
CANADA / JUDGMENT

Simons v. Simons

2013 BCSC 650

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Supreme Court of British Columbia

DECIDED

15 April 2013

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2013 BCSC 650 Simons v. Simons

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Simons v. Simons,

2013 BCSC 650

Date: 20130415

Docket: S127674

Registry: Vancouver

In the Matter of the Patients Property Act, R.S.B.C. 1996, c. 349

and the amendments thereto and Montague Simons

Between:

Jeffrey Alan Simons

Petitioner

And

Montague Simons and Stephen Michael Simons

Respondents

Before: The Honourable Madam Justice Kloegman

Reasons for Judgment

In Chambers

Counsel for the Petitioner:

F.L. Lamer

Counsel for Phillip Allan Weinstein:

C.A. Campbell

Counsel for Mary Linda Di Clemente Simons:

D.E. Burns

Place and Date of Trial/Hearing:

Vancouver, B.C.

March 26-28, 2013

Place and Date of Judgment:

Vancouver, B.C.

April 15, 2013

- [1] The named respondent, Montague Simons, whom the parties refer to as the "Patient", is the subject of a petition proceeding brought by his son, Jeffrey Simons, under the Patients Property Act, R.S.B.C. 1996, c. 349. Jeffrey Simons holds a power-of-attorney for the Patient and is a joint trustee with him over the assets of the Montague Simons Alter Ego Trust ("MSAE Trust"). Jeffrey Simons now seeks to be appointed as committee over both the Patient's estate and person. The other named respondent is the Patient's younger son, Stephen Simons, who supports his brother Jeffrey Simons' application.
- [2] The Patient is newly married. In September 2012 he married Linda Di Clemente with whom he had had a long-term relationship and was living with intermittently since the death of his wife in December 2009. On November 26, 2012, after this litigation started, the Patient signed a representation agreement under the Representation Agreement Act, R.S.B.C. 1996, c. 405 (the "Representation Agreement"), appointing Ms. Di Clemente as the person authorized to make, or help make decisions, and to undertake, or help undertake any tasks with respect to the Patient's personal care and health matters.
- [3] Ms. Di Clemente is not named as a respondent to the petition. She applies for an order adding her as a respondent. She opposes the appointment of Jeffrey Simons as the Patient's committee and supports the application of the Patient's nephew, Phillip Weinstein, as committee. She also applies for an order that the Representation Agreement continue in full force and effect notwithstanding any appointment of committee.
- [4] To further complicate things, up until December 2012, Mr. Campbell, who is counsel for Mr. Phillip Weinstein, also represented the Patient, both in these proceedings and another petition brought by the Patient to seek an accounting by Jeffrey Simons of the affairs of the MSAE Trust. In these latter proceedings, the Patient was purportedly giving instructions to counsel to obtain an accounting for him of his financial affairs, whereas Mr. Weinstein in the

within proceeding was claiming the Patient to be incapable of handling his own financial affairs.

- [5] Mr. Campbell withdrew from his representation of the Patient and now represents Mr. Weinstein only. Ms. Di Clemente is represented by separate counsel. The Patient is unrepresented, except through the involvement of the Public Guardian and Trustee.
- [6] The affidavit material is voluminous and replete with mutual accusations and allegations of physical and financial abuse of the Patient. Although it is evident that everyone involved purports to love and care about the Patient, the acrimony between Jeffrey and Stephen Simons on the one side, and Ms. Di Clemente and Mr. Weinstein on the other side, has influenced the judgment of some of these parties to act to the detriment of the Patient. The situation has become intolerable and the following issues must be resolved with due dispatch:
- 1) Who are the appropriate parties to the petition proceedings and what is the appropriate mode of hearing?
 - 2) Does the Patient require a committee?
 - 3) If so, who is the best qualified candidate? and
 - 4) Should the Representation Agreement survive any appointment of committee?

