

CANADA / JUDGMENT

Drachenberg v. Evans

2021 BCSC 1293

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 1293 Drachenberg v. Evans

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Drachenberg v. Evans,

2021 BCSC 1293

Date: 20210705

Docket: S46403

Registry: Penticton

Between:

Corinna Lee Drachenberg and Barrie Edward Drachenberg

Petitioners

And

John Henry Evans and Helen Evans

Respondents

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Petitioners:

N.R. Zaseybida

Counsel for Respondent,

John Henry Evans:

T.H. Suleyman

Counsel for the Respondent,

Helen Evans:

K.M. Robinson

Place and Date of Trial/Hearing:

Kelowna, B.C.

June 2, 2021

Place and Date of Judgment:

Kelowna, B.C.

July 5, 2021

Introduction

- [1] This is an unfortunate family dispute. I will refer to the family members by their first names for readability, intending no disrespect.
- [2] The dispute is between an 82-year-old mother, Helen, and her five children ("Children") over the management of her assets. The petitioner, Corinna, is Helen's oldest child. Corinna's husband, Barrie, is the other petitioner. The respondent, John, is one of the Children. Corinna, Barrie and Helen live in Summerland. John lives in the Lower Mainland.
- [3] With the best of intentions, Corinna and Barrie took steps to jointly assist Helen with managing and protecting her assets, which will eventually form her estate. To some extent, John was also involved. These steps included: i) arranging for Helen to transfer title to her West Kelowna condominium ("Kelowna Condo") and farm property near Torch River, Saskatchewan ("Torch River Farm") into joint names; and ii) selling the Kelowna Condo and moving her into a condominium in Summerland ("Summerland Condo"). Corinna and Barrie purchased the Summerland Condo so that Helen could live nearby and Corinna could look after her.
- [4] Corinna and John now disagree over how Helen's assets should be managed going forward.
- [5] Because of Helen's age and current health, her day-to-day living and financial affairs were managed by Corinna, who says she retired early from her job as a registered nurse to do so. Corinna says she provides approximately four hours of in-home care per day for Helen. The sale of the Kelowna Condo and Helen's relocation into the Summerland Condo was done without seeking the blessing of Corinna's siblings.

- [6] The net proceeds of sale of the Kelowna Condo, approximately \$141,000 ("Condo Proceeds"), are currently being held in a lawyer's trust account. Helen says the Condo Proceeds should be released to her. Corinna and Barrie agree. John does not.
- [7] John's concern stems from Corinna and Barrie's position that, upon release of the Condo Proceeds, Helen must reimburse them \$39,738.20. This figure was derived from the following factors: Corinna says Helen agreed to pay her \$300 per month to attend to her day-to-day needs; they renovated the Kelowna Condo to sell it; and they renovated the Summerland Condo to accommodate Helen's needs (collectively, the "Claimed Expenses"). As proof that Helen owes the Claimed Expenses, on February 5, 2021, Corinna and Barrie arranged for Helen to sign a promissory note for \$39,738.20 ("Promissory Note").
- [8] John's objections focus on Helen's mental capacity and competency to make agreements with Corinna and Barrie including signing the Promissory Note. He believes Helen was coerced by them to sign it and to make other financial decisions he believes are not in her best interests. While he concedes that the Condo Proceeds are properly Helen's to do with as she pleases, he believes Corinna and Barrie may be taking advantage of and exploiting her. John says Helen is elderly, fragile, and easily manipulated. He is worried about Helen's deteriorating health and wants to ensure that her interests are protected.
- [9] Corinna concedes that Helen has short-term memory problems, but maintains that she is nevertheless mentally competent and perfectly capable of making financial decisions, including those at issue here. Helen agrees with Corinna.

The Petition

- [10] On March 25, 2021, Corinna and Barrie filed this petition in their personal capacity against John and Helen ("Petition") seeking:
- a) a declaration that John, Corinna and Barrie hold the Condo Proceeds of \$141,145.49 plus interest, if any, in trust for Helen;
 - b) an order that the Condo Proceeds be paid out to Helen or, alternatively, to Corinna as Helen's power of attorney, in trust for Helen;
 - c) a declaration that Corinna and John hold title to the Torch River Farm in trust for Helen;
 - d) an order that John immediately sign any documents, in registrable form, required by Corinna to transfer title of the Torch River Farm into Helen's name; and
 - e) special costs or in the alternative costs.
- [11] Helen agrees that the orders sought by the Petitioners should be granted.

