

CANADA / JUDGMENT

Mendres v. Ramsay

2023 BCCA 137

COURT

British Columbia Court of Appeal

DECIDED

21 March 2023

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2023 BCCA 137 Mendres v. Ramsay

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Mendres v. Ramsay,

2023 BCCA 137

Date: 20230321

Docket: CA48170

Between:

Jessica Mendres

Appellant

(Respondent)

And

Kenneth Wayne Ramsay, Marian Carol Dashwood-Jones

Respondents

(Petitioners)

And

Valerie Anne Edwards

Respondent

(Respondent)

And

Public Guardian and Trustee

Respondent

(Respondent)

Corrected Judgment: The date of the judgment was corrected on the cover page on March 29, 2023.

Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated February 25, 2022 (Ramsay v. Edwards, Victoria Docket S10127).

Oral Reasons for Judgment

Counsel for the Appellant:

A. James

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N.P. Lenaghan

Counsel for the Respondent, Public Guardian and Trustee:

M.G. Underhill

Place and Date of Hearing:

Vancouver, British Columbia

March 21, 2023

Place and Date of Judgment:

Vancouver, British Columbia

March 21, 2023

Summary:

The appeal is from appointment, summarily, of committees over the patient. The appellant contested the summary nature of the proceedings, the weight accorded evidence of recent events and a failure to specifically consider the suitability of one of the two committees appointed. Held: Appeal dismissed. The mode of proceeding and weight to be given evidence are matters of judicial discretion with which the court should not interfere. The court agrees that each person

appointed as a committee should be considered individually. Notwithstanding the judge did not do so, the court did not interfere with the order for a number of reasons, including that recently both persons appointed as a committee had acted together as a unit. One of the persons was recognized as having ensured appropriate treatment for the patient. There was no reason to pry the unit apart.

- [1] SAUNDERS J.A.: This appeal concerns the appointment of committees of the respondent Valerie Anne Edwards. By order made April 5, 2022, the respondents Mr. Ramsay and Ms. Dashwood-Jones were appointed committees over Ms. Edwards' person and estate, subject to certain restrictions.
- [2] By the same order, Ms. Mendres' competing application to be appointed as Ms. Edwards' committee was dismissed.
- [3] Mr. Ramsay is the brother of Ms. Edwards. Ms. Dashwood-Jones is Mr. Ramsay's spouse. Ms. Mendres is Mr. Ramsay's daughter and Ms. Edwards' niece.
- [4] At the time of the committee's appointment, Ms. Edwards was 76 years old. She lived in her own residence with significant assistance from caregivers. There is no dispute that Ms. Edwards was incapable of managing herself or her affairs within the meaning of the Patients Property Act, R.S.B.C. 1996, c. 349; the declaration to that effect is not contested on this appeal.
- [5] The appointment of committees was made pursuant to s. 6 of the Act:

6 (1) Subject to section 13, on application by the Attorney General or any other person, the court may appoint any person to be the committee of the patient.

...
[6] By R. 2-1(a) and (b) of the Supreme Court Civil Rules, the application referred to in s. 6(1) must be brought by petition.
[7] The exercise of powers of a committee is governed by s. 18 of the Act, referring to the objective of benefit to the patient:

18 (1) A committee must exercise the committee's powers for the benefit of the patient and the patient's family, having regard to the nature and value of the property of the patient and the circumstances and needs of the patient and the patient's family.

(2) A committee must, to the extent reasonable, foster the independence of the patient and encourage the patient's involvement in any decision making that affects the patient.
[8] It is important to note, as stated in *Horton (Re)*, 2020 BCSC 87, that:

[46] The Act does not prescribe criteria for or factors to be considered in the selection of a person to serve as a committee, but it is well established that the test invokes the *parens patriae* jurisdiction of the court and is governed by an assessment of who will serve the patient's best interests: *Bowman (Re)*, 2009 BCSC 523 at para. 32."

I refer also to *Stubban v. Stubban*, 2002 BCCA 398.

[9] In reviewing the order appealed, this court must recognize that the appointment of a committee is a discretionary order. This means that our approach must be deferential, and we may only interfere with the exercise of discretion where the judge has acted on a wrong principle or failed to give sufficient weight to all relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; *Stubban*.

[10] I turn to the judgment and the grounds of appeal.

