SUPREME COURT OF NOVA SCOTIA

Citation: *Taraschi-Carr v. Gulati*, 2022 NSSC 56

Date: 20220223
Docket: Hfx No. 505954
Registry: Halifax

Between:

Gola Taraschi-Carr

Applicant

v.

Rohit Gulati

Respondent

and

Kamal Gulati

Intervenor

Judge: The Honourable Justice D. Timothy Gabriel

Heard: November 29 and 30, 2021, in Halifax, Nova Scotia

Counsel: Ian Dunbar, for the Applicant
Sara Nicholson, for the Respondent
Peter Rumscheidt, for the Intervenor

Revised Decision: The text of the original decision has been corrected according to the attached erratum, dated March 7, 2022.

By the Court:

Introduction

[1] On May 5, 2021, the Applicant filed a Notice of Application in Court seeking an order:

1. Setting aside and declaring that the Power of Attorney dated February 3, 2021, signed by Kamal Gulati in favour of Rohit Gulati is invalid due to lack of capacity and/or undue influence.
2. Declaring that the Power of Attorney signed by Kamal Gulati in favour of Gola Taraschi-Carr (a.k.a. "Shruti Gola Taraschi") be declared valid and in full force and effect.
3. An accounting of all activities by Rohit Gulati, if any, relating to any and all bank accounts, investments, or other funds held by Ms. Gulati, either solely or jointly, and the return of all funds withdrawn by Rohit Gulati.
4. Any other interim or permanent order that this Honourable Court deems just and reasonable.

[2] The pleadings named the Applicant and her brother Rohit Gulati as the only parties.

[3] On May 26, 2021, counsel for Kamal Gulati (their mother) corresponded with the parties' respective counsel, noting, *inter alia*, as follows:

> It is my client's position that at all relevant times she had capacity and, in particular, when she executed the Power of Attorney on February 3, 2021. She opposes [her daughter, Gola's] efforts to seek an order setting aside the Power of Attorney.
>
> ...
>
> I would ask that each of you please seek instructions from your clients with respect to whether they will consent to my client joining the proceedings as an Intervenor. If either of your clients will not consent, then I will bring the required motion to seek an order.
>
> If both of your clients will consent to my client becoming an Intervenor then I will advise the Court and will asked to participate in the motion for directions.
>
> (*affidavit, Robert Mroz, November 15, 2021, Exhibit "C"*)

[4] Counsel for the Applicant responded the same day and said, in part:

> Ms. [Kamal] Gulati told my client that she has not retained a lawyer and she does not know the name, Peter Rumscheidt.
>
> As you can appreciate, this is a very difficult situation for all involved and my client is simply trying to continue to act in the best interests of her mother.
>
> In light of Ms. Gulati's apparent confusion, we suggest that Ms. Gulati be assessed again by her treating physician who previously diagnosed her dementia to ensure that she can properly instruct counsel.
>
> (*Mroz affidavit, Exhibit "D")*

[5] After some misunderstanding between the parties and Kamal Gulati as to whether an assessment of Kamal Gulati had actually been scheduled by the Applicant, Mr. Rumscheidt emailed Applicant's counsel:

> Please confirm there is no assessment of Kamal scheduled. As we discussed in the call with Sara [Nicholson, counsel for the Respondent], we will jointly work on identifying an assessor and work out what the assessor will be asked to assess.
>
> (*Mroz affidavit, Exhibit "E"*)

[6] Ultimately, counsel for the Respondent consented to the acquisition by Kamal Gulati of Intervenor status. The order to that effect, which was dated September 9, 2021, contained a recital:

> And whereas Gola Tarachi- Carr takes no position with respect to Kamal Gulati's request to become an Intervenor as she is contesting the capacity of Kamal Gulati...
>
> [Emphasis added]

[7] The parties could not agree upon the parameters of the assessment that had been contemplated by the earlier correspondence. After signalling her intention to do so at a motion for directions in late June 2021, the Applicant filed, on October 1, 2021, documents with respect to a motion for a Court ordered Independent Capacity Assessment of Kamal Gulati, with the Assessor to be agreed upon by the parties, or failing such agreement, to be appointed by the Court.

[8] On October 25, 2021, counsel for the Intervenor forwarded to Applicant's counsel a Litigation Guardian's Statement of the same date, in purported compliance with *Civil Procedure Rule* 36.07(3). The litigation guardian is noted to be Natasha Gulati, Rohit's daughter, who is a lawyer in Ontario. To date there has not been a Court order to that effect.

[9] In Mr. Rumscheidt's letter accompanying the Statement was noted the following:

> I confirm and emphasize that the appointment of a Litigation Guardian for Kamal is not and should not in any way be taken as a concession or acknowledgement that Kamal lacked the requisite capacity to sign the Power of Attorney on February 3, 2021. As well, it should not be taken as a concession that Kamal lacks capacity in any broader context.
>
> (*Mroz affidavit, Exhibit "H"*)

[10] The Applicant asks this Court to order an Independent Capacity Assessment of the Intervenor, arguing that such an order is still necessary. In particular, she says that an examination of Kamal Gulati's present capacity will assist the Assessor in formulating an opinion as to her capacity to execute the impugned Power of Attorney on February 3, 2021.

