

CANADA / JUDGMENT

Cepuran v. Carlton

2021 BCSC 542

COURT

Supreme Court of British Columbia

DECIDED

5 March 2021

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2021 BCSC 542 Cepuran v. Carlton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cepuran v. Carlton,

2021 BCSC 542

Date: 20210305

Docket: S2012184

Registry: Vancouver

In the Matter of the Patients Property Act, R.S.B.C. 1996, c. 349

and amendments thereto

And

In the Matter of Anna Cepuran,

also known as Ana Cepuran

- and -

Docket: S199918

Registry: Vancouver

Re: The Anna Cepuran Alter Ego Trust

- and -

Docket: S1912126

Registry: Vancouver

Between:

Ana Cepuran also known as Anna Cepuran

Petitioner

And

Harold Brian Carlton,

Sheri Colleen Cepuran and Urban Properties Limited

Respondents

Before: The Honourable Mr. Justice Veenstra

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners in S2012184 and S199918 and the Respondents in S1912126:

E. Clough

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D.K. Magnus

Place and Dates of Hearing:

Vancouver, B.C.

February 16-19, 2021

Place and Date of Judgment:

Vancouver, B.C.

March 5, 2021

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- [1] THE COURT: Before me are three petitions and multiple applications that raise issues as to the capacity of Ana Cepuran, both at present and in August 2019, as well as with respect to certain actions taken by her daughter, Sheri Cepuran, pursuant to a power of attorney. Because both of these parties have the same surname, as do Ana's late husband John and late son Grant, the parties in their submissions generally used first names for those four individuals. I will adopt that approach for simplicity and intend no disrespect in doing so.
- [2] In four days of argument, I was taken through several binders of affidavit materials as well as numerous legal authorities. It is clear that there are numerous facts in issue. In recognition of this, Sheri applies for an order that the proceedings be referred to the trial list and either consolidated or ordered to be heard together. Ana argues that notwithstanding the disputed facts, I can find sufficient facts to make final orders in Ana's favour.
- [3] If I do not make final orders, then I am asked to decide:
- (a) whether to order further medical examinations of Ana to determine her capacity pursuant to either s. 5 of the Patients Property Act, R.S.B.C. 1996, c. 349 [PPA], or the parens patriae jurisdiction of the court;
 - (b) what direction to provide with respect to further proceedings in each matter; and
 - (c) whether Ana has waived privilege over the files of the solicitor who prepared the power of attorney that Ana granted to Sheri.

The Proceedings

- [4] The three petitions arise from the same factual matrix and raise related issues. They are:
- a) a petition filed on September 5, 2019, by Brian Carlton, in his capacity as trustee of the Ana Cepuran Alter Ego Trust ("AET"), seeking directions regarding his administration of the AET (the "Trustee Petition");
 - b) a petition filed on October 25, 2019, by Ana seeking relief including a declaration that the AET is null and void (the "Nullification Petition"); and
 - c) a petition filed on November 17, 2020, by Sheri under the PPA (the "Committeeship Petition"), seeking:
 - 1. a declaration that Ana is not capable to manage her affairs;
 - 2. if necessary, an order that Ana attend an assessment of her capacity to manage her affairs; and
 - 3. an order appointing Sheri as committee of Ana's estate.

- [5] Sheri filed a notice of application seeking an order that the Nullification Petition be referred to the trial list, or alternatively that certain pre-hearing discovery apply to that petition. At the hearing Sheri argued that there should be trials of the issues in all three petitions. Sheri has also filed a notice of application seeking a declaration that Ana has waived privilege in respect of her estate planning file with a lawyer.

Facts

The Cepuran family

- [6] Ana, who is now 81 years of age, was married to the late John Cepuran. They had two children, Grant and Sheri. Ana and John's marriage seems to have been quite traditional in that John worked outside the home as a pharmacist while Ana was a homemaker. John took care of all financial matters while Ana took care of the family home. Sheri's evidence, which was not contradicted, was that it was always John who made decisions regarding financial and legal matters.
- [7] John had inherited three properties from his parents:
- a) a five-acre parcel in Surrey on which is located a single-family home (the "Surrey Property"); and
 - b) two lots on or adjacent to West Broadway in Vancouver, one of which has a mix of commercial and residential rental units, the other of which contains a single-family home (the "Vancouver Properties").

All three of these properties have significant development potential, and they constitute the primary assets underlying these proceedings. All three of them were, as of the beginning of 2019, registered in the names of Ana and John as joint tenants.

- [8] Sheri pursued education, including a bachelor's degree in communications from Simon Fraser University, followed by the real estate licensing course at the Sauder School of Business. She worked for a number of years at TD Canada Trust, including in management roles, then went into real estate sales and more recently has been involved in real estate management. For the last several years, Sheri has been the owner and president of Urban Properties, a management company which has managed the Vancouver Properties for over 50 years.
- [9] Sheri was in a common-law relationship approximately ten years ago with Rob Boyko. They have a daughter, S.B. Although Sheri and Mr. Boyko separated in 2011, they remain on good terms and both remain involved in parenting S.B. Ana was also involved in assisting with care of S.B. in her younger years. Mr. Boyko's evidence was that he remained on good terms with both John and Ana even after his separation from Sheri.

- [10] Grant died in April 2017. He was survived by his wife and three children. Sheri's evidence is that Grant's contact with his parents was more intermittent and that he was estranged from them for a period of time.
- [11] Sheri gave evidence as to her relationship with her parents over the last several years, which for the most part was not contradicted. She said that she was in almost daily contact with her parents for 20 to 30 years prior to her father's death and saw her mother approximately three times per week. Her evidence was that particularly in his later years, her father consulted with her about financial matters and told her that he trusted her advice, given her education and experience in banking and real estate management.
- [12] With respect to the time after John's diagnosis with cancer, Sheri's evidence was that she was regularly involved in John's health care, often driving back and forth to Surrey multiple times each week to transport her parents to and from appointments and to purchase and deliver medical supplies. With respect to financial matters, Sheri's evidence was that she ensured that her parents' bills were paid and taxes filed in a timely manner, worked with her father on plans for the renovation and remediation of the rental units at the Vancouver Properties and spoke with her parents about estate planning and other financial matters.
- [13] Ana did not directly dispute much of this evidence. Although she acknowledged that at one point she stated that Sheri had "killed her dad", she explained her choice of those words as follows:

When my husband got sick, Sheri would not answer his questions about the properties, specifically how much rent Rob and Joe were paying. He was very disappointed with her.

- [14] John died on April 19, 2019. Thus, Ana's remaining direct family are Sheri and S.B., Grant's widow and Grant's three children. Ana's evidence was that since John's death, Grant's children had visited her once and that she had spoken with Grant's widow "occasionally".

Management of the Properties

- [15] As noted above, Urban Properties has been managing the Vancouver Properties for some 50 years. The most recent management contract is dated September 1, 2006. That contract provides for Urban Properties to provide management services on a month-to-month basis.
- [16] There was conflicting evidence as to when Sheri became owner and president of Urban Properties. Her evidence was that she acquired the company in about 2010 while she was on maternity leave. Ana's evidence was that Ana and John had purchased the company for Sheri and that they did so in 2014.

- [17] Mr. Brian Carlton became managing broker of Urban Properties in 2011 when it formed a joint venture with another property management firm, Colyvan, with which Mr. Carlton had been involved. In late 2014, the joint venture dissolved. However, in 2015, Mr. Carlton left Colyvan and entered into a consulting contract with Urban Properties pursuant to which he acts as its general manager.
- [18] The practice appears to have been for Urban Properties in most months to pay a round dollar amount to John and Ana representing the approximate net income of the Vancouver Properties for that month. Expenses were generally paid from the income earned each month. The largest expenses each year were property taxes which were paid at the end of January and June each year. As a result, income in months leading up to the payment of property taxes was generally lower than in other months.
- [19] Sheri's evidence was that there had been remediation work on the single-family home located on the Vancouver Properties between about 2009 and about 2015.
- [20] Both Sheri and Mr. Carlton gave evidence of discussions in about 2015 with John about the need for remediation and renovation of the commercial properties. Sheri's evidence was that one of the issues that needed resolution was water leaking from the second-floor residential apartments into the commercial units on the main floor. Their evidence was that a decision was made to carry out the renovation and remediation work over a period of time so that it could be funded from the income generated by the rental units, and that this work started in early 2015 and finished in late 2019. In a November 2019 affidavit, Mr. Carlton stated that the renovations had just completed and by February 2020, the final apartment to be worked on had been re-tenanted and was generating rent once again.
- [21] Ana's evidence with respect to these renovations is as follows:
- ... I recall discussions with my daughter about renovating the suites but she spent funds in excess of \$1,000 without first consulting me as she is required to do under the terms of the Management Agreement; I wanted to be included in these renovations. I also noted that the renovations took place on suites where there no income is being generated. Furthermore, the remediations/renovations took place when my daughter and I were not speaking.
- [22] Mr. Carlton gave evidence that Urban Properties in the ordinary course of business mailed a package of financial statements to John and Ana at the Surrey Property every month. Those statements include copies of all invoices paid from the property account. Ana's evidence is that she never received financial statements until late 2019, after she had retained counsel, when her counsel demanded an accounting and the statements were sent to her counsel.

Support for John and Ana 2016 to 2019

- [23] As noted above, John was diagnosed with cancer in 2016.

[24] There was evidence from Joe Duncan, who had known the Cepurans for years and helped them out from time to time on a voluntary basis, that at some point in 2016 he agreed to begin assisting them on a more formal basis in return for a monthly fee and for free rent at one of the apartments in the Vancouver Properties. Mr. Duncan's evidence was that by 2018, he was working almost full time at the Surrey Property and left his former employment to be able to do so. The evidence included a lease dated September 23, 2018, between Urban Properties and Mr. Duncan for a three-year term expiring September 30, 2021, at a rent of zero dollars. Sheri's evidence was that this arrangement had been discussed with her parents and was made at their request. The lease, which was signed by Mr. Carlton as landlord's agent, states with respect to rent that:

Rent is waived in lieu of providing janitorial services, painting, lawn maintenance, garbage take out services, and home helper services to John and Anna Cepuran for their properties as per oral agreement.

[25] The evidence indicated that a similar rental arrangement was in place for Mr. Boyko. He gave evidence that in April 2018 he left his employment as general manager of a collection of businesses and commercial real estate owned by a dentist so that he could be available as needed to help Sheri, Ana and John and to look after S.B. in order to give Sheri more time to help her parents. Due to the time required for him to perform those tasks, he was not able to participate in other work. His evidence was that from a couple of days after John's death until late August of 2019, he began attending at the Surrey Property daily to help care for Ana. He would do yard maintenance and also help Ana with personal banking or explain various financial documents such as credit card statements or tax notices to her.

[26] The lease with respect to Mr. Boyko's unit, which was signed by Mr. Carlton as landlord's agent and is dated May 1, 2018, states that the rent is "\$ N/A" and that:

Rent is waived in lieu of providing assistance to Sheri, John, and Anna Cepuran as per oral agreement. Assisting Sheri with [S.B.] so that Sheri may assist and attend to her parents as needs arise.

[27] Ana denies knowing of any such arrangements with Mr. Boyko or Mr. Duncan. Her evidence was that "it would not make sense" for her to give away her rental property for free, and she did not know of the arrangements with Messrs. Boyko and Duncan until she received copies of the financial statements through counsel in the fall of 2019. As noted above, she denies having previously seen any financial statements. Rather she asserts that:

Urban Properties is not managing my properties in my best interests as a result of giving away suites to friends of my daughter without my knowledge or consent. It is alleged by my daughter that I do not remember this agreement. I do not remember it because it did not happen. Prior to my husband's death in April 2019, my husband would continually ask Sheri how much rent Joe and Rob were paying and Sheri would ignore his questions.

[28] Mr. Boyko gave evidence of a conversation in May or June of 2018 in which he thanked Ana for her and John agreeing to allow him to live next door to Sheri and S.B. rent-free and that Ana responded "a father should be close to her daughter." Mr. Boyko also gave evidence of delivering the monthly financial reporting package to Ana in June 2019 and going through it with her.

