COURT OF APPEAL FOR ONTARIO

CITATION: Vanier v. Vanier, 2017 ONCA 561
DATE: 20170630
DOCKET: C62537

Epstein, Benotto and Trotter JJ.A.

BETWEEN

Jean-Raymond Vanier

Applicant (Appellant)

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 (Respondents)

Lionel J. Tupman and John E. S. Poyser, for the appellant

Jean-Pierre Vanier, acting in person

David N. Delagran, for the respondent Rita Vanier

Heard: March 15, 2017

On appeal from the order of Justice Michael A. Penny of the Superior Court of Justice, dated July 14, 2016, with reasons reported at 2016 ONSC 4620.

Epstein J.A.:

[1] During their lengthy marriage, the respondent, Rita Vanier, and her husband, Frank Vanier, built a successful business - the respondent 92780

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Canada Ltd. [1] Frank died in 2011, leaving his entire estate to Rita. The combination of Rita's advancing years (she is now 90 years of age) and some unfortunate family dynamics, has given rise to a struggle among Rita's twin sons, Jean-Pierre ("Pierre") and Jean-Raymond ("Raymond") and her daughter, Patricia, over who should have power of attorney over Rita's property. This struggle has had a devastating impact on the family's finances and, more significantly, on their relationships. This appeal arises out of one aspect of that struggle.

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[2] In September of 2011, Rita designated Patricia as her attorney for property under a Continuing Power of Attorney for Property (the "2011 CPOAP"). Patricia allegedly took advantage of her authority under the 2011 CPOAP and diverted several hundred thousand dollars from Rita to herself, leading to litigation (unrelated to this appeal), which ultimately settled. Against the background of Patricia's alleged defalcation, Rita turned to Raymond and Pierre, and on October 18, 2013 Rita signed a power of attorney (the "2013 CPOAP") naming them as her attorneys for property, jointly and severally.

[3] Following settlement of the litigation with Patricia, Raymond and Pierre soon grew suspicious of how the other was handling Rita's property. The resultant breakdown in the relationship between the two brothers caused Rita to

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[1] Although a respondent, the company is unrepresented and took no part in the motion or the appeal.

make yet another change. On May 12 2015, Rita executed a new CPOAP (the "2015 CPOAP"), the effect of which was to remove Raymond as her co-attorney for property and to appoint Pierre as her sole attorney for property.

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[4] Raymond took issue with the 2015 CPOAP, and on June 19, 2015 he brought an application under the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 (the "*SDA*"), seeking several orders, including the removal of Pierre as attorney for property, and a declaration that the 2015 CPOAP was void. As part of this application, Raymond brought a motion, heard July 5, 2016, seeking an order removing Pierre as attorney for property on an interim basis pending determination of the application, an order appointing an interim guardian of property for Rita, and an order requiring Pierre to pass accounts.

[5] Other than ordering Pierre to pass his accounts, the motion judge dismissed the motion, and declared the 2015 CPOAP to be valid. Raymond appeals the dismissal on the basis that the motion judge applied the wrong test for undue influence, erred by failing to find suspicious circumstances surrounding Rita's execution of the 2015 CPOAP, and erred by failing to consider all of the evidence. Raymond also seeks leave to appeal the $55,000 in costs the motion judge ordered him to pay Rita.

[6] For the reasons that follow, I would dismiss the appeal.

BACKGROUND

[7] The events that led up to the execution of the 2015 CPOAP are central to this dispute.

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[8] The bulk of 92780's funds were held at the Royal Bank of Canada (the "RBC"), and were frozen pursuant to the litigation with Patricia. In March 2015, following the settlement with Patricia, the RBC required all three directors of 92780 – Rita, Pierre and Raymond - to sign documents authorizing a new account. Raymond refused, and as a result approximately $600,000 of the corporation's funds remained frozen.

[9] The terms of the settlement with Patricia required her to repay Rita approximately $300,000. Raymond, acting unilaterally, instructed Rita's lawyer to hold the settlement funds and not to release them.

