

CANADA / JUDGMENT

Cole v. Hamel

2018 BCSC 338

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Supreme Court of British Columbia

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2018 BCSC 338 Cole v. Hamel

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cole v. Hamel,

2018 BCSC 338

Date: 20180306

Docket: S186862

Registry: New Westminster

Between:

Suzanne Lee Cole and Morganne Maxwell

Petitioner

And

Leah Nancy Hamel

Respondent

- and -

Docket: 192081

Registry: New Westminster

Between:

Kristine Germaine Olsen

Petitioner

And

Leah Nancy Hamel

Respondent

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for Petitioner, Suzanne Cole and Morganne Maxwell:

T.R. Britnell

J. Porciuncula

Counsel for Respondent, Kristine Olsen:

E. Clough

Place and Date of Hearing:

New Westminster, B.C.

November 9 and 10, 2017

December 14, 2017

Place and Date of Judgment:

New Westminster, B.C.

March 6, 2018

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I. INTRODUCTION

- [1] This proceeding involves a petition and a cross-petition by the three daughters of Leah Nancy Hamel ("Ms. Hamel"). In both proceedings, the parties seek orders for committeeship of the person and estate of Ms. Hamel.
- [2] In the first petition filed, New Westminster Registry No. 186862, Ms. Suzanne Cole ("Ms. Cole") and Ms. Morganne Maxwell ("Ms. Maxwell") seek:
- a) a declaration that Ms. Hamel is incapable of managing herself or her affairs;
 - b) an order appointing them as co-committees of the estate and person of Ms. Hamel; and,
 - c) an order that they be paid their reasonable costs and expenses out of the estate of Ms. Hamel, subject to the approval of the Public Guardian & Trustee.
- [3] In the cross-petition, New Westminster Registry No. 192081, Ms. Kristine Olsen ("Ms. Olsen") -- Ms. Hamel's third daughter -- seeks an order that she be appointed sole committee of the person and estate of Ms. Hamel. In the alternative, Ms. Olsen seeks that the Public Guardian and Trustee be appointed committee. Ms. Olsen also seeks reasonable costs payable out of the estate of Ms. Hamel.
- [4] Each of the petitions are opposed by the respondents named respectively in the petitions.

II. LEGAL FRAMEWORK

- [5] Guardianship of adults, or committeeship, is governed in British Columbia by the Patients Property Act, R.S.B.C 1996, c. 349 [PPA]. The incapable adult is referred to as the patient. Committeeship may be over the estate of the patient (financial, business and legal affairs), their person (personal and health care matters), or both.

- [6] Section 3 of the PPA governs when the court may make a declaration that a person is incapable of managing themselves or their affairs. The court must be satisfied upon reviewing the evidence of two medical practitioners that, because of mental infirmity arising from disease, age or other cause, a person is incapable of managing herself or her affairs.
- [7] Once a declaration of incapability is pronounced, every power of attorney given by the person is terminated and, unless the court orders otherwise, every representation agreement made by the person is terminated: PPA, ss. 1, 19.
- [8] The parties agree that Ms. Hamel is incapable of managing herself and her affairs. The opinions of two medical practitioners, filed as exhibits herein, support that agreement. The Court is satisfied on the evidence such that Ms. Hamel is declared incapable of managing herself or her affairs; hence, it is necessary to appoint a committee.
- [9] In determining who should be appointed committee, the paramount consideration for the court is the patient's best interests. Since multiple parties seek to be appointed in this case, the Court must decide who will best serve Ms. Hamel's interests. While the Public Guardian and Trustee could be appointed committee for Ms. Hamel, I intend to choose one or more family members from among the three parties to the litigation because the costs of the administration of the estate will be lower if a family member is appointed. In this case, the issue is which of the daughters of Ms. Hamel will be appointed committee of her person and estate.

III. CONTENTS OF AFFIDAVITS

- [10] The contents of the affidavits of the parties presented in this case present some difficulty. The Supreme Court Civil Rules, B.C. Reg. 168/2009 define the contents of an affidavit as limited to statements a witness may be allowed to make if speaking from the witness box. In other words, only first hand knowledge of facts known to the witness can be included in an affidavit with few exceptions. Assumptions, opinions, impressions and hearsay statements are generally not admissible.

IV. FACTS

A. Incapability

- [11] The reports of Dr. Martha Donnelly, specialist in Geriatric Psychiatry, and Dr. Peter Chui, General Practitioner, were filed as exhibits in support of the position that Ms. Hamel is incapable of managing herself and her affairs.

