

ONTARIO
SUPERIOR COURT OF JUSTICE
ESTATES' LIST

IN THE MATTER OF THE PROPERTY AND PERSON OF JULIA GREEN

BETWEEN:)
)
HEATHER MCGREGOR)
Applicant) On her own behalf. Heather McGregor was
) assisted by *Amicus* counsel, Mr. Matthew
) Rendely.
- and -)
)
RANDYLAIN GREEN PERKIN,)
WORREL GREEN, DENEACE GREEN,)
THE PUBLIC GUARDIAN AND)
TRUSTEE and JULIA GREEN)
Respondents)
) Julia Green did not appear as she is an
) incapable person.
)
) The Public Guardian and Trustee did not
) appear.
)
AND BETWEEN:)
)
RANDYLAIN GREEN PERKIN and)
WORREL GREEN)
Applicants)
- and -)
)
HEATHER MCGREGOR, DENEACE)
GREEN, JULIA GREEN and THE PUBLIC)
GUARDIAN AND TRUSTEE)
Respondents)
)
) Heather McGregor and Deneace Green
) appeared on their own behalf.
)
) Julia Green did not appear as she is an
) incapable person.
)
) The Public Guardian and Trustee did not
) appear.
)
) **HEARD:** January 15, 2024

C. GILMORE J.

Introduction

[1] These proceedings relate to the capacity and substitute decision-making for the Respondent Julia Green (“Julia”). It is uncontested that Julia is incapable of making decisions related to her property or personal care. Julia is 87 years old and has resided at the Kennedy Lodge long-term care home (“Kennedy Lodge”) in Scarborough, Ontario since 2019.

[2] The Applicant Heather McGregor (“Heather”) is the youngest of Julia’s eight children. The Respondents Randylain Green Perkin (“Randylain”), Worrel Green (“Worrel”) and Deneace Green (“Deneace”) are also Julia’s children. The remaining four of Julia’s children did not participate in this litigation. Heather, Randylain and Worrel live in Toronto. Deneace lives in Jamaica.

[3] All of the parties in this litigation are self-represented. They have benefitted from the assistance of counsel appointed as *amicus curiae* to assist them with the drafting of their materials and to assist the court with any questions during the hearing. The court is very grateful to both Mr. Matthew Rendely and Mr. Alex Procope for their time and patience in this matter.

[4] Julia signed a Power of Attorney for Property and Personal Care dated October 1, 2017, in favour of Worrel (the “General POA”). The parties concede that this POA is of no effect as it was improperly witnessed. As such, the guardianship of Julia’s property remains a live issue. Heather submits that she should be appointed as her mother’s Guardian of Property as she has submitted an appropriate management plan. Randylain has acted as Trustee of her mother’s government pension income and submits that no appointment of a Guardian of Property is necessary as the *status quo* is the least restrictive option.

[5] With respect to her personal care, Julia executed a Power of Attorney for Personal Care (the “POAPC”) on November 14, 2017, in favour of Randylain and Worrel (“the POAs”).

[6] Heather challenges the POAPC on the grounds that her mother did not have the requisite capacity to sign it. Heather’s position is that Randylain and Worrel have the burden of proof with respect to Julia’s capacity at the requisite time. Since they did not file any retrospective capacity assessment, they have not met the burden of proof.

[7] The POAs claim that Julia signed the 2017 POAPC freely and initiated the arrangements for it. The POAs deny that Julia lacked capacity at that time. Randylain’s evidence is that her mother prepared the POAPC to avoid fighting amongst the siblings. She views Heather’s actions as a “veiled coup.”

[8] Heather has submitted a Guardianship Plan in support of her application to become her mother’s Guardian of Personal Care. While not parties to this application, Heather’s sister Arlene Camenzuli and Julia’s sister Thelma Fearon also support Heather’s application. Deneace supports Heather’s application as well.

[9] Randyln and Worrel have commenced a counter-application confirming the validity of the POAPC. If the POAPC is set aside they seek to be appointed as Guardians of Personal Care for their mother. Their position is that there is no need to appoint a Guardian of Property and Randyln should remain the Trustee of their mother's government pension income.

[10] For the reasons set out below, the 2017 POAPC shall be set aside. Heather McGregor shall be appointed Julia's temporary Guardian of Personal Care and Property for one year. At the conclusion of that year the parties will return before me to report on the guardianship and whether it should be made permanent. The parties may also agree to extend the guardianship on consent.

Background Facts and the Positions of the Parties

[11] Julia and her now-deceased husband Rudolph Green emigrated to Canada from Jamaica with their eight children many years ago. Following Rudolph's death in 2013, the family began to splinter. There were disputes about Rudolph's will and the family home in Jamaica. Litigation related to the Jamaican home has been ongoing for years.

[12] There has also been an ongoing bitter dispute between these parties regarding the management of their mother's care and property. Heather and Deneace have made significant allegations regarding what they allege to be the deplorable care she receives from Kennedy Lodge and her abandonment by Randyln and Worrel. Heather and Deneace claim that during their mother's decline, Randyln and Worrel took advantage of her and had her sign a POA when she had no capacity to do so. When Julia was no longer useful to them, they put her in Kennedy Lodge to die in pain and despair.

