
CANADA / JUDGMENT

Hollander v. Mooney

2012 BCSC 1972

COURT

Supreme Court of British Columbia

DECIDED

28 December 2012

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2012 BCSC 1972 Hollander v. Mooney

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hollander v. Mooney,

2012 BCSC 1972

Date: 20121228

Docket: S090935

Registry: Vancouver

Between:

Gina Marie Hollander and Joy Evelyn Mooney,

executor of the Will of Mark Anthony Mooney, Deceased

Plaintiffs

And:

Eldon Bernard Mooney, also known as Elden

Bernard Mooney, Gail Anita Nelson and

Sasha-Marie Shannon Wise

Defendants

Before: The Honourable Mr. Justice Leask

[Corrected Judgment: The text of the judgment was corrected at paragraphs 9 and paragraph 71 on date January 17, 2013]

Reasons for Judgment

Counsel for the Plaintiffs:

H.H. Low

Counsel for the Defendants:

R.R.E. DeFilippi

Counsel for the Public Guardian and Trustee:

R.D. Lee

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 11-12, 26-27,

September 30, 2011

Written Submissions:

October 17 & 27, 2011

Place and Date of Judgment:

Vancouver, B.C.

December 28, 2012

INTRODUCTION

- [1] This case involves a dispute between adult children about the proper care for their father while he was alive and the proper disposition of his assets after his death. While he was alive a law suit was commenced pitting members of the family against each other. An effort was made to resolve the matters in dispute at a Judicial Settlement Conference. The parties appeared to reach a settlement. While the lawyers were discussing implementation strategies, the father died. Now there is a dispute about whether the settlement is enforceable.

FACTS

- [2] On April 28, 2008, Eldon Bernard Mooney, ("Eldon"), executed a will (the "2008 Will") and a declaration (the "Eldon Declaration"). That same day, Eldon's daughter, Gina, also executed a declaration (the "Gina Declaration").
- [3] Pursuant to the Eldon Declaration, the Gina Declaration and related documents (collectively, the "Declarations"), virtually all of Eldon's property, approximately \$1.5 million (except for the Odlum Brown RRIF Account), was then transferred or confirmed to have been previously transferred from Eldon to Eldon and either or both of Gina and Eldon's son, Mark Anthony Mooney ("Mark"), as joint tenants, with the result that upon Eldon's death, all of

Eldon's property would vest in the survivor(s). There would be no property in Eldon's estate upon his death, nothing for the 2008 Will to attach.

- [4] With respect to the Odlum Brown RRIF Account, Eldon had previously designated Gina and his other daughter, Gail, as the beneficiaries. Pursuant to the Gina Declaration, upon Eldon's death, Gail was to receive \$200,000 from the Odlum Brown RRIF Account and any shortfall was to be made up from the balance of Eldon's property that had vested in either or both of Gina and Mark, leaving Gina and Mark with some \$1.3 million between them.
- [5] Shortly after April 28, 2008, Eldon was hospitalized and underwent treatment for a head injury he had suffered prior to April 28, 2008. Following his discharge and while a resident at a care facility, a dispute arose amongst the family as to which facility Eldon should occupy.
- [6] On October 19, 2008, Eldon appointed his daughter, Gail, and her daughter, Eldon's granddaughter, Sasha, as his representatives under the Representation Agreement Act, RSBC 1996 c.405 (RAA). However, as a result of the Eldon Declaration and the Gina Declaration, and previous transfers, access by Eldon and his representatives to Eldon's property was severely restricted.
- [7] As Eldon's representatives, Gail and Sasha were entitled to make decisions on behalf of Eldon about "obtaining legal services to continue, compromise, defend or settle any legal proceedings on [Eldon's] behalf": RAA, s. 7(1)(d).
- [8] In addition, and in the context of legal fees, Gail and Sasha were entitled to be reimbursed from Eldon's estate "for reasonable expenses properly incurred in performing the duties or exercising the powers" as Eldon's representatives: RAA, s. 26(2).
- [9] On February 6, 2009, Gina and Mark, as petitioners, commenced proceedings on notice to their father, Eldon, their sister, Gail, and the P.G.T., seeking, in part, a declaration that Eldon was incapable of managing his affairs and an order appointing Solus Trust as the committee of Eldon's estate, pursuant to s. 3 of the Patients Property Act, RSBC 1996, c.349 (PPA). The application was opposed by Eldon and his representatives, Gail and Sasha.
- [10] On February 20, 2009, Eldon made another will (the "2009 Will") appointing Gail (with Sasha as the alternate) as his executor and divided his estate into three parts: (1) to his daughter, Gail; (2) to his son, Mark, or if Mark predeceased Eldon, to Mark's daughter, Kendall Ashley Mooney ("Kendall") (a minor); and (3) to Samantha Hollander ("Samantha"), and David Hollander ("David"), Gina's adult children.
- [11] On March 9, 2009, Eldon executed a Nomination of Committee pursuant to s. 9 of the PPA, nominating his daughter, Gail, and his granddaughter, Sasha, as his committees.
- [12] During the summer of 2009, Mark passed away and was replaced in the proceedings by his wife, Joy.

