
CANADA / JUDGMENT

Re: Pepe

2012 BCSC 24

COURT

Supreme Court of British Columbia

DECIDED

11 January 2012

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2012 BCSC 24 Re: Pepe

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Re: Pepe,

2012 BCSC 24

Date: 20120111

Docket: S113009

Registry: Vancouver

Between:

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

Re: Carl Pepe

Petitioner

And

Lucy Pepe

Respondent

Before: The Honourable Mr. Justice Blair

in Chambers

Corrected Judgment: The front page of the judgment was corrected
on January 17, 2012.

Reasons for Judgment

Counsel for the Petitioner:

R. McLarty

L. Li, Articled Student

Counsel for the Respondent:

P. Lundrie

Place and Date of Hearing:

Vancouver, B.C.

November 24 & 30, 2011

Place and Date of Judgment:

Vancouver, B.C.

January 11, 2012

- [1] The Public Guardian and Trustee of British Columbia (the "PGT") seeks a declaration that Carl Pepe is by reason of mental infirmity arising from disease, age, or otherwise, incapable of managing his financial and legal affairs pursuant to s. 3 of the Patients Property Act, R.S.B.C. 1996, c. 349 (the "Act") and an order appointing the PGT as the committee of the estate of Carl Pepe pursuant to s. 6 of the Act.

Background

- [2] Carl Pepe was born April 27, 1915 and is presently 96 years of age. His wife, Lucy Pepe, also known as Lucia Pepe, was born November 28, 1929, and is presently 82 year of age. The couple married on June 2, 1952 and they have four adult children, a son Dominic Donald Pepe ("Donald Pepe"), and three daughters, Angela Marie Coughlan ("Angela Coughlan"), Anna Marie DiTrocchio ("Anna DiTrocchio"), and Rose Marie Pepe, also known as Rose Marie Price ("Rose Pepe").
- [3] Carl and Lucy Pepe are the registered owners of their home located at 825 West 45th Avenue, Vancouver, British Columbia (the "Residential Property"). Carl Pepe is the registered owner of a commercial building located at 2425 East Hastings Street, Vancouver, British Columbia (the "Commercial Property"). Donald Pepe is the president and sole director of Olympia Tailors Ltd. ("Olympia Tailors") a B.C. incorporated company with an address for service at the Commercial Property. The tailoring business was founded by Carl Pepe and Donald Pepe deposed his father gave the business to him in 2001.

- [4] Lucy and Donald Pepe are Carl Pepe's primary caregivers and the three reside on the Residential Property. Both Lucy and Donald Pepe oppose the PGT's application asserting that they should be permitted to continue to look after Carl Pepe and his financial and other business affairs, not the PGT.
- [5] There are two questions to be determined in this application. The first is whether Carl Pepe is incapable of managing his own affairs and the second, if he is incapable, who should be named the committee of Carl Pepe's estate?

The Medical Evidence Regarding Carl Pepe's Capabilities

- [6] Counsel for the PGT have filed reports from two physicians, Dr. Susan More, a geriatric psychiatrist, and Dr. John McMorran, a general practitioner, with respect to Carl Pepe's capabilities to manage his own affairs.
- [7] Dr. More examined Carl Pepe on August 8 and September 25, 2008 at the request of Dr. McMorran, the latter having been Carl Pepe's family physician for some years. Dr. More's examinations included some testing with a view to determining Carl Pepe's capacity to manage his financial and legal affairs. On the basis of her examinations she deposed in her affidavit sworn April 8, 2011:
 - 4. ... I am of the opinion that the Patient [Carl Pepe] is incapable of managing his financial and legal affairs by reason of mental infirmity arising from disease, age, or otherwise.
 - 5. The Patient is more impaired than he might appear superficially. He has significant difficulty with visual spatial and executive tasks, poor understanding of his finances, and impaired judgment and decision making.
 - ...
 - 8. My examination of the Patient satisfied me that he suffers from cognitive impairment and diminished insight and judgment that is unlikely to improve in his ability to manage his affairs.
 - 9. On the basis of my assessment, which included two examinations of the Patient and other inquiries, I am of the opinion that the Patient, because of mental infirmity arising from disease, age, or otherwise, is incapable of managing his financial and legal affairs.
- [8] Dr. McMorran deposed that he examined Carl Pepe on April 8, 2008, two months after his stroke in February 2008, and after performing a mini-mental state examination concluded that while Carl Pepe had recovered from his stroke he was unaware of the nature and extent of his finances and referred Carl Pepe to Dr. More for a detailed evaluation.

