

CANADA / JUDGMENT

McCoy (Re)

2020 BCSC 2182

COURT

Supreme Court of British Columbia

DECIDED

9 October 2020

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2020 BCSC 2182 McCoy (Re) IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: McCoy (Re), 2020 BCSC 2182 Date: 20201009 Docket: S196694 Registry: Vancouver Re: In the Matter of the Patients Property Act, R.S.B.C. 1996, c. 349 and amendments thereto And: In the Matter of Brian Edward McCoy

- and - Docket: S195442 Registry: Vancouver Re: In the Matter of the Patients Property Act, R.S.B.C. 1996, c. 349 Re: Brian Edward McCoy Before: The Honourable Madam Justice Francis Oral Reasons for Judgment Re: Costs In Chambers Counsel for the petitioner, Silise Lebedovich in Action, No. 196694: R.D. Urquhart A. Sharkey Counsel for the petitioner, Maryanne Csizmazia in Action S195442: A. Mortimore P. Storey Counsel for Brian McCoy: No Appearance Place and Date of Hearing: Vancouver, B.C. October 5, 2020 Place and Date of Judgment: Vancouver, B.C. October 9, 2020

[1] THE COURT: These are my reasons for judgment on costs. They were delivered orally and have been edited for publication.

[2] This matter came before me as two contested petitions under the Patients Property Act, R.S.B.C. 1996, c. 349 [Act] regarding the committeeship of Brian Edward McCoy. The petitions were heard on January 16, 2020, and I issued reasons for judgment on February 25, 2020. Pursuant to my judgment, Mr. McCoy was declared incapable of managing his person or his estate, and Maryanne Csizmazia was appointed his committee of person and estate on certain terms.

[3] The parties appeared before me again on October 5, 2020 to speak to costs. It is Ms. Csizmazia's position that:

1. her special costs and the special costs of Mr. McCoy should be paid by Ms. Lebedovich; and
2. Ms. Lebedovich should bear her own costs.

[4] Ms. Lebedovich's position is that all parties should bear their own costs, although she does not object to an order that Ms. Csizmazia receive her special costs from the estate of Mr. McCoy. She is prepared to bear her own costs and takes the position that she should not be liable for the costs of anyone else. Costs in Committee Proceedings

- [5] Section 27 of the Act governs the determination of costs on applications for the appointment of a committee. It states that costs of all proceedings under the Act are in the discretion of the court.
- [6] In committeeship applications, the common practice is to award the successful applicant costs from the patient's estate on a special costs basis. This practice is based on the notion that a successful applicant for committee gets no personal benefit from their appointment. They have taken on legal fees in order to obtain an order that is in the best interests of the patient and as such, it is sensible for the patient's estate, and not the applicant, to bear that cost: *Vieira (Re)*, 2013 BCCA 420 at paras. 17-25.
- [7] Similarly, it is not uncommon in contested committeeship 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 committeeship 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).
- [9] The order sought by Ms. Csizmazia, that Ms. Lebedovich be personally liable to pay her special costs and the special costs of Mr. McCoy, is therefore somewhat extraordinary in the context of Patients Property Act jurisprudence. Ms. Csizmazia's counsel was frank in her submission that such an order does not have precedent in the case authorities under the Act, but she submits that an incremental development of the law is called for to ensure that costs in committeeship proceedings serve the function of encouraging parties to behave reasonably in contentious family disputes.
- [10] She argues that recent developments in the case authorities, particularly the B.C. Court of Appeal's decision in *Pellerin v. Dingwall*, 2018 BCCA 110, have opened the door to a broader use of special costs to deter poor conduct in the context of Patients Property Act applications.

