

CANADA / JUDGMENT

Fung (Re)

2023 BCSC 1036

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Supreme Court of British Columbia

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2023 BCSC 1036 Fung (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fung (Re),

2023 BCSC 1036

Date: 20230616

Docket: S226230

Registry: Vancouver

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

and amendments thereto

Re: Chee Ping Fung

Before: The Honourable Justice Kirchner

Reasons for Judgment

Counsel for the Petitioner, Rudolf You Sang Li:

E.B. Clavier

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Counsel for the Petition Respondents, Rosana Chun Ha You and Harriet Mei-Har Li:

S. You

No other appearances:

Place and Dates of Hearing:

Vancouver, B.C.

April 26-27

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Place and Date of Judgment:

Vancouver, B.C.

June 16, 2023

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I. Introduction

- [1] There are two competing applications before the court under the Patients Property Act, R.S.B.C. 1996, c. 349. Each seeks the appointment of a committee for the person and estate of Chee Ping Fung. The applications are brought by Ms. Fung's four children who agree that Ms. Fung is incapable of managing herself and her affairs but disagree on who should be appointed her committee.
- [2] In one camp are two of Ms. Fung's daughters, Rosana Chun Ha Yiu ("Rosana") and Harriet Mei-Har Li ("Harriet"), who seek to have themselves appointed as joint committees. In the other camp is Rudolf Yiu Sang Li ("Rudolf"), Ms. Fung's son whose application to have himself appointed committee is supported by his sister, Lar Har Glendy Li ("Glendy"). Glendy does not wish to be a committee because she feels intimidated by Rosana, her older sister. She feels that Rudolf is best positioned to manage influences from Rosana and Harriet and therefore supports Rudolf as committee.
- [3] Since three of the four children share a same last name, I will refer to them by the first (English) names to avoid confusion and I intend no disrespect in doing so.
- [4] Ms. Fung is 91-years-old and has been living with dementia, likely connected to Alzheimer's, since a diagnosis in 2017. As to be expected with dementia, her condition has worsened over the years and her care needs are growing.
- [5] At the heart of the dispute is whether Ms. Fung's best interests lie in her continuing to live in a senior's care home where she receives 24-hour care and supervision, which is Rudolf's and Glendy's view, or whether she should be living in her own home where Harriet proposes to care for her, as Harriet and Rosana propose.
- [6] Rudolf raises a number of other points as to why he suggests Harriet and Rosana are not suitable committees. I will address each of those in the course of these reasons but the real issue in this dispute is where Ms. Fung should live out the rest of her life and how she will best be cared for as her dementia worsens.
- [7] The Public Guardian and Trustee ("PGT") filed a response to the Petition but takes no position on who amongst the contenders should be named as committee. The PGT is willing to act as committee if the court finds neither of the contending applicants suitable, although the PGT suggests this should be a last resort. I find it is not necessary to appoint the PGT as committee.

- [8] The PGT also proposes some additional terms to the orders sought by both parties relating to posting a bond or other security. The PGT also recommends certain restrictions in the order on disposing or encumbering Ms. Fung's real property. Both groups of siblings agree that the PGT's suggested additions are appropriate and should be added to their proposed forms of order.
- [9] In addition, during oral submissions, I requested that the parties make proposals for the committee to consult with and keep the other siblings informed about matters respecting Ms. Fung and her estate. Counsel have agreed on terms to this effect to be included in an order.

II. Incapacity

- [10] I will deal quickly with the issue of incapacity. I have read the affidavit of Dr. John Sloan, the two affidavits of Dr. Willard Johnston, and the affidavit of Dr. Henry Ngai, all of whom have examined Ms. Fung. Dr. Johnston examined her on two occasions and Dr. Ngai is her family doctor. All three doctors conclude that Ms. Fung is incapable of performing simple financial calculations, that she is not aware of the state of her own finances, she cannot do her own banking or her own shopping, she is not able to make informed health care decisions for herself, and she is not able to carry out other tasks of daily living. They each opine that she is, by reason of mental infirmity due to Alzheimer's, incapable of managing herself and her affairs. I accept their evidence.
- [11] Pursuant to s. 4 of the Patients Property Act, I find Ms. Fung is no longer capable of managing herself or her affairs and I make that declaration as sought by both groups of siblings.
- [12] The only question, then, is who should be appointed committee for Ms. Fung's person and estate.

III. Background

- [13] Ms. Fung immigrated to Canada from Hong Kong in 1984 with her husband, the applicants' father, Fook Li. In 1987 she and Mr. Li bought a house on McLeod Court in Richmond, B.C. where they lived for the rest of Mr. Li's life. As I discuss below, in July 2022, Rudolf and Glendy moved Ms. Fung out of the McLeod Court home and into a care home. However, she still owns the McLeod Court home and Harriet is presently living there.
- [14] Harriet lived with her parents for most her life both before and after they came to Canada. She immigrated two years before Ms. Fung and Mr. Li but lived with them in Canada from the time they arrived until 1994 when she married and moved out. Harriet's marriage lasted only four years and after its breakdown she moved back in with her parents in 1998 and has lived there ever since. She says the fact she has lived with her parents for most of her life makes her well-suited to be a committee and caregiver for Ms. Fung.

- [15] In 2014, Mr. Li was diagnosed with dementia. Three years later, in 2017, Ms. Fung also began to show signs of cognitive decline. Dr. Ngai, Ms. Fung's family doctor, described the onset of Ms. Fung's dementia in a medical file note dated July 31, 2022:

Dementia. Cognitive decline started dating back to 2017 also. At the time she had become more forgetful, paranoia and blaming others for misplaced items. She had trouble driving safely on the road and her license was taken away from her and car sold. She did not take her medications regularly and she was not eating the proper food. She had her first geriatric assessment back in 2019 by Dr. Anastasia Forbes. She was still managing a lot of things on her own but her family has some internal conflict among themselves regarding care, placement and finance competency.

- [16] With Mr. Li's diagnosis and Ms. Fung's signs of cognitive decline, the four siblings took some concerted action to communicate with each other and watch over their parents. On August 12, 2019, Rosana, Glendy, and Harriet took Ms. Fung and Mr. Li to meet with a lawyer, Peter Li, to discuss powers of attorney and wills. On September 9, 2019 Ms. Fung and Mr. Li each signed enduring powers of attorney and representation agreements at Peter Li's office. On September 24, 2019 they signed mirror wills.

- [17] The powers of attorney named all four siblings as attorneys with a power to act by majority. Thus, consent of three of the four siblings was needed for any exercise of the power of attorney. Both representation agreements named Glendy, who is a retired nurse, as the representative to make health care decisions for each of Ms. Fung and Mr. Li. Harriet was named as the alternate representative with Rosana as the second alternate and Rudolf as the third. The will appointed Harriet as executor with Rosana as the alternate executor and Rudolf and Glendy as the second and third alternates.

- [18] On December 13, 2021, Mr. Li had a fall in the McLeod Court home. Two days later Glendy went to check on him and found he was slurring his speech and appeared confused. She called an ambulance which took him to Richmond Hospital. Three days later, on December 16, he was diagnosed with a lung infection and treated in the hospital. He was released on December 31 but died at home on January 16, 2022.

- [19] Following Mr. Li's death, the two camps of siblings fought over matters including Mr. Li's estate, Ms. Fung's bank accounts, and Ms. Fung's care. At one point in February 2022, an argument amongst the four siblings at the McLeod Court home became sufficiently heated that Rosana's daughter Selina called the police. They attended and directed Rudolf and Glendy to leave the house. Rosana had already left and was watching the events from her car with Selina. Harriet, who lived in the house, stayed. By all accounts, this event was very distressing to Ms. Fung who was present at the home during the argument.

