
CANADA / JUDGMENT

Simons v. DeClemente-Simons

2014 BCCA 132

COURT

British Columbia Court of Appeal

DECIDED

2 April 2014

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2014 BCCA 132 Simons v. DiClemente-Simons

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Simons v. DiClemente-Simons,

2014 BCCA 132

Date: 20140402

Docket: CA040899

Between:

Jeffrey Alan Simons

Respondent

(Petitioner)

And

Linda DiClemente-Simons

Appellant

(Respondent)

And

Montague Simons

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Hall

The Honourable Madam Justice Saunders

The Honourable Madam Justice Kirkpatrick

On appeal: from an order of the Supreme Court of British Columbia, dated
April 15, 2013 (Simons v. Simons, 2013 BCSC 650, Vancouver Docket S127674)

Oral Reasons for Judgment

Counsel for the Appellant:

D.E. Burns and S. Pedlow

Counsel for the Respondents:

F.L. Lamer

Place and Date of Hearing:

Vancouver, British Columbia

April 2, 2014

Place and Date of Judgment:

Vancouver, British Columbia

April 2, 2014

Summary:

The appeal is from appointment of a committee of the person and estate of Mr. Simons. Both the mode of hearing in the Supreme Court of British Columbia and the identity of the committee appointed are challenged. Held: The mode of hearing engages the discretion of the judge, as to which this court is limited on review. No reversible error on the mode of hearing is established. Nor is there a basis upon which to interfere with the selection of the committee, one clearly being required in this case. Appeal dismissed.

- [1] SAUNDERS J.A.: Ms. DiClemente-Simons appeals from an order made on the hearing of a petition, appointing her step-son Jeffrey Simons as committee of the estate and person of her husband Montague Simons, Jeffrey Simons' father. The order was made pursuant to the Patients Property Act, R.S.B.C. 1996, c. 329. The appellant seeks an order: (1) quashing the Supreme Court of British Columbia order; (2) referring Jeffrey Simons' petition for appointment as committee to the trial list; (3) appointing the Public Guardian and Trustee interim committee of her husband's estate and person or alternatively appointment of an independent third person as the committee; (4) appointing a lawyer to represent her husband; and (5) a declaration that the representation agreement of Montague Simons be continued or in the alternative appointment of herself as committee of his person. In aid of

the appeal, whom I shall refer to as Ms. DiClemente as in the reasons for judgment of the Supreme Court of British Columbia, seeks to adduce new evidence in the form of affidavits.

- [2] The order appealed was made by Madam Justice Kloeckman April 15, 2013. The new evidence Ms. DiClemente seeks to adduce concerns Mr. Montague Simons' circumstances and care since Jeffrey Simons was appointed committee. In particular, the new evidence describes occasions in which Ms. DiClemente says her access to and care for her husband have been impeded by Jeffrey Simons acting on the committee order now in place. The affidavits include a description of events that have led to Montague Simons' admission into a care facility, and to some degree encompass complaints by Ms. DiClemente of lack of financial support. On the matter of care, the new affidavits say Ms. DiClemente is highly restricted in the hours she is allowed to visit Montague Simons in spite of Montague Simons' desire to see her.
- [3] The governing principle on the admission of new evidence is the interests of justice.
- [4] In this case the new evidence does not really add a great deal to the issues before us. It is common ground that Montague Simons' condition has worsened since the order appealed, and Ms. DiClemente is restricted in her hours of visiting. Accepting the new evidence at face value, that is, as being reasonably capable of belief, it seems to me it properly goes to the question of the continuing best interests of Montague Simons and appropriate directions the Court may wish to give to the committee. It does not address the essential questions for us, which are whether the judge made a reversible error either in declining to set the matter for a conventional trial or in appointing Jeffrey Simons as committee of Montague Simons' person and estate. I understand that this evidence newly tendered describes circumstances that may be relevant to ongoing matters in the trial court concerning administration of the committee'ship, but it seems to me that it does not erode the basis of the order that is appealed, nor does it demonstrate an error in the judge's view of her task and the best mode by which to proceed on the petition. It is, in my view, therefore unnecessary to admit the new evidence, and I would not do so.
- [5] I turn then to the appeal itself, starting with the reasons of the judge (indexed at 2013 BCSC 650).
- [6] The judge described the parties and the issues before her:
- [1] The named respondent, Montague Simons, whom the parties refer to as the "Patient", is the subject of a petition proceeding brought by his son, Jeffrey Simons, under the Patients Property Act, . Jeffrey Simons holds a power-of-attorney for the Patient and is a joint trustee with him over the assets of the Montague Simons Alter Ego Trust ("MSAE Trust"). Jeffrey Simons now seeks to be appointed as committee over both the Patient's estate and person. The other named respondent is the Patient's younger son, Stephen Simons, who supports his brother Jeffrey Simons' application.

