
CANADA / JUDGMENT

Lindberg v. Lindberg

2010 BCSC 1127

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 1127 Lindberg v. Lindberg

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lindberg v. Lindberg,

2010 BCSC 1127

Date: 20100811

Docket: S100909

Registry: Vancouver

Between:

Edward Ushean Lindberg

Petitioner

And

Dorothy Helen Lindberg

Respondent

Before: The Honourable Mr. Justice Willcock

Reasons for Judgment

In Chambers

Counsel for the Petitioner:

G.J. Niemela

Counsel for the Respondent:

M.D. Tatchell

Place and Date of Hearing:

Vancouver, B.C.

July 16, 2010

Place and Date of Judgment:

Vancouver, B.C.

August 11, 2010

[1] This is an application brought by Wendy Shoemaker to set aside an injunction pronounced February 9, 2010, and for an order dismissing the petition of Edward Ushean Lindberg seeking appointment as committee of the person and estate of his mother, Dorothy Helen Lindberg.

THE FACTS

The Petition

- [2] On February 8, 2010, Edward Ushean Lindberg (Shean Lindberg), applied by petition for a declaration that his mother Dorothy Helen Lindberg is incapable of managing herself or her affairs and for an order appointing him as committee to manage and administer her affairs. In support of that application he relied upon an affidavit of kindred and fortune sworn February 8, 2010, and the affidavit of Dr. Don MacIntosh sworn February 6, 2010.
- [3] By affidavit of kindred and fortune Mr. Lindberg deposed to the fact that he was Dorothy Helen Lindberg's only child and her closest next of kin, that his mother was 87 years of age and retired and that she was resident at Sherwood Crescent Manor in Abbotsford. Mrs. Lindberg owned real property, a home in Abbotsford, the value of which was not provided in the affidavit. Mrs. Lindberg was said to own capital with a value of approximately \$50,000 and personal effects. Her income was stated to be \$21,600 per year.
- [4] Mr. Lindberg deposed to the fact that in the summer of 2008, his mother started to display signs of dementia and Alzheimer's disease, and that in early to mid-2008, her financial affairs had become disordered. At that point, Mr. Lindberg says that he began taking care of his mother's affairs. He claims to have always had a close relationship with his mother and to have visited her regularly.
- [5] Mr. Lindberg says he first learned in April or May 2009 that Ms. Shoemaker had been given a power of attorney by his mother and on January 31, 2010 that his mother's home had been listed for sale and that she had been taken to a seniors' care home. He described his mother as confused and upset and deposed that she wanted him to take her back to her home.

- [6] Dr. MacIntosh deposed that he had been Mrs. Lindberg's doctor since the mid-1980s and that in his opinion Mrs. Lindberg had been incapable of managing her affairs since January 2009 as a result of the onset of irreversible dementia.

The Injunction Application

- [7] By motion filed in the proceedings commenced by the petition, Mr. Lindberg sought an ex parte injunction restraining his mother and her servants or agents from disposing of or transferring title to her property and restraining them from dealing with the property until the hearing of the petition.
- [8] In support of the application for the injunction, Mr. Lindberg relied upon the affidavit of Dr. MacIntosh, his affidavit of kindred and fortune, and two additional affidavits: an affidavit sworn by his solicitor Glenn Niemela, on February 8, 2010 and an affidavit sworn by Sasha Nieves on February 8, 2010. The latter affidavits provided particulars of the title to the property owned by Mrs. Lindberg and described the difficulty that Mr. Lindberg had experienced in attempting to obtain a second medical opinion addressing her mental capacity.
- [9] An injunction was granted by Madam Justice Ballance of this court on February 9, 2010.

