

CANADA / JUDGMENT

Nasely King (Re)

2020 BCSC 1940

COURT

Supreme Court of British Columbia

DECIDED

9 December 2020

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2020 BCSC 1940 Nasely King (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nasely King (Re),

2020 BCSC 1940

Date: 20201209

Docket: S1912071

Registry: Vancouver

NASELY KING

- and -

THE PATIENTS PROPERTY ACT R.S.B.C. 1996, CHAPTER 349 AND AMENDING ACTS

Corrected Judgment: The text of the judgment was corrected at paragraph 25 on December 9, 2020.

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioner:

G.K. Yu

Counsel for the Respondents, George Lau, Victor King and Wendy King:

D.J. Herbert

Counsel for the Respondent, Rita King:

L.T. Self

Counsel for the Solicitor, the Public Guardian and Trustee of British Columbia:

S.J. Watson

Place and Date of Hearing:

Vancouver, B.C.

October 28, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 9, 2020

INTRODUCTION

- [1] These applications concern the competing applications of the parties to determine who should be appointed as committee of both the person and estate of Nasely "Les" King.

BACKGROUND FACTS

- [2] The following are the facts that I find for the purpose of this applications.
- [3] Mr. King is 80 years old.
- [4] Beginning in June 2017, medical assessments were made to the effect that Mr. King was suffering an impairment of his cognitive functions or dementia. In late 2019, that diagnosis was confirmed and Mr. King's doctors opined that his condition was unlikely to improve. The final medical assessment of Mr. King by Dr. Michael Passmore in April 2020 is consistent with this conclusion.
- [5] In 1971, Mr. King married Rita King and they remain married at this time. They have three children: George Lau (age 47; certified professional accountant); Wendy McGrath (age 45; pharmacy administrative coordinator); and, Victor King (age 43; solution architect). Meaning no disrespect, I will refer to Mr. and Ms. King's children by their first names for convenience. When referring to the children altogether, I will collectively refer to them as the "Children".
- [6] Mr. King's financial affairs are complex. They principally involve a business operation under the name of "King Automobile Service" that provides car repair services through a company, L.K.'s Kar King Auto Repairs Ltd. Another company operated by Mr. King is L.K.'s Kar King Auto Leasing Ltd. which has little ongoing activity. Finally, Mr. King operated other businesses through other companies, L.K.'s Kar King Kar Wash Ltd. and L.K.'s Kar King Limousine Service Ltd., although they ceased operations some time ago. All of these companies are collectively referred to as the "Companies".

- [7] Mr. King started the Companies in the early 1980s and was the driving force behind them. Later on, Ms. King and the Children were involved.
- [8] The Companies operate or operated from lands in Vancouver, BC. The businesses are located at a mixed commercial-residential property at 758 Alexander Street, property owned jointly by Mr. and Ms. King as joint tenants. The businesses occupy the lower portion of the building; five apartments are located in the upper floor.
- [9] The adjacent property, 768 Alexander Street, is a parking lot comprised of three lots owned by 466267 B.C. Ltd. ("HoldCo").
- [10] HoldCo owns, either directly or indirectly, the shares in the Companies. The ownership of the shares in HoldCo includes various classes of common shares and preference shares. For share classes A-E, depending on the class of shares, Mr. King holds 50% or 51% of these shares and Ms. King holds 35% or 34% of these shares in her own name. Ms. King holds 15% of these shares "in trust" for the Children in equal amounts (5% each). Class F shares are held in equal amounts by Ms. King and Mr. King in their own names (50% each).
- [11] At present, the Companies are being managed by an employee, Tony Lam, who has been with the Companies for over 30 years. Ada Yeung is the bookkeeper for the Companies. None the Children are financially dependent on Mr. King or rely on income from the Companies.
- [12] Mr. and Ms. King are also joint tenants of the former family home located at 5380 Cantrell Road, Richmond, BC. Ms. King occupies that property now as her home.
- [13] The value of Mr. King's interests is substantial. Based on assessed values of the real estate, Mr. King's interests, either directly owned or through his shareholdings, have a value in excess of \$6 million. Mr. King also has bank accounts, with undisclosed values. He uses one bank account to deposit his CPP and OAS benefits.
- [14] Mr. King's 2018 tax return indicates a total income of \$45,857, which includes his CPP and OAS benefits and \$30,000 of business income.
- [15] Mr. King's family relationships are also complex. It is common ground that Mr. King had a number of relationships with other women during his marriage to Ms. King. Mr. King was also involved financially with these other women, some of which was known to Ms. King.
- [16] In 2003, Yu Man Yim, also known as Fanny Yu Man Yim, began a relationship with Mr. King. Ms. Yim is 61 years old. She asserts that she became Mr. King's common law spouse around that time when they jointly bought a Vancouver property and began living together at that property. In 2007, Ms. Yim began working at L.K.'s Kar King Kar Wash Ltd.
- [17] There is substantial independent evidence to confirm that Mr. King and Ms. Yim's had a significant and long standing relationship.