I. parties and mode of hearing

- [7] The petitioner does not strongly oppose the formal adding of Ms. Di Clemente as a respondent, although he says it is not necessary.
- [8] The test under Rule 8-2 is not whether it is necessary to add Ms. Di Clemente, but whether she will be a person who is affected by the order sought. I agree with counsel for Ms. Di Clemente that there is no doubt, as the wife of the Patient, that she would be affected by the orders sought. I grant her leave to be added as a respondent.
- [9] Counsel for Ms. Di Clemente seeks to have the petition turned into a viva voce trial of the disputed facts. He refers to the many conflicting allegations in the affidavits and submits that these and many other collateral issues must be adjudicated upon before the case is decided.
- [10] The decision to direct a trial of the issue of the Patient's competency is a discretionary one: Lee (Re), 2002 BCSC 838. As stated earlier, the current situation is intolerable for the parties and a resolution needs to be achieved as quickly and efficiently as possible. In my opinion, nothing would be gained by setting this down for trial. The cost and delay to the parties would be enormous and unnecessary to make a fair decision.

[11] There are sufficient undisputed facts on the affidavits, or alternatively, disputed facts that can be resolved by the corroborative evidence of third party witnesses or documents, to allow for the proper exercise of my judicial function in this matter.

II. Does the patient require a committee?

[12] Section 2 of the Patients Property Act provides:

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

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

(b) disorder or disability of mind arising from the use of drugs,

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

[13] Section 3 of the Patients Property Act provides:

3 (1) If, on

(a) hearing an application, and

(b) reading the affidavits of 2 medical practitioners setting out their opinion that the person who is the subject of the application is, because of

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

(ii) disorder or disability of mind arising from the use of drugs,

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

the court is satisfied that the person is incapable of managing himself or herself or his or her affairs, it must, by order, declare the person

(g) incapable of managing himself or herself or his or her affairs.

[14] The Patient has suffered and continues to suffer a plethora of medical ailments over the years. Dr. Levitt, an internist and cousin of the Patient who has treated him since 1983, lists those ailments as:

a. Essential hypertension associated with hypercholesterolaemia since 1983;

b. Type II diabetes mellitus diagnosed in January 1999;

c. Diastolic dysfunction and mild aortic valvular insufficiency July 1999;

d. moderate restrictive lung disease and central obesity causing significant effort intolerance since January 2007;

e. early symptoms of memory impairment and cognition since 2007;

- f. mild renal insufficiency due to hypertensive nephrosclerosis since 2008;
 - g. degenerative disease of the left hip since 2009;
 - h. asymptomatic abdominal aortic aneurysm 2009.
 - i. early dementia with a probable diagnosis of Alzheimer's dementia in February 2010;
 - j. Atrial fibrillation since February 2010
 - k. left total hip replacement in April [sic] 2010.
- [15] In addition, Dr. Levitt deposes that in or around 2009 or 2010, the Patient presented with evidence of early dementia. The Patient's cognitive function then seemed to have undergone a significant decline as a result of, and following his hip replacement surgery on March 29, 2010.
- [16] All the material evidence from both sides is consistent with the fact that the Patient seemed to be suffering from fairly severe dementia in the months following his surgery, but then made significant improvement over the summer months and was much better by the fall of 2010. In July 2010, Dr. Levitt opined that as a result of his cognitive impairment, the Patient was incapable of making rational and logical decisions. On September 22, 2010, Dr. Levitt prepared a Physician's Evaluation Form for the Public Guardian and Trustee, in which he opined that the Patient seemed fully aware of his financial situation and was able to carry out all personal functions on his own, except shopping. The Patient's judgment was described as adequate, his thought content and perception was normal, and his cognition was mildly impaired. At this point in time, the Public Guardian and Trustee, who had been asked to intervene, was satisfied that it did not need to seek authority over the Patient's affairs.
- [17] However, the Patient's cognitive functions began to deteriorate from November 2010 onwards. The Vancouver Coast Health Authority, which opened a file on the Patient in April 2010 while he was still suffering dementia from the effects of the hip surgery, received the first report from Jeffrey Simons of physical abuse by the Patient's then long-time girlfriend, Ms. Di Clemente. This led to a series of interviews with the Patient who admitted that Ms. Di Clemente hit him out of jealousy over the Patient's other long-time girlfriend, Mary Ogilvie.
- [18] The accusations by Jeffrey Simons of physical abuse by Ms. Di Clemente seem to have been met by or to have precipitated the allegations of financial wrongdoing on the part of Jeffrey Simons. These allegations by Ms. Di Clemente were centered around her requests and subsequent refusal by Jeffrey Simons to release the Patient's monies to her.
- [19] Dr. Chung, geriatric physician, began her involvement with the Patient in May 2010, after his surgery and the delirium that ensued. She referred him in August 2011 for an assessment of cognitive decline. She concluded at that time there was insufficient evidence to deem him incapable of managing his finances. In April 2012, Dr. Chung conducted a formal financial competency assessment and concluded that the Patient was no longer competent to manage

