

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *In the Matter of the Patients Property Act*
v. Jones,
2021 BCSC 1427

Date: 20210722
Docket: S65951
Registry: New Westminster

In the Matter of the Patients Property Act
R.S.B.C. 1996, Chapter 349, as Amended

and

Joelle Audra Jones

Before: Registrar Nielsen

Report and Recommendation

Counsel for Patient: E. Hong

Counsel for Committee: T. Chan

Place and Date of Hearing: New Westminster, B.C.

August 29 & 30,
December 14, 2016,
February 28, August 16,
November 29, 2018,
April 26, September 10, 2019
February 5, 2020
February 2, May 6 and
May 20, 2021

Place and Date of Decision: New Westminster, B.C.
July 22, 2021

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Introduction

[1] The patient, Ms. Joelle Jones (Joelle) has been afflicted with diabetes since she was eleven years old. In January of 2001, while residing in Red Deer Alberta, she went into a diabetic coma for approximately three weeks. As a result of the coma, Joelle suffered physical and intellectual disabilities.

[2] On April 11, 2001, her sister, Ms. Carrie Victor (Carrie) was appointed committee of Joelle's estate.

[3] In November of 2001, Joelle was released from the hospital and began living with her father, Daniel Morrison (Dan), and her brother, Terry Morrison (Terry) at Dan's residence at 13063 Lanark Place, Surrey BC. Joelle has continued to live at Dan's residence since Dan passed away on April 23, 2011.

[4] Joelle's income consists of approximately 12,000 per year in disability benefits.

[5] Carrie continued as Joelle's committee until 2012. Both Joelle and Terry became concerned when they discovered that Carrie had not deposited several cheques payable to Joelle, and had failed to pay Joelle's allowance to her. This precipitated Joelle's application to have herself declared as no longer incapable of handling her own affairs, and to have Carrie removed as her committee.

[6] By order dated October 30, 2012, Carrie was discharged as Joelle's committee and she began to handle her own affairs. The court premised Carrie's discharge with her passing her accounts before the Registrar, or upon the waiver of Joelle in a form satisfactory to the Public Guardian and Trustee (the PGT).

[7] Carrie had previously passed her accounts with the PGT on three occasions, however, Joelle alleges those accounts were incomplete, inaccurate, and contained misrepresentations. Joelle also alleges Carrie did not provide the PGT with details of Joelle's power chequing account from which inter-mingled money was expended not to her benefit. She further alleges that Carrie inter-mingled and misappropriated her

funds, and has failed to account for monies over the twelve years she acted as committee.

[8] Carrie agrees she inter-mingled Joelle's funds with her own, and that her accounting is not perfect, however she states that she has recreated the accounts to the best of her ability. She further submits she acted only for Joelle's benefit, and in fact, Joelle benefitted from the intermingling of funds. She also alleges that Terry and Joelle disposed of some of the accounting records she allegedly kept at Dan's residence, thereby making an accurate and complete accounting impossible.

[9] Joelle did not provide a waiver and instead has required Carrie to pass her accounts. The court ordered a reference to the registrar for the purpose of passing the accounts on March 29, 2016. The court's order states:

1. Pursuant to Section 13 of the *Patient's Property Act*, Carrie Lyn Victor shall attend a hearing before a Registrar passing of accounts as a Committee arranged by Joelle Audra Jones or her counsel.
2. This application shall be adjourned to the hearing of Estate File No. P21791 to be heard on April 25, 2016.
3. The signature of Carrie Lyn Victor is hereby dispensed with.

[10] After much difficulty in getting her to pass her accounts, Carrie made her first statement of account on July 14, 2017, which was served in August 2017. A revised account was made on August 26, 2019 (the revised P40).

[11] Since Dan passed away on April 23, 2011, Carrie, Terry, and Joelle have been embroiled in two collateral estate proceedings. A wills variation action was settled, giving Joelle 55% of Dan's estate and 22.5% to Carrie and Terry respectively. Pursuant to a registrar's report dated July 23, 2015, Carrie's share of Dan's estate was established at 105,403.57. This amount has not been paid and awaits the outcome of this passing of accounts.

[12] On December 22, 2016, Carrie made an assignment into bankruptcy.

[13] At the passing of accounts, Carrie, Joelle and Terry testified in-person. Each of them were cross examined extensively on their oral and prior affidavit evidence.

The Expenses Disputed by Joelle

[14] Joelle does not dispute all the accounts. What follows is a discussion of those accounts in dispute in the revised P40 sworn August 26, 2019.

F1: Entertainment from 2001 to 2007

[15] Carrie claims 2,795.07 in expenses for entertainment for Joelle involving the purchase of books, magazines, rental of videos, watching movies in theatres with Joelle, and taking Joelle to the Cloverdale rodeo in 2002.

[16] Both Joelle and Terry testified that Carrie had taken Joelle to a Costco XMAS party in 2002 which was a disaster, and afterwards, the two saw each other rarely. Joelle testified that she and Carrie would see a movie together once or twice a year, no more. Joelle submits that in the absence of receipts, Carrie should be credited for no more than 200.00.

[17] In the absence of receipts, and given the evidence of the parties, I would recommend no more that 1,000 be credited to Carrie.

F2: Gas from 2001 to 20012

[18] Carrie claims 3,313.79 in gasoline costs. Part of the gasoline costs are alleged reimbursement of Dan's expenses. Carrie testified that during the committeeship, she and Dan had to drive Carrie to medical appointments, between Dan and Carrie's home, and in connection with Joelle's social activities and entertainment. There is no proper accounting for these alleged expenditures. There are records from the Scotia bank chequing account #81190 00846 89 containing Joelle's money (Joelle's power chequing account) which show gasoline expenditures in the amount of 1,156.05, but there is no reference to how they were for Joelle's benefit.

[19] Joelle testified she and Carrie rarely engaged socially or otherwise after 2002, and that by mid-2003 she was attending her own appointments on foot or by transit. She further testified that she and Dan often ran their errands together. Carrie's claims, according to Joelle, are an exaggeration and not adequately supported.

