SUPREME COURT OF NOVA SCOTIA
Citation: *Burke v. Hillier*, 2015 NSSC 144

Date: 2015-05-12
Docket: *Syd* No. 434044
Registry: Sydney

Between:

Laurea Maria Burke

Applicant

v.

Karen Hillier

Respondent

Motion Decision
(Civil Procedure Rule 21)

Judge:	The Honourable Justice Robin C. Gogan
Heard:	March 3, 2015, in Sydney, Nova Scotia
Final Written Submissions:	March 17, 2015
Release of Written Decision:	May 12, 2015
Counsel:	Laurea Maria Burke, Applicant, in person Elizabeth Cusack, Q.C., for the Respondent

By the Court:

Introduction

[1] This matter involves a proceeding that is characterized by the Respondent as a "tragic dysfunctional family feud". At this point in the proceeding, the characterization appears to be fair comment. What remains undetermined is whether any legal resolution exists.

[2] This decision is about a very discreet issue in the overall dispute. It will address whether Laurea Burke, the matriarch of this family, should be ordered to submit to a mental capacity assessment. For the reasons that follow, I am not prepared to grant the motion.

Background

[3] This proceeding began with a Notice of Application in Court. The Applicant, Laurea Burke ("**Burke**"), is the mother of the Respondent, Karen Hillier ("**Hillier**"). Burke seeks the return of more than $40,000.00 from Hillier. She says that Hillier removed this money from a joint bank account without her consent. Hillier denies acting improperly. She says that she was acting as her

mother's lawful attorney at the time and was instructed by Burke to take exclusive possession of the money.

[4] Subsequently, Burke made repeated requests for Hillier to return the money. She revoked the Power of Attorney granted to Hillier and sent her a Direction to Pay on September 25, 2014. Hillier has not returned the money. Burke now brings the Application in Court seeking its return.

[5] Hillier contests the Application in Court. She says that she acted according to Burke's instructions at the time that she took possession of the money. She says that Burke does not remember giving her the instructions and that Burke is not competent to manage her affairs. She is of the view that the Power of Attorney appointing her is still valid but any revocation or subsequent appointments are not by virtue of Burke's mental state. Hillier is concerned that Burke is now under the influence of her other children who are not acting in her best interest. For this reason she has not returned the money. Instead, Hillier has paid the money into court.

[6] Hillier now brings this motion to have Burke submit to a mental capacity assessment. She says that if her Burke is found "competent" to manage her affairs, then she will return the money.

Issues

[7] Is it appropriate to order Burke to submit to a mental capacity assessment?

Position of the Parties

Laurea Maria Burke

[8] Burke says that she is competent to manage her own affairs. She vigorously contests the motion. She says that she does not need to have her mental competency assessed. She lives independently. She wants her money returned to her possession.

Karen Hillier

[9] Hillier says that if Burke is competent, the money will be returned to her. Hillier believes that Burke is not competent and that the money would be at risk if returned. She asks for an Order requiring Burke to submit to a mental capacity assessment pursuant to ***Civil Procedure Rule*** 21.02(3). She is prepared to pay the cost of the assessment, subject to seeking costs in the proceeding.

Analysis

[10] The evidence on this motion came in the form of affidavits and cross-examination. Hillier relied upon affidavits dated December 12, 2014 and February 2, 2015. Burke relied upon her affidavit dated December 3, 2014.

[11] The salient facts begin with a Power of Attorney executed by Burke on July 16th, 1998. The Power of Attorney appointed Burke's husband, Ernest Burke, as attorney. In the alternative, Burke appointed Hillier along with daughter Deborah Murphy to act as attorney. The Power of Attorney was contingent in the sense that it was granted for time periods when Burke was unable to manage her own financial affairs by reason of mental or physical incapacity.

[12] By the summer of 2011, the health of Ernest Burke was deteriorating. In 2012, Mr. Burke was diagnosed with dementia. During this period, Mr. Burke continued to live at home and be cared for by his wife and other family members.

[13] In the period after Mr. Burke's health begins deteriorating, Hillier observed Burke to have difficulty managing his care. She says that she observed obvious signs of memory loss and difficulty following instructions. In a medical assessment by geriatric specialist dated January 10, 2012, Dr. R. Bulajic observed: "…I am worried for Laurie. Laurie can be mixed up with timelines and events.

Frequently, Laurie looks to her daughter Karen for answers" and "his wife might be having as well some cognitive impairment."

