
CANADA / JUDGMENT

Uragi (Re)

2016 BCSC 2252

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Supreme Court of British Columbia

DECIDED

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2016 BCSC 2252 Uragi (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Uragi (Re),

2016 BCSC 2252

Date: 20161110

Docket: S156627

Registry: Vancouver

In the Matter of the Patients Property Act,

R.S.B.C. 1996, c. 349 and Amendments thereto

And

In the Matter of Chita Uragi

Before: The Honourable Madam Justice Fleming

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners, Yoshiko Ito

and Kimihisa Ito:

K.A. Kuntz

A.S. Boucher

Counsel for the Respondent,

Fusako Yoshimura:

J.L. Carpick

J.W. Zaitsoff

Counsel for the Public Guardian and

Trustee of British Columbia:

D.J. Herbert

Place and Date of Hearing:

Vancouver, B.C.

November 7, 2016

Place and Date of Judgment:

Vancouver, B.C.

November 10, 2016

- [1] THE COURT: These reasons address costs in relation to two applications I decided in July 2016 regarding the ongoing care of Chita Uragi.

Overview

- [2] The first involved a petition for committee brought by Mr. and Mrs. Ito, the petitioners. They asked that Mrs. Ito be appointed committee of Ms. Uragi's person and proposed that the Royal Trust be appointed committee of her estate. In the alternative, they proposed that the Public Guardian and Trustee ("PGT"), be appointed.
- [3] The second application was brought by Ms. Yoshimura, Ms. Uragi's niece, and a respondent to the petition ("Travel and Document Application"). She sought a number of orders, among them a declaration that she was authorized to arrange for Ms. Uragi's travel to Japan where she would remain, as well as an order requiring the petitioners to provide her with Ms. Uragi's passport, a copy of her will, and all records relating to a company called Bow Riverside Developments that was owned by the Uragis and the petitioners.
- [4] In her response to the petition Ms. Yoshimura opposed the appointment of a committee for Ms. Uragi, but if the court disagreed she took the position she should be appointed.
- [5] The PGT was served with the petition and the Travel and Document application. It did not oppose any of the orders sought in the petition and agreed that committees should be appointed. The PGT recommended that the committee of Ms. Uragi's estate be a neutral party but took no position on who should be appointed as committee of her person.

- [6] Both the PGT and the petitioners opposed Ms. Yoshimura's Travel and Document application on the basis the decision to move Ms. Uragi to Japan should be made by a validly appointed representative or committee of her person, and Ms. Yoshimura was not entitled to any of the documents she asked to be produced.
- [7] In their pleadings and evidence the Itos and Ms. Yoshimura raised serious concerns about each other's motives and conduct in relation to Ms. Uragi. At the hearing the PGT advised that it would accept an appointment as committee of Ms. Uragi's person. Ms. Yoshimura opposed the PGT being appointed to this role unless the court granted her Travel and Document application or adjourned it very briefly.
- [8] The parties did not dispute that Ms. Uragi was unable by reason of mental infirmity to manage her affairs. Based on the medical evidence I declared Ms. Uragi incapable of managing her affairs by reason of a mental infirmity arising from moderate to severe dementia. Consequently, Ms. Uragi fell within the definition of a patient under the Patients Property Act, R.S.B.C. 1996, c. 349.
- [9] Based on all of the evidence I decided her best interests required the PGT to be appointed as committee of her person despite the availability of Ms. Ito and Ms. Yoshimura. The PGT had indicated in the event of such an appointment that it would also ask to be appointed as committee of Ms. Uragi's estate and so I granted that appointment as well. I dismissed the petition and the Travel and Document application. The other terms of the order I made were:
- All powers of attorney and representation agreements executed by Ms. Uragi were terminated;
 - The petitioners in their roles as attorneys and trustees of the joint partner trust were to deliver to the PGT an affidavit that was to include a full accounting and summary of the assets and liabilities of Ms. Uragi and the Uragi joint partner trust; and
 - The special costs of the PGT were to be paid out of the estate of Ms. Uragi.
- [10] Regarding the last term, paragraph six of the entered order provides the costs of the PGT incidental to "this application" be paid from the estate as special costs. The order's preamble refers separately, however, to the applications of the petitioners and Ms. Yoshimura. I interpret paragraph six as referring to the petition only.