Joelle acknowledges that the expenditure of gasoline for Joelle's benefit would have been necessary up to the end of 2002, however, the amount should be limited to 500.00.

[20] In the absence of proper records, and given the evidence of the parties, I agree the amount claimed needs to be reduced. I recommend allowing 1,500 for gas expenditures.

F4: Clothing from 2001 to 2007

[21] Carrie claims 3,527.61 in clothing expenses for Joelle from 2001 to 2007. Carrie testified that Joelle's weight fluctuated and she encountered incontinence issues which necessitated the purchase of clothes. Again, these expenditures are not adequately accounted for. Joelle does agree that Carrie purchased second hand clothes for her from thrift stores, and would deliver them to her in a garbage bag.

[22] The records from the power chequing account between 2003 and 2007 show clothing and shoe purchases totalling 4,335.90, and between 2008 and 2012 totalling 12,224.45. However, the bulk of these purchases were from high end designer stores. Both Terry and Joelle testified that the clothes given to Joelle came from thrift stores and that she was never provided with any designer clothes.

[23] Joelle submits that Carrie has failed to account for the discrepancy between the 16,580.35 she actually incurred at clothing and shoe stores between July 2003 and October 2012, taken from Joelle's power chequing account, and the 3,527.61 she claims as an expense of the committeship from 2001 to 2007.

[24] In my view the evidence supports a claim in the range of 1,500 and I would recommend this amount. However, this still leaves 15,080.35 in clothing and shoe expenditures from the power chequing account still unaccounted for. By way of example, the records show unexplained debit transactions at Winners, Banana Republic, Danier Leather, Bebe, Zigzag White Rock, Magique, Sinika's Boutique, BCBG Max, Azria, Holt Renfrew, John Fluevog Boots and Shoes, Turner Shoes,

Bootlegger, Calvin Klein, Le Chateau, Tommy Hilfiger, Club Monaco, Reitman's, The Gap, and Anna Christina Boutique.

F13: Food from 2001 to 2008

[25] Carrie claims 4,923.89 for food related expenses from 2001 to 2008. Carrie testified that since 2002 Dan had charged Joelle "room and board" which included groceries for meals. These expenditures are not in dispute. The 4,923.89 is in addition to the amounts claimed for room and board. Carrie attributes this expenditure, in part, to be a reimbursement to Dan for fast food bought on Joelle's behalf by him. In addition, she attributes it to special diabetic dietary requirements for Joelle at Organic Grocer, and Carrie taking Joelle to Earls and Brewster's Pub.

[26] Joelle testified that Carrie would on occasion meet with Dan to ask for or borrow money. Carrie on the other hand, attributes these meetings to discussions whereby Carrie was reimbursing Dan for Joelle's additional food expenses.

[27] Both Joelle and Terry testified that over the years Dan would, on occasion, take them for a meal, or just a coffee, at McDonalds but he would never seek reimbursement. The outings were traditionally at his expense.

[28] Joelle testified that Carrie and her did not go out for meals together or otherwise socialize after 2002, and they rarely saw each other.

[29] Joelle's power chequing account reveals a further 947.72 in purchases from grocery stores between 2009 and 2012, which are not accounted for.

[30] I do not find that the 4,923.89 in food expenditures, in addition to Joelle's room and board, to have been properly accounted for. In the absence of any proper accounting or receipts, I would recommend that no more than 1,000 be allowed for additional food expenditures. This leaves a total of 4,871.61 in additional food expenditures not being accounted for.

F16: Miscellaneous from 2001 to 2012

[31] Carrie claims 2,069.03 for miscellaneous expenses from 2001 to 2012. These expenses include cotton swabs, hair clips, arts and craft supplies, some household expenses, and the paying for Joelle's TV while in hospital.

[32] Given that these matters do not fit under any of the other defined categories, they've been listed, as a group, as miscellaneous. The bulk of these expenses are not supported by receipts, and Joelle submits they ought to be disallowed.

[33] Some of the expenses are supported by receipts, but most are not. I would recommend that a total 1,100 be allowed under the category of miscellaneous.

F19: Daniel Morrison from 2001 to 2012

[34] Carrie claims 16,943.29 in payments made to their father from 2001 to 2012 in respect of an alleged loan in the amount of 51,628 which supposedly predated the committee's term. According to Carrie, she made loan repayments to Dan during the committee's term. Prior to his death, Carrie alleges that Dan decided to forgive the alleged loan's outstanding balance of 25,000.

[35] Carrie testified that prior to his death, Dan provided extensive care to Joelle and would seek reimbursement from Carrie for the alleged expenses incurred. Carrie submits that she would have paid 26,628 in order to reduce the debt from 51,628 to 25,000.

[36] Three cheques were produced as Appendix 12, which include handwriting from counsel in order to indicate what the original carbon copies state, given that they are essentially illegible. There are also cheques to Dan allegedly for payments towards Joelle's van in the amount of 200 for September to December 2001, and February 2002 which have been included under this category as they do not fit logically elsewhere.

[37] The evidence provided by Carrie in support of her contention that she repaid the alleged loan does not actually add up to the 16,943.29 claimed. As noted by

counsel for Joelle, in Carrie's closing argument, Carrie appears to be claiming she actually paid 26,628 to reduce the alleged loan from 51,628 to 25,000.

[38] Joelle submits there never was a loan. Joelle testified that while she was still in hospital recovering from her coma, Carrie had her sign documents alleging that Carrie owed Dan money.

[39] There are problems with Carrie's evidence. The cheques produced, all of which are issued from Joelle's power chequing account, as Appendix 12 of Carrie's closing argument in support of the alleged repayment, total 20,000, not 16,943.29. Further, despite the fact that the cheques are dated months and years apart, the cheques are sequentially numbered:

- a. Cheque #026 for 5,000 is dated August 30, 2001;
- b. Cheque #027 for 7,500 is dated September 10, 2002, and
- c. Cheque #028 for 7,500 is dated January 15, 2004.

[40] As the earliest records for Joelle's power chequing account date from July 2003, it is impossible to verify whether the August 30, 2001 and September 10, 2002 cheques were ever cashed. The 2004 statement for Joelle's power chequing account does show that no cheque in the amount of 7,500 was ever cashed at any time in 2004.

