

CANADA / JUDGMENT

Evans (Re)

2021 BCSC 570

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Supreme Court of British Columbia

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2021 BCSC 570 Evans (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Evans (Re),

2021 BCSC 570

Date: 20210330

Docket: S216696

Registry: New Westminster

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

and amendments thereto

Re: Ursula Evans

Before: The Honourable Mr. Justice Milman

(via teleconference)

Reasons for Judgment

Counsel for the Petitioner, Gail Florence Nelson:

B.D. Rosberg

Counsel for the Respondent, Donna Ursula Evans:

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Counsel for the Respondent, Clinton John Rennie:

P. Roxburgh

Place and Date of Hearing:

Abbotsford, B.C.

February 25, 2021

Place and Date of Judgment:

New Westminster, B.C.

March 30, 2021

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I. Introduction

- [1] Before the court are two competing applications brought under the Patients Property Act, R.S.B.C. 1996, c. 349 (the "Act"), by which each applicant seeks to be appointed as committee (or committee of the person) for Ursula Evans ("Ursula"). Ursula is currently 88 year old and, it appears, no longer capable of managing her affairs or her person due to a mental infirmity.
- [2] Because many of those who are involved or interested in these proceedings share the same last names, I will refer to the family members, including Ursula, by their first names for the sake of convenience. I mean no disrespect in doing so.
- [3] Ursula is now widowed but had previously been married twice. She and her first husband had a daughter who was called Barbara Joyce Rennie ("Barbara"). Barbara died on May 24, 2018 and is survived by her two children, Donna Ursula Evans ("Donna") and Clinton John Rennie ("Clinton").

- [4] Ursula's second husband, Kenneth William Evans ("Kenneth"), died on July 28, 2012 after 45 years of marriage with Ursula. Kenneth adopted Barbara after he married Ursula. The petitioner, Gail Florence Nelson ("Gail") is the natural daughter of Ursula and Kenneth. Gail has three children of her own, Sean Evans ("Sean"), Nicole Nelson ("Nicole") and Trevor Kenneth Nelson ("Trevor").
- [5] Owing to the family's unfortunate dynamics, a rift has developed between Barbara's children (Donna and Clinton), on the one hand, and Gail and her children (Sean, Trevor and Nicole), on the other, with respect to Ursula's care.
- [6] Gail commenced these proceedings on July 10, 2019 by filing a petition seeking to be appointed as committee for Ursula. The petition was prompted by Gail's concerns about Donna's role in inducing Ursula to execute a number of documents purporting to alter Ursula's affairs in a manner that, it is alleged, unduly favoured Donna.
- [7] On July 16, 2019, Gail obtained an order from this court, without notice, that, among other things, prohibited Donna and others from acting under any of those documents for a period of 30 days.
- [8] Gail's petition is opposed by Donna and Clinton. On December 21, 2020, Donna filed a competing application seeking to be appointed as committee of the person for Ursula and to have the Public Guardian and Trustee of British Columbia (the "PGT") appointed as committee of Ursula's estate. Both Donna and Clinton allege that Gail is, for various reasons, unfit to serve as committee. Clinton wishes to see the PGT appointed as committee of the estate.
- [9] Gail opposes Donna's application.
- [10] For the reasons that follow, I have concluded that Gail's application should be allowed on certain terms and Donna's refused.

II. The Legal Framework

[11] The applications are brought under ss. 2 and 3 of the Act. Those provisions state as follows:

2 (1) The Attorney General, a near relative of a person or other person may apply to the court for an order declaring that a person is, because of

- (a) mental infirmity arising from disease, age or otherwise, or
- (b) 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.

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.

[12] The test to be applied where, as here, more than one applicant seeks such an appointment, was conveniently summarised by Masuhara J. in *Stewart (Re)*, 2014 BCSC 2321 as follows at paras. 27-30:

[27] The application for an appointment invokes the *parens patriae* jurisdiction of the court and is governed by an assessment of who will serve the patient's best interest.

[28] Section 18 of the Act states that:

A committee must exercise the committee's powers for the benefit of the patient and the patient's family, having regard to the nature and value of the property of the patient and the circumstances and needs of the patient and the patient's family.

[29] As has been observed in other cases, the Act does not prescribe criteria for the selection of an appropriate committee. However, cases have identified various considerations; see for example: *Vranic (Re)*, 2007 BCSC 1949; *Bowman (Re)*, 2009 BCSC 523; *Palamarek (Re)*, 2011 BCSC 563; *Re Matthews*, 2013 BCSC 1045; and *Sangha (Re)*, 2013 BCSC 1965. They include:

(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.
- [30] The above listing is of course non-exhaustive or in any particular order. The inquiry is fact specific and a particular factor may or may not be applicable and may attract different weight depending on the circumstances of a case.

