
CANADA / JUDGMENT

Horton (Re)

2020 BCSC 87

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Supreme Court of British Columbia

DECIDED

23 January 2020

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2020 BCSC 87 Horton (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Horton (Re),

2020 BCSC 87

Date: 20200123

Docket: S194379

Registry: Vancouver

In the matter of the Patients Property Act,

R.S.B.C. 1996, c. 349 and amendments thereto

Re: Sandra Sharlene Horton

Before: The Honourable Madam Justice Warren

Reasons for Judgment

Counsel for the Petitioner:

D.J. Herbert

Counsel for the Respondent:

J.M. Diakow

Place and Date of Hearing:

Vancouver, B.C.

December 5, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 23, 2020

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Introduction

- [1] Dennis Ross Premack and Gaylene Fay Lucas are siblings. They have brought competing applications, pursuant to the Patients Property Act, R.S.B.C. 1996, c. 349, for appointment as committee of the estate and person of their mother, Sandra Sharlene Horton. Ms. Lucas also seeks an order, in the alternative, that the Public Guardian and Trustee (the "PGT") be appointed committee.
- [2] There is no dispute that Ms. Horton is, because of mental infirmity arising from disease, age or otherwise, incapable of managing herself and her affairs, and that an order declaring such should be granted pursuant to s. 2 of the Patients Property Act. The real issue is who should be appointed her committee pursuant to s. 6 of the Patients Property Act.
- [3] I use first names to refer to Dennis Premack, Gaylene Lucas and their siblings because two of them have the same surname. I intend no disrespect in doing so.

A Preliminary Comment on the Evidence

- [4] There is significant conflict in the evidence, particularly as between the affidavits sworn by Dennis and the affidavit sworn by Gaylene. Their brother and sister, Brian Premack and Heather So, have sworn affidavits in support of Dennis's application but those affidavits are brief and quite vague, and they do not assist in resolving the conflicts. Neither Dennis nor Gaylene applied for an order permitting cross-examination on affidavits.

- [5] Dennis commenced this proceeding in April 2019. His initial affidavit was brief and did not allude to the friction between him and Gaylene. Gaylene swore a substantive affidavit in response to Dennis's application in which she gave evidence about the family conflict, setting out her version of its cause and making serious allegations against Dennis. Dennis then swore a substantive affidavit responding to several of the contentious aspects of Gaylene's affidavit and making allegations about Gaylene. Brian, Heather and Anne Wikman, Dennis's spouse, also then swore affidavits in support of Brian's position.
- [6] Gaylene then filed her own application but she did not file any further affidavits although, as an applicant who had filed her own notice of application, she could have done so either as of right or on application. At the hearing, and after oral submissions had been made on Dennis's behalf, her counsel sought to have a brief affidavit admitted that I was told addressed one discrete issue, specifically, whether she made a report to the police about Dennis in November 2018. I sustained Dennis's objection to the admission of that affidavit based on lateness. I ruled it inadmissible because Dennis did not have the opportunity to attempt to test the evidence in it and because I concluded there was no admissible evidence of the identity of the person who made the police report in any event. Nevertheless, certain allegations against Gaylene remain unanswered.
- [7] Both sides have included hearsay in their affidavits, and some of the affidavits, particularly Brian's and Heather's, contain bare statements of their beliefs without providing an adequate factual foundation. I have not relied on any of the hearsay for its truth. I have not relied on bare statements of belief.
- [8] I have concluded that it is not necessary to resolve the conflicts in the evidence and that I can make the findings required to decide the applications notwithstanding the deficiencies in the record because there is sufficient, reliable, uncontroverted evidence relevant to the central facts on which the applications rest. Specifically:
- (a) the medical evidence establishes that Ms. Horton is, by reason of mental infirmity due to dementia, incapable of managing her affairs and her person; and
 - (b) the combination of certain undisputed conduct of each of Dennis and Gaylene, and the obvious animosity between them with respect to their mother, forces the conclusion that it is not in Ms. Horton's best interests for either of them to be appointed her committee.

Background

- [9] Ms. Horton is 76 years old. She has four children: Brian, born September 19, 1962; Gaylene, born October 16, 1963; Dennis, born July 12, 1965, and Heather, born January 30, 1970. The father of Ms. Horton's children, Norman Premack, died in 1977. Ms. Horton subsequently married John Horton, who died in 2004. John Horton had a son, Gordon Horton, from a previous relationship.