- [13] On December 2, 2009, the Court directed that there be a trial of certain issues raised in the proceedings. In the result, on December 24, 2009, Gina and Joy filed a statement of claim against Eldon, Gail and Sasha. The statement of claim put into issue, in part, Eldon's mental capacity to execute the Nomination of Committee on March 9, 2009. The statement of defence of Eldon, Gail and Sasha was filed on January 4, 2010.
- [14] Thereafter, lists of documents were exchanged and on March 4, 2010, the proceeding was set for trial to commence on January 24, 2011, for 10 days.
- [15] In October 2010, Eldon, Gail and Sasha filed a counterclaim. The counterclaim put into issue, in part, Eldon's mental capacity to make the transfers and other inter vivos gifts to Gina and Mark on April 28, 2008.

Settlement Conferences

- [16] In November of 2010, the parties appeared in Court in connection with certain interlocutory applications and at the invitation of the Court, entered into a Settlement Conference, pursuant to Rule 9-2 of the Supreme Court Civil Rules, B.C. Reg. 168/2002.
- [17] On a preliminary basis, Anna Laing ("Laing"), counsel for Gina and Joy, proposed that all of Eldon's property be transferred to a trust company, Solus Trust, and that Eldon's property be distributed on his death equally among Gina, Joy and Gail, without regard to either the 2008 Will or the 2009 Will.
- [18] However, the proceedings were not then resolved as there were two other issues outstanding:
1. who would be the committee of Eldon's person and estate until his death;
 2. payment of the legal fees incurred by the parties.
- [19] At that hearing, the Court extended the length of the trial by five days, for a total of fifteen days, and directed that the parties re-attend before the Court in early January 2011 to continue the Settlement Conference. Examinations for discovery of Gina, Joy, Gail and Sasha were conducted in late November 2010.
- [20] On January 10, 2011, the parties, including Gina and Joy, and their counsel, Ms. Laing, along with Gail and Sasha, and Mr. DeFilippi, counsel for Eldon, Gail and Sasha, appeared before this Court to continue the Settlement Conference.
- [21] The discussions and negotiations between and among the parties, and the Court, are set out in the transcript.
- [22] Certain key passages show the following:

- (a) the discussions and negotiations were predicated on the basis that Solus Trust would be the committee of the estate, Gina and Joy would return all of Eldon's property to Solus Trust and when Eldon passed away, his property would be distributed as though he died intestate;
- (b) the Court, itself, proposed that " all reasonable expenditures by both sides up until now does get charged against the estate and everybody stops ";
- (c) none of the 2008 Will, Eldon's Declaration, Gina's Declaration or the 2009 Will would be given effect to, and there would be no claim under the Wills Variation Act, R.S.B.C. 1996, c. 489 ["WVA"];
- (d) the parties, with the assistance of the Court, would attempt to reach an agreement and if they did so, the formal document would be drafted later;
- (e) Ms. Laing, counsel for Gina and Joy, wanted " some fairly solid agreement on major points before adjourning " the trial;
- (f) the drafting of the formal order or agreement was an implementation task, not " a figuring out new answers to the problem task ";
- (g) the principle was that Eldon's property was going to be divided three ways between Joy, Gina and Gail, everyone " here is agreed about that ".

[23] During the noon break, Ms. Laing prepared a document entitled "Hollander v. Mooney: Terms of Agreement" (the "Terms of Agreement") and presented it to Mr. DeFilippi and the Court.

[24] The Terms of Agreement were discussed (and in some instances modified) by counsel and the Court. The Terms of Agreement, as settled, provided, in part:

- (a) all of Eldon's property (including Eldon's Odlum Brown RRIF Account) would be transferred to a trust company, Solus Trust;
- (b) upon Eldon's death, Eldon's property would be distributed among Gina, Joy and Gail, in equal shares;
- (c) the reasonable legal costs were to be paid out of Eldon's property;
- (d) releases would be provided.

[25] On January 11, 2011, Ms. Laing wrote to John Blackmer ("Blackmer"), the president of Solus Trust, and said, in part:

Further to our discussion yesterday, I advise that it has been agreed by the parties that:

1. [Solus] will be appointed committee of the estate of [Eldon];
2. [Solus] will be appointed committee of the person together with [Gail] (daughter) and [Joy] (daughter-in-law).

