

CANADA / JUDGMENT

Karrington v. Morrisonn

2023 BCSC 570

COURT

Supreme Court of British Columbia

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2023 BCSC 570 Karrington v. Morrisonn

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Karrington v. Morrisonn,

2023 BCSC 570

Date: 20230412

Docket: E170577

Registry: Vancouver

Between:

Ashleigh Karrington

Claimant

And

Jonn Morrisonn also known as John Morrison, World Financiers Ltd., North Atlantic Arts Imports Ltd., 1239 Odlum Holdings Ltd., Shaone Morrisonn, Juhli Rycroft, Caashia Karrington

Respondents

Corrected Judgment: The text of the judgment was corrected at paragraph 173(d) on May 3, 2023.

Before: The Honourable Justice E. McDonald

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

July 26, August 18, September 20, September 22, October 24, 2022 and January 11, 2023

Place and Date of Judgment:

Vancouver, B.C.

April 12, 2023

Table of Contents

Introduction.. 3

Background.. 3

Application to Appoint Litigation Guardian & Examine Jonn.. 6

The Law re Appointment of Litigation Guardian.. 8

The Evidence. 9

Dr. Passmore. 10

Dr. Dian.. 11

Admissibility of the Surreptitious Recordings. 16

Relevance. 17

Identification of Parties. 17

Trustworthiness of the Recordings. 18

Probative value versus prejudicial effect 18

Expert Opinions Considering the Recordings.	19
Analysis - Appointment of Litigation Guardian..	22
The Law re Examining a Mentally Incompetent Person..	24
Analysis - Granting Leave to Examine Jonn..	26
Application for further production of documents from the respondents	28
Application for Documents in Possession of Third Party..	37
Conclusion..	39

Introduction

- [1] For ease of reference and due to many of the parties having the same or similar surnames, I will refer to the various individuals involved in this family law proceeding by first name. However, in doing so, I mean no disrespect.
- [2] The claimant, Ashleigh Karrington ("Ashleigh"), filed the notice of family claim on March 3, 2017 and last amended it on February 5, 2020 (the "Claim"). The respondents to the Claim include, Jonn Morrisonn ("Jonn"), who is alleged to be Ashleigh's spouse, the parties' children and step-children, and various corporations.
- [3] In the Claim, Ashleigh asserts the existence of a marriage-like relationship with Jonn beginning in February 1994 and continuing until their separation in September 2016. She seeks an order for spousal support, division of family property and debt, and she asserts an interest in various properties and assets held by Jonn and/or other respondents.
- [4] At present, Ashleigh is attempting to identify and quantify assets that she alleges are family property. Ashleigh is concerned that Jonn has arranged his affairs to deliberately thwart her Claim, for example, by transferring assets to his son, Shaone Morrisonn ("Shaone").
- [5] There are three applications which are the subject of these reasons for judgment: (a) an application made on Jonn's behalf seeking the appointment of a litigation guardian for him; and (b) two applications by Ashleigh seeking production of documents from Jonn and Shaone and a third-party, Vancouver City Savings Credit Union ("VanCity").

Background

- [6] Jonn is approximately 73 years old and Ashleigh is approximately 69 years old. Ashleigh and Jonn have one adult daughter together, Caashia Karrington ("Caashia"), who is named as a respondent. Two of Jonn's children from a previous relationship, Juhli Rycroft ("Juhli") and Shaone, are named as respondents.
- [7] Before retiring, Jonn worked as a businessman and investor. He accumulated substantial real property.

- [8] There have been a number of interlocutory applications heard since the commencement of this litigation. For example, on July 31, 2019, a Master ordered that, among other things, Jonn pay Ashleigh interim spousal support of \$6,586 per month based on his imputed annual income of \$300,000.
- [9] Counsel made arrangements to schedule Jonn's examination for discovery for early March 2021. However, in February 2021, Jonn's counsel provided Ashleigh's counsel certain medical records indicating that Jonn has dementia. Jonn's counsel advised that he would apply to adjourn the trial and seek the appointment of a litigation guardian for Jonn. Jonn's examination for discovery did not occur.
- [10] In February 2021, the parties agreed, on a without prejudice basis, to the interim appointment of a litigation guardian for Jonn. Cole Williams ("Cole"), who is Jonn's godson, was appointed as the interim litigation guardian.
- [11] In September 2021, Jonn's counsel served Ashleigh with a comprehensive cognitive evaluation report prepared by Dr. Michael Passmore ("Dr. Passmore's Report #1"). Dr. Passmore's opinion in the report is that Jonn suffers from incapacity due to severe neurocognitive disorders.
- [12] On May 24, 2022, Ashleigh applied for an independent medical examination ("IME") of Jonn pursuant to Rule 9-5(1) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [SCFR]. On May 24, 2022, Justice Coval granted the order for the IME to assess Jonn's mental capacity to instruct counsel, be a witness at discovery and at trial.
- [13] In unpublished oral reasons for judgment on May 24, 2022, *Karrington v. Morrison*, May 24, 2022, Vancouver Registry, E170577, at paras. 8-12, 15-16 and 18-23, Coval J. set out the grounds for requesting the IME and his reasons for granting the orders sought:
- [8] In September 2021, counsel for Mr. Morrison served a comprehensive cognitive evaluation by Dr. Michael Passmore. This concluded that Mr. Morrison was suffering from incapacity due to severe neurocognitive disorders. The conclusion of the report says:

In my opinion, the Examinee is not capable of managing himself, his personal affairs or his financial affairs. In my opinion, he is also not capable of instructing counsel on litigation file issues nor is he fit to stand for discovery and/or trial to answer questions from his own lawyers or the opposing lawyers and provide reliable answers. His incapability is due to major neurocognitive disorders in the severe stage. This health condition is progressive and irreversible; therefore, his capability in these respects is not likely to improve in future.

- [9] The claimant seeks the IME because she questions whether Mr. Morrison is feigning incapacity to avoid participating in the case and, in particular, cross-examination. The claimant and her counsel were not involved or aware of the preparation of Dr. Passmore's exam, or the preparation of this report, until September 2021 when the report was served on them.

- [10] Counsel for the claimant points to numerous reasons justifying this skepticism regarding Mr. Morrison's alleged incapacity. These include the following.
- [11] In August and September of 2020, Mr. Morrison swore two lengthy, complex affidavits and signed his Form 8 financial statements. The affidavits describe corporate history of the companies in issue, chronology of transfer of assets, and his explanation of the role of his son and how assets have come to be in his son's name.
- [12] Also, there is a pattern of tactics in the litigation, including that Mr. Morrison failed to attend various applications, despite being served. He has failed to pay spousal support. He unsuccessfully opposed an application to sell a property to pay for such support. He sought unsuccessfully to withdraw an admission about the parties' separation date in order to raise limitation period arguments against the plaintiff. He avoided examinations for discovery in 2021, although his counsel points to his medical justifications for that.
- [15] The Claimant alleges she spoke to Mr. Morrison as recently as May 9, 2022, and he was speaking intelligently and asking her to drop the litigation. At the same time that he was telling Dr. Passmore that he did not recall his daughter, he was, according to the evidence that I have seen, having coherent text message exchanges with her. There is also a history in this court of Mr. Morrison being found guilty of deceit and fraud. See for example, *Fabrikant - Commonwealth Trading Inc. v. Saks Fourth Avenue Ltd.*, [1991] B.C.J. No. 322.
- [16] The Claimant says the IME with Dr. Dian will be importantly different than the examination by Dr. Passmore because Dr. Dian will have Mr. Morrison's 2020 affidavits and other documents which are potentially inconsistent with Dr. Passmore's conclusions. They argue it is possible Mr. Morrison may have falsely manipulated his responses to Dr. Passmore, and Dr. Dian may be able to test for that.
- [18] I find the IME is warranted based on the following three considerations.
- [19] First, the claimant has abundant evidence from which to be skeptical of Mr. Morrison's litigation tactics and desire to avoid discovery and testifying.
- [20] Second, the IME is justified in the sense of putting the parties on an equal footing so that Dr. Dian can perform this examination with the background material the claimant believes is significant, such as the August and September 2020 affidavits. In his email of May 17, 2022, Dr. Dian confirms he is prepared to review such materials as an independent indication of Mr. Morrison's capability during the period of alleged cognitive decline.
- [21] Third, there is no prejudice to Mr. Morrison from attending the examination, other than the inconvenience of attendance for someone who is not in the best of health.
- [22] Counsel for Mr. Morrison put forward a strong argument that the IME may be pointless. But at this stage I do not want to prejudge that issue.