[14] Mr. Burke was moved to a nursing home in April of 2014. After the move, Hillier observes Burke to have trouble managing payments to the nursing home and medication expenses for her husband.

[15] On April 2, 2014, Burke calls Hillier and she is upset. She explains that she believes that the government is going to take all of her money to pay for her husband's nursing home costs. Hillier tries to reassure Burke that this isn't the case. Burke remains upset. Hillier takes Burke to her home for the night.

[16] On April 3, 2014, Burke and Hillier go to the bank. Several transactions are carried out. Among them was the transfer of $43,739.00 from the parties' joint account to an account in Hillier's name alone. Hillier says that Burke is happy to have this banking done.

[17] On the same day, Hillier takes Burke to an appointment with Dr. Mary Doyle. A mental capacity examination is scheduled for the following week on April 10, 2014. On April 22, 2014, Dr. Doyle wrote a letter which set out as follows:

> To Whom It May Concern,
>
> On April 10, Laurea Burke presented to the office for a mental capacity exam based upon a history of significant cognitive dysfunction and memory impairment. These symptoms were noted by Laurea herself and this was confirmed by her daughter Karen who was present with her.
>
> The purpose of this visit on April 10 was to rule out dementia as a cause for this impairment. Of note, Laurea had no recollection of being in my office one week earlier on April 3 when this visit was arranged. Standardized testing was done to rule out dementia for her significant memory impairment.
>
> It is my professional diagnosis that Laurea is under extreme stress and is suffering from clinical depression. It is not at all uncommon for depression to present as dementia like illness in the elderly. However, it is reversible. She is currently under treatment for this and her response is yet to be assessed.
>
> In my professional opinion, she is currently not in the state of mind to be making important decisions.

[18] In addition to writing the foregoing letter, Dr. Doyle referred Burke to Dr. Ranka Bulajic, Geriatrician. An appointment was set for July 15, 2014. Burke did not attend the appointment.

[19] On July 3, 2014, Burke revoked the Power of Attorney in favour of Hillier and executed a new Power of Attorney appointing her son, Bernie Burke as her attorney. Hillier was advised of this revocation by letter dated August 14, 2014. Subsequently, Burke executed a Direction to Pay demanding the return of the money. This was served on Hillier. Hillier did not return the money. Hillier remained concerned about her mother's state of mind and questioned the validity of the documents signed by Burke.

[20] Hillier says that her mother has demonstrated an ongoing "pattern of forgetfulness".

[21] Burke testified that she "truly believes that she is in a good state of mind". She says that she still drives a vehicle, pays her own bills and does her own grocery shopping. She goes to bingo and plays cards with friends. She vigorously contested being forced to submit to a mental capacity assessment.

[22] This motion is made for an Order pursuant to ***Civil Procedure Rule 21*** which provides:

> **Scope of Rule 21**
>
> **21.01** A judge may order a medical examination or test, in accordance with this Rule.
>
> **Medical Examination**
>
> **21.02(1)** A party who, by claim, defence or ground, puts in issue the party's own physical or mental health condition may be ordered to submit to a physical or mental examination by a medical practitioner.
>
> (2) The party who puts their own physical or medical condition in issue has the burden to satisfy the judge that the party should not be examined.
>
> (3) A party who puts in issue the physical or mental condition of another party may make a motion for an order that the other party submit to a physical or mental examination by a medical practitioner, and the party must satisfy the judge on all of the following:
>
> > (a) the party has, by a claim, defence or ground, put in issue the other party's physical or mental condition;

> (b) the claim, defence or ground putting the other party's condition in issue is supported by evidence;
>
> (c) the examination may result in evidence that proves or disproves the claim, defence or ground.

(4) A party being examined under an order must co-operate in the examination, including giving answers to questions asked by the practitioner as part of the examination.

(5) An order for a medical examination must include a description of the purpose of the examination, and a requirement that the party to be examined attend for the examination, including the name of the practitioner and either the time, date and place of the appointment or a method to determine a time, date and place for the examination.

(6) The order may contain any other necessary provisions, including any of the following requirements:

> (a) the party to be examined undergo a test and deliver evidence of the results to the practitioner before the examination;
>
> (b) a person deliver relevant documents to the practitioner before the examination;
>
> (c) the practitioner, by a deadline, deliver an expert's report to the party who obtains the order;
>
> (d) the party receiving the report, by a deadline, deliver a copy to each other party.

[23] The remaining provisions of ***Civil Procedure Rule*** 21 provide guidance on various aspects of the examination, the form and delivery of a report and liability for costs.

