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Bad Fiduciaries

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BAD FIDUCIARIES

I. Introduction

The words "bad fiduciaries" may conjure up images of escapees from jail in their black-and-white striped prison attire, carrying bags full of loot stolen from those whom they were supposed to protect. Indeed, sometimes that is not too far off the mark. We do see blatant misappropriation of trust property by trustees or the use of powers of attorney to steal money. But such cases are not particularly enlightening, and not the main focus of this paper. Rather, I will focus on some of the subtler cases involving allegations of breach of fiduciary duties, with the occasional blatant case thrown in.

Fiduciary duties in the context of private express trusts are nuanced. Trusts may be settled with a variety of objectives in mind, including business and tax objectives and providing for family or others. The same trust may be settled to attain multiple objectives. The trust instrument may set out the trustee powers broadly, and the trustees may act within the confines of their *apparent* powers, but may still be liable for breach of fiduciary duties if they act in bad faith or in a conflict of interest. Conversely, a trustee may act in the utmost good faith with the best of intentions, but be in breach of trust if she acts in a manner not authorized by the trust instrument.

The duties of an attorney under an enduring power of attorney appear less nuanced. The attorney must act only in the best interest of the donor. But even here, it is not always as straightforward. The attorney must also consider the donor's wishes, which might entail benefits for the donor's spouse, which is particularly problematic if the spouse is also the attorney or one of the attorneys. In the case of a committee, the *Patients Property Act* expressly provides that the committee must act for the benefit of "the patient and the patient's family," and accordingly in some cases it may be used to benefit family members as well as the incapacitated person whose assets the committee is managing.

The first section will deal with trusts, followed by remedies for breach of trust. This is followed by powers of attorneys and then finally committeeships. I will not be canvasing all of the recent cases, but rather have selected a handful of cases to illustrate some of the nuances and problems as well as remedies, with an emphasis on cases in the last five or six years.

II. Trusts

Lawyers often use broad language conferring discretion and protecting trustees from liability when drafting trust instruments. The terms may, for example, give trustees "absolute, unfettered discretion" in making distributions of income or capital. Trustees may also be beneficiaries, and the terms of the trust may permit the trustees to distribute to themselves.

Such language does in fact confer broad powers on trustees, but perhaps should not be taken too literally. It should be read in the context of the underlying nature of a trust, which is a fiduciary relationship of the highest level.

I will discuss three cases involving trustees who were perhaps following the letter of the trust instrument, but either acted in bad faith preferring their own interests to other beneficiaries, as in *Pirani v. Pirani*, 2020 BCSC 974, failed to diversify investments and maintain an even hand between income and capital beneficiaries, as in *Miles v. Vince*, 2014 BCCA 289, or, though acting in good faith, exercised their powers in an unauthorized manner as in *TLC The Land Conservancy of British Columbia v. The University of British Columbia,* 2014 BCCA 473.

A. *Pirani v. Pirani*

During the reign of Idi Amin, four brothers immigrated to Canada. Their names were Mohammed Aly Pirani, Madatali Pirani, Pyarali Pirani and Haider Pirani. Only Haider Pirani is still alive. The Pirani brothers established a successful business through family owned companies owning and operating hotels in Canada and in the United States. The two main companies were Pirani Enterprises and Piramco Investments Ltd.

In 1993, they arranged an estate freeze of their companies. An estate freeze involves exchanging shares that increase in value with the company for other shares that have a fixed value. New shares are then issued for a nominal amount of money. These new shares are initially worth only the nominal value, but if the company grows, the new shares will become worth more. In this case, each brother created a holding company to hold the growth shares in the operating companies. A family trust was settled in each case to hold the shares in the holding company. Accordingly, as a result, there were four trusts. In each case, the trustees held shares in one of the four holding companies. The beneficiaries of each trust consisted of the children and grandchildren of one of the brothers.

One of the trusts was created for Mohammed Aly Pirani's descendants. In the reasons for judgment, this trust is referred to as the "MAP Trust." Mr. Mohammed Pirani was one of the initial trustees of this trust, together with his wife, and his brother Haider Pirani. After

Mohammed Pirani's death, his nephew (Madatali's son) Mustaq Pirani became a trustee. Mohammed Pirani's wife also died, but no other trustee was appointed. This trust held shares in a holding company 438702 B.C. Ltd. ("702") The beneficiaries of the trust were Mohammed Pirani's children Mehboob Pirani (referred to in the decision as "Meb"), Fareed Pirani, and Arshad Pirani, as well as his grandchildren, Meb's son Imran Pirani, and Fareed's daughters Sheliza Pirani and Zaida Pirani. None of the trustees were beneficiaries.

One of the other trusts is referred to as the Madatali Trust which held shares in another holding company, 438703 ("703"). The trustees were initially Madatali Pirani, Haider Pirani and Meb Pirani. When Madatali died, no new trustee was appointed. The beneficiaries of this trust were Madatali Pirani's three children, Mustaq Pirani, Bashir Pirani and Najma Pirani. Again, none of the trustees were beneficiaries. You will notice that Meb Pirani is a beneficiary of MAP Trust, and a trustee of the Madatali Trust, while Mustaq Pirani is a trustee of the MAP Trust and a beneficiary of the Madatali Trust.

Although the terms of the trusts provided for a termination after 80 years, in each case the trust deed allowed the trustees to terminate the trusts earlier if they considered it advisable to preserve the capital of the trusts because of taxation. Under the *Income Tax Act,* RSC 1985, c.1 (5th Supp.), the trusts would be subject to a deemed disposition of the trust assets 21 years after the trust was settled, which would have resulted in significant taxes on the shares of the holding companies. But if the shares were rolled out of the trusts to the beneficiaries before the 21st anniversary, the tax would be avoided (or really deferred until the beneficiaries sold the shares or died).