III. The Medical Evidence

- [13] In their respective applications, both Gail and Donna rely on the medical evidence of two physicians, Dr. John Sloan and Dr. Williard Johnston.
- [14] Dr. Sloan examined Ursula on February 26, 2019. He concluded that Ursula:
- a) suffers from significant short-term memory impairment;
 - b) with respect to her financial affairs:
 - i. lacks insight into the extent to which her memory and other impairments have interfered with her financial capability; and
 - ii. is not able to give a sufficient estimate of the extent of her assets;
 - c) with respect to her person:

- i. could contribute meaningfully to important healthcare decisions but left to her own devices she would be at risk to act in a way not consistent with her interest without independent advice;
- ii. is able to carry out some activities of daily living, such as shopping for groceries, housework, taking a shower or bath, and cooking, but is unable to carry out banking and medication management;
- iii. is able to express a consistent preference for a personal Guardian to assist in financial decision-making and healthcare decision-making, or other personal matters; and
- iv. is incapable of making or revoking an Enduring Power of Attorney;
- d) is incapable of managing her financial affairs; and
- e) is incapable of managing her person.

[15] During that assessment, Ursula "consistently identifie[d] her daughter Gail as her favoured substitute decision-maker for finances and person."

[16] Dr. Johnston examined Ursula on May 1, 2019. He concluded that Ursula:

is now, and was as of November 2018, NOT CAPABLE to manage her financial or personal affairs or the appointment of an enduring power of attorney but is capable of expressing her preference for her daughter Gail to act in her stead.

[Original emphasis.]

IV. Ursula's Property

[17] Ursula owns the following real property:

- a) 27135 33 Avenue, Aldergrove (where Ursula resides with Nicole);
- b) 27156 33 Avenue, Aldergrove (which is rented out to third parties, including Irene Norah Cawson);
- c) 2627 60 Avenue, Langley (where Donna resides with her daughter);
- d) 2821 McCrimmon Drive, Abbotsford (where Sean resides); and
- e) a life estate in 6821 272 Street, Langley (where Gail resides with two roommates).

[18] In addition, Ursula owns personal property including brokerage accounts holding investments that were said to be worth \$1,627,225.44 in 2019. She is the trustee of a family trust, the beneficiaries of which are other family members. She holds an RESP account for Sean, Trevor and Nicole that was worth \$177,364.87 as of May 31, 2019.

V. The Parties' Arguments

A. Gail's Allegations concerning Donna

- [19] Gail says that she has seen a will that Ursula executed in December 2016 with the advice of Gail's current counsel, Mr. Rosberg, and that she has more recently been unable to locate among Ursula's records. According to Gail, that will named Ursula's friend Pavil Vik as executor and Gail's son Sean as alternate. It also stipulated that the estate was to be divided equally between Barbara and Donna, but if either of them predeceased Ursula, then their share was to be distributed to their respective children. Gail says that Ursula did not see Mr. Rosberg between February 2017 and early 2019, at which time Gail became concerned about documents that Ursula had executed in the interim with the assistance of another lawyer, Calvin Patterson, who practiced at the time in Kamloops but has since retired.
- [20] Mr. Patterson's work for Ursula appears to have begun when Barbara forwarded to him a copy of a draft power of attorney and will for him to prepare for execution by Ursula. Three of Mr. Patterson's invoices for that work, rendered to Ursula on January 12, 2017, have been reproduced in evidence. They pertain to the preparation of:
- a) a power of attorney (the last step of which was the delivery of that document in draft to Ursula, Barbara and Gail on February 24, 2015);
 - b) a representation agreement (prepared between February 24, 2015 and November 15, 2016); and
 - c) a new will (prepared between August 1, 2015 and November 16, 2016).
- [21] Gail alleges that Ursula executed the following documents, prepared by Mr. Patterson, when she was no longer capable of managing her affairs:
- a) an Enduring Power of Attorney in favour of Donna, dated April 6 2017;
 - b) a will and associated "Wills Variation Statement", dated November 29, 2018; and
 - c) a Representation Agreement, dated December 1, 2018, naming Ursula's tenant, Ms. Cawson, as her representative.
- [22] Gail says that Ursula had been hospitalized in March 2017 for chest pains and was receiving morphine treatment through to at least April. Although Gail also alleges that Mr. Patterson could not have consulted properly with Ursula in the preparation of the Enduring Power of Attorney because Ursula did not travel to Kamloops during the preceding weeks and months, Mr. Patterson's accounts show that he had several in-person and telephone consultations with Ursula prior to April 6, 2017. In one of his invoices, Mr. Patterson described a telephone call with Ursula on October 2, 2016, as follows: "Telephone call from Ursula Evans regarding her annoyance with her progeny."

