COURT OF APPEAL FOR ONTARIO

CITATION: Palichuk v. Palichuk, 2023 ONCA 116
DATE: 20230223
DOCKET: C70118

Doherty, Feldman and Trotter JJ.A.

BETWEEN

Linda Palichuk

Applicant (Appellant)

Nina Palichuk, Susan Palichuk and Public Guardian and Trustee

Respondents (Respondents)

AND BETWEEN

Nina Palichuk

Applicant (Respondent)

and

Linda Palichuk, Susan Palichuk and BMO Nesbitt Burns

Respondents (Appellant)

Joseph Figliomeni and Quinn Giordano, for Linda Palichuk

Jonah Waxman and Julia Chumak, for Susan Palichuk

M. Jasmine Sweatman, for Nina Palichuk

Heard: November 16, 2022

On appeal from the orders of Justice Roger Chown of the Superior Court of Justice, dated November 9, 2021, with reasons at 2021 ONSC 7393, and from the costs order dated December 7, 2021, with reasons at 2021 ONSC 8051.

Trotter J.A.:

A. INTRODUCTION

[1] This case involves a dispute between Linda, her sister Susan, and their elderly mother, Nina.[1]

[2] On September 11, 2020, Nina executed the following four instruments (referred to in these proceedings as the "impugned instruments"):

> (a) a will that disinherited Linda and named Susan as her main beneficiary, and Susan's friend as alternate trustee and executor;
>
> (b) a continuing power of attorney for property, naming Susan as the sole attorney;
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> (c) a power of attorney for personal care, naming Susan as the sole attorney; and
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> (d) a transfer and declaration of trust transferring Nina's home to Susan as a bare trustee.

[3] Linda brought an application to declare Nina incapable of managing her property or personal care and seeking a guardianship order. She also sought the "opinion, advice, and direction of the Court" respecting the validity of the impugned instruments, claiming that Nina lacked the capacity to execute them or that they were the product of Susan's undue influence over Nina.

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[1] For the sake of clarity in these reasons, I respectfully refer to the three parties by their first names.

[4] Nina brought her own application, seeking relief against Linda. Because Linda refused to relinquish her signing authority on a bank account held by Nina at BMO Nesbitt Burns ("BMO"), Nina applied to have Linda removed from the account.

[5] The applications were heard at the same time. The application judge found Nina capable and refused to make a guardianship order. He also found that Nina had the capacity to execute each of the impugned instruments. However, the application judge refused to consider Linda's allegations of undue influence because, as a capable person, Nina could revoke any or all of the instruments at any time, rendering the question of undue influence hypothetical.

[6] The application judge allowed Nina's application and ordered that Linda take all steps to remove herself from the BMO account. He also made a costs award against Linda in the amount of $100,224.11.

[7] Linda appeals on the basis that the application judge erred in his assessment of Nina's capacity at the time of the hearing, and at the time she executed the impugned instruments. She also appeals the order removing her from the BMO account. Further, Linda submits that the application judge erred in failing to address the issue of undue influence. She asks that this aspect of her application be returned to the Superior Court for determination. Finally, Linda appeals the costs award made against her.

[8] The following reasons explain why I would dismiss the appeal. I would not disturb the application judge's refusal to make a guardianship order. His decision on this issue was well-supported by the evidence. I would deny the request to remit this case for determination on the question of whether any of the impugned instruments were the product of Susan's undue influence. The application judge was correct to hold that at this time, the validity of these instruments is hypothetical. Indeed, the application judge's determination of capacity in relation to these instruments was unnecessary for the same reason.

[9] As for the costs award, I see no error in the application judge's analysis. Nina and Susan were forced to expend considerable resources in responding to Linda's application, each claiming fees roughly equal to or greater than what Linda claimed she would have been entitled to if successful.

B. OUTLINE OF RELEVANT FACTS

(1) Background

[10] At the time these applications were heard, Nina was 90 years old. She had previously lived on a two-acre property in Acton, Ontario (the "Acton property") for about 50 years with her late husband.

[11] After her husband's passing in 2016, Nina appointed Linda and Susan as co-attorneys for property and personal care. She also executed a will in which Linda and Susan were named as joint executors and beneficiaries of Nina's estate.

That same year, Nina added Linda as a joint account holder on her BMO investment account.

[12] Since November 2019, Nina has lived in an assisted living situation at Amica Retirement Residence ("Amica").

[13] Linda was 67 years old at the time of the applications and is married with one adult child. She lives in Burlington.

[14] Susan, who was 65 at the time of the applications, is single with three grown children. Although she owns a house in Georgetown, she moved into Nina's Acton property in 2016 before Nina moved to Amica.

