
CANADA / JUDGMENT

Houston v. Houston

2012 BCCA 300

COURT

British Columbia Court of Appeal

DECIDED

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2012 BCCA 300 Houston v. Houston

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Houston v. Houston,

2012 BCCA 300

Date: 20120705

Docket: CA039033

Between:

Angela Mary Comber Houston and

Angela Mary Comber Houston,

Executrix of the Estate of George Frederick Houston

Appellants

(Plaintiffs)

And

James Gregg Houston

Respondent

(Defendant)

And

Land Title and Survey Authority of British Columbia

(Defendant)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Low

The Honourable Mr. Justice Groberman

On Appeal from the Supreme Court of British Columbia, April 21, 2011

(Houston v. Houston, 2011 BCSC 510, Victoria Docket Number 09 3880)

Counsel for the Appellant:

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Counsel for the Respondent:

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Place and Date of Hearing:

Vancouver, British Columbia

May 11, 2012

Written Submissions Received:

June 15, 22 and 29, 2012

Place and Date of Judgment:

Vancouver, British Columbia

July 5, 2012

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Mr. Justice Low

The Honourable Mr. Justice Groberman

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] This appeal arises in the context of an unfortunate family dispute that developed in the last months of the life of the late Dr. George Frederick Houston and blossomed into litigation, in the form of three actions, soon after his death on May 8, 2009 at the age of 92.

- [2] This action was brought by Mrs. Angela Houston, the widow of the deceased, both in her personal capacity and as her late husband's executrix. They had been married 34 years when he died and it had been the second marriage for both of them. Both had had children by their first marriages – Dr. Houston Sr. had four, including the defendant Dr. James Houston; and Mrs. Houston had two, including a daughter, Ms. Fowler, from whom she was estranged for many years. Dr. Houston Sr. finally arranged a meeting of the two in 2007, and they were reunited. Mrs. Houston was 91 when her husband died.
- [3] In the years leading up to his death, Dr. and Mrs. Houston had told the Houston children that they had similar wills, under which each left his or her estate to the survivor of them, and any residue to the six children. (They had not, however, signed mutual wills or agreed with each other not to change their wills.) Each had also granted a power of attorney to the other and to James Houston, who lived in Victoria and was a physician specializing in palliative care. Thus Dr. Houston Sr.'s power of attorney was in favour of his wife and James Houston, empowering each to "act separately". It was dated July 22, 2005. On March 12, 2008, Dr. Houston Sr. granted a second power of attorney in favour of his wife and, in the event she was "unable or unwilling to act", to James Houston. Both documents were enduring powers of attorney, i.e., they could be exercised during any mental infirmity on the donor's part, and both empowered the attorney to "do on my behalf anything that I can lawfully do by an attorney."
- [4] Relying on the first power of attorney, James Houston executed and filed in April 2009 the necessary documents to sever the joint tenancy in which the senior Houstons held the condominium near Victoria where they lived. This occurred less than a month before Dr. Houston Sr. died. The trial judge found that the son had acted in accordance with his father's authorization to do what was necessary to protect his "estate wishes."

- [5] In her statement of Claim, Mrs. Houston pleaded that:

The Defendant [James] Houston filed the Original Power of Attorney in the Victoria Land Title Office knowing full well of the existence of the Second Power of Attorney and well beyond the three year limitation as set out in S.56(1) of the Land Title Act to enable him to legally use the original Power of Attorney.

On April 22, 2009 the Defendant Houston filed a Form A-Freehold Transfer in the Victoria Land Title Office under No. FB261090 severing the joint tenancy in the property and creating a tenancy in common.

The Defendant Houston breached his fiduciary duty to the Deceased and to the Plaintiff and specifically went against the wishes of the deceased as set out in the Deceased's Last Will and Testament bearing the date July 25, 2005 and has caused distress and damages to the Plaintiff as a result. [At paras. 10-2.]

In her prayer for relief, she sought an order that title to the property be "rectified" by returning it to joint tenancy, general damages, and costs on an indemnity basis. (I understand the property has since been sold, and that the proceeds are being held in trust pending the resolution of this appeal.)

- [6] Notwithstanding the narrow scope of the case as pleaded, the trial ultimately centred not on the expiration of the first power of attorney (see s. 56(3) of the Land Title Act, R.S.B.C. 1996, c. 250), but on the more difficult question of whether it had been revoked by virtue of the donor's execution of the second power of attorney. The second major issue arose from the plaintiff's assertion that even if the first power of attorney had not been revoked, James Houston had engaged in "self-dealing" in severing the joint tenancy and thus breached the fiduciary duty owed to his principal.

Factual Background

- [7] I do not propose to rehearse here all of the facts found by the trial judge, Madam Justice Hyslop, since these will not be of interest to anyone but the family, and the questions raised on appeal are questions of law. I will attempt to limit myself to the facts that are material to those issues. The trial judgment is indexed as 2011 BCSC 510.
- [8] Hyslop J. made her findings of fact at paras. 11-65 of her reasons, recounting the division that arose between the children of Dr. Houston Sr. on the one hand, and their stepmother and her daughter on the other. It appears that Dr. Houston Sr., who was a "gentle man" and not in robust health, was caught in the middle: he wanted to protect his children's interests as the Houstons had always planned to do in their wills, but he did not want to 'cross' his wife, who was his caretaker. She and her daughter began to take some steps in 2008 that were bound to attract the concern, if not animosity, of Dr. Houston Sr.'s children.
- [9] According to a letter written by James Houston which was in evidence for some reason, the first sign of trouble arose when Ms. Fowler said at a "family meeting" that she wanted a power of attorney from her mother. The Houston children said this would be inconvenient, given that Ms. Fowler did not live on Vancouver Island. The Houstons' original lawyer, Mr. DeMeo, recommended the "status quo." At some point in the late summer of 2008, when the Houston siblings were out of town, however, a new lawyer, Mr. Humphries, was retained in place of Mr. DeMeo. Mr. Humphries was instructed to prepare a new power of attorney for Mrs. Houston, appointing Ms. Fowler to act on her behalf.
- [10] In October 2008, James became aware from Mrs. Houston that his father had also executed a power of attorney – the second one described earlier. It was witnessed by a lawyer, Ms. Bracci, who would appear to have worked at Mr. DeMeo's firm. Under its terms, James Houston was appointed to act only if his stepmother was unable or unwilling to do so. He became concerned about the asymmetry of the Houstons' respective powers of attorney and about the potential difficulties of having to involve Ms. Fowler in signing documents on her mother's behalf. As the trial judge stated:

