

CANADA / JUDGMENT

Zeiler v. Zeiler

2019 BCSC 1887

COURT

Supreme Court of British Columbia

DECIDED

23 September 2019

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2019 BCSC 1887 Zeiler v. Zeiler

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zeiler v. Zeiler,

2019 BCSC 1887

Date: 20190923

Docket: S28753

Registry: Cranbrook

Between:

Tracie Lee Zeiler

Petitioner

And

Holly Marlene Zeiler

Respondent

- And -

Docket: S29307

Registry: Cranbrook

Between:

Gerald Bernard Onischak and Trish Ann White

Petitioners

And

Holly Marlene Zeiler

Respondent

Before: The Honourable Mr. Justice Brundrett

Oral Reasons for Judgment

In Chambers

Counsel for Tracie Zeiler:

A. Brunet

Counsel for Gerald Onischak and Trish White:

C.E. Smith

Appearing on her own behalf:

Holly Zeiler

Place and Date of Trial/Hearing:

Cranbrook, B.C.

September 23, 2019

Place and Date of Judgment:

Cranbrook, B.C.

September 23, 2019

Introduction

- [1] I have two petitions before me in relation to the management of the affairs of Holly Zeiler: one from Tracie Zeiler, who is Holly Zeiler's sister; and a second from Trish White and Gerald Onischak, who are friends of Holly Zeiler. Holly Zeiler suffered head injuries in a serious motor vehicle accident in 1995. She is now 53 years old.
- [2] The two petitions invoke the jurisdiction of the Court to appoint or rescind a committee for a "patient" pursuant to s. 6 of the Patients Property Act, R.S.B.C. 1996, c. 349. Under s. 6(3) of the Act, if a private committee is not appointed, the Public Guardian and Trustee would become the committee of the patient.
- [3] On July 17, 1995, Mr. Justice Hall appointed Tracie Zeiler as a private committee of Holly Zeiler.

- [4] Since that time, Tracie Zeiler has managed the affairs of Holly Zeiler, and she has done so successfully despite what I am told were difficulties over the years and even some attempts many years ago by some individuals to take advantage of Holly Zeiler.
- [5] While a committee has been appointed in the past, it is apparent that Holly Zeiler does have some independence and wishes to have some say over her own affairs. She owns her own home, lives on her own, and even works part-time. I am advised that she obtained her driver's licence in 2015 after flying to Vancouver.
- [6] Unfortunately, Holly Zeiler suffers from some cognitive impairment due to the motor vehicle accident, and she is challenged in her capacity to deal with some novel or complex financial matters. Her difficulties include memory problems. I am told she can also become emotional at times.
- [7] It is apparent that, while injured, Holly Zeiler still functions at a relatively high level and enjoys her independence. She can nevertheless become frustrated with restrictions on her affairs.
- [8] In addition to her sister Tracie Zeiler, I gather Holly Zeiler has a brother (Richard) and a mother (Emily) who reside in the Creston area. Unfortunately, there has been a rift between Holly Zeiler and the rest of her family -- a rift that I hope everybody in the future will attempt to mend. Richard and Emily have filed consents to the Public Guardian and Trustee taking over the conduct of Holly's estate, and both Tracie and Richard have appeared in court today. I take from their appearance today the fact that they still care for their sister and wish the best for her, despite past difficulties in the family.

The Petition to Remove Tracie Zeiler as Committee

- [9] Recently, the relationship between the Zeiler sisters has deteriorated. I am told that things got so bad at one point that they allegedly escalated into a physical altercation. Communications between the sisters have now broken down. Perhaps understandably, Tracie Zeiler now wishes to be removed as committee in relation to her sister.
- [10] It should be pointed out that no one today has questioned Tracie Zeiler's commendable and longstanding contribution in acting as Holly Zeiler's committee, sometimes in what must have been difficult circumstances.
- [11] So the first petition I will deal with presently, which is unopposed, is the petition in relation to docket S28753 to remove Tracie Zeiler as committee over her sister Holly Zeiler's affairs. I am prepared to make that order.

The Petition to Appoint Mr. Onischak and Ms. White as Committees

- [12] The second petition on docket S29307 is more difficult. That petition raises the question of who should be appointed in the future to manage Holly Zeiler's affairs.

