CITATION: Carey v. Carey, 2018 ONSC 4564
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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
ROBERT CAREY, LYDIA CAREY-PATEL, DAVID AELLO Applicants	Richard K. Watson, for the Applicants
– and –	
DOUGLAS CAREY, ARTHUR CAREY, JENNIE CAREY and THE OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE Respondents	Matthew R. Harris and Yonatan Lipetz for the Respondents, Douglas Carey and Arthur Carey Michael Freeman for the Respondent, Jennie Carey
	HEARD: March 8, 9, May 17, 18, June 8, 2018

REASONS FOR JUDGMENT

KURZ J.

[1] "*A house divided against itself cannot stand*". These words of American president, Abraham Lincoln, echoing the words of the New Testament, are particularly apposite to the unhappy facts of this case.

[2] The extended Carey family was largely a loving and intact one until approximately May, 2013. At that time, the family's elderly matriarch, Jennie Carey ("Jennie"), left the home that she had shared for the past 13 years with her daughter, Lydia Patel ("Lydia"), Lydia's husband and three children. Jennie moved in with two of her adult sons, Arthur and Douglas Carey ("Arthur" and "Douglas"). With Jennie in their care, Arthur and Douglas took control of

Jennie's finances and personal care under powers of attorney signed just a month earlier. Purportedly at Jennie's behest, they refused to allow the remainder of her seven grown children to have contact with her.

[3] Five of Jennie's children, Robert, David, Edward, and Lynn Carey, as well as Lydia and Jennie's brother, David Aello ("the original applicants"), brought this application in 2014. They alleged that Arthur and Douglas effectively kidnapped their mother as part of a scheme to misappropriate her money. They sought to terminate the powers of attorney that Jennie had granted to Arthur and Douglas. The original applicants sought to have Jennie's oldest child, Robert Carey ("Robert"), appointed in Arthur and Douglas' stead as Jennie's sole attorney. They also requested an order that Jennie's property be delivered up to Robert and for a formal declaration that Jennie is incapable of managing her property and personal care.

[4] Just prior to the trial before me, three of the original applicants, Edward, David, and Lynn Carey ("E, D & L"), effectively changed sides. They now support Arthur and Douglas. As a result, they asked to be withdrawn as parties to this proceeding. They assert that they feel that their mother is well cared for in Arthur and Douglas' care and should be allowed to remain.

[5] With regard to the allegations of serious financial malfeasance that they had levelled against their two brothers for about four years, E, D & L say that they have changed their minds about that as well. They no longer object to their brothers caring for their mother's property under a power of attorney for property. They claim that their change of heart arose from increased contact that Arthur and Douglas allowed them to exercise with their mother.

[6] In changing sides, E, D & L also complained about the work of their former counsel, Richard Watson. David originally sought the removal of Mr. Watson as counsel for the remaining applicants, Robert Carey, Lydia Patel, and David Aello (whom I collectively refer to as "the applicants" in the balance of these reasons). For oral reasons given earlier in this trial, I refused to remove Mr. Watson as counsel for the applicants.

[7] Much of the evidence relied upon in E, D & L's request to be removed from this litigation came from David Carey, while he was still a party. However he refused to agree to be cross-examined on that change of heart by Mr. Watson, claiming a conflict of interest. Thus, I

can place little to no weight on the evidence of David Carey. Instead, Edward Carey testified on behalf of E, D & L., waiving any claim to Mr. Watson being in conflict of interest. I have considered that evidence.

[8] I note that on March 6, 2018, prior to the commencement of this trial, the parties agreed to and I ordered the adoption of a somewhat summary procedure for this trial under R.50.07(1)(c) of the *Rules of Civil Procedure*. That consent process involved a limited number of witnesses, evidence in chief by affidavit, and time limited cross examinations under R. 53.02. The parties agreed to conduct the trial in this manner because of the delays that had already occurred over the four previous years. They hoped to avoid the further delay that would have been required had they parties engaged in a lengthy standard *viva voce* trial. I felt that the process agreed upon was in the interests of justice.

Central Question in this Case

[9] All the parties before the court, Jennie's own counsel, and two capacity assessors agree that Jennie is currently incapable of managing her affairs, for both her property and her personal care. Jennie's counsel feels that she is incapable of instructing them. Further, the applicants now concede the propriety of the original powers of attorney.

[10] Thus the central question for this court is whether Arthur and Douglas' conduct as Jennie's attorneys was so improper that they must be removed and replaced by Robert as Jennie's guardian, and that Jennie's residence should be changed to that of Robert.

Background

[11] Jennie is a 91 year old widowed woman who currently suffers from dementia. Until 2013, she always had a close relationship with all of her children, grandchildren and her brother, David Aello.

