SUPREME COURT OF NOVA SCOTIA
Citation: *Withenshaw v. Withenshaw*, 2020 NSSC 208

Date: 20200727
Docket: SK 475379
Registry: Kentville

Between:

Gary Paul Withenshaw and George David Withenshaw

Applicants

v.

Gail Eileen Withenshaw

Respondent

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	March 16 - 17, 2020, in Kentville, Nova Scotia
Counsel:	Richard W. Norman, for the Applicants Gail Eileen Withenshaw, unrepresented

By the Court:

[1] The Applicants' (Amended) Notice of Application in Court, was filed on April 18, 2018. The following relief is sought:

1. an order requiring the Respondent to account for all assets formerly belonging to the late Doris Kathleen Withenshaw ("Mrs. Withenshaw") which the Respondent dealt with as Mrs. Withenshaw's attorney under power of attorney;
2. an order requiring the Respondent to make restitution to the estate of Mrs. Withenshaw (the "Estate") with respect to any money or assets belonging to Mrs. Withenshaw which the Court determines were improperly taken or used for the Respondent's benefit;
3. prejudgement interest on any funds to be returned to the Estate;
4. costs on a solicitor-client basis.

Background

i) General

[2] Gary, George, and Gail Withenshaw are siblings. Their mother, Doris Withenshaw ("Mrs. Withenshaw" or "Doris") died on November 1, 2014. The Respondent ("Gail") had been the recipient of a Power of Attorney ("POA") executed by her mother in 2006. She was also Executrix of her mother's estate. The Last Will and Testament left bequests to all three of Doris' children.

[3] It is clear that by 2006, Mrs. Withenshaw was legally blind and suffering from Alzheimer's disease, which was progressive. The evidence establishes that her mental and physical condition continued to decline to the time of her death in 2014.

[4] The Applicants ("Gary" and "George") maintain that, in or around 2006, at the inception of the POA, their mother's estate held approximately $320,000.00. After her death, in 2014, they made requests to Gail for information about their mother's remaining assets. These assets remain undistributed (although the Respondent has taken her Executrix commission). The Applicants say that they have never received the answers that they sought.

[5] In late 2017, the Applicants felt it necessary to commence an application, in Probate Court, compelling their sister to pass her accounts as Executrix of their mother's estate. The information that she initially provided in response was scant, and without any supporting documents such as invoices or bank account statements.

[6] By March 2018, what supporting information the Applicants had received indicated that their Mother's estate possessed comparatively few assets. These assets totalled $85,310.78, the bulk of which consisted of life insurance proceeds, which, of course, had been paid to the estate only after Doris Withenshaw had passed away.

ii) Mrs. Withenshaw and the parties' relationship inter se

[7] Gary testified that his relationship with his mother was a good one. He says that he did chores and some repairs around her home to assist her. When she moved into a seniors apartment in or around 2002, he assisted her with her taxes, among other things. In particular, he says that through this means he was aware that she had various investments which totalled approximately $320,000.00.

[8] He further testified that, around this time, his mother had broached some concerns to him with respect to the relative lack of diversity in her investment portfolio. Specifically, her concern was that she had approximately 80% of her money tied up in securities. She was concerned about some losses that she had sustained as a result of the economic downturn in 2001, and wondered if Gary could take her to see his financial advisor at Clarica (later known as Sun Life Financial). At the time, his mother's investment advisor was Sharon Simoneau (Investors Group) with whom Gail also dealt when she brought Doris in for financial advice from time to time.

[9] Doris' investments were moved to Clarica. The change became a new bone of contention between her children. The Respondent felt that the move was Gary's method of asserting control over their mother and her finances. Moreover, when Gary did her taxes that year he apparently made a mistake in that he understated her income, having neglected to add in the income from a RIF.

[10] In 2006, and on the Respondent's recommendation, her mother returned her investments to Investors Group. Gail indicated that her mother also designated her as her attorney, and discussed the possibility of the Respondent becoming the

Executrix of her Last Will and Testament at that time. It appears that the Will, however, was not signed until May 6, 2010 (I will refer briefly to this later).

[11] Specifically, the Respondent says:

> 38. May 12, 2006, while at her favorite restaurant, Mom said she wanted to bring her investments back home, so that she could enjoy her final years spending her money the way she wanted. Mom also shared that she needed to change her will, which to that point in time was leaving the Faith Baptist Church 40% and each of her children 20%.
>
> 39. During this meal, Mom asked me once again to be her executrix and I reluctantly accepted ... Mom firmly stated this is what she wanted. Later, at Mom's residence we decided to take our dogs for a walk. At this time, one of her dogs wrapped her leash around Mom's legs, causing her to fall to the pavement breaking her hip.
>
> 40. I called an ambulance which took her to Soldiers Memorial Hospital in Middleton, from where she was transferred the next morning to Valley Regional Hospital, Kentville, NS. Prior to surgery, Dr. Beveridge commented that she was so frail she may not make the surgery. She did, and I stayed by her side. May 14, 2006, the day after Mom's surgery, I went back to work in Middleton where I made arrangements to replace myself so I could be with Mom ...
>
> 41. On May 17, 2006, Mom was transferred to SMH in Middleton to recover. I worked on the same floor at the opposite side of the building from where Mom was. I enjoyed all my breaks and lunches with her. At this time Mom and I realized how depressed and lonely she had become at Middleton Estates. She didn't have her car and the supportive people she had in place before Gary took her investments to Halifax. We talked about options for her to maintain her independence while having help should she need it due to her blindness.
>
> 42. June, 2006, approximately 2 – 3 weeks after being in SMH recovering from hip surgery, Mom reiterated to me that she needed to see her lawyer of many years, Hanson ("Sonny") Dowell, from Middleton. Hanson met alone with Mom in her hospital room, before calling me in and recommending an "Enduring Power of Attorney". He explained to both of us the importance of such a document should something like this happen again should she not wake up from surgery.
>
> 43. Power of Attorney was never mentioned before; needing one was never an issue. Mom knew I would always be there for her, and she asked me to accept. I accepted to be Power of Attorney and Executrix, again voicing my concern of having to deal with my brothers. June 17, 2006, I drove Mom to Hanson Dowell's home/office in Middleton, where she signed the documents ...
>
> (*Respondent's affidavit, Exhibit "7"*)

[12] Gary describes his mother's health problems around this time as such:

> 19. The information my mother prepared for her taxes was relatively well organized in 2004 and she provided me with the many receipts for her charitable giving ($8000 in $5 and $10 dollar receipts). However, in 2005, I noticed that she did not include many of her receipts and those that she did include were not well organized and had to be searched for in her paperwork. That surprized [sic] me because she prided herself of being well organized. She did not drive a car anymore because she was diagnosed as legally blind and had to give up her licence. She still got her mail but she was not as efficient at organization of her tax receipts…
>
> 20. In or around mid-2005, my mother's short-term memory began to fail. She would get frustrated trying to remember things and I would change the subject to avoid her becoming frustrated or embarrassed. In or around July 2006, my mother moved into the private home of Barb Kennedy in Kingston, Nova Scotia, leaving the seniors' apartment she was living in. She moved there because she was having difficulty living independently at the seniors' apartment. She would sometimes get lost on walks and have to be returned in a taxi by a Good Samaritan. She was at Barb Kennedy's house until September 2007 when she moved to the Grand View Manor, a long-term care facility. She moved to the Grand View Manor because Barb Kennedy was unable to provide her with the supervision she needed.
>
> 21. While at Barb Kennedy's house, she would also go out for walks by herself and get lost. She was legally blind and became disoriented out on her own with her dog on walks. She would let anyone who approached her drive her home to where she lived.
>
> 22. Shortly after moving to the Grand View Manor, she was placed in the locked wing so that she would not wander away and get lost, as she had continued to do.
>
> (*Gary Withenshaw's affidavit, January 10, 2020, Exhibit "6"*)

[13] On November 12, 2006, the Respondent sent the following email to her brother (Gary):

> Just received Canada Revenue Agency Reassessment for 2005. Your refund amount was incorrect, and now she owes $1,663.40. Please do not mention this or other money matters with her as it upsets her. I will discuss this with her when the time is right. Also, do not give our her phone number to anyone ie. Veterans Affairs, it only confuses and upsets her … If you come across anymore of her papers at all, please mail them to me …
>
> (Gary Withenshaw's a*ffidavit, August 15, 2018, Trial Exhibit "5", Tab C, p. 2*)

[14] The Applicants' current relationship with their sister is an acrimonious one. This attitude is reciprocated by the Respondent. Indeed, while it appears that the parties had not seen "eye to eye" for some prior period of time, whatever

relationship the Applicants did have with the Respondent regressed further as a result of the events that preceded their mother's execution of the POA in favour of Gail. It reached its nadir in the aftermath of Gail's provision of the Probate Inventory to the Applicants, and the commencement of this Application in Court.

iii) Document acquisition – including Mrs. Withenshaw's income and expenses

[15] Perhaps due in part to this, the documents which were eventually made available took some time to obtain. On September 10, 2018, an order was issued as a result of a motion in Chambers heard on September 6, 2018. That order directed the Respondent to request and produce forthwith the following:

> 1. (a) the late Doris Withenshaw's financial records held by Sun Life Inc. between January 1, 2006 and December 31, 2006;
>
> (b) financial records relating to the late Doris Withenshaw held by The Investor Group in Middleton, Nova Scotia between January 1, 2006 and December 31, 2014;
>
> (c) the late Doris Withenshaw's medical records held by the Nova Scotia Health Authority from January 1, 2016 through 2014;
>
> (d) the late Doris Withenshaw's medical records held by Grand View Manor, and
>
> (e) the late Doris Withenshaw's medical records held by her family physician(s) from January 1, 2006 through 2014;
>
> (f) the late Doris Withenshaw's notices of assessment from Canada Revenue Agency from 2006 through 2014.