[13] Randyln and Worrel deny all such allegations and submit that their mother is in a safe place where she is properly cared for and all her needs met. Her mother made Randyln and Worrel POAs for exactly the reasons that are being played out in this Application. She was aware of the conflict between her children and appropriately chose two children whom she could trust to make decisions about her care when she was no longer able to do so. Randyln and Worrel submit that Heather's application is not grounded in either fact or evidence. It is the product of guilt for having abandoned her parents and mother for over ten years.

[14] Randyln is a registered practical nurse who has worked in long-term care for 30 years. Heather is a registered nurse and also has considerable experience in caring for elderly patients.

[15] Julia has no savings. Her sole source of income is from CPP, OAS and GIS which total approximately \$25,500 per year. This is just enough to cover the cost of her long-term care plus some additional care. Julia cannot afford any extras and receives only basic shelter needs at Kennedy Lodge.

[16] Julia was admitted to Kennedy Lodge on August 29, 2019. She currently suffers from knee arthritis, hypertension, reflux disease, hyperlipidemia, dementia in Alzheimer's disease including severe cognitive impairment, fungal toe infection, edema, and dry eyes. She is at a high risk for falls and, in addition to medications for the above conditions, also takes psychotropic medication to reduce agitation and assist with sleep. Julia has severe mobility issues and requires the use of a wheelchair and mechanical assistance to get in and out of bed and for toileting.

[17] Julia's cognitive decline began in 2013 when she was assessed by her family doctor, Dr. Pamela Mark as being in the early stages of Alzheimer's disease.

[18] After her husband's death in 2013 Julia spent most of her time in Jamaica until approximately 2017. There was much push/pull and conflict within the family concerning Julia. Julia would return home to Canada and then be whisked back to Jamaica by Worrel on short or no notice to the rest of the family. Worrel denies this and claims that Heather basically abandoned Julia for many years and did not even try to communicate with her.

[19] In a 2015 email from Randylain to Worrel, Randylain expressed concern about her mother's capacity and the risk of a challenge if her mother signed any legal documents. Randylain wrote to her brother on January 2, 2015 the following:

Mother said you gave her documents to sign recently. She also said she does not know what that was about. Can you tell me what you got her to sign? Please keep in mind that any document that you get her to sign at this stage can be challenged in court. We are all fully aware that her mental capacity is not intact.

[20] There were two videos taken by the parties' brother Dornan in 2015. They were taken in Jamaica and the parties are speaking in Jamaican Patois. It is often hard to decipher what is being said, but the video clearly shows Julia repeating herself multiple times and saying that Randylain threatened her more than once. At one point, Randylain is seen yelling at her mother.

[21] In 2016, Heather wrote to Worrel and expressed concern about her mother's physical and mental decline. In September 2016, while Julia was in Jamaica visiting family, her son Dorman wrote to Heather and expressed a concern about Julia's mental confusion and discussed hiring a caregiver for her during her stay in Jamaica. Eventually a caregiver was hired. Randylain was upset by this and moved Julia to a different location. The family was not informed.

[22] Heather and Deneace allege that between 2015 and 2018, Randylain and Worrel attempted to distance Julia from the rest of the family. As mentioned above, Worrel took Julia to Jamaica on several occasions where she stayed for extended periods. Worrel claimed that her presence was needed to deal with litigation related to property she and her husband owned there. Further, Julia liked staying in Jamaica and only returning to Canada periodically.

[23] Heather and Deneace deny this explanation and claim that their mother was deliberately removed from Canada in order to distance her from her family in Canada. Heather and Deneace also claim that as their mother's health began to decline, she was subject to emotional and physical abuse by Randylain and Worrel while in Jamaica.

[24] All of these allegations are denied by Randylain and Worrel, who maintain that they were the only ones throughout this time who were caring for their mother.

[25] Upon Julia's return to Canada in 2019 she was placed at Kennedy Lodge without any consultation with the rest of the family. Heather and her sister Arlene attempted to visit their mother but were unable to do so due to COVID restrictions. Further, Kennedy Lodge informed them that Julia was not permitted visitors unless they were approved by her POAs.

[26] Randylain submits that Heather and Deneace have disrespected the staff at Kennedy Lodge and ignored their reassurances concerning Julia's care. Julia requires significant care because of her various conditions, dementia and lack of mobility.

[27] In April 2021, a hearing related to Julia's capacity was conducted by the Consent and Capacity Board. Heather requested the hearing as she was not receiving access to her mother and was not aware of the 2017 POAPC. Representatives from Kennedy Lodge claimed that Julia had capacity as she was making her own decisions. However, Kennedy Lodge staff treated Julia as if she lacked capacity and deferred to the POAs' decisions on all matters.

[28] Given disputes between Heather and Randylain and Worrel over visits to their mother, I made an order in July 2022 which permitted Heather to visit her mother three times a week for up to three hours plus one 24-hour overnight visit. Heather was permitted to take her mother off premises for any visit. Prior to this, Randylain had not permitted her mother to be taken out of Kennedy Lodge. Given these court-ordered changes in visitation, Julia now has a life outside of the confines of Kennedy Lodge. Heather has noticed that her mother's mood has improved, she interacts with others more positively and the swelling in her feet has gone down as a result of Heather's massages.