[41] As submitted by counsel for Joelle, it would have been stale dated by July 2004. Adding to the mystery is the fact that a cheque with the same number #028 was cashed from Joelle's power chequing account on February 9, 2004 in the amount of 450, for rent on Joelle's behalf, to her father, Dan.

[42] Counsel for Joelle submits that it is improbable that Dan would have forgotten or declined to cash a cheque in the amount of 7,500, particularly if the funds were meant to repay a legitimate loan. It begs the question of why would Carrie produce a cheque payable to Dan for 7,500 which was not cashed by him or anyone. Counsel for Joelle submits the only reasonable explanation is that towards the end of the

committeeship, Carrie backdated the cheques in an attempt to reconcile her accounting, knowing the supporting records were no longer be available to dispute the payments.

[43] At the passing of accounts before the PGT for the period from April 2001 to October 2004, Carrie presented to the PGT that she paid a total of 15,567 to Dan for the alleged loan as follows:

- a. July 1, 2001 – 8,067;
- b. February 2, 2002 – 5,000, and
- c. February 27, 2002 – 2,500.

[44] Of the three alleged payments, only the July 1, 2001 payment in the amount of 8,067 is supported by the evidence as having been paid. However, counsel for Joelle submits the 8,067 payment to Dan was a partial repayment of other liabilities totalling 9,950 listed in Carrie's Affidavit of Kindred and Fortune. The other two alleged payments are not traceable as Carrie did not provide copies of those cheques to the PGT and there are no statements for Joelle's power chequing account from January 2002 to July 2003. The amounts Carrie advised the PGT she made towards the alleged loan do not correspond to the dates of the duplicate cheques she now relies upon in Appendix 12.

[45] Counsel for Joelle submits the most reasonable explanation for Carrie reporting differing amounts and dates of repayment of the alleged loan is that while she was attempting to account, she forgot what she had represented to the PGT about the alleged loan in 2004.

[46] In her passing of accounts to the PGT for the period October 2004 to October 2009, Carrie represented that she paid a total of 11,011 to Dan on the alleged loan by making cash payments to him whenever there was money left over after payment for Joelle's expenses.

[47] Counsel for Joelle submits that none of these monies were paid to their father, rather Carrie spent the money for her own benefit.

[48] Counsel for Joelle has submitted that the evidence of Carrie regarding the forgiveness of the alleged loan is also problematic. In an affidavit sworn September 6, 2013, Carrie attests that as executrix of Dan's estate, she forgave all of the alleged loan and deposited 20,643 into Joelle's power chequing account as a result. The evidence she forgave the alleged loan contradicts the evidence she gave to the PGT in her last accounting that it was her father, Dan, who forgave the remaining 25,000 owing on the alleged loan.

[49] Counsel for Joelle submits the evidence produced by Carrie in relation to the alleged loan is entirely unsatisfactory and that she has failed to provide any evidence supporting the basis for the alleged loan, what amounts the alleged loan consisted of, when the amounts were incurred, and on what terms the alleged loan was paid to Dan. Joelle's evidence was that she had no knowledge of a loan allegedly owed to Dan until she obtained the records of the PGT.

[50] I agree with the submissions of counsel for Joelle that Carrie has failed to prove the existence of a valid loan owed to Dan, or valid payments having been made towards it. I would recommend the disallowance of the claim for 16,943.29 in its entirety.

F23: Respite care from 2002 to 2004

[51] Carrie claims 7,200 for respite care allegedly provided between 2002 and 2004. She testified that due to his post-polio syndrome, Dan would become exhausted from taking care of Joelle, so Carrie would assume that duty at her home from time to time. She testified she would assist with bathing and feeding Joelle. Hiring a care aid was apparently not an option as Joelle would experience occasional violent outbursts. Carrie maintains she provided this care on a monthly basis over a period of three years for which she claims 200 per month. She further attests that she spent approximately three to five days a week with Joelle throughout the eleven year committee ship.

[52] Joelle and Terry testified that Joelle did not go to Carrie's on any regular basis, and not at all after December 2002. Indeed, Joelle testified that she did not engage socially, or on a caregiving basis, after December 2002. By mid 2003, Joelle had progressed to the point where she could handle the day-to-day activities of daily living including her personal care, grocery shopping, and navigating transit to her appointments.

[53] Counsel for Joelle submits this claim ought to be denied in its entirety.

[54] I am satisfied that Carrie did provide some respite care, however, I do not agree that it was provided on any regular ongoing basis. At best it was provided on occasion. I would recommend an amount of 2,500 to be allotted for respite care.

F27: Remuneration 2012

[55] Carrie has limited her claim for remuneration to 2,195.41, the amount she took in her final passing of accounts with the PGT who approved this amount. Counsel for Carrie submits this amount is negligible given the length of the committee, and the time and effort invested, and is inconsistent with the allegations made by Joelle and Terry within the proceeding.

[56] For reasons which precede, and follow the topic of remuneration, I agree with counsel for Joelle, that given the conduct of Carrie, no remuneration is appropriate. I would recommend the denial of the 2,195.41 claimed.

Further Allegations by the Patient Joelle Jones

Failure to account for all the expenses from January 2002 to June 2003

[57] Between January 28 and February 1, 2002, the exact date is unknown, Carrie withdrew 50,878.06 from Joelle's Bank of Montreal account #0784 8127-094 (BMO acct. 094), leaving BMO acct. 094 empty. On the statement of BMO acct. 094. for the period ending February 1, 2002, Carrie hand wrote "transferred to the Scotia Bank", meaning Joelle's power chequing account. By July 2003, there was only 601.12 in the power chequing account, despite Joelle having received income in the amount of 15,621.76, between January 28, 2002 and June 2003 (4,891.54 from

Sunlife disability benefits and 10,730.22 in CPP benefits). Carrie accounted for 16,087.85 during this period comprised of:

- a) Room and Board of 7,650;
- b) Expenditures supported by receipts of 5,093.44; and
- c) Joelle's allowance of 3,344.41.