The Representation Agreement

- [10] The applicant, Ms. Shoemaker, is the daughter of Teresia Reid. She says that she has been a long-standing friend of Mrs. Lindberg and that her mother, Mrs. Reid, has been Mrs. Lindberg's friend for over 50 years. Ms. Shoemaker has produced a last will and testament of Mrs. Lindberg, a power of attorney given on February 23, 2005, and an enhanced representation agreement made on February 28, 2005.
- [11] The last will and testament calls for the payment to Mr. Lindberg of the sum of \$100,000 and the division of the balance of Mrs. Lindberg's estate between his four children, Mrs. Lindberg's grandchildren. Ms. Shoemaker is appointed the executor and trustee of the estate. The will was executed on January 31, 2005 and witnessed by John G. Tait, Q.C.
- [12] The power of attorney was given on February 23, 2005 by Mrs. Lindberg to Ms. Shoemaker. It appoints Ms. Shoemaker to be Mrs. Lindberg's attorney in accordance with the Power of Attorney Act, R.S.B.C. 1996, c. 370, to do on her behalf anything that she could lawfully do by an attorney. The power of attorney is enduring and may be exercised during subsequent mental infirmity. The power of attorney was also witnessed by Mr. Tait.
- [13] On February 28, 2005, Mrs. Lindberg executed an enhanced representation agreement expressly made under the Representation Agreement Act, R.S.B.C. 1996, c. 405 [RAA]. The agreement provides that the power of attorney will remain in full force and effect and appoints Ms. Shoemaker to be the representative of Mrs. Lindberg. It authorizes the representative to assist Mrs. Lindberg in making decisions or to make decisions on her

behalf about personal care, health care and routine management of financial affairs. The routine management of financial affairs is expressly said to include the disposition or encumbrance of land owned by Mrs. Lindberg.

- [14] Ms. Shoemaker deposes that when these documents were executed Mrs. Lindberg was of sound mind. That opinion is reflected in the drafting and witnessing of the documents by Mr. Tait and is consistent with the evidence of Dr. MacIntosh and Mr. Lindberg himself that Mrs. Lindberg first demonstrated signs of dementia in early 2009, years after the execution of the representation agreement and power of attorney.

Ms. Shoemaker's Evidence

Ms. Shoemaker apparently made no use of the representation agreement or power of attorney until December 2009. Prior to that date, she had regularly visited Mrs. Lindberg at her home and periodically brought her groceries. She claims to have seen no evidence that Mrs. Lindberg was in distress or exposed to any danger until she received a telephone call from the Abbotsford Police Department on November 30, 2009, which led her to believe that Mrs. Lindberg was having difficulty caring for herself and that she was exposed to some risk as a result of people living in the basement of her home who were thought by the police to be undesirable.

- [15] Ms. Shoemaker had discussions with Cst. Kingra of the Abbotsford Police Department and representatives of the Fraser Health Authority in early December 2009, leading to the conclusion that it was in the interest of Mrs. Lindberg to move her from her home to Sherwood Manor, a care facility. She made arrangements to evict the tenants from the home, remove the possessions of other parties, secure and insure the premises and protect Mrs. Lindberg's personal property.
- [16] On making inquiries, Ms. Shoemaker found that Mrs. Lindberg had significant unpaid debts and she felt that her affairs were not being properly looked after. Ms. Shoemaker deposes that she believes Mr. Lindberg had little contact with his mother in the last three years, that Mrs. Lindberg's interests would not be served by an order giving him committee, and that she was the most appropriate person to be appointed as a committee. Significantly, Ms. Shoemaker says that she notified Mr. Lindberg on December 19, 2009 that his mother was moving into Sherwood Manor.
- [17] The tenants who were living in the basement of the Abbotsford home at the time Mrs. Lindberg was moved to the care facility were evicted and the home has become vacant. There have been break-ins. This has led Ms. Shoemaker to hire a security service to guard the home. It was impossible to obtain insurance for the home and its contents unless Ms. Shoemaker made arrangements to have an alarm installed and to continue the security. Insurance has been expensive.
- [18] Ms. Shoemaker says that it is not possible to pay for the costs of Mrs. Lindberg's care as well as the property taxes, utilities, insurance and security costs associated with the Abbotsford house. She says that the house has a value in the range of \$850,000. There is no mortgage

against the title of the property. She is of the view that it is in Mrs. Lindberg's interests to sell the house and use the proceeds of the sale to pay for her care. The costs of care should not encroach significantly upon the value of Mrs. Lindberg's estate. The principle reason for selling the property is to reduce Mrs. Lindberg's ongoing expenses.

- [19] Ms. Shoemaker says that Mrs. Lindberg has friends who visit her at Sherwood Manor, that Mr. Lindberg does not visit his mother regularly, and that it would not be in her interests to move to Vancouver. Ms. Shoemaker says she has been advised by caregivers that it is unsettling to a patient with dementia to be moved to a new environment. She says that it is in Mrs. Lindberg's own interests for her to remain in a stable environment with little change, and to continue to see the people who have been visiting her occasionally at Sherwood Manor.

