

CANADA / JUDGMENT

McCormack (Re)

2022 BCSC 1660

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2022 BCSC 1660 McCormack (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McCormack (Re),

2022 BCSC 1660

Date: 20220922

Docket: S217122

Registry: Vancouver

In the Matter of the Patients Property Act, R.S.B.C. 1996, c. 349 and amendments thereto

Re: Susan Couldwell McCormack

Before: The Honourable Madam Justice J. Hughes

Reasons for Judgment on Costs

Counsel for the Petitioners, Sandra Lee Couldwell and William Tupper Couldwell:

E.B. Clavier

Counsel for the Respondents, John Joseph McCormack, John Paget McCormack, Brendan William McCormack, and Liam James McCormack:

G.W. White, K.C.

P. Storey

Written Submissions of the Petitioners, Sandra Lee Couldwell and William Tupper Couldwell:

July 25, 2022

Written Submissions of the Respondents, John Joseph McCormack, John Paget McCormack, Brendan William McCormack, and Liam James McCormack:

August 19, 2022

Written Reply Submissions of the Petitioners, Sandra Lee Couldwell and William Tupper Couldwell:

August 26, 2022

Place and Date of Judgment:

Vancouver, B.C.

September 22, 2022

Overview

- [1] These reasons deal with the issue of costs arising from a contested petition under the Patients Property Act, R.S.B.C. 1996, c. 349, (the "Act") in which the petitioners sought to be appointed as committees of Susan Couldwell McCormack ("Susan"). The petitioners are Susan's siblings: Dr. William Tupper Couldwell ("William") and Sandra Lee Couldwell ("Sandra"). The respondents are Susan's husband John J. McCormack ("John") and three sons: John Paget McCormack ("John Paget"), Liam McCormack and Brendan McCormack.
- [2] The respondents opposed the petitioners' appointment as Susan's committees and brought an application seeking to have John and John Paget appointed. Pursuant to my reasons for judgment issued June 23, 2022 ("Reasons"), Susan was declared incapable of managing her person and estate, and the respondents John and John Paget were appointed committee of her person and estate.
- [3] At the hearing of the petition, the parties requested that the issue of costs be addressed following issuance of my Reasons. The parties have since provided their submissions on costs. The petitioners say that each of the parties ought to be awarded their costs as special costs to be paid from Susan's estate, or alternatively, that the respondents be awarded their special costs from the estate and the petitioners pay their own costs.
- [4] The respondents take the position that their special costs, or alternatively ordinary costs, be paid by the petitioners and not from Susan's estate. They also say that the petitioners should bear their own costs. The respondents acknowledge that the special costs order they seek would be exceptional. They say such an order is warranted because the petitioners' application to be appointed committees was motivated not by Susan's best interests, but instead by their animosity towards John.
- [5] For the reasons that follow, I find that the respondents are entitled to their special costs of this proceeding payable from Susan's estate and that the petitioners are to bear their own costs.

Analysis

Costs in Committee Proceedings Generally

- [6] Costs awards in committeeship applications are governed by s. 27 of the Act, which provides that "The costs of all proceedings under this Act are in the discretion of the court". Section 27 of the Act is to be interpreted in a manner consistent with provisions dealing with costs in other civil proceedings as giving the court very broad discretion to make costs awards: *Vieira (Re)*, 2013 BCCA 420 at para. 15.
- [7] Special costs are commonly awarded from a patient's estate to reimburse a successful applicant in bringing an application that is found to be in the best interests of the patient, where the application is brought in good faith and where the applicant receives no obvious benefit from the appointment as committee: *Swereda (Re)*, 2020 BCSC 701 at para. 40, citing *Vieira* at para. 17. This is based on the notion that a successful applicant has incurred legal fees in order to obtain a result that is in the patient's best interests, without personal benefit: *McCoy (Re)*, 2020 BCSC 2182 at para. 6; see also *Pellerin v. Dingwall*, 2018 BCCA 110 at para. 47; *Vieira* at para. 17.
- [8] However, the court retains a wide discretion to depart from this practice. In *Vieira*, Justice Groberman summarized the approach to awarding costs in committeeship proceedings as follows:
- [17] In applications for committeeship, it appears that the usual practice of the Supreme Court is to award the successful applicant costs from the estate. This is a sensible position where the application is brought in good faith and where the applicant receives no obvious benefit from the appointment of a committee. Where a committee is appointed, it is because the court has concluded that it is in the best interests of the patient. A party who has brought an application that is found to be in the best interests of the patient, and with no ulterior motive, should be reimbursed for their costs in doing so.
- [18] While it appears to be the usual practice for a successful applicant on a committeeship application to be granted an order for special costs to be paid from the patient's estate, there is wide discretion to depart from this practice. If, for example, there are concerns about the motives of the applicant, the applicant's conduct of the application, or the ability of the estate to bear an order for costs, a different order might be called for. I do not suggest in any way that this is an exhaustive list of considerations.
- [9] In the present circumstances, there is no dispute that the respondents are entitled to an award of special costs payable by Susan's estate. The issues that arise for determination are whether:
- a) despite the petition being dismissed, the petitioners are entitled to their special costs payable by Susan's estate; and

