
CANADA / JUDGMENT

Peric v. Peric

2015 BCSC 1466

COURT

Supreme Court of British Columbia

DECIDED

20 August 2015

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2015 BCSC 1466 Peric v. Peric

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Peric v. Peric,

2015 BCSC 1466

Date: 20150820

Docket: S149861

Registry: Vancouver

Between:

Radovan Matija Peric

also known as Radovan Matthew Peric,

by his Litigation Guardian

Michael Branimir Peric

Plaintiff

And

Branimir John Peric

Defendant

Before: The Honourable Mr. Justice Bowden

Reasons for Judgment

Counsel for Plaintiff:

D. Herbert

Counsel for Defendant:

A. Francis

Place and Date of Trial/Hearing:

Vancouver, B.C.

August 5, 2015

Place and Date of Judgment:

Vancouver, B.C.

August 20, 2015

- [1] The applicant/defendant, Branimir Peric ("Branko"), seeks an order striking a Notice of Civil Claim filed by the respondent/plaintiff as an abuse of process. Alternatively, the applicant asks for an order removing Michael Peric ("Michael") as litigation guardian for Radovan Peric ("Radovan").
- [2] Radovan is the father of Branko and grandfather of Michael. Michael is the litigation guardian for Radovan and in that capacity has commenced proceedings against Branko by Notice of Civil Claim filed on December 18, 2014, ("Civil Claim").
- [3] Radovan is 91 years of age. On May 5, 2014, Dr. Jay Slater provided a preliminary opinion to the Public Guardian and Trustee that Radovan had a mental disorder or disability that rendered him incapable of making decisions regarding his financial or legal affairs. There is no dispute that Radovan is currently incapable of managing his affairs. He resides in a house at 2704 West 12th Avenue, in the City of Vancouver, British Columbia, ("Residence"), where Branko and his grandson, Robert Peric, now assist with his care. After his wife died in 2012, Radovan became the sole owner of the Residence. It is his primary asset.
- [4] On March 15, 2007, Radovan executed a will, (the "First Will"). The First Will provided that if his spouse did not survive him, his estate was to be divided equally among Branko and his four grandchildren including Michael.
- [5] On May 23, 2014, with the assistance of a lawyer arranged by Branko, Radovan carried out the following transactions:
 - 1. He executed a will, (the "Second Will");
 - 2. He transferred the Residence to himself and Branko as joint tenants in consideration of \$1.00 and natural love and affection;
 - 3. He executed a declaration of trust;

4. He revoked a power of attorney previously granted to Michael and his brother, Robert Peric, and appointed Branko in their place.
- [6] In the Second Will, Radovan names Branko as his trustee and, after the payment of taxes, debts and expenses, leaves the residue of his estate to Branko provided that he survives Radovan.
- [7] Contemporaneously with the transfer of the Residence, Radovan and Branko executed a declaration of trust, which provides that Branko holds his interest in the Residence for the benefit of Radovan who is stated to be the sole beneficial owner. The declaration of trust has not been registered against the title to the Residence. A certificate of pending litigation has been registered on the title.
- [8] The Civil Claim, inter alia, seeks to set aside the transfer of the Residence and have Radovan reinstated as the sole registered owner. In essence it is alleged that Branko arranged for the transfer of the title to him and Radovan as joint tenants when Radovan did not have the legal capacity to execute the necessary documents.
- [9] As litigation guardian of Radovan, Michael's expressed concern is that the transfer of a one-half interest in the Residence to Branko, exposes the Residence to claims by third parties such as creditors of Branko. The evidence is that Branko would like to secure a line of credit, using the Residence as security, to pay for a new roof. He is also concerned that the Residence may have to be sold to pay for Radovan's care and a sale may not be agreeable to Branko.
- [10] In respect of the Civil Claim, the respondent seeks the production of medical and legal documents to assist him in determining whether the impugned transactions should be set aside.
- [11] Michael has filed a petition seeking to be appointed as committee of Radovan's person and estate. Branko and all of his children, except Michael, oppose his appointment. No steps have been taken by Michael to set that matter down for hearing.
- [12] There is some history of Michael assisting Radovan with his affairs. From 2007 until May 2014, Michael acted as his power of attorney. In 2008, Michael was added as a signing authority on Radovan's bank accounts to assist him with financial matters. He assisted Radovan in that regard from 2011 until May 23, 2014. It appears that Michael has been trusted by Radovan over a number of years to assist him with his financial affairs.
- [13] Radovan has given funds to his grandchildren and Branko from time to time. Michael has used the amount given to him to support Radovan and his wife. In addition Michael has been lending funds to Radovan for his care and is currently owed \$39,582.19 by Radovan.