[23] Counsel for Mr. Morrison took me to a significant number of consulting reports in 2020, late 2020 and early 2021, including from two internal medicine doctors and also a report from Mr. Morrison's family doctor and, somewhat unusually, consulting reports from Dr. Dian himself, regarding the evidence of cognitive decline and impairment of Mr. Morrison. The litigation guardian, Mr. Cole Williams, has sworn an affidavit attesting to Mr. Morrison's severe cognitive impairment. Often, this evidence would persuade me that an IME was not worthwhile, all things considered. But in this case, for the three reasons that I have given above, in my view, it just crosses the threshold of being justified in the overall interests of justice.

[14] On June 1, 2022, Jonn attended the IME. On June 9, 2022, Dr. Dian prepared an IME report.

Application to Appoint Litigation Guardian & Examine Jonn

[15] In a notice of application filed February 24, 2021, Cole applies pursuant to Rule 9-2(8), 20-3(7) and 20-3(10) of the SCFR, for an order appointing him as Jonn's litigation guardian.

[16] In her notice of application filed July 13, 2022, Ashleigh applies for an order that Jonn attend examination for discovery. Jonn takes the position that his litigation guardian is the appropriate person to attend examination for discovery on his behalf.

[17] In addition to being Jonn's interim litigation guardian, Cole is also the son of Jeff Williams. Jeff, who is now deceased, was Jonn's long-time business associate and friend. The Williams and Morrison families came to know each other well.

[18] There is no dispute that Jonn is diagnosed with dementia. The contentious issue concerns the severity of his condition and whether an ongoing litigation guardian should be appointed.

[19] Jonn has been an active participant in this family law proceeding in the past. For example, he made a detailed affidavit on September 15, 2020 describing his activities and assets. Apparently, Jonn's condition has worsened over time. His counsel is concerned that he can no longer provide instructions or make decisions regarding the litigation.

[20] Cole's position is that Jonn has become a mentally incompetent person due to dementia and cognitive impairment. Cole provides evidence to support the application to appoint him as the ongoing litigation guardian. I was not advised of Cole's current age, but I infer from the material that he is in his mid-to-late 20s.

[21] Cole is university educated, having attended university abroad before he returned to Vancouver in early 2022. Cole says that when he returned to Vancouver, he took on the role of Jonn's informal caregiver. Cole now lives and works in Vancouver.

[22] Cole submits that he is the best person to act as Jonn's litigation guardian. While Ashleigh opposes the appointment of an ongoing litigation guardian for Jonn, she raises no objection regarding Cole's appropriateness, per se, to act as the litigation guardian.

- [23] Ashleigh asserts that while John has dementia, his condition is not so severe that he is unable to instruct counsel or provide evidence in this family law proceeding. She is concerned that this application is a yet another attempt by Jonn to delay the proceedings and avoid giving evidence.
- [24] In her affidavits, including her affidavit #8 made May 17, 2022, Ashleigh denies that Jonn is dealing with any long-term health issues preventing him from instructing counsel or giving evidence. She describes Jonn as a "master manipulator".

The Law re Appointment of Litigation Guardian

- [25] Rule 20-3(10) of the SCFR provides that where a person who is a party to a family law case becomes a mentally incompetent person the court must, except for in certain circumstances, appoint a litigation guardian for the person.
- [26] For the purposes of appointing a litigation guardian under Rule 20-3, the rules are essentially identical to those under the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Civil Rules]: *H.S.A. v. S.K.A.*, 2022 BCSC 926 at para. 2.
- [27] Importantly, under s. 3 of the Adult Guardianship Act, R.S.B.C. 1996, c. 6, an adult party is presumed to be competent and the onus is on the party raising legal disability to demonstrate a sufficient lack of mental capacity: *Holland v. Marshall*, 2009 BCCA 582 [Holland] at paras. 11-12; *Stanford v. Murad*, 2021 BCSC 130 [Stanford] at para. 19.
- [28] Rule 20-2 of the Civil Rules, which corresponds to Rule 20-3 of the SCFR, is a complete code for the process of appointing legal guardians for "persons under disability": *Walker v. Manufacturers Life Insurance Company*, 2015 BCCA 143 at para. 11 [Walker]. Neither the Civil Rules nor the SCFR define the phrase "persons under disability." However, an examination of the relevant Rule reveals that a person is under disability if they are an infant or "mentally incompetent": *E.M.E. v. D.A.W.*, 2003 BCSC 1878 [E.W.E.] at para. 16.
- [29] Rule 1-1(2) of both SCFR and Civil Rules incorporates the Interpretation Act, R.S.B.C. 1996, c. 238, which defines a "mentally incompetent person" as a person with a mental disorder as defined under s. 1 of the Mental Health Act, R.S.B.C. 1996, c. 228 [MHA]. Under the MHA, a mental disorder is a disorder of the mind that requires treatment and seriously impairs a person's ability to (a) react appropriately to the person's environment or (b) associate with others.
- [30] In *E.M.E.*, this Court held that a person has a mental disorder, as defined under the MHA, if they are significantly impaired in their ability to conduct their affairs generally: at para. 39. The Court notes that the inquiry should focus on the person's ability to function in the broader environment of their community, and not just the environment of the court system alone. The relevant principles set out in *E.M.E.* were endorsed by our Court of Appeal in *Holland* at paras. 49-52.

- [31] In Walker, J.A. Chiasson (in chambers) articulated the test differently. He stated that a person has a legal disability for the purposes of Rule 20-2 of the Civil Rules if they are incapable of instructing counsel, conducting litigation, or exercising judgment in relation to the claims in issue to a degree expected of a reasonable person: at para. 12.
- [32] Despite different articulations in Walker and Holland, I conclude that the overarching test, as described in Holland, is whether a person is significantly impaired in their ability to conduct their affairs in the broader environment of their community. According to Walker, one factor to consider is whether the person is capable of instructing counsel and exercising judgment in relation to the claims at issue.

The Evidence

- [33] With these legal principles in mind, I turn now to describe the evidence presented on these applications.
- [34] According to Cole, he has noticed Jonn's cognitive abilities declining, especially around the winter of 2020, even though he was only seeing him periodically from 2019 to 2021.
- [35] Cole provides a number of examples of Jonn's cognitive difficulties such as noticing Jonn becoming confused about things such as door locks, why Cole is searching Jonn's office looking for documents related to the Claim and being unable to remember that someone has left the house despite multiple reminders.
- [36] Cole states that on June 1, 2022, after driving Jonn to and from the IME appointment, he noticed John slurring his words and his face drooping. Cole took Jonn to the hospital and doctors told Cole that Jonn had suffered another stroke.
- [37] Cole describes his observations of Jonn from the first few months of 2022. He describes seeing Jonn's continuing cognitive decline, for example, when Jonn repeats the same question over despite having received an answer.
- [38] Shaone, who is in his late 30s, has been working and living abroad for many years. In Shaone's affidavit #1 made February 25, 2020, he says Jonn has been too ill for many years to engage in business including because he suffered a stroke. Shaone has little to offer regarding day-to-day observations of Jonn, likely due to the fact that he has been abroad for many years.
- [39] I also reviewed expert reports concerning Jonn's medical and cognitive condition. Due to significant conflicting statements in the expert reports, I directed that the parties conduct cross-examinations of the experts before me.

