

CANADA / JUDGMENT

Galloway v. Barski

2016 BCSC 1588

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 1588 Galloway v. Barski

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Galloway v. Barski,

2016 BCSC 1588

Date: 20160829

Docket: S169307

Registry: New Westminster

Between:

Patricia Gertrude Galloway, a person under disability

by her litigation guardian, Jack Herbert Galloway also known as

John Herbert Galloway

Plaintiff

And

Joan Anne Barski and Christopher David Barski

Defendants

And

Patricia Gertrude Galloway and

Jack Herbert Galloway also known as John Herbert Galloway

Defendants by Counterclaim

And

Jack James Galloway

Third Party

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Plaintiff:

D. Magnus

The Defendant, Joan Anne Barski:

In Person

The Defendant, Christopher David Barski:

In Person

Counsel for the Third Party, Jack Galloway:

R. Darnell

Place and Dates of Trial/Hearing:

New Westminster, B.C.

November 20, 2015 and

April 1, 2016

Place and Date of Judgment:

New Westminster, B.C.

August 29, 2016

Introduction

- [1] This proceeding concerns property owned by Jack and Patricia Galloway in Langley, BC ("the Property") that was transferred by Jack's daughter Joan Barski to her son, Christopher Barski, using powers of attorney which Jack and Patricia had given her. Jack argues that the transfer was inappropriate and seeks to have it reversed. Joan and Christopher say they were acting to protect Jack from his other son, Jack James Galloway, who they believe has abused and manipulated Jack.
- [2] In these reasons I will use the parties' first names and will refer to the plaintiff as "Jack" and Jack James Galloway as "James" to eliminate any confusion. No disrespect is meant to the parties.

- [3] Jack is 96 years old and resides in his own home at 5550 Langley Bypass, Langley, BC. As addressed above his two children, Joan and James, are also parties to the action.
- [4] When this proceeding was commenced Jack's wife Patricia was 95 years old; she died in July 2015
- [5] On December 1, 2014, Joan used a power of attorney granted by her mother on August 25, 1994, to transfer the property to Jack; she then used Jack's power of attorney given the same day to transfer the property to Christopher. Christopher executed a Declaration of Bare Trust and Agency Agreement on December 1, 2014, between himself as "Nominee" and Joan as "Attorney" and owner of the Property ("the Trust Agreement").
- [6] Jack argues he is legally competent and wants title to the property put back into his name. Christopher and Joan do not want to transfer legal title to the property to Jack because they believe James has been abusive to Jack and has taken advantage of him over the years he has resided with his father. They fear James will coerce Jack to transfer the property or other assets to him. They want to retain control of the property and want the court to intervene and make orders for Jack's protection against James, including precluding James from residing with his father.
- [7] Further, Joan and Christopher object to returning title to Jack because they contend the Trust Agreement cannot be altered, amended, modified, set aside, voided or deemed avoidable by any subsequent revocation of Jack's power of attorney. Any such revocation of Jack's power of attorney, they argue, does not alter Christopher's obligations to Joan who continues to act as a fiduciary to Jack. Christopher and Joan claim their roles and obligations under the Trust Agreement and their fears about James' behaviour toward Jack justify their refusal to transfer title in the land back to Jack.

Litigation History

- [8] On March 17, 2015, Jack and Patricia filed a notice of civil claim seeking a declaration that the transfers of the property to Christopher are void and should be set aside in addition to other related relief.
- [9] On April 10, 2015, Joan and Christopher filed responses to the plaintiff's claims, a counterclaim and a third party notice against James.
- [10] Responses to the counterclaim and third party notice were filed May 4 and 5, 2015, respectively.
- [11] The defendants' counterclaim filed April 10, 2015, seeks the following:
- a. an order prohibiting Jack from using abusive, derogatory or other inappropriate language towards the plaintiffs;

- b. another order directed to the plaintiffs to prevent James from engaging in abusive, harassing or exploitive behaviour and requiring him to treat Jack with common decency and basic dignity;
 - c. an order in favour of the defendants enjoining James from pursuing property transfers or estate planning considerations while Jack is incompetent. They also sought relief specifically to protect Patricia;
 - d. an injunction to prevent James from serving as a power of attorney, agent, representative, fiduciary or otherwise over the plaintiffs or the plaintiffs' property without the posting of a security bond;
 - e. an account of any personal property transfers made to James;
 - f. an order requiring the presence and monitoring of the plaintiffs by a BC trustee, Public Guardian, conservator or otherwise to protect the interests of the plaintiffs from exploitation and/or abuse;
 - g. an injunction restraining the plaintiffs from obtaining credit, co-signing, guaranteeing or creating a joint account with the third party without court approval;
 - h. an order requiring an assisted-living registrar to investigate the health and safety of the plaintiff and ensure adequate measures are implemented to prevent abuse and exploitation of Patricia while in her care home;
 - i. an order requiring Patricia's care home to continue to monitor and implement adequate measures to protect her from abuse and neglect;
 - j. an order appointing Joan as guardian of the plaintiffs.
- [12] The third party notice contains claims similar to those in the counterclaim but all directly targeting James, including:
- a. to enjoin James from using abusive, derogatory or harassing language towards the plaintiffs;
 - b. a protective order against James in favour of the plaintiffs to protect them from abusive, harassing or exploitive behaviour and requiring James to treat the plaintiffs with common decency and basic human dignity;
 - c. a protective order against James preventing him from contacting, threatening or intimidating Joan and permitting Joan to have free and unmonitored visits with her parents;
 - d. an order preventing James from pursuing property transfers or estate planning considerations with the parties who are incompetent or have dementia;
 - e. an order requiring James to post a security bond before acting as power of attorney, agent, representative, fiduciary or otherwise over the plaintiffs;

- f. a declaration that James has unpaid loans owed to the plaintiffs of approximately \$80,000 since 1975, some of which they pleaded were used to fund criminal activity;
- g. orders requiring James to pay rent and reasonable household and transportation expenses with portions of such payments to be made to Joan for the benefit of Patricia;
- h. orders restricting James from activity concerning the plaintiff's finances;
- i. an order appointing Joan as guardian of Jack.

[13] Jack applies today for the following orders:

- a. an order requiring Christopher to transfer and convey title to the property to him and Patricia as joint tenants;
- b. declarations that Patricia's power of attorney dated August 25, 1994, and Jack's power of attorney dated August 25, 1994, are revoked and have no further effect;
- c. the defendants pay all costs associated with the conveyance of the property to the plaintiffs;
- d. an order dismissing the defendants' counterclaim as disclosing no cause of action, and being frivolous and vexatious;
- e. an order dismissing the third-party proceedings; and
- f. special costs.

[14] Jack wishes to resolve this proceeding on a summary trial in part because at his advanced age he would like his affairs settled before he dies. Christopher and Joan contend it is not suitable for summary trial and wish to have further document production and other pre-trial steps to investigate their allegations before bringing this proceeding to trial. They believe that a trial of the questions concerning James' mistreatment of Jack is necessary to resolve Jack's claim for return of title to the property.

Background

[15] The property was purchased by Jack and Patricia in 2003 as joint tenants. It was their home until Patricia was placed in an extended care home, where she lived at the time of her death in 2015. James has lived in the property with Jack since 2011.

[16] Toward the end of Patricia's life, she was incompetent and disabled by senile dementia.

[17] Jack and Patricia granted powers of attorney to Joan on August 25, 1994.

[18] Christopher is an attorney in the United States.