Background

[11] Kamal Gulati ("Kamal", "Ms. Gulati" or "the Intervenor") is an 82-year-old woman born in India. Her husband, Raj Paul Gulati was also born in India. It was there that he and the Intervenor met, were married, and began to raise their family. He is now 90 years old. Their eldest child, Rohit Gulati (hereinafter "Rohit", or the Respondent) was born in India, and migrated with them to Canada. Their second child, "Nidhi", and their youngest, Gola Taraschi-Carr (hereinafter, "the Applicant" or "Gola"), were born in Canada.

[12] In 2012, Kamal and Raj Gulati executed enduring Powers of Attorney and Personal Care Directives. Each named the other as Attorney, and/or substitute decision-maker. In the event one predeceased the other or was unable to assume his or her responsibilities pursuant to these instruments, Gola was named as alternate.

[13] On November 24, 2020, Kamal's geriatrician, Dr. Katalin Koller, corresponded with her family physician, Dr. Lobbin. This occurred in the aftermath of an assessment performed that day.

[14] On page 3 Dr. Koller notes:

> Ms. Gulati is an 81-year-old woman with prior comorbidities as outlined in a recent workup for the possibility of thyroid cancer. Over the past year, she has had cognitive and functional decline and now meets criteria for early moderate stage

> dementia. I did review this with Gola and arranged to have assumed follow-up this week to allow for the diagnosis to be shared with Ms. Gulati in a supportive manner.
>
> ...
>
> My recommendation is for formal care implementation, given the indication for formal support, as well as the considerable caregiver burden. In my clinical opinion, Ms. Gulati does not have appropriate capacity to make decisions with regards to her personal care needs. She did not display appropriate insight today to what her functional needs are and how she is obtaining supports. She also does not display appropriate insight into her medical issues and would require support making both personal care and medical care decisions.
>
> (*Affidavit, Dr. Koller, October 1, 2021, Exhibit "G"*)

[15] Raj Gulati is also under the care of a geriatrician, Dr. Maia von Maltzahn. He was diagnosed with vascular dementia in June 2019, and a determination was made at that time that he lacked the capacity to make decisions about his own healthcare and personal care needs. On or around the date of Kamal Gulati's diagnosis by Dr. Koller, Raj Gulati's own dementia had progressed to the "moderate to severe" stage. (*Affidavit, Dr. von Maltzahn, October 1, 2021, para. 9*).

[16] The Applicant eventually found it necessary to move in with her parents at their residence located at 22 Birkdale Crescent on December 7, 2020. She stayed with them daily to ensure that they were being looked after and their needs attended to.

[17] Each morning the Applicant would leave to go to work. Due to Covid-19 restrictions, she was working at her own home, which was where the equipment needed to carry out her duties was located. Health care workers attended to the needs of her parents at their home during the weekdays while Gola was at work. This arrangement remained in place until she stopped living with them at 22 Birkdale Crescent, on January 22, 2021, under circumstances which I will outline shortly.

[18] Meanwhile, the Applicant's relationship with each of her siblings was already strained. She testified that her brother was bullying and vulgar in his dealings with her, frequently swearing at her and using abusive epithets when addressing her. Her sister, Nidhi, apparently sides with their brother. She lives in the United States. Rohit lives in Ottawa, Ontario.

[19] Nonetheless, the Applicant endeavoured to keep her siblings up-to-date via email and texts with respect to their parents' health. These updates elicited no response from her brother.

[20] On January 6, 2021, while the Applicant was working at her residence, Rohit unexpectedly arrived in Halifax from Ontario. Remarkably, he went straight to his parents' home. He did not quarantine himself as mandated by the Covid-19 restrictions then in place in this Province. He announced that he intended to stay in the home.

[21] Neither Kamal nor Raj Gulati seemed concerned about the Respondent's precipitous action. They were, however, distressed by the upheaval which resulted. At the same time, their social worker expressed concern to Gola, telling the Applicant that she feared that she (Gola) had "lost control" of the situation.

[22] Feeling that she had to act quickly, the Applicant filed a Notice of Application in Court on January 8, 2021 seeking:

> (a) A declaration that the Respondent has trespassed on the property of the Applicant's parents, Raj and Kamal Gulati, the affected property being a 22 Birkdale Crescent, Halifax ("the Gulati home").
>
> (b) An interim injunction preventing the Respondent from further trespass at the Gulati home until he completes a period of self-isolation away from the home for a period of fourteen days, beginning January 20, 2021.
>
> (c) A representation order under the *Adult Capacity and Decision-Making Act*, SNS 2017, c.4 declaring that the Applicant as [sic] the representative for Raj Gulati and Kamal Gulati.

[23] An Interim Injunction Order was signed by Justice Christa Brothers on January 8, 2021. It stated:

> Whereas the Applicant has moved on an emergency basis for an *ex parte* interim injunction;
>
> Upon reading the materials file a behalf of the Applicant and hearing counsel for the Applicant by teleconference;
>
> And upon being advised by counsel for the Applicant that the Respondent was given email notification of this motion;
>
> And upon determining that this motion should be granted;
>
> NOW THEREFORE IT IS ORDERED THAT:
>
> 1. The Respondent is hereby prohibited and enjoined from attending the property located at 22 Birkdale Crescent, Halifax, Nova Scotia and is to vacate the property immediately or at the latest by 4 p.m. on Friday, January 8, 2021.
>
> 2. This order shall remain in effect until January 14, 2021 at 4:30 p.m. unless:

a. A Justice of this Court extends it; or

b. The Respondent confirms he does not wish to be heard and in which case, it shall extend until January 20, 2021 at 11a.m.