A formal settlement agreement is being drawn up by [Gail's] lawyer, Mr. DeFilippi. He and I will discuss timing of the appointment for committee of the estate and be back to you about that. [Emphasis in original]

[26] In addition, Mr. DeFilippi wrote to all of Ms. Laing, Mr. Blackmer and Sarah Watson ("Watson"), the solicitor for the P.G.T., and said, in part:

Further to our attendance before Mr. Justice Leask on Monday, January 10, 2011, the parties have agreed, generally, on the broad outlines of the terms of the comprehensive settlement arrangement.

In that regard, we have been tasked with preparing and circulating the draft Settlement Agreement and accordingly, we are attaching for your review and comment, Draft #1 of January 12, 2011.

We point out that this is a very rough draft and, even now, is undergoing revision. However, it contains, we believe, the broad outlines of the arrangement agreed to, and additional provisions that are necessary and desirable (at least at the outset), and with that in mind, we would be very interested in your thoughts and comments.

Ms. Laing and the writer are scheduled to reappear before Mr. Justice Leask on Thursday, January 13, 2011, at 9:00 a.m. to review the draft Settlement Agreement and, we trust, further "flesh out" the administrative and the implementation provisions that are needed. [Emphasis in original]

[27] On January 20, 2011, the parties again appeared before this Court. At that time, the parties did not have a copy of the transcripts from the hearing on January 10, 2011.

[28] At the outset of the hearing Ms. Laing, counsel for Gina and Joy, said:

MS. LAING: My lord, we have exchanged drafts of settlement agreements.

THE COURT: Clever use of the plural, Ms. Laing.

MS. LAING: Yes. And there are I think a number of points of disagreement -

THE COURT: Okay.

MS. LAING: -- between the parties and I will identify what are the -- the most significant ones for the plaintiffs. And I should be frank, my lord, last week both my clients told me they were of the view that when we left on Monday they had been sent away with a direction by your lordship to think about it and did not fully comprehend that we had a settlement agreement, and I've worked really hard to bring them back on side, and that's -- and they're there.

THE COURT: I have to say, counsel, quite frankly it seemed pretty clear to me.

MS. LAING: Well and to be honest, my lord, to me as well, but now we seem to have a difficulty or we are not ad idem as to what was agreed. ". [emphasis added]

[29] Certain key passages from the transcripts show the following:

- (a) Ms. Laing, in relation to the payment of legal fees from Eldon's property, stated that it was Gina and Joy's understanding and agreement " was that it was legal fees up to December 31 ", on the basis that was the view expressed by the Court, on January 10, 2011;
- (b) the central core of the agreement reached on January 10, 2011, was that all of Eldon's property would go to Solus Trust and there would not be any issues raised about the 1994 Will, the 2008 Will, the 2009 Will or any of the Declarations;
- (c) on the strength that the parties had reached an agreement, the trial was adjourned.

[30] During the period January 21, 2011 to January 27, 2011, correspondence was exchanged among Mr. DeFilippi, Ms. Laing, the solicitor for the P.G.T., Roger D. Lee ("Lee"), and the solicitor for Kendall's proposed litigation guardian, Ms. Francis, concerning the issue of whether Kendall, through her litigation guardian, before Eldon passed away, could disclaim any interest she might have in Eldon's estate upon his death under the 2009 Will.

[31] On Saturday, January 29, 2011, Eldon passed away unexpectedly.

[32] On Sunday, January 30, 2011, Ms. Laing wrote to Mr. DeFilippi, Ms. Francis and Mr. Lee and said, in part:

Our clients are not ad item on a number of items, not the least of which was the date to which legal fees were paid out of the estate. There was no concluded agreement and is [sic] now moot, given [Eldon's] death.

[33] On Monday, January 31, 2011, Mr. DeFilippi responded:

We are not sure we entirely agree with you (and Mr. Justice Leask may not agree with you), but rather than debate the point here, we will be sending in a request to appear before Mr. Justice Leask this morning to appear before him today (by telephone if necessary) seeking an interim interlocutory injunction essentially maintaining the status quo until February 14, 2011. That said, if we can agree that the status quo should be maintained until the 14th, please let us know.

[34] The defendants now say that Eldon's Contract, meaning the agreement purportedly reached on January 10, 2010, was a contract to create an inter vivos trust and therefore the following is applicable:

- (a) it did not take effect upon death;
- (b) it was intended to have immediate effect;
- (c) Gail and Sasha as Eldon's Representatives had the legal authority to enter into Eldon's Contract;
- (d) the creation of the trust was not contingent on the transfer of property into the trust; and
- (e) none of Kendall, David or Samantha had any interest in Eldon's property at the time of his death.

