

CANADA / JUDGMENT

Begg v. Begg

2013 BCSC 84

COURT

Supreme Court of British Columbia

DECIDED

21 January 2013

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2013 BCSC 84 Begg v. Begg

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Begg v. Begg,

2013 BCSC 84

Date: 20130121

Docket: S65035

Registry: Nanaimo

Between:

Monica Elizabeth Begg by her Guardians ad Litem under the Representation Agreement executed June 23, 2011: Katherine Marie Christine Taberner; Paula Jean Charlotte Begg; Virginia Anne Stephen

Plaintiff

And

Stephen Robert Begg; Patricia Elizabeth Begg; Philip Stanley Gerard Begg aka Philip Stanley Gerard Stanley; Geraldine Frances Herron; Jacqueline Mary Winnifred Buchanan; Ian Christopher Begg; Margaret Mary Lacroix

Defendants

Before: The Honourable Mr. Justice D.A. Halfyard

Reasons for Judgment

Counsel for the Plaintiff:

S. McPhee Q.C.

The Defendant, Stephen Robert Begg appeared on his own behalf

There was no appearance by the other six defendants

Place and Date of Hearing:

Nanaimo, B.C.

December 3 and 4, 2012

Place and Date of Judgment:

Nanaimo, B.C.

January 21, 2013

The Applications

- [1] There are two applications before the court. The first application was filed by the defendant Stephen Robert Begg on November 2, 2012. The second application was filed on behalf of the plaintiff Monica Elizabeth Begg on November 22, 2012. It is in the nature of a cross-application to that of the defendant Stephen Robert Begg.
- [2] This action is brought on behalf of the plaintiff Monica Elizabeth Begg by her litigation guardians, Katherine Taberner, Virginia Stephen and Paula Begg. They are daughters of the plaintiff. The seven defendants are also children of the plaintiff. The three litigation guardians live on Vancouver Island (Paula in Nanaimo and Katherine and Virginia in Port Alberni). The seven defendants live in or near the Vancouver area of the lower mainland of British Columbia. The parties have been referred to as "the Island Group" and "the Mainland Group" in the course of this litigation. Monica Begg is now 91 years of age.
- [3] The defendant Stephen Robert Begg has been acting on his own behalf in this proceeding since about January 30, 2012. The other six defendants are represented by counsel, but they did not appear on either of the two applications. They did not support the defendant Stephen Robert Begg in his application and they did not oppose the application made on behalf of the plaintiff. For convenience, I will refer to the defendant Stephen Robert Begg as "the Defendant".

The Application of the Defendant

- [4] In his notice of application, the defendant requests 11 orders which would grant him multiple forms of relief. The first three of the orders sought are at the core of his application, and they are the following (in his words):
 - 1. That the court order the representation agreement dated June 23, 2011, signed by Monica Elizabeth Begg as revoked and invalid.

2. That the court cancel the power of attorney dated June 23, 2011 and any other power of attorney, and made between Monica Elizabeth Begg and the defendants Katherine Marie Christine Taberner and Paula Jean Charlotte Begg.
 3. That the court order for an interim injunction, dated February 7, 2012, restricting the defendant Stephen Begg, be discharged.
- [5] Much of the other relief sought by the defendant is dependent on his succeeding in having the representation agreement and the power of attorney set aside. Other parts of the relief sought would require the defendant to prove that the three litigation guardians of Monica Begg (all of whom are her representatives under the representation agreement and two of whom are her attorneys under the power of attorney) have failed to comply with their obligations to Monica Begg as required by the Representation Agreement Act and by the Power of Attorney Act. In particular, the defendant alleges that the litigation guardians have made and acted upon various decisions that are not in Monica Begg's best interests in relation to her personal care, her health care, her financial affairs and the commencement of legal proceedings on her behalf.
- [6] Counsel for the plaintiff, while opposing the entirety of the defendant's application, conceded that the defendant had the right to bring his application to challenge the validity of the representation agreement and the power of attorney and to seek to have the interlocutory injunction set aside, as against himself. Plaintiff's counsel also seemed to concede that the defendant could challenge the propriety of the decisions made by the litigation guardians pursuant to their authority under the representation agreement. Mr. McPhee did question the defendants' right to claim orders that would require the litigation guardians to provide an accounting; to cease and desist spending Monica Begg's money on this lawsuit; to pay back to Monica Begg all of her money they have spent to date on this lawsuit; and to pay damages to Monica Begg, on the ground that the defendant had not filed any response to civil claim or any counterclaim. As to the defendant's request for an order requiring the litigation guardians to produce to the court any Will executed by Monica Begg after September 18, 2008, counsel for the plaintiff simply stated that no facts had been established which could justify such an order.

The Application of the Plaintiff

- [7] Counsel for the plaintiff opposes the granting of any order sought by the defendant and seeks an order declaring that the representation agreement and the power of attorney are valid. In the event that the court may decide to set aside the representation agreement or power of attorney, an order is sought in the alternative that the present litigation guardians be appointed as committees of Monica Begg.

The Procedural Issue

- [8] In support of his position as to the procedure that should be followed, counsel for the plaintiff submitted that both of the present applications should be considered to be interlocutory applications, and not as applications for summary trial and final judgment. Understandably, the defendant was not able to contribute to the discussion on this issue.
- [9] This action was commenced on December 30, 2011. The essence of the cause of action is that the defendants wrongfully removed Monica Begg from Echo Village (a care facility in Port Alberni) on December 17, 2011 and thereafter wrongfully confined her against her will. In alleging that the removal of Monica Begg from the care facility was wrongful, the litigation guardians of the plaintiff rely on the facts (which were pleaded) that they had arranged for Monica Begg to be admitted to the Echo Village complex care facility on December 1, 2011, that on or before December 1, 2011 Monica Begg lacked legal capacity to act on her own behalf and that in placing her in the said care facility, they were acting under the authority granted to them by Monica Begg under the representation agreement made on June 23, 2011. Damages are claimed for the alleged wrongful removal and detention of Monica Begg. Injunctions were also claimed, to require the defendants to return the plaintiff to the care of her representatives under the representation agreement (i.e., the litigation guardians) and to restrain the defendants from any further interference with the person or estate of Monica Begg.
- [10] There have been four legally significant events since the notice of civil claim was filed and served on the defendants, as follows:
- a) The defendants returned Monica Begg to the care of the litigation guardians, on December 30, 2011.
 - b) The defendant Stephen Begg took Monica Begg out of the Echo Village care facility without the approval of any of the other six defendants on January 30, 2012, took her to his home in Burnaby, and returned her to the care of the litigation guardians (or to Echo Village) on or about February 2, 2012.
 - c) On February 7, 2012, the plaintiff applied for an injunction restraining the defendants from further interfering with the person or the estate of Monica Begg, and a time-limited injunction was granted. (It has since been extended on a number of occasions, and remains in force.)
 - d) On May 22, 2012, Dr. Lonn Myronuk, geriatric psychiatrist, expressed the opinion that Monica Begg lacked the capacity to make competent, reasoned decisions about her person or her estate, because she lacks the necessary executive cognitive ability to be able to weigh her options. He was also of the opinion that she was "not . . . capable of independently making decisions about when and where she will visit family" and that Mrs. Begg lacks capacity to instruct counsel. The doctor's diagnosis was: "Mrs. Begg suffers from progressive dementia that is now of moderate severity."

