

CANADA / JUDGMENT

Walker v. Kierans

2023 BCCA 433

COURT

British Columbia Court of Appeal

DECIDED

15 November 2023

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2023 BCCA 433 Walker v. Kierans

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Walker v. Kierans,

2023 BCCA 433

Date: 20231115

Dockets: CA49406; CA49417; CA49418

Dockets: CA49406; CA49417

Between:

Kathleen Walker

Appellant

(Petitioner)

And

Paul Kierans, Public Guardian and Trustee of British Columbia,

L'Arche Greater Vancouver, Community Living British Columbia, and

Margaret Mary Kierans

Respondents

(Respondents)

- and -

Docket: CA49418

Between:

Kathleen Walker

Appellant

(Respondent)

And

Margaret Mary Kierans

Respondent

(Petitioner)

And

Public Guardian and Trustee of British Columbia

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Voith

(In Chambers)

On appeal from: Orders of the Supreme Court of British Columbia, dated

October 6, 2023 and October 18, 2023 (Kierans (Re), 2023 BCSC 1841,

Vancouver Dockets S220769 and S229990).

Oral Reasons for Judgment

The Appellant, appearing in person:

K. Walker

Counsel for the Respondent,

Margaret Mary Kierans:

C.R. Dheensaw

Place and Date of Hearing:

Vancouver, British Columbia

November 14, 2023

Place and Date of Judgment:

Vancouver, British Columbia

November 15, 2023

Summary:

The applicant sought an order that her brother be examined by two physicians in order to obtain evidence that established his incapacity. The applicant and her sister both brought petitions seeking committee ship of their brother. The applicant appealed the judge's order dismissing her petition and granting her sister committee ship. In bringing her application, the applicant sought to obtain "affidavits of incapacity" for use at the appeal hearing. Held: Application dismissed. The applicant significantly misapprehended the judge's reasons. The issue of whether the applicant's brother is incapable of managing himself and his affairs was never an issue before the judge. The judge decided the competing petitions on the basis that he found the applicant's sister to be best suited to be committee. The application is also unrelated to any of the alleged errors the applicant is seeking to argue on appeal. During the hearing of the petitions, the applicant also expressly declined to ask the judge for the same order she now seeks. It was open to the judge to rely on the two medical affidavits he had already been provided with and there was no dispute with the conclusions expressed in those affidavits.

VOITH J.A.:

APPLICATION

- [1] This is an application to preserve evidence, brought by the appellant Kathleen Walker, pursuant to Rule 59 (adducing fresh or new evidence on appeal) of the Court of Appeal Rules, B.C. Reg. 120/2022. However, the order Ms. Walker actually seeks appears to be an order that her brother, Paul Kierans, be examined by two physicians of Ms. Walker's choosing on or before November 30, 2023, to obtain "affidavits of incapacity", with the admissibility of those affidavits to be determined by the division hearing the appeal.
- [2] The respondent opposes the application and asks that it be dismissed.

BACKGROUND

- [3] Two petitions came before Justice Basran seeking committee ship of Paul Kierans, a 65-year-old man living with Down syndrome who has resided at a community group home called L'Arche Greater Vancouver ("L'Arche") for approximately 30 years. One was brought by his sister, Ms. Walker, and the other by one of his other sisters, Margaret Mary Kierans. Ms. Walker has appealed Justice Basran's order pronounced on October 18, 2023, dismissing her petition and granting Ms. Kierans' petition seeking committee ship over Mr. Kierans' person and estate (his reasons are indexed as Kierans (Re), 2023 BCSC 1841 [RFJ]). The hearing took place on August 1-3, September 6, and October 6 of 2023. It is relevant that the parties concluded their substantive submissions on August 3, but the judge adjourned the hearing to see if the parties could resolve an aspect of their dispute amicably.