[12] Jennie lives on pension income that totals about $42,000 per year. Her former home in Oakville has been sold. Pursuant to a court order, the $180,000 net proceeds of that sale are held in trust pending this proceeding.

[13] At present, Jennie shuttles along with Arthur between two homes. On Saturday through Tuesday, she lives with Arthur, his girlfriend and the girlfriend's 11 year old son in a North York townhouse. For the rest of the time, Jennie lives in Douglas' Nobleton, Ontario home with Arthur, Douglas and Douglas' family. In accordance with my mid-trial endorsement, the applicants are entitled to contact with Jennie for one weekend day per week. While counsel were to cooperate to coordinate this contact, I suggested that visits take place from 11:00 a.m. to 7:00 p.m.

[14] Arthur is presently unemployed, for what he describes as medical issues.

[15] For thirteen years, Lydia, Lydia's husband, Anil Patel ("Anil"), and their three children lived with Jennie, rent-free in Jennie's home. That arrangement ended in or about May, 2013. At that time, Jennie got into a serious argument with Anil. At one point, Jennie told Anil that if he did not like what she was doing, he could leave. Later that day, Arthur and David picked her up. They say that they did so at her behest. She has remained in the care of one or the other of those two sons since that time.

[16] According to a redacted police record, Jennie attended at the Oakville station of the Halton Regional Police Service on July 3, 2013. She recounted her argument with Anil to an officer. She asserted that she wanted her son-in-law removed from her home. She would not return to the home until he left. She complained of bullying.

[17] The officer recorded that Jennie "…appears to be in her right mind."

[18] It appears that one of Arthur or Douglas was present during the police interview.

[19] The evidence that both Lydia and Robert tendered at trial was that they were always close to their mother until she went to live with Arthur and Douglas. There is little objective evidence to gainsay that view. Jennie did write a letter setting out a series of complaints against Lydia and in particular, Anil. However Jennie was secluded from her other children and in the care of Arthur and Douglas at the time that she wrote the letter. It would be dangerous to rely on that letter for the truth of its contents.

[20] Jennie never returned to live in her home. It was ultimately sold in accord with a consent order. The proceeds of sale were placed in trust, where they continue to be held.

[21] Jennie originally alternated between the homes of Arthur in Vaughan and Douglas in Nobelton. At the behest of Lydia and Anil, the York Regional Police Service paid a number of "wellness" visits on Jennie in Arthur's home. They did so in order to confirm her well-being. At no time did the officers report any concerns with Jennie's well-being.

[22] During her time in Arthur and Douglas' care, Jennie was seen a number of times by her family doctor and her dentist. They reported no concerns with her well-being. No evidence has been proffered that she is or has been unhappy in Arthur and Douglas' care. However in her interview with a capacity assessor in late 2016, Jennie stated that she would be happy living with any of her children.

[23] On December 5, 2016, Jennie's lawyer, Simon P. Valleau, wrote to counsel for the parties and the Office of the Public Guardian and Trustee ("OPGT"). Mr. Valleau was responding to a potential settlement of this case. He advised counsel and the OPGT that Jennie did not wish to live with Robert unless it were "necessary". At the time of the letter, Jennie did not feel that that arrangement was necessary. She preferred to live with Arthur and Douglas. She had been in their care for about 3 ½ years at the time. Mr. Valleau added that Jennie had no objection to Robert or any of her children taking care of her if necessary. But she preferred to live with Arthur and Douglas. She also wanted to visit with her children other than Arthur and Douglas and her grandchildren.

[24] Mr. Valleau's letter was written shortly before capacity assessor, Rena Postoff, met with Jennie for her court ordered capacity report of December 23, 2016. Ms. Postoff's report opined that Jennie is incompetent to manage her personal care. She found that Jennie:

> …demonstrated an impaired ability to provide any factual knowledge needed to make decisions about her personal care needs. She demonstrated no insight into her limitations or deficits. Throughout the assessment, Ms. Carey demonstrated evidence of impaired memory and recall, word finding difficulties, disorientation in all three spheres, impaired judgment, repetitiveness, and perseveration. Her ability to learn new information was impaired… If left to her own accord, Ms. Carey would most likely neglect her personal

> care needs, predominantly due to impaired memory and lack of insight. Her ability to problem solve would most likely lead to her increased risk of self-harm and/or neglect.