[29] In July 2022, Julia underwent a court-ordered optometrist assessment for severe symptoms of dry eyes caused by a macular hole. Heather arranged for an eye examination and took Julia to the appointment. Julia was prescribed a hydrating solution. When Heather went to visit her mother, no solution was in her room resulting in her mother having dry eye discharge and discomfort. Heather complained that Randylain and Worrel did not bring this to the attention of the staff at Kennedy Lodge or seek further medical assistance. Further, anyone who saw Julia could tell she was suffering from dry eyes given the evident discharge, yet the POAs ignored this condition.

[30] Randylain deposed that no court order was required for the optometrist assessment. Further, Julia has been using eye drops all of her life.

[31] In late July 2022, Julia underwent a court-ordered physiotherapist/occupational therapist wheelchair/seating assessment. This was arranged by Heather. The assessment recommended that Julia have a Type 3 wheelchair, a gel cushion and a backrest and that Julia should participate in certain exercises. The POAs have not provided Julia with these recommended items. Heather purchased an orthopedic cool gel seat, recliner seat and extra wide wheelchair for her mother using her own resources. These were only temporary solutions while Heather waited for the POAs to follow up on the assessment recommendations. They never did. Heather submits that she has been unable to follow up on all of the recommendations because she does not have the authority to enforce a plan of care.

[32] Heather submits that the POAs do not provide adequate shoes or clothing for her mother. Heather has purchased shoes and nightgowns for her mother as requested by Julia's personal support worker. The POAs had been dressing Julia in used men's clothing. Deneace and Heather used their own resources to ensure their mother was dressed in fresh and appropriate clothing. Heather has also purchased the following items for her mother from her own resources:

- a. Flat screen TV

- b. Computer desk
- c. Special clock for seniors with dementia
- d. Compression socks
- e. Hygiene products such as body and face lotion, nail clippers, combs, mirror and deodorant

[33] Randylain and Worrel submit that their mother has everything she needs. Her room at Kennedy Lodge is appropriately decorated, including family photos. She is dressed in comfortable clothing and provided with all necessary toiletries.

[34] Heather argues that the POAs ignore their mother and rarely visit. Between July 2019 and August 2022, the POAs visited their mother a total of ten times. Even during COVID, Heather managed 40 long visits with her mother over a few months.

[35] The POAs deny this allegation. Randylain's evidence was that when Julia was admitted to Kennedy Lodge, she and her husband visited at least twice a week. Sometimes her name was not recorded properly, or the receptionist just waved them in. The visitor logs are therefore not reliable. She last visited her mother in early January 2024.

[36] On October 26, 2022, Julia underwent a formal capacity assessment for personal care. She was found not to possess the required capacity to make personal care decisions. On December 10, 2022, Julia underwent a formal capacity assessment for property. Julia was found not to possess the required capacity to manage her property. The capacity assessments cost approximately \$3,000 and were financed by Heather. I ordered that the cost of the assessments be paid from Julia's assets. Currently, Julia does not have sufficient assets to reimburse Heather. Heather submitted that she had to cancel the first capacity assessment because Randylain and Worrel refused to cooperate. After this, Heather simply went ahead and booked the assessment without their involvement. Randylain submitted that the court ordered that she and Worrel were not to interfere with the assessment. They did not interfere.

[37] Sometime during the week of July 3, 2023, Julia had a fall. The fall was not reported to Julia's children. Heather suggested that her mother return to Jamaica for palliative care because of a concern about the lack of supervision at Kennedy Lodge. Randylain was abusive in her response. Worrel simply ignored his sister. Randylain denies any knowledge of a fall in 2023.

Prior Legal Proceedings

[38] In 2021, Heather and Deneace commenced a claim against Kennedy Lodge, Randylain and Worrel to revoke the existing POAs and seek guardianship of Julia. The claim was struck by Pattillo J. on January 19, 2022.

[39] In early 2022, Heather brought a motion to request access to her mother. Given that the previous claim had been struck, Heather was ordered to commence a new application on the Estate's List. Heather commenced the within application in May 2023. Randylain and Worrel commenced an application seeking to enforce the current POAs and in the alternative they sought guardianship of their mother. Randylain and Worrel's application was consolidated with Heather's application into the within Application. All of the previous proceedings have been consolidated into the within proceeding.

[40] A schedule for cross-examinations was set by the court but no cross-examinations were ever scheduled.

Heather's Guardianship and Management Plans

[41] If Heather is granted guardianship, she intends to contact the Local Health Integration Network (now operating as Home and Community Care Support Services) and request a move from Kennedy Lodge to a nursing home close to her home. She wants to become actively involved in her mother's care and use her nursing skills to ensure the best care for her mother. Heather would also ensure that her mother receives a new seating assessment to promote comfort and proper foot elevation.

[42] Heather submits that there have been too many negative experiences in the current care facility. She seeks to start fresh and foster positive relationships with the staff at a new nursing home.

[43] In her Guardianship Plan, she lists the following long-term goals for her mother:

- To gain access to health records (the current POAs have refused to provide them).
- To be involved in treatment plans.
- To be contacted for any change in health condition.
- To be involved in care conferences.
- To know what Julia's advanced directives are, for example level of care and prior expressed wishes with regards to Kennedy Lodge.
- To restore Julia's ambulation ability to walk, and walking cane status, with the assistance of the physiotherapist.
- To maintain Julia's bowel and bladder continence.
- To restore Julia's desire to feed herself.