Other than hurt feelings, Dr. James Houston's objection was that Ms. Fowler lived in Vancouver and her mother and Dr. George Houston lived in Victoria. This would make matters inconvenient. Dr. James Houston took the matter up with Mrs. Houston and his father. He had difficulty understanding why Ms. Fowler was to be the attorney for her mother and why he should not be the attorney for his father. This created further tension between him and Ms. Fowler. [At para. 37.]

[11] A number of conversations among various family members took place, as described at paras. 38-40 of the trial judge's reasons. She found that Dr. Houston Sr. told his son that he wanted him, James, to hold his power of attorney. James set up an appointment for his father to discuss the matter with Mr. Humphries. However, because of Mrs. Houston's strong objection, Dr. Houston Sr. did not attend at the lawyer's office. Mr. Humphries wrote to his clients, expressing his concern and trying to calm the waters. Interestingly, he opened his letter thus:

First of all, I only attended to preparing a power of attorney from Mrs. Houston to Louise [Ms. Fowler]. No one is suggesting that said power of attorney shouldn't have been done. In fact, it is a good thing that Louise has this power. It will, of course, remain in full force and effect, just as the existing power of attorney from Dr. Houston to his son will remain in effect. What I wish to discuss here are not the powers of attorney, but instead your two Wills. [Emphasis added.]

As noted by the trial judge, most of the letter "provided advice on [the Houstons'] wills on the basis that they would sever any survivorship in which they held their property." However, Ms. Fowler told him to leave the Houstons alone and wrote him a letter stating that "entertaining any further requests [would] not be considered" until "full disclosure" of the Houstons' investments was made (to whom was unstated) "going back 3 years" by the Houstons' investment advisor, Mr. Klaibert.

[12] A new lawyer, Mr. Adelaar, was retained, and took a hostile stance that only made matters worse. Purporting to act for Mrs. Houston, he demanded that Mr. Klaibert provide records of the Houstons' investment portfolio since its inception - a request the advisor resisted on the ground that to his knowledge, Mrs. Houston had received and kept all of the financial records and was familiar with them. He met in November 2008 with the senior Houstons and Ms. Fowler and answered various questions posed by Ms. Fowler. In the spring of 2009, when he was away on vacation, he learned that the bulk of the Houstons' portfolio had been ordered to be sold - a move that triggered various fees and that, in the advisor's opinion, represented a "very poor financial decision." The account was ordered transferred to CIBC Wood Gundy, breaking the Houstons' relationship with the advisor. Mrs. Houston told him the fund had been moved because he had not co-operated with her daughter - a charge the trial judge found to be untrue.

[13] Although the documents authorizing the transfer of the funds were signed by Dr. Houston Sr., the trial judge noted at para. 57 of her reasons that by the fall of 2009, the portfolio at CIBC Wood Gundy was in the joint names of Mrs. Houston and Ms. Fowler. I am not aware of any evidence as to whether he consented to this change, or how it came about.

[14] In January 2009, Mr. Adelaar, purporting to act on behalf of both the senior Houstons, wrote to Mr. Humphries stating in part, "Neither of my clients will amend their Powers of Attorney (one because he is incapable and the other because she sees no need.)" Mr. Adelaar acted on behalf of Mrs. Houston at trial.

[15] The trial judge found that on April 1, 2009, the following events occurred:

On April 1, 2009, Dr. James Houston and his sister, Mrs. Russell, took Dr. George Houston to a coffee shop within walking distance of the condominium. Dr. George Houston was asked when he became aware of the transfer of the fund to Wood Gundy. He said that he was made aware that the funds had been transferred after the fact. He stated that the transfer had happened because Ms. Fowler did not get along with Mr. Klaibert. He was asked if he was comfortable with the decisions made on his behalf. He told his son and daughter that he was uncomfortable with the situation. He stated that he wanted his estate to eventually be divided among all of the six children [i.e., the four children of Dr. Houston Sr.'s first marriage and the two children of Mrs. Houston's first marriage.] He expressed concerns that this might not happen. Dr. George Houston was asked whether he wanted Dr. James Houston to seek legal advice on his behalf and sort out this matter. He told Dr. James Houston that he wanted this to happen. Dr. George Houston told Dr. James Houston and Mrs. Russell that he did not trust Ms. Fowler.

Mrs. Russell confirmed Dr. James Houston's evidence as to when her father learned of the transfer of the investment fund. She also confirmed Dr. James Houston's evidence that Dr. George Houston desired that his estate be eventually divided among the six children. Mrs. Russell stated that her father was well aware of the influence that Ms. Fowler had over her mother, and that he knew that Ms. Fowler would effectively direct what happened to the estate after he passed away.