- [12] Dr. Donnelly examined Ms. Hamel on October 4, 2016. She opines that Ms. Hamel is incapable of managing both herself and her affairs by reason of mental infirmity arising from vascular dementia, which is both untreatable and irreversible. Dr. Donnelly noted that Ms. Hamel indicated she trusted Ms. Cole to manage her finances because Ms. Cole had a good sense of business.
- [13] Dr. Chui examined Ms. Hamel on November 3, 2016. He opines that Ms. Hamel is not capable of managing both herself and her affairs by reason of mental infirmity and that her condition is not likely to improve. During his assessment of Ms. Hamel, he noted that she was able to understand the committee process and able to express her preference for whom she would like to act as committee. She preferred Ms. Cole because she was the closest to Ms. Hamel and "knows what is going on".
- [14] In a filed response to petition, the Public Guardian and Trustee does not oppose the appointment of Ms. Cole or Ms. Maxwell and, subject to the posting of security, is unopposed to the granting of an order declaring Ms. Hamel incapable of managing herself and her affairs.

B. Contextual Background

- [15] Ms. Cole started living with her mother in 1995 in Ms. Hamel's condo located in Vancouver. In 2007, Ms. Hamel executed a power of attorney (the "2007 POA") appointing Ms. Cole as power of attorney. Also in 2007, Ms. Hamel executed a representation agreement appointing Ms. Cole as her representative.
- [16] In 2008, Ms. Hamel executed an amended representation agreement which added Ms. Maxwell and Ms. Olsen as representatives. Ms. Hamel also executed powers of attorney appointing Ms. Cole and Ms. Olsen jointly as powers of attorney in 2008 (the "2008 POA").
- [17] Ms. Cole continued to live with her mother from 1995 until 2014; she provided her mother with care and companionship through those years. In 2000, when Ms. Hamel started exhibiting short-term memory failure, Ms. Cole began assisting her with the management of her finances and her daily activities. As the dementia progressed, Ms. Cole's role evolved. By 2006, Ms. Cole was her mother's caregiver. On occasion, Ms. Cole spent up to 18 hours per day attending to Ms. Hamel's comfort and care.
- [18] For obvious reasons, Ms. Hamel stopped driving her car; all driving was done by Ms. Cole including for attendances at medical appointments and procedures, shopping outside the condominium, and community events. Arrangements for specialized service providers including Meals on Wheels, Bayshore Home Services, Lifeline, Crossreach Seniors' Day Centre, VGH Short Term Assessment, and Treatment Center were all arranged by Ms. Cole. Ms. Cole also arranged the completion of tax returns, bill and utility payments, and maintenance of health and financial records.

- [19] In 2016, after a period in St. Paul's Hospital Emergency Unit and Pain Clinic, Ms. Hamel entered the Windermere Care Facility.
- [20] In 2014, Ms. Cole had ceased to live with Ms. Hamel, but she continued to provide care and arrange for services for Ms. Hamel. After assisting with the move of Ms. Hamel into the Windermere Care Facility in February 2016, Ms. Cole arranged for the packing and storing of Ms. Hamel's personal property. She also arranged for a number of real estate agents to consult upon and to sell her mother's condominium. She further continued to monitor her mother's care at Windermere.
- [21] Ms. Cole also provided Ms. Hamel with companionship. Ms. Hamel told Ms. Maxwell more than once that she enjoyed the presence of Ms. Cole.

C. Ms. Hamel's Condition, Hospital Visits, and Medications

- [22] Ms. Hamel suffers from dementia. Her short term memory loss was noticeable in about 2000. She was high functioning for many years, relying on routine and repetition, but her decision-making ability was compromised. By 2013, Dr. Donnelly assessed her as incapable of making decisions around her finances. Ms. Hamel also wears a pacemaker for a heart condition.
- [23] In January of 2016, Ms. Hamel experienced very intense spinal pain of a continuing duration, diagnosed generally as spinal degeneration marked by "spinal stenosis" (narrowing of the spinal canal) and facet joint arthropathy. This disintegration cannot be reversed or halted by medical intervention, so Ms. Hamel is in palliative care; doctors can only treat her to manage her symptoms, particularly the pain. As the spinal disintegration progresses, the pain increases.
- [24] During the January 2016 flare up of symptoms, Ms. Hamel was screaming in pain. Medical doctors -- specialists in pain management at the Pain Management Centre at St. Paul's Hospital -- created an effective pain relief cocktail comprised of several medications including methadone, together with the use of a transdermal fentanyl patch.
- [25] Ms. Olsen expressed an opinion of doubtful admissibility, that methadone and fentanyl were used by drug addicts. No one in this case is a drug addict, and no one in this case is using street drugs. Ms. Olsen's opinion is irrelevant and of no assistance. A physician with special credentials is required to prescribe methadone or fentanyl.
- [26] While Ms. Hamel was in St. Paul's Hospital, her care team decided it was necessary for Ms. Hamel to be treated in a long-term care facility. When she was discharged from St. Paul's Hospital, emergency funding for 24 hour care in her home was provided until a long-term care bed became available.