Positions of the Parties

- [11] The petitioners seek their solicitor and own client costs or special costs from the estate of Ms. Uragi in relation to both the petition and the Travel and Document application. They take no position on Ms. Yoshimura costs in relation to the petition. The petitioners argue she should bear her own costs for the Travel and Document application and in the event the court does not order their costs for this application payable from the estate, Ms. Yoshimura should be required to pay them.

- [12] Ms. Yoshimura seeks special costs for both the petition and her application payable from the estate. She also argues the Itos should be ordered to indemnify the estate for the special costs payable to the PGT and herself and be denied payment of any of their own costs.
- [13] The PGT takes no position with respect to the petitioners and Ms. Yoshimura receiving special costs from the estate in relation to the petition, if the court is satisfied they acted in good faith, motivated by Ms. Uragi's best interests. The PGT argues Ms. Yoshimura ought to pay its tariff costs for the Travel and Document application.

Legal Framework

- [14] Section 27 of the Patients Property Act provides that the costs of all proceedings under the Act are in the discretion of the court. The provision, along with others dealing with costs in civil proceedings, have been interpreted as giving the court a very broad discretion to make costs awards: *Vieira (Re)*, 2013 BCCA 420 at para. 15.
- [15] The usual practice in relation to petitions for committeehip is to award the successful applicant special costs payable from the estate. Even where a party is not successful the court may award special costs. The court may also order tariff costs, deny a cost award, or order costs against a party personally. The authorities require the court in exercising its discretion, to consider the intentions of the parties seeking appointment and whether they were acting in good faith based on a concern for the patient's best interests. A number of considerations may lead to an order other than an award of special costs payable from the estate. If, for example, there are concerns about the motives of the applicant, his or her conduct, or the ability of the estate to bear an order for costs, a different order may be granted. (See: *Vieira; Re Bush* (1995), 8 E.T.R. (2d) 293 (B.C.S.C.) at para. 26; and *Royal Trust Corp. of Can. v. Clarke* (1989), 35 B.C.L.R. (2d) 82 (C.A.)).
- [16] A summary of the relevant aspects of my reasons for judgment, as well as some of the undisputed evidence, is as follows.
- [17] Ms. Uragi was 94 years old and living alone on a large rural property when the petition and Travel and Document application were brought. She moved to Canada from Japan in 1975 and became a Canadian citizen but spoke no English. Her husband died in 2005. They had no children. All other family members lived in Japan.
- [18] The petitioners were long-time friends of Ms. Uragi. The friendship emerged from business dealings between Mr. Ito and Mr. Uragi. The Uragis bought large amounts of land in Alberta and eight lots in the Lower Mainland after immigrating to Canada. Ultimately, the Uragis and the Itos together owned Bow River.
- [19] In 2003, Ms. Uragi appointed the petitioners as her attorney and representatives for healthcare pursuant to a power of attorney and representation agreement with the assistance of her own legal counsel. She also nominated them for appointment as her committee in the event she became incapable of managing her affairs.