The trustees of each of the four trusts, including the MAP Trust and the Madatali Trust, decided to wind-up the trusts by distributing the shares before the 21st anniversary.

In winding-up the MAP Trust, the trustees, Haider and Mustaq as the trustees decided to give Meb voting control over the holding company 702, and 45% of the equity, while giving Fareed and Arshad 20% of the equity each, and Meb's son, Imran, 15% of the equity. There was a twist in the plan. The trustees decided to do another estate freeze, essentially freezing the value of the shares distributed to the beneficiaries, and creating new growth shares, all of which were distributed to Meb. The effect was that Meb would have voting control over 702 and all of the future growth in value. Before implementing the plan, the trustees removed Fareed and Arshad as directors of 702. Directors' resolutions would be required to create new shares and implement the estate freeze.

The trustees of the other trusts followed a similar plan in respect of the shares of the holding companies held in each trust. In the case of the Madatali Trust, the trustees gave Mustaq the voting control and growth shares. In each case, growth shares were given to those beneficiaries most active in the businesses.

Although the trustees received good legal advice that it would be best to consult with all of the beneficiaries before distributing the trust assets, they did not do so.

To implement an estate freeze it was necessary to value the company shares. The value of the new freeze shares issued in exchange for the old growth shares needed to be determined. An appraisal firm, Duff & Phelps were hired to appraise the shares. However, the valuation was based on the values of various real estate holdings owned by Pirani Enterprises and Piramco Investments Ltd. These valuations of real estate were not based on professional appraisals, but were estimates made by Mustaq Pirani, which the trial judge, Madam Justice Sharma, found were unreliable, and likely too low. The effect of a low valuation would be to undervalue the freeze shares, and overvalue the new growth shares.

Fareed Pirani, Arshad Pirani, Sheliza Pirani and Zaida Pirani, all beneficiaries of the MAP Trust sued Haider Pirani and Mustaq Pirani, who were the trustees, Meb Pirani and Imran Pirani, who were beneficiaries, and the holding company 702. Their allegations included that the trustees were in breach of trust and breach of their fiduciary duties. They alleged that the trustees were in a conflict of interest, and that Meb colluded with the trustees of the MAP Trust to deprive the plaintiffs of their entitlement to share in the family business.

The defendants denied the allegations. The claims were advanced by beneficiaries of the MAP Trust, and the defendants focused their defence on the wording of the trust, which did give the trustees the discretion to wind-up the trust, and gave them a broad discretion on how to distribute the shares. The trustees of the MAP Trust, Haider and Mustaq were not beneficiaries of that trust, and they argued that they had no conflict of interest.

Madam Justice Sharma found that there was a *prima facie* case that the defendant trustees were in breach of their fiduciary duties by acting in a conflict of interest. The plaintiffs established that the defendants "were in a position where there was a substantial risk their duties and interests could conflict." The burden then shifted to the defendant trustees to show that they acted in the best interest of the beneficiaries. She found that the defendants failed to meet that burden.

With respect to the argument that the trust instrument gave the trustees an unfettered discretion to allocate the trust property on winding up the trust, she held that this was not a complete answer. She wrote at paragraph 155,

> The Defendants' fiduciary obligations crystallized the moment they were appointed as trustees, in addition to the duties or powers spelled out in the deed. It is in that sense that the nature of the discretion and the wording of the deed cannot be the full answer. More to the point, there is no power under the deed that could purport to authorize trustees to breach their duty of loyalty.

The defendants argued that, because the trustees of the MAP Trust were not beneficiaries, there was no conflict of interest, but Madam Justice Sharma took a broader approach, and considered the overlapping roles of the trustees and directors of the holding companies. The trustees of the four trusts addressed the winding-up of the trusts before the 21-year deemed disposition together. They went further than distributing the shares by implementing new estate-freezes, and they determined the direction of the family business including the allocation of the future wealth, without properly considering the interests of the other beneficiaries. She wrote at paragraphs 281, 284 and 285:

> [281] It is important to analyze their conduct in context. It is materially significant that despite the existence of separate trusts and Numbered Companies, the Defendants created and implemented a plan that dealt with four trusts together. They chose to act collectively to address the 21 Year Rule.
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> ….
>
> [284] In my view, one cannot separate out the Defendants' decision (as directors in the Family Business) to restructure the Numbered Companies, from their distribution decisions as trustees, which conferred all future growth in each company to only specific pre-determined beneficiaries.

> [285] To the extent the Defendants assert their decisions as trustees was somehow isolated from their decisions about the corporate reorganization, I do not find the evidence supports that conclusion. Specifically, Meb's insistence that he had "no involvement" in the MAP Trustees' decision to allocate to him all the future growth in 702 rings hollow on the facts of this case. The Defendants collectively made decisions about the running and future operations of the Family Business.

Madam Justice Sharma was critical of the defendant trustees' failure to consult with the beneficiaries in view of the conflicts of interest:

> [194] The Defendants received advice about options to address the 21 Year Rule, but also how to go about choosing one of the options. They were strongly advised to inform and seek the view of all adult beneficiaries before decisions were finalized. Why? Because legally their duty as trustees required them to approach the complex task of winding up of the trust and make decisions only in the best interests of all beneficiaries. I note they were also advised to do this to maintain family harmony (see above, para. 180), but this does not detract from the legal foundation for this advice.
>
> [195] Given the overlapping roles within the Family Business and family trusts, they needed to do something to address the existing conflicts. They were obliged to ensure their judgment was not swayed by self interest, or indeed anything not consistent with the best interests of all beneficiaries. They did not follow any of the advice they received from Mr. Fish at the outset. It is difficult to conclude how they discharged their fiduciary obligations without following that sound legal advice.