- b) the respondents' costs ought to be paid by the petitioners as special costs.

Costs of Unsuccessful Applicants

- [10] An unsuccessful applicant may be entitled to special costs payable by the estate where the applicant acted in good faith for the benefit of and in the best interests of the patient, without any expectation of personal benefit: *Swereda* at para. 44; *Sangha (Re)*, 2013 BCSC 1965 at paras. 113-114. The principles that apply when determining cost awards for unsuccessful committeehip applicants were summarized in *McCoy* as follows:
- [7] Similarly, it is not uncommon in contested committeehip applications for the court to order that all parties receive their costs on a special costs basis from the estate. The losing party in a committeehip application is often someone who has incurred legal fees not to pursue their own interests but to protect what they believe to be the best interests of a family member or loved one. Even if such a party is not ultimately successful, the court may still award them special costs from the estate where satisfied that the party's actions were genuinely taken with the best interests of the patient in mind. This approach was taken in *Re Matthews*, 2013 BCSC 1045 and *Welling (Re)*, 2018 BCSC 2402.
- [8] On the other hand, where the court is not persuaded that a party, successful or unsuccessful, has acted with the best interests of the patient in mind because the party had improper motives, was seeking to advance their own interests, or otherwise failed to act in the best interests of the patient, a court will not hesitate to deprive a party of special costs from the estate. This can take the form of requiring parties to bear their own costs (*Kirkwood (Re)*, 2016 BCSC 1250), ordering one party to pay party-and-party costs of another party (*Sangha (Re)*, 2018 BCSC 54), or depriving a party of some portion of their costs from the estate (*Vranic (Re)*, 2007 BCSC 1949).
- [11] The petitioners were unsuccessful in their application to be appointed Susan's committees. However, I may still exercise my discretion in favour of awarding them their special costs payable from the estate if I am satisfied that the application was brought in good faith and in Susan's best interests: *Kirkwood (Re)*, 2016 BCSC 1250 at para. 10. I do not doubt that the petitioners' conduct in retaining legal counsel and taking steps towards bringing this petition was initially motivated by their desire to act in what they perceived to be Susan's best interests. However, I am not convinced that this remained the case as the litigation progressed.
- [12] I agree with the respondents that the evidence shows a history of hostility between William and John and that at times, William's conduct may have been motivated not only by Susan's best interests, but also out of animosity towards John. In particular, by the time this matter came on for hearing, the main issue was whether Susan's needs were being met at her current residence at Yaletown House, or whether she should be moved to a private long-term care facility. As I noted in the Reasons, it was unclear why the petitioners need to be appointed committees to investigate other long-term care facility options for Susan. The

evidence showed that Sandra was previously able to do this without being appointed committee. The need for the petitioners to be appointed committees only really became necessary if they intended to move Susan over John's objection. On that issue, I found that the admissible medical evidence before me--particularly that of her treating physician, Dr. Tran--established that Susan was in the final stages of decline, and that moving her would be stressful and disruptive, contrary to her best interests: Reasons at paras. 117-120.

