

CANADA / JUDGMENT

Yu (Re)

2021 BCSC 1793

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2021 BCSC 1793 Yu (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Yu (Re),

2021 BCSC 1793

Date: 20210910

Docket: S2013451

Registry: Vancouver

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

and amendments thereto

Re: In the Matter of Ying Wong Yu

- and -

Docket: S211351

Registry: Vancouver

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

and amendments thereto

Re: In the Matter of Ying Wong Yu

Before: The Honourable Madam Justice Blake

These Reasons for Judgment have been redacted for publication purposes

Reasons for Judgment

Counsel for the Petitioners/Respondents

Annie Chung, Diana Yu and Pong Yu

in Actions Nos. S2013451 and S211351:

M. Gemmiti

Counsel for Respondents/Petitioners

Joe Yu and Wayne Yu

in Actions Nos. S2013451 and S211351:

K. Richardson

Place and Date of Hearing:

Vancouver, B.C.

June 15 and 17, 2021

Place and Date of Judgment:

Vancouver, B.C.

September 10, 2021

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Introduction

- [1] These are two competing petitions brought by some of the children of Ms. Ying Wong Yu ("Ms. Yu") for declarations that Ms. Yu is no longer capable of managing her person or her affairs and for their respective appointment as committee for their mother. The parties are all agreed that a declaration pursuant to s. 6 of the Patients Property Act, R.S.B.C. 1996, c. 349 [PPA] must be made, but disagree as to who should be appointed Ms. Yu's committee of person and committee of estate.
- [2] Ms. Yu has eight children. I will refer to them by their first names to avoid any confusion, without intending any disrespect. I note Ms. Yu is referred to as the "Patient" in some of the filed materials.
- [3] The petition of Annie Chung ("Annie"), Diana Yu ("Diana") and Pong Yu ("Pong") was filed on December 17, 2020. They seek to be jointly appointed as committee of the person and estate of Ms. Yu, an order that they may sell, encumber or otherwise dispose of property legally (although not beneficially) owned by Ms. Yu at 420 - 422 East Hastings Street, Vancouver, British Columbia (the "420 Property") without further order of the court, and that they be reimbursed the costs of their petition out of Ms. Yu's estate on a special costs basis. Three of Ms. Yu's children, Shirley Yu ("Shirley"), Mimi Tong ("Mimi") and Amy Yu ("Amy"), have provided their written consent to having Annie, Diana and Pong appointed as joint committee. Shirley, Mimi and Amy did not respond to either of the petitions filed nor provide any affidavit evidence.
- [4] Two of Ms. Yu's sons, Joe Wing Oi Yu ("Joe") and Wayne Yu ("Wayne"), oppose the relief sought in the petition filed by Annie, Diana and Pong. They disagree that Annie, Diana and Pong are suited to act as joint committees for their mother. They further allege that there is evidence consistent with elder abuse, which they say Ms. Yu may have suffered in Annie's care. Joe reported his concerns about both Ms. Yu's well-being and Ms. Yu's financial affairs to the Public Guardian and Trustee (the "PGT") on January 27, 2020 (including actions taken by Annie and Diana as attorney for Ms. Yu pursuant to a power of attorney she granted to

them on February 3, 2014). Joe and Wayne oppose the relief sought by Annie, Diana and Pong, and bring their own cross-petition to be appointed committee of the person and of the estate of Ms. Yu.

- [5] The PGT provided a detailed response to the petition filed by Annie, Diana and Pong, which will be referred to in significant detail below. While they did not oppose a declaration that Ms. Yu was incapable of managing her affairs and her person, they do oppose the appointment of Annie, Diana and Pong as joint committees of the estate of Ms. Yu. They further provided in their response:
19. Given the concerns raised in the paragraphs above, the Public Guardian and Trustee does not recommend that the Court appoint the Petitioners as committees of estate for Ms. Yu. While Pong was not an Attorney for Ms. Yu, the Petitioners have indicated to the Public Guardian and Trustee that they wish to act jointly, and therefore, the Public Guardian and Trustee assumes that Pong does not wish to be appointed as sole committee of estate.
23. The appointment of the Public Guardian and Trustee as committee is typically a last resort measure where no person is available or appropriate to act. If, however, the Court determines that the appointment of a family member would only lead to escalated conflict or would otherwise not be in the best interests of Ms. Yu, the Public Guardian and Trustee is prepared to act as committee of person and estate.
- [6] Joe and Wayne filed their petition on February 8, 2021, seeking an order that they "be appointed as joint committee of the Person and Estate of Ying Wong Yu with liberty to act jointly". Annie, Diana and Pong did not file a response to this cross-petition, but the PGT did. The PGT take no position on the potential appointment of Joe and Wayne as committee of person and estate of Ms. Yu, but again reiterated they were prepared to act as committee of person and estate of Ms. Yu.
- [7] In the alternative, if Joe and Wayne were not appointed as joint committees, they seek an order that:
- (i) any sale of the 420 Property must be approved by the PGT, and that an accounting of the proceeds of sale must be approved by the PGT prior to any distribution;
 - (ii) that they "be consulted prior to any significant care decisions being made on behalf of the Patient, including but not limited to decisions relating to the Patient's place of residence, admission to a care facility, health care providers, and major health care";
 - (iii) a declaration that the enduring Power of Attorney granted by Ms. Yu on February 3, 2014 to Annie and Diana "Is invalid or void, or alternatively, is terminated"; and
 - (iv) an order for their special costs to be paid from Ms. Yu's estate.

- [8] Finally, Joe and Wayne seek an order that Annie and Diana, in their capacity as attorneys for Ms. Yu, provide them an "accounting of the Estate of Ying Wong Yu from the date they began acting as attorney for the Patient to present". The PGT also recommended this order be made.
- [9] The affidavit evidence in this case includes hearsay, accusations, conjecture and argument. There was also a significant amount of potentially relevant evidence that was not before me, including but not limited to critical information about the financial transactions involving Ms. Yu's funds. In addition, the parties raised several issues which are not properly before me in this application and of which I make no findings.
- [10] I have carefully reviewed all of the affidavit materials filed in support of these two petitions. I have disregarded those portions of the affidavit materials that are inadmissible, or contain unsubstantiated accusations, conjecture, and argument. The factual determinations I make below are based on my review of all of the evidence, subject to my findings as to the admissibility or weight of that evidence.
- [11] The fundamental issue in these proceedings is who should be appointed as Ms. Yu's committee. This requires a determination as to what is in Ms. Yu's best interests. For the reasons that follow, I have concluded the PGT should be appointed her committee of person and estate. As a result of this decision, I do not need to address the PGT's proposed security should any of Ms. Yu's children be appointed as her committee.
- [12] In making this determination I have considered the actions taken by Ms. Yu's attorneys, Diana and Annie (including but not limited to the incomplete financial information provided to date, the lack of completeness in that accounting, and their inappropriate intermingling of Ms. Yu's assets with their own and those of the Company), the actions taken by all of her children in accepting a significant gift from Ms. Yu at a time her capacity was highly questionable (in the amount of \$880,000), and the conflict of interest of all of the petitioners.

Ms. Yu's Declaration of Incapability

- [13] Committeeship petitions are governed by the PPA. Section 3 of the PPA provides that the court must be satisfied, upon reviewing the evidence of two medical practitioners that, because of mental infirmity arising from disease, age or other cause, a person is incapable of managing herself or her affairs, before appointing a committee for either the person or her estate. If the Court is satisfied that is correct it must, by order, declare the person incapable of managing herself or her affairs.
- [14] All parties agree that Ms. Yu is incapable of managing herself and her affairs and rely on the medical evidence which supports this conclusion.