- To restore Julia's sense of pride, self-worth, and independence.
- To explore if a private room is an option for Julia.
- To explore providing a mechanical lift or a better ramp for her home so that transfer in and out of house does not require more than two people to assist. If Julia is moved, she will ensure a more accessible home.
- To make some adjustments to her home so that her mother can visit more frequently during winter months.
- To purchase all necessary care equipment for home use and have them ready for overnight visits.
- To continue to make her assigned room environment at the facility bright with the atmosphere of home (bedding, seasonal decorations, hygiene products she prefers to use, music, movies she likes).
- To obtain a television connection so that the television is easy to operate when Heather or Heather's family is not at the LTC facility.
- To encourage visits from other siblings and their family, and from Julia's sister and her sister's children.
- To make phone calls (if possible) to the people Julia asks for so that she can speak with them.
- To provide a sense of living in a relaxing, loving home setting, rather than an empty, lifeless clinical space, waiting for the next meal to be served, and death.
- To stimulate the sense of smells that will trigger familiar pleasant memories.
- To provide hope and to support Julia's trust in Jesus that he did not forsake her.
- To encourage attending church services all day on Sundays, knitting, crocheting, cooking, baking, watching food preparation channels, completing crossword puzzles, connecting with friends via telephone, praying with church sisters over the telephone, visiting sick church brothers and sisters, babysitting grandchildren, sewing/clothing alterations, and caring for her garden indoors and outdoors.

[44] Heather expresses many concerns about her mother's current care arrangement at Kennedy Lodge, including confinement, lack of hygiene, disrepair and infrequent room cleaning. Further, Julia is often left in her wheelchair for extended periods due to staff's fears that she will fall if she gets up.

[45] Heather submits that her mother has always expressed a wish to return to Jamaica to live out the rest of her days. She wrote a letter to the entire family in July 2023 expressing her concerns about their mother's rapid decline and a fear she would not make it to her next birthday in July

2024. She suggested that her mother return to Jamaica. Many of the family including Arlene, Deneace and Julia's sister support this plan. Worrel and Randylain do not.

The Response to Heather's Plans

[46] While Randylain concedes that Heather's care plan is comprehensive, it is not necessary as Julia already has a comprehensive care plan at Kennedy Lodge. Notwithstanding Heather's statements that her mother has expressed that she wants to live with Heather and her husband Monte McGregor, Randylain has never heard her mother express this wish. In any event, Heather's husband is blind and could not realistically assist with caregiving.

[47] Randylain does not believe there is any benefit to Julia traveling to Jamaica as she is cognitively and physically impaired. Given the edema she has in both legs, sitting in an airplane for five hours could lead to more health issues including blood clots.

[48] Randylain does not agree that her mother is "confined" to her room at Kennedy Lodge. She is free to take advantage of activities at the Lodge or enjoy the garden and religious services. However, given her mobility issues her activities are now more limited and passive.

[49] Randylain does not agree to releasing her mother's medical records to Heather or the family. Her mother may be incapable, but she has a right to privacy. Family members are entitled to attend care conferences and will be advised of any changes to Julia's health status.

[50] Heather's objectives of restoring her mother's ambulation, independence and self-worth are worthy goals but unrealistic given Julia's advanced stage of Alzheimer's and mobility issues.

[51] The POAs have always provided Julia with any hygiene products she requires. Her pain is being appropriately managed.

[52] Randylain denies any concerns with disrepair or general hygiene at Kennedy Lodge. Her mother is in a typical two-person nursing home room. She is not subject to "forced immobility" as suggested by Heather. She is free to move about and is never forced to remain seated.

[53] Randylain and Worrel's plan for their mother's care may be summarized as follows:

- She will remain at Kennedy Lodge where she is receiving excellent care.
- Randylain and Worrel will continue to visit with her regularly.
- The POAs will continue to provide her with religious music and encourage her to attend church services and hymn sing.
- The POAs will consult with Julia and other supportive family members and caregivers regarding decisions for Julia.

[54] Randylain disagrees with the value attributed to Julia's land in Jamaica. It is not worth \$100,000 but more in the range of \$18,400. Further, title to the property has never been registered in the name of Julia and Rudolph Green despite their purchase of the property 30 years ago. The title issues continue to be litigated.

[55] Julia has entrusted RandyLain with the sum of \$17,000 which is to be used to transport her remains for burial in Jamaica.

[56] RandyLain will continue to act as Trustee for Julia's government pensions which are used wholly to pay for her living costs at Kennedy Lodge.