- [13] Dr. Tran's evidence was available to the petitioners since at least April 2022. In my view, had the sole motivating factor driving this litigation been Susan's best interests, this evidence ought to have been cause for pause and reconsideration. Yet, that was not the course adopted by the petitioners. Instead, they persisted in their efforts to be appointed committees in place of John and took steps to obtain further medical evidence from Dr. Makarenko, which I found suffered from significant and material defects that resulted in it being given no weight: Reasons at paras. 42-49.
- [14] The petitioners also took issue with whether John was expending sufficient funds on Susan's care and comfort. I found that John's decisions in that regard were appropriately made in consultation with her care team and occupational therapists: Reasons at paras. 103, 105.
- [15] In addition, the petitioners' conduct in the course of the proceedings gave rise to cause for concern that their ongoing pursuit of this litigation was motivated not only by Susan's best interests, but also by William's antipathy towards John. Such conduct included the following:
- a) surreptitiously obtaining photographs of John and Susan's family home and photographs and video of Susan in her current condition, and then tendering those photos into the public record through this proceeding, suggesting a lack of appreciation for John and Susan's privacy (Reasons at para. 113);
 - b) making assertions that I found to be unsupported in the evidence, including that John was motivated not to spend money on Susan's care out of self-interest (Reasons at paras. 59, 103-104); and
 - c) making speculative and unsupported allegations regarding John's own mental capacity (Reasons at paras. 59, 83).
- [16] The petitioners now contend that the photographs and videos were taken and produced to provide objective evidence on Susan and her condition. That may well have been their intent, but it does not excuse the manner in which they were obtained. Further and in any event, "objective" evidence of that nature is of limited assistance to the Court, as it is not in a position to draw inferences and make findings on matters requiring medical expertise--e.g. Susan's current condition, prognosis and ongoing care needs--based on photographs or videos standing alone. Such findings usually require some expert evidence, and indeed that is what the petitioners sought to provide, albeit with the issues identified above, when they provided the photographs and videos to Dr. Makarenko as the basis for his medical opinion.

[17] I accept the assertion in the petitioners' written submissions that "their focus was not 'squarely on themselves'" (emphasis added) and find that they were at least in part acting in Susan's best interests. However, I do not agree that their focus remained entirely on Susan and her best interests throughout this proceeding. Although I do not go so far as to find that the petitioners acted with improper motive, at times their animosity towards John appeared to overshadow Susan's best interests. In the result, I am not persuaded that an award of special costs to the petitioners payable by Susan's estate is warranted in the circumstances. I order that the petitioners are to bear their own costs of this proceeding.

Special Costs Payable by Unsuccessful Petitioners

- [18] This leaves the issue of whether I ought to exercise my discretion to order that, in addition to being deprived of their costs, the petitioners ought to also pay the respondents' special costs, or alternatively, ordinary costs. The respondents assert that their special costs should be paid by the petitioners for two reasons: (1) the petitioners' personal motivations overrode the required good faith concern for Susan's best interests; and (2) the petitioners engaged in reprehensible litigation conduct. The respondents acknowledge that an order that the petitioners pay their special costs would be exceptional, but say that the circumstances of this case warrant such an exceptional order.
- [19] The issue of when special costs may be awarded against an unsuccessful applicant for committeehip was considered in *McCoy*, where the Court noted that an order that an unsuccessful petitioner pay special costs is "somewhat extraordinary" and without precedence in the case authorities under the Act: para. 9. The two circumstances in which special costs orders may be appropriate in committeehip applications are (*McCoy* at para. 11):
- a) Punitive special costs orders made to sanction conduct that is deserving of rebuke by the court: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.); *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177; and
 - b) Special costs orders of all parties from the estate in certain circumstances in which the court finds that the will maker or patient created the circumstances that gave rise to the litigation: *Parker v. Thompson*, 2014 BCSC 2311 at paras. 10-11.
- [20] Notably, the Court in *McCoy* considered and rejected the submission that a special costs order may be made outside of these two recognized circumstances and absent a finding of reprehensible conduct: paras. 12-16. This is essentially the same submission the respondents make here to the extent that they suggest a special costs award is warranted on account of the petitioners' alleged improper motives.