(2) Background to the Litigation

[15] Things started to go wrong between Linda, Susan, and Nina in 2017. Each party has her own version of what happened.

Linda's Version of Events

[16] According to Linda, the Acton property fell into a state of disrepair. Susan was either unable or unwilling to assist with the maintenance and upkeep of the home, both inside and out. There was compelling evidence that Susan was a hoarder. The application judge noted that photos of the inside of the house revealed "squalid conditions."

[17] Linda claims that, by the middle of 2018, Susan began to alienate Nina from her, making visits difficult. She tried to visit her mother, but was obstructed by Susan. In 2019, she noticed that large withdrawals had been made from Nina's bank account, causing her to become suspicious of Susan. Linda claims that Susan told her that she was entitled to their mother's assets.

[18] In November of 2019, Nina moved into Amica. Linda assumed that Nina would sell the Acton property. Linda's attempts to ready the house for sale were thwarted by Susan. During cross-examination on her affidavit, Linda said that Susan complained about how expensive it was for Nina to live at the retirement home, and that it would be better if Nina were to return home.

[19] In 2020, Nina's financial advisor told Linda that Nina wanted Linda's name removed from the BMO account. Susan prevented Linda from speaking to Nina about this decision. Linda acknowledged that the funds in the BMO account belonged solely to Nina. However, she refused to remove her name from the account because she believed her mother needed to be protected from Susan.

[20] The application judge encapsulated Linda's position as follows, at para. 33:

> Overall, Linda's narrative is that Nina cannot look after her financial affairs and her health, Susan alienated Nina from Linda, Susan wants Nina's money, and Susan is not a suitable guardian.

Susan's Version of Events

[21] Susan's version is very different. She claims that Linda disengaged from the family long ago, even before their father passed away. According to Susan, after he died, Linda rarely visited the house and only called Nina sporadically. Susan denies alienating Linda from Nina.

[22] Susan also denies she is a hoarder and that the house fell into a state of disrepair, although other, independent evidence suggests otherwise. As for Nina's money, Susan denies that she has ever made any large cash withdrawals.

[23] The application judge summarized Susan's position in the following way, at para. 40:

> Susan denies influencing Nina in her decisions, including her decision to disinherit Linda, to change her powers of attorney, or to transfer the house to Susan in trust. She says that Nina is afraid of Linda.

Nina's Version of Events

[24] Evincing Nina's version of events is slightly more complicated because some of the evidence pertaining to her narrative is derived from a capacity assessment performed by Dr. Richard Shulman, a geriatric psychiatrist.

[25] Nina swore three brief affidavits, dated May 6, 2021, May 10, 2021, and June 23, 2021. In essence, she states that she does not need a guardian for personal care or property. But should she need one in the future, she wants it to

be Susan, not Linda. In terms of her BMO account, at one point she thought that both Linda and Susan should be added to the account; however, she came to see things differently because she is mad at Linda, she is afraid of Linda, she feels bullied by Linda, and "[Linda] is very controlling."

[26] Nina was cross-examined on her affidavits. The application judge observed that she appeared to be aware of her finances and where her money goes each month. However, in her interviews with Dr. Shulman (discussed more fully below), she expressed confusion about the disposition of the Acton property. Nina believed that she had gifted the property to Susan outright. Nonetheless, she believed she could return to live there at any time. During cross-examination, Nina maintained that she gave the property to Susan "because [she] wanted to."

[27] Nina explained that she disinherited Linda because she believed that Linda had stolen money from one of her bank accounts. She reported the matter to the police. But as it turned out, Linda did not steal anything; she had written two cheques to cover the cost of landscaping work on the Acton property to ready it for sale. Nina also said that she disinherited Linda because her financial situation is better than Susan's; she considered Linda and her family as being "well off", whereas Susan was not.

(3) September 11, 2020 – Executing the Impugned Instruments

[28] On September 11, 2020, Nina consulted with a lawyer, Ronald Henry. This was not the same lawyer (Margaret Chapman) who prepared Nina's 2016 powers of attorney and will. Susan drove Nina to this appointment. Nina claimed that Susan was not present during the meeting with Mr. Henry. However, other evidence (Susan's affidavit and Mr. Henry's notes) confirms that Susan was present.

[29] At this meeting, Nina transferred her home to Susan. They both executed a declaration of trust that clarifies that Susan holds the property in trust for Nina as a bare trustee.

[30] Nina also changed her will to name Susan as her trustee and beneficiary. Susan's long-time friend, Carolyn Roche, was named as an alternate estate trustee. Nina provided for two of Susan's three children, but not for Linda's daughter.

[31] The will contains a clause that explains why Linda is not provided for in the will. As noted above, Nina mistakenly believed that Linda stole money from her as well as denying her bank statements and access to the BMO account.