John's Application

[12] In addition to responding to the petition, John filed an application on April 28, 2021, ("John's Application") seeking various document production and other orders, namely:

- a) the production of Helen's former counsel's (Daniel K. Lo's) complete legal file in relation to the revocation of previous powers of attorney, the subsequent grant of power of attorney to Corinna, the Promissory Note together with any notes relating to steps taken to assess Helen's competence;
- b) the production of Helen's doctor's (Dr. Richardson's) complete medical file;
- c) a full accounting of the expenses Corinna and Barrie say they incurred on Helen's behalf including the Claimed Expenses;
- d) an order that Mr. Lo, Dr. Richardson, and Helen be cross-examined on their affidavits; and
- e) an order that the Petition filed by Corinna and Barrie be referred to the trial list.

[13] Helen does not want John involved in her affairs and strongly opposes John's Application.

Background

[14] Helen's three other children are Melanie, Vance, and Travis. Save for Melanie filing an affidavit, they take no position and are not involved in this proceeding.

[15] Helen was involved in a motor vehicle accident in 1984 that resulted in her having some short-term memory problems. Notwithstanding these problems, Helen lived alone in the Kelowna Condo.

[16] On June 25, 2018, Helen granted a power of attorney to Corinna and John ("June 2018 Power of Attorney") that allowed them to exercise it if Helen experienced a subsequent mental infirmity.

[17] In October 2018, Helen's family doctor was Dr. Marie Wild. Through Dr. Wild arrangements were made for Helen to receive some home care provided by Interior Health, which Helen did not particularly care for. Helen asked Corinna, a registered nurse, if she would assist her. Corinna agreed, took early retirement, and started providing Helen with daily home care. Corinna proposed charging \$300 per month for that help. On October 23, 2018, Helen appointed Corinna as her representative to provide care pursuant to s. 9(1)(a) of the Representation Agreement Act, R.S.B.C. 1996. c. 405.

[18] In February 2020, Corinna, and John had concerns that Melanie may have influenced Helen's legal affairs. They understood that in January 2020, Melanie had taken Helen to a notary to sign some legal documents. Helen was unable to recall what those documents were and Melanie would not disclose the nature of those documents.

- [19] Accordingly, on John's suggestion and with Helen's approval, Corinna and John used the June 2018 Power of Attorney to transfer the Kelowna Condo and the Torch River Farm as follows:
- a) the Kelowna Condo was transferred into the joint names of Corinna, John, and Barrie; and
 - b) the Torch River Farm was transferred into the joint names of Corinna and John.
- [20] It is unclear whether Helen waived the condition that the June 2018 Power of Attorney was to be used on her infirmity.
- [21] Helen's attempts to sell the Kelowna Condo on her own were unsuccessful. A realtor recommended that minor updates to the Kelowna Condo would make it more marketable. Accordingly, Corinna and Barrie arranged and paid for such things as new paint and flooring.
- [22] Prior to the purchase of the Summerland Condo, Corinna was assisting Helen approximately twice per day for two to four hours, preparing her meals, housekeeping, assisting with her personal care, shopping, appointments, and other matters as required. To do so required Corinna to drive daily from Summerland to West Kelowna. With the purchase of the Summerland Condo, Corinna and Barrie proposed to charge Helen rent of \$1,000 a month inclusive of the monthly strata fee of \$353.51.
- [23] The Kelowna Condo sold on September 1, 2020. Corinna and Barrie initially wanted to be reimbursed approximately \$44,000 from the Condo Proceeds. However, John objected because he felt that Corinna and Barrie were charging Helen inappropriate amounts in order to profit from her. Arguing that he was a joint attorney under the June 2018 Power of Attorney, he sought an accounting and particulars of those expenses. The accounting that Corinna and Barrie have since provided has not satisfied his concerns.
- [24] At some point, but likely corresponding to Corinna and Barrie's attempts to be reimbursed for the Claimed Expenses from the Condo Proceeds, a "trust agreement" was prepared by Corinna and Barrie's lawyer. The parties to the trust agreement were John, Corinna and Barrie, and referenced that Helen had granted a Power of Attorney to John and Corinna on June 25, 2018. The trust agreement was back-dated to February 4, 2020, the same day the Kelowna Condo was transferred into Corinna, Barrie, and John's names. One of the preambles to the trust agreement states: "Helen Evans is incapable of managing her affairs". One of the other preambles provides for payment of the Claimed Expenses to Corinna and Barrie. Although Corinna and Barrie signed the trust agreement, John did not.
- [25] A similar trust agreement between John and Corinna was prepared respecting the Torch River Farm. It is dated February 18, 2020. It was signed by Corinna but not John.

