinately and taken no steps to advance the action toward trial in more than seven years. They say that the Plaintiff has been dilatory and the delay is inexcusable.
- [63] They rely on the presumption of prejudice that arises where inordinate and inexcusable delay is established: *Tundra Helicopters* at para. 36; *Busse v. Chertkow*, 1999 BCCA 313 at para. 27. They submit that the presumption reflects the fact that the recollections of witnesses are subject to the "normal frailties of human memory and of its tendency to reconstruct bygone events": *March v. Tam*, 2002 BCSC 1125 at para. 53.
- [64] They assert that a fair trial of the issues is no longer possible because of the delay. They submit that the fact it is a wills variation claim also favours a dismissal in the interests of justice. The Deceased died on July 24, 2013 and probate was granted on January 14, 2014, yet the beneficiaries have been waiting for over seven years. They say that it is prejudicial to beneficiaries for the administration of an estate to be hung up indefinitely: *Allen v. Sir Alfred McAlpine & Sons Ltd.*, [1968] 2 Q.B. 229 (Eng CA).
- [65] The Plaintiff notes that the Court of Appeal has endorsed a cautious approach to dismissal for want of prosecution: *Tundra Helicopters* at para. 37.
- [66] Mr. Edmonds submits that the delay was due to Mr. Marzec's health issues and thus is excusable delay. He emphasizes the lack of any suggestion of tactical delay.
- [67] He also relies on *Pardy v. Levant*, 2015 BCSC 130, and, in particular, the Court's observation that, in some cases, the presumption of prejudice may be insufficient on its own to warrant dismissal: at paras. 12-15. In *Kolic v. Kolic*, 2019 BCSC 1827, an application to dismiss was brought five years after the filing of a wills variation claim. The delay was found to be inordinate and inexcusable, but the presumption of prejudice was found to be insufficient in the circumstances:
- [39] That said, given the nature of the litigation which involves a will and conduct prior to an individual's death, it is not uncommon to assess past events at such trials. There are in this case notes of the officer and the solicitor and such witnesses are available to testify. While a rebuttable presumption of prejudice exists, I am not satisfied the prejudice is sufficiently significant that serious prejudice exists sufficient to make a fair trial impossible.
- [68] He notes that the Applicants have put forward no evidence of specific prejudice.

[69] As for the interests of justice, counsel for the Plaintiff contends that the claim seeks to enforce a parent's moral obligation to a disabled child and that the Court should be reluctant to dismiss a claim of that nature.

1. Inordinate Delay

[70] Whether delay is inordinate is case and circumstance specific.

[71] The NOCC was filed in a timely way. While not moving with particular expedition, progress was reasonable through to the October 16, 2015 Communication. Then, nothing whatsoever was done to advance toward trial. I consider the delay between the Communication and the filing of this application inordinate in the circumstances.

2. Inexcusable Delay

[72] There is, however, reason for the delay.

[73] On Mr. Edmonds' evidence, the Plaintiff has a chronic and untreated mental illness, and has been caught up in a pattern of hospitalizations and criminal detentions directly and indirectly related to his mental illness. The evidence shows that Mr. Marzec has effectively fallen off the grid between his periods of hospitalization and detention, again for reasons very likely related to his mental illness, and that he has probably suffered ongoing decline in social skills and ability over the period since Mr. Edmonds spoke with him directly.

[74] Mr. Edmonds has made admirable efforts to locate Mr. Marzec at various times since October 2015. It was reasonable to spend time seeking assistance from the PGTs. Even so, it is apparent that a litigation guardian could and should have been sought earlier on in the matter. That said, as much as Plaintiff's counsel may have been dilatory in seeking a litigation guardian, that should be treated as a period of delay imposed on the Plaintiff by his solicitor and not as delay attributable to the Plaintiff. It also accounts for only some of the period of delay. Mr. Edmonds properly spent time pursuing other avenues to move things forward first.

[75] While the evidence is not detailed enough to establish that the entire delay can be attributed to Mr. Marzec's illness, I find the bulk of it can. Further, some part of the delay rests with Mr. Edmonds.

3. Prejudice

[76] I conclude that a fair trial can be held.

[77] While Mr. Marzec would have been able to testify when the NOCC was filed and he may be incapable now, that may have been the case as early as 2016. Any prejudice in that respect cannot be attributed to the delay.

[78] Further, the Will does not exclude Mr. Marzec based on some specific past event or events (see, for comparison, Kolic, which involved allegations of assault and past abusive behaviour). The Plaintiff was excluded because he and the Deceased had no extant

relationship. This application suggests that the "past events" at trial will centre on an inquiry into Mr. Marzec's capacity and ability to have a relationship with the Deceased. Medical records and expert opinion will be important, as opposed to the evidence of individual witnesses recalling discrete events from memory.