- [20] In March 2004, the Uragis executed a joint partnership trust agreement. Under the trust agreement the Itos were appointed as the trustees as well as the residual beneficiaries following the death of the Uragis'. The property held by the trust had an apparent value of several million dollars.
- [21] The petitioners began to assist Ms. Uragi with healthcare decisions in the fall of 2004. After the death of Mr. Uragi in 2005 they spent considerable time with her. Ms. Ito, in particular, assisted Ms. Uragi by managing her care, arranging for caregivers, health and other medical treatment, as well as the upkeep of her home and property. Until prevented from doing so by Ms. Yoshimura, Ms. Ito visited Ms. Uragi every week.
- [22] In 2006 Ms. Uragi executed a will with the advice and assistance of her own counsel. The will appointed the Itos as executors and trustees. It devises her Lower Mainland property to family members in Japan including Ms. Yoshimura's children and the residue of her estate to the Itos.
- [23] Ms. Yoshimura arrived in the Lower Mainland on or about April 22, 2015 and began to make arrangements for Ms. Uragi to travel to Japan, obtaining a Canadian passport for her and retaining the services of two Japanese physicians to accompany Ms. Uragi on a flight.
- [24] In May 2015, the Itos became aware of Ms. Yoshimura's plan for Ms. Uragi. They also became concerned Ms. Yoshimura may not have been insuring that Ms. Uragi was eating properly. On May 19, 2015, they attended her home with the RCMP and legal counsel and informed Ms. Yoshimura of the 2003 representation agreement and their legal authority to determine where Ms. Uragi resided and to prevent her removal from the jurisdiction. A confrontation occurred. At the time Ms. Uragi appeared gravely ill and was taken to hospital by ambulance where she remained for about 10 days. An attending physician found her to be very frail and weak and suffering from dehydration and malnutrition.
- [25] During the confrontation Ms. Yoshimura denied knowing the whereabouts of Ms. Uragi's passport and other identification, although she was, in fact, holding them on her person. In her evidence, one of her explanations for doing so was she was previously unaware of the Itos' legal authority or the 2003 representation agreement. I did not accept this evidence.
- [26] After the incident Mr. Ito found correspondence Ms. Yoshimura and her mother had sent to Ms. Uragi in her home which urged her to change her estate plans for their benefit and attempted to influence Ms. Uragi against the Itos. The letters also revealed Ms. Yoshimura was aware of the Itos' role in managing Ms. Uragi's affairs.
- [27] Following the confrontation on April 22, 2015, Ms. Yoshimura left Canada for Japan. On June 24, 2015, she returned to Ms. Uragi's home. The same day she arranged for Ms. Uragi to sign a revocation of the 2003 representation agreement and a new representation agreement appointing Ms. Yoshimura as her representative for personal and healthcare decisions and routine management of her finances, with Ms. Yoshimura's lawyer acting as monitor. The same lawyer contacted the petitioners' counsel and demanded they cease any direct contact

with Ms. Uragi and not enter her property.

- [28] The undisputed evidence indicates that on June 30, 2015 Ms. Ito attended Ms. Uragi's bank to pay her property tax bill and was advised her bank account was on hold because the power of attorney had been revoked. On July 26, 2015 counsel for the petitioners informed Ms. Yoshimura's lawyer of the 2003 power of attorney. Shortly after that he provided notice that Ms. Uragi had revoked the power of attorney and executed a new one. On July 29, 2015, in response to concerns expressed by the petitioners regarding the safety of Ms. Uragi in the care of Ms. Yoshimura and the preparation of the new representation agreement, the PGT recommended the petitioners apply to the court to cancel the new agreement, noting, in particular, that counsel for Ms. Yoshimura as the monitor was in conflict and "this is the only means of remedying the concerns complained of and your clients would have the best evidence available at this time to put before the court regarding the hospitalization last year."
- [29] In her evidence, Ms. Yoshimura alleged the Itos exercised undue influence over Ms. Uragi and abused their authority as her attorneys based largely on suspicions in relation to land transfers that involved both Mr. and Mrs. Uragi that occurred prior to 2005. In addition, Ms. Yoshimura accused the Itos of using proceeds obtained from a mortgage on land owned by Ms. Uragi to pay her expenses rather than using the income from the trust or other assets.
- [30] In addition to financial misconduct, Ms. Yoshimura alleged Ms. Uragi had made serious complaints to her about the Itos and Ms. Ito in letters, relying upon her own interpretation of those letters. Translations provided by a certified interpreter indicated her interpretation greatly exaggerated Ms. Uragi's complaints.
- [31] Ultimately, despite the allegations, I found that both Ms. Ito and Ms. Yoshimura had the ability to ensure Ms. Uragi received appropriate care. I determined however that her best interests required the PGT to be appointed committee of her person in light of the deep mistrust between the Itos and Ms. Yoshimura, her attempts to undermine the relationship between Ms. Uragi and the Itos, as well as her conduct in arranging for Ms. Uragi to execute new legal documents without the benefit of independent legal advice at a time when she was either incapable or of very diminished capacity, as well as what I described as the Itos and Ms. Yoshimura's financial conflict of interest.
- [32] I wish to clarify this last point. Ms. Yoshimura is not a beneficiary under Ms. Uragi's will, but her children are. She would, therefore, not be in a direct financial conflict of interest if appointed as committee of Ms. Uragi's person. Although not expressed in my reasons, my concern was that Ms. Yoshimura may have been financially motivated, although I accepted that after returning to Canada in June 2015 she provided Ms. Uragi with a high level of care.