- [15] Annie, Diana and Pong filed in support of their petition two affidavits of medical practitioners: Dr. Andrew Louie (sworn October 14, 2020) and Dr. Alex Kai-Hong She (sworn October 14, 2020). Dr. Louie has seen Ms. Yu multiple times since his initial consultation on August 24, 1991, most recently on September 3, 2020 when he attended on her in person. He is of the opinion that she is incapable of managing both herself and her affairs "by reason of mental infirmity arising from vascular dementia due to a previous stroke in 2013 which is both untreatable and irreversible". He further deposed:
8. The patient needs some assistance for daily activities such as getting out of bed in the morning, going to bed at night, dressing herself, bathing, brushing her teeth, and eating meals. Although she may be able to manage some of these activities without physical assistance, she may not carry them out unless she was told to do so.
 9. The Patient likely could not prepare a meal and definitely could not prepare one safely.
 10. The Patient would not recognize that she was ill and would not, on her own, know or be able to take medication. She would not be able to manage a crisis. For example, she would not know or be able to telephone 911 for assistance in an emergency.
 11. In my opinion, due to the Patient's advancing age and dementia, she is unable to live alone. I believe her needs are being met in her current living situation of living with her daughter.
- [16] Dr. She has seen Ms. Yu from time to time since his initial consultation on June 4, 2008, most recently on September 14, 2020. He also deposed that she was incapable of managing herself and her affairs by reason of "mental infirmity arising from vascular dementia due to a previous stroke in 2013 which is both untreatable and irreversible". He concluded that "In my opinion, due to the Patient's advancing age and dementia, the Patient is unable to live alone", but did not comment on her current living situation.
- [17] These affidavits were both sworn on October 14, 2020, and this matter was heard before me almost seven months later, but given the restrictions placed by the COVID-19 pandemic and the fact both doctors agreed her condition was "both untreatable and irreversible" I accept the medical evidence and conclude Ms. Yu is incapable of managing herself and her affairs and I make a declaration pursuant to s. 6 of the PPA to that effect.

Background

- [18] Ms. Yu was born October 27, 1930 and is currently 90 years old. Her husband died in 1972 and she has eight children, as set out above.
- [19] Ms. Yu made her Last Will and Testament (the "Will") on November 30, 1990. Her Will names Annie, Mimi and Pong as her executors and divides the residue of her estate into 11 shares: two shares to go to each of her sons (Joe, Wayne and Pong) and one share to go to each of her daughters (Annie, Diana, Mimi, Amy and Shirley).

- [20] At some point before 1994, Ms. Yu purchased the 420 Property and a property at 426 East Hastings St., Vancouver, BC (the "426 Property"). The parties agree that in 1994 the 426 Property was Ms. Yu's family residence.
- [21] In or about February of 1994 Ms. Yu incorporated a holding company, 464545 BC Ltd. (the "Company"). During that same month Ms. Yu transferred beneficial ownership of the 426 Property to the Company for consideration in the amount of \$504,500. This consideration was secured by two promissory notes issued by the Company to Ms. Yu:
- (a) a promissory note payable by the Company to Ms. Yu in the amount of \$237,995.28, on demand; and
 - (b) a promissory note payable by the Company to Ms. Yu in the amount of \$266,504.72, on demand.
- [22] In February 1994 she also transferred beneficial ownership of the 420 Property to the Company for consideration in the amount of \$498,300. This consideration was secured by way of:
- (i) Ms. Yu being issued 1,000 Non-Voting Class "E" preference shares with a redemption value of \$284,745;
 - (ii) a promissory note payable by the Company to Ms. Yu in the amount of \$105,079.88, on demand; and
 - (iii) a promissory note payable by the Company to Ms. Yu in the amount of \$108,474.87, on demand.
- [23] Upon a review of the share register for the company, it is clear Ms. Yu was issued 100 Class A voting shares on February 9, 1994.
- [24] On the same day Ms. Yu and the Company entered into two identical Trust Declarations (one for each of the Hastings Properties), which recorded that Ms. Yu as legal owner of each of the Hastings Properties, held legal title for the benefit of the Company, and Ms. Yu, as Trustee, agreed to hold legal title to each property on the following identical trust terms:

has held and will henceforth hold and stand possessed of the lands and premises as hereinbefore described, and shall take the profits thereof UPON Trust for the said Beneficiary [the Company] and the proceeds of sale in the event that the said land and premises shall be sold or dispose of UPON TRUST for the said Beneficiary [the Company] and the Trustee hereby agrees to assign the said lands and premises at the request and cost of the said Beneficiary [the Company] to such person or persons at such time or times and in such manner as the said Beneficiary [the Company] shall direct or appoint, THE TRUSTEE [Ms. Yu] has, concurrently with the execution of this Trust Declaration, executed a Land Title Act Form "A" Transfer dated the 9th day of February 1994, in favour of the Beneficiary [the Company] in registrable form, a copy of which is attached hereto and marked as Schedule "A" herein, which Land Title Act Form A Transfer shall be delivered to the Beneficiary for its own use absolutely.

Attached to each of these Trust Declarations were executed Form "A" transfer forms, which have never been registered.

[25] Annie says that the Company has six authorized class of shares, and the following shareholders:

(a)

Ms. Yu

100 Class A common voting shares 1,000 Class E preferred shares
(redeemed November 28, 2018).

(b)

Shirley

4,000 Class C common non-voting shares.

(c)

Annie

4,000 Class C common non-voting shares.

(d)

Wayne

2,000 Class C common non-voting shares.

(e)

Joe

4,000 Class D common non-voting shares.

(f)

Pong

4,000 Class D common non-voting shares.

(g)

Wayne

2,000 Class D common non-voting shares

For reasons which were not explained Diana, Mimi and Amy are not shareholders in the Company.

- [26] There was no evidence before me relating to the Articles of the Company, the rights and restrictions associated with each class of shares, nor if there was any prescribed redemption value for the classes of shares (other than the redemption value for the Class E preference shares). Ms. Yu, Annie and Shirley were the directors of the Company in 1994, and they continue to be the directors. There was no evidence before me as to what (if anything) the Articles provide is to happen if one of the directors is incapable.
- [27] The 420 Property is a two-level property which consists of a commercial unit downstairs, and two residential units upstairs. The commercial unit has historically been leased, although it is vacant at present.
- [28] Ms. Yu also owned a condominium located at 811 - 1530 Burrard Street, Vancouver, B.C. (the "Burrard Condo") which Wayne lived in for approximately five years without contributing to the costs. In or about 2010 Ms. Yu sold the Burrard Condo and Wayne moved to Unit A of the 420 Property. Wayne suffers from a disability, receives provincial government disability assistance, and has primary custody of his daughter. Prior to the sale of the 426 Property, he paid Ms. Yu reduced rent of \$400 cash monthly. However, at some point since the sale he has stopped paying rent.
- [29] Ms. Yu lived with Annie for many years at the 426 Property until they moved in with Pong on July 30, 2013. In January 2014, Ms. Yu and Annie moved to 201 - 6191 Buswell Street, Richmond, B.C (the "Richmond Condo"). They still live in the Richmond Condo which is held jointly in the legal name of Annie and her daughter, Jennifer. Ms. Yu's daughter Diana lives next door (in suite 204) and her son Pong also lives in the same building (in suite 305).
- [30] Ms. Yu's taxable income in 2019 was \$16,851. She receives monthly CPP payments of \$517.24, monthly Old Age Security payments of \$990.35, and quarterly payments from a RRIF of \$122.67, which means her monthly income is less than \$1,550.

The Power of Attorney

- [31] On February 3, 2014 (after her stroke in July 2013) Ms. Yu revoked all previous enduring powers of attorney made by her and granted an enduring power of attorney to Annie and Diana (the "Attorneys"), allowing either of them to act alone, but requiring each of them to keep each other and Ms. Yu "to the extent possible, fully informed as to their actions" (the "Power of Attorney").
- [32] The Attorneys owe fiduciary duties to Ms. Yu pursuant to the Power of Attorney Act, R.S.B.C. 1996, c. 370 [PAA] and the common law. As set out in s. 19 PAA:

19 (1) An attorney must

- (a) act honestly and in good faith,
- (b) exercise the care, diligence and skill of a reasonably prudent person,

- (c) act within the authority given in the enduring power of attorney and under any enactment, and
 - (d) keep prescribed records and produce the prescribed records for inspection and copying at the request of the adult.
- (2) When managing and making decisions about the adult's financial affairs, an attorney must act in the adult's best interests, taking into account the adult's current wishes, known beliefs and values, and any directions to the attorney set out in the enduring power of attorney.
- (4) An attorney must keep the adult's property separate from his or her own property.
- [33] The Power of Attorney was clearly a boiler plate, check the boxes, form. Of particular note, under the section entitled "Charitable Donations and Family Gifting" Ms. Yu did not tick the box stating "I authorize my Attorney(s) to maintain the level and types of donations and family gifting that I have made while capable" nor did she tick the box stated "I do authorize my Attorney(s) to disperse the capital of my estate prior to my death, priority should be given to my future care needs, however, my estate is sufficient to make large gifts consistent only with the provisions of my Will prior to my death". Rather, she ticked the following two boxes:

X I do not authorize my Attorney(s) to disperse the capital of my estate prior to my death; I want it to be used for my care;

X If I am no longer able to live in my home, I authorize my Attorney(s) to distribute my personal effects pursuant to any memorandum I have made or to the wishes I have made known while capable.

