Part I Statement of Facts

National Interest

1. Canada's aging population, the accompanying rise in dementia and the large inter-generational transfer of wealth, create opportunities to act for self-interest or the persons autonomy. The person may not meet the tests for capacity long before they are found legally incapable, making them especially vulnerable. Further the relationship between capacity and autonomy is complex and nuanced getting to the core of identity and rights. These issues, seated at the heart of family dynamics, sometimes lead to conflict that, when it arrives in court, expose the fragility of law and regulation to interpretation based on personal concepts of familial duty. Into these conflicts each province inserts different processes to allow legal counsel for the person while capacity remains an issue. The breadth of the issues provinces allow counsel to argue, prior to a determination of capacity, is indicative of that legislature's belief a law degree is an indication of moral character.

2. Fundamental justice suggests the reality of capacity determines whether the person should be represented by counsel with privilege, or by a litigation guardian. Under Ontario's Substitute Decision Act (SDA) [3(1a)] courts may order The Public Guardian and Trustee (PGT) to appoint Section 3 counsel (S.3). The person deemed capable to instruct, but the reality of capacity determines if they can instruct. As the appointment is by order the person neither hires or can fire counsel, removing case law tests for a litigation guardian. Deeming conveys lawyer/client privilege where it is unknown the client has ability to process, retain and understand relevant information necessary to instruct. Law Societies' Rules of Professional Conduct (RPC) require lawyers to seek a litigation guardian if, or when their client, can no longer instruct. If they do not justice is undermined. Courts unquestioningly accept S.3's positions as on instruction, protected by privilege as a result those with statutory duty to act according to the persons wishes can appear to be acting against the persons instruction.

3. In this case Mrs. Childs may have been incapable long before S.3 was appointed. S.3 did not inform the court. They did not communicate or counsel the person after the release of a capacity assessment found Mrs. Childs incapable, yet took positions for 7 more months, during 6 days of hearings and several settlement conferences. The positions taken conflicted

with client instruction reported to the court. S.3 evoked privilege, and the appeal panel concurred. This novel use of privilege, to protect the lawyer, while they have an incapable client and argue against the client's instruction deserves review.

4. This arose as the trial Judge ignored the reality of incapacity, which he had ruled was the case in at [5] of 2015onsc4036 (4036), yet permitted S.3's subsequent 59.06 motion and dismissed the need for a litigation guardian stating "I am of the view that the order not having been issued and entered, there has been no declaration, no finding, technically speaking of incapacity so S.3 counsel is still in."[1] That technicality did not alter the reality of incapacity. The combination of S.3 not seeking instructions, and the Judge allowing standard counsel to represent an incapable client, created a new class of lawyer – neither regular counsel nor litigation guardian; free from seeking instruction while protected by privilege, guaranteed payment and free from liability.

5. Also of national interest is the appropriate level of compensation for guardians of personal care who offer the in-home caregiving many elders desire. Too often daughters are pitted against other siblings who dispute payment to protect their inheritance even after they promised compensation to prolong care. In this case the SDA sets tariff for the property guardian used to authorize about $200K in fees over 5 years, but not for the guardian of care. The lack of tariff for caregiving resulted in the guardian of care's services being defined in 4036 as "care manager" and valued at $6K/year. In 6616 it is argued care management included an expectation of 24/7 caregiving. The unjust enrichment that occurs when brothers withdraw promised compensation, then support a similar amount being allocated to the bank S.3 introduced suggests decisions guided by inheritance interest, or malice, especially when valued care at $50K/yr. when they wanted it to continue, or provided it themselves. The final result achieved the promise rate only to see it clawed back through costs decisions that award over $200K in costs to S.3 counsel who acted without instruction, a property guardian that has neither followed it's filed plan or consulted with the person, and two brothers whose withdrawal of compensation, removal of the person from their home, isolating them from friends and attorneys, not returning property ordered returned and leaving her in excrement

[1] Book 2 Tab H page 361 L25 - 30

does seem a reasonable way to ensure fiduciaries to assist in the needs of their elderly parents.

6. These issues get to how to protect a person's Charter rights when they potentially cannot act for themselves. Ontario's Law Commission, in a 3 ½ year study involving over 800 individuals and institutions from across the country, recommends sweeping changes to Ontario's guardianship laws and processes due to the "Widespread lack of understanding among individuals, families, health and legal professionals, institutions, community agencies, and others; and in population"[2].

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7. Mrs. Childs pervasive capable and current wish is to live out her days in her home. She has the income and assets to allow it. This is agreed by all parties[3], is reflected in her instructions to S.3, in her statement during the capacity assessment "*I want to stay here as long as I can, until I die. Have someone write it down.*" [4] And was expressed to a geriatric physician. [5]

8. Mrs. Childs scored 20/30 on the MoCA test [4] in November/10. Anything below 26/30 is abnormal. In April/13, she scored 10/30. In January/14, an assessment by the Brockville CCAC, for placement found Mrs. Childs not capable for personal care and property. This was confirmed by a second capacity assessment carried out May 13/15.

9. Between Mar/09 and June/11 Caroline's provided 140 days of assistance. In late June/11 Caroline moved in, with the consent of all, as Mrs. Childs should no longer live alone. The purpose was to arrange in-home long-term care. Caroline sought compensation only for out of pocket expenses. In Sept/11, I proposed compensating Caroline for caregiving and making the arrangement permanent, as locating in-home care was difficult, and Mrs. Childs had shown a dramatic improvement.