[10] The effect of Raymond's actions led to Rita's not having access to moneys she needed to pay her basic living expenses, including the rent at the Marleigh, her retirement home. Rita's rent cheque in May 2015 was returned as her account did not have sufficient funds. The desperate position in which Rita found herself led to her signing the 2015 CPOAP.

[11] The following is a summary of the circumstances surrounding Rita's execution of the 2015 CPOAP from the differing perspectives of Pierre/Rita and Raymond. I agree with the motion judge that it was not necessary to resolve all factual disputes in order to resolve the issues in this case. The issue to be

determined was narrow – whether the 2015 CPOAP was valid. Its resolution did not require the determination of every factual issue in dispute.

Pierre and Rita's Version of Events

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[12] Following Rita's authorizing the 2013 CPOAP, both Raymond and Pierre occasionally reimbursed themselves from that portion of the corporate account that was not frozen (at the Toronto-Dominion Bank), for expenses incurred on Rita's behalf, or expenses related to the litigation with Patricia. However, in February 2015, Raymond, who had online access to all banking transactions, expressed concern over Pierre's transactions.

[13] In response to this concern, Pierre provided Raymond with detailed banking receipts. Raymond remained suspicious of his brother, and in March 2015 demanded that Pierre and Rita notify the banks that, going forward, all cheques were to be co-signed by him. Raymond further demanded that the 2015 CPOAP be changed so that he and Pierre would act jointly as powers of attorney, rather than jointly and severally.

[14] Not being able to appease Raymond, and concerned that the impasse was restricting Rita's access to much-needed funds, Pierre decided to take action.

[15] On May 3, 2015 Pierre called a special meeting of the shareholders of 92780, to be held on May 14, 2015. The meeting was to ratify a resolution

removing Raymond as director, enabling the two remaining directors, Rita and Pierre, to instruct the RBC to release Rita's funds to her.

[16] Pierre also urged Rita to make a new CPOAP removing Raymond, so that he (Pierre), as sole power of attorney for property, could instruct counsel to release the settlement funds to Rita. On May 12, 2015, Pierre went to Rita's retirement home to have her execute the 2015 CPOAP, which he had prepared following the same wording as the 2013 CPOAP. Rita executed the document that day. Her signature was witnessed by two staff members at the retirement home where Rita had lived for some time.

[17] On May 14, 2015, before the shareholders' meeting, the police were called to Rita's residence in response to the escalating family dispute over the management of Rita's finances. Rita told the police that Raymond was preventing her from accessing funds she needed to pay her living expenses, particularly her rent. The police investigated Raymond's suspicion that Pierre was abusing his authority as power of attorney for property, and eventually concluded that it was an "unfounded, civil matter".

[18] The shareholders' meeting went ahead and by 2-1 vote, Raymond was removed as director.

[19] In response, Raymond arranged for Rita to undergo a capacity assessment. On May 27, 2015 Louise Silverston, a designated capacity assessor under the *SDA*, performed an assessment of Rita. The assessor concluded that

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Rita was capable of executing and revoking a power of attorney for property, pursuant to s. 8(1) of the *SDA*.

Raymond's Version of Events

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[20] Raymond's position is that Pierre has maintained a relationship of dominance and control over Rita for many years. Since 2012, Pierre has paid the bills and had performed all the bookkeeping for Rita and for 92780.

[21] Following the settlement of the litigation with Patricia, Pierre and Raymond became engaged in a dispute regarding reimbursements to Pierre for expenditures claimed to have been made for Rita's benefit. Raymond grew suspicious over unaccounted for monies, and therefore took steps to put Rita's funds out of Pierre's unilateral reach.

[22] According to Raymond, Pierre induced Rita into signing the 2015 CPOAP, as well as into approving the corporate resolution removing Raymond as director of 92780, by telling her that if she did not sign, she would not have access to any of her money. Fearing eviction from her retirement home, Rita signed the resolution and the 2015 CPOAP. The result was to give Pierre exclusive control over the family corporation and its assets.

[23] Raymond says the staff at the retirement home called the police out of concern over Pierre's conduct towards Rita. Raymond says the police report shows that Rita was led to believe that the only way she could access her money

and pay her rent was by removing him (Raymond) as power of attorney for property and as director of 92780.