D. Windermere Care Facility

- [27] The Windermere Care Facility was the first available facility that was able to manage and provide daily care for Ms. Hamel's dementia and complex medical needs. Ms. Cole had a little over a single day's notice that Ms. Hamel was to be transferred to the Windermere Care Facility on February 17, 2016.
- [28] Ms. Cole has since maintained a constant presence at Windermere. She was there several times a week when Ms. Hamel was first admitted. After Ms. Hamel was settled in the facility, Ms. Cole has attended about once a week unless she is needed more often.
- [29] Ms. Cole attends all family meetings at Windermere, and meets with the health care team to discuss how Ms. Hamel is doing. She keeps a careful watch on her mother's comfort and happiness.
- [30] I note there is a conflict in the evidence between Ms. Cole and Ms. Olsen respecting where it is that Ms. Hamel wished to live when she went into care. Frankly, that is not a conflict that can be resolved on the extent of affidavit evidence now before this court.
- [31] Further, there are conflicts between the parties about whether Amica, an international commercial senior care provider, would accept a patient with the complex medical needs and dementia challenges faced by Ms. Hamel. There is a single Amica location -- Arbutus Manor -- in the City of Vancouver on Eddington Drive near Arbutus Street. The issue of whether Amica would accept Ms. Hamel as a resident cannot be resolved as there is no evidence for the Court upon which to base that decision.
- [32] Ms. Olsen has expressed an opinion that a private care facility would be superior to a publicly funded facility. That opinion, of doubtful admissibility, also assumes that both facilities had the capacity to accept Ms. Hamel as a resident. Further, it assumes that if there was capacity, that both facilities would accept Ms. Hamel in her existing condition. There was no evidence presented before this Court to allow that conclusion to be reached.
- [33] Ms. Cole's observations of her mother at Windermere is consistent with her mother being happy in that Ms. Hamel appears to have friends with whom she communicates on her floor at Windermere, and she participates in activities there. In June 2017, a staff member recounted to Ms. Cole how Ms. Hamel, patiently and apparently expertly, had been teaching the other residents at her table how to complete an art project upon which the residents were then working. Ms. Hamel also goes on day trips and is an active participant in church services, bingo, and other activities at Windermere.
- [34] Ms. Maxwell agrees that Windermere is the best place for Ms. Hamel. Ms. Cole discussed the move with her at the time and has continued to update her. However, both she and Ms. Cole would move Ms. Hamel if it was advisable to do so, regardless of the cost.

E. The Petitioners

- [35] Two of the present petitioners -- that is Ms. Maxwell and Ms. Olsen -- reside a long way from British Columbia; while that distance in itself is not a determining factor, I am of the view there is a positive factor in favour of appointing Ms. Cole in that she resides in Vancouver and is readily available to respond to any urgent issue that may arise in Ms. Hamel's care and treatment.
- [36] All three daughters have had continuing contact with their mother in varying degrees and, in part, contact is limited by the ability of Ms. Hamel to respond to their contact efforts. All three daughters wish nothing but the best for their mother, who is significantly disabled by terminal spinal degeneration. That condition accompanied by dementia have made it difficult for her to travel or, for that matter, carry on a telephone conversation. Again, there is dispute over which of the daughters is the better caregiver at which time. I am satisfied that Ms. Cole has spent significantly more time caring for her mother than either of her sisters. This is not as a result of any lack of care or familial feeling by the other sisters, but rather simply the proximity of Ms. Cole and her ability to be present in the moment dealing with her mother's needs.
- [37] Ms. Olsen has opined that Ms. Cole's personal employment has not put her in positions of trust or management of money, but it is difficult to appreciate this position.
- [38] In fact, Ms. Cole has been in several positions of trust and management of money, including the following:
- a) as an account executive for International Flag and Banner, securing the largest print job in the firm's 20-year history;
 - b) with the RCMP, obtaining the highest level, "Eyes Only", security clearance with the records department of the RCMP Headquarters, Pacific Region;
 - c) as a Customs Inspector, Marine Terminals; and
 - d) in earning an Internationally recognized instructor diploma, First Class honours, from Vancouver Community College with Post-Secondary Endorsement.
- [39] Ms. Olsen also alleges that Ms. Cole has not kept her updated about her mother's situation. However, efforts made by Ms. Cole to update Ms. Olsen include:
- a) After Dr. Donnelly said in 2013 that Ms. Hamel was no longer capable of handling her finances, Ms. Cole told Ms. Olsen about the report. Ms. Olsen did not ask to see it.
 - b) Ms. Cole emailed Ms. Olsen on February 27, 2016, updating Ms. Olsen on how Ms. Hamel was settling into Windermere. She said that Ms. Olsen had not responded to her two previous emails and had made no attempt to find out about their mother. Ms. Cole asked if Ms. Olsen was interested in further updates. Ms. Olsen responded later that day that she was out of internet range and couldn't respond to Ms. Cole's emails.