10. Michael agreed to "any reasonable" compensation for care in late Sept/11. Caroline agreed to

[2] http://www.lco-cdo.org/en/our-current-projects/legal-capacity-decision-making-and-guardianship/
[3] Book 2 Tab L page 436 "Are prepared to admit that one of her capable wishes was to live at her home"
[4] Book 2 Tab I page 299
[5] Book 2 Tab I page 315

remain on that basis. The issue progressed over about a hundred emails, as the relations between children deteriorated.[6] In April/13 Michael proposed $50,000/yr., but refused to compensate the first 4 months of care. Andrew agreed. I agreed with the amount, but not the 4-month hiatus as it seemed designed to provide an inheritance benefit. No agreement or payments were made. About October 30/14 after 28 months of care away from her husband, Caroline returned to her home in London UK.

11. I stepped in, however gave up after 3 months as Andrew and Michael would not authorize payments for my expenses, or for respite so I could return home. In Dec/13, they proposed Andrew receive $50K for care at his home. In Jan/14, that I receive that amount for care at Mrs. Childs, during the period until placement in a CCAC home occurred. Neither proposal was consistent with Mrs. Childs wish to live at her home.

12. In Feb/14 discussions, through counsel, resulted in agreement Andrew would provide care primarily at Mrs. Childs home. Within 2 months Andrew moved Mrs. Childs, and some of her belongings, to his home. Mrs. Childs was isolated from friends and family. Our calls and emails were not answered. Calls were later formalized to Sunday between 12-1. Mrs. Childs health and cognitive ability was reported as severely declining. No doctor's visits occurred.

13. About Sept/14 Andrew and Michael filed an application for guardianship proposing to place Mrs. Childs in a CCAC home, sell her property and control the assets. They also rescinded their offer of compensation for past care and invited Caroline to use the courts. tab3 pg3 In Jan/15 Caroline and I filed a cross application proposing to direct Mrs. Childs assets to her wish to live out her days in her home. We also filed a motion for S.3 to be appointed.

14. S.3 counsel was approved at the January 22/15 and met Mrs. Childs on April 7 and April 17. s.3 did not advise the court Mrs. Childs was incapable after these meetings.

15. On April 20/15 S.3 proposed an Urgent Order to remove Mrs. Childs from Andrew's and to return her home under Caroline's care. Two days later S.3 amended the scope to suspend

[6] Book 2 Tab L page 431 - 435

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Mrs. Childs Power of Attorney for Property and replace it with S.3 instructing BMO, who would seek to be permanent property guardian. Case law suggest a person's PoA should not be overturned without deep consideration.[7] S.3 indicated removal would not proceed without the property change. [8] PSW reports for this period state "Client stated she wanted to get away from here ... Situation continued to be unacceptable" [9] Opposing counsel reported Andrew elected to leave Mrs. Childs in excrement overnight. [9] PSW reports state: "Son states only way to avoid her throwing up is not to feed her before shower" (about noon) [9] Mrs. Childs pleaded to return to home. Concerned for her safety, I consented. The panel at [59] did not see Mrs. Childs' duress as meeting the test for legal duress to consent, suggesting contract law supersedes acting to protect a person's charter rights to the security of the person. On April 24/15, Justice MacLean approved the motion, on the parties' consent. Mrs. Childs was deemed capable. She was not served. S.3 does not cite instruction as the basis of suspending the PoA.[10] At [10] of that order Michael is to return Mrs. Childs and her belongings to San Lake. Michael did not return the coin and stamp collection Andrew removed.

16. Since May/15 the accuracy of S.3's reported instructions have been an issue. Instructions originally filed May 14 were amended based on S.3's last meeting and filed as the Factum of Eileen Childs. In summary, they are: (1) she wishes to live at her home at Sand Lake as long as it is safe (2) She would like to have professionals take care of her (3) She does not wish her children to live with her. On May 19, 2015, she indicated she is pleased to have Caroline Childs live with her (4) When it is not safe she wishes to live with people her age where there are activities (5) Because of her memory problems, she knows she cannot look after her money. She would prefer a bank manage her assets and pay her bills. (6) She does not believe her children should be paid to visit or to live with her. (7) She wishes the litigation would end and but does not know what she can do about it.

17. May 19, was the last time S.3 met with, counseled, sought instructions from or served, her client on any matter, legal or otherwise, while S.3 counsel. I am ending the Fact Section here

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[7] Hammond Estate Re. (1998) Newfound Supreme Court Trail Div.
[8] Misicilabous documents Ex. Bk. Vol. 3 Tab 14 pg 850 para 74.
[9] Book 2 Tab 1 pages 320 – 329 Quote on 329 & Tab L pages 439
[10] Book 2 Tab L page 441 – 449 S. 3 Motion Record for April Order. (instruction not mentioned)

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as the hearings continued with S.3 who does not meet the tests for counsel and privilege and was not a litigation guardian. S.3 set up a dichotomy between her positions, and others stating "*All she's deemed is capable of* [is] *instructing me and the evidence of incapacity will speak for whether or not she's capable or not of expressing wishes*".[11] Mrs. Childs current wishes, which the SDA requires courts [18(4), 25(5), 57(3)] consider "if they can be ascertained" were only presented by Caroline and myself and we were increasingly dismissed by a chorus singing, with self-interest, harmony to S.3. Contrary to [93] of 2015onsc6616 (6616) and [93, 94, 97] 2017onca516 (516) the courts were neither helped by S.3 nor did she 'advocate' for her client. Given a duty to consider Mrs. Childs' current wishes and rights to autonomy the courts were led astray.