Alleged Agreement and Estate Planning

[29] Sheri gave evidence of discussions leading up to an alleged agreement between Sheri, John and Ana. That evidence is as follows:

In or about 2015 to 2016, my Dad was no longer able to work due to his age (80) and his cancer diagnosis. Around that time, my Dad told me that they required assistance with their finances.

In late 2017, I met with my Mom and Dad to discuss their financial situation. I recall that my Mom and Dad told me that they did not feel able to manage their finances or the Properties, given the extent of their financial knowledge and magnitude of the estate. My Dad asked me to help them with their financial management and estate planning, given my experience in finance and property management. My Mom and Dad wanted to make an arrangement whereby they could:

- (a) retain ownership of the Commercial Properties and the King George Property;
- (b) pay for their expenses; and
- (c) allow for their long-term plan of maintaining the Commercial Properties and the King George Property for the benefit of the future generations of our family, to be managed by me in my discretion.

At that time, the Commercial Properties were not making enough income to pay my parents, after the expenses for the ongoing remediation and renovation, discussed with and directed by my Dad on behalf of my Mom and Dad, were taken into account. Further, it was usual that the Commercial Properties did not provide any income in certain months, as the funds would be needed to pay the City of Vancouver property taxes. My Dad told me numerous times that my parents wanted the remediation and renovation to continue, despite that they did not have the cash flow to support the expenses. Prior to this time, my Dad's solution to the cash flow issue had been to refinance and take out larger lines of credit in order to pay for the Renovations and their living expenses.

At that time, my Dad was suffering from terminal cancer. I wanted my Mom and Dad to be comfortable in their remaining years, and to live at their home as long as they were able and wanted to. I did not want for my parents to have to go through the stress and difficulty of having part of their property subdivided, and to deal with the construction that would almost certainly ensue. I wanted my parents to have a positive living situation for the rest of their lives, and not have to worry about their expenses.

My parents and I came to an agreement, the particulars of which include the following:

- (a) I agreed to help my Mom and Dad to manage their finances and create tax-efficient estate plans for future generations of the Cepuran family;
- (b) I agreed to sell my principal residence;
- (c) I agreed to loan my Mom and Dad up to \$400,000 to cover their cash shortfalls (the "Loan");
- (d) the Loan would be used:
 - (i) to ensure that the Properties could continue to have cash-flow to operate, and to cover any shortfalls with respect to the Properties, including as may result from remediation or renovation; and
 - (ii) to provide care to my Mom and Dad, including medical equipment, specialized care not covered by insurance, and other expenses, such as funeral expenses;
- (e) my Mom and Dad agreed that I would live [in the home at the Vancouver Properties], rent-free, with certain costs, including utilities, property tax, insurance, water, and sewer, to be covered by the rental income generated by the [Vancouver Properties];
- (f) my Mom and Dad agreed to create mutual wills, the particulars of which included:
 - (i) I would inherit the estate of the survivor of my Mom and Dad; and
 - (ii) I would have discretion as to any gifts to my Mom and Dad's grandchildren, including [S.B.] and my late brother's children. . . .

[30] I draw no conclusion as to whether this agreement, in fact, existed since at least some of it appears to be disputed by Ana. I will for convenience refer to it as the "Alleged 2017 Agreement."

[31] Ana does not provide one collective response to the Alleged 2017 Agreement. She has responded to some components of it. With respect to the loan, she stated:

Sheri has not loaned me or my husband \$400,000.00. I acknowledge that my daughter assisted me after my husband's death but she did not loan me \$400,000.00.

This of course is not responsive, since it denies a fact that is different than that asserted by Sheri. With respect to living at the house, Ana says:

[A]t the time the agreement was made with my daughter for her to live at [the house at the Vancouver Properties] rent free, I was getting along with my daughter. I no longer wish for her to live in property rent free. As far as I am aware, there is no agreement that obliges me to continue to provide Sheri with rent free accommodations.

With respect to the provisions regarding creation of mirror wills, Ana simply states:

I have now revoked that will, and the terms of it have changed.

[32] Sheri's evidence was that in pursuance of the Alleged 2017 Agreement, she sold her own home, retaining the money in the bank so that it would be available to cover her obligations under the Alleged 2017 Agreement. Over the course of nearly 18 months, she alleges that she made seven advances totalling \$44,900 to John and Ana's Urban Properties account in order to cover shortfalls. In addition to the funds paid to Urban Properties, Sheri gave evidence of other payments made directly to or for the benefit of John and Ana, including a cheque payable to them directly, two payments for medical equipment required by John and two payments of funeral expenses for John. Sheri alleges that a total of \$85,045 was advanced to the benefit of John and Ana pursuant to the Alleged 2017 Agreement.

[33] Ana acknowledges that Sheri assisted her with payments but says that she was not kept apprised of the amounts and has still not seen proof of these payments.

[34] Sheri also gave evidence that in 2017 she was asked by John to contact a lawyer on behalf of John and Ana so that they could prepare wills. She put them in touch with Janice Papp, a lawyer in Langley who prepared a number of documents that were executed on January 25, 2018, including:

- a) mirror wills by each of John and Ana, each of which:
 - 1. named Sheri as sole executor;
 - 2. named the other of John and Ana as the sole beneficiary of the estate;
 - 3. named Sheri as the alternate beneficiary of the estate, if the other of John and Ana died first; and
 - 4. named S.B. as the further alternate beneficiary of the estate.
- b) enduring powers of attorney for each of John and Ana naming Sheri as sole attorney; and
- c) representation agreements for each of John and Ana, naming Sheri as sole representative.

[35] None of these documents named Grant's children as beneficiaries. With respect to that Sheri's evidence was that:

During [discussions with respect to the Alleged 2017 Agreement], my parents told me that my grandmother had provided my late brother, Grant, with significant cash during his lifetime, from the sale of other real estate. My parents considered this to be an advance on his inheritance.

While talking to my Dad about estate and trust planning, I recall asking my Dad about whether he wanted to leave a portion of my parents' assets to my brother's children. My Dad told me that he did not want to make that decision, and would leave it up to me to decide. As noted above, he told me that he felt that my brother had already received a significant portion of his inheritance directly from my paternal grandmother before she died.

[36] Sheri's evidence is that there were further discussions about estate planning as well:

From 2017 and into 2018, my Dad and I discussed, but he but did not actually undertake, trust planning. My Mom, my Dad, and I had numerous conversations regarding the possible use of alter ego trusts or joint partner trusts as estate planning devices, including for the purpose of reducing probate fees. My Dad agreed with trust planning to maximize the wealth to be transferred to future generations of the Cepuran family, while ensuring the assets would continue to be available for him and for my Mom during their lifetimes. As my Mom ordinarily did not participate much in conversations related to financial, tax, and estate planning, I do not recall that she expressed an opinion about trust planning one way or another. However, I recall that my Mom was present for these conversations. My parents decided that, given my Dad's health circumstances, they did not want to engage in alter ego trust planning at that time. He told me that he just wanted to update his will at that time, but asked me to look into trust planning at a later date, and to set up an alter ego trust for my Mom once he had passed. I specifically recall my Dad saying, "You will help Mom with all of this" with reference to the alter ego trust planning. My Dad and I were both concerned that my Mom would have a hard time understanding alter ego trust planning given her lack of financial sophistication.

[37] In response Ana says that "My husband did not at any time while I was present tell my daughter to create an alter ego trust."

[38] I note that the power of attorney executed by Ana (the "POA") includes the following specific provisions which appear to contemplate such steps being taken:

5. CONTINUED AUTHORITY

My Attorney may exercise the authority granted by this Enduring Power of Attorney while I am capable of making decisions about my financial affairs, and this authority continues despite my incapability to make those types of decisions.

6. EXPRESS POWERS

Without limiting the generality of the foregoing I expressly give my attorney the following powers:

Deal with Land

(a) to transfer or deal with any real property in which I have an interest . . .

Reorganize Affairs

(c) to reorganize my assets and affairs for the benefit of me, my estate or my family members, including but not limited to:

i. The creation and settling of corporations and trusts for the benefit of me, my estate or my family members and the transfer of my assets to such corporations and trusts;

ii. The reorganization of any corporations in which I have an interest to complete an estate freeze or otherwise benefit me, my estate, or my family members and

iii. The implementation of any other measures designed to achieve tax efficiencies for me, my estate or my family members.

[39] The POA stated that it was effective immediately. The execution of the POA by both Ana and Sheri was witnessed by the lawyer retained by John and Ana to prepare the various estate planning documents, Janice Papp.

[40] Ana's evidence with respect to the POA is that:

I understood when I executed the power of attorney that it was only to be used if I could no longer manage my own affairs. I am still able to manage my own affairs.

[41] It is this assertion that Sheri argues constitutes a waiver of privilege in respect of legal advice given to Ana when she granted the POA.

Events Following John's Death

[42] As noted above, John died on April 19, 2019.

[43] The evidence indicates that both Rob and Joe were at the Surrey Property nearly daily starting a day or two after John's death, checking on Ana and performing various chores around the property.

[44] The evidence reflected a number of interactions between Ana and various of the other individuals involved in assisting her or in managing her properties. For example, Mr. Carlton gave evidence of two meetings with her - one of which was at the Vancouver Properties, where he attempted to speak with her about the status of the renovations and current leasing arrangements but was concerned that she appeared not to be listening, mumbled things he could not understand, and became fixated on an old cast iron bathtub that was in the process of being replaced.

[45] Several witnesses gave evidence of Ana struggling to remember and keep track of things. Mr. Boyko talked about a day in July 2019 when he was working at the Surrey Property. Ana had picked some potatoes and asked him if he wanted to take some home. He said yes, and Ana gave him a bucket of potatoes. About an hour and a half later, she asked him again if he would like to take some potatoes. He pointed to the bucket she had already given him. He said that Ana looked at him and then at the bucket, then muttered "sometimes I forget things." Both Mr. Duncan and Sheri gave evidence of similar events.

[46] There was also evidence of unusual behaviour on Ana's part. Mr. Duncan gave evidence of Ana hiding around the yard so that she could spy on him. Once he noticed her and spoke to her. She told him that she had been watching him and was watching every move he made. Mr. Duncan recalls a conversation in which Ana told him that everyone was out to get her, and when he asked what she was talking about, she became angry and kept repeating that everyone was out to get her. Mr. Duncan also recalled one time when he was trying to get into an old chicken coop and had to put his shoulder against the door to get it open. Ana had been watching him, came out and began yelling at him about kicking the door.

[47] Several of the affidavits included evidence about a visit to the Surrey Property on about May 28, 2019, when Sheri was there along with Messrs. Duncan, Boyko and Carlton. Their evidence indicates that Ana became very angry and stated that she did not want either Sheri or Mr. Duncan to be around anymore, but that she would allow Mr. Boyko to continue to visit. Mr. Boyko gave evidence as to the conversation he had with Ana later that day. He described her as very agitated and that:

Ana told me that she did not trust Sheri because Sheri had made a decision to replace an aging tub in one of the suites at the [Vancouver] Properties. Ana also told me that Joe could not come back to the [Surrey] Property because he had kicked in a door, and because she did not need him anymore. I did not confront Ana about her reasoning because she was highly agitated and I did not think she could engage in rational discussion.

[48] There does not appear to be any dispute that Ana had little experience with or understanding of finances. Mr. Boyko gave evidence that in May and June of 2019, he spent a fair bit of time helping Ana figure out how to pay her bills, read credit card statements, arranging for her to set up an MSP account, writing cheques (which Ana did not know how to do), dealing with a tax refund and life insurance benefit that she was to receive, and explaining to her various issues with respect to John's registered retirement fund ("RIF"), of which she was the beneficiary.

[49] There were various complaints from Ana about lack of money. Sheri's evidence is that at one point Ana suggested she would sell one of the properties so that she could buy a new car, demonstrating a lack of understanding of their relative value, not to mention a lack of awareness that she had more than enough money in the bank to buy a new vehicle if she wanted one. Ana also expressed concern that she did not have the funds to buy groceries, despite the fact that she received a monthly pension, significant RIF income and the income from the Vancouver Properties. Ana's evidence on these points was that she does not recall talking about selling a property to buy a car and that she only complained about lack of money to buy food because she wanted to press to get more from the rental income.