[11] The judge described the record before him in this fashion:

[3] ... In this regard, the numerous affidavits and their contents filed in these two applications make it crystal clear there is dramatic ill will and animosity between father and daughter, which is most unfortunate and has resulted in these contested applications.

[12] After finding that Ms. Edwards is incapable of managing herself and her affairs, the judge turned to the contest as to who should be appointed committee. He described the circumstances this way:

[5] Turning to the applications, as Ms. Mendres has emphasized throughout, in March of 2014, [Ms. Edwards] appointed [Ms. Mendres] as her power of attorney and representative. In addition, it appears that [Ms. Edwards] named [Ms. Mendres] as the executor of her will and the sole beneficiary. I also accept that [Ms. Mendres] and [Ms. Edwards] had a loving and caring relationship, at least until around 2017, when the petitioners submit [Ms. Mendres] commenced acting inappropriately and inadequately, given her duties and responsibilities as [Ms. Edwards]'s attorney and caregiver. While acknowledging the fact that it is significant that [Ms. Edwards] entrusted [Ms. Mendres] with her affairs when she appointed her power of attorney, the petitioners submit that things went downhill around 2017. They, in their numerous affidavits, submit that [Ms. Edwards] was clear that she had a falling out with [Ms. Mendres] such that, in due course, it is alleged that [Ms. Mendres] was fired by [Ms. Edwards].

[6] In response, as has been the case throughout all of the assertions and counter assertions, [Ms. Mendres] says, "No, that's not correct," her and [Ms. Edwards] agreed that because of the difficulties [Ms. Mendres] was going through at that point in time with a separation and a young child, that she and [Ms. Edwards] decided to amiably part ways at that particular point in time. In addition, the petitioners submit there is substantial direct evidence by way of financial documents that illustrate [Ms. Mendres] had not been properly taking care of

[Ms. Edwards]'s financial affairs. There is also submissions by the petitioners that not insubstantial amounts of money were taken by [Ms. Mendres] from [Ms. Edwards]'s account and many cheques were written that suggest some inappropriate conduct on the part of [Ms. Mendres].

- [7] I will state for the record that I am unable to determine who is more accurate or reliable with much of the conflicting statements contained in all these affidavits, not just from the petitioners and [Ms. Mendres], but also their acquaintances, friends, and sometimes relatives. What I do find most significant and, as I said to counsel before the break, I am satisfied, because of all of those conflicting assertions, what I should properly focus on is what has been occurring in the last two years or so, how [Ms. Edwards] is doing, and of course, what is in her best interests.
- [13] The judge found on the basis of evidence from Ms. Edwards' caregivers that Mr. Ramsay and Ms. Dashwood-Jones had been providing care and assistance for her, and "in some occasions paying out of their own pockets [Ms. Edwards]'s caregiver expenses". He found that what had been taking place in the last couple of years had been in Ms. Edwards' best interests and that she is "presently receiving the proper emotional and financial support that she needs because of the involvement of her brother, [Mr. Ramsay]".
- [14] The judge narrowed the most weighty evidence to the letter from Ms. Edwards' long-time doctor stating that, considering Ms. Edwards' diagnosis, she "is doing well". The doctor stated that Mr. Ramsay and Ms. Dashwood-Jones had been in contact with him and observed "Jessica Mendres has not been in contact with me for four years".
- [15] The judge recognized that the doctor's statement of Ms. Mendres' involvement was in conflict with Ms. Mendres' evidence that she has a good relationship with the doctor, and had promised that she would make an appointment with the doctor for a full medical assessment of Ms. Edwards in the event she was appointed committee. He said, however, that this promise of Ms. Mendres seemed inconsistent with the appellant's assertion that she had been involved in Ms. Edwards' wellbeing and care for the last couple of years. The judge then applied himself to the decision he was required to make and held that Mr. Ramsay and Ms. Dashwood-Jones are best suited to exercise the powers of a committee, provided appropriate conditions were included in the order protecting the body of Ms. Edwards' estate. He expressed himself this way:
- [11] The particular applications that I have to deal with, as I say, are under the Patients Property Act, and as Master McCallum said in *Garrett-Jones*, 2006 BCSC 234, some guidance as to the determination between competing applicants can be found in s. 18 of the Act which states:

A committee must exercise the committee's powers for the benefit of the patient and the patient's family, having regard to the nature, and value of the property of the patient and the circumstances and needs of the patient and the patient's family.