[35] The plaintiffs' response is as follows:

- (a) the parties did not agree to create an inter vivos trust for Eldon;
- (b) the Court does not have the authority to imply the terms necessary to create an inter vivos trust for Eldon; and
- (c) Eldon's representatives Gail Nelson and Sasha Wise (the "Representatives") did not have the authority to bind Eldon to create an inter vivos trust that provided Gail with a remainder interest in the trust.

LAW

[36] Although the parties have made extensive written and oral submissions on the law, there is substantial agreement on a number of issues. First, all counsel agree that the holder of a general power of attorney on behalf of an incapacitated adult may perform any function that the adult could perform for himself except matters where the right, privilege or duty is imposed on the adult personally or the performance of which requires special personal skill or there is a statutory or other requirement that the action must be done in person. (P.Watts and F.M.B. Reynolds, *Bowstead and Reynolds on Agency*, 19th ed., London, Sweet & Maxwell, 2010, Article 6, paras 2-017 and 2-018).

[37] For the purpose of this case, counsel agree that the holder of a general power of attorney cannot make a will for an incapacitated adult nor change the beneficiaries of a will.

[38] All counsel accept that *Banton v Banton*, [1998] O.J. No. 3528, 164 D.L.R. 4th 176 stands for the proposition that holders of a general power of attorney can establish an inter vivos trust into which an incapacitated adult's property can be placed with a life interest to the incapacitated adult. In *Banton* the holders of the power of attorney granted the remainder interest to themselves which the court refused to uphold.

[39] Counsel also agree on the relevance of *Easingwood v. Easingwood Estate*, 2011 BCSC 1154, [2011] B.C.J. No. 1630 in which Dillon J. found that:

- (a) "when the trust was created ... [the grantor] lacked mental capacity to deal with his property ..." (para 36)
- (b) "[the attorneys] ... had fiduciary obligations towards ... the donor, but not obligations as a general trustee for the benefit of others" (para 36)
- (c) "A power of attorney with the generalized power as here include the power to settle on irrevocable inter vivos trust."
- (d) "The trust here reflected perfectly the terms of [the donor's] will" (para.40)
- (e) "It was not a situation as in *Banton* where the assets were distributed contrary to the stated wishes of the donor" (para 40)

- (f) "Nor is this a situation where the attorneys used the power for their own benefit without the knowledge of the donor." (para 40)
- (g) "The trust was a valid act of transfer and was properly constituted as an inter vivos trust" (para 42)
- [40] After a number of submissions to the Court, both written and oral, counsel's disagreement seemed to focus on the proper interpretation of s.7(1)(d) of the Representation Agreement Act, R.S.B.C. c. 405
- (d) obtaining legal services for the adult and instructing counsel to commence proceedings, except divorce proceedings, or to continue, compromise, defend or settle any legal proceedings on the adult's behalf.
- [41] The Court asked counsel if the legislative history could provide any assistance in interpreting s. 7(1)(d). Counsel for the plaintiffs informed the Court that during the legislative discussions about the RAA, there was no discussion about the power of a representative to secure legal services for the adult and the scope of such a power. Counsel drew to the Court's attention a discussion at the committee stage where the Attorney General was asked:

"A. Warnke: ... could an agreement stipulate that the representatives could make changes to an individual's will if the agreement stipulates such?

Honourable C. Gabelmann: There are later sections which limit what can be in the agreement. One thing that cannot happen is the amendment of a will. That cannot be done by a representative." (HANSARD, Volume 12, Number 6, Wednesday July 14, 1993, p.8687)

Following up that exchange, in response to a question from another MLA, the Attorney said:

"Honourable C. Gabelmann: The representative can support, encourage and do all those kind of things to help but can't actually enter into a Will on behalf of the individual. (Emphasis added) (HANSARD, supra at pp 8687-8688)

ANALYSIS

- [42] There are several points which need to be kept in mind when analyzing this situation. First, there is the issue of what matters were in dispute between the parties in the litigation before the Court. Although the case began with Gina and Mark seeking a declaration that their father, Eldon, was incapable of managing his affairs and an order that Solus Trust be appointed as the committee of Eldon's estate, by late 2010 the issues in dispute between the parties had expanded to include all of Eldon's testamentary dispositions as well as his inter vivos property transfers. At the time of the January 10, 2011 Settlement Conference there was no agreement between the parties involved in the litigation concerning a valid testamentary disposition of Eldon's assets nor concerning which of his assets would be governed by his expressed testamentary wishes. Second, Eldon himself was a defendant in

the proceedings before the Court. Third, Gail and Sasha had both a general and enduring power of attorney to act on Eldon's behalf and were appointed as his representatives under the RAA with the full power to act jointly or singly. Their powers included the power to "... compromise ... or settle any legal proceedings on [his] behalf." Throughout the Settlement Conference and all legal proceedings before the Court prior to Eldon's death, Mr. DeFilippi maintained that he represented all the defendants in the case before the Court, including Eldon. There is also no dispute before the Court that, by January 2011, Eldon was incapable of managing his own affairs. Lastly, on January 10, 2011 the parties purported to reach an agreement in the following terms:

Hollander v. Mooney: Terms of Agreement

1. Committee of person:

Trust company, Joy, Sasha

Gail takes Eldon to 2 doctors within 2 weeks to get assessment of incapacity of person

Application by Trust company, Sasha & Joy within 30 days of receipt of doctors' reports

Gail and Gina have:

- (i) unrestricted access to Eldon;
- (ii) the right to obtain information about Eldon's condition, care from doctors and 3rd party caregivers.

2. Committee of estate: Trust company

Assets transferred to trust company once committee of person is appointed by Court

3. Estate:

estate is divided 3 ways - Joy, Gina, Gail

April 2008 Will is presented for probate by Solus Trust as administrator with will annexed (Gina renounces as executor). However, distribution is as per agreement between Joy, Gina, and Gail.

4. Legal fees:

Reasonable legal costs (including monies already paid to , as reviewed by the Public Guardian and Trustee, paid out of the estate.

Cap:

[43] When the parties left the courtroom on January 10, 2011 there were three tasks remaining to be accomplished:

- 1. deciding on the most appropriate legal mechanisms for implementing the agreement;
- 2. drafting a detailed agreement or Court Order (or both); and

3. making an application to the Court for approval of the agreement reached between the parties.

[44] At the time of Eldon's death on January 29, 2011 none of those tasks had been completed.

[45] One of the arguments initially raised by the plaintiffs was that the parties had not reached a binding agreement on January 10, 2011 because of a failure to achieve consensus on a fundamental term of the alleged agreement - the date up to which all parties' legal bills would be paid from Eldon's assets. Review of the transcripts demonstrated that there was no merit to this argument. Both sides of the dispute accepted the Court's proposal that the cutoff date for payment of legal bills was the date of the Settlement Conference - January 10, 2011.

[46] The other issue raised by the plaintiffs had considerably more substance. At the Settlement Conference, counsel had different ideas about the best legal mechanism for implementing the agreement. The drafts exchanged between the lawyers during January 2011 had not resulted in any consensus on that topic. Following Eldon's death, counsel for the plaintiffs' took the position that their disagreement went to the heart of the issue of whether or not the parties had actually settled their disputes on January 10, 2011. The core of their argument was that Gail and Sasha did not have the power to make an agreement on Eldon's behalf that would alter the "testamentary disposition" of his assets on his death.

[47] In response to their argument Mr. DeFilippi developed the legal argument subsequently referred to as "Eldon's Contract" to describe what he termed the essential features of the agreement reached on January 10, 2011. His position was that the agreement was a contract made on behalf of Eldon by his representatives Gail and Sasha to create an inter vivos trust. Viewed in this light, Eldon's Contract:

- a) did not take effect upon death;
- b) was intended to have immediate effect;
- c) was within the authority of Gail and Sasha as Eldon's Representatives;
- d) created a trust that was not contingent on the transfer of property into the trust; and
- e) therefore none of Kendall, David or Samantha had any interest in Eldon's property at the time of his death.

[48] The plaintiffs made a number of arguments against accepting the "Eldon's Contract" analysis. A non-exhaustive list of their arguments includes:

1. Neither at the Settlement Conference nor in the drafts exchanged between counsel prior to Eldon's death did any lawyer mention the concept "inter vivos" trust;

2. The parties did agree at the Settlement Conference that Solus Trust would be appointed committee of Eldon's estate. The plaintiffs submit that there is a fundamental inconsistency in categorizing Solus Trust as both committee of Eldon's estate and trustee of an inter vivos trust established by Eldon;
3. The Court cannot imply from the agreement of Gina, Joy and Gail for an Equal Division of Eldon's assets on his death that Eldon had bound himself to make an inter vivos trust on January 10;
4. The Representatives had no legal authority to bind Eldon to make an inter vivos trust;
5. There was no consideration flowing to Eldon to induce him to enter into an agreement to establish an inter vivos trust.

[49] The Public Guardian and Trustee, in its submission, agreed with the plaintiffs that the representatives did not have the power to enter into a contract that all of Eldon's assets could be placed in an inter vivos trust for Eldon's benefit during his lifetime with a gift of the remainder to Gail, Gina and Joy on his death. The P.G.T. also submitted that the trustee of an inter vivos trust should not, at the same time, be a committee of the patient's estate. There was a further submission that Kendall, through a litigation guardian, should be a participant in the proceedings.