[32] At this same meeting, Nina revoked her 2016 powers of attorney. She executed new powers of attorney for property and personal care, naming Susan as the attorney in both, and Susan's friend Ms. Roche as an alternate attorney.

[33] The question of why Nina and Susan went to Mr. Henry for legal services, rather than returning to Ms. Chapman (the lawyer who prepared the 2016 documents) was not well-developed on the applications. On cross-examination, Susan swore that they had initially gone to Ms. Chapman, but after hearing Nina talk about her situation for about an hour, Ms. Chapman said she could not act and said something about a conflict of interest relating to a prior meeting with Linda.

(4) The Capacity Assessment

[34] Dr. Richard Shulman, a geriatric psychiatrist, was retained by Nina to conduct a capacity assessment. He initially assessed Nina on April 12, 2021.

[35] Nina understood that Linda had commenced a guardianship application, which she referred to as, “Linda kicking her in the teeth.” Nina denied the need for a guardian but stated she would be open to Susan becoming her guardian if the court felt she required one. Nina articulated reasons for wanting Susan to be her power of attorney, and for transferring her house into Susan’s name. Nina said Susan cares about her welfare, more so than Linda, who Nina claims is only interested in her money. Nina considers Linda to be more self-sufficient than Susan. Nina denied that Susan pressured her or coerced her into transferring the house to Susan or into appointing Susan as her power of attorney, for both property and personal care.

[36] Dr. Shulman prepared a capacity assessment report, dated May 5, 2021. After setting out the relevant provisions of the *Substitute Decisions Act,* 1992, S.O. 1992, c. 30 (the "*SDA*"), the *Health Care Consent Act,* 1996, S.O. 1996, c. 2, Sched. A (the "*HCCA*"), and some of the relevant case law, Dr. Shulman made the following findings with respect to Nina's capacity:

(a) Nina has the capacity to manage property with some assistance. She has the ability to understand the relevant information pertinent to the management of her property. She showed awareness of her limitations and her diminishing ability to manage the Acton property independently. Nina was aware of her finances and the financial demands of living at Amica. She required assistance with her banking, but only to the extent of being driven to and from the bank (given that she cannot operate an ATM or do on-line banking);

(b) Nina has the capacity to make her own personal care decisions. She understands her own nutritional needs and the reasonably foreseeable consequences of a decision or lack of decision for her own nutrition. Similarly, Nina understood the various options for shelter. Nina believed that she gifted her home to Susan (when in fact Susan holds the property in trust). Nonetheless, Nina believes she could return to her own home if she so desired, but said she wishes to remain at Amica. Dr. Shulman reached similar conclusions about Nina's decision-making in relation to clothing, hygiene, and her personal safety.

(c) Nina has the capacity to grant and revoke powers of attorney for both property and for personal care.

[37] Dr. Shulman met with Nina again in person on May 10, 2021, and by video conference on June 23, 2021, resulting in a further report. In his second report, Dr. Shulman explained that Nina had little recall of the September 11, 2020, meeting at the lawyer's office when she executed the impugned instruments. He explored the transfer of the Acton property to Susan in greater detail. He reiterated

that Nina did not realize that the house had been transferred in trust; she did not understand the concept of a trust. She was nonetheless content with the effect of the transfer.

[38] Nina told Dr. Shulman that she was disinheriting Linda because she was upset with the way Linda treated her. Dr. Shulman wrote: “She says the Will is not written in stone and she would be willing to revise the Will to divide the BMO account distribution equally between the two daughters if Linda treated her better. This would include Linda dropping the lawsuit.”

[39] Dr. Shulman also addressed the issue of undue influence. Given how I would dispose of this appeal, I will not address this evidence in much detail. Briefly, Nina adamantly denied that she was being dominated or manipulated by Susan. Dr. Shulman observed that Nina displayed mild cognitive impairment, but short of being diagnosed with dementia. As he said: “I conclude that her mild cognitive impairment theoretically increases the vulnerability to undue influence but in my clinical opinion she is sufficiently cognitively intact to be able to resist any attempt at coercion or even subversion of the will.”

[40] Finally, Dr. Shulman addressed the issue of testamentary capacity at some length. He concluded that, at the time of his assessment, and in September of 2020, Nina met the governing test for testamentary capacity.

C. THE NATURE OF THE APPLICATIONS AND THE APPLICATION JUDGE'S REASONS

[41] As noted at the outset of these reasons, Linda's application was for a guardianship order. With respect to the validity of the impugned instruments, Linda sought "the opinion, advice, and direction of the court". Although the rule was not cited in Linda's Notice of Application, this prayer for relief was presumably based on rule 14.05(3)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which permits an applicant to seek "the opinion, advice or direction of the court" in certain circumstances. Later in these reasons I will address the applicability of this rule in the circumstances of this case.