Mr. Lindberg's Evidence

- [20] Mr. Lindberg says that it is not accurate to describe Ms. Shoemaker as a long-standing and close friend of his mother. He claims to have seen little of her over the years. He says that he has visited his mother regularly, almost weekly, in the years since he moved from Abbotsford to Vancouver in 1990. It is Mr. Lindberg's preference to either have his mother live in her home, if possible, and if not, he says she should be at a care facility in Yaletown, near his residence so that she can be visited by him and his children more easily. He says that on his most recent visit to his mother, he has found that her health is failing. He attributes her poor health to her circumstances in the care home.
- [21] Mr. Lindberg believes property values are now temporarily low in Abbotsford. He believes the value of his mother's home is in excess of \$1 million and that his mother will suffer a loss if the house is sold immediately. He has filed an affidavit from a realtor to the effect that real estate values are low in Abbotsford but likely to rise.

Response

- [22] Ms. Shoemaker says that Mrs. Lindberg's health was failing for some time prior to her move and that Mr. Lindberg is no doubt seeing the result of months of poor health. She says she is advised by staff that Mrs. Lindberg's condition is gradually improving. Ms. Shoemaker says that Mr. Lindberg's description of her relationship with his mother is misleading. She establishes, assisted by photographs, that she has regularly been in the company of Mrs. Lindberg, in the presence of Mr. Lindberg on a number of special family occasions in the recent past.

The Application at Bar

- [23] Ms. Shoemaker says that the injunction was obtained on the basis of incomplete or misleading evidence and that it should therefore be set aside. Ms. Shoemaker further says the petition should be dismissed because adequate provision has been made by Mrs. Lindberg for her care, in the form of a representation agreement and power of attorney. In any event, Ms. Shoemaker submits that Mr. Lindberg is not suitable for appointment as committee of his mother.
- [24] Mr. Lindberg says that the petition cannot be dealt with by way of an application. He says that further evidence is necessary in order for the petition to be heard on its merits; in particular that he requires a further affidavit from a medical practitioner attesting to his mother's incapacity. He requires an order permitting him to obtain such an opinion before the petition is heard.

ISSUES

- [25] On this application, it falls for me to determine:
- (a) whether there is a basis for setting aside the order of February 9, 2010;
 - (b) whether the Court can address Mr. Lindberg's petition that he be appointed committee; and
 - (c) if so, whether either Mr. Lindberg or Ms. Shoemaker should be appointed committee of Mrs. Lindberg.

APPLICABLE LAW

Setting Aside an Interim Order

- [26] In *British Columbia (Public Trustee of) v. Batiuk*, [1996] B.C.J. No. 1646, 14 E.T.R. (2d) 5 (S.C.) [Batiuk], Vickers J., on an application to set aside an *ex parte* order requiring a patient to submit to a medical examination, described the well-settled rule that an *ex parte* application requires the full and frank disclosure of relevant facts. In the absence of such disclosure, an order may be voided. Citing the decisions in *Gulf Islands Navigation Ltd. v. Seafarers' International Union of North America (Canadian District) et al.* (1959), 18 D.L.R. (2d) 625, 28 W.W.R. (N.S.) 517 (B.C.C.A.); and *Canadian Pacific Railway v. United Transportation Union, Local 144 et al.* (1970), 14 D.L.R. (3d) 497 (S.C.), the Court held: "non-disclosure of relevant material on an *ex parte* application, even if inadvertent, is sufficient ground for setting aside or dissolving the order" (at para. 11).
- [27] The Batiuk Court also held that if an order is to be made *ex parte*, the applicant must satisfy the court that the matter is urgent: "If it later transpires that it was not a matter of urgency but that impression was left with the court, the order will be set aside: *John Doe v. Canadian Broadcasting Corp.* (1993), 86 B.C.L.R. (2d) 202 [C.A.]".

Tests on an Application for an Injunction

[28] Both parties agree that the test that ought to have been applied on the application for an ex parte injunction and on an application to set aside that injunction on the merits is that established in *Attorney General of British Columbia v. Wale et al.*, [1987] 2 C.N.L.R. 36 (B.C.C.A.). In that case, at 49 and 50, McLachlin J.A. held:

The traditional test for the granting of an interim injunction in British Columbia is two-pronged. First, the applicant must satisfy the court that there is a fair question to be tried as to the existence of the right which he alleges and a breach thereof, actual or reasonably apprehended. Second, he must establish that the balance of convenience favours the granting of an injunction.