- [11] The door that Pellerin opens, according to Ms. Csizmazia, is an invitation for the court to make an award of special costs against a party in circumstances beyond the two well-recognized special costs scenarios that have developed in the case authorities. The two recognized circumstances in which special costs may be appropriate in estate and incapacity litigation are:
1. Punitive special costs orders made by the court to sanction conduct by a party 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.
 2. Special costs 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 litigation: *Parker v. Thompson*, 2014 BCSC 2311 at paras. 10-11.
- [12] Ms. Csizmazia submits that under the authority of *Pellerin*, I should make a special costs award that falls outside these two recognized circumstances and order special costs not from the estate of Mr. McCoy but against Ms. Lebedovich personally, absent a finding of reprehensible conduct deserving of rebuke by the court.
- [13] In *Pellerin*, the Court of Appeal considered both compensatory and punitive special costs orders. The Court of Appeal remitted the matter of the special costs of the Public Guardian and Trustee back to the chambers judge on the basis that the judge had not considered the relevant evidence or made the necessary findings of fact to allow the court to adjudicate whether the special costs of the Public Guardian and Trustee should be borne by the estate or by Ms. Pellerin, the unsuccessful petitioner.
- [14] In the same case, the Court of Appeal refused to order that Ms. Pellerin, the unsuccessful petitioner, pay the special costs of Mr. Pellerin, the successful party. In declining to make a punitive special costs order against Ms. Pellerin in favour of Mr. Pellerin, the Court of Appeal cited *Smithies* and the reprehensible conduct test.
- [15] With respect to the question of whether the Public Guardian and Trustee's special costs should be borne by the estate of the patient or by the unsuccessful petitioner, the court in *Pellerin* cited *Gichuru v. Pallai*, 2018 BCCA 78, for the proposition that an order of special costs demands some degree of procedural fairness. As a result, the court in *Pellerin* remitted the question of special costs back to the chambers judge for determination. The question of whether a punitive special costs award was available for something less than reprehensible conduct was not before the Court of Appeal in *Pellerin*.
- [16] In my view, *Pellerin* stands only for the proposition that there must be an evidentiary basis for a special costs award. It does not create a new standard for a conduct-based special costs award. I am therefore bound by the authorities to determine whether Ms. Lebedovich's behaviour reaches the threshold of conduct deserving of rebuke by the court before I can consider whether a punitive special costs order is appropriate in this case.

- [17] The facts upon which Ms. Csizmazia relies to support a special costs order mostly centre around a number of actions Ms. Lebedovich took that interfered with Ms. Csizmazia's contact with Mr. McCoy and Mr. McCoy's contact with his lawyer. Ms. Csizmazia also alleges that Ms. Lebedovich drove up the cost of litigation by insisting that all communication go through the lawyers and refused to engage in any good faith efforts to resolve the application.
- [18] I accept that the evidence shows a pattern of conduct by Ms. Lebedovich that was sometimes heavy handed. I also find that the refusal of her solicitor to engage in discussions with the other parties suggests a civil litigation mindset that is not particularly helpful when seeking to resolve a dispute involving an incapable adult and disagreements about his best interests amongst those who love him. However, I do not find that any of the alleged poor conduct of Ms. Lebedovich amounts to conduct deserving of censure by the court.
- [19] As I found in the reasons for judgment, at all times Ms. Lebedovich was acting in good faith, doing what she believed was in Mr. McCoy's best interests. It is exceedingly common in committeeship disputes for families and loved ones to have diametrically opposed views of the best interests of the patient. These views are often deeply felt. Where a party is acting in good faith and genuinely seeking to protect the best interests of the patient, with no personal interest or improper motive, it would be highly unusual for the court to make a punitive costs order against them. Doing so could discourage family members and others from coming forward to engage in this kind of protective litigation and could have a chilling effect that would leave incapable adults more vulnerable than they already are.
- [20] Because I do not find that any of the actions of Ms. Lebedovich are deserving of censure, I need not resolve the dispute between the parties as to which actions of Ms. Lebedovich constitute pre- or post-litigation conduct.
- [21] For the above reasons, I am not prepared to sanction Ms. Lebedovich with special costs. Therefore, consistent with the position of Ms. Lebedovich, I order that Ms. Csizmazia shall receive her special costs from the estate of Mr. McCoy and not from Ms. Lebedovich. Ms. Lebedovich shall bear her own costs. "Francis, J."

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