- [4] The primary issue before the judge was who should be appointed committee of the person and estate of Mr. Kierans. Ms. Walker only sought appointment over Mr. Kierans' person and not estate; she supported the appointment of the Public Guardian and Trustee of British Columbia to manage his estate. Both sisters opposed the other being appointed as committee. They both agreed Mr. Kierans is incapable of managing his own affairs but disagreed on the extent of his disability: RFJ at para. 23.
- [5] The background and chronology that preceded the applications had various aspects that were described by the judge and that have been developed in other judgments.
- [6] Ms. Kierans has throughout been a consistent and steady presence in Mr. Kierans' life. Ms. Walker, however, became estranged from her family in approximately 2013. Neither Ms. Kierans, nor any of Ms. Walker's other siblings, knew of her whereabouts from 2015 to the spring of 2021: RFJ at para. 26. During this period, Ms. Walker struggled with various difficulties. When her circumstances stabilized she reached out to her brother and, starting in March 2021, began to spend time with him again.
- [7] On February 1, 2021, Mr. Kierans appointed Ms. Kierans as his representative under a representation agreement. L'Arche had sought this appointment shortly after the first COVID-19 vaccine became available to facilitate medical decisions. Further details of that appointment are described in the judge's reasons: RFJ at paras. 30-33.
- [8] A year later, on February 1, 2022, Ms. Walker filed her petition (File No. S220769) seeking committeeship and asked that the representation agreement be declared void. She relied on the fact that she lives in the Vancouver area, has a strong desire to care for her brother, and the fact that they are closer in age, as opposed to Ms. Kierans who is a decade older and lives in Ontario. Ms. Kierans filed a response to this petition opposing all orders sought.
- [9] Thereafter, in September 2022, Ms. Walker lost her ability to visit her brother as a result of a decision made by Ms. Kierans in her capacity as Mr. Kierans' personal representative. The reasons for that decision are detailed but easily distilled. Simply put, Ms. Walker's conduct during her visits with her brother became disruptive and detrimental to him, to L'Arche staff, and to other residents within the home: RFJ at paras. 34-40. The situation was so serious that L'Arche wrote to Ms. Kierans on August 31, 2022 advising her that it would be terminating Mr. Kierans' residency at L'Arche unless action was taken respecting Ms. Walker's visits. Ms. Kierans, in her role as Mr. Kierans' representative, then determined that Ms. Walker should no longer be permitted to visit Mr. Kierans in person: RFJ at paras. 41-43.
- [10] On November 7, 2022, Ms. Walker brought an interim application seeking to resume in-person visits with Mr. Kierans. Justice Sharma dismissed the application, finding that it would not be in Mr. Kierans' best interests to reinstate visits with Ms. Walker (her reasons are indexed at 2022 BCSC 2285). Justice Sharma found there was evidence that Ms. Walker's visits with Mr. Kierans were disruptive for Mr. Kierans and the staff at his group home. Further, since in-person visits were terminated, Ms. Walker had been offered telephone and Zoom contact opportunities to speak with Mr. Kierans but she had not availed herself of

those opportunities. Ms. Walker applied for leave to appeal the judge's dismissal and her application was denied. She then sought to review that decision and her application was dismissed (those reasons are indexed at 2023 BCCA 91).

- [11] On December 16, 2022, Ms. Kierans filed her own petition (File No. S229990) seeking committee-ship of Mr. Kierans' person and estate. In support of her petition, Ms. Kierans obtained two medical affidavits, required under the Patient's Property Act, R.S.B.C. 1996, c. 349 [PPA], that confirmed Mr. Kierans is incapable of managing his own affairs. Ms. Kierans submitted before the judge that her consistent and ongoing contact with Mr. Kierans, her ability to serve as committee, and her demonstrated history of appropriate decision-making ability for him supported her application.
- [12] Ms. Walker did not obtain any medical affidavits in support of her application, but the judge did not consider this to be an impediment to Ms. Walker bringing her petition as there was no dispute that Mr. Kierans was incapable of managing his own affairs and required a committee: RFJ at para. 22. The judge was satisfied, based on the medical affidavits filed by Ms. Kierans, that Mr. Kierans was incapable of managing his affairs.
- [13] When the parties reappeared before the judge on October 6, 2023, Ms. Walker asked the court to "convince" Ms. Kierans to consent to an order facilitating an examination of Mr. Kierans by two doctors retained by Ms. Walker: RFJ at para. 56. Ms. Walker expressly stated she was not seeking an order of the court appointing the physicians to examine her brother: RFJ at para. 56. The judge explained that he would not attempt to convince Ms. Kierans as that would be inappropriate. Ms. Walker then stated she did not wish to participate any further in the hearing, and would conduct a "watching brief" over the rest of the proceeding. She did so from the public gallery. The judge thereafter provided Ms. Walker with a further opportunity to make submissions about the underlying petitions, but she declined to do so: RFJ at paras. 57, 60.
- [14] On October 10, 2023, Ms. Walker filed a Notice of Appeal (CA49406) in her petition, File No. S220769. It appears that Ms. Walker filed this Notice of Appeal after the hearing before Basran J. concluded but before his reasons were released.
- [15] On October 12, 2023 (which was still prior to when Basran J. issued his reasons), Ms. Walker filed a Notice of Urgent Application and a Notice of Application seeking, among other things, a stay of proceedings, an order expediting the appeal, and an order that Mr. Kierans be examined by physicians Ms. Walker had retained. The Registrar dismissed her application on October 16, 2023.
- [16] On October 18, 2023, Basran J. released his reasons, and Ms. Walker filed a Notice of Appeal (CA49417) in her petition (File No. S220769) and a Notice of Appeal (CA49418) in Ms. Kierans' petition (File No. S229990). Each of her filed Notices of Appeal pertains to the same matter, the committee-ship of Mr. Kierans.

