

CANADA / JUDGMENT

Walker v. Kierans

2024 BCCA 120

COURT

British Columbia Court of Appeal

DECIDED

28 March 2024

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2024 BCCA 120 Walker v. Kierans

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Walker v. Kierans,

2024 BCCA 120

Date: 20240328

Dockets: CA49417; CA49418

Docket: CA49417

Between:

Kathleen Walker

Appellant

(Petitioner)

And

Margaret Mary Kierans, Public Guardian and Trustee of British Columbia, L'Arche Greater Vancouver, Community Living British Columbia,

and Paul 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 Justice Griffin

The Honourable Mr. Justice Voith

The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated October 18, 2023 (Kierans (Re), 2023 BCSC 1841, Vancouver Docket S220769).

The Appellant, appearing in person:

K. Walker

Counsel for the Respondent,

Margaret Mary Kierans:

C.R. Dheensaw

Counsel for the Respondent, Public Guardian and Trustee of British Columbia:

M.T. Wolf

Place and Date of Hearing:

Vancouver, British Columbia

February 5, 2024

Place and Date of Judgment:

Vancouver, British Columbia

March 28, 2024

Written Reasons by:

The Honourable Mr. Justice Voith

Concurred in by:

The Honourable Justice Griffin

The Honourable Justice Skolrood

Summary:

The appellant appeals the dismissal of her petition to be appointed committee of the person of her brother. The appellant contends the judge erred by appointing her sister as committee when she lives outside of the province while the appellant lives in close proximity to her brother. She also contends the judge made several factual errors. Held: Appeal dismissed. The judge properly considered and applied the legal principles regarding the appointment of a committee. The paramount consideration is the best interests of the patient. The judge referred to numerous relevant considerations and was mindful of the appellant's proximity to her brother. He found, however, that it was in the patient's best interest for the appellant's sister to be appointed committee. Further, the judge's reasons are supported by the evidence and consistent with the record. The judge's reasons had one slight inaccuracy that was not substantial or material to his reasoning. There is no merit to either ground of appeal.

Reasons for Judgment of the Honourable Mr. Justice Voith:

- [1] At the outset of the appeal the appellant, Ms. Walker, asked that Justice Skolrood and I recuse ourselves. She did so without having filed a formal application. Both Justice Skolrood and I have, in separate reasons that are being released concurrently with these reasons, dismissed her application or request.
- [2] The appellant appeals the dismissal of her petition to be appointed committee of the person of her brother, Paul Kierans. She contends the judge erred when he appointed the respondent, Ms. Kierans, who is a sibling to Mr. Kierans and Ms. Walker, as committee of the person and estate of Mr. Kierans. Her appeal focuses on the fact that her sister resides outside of British Columbia while she lives in close proximity to her brother. She also contends the judge made material factual errors in his judgment. For the reasons that follow, I would dismiss her appeal.

Background and the judge's reasons

- [3] This appeal largely turns on a proper appreciation of certain key facts and the "best interests of the patient" test for appointing a committee. Mr. Kierans is a 65-year-old gentleman who lives with Down Syndrome. He has lived in a community group home operated by L'Arche Greater Vancouver ("L'Arche") since 1992. L'Arche is a faith-based, assisted-living community of group homes.
- [4] Mr. Kierans' parents are both deceased. He has no spouse or children. He has five siblings that include Ms. Walker and the respondent Ms. Kierans. His assets are modest, consisting of less than \$30,000 in a bank account. He receives government benefits of approximately \$729 per month, plus room and board payable to L'Arche.
- [5] Ms. Walker and her brother have a longstanding and loving relationship. However, in or about September 2013, she substantially severed contact with her siblings. From at least 2015 to March 2021, Ms. Walker had no contact with Mr. Kierans. Those years, and the approximate seven years leading up to this period, were difficult for her. She suffered a mild traumatic brain injury and struggled with other serious physical illnesses. She was determined to be a "person with disabilities". She lost her home and stopped practicing law.
- [6] In early 2021, shortly after the first COVID-19 vaccine became available, L'Arche sought the appointment of a representative for Mr. Kierans to facilitate making medical decisions for him. On February 1, 2021, Ms. Kierans became her brother's representative pursuant to a representation agreement.
- [7] In March 2021, Ms. Walker began to visit her brother again. In December 2021 and January 2022, L'Arche imposed various temporary measures to help slow the spread of COVID-19 at its facilities. This included cancelling in-person visits in order to safeguard the health of its residents.
- [8] On February 1, 2022, Ms. Walker filed a petition in which she sought, among other things, to be appointed the committee of the person of Mr. Kierans and to have the Public Guardian and Trustee of British Columbia appointed committee of his estate.
- [9] Importantly, on August 31, 2022, L'Arche, through its counsel, wrote to Ms. Kierans and advised her that it would be giving 30 days' notice to Mr. Kierans to terminate his residency at L'Arche, unless action was taken respecting Ms. Walker's visits with him. It advised Ms. Kierans that Ms. Walker's visits had become disruptive and detrimental to Mr. Kierans, L'Arche staff, and other residents.
- [10] On September 12, 2022, Ms. Kierans, through her counsel, advised Ms. Walker that her in-person visits with her brother were being terminated in order to safeguard his ongoing residency at L'Arche.