[42] At the hearing of the applications, there was a dispute about whether it was fair to determine disputes between the parties without a trial. Linda brought a motion (within her application) to consolidate the two applications and convert them into an action. The application judge refused to do so. He said, at para. 122: "I do acknowledge that there are <u>some</u> contested facts which speak to Nina's capacity, but the evidence in Nina's favour on this issue is overwhelming. The contested facts are minor and do not qualify as 'material facts in dispute requiring a trial'" (emphasis in the original).[2]

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[2] This would appear to be a reference to Rule 14.05(3)(h), which authorizes proceeding by way of application "in respect of any matter where it is unlikely that there will be any material facts in dispute requiring a trial."

[43] The application judge engaged in a thorough analysis of Nina's capacity in four areas: (1) capacity to manage property and personal care; (2) capacity to give a power of attorney; (3) testamentary capacity; and (4) capacity to make an *inter vivos* gift. In each instance he found that Nina was capable. As I will explain, I need only address the application judge's findings on the guardianship application – Nina's capacity to manage property and her personal care.

D. GUARDIANSHIP (CAPACITY TO MANAGE PROPERTY AND PERSONAL CARE)

[44] The application judge addressed the related questions of whether he should appoint a guardian for property (*SDA*, s. 22) and for personal care (*SDA*, s. 55).

[45] Linda's position on Nina's capacity has been a moving target in this litigation. During the cross-examinations leading up to the hearing of the application, Linda's counsel was more focused on undue influence. This left opposing counsel with the impression that capacity was no longer an issue. At the hearing of the applications, Linda's counsel was equivocal on the issue. This led the application judge to say, at para. 98: "As Linda has not formally abandoned her guardianship request or withdrawn any of her requests for relief, Nina's capacity remains a disputed issue." Similarly, during oral argument in this court, Linda's counsel purported to rely solely on their written submissions on the capacity issue, preferring to focus on undue influence.

[46] This diffident approach to the capacity issue is likely driven by the fact that the only expert opinion evidence on capacity came from Dr. Shulman, who found Nina to have capacity both at the time of the assessment and when she executed the impugned instruments. Cross-examination did not weaken his opinion. Linda did not obtain any further assessment. There was no competing expert evidence.

[47] This was critical to the application judge's determination. Based on the respect for personal autonomy, our law presumes that a person is capable. This is reflected in s. 2 of the *SDA*, which provides:

> 2 (1) A person who is eighteen years of age or more is presumed to be capable of entering into a contract.
>
> (2) A person who is sixteen years of age or more is presumed to be capable of giving or refusing consent in connection with his or her own personal care.

This presumption is operative in related legislation.[3]

[48] The application judge identified the tests for determining capacity for property (*SDA*, s. 6), and for personal care (*SDA*, s. 45), as set out below:

> 6 A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

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[3] See also s. 4 of the *HCCA*. There are analogues in Canadian criminal law, whereby a person is presumed not to suffer from a mental disorder that would exempt them from criminal responsibility (*Criminal Code*, R.S.C. 1985, c. C-46, s. 16(2)). Similarly, an accused person is presumed to be fit to stand trial (s. 672.22).

…

> 45 A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

[49] Applying these provisions in the context of governing authority, the application judge said, at para. 133:

> In applying these standards, it is readily apparent that Nina is capable of managing her property and her personal care. Dr. Shulman reviewed and applied the applicable tests in his report of May 5, 2021. His description of Nina's answers to his questions generally accords with Nina's evidence in her cross examination. His conclusions are grounded in the evidence and are well supported. There is no competing expert evidence. [Emphasis added.]

[50] Further, the trial judge addressed Linda's principal arguments against finding Nina to have capacity, in paras. 134-135:

> Linda noted that Dr. Shulman said Nina is capable to manage property "with assistance." She argues that this is an equivocal opinion that justifies a trial. However, Dr. Shulman's reports indicate only that Nina requires assistance with transportation to the bank and advice from her financial advisor, and help with showering so as not to fall. He did not imply that help was needed beyond this. This kind of assistance does not indicate that Nina is "not able to understand information that is relevant to making a decision" about the management of her property or her care.
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> Linda raised as a concern the observations that she made in June of 2020 when Nina lived with her for three weeks. Nina forgot to take her medications. That is not a

> significant marker of lack of capacity under the SDA definitions. It again does not suggest Nina is "not able to understand information that is relevant to making a decision" concerning her care. In any event, even if Nina requires cuing to take medication this would not justify a guardianship order, especially in her current circumstances where she lives at Amica.
>
> I find it significant that, after having lived with Nina and observed her for three weeks in June of 2021, Linda does not raise examples of more significant memory issues, confusion, lack of comprehension of financial or other issues, or incompetence. [Emphasis added.]