- [34] The Power of Attorney was witnessed by a notary public, and on the same day Annie and Diana also executed their attorney declarations before the same notary.

Actions of the Attorneys

- [35] Details of actions allegedly taken by the Attorneys are disputed by the parties. While I have summarized their positions in the following sections, there is insufficient evidence before me to make any findings of fact preferring one version of events to the other, and these issues will need to be investigated further by the PGT, in their capacity as Ms. Yu's committee of estate.
- [36] Joe and Wayne both allege Ms. Yu was incapable of granting a power of attorney in February 2014 and seek a declaration that the Power of Attorney was invalid or void. However, there was no admissible evidence (medical or otherwise) as to Ms. Yu's capacity on February 3, 2014. Likewise, there was no evidence before me from the notary who witnessed Ms. Yu's execution of the Power of Attorney. Rather, Joe and Wayne rely upon the fact that Ms. Yu suffered a stroke in July 2013 and invite me to assume that may have meant her capacity suffered. The fact Ms. Yu could not recall granting the Power of Attorney in the fall of 2017 is

not evidence of her alleged lack of capacity in February 2014. It would be wrong to make such an assumption and I decline to do so.

Ms. Yu's monthly costs and withdrawals from her bank account

- [37] Joe and Wayne allege that Annie said Ms. Yu's monthly maintenance costs are approximately \$36,000 per year and that "Annie has told me she takes \$3,000 per month from the Patient's estate as compensation for her role as caregiver".
- [38] Annie disputes this allegation in her Third Affidavit sworn May 7, 2021. She deposes that she does not charge Ms. Yu for being her primary caregiver. She says that her siblings agreed that it was challenging for her to provide for their mother and that funds should be made available to hire third party providers. She acknowledged that typically the payments are around \$1,500 a month, but could reach up to \$3000.
- [39] Diana and Pong say that the "cost of maintenance of the Patient is marginal because she lives with my sister Annie and Annie pays for living expenses". Annie gave similar evidence in her First Affidavit sworn December 16, 2020.
- [40] Annie's counsel argued that while Annie cannot say she has not received anything from Ms. Yu, anything she has received is marginal. However, Joe, Wayne, and the PGT, based on the bank records, identify frequent and as of yet unexplained withdrawals being made on a monthly basis from Ms. Yu's bank account.
- [41] In their response to the petition of Annie, Diana and Pong the PGT explained as follows:
18. An accounting has been requested from the Attorneys by the Public Guardian and Trustee but it has not been provided. From discussions with counsel for the Petitioners, the Public Guardian and Trustee is led to understand that the Attorneys did not keep a detailed accounting in their seven years as Attorneys. With the absence of an accounting, the Public Guardian and Trustee has reviewed the filed affidavit material and has the following questions and concerns:
 - (b) The Petitioners have advised the Public Guardian and Trustee that CIBC Account [XXXX]831 belongs to Ms. Yu and that Annie and Diane [Diana] are named on the account for assistance. While Annie has provided some guidance for the transactions in this account in her affidavits, there are numerous deposits, pre-authorized payments and withdrawals that have not been explained. For the transactions that are identified, they raise concerns for the Public Guardian and Trustee. Although Annie has indicated in her 3rd affidavit, paragraph 12, that her mother does not contribute to expenses, this bank account shows withdrawals for Ms. Yu ranging from amounts of \$200 to \$2300 in a single transaction, beginning on October 26, 2017. In his 3rd affidavit, paragraph 7, Wayne tallies these withdrawals at \$55,500 for a three year period. Moreover, the bank account shows payments to the Company. The Public Guardian and Trustee would expect dividends to be paid to Ms. Yu, not payments to be made by her to the Company. Moreover, it is concerning that the balance in Ms. Yu's

account is only \$30, 964.72 as of March 29, 2021 if she has only minimal expenses. Without further explanation from the Attorneys, the Public Guardian and Trustee is concerned that a large number of the transactions in this account have not been to Ms. Yu's benefit.

- (h) At paragraph 12 of Annie's 3rd affidavit, it is not clear whether Annie has received payment for Ms. Yu for providing care or whether Ms. Yu has contributed towards household expenses. The last line of the paragraph suggests that Ms. Yu has been paying between \$1,500 and \$3,000 a month but, without an accounting, the reasons for the payments are unknown to the Public Guardian and Trustee. Moreover, if Annie does wish to receive payment for caregiving after the appointment of a committee, the amount of payment should be addressed by the Court and made part of the Committee Order.

[Emphasis added.]

The Burrard Condo

- [42] Joe and Wayne allege that the sale proceeds from the Burrard Condo were used to purchase the Richmond Condo, and they say the Richmond Condo is beneficially owned by Ms. Yu. Annie denies this, and says that she and her daughter are the legal and beneficial owners of the Richmond Condo. Her position is Ms. Yu did not own the Burrard Condo, but rather Annie did, and she and Wayne were named as tenants in common on title, and were both named on the mortgage. Annie says Ms. Yu paid a portion of the mortgage each month "effectively paying Wayne's rent to reside in the Burrard Condominium". Her evidence is Wayne paid nothing to live in the Burrard Condo, and that when he expressed a desire to move back to the 420 Property in 2006 the property was then sold. She says Wayne requested and received \$20,000 from the net sale proceeds and she believes she retained the remaining sale proceeds.

Sale of 426 Property and Distribution of Proceeds of Sale

- [43] The 426 Property consists of a 2,200 square foot, 6 bedroom condominium (in which the Yu family lived for many years), and a commercial space with a separate entrance.
- [44] After Ms. Yu and Annie moved to the Richmond Condo a decision was made to sell the 426 Property. Annie's evidence as set out in her Second Affidavit sworn December 16, 2020 is that Ms. Yu loaned the Company approximately \$50,000 to complete renovations. Annie used her power of attorney to sell the 426 Property on October 30, 2017 for a sale price of \$1,830,000. From that, the seller was entitled to receive net sale proceeds of \$1,810,831.22.

- [45] A critical issue in the cross-petitions arises out of the distribution of the net sale proceeds of \$1,810,831.22, and a failure on the part of the Attorneys (Annie and Diana) to properly account for the funds received by Ms. Yu from the net sale proceeds. The evidence appears to be that the net sale proceeds were \$1,810,831.22, and that the amount of \$1,807,984.44 was deposited into CIBC Account XXXX293 ("Account 293"). Annie's explanation of the distribution of the net sale proceeds in her Second Affidavit is:
14. Though the sale was completed in the Patient's name because she was the registered owner, the Company was the beneficiary of the net sale proceeds because of the Trust Declaration.
 15. We paid the taxes associated with the sale in two installments: \$135,000 on February 1, 2018 and \$181, 786 on April 5, 2018. Attached to this Affidavit as Exhibit "I" are copies of the bank drafts payable to the Receiver General in respect of the tax payment. Exhibit "I" are copies of the bank drafts payable to the Receiver General in respect of the tax payment.
 16. On September 18, 2018, there was a Meeting of the Directors of the Company. Resolutions were passed to cause the redemption of the Company's Class "E" shares held by the Patient for a redemption value of \$284,745, demand for the payment of \$519,000 from the outstanding Shareholder's Loan of \$550,925, and a declaration of a dividend on the Company's Class "A" shares in the amount of \$393,689. Attached to this Affidavit as Exhibit "J" are copies of the Minutes of the Meeting of the Directors and the related resolutions.
 17. Using the funds from the sale of 426 Hastings, the Patient invested \$50,000 (plus additional \$2,000 from her own account) in a TFSA and acquired a CIBC GIC for \$403,000. Additionally, the Patient used \$50,000 to acquire securities from Probit Capital Corporation in order to partially shelter the taxable capital gain; the amount was later refunded. Lastly, the Patient received \$50,000 from the Company as repayment for the renovations she funded, for the Company's benefit, on 426 Hastings prior to its sale. Details of these investments can be found in my 1st Affidavit made in this proceeding.
 18. A portion of the funds from the sale of 426 Hastings were used to make payments to the Patient's children. The distributions were consistent with the payment scheme found in her Will in which each son is to receive twice the amount of each daughter. Each of Joe Yu, Pong Yu and Wayne Yu received \$160,000 and each of Diana Yu, Shirley Yu, Amy Yu, Mimi Yu and myself received \$80,000.
 19. The Patient continues to hold title of 420 Hastings for the benefit of the Company. It consists of two units. The commercial unit is not rented and Wayne Yu lives in the residential unit. Wayne does not pay rent.