- [19] In September 2005 Jack made his will dividing his estate between his children and two grandchildren. Joan was to receive 60% of the residue, James 20% of the residue, and Joan's two children Christopher and Kevin 20% of the residue. On November 12, 2014, Jack made a new will in which he gave James the property and divided the residue of the state equally between Joan and James without any bequest to his grandchildren.
- [20] In late 2014, Joan learned that Jack had drafted a new will and disinherited her from a substantial part of his estate. Joan formed the belief that James had abused and manipulated his father, taking advantage of his vulnerability and unduly influencing him to change his will. James and Jack deny that James has mistreated or abused him and specifically deny James has unduly influenced him.
- [21] During the spring of 2014 Joan and James engaged in serious confrontations concerning Joan's visits with Patricia at the care home; she claims that James was impeding her right to visit with her mother and attempting to force her mother to sign documents Joan suspected were prejudicial to Patricia's interests. As addressed in more detail below, Joan also implicates James in her mother's death.
- [22] As a result of their alleged concerns, Joan and Christopher retained a solicitor to prepare the Trust Agreement on November 24, 2014. The Trust Agreement was signed December 1, 2014. Soon after, Joan effected the transfer of the property described above.
- [23] The Trust Agreement describes Christopher as the "Nominee" and Joan as both the "Attorney" appointed by Powers of Attorney signed August 25, 1994, for Jack Herbert Galloway and Patricia Gertrude Galloway" and as "the Owner".
- [24] The following clauses of the Trust Agreement are germane to this application:

1. Appointment

The Owner appoints the nominee as their nominee, as agent and bare trustee to hold legal title to the Property for and on behalf of the Owner in accordance with this Agreement with full power to manage and deal with the property and execute any instrument, document or encumbrances in respect of the Property for the sole benefit and account of the Owner, all of the direction of the owner, as principal and beneficial owner and strictly in accordance with this agreement, and the nominee accepts such appointment.

2. Nominee's Agreement

The nominee acknowledges and agrees that:

- (a) the nominee has acquired or will acquire and will hold legal title in the property as nominee, agent and bare trustee for and the sole benefit and account of the Owner as principal and beneficial owner and the equitable and beneficial interest in the property will be vested solely and exclusively in the owner;

- (b) the Nominee will hold legal title to the Property as nominee, agent and bare trustee for the sole benefit and account of the Owner as principal and beneficial owner subject to and in accordance with this Agreement .
- (c) any benefit accruing from the property is and will continue to be a benefit of the owner and if received by the Nominee will be received and held by the Nominee for the sole use, benefit and advantage of the Owner
- (e) the Nominee will, upon and in accordance with the direction of the Owner, act as the agent of the Owner, as undisclosed principal, in respect of any matter relating to the Property or the performance or observance of any contract or agreement relating to the Property;
- (f) acting under this Agreement at the direction of the Owner, the Nominee will have the full right and power to execute and deliver, under seal and otherwise, any transfer, deed statement of adjustments, plan lease, sublease, easement, right-of-way without delivering proof to any person of its authority to do so and any person may act in reliance on any such instrument or document and for all purposes any such instrument or document will be binding on the Owner

...

5. Time Limitation

The powers conferred on the Nominee under this Agreement will not extend beyond the expiration of 80 years from the date of execution and delivery of this agreement unless renewed. This agreement shall not be altered, amended, modified, set aside, revoked, voided, or deemed avoidable by any subsequent revocation of the Power of Attorney dated August 25, 1994 and any revocation of such Power of Attorney shall not alter nominee's obligations hereunder to Joan Anne Barski who will continue to act as a fiduciary to Jack Herbert Galway and Patricia Gertrude Galloway.

6. Indemnity of Owner

The owner agrees to indemnify and save harmless the Nominee against any and all liability resulting from the Nominee's holding of title to or dealing with the Property as directed by the Owner

- [25] Neither Jack nor Patricia were consulted or agreed to the transfer of the property to Christopher or into the trust. Further, when the property was transferred, neither the transfer itself nor the Land Title records indicate that Christopher holds title to the property in trust.
- [26] On March 17, 2015, Jack and Patricia began this action and, through counsel, demanded the defendants return title to the property. On March 19, 2015, Jack revoked the power of attorney he had granted to Joan. Subsequent demands for the return of the property to Jack and Patricia followed but were ignored.

- [27] On the basis of the provisions of the Trust Agreement, the defendants contend that they cannot be compelled to transfer title to the property back to Jack notwithstanding his expressed direction to them to this effect.
- [28] On September 16, 2015, Jack attended a strata meeting of the Owners, Strata Plan NW 2871. At that meeting he was refused the right to vote because he was not a registered owner of the property. He was ejected from the meeting.
- [29] During the course of these proceedings, Christopher and Joan executed a new trust agreement dated March 10, 2016 (the "New Agreement"). In the New Agreement, the defendants have altered the definitions to reflect their original belief that Jack and Patricia were to be the principal beneficiaries of the Trust Agreement and beneficial owners of the property.
- [30] Paragraph 13 of the Trust Agreement was also changed in the New Agreement to include the following:

Nothing herein constitutes a testamentary disposition of the property which shall remain with the principles and the property shall be part of their estate upon death"

- [31] The New Agreement indicates that Joan again acted under the August 25, 1994 powers of attorney granted by Jack and Patricia. However, by March 2016 Jack's power of attorney had been revoked and Patricia had passed away, terminating her power of attorney as per s. 30(4) (b) of the Power of Attorney Act, R.S.B.C. 1996, c. 370.

Issues

- [32] In this summary trial hearing, Jack seeks restoration of title to the property to himself. The defendants contend this is not a suitable application for a summary trial process because of the volume of allegations concerning the abuse and mistreatment of Jack by James. Thus, the first issue is whether Jack's claim can be decided on a summary basis. If a summary trial is appropriate in the circumstances, the issue becomes whether Joan's use of Jack's power of attorney transferring title into the trust was a proper use of the power of attorney within the provisions of the Power of Attorney Act, and other related enactments and if not, whether an order should be granted compelling Christopher to transfer title to Jack and Patricia.
- [33] The court must address the remedies sought by the defendants in their Counterclaim and Third Party Proceedings. Jack seeks a summary dismissal of the Counterclaim brought by the defendants against him. James seeks a summary dismissal of the Third Party Notice proceedings brought against him.
- [34] Finally, there were other outstanding applications by the defendants addressed during argument that must be resolved.

The Transfer of Property and Trust Agreement

Position of the Plaintiff

- [35] Jack has been represented by independent counsel, Mr. Magnus, throughout these proceedings, including at this hearing. He has expressed his wishes and described his relationship with James in affidavits made July 13, 2015, July 31, 2015, and August 6, 2015, all sworn before his counsel.
- [36] He argues he is capable of managing his own affairs and does not want to be precluded from the company of his son. He says he invited James to live with him in 2011, and James has since assisted him with cooking, cleaning, laundry, car maintenance and travel. Jack rejects the defendants' assertions that he has been physically abused, forcibly confined, deprived of the necessities of life, isolated, or that he has suffered psychological or emotional abuse, intimidation, threats, coercion or harassment by James. He further denies James deals with his finances. In sum, Jack denies that James has threatened, bullied, or taken advantage of him or his wife in any way.
- [37] Jack argues Joan and Christopher wrongfully transferred Patricia's interest in the property to himself and compounded their error in transferring his interest in the property into the trust. He relies on s. 27 of the Property Law Act, R.S.B.C. 1996, c. 377, which prohibits an attorney from transferring property to herself unless expressly authorized in the power.
- [38] He also argued that the transfer of the property by Joan to the trust constituted an unauthorized delegation of Joan's authority over the property to Christopher.
- [39] Finally, Jack contends that this action can be resolved in a summary trial, in part because the outcome does not turn on any credibility issues. Otherwise, there has been more than adequate time for the defendants to prepare for the application and the defendants have not taken steps in this direction save the applications for documents disclosure and, cross-examination of Jack and James. No appointments to conduct those discoveries have been taken out by the defendants. Rather, applications to cross-examine were filed together with the defendants' responses to the application and never pressed.