[51] The application judge concluded that the evidence of Nina's capacity to make decisions about property and personal care was "incontrovertible" and that there was therefore no basis for a guardianship order.

[52] On appeal, Linda accepts that the application judge identified the correct legal standards, but submits that he did not engage with them appropriately. First, Linda submits that the application judge did not properly focus on Nina's capacity on September 11, 2020, when she executed the impugned instruments. I do not accept this submission. As I will discuss below, it was not necessary to determine Nina's capacity at that time. For the purpose of deciding the guardianship application, only Nina's capacity at the time of the application had to be determined. At the same time, I accept that Nina's behaviour and condition back in 2020 were relevant to Dr. Shulman's assessment of her capacity when he engaged with Nina between April and June of 2021. The application judge took all of this into account in determining Nina's capacity at the date of the application.

[53] Second, Linda submits that the application judge erred in relying on Dr. Shulman's capacity assessment because it was premised on factual inaccuracies in the information that Nina relayed to him. The most important factual inaccuracy was Nina's belief that Linda had stolen money from her account. Dr. Shulman was aware of this misapprehension on Nina's part. It did not alter his opinion. A person can be mistaken and still be capable. That was the situation with Nina.

[54] Linda also points to other examples of Nina's behaviours that she argues indicate Nina's lack of capacity. It is true that Nina misunderstood the precise legal circumstances under which she transferred the Acton property to Susan. But, as the application judge found, her appreciation of the essence of the transaction spoke to her capacity to make this *inter vivos* gift.

[55] Linda asks this court, based on the same record that was before the application judge, including an uncontroverted expert assessment, to come to a contrary conclusion about Nina's capacity. This is not the role of an appellate court reviewing reasonable findings of fact. Both Dr. Shulman and the application judge had the advantage of evaluating Nina based on, at least in part, their first-hand observations of her. The application judge also had the benefit of multiple days of cross-examination. We do not. As this court recently said in *Leonard v. Zychowicz*, 2022 ONCA 212, 75 E.T.R. (4th) 21, at para. 21: "A judge's findings of fact based on the acceptance of expert evidence and their preference of the evidence of one

expert over another is entitled to deference and should not be disturbed in the absence of a palpable and overriding error in the assessment of evidence."

[56] This was not a case of competing expert evidence but simply the acceptance of uncontroverted expert evidence. Even if one were to discount Dr. Shulman's assessment entirely, Linda would have to put forward sufficient evidence to displace the presumption of capacity under s. 2 of the *SDA*. She did not.

[57] Given the application judge's conclusion that Nina had capacity, it also followed that she was the sole beneficial owner of her BMO account. He ordered that Linda take steps to remove her name from the account. Since I would uphold the application judge's holding on capacity, it follows that Linda's appeal on this ground must also be dismissed.

E. UNDUE INFLUENCE AND THE IMPUGNED INSTRUMENTS

[58] The question of undue influence was irrelevant to the application judge's decision on the guardianship application. However, Linda submits that it is relevant to the validity of the impugned instruments. She submits that the application judge erred by not addressing this issue. I do not accept this submission.

[59] The application judge appreciated the fundamental distinction between capacity and undue influence. He addressed this in the context of whether a trial was required. He said the following, at para. 120:

> It would be wrong to conflate the issue of undue influence with the issue of capacity. The evidence of undue influence is discrepant, but the evidence of Nina's capacity is incontrovertible. If the issue of undue influence required resolution, Linda's position would be much stronger, but as I have already indicated, on my view of this case I should not address the undue influence issue. [Emphasis added.]

[60] The application judge's decision not to address undue influence is found in paras. 100-103 of his reasons, which I reproduce in full:

> Linda argues that the impugned instruments are invalid because of undue influence, and a trial is required to determine the contested facts on this issue. She has not raised knowledge and approval as an issue.
>
> But there is no point in having a trial over the validity of the impugned instruments while the impugned instruments remain executory. By "executory," I mean "to take effect on a future contingency": *Merriam-Webster online*, https://www.merriam-webster.com/dictionary/executory, retrieved on November 8, 2021. Nina is free to change her Will and her powers of attorney, and she is free to collapse the trust which transferred the Acton property to Susan.
>
> If I allow this matter to proceed to trial to assess whether Nina was subject to undue influence when she made the impugned instruments, she could well prepare new ones before trial, or during the trial, and in that case the litigation would be moot. The circumstances of making the current impugned instruments would no longer matter as it would be necessary to consider the circumstances surrounding the making of the new instruments.
>
> Because the impugned instruments are executory, the issue that Linda seeks to have adjudicated is hypothetical and premature. The court should not expend its resources, or allow the parties to expend their resources, in a wasteful exercise. [Emphasis added.]