- [14] The evidence indicates that Michael is not pleased with the transactions entered into by Radovan on May 23, 2014. There is some evidence that Michael also expressed his displeasure regarding the Second Will executed by Radovan on that date and indicated that he intended to challenge it after Radovan's death. He has said that he does not believe that Radovan had the capacity to execute the Second Will or transfer the Residence.
- [15] The applicant submits that the transactions entered into by Radovan on May 23, 2014, were part of an estate plan in respect of which he received independent advice from an estate planning lawyer.
- [16] The applicant also says that Radovan does not have the financial resources to finance the action commenced by the Civil Claim. Further, the applicant says, if a cost award is made against Radovan, the costs will have to be paid by his estate which may require a sale of the Residence.
- [17] The applicant argues that the Civil Claim is a collateral attempt by Michael to obtain evidence to facilitate his expected attempt to overturn the Second Will after Radovan's death. If the Second Will is overturned then, the respondent submits, Michael stands to benefit as a beneficiary of the First Will.
- [18] The applicant says that the Civil Claim does not serve any purpose other than serving as a collateral attack on the Second Will because, by virtue of the declaration of trust, beneficial ownership of the Residence remains with Radovan. As such, the applicant submits, the Civil Claim amounts to an abuse of process.
- [19] The applicant also argues that Michael stands to benefit from the Civil Claim because if the property transfer is successfully challenged then it is likely that the Second Will, which was executed at the same time, will ultimately be found to be invalid. The applicant says that the result would be that Michael would stand to benefit from the First Will. Accordingly, the applicant submits, Michael is not an appropriate litigation guardian.

Analysis

- [20] With regard to the application to strike the Civil Claim, the main thrust of the applicant's argument is that the Civil Claim amounts to an abuse of process because the remedy sought will achieve nothing more than Radovan already has namely, a declaration that he holds both legal and beneficial title to the Residence. The abuse is said to be the use of the Civil Claim to advance a claim that the applicant desires to make after Radovan's death to set aside Radovan's Second Will.
- [21] That argument does not address the risk that as a result of the transfer, title to the Residence may be subject to a charge by a third party such as a lender who provides Branko with a line of credit secured against title. As a joint legal owner with a power of attorney from Radovan, Branko is in a position to grant such security.

- [22] In my view, the action by Radovan, through his litigation guardian, Michael, challenging the validity of the transfer of the Residence and the granting of a power of attorney to Branko is not an abuse in the sense that is described in *Babovic v. Babowech*, [1993] B.C.J. No. 1802; or *Dempsey et al. v. Envision Credit Union et al.*, 2006 BCSC 750.
- [23] The evidence satisfies me that the Civil Claim is not unreasonable. The evidence is that, on May 5, 2014, his family physician reported that Radovan had a mental disorder or disability that rendered him incapable of making decisions regarding financial or legal affairs. He was of the view that Radovan was not capable of making changes to his power of attorney or financial plans. There is also evidence that Branko was aware of Radovan's declining health and mental faculties before that date.
- [24] I consider it to be in Radovan's interest to determine the validity of the transfer and the granting of a power of attorney so that he may regain complete control over the Residence. It would not be in Radovan's interest if the Residence were used as security for a mortgage loan or line of credit, for example, if the borrowed funds were used for a purpose other than maintaining or improving Radovan's lifestyle.
- [25] While the result of the Civil Claim will likely have an impact on a subsequent challenge of the Second Will that, in my view, is not a reason to strike the Civil Claim.
- [26] I will now discuss the suitability of Michael as litigation guardian.
- [27] In *Gronnerud (Litigation Guardians of) v. Gronnerud Estate*, 2002 SCC 38, the Supreme Court of Canada provided some guidance regarding the criteria for removing a litigation guardian. Of significance in the case at bar is that the litigation guardian must be indifferent as to the outcome of the proceedings. The court said that while it is acceptable and perhaps desirable in some cases to have a trusted family member as litigation guardian an exception would be where there is a particularly acrimonious dispute among the family members.
- [28] *Gronnerud* was considered by this court in *Lodge (Guardian ad litem of) v. Lodge*, 2003 BCSC 1205. Justice Chamberlist stated at para. 21:
- [21] Applying these decisions from Ontario and Saskatchewan to Rule 6(8) and 6(10) of the Rules of Court (now Rules 20-2(8) and 20-20(9) of the Supreme Court Rules) establishes in my mind the following principles with respect to a litigation guardian in British Columbia, namely:
- (a) a litigation guardian will be found to have an "interest in the proceedings" adverse to the person under disability where there is a "high level of conflict", between the proposed litigation guardian and a party in the proceeding;
 - (b) a litigation guardian will also have an "interest adverse to the person under disability" in those cases where the litigation guardian stands to benefit, either directly or indirectly by the litigation, even if that benefit has not vested at the time of the appointment. It is sufficient that the potential benefit, realistically assessed, is present.

- [29] In my view both of those criteria are met here.
- [30] There is high level of conflict between Michael and Branko and to a lesser extent between Michael and two of his siblings. His sister, Leah Peric and brother, Robert Peric, question his reason for making the Civil Claim on their grandfather's behalf against their father and oppose his application to be appointed committee.
- [31] It also appears from the evidence that Michael stands to benefit from the litigation, at least indirectly, because if the transfer of the Residence is set aside it is likely that the Second Will made on the same date will be set aside. In that event Michael stands to benefit as a beneficiary of the First Will. The mental capacity required to enter into an inter vivos transaction such as the transfer of the Residence is much the same as the mental capacity necessary to make a valid will. For this proposition I refer to *Brydon v. Malamas*, 2008 BCSC 749, at para. 46.
- [32] I decline to strike the Civil Claim however I order that Michael Branimir Peric be removed as litigation guardian for Radovan Matija Peric, also known as Radovan Matthew Peric.
- [33] The application by the respondent for the production of medical and legal documents is adjourned generally to allow for the reconsideration of that application when a new litigation guardian or committee is appointed.
- [34] As the result of this application is mixed, I decline to order costs.

"Bowden, J."

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Prepared on 29 October 2026 · Esheria