Deneace's Submission

[57] Deneace provided a written submission to the court. She fully supports her sister's application for the following reasons:

- a. The POAs have blocked access to Julia by family members.
- b. The POAs have isolated Julia and neglected their fiduciary duties. They have left Julia in the care of strangers in a facility that has low care and hygiene standards.
- c. The POAs obtained the POAPC by manipulation at a time when Julia's lack of cognition was well known within the family.
- d. The POAs do not propose a plan that is in Julia's best interests. Rather, they propose to leave her in isolation without stimulation or adequate assistance.
- e. The POAs do not adequately communicate with the rest of the family. When Julia suffered a head injury in July 2023, the POAs did not provide any information or reports despite requests.
- f. In November 2023, Julia was noted as having open sores on her body. By way of complaint to the POAs and a letter to Kennedy Lodge, Deneace requested an investigation. Kennedy Lodge did an investigation and shared the results with the POAs. The POAs have not provided any response to these enquiries.
- g. Julia often has pus oozing from her eye and painful swelling in her hands and feet. A request for treatment and assistance has been made to the POAs by Deneace but without any response.
- h. In December 2023, it was noted by Deneace and her sister Arlene that their mother was residing in a feces-smearred environment for several days. A complaint letter was sent to Kennedy Lodge. A response was received from Kennedy Lodge on December 18, 2023, advising that they would look into the matter. Deneace has heard nothing further.

Legal Analysis and Issues

A. Is the 2017 General POA Valid?

[58] The 2017 General POA does not contain a provision that it can be exercised during Julia's incapacity. Pursuant to s. 7(1) of the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 (the "SDA"), the General POA must contain such a provision. As Julia is conceded to be incapable of managing her property, Heather argues that the General POA must be declared invalid.

[59] Even if the General POA survives incapacity it was witnessed by only one person and therefore does not meet the requirements under s. 10(1) of the *SDA*.

[60] It is clear that the General POA is invalid either due to incapacity or improper execution. A new Guardian of Property must be named for Julia unless the current arrangement of Randylain acting as Trustee for Julia's income is ordered to continue. Both the current POAs and Heather have submitted Management Plans for consideration.

B. Is the 2017 POAPC Valid?

[61] Heather queries whether Julia had the requisite capacity at the time she signed the POAPC in November 2017. There are numerous instances in which the siblings expressed concern about their mother's capacity as outlined above.

[62] Julia's trajectory of decline began with Dr. Mark's diagnosis of Alzheimer's in 2013. It was in fact Worrel who reached out to Dr. Mark in 2013 because his mother had stopped eating. He and Randylain agreed that their mother could no longer live alone after they received Dr. Mark's diagnosis.

[63] Thereafter, an email from Randylain to Worrel in January 2015 expresses serious concern about having their mother sign any documents because her "mental capacity is not intact." Randylain did not deny sending this email nor was she cross-examined on it. She now says that there is no reference as to what document was being referred to and as such minimal weight should be ascribed to this statement. I do not agree. This is a clear statement about Randylain and Worrel's opinion of their mother's capacity at that time. Randylain did not deny writing the email.

[64] In February 2015, Heather visited her mother at her apartment and found her to be confused, dirty, dehydrated and hungry.

[65] In September 2016, Heather was informed by her brother Dorman that he was having difficulty having conversations with his mother over straightforward matters such as bill payments. Julia was reported as repeating herself and talking in circles.

[66] In November 2016, Heather wrote to Worrel about her concern that her mother's physical and mental capacity had declined considerably.

[67] In June 2017, Heather and Dorman exchanged emails about the necessity of hiring a caregiver for their mother while she was in Jamaica because of her inability to care for herself.

[68] On November 14, 2017, Julia executed the POAPC that is the subject of this proceeding. The document was witnessed by Dorrell Salmon and Patsy Cutler. Ms. Salmon and Ms. Cutler have sworn affidavits in this proceeding confirming that they witnessed Julia sign the POAPC and that she did so freely and in full control of her mental faculties. Both of the witnesses are friends of RandyLain. The document was not prepared by a lawyer or signed in a lawyer's office.

[69] In April 2021, a hearing was conducted by the Consent and Capacity Board regarding Julia. No finding was made concerning her capacity, but Kennedy Lodge treated Julia as if she lacked capacity because they always conferred with and deferred to the POAs. Heather initiated the hearing because she was prevented from seeing her mother. She was not aware of the 2017 POAPC and had not been informed about it by the POAs.

[70] Worrel commented in May 2022 that his mother's Alzheimer's had progressed rapidly since Rudolph Green passed away in 2013. The POAs dismiss this evidence as not being determinative as to Julia's ability to understand the role of an attorney for personal care.

[71] In October and December 2022, the capacity assessments were undertaken, and Julia was found to be incapable of making personal care or property decisions.

[72] Further, RandyLain and Worrel have not provided any retrospective capacity assessment to confirm that Julia had capacity when she signed the POAPC in 2017.

[73] RandyLain and Worrel submit that their mother freely entered into the POAPC understanding the implications and initiating the process in order to reduce the well-known conflict amongst her children.

[74] Heather submits that even if the POAPC is not set aside because of undue influence or lack of capacity, it must be set aside due to a breach of fiduciary duty by way of misconduct or neglect by RandyLain and Worrel.

[75] In support of the contention of misconduct and neglect Heather submits (with the support of Deneace and Arlene) that:

- a. RandyLain and Worrel do not visit their mother regularly or for more than short visits;
- b. They do not care for her needs or act proactively regarding her medical concerns;
- c. They have physically, mentally and financially abused her in the past;
- d. They have not reacted adequately to concerns about Julia's eyes, sores on her body, falls, clothing, shoes, physiotherapy and equipment;
- e. Their choice of long-term care residence is inadequate;
- f. They failed to advise family members of the 2017 POAPC after it was signed and then prevented access to her by family members until court orders made permitting access;

- g. They do not keep family members advised of their mother's ongoing health issues; and
- h. They refuse to provide medical records documenting their mother's conditions.