Madam Justice Sharma was also critical of the manner in which the shares were valued for the purpose of the new estate freezes. Both Meb and Mustaq had an interest in undervaluing the shares that were exchanged for freeze shares, which would benefit them as holders of the growth shares in two of the companies, and they failed to get accurate valuations. She found that they knew the shares were undervalued.

She concluded at paragraph 346 with respect to the allegations of breach of fiduciary duties:

> a) I am satisfied that the plaintiffs established Haider and Mustaq were in a *prima facie* conflict as the MAP Trustees because of their overlapping roles. They failed to persuade me that they conducted themselves in good faith and with honesty in the face of that conflict. I conclude that Mustaq's duty of loyalty was impaired by his self-interest. I conclude Haider and Mustaq breached their fiduciary duties to the plaintiffs.
>
> b) I am persuaded that the evidence establish that Meb knowingly assisted Mustaq and Haider in their breach of their fiduciary duties. I also conclude his conduct was not in good faith because he was guided by his self-interest.
>
> c) With regard to the process of winding up of the family trusts and the steps taken to restructure the Numbered Companies, the Defendants acted collectively. I conclude they all were in a *prima facie* conflict from the outset of the process. Mustaq and Meb failed to persuade me that in light of that, they adhered to their duty of loyalty to all beneficiaries. I conclude their actions and decisions were influenced by their self-interest and their conduct was not in good faith throughout that process.

She ordered that Meb and Mustaq give up what they gained by breaching their duties, by ordering the disgorgement of some of the shares that they received, as well as disgorgement of some of the shares Imran received from his father.

Pirani is under appeal.

B. *Miles v. Vince*

William Vince settled two trusts, one of which he named the William Vince Family Trust, and the other, the Vince Insurance Trust. He settled the family trust in 2006 while he was healthy, and he transferred the shares of three companies, each of which owned real estate on Main Street in Vancouver. He settled the insurance trust after he was diagnosed with cancer, and that trust received the proceeds of his life insurance policy of over $2 million following his death in June 2008.

The terms of the family trust gave the trustee the discretion to make income and capital payments to Mr. Vince's three children. The terms of the insurance trusts also gave the trustee discretion to make income and capital payments, but his widow, Cynthia Miles, and his three children were the beneficiaries of the insurance trust. Both trusts provided that on a division date, 80 years after the creation of the trust or such earlier date as the trustee decides, the capital would be divided among the three children.

Mr. Vince's sister, Marilynn Vince, became the trustee of both trusts.

Ms. Vince as trustee of the family trust endeavored to carry out her brother's vision to develop the Main Street properties. She commissioned a report to determine the best way to maximize the best use of the properties, incorporated a non-profit housing society, and arranged financing from B.C. Housing of $5,550,000 to purchase another property and develop the Main Street properties.

She also lent funds from the insurance trust to the family trust to help finance the development. The initial loan was for $1,170,000, but there were further loans, and with accrued interest, the amount owing from the family trust to the insurance trust was $2,135,485 as at December 31, 2012.

The main security for the loan from the insurance trust consisted of second mortgages in the Main Street properties. But under the terms of the mortgages, the insurance trust could only enforce them if B.C. Housing, which held first mortgages consented, or if B.C. Housing commenced foreclosure. Furthermore, the Provincial Rental Housing Authority had an option to purchase the properties, and if it exercised the option, the Insurance Trust would have to deliver a discharge of its mortgage without requiring payment.

From 2008 to 2012, the trustee made payments to Ms. Miles and paid expenses for her and the children from the insurance trust, but then stopped.

Ms. Miles applied to the Supreme Court of British Columbia to remove Ms. Vince as trustee of the insurance trust, but her application was dismissed. She appealed to the Court of Appeal.

Madam Justice Levine wrote the reasons for judgment in the Court of Appeal removing Ms. Vince. In doing so, she considered the different purposes of the two trusts. When he settled the family trust, Mr. Vince intended to create social housing and develop the Main Street properties. But he settled the insurance trust at a time when he was ill with cancer, and he intended the insurance trust to provide for his widow and children following his death.

She held that by putting all of insurance trust assets into an illiquid real estate development, Ms. Vince endangered the insurance trust assets, and she did not meet the standard of a prudent investor.

Although the *Trustee Act*, RSBC 1996, c. 464 as amended, does not expressly require a trustee to diversify the trust assets, Madam Justice Levine adopted Professor Donovan Waters' analysis of the prudent investor standard set out in the Trustee Act in Waters' Law of Trusts in Canada, 4th ed., as follows:

> [61] Professor Waters notes (at 1008) that in 1997 the Uniform Law Conference of Canada promulgated the Uniform Trustee Investment Act, 1997, which imposed an obligation for trustees to diversify investments and provided a list of factors which a trustee may consider in making investment decisions.
>
> [62] He describes the "prudent investor" standard as used in the B.C. Trustee Act, (at 1018):
>
>> The reference to the "prudent investor" is intended to bring into the picture the requirements of modern portfolio theory, which teaches that one must first decide what is the level of appropriate level of risk, and then seek to maximize the return within that constraint.
>
> [63] He points out that diversification is implicit in the prudent investor standard, based on modern portfolio theory (at 1019-1020):
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>> It is true that in some jurisdictions, particularly those retaining the prudent man standard, there is room for argument as to whether the trustee has the duty to diversify. The new prudent investor standard, based on modern portfolio theory, leaves less room for argument; diversity is inherent in modern portfolio theory. Even so, the circumstances of a trust might be inconsistent with diversification. For example, if a trustee expected to hold property only for a few weeks, it might not be prudent to expose the assets to the volatility which inheres in equity investments.