[50] At one point, Ana told Sheri that she was going to sell all the properties, kick everyone out and "wipe my a** with hundred dollar bills". In her affidavit, Ana acknowledged making this statement but explained that it was made in anger to emphasize to Sheri that the properties and the money she has are hers to do with what she wants, and did not reflect an actual plan of action.

[51] At another point, Sheri's home security video showed her mother arriving at the house in Vancouver, climbing over a fence (despite Ana having always had a key), and digging a hole in a planter. Ana's response to this evidence was to acknowledge that she had done this but that "the property belongs to me, and I am entitled to enter the property however I please".

[52] Both Sheri and Mr. Duncan gave evidence as to Ana getting old produce and other food from dumpsters. Ana denied this evidence.

- [53] There was evidence from both Sheri and Mr. Duncan that in the fall of 2020 they observed Ana digging through garbage cans in a nearby park to find returnable bottles and cans. She was doing so without a mask or gloves, despite the ongoing COVID-19 pandemic. Ana initially gave an affidavit denying this conduct. When Sheri subsequently produced photographs, Ana made a further affidavit admitting that she had indeed been doing this but complaining about her privacy being breached.
- [54] The evidence included transcripts prepared by Sheri of an extensive series of voicemails left by Ana. Sheri's evidence was that from April to September of 2019, there were more than 400 voicemails adding up to over 28 hours. Sheri prepared transcripts of many of those voicemails, and a number of them appear to be rambling and incoherent. Sheri's explanation of some of the less coherent portions of voicemails indicate that Ana was moving back and forth from current-day events and issues to events from various points in the past. Sheri's evidence was that these voicemails reflected a new pattern of behaviour that had not been experienced prior to John's death.
- [55] Ana does not deny these voicemails. Her evidence is that "I do not recall the details of every message, but I do know that the portions quoted in Sheri's affidavit have been taken out of context." However, Sheri's evidence is that she has produced the full recordings, and nothing specific has been identified by Ana as being missing "context".
- [56] I do not intend to review all of the evidence on these matters in detail. As a whole, the evidence from Sheri and Messrs. Duncan, Boyko and Carlton indicated very unusual behaviour that may indicate issues as to mental health or mental capacity. The significance of that evidence to those issues is a matter for medical evidence, which is discussed below.
- [57] Ana's evidence was that in about June and July of 2019, Sheri "became controlling and domineering with me in terms of taking over my properties and financial affairs." Ana alleged that in or about the beginning of July, Sheri told her that she would be selling the Surrey Property and moving Ana to one of the apartments in Vancouver. Sheri flatly denies this allegation, although she says that at times when her father was receiving regular treatments at the BC Cancer Clinic in Vancouver, Ana had talked about possibly moving to Vancouver after John died and volunteering at the clinic since the people there had been so good to John.
- [58] Mr. Boyko also gave evidence that Ana had complained to him about being pressured to move to Vancouver. In response, Mr. Boyko had told Ana that he believed Sheri would support Ana in living wherever she wanted to live.

- [59] Ana also alleged that Mr. Boyko had told her that everything in the house was garbage and he would be renting a container and throwing it all out. Mr. Boyko's evidence is that the only discussion about renting a container arose from a time that Ana had taken him to John's wine-making room and asked him how she could get rid of the equipment and other things in the room, given that she did not drink wine. Mr. Boyko said that he had offered to arrange for a container to be brought in so that the wine room could be emptied.
- [60] Beginning in June 2019, Sheri made appointments to see Dr. Vinnitsky, her mother's family doctor, to explore her concerns about her mother's behaviour. She was accompanied by Mr. Boyko. There were visits on June 11, June 18 and August 2, 2019. Sheri says that she presented Dr. Vinnitsky with both the POA and the representation agreement she held in respect of her mother. The evidence of both Sheri and Rob was that they were advised at these meetings that:
- a) Ana had been diagnosed with Parkinson's disease;
 - b) Ana suffered from paranoia and delusions, not delirium, and that this was common among the elderly;
 - c) Dr. Vinnitsky was not qualified himself to assess her capacity, but rather she should be referred to a geriatric psychiatrist; however, Dr. Vinnitsky did not think she would attend an appointment if he was to make a referral;
 - d) Dr. Vinnitsky would prescribe her something to hopefully make her less paranoid; and
 - e) She should contact the Ministry for Seniors to see what other support services were available.
- [61] Dr. Vinnitsky subsequently denied these conversations. However, his clinical records of the three meetings with Sheri arguably provide some support for her evidence.
- [62] Mr. Boyko subsequently noticed at the house a prescription for Risperidone. The evidence suggests that Risperidone is primarily used as an antipsychotic medication. Ana told Mr. Boyko that she did not take it.

Steps Taken by Sheri July to August 2019

- [63] On July 5, 2019, Sheri filed a caveat against title to the Surrey Property and the Vancouver Properties. The caveat asserted the following:
- (f) My Mother has become incapable of managing her own financial affairs;
 - (g) The Lands are or may be endangered because my Mother is incapable to manage her own financial affairs. She is vulnerable to potential financial abuse.

[64] A copy of the caveat was mailed to Ana by the Land Title Office. Ana was upset by the caveat and ultimately ended up retaining counsel, Mr. Magnus, who continues to act for her in these proceedings.

[65] Sheri was initially unaware that her mother had retained counsel. Her concerns about her mother's capacity continued to mount. She continued to receive the above-noted voicemail messages from her mother.

[66] Dr. Vinnitsky's clinical records from his August 2, 2019 meeting with Sheri and Mr. Boyko indicate:

Discussion about mother progressive decline in mental health related to forgetfulness and issues of personal safety.

Family was advised to contact a geriatric occupational therapist to assess patient at home, including issues of progressive senility.

[67] At some point in August 2019, Ana told Mr. Boyko that she no longer wanted him to come to the Surrey Property. This meant that Ana was now isolated from all of the family and friends who had previously supported her.

[68] Sheri obtained legal advice with respect to the situation. She concluded that it was necessary to act pursuant to the POA. Her explanation is as follows:

My biggest concern was that my Mom would fall victim to either herself or to somebody else. My Mom has had no experience in any financial or real estate property management. She appeared to be suffering from memory loss, and her doctor told me that she was suffering from paranoia. Her voicemail messages showed that she was volatile in her thinking, at times irrational. I thought it was my duty to take steps to protect my Mom and the assets.

Given my Mom's unusual and erratic behaviour over the summer of 2019 after my Dad's death, and given her lack of financial sophistication, I settled the AET to protect her. I had previously discussed alter ego trust planning with both of my parents, despite that my Mom did not appear engaged in the discussion. My Mom's POA specifically directed me to engage in trust planning for the benefit of my Mom and her family. Since my Mom had directed me in the POA that I could settle trusts for her benefit, I knew that she had considered trust planning and wanted me to take steps to protect her and her finances. I thought that my actions in settling the AET were consistent with my Mom's existing and long-term instructions to me.

[69] Sheri did not have a further conversation with Ana to confirm that Ana still wanted to proceed with what Sheri understood to be "Ana's existing and long-term instructions." Sheri's evidence was that she was worried about Ana's mental capacity and paranoia, and did not want to cause her distress.

[70] On August 20, 2019, Sheri settled the AET and signed documents transferring Ana's beneficial interests in both the Surrey Property and the Vancouver Properties to the trust. Mr. Carlton was appointed as trustee. Ana was the sole beneficiary of the trust for so long as she lived. Thereafter, the beneficiaries of the trust were the same as were set out in Ana's will made on January 25, 2018. Legal title to the lands was not immediately transferred, as Mr. Carlton needed to make arrangements to fund payment of the property transfer tax.

[71] Ana's evidence was that:

[T]he AET was settled without my knowledge or consent after my husband's death. At no time did Sheri discuss settling the AET with me prior to settling it.

And that:

Sheri has not add any time discussed the AET with me other than to yell at me from the yard as she was leaving my home to say "hey, mom, remember when we talked about the AET?!" She had not spoken with me about this prior and I did not know what she was talking about.

[72] The documentary records include a cheque dated August 28, 2018, in the amount of \$18,508.63 from Urban Properties' account for the Cepuran properties to Sheri with the re line stating "Reimbursement for Ana Cepuran, Clark Wilson alter ego trust." Ana argued at the hearing that it was improper for Sheri to have paid for the fees to create the trust from Ana's own money. Sheri's evidence was that the content of the re line was in error and that she had intended that the funds be a partial reimbursement of the money she had loaned to her parents through Urban Properties. The monthly financial statements appear to indicate that the amount shown as owing to Sheri was reduced by that amount as between the July 31 and August 31, 2019 statements.

Ana's Response to Trust

[73] Although Ana was not immediately told of the AET, she had obtained legal advice in response to the caveat. On August 23, 2019, she saw Dr. Vinnitsky and obtained from him a handwritten note stating:

Mrs. Cepuran is fully capable of managing her affairs in its entirety and is deemed to be fully competent to conduct her business and social undertakings.

[74] On August 30, 2019, Ana signed a revocation of power of attorney. Her lawyer wrote to Sheri's lawyer advising of the revocation.

[75] Ana's evidence is that she is able to take care of herself. She says that since John's death, she has taken steps to educate herself with respect to her finances, including:

- a) attending at the banks where she holds accounts and discussing her accounts with "banking professionals";
- b) learning how to write cheques;

- c) paying bills when received;
- d) retaining a new accountant to file tax returns; and
- e) attending school to improve her writing and reading skills in English.

Commencement of Proceedings

- [76] The first of the proceedings that are before me is the Trustee Petition, which was filed on September 5, 2019. In it, Mr. Carlton in his capacity as trustee of the AET seeks direction from the court, including as to whether the trustee should proceed with registering the transfer of legal title to the various properties. The petition asserts, among other things, that Ana is no longer capable to manage her own financial affairs, and disputes the validity of the revocation of the POA. The petition, among other things, notes the advice that Sheri said she had been given by Dr. Vinnitsky when she met with him in June 2019.
- [77] Dr. Vinnitsky was asked by Ana's lawyer to respond in writing to Sheri's evidence as to what she had been told by Dr. Vinnitsky at their three meetings. He responded by letter dated October 9, 2019. The letter expressed the doctor's "absolute indignation and frank disgust" and asserted that Sheri's statements were "a complete and total misrepresentation of what had been discussed and presented" with respect to Ana's condition. He referenced Ana being "even more distraught as a result of actions being undertaken by her own daughter to remove her from managing her own affairs which she had expressed explicitly to me during our interactions." He stated that the Risperidone that was prescribed to Ana was a medication for "stress" and that to suggest it was an antipsychotic medication was:
- ... to blatantly misrepresent indications for the use of this drug in specific circumstances, and I consider this quite repugnant to assign label of unwarranted severe psychiatric disorder done by the daughter on her own mother. I do not want to comment on any ulterior motives Mrs. Cepuran's daughter and her partner have for their reasons to remove Ana's rights to exercise her rightful abilities to manage her financial and other affairs.
- [78] Dr. Vinnitsky subsequently swore an affidavit to which he attached the October 9, 2019 letter. In the text of the affidavit, he denied having made any of the statements attributed to him by Sheri.
- [79] Ana through her counsel filed a response to the Trustee Petition on October 25, 2019. That same day she filed the Nullification Petition. In it, she seeks orders that the AET be declared null and void or, in the alternative, set aside, and a declaration that the revocation of power of attorney is valid.
- [80] Certificates of pending litigation have been registered against title to all of the properties in respect of each of these two petitions.
- [81] On October 22, 2019, Ana's counsel wrote to Sheri's counsel stating:

Our client has also instructed us to put your client on notice that Sheri may no longer reside in our client's property rent free Our client has instructed us to advise that she must start receiving \$5,000 per month from that property commencing January 1, 2020.