Dr. Passmore

- [40] The first doctor to prepare a report is Dr. Michael Passmore. On June 23, 2021, Dr. Passmore, a medical doctor and specialist in geriatric psychiatry, conducted an assessment of Jonn when he was 71 years old. This assessment led to Dr. Passmore's Report #1.
- [41] Dr. Passmore took a history from Jonn and reviewed medical records. Dr. Passmore was asked to give his opinion about whether Jonn suffers from any neurocognitive deficits, whether he is able to manage his affairs and person and whether he has the ability to instruct legal counsel. No objection is taken to Dr. Passmore's qualifications as an expert in geriatric psychiatry who is able to provide his opinion about Jonn's cognitive abilities.
- [42] In reviewing various medical records, Dr. Passmore notes that the results of a 2018 CT scan of Jonn's head indicate damage to the right occipital lobe likely due to stroke and tests results from early 2019 indicating some cognitive deficits. In assessing Jonn's financial capability, Dr. Passmore noted, for example, that Jonn had no understanding of the value of the property he owned, his current debts, expenses or income. Jonn could not fill out a sample cheque or do a simple financial calculation. In assessing Jonn's personal care capability, he has some awareness of his chronic health problems and that he had suffered a stroke. He said his godson helped him with daily activities but he could not remember his godson's name.
- [43] Under the heading "Mental Status Examination", Dr. Passmore notes that Jonn's speech included occasional word-finding difficulties, thought form was "at times repetitive due to short term memory impairment, demeanor was slightly "over-familiar" at times, thought content was "somewhat grandiose, possibly delusional", and judgment and reliability was compromised. Jonn's MoCA tests result was 5/30, with normal being 26+/30. Dr. Passmore described Jonn's insight, judgment and reliability as compromised.
- [44] Dr. Passmore diagnoses Jonn with major neurocognitive disorder due to multiple etiologies (Vascular and Alzheimer's disease), severe stage with his performance on cognitive testing indicating severe impairment. Dr. Passmore states that the condition is progressive and irreversible.
- [45] In Dr. Passmore's opinion, due to major neurocognitive disorder at the severe stage, Jonn is incapable of managing personal and financial affairs and instructing counsel. Dr. Passmore also opines that Jonn is incapable of testifying or providing reliable answers at discovery or trial.

Dr. Dian

- [46] On June 1, 2022, pursuant to Coval J.'s order, Dr. Dian, a medical doctor and specialist in the area of geriatric medicine, conducted an IME of Jonn. On June 9, 2022, Dr. Larry Dian prepared a written report concerning the IME ("Dr. Dian's Report #1"). No objection is taken to Dr. Dian's qualification as a medical doctor with a specialty in geriatric medicine who is capable of providing his opinion concerning Jonn's cognitive condition.
- [47] According to his report, Dr. Dian relied on a number of documents such as medical and consultation records with other medical practitioners, including records related his own consultation with Jonn on October 31, 2019.
- [48] In November 2020, at the request of another physician, Dr. Dian contacted Jonn with respect to conducting an assessment of him. Dr. Dian provided a report back to the referring physician stating that based on a record review, Jonn met the criteria for dementia syndrome, thought to be "mixed". Dr. Dian also reported that based on his telephone interaction with Jonn, he believed Jonn was living at extreme risk and that a competency assessment should be arranged.
- [49] In conducting the IME, counsel for Ashleigh requested an opinion from Dr. Dian concerning, among other things, whether Jonn is mentally competent to instruct counsel, to answer questions at trial/discovery, and, whether there are professionally accepted tests/methods "to determine whether a person claiming mental incompetence has manipulated answers or distorted responses to questions during diagnostic testing and examination".
- [50] In Dr. Dian's Report #1, he provides his clinical assessment of Jonn. At first, Jonn told Dr. Dian that he did not recall Ashleigh or Caashia. Later, Jonn acknowledged that Caashia was his daughter and Ashleigh was her mother.
- [51] Dr. Dian administered a Folstein Mini-Mental Status Examination ("MMSE") assessment and Jonn scored 17/30. Dr. Dian also administered some, but not all, of the components of the MoCA because Jonn abandoned some of the tasks saying he could see well. Dr. Dian notes that Jonn appeared strikingly indifferent to his apparent poor performance during testing.
- [52] Due to Jonn's very poor performance and vague responses, Dr. Dian asked him additional questions, for example, about his date or year of birth, which he claimed he did not know. Dr. Dian also asked about the identity of US presidents and Jonn was able to name some early US presidents and with prompting he was able to recall some facts concerning more recent presidents.

- [53] Dr. Dian described the assessment as very unusual and complicated due to the predominance of Jonn's vague responses and the existence of some inconsistencies. Dr. Dian acknowledges that Jonn's test scores are very poor and he notes that the pattern of memory loss, such as forgetting one's own birthday, is uncommon and inconsistent. Dr. Dian found Jonn's lack of emotional response to his poor performance to be another unusual feature.
- [54] Dr. Dian states that Jonn's performance demonstrates significant deficits in memory, visual spatial calculations, planning, insight and judgment but due to inconsistencies in his responses and his lack of concern over his poor performance, he has significant concerns regarding the reliability of Jonn's responses. Some inconsistencies Dr. Dian identified include Jonn having no recollection of recent affairs but remembering certain details of his godson's lives and initially denying knowledge of his child, Caashia.
- [55] In specific response to some of the questions posed by Ashleigh's counsel, Dr. Dian opines that based on Jonn's answers during the assessment, he does not believe Jonn could instruct counsel nor answer questions about his finances, business activities, real estate or his relationship with Ashleigh. In response to questions about Jonn's activities between June 2015 to September 2020, when, for example, Jonn swore affidavits in these proceedings concerning his financial affairs, Dr. Dian notes that it appears Jonn "sustained a progressive decrease in his cognitive function" but the etiology of the decline is unclear. He says the pattern of memory loss is inconsistent with "any of the common causes of dementia".
- [56] Dr. Dian acknowledges that each of the three successive strokes suffered by Jonn could cause further cognitive decline and provide atypical types of dementia. Dr. Dian also acknowledges the appearance of an underlying neurodegenerative disease such as Alzheimer's, would progress independently of the strokes.
- [57] Dr. Dian acknowledges that in 2019, he and another physician, diagnosed Jonn with Major Cognitive Disorder. He says it is quite possible that there was "a substantial decline" in Jonn's function after October 2019, due to strokes, losing the services of his personal assistant, weight loss and medication non-adherence.
- [58] Dr. Dian recommends further neuropsychological testing of Jonn to determine the true nature of his cognitive deficits and to elucidate on the inconsistencies he notes.
- [59] Following Dr. Dian's Report #1, Ashleigh's counsel supplies Dr. Dian with a number of surreptitious audio recordings of conversations between Ashleigh and Jonn (the "Recordings"). Some of the Recordings apparently pre-date the May 24, 2022 hearing before Coval J. and some post-date the hearing.

- [60] Initially, the only evidence of the Recordings in the application record was found in Xu Ping's affidavit #1, made July 20, 2022. Xu Ping purports to attach "true copies" of eight audio recordings described as nos. A0030316, A0040321, A0110402, A0260121, A0280124, A0340412, A0350412 and A0410506 as exhibits "C" to "J", respectively, of the affidavit. However, exhibits "C" to "J" appear to be written transcriptions of the Recordings prepared by an unknown person. There is no transcript of the Recordings by a certified court transcriber.
- [61] During the hearing, I pointed out to Ashleigh's counsel that there appeared to be no evidence about how, when and where the Recordings were made. After pointing this out, I was eventually provided with Ashleigh's affidavit #10 made on October 24, 2022. Jonn's counsel objected to the admissibility of this affidavit as well as to the admissibility of the Recordings. I indicated that I would deal with the request to admit Ashleigh's affidavit #10 and the admissibility of the Recordings in my reasons for judgment.
- [62] In her affidavit #10, Ashleigh states that she personally recorded the conversations between herself and Jonn on the dates indicated in Dr. Dian's Report #1, except that the recording described as made on May 24, was actually made on May 29, 2022. She does not say how she made the Recordings, for example, whether she used her cell phone or a tape recorder. She also does not state whether the Recordings represent all of the conversations she recorded.
- [63] Ashleigh states that five of the "tapes" are telephone conversations and three are face-to-face conversations. Ashleigh says she knows the date and place of the Recordings because she has a record of her conversations with Jonn in 2022 and a calendar showing where she was at the time of the conversations. However, she does not specify whether the "record" and the calendar are one and the same, nor does she attach copies of the document(s) to her affidavit.
- [64] I listened to each of the Recordings which were provided to me during the hearing. In some of the Recordings, I could not hear much of what Jonn is saying due to overwhelming background noise. Based on what I could hear, I noted many discrepancies between the Recordings and the informal written transcriptions that are exhibited to Xu Ping's affidavit #1. However, nothing much turns on this since both experts confirm that they listened to the Recordings in reaching their revised opinions.
- [65] From my listening, I noted significant variability in Jonn's speaking fluency and the content of his conversation. In some Recordings, he speaks at length and I am able to follow what he is saying but in others, he speaks much less and his verbal fluency is poor. He sometimes sounded confused about things and he expressed frustration over things such as his personal care and poor physical mobility.
- [66] In some of the Recordings, I heard Jonn failing to remember things such as Cole Williams' name, whether there was a court application and what the court application was about.