[46] There was no explanation why such a significant portion of the net sale proceeds - \$880,000 - were distributed to the children, nor why those children who were not shareholders of the Company (namely Diana, Amy and Mimi) received a portion. There was also a lack of evidence as to whether these were gifts made by Ms. Yu (or were gifts made on her behalf by her Attorneys) and Ms. Yu's capacity at the time the funds were transferred in November of 2017 and 2018.

[47] Counsel for Annie, Diana and Pong agreed there was no determinative evidence before me as to whether Ms. Yu had capacity at the time, and quite properly advised me he could not legitimately argue it was clear she did. He did, however, argue that since all the siblings were involved there were no "shenanigans" by the Attorneys in the making of the gift.

[48] The PGT succinctly summarizes their concern in para. 18(g) of their Response to Petition (to Annie, Diana and Pong) as :

Given the evidence provided with respect to Ms. Yu's declining cognitive abilities following her stroke, the Public Guardian and Trustee has concerns whether Ms. Yu could adequately understand her financial circumstances and provide informed direction or consent for these gifts. These large gifts to Ms. Yu's children are even more concerning in light of the evidence provided by Joe at paragraph 40 of his 1st affidavit. He states that Annie informed her siblings at a Shareholder's Meeting on September 28, 2019 that they needed to sell 420 Hastings as Ms. Yu had "no money even despite the sale of the Burrard Condominium and 426 Hastings".

[49] Joe and Wayne were concerned about the distribution of the net proceeds of sale, and made requests for an accounting of this distribution. A lawyer was engaged by the Company and Ms. Yu in July 2019 to provide Joe with an accounting of the distribution of the net sale proceeds in July 2019, which raised further questions from Joe and Wayne (the "Company Accounting"). The lawyer made clear in the Company Accounting that he was "engaged by the Company and Mrs. Ying Won Yu ("Mrs. Yu") to prepare the enclosed Summary of Payments to summarize the distribution of the sale proceeds for the Property [the 426 Property]". Neither the issue of the substantive sufficiency of the Company Accounting, nor the sufficiency of the financial information provided to date by the Attorneys for their actions in that capacity from February 2014 to date, is before me on the hearing of these cross-petitions; however it is clear that there still remain many questions arising both out of the Company Accounting provided to date, and the actions taken by Annie and Diana as Attorneys.

[50] The PGT's response to the petition of Annie, Diana and Pong also provides a useful summary of their understanding of the distributions of the sale proceeds of the 426 Property:

13. From either CIBC Account [XXXX]293 or CIBC Account [XXXX]831, the net sale proceeds for 426 Hastings appear to have been distributed as follows:

(a) Taxes were paid in the amount of \$135,000.

- (b) Taxes were paid in the amount of \$181,786.14.
 - (c) The amount of \$50,000 was reimbursed to Ms. Yu for payments she made towards renovations/repairs to 426 Hastings prior to sale.
 - (d) A CIBC TFSA was purchased for Ms. Yu in the amount of \$50,000.
 - (e) An amount of \$50,000 was invested for Ms. Yu into securities through Probit Capital Corporation.
 - (f) A GIC was purchased for Ms. Yu in the amount of \$403,000 and the funds are held in CIBC Account [XXXXX]779, an account held jointly by Ms. Yu, Annie and Diana.
 - (g) A gift of \$880,000 was made to Ms. Yu's children, comprising of \$160,000 to Joe, Pong and Wayne, and \$80,000 to Annie, Diana, Amy, Mimi and Shirley. The distribution is consistent with the payment scheme in Ms. Yu's Will. As Shirley had an outstanding loan with Ms. Yu for \$10,520, she received payment of only \$69,480.
 - (h) \$71,715.80 (although the Public Guardian and Trustee arrives at an amount closer to \$69,000 based on the net sale proceeds less a total of the amounts above) was used to pay for insurance premiums, funds for Company operations, and various expenses.
14. On September 18, 2019 at a Meeting of the Directors, resolutions were passed to redeem Ms. Yu's Class E shares for a redemption value of \$284,745; pay \$519,000 to Ms. Yu of her outstanding Shareholder's Loan of \$550,925; and, declare dividends of \$393,689 for Ms. Yu's Class "A" Shares. Pages 70, 71 and 74 of Annie's 2nd affidavit include Ms. Yu signed acknowledgements for the receipt of funds in the amounts of \$393,689, \$519,000 and \$284,745.
- [51] I am unable, and it would be inappropriate for me, to make any findings of fact on the evidence relating to: payments Annie received in her capacity as caregiver; the beneficial ownership of the Burrard Condo; the distribution of proceeds from the sale of the 426 Property; or actions taken by the directors of the Company. However, there are a number of issues arising out of the actions of the Attorneys, and the Company Accounting, that have been identified by Joe, Wayne and the PGT which are concerning. These concerns can briefly be summarized as:
- (a) it appears Ms. Yu's personal property has been co-mingled with the Company assets. While counsel for Annie, Diana and Pong says there was no malfeasance, at a minimum it raises whether the Attorneys, intentionally or inadvertently, affected Ms. Yu's estate plan;
 - (b) there is no explanation why the net proceeds of sale of the 426 Property were not deposited into a Company Account, but were rather deposited into Account 293 owned jointly by Ms. Yu and Annie, which Annie says they hold in trust for the Company.
 - (c) there is no explanation why Account 293 is not in the sole name of Ms. Yu, and why Annie is a joint owner of that account;

- (d) there is no explanation why funds from Account 293 were transferred in staggered amounts to a CIBC Account XXXX831 ("Account 831") which again is an account held jointly by Ms. Yu, Annie and Diana, or why Annie and Diana are joint owners of that account;
- (e) there appear to be deposits, pre-authorized payments and withdrawals from Account 831 that are not accounted for;
- (f) there appear to be payments from Account 831 to the Company that are likewise not accounted for, nor explained; as the PGT properly notes they would expect dividends being paid to Ms. Yu from the Company, not payments being made by her to the Company;
- (g) there are net sale proceeds from the sale of the 426 Property that appear to be unaccounted for;
- (h) the PGT can identify Ms. Yu's CPP monthly payments into Account 831, but cannot determine if other deposits into the account are Ms. Yu's Old Age Security payment and any other income she may receive;
- (i) there is a lack of clarity and explanation as to whether Ms. Yu personally paid all of the income taxes (in a total amount of \$316,786.14) resulting from the sale of the 426 Property, or only \$181,768.14 and, in any event, why these amounts were paid by Ms. Yu and not by the Company;
- (j) there is no evidence that Ms. Yu intended to, nor had the necessary legal capacity to, make gifts in the amount of \$880,000 to her children;
- (k) it is unclear to what extent Ms. Yu has been contributing to household expenses;
- (l) it is unclear whether Annie has received payment from Ms. Yu for providing care;
- (m) there is a lack of accounting for the rental income to the Company for the rent of the commercial and residential units of both the 420 and 426 Properties, which is troubling, particularly in light of the payments being made by Ms. Yu to the Company;
- (n) there are three transactions from Account 831 totalling \$16,600 to Remedios and Company, which were previous counsel for Annie, Diana and Pong;
- (o) there was no evidence why the CIBC GIC purchased for Ms. Yu was also owned as joint tenants (with rights of survivorship) by Ms. Yu, Diana and Annie (recorded on title as "Joint Tenants with Right of Survivorship Ying Wong Yu or Diana So Yat Yu or Annie Lui Yat Chung");
- (p) there was evidence that Ms. Yu's TFSA, which was funded with almost all proceeds from the sale of the 426 Property, had designated beneficiaries, but no evidence as to who those beneficiaries are; and
- (q) there may be further issues not identified before me with respect to the legal ownership of Ms. Yu's assets.

- [52] As of March 29, 2021, the balance in Account 831 was \$30,964.72. As of October 30, 2020, the balance in Account 293 was \$390.11.