...

The first step in determining where the balance of convenience lies is to examine the adequacy of damages as a remedy for the respective parties. In most cases, an interlocutory injunction should not be granted unless there is doubt whether damages would be an adequate remedy in the event the applicant succeeds at trial. In other words, it must be shown that the applicant may suffer irreparable harm in the sense that "the remedy by damages is not such a compensation as will in effect, though not in specie, place the parties in the position in which they formerly stood": ... If damages will be an adequate remedy, and if it appears that the alleged offender can pay them, the court is generally not justified in giving one party his remedy to the detriment of the other before the issues have been tried.

Appointment of a Committee

[29] Ms. Shoemaker says the petition is bound to fail because Mrs. Lindberg granted an enduring power of attorney naming Ms. Shoemaker as her attorney and a representation agreement naming her as representative at a time when there was no question with respect to her mental capacity.

[30] Ms. Shoemaker relies upon the following description of the law, in *Allan v. Patterson*, 2000 BCSC 1525 at paras. 9 and 10:

...[T]he power of attorney... no longer has any effect unless it is "saved" as a representation agreement under the provisions of the Representation Agreement Act and provided the court makes an order that the said deemed representation agreement survives the declaration. Unless the power of attorney is deemed to be a valid representation agreement and is continued in effect there is no person who has lawful authority to make decisions with respect to [the patient's] affairs or his person. In this event, it will be necessary to appoint a committee of the estate and a committee of the person.

DOES THE POWER OF ATTORNEY QUALIFY AS A REPRESENTATION AGREEMENT?

It is appropriate to deal with this issue first because it is conceded by counsel for the petitioner that if the power of attorney is deemed to be a valid Representation Agreement the petitioner's application must fail. Section 39 of the Representation Agreement Act provides as follows:

39. An agreement that
- (a) was made before this Act authorized the making of a representation agreement and
 - (b) would have been a valid representation agreement if, at the time the agreement was made, this Act had authorized the making of a representation agreement,

is valid and is deemed for all purposes to have been made under this Act.

[31] Section 29 of the RAA provides that representation agreements end on the happening of certain events, including:

- (h) as provided in section 19 of the Patients Property Act.

[32] Sections 19, 19.1 and 19.2 of the Patients Property Act, R.S.B.C. 1996, c. 349 [PPA], provide that representation agreements are terminated or suspended upon the signatory becoming a patient except in certain conditions. The relevant provisions of the PPA are ss. 1, 19, 19.1 and 19.2 which read, in part, as follows:

1 In this Act:

"patient" means

- (a) a person who is described as one who is, because of mental infirmity arising from disease, age or otherwise, incapable of managing his or her affairs, in a certificate signed by the director of a Provincial mental health facility or psychiatric unit as defined in the Mental Health Act, or
- (b) a person who is declared under this Act by a judge to be
 - (i) incapable of managing his or her affairs,
 - (ii) incapable of managing himself or herself, or
 - (iii) incapable of managing himself or herself or his or her affairs;

19 On a person becoming a patient as defined in paragraph (b) of the definition of "patient" in section 1,

- (a) every power of attorney given by the person is terminated, and
- (b) unless the court orders otherwise, every representation agreement made by the person is terminated.

19.1 (1) On a person becoming a patient as defined in paragraph (a) of the definition of "patient" in section 1, the following are suspended:

- (a) every power of attorney that was given by the person;
- (b) every provision of a representation agreement made by the person in respect of his or her property unless the representation agreement is one referred to in section 19.2 (1) (b).
- (2) After receiving a copy of the suspended power of attorney or of a representation agreement any provision of which has been suspended under subsection (1) and any information that the Public Guardian and Trustee may require, the Public Guardian and Trustee must determine whether it is necessary or desirable for the Public Guardian and Trustee to manage the patient's property under this Act.
- (3) If the Public Guardian and Trustee determines that it is necessary or desirable for the Public Guardian and Trustee to manage the patient's property, then on the making of the determination
 - (a) the power of attorney that was suspended under subsection (1) is terminated, or
 - (b) the provisions of the representation agreement that were suspended under subsection (1) are cancelled,

as the case may be...