[23] In any event, Gail alleges that the November 29, 2018 will is problematic for a number of reasons. It appointed Mr. Vik and Ms. Cawson as joint trustees, with Donna as an alternate. After making provision for certain specific gifts (namely, her interest in the 27135 33 Avenue property to Nicole and the 27156 33 Avenue property to Trevor), the will allocated the residue of the estate among Gail and the grandchildren, in equal shares per capita, as opposed to per stirpes as formerly.

[24] The accompanying Wills Variation Statement states, in relevant part, as follows:

Whereas I, Ursula Evans, of 26267 60 Avenue, Aldergrove British Columbia, have this 29 day of November, 2018 executed a Will in which I have made a lesser provision for my daughter, GAIL NELSON, I HEREBY DECLARE THAT:

1. I have given careful thought and consideration to making an equal provision for my said daughter, however, I have decided to make a lessee provision for her for the following reasons:
 - (a) I have advanced a significant amount of money to Gail during my lifetime;
 - (b) As a result of my financial assistance to Gail, she was able to purchase the following properties
 - (c) Due to Gail's personal circumstances, she has had to dispose/sell the above noted properties to satisfy her creditors.

[25] Gail asserts that that document too is problematic for a number of reasons. Among other things, it states Ursula's current address to be 26267 60 Avenue, which is actually Donna's address and has not been Ursula's for 28 years. Gail denies that she received more gifts than Barbara from her parents. Rather, she says that her parents provided for her and Barbara "more or less equally."

[26] In addition, Gail alleges that Donna improperly induced Ursula, while she was no longer capable of managing her affairs, to effect the following transfers of property to Donna:

- a) on November 9, 2018, a transfer of title to the real property at 26267 60 Avenue, Langley, from Ursula's name alone into a joint tenancy shared by Ursula and Donna; and
- b) on or about September 28, 2018, a transfer of \$800,000 from an Odlum Brown investment account in Ursula's name alone into a newly-opened joint account shared with Donna.

[27] Gail alleges that both Donna and Barbara, while she was alive, wrote cheques for their own benefit using Ursula's checking accounts.

[28] Gail alleges that Donna is bound by a written lease signed in July 2018 to pay Ursula \$1,000 per month in rent for the property at 2627 60 Avenue but has never made those payments.

- [29] Gail alleges that on July 12, 2019, after learning of the petition, Donna, with the assistance of Ms. Cawson, took Ursula from her home, without her medication, her cane or her inhaler, to deal with outstanding property taxes at Langley Township Hall, even though those taxes had already been paid.
- [30] In her responding affidavits, Donna says that she has never seen Ursula's will and is unaware of its contents. She maintains that Ursula has always wanted Donna to have title to the 60 Avenue property.
- [31] Donna says that she contacted Mr. Patterson on January 7, 2019 with a view to protecting Ursula from misconduct by Gail and Nicole.
- [32] Donna contends that Gail presented her with the papers from Odium Brown that she signed on September 24, 2018, and that she signed them only after confirming with Ursula that that was what she wanted.
- [33] Donna acknowledges having shared a joint checking account with Barbara and Ursula for the previous three years. She says that Ursula wanted Donna's name on the account "to ensure that [Gail] would not have access to these funds." Gail responds that she was added to the account after Barbara's death at Ursula's request.
- [34] Donna acknowledges having written cheques for her own benefit using Ursula's accounts, but she says that these were loans that were all repaid after a short time.
- [35] Donna says that she and Barbara helped Ursula with her banking and personal care until Barbara was diagnosed with terminal cancer in summer 2015. Thereafter, Ms. Cawson took over Ursula's personal care and Gail took over her banking. Donna says that she continued to help Ursula with the corporate accounting until March 2018.
- [36] Donna says that she did not believe that Ursula had dementia in 2018 because that was the opinion that Donna had received from Ursula's family physician, Dr. Waiz, when he saw her in April and July 2017.

B. Donna and Clinton's Allegations concerning Gail

- [37] Donna and Clinton believe that Gail is unsuited to serve as committee. Their concerns fall into the following three categories:
- a) a history of violent and aggressive behaviour by Gail;
 - b) a history of drunkenness and violent and aggressive behaviour by Nicole; and
 - c) alleged financial irregularities in Gail's use of Ursula's checking account.

