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A Vexatious Litigant After Only Two Applications in One Proceeding

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Case Commented On: *Re FJR (Dependent Adult),* 2015 ABQB 112 (CanLII)

Although the Alberta law giving the courts more power to deal with "vexatious litigants" in a simplified process has only been in effect a little more than five years — since October 30, 2009 — the law is quite well settled. Under section 23.1(1) of the *Judicature Act*, RSA 2000, c J-2, on application or the court's own motion, and with notice to the Minister of Justice and Solicitor General, if a Court is satisfied that a person is instituting vexatious proceedings or is conducting a proceeding in a vexatious manner, then the court may order that the person not commence or continue proceedings without the court's permission. Section 23(2) provides a non-exclusive list of examples of vexatious proceedings and conduct. These provisions have been considered in approximately 70 cases over the past five years. Recently and helpfully, in *Chutskoff v Bonora*, 2014 ABQB 389 (CanLII) at paras 80-93, Justice Michalyshyn undertook a comprehensive review of this case law. As a result of all of this consideration, most vexatious litigant proceedings now simply involve application of the established principles to the particular facts of each case. Nonetheless, the occasional new legal issue arises, as it does in *Re FJR*. This post considers a case in which the person found to be a vexatious litigant had only made two applications, and both of them were made in only one court proceeding.

Facts

In November 2013, IR filed an application to have herself and her two sisters appointed as joint guardians of their father, FJR, under the *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2. FJR requested a hearing, which was held before Justice Gross in June 2014, at which time the application was granted with the requirement that it be reviewed within 60 days. In August of 2014, Justice Yungwirth conducted the review and continued the appointment of the three daughters as guardians. In October 2014, FJR applied to have further neurological and capacity assessment reports ordered and the guardianship order repealed, but Justice Manderscheid in November 2014 dismissed this application. In December 2014, FJR filed a further application seeking substantially the same remedies, as well as invalidation of a 1996 Enduring Power of Attorney that allowed IR to handle his financial matters. This application was heard by Justice Shelley in December of 2014. She adjourned the matter in order to read the extensive materials and then rendered her decision — the case commented upon in this post — denying FJR's application in February 2015.

Four different Court of Queen's Bench judges had thus, over the space of four applications and nine months, determined that FJR required a guardian. Under section 26(6) of the *Adult Guardianship and Trusteeship Act*, a court may make an order appointing a guardian for an adult — who then becomes a "represented adult" — if the court is satisfied that the adult does not have the capacity to make decisions about personal matters; that less intrusive and less restrictive alternative measures than the appointment of a guardian have been considered and would not likely be effective; and that it is in the adult's best interests to make the order. "Personal matters" is a defined term in the Act and includes non-financial matters such as health care, where the represented adult is to live, their education, their employment, their social activities, etc.

The guardianship order was granted based upon nine medical reports, including three obtained by FJR, which indicated he suffered from dementia and paranoia, and that he lacked capacity. FJR disputed the numerous reports based on his belief that the symptoms noted in those reports were attributable to the lingering effects of a concussion he suffered in a fall. However, the medical reports indicated that symptoms of his dementia were present prior to any fall.

Vexatious litigant order

Justice Shelley also issued an order under section 23.1(1) of the *Judicature Act*, prohibiting FJR from commencing or continuing any action in the Alberta courts without permission from the court, setting out the procedures for any application for permission, and staying her order for 30 days to allow the Minister of Justice and Solicitor General to make submissions. Justice Shelley issued this order on her own motion, as is provided for in section 23.1(1).

Justice Shelley granted the vexatious litigant order after IR expressed concern that her father would continue to bring applications to repeal the guardianship order. IR advised the court that FJR had consulted at least 17 lawyers since December 2012 in an attempt to retain one who would challenge the guardianship order and the Enduring Power of Attorney. He had also consulted at least 11 different medical practitioners in an effort to obtain a favourable capacity report. (FJR had also filed a complaint with the Law Society of Alberta against IR's lawyer, but this was not mentioned as a part of the reasons for granting the vexatious litigant order.)

Justice Shelley indicated that the underlying rationale for the vexatious litigant provisions in the *Judicature Act is* "an acknowledgement of the unreasonable burden placed upon courts by groundless litigation, which prevents expeditious resolution of proper litigation" (at para 22). However, she explicitly stated that in this case she did not see FJR's conduct as a deliberate attempt to bring groundless litigation, acknowledging that he sincerely believed he did not lack capacity (at para 23).

Justice Shelley did not refer to any of the examples of vexatious proceedings or of conducting proceedings in a vexatious manner in section 23(2) of the *Judicature Act*. She did not cite a single precedent applying that provision. Instead, she held that it was not in FJR's best interests to continue to try to have the guardianship order lifted and the Enduring Power of Attorney repealed, or to continue to try to find doctors and lawyers who would support his position (at para 21). She also found that his medical condition prevented him "from appreciating that his daughters' actions, and those of the court, are aimed at protecting him" (at para 23). The only attention that Justice Shelley paid to the requirement for persistent vexatious proceedings or conduct was her statement that "[i]t is clear that FJR will *likely* continue his efforts to have the guardianship order set aside," noting his attempts to do so before Justice Yungwirth (even though that hearing was the review hearing required by the initial order of Justice Gross) and

Justice Mandersheid (at para 24). Thus, she concluded that "the issuance of a vexatious litigant order . . . is appropriate order in these circumstances and may assist in preventing further similar applications being brought by FJR in his attempt to revisit matters already well settled by this Court" (at para 24). Justice Shelley also justified her order as preventing FJR from incurring further substantial costs (at para 25), a reason that appears to go to FJR's perceived best interests.