Madam Justice Levine also found that in making the loan, Ms. Vince put herself in a conflict of interest as trustee for both trusts. The loan was now in default, but if Ms. Vince as trustee of the insurance trust demanded payment of the loan, it would put the development in jeopardy.

Furthermore, Ms. Vince as trustee had a duty to maintain an even hand between income and capital beneficiaries. The real estate development had potential for significant profit for the capital beneficiaries, but was not generating income for the income beneficiaries.

Madam Justice Levine summarized her reasons for removing Ms. Vince as follows:

> [87] In this case, the respondent, in her capacity as the trustee of the Insurance Trust, failed to protect the interests of all of the beneficiaries of that trust. By investing all of the trust property in the Loan, she put the trust property at risk, put herself in a conflict of interest, and failed to act with an even hand among the beneficiaries. Her continuation as trustee jeopardizes the proper and efficient administration of the trust.

C. *TLC The Land Conservancy of British Columbia v. The University of British Columbia*

It is perhaps a bit unfair to discuss this case in a paper entitled "Bad Fiduciaries." There is no suggestion in the decision that the executors and trustees were self-interested or acted in bad faith. But it illustrates that fiduciaries must act within the scope of their authorities, derived in this case from a will, and that they are not permitted to do indirectly what they may not do directly to benefit objects that are not the objects of the trust.

In her will, dated February 15, 2007, Jessie Binning, expressed the hope that her home, designed by her late husband, architect and artist, Bertram Charles Binning, would be preserved as a historic site. Specifically, her will provided:

> (i) the lands and buildings at 2968 Mathers Crescent, West Vancouver, British Columbia, … which my late husband, B.C. BINNING and I used as our residence (the "Residence"), have been designated a National Heritage Site and have been listed on the heritage inventory of West Vancouver, British Columbia;
>
> (ii) it is my hope that the Residence and historic household furnishings will be preserved for historical purposes;
>
> (iii) if my Trustees decide it is feasible and practical to do so, to establish a foundation or other organization, society, association or corporation (the "Entity"), as my Trustees decide, and to transfer any interest (the "Property") I have in the Residence, along with those household furnishings selected by my Trustees, to the Entity to hold, maintain and use the Property and those household furnishings for those purposes it decides are desirable;
>
> (iv) if the Property is transferred to the Entity and, due to unforeseen circumstances, the Entity decides it is no longer feasible or practical to retain the Property and it subsequently sells the Property, it is my hope that it will give the net sale proceeds to the B.C. BINNING MEMORIAL FELLOWSHIP FUND, administered by THE UNIVERSITY OF BRITISH COLUMBIA, for the purpose of creating additional scholarships to be awarded by it each year from the income earned by those proceeds;
>
> (v) if my Trustees decide not to retain the Property and historic household furnishings, the Trustees will sell the Property, and sell or otherwise dispose of those household furnishings, and give the net sale proceeds to the B.C. BINNING MEMORIAL FELLOWSHIP FUND, for the purpose of creating additional scholarships to be awarded by it each year from the income earned by those proceeds;

She also provided in her will that if the Entity were established, the residue of her estate would be divided equally between the Entity and the B.C. Binning Memorial Fellowship Fund, or if the Entity were not established, it would go to the Fellowship Fund.

Mrs. Binning died in May 2007.

Her executors and trustees sought to give effect to Mrs. Binning's hope that the residence, or the Binning House as it is known, would be preserved for historic purposes. The practical difficulty they faced was that after various bequests were paid out of her estate there was no residue left to pay to a new Entity to maintain the Binning House.

A more practical alternative would be to donate Binning House to an established entity to maintain, such as TLC The Land Conservancy of British Columbia, which I will refer to as TLC. The problem is that the will did not give the executors and trustees the authority to do so.

After receiving legal advice from their lawyers, the executors and trustees decided to incorporate a non-profit society. They then transferred title to the Binning House to the new society, which in turn, immediately transferred the title to the TLC. The new society also executed a deed of gift giving TLC the residence "for the purpose of restoring, developing and preserving the Binning House, formerly the home of B.C. Binning, for historical purposes with a view to educating the public and commemorating the site".

In this way, the executors and trustees sought to both follow the letter of the will, by setting up a new entity and transferring the Binning House to the new entity, while finding a more practical manner of giving effect to Mrs. Binning's hope to preserve the historic residence.

Unfortunately, TLC had some significant financial problems, and sought protection under the federal Companies' Creditors Arrangement Act. When TLC received an offer to purchase the Binning House for $1.6 million to a collector of Bertram Binning's art, it applied to court for approval of the sale, with the proceeds to be used to assist with TLC's restructuring.

The University of British Columbia did not oppose the sale, but took the position that the proceeds should be paid to UBC for the B.C. Binning Memorial Fellowship Fund. UBC argued that the executors and trustees acted outside of the scope of their authority in transferring the Binning House to TLC indirectly through the new society.

UBC was unsuccessful in the Supreme Court of British Columbia, and appealed to the British Columbia Court of Appeal.

The Court of Appeal found that the executors and trustees had committed a fraud on their powers under the will by transferring the Binning House to TLC through the new society. Despite the strong term "fraud," this does not mean that they acted dishonestly, but rather that what they did was beyond the scope of their powers under the will. Mr. Justice Tysoe explained what a fraud on the power is at paragraphs 42 and 43:

> [42] In order to succeed in having the transfer of the Binning House declared void, UBC had the onus of proving that the transfer was a fraud on the power contained in the Will authorizing the Trustees to transfer it. The phrase "fraud on a power" is a term of art, and it does not connote fraud in the usual sense of dishonesty. This is explained by Geraint Thomas in Thomas on Powers, 2d ed. (Oxford: Oxford University Press, 2012) at para. 9.03:
>
>> The doctrine of fraud on a power is not founded upon a state of conscience imputed to the donee in equity. Dishonesty of some kind is often present, but it is not essential. Indeed, the donee's intention or motive may be perfectly honest. Thus, the doctrine may apply where the donee honestly believes that, by his exercise of the power, he is disposing of the property in a more beneficial manner, or in a way which is consonant with what he believes would have been the real wish of the donor of the power …
>>
>> [Footnotes omitted.]