- [21] The respondents rely on various authorities in support of their position that special costs may be awarded against a party who pursues a committee ship application for improper motives. However, the respondents did not identify any instance in which the costs order they seek here--an award of special costs against unsuccessful petitioners--has been granted. Rather, absent reprehensible conduct, the weight of the jurisprudence favours unsuccessful parties being required to bear their own costs:
- [22] In *Sangha*, an unsuccessful petitioner who was found to have breached her fiduciary duty and taken aggressive actions in the litigation was denied her costs from the estate: paras. 116-117. *Kirkwood* is to the same effect: the parties bore their own costs in circumstances where the petitioner was motivated by his antipathy towards his stepmother and his self-interest in ensuring his father's estate was administered so as to safeguard his inheritance, rather than in his father's best interests: paras. 12, 14-15.
- [23] In *Horton (Re)*, 2020 BCSC 87, siblings who brought competing committee ship applications were each denied their costs payable out of the estate where the committee ship applications were necessitated by their ongoing power struggle and they engaged in conduct that was motivated by animus to each other: para. 74.
- [24] The only decision identified by the respondents in which a costs award was made against unsuccessful petitioners is *Klop (Re)*, 2021 BCSC 644. In that case, unsuccessful petitioners for committee ship were ordered to pay the respondents' partial ordinary (not special) costs. I note, however, that costs were addressed summarily at the conclusion of the Court's reasons on the application in the main: *Klop* at para. 62.
- [25] The jurisprudence thus does not support award of special costs being made against an unsuccessful committee ship applicant based on a party having improper motives, absent reaching the threshold of reprehensible conduct sufficient to warrant a special costs order.
- [26] None of the parties take the position that any conduct on Susan's part created the circumstances giving rise to the petition. As such, the remaining issue before me is limited to whether the petitioners' conduct--in addition to depriving them of their costs as I concluded above--reaches the threshold of conduct deserving of rebuke by the court to justify a punitive special costs order: *McCoy* at para. 16.
- [27] The allegations of reprehensible litigation conduct relied on by the respondents--each of which they say justify special costs as per *Dunn v. Baird Estate*, 2022 BCSC 498, and the general cost principles for committee ship applications set out in *Vieira*--fall generally into the following categories:
- a) being reckless with the truth and making inflammatory and unsupported allegations against John, including allegations of dishonesty, impropriety, fraud and breach of fiduciary duty;
 - b) surreptitiously obtaining photographs and video evidence;

- c) tendering opinion evidence that was not impartial and ultimately found unhelpful to the court; and
- d) refusing to engage in reasonable settlement negotiations.

[28] The respondents point to no authority for the proposition that tendering evidence that is found to be inadmissible or given no weight constitutes grounds for special costs. Rather, the jurisprudence suggests that it would be improper to base a special costs award on the acceptance or rejection of testimony as if that were the test, as special costs could be awarded whenever credibility is in issue instead of only in exceptional cases: *Equustek Solutions Inc. v. Jack*, 2021 BCSC 1180 at para. 17, citing *Grewal v. Sandhu*, 2012 BCCA 26 at para. 107. Indeed in *Grewal*, an award of special costs was overturned despite the trial judge's conclusion that the offending party's conduct in the course of the litigation was characterized by "a lack of candor and efforts to conceal evidence": paras. 106-107.

[29] The Court has expressed its concerns regarding the way in which the petitioners obtained photographic and video evidence. In the circumstances of this case, however, that conduct does not in my view rise to the level of reprehensible conduct within the meaning of special costs jurisprudence. I agree with the petitioners that obtaining the necessary medical evidence in support of their application was made more difficult by the ongoing pandemic. However, this was likely also exacerbated by the animosity between William and John, and resulting inability to work cooperatively to facilitate obtaining the necessary medical assessments in a more conventional manner.

[30] As to the allegation that the petitioners failed to engage in reasonable settlement negotiations, the respondents again point to no authority for an award of special costs being made on this basis. Parties are not obliged to engage in settlement discussions, but if such negotiations do take place, they can avail themselves of provisions of R. 9-1 of the Supreme Court Civil Rules if they wish to attract cost consequences from failure to accept a reasonable offer.