- [11] Over the past two years, Ms. Walker has filed numerous applications against Ms. Kierans and L'Arche. For present purposes, most of those applications are not directly relevant. One such application, however, played a prominent role in the judge's considerations. On September 12, 2022 and September 22, 2022, Ms. Walker filed an application, and then an amended application, seeking, among other things, to enforce in-person visitation rights with her brother. She based her application on what she described as an agreement made between herself, her brother, and Community Living British Columbia.
- [12] Ms. Walker's application was dismissed by Justice Sharma in reasons indexed at 2022 BCSC 2285. Justice Sharma found, based on the record before her, that it was not in Mr. Kierans' best interests to have in-person visits with Ms. Walker reinstated. She described the application as "ill-conceived" and she expressed some concern over Ms. Walker's behaviour at the application hearing.
- [13] On November 14, 2022, Justice DeWitt-Van Oosten, of this Court, declined to hear Ms. Walker's urgent stay application. On January 13, 2023, Justice Groberman declined to grant Ms. Walker leave to appeal Justice Sharma's decision. On February 17, 2023, a division of this Court dismissed Ms. Walker's review application in reasons indexed at 2023 BCCA 91. On July 6, 2023, the Supreme Court of Canada dismissed Ms. Walker's application for leave to appeal (docket no. 40646).
- [14] On December 16, 2022, Ms. Kierans filed her own petition seeking to be appointed committee of the person and estate of Mr. Kierans.
- [15] The competing petitions, brought by Ms. Walker and Ms. Kierans respectively, were heard by Justice Basran on August 1-3, September 6 and October 6, 2023. His reasons for judgment, which are indexed at 2023 BCSC 1841, show that he carefully considered and weighed the evidence and issues before him.
- [16] The judge described much of the background I have provided and the positions of the parties before him. He confirmed that he had been provided with two medical affidavits, as required by the Patients Property Act, R.S.B.C.1996, c. 349 [PPA], which confirmed that Mr. Kierans lacked capacity to manage his personal and financial affairs. He identified that the Public Guardian and Trustee took no position on the application before him but had expressed that its appointment as committee of Mr. Kierans' estate, in light of Mr. Kierans' modest assets, ought to be viewed as a "last resort measure" and it confirmed that typically a family member is preferred to act in this capacity. I should note that on appeal the Public Guardian and Trustee supports the orders made by Justice Basran.
- [17] The judge properly identified the various legal requirements of the PPA that were relevant to the applications before him and he then said:
- [50] In determining who should be appointed committee, the paramount and overriding consideration is who will serve the patient's best interests: *Bowman (Re)*, 2009 BCSC 523 at paras. 32 and 34.

- [51] In selecting an appropriate committee, the court's fact-specific inquiry should consider and weigh the following non-exhaustive list of considerations:
- a) whether the appointment reflects the patient's wishes, if he/she is capable of forming such a wish;
 - b) whether immediate family members are in agreement with the appointment;
 - c) whether there is any conflict between family members or between the family and patient and whether the proposed committee would be likely to consult with immediate family members about the appropriate care of the patient;
 - d) the level of previous involvement of the proposed committee with the patient, usually family members are preferred;
 - e) the level of understanding of the proposed committee with the patient's current situation and if that person will be able to cope with future changes of the patient;
 - f) whether the proposed committee will provide love and support to the patient;
 - g) whether the proposed committee is the best person to deal with the financial affairs and ensure the income and estate are used for the patient's benefit;
 - h) whether a proposed committee has breached a fiduciary duty owed to the patient, or engaged in activity which diminishes confidence in that person's abilities to properly handle the patient's affairs;
 - i) who is best placed to advocate for the patient's medical needs;
 - j) whether the proposed committee has an appropriate plan of care and management for the patient and his affairs and is best able to carry it out; and
 - k) whether a division of responsibilities, such as between the patient's estate and the patient's person, to different persons would serve the best interests of the patient, or would such a division be less than optimal for the patient.