[82] There followed several months of exchanges of further affidavits and discussions on how best to proceed with the matter. Sheri has produced numerous documents to Ana's counsel, including leases, the management agreement, and copies of numerous financial reports. Sheri's counsel suggested on numerous occasions that the various petitions would have to be converted to an action. Ana's counsel consistently took the position that all matters could be determined on a summary basis.

[83] In the summer of 2020, Sheri commissioned medical reports from two medical doctors. With those in hand, on November 17, 2020, Sheri filed the Committeeship Petition.

Medical Evidence

[84] Given the dispute as to Ana's capacity and in the absence of any ability to compel Ana to see a specialist for an assessment of her capacity, Sheri through her counsel obtained expert reports from two specialists who were provided with detailed information by counsel, including the various affidavits already filed in the Trustee Petition and the Nullification Petition (including Dr. Vinnitsky's affidavit of October 22, 2019), a memo summarizing facts that were subsequently outlined in Sheri's Affidavit of Kindred and Fortune in the Committeeship Petition, and voice records and transcripts of the various voicemail messages left by Ana for Sheri.

[85] There were, of course, significant conflicts in the evidence of Ana and Dr. Vinnitsky on the one hand, and Sheri and Messrs. Duncan, Boyko and Carlton on the other hand. Rather than ask the specialists to weigh that evidence, Sheri's counsel instructed them to assume that the evidence of Sheri and Messrs. Duncan, Boyko and Carlton was accurate.

[86] Each of the experts was asked to opine as to Sheri's capacity as of August 30, 2019, when she signed the revocation of power of attorney with specific reference to the language of the Power of Attorney Act, R.S.B.C. 1996, c. 370 [PoA Act], i.e., whether Ana was capable of understanding the nature and consequences of the power of attorney. Each was also asked to opine as to whether Ana was capable of managing her affairs under the PPA.

[87] Dr. Sloan is a family physician with significant experience in geriatric care and in conducting capacity assessments. He is a fellow of the College of Family Physicians of Canada, a clinical professor in the department of family practice at the University of British Columbia and founding past president of the BC Association of Geriatric Care Physicians. He provided two reports, one addressing the revocation of the POA and the other addressing the PPA. Each report made clear the limitations arising from the circumstances, including the lack of a meeting with Ana, the lack of access to Ana's medical records and the instructions to accept certain evidence notwithstanding the existence of conflicting evidence. Each report addressed in detail the evidence as to Ana's behaviour from April 2019 onward,

identifying matters that were material to the capacity assessment.

[88] Dr. Sloan's first report concluded that Ana:

... would in my opinion and based on the contents of this report more likely than not have been incapable of revoking a power of attorney instrument as of August 30, 2019.

[89] Dr. Sloan's second report commented that:

These characteristics, especially short-term memory problems plus "executive" (insight and judgment) deficiencies, and finally paranoid ideas, are likeliest in someone of Ana's age and background to be caused at least in part by a dementia, now termed Major Neurocognitive Disorder (MND). I believe the facts establish the presence of MND as likelier than not in Ana Cepuran.

Dr. Sloan noted that Ana's affairs are not simple, including the management of rental properties. He concluded that:

Ana Cepuran, presently and for approximately the past year, is and was in my opinion and based on the contents of this report more likely than not INCAPABLE of managing her affairs under the Patients Property Act.

The reason for any such incapability is mental infirmity due to Major Neurocognitive Disorder. Based on the natural history of this condition, I do not think it is likely that Ana Cepuran will recover capability in the future.

[90] Dr. Passmore is a staff geriatric psychiatrist with Providence Health Care. His report dated September 9, 2020, stated in its "Summary" that:

- 1) I am able to conclude that Ana is likely to be incapable of managing her affairs under the PPA;
- 2) I am able to conclude that on or about August 30, 2019, Ana was likely to have been incapable of revoking an enduring power of attorney instrument.

[91] These statements were explained in more detail in subsequent parts of Dr. Passmore's opinion as follows:

In view of the fact that I have not personally assessed Ana, I am not able to opine on her capability. However, based on my review of the documentary evidence made available to me, I am able to draw conclusions regarding whether or not Ana is likely to be or to have been capable. This evidence contains numerous historical red flags raising concerns in my mind regarding Ana's capability. In my experience, such red flags appearing in a patient's history would be sufficient to cause significant concern about the patient's risk of financial mismanagement and/or financial abuse.

Having discussed and analyzed the documentary evidence in detail, Dr. Passmore continued his commentary:

The documentary evidence made available to me includes numerous historical examples, both objective and subjective, of Ana presenting with clinical abnormalities. These include mental state abnormalities such as disorganized speech and thought form, paranoid thought content, possible hallucinations, and cognitive impairment. These also include physical abnormalities such as shaking. Ana's history also includes receipt of a prescription for an antipsychotic medication called risperidone. Risperidone is typically prescribed to treat psychotic symptoms such as delusions, hallucinations and disorganized thought/behaviour.

[92] On August 21, 2020, Dr. Vinnitsky provided a further handwritten note to Ana on a prescription form. That note commented:

Mrs. Cepuran is deemed to be physically and mentally fit to manage her affairs. She is in the state of good physical health and very [indecipherable]. She does not experiencing any tremors on my observation during her visits to the office. Patient was not bedridden during her encounter with blood clot. Anna doesn't have any paranoid and delusional problems and she is deemed to be healthy for her age.

[93] Dr. Sloan provided a letter dated September 5, 2020, commenting on this note, stating:

I have concerns about the absence of any documented process by which Dr. Vinnitsky reached his opinion. Specifically he cites no historic facts, no clinical notes, no interview, no mental status examination, no questions and answers in respect of capability to manage affairs and no dementia screening score.

[94] In response to the Committeeship Petition, Ana's counsel arranged for her to be assessed by Dr. Larry Dian on December 7, 2020. Dr. Dian's report, dated December 10, 2020, was in the materials before the court. He is a medical doctor with a fellowship in internal medicine and a certificate of special competence in geriatric medicine from the Royal College. He is a clinical professor at the University of British Columbia, and is head of clinical services at the Falls and Fractures Prevention Clinic at Vancouver General Hospital, with considerable experience in the assessment of gait abnormalities and assessment of fall risk.

[95] Dr. Dian was provided with Dr. Vinnitsky's clinical records as well as with the affidavits of Dr. Sloan and Dr. Passmore. He met with Ana and performed the Montreal Cognitive Assessment ("MOCA") test on which she scored 21/30. He concluded that:

By this assessment, she demonstrated good cognitive function. She clearly does not meet the criteria for dementia syndrome. She probably does meet criteria for what is termed Minimal Cognitive Impairment (MCI). This is an intermediate or transition zone between normal and dementia, however she is clearly able to take care of herself as well as appearing to have a comprehensive awareness of her finances and assets.

She wishes to revoke the Power of Attorney because of her daughter's behavior over the last number of months. I do not find any reason to prevent her from revoking the Power of Attorney.

- [96] Dr. Passmore was asked to comment on Dr. Dian's report and did so by way of a nine-page letter commenting on a number of factors, including:
- a) differences between the facts relied on by Dr. Dian and the collateral information on file - noting that in his experience "Inconsistency between an elderly individual's historical reporting and collateral information providing another perspective on historical events is common when the individual has short-term memory impairment";
 - b) differences between the process apparently used by Dr. Dian to assess capacity and the recommended procedure in certain publications referenced by Dr. Passmore;
 - c) comments on the importance of obtaining reliable collateral history to determine whether the subject's cognitive impairment has progressed to mild dementia; and
 - d) a comment that an MOCA score of 21/30 can be representative of an individual suffering mild dementia, and that such a score does not usually represent "good cognitive function."
- [97] Dr. Dian provided a further response to Dr. Passmore written on February 14, 2021, and provided to counsel and the court during the course of the hearing.

Current Status

- [98] Ana, through her counsel, has advised that she has created a new will that makes no provision for Sheri, has also sought to cancel the Urban Properties management agreement, and has advised of her intention to evict Messrs. Duncan and Boyko from their apartments and Sheri from the house.
- [99] There has been what might be described as a "soft stay" of further steps on the part of either side while litigation has been ongoing. Mr. Carlton has taken no further steps to implement the AET. Urban Properties continues to manage the Vancouver Properties. Sheri and Messrs. Duncan and Boyko continue to live at the Vancouver Properties and have not been paying rent, and no steps have been taken to oust them from those properties. The net proceeds of the rent actually collected from the Vancouver Properties are being paid to Ana each month, and since the completion of renovations at the end of 2019, the amounts paid are higher than they were during the course of the renovation work.
- [100] Ana continues to be estranged from her family. She has through counsel directed that Sheri is to have no further contact with her. As a result, Ana has no further contact with S.B. either. Ana gave evidence of having been visited once in the summer of 2020 by Grant's children and having had some phone calls with Grant's widow. Ana's estrangement from family is such that when required to give an emergency medical contact while in hospital, the person who filled that role was her lawyer's paralegal.

Issues

- [101] With respect to the Committeeship Petition, the issues to be determined are:

- a) whether the petition can be decided on the basis of the current record; and
- b) if not, what order should be made to allow the matter to be determined.

[102] With respect to the Trustee Petition and the Nullification Petition, the issues to be determined are:

- a) whether on the relevant facts and applicable law there is a bona fide triable issue, such that a trial of the proceeding should be ordered pursuant to Supreme Court Civil Rule 22-1(7)(d); and
- b) if so, what orders should be made to provide for such determination, and what is the appropriate relationship between these proceedings and the Committeeship Petition?

[103] Finally, Sheri seeks a declaration that Ana has waived privilege over the file of her former solicitor, Janice Papp, such that the file should be disclosed.

The Committeeship Petition

[104] It is common ground that the central issue to be decided in respect of the Committeeship Petition is whether Ana is capable. The law is clear that Ana is to be presumed capable. That presumption will only be displaced by a declaration as to her incapacity.

Positions of the Parties

[105] Sheri's position is that the medical and lay evidence as a whole establish that Ana is not capable to manage her affairs, and that Sheri ought to be appointed as Ana's committee. Alternatively, Sheri argues that the evidence is sufficient to warrant a further inquiry into Ana's capacity, that this court should order medical examinations pursuant to either s. 5 of the PPA or pursuant to its parens patriae jurisdiction and that there should be a trial of the issue of capacity.

[106] Ana's position is that she is competent and free to deal with her assets. She challenges the admissibility of the evidence of Dr. Sloan and Dr. Passmore, and even if admissible, argues that it should be given no weight given:

- a) the factual assumptions the doctors are instructed to make; and
- b) the fact that neither of them met with Ana.

She argues that Dr. Dian's report should be preferred and that she has provided sufficient medical evidence for the court to conclude that she is capable of managing her affairs.

[107] Ana suggests that Sheri is not acting in Ana's best interests - which in her submission are to be defined by Ana's present wishes - and that " these proceedings are merely an attempt to preclude Ana from disposing of what Sheri perceives as her inheritance." [I note that, notwithstanding this argument, Ana has deposed that she does not presently intend to dispose of any of the properties.]

[108] With respect to the question of further medical examinations, Ana argues that:

- a) the court can only make an order under s. 5 of the PPA if there are two clear medical opinions stating that the person is not competent, which the reports do not clearly do; and
- b) the threshold for the court to exercise its *parens patriae* jurisdiction to order further medical reports has not been met.

[109] The Public Guardian and Trustee did not appear at the hearing of this matter. It did, however, file a response to petition by which it opposed the order declaring that Ana was incapable but took no position on the request for an order for further medical examinations. Its position is summarized in its Response to Petition as follows:

The medical affidavits filed fall short of meeting the threshold to make the declaration of incapability, particularly given both physicians were instructed to disregard evidence of Ms. Cepuran and Dr. Vinnitsky, to the extent that it conflicted with the evidence of Sheri Cepuran and others. However, the Public Guardian and Trustee notes there appears to be no ambiguity in the medical affidavit of Dr. Dian indicating that Ms. Cepuran is not incapable.