[24] Raymond also argues that undue influence was a significant factor in Rita's decision to grant the 2015 CPOAP. He relies on the assessors report, at p. 6, where the assessor says:

> It is my opinion that undue influence was a factor in [Rita's] change of Power of Attorney for Property and Personal Care, and that [Rita] would not have done these changes on her own or if properly informed as to what was actually the concern. I am of the opinion that [Rita's] distress is so acute, secondary to her mental status, that this had made her extremely vulnerable, and has influenced and guided her signature of any legal documents in the past months.

Decision Below

[25] The motion judge identified the main issue as a narrow one – the validity of the 2015 CPOAP. He noted that Ms. Silverston had found that, as of May 27, 2015, Rita had the capacity to grant and revoke a power of attorney. In the light of this professional evidence, Raymond was challenging the 2015 CPOAP on the basis of undue influence.

[26] The motion judge expressed the view, at para. 10, that the burden of proof to establish undue influence rests with the party alleging it. The motion judge set out the test for undue influence as follows:

> 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

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> 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.

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[27] To overcome his burden, Raymond sought to rely on *Nguyen-Crawford v. Nguyen*, 2010 ONSC 6836, 71 E.T.R. (3d) 55, which held that 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.

[28] The motion judge acknowledged that, according to Raymond, the suspicious circumstances included the fact that Pierre had drafted the 2015 CPOAP, that Rita had not been provided with independent legal advice and that Pierre had told her that if she did not sign the document she would have no access to her funds. Raymond also relied on the assessor's view that Rita had been subjected to undue influence.

[29] The motion judge held that the evidence did not support a finding of suspicious circumstances. Given the assessor's opinion that Rita had the capacity to execute a power of authority, the motion judge attached little weight to Pierre's having drafted the 2015 CPOAP, or to Rita's having signed it without independent legal advice. The motion judge found that Pierre's alleged statements about Rita's not having access to her money unless she signed the 2015 CPOAP were uncorroborated. In any event, such statements were either

true or based on a reasonable perception of what was going on, as it was Raymond's conduct that, arguably, had created the restrictions on Rita's access to her money.

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[30] The motion judge also held that the part of the capacity assessment to the effect that Rita had been the subject of undue influence was inadmissible and unreliable – it was beyond the scope of the assessor's role, and was based, for the most part, on double hearsay.

[31] The motion judge therefore concluded that Rita had the capacity to execute the 2015 CPOAP, and that it had not been the product of undue influence. Raymond had not shown any evidence of impropriety on Pierre's part rising beyond the level of Raymond's distrust and speculation. There was therefore no basis to interfere with the 2015 CPOAP.

[32] The motion judge went on to hold that as the role of power of attorney was fiduciary in nature, a person holding it must be prepared to account for his administration of someone else's property. Pierre was therefore ordered to pass his accounts on July 14, 2016, and on an annual basis thereafter.

[33] In a costs endorsement released a month later, the motion judge expressed the view that this "relatively straightforward matter [had] generated an astonishing level of lawyer activity … all out of proportion to the monetary stakes." He went on to say that Rita had been put to significant expense by Raymond, and was therefore entitled to her costs from him. Leaving Pierre's

costs to the passing of accounts, the motion judge ordered Raymond to pay Rita's costs fixed in the amount of $55,000.

The Appeal

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[34] Raymond argues the motion judge erred in:

1. applying the wrong test for undue influence,
2. finding that the evidence did not establish suspicious circumstances,
3. failing to consider relevant evidence, and
4. the determination of the award of costs.

[35] Counsel for Rita raises an additional issue. He argues that although the motion judge correctly found that the assessor's opinion on undue influence was inadmissible and unreliable, this court ought to censure the practice of seeking and providing opinion evidence on undue influence from capacity assessors.

A. Standard of Review

[36] The parties are in agreement as to the standard of review. The question of whether the motion judge erred in applying the wrong test for undue influence is one of law, and thus is reviewed on a correctness standard. The other issues on appeal are questions of mixed fact and law, and subject to a more deferential review.

B. Issues

Issue 1: Did the motion judge err in applying the wrong test for undue influence?

[37] The parties do not dispute what constitutes undue influence or its consequences, if established. The divide is over who bears the burden of establishing it.