- [11] The notice of civil claim has not been amended to reflect these additional facts. Neither the six defendants represented by counsel, nor the defendant Stephen Begg, have ever filed a response to civil claim (and so obviously have not filed any counterclaim). Although the defendant has not filed a defence to the action, it is apparent from the affidavit evidence and argument he presented on the hearing of the applications that his defence consists generally in the following allegations:
- a) The representation agreement is invalid because it fails to meet the execution requirements of the Representation Act, or alternatively because it has been revoked by Monica Begg.
 - b) The Power of Attorney signed by Monica Begg on June 23, 2011, has been terminated by a revocation signed by Monica Begg.
 - c) The defendants' taking of Monica Begg from Echo Village on December 17, 2011 was not wrongful or unlawful, because at that time they had no knowledge of the existence of the representation agreement or the power of attorney and moreover, Monica Begg consented to going with them and there was no detention against her will.
 - d) Monica Begg had legal capacity to make her own decisions at least up until April 20, 2012.
- [12] The reply position of the litigation guardians (on behalf of the plaintiff) is as follows:
- a) The representation agreement was lawfully executed and is valid.
 - b) Monica Begg had legal capacity to execute the representation agreement and the power of attorney on June 23, 2011.
 - c) Monica Begg no longer had legal capacity to make her own decisions by the time she was placed in the complex care facility at Echo Village on December 1, 2011.
 - d) As a consequence, even assuming that Monica Begg signed the purported revocation document dated December 22, 2011, it is of no force or effect because she did not possess the legal capacity to execute such document or alternatively because the purported revocation does not meet the statutory requirements.
- [13] On behalf of the plaintiff, the allegations of abuse and neglect are denied and a body of facts are asserted in the affidavit evidence in an attempt to show that the litigation guardians have provided Monica Begg with proper personal care, health care and administration of her legal and financial affairs, and that at all times they have acted in her best interests.
- [14] It seems to me that both the defendant and the plaintiff are seeking final judgment on issues that are essential to the cause of action and to the defence to the action. The defendant seeks to have the representation agreement set aside as being invalid and in the alternative he alleges that both the representation agreement and the power of attorney cease to have any legal effect by reason of the plaintiff having revoked them on or about December 22, 2011. On behalf of the plaintiff, the court is being asked to decide that the representation agreement and the power of attorney were valid from the time of execution, that Monica

Begg had lost the mental capacity to act on her own behalf by December 1, 2011, and that as a consequence they have had authority to make decisions for her since that time, pursuant to the representation agreement. The court is also urged to find that the purported revocation of December 22, 2011 has no force or effect, because among other things, Monica Begg lacked the mental capacity required by law to make a valid revocation.

- [15] Counsel for the plaintiff did not suggest that the action could survive if the court found that the representation agreement was invalid from its inception, or found that it had been effectively revoked by Monica Begg. It appears obvious that if the court made either of those decisions, the defendants would be entitled to move for dismissal of the action. It seems plain that the defendant is seeking final judgment.
- [16] But Mr. McPhee contended that even if the court decided the issues of validity and revocation in favour of the plaintiff, the issues of whether there had been a wrongful removal and detention of Monica Begg, and if so, whether damages should be awarded (and, if so, in what amount), would still have to be decided (presumably at a later trial). That may be so. But in my opinion, both parties to these applications are claiming orders which would be final orders on several issues that are central to the cause of action and to the defences to the action.
- [17] At the outset of the hearing, the defendant had applied to adjourn his application on the ground that one of his sisters (a co-defendant) had filed a complaint against the litigation guardians with the office of the Public Guardian and Trustee, and that a solicitor employed by the Public Guardian had indicated that his office would proceed to investigate the complaint. After hearing submissions, I dismissed the defendant's application to adjourn. Mr. McPhee had stated that if the court adjourned the defendants' application, he would nevertheless proceed with the application of the plaintiff. In those circumstances, the defendant (having failed on his adjournment application) decided to proceed with his application. At that point, it was implicit in the positions of both parties that, insofar as possible, the potential procedural irregularities or defects should be ignored or remedied by the court, so that both applications could proceed, on the issues that the court found suitable for determination.
- [18] With what I consider to be the implied consent of the parties, I am going to treat these two applications as follows. I will treat the defendant's application as an application for summary trial (of the defence issues of invalidity and revocation I have described) and final judgment, dismissing the plaintiff's action (which would automatically cancel the existing interlocutory injunction). In the alternative, the defendant seeks an interlocutory order setting aside the interlocutory injunction, as against himself only. The other claims for relief being made by the defendant must be dismissed regardless of the outcome of his summary trial application, because, in my view, they could not be entertained without a counterclaim having been made.

- [19] I intend to treat the plaintiff's application as an application for summary trial and final judgment on several issues that are essential to the cause of action, which I have identified above (in paragraph 14).

The Issues

- [20] As I see it, the issues that can and should be determined on the present applications are limited to the following:
- a) Was there a defect in the execution of the representation agreement which makes it invalid?
 - b) Assuming that Monica Begg had the capacity required by law to revoke the representation agreement as of December 22, 2011, did she effectively revoke the representation agreement?
 - c) Should the interlocutory injunction be set aside, to the extent that it applies to the defendant Stephen Begg?
- [21] As to the first two of these issues, any defects or irregularities in the procedure used to bring these two applications on for hearing as applications pursuant to Civil Rule 9-7, will be deemed to be waived. I think that in the present circumstances, the court has the power to do this, pursuant to Civil Rule 1-2(3); and that this should be done in order to enable these applications to proceed and be decided, to the extent possible.
- [22] Having read the evidence and having heard the arguments, I have decided that I will be able to find the facts necessary to decide the issues of fact and law that are necessary to decide the first two issues just described. I am also of the opinion that it would not be unjust to decide these two issues, by way of summary trial. The third issue requires only an interlocutory (not a final) decision, and is properly before the court.
- [23] The applicants have also raised the following two issues:
- a) As of December 1, 2011 and thereafter, was Monica Begg incapable of making decisions independently about her personal care, health care and legal matters?
 - b) Have the legal representatives of Monica Begg made decisions relating to her personal care, her health care, her legal affairs and her financial affairs which fail to comply with their statutory obligations prescribed by s. 16(1)(2)(3) and (4) of the Representation Agreement Act?
- [24] In my opinion, neither of these two issues should be decided on the present applications. My reasoning is as follows.

The Issue of the Plaintiff's Mental Capacity

- [25] On the issue of whether the plaintiff was "incapable of making decisions independently" by December 1, 2011, the positions of the two applicants are as follows.