Applicable Law

Expert Reports

[110] There is a two-step process to accepting expert evidence. A useful list of the factors to be considered by the court is found in the judgment of Laskin J.A. in *R. v. Abbey*, 2017 ONCA 640, at para. 48:

Expert evidence is admissible when:

- (1) It meets the threshold requirements of admissibility, which are:
 - a. The evidence must be logically relevant;
 - b. The evidence must be necessary to assist the trier of fact;
 - c. The evidence must not be subject to any other exclusionary rule;
 - d. The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is:
 - i. Impartial,
 - ii. Independent, and
 - iii. Unbiased;
 - e. For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose,
- and

(2) The trial judge, in a gatekeeper role, determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as:

- a. Legal relevance;
- b. Necessity;
- c. Reliability; and
- d. Absence of bias.

[111] Ana argues that the opinions of Drs. Sloan and Passmore offend the ultimate issue rule. With respect to that rule, I note the comments of McLachlin J. (as she then was) in *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 666:

While care must be taken to ensure that the judge or jury, and not the expert, makes the final decisions on all issues in the case, it has long been accepted that expert evidence on matters of fact should not be excluded simply because it suggests answers to issues which are at the core of the dispute before the court.

[112] At the same time, as noted in *R v. Jacobs*, 2014 ABCA 172, at para. 60:

. . . the closer an expert opinion comes to opining on the ultimate issue in dispute, the more the trial judge must scrutinize its probative value to offset the danger of uncritical acceptance of the expert's opinion as determinative of matter in question. . . .

The PPA and Parens Patriae Jurisdiction

[113] Before turning to the PPA, I note the provisions of s. 3(1) of the Adult Guardianship Act, R.S.B.C. 1996 c. 6:

Until the contrary is demonstrated, every adult is presumed to be capable of making decisions about the adult's personal care, health care and financial affairs.

[114] The PPA provides a means by which the contrary may be demonstrated. The relevant provisions of the PPA are:

Hearing of Application

3 (1) If, on

- (a) hearing an application, and
- (b) reading the affidavits of 2 medical practitioners setting out their opinion that the person who is the subject of the application is, because of
 - (i) mental infirmity arising from disease, age or otherwise, or
 - (ii) disorder or disability of mind arising from the use of drugs,

incapable of managing his or her affairs or incapable of managing himself or herself, or
incapable of managing himself or herself or his or her affairs,

the court is satisfied that the person is, because of

(c) mental infirmity arising from disease, age or otherwise, or

(d) disorder or disability of mind arising from the use of drugs,

incapable of managing his or her affairs or incapable of managing himself or herself, or
incapable of managing himself or herself or his or her affairs, it must, by order, declare the
person

(e) incapable of managing his or her affairs,

(f) incapable of managing himself or herself, or

(g) incapable of managing himself or herself or his or her affairs.

(2) The court may, on hearing an application under this section and reading the affidavits
described in subsection (1), direct an issue to be tried, and in that event the following
provisions apply:

(a) the question in issue is whether the person who is the subject of the application is, because
of

(i) mental infirmity arising from disease, age or otherwise, or

(ii) disorder or disability of mind arising from the use of drugs,

incapable of managing his or her affairs or incapable of managing himself or herself, or
incapable of managing himself or herself or his or her affairs;

(b) this Act applies to the issue and the trial of it;

(c) the Supreme Court Civil Rules apply;

(d) the court must

(i) dismiss the application, or

(ii) by order, declare that the person who is the subject of the application

(A) is incapable of managing his or her affairs,

(B) is incapable of managing himself or herself, or

(C) is incapable of managing himself or herself or his or her affairs.

Examination

5 (1) If

- (a) an application is made or an issue is tried under section 3,
- (b) an appeal is taken from an order under section 3, or
- (c) an application is made under section 4,

the court hearing the appeal or application or trying the issue may order the person who is the subject of the application or the patient to attend and submit at the time and place the order directs to examination.

- (2) An examination under this section must be made by
 - (a) one or more medical practitioners other than those whose affidavits were before the court on the appeal, application or trial, or
 - (b) a board of 3 or more medical practitioners designated by the College of Physicians and Surgeons of British Columbia at the request of the court.
- (3) If the person who is the subject of the application or the patient requests an examination under this section, unless the court hearing the appeal or application is satisfied that the person or patient is not mentally competent to form and express the request, the court must order the examination.

[115] The term "patient" is defined in s. 1 of the Act; the material portion of that definition is as follows:

"Patient" means . . .

- (b) a person who is declared under this Act by a judge to be
 - (i) incapable of managing his or her affairs,
 - (ii) incapable of managing himself or herself, or
 - (iii) incapable of managing himself or herself or his or her affairs.

[116] A series of authorities have defined the proper approach to these provisions.

[117] In *McNeal v. Few* (1975), 63 B.C.L.R. 281 (C.A.), a petition was filed under the PPA without any supporting medical affidavits. The chambers judge made an order under what is now s. 5 that the person who was the subject of the application attend and submit to a medical examination. The Court of Appeal allowed the appeal, concluding that no such order could be made in the absence of an application under s. 3 supported by affidavits from two medical practitioners. Justice McFarlane commented at p. 284:

[5] I think that basically there must be a very sound reason for the legislature having enacted the legislation in this way, and [it] supports an interpretation which I think ought to be given if the words are reasonably capable of it, namely, that to ask a court to make an order that a person may not handle his own affairs and have a committee appointed is a very serious matter indeed, and it seems to me altogether proper that as a condition of such an order

being made the evidence of at least two duly qualified medical practitioners should be required as a preliminary necessity.

- [118] In *Re Scow* (1985), 63 B.C.L.R. 287 (S.C.), the applicant sought to obtain an order under what is now Supreme Court Civil Rule 7-6(1) for an independent medical examination of a person in support of an application under the PPA. Murphy L.J.S.C. ruled that such an order could not be made, relying at para. 11 on the judgment in *McNeal*:
- [11] The concluding words of *McFarlane J.A.* in the passage previously quoted, which I have emphasized, are a strong statement as to the requirements for the appointment of a committee, and is still the law today notwithstanding the provisions of R. 30. It is as equally serious to require a person to attend for a medical examination to determine that person's mental capacity as it is to ask the court to appoint a committee without requiring two preliminary medical affidavits. The advent of R. 30 in its present form has not altered that basic requirement. The [PPA] is a code in itself for the appointment of a committee. If the legislature had considered that provisions for obtaining the required medical affidavits in respect of a person who was unwilling to be examined were necessary, desirable or required, the legislature would have enacted them. The Act itself allows the court to order a person to attend for a medical examination, but only after the initial medical affidavits have been provided. I do not think that a procedural provision in the Rules can operate as an amendment to the Act, which would be the result, in effect, if R. 30 is applicable. Rule 30 speaks of the physical or mental condition of a person which is in issue. Under the Act there is no issue until the court directs an issue under s. 2(5). This occurs only on hearing an application and reading the required affidavits.

[Emphasis in the original.]

- [119] In *Kartsonas v. Kartsonas*, 2009 BCCA 218, an application under the PPA was supported by affidavits from two medical doctors. However, one of the two affidavits was found to be ambiguous and unclear. The deponent commented that he did not believe there had been any significant change since the other doctor (Dr. Rabheru) found Mr. Kartsonas to be financially incapable, noted that the issue of Mr. Kartsonas' capacity is "complex due to his frontal cognitive impairment" and suggested that he "would benefit from a complete competency assessment". Justice Newbury, in allowing the appeal, concluded:
- [17] It was on this affidavit and Dr. Rabheru's affidavit described above that the petitioners relied on to meet the requirements of s. 3(1)(b) of the Act. I do not find it necessary to consider the opinions of the other doctors who did not find Mr. Kartsonas to be incompetent, since it is my view that Dr. McDonald's affidavit did not constitute an opinion that Mr. Kartsonas is "because of mental infirmity arising from disease, age or otherwise, incapable of managing his affairs". While Dr. McDonald stated in his letter that he had previously agreed with Dr. Rabheru's opinion of June 15, 2005, his affidavit sworn June 11, 2008 opined only that the issue of Mr. Kartsonas' capacity was "complex" and that he would benefit from a complete assessment. Given the very serious nature of a committeeship order, it is not appropriate to

grant, nor does the Act permit the court to grant, an order of committeehip on the basis of ambiguous or unclear medical opinions, or opinions that are not up to date.

- [18] In these circumstances, it seems to me that it would be appropriate for this court to order an assessment of Mr. Kartsonas pursuant to s. 5(1)(b) of the Act. Since the Act specifies that the order must state the time and place which Mr. Kartsonas must attend, I would ask that counsel confer with appropriate medical practitioners or the College of Physicians and Surgeons of British Columbia and advise the Court in writing no later than 60 days after issuance of these reasons. The order may then be prepared and entered.
- [120] In *Temoin v. Martin*, 2011 BCSC 1727, Justice Fisher (as she then was) dealt with a petition brought under the PPA in which an application was made for an order that Mr. Martin attend two medical examinations on certain terms and conditions. The petitioner had not filed two affidavits from medical practitioners as to Mr. Martin's capacity to manage himself or his affairs, and conceded that there was no authority in the circumstances to make such an order under s. 5 of the PPA. Instead, she sought an order under the inherent or *patria potestas* jurisdiction of the court. The materials included a report from one geriatric psychiatrist who opined that Mr. Martin "no longer possesses testamentary capacity and is very likely to lack the capacity to manage his personal finances and affairs." However, Mr. Martin refused to attend any further examinations and instead submitted a series of affidavits from lawyers and financial planners who opined that Mr. Martin was fully capable.
- [121] Justice Fisher reviewed at paras. 39 to 42 the judgments in *McNeal* and *Re Scow*, commenting at para. 40 that it is "settled law" that the court cannot order a medical examination under the PPA before two medical affidavits have been produced. She noted at para. 54 the principle reflected in s. 3(1) of the Adult Guardianship Act, quoted above. She continued at paras. 55 to 56 to consider the important policy interests balanced by the PPA as follows:
- [55] In this province, the contrary is demonstrated where a person has been found incapable under the process set out in the Patients Property Act. The requirements of the Patients Property Act reflect the serious restrictions of liberty that result from a finding of incapacity. It is a blunt instrument for addressing these issues, as a person is either capable or incapable. Part 2 of the Adult Guardianship Act, which provides for different levels of decision-makers and guardians, was enacted long ago but has never been proclaimed in force.
- [56] I agree with Mr. Manson's submission that the Court of Appeal's reasons in *McNeal* are rooted in the very serious consequences of an order declaring that a person is incapable of handling himself or his affairs. Given the presumption of competence, an individual should not be forced to undergo a medical examination that seeks to establish incapacity absent his or her consent, unless there is evidence before the court of incompetence. *McNeal* says that, under the Act, the evidence of incompetence must be, at a minimum, two affidavits from

qualified medical practitioners stating an opinion of incapacity to manage oneself or one's affairs.

[122] She went on at paras. 58 to 61 to consider the judgment of the Court of Appeal in *Kartsonas*. With respect to the requirements of ss. 3 and 5 of the PPA, she commented that:

[58] Although the Patients Property Act requires evidence from two qualified medical practitioners to properly bring an application before the court, those two affidavits may or may not be sufficient to satisfy the court that the person who is the subject of the application is incapable of managing himself or his affairs. Under s. 3(2), the court may direct the issue of incapacity to be tried, and under s. 5 the court may order the person to attend and submit to an examination.

After discussing the above-noted excerpts from *Kartsonas*, Fisher J. stated:

[61] In the context of the issues in this case, *Kartsonas* is interesting. Although the application was accompanied by two medical affidavits, one of those was deficient, in that it did not provide the opinion required in s. 3(1)(b) of the Patients Property Act. In such circumstances, this Court also has the authority to order a medical examination under s. 5(1) (a) provided it has directed an issue to be tried under s. 3(2). Essentially, the Act permits further evidence to be adduced where the court believes that one, or perhaps both, of the medical affidavits are deficient in some way.