- [2] The Patient is newly married. In September 2012 he married Linda Di Clemente with whom he had had a long-term relationship and was living with intermittently since the death of his wife in December 2009. On November 26, 2012, after this litigation started, the Patient signed a representation agreement under the Representation Agreement Act, R.S.B.C. 1996, c. 405 appointing Ms. Di Clemente as the person authorized to make, or help make decisions, and to undertake, or help undertake any tasks with respect to the Patient's personal care and health matters.
- [3] Ms. Di Clemente opposes the appointment of Jeffrey Simons as the Patient's committee and supports the application of the Patient's nephew, Phillip Weinstein, as committee. She also applies for an order that the Representation Agreement continue in full force and effect notwithstanding any appointment of committee.
- [6] The affidavit material is voluminous and replete with mutual accusations and allegations of physical and financial abuse of the Patient. Although it is evident that everyone involved purports to love and care about the Patient, the acrimony between Jeffrey and Stephen Simons on the one side, and Ms. Di Clemente and Mr. Weinstein on the other side, has influenced the judgment of some of these parties to act to the detriment of the Patient. The situation has become intolerable and the following issues must be resolved with due dispatch:
- 10 what is the appropriate mode of hearing?
- 2) Does the Patient require a committee?
- 3) If so, who is the best qualified candidate? and
- 4) Should the Representation Agreement survive any appointment of committee?
- [7] As to the mode of hearing, the judge said:
- [10] The decision to direct a trial of the issue of the Patient's competency is a discretionary one: Lee (Re), 2002 BCSC 838. As stated earlier, the current situation is intolerable for the parties and a resolution needs to be achieved as quickly and efficiently as possible. In my opinion, nothing would be gained by setting this down for trial. The cost and delay to the parties would be enormous and unnecessary to make a fair decision.
- [11] There are sufficient undisputed facts on the affidavits, or alternatively, disputed facts that can be resolved by the corroborative evidence of third party witnesses or documents, to allow for the proper exercise of my judicial function in this matter.
- [8] The judge found that Montague Simons is a patient within the meaning of the Patients Property Act, R.S.B.C. 1996, c. 348, who requires appointment of a committee, a conclusion that is not challenged on appeal and is clearly correct.