[26] The following facts are alleged in paragraphs 24 and 25 of the Notice of Civil Claim:

24. On or about December 1, 2011, the plaintiff was admitted to a complex care facility, Echo Village.
25. At least by this point in time, the plaintiff lacked legal capacity to act and the Vancouver Island Group were making decisions on her behalf pursuant to the representation agreement executed June 23, 2011.

[27] It is accepted by the defendant that Monica Begg possessed the mental capacity required to make a valid representation agreement and to grant a power of attorney, on June 23, 2011. Based on the opinions expressed by geriatric psychiatrist Dr. Lonn Myronuk in his report dated May 22, 2012, the defendant also accepts that Monica Begg was no longer capable of making competent, reasoned decisions about her person or estate, by April 20, 2012, when Dr. Myronuk examined her. The defendant agrees that, at the present time, Monica Begg is incapable of managing herself or her affairs.

[28] The defendant challenges the assertion that the plaintiff lacked legal capacity to act on her own behalf, as of December 1, 2011. He says (or it is implicit in his position) that at that time, and for several months thereafter, the plaintiff had sufficient legal capacity to do all of the following things:

- a) to make her own decisions about her personal care and health care, including the decision whether or not to begin living at Echo Village on December 1, 2011.
- b) to make her own decision to leave Echo Village with her son, Philip Begg, on December 17, 2011, and to live in the home of Philip Begg instead of at Echo Village;
- c) to make her own decision on December 22, 2011, as to whether or not she would revoke the representation agreement and the power of attorney that she executed on June 23, 2011;
- d) to make her own decision as to whether or not she would commence a law suit against seven of her children on December 30, 2011;
- e) to make her own decision as to whether she would leave Echo Village with her son Stephen Begg on January 30, 2012, to visit with him for three or four days;
- f) to make her own decision on February 1, 2012, as to whether or not she would revoke the representation agreement and the power of attorney; and
- g) to make her own decision as to whether or not the court should be asked to impose conditions under which seven of her children could visit with her.

[29] The defendant relies on the presumption of capability as set out in s. 3(1) of the Representation Agreement Act, which is as follows:

3(1) Until the contrary is demonstrated, every adult is presumed to be capable of

- (a) making, changing or revoking a representation agreement, and
 - (b) making decisions about personal care, health care and legal matters and about the routine management of the adult's financial affairs.
- [30] The defendant relies on his own affidavit evidence, and the affidavit evidence of the defendants, Philip Begg and Patricia Begg, as to the interactions he and they have had with their mother and their opinions as to her mental capacity during the period from the summer of 2011 to the spring of 2012.
- [31] The defendant also relies on the evidence given by Peter J. Goodwin, Barrister and Solicitor, in his affidavit sworn February 3, 2012. In summary, Mr. Goodwin deposed that he met privately with Monica Begg on December 22, 2011, and February 1, 2012, at his office in New Westminster and that in his opinion Mrs. Begg was competent to provide instructions to him concerning her personal affairs (including her living arrangements and matters involving her children).
- [32] Counsel for the plaintiff accepts that the presumptions in s. 3(1) of the Representation Agreement Act (and a similar presumption relating to the power of attorney, as a result of s. 11(1) of the Power of Attorney Act) have application in the present case. But counsel submits that the evidence rebuts that presumption and proves that, by December 1, 2011, the plaintiff was incapable of doing the things referred to in s. 3(1) of the Representation Agreement Act or the things referred to in s. 11(1) of the Power of Attorney Act.
- [33] Counsel for the plaintiff relies on the evidence given by the litigation guardians to the effect that Monica Begg's mental abilities rapidly deteriorated during the months of September, October and November 2011. He relies heavily on the evidence of Dr. J. Colin Forrester given in his affidavit sworn December 29, 2011. Dr. Forrester is a general practitioner who was Monica Begg's physician from March 2007, until November 10, 2011. I reproduce the parts of his affidavit that are relevant to this issue:
- 9. Throughout the fall of 2011, Monica Begg's health and particularly her cognitive health deteriorated. She was at high risk for increased suffering at her residence at that time.
 - 10. While I was made aware of and was advised that Monica Begg was receiving in-home care and support at home, it became apparent from the reports and meetings that I attended with Monica Begg and her daughters, Katherine Taberner, Paula Begg and Stephen that Monica Begg's condition was deteriorating and that her personal health and safety was at risk, even with home support, while she lived at home.
 - 11. On or about November 10, 2011, I assessed and recommended that plans be made for her to be in complex care given her deterioration and her dementing illness.
 - 12. On October 13, 2011, prior to November 10, 2011 visit, I had repeated a MOCA examination that confirmed her vascular dementing illness and deterioration of her cognitive abilities.

...

16. At the time of my last engagement with Monica Begg, I was of the opinion that she was incapable of managing her own affairs and was reliant on those designated by her power of attorney and representation agreement to make decisions for her health, personal care and financial matters at the time.
17. Given the degenerative nature of the condition that I observed in Monica Begg in November 2011, I am of the opinion that she would not likely retain her capacity to act on her own in the intervening weeks since then.
- [34] Counsel for the plaintiff pointed out that Dr. Myronuk (at pages 7-8 of his report) referred to Dr. Forrester's opinion as to Monica Begg's capacity as of November 10, 2011, and that Dr. Myronuk did not express any disagreement with that opinion. Counsel further submitted that Dr. Myronuk's discussion of Mr. Goodwin's affidavit (at pages 14-15 of his report) was somewhat critical of Mr. Goodwin's opinion as to Monica Begg's competency, in that Dr. Myronuk states that Mr. Goodwin "does not state the facts or assumptions upon which that conclusion is based" (December 22, 2011), and ". . . it is not stated what specific questions or tests were applied in his assessment of her competence, or what observations or other information his conclusions of lucidity, coherence or understanding were based" (February 1, 2012).
- [35] Plaintiff's counsel argued that, on the whole of the evidence the court should find that by December 1, 2011, Monica Begg was incapable of:
 - a) Making, changing or revoking a representation agreement, and
 - b) Making decisions about her personal care, health care and legal matters.
- [36] It was further argued that the evidence supported the conclusion that she did not thereafter regain her capacity to do any of those things.

Discussion

- [37] Section 2 of the Representation Agreement Act defines the purpose of the Act in a way which focuses on an adult's capacity to make decisions independently "about their health care or personal care, the routine management of their financial affairs or other matters." In my opinion, it is implicit in the definition of the purpose that a representative named in an agreement may only make decisions for the adult about any of the specified matters if the adult becomes "incapable of making decisions independently" about one (or more) of those matters, as described in s. 3(1).
- [38] The essential opinions expressed by Dr. Myronuk in his comprehensive report dated May 22, 2012 are undisputed, and they satisfy the legal requirements for the exercise of authority by the three representatives under the representation agreement. Dr. Myronuk does not expressly state when the plaintiff had become incapable of making decisions independently.

I think it is implicit from his report that the plaintiff had reached this level of incapacity by the time he examined and tested her on April 20, 2012. But I would not infer a date that is significantly earlier, in light of Dr. Myronuk's statement (at p. 27) that:

Mrs. Begg's cognitive performance on my testing . . . was substantially worse than that obtained in 2011. . . .

and his reference (at p. 31) to the plaintiff's "current mental state." Also, at several points in his report, Dr. Myronuk describes the plaintiff's dementia as being a "progressive" disease.