- [26] Currently, Helen's income is \$2,441.35 per month. It is comprised of CPP, Old Age Security, and a Public Service pension. Her monthly expenses, including rent of \$1,000 per month and \$300 per month for daily care provided by Corinna, total approximately \$2,885. But for the rent and care expenses, Helen's income would meet her monthly expenses. Accordingly, John does not want the Condo Proceeds paid to Helen for fear that Corinna and Barrie will end up with Helen's money to the exclusion of the other Children.
- [27] The lines are drawn in the sand. John steadfastly refuses to authorize the Condo Proceeds being paid out to Helen. He also refuses to transfer the Torch River Farm back into Helen's name. He continues to believe that Corinna and Barrie are taking advantage of Helen and seeks to intervene on behalf of the Children.
- [28] John's position has upset Helen and Corinna. Helen says the Condo Proceeds are rightfully hers and she wants them released to her. She also wants the Torch River Farm transferred back into her name.
- [29] On February 5, 2021, she revoked the June 2018 Power of Attorney and appointed Corinna as her sole attorney.
- [30] To complicate matters, on March 9, 2021, Helen was diagnosed with breast cancer, has since had a mastectomy and is receiving post-surgery treatment.
- [31] Helen retained her own counsel, Ms. Robinson to represent her in this petition. Given what she considers to be John's improper interference, she now wants nothing to do with him and wants him to leave her alone.

Medical evidence

- [32] The medical evidence in the material before me comprises mostly clinical records and consultation reports. There is no document or other agreement between the parties that would allow this evidence to be admitted for the truth the contents. It is not in a form that could be considered opinion evidence. Only for the purpose of narrative, I propose to summarize what they say.
- [33] Helen's medical history commences on October 1, 2018, with a clinical record prepared by Dr. Wild, Helen's then general practitioner, addressed "To Whom It May Concern" that reads:
- Helen Evans is having memory problems and signs of possible dementia. She is being referred [for] further assessments. Due to the patient's memory issues, living alone is dangerous to her health. I would recommend assisted-living made for this patient.

- [34] Helen was next referred to Dr. Jennifer Dicus, a general practitioner with the Seniors' Health and Wellness Centre, who assessed her on November 20, 2018. The reason given for the assessment was "cognitive change". Helen attended the assessment with Corinna. Dr. Dicus' assessment included taking a past medical history, a review of medications, allergies, social history, functional history, a review of her symptoms, a physical examination, and mini-cognitive testing, all of which resulted in the following impression:

Helen is an 80 yo woman with a history of TIA who has had a progressive deficit in short term memory and executive function with a related change to her IADLs consistent with a new diagnosis of Early Dementia likely secondary Alzheimer's and/or vascular causes (+/-effects of remote brain injury). Her gait pattern along with the rest of her history and physical exam does not seem consistent with Parkinsonism.

- [35] According to this record, Dr. Dicus found that Helen's functional cognitive testing results were below normal limits and recommended a follow-up in eight weeks. That follow-up occurred on March 19, 2019. Again, according to the records, no substantial changes were noted.

- [36] Following Helen's move to Summerland, she was assessed by a new family practitioner, Dr. Wendy Richardson. On February 6, 2020, Dr. Richardson prepared a clinical record stating the following:

Helen Evans has been my patient since 26th August 2019.

Helen Evans is a 81-year old lady who has dementia and is frail and vulnerable, with poor hearing.

In my opinion Helen has not been competent to sign legal documents or managing her financial affairs, since I have known her.

- [37] As earlier stated, this clinical record is not admissible as opinion evidence. It is admissible only as proof that Dr. Richardson made the statements contained in it.