Position of Defendants

- [40] Joan and Christopher argue that this proceeding is not suitable to be resolved at a summary trial. They submit that Jack and James' living arrangements expose Jack to potential abuse and intimidation by James and, as such, it should be inferred that Jack is unable to make informed choices or decisions free of James's influence. They further submit these issues require assessments of credibility. They contend that the Trust Agreement was created to protect Jack from this abuse, duress or coercion from James.
- [41] The defendants do not contend that Jack is incompetent or unable to manage his affairs or himself. They believe he is vulnerable and has surrendered to pressure, manipulation and abuse from James and that he has acted out of fear.

- [42] The defendants' evidence on this application is replete with allegations concerning James' past behaviours towards his parents which they contend were manipulative, degrading, and exploitative of their parents' weaknesses.
- [43] Joan contends that the Trust Agreement is not a testamentary trust and the property will be part of Jack's estate upon his death. She relied on independent legal advice regarding her duties to her parents and claims to seek no benefit from the trust which she has created.
- [44] In part, Joan affirmed that she had seen signs of abuse such as unexplained injuries, broken bones, threatening and abusive behaviour, the sudden emergence of James, who she describes as a previously uninvolved relative, suspicious changes in her parents' wills, surreptitious request to change wills and other financial moves, and other documents that have raised her suspicions.
- [45] The defendants submit these signs of abuse necessitated their actions, and justify their response, counterclaim, third party notice and the interim applications sought in this hearing, including those seeking to restrain James from dealing with Jack. She invokes the family violence provisions of the Family Law Act, S.B.C. 2011, c. 25, in seeking a protection order in favour of Jack.
- [46] The defendants accept that it was Joan's duty to use Jack's power of attorney only for his benefit and in compliance with the Power of Attorney Act and other related enactments and not for her own profit, benefit of or advantage. They argue she acted properly and in doing so did not need to inform Jack about her intended actions or obtain his consent; rather, they contend the power of attorney gave Joan unfettered rights to make any decision concerning her parents property she wished.
- [47] They have refused to accept Jack's direction to transfer title to the property back to himself because their concern of James' influence, and argue the Trust Agreement insulates them from any obligation to accept direction from Jack on this issue.
- [48] Joan and Christopher rely on the decision of *Easingwood v Cockcroft*, 2013 BCCA 182, as authority for the fact that attorneys operating under valid general powers of attorney are entitled to create inter vivos trusts or transfers held by principals provided the trust does not otherwise step into an area prohibited by other general principles of law or statutory prohibitions.
- [49] They contend that the decision in *Easingwood* is apposite to this case based on the Court of Appeal's conclusions that:
- [78] There is, as contended, a requirement that the power of attorney must be used for the donor's benefit and not the attorneys' benefit. That does not mean, however, that where there is benefit to attorneys, such as in preserving the value of assets, while fully meeting the obligation to secure the best interests of the donor, the attorneys may not take a prudent step

- [50] In essence, Joan and Christopher contend that in creating the Trust Agreement they acted in Jack's best interest and are protecting him from himself and James' abuse by refusing his request that title to the property be returned to him. In this way they are entitled to act despite his wishes to the contrary.

Appropriateness of a Summary Trial

- [51] The defendants' belief is that James has abused the plaintiffs. This belief is based on some personal observations, but otherwise on speculation, hearsay, and inference. If the outcome of this application depended on the evidence tendered by the defendants, it may have been appropriate to decline to deal with this case on a summary trial and order a trial of the issues. However, and as will be discussed below, it is not. The action is between Jack and the defendants and the facts concerning Jack's claims and relating to the transfer of the property are not contentious.
- [52] In *Gichuru v. Pallai*, 2013 BCCA 60, the court described considerations important in assessing whether a summary trial is appropriate. In *Gichuru*, Madam Justice D. Smith wrote:
- [30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed that the court under this rule "tries the issues raised by the pleadings on affidavits", that "a triable issue or arguable defence will not always defeat a summary trial application", and that "cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law" provided that the judge does not find "it is unjust to do so" (p. 211). In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, *inter alia*, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

- [31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263 (CanLII) at para. 12, upheld on appeal at 2006 BCCA 369 (CanLII).
- [53] The defendants argue the allegations against James in the counterclaim and third party notice are irrevocably tied up in the issue of the relief sought by the plaintiff. They contend that settling the matter by summary trial would be inappropriately litigating in slices: see *Coast Foundation v. Currie*, 2003 BCSC 1781. However, there are two distinct issues. The first

question deals with the defendants' use of the power of attorney, the creation of the Trust Agreement and the transfer of the property to the trust. The second question deals with the potential that James is abusing or unduly influencing Jack, which Joan and Christopher allege were their motives for constituting the trust and transferring the property. In my view and on review of the law, the defendants' motives for creating the trust agreement and using the power of attorney are not in issue on the question of whether title to Jack's property should be returned to him. I have heard the arguments on this point and accept that nothing will change after a trial on this issue. As discussed further below, Madam Justice Fisher addressed this point in *McMullen v. McMullen*, 2006 BCSC 1656, where she determined it was inappropriate for an attorney to transfer property to themselves without the donor's knowledge and consent despite sincere motivation to protect the father's financial interests. Whether that happened here is thus the question.

- [54] While Jack's age is a compelling feature in the need to resolve this matter at this time, there is also common agreement he was competent when the transfer of the property to the trust was completed and his competence is not disputed now. None of the defendants' allegations displace the presumption of Jack's competency; he is represented by counsel and his evidence alone persuades me he is capable of presenting his own views properly informed by counsel and independent of influences alleged by the defendants. Thus and to the extent that it is clear he wants the title to his home returned to him, there are no factual issues concerning his state of mind or intent requiring a trial, and the plaintiff's claims can be litigated without necessarily settling the issues raised by the counterclaim and third party notice: see *Reschetnyk v. Waslyk* (1999), 30 E.T.R. (2d) 278, [1999] O.J. No. 4550 (QL) (Ont. S.C.J.), cited in *McMullen* at para. 55.
- [55] Though this is sufficient in itself to establish that a summary trial is appropriate, I wish to make an additional comment on the issue of "credibility" as it has been addressed by the defendants. This case is not one where the parties seek to have contradictory versions of events accepted. Jack is the only party properly in a place to affirm the defendant's allegations of what James has done. He has not, and Joan and Christopher are instead seeking to challenge his evidence based on propensity and bad character evidence, rumour, and conjecture that go against Jack's deposed version of events. They do not, in my mind, raise sufficient concern that I can accept Jack's evidence or that viva voce evidence would be required to resolve this issue.
- [56] Finally, in my view, there is urgency in resolving this matter and some likelihood of prejudice if it is delayed to a trial given Jack's age. There will also be significant cost savings in resolving the issue of the property at this time.
- [57] In all of the circumstances I exercise my discretion to decide the property issue on this summary trial. I will address disposition of the counterclaim and third party notice below.