The Parties' Submissions

[38] Raymond submits that the test relied upon by the motion judge, set out above - the test for "testamentary undue influence" - is not the appropriate test for the granting of a power of attorney. The test the motion judge ought to have used is the test for *inter vivos* equitable undue influence, either actual or presumed. The effect of the *inter vivos* test would be to shift the onus to Pierre to prove that Rita signed the 2015 CPOAP, willingly and without undue influence.

[39] Raymond relies on the decision of the House of Lords in *Royal Bank of Scotland v. Etridge (No. 2)*, [2001] UKHL 44, that explains how equity identifies two forms of unacceptable conduct in the context of *inter vivos* transactions. One involves overt acts of improper pressure or coercion (actual undue influence). The other arises out of a relationship between two people, where one acquires a measure of influence or ascendancy over another, of which the ascendant person takes unfair advantage. The law has long recognized the need to prevent abuse of influence in these "relationship" cases despite the absence of evidence of overt acts of persuasive conduct (presumed undue influence).

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[40] Raymond points to a reference to presumed undue influence in the *inter vivos* setting in this court's decision in *Bank of Montreal v. Duguid* (2000), 47 O.R. (3d) 737, where Feldman J.A., in dissent but not on this point, stated:

> In the case of presumed undue influence, the claimant must show only that there existed a relationship of trust and confidence such that it is fair to presume that the wrongdoer abused that relationship to procure the transaction. The onus then shifts to the wrongdoer to prove that the complainant in fact entered into the transaction freely.

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[41] Raymond argues that in the presence of a relationship of dominance, trust or confidence (such as has existed between Rita and Pierre for some time), the court will assume that the juridical act has occurred by virtue of inappropriate conduct, thereby putting the person seeking to rely on the juridical act to the evidentiary burden of proving that the act was made as a result of the maker's "full, free and informed thought".

[42] Raymond submits that although this test is traditionally applied to *inter vivos* gifts improperly taken, it equally applies to *inter vivos* transfers of power over the grantor's assets. Accordingly, Pierre's dominance over Rita triggers the presumption of undue influence in regards to the Rita's execution of the 2015 CPOAP. Since Pierre has failed to lead evidence to rebut the presumption of undue influence, the 2015 CPOAP should be set aside.

[43] Rita argues that the motion judge stated the correct test, that of testamentary undue influence, and correctly applied that test. There is no proof of

any actual coercion, and accordingly no undue influence surrounding the execution of the 2015 CPOAP.

[44] Rita submits that the cases establishing the doctrine of *inter vivos* undue influence are not relevant in the circumstances of this case. Rita argues that the test of presumptive *inter vivos* undue influence, in which specific overt acts of coercion need not be established where there is a relationship of trust or dominance, is restricted to circumstances where the trusted person has a received a "large or immoderate benefit" from the transaction. However, there is no evidence of that here. Raymond's argument is not founded on evidence that Pierre misappropriated Rita's assets, but on the suspicion that such might occur. Further, Pierre gained nothing under the 2015 CPOAP that he did not already have under the 2013 CPOAP: the only impact was Raymond's loss of authority.

[45] Rita goes further. She submits that even if the doctrine of *inter vivos* presumptive undue influence were found to apply to the circumstances surrounding the making of a power of attorney for property, the result of this motion would be the same. The impact of using the *inter vivos* test is that the onus would shift to Pierre to demonstrate no undue influence. This is, of course, a rebuttable presumption. At the hearing before the motion judge, Raymond relied upon four statements that he said Pierre had made to Rita as establishing undue influence:

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1. She would not be able to continue to live at the Marleigh if she did not execute the May 12, 2015 CPOAP;

2. She would not have access to any money to pay her rent unless she removed [Raymond] from his role as Attorney for Property under the October 18, 2013 CPOAP;

3. She had no choice but to execute the May 12, 2015 CPOAP;

4. Once she executed the May 12, 2015 CPOAP and money was released, [Raymond] would again become one of her Attorneys pursuant to a future Continuing Power of Attorney.