- [67] In one portion of the Recording, Jonn thanks Ashleigh for calling him before telling her that he cannot remember or find her telephone number. Ashleigh states to him that he is not supposed to say that.
- [68] In many of the Recordings, Ashleigh and Jonn talk about the family law proceedings. They discuss how to resolve the litigation, including by getting married or by having Ashleigh write down her list of settlement requirements. Ashleigh repeatedly tells Jonn that she wants something from him in writing to settle and Jonn tells her that his problem is that he cannot remember what they talk about. No party raised objections to these recorded conversations based on settlement privilege.

Admissibility of the Surreptitious Recordings

- [69] In *C.C. v. S.P.R.*, 2022 BCSC 1057 [C.C.], Justice Gibb-Carsley considered the admissibility of surreptitious recordings. During the trial, the respondent who had made the recordings sought to adduce them, along with transcripts, into evidence. Gibb-Carsley J. noted (at para. 4) that while the practice of secretly recording a party for use in a family law proceeding should be discouraged, "there are circumstances where the probative value of admitting surreptitiously made recording outweighs the prejudicial effect of its admission".
- [70] In *C.C.*, at paras. 31-32, Gibb-Carsley J. set out the test applicable in British Columbia for determining the admissibility of surreptitious recordings:
- [31] In British Columbia, the court has developed a four-part test to determine the admissibility of surreptitious recordings. This test as set out by Justice Skolrood in *Finch v. Finch*, 2014 BCSC 653 at para. 62 [Finch] can be summarized as follows:
- i. the recordings must be relevant;
 - ii. the participants must be accurately identified;
 - iii. the recordings must be trustworthy; and
 - iv. the court must be satisfied that the probative value of the recordings outweighs its prejudicial effects.
- [32] Justice Skolrood considered the leading cases in this province regarding the use of surreptitious recordings including *A.D.B. v. E.B.*, [1997] B.C.J. No. 227, 1997 CarswellBC 104 (S.C.), *Sweeten v. Sweeten*, [1996] B.C.J. No. 3138, 1996 CanLII 2972 (S.C.) [Sweeten], and *Mathews v. Mathews*, 2007 BCSC 1825 [Mathews], and accepted that as a starting point there is a limited discretion for the court to exclude the evidence simply on a policy basis.

Relevance

- [71] As indicated in C.C. and Finch, the first matter to consider in deciding whether to admit the surreptitious recordings into evidence is relevance. Key issues on this application and in this Claim are the identification of Jonn's assets and income and whether he is a mentally incompetent person.
- [72] While I agree with the court in C.C. that making surreptitious recordings of the other party in family litigation ought to be discouraged, I accept that Ashleigh made the Recordings to gather information that might shed light on whether Jonn is a mentally competent person who is able to answer questions about his assets and income.
- [73] In all of the circumstances, I conclude that the Recordings are relevant because, for example, they contain examples of Jonn's conversational skills around the time when Dr. Dian conducted the IME. I also note that both experts treat the Recordings as impacting their opinions concerning things such as Jonn's cognitive function.

Identification of Parties

- [74] The identification of the parties is provided in Ashleigh's affidavit #10. In my view, while this affidavit was not served in time, there is no prejudice to Jonn arising from the late service.
- [75] Jonn's counsel was already aware, including because of Dr. Dian's Report #2, that the Recordings were alleged to have been made on the dates set out and that the parties recorded were Jonn and Ashleigh. I also note that Cole states in his affidavit #3 that he listened to the Recordings and he does not state that the voices heard p in the Recordings are people other than Jonn and Ashleigh.
- [76] I have also considered that if I were to refuse to admit Ashleigh's affidavit #10, there would be no evidentiary foundation for the Recordings when I was provided with a great deal of evidence involving the Recordings. Therefore, I conclude it is appropriate in all of the circumstances to admit Ashleigh's affidavit #10 into the record. My reasons for doing so include that there is no real prejudice to Jonn associated with admitting the affidavit.

Trustworthiness of the Recordings

- [77] As noted in C.C., at para. 51, citing M.Y.T.C. v. L.H.N., 2019 BCSC 2454 at para. 15, the trustworthiness of recordings is not concerned with whether something is out of context, but rather, whether the recordings themselves have been manipulated. There was no submission that the Recordings were manipulated, however, there were arguments that the Recordings lack context or they are incomplete.
- [78] Nothing in the evidence convinces me that the Recordings have been manipulated. I therefore conclude that they are trustworthy.

Probative value versus prejudicial effect

- [79] As I mentioned, Jonn's ability to converse and appropriately respond to questions and things said to him is probative of the issues, including whether he is a mentally incompetent person. I conclude that the Recordings do have probative value to the issues raised.
- [80] I have turned my mind to the potential prejudice faced by Jonn if I were to admit the Recordings, for example, because the Recordings are taken out of context and the Recordings sometimes begin or end abruptly suggesting that more was said during the conversation. In my view, these concerns are best addressed when considering what weight ought to be given to the Recordings.
- [81] In light of all of the circumstances, I conclude that the probative value of the Recordings outweigh their prejudicial effect. For the purposes of this application, I have concluded that it is appropriate to admit the Recordings into evidence.
- [82] Having determined that the Recording are admissible, I will now consider the expert evidence that is based, at least in part, on the Recordings.

Expert Opinions Considering the Recordings

- [83] On June 22, 2022, Dr. Dian prepared a supplementary medical legal report ("Dr. Dian's Report #2") based on a review of the Recordings.
- [84] In Dr. Dian's Report #2, he is asked to compare Jonn's exhibited level of cognitive functioning in the Recordings to his presentation during the IME and to explain whether the information provided in the Recordings changes his opinion regarding Jonn's level of cognitive function, his capacity to instruct counsel and answer questions at trial or discovery.
- [85] Dr. Dian accepted that the Recordings were made on March 3, 6, 10 and 25, April 22, May 24 and 25 and June 17, 2022 and that the persons speaking are Jonn and Ashleigh. He also accepted that Jonn did not know the conversations were being recorded.
- [86] Dr. Dian states that the Recordings paint a substantially different picture of Jonn's cognitive function. He finds a "substantial difference in cognitive function in the audio recordings" compared to the function he observed during the IME. Dr. Dian concludes that the Recordings reveal "extensive current knowledge of his financial affairs, as well as detailed planning of future business opportunities" and they change his opinion about Jonn's level of cognitive function. In response to my question, Dr. Dian confirmed that in forming his revised opinion, he accepted that the things said by Jonn during the Recordings were true and accurate.

- [87] Dr. Dian says that the deficits indicated in Jonn's test scores and during his IME assessment were "clearly not found" in the Recordings. Dr. Dian said that people with severe dementia "typically do not have the depth of detail, memory and executive function evident in the audio recordings". Dr. Dian does not specify whether he concludes that Jonn suffers from a less severe cognitive disorder; however, I infer that this is his revised opinion based on the Recordings.
- [88] Finally, Dr. Dian concludes that the Recordings demonstrate a great deal of financial awareness of Jonn's business activities and no evidence of cognitive deficits severe enough to preclude Jonn's ability to instruct counsel or answer questions under oath. Based on the content of the Recordings, Dr. Dian states that he no longer recommends further testing by a neuropsychologist.
- [89] In his testimony, Dr. Dian said he found it particularly significant that in some of the Recordings, Jonn knew about current technology and current business figures, such as Elon Musk and Bill Gates. In one portion of the Recordings, Jonn and Ashleigh discuss fibre optic cable and satellites. Although he has some difficulty remembering his name, Jonn informs Ashleigh that Elon Musk is launching satellites. Ashleigh asks Jonn how far up the satellites go and Jonn provides specific distances before mentioning that satellites travel on different orbital paths. When Ashleigh says she doesn't know anything about it, Jonn tells her that he has been studying that issue today.
- [90] Jonn's counsel did not receive copies of the Recordings until July 14, 2022, which was after service of Dr. Dian's Report #2. However, shortly after receiving them, Jonn's counsel instructs Dr. Passmore to review the Recordings and provide a rebuttal report to Dr. Dian's Report #2.
- [91] On July 22, 2022, Dr. Passmore prepared a further written report dated July 22, 2022 ("Dr. Passmore Report #2 - July 22, 2022"). In Dr. Passmore's Report #2, he confirms that he listened to the Recordings and he notes many examples in the Recordings where Jonn makes statements indicating that he has trouble remembering or he is having cognitive challenges.
- [92] Dr. Passmore also notes many examples of Jonn saying things that he views as disorganized, grandiose and, possibly, delusional thinking. Dr. Passmore says that in some respects, the Recordings are consistent with his impression during his face-to-face assessment of Jonn that he is a "talker" and a person with a preserved ability to engage in "shop-talk".
- [93] After reviewing Dr. Dian's reports and the Recordings, Dr. Passmore states that without having re-examined Jonn, he can not say whether his opinion on capacity has changed, but he does say it most likely would remain the same. In cross-examination, Dr. Passmore said his current opinion of Jonn's cognitive state is that Jonn's dementia is most likely at the moderate stage and moving into the severe stage. He acknowledges he has changed his opinion due to new information consisting of the Recordings and the updated historical information contained in Dr. Dian's Report #2.