Comments

The granting of the vexatious litigant order in this case is unusual — and inappropriate — for three reasons. First, there were very few applications, both of them in only one proceeding, rather than the usual large number of applications in multiple proceedings. Second, Justice Shelley specifically found that FJR's conduct was not a deliberate attempt to bring groundless litigation. Third, the main reason advanced for granting the vexatious litigant order was that it was in the vexatious litigant's best interests. I will address each of these points in turn and then suggest what might be a better way to handle this type of situation, albeit a way requiring a statutory amendment to the *Adult Guardianship and Trusteeship Act*.

On the first point, FJR brought only two applications, albeit in very short order, after the mandated review of the initial guardianship order: one before Justice Manderscheid in October 2014 and this one before Justice Shelley in December 2014. Two applications in only one proceeding that had only been commenced 15 months before the vexatious litigant order — these are very paltry numbers in the vexatious litigation context. Usually a far greater number of proceedings, applications, and appeals have tried the patience of the courts and the resources of a large number of defendants before a vexatious litigation order is applied for. *Allen v Gray*, 2012 ABQB 66, involved twelve different lawsuits in the province of Alberta. There were at least eight different actions and numerous applications within each recounted in *Wong v Giannacopoulos,* 2011 ABCA 206 (CanLII), leave refused 2011 ABCA 277 (CanLII). In *Onischuk v Alberta*, 2013 ABQB 89 there were only three separate actions but numerous appeals, all about one cause. Persistent behaviour — i.e., a prolonged or insistently continuous quality to behaviour — is key under section 23(2) and the case law interpreting it. Every subsection in section 23(2) setting out the examples of vexatious conduct starts with the word "persistently". The persistent conduct is supposed to have occurred in the past, and it serves as an indication that it will persist into the future if not restrained. In this case, however, it was only the likelihood that the litigious conduct would persist into the future that was given as a reason for granting the vexatious litigant order.

Second, Justice Shelley specifically found that FJR's conduct was not a deliberate attempt to bring groundless litigation. However, in *Onischuk v Alberta,* Justice Rooke relied upon *Del Bianco v 935074 Alberta Ltd*., 2007 ABQB 150, *Jamieson v Denman*, 2004 ABQB 593, *Prefontaine v Pairs*, 2007 ABQB 77, and *O'Neill v Deacons*, 2007 ABQB 754 to synthesize a definition of a "vexatious litigant" as "one who repeatedly brings pleadings containing extreme, unsubstantiated, unfounded, and speculative allegations against a large number of individuals *to exploit or abuse the court process for an improper purpose, or to gain an improper advantage*" (at para 9, emphasis added). This definition acknowledges the provision's roots in the court's inherent jurisdiction to control abuses of the courts' processes. It also points out that motive is important. Justice Jack Watson, in *Jamieson v Denman* at paras 126-127, in a passage quoted with approval by then Associate Chief Justice Neil Wittmann in *O'Neill v Deacons* at para 22, and by Justice Hawco in *Allen v Gray*, discussed the notion that "vexatious" is a normative as well as a legal concept:

> My view of the word "vexatious" is that it connotes not simply that the party was acting without the highest motives, or was acting in a manner which was hostile towards the other side. "Vexatious", as a word, means to me that the litigant's mental state goes *beyond simple animus* against the other side, and rises to a situation where the litigant actually is *attempting to abuse or misuse the legal process.* (Emphasis added)

In this case, Justice Shelley specifically found that the applications were not an attempt to abuse the court process. The problem was that FJR lacked capacity, and not that he was exploiting the court process for an improper purpose or to gain any improper advantage. The vexatious litigant provisions of the *Judicature Act* seem inappropriate in his circumstances.

Third, while Justice Shelly did refer to the prevention of unsupported and duplicative proceedings, the main reason for granting the vexatious litigant order was FJR's best interests. The best interests of a represented adult are certainly a primary concern under the *Adult Guardianship and Trusteeship Act*, but irrelevant under the vexatious litigant provisions of the *Judicature Act*. Hopeless proceedings are one of the recognised indicia of vexatious proceedings; see point #2 in para 92 in the review of the vexatious litigant jurisprudence in *Chutskoff v Bonora*, 2014 ABQB 389 (CanLII). And Justice Shelley does refer to FJR's proceedings as "unsupported" (at para 23), as well as noting that further neurological reports are unnecessary (at para 18) and the ample evidence in the record that his mental condition would deteriorate over time (at para 18). But it is the best interests of FJR that she relies upon and this is simply not something that can be taken into account under section 23 or section 23.1 of the *Judicature Act*.

Finally, a person might wonder how FJR, a person found to be a "represented adult", could bring applications in court without his guardian deciding to do so on his behalf. After all, a guardian has exclusive authority with respect to "personal matters" and section 1(bb)(vii) of the *Adult Guardianship and Trusteeship Act* provides that "personal matters" can include "the carrying on of any legal proceeding that does not relate primarily to the financial matters of the adult." In this case, FJR's applications did not relate primarily to his financial affairs. It is true that section 34(1) of the Act provides that a guardian may act only with respect to those personal matters of the represented adult that the guardian has been granted authority over in the guardianship order, and Justice Shelley does not indicate whether or not the guardianship order granted to IR included "the carrying on of any legal proceedings." If it did, why could FJR bring the application that he did? The answer is found in section 40(1) of the *Adult Guardianship and Trusteeship Act* which provides that a represented person may apply to the Court for a review of a guardianship order. There appears to be no limit on how often or how many times a represented person may apply to the court for such a review. Perhaps there should be. Dealing with the course of conduct undertaken by FJR under the *Adult Guardianship and Trusteeship Act*, rather than under the vexatious litigants' provisions of the *Judicature Act*, might be more appropriate. The former act focuses on the represented person's best interests, and the latter does not. A limitation under the former does not carry the stigma that a vexatious litigant order does.