- [38] One year later, Dr. Richardson authored another clinical note dated January 26, 2021, addressed "To Whom It May Concern", as follows:

Helen Evans consulted me in my office on 19th January 2021. I have known her since August 2019. She lives independently, with a lot of support from her daughter Corinna Drachenberg. Helen expressed her distress that she has been made to change her will by her other daughter, and in particular where she was going to be buried. She strongly expressed her desire to be buried in Summerland, as her previous will stated. She wishes to go back to her previous will, and I judge her competent to do so.

Helen also wishes her daughter Corinna Drachenberg to be sole Power of Attorney rather than sharing it with one of her brothers.

- [39] Dr. Richardson explained the discrepancy between the February 6, 2020 and January 27, 2021 notes in her affidavit sworn April 20, 2021. Once again, this evidence was not tendered as expert evidence and is admissible only as lay evidence. She stated that when she wrote her February 6, 2020 note, it was based on consultations and visits she had had with Helen up to that point in time, where Helen appeared withdrawn and spoke very little. She was advised that Helen had then been living in West Kelowna and had just recently moved to Summerland. She was confused about her affairs and concerned about signing legal documents that she was unable to recall. In October 2020, Helen had a fall and was hospitalized. Dr. Richardson observed her both at the hospital and working on her mobilization. She observed that Helen's mental state had changed. Helen had "become more vibrant, expressive and perkier". Also, Dr. Richardson prescribed a change in Helen's medication in January 2021, which seemed to have helped. She states in her affidavit that:
7. During the past 6 months, I have noted that Helen Evans is more lively, outspoken and clear about what she would like. She had told me that she had been upset about changes to her Will and that she wished to revise her Will so that her daughter, Corinna would be her executor and that her remains were buried in Summerland. Helen Evans also advised me that she wanted her daughter Corinna to be her Power of Attorney and advised me that she was upset with her son, John who would not let the money from the sale of her property in West Kelowna be released so that she had money for paying ongoing expense she has and to buy herself a wheel chair and other necessities.
- [40] To summarize, Dr. Richardson says she observed a significant improvement in Helen's mental capacity since she was first a patient of hers and writing her note of February 6, 2020. She ends her affidavit by stating:
9. From my interaction with Helen Evans on January 19, 2021, it was my opinion that Helen Evans had mental capacity to give instructions to have a Will and Power of Attorney prepared and to sign the same. It is my opinion that Helen Evans had the mental capacity to understand the general nature and effect of those legal documents.
10. I have been treating and seeing Helen Evans in regard to her cancer and recent surgery. From my interaction with Helen Evans today, April 20, 2021, it is my opinion Helen Evans continues to have mental capacity to give instructions related to her care and general legal matters.
- [41] Additionally, the office of the Public Guardian and Trustee has conducted some sort of investigation into Helen's mental competency. By letter dated February 12, 2021, that investigation was completed with the determination that "the PGT will not be seeking authority to manage Helen Evan's affairs", and closed their file.

[42] While Helen and Corinna emphasised the fact that the position taken by the Public Guardian and Trustee's office is important, at best it appears to have been a cursory investigation and I am not persuaded that the Public Guardian and Trustee's involvement can be given any weight, one way or the other.

The Law

[43] The statutes that are relevant to the issues before me are the Trustee Act, R.S.B.C. 1996, c. 464; the Power of Attorney Act, R.S.B.C. 1996, c. 370; the Adult Guardianship Act, R.S.B.C. 1996, c. 6; and the Representation Agreement Act. The relevant sections are as follows:

Trustee Act

59 (1) If a person is jointly or solely seized or possessed of any land or entitled to a contingent right in it on a trust, and a demand has been made on the trustee by a person entitled to require a conveyance or assignment of the land, or his or her duly authorized agent, requiring the trustee to convey or assign it, or to release the contingent right, the court, if satisfied that the trustee has wilfully refused or neglected to convey or assign the land for 28 days after the demand, may make an order

- (a) vesting the land in the person, in the manner and for the estate that the court directs, or
 - (b) releasing the contingent right in the manner the court directs.
- (2) The order has the same effect as if the trustee had duly executed a conveyance or assignment of the land, or a release of the right, in the same manner and for the same estate.

Power of Attorney Act

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.
- (3) An attorney must do all of the following:

- (a) to the extent reasonable, give priority when managing the adult's financial affairs to meeting the personal care and health care needs of the adult;
- (b) unless the enduring power of attorney states otherwise, invest the adult's property only in accordance with the Trustee Act;
- (c) to the extent reasonable, foster the independence of the adult and encourage the adult's involvement in any decision-making that affects the adult;
- (d) not dispose of property that the attorney knows is subject to a specific testamentary gift in the adult's will, except if the disposition is necessary to comply with the attorney's duties;
- (e) to the extent reasonable, keep the adult's personal effects at the disposal of the adult.