[25] That report came almost two and a half years after the July 14, 2014 capacity assessment report of capacity assessor, Elizabeth S. Milojevic. Ms. Milojevic concluded that Jennie was incompetent to manage her property. Ms. Milojevic opined that:

> In my opinion, due to her short term memory problems, Mrs. Jennie Carey has no ability to retain and retrieve information relevant to the management of her finances...
>
> … Mrs. Carey's severe difficulty with her short term memory precludes the learning of skills necessary for the management of her finances.
>
> On July 23, 2014, I found Mrs. Jennie Carey incapable of managing her finances as she was unable to pass the first standard "Understand" as it is prescribed by the *Substitute Decisions Act, 1992*.

[26] While the statements of both Mr. Valleau and Ms. Postoff were strictly speaking hearsay (as to Jennie's wishes at the time), neither party objected to that evidence and each party relied in some measure upon it.

Applicants' Concerns with Arthur and Douglas' Care of Jennie

[27] The applicants raise two main concerns with Arthur and Douglas' care of Jennie, which they characterize as a form of "elder abuse". They allege that Arthur and Douglas have helped themselves to Jennie's money. They accuse Arthur and Douglas of mortgaging Jennie's home and taking the proceeds, pawning her jewelry, emptying the contents of her home, getting her to change her will, and spending her pension income. They further allege that Arthur and Douglas engaged in a course of conduct designed to isolate Jennie from the remainder of her family in order to cover up their financial misdeeds.

Evidence of Alleged Financial Impropriety

[28] A key piece of evidence that the Applicants rely on in support of their claim of financial elder abuse is a $434,000 mortgage on Jennie's home that they say Arthur and Douglas orchestrated and obtained with "false and forged" documentation. They assert that this new mortgage increased Jennie's previous mortgage by about $270,000. They point out that at the

time of the mortgage, Arthur obtained a one per cent interest in the home. He signed the mortgage as a co-mortgagee. The applicants add that Arthur and Douglas have failed to account for those funds, despite numerous requests and then court orders, requiring broad disclosure.

[29] They applicants also assert that Arthur and Douglas have failed to account for the profits that they earned from pawning Jennie's jewelry. Lydia testified as to her intimate knowledge of her mother's jewelry, which disappeared when her mother left her home. Arthur's former wife, Maria Garisto, testified that she found some pawn slips while going through papers as part of her divorce. Believing that one was for her wedding ring, she went to the pawn shop. But she found that she did not recognize the ring. Arthur explained to her that it was Jennie's ring he had pawned. Ms. Garisto decided to bring the pawn slips to Mr. Watson.

[30] The Applicants also point to the disappearance of Jennie's furniture and the fact that she changed her will while under Arthur and Douglas' influence. Finally, in addition or in the alternative, the applicants contend that Arthur and Douglas are unable to financially manage Jennie's affairs. They point to the fact that she rarely has funds in her bank account and is regularly in deficit. They say that this should not occur in light of Jennie's pension income and the fact that she is living with one or both of her sons. That should reduce her expenses.

Disclosure Orders

[31] On June 16, 2016, Gibson J. ordered that Arthur and Douglas "… prepare an accounting of how they have dealt with their mother's property" by August 15, 2016. After receiving that disclosure, the Applicants tendered the affidavit of a forensic accountant. The accountant, Jacqueline Kennedy, prepared an affidavit and report that questioned the depth of the disclosure as well as the honesty of those who provided it. She did not testify at trial.

[32] On October 21, 2016 Douglas was cross-examined on his affidavit material, while Arthur was cross examined on November 18 and 23, 2016. Both gave a number of undertakings, which were not fulfilled.

[33] On November 10, 2016, Gray J. ordered Arthur and Douglas to provide the applicants with all documents in their possession or within their power to obtain relating to all funds obtained by all mortgages placed on Jennie's Oakville home since 2000.

[34] On April 27, 2017 Gray J. ordered Arthur and Douglas to provide a detailed list of all of the jewelry of Jennie that they pawned, the amount of the proceeds and a list and details of all mortgages that they personally placed on Jennie's home.

[35] On August 3, 2017, Woollcombe J. further ordered that the previously ordered disclosure be made. She added that if the Respondents claim that they have made best efforts to comply with their disclosure obligations, they must explain what, precisely, those best efforts entailed and why they are not successful.

[36] On October 31, 2017, Coats J. heard a motion to strike Arthur and Douglas' pleadings for failure to honour undertakings or comply with disclosure orders. She found that they had substantially complied with a number of undertakings and disclosure orders but not all. She found that striking their pleadings as a first resort was premature. Instead she gave them one last chance to provide the disclosure, lest Arthur and Douglas' pleadings be struck. She stated:

> The Respondents have one last chance to comply with Gray J.'s order and to make appropriate efforts to answer undertakings and comply with orders that I have identified as not being adequately answered at paras. 6-10 of this endorsement by November 17, 2017. The Respondents must produce all outstanding documents or prove that they used their best efforts to obtain said documents by this deadline. In the event of the Respondent's non-compliance, the Applicant may move to strike the Applicant's pleadings with notice.