[31] Finally, I agree with the petitioners that the circumstances before me do not rise to the level of those that attracted special costs in *Dunn*. That case involved estate litigation under the Wills, Estates and Succession Act, S.B.C. 2009, c. 13, where it was alleged that some of the defendants engaged in financial wrongdoing in respect of an elderly family member. Special costs in *Dunn* were awarded based on the Court's finding that serious allegations of fraud, breach of trust and theft were made recklessly and with great reputational impact:

[63] The allegations against Mr. Savji and Ms. Moraitis are especially concerning as they involve allegations of fraud, breach of trust and theft. Mr. Savji is the CEO of a business that requires the trust of his customers. Ms. Moraitis is in the health care field which involves the care of elderly patients. Allegations of breach of trust against a vulnerable elder have the potential of damaging their professional and personal reputations irrevocably.

- [64] As I have found above, these allegations were made recklessly, based solely on suspicion and conjecture.
- [65] Although the defendants discontinued the action against Mr. Savji, this does not undo the harm that may have already been done. The action was filed in January 2021. The notice of civil claim remains a document of public record. A notice of discontinuance does not undo a serious, reputation-smearing accusation.
- [66] I am satisfied that special costs should be awarded against the applicants as a rebuke for bringing allegations of fraud without foundation.
- [32] The allegations of fraud, breach of trust and theft made in Dunn were that one of the defendants "misused her role as power of attorney to convert the deceased's property for her own use"--essentially theft of funds: para. 49. These are very different, and in my view far more serious, allegations than those made by the petitioners in this case. Here, the petitioners did not accuse the respondents of misuse of their power of attorney. Rather, they questioned Susan's capacity to execute the power of attorney for the purpose of asking the court to treat it cautiously in its analysis of the factors in *Stewart (Re)*, 2014 BCSC 2321, for appointment of a committee.
- [33] Further, the professional reputational impacts that were found to be particularly concerning in Dunn do not arise to the same extent in the present circumstances. While raised, the allegation that John's reluctance to expend funds on Susan's care arose out of self-interest in preserving her estate for his and their sons' benefit, was not pressed by the petitioners at the hearing. I find that when taken as a whole, the petitioners' allegations do not rise to the same level as those made in Dunn so as to warrant an award of special costs on that basis.
- [34] I accept that the petitioners' conduct was at times confrontational and disparaging towards John and that their approach to this litigation can be fairly characterized as aggressive. Such an approach is "not particularly helpful" when seeking to resolve a committee-ship application involving disagreement between family members as to what is in a patient's best interests: *McCoy* at para. 18. However, taken as a whole, I do not find that the petitioners' conduct in this case rises to the level of reprehensible conduct deserving of rebuke by the court so as to warrant a punitive order of special costs against them.
- [35] I am also cognizant of the broader circumstances in which proceedings under the Act are often brought, and that granting orders of the nature sought by the respondents may have a chilling effect on committee-ship applications, resulting in incapable adults being left in vulnerable positions: see e.g. *McCoy* at para. 19.
- [36] The respondents did not address in any detail their alternative position that the petitioners ought to pay the respondents' ordinary costs. *Klop* is the lone decision identified by the respondents in which an order of a similar nature was made, but ordinary costs were only awarded on a partial basis. Further and as noted above, *Klop* addressed the issue of costs summarily at the conclusion of the committee-ship application and the Court does not

appear to have had the benefit of submissions on, or opportunity to consider, the jurisprudence regarding costs awards specific to committee applications as set out above.

[37] In the result, having found that the respondents are entitled to special costs payable by the estate and that the petitioners ought to bear their own costs, I decline to exercise my discretion to order that the petitioners pay the respondents' ordinary costs. In my view, this would amount to making a punitive costs order in circumstances where I have found that the standard for a punitive award--conduct deserving of rebuke by the court--has not been met. It is also relevant, in my view, that the petitioners have effectively been sanctioned for their conduct by being deprived of recovering their costs of the petition from Susan's estate, despite the usual practice of awarding such costs in proceedings under the Act: Vieira at para. 17.

Conclusion

[38] The respondents are awarded their special costs of this proceeding, payable by Susan's estate.

[39] The petitioners are to bear their own costs of this proceeding.

"Hughes J."

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