Mrs. Russell walked her father back to the condominium. He confirmed again that he wanted this matter sorted out. Mrs. Russell stated that her father may have been aware of the advice to sever the joint tenancy. Mrs. Russell stated that her father was clear in what he wanted to transpire. [At paras. 58-60.]

[16] James Houston and his siblings sought the advice of a solicitor, Mr. O'Connor. He advised James that the first power of attorney was "still active". James testified that he believed he was told the severance of the Houstons' title to the condominium "was the only thing" he could do to secure some of his father's estate. He instructed Mr. O'Connor to proceed. On April 22, the lawyer filed the first power of attorney and a Form A Transfer dated April 14, 2009, signed by James Houston as attorney for his father, in the Land Title Office. Mrs. Russell testified that she told her father what Mr. O'Connor's advice had been, and that Mr. Houston Sr. "wasn't unhappy."

- [17] On April 27, 2009, Dr. Houston Sr. was admitted to hospital and received an unexpected diagnosis of cancer. Sadly, he died on May 8. It is common ground that he was mentally capable until one or two days before his death.
- [18] The unpleasantness between Mrs. Houston and Ms. Fowler on the one hand, and the surviving Houston children on the other, manifested itself even in the funeral arrangements. Ultimately, Mrs. Houston refused to attend her husband's funeral (or a later "celebration of life") and refused to pay the full cost of his obituary. Immediately after the funeral, she made inquiries at the Land Title Office and discovered the joint tenancy had been severed. As had been expected by (and discussed with) his children, Dr. Houston Sr. left the bulk of his estate to his wife. I gather the estate is a modest one, and that indeed the deceased's interest in the condominium may well be its only substantial asset.
- [19] Some time after her husband's death, Mrs. Houston began a separate proceeding against Mr. O'Connor, alleging that he had breached a duty of care owed to her and to Dr. Houston Sr. For reasons indexed as 2011 BCSC 509, Hyslop J. dismissed that action. (I understand that decision is also under appeal.) The children of Dr. Houston Sr. have also commenced an action under the Wills Variation Act, but for obvious reasons, it has not yet proceeded to trial.

The Trial Judge's Analysis

- [20] The trial judge began her analysis of the legal issues at para. 66 of her reasons, dealing first with whether Dr. Houston Sr.'s first power of attorney had been revoked by the granting of the second. She noted that the plaintiff had "provided no law applicable in British Columbia" in support of the argument that it had been so revoked. She quoted a passage from an article by C.S. Thériault entitled Powers of Attorney - Some Fundamental Issues in (1999) 18 E.T.P.J. 227 (see *infra*, at para. 34), which suggested the law is unclear, citing textbook authorities. She rejected the plaintiff's contention that the fact that James Houston and Mrs. Russell had not known whether the first power of attorney was valid, was sufficient to find that it was invalid. (Para. 69). After rejecting other arguments based on the operation of ss. 27 and 27.1 of the Property Law Act, she found at para. 73 that the first power of attorney was "valid because it is an enduring power of attorney pursuant to s. 8 of the Power of Attorney Act, R.S.B.C. 1996, c. 370." At the time of James' exercise of that document in April 2009, s. 8 provided in part:

8(1) The authority of an attorney given by a written power of attorney that

- (a) provides that the authority is to continue despite any mental infirmity of the donor, and
- (b) is signed by the donor and by a witness to the signature of the donor, other than the attorney or the spouse of the attorney,

is not terminated only because of subsequent mental infirmity that would but for this Act terminate the authority.

(2) The authority of an attorney given by a power of attorney referred to in subsection (1) terminates

- (a) on the making of an order under section 3 of the Patients Property Act,
- (b) on the appointment of a committee under section 6 (1) of that Act, or
- (c) as provided in section 19 (a) or 19.1 (3) (a) of that Act.

[21] The trial judge then referred to s. 54 of the Land Title Act, R.S.B.C. 1996, c. 250, which states:

54 The execution by a principal of a subsequent power of attorney does not for the purpose of this Act revoke the appointment of an attorney made by that principal under a previous power of attorney, unless

- (a) the subsequent power of attorney expressly revokes in whole or in part the previous power of attorney, and
- (b) section 57 is complied with.

(Section 57 of the Act provides a procedure for revoking a power of attorney filed in the Land Title Office.) The trial judge did not comment further on s. 54.

[22] The trial judge then returned to the Power of Attorney Act, reasoning as follows:

Section 8(2) ... provides the authority as to when a power of attorney terminates. It terminates upon making an order under Part 3 of the Patients Property Act, R.S.B.C. 1996, c. 349. Part 3 of the Patients Property Act permits the Court, if the evidence is sufficient, to make an order that a patient is incapable of managing his or her affairs, or incapable of managing himself or herself, or both. A power of attorney terminates upon the appointment of a committee under s. 6 of the Patients Property Act. Section 19 of the Patients Property Act relates the effect on a power of attorney and representation agreement when a person becomes a "patient" within the meaning of the statute.

I conclude that the first power of attorney used by Dr. James Houston was a valid power of attorney and was capable of severing the joint tenancy. I also find that it did sever the joint tenancy of the condominium. [At paras. 77-8.]

[23] Turning next to the question of whether James Houston had breached his fiduciary duty by exercising the power of attorney as he did, the trial judge noted the following passage from *Egli v. Egli* 2004 BCSC 529, in which Madam Justice Garson (then of that court) had stated:

It is the attorney's duty to use the power only for the benefit of the donor and not for the attorney's own profit, benefit or advantage (Chapman). The attorney can only use the power for his or her own benefit when it is done with the full knowledge and consent of the donor (Robertson, *Mental Disability and the Law in Canada* at 183). I am not aware of any authority that detracts from this principle in circumstances where the benefit is conferred on family members. [At para. 82.]