Part II Statement of Question

18. Is deferral to judicial discretion an acceptable standard for appellate review?
19. Was Mrs. Childs rights to justice respected when (a) S.3 did not inform, consult or seek her instruction after May 19/15? (b) Justice Tranmer allowed S.3 to continue, due to the technicality of an order not being entered, despite earlier ruling Mrs. Childs incapable?
20. Is S.3 entitled to claim lawyer/client privilege after May 19/15 when she ceased consulting on the law or seeking instruction? Can privilege be waived to determine the validity of instruction of an incapable person, as can occur to prove the validity of a trust agreement after death, given neither party can provide informed consent, and confirming instruction actually affects the person's life?
21. What is the duty of Judges to (a) clearly state directions in decisions? (b) accurately reflect arguments in decisions rebutting them? Was 2015onsc4036 unambiguous regarding Caroline's duties?
22. Was Justice Tranmer correct in reviewing case law on compensation, finding it applied, and then ignoring it based on a statement for which there is no support and agrees with his bias? Was the level of compensation awarded for past care giving correct? Did Andrew and Michael proposed caregiving was worth $50K then resiling result in their unjust enrichment? Was the compensation for future duties outlined in 4036 correct, if that decision intended Caroline to provide 24/7 caregiver in addition to being the manager?

[11] Book 2 Tab K page 370 – 372 Quote on p371 L31 – 372 L5

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23. Should persons that act on statutory duty according to the person's capable and current wishes bear substantial cost, while those that ignore them, or act without instruction, have their costs paid? Was Justice Simmons correct in excluding docket information necessary to evaluate whether non-litigation and inappropriate costs were assigned?
24. Was the appointment of BMO a matter of consent? Are they an appropriate guardian considering the requirements of SDA 32 (2, 3, 5) to involve the incapable person?

Part III Statement of Argument

25. The SDA, except for [3], ensures Section 7 Charter rights to autonomy and self-direction through requirements to consult with the person, follow known capable wishes and consider current wishes, values and beliefs. This applies to the PGT [17 (5)], the courts [18(4), 25(5), 57(3)], personal care guardians/attorneys [66] and property guardians [32]. The exception is [3] which applies when capacity is at issue. Rather that resolve that fundamental fact, [3] deems the person "capable to retain and instruct counsel". The person does not request or choose counsel and are obligated to pay their bills if they have means. They also cannot fire them without a court order. This breach of a person's Section 7 autonomy contaminates Ontario's guardianship process, allowing as happened here, a person's legal and clearly capable PoA for Property to be suspended with neither court examination or the persons direct involvement due to consent obtained through duress, the support of S.3 and the presumption of instruction. Caroline's affidavit evidence about this process is the only information excluded by the Evidentiary ruling, concealing from examination a deemed capable persons involvement in changes to their capable legal instruments.

26. The combination of a potentially incapable client, a statute that removes every control a regular client has over counsel (from selection and payment to firing) and an adversarial legal system that encourages parties with similar interests to co-operate, a person has only hope S.3 will stand up for their interests. Legal scholarship[12] reviewing both the RPC and case law on S.3 find instruction necessary. Banton v Banton[13] notes S.3 is not a litigation guardian, and must be satisfied capacity to instruct exists or must not act. Evidence suggests Mrs.

[12] Book 1 Tab E pg 195 – 218 Representing Incapable Persons - Marshall Swadron
[13] Banton v Banton para 121 - 122

Childs was incapable about April/13. After May 19/15, Mrs. Childs is neither informed of issues and developments required by RPC 3.2.1 nor are instructions sought as required by most RPC rules. S.3 took positions at variance to Mrs. Childs filed instructions. The panel finds [94] S.3's actions appropriate based on one instruction while ignoring all others.

27. The panel [51-53] notes our appeal rest on disputed findings of fact. At [52] it suggests no palpable error are evident. At [18] of 4036 Justice Tranmer, in two consecutive sentences, provides two opposing facts regarding Andrew agreeing to compensate; that he never agreed and that his lawyer proposed $150/day. This becomes an overriding error at [32, 37, 42] of 4036 where Andrew never agreeing is cited as playing a role in the compensation awarded.

28. Despite caregiving being the issue adjudicated at [17] of 4036 Caroline is said to have agreed to provide care at no cost. This is repeated at [32, 34, 36, 38, 39, 40], restated in hearing the 59.06 motion and its ruling, and reiterated at [1(5), 36, 38. 39, 42, 59c, 62] of 6616. The panel accepts it as fact due to deference and repetition. There is no transcript. No fact. The panel also rejects bias though it is suggested by [33] of 4036; "A child should not be paid to care for an ailing mother" which dovetails with the repeated statement. It is consistent with using proved sacrifice as the test for past compensation at [36] of 4036, while ignoring reviewed case law that applies to Caroline's care. In August S.3 observed the statement was about guardianship. [14]

29. On May 26 and June 3 S.3 billed to review case law on compensation for caregiving[15] but did not communicate with this with Mrs. Childs despite the instruction see wished litigation to end and not knowing what she could do. Later S.3 tells the court "I didn't talk to Mrs. Childs about it [compensation], I didn't talk to her about whether she could afford living in Sand Lake and - and didn't talk to her about Caroline needing money".[16] In not presenting case law or counseling regarding a necessary service, *Starson v. Swayze* at [81] suggests Mrs. Childs was denied information to make informed decisions.