[50] In its interpretation of the Representative Agreement Act the P.G.T. made extensive reference to the Regulations under the Act and argued that all of section 7 is limited to "routine management of the adult's financial affairs". The P.G.T. further argued that:

"It cannot be read into ss. 7 and 9 of the RAA that financial powers given to a representation under a s.9 representation agreement are greater than those given to a power attorney. They are the same."

[51] Dealing with the plaintiff's minor arguments first:

1. The fact that counsel did not refer to the settlement as "Eldon's Contract" during the settlement negotiations or in their exchange of drafts prior to his death does not seem like an impediment to accepting the analysis now, provided, of course, that the analysis is sound.
2. I am also not satisfied that there is some fundamental inconsistency between Solus Trust being the committee of Eldon's estate and trustee of an inter vivos trust created by Eldon. Human beings can have various roles in the affairs of other human beings; I know of no general principle that restricts other "legal persons" such as corporations and trust companies from having more than one relationship with another "legal person" or a living, breathing human being. The very significant dispute in this case over who was to be the committee of the person for Eldon was apparently resolved satisfactorily by an agreement that Solus Trust would be the "tie-breaker" between two human beings. In the circumstances of this case, I believe Solus Trust can "wear three hats": (1) committee of the estate; (2) member of a group that operates as committee of the person; and (3) trustee of an inter

vivos trust.

3. The argument that the Court cannot imply that Eldon bound himself to make an inter vivos trust from the agreement of Gina, Joy and Gail for an equal division of Eldon's assets fails because it is a form of shadow boxing or "straw man" argument. Counsel for the defendants is not asking the Court to decide the issue by implying the existence of a contract nor is there any reason to give serious consideration to such a suggestion if it were made.

[52] Dealing with the P.G.T.'s submissions about the RAA, the first point is that the Regulations and the "routine management of the adult's financial affairs" relate to s. 7(1)(b) of the Act rather than s.7(1)(d). As to the point concerning whether s.7(1)(d) is a broader power than that possessed by the holder of a general power of attorney, that is discussed later in the Reasons under the heading Legislative Intent.

[53] The two most serious arguments made against the "Eldon's Contract" analysis are:

- a) Gail and Sasha did not have legal authority to create the inter vivos trust in Eldon's name necessary to implement the agreement reached at the Settlement Conference; and
- b) there was no consideration flowing to Eldon to create a binding contract.

Gail and Sasha's Legal Authority

[54] Gail and Sasha were appointed as Eldon's representatives by the October 14, 2008 representation agreement. That agreement included the following language in para. 1.

"My representatives may act separately, but I would like them to communicate and consult each other as much as possible."

and also stated at 1(c):

- c) Financial Affairs

I authorize my Representatives to help me make decisions or to make decisions on my behalf about managing my financial affairs, such as:

...

· obtaining legal services and instructing counsel to commence proceedings (except divorce proceedings) or to continue, compromise, defend or settle any legal proceedings;"

[55] This mirrors the language of s. 7(1)(d) of the Representation Agreement Act, RSBC 1996, c. 405.

[56] The significance of the provision that Eldon empowered his representatives to act separately is that Gail has a conflict of interest. If she were the sole representative or if the two representatives were required to act jointly then the fact that she obtains a personal benefit from Eldon's Contract would prevent it from being a valid implementation of the representation agreement. However, the power of the representatives to act separately and

the fact that Sasha obtains no benefit under Eldon's Contract means that Gail's conflict of interest does not defeat Eldon's Contract.

[57] Aside from Gail's conflict of interest the principal arguments made by the plaintiffs (and supported by the Public Guardian and Trustee) against the legal authority of the representative to bind Eldon were:

1. The contract was, in effect, making a testamentary disposition by Eldon, and therefore beyond the authority of a representative to make for an incapable adult;
2. Even if the contract was not a testamentary disposition, it was not in Eldon's best interest to have the contract made for him and therefore, it was not within the fiduciary obligation of the Representatives to make for him; and
3. Even if the Eldon Contract was valid, it would not nullify the operation of the 2009 Will or the need for the will to be probated nor would it eliminate the rights of the beneficiaries under the 2009 Will, including Kendall, to argue that the Eldon Contract was invalid.

[58] The idea that Eldon's Contract is a "testamentary disposition" requires close examination. First, it is undisputed that representatives cannot make a will for an incapacitated person. Counsel for the plaintiffs and the P.G.T. go beyond the proposition and say that the representatives cannot change the "estate plan" of an incapacitated adult. I agree with two of counsel for the defendants' propositions about this topic. He says:

First, the term "estate plan" is not found in the (or likely in any) legislation under consideration, it is not a technical term nor a term of art. However, it may be said that an "estate plan", or more accurately "estate planning", is the process of anticipating and arranging for the disposal of a person's property (both prior to and upon death) involving wills, trusts, beneficiary designations, powers of appointment, property ownership, gifts, powers of attorney, living wills and the like.