[37] In her costs endorsement, Coats J. pointed out that only one of Arthur and Douglas' undertakings had been answered on time and in full. Seven of the undertakings were not satisfied until after the date that the motion before her was brought. With respect to eight undertakings, she found that some efforts had been made but that more were required. She awarded partial indemnity costs of $13,000 to the Applicants. She limited those costs because they were not fully successful. Arthur and Douglas' pleadings had not been struck.

[38] On December 21, 2017, Gibson J. struck Arthur and Douglas' pleadings because of their failure to fully honour the previous disclosure orders. They moved for leave to appeal, placing this proceeding in limbo.

[39] On February 16, 2018 the parties agreed to set aside the order to strike of Gibson J., with Arthur and Douglas withdrawing the balance of their appeal. But as counsel for Arthur and Douglas conceded at the commencement of this trial, that restoration of this proceeding does not prevent me from drawing an adverse inference from their failure to comply with the previous disclosure orders, including that of Coats J.

[40] Arthur and Douglas deny any financial impropriety. They say that they never appropriated Jennie's funds or forged any of her documents. They say that Jennie herself had trouble balancing her cheque book. Arthur says that the pawn tickets were for his jewelry. They argue that the applicants have offered no concrete evidence of their alleged financial malfeasance. The evidence of Ms. Garisto is that of a disgruntled ex-wife.

Allegations of Personal Care Impropriety

[41] With regard to personal care, the Applicants were long concerned that Arthur and Douglas had cut off their contact with Jennie after she came into their care. They did not see her for about three and a half years after Jennie moved in with Arthur and Douglas. In refusing to allow contact, Arthur and Douglas claimed to be acting at their mother's behest. The Applicants were not able to have to regular contact with Jennie until it was ordered by Gray J. on November 10, 2016. That order called for limited visitation with Jennie for one hour each Sunday and /or Tuesday plus telephone and email communication.

[42] Lydia complains that Arthur continued to arbitrarily control her contact with her mother, even after Gray J.'s order. She testified to occasions when he would justify his denial of access to her mother by saying that she did not ask him "properly" or "nicely" enough. Arthur did not deny this.

[43] A York Regional Police Services report shows that on Jennie told police officers that she did not want to speak to Lydia or Anil and that she was content staying with Arthur and Douglas.

[44] As set out above, on March 8, 2018, during the course of this trial, I increased the visitation with Jennie to six hours per day each weekend.

[45] No evidence has been tendered at this trial that Jennie has been reluctant to see any of the original applicants since Gray J. made his order. Further, since I ordered increased contact during the course of this trial, all parties appear to agree that this contact has gone well. They agree that it should, at minimum, continue if Jennie is not placed with Robert.

Issues:

[46] The three issues that I must determine are:

a. Should Arthur and Douglas be removed as Jennie's Attorneys for Property?
b. Should Arthur and Douglas be removed as Jennie's Attorneys for Personal Care?
c. If the Answer to either question is yes, what plan(s) would be in Jennie's best interests?

Issue No 1: **Should Arthur and Douglas be Removed as Jennie's Attorneys for Property?**

[47] This proceeding is governed by the *Substitute Decisions Act* ("*SDA*"). The *SDA* sets out separate regimes for property and personal care. However guardians for both are subject to the same fiduciary duties, which are described in *SDA* s.32. The following are the relevant provisions for the purposes of this proceeding:

> Duties of guardian
>
> 32 (1) A guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit.
>
> Personal comfort and well-being

(1.1) If the guardian's decision will have an effect on the incapable person's personal comfort or well-being, the guardian shall consider that effect in determining whether the decision is for the incapable person's benefit.
…

Family and friends

(4) The guardian shall seek to foster regular personal contact between the incapable person and supportive family members and friends of the incapable person.

Consultation

(5) The guardian shall consult from time to time with,

supportive family members and friends of the incapable person who are in regular personal contact with the incapable person; and

(b) the persons from whom the incapable person receives personal care.

Accounts

(6) A guardian shall, in accordance with the regulations, keep accounts of all transactions involving the property.

Standard of care

(7) A guardian who does not receive compensation for managing the property shall exercise the degree of care, diligence and skill that a person of ordinary prudence would exercise in the conduct of his or her own affairs.

…

38 (1) Section 32, except subsections (10) and (11), and sections 33, 33.1, 33.2, 34, 35.1, 36 and 37 also apply, with necessary modifications, to an attorney acting under a continuing power of attorney if the grantor is incapable of managing property or the attorney has reasonable grounds to believe that the grantor is incapable of managing property.