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[14] Book 2 Tab K page 363 L24-27 "she had said through her counsel to the court on June 18th that **she will be guardian of care** even without compensation"
[15] Book 2 Tab L page 508
[16] Book 2 Tab K page 362 L24 – 31

30. Through June (2th to 17th) S.3 offered between $500 - $800 as a 'guardianship fee' reflected in S.3's Factum of Eileen Childs filed with the court June 10/15. It states at [12c] "$500 per month … reflective of her managerial role in overseeing professional caregiving, and not an amount that equals the actual caregiving itself". [17] Andrew and Michael's 3-line factum endorsed that factum. They resiled from that endorsement, as they had their $50K proposal, when legal advantage and inheritance interest outweighed their fiduciary duty to Mrs. Childs.

31. Of the meaning of [46] of 4036 Justice Tranmer said "So, maybe that is unfortunate wording or misleading wording"[18] suggesting 4036 is ambiguous.

32. The issue adjudicated in 4036 was compensation for caregiving [15, 18, 20, 21, 22, 35]. SDA [57(3b)] requires courts consider Mrs. Childs wishes; which at [6] S.3 reported was for professional care givers. S.3 submitted [27] that Caroline be the manager of care not the primary caregiver. Paragraph [31] discusses case law for a manager of care spending 20 hrs/mth arranging caregivers, [42] sets a rate for past caregiving 66% higher/mth than for current services ($25,000/30mth=$833/mth vs $500/mth going forward), [45] says her role as guardian "is a distinct issue from the direct care giving that has taken place to date" implying a different role [46] says the current "role as manager of care rather than primary care attendant", points out there are "sufficient assets to permit proper home care" and says Caroline's duties are to "access the proper services and caregivers" and [47] states the award was based on submissions. There were two submissions, with different duties for $500/month. At [25] for 24/7 caregiving or [27] as manager of care but not the caregiver (referred to in [46]). We concluded Caroline could not provide more than 83 hrs/wk of care. Compensation for management and occasional caregiving is in line with caselaw.

33. In August, hearing the 59.06 motion Justice Tranmer says "I had it firmly in my head … she was going to be [the care giver] but she was not going to get paid for it",[17] similar to the wording used in [64, 67, 74] of 6616 and echos [33] of 4036. The 59.06 motion ruling finds 4036 intended Caroline was to be the primary care attendant based on [15, 16, 17, 38]. The

[17] Book 2 Tab H page 274 - Factum of Eileen Vera Childs – dated June 10, 2015
[18] Book 2 Tab K page 364 L15 - 20

appeal panel at [67-71] of 516 concur, relying on [32, 38, 42, 43, 44] of 4016. They take as fact [68] Caroline would provide care without compensation. The panels at [71] say 4036 is clear; compensation going forward was for being guardian of personal care, but "while Caroline 'lived with' her mother she was to provide personal care without compensation". This reflects [59d] of 6616 which states "The court awarded modest compensation for past care and no compensation for personal care going forward for Caroline's service as personal caregiver (although the court awarded $500/mth to her as guardian of care)". No paragraph, or combination of paragraphs, exist to that effect in 4036. The panel used after the fact information to arrive at what is not in 4036. National confidence in the judicial system depends on clear orders and panels evaluating unclear decisions based on the decision itself, not later information.

34. The suggestion that $500/month ($0.69/hr.) for being manager of care is reasonable when 24/7 caregiving is expected suggests both vagueness in the decision and misuse of judicial discretion. The case law[19] reviewed outlines the tests: (1) the benefit to the person, (2) the amount be reasonable and (3) fit the financial context of the person. At [16, 32, 38, 39] of 4036 the benefit Mrs. Childs received is recognized, at [3, 32] Mrs. Childs significant assets are acknowledged, while at [22] that the amount is claimed to be ½ the commercial rate is noted, but not tested. Justice Simmons at [55] of M47021 said 'In my view (and even despite her counsel's submissions that she was prepared to carry on without compensation), it is at least arguable that the June 25,2015 decision on that issue was in error in relation to the compensation awarded'. The panel [71] accepted the proposition Caroline should be compensated for a service she wasn't seeking payment for, while not being compensated for the one she was, raises questions about the value of adjudication. Justice Tranmer says he did this to pay Caroline something identifying at [62] of 6616 S.3's submissions "a primary paid caregiver should not be appointed guardian of care as that would put her in a conflict position" as the basis. SDA [57(2)] specifically allows a relative to be both a guardian and a paid caregiver. S.3 also supported joint guardianship at [82] of 6616 for similar reasons. That neither Justice Tranmer, nor the panel, reviewed the statute puts relatives offering care at risk.