[58] Counsel for Joelle submits that assuming all the expenses claimed are legitimate, and rounding up the amounts to 20,000 to account for other minor expenses, Carrie has failed to account for approximately 46,499.82.

[59] I agree this significant amount is seemingly unaccounted for. It should be emphasized that it is the duty of the committee to properly account. That has not been done, and given the ongoing co-mingling of funds, the failure to keep receipts and records, and the passage of time, it is now virtually impossible.

Failure to account for expenses from July 2003 to October 2012.

[60] Counsel for Joelle submits that all the charges, withdrawals, and consumer purchases which were made from Joelle's power chequing account, in the amount of 53,368.29, between July 2003 and October 2012 have not been properly applied to the line items in the revised P40. As a result, they have not been accounted for and give the false impression of a surplus, rather than a loss. This has given rise to what she submits is a spurious submission on the part of Carrie, that Joelle has benefitted from Carrie's comingling of funds because of the alleged surplus.

[61] Counsel for Joelle submits that the only reasonable explanation for how the revised P40 shows a surplus of monies to Joelle, rather than a loss, is because Carrie invented and exaggerated the expenses claimed, and did not account for the many expenditures from Joelle's power chequing account which are not referenced as expenses in the revised P40.

[62] Counsel further submits that by listing only a fraction of the expenses and deductions incurred between 2001 and 2012 on the revised P40 as being for Joelle's benefit, Carrie acknowledges that the unaccounted for expenses which haven't been claimed on the revised P40 were not incurred for Joelle's benefit.

Credibility of the parties

[63] Both parties made extensive submissions regarding credibility.

The credibility of Carrie Victor

[64] Counsel for Carrie submits that she is the most credible of the three viva voce witness's and the evidence of both Joelle and Terry is colored by self interest, lack of first hand knowledge, and memory impairments. Carrie attributes the lack of documentation in regards to banking records and receipts to their destruction by Joelle and Terry as she kept them in Dan's office at the house where they both resided. Ultimately, when she obtained the contents of Dan's filing cabinet, where she allegedly stored the records, they consisted of empty folders. Conveniently, some of the missing records were eventually found in Carrie's apartment.

[65] Carrie submits it would have been unreasonable for her to have destroyed her own accounting records before Dan's passing given that she would have needed them for her third accounting to the PGT. Of course, this presumes the records were favorable to Carrie and would have assisted her, rather than exposed financial misdealing's.

[66] In a 2004 report to the PGT, Carrie reported that Joelle would hide or throw away any mail in the house with her name on it. Given Carrie's concerns expressed to the PGT, it is somewhat counter intuitive for Carrie to have stored her records at Dan's house, given Joelle's alleged proclivities.

[67] Joelle submits that Carries assertion that she kept the records at Dan's house is simply untrue.

[68] Carrie submitted documents and an accounting to the PGT in October 2012, yet she submits these records have disappeared. It is difficult to reconcile this with the fact that in April 2017, Carrie was able to produce a large volume of original receipts and was able to recreate an accounting by using them. Clearly Carrie was in possession of many records related to the committee ship.

[69] Carrie acknowledges that she did not appear, as originally ordered, to pass her accounts, but submits she was experiencing physical and mental health issues caused by severe depression because of the multiple legal actions involving Terry and Joelle, and her financial difficulties which led to her assignment into bankruptcy.

[70] Carrie submits that she was candid about her co-mingling of funds with the PGT, how she understood it was improper, but that she always erred on the side which was to the estate's benefit. She further acknowledged that the recreation of the accounts was only possible to the extent of her memory and the existing documentation. In her words, "the accounting is not perfect".

[71] Carrie submits that prior to the committee ship, she had no experience or knowledge about fiduciary matters. She was also distraught by what she described as the hostility of her siblings. Counsel for Carrie submits that she presented her accounting in a straightforward manner to the best of her ability, and was ultimately able to explain it with the support of the receipts she possessed.

[72] Carrie also submits that her forgiveness of the loan Joelle allegedly owed to their father Dan, and her retaining of a lawyer to represent Joelle in a separate Wills Variation Act proceeding which resulted in a variation of the will to Joelle's favor, also buttress's her credibility. The wills variation proceeding resulted in Dan's estate being divided on the basis of 55% to Joelle and 22.5% to Terry and Carrie respectively through settlement.

[73] I have no evidence before me of any of the nuances arising from the wills variation action. The settlement on the terms described may have been based on legal advice that it was inevitable the will would have been varied given Joelle's

disabilities, or the fact that they arouse after the making of the will. I simply don't have any basis to arrive at a conclusion in this regard. Also, Terry agreed to the variation, and Carrie takes issue with his evidence in this proceeding. If the settlement agreement were to buttress Carrie's credibility, it would equally buttress Terry's.

[74] Joelle submits that Carrie has had financial difficulties, which date back to her appointment as committee. The records illustrate that Carrie drew from at least four forms of credit, she rarely paid the minimum balance on those credit cards, and continued to accrue debt by making expensive consumer purchases.

[75] The records show that in April 2001, when Carrie obtained committeehip, she owed 1,899.96 on her MasterCard ending in 7565 and carried a 1,951.69 balance from the prior month. In October 2004, when she first passed her accounts before the PGT she owed 5,995.67; in October 2007, when she passed her second accounts she owed 7,502.57; and in October 2012, at the end of the committeehip she owed 13,191.40 on the Master Card.

[76] In October 2012, Carrie owed 7,603.22 on her Scotia bank Visa ending in 024; 24,079.92 on her Scotia bank Visa ending in 018; 13,343.58 on her Scotia bank line of credit; and, 13,191.4 on her Master Card ending in 7565. These debts, and the seemingly extravagant purchases in the records made from the co-mingled funds, are indicative of an unsustainable pattern of behavior.

[77] In January 2015, Carrie lost her home to foreclosure.

[78] It is also troubling that despite acknowledging that she should not be co-mingling funds, she continued to do so to the very end of the committeehip in 2012. Counsel for Joelle submits that this was a knowing and continued breach of her fiduciary duty to Joelle. I agree. It has also resulted in a situation where an accurate accounting is now impossible.