- [20] In the weeks and months that followed, tensions between the two camps continued and Glendy and Rudolf became more concerned about Ms. Fung's health and her living conditions at home. Glendy states that on at least one occasion Harriet had left Ms. Fung alone at home without warm food. She was concerned that Harriet was not looking after Ms. Fung's hygiene and had not been properly attending to Ms. Fung's medication. Harriet and Rosana deny this.
- [21] On July 28, 2022, Glendy and Rudolf moved Ms. Fung to Hamilton High Street Residence, a senior's care home in Richmond. Glendy used her authority under Ms. Fung's representation agreement to have her admitted as a resident. They did this without notice to Harriet and Rosana, knowing neither would agree to the move.
- [22] Prior to the move, Rudolf's wife, Lowena Li, researched different care homes and gathered information on 10 or so facilities. Glendy, Rudolf and Lowena determined that Hamilton was the best option for a number of reasons, including its proximity to all four siblings, the fact most of its staff and residents speak Cantonese, it offered a daily Chinese food menu, it is a new facility with many units that had never been occupied, and it has multiple levels of care services.
- [23] Before finalizing the decision to move Ms. Fung to Hamilton, Lowena, Glendy and Rudolf took Ms. Fung there for a tour. Lowena states that Ms. Fung appeared to like the place very much, commenting that it looked like a luxurious hotel. During the tour, Ms. Fung selected a unit for herself in an assisted living floor. They took her for a second visit on July 14, 2022 when Ms. Fung was apparently assessed and approved for assisted living. They moved her in a week later.
- [24] Glendy or Rudolf was with Ms. Fung for the first four nights of her stay at Hamilton. During this time, they came to believe that Ms. Fung's dementia was sufficiently advanced that she likely required a more intensive level of care than assisted living could offer. Following discussions and further assessment by staff and a nurse practitioner, Ms. Fung was approved for placement in a full care "Transition Unit". (This has also been referred to as the Extended Memory Care Unit but I prefer to call it the Transition Unit to distinguish it from another unit called the Memory Care Unit.) There, Ms. Fung's movements are supervised and she receives more focused care.
- [25] Rudolf, supported by Glendy, argues that since moving into Hamilton, Ms. Fung is eating well and her weight has increased to a healthier state. She had her hair cut and her nails done. She socializes with other residents and can share her mealtimes with them in the dining room. She also engages in activities, along with other residents, offered by the facility.

[26] Harriet and Rosana dispute this evidence take issue the move to Hamilton and especially the move into the Transition Unit. Their evidence suggests Ms. Fung's ability to freely interact with other residents and share meals with them in the main dining room is significantly restricted by living in the Transition Unit.

[27] I will attempt to resolve these apparent conflicts on the evidence later in these reasons.

IV. Assets

[28] Ms. Fung is in a strong financial position. She has a very modest income of \$1,262 a month, comprised mostly of income from a rental property she owns on Garden City Road in Richmond. However, between that property and the McLeod Court home, she holds real property that is valued at over \$2.4 million. She has personal property valued at more than \$4.3 million including bank accounts that exceed \$3 million. Her approximate monthly expenses are \$12,000 or \$13,000 which includes \$10,000 for the cost of living at Hamilton. As the cost would suggest, Hamilton is a higher end care facility for seniors but Ms. Fung is financially well-positioned to live there.

V. Issues

[29] The only contentious issue is which of the two applicants should be appointed Ms. Fung's committee. This question, though, is laden with many difficult issues respecting who is best positioned to manage Ms. Fung's affairs and whether Ms. Fung's best interests lie in remaining in Hamilton or returning to her home.

[30] Apart from the most significant question of where Ms. Fung should live, Rudolf, supported by Glendy, makes a several discrete points as to why he says Harriet and Rosana are not suitable committees of either Ms. Fung's estate or person. These include that Harriet is in a conflict of interest because of the sale of a property that was in her and Ms. Fung's names as tenants in common, her involvement in some of Ms. Fung's financial affairs which Harriet did not disclose to the other siblings, and because Harriet lives rent free in Ms. Fung's McLeod Court home. Rudolf also says that Harriet and Rosana have effectively blocked the exercise of the parents' powers of attorney, at least in respect of accounts at CIBC, by failing to attend the bank to sign necessary documents to give the siblings, as attorneys, access to the accounts. I will address each of these in a moment.

[31] However, the real issue, as I have said, is whether Ms. Fung should be living in Hamilton, as Rudolf and Glendy argue, or whether she should live out her days in her own home as Harriet and Rosana suggest. A finding that her best interests lie in living in Hamilton will favour Rudolf's application to be committee whereas a finding that she ought to live at home under Harriet's care favours Harriet and Rosana's application. I will address that after dealing with the discrete issues raised by Rudolf.

VI. Discrete Points Respecting Suitability

A. The Williams Road Property

- [32] Rudolf argues Harriet must be disqualified as a committee of Ms. Fung's estate if not her person because Ms. Fung was a registered co-owner with Harriet of a house on Williams Road in Richmond that Harriet claims as her own. This house was sold in 2022 and all the proceeds of sale went to Harriet. Rudolf argues the matter must be investigated to determine if Ms. Fung has any entitlement to those proceeds. He says the need for an investigation places Harriet in a disqualifying conflict of interest.
- [33] Harriet and Rosana argue the house has always belonged to Harriet and the whole family recognized this. They say Ms. Fung held a one-half interest in trust for Harriet and this was done in an effort to protect the property from a potential family law claim by Harriet's now ex-husband. They say it is only after these court proceedings started that Rudolf began to question the ownership of the property.
- [34] The Williams Road property was purchased on September 10, 1991. Harriet and her then boyfriend (later husband) signed a contract of purchase and sale for the property but ran into financial problems and were unable to back out of the deal. Harriet says that Mr. Li came to their rescue by giving her \$220,000 to complete the purchase.
- [35] However, Mr. Li and Ms. Fung were not confident in Harriet's marriage. Thus, in providing her the \$220,000 they insisted that the property be registered jointly in Harriet's and Ms. Fung's names as tenants in common to protect the property from a claim by Harriet's husband should the marriage fail.
- [36] Rudolf questions whether this was the true purpose of the ownership structure. He argues it would not have been effective to shield the property from a family law claim. Counsel for Harriet and Rosana concede that it probably would not have provided the intended protection but notes there is no evidence the parties had legal advice on structuring the ownership to achieve that purpose. Thus, the fact the ownership structure may have been ineffective to protect the home from a family law claim is not a basis to reject Harriet's explanation.
- [37] Harriet and Rosana argue the facts relating to the purchase and use of the Williams Road home establish that it was Harriet's home and all the family members knew that.
- [38] First, she points out that the other three siblings each received \$220,000 from the parents around the same time she did. Technically, these were loans and Harriet repaid a large portion of the \$220,000 but eventually her parents said she could stop making payments, as the other siblings were said to have done. Harriet says by that point she had repaid a total of \$170,000.
- [39] Rosana and Glendy each confirmed they received \$220,000 from the parents in 1991. Rosana says she repaid \$500 per month until 2018 when her parents told her she could stop.