- [38] Nicole has been living in Ursula's home, rent free, since the beginning of 2019. According to Gail, she is employed full-time and pays for her own food and expenses. She also helps with Ursula's care. Gail acknowledges that Nicole has struggled in the past with alcohol abuse but she says that Nicole has more recently taken steps to manage her drinking problem and has been abstinent since the middle of 2019.
- [39] Donna says that she did not talk to Ursula very much after Christmas of 2018 because Nicole and Gail were always present in the room with Ursula and would "yell" and "insult" her whenever she called. For example, Donna says that during one conversation that took place on July 15, 2019, Gail stated that Donna was not welcome to take Ursula anywhere. I note, however, that that conversation occurred five days after the petition was filed, when tensions were already high as a result of Gail's suspicions about Donna.
- [40] Donna alleges that Gail often behaves aggressively towards Ursula and has demonstrated a capacity for violence in the past. Indeed, Donna claims to have witnessed a violent altercation between Gail and Barbara decades ago. Gail responds that it was Barbara who was the aggressor on that occasion and asserts that it is Barbara and Donna who have a history of violence. Clinton recounts an incident in 1997 during which he had to intervene to prevent Gail from striking Ursula with a chair. Gail denies the incident.
- [41] Donna says that both Sean and Trevor have come to stay with her side of the family in response to Gail's aggressive behaviour, although they have both made affidavits denying that those moves were prompted by violence or aggressive behaviour on Gail's part.
- [42] Donna also alleges that Ursula is fearful of Gail. In an attempt to bolster that allegation, Donna has adduced an affidavit from Ms. Cawson, who says that she has witnessed "aggressive behaviour" by Gail and Nicole, particularly shouting at Barbara and Ursula and telling them to "shut up." Ms. Cawson recalls being physically blocked from leaving the house by a drunken Nicole on February 21, 2018, when Ms. Cawson tried to give Ursula and Gail the name of a lawyer who could help with the preparation of Ursula's will. On that occasion, Ms. Cawson says, Ursula asked her to call the police, which she did. She recalls another incident on February 28, 2019 when Ms. Cawson brought a rent cheque to Ursula's home, only to be greeted at the door by Gail who told her to stay away because Ursula did not want her on the property. Gail responds that Ursula has known Ms. Cawson since 2009 or early 2010 but they have been in conflict since 2016. According to Gail, Ursula no longer wishes to see Ms. Cawson.
- [43] Donna has also adduced an affidavit from another friend of hers, Tanya Kolbe, who says she overheard a telephone conversation in August 2019 during which Donna was subjected to "nothing but verbal abuse" by Gail and Nicole, who prohibited Donna from speaking with Ursula. Ms. Kolbe also recounts an incident that occurred on July 12, 2019 while Ms. Kolbe was babysitting. On that occasion, she says, Gail approached her aggressively with what seemed to her to be an "irrational" belief that Ursula had been kidnapped, presumably by Donna. Ms. Kolbe says that Gail's aggressive tone made the children "nervous and scared"

and that the allegation of kidnapping was, in Ms. Kobe's view, "ridiculous."

[44] Both Donna and Clinton complain of a series of cheques totalling \$36,957.56 that Gail is alleged to have written for her own or Nicole's personal benefit on Ursula's checking account. Gail has responded with an explanation for each of those cheques, not all of which, she says, were written by her. The only outstanding item, according to Gail, is a \$9,000 cheque written on May 1, 2019 to cover Nicole's tuition and school supplies, which Gail says is to be reimbursed from the children's RESP.

C. The Position of the PGT

[45] The PGT has responded as follows with respect to the potential appointment of a committee of the person:

The [PGT] does not oppose the appointment of the petitioner as committee of person, notwithstanding the allegations concerning aggressive behaviour and a certain 'roughness' with her mother, some of which are reported to have taken place some time ago and which have been denied by [Gail] and her children. The allegations concerning [Nicole's] alcohol abuse are of concern and the [PGT] notes that the committee of person must take appropriate steps to ensure [Ursula's] continued safety in the home.

The [PGT] does not oppose the appointment of [Donna] as committee of person, but notes the effect of such an appointment would result in [Ursula's] likely removal from her present home, where she has lived for many years, resulting in considerable disruption and potential confusion to her, and the impracticality of [Ursula's] remaining in her own home with a committee of person whose relationship with her co-resident, [Nicole], appears strained.

The [PGT] recommends that, if either the petitioner or applicant are appointed committee of person, it be a term of such appointment that the committee of person keep [Ursula's] daughter and grandchildren informed of significant health and personal care decisions made on behalf of [Ursula] and facilitate meaningful and independent contact by family members with [Ursula].