[79] The presumption is insufficient to carry the day here, and the Applicants have failed to show sufficient actual prejudice.

#### 4. Interests of Justice

[80] Finally, while the inability to administer the estate is some evidence of prejudice to the beneficiaries, it is not compelling here. There is no evidence the Defendant institutional charities are suffering any hardship. There are no individual Defendants.

[81] The Plaintiff, on the other hand, has limited assets and prospects, serious medical issues and a real chance of success on his claim.

[82] I am satisfied that it would be unjust to dismiss the action in the circumstances.

### C. Appointment of Litigation Guardian

[83] The Applicants contend that the Rules require the appointment of a litigation guardian to be by court order when a party becomes mentally incompetent during a proceeding. They object to the filing of the Certificate and Consent.

[84] They say that as Mr. Edmonds has not been in direct contact with the Plaintiff, there is no foundation for his Certificate. They also suggest the absence of evidence demonstrating Mr. Edmonds' ongoing retainer is problematic.

[85] The Plaintiff's response to application does not respond to these arguments beyond opposing the relief sought. I interpret that as an assertion that the Certificate and Consent are valid as they stand.

[86] Rule 20-2, which deals with persons under disability, includes these provisions:

#### Start of proceedings by person under disability

(2) A proceeding brought by or against a person under legal disability must be started or defended by his or her litigation guardian.

### Role of litigation guardian

(3) Unless a rule otherwise provides, anything that is required or authorized by these Supreme Court Civil Rules to be done by or invoked against a party under disability must

(a) be done on the party's behalf by his or her litigation guardian, or

(b) be invoked against the party by invoking the same against the party's litigation guardian.

Lawyer must be involved

- (4) A litigation guardian must act by a lawyer unless the litigation guardian is the Public Guardian and Trustee.

### **Litigation guardian**

- (5) Unless the court otherwise orders or an enactment otherwise provides, a person ordinarily resident in British Columbia may be a litigation guardian of a person under disability without being appointed by the court.

### **Committee as litigation guardian**

- (6) If a person is appointed committee, that person must be the litigation guardian of the patient in any proceeding unless the court otherwise orders.

### **Consent of litigation guardian**

- (7) Before the name of a person is used in a proceeding as a litigation guardian, that person's consent, signed by the person or his or her lawyer, must be filed, unless the person
  - (a) has been appointed by the court, or
  - (b) is the litigation guardian under section 35 (1) of the Representation Agreement Act of a party to that proceeding.

### **Certificate of fitness**

- (8) Unless a committee has been appointed, the lawyer for a person under disability, before acting in a proceeding, must, unless subrule (9) applies [which involves filing a certificate for a person under s. 35(1) of the Representation Agreement Act], file a certificate that he or she knows or believes that
  - (a) the person to whom the certificate relates is an infant or mentally incompetent person, giving the grounds of that knowledge or belief, and if the person to whom the certificate relates is a mentally incompetent person, that a committee has not been appointed for the person, and
  - (b) the proposed litigation guardian of the person under disability has no interest in the proceeding adverse to that person.

Party becoming incompetent

- (10) If a party to a proceeding 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.

#### Removal of litigation guardian

- (11) If it is in the interest of a party who is under disability, the court may remove, appoint or substitute a litigation guardian.

[Emphasis added]

[87] Very similar facts and issues were before the Court in *Gengenbacher v. Smith*, 2016 BCSC 1164. The action had been filed in Mr. Gengenbacher's own name. The relevant passage of the decision reads:

[11] I will deal first with the application to substitute a litigation guardian, a Mr. Evens, on behalf of Mr. Gengenbacher. Mr. Evens has signed a consent stating that he is Mr. Gengenbacher's brother, undertakes to be responsible for the costs of the proceeding, and has no interest in the proceeding adverse to that of Mr. Gengenbacher.

[12] Counsel for Mr. Gengenbacher has prepared a certificate of fitness, in the terms required by Rule 20-2(8), certifying that Mr. Gengenbacher is a mentally incompetent person, and setting out the bases of that belief. Those bases include meetings and telephone conversations with Mr. Gengenbacher since 2014, and review of medical reports from a psychiatrist, a neurologist and Alberta government employees, all from between 2008 and 2010.

[13] Counsel for the lawyer points to the age of the medical information on which the certificate is partly based, and is concerned that any order made with respect to appointing a litigation guardian not become either *res judicata* in any later proceedings between Mr. Gengenbacher and his former lawyer, or influence any findings of fact in any later proceedings. The concern is that the order might be taken as a finding of Mr. Gengenbacher's capacity that might somehow be applied retrospectively.