his own finances or give directions regarding his power-of-attorney. This was due to problems with his short term memory, executive dysfunction, questionable judgment and mental status testing.

- [20] Dr. Chung conducted a further assessment of competency in August 2012 and became concerned that the Patient was incapable of removing himself from abusive situations. In her affidavit of October 26, 2012, she opined that due to his multiple and severe medical problems, inability to handle medications on his own, inability to understand or retain information regarding his medical condition, and inability to make or implement decisions to remove himself from dangerous situations, he was not only incapable of managing his own affairs, but he was incapable of managing his own person, too.
- [21] In his affidavit of October 2, 2012, Dr. Levitt deposed that he agreed with the geriatric assessments prepared to that date. From his own observations and treatment of the Patient, his opinion was that the Patient was unable by reason of mental infirmity arising from disease and age to manage his own affairs and manage himself and his medical problems.
- [22] Dr. Greenberg became the Patient's general physician on June 7, 2012. In his affidavit of January 14, 2013, he opined that the Patient was capable of making his own personal care decisions with respect to nutrition, shelter, clothing, hygiene, safety and medical treatment, and was able to appreciate the reasonably foreseeable consequences of decisions in this regard.
- [23] At the initial hearing of this petition before Dardi J. on January 31, 2013, counsel for the Patient and Mr. Weinstein sought an adjournment to allow Dr. Donnelly, geriatric psychiatrist, to prepare an opinion of competency. That adjournment was granted, and Dr. Donnelly produced her report on February 12, 2013.
- [24] Although it is based on a single interview, the report is lengthy and thorough. Dr. Donnelly concluded that due to the Patient's extremely poor short term memory and bad executive functioning he was not able to understand what was going on with his finances and was clearly not capable of managing them. Similarly, she concluded that the Patient was not capable of making personal decisions and thus was personally incompetent as well. She appreciated his desire to be with Ms. Di Clemente as his preferred choice, but he was not capable of calling for help if there were problems. She reported that he needed complete support regarding his safety.
- [25] The only person who questioned Dr. Donnelly's opinion was Ms. Di Clemente. Through counsel, she submitted that the only opinion that counts is that of Dr. Greenberg, who says the Patient is competent to care for his person. She complained that Dr. Donnelly did not interview Mark Leblanc, the social worker who had carriage of the Patient's file. She complained that Dr. Chung used circular reasoning and that Dr. Levitt was biased.
- [26] On my view of the whole of the evidence and on a balance of probabilities, the petitioner has proved that the Patient is incapable of managing himself or his affairs, and I so declare.

III. Appointment of Committee

- [27] The paramount consideration in appointing a committee is what is in the best interests of the patient: *British Columbia (Public Trustee) v. Pollen*, [1996] B.C.J. No. 2394 (S.C.). The test is similar to the one the court applies when dealing with children, but there is an important difference. As stated by Ballance J. in *Vranic (Re)*, 2007 BCSC 1949 at paras. 92 and 93:
- [92] For sound reasons, that standard quite properly reflects the protective approach of the court in dealing with matters which affect children. Although the test by the same name applies in considering the appointment of a committee for a mentally incapacitated adult, its application requires a more nuanced approach which acknowledges and takes into consideration issues concerning the adult's autonomy, his personal dignity, his idiosyncrasies and the way he has chosen to live his life while capacitated. It also takes into account most assuredly any wishes he has validly expressed while mentally competent or lucid about who he would like to act as his committee or otherwise make decisions on his behalf.
- [93] These factors should also inform the manner in which a committee performs his or her duties.
- [28] Additional factors when considering a candidate include the candidate's previous involvement with the patient and his family, his knowledge and understanding of the patient's situation and needs, his level of experience or capability in performing the duties of committee, his plan for management of the patient and any potential conflict of interest between the patient and the candidate: *Bowman (Re)*, 2009 BCSC 523; *Vranic (Re)*.