[61] Although I agree with the application judge's conclusion on this issue, his characterization of the impugned instruments as "executory" was unhelpful. "Executory" is not a term of art in this area of the law. The application judge sourced the definition of this term from an American, non-legal dictionary. Also, it is debatable whether all the impugned instruments were "executory" in the manner described by the application judge – i.e., that they would only "take effect upon a future contingency." The transfer of the Acton property was not contingent on anything; by its very terms, the power of attorney for property indicated that it would take effect upon execution.

[62] At the same time, I agree with the submissions of Nina's counsel that, terminology aside, the application judge's broader concern was about engaging in an academic or hypothetical exercise because Nina, having been found capable, could change all the impugned documents. Nina could make the changes to revoke any or all impugned instruments in the middle of that trial, resulting in a waste of judicial time and resources. It would also put the litigants to unnecessary expense. The application judge cited cases where this concern has been expressed: see *Re Skinner*, [1970] 3 O.R. 35 (H.C.J.), at pp. 38-40, and *Furfaro v. Furfaro* (1986), 22 E.T.R. 241, at pp. 247-48.

[63] Similarly, in Brian A. Schnurr, *Estate Litigation*, loose-leaf, 2nd ed., vol. 2, (Toronto: Thomson Reuters Canada Limited, 2021), at c. 12.3, the author identified two types of questions that should not be entertained in this context:

> One type relates to matters of an academic or hypothetical nature. The court will refuse to answer questions in the abstract. The court will only answer questions that apply to the facts of a particular case.
>
> . . .
>
> The other type of question that should not be put to the court is one that may or may not be a problem depending upon the happening of future events. In cases of this nature, the court will refuse to proceed with the action.[4]

These principles apply to this case.

[64] This brings me back to the jurisdictional basis upon which this aspect of Linda's application proceeded – r. 14.05(3)(a). This rule provides:

> 14.05(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,
>
> > (a) the opinion, advice or direction of the court on a question affecting the rights of a person <u>in respect of the administration of the estate of a deceased person or the execution of a trust</u>. [Emphasis added.]

This is the only rule to employ the language "opinion, advice or direction."

[65] Linda sought the "opinion, advice or direction" on the validity of all the impugned instruments. However, the rule does not contemplate the court providing an "opinion, advice or direction" on the will of a living person, the granting of a power of attorney, or the settling of a trust.

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[4] At para. 107 of his reasons, the application judge referred to the second paragraph in this quote.

[66] More generally, the courts do not entertain requests for its opinion, advice or direction. In *1472292 Ontario Inc. (Rosen Express) v. Northbridge General Insurance Company*, 2019 ONCA 753, 96 C.C.L.I. (5th) 1, the court considered an appeal from a decision refusing to make a declaration about rights under an insurance policy. In dismissing the appeal, the court referred to s. 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, which empowers the court of appeal, superior court, and the small claims court to make binding declarations of rights. The application judge refused to do so. In upholding this decision, Feldman J.A. wrote, at para. 22:

> [A declaration of right] is not to be given as an opinion on a hypothetical set of facts, or as an academic exercise to settle what may happen in the future… At p. 26, Riddell J.A. quoted from *Curtis v. Sheffield* (1882), 21 Ch. D. 1, at pp. 3-4, where Jessel M.R. stated:
>
> > Now it is true that it is not the practice of the Court, and was not the practice of the Court of Chancery, to decide as to future rights, but to wait until the event has happened, unless a present right depends on the decisions, or there are some other special circumstances to satisfy the Court that it is desirable at once to decide on the future rights.

[67] Returning to this case and the application of r. 14.05(3)(a), I accept that determining the validity of a will depends upon a future contingency – the testator's death. The *Succession Law Reform Act*, R.S.O., 1990, c. S. 26 clearly states at s. 22 that a will speaks from death:

> 22 Except when a contrary intention appears by the will, a will speaks and takes effect as if it had been made immediately before the death of the testator with respect to,
>
> (a) the property of the testator; and
>
> (b) the right, chose in action, equitable estate or interest, right to insurance proceeds or compensation, or mortgage, charge or other security interest of the testator under subsection 20 (2).

[68] In the case of *Duke of Marlborough v. Lord Godlophin* (1750), Ves. Sen. 61, 28 E.R. 41 (H.C. of Ch.), Lord Hardwicke L.C. remarked that the testamentary document of a living person is nothing more than a piece of waste paper, at p. 50: "…[T]he law says, that a testamentary act is only inchoate during the life of the testator, from whose death only it receives perfection: being till then ambulatory and mutable, vesting nothing, like a piece of waste paper." This decision has been cited in other cases for the proposition that a will only speaks from the moment of death: see *Y.P. v. M.L.S.*, 2006 MBCA 32, 205 Man R (2d) 20, at para. 19; *S.A. (Trustee of) v. M.S.*, 2005 ABQB 549, 18 E.T.R. (3d) 1 at para. 28.