[79] Counsel for Joelle submits that Carrie's misuse of Joelle's investment proceeds is further indicative of her lack of credibility. On October 2, 2004, Carrie

purchased a GIC (the 2004 GIC) for Joelle at Scotia bank in the amount of 15,000, with interest that accrued at 3.69% The GIC matured on October 2, 2007, with interest in the amount of 1,722.53. In 2007, Carrie reinvested these funds into another GIC (the 2007 GIC) with interest payable at 3.4%. The 2007 GIC matured October 2, 2010 with a value of 18,488.56. Rather than reinvest this amount, Carrie cashed it in and transferred the funds to Joelle's power chequing account, which at the time had a negative balance of 2.19. Carrie deposed in her affidavit #1 filed herein, that she took the funds as a gift from her father. Under cross examination she stated she used the money to repay Joelle's alleged loan to their father Dan. However, the records produced contain no evidence of a repayment to their father.

[80] The records of Joelle's power chequing account do not show any repayment to Dan. Rather, they show expenditures on personal purchases, none of which were for Joelle, and withdrawals of funds till the account had dwindled to 207.43 by February 24, 2011.

[81] On September 29, 2012, one month prior to the end of the committee's term, Joelle's power chequing account had a balance of only 1,239.79. On October 23, 2012, one week prior to the court declaring Joelle capable of handling her own affairs, Carrie deposited 20,643 into the account. In affidavit #1 Carrie deposed that she deposited the money as a gift from Carrie to help with her start to independence. Under cross examination, Carrie stated she deposited the 20,643 into the account because she felt Joelle should not have to repay the alleged loan to their father Dan. The source of the 20,643 was a personal loan from her friend, Ms. White.

[82] Counsel for Joelle submits that the reason for the deposit was because Carrie knew that Joelle would soon have access to the records and would soon discover that Carrie had been using Joelle's funds for Carrie's personal purchases.

[83] Counsel further submits that this is reinforced by the fact that just four days before the committee's term ended, Carrie opened a new savings account at the BMO on October 26, 2012, having account number 0784-8981-899 (the new BMO account). Then, one day later, on October 27, 2012, Carrie withdrew the full balance

of Joelle's power chequing account in the amount of 20,666.90, and deposited this amount into the new BMO account on October 29, 2012. Then, again on October 29, 2012, Carrie provided an accounting to the PGT for the time period from October 2009 to October 2012. This accounting disclosed for the first time the new BMO account and the balance of 20,531.64.

[84] Counsel for Joelle submits that the creation of the new BMO account was designed to hide the deposit of the 2007 GIC into Joelle's power chequing account; hide the many questionable consumer purchases not made for Joelle's benefit; the deposit of the 20,643 on October 23, 2012; and, the very existence of Joelle's power chequing account.

[85] Counsel for Joelle further submits that Carrie's credibility is negatively affected by her representations to Joelle concerning alleged problems with Joelle's Sun Life benefits, and in Carrie's dealings with the PGT.

[86] On April 12, 2011, shortly after their father Dan died, Carrie advised Joelle that she would no longer be receiving her monthly allowance as there was an alleged problem with the Sun Life disability benefits. This was to precipitate Joelle's application to have Carrie removed as committee. Despite Carrie's allegations in this regard, no records were submitted which suggested any difficulty with the Sun Life benefits during this time period. Coincidentally however, on April 12, 2011, Joelle's power account balance was just 652.09.

[87] In regard to Carrie's dealings with the PGT, Joelle alleges there were numerous misrepresentations of fact.

[88] In 2004, Carrie advised the PGT that she and Joelle lived together. At the initial passing of accounts before the PGT, Carrie claimed 6,800 for rent and 1,360 for food. She later revised her evidence to allege she provided "respite care" to their father Dan by having Joelle come to her condominium in White Rock "very often". I accept Joelle's evidence that neither assertion was true.

[89] Carrie also alleged to the PGT that she and Joelle were “best friends”. However, on October 16, 2012, in an email to her lawyer, Carrie advised that Joelle had never liked her, had assaulted her, and that she had taped phone conversations of Joelle threatening and swearing at her. She alleged this had gone on her entire life. While this does not bear directly on the accounting, it does illustrate a tendency on the part of Carrie to reframe the truth when it suits her. I did not find Carrie to be a credible witness.

The Credibility of Joelle Jones

[90] Counsel for Carrie submits that Joelle was not a credible witness. He submits her evidence was heavily influenced by an underlying bias against her sister and cannot be relied upon as her memory is unreliable and selective. Further, he submits Joelle over emphasizes the negative.

[91] Joelle swore seven affidavits in this proceeding and was cross examined for a full day. However, six of the seven affidavits were sworn before Carrie had produced an accounting, and any documents in support. Joelle encountered significant difficulty in compelling Carrie to account and produce her records. Eventually Carrie did produce six volumes of materials. Counsel for Joelle submits the material disclosed was highly disorganized, making it difficult to review and cross reference the material.

[92] Joelle was mistaken about some of the specific transactions which took place early in the committee'ship. However, she was prepared to admit when she could not recall certain matters with specific detail. Further, she is certainly not financially experienced by any stretch. Much of the uncertainty in regards to the specific financial transactions is understandable given the state of the records, and the sheer passage of time. Further, it was Carrie's duty, as committee, to account and produce a proper paper trail from which to make sense of the accounting. The responsibility was not the patient's. To the extent that the documentation gives rise to confusion, that rests at the feet of the committee who co-mingled funds during the entire

committeeship. Carrie made many questionable transactions, and used Joelle's power chequing account as her personal ATM.

[93] I agree with counsel for Joelle that she made every effort to answer the questions put to her truthfully, to the best of her ability. In my view, Joelle was a credible witness, but had difficulty with her recollection of certain transactions and events.

The Credibility of Terry Morrison

[94] Terry Morrison is the brother of Joelle and Carrie. He has lived in Dan's house with him and Joelle since her discharge from hospital. Terry saw Joelle and his father on a daily basis and shared family meals. Terry swore three affidavits in the within proceeding and was cross examined for a half day.