A. Committee Over the Estate

- [29] There are three possible candidates put forth to assume the role of committee over the estate of the Patient: Jeffrey Simons, Phillip Weinstein, and the Public Guardian and Trustee.
1. Jeffrey Simons
- [30] In the case before me, I am satisfied that Mr. Jeffrey Simons is the best candidate to appoint as committee over the estate of the Patient. The evidence shows that before Ms. Di Clemente got involved in the Patient's financial affairs and care needs, and more importantly, before the Patient was declared incompetent, the Patient exhibited trust in his son Jeffrey Simons. He appointed Jeffrey Simons power-of-attorney on June 24, 2009, before the Patient's wife died. He appointed Jeffrey Simons co-trustee of the MSAE Trust on March 19, 2010, before the Patient had his hip surgery. During his period of dementia in the aftermath of surgery, and with the assistance of Ms. Di Clemente who handwrote the document, and without any legal advice, the Patient purported to terminate the power-of-attorney. However, in September 2010, after the post-surgery effects had dissipated, the Patient reappointed Jeffrey Simons irrevocably with a properly-drawn legal document drafted by a solicitor.

- [31] The appointment of Jeffrey Simons in March 2010 as co-trustee of the MSAE Trust took place at a time when the Patient had medical problems and perhaps the onset of mild dementia, but it was not until two years later in the spring of 2012 that Dr. Chung considered the Patient no longer capable of managing his financial affairs. The Trust documentation was prepared by a solicitor and two separate legal opinions were obtained.
- [32] Jeffrey Simons held a joint account with the Patient into which the revenue from the Trust was deposited and from which he paid the Patient's expenses, including medical treatments. This account was closed by Ms. Di Clemente, purportedly on the instructions of the Patient, in October 2012. By this time the Patient was incompetent to handle his financial affairs, according to Drs. Chung and Levitt.
- [33] Jeffrey Simons has business experience and is presently completing the development and construction of a townhouse project. He is willing to abide by any recommendations of the Public Guardian and Trustee, and to account to that office with regard to the MSAE Trust and any other assets of the Patient's estate.
- [34] The office of the Public Guardian and Trustee recognizes Jeffrey Simons' suitability as a prospective committee of the Patient's estate in that it does not oppose the petition. Ms. Watson of that office makes the following comments:

The estate planning from 2010 indicates that [Jeffrey Simons] was an individual in whom [the Patient] placed trust and whom he gave significant responsibilities regarding management of his affairs.

The Public Guardian and Trustee has not taken issue with how [Jeffrey Simons] has managed [the Patient's] financial matters as his power-of-attorney.

As a person of trust in the patient's life prior to his incapacity, and in the absence of any finding of any wrongdoing, the Public Guardian and Trustee does not oppose the appointment of Jeffrey Simons as committee of the estate.

- [35] Ms. Di Clemente and Phillip Weinstein have accused Jeffrey Simons of trust improprieties because of his refusal to account to them for the revenues from the MSAE Trust property, alleged unauthorized payments to Stephen Simons, granting a collateral mortgage over MSAE Trust property used to secure a loan to Jeffrey Simons' development company, and selling of the Oak Street residence. The office of the Public Guardian and Trustee has already spent \$1,200 on accounting fees to review these matters. While the report on this review is not final, Ms. Watson states that many of the allegations concerning trust impropriety relate to a period where the Patient was capable and acting as co-trustee, the inference being he knew about the transactions and sanctioned them.
- [36] The evidence indicates that any payments of Jeffrey Simons to Stephen Simons were made in furtherance of the Patient's long standing desire, and pattern of conduct, to support his son Stephen.