[24] The Applicant did not pursue the other relief mentioned in her Notice of January 6, 2021. Nonetheless, the ripple effect continued. Rohit had violated the Covid protocols. As a result, healthcare workers formerly attending 22 Birkdale Crescent to look after Raj and Kamal during the daytime hours (while Gola worked) ceased doing so.

[25] The VON did not return to resume their duties at the Gulati home until January 22, 2021, which was the same day that Rohit, having completed the period of self-isolation specified in the Interim Injunction Order, returned to live there. It was also the same day that the Applicant ceased residing at the Gulati home and returned to live at her own premises full-time.

[26] On approximately January 28, 2021, the Applicant's sister, Nidhi, arrived at the Gulati home. She had travelled from the United States. She completed the applicable period of self-isolation.

[27] Five days after Nidhi's arrival (on February 3, 2021), Kamal attended the office of a lawyer, Bhreagh MacDonald, where she signed a new Power of Attorney. This one named the Respondent as her Attorney. It is this Instrument which the Applicant challenges. The earlier Personal Care Directive, naming the Applicant as substitute decision maker for her mother in the event of her father's incapacity, remains extant.

[28] It is against this backdrop that the Applicant seeks a Court ordered Capacity Assessment of her mother, the Intervenor, as of February 3, 2021.

[29] Obviously, the issue is whether the Court has the power to require such an assessment, and, if so whether it ought to do so, and on what terms.

[30] First, however, I must discuss the purported appointment of a Litigation Guardian for the Intervenor at greater length.

Discussion

A. The status of the Litigation Guardian

[31] The purported appointment of a Litigation Guardian for Kamal Gulati in this matter merely speaks to her (perceived) present capacity to retain and instruct counsel. Counsel for the Intervenor stressed this during the course of his submissions, and I accept it. This says nothing about her capacity in any broader context.

[32] Following a discussion held with the Court prior to the commencement of this motion, counsel for the Intervenor has forwarded a draft of an Order, for the Court's approval, which would appoint Natasha Gulati (Raj's granddaughter) as Litigation Guardian for her grandmother, the Intervenor. This is apparently intended to "formalize" the filing of Natasha Gulati's Litigation Guardian Statement which occurred on October 25, 2021. No medical evidence or other basis has been provided. The other parties have not objected.

[33] Civil Procedure Rule 36.01(1) provides as follows:

> This Rule allows for a party to represent the interests of another person in a proceeding, in one of the following ways:
>
> (a) as a public official, in an official capacity;
>
> (b) as litigation guardian for a child, or person who has been found not to have capacity to act on their own or to instruct counsel;
>
> (c) as guardian under the *Guardianship Act* or a statutory representative;
>
> (d) under a private instrument giving the party management of the property or affairs of the other person or appointing the party as representative, such as an executor under a will, a trustee under a trust that includes powers to sell or manage, or an attorney under a power of attorney;
>
> (e) under a public instrument, such as a trustee in bankruptcy, a receiver under an order, an administrator of a deceased's estate, or an authority appointed by a tribunal or by a public authority under legislation;
>
> (f) by appointment under this Rule.

[34] Rule 36.07 adds context to this:

> (1) A guardian of a child under the Guardianship Act must start, defend, contest, or respond to a proceeding involving the child, in the name of the child and by the guardian, unless a judge orders that another person act as litigation guardian.
>
> (2) A statutory representative must start, defend, contest or respond to a proceeding involving the represented adult in the names of the adult and the representative, unless a judge orders that another person act as litigation guardian.
>
> (3) In all other instances, a person may become the litigation guardian by filing a litigation guardian's statement.
>
> (4) The litigation guardian's statement must include one of the following kinds of headings:
>
> > (a) a standard heading with the words "Intended Proceeding in the Supreme Court of Nova Scotia" instead of "Supreme Court of Nova Scotia", if the statement is signed before a proceeding is started;
> >
> > (b) the standard heading of the proceeding, modified if necessary to add the litigation guardian's name and title.
>
> (5) The litigation guardian's statement must be entitled "Litigation Guardian's Statement", be signed personally by the litigation guardian, and include all of the following:
>
> > (a) the guardian's consent to be litigation guardian for the party;
> >
> > (b) a description of the litigation guardian's relationship to the party;
> >
> > (c) confirmation the litigation guardian has appointed counsel for the party;
> >
> > (d) a representation that the litigation guardian has no interest in the proceeding adverse to that of the party;
> >
> > (e) an acknowledgment that costs are normally awarded for or against a party rather than the party's litigation guardian, but that a litigation guardian may be liable for costs if the guardian abuses the court's processes.
>
> (6) The litigation guardian's statement may be in Form 36.07.

[35] Finally, Rule 36.08(1) provides that a Judge "...may appoint, discharge, or replace a Litigation Guardian".