[76] All of these allegations are adamantly denied by Randylain and Worrel who have deposed that Kennedy Lodge provides everything needed for their mother, who is content and well-situated. Further, they have advised the Lodge to provide access to family members. Heather has a court-ordered access schedule which permits her to take Julia out for day and overnight visits. They have not provided medical records to protect their mother's privacy.

[77] The contradictions in the evidence in this case are significant. There is a massive amount of affidavit material going back several years, none of which was cross-examined upon. I find that despite the contradictions in the evidence, there is concern on the part of the court about the decisions made by the POAs to keep Julia at Kennedy Lodge and whether that is in her best interest.

[78] The POAs' response to this is that any concerns should be directed to the Lodge's administration. Further, Kennedy Lodge has a detailed plan of care in place which was recently revised due to Julia's deterioration.

[79] The POAs submit that even if they were removed as POAPCs, the *Health Care Consent Act 1996*, S.O. 1996, c.2, Sched. A (the "*HCCA*") provides for statutory decision makers. Julia's children would be her highest-ranked statutory decision makers.

[80] I find that the statutory decision-making regime under the *HCCA* could never work in this case. These siblings have been in an entrenched and bitter conflict for years. This is borne out by even the briefest review of emails exchanged between them. Leaving Julia in a situation where decisions about her treatment and care would be made jointly by her children would be disastrous and would lead to the appointment of last resort, the Public Guardian and Trustee (the "PGT"). I do not find that is necessary in this case where there are family members who can be responsible substitute decision makers for Julia.

[81] Persons who enter into a contract under the *SDA* are presumed capable. There is an exception under s. 2(4) of the *SDA* where there are reasonable grounds to believe that a grantor might be incapable. That section of the *SDA* has been applied as meaning that a grantee of a POA for Property must demonstrate on a balance of probabilities that the grantor had the requisite capacity at the relevant time: see *Lockhart v. Lockhart*, 2020 ONSC 4667.

[82] As such, the POAs have the burden of proof that Julia signed the POAPC freely and without undue influence.

[83] I find that there is evidence that Julia was not capable in 2017 when she signed the POAPC and that that evidence is sufficient to displace the presumption of capacity. I rely specifically on the evidence of decline in Julia's condition commencing with her diagnosis of dementia in 2013 and the myriad of comments made by her children in various emails concerning her decline including a clear statement by Randylain in 2015 that her mother was not capable of signing documents as she was not mentally "intact." The 2022 capacity assessments cannot be ignored

either. They depict a woman who cannot answer even the simplest of questions and has no orientation as to time and place. Julia continues to decline.

[84] There is also a concern about circumstances under which the POAPC was signed. It is well documented that Julia spent much of 2015 to 2017 in Jamaica. While there, videotapes were taken of Randylain yelling at her mother and threatening her in 2015. There was evidence that Julia was being kept from the family in Canada by having her spend long periods of time in Jamaica.

[85] As the threshold with respect to capacity to sign a POAPC is lower than that for a will, I further find that if I am wrong with respect to the issue of capacity in the face of the other evidence provided by the POAs (such as the affidavits of Ms. Salmon and Ms. Cutler), the POAPC must be set aside based on a breach of fiduciary duty on the part of the POAs arising from inaction on their part to adequately address their mother's needs. This is set out in more detail below with respect to why Heather should be appointed her mother's Guardian of Property.

C. Should Heather's Application be Dismissed as an Abuse of Process or Due to Issue Estoppel?

[86] The POAs argue that Heather's application should be dismissed because the issues in her application have already been litigated and determined by this court. The POAs rely on *Smith Estate v. National Money Mart Company*, 2008 ONCA 746, 92 O.R. (3d) 641, at paras. 33-36, in which the court sets out that where the issues and the parties are the same in the new litigation, the proceeding should be dismissed as an abuse of process as the litigation offends the principles of judicial economy, consistency and the integrity of the administration of justice.

[87] Allegations related to the validity of the POAs were already raised by Heather in 2021 and dismissed by Pattillo J. in January 2022. The main application was brought against Kennedy Lodge and its staff members. However, Deneace and Heather brought a subsequent motion to have the 2017 POAPC terminated. Randylain and Worrel were not parties to the motion but were added to the style of cause by Patillo J. Worrel appeared at the motion and made submissions.

[88] During the course of that motion, Deneace and Heather pointed to the 2015 video in which Julia makes allegations against Randylain. Justice Pattillo found that the video was too dated and too isolated to conclude that Randylain was not fit to be an attorney. My endorsement of June 30, 2022 indicated that Pattillo J.'s decision could not be relitigated unless there was a change in circumstances.

[89] In order to relitigate without being an abuse of the court's process, one of three factors must be present:

- a. The first proceeding is tainted by fraud or dishonesty;
- b. There is new evidence available which impeaches the original results; or
- c. When fairness dictates the original result should not be binding in the new context: see *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 52.