[40] Future communications have been addressed in a set of conditions agreed upon between the parties (which I will outline below) so I will not address this matter further in these reasons.

V. FINANCES

[41] Ms. Cole first started assisting Ms. Hamel with her finances in about 2000. Ms. Hamel asked Ms. Cole to manage more of her finances as the years progressed, until Ms. Cole was managing all of Ms. Hamel's finances.

[42] Ms. Hamel's assets as of December 2016 totalled \$696,042.79, and are comprised of the following:

Gold jewelry

\$4,000.00 (approximate value)

Trust funds from sale of condo

\$563,148.03

Vancity chequing account

\$8,272.11

Investors Group

\$120,622.65

[43] Ms. Hamel's current net income is approximately \$1,994.84 from the following sources:

Canada Pension Plan

\$480.00

Old Age Pension

\$580.00

Investors Group

\$734.84

Keith Hamel

\$200.00 (approximate; sometimes irregular)

[44] Ms. Hamel's expenses were approximately \$1,742.52 per month after Ms. Cole moved out in 2014, and before Ms. Hamel moved into Windermere. In addition to these expenses, Ms. Hamel had cash for discretionary spending on items such as church donations, McDonald's (a daily part of her social life prior to moving to Windermere), and cash gifts to her grandson.

A. Vancity Visa and Living Expenses

- [45] Ms. Hamel welcomed Ms. Cole when she moved into Ms. Hamel's condo in about 1995. She and Ms. Hamel discussed their living and financial arrangements. The arrangements evolved over time, as Ms. Hamel was fully competent when Ms. Cole moved in and she became less competent as the years went by.
- [46] Ms. Cole did all the cooking and cleaning from the beginning. They did not divide grocery bills or household supplies.
- [47] Even when Ms. Hamel was able to drive, she asked Ms. Cole to drive. At some point, Ms. Hamel and Ms. Cole agreed to sell her car to avoid expenses for two vehicles. They chose to keep a 1996 Toyota Corolla owned by Ms. Hamel because that vehicle best suited their needs. Ms. Cole would drive Ms. Hamel wherever she needed to go. Ms. Hamel paid for the car-related expenses.
- [48] Along the way, Ms. Hamel agreed to pay for some of the food and expenses for Ms. Cole's dog. Ms. Olsen has alleged that Ms. Hamel told her that she was not pleased Ms. Cole had brought a large, shedding dog into the condominium. This reference is 15 years old and concerns Ms. Cole's previous dog. The current dog owned by Ms. Cole is named "Ha Shee", is not large, and does not shed. Ms. Hamel has told Ms. Maxwell on more than one occasion that she enjoyed having Ms. Cole and Ha Shee live with her, and said that when Ms. Cole wasn't home, she would have been lonely if not for the dog. She said Ha Shee gave her comfort.
- [49] Ms. Hamel loves Ha Shee and calls him "the baby". She enjoys it when Ms. Cole brings Ha Shee to Windermere for a visit.
- [50] When Ms. Hamel started to experience short-term memory loss in about 2000, Ms. Cole started helping her more with her finances. By about 2008, Ms. Hamel had granted Ms. Cole complete on-line access to Mrs. Hamel's Vancity chequing account and had made her Vancity Visa card joint with Ms. Cole.
- [51] Ms. Hamel used the Vancity bank account to pay the living expenses, and Ms. Cole made the bill payments for Ms. Hamel on-line.
- [52] Ms. Hamel made her Vancity Visa card joint with Ms. Cole so Ms. Cole could help her with the shopping. As Ms. Hamel's health declined, Ms. Cole ran all of her errands, so Ms. Cole was the one who used the Visa most of the time. Ms. Cole largely used the Visa for their joint groceries, household expenses, and Ms. Hamel's personal expenses.
- [53] At some point, Ms. Hamel told Ms. Cole to use the Vancity Visa if she needed anything for herself. Ms. Cole avers her mother once told her that, unlike her sisters, Ms. Cole never had a spouse or children to help her, and she wanted to help Ms. Cole. Nevertheless, I find that when Ms. Cole used the Visa for a personal purchase, she repaid Ms. Hamel in cash or made a direct payment to the Visa.