- [40] Rudolf's situation was somewhat different. He received \$140,000 from Mr. Li and Ms. Fung in 1989 and says he started to pay that back with interest at 7%. However, in 1997 his parents told him he could just start paying \$500 per month as his siblings were doing. At the same time, the parents gifted him another \$80,000, bringing the total amount to \$220,000, the same amount they provided to the other siblings. Rudolf says between 1989 and 2017 he repaid his parents a total of \$200,000.
- [41] Harriet and Rosana argue the fact each sibling received \$220,000 from their parents with some obligation to repay it for a time supports the suggestion that the Williams Road home, which Harriet bought with her \$220,000, belongs to her. I agree these facts tend to support Harriet's position.
- [42] Second Harriet points to the fact that Ms. Fung never claimed the rents from the Williams Road property as her own income, even before her dementia diagnosis. After Harriet divorced in 1998, she moved back with her parents at the McLeod Court home and rented out the Williams Road property. She claimed all the rents from that property as income on her tax return. Ms. Fung claimed none of them. I agree with Harriet that this suggests that Ms. Fung recognized that Harriet was the beneficial owner of Ms. Fung's half interest and did not claim any entitlement to the rents from the property.
- [43] Next Harriet says that in 2019 she and her parents discussed removing Ms. Fung's name from the title but they received legal advice that doing so would trigger property transfer tax. Instead, Ms. Fung executed a trust declaration confirming that since 1991 she had held her interest in the property in trust for Harriet. She also granted Harriet a power of attorney for decisions specifically respecting the Williams Road property. Harriet says this is clear evidence that Ms. Fung recognized that the Williams Road property belonged to Harriet.
- [44] Rudolf argues that Ms. Fung's understanding of the trust declaration and power of attorney is questionable because she signed them on July 9, 2019, two years after her dementia diagnosis. However, two months after this, Ms. Fung signed the enduring power of attorney and the representation agreement discussed earlier and three months later she signed her will. No one disputes her capacity to have signed those documents. In fact, Rudolf relies heavily on the validity of those documents in this proceeding and he and Glendy used the representation agreement to have Ms. Fung admitted to Hamilton. If Ms. Fung had capacity to sign those documents in the fall of 2019 she must have had capacity to sign the trust declaration and power of attorney for Williams Road property two months earlier. Again, I agree with Harriet that this tends to support her position that the Williams Road property belonged to her.
- [45] On May 3, 2022, Harriet sold the Williams Road property to a numbered company for \$1,561,540. Harriet signed the transfer documents on Ms. Fung's behalf using the July 9, 2019 power of attorney. Rudolf argues this is significant because this was done after Ms. Fung had signed the September 2019 enduring power of attorney which requires a majority of the four children to act together. He says Harriet ought to have disclosed the Williams

Road transaction and the Williams Road power of attorney to her siblings. Harriet says it makes sense for her to have used the power of attorney that was specific to the Williams Road property because the property is hers and that power of attorney was prepared for the very purpose of allowing Harriet to deal with her own property. Given the totality of the evidence respecting the Williams Road property, I find this argument persuasive.

- [46] Harriet asserts that Rudolf has always known that the Williams Road property belonged to her and suggests he is only now making this an issue to support his opposition to Harriet and Rosana being named committees. She and Rosana point to a February 2022 request that Rudolf made of the Public Guardian to investigate Ms. Fung's circumstances and Harriet's care of her. In that form, Rudolf listed Ms. Fung's real property but did not list the Williams Road property even though it had not yet sold. In a November 2020 email to the Public Guardian, Rudolf stated that Harriet had "rented out her own house" (emphasis added) and moved in with Ms. Fung and Mr. Li. Harriet argues this is evidence that Rudolf has always known and recognized that the Williams Road property belongs to Harriet. Again, I agree this evidence tends to support Harriet's position.
- [47] Harriet and Rosana also point to a 2019 WhatsApp message sent amongst the siblings. In 2018, following Ms. Fung's dementia diagnosis, Selina (Rosana's daughter) set up a WhatsApp chat group for the siblings to communicate about their parents' condition and needs. In a 2019 message, Rosana mentioned a meeting that Harriet and Ms. Fung had the previous month with a lawyer to discuss "having the name changed with her [Harriet's] rental house". Neither Rudolf nor Glendy raised any concern about this meeting at the time of the WhatsApp message or after. Again, I agree this supports Harriet's position on the Williams Road property.
- [48] Rudolf argues the transactions and dealings with the Williams Road property are sufficiently murky that they must at least be investigated by Ms. Fung's committee to determine whether Ms. Fung has any interest or a claim in respect of the property and now its proceeds of sale. He says the need for an investigation puts Harriet in a conflict of interest that disqualifies her from being named committee, at least of Ms. Fung's estate if not her person.
- [49] There is some merit in Rudolf's position but the significance of this point should not be overstated when considering what is in Ms. Fung's best interest. As I have just described, Harriet's explanation about the ownership of the property is supported on the facts advanced in this proceeding. In my view, Harriet's explanation of the Williams Road property transaction is reasonable and consistent with uncontested facts.
- [50] I agree with Rudolf that an arm's length committee acting in Ms. Fung's best interests would likely want to conduct some investigation to verify the facts and satisfy themselves that Harriet was the true owner of the property. It may also be that insofar as the transaction was designed (perhaps poorly) to shield the property from a family law claim, Harriet cannot have it "both ways" and say on the one hand Ms. Fung owns half the property when it come to a claim by her ex-husband but Harriet owns the property in all other circumstances: V.J.F.

v. S.K.W. 2016 BCCA 186 at para. 52.

- [51] However, I am not dealing with such a claim either by the ex-husband or Ms. Fung. I am determining who, as committee, will best serve Ms. Fung's interests. The evidence is compelling that Ms. Fung had no intention of claiming an entitlement to the Williams Road property as against Harriet, even if she might have had the ability to do so at law. In my view, this arrangement, made within the family, should not disqualify Harriet from acting as committee if I were to find that she is best suited to serve in that role.

B. Conflict Based on Harriet Living in the McLeod Court Home

- [52] Rudolf next argues that Harriet is in a conflict of interest because she is living rent-free in Ms. Fung's McLeod Court home. He says a committee's duty is to maximize the value of the patent's assets and Harriet cannot do this by living in Ms. Fung's home without paying market rent.
- [53] If I find that Rosana and Harriet should be committees of Ms. Fung's person, it will follow that Ms. Fung will likely move back to the McLeod Court home and Harriet will continue living there to care for her. In that case, Harriet living in the home providing care to Ms. Fung in exchange for rent would likely remove this as an issue. It is only if matters reached a point where Ms. Fung might have to be moved back into care - a possibility Harriet acknowledges in one of her affidavits - that this could become an issue. However, since the central issue now before the Court is whether Ms. Fung's best interests are to remain a care facility or return to the McLeod Court home, I do not consider this to be a significant issue in deciding who should be committee.

C. Failure to Act on the Power of Attorney

- [54] Next Rudolf argues that Harriet and Rosana have not been diligent in managing Ms. Fung's affairs pursuant to the powers of attorney Ms. Fung and Mr. Li signed in September 2019. After the powers of attorney were signed, Rudolf and Glendy arranged for the siblings to access Mr. Li's and Ms. Fung's bank accounts at CIBC. However, Harriet and Rosana did not attend at the bank to sign the documents needed to activate the siblings' access. Rudolf says he reminded Rosana about this in February 2021 and in March 2021 he pointed out to all the siblings through the group chat that this task was still outstanding. Rosana and Harriet did not respond.
- [55] Rudolf argues this shows a lack of diligence on their part that is not in keeping with the duties of a committee. The powers of attorney were put in place for the very reason that both Mr. Li and Ms. Fung were suffering from dementia and should have help from the siblings in managing their finances. Rudolf argues Harriet and Rosana's inaction on this point undermined that important objective.