[19] Kiomall v Kiomall

35. Unjust enrichment is dismissed at [41] of 4036. The panel at [60] uses the repeated statement as a basis to reject the claim of unjust enrichment while not subjecting Michael's promise of reasonable compensation to any test, nor his offer of $50K, nor the inheritance or legal strategy benefit he gets from withdrawing it and inviting Caroline to use the courts to recover something for 2.4 years of service. And never considering how reasonable compensation for 24/7 care relates to either Mrs. Childs wish to live at home, or her right to direct her assets as she sees fit. The process invites mockery of the justice system due to the low standard of evidence and review.

36. On July 9/15, 49 days after S.3 last spoke with Mrs. Childs, S.3 files the 59.06 motion. Mrs. Childs was not consulted, and neither Justice Tranmer or the panel considered S.3 upending her instructions to have professional caregivers (2), or that the litigation end (7). Despite instruction she wished to remain at home as long as it is safe (1), the S.3's motion does not allege lack of safety. Caroline did not financially benefit through the letter. The attempt to hire PSW's 12 hr/day is consistent with 12c of Mrs. Childs factum, S.3's s court submissions [27] and the meaning of 4036 as written. Despite the letter third party care approximated 22hrs/wk. Caroline remined the primary caregiver. Had the decision been clear rule 59.04(10) allows an order to be entered. The motion, if successful would guarantee billings for S.3 and protect Andrew and Michael's inheritance. Mrs. Childs was not served.

37. The appeal panel was asked "When is a person no longer legally capable? On the findings of a capacity assessor? On the decision of a Judge? On the entry of the formal order subsequent to a decision? How does this affect the deemed capacity to instruct in SDA [3]" This issue is absent in their decision.

38. Justice Tranmer at [5] of 4036 ruled Mrs. Childs incapable. SDA [2(3)] presumes capacity unless there are reasonable grounds to believe "the person is incapable of entering into the contract or of giving or refusing consent". [5] of 4036 must represent reasonable grounds. The factum of PGT [20] states the role of S.3 is "not exhausted by virtue of a finding on incapacity" as "the proceedings have not concluded in the within circumstances" suggesting

[20] Book 2 Tab H page 278 Factum of PGT Aug 5/15

the SDA and government policy are in conflict. S.3's factum[21] is ambiguous. The request a litigation guardian be appointed is sandwiched between withdrawal of support for Caroline's guardianship and a request to argue 'new information' until a litigation guardian is appointed. Transcripts show S.3 requested the PGT speak first. During his submissions Justice Tranmer took the position "no order been issued" regarding capacity. Subsequently our counsel begins to submit that the courts have not settled the issue. Justice Tranmer re-states no order has been entered so S.3 counsel is still in then asks S.3 "Do you disagree?" S.3 responds, in spite of her factum, "I do not disagree." [1] The above were in of my submissions on Nov. 13/15.

39. Mrs. Childs competence to instruct was not discussed. The tests for a litigation guardian are the person does not appreciate the nature of the proceedings, cannot choose or keep counsel and cannot distinguish between relevant and irrelevant issues. SDA [3] through its deeming provisions undermines each of these tests. Justice Tranmer ruling on a different matter [22] summarized *Starson v. Swayze.* on treatment capacity. It says at [78] "This requires the cognitive ability to process, retain and understand the relevant information". At [80] "the ability to appreciate the consequences of a decision" is suggested except if other factors as [81] "the attending physician's failure to adequately inform the patient of the decision's consequences" are evident. These tests could to apply capacity to give legal instruction, as similar abilities apply, as does input of a technical expert so the consequences can be understood. Capacity rests on the persons actual abilities. Fundamental justice, after Carter, suggests lack of an entered order should not permit a person ruled incapable to make treatment decisions. RPC 3.2-9 suggest the lawyer should seek appointment of a litigation guardian when a client cannot instruct. S.3's half-hearted approach, never arguing her factum, does not meet the test of a lawyers' duty, while the confusion over capacity, instruction and the ability to express wishes is evident during s.3's and the Judges exchange Oct 21.

40. In approving the 59.06(2) motion a duly filed appeal was interrupted. An order for 4036, needed for its perfection, required an endorsement from the Court of Appeal for Justice

[21] Book 2 Tab H page 285 #6 a – c Factum of S.3 July 27/15
[22] Brown v. Moser, 2015 ONSC 6405

Tranmer to set a 59.04(10) appointment.[23] Mrs. Childs remained ruled competent until June 25, 2016 yet other parties neither served her nor sought instruction, despite positions on her care, property, and guardianship not covered in the instructions filed in Factum of Eileen Childs.

41. Of S.3 not relaying settlement offers to Mrs. Childs Justice Tranmer says "But she's not litigating this." [24] The 59.06 motion was s.3's motion. As Mrs. Childs was not consulted after May 19, the 59.06 motion was not on her instruction so technically, Mrs. Childs was not litigating – S.3 was. This led to the motion referred to at [38] of 516 that S.3 became a party. The panel rejected this due to judicial discretion at [46]. But if it's not Mrs. Childs motion, which it can't because she wasn't contacted and she instructed litigation end, whose is it?