> [43] The parties are agreed, as they were before the chambers judge, that the two basic elements of a fraud on a power are as set out in Thomas on Powers at para. 9.02:
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> > (a) "a disposition beyond the scope of the power by the donee, whose position is referable to the terms, express or implied, of the instrument creating the power;" and
> >
> > (b) "a deliberate breach of the implied obligation not to exercise that power for an ulterior purpose".

Mr. Justice Tysoe found that the will required that the executors and trustees would need to determine whether it was practical and feasible not only to establish the Entity and transfer the Binning House to it, but also that it was practical and feasible for the Entity to hold, maintain and use it. But in this case the executors and trustees knew it would not be feasible for the society they incorporated to retain the Binning House in view of the fact that there was no cash available to do so.

Although the executors and trustees transferred the Binning House to a new Entity, the purpose of doing so was so that the Binning House would end up with TLC, which was not an "object of the power," or in other words, a beneficiary of Mrs. Binning's will. Although the executors and trustees acted in good faith, they had an ulterior purpose when they incorporated the new society and transferred the Binning House to it. In this sense, they exercised their powers fraudulently.

Mr. Justice Tysoe wrote at paragraph 67:

> The Trustees had received legal advice from the Estate Lawyers that the Binning House could not be transferred directly to TLC or, in other words, TLC was not a proper object of the power given to them under the Will. The Trustees then set out to do indirectly that which they knew could not be done directly. They transferred the Binning House to the New Society with the intention that the New Society would immediately transfer it to a non-object, TLC. The Trustees deliberately used the power in the Will for the purpose of benefiting a non-object. They used it for an ulterior purpose.

The Court of Appeal ordered TLC to transfer the Binning House back to Mrs. Binning's estate. The result is that the proceeds of sale went to UBC for the B.C. Binning Memorial Fellowship Fund.

III. Remedies for Breach of Trust

Common remedies against trustees in breach of their fiduciary duties include removal of the trustee, orders compensating beneficiary losses, and disgorgement of property or profits wrongfully acquired by the trustee.

A. Removal of Trustee

The overriding consideration in deciding whether to remove a trustee is the welfare of the beneficiaries. This is set out in the Court of Appeal decision in *Conroy v. Stokes*, 1952 CarswellBC 51. In that case, there was friction between the will-maker's children and the trustee, as well as between the children and the will-maker's second wife, but the Court of Appeal held that the friction between the trustee and some of the beneficiaries was not in the circumstances of that case sufficient grounds to remove the trustee.

Mr. Justice Bird for the Court wrote at paragraph 10:

> Here the acts or omissions complained of do not, in my opinion, support a conclusion that the conduct of the trustees has endangered the trust property, or show a want of honesty or of proper capacity to execute the duties, or a want of reasonable fidelity. The failure of the trustees to account to the beneficiaries annually and to pass their accounts annually are perhaps matters for criticism on the basis of neglect of duty, but such omissions, as is said by Story, are not such as to induce the court to remove trustees unless persisted in.

He wrote at paragraph 12,

> In the circumstances I find nothing in the evidence to support a conclusion that the "welfare of the beneficiaries," and that phrase I think must be taken to mean the "benefit of the beneficiaries collectively," has been impaired by any act or omission of the trustees.

This represents a flexible approach. On the one hand, the court may remove a trustee who has not committed a breach of trust, if the trustee's conduct is such as to endanger the welfare of the beneficiaries, which may occur, for example, where there is friction between the trustee and beneficiaries that does affect the operation of the trust. On the other hand, not every breach of trust will lead to the removal of the trustee.

Recent cases in which the courts have considered removing trustees or personal representatives of estates include *Re Kajaks Estate*, 2016 BCSC 651 (executor and trustee removed); *Werner v. McLean*, 2016 BCSC 1510 (administrator not removed); *Re Dirnberger Estate*, 2016 BCSC 439 (executor removed); *Re Tomlinson Estate*, 2016 BCSC 1223 (executor not removed); *Gechman v. Gechman Estate*, 2017 BCSC 416 (executor passed over); *Re Stade Estate*, 2017 BCSC 2354 (executors removed); *Sheppe v. Harlingten*, 2018 BCSC 1460 (trustee removed); *Re Nieweler Estate*, 2019 BCSC 401 (one of three executors removed); *Burke v. Burke*, 2019 BCSC 383 (executor not removed); *Re Liu Estate*, 2019 BCSC 597 (administrator not removed); *Weisstock v. Weisstock*, 2019 BCSC 517 (both executors passed over); *Gawdun v. Lord*, 2020 BCSC 266 (executor not passed over).

B. Compensation and Disgorgment

Compensation and disgorgement are conceptually straightforward, but are more complex in application. The decision in *Kyle Estate v. Kyle,* 2016 BCSC 855, appeal allowed in part, 2017 BCCA 329, provides a useful illustration of their application in the context of a resulting trust.

Kyle dealt with an issue we are all rather familiar with: a parent contributes the funds held in a joint account with an adult child, who, following the parent's passing, claims the right to retain the funds beneficially. The child's siblings disagree.