[16] The Respondent was also ordered to pay costs to the Applicants in the amount of $650.00 as a result of that motion.

[17] The Applicants found it necessary to return to Chambers on April 11, 2019, seeking further production. An order was issued on that date, the relevant portions of which read as follows:

> IT IS ORDERED:
>
> 1. Sun Life Assurance Company of Canada, a non-party, shall produce account statements, canceled [sic] cheques, and file notes, from any

Clarica Life Insurance Co. financial accounts held by the late Doris Withenshaw from January 1, 2006 through December 31, 2006;

2. Investors Group Financial Services Inc., a non-party, to produce copies of any cancelled cheques still in its possession written between January 1, 2006 and December 31, 2014 regarding the late Ms. Withenshaw's Investor Group's account and also to produce any information in its possession about the source of the funds deposited into the late Ms. Withenshaw's Investors' Canadian Money Market Fund B#00379;

3. Costs of the motion shall be in the cause.

[18] The evidence satisfies me that Doris Withenshaw's living expenses included the following: $10,537.96 from August 15, 2007 through December 31, 2007, $29,371.50 for the calendar year 2008, $31,529.19 for 2009, $28,824.33 for 2012 and $5,461.80 for 2014. (A*ffidavit of Gary Withenshaw, January 10, 2020, Exhibit "6", Tab A*)

[19] The evidence further satisfies me that the deceased's income over the relevant interval is accurately set forth below:

(a) 2006: $46,166;

(b) 2007 $45,327;

(c) 2008 $37,024;

(d) 2009 $33,967;

(e) 2010: $33,753;

(f) 2011: $40,507;

(g) 2012: $39,693;

(h) 2013: $43,481; and

(i) 2014 $32,904.

(*Gary Withenshaw's affidavit, Exhibit "6", Tab B)*

iv) The POA

[20] The characterization of the document which is central to this application, the POA itself, has generated no apparent controversy. Neither side has disputed that it was, in effect, an Enduring Power of Attorney.

[21] As noted, the Applicants seek an order pursuant to *s. 5(1)a* of the *Act*, requiring the Respondent to have her accounts passed by the Court. The Respondent resists this, adding that, in any event, the Applicants have not established the statutorily prescribed prerequisites to such an accounting.

[22] The parties have agreed that this application should be bifurcated. The first part, the one to which this decision relates, simply deals with whether or not the Court should order the Respondent pass her accounts with respect to her stewardship of her mother's assets up to the date of the latter's death, under the auspices of the POA. If she is so directed, the second part would involve the examination of the those accounts, and any ancillary orders necessitated by the Court's finding(s) in relation to those accounts (if any).

[23] Some preliminary matters require brief comment.

iv) The legislation – an overview

[24] At common law, a written Power of Attorney was a document whereby the donor verified that the designated attorney had her permission to perform certain acts on behalf of the donor, as effectively as if the latter had performed them herself. As a consequence, the document would lose its efficacy in the event that the donor subsequently lost the ability to approve or ratify the action(s) performed pursuant to it. This would occur, for example, in the event that the donor subsequently became incapacitated.

[25] Legislation which specifically provided for Powers of Attorney which would allow the attorney to continue to manage the affairs of the donor, notwithstanding the latter's subsequent incapacity, transgressed into subject matter not recognized by the common law. Enduring Powers of Attorney are therefore creatures of statute.

[26] In Nova Scotia, section 3 of the A*ct* provides:

> 3. A power of attorney, signed by the donor and witnessed by a person who is not the attorney or the spouse of the attorney, that contains a provision expressly stating that it may be exercised during any legal incapacity of the donor, is

> (a) an enduring power of attorney;
>
> (b) not terminated or invalidated by reason only of legal incapacity that would, but for this *Act*, terminate or invalidate the power of attorney; and
>
> (c) valid and effectual,
>
> subject to any conditions and restrictions contained therein that are not inconsistent with this *Act*. R.S., c. 352, s. 3.

[27] It is s. 5(1)(a) which is central to this application:

> 5(1) Where a donor of an enduring power of attorney becomes legally incapacitated, a judge of the Trial Division of the Supreme Court may for cause, on application,
>
> (a) require the attorney to have accounts passed for any transaction involving the exercise of the power during the incapacity of the donor;
>
> [Emphasis added]

v) Jurisdiction and standing

[28] The Respondent did not dispute that the Applicants, as children of the late Ms. Withenshaw, siblings of the attorney, and as residuary legatees (along with the Respondent) of their mother's Last Will and Testament, possessed standing to make this application.

[29] However, as Justice LeBlanc (as he was then), observed, in *B.F.H. v. D.D.H.*, 2010 NSSC 340:

> **10.** Where a donor has become legally incapacitated, as Mrs. H. is on account of the order under the *Incompetent Persons Act*, subsection 5(1)(a) of the *Powers of Attorney Act* permits the court to "require the attorney to have accounts passed for any transaction involving the exercise of the power during the incapacity of the donor." … the period for which an accounting is required is from the date the Court determines that Mrs. H. had become incompetent or incapable of managing her affairs. Prior to that date, the applicant is not entitled to seek any accounting or to otherwise make any claim. Any accounting prior to the date of incapacity is owed only to the applicant.
>
> [Emphasis added]

[30] The implications of this are obvious. If "any accounting prior to the date of incapacity is owed only to [Doris Withenshaw]" and she is deceased, only her

estate, under different legislation, could hold the Respondent to pass accounts for transactions incurred prior to the period of incapacity – and the Respondent is the Executrix of the estate in any event.

[31] The Applicants have not (to date) challenged the provisions of the Will, or sought their sister's removal or substitution within the context of the probated estate. Their concern, at present, is with the assets which were administered during the Respondent's tenure as their mother's attorney (which tenure ended upon the latter's death), and (what they say) is the very small portion of her assets which were still extant when Mrs. Withenshaw died.

vi) The reports and records

[32] The Applicants provided evidence from Doctors David Mulhall and Mark Bosma. The former is an assistant professor at the Department of Psychiatry at Dalhousie University, as is the latter, who is a physician. Both practice in Halifax, Nova Scotia. They also sought to rely on observations made in the records maintained by the various facilities at which Doris either resided or was treated from 2006 to her death in November 2014.

[33] Dr. Mulhall provided an affidavit sworn December 30, 2019, which was entered as Exhibit "1", Dr. Bosma's affidavit was sworn on January 10, 2020, and entered as Exhibit "4". In paras. 4 and 5 of Exhibit "1", Dr. Mulhall tells us that:

> 4. In 2006 and 2007, I assessed Doris Kathleen Withenshaw. Attached as Exhibit "A" is a true copy of notes of my assessment dated December 20, 2006. My notes are an accurate representation of my assessment and diagnosis at that time.
>
> 5. Attached as Exhibit "B" is a true copy of notes of my assessment dated May 2, 2007. My notes are an accurate representation of my assessment and diagnosis at that time.

[34] Dr. Mulhall attended and was subjected to cross-examination on his affidavit and the notes of his two written assessments attached thereto.

[35] Dr. Bosma also attended and faced cross-examination with respect to the opinions put forth in his report. He provided evidence directly related to the determinations which this Court must make. It was evident that his opinions as to Doris Withenshaw's incapacity, and the relative timeframe within which it commenced, relied heavily upon the observations and diagnoses found in the notes

made by Dr. Mulhall in relation to his two assessments in December 2006 and May 2007. Dr. Bosma also reviewed the "Nova Scotia Home Care Report" and assessment notes from Soldiers Memorial office dated May 22, 2015, and "a sample of multi-team observation from staff at Grand View Manor from December 2007 to March 2008, and "affidavit of Gary Withenshaw dated August 15, 2018" (*Exhibit "5"*).