[46] The motion judge held, at para. 13, that these statements "were either true, or based upon an entirely reasonable perception of what was going on". Accordingly, even if the *inter vivos* presumed undue influence test applied, Pierre would have successfully rebutted the burden, and demonstrated that there was no undue influence.

[47] Pierre takes no position on this issue.

(a) Analysis

[48] I would not give effect to this ground of appeal.

[49] First, there is no indication that the application of the *inter vivos* equitable undue influence test was argued before the motion judge. As noted by Weiler J.A. in *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130, at para. 18, the

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general rule is that appellate courts will not entertain entirely new issues on appeal. The burden is on the appellant to persuade the appellate court that "all the facts necessary to address the point are before the court as fully as if the issue had been raised at trial". While this burden may be more easily discharged where the issue sought to be raised involves a question of pure law, the ultimate decision of whether to grant leave to allow a new argument is a discretionary decision to be guided by the balancing of the interests of justice as they affect all parties.

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[50] However, I need not decide whether it is in the interests of justice for this issue to be dealt with, as the *inter vivos* equitable undue influence test has no application on the facts of this case. As noted by the House of Lords in *Eltridge*, at paras. 21-22, there are two prerequisites to the evidential shift in the burden of proof from the complainant (Raymond, arguing on behalf of Rita) to the other party (Pierre). First, the complainant reposed trust and confidence in the other party. Second, the transaction is not readily explicable by the parties' relationship. This second part of the test has been held by the House of Lords to mean that the evidence must support a finding that the transaction is "immoderate and irrational".

[51] In oral argument, Pierre candidly conceded the first part of the test, in other words that Rita reposed trust and confidence in him. However, he submits

that Raymond cannot meet the second part, in other words show that the 2015 CPOAP was "immoderate and irrational".

[52] I agree. There is nothing “immoderate or irrational” about the 2015 CPOAP. The record supports a finding that Rita’s decision to give the power of attorney to one son over the other was an emotionally difficult but totally rational decision. Rita was very clear in what she said to the police and to Ms. Silverston, none of which evidence was challenged. She knew her money was out of reach. She needed her funds to pay basic expenses such as rent. She understood that Raymond was interfering with her access to the fund and that the solution had to lie with Pierre.

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[53] Moreover, far from being “immoderate”, the 2015 CPOAP conferred little, if any, benefit on Pierre. He was left with the same power as he had under the 2013 CPOAP. The minor “benefit”, if one could call it that, is that the 2015 CPOAP protected Pierre from the stress and inconvenience of Raymond’s being in a position to interfere with Rita’s finances.

[54] For these reasons, I am of the view that the motion judge was fully justified in applying the testamentary undue influence test.

[55] I add, that even if the *inter vivos* equitable undue influence test were applicable, the record does not support a finding of undue influence.

Issue 2: Did the motion judge err in finding that the evidence did not establish suspicious circumstances?

[56] Pursuant to s. 2 of the *SDA*, a person is presumed to be capable of granting a power of attorney for property. However, s. 2(3) states that a person cannot rely on this presumption if "he or she has reasonable grounds to believe that the other person is incapable of entering into the contract or of giving or refusing consent". As held in *Nguyen*, where there are suspicious circumstances of undue influence surrounding the granting of a power of attorney, the presumption of capacity does not operate, and the burden of proof with respect to capacity shifts to the grantee of the power of attorney.

[57] The actual requirements in order to be capable of granting a power of attorney for property are set out in s. 8 of the *SDA.* Section 8 makes clear that capacity deals with issues beyond undue influence.

(a) Parties' Submissions

[58] Raymond submits that the motion judge erred in failing to find suspicious circumstances. The motion judge should have considered:

1. that Pierre attended at Rita's nursing home with the 2015 CPOAP that he had drafted,
2. the execution of the 2015 CPOAP in the context of the corporate vote two days later removing Raymond as a director of 92780.

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3. the police report indicating that Rita was unsure what she had signed and that she believed she had to sign the document to receive money she needed to pay her expenses; and

4. Ms. Silverston's evidence that undue influence was a factor in Rita's change of power of attorney

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[59] Raymond goes on to argue that the motion judge failed to weigh the cumulative effect of these factors when considering whether there were suspicious circumstances.