- [10] John Horton did not leave a will when he died. Ms. Horton received a share of his estate on an intestacy basis. This includes a tenancy for life in a detached single-family home in Surrey, where she resides with her dog and three cats.
- [11] Ms. Horton is a strong-willed person. She has lived alone for more than 15 years. She does not like being told what to do and she has expressed the desire to remain living in her home for as long as possible.
- [12] Dennis lives on Texada Island with Ms. Wikman. He has been employed in open pit mining on Texada Island since 1994. He serves as Financial Secretary for the United Steelworkers of America Local #816.
- [13] Gaylene lives in Surrey with her husband. Their home is about a 25-minute drive from Ms. Horton's house. Gaylene has three adult children, all of whom are married and independent. For about the last 20 years, she has worked in administrative positions. She is currently employed as a director of finance and facilities for a private elementary school.
- [14] Brian lives in Surrey. He is not married and has no children. Gaylene has characterized him as having had problems with alcohol for many years. He has not disputed that characterization.
- [15] Heather lives in Port Coquitlam with her husband and two children. She is a homemaker.
- [16] Dennis, Gaylene, Brian and Heather all have ongoing relationships with their mother. However, Gaylene deposes that Dennis and Ms. Horton were estranged between 2007 or 2008 and 2017, and that since 2017 Ms. Horton has complained to Gaylene about interactions she has had with Dennis. Dennis denies there was ever an estrangement between him and his mother. He acknowledges that since late 2018, his mother has exhibited some hostility towards him and has accused him of taking her money. He maintains that this is due to Gaylene's influence over their mother. He alleges that Gaylene repeatedly makes negative and false accusations about him to their mother. Gaylene alleges that Dennis has a short temper, is quick to anger, and is controlling and verbally abusive. He denies this characterization.
- [17] Ms. Horton's assets consist of the life estate in the home in which she lives, an entitlement to share the equity in the home with Gordon Horton as the intestate heirs of John Horton, two accounts at the Bank of Montreal with a total value of approximately \$31,000, and three accounts at Raymond James with a total value of approximately \$180,000. Her only liability is a debt of \$19,513.72, which Dennis says he is owed on account of certain expenses he incurred personally on his mother's behalf.
- [18] Ms. Horton has net income of \$46,000 per year, or slightly more than \$3,800 per month. Her monthly expenses, which include property taxes and insurance, utilities, food and the cost of Nurse Next Door services, total approximately \$4,400.

- [19] In 2005, Ms. Horton executed a power of attorney in favour of Dennis and Gaylene, with each having the power to act separately. At the same time, she executed a will in which she appointed Dennis executor and Gaylene alternate executor. The 2005 will directs that Ms. Horton's estate be divided equally among her four children on her death. The 2005 power of attorney and will were kept in a safe deposit box at the Credit Union, held jointly by Ms. Horton and Gaylene.
- [20] By late 2016 or early 2017, Ms. Horton was exhibiting signs of cognitive decline. Dennis, Gaylene, Brian and Heather met at an A&W restaurant to discuss the matter. Dennis, Brian and Heather all place this meeting in the fall of 2016. Gaylene places this meeting in April or May 2017. The timing as between the fall of 2016 or the spring of 2017 is not material. What is clear is that since late 2016 or early 2017, all of Ms. Horton's children have been concerned about her cognitive decline and her ability to care for herself.
- [21] Shortly after the A&W meeting, Dennis and Gaylene went to the Credit Union to make sure the 2005 power of attorney was in the safe deposit box. They found it there, read it together, and returned it to the safe deposit box for safekeeping.
- [22] In April 2017, Ms. Horton's then family doctor, Dr. Starke, assessed her cognitive health. Gaylene deposes that she attended this appointment together with Dennis, and that Dr. Starke said he suspected "early onset dementia/alzheimer's disease" and Ms. Horton should have an in-home assessment to determine whether it was safe for her to live on her own. Heather deposes that she and Brian accompanied Ms. Horton to an appointment with Dr. Starke in April 2017, that Dr. Starke told them that Ms. Horton had scored 17/30 on a cognitive assessment and that she should not be living at home on her own.
- [23] Dennis deposes that following the April 2017 appointment, Dr. Starke made a significant effort to secure an assessment of Ms. Horton by geriatric specialists with the Fraser Health Authority but that Gaylene unilaterally cancelled the assessment. He deposes that he and Gaylene then returned, with Ms. Horton, to Dr. Starke's office, that Dr. Starke was angry that Gaylene had cancelled the appointment, and that Dr. Starke rebooked the assessment.
- [24] In or about June 2017, an in-home assessment of Ms. Horton was conducted by employees of Fraser Health. It is not clear what the outcome of that assessment was. Gaylene deposes that the assessor indicated she would send her completed report to Dr. Starke and that Dr. Starke subsequently advised that while Ms. Horton may need to consider care in the future, no home support was required at that time. Dennis deposes that Dr. Starke did not say Ms. Horton did not need home support and, to the contrary, was clear in his view that she should be in care. I have not been provided with a copy of the report or any evidence from Dr. Starke.
- [25] In the spring of 2017, Dennis started assisting Ms. Horton with her financial affairs pursuant to his authority under the 2005 power of attorney. Specifically, he began monitoring Ms. Horton's bank account and paying at least some of her bills. He deposes that he started doing so after Gaylene cancelled the first Fraser Health assessment appointment, because