- [39] Dr. Colin Forrester has given an opinion which favours the plaintiff's case, as to the time of the onset of the plaintiff's mental incapacity. If Dr. Forrester's opinions are accepted, it would support the conclusion that the presumption of capacity in s. 3(1) of the Act was rebutted as of November 10, 2011. But there are reasons which, in my view, militate against such acceptance.
- [40] First, Dr. Forrester is a general medical practitioner, and not a psychiatrist. Although I think it would be wrong for the court to disregard Dr. Forrester's opinion for that reason alone, the issue here does involve questions related to the field of psychiatry. In a case such as this, it seems to me that the opinion of a non-specialist should not be accepted as being determinative where a legally-defined degree of mental incapacity must be assessed. (I would accept without reservation Dr. Forrester's opinion that Monica Begg required the level of care provided by a "complex care" facility.)
- [41] Second, Dr. Forrester's opinions are not set out in the form of an expert report, in accordance with the requirements of Civil Rule 11-6(1). The certification required by Rule 11-2(2) is not included. There is no complete description of the facts on which the opinion is based. Other requirements of Rule 11-6(1) are absent. It is unclear whether Dr. Forrester's report was served as an expert's report (pursuant to Rule 11-6(3) or otherwise). Counsel for the plaintiff did not request leave to introduce Dr. Forrester's affidavit as the opinion of an expert, pursuant to Rule 9-7(5)(e)(ii).
- [42] Third, it seems clear that to some extent, Dr. Forrester relied on information provided by the Vancouver Island Group, in forming his opinions. But the nature of that information and the extent to which it was relied on, is not readily apparent. It is also apparent that Dr. Forrester did not express, on November 10, 2011, an opinion similar to the opinion he gave in his affidavit six weeks later.
- [43] Fourth, the evidence given by the Vancouver Island Group to the effect that there was a rapid decline in the plaintiff's mental abilities between mid-September and mid-November, 2011, was likely relied on (at least in part) by Dr. Forrester. The evidence could support the conclusion that there was some decline over this time period, but the question is whether the extent of that decline was such that the plaintiff became incapable of making decisions independently by December 1, 2011. The defendants Philip Begg, Patricia Begg and Stephen Begg have given evidence which is inconsistent with that allegation of a sharp decline. In

several instances, there are conflicting facts and opinions asserted in the evidence presented by the two groups on this issue. Neither group of siblings accepts the evidence given by the other group. Understandably, Dr. Forrester was unaware of the observations made and the opinions expressed by the Mainland Group.

- [44] Fifth, the "rapid decline" issue is an important issue which, in my view, cannot be decided without first assessing the credibility of the persons who have given relevant affidavit evidence. That includes Peter Goodwin, whom, I consider to be an independent witness. It was his firm opinion that Monica Begg was competent to instruct counsel on both December 22, 2011, and February 1, 2012.
- [45] Mr. Goodwin gave evidence to the effect that Monica Begg wanted a resolution of the conflict between her children and expressed a desire that agreement be reached between them as to who should be her representatives and attorneys. Mr. Goodwin said that on December 22, 2011, he discussed with Monica Begg the issue of whether she wished to cancel or revoke the existing representation agreement and power of attorney and replace them with a representation agreement and power of attorney in which her representatives and attorneys would be her two children, Patricia Begg and Philip Begg; and that Monica Begg decided not to execute the new documents that Mr. Goodwin had prepared, and wanted to consider the matter further.
- [46] Mr. Goodwin has deposed that on February 1, 2012, Monica Begg told him that the existing power of attorney was satisfactory to her. But he said she also told him, in effect, that she would like to cancel the existing representation agreement and replace it with an agreement in which one of her children living on Vancouver Island and one of them living in the lower mainland would be her representatives and that they would act together in her best interests. Mr. Goodwin further states that the plaintiff said that "she would like to see Stephen from the lower mainland and Paula from Vancouver Island appointed as her representatives to act jointly." And he deposes that Monica Begg decided not to make those legal changes until discussing the matter with her children. Mr. Goodwin states ". . . that the most important matter to Mrs. Begg was that there be a resolution of the existing conflict among her children with respect to her care and well being" (paragraph 8). From paragraph 7 of Mr. Goodwin's affidavit, I infer that the conflict between her children that Monica Begg was discussing with Mr. Goodwin, included "this existing litigation."
- [47] Although Dr. Myronuk noted that Mr. Goodwin had not given detailed reasons to support his opinion as to Monica Begg's competency, he did not contradict Mr. Goodwin's opinion. Nor did Dr. Myronuk suggest that Mr. Goodwin was mistaken. It seems to me that the opinions expressed by Mr. Goodwin could logically co-exist with the opinions given by Dr. Myronuk. They are speaking of different points in time.
- [48] As I see it, there is no sufficient basis on which to assess credibility. None of the testimony of any affiant has been tested by examination for discovery or by cross-examination on affidavits. No damaging admissions have been made, and no serious self-contradictions have

been identified. There are potential weaknesses in the credibility of the Island Group by reason of their failure to disclose the existence of the representation agreement (and other important information) in a timely way, but this apparent weakness is not sufficient to justify the rejection of their challenged evidence on the basis of affidavit evidence alone.

- [49] My conclusion is that I am unable to find the facts necessary to decide the issues of fact and law relating to the issue of whether the plaintiff had become incapable of making decisions independently by December 1, 2011. In addition, I think it would be unjust to some extent, to decide this issue by summary trial. Neither side appears to be in a position to present their best case, there is considerable inadmissible hearsay, and a decision would not necessarily resolve this lawsuit. Consequently, this issue is not suitable for determination by way of summary trial.

The Issue of whether the Island Group have failed to meet their Statutory Obligations to the Plaintiff

- [50] As mentioned, the defendant has made numerous allegations which criticize the conduct of his three sisters who are the representatives of their mother under the representation agreement (and two of them are their mother's attorneys under the power of attorney). The defendant challenges their decision to place their mother in Echo Village in Port Alberni, their decision to commence this lawsuit and to fund it with their mother's money and their decisions regarding her medical treatment for dementia. It is contended that the decisions made by the three representatives have not been in their mother's best interests and the defendant alleges that this conduct justifies their removal as representatives and attorneys of their mother.
- [51] Counsel for the plaintiff seemed content to have the court try this issue. Mr. McPhee recognized that serious allegations were being made by the defendant but was prepared to deal with them head on and expressed confidence that the representatives of the plaintiff would be successful in defending against these allegations.
- [52] I have stated my opinion that this issue should not be tried by summary trial on the present hearing. First, I am not prepared to ignore the serious procedural violations in relation to the trial of this issue. As noted, the defendant not only has not filed a response to civil claim, but he has not filed a counterclaim. Yet he wants to try to prove misconduct on the part of the plaintiff's representatives and claims that the misconduct justifies their removal and the substitution of other persons to be the plaintiff's representatives and attorneys. This procedural defect is sufficient to make the fourth issue ineligible for summary trial. But there are additional reasons why the issue should not be tried summarily.