[95] Carrie submits Terry is not a credible witness, as he has an interest in the outcome given that he has been helping Joelle with her legal fees, and collecting rent from Joelle since Dan's death. Carrie further submits that, like Joelle, Terry is biased against her and refuses to accept the possibility that the estate has been properly accounted for.

[96] I accept that Terry was absent from Dan's house daily while he was at work, however, he saw and spoke to Joelle and his father daily. He lived with the two of them in the same house and shared family meals. Terry was not actively involved in Joelle's care beyond accompanying Joelle and Dan to appointments, on occasion. He was however able to observe what was going on around him when he was present, and speak to his experience with both Dan and Joelle. Terry clearly is at odds with his sister Carrie, however, I found Terry to be a credible witness.

The Third Party Affiants

[97] A number of affidavits were filed involving evidence from neighbors of Dan. For the most part the affidavits provide evidence of the rarity of occasions that the neighbors saw Carrie's vehicle at Dan's house. Carrie submits that the affidavits

should be given little weight, and to the extent the evidence differs from the viva voce evidence of the parties, they should not be given any weight.

[98] I agree with the submission of Carrie in this regard. However, the affiants do confirm, to a certain extent, the evidence of both Joelle and Terry in regard to the general infrequency of Carrie's visits.

Analysis

[99] Committeeships are governed by the *Patients Property Act*, RSBC 1996, c. 349 (the *PPA*). Pursuant to s. 13 of the *PPA*, Carrie was required to pass her accounts.

[100] The *PPA* prescribes the supervisory role of the courts and the duties of a committee:

Passing of accounts

13 (1) if

- (a) an application is made under section 12 for the discharge of a committee other than the Public Guardian and Trustee, or
- (b) an application is made for the rescission of the appointment of a committee other than the Public Guardian and Trustee,

(2) If a committee fails to pass the accounts as ordered, or if the accounts are found to be incomplete or inaccurate, the committee may be required to attend before the court to explain why the accounts have not been passed or a proper proceeding in connection with them taken, and the court may give the direction it considers proper.

(3) After the order made under subsection (1) has been carried out, and the court is satisfied that no further passing of accounts is necessary, the court may order that the committee is discharged.

(4) If the Public Guardian and Trustee or a committee is discharged under this section, the Public Guardian and Trustee or the committee

(a) has no further powers or duties with respect to the estate of the person who has ceased to be a patient, and

(b) is released, except in respect of undisclosed acts, neglects, defaults or accounts or dishonest or unlawful conduct, from all actions, claims and demands for or concerning the Public Guardian

and Trustee's or the committee's management or administration of the estate.

Compensation for acting as committee

14 (1) A person may be allowed reasonable compensation from the estate of a patient or from the estate of a person who has ceased to be a patient for services rendered as committee of the patient or of the person who has ceased to be a patient.

(2) The compensation, if any, to be paid to a person other than the Public Guardian and Trustee must be fixed on the passing of accounts.

(3) If, in the opinion of a person who is entitled to compensation under this section, the estate of a patient or the estate of a person who has ceased to be a patient is so limited in value that the payment out of it of compensation would create poverty or hardship for the patient or person who has ceased to be a patient or the patient's dependants, no compensation need be claimed or paid or no amount need be retained out of the estate.

(4) A committee of a patient or a person who has been the committee of a person who has ceased to be a patient has a first lien or charge on the estate of the patient or person who has ceased to be a patient for all costs, expenses and advances made by him or her for or incidental to the administration of the estate of the patient or the person who has ceased to be a patient or for the benefit of the patient or person who has ceased to be a patient, the patient's family or other dependants.

Powers of committee

15 (1) Subject to section 16,

(a) the committee of a patient as defined in paragraph (a) or (a.1) of the definition of "patient" in section 1 has all the rights, privileges and powers with regard to the estate of the patient as the patient would have if of full age and of sound and disposing mind, and

(b) the committee of a patient

(i) declared to be incapable of managing his or her affairs has all the rights, privileges and powers with regard to the estate of the patient as the patient would have if of full age and of sound and disposing mind,

(ii) declared to be incapable of managing himself or herself has the custody of the person of the patient, and

(iii) declared to be incapable of managing himself or herself or his or her affairs has all the rights, privileges and powers with regard to the estate of the patient as the patient would have if of full age and of sound and

disposing mind, and as well the custody of the person of the patient.

(2) For investing money, a committee is a trustee within the meaning of the [Trustee Act](#).

...

Rights, powers and privileges included

17 The rights, powers and privileges vested in the committee include all the rights, powers and privileges that would be exercisable by the patient as a trustee, as the guardian of a person, as the holder of a power of appointment and as the personal representative of a person, if the person were of full age and of sound and disposing mind.

Exercise of powers

18 (1) 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.

(2) A committee must, to the extent reasonable, foster the independence of the patient and encourage the patient's involvement in any decision making that affects the patient.

...

Costs

27 The costs of all proceedings under this Act are in the discretion of the court.

Orders by court

28 If there is insufficient provisions in this Act, the court may at any time, on the application of any person, make an order not in contradiction to this Act or the regulations that it considers necessary for or in the interests of the proper, honest and prudent management and administration of the estate of a patient.

[101] *Supreme Court Civil Rule 25-13* does not apply to the passing of accounts of a committee. This is significant in two ways. First, Rule 5 of the *Patients Property Act* applies with respect to the creation of an account affidavit, not SCCR 25-13(6). And second, as SCCR 25-13(5) does not apply to the passing of accounts of a committee, the passing of accounts of the committee by the registrar results in a report and recommendation pursuant to SCCR 18-1(3) as the court making the original reference did not specify the registrar was to certify the result. Unless the court specifies that the registrar is to issue a certificate, the default is a report and recommendation.

[102] SCCR 18-1(3) provides:

Report and recommendation

(3) If the court does not direct that the result of an inquiry, assessment or accounting be certified, the result of the inquiry, assessment or accounting must be stated in the form of a report and recommendation to the court.