See: Stewart (Re), 2014 BCSC 2321 at paras. 29 and 30.

[18] The judge then addressed several matters that are, in some respects, interrelated. He identified that after three days of hearings the parties had substantively concluded their submissions. However, at his suggestion, the hearing was adjourned for a month to provide the parties an opportunity to potentially resolve the conflict over Ms. Walker's inability to have in-person visits with Mr. Kierans. The judge observed:

[55] During this period, counsel for Ms. Kierans wrote to Ms. Walker to try to facilitate some contact between her and Mr. Kierans. Ms. Walker did not respond to this letter. Instead, she filed three requests to appear before me, on three consecutive days in mid-August, seeking various orders, prior to the agreed upon continuation date of September 6, 2023.

- [19] Next, after observing that the hearing was further adjourned to October 6, 2023, the judge noted that Ms. Walker had advised him she would no longer be participating in the hearing and would, instead, now be conducting a "watching brief" over the remainder of the proceedings: paras. 57 and 60.
- [20] Next, the judge turned to the earlier events where Ms. Walker's in-person visits with her brother were terminated and said:
- [64] In assessing Mr. Kierans' best interests, I am satisfied that Ms. Kierans made the decision to terminate Ms. Walker's in person visits with Mr. Kierans on the basis that it is critically important that Mr. Kierans not be evicted from his home of 30 years at L'Arche. This facility has provided the care and support he requires over this extended period. An abrupt change in residency would be devastating to Mr. Kierans.
- [65] I am convinced that Ms. Kierans took the decision to terminate Ms. Walker's in-person visits with Mr. Kierans with a view to preserving his best interests, specifically, to ensure that he would remain in secure and stable care at L'Arche, where he has resided for over 30 years.
- [66] It is important to note that Ms. Walker's visits with Mr. Kierans were periodically putting his health and well-being at risk. Furthermore, Ms. Walker's behaviour towards L'Arche employees was threatening, ongoing, and disruptive. In my view, the termination of her in-person visits was a rational decision by Ms. Kierans based on Mr. Kierans' best interests.
- [21] The judge confirmed that these various findings accorded with the findings that had earlier been made by Justice Sharma: paras. 68-70.
- [22] The judge again 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": para. 71. In addressing this central question, the judge said:
- [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.
- [80] I am satisfied that Ms. Kierans is best placed and suited to be Mr. Kierans' committee.
- [23] I have quoted from the judge's reasons at some length to demonstrate how carefully he considered and weighed the evidence and central issue before him.

Analysis

Appointment of a committee

- [24] The primary legal issue raised by the appellant rests on the assertion that it is "settled law" that a person who resides outside of British Columbia will not be appointed the committee of a patient who lives within the province. Respectfully, I do not believe that any such inflexible principle exists.