[90] The POAs submit that none of the above factors are present here. The only new evidence relates to issues with Kennedy Lodge which have nothing to do with the decisions provided by Randylain and Worrel.

[91] I do not agree for the following reasons:

- a. One of the chronic issues in this case is that Heather and Deneace have been attempting to litigate a complex issue on their own without counsel. Part of the reason for this hearing was to ensure that all material was properly before the court and a decision made on a complete record. It has taken over a year to get here. The record is finally complete and proper management plans submitted. With all due respect to Pattillo J., I fear that he did not have complete, or even sworn, material before him. I reference this because of the many times this matter came before me in a state of complete procedural disarray without proper material or pleadings.
- b. There is new evidence available. The POAs are correct that much of this evidence relates to issues with the care provided by Kennedy Lodge. While technically this may not relate to decisions made by Randylain and Worrel, they are the ones who insist that their mother remain there and that it is appropriate for her. Recent information and photographs provided by Heather and Deneace suggest otherwise. There is also the new evidence by way of the capacity assessments done in 2022. Those assessments record that Julia is very far along on the trajectory of decline and that she was completely unable to answer any of the questions put to her by the assessor. That is, while I have already found that she was very likely incapable in 2017 when she signed the POAPC, she is almost incoherent now. A different level of decision making is required at this point to ensure the best quality of life for Julia.

[92] I therefore do not find that this consolidated Application is an abuse of process as the important issue of Julia's best interests must be front and centre for this court. Further, in terms of relitigating the same issues, there is both new evidence and some concern by this court that the previous decision was not made on a full and proper record.

D. Who Should be Appointed as Julia's Guardian of Personal Care and Property?

[93] Sections 22 and 55 of the *SDA* permit the court to appoint a guardian of property and personal care where a person is incapable of making such decisions on their own. Clearly Julia fits this criterion.

[94] In making such an appointment, the court must consider the incapable person's wishes and the closeness of the incapable person to the proposed guardian. It is not possible to ascertain Julia's wishes in these circumstances. There is no doubt that Julia is close to Heather.

[95] This contentious litigation has been going on for more than four years. It is time to change the current arrangement because there are concerns raised by Heather which simply cannot be ignored. I find that Randylain and Worrel's POAPC has been ridden by a form of passive management which is not in Julia's best interests given her advanced Alzheimer's disease.

[96] Specifically, I am concerned about the following:

- a. Complaints about Julia's lack of proper clothing and footwear.
- b. The fact that Heather had to obtain a court order to pursue the physiotherapist's assessment and that the recommendations were not followed by Randylain and Worrel.
- c. A concern that Heather had to obtain an appointment for Julia with an optometrist, pay for it herself and follow up on treatment.
- d. A concern that Randylain and Worrel have not provided a welcoming arrangement for other family members to visit their mother and that at times their instructions to Kennedy Lodge have resulted in obstructions to visitation by other family members.
- e. Given how much time is spent in Jamaica by Randylain, I remain unconvinced that her visitation of her mother is as frequent as she suggests.
- f. The recent revelation of the sores on Julia's body in November 2023 had to be brought to the attention of Randylain, Worrel and Kennedy Lodge by Deneace and Heather.
- g. Julia had a fall and sustained a head injury in July 2023, about which Randylain was completely unaware. The POAs were informed by Heather and Deneace about the head injury but received no response.
- h. Complaints from Arlene, Deneace and Heather have been made to the POAs regarding Julia's painfully swollen hands and feet without any response.
- i. The situation with Julia's eye is distressing. She is clearly suffering and experiences discharge from her eyes, yet no plan appears to have been put in place by Randylain and Worrel to remedy this.
- j. The numerous and specific complaints about Julia's care raised by Deneace in her submissions. Deneace alleges that because Kennedy Lodge does not toilet their mother as often as needed and she has become incontinent by necessity. When the sores were discovered on her mother's body, the nurses simply returned her to bed. Julia has experienced pain and swelling in her arms, shoulder and back due to rubbing from the mechanical lift that is used to take her in and out of bed. She was uncomfortable in her clothing due to the swelling. Kennedy Lodge was advised but took no steps.
- k. Arlene described a situation in which her mother soiled her diaper and feces were under her bed, on the floor, in the bathroom and on her wheelchair seat. Heather and Arlene both assisted with the clean up, but it took Kennedy Lodge two full days to sanitize the affected areas and the seat.

- l. Julia was suffering because her pain medication was reduced. This was apparently on RandyLain's instruction. Heather was concerned about her mother's inability to cope without her regular level of pain medication.
- m. Despite ongoing complaints by Heather about the quality of care at Kennedy Lodge, RandyLain and Worrel refuse to discuss any alternatives.
- n. RandyLain concedes that there have been some care issues related to her mother but did not provide any details as to what those were.
- o. The breadth and thought that have gone into Heather's Guardianship Plan is indeed impressive. This includes a plan to improve Julia's life and care with an emphasis on connecting with family and her spiritual needs. RandyLain and Worrel's plan seems to contemplate simply more of the same with very little detail.
- p. Heather has not given up. Her persistence to provide a better living situation for her mother demonstrates her dedication.
- q. Heather is a trained nurse and has the experience and training to make decisions and care for her mother in all aspects.