[103] Although SCCR 25-13(6) does not apply to the passing of accounts of a committee, registrars will typically direct that the committee organize their accounts for the passing in an affidavit similar to a P40 referred to in SCCR 25-13(6), as a matter of convenience. Rule 5 of the *PPA* Rules states:

Examination

5 (1)

- (a) an application is made or an issue is tried under section 3,
- (b) an appeal is taken from an order under section 3, or
- (c) an application is made under section 4,

the court hearing the appeal or application or trying the issue may order the person who is the subject of the application or the patient to attend and submit at the time and place the order directs to examination.

(2) An examination under this section must be made by

- (a) one or more medical practitioners other than those whose affidavits were before the court on the appeal, application or trial, or
- (b) a board of 3 or more medical practitioners designated by the College of Physicians and Surgeons of British Columbia at the request of the court.

(3) If the person who is the subject of the application or the patient requests an examination under this section, unless the court hearing the appeal or application is satisfied that the person or patient is not mentally competent to form and express the request, the court must order the examination.

[104] The written accounting by the committee does not have to be perfect to be passed, so long as it accurately accounts for the monies coming into the estate and the monies paid out. The court has to be satisfied that the committee has properly accounted for the estate, and has acted reasonably and honestly.

[105] In *BC (Public Guardian an Trustee) v. MacDougal*, 2016 BCSC 457, MJ Thompson summarized the duties of a committee, stating in part:

[15] A committee is held to the standard of a “reasonable and prudent person of business”: *O’Hagan v. O’Hagan*, 2000 BCCA 79 at para. 24. In *Davis (Re)*, 2014 BCSC 1140 at para. 33, Madam Justice Dorgan relied on *O’Hagan* in holding that assessing the committee’s ability to discharge their obligations requires a determination of whether the committee can act as a “reasonable and prudent person of business.” Dorgan J. followed *Ng v. Ng*, 2013 BCSC 97, wherein Madam Justice Gropper held that the standard upon which to assess the conduct of the committee is in accordance with the responsibilities set out in s. 18(1) of the Patients Property Act:

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.

...

[17] In *Re Pearce* (1984), 53 B.C.L.R. 222 at 224 (C.A.), our Court of Appeal adopted a passage that makes the point that a committee of a patient’s property may not be a trustee in the strict sense, but he or she is a fiduciary and a trustee in a more general sense:

The chambers judge made reference to a decision of the Nova Scotia Supreme Court in *Re Creelman* (1973), 40 D.L.R. (3d) 306 (T.D.). Hart J. was there dealing with remuneration of what in Nova Scotia is styled a guardian of the incompetent person. The guardian in our province is the committee. At p. 309 Hart J. cited *Scott on Trusts*, 3rd ed. (1967), vol. 1, at pp. 71-72, as follows:

“A guardian of the property of a person who is under an incapacity is a trustee in the broad sense of the term. He is under a duty to his ward to deal with the property for the latter’s benefit. Like a trustee, a guardian is a fiduciary. He is not, however, a trustee in the strict sense.”

In my opinion, that passage correctly sets out the law on this subject.

...

[19] Acknowledging that a committee has been held not to be a trustee in the strict sense, I see applications to remove a trustee and applications to rescind a committee’s appointment as closely analogous. In the former case, the focus is on the beneficiaries’ welfare; in the latter, it is on the best interests of the patient’s estate. Not every mistake or error should result in the rescission of committee’s appointment. In my opinion there are sufficient grounds to rescind a committee’s appointment if the committee’s acts or omissions are (1) shown to endanger the patient’s estate; or (2) show a want of honesty or reasonable fidelity or proper capacity to execute the duties of a committee. This approach is not in any way inconsistent with the *O’Hagan*, *Davis (Re)*, and *(Re) Walsh* cases: if a committee has committed this type of act or omission, then the committee is sufficiently wayward that they do not

measure up as a reasonable and prudent person of business or as having acted or likely to act in the best interests of the patient.

...

[22] Ms. Horton submits that Mrs. MacDougall does not have all of the receipts. This may explain, at least in part, the difficulties in providing a proper accounting, but it is ultimately an unsatisfactory answer. It is axiomatic that a person acting under a power of attorney must be in a position — for instance, by keeping receipts for expenditures — to account properly if required to do so. This is her duty as a fiduciary. I accept the submission of the PGT that the failure to be able to properly account in relation to the \$46,000, and thereby comply with that term of the committee order, calls into serious question Mrs. MacDougall's capacity to execute the duties of committee of the estate of her husband.

[106] Given the court's findings in *McDougal*, supra, the principles of trust law apply to Carrie.

[107] Carrie submits that while her accounting is not perfect, it provides a degree of certainty and accurateness with respect to the assets and liabilities of the estate at both the beginning and conclusion of her committee. Carrie concedes this alleged certainty and accurateness is however based upon deduction and inference, without a complete tracing of funds, which cannot be conducted given the lack of available records.

[108] I agree with the submission of Joelle that Carrie has failed to meet the standard of a reasonable and prudent business person, and has failed to act in the patient's best interests. These failures include:

- 1) The co-mingling of the patient's money with the committee's on an on-going basis throughout the entire committee, despite being aware this was contrary to her fiduciary duty;
- 2) Failing to account for more than 50,000 in expenses between July 2003 and October 2012;
- 3) Failing to keep reasonable records of how the patient's money was being used, or at all;

- 4) Charging the patient for services not provided, including alleged respite services;
- 5) Failing to re-invest Joelle's 2007 GIC in 2010;
- 6) Charging the patient for purchases which were not for the patient's benefit, and double charging the patient for food and groceries;
- 7) Failing to properly account for Joelle's alleged loan to her farther Dan;
- 8) Failing to pass her accounts within a reasonable time frame and repeatedly delaying the passing;
- 9) Failing to keep reasonable records of alleged payments to their father Dan;
and
- 10) Generally failing to take reasonable care of the patient's savings, finances and assets.

[109] Carrie submits that her accounting accurately reflects how monies coming into the estate were for Joelle's benefit. As a result, she submits there is no basis upon which to conclude there was a loss incurred by the estate, or profits gained by Carrie which she must repay.