her conduct in this regard caused him to believe that she was in denial about the deterioration in Ms. Horton's condition and was not communicating with him honestly about his mother's health. It is apparent that Dennis did not tell Gaylene that he was involving himself in Ms. Horton's financial affairs. On Dennis's own evidence, Gaylene learned he was doing so at a meeting with a geriatric specialist a year later, in April 2018.

- [26] Gaylene deposes that in June 2017, she learned that the sign-in card for the safe deposit box showed that Ms. Horton had signed in twice recently and that she and Dennis were concerned that one of their siblings may have been attending the safe deposit box with Ms. Horton. Dennis denies discussing this concern with Gaylene.
- [27] Gaylene deposes that in September 2017, she and Dennis agreed that she should deliver the 2005 will and power of attorney to the offices of the MacCallum Law Group, a law firm in Langley, for safekeeping. Dennis acknowledges that he and Gaylene took the 2005 power of attorney to Mr. MacCallum's office for a consultation but he says they returned it to the safe deposit box. He denies suggesting that the papers be taken to Mr. MacCallum's office for safekeeping. He says Gaylene unilaterally removed the documents from the safe deposit box and took them to Mr. MacCallum's office.
- [28] On September 28, 2017, Ms. Horton and Dennis attended at the offices of the MacCallum Law Group, without an appointment, and retrieved the documents. Stacey Gallie, a paralegal at the MacCallum Law Group, has sworn an affidavit in which she deposes that when Ms. Horton and Dennis attended at the offices that day, Dennis spoke for his mother, demanded that the documents be released, raised his voice, became loud and argumentative, and objected to Ms. Gallie meeting with Ms. Horton alone. She deposes that Ms. Horton appeared uncomfortable and looked nervous. Dennis denies raising his voice with Ms. Gallie. For reasons expressed later, I have concerns about Dennis's conduct in relation to his mother's affairs. Ms. Gallie has no stake in this matter and there is nothing in the record to call into question the accuracy or veracity of her account, other than Dennis's denial. In the circumstances, I prefer her evidence over Dennis's evidence.
- [29] In September 2017, Dennis engaged Nurse Next Door to provide in-home support to Ms. Horton. Gaylene deposes that she was not consulted about or involved with the establishment of these services. She says Ms. Horton expressed displeasure about receiving help from Nurse Next Door and claimed that Dennis said he would pay for it. Dennis deposes that Gaylene told Ms. Horton that she did not need the services of Nurse Next Door and that it was a waste of money. Gaylene deposes that the quality of service provided by Nurse Next Door was poor. Dennis accuses Gaylene of unfairly disparaging Nurse Next Door, apparently to sabotage Ms. Horton's transition to regular in-home care out of some inability to accept the deterioration in her mother's condition.
- [30] On November 24, 2017, Dr. Starke completed a Disability Tax Credit Certificate for Ms. Horton in which he characterized her as suffering from "severe cognitive decline due to Alzheimer's Disease" and requiring help with activities of daily living.