Wayne's Gift

- [53] There is a further disagreement between Annie (presumably in her capacity as Attorney) and Wayne as to whether he has actually received the gift of \$160,000 which was made to each of his brothers ("Wayne's Gift"). Annie says that \$35,600 was paid to Wayne on October 29, 2018, and \$122,138 was paid to him on September 8, 2020. This totals \$157,738, and there is no explanation for the missing \$2,262. Wayne's affidavit evidence (as set out in his Second Affidavit sworn February 5, 2021) is directly contrary:
26. After 426 Hastings sold, Annie told me I would be receiving \$160,000 from the sale proceeds according to the Patient's wishes. We decided that the bulk of those funds would be set aside for me until we could find a property for me to purchase with those funds. Annie told me she would help me find a place and would involve Mimi's husband, Edward who is a real estate agent. Annie and Edward showed me several properties that were all substandard housing and unacceptable for myself and my daughter. With my agreement, approximately \$34,000 from the \$160,000 was used by my brother, Pong to purchase a vehicle that I currently make use of. I do not know where the approximate balance of \$126,000 is being held. Annie once told me that the Patient is holding it in trust. Since 426 Hastings sold, I have stopped paying the Patient cash rent for Unit a of 420 Hastings and I expect that she or Annie is taking rent from the monies they hold in trust on my behalf.
- [54] In line with each of the issues identified above, I cannot resolve this contradiction on the basis of the evidence that is before me. While Wayne's counsel argued that I should make an order that if the Attorneys hold any funds in trust (including the allegedly missing \$126,000) they move all such funds into a new account for Ms. Yu, the issue of the allegedly missing funds is not properly before me on a committee application, nor am I able to resolve this matter on the basis of two directly contradictory affidavits on the point. The issue of where these funds are currently held, and any subsequent claims brought by Wayne relating to these funds, will have to be dealt with by the PGT in their capacity as committee of estate (presumably after the future accounting by the Attorneys).
- [55] However, it does raise an additional issue, which is that Wayne has not been paying rent for his unit at the 420 Property since the 426 Property sold in 2017. He resides in Unit A of that property. Wayne is on disability benefits and until 2017 he paid Ms. Yu \$400 cash each month for rent but at some point after the sale he ceased doing so.
- [56] Wayne also gave evidence that Ms. Yu historically supported him and his daughter by "frequently gifting small cash payments to us of \$20 to \$50". He complains that Annie "has chosen not to gift me money as frequently as the Patient used to when the Patient controlled her own finances". Wayne has historically relied upon financial assistance from his mother. This puts him in a potential conflict of interest were he to be named as her co-committee of

estate. While his counsel in argument suggested Wayne could re-commence paying the reduced rent of \$400 monthly, and repay the unpaid rent, this does not ameliorate the conflict of interest he would be in were he to be named co-committee of estate.

[57] Joe may also be placed in a potential conflict of interest should he be named as Ms. Yu's co-committee of estate. Joe testified he has retained counsel to represent him "in a corporate dispute over the sale of 420 Hastings. I am concerned that Diana and Annie are not acting in the best interests of the Company". Any potential corporate litigation relating to the Company could put Joe in that potential conflict of interest.

Ms. Yu's Current Assets

[58] It is obvious from the above discussion that there is no ability to clearly identify Ms. Yu's current assets at this time. To do so would require a proper accounting from the Attorneys, and perhaps significantly further information from the directors of the Company. Annie, Diana and Pong all swore Affidavits of Kindred and Fortune in which they deposed that Ms. Yu has no known debts and her current assets were as follows:

- (a) Real Estate - Ms. Yu holds the 420 Property in trust for the Company under the Trust Declaration made February 9, 1994. In 2020 it was assessed at \$1,609,100;
- (b) Personal Property - Ms. Yu holds 100 Class "A" shares in the Company which constitute 100% of the voting shares. She does not own other personal property of material value;

(c) Capital

1.

CIBC Flexible GIC Account [XXXXXX]779

\$414,444.61

2.

CIBC TFSA No. [XXXXXX]998

\$ 53,530.66

3.

RRIF NO. [XXXXXXXX]386

\$ 4,239.60

4.

Manulife Policy [XXXX]736 (net value)

\$ 19,551.44

5.

IG Wealth Management [XXX]615

\$ 2,279.39

6.

CIBC Account [XXXX]831

\$ 30,668.19

Sept. 28, 2020)

7.

CIBC Account [XXXX]293

\$ 390.13

(Nov. 30, 2020)

8.

Promissory Notes

\$718,052.00

(total of four notes)

[59] Counsel for Annie, Diana and Pong correctly acknowledged in oral argument that the promissory notes deposited to be owed to Ms. Yu in the total amount of \$718,052 were likely reduced by the distributions made to her out of the sale proceeds of the 426 Property, which should have been accounted for in each of the three Affidavits of Kindred and Fortune (being at least the \$519,000 repaid on the outstanding shareholder's loan secured by way of a promissory note).

[60] The Affidavits of Kindred and Fortune sworn by Joe and Wayne identified different assets owned by Ms. Yu, with the differences largely accounted for in the uncertainty of the information provided by both the Company and the Attorneys to date.

[61] I am unable to determine Ms. Yu's current assets without a proper accounting by the Attorneys, and further information from the Company.

Potential Sale of the 420 Property

[62] Annie, Diana and Pong wish to sell the 420 Property. Although they tendered no affidavit evidence to support this desire, they seek an order authorizing the sale on behalf of the committee of the estate. The legal basis of their petition had only this to say:

7. the joint committee should be empowered to sell 420 Hastings if they believe it is in the Patient's best interest to do so. The net proceeds from the sale of 420 Hastings can, if needed, be allocated to the Patient by way of repaying the Shareholder's Loan and promissory notes and/or as a dividend.
- [63] Wayne and Joe object to the potential sale of the property, and say it could be contrary to Ms. Yu's wishes and premature. They both gave evidence that there was a shareholders meeting at which the "shareholders tentatively agreed to a prospective distribution of the sale proceeds [of a potential sale of the 420 Property] in proportion to our shareholding" but no specific details of such a distribution. This is notable given the distribution of the net sale proceeds from the 420 Property resulted in gifts being made to the non-shareholder siblings (as part of the \$880,000 gift).
- [64] Further, Wayne's specific evidence on this clearly points to his own self-interest in that he would have to move from the 420 Property (where he used to pay a reduced rent and currently pays no rent). Wayne gave evidence of observing a realtor attending at the property in January 2019, and changing the pad lock at the front gate to stop realtors and clients from entering the property unannounced.
- [65] Ultimately neither Annie nor Shirley (both directors of the Company together with Ms. Yu) gave any evidence as to their intentions with respect to a sale of the 420 Property (or any potential distribution of the potential net sale proceeds). Annie, Diana and Pong clearly want to be able to sell that property without further order of this Court. Further, their counsel acknowledged in oral argument that Annie and Diana (as Attorneys) and Annie (as a director of the Company) are in the difficult position of acting in the best interests of Ms. Yu, and yet attempting to keep the Company solvent. There is clear evidence of this difficulty in the apparent ongoing, inappropriate use of Ms. Yu's personal funds to keep the Company solvent.
- [66] In argument counsel for Annie, Diana and Pong sought an order that the committee should exercise Ms. Yu's voting rights as owner of the Class A voting shares to vote that the 420 Property be sold. There is insufficient evidence before me on this issue to even consider making such an order, and the authority for how to vote Ms. Yu's Class A voting shares will clearly belong to the committee of her estate. He argued that as the voting shareholder, Ms. Yu's committee could vote her shares to dividend out to her the entire net sale proceeds from a future sale of the 420 Property, or alternatively could be put into a restricted account for the sole benefit of Ms. Yu. Again, with no evidence before me as to the rights and restrictions of each class of shares, and no evidence before me of the tentative agreement of the shareholders with respect to a distribution of the net sale proceeds, I cannot accept this argument.

[67] The evidence was consistent that the commercial space at the 420 Property is not currently rented, and that both units appear to be occupied but may not be generating rental income. Presumably the rental of any of these spaces would generate income to be properly paid to the Company (not Ms. Yu), but which would indirectly benefit her as creating a source of income for the Company to be used as a source of funds. This will also be an issue for the committee of her estate.