- [54] Ms. Olsen alleges that Ms. Cole misused or abused the Vancity Visa. Ms. Cole has sworn this isn't true. Further, Ms. Hamel received all the Visa statements and could see for herself what Ms. Cole had charged during the period she had capacity to do so.
- [55] Ms. Olsen and Ms. Cole conflict over Ms. Cole's use of certain of Ms. Hamel's finances. Some of the complaints made by Ms. Olsen involve very small amounts of money and items such as underwear purchased for Ms. Hamel. It is apparent to this Court that Ms. Cole and Ms. Hamel had adopted certain patterns of the use of the Visa account and other finances, which had to change once Ms. Hamel became incapable of managing her own affairs. Given that the parties have agreed to the set of conditions that will allow for one or more of the petitioners to become committee, subject to those agreed conditions, I do not see any useful purpose in pursuing this conflict. It would be very difficult to resolve on affidavits and with a lack of any type of forensic audit.

B. Investments and Condominium Sale

- [56] There was much discussion about powers of attorney given in 2007 and 2008 as well as the treatment of Investors Group accounts. Mr. Nowak of Investors Group has performed admirably in this situation of conflict between two sisters as a financial consultant responsible for Ms. Hamel's investment accounts.
- [57] Given the conditions to which the parties have agreed, I have no doubt that Mr. Nowak will continue with his involvement. I do note there is a small difficulty in that Mr. Nowak, who has been a long-term advisor to Ms. Hamel, cannot take instructions from Ms. Olsen because she is not a resident of Canada, but this matter does not require further attention for the reasons which follow.
- [58] It is also unnecessary at this point in time to deal with issues relating to the sale of the condominium. That sale occurred apparently on advantageous terms. As a result, there is a fund of money held in a law firm trust account, which unfortunately has never been invested on an interest bearing basis. That is a task that the new committee will have to undertake.

VI. LAW

- [59] The PPA does not set out specific criteria for the determination of suitability when competing petitioners seek appointment as a proposed patient's committee. Nonetheless, the courts have identified a non-exhaustive list of factors for consideration.
- [60] The test for determining who is appropriate to act as a committee invokes the *parens patriae* jurisdiction of the Court, and is governed by the assessment of who will serve the patient's best interests. *Bowman (Re)*, 2009 BCSC 523 at para. 32.
- [61] In *Stewart (Re)*, 2014 BCSC 2321 at para. 29, Masuhara J. listed the following considerations regarding the applicable law on this question:

- a) whether the appointment reflects the patient's wishes, obviously when he or she was capable of forming such a wish;
- b) whether immediate family members are in agreement with the appointment;
- c) whether there is any conflict between family members or between the family and the patient, and whether the proposed committee would be likely to consult with immediate family members about the appropriate care of the patient;
- d) the level of previous involvement of the proposed committee with the patient, usually family members are preferred;
- e) the level of understanding of the proposed committee with the patient's current situation, and will that person be able to cope with future changes of the patient;
- f) whether the proposed committee will provide love and support to the patient;
- g) whether the proposed committee is the best person to deal with the financial affairs and ensure the income and estate are used for the patient's benefit;
- h) whether a proposed committee has breached a fiduciary duty owed to the patient, or engaged in activity which diminishes confidence in that person's abilities to properly handle the patient's affairs;
- i) who is best to advocate for the patient's medical needs;
- j) whether the proposed committee has an appropriate plan of care and management for the patient and his or her affairs and is best able to carry it out; and
- k) whether a division of responsibilities such as between the patient's estate and the patient's person to different persons would serve the best interests of the patient, or would such a division be less than optimal for the patient.

[62] In *Bowman (Re)* at para. 33, Dardi J. added the proposed committee's level of experience and capability in performing the duties of committee as an additional factor for consideration.

[63] In *Haston (Re)*, 2016 BCSC 1962 at para. 32, N. Brown J. expanded on the non-exhaustive factors noted by Masuhara J. by adding the following considerations:

whether the proposed Committee's resides near the patient; whether the proposed Committee is able to provide transportation for the patient, if necessary; whether outside demands on the proposed Committee's time and availability will detract from his or her ability to perform his or her obligations; and whether the proposed Committee is able and willing to facilitate any recreation or religious practice in which the patient wishes to participate.

[64] Masuhara J. in *Stewart (Re)* noted that the inquiry is fact specific, and a particular factor's applicability and weight will depend on the circumstances of each case.