Conclusion

- [58] For the following reasons I have decided the transfer of the property to Christopher and the trust is null and void and title to that land must be returned to Jack.
- [59] The backdrop to Joan's actions and their alleged impetus was set out in various affidavits containing allegations many of which are inadmissible evidence, conjecture or speculation and punctuated with a few personal observations. These include allegations that James abuses his father and was complicit in his mother's death. I will deal with the defendants' affidavit evidence later in these reasons.
- [60] Notwithstanding Joan's claims concerning James' behaviour, I find that Joan breached her duties as an attorney in using the power of attorney to transfer title to her son Christopher in trust for herself without consulting Jack and obtaining his consent. In the result, I direct that the defendants are to transfer title to the property into the names of Jack and Patricia as joint tenants.
- [61] The defendants may honestly believe Jack is at risk at the hands of the James and were thus motivated to use the powers of attorney to transfer Patricia's interest in the property to Jack and then into Christopher's name as a nominee and trustee. Joan's plan to wrest the property from her father happened after she learned he had changed his will to James' advantage. Her plan was formed after she learned her father changed his will and her intention was possibly to use this trust to frustrate James' efforts to further influence Jack. Now she wants the court to order James' ouster from the property.
- [62] Her actions, however, contain two significant flaws fatal to the trust and maintaining control of the property. These flaws include her insistence that the Trust Agreement is binding on Jack notwithstanding his contrary views and insulates them from any obligation to transfer title to him, and second, her denial that she received a personal benefit arising from the transfer of the property to the trust.
- [63] Regarding the first issue, the Property Law Act provides at s. 27:
- 27 A sale, transfer or charge to or in favour of himself or herself by an attorney named in a power of attorney, of land owned by the principal and purporting to be made under the power of attorney, is not valid unless the power of attorney expressly authorizes it or the principal ratifies it.
- [64] In circumstances where an attorney has used a power of attorney to confer a benefit on themselves or a family member, s. 27 of the Property Law Act will operate to void that transfer: *Egli v. Egli*, 2004 BCSC 529 at para. 82, *aff'd* 2005 BCCA 627.

- [65] Regarding the second issue, although Joan claims to now hold the property in trust for the plaintiff, the Trust Agreement clearly identifies her as the "legal and beneficial owner" and states the property is held for her "sole benefit and account". The defendants are not assisted by the suggestion that they intended Christopher to hold title to the property in trust for Joan who in turn holds the interest in trust for Jack on the terms of the Trust Agreement.
- [66] Further, the defendants attempt to "alter" or "fix" the flaws in the Trust Agreement but the New Agreement has occurred too late in the day and highlight the fact that Joan was the "beneficial owner" of the trust property under the Trust Agreement. The New Agreement was signed by Joan purportedly as attorney appointed under the August 25, 1994 power of attorney. However, she and Christopher acted well after the revocation of both Jack and Patricia's powers of attorney.
- [67] Further, to the extent it is relevant, I am not persuaded that the transfer to the trust did not constitute a benefit to Joan despite her affidavit or that of Mr. Becker. Without making a determination of her specific motivation, Joan was aware that Jack had changed his will and she was unhappy with his decision when she executed the Trust Agreement. The alteration of Jack's will resulted in Joan's inheritance expectation being reduced dramatically. In part, the transfer of the property into the trust will prevent Jack from encumbering his title, transferring title in the home to James or anyone else, thus ensuring the property will only be distributed under the will. The obvious benefit to Joan from this circumstance is that she will be better able to challenge Jack's will in the hope of receiving a greater share of his estate, whereas if Jack disposes of the property inter vivos, Joan may have no practical means of obtaining a larger share of her father's estate.
- [68] As well, when the New Agreement was disclosed to the plaintiff, the defendants also produced a power of attorney given by Christopher to Joan on December 1, 2014. This power of attorney gave Joan the express authority to deal with the property including the power to buy and sell and to execute documents. This power of attorney did not make any reference to the Trust Agreement but included a term that Joan was entitled to an annual fee not to exceed 5% of the average annual value of Christopher's assets (possibly including the trust property). This power of attorney appears to indirectly permit Joan to receive a 5% annual fee from the property. Although this may not have been her intention, there is no evidence to explain why Christopher placed his mother into a position where she could manage the property and demand from him the annual fee.
- [69] Against these benefits, Jack has been significantly impacted by the transfer of title. He does not receive notice of strata of events and has been denied the opportunity to attend at and vote at strata meetings and he can no longer transfer title or use the property as mortgage security. Jack has been clear; he is opposed to the property being held in the trust and is interested in regaining title to the property notwithstanding his daughter's stated desire to protect him from James. He ought to have been given the right to approve, disapprove or ratify the transfer. To the extent that s. 19(2) of the Power of Attorney Act requires attorneys to act in the donor's best interests, taking into account the adult's current wishes, known

beliefs and values, and within the authority given in the enduring power of attorney and under any enactment, Joan has failed to discharge her obligations.

- [70] Likewise, s. 19(3)(d) of the Power of Attorney Act disallows an attorney from disposing of property that the attorney knows is subject to a specific testamentary gift in the adult's will, except if the disposition is necessary to comply with the attorney's duties. The evidence is likewise clear that Joan knew the property was included in Jack's will and that Jack had changed his will when she executed the Trust Agreement. While she maintains she did so as part of a strategy to protect Jack's property from James' influence, she was not entitled to do so in a manner contrary to Jack's wishes.
- [71] This conclusion is supported by Madam Justice Fisher's judgment in McMullen. In McMullen, Fisher J. addressed circumstances similar to those relied on by the defendants in this case: the attorneys transferred property to their spouses to protect Mr. McMullen's interest from exploitation by others. However, there was no evidence that the donor was incapable of managing his financial affairs when the transfer occurred. Madam Justice Fisher accepted that the defendants were motivated by the best interests of the donor; however, she concluded that the power of the attorney created a duty to act in accordance with the donor's intentions and the attorney breaches that fiduciary duty when acting without the donor's knowledge or consent.
- [72] The court's comments in McMullen concerning the dilemma of children in the circumstances of the defendants are apposite:
- [68] Mr. McMullen may be making improvident decisions, according to his family, but the law entitles him to do so, provided he is capable of making financial decisions and does not harm others. There is no question that it has been, and continues to be, extremely difficult for Mr. McMullen's family to watch him make what they see as questionable decisions, but unless and until Mr. McMullen is declared incapable of managing his financial affairs, his attorneys are not entitled to step in and make decisions for him without his knowledge and consent. It is not proper, in my view, based on the *Re Scow* and the cases which have followed it, for this Court to make an order under Rule 30(1) when the underlying purpose is to lay a possible foundation for an application under the Patients Property Act.
- [73] There has been no application to appoint a committee in this case because all parties recognize that Jack is competent. There has been no attempt to engage authorities to assess or assist Jack under the Adult Guardianship Act, R.S.B.C. 1996, c. 6. The goals of both that legislation and the Power of Attorney Act are to intrude as little as possible into the independent decision-making of adults. The important policy objectives in this regard are to protect disabled persons while honouring the integrity of adults to function independently. Until such a time as Jack's competency or his risk of abuse are properly assessed as under those acts, none of the defendants' measures are appropriate.
- [74] Finally, Easingwood does not serve to assist the defendants.

[75] The facts in *Easingwood* are important to understanding the permitted uses of powers of attorney. In that case, the father of the attorneys had become incapable of managing his affairs. The children used the general power of attorney they had been granted to create a trust because the donor's son (one of the attorneys) was seriously ill and the power of attorney would not have allowed his surviving child and remaining attorney to act. Thus when the inter vivos trust was created, it merely purported to allow the trust to be administered independent of the power of attorney.