[123] She then turned to the specific issue before her: does the *parens patriae* jurisdiction allow the court to order an examination in situations where s. 5(1) is not available - concluding at para. 62 that:

[62] The application in this case takes this issue a step further. The Petitioner has filed only one medical affidavit which is deficient and no other medical evidence is available because Mr. Martin has not agreed to submit to any further assessments. She has also produced lay evidence attesting to Mr. Martin's memory and cognitive problems. The Patients Property Act does not specifically address this kind of situation. I view this as a legislative gap. Provided there is evidence of incompetence, and evidence that the person who is the subject of the application needs protection, there must be some way for the Court to ensure that adequate medical evidence is brought before it to determine the issue of capacity. As LaForest J. said in *Re Eve*, the courts will not readily assume that *parens patriae* jurisdiction has been removed by legislation where a necessity arises to protect a person who cannot protect himself.

[124] Ultimately, Fisher J. concluded that while the court has jurisdiction to order a medical examination under its *parens patriae* jurisdiction, in the particular circumstances of the case before her, she would not make such an order. She found that the evidence was insufficient to establish that Mr. Martin was *prima facie* incompetent or in need of protection.

- [125] The judgment was upheld on appeal [Temoin v. Martin, 2012 BCCA 250]. On appeal, Justice Neilson concluded that there was, in fact, a "legislative gap" which permitted the operation of the *parens patriae* jurisdiction:
- [50] Whether a legislative gap exists is a question of legislative intent. The Patients Property Act reveals two objectives, both of which serve the goal of free choice. First, it guards the autonomy of capable individuals by requiring a minimum of two medical affidavits to rebut the presumption of capability. Second, it protects the interests of vulnerable adults whose capacity has been compromised by mental infirmity, and who are therefore incapable of making autonomous choices.
- [51] The legislative framework of the Act, however, presupposes a willing participant in two medical assessments, as well as ready access to two properly qualified physicians. It provides no protection for individuals who appear to be incapable but have no access to physicians, or who refuse to be medically examined. This gap is particularly acute if the refusal to undergo examinations flows from the apparent incapability. In these cases, the requirement of two medical opinions, designed to protect individual autonomy, become an impediment that places individuals who are incapable of making free choices beyond assistance. The inability to order medical examinations to provide an evidentiary foundation for a hearing under s. 3 of the Patients Property Act leaves these individuals without autonomy or protection, and creates a gap that is incompatible with its legislative objectives.
- [126] The appellant argued that Fisher J. had set too high an evidentiary standard for the granting of an order under the *parens patriae* jurisdiction. Justice Neilson did not accept that argument, concluding at paras. 59 and 61 that:
- [59] I do not find these arguments persuasive as they fail to recognize the significance of personal autonomy and the serious consequences of an order for committeeship or the intrusive nature of compelling an individual to undergo medical examination against his or her will. As well, a less onerous test has the potential to invite unwarranted harassment and abuse by individuals who bring proceedings under the Patients Property Act for self-serving motives.
- [61] Ultimately, the exercise of the *parens patriae* power is discretionary, and will be governed by the facts of the individual case. Thus, flexibility is required and I decline to endorse one evidentiary standard for all cases of this nature. It is, however, beyond dispute that the applicant must present evidence establishing a serious question to be tried, both with respect to the individual's capacity and his or her need for protection. In this case, I am satisfied the chambers judge made no error in requiring *prima facie* evidence of incompetence and a compelling need for protection before she would exercise her *parens patriae* jurisdiction to make the order sought by Ms. Temoin.

[127] The *parens patriae* jurisdiction was exercised by Justice Pearlman in *Singh (Re)*, 2017 BCSC 984. In that case there was a medical opinion from a former family doctor based on an examination in 2015 reflecting moderate to severe dementia, which was deteriorating, but the individual in question had refused to agree to a further assessment. Justice Pearlman cited at para. 46 a series of principles derived from *Temoin*, adopting from that case the following test at para. 47:

... a requirement for "prima facie evidence of incompetence and a compelling need for protection.

[128] Justice Pearlman noted at para. 48 that:

On this application, the issue is not whether Kissun Singh is incapable of managing his person or affairs, but rather whether the applicants have adduced sufficient evidence to justify an inquiry into that question by ordering the medical examinations.

[129] He concluded after reviewing the evidence that it established a serious question to be tried, and ordered that Mr. Singh attend two medical examinations by geriatric psychiatrists, licensed as such in British Columbia, with the psychiatrists to be chosen by and paid by the petitioner.

Resolution of Disputed Factual Issues

[130] All three of these proceedings were brought by way of petition. Petitions are heard in chambers generally based only on affidavit evidence. However, Supreme Court Civil Rule 22-1(7) provides that on the hearing of a chambers proceeding, the court may:

(d) order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding.

[131] Proceedings brought by petition are referred to the trial list when there are disputes of fact or law, unless the party requesting the trial is bound to lose: *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P. / Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247 [Saputo], at para. 43.

[132] The test generally applied is summarized in *Robertson v. Dhillon*, 2015 BCCA 469, at paras. 55-56:

[55] On the hearing of a petition, a judge must be satisfied that there is no dispute as to the facts or law which raises a reasonable doubt or which suggests that there is a defence that deserves to be tried: *Douglas Lake Cattle Co. v. Smith* (1991), 54 B.C.L.R. (2d) 52 (C.A.) at 59. If such a dispute exists, the judge may refer the matter to the trial list, pursuant to R. 22-1(7) (former R. 52(11)(d)).

[56] The test is not that used to determine a summary trial. Rather it is akin to that on an application for summary judgment under R. 9-6. Mr. Justice Lambert summarized the task in *Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd.* (1984), 55 B.C.L.R. 137 (C.A.) at 138-39:

We were referred by counsel for T & A Holdings Ltd. to the judgment of Esson J. (as he then was) in *Progressive Const. Ltd. v. Newton*, 25 B.C.L.R. 330, [1981] 2 W.W.R. 741, 117 D.L.R. (3d) 591 (S.C.), and particularly at p. 334. There Esson J. summarizes, in my opinion, accurately, the law in relation to establishing a defence on an application for summary judgment in these words [pp. 334-35]:

The cases do not establish an invariable rule as to what steps must be taken to resist a R. 18 application for summary judgment. On all such applications the issue is whether, on the relevant facts and applicable law, there is a bona fide triable issue. The onus of establishing that there is not such an issue rests upon the applicant, and must be carried to the point of making it "manifestly clear", which I take to mean much the same as beyond a reasonable doubt. If the judge hearing the application is left in doubt as to whether there is a triable issue, the application should be dismissed.

In essence, if the defendant is bound to lose, the application should be granted, but if he is not bound to lose, then the application should be dismissed.

[133] The test was concisely summarized in an estate litigation context in *Kerfoot v. Richter*, 2018 BCCA 238, para. 20:

... proceedings brought by petition should be referred to the trial list when there are disputes of fact or law, unless the party requesting the trial is bound to lose.

[134] As noted above, PPA s. 3(2) authorizes the court to direct an issue to be tried on the hearing of an application under the act. In *Cameron (Re)*, 2020 BCSC 157, affirmed 2021 BCCA 64, Grauer J. (as he then was) commented at paras. 41 and 49:

[41] The subsection is, of course, permissive. Reading subsections 3(1) and 3(2) together, the ability to order a trial of the issue of capacity turns, in this legislation, upon whether the court is satisfied as to the person's incapacity upon hearing the application and reading the affidavits of two physicians. If it is, then the court must make the order. If it is not, then it may do one of three things. It may dismiss the application; it may order a trial of the issue under subsection 3(2); or, either on the hearing of an application under subsection 3(1), or on the trial of the issue under subsection 3(2), it may order further medical examination under section 5 . . .

[49] *Saputo* and *Kerfoot* are, of course, binding on me, but the principles they express must, as I apprehend them, be considered in the context of the legislation that gives rise to the application in question, the starting point of the analysis. Neither of those cases considered an application under section 3 of the PPA. That section contains its own scheme for the determination of the question that is the subject of the application, and for directing that the issue be tried if appropriate. To that extent, the force of the reasoning in *Saputo* and *Kerfoot*

becomes somewhat diluted.

- [135] While Grauer J. suggests that the reasoning in Saputo and Kerfoot is "somewhat diluted," he does not set out an alternative test as to when to order a trial. As noted by Fisher J. in *Temoin* (S.C.), however, a medical examination should be ordered under s. 5(1) only in cases where the court has directed an issue to be tried under s. 3(2).

Analysis

Expert Reports

- [136] Ana argues that the reports of Drs. Sloan and Passmore should be ruled inadmissible or at the very least given no weight. She argues that the reports are improper because they were prepared without either doctor having met with Ana. Apart from the fact that this circumstance seems to have been one created by Ana's own actions and decisions, there is no evidence tendered that would allow me to conclude that a capacity assessment without a meeting with the subject is per se inappropriate. Both doctors made clear in their reports that the reports were prepared without the benefit of having met with Ana and both frankly discussed the limitations that imposed on their opinions. I note that limited reports like this have been accepted in past cases, including *Kartsonas*.
- [137] Ana argues that because each of the doctors was provided with facts that they were instructed to assume, including an instruction to assume that the facts set out in the affidavits of Sheri and others were to be assumed correct, the authors were required to engage in impermissible fact finding. That argument does not reflect the actual instructions given. The authors were not instructed to come to their own determination of which facts to accept. They were given clear instructions as to which facts to accept. Having reviewed their reports, I do not see that those instructions gave rise to confusion. Providing expert witnesses with assumed facts for purposes of a report is a long-standing and accepted part of the process for expert evidence.
- [138] Ana argues that the two doctors, by opining as to Ana's capability to manage her affairs, touch on the ultimate issue before the court. The issue of capability to manage affairs is indeed front and centre in the PPA, but so is the statutory requirement for two medical doctors to give their opinions on that very issue. I note that Dr. Dian addressed the very same issue. Any objection to the doctors addressing the very issue they are statutorily required to address on the grounds it is an "ultimate issue" is not sustainable.
- [139] I note in passing that Dr. Dian's report goes on to state "I do not find any reason to prevent [Ana] from revoking the power of attorney". That statement arguably does go beyond medical analysis and tread on the role of the court in determining the legal consequences of medical findings. However, the admissibility and weight to be given to Dr. Dian's report is not challenged before me on that basis.

- [140] Ana argues that Drs. Sloan and Passmore engaged in impermissible advocacy and are obviously biased. I do not find any indication of advocacy or bias in the reports. Rather, both doctors present in their written reports as being detached expert observers of the facts, doing the best they can with a wide range of evidence as to Ana's behaviour but without the benefit of an examination.
- [141] While Dr. Vinnitsky was not presented as an expert witness, Ana did rely on his two handwritten notes as well as his affidavit and attached letter. I do have concerns about the tone of Dr. Vinnitsky's letter, which gives rise to concerns that Dr. Vinnitsky may see himself as an advocate on Ana's behalf.
- [142] I find that the expert reports of Drs. Sloan and Passmore are admissible on the question of whether Ana has the capability to manage her affairs, as well as in respect of her capacity to revoke the POA.

Whether to Order a Medical Examination and/or a Trial of an Issue

- [143] Given my conclusion that the reports of Drs. Sloan and Passmore can be admitted, I must now evaluate them along with the report of Dr. Dian and the collateral evidence to determine whether I can make a finding as to whether Ana is, because of mental infirmity arising from disease, age, or otherwise, incapable of managing her affairs.
- [144] A major concern is the less than fully certain conclusion of Dr. Passmore in his report. His conclusion that Ana is "likely to be incapable of managing her affairs under the PPA" does not conform to the very specific requirements of s. 3 of the PPA.
- [145] In my view this report gives rise to the same concerns as the report in issue in Kartsonas. As in that case, it is not appropriate or permitted under the act to grant an order of committeehip on the basis of ambiguous or unclear medical opinions. That leaves open the question, however, of whether the circumstances are sufficient to grant an order either pursuant to s. 5(1) of the PPA or pursuant to the parens patriae jurisdiction for medical examinations.
- [146] The reports of Drs. Sloan and Passmore are effective in tying the observations of the various witnesses, particularly Sheri and Messrs. Boyko, Duncan and Carlton, to likely medical diagnoses that would flow should that evidence be accepted and that would create a solid evidentiary foundation for a conclusion that Ana was not capable and was in need of protection. The comments about short-term memory, some of the unusual behaviours observed, her poor treatment of those with a long record of assisting her, and the concerning record of voicemail messages all give rise to real concern about Ana's capability.
- [147] It is difficult to reconcile the reports of Drs. Sloan and Passmore with the report of Dr. Dian. Having read Dr. Dian's report, it appears to me that he has accepted at face value the comments made by him to Ana as to what are contested matters in the proceeding. It is not

clear to what extent Dr. Dian was aware of the "collateral information" (as that term is used by Dr. Passmore), and if he was aware, whether he attached any weight to it. I am concerned by the differing views taken by Drs. Passmore and Dian of the MOCA score and about Dr. Passmore's comments as to the process used by Dr. Dian.