John Henderson Kyle, who was known as Jack, died on June 20, 2012, leaving his wife and four children surviving him. He named his son Christopher Kyle as the executor of his home-made will and codicil. Jack Kyle deposited $400,000 into a joint account with Chris Kyle at Coast Capital Savings Credit Union, Richmond Branch. Chris Kyle took $25,000 out of the joint account for himself during Jack's lifetime, made a couple of payments to his father's caregivers, and retained the balance on his father's death in the amount of $372,637. He used the remaining funds in the Coast Capital account, with other funds that he contributed, to pay off a commercial mortgage in the amount of $526,473 on four properties owed by 1537 Holdings Ltd, a company in which Chris Kyle owned all of the shares.

Chris Kyle's brother Robert William Kyle, who was named as the alternate executor of their father's will, brought a claim against both Chris Kyle and 1537 Holdings Ltd. At trial, Mr. Justice Burnyeat found that Jack Kyle had not intended to make a gift of the funds to Chris, but intended for all four of his children to share the funds.

Mr. Justice Burnyeat found that Chris Kyle was was not entitled to retain the funds in the joint account, and provided in his orders for the following remedies:

1. Chris Kyle was removed as executor and trustee of his father's will and estate;
2. Chris Kyle was required to divide the amount of $377,637 equally with his brothers, bringing the $25,000 he received from the Coast Capital account before his father died into account;
3. Chris Kyle was ordered to pay compound interest on the funds from the joint account from July 1, 2012 to the date of trial, at the rate which would have been available at Coast Capital in the "high-interest no-fee savings" account, and 5% interest thereafter as set out in the *Canada Interest Act* until paid;
4. Chris Kyle was ordered to pay an amount reflecting the interest that 1537 Holdings Ltd. saved as a result of paying out the mortgage, which was calculated at $1,178.00 per month, from July 1, 2012 when it was paid out to the date of trial. This amount reflected the proportionate share of the savings from the funds in the joint account to the full amount of the loan paid out; and
5. Chris Kyle was also ordered to pay a portion of the increase in value of the four properties owned by 1537 Holdings Ltd. from July 1, 2012 to the date of trial. The portion was to be calculated on the basis of the $377,637 used from the Coast Capital account to pay off the mortgage divided by the assessed value of the properties in 2012 of $1,580,000. Either Chris Kyle or 1537 Holdings Ltd. was required to pay that portion of the increase of value as determined by appraisals.

Chris Kyle was also ordered to pay special costs.

The result of the trial decision was that Chris Kyle was required to both compensate the beneficiaries for the value of the funds in the joint account, plus the loss of interest they would otherwise have received if the funds were kept in the joint account, and the disgorgement of the benefit 1537 Holdings Ltd., and indirectly Chris Kyle as the shareholder, received by virtue of the interest saved on the mortgage, as well as the proportionate share of the increase in value of the properties that had been subject to the mortgage. This appears to the writer to be (to use technical language) a triple whammy. In addition to repaying the principal, Chris Kyle was required to compensate the beneficiaires for their loss by paying the interest that would have accrued had the funds been retained in the joint account, plus disgorging the mortgage savings, plus disgorging a portion of the increase in the value of the properties, without allowing Chris to offset the compensatory interest from the disgorged savings of the mortgage interest, nor was he allowed to offset either the compensatory interest or mortgage interest from the appreciation of property values.

The Court of Appeal allowed Chris Kyle's appeal in part. The Court of Appeal agreed with Mr. Justice Burnyeat that Chris Kyle was not entitled to retain the funds in the joint account, but held that the funds resulted to Jack Kyle's estate, rather than held in trust for all four of the children. The Court of Appeal also allowed the appeal to the extent of substituting party and party costs (and double costs after the date of an offer) for full-indemnity special costs.

The most significant variation of the trial judge's decision from our perspective was in respect of the disgorgement of a proportionate share of the increase in value of the properties owned by 1537 Holdings Ltd. Madam Justice Saunders held that there was an insufficient connection between the use of the funds to pay off the mortgage and the increase in the values of the properties to warrant a disgorgement of a proportionate share of the increase in the property values. She wrote at paragraphs 37 through 39 as follows:

> [37] In Waters' *Law of Trusts in Canada,* D. Waters et al., 4th ed. (Toronto: Carswell, 2012), Professor Waters states at 527:
>
> > Profits that result from the breach of a fiduciary duty can be disgorged in two ways: (i) imposing a personal debt on the fiduciary, requiring her or him to repay the gain; or (ii) by the imposition of a constructive trust requiring the fiduciary to transfer the gain.
>
> [38] To same effect the Supreme Court of Canada in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at para. 45, discussing the availability of a constructive trust to remedy a wrongful act absent unjust enrichment, set as a condition:
>
> > (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> [39] Here there is no relationship between the payment on the mortgage and acquisition of the property. The amount ordered to be disgorged did not result from the breach of the fiduciary duty through payment of the mortgage. There is, in my respectful view, no basis to require payment of any portion of the appreciation of the real property in the circumstances of this case.

The Court of Appeal thereby reduced the amount Chris Kyle was required to pay. The result was no longer a triple whammy, but a double: he still had to pay compensation for the interest foregone on the joint account, plus disgorgement of the interest his company saved by paying down the mortgage.

IV. Enduring Powers of Attorney

An attorney acting under an enduring power of attorney has substantially similar fiduciary dutes to a trustee, and the bad attorney may face the same remedies for breach of her obligations. Let's start with discussing some of the relevant legislative remedies for breaches of an attorney's fiduciary dutes, followed by a brief disussion of cases, to illustrate a couple of points. *Sommerville v. Sommerville*, 2014 BCSC 1848 demonstrates that the duties of attorneys are not always clearcut, particularly when the attorney is a spouse of the donor, and they share income or assets. Although most of the cases involve donors who have lost capacity—or are alleged to have lost capacity—an attorney exercising an enduring power of attorney may be required to account for her conduct while the donor is or was still capable. This last point is illustrated in the case of *Sull v. Pengelly*, 2019 BCSC 575.