[36] Upon reflection, I am not prepared to sign an Order which would, in effect, ratify the process that was followed. The Court is bereft of any medical evidence of

the Intervenor's capacity to retain and instruct counsel on October 25, 2021. This was when the "Litigation Guardian's Statement" was filed (on its own) by counsel for the Intervenor. The matter was not argued before the Court in any depth, as it is not the issue before the Court in this motion. It should be taken up with the Application Judge for a determination of the status of Natasha Gulati as Litigation Guardian for the Intervenor.

[37] Nonetheless, for the purposes of this Application, I observe that I have a draft form of Order, with which none of the parties appears to take issue, recognizing Natasha Gulati as the Guardian. Although I am not prepared to sign it, I will treat it, in effect, as an acknowledgement, by all parties (for the purposes of this motion only) that the Intervenor's position (i.e., that she is not prepared to consent to the Capacity Assessment requested by the Applicant) is accurately before the Court. Once again, the status of the Litigation Guardian (in any broader context) should be raised with the Justice scheduled to hear the Application itself.

B. Potential Sources of Authority for the Order sought

[38] The Applicant initially suggested four potential bases for the Order she seeks. The first was said to arise under the *Personal Directives Act*, SNS 1988,c.8 ("*PDA*"). That legislation provides, in part, as follows:

> 2(a) "Capacity" means the ability to understand information that is relevant to the making of a personal-care decision and the ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision;
>
> ...
>
> 10(1) A Personal Directive may name a person, by name, title or position, with whom the person making an assessment of the capacity of the maker is to consult in making the assessment.
>
> (2) A delegate, statutory decision-maker, nearest relative, health care provider, person in charge of a home-care services provider or person in charge of a continuing-care home in which a maker or person represented resides may request an assessment of capacity of a maker or person represented.
>
> (3) A maker or person represented may request a reassessment of capacity.
>
> (4) A person assessing capacity of a maker or person represented has the right to all medical information and documents relevant for the purpose of making the assessment.

> (5) A person who has custody or control of any information or document referred to in subsection (4) shall, at the request of the person assessing capacity, disclose that information.

[39] With respect, and as the Applicant's counsel conceded during oral argument, these provisions are inapplicable here. They do not provide a means by which an individual noted in s. 10(2) may request an assessment of a donor's capacity to make an enduring Power of Attorney ("POA").

[40] There is no comparable provision in the *Powers of Attorney Act*, R.S. c. 352, s. 1 ("*POAA*"). Moreover, the capacity which a donor must possess in order to execute a Power of Attorney is different to that required to make a Personal Care Directive.

[41] The second potential source, the *Adult Capacity and Decision Making Act*, SNS 2017,c.4 ("*ACDMA*") is similarly of no avail. Section 10 is referenced in the Applicant's brief:

> 10(1) The Court may order a capacity assessment of an adult if
>
> > (a) the adult's capacity to make decisions is at issue in a proceeding under the *Act*; and
> >
> > (b) there are reasonable grounds to believe that the adult is incapable of making decisions about any matter.
>
> (2) An order under subsection (1) may direct an adult whose capacity is at issue to undergo the capacity assessment and to
>
> > (a) permit an assessor and any person assisting the assessor to enter the adult's place of residence to conduct the capacity assessment; or
> >
> > (b) attend at another place at any time specified in the order to undergo the capacity assessment.

[42] However, the Applicant does not seek a Representation Order, which is what the *ACDMA* speaks to.

[43] The Court's inherent *parens patriae* jurisidiction offers no assistance to the Applicant, either. I acknowledge that such could potentially be invoked to fill a legislative void if the Court determined that it was in the best interest of a vulnerable person involved in legal proceedings to do so. That said, there has been little evidence with respect to Kamal Gulati's best interest within the context of this motion. I have virtually no evidence with which to balance what the Applicant seeks (including the inevitable turmoil and stress for the Intervenor which would

accompany it) with Kamal Gulati's own personal best interests, particularly in light of her significant current health issues.

[44] The *Civil Procedure Rules* are what is left. The relevant portions thereof follow:

> 21.02(1) A party who, by a claim, defence, or ground, puts in issue the party's own physical or mental condition may be ordered to submit to a physical or mental examination by a medical practitioner.
>
> (2) The party who puts their own physical or mental condition in issue has the burden to satisfy the judge that the party should not be examined.
>
> (3) A party who puts in issue the physical or mental condition of another party may make a motion for an order that the other party submit to a physical or mental examination by a medical practitioner, and the party must satisfy the judge on all of the following:
>
> > (a) the party has, by a claim, defence, or ground, put in issue the other party's physical or mental condition;
> >
> > (b) the claim, defence, or ground putting the other party's condition in issue is supported by evidence;
> >
> > (c) the examination may result in evidence that proves or disproves the claim, defence, or ground.
>
> …

[45] To break this down, and in the specific circumstances of this motion, the Rule states that the Court "may" order the examination sought by the Applicant if she is able to satisfy these prerequisites:

1. The Intervenor must either have put "in issue" her own "mental condition" (21.02(1)), or another party must have done so (21.02(3)(a));
2. If the Intervenor's "mental capacity" has been put in issue by another party, that party must have some evidentiary basis for doing so (21.02(3)(b)); and
3. The Court must be satisfied that the requested examination "may" result in evidence that proves or disproves what has been alleged.

[46] These, then, are the issues which the Court must address.