[36] His opinion was also based upon the following assumptions:

> * The documents sent to me are true and accurate observations made at the time.
>
> * The documents are generally a representative subset of a larger set of medical records (of which there are more than 3000 pages).
>
> * Mrs. Withenshaw had approximately $300,000 of assets held in various investment vehicles as of 2006/2007.
>
> (*Bosma report*, Exhibit "4", page 3)

[37] What was referred to as "the documents" had been culled from the extensive records obtained pursuant to the two disclosure orders referenced above.

[38] The Respondent provided an affidavit of Dr. J. Mark Johnson, a psychiatrist practising in the town of Kentville, Nova Scotia, who, at the request of Dr. Peter Goddard of Grand View Manor, had assessed Doris on September 10, 2007. His report of that date was attached. Despite the extreme lateness at which the affidavit was filed, long after the date which was specified at the motion for directions for such filings, and the lack of notice provided to the Applicants that Dr. Johnson would be testifying, I allowed him to be called because the essentials of his observations had been included in some of the earlier materials obtained by the Applicants. Much like that of Dr. Mulhall, his testimony at the hearing related, in its entirety, to observations and assessment notes that he made at the time. It was clear that he had very little recollection, when cross-examined, independent of that report.

(vii) Opinions and records

[39] Before considering the particulars of those records and reports, it is important to bear in mind the difference between opinion evidence contained in, for example, a Rule 55 expert's report, and the observations or opinions noted in a patient's or resident's records, such as those encountered in this case. Dr. Bosma's

was a proper expert's report: all of the requirements of *Civil Procedure Rule* 55 were observed.

[40] Dr. Mulhall's and Dr. Johnson's assessment notes and testimony offered insight into the results of their observations and diagnoses in 2006 and 2007. It is clear, as noted earlier, that Dr. Bosma relied, in part, upon Dr. Mulhall's assessment notes as recorded in December 2006 and May 2007 respectively, when he provided his own opinion upon the issue of, and the timing of, Doris Withenshaw's incapacity.

[41] As to the notes, observations and opinions contained in Doris' charts and records, both the relevant legislation, and the common law, offer some insight as to the proper treatment of these materials.

[42] The common-law position remains unchanged from its articulation in the well-known case of *Ares v. Venner*, [1970] SCR 608, where at p. 626 the court stated:

> Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein. They should, and no way, preclude a party wishing to challenge the accuracy of the records or entries from doing so.

[43] As has been observed in subsequent cases (see for example, *R. v. Monkhouse* (1987), 83 AR 62 (CA)) the records entry does not necessarily have to have been made by someone who actually saw the act or thing that has been recorded. It suffices if the person making the entry acts within the usual parameters in effect for the preparation and entry of the records in effect at the particular institution involved.

[44] Much of the common law with respect to business records has been codified in s. 23 of the *Evidence Act*, RSNS, 1989, c. 154, the relevant portions of which read as follows:

> 23(1) In this Section,
>
> (a) "business" includes any kind of business, profession, occupation, calling, operation of institutions, and any and every kind of regular organized activity, whether carried on for profit or not;
>
> (b) "record" includes any information that is recorded or stored by means of any device.

> (2) any writing or record made of any act, transaction, occurrence or event is admissible as evidence of any such act, transition, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.
>
> ...
>
> (4) the circumstances of the keeping of any records, including the lack of personal knowledge of the witness testifying as to such records, may be shown to affect the weight of any evidence tendered pursuant to this section, but such circumstances do not affect its admissibility.

[45] Notwithstanding this codification, and as pointed out in *Bezanson v. Sun Life Assurance Company*, 2015 NSSC 1:

> 17. … the common law rule as set out in *Ares* survives. In *The Law of Evidence in Canada*, authors Sopinka, Lederman and Bryant note:
>
> > ...unlike the statutory business records provisions, the common law exception applies to oral as well as written statements, does not require the giving of notice and clearly allows for statements of opinion and subjective impressions. (at 6.199, 4th ed, Markham Ont:LexisNexis 2014)
>
> 18. And further in that same volume:
>
> > The subjective opinions of doctors and nurses contained in hospital records are inadmissible under the business record legislation, according to the *Bremner* case, but admissible at common law according to the *Ares* case. Thus, notwithstanding the existence of business record statutes in Canada, the decision in *Ares v. Venner* is of considerable practical importance.
> >
> > ...As noted , the provincial business records provisions permit records of "any act, transaction, occurrence or event". There are no words of limitation so as to restrict the nature of the record, yet the courts have done so. Moreover, this narrow interpretation by the courts is not in keeping with the Supreme Court of Canada's expression of the common law exception which clearly encompassed statements of opinion.

[46] Justice Boudreau continued her thoughtful analysis of the authorities and concluded, in *Bezanson*, as follows:

> 30. … Where a person with specialized knowledge in an area, having reviewed and analysed information, has arrived at his/her own subjective conclusion, and gives an opinion, such opinion is subject to special rules of evidence. It cannot be introduced to a court for its truth, without respect for those rules.
>
> 31. *Ares v. Venner* continues to stand for the proposition, in my view, that some simple observational opinions might be permitted to stand in business records. It should be noted that even lay persons are often permitted to opine in areas of common human experience (such as a person's temperature ("warm to touch"), color ("flushed"), mood ("angry"), and so on). But a true opinion, given by a person within their area of special expertise, is not and could never be a business record. In particular, where the medical opinions are crucial and of utmost importance to the case, as they would be here, the Court needs to be assured of their reliability. Such opinions must be brought forward to the Court by their authors, defended, and properly tested by cross-examination.
>
> 32. I should note that the Defendants exhibits also contain, within them, some medical opinion from persons who did not testify. They are subject to the same rules.

[47] In a similar vein, in *Tingley v. Wellington Insurance*, (2008) NSSC 317, it was noted:

> 38. … There is a distinction to made between physicians' file materials, which are admissible in the manner described in *Ares v. Venner* and the *Nova Scotia Evidence Act*, and the physicians' opinions and experts' reports, which require the witnesses to be available for cross-examination.
>
> 39. To the extent that the materials sought to be admitted are in the nature of records "made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record," they are, except to the extent challenged by the parties, admissible as *prima facie* proof of the facts stated in the records. While the phrasing differs somewhat, I am satisfied that such records are admissible under the hearsay exception described in *Ares* and under the *Evidence Act* provision for business records. Such records are subject to challenge as to their accuracy. This conclusion accords with the principles stated in *Seaman, supra*. As to opinions, I also follow *Seaman* in concluding that any "opinions contained in the clinical records are not admissible for their truth. The opinions are admissible only for the fact that they were made at the time."
>
> 40. As a result, the physicians files are admissible pursuant to the hearsay exception and pursuant to the *Evidence Act* to the extent that they state facts, subject to challenge as to accuracy. The weight of such records, however, will have to await all of the evidence, including an assessment of the extent their accuracy and reliability are challenged by the witnesses and the remaining evidence. However, no opinions or diagnoses by the physicians are admissible for

> their truth. They may be admitted for the bare fact that they were made, and were available to other physicians with whom the plaintiffs consulted or were treated, but for no purpose beyond that.
>
> [Emphasis added]

[48] Both parties tendered documents which would be captured under the common law principles set out in *Ares*. These included records from the Valley Regional Hospital, financial records from Doris' advisors, letters, notes and chart records from Grand View Manor, as well as those from Soldiers Memorial Hospital.

[49] Neither side called evidence with respect to the recordkeeping regime(s) in place at any of the institutions from which these records emanated. That said, the commonality of the sources from which the submitted records were obtained, by both sides, constitutes an acknowledgement by each that there were valid recordkeeping regimes in these places. Moreover, neither side maintained that records proffered by the other were irregular or inconsistent with the regular method adopted for recordkeeping from any source.

[50] Some documents exhibited in the filed affidavits are not, however, admissible. For example, the Respondent tendered with her affidavit of February 18, 2020, Exhibit "7" (at Tabs 2, 3, 4, 5, 7 and 18) copies of her mother's journal entries which span a period of time in 2003 and also include at least one earlier entry. There are also third-party materials contained in this affidavit and some of the others filed by the Respondent from such disparate sources as "Billy Graham Evangelistic Association of Canada" (also at Tab "1"), what appears to be handwritten notes (allegedly by Doris Withenshaw) on a calendar from the year 2004, more handwritten notes allegedly written by the deceased in a cheque book on January 5, 2005, and some other materials of the same type.

[51] Broadly speaking, these latter categories of documents appear to have been intended by the Respondent to support her claims as to how she came to be the Executrix of her mother's will, and also as to the sums of money which she contended that her mother was providing or had earlier provided to one or the other of the Applicants, in various instances, prior to 2006.