- [65] Thus, depending on the circumstances of the case before the court, the above factors have been used as guiding principles. In particular, past courts have preferred one petitioner over another in the following circumstances:
- a) In *Spring (Re)* 2016 BCSC 917, the Court appointed one sister over another as committee of their mother's person on the basis that she lived closer in proximity, had provided her mother with past care, and was familiar with her needs and medical care. The Court held that she was in a better position to advocate for her mom's medical needs. In contrast, the other sister would need to rely on information communicated to her by the care facility, not day-to-day or week-to-week observations of her mother.
 - b) In *Stewart (Re)*, the Court held that the mother's best interests would be served by her daughter, Maria, who acted as her primary caregiver for the past 5 years during a time in which her needs increased considerably. The Court found that Maria had a fuller view regarding the program of care her mother needed and had a positive and regular relationship with her care providers. The assertion that Maria lives in her mother's home "rent free" needs to be viewed in light of the assistance that her mother received, and the considerable benefit of having Maria reside with her.
 - c) In *McNally (Re)*, 2016 BCSC 1136, the Court found the proposed patient's son, Greg, to be more suitable as a committee over his sister, Elynn. In doing so, the court noted the very important task of a committee is to make decisions in the best interest of the patient regardless of what might be the most desirable arrangement from an emotional point of view. In contrast to Elynn, Greg based his decisions on the practical and real needs of his mother. In addition, despite the difficulties between him and his sister, he nonetheless attempted to include her in decisions about their mother.

VII. ARGUMENT

- [66] After the first day of submissions, and at the opening of the second day of submissions, counsel for the parties presented a written set of conditions which the Court was advised that the parties have agreed would apply regardless of which of the parties would be appointed as committee for Ms. Hamel. The conditions are as follows:

CONDITIONS AGREED BY COUNSEL

1. The committee will give the non-committee irrevocable authority for access to all information from all financial institutions and the care home.
2. The committee will advise the non-committee of any health events and medication changes as soon as possible, and within 24 hours of the committee becoming aware of such health event or medication change.
3. If the non-committee requests an update, the committee will provide one.

4. The committee will consult with the non-committee if:
 - a) The committee wishes to change financial institutions;
 - b) The committee wishes to move Mrs. Hamel to a new care home or other facility.
 5. All of the children of Leah Hamel shall have unlimited and unrestricted right to visits and outings with Ms. Hamel, not subject to the consent or approval of any other.
 6. The committee shall provide an annual accounting of the Estate of Leah Hamel to the Public Guardian and Trustee's office. The first accounting is due one year after the date of the Order appointing a committee. The committee shall provide a copy of the accounting to the non-committee within 10 days of providing the accounting to the Public Guardian and Trustee.
 7. The committee shall keep receipts for all funds expended from Ms. Hamel's accounts or on her behalf, and shall make the receipts available for viewing by the non-committee.
 8. Regarding the assets of Leah Hamel:
 - a) The committee may transfer up to \$60,000 (the "Operating Funds") from the Trust Account held by Ryan Klassen to an operating account, to be held by the committee for the benefit of Leah Hamel;
 - b) The committee shall direct all funds of Leah Hamel (except the Operating Funds) to a financial institution where an investment (the "Investment") has been established by the committee in compliance with the Trustee Act.
 - c) The committee shall have no access to the capital of the Investment, other than for reinvestment purposes, without the prior written consent of the Public Guardian and Trustee.
 9. Any financial institution and any successor institutions holding funds of Leah Hamel shall be served with a copy of this Order, and proof of such service is to be provided to the Public Guardian and Trustee.
- [67] One of the allegations made by Ms. Olsen concerning Ms. Cole is that Ms. Cole chose the Windermere Care Facility as it was less expensive than another named facility, Amica. Ms. Olsen also alleged that reduction in costs was for the purpose of enhancing the value of the portion of the estate that would eventually flow to Ms. Cole. This allegation is very serious as it suggest a conflict of interest, and must be examined by the Court to determine if Ms. Olsen has proven the allegation.
- [68] First, while a number of hearsay statements have been led from Ms. Olsen stating that Ms. Hamel wished to attend Amica, there is no evidence that there was space available in the Amica facility at the material time, or that the very serious medical condition suffered by Ms. Hamel, including dementia and palliative spinal degeneration requiring specialized medication could be treated at Amica.