Analysis

1. Has the Intervenor put her own "mental condition" in issue?

[47] The Applicant argues that, when this proceeding was commenced, it involved two parties: the Applicant and the Respondent. Then, Kamal Gulati intervened. As the latter stated in her Notice of Contest dated September 14, 2021:

> 2. At all times in relation to the preparation and execution of the February 3, 2021 Power of Attorney, the Intervenor had full capacity and understood the nature and effect of the Power of Attorney document.
>
> [Emphasis added]

[48] The Intervenor (the argument continues) thereby directly placed in issue her capacity to execute the impugned instrument within the meaning of *Civil Procedure Rule* 21.02(1). So, her "mental condition", within the meaning of that Rule, is engaged.

[49] With respect, even if one asserts an equivalence between "mental capacity" and "mental condition", this argument overlooks the fact that her capacity was initially placed in issue by the Applicant herself, when this proceeding was initiated. The fact that it only involved herself and her brother at that time does not alter that reality. Merely intervening to take issue with an assertion made by one of the parties about her, should not have the effect of deeming the Intervenor to have been the one to have put the fact "in issue" for the purposes of *Civil Procedure Rule* 21.02. At face value, she intervened because she disagreed with something one of the parties to this proceeding had said about her. It was the Applicant who raised it. She thereby placed it in issue.

2. Has the Applicant put the Intervenor's "mental condition" in issue?

3. If yes, does the Applicant have some evidentiary basis for doing so?

[50] It is convenient to deal with these two issues together.

[51] As has been mentioned previously, Civil Procedure Rule 21.02(3)(a) provides that the Rule may also be triggered when one party puts "…in issue the other party's … mental condition". When this Application commenced, Kamal was not a named party, and therefore "...the other party's... mental condition" had not been put in issue, within the meaning of 21.02(3)(a), at precisely that time. However, Kamal became

a party when she intervened. Such is certainly the effect of Civil Procedure Rule 35.10. Is that enough?

[52] Admittedly, there is a dearth of decisions in this Province involving the use of Rule 21.02 outside of the tort context. Both parties have referred to *Burke v. Hillier*, 2015 NSSC 144.

[53] It is important to understand the factual milieu in *Burke*. The Applicant, who was the mother of the Respondent, sought to recover in excess of $40,000.00 from her daughter. Ms. Burke claimed that her daughter (Hillier) had removed the money from the bank account without her consent. Hillier was her mother's lawful Attorney of time.

[54] Following repeated requests made by Ms. Burke to her daughter for the return of the money, she revoked the Power of Attorney. By the date of the Application, the money had still not been returned. Ms. Hillier claimed she took possession of the money in accordance with her mother's instructions, that the latter had subsequently forgotten giving her the instructions, and was not competent to manage her own affairs. She claimed that Ms. Burke was under the influence of her other children, who were now influencing her, and who did not have her best interests in mind. She cited this as the reason why she had not returned her mother's money. She paid the money into Court instead.

[55] Ms. Hillier brought a motion pursuant to Civil Procedure Rule 21.02(3), seeking an Order requiring her mother to submit to a Mental Capacity Assessment, further indicating that she was prepared to fund the Assessment if the Order was granted. Ms. Burke, on the other hand, took the position that she was in a good state of mind, emphasizing that she still drove her own vehicle, paid her own bills, did her own grocery shopping, and socialized with friends.

[56] In or around the relevant time period, the health of Ms. Burke's husband had been deteriorating, and she was his primary caregiver. He had been diagnosed with dementia, and she was having difficulty managing his care.

[57] As noted in para. 13 of *Burke*:

> In the period after Mr. Burke's health begins deteriorating, Hillier observed Burke to have difficulty managing his care. She says that she observed obvious signs of memory loss and difficulty following instructions. In a medical assessment by geriatric specialist dated January 10, 2012, Dr. R. Bulajic observed: "...I am worried for Laurie. Laurie can be mixed up with timelines and events. Frequently, Laurie

> looks to her daughter Karen for answers" and "his wife might be having as well some cognitive impairment."

[58] Justice Gogan continues:

> ...A mental capacity examination is scheduled [by Ms. Hillier for Ms. Burke] for... April 10, 2014. On April 22, 2014, Dr. Doyle wrote a letter which set out as follows:
>
> > To Whom It May Concern,
> >
> > On April 10, Laurea Burke presented to the office for a mental capacity exam based upon a history of significant cognitive dysfunction and memory impairment. These symptoms were noted by Laurea herself and this was confirmed by her daughter Karen who was present with her.
> >
> > The purpose of this visit on April 10 was to rule out dementia as a cause for this impairment. Of note, Laurea had no recollection of being in my office one week earlier on April 3 when this visit was arranged. Standardized testing was done to rule out dementia for her significant memory impairment.
> >
> > It is my professional diagnosis that Laurea is under extreme stress and is suffering from clinical depression. It is not at all uncommon for depression to present as dementia like illness in the elderly. However, it is reversible. She is currently under treatment for this and her response is yet to be assessed.
> >
> > In my professional opinion, she is currently not in the state of mind to be making important decisions.
>
> 18. In addition to writing the foregoing letter, Dr. Doyle referred Burke to Dr. Ranka Bulajic, Geriatrician. An appointment was set for July 15, 2014. Burke did not attend the appointment.