[60] Rita submits that Raymond simply disagrees with the manner in which the motion judge weighed the evidence in finding that there were no suspicious circumstances of undue influence surrounding Rita's execution of the 2015 CPOAP.

[61] Rita further submits that the law regarding suspicious circumstances has historically only been applied to wills. It was only in the recent case of *Nguyen* that the doctrine was applied in the context of powers of attorney. Rita submits that *Nguyen* was wrongly decided, and should not be applied in these circumstances.

[62] Where suspicious circumstances in the preparation of a will are established, the general presumption of capacity to execute a will is displaced, and the onus of proof on the question of capacity shifts to the propounder of the document. The most commonly recognized example of a suspicious

circumstance is when a person who is instrumental in the making of a will obtains a benefit under it.

[63] However, Rita argues, there are two reasons why the doctrine ought not to be applied in cases involving powers of attorney. First, unlike cases involving wills, an attorney for property who is involved in the preparation of a power of attorney cannot be said to have received a "benefit" by that appointment, in that neither legal nor equitable title to any property is transferred by virtue of the appointment. Second, the doctrine exists, in part, because evidence to prove or disprove undue influence is often unavailable in wills cases. Conversely, in cases such as this, the grantor of the power of attorney is still alive, has not been declared incapable, and can provide evidence surrounding the execution of the document.

[64] Rita argues that there is much evidence as to how the 2015 CPOAP came to be signed. There are contemporaneous statements made by Rita to Raymond, Pierre, the assessor, and the police about why she signed the 2015 CPOAP. This evidence exists because Pierre made no attempt to conceal what he was doing from anyone. The motion judge was correct in finding that there was no evidence of suspicious circumstances. It is clear what Pierre did, and why.

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[65] Pierre submits that the evidence does not support a finding of suspicious circumstances or any form of wrongful conduct in the context of Rita's execution of the 2015 CPOAP.

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(b) Analysis

[66] As with the first issue, I do not see this appeal as an appropriate one in which to consider the application of the doctrine of suspicious circumstances to powers of attorney as a whole. In front of the motion judge, counsel for Rita dealt with *Nguyen* briefly, arguing that as Pierre had gained no benefit under the 2015 CPOAP, the doctrine of suspicious circumstances did not apply. As I read the transcript, counsel was not suggesting that the doctrine of suspicious circumstances could never apply in the context of powers of attorney, or that *Nguyen* should not be followed.

[67] Moreover, I agree with Rita that Raymond's argument is simply a challenge to the motion judge's findings of fact leading to his conclusion that there were no suspicious circumstances surrounding Rita's signing of the 2015 CPOAP. I see no basis to interfere with this finding.

Issue 3: Did the motion judge err in not considering relevant evidence?

[68] A failure to consider relevant evidence can amount to a palpable and overriding error if the evidence was potentially significant to a material finding of fact: *Waxman v. Waxman* (2004), 186 O.A.C. 201, at para. 343, leave to appeal refused, [2004] S.C.C.A. No. 291.

(a) **Parties' Submissions**

[69] Raymond argues that the motion judge failed to consider relevant evidence. He relies on the fact that the endorsement contains no reference to the police report that records suspicious circumstances, or to Raymond's removal as a director of 92780. Raymond submits that this evidence was material to the motion judge's determination of the issues of undue influence and suspicious circumstances.

(b) **Analysis**

[70] I see no merit to the argument that the motion judge failed to consider relevant evidence. A judge is not required, in his or her reasons, to mention every single piece of evidence: *R. v. C.(T.)* (2005), 74 O.R. (3d) 100 (C.A.), at para. 45. The record demonstrates that the motion judge was aware of the evidence referred to by Raymond. The fact that the motion judge did not expressly mention the police report or the corporate resolution in his reasons does not mean that he failed to consider them.

Issue 4: Did the motion judge err in costs?

(a) **Parties' Submissions**

[71] Raymond seeks leave, if necessary, to appeal the $55,000 costs award made against him. Raymond submits that he initiated these proceedings with the sole goal of protecting his mother and advancing her best interests. In the

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circumstances, he should not have to bear the onus of paying a $55,000 costs award.