[52] The first threshold to be met by any piece of proffered evidence is relevance. If it is not relevant, it is inadmissible. The inquiry stops there. No recourse to any of the other rules of admissibility is required.

[53] Attempts were made by the Respondent, in her evidence, to advance such themes as "Mom was often upset with the Applicants", "Mom wanted me to be her Executrix even though I was reluctant to do so", "Mom wanted me to have her Power of Attorney even though I was reluctant to be cast into that role", "Mom gave them (the Applicants) money during her lifetime, too", or "the Applicants were often mean to me and that is their motivation in bringing this Application". Clearly, evidence pertaining to one or more of these topics is not relevant to the exercise which this Court must undertake in this proceeding. Obviously, I have reviewed the evidence tendered by Gary and George Withenshaw in an apposite manner.

[54] Counsel for the Applicants stated that in the interests of economy of time and expense, and also in recognition of the fact that the Respondent was significantly late in filing most of her materials, no application to strike was brought in advance of the hearing in this matter, since such an application would likely have necessitated another adjournment of this Application. That notwithstanding, I will review the relevant records which have been submitted to me by all parties through the lens afforded by *Ares*, and will disregard entirely the irrelevant ones. Similarly, the irrelevant portions of the affidavits or other evidence offered by any of the parties will be disregarded also.

Issues

[55] The statutory prerequisites to the relief sought by the Applicants define what is in issue and may be posed as such:

A. Have the Applicants shown that their mother was in a state of legal “incapacity” at any point during the Respondent’s tenure as her Attorney, and if so, when did that incapacity commence?

B. Has "cause" within the meaning of section 5(1) of the *Act* been established?

Discussion and Analysis

A. Have the Applicants shown that their mother was in a state of legal “incapacity” at any point during the Respondent’s tenure as her Attorney, and if so, when did that incapacity commence?

i) The law bearing upon the issue

[56] As a fiduciary, an attorney must not use the power conferred upon her for her own benefit unless it is done with the knowledge and consent of the donor. The attorney is fully accountable to the donor for her use of the powers thus conferred. As explained earlier, the instrument became inoperative (at common law) once the donor became incapacitated and was unable to direct or ratify the actions of her attorney as a consequence.

[57] This is why section 5(1)(a) of the *Act* restricts the ability of the Court to order an accounting for any transaction(s) other than those which occurred "during the incapacity of the donor". This has been interpreted to constitute an ouster of "... any common law or equitable jurisdiction the court had, pursuant to Section 3 of the *Judicature Act*, RSNS 1989 c. 240, to order a passing of accounts for any and all transactions of the attorney" (see, *B.F.H. v. D.D.H.*, *supra*, at paras 24 – 25).

[58] Interestingly, neither "capacity" nor "incapacity" is defined in the *Act*, nor is a process outlined whereby the issue may be determined. This distinguishes the *Act* from other somewhat related pieces of legislation such as, for example, the *Personal Directives Act*, RSNS 2008, c. 8, as amended, or the *Incompetent Persons Act*, RSNS 1989 c. 218.

[59] With nothing to displace it, however, the rebuttable presumption of legal capacity (at common law) remains. It follows, therefore, that the Applicants would carry the onus to establish, on a balance of probabilities, the fact of their mother's "incapacity", within the meaning of the *Act*, and the period of time to which it pertained.

[60] On this point, I have had the benefit of the expert testimony of Dr. Bosma to which I earlier adverted. While not (strictly speaking) mandatory, it will usually be preferable that such an important issue be determined with the assistance of at least some expert evidence. Justice Rosinski came to the same conclusion in *Vernon v. Sutcliffe*, 2014 NSSC 376, when he observed:

> 93. I believe that, bearing in mind that the purpose of applications pursuant to s. 5 of the *Powers of Attorney Act* is to ensure by way of court review the proper administration of the tangible and intangible interests of persons who are arguably in a state of "legal incapacity", courts should be hesitant to draw bright lines, such as permitting only expert opinion evidence regarding the issue of "legal incapacity", which might prevent the court from otherwise assessing upon reliable factual evidence whether it is more likely than not that the individual in question is in a state of "legal incapacity".

> 94. Thus, I prefer to conclude that, as a matter of law, expert opinion evidence is not always necessary to establish a state of "legal incapacity" under s. 5 of the *Powers of Attorney Act*. However, it is surely preferable for the Court to have the best evidence available, and except in a rare and exceptional case, courts should expect to receive from the parties expert opinion evidence regarding the assertion that a person is in a state of "legal incapacity".

ii) What does legal "incapacity" mean in the current context?

[61] *Black's Law Dictionary* (online, 2nd edition) defines legal "incapacity" (in part) as the inability "... to make rational decisions or engage in responsible actions."

[62] In the case at bar, concerned as it is with the late Mrs. Withenshaw's ability to understand, countenance or ratify financial decisions and/or transactions made by her daughter on her behalf, it would be essential that the former possess (at the relevant time) the ability to understand information relevant to these decisions or transactions, and have an appreciation or an insight as to the effect that these decisions or transactions were having upon her overall financial situation.

iii) Analysis – legal "incapacity"

[63] As previously indicated, Mrs. Withenshaw signed the Power of Attorney in favour of the Respondent on June 20, 2006. It was prepared by lawyer, C. Hanson Dowell, Q.C., who handled all of her legal matters. The document includes:

> My attorney shall have the power for and in my name to do all acts as fully and effectually as I could do, whether individually or in any capacity in which I may serve, and particularly the following acts, the enumeration of which is not in any way to limit the general powers herein conferred...

[64] The POA also directs that:

> The powers hereby given may be exercised even in the event of any subsequent incapacity or infirmity, physical or mental, and shall continue until a court shall have appointed a guardian for my estate and my set attorney advised thereof accordingly.

[65] The Applicants have not taken the position that their mother lacked the capacity to execute the Power of Attorney when it was signed. They do say, however, that she was in the grip of Alzheimer's Disease at the time, which was

progressing rapidly and causing an incremental and correspondingly rapid diminution of her mental faculties over time.

[66] Ms. Withenshaw's condition is referenced in the Intake Assessment notes of Dr. David Mulhall on, December 20, 2006 (*Trial Exhibit "1", Tab A*). There at para. 1 we find:

> The above-named 82-year-old single woman from Kingston was seen with her daughter today by Senior's Mental Health Services – Helen Anderson Sutton, LPN, and Dr. Mulhall; referral by Dr. Alnamo. She had a recent fall and fractured her hip and an extended period of convalescence at Soldier's Memorial Hospital. She has now moved into private care. She appreciates the fact that she is able to keep her dog but finds the house somewhat noisy with teenage children and at time gets frustrated stating that she would like to leave. Her family wonders whether she would be better off in a more structured setting with day activities but recognize she wishes to keep her independence and her dog which she takes out for walks four times a day. They worry about her walking and getting lost in the community and slipping on the ice. She believes that are overly cautions. She has macular degeneration and continues to wish to walk at nightime. When she gets upset and can't find something, she tends to show some paranoid viewpoints.

[67] At para. 3, Dr. Mulhall continued:

> On formal testing, she scored 24 out of 30; good orientation in time and place (9 out of 10); good concentration; short-term memory poor (0 out of 3 with all 3 gained on prompting); 1 out of 3 on three-staged command. She drew a satisfactory clock; was able to do the tapping game. She had problems with calculation and with news. She knew the time of the day but not the contents of her last meal. She presents herself in a feisty manner; felt that she was doing satisfactorily; acknowledged the compromise that she had made in choosing her care situation but was comfortable continuing with it. She was given some general advice regarding safety. There was little to add in terms of medication as she is comfortable with her current dose of Aricept and appears to be maintaining reasonable level of cognition. She is unable to tolerate a higher dose. Neither she nor her daughter feel that she has a sustained depression nor do they feel that her paranoia is deeply ingrained and generally her upsets can be dealt with by a soothing phone call. She and her daughter preferred to leave it that way.
>
> DIAGNOSIS:
>
> | | | |
> |---|---|---|
> | Axis I | 290.0 | Dementia, senile onset, Alzheimer's type -mild |
> | Axis II | V71.09 | Nil |
> | Axis III | Macular degeneration | |

Axis IV	Psychosocial stressors; move into care
Axis V	GAF: current = 52; best in past six months = 56

[68] Some insight into the insidious progress of the Alzheimer's Disease may be gleaned from Dr. Mulhall's observations in his "review note" less than five months later. On May 2, 2007, he notes, *inter alia*:

> … She [Mrs. Withenshaw] continues to live in her own setting, somewhat intolerant of others including other residents and the younger adolescents in the home. She frequently misplaces items, needs to be reassured on an ongoing basis, often threatens to leave, etc. She is insistent to go for walks and often wanders the house with her dog show does not always "guide her home". Her caregiver has concerns about her safety. In addition she is concerned regarding her dog who has been aggressive to others and bitten on three occasions. Should there by a further episode the dog would no longer by acceptable in her residence.
>
> On formal testing, she scored 20 out of 30; down 24 out of 30 five months ago. Orientation 2/5 in place, 0/3 in short term memory, only two gained on prompting. Decline in concentration now 2/5. Problems with calculation and news. Verbal fluency of 7. She drew a satisfactory clock.
>
> Evidence of concentrating decline in her cognition and increased difficulties for her caregiver. The previous recommendation of a trial of cholinesterase inhibitor were repeated and not accepted, i.e. consider use of Galantamine ER initially 8 mg. and then attempts to increase further. Second suggestion of a trial of a low dose non sedating antipsychotic agent such as Risperidone [sic] initially in dose of 0.125 mg. at night increasing as tolerated.
>
> Her current residential situation is under review. She is due to be seen by Continuing Care and there are family differences in approach and there needs to be a recognition of her limitations and some forward planning in place.
>
> DIAGNOSIS:
>
> | | |
> |---|---|
> | Axis I | 290.0 Dementia, senile onset, Alzheimer's type – moderate |
> | Axis II | V71.09 Nil |
> | Axis III | Macular degeneration |
> | Axis IV | Psychosocial stressors: "paranoid style" |
> | Axis V | GAF current = 46; best in past six months = 52 |
>
> (*Trial Exhibit "1", Exhibit "B"*)

[69] There is further evidence of Mrs. Withenshaw's condition in May 2007, including that which is contained in the documents prepared when she was

assessed for a change of housing/care provider. Dr. Mulhall's notes (above) referred to the fact that she was "… due to be seen by Continuing Care…". The review officer was provided with the records which were tendered into evidence as Exhibit "3".

[70] This assessment was performed preliminary to her eventual placement at Grand View Manor on August 15, 2007. She had resided at the Kennedy Seniors Boarding Home from July 12, 2006 to August 14, 2007.

[71] The records in Exhibit "3" were part of the voluminous production obtained pursuant to the two disclosure orders, some of which production was also culled to provide the medical and resident records which were exhibited to the Court by the Applicants (*Tab K to Gary Withenshaw's affidavit, January 10, 2020, Court Exhibit "6"*), and by the Respondent (for example, in Exhibit "7", at Tabs 17, 20, 23, 25, 26 - 31).

[72] On May 8, 2007, a number of entries were made by Care Coordinator, Angela Burke, at the Soldiers Memorial Hospital, as part of her intake/assessment process. These included (in part):

- Widow since 1979
- Daughter, Gail, has POA

  ...
- ... Caregiver reports that client's hygiene has declined significantly over the past nine months. Client refuses assistance with hygiene and caregiver has noticed client is not maintaining her hygiene.
- Daughter repeats events over and over to client.
- Client depends on caregiver to maintain the daily routine ... Client loves to be active and has been walking several times/day to get out of the home and to relieve frustrations. Client has had to ask for directions to get her back to her home ...
- Client wears glasses. She is legally blind (macular degeneration). Client carries a white cane to identify to others she is visually impaired.

[73] Then, on May 18, 2007, following is noted:

- Client has dementia ... Client is frustrated over her loss as related to her vision and cognitive impairments. Acts out with temper tantrums at times. Client is not happy at her current boarding arrangement and feels her

daughter should just lock her up and throw away the key. Daughter stated that client was a devout Christian and it breaks her heart to see her change so much ...

- Daughter reports client's confusion increases in the evening and that she can become very "hateful".
- Client's mood can change quickly and client will verbalize her frustration toward caregivers, client got up a couple of times during the assessment and said she had to leave and went outside. This had been client's habit at the boarding home to leave when she was feeling frustrated or confined and take her dog for a walk. Client was not treating the dog nicely (hitting it with the lead). Again, this is a significant change related to her dementia as client adores her pets and feels there isn't much left once they are gone. Caregivers are attempting to limit client's walking as they live in a high-traffic area and client is not always careful.
- ...Client has also lost the ability to do her knitting.

  ...
- Client has daily incontinence and caregivers encouraging client to wear an incontinent product but client refuses to wear a pad and does not identify that she has an incontinence problem.

  ...
- Paranoid behaviour.

  ...
- Client moved to the private boarding home in July 2006. Initially, this was a good arrangement as client was able to take her two dogs. Client has been having a steady decline in her cognitive function and now been taking her frustrations out on her dogs. Therefore, her daughter now has both dogs. The boarding home is located in a high-traffic area uptown and client was attempting to walk alone in the community, was reporting unsafe behaviour … boarding home staff now have chimes on the door to alert them when client is leaving. Client enjoys walking and this is an activity that needs to continue. However, the walking needs to be in a supervised setting or an area that is safe. Client embraces rules, authority and structure (client has a military background). Client wants to move to a home that offers more structure and activity. Client needs to be kept busy. Client's care needs are beyond boarding home level.

(*Exhibit "3", pp. 15, 16,17, 18, 19 and 20 of 29*)

[Emphasis added]

[74] Ultimately, it was concluded that Mrs. Withenshaw's needs transcended the services available at the Kennedy boarding house (in which she had resided prior to this assessment) and the decision was made to provide her with a placement in a long term care facility (Grand View Manor).

[75] I have mentioned earlier that the evidence has satisfied me that Mrs. Withenshaw's dementia was progressive, up to the date of her death, and this was indeed so. With the assistance of some of the records compiled while she was at Grand View Manor, we may briefly observe how the disease afflicted her throughout 2008 and the remaining years of her life. (I do not intend to exhaustively review these records, what follows are representative examples only.)

[76] The records from the end of December, 2007 into March, 2008 reveal progressive upset and agitation on Mrs. Withenshaw's part. This is not to say that she did not have "good" days (or shorter periods of time), merely that, overall, the "good" periods begin to be noted with much less frequency by her caregivers at Grand View. (*Gary Withenshaw's affidavit, January 10, 2020, Exhibit "6", Tab "K" pp. 14 – 18.*)

[77] Indeed, she appears to have sustained another fall on March 18, 2008, having been found by an LPN at 5:30 a.m. that morning lying on the floor in the doorway of her room. When told an RN was on the way, Mrs. Withenshaw stated, "I am an RN and I'm fine". She adverted to some discomfort in her head and hip, and that she had fallen in her room and crawled into the hallway. She was taken to the local Emergency Department and subsequently released later that day.

[78] Much of her mother's erratic behaviour was attributed by the Respondent to her glaucoma and the regimen of medication prescribed by her medical caregivers (*Gail Withenshaw's affidavit, Exhibit "7", February 18, 2020, Tab "26"*)

[79] This concern was addressed, in part, in the assessment notes of June 20, 2008, dictated by Dana L. McNamara – Morse, Nurse Practitioner, for Dr. Glenn Ginther. (*Gail Withenshaw's affidavit, Exhibit "7", Tab "27"*).

[80] At p. 1 thereof we find:

> ... Collateral information was obtained by both the nursing staff and her daughter, Gail, who I met during the visit. Gail's major concern or issue appears to be over sedation and her mother's inability to mobilize independently. We understand there have been episodes of wondering where Doris has gotten lost downtown in Berwick. Gail reports from others doing apparently well and Karen feels she has

> improved since her previous assessments by Dr. Mulhall. Doris described her area of living adequate, her biggest concern is her inability to walk independently outside although there appears to be a compromise in the situation that has created some outside ability for Doris to mobilize around the ground of Grand View Manor.
>
> ...
>
> From a behavioural perspective, it is important for the staff to be educated regarding Mrs. Withenshaw's macular degeneration and her personal space or closeness required to see an individual when communicating is not a physical threat but simply her way of trying to visualize your face during the communication. Doris most certainly has concerns regarding her mobility and not being able to walk independently where she would like to go and we believe you have already created a compromise in this area with allowing her to walk outside the facility and the grounds the matter. Given her dementia, it is important for the staff to reinforce to her that she is capable of doing this as she will most likely forget and become focused on the fact that she is not allowed to go. She most certainly has receptiveness and this can be offset especially when she becomes mildly agitated regarding specific issue by distraction techniques or taking her for a walk because it seems to be what she most certainly loves to do.
>
> ...
>
> I would also suggest going out with her daughter as frequently as possible be supported until she is unable to do so any longer. There is most certainly going to be some mild confusion upon her return but this can be addressed quite simply by distraction and her visits with her daughter are most likely more beneficial than staying at home despite her mild confusion upon her return.