[110] Carrie further submits that even if she did breach her fiduciary duty, she did not profit from it, given that she has made an assignment into bankruptcy, there was no loss to the estate, and therefore she ought to be excused of any liability from a technical breach.

[111] I do not agree. The co-mingling of funds in this case is particularly egregious given that Carrie was both aware, early in the committeeship, that this was a breach of her fiduciary, and the co-mingling has rendered the ability to trace monies virtually impossible. This includes 53,368.29 in charges, withdrawals and consumer purchases, from Joelle's power chequing account, not for her benefit, from July 2003

to October 2012. Carrie used Joelle's power chequing account as her personal ATM throughout the committee's term.

[112] In my view, Carrie has failed to meet the standard of reasonableness and prudence. This failure has enabled the committee to avoid the appropriate measure of scrutiny with respect to the estate's accounts, has given rise to warranted scepticism on the part of the patient, and turned what should have been an easy exercise of passing the accounts of a relatively small estate, into a marathon.

[113] Joelle seeks an order that the committee repay/surcharge the estate the sum of 80,000, and that she pay her costs of the passing of the accounts on a special costs basis.

[114] The basis of the 80,000 calculation is a combination of what Joelle submits is an appropriate amount to be allowed for the various expenses challenged versus what was claimed, and a 53,368.29 surcharge for the unaccounted for charges, withdrawals, and consumer purchases from Joelle's power chequing account from July 2003 to 2012, which were not accounted for in the revised P40 affidavit.

[115] In support of this submission Joelle relies on *Re Lowe Estate*, 2002 BCSC 813 at para 43, and the decision of the Ontario Court of Appeal in *Re O'Rourke* (1987) 58 O.R. (2d) 45 where the court stated:

A committee is not a trustee in the strict sense but stands in a significant fiduciary relationship to the person declared incompetent or unable to manage his affairs.

In *Re Taylor* (1982), 13 E.T.R. 168, Robison L.J.S.C., said this [at p. 172]:

The committees here stand in a significant fiduciary relationship to the patient. In summing up the matter of loyalty or fiduciary, in such circumstances, Rand J. in his dissenting judgment in *Midcon Oil & Gas Ltd. v. New Br. Dom. Oil Co.*, 1958 CanLII 42 (SCC), [1958] S.C.R. 314, 12 D.L.R. (2d) 705, said at p. 716:

"The loyalty of the fiduciary declared by these authorities means that he must divest himself of all thought of personal interest or advantage that impinges adversely on the interest of the beneficiary or that results from the use, in any matter or degree by the fiduciary, of the property, interest or influence of the beneficiary. Equity, in applying the rule as one of fundamental public policy, does so ruthlessly to prevent its corrosion by particular exceptions; by an

absolute interdiction it puts temptation beyond reach of the fiduciary by appropriating its fruits."

In *Bray v. Ford*, [1896] A.C. 44 at 51, 65 L.J.Q.B., 213 (H.L.), Lord Herschell said in considering the position of the trustee who has made a profit by his management directly or indirectly, as follows:

"It is an inflexible rule of a Court of Equity that a person in a fiduciary position ... is not, unless otherwise expressly provided, entitled to make a profit; he is not entitled to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding the fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule."

Once the court has found a deficiency it is an error of law not to surcharge the estate with the amount of the deficiency:

Re King, 1970 CanLII 536 (ON CA), [1971] 1 O.R. 331, 15 D.L.R. (3d) 285 (Ont. C.A.).

Disposition

[116] Acceptance of the registrar's recommendations in regard to the expenses disputed by Joelle would result in a repayment/surcharge to the estate of 34,468.09. However, this does not take into account the failure to account for the 2002 to 2003 time period, nor does it take into account the unaccounted for charges, withdrawals, and purchases in the amount of 53,368.29 from Joelle's power chequing account from July 2003 to October 2012.

[117] Joelle submits that it is now impossible to calculate, with precision, the loss to Joelle due to Carrie's actions throughout the committee's term. However, given the "longitudinal overlap" between the amounts not accounted for, Carrie ought to surcharge the estate 80,000, and be responsible for Joelle's costs on a special costs basis. In my view, an appropriate surcharge, considering all the amounts involved, is 50,000.

[118] The ordinary rule on the passing of accounts of a committee is that their costs are reimbursed on a special costs basis from the patient's estate. The circumstances where the committee's conduct warrants a departure from this general rule typically involve misconduct on the part of the committee. In circumstances involving

committee misconduct the courts have differed in their approach. In the case of *Re Kanee Estate (1992)*, 69 B.C.L.R. (2d) 89 (BCCA), the court ordered the committee to bear their own costs as a result of their misconduct, whereas In *Volchuck Estate (Re)*, 2007 CanLII 42973 (ONSC), the court ordered full indemnity costs as a result of the trustee's misconduct. In my view, the circumstances of this case warrant a departure from the general rule.

[119] The issue of costs is an exercise of the court's discretion. The discretion is to be exercised judicially. For an order of special costs, the court must be satisfied that the conduct of the committee was reprehensible, which encompasses scandalous or outrageous conduct deserving of rebuke. See *Re Lowe Estate*, 2002 BCSC 813 at paras 49 to 50. Conduct which may be considered in the context of this case would include those actions summarized above regarding the committee's failure to act in the patient's best interest. In my view, the committee's conduct has met this threshold.

[120] A complicating factor which is beyond this passing of accounts is the effect, if any, on the patient's ability to realize on any amounts awarded given Carrie's assignment into bankruptcy.

Recommendation

1. That the court refuse to pass the committee's accounts as presented;
2. That the committee's remuneration be nil;
3. That the committee surcharge the estate 50,000;
4. That the committee pay interest on the surcharged amount from April 6, 2016, being the date upon which the committee was ordered to pass her accounts, to the date of the court's passing of the accounts;
5. That the committee be denied costs of the passing of accounts; and

6. That the costs of the passing of accounts, and any applications related to the passing of the accounts, be paid by the committee to the patient on a special costs basis.

All of which is respectfully submitted.

“Registrar Nielsen”