[24] The relief sought is clearly discretionary. Discretion must always be exercised judicially in keeping with the relevant *Rules* and legal principles.

[25] Outside the context of injury litigation, the application of ***Civil Procedure Rule*** 21 has not been extensively considered. In ***MacIntyre v. RBC Life Insurance Co***, 2010 NSSC 152, Justice Bourgeois (as she then was) adopted principles first set out by Goodfellow J. in ***Noseworthy v. Murphy*** (1999), 174 N.S.R. (2d) 367. These principles recognize that an independent medical assessment is intrusive upon a party's privacy and must be clearly justified. Those principles relevant to the disposition of the present matter are as follows:

> 1. The onus is upon the party applying for the independent medical examination to satisfy the court, on a balance of probabilities, that such a request is reasonable, and that the proposed examiner is properly qualified;
>
> 2. The entitlement of a party to personal privacy, physical and psychological integrity must not be breached lightly and only when the court is satisfied such is necessary to secure a just determination of the issues before the court.
>
> 3. The court, in order to meet the object of the Civil Procedure Rules, CPR 1.03 has repeatedly indicated that the Rules are to receive a liberal interpretation. Civil Procedure Rules are our tools and not our masters.
>
> 4. The Interpretation Act provides some general guidance, although it does not specifically apply to rules of court.

[26] In ***MacIntyre***, *supra*, Justice Bourgeois declined to order the requested assessment on the basis that the moving party had failed to meet the requirements of ***Civil Procedure Rule*** 21.02(3)(b) and (c).

[27] An Order for various assessments was also denied by Justice Bourgeois in ***Doncaster v. Field***, 2014 NSSC 234. In that case, the court was not satisfied that the Respondent's mental health was in issue or that the requested assessment was warranted. In assessing whether such assessments were warranted, reference was made to the reasons found in ***Farmakoulas v MacInnes*** (1996) 152 N.S.R. (2d) 52; ***Jarvis v Landry***, 2011 NSSC 116; and ***Lewis v. Lewis***, 2005 NSSC 256.

[28] Important guidance is provided by the decision of the Nova Scotia Court of Appeal in ***Ocean v. Economical Mutual Insurance Co.***, 2009 NSCA 81. In that case, our Court of Appeal considered whether it was appropriate to order a self-represented litigant to undergo a psychiatric assessment to determine her competence to conduct litigation on her own behalf. Bateman, J.A., writing for the court, decided that such an order was not appropriate. Among the reasons cited were the following:

> 1. The ***Civil Procedure Rules (1972)*** do not provide a procedure for determining the competency of a party to a proceeding;
>
> 2. There is no authority in the ***Incompetent Persons Act*** to order a competency assessment of an alleged incompetent person;
>
> 3. Both under the ***Civil Procedure Rules (1972)*** and the ***Incompetent Person's Act*** an incompetent person must be incapable of managing her own affairs. There is no lesser category of mental incompetence; and

4. Permitting an opposing party to raise the question of a party's mental capacity in a proceeding sets a dangerous precedent (see ***Halstead v. Anderson***, 1993 CarswellSask 568).

[29] The circumstances in ***Ocean*** are distinguishable from those in the present motion. However, in concluding that a mental assessment was not appropriate, Bateman, J.A. discussed the relationship between the ***Civil Procedure Rules*** and the ***Incompetent Persons Act***, a subject which is relevant to the disposition of the motion. After reviewing the relevant rules and provisions, Bateman, J.A. concluded:

> [55] The definition of a mentally incompetent person in ***Rule*** 1.05 is identical to that for an incompetent person in s. 2(b) of the ***IPA***. The ***Rules*** do not contain a procedure for determining the competence of a person. Nor do the ***Rules*** contemplate a status between competence and full incompetence. A person under disability, for purposes of the ***Rules***, is a mentally incompetent person.
>
> [56] The procedure for determining competence is contained in the ***IPA***. Significantly, that ***Act*** does not empower a court to order an assessment of mental competence. The necessary evidence must accompany the application. A guardianship application under the ***IPA*** must include affidavits from the applicant and 2 medical practitioners, the latter providing particulars of the current state of the person in question (Supreme Court of Nova Scotia Practice Memorandum No. 10).