- [37] The collateral mortgage relates to the project with which the Patient had some involvement and had planned his own unit with an office.
- [38] The Oak Street residence belonged to the estate of Jean Simons, over which Jeffrey Simons was executor. The Patient only had a life interest for as long as he chose to live there and the residence was sold when the Patient went to live full-time with Ms. Di Clemente.
- [39] The above complaints are just a sampling of those made by Ms. Di Clemente and Phillip Weinstein which, when examined, were unfounded. Unlike the allegations by Jeffrey Simons of the physical abuse of the Patient by Ms. Di Clemente, which were corroborated by other evidence, Ms. Di Clemente's and Phillip Weinstein's allegations of financial abuse by Jeffrey Simons were singularly unsubstantiated. Counsel was not able to provide me with independent evidence of financial abuse, or even independent reporting of financial abuse by Jeffrey Simons. The Public Guardian and Trustee, who has been reviewing the accounts of the MSAE Trust and the conduct of Jeffrey Simons in the Patient's financial affairs, has yet to find anything untoward. That office has not produced a final report due to time constraints, but I am satisfied from the letter of March 19, 2013, that Jeffrey Simons' accounts of his father's finance seem to be in order.

2. Phillip Weinstein

- [40] I have no trouble disqualifying Phillip Weinstein as a suitable candidate for committee over the Patient's estate for these reasons:
- 1) From the affidavit evidence it appears that as an adult, he did not become involved with the Patient until August 2011. Before that, he spent time with the Patient as a child and young teenager, but there is a noticeable absence of evidence regarding time spent with the Patient after those years.
 - 2) Ford Scott, a long-time business partner of the Patient, deposed that the Patient despised Phillip Weinstein for suing his own father, the Patient's brother. In 2009, the Patient told Mr. Scott that if Phillip Weinstein came to the house he would throw him out.
 - 3) Phillip Weinstein sued his father over his mother's estate in 1996. The British Columbia Court of Appeal upheld the decision of the chambers judge refusing to substitute Phillip Weinstein as executor in the place of his father, quoting the chambers judge's comment that:

[Phillip Weinstein] himself is in conflict with the estate in refusing to account for a significant sum of money withdrawn from the accounts of Mrs. Weinstein under a power of attorney shortly before she died;

Weinstein v. Weinstein (1996), 81. B.C.A.C. 282.

- 4) He was incarcerated for two weeks in 1985 and again in 1988 for ignoring court orders to pay maintenance arrears to his ex-wife.

5) He is reported to have been expelled from the Board of the Shalom Branch Building Society because he was in a conflict of interest. The Board alleged that the safety of the residents was put into question by his actions and he improperly managed the apartments.

[41] Taken as a whole, the above concerns suggest that Mr. Weinstein would not be an appropriate person to be entrusted with the Patient's financial affairs.

3. Public Guardian and Trustee

[42] As another principle of law, a family member as committee is preferable to the Public Guardian and Trustee: *Kong v. Kong*, 2010 BCCA 298. Mutual suspicion and hostility amongst family members is not a bar to the application of this principle, although it is obviously an important factor to consider: *Watson (Re)*, 2007 BCCA 91; *Palamarek (Re)*, 2011 BCSC 563.

[43] As stated above, the Public Guardian and Trustee does not object to the appointment of Jeffrey Simons as committee over the estate of the Patient or continuing as a trustee of the MSAE Trust. In a March 19, 2013 letter, Ms. Watson writes:

It has been suggested in some of the correspondence following the January 31, 2013 hearing that an institutional committee of estate should be appointed. I note that the bulk of Mr. M. Simons' assets are in the Trust, and it is only the income from the Trust that would be managed by the committee of the estate. It is unlikely that any institutional body would be prepared to manage assets in this amount unless generously remunerated for their services, thereby depleting the funds available.