- [94] On July 24, 2022, Dr. Dian provided a third report rebutting Dr. Passmore's July 22, 2022 opinion ("Dr. Dian's Report #3").
- [95] Dr. Dian disagrees with Dr. Passmore's opinion that Jonn's indifference to his poor performance during the IME might be attributable to "Cognitive White Coat Syndrome" because he says Jonn appeared relaxed, not anxious, during the IME. Dr. Dian agrees that anxiety can cause poor performance during an assessment but because Jonn seemed indifferent to his poor performance, Dr. Dian concludes that anxiety was not a factor.
- [96] Regarding Dr. Passmore's opinions about the Recordings, Dr. Dian agrees that some of the content of Jonn's conversation "is most unusual, possibly even bizarre and delusional". However, Dr. Dian notes that Jonn spoke in detail about his current activities and in respect of those matters, Jonn's recollection was "accurate and detailed" including while he was discussing his business affairs.
- [97] One difficulty with this is that I have no evidence before me to establish that Jonn's statements in the Recordings are true and accurate. Therefore, Dr. Dian's opinion is based, at least in part, on his acceptance of the truthfulness of Jonn's statements in the Recordings when the truth of those statements are unproven.
- [98] Dr. Dian agrees with Dr. Passmore that Jonn is an inaccurate historian and that there is clear evidence of cognitive impairment. However, because Dr. Dian regards Jonn's poor performance during the IME assessment as very inconsistent with the Recordings he reviewed, Dr. Dian believes that Jonn was actively trying to deceive him.
- [99] In considering all of the circumstances, I prefer the opinion of Dr. Passmore to that of Dr. Dian. One reason for my conclusion is that Dr. Passmore is a geriatric psychiatrist and in possessing this particular expertise, I am satisfied that I ought to place greater weight on his psychiatric expertise, as well as his specific and detailed analysis of the Recordings. I found Dr. Dian was less specific and detailed in his analysis of the Recordings although he did emphasize Jonn's conversation about satellites, fibre optic cables, Elon Musk, Bill Gates and alleged business activity in North Korea.
- [100] I note that although Dr. Passmore changes his opinion concerning the severity of Jonn's dementia based on the Recordings, he says that without having re-examined Jonn, he is unlikely to change his opinion regarding Jonn's capacity.

Analysis - Appointment of Litigation Guardian

- [101] For reasons that I will explain, I have concluded that it is appropriate to appoint a litigation guardian.
- [102] As stated earlier, considering this issue involves determining whether Jonn is a person who is significantly impaired in his ability to conduct his affairs in the broader environment of his community. One factor to consider is whether Jonn is capable of instructing counsel and exercising judgment in relation to the claims at issue.

- [103] Jonn's counsel is concerned that Jonn is incapable of giving instructions and making decisions in the litigation. In my view, where counsel expresses concern to the court and the other parties about a client's competence to provide instructions, it ought to carry some weight. Jonn's counsel previously actioned his concern by obtaining consent to the interim appointment of a litigation guardian.
- [104] Cole's evidence is that Jonn is unable to manage his affairs or himself. Shaone also expresses concerns about Jonn's ability to manage his affairs based mainly on the medical evidence.
- [105] Drs. Passmore and Dian agree that Jonn suffers from moderate dementia. Drs. Passmore and Dian agree that Jonn has suffered from strokes that are likely contributing to his cognitive decline.
- [106] In my view, the preponderance of the evidence before me, including from my review of the Recordings, satisfies me that Jonn is significantly impaired in his ability to conduct his affairs generally. For example, in the Recordings, I heard Jonn to say that he does not have cash or a bank card to give Ashleigh even a small sum of money that she tells him he owes her. Jonn did not know about important current events in the family law litigation, for example, when he asks Ashleigh about a court of application that was likely her application to have him submit to the IME.
- [107] In terms of his grasp of the court proceedings and the role of his counsel, Jonn can be heard telling Ashleigh that his lawyer is a "bandit" who knows judges that take "payoffs" and that is what his lawyer wants. Not only is this scandalous, I conclude that it is an example of the kind of delusional thinking identified by Drs. Dian and Passmore. It also confirms to me that Jonn's ability to instruct counsel and make decisions in the litigation is significantly compromised including due to such delusional thinking caused by moderate moving to severe dementia.
- [108] In terms of Jonn's memory, I heard him unable to remember basic information, such as the name of his godson, Cole, or Ashleigh's telephone number, despite apparently being in frequent contact with her.
- [109] On my review of the legal principles and the whole of the evidence, I am convinced that the applicant has demonstrated that Jonn is significantly impaired in his ability to conduct his affairs generally in the broader environment of his community. I am also convinced that he is impaired in his ability to instruct counsel and exercise judgment in respect of the claim generally.
- [110] As there is no objection to Cole acting as the litigation guardian and as I am satisfied that he is an appropriate person to act in that role, I order that Cole Williams is appointed as the litigation guardian of Jonn pursuant to Rule 20-3(10) of the SCFR.

The Law re Examining a Mentally Incompetent Person

- [111] As I have found that Jonn is a mentally incompetent person and I have appointed Cole as the litigation guardian, I now embark on a consideration of Ashleigh's application for leave to examine him.
- [112] Under Rule 9-2(8) of the SCFR, a mentally incompetent person can only be examined with leave from the court. Rule 7-2(9) of the Civil Rules is identically worded. The court should grant leave only if the party seeking examination can establish that the proposed examinee can give sufficiently reliable evidence: *DeMerchant v. Chow*, 2010 BCSC 1447 [*DeMerchant*] at para. 44.
- [113] In considering whether the proposed examinee is able to give sufficiently reliable evidence, the elements of testimonial competence may provide useful guidance, namely, the proposed examinee's capacity to observe, recollect and communicate. If the person satisfies the low threshold of testimonial competence, the court should grant leave for them to be examined, provided the person would not suffer psychological damage in the process.
- [114] The onus for showing that a mentally incompetent person should be examined rests on the party seeking examination: *Penn v. Secord*, [1980] 1 W.W.R. 464, 1979 CanLII 693 (B.C.S.C) at para. 7.
- [115] In *DeMerchant*, the Court frames the inquiry in terms of the reliability of the proposed examinee's testimony: at paras. 44-47. If the court is satisfied that the person's evidence would be unreliable, and that examining them would be futile, then leave should not be granted: at para. 44. Ultimately, in that case, the Court declines to grant leave to examine the proposed examinee due to medical evidence indicating that they have a tendency to fill in memory gaps by confabulating.
- [116] Courts outside of British Columbia have also considered whether a person under a disability should be examined for discovery. For example, in *Abrahamson v. Buckland*, [1990] 5 W.W.R. 193, 1990 CanLII 7809 (S.K.C.A.) [*Abrahamson*], at paras. 32-33, the Saskatchewan Court of Appeal set out a useful framework that has been cited by courts in Saskatchewan, Ontario and Alberta, including the Alberta Court of Appeal in *Bilawchuk v. Wawryko*, 2002 ABCA 178 at para. 67.
- [117] The relevant portions of the framework described in *Abrahamson* are as follows:
- 32 3. In determining whether, to what extent, and in what manner the party under disability may be required to submit to examination for discovery, the Court will have regard for the nature of the disability and its effect, if any, upon the competence of that party to testify to the matters in issue, or any of them, in accordance with the rules governing the examination of witnesses, including the provisions of s. 42(1) of the Saskatchewan Evidence Act having to do with the capacity of children of tender years to testify on oath or otherwise.