- [56] Harriet and Rosana say they were not asked to attend at CIBC and were not aware of the issue. They also say, however, that they were reluctant to exercise the authority under the powers of attorney because they questioned whether Mr. Li and Ms. Fung were truly comfortable with that arrangement. Harriett deposes that Mr. Li managed his and Ms. Fung's financial affairs until close to his passing. She says he was "fairly sharp with numbers and financial matters" until his death despite his dementia, although he lost motivation to manage finances in his later years. Harriet and Rosana point to references in Mr. Li's medical records in 2017 and 2018 stating that Mr. Li's dementia at that stage was mild and early. They say he was financially astute and did not like sharing his financial circumstances with his children. They say he also kept changing his mind as to who should be attorneys under a power of attorney so Harriet and Rosana were concerned about whether the power of attorney truly represented his wishes. For these reasons, they have been reluctant to use it.
- [57] I find that Rudolf's concern has merit. By 2019, Mr. Li's dementia had progressed significantly and there were real concerns about his ability to manage his own finances. Ms. Fung had also been diagnosed and her condition was starting to deteriorate. It is evident that by 2019 Mr. Li's and Ms. Fung's best interests lay in having trusted people assist them in the management of their financial affairs. The fact that the powers of attorney required at least three of the four siblings to act together gave considerable protection to Ms. Fung and Mr. Li. Harriet and Rosana's reluctance to act in that situation out of an apprehension that doing so was against the parents' wishes suggests a tendency to defer to the parents' direction when some other course of action is in their best interests.
- [58] This is not just an issue with the CIBC account. It raises a broader question of the extent to which Harriet and Rosana are able to resist Ms. Fung's apparent wishes or direction when her better judgment is clouded by dementia. As will be seen, this concern has been raised in other contexts.
- [59] In my view, the factor favours Rudolf's application over Harriet and Rosana's.

D. TD Bank Accounts

- [60] The next issue Rudolf raises concerns Ms. Fung's TD Bank account. In October 2021, Harriet took her parents to the TD Bank to have her and Selina's names added to Mr. Li's and Ms. Fung's account as joint account holders. Harriet states this was done at Mr. Li's and Ms. Fung's request so that Harriet and Selina could buy groceries and pay household expenses for Mr. Li and Ms. Fung. I accept this was done at the parents' request.
- [61] Nevertheless, that by this time, Mr. Li and Ms. Fung had signed the powers of attorney appointing the four siblings as attorneys with the power to act by majority. Rudolf argues these were the vehicles through which the parents' expenses should have been paid. At a minimum, though, he says Harriet ought to have informed the other siblings about becoming a joint account holder on the TD Bank account. He says this indicates her

unsuitability to be a committee due to the need for strict adherence to proper financial management.

- [62] I agree with Rudolf this is a concern. I make no finding that Harriet has misappropriated funds or misused the access she was given to this account. The evidence on this application does not permit that scrutiny. Rudolf does not suggest in this proceeding that there has been any misappropriation of money from the account or improper spending but he correctly points out that this cannot be known. For him, the issue is that Harriet was not transparent about the TD Bank accounts with her siblings who are also co-attorneys. I agree.
- [63] It may make perfect sense for Harriet and Selina have their names added to the account for the convenience of making day-to-day purchases of groceries and daily needs of the parents. However, Harriet ought to have been more forthcoming about this arrangement to the siblings. A more transparent option, and one that would benefit from the protections offered by the terms of powers of attorney, would have been for the siblings to use the power of attorney to set aside a fund that Harriet could draw upon for the parents' day-to-day needs.
- [64] To the extent Harriet was simply following the direction of Mr. Li and Ms. Fung, I find this is another example of her doing so when better judgment called for a different approach.

E. Funeral Expenses

- [65] In January 2022, Harriet arranged for Ms. Fung to sign various cheques on a CIBC account for large amounts of money. The CIBC statement for January 2022 shows a cash withdrawal of \$5,000 and a cheque dated January 20, 2022 for \$60,000.
- [66] Harriet explained that this was done to pay the funeral costs for Mr. Li. She also said that Ms. Fung liked to have cash on hand which she kept in various places in the house. Again, without suggesting money was misappropriated or improperly used, I agree with Rudolf that this shows an unwillingness on Harriet's part to follow an established arrangement for managing Ms. Fung's accounts (the power of attorney) and to abide by its protections (acting by a majority of the siblings). As with accessing the TD account for household expenses, Harriet's use of this money to pay for funeral expenses may be perfectly innocent but it fosters mistrust amongst the siblings and tends to undermine Harriet's suitability to be a committee.

VII. Residence for Ms. Fung

- [67] I now turn to the central issue of whether Ms. Fung should remain living in Hamilton or whether she should return to her home and live under Harriet's care. Given the strong views of the competing applicants on this matter, it has considerable bearing on who is best suited to be appointed committee.

A. The Parties' Positions

- [68] Harriet and Rosana argue that Ms. Fung has expressed a clear wish to live in her home. They say that at 91, she may not have much time left and she should live out the rest of her days at home close to her daughters where she is most comfortable. They argue this accords with her specific wish as expressed to both Dr. Ngai and Dr. Johnston whose evidence I will discuss in a moment.
- [69] Rosana and Harriet argue that Ms. Fung was inappropriately placed in a "secure" unit in Hamilton (the Transition Unit) without evidence that this is medically necessary. One of the features of this unit is that residents in cognitive decline are monitored so they do not walk off on their own. As discussed below, Dr. Ngai opines that Ms. Fung is not at risk of doing this.
- [70] Rudolf, supported by Glendy, argues that it is in Ms. Fung's best interests to continue living in Hamilton where she will receive professional care 24 hours a day, all of her meals prepared (but still free to go out for meals with one or more of the siblings), and access to activities and her contemporaries to keep her engaged and active. They argue she is doing well in Hamilton, that she is socializing with other residents, and participating in activities. They say her health has improved since she moved in. They point out that Hamilton is a new and modern facility. It is expensive - an indication, they say, of its quality - but Ms. Fung can readily afford it.
- [71] Rudolf and Glendy acknowledge Ms. Fung has expressed a strong desire to live at home but they also point to the medical observations that she is not fully aware of her condition or, for that matter, where she is. They say despite her expressed wish, it is not in her best interests to live at home where her care is uncertain at best. They say this is a case where Ms. Fung's personal autonomy must give way to what is best for her. They say Rosana and Harriet will not make that difficult decision for Ms. Fung because they are unable to press back against Ms. Fung when she expresses a wish for something that is not in her best interests.
- [72] Rudolf also argues that Harriet has shown herself to be ill-suited to looking after Ms. Fung in the McLeod Court home based on events both before and after Mr. Li died. He points to several incidents that he suggests are cause for concern:
- a) In August 2020, Rosana and Harriet are said to have given Mr. Li "unknown white pills to increase his appetite" and calcium pills without a prescription.
 - b) In November 2020, when Harriet was living in the home and caring for Mr. Li and Ms. Fung, there was a three-day period with no heat in the house. Harriet did not hire someone to repair the furnace, apparently because Mr. Li's regular handyman was out of town. After Glendy learned of the situation from Ms. Fung, she called a gas fitter to do an emergency repair. Harriet says her parents were not in danger because she had put space heaters in the parents' bedroom. It was Glendy, though, who finally had the furnace fixed.