42. Only with an incapable client could such a situation occur. After introducing BMO into a motion to protect Mrs. Childs safety, on May 20/15 S.3 began working for BMO, writing their property management plan, swearing affidavits and consulting them more than she did her client; all at Mrs. Childs expense. Concurrently S.3 approved BMO's fees in excess of [SDA 40(1)], potentially in excess of $200K over 5 years, without getting the approvals outlined in [SDA 40(3)]. RPC [3.4-1] suggests a conflict when work for two clients is temporally connected, and has immediate or long term financial impact on both. S.3 submitted material to BMO for approval and drafted and swore affidavits suggesting a client relationship. [SDA 69(1)] says the applicant (BMO) must serve the person and inform them of their right to oppose the property management plan [SDA 70(1ci&ii)]. This is attributed to S.3. Conflict is further suggested as SDA [3(3)] gives the BMO authority to request a review of S.3's fees. Whether Mrs. Childs instructions (5) on banking are clear and broad enough to permit upending of her PoA and charging her for work that benefits BMO's is questionable. S.3's letter of May 26 says "We do not know if the current asset structure was arranged by Mrs. Childs or unfolded out of inattention"[25] though her deemed capable client was not asked. On May 13 Mrs. Childs understanding of her finances and banking is minimal and

[23] Book 2 Tab L page 497 - 503
[24] Book 2 Tab K page 398 L10 – 27
[25] Book 2 Tab L page 456 – 461 note underline at 460

confused. [26] This likely applied to the banking 'instructions' provided at most 36 days earlier. Whether such changes should be protected by privilege is questionable. Conflict is also suggested when on June 26th, with no hearings scheduled, S.3 contacts Ms. Mayeski to represent BMO[27]. The panel deems the relationship appropriate due to deference [98].

43. Our consent to BMO at [8] of 4036 was more equivocal than reported. In Nov/15 I argued [28] our consent was not informed and was coerced. Of significance, the work S.3 did for BMO and the conflict it creates were not revealed while the PGT apparent approval of BMO without condition on June 16, leading to our consent. On June 17, for the court, they approved only our management plan. PGT management wrote both positions were proper suggesting policy applying the SDA tests at [24(5)] regarding the closeness of the relationship to the person that ensure the persons involvement required by [32(2,3)] are lax. These reasons are not summarized or refuted at [47–49, 52, 92] of 6616. The panel at [55, 56] suggest having counsel can overcome lack of disclosure, while being immune to the authority.

44. Neither Justice Tranmer, or the panel, test parties' submissions against Mrs. Childs instructions. While Mrs. Childs instructions are to remain at home as long as it is safe and to have professionals care for her, S.3 supports Michael's Oct. 9/15 guardianship plan he hire Caroline as caregiver at $50K/yr. neither he or S.3 would approve in June. If Caroline refused, placement would occur. S.3 supports BMO's motion[29] Mrs. Childs coins and stamp collections, not returned by Michael under April Order [10] could be kept by them. Neither S.3 or BMO consulted Mrs. Childs. S.3 supports excluding affidavit references to Andrew and Michael's conduct, PSW reports of Andrew's deplorable care (S.3 did not ask Mrs. Childs despite PSW reports where she says "thank god a human. I hate those people") S.3 also proposes Mrs. Childs PoA no heroic measures clause be changed to do not resuscitate and be registered with first responders for which no instruction exists.

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[26] Book 2 Tab I pg 175 – 176 "The bank is a good place to put it and that's where it goes" & "she informed me Caroline kept tabs on what was spent" & "It was '*absolutely OK*' with her if Caroline did the money handling. She then informed me that someone at the bank managed her money"

[27] Book 2 Tab L page 518 June 30 entry

[28] Book 2 Tab K page 417 – 426

[29] Book 1 Tab C page 43 – 45 BMO Order on BMO Motion

45. The April Order [2, 5] requires BMO operate under the instruction of S.3. It would remain in effect until an order appointing BMO was entered June 25, 2016. Ahead of the Nov. 13 hearing S.3 transferred $300K to BMO, despite sufficient funds on hand and knowing BMO's appointment would be reviewed. In Feb. 2016, ahead of Caroline's Stay motion, S.3's docket suggests another transfer of $400K. Together they allow BMO to bill $42K even if replaced. When S.3 requested she be relieved, neither S.3 or BMO informed the court of the April Order. From Feb 25/16 to June 25/16 BMO controlled Mrs. Childs assets with no order and without following their June 10/15 plan to provide quarterly asset reports. Despite SDA [32(10)] requiring a property guardian operate by their plan, BMO has taken the position Justice Tranmer at [8] of 4036 allowing them to 45 days to file an amended plan, which they filed a motion to amended to allow filing under under SDA [32(11)] "within 45 days of a final judgement that is not appealed and, if appealed, then 45 days of a final appellate decision". [32(11)] depends on a plan being in place under [32(10)] nevertheless BMO asserts this permits them to control $1.4 M of Mrs. Childs assets for almost 2 years without reporting or a plan. The Passing of Accounts Justice MacLeod ruled a collateral attack; was to find the extent of BMO's actions, and to separate intermingled fees for managing Mrs. Childs finances from litigation expenses, which Justice Tranmer assigned to us.