19.2 (1) This section applies if

- (a) before becoming a patient as defined in paragraph (a) of the definition of "patient" in section 1, a person made a representation agreement in respect of which a certificate was completed under section 9 (2) (b) of the Representation Agreement Act,
- (b) the representation agreement, by virtue of the authority given to a representative under section 9 (1) (g), (h) or (i) of the Representation Agreement Act, or under both that section and section 7 (1) (b) or (d) of that Act, applies to all of the person's property, and
- (c) the Public Guardian and Trustee receives a copy of each of the following:
 - (i) the representation agreement;
 - (ii) the certificates referred to in sections 5 (4), 9 (2) (b), 12 (3) and 13 (6) of the Representation Agreement Act;
 - (iii) an undertaking in the prescribed form signed by the representative.
- (2) If the conditions in subsection (1) are met, the Public Guardian and Trustee's authority as committee under the certificate referred to in paragraph (a) of the definition of "patient" in section 1 is terminated on the Public Guardian and Trustee notifying the representative that those conditions have been met.

[33] Section 19 of the PPA is applicable where the Court declares a person to be a patient (a patient as defined by s. 1(b)). Sections 19.1 and 19.2 are applicable where an individual is otherwise certified to be a patient (a patient as defined by s. 1(a)). In the former cases there

is a presumption that representation agreements will be terminated by the Court but there remains discretion to save agreements. In the latter cases the representation agreement is suspended pending inquiry by the public trustee, who may elect to continue the representation in relation to the management of financial affairs.

- [34] Mr. Lindberg says that only five cases appear to have referred to s. 19(b) of the PPA: *Macdonald Estate v. British Columbia (Public Guardian & Trustee)*, 2003 BCCA 428; *Re Grav*, 2007 BCSC 123; *Egli v. Egli*, 2004 BCSC 529; *Allan v. Patterson*; and *Re Reisinger* (2002), [2002] B.C.J. No. 3162, 47 E.T.R. (2d) 127 (S.C.).
- [35] Mr. Lindberg says that, while it is true that a valid and subsisting representation agreement will make committeeship unnecessary, the court has a discretion to terminate or continue a representation agreement. He says it was inappropriate and unnecessary for counsel in *Allan* to concede that if the power of attorney was a valid representation agreement, the petitioner's application must necessarily fail. Mr. Lindberg says the Court should consider the factors described in *Re Reisinger*, at para. 30 when considering whether the representation agreement should be given continuing effect:

In deciding whom to appoint as a property guardian, the Court will consider a number of factors: The paramount consideration is the patient's best interests. Preference is usually given to members of the patient's family, subject to the best interests of the patient. The Public Trustee will usually only be appointed where the Court finds that no other applicant is suitable. While the Court will consider the patient's own preference as to an intended appointee, the Court must exercise care in giving weight to such expressed wishes where the patient suffers from a mental infirmity. The Court will consider the proposed committee's previous involvement with the patient and her affairs, his or her knowledge and understanding of the patient's situation and needs; and his or her level of expertise and ability to perform the duties of a committee. Finally, the court must consider whether the proposed committee has or may have a conflict of interest with the interest of the patient.

- [36] I agree that this is a detailed and useful discussion of the criteria that should be considered on the appointment of a committee. However, it is not, in my view a description of the test that should be applied in determining whether or not an order should be made recognising the continuing effect of a representation agreement after an individual becomes disabled.
- [37] In *Macdonald Estate*, the Court of Appeal considered an appeal by the public trustee from an order of a chambers judge appointing a committee. The issue on appeal was whether the court has the power under the PPA to appoint a committee of the estate of a minor. The position of the public trustee was that the legislature did not intend that the PPA would apply to minors, since the result would be a system of overlapping and potentially conflicting statutory jurisdiction in relation to the guardianship of minors. The Court held that the PPA, when read as a whole, did not permit the court to appoint a committee of the estate of a minor. In doing so the Court reviewed the history of the legislation and the purpose of the RAA. It noted that the RAA expressly describes its purpose as intending to permit an adult to

appoint a decision-maker of her choice in the event she becomes mentally disabled.

- [38] In *Re Grav*, this court considered whether it was necessary to make a declaration of incapacity and appoint a committee where a patient had granted a continuing power of attorney for his personal care and for his estate before becoming incapacitated. The Court addressed that question at paras. 13 and 14, as follows:

I find that it is inconclusive as to whether the January 2006 or March 2006 Powers of Attorney are valid. As such, I do not agree that it is not necessary to make the declaration and appointment of committee. ...