[48] The attorney's fiduciary duties require him or her to work for the benefit of the donor alone, setting aside his or her own interests. The attorney may not obtain secret profits, benefits or advantages from their position without the full knowledge and express consent of the donor (see: *Richardson Estate v. Mew*, [2009] O.J. No. 1947 (O.C.A.) at para. 49, citing *Elgi*

(Committee of) v. Elgi (2004), 28 B.C.L.R. (4th) 375 (S.C.), aff'd (2005), 262 D.L.R. (4th) 208 (B.C.C.A.)).

[49] Here it is conceded that Jennie executed two valid powers of attorney, for both property and personal care on April 24, 2013, just weeks before Jennie came to live with Arthur and Douglas. Both powers of attorney name Arthur as her attorney and Douglas as the alternate. In the absence of evidence to the contrary and with the concurrence of the applicants, I assume that Jennie had the capacity to execute those documents at the time that she did so.

[50] Section 9 of the *SDA* speaks to the validity of a continuing power of attorney granted by a competent donor. It states:

> Validity despite incapacity
>
> 9 (1) A continuing power of attorney is valid if the grantor, at the time of executing it, is capable of giving it, even if he or she is incapable of managing property.
>
> Same
>
> (2) The continuing power of attorney remains valid even if, after executing it, the grantor becomes incapable of giving a continuing power of attorney.

[51] Notwithstanding such a power of attorney, the *SDA* allows the court to appoint a guardian for property upon the following terms:

> Court appointment of guardian of property
>
> 22 (1) The court may, on any person's application, appoint a guardian of property for a person who is incapable of managing property if, as a result, it is necessary for decisions to be made on his or her behalf by a person who is authorized to do so.
>
> Same
>
> (2) An application may be made under subsection (1) even though there is a statutory guardian.
>
> Prohibition
>
> (3) The court shall not appoint a guardian if it is satisfied that the need for decisions to be made will be met by an alternative course of action that,
>
> (a) does not require the court to find the person to be incapable of managing property; and

> (b) is less restrictive of the person's decision-making rights than the appointment of a guardian.

[52] In *Re Schaefers Estate*, (2008) 93 O.R. (3d) 447 (S.C.J.), Fragomeni J. of this court reviewed the applicable authorities regarding the removal of an attorney appointed under a valid power of attorney. He concluded that a two part test must be met before the attorney is removed. He stated:

> [24] The jurisprudence establishes that two issues require consideration. First, there must be strong and compelling evidence of misconduct or neglect on the part of the attorney before a court should ignore the clear wishes of the donor. With respect to this issue, the evidence has to establish that the donor was capable of granting a proper power of attorney.
>
> [25] The second issue relates to whether the court is of the opinion that the best interest of an incapable person are being served by the attorney.

[53] The rationale for this reluctance to impose a court appointed guardian in the face of an attorney chosen by the person being protected is explained by Somers J. of this court in a case cited by Fragomeni J., *Glen v. Brennan*, [2006] O.J. No. 79, (S.C.J.). At para. 9, Somers J. states:

> The courts have generally taken the view that a written power of attorney executed by the donor at a time when he was apparently of sound mind (and there is nothing in the material to suggest otherwise) is simpler to deal with and gives the donee more flexibility in dealing on behalf of the donor. Also favouring a continuation of the appointment respects the wishes of the person who made the grant.

[54] In *Re Schaefers Estate*, Fragomeni J. cited the attorney's failure to provide a monthly accounting, his failure to voluntarily pass accounts, his failure to provide missing information or documentation with respect to missing funds and his inability to follow court orders as reasons to remove and replace him with a court appointed guardian. Those findings were cited with approval by Whitten J. in *McMaster v. McMaster*, 2013 ONSC 1115 (CanLII) and Leitch J. in *Abel v. Abel Estate*, [2017] O.J. No. 6729 (S.C.J.).

[55] Here there is strong and compelling evidence of misconduct and/or neglect by Jennie's attorney for property, Arthur (who has worked in concert with Douglas, his alternate). In particular:

1. Arthur had failed to adequately explain how he manages to spend all of Jennie's approximately $42,000 per year pension income when she has no independent housing costs, no car, and no other notable expenses that have been brought to my attention.

2. Arthur failed to adequately account for the manner in which Jennie's increased mortgage funds were utilized. Even if they did not take those funds, they had recourse to obtain the records to disclose the information sought, but have failed to do so.