33 4. In determining the competency of the party, the court should have regard for the presence of those characteristics, or the absence of those disabilities, which render a witness legally fit and qualified to give evidence and make admissions, as for example, in *Hebert v. Calgary*, per Ford J.A.; *Nemeth v. Harvey*; and *Bennett v. Hartemink* (1983), 42 C.P.C. 33 (Ont. H.C.).

[118] Further, *R. v. Marquard*, [1993] 4 S.C.R. 223 [Marquard], the leading decision regarding testimonial competence, is also instructive. At issue in that case was whether a child had the capacity to testify under s. 16(1)(b) of the Canada Evidence Act, R.S.C. 1985, c. C-5, which is worded almost identically to s. 5(1) of British Columbia's Evidence Act, R.S.B.C. 1996, c. 124.

[119] In *Marquard*, the Court states that there are three components to testimonial competence: (1) the capacity to observe; (2) the capacity to recollect; and (3) the capacity to communicate. So long as a person has basic abilities in those three areas, and understands the nature of an oath or solemn affirmation, their evidence should be admitted and any deficiencies in the person's ability to observe, recollect or communicate should thereafter go to weight. The Court further states, at para. 14, that the threshold for testimonial competence is not high.

[120] Finally, in Ontario, Courts have emphasized in cases such as *M.S. v. The York District Area School Board*, 2018 ONSC 2004 at para. 17 and *Michriky v. Hack*, [2005] O.J. No. 982 (S.C.) at paras. 11-12, the importance of preventing psychological damage to those under disability when deciding whether an examination for discovery should be permitted. These decisions state that in determining whether leave should be granted to examine a mentally incompetent person, the court should consider the impact that such examination would have on the person, given their vulnerabilities and particular psychological condition.

[121] Therefore, from my review of the authorities, I conclude that in deciding whether to grant leave, the court should consider whether the person's evidence would be sufficiently reliable and whether examining them would be futile: *DeMerchant* at para. 35. In this regard, the court may consider whether the person is "legally fit and qualified to give evidence" (*Abrahamson* at para. 29) and whether they possess the capacity to observe, recollect and communicate evidence: *Marquard* at para. 12. If the proposed examinee can give sufficiently reliable evidence, and there is no concern that they would suffer psychological damage in the process, the court should grant leave for them to be examined.

Analysis - Granting Leave to Examine Jonn

[122] Based on the authorities and the evidence discussed above, and keeping in mind that Ashleigh bears the onus, the issue is whether leave to examine Jonn ought to be granted. To do so, I must be satisfied that Jonn is capable of giving sufficiently reliable evidence and he will not suffer psychological damage in the process.

- [123] I have noted that the threshold for testimonial competence is not high. If the person is shown to have basic abilities to observe, recollect and communicate, along with an understanding of the nature of an oath, their evidence should be admitted: Marquard at para. 14.
- [124] The authorities indicate that a deficit in a person's ability to observe, recollect or communicate is not necessarily a disqualifier to testimonial competence. That is because, after it has been determined that their evidence should be admissible, any deficiencies in their ability ought to go to weight: Marquard at para. 14.
- [125] In the case before me, there is evidence of a deficit in Jonn's ability to recollect, which I have already discussed at length. However, there is also evidence, for example in certain portions of the Recordings, where Jonn shows at least a basic ability to recollect some things.
- [126] In my view, while a deficit has been identified, Jonn has basic abilities to observe, recollect and communicate - at least as it appears at the time of the IME and the Recordings. In light of all of the evidence, I conclude that it is appropriate to grant leave to Ashleigh to examine Jonn for discovery.
- [127] While it may turn out that Jonn's evidence is ultimately found unreliable, I conclude that Ashleigh should have the opportunity to examine him due to the low bar for testimonial competence and my finding that he just meets the threshold of possessing basic ability.
- [128] In granting leave, I wish to point out that my decision is based on the evidence that was before me on this application. The evidence includes Dr. Passmore's opinion, which I have accepted, that Jonn's dementia is most likely at the moderate stage and moving into the severe stage. Dr. Passmore's opinion is also that his dementia is expected to follow an overall downward trajectory.
- [129] It will be a matter for the trial judge, for example, to determine other issues such as the admissibility of Jonn's examination evidence at trial and whether he ought to testify at trial
- [130] As the Court did in M.S., at para. 17, I have also considered the potential for psychological or physical damage to Jonn as a result of requiring him to attend for examination. I again note the evidence that following the IME, Jonn was taken to the hospital due to Cole observing signs of another stroke.
- [131] While no medical expert suggests that Jonn is at increased risk of further stroke if he were to be examined, I do have some residual concerns based on Cole's observations of his condition after the IME. Therefore, unless the parties otherwise agree, I impose a limit on the length of any examination of Jonn such that it is not to exceed two and a half hours during any one day.

[132] For clarity, I am not reducing the usual examination duration available under Rule 9-2(2)(a) of the SCFR. However, I am stipulating that Jonn's examination shall not exceed two and a half hours during any one day, unless the parties otherwise agree.

[133] Finally, given all of the circumstances, including Jonn's history of strokes and Dr. Passmore's opinion regarding the expected overall downward trajectory of his dementia, I order that Jonn's examination shall also be video recorded.

Application for further production of documents from the respondents

[134] On July 13, 2022, Ashleigh filed an application seeking to require:

- i. Jonn and Shaone to amend their lists of documents and to produce the documents described in Schedules "A" and "B", respectively, to the notice of application;
- ii. Jonn and Shaone to provide affidavits verifying their amended lists; and
- iii. to require Jonn to attend an examination for discovery.

[135] On July 31, 2019, Jonn was ordered to file and serve a financial statement and a list of documents. Jonn eventually filed and served a financial statement and list of documents, which Ashleigh alleges is deficient. On December 14, 2020, Ashleigh served Jonn and Shaone with a demand for further document production.

[136] When no further documents were produced despite her demand, Ashleigh filed a notice of application for further document production on February 12, 2021. That application was not heard.

[137] On February 19, 2021, Shaone produced a list of documents. Ashleigh submits that Shaone's list of documents does not include all of the documents demanded on February 12, 2021.

[138] On May 20, 2022, Ashleigh delivered a further demand for documents to Jonn and Shaone.

[139] Since Ashleigh filed a notice of application on July 13, 2022, Jonn and Shaone have continued serving amended lists of documents. For example, during the hearing of this application, I was provided with copies of first and second amended lists of documents dated July 22 and August 15, 2022, respectively.

[140] Shaone submits that he has been out of the country working as a professional hockey player and hockey scout and he has had challenges returning to Canada for numerous reasons including during the COVID-19 pandemic. Jonn's litigation guardian, Cole, describes the efforts he has made to locate and produce documents on Jonn's behalf. However, Ashleigh submits that neither respondent has produced all of the documents demanded.