- [69] Further, the evidence is that Ms. Cole did not, by herself, choose the Windermere Care Facility. It was a facility chosen in conjunction with the care team at St. Paul's Hospital, and very little notice of that choice was given to Ms. Cole.
- [70] In the third affidavit of Ms. Olsen, she stated she is convinced that "without the cocktail of drugs" prescribed by specialist medical practitioners, Ms. Hamel would not have deteriorated as she has over the last year or so.
- [71] The fact that Ms. Olsen is "convinced" is clear evidence this is a statement of opinion. Ms. Olsen is not a medical practitioner and not capable of providing an opinion on what might or might not have happened to the condition of Ms. Hamel with or without the particular narcotic prescription Ms. Hamel has been given.
- [72] That opinion expressed is based on the very serious premise that medications have been prescribed in error or otherwise represent some sort of medical malpractice; that serious premise is without any factual foundation whatsoever.
- [73] On the facts before this Court, which are not disputed, the removal of the medication without sound medical support would likely -- based on the history of prior emergency treatment for acute unyielding pain -- put Ms. Hamel back into the emergency ward in the condition in which she first entered the emergency ward. The premise which Ms. Olsen relies upon appears to be wholly contrary to Ms. Hamel's interests.
- [74] As noted, Ms. Olsen has no background as a medical doctor or with pharmaceuticals, and the statement which she makes concerning the prescription of methadone and fentanyl for her mother must be taken as one of opinion without any basis in fact. This Court can take judicial notice of the fact that methadone was developed in Germany during the Second World War years as a synthetic painkiller when other opioids were not available in that country. Post-war, methadone came to be used extensively as a painkiller in North America because it is far less dangerous than other narcotics for the treatment of unrelenting pain.
- [75] The fentanyl prescribed for Ms. Hamel in this case is in the form of a trans-dermal patch. A transdermal patch is applied to the skin to provide a low dosage of medication over an extended time period; this allows the even ingestion of a prescription by a patient. Taking all of the foregoing together, I find that Ms. Olsen has not proven the allegations which she has levelled. It is a pernicious allegation suggesting moral turpitude which ought not to have been made without a strong factual basis. In this case there was no such factual basis.

VIII. ANALYSIS AND CONCLUSION

- [76] In Ms. Olsen's first affidavit, she states that while she lives in Phoenix, Arizona, she is:
3. only a short flight from Vancouver. I am able to be in Vancouver within half a day on short notice.

85. There are more than 15 nonstop flights leaving Phoenix for Vancouver every day beginning at 6:00am and departing throughout the day into the night. The flight takes about three hours. Taking into account travel time to and from airports, I can be at Mom's care facility in approximately six hours if an emergency arose.
- [77] The Concise Oxford Dictionary defines the word emergency used as a noun as "a serious, unexpected, and potentially dangerous situation requiring immediate action." The Canadian Oxford Dictionary defines emergency in relation to a medical condition as "a medical condition requiring immediate treatment." Even if Ms. Olsen were in the most ideal circumstances able to travel from Phoenix to the Windermere Care Facility in six hours that would not be consistent with an immediate response. I appreciate that there are advances in communication devices that can now be used on commercial aircraft. However, where a doctor or other physician is treating a patient in emergency circumstances, a communication such as messaging or long-distance telephone would simply be a distraction and not a reasonable way for a physician faced with a patient requiring emergency treatment to react.
- [78] I also appreciate that Ms. Olsen is seeking the best for her mother, however the suggestion of six hours as a minimum travel time in relation to an emergency would be inadequate. Clearly, Ms. Cole, who resides in Vancouver, could be at the Windermere facility or an emergency hospital facility within an hour, speaking to Ms. Hamel or in face-to-face communication with a doctor dealing with a medical emergency. This would be a preferred course of action to someone travelling for a time period at least six times as long.
- [79] The appointment of a committee must be in the best interests of the patient. Among other factors, the appointment must, if possible, be compliant with the patient's expressed wishes. In this case, the appointment of Ms. Cole is compliant with those wishes which were discussed, among other places, in the evidence of the two medical doctors who gave opinions concerning Ms. Hamel's mental capacity.
- [80] Ms. Cole has had a high level of previous involvement in the life of Ms. Hamel, as for at least 15 years they lived together. She was present and involved with the care of her mother as Ms. Hamel's medical condition deteriorated suddenly at the end of 2015. She participated and was present in the emergency treatment of her mother for extreme pain as a result of spinal stenosis, treatment in St. Paul's hospital, at her condominium with 24 hour emergency care, and during and after the transfer of Ms. Hamel to long-term palliative care in the Windermere Care Facility. The involvement of Ms. Cole in these aspects of treatment demonstrates that Ms. Cole is able to adjust and cope with changes in the needs and requirements of Ms. Hamel, including transportation requirements, as those needs and requirements change over time.
- [81] I have no doubt each of the parties would provide love and support for Ms. Hamel, however, Ms. Cole has the distinct advantage of daily proximity to Ms. Hamel and her care facility.