3. Arthur and Douglas failed to obey a number of court orders requiring disclosure. Their failure was so egregious that their pleadings were struck. While it is true that the parties agreed to reinstate those pleadings, that agreement did not reverse the findings of Coats J. in light of the previous disclosure orders of Gray J. , Gibson J., and Woollcombe J. Those breaches, in themselves, are sufficient to meet the first part of the test in *Re Schaefers Estate.*

4. Despite her potential animus as Arthur's ex-wife, I find that the evidence of Maria Garisto was credible. She was candid in expressing her feelings about Arthur's conduct towards her (often being in default of his support obligations). But she did not exaggerate her evidence against him. She was not shaken in cross-examination. Her explanation of how Jennie came to live with her and Arthur actually supports his evidence. So too was her statement that Arthur favoured Jennie over her. Ms. Garisto's evidence was also buttressed by pawn receipts, whose contents confirm Lydia's contentions about her mother's missing jewelry. I do not find Arthur's denials to be credible. I find that Arthur did pawn Jennie's jewelry and at the very least, failed to account for the proceeds.

5. At the very least, Jennie's attorneys have shown little skill in using her funds in a responsible manner to secure her financial best interests. She

has no financial margin of error should she require an unexpected expenditure for her medical care and well-being.

6. Whatever Arthur may have done or neglected to have done, Douglas failed to step in.

7. I note that even Edward Carey, who is supporting his two brothers' plan to care for his mother, was only able to say in cross-examination that Arthur is trustworthy "to a degree". That is damning by the faint praise of an ostensible supporter.

[56] To be fair to Arthur and Douglas I do not find that they exercised a malign influence on Jennie in regard to her will. An unsigned copy of her will, dated April 24, 2013, the date that she signed her powers of attorney, was provided to the court by Hercules Faga, the solicitor who prepared her will. The draft will shows that while Jennie made Arthur and Douglas her trustees and executors, they were only given a one seventh share of the residue of her estate. Each of their siblings other than Lydia received a similar bequest. It appears that Lydia's three children received her one seventh share. The only other bequests of any apparent value were for $5,000 to each of two Christian Ministries.

[57] Nonetheless, for the reasons set out above, I find that Fragomeni J.'s two part test in *Re Schaefers Estate* has been met. Jennie's best interests are not being served by the power of attorney for property. As set out below, it is necessary for me to appoint a guardian or guardians for property.

<u>Issue No 2:</u> Should Arthur and David be Removed as Jennie's Attorneys for Personal Care?

[58] The answer to the second question is far more complex than the first and the result is inevitably more nuanced than that of the first.

[59] On the one hand, I have to consider whether the past is prologue to the future. In other words, it appears that only court intervention will ensure that Jennie can retain her ongoing contact with the applicants. Before Gray J. intervened, Arthur (with the presumed concurrence of Douglas) meted out contact with Jennie in such atomized portions and upon such unilateral

sufferance, that one would have thought that they were distributing a rare substance. Arthur also let his personal animus get in the way when dealing with Lydia, requiring her to ask to see Jennie in the "proper" manner (a claim that Arthur did not deny in his testimony).

[60] Under *SDA* s. 66 (1) and 67, Arthur has an obligation to perform his duties as attorney for personal care "… diligently and in good faith."

[61] Under *SDA* s. 66(6), one way in which an attorney must fulfil that obligation is to "… foster regular personal contact between the incapable person and supportive family members and friends of the incapable person."

[62] Under *SDA* ss. 66 (7), an attorney is required to "… consult from time to time with supportive family members and friends of the incapable person who are in regular personal contact with the incapable person …"

[63] Arthur voluntarily did none of those things until he and Douglas reached out to and ultimately recruited E, D & L to their side of this dispute. Even then, Arthur and Douglas required the impetus of Gray J.'s order.

[64] But this critique of Arthur and Douglas' personal care of Jennie is far from the end of the story. Whatever concerns the court may have with their care of Jennie's property and their behavior to their siblings and uncle, Jennie is by all reasonable accounts happy and comfortable in their care. To the extent that her wishes can be determined, she would prefer to continue with the status quo.

[65] At least equally important, there is no credible or independent evidence that Jennie has been physically mistreated or neglected in the care of Arthur and Douglas. I refer here to the evidence of the police officers who paid wellness visits on Jennie to check on her, as well as her family doctor and dentist.

[66] Robert and Lydia have spoken of Jennie's mistreatment at their brothers' hands. But I find that those comments are hyperbolic, likely as a result of their distrust of their brothers and their earlier deprivation of contact with their mother. By way of just two examples, Robert

testified, without reference to actually seeing this, that his mother probably sits in a chair all day, crying, thinking about her kids. Lydia similarly testified that what she perceives as a deterioration in Jennie's condition (at age 91) comes as a result of Jennie not seeing her children and grandchildren. The stress of not seeing them, more than normal aging and infirmity, is the reason that Lydia gives for Jennie appearing to have aged significantly in Arthur and Douglas' care. That claim speaks more to Lydia's feelings than any evidence tendered at this trial.