- [18] In particular, on February 14, 2012, Mr. King executed his will, although only a portion of that document has been disclosed in evidence. In the portion disclosed, Mr. King refers to Ms. Yim as his "common law spouse". On April 17, 2013, Mr. King and Ms. Yim purchased adjacent spaces in a crypt wall for their burial arrangements. In 2015, Ms. Yim and Mr. King began living together on Rumble Street in Burnaby, BC, a property owned solely by Ms. Yim. By this time, Mr. King and Ms. Yim had sold the jointly held property in Vancouver.
- [19] As I will describe below, Mr. King was essentially maintaining a relationship with Ms. King and the Children to a degree, while also maintaining a significant relationship with Ms. Yim. Yet, there was no real intersecting of those relationships, as dictated by Mr. King. In essence, the King family knew about Ms. Yim only in a very general way, and Ms. Yim knew about the King family in a very general way. They remained separated however, they never saw each other or if they did, they never acknowledged each other.
- [20] Ms. Yim asserts that she has assisted Mr. King with his medical issues for many years now, particularly as his health has declined. She refers to Mr. King's heart surgeries in 2010 and 2012. It is uncontested that Ms. Yim has been assisting Mr. King in that respect, and has been the contact person for all his health care professionals. Ms. Yim takes him to all of his medical appointments and assists him with personal care and medications.
- [21] I accept that Ms. King and the children were aware of Mr. King's surgeries to some degree and had contact with him during that time, but it was not significant. Ms. Yim asserts that Ms. King and the Children have not been involved in Mr. King's care and have only visited him occasionally over the last few years. Ms. King and the children have a different version of events, asserting that they had regular contact with Mr. King over the years. The truth probably lies somewhere in between although I accept that Ms. Yim has been more significantly involved in Mr. King's life than Ms. King and the Children.
- [22] Since 2017, Mr. King has been occupying one of the apartments on Alexander Street (the "Apartment") after moving from the Rumble Street residence where he and Ms. Yim resided. This living situation arose when Mr. King lost his drivers licence and could no longer drive to work. This arrangement allowed Mr. King easy access to visit the businesses in the lower floor of the building every day, where he enjoys interacting with the customers.
- [23] This arrangement also allowed Ms. Yim to see Mr. King on a regular basis. When she worked in the car wash business, Ms. Yim regularly cooked dinner for Mr. King at the Apartment before going home to Rumble Street. She stayed overnight at the Apartment for two, sometimes three, days a week. She assisted Mr. King in his daily activities, including medical visits and shopping. Ms. Yim states that Mr. King's monthly expenses are approximately \$3,000 for food, personal items, medications and pocket money.