Power of Attorney Accounts

[68] There has been significant difficulty in obtaining the prescribed records from the Attorneys that they are obliged to keep and to produce pursuant to s. 19(1) of the PAA. The failure to produce these records has resulted in the lack of clarity of Ms. Yu's assets. Further, it is clear that Annie and Diana, in their capacity as Attorneys, have failed to comply with s. 19(4) of the PAA, which requires that "An attorney must keep the adult's property separate from his or her own property". The evidence is that after the sale of the 426 Property the Attorneys inappropriately co-mingled Ms. Yu's property, in that they placed those proceeds into CIBC Accounts 293, 831, and the GIC account (all of which are owned as joint assets). Further, the TFSA has designated beneficiaries, who have not been identified in these proceedings.

[69] For the reasons set out in para. [36] above, there is insufficient evidence before me upon which I could determine that the Enduring Power of Attorney was invalid because Ms. Yu did not have the necessary capacity to grant a power of attorney in February 2014.

[70] However, by operation of s. 19 of the PPA when a patient is declared by a judge to be incapable of managing herself or her affairs, then every power of attorney given by that patient is terminated. The effect of a court declaring Ms. Yu to be incapable of managing herself or her affairs is to terminate the Enduring Power of Attorney granted by Ms. Yu to Annie and Diana.

[71] The Attorneys handling of Ms. Yu's financial affairs is an issue of significant concern and notwithstanding that I am appointing the PGT committee of estate I order that they take immediate steps to protect and secure Ms. Yu's assets, including to:

- (i) CIBC Account 831 - remove Annie and Diana as joint owners, or alternatively transfer the balance in this account to another account in the sole name of Ms. Yu;
- (ii) CIBC Account 293 - remove Annie as a joint owner, or alternatively transfer the balance to another account in the sole name of Ms. Yu;
- (iii) GIC Account XXXXXX779 - remove Diana and Annie as joint owners, or alternatively transfer this investment to another authorized investment in the sole name of Ms. Yu; and

(iv) CIBC Tax Free Savings Account XXXXX998 (with unknown designated beneficiaries) - determine the named designated beneficiaries, the date of their designation, and who appointed them and take any further necessary steps appropriate to ensure the named beneficiaries were not determined by the Attorneys in a manner inconsistent with Ms. Yu's testamentary wishes.

[72] Annie and Diana have failed to provide a fulsome accounting to Ms. Yu for their actions as her Attorneys. Joe, Wayne and the PGT have all asked that an order be made that the Attorneys provide an accounting for all actions taken by the Attorneys from February 3, 2014 to the date of these reasons. All of the parties appearing before me (including Annie, Diana and Pong) agreed that I should order that the Attorneys account to the appointed Committee as part of the committee applications before me, that I have the inherent jurisdiction to make such an order, and it is proportionate for me to do so at this time.

[73] As such I order that Annie and Diana, in their capacity as Attorneys for Ms. Yu, provide an accounting for all actions taken in that capacity from February 3, 2014 to date to the PGT in their capacity as committee of Ms. Yu's estate, within 90 days of the date of these reasons (the "Attorney Accounts"). For clarity, the Attorney Accounts should include all transactions from CIBC Account 293. Once the PGT receives and reviews the Attorney Accounts they can determine any appropriate next steps, including but not limited to asking further questions or proceeding to require the Attorneys to properly pass those Accounts. The next steps may also (in the PGT's discretion) include dealing with the rental income of the 420 Property, the potential sale of the 420 Property, and any issues with respect to Wayne's Gift.

[74] I am not in a position in this application to make any determination of whether the Attorneys breached their fiduciary duties.

Committee of the Estate and Person of Ms. Yu

Legal Principles

[75] Section 6 of the PPA provides that a court may appoint a committee of estate and person, but does not prescribe any criteria for the selection of an appropriate committee. The overriding principle that I must consider is the best interests of Ms. Yu.

[76] The applicable test to be applied where more than one applicant seeks an appointment was eloquently summarised by Masuhara J. in *Stewart (Re)*, 2014 BCSC 2321 as follows:

[27] The application for an appointment invokes the *parens patriae* jurisdiction of the court and is governed by an assessment of who will serve the patient's best interest.

[28] Section 18 of the Act states that:

A committee must exercise the committee's powers for the benefit of the patient and the patient's family, having regard to the nature and value of the property of the patient and the circumstances and needs of the patient and the patient's family.

- [29] As has been observed in other cases, the Act does not prescribe criteria for the selection of an appropriate committee. However, cases have identified various considerations; see for example: Vranic (Re), 2007 BCSC 1949; Bowman (Re), 2009 BCSC 523, Palamarek (Re) , 2011 BCSC 563, Re Matthews, 2013 BCSC 1045; and Sangha (Re), 2013 BCSC 1965. They include:
- (a) whether the appointment reflects the patient's wishes, obviously when he or she was capable of forming such a wish;
 - (b) whether immediate family members are in agreement with the appointment;
 - (c) whether there is any conflict between family members or between the family and the patient, and whether the proposed committee would be likely to consult with immediate family members about the appropriate care of the patient;
 - (d) the level of previous involvement of the proposed committee with the patient, usually family members are preferred;
 - (e) the level of understanding of the proposed committee with the patient's current situation, and will that person be able to cope with future changes of the patient;
 - (f) whether the proposed committee will provide love and support to the patient;
 - (g) whether the proposed committee is the best person to deal with the financial affairs and ensure the income and estate are used for the patient's benefit;
 - (h) whether a proposed committee has breached a fiduciary duty owed to the patient, or engaged in activity which diminished confidence in that person's abilities to properly handle the patient's affairs;
 - (i) who is best to advocate for the patient's medical needs;
 - (j) whether the proposed committee has an appropriate plan of care and management for the patient and his or her affairs and is best able to carry it out; and
 - (k) whether a division of responsibilities such as between the patient's estate and the patient's person to different persons would serve the best interests of the patient, or would such a division be less than optimal for the patient.
- [30] The above listing is of course non-exhaustive or in any particular order. The inquiry is fact specific and a particular factor may or may not be applicable and may attract different weight depending on the circumstances of a case.
- [77] Annie, Diana and Pong seek to be named joint committees of person and estate, and do not wish to split the committee of person from the committee of the estate. They did not address whether they would prefer the PGT to be appointed over Joe and Wayne, if they were not appointed.

- [78] Joe and Wayne seek to be appointed jointly as committee of the estate and person of Ms. Yu. However, if I were to find an insurmountable conflict arises with respect to Wayne, then Wayne supports an order that Joe be appointed as the sole committee of the estate of Ms. Yu. In any event, they would prefer that I appoint the PGT rather than Annie, Diana and Pong.
- [79] The inquiry as to who should be appointed committee of the estate and the person is fact specific, and the relevance and weight of the Stewart factors will depend on the unique circumstances of each case.
- [80] I find the PGT is the appropriate committee of Ms. Yu's estate and of her person. In doing so, I considered and evaluated all admissible evidence available to me on these two applications in light of the legal test set out above. However, nothing I say in these Reasons for Judgment should constrain any judge in any future hearing who may be required to undertake a more detailed analysis of the circumstances, in particular but not limited to the Attorney Accounts and any future litigation arising from them.
- [81] The fundamental issue before me is what is in the best interests of Ms. Yu, and that consideration involves the review of the actions taken by the Attorneys, the current financial position of Ms. Yu (and whether that financial position was impacted adversely by decisions made by the Attorneys), the parties' respective proposals for her financial and personal future and their respective conflicts of interest. In deciding this issue, it is unnecessary that I resolve all of the conflicting evidence before me. There are a number of factors clearly supporting the PGT's appointment over either Annie, Diana and Pong, and over Joe and Wayne, which are beyond any serious dispute.

Consideration of the relevant factors

- [82] Upon a review of the totality of the admissible evidence, I am unable to conclude that any of the petitioners have demonstrated they are able to put their mother's best interests above their own financial self-interests. They have demonstrated they are unable to understand and appreciate the need to hold Ms. Yu's best interests as their paramount concern. They are each clearly financially self-interested, and have each already benefited from the significant gift made from the net sale proceeds of the 426 Property. Likewise, they have all failed to provide any evidence as to their potential financial benefit should the 420 Property be sold (being the alleged agreement of the shareholders as to the distribution of the net sales proceeds, and any explanation as to whether they intend to make a distribution to the non-shareholder siblings).
- [83] Further, Annie, Diana, Joe and Wayne have all demonstrated they are in various potential conflicts of interest with the best interests of their mother, in light of the identified potential future litigation (which may involve the actions of the Attorneys and/or the directors of the Company). It is also apparent there is significant conflict, tension and a lack of trust between all of the petitioners. My paramount consideration is who has demonstrated they can best protect Ms. Yu's best interests. I am satisfied that the overwhelming evidence establishes

that the PGT is the appropriate choice as the committee of Ms. Yu's estate and person, and the PGT is appointed in that capacity.