- [13] The Public Guardian and Trustee has advised that it takes no position on that petition.
- [14] Tracie Zeiler also does not take a position on that application. However, her counsel has appeared at this hearing, pointed to some concerns on the record and clarified some of the relevant facts.
- [15] I have the benefit of a neuropsychological assessment prepared by Dr. Martzke dated November 13, 2015. That assessment states, in part, as follows:

Although Ms. Zeiler appears capable of managing routine financial matters, her capacity to effectively deal with infrequent, novel or more complex financial matters is less certain. Ms. Zeiler's functional capacity is greatly reduced in the absence of structure and familiarity. In addition, her very poor memory makes it unlikely she could accurately retain information presented that might be required to make an informed financial decision. In order to weigh the "pros and cons" in complex decision making, it is first necessary to understand the pros and cons, and then it is necessary to be able to hold these pros and cons "in your head" simultaneously so as to inform decision making. Ms. Zeiler is easily confused even when novel information is presented slowly and clearly, and has very poor memory so that she would almost certainly place undue weight upon whatever factors are presented "last," and likely ignore factors that were presented earlier and not retained. By the same token, Ms. Zeiler remains at increased risk of exploitation by unscrupulous individuals who might intend to take advantage of her owing to her cognitive limitations. For these reasons, Ms. Zeiler remains vulnerable to making poor decisions under novel or complex situations, and it appears prudent that appropriate financial management remain in place.

[Emphasis added.]

- [16] Hence, the report largely supports the appointment of a committee to help Holly Zeiler manage her affairs, and indicates certain of her cognitive impairments remain, at least as of 2015, too severe to give complete financial autonomy to Holly Zeiler.
- [17] Holly Zeiler's views are noted in Dr. Martzke's report. One of her chief complaints has been the lack of financial information that was allegedly provided to her by her sister. While this may have been Holly Zeiler's perception, I am satisfied that Tracie Zeiler attempted to share financial and other information with her sister over the years.
- [18] Holly Zeiler did admit, in her interview with Dr. Martzke, that it would be better to have a committee in place to manage her affairs.
- [19] Holly Zeiler has also prepared an affidavit which has been filed and which appears to be consistent with the collateral information in the materials. That affidavit is supportive of the petitioners' application to be appointed as committees. I accept that Holly Zeiler's affidavit is reliable and reflective of her views, although I do note Ms. Brunet's concern that much of the record, in terms of its source, stems from Holly Zeiler herself.

- [20] It is apparent that Holly Zeiler does not want the Public Guardian and Trustee to act as committee over her affairs because she does not want her affairs to be managed remotely. She also prefers the regular meetings and disclosure which she feels she could get from having a local committee appointed.
- [21] The petitioners Trish White and Gerald Onischak are friends of Holly Zeiler who have known her for about two years. They met Ms. Zeiler when they hired her as a dog walker in Creston in the summer of 2017. They have since become involved in her life and have become close to her.
- [22] Ms. White is 73 years old. She has been an occupational therapist for 50 years and has considerable experience as a clinician. She owns and operates a small occupational therapy-based rehabilitation company.
- [23] Ms. White's common-law spouse, Gerald Onischak, is trained as a psychiatric social worker and has considerable experience dealing with individuals with mental health issues. He has been an outreach worker for the Vancouver Police Department, among other occupations he has had in the past, but now works as a program assistant in Ms. White's occupational therapy business. Mr. Onischak has vision difficulties but can navigate through the world with some measure of independence and confidence.
- [24] While they have not known Holly Zeiler for a lengthy period of time, Ms. White and Mr. Onischak appear to be well-meaning people who are experienced in dealing with those who have physical or mental disabilities. The petitioners also appear to have no ulterior motive. Both are prepared to devote the necessary time to manage Ms. Zeiler's affairs. Both have established lives and careers and appear, at first blush, to be suitable for the heavy fiduciary duties that might be placed upon them in this matter.
- [25] Significantly, the application of Ms. White and Mr. Onischak is supported by Mr. David Lyons, who is the long-time clinical counsellor for Holly Zeiler. He has been the counsellor for Ms. Zeiler on an interim basis since her motor vehicle accident in 1995. Mr. Lyons states as follows, in his affidavit:

I am aware that Holly has approached the petitioners [Trish] White and Gerald Onischak about applying to become her committees. From my discussions with Holly, and my knowledge of both Ms. White and Mr. Onischak, I believe they are a good 'fit' for Holly, and if asked, I would endorse their efforts to become committees for Holly. I say this because they told me of their intention to help Holly gain more independence in her life, and, as well, they are trained and knowledgeable regarding brain injury. In my opinion, and after witnessing the frustration and emotional toll that Holly experiences with her sister as her Committee, I believe a change of Committee to the petitioners would be in Holly's best interests.

- [26] I have Holly Zeiler's evidence as to her wishes. She supports Ms. White and Mr. Onischak being appointed as committee over her affairs.

[27] Despite their differences, Tracie Zeiler is, understandably, concerned about the welfare of her sister. However, she is not opposed to the petitioners' application to be appointed as committees. While she does not know Ms. White or Mr. Onischak, she attests that they "seem to have [her] sister's interests at heart." Certainly, neither Tracie Zeiler nor anyone else has pointed to anything deficient in the background of Ms. White and Mr. Onischak.

[28] I have reviewed the various considerations outlined by Mr. Justice Masuhara in *Stewart (Re)*, 2014 BCSC 2321, at paras. 27-30. There, the Court set out the following guiding principles:

[27] The application for an appointment invokes the *parens patriae* jurisdiction of the court and is governed by an assessment of who will serve the patient's best interest.