- [24] Ms. Yim also asserts that she has assisted Mr. King with his business operations for many years now, including by providing input to Mr. Lam and Ms. Yeung regarding those operations. Mr. Lam denies that he ever consulted with Ms. Yim relating to the auto repair business operations, although Ms. Yeung says that Ms. Yim is very activity involved in assisting Mr. King with business matters. I accept that Ms. Yim did provide some assistance in that respect over the years.
- [25] George refers to having some contact with his father in recent years, and particularly the 2019-2020 time frame. Those visits appear to have been directed principally toward Mr. King's hospital stays and George's efforts to investigate his father's financial affairs and those of the Companies after this petition was filed in these proceedings. George has since formed the view that there are some irregularities as regards Ms. Yim, including relating to the Vancouver residence that Ms. Yim says was later put in her name only as a result of Mr. King's gift to her.
- [26] In addition, Wendy and Victor refer vaguely to having some contact with their father over the years. On February 14, 2012, Mr. King executed an enduring power of attorney in favour of Victor; however, Victor only learned of this document in late 2019 and he has not yet received the original document so that he can execute it and perfect his appointment as power of attorney.
- [27] As stated above, the evidence conclusively shows that, despite Ms. Yim and the King family knowing about each other, there is little contact or communication between them. The divide has continued over the years, and is now characterized by animosity, mistrust and suspicion on both sides. Mr. King appears to be have studiously promoted this lack of contact and downplayed his respective relationships when dealing with these two solitudes of his life.
- [28] Ms. Yim's ability to look after Mr. King's personal affairs is supported by Mr. King's brother, Pinney King and Mr. King's friend, Frank Lomar. Both Pinney King and Mr. Lomar are of the view that Mr. Lam is not an appropriate person to manage Mr. King's businesses, stating that Mr. Lam is a mechanic and lacks management skills.
- [29] Ms. King's evidence is that her husband continued some contact with her over the years, including phone calls and visits from time to time. In addition, Ms. King continued to receive income from the Companies despite her having no active involvement in the operations. Ms. King only recently appears to have acknowledged that their marriage had ended. Nevertheless, I find as a fact that their marital relationship essentially ended many decades ago.

- [30] On February 4, 2020, Ms. King commenced a family law proceeding against Mr. King. That pleading has not been served on Mr. King and the document is not in evidence in terms of disclosing issues raised by Ms. King that might be relevant on this application. Ms. King asserts that she did so only to prevent Ms. Yim from putting Mr. King's assets up for sale, although it is not clear how Ms. Yim could do so, even through Mr. King, without Ms. King's involvement.
- [31] Ms. King indicates that, if her children's application to be appointed as committee is successful, "there may not be any need to move ahead with [the family law] proceedings". She considers that, if her children are appointed, their family can resolve the issues amicably and fairly, but it becomes more "challenging" if Ms. Yim is appointed.

THE APPLICATIONS / RELEVANT TEST

- [32] On October 24, 2019, Ms. Yim filed a Petition seeking the appointment of herself as committee of Mr. King's person and estate. In May 2020, Ms. Yim's Petition was amended to seek her appointment as committee only with respect to Mr. King's person. Ms. Yim then proposed that the Public Guardian and Trustee (PGT) be appointed committee of Mr. King's estate.
- [33] On July 16, 2020, George, Wendy and Victor filed a competing application to appoint themselves as co-committees of Mr. King's person and estate. Ms. King supports her children's application to be appointed as Mr. King's committee.
- [34] The PGT has maintained a neutral position in respect of these competing applications. However, as I will note below, the PGT's response to the applications and its submissions have been helpful in determining a path forward.
- [35] Pursuant to s. 6 of the Patients Property Act, R.S.B.C. 1996, c. 349 (the "Act"), I have the discretion to appoint any person to be committee of the patient.
- [36] Section 18 of the Act provides:
- (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.
- [37] The principles upon which the Court is to exercise its discretion under the Act were discussed by Justice Dardi in *Bowman (Re)*, 2009 BCSC 523, which I adopt:
- [32] On an application for either the appointment or removal of a committee, the test for determining who is appropriate to act as a committee invokes the *parens patriae* jurisdiction of this court and is governed by an assessment of who will serve the patient's best interests: *British Columbia (Public Trustee) v. Pollen* (1996), 15 E.T.R. (2d) 154, [1997] B.C.W.L.D. 042;