[76] However, in *Easingwood*, the Court of Appeal was clear that such inter vivos trusts are acceptable only where the trust created does not otherwise step into territory prohibited by other general principles of law or statutory prohibitions:

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

[Emphasis added]

[77] In *Easingwood*, the trial judge found that the donor's children had established the trust in keeping with their father's wishes. In that case, the trust was an estate planning tool and did not go beyond what their father had contemplated by his will before he became incompetent. The Court of Appeal further highlighted the fact that the trust was consistent with a marriage agreement their father entered into with the plaintiff who his second wife and was challenging the trust. The inquiry was a fact sensitive exercise.

[78] Thus, in contrast, the decision in *Easingwood* is against the argument advanced by the defendants because, in this case, the trust created by the attorney does not reflect Jack's wishes or intentions as currently expressed or as contemplated by his will extant when they transferred the property.

[79] In sum, in light of Joan and Christopher's transfer of the title to themselves, in the absence of consultation or information exchanged with Jack before the property was transferred or obtaining his consent, and against his best interests on the evidence, it is clear that Joan has acted in breach of their fiduciary duty in using the power of attorney to transfer the property to the trust.

[80] Jack also contends that the trust agreement was an impermissible delegation of Joan's authority.

[81] Section 23 of the Power of Attorney Act states as follows:

23 (1) Unless the enduring power of attorney states otherwise, an attorney must not delegate any decision-making authority given to the attorney in an enduring power of attorney.

- (2) Despite subsection (1), unless the enduring power of attorney states otherwise, an attorney may delegate all or part of the attorney's authority in relation to investment matters to a qualified investment specialist, including a mutual fund manager, if done in accordance with,
- (a) if the attorney is the Public Guardian and Trustee, the Public Guardian and Trustee Act, or
 - (b) in any other case, section 15.5 of the Trustee Act.

[Emphasis added.]

- [82] Although neither of the two exceptions referred to in s. 23(2) of the Power of Attorney Act apply, I do not accept that the transfer of the property to the trust constituted a delegation of Joan's decision-making authority as given by the powers of attorney. The analysis above makes clear that the trust did not act to hold the property for the benefit of Jack and Patricia, or otherwise operate to further the purpose of the powers of attorney. The authority delegated to Christopher through the Trust Agreement thus was not a delegation of Joan's decision-making authority under the power of attorney. Although the Court in Easingwood did not directly address s. 23 of the Power of Attorney Act, it did not prevent the placing of the father's property into an inter vivos trust because the transfer in that case was an impermissible delegation of the attorney's authority. However, neither consideration alters the outcomes discussed above.
- [83] Therefore, I have concluded that Joan acted improperly in using the power of attorney to transfer property without informing Jack or obtaining his agreement or consent to the transfer while he was competent. Further, the transfer was impermissible in that it was made to a trust in which she became the legal and beneficial owner of the trust property. It is clear that the transfer of the property to the trust impacts Jack's use of the property and fetters his ability to deal with it. As the transfer was made in breach of Joan's fiduciary duty and against Jack's wishes, it must be set aside and the property returned to Jack.

The Counterclaim and Third Party Notice

- [84] The relief sought in the counterclaim and third party notice are reviewed above. In essence, the defendants want to shield Jack from any close contact with James to eliminate the risk that James might abuse Jack or influence him to transfer assets to James. They contend that James has perpetrated family violence against Jack and exploited his vulnerability to his own advantage and Jack can be protected only by an order limiting James contact with his father. They cite the Public Guardian and Trustee Act, R.S.B.C. 1996, c. 383, the Power of Attorney Act, and the Family Law Act as the bases for protective orders in favour of Jack
- [85] The statement of facts in the counterclaim are repeated verbatim in the third party notice filed by the defendants.

The Counterclaim

- [86] Jack seeks a summary dismissal of the defendants' counterclaim and their third party notice, contending they are an exercise in harassment and are otherwise scandalous, vexatious, and should be struck out: see *Geyer v. Merrit* (1979), B.C.L.R. 27 (S.C.) at para. 4; Supreme Court Civil Rules, B.C. Reg. 168/2009, R. 9-1(5)(b). He argues the counterclaim includes evidence, is replete with scandalous accusations, and is brought solely for a tactical purpose.
- [87] With respect to the protection order, he argues that James is not a family member under the Family Law Act and no order can be made to restrict his activity or involvement as sought by defendants. He further argues that the allegations made by the defendants do not amount to family violence, and that there is no persuasive evidence that the plaintiff is being abused by his son.
- [88] He otherwise argues that, assuming the facts alleged are true, the claim discloses no cause of action and has no reasonable prospect of success: see Supreme Court Civil Rules, R. 9-1(5)(a). Lastly, he contends that the defendants claim is an abuse of process as identified in R. 9-5(1)(d).

Discussion and Analysis

- [89] For the reasons that follow, I have determined the counterclaim discloses no cause of action as against the plaintiffs and that it should be struck under R. 9-5(1)(a). First, the counterclaim is made only against Jack and Patricia whereas the claims are actually directed against James as also described in the third party notice. Although the rules permitted the defendants to name another person in a counterclaim, the defendants chose not to name James. To the extent the claims in the counterclaim are advanced against Jack and Patricia and the counterclaim makes no direct claim against, they are struck.
- [90] The exception to that statement is where they seek an injunction restraining the plaintiffs from obtaining credit, co-signing, guaranteeing or creating a joint account with James without court approval, and where they ask for an order appointing Joan as guardian for the plaintiffs.
- [91] However, the defendants did not refer to any specific authority that would permit the court to make those orders. With reference to the general authorities provided in the counterclaim, the defendants did not make submissions concerning the application of the Public Guardian and Trustee Act, and the basis for relying on this Act is unclear, as it only outlines the powers and duties of the Public Guardian and Trustee. They may have intended to rely on the Adult Guardianship Act in which one of the objectives is "support and assistance for adults who are abused or neglected" as this statute was invoked in their application response, but it merely provides a framework for reporting abuse to designated agencies and granting those agencies the power to bring applications before the court. Reviewing all of these Acts, none provide the court with a power to grant Joan and Christopher their relief. No efforts have been made under these Acts, or the Patients

Property Act, R.S.B.C. 1996, c. 349, to address any concerns with his competence in the face of the allegations of abuse.

- [92] With specific reference to the defendants' request for an order to appoint Joan as Jack's guardian, Jack is presumed to be competent and it is abundantly clear he is competent: see Power of Attorney Act, s. 11; Adult Guardianship Act, s. 3. Joan might have challenged that assertion if she had been able to apply under s. 2 the Patients Property Act for a declaration that Jack was not competent to manage himself or his affairs. Obviously, the evidence is against that proposition and there is no power or foundation for an order to appoint Joan as Jack's guardian.
- [93] Since this litigation began Patricia died and the defendants have no claim against her or her estate. The third parties claims were intended only to limit her freedom to interact with James and allow Joan to act as guardian.
- [94] Considering the above, I am satisfied that the counterclaim raises no issues between Joan and Christopher and Jack and Patricia or, to the extent they may, provide no reasonable claim as against them.
- [95] The counterclaims against the plaintiffs are dismissed.

Third Party Notice

- [96] In my view, the defendants' third party notice merits consideration only to the extent they seek a protection order under the Family Law Act.
- [97] The substance of the third party proceedings is directed at the relationship between James and Jack and the possibility that Jack has been subject to family violence at the hand of James. The legal bases given for the third party notice were again, the Public Guardian and Trustee Act, the Power of Attorney Act, and the Family Law Act. In argument, the defendants' claims were narrowed to a consideration of the need to protect Jack from James with orders under ss. 183 and 184 of the Family Law Act.
- [98] For the reasons set out in the counterclaim concerning the other statutes, I have concluded that none of the third party claims are authorized by those statutes other than the Family Law Act.
- [99] The allegations made by the defendants in support of their application for a protection order centre on James' prior bad behaviour and his alleged mistreatment of his parents. There are many scurrilous allegations made for the most part without any substance, and were inappropriate in any affidavit in this Court and in particular in this case.