- [31] In April 2018, Ms. Horton was assessed by Dr. Dilpriya Mangat, a geriatric specialist, at the Pattison Outpatient Centre at Surrey Memorial Hospital. Dennis and Gaylene attended the appointment. A medical record of the appointment refers to Ms. Horton having been given "a working Diagnosis of early Alzheimer Dementia". According to Dennis, Dr. Mangat reported that Ms. Horton "had scored 9/30 and that [she] was at the point where someone needed to be looking after her bills". He deposes that he then told Dr. Mangat that he had been monitoring Ms. Horton's bank account and paying her bills for about a year and that Gaylene became extremely angry on learning about this.
- [32] On October 16, 2018, Dennis transferred Ms. Horton's financial assets from financial institutions in Vancouver to branches in Powell River. The accounts remained in Ms. Horton's name. He says he moved the assets to Powell River "for ease of payment and to gather it all in one place". He deposes that Heather and Brian knew he was doing this, which implies that Gaylene did not know. At the same time, he obtained a bank draft for \$20,000, drawn on Ms. Horton's account, to partially repay bills he says he paid on her behalf. He has attached to his affidavit a list of expenses totaling \$39,513.72, which he says he incurred on Ms. Horton's behalf between June 2017 and January 2019. A significant component of that amount is the cost of Nurse Next Door services. He does not explain why he did not pay these expenses directly out of Ms. Horton's account at the time they were incurred. He does not explain why he obtained a bank draft for only \$20,000 when, according to his accounting, he was owed more than \$31,000 in October 2018.
- [33] Gaylene deposes that in October 2018 she received a phone call from an employee at the Bank of Montréal who advised her that Ms. Horton wanted to move some money around and that she had obtained a bank draft for \$20,000. Gaylene deposes that she asked her mother about the \$20,000 draft and her mother had no recollection of obtaining it.
- [34] Gaylene deposes that by November 2018, she had grown concerned about the level of care being provided by Nurse Next Door, her mother's complaints to her about Dennis, and the telephone call from the bank employee. She deposes that her mother told her that she did not want to be controlled by Dennis and that she "wanted new papers drawn up". She claims that she was reluctant to act under the 2005 power of attorney because she was scared to confront Dennis. She claims that she did not want her mother to be caught in the middle. Instead of communicating with Dennis or calling a meeting of all her siblings, she filed a report with the PGT asserting that Ms. Horton was vulnerable to financial abuse and verbal abuse by Dennis and, on November 22, 2018, she took her mother to a lawyer who prepared a new power of attorney which revoked the 2005 power of attorney and appointed Gaylene as power of attorney with Heather as alternate, and a representation agreement naming Gaylene as representative and Heather as alternate.
- [35] The 2018 power of attorney is signed by Ms. Horton and Gaylene but not by Heather. The representation agreement is signed by Ms. Horton and Gaylene but not by Heather. The signatures on both documents are witnessed by the lawyer who prepared them. That lawyer has not provided any evidence on these applications and there is no evidence as to whether

he was told anything about the state of Ms. Horton's cognitive health. Heather deposes that she learned about the new documents from Gaylene only after the fact, and that she "had not been asked to do this".

- [36] On November 24, 2018, someone contacted the Surrey RCMP and complained about Dennis taking Ms. Horton's money. Ms. Wikman deposes that on that day a constable from the Surrey RCMP phoned and asked to speak to Dennis. She deposes that Dennis was not at home and the constable told her that Gaylene had alleged that Dennis took \$20,000 from his mother's bank account and "also took another \$150,000". She says she explained that Dennis had been managing his mother's financial affairs and offered to bring all related documentation to the RCMP office for verification. She deposes the constable then told her that no charges would be pursued. Ms. Wikman's evidence that she was told by the constable that Gaylene had reported the matter to the police is hearsay and, as such, it is not admissible for its truth. Accordingly, I am not in a position to find that the police report was in fact made by Gaylene.
- [37] On November 28, 2018, Dennis learned about the new power of attorney.
- [38] On January 24, 2019, a family meeting was held at the Pattison Outpatient Centre. Present were Ms. Horton, each of her children, several medical professionals, a social worker, and Ms. Horton's new general practitioner, Dr. Wei. Dennis and Brian expressed the view that Ms. Horton should not be living on her own. According to Gaylene, the social worker said that Ms. Horton had expressed a preference for Gaylene to look after her health care and a preference to live in her home for as long as she was able. Gaylene deposes that the professionals advised that Ms. Horton was capable of continuing to reside in her home with Nurse Next Door services. According to Gaylene, Dennis became agitated, Brian walked out of the meeting, and Heather was upset. Gaylene's characterization of this meeting has not been disputed by Dennis, Brian or Heather.