- [148] Ana's affairs are not simple. She owns multiple valuable properties that generate rental income. If she is not truly capable of managing these complex affairs, then she is very likely in need of protection.
- [149] Given that there are two medical reports supporting a serious issue to be decided as to Ana's capacity, I conclude that the court, as in *Kartsonas*, has the jurisdiction to grant orders pursuant to ss. 5(1) and 3(2) for an issue to be tried and for medical assessments to be obtained in support thereof. The legislative gap that rendered recourse to the *parens patriae* jurisdiction necessary in *Temoin and Singh (Re)* is not a factor here.
- [150] For all of these reasons, I would grant an order equivalent to that granted in *Kartsonas*. That is:
- a) an order pursuant to s. 3(2) of the PPA that an issue be tried as to whether Ana is, because of mental infirmity arising from disease, age, or otherwise, incapable of managing her affairs; and
 - b) an order pursuant to s. 5(1)(a) of the PPA that Ana attend and submit at times to be determined examinations by two geriatric psychiatrists who are to assess and provide their opinions as to whether Ana is, because of mental infirmity arising from disease, age, or otherwise, incapable of managing her affairs.

The Trustee Petition and the Nullification Petition

- [151] While the Committeeship Petition focuses on Ana's current capability, the other two petitions necessitate a consideration of her capacity as of August 2019 when Ana signed the revocation. However, there is considerable overlap between the issues in the three proceedings.

Positions of the Parties

- [152] Sheri's position is that she acted within her authority to settle the AET, that Ana did not have the capacity in August 2019 to revoke the POA, and that the court should authorize Mr. Carlton as trustee to proceed with implementation of the AET. Acknowledging the factual and legal disputes that have arisen, Sheri applies for an order that the petitions be referred to the trial list.
- [153] Ana's position is that Sheri was in a conflict of interest and thus acted in breach of her fiduciary duties, that she was required to and failed to consult with Ana immediately prior to settling the trust, and that as a result the AET is void regardless of any issues as to capacity. Ana argues that the true purpose of the AET is to benefit Sheri and not Ana, and

that she would have never supported the creation of a trust that would limit her powers to manage and dispose of her properties. Ana also argues that she was not aware that the POA granted such a broad scope of powers to Sheri.

[154] Ana further argues that Sheri's lawyer should have provided her with a tax opinion and that in the absence of that, the court should conclude that the transfer of the properties to the estate is not prudent.

[155] Ana also argues that Mr. Carlton is not an appropriate trustee for multiple reasons:

- a) She does not know and trust Mr. Carlton; and
- b) Given that he is an independent contractor to a company owned by Sheri, he has conflicting loyalties.

[156] Ana argues that the court should prefer Dr. Vinnitsky's evidence over Sheri's evidence with respect to their meetings in June and early August 2019, and that because Sheri is lying, the court should infer that she is not acting in good faith, which is a requirement of s. 19(1)(a) of the PoA Act.

[157] For all of these reasons, Ana argues that regardless of any factual conflicts, there are clear breaches by Sheri of the PoA Act that allow the court to decide both the Trustee Petition and the Nullification Petition without resolving disputed issues of fact.

Applicable Law

[158] The relevant provisions of the PoA Act with respect to these issues are:

Duties of attorney

19 (1) An attorney must

- (a) act honestly and in good faith,
 - (b) exercise the care, diligence and skill of a reasonably prudent person,
 - (c) act within the authority given in the enduring power of attorney and under any enactment, and
 - (d) keep prescribed records and produce the prescribed records for inspection and copying at the request of the adult.
- (2) When managing and making decisions about the adult's financial affairs, an attorney must act in the adult's best interests, taking into account the adult's current wishes, known beliefs and values, and any directions to the attorney set out in the enduring power of attorney.

Attorney's powers

20 (1) An attorney may make a gift or loan, or charitable gift, from the adult's property if the enduring power of attorney permits the attorney to do so or if

- (a) the adult will have sufficient property remaining to meet the personal care and health care needs of the adult and the adult's dependants, and to satisfy the adult's other legal obligations, if any,
- (b) the adult, when capable, made gifts or loans, or charitable gifts, of that nature, and
- (c) the total value of all gifts, loans and charitable gifts in a year is equal to or less than a prescribed value.

[159] Ana also relies on ss. 27 and 27.1 of the Property Law Act, R.S.B.C. 1996, c. 377:

Attorney cannot sell to himself or herself

27. A sale, transfer or charge to or in favour of himself or herself by an attorney named in a power of attorney, of land owned by the principal and purporting to be made under the power of attorney, is not valid unless the power of attorney expressly authorizes it or the principal ratifies it.

Validity of sale, transfer or charge by attorney to self

27.1 (1) In this section:

"agreement" means an enduring power of attorney made under Part 2 of the Power of Attorney Act;

"attorney" means a person named in an enduring power of attorney as an attorney.

- (2) A sale, transfer or charge to or in favour of an attorney by the attorney of land owned by the adult who made an agreement, and purporting to be made under the agreement, is not valid unless the sale, transfer or charge is expressly authorized by that agreement.

[160] Ana relies on a line of cases beginning with Egli v. Egli, 2004 BCSC 529. In that case, a son had transferred property of his elderly father to himself, making use of a power of attorney. The case was decided on multiple grounds, but dealing specifically with whether the transfer was a breach of fiduciary duty, Justice Garson (as she then was) concluded at para. 86 that:

[86] Even if the problem with corroboration did not exist, David Egli's evidence as to Hans Egli's intention to benefit his grandchildren might not be enough to satisfy the requirements of David Egli's fiduciary obligations. David Egli testified as to a general wish on the part of Hans Egli to benefit his grandchildren and great grandchildren. However, he did not testify as to whether Hans Egli ever had an intention to give away the bulk of his investments to David and Judy Egli and to their children and grandchildren, before his death, to the exclusion of his other son Gerald who, under Hans Egli's will, would otherwise enjoy a life estate in such assets after Hans Egli's death. In my opinion, therefore, David Egli's evidence does not establish that Hans Egli either knew about the planned transaction to transfer the stock portfolio nor did he consent to it.

[161] To similar effect is *Galloway v. Barski*, 2016 BCSC 1588. In that case there was no issue as to Mr. Galloway's capacity. However, his daughter Joan believed that he was subject to financial abuse or undue influence from her brother and so used a power of attorney granted to her years earlier to transfer Mr. Galloway's home to Joan's son. Justice Armstrong at para. 64 cited *Egli* for the proposition that unless the transaction is expressly authorized or ratified:

[64] In circumstances where an attorney has used a power of attorney to confer a benefit on themselves or a family member, s. 27 of the Property Law Act will operate to void that transfer: *Egli v. Egli*, 2004 BCSC 529 at para. 82, *aff'd* 2005 BCCA 627.

[162] Justice Armstrong also noted at para. 69 that:

... To the extent that s. 19(2) of the Power of Attorney Act requires attorneys to act in the donor's best interests, taking into account the adult's current wishes, known beliefs and values, and within the authority given in the enduring power of attorney and under any enactment, Joan has failed to discharge her obligations.

[163] Sheri on the other hand relies on the judgment of the Court of Appeal in *Easingwood v. Cockroft*, 2013 BCCA 182. In that case certain estate-planning steps had been taken pursuant to a power of attorney made by Mr. Reg Easingwood, who had subsequently died. Most of his assets had been placed in an inter vivos trust, the terms of which mimicked the terms of his will. The power of attorney provided for two of Mr. Easingwood's children to act jointly. The inter vivos trust was created at a time when Mr. Easingwood was no longer competent and at a time when one of the two attorneys (Hank) was himself terminally ill. Reg's wife by a second marriage, Kay, sought to challenge the will under the Wills Variation Act and wanted to set aside the inter vivos trust in order that the assets would be restored to the estate.

[164] The Court of Appeal refused to set aside the trust. Justice Saunders noted at para. 44 that:

[44] We have not been directed to any authority that concludes, as a matter of law, that attorneys operating under a valid general power of attorney may not create an inter vivos trust or transfer to such a trust assets held by the principal, and I conclude that on the plain reading of the power of attorney, an attorney may do so, provided the trust created does not otherwise step into territory prohibited by other general principles of law or statutory prohibitions.

[165] In response to an argument that the two attorneys were eventual beneficiaries in the estate and thus were in breach of their fiduciary duties by benefitting themselves, Saunders J.A. commented at para. 73 that:

[73] In these passages, the judge found the trust did not diverge from Reg's known intentions as reflected both in the will and the marriage agreement - in other words, Reg's interests were not reduced or adversely affected and there was no conflict of interest between the attorneys and Reg. Further, the judge found the trust was created for two sound reasons: because the

power of attorney could lapse if Hank predeceased Reg, thus triggering appointment of a committee, contrary to Reg's wishes; and because it was prudent business as it accorded with estate management advice received by the attorneys. That is, the judge found that the creation of the trust was bona fide.

- [166] In response to an argument that the trust benefitted the family members more than Mr. Easingwood, Saunders J.A. concluded at paras. 77 to 79 that:
- [77] The key question is in which direction the best interests of the principal lie. Here, the principal was a man of business who had executed a will that complied fully with the terms of a marriage agreement. The trust, in turn, is entirely consistent with the marriage agreement, the will, and business prudence, and the trust secured the principal's assets for his use during his lifetime. It would be a fiction to say the attorneys were acting in breach of their duty to their principal in the creation of the trust, when it conforms to all the arrangements the principal had made.
- [78] Kay raises the spectre of advantage gained by the attorneys through a share of assets which are enhanced in value by the tax savings. There is, as contended, a requirement that the power of attorney must be used for the donor's benefit and not the attorneys' benefit. That does not mean, however, that where there is benefit to attorneys, such as in preserving the value of assets, while fully meeting the obligation to secure the best interests of the donor, the attorneys may not take a prudent step. Here, the 'benefit' arose by operation of the Income Tax Act, and was in reality a benefit to all possible beneficiaries - not only the attorneys. Further, the judge was satisfied, on the evidence, that the attorneys complied with their duty to Reg. This was a fact-sensitive enquiry, and one with which we should not interfere, in my view.
- [79] On my review of the record and the findings of fact by the judge, there is no basis, in my view, to interfere with the conclusion that no breach of fiduciary duty was demonstrated.

Analysis

- [167] The key difference between the Egli and Easingwood lines of authority is the extent to which the actions taken by the attorney match the wishes, beliefs, and values of the grantor of the power. In the present case, this question is inextricably tied into resolution of both questions of Ana's capacity in August 2019 as well as the discussions that Sheri alleges took place prior to John's death. If Sheri's evidence is accepted as to those past discussions and if Ana is found to have been not competent in August 2019, then the AET may well be valid.
- [168] The cases, and particularly Easingwood, clearly allow for settlement of a trust by an attorney, notwithstanding some eventual benefit to the attorney, but make the determination of whether that is appropriate in particular circumstances a fact specific inquiry. I note that s. 6(c) of the POA that Ana executed clearly contemplates and authorizes that the re-organization that Sheri is empowered to undertake "could benefit me, my estate or my family members." It is also of significance that the beneficiaries under the AET are

identical to those in the then existing will.