[30] Later, the legal principles were summarized:

> [81] The fundamental precept is that an adult person is presumed to be competent to manage her own affairs…
>
> [82] I have previously referred to the fact that the Civil Procedure Rules (1972) does not outline a procedure for having a person declared incompetent. While a litigation guardian may be appointed for a "person under disability", that person must be someone who is mentally incompetent, in other words, someone who by

> reason of mental infirmity, is incapable of managing her own affairs. The statutory vehicle to address issues of incompetency is the IPA.
>
> [83] The established procedure associated with the IPA requires that an application for guardianship be accompanied by affidavits from two medical practitioners providing the facts upon which their opinion of incompetence is based. Significantly, there is nothing in the IPA that permits a court to require that a person submit to a medical examination, either prior to or subsequent to the application for guardianship being made. Additionally, under the IPA, competency is an all or nothing proposition. Only where a person is, by reason of mental infirmity, incapable of managing her affairs – both property and personal – is a guardian appointed.

[31] While the decision in ***Ocean*** involved the interpretation of the previous ***Civil Procedure Rules***, I conclude that the foregoing reasons continue to be applicable in the present circumstances.

Determination

[32] The sole issue for determination on this motion is whether Burke should be compelled to attend a mental capacity assessment. The burden is on the moving party to satisfy the Court that the requirements of ***Civil Procedure Rule*** 21.02 have been met. Even if these requirements are met, the Court retains the ultimate discretion as to whether an assessment should be ordered in the particular circumstances.

[33] The circumstances of this case call for consideration of the factors in ***Civil Procedure Rule*** 21.02(3). To order an assessment under this provision, the Court

must be satisfied that all of the factors in ***Rule*** 21.02(3) have been established on a balance of probabilities.

[34] The first factor is whether the moving party has put in issue the other party's mental condition. A party's mental condition is in issue only if her mental competency must be established in order to prove the cause of action or defence. (see ***Ocean***, supra at paragraph 61). Hillier says in her Notice of Contest that she conducted the impugned transaction as Burke's lawful attorney and that a subsequent revocation and new Power of Attorney appointing another attorney are invalid due to Burke's mental incompetence. I am satisfied that Hillier has put Burke's mental condition in issue in the proceeding. I say this subject to comments I make below regarding the residual discretion to order the assessment.

[35] In my view, the requirement for an evidentiary foundation as set out in ***Rule*** 21.02(3)(b) is more problematic. The evidence offered on possible incompetency is limited and conflicting. The evidence offered did support that Burke suffers from memory loss of some degree. Of significance was evidence that Burke did not (and still does not) recall the financial transactions of April 3, 2014 nor a visit to her family doctor of the same date. The medical information provided did not support incompetency but rather extreme stress and depression that were being treated. This information is now over 1 year old and no updated medical information was

provided. I note in particular that the evidence did not include an affidavit from a medical practitioner who had examined Burke as required by s.5 of the ***Incompetent Person's Act,*** R.S. c.218, s.1, nor did Dr. Doyle, or any other doctor, testify.

[36] By contrast, Hillier has offered evidence that she continues to live independently. She says that she drives, does her grocery shopping, pays her bills, does her own banking and attends social functions. Burke is representing herself in this proceeding. She filed documents. She testified and was cross-examined. It was clear to me that she understood the nature of the proceeding and that she could reasonably comprehend the direction of the Court during her various appearances. I acknowledge that she was receiving some assistance from Bernie Burke and other family members during the hearing.

[37] Burke admitted to memory problems and lack of recall. At times, this was demonstrated during cross-examination. Of concern was Burke's lack of ability to recall to legal transactions which took place during the relevant time periods. I am not satisfied however, based upon the evidence presented, that there is a foundation to argue Burke's total incompetency. As I say this, I am mindful of Justice Bateman's observations in ***Ocean*** that competency is "an all or nothing proposition".

[38] Even if Hillier had been able to satisfy all of the requirements of ***Rule*** 21.02(3), I would decline to order Burke to submit to a mental capacity assessment. By way of the pleadings in this matter, Hillier has raised something more than the issue of a mental condition. Rather, the issue of Burke's competency has been raised. Hillier is of the view that Burke is not competent to manage her own affairs. Such an allegation, if proven, has very significant legal consequences.

[39] In Nova Scotia, the procedure for declaring incompetency is found in the ***Incompetent Person's Act***. In my view, if competency is the issue, then the established procedure should be followed. This procedure does not provide for the Court to compel a mental capacity assessment. If such an assessment cannot be compelled in a proceeding focused solely on the competency of a party, then it cannot be appropriate to compel it in collateral circumstances.

Conclusion

[40] The Respondent's motion is dismissed. If the parties cannot agree on costs, written submissions shall be provided no later than May 29, 2015.

Gogan, J.