[24] Hyslop J. reviewed the factual circumstances leading to James Houston's severance of the joint tenancy, finding that Mrs. Houston had prevented her husband from attending at Mr. Humphries' office in November 2008, and that Dr. Houston Sr. "did not trust Ms. Fowler and told Dr. James Houston and Mrs. Russell." (Para. 83.) The trial judge rejected the contention that the father's failure to visit Mr. O'Connor or any other lawyer was evidence of his "lack of consent". In her analysis:

... [Dr. Houston Sr.] was failing physically, and he did not want to provoke arguments with his wife. Mrs. Houston prevented [him] from seeing Mr. Humphries in November or December 2008 when he wished to discuss his second power of attorney and the possibility of changing it. ...

...

Although [Dr. Houston Sr.] did not specifically direct Dr. James Houston to use the power of attorney to sever the joint tenancy, he clearly instructed Dr. James Houston to use the power of attorney so that his estate would be preserved and his ultimate wishes fulfilled.

I conclude that Dr. James Houston did not breach his fiduciary duty to his father. Rather, he followed [Dr. Houston Sr.'s] instructions as I have already described. [At paras. 87, 89-90.]

In the result, the action was dismissed.

On Appeal

[25] Mrs. Houston asserts on appeal that the trial judge made the following errors:

I. Error in Determining Legal Effect of New POA on Old POA

The trial judge erred:

- (a) in treating subsection 8(2) of the Power of Attorney Act as a complete code of the ways in which a power of attorney may be terminated; and
- (b) in failing to hold that James' notice of the revocation of his authority under the Old POA rendered illegitimate his continued use of it.

II. Alternatively, Error in Determining Whether Severance of Joint Tenancy Ultra Vires Old POA

James' severance of the condominium's joint tenancy was ultra vires the Old POA because it:

- (a) was an act tantamount to a testamentary act;
- (b) was inconsistent with the scope of authority given under the Old POA; and
- (c) constituted unauthorized self-dealing under the Old POA.

Mrs. Houston confirmed in her factum that she does not challenge the trial judge's findings of credibility. She also acknowledged that the questions raised on her appeal, which she described as involving the interaction between the common law and statute, are questions of law.

Powers of Attorney and Revocation

[26] It may be useful at the outset to say something about the nature of powers of attorney in British Columbia and the law relating thereto. To begin with, a power of attorney is a type of agency. At common law, where an agency was granted by deed giving specified authority to the agent, it was called a "power of attorney". In British Columbia, the Power of Attorney Act has modified the common law with respect to powers of attorney. (Like counsel before us, I refer to the Act as it stood in April 2009 when the power of attorney in this case was exercised. The Act has since been amended substantially.) The Act does not define what is a power of attorney but provided in s. 9 that a general power of attorney "may" be in Form 1 or Form 2 of the Schedule to the Act. Neither form required that the document be executed under seal (and neither instrument in this case was). The Land Title Act contains additional requirements that apply to any document tendered for registration that has been executed under a power of attorney, and requires the registrar to maintain an index of powers of attorney: see ss. 51-57.

[27] Being a type of agency, the power of attorney is subject to various rules, some of which are codified in the Act, for the protection of the agent. As Professor G. Fridman notes in *Canadian Agency Law* (2009), although at common law a power of attorney was strictly construed, the ordinary rules of construction of documents are employed in determining the scope of the agent's authority where the document is not under seal or where the authority is given orally. Thus Fridman writes:

If the document involved is not a deed, or the contract of agency is parol, the agent's authority is to be construed having regard to the purposes of the agency, i.e., the surrounding circumstances and the usual course of the business in which the agent is concerned. In particular, where general words are used, they must be construed and understood in light of the usual course of the agent's business.

Writing which contains the agent's authority is of prime importance, but if there is any ambiguity about the wording of the agent's authority then, as long as the agent acts in good faith and in accordance with a reasonable construction of his authority (if there is more than one possible), he will be considered to have acted within his authority, whether or not in fact what he did was what the principal intended he should do. [At 64.]

[28] Sections 3 and 4(1) of the Power of Attorney Act reflect the common law's concern for the agent whose authority has been terminated without his knowledge:

3 If an agent purports to act on behalf of a principal at a time when the agent's authority to do so has been terminated and

- (a) the act is within the scope of the agent's former authority, and
- (b) the agent has no knowledge of the termination,

then, for the purpose of determining the liability of the agent for the act, the agent is deemed to have had the authority to so act.

4(1) If

- (a) the authority of an agent has been terminated, and
- (b) a person who has no knowledge of the termination purports to deal with the principal through the agent,

then, for the purpose of determining the legal rights and obligations of the principal in relation to that person, the transaction is, in favour of that person, deemed to be as valid as if the authority had existed.

[29] At common law, an agency normally terminates when the undertaking entrusted to the agent has been performed or where the agency was given for a stated period of time. An agency will also terminate if the subject matter of the agency is impossible of performance, or upon the death or insanity of either the principal or the agent while the agency is extant: *Fridman*, supra, at 123-28. In British Columbia, amendments to the Act in 1979 reversed the common law rule regarding the principal's mental incompetence by providing the option of the "enduring" power of attorney: see s. 8(1), quoted above at para. 20.

[30] Except where the agency is irrevocable (i.e., where the agent by deed or for valuable consideration has agreed to act on the principal's behalf in order to protect an interest of the agent) the principal may unilaterally revoke or terminate the agency relationship, subject to its express terms. It seems clear that the agency is revoked by the giving of appropriate notice to the agent, and no prior warning is required at common law.