Furthermore, I have concluded, as set out below, that [the patient] is incapable of managing himself and his affairs and, therefore, meets the definition of a patient in s. 1(b) of the Patients Property Act Pursuant to s. 19 of the PPA, once a person becomes a patient, every power of attorney given by the person is terminated.

- [39] The case did not address a representation agreement and is therefore not particularly helpful.

- [40] In *Egli*, the public trustee sought to set aside transactions entered into by the respondent said to have been authorized by powers of attorney. The public trustee argued the powers of attorney were terminated as a result of the operation of s. 19 of the PPA and further, that the appointment of an attorney is void if, at the time of the appointment, the principal lacked the capacity to understand the nature and effect of the appointment. The Court held that what was then s. 8 of the PPA provided that an enduring power of attorney would not terminate upon the adult grantor's subsequent mental infirmity. The Court concluded that the onus rested upon the public guardian and trustee to prove that the patient was not competent on the day he executed the power of attorney. No significant reliance was placed upon s. 19 of the PPA.

- [41] In *Re Reisinger*, the parties conceded that the execution of an enduring power of attorney and a representation agreement did not oust the court's jurisdiction, because they would be terminated unless the court ordered otherwise. The decision, however, was founded upon the invalidity of the agreements, rather than a determination that a valid representation agreement should be terminated. The Court held, at paras. 38-40:

In my view, the Power of Attorney and Representation Agreement are of little import here. With all due respect to the professionals involved in the medical and legal assessments on behalf of Mrs. R, I am unable to place much weight on their evidence in the light of the evidence of Dr. Michael Bale. Rather than being limited to one or two visits in which to assess her, Dr. Bale regularly treated Mrs. R as her family physician from January 1999 until February 2001.

During that period it became apparent to Dr. Bale that Mrs. R had a dementing process, likely the result of Alzheimer's disease. ... He has provided an opinion that as of February 7, 2001, the date of his last patient visit with her, she was incapable of managing her affairs.

Thus, while Mrs. R may have had the limited capacity required to understand the Power of Attorney and Representation Agreements she executed in February 2001, her overall mental functioning had obviously deteriorated significantly by that date. ... I find that the Power of Attorney and Representation Agreement were executed at a time when she was under a significant mental disability and very much under Britz's control. ... In light of all these circumstances, the fact that Mrs. R selected Britz as her attorney and representative can be given little or no weight in this selection process.

- [42] The decision in *Allan* is, similarly, of little instructive value with respect to the critical question before me. As noted above, the parties in *Allan* conceded that if the power of attorney in question could be considered to be a valid representation agreement then an application to appoint a committee would fail. In considering whether the power of attorney should be saved, the sole question addressed in *Allan* was whether the agreement was clearly one which was intended to serve the purpose of a representation agreement. The Court held the power of attorney did not meet the requirements that must be satisfied for an agreement to qualify as a valid representation agreement under s. 13 of the Representation Agreement Act and did not have to further address the question whether the agreement could be saved by s. 19(b).
- [43] In the case at bar, the representation agreement meets the criteria to qualify as a valid representation agreement set out in s. 13 of the RAA. The question to be determined is whether there is any reason why the court should not consider the representation agreement to be continuing despite Mrs. Lindberg's incapacity.
- [44] The applicant relies upon the history and purpose of the enactment and amendments to the RAA, the Power of Attorney Act and the PPA. The effect of recent enactments was discussed in detail in *Goodrich v. British Columbia (Registrar of Land Titles)*, 2004 BCCA 100, and is further described in Robert M. Gordon et al., *The 2008 Annotated British Columbia Representation Agreement Act, Adult Guardianship Act and Related Statutes* (Toronto: Thomson Carswell, 2008). The latter text succinctly summarizes the purpose of the legislation at 11-12:

Both the Representation Agreement Act and the Power of Attorney Act provide for adults to plan for the possibility of a catastrophic and incapacitating event in their lives such as a debilitating brain injury or for the onset of a degenerative physical disorder such as AIDS or Alzheimer Disease. Adults may enter into representation agreements with others who are willing to represent them, to follow their wishes and/or instructions, and to make prescribed substitute decisions on their behalf. As well, intellectually or physically disabled young people who have been cared for by family members during their youth and who become adults may be able to enter into representation agreements with family members or other people of their choice. With such an agreement in place there is no need for the court to appoint a committee under the Patients Property Act or a personal or property guardian when the new Part 2 of Adult Guardianship Act comes into force.