[14] In my view, the Rules with respect to conducting litigation through a litigation guardian clearly leave any assessment of capacity to counsel: the court does not inquire into capacity, nor does the court rule on capacity. It is enough that a lawyer, as an officer of the court, certify that a person is "a mentally incompetent person," in the words of Rule 20-2(8).

[15] If this were a fresh action, no order would be required. Sub-rule (2) provides that no action may be by or against a person under legal disability except by his or her litigation guardian. "Person under legal disability" is a necessarily broader term than "mentally incompetent person" so as to permit infants to engage in litigation while minors. In *E.M.E. v. D.A.W.*, 2003 BCSC 1878, the court held at para. 16 that persons under legal disability for the purposes of Rule 20-2 were infants or mentally incompetent persons, based on a reading of the Rule as a whole. I note that sub-rule (12) contemplates a litigant who attains majority during the litigation, and who is "then under no legal disability" of assuming conduct of their litigation on filing an affidavit.

- [16] Sub-rule (10) contemplates court involvement in this question only if a litigant becomes a mentally incompetent person while a party to a proceeding, in which case the court must appoint a litigation guardian if no committee has been appointed or the litigant has not nominated a representative under the Representation Agreement Act, R.S.B.C. 1996, c. 405. *E.M.E. v. D.A.W.*, does not require an inquiry into mental capacity in every case, as in there it was an opposing party seeking appointment of a litigation guardian for a self-represented litigant, with neither a lawyer's certificate nor consent of a proposed litigation guardian. In my view, the court can accept the certificate of one of its officers, even in the midst of an action, without having to go behind that certificate or requiring evidence to support it. Otherwise, a represented party might be exposed to collateral proceedings or inquiries, additional expense of expert opinions on mental capacity, or, in a worst case, investigation or examination by opposing counsel into capacity in the middle of proceedings.
- [17] On filing a signed certificate of fitness, I order the appointment of Mr. Evens as litigation guardian for Mr. Gengenbacher.
- [Emphasis added.]
- [88] Paragraph 14 of the Gengenbacher decision has been cited by the Court of Appeal: *Boury v. Iten*, 2019 BCCA 81 at para. 78; *Rehak v. Zalanfy Estate*, 2019 BCCA 86 at para. 18.
- [89] The Applicants are correct. The Rules do require a court appointment here. Counsel for the Plaintiff cannot, as he has purported to do, file the Certificate and Consent and then unilaterally adjust the style of cause. That does not mean the Certificate and Consent are void, just that their filing does not itself effect an appointment.
- [90] I do not see any purpose that would be served by requiring counsel for the Plaintiff to file a separate application, the issue of appointment having been raised and canvassed under the Applicants' application. As the Applicants cited Gengenbacher in their notice of application, they were alive to the applicable law.
- [91] Gengenbacher holds that it is inappropriate for the Court or the party opposite to go behind a solicitor's certificate of fitness or demand that evidence be adduced in support of a certificate: at para. 16.
- [92] Here, the appointment issue was raised in the midst of an application to dismiss for want of prosecution. Mr. Edmonds provided evidence to establish the delay was excusable. It is not open to the Applicants to point to that evidence and critique its admissibility or sufficiency as evidence in support of the Certificate. Mr. Edmonds is not obliged to provide any evidence regarding the Certificate.
- [93] Neither is Mr. Edmonds obliged to establish by evidence to the Applicants' satisfaction that he continues to be retained. The Applicants provide no authority for that remarkable assertion.

[94] The Applicants complain of delay. I can see no reason not to appoint Mr. Todd based on the matter having been brought before me by the Applicants. Mr. Edmonds has provided the Certificate. There is no evidence that a committee has ever been appointed for Mr. Marzec. Mr. Edmonds sought PGT assistance, but was unable to obtain it. Mr. Todd has filed a Consent. The appointment is proper.

#### IV. Disposition

[95] The application for an order dismissing the proceeding for want of prosecution is denied.

[96] The application seeking to have the Consent and Certificate declared void is denied.

[97] Mr. Todd is appointed as litigation guardian for Mr. Marzec in this proceeding and the style of cause is amended accordingly.

[98] The parties are directed to schedule a case management conference to be held no later than March 15, 2022, subject to agreement to a later date.

[99] The case management conference is to address:

- a) litigation timelines;
- b) an application to grant Mr. Todd the authority to provide consent on behalf of Mr. Marzec to obtain medical and other records from third parties; and,
- c) such other matters as may be raised by the parties.

[100] The costs of this application are in the cause.

"Tucker, J."

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