- [12] Counsel have, quite properly, acknowledged that the law or the principles surrounding these type of applications are well settled and there is no disagreement that the factors outlined by Justice Warren in *Re Horton*, 2020 BCSC 87, which has been included in the petition record, are neatly summarized by Justice Masuhara in *Stewart*, 2014 BCSC 2321. I do not find it necessary to recite all of those factors. I will state for the record I have considered them all, and when I consider the totality of the evidence, applying those factors and the principles enunciated in the relevant authorities, I am satisfied that the petitioners' application should be granted and therefore I will make that order in due course.
- [13] Given the totality of the circumstances, I am satisfied that the petitioners are best suited to exercise the powers of a committee for the benefit of [Ms. Edwards]. So there will be a declaration that Valerie Edwards is incapable of managing herself or her affairs. There will be an order appointing the petitioners as committees as sought in paragraph 2 of their notice of application. The order will be made on the condition that the committee -- this is with respect to the position taken by the Public Guardian, the committee will have no access to the capital of the patient's fund held, I think it is CIBC Wood Gundy, other than for reinvestment purposes, without the prior written permission of the Public Guardian and Trustee. Income earned may be paid to the committees for the benefit of the patient. A copy of this order is to be served upon CIBC Wood Gundy.
- [14] I am also satisfied, having regard to the totality of the circumstances and [Ms. Mendres]'s position as executor and apparent beneficiary of [Ms. Edwards]'s will, that the paragraph located at number 9 of the response of the Public Guardian and Trustee should be included in the order and that is to preclude the committees from disposing of or encumbering the real property that is referenced at paragraph 9 of the Public Trustee's response.
- [15] In addition, it is appropriate to grant the petitioners' application that they are entitled to costs of this application paid out of the patient's estate and as outlined, as I said, in their notice of application, the reasonable costs and expenses of and incidental to the application.
- [16] Ms. Mendres contends that the judge erred in law and principle in his analysis, and accordingly the standard of review is correctness. She advances the following grounds of appeal:
- 1) the judge erred in principle by exercising his discretion to proceed summarily in the presence of conflicting affidavit evidence on crucial points germane to the factors in the committee appointment analysis;
 - 2) the judge erred by giving insufficient weight to Ms. Edwards' wishes as expressed when she was competent; and
 - 3) the judge erred by considering Mr. Ramsay and Ms. Dashwood-Jones together, rather than considering their individual suitability.

- [17] In the first two grounds of appeal, the appellant contends the judge erred by deciding the case summarily instead of referring it for further enquiry, and by giving insufficient weight to the wishes of Ms. Edwards when she was competent as demonstrated in her execution of a power of attorney in favour of Ms. Mendres.
- [18] In response, Mr. Ramsay and Ms. Dashwood-Jones contend that both of these issues are matters within the judge's discretion, and that the judge made no error that would allow us to interfere with the order.
- [19] In *Cepuran v. Carlton*, 2022 BCCA 76, a five-judge division of this court addressed the proper approach to a hearing of a matter started by petition, in a case concerning competency under the Act:
- [158] It should be kept in mind that the starting point for those matters that are properly brought by way of petition is that the Rules contemplate that a summary procedure will be appropriate: *Conseil scolaire [L'Association des parents de l'école Rose-des-Vents v. Conseil scolaire francophone de la Colombie-Britannique]*, 2011 BCSC 89] at paras. 29-30. This is different than the starting point for an action. There should be good reason for dispensing with a petition's summary procedure in favour of an action. The mere fact that there is a triable issue is no longer a good reason.

...

- [166] At a minimum, when considering whether to order the use of hybrid procedures within the petition proceeding itself, or to refer the matter to trial, the court will need to be mindful of the object of the Rules set out in R. 1-3: to secure the just, speedy and inexpensive determination of every proceeding on its merits, and so far as can be achieved, in ways that are proportionate to the amount involved, the importance of the issues, and the complexity of the proceeding.

[Emphasis added.]