[69] There are a couple of Superior Court of Justice decisions that involve a review of the validity of a trust or will during the grantor or testator's lifetime. See, e.g. *Brandon v. Brandon*, [2001] O.J. No. 2986, which was upheld by this court in brief reasons, see *Brandon v. Brandon,* [2003] O.J. No. 4593, and *Rubner v. Bistricer*, 2018 ONSC 1934, 36 E.T.R. (4th) 79. Neither case involved a direct challenge to the trust or to the will. Instead, the question of the validity of these instruments was incidental to another dispute. The *Brandon* case was primarily an

action to enforce a mortgage, with a counterclaim to discharge the mortgage and declare an *inter vivos* trust invalid due to undue influence. In *Rubner,* the validity of a will was directly relevant to the current management of property by joint attorneys for property for the incapable person.

[70] Another Superior Court of Justice decision, *Dempster v. Dempster*, 2008 CanLII 2747 (Ont. S.C), cites *Brandon* in suggesting at para. 9. that the law in Ontario "may well be moving towards" permitting claims of undue influence where a testator remains alive. Given the incidental nature of the validity issue in *Brandon*, I disagree with this portent. I also disagree with the suggestion that Cullity J.'s comment at para. 28 of *Stern v. Stern*, (2003) 49 E.T.R. (2d) 129 (Ont. S.C), is intended to open the door to will challenges during the testator's life:

> The court should not, I think, close its eyes to the fact that litigation among expectant heirs is no longer deferred as a matter of course until the death of an incapable person. While, in law, the beneficiaries under a will, or an intestacy, of an elderly incapable person obtain no interest in that person's property until his, or her, death, the reality is that very often their expectant interests can only be defeated by the disappearance, or dissipation, of such property before the death.

I read this quote consistently with the two cases discussed above: litigation among expectant heirs may occur before death when a present dispute comes before the court. Practically, there will be some cases in which the validity of a will, trust or transfer *incidentally* comes into play. This does not mean that it is either necessary

or desirable for the law to permit direct challenges to these instruments during the grantor or testator's life.

[71] To the contrary, there are strong public policy reasons not to permit a challenge to a will prior to the death of a testator. A testator may change their will as often as they like. It is entirely unknown how much, if any, money or property there will be left to dispute until the testator dies. It cannot be known if any of the beneficiaries will have predeceased the testator. Thus, the common law insists upon the death of the testator before litigation. Otherwise, the courts would be inundated with litigation that is hypothetical during the lifetime of the testator, with the potential for re-litigation after their death.

[72] The application judge was aware of the problems associated with considering the validity of the will and the property transfer in the circumstances. As he said at para. 126 of his reasons:

> It is less obvious that I need to assess Nina's testamentary capacity or her capacity to transfer the Acton property to Susan, when Nina is alive and these instruments are executory. However, if Nina did not have the requisite capacity, and if she was not expected to regain capacity, it might be open to Linda to challenge the validity of the Will at this time. In that case, the issue of the validity of the Will and property transfer might not be premature or hypothetical.

Nonetheless, although the application judge refused to consider undue influence in relation to these instruments, he did determine Nina's capacity.

[73] The application judge should not have provided his "opinion, advice or direction" on either basis because there is every possibility that Nina may decide to reorganize her affairs. As Dr. Shulman reported in his assessment report, Nina said that her will was not "written in stone". Nina said she might change it if Linda treats her better.

[74] As for the transfer of the Acton property, Susan has no beneficial interest in the property. She simply holds it in trust for Nina. Even absent the trust agreement, since the transfer was gratuitous, the law presumes that Susan holds the property in trust for Nina. In *Foley v. McIntyre*, 2015 ONCA 382, 125 O.R. (3d) 721, Juriansz J.A. said, at para. 26: "Equity presumes bargains, not gifts. Thus, when a parent gratuitously transfers property to an adult child, the law presumes that the child holds the property in a resulting trust for the parent: *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795, at para. 36".

[75] For all these reasons, the application judge should not have provided his "opinion, advice, and direction" on the validity of the transfer and settlement of the trust as part of Nina's estate planning. As the application judge said, at para. 161: "…the transfer of the Acton property might properly be treated as testamentary. Because Susan is a bare trustee, she will derive no benefit from the transaction until Nina dies."