- c) On December 13, 2021, Mr. Li fell in the house and hurt his back. He was unable to get out of bed. Glendy learned of this two days later in a phone call from Ms. Fung. Apparently Harriet was aware of the incident. Glendy went to the house and saw that Mr. Li appeared confused and was slurring his speech. She called for an ambulance and Mr. Li was taken to Richmond General Hospital where he was diagnosed with a lung infection the following day. He remained in the hospital until December 31, 2021. Rudolf says Harriet neglected to attend to Mr. Li's medical need in those two days and it took Glendy's intervention to get him the help he needed.
 - d) On January 11, 2022 Glendy learned that since Mr. Li had returned home from the hospital 10 days earlier, he had been sleeping on the couch. She went over to the house to help him to his bedroom. Again, Rudolf argues it was Glendy's intervention, and not Harriet's care, that got Mr. Li back in bed.
 - e) Following this incident, on January 13 and 15, 2022, Glendy messaged the siblings to suggest they get nursing care for Mr. Li. She said Harriet had told her over the phone that Mr. Li had not eaten or had water for two days and would not get out of bed. She said Harriet and Rosana did not respond to the suggestion of nursing care. Rudolf argues this shows Harriet's concern for the situation was inadequate.
 - f) Rudolf and Glendy say that Harriet generally provides inadequate attention to whether Ms. Fung is taking her medication. Harriet says starting in 2018 or 2019 her parents' medication was provided in blister packs and she administered it to them daily. However, Rudolf points to a February 2023 note in Ms. Fung's medical file where Dr. Ngai states that Harriet would prepare Ms. Fung's medication for her and leave it for her to take. Harriet apparently reported to Dr. Ngai that Ms. Fung is "pretty compliant" with taking the medication. Rudolf argues that "pretty compliant" is not reassuring and is not in keeping with the level of care and attention that Ms. Fung now requires.
- [73] Harriet and Rosana argue that the time before Mr. Li died is not a good indication of Harriet's ability to care for Ms. Fung. They say Harriet then had two people to look after but now there is just Ms. Fung. Harriet has also now retired and has no other demands on her time. She can dedicate herself to looking after Ms. Fung. They also point to the fact that some modifications have been made to the house, including a chair lift to carry Ms. Fung up the stairs, a shower chair, and other accommodations.
- [74] I will return to the issue of Ms. Fung's in-home care in a moment but I agree that the incidents just outlined, though somewhat isolated, are at least concerning as to the level of care Harriet is capable of providing to Ms. Fung.

B. The Medical Evidence

- [75] On the issue of where Ms. Fung should reside, I find the medical evidence is particularly important. The opinions of Dr. Henry Ngai and Dr. Willard Johnston are informative on this issue.
1. Dr. Henry Ngai
- [76] Dr. Ngai was Ms. Fung's family doctor starting in March 1993. From 2001 to 2022 Ms. Fung's care was transferred to Dr. Ngai's associate, Dr. Anita Cheung but she retired in 2022 and Dr. Ngai resumed Ms. Fung's care. Dr. Ngai saw Ms. Fung on June 22, 2022, about a month before she moved into Hamilton. He saw her again in Hamilton on January 8, 2023 and March 5, 2023. He also spoke with some of the staff at Hamilton on these two occasions.
- [77] In an affidavit made March 23, 2023, Dr. Ngai opined that Ms. Fung is not capable of managing her financial affairs but she is capable of managing her person to a certain degree although not completely on her own. He says she can manage her personal hygiene and other activities of daily living with minimal prompting and minimal assistance. He states she is "quite independent with her self-care" and requires minimal help in getting herself dressed and cleaned up morning. He states "Mrs. Fung has capacity and [is] able to decide where she should be living." He says she has expressed her opinion with certainty that she wants to be back in her home where she can go out for dim sum, order the meals she would like, and watch Chinese television. He says she does not like Hamilton because it is inconvenient for her daughters to come and take her out. He said she does not like the food at Hamilton and prefers the food she was having while living at home.
- [78] Dr. Ngai states that Ms. Fung has limited ability to make informed health decisions, has difficulty understanding the need and nature of any proposed medical procedures, and lacks knowledge of her own medical condition. However, he believes she has some ability to understand the risk and benefit of medical treatments and can still clearly communicate her wishes. Her dementia has not completely overtaken her ability to analyse a situation.
- [79] Dr. Ngai states that Ms. Fung has "a moderate degree of dementia and her ability to manage her personal affairs is unlikely to improve." He says her mental capacity has deteriorated over time but she still has capacity to communicate her wishes with clarity and adequate reasoning.
- [80] In something of a contradiction, Dr. Ngai states that Ms. Fung "knew where she was" and "where she wanted to be" yet earlier in his affidavit he said she thought she was in the United Kingdom.
- [81] Dr. Ngai suggests that Ms. Fung does not pose any "flight risk" from Hamilton and there is no suggestion that she might attempt to leave the facility on her own. He suggests there is no medical evidence to "support the necessity of Mrs. Fung being placed in a locked secure unit."

[82] Dr. Ngai concludes his affidavit stating this:

In my opinion, it is in the best interest of Ms. Fung to comply with her wishes, provided her request is safe, reasonable and logical. It would be in her best interest to be able to stay in a place where she desires as long as it is safe, caring and close to her own family and respect her need for autonomy, preserve her dignity and sense of personhood as well as acknowledge whatever is left of her ability of self-determination.

[Emphasis added.]

[83] As I will discuss in a moment, the underlined passages are significant qualifications on Dr. Ngai's opinion, particularly since he has not assessed whether it is safe for Ms. Fung to live in the McLeod Court home.

2. Dr. Willard Johnston

[84] Dr. Johnston is a physician who examined Ms. Fung on June 28, 2022 and again on January 10, 2023. In his second affidavit, he opines on the suggestion that Ms. Fung wishes to return to the McLeod Court home. He also comments on Dr. Ngai's opinion.

[85] During his second assessment done at Hamilton, Dr. Johnston noted that Ms. Fung did not know the date, did not know the season, and did not know the kind of building she was in. Nor did she know what city she was in. She thought the year was "19 something". When Dr. Johnston asked Ms. Fung why she was taking medication, she responded "I do not know. I am not taking any medication".

[86] Dr. Johnston states that Ms. Fung continues to be suffering from dementia, probably of the Alzheimer's type. This type of dementia, he says, is progressive and irreversible.

[87] Dr. Johnston noted that Hamilton appears to be normal residence for seniors with usual resources for care of the cognitively disabled. He said that when Ms. Fung was directly questioned about it, she clearly stated she wants to leave Hamilton and return to her own home. He suggests this preference was expressed in the context of her having no insight into her previous living conditions at home or her capability to manage her own affairs. He suggests her preferences should be interpreted in light of his own previous opinion that decisions in Ms. Fung's best interest should be placed in the hands of a capable decision-maker.

[88] Dr. Johnston agrees with Dr. Ngai that Ms. Fung is capable of managing her person to a certain degree but not completely on her own. However, he says there are further relevant aspects that Dr. Ngai does not consider: one is the spectrum of capability and the second is task-specific capability. With respect to these he states:

19. Capability of "a certain degree" does not exhaust the analysis of where someone might be on the spectrum, or whether some safe threshold of mastery of survival skills exceeded. To observe that a person is capable of participating in making some good healthcare decisions, assisted by an advisor acting in good faith, does not in itself promote the person beyond the threshold of capability.
 20. While it may be stated that Mrs. Fung has the specific capacity to know where she wants to live, in that she has some memories concerning her life at the family home which she compares favourably to her present experience at the residential facility (which would distinguish her from for instance, someone who had no residual memory of her previous living circumstances and/or could not comprehend or appreciate her present experience), knowing where one would, in the moment, prefer to reside is not prediction of, or a sufficient test of, specific capability to manage personal activities at some desired location.
- [89] The sentence making up the second quoted paragraph requires some disentangling. I take Dr. Johnston to be saying that even though Ms. Fung has true recollections of living at home that she can compare favourably with her life at Hamilton, this is not a sufficient test of her capacity to manage herself at home or make judgments about her ability to do so.
- [90] Dr. Johnston opines that while Ms. Fung's accommodation preferences can be acknowledged and sympathized with, they should not be determinative of her care given her lack of insight into her own medical condition and daily living needs. He states she appears "healthy and vigorous" while living at Hamilton and there was no evidence that she was dwindling by living in that facility.

