

CITATION: Vanier v. Vanier, 2016 ONSC 4620
COURT FILE NO.: 03-61/15
DATE: 20160714

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jean-Raymond Vanier, Applicant

AND:

Rita Vanier, 92780 Canada Ltd., Jean-Pierre Vanier in his capacity as attorney under a Continuing Power of Attorney for Property dated May 12, 2015 Respondents

BEFORE: Penny J.

COUNSEL: *Lionel J. Tupman and Arieh Bloom* for the Applicant

David N. Delagran for Rita Vanier

Pierre Vanier on his own behalf

HEARD: July 5, 2016

ENDORSEMENT

[1] Raymond Vanier and Pierre Vanier are the sons of Rita Vanier. Raymond is represented by Whaley Estate Litigation. Pierre was represented by Lenczner Slaght and is now acting on his own behalf. Rita is represented by counsel appointed under s. 3 of the *Substitute Decisions Act*, Beard Winter.

[2] This proceeding has its origins in an earlier dispute with Pierre and Raymond's sister, Patricia. In 2014, Raymond and Pierre commenced an application against Patricia in relation to alleged misuse of their mother's funds. That litigation settled in March 2015.

[3] Raymond and Pierre then became involved in a dispute about reimbursement of about \$3,300 to Pierre from funds of 92780 for expenses Pierre said he incurred on his mother's behalf. Raymond is concerned not only about these reimbursements but suspects that there are unaccounted for assets that should be in his mother's accounts and that Pierre used Rita's money to pay his own legal bills from Lenczner Slaght in this proceeding.

[4] Pierre and Raymond were joint continuing powers of attorney for property on their mother's behalf. Their dispute extended to the use of this CPOA and their mother's access to the proceeds of the settlement with Patricia (of over \$300,000) and the assets (of over \$600,000) of 92780, which is a holding company of which Rita, Pierre and Raymond are the shareholders.

[5] In the face of this dispute, 927805's banks and the lawyers holding Rita settlement funds refused to permit transfers to Rita without clear direction or authorization.

[6] Raymond refused to provide consent to the transfer of his mother's funds for fear, he says, that Pierre might misappropriate their mother's money. As a result, Rita did not have access to her capital and could not fund significant expenses such as the rent required for her to stay in her retirement residence. In order, Pierre says, to try to free up his mother's access to her funds, on May 12, 2015 Pierre obtained a new CPOA for property appointing him as his mother's sole attorney. Ultimately, a court order was required to release \$50,000 to cover these expenses for several months. Those funds have now been completely used up.

[7] There is obviously a long history to this matter. As a result of the problems with Patricia, the brothers are now highly suspicious of one another. They have, unfortunately in my view, both lost sight of the fact that it is Rita's best interests that must be served here, not their own pride, suspicions, authority or desires.

[8] The main issue in this matter is a narrow one - is the May 12, 2015 CPOA valid? A capacity assessor retained by Raymond after he found out about the new CPOA found that, as of May 27 2015, Rita lacked capacity to manage her property. The capacity assessor found, however, that Rita did not lack capacity to grant a power of attorney. For reasons that have not explained but are readily apparent, Raymond did not initially disclose the existence of that capacity assessment to Pierre.

[9] Raymond challenges the May 12, 2015 CPOA granted to Pierre. It is common ground, however, that a power of attorney is valid if at the time of execution the grantor was capable of giving it, even though she lacked capacity to manage her property. As there is professional evidence that Rita had capacity to grant the power of attorney, Raymond attacks the power of attorney on the basis of undue influence.

[10] In general, to establish undue influence, the burden of proof rests with the party alleging it. The extent of the influence must amount to coercion; simple influence is not enough. The testator's free will must be overborne. Put another way, it is not improper for any potential beneficiary to attempt to influence the decision of the testator provided the pleading does not amount to coercion and the latter continues to act as a free agent. "Some begging is permissible." See Feeney's *Canadian Law of Wills*, 4th at 3.10 to 3.14; *Hall v. Hall* (1868), L.R. 1 P. & D. 481.