Generally, the [PGT] is reluctant to act as committee of person however, in this instance, if it is determined to be in [Ursula's] best interests and will reduce family conflict, the [PGT] is prepared to be appointed committee of person, but only if the [PGT] is also appointed committee of estate. The [PGT] will not act as committee of person alone and will not act as joint committee with another person.

[Original emphasis.]

[46] The PGT's position with respect to the appointment of a committee of the estate is as follows:

Given the transfers of property into joint names at a time when [Ursula] may have lacked capacity, the [PGT] does not support [Donna] acting as financial representative for [Ursula] under the April 7, 2017 power of attorney signed by [Ursula] in favour of [Donna]. The committee of estate may be required to take steps to secure the transfer of these assets back into the sole name of [Ursula].

The [PGT] does not oppose the appointment of the petitioner as committee of estate.

Whilst the appointment of the [PGT] as committee of estate is typically a last resort measure where no person is available or appropriate to act, if the Court determines that the appointment of a family member would only lead to escalated family conflict or would otherwise not be in [Ursula's] best interests, the [PGT] is prepared to act as committee of estate.

[47] The PGT recommends that any appointment be subject to terms, in lieu of security, restricting the committee from disposing or encumbering any of the following property, other than for reinvestment purposes, without the prior written consent of the PGT or pursuant to a subsequent court order obtained on notice to the PGT:

- a) the real property on 33 Avenue and 60 Avenue (with the exception of any legal action in relation to the 60 Avenue property to secure its return into Ursula's sole name or to prevent the severance of the joint tenancy in which it is currently held);
- b) the proceeds of any sale of those properties; and
- c) Ursula's specified investment accounts.

VI. Discussion

[48] The evidence before me, particularly the affidavits of Drs. Sloan and Johnston, establishes that Ursula is currently incapable of managing her person or her affairs, and has been in that condition since at least November 2018.

[49] There is no persuasive evidence to the contrary. The statements in Donna's affidavit relaying remarks conveyed to her by Dr. Waiz as to Ursula's condition as of April and July 2017 are hearsay and, as such, not admissible to prove the truth of their contents. As I indicated to counsel during the hearing, I considered that evidence only insofar as it was tendered to explain Donna's subsequent conduct. In any event, Gail has reproduced a form subsequently completed by Dr. Waiz on March 15, 2019 in support of Ursula's claim for a disability tax credit. The form suggests that, by that time, he too was of the view that Ursula was "markedly restricted in performing the mental functions necessary for everyday life" and had been so since 2018.

[50] It follows that a committee should be appointed. What is left to be decided is who that should be. In deciding that question, it is not necessary that I resolve all of the conflicting evidence before me. There are a number of factors supporting Gail's application over Donna's that are beyond serious dispute.

- [51] First, Dr. Sloan and Dr. Johnston report that when they assessed her in 2019, Ursula was capable of expressing a preference as to who should make decisions on her behalf, and expressed a clear preference in favour of Gail. The evidence adduced by Donna and Clinton suggesting that Ursula has occasionally expressed a mistrust of Gail in the past, if indeed she made the statements attributed to her, was dated, contextual and episodic. It does not suffice to cast serious doubt on the reliability of the more recent reports from Dr. Sloan and Dr. Johnston suggesting that Gail would be Ursula's preferred choice today. There is certainly no reliable evidence before me suggesting that Ursula would want to see Donna appointed as her committee over Gail.
- [52] Second, particularly with the constraints occasioned by the current pandemic, it would be impossible for Donna to be appointed as committee of the person without forcing Ursula to move out of the home where she has been residing for many years. Donna has simply not presented a comprehensive and viable care plan, as has Gail.
- [53] Third, it is not seriously contested that for the last several years Gail, with Nicole's help, has been primarily responsible for Ursula's care. Although I accept that Nicole's susceptibility to alcohol abuse must continue to be monitored closely, I am satisfied that reasonable efforts have been made to address the problem.
- [54] Finally, I am not persuaded that this is a case that justifies the appointment of the PGT as committee rather than a family member. Although I recognise that there remain unresolved questions concerning how Ursula's assets and income have been handled by both Gail and Donna, I have concluded that those concern can be adequately addressed with the terms suggested by the PGT in paras. 45-47 of its response to the petition, which terms Gail has indicated she is prepared to follow.
- [55] I am therefore appointing Gail on those terms, subject also to the requirement that she keep each of Ursula's grandchildren informed of significant health and personal care decisions made on her behalf and that she facilitate meaningful and independent contact by other family members with her.

VII. Summary and Conclusion

- [56] Gail's application is allowed on the terms set out above.
- [57] Donna's application is refused.
- [58] Gail is entitled to her costs, to be paid from the estate.

"Milman J."

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