- [84] What follows is the rationale for this determination based on the relevant applicable factors as set out by Masuhara, J. I have incorporated the Stewart factors into three broad categories, to best identify and address the specific concerns that are most relevant to Ms. Yu's circumstances (and avoid unnecessary repetition), namely: Ms. Yu's wishes and who is best positioned to advocate for her future needs; the conflict and discord amongst her family; and who is best positioned to deal with her financial affairs.
- a) Ms. Yu's wishes and her future care needs
- [85] Annie, Diana and Pong point to the facts that Ms. Yu named Annie, Mimi and Pong as co-Executors of her Will in 1990, Annie as a director of the Company in 1994, and Annie and Diana as her attorneys in 2014, as evidence of Ms. Yu's wishes that they be responsible for her needs. They stress that Ms. Yu made no expression of confidence in either Wayne or Joe.
- [86] They say they have the best understanding of Ms. Yu's current situation and her needs. Annie has lived with Ms. Yu for many years, has provided her full time care for almost seven years, and Diana and Pong live nearby.
- [87] Joe and Wayne take the position that Ms. Yu's capacity at the time she executed the Enduring Power of Attorney is in dispute, and so an insignificant amount of weight should be placed on that decision. For reasons I have already addressed, there is insufficient evidence before me to conclude that Ms. Yu's cognitive state was so diminished in February 2014 that she lacked the capacity to grant a power of attorney as of that date.
- [88] While Ms. Yu's validly expressed wishes while mentally competent are an important factor in many circumstances (see Vranic (Re), 2007 BCSC 1949) and family members may be preferred normally, in these circumstances I must also consider Annie and Diana's financial management as fiduciaries and the family's lack of consensus for Ms. Yu's current and future needs.
- [89] Joe and Wayne seek as an alternative claim for relief that they be consulted prior to any significant care decisions being made on behalf of Ms. Yu. This clearly shows their appreciation for the importance of consultation with immediate family members about the appropriate care for Ms. Yu.
- [90] I am disappointed in the lack of evidence by either set of petitioners to address Ms. Yu's expected future care needs, including medical needs. I note that Dr. Louie provided evidence that "I believe her needs are being met in her current living situation of living with her daughter". There was also hearsay evidence from Joe that Shirley has advised all of her siblings that they must consider Ms. Yu's future medical needs, the fact Annie may not be able to care for her in the future, that she may need to be placed in a care home at some point in the future, and that consideration should be given to getting her on a wait list. Unfortunately, there was no further evidence on this point before me.

- [91] Annie, Diana and Pong propose Ms. Yu continue living with Annie in the Richmond Condo. Annie says she can "look after her 24/7" and that she gets assistance from Diana and Pong. She further states that "I believe, after so many years of living together, my mother would be upset if she moved away from me". I wish to emphasize that this Court recognizes that Annie has been a long term caregiver for her mother, and has demonstrated a commitment to that role. My reasons for judgment are not intended to reflect adversely on that long-term support.
- [92] Joe says that in September 2018 Ms. Yu told him she no longer wished to live with Annie but wanted to move to the 426 Property (which had already been sold).
- [93] Joe and Wayne say Ms. Yu may need to be placed in a long-term care facility soon. They note that Annie is currently approximately 70 years old. Wayne's proposal (supported by Joe) is set out in his First Affidavit sworn February 5, 2021:
12. My plan for the patient's care is to maintain her current living conditions due to the risks associated with moving her to a new location during the COVID-19 pandemic. The Patient has expressed to me on at least four separate occasions that she no longer wishes to live with Annie however, and so I would arrange for alternate living conditions as soon as reasonably possible. The Patient has expressed to me multiple times that she wishes to move into 426 Hastings, where our family has resided for over 40 years. However, that property was sold in 2017. My sister, Diana continues to occupy one of two residential units in 420 Hastings ("Unit B") despite that she recently purchased and moved into a condominium unit located at 6191 Buswell St, Richmond, BC. I would ask Diana to vacate Unit B and would move the Patient into this unit and arrange for a fulltime caregiver for the Patient. I have resided in the other of the two residential units of 420 Hastings ("Unit A") for over 10 years. If I lived next door to the Patient I would [be] able to assist the Patient with some elements of her daily personal care. In the alternative, I would place the Patient in a long-term residential care facility if her care needs become too complex for her to be cared for at home.
- [94] I am concerned that Annie, Diana and Pong clearly want to maintain Ms. Yu's current living arrangement, whereas Joe and Wayne want to move her to the 420 Property. While both sets of petitioners allude to Ms. Yu's potential need for further nursing assistance, and potential future need to move to a nursing home, there is very little evidence before me as to Ms. Yu's current daily needs, how they are met, and how her future daily needs are proposed to be met. The focus on the applications before me was very much on Ms. Yu's financial circumstances.
- [95] On the specific topic of the divergent views of where Ms. Yu should live, that will clearly now be a decision for the PGT, which will be made when they consider what is in the best interests of Ms. Yu.

[96] I find that in all of the circumstances Ms. Yu's wishes, along with the proposed committees' love, understanding, and ability to advocate or plan for Ms. Yu's future needs are all neutral factors which do not prefer one set of petitioners over the other.

b) Conflict and discord amongst the family

[97] The evidence in support of this petition and counter petition clearly demonstrate the lack of consensus and agreement amongst the family members. It is clear that there is significant conflict between the siblings and a lack of trust between them. It is hoped that regardless of the determination of this litigation Annie, Diana, Pong, Joe and Wayne will continue to love and support their mother.

[98] Joe and Wayne make allegations that Ms. Yu has been the victim of elder abuse. I am unable to make any findings related to the alleged elder abuse based on the evidence before me. The allegations rely upon hearsay evidence from their mother (whom they say is now incapable, and has been for some unknown period of time) and are based upon their own conjecture and supposition. Joe reported the concerns of elder abuse (and her financial affairs) to the PGT in January of 2020. The PGT in their response to both petitions note:

With respect to the concerns raised by the Respondents [Joe and Wayne] of possible elder abuse and Ms. Yu's desire not to live with Annie, the evidence is conflicting and the Public Guardian and Trustee is not in a position to resolve the disputes in evidence. Accordingly, the Public Guardian and Trustee takes no position on the appropriate person to be committee of person of Ms. Yu.

[99] Annie, Diana and Pong put a significant amount of weight on the fact that three of the siblings (Shirley, Amy and Mimi) have consented to their appointment. While counsel argued that Shirley, Amy and Mimi's silence with respect to the allegations of elder abuse made by Joe and Wayne "is deafening", this must be considered in the context that in this highly adversarial hearing Shirley, Amy and Mimi have failed to provide any affidavit evidence. The fact Annie failed to substantively respond to any of the allegations of elder abuse must also be considered.

[100] I am mindful that there is a significant level of discord and disharmony demonstrated on the evidence, and that appointing one group of siblings over the other would inevitably exacerbate the existing conflict between the parties. In my view, it is a fair and reasonable inference from the pattern of behaviour exhibited, and the affidavit evidence filed, that if I appoint either Annie, Diana or Pong, or Joe and Wayne, as co-committees, then there will continue to be increased conflict, acrimony and legal expense at the cost of Ms. Yu. This factor weighs in favour of appointing the PGT as committee of the person.

c) Best person to deal with financial affairs

[101] It is clear that the PGT is the best choice to deal with Ms. Yu's financial affairs, and to ensure that her income and her estate are used for her benefit.