[31] The Act as it stood at the material time did not purport to regulate the manner in which a power of attorney is revoked or terminated. It simply defined "terminated" as follows:

"terminated", when used with reference to the status of an agent's authority, means that the authority has been terminated by revocation, or by operation of law or both.

As seen above, s. 54 of the Land Title Act stated, and still states, that "for the purpose of this Act", a second power of attorney does not revoke an earlier one unless it does so expressly and a notice of revocation is filed with the Registrar under s. 57. (Section 54, or a version thereof, has been in force since 1921.) I agree with counsel for James Houston that s. 54 would not operate to "give life to a Power of Attorney which has, as between the principal and the attorney been revoked prior to registration ... in the Land Title Office." (It would operate, on the other hand, to protect a bona fide purchaser relying on an instrument executed by an attorney purporting to act under an instrument where no notice of revocation had been filed.) As mentioned above, the Houstons' condominium has been sold, and we are therefore not concerned with questions of title to that property. Rather, we are concerned with whether the severance of the joint tenancy was valid, so that Dr. Houston Sr.'s interest (now in the cash proceeds) passed to his estate, or was invalid, so that the entire property (now cash proceeds) became that of Mrs. Houston on his death.

Revocation by Implication

[32] As we have seen, the trial judge referred to ss. 8(1) and (2) of the Act, concluding that the first power of attorney (which empowered either Mrs. Houston or James Houston to act for Dr. Houston Sr.) was valid at the time James Houston severed the joint tenancy, apparently because none of the events listed in s. 8(2) had occurred. (Paras. 73-8.) I agree with counsel for Mrs. Houston that if this was indeed the trial judge's analysis, it was erroneous. As I read it, the Act does not purport to describe exhaustively the circumstances in which the attorney's authority will be regarded as terminated. Rather, it adds three statutory circumstances which in addition to termination at common law are to be regarded as terminating events.

[33] It is clear that the first power of attorney signed by Dr. Houston Sr. did not on its face provide for its revocation, termination or even suspension on the happening of any particular event. It is equally clear that the second power of attorney made no express reference to the first power of attorney, and indicated no intention on the donor's part to terminate, revoke or suspend the first or any other power of attorney. Nor was any notice of termination given to James in respect of the first instrument. There is no evidence of the circumstances of Dr. Houston Sr.'s execution of the second instrument.

[34] Can the revocation of a power of attorney be implied and if so, in what circumstances? There is almost no law on this subject. In her article, *supra*, Ms. Thériault writes:

One author indicates that revocation of a power of attorney may be either express or implied and that express revocation should be by deed, while implied revocation occurs where the donor behaves in a manner which is incompatible with the continued operation of the power. It is not entirely clear whether the granting of a power of attorney results at common law in the implied revocation of a previously given power of attorney. One author [citing B. Collier and S. Lindsay, *Powers of Attorney in Australia and New Zealand* (1992) at 42] states unequivocally that there is no such principle. However, the better view is likely that the granting of a power of attorney may revoke by implication a previously given power of attorney in circumstances where the granting of a new power of attorney can be considered an act inconsistent with the operation of the first power of attorney. Long [A. Long, *Powers of Attorney and Other Instruments Conferring Authority* (1987) at 38] states that "the subsequent appointment of another agent whose powers would clash with those given to the first generally constitutes an implied revocation of the powers of the earlier appointment, unless the second instrument expressly provided for its continuance". Corbin [Barry S. Corbin, "Some Practical Considerations Concerning Powers of Attorney", a paper presented in 1994] properly notes that if a secondary power of attorney is executed as a "back-up" power of attorney, care must be taken to omit any language in the secondary power of attorney which would have the effect of revoking the primary one. [At 244-45.]

The author concludes that it is "obviously not wise" for a donor to rely solely on an implied or verbal (i.e., oral) revocation of a power of attorney and that "written notice should be given to the attorney in all cases." (At 246.)

- [35] One English case authority was brought to our attention that is of assistance. In *In Re E* (Enduring Power of Attorney) [2001] Ch. 364, the donor had executed a power of attorney in 1992 appointing two of her three daughters jointly to be her attorneys for purposes of the U.K. Enduring Powers of Attorney Act, 1985. Five years later, she executed another power of attorney which did not refer to the first one and appointed all three daughters "jointly save that any two of my attorneys may sign" as her attorneys for the purposes of the Act. Later, she was found to be incapable of managing her affairs and the third daughter, "X", applied to register the second power of attorney under a statutory procedure not available under the British Columbia statute.
- [36] Registration was refused to X on the ground that the grant to any two of the donor's daughters contravened a statutory provision that "an instrument which appoints more than one person to be an attorney cannot create an enduring power unless the attorneys are appointed to act jointly or jointly and severally". Later, the other two daughters applied to register the first power of attorney, and the donor's solicitors objected on the grounds that it had been revoked by the later instrument. The matter first came before a master, who ruled that in the circumstances of the case, the donor had wanted to appoint X as an "additional attorney" for purposes of the Act and that the most convenient way of doing so had been to sign a new instrument appointing all three of her daughters as attorneys. Thus he concluded that the donor had not had *animus revocandi* in respect of the earlier appointment. The master also stated the following principles which emerged from his analysis:
- (1) A later instrument does not automatically revoke an earlier instrument. This is because it was Parliament's intention that a donor should be able to create more than one enduring power of attorney, if he or she wished. It might be necessary to create more than one power in order to deal with different aspects of the donor's affairs or to take effect at different times or in different circumstances. (2) A later instrument which expressly revokes an earlier instrument will revoke the earlier instrument, but only when notice of the revocation is given to the attorney appointed in the earlier instrument ... (3) In the absence of express revocation, whether an earlier instrument is impliedly revoked by a later instrument is essentially a question of construction. (4) The donor must have intended to revoke the earlier instrument. (5) If there is more than one instrument, the court should attempt to construe them so that, wherever possible, both or all may stand. This reflects the general principle that people should be able to make such arrangements for the management of their affairs as they please. [At 369.]
- [37] On the appeal, Arden J. agreed with the master's conclusion that the earlier power had not been revoked by the execution of the second one. However, his formulation of the law was somewhat more nuanced than that of the master. Arden J. wrote:

- (1) The general law of agency in my judgment shows that to amount to revocation by conduct, the conduct must be inconsistent with the continuation of the agency. Contrary to X's submission, this in my judgment means more than that the conduct should be reasonably understood as amounting to revocation. To be inconsistent, it must be unambiguous in its effect. I approach the question of revocation in this way rather than by applying presumptions as a matter of construction, which was the approach of Master Lush.
- (2) The onus is on X to show that the 1992 power has been revoked. Accordingly, she has to show that the donor must have intended to revoke the 1992 power. It is not enough to show that the donor must have forgotten about the 1992 power or made no reference to it. Indeed if she had forgotten about it that would suggest that she did not intend to revoke it. As the passages cited by the master from the Law Commission's report show, it is not the policy of the 1985 Act to prohibit successive [ending powers of attorney].
- ...
- (4) There is no contemporaneous evidence as to the donor's intentions, or even any later evidence from her as to what she intended ...
- (5) I do not consider that it is clear that the 1997 power revokes the 1992 power. There is no reason why the donor should not want to preserve the possibility that the 1992 power might be used if for some reason the 1997 power could not be used. She did not know that the 1997 power was not valid as an EPA when she signed it, but there is no reason why she should not have wanted to cover the situation that it might be invalid. To have several simultaneous powers would be a legitimate and understandable wish, and not an irrational one as suggested by X. [At 373; emphasis added.]
- [38] With respect to the argument that the two powers of attorney were inconsistent, the Court was of the view that such an interpretation depended on the 'reading in' of extra words and that it was not a necessary implication that the second document was intended to revoke the first. It was more likely, Arden J. said, that the donor had wished to "cover the possibility that one of the sisters was unable to act, for example because she was abroad or ill, or because she was unwilling to agree to something that two sisters approved. This is another situation for which the donor may have wanted to have a contingency plan." In any event, the effect of the second power of attorney properly interpreted was not inconsistent with the earlier one and indeed confirmed its tenor that the donor would be content that only two of the daughters should have power to act on her behalf. Although the lower court had based its conclusions on "general principles applicable to wills", Arden J. found it was unnecessary to invoke those principles as the necessary guidance was provided by the general law of agency. Nevertheless, he agreed with the master that a later instrument does not automatically revoke an earlier one and that "The donor must have intended to revoke the earlier power and this must also be the effect of the donor's words or conduct." (At 374; my emphasis.)

[39] Returning to the case at bar, the plaintiff suggested that there exists a "doctrine of implied revocation" applicable to powers of attorney which traces its roots to at least the 17th century and which has received contemporary recognition by courts in England, Australia and Ontario. The 17th century case referred to is *Smith & Jennings' Case* (1610) 145 E.R. 329 (Ex. Ct.), but it does not provide any assistance in this instance. The English case referred to is *In Re E*, supra. The Australian case is *Estate of Shylie Vanessa Evans* [2010] SASC 193, which concerned the validity of multiple powers of attorney granted at different times by the donor to different people. The Court said this:

A power of attorney may be impliedly revoked where the donor performs an act inconsistent with the continued operation of the power. Conduct of the donor which will amount to being inconsistent with the continued operation of the power, has been held to include where the power authorises the donee to perform a particular act, but the donor instead performs that act.

The execution of a later power of attorney does not automatically revoke an earlier power. In other words, the mere existence of one power of attorney, of itself, does not cast doubt over the validity of another power of attorney. Collier and Lindsay in their text *Powers of Attorney in Australia and New Zealand*, say the following:

There is no principle that the grant of a power impliedly revokes previous powers granted by the donor, and it seems that where a donor has given several powers of attorney to different attorneys, even though the authority given may be general, one of the donees would not have authority to revoke the authority of the other donees – such a decision would appear to be one within the province of the donor alone, as a matter requiring personal discretion.

In the case of multiple powers of attorney, the onus is on a plaintiff to show an intention on the part of the donor to revoke the earlier power, as demonstrated by words or conduct unambiguously inconsistent with the continuation of the earlier instrument. [At paras. 20-2; emphasis added.]

At para. 24, it was said the court would be "reluctant" to impute an intention to revoke "in the absence of conduct or words unambiguously inconsistent with the continued operation of the power." The trial judge concluded that notwithstanding the execution of the later instruments, there was insufficient evidence from which to impute to the donor an intention to revoke the first power of attorney.

[40] The Ontario case referred to by the plaintiffs is *Chow v. Law* (2007) 32 E.T.R. (3d) 142, but it turned on the formalities of execution under the Powers of Attorney Act of Ontario. It is not relevant to this case.

[41] Various authors on the subject of agency have suggested that the donor of a power of attorney may revoke it, "either expressly (for example by saying so, or by tearing up the document) or impliedly, by doing an act which is inconsistent with the continuation of the power (for example, concealing the whereabouts of all assets from the attorney)": see *Cretney & Lush on Lasting and Enduring Powers of Attorney* (6th ed., 2009) at §14.3. The

authors of *Bowstead and Reynolds on Agency* (19th ed., 2010) state that "there may be implied revocation by an act clearly inconsistent with the continuation of the agency, coming to the notice of agent ..." (At §10-027.) In support, they cite *In Re E*, supra. Halsbury's (4th ed., Vol. 1(2), at para. 191), written prior to *In Re E*, simply states that revocation "need not necessarily be by formal instrument. A deed may be revoked by word of mouth ...".