[59] However, the Court noted that while the evidence supported the contention that Ms. Burke was experiencing some degree of memory loss, it was limited and conflicting on the issue of capacity. The Court noted, in particular, that Ms. Hillier had failed to provide an affidavit from Dr. Doyle, or any other doctor, who had examined her mother, and that this was one reason why Rule 21.02(3)(b) had not been satisfied.

[60] In this case, the Court faces no such impediment.

[61] Affidavits detailing the observations made of Ms. Gulati by her medical caregivers prior to February 3, 2021, have been filed. Without commenting upon their sufficiency, they will be relevant to her capacity to enter into a POA on

February 3, 2021, which is the only issue in these proceedings. Some of these observations were made less than two months before she signed the impugned Power of Attorney.

[62] Therefore, and with respect to Civil Procedure Rule 21.02(3)(b), there is some evidence in the affidavits of Drs. Koller, Lobban, and von Maltzahn which show that the Applicant's motion is not being made gratuitously.

[63] For example, we have seen that Dr. Koller provided ongoing geriatric care for the Intervenor. She was assisted by R.N. Jody Wells, who collaborated with Dr. Koller the preparation of the report dated June 21, 2019 (*affidavit, Koller, September 27, 2021, Exhibit "B", p. 2*) where it was noted:

> ... She (the Intervenor) tells me that she used to be a big reader (her Masters degree is in literature), but she is no longer reading because she cannot concentrate.
>
> From Gola's perspective things began to deteriorate slowly over the past two years. She said the first changes started about two years ago where she noticed short-term memory problems, forgetting conversations and repetition. Then in the past two months, things declined more rapidly, to the point where she (the Intervenor) is no longer caring for her husband, she stopped shopping, stopped driving (three weeks ago) and stopped feeding Raj and stopped eating herself. She has started to lose track of dates, is having trouble with comprehension, having word finding difficulties, having more trouble using the phone. Gola noted that her mother is a very proud person who would always be dressed and presentable for company. Today when I arrived she was still in her dressing gown and Gola found this to be very out of character. She finds her mother has become more "childlike" and is demanding in a way that she was not like before. She has always kept her emotions in check, but recently has been asking for help and again, from Gola's perspective, this is out of character. She also reports more tears, anger, frustration and confusion. There is a long-standing history of anxiety, but Gola feels this has been escalated recently. There are no reports of hallucinations and delusions.

[64] On October 17, 2019, (*Mroz affidavit, Exhibit "F"*) Dr. Koller authored an ambulatory care clinic letter in relation to Kamal. On pages two and three Dr. Koller described the Intervenor as "... an 80-year-old woman with multifactorial cognitive impairment that is in the presence of a history of significant caregiver stress and anxiety. Mood and anxiety symptoms have improved on Mirtazapine...".

[65] November 24, 2020, Dr. Koller authored another ambulatory care clinic letter (*Mroz affidavit, Exhibit "G"*). This time, she observes (at p. 3):

> ... She [Kamal] was able to name the Canadian Prime Minister, but not the US President. When I asked her about which books she reported she is currently reading, she gave rather vague responses with an overarching theme of the book rather than specifics I asked for them. She did not appropriately recall her supper from the night before, as confirmed by her daughter. She also gave her wrong address.
>
> IMPRESSION AND PLAN:
>
> Ms. Gulati is an 81-year-old woman with prior comorbidities of as outlined in a recent workup for the possibility of thyroid cancer. Over the last year, she has had cognitive and functional decline and now meets criteria for early modern stage dementia. I did review this with Gola and arranged to have assumed follow-up this week to allow for the diagnosis shared with Ms. Gulati and supportive manner.
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> ...
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> My recommendation for formal care implementation, given the indication for formal support, as well as the conservative caregiver burden. In my clinical opinion, Ms. Gulati does not have appropriate capacity to make decisions with regards to her personal care needs. She did not display appropriate insight today to what her functional needs are and how she is obtaining supports. She also does not display appropriate insight into her medical issues and would require support making both personal care and medical care decisions.

[66] Then, in her ambulatory care clinic letter of November 26, 2020, Dr. Koller continues:

> With regards to Ms. Gulati, I outlined my clinical evaluation with regards to her cognitive diagnosis. This is based on my previous evaluations of Ms. Gulati and her follow-up on Tuesday. In my clinical opinion, Ms. Gulati now meets criteria for mild to moderate dementia. Details are as per her November 24 assessment. I discussed this in detail with Ms. Gulati with her permission a supportive conversation occurred. It is worthwhile to note that Ms. Gulati did not feel there were any issues with your memory and she was repetitive intermittently, over one that she is well, does not have health concerns mismanaging everything independently, which is not peace. She did not appear distressed by the information provided.
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> ...
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> Today, I shared that with regards to Ms. Gulati, is my opinion that she lacks capacity for decision-making with regards to her personal care needs, as well as medical care needs. This is further documented in my letter from of November 24. Dr. von Maltzahn [Raj Gulati's geriatrician] expressed her recommendation that Mr. Gulati not be acting in the enduring power of attorney position for Ms. Gulati with details as per her dictation. As Gola is listed as her the second, Mr. Gulati is not able to be appointed enduring power of attorney I recommended that Gola be

> active in her enduring power of attorney both this time she is aware of this and is an agreement of this.