Medical Evidence

- [39] On February 5, 2019, Ms. Horton was assessed by Dr. John Sloan, a family physician with experience in geriatrics. He has sworn an affidavit in which he expresses the opinions that Ms. Horton suffers from mild to moderate dementia, is incapable of managing her estate, is capable of managing her person but will probably need assistance in future, and there is no realistic possibility of her regaining these capabilities. He also deposes that during his assessment of Ms. Horton, she expressed a preference for Gaylene to be appointed her financial guardian and gave "credible reasons for her choice". His report, which is attached as an exhibit to his affidavit, reads in part:

After having her daughter Gaylene leave the room, I asked Ms. Horton whom she would trust to manage her finances if she needed assistance. She named her daughter Gaylene. She named her other three children and gave credible reasons for her choice: the others were all busy with other activities, live far away, or would not be willing to take on this responsibility, she said. I changed the subject and discussed other matters for a few minutes, and then returned and asked the same question. She gave the same answer.

[40] On March 22, 2019, Ms. Horton was assessed by two geriatric psychiatrists, Dr. Caroline Gosselin and Dr. Peter Chan. Dr. Gosselin and Dr. Chan have both sworn affidavits in which they each express the opinion that Ms. Horton is, by reason of mental infirmity due to dementia, incapable of managing her affairs and her person, and that there will be no improvement in her condition. Dr. Gosselin also deposes that she expects gradual further deterioration. Among other things, Dr. Gosselin reports that Ms. Horton had no recollection of executing a new power of attorney in November 2018 and said she did not know what a representation agreement is. Dr. Chan reports that Ms. Horton is not able to make decisions to ensure her own safety, could not remember the number to call to get help from the fire department in an emergency, and when asked what number to call she responded "not 222, what is it?"

Positions of the Parties

- [41] As noted, Dennis and Gaylene each seek appointment as committee of the estate and person of Ms. Horton and oppose the application of the other. Gaylene advances the alternative position that the PGT be appointed as committee of the estate and person of Ms. Horton. Brian and Heather support Dennis's application.
- [42] The PGT filed a response to Dennis's petition but did not appear at the hearing. In its response, the PGT submits that if Dennis or Gaylene is appointed committee, it should be a term of the appointment that the committee keep their siblings promptly informed of significant decisions made on behalf of Ms. Horton and facilitate contact between her and each of them, and that, in lieu of a bond, the committee should have no access to two of the Raymond James accounts (with balances totaling approximately \$120,000), except for reinvestment purposes, without the prior written consent of the PGT.
- [43] The PGT's response notes the conflicts in the affidavits filed by Dennis and Gaylene, and the serious allegations each has raised concerning the fitness of the other to act as their mother's committee, which indicates they are not able to work together as co-committees. The PGT advises that, if the court determines the PGT's involvement will reduce family conflict and serve Ms. Horton's best interests, the PGT is willing to serve as committee of the person of Ms. Horton provided the PGT is also appointed committee of her estate.

Legal Principles

[44] There is no dispute about the applicable legal principles and so I will summarize them only briefly.

[45] The applications are brought pursuant to ss. 2 and 6 of the Patients Property Act, the material portions of which read:

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

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

incapable of managing his or her affairs or incapable of managing himself or herself, or incapable of managing himself or herself or his or her affairs.

6(1) Subject to section 13, on application by the Attorney General or any other person, the court may appoint any person to be the committee of the patient.

[46] The Act does not prescribe criteria for or factors to be considered in the selection of a person to serve as a committee, but it is well established that the test invokes the *parens patriae* jurisdiction of the court and is governed by an assessment of who will serve the patient's best interests: *Bowman (Re)*, 2009 BCSC 523 at para. 32.