- [53] The state of the evidence makes me uncertain whether I would be able to find the facts necessary to decide the issues of fact and law relating to this issue. There would be complex issues of mixed fact and law relating to whether or not there has been compliance by the representatives of the plaintiff, as to their statutory obligations under s. 16(1) to (4) of the Representation Agreement Act. Opinions have been expressed, which are probably not admissible. There is considerable hearsay evidence, which is not admissible.
- [54] Even if I was able to find the facts necessary to decide the issues of fact and law (and absent the procedural defects) it is my opinion that it would be unjust to decide this issue in the context of the present applications. Although the affidavit evidence is voluminous, none of the testimony of any affiant has been tested by examination for discovery or by cross-examination on affidavits. Serious allegations of fraud, deceit and abuse have been made against the representatives of the plaintiff. The defendant has firmly asserted his belief that the representatives of the plaintiff have acted throughout with the ulterior motive of gaining financial benefit for themselves, and have not been acting in their mother's best interests. He has even alleged serious misconduct on the part of counsel for the plaintiff, which carries the implication that Mr. McPhee has improperly taken up the cause of the three siblings who are the litigation guardians of the plaintiff. In my opinion, these kinds of issues, and particularly in the circumstances of this case, should not be tried on affidavit evidence.
- [55] I return to the issues that I consider to be suitable for summary trial, and the interlocutory issue relating to the injunction.

Issue No. 1

Was there a defect in the execution of the representation Agreement which makes it invalid?

Positions of the Parties

- [56] The defendant takes the position that the representation agreement is invalid because the agreement was only signed by Monica Begg and was not signed by the representatives themselves, as required by s. 13(2) of the Representation Agreement Act. It is conceded that the plaintiff had the legal capacity to make the representation agreement.
- [57] On behalf of the plaintiff, it is submitted that the failure of the representatives to sign the agreement was an inadvertent mistake which should not affect the validity of the agreement. Counsel points out that all three of the representatives signed certificates in which each of them acknowledged that they were named as their mother's representative in the agreement dated June 23, 2011 and stated that they accepted their duties and responsibilities under the agreement. All of these certificates were signed on June 23, 2011 and appear to have been attached to the representation agreement. Mr. McPhee says that the signing of these certificates by the representatives should be considered as being tantamount to them signing the agreement itself, since the purpose in signing the agreement and the purpose in signing a certificate must be the same.

[58] In the alternative, counsel for the plaintiff submits that if the failure of the representatives to sign the agreement itself amounts to "a defect in the execution of a representation agreement" within s. 13(7) of the Act, then that subsection permits a representative to apply to the court for an order under s. 32(4) of the Act, declaring that the agreement is not invalid solely because of the defect. Counsel says that the representatives are making that application in the event that the court concludes there is a defect in the execution of the agreement, and submits that the court should grant the requested order.

Discussion

[59] The relevant parts of the Representation Agreement Act are the following:

5 (4) A representation agreement is invalid unless each representative completes a certificate in the prescribed form.

Section 13 of the Act provides

:(1) A representation agreement must be in writing.

(1.1) For the purposes of this Act, a representation agreement is executed when the following requirements are met:

- (a) the agreement is signed and witnessed in accordance with this section;
- (b) all certificates required under this section and sections 5, 6, 9 and 12 are completed.

(2) A representation agreement must be signed by the adult and

...

- (c) if the representation agreement appoints more than one representative but each may act independently, at least one representative

...

(2.1) Before a person may exercise the authority of a representative granted in a representation agreement, the person must sign the representation agreement.

- (3) The persons referred to in subsection (2) need not be present together when they sign the representation agreement and any one or more of them may sign it in counterpart.

(3.01) Subject to subsection (3.02), the adult's signature must be witnessed by 2 witnesses each of whom must sign the representation agreement.

...

(3.03) The signature of a representative or alternate representative need not be witnessed.

...

- (6) A witness to a representation agreement made under section 7 must complete a certificate in the prescribed form.
- (7) If there is a defect in the execution of a representation agreement, a person named in the agreement as a representative may apply to the court for an order under section 32 (4) that the agreement is not invalid solely because of the defect.

Section 32(4) provides:

- (4) On application under section 13 (7) . . . , the court may order that a representation agreement is not invalid solely because of a defect in the execution of the agreement.

Section 39 states:

39 An agreement that

- (a) was made before this Act authorized the making of a representation agreement, and
- (b) would have been a valid representation agreement if, at the time the agreement was made, this Act had authorized the making of a representation agreement,

is valid and is deemed for all purposes to have been made under this Act.

[60] The representation agreement in this case was made before the Act was proclaimed in September 2011. By its terms, the agreement was intended to be made under s. 7 of the Act. No defect other than the failure of the representatives to sign the agreement itself has been alleged. As a consequence, it is my opinion that s. 39 of the Act applies, subject to determination of the defendant's objection to the validity of the agreement.

[61] I would first note that s. 5(4) of the Act places far greater significance in the completion of certificates by the representatives than on the signing of the agreement itself, by the representatives. The automatic consequence of non-compliance with s. 5(4) is that the agreement is invalid. Moreover, the agreement in this case states that "The representatives may act separately." That means that s. 13(2)(c) of the Act would apply, so that only one of the three representatives would be required to sign the agreement (although the exercise of authority by a representative seems to depend on such signing: see s. 13(2.1)). Another indication that the signature of a representative on the agreement itself is not a crucial matter, is that the signature of a representative to the agreement need not be witnessed: s. 13(3.03).

[62] Tiah Workman, the Notary Public who took instructions from Monica Begg to prepare a representation agreement and who witnessed the signature of Monica Begg to the agreement has sworn an affidavit made on November 28, 2012. Paragraph 13 of that affidavit states that the representation agreement "inadvertently excluded a section for the representatives to sign." It is obvious from looking at the agreement that none of the names of the three representatives were typed on the agreement, with a line above such typed names for each representative to place her signature. I accept Ms. Workman's evidence, and

I find that this was an inadvertent mistake on the part of the Notary Public. Ms. Workman does not say whether or not she was aware of the contents of s. 13(2) and s. 13(2.1) of the Representation Agreement Act.

Conclusion

[63] I think it is arguable that, if one of the three representatives had signed the agreement itself, the execution requirements of the Act would have been satisfied. In my view (contrary to Mr. McPhee's first position), this failure should be considered to be "a defect in the execution of [the] representation agreement." But having regard to the undisputed facts relating to the making of the representation agreement, it is my opinion that this defect should not affect the validity of the agreement. Accordingly, I order, under s. 32(4) of the Act, that the agreement is not invalid solely because of that defect. Since no other complaint about the agreement is being made, I find that the representation agreement was validly made.

Issue No. 2

Assuming that Monica Begg had the capacity required by law to revoke the representation agreement as of December 22, 2011, did she effectively revoke the representation agreement?