At the outset, the overarching problem with this submission is that Eldon's estate plan (whether it is found in Eldon's Wills or the intestacy provisions in the Estate Administration Act, R.S.B.C. 1996, c. 122) has not changed, whether by the terms of Eldon's Contract or otherwise. That was the whole purpose of Eldon's Contract as explained to the Court by Ms. Laing at the time.

[59] As to the question of Eldon's "best interests", this is a question that requires further discussion at a later point in these reasons. The short answer is: the continuation of this law suit was clearly not in Eldon's best interests. The costs of litigation were eroding the assets available to care for Eldon during his lifetime. Any reasonable settlement of the dispute was probably in Eldon's best interests. The agreement reached between the parties, represented by competent counsel on both sides, appeared reasonable at the time.

[60] As to the effect of Eldon's contract on the 2009 Will, counsel for the defendants makes no claim that it nullifies the 2009 Will. He says it has no effect whatsoever on the 2009 Will. The summary of the "Terms of Agreement" presented to the Court by counsel for the plaintiff said this:

"3. Estate:

- (a) estate is divided 3 ways - Joy, Gina, Gail
 - (b) April 2008 Will is presented for probate by Solus Trust as administrator with Will annexed (Gina renounces as executor). However, distribution is as per agreement between Joy, Gina, and Gail.
- [61] As to eliminating the right of the beneficiaries under the 2009 Will, including Kendall, to argue that the Eldon Contract was invalid, that was never in the contemplation of any of the parties. The discussion at the January 10, 2011 Settlement Conference contemplated that implementing the agreement would require a Court hearing where any interested party (and Kendall was specifically mentioned) would have the opportunity to challenge the proposed arrangement. Categorizing the agreement as Eldon's Contract made no change in that procedural requirement. Indeed, because Eldon's Contract was allegedly made by his representatives on his behalf there is a requirement for Court approval. Supreme Court Civil Rules, Rule 20-2(17).

Consideration

- [62] There is no dispute between the parties that contracts require consideration to be enforceable. Counsel for the plaintiffs argue that:
- 30. Even if Gail and Sasha had the authority to bind Eldon to make a trust and settle his assets into it, the Plaintiffs submit that no valid consideration flowed to Eldon for doing so.
 - 31. The Court has suggested that consideration flowed to Eldon through the preservation of his assets for his own use during his lifetime, including the collecting in of assets that he had previously transferred to others by way of joint tenancy.
 - 32. There was no issue that the joint tenancy assets were for Eldon's benefit during his lifetime and therefore, there was no consideration flowing to Eldon as a result of this agreement. The Plaintiffs were not asserting that Gina owned the joint tenancy assets or any of Eldon's assets to Eldon's exclusion. In Gina's Affidavit of Kindred and Fortune sworn January 27, 2009 long before the counterclaim commenced, she expressly states at para. 24 that assets she had placed in her sole name for Eldon's protection were held by her in trust and that she had no beneficial interest in those funds. Eldon's entitlement to his own assets did not alter as a result of the agreement; he received nothing additional by way of consideration.
 - 33. Refraining from using Eldon's assets to continue funding the litigation does not constitute adequate consideration to Eldon for entering into the contract with the Plaintiffs to settle the litigation. The Representatives were not entitled to use Eldon's monies to litigate the issue of who would get Eldon's estate on his death. It is no consideration to Eldon for Gail and Sasha to forbear to do something they were not otherwise entitled to do.

34. Further, Eldon had made his estate plan. It was not in his best interest that during his lifetime the parties were attempting to undo that estate plan for their own benefit and there can be no consideration flowing to Eldon where the contract was not in his best interest.
- [63] The defendants' response to these arguments is refreshingly simple. Eldon was a party to the litigation. Eldon's assets, needed to maintain him for the balance of his life, were being dissipated in the law suit. Settling the dispute was in Eldon's interest because it would terminate the drain on his assets caused by the law suit. This consideration applied with full force to Eldon as it does for every party to a law suit who chooses to settle rather than continuing to battle in Court, with all its attendant costs and unpredictability of result.
- [64] On this issue I find myself persuaded by the defendants' submissions and unpersuaded by the plaintiffs'.