- [169] With respect to Ana's arguments based on a need for Sheri to have obtained her consent immediately prior to settling the trust, that argument falls away if it is determined that Ana was not competent at the time.
- [170] With respect to Ana's arguments based on s. 20(1) of the PoA Act, the opening words of subsection (1) contemplate an attorney acting "if the enduring power of attorney permits the attorney to do so." If that is established, based on the wording of the POA, then there is no need for compliance with s. 20(1)(c).
- [171] With respect to Ana's argument as to the need for a tax opinion, there is no evidence at this time to establish that such an opinion is required for a trust of this nature.
- [172] With respect to Ana's concerns as to Mr. Carlton as a trustee, there are arguments to be made on both sides of this issue, and it is more appropriately determined after the other issues have been determined.
- [173] Overall, given the contested fact and opinion evidence, I conclude that the issues raised in the Trustee Petition and the Nullification Petition cannot be resolved on a summary basis and must be referred to trial. Applying the test in Saputo and Kerfoot, there are disputes of fact and law, and the party requesting the trial is not bound to lose.

Consolidation and Further Proceedings

- [174] As noted above, there were applications before me to refer matters to the trial list, for additional medical examinations and for disclosure of documents. For the reasons set out above, I have decided that further medical examinations should be ordered pursuant to s. 5 of the PPA and that there must be trials of the various issues in all three petitions. Questions remain as to how otherwise the matters are to proceed.

Positions of the Parties

- [175] Sheri argues that all three matters should be either consolidated or ordered to be heard together.
- [176] Ana argues that the court should not use a referral to the trial list and a consolidation of the proceedings to do an end run around the legislative framework of the PPA or the *parens patriae* jurisdiction and that as a result any further proceedings in the Committeeship Petition must proceed separately.

Applicable Law

- [177] In *Liu v. Tsai*, 2017 BCSC 221, Master Bouck conveniently assembled authorities setting out the principles that govern a decision as to whether proceedings should be consolidated. There are two questions which must be answered. The first is whether the two proceedings involve common claims, disputes, and relationships. The second is whether the two

proceedings are so interwoven as to make separate trials at different times before different judges undesirable and fraught with problems and expense. Factors that are relevant to the present case include the risk of inconsistent findings on identical issues and the potential prejudice to witnesses of having to attend multiple hearings to give virtually the same evidence. As noted at para. 3:

- [3] Consolidation is the most appropriate where the commonality in issues and parties in the multiple actions will mean that the disposition of one action will necessarily dispose of the issues in the other

As noted in para. 4:

- [4] In exercising its discretion under SCCR 22-5(8), the court must decide whether the degree of commonality and intertwining of issues as revealed in the pleadings outweighs prejudicial factors raised by the party opposing the order
- [178] The primary prejudicial factor raised in this case arises from the comments of Murphy L.J.S.C. in *Re Scow*. I take from *McMullen v. Webber*, 2006 BCSC 1656, that the court must ensure that rules such as what is now Supreme Court Civil Rule 7-6 (formerly Rule 30(1)), which provides for compelled medical examinations, are not used in related proceedings to buttress a proceeding under the PPA.

Analysis

- [179] I accept that there are important policy rationales that require the proceedings under the PPA to remain separate from the Trustee Petition and the Nullification Petition. It may, however, be appropriate for a process to be established that will allow evidence from the PPA proceeding to be considered in the other proceedings.
- [180] The Trustee Petition and the Nullification Petition are closely intertwined. I order that they be consolidated and proceed as one action in court file number S199918. I will refer to the action herein as the "AET Action." For those purposes, I would direct that:
- a) The petitioner in the Trustee Petition file a notice of civil claim setting out claims as previously made in the Trustee Petition. Given that the pleadings have been previously drafted in petition form, I assume that this could be done relatively efficiently and would direct that it be filed by March 26, 2021;
 - b) Ana file a response to civil claim as well as a counterclaim dealing with the claims she has advanced in the Nullification Petition, to be filed within three weeks of receipt of the filed notice of civil claim;
 - c) The defendants by counterclaim file their responses to counterclaim within two weeks of receipt of the filed counterclaim; and

- d) Each party should issue a list of documents in the AET Action within three weeks of the close of pleadings.
- [181] With respect to the Committeeship Petition, I do not believe it is necessary for a notice of civil claim to be filed. I direct that the petition serve as the notice of civil claim and that the responses to petition serve as the responses to civil claim.
- [182] With respect to the medical examinations that I have ordered, I would direct that counsel confer among themselves as to who would be the appropriate medical practitioners to undertake the examination. I am cognizant of PPA s. 5(2)(a), which would appear to rule out the three medical practitioners who have already provided evidence on this hearing. As well, counsel should address how best to ensure that the two medical practitioners who will undertake these examinations have access to reliable collateral history (as discussed in Dr. Passmore's most recent letter in the materials).
- [183] I would direct that there be a case planning conference (or, if a judicial management judge is appointed, a judicial management conference), dealing with both the AET Action and the Committeeship Petition. That conference should address the question of which of the Supreme Court Civil Rules should apply to the committeeship proceeding (with reference to PPA s. 3(2)(c)). It should also address ways to minimize the inconvenience to witnesses who might otherwise be called upon to give much the same evidence in two different actions while maintaining the necessary separation between the two proceedings. It should also consider how Sheri's counsel might obtain the necessary medical evidence for purposes of the AET Action in a way that minimizes the inconvenience to Ana.

Waiver of Privilege

Positions of the Parties

- [184] Sheri argues that Ana has waived privilege in respect of her estate planning file with Janice Papp, given that she has voluntarily injected into the litigation her understanding of the law on material issues - namely her understanding of when and how the POA can be used.
- [185] Ana argues that the application is premature, that the statements identified by Sheri as to Ana's understanding of the POA are collateral to the true issues in the proceedings, and that the application should await the exchange of list of documents.

Applicable Law

- [186] There is ample authority for the proposition that a waiver of privilege may be implied where a party voluntarily injects its understanding of its legal position or relies on legal advice to justify its conduct and acts in a manner inconsistent with maintaining the privilege: *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471, at para. 22. However, the court should tread cautiously in finding that privilege has been waived per *Soprema* at para. 50:

The starting point of an articulation of the test for implied waiver must recognize what the Supreme Court of Canada has made clear about the importance of solicitor-client privilege. In *R. v. McClure*, 2001 SCC 14 at para. 35, the Court said that solicitor-client privilege "must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis" (emphasis added). Furthermore, the Court said (at para. 17) that solicitor-client privilege "is part of and fundamental to the Canadian legal system. ... [I]t has evolved into a fundamental and substantive rule of law." This view was affirmed in *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31 at paras. 20-21, where the Supreme Court of Canada made clear that communications protected by privilege should be disclosed only where "absolutely necessary", applying "as restrictive a test as may be formulated short of an absolute prohibition in every case."

[187] In *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2018 BCCA 263, at paras. 33 to 37, Justice Hunter raised concerns about the procedural context for determination of waiver of privilege:

Procedural Issues

- [33] Before addressing the proper test for waiver of privilege, I wish to make some comments on the procedural approach implicitly endorsed by the chambers judge. The appellants have characterized this as a jurisdictional issue, but I would prefer to address it in procedural terms. There is no doubt that a judge of the Supreme Court of British Columbia has the jurisdiction to determine that solicitor-client privilege has been waived, but the procedure adopted by the respondents enhances the danger that a waiver order will be made in circumstances that do not adequately protect the privilege.
- [34] In the ordinary course of litigation, the question of waiver will arise in one of two ways. A litigant will challenge a list of documents that asserts privilege over documents, and bring an application in relation to particular documents listed but not disclosed. Or a litigant may refuse to answer a question based on the assertion of privilege, permitting a narrow order to be sought tailored to the question asked and the scope of the waiver claimed.
- [35] In this case, the respondents chose not to defend the Conspiracy Claim based on abuse of process. By defending the claim, discovery of documents would have been required that could have raised the waiver issue, and examinations for discovery would have been held at which the waiver issue could have been explored.
- [36] Instead, the respondents filed a pleadings application under Rule 9-5, a procedure that does not engage either of these discovery mechanisms, and brought an interlocutory application for a "declaration". I do not regard it as decisive that such an application is not authorized by the rules. A judge of the Supreme Court of British Columbia has broad inherent jurisdiction, and in a proper (though rare) case it might well be appropriate to follow such a course. In this case, it has led the chambers judge to make a very wide disclosure order for the benefit

of the respondents in a proceeding chosen by the respondents that would not normally require disclosure of documents at all.

[37] In the view I take of the merits of this appeal, it is not necessary to explore further the procedural problems created by this approach.

Analysis

[188] In light of the directions I have just given, Ana will be required to issue a list of documents within a few weeks. That list of documents will presumably include a Part 4 that will list any relevant contents of the file of Janice Papp, which I understand Ana's counsel has requested but not yet received.

[189] In light of the comments of Hunter J.A. in H.M.B. Holdings and given that the pleadings in the AET Action will soon be updated and listing of the documents in that action will occur shortly thereafter, I conclude that the appropriate course of action is to adjourn this application generally, to be brought on again once lists of documents have been exchanged.

Conclusion

[190] With respect to the Committeeship Petition, I would grant:

- a) an order pursuant to s. 3(2) of the PPA that an issue be tried as to whether Ana is, because of mental infirmity arising from disease, age, or otherwise, incapable of managing her affairs;
- b) an order pursuant to s. 5(1)(a) of the PPA that Ana attend and submit at times to be determined examinations by two geriatric psychiatrists who are to assess and provide their opinions as to whether Ana is, because of mental infirmity arising from disease, age, or otherwise, incapable of managing her affairs; and
- c) an order that for purposes of the trial I have ordered, the petition serve as the notice of civil claim and the responses to petition serve as responses to civil claim.

[191] With respect to the Trustee Petition and the Nullification Petition, I grant orders that:

- a) each of these proceedings be referred to the trial list;
- b) they be consolidated and proceed as one action in court file number S199918;
- c) the petitioner in the Trustee Petition, by March 26, 2021, file a notice of civil claim setting out claims as previously made in the Trustee Petition;
- d) Ana file a response to civil claim as well as a counterclaim dealing with the claims she has advanced in the Nullification Petition, to be filed within three weeks of receipt of the filed notice of civil claim;
- e) the defendants by counterclaim file their responses to counterclaim within two weeks of receipt of the filed counterclaim; and

- f) each party should issue a list of documents in the AET Action within three weeks of the close of pleadings.

[192] I direct that, once these steps have been taken, there be a case planning conference (or, if a judicial management judge is appointed, a judicial management conference) dealing with both the AET Action and the Committeeship proceeding. With respect to the Committeeship proceeding, the items for consideration at that conference should include determination of:

- a) the appropriate medical practitioners to undertake the medical examinations pursuant to PPA s. 5(1);
- b) how best to ensure that the medical practitioners have access to reliable collateral history; and
- c) which of the Supreme Court Civil Rules should apply to the proceeding.

[193] More generally, the parties should be prepared to address:

- a) ways to minimize the inconvenience to witnesses who might otherwise be called upon to give much the same evidence in multiple different proceedings, while maintaining the necessary separation between the two proceedings; and
- b) how Sheri's counsel might obtain the necessary medical evidence for purposes of the AET Action in a way that minimizes the inconvenience to Ana.

[194] The application with respect to waiver of privilege over the Janice Papp file is adjourned generally.

[195] I note that these reasons for judgment are given orally. Should a transcript be ordered, I reserve the right to edit for clarity and flow, but the substance and the result will not change.

(SUBMISSIONS)

[196] THE COURT: If there are any further directions required in terms of allegations of conflict, the parties can make submissions at a future date on the foundation of the new pleadings in the AET Action.

(SUBMISSIONS)

[197] THE COURT: I will be seized of the further directions and case planning conference that I provided for, unless in the interim a judicial management judge is appointed.

(SUBMISSIONS ON COSTS)

[198] THE COURT: If either of you believe you should be applying for costs in respect of today's judgment, then you have leave to do so.

(SUBMISSIONS RE TIMING)

[199] THE COURT: If either party seeks an order as to costs, they should file their submission by April 16, 2021. Any submission in response should be filed by May 7, 2021. Once I have those, I will review them and let you know whether I think it is necessary to have an actual hearing.

"Veenstra J."

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