A. Framework

When the *Power of Attorney Act*, RSBC 1996, c. 370 was amended effective September 1, 2011, the amendments set out a supervisory role for the Public Gaurdian and Trustee, which is set out in Part 4, Division 2. The Public Guardian and Trustee does not monitor all powers of attorney, but may investigate when there is a report of abuse, or if the Public Guardian and Trustee has reason to believe there is abuse. Subsections 34 (2) and (3) provide:

> (2) Any person may make a report to the Public Guardian and Trustee if the person has reason to believe that
>
> (a) an adult is, or was at the time, incapable of making, changing or revoking an enduring power of attorney,
>
> (b) fraud, undue pressure or some other form of abuse or neglect is being or was used to induce an adult to make, change or revoke an enduring power of attorney, or
>
> (c) an attorney is
>
> (i) abusing or neglecting the person for whom the attorney is acting,
>
> (ii) incapable of acting as an attorney, or
>
> (iii) otherwise failing to comply with an enduring power of attorney or with the duties of an attorney.
>
> (3) If a person makes a report, the Public Guardian and Trustee must promptly review the report and may do one or more of the following:
>
> (a) conduct an investigation to determine the validity of the report, and, if an investigation is conducted, the Public Guardian and Trustee may advise the person who made the report of the outcome;
>
> (b) apply to the court for an order described in section 36;
>
> (c) advise the person who made the report that the person may apply to the court for an order described in section 36;
>
> (d) make a report under section 46 of the *Adult Guardianship Act*;
>
> (e) take steps under the *Patients Property Act* to become a committee or take steps under the *Adult Guardianship Act* to become a statutory property guardian;
>
> (f) take no action, or take any action that the Public Guardian and Trustee considers necessary.

Section 36 (5) provides:

> (5) On application by the Public Guardian and Trustee or a person who made a report to the Public Guardian and Trustee under section 34, the court may make any order that the court considers necessary, including an order
>
> (a) to confirm a change to, or the revocation of, an enduring power of attorney,
>
> (b) to terminate all or part of an enduring power of attorney, or
>
> (c) that, if the application concerns a matter described in section 34 (2) (a) or (b),
>
> (i) the enduring power of attorney and all actions done under it are void, or

(ii) the enduring power of attorney is terminated, but any action done under it before it was terminated is not void.

Mr. Justice Baird applied section 36 of the *Power of Attorney Act* in *British Columbia (Public Guardian and Trustee) v. Ferrier*, 2017 BCSC 2142, a case involving egregious breaches of fiduciary duties by the attorneys, who were the donor's children. The donor, Marilyn Ferrier, was incapable of managing her affairs. Her children used her funds for various personal expenses, and one of them attempted to access $451,000 of the donor's money to pay off his mortgage. They claimed that their mother had stated to them that she wished to have her funds shared with them. On application by the Public Guardian and Trustee, the court terminated the power of attorney and appointed the Public Guardian and Trustee as Marilyn Ferrier's committee of her person and of her estate.

The wording of subsection 36 (5) implies that if someone other than the Public Guardian and Trustee wishes to make an application under that subsection, she must first report the suspected abuse to the Public Guardian and Trustee.

An alternative approach to dealing with the bad attorney without first making a report under section 34 of the *Power of Attorney Act* to the Public Guaridan and Trustee is to bring an application under the *Patients Property Act,* RSBC 1996, c. 349, to be appointed committee of the donor. (Of course, the Public Guardian and Trustee must be given notice of the applicaton.) When a person is declared incapable of managing herself or her affairs or both under the *Patients Property Act*, then pursuant to section 19 (a) every power of attorney given by that person (the "patient") is terminated, and unless the court otherwise orders, so is every representation agreement. The committee would then have standing to bring claims on behalf of the patient against the attorney who has breached her fiducairy duties.

B. *Sommerville v. Sommerville*

When spouses make powers of attorney, they often appoint each other. It is also common for spouses to pool at least some of their financial resources for their benefit as a couple, even when they keep many of their assets separate. When one spouse loses capacity, the other when acting as attorney may be placed in a conflict of interest by virtue of the fact that the management of the now incapacitated spouse's assets may benefit the capacitated spouse who is the attorney. This issue can and should be addressed in the power of attorney instrument, but is often not.

The attorneys in *Sommerville v. Sommerville*, 2014 BCSC 1848, might perhaps be labelled "bad fiduciaries" for failing to consult with each other and work together, but each had a defensible position, and there is no suggestion that either acted dishonestly or in bad faith. Rather, this case is set out here as an illustration of the difficulty of applying the principle that the attorney must act in the best interest of the donor when the donor and one of the attorneys are spouses who are financially interdependent.

Richard Craig Sommerville (referred to in the decision as "Craig") appointed both his spouse, Isabel Sommerville, and his daughter Janet Sommerville as his attorneys. Either could act separately. His marriage to Isabel was his second marriage, and Janet was his daughter from a previous marriage.

Craig and Isabel Sommerville had a marriage agreement, which provided that each would have his and her separate assets, but the agreement also contemplated that they would have joint assets. Craig Sommerville owned the house they were living in, had larger investments and larger pensions. The agreement initially provided that if Craig Sommerville had to move out of the house because of ill health, Isabel would have to move out after a year, but they amended the agreement so that she would be able to stay in the house. Craig's will provided that Isabel would be able to remain in the house after his death until she remarried or died. He left the residue of his estate to his four children.

Craig Sommerville had arranged for his pensions to go into a joint account with Isabel, who contributed a portion of her pension to the joint account. They used the joint account for their expenses. Craig also had investment income, including RRIFs, most of which was reinvested.