[28] Section 18 of the Act states that:

A committee must exercise the committee's powers for the benefit of the patient and the patient's family, having regard to the nature and value of the property of the patient and the circumstances and needs of the patient and the patient's family.

[29] As has been observed in other cases, the Act does not prescribe criteria for the selection of an appropriate committee. However, cases have identified various considerations; see for example: *Vranic (Re)*, 2007 BCSC 1949; *Bowman (Re)*, 2009 BCSC 523; *Palamarek (Re)*, 2011 BCSC 563; *Re Matthews*, 2013 BCSC 1045; and *Sangha (Re)*, 2013 BCSC 1965. They include:

- (a) whether the appointment reflects the patient's wishes, obviously when he or she was 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 the 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 will that person 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 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 or her 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.

[30] The above listing is of course non-exhaustive or in any particular order. The inquiry is fact specific and a particular factor may or may not be applicable and may attract different weight depending on the circumstances of a case.

[29] In considering the best interests of Holly Zeiler, I return to Dr. Martzke's report. That report indicates as follows, on the last page:

Since the time of Dr. van Mastrigt's assessment, there has been a near cessation of communication between Ms. Zeiler and her sister (who serves as Committee) regarding financial matters. This has been associated also with straining of the relationship between Ms. Zeiler and her sister so that Ms. Zeiler feels she has lost the close relationship she used to enjoy with her sister. Ms. Zeiler strongly desires increased information regarding her finances and involvement in discussions regarding financial decisions (even if the final "say" rests with another). Although Ms. Zeiler believes her sister has done a capable job as Committee, on balance, it no longer appears desirable to have Ms. Zeiler's sister serving as Committee. Another individual who resides in or near Creston and can be more readily accessed (through regular, predictable and scheduled meetings) should be secured to act as Committee. It would not serve Ms. Zeiler well to have a Committee located remotely, though Ms. Zeiler would be willing to drive to attend meetings in locations in reasonable proximity to Creston if needed (for example, Cranbrook, Nelson or Trail). It is recommended that Ms. Zeiler be provided information in simple, written summaries as often as is practically possible by the Committee, given her memory difficulties. She should also be provided copies of routine financial statements and account summaries. Audio recording of face to face meetings is also recommended to afford Ms. Zeiler an opportunity for unlimited review (she could then take notes from the audio recordings at her leisure to support memory). Given her memory difficulties, it is entirely possible Ms. Zeiler could be provided detailed information in a meeting, yet believe she has been denied access to information. Regularly scheduled meetings that include written summaries (e.g., bank and other updated financial statements), along with audio recordings of those meetings, would likely go a long way toward addressing this issue. If necessary, a third party (e.g., independent accountant) could also be employed to review financial information provided by the Committee with Ms. Zeiler to aid understanding, though this would be less desirable than conversation directly between the Committee and Ms. Zeiler.

[Emphasis added.]

- [30] I do have some concerns with respect to the petitioners. Ms. White and Mr. Onischak are in their seventies. Although they seem to be functional and independent now, their health could potentially decline as time goes on. As well, they are not family, and their two-year relationship with Holly Zeiler is still in its early stages and is untested given that they have not been historically involved in her care. These concerns are, however, not so great as to detract from the suitability of the petitioners as committees.
- [31] Considering the best interests of Holly Zeiler in all the circumstances, I am satisfied that Ms. White and Mr. Onischak are appropriate committees for Ms. Zeiler's affairs.
- [32] However, that order will be limited to 10 years and may be reviewed or extended after that, depending upon the circumstances at that point in time.
- [33] Therefore, there will be an order designating Ms. White and Mr. Onischak as private committees over Holly Zeiler's affairs for a period of 10 years.
- [34] There is no need to make an order that Ms. Zeiler is incapable of managing her affairs, as that has been previously made.
- [35] The rest of the terms of the order will go as sought by the petitioners except that the recommendations in paragraph 4.5 - 4.7 of the Public Guardian and Trustee's submission will be incorporated into the order as Mr. Smith pointed out earlier.
- [36] All right. That is my order.
- [37] Counsel, do you have any questions or any other matters you wish to raise?
- [38] MR. SMITH: My Lord, only one, and that is, as we said at the outset of this proceeding, it is sort of a bifurcated process we have been --
- [39] THE COURT: Yes.
- [40] MR. SMITH: -- thrust into. Our next step, then, would be to apply for security for the committees.
- [41] THE COURT: Yes.
- [42] MR. SMITH: Only that your order reflect that we would do so, would we be at liberty to then deal with any costs issue after that application.
- [43] THE COURT: It seems appropriate. Ms. Brunet, do you have any submissions on that?
- [44] MS. BRUNET: No, I do not have any submissions.
- [45] THE COURT: All right. Yes, certainly, you can incorporate that language into the order reflecting that position, Mr. Smith.

"Brundrett J."

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Prepared on 27 October 2026 · Esheria