[17] On October 26, 2023, Ms. Walker filed the present Notice of Application (for all three of the above appeals). She seeks an order to preserve the evidence of Mr. Kierans' preference for a representative, which she asserts was "incorrectly stated" by the judge in his reasons for judgment, as well as an order that Mr. Kierans be examined by two doctors of her choosing, with the admissibility of those medical reports to be determined at the hearing of her appeal.

LEGAL PRINCIPLES

Fresh or New Evidence

[18] As noted earlier, Ms. Walker purports to bring her application under Rule 59. That Rule deals with applications to adduce fresh or new evidence and, in my view, has little to do with the disposition of her application.

[19] The case of *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 1979 CanLII 8 sets out the test to determine if fresh evidence should be admitted on appeal. However, Ms. Walker is not seeking a ruling on the admissibility of evidence. Instead, she seeks an order directing her brother to attend medical examinations so that she can secure evidence she believes will assist her on appeal.

PARTIES' POSITIONS

[20] Ms. Walker's submissions are not easy to understand. In her written argument, she alleges that the judge made the following errors:

- 1) Finding that Mr. Kierans was offered a choice of Ms. Kierans and Ms. Walker as a representative and then chose Ms. Kierans, when in fact, Ms. Walker was never offered as a choice;
- 2) Finding that Ms. Walker never exercised the offer by Mr. Kierans' group home for her to telephone Mr. Kierans; and
- 3) Only allowing the appellant to play two minutes of a recording of a telephone call she had with Mr. Kierans on July 21, 2023.

It is not clear, however, how her present application to "preserve evidence" is relevant to any of these purported errors.

[21] The respondent's position is that the appellant has not identified a legal basis for the order she seeks. None of the authorities that Ms. Walker cites support the order she seeks. The judge's reasons identified that all parties agreed that Mr. Kierans was incapable of managing his own affairs. Accordingly, any further medical affidavits would serve no useful purpose. The respondent also contends the appellant, in the course of the hearing, raised the issue of having Mr. Kierans examined by two doctors of her choosing, but declined to seek such an order at the time. They say it is not now open to her to seek such an order now.

DISPOSITION

- [22] In my view, Ms. Walker's application significantly misapprehends the judge's reasons. That misapprehension is, in a sense, more fundamental than Ms. Walker's confusion about the jurisdictional basis for her application.
- [23] In his reasons the judge identified that "[i]n determining who should be appointed committee, the paramount and overriding consideration is who will serve the patient's best interests": RFJ at para. 50. Later he confirmed that, "[t]he most important factor in deciding who is best placed to act as Mr. Kierans' committee is determining who is most likely to preserve, protect and promote his best interests": RFJ at para. 71.
- [24] The issue Ms. Walker focuses on in this application, having Mr. Kierans attend before two physicians who can confirm he is incapable of managing himself or his affairs, was never in issue before the judge. Instead, the judge heard the competing applications before him on the basis that "the parties do not dispute that Mr. Kierans requires the appointment of a committee because he is incapable of managing his own affairs": RFJ at para. 22.
- [25] The judge decided the competing applications before him on the basis that he found that Ms. Kierans was "best placed and suited to be Mr. Kierans' committee": RFJ at para. 80.
- [26] The basis for the judge's determination is summarized in the following paragraphs of his decision:
- [72] Ms. Kierans has been a consistent presence in Mr. Kierans' life. Although she lives in Ontario, she has twice weekly video calls with him and has travelled to Vancouver on at least five occasions and visited him. As his representative, she regularly communicates with L'Arche's staff and Mr. Kierans' physicians to ensure his well being.
- [73] Ms. Kierans has taken decisions that are manifestly in Mr. Kierans' best interests. She understands his current situation and is focused on his health and well being. Notwithstanding the physical distance between them, Ms. Kierans has demonstrated the willingness and ability to take on the role of committee.
- [74] Ms. Walker, on the other hand, seems to be primarily motivated by her own wishes and desires. She conflates her needs with Mr. Kierans' best interests.
- [75] In my view, Ms. Walker sought to exert control over Mr. Kierans by disrupting his routine, ignoring instructions from L'Arche staff, and repeatedly berating and abusing them. In so doing, she jeopardized Mr. Kierans' longstanding residency at L'Arche. It is beyond obvious that forcing Mr. Kierans to move out of L'Arche would be devastating to him and detrimental to his best interests. Nevertheless, Ms. Walker persisted in behaviour that imperiled his ability to remain there. She was not acting in his best interests but instead focused on her needs.