- [102] The Attorneys have demonstrated a lack of fundamental appreciation for their responsibilities as fiduciaries. While leaving aside the issue of the necessary review of the Attorney Accounts, and any determination as to whether they in fact breached their fiduciary obligations to Ms. Yu, the evidence before me is clear that:
- (a) the Attorneys participated in gifting approximately \$880,000 from Ms. Yu's assets to her eight children, notwithstanding the clear instructions in the Power of Attorney that the Attorneys were not to make gifts;
 - (b) the Attorneys inappropriately justify this gift by saying the gift was not made in secret, and all of their siblings were involved, which shows a clear lack of appreciation of their fiduciary role as Attorneys;
 - (c) the Attorneys have co-mingled Ms. Yu's assets with those of the Company;
 - (d) the Attorneys have co-mingled Ms. Yu's assets by placing them in accounts owned jointly with them (with the potential of impacting her long held estate plan with the rights of survivorship associated with those joint accounts); and
 - (e) the Attorneys have failed to keep and produce appropriate records, as was their responsibility as Attorneys.
- [103] There is no evidence before me as to Pong's appreciation of his proposed role as a fiduciary, other than his apparent acceptance of the gift made to him of \$160,000.
- [104] Joe and Wayne are both in a position of potential significant conflict of interest with Ms. Yu. Joe has retained corporate counsel and appears to be anticipating future corporate litigation involving the Company. Wayne has unilaterally decided to stop paying rent for the unit he occupies at the 420 Property, and clearly believes Ms. Yu should continue to make gifts to him as she had in the past.
- [105] In all of the circumstances I am deeply concerned about Ms. Yu's current financial affairs, and the ability of any of the petitioners to ensure that her assets are used solely for her benefit. Unfortunately, there is clearly a significant potential of future litigation likely to involve conflicts of interests among both groups of petitioners.
- [106] Annie, Diana and Pong have no proposal for unravelling and understanding the actions taken by the Attorneys, although they do agree the Attorneys should provide the Attorney Accounts. Their plan for managing her financial affairs does not address resolving any inappropriate steps taken by the Attorneys (such as the \$880,000 gift), nor does Annie in her capacity as a director of the Company have any proposed plan for disentangling the financial affairs of Ms. Yu from the financial affairs of the Company.

- [107] Likewise, neither Joe nor Wayne put forward a concrete plan for either addressing the actions taken by the Attorneys nor do they propose any plan for disentangling the financial affairs of Ms. Yu from the financial affairs of the Company (notwithstanding Joe's evidence there may be separate litigation involving the Company).
- [108] I am not satisfied that either group of petitioners would be able to fulfil their duties, and exercise their powers, in the selfless manner required of a committee. Neither group of petitioners has demonstrated a fundamental appreciation of the role of a fiduciary, nor demonstrated the ability to place Ms. Yu's best interests above their own.

Summary

- [109] The PGT is in the best position to protect and manage Ms. Yu's financial affairs. Further, given the significant distrust and conflict between the two separate groups of petitioners, and Joe and Wayne's concerns over the lack of transparency exhibited by the Attorneys, and Annie as primary caregiver to date for Ms. Yu, I find the PGT is also in the best position to protect and plan for Ms. Yu's future care needs.
- [110] As committee of the person, the PGT is to consult regularly with Ms. Yu's medical doctors, and is to canvas all of her children in advance of any significant care decisions they make on behalf of Ms. Yu (although the PGT's decision, as committee of the person, shall make all ultimate health care decisions). As eloquently described by Justice Masuhara in *Stewart (Re)*, "Consultation does not mean agreement; rather, it means discussion with a hope that the best interest of Hazel [the patient] could be arrived at through it" (para. 48).
- [111] I also direct the PGT to facilitate meaningful and independent contact of all family members with Ms. Yu, for so long as they determine that to be in her best interests. I note that Annie, Diana and Pong proposed that Ms. Yu continue to live with Annie until that was no longer possible, and Joe and Wayne proposed that Ms. Yu live with Annie, and then move to reside at the 420 Property. While I will not fetter the PGT's discretion to make all necessary health care decisions for Ms. Yu, I would urge them to consider not only Ms. Yu's current health needs but her anticipated short and long term health and care needs, and develop a long term plan for her care that will ensure her best interests are protected.
- [112] While I am mindful that typically the appointment of the PGT as a committee is a last resort measure where no person is available or appropriate to act, I determine that in these circumstances, the appointment of either of the groups of petitioners would not be in the best interests of Ms. Yu. The PGT is prepared to act as committee of both Ms. Yu's person and estate, and I find that is in her best interests for them to be appointed as such.

Orders

- [113] I order as follows:
- (a) Ms. Yu is declared incapable of managing herself or her affairs;

- (b) the PGT is appointed as committee of the estate and person of Ms. Yu;
 - (c) the PGT is to immediately take steps to protect and secure Ms. Yu's assets, including to:
 - (i) secure GIC Account XXXXXX779 (either by removing Diana and Annie as joint owners, or alternatively transferring this investment to another authorized investment in the sole name of Ms. Yu);
 - (ii) secure CIBC Account XXXX831 (either by removing Annie and Diana as joint owners, or alternatively transferring the balance to another account in the sole name of Ms. Yu);
 - (iii) secure CIBC Account 293 (either by removing Annie as a joint owner, or transferring the balance to another account in the sole name of Ms. Yu); and
 - (iv) determine the named beneficiaries of CIBC Tax Free Savings Account XXXXX998, including who made the designation, when, and take any necessary further steps;
 - (d) the Attorneys are to provide the Attorney Accounts to the PGT, in their capacity as committee for Ms. Yu, within 90 days of these reasons for judgment being issued;
 - (e) the Attorneys are terminated in their role as Powers of Attorney by operation of s. 19 of the PPA;
 - (f) costs as ordered below; and
 - (g) the balance of the relief sought in both the petition brought by Annie, Diana and Pong, and in the petition brought by Wayne and Joe, is dismissed.
- [114] The committee of estate may also wish to consider the need to consult with a corporate lawyer, from the perspective of Ms. Yu as a director and voting shareholder of the Company.

Costs

- [115] Both sets of petitioners seek that their costs of bringing their petitions be paid from Ms. Yu's estate on a special costs basis. They take the position that no one was motivated by malice, nor improper motives, and that the petitions were necessary to protect both Ms. Yu's health and her estate moving forward.
- [116] Section 27 of the PPA provides that the costs of proceedings brought under the PPA are in the discretion of this Court. In *Vieira (Re)*, 2013 BCCA 420, the Court of Appeal noted:
- [17] In applications for committeehip, it appears that the usual practice of the Supreme Court is to award the successful applicant costs from the estate. This is a sensible position where the application is brought in good faith and where the applicant receives no obvious benefit from the appointment of a committee. Where a committee is appointed, it is because the court has concluded that it is in the best interests of the patient. A party who has brought an application that is found to be in the best interests of the patient, and with no ulterior motive, should be reimbursed for their costs in doing so.

- [118] While it appears to be the usual practice for a successful applicant on a committee ship application to be granted an order for special costs to be paid from the patient's estate, there is wide discretion to depart from this practice. If, for example, there are concerns about the motives of the applicant, the applicant's conduct of the application, or the ability of the estate to bear an order for costs, a different order might be called for. I do not suggest in any way that this is an exhaustive list of considerations.
- [117] While the petitioners were unsuccessful in being named as committee, I do not conclude that either group of petitioners were motivated by malice, nor improper motives. I would therefore award costs to all of the parties from Ms. Yu's estate.
- [118] However, I have concern about ordering Ms. Yu's estate to pay special costs: see Vieira at para. 18 and Seifred v. Arnold, 2021 BCSC 278 at para. 224. I also note that each group of petitioners has already received a significant financial gift from the decision to gift the children \$880,000. Annie, Diana and Pong received \$360,000 from Ms. Yu in 2018, and Joe and Wayne were to receive \$320,000 (and acknowledge receiving between them a total of \$194,000 - being \$160,000 to Joe and \$34,000 to Wayne). To make an order for special costs payable from Ms. Yu's estate to each of the petitioners would be an undue burden upon her estate, given the uncertainty over her current assets, her anticipated future financial needs and the recent receipt by the petitioners of this significant gift. It would not be appropriate to order those costs as special costs in the circumstances.
- [119] Accordingly, the parties are entitled to their ordinary costs of and incidental to these two petitions, assessed at Scale B, to be paid from Ms. Yu's estate. Each of the petitioners' Bills of Costs are subject to review and approval by the PGT, and assessment before a registrar of this Court in the event they cannot be agreed to. Further, if the PGT determines that the payment to Remedios and Company (in the total amount of \$16,600 as set out in para. [51] (n) above) was made on account of these legal proceedings, that payment should be considered as part of the review and approval of the petitioners' Bills of Costs.

"Blake, J."

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