- [45] As noted in Goodrich, amendments to the legislation have followed upon the work of the Law Reform Commission and papers prepared for the Attorney General of British Columbia addressing the problem arising from the common law's reluctance to give enduring or continuing effect to powers of attorney following the onset of debilitating illness or dementia. The legislative intent of the amendment to the legislation appears to be to give effect to individual autonomy enduring beyond the onset of dementia.

ANALYSIS

The Application to Set Aside the Injunction

- [46] The interim injunction is only effective until the hearing of the petition. For reasons set out below I grant Ms. Shoemaker's application to dismiss the petition. The interim injunction will therefore fall with the petition.
- [47] Even if I were not dismissing the petition I would set aside the injunction because I am of the view that errors in and omissions from the affidavit of Mr. Lindberg created a misleading impression with respect to the urgency of the ex parte application. The application was not brought on urgently after Mr. Lindberg learned his mother had moved to Sherwood Manor. If the Court knew at the time of the hearing of the ex parte application on February 9, 2010 that Mr. Lindberg had been aware of all material facts since December, it is unlikely to have proceeded on an ex parte basis. It is probable that Mr. Lindberg would have been required to give notice of his intended application to the applicant. For that reason, I would have set aside the interim ex parte injunction restraining the plaintiff or her agents from disposing of or otherwise encumbering her property had it been necessary to do so.

The Application to Dismiss the Petition

- [48] In my view, the question before the Court on this application is not whether Mr. Lindberg or Ms. Shoemaker is the most appropriate person to act as committee of Mrs. Lindberg. Nor is the question of whether it is preferable for Mrs. Lindberg to live in a care facility in Abbotsford, to which she is becoming accustomed, or to move to a facility in Yaletown where she may be closer to family members. The question is, rather, whether Mrs. Lindberg's choice of Ms. Shoemaker to act as her representative and make decisions with respect to her care and the management of her finances should be regarded as effective and continuing, despite Mrs. Lindberg's apparent dementia.
- [49] The law permits the representation agreement to continue to be effective, despite the onset of disability, and recognizes the autonomous choice of a representative by a patient. The difficulty is that s. 19 of the PPA permits a representation agreement to be saved but does not establish the criteria which should be considered in determining whether or not to exercise that discretion. In the absence of further explicit direction in the legislation, I consider the following factors to be appropriate criteria:

- (a) the circumstances in which the representation agreement was executed;
- (b) the scope of the representation agreement; and
- (c) the basis for the application to set it aside.

[50] The representation agreement in this case was entered into with the assistance of counsel at a time when there appears to have been no indication of any disability on the part of Mrs. Lindberg. There is no cause in the case for any concern with respect to the circumstances of the execution of the agreement. There is no suggestion of undue influence, and no indication that Mrs. Lindberg was acting out of any motive other than reasonable foresight in relation to her own needs and abilities.

[51] The representation agreement is broadly worded. It was executed shortly after the execution of a will that also appointed the representative as executor and trustee, and the enduring power of attorney. The execution of these documents demonstrates broad faith in the abilities of the representative.

[52] The petition is brought, apparently, as a result of the representative's decision to sell property rather than as a result of any concern with respect to the propriety of the conduct of the representative generally. The representative did not act precipitously or inappropriately upon being able to do so, but acted only upon being contacted by the police and upon being asked to take measures to protect Mrs. Lindberg. The representative appears to have acted without regard for her own interests or any apparent motive other than to assist Mrs. Lindberg. There is no evidence of a significant change in circumstances that would militate against the continuation of the representation agreement. There was no apparent falling out between Mrs. Lindberg and Ms. Shoemaker and no significant change in Mrs. Lindberg's relationship with her son or other family members between the execution of the agreement and the onset of Mrs. Lindberg's incapacity.

[53] For these reasons I am of the opinion the representation agreement appointing Ms. Shoemaker should be saved pursuant to s. 19(b) of the PPA. It is not therefore necessary or appropriate to obtain an additional medical opinion to the effect that Mrs. Lindberg is incapable of managing her own affairs. While there is little doubt that such an opinion could be obtained upon a further examination, a declaration that she is a patient should not result in the termination of the representation agreement. I agree with the view expressed in Allan to the effect that in the presence of an effective representation agreement, an application for the appointment of a committee is unnecessary. Therefore I allow the application and dismiss the petition.

___ "Willcock J." ___

The Honourable Mr. Justice Willcock

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