- [9] The judge next addressed the alternative persons presented for appointment as committee, Jeffrey Simons, Phillip Weinstein and the Public Guardian and Trustee, first as to committee of the person and second as to the estate. The judge observed that the paramount consideration on appointment of a committee is the best interests of the patient, citing *British Columbia (Public Trustee) v. Pollen*, [1996] B.C.J. No. 2394 (S.C.), and said:
- [27] The test is similar to the one the court applies when dealing with children, but there is an important difference. As stated by Ballance J. in *Vranic (Re)*, 2007 BCSC 1949 at paras. 92 and 93:
- [92] [T]he test requires a more nuanced approach which acknowledges and takes into consideration issues concerning the adult's autonomy, his personal dignity, his idiosyncrasies and the way he has chosen to live his life while capacitated. It also takes into account most assuredly any wishes he has validly expressed while mentally competent or lucid about who he would like to act as his committee or otherwise make decisions on his behalf.
- [93] These factors should also inform the manner in which a committee performs his or her duties.
- [28] Additional factors when considering a candidate include the candidate's previous involvement with the patient and his family, his knowledge and understanding of the patient's situation and needs, his level of experience or capability in performing the duties of committee, his plan for management of the patient and any potential conflict of interest between the patient and the candidate: *Bowman (Re)*, 2009 BCSC 523; *Vranic (Re)*.
- [10] No exception is taken by the appellant to the judge's expression of the criteria applicable to appointment of a committee.
- [11] The judge rejected Phillip Weinstein's application for appointment as committee, saying he was wholly unsuitable. The appellant does not challenge that conclusion, which again, on the record and for the reasons of the judge, is unassailable.
- [12] In respect to the appointment of Jeffrey Simons to act as committee of the estate, the judge thoroughly reviewed the evidence of the trust demonstrated by Montague Simons in his son Jeffrey before Montague Simons was declared incompetent, and noted the position of the Public Guardian and Trustee that Jeffrey Simons was a suitable prospective committee of the estate. Ms. DiClemente had made complaints to the judge as to Jeffrey's handling of the estate as attorney, before he brought the application for appointment as committee. The judge referred to several examples of these alleged improprieties, and rejected Ms. DiClement's submission that they demonstrated a lack of suitability on Jeffrey Simons' part to act as committee. The judge said:
- [39] The above complaints are just a sampling of those made by Ms. Di Clemente and Phillip Weinstein which, when examined, were unfounded. Unlike the allegations by Jeffrey Simons of the physical abuse of the Patient by Ms. Di Clemente, which were corroborated by

other evidence, Ms. Di Clemente's and Phillip Weinstein's allegations of financial abuse by Jeffrey Simons were singularly unsubstantiated. Counsel was not able to provide me with independent evidence of financial abuse, or even independent reporting of financial abuse by Jeffrey Simons. The Public Guardian and Trustee, who has been reviewing the accounts of the MSAE Trust and the conduct of Jeffrey Simons in the Patient's financial affairs, has yet to find anything untoward. That office has not produced a final report due to time constraints, but I am satisfied from the letter of March 19, 2013, that Jeffrey Simons' accounts of his father's finance seem to be in order.

- [13] I would observe that the handling of trust funds will be reviewed by the Public Guardian and Trustee. To the extent there has been insufficient financial support from Montague Simons' estate for Ms. DiClemente, this is again a matter for the trial court overseeing administration of the trusteeship.
- [14] In addressing the appointment of the committee, the judge recorded Ms. DiClemente's position that the Representation Agreement should continue, as would be allowed under s. 19 of the Patients Property Act. The judge said:
- [50] Even if the Patient had the capacity to enter into the Representation Agreement, which has not been proven on the evidence, the Representation Agreement purports to include additional powers to the standard statutory agreement which would be in direct opposition to the powers of a committee over the person of the Patient, such as:
- (a) physically restrain, move or manage me, or have me physically restrained, moved or managed, when necessary and despite my objections at the time;
 - (b) give consent on my behalf to all health care, even if I refuse at that time to give my consent to the health care;
 - (c) give or refuse consent on my behalf to all types of medical care including life support care or treatment;
 - (d) decide whether I should have contact or associate with another person.
- [51] I pause here to note two things. Firstly, although Ms. Di Clemente relies on her long term relationship with the Patient as a factor in her favour, there is no doubt that both during his marriage to Jean Simons and after she died in 2009, the Patient continued to see other women, of which Ms. Di Clemente was one, but not the only one. Therefore, her position as exclusive companion to the Patient was not confirmed until her marriage to him in 2012.
- [52] Secondly, although the evidence is inconclusive as to the extent and severity of Ms. Di Clemente's physical abuse of the Patient, there is no doubt that she did hit him from time to time.
- [15] The judge concluded that she should not leave the care of Montague Simons in the hands of Ms. DiClemente as contemplated by the Representation Agreement, saying:

- [57] Ms. Di Clemente submits that to avoid conflict, a committee should only be appointed over the Patient's estate, leaving care for his person in her hands. I am not prepared to do this because in addition to the allegations of physical abuse of the Patient, there are other concerns about empowering Ms. Di Clemente to make all health care decisions for the Patient.
- [16] After referring to examples of decisions or actions said to have been taken by Ms. DiClemente in respect to Montague Simons that do not appear sound, the judge found:
- [60] Although the evidence establishing the exact circumstances of each of the above facts may be disputed, the core facts themselves are not, and are sufficient to create a concern about Ms. Di Clemente's judgment in pressured situations. Even the circumstances of her marriage to the Patient raise a question of judgment. In the fall of 2012, at a time when it was obvious to all that the Patient's mental status was questionable, she took the Patient to Manitoba and married him without telling anyone until after the fact. She may desire to be a loving and committed wife to the Patient and he may, at some level, desire that too, but unfortunately he is no longer able to decide what is in his best interests and the law must intervene.
- [61] In my opinion, on the whole of the evidence, Jeffrey Simons is the most suitable candidate to act as committee over the Patient's person, as well as his estate.
- [17] I have reviewed the reasons for judgment at some length because they demonstrate a careful review and, I consider, a correct application of the law, to Montague Simons' needs, both as to his estate and his person.
- [18] Mr. Burns made a spirited submission seeking an interim appointment of the Public Guardian and Trustee and a full trial to test the contradictory affidavits filed in this matter. However the mode of hearing is a matter of the trial court's discretion. Accordingly, this Court must approach the appeal with the requisite deference. It is well known that we may interfere with an order made in the exercise of discretion only if we consider the judge did not give weight to all relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, 96 D.L.R. (3d) 14; and *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, and more recently in this Court, *Logan v. Hong* 2013 BCCA 249.
- [19] While it was open to the judge to have ordered a trial, I do not consider there is reversible error in the judge having failed to do so. I would not interfere with the judge's conclusion on that issue. Further, I consider the judge's view that there was sufficient undisputed facts, or disputed facts that were corroborated, to support her conclusion is well seated in the evidence that was before her.
- [20] Mr. Burns, for Ms. DiClemente, takes particular objection to certain statements in the judgment, in para. 18 dealing with timing of allegations of the one party against the other, and a reference to a payment of a debt to a former drug dealer. As to the first of these I

would say nothing appears to flow from the timing issue, and as to the second it appears on the evidence to be accurate. And as to both, Ms. DiClemente takes too much from the statements which I read as simply narrative and not as grounding the decision on appointment of a committee.

- [21] Notwithstanding Mr. Burns' presentation on behalf of Ms. DiClemente in aid of her appeal, and in particular as to her desire to spend more time with her husband and to be allowed to provide more care for him, I see no basis upon which to say the judge erred in law on his appointment of the committee, or that she made any material findings of fact that were not supported by the evidence.
- [22] That being so, the more recent complaints of Ms. DiClemente set out in the new evidence, in my view, are not capable of overturning the order under appeal. Being complaints of post-order matters, or complaints of lack of support, they are, in my view, matters to be advanced before the trial court as I have earlier noted, and do not present a risk of litigating in slices.
- [23] I would note that I have not addressed the issue of continuation of the Representation Agreement and the question of the onus of proof. Events have overtaken that issue, as Mr. Burns properly recognized.
- [24] Last, Ms. DiClemente raises the absence of any person before the Court charged with the duty to represent Montague Simons only. She says he needs his own representation on the identity of the committee. However, there was no application before the judge for an order of this nature and no discussion of this issue by the judge. In my view this issue is not part of this appeal.
- [25] Accordingly, I would dismiss both the application to introduce new evidence and the appeal.
- [26] Ms. DiClemente seeks an order for special costs. In this circumstance an order for special costs is not appropriate, in my view.
- [27] HALL J.A.: I agree.
- [28] KIRKPATRICK J.A.: I agree.
- [29] HALL J.A.: The appeal stands dismissed.

"The Honourable Madam Justice Saunders"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/CA/14/01/2014BCCA0132.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/simons-v-declemente-simons-2014>

Prepared on 29 October 2026 · Esheria