- [100] On those points the defendants provided 11 affidavits between July 25, 2015, and March 30, 2016. Joan has affirmed six of these affidavits. Her first affidavit, affirmed July 27, 2015, was the only affidavit referenced in her response to the summary trial application. In that affidavit she made repeated attacks on James' character, presumably intending to colour the court's view of his involvement with Jack and Patricia.
- [101] This affidavit betrays Joan's animus to James. For example, she included in these allegations such as "to the best of my knowledge, my brother has derived his funds from criminal activity, public benefits, personal injury claims, pornography or the funds of several spouses, girlfriends (or their respective families thereof) and my parents." Further, at paragraph 9 of her affidavit she says "my brother's property was lost to RCMP seizure and arrest". There is no factual basis given for that allegation and it is obviously intended to be an attack on James's credibility.
- [102] The allegations continue. At paragraph 13 she described her brother's move to Jack's home, saying "the motivation for the move was not charitable or gratuitous as a caregiver or abide but solely self-interested for free housing." At paragraph 14 she said "my brother has a history of manipulation, degradation and abuse towards the vulnerable and weak, including ex-spouses and domestic partners." Although she professes limited personal knowledge, she compensates by stating that she has been informed by others about James demeaning and intimidating and denigrating her parents. For example, she described being informed by nurses and medical staff over previous years concerning James's behaviour towards her mother. Only on occasion does she claim to have witnessed some this behaviour.
- [103] In paragraph 18 she said her brother is unemployed and refuses to seek employment to obtain financial independence. At paragraph 19 she describes her brother's financial desperation and lack of any alternative to acquire assets so that "his only hope of financial end independence is contingent upon the deterioration of the health and safety of my parents".
- [104] At paragraph 21 she said "I met in late 2014 with my father regarding my concerns after learning that my father drastically changed his lifelong estate plan to substantially disinherit me despite no underlying change in circumstances to justify such a decision or the underlying consistency of lifelong estate plan." Further in her affidavit, at paragraph 27, she states she told her father "that his frail condition and potential for emotional abuse made it possible that he was unable to make informed financial decisions when those decisions conflicted with [her] brother's desire to acquire his funds for his own luxuries or personal sustenance and that these concerns only grew more prominent with time and/or age".
- [105] She said that Jack was denying and/or refusing to acknowledge significant risk factors with his son.

- [106] Concerning James' treatment of Patricia, at paragraph 51 she described finding some of her mother's possessions missing from her room in the Maple Hills care home where she lived. She had no information to suggest the missing items had been taken by James but implied this might have been the case.
- [107] At paragraph 64 of her affidavit she said "the circumstances surrounding my mother's fall or highly suspicious" and "my brother's version of events regarding my mother falling headfirst onto Fraser Highway while in his care and control are not reasonable or believable". She likewise described the defendant as sociopathic and said she had concerns for her father's safety because her mother had died "in the care of my brother" (though I note Patricia passed sometime after her fall and when she was in hospital). These statements were clearly made to invite the court to infer James killed their mother and will, if given the opportunity, harm or kill their father.
- [108] Regarding these proceedings, at paragraph 65 she said James "likely persuaded my father to move for the summary trial ruling", noting "my father signed the affidavit on Monday, and my mother was dropped headfirst onto the highway the following day".
- [109] The defendants vigorously argue that Jack is a family member who is or is likely at risk of family violence carried out by James. They urge the court to act under the Family Law Act to obviate any ongoing risks. I accept that it is possible under section 183 of the Family Law Act to make a protection order in favour of an adult family member in circumstances described in the definition of family violence in s. 1 of that Act.
- [110] The relevant provisions read as follows:
- 1 In this Act:
- "family member", with respect to a person, means
- (a) the person's spouse or former spouse,
 - (b) a person with whom the person is living, or has lived, in a marriage-like relationship,
 - (c) a parent or guardian of the person's child,
 - (d) a person who lives with, and is related to,
 - (i) the person, or
 - (ii) a person referred to in any of paragraphs (a) to (c), or
 - (e) the person's child,
- and includes a child who is living with, or whose parent or guardian is, a person referred to in any of paragraphs (a) to (e);
- "family violence" includes

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,
- (d) psychological or emotional abuse of a family member, including
 - (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
 - (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
 - (iii) stalking or following of the family member, and
 - (iv) intentional damage to property, and

Part 9 -- Protection from Family Violence

Definitions

182 In this Part and the regulations made under section 248 (1) (d) [general regulation-making powers]:

"at-risk family member" means a person whose safety and security is or is likely at risk from family violence carried out by a family member;

183 (1) An order under this section

- (a) may be made on application by a family member claiming to be an at-risk family member, by a person on behalf of an at-risk family member, or on the court's own initiative, and
 - (b) need not be made in conjunction with any other proceeding or claim for relief under this Act.
- (2) A court may make an order against a family member for the protection of another family member if the court determines that
- (a) family violence is likely to occur, and
 - (b) the other family member is an at-risk family member
- (3) An order under subsection (2) may include one or more of the following:
- (a) a provision restraining the family member from
 - (i) directly or indirectly communicating with or contacting the at-risk family member or a specified person,

- (ii) attending at, nearing or entering a place regularly attended by the at-risk family member, including the residence, property, business, school or place of employment of the at-risk family member, even if the family member owns the place, or has a right to possess the place,
- (iii) following the at-risk family member,
- (iv) possessing a weapon, a firearm or a specified object, or
- (v) possessing a licence, registration certificate, authorization or other document relating to a weapon or firearm;
- (b) limits on the family member in communicating with or contacting the at-risk family member, including specifying the manner or means of communication or contact;
- (c) directions to a police officer to
 - (i) remove the family member from the residence immediately or within a specified period of time,
 - (ii) accompany the family member, the at-risk family member or a specified person to the residence as soon as practicable, or within a specified period of time, to supervise the removal of personal belongings, or
 - (iii) seize from the family member anything referred to in paragraph (a) (iv) or (v);
- (d) a provision requiring the family member to report to the court, or to a person named by the court, at the time and in the manner specified by the court;
- (e) any terms or conditions the court considers necessary to
 - (i) protect the safety and security of the at-risk family member, or
 - (ii) implement the order.
- (4) Unless the court provides otherwise, an order under this section expires one year after the date it is made.