- [76] Since commencing her petition on February 1, 2022, Ms. Walker has deposed and filed 25 affidavits in this proceeding containing various allegations involving Ms. Kierans and L'Arche. These affidavits also contain detailed accounts of the alleged history of Ms. Walker's acrimonious relationships with her siblings and others. They reveal substantial personal animosity between Ms. Walker and Ms. Kierans, L'Arche, and its employees. They suggest a belief that Ms. Kierans and L'Arche staff are conspiring against her. The evidence before me does not substantiate these allegations. On the contrary, the actions undertaken by Ms. Kierans and the staff at L'Arche suggests that they are motivated by Mr. Kierans' best interests.
- [77] As noted, Mr. Kierans chose Ms. Kierans to be his representative in early 2021 under the representation agreement. At that time, Ms. Walker had been absent from Mr. Kierans' life for at least six years. Since then, Ms. Kierans has served as Mr. Kierans' representative for over two-and-one-half years. During this period, she has taken reasonable decisions on his behalf and interacted effectively with L'Arche's staff and Mr. Kierans' physicians, with a view to promoting his best interests.
- [78] There is evidence that Ms. Kierans is not at all hostile towards Ms. Walker or other family members. In my view, she is likely to consult with other family members regarding Mr. Kierans' care.
- [79] Ms. Kierans tried to mediate with Ms. Walker to facilitate contact between Ms. Walker and Mr. Kierans but Ms. Walker refused these overtures. For an extended period, Ms. Walker also refused to engage with Mr. Kierans by telephone or videoconference calls in lieu of in person visits. Until recently, Ms. Walker declined these opportunities. This inflexibility, stubbornness, and unwillingness to compromise suggests that Ms. Walker is motivated by her own best interests, not those of Mr. Kierans.
- [27] It is apparent that the medical evidence that had been obtained by Ms. Kierans, and that was before the judge, served as a threshold requirement for the parties' applications. That medical evidence, however, played no part in the weighing exercise the judge engaged in or in his ultimate decision.
- [28] I would make three other related observations. First, Ms. Walker's application to have her brother examined by two physicians is unrelated to the errors she has identified with the judge's reasons and that I identified earlier.
- [29] It appears the judge did misspeak when he indicated that Mr. Kierans was asked whether he wanted Ms. Kierans or Ms. Walker to act as his representative. In fact, Mr. Kierans was asked to choose between Ms. Kierans and another of his sisters--this was before Ms. Walker had reappeared in her brother's life. There was no reason for L'Arche to suggest Ms. Walker might be her brother's personal representative at the time.

- [30] More importantly, this selection played no meaningful role in the judge's reasoning. Instead, his focus was on the thoughtful and responsible way in which Ms. Kierans had performed her obligations under the representation agreement.
- [31] Second, it is relevant that Ms. Walker expressly declined to ask Basran J. for the order she now seeks: RFJ at para. 56. The fact she says she had earlier filed a requisition in aid of such an order is irrelevant. What is important is that she told the judge she was not seeking an order appointing the physicians she had retained to examine her brother. She did not suggest otherwise when she was before me.
- [32] Third, Ms. Walker relies on this Court's decision in *Cepuran v. Carlton*, 2022 BCCA 76 in aid of her application. She further relies on s. 5 of the PPA, which allows a court in certain circumstances to order a patient, who is subject to an application under s. 3 (an application to determine if an individual is capable of managing their affairs), to submit to an examination before one or more medical practitioners.
- [33] In my view, neither *Cepuran* nor s. 5 of the PPA is engaged in this case. In *Cepuran*, the Court explained the relationship between s. 3 and s. 5 of the PPA:
- [25] The interplay of ss. 3 and 5(1)(a) of the PPA creates a two-stage analysis where the necessary two medical affidavits have been provided. At the first stage, the judge considers whether the judge is "satisfied" by the two medical affidavits that the person is, because of mental infirmity arising from disease, age or otherwise, incapable of managing his or her affairs or person. If the judge is satisfied, the order declaring the person incapable must be granted. If the judge is not satisfied, there is a second stage: the judge has discretion to refer the capacity issue to trial pursuant to s. 3(2), or to order the person submit to medical examination pursuant to s. 5. The judge may also dismiss the petition.
- [34] In this case, it was open to the judge to rely on the two medical affidavits he had been provided. There was no concern with the conclusions expressed in those affidavits. As noted earlier, each of the parties before the judge recognized Mr. Kierans is incapable of managing his affairs.
- [35] Based on the foregoing considerations, Ms. Walker's application to have her brother examined by two additional physicians is denied.

"The Honourable Mr. Justice Voith"

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Prepared on 27 October 2026 · Esheria