VIII. Analysis

- [91] Section 6 of the Patients Property Act states that once the court has found a patient incapable of managing her estate or her person, the court may appoint any person to be the committee of the patient. The Act does not set out criteria for selecting a committee but s. 18 describes the duties of a committee as follows:
18. (1) 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.
 - (2) A committee must, to the extent reasonable, foster the independence of the patient and encourage the patient's involvement in any decision making that affects the patient.

Obviously, the Court must select a person capable of fulfilling these duties.

[92] In *Stewart (Re)*, 2014 BCSC 2321 at para. 27-29, Justice Masuhara noted that an application under the Patients Property Act invokes the Court's *parens patriae* jurisdiction and the selection of the appropriate committee is governed by an assessment of who will serve the patient's best interests. He identified a non-exhaustive list of factors that courts might consider in making that assessment. The parties agree these are relevant considerations for this case. I propose to go through that list now.

A. The Stewart Factors

(a) Whether the appointment reflects the patient's wishes when she was capable of forming such a wish

[93] This factor is largely neutral as between the four siblings but on balance I find it tips slightly in favour of Rudolf's application. To the extent an appointment can reflect Ms. Fung's wishes when she had capacity, the appointment of any of the parties seems consistent with those wishes. All four children were named as co-attorneys under her power of attorney. Harriet was named as the first executor of her will and Glendy was named as representative for the representation agreement. I place some greater significance on the representation agreement since this indicates that Ms. Fung wished to have Glendy make decisions about her medical care. This favours Rudolf's application since Glendy supports him and the two have a history of working together to manage Ms. Fung's care. I am satisfied that Rudolf will rely on Glendy in making any medical decisions about Ms. Fung.

(b) Whether immediate family members agree with the appointment

[94] Obviously, there is no agreement amongst the four siblings. This factor is neutral since they are split into two equal camps.

(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

[95] There is obvious conflict between family members but no real conflict between any family member and Ms. Fung. All parties agree that any order I make should include an obligation for the committee to consult with and keep the other siblings informed about Ms. Fung's care and finances. To this extent, consulting with other family members may be a neutral factor.

[96] However, Harriet and Rosana argue that Rudolf and Glendy's unilateral actions in admitting Ms. Fung to Hamilton without disclosing those plans to Harriet and Rosana indicates they are not likely to consult with them about Ms. Fung's care. I accept this is a concern but it is not a good indicator of whether Rudolf will communicate with the other siblings.

- [97] When Ms. Fung was admitted to Hamilton, there was much disagreement amongst the sibling about her care. I agree with Rudolf that Rosana and Harriet would not have agreed to moving Ms. Fung into Hamilton and, had they known about it, the conflict between the siblings would have escalated. This probably would have caused significant distress for Ms. Fung, just as the incident at the McLeod Court home did when the RCMP were called to break-up a sibling argument.
- [98] Glendy claimed the authority under the representation agreement to make the decision to admit Ms. Fung to Hamilton and she probably had the duty to act on that, believing as she did that it was in Ms. Fung's best interests. Excluding Harriet and Rosana from that decision was unfortunate but likely necessary if Glendy was to fulfill her obligation under the representation agreement as she saw it.
- [99] On the other hand, Harriet has shown a tendency not to consult with or advise other family members about her involvement in Ms. Fung's financial matters, despite Ms. Fung's power of attorney requiring three of the four siblings to act. This is a factor in considering her suitability to be committee of Ms. Fung's estate. I also place some significance on the fact that on more than one occasion, Harriet allowed unfavourable circumstances in the McLeod Court home to persist for two or three days (the broken furnace and Mr. Li not eating or drinking) before informing the other siblings.
- [100] On balance, I find this factor tips in favour of Rudolf, despite the unilateral admission of Ms. Fung into Hamilton. I find Rudolf has demonstrated a greater likelihood that he will consult with the other siblings about Ms. Fung's care than will Rosana and Harriet.
- (d) The level of previous involvement of the proposed committee with the patient
- [101] On its face, the level of previous involvement with Ms. Fung would seem to pull slightly in favour of Harriet and Rosana since Harriet has lived with Ms. Fung for much of her life. However, all four siblings have been active in looking after Ms. Fung and Mr. Li (when he was alive). Glendy, in particular, has been attentive to the parents' medical condition and actively tried to manage their care.
- (e) The level of understanding of the proposed committee with the patient's current situation, and how that person will cope with future changes of the patient
- [102] I will address to this point in a moment.
- (f) Whether the proposed committee will provide love and support to the patient
- [103] I am satisfied that all four siblings will provide love and support. This factor is neutral.
- (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

[104] There is some pull in favour of Rosana and Harriet on this point since Harriet worked as a chartered accountant and understands numbers. However, Ms. Fung's finances are not complicated and I am sufficiently concerned with the fact that Harriet has unilaterally taken steps to involve herself in Ms. Fung's financial matters (albeit at Ms. Fung's and Mr. Li's request) without advising or consulting with her siblings. As I have said earlier, the fact that the power of attorney requires three of the four siblings to act created considerable protections for Ms. Fung that are defeated if one of the siblings involves themselves in Ms. Fung's finances without disclosing this to the others. For that reason, I find this factor favours Rudolf's application.

(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

[105] I make no finding that anyone has breached a fiduciary duty owed to Ms. Fung. However, for the reasons I just outlined, I am concerned that Harriet has engaged in activity that diminishes Rudolf and Glendy's confidence in her ability to properly handle Ms. Fung's financial affairs.

Other Stewart Factors

[106] In my view, this case largely turns on how the proposed committee will cope with future changes of the patient (consideration (e) from Stewart noted above) and the remaining factors from Stewart which are:

- (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.

[107] I will next consider these three factors together in the context of analyzing what I believe to be the best plan of care for Ms. Fung.

B. Who has the Best Plan of Care for Ms. Fung?

[108] I find that Ms. Fung's best interests lie in her continuing to live in Hamilton where she will receive 24-hour care as her cognitive ability diminishes. This heavily favours Rudolf's application. I accept without question that Harriet and Rosana are well-meaning and wish to give effect to Ms. Fung's wish to live at home. However, I am not able to conclude on the evidence that Ms. Fung will receive the best care she requires if she returns to her McLeod Court home.

[109] Harriet and Rosana place considerable reliance on Dr. Ngai opinion which is supportive of Ms. Fung living where she chooses. However, Dr. Ngai's qualifies this opinion by stating that her preference should be supported "provided her request is safe".

- [110] I cannot conclude on the evidence that it is safe for Ms. Fung to return to the McLeod Court home under Harriet's care. Rather, I find (with some hesitations I will discuss later) that Hamilton is a more reliable choice to ensure that Ms. Fung receives the care she needs.
- [111] Harriet and Rosana have presented the Court with no plan of care for Ms. Fung living at the McLeod Court home. Their evidence is very general that Harriet will be able to look after Ms. Fung since she is no longer working and can focus her attention on providing care. However, there is nothing in her affidavit to demonstrate an appreciation for the medical challenges that accompany dementia, especially as it worsens over time. They have provided no evidence of what specific care they understand Ms. Fung will require or what outside professional services they would to engage to assist in that care (such as Nurse Next-Door or Meals on Wheels).
- [112] In fact, the evidence is compelling that Ms. Fung has resisted in-home professional care and service providers while living at the McLeod Court home and, apart from an occasional house cleaner, Harriet was unwilling or unable to push back against Ms. Fung's resistance to these services. Thus, even if a plan for Ms. Fung's in-home care had been presented, I am not confident that Harriet could maintain that plan if it required her to insist that Ms. Fung accept professional in-home services.
- [113] This concern is illustrated by a January 27, 2020 progress report dictated by Dr. Forbes, a geriatric specialist, after she saw Ms. Fung. Harriet and Glendy had taken Ms. Fung to the appointment. On the first page of the three-page note, Dr. Forbes states:

Main issue seems to be disputes among siblings about parents' care. Harriet does not want her parents to go into facility care and they do not want to move either. Given Mr. [Li's] blindness (he was previously seen by Dr. Barnett), he is best suited to stay in his own home with some additional home supports. We talked about this at length today. Harriet cannot argue with her parents about their refusal to get help in, easily. She would prefer to get no help in and do it herself rather than to argue with her mother about the home help needed. When she has tried in the past it causes arguments and this was exhausting for Harriet.