Re Poon, 2005 BCSC 254, 14 E.T.R. (3d) 29; and s. 28 of the Act. This inquiry includes a consideration of who can best deal with the patient's financial affairs, nurture her estate, and see that her income and estate are applied for her greatest benefit: Re Pineo, [1985] B.C.W.L.D. 1982.

[38] In Stewart (Re), 2014 BCSC 2321, Justice Masuhara helpfully set out various non-exhaustive factors to be considered in determining what is in the best interests of the patient:

[29] As has been observed in other cases, the Act does not prescribe criteria for the selection of an appropriate committee. However, cases have identified various considerations; see for example: Vranic (Re), 2007 BCSC 1949; Bowman (Re), 2009 BCSC 523; Palamarek (Re), 2011 BCSC 563; Re Matthews, 2013 BCSC 1045; and Sangha (Re), 2013 BCSC 1965. They include:

- (a) whether the appointment reflects the patient's wishes, obviously when he or she was capable of forming such a wish;
- (b) whether immediate family members are in agreement with the appointment;
- (c) whether there is any conflict between family members or between the family and the patient, and whether the proposed committee would be likely to consult with immediate family members about the appropriate care of the patient;
- (d) the level of previous involvement of the proposed committee with the patient, usually family members are preferred;
- (e) the level of understanding of the proposed committee with the patient's current situation, and will that person be able to cope with future changes of the patient;
- (f) whether the proposed committee will provide love and support to the patient;
- (g) whether the proposed committee is the best person to deal with the financial affairs and ensure the income and estate are used for the patient's benefit;
- (h) whether a proposed committee has breached a fiduciary duty owed to the patient, or engaged in activity which diminishes confidence in that person's abilities to properly handle the patient's affairs;
- (i) who is best to advocate for the patient's medical needs;
- (j) whether the proposed committee has an appropriate plan of care and management for the patient and his or her affairs and is best able to carry it out; and
- (k) whether a division of responsibilities such as between the patient's estate and the patient's person to different persons would serve the best interests of the patient, or would such a division be less than optimal for the patient.

WHO SHOULD BE COMMITTEE OF MR. KING'S PERSON?

- [39] There is obviously significant conflict between Ms. Yim on the one hand, and Ms. King and the Children on the other. The King family call Ms. Yim their father's "friend"; Ms. Yim calls Mr. King her common-law spouse.
- [40] Wherever the truth may lie in that respect, the fact is that Ms. Yim has been the person principally involved with the day-to-day life of Mr. King, particularly as his health has declined over the years. I accept that Ms. Yim loves Mr. King very much and is dedicated to his care and well-being at this difficult time.
- [41] I also accept that George, Wendy and Victor love and support their father. They have maintained a relationship of sorts with their father that continues to this day; however, they have not been involved to anywhere near the degree of Ms. Yim and their increased focus on their father's life seems to have been largely driven by the filing of Ms. Yim's petition.
- [42] I am also mindful of Dr. Passmore's report dated April 1, 2020 that confirms Mr. King's recent statements as to who he wants to care for him at this stage of his life:

I asked [Mr. King] if he understands that [Ms. Yim] is seeking to apply for committee of person for him. He did not understand that term. I explained to him in basic terms that [Ms. Yim] is seeking to apply to the Court in order that she might be granted formal authority to make personal care decisions for him in the context of his cognitive impairment. He reported to me his agreement with this and that he loves and trusts [Ms. Yim] very much. I asked him if he would want any of his children or any other person to assist him with his personal care decisions and he said that would not. . . .