[67] In December 2020, Kamal Gulati was referred to palliative care as a result of concerns with respect to the possibility of thyroid cancer being present. Dr. Koller referred to this in her telephone consult/clinical review dated January 7, 2021 (*Mroz affidavit, Exhibit "I"*) and concluded, at page 2 thereof:

> I was asked [by counsel for the Applicant] to provide documentation to confirm my opinion with regards to Mrs. Gulati's personal care healthcare decision-making capacity. [Counsel for the Applicant] sent an affidavit via secure email for my review. This outlined my clinical opinion regarding her dementia diagnosis and the clinical opinion that she lacks capacity to make personal health care decisions. I have signed the affidavit...

[68] So (and to repeat) there is some medical evidence with respect to the Applicant's expressed concerns.

[69] With that having been said, in *Ocean v. Economical Mutual Insurance Company*, 2009 NSCA 81, Justice Bateman stated at paras. 55 – 56:

> 55. The definition of a mentally incompetent person in Rule 1.057 is identical to that for an incompetent person in s. 2(b) of the *IPA*. The *Rules* do not contain a procedure for determining the competence of a person. Nor do the *Rules* contemplate a status between competence and full incompetence. A person under a disability, for purposes of the *Rules*, is a mentally incompetent person.
>
> 56. The procedure for determining competence is contained in the *IPA*. Significantly, that *Act* does not empower a court to order an assessment of mental competence. The necessary evidence must accompany the application. A guardianship application under the *IPA* must include affidavits from the applicant and two medical practitioners, the latter providing particulars of the current state of mental health of the person in question (Supreme Court of Nova Scotia Practice Memorandum No. 10).

[70] Similarly, one of the factors which was critical to Justice Gogan's analysis in *Burke* was the existence of the *Incompetent Person's Act*, R.S. c. 218, s.1 ("IPA"). As she noted:

> 39. In Nova Scotia, the procedure for declaring incompetency is found in the *Incompetent Person's Act*. In my view, if competency is the issue, then the established procedure should be followed. This procedure does not provide for the Court to compel a mental capacity assessment. <u>If such an assessment cannot be</u>

> compelled in a proceeding focused solely on the competency of a party, then it cannot be appropriate to compel it in collateral circumstances.
>
> [Emphasis added]

[71] It is true that Civil Procedure Rule 1.057 and the *IPA* (referenced in both *Burke* and *Ocean*) are no longer in existence. This, in my view, is immaterial.

[72] The *IPA* has been replaced in the Province of Nova Scotia by the *Adult Capacity and Decision-Making Act* (*"ACDMA"*), as amended, 2019, c.8, s.179. It is under the auspices of this legislation that issues of "capacity" are now addressed.

[73] The purpose of the *ACDMA* is to:

> (a) recognize that adults may experience an impairment of their capacity;
>
> (b) provide a fair and respectful legal framework for protecting the safety and security of adults whose capacity is impaired and who may be made vulnerable thereby;
>
> (c) promote the dignity, autonomy, independence, social inclusion and freedom of decision-making of adults who are the subject of this legislation; and
>
> (d) ensure that the least restrictive and least intrusive supports and interventions are considered before an application is made or a representation order is granted under this *Act*.

[74] In section 3(d), "capacity" is said to mean:

> "...the ability, with or without support, to
>
> (i) understand information relevant to making a decision,
>
> (ii) appreciate the reasonably foreseeable consequences of making or not making a decision including, for greater certainty, the reasonably foreseeable consequences of the decision to be made."

[75] Section 3(e) tells us that "capacity assessment" means an assessment, conducted by an assessor, of the capacity of an individual; and subsection (f) says "capacity assessment report" means a report prepared by an assessor respecting the conduct and results of a capacity assessment. As was the case with its predecessor, there does not appear to be any power given to the Court under this legislation to compel a person to undergo a capacity assessment (see in particular, ss. 9, 14 and 15).

[76] Returning to the *POAA*, we find no process specified by which "capacity" is to be determined. Uniquely, in Nova Scotia, the term itself is undefined. As the *Law Reform Commission Discussion Paper* regarding the *POAA* of February 2014 mentioned in para. 4.3:

> Nova Scotia's *Act* does not set out a test for capacity to execute an EPA [Enduring Power of Attorney]. Guidance as to requisite capacity to execute an EPA is provided for in the case law. In the case of *Re Isnor Estate* the court cited with approval the holding in *Godelie v. Pauli (Committee of)*, that in order to have capacity to execute EPA, a donor must understand the nature and effect of granting an EPA. The case provided the following criteria to determine the requisite capacity to execute a general EPA:
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> > 1. An appreciation that the document authorizes the donee to exercise all powers in the lifetime of the donor that the donor can himself exercise with respect to the matters set forth in the terms of the document, unless and until the document is revoked or otherwise terminated.
> >
> > 2. An appreciation that the all-embracing terms of the document give to the donee power to deal with everything that the donor owns and with respect to the total financial affairs of the donor.
> >
> > 3. An appreciation by the donor of the nature and extent of his property and financial affairs, as they exist at the time of the execution of the documents, or which the attorney will be entitled to assume control.
>
> *Goldelie* also held that the donor must understand that the right to revoke an EPA is lost in the event that the donor becomes legally incapacitated.
>
> The Courts generally recognize the importance of assessing capacity based upon a functional view of whether or not the donor understands the very specific nature and effect of the EPA. The court in *Re Isnor Estate* held that capacity varies according to the types of powers being granted. For a limited EPA, the test for capacity is whether the donor understands the nature and effect of the more limited powers granted.
>
> [Emphasis added]

[77] The process contemplated by Rule 21.02 is directed towards issues related to a "physical or mental condition". What is under consideration in this proceeding is Ms. Gulati's competence or capacity (to execute the impugned POA) on February 3, 2021.