[47] In *Stewart (Re)*, 2014 BCSC 2321 at para. 29, Justice Masuhara helpfully summarized the factors that have been considered in other cases in determining who should be appointed to serve in this important role:

- whether the appointment reflects the patient's wishes, when he or she was capable of forming such a wish;
- whether immediate family members are in agreement with the appointment;
- whether there is any conflict between family members or between the family and the patient, and whether the proposed committee would be likely to consult with immediate family members about the appropriate care of the patient;
- the level of previous involvement of the proposed committee with the patient, with family members usually being preferred over an outsider;
- the level of understanding of the proposed committee of the patient's current situation, and whether that person will be able to cope with future changes;
- whether the proposed committee will provide love and support to the patient;
- whether the proposed committee is the best person to deal with the financial affairs and ensure the income and estate are used for the patient's benefit;
- whether the proposed committee has breached a fiduciary duty owed to the patient, or engaged in activity which diminishes confidence in that person's abilities to properly handle the patient's affairs;

- who is best to advocate for the patient's medical needs;
- whether the proposed committee has an appropriate plan of care and management for the patient and his or her affairs, and is best able to carry it out; and
- whether a division of responsibilities such as between the patient's estate and the patient's person to different persons would serve the best interests of the patient, or whether such a division would be less than optimal.

[48] As Justice Masuhara noted at para. 30 of Stewart, this list of factors is not exhaustive, the inquiry is fact specific, one or more factors may not be applicable in any particular case, and the factors may be given different weight depending on the circumstances.

Analysis

[49] Dennis seeks a declaration, pursuant to s. 2 of the Patients Property Act, that Ms. Horton is incapable of managing both her affairs and her person. Gaylene does not oppose the granting of this relief.

[50] The weight of the medical evidence, as summarized above, establishes that Ms. Horton is, because of mental infirmity due to dementia, incapable of managing her affairs and her person. Although Dr. Sloan expressed the view that, as of early February 2019, Ms. Horton was capable of managing her person but not her estate, both Dr. Gosselin and Dr. Chan, who assessed her about six weeks later, expressed the view that she is not capable of managing either her affairs or her person. Further, Dr. Gosselin expressly opined that Ms. Horton will experience gradual further deterioration and nearly a year has passed since Dr. Sloan's assessment.

[51] In the circumstances, I have no difficulty concluding that the s. 2 declaration should be made.

[52] I turn to the contentious issue of who should be appointed Ms. Horton's committee. While family members are usually preferred over an outsider, I have concluded that it is in Ms. Horton's best interest for the PGT to be appointed committee of her estate and her person. This is so even though the PGT will charge fees while counsel for both Dennis and Gaylene have said they will not.

[53] The determining factors are:

- (a) the animosity between Dennis and Gaylene;
- (b) that both of them have demonstrated an unwillingness to consult with each other concerning their mother's care and her affairs;
- (c) that both of them have engaged in activity that diminishes my confidence in their suitability for the role;

- (d) that neither of them has proposed a clear plan for their mother's care; and
- (e) that the involvement of a neutral third party will reduce the family conflict.

- [54] The affidavits overwhelmingly establish very significant friction between Dennis and Gaylene, each of whom has shown considerable animus against the other. The tension seems to have come to a head in the fall of 2018, when Dennis inexplicably moved Ms. Horton's financial assets to Powell River without first consulting or even advising Gaylene, and then Gaylene inexplicably facilitated the making of the new power of attorney and representation agreement without first consulting or even advising her siblings. Dennis and Gaylene have different views about the level of care their mother requires and have engaged in a power struggle over her care and the management of her financial affairs. Given the extent of discord, it would be inappropriate for them to serve as co-committees, or for one to serve as committee of Ms. Horton's estate and the other as committee of her person. The selection of one over the other is not likely to reduce the conflict, given my conclusion that neither is likely to consult the other, and this will no doubt cause distress to Ms. Horton.
- [55] Again, both Dennis and Gaylene have demonstrated an unwillingness to consult with each other concerning their mother's care and her affairs. Both have acted unilaterally, which has increased the conflict in the family and resulted in upset for Ms. Horton.
- [56] Gaylene cancelled at least one of Ms. Horton's medical appointments without first discussing the matter with Dennis. She has taken Ms. Horton out at times when Nurse Next Door was scheduled to attend without letting Nurse Next Door know, in advance. Nearly a year and a half after being told by Dr. Starke that he suspected the onset of dementia and nearly eight months after Dr. Mangat diagnosed Ms. Horton with early Alzheimer's dementia and told the family that she needed someone to look after her finances, Gaylene facilitated the making of the new power of attorney and representation agreement without first consulting with or advising her siblings. Her explanation of being scared to confront Dennis and not wanting her mother to be caught in the middle rings hollow because this conduct, particularly coupled with her report to the PGT alleging abuse of Ms. Horton by Dennis, was certain to seriously exacerbate what was already an extremely fraught and tense situation. In other words, her conduct was certain to lead to confrontation.
- [57] For his part, Dennis began exercising his authority under the 2005 power of attorney in the spring of 2017 without first consulting with or even advising Gaylene. He has not provided a reasonable explanation for taking this step unilaterally. Of course, he had the authority under the power of attorney to act separately but, given the increasing friction in the family, it should have been obvious to him that the appropriate course was to act transparently.
- [58] Dennis also secured the services of Nurse Next Door without consulting Gaylene. His lawyer submitted that there was evidence he did consult Gaylene, but his affidavit is far from clear on this point. He deposes that he, Brian and Heather wanted to help their mother stay at home as long as possible and then he says "[w]e spoke to her about getting help from Nurse Next Door". In context, this appears to reflect consultation only with Brian and Heather. He