[97] Section 66(4) of the *SDA* outlines a guardian's responsibilities with respect to determining the best interests for an incapable person as follows:

(a) the values and beliefs that the guardian knows the person held when capable and believes the person would still act on if capable;

(b) the person's current wishes, if they can still be ascertained; and

(c) the following factors:

1. Whether the guardian's decision is likely to,

i. improve the quality of the person's life,

ii. prevent the quality of the person's life from deteriorating, or

iii. reduce the extent to which, or the rate at which, the quality of the person's life is likely to deteriorate.

2. Whether the benefit the person is expected to obtain from the decision outweighs the risk of harm to the person from an alternative decision. 1996, c.2, s.43 (3);

[98] I find that Heather is well equipped to determine what is best for her mother in all of the above areas and that she will ensure that her mother's quality of life is improved. The focus must shift from the conflict between these siblings to what is best for Julia. To that end, I find that Heather is more open to ensuring that Julia has the best possible life at this palliative stage,

including fostering relationships with other family members. During Randylain and Worrel's time as POAPC, the family remains at war and divided into "us" and "them" factions.

[99] As for the appointment of a Guardian of Property, the POAs submit that Randylain should continue as the Trustee of Julia's income and that given Julia's minimal resources such an appointment is not required because the current arrangement is already the least restrictive option. I disagree. The evidence is clear that Heather and Randylain cannot work together. Leaving Randylain with any authority over Julia would inevitably lead to conflict between Randylain and Heather.

[100] The POAs submit that Heather should not be named Guardian of Property because she is litigious and has sought payment from her mother's funds for the cost of the capacity assessments. The cost of the capacity assessments was ordered to be paid from Julia's funds by this court. This is not an unusual order where an individual's capacity is in issue. Heather paid for the assessments and sought reimbursement through Randylain and Worrel and was refused on the basis that Julia's funds were better used for her care. I do not see that Heather's request was inappropriate given that she paid for the assessments herself and the court ordered payment from Julia's assets.

[101] Randylain questions Heather's ability to manage the property and litigation in Jamaica. I agree that Heather has not been historically involved with this and that at least until the guardianship is made permanent, if it is made permanent, Heather may not take steps with respect to the Jamaica property.

[102] An appointment of a Guardian of Property is necessary to ensure that Heather has full decision-making authority in all areas. If she does not, more litigation will surely ensue given the history of these parties.

[103] I am mindful that the appointment of Heather as Guardian of Property and Personal Care will not be well received by some members of the family. As such, I order a temporary guardianship with certain directions such that the court will be in a position to monitor whether the change in arrangements for Julia continues to be in her best interest.

Orders

[104] Given all of the above, I make the following Orders:

- a. The 2017 Power of Attorney for Personal Care is hereby set aside.
- b. Heather McGregor is hereby appointed as the temporary Guardian of Property and Personal Care for the incapable person Julia Green for a period of one year from the date of the appointment order.
- c. After one year, the parties are to appear before me and provide evidence as to why the temporary guardianship should be terminated or made permanent.
- d. The temporary guardianship may be extended as required in the event that it is not possible to obtain a court date in exactly one year.

- e. Randylain and Worrel are to cooperate in providing all required documentation, consents and any property belonging to their mother in Canada (including the \$17,000 set aside for her burial in Jamaica) to Heather McGregor forthwith.
- f. Heather is not to take any steps with respect to the litigation and property in Jamaica unless and until the guardianship is made permanent.
- g. No party may bring any motion or commence any new proceeding in this matter prior to the expiration of the temporary guardianship in one year without my consent or that of my designate.
- h. I do not order any costs of this proceeding.
- i. In the event that Julia has sufficient funds available, Heather may reimburse herself for out-of-pocket expenses incurred for Julia since 2019 including the cost of the capacity assessments, wheelchairs, cushions, and clothing.
- j. Heather's authority as temporary Guardian is not to be interfered with by Randylain and Worrel and may include a decision to remove Julia from Kennedy Lodge.
- k. Heather is to facilitate visits from family members to Julia but always in consideration of Julia's daily routines and best interests.
- l. A copy of this judgment and Heather McGregor's Guardianship Plan is to be provided to Kennedy Lodge in order that they may assist in its implementation.
- m. The requirement to post a bond is hereby dispensed with.
- n. Heather shall keep careful accounts and provide an informal accounting to the court upon the return of this matter in one year.
- o. Heather McGregor is to provide a draft Guardianship Order for my review which has been approved by the PGT. A copy of this judgment and the Guardianship Order is to be provided to the PGT. I would seek Mr. Rendely's assistance to ensure that the Order is in the proper form given my findings herein and that the draft Order has also been reviewed by Mr. Procope.

The temporary guardianship is in effect immediately.

C. GILMORE J.

Released: January 23, 2024

CITATION: McGregor v. Green Perkin et al., 2024 ONSC 498

COURT FILE NO.: CV-23-00698457-0000

DATE: 20240123

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HEATHER MCGREGOR

Applicant

– and –

RANDYLAIN GREEN PERKIN, WORREL GREEN,
DENEACE GREEN, THE PUBLIC GUARDIAN AND
TRUSTEE and JULIA GREEN

Respondents

REASONS FOR JUDGMENT

C. GILMORE J.

Released: January 23, 2024