[67] From all of this I come to the following conclusions:

1. Arthur and Douglas failed in their duties as Jennie's attorneys to foster regular contact between Jennie and the original applicants, and now the applicants. Had they done so, this proceeding may not have been necessary.
2. Nonetheless, Jennie is happy where she is. She has expressed no desire to move.
3. While she told a capacity assessor and her own lawyer in 2016 that she would be happy to live with any of her children, that does not mean that she should be moved. She is a 91 year old woman suffering from dementia. I can take judicial notice of the fact that change is difficult for persons with dementia.
4. As stated above, the weight of independent evidence supports a finding that Jennie is being properly cared for in a physical sense by Arthur and Douglas.
5. This point is supported by the evidence of Edward Carey, who has had the opportunity to see his mother at Arthur's home. He found Arthur's home to be clean and appropriate. He feels that Jennie is being well cared for by his brothers.
6. I do note that Jennie's current living arrangements, shuttling between two homes, is not ideal. That is particularly so in light of my concern regarding

change for a person with dementia. That being said, Jennie seems to have adapted to the arrangement.

7. Left to their own devices, Arthur and Douglas may not be as amenable to full family contact as they now present themselves to be.

8. However with court intervention, they have acceded to the requirement that they allow Jennie to have regular contact with their siblings. They are agreeable to a further order to that effect.

[68] With all of those facts in mind, and applying the two part test of *Re Schaefers Estate*, I find that there has been sufficient misconduct and neglect as to warrant the removal of Arthur and Douglas as Jennie's attorneys. In making that decision I have considered the findings set out immediately above. In addition, because the two are connected here (see *SDA* s. 32(1.2), which requires the management of property in a manner consistent with the decisions of the person entitled to make personal care decisions), I have also considered my findings about Jennie's attorneys for property. Inasmuch as there is a connection between the roles of attorney for property and personal care, my findings with regard to each are relevant to the other. When an attorney is able to breach of a fiduciary duty in regard to property, the court cannot simply ignore that breach in regard to personal care.

[69] A new plan is clearly necessary and in Jennie's best interests. But at the same time, if Jennie is to continue to reside with Arthur and Douglas, at least one has to be involved in making decisions for her personal care. They see Jennie on a more day to day basis than their siblings. They have a clear picture of Jennie's present condition and needs.

[70] However Jennie's guardian(s) have to make decisions about Jennie's personal care in a way that better promotes Jennie's best interests rather than their own. As set out below, I find that a compromise solution offers the best chance of meeting that goal.

<u>Issue No 3:</u> What Plan(s) Would be in Jennie's best Interests?

[71] Jennie's situation is complex and the solution to the problems raised by my findings above require a nuanced approach. I find that she is not competent in regard to either her property or personal care.

[72] With regard to property, Arthur cannot remain in his current capacity as Jennie's sole attorney, with Douglas as the alternate. Arthur has simply breached too many obligations to her regarding both the selfless preservation of her property and the transparent disclosure of information about that property. Douglas, as alternate, has not distanced himself from that behaviour. He joins Arthur in defending it.

[73] But that does not end the court's consideration. My concerns about Arthur and Douglas' financial probity do not mean that Jennie must be moved into the home of a less self-interested party. The court is unwilling to move this 91 year old woman with dementia from a home situation in which she is happy and apparently well cared for, without good reason.

[74] The alternative personal care plan is presented by Robert. He wants his mother to come live with him and his wife in his condominium. While well-meaning, this plan is not the best one to care for Jennie in her final years. That is because:

1. Robert works full time. He is a hair dresser who commutes daily to Kitchener from his Mississauga condominium. That means that he is away from home a great deal of the time;
2. Robert's plans for Jennie are very vague and do not appear to be well thought out. He will bring in "an agency" to care for her while he is away. In addition, his wife will be around. His wife does not appear to be close to Jennie. What agency Robert plans to hire he has not said. From this I infer that he does not know and has not made the necessary enquiries. Simply put, he is not prepared to have her in his care. Recall that he has had four years to devise a plan for his mother. Put bluntly, Robert has not demonstrated that he is prepared at this time to assume the burden of having his elderly, intellectually disabled mother live with him.