does not directly dispute Gaylene's claim that she was not consulted. Dennis has not explained why he did not pay Nurse Next Door from Ms. Horton's own funds. The reasonable inference is that he either did not want Gaylene to know he was exercising his authority under the power of attorney or he wanted her to believe that he was paying for Nurse Next Door.

- [59] Again, Dennis moved Ms. Horton's financial assets to Powell River and transferred a significant amount of her money to himself without first consulting or advising Gaylene. There is no evidence that he provided his siblings with even a basic accounting of the expenses he says he incurred before reimbursing himself, or even shortly thereafter. There is no evidence that he provided them with a contemporaneous explanation for moving the accounts. This conduct was unreasonable and obviously provocative. Further, in this day of electronic banking, his vague explanation that he moved the funds to Powell River "for ease of payment and to gather it all in one place" is entirely inadequate.
- [60] In addition to their unwillingness to consult and co-operate with each other, Dennis and Gaylene have engaged in other concerning conduct that has been contrary to their mother's best interests. Dennis behaved aggressively and inappropriately at the MacCallum Law Group offices when he attended there with his mother in September 2017. His behaviour must have been distressing to Ms. Horton. Gaylene has taken her mother out at times when she must have known Nurse Next Door was scheduled to provide services. Even if she had concerns about the quality of care Nurse Next Door was providing, unilaterally preventing the provision of the services was inappropriate and contrary to Ms. Horton's best interests.
- [61] A committee must exercise his or her powers for the benefit of the patient. This obvious proposition is expressed in s. 18 of the Patients Property Act. The conduct of Dennis and Gaylene outlined above shows that they have both been prepared to subvert their mother's best interests in favour of continuing their power struggle. This seriously diminishes my confidence in their suitability for the role of committee.
- [62] Further, neither Dennis nor Gaylene has proposed a clear plan for their mother's care.
- [63] As noted, at the January 2019 family meeting, Dennis expressed the view that Ms. Horton should not be living on her own. He has deposed that in the spring of 2017, Dr. Starke recommended that Ms. Horton be placed in a care facility and that in November 2018, Dr. Wong (a locum for Dr. Starke) told him that Ms. Horton needed to be placed in care. Since at least April 2019, he has known that Dr. Chan was of the view that Ms. Horton was not able to make decisions to ensure her own safety. Dennis deposes that his mother has not eaten properly for over a year, the cat litter box in her home is not emptied regularly, and there is cat and dog hair everywhere. Notwithstanding all these concerns, he has not included in his affidavit any statement of his actual intentions with respect to his mother's care should he be appointed committee. His counsel submits that he will take advice from her care providers in determining the appropriate care plan for her, but he has not even included a statement to this effect in his affidavit.