- [9] Dr. McMorran saw Carl Pepe again on June 24, 2008, at which time he found him suffering from mild cognitive impairment, that he was overpowered by his wife, and, although he did not find him incapable at that time of managing his financial and legal affairs because of mental infirmity, he did recommend that his daughter, Angela Coughlan, be appointed as committee of the estate of Carl Pepe.
- [10] After examining Carl Pepe again on July 18, 2009, Dr. McMorran concluded that his patient showed a decline in his mental status since June 24, 2008, and was unaware of the nature and extent of his finances. On May 13, 2010, Dr. McMorran examined Carl Pepe and stated at paragraphs 10 to 12 of his March 29, 2011 affidavit:
10. On May 13, 2010, I examined the Patient again and concluded that he is incompetent to manage his personal finances due to memory and cognitive impairments ...
 11. The medical record indicates that the Patient has evidenced progressive, cognitive deterioration for two to three years and is extremely unlikely to demonstrate improved cognitive function.
 12. On the basis of my aforesaid findings, I am of the opinion that there is very little likelihood that the Patient will improve in the future and that, because of mental infirmity arising from disease, age, or otherwise, he is incapable of managing his financial and legal affairs.
- [11] Counsel for Lucy and Donald Pepe submitted that a further and more recent medical report should be obtained to determine Carl Pepe's present capability to manage his financial and legal affairs given that Dr. More last saw Carl Pepe more than three years ago, on September 25, 2008. However, in considering Carl Pepe's present capabilities, Dr. More noted that he suffers from cognitive impairment and diminished insight and judgment "that is unlikely to improve in his ability to manage his financial and legal affairs."
- [12] Dr. McMorran's findings appear similar to those expressed by Dr. More, specifically that Carl Pepe, as of July 2009, suffered from moderate cognitive impairment and diminished insight and judgment "that is unlikely to improve in his ability to manage his affairs." Dr. McMorran indicated that in 2009 Carl Pepe exhibited a decline in his mental status since June 2008 and that in 2010, he referred to Carl Pepe as suffering from progressive, cognitive deterioration for two to three years and is extremely unlikely to demonstrate improved cognitive function.
- [13] The findings of Drs. More and McMorran are consistent in that Carl Pepe's condition was such that it was unlikely or extremely unlikely that his cognitive function would improve such that he could manage his financial and legal affairs. Those findings in themselves are sufficient for me to conclude that it is unnecessary to obtain a further medical report on Carl Pepe's capabilities.
- [14] However, in considering the submission made by counsel for Lucy and Donald Pepe that further medical evidence should be obtained with respect to Carl Pepe's capabilities, I should note that the PGT filed its petition on May 6, 2011 and the response from counsel for Lucy Pepe is dated June 24, 2011. Lucy and Donald Pepe had a five-month period before this

matter was heard on November 24, 2011 in which to have Carl Pepe examined and another medical report prepared by a specialist of their choice. No further medical review of Carl Pepe's capabilities is before the Court.

- [15] The submission by counsel for Lucy and Donald Pepe that Carl Pepe should be examined again to determine his present capabilities is further complicated by Lucy Pepe's refusal to have Carl Pepe undergo any further medical examinations. Counsel for the PGT arranged for Dr. McMorran to refer Carl Pepe to another geriatric psychiatrist, Dr. Sandi Culo, for a further assessment at Vancouver General Hospital on January 5, 2011. Lisa Li, an articling student with counsel for the PGT, deposed in her affidavit sworn May 6, 2011, that by letter dated December 7, 2010, notice of Carl Pepe's appointment with Dr. Culo was couriered to Lucy and Carl Pepe with copies of the December 7, 2010 letter sent to the Pepes' four children.
- [16] Ms. Li deposed that on December 17, 21 and 22, 2010, she called Carl and Lucy Pepe to confirm that they had received and understood the contents of the December 7, 2010 letter. Ms. Li, in her affidavit at paragraph 10, deposed that Lucy Pepe advised her that she:
- a. will not take Carl Pepe to any doctors;
 - b. will not allow any doctors to access the Commercial or Residential Properties;
 - c. does not want daughters Angela Coughlan, Anna DiTrocchio, or Rose Pepe to take Carl Pepe to any doctors; and
 - d. does [not] want to discuss the health of Carl Pepe with anyone.
- [17] Ms. Li, on January 4, 2011, also delivered a second letter to Donald Pepe advising him of the appointment with Dr. Culo and to make arrangements for Carl Pepe to attend the appointment. Dr. Culo advised by letter dated January 5, 2011 that Carl Pepe failed to attend the appointment on January 5, 2011.
- [18] I conclude from Ms. Li's affidavit that Lucy Pepe thwarted this attempt in January 5, 2011 to have Carl Pepe undergo a further medical examination to explore his capabilities. Given the opposition from Lucy Pepe regarding further medical examinations of Carl Pepe, it is difficult to give any credit to her counsel's submission that a further medical assessment should be performed at this time.
- [19] Pursuant to Rules 22-2(13)(b)(ii) and 22-1(4)(e) of the Supreme Court Civil Rules, I conclude this to be a proper situation in which to receive into evidence the facts stated to be based on information and belief contained in the affidavit of Lisa Li sworn and filed May 6, 2011. In reaching that conclusion, I note the date of Ms. Li's affidavit provided time for Lucy Pepe to respond to Ms. Li's evidence, but no response was filed.