Privilege

46. At [89] of 516 the panel accepts S.3's defense of privilege. At [94] they note S.3 met Mrs. Childs 3 times. The last meeting occurred May 19. S.3's statement "Once there is an assessment of incapacity and indeed, a finding of incapacity, even though we don't have an entered judgment, it would make a mockery of section three for me to return to seek instructions from Mrs. Childs" is not noted. The assessment was released May 25. Hearings occurred June 18, Aug 21, Oct. 20–23 and Nov 13. Actions typically requiring instruction occurred as late as Feb 25/16. Of Mrs. Childs capacity to instruct S.3 tells the court "I am making no statement that she's deemed to be capable to instruct me. I cannot take the step further to comment on whether I feel that her instructions are indeed capable or not. I'd be giving evidence otherwise".[30]

[30] Book 2 Tab K page 383 - 388

47. I have based my arguments regarding privilege on the paper The Supreme Court of Canada on Solicitor-Client Privilege listed in the Authorities[31]. That paper references the cases and paragraphs cited below. The conditions to establish lawyer-client privilege are: "(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice". [32] None of this happened after May 19, and little happened before. *R. v. McClure* found privilege a principle of fundamental justice under s. 7 [33]while *Lavallee* [34] found privilege to be a fundamental right to privacy protected under s. 8 of the *Charter*. Privilege belongs to the client, not the lawyer and can only be asserted or waived by the client. [35] It does not extend where legal advice is not sought or offered or to furthering unlawful conduct.[36] In this case the fact no contact occurred after May 19, no status was reported to Mrs. Childs nor were her instruction sought, and her incapacity to legally issue instructions was noted by S.3 suggest privilege is being claimed to protect S.3 not Mrs. Childs charter rights. S.3's actions after May 19 increasingly diverge from the instructions S.3 reported as Mrs. Childs instructions to her. Finally, courts [37] have denied privilege where a lawyer filed false statutory declarations with the Law Society. In writing that she was the source of BMO informing Mrs. Childs a management plan written after her last meeting, and swearing it affidavit knowing [SDA 69(1), 70(1ci&ii)] were compiled with falsely allowed the court to believe stature had been followed.

48. The Evidentiary ruling was released Nov. 13, ahead of my submissions. At [16-18] the order references only [64–82] of Caroline's Affidavit 3[38], which deal with the process around the April Order and the introduction of BMO. My affidavit is dismissed as "bearing little evidentiary weight". At [27] the order says those paragraphs "shall not be considered relevant or admissible to this variation hearing." No other evidence about S.3 is excluded nor does it apply to future hearings. 6616 shows no evidence filings about other parties was

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[31] Book 1 Tab F page 219 - 240
[32] *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, note 3, para. 15; *Solosky v. The Queen*, [1980] 1 S.C.R. 821, p. 837, Dickson J. (as he then was).
[33] *R. v. McClure*, [2001] 1 S.C.R. 445 note 4, paras. 41-2
[34] *Lavallee, Rackel & Heintz v. Canada (Attorney General); White v. Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink*, [2002] 3 S.C.R. 209. para. 35.
[35] *R. v. McClure*, [2001] 1 S.C.R. 445 *Id.*, para. 39 (emphasis added); above, note 4, para. 37.
[36] *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, note 3, para. 16., Major J.
[37] *R. v. Wijesinha*, [1995] 3 S.C.R. 422, para. 65, Cory J
[38] Book 2 Tab J page 328 - 351

considered, nor does anything prior to June 18 appear to be considered. In November this is reiterated.[39] *Brown* v. *Municipal Property Assessment Corp.* [40] at [26] suggest a motion to vary should not be used to shelter from examination issues not adjudicated. An appeal of this ruling would have to be filed December 14. The decision for 6616 was released December 16. It is only through the striking of evidence that S.3's actions can be seen as exemplary.

49. At [80] the panel categorically rejects a meeting between S.3 and Justice Tranmer occurred. The Oct. 22 hearing begins similarly with Justice Tranmer asking if opposing counsel passed on instructions he talked to them about in the hall.[41] Emails were filed confirming Justice Tranmer's request for a transcript, relayed by S.3, was being complied with.

50. At [97] the panel suggests that S.3 had no reason to investigate beating allegations as none of the other professionals reported of such. This position is inconsistent with S.3's April Urgent Order for removal from Andrew's, and respect for an incapable persons personal safety. At [14] of 6616 Justice Tranmer reports S.3 saying reporting this is a violation of SDA [66(6)]; not fostering personal contact with the supportive family members. Neighbours affidavits and PSW reports, showing Andrew left Mrs. Childs in excrement and would not feed her to control 'vomiting' suggests the report warrant some interaction between S.3 and her client. S.3's and the panels position is consistent with Justice Tranmer's August statement "Has that beating taken place since June 18th? .... All right. So, what possible relevance."[42] Safety of the person should deserve investigation.

51. At [83-85] of 516 the panel suggests S.3 is in the best position to suggest the litigation guardian again deferring to Justice Tranmer. At [84] it says no palpable or overriding errors exist regarding his decision despite; Michael's guardianship plans to place Mrs. Childs against her wishes, his pre-June 18 endorsement of her isolation and abominable care, his guardianship plans proposal Andrew provide relief care in his home. Further Schedule A of Michael's guardianship plan ignores Ontario's Personal Health Information Protection Act

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[39] Book 2 Tab K page 413
[40] *Brown* at para 20
[41] Book 2 Tab K page 369
[42] Book 2 Tab K page 366

by giving non-guardians permission to contact Mrs. Childs doctor regarding private medical information. It forces Mrs. Childs' to undergo monthly shelter assessments while making the decision of doctors binding on the joint guardians, despite SDA [66(3,4)] that guardians consider Mrs. Childs beliefs, values, capable and current wishes when making care decisions. All suggest Michael puts his interests, or objectives, ahead of Mrs. Childs.