Legislative Intent

- [65] After a number of submissions to the Court, both written and oral, counsel's disagreement seemed to focus on the proper interpretation of s.7(1)(d) of the Representation Agreement Act, R.S.B.C. c. 405
- (d) obtaining legal services for the adult and instructing counsel to commence proceedings, except divorce proceedings, or to continue, compromise, defend or settle any legal proceedings on the adult's behalf.
- [66] The plaintiff's position is that "A fundamental principle in law is that the Court will not allow for the replacement of a person's selected estate beneficiaries, after his incapacity, with new beneficiaries selected by the person's committee, attorney or representative." The plaintiffs say:
- "There is no limitation on the type of legal action that a representative may compromise under s. 7(1)(d) of the RAA; however, in compromising any legal action on behalf of the incapable adult, the representative cannot substitute new estate beneficiaries for those selected by the adult while capable. The right to compromise a legal action for the incapable adult would never involve a compromise that alters post-death beneficiaries of the adult's assets."
- [67] Plaintiff's counsel maintained the position that all the powers conferred on representatives by the RAA were "still subject to the rule against the representatives making a new testamentary plan for the incapable adult, in the context of financial management or legal advice."
- [68] The plaintiff's position concerning the matters in issue in the litigation was that their original action concerned the management of Eldon's person and affairs and who should assume those responsibilities during Eldon's lifetime. They assert that the counterclaim concerned whether certain assets were held in trust for Eldon during his lifetime. They summarized their position on this aspect of the case:

"There was no pleaded issue about which persons were entitled to [Eldon]'s assets after his death. Therefore, for the Defendants to settle the matter of who should be [Eldon]'s committee by rearranging the disposition of his assets on his death through a trust or other arrangement, goes beyond their authority as his litigation representatives under the RAA."

- [69] Counsel for the defendants concedes that the holder of a general power of attorney could not necessarily have entered into Eldon's Contract. He relies on the fact that Gail and Sasha were representatives with the powers conferred by s.7(1)(d) of the RAA.
- [70] Counsel for the defendants also made the point that Eldon's Contract closely resembles a suggestion made by the plaintiffs' counsel in the correspondence between counsel following Eldon's death. Next, he reiterated a central theme of his submissions - his position that "Nothing in Eldon's contract provided for a transfer of any of Eldon's Property upon his death." Then he turned to the language of s.7(1)(d) to make two points: (a) "that Gail and Sasha had the power to contract on behalf of Eldon on January 10, 2011, including the power to enter into a contract to compromise and settle a legal proceeding to which Eldon, albeit incapacitated, was a party, subject to Court approval;" and (b) that the legislature had turned its mind to limitations on the representatives' powers to deal with legal proceedings by inserting the phrase "except divorce proceedings" in s.7(1)(d). He also emphasized Rule 20-2(17) of the Supreme Court Civil Rules which specifies that no settlement or compromise of legal proceedings to which an incapacitated adult is a party is "... binding without the approval of the court ..."
- [71] Defendants' counsel again emphasized that Eldon's Contract does not create "new beneficiaries" of Eldon's estate or, indeed, any beneficiaries because "it was not a testamentary disposition that relied upon Eldon's death for its vigour and effect." He also takes issue with the plaintiff's submission that "this was not an issue in the litigation." On that subject he asserts, firstly, that the counterclaim was expressly aimed at an aspect of Eldon's estate plan - the transfer of the bulk of Eldon's property in trust to Gina and, secondly, he completely disagrees with the plaintiff's submission that the pleadings in a litigation somehow constrain the ambit of a settlement. In counsel's words:

"... in many instances, an agreement that compromises or settles legal proceedings may, in addition compromise or settle matters that are not (but may be, then or in the future) the subject matter of further disputes or legal proceedings, and the agreement may even compromise and settle matters that are wholly unrelated to the matter strictly at issue in the legal proceedings."

CONCLUSION

- [72] I am satisfied that the Eldon's Contract analysis is a proper framework for interpreting the agreement reached by the parties at the Settlement Conference on January 10, 2011. I am also satisfied that the representation agreement appointing Gail and Sasha as representatives read with s. 7(1)(d) of the RAA empowered them to settle this law suit by entering into Eldon's Contract. These were the central issues presented to the Court in the

series of written submissions and oral hearings that occurred in the latter half of 2011. It is my considered opinion that these findings do not conclude the tasks before the Court.

- [73] I am aware that the original Application filed by the defendants sought a ruling that a settlement had been reached and also sought the Court's approval of that settlement pursuant to Rule 20-2(17) of the Supreme Court Civil Rules. It is my understanding that the original material was served upon Kendall or someone acting as her litigation representative. Despite these two significant facts, I believe that the focus of submissions and the Court's attention has been on the validity of the Eldon's Contract analysis and the power of Eldon's representatives to settle this law suit.
- [74] In my opinion it is necessary, unless all potential parties reach agreement, for the Court to hold the Rule 20-2(17) hearing to determine whether this contract is in Eldon's best interest. I do not regard the findings in these Reasons as having disposed of that issue. The responsibility for bringing this issue before the Court rests on the representatives who entered into the settlement agreement on Eldon's behalf.

"Leask J."

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