- [20] Pursuant to s. 3 of the Act, I have heard the application brought by the PGT, together with the affidavits of Drs. More and McMorran who are both medical practitioners and who opine that because of mental infirmity arising from disease, age, or otherwise, that Carl Pepe is incapable of managing his financial and legal affairs.
- [21] Based on the opinions of Drs. More and McMorran, which I accept, together with the other material filed, I declare that Carl Pepe, by reason of mental infirmity arising from disease, age or otherwise, is incapable of managing his financial and legal affairs.

Committee to be Determined

- [22] Having found Carl Pepe incapable of managing his financial and legal affairs, the question then turns to who should assume the role of committee of his estate pursuant to s. 6 of the Act. In *Finlay v. Finlay*, [1997] B.C.J. No. 424, Low J., as he then was, discussed the Act's criteria for selecting a committee, stating at para. 13:
- [13] ... The Act sets out no criteria for selection of an appropriate committee by the court. The parens patriae jurisdiction of the court requires the court to exercise its power to appoint a committee only in the best interests of the patient.
- [23] Low J. also noted that s. 28 of the Act might provide further assistance, that section reading:
- If there is insufficient provision in this Act, the court may at any time, on the application of any person, make an order not in contradiction to this Act or the regulations that it considers necessary for or in the interests of the proper, honest and prudent management and administration of the estate of a patient.
- [24] Lucy and Donald Pepe, in their affidavits sworn June 24, 2011, originally contended that the Court should allow the status quo to continue, leaving them with the effective responsibility for looking after both the person and estate of Carl Pepe. However, Donald Pepe, in his affidavit sworn November 18, 2011, deposes that he and his mother, Lucy Pepe, agree that if Carl Pepe was found incapable of managing his financial and legal affairs that they, Lucy and Donald Pepe, should be appointed committees of the estate of Carl Pepe.
- [25] Carl Pepe also swore an affidavit on June 24, 2011 in which he deposed that he did not want the PGT to take over his property or control him. Carl Pepe's affidavit in many aspects echoes the affidavits sworn by Lucy and Donald Pepe, and given both the similarity of the contents of the three affidavits and the information and opinions contained in the medical reports prepared by Drs. More and McMorran, I am reluctant to attach much, if any, weight to Carl Pepe's affidavit.
- [26] The three daughters, Angela Coughlan, Anna DiTrocchio and Rose Pepe did not file any affidavits with respect to the PGT's application, but all attended the hearing and each advised the Court that they favoured the PGT being appointed committee of the estate of Carl Pepe.