The Trust addresses the appointment, removal and resignation of trustees at section 15, providing that there must be a minimum of two trustees at all time, and that Mr. J. Simons has the power to appoint another trustee. In the absence of any finding as to any actual wrongdoing on the part of Mr. J. Simons, whether upon a review by the Public Guardian and Trustee or upon a formal passing of accounts, there would not appear to be any reason for removal of Mr. J. Simons as trustee, nor to vary the provisions of the Trust signed by Mr. M. Simons when he was capable. Further, I note that many of the allegations concerning trustee impropriety relate to a period where Mr. M. Simons was capable and acting as a co-trustee.

As indicated in the response of the Public Guardian and Trustee, as a person of trust in Mr. M. Simons' life prior to his incapacity, and in the absence of any finding of any wrongdoing, the Public Guardian and Trustee does not oppose the appointment of Mr. J. Simons as committee of the estate. There are adequate mechanisms available to ensure proper accounts are maintained and provided.

[44] The only concern expressed by the Public Guardian and Trustee, and one which I share, is that whoever is appointed committee over the estate of the Patient must also cooperate with the committee of the person. Given the extreme animosity between the Patient and Ms. Di Clemente, it would not be prudent to split the committeeship. As the Public Guardian and Trustee states: "the status quo does not seem to be in the best interests of the patient."

IV. COMMITTEE OVER THE PERSON

- [45] Jeffrey Simons has looked after the Patient since his mother, Jean Simons, died. He hired a full-time caregiver to care for his father in his own home. He made it clear to the Vancouver Health Authorities that he did not wish to institutionalize his father until it was absolutely necessary.
- [46] His plan for the Patient is to move him into one of the units of the condominium project that Jeffrey Simons is completing. While the Patient was competent, he had taken an avid interest in the construction of the project, visiting the site and talking to his friends about it. Jeffrey Simons intends to hire a full-time caregiver and to see the Patient every day. He is willing to be guided by any recommendations of the Vancouver Health Authority, or Drs. Chung or Donnelly as to his father's personal care.
- [47] Ms. Di Clemente does not seek to be appointed committee over either the estate or person of the Patient but applies for an order under s. 19(b) of the Patients Property Act that I exercise my discretion and declare that the Representation Agreement (which would ordinarily terminate on the appointment of the committee) should continue in full force and effect.
- [48] The Representation Agreement was made in November 2012, after this litigation was started and after the Patient was declared incompetent by Dr. Chung. Dr. Greenberg states that the Patient understands the nature of a representative's role in a representation agreement and that he can choose his representative. However, Dr. Greenberg gives no basis for this opinion other than that he has been the Patient's general physician since June 2011 and has had 19 consultations with him. Dr. Greenberg does not refer to the Representation Agreement, or the powers contained within it. He does not state whether he reviewed it with the Patient, or at all.
- [49] Section 10 of the Representation Act sets out the relevant factors that the court must examine to determine whether the patient has the capacity to authorize the standard powers under the agreement. Dr. Greenberg's bald opinion refers to none of those, or indeed any factors to reach his opinion.
- [50] Even if the Patient had the capacity to enter into the Representation Agreement, which has not been proven on the evidence, the Representation Agreement purports to include additional powers to the standard statutory agreement which would be in direct opposition to the powers of a committee over the person of the Patient, such as:
- (a) physically restrain, move or manage me, or have me physically restrained, moved or managed, when necessary and despite my objections at the time;
 - (b) give consent on my behalf to all health care, even if I refuse at that time to give my consent to the health care;
 - (c) give or refuse consent on my behalf to all types of medical care including life support care or treatment;