- [43] I accept that Mr. King was, by April 2020, suffering some cognitive impairment. Even with that caveat in mind, however, it is some indication as to Mr. King's wishes. Further, those indicated wishes are consistent with Mr. King's earlier actions confirming his commitment to Ms. Yim from many years ago (2012/2013) when no mental health difficulties were evident, including Mr. King's reference to her in his 2012 will as his spouse and their joint purchase of crypt spaces together.
- [44] Both Ms. Yim and the Children presently agreed as to Mr. King's care plan. They all want him to remain in the Apartment as long as he is able, and with as much care as needed. They all agree that this is Mr. King's wishes, so that he may visit his businesses daily where he enjoys interacting with customers.
- [45] The ongoing lack of communication between Ms. Yim and the King family is of some concern. Turning care of Mr. King's person over to the Children would be a significant and perhaps distressing change for Mr. King, given Ms. Yim's long standing role as his primary caregiver.

- [46] Overall, I consider that Ms. Yim is the best choice in terms of acting in Mr. King's best interests as the committee of his person. That appointment will, however, be subject to an increased level of communication by her to the King family, so that they can be kept apprised of matters on a regular basis.

WHO SHOULD BE COMMITTEE OF MR. KING'S ESTATE?

- [47] Ms. Yim does not now seek to be appointed as committee of Mr. King's estate, despite her past involvement in the Companies. She proposes that the PGT assume that role as a neutral party.
- [48] The immediate difficulty with this position is that noted by the PGT. The businesses run by the Companies are ongoing concerns that require consistent involvement on a day-to-day basis and involvement as to overall management and corporate governance. That is simply not what the PGT's office is equipped to do.
- [49] I agree with the PGT that this role is more appropriately assumed by someone with expertise and knowledge in that regard and, ideally, someone within the family.
- [50] One of the options raised during this hearing was consideration of the persons who were appointed executors under Mr. King's 2012 will. The parties agreed that the first appointee, Luigi Panichelli, was ill suited for this role and he did not consent to any appointment. The alternative appointee is Gary Boswell, a retired lawyer, however, counsel later advised that Mr. Boswell did not wish to be appointed. Finally, the parties agreed that the second alternate appointee, The Canada Trust Company, was also ill suited for this role.
- [51] No other potential candidate(s) for committee of Mr. King's estate have emerged, save for the Children. I note that none of them were named as Mr. King's executors under his 2012 will; and, while Victor was named as Mr. King's power of attorney some years ago, that appointment was not perfected by Victor's signature.
- [52] George in particular has been a professional accountant for 14 years. He states that he has expertise with owner-managed businesses, accounting, taxation and providing business advice for clients. He also states that he has experience in the areas of business succession and estate planning. Since these proceedings began, George has taken active steps to investigate the affairs of the Companies, HoldCo and their operations. Along with his siblings, George has indicated that he would continue to employ Mr. Lam to manage the business, which will provide significant continuity in the operations of the businesses.
- [53] The experience of Wendy and Victor as might be relevant to the current business operations is not clear, although I can only presume that the Children all wish to work together in that regard. All three children already have a financial interest in HoldCo through the 15% shareholding held by Ms. King "in trust" for them; accordingly, their financial interests coincide with those of Mr. King in that respect.