Whether to make protection order

184 (1) In determining whether to make an order under this Part, the court must consider at least the following risk factors:

- (a) any history of family violence by the family member against whom the order is to be made;
- (b) whether any family violence is repetitive or escalating;
- (c) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at the at-risk family member;

- (d) the current status of the relationship between the family member against whom the order is to be made and the at-risk family member, including any recent separation or intention to separate;
 - (e) any circumstance of the family member against whom the order is to be made that may increase the risk of family violence by that family member, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence;
 - (f) the at-risk family member's perception of risks to his or her own safety and security;
 - (g) any circumstance that may increase the at-risk family member's vulnerability, including pregnancy, age, family circumstances, health or economic dependence.
- (2) If family members are seeking orders under this Part against each other, the court must consider whether the order should be made against one person only, taking into account
- (a) the history of, and potential for, family violence,
 - (b) the extent of any injuries or harm suffered, and
 - (c) the respective vulnerability of the applicants.
- (3) For the purposes of subsection (2), the person who initiates a particular incident of family violence is not necessarily the person against whom an order should be made.
- [111] I am satisfied that James is a family member as that term is defined in the Act because he is a person who lives with and is related to Jack. Likewise, James' alleged actions might constitute family violence, meaning that Jack is potentially an at-risk family member.
- [112] Should an order be made under those provisions, the defendants described in their heading "Relief Sought" 15 terms they contend should be made to protect Jack. Items one and two seek to enjoin James from abusive derogatory or harassing language or conduct, or exploitive behaviour towards Jack. They ask for an order that James treat Jack with common decency and basic dignity. These orders could be made under s. 183(3)(b). However, there is no authority in the court to make orders concerning the balance of the claims set out in the third party notice, including:
- a. Item 3, which seeks a protective order controlling James' contacts with Joan. No part of section 183 authorizes an order to be made in favour of someone who is not a family member as defined by the Act.
 - b. Item 4, which seeks to enjoin James from pursuing property transfers or estate planning considerations with parties who are incompetent or have dementia, including Patricia Galloway;
 - c. Item 5, which seeks to enjoin James from serving as a power of attorney, agent, fiduciary or otherwise over Jack without posting a bond;

- d. Item 6, which seeks a declaratory ruling that James has unpaid loans to Jack in the amount of \$80,000 with interest accruing since 1975;
- e. Item 7, which seeks a ruling that James has not paid rent since 2010 and setting a reasonable amount of rent and item 8, where the defendants further want an order that Jack pay rental rates, household and transportation expenses one half of which is to be held in trust by Joan for the benefit of Patricia;
- f. Item 9, which seeks an account of any personal property transfers made to James;
- g. Item 10, which seeks an order requiring the presence and monitoring of Jack by various public bodies to protect his interest from exploitation and abuse;
- h. Item 11, which seeks to restrain the plaintiffs from obtaining credit or co-signing loans or guaranteeing loans or creating joint accounts with James without court approval.
- i. Item 12, which seeks an order restraining James from financial abuse and prohibiting James from utilizing or occupying the plaintiffs' property without compensation or consideration;
- j. Item 13, which seeks an order requiring assisted-living registrar to investigate the health and safety of the plaintiff and ensure adequate measures are implemented to prevent abuse and expectation of the plaintiff;
- k. Item 14, which seeks an order requiring Maple Hill's care home to monitor and implement adequate measures to protect Patricia (though this remedy is likely irrelevant considering her passing);
- l. Item 15, which seeks an order appointing Joan as guardian for the plaintiff (which additionally cannot succeed because this claim can only be brought under the Patients Property Act).

[113] I will thus only address the third-party claims for protective orders described in Items 1 and 2 of the relief sought.

Discussion and Analysis

Procedural Issues of the Third Party Notice

[114] Rule 3-5 of the Supreme Court Civil Rules authorizes the commencement of third party proceedings in a civil action as follows:

Making a third party claim

(1) A party against whom relief is sought in an action may, if that party is not a plaintiff in the action, pursue a third party claim against any person if the party alleges that

- (a) the party is entitled to contribution or indemnity from the person in relation to any relief that is being sought against the party in the action,

- (b) the party is entitled to relief against the person and that relief relates to or is connected with the subject matter of the action, or
- (c) a question or issue between the party and the person
 - (i) is substantially the same as a question or issue that relates to or is connected with
- (A) relief claimed in the action, or
- (B) the subject matter of the action, and
 - (ii) should properly be determined in the action.

[115] Rule 3-1 of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Rules] governs the correct form of proceeding in a family law case. The Rules do not provide an avenue for a third party notice to be filed. Available actions under the Rules are limited to notices of family claims, responses to family claims, counterclaims and responses to counterclaim.

[116] In this case the defendants seek relief under s. 183 of the Family Law Act. Under R. 3-1(2.4) of the Rules, orders sought under s. 183 must be brought in accordance with R. 3-1 (4), which states at that, if there is no existing family law case within which it is appropriate to seek the order, a person wishing to obtain that order must start a family law case by petition under R. 17-1 and seek the order within that family case. The defendants have not done so.

[117] The defendants seek protection orders under the Family Law Act. They purport to bring it by way of third party notice in the plaintiffs' litigation. In my view, the defendants' error in doing so is important but not determinative of whether this case can or should be decided at this time.

[118] The emerging concern on this point is to balance the importance of just, speedy and inexpensive determinations of proceedings on their merits against important procedural differences related to third-party notices and family law claims. Stated simply, if the manner the defendants have pursued their action unfairly prejudices the third party without adequate justification or excuse, the third party notice will be considered a nullity.

[119] In *Tomic v. Tough*, 2013 BCCA 355, the petitioner commenced a proceeding under the Partition of Property Act, R.S.B.C. 1996, c. 347, and the Family Relations Act, R.S.B.C. 1996, c. 320. In the first proceeding he sought an order partitioning property owned with the respondent and she sought to have all of their issues resolved under the Rules and an adjournment of the petition. The Court of Appeal affirmed the trial judge in deciding, notwithstanding the rules that required partition actions to be commenced by petition, the petition was not a nullity and could be joined for hearing with the family law case. The Court of Appeal made this determination in part because the trial judge would have been required to determine a substantive issue on an interlocutory motion concerning an agreement in effect between the parties.

- [120] In this case, the Rules do not allow for third-party notices in family law cases. More importantly the rules require applications under s. 183 of the Family Law Act to be brought by petition.
- [121] The defendants' third-party notice may be supported under R. 3-5(1)(b) and (c) of the Rules if the claims for relief against James are connected with the subject matter of Jack's action. Otherwise the third party notice may be sustained if there is a question or issue between the defendants and James that is substantially the same as the question or issue that relates to or is connected with the relief claimed in Jack's action or the subject matter of Jack's action. It must also be properly determined in Jack's action.
- [122] I continue to have some doubt about the propriety of the defendants' pleadings but have been asked to decide this question on the merits without dealing with the procedural issue.

Conclusion

- [123] The plaintiffs and third party argue that the defendants third-party notice should be struck out under R. 9-5(1) of the Supreme Court Civil Rules, which states:

Scandalous, frivolous or vexatious matters

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

- (a) it discloses no reasonable claim or defence, as the case may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious,
- (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
- (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

Admissibility of evidence

(2) No evidence is admissible on an application under subrule (1) (a).

- [124] The principles governing the application of this rule set out by Madam Justice Allan in *McNutt v. A.G. Canada et al*, 2004 BCSC 1113, which states:

- [40] In contrast to the bar prohibiting evidence on the first branch of Rule 19(24), evidence is admissible on an application brought pursuant to Rule 19(24) (b) through (d). Ms. Dickson submits that the statement of claim, which erroneously alleges serious wrongdoing against Ms. Maley, is frivolous, vexatious and embarrassing. A pleading is frivolous if it is without substance, is groundless, fanciful, "trifles with the court" or wastes time: *Borsato v. Basra*, 2000 BCSC 28, 43 C.P.C. (4th) 96. In that case, the defendant's solicitor had filed a statement of defence that Master Baker described as "a triumph in minimalism that would gladden the

heart of John Cage." It read as follows: "Except where expressly admitted, the defendants deny the allegations of fact in the Statement of Claim." No admissions were made. Master Baker dismissed the defence as frivolous. He also found the pleading vexatious and embarrassing.