- [27] The differing positions taken by the members of Carl Pepe's immediate family with respect to the PGT's application is yet another manifestation of the considerable conflict and estrangement which has developed between Lucy and Donald Pepe against the three daughters Angela Coughlan, Anna DiTrocchio and Rose Pepe.
- [28] Both Lucy and Donald Pepe in their respective affidavits describe the three daughters as greedy and assert that they are trying to obtain control of the assets and property of Carl and Lucy Pepe. Lucy and Donald Pepe also blame the three daughters for the intervention of the PGT into Carl Pepe's affairs.
- [29] Marc Leblanc, long term care case manager of Vancouver Coastal Health, in his affidavit sworn March 29, 2011 deposed that the PGT's involvement arose from a referral on June 20, 2008 by Vancouver Coastal Health about the circumstances in which Carl Pepe found himself. Its concerns involved Carl Pepe's physical and intellectual capabilities as he was recovering from his February 2008 stroke, and the complications arising from the friction between Lucy and Donald Pepe and the three daughters with respect to the sale of the Commercial Property, a sale pressed by the daughters over the objections of Lucy and Donald Pepe.
- [30] The Vancouver Coastal Health in June 2008 also understood that Lucy Pepe was contemplating divorcing Carl Pepe. Lucy Pepe, on May 23, 2008, commenced a family law action in the Supreme Court of B.C., File No. E081803, Vancouver Registry, against Carl Pepe in which she asserted an interest in the Commercial Property which was registered solely in the name of Carl Pepe. The relief she sought also included a declaration pursuant to s. 57 of the Family Relations Act, R.S.B.C. 1996, c. 128 that the parties had no reasonable prospect of reconciliation. Lucy Pepe deposed that she started the family law action to stop the proposed sale of the Commercial Property which, in 2008, had a market value of some \$3 million.
- [31] In considering whether to name Lucy Pepe as a committee with Donald Pepe of the estate of Carl Pepe, her prior approach to Carl Pepe's financial affairs warrant consideration. Marievic Evangelista, a regional consultant with the office of the PGT, wrote on December 4, 2008 to Lucy Pepe who then possessed a power of attorney for Carl Pepe, noting that Lucy Pepe was in a position of trust with respect to Carl Pepe's financial affairs. Ms. Evangelista advised Lucy Pepe that the PGT's role was to provide her with information and assistance with respect to her management of Carl Pepe's financial affairs and to review the management of these affairs when concerns are raised.
- [32] Ms. Evangelista advised that some concerns had been raised and as such the PGT requested Lucy Pepe to provide a financial statement for Carl Pepe's financial affairs for the period November 1, 2007 to November 1, 2008, setting out the information required and advising that the PGT may apply to be appointed committee of Carl Pepe's estate if the financial information requested was not forthcoming. Lucy Pepe did not respond to the December 4, 2008 letter from the PGT's office and has still not provided a financial statement with respect

to Carl Pepe's financial affairs with the information outlined in Ms. Evangelista's letter.

- [33] In his affidavit sworn June 24, 2011, Donald Pepe provided summaries of Carl Pepe's income and the disposition of the proceeds of a \$250,000 loan obtained by Lucy Pepe in October 2008 and secured by a mortgage against Carl and Lucy Pepe's equity in the Residential Property. The information provided by Donald Pepe does not include the details sought by Ms. Evangelista in her December 4, 2008 letter.
- [34] Although Lucy Pepe deposes that she has done a good job of managing the family's finances and ensuring that bills and debts are paid, the financial information supporting her contention has not been provided. For example, in early 2008, there was a mortgage against the Commercial Property which went into default leading to a foreclosure action against Carl Pepe. Neither Lucy Pepe nor Donald Pepe provided information as to why the default occurred.
- [35] However, Carl Pepe's former solicitor, Kevin Moore, in his December 10, 2008 response to a query from the PGT, advised that Carl Pepe consulted him in early 2008 with respect to a pending foreclosure on the Commercial Property. During the next few months, Carl Pepe listed the Commercial Property for sale, but was unable to obtain possession of that portion of the building which was occupied by Olympia Tailors, the business operated by Donald Pepe. Mr. Moore wrote that Carl Pepe's attempts to sell the Commercial Property and repay the outstanding mortgage were strongly opposed by Lucy and Donald Pepe.
- [36] The mortgage was discharged and the foreclosure action terminated in July 2008 with the payment of some \$150,000, obtained by the proceeds of the \$250,000 mortgage against the Residential Property.
- [37] The PGT in its material noted a transaction which occurred on March 9, 2010 involving Carl and Lucy Pepe's joint account at the Royal Bank of Canada. The bank advised that Lucy Pepe, on March 9, 2010, removed \$140,000 from the joint account of Carl and Lucy Pepe and transferred the funds into an account in the name of Lucy Pepe alone. Lucy Pepe provided no explanation for the transfer, although it was raised in the affidavit of Ms. Li referred to earlier in these reasons.
- [38] Another factor as to the suitability of Lucy Pepe to assume the role of co-committee of the estate of Carl Pepe is that Carl Pepe's 2008 will names her as the sole beneficiary of his estate provided she survives him for 30 days. She, therefore, has a personal interest in his income and assets and how they are to be used for his benefit during his lifetime.
- [39] Counsel, following the November 30, 2011 hearing, by agreement, provided medical reports pertaining to Lucy Pepe's health, prepared by Dr. McMorran and Dr. Harpreet Chauhan, a geriatric psychiatrist. They described Lucy Pepe as suffering from high anxiety, and adenocarcinoma, stage IV, with metastases both to brain as well as her liver. She is in a palliative course of treatment. I understand counsel will file the reports as exhibits, and I confirm that the reports were made available to me to assist in the preparation of these

reasons for judgment.