- [25] Pursuant to s. 6(1) of the PPA, a court may appoint any person to be the committee of a patient. Once appointed, the committee is required to exercise their powers for the benefit of the patient and their family: PPA, s. 18(1).
- [26] In an application for the appointment of a committee, the paramount consideration is, as the judge identified, the best interests of the patient: *Bowman (Re)*, 2009 BCSC 523 at para. 32; *Simons v. DiClemente-Simons*, 2014 BCCA 132 at paras. 9-10; see also the discussion in the CED (Westlaw, 4th ed., online), *Mental Incapacity (Western) IV.C.* at § 100.
- [27] The PPA does not specify or establish the criteria for determining an individual's suitability to be appointed committee of a patient. Instead, these various considerations have been developed in the relevant jurisprudence. The judge identified the considerations that are found, for example, in *Stewart (Re)*, 2014 BCSC 2321 at paras. 29 and 30. Though Ms. Walker contends the judge should have relied on more recent authority, and refers to *McCormack (Re)*, 2022 BCSC 1046 in aid of that submission, the judge in *McCormack (Re)* did, in fact, quote directly from *Stewart (Re)*: *McCormack (Re)* at paras. 68-72.
- [28] This is not to say that the factors described in *Stewart (Re)*, or in any other authority, are intended to be comprehensive. Instead, the court is required, as the judge correctly observed, to engage in a "fact-specific inquiry" that weighs a "non-exhaustive list of considerations": at para. 51.
- [29] One such consideration is the physical proximity of the proposed committee to a patient. This is for self-evident and practical reasons. However, that factor, in isolation, does not determine the issue. Nor does it assume inordinate importance. None of the authorities relied on by Ms. Walker suggests otherwise.
- [30] In this case, the judge recognized that Ms. Walker emphasized her physical proximity to her brother and that Ms. Kierans lives out of province: paras. 6, 52 and 72. Notwithstanding this particular consideration, the judge found, for the various reasons he expressed, that Ms. Kierans was "best placed and suited" to be Mr. Kierans' committee: para. 80.
- [31] I have no doubt that Ms. Walker cares deeply for her brother and that he, in turn, loves her. But several of the judges Ms. Walker has appeared before have expressed concern about her erratic behaviour and ultimately, though not expressly, her judgment. Justice Basran observed that Ms. Walker had filed some 25 affidavits in the proceeding and made, in his view, repeated and unsubstantiated allegations of wrongdoing against Ms. Kierans, L'Arche staff, and others: at para. 76. Before us Ms. Walker extended these allegations, without any apparent foundation, to the Public Guardian and Trustee and to counsel for Ms. Kierans.
- [32] In my view, the judge properly considered and applied the legal principles that guided his decision. I see no merit to this first ground of appeal.

The judge's findings

- [33] The second issue raised by Ms. Walker pertains to three instances where she asserts the judge misapprehended the evidence before him.
- [34] Appellate intervention on the basis of an alleged misapprehension of the evidence is warranted only if the misapprehension is shown to be substantial, material and essential to the reasoning process that gave rise to the judge's decision: *R. v. Swales*, 2014 BCCA 350 at para. 48; *R. v. Caron*, 2018 BCCA 212 at para. 46; *R. v. Gill*, 2018 BCCA 275 at paras. 58-59.
- [35] The parties agree that one aspect of the judge's reasons is inaccurate. The judge said:
- [32] Prior to executing the representation agreement, Mr. Kierans was asked by three L'Arche employees, including Ms. Correia, which of his sisters--Ms. Kierans or Ms. Walker--he wanted to take care of him and make decisions for him. He answered affirmatively in favour of Ms. Kierans.
- [36] It is common ground the judge misspoke when he referred to Ms. Walker in the foregoing paragraph. At the time the representation agreement was being prepared, Ms. Walker had been absent from her brother's life for a number of years. Instead, the evidence reveals that Mr. Kierans had been asked whether he wanted Ms. Kierans or another sister, Ms. Wahlen, as his representative.
- [37] In my view, it cannot be said that the judge's error was substantial, material, and essential to his reasoning. Indeed, the error identified by Ms. Walker is found in a portion of the judge's reasons where he deals with the background of the dispute before him. The error plays no part in the judge's analysis which commences more than 20 paragraphs later under the heading "Discussion".
- [38] The second alleged error arises from the judge's statement that "[f]or 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": para. 79.
- [39] Ms. Walker appears to interpret this passage as suggesting she has never taken the opportunity to telephone her brother. Respectfully, this submission is not faithful to the language used by the judge. Further, on the evidence before the judge, Ms. Walker was offered the opportunity to telephone her brother by letter dated September 14, 2022. The first indication that she attempted to call her brother is found in her 19th affidavit where she deposes she attempted to call him on Friday, June 9, 2023 but was unable to reach him. The judge's findings are consistent with this record.
- [40] The third concern raised by Ms. Walker arises from the judge having described L'Arche as Mr. Kierans' "home of 30 years": para. 64. Ms. Kierans, in her second affidavit, had deposed that her brother had resided in a community group home at L'Arche since 1992. Ms. Walker, in her 17th affidavit, had deposed that her brother had lived in various L'Arche group homes since 1993 but had "visited" with family members on weekends and holidays. Thus, the judge's finding is supported by the evidence of both Ms. Kierans and Ms. Walker and reflects no misapprehension of that evidence.

[41] In my view, there is no merit to the appellant's second ground of appeal.

Disposition

[42] In my view, the appeal should be dismissed.

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Justice Skolrood"

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