- [20] I see no error in the judge's decision to proceed summarily in this case. Even with both parties' confirmation in court that they were prepared to proceed summarily, a position contrary to the appellant on appeal, the judge went on to correctly observe that it was for him to determine whether to proceed in that fashion, recognizing that he must be satisfied that the evidence was sufficient for him to make the required decision. He then correctly asked himself whether that sufficiency was established, found it was, and gave reasons - the relationship between the appellant and Ms. Edwards before the applications had lain fallow after the appellant ceased to provide care to Ms. Edwards in December 2018, the appellant acknowledged that she and Ms. Edwards had parted ways on that date, subsequent to December 2018, the care of Ms. Edwards had fallen to Mr. Ramsay and Ms. Dashwood-Jones, and that in the doctor's view, Ms. Edwards was doing well. These findings are uncontradicted and are relevant to the best interests of Ms. Edwards at the time of the applications.

- [21] The judge observed that, on the record before him, prior to appointing the appellant as her power of attorney, Ms. Edwards had made a similar appointment in favour of Ms. Dashwood-Jones, subsequently overtaken by the appointment to the appellant. He acknowledged the high conflict between the parties. He recognized the break in the relationship between the appellant and Ms. Edwards. He gave weight to Ms. Edwards most recent experience, being the current ongoing assistance given to her by Mr. Ramsay and Ms. Dashwood-Jones and he gave weight, as he was entitled to do, to their knowledge of Ms. Edwards' current medical condition. With this record before him, there was ample foundation for the judge to proceed with the applications summarily.
- [22] I conclude that the appellant has not established an error on the part of the judge in proceeding summarily.
- [23] Nor, in my view, can there be complaint on the weight given by the judge to certain evidence, particularly here where that evidence is of past events that have been overtaken by the intervention of time. The weight given by a judge to evidence is a matter particularly within the province of that judge and generally outside our intervention.
- [24] The third ground of appeal concerns the absence in the judge's reasons of specific analysis of the suitability of Ms. Dashwood-Jones to act as committee. As the judge recounted, there was evidence that Ms. Edwards, when competent, had decided against Ms. Dashwood-Jones having authority over her affairs.
- [25] It is true that the judge did not address the suitability of Mr. Ramsay and Ms. Dashwood-Jones separately; while his analysis focuses on Mr. Ramsay and concludes that Ms. Edwards is receiving appropriate support because of the involvement of her brother, that conclusion is not repeated in respect of Ms. Dashwood-Jones.
- [26] I understand the Act to require that the judge, considering the best interests of the patient, must address the suitability of the committee individually. Failure to do so opens the order to intervention.
- [27] In this case, I would not move through that opening, notwithstanding the gap of a specific consideration of the suitability of Ms. Dashwood-Jones as committee in the reasons for judgment. In the circumstances, such interference would be to put form over substance, in my view. I say this for these reasons:
- First, the judge demonstrated his understanding that both Mr. Ramsay and Ms. Dashwood-Jones were involved recently in supporting Ms. Edwards.
 - Second, nothing in the record suggests this support has been less than optimal for Ms. Edwards.
 - Third, the judge specifically recognized the beneficial role Mr. Ramsay has played in respect of Ms. Edwards.

- Fourth, the judge understood that the relationship between Ms. Edwards and the appellant had fractured some time ago and had not been repaired.
- Fifth, the inference from the accepted evidence is that the two appointed committees have applied themselves as a unit in matters relating to Ms. Edwards, and so the unit has been beneficial. Although the appellant fairly takes issue with the absence of individual consideration of Ms. Dashwood-Jones, absent some recent reason to doubt her bona fides to Ms. Edwards and suitability as committee, the unit aspect and worth of Mr. Ramsay's attention devolves in her direction. There is no reason to pry them apart in this family responsibility.
- Sixth, the order includes conditions proposed by the Public Guardian and Trustee that are protective of the estate of Ms. Edwards.
- Seventh, in the event either of the named committees becomes unable to act as committee, the Public Guardian and Trustee is there as a safety net, able to engage the court.

[28] Notwithstanding the strong submissions on behalf of the appellant, in my view there is no proper basis for us to interfere with the order. I would dismiss the appeal.

[29] BAUMAN C.J.B.C.: I agree.

[30] HARRIS J.A.: I agree.

[31] BAUMAN C.J.B.C.: The appeal is dismissed. We thank Ms. James for her submissions.

"The Honourable Madam Justice Saunders"

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