- [41] A pleading is embarrassing if it does not state the real issue in an intelligible form. It is also embarrassing if it is prolix, includes irrelevant facts, argument or evidence. It is prejudicial if it is constructed in a manner calculated to confuse the defendants and make it difficult, if not impossible, to answer: *Kuhn v. American Credit Indemnity Co.*, [1992] B.C.J. No. 953 (S.C.) (QL). In *Kuhn*, the statement of claim, which was 456 numbered paragraphs in length, consisted of irrelevant facts, argument or evidence. It was almost impossible for the defendant to reply to the document and the facts, even if proven, would not make out the cause of action that the plaintiff sought to advance.
- [42] A pleading is an abuse of process if the litigation process is used for an improper purpose; e.g. where the proceedings constitute a sham, where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose: *Babavic v. Babowech*, [1993] B.C.J. No. 1802 (S.C.) (QL); *Drinking Driving Awareness Corp. v. British Columbia* (5 December 2003), New Westminster Registry S78513. In *Babavic*, the Court found that the plaintiffs' action was an abuse of the court's process because it was a vexatious suit without merit brought with the sole motive and intent to harass one of the defendants and interfere with her ability to enforce a judgment. In *Drinking Driving Awareness Corp.*, the Court struck out the plaintiffs' claims against a number of defendants including Her Majesty the Queen, the Premier, the Provincial and Federal Attorney Generals and a Crown counsel. The plaintiffs did not attend the application, which was brought by some, but not all, of the defendants. Madam Justice Koenigsberg found the statement of claim and particulars incomprehensible and incapable of amendment. Invoking her inherent jurisdiction, she dismissed the action in its entirety, even against the defendants who had not brought an application to strike.
- [125] The basis of the third party notice seeking a protection order is best summarized in paragraph 51:
51. The defendant believes that the continued living arrangement with the potential for abuse and intimidation from third party renders it such that the plaintiff Jack Galloway cannot make an informed decision free of duress or coercion. Such decisions include decisions related to this litigation, decisions relating to the interests and protection of the plaintiff and Patricia Galloway which may be different from his own perceived desires, and decisions regarding finances and living arrangements. Defendant believes that a free and informed decision can only be made free from the constant presence and abuse of a third party Jack Galloway.

[126] As reviewed above, the third party notice is prolix and infused with irrelevant facts, argument and evidence as those terms were discussed in McNutt. It is obviously prejudicial to James. It is also, in the circumstances of this case, prejudicial to Jack, who is competent and has disavowed any of the allegations that James has misconducted himself towards him. Jack has independent counsel in this proceeding and should not have imposed upon him the protection order requested by the defendant when he has stated clearly that he does not want it.

[127] If the defendant has a serious concern about Jack's welfare, and in particular the management of his financial affairs, an effort can be made to obtain protection and help under the Adult Guardianship Act. The use of the Family Law Act is, in my view, inappropriate in the circumstances of this case.

[128] Further, I also conclude that Jack is not an at-risk family member and that family violence is not occurring or likely to occur given:

- Jack's disavowal of the allegations, being satisfied he appreciates the nature of Joan and Christopher's' allegations about James conduct and that he is satisfied his own safety and security are not at risk;
- the fact that Jack is represented by counsel and has had ready access to an independent legal advice and an advisor who would be able to assess Jack's competence; and
- the vexatious and scandalous contents of the third party notice and Joan's affidavit, including her flagrant attacks on James' character and unfounded speculation as to his motives and actions, satisfy me that her evidence is substantially unreliable. I also conclude that the content of Joan's affidavits and third party notice suggest an improper motive -- that Joan has acted because Jack re-ordered the provisions of this will for James' benefit and this change prompted her to act in this litigation in order to punish her brother and deprive him of the benefit of living with his father.

[129] In making this determination, I do not accept the defendants' contention that their claims involve an assessment of credibility and that it is premature to resolve this issue at this time.

[130] As the Court of Appeal states in *MacMillan v. Kaiser Equipment Ltd.*, 2004 BCCA 270:

A summary trial almost invariably involves the resolution of credibility issues for it is only in the rarest of cases that there will be a complete agreement on the evidence. The crucial question is whether the court is able to achieve a just and fair result by proceeding summarily.

[131] Further, the Court of Appeal in *Gichuru* made clear at paras. 32 and 33 that all parties to an action must come to a summary trial hearing prepared to prove their claim or defence -- a party cannot, by failing to take necessary pre-trial steps, frustrate the benefits of the summary trial process. Though the defendants have made a number of applications for examination or production -- some abandoned at this summary trial application and all brought on the eve of the last hearing -- I have determined they have been dilatory in

assembling any case beyond the allegations and conjecture reviewed above.

- [132] Given my assessment of the reliability of Jack's evidence and the unreliability of Joan's, as well as my ability to assess the admissible evidence on the question of whether a protection order under the Family Law Act should be made, I am satisfied the issues can be justly and fairly determined.
- [133] Those claims relating to the Public Guardian and Trustee Act and the Adult Guardianship Act as included in the third party notice are struck for the same reasons addressed above.
- [134] In conclusion, it would be an abuse of the process of the court to permit the third party notice to continue and to impose a protection order on Jack that is against his wishes and it is struck under R. 9-5(b) and (d) of the Supreme Court Civil Rules.
- [135] Otherwise, I have found that Jack is competent and able to make decisions concerning his own affairs including the maintenance of a relationship with James. Jack is not an at-risk family member as that term is defined by the Family Law Act.
- [136] The flaws in the third party notice and the defendants' affidavits illustrate a sound reason why protection orders under the Family Law Act should be brought by petition and separate from the property claim in this case. Although I am not dismissing the third-party notice for this reason, this flaw in Joan's approach to this claim, if not a nullity, is an irregularity that has led her into a significant error in approach.
- [137] As such, the third party notice is dismissed.

The Defendants' Other Applications

- [138] The defendants brought various applications to compel examinations for discovery and the production of records from the RCMP and Fraser Health Authority. The defendants also sought orders entitling them to cross-examine staff members from Maple Hill care facility concerning James and the plaintiffs. None of the applications naming third parties were served on those third parties and the defendant abandoned those applications at this application.
- [139] As addressed above, the defendants' application to cross-examine Jack was also abandoned at this hearing.
- [140] The defendants reduced the relief being pursued from their July 31, 2015, application. The defendants continue to seek:
- a. an order permitting Joan to enter Jack's house for the purposes of visiting with him;
 - b. an order that James be required to vacate the house and that he not interfere when the defendants visit the plaintiffs;
 - c. an order restraining James from removing family photos and cards from Jack's house;

- d. an order restraining James from stalking, following or monitoring the defendants;
- e. an order restraining James from any contact or association with the assets, business or financial affairs of Jack.

[141] I am not satisfied that, on an interim or permanent basis, the orders requested by the defendants can be made. In the face of Jack's affidavit evidence concerning his relationship with James, it would be wholly inappropriate to deprive him of James' company and assistance in his home. The fears and suspicions described by the defendants, to the extent they constitute admissible evidence, do not in my view rise to a level that would persuade me to make any orders changing the status quo in the relationship.

[142] If the defendants continue to have concerns about James' relationship with Jack, the Adult Guardianship Act provides options for reporting instances of abuse and details the ability of a qualified health care provider to undertake investigations and seek protective orders and alternative measures from the court.

Order

[143] I direct and order the defendant Christopher to forthwith prepare and file a transfer of title to the property to Patricia and Jack as joint tenants.

[144] The defendants will pay the costs associated with the transfer to Jack and Patricia including any property transfer taxes, costs and disbursements or other expenses that are necessary to complete the transfer.

[145] The defendants counterclaim and third party claims are struck.

[146] Costs for this hearing were not argued though special costs were sought in the Jack and James' application materials. The parties are thus at liberty to make submissions concerning costs of this hearing within 30 days.

"The Honourable Mr. Justice Armstrong"

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