- [141] It should be kept in mind that in the Claim, Ashleigh asserts an interest in various properties and companies that she alleges constitute family property. Her claims extend to companies where Jonn is the sole shareholder, for World Financiers Ltd., and to companies, the shares of which, are held by Shaone and Caashia. Ashleigh also alleges that Shaone and Caashia hold assets, including real estate assets, in trust for Jonn. It is not disputed that Jonn has transferred a number of real properties to Shaone.
- [142] Ashleigh submits that Jonn and Shaone have consistently failed to produce documents in a timely and complete fashion. In her view, they are engaging in deliberate delay tactics to avoid providing documents as a way to thwart her Claim.
- [143] The respondents oppose the document production applications. Jonn and Shaone say the applications are unnecessary because they have diligently produced documents, including by recently providing several amended lists of documents.
- [144] Rule 5-1 of the SCFR describes the requirements on parties to make financial disclosure in family law proceedings including based on the nature of the claims advanced. Rule 9-1(1) requires parties to a family law proceeding to prepare lists of documents listing all documents that are or have been in the party's possession or control and that could be used by any party at trial to prove or disprove a material fact and all other documents to be referred to at trial.
- [145] In the present case, Ashleigh has demanded pursuant to Rule 9-1(7) of the SCFR that Jonn and Shaone serve an amended list including documents that should have been disclosed under Rule 9-1(1). Ashleigh has also demanded pursuant to Rule 9-1(8) of the SCFR that Jonn and Shaone produce certain additional documents.
- [146] Rule 9-1(8) of the SCFR provides that if a party believes a list of documents should include documents that: (a) are within the listing party's possession, power or control; (b) relate to any and all matters in question in the case; and (c) are additional to the documents required under subrule (1), the party may by written demand identify the additional documents with reasonable specificity and that indicates the reason why such additional documents should be disclosed, require the listing party to list and provide the documents.
- [147] In *Lit v. Hare*, 2012 BCSC 1918 [Lit], at para. 60, Justice Fitch (as he then was) discussed demands for documents in a family law proceeding pursuant to Rule 9-1(7) and (8) of the SCFR. In that case, the applicant failed to comply with the requirements of the Rules and the applications seeking documents that ought to have been listed and additional documents were dismissed with Fitch J. stating, at para. 68, as follows:
- [68] In my view, the applications are premature and framed in overly broad and vague terms. The lack of specificity which characterizes this application is fatal to its success. In addition to the challenges faced by the respondents as a consequence of the manner in which the applications have been framed, it is difficult for the court to adjudicate on a document production application where what is sought are "all documents not yet produced" in

broadly defined categories. That the application lacks sufficient particularity is very likely a function of the failure to observe the procedure contemplated by the Rules. That failure cannot, in this case, be attributed to mere oversight. Had the written demand process mandated by the Rules been followed, I think it reasonable to suppose that many of the difficulties associated with this application would not have arisen. Moreover, had the procedure mandated by the Rules been observed, I think it is unlikely that it would have been necessary to file the volume of material that accompanied these applications.

[148] A party demanding additional documents under Rule 9-1(8) must specify the documents demanded and tie the documents to an issue in the proceedings: *Mossey v. Argue*, 2013 BCSC 2078 at paras. 15-18.

[149] The respondents, Jonn and Shaone, submit that they have made reasonable and timely efforts in the circumstances to list the documents required by Rule 9-1(1) and they oppose the application on the basis that Ashleigh's request for documents is vague and overbroad and she has failed, in respect of the additional documents sought, to demonstrate how the documents are tied to an issue in the proceedings.

[150] For example, Shaone submits that with respect to the West 4th Property, which is included in the Claim, the request in item 2(j) of Schedule "B" for "all written correspondence between Shaone and Jonn, whether by email, text, or electronic message, relating in any way to the West 4th Property" is overbroad. There are similarly worded demands related to the Odium Drive, Adanac Street, Venables, East 5th, East 7th, West 3rd, West 8th Properties, Adanac Holdings and West 8th Company. I agree that such requests are duplicative and overbroad.

[151] However, in my view, the majority of the documents or classes of documents set out in Schedules A and B to the notice of application are identified with sufficient particularity. In addition, I find that there is ample evidence in the material before me of the reason why such additional documents should be disclosed including because the demanded documents relate to matters in question in the Claim, such as, the circumstances of how assets claimed to be family property were transferred, acquired or encumbered.

[152] In reasons for judgment indexed at *Karrington v. Morrison*, 2020 BCSC 1797, Master Muir details the evidence of Jonn and Shaone's financial issues that was before the court on that application. There are clearly many issues to be resolved in this Claim concerning the true state of the parties' assets and liabilities.

[153] Given the intertwined nature of the financial issues between Jonn and Shaone, including because Ashleigh effectively claims that Shaone holds assets in trust for Jonn, I have concluded that she is entitled to demand the specified documents she seeks from Shaone, such as bank records.

- [154] I have also considered the matter of proportionality in relation to the demands for additional documents. However, in light of the evidence of the complex financial circumstances of the parties and questions related to the intertwining of Jonn and Shaone's financial affairs, I conclude that the demands are proportionate to the aim of securing a just, speedy and inexpensive determination of this family law proceeding: *Parise v. Adelson*, 2021 BCSC 891 at para. 14.
- [155] However, as I mentioned earlier, while I have concluded that in general it is appropriate to make the orders sought by Ashleigh, I have concluded that the following documents or classes of documents set out in Schedules "A" and "B" are over broad, vague, duplicative and/or not related to a matter in issue in the claim. The order shall not require that the following documents or classes of documents be listed or produced:

From Schedule "A"

- a) Item 2(k) seeking all correspondence between Shaone and Jonn and/or any tenant of the West 4th Property;
- b) Item 2(r) seeking all document properties and other electronic data relating to the West 4th Sale Agreement, including the date of creation revision and authors of the document;
- c) Item 3(w) seeking all written correspondence between Shaone and Jonn relating in any way to the West 4th Property;
- d) Item 4(p) seeking all written correspondence between Shaone and Jonn relating in any way to the Adanac Street Property or Adanac Holdings;
- e) Item 5(aa) seeking all written correspondence between Shaone and Jonn relating in any way to the Odlum Drive Property;
- f) Item 5(dd) seeking all written correspondence Shaone and Jonn relating in any way to the Venables Property or West 8th Company;
- g) Item 6(f) seeking all correspondence between Jonn and Shaone and/or any tenant of the East 5th Avenue Property;
- h) Item 6(g) seeking all written correspondence between Shaone and Jonn relating in any way to the East 5th Avenue Property;
- i) Item 7(i) seeking a copy of the electronic document properties and other electronic data relating to the East 7th Sale Agreement, including the date of creation, revision and authors of the document;
- j) Item 7(j) seeking all written correspondence between Shaone and Jonn relating in any way to the East 7th Avenue Property;
- k) Item 8(k) seeking all written correspondence between Shaone and Jonn relating in any way to the 958 Property;

- l) Item 15 seeking unredacted copies of all emails, text messages and electronic messages exchanged between Cole and Jonn from January 1, 2020 through to the current date; and
- m) Item 15 seeking unredacted copies of all emails sent by Cole to Garry Thomas from August 2020 through to February 15, 2021.

From Schedule "B"

- n) Item 2(i) seeking all document properties and other electronic data relating to the West 4th Sale Agreement, including the date of creation revision and authors of the document;
- o) Item 2(j) seeking all written correspondence between Shaone and Jonn relating in any way to the West 4th Property;
- p) Item 3(w) seeking all written correspondence between Shaone and Jonn relating in any way to the Odlum Drive Property;
- q) Item 4(p) seeking all written correspondence between Shaone and Jonn relating in any way to the Adanac Street Property or Adanac Holdings;
- r) Item 5(ff) seeking all written correspondence between Shaone and Jonn relating in any way to the Venables Property or West 8th Company;
- s) Item 6(f) seeking all correspondence between Jonn and Shaone and/or any tenant of the East 5th Avenue Property;
- t) Item 6(g) seeking all written correspondence between Shaone and Jonn relating in any way to the East 5th Avenue Property;
- u) Item 7(j) seeking all document properties and other electronic data relating to the East 7th Sale Agreement, including the date of creation, revision and authors of the document;
- v) Item 7(k) seeking all written correspondence between Shaone and Jonn relating in any way to the East 7th Avenue Property;
- w) Item 8(c) seeking all correspondence between Shaone and Jonn relating in any way to the West 3rd Avenue Property;
- x) Item 9(k) seeking all written correspondence between Shaone and Jonn relating in any way to the 958 Property;
- y) Item 12 seeking unredacted copies of all emails, text messages and electronic messages exchanged between Cole Williams and Shaone Morrisonn from January 1, 2020 through to the current date.