- [40] The suitability of Donald Pepe to be named as a co-committee with Lucy Pepe of the estate of Carl Pepe raises several concerns. If Lucy Pepe fails to survive Carl Pepe for 30 days, he, along with his three sisters from whom he is estranged, become the beneficiaries of Carl Pepe's estate, giving him a personal interest in his father's income and assets and their use during Carl Pepe's lifetime.
- [41] Donald Pepe has also sided with Lucy Pepe against his three sisters and given the friction within the family, his appointment as co-committee, together with Lucy Pepe, is likely to further exacerbate the already difficult situation within the family which appears to include steps to isolate Carl Pepe from his daughters.
- [42] Another factor to consider with respect to Donald Pepe's suitability to be a co-committee of Carl Pepe's estate is his occupation, through Olympia Tailors Ltd. which he owns and operates, of the business premises in the Commercial Property. As a co-committee, he would be negotiating a leasing arrangement on behalf of the patient, Carl Pepe, with a company, Olympia Tailors, that he controls. Further, the details of the present leasing or rental arrangement between Olympia Tailors and Carl Pepe lack transparency. It appears from Donald Pepe's affidavit that rather than making payments to Carl Pepe for occupying part of the Commercial Property, Donald Pepe, or his company, pays debts owed by Carl and Lucy Pepe. However, he has not supported this arrangement with the production any actual financial statements or payment records.
- [43] Donald Pepe also has a medical history of schizophrenia from which his counsel sought leave to have Donald Pepe give viva voce evidence that the schizophrenia resulted from a mis-diagnosis. In denying the leave, I acceded to the submission from counsel for the PGT that Donald Pepe's medical history had been raised in the material filed by the PGT, and that Donald Pepe had ample opportunity prior to the hearing of the petition to file an affidavit clarifying his medical history.
- [44] After considering the above, I am not satisfied that in the unique circumstances either Lucy Pepe or Donald Pepe, acting either alone or together, are appropriate committees or co-committees of the estate of Carl Pepe. There are potential conflicts in naming them as co-committees. Lucy Pepe is both a potential beneficiary of her husband's will and as a claimant in her family law action to an interest in Carl Pepe's Commercial Property. Donald Pepe's conflicts include those based on his interest in keeping the Commercial Property controlled by the family and available for Olympia Tailors and as a future beneficiary of his father's estate. Further, neither Lucy nor Donald Pepe have been forthcoming with respect to the financial situation involving themselves and Carl Pepe. Lucy Pepe never responded to the PGT's request in 2008 for financial information, nor has she explained why in 2010 she transferred \$140,000 from her joint account with Carl Pepe into her own bank account. Similarly, Donald Pepe did not fully divulge the financial arrangements involved in his company's use of a portion of the Commercial Property.

[45] Lucy Pepe's medical situation by itself would not preclude her from acting as a committee of her husband's estate, but I conclude that given the other concerns I have expressed with respect to Lucy Pepe are such as to preclude her from being appointed as a committee or co-committee of Carl Pepe's estate.

[46] Given all the circumstances and upon exercising the broad discretion provided the Court by ss. 6 and 28 of the Act, with particular consideration of what is in the best interests of Carl Pepe, I appoint the PGT as the committee of the estate of Carl Pepe.

Conclusion

[47] I grant the petition of the PGT in the following terms:

- 1) that the Court receive into evidence the facts stated to be based on information and belief contained in the affidavit of Lisa Li sworn May 5, 2011;
- 2) I declare that Carl Pepe is by reason of mental infirmity arising from disease, age or otherwise, incapable of managing his financial and legal affairs pursuant to s. 6 of the Act;
- 3) I order that the PGT be appointed as the committee of the estate of Carl Pepe pursuant to s. 6 of the Act; and
- 4) I order that the petitioner's costs for this be paid out of the estate of Carl Pepe on a special costs basis.

"R.M. Blair J."

BLAIR J.

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