[11] To overcome this burden, Raymond seeks to rely on what he calls suspicious circumstances. Where there are suspicious circumstances of undue influence surrounding the execution of a power of attorney, the presumption of capacity under s. 2 of the SDA does not operate and the burden of proof with respect to capacity shifts to the grantee of the power of attorney, *Nguyen-Crawford v. Nguyen*, 2010) ONSC 6836 at para. 85.

[12] I do not think the evidence warrants the conclusion that there are suspicious circumstances. Raymond relies on Pierre having drafted the power of attorney and getting his mother to sign it without the benefit of independent legal advice. Given the capacity assessor's

opinion that Rita had capacity to execute a power of attorney, I do not think this particular fact bears much weight in the circumstances.

[13] Raymond also relies on a number of statements Rita made to him. These statements are, of course, uncorroborated and come from a person who he alleges lacks capacity to manage her property. The statements are also, in many cases, either true or based on an entirely reasonable perception of what was going on. I say this because it was Raymond's conduct which, arguably, caused the significant restriction on Rita's access to her own money.

[14] Raymond also relies on a section of the capacity assessment in which the capacity assessor purports to opine on whether Rita was subject to undue influence. I agree with counsel for Rita that the capacity assessor's evidence on this issue is entirely inadmissible and unreliable for a number of reasons. Among other things, it is beyond the scope of her expertise, based in most cases on double hearsay, reflects information obtained from Raymond without checking collateral sources and speaks directly to the factual finding that is for the court to determine in this case.

[15] On the available evidence, therefore, I find that Rita had capacity to execute the May 12, 2015 CPOA and that the CPOA was not the product of undue influence. The May 12, 2015 CPOA is valid.

[16] I agree with s. 3 counsel for Rita that, having found the CPOA valid, it is unnecessary to make a determination about Rita's current capacity to manage her property. This is because Rita, with the necessary capacity, appointed the person she chose (Pierre) to manage her property in the event that she was unable to do so.

[17] There being a valid CPOA for property, therefore, the question becomes whether there are grounds to replace Rita's attorney for property with a professional interim guardian. I do not think Raymond has shown any evidence of impropriety on Pierre's part that rises above the level of speculation.

[18] Pierre has provided a *prima facie* explanation for the \$3,300 in reimbursements he received from 92780. Raymond's other concerns, once again, do not rise above the level of speculation. While there may be questions about the value of the golf course shares or the payment of Pierre's legal fees, those can be addressed in the course of the passing of Pierre's accounts, which is addressed below.

[19] For these reasons, Raymond's application for the appointment of an interim guardian in replacement of Pierre as power of attorney is dismissed.

[20] As I understand it, Pierre initially agreed to provide an accounting but, at the hearing, decided to resile from that commitment. The role of a power of attorney is fiduciary in nature. A person holding a power of attorney must be prepared to account for his administration of someone else's property. Indeed, attorneys should, where questions arise, welcome the opportunity to do so.

[21] In the circumstances of this case, it is highly appropriate that there be maximum transparency about the use and disposition of Rita's limited resources. Again, I cannot emphasize enough that Rita's assets must be available to her for the sole purpose of furthering Rita's best interests.

[22] There shall, accordingly, be an order requiring Pierre to pass his accounts as power of attorney for Rita from May 12, 2015 to July 14, 2016, and on an annual basis thereafter. Pierre's notice of application to pass his accounts for the initial period shall be commenced by August 15, 2016 and by September 1 in each succeeding year.

[23] Anyone seeking costs shall do so by filing brief written submission not to exceed two typed, double-spaced pages together with a Bill of Costs within 10 days. Anyone wishing to respond to such a request may do so by filing a written response (subject to the same page limit) within a further 10 days.

Penny J.

Date: July 14, 2016