3. Robert has seen little of his mother since 2016. As he fairly points out, he is busy. That is fair for an adult son of an elderly woman who lives in a different city. But he has made no changes to his life to accommodate increased contact with his mother. If he has not done so during the course of this litigation, there is scant reason to believe that he will do so after it is completed. Those facts do not amount to ideal qualifications for a perspective caregiver for a mentally challenged elderly woman.
4. On the other hand, Arthur and Douglas have successfully cared for Jennie full time since 2013. That is a status quo of over five years.

[75] The question then is how to allow Jennie to continue to live with Arthur and Douglas while continuing to safeguard her interests in securing her remaining finances and contact with her extended family.

[76] I find that it is in Jennie's best interests that her present living arrangements continue, as she is able to reasonably maintain contact with all of her other children, grandchildren, and her brother.

[77] If Jennie is going to live with Arthur and Douglas, one of them, presumably Arthur, who is her primary caregiver, must have some involvement as her guardian in each sphere. However I am not satisfied that he have the role exclusively in either sphere. There must be oversight and a counterbalance.

[78] With regard to personal care, a second guardian other than Douglas must be appointed. He has simply concurred with Arthur's conduct. The applicants refuse to work with David, whom I also would not consider since he refused to be cross-examined. Edward and Lynn do not live in Ontario, meaning that it would be difficult for them to be involved in day to day personal care decisions. Jennie's brother, David Aello, is also out of the country for the winters. There appears to be particularly bad blood between Lydia and Arthur. By process of elimination, that leaves Robert. Arthur and Douglas have expressed a willingness to work with him. At this time, he could greatly assist his mother as co-guardian for personal care. This way he will be involved

in making decisions about Jennie's care, including the scheduling of her contact with her children and extended family.

[79] While I would like to see alternate weekend and mid-week contact between Jennie and her extended family, I would like to see Robert and Arthur work together to prepare a plan for Jennie's personal care, including contact with the applicants. They would then present that plan to the OPGT and then the court. If they are unable to agree, they would return before me for confirmation or determination of the appropriate plan.

[80] With regard to property, I believe that it would be ideal to have both personal guardians involved. I believe that it would also be best to have Edward, who is well enough off to have no financial interest in this matter and has seen both sides of the case, involved. However the Applicants again refuse to agree, citing the fact that he lives in the USA and that he is a "turncoat" (my term, not theirs).

[81] Contrary to the position of the Applicants, the *SDA* does not absolutely prohibit a non-Ontario resident from being a guardian for property. Rather it makes the prohibition subject to court order, which involves the provision of security for the value of the property. The provision grants me a great deal of discretion in that regard.

[82] Here Jennie's resources are limited and require preservation. I am not certain that this will occur without strong oversight. I believe that it is necessary to work out a budget that meets Jennie's needs in her final years, while preserving the nest egg of the proceeds of sale of her home in the case of urgent need. In that regard, I would prefer not to bring in a professional trustee to take on the role at some expense.

[83] I appoint Arthur (because of his day to day role as Jennie's caregiver), Robert (because he will want to ensure financial oversight) and Edward as joint guardians of property for Jennie. I have appointed Edward because of my concern that Arthur and Robert may not be able to agree on a reasonable budget and plan for Jennie and they may require a tie-breaker. Further, Edward has financial acumen and is willing to change his mind when the facts, as he sees them warrant them. I am not concerned about his self-interest in this matter.

[84] With regard to a bond, I have little concern about the need for a hefty bond. Edward has already funded much of the litigation for the applicants because of his view of the need for financial transparency of his mother's financial affairs. Even though, in Parliamentary terms, he "crossed the aisle", he does retain some residual skepticism about Arthur's trustworthiness. Accordingly I set Edward's bond at $2,500, to be paid to Mr. Harris' firm and to remain in trust until further order of this court.

[85] The three guardians will work out a plan for a budget for Jennie's upkeep and the preservation of her home sale proceeds. They will present it to the OPGT. It they cannot agree, they will present it to me.

[86] I adjourn the balance of this trial to November 16, 2018, in order to allow the guardians to work together on plans for Jennie's personal care and property. If they agree to such a plan or plans they shall submit them to the OPGT. If they are unable to do so, I reserve the right to make the final determination.

[87] I reserve the issue of costs until after the plans are finalized.

Kurz J.

Released: July 26, 2018

CITATION: Carey v. Carey, 2018 ONSC 4564
COURT FILE NO.: 3483/14
DATE: 20180726

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ROBERT CAREY, LYDIA CAREY-PATEL, DAVID AELLO

Applicants

– and –

DOUGLAS CAREY, ARTHUR CAREY, JENNIE CAREY and THE OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE

Respondents

REASONS FOR JUDGMENT

Kurz J.

Released: July 26, 2018