- [42] Counsel for James Houston submits that the doctrine of implied revocation should not be found to be part of the law of this province as of April 2009, since it has never been recognized by a Canadian court nor relied on in the last 400 years by any Commonwealth court to set aside a power of attorney. Further, it is said the Legislature has made it clear that "no [power of attorney] can be revoked by implication: all such revocations must not only be express but must be communicated, in writing, to the former Attorney". James Houston relied in support of this proposition on ss. 28-30 of the present Power of Attorney Act, but these sections did not come into effect until 2011 – long after the severance of the joint tenancy in this case.
- [43] Setting aside the new provisions, it would appear that even if a power of attorney may in theory be revoked by implication, in practice the conduct on which the revocation is grounded must leave no room for doubt that the donor intended to revoke. It is difficult to imagine what type of conduct would suffice, short of an express revocation and the communication of that to the attorney. In any event, it appears that the mere fact a donor has executed a power of attorney in favour of A and later executes another in favour of B will not by itself be regarded as conduct that unambiguously reflects an intention to revoke the first.
- [44] On behalf of Mrs. Houston it was submitted that the two powers of attorney in this case were inconsistent – the first instituting a "parallel, active appointment" of James Houston alongside Mrs. Houston, and the second making a "conditional" appointment which was inconsistent with the conferral of a "separate, standalone, and unconditional power upon James" given by the first instrument. The plaintiff also emphasizes that Mr. Humphries wrote to Dr. Houston Sr. asking him to consider a new power of attorney that would name James Houston unconditionally, and that Dr. Houston Sr. did not take this advice. Instead, Mr. Adelaar had made it clear Dr. Houston Sr. would not be amending the new power of attorney. (The subject of who Mr. Adelaar was acting for is a question that bears some consideration but that is not a task for us in this appeal.)
- [45] I do not find the plaintiff's arguments persuasive. As already noted, there is no evidence Dr. Houston Sr. even recalled, when he signed the second power of attorney, that he had given an earlier one. When James brought the matter to his attention, the trial judge found, he said he wanted the matter "straightened out" and specifically said he wanted James to hold his power of attorney. (Para. 40.) He intended to see Mr. Humphries for this purpose, but the trial judge found he was stopped from doing so by Mrs. Houston. These findings all weigh strongly against the suggestion that he had intended the second power of attorney to revoke the first, or intended that James not be authorized to act as his attorney in any event.

- [46] I agree with Mr. Hargreaves, counsel for James Houston, that the question of whether the first power of attorney was revoked by implication is essentially a matter of fact - what did the donor intend? In my view, the circumstances of this case do not support a finding that Dr. Houston Sr. intended to revoke the first power of attorney by granting the second. Thus I reach the same conclusion reached by the court below, although for different reasons.
- [47] It follows that it cannot be said that James Houston exercised his authority as his father's agent with "knowledge" that it had been terminated. As for the plaintiff's assertion that he had "knowledge of circumstances that would put a reasonable person on inquiry", James did make an inquiry, and received the advice that the first power of attorney was still valid. I know of no reason why he would not be entitled to rely on such advice, notwithstanding the plaintiff's claim made against the lawyer in the other proceeding. Even more importantly, if there was any ambiguity about Dr. Houston Sr.'s intentions, it was dispelled by his authorizing James to act under the first instrument to do what was required to protect his wishes.

Alternative Argument

- [48] Before leaving the topic of implied revocation, I note that there is one other basis on which the trial judge's conclusion might have been upheld. Even if one assumed that the second power of attorney somehow revoked the first, it may have been open to James Houston to have proceeded on the assumption that Mrs. Houston was "unwilling to act" to carry out her husband's wishes, thus empowering him to act under the second instrument. This was not asserted on the appeal, however, and I therefore reach no final conclusion with respect to this possibility.

Was the Severance "Ultra Vires" the Attorney?

- [49] Although the first power of attorney was on its face unrestricted, giving either Mrs. Houston or Dr. James Houston the power to do anything Dr. Houston Sr. could do by such an instrument, the plaintiff contends that the severance of the joint tenancy was an act "tantamount to a testamentary act" and therefore beyond the authority of the attorney. She relies on the fact that an attorney cannot execute a last will and testament on behalf of a testator: see *Chichester Diocesan Fund and Board of Finance Inc. v. Simpson* [1944] A.C. 341 (H.L.) at 371, per Lord Simonds. Building on this, they cited published commentaries for the proposition that as a matter of policy some acts "closely akin to a will" should be also "treated in law like a will", including the transfer documents by which the severance of the joint tenancy was effected in this case. They note, for example, Ms. Thériault's comment that:

Given the restriction [against making a will] a question arises as to whether an attorney can designate on behalf of a donor a beneficiary under a life insurance policy, RRSP, RRIF or similar plan. Insofar as life insurance policies are concerned, Norwood [D. Norwood, *Norwood on Life Insurance in Canada* (2d ed. 1993) at 285-6] states "certainly a representative cannot revoke or

change a life insurance beneficiary since that would be to usurp the personal discretion of the insured". Also the British Columbia Supreme Court in *Fontana v. Fontana* described the designation of a beneficiary of a life insurance policy as being more closely akin to a will than an inter vivos gift, and suggested that it should be "treated in law like a will". This characterization lends support to the proposition that an attorney is not entitled to make, change or revoke a designation of a beneficiary of a life insurance policy on behalf of a donor. A similar argument could be made in respect of RRSPs and RRIFs. [Supra, at 239-40; emphasis added.]

