

CANADA / JUDGMENT

Seifred v. Arnold

2020 BCSC 2250

COURT

Supreme Court of British Columbia

DECIDED

15 December 2020

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2020 BCSC 2250 Seifred v. Arnold IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Seifred v. Arnold, 2020 BCSC 2250 Date: 20201215 Docket: S171250 Registry: Vancouver Re: The Patients Property Act, R.S.B.C. 1996, c. 349 and Re: Grace Caroline Seifred Between: Daryl Richard Seifred Petitioner And Donna Marie Arnold and Barbara Grace Sward Respondents - and - Docket: S187633 Registry: Vancouver Re: The Patients Property Act, R.S.B.C. 1996, c. 349 and Re: Grace Caroline Seifred Before: The Honourable Madam Justice Marzari Oral Reasons for Judgment (In Chambers) Counsel for the Petitioner, Daryl Richard Seifred in Action No. S171250: A.A. Mortimore A. Pearl Counsel for the Petitioner/Respondent, Donna Marie Arnold in Action Nos. S171250 and S187633: E. Macaulay Counsel for the Respondent, Barbara Grace Sward in Action No. S171250: J.N.E. Ramsay Counsel for the Respondent, Grace Caroline Seifred in Action No. S187633: T.R. Britnell, Q.C. D. Hunter Place and Date of Trial/Hearing: Vancouver, B.C. October 13-15, December 15 2020 Place and Date of Judgment: Vancouver, B.C. December 15, 2020

- [1] THE COURT: I have received written submissions with respect to the issue of Mrs. Seifred's standing to file a response in this action and to make substantive responses to express her wishes with respect to the issue of her committee's role. I have received those submissions from counsel for Mrs. Seifred herself, as well as responding submissions from some but not all of the other involved parties on that issue. I have also received submissions, as I requested, on the issue of the admissibility of Mrs. Seifred's file as disclosed in Ms. Britnell's affidavit, essentially setting out the circumstances of her instructions to file an affidavit, swear an affidavit, and to take a position with respect to the committee's role back in 2017, and later, the circumstances of her instructions on the nomination of committee, including Ms. Britnell's observations with respect to that.
- [2] Today I understand that Mrs. Seifred is no longer seeking to make substantive submissions with respect to:
- a) the committee's role, either with respect to the nomination of committee or whether she should have a committee nominated,
 - b) who the committee should be, or

- c) whether Mrs. Seifred was under any undue influence when she made those decisions in 2017, provided that Donna, as the party who seeks to rely on the nomination of committee and the affidavit of Mrs. Seifred prepared in early 2017, has the opportunity to address those issues.
- [3] As a result, I do not need to address whether or not Mrs. Seifred has standing and whether or not there is an ethical obligation on behalf of Ms. Britnell, as Mrs. Seifred's counsel, to make Mrs. Seifred's 2017 views known to the court. Ms. Britnell is satisfied that the proposed solution provides a satisfactory means to ensure that Mrs. Seifred's earlier views are made known to the Court.
- [4] For what it is worth, I was convinced by the arguments made on behalf of Mrs. Seifred that the capacity to express one's wishes to the court, as expressed in *Marczak (Re)*, 2007 BCSC 684, is something that requires perhaps less capability than one may need to, for example, prepare a will, or even prepare a nomination of committee. While the court needs to be aware of the frailties of the expression of such wishes, especially when there are allegations of undue influence and incapacity, it would be wrong not to consider those expressed wishes.
- [5] Counsel have managed to find a way to address those issues without requiring Mrs. Seifred to make submissions on her own behalf at a time when all participants agree her capacity is much more compromised than it was in 2017.
- [6] The second issue that I have to address then, is whether or not privilege should be waived over Mrs. Seifred's notes and the legal file relating to her instructions to counsel regarding responding to the petition brought by her son Daryl, and in preparing the nomination of committee on two different occasions: in February and March of 2017. On that issue, all counsel are agreed that I should waive privilege.
- [7] I do not think that is sufficient for me to decide to waive privilege, per se. It is a right held by Mrs. Seifred and not one that is open to her children to waive. However, I am particularly moved to consider waiver of that privilege in light of Ms. Britnell's arguments, who, as counsel for Mrs. Seifred, is solely present to represent the best interests of Mrs. Seifred. Ms. Britnell's view is that it is in Mrs. Seifred's best interests to have privilege waived over her file, in order to allow her to support the degree to which Mrs. Seifred had capacity to give the instructions that she did in 2017, and to partially address Mrs. Seifred's lack of ability to give an affidavit today in this proceeding due to her incapacity.
- [8] Counsel for Mrs. Seifred notes that the allegations of undue influence raised by her daughter Barbara that may affect the weight to be given to Mrs. Seifred's wishes in February 2017 and March 2017, did not arise until much later. At the point those allegations arose, it was more difficult for Mrs. Seifred to instruct counsel and provide Ms. Britnell with an affidavit, on something this sensitive. And so in effect, the only thing the Court has with respect to supporting Mrs. Seifred's wishes are the instructions she gave to her counsel and Ms. Britnell's observations of her that she recorded in her notes while she took those

instructions.

- [9] I note that there are a number of cases, most notably *Fraser v. Fraser*, 2008 BCSC 1733, but also *Marczak (Re)* where the court has been open to affidavit evidence from counsel describing the circumstances of things like nominations of committees or powers of attorney. However, it is a slippery slope; allowing this evidence is already waiving privilege, in my view.
- [10] I considered whether or not to allow evidence of Ms. Britnell's description of the steps she took in taking the affidavits and preparing the nomination of committee, but not allowing the notes in which Ms. Britnell recorded those instructions. However, the two things are so intertwined, and I do not think it is possible to disentangle them to the extent necessary to determine what is an observation and what is instructions. In this context where instructions are necessarily bound up with the observations, because the instructions are not valid without the observations, I do not see any utility in attempting to distinguish those two things.
- [11] In the end, although I am perhaps less convinced than the court in *Palamarek (Re)*, 2010 BCSC 1894 that privilege is not violated, in this case, in my view, it is in the best interests and in the interests of justice to admit the evidence, even though it is a violation of privilege. I rely on para. 58 of *Palamarek (Re)* in concluding that general policy supports the admission of this evidence in this case, being an investigative case where the best interests of Mrs. Seifred are the subject of my investigation.
- [12] So, I am going to allow the affidavit of Mrs. Britnell to be put before me and to be admitted into evidence, and for counsel to make arguments with respect to whether it supports the validity of the nomination of committee, whether there was undue influence exercised, and whether Mrs. Seifred was under influence at the time. "Marzari J."

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