[81] Notwithstanding attempts to provide Doris with adequate supervision, and to allow the Respondent the flexibility to accompany her on walks outside the premises, she remained a flight risk. For example (and I will once again state that this is not intended to be exhaustive) on August 25, 2008, the RN on-duty made the following note on her chart:

> At approximately 0830 this a.m. resident [Doris Withenshaw] went for a walk in driveway as she often does. Staff at GVM (Grand View Manor) were alerted that resident had left GVM [Grand View Manor] property and was walking along Commercial Street heading towards Highway #1. Myrna Hayes, PTA, along with this writer went in writer's car to find resident. Found her walking about 1/2 km up the road towards Windemere. Resident very resistant to getting in car and returning to GVM, stating "I don't live at GVM anymore, I'm on my own now" and kept walking quickly ahead. Writer along with Myrna Hayes got out of the car and approached resident who became angry in her tone. Resident went on to property of the home and wanted to look about the flower garden. We took the

> time to do this with resident, homeowner was very good about the situation. Resident remained resistant to returning with staff to GVM but fortunately it started to rain very hard and at this point she agreed to return to GVM in writer's car. (*Gary Withenshaw's, affidavit, Exhibit "6", Tab K, pp. 27-28)*

[82] After this incident, at 1130 a.m., a member of the activity team is noted as having brought Mrs. Withenshaw some CD books. She was not receptive to this, and it is noted that she threw the CD tapes across the room. (*Exhibit "6", affidavit, Tab K, p. 28)*

[83] Approximately 10 minutes after the above incident, the nurse who is reported as having assisted in securing Mrs. Withenshaw's return to Grand View made note of a telephone conversation with the Respondent during which the latter was informed of the incident earlier that morning. The nurse is noted as suggesting a meeting to discuss her mother's behaviour and the risks of her wandering off again in the future, however, the Respondent "did not seem interested" in that.

[84] Instead, the Respondent preferred an approach which involved being "more firm" with her mother, indicating that she was hoping to "tap into" her mother's natural empathy and compassion and thereby induce her to comply with Grand View Manor rules so as not to worry the Respondent too much.

[85] The notes go on to indicate that the Respondent was cautioned:

> ... Due to her mother's Alzheimer's this approach may not work. Gail asked how we deal with this type of behaviour in the past. I said that of course our main concern is always that the resident is safe and unharmed. But unless a resident is on a secured unit the risk always remains that a resident may wander off facility property and get lost/have a fall etc. ... She (Gail) said that she has accepted that due to her mother's Alzheimer's she may not die peacefully in her sleep but rather have an accident due to her wanting to wandering off. Gail indicated that her mother needs a lot of positive attention, I stated that Doris needs to get a lot of attention from staff in the way of positive conversation, hugs, walks with staff etc. Doris also gets a lot of attention due to her negative behaviour ... (*Exhibit "6", Tab "K", pp. 28 to 30*)

[86] Mrs. Withenshaw fell again. On October 6, 2008, she was diagnosed as having sustained a broken pelvis. She was placed on immediate bedrest.

[87] The subsequent Grand View Manor "Clinical Support (physiotherapy) Service Referral Form" dated October 20, 2008 (*Exhibit "7", Gail Withenshaw's affidavit, Tab 29*), states that, in part, her other diagnoses are "dementia, macular

degeneration, osteoporosis, degenerative disc disease". She is noted as being dependent for both bathing and dressing, as well as feeding herself, however, this latter notation appears to be only based upon her (then) current condition. She is noted to be incontinent both of bladder and bowel function.

[88] Her physiotherapist indicates: " Resident very upset re-being on bedrest. Stated she now has left-sided sciatica in addition to right hip pain. No observable restrictions of motion or pain and movements in bed to get dressed (assisted by physiotherapist). Mrs. Withenshaw's height was listed as "under 5 feet" and her weight was listed as 83.3 pounds. (*Exhibit "7", Tab "29", last three pages*)

[89] Ultimately, concerns about the prospect that Mrs. Withenshaw might again leave the property on her own and be at further risk of injury led to her being placed in a secured (locked) facility at Grand View Manor, so as to prevent her from wandering off when she could not be supervised.

[90] Moving forward, Nurse Practitioner, Dana McNamara-Morse, again provided notes in an assessment dated June 2, 2009, (*Exhibit "7", Tab 30*). At p. 2 of same it was noted:

> She [Mrs. Withenshaw] is most certainly independently mobile from a functional perspective. She continues to be independent requiring some assistance especially with her choosing clothing, her macular degeneration has significantly declined and her vision has significantly declined since our last assessment. She is likely becoming frustrated with her decline in her need for more support, more assistance with her ADLs and minimal activity to distract herself, save for walking. During our assessment this most certainly did happen with her inability to accomplish some of the visual spatial tasks and this is likely coming out in her agitation with the staff. She will likely require more assistance with her activities of daily living although she struggles with her independence.
>
> ...
>
> I had a lengthy discussion with her daughter after the assessment and her daughter is agreeable that her mother should absolutely not leave this facility. Staff should not allow her to go out and sit on the benches outside as she will most certainly leave and go down the driveway. She has no short-term memory, no insight and poor judgement, she needs an all or nothing approach providing her with the kindness of allowing her to go outside sets her up for failure. She will most certainly benefit from a locked wandering garden if this were available.

[91] Following this report, a case conference respecting Doris Withenshaw was held at Grand View Manor, at which meeting both the Respondent, Administrator,

Graham Hardy, and Nurse Practitioner, Dana McNamara-Morse, as well as representatives for of the Director of Care at the facility and risk management all attended. Among the behavioural concerns noted in the report (*Exhibit "6", affidavit, Gary Withenshaw, Tab K, pp. 34 to 36*) included the fact that Mrs. Withenshaw was at significant risk for harm resulting from her increasing dementia, the fact that she wanders outside of the facility (Grand View Manor) property, the compounding effect of her macular degeneration upon this condition, her need to be in in a secure unit for her own safety, recommendations with respect to the dosage of certain medications that had been prescribed, and the results of recent cognitive testing.

[92] At p. 35 of the report, it was noted:

> Mr. Hardy explained that the facility cannot guarantee the safety of this resident unless she is on a secure unit. The issue of having the daughter sign a waiver releasing the facility of any responsibility in the event her mother wanders off and is lost or struck by a car is a non-option in this case. A signed waiver will not keep this resident safe nor prevent an accident where someone else may be harmed, nor allow the management and staff of the facility to feel any less responsible if harm were to come to this resident. Safety of the resident is paramount.

[93] There are continuing references to a steady increase in the aggression manifested by Mrs. Withenshaw toward others up to the time of her ultimate passing in 2014 (*Exhibit "6", Tab K, pp. 37 – 48*). She progresses from yelling and pushing caregivers, shouting loudly, yelling personal insults, vicious cursing or using foul language, making threatening gestures, and combativeness, to "... very aggressive, hitting, spitting and trying to bite staff ... Resident repeatedly dug nails into writer. Writer required second staff to assist. Resident also repeatedly banged walker into staff's legs"

[94] On February 26, 2013, she is noted as "... pinching and cursing at staff, calling us bitches and becoming aggressive to myself and co-staff".

[95] On December 24, 2013 (*Exhibit "6", Tab K, p. 44*), she was described in a "Specialized Equipment Assessment Form" as an:

> ... Elderly lady who can fluctuate between being cooperative and uncooperative and verbally aggressive – often becomes lethargic without notice and head falls backward.

[96] Her weight on that date was recorded as 76 pounds.

[97] The assessment form goes on to describe her as dependent for her self care and feeding, and no longer able to endure weight-bearing activities such as walking, and wheelchair dependent. (*Exhibit "6", Tab K, p. 45*)

[98] It is now helpful to consider, in turn, more of the specifics what each of the Doctors (noted earlier) had to say.

Dr. David Mulhall

[99] Dr. Mulhall's affidavit was marked as Exhibit "1". He attested that he is a physician practising in Kentville, Nova Scotia, and has been doing so for more than 30 years. His specialty is psychiatry, and he is an assistant professor at the Department of Psychiatry at Dalhousie University in Halifax, Nova Scotia. His testimony was in relation to the assessments of Mrs. Withenshaw that he made in 2006 and 2007. The notes referable to those assessments were attached as Tab "A" to his affidavit.

[100] Reference has been made earlier to the substance of those notes. There is a significant difference in Mrs. Withenshaw's condition during the five month period which the notes span. During that span she has regressed from the point where she was at risk of getting lost in the community, getting upset when she could not find something, and tending to show some paranoid viewpoints, to (on May 2, 2007):

> ... She frequently misplaces items, needs to be reassured on an ongoing basis, often threatens to leave, etc. She is insistent to go for walks and often wanders the house with her dog [who] does not always "guide her home". Her caregiver has concerns about her safety.