Another writer, Ann Soden, writes in *Advising the Older Client* (2005) that:

Granting powers to modify or implement an estate planned by empowering or precluding the attorney from changing beneficiaries on life insurance contracts or RRSPs, placing titles in joint tenancy, or effecting an estate freeze would appear to be beyond the scope of the authority that could validly be granted to an attorney. These powers are tantamount to being testamentary in nature. Since an attorney cannot make a will for the grantor, it follows that they cannot do indirectly what they are prohibited from doing directly. [At 80-81; emphasis added.]

[50] Aside from *Fontana v. Fontana* (1987) 28 C.C.L.I. 232 - a case dealing with standards of undue influence and therefore not directly relevant to this case - neither writer cites any case authority in support of these assertions. The execution of a will is governed by centuries of case law and by statute because of the obviously solemn nature of a will. But even if one accepted that certain steps such as the designation of an insurance beneficiary for the carrying out of an estate freeze should be treated with similar solemnity, I would not regard the severance of a joint tenancy as of the same ilk. A joint tenancy may be severed unilaterally and at any time - it is not connected to or dependent upon the donor's death to take effect. As the law now stands, it is not even necessary that the co-owner receive notice of the severance. (This state of affairs has been decried recently by the British Columbia Law Institute in a Consultation Paper on Joint Tenancy, released June 2011, at 19-21, but the Legislature has not yet chosen to follow the Institute's recommendation that such notice be required.)

[51] One wonders if the commentaries quoted from above are intended to reflect best practices or to assist banks and insurance companies in avoiding problems of proof, rather than to reflect any restriction that the law might apply to an otherwise unrestricted power of attorney. It bears repeating that an agency may be created orally and that it was only because an interest in land was involved in the case at bar that the attorney here required written proof of his authority - i.e., a power of attorney.

[52] I am not persuaded that the execution of a transfer for purposes of severing a joint tenancy is akin to the execution of a will. Thus I do not accede to the plaintiff's submission that it lay beyond the attorney's powers - written or oral - to do so in this case.

Breach of Fiduciary Duty?

- [53] The remaining issue is whether Dr. James Houston can be said to have breached the fiduciary duty he owed to his father, as his principal, in effecting the severance of title to the condominium.
- [54] There can be no doubt that a fiduciary who engages in 'self-dealing' or who receives a secret benefit or profit from a transaction carried out on the donor's behalf, is accountable to the donor for such profit: see generally Fridman, *supra*, at 106-110. An obvious exception exists, however, where the donor consents to or authorizes the attorney's acting as he or she has. This concept is encapsulated in s. 27 of the Property Law Act, which was quoted by the trial judge at para. 70 of her reasons:

Attorney cannot sell to himself or herself

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. [Emphasis added.]

- [55] The trial judge found, correctly, that James Houston did not carry out a transfer "to or in favour of himself" within the meaning of these provisions. The plaintiff argues, however, that by severing the tenancy, he "created an estate" for his father, since by the time he died, Dr. Houston Sr.'s only asset was the interest in the condominium. Title having been severed, that interest passed to his estate when he died. As the trial judge noted at para. 71 of her reasons, James Houston and his siblings have commenced an action under the Wills Variation Act – which they could not have done except for the severance. Obviously, they might benefit from James' exercise of the authority granted to him.
- [56] The question of whether James Houston had his father's authorization or consent to "create an estate" for him was again one of fact. In this case, the question was a delicate one that depended greatly on the credibility of James Houston and his sister, who also participated in the critical conversation with their father. The brother and sister were extensively examined and cross-examined about that conversation, and the trial judge realized its importance in the context of the law applicable to fiduciaries. She found that although the father had not specifically directed his son to use the power of attorney to sever the joint tenancy, he had "clearly instructed Dr. James Houston to use the power of attorney so that his estate would be preserved and his ultimate wishes fulfilled." (Para. 89.) The trial judge has not been shown to have been wrong in reaching this conclusion or in finding that James acted so that his father's wishes would be respected. The trial judge also accepted that before he made the appointment for his father to see Mr. Humphries in the fall of 2008, James had told Dr. Houston Sr. that if he, the father, was happy to "let things go the way they [were] going", the Houston children were "happy with that. We were all well enough off." But, he said, "Dad wasn't. He said he [had] always been a man of fairness. He wanted things to go six ways to the family." To be blunt, the fear of what Ms. Fowler and Mrs. Houston would do after Dr. Houston Sr.'s death put this plan into serious jeopardy.

[57] I would not accede to this ground of appeal.

Disposition

[58] In all the circumstances, I conclude that the trial judge's findings that Dr. Houston Sr. had not revoked his first power of attorney and that he had "clearly instructed Dr. James Houston to use [it] so that his estate would be preserved and his ultimate wishes fulfilled", provide a complete answer to the plaintiff's submissions in this court. The deceased wished to protect his "estate wishes", which he reasonably believed to be in jeopardy and which he was unable to assert in the face of the opposition of Mrs. Houston and her daughter. He was entitled to have his wishes respected and he authorized his son, in general terms, to act. The severance of the joint tenancy was a blunt tool, but would appear to have been the only avenue available for this purpose. James Houston sought and obtained legal advice to the effect that it was open to him to proceed as he did.

[59] With thanks to both counsel for their able submissions, I would dismiss the appeal.

"The Honourable Madam Justice Newbury"

I Agree:

"The Honourable Mr. Justice Low"

I Agree:

"The Honourable Mr. Justice Groberman"

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