Costs in Relation to the Petition

- [33] The petitioners submit it was appropriate and necessary for them to bring the petition to protect the interests of Ms. Uragi as former attorneys and representatives for Ms. Uragi. They were concerned their fiduciary role had been usurped by Ms. Yoshimura to the detriment of Ms. Uragi and by the plan to remove her from her home in Canada for Japan despite her very poor health and mental capacity issues.
- [34] They point out that from the outset they sought the appointment of a trust company to serve as a neutral committee of Ms. Uragi's estate and Ms. Ito as committee of her person, given their long-standing friendship and all of the assistance and support she had provided to Ms. Uragi since the death of her husband. They suggest their genuine concern for Ms. Uragi was also evident from their alternative position which suggested the appointment of the PGT.
- [35] The PGT also argues the petition was necessary.
- [36] Consistent with what I would describe as the inflammatory tone of her evidence and submissions at the substantive hearing, Ms. Yoshimura took the position the Itos should be denied payment of any of their costs and required to indemnify the estate for all of the costs payable to her and the PGT because their "personal agenda loomed large". She argued they were motivated not by a concern for Ms. Uragi, but, rather, by their interest in avoiding an investigation into their own conduct regarding their care of Ms. Uragi and her finances. I do not accept this. I made no findings of wrongdoing by the Itos in my reasons for judgment.
- [37] Although I commented on their late disclosure of Ms. Uragi's will and the trust document and the sparse evidence they provided regarding Ms. Uragi's financial circumstances in my reasons, I also accepted they took this approach because they were very concerned Ms. Yoshimura would seek to make more changes to Ms. Uragi's legal documents in light of her prior conduct in relation to the representation agreements and power of attorneys. At this hearing counsel for the PGT pointed out that Ms. Ito was only required to provide a general statement regarding Ms. Uragi's assets and liabilities, income and expenses in her affidavit of kindred and fortune.
- [38] Despite dismissing the petitioners' application to appoint Ms. Ito as committee of Ms. Uragi's person, I agree it was necessary for them to bring the application. I am also satisfied they did so in good faith and based on their concern for the best interests of Ms. Uragi. Having assisted and supported Ms. Uragi for several years, they were understandably concerned by the actions of Ms. Yoshimura. Accordingly, I grant their application for special costs in relation to the petition payable from the estate of Ms. Uragi.
- [39] As suggested and reviewed above, I am not satisfied that Ms. Yoshimura's conduct relevant to both the petition and her application was primarily motivated by concern for the best interests of Ms. Uragi. On the other hand, the medical evidence showed that after June 2015 Ms. Uragi thrived in Ms. Yoshimura's care. In addition, her response to the petition played a role in my determination that Ms. Uragi's best interests required the appointment of the

PGT. In all of the circumstances I regard it as appropriate to award Ms. Yoshimura tariff or regular costs payable from the estate as opposed to special costs in relation to the petition.

Costs in Relations to the Travel and Document Application

- [40] The PGT and the petitioners argue the Travel and Document application should not have been brought given the petition for committeehip and the fact that Ms. Yoshimura was not entitled to the documents she asked be produced.
- [41] In dismissing the travel portion of the application I accepted the PGT's submission that it was the role of a validly appointed representative or committee of Ms. Uragi's person to determine whether a trip or move to Japan was in her best interest, and if appointed they would assess the proposed care plan. I also noted the absence of any evidence about how long Ms. Uragi would be permitted to remain in Japan as a Canadian citizen if she was granted entry given her physical and mental infirmities.
- [42] I agree with the PGT and the petitioners that the travel portion of the application was unnecessary. Ms. Yoshimura's response to the petition made it clear her primary goal was to move her aunt from her home to Japan. This plan was part of her position that she should be appointed committee. Ms. Yoshimura was not entitled to the documents she sought. In these circumstances I conclude it would not be appropriate for Ms. Uragi's estate to bear any of the costs related to the Travel and Document application.
- [43] This is not an action in which there will be a trial and so the usual rule that costs will be in the cause is not applicable. In my view, as the losing party who brought an application that was partly unnecessary and partly without merit, Ms. Yoshimura should be required to pay the regular or tariff costs of both the petitioners' and the PGT for the Travel and Document application and bear her own costs for that application.
- [44] The petitioners and the PGT will have their costs for the costs hearing assessed as special costs payable from Ms. Uragi's estate and Ms. Yoshimura will bear her own costs.

"Fleming J."

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