[101] "Evidence of continuing decline in her cognition and increased difficulties for her caregiver" (para. 4) is noted. Mention is also made of Axis IV psychosocial stressors "paranoid style". Although, Dr. Mulhall does not mention it, we know from Angela Burke's assessment of May 7, 2007, that it had been noted that she had also lost her ability to knit, and was (uncharacteristically) mistreating her dog by this time.

[102] On cross-examination, Dr. Mulhall explained that while he was unable to remember anything beyond what was written in his reports, he was able to indicate that Mrs. Withenshaw's declining orientation, and the other problems noted, would not have been due to her limited eyesight, as only 28 of the 30 factors noted in the

cognition test would have been dependent upon eyesight. Moreover, he indicated that the fact that she was "misplacing items" was not a sign of depression (a theory which the Respondent attempted to advance). He explained that he was more concerned (in December, 2006 and May, 2007) with "screening" Mrs. Withenshaw with respect to her (then) current residence requirements, than with administering a diagnostic test.

Dr. Mark Bosma

[103] Dr. Bosma testified that he is a physician practising in Halifax, Nova Scotia, and is an assistant professor at the Department of Psychiatry at Dalhousie University in Halifax. His affidavit and report were submitted as Exhibit "4", and were compliant with the C*ivil Procedure Rules* so as to be received as expert opinion evidence. His report is set out at Tab "B" of Exhibit "4" (affidavit of January 10, 2020) and, as he notes, "the purpose of this report is to provide an opinion on Mrs. Withenshaw's financial capacity (i.e. her capacity to make decisions around her estate) beginning or around 2006". He goes on to provide his opinion and concludes, at pp. 3 to 4 of that report:

> In providing this opinion I have taken into account all information as provided to me by Richard W. Norman, as outlined at the start of the report. My opinion is based on the following assumptions:
>
> - The documents sent to me are true and accurate observations made at the time
> - The documents are generally a representative subset of a larger set of medical records (of which there are more than 3,000 pages)
> - Mrs. Withenshaw had approximately $300,000 of assets held in various investment vehicles as of 2006/2007
>
> Based on my review of the documents, I think it is unlikely that Mrs. Withenshaw had capacity to make financial decisions (i.e. decisions about her financial estate) at or near the time of the second assessment completed by Dr. David Mulhall in May 2007. While it is possible she lacked capacity at the time of the first assessment in December 2006, there is not enough information available to reach this conclusion.
>
> Managing finances is considered an IADL, or instrumental activity of daily living. Other examples include driving a car, planning and cooking a meal, performing housekeeping tasks, and managing medications. These activities all require a significant degree of executive function, which is the ability to plan and organize, focus attention, and perform complex multi-step tasks. The ability to perform these activities is affected in the early, or mild stage, of dementia. The ability to

> perform ADLs, or activities of daily living, is affected in the moderate stage of dementia. Examples of ADLs include managing personal hygiene, dressing, bathing, and toileting.
>
> At the time of Dr. Mulhall's second assessment in May 2007, Mrs. Withenshaw was clearly in the moderate, or middle stage of dementia, given that she was not managing her personal hygiene appropriately (and hadn't been doing so for some time), and was incontinent of bladder, with little insight into her need for care. It was also commented on in May 2007 that she was fully dependent for all IADLs, which likely suggests she was dependent on others to manage her finances. Other documented behaviors at that time, including wandering, and worsening confusion in the evening, are common in the moderate stage of dementia and support the diagnosis made by Dr. Mulhall.
>
> In order to have capacity to manage finances, an individual must have the ability to know information about their estate. This includes having knowledge of assets (such as property, investments, bank account balances, and exact source and amount of income), debts, and expenses. An individual must also be able to appreciate the personal consequences of decisions made regarding their estate — i.e. a person must know how their decisions regarding their estate will personally affect them. Given her diagnosis of dementia in the moderate stage with evidence of significant cognitive impairment including short term memory deficits, and significant functional decline with limited insight into her deficits and need for care, it is unlikely that Mrs. Withenshaw would have known the exact details of her estate, or been able to appreciate the consequences of her decisions. Thus, she would have likely lacked capacity to make financial decisions on or before May 2007.
>
> …
>
> [Emphasis added]

[104] Upon cross-examination, while conceding that blindness or macular degeneration may have an effect upon a person's abilities such as driving, managing a household in a safe manner, personal care such as dressing/grooming/bathing and other matters involving personal hygiene are less likely to be impaired. Incontinence, for example, does not require visual ability. What is important is whether the person recognizes they are, for example, incontinent and (further) that they require assistance.

[105] With reference to the MMSC scores cited in Dr. Mulhall's assessments, Dr. Bosma indicated that the cumulative points "lost" in the second assessment would not have relied much upon visual acuity. He said there were clearly progressive deficits shown in short-term memory recall, concentration and orientation. That said, he reiterated that the most important criteria relate to the patient's functional

status, for example, with respect to hygiene and incontinence, as well as their ability to seek assistance when needed. Put differently, the issue is inextricably bound to a patient's judgement – are they exhibiting good judgement; can they formulate a plan, that is, demonstrate executive functioning?

Dr. Mark Johnston

[106] Dr. Johnston's affidavit states that he is a psychiatrist in the town of Kentville, Nova Scotia. He had been asked by Dr. Peter Goddard of Grand View Manor to assess Doris Withenshaw on September 10, 2007.

[107] As previously indicated, his affidavit was not sworn until March 5, 2020, approximately 12 days before this matter was heard. I have earlier explained that I allowed this late filing over the objections of counsel for the Applicants because the substance of Dr. Johnson's testimony was contained in the records to which each of the parties had long had access, hence, the prejudice to the Applicants appeared to be minimal. I determined that, in this case, late filing(s) could be more appropriately considered at the time when costs are determined.

[108] Dr. Johnson had no independent recollection of anything pertaining to Mrs. Withenshaw beyond what was contained in his report. He estimated that he probably spent between 30 to 60 minutes with her, and that he also spoke to her daughter (the Respondent) at the time. He emphasized that the purpose of the testing which was administered was to determine if her memory was impaired and, if so, how impaired it was. His report indicated that he found some slight impairment in that respect. He emphasized "I was not asked to assess her competency at the time". He also pointed out that he had not been asked to assess whether she was independent with respect to daily activities, so he made no notes with respect to her functionality or level of dependence.

iv) findings

[109] I found Dr. Johnson's testimony and records to be of very limited assistance in this matter. This is not because I had any difficulty with what he had to say. The object of his examination in 2007 appeared to be simply to assist Mrs. Withenshaw’s caregivers with respect to the formulation of a plan for her care on an ongoing basis. As he himself stressed, he was more focused upon determining the extent to which her memory was impaired, given how integral this was to the

plan for her ongoing care. He reiterated that he was not asked to address her competency at the time of his examination.

[110] Many of the same points could be made in relation to Dr. Mulhall and his observations. He too had no independent recall beyond those observations that were noted in his reports. However, I did attach more significance to his assessment notes, dated in December 20, 2006 and May 2, 2007, insofar as there appears to have been a clear decline in Mrs. Withenshaw's orientation and functional capability based on the observations that he had made, between the beginning and end of that five month span. This is to be contrasted with Dr. Johnson, who appears to only have made the one assessment, based upon a 30 – 60 minute visit. He was therefore without any baseline or frame of reference with which to compare what he was able to observe on the occasion of that assessment.

[111] I attached significant weight to Dr. Bosma's report and opinion. He was the only physician who offered an opinion directed specifically to the issue which this Court must determine, which is to say, Mrs. Withenshaw's capacity to manage her own financial affairs. I found that the assumptions upon which that opinion was based were accurate. It bears specific mention that I found that the documents upon which Dr. Bosma relied were a representative subset of the medical records. Although the Court had a larger subset or "pool" of documents to review than those which were presented to him prior to authoring his report, these additional documents did not, in my view, diminish the representativeness of those that he saw, nor the weight which I placed upon his ultimate conclusion.

[112] It is true that both sides did evince some concern over the "representativeness" of the records proffered by the other. However, neither was able to show that the relevant, admissible documents or records relied upon by the other had been taken out of context, nor any other basis upon which I could conclude that such were unrepresentative.

[113] Although obviously not required to accept Dr. Bosma's opinion, I have been satisfied upon the balance of probabilities that Doris Withenshaw lacked capacity to make financial decisions on or by May 1, 2007, at the very latest. She was incontinent, and unable to appreciate that she needed assistance with her hygiene. She had lost the ability to knit. She was (uncharacteristically) mistreating her dog on occasion. She was frequently misplacing items, and "problems with calculation and news" (*Exhibit "1", last* page) had also been noted by Dr. Mulhall.