[64] In his affidavit sworn November 2, 2012, Stephen Begg deposes at paragraph 10 in part as follows:

10. On December 23, 2011, Monica also signed a Revocation of the Representation Agreement and Power of Attorney which she had signed on June 23, 2011, attached as Exhibit "A". This stated wish of Monica Begg's was ignored by the [litigation guardians]. . . .

[65] I set out Exhibit "A" in full:

December 22, 2011

To whom it may concern:

I revoke the representation agreement signed by me June 23, 2011.

I revoke the power of attorney signed by me June 23, 2011.

I have decided not to return to Vancouver Island or Echo Village to live and have accepted an invitation to live with my son, Philip Begg.

[Signature of Monica E. Begg]

[66] The above is the only evidence before the court relating to the purported revocation. There is no evidence as to who prepared the document, where Monica Begg was at (and who was present) when she signed it, or whether she signed it before or after her visit with the lawyer Mr. Goodwin.

- [67] Monica Begg was living at the home of her son Philip Begg in the two weeks from December 17 to December 30, 2011. Yet in his affidavit sworn April 18, 2012, Philip Begg makes no mention of the revocation document. Nor does he state that he learned of its existence at some later date. In an exchange with the court during the hearing, Stephen Begg stated that he first learned of the existence of the revocation document in April or May 2012.
- [68] It seems odd that Monica Begg did not mention the revocation document that she had signed, during either of her two meetings with Mr. Goodwin (on December 22, 2011 and February 1, 2012). It is possible that she signed the revocation after her meeting with Mr. Goodwin on December 22, and then forgot about it by the time she met with him again on February 1, 2012. But that is only speculation.
- [69] In her response to Stephen Begg's evidence concerning the alleged revocation, Virginia Stephen (in her affidavit sworn November 22, 2012) states her opinion that the document is invalid by reason of their mother's incapacity and then adds: ". . . these documents were not provided to myself nor Katherine nor Paula until later in the proceedings." She does not deny the authenticity of her mother's signature.
- [70] How and why the revocation document came into existence thus remains somewhat of a mystery. It was not suggested that more evidence would be presented to explain this document, if the revocation issue was referred to the trial list.
- [71] As a general rule, the court hearing a summary trial application should not assume the truth of a fact in issue, for the purpose of the summary trial only. For example, see *Hobbs v. Robertson* 2002 BCCA 381 at paras 8 - 10. Here, there is a serious dispute as to whether the plaintiff had the mental capacity required by law to revoke a representation agreement, after December 1, 2011, and the issue cannot be determined by summary trial.
- [72] In the present case, in order for the defendant to succeed on his defence of revocation, he would first have to persuade the court that the presumption of capability in s. 3(1) of the Act has not been rebutted (the onus of proving incapacity is, of course, on the plaintiff). In addition, he would have to prove that the plaintiff signed and delivered a document which effectively revoked the representation agreement. As I see it, even assuming legal capacity on the part of the plaintiff, the other facts alleged by the defendant, even if true, could not constitute a valid or effective revocation, in law.
- [73] Reasoning by analogy from *MacMillan v. Kaiser Equipment Ltd.* 2004 BCCA 270, and para. 32 in particular, I think the assumption of the plaintiff's mental capacity can properly be made in this case relating to the revocation issue.
- [74] In my opinion, in order for a purported revocation to be effective, there must be proof of an intent to revoke. But in my view, the evidence negatives such intent on the part of the plaintiff.

- [75] There is uncontradicted evidence given by Mr. Goodwin, which has not been challenged and which is to the effect that Monica Begg did not want to revoke the representation agreement that she had made. He had prepared the necessary documents, but she decided she did not want to sign them, on both occasions that she met with Mr. Goodwin. I understood counsel for the plaintiff to accept this part of Mr. Goodwin's evidence. I infer that, up to and including February 1, 2012, Monica Begg had not formed the intention to revoke the representation agreement or the power of attorney. She had apparently decided that she would not do this, unless her children could agree on a satisfactory way to replace the existing agreement. I conclude that an essential element of the defence of revocation has not been proved.
- [76] It follows from the decisions that I have made thus far that the defendant's application for an order dismissing the plaintiff's action, must be dismissed.

Issue No. 3

Should the interlocutory injunction be set aside, to the extent that it applies to the defendant Stephen Begg?

Positions of the parties

- [77] Only Stephen Begg, and not any of the other six defendants has applied to have the injunction set aside. He seeks to have it set aside, only as against himself. The defendant relies on the following facts, which he argues have been proved by the affidavit evidence.
- a) The removal of Monica Begg from Echo Village on December 17, 2011 was not wrongful, because she was taken out of Echo Village with her consent and because the defendants had no knowledge of the representation agreement or the power of attorney until December 21, 2011.
 - b) After having been informed of the existence of the representation agreement and the power of attorney, the defendants returned their mother to Echo Village on December 30, 2011, notwithstanding that they did not accept the validity of these documents or the power of the litigation guardians to exercise authority pursuant to those documents.
 - c) Although the defendant took Monica Begg away from Echo Village on January 30, 2012 without the approval of the other defendants, Monica Begg consented to go with him for a visit of three to four days, and he returned her to Echo Village on February 2, 2012, as promised.
 - d) In taking his mother to his home on the lower mainland for a visit of four days, the defendant was not breaching any agreement made between the Island Group and the Lower Mainland Group.

- [78] In making subsequent visits to his mother in April and July 2012, the defendant deposes that he attempted to give (and believes that he did give) proper advance notice of his intention to visit, in accordance with the terms of the injunction made on February 7, 2012 and the email address or addresses that he says were given to him.
- [79] I think it is implicit in the defendant's position that, even if his off-Island visit with his mother from January 30 to February 2, 2012 was in breach of an agreement, the defendant has abided by the terms of the injunction for the past ten months, and therefore an injunction is no longer necessary to restrain him.
- [80] Counsel for the plaintiff acknowledges that the defendants had no knowledge of the representation agreement or the new power of attorney until December 21, 2011. But it is submitted that the defendant breached an agreement made between counsel for the plaintiff and counsel for all seven defendants, when he took his mother away from Echo Village on January 30, 2012. Counsel also argued that the defendant failed to give proper notice of his intention to visit with his mother at Echo Village. It is said that he sent his notices in April 2012 and July 2012 to the wrong email address and in the alternative that the length of notice was insufficient.
- [81] It is implicit in counsel's position that the defendant has, since January 30, 2012, been acting separately and independently from the other six defendants, regardless of whether or not they approve of his actions, and thus his future actions are unpredictable and need to be restrained by court order.