- [64] In her affidavit, Gaylene emphasizes that her mother has consistently said she wants to remain living in her own home for as long as possible. She deposes that she prefers to respect her mother's wishes in this regard if it is safe to do so. She says she recognizes her mother will eventually need full time care and when that time comes, or when it is no longer safe for her to remain in her own home, she is prepared to "make the difficult decision to transition [Ms. Horton] into a senior's home or care facility". However, she now has the opinions of Dr. Gosselin and Dr. Chan and is aware that Dr. Chan, at least, has raised safety concerns and she has not disputed Dennis's description of the state of Ms. Horton's home, yet she has not seen fit to articulate any particular plan or timeline for the transition in light of these developments.
- [65] Gaylene's counsel submits that Ms. Horton has expressed a preference for Gaylene to act for her in the event of her incapacity and that her wishes in this regard should be given significant weight. There is no dispute that Ms. Horton has recently expressed a preference for Gaylene to act. This is reflected in the 2018 power of attorney and representation agreement and in Dr. Sloan's report. However, these expressions of preference were made by Ms. Horton long after the commencement of her cognitive decline.
- [66] Gaylene's counsel submitted that the evidence establishes that Ms. Horton expressed a preference for Gaylene to act on her behalf even before she received the dementia diagnosis. He referred to paragraph 22 of Gaylene's affidavit in this regard. However, that paragraph refers to Ms. Horton's stated desire to remain in her home for as long as possible. There is no mention there of any preference with respect to who should make decisions on her behalf in the event of her incapacity.
- [67] The level of capacity required to express a preference for a personal representative is a low one: the patient need only know what her wishes are in this regard: *Fraser v. Fraser*, 2008 BCSC 1733 at para. 20. However, by November 2018, at least a year and a half had passed since Dr. Starke advised that he suspected dementia. Further, by March 2019 (less than four months after the 2018 power of attorney was prepared), Ms. Horton told Dr. Gosselin she had no recollection of the new power of attorney and she said she did not know what a representation agreement was.
- [68] It is not necessary for me to conclude that Ms. Horton lacked the capacity to make the power of attorney and representation agreement in November 2018 or to express a preference for Gaylene to act for her as she did to Dr. Sloan in February 2019. However, I am not satisfied that she had the capacity to do so. The very real uncertainty about her capacity, particularly given Brian's and Heather's support of Dennis's position notwithstanding their mother's recent expressions of preference for Gaylene, has caused me to give Ms. Horton's stated preference significantly less weight than I would have otherwise given this factor. In the result, it does not outweigh my conclusion that Gaylene is unsuitable.

[69] I have considered whether an order appointing Dennis or Gaylene committee and, as suggested by the PGT, also requiring him or her to keep their siblings promptly informed of significant decisions made on behalf of Ms. Horton and facilitate contact between her and each of them would sufficiently mitigate my concerns about their suitability. I have concluded it would not. It is obvious that Dennis and Gaylene fundamentally disagree over the nature and extent of the care that should be provided to their mother and whether it is safe to continue to respect her wish to remain in her own home. At times, their power struggle rather than their mother's best interests has motivated both of them. A term in an order requiring one of them to keep the other advised of decisions that the latter fundamentally disagrees with will not serve to reduce the family conflict or ensure that Ms. Horton's best interests are the only consideration in decisions made on her behalf. In contrast, the involvement of the PGT, a neutral third party, will defuse the power struggle between Dennis and Gaylene and thereby reduce the family conflict. This will best serve Ms. Horton's interests.

Conclusion

- [70] I declare that Sandra Sharlene Horton is, because of mental infirmity arising from disease, age or otherwise, incapable of managing both her affairs and her person.
- [71] I appoint the PGT as committee of the estate and person of Sandra Sharlene Horton.
- [72] Dennis and Gaylene each seek special costs payable out of Ms. Horton's estate.
- [73] There is no dispute that a successful applicant for a committee ship should be awarded special costs payable out of the patient's estate and that even unsuccessful applicants whose actions were motivated by concern for the best interests of the patient should be awarded special costs payable out of the estate: *Re Atwal*, 2005 BCSC 660 at paras. 23-25. Dennis submits that Gaylene should not be awarded costs because these applications were necessitated by her wrongful conduct in facilitating the preparation and execution of the 2018 power of attorney.
- [74] In my view, neither Dennis nor Gaylene should be awarded costs payable from Ms. Horton's estate because, as discussed above, each of them engaged in conduct that was motivated by animus against the other. These applications were necessitated by their ongoing power struggle.

"Warren J."

The Honourable Madam Justice Warren

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Prepared on 24 October 2026 · Esheria