[Emphasis added]

- [114] While this note is hearsay, it is significant that Harriet was at the appointment when Dr. Forbes recorded this observation. It is consistent with other evidence of Harriet acceding to her parents' expressed wishes even when it is not in their best interests to do so.
- [115] Rosana and Harriet argue it was Glendy's responsibility as Ms. Fung's and Mr. Li's representative under their representation agreements to arrange for any home care that might have been needed. They argue it is not sufficient for Glendy to now say that it was Harriet's responsibility just because Harriet was living in the home. Their counsel asks rhetorically, "what legal authority did Harriet have to get nursing support?"

- [116] This argument illustrates the central concern about how Ms. Fung would be cared for in the McLeod Court home. Putting aside what responsibilities Glendy might have had under the representation agreement, it is for Rosana and Harriet to now demonstrate that Harriet will provide the best care for Ms. Fung. However, in the absence of any care plan, Harriet's past practices is all the court has to go on. Her inability to resist Ms. Fung's refusals of in-home professional care and her passing the responsibility for arranging that care on to Glendy does not provide a reliable basis on which the Court can confidently say that Harriet will provide the care Ms. Fung needs.
- [117] Moreover, the care Harriet gave Mr. Li and Ms. Fung while Mr. Li was still alive does not suggest a strong ability to care for Ms. Fung now and in the future. I do not suggest that Mr. Li or Ms. Fung were mistreated but I find it is reasonable for Rudolf and Glendy to be concerned about some of the incidents I have set out earlier at para. 72, especially as Ms. Fung's condition deteriorates.
- [118] I acknowledge Ms. Fung's stated preference to live in the McLeod Court home and Dr. Ngai's opinion that her wish should be respected if it is safe to do so. However, Dr. Ngai was not asked to assess whether Ms. Fung would be safe living at home under Harriet's care and he offers no opinion on that question. Without evidence to assure the Court that Ms. Fung's wish to live at home is a safe choice, Dr. Ngai's opinion is ultimately of little assistance on the question of where she should live.
- [119] Dr. Johnston opines that Ms. Fung will be properly looked after at Hamilton. I accept the evidence that Hamilton offers Ms. Fung opportunities to socialize and engage with others of her own age. While photographs offer only fleeting glimpses of life at Hamilton, the pictures in evidence show that it is a modern and bright facility. Provided Ms. Fung has access to all that Hamilton has to offer (a point I address in a moment) it appears she will have the opportunity to be stimulated by regular activities that bring her in contact with her contemporaries while being fully cared for by a professional staff. Hamilton is also relatively close in distance to all four siblings each of whom can access it in a reasonable amount of time.
- [120] I also place considerable weight on Glendy's evidence about Ms. Fung's care needs and her view that it is in Mr. Fung's best interests to live in a residential care facility such as Hamilton. I am satisfied by Glendy's affidavits that for the last few years as Mr. Li's and Ms. Fung's health declined, she has made considerable effort to assist them in obtaining the medical care that they need. She is a retired registered nurse who worked on extended care units and treated hundreds of patients with dementia. She is uniquely positioned amongst the siblings to understand Ms. Fung's care needs. In my view, she has approached Ms. Fung's care with the compassion of a daughter but the objectivity and attentiveness of a professional who recognizes Ms. Fung's limitations and needs. The fact that Glendy believes so strongly that Ms. Fung's best interests require her to live in a facility like Hamilton carry considerable weight in my view.

C. Concerns with Hamilton

- [121] Harriet and Rosana have expressed much concern about Ms. Fung's well-being at Hamilton and led evidence about restrictions on her movements and problems with the services and care provided by Hamilton. They point out that the Transition Unit is smaller than the main residential area of Hamilton and say it is locked off from the main area such that Ms. Fung cannot move throughout the facility without a staff escort. Since there is often not a staff member to accompany her, she spends much of her day in her room or confined to the Transition Unit. Harriet and Rosana argue there is no medical evidence to suggest Ms. Fung requires the severe restrictions on her movements.
- [122] There is a separate dining room in the Memory Care Unit adjacent to the Transition Unit which Harriet and Rosana say Ms. Fung is urged to use. They say the residents of that unit are more advanced in their dementia than is Ms. Fung so they are not good company for her at meals or throughout the day.
- [123] They say Ms. Fung is not eating well at Hamilton because the menu choices are not to her liking. They dispute Glendy's evidence that Ms. Fung's weight increased to a healthier state after she moved into Hamilton. They say her weight had already increased to a healthier state before the move and in fact dropped for a time after she started living there.
- [124] I note that Ms. Fung's weight log suggests that both parties are correct, but ultimately Ms. Fung's highest weight over the past 5 years has been achieved in the first three months of 2023, suggesting Glendy's evidence that she is now eating well at Hamilton is correct.
- [125] Harriet and Rosana also say that Ms. Fung's room is sparse and furnished with simple Ikea-type furniture.
- [126] Harriett and Rosana have tendered evidence of facility inspection reports from Vancouver Coastal Health Authority from September 15, 2022 through February 14, 2023. The first of these note a number of regulatory infractions by Hamilton that appear to have taken some time to correct. A few of these infractions are of particular concern.
- [127] First, the September 15, 2022 report notes there is non-compliance with the menu reflecting the cultural preferences of the residents. The report observes:
- The population of the facility are predominantly from an Asian culture. Licensing met with the Head Chef to understand how the facility meets the cultural needs of these residents. No alternative menu is provided to residents from none [sic] western cultures, only additional rice serving provided. Menu is mostly influenced by western cuisine.
- [128] This is a significant concern because the Chinese menu option was one of the key factors that led Rudolf and Glendy to select Hamilton as a suitable care home for Ms. Fung.
- [129] However, it appears from the December 8, 2022 and February 14, 2023 follow-up inspection reports that this issue has been addressed as no continuing infraction is noted. Glendy deposes in an April 2023 affidavit that Ms. Fung eats soft food and primarily Asian dishes

including Hong Kong style congee, chow mein, egg foo yung with shrimp and rice and dumplings. She attaches to her affidavit Ms. Fung's menu plan for December 18, 2022 which reflects this. The fact Ms. Fung has reached her highest weight in five years in the first three months of 2023 supports Glendy's evidence that she is now eating well.

[130] A second area of concern in the inspection reports is a finding in the September 15, 2022 report that Hamilton was not in compliance with its managers having the required skills or training to oversee regulations applicable to the Memory Care Unit. The report states:

As per facility owner; new managers are required to read the Residential Care Regulation during intake. During the inspection it was made clear to licensing that positions above nurses within the facility have no prior knowledge or experience working in a regulatory healthcare setting.