...

32 (1) An attorney may request information and records respecting the adult for whom the attorney is acting, if the information or records relate to

- (a) the incapability of the adult, or
- (b) an area of authority granted to the attorney.

Adult Guardianship Act

2 This Act is to be administered and interpreted in accordance with the following principles:

- (a) all adults are entitled to live in the manner they wish and to accept or refuse support, assistance or protection as long as they do not harm others and they are capable of making decisions about those matters;
- (b) all adults should receive the most effective, but the least restrictive and intrusive, form of support, assistance or protection when they are unable to care for themselves or their financial affairs;

...

3 (1) 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.

- (2) An adult's way of communicating with others is not grounds for deciding that he or she is incapable of making decisions about anything referred to in subsection (1).

Representation Agreement Act

2. The purpose of this Act is to provide a mechanism

- (a) to allow adults to arrange in advance how, when and by whom, decisions about their health care or personal care, the routine management of their financial affairs, or other matters will be made if they become incapable of making decisions independently, and

- (b) to avoid the need for the court to appoint someone to help adults make decisions, or someone to make decisions for adults, when they are incapable of making decisions independently.

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

- (a) making, changing or revoking a representation agreement, and
 - (b) making decisions about personal care, health care and legal matters and about the routine management of the adult's financial affairs.
- (2) An adult's way of communicating with others is not grounds for deciding that he or she is incapable of understanding anything referred to in subsection (1).

...

8 (1) An adult may make a representation agreement consisting of one or more of the standard provisions authorized by section 7 even though the adult is incapable of

- (a) making a contract,
 - (b) managing his or her health care, personal care or legal matters, or
 - (c) the routine management of his or her financial affairs.
- (2) In deciding whether an adult is incapable of making a representation agreement consisting of one or more of the standard provisions authorized by section 7, or of changing or revoking any of those provisions, all relevant factors must be considered, for example:
- (a) whether the adult communicates a desire to have a representative make, help make, or stop making decisions;
 - (b) whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others;
 - (c) whether the adult is aware that making the representation agreement or changing or revoking any of the provisions means that the representative may make, or stop making, decisions or choices that affect the adult;
 - (d) whether the adult has a relationship with the representative that is characterized by trust.

Discussion

[44] In a nutshell, the orders sought in the Petition and John's Application relate to Helen's mental competency to make financial and other decisions on her own and whether John has the ability to prevent her from having access to the Condo Proceeds and/or demanding that title to the Torch River Farm be transferred back to her.

- [45] Of note was Corinna and John's February 2020 use of the June 2018 Power of Attorney to transfer the Kelowna Condo and Torch River Farm into their names. It required, as a condition precedent, that Helen be mentally infirm. Therefore, for the June 2018 Power of Attorney to be validly used, either Helen was admittedly infirm at the time or she waived the requirement of infirmity. The evidence is unclear on this point. What is clear is that Corinna, John and Helen agreed to use the June 2018 Power of Attorney to protect Helen's interests because she could not recall what documents she signed when Melanie had taken her to see a notary. Why Helen did not sign the transfer documents herself at the time was not explained.
- [46] I have been referred to a number of cases dealing with similar situations including *Mortimer v. Bender*, 2020 BCSC 483; *Egli v. Egli*, 2005 BCCA 627; *E.M.E. v. D.A.W.*, 2003 BCSC 1878, which I have found helpful.
- [47] *Mortimer* is authority for the proposition that an attorney only has a duty to account to the grantor of a power of attorney and not the beneficiaries of the grantor's estate. Only the donor/grantor or the donor's/grantor's estate may apply to have the attorney provide a full accounting (at paras. 51-54).
- [48] Although it is trite that a power of attorney executed by someone mentally incompetent to give a power of attorney is void, the law does not prescribe any fixed standard of sanity as a requirement for the validity of all transactions. In relation to each particular matter or piece of business transacted, it requires that each party have a soundness of mind as to be capable of understanding the general nature of what he or she is doing by his or her participation: *Egli*, at paras. 27-28. The test of validity of the power is whether at the time of the execution, the donor understood the nature and effect of the power and not whether the donor would have been able to perform all the acts which the power authorized: *Egli*, at para. 30. This is a factual question: *Egli*, at para. 34.
- [49] In my view, the clinical records of Drs. Wild and Dicus are not admissible as proof that Helen is suffering from cognitive or mental issues or to prove that she is unable, because of mental infirmity, to manage her personal and financial affairs. They are neither properly prepared expert reports nor were the doctors properly qualified to express those opinions.
- [50] While the evidence of Helen's condition suggests there may be some impairment with her memory (which given her age and prior motor vehicle accident is not surprising) and is manifesting some signs of declining mental ability in comparison to the standards of someone much younger, the evidence falls short of establishing a sound basis for determining that she is, at present, incompetent to instruct counsel, or incompetent to swear affidavits, or incompetent to determine how her affairs should be managed.
- [51] I am comforted in this conclusion by the in-court representations of Ms. Robinson (her current counsel) and the affidavits of Mr. Lo (her prior counsel) and Dr. Richardson (her current doctor), all of whom say that from their observations, Helen appears competent to manage her affairs. Dr. Richardson's affidavit is seemingly being proffered by Corinna and