[72] Furthermore, the overriding principal in awarding costs is reasonableness. Raymond submits that the amount of costs awarded was excessive and unreasonable, being disproportionate to the monetary value of the issues in dispute and not within his reasonable expectations.

[73] Rita argues that although Raymond asserts that he initiated these proceedings with the goal of protecting her, the motion judge found otherwise. Furthermore, Raymond relies on his reasonable expectations as to costs payable. However, he failed to deliver a bill of costs. Accordingly, there is no evidence of the costs Raymond would have sought, if successful. The motion judge was also provided with an offer to settle made by Rita, which was left open for several days.

[74] Pierre makes no submissions concerning the motion judge's costs order. He does express concern about the ongoing costs that will be incurred as a result of the order requiring him to annually pass accounts.

(b) Analysis

[75] The order requiring Pierre to annually pass Rita's accounts was not appealed. I therefore make no comment on Pierre's objection to those future expenses.

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[76] I agree with the motion judge's observations that this litigation reflects a profound lack of judgment on Raymond's part. I also agree with the point made by Rita's counsel, in response to Raymond's argument about the reasonableness of the costs award, that Raymond did not submit a draft bill of costs.

[77] In the light of these two observations, and given that the motion judge's determination of costs is entitled to considerable deference, I see no basis to interfere with the costs award.

Issue 5: The finding of undue influence by the capacity assessor

(a) Parties' Submissions

[78] Rita submits that the scope of capacity assessors is statutorily restricted to inquiring into and providing an opinion on capacity. Under s. 78(2) of the *SDA*, the assessor was required to advise Rita of the purpose of the assessment, and of Rita's right to refuse to participate. The assessor did tell Rita her capacity to grant and revoke powers of attorney would be assessed. However, the assessor did not tell Rita that allegations of undue influence were being investigated. Rita was therefore not able to exercise her statutory right to refuse the assessment.

[79] Rita submits that the assessor had neither the understanding of the law nor the authority under the *SDA* to inquire into undue influence, let alone draw conclusions on that issue. Her "investigation" of the topic was entirely one-sided, as she concluded that Pierre had unduly influenced Rita without seeking any evidence from him.

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[80] Counsel for Rita argues that although the motion judge correctly found that the assessor's opinion on undue influence was inadmissible and unreliable, this court ought to censure the practice of seeking and providing opinion evidence on undue influence from capacity assessors. Rita argues that such evidence, in addition to being outside the scope of the statute, has the potential, as demonstrated by this case, of fueling unnecessary litigation.

(b) Analysis

[81] I understand Rita's counsel's concern. However, the record contains no evidence about how prevalent such a practice is. Accordingly, other than expressing my agreement that it was inappropriate for the assessor to provide an opinion on undue influence and agreeing, as I have, that her opinion on undue influence was unreliable and inadmissible, I leave more in-depth consideration of this issue to another day, in which it is fully canvassed in the record.

CONCLUSION

[82] I endorse the wise words of the motion judge when he expressed the view that both Raymond and Pierre had "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". I support this view particularly in the light of the submissions Rita personally made to the panel in the course of the hearing. Notwithstanding that she was ably represented by counsel, Rita, on two occasions during argument, asked and obtained permission to address the court. On both occasions, Rita

professed her love for both of her sons, but in no uncertain terms Rita also powerfully conveyed her frustration over the damage that the family has suffered as a result of these seemingly meritless proceedings.

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[83] Rita asked the panel for assistance in ending the litigation. Hopefully, in the light of this decision, her sons will honour Rita's wishes.

DISPOSITION

[84] For these reasons, I would dismiss the appeal. I would order Raymond to pay Rita her costs of this appeal in the amount of $30,000 including disbursements and HST. Pierre was not represented by counsel. However, he requested a significant order for costs. Pierre has been put to a great deal of time and effort and personal expense for reasons, as I have said, that are questionable. I would

therefore order Raymond to pay costs to Pierre in the amount of $5,000.

Released: “GE” June 30, 2017

“Gloria Epstein J.A.”
“I agree. M.L. Benotto J.A.”
“I agree. G.T. Trotter J.A.”

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