- (d) decide whether I should have contact or associate with another person.
- [51] I pause here to note two things. Firstly, although Ms. Di Clemente relies on her long term relationship with the Patient as a factor in her favour, there is no doubt that both during his marriage to Jean Simons and after she died in 2009, the Patient continued to see other women, of which Ms. Di Clemente was one, but not the only one. Therefore, her position as exclusive companion to the Patient was not confirmed until her marriage to him in 2012.
- [52] Secondly, although the evidence is inconclusive as to the extent and severity of Ms. Di Clemente's physical abuse of the Patient, there is no doubt that she did hit him from time to time.
- [53] The notes of the social worker, Mr. Mark Leblanc, are replete with reports from Jeffrey Simons and others about bruising and other marks on the Patient. Caregiver Allan Deang, internist and family friend Dr. Levitt, friends Frank Wyner and Elie Otake, and Mary Ogilvie all depose to having personally observed cuts and bruises (or even a black eye) on the Patient, and having discussions with the Patient wherein he reported Ms. Di Clemente hitting or choking him.
- [54] Ms. Di Clemente has admitted to Mr. Leblanc and others that she has hit the Patient, albeit she says "lightly" or "in jest." Neighbours have reported to police officers about loud arguments during which Ms. Di Clemente has been heard to yell and threaten the Patient. Ms. Di Clemente's justification for the verbal abuse is her Italian heritage.
- [55] In March 2012, Ms. Di Clemente was arrested for assaulting the Patient. She was kept in jail overnight and released the next day. No charges were brought.
- [56] The allegations against her of severe physical abuse such as choking and slapping must be tempered with the fact that Dr. Chung, geriatric physician, has opined that the Patient may say things in agreement with what he thinks others want to hear. Although on many occasions he has complained to others about physical abuse, he has also on occasion denied any such abuse at the hands of Ms. Di Clemente. According to Dr. Chung, the point is not whether the Patient is reporting accurately about the abuse, but rather that he is currently unable to remove himself from abusive situations of any degree.
- [57] Ms. Di Clemente submits that to avoid conflict, a committee should only be appointed over the Patient's estate, leaving care for his person in her hands. I am not prepared to do this because in addition to the allegations of physical abuse of the Patient, there are other concerns about empowering Ms. Di Clemente to make all health care decisions for the Patient.

- [58] There is evidence she argued with Dr. Levitt about treating the Patient's infected toe. She was uncooperative carrying out Dr. Chung's request to see the Patient on October 19, 2012, telling Mr. Leblanc "[the Patient] can go on his own," and later that "she could not afford gas or parking," and that the Patient "did not want to go to see Dr. Chung." At the urging of Mr. Leblanc, she finally relented and took the Patient to see Dr. Chung.
- [59] She told Mr. Leblanc she wanted \$10,000 to \$15,000 to obtain an evaluation of the Patient for pomegranate extract therapy. The Patient's driver's licence was revoked by spring 2012, but she continued to let him drive on his own. She signed the Patient's names on cheques, at least one of which was to a past drug dealer to whom she was indebted. She showed a tendency towards violence in an altercation with the Patient's other long-time girlfriend, Ms. Ogilvie.
- [60] Although the evidence establishing the exact circumstances of each of the above facts may be disputed, the core facts themselves are not, and are sufficient to create a concern about Ms. Di Clemente's judgment in pressured situations. Even the circumstances of her marriage to the Patient raise a question of judgment. In the fall of 2012, at a time when it was obvious to all that the Patient's mental status was questionable, she took the Patient to Manitoba and married him without telling anyone until after the fact. She may desire to be a loving and committed wife to the Patient and he may, at some level, desire that too, but unfortunately he is no longer able to decide what is in his best interests and the law must intervene.
- [61] In my opinion, on the whole of the evidence, Jeffrey Simons is the most suitable candidate to act as committee over the Patient's person, as well as his estate.

V. conclusions

- [62] I join Ms. Di Clemente as a respondent to these proceedings.
- [63] I declare the Patient to be incapable of managing himself or his affairs.
- [64] I appoint the petitioner Jeffrey Simons as committee over the estate and person of the Patient.
- [65] I dismiss Ms. Di Clemente's application to continue as the Patient's representative under the Representation Agreement.
- [66] I decline, at this stage, to grant any orders under Petition S127674. Jeffrey Simons will remain co-trustee of the MSAE Trust and is empowered to appoint Mr. Ali as the other trustee.
- [67] Jeffrey Simons will pass before the Public Guardian and Trustee the accounts of the MSAE Trust at the same time as he passes the accounts of the Patient's estate.
- [68] The Public Guardian and Trustee is entitled to costs of \$1,200 from the MSAE Trust for reimbursement of accounting fees.

"Kloegman J."

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