Barrie as an expert opinion. Although it was not objected to by John, and I have no concerns that Dr. Richardson is a medical doctor and qualified as such, I have concerns whether her opinions go to the ultimate issue of Helen's current mental capacity and her capacity to grant or revoke powers of attorney. Nevertheless, I accept Dr. Richardson's lay observations that Helen's mental acuity has significantly improved since January/February 2020.

- [52] Until the contrary is demonstrated, Helen is presumed to be capable of making decisions about her personal care, healthcare, and financial affairs: Adult Guardianship Act, s. 3(1). On the available and admissible evidence before me, this presumption has not been rebutted.
- [53] Likewise, until the contrary is demonstrated, Helen is presumed to be capable of making, changing or revoking a representation agreement and decisions about her personal care, healthcare, and legal matters and about the routine management of her financial affairs: Representation Agreement Act, s. 3(1). This presumption has also not been rebutted.
- [54] Given this finding, the orders sought in the Petition must be allowed.
- [55] Respecting John's Application, what he seeks firstly is production of Mr. Lo's legal files which are covered by solicitor-client privilege that has not been waived. I know of no ability for John to obtain these documents without Helen's consent, which she specifically has not granted.
- [56] Secondly, he seeks production of Dr. Richardson's complete medical file. These are personal and confidential records that Helen has stated she does not want released to John. John's request for these records was made after the June 2018 Power of Attorney was revoked by Helen. Again, I know of no ability for John to obtain these records without Helen's consent.
- [57] Thirdly, he seeks a further accounting from Corinna and Barrie respecting the Claimed Expenses. Barrie has provided an accounting, which, while detailed, is inadequate in John's view. Given my finding that Helen is currently competent to manage her affairs, I see no current ability for John to demand these details when the matter is between Helen, on one hand, and Corinna and Barrie on the other. Moreover, Helen has made it clear that she does not consent a further accounting being provided to John.
- [58] Fourthly, he seeks an order that Mr. Lo, Dr. Richardson and Helen be cross-examined on their affidavits. In my view, before such an order can be made, there must be a valid reason for doing so. Mr. Lo and Dr. Richardson both swear that they believe Helen is competent to manage her affairs. Helen agrees. The only admissible evidence to suggest otherwise comes from John who states that Helen's short term memory and cognitive functions have been decreasing over the years. Other than this general statement, no details are provided. In short, the evidence sufficient to persuade me that cross-examination of Mr. Lo, Dr. Richardson, and Helen, or any of them, on their affidavits would be an appropriate order, is lacking.

- [59] Lastly, John seeks an order that the Petition be referred to the trial list. Similarly, I am not persuaded that the admissible evidence suggests a trial on these issues is required. To repeat, Helen is deemed competent to manage her affairs until the contrary is proven: Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City), 2021 BCCA 160 at para. 74.
- [60] Given my finding that the admissible evidence does not demonstrate that Helen is incapable of managing her affairs, the Petition must be allowed and John's Application must be dismissed.
- [61] Scale B costs will follow the event. Although the petitioners sought special costs in the Petition, it was neither argued nor pursued.

"G.P. Weatherill J."

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