Discussion

- [82] The defendants first retained Peter Lawless as their counsel. He was served with the Notice of Civil Claim, the Notice of Application for the injunction and the supporting affidavits on December 30, 2011. It seems clear that Mr. Lawless advised the defendants that their mother should be returned to Echo Village, pending resolution of the immediate dispute between the children, and that this was done promptly. Later in January (on or about January 13) the defendants retained Scott Cordell as counsel in place of Mr. Lawless. Mr. Cordell confirmed on January 23, 2012 that he was representing all of the defendants. By the time the plaintiff's application for an injunction was heard on February 7, 2012, the defendants (or six of them) had retained new counsel, Anna Laing.
- [83] On reviewing the evidence, including the exchange of correspondence between Mr. McPhee and Mr. Lawless, it seems plain that, in exchange for the adjournment of the plaintiff's injunction application, the defendants agreed to return Monica Begg to Echo Village, and did so, on December 30, 2011. I infer that some assurance was given by Mr. Lawless that Monica Begg would not be removed again while the injunction issue remained unsettled. After that, nothing was settled, and on January 13, 2012 Mr. Cordell was retained. By letter dated January 27, 2012, Mr. Cordell informed counsel for the plaintiff that the defendants would be disputing the claims being made on behalf of the plaintiff. There was no

confirmation in writing that the previous understanding between counsel would remain in effect.

- [84] Since the defendants gave notice (on January 27) of their intention to retain independent counsel for Monica Begg, it seems difficult to infer the continuation of the agreement not to remove Monica Begg from Echo Village. Then, on January 30, 2012, Stephen Begg did remove her and take her to his home in the lower mainland, for that specific purpose. He did that, without giving any advance notice of his intention, to the litigation guardians. He knew he did not have the approval of the other defendants. Then, at the hearing of the injunction application on February 7, 2012, the other six defendants distanced themselves from Stephen Begg, and from his actions in removing Monica Begg from Echo Village for four days.
- [85] When the defendant embarked on his unilateral venture on January 30, 2012, there was of course no injunction yet in place. I am satisfied that he was acting contrary to the terms of a temporary agreement which the other six defendants had chosen to continue to abide by. But I am unable to say whether the agreement between Mr. McPhee and Mr. Lawless remained in effect, as of January 30, or whether the defendant believed that it continued to exist.
- [86] I find that it was the defendant's actions that caused the litigation guardians to proceed with the injunction application on February 7, 2012. It is apparent that Mr. McPhee and the litigation guardians believed that the agreement of December 30 continued to exist and to bind all the defendants.
- [87] The intervention of Dr. Myronuk's report in late May 2012 would have made it plain to all parties that Monica Begg was no longer capable of instructing counsel. That meant that there was no longer any rational basis for the defendant to seek independent legal advice for his mother, and he did not attempt to do so.
- [88] With respect to the complaints of counsel for the plaintiff that the defendant did not comply with the notice provisions of the injunction order in July 2012, the evidence is confusing to say the least. I will make only two comments about this evidence. First, I am not persuaded that the defendant failed to give notice of his intended visit in July 2012, within the time limits set by the order. Second, I reject the defendant's accusation that Mr. McPhee had altered and falsified the email sent by the defendant. (The defendant suggested that Mr. McPhee had changed his client's email address to an incorrect address, to justify his client's assertion that she had not received it.)
- [89] I conclude that the defendant has abided by the terms of the injunction, for about the past eleven months.
- [90] If there continues to be an agreement between the litigation guardians and the other six defendants, whereby those defendants have agreed not to take their mother away from Echo Village for overnight visits and not to remove her from Vancouver Island pending resolution

of this dispute (by settlement or court order), then I would question the necessity for the injunction to continue, as against those defendants. But I do not know whether such an agreement exists, and those defendants have not made any application to dissolve the injunction. Moreover, it appears that no progress has been made in settling the dispute about the kind and location of the care facility in which Monica Begg should be living.

- [91] I cannot understand why any of Monica Begg's children should be restrained from taking her on overnight visits with them, for a few days at least, unless her physician was of the opinion that such visits would not be good for her. The same reasoning would apply to the order which restrains the defendants from removing Monica Begg from Vancouver Island. If there was evidence available to establish that such visits would be beneficial to Monica Begg (or at least, not harmful to her), I would entertain an application to vary the terms of the injunction, or even to set it aside. Perhaps the parties can make an agreement that will satisfactorily replace the injunction, pending resolution of the litigation.
- [92] If such an agreement was reached between the litigation guardians and the other six defendants, and if the defendant Stephen Begg agreed to become a party to the agreement, then it would also seem unnecessary to continue the injunction, as against him. But of course, the required circumstances do not exist. Nor has Stephen Begg made any separate agreement with the litigation guardians, which satisfies them that the injunction is no longer necessary to protect their mother from potentially harmful interference.
- [93] In the result, I am not persuaded that the injunction should be set aside insofar as it restrains the defendant Stephen Begg. That aspect of his application is also dismissed.

Final Comments

- [94] I subscribe to the conventional wisdom that a judge should not say more than is reasonably required to decide the issues in a case. But I feel constrained to make some additional comments in this case, because of certain conduct of some of the litigants which I find to be deserving of criticism. I do so only in the interests of promoting a settlement of this unfortunate dispute. It is crystal clear from the evidence that the conflict between the two groups of children has greatly upset Monica Begg, and cannot be in her best interests.
- [95] Up until the time that Dr. Myronuk delivered his report in late May 2012, I think that most of the matters in dispute between the parties to this litigation were matters upon which reasonable persons could hold different opinions. As an outside observer, I find the position taken by the defendants, up to the time of the injunction, to be understandable. Their hostile reaction to the actions of the Island Group and their mistrust of their three sisters was not surprising, given the circumstances. In my opinion, the conduct of the three litigation guardians was the major cause of the reactions of their siblings of which they now complain.

- [96] The litigation guardians failed to disclose any of the following information or opinions to their siblings, in a timely way:
- a) That their mother was planning to make a representation agreement and a power of attorney which would give authority only to the litigation guardians;
 - b) That their mother in fact did make such a representation agreement and power of attorney on June 23, 2011;
 - c) That, in their opinion, their mother's physical and mental health was deteriorating badly, in the months of September, October and November 2011;
 - d) That in their opinion, their mother could no longer live on her own, even with the assistance of home support workers, by November 2011.
 - e) That their mother's physician, Dr. Forrester, had recommended on November 10, 2011 that their mother should live in a complex care facility;
 - f) That they had recommended to their mother, and their mother had agreed, to move from her home to a complex care facility at Echo Village in Port Alberni;
 - g) That they had moved their mother from her Nanaimo home, into Echo Village at Port Alberni, on December 1, 2011; and
 - h) That in their opinion, their mother was, by November 2011, incapable of making her own decisions, as to her personal care and health care.
- [97] The first of the above items of information that was disclosed to the defendants was that their mother had moved from her home in Nanaimo to the care facility at Echo Village in Port Alberni. That information was not given until December 7, 2011, after inquiries were made as to their mother's whereabouts, by one or more of the defendants. The failure to give advance notice of the intention to move Mrs. Begg to a care facility in Port Alberni was aggravated by the fact that she had been living in Nanaimo for almost 25 years.
- [98] Patricia Begg and Ian Begg met face to face with Paula Begg at Paula's home in Nanaimo on December 8, 2011. During their conversations, Paula told Patricia and Ian, in effect, that their mother was free to leave Echo Village as she wished. Paula did not mention anything about the representation agreement or power of attorney, during this meeting.
- [99] On December 17, 2011, Philip Begg spoke to Virginia Stephen, and asked her questions about why their mother had been moved to Echo Village and why the Lower Mainland Group had not been told about what was being done with respect to their mother's care. That was shortly before Philip Begg took his mother from Echo Village, to come to live with him. On December 17, shortly after Philip Begg had taken his mother with him, he spoke to his sister Paula by telephone and told her that their mother was with him and had accepted his invitation to live at his home. Soon after that he telephoned his sisters Virginia and Katherine, and also told them that their mother had accepted his invitation to live with him.