52. At [7-18] of 6616 S.3's criticisms of Caroline are misapplications of SDA 66 applying the guardian's duties to the person to other parties. These errors directly lengthened litigation. At [91] the panel categorically rejects S.3 failed in any way in her duties.

Costs and Simmons on quantum

53. At [102, 103] of 516 the panel reiterates [66, 69, 70. 75] of 6616 that we put all issues back into litigation including the appointment of S.3 and her role, BMO, Michael as litigation guardian. The court is master of its domain. We filed no motion since January 2015 when the original cross motion was filed. One can only speculate on why Justice Tranmer listened to arguments when there was no motion, though the record shows frequent references to preventing an appeal.

54. At [103] of 516 the panel says our position we were the only parties respecting Mrs. Childs wishes "does not amount to a reason to interfere with the costs decisions below" while at [104] there is "no error in principle". At [15] of Fiacco, [43] on which Justice Tranmer's cost decisions rely, says "When a court makes an order designed to protect the property of a vulnerable person … it is not acceptable for any person … to fail to comply". This is directly analogous to Michael being ordered by April [10] to return Mrs. Childs and her belongings and then not returning Mrs. Childs coins and stamps. He faces no cost consequences. We were assigned costs as we argued against BMO's motion allowing unreturned property to be kept till Mrs. Childs death. Similar issues occurred around accessing Mrs. Childs Will, prior to litigation, also referenced in Fiacco.

55. Justice Simmons erred in excluding S.3's quantum from review. s.3's Jan. 29/16 docket

[43] Fiacco and Lombardi

shows numerous[44] items courts[45] have found questionable. S.3 charged Mrs. Childs to research 'collections', when s.3's fees are guaranteed. Entries for specific tasks on specific days vary across dockets. BMO's dockets show that parties that should have been independent from each other, and have a duty to respective oversight and approval of each other's actions, consulted more regularly that necessary for litigation issues. Cost Submissions were filed within a day of each other eliminating prior review.

Conclusion

56. The next 20 years will see a large rise in courts facing issues around capacity, the ability to instruct and the scope of actions appointed represents have until capacity is determined. This case shows the finding of the Ontario Law Commission, that there is a widespread lack of understanding regarding capacity and guardianship is correct. It also shows that except for the determined actions of some parties the persons Charter rights and recorded instructions, get forgotten. Persons capable legal documents they put in place to protect themselves can be upended and replaced without clear involvement of the person, or considered court oversight. Letting over 200K in cost to the parties that questioned these changes and intervened to allowed the persons autonomous wishes to be realized stand, will ensure other do not do this, putting more elderly Canadians at risk of these occurances. These decisions deserve review by this court. While the particulars are unique the underlying issues are common and will become increasingly pervasive.

Part IV Submissions in support of order sought concerning costs (Page #)

57. Not sure what to say here. It seems to me that regardless of ones' knowledge of a person's capable wishes, or fiduciary duty, it is not in one's personal interest to try protect another's rights and wishes if the courts are involved, but I can't help myself. An injustice has occurred because there no guidance, or much understanding, of how courts are to deal with counsel appointed for a person who's capacity is at issue. They and other litigants are at risk.

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[44] Book 2 Tab L page 523 Oct 29, Nov 9 research collections when payment guarnteed
[45] Book 1 Tab E page 241 – 252 especially pages 244-245

Part V Order or Orders sought

58. If leave granted, an immediate Order for BMO to comply with its June 10, 2015 property management plan and issue the required quarterly asset reports from June 18, 2015 on so that all parties have the facts regarding costs, and changes to Mrs. Childs assets.
59. An Order revoking any action taken by S.3 after May 19, 2015, or decision based primarily on such, without clear evidence that Mrs. Childs was (1) believed to be capable to issue the instruction at the time (2) did issue the instruction (3) the specifics of the instruction so the court can ensure the action taken was within the scope of the instruction.
60. An Order Revoking Justice Tranmers December Order for joint guardianship for personal care, and an Order appointing Caroline Childs guardian of personal care according to her guardianship plan as filed January 2015 and accepted by the court, and all parties June 18, 2015.
61. An Order Revoking Justice Tranmers December Order appointing BMO as guardian of property. An Order limiting BMO's fees to 6% of expensed paid (allowing for tariff on actual expenses without influence of S.3's transfers). An Order appointing Peter Childs and Caroline Childs as joint guardian of property according to their property guardianship plan approved by the PGT June 17, 2015.
62. An Order that S.3 bear Peter and Caroline's costs after May 19, 2015. An order that Andrew and Michael bear Peter and Caroline's from the date of their filing of application to May 18, 2015. An Order that all other parties bear their own costs.
63. Such order as necessary to the provinces, particularly the province of Ontario, to ensure the appointment of counsel for potentially incapable persons resolves that issue before counsel represents the person on other matters.
64. Such order as necessary to the provinces, particularly the Province of Ontario, to ensure where an Act or Statute sets a tariff for Property Guardianship that a tariff is also set for the service of caregiving, where the Guardian of Personal Care provides, or is expected to provide, such service.
65. Such orders as are necessary for judicial training when hearing issues regarding competency and persons charter rights when the person is not a direct participant in hearings that affect them.
66. Other such order as the court may see fit.

Peter Childs
Sept 17/2017