[114] It is possible that her incapacity preceded that date, and one may certainly be suspicious that this may have been the case. For example, we know from the Respondent's email to Gary in November 2006 (*Exhibit "5", Tab C*), that discussions about financial matters were already upsetting Mrs. Withenshaw by that time.

[115] I am also mindful that the course of her regression appears to have been rapid, and that the symptoms noted in Dr. Mulhall's second report did not emerge out of "whole cloth" on May 1, 2007. This was simply the date of his second assessment. That said, I have not been presented with sufficient evidence upon which to support an earlier finding of legal incapacity.

B. Has "cause" within the meaning of section 5(1) of the *Act* been established?

[116] The words "for cause" are usually encountered within the context of criminal jury trials (i.e. "challenge for cause") or contractual disputes such as with respect to termination (i.e. "termination for cause"). In the case at bar, notwithstanding the finding that their mother was legally incapacitated from May 1, 2007 onwards, I must also be satisfied that the Applicants have established "cause" within the meaning of the *Act*, before they may be granted the relief that they seek.

[117] The *Act* does not define what is meant by the words "for cause". Certainly, it is futile to attempt to lay down an exhaustive list of what will or will not constitute "cause" in any given set of facts. It may be said, however, that what must be present is more than just a general dissatisfaction on the part of the Applicants with respect to the way the Respondent went about her duties.

[118] In *D.B. v. J.M.J.*, 2010 NSSC 137, Bryson, J. (as he was then) touched upon this issue:

> 15. ... In this case the *Powers of Attorney Act* only requires an accounting "for cause". The only alleged cause here is a failure to consult and keep the Applicant and her siblings informed – an accusation which Ms. J. denies. In any event, it is not a requirement of Ms. E's power of attorney... to provide an accounting to anyone in particular. Accordingly, the only obligation that arises is the one imposed by the legislation. I am also mindful that there is no evidence before the court that Ms. E had substantial assets. Her resources seem to be very limited and her present care is subsidized by the province.

[119] I conclude that the "cause" which must be demonstrated, in any given set of circumstances, must be related to the duties or obligations required of the Attorney pursuant to either the common-law, the *Act*, or the document itself. Specifically, and having regard to the Respondent's legal obligations (in an omnibus sense), I ask whether the Applicants have demonstrated acts or omissions on her part which would cause a reasonable person to question whether she had adhered to those obligations?

[120] In this case, reference has already been made to the precipitous decline in Mrs. Withenshaw's assets over the period of time during which Gail was her Attorney. It is difficult to fix a precise amount, but even on the basis of the CI/Sun Life account information (*Gary Withenshaw's affidavit, Exhibit "6", Tabs "L" and "M"*), Doris' assets at the commencement of the POA (in June, 2006) were significant by any yardstick. Very little of these assets remained upon her death (in 2014). This is despite the fact that her income appears to have exceeded her living expenses each year from 2006 – 2014.

[121] The Applicants also allege (*Exhibit "6"*):

> 26. After 2006, I observed that my sister began to purchase a number of expensive items such as a John Deere tractor with front end loader and mower, a cottage at Trope Lake, a new car, a truck, and a parcel of land near her house. This was out of character for her and I thought these purchases were beyond her means.

[122] The Respondent responds in her brief:

> Again, if Gary was concerned that my mother was incompetent and I was taking advantage, the proper authority should've been notified at this time. The car was mentioned in my affidavit paragraph #73.
>
> In my Notice of Contest dated and signed June 19, 2018 by my previous lawyer... we contest [sic] my brother's accusations by stating: The Lake property was mortgaged by the Respondent. She did make an error, of the $16,000.00 gift of a down payment in 2008. It was actually $10,000.00 as per my brothers evidence cheque #016, also signed by my mom. As for, my land, I bought this in 2012 with winnings from bingo. I can prove this as well. The John Deere lawn tractor was a gift by my mom, also mentioned in Barb Kennedy's affidavit and cheque #003 signed by mom. My mom had a blast driving this in the pasture. She loved it. It was the only way she could drive again (with me beside her of course) I did not receive this cheque until after my affidavit was complete.
>
> [Emphasis in original]

[123] In para. 73 of her affidavit, as referenced in her brief (*Exhibit "7"*), the Respondent does discuss the car:

> Due to disc degeneration, mom was having more and more difficulty getting up into the front seat of the F150 truck. She suggested we get a car, so we could easily get in. After trying out a few cars, she picked a 2008 Calibre. It was good on gas and had 17" wheels. Mom, being so short, the seat was right there at her bottom. No climbing or pulling herself up, just turn and sit. During the purchase the salesman asked whose name it should go in, mom said "Gail's name". I commented that it probably should go to the estate. She said, "no, you will be driving me around all the time; when I'm gone it's yours." I told her, "Gary is going to have a fit". She said, "oh well, it's my money."

[124] Another basis upon which the Applicants rely are the cheques made payable to Gail Withenshaw from her mother's Investors Group account. For example, on March 23, 2007, a cheque payable to Gail Withenshaw in the amount of $50,000.00 was signed by both Doris and Gail. On June 5, 2008, the Respondent signed a $10,000.00 cheque payable to herself, and wrote upon it "car for Mom". On June 20, 2008, another cheque in the amount of $10,000.00 payable to Gail Withenshaw, was signed by both Gail and her mother (*Gary Withenshaw's affidavit, Exhibit "6", Tab C*).

[125] The Respondent deals with this evidence as follows. Some of what she says is hearsay or otherwise speculative, but I have reproduced it in full so that the essence of what she contends is apparent:

> I just received the cheques my brothers are referring to including cheque 001, $50,000.00. My Mom signed the cheque first, later Sharon Simineau, Investors Group, asked me to squish my signature under hers. I assume she thought Mom and I had taken on Joint Account like she originally suggested. I did not have this evidence before my Affidavit was complete. Please consider striking this from the evidence.
>
> Cheque 002, 008, 010, 012, 013, 019 – 061, 063 – 67 and cheque #068 are all missing. I would like these cheques from my brothers please. Cheque 003 was for the John Deere Law Tractor, that my brothers did not put in their Affidavit as evidence. Therefore they are accusing me in their brief as taking this from my Mom when she clearly signed for it and enjoyed the tractor herself.
>
> Also the cheques my brothers are referring to that I signed, were also signed by my Mother, except for the car. She didn't sign for the car, only because there

> were people present and her inability to see the lines to sign on, cause her embarrassment. Therefore she often asked me to sign her cheques, especially if there were people present because of her Macular Degeneration Disease. I can also show proof that I developed a large debt on my Visa, driving in 2012, 2013, 2014 from Middleton to Berwick to be with Mom, sometimes 2 – 3 times a day. I have had a small hobby farm to attend to since 1997 so I could not always spend full days with her and had to often drive 70 km round trip. I did not pay myself as my Mother often told me to do.

[126] It is apparent that cheques for large sums of money were being paid to the Respondent, some at times during which I have been satisfied that Doris Withenshaw lacked legal capacity. It is also clear that the Respondent admits to having received gifts from her mother during the period that the latter was incapacitated.

[127] I am certainly suspicious of the $50,000.00 cheque payable to the Respondent dated March 23, 2007. However, as previously noted, I lack sufficient evidence to conclude, on a balance of probabilities, that her mother's period of incapacity preceded May 1, 2007, so I do not rely upon this payment when the issue of "cause" is determined.

Conclusion

[128] Cumulatively, the Applicants have established "cause" sufficient for the Court to require the Respondent to have accounts passed for any and all transactions involving the exercise of the POA during the incapacity of the donor, which is to say from May 1, 2007, to the date of Mrs. Withenshaw's death on November 1, 2014.

[129] I am well aware that I have concluded that Doris Withenshaw's period of legal incapacity (for the purposes of this proceeding under the *Powers of Attorney Act*) preceded the execution of her Last Will and Testament by almost three years. It should be borne in mind that the issue of her Testamentary Capacity in 2010, when the will was signed, is a separate issue, one which was not argued before me in this proceeding. It is not my intention to opine, or even comment upon, that distinct issue.

[130] I will say one final thing. The "Doris Withenshaw" that emerges in the testimony of her children, and in the records provided to this Court, lead me to view her as having been a kind and compassionate woman, one who loved and cared deeply for all of her children and grandchildren. Tragically, she fell prey to a

terrible and relentless disease, one which dramatically impacted upon her ability to interact with others and to function both physically and mentally. I am certain that the last thing that she would have wanted was to see her children at such significant odds after her passing.

[131] Nonetheless, as a consequence of my findings, and if they cannot now find a way to resolve matters satisfactorily between them, the parties will arrange to have the matter set down for a further motion for directions. At that time, a date for the hearing of the second part of this application will be set, as well as dates for the filing of materials.

[132] I will deal with the issue of costs after the second part of this Application is concluded.

Gabriel, J.