[131] In a related point, the September report states that the facility is locked and no resident has a consent on file for an environmental restraint. It is not clear whether this is speaking of Hamilton generally or the Memory Care Unit specifically. If it is just speaking of the Memory Care Unit, it is not clear if that includes the Transition Unit.

[132] In a follow-up inspection on November 2, 2022, it was noted that a consent form for an environmental restraint had been added to the intake package for new residents to the facility but "[r]estraint paperwork for residents in the locked memory care unit still not obtained." Again, it is not clear if this includes the Transition Unit. The infraction was apparently still not resolved by the time of a December 8, 2022 follow up inspection but it seems to have addressed by a February 14, 2023 follow up.

[133] It is important to note these inspection reports were made after Ms. Fung was admitted to Hamilton and there is no evidence that these deficiencies existed when Rudolf and Glendy had Ms. Fung admitted. As the issue before me is who will best serve Ms. Fung's interests as committee, I do not find these reports are a poor reflection on Rudolf and Glendy's judgment to admit Ms. Fung to Hamilton. When they admitted her, their research indicated Hamilton provides high quality care, meals that suited Ms. Fung's dietary preferences, and activities and companionship to keep Ms. Fung engaged.

[134] That said, the inspection reports appear to support Harriet and Rosana's evidence that the Transition Unit was locked at least for a period of time and Ms. Fung's ability to move throughout the larger Hamilton facility was and may still be restricted. Rudolf concedes that the Transition Unit has been locked in the past but points to evidence suggesting that it has not been locked off from the main Hamilton areas since March 2023. In recent (April 2023) affidavits, Rudolf and Glendy say that Ms. Fung is active with other residents at Hamilton, participating in activities and eating in the bistro or in the main dining room, both of which are in the main Hamilton complex.

[135] Nevertheless, Glendy believes that the security and supervision offered by the Transition Unit is important for Ms. Fung because she tends to wander off within the facility and get lost. Rudolf points to several observations of this in records attached to Harriet's April 12,

2023 Affidavit (#3). Glendy also says that Ms. Fung has limited insight into her limitations and requires regular prompting to engage in activities of daily living. She says she needs nursing staff to check on her regularly to ensure she is eating and drinking and otherwise safe and comfortable. She notes this level of care is not available in the assisted living area of Hamilton so it is beneficial for Ms. Fung to be in the Transition Unit. As I have said earlier, I find that Glendy has good insights into Ms. Fung's limitations and care needs and I give weight to these observations.

- [136] I remain somewhat uncertain as to the status of the Transition Unit and whether the door to it remains open or locked. I accept Glendy's evidence that Ms. Fung requires some careful supervision but I have some concerns that she may find herself unnecessarily confined within the Transition Unit at times. I am also concerned that if she must take her meals in the Memory Care Unit she will be deprived of the benefit of the company of the larger population of Hamilton residents. I cannot conclude on the affidavit evidence the extent to which this might be happening.
- [137] Despite these concerns, I remain of the opinion that Ms. Fung's best interests are to live in a facility like Hamilton where her personal and medical needs will be fully cared for and she will be appropriately supervised. The misgivings I have can be addressed by commenting on the duties that I consider the committee has to ensure Ms. Fung enjoys the most freedom of movement within Hamilton that her medical condition will reasonably allow. In my view, the committee should ensure that Ms. Fung is not unduly or unnecessarily confined within a unit in Hamilton without medical justification, thus depriving her of the larger benefits Hamilton has to offer.
- [138] Rosana and Harriet also say there have been times when Hamilton staff have prohibited them or other family members from taking Ms. Fung out of Hamilton for a meal or some other family event. The reason for this is not well-explained in the evidence and this tends to undermine Rudolf's assertion that any of the siblings will be free to take Ms. Fung out for dim sum unless there is some good reason why Hamilton staff consider it not to in Ms. Fung's interests on a given day.
- [139] Again, it will fall to the committee to ensure Ms. Fung is permitted to have outings with her children or grandchildren (subject to a demonstrable medical or safety reason not to permit that on a given day). This is particularly important given Ms. Fung's fondness for going out for dim sum and the pleasure this appears to give her. Any restrictions on this should be justified with more than a summary statement from Hamilton staff that taking Ms. Fung out of the facility could pose a health or safety risk, as Harriet said she was told on April 9, 2023. If there are to be restrictions on this, it falls to the committee to ensure a proper explanation is provided by Hamilton staff and to communicate that explanation to the other siblings in accordance with the order that I will make.

[140] Finally, at the risk of tinkering, I tend to agree with Rosana and Harriet that the photographs of Ms. Fung's room suggest it is sparsely furnished and somewhat drab. Ms. Fung has considerable financial resources and the committee should not be reluctant to authorize the use of those to make her room at Hamilton more of a home if the siblings feel it can be brightened up in a manner that is consistent with her care needs.

D. The Haston Factors

[141] Before concluding, I note that in *Haston (Re)*, 2016 BCSC 1962 at para. 32 Justice Brown added the following considerations to the Stewart list:

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.

[142] I find these factors mostly neutral except that Harriet typically took Ms. Fung to church on Sundays when she was still living at the McLeod Court home. In light of my conclusion that Ms. Fung's best interest are to live in Hamilton, demands on providing transportation, the committee's time to provide care and perform obligations, and facilitate recreational activities are not significant issues. However, ensuring that Harriet may continue to take Ms. Fung to church, if that is still important to Ms. Fung, is a factor and I reiterate that the committee has a duty to ensure Ms. Fung can go on such outings provided it is safe for her to do so.

E. Appointment of Committee

[143] For the reasons I have given, I find that Ms. Fung's interests will best be served by Rudolf serving as committee of Ms. Fung's person. He, together with Glendy, have made considered decisions about Ms. Fung's care, including recognizing the need to place her in Hamilton where her needs are met and she receives 24-hour professional care. They made an informed choice in selecting Hamilton after researching many different options and giving careful thought to what would be best for Ms. Fung. While Glendy, by her own choice, will not be a committee, she and Rudolf have worked in concert over the past three years to try to provide Ms. Fung with the care Glendy believes that she needs. She deposes that if Rudolf is appointed committee, she will "support him in whatever way he needs to take care of our mother and ensure that she is happy, healthy and safe." I am satisfied that Rudolf will continue to rely on Glendy's advice and assistance to make the best decisions on Ms. Fung's behalf.

[144] I also find that that the Stewart factors favour the appointment of Rudolf as committee of Ms. Fung's estate. He has tried to organize Ms. Fung's financial affairs in accordance with an overall plan that has included the enduring power of attorney that both protects Ms.

Fung's interests (with the requirement for the siblings to act as a majority) and provides transparency for other siblings. While the appointment of committee will now replace that power of attorney and give Rudolf sole control over Ms. Fung's financial affairs, his past commitment to that organized and transparent approach satisfies me that he will carry that same approach into his role as committee.

[145] With the committee'ship now addressed through this judgment, it is my hope that the parties can put some of their conflict aside and all four will now focus on giving Ms. Fung the best life she can have in her remaining years. It is clear that all four children have great affection for Ms. Fung and care deeply for her happiness and how she will live out the rest of her life. A reconciliation amongst her children will undoubtedly make her remaining years much more enjoyable.

IX. Conclusion

[146] For these reasons, I find that Rudolf should be appointed committee and I will make the order in the form most recently proposed by Rudolf.

[147] The parties requested an opportunity to speak to the issue of costs. If they are unable to resolve that issue amongst them, they may request an opportunity through Supreme Court Scheduling to address the issue before me. Before any such request is made, however, I direct the parties to each provide the court with a written submission on costs, not exceeding five pages. I leave it to counsel to agree on a schedule for exchange of any such submissions.

"Kirchner J."

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