- [54] Frankly, there is no other realistic option. Considering all of the circumstances, I agree that it is in Mr. King's best interests that the Children be appointed as co-committees of his estate, with one exception.
- [55] Ms. Yim alleges that, since Ms. King has started a family law proceeding, there is a potential conflict of interest should any of the Children be appointed. She is concerned that they will not be able to act fairly and in an unbiased way to attend to Mr. King's financial affairs in the context of this litigation. She asserts that the Children will possibly be tempted to minimize Mr. King's interests so that their mother's interests are maximized in the estate.
- [56] Ms. Yim has referred to authorities concerning conflicts of interest in relation to committees who are family members. Those authorities refer to the requirement that a committee be "indifferent" as to the outcome of the proceedings: Poon (Re), 2005 BCSC 254 at paras. 31-35, citing Gronnerud (Litigation Guardians of) v. Gronnerud Estate, 2002 SCC 38 at paras. 19-21 and 24.
- [57] As the PGT notes, it is difficult to assess where a conflict exists by reason of this family law proceedings and, if so, how that might be assessed in terms of the Children's ability or desire to fully protect their father's interests in the face of their mother's as yet unknown claims.
- [58] I agree that, on its face, George, Wendy and Victor's status as children of Mr. King does not by itself give rise to any conflict. However, I must give some regard to the outstanding action by Ms. King and her lack of candour in failing to disclose the pleadings to identify the issues raised in that litigation.
- [59] To address Ms. Yim's concerns, I appoint the PGT as litigation guardian for Mr. King in respect of the family law proceedings commenced by Ms. King: the Act, s. 22(2). In addition, if any other family litigation matters arise, the PGT will be appointed to represent Mr. King as litigation guardian for those matters.

CONCLUSION

- [60] Pursuant to s. 2(1) of the Act, I declare that Nasely "Les" King is, by reason of mental infirmity, incapable of managing his person or affairs.
- [61] As to the committee orders sought, I order that:

Committee of the Person

- a) Ms. Yim is appointed as committee of Mr. King's person;
- b) Ms. Yim will consult by email or text with George Lau, on behalf of the Children, before making any significant decisions as to Mr. King's person, activities, medical/health (issues or non-issues) or living arrangements (including moving him to a care home or similar facility);

- c) Ms. Yim will make reasonable efforts to provide regular (and, if appropriate, immediate) updates by email or text to George Lau, Wendy McGrath and Victor King as to Mr. King's person, activities, medical/health (issues or non-issues) and living arrangements;
- d) George Lau, Wendy McGrath and Victor King will advise as to their preferred means of communication from Ms. Yim within 24 hours and will advise of any changes as soon as possible;
- e) George Lau, Wendy McGrath and Victor King shall have unlimited and unrestricted rights to visit Mr. King and take him on outings, as appropriate, while providing reasonable notice to Ms. Yim; and
- f) If any disputes should arise as between Ms. Yim and the Children as to meeting the financial needs of Mr. King's daily life, that dispute will be referred to the PGT for comment and review. If the matter is not resolved through those means, the parties are at liberty to seek the direction of the Court.

Committee of the Estate

- g) George Lau, Wendy McGrath and Victor King are appointed as co-committees of Mr. King's estate, to act jointly;
- h) In lieu of George Lau, Wendy McGrath and Victor King posting a bond, they will be jointly and severally prohibited from disposing of or encumbering or causing any disposition or encumbrance of:
 - i) Any real properties held by Mr. King;
 - ii) Any interest held by Mr. King in the Companies;
 - iii) Any real properties held by HoldCo; or

Unless a further court order (on notice to the PGT) is made or, the PGT gives prior written consent;

- i) Within 120 days of this order, George Lau, Wendy McGrath and Victor King, as co-committees of Mr. King's estate, shall file a joint affidavit with the Court, copied to the PGT and Ms. Yim, setting out the value of Mr. King's assets and liabilities, including accounts, and all sources of and details of Mr. King's income and expenses; and
- j) The PGT is appointed litigation guardian of the current family law proceedings commenced by Ms. King on February 4, 2020 and any future family law litigation in which Mr. King is named.

[62] All parties are entitled to recover their special costs from Mr. King's estate, subject to review by the PGT: *Royal Trust Corporation of Canada v. Clarke* (1989), 35 B.C.L.R. (2d) 82 (C.A.); *Atwal (Re)*, 2005 BCSC 660 at para. 25; and, *Bowman* at para. 50.

"Fitzpatrick J."

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