During these conversations, none of the three litigation guardians told Philip Begg anything about the existence of the representation agreement (or the new power of attorney), nor did they tell Philip Begg that they had been exercising their authority under the representation agreement. Moreover, none of the three litigation guardians told Philip that they believed that their mother no longer had the legal capacity to make decisions for herself. I think it also questionable whether Virginia and Katherine were justified in making a "missing person" report to the RCMP on December 17.

[100] The existence of the representation agreement and power of attorney that had been signed on June 23, 2011 was not disclosed to the defendants until December 21, 2011, when Stephen Begg and Ian Begg met with the three litigation guardians and counsel for the plaintiff, in Nanaimo. It appears that this was the first time the Island Group told any of the Mainland Group that they believed their mother had lost her legal capacity to make decisions for herself.

[101] There is not much evidence in the way of an explanation for the conduct of the litigation guardians. In her affidavit sworn November 22, 2012, Virginia Stephen discusses the non-disclosure of the representation agreement and power of attorney at paragraph 79. She deposes that, in her opinion, their mother "chose not to discuss" these transactions with her other seven children, and then states:

This was not something for me or Paula or Katherine to talk to our siblings about as it was our mother's private business. This was not unusual behaviour for our mother. She did not discuss much of her personal business with the rest of the family.

[102] There is no suggestion in the evidence given by the litigation guardians that their mother ever told them not to tell her other children about her making the representation agreement and a new power of attorney. Tiah Workman, Notary Public, in her affidavit sworn November 28, 2012, gives this evidence at para. 8:

I asked her if she had other children and whether she had discussed this with them. She advised me that she had other children but had chosen not to discuss this with the rest of her family.

[103] I find this explanation for the non-disclosure to be unsatisfactory. It could perhaps account for part of the delay in providing information to the defendants. But the litigation guardians allege that, before the decision was made to move her into Echo Village, their mother had lost her capacity to make decisions on her own, and that they were making her decisions for her. I appreciate that they say their mother agreed with their recommendation that she move into Echo Village. But if the litigation guardians believed that their mother was incapable of making her own decisions, and that they were making decisions for their mother in the exercise of their authority under the representation agreement (as well as the authority under the new power of attorney) by the end of November 2011 at the latest, the explanation offered for failing to inform their siblings of what they were doing loses all persuasive effect at that point. There is no wonder that the three defendants who have sworn affidavits have sworn that they believe that a large body of important information

was deliberately concealed from them by the litigation guardians. I make no finding in that regard, but it certainly seems arguable that the defendants had reasonable grounds to suspect intentional concealment.

- [104] Stephen Begg has gone beyond alleging intentional concealment on the part of the litigation guardians. He has accused them of abusing the trust placed in them by their mother, and acting in their own interests, instead of hers. In this connection, the defendant also claims that the litigation guardians have failed to meet their statutory obligations under the Representation Agreement Act, with respect to the care facility in which they have placed their mother and with respect to the medical care and treatment being provided to her. These allegations cannot be decided on the present application for reasons earlier stated. But some of the accusations seem to be accompanied by malice that could well turn out to be unwarranted.
- [105] Stephen Begg accused the litigation guardians of committing forgery or fraud in the making or signing of the "no CPR" order and even reported them to the police. They were interviewed by a police officer as a result. I find that this accusation is not supported by the evidence, and should not have been advanced.
- [106] The defendant made statements in open court to the effect that he believed Mr. McPhee had falsified an email sent by the defendant in July 2012, to give notice of an intended visit with his mother. I have already said that I reject this accusation. The defendant attempted to articulate the reasons on which his belief was based. I found his arguments confusing. He said he would probably need to demonstrate the alleged alteration of his email by means of a computer, in order to persuade the court that Mr. McPhee must have changed the email.
- [107] Notwithstanding the flimsy evidence, the existence of a plausible alternate explanation and the numerous inherent improbabilities in this accusation, the defendant continued to profess the belief that Mr. McPhee had doctored his email, and to suggest that he could show how it was done, if he could use a computer in court.
- [108] I was completely satisfied that this allegation of misconduct by Mr. McPhee, is false. But I would not go so far as to find that the defendant knew that it was false, in the circumstances that exist here. That issue could not be determined without a careful assessment of credibility. But this objectionable conduct of the defendant, together with his other allegations of misconduct against the litigation guardians, has also contributed to the hostility between the two groups.
- [109] It may be that the relationship between the two groups of siblings has been damaged beyond repair. Only time will tell. The two groups appear to have held conflicting opinions on every major issue in the case, and each group now seems to even blame the other for the failure to negotiate or mediate a settlement. Nevertheless, as see it, the parties should renew their efforts to settle this lawsuit. It would appear that this would require the negotiation of an agreement as to who should be the representatives and who should be the

attorneys for Monica Begg. But she is no longer capable of executing such documents, so that the approval of the Public Guardian and Trustee and/or the court would be required. But the main thing is that all parties should pursue a resolution that is in the best interests of Monica Begg. In my opinion, the present action is not a suitable method for resolving this dispute.

[110] There is another reason for pursuing settlement of this lawsuit and I think it was obliquely referred to by counsel for the plaintiff in his oral submissions. Even if the litigation guardians were to succeed in rebutting the presumption that Monica Begg had capacity to make certain decisions independently, by December 1, 2011, that would not necessarily mean that she could not have made an independent decision to go and live with her son Philip or to go on a visit with her son Stephen. Dr. Myronuk's opinion on this subject was not given with the degree of certainty attributed to his opinion about Mrs. Begg's capacity to make her own decisions about her health care and personal care. Moreover, his opinion relates to the plaintiff's mental capacity as of April 20, 2012, which is several months after her alleged wrongful removals by Philip and Stephen. In addition, the evidence to the effect that Mrs. Begg went with her sons willingly appears strong.

[111] Finally, there was no medical evidence to support the Island Group's position until Dr. Forrester made his affidavit on December 29, 2011. The defendants could not be expected to have had knowledge of any reliable evidence of incapacity before that. It seems to me that the Island Group will be facing a difficult task to prove that their mother was not capable of giving a valid consent at the relevant times. Proof of that fact would appear to be necessary in order to establish that the removal of Mr. Begg from Echo Village was wrongful.

Costs

The issue of costs has not yet been argued. There is a complication in that Stephen Begg has been acting separately from the other defendants. They have not supported his application, nor have they opposed the plaintiff's cross-application. Nevertheless, I would strongly urge the parties to try to settle the costs issue, without the need for further litigation in court.

"Mr. Justice D.A. Halfyard"

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