[76] As for the powers of attorney, again the question of undue influence is premature.[5] Counsel did not point us to any existing cases in which the question of undue influence was determined while the grantor was both alive and capable. The two cases referred to in Linda's factum to suggest that the court may consider undue influence to undermine the validity of a document or transfer in the face of capacity: *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 and *O'Meara v. Miller*, 2021 ONSC 5919, both involved estate disputes after the grantor's death. There is nothing on the facts of this case that would suggest expanding the law.

[77] I would also add that, if Susan begins to act under the authority of either power of attorney document, she will be held to exacting standards. A person acting under a power of attorney for property is a fiduciary whose powers and duties must be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit: *SDA,* ss. 32(1) and 38(1). There was no evidence that Susan was acting under the authority of the continuing power of attorney at the time of the application.

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[5] In *Vanier v. Vanier*, 2017 ONCA 561, 28 E.T.R. (4th) 1, it was argued that the doctrine of suspicious circumstances should not be applied in cases involving powers of attorney: first, because unlike in cases involving wills, an attorney for property cannot be said to have received a "benefit"; and second the doctrine exists in part because direct evidence to prove or disprove undue influence is not available in will cases but is in cases of powers of attorney. Epstein J.A., as she then was, writing for the court, concluded that this was not an appropriate case in which to consider the application of the doctrine of suspicious circumstances to powers of attorney as a whole. She added that on her reading of the transcript, counsel on the motion had not suggested that the doctrine could never apply in the context of powers of attorney.

[78] Similarly, the powers and duties of an attorney for personal care must be exercised diligently and in good faith according to the incapable person's best interests: *SDA*, ss. 66(1), (4) and 67. Susan is not authorized to act on this power of attorney while Nina remains capable of making her own personal care decisions: *SDA*, s. 49.

[79] In conclusion, the application judge did not err by failing to consider the issue of undue influence as it related to the impugned instruments. Where the grantor was found capable at the time of the application, it would have involved delving into a hypothetical or abstract inquiry, resulting in the waste of judicial resources, and at great expense to the parties. For these same reasons, the application judge's inquiry into whether Nina was capable at the time that she executed the impugned instruments was also unnecessary.

F. THE APPEAL AGAINST THE AWARD OF COSTS

[80] As noted in the introduction to this judgment, the application judge made a combined costs award against Linda in the amount of $100,224.11. Linda contends that the quantum of this award was excessive in the circumstances. However, Linda has not sought leave to appeal from this court. In *McFlow Capital Corp. v. James,* 2021 ONCA 753, Thorburn J.A. said, at para. 50:

> Since the substantive appeal is dismissed, the appellants are required to seek leave to appeal the discretionary costs award: *CJA,*s. 133; *Gary Anthony Bennett Professional Corporation v. Triella Corp.,* 2019 ONCA

> 225, at para. 7. To grant leave, there must be "strong grounds upon which the appellate court could find that the trial judge erred in exercising his discretion": *Brad-Jay Investments Limited v. Village Developments Limited* (2006), 218 O.A.C. 315 (C.A.), at para. 21, leave to appeal refused, [2007] S.C.C.A. No. 92.

[81] A court should set aside a costs award only if the judge has made an error in principle or if the costs award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27. I would not grant leave to appeal.

[82] Linda relies upon the application judge's finding in his costs decision that Linda brought her application "out of a general concern for Nina's physical safety, financial security and psychological well-being" (para. 2) and his observation that this case is a "tragedy" (para. 3). However, the application judge was right to say that, once Dr. Shulman's reports were served, the writing was on the wall that Nina would be found capable.

[83] I see no error in the application judge's analysis. Linda's Bill of Costs was comparable to the costs expended by both Susan and Nina. It ought to have been within Linda's reasonable contemplation that her litigation opponents would incur similar expenses in responding to the broad and far-ranging proceedings she initiated. Indeed, Nina incurred a substantial disbursement in the amount of roughly $9,900 to obtain Dr. Shulman's assessment reports.

[84] I would dismiss the appeal against the costs award.

G. DISPOSITION

[85] I would dismiss the appeal with costs payable by Linda. If the parties are unable to agree on the quantum of costs of the appeal, they may make brief written submissions. Susan and Nina may make submissions of no longer than three pages each within 21 days of the release of this judgment. Linda may make submissions of no longer than three pages within 10 days of receiving the submissions of Susan and Nina. Each party shall include a Bill of Costs with their written submissions.

[86] Lastly, at the hearing of the appeal, it became apparent that Linda had not yet removed her name from Nina's BMO account, even though she had been ordered to do so. I would order that Linda remove her name from the BMO account no later than 5 days from the date on which this judgment is released.

Released: February 23, 2023 "D.D."

"Gary Trotter J.A."
"I agree. Doherty J.A."
"I agree. K. Feldman J.A."