[78] What is "in issue" in this proceeding (therefore) is far more all-encompassing than a "mental condition". As Justice Gogan in *Burke* aptly put it:

> 38. …By way of the pleadings in this matter, Hillier has raised something more than the issue of a mental condition. Rather, the issue of Burke's competency has been raised. Hillier is of the view that Burke is not competent to manage her own affairs. Such an allegation, if proven, has very significant legal consequences.
>
> [Emphasis added]

[79] Justice Rosinski, in *Vernon v. Sutcliffe*, 2014 NSSC 376, noted appositely:

> 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".
>
> [Emphasis added]

[80] Ms. Gulati's "mental condition", as mentioned in Civil Procedure Rule 21, has not been put in issue for the purposes of this Application. Her mental capacity has.

[81] This is patent. In the Notice of Application in Court, we have earlier seen that the Applicant seeks, in part, an Order:

> 1. Setting aside and declaring that the Power of Attorney dated February 3, 2021 signed by Kamal Gulati in favour of Rohit Gulati is invalid due to lack of capacity and/or undue influence.
>
> [Emphasis added]

[82] The distinction is an important one. There is no mechanism built into the *ACDMA* by which to compel a person to undergo a capacity assessment. There was none in its predecessor, the *IPA*. Respectively, they are the present and the former statutory regimes which specifically address mental capacity (or lack thereof).

[83] This specific legislation does not give the Court the power to force someone to undergo a capacity assessment. Therefore, in my view, the Court should not construe the words "mental condition" in Civil Procedure Rule 21.02 broadly enough to arrive at such a result.

[84] For this reason alone, the motion must fail.

4. Has the Court been satisfied that the requested examination "may" result in evidence that proves or disproves what has been alleged?

[85] In light of my above determination, there is no need to address this last issue.

[86] Nonetheless, were I required to do so, I would have noted that there has been nothing presented to the Court explaining either who would conduct the requested examination (if I were to grant the Order that the Applicant seeks) or how a present examination of the Intervenor (over one year after she had signed the impugned POA) would assist that specialist in rendering an opinion as to the Intervenor's capacity to do so on the relevant date.

[87] The present situation is different, for example, than what is encountered in a torts case, such as a motor vehicle accident. In such an instance, it is quite obvious that the condition of the Plaintiff as of the date of the (requested) assessment "may result in evidence…" proving or disproving a claim for damages which is being made. For example, it may provide evidence as to whether the Plaintiff's current condition was caused by the accident, and the severity of the injuries which have resulted. Patently, the Plaintiff's current condition, in and of itself, is directly relevant to the damage award.

[88] Here, what is at issue is the Intervenor's capacity as of one date: February 3, 2021. In the specific circumstances of this case, and given the dynamics and rapidity of Ms. Gulati's dementia, the Court would need to understand how an examination of her current condition, over one year later, "projected backward" to February 3, 2021, may assist the specialist in forming an opinion with respect to her capacity as of that date. This has not been explained in either of the affidavits of Kamal Gulati's physicians that were filed, or by anyone else. The words "may result" do not represent a particularly high standard, but, in my view, they are not to be conflated with "might result", which could encompass just about any requested examination, no matter what the circumstances.

[89] Finally, even if all of the conditions precedent in Civil Procedure Rule 21.02 had been met, such an Order is discretionary. Even if satisfied that the examination "may result in evidence which proves or disproves the claim", the Court would still need to balance, in this case, the degree of assistance that a current examination of the Intervenor would provide, against the intrusiveness of making such an Order. As already mentioned, this is particularly so when one considers the present fragility of the Intervenor's health, and also the extent of the information (collected over a period of June – December 2020) which is already accessible. This presently

existing data would require an extrapolation (with respect to some of it) of only less than two months to February 3, 2021.

Conclusion

[90] The motion is dismissed.

Costs

[91] I have considered all matters occurring antecedent to and during the hearing of this motion. I will not comment further upon them as the Application itself is still to be heard. Costs are fixed in the amount of $1,500.00, and shall be in the cause.

Gabriel, J.

SUPREME COURT OF NOVA SCOTIA
Citation: *Taraschi-Carr v. Gulati*, 2021 NSSC 56.err1

Date: 20220304
Docket: Hfx No. 505954
Registry: Halifax

Between:

Gola Taraschi-Carr
Applicant

v.

Rohit Gulati
Respondent

and

Kamal Gulati
Intervenor

ERRATUM

Judge: The Honourable Justice D. Timothy Gabriel

Heard: November 29 and 30, 2021, in Halifax, Nova Scotia

Counsel: Ian Dunbar, for the Applicant
Sara Nicholson, for the Respondent
Peter Rumscheidt, for the Intervenor

Erratum Date: March 4, 2022

Para. 32 – "daughter" has been replaced with "granddaughter"