- [82] Ms. Cole has proven that she has previously occupied positions of trust with the Royal Canadian Mounted Police and Canada Customs. Despite some issues raised by Ms. Olsen concerning the arrangement of Ms. Hamel's finances, there has been no proven breach of fiduciary duty by Ms. Cole. To the contrary, Ms. Cole has been a staunch supporter of sound financial planning in the affairs of Ms. Hamel; this was particularly demonstrated by her support in Ms. Hamel's investment planning, which now provides a portion of the monthly income necessary to pay the expenses of Ms. Hamel. Ms. Cole further does not have outside demands on her time and is therefore able to respond to Ms. Hamel's needs as they arise in a timely manner.
- [83] Together with the care team and pain specialists from St. Paul's Hospital, and later the staff at the Windermere Care Facility, Ms. Cole has been involved in the development of an appropriate palliative care plan for Ms. Hamel. On the evidence before me, which I accept, Ms. Hamel is responding well to the programs at the Windermere Care Facility by making friends and participating in activities there to the extent she is able. Ms. Hamel is reported to be happy at that location, and there is no contrary evidence.
- [84] Because of her proximity to and knowledge of the medical condition of Ms. Hamel, Ms. Cole is in the best position to advocate for Ms. Hamel to persons providing medical treatment or care for Ms. Hamel.
- [85] As described by her legal counsel, Ms. Cole has demonstrated acceptance of the need to change the record keeping around the personal finances of Ms. Hamel. That change is from a long-term shared household regime to a new regime consistent with trust-level reporting, reporting to the Public Guardian and Trustee, and to her sisters on a regular and consistent basis as provided in the conditions set forth above to which all parties have agreed.
- [86] For the reasons set out in this analysis, based on a review of all of the cases cited by counsel, and taking into account the submissions of counsel -- for which I thank them -- I am satisfied on a balance of probabilities that there is only need to appoint a single committee in this case without any division of responsibilities. I appoint Suzanne Lee Cole as the committee of the person and estate of Leah Nancy Hamel. This order appointing Ms. Cole as committee of the person and estate of Ms. Hamel shall include in its terms the conditions agreed upon by the parties, as are set forth above.

A. An Aside

- [87] For the benefit of all concerned, by appointing Ms. Cole as committee for Ms. Hamel, I have not decided that Ms. Olsen and Ms. Maxwell would be somehow disqualified from becoming a committee should such a need arise in the future. That said, I doubt if Ms. Hamel would be pleased with the degree of conflict between the parties displayed in these proceedings. I have no doubt that Ms. Hamel would expect a level of familial harmony among her children.

B. Costs

- [88] The parties submitted that the Court should award special costs to all parties on these applications.
- [89] Section 27 of the PPA provides that costs of committee proceedings are in the discretion of the court. As noted in various cases including *Sangha (Re)*, 2013 BCSC 1965 at para. 112, the usual practice is that the patient's estate will bear the costs of committee applications on a special costs basis. Punnett J. wrote:
- [112] The court in *[Vieira (Re), 2013 BCCA 420]* noted that "the usual practice [is] for a successful applicant on a committee application to be granted an order for special costs to be paid from the patient's estate," and held that this was a "sensible position" given that the applications are generally brought by the proposed committee for the benefit of the patient to assist with the management of the patient's person and his estate (at paras. 17-18). There may be exceptions, the court indicated, where "there are concerns about the motives of the applicant" or "the applicant's conduct of the application" (at para. 18).
- [90] Therefore, special costs may be awarded if a party was acting in good faith for the benefit of the patient, and there was no ulterior motive or obvious benefit from the appointment as committee. The parties before this court acted in good faith to achieve a positive circumstance in the appointment of a committee for Ms. Hamel.
- [91] Finally, costs can be awarded on a special costs basis even if the applicants for costs were not appointed committee: see *Vieira (Re)*, 2013 BCCA 420. In the case before me, while Ms. Olsen was unsuccessful in her cross-application for committee, I find that it -- like that of Ms. Cole and Ms. Maxwell -- was made in an attempt to ensure the best interests of Ms. Hamel.
- [92] In this case I award special costs to Ms. Cole, Ms. Maxwell and Ms. Olsen. In Ms. Olsen's case and in accordance with her instructions to the Court through counsel, Ms. Olsen will not be entitled to any reimbursement for the travel costs from Phoenix to Vancouver for the dates on which this application was heard in Vancouver. In the case of Ms. Cole and Ms. Maxwell, there will be one set of costs as one counsel appeared for both parties, but additional costs and disbursements are awarded for separate attendances to obtain instructions and necessary affidavit evidence. All costs shall be subject to the approval of the Public Guardian and Trustee and shall be payable by the estate of Ms. Hamel after assessment by the Registrar of this Court.

"Ball J."

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