[156] Regarding Ashleigh's request that Jonn and Shaone provide an affidavit verifying their lists of documents, the test for making such an order is summarized in *Grandmaison v. Berkenbos*, 2018 BCSC 1329, at paras. 35-40 [Grandmaison]:

- [35] The authorities before me support that the court may order a party of record to serve an affidavit verifying a list of documents in circumstances including:
1. when document production has been clearly inadequate (Centura at para. 38), meaning documents that are significant to the defence or claim of one party have been omitted from any list delivered under the Rule, and there is no adequate explanation or reason for the omission (Copithorne at para. 12); or
 2. when a party has displayed a dilatory or casual attitude to document production (Centura at para. 38), giving the other party reasonable cause to suspect that, either deliberately or by wilful indifference, relevant documents may be hidden from them (Synergy Management at para. 15, cited in Copithorne at para. 12).
- [36] In addition, an affidavit will not be ordered where there is a genuine dispute as to what is producible (Centura at para. 38).
- [37] I am not persuaded that Cambie is authority for the proposition that "suspicions" by themselves are sufficient for an order pursuant to R. 7-1(8). Mr. Justice Steeves' reasons indicate, at para. 29, that the "suspicions" in that case were supported by conduct that gave the other party reasonable cause to suspect that relevant documents may be hidden from them:
- [29] The plaintiffs say very little has been produced and they are suspicious that not all documents have been listed or produced. For example, they question how it could be that senior officials such as the deputy minister was not more involved and the subject of more correspondence and communications.
- [38] Moreover, the reasons in Cambie should be appreciated in the context of that litigation - a unique 165-day trial, which was adjourned for a full year half-way through, and which has led to numerous interlocutory disputes over evidentiary matters. For example, prior to the reasons in 2018 BCSC 749, the Cambie litigation had already produced over 35 published judgments.
- [39] I am also not persuaded that the decisions of Master Taylor in Totzauer or Mr. Justice Pearlman in Gardner expand the legal test. These decisions merely reinforce that the lack of a satisfactory explanation for having a casual attitude or failing to list documents is a consideration in the analysis that may ultimately favour the ordering of an affidavit: see e.g. Totzauer at paras. 65-66; Gardner at para. 54.
- [40] Moreover, in Gardner, Pearlman J.'s framing of the legal test mirrors what I have outlined above:

- [52] Rule 7-1(8) permits a court to order that a party provide an affidavit verifying its list of documents when in the absence of any adequate explanation, relevant documents have been omitted from a list of documents. Such an order may also be made where a party has shown a "dilatory and casual attitude to production of documents" leading to an inference that "either deliberately or by wilful indifference relevant documents may be hidden".
- [157] There is evidence from Cole and Shaone regarding their efforts to produce documents. Both of them describe efforts to locate and produce documents in circumstances where they questioned Jonn's cognitive abilities and they were abroad for extended periods. There is also evidence that Cole and Shaone continue to produce documents, including while the hearing of these applications was underway.
- [158] Considering all of the evidence, I conclude there are explanations from Cole and Shaone for delays and challenges in producing and listing documents. While their efforts are far from perfect, their evidence leaves me unable to find the kind of deliberate or wilful indifference that is discussed in *Grandmaison*.
- [159] Therefore, at this juncture, I do not find that I ought to require Cole and Shaone to prepare affidavits verifying their lists of documents. However, while I dismiss this aspect of Ashleigh's application, she has leave to seek such relief in the future, should she decide it is necessary to do so.
- [160] In relation to the request for a fine to be assessed against Jonn and Shaone, as I am satisfied in light of the explanations provided for the delay in listing and producing documents, and because numerous amended lists of documents have recently provided, that I ought to decline to order a fine. In my view, the orders I am making adequately address the concerns raised. However, I grant Ashleigh leave to seek the imposition of a fine in the future should she decide it is necessary to do so.

Application for Documents in Possession of Third Party

- [161] On October 13, 2022, Ashleigh filed an application to require VanCity to produce certain documents or categories of documents described in Schedule "A" to the application.
- [162] Rule 9-1(15) of the SCFR provides that if a document is in the possession or control of a person who is not a party, the court may make an order for production, inspection or copying of the document.
- [163] In *Harder v. Growers Supply Company Limited*, 2022 BCSC 745, Justice Mayer addresses Rule 7-1(18) of the Civil Rules, which is the equivalent to Rule 9-1(15) of the SCFR, and concludes that it provides a mechanism for accessing specific documents that are relevant:

- [20] Mr. Hardwick submits that an order under Rule 7-1(18) should not go because the documents sought will not tend to prove or disprove a material fact in this litigation, citing *MacKinnon v. Rabeco Holdings (1989) Ltd.*, 2014 BCSC 1703, at paras. 15 and 16. I am not persuaded that the test for production under Rule 7-1(18) is that strictly confined. However, I think that the test is one of relevance, as was stated by Justice G.C. Weatherill in *Northwest Organics, Limited Partnership v. Roest*, 2017 BCSC 673, at para. 81:
- [81] It is apparent from the wording of Rule 7-1(18) that it was not intended to provide broad discovery of documents from non-parties, but rather a mechanism by which parties can access specific documents or classes of documents when it has been demonstrated that they are in the possession or control of a non-party and are relevant to an action . . .
- [164] There is no need for a party to exhaust its other discovery methods prior to applying for documents in the hands of a third party but the court should take into account whether the documents are also in the possession of a party: *J.A. Brink Investments Inc. v. B.C.R. Properties Ltd.*, 2017 BCSC 1545 at para. 28.
- [165] There is no suggestion that the non-party's privacy interests are at stake in relation to Ashleigh's application for documents from VanCity. Indeed, there is evidence that VanCity was provided with the application material, it provided input on the proposed form of order and it takes no position on the application.
- [166] In my view, given that VanCity documents have been included in the lists of documents provided by the respondents, there is no question that the documents or classes of documents sought are held by VanCity.
- [167] As to whether the documents or classes of documents are specific and relevant, I am satisfied that they are relevant and they are described with sufficient specificity. In my view, there can be no suggestion that Ashleigh is seeking broad document disclosure from VanCity. The draft order, for example, includes a requirement to produce documents provided to VanCity by the respondents for the purchase and/or refinancing of the properties listed in the Claim, including statements of assets and liabilities. In my view, the specific documents or class of documents are set out and they are relevant.
- [168] VanCity's input regarding the form of the order is included in the version of the order attached as Schedule "A" to the October 13, 2022 notice of application.
- [169] Counsel for Jonn submits that there is no dispute that VanCity has relevant records. In fact, the respondents have served lists of documents including documents from VanCity.

- [170] The respondents say the issue is the absence of evidence to suggest that VanCity has records beyond those already produced. There is evidence that Shaone corresponded with an employee of VanCity asking for documents. Shaone is told that VanCity has provided him with the records. Ashleigh's counsel submits, and I agree, that this letter from VanCity cannot be taken as an assurance that the documents and classes of documents she requests have already been provided.
- [171] I agree with Ashleigh's counsel that the documents or classes of documents sought from VanCity as described in Schedule "A" to the notice of application are relevant. That is because the documents relate to, among other things, property acquired during the parties' relationship and the refinancing or transfer of property to Shaone.
- [172] I therefore make the order directing VanCity to produce copies of documents or categories of documents in the terms set out in the draft order found at Schedule "A" to the October 13, 2022 notice of application. I add one additional term requiring Ashleigh to serve the respondents with copies of any response and documents received from VanCity within three business days of the receipt of same.

Conclusion

[173] In determining the applications, I make the following orders:

- a) Cole Williams is appointed as the litigation guardian of Jonn Morrisonn.
- b) Ashleigh Karrington is granted leave to conduct an examination for discovery of Jonn Morrisonn.
- c) Jonn Morrisonn shall, within 14 days of these reasons for judgment, amend his list of documents and produce copies of the documents or categories of documents set out in Schedule "A" to the notice of application filed July 13, 2022, save and except for those documents specifically excluded for the reasons explained in these reasons for judgment, within 14 days of the date of this order.
- d) Shaone Morrisonn shall, within 14 days of these reasons for judgment, amend his list of documents and produce copies of the additional documents or categories of documents set out in Schedule "B" to the notice of application filed July 13, 2022, save and except for those documents excluded for the reasons explained in these reasons for judgment.
- e) VanCity is directed to produce copies of documents or categories of documents on the terms set out in the draft order attached as Schedule "A" to the October 13, 2022 notice of application.
- f) Ashleigh must serve the respondents with copies of any response and documents received from VanCity within three business days of the receipt of same.

[174] On the matter of costs, I conclude that Jonn is entitled to costs in respect of his application seeking the appointment of a litigation guardian. I conclude that Ashleigh is entitled to her costs in respect of her applications concerning document production because she was successful in obtaining most of the relief sought in those applications.

"E. McDonald J."

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