After Craig became ill, Janet Sommerville redirected his pensions into an account in his sole name, in contemplation that he may have to go into a care facility, which he subsequently did following a stroke. She did so without consulting Isabel first. Not surprisingly, Isabel disagreed, and Janet then brought a petition to court to seeking directions.

Janet Sommerville's position was that the pension funds should be used first to pay for her father's personal and care expenses, followed by expenses necessary to preserve the home. Then only to the extent that there is pension income left, the pension income could go into the joint account for Isabel's use. Janet also sought to be mainly responsible for the management of Craig's finances.

Madam Justice Fisher summarized the duties of an attorney as set out in the legislation as follows:

> [39] An attorney's duties are now enunciated in s. 19 of the *Power of Attorney Act*. Section 19 (1) essentially codifies the duties of a fiduciary to act honestly and in good faith, to exercise reasonable care, and to account to the donor, within the authority granted in the power of attorney. Section 19(2) specifies that an attorney making decisions about the donor's financial affairs must act in the donor's best interests, taking into account the donor's "current wishes, known beliefs and values" and any directions contained in the instrument, and s. 19(3) requires an attorney to give priority "to the extent reasonable" to meeting the personal care and health needs of the donor.

Madam Justice Fisher rejected the argument made on Isabel's behalf that an attorney could use the power of attorney for the benefit of the donor's family in a manner analogous to a court-appointed committee. She noted that the ability for an attorney to make gifts as set out in section 20 of the *Power of Attorney Act* is limited.

However, in exercising a power of attorney, you may consider the donor's wishes including making provision for a spouse or other family member. She wrote:

> [45] In my view, s. 19 does not alter the attorney's common law duty to act only for the benefit of the donor. However, the best interests of the donor are not to be considered in a vacuum. His "current wishes, known beliefs and values" may permit the attorney to continue to provide for a spouse or family member if there is clear and convincing evidence of an intention to do so, and it can be done without compromising the donor's interests.

Madam Justice Fisher found on the basis of Craig's conduct in directing the pension income into the joint account, as well as the terms of the marriage agreement and Craig's will, that he wished for Isabel to manage their family finances and he intended to share his pension income for their joint expenses.

At paragraph 72, Madam Justice Fisher issued directions under section 36 (1) of the *Power of Attorney Act* as follows:

1. All of Craig's pension funds should be deposited into a bank account in the joint names of both Isabel and Janet as attorneys for Craig. The funds currently held by Janet as attorney are to be deposited into such an account. The pension funds that are still being deposited into Isabel's joint bank account should be re-directed into this new account.
2. Isabel is to continue to manage Craig's finances and will [be] responsible for running the bank account referred to in (1) and paying for Craig's personal and health care expenses. Janet will be able to monitor the use of the account as a joint attorney.
3. In using the pension funds, Isabel is to give priority to Craig's monthly personal and health care expenses. She may use pension funds that are not required for Craig's personal and health care expenses in her discretion and for her own expenses.
4. While she continues to live in the Lochside residence, Isabel may use Craig's investment income to pay expenses associated with the ownership of the home, which will include property taxes, insurance, utilities, repairs and maintenance. Otherwise, Isabel may not use Craig's investment income for any purpose other than to supplement his personal and health care expenses if this becomes necessary.
5. If Janet has any concerns about how Craig's income is being used, she is to consult with Isabel and is not to take any steps or make any directions without Isabel's concurrence unless she considers it necessary to prevent Craig's assets from being used improperly.

C. *Sull v. Pengelly*

In *Sull v. Pengelly*, 2019 BCSC 575, the plaintiff, Tony Halvinder Sull, advanced a claim on behalf of his late mother's estate, against his step-sister, Bonnie Pengelly, in respect of her handling of their mother's affairs under an enduring power of attorney. Mrs. Pengelly was also their mother's executor, and Mr. Sull brought the claim with the leave of the court.

Their mother, Jeet Kaur Sull, suffered from Parkinson's. Her physical condition, beginning sometime in about 2005 until her death on January 20, 2012, significantly deteriorated. She could not move without assistance by 2010 or 2011, required a wheelchair, and required assistance in bathing and dressing. Her speech was limited to a few words, and she communicated using gestures and facial expressions. She had difficulty swallowing.

Despite her physical deterioration, the court made no finding that she was incapable of making her own financial or legal decisions. She made her will on November 23, 2004, and provided that the residue of her estate would be divided equally among her children.

On September 29, 2010, the deceased transferred her residence into a joint tenancy with Mrs. Pengelly. Mr. Justice Voith held in the decision that Mrs. Pengelly held the house in a resulting trust for her mother's estate.

Although the court found that the deceased was a frugal person, and did not have significant expense needs, about $305,000 was spent using the deceased's credit card and withdrawals from the deceased's accounts, lines of credit and a mortgage during the period of time from August 2008 until her death. Mrs. Pengelly denied that she used the power of attorney and claimed that she had no knowledge or involvement with her mother's finances.

Mr. Justice Voith found that she had in fact used the power of attorney, and had misappropriated about $305,000 from her mother. Following the deceased's death, Mrs. Pengelly transferred her mother's residence into her sole name, sold it, and after paying off the financial encumbrances, received just under $300,000 out of the proceeds.

In reaching the decision, Mr. Justice Voith set out the attorney's duties to account. He wrote at paragraphs 116 and 117 as follows:

> [116] Thus, only the donor/grantor of the authority, or their estate, may apply to have the attorney provide a full accounting of their activities as attorney. By contrast, any person interested in an estate administered by an executor may apply for an order for the executor to pass their accounts: R. 25-13(1)(a) of the *Supreme Court Civil Rules*.
>
> [117] In this case, the Plaintiff properly applied to bring this action on behalf of his mother's estate and he is able to seek a full accounting by Mrs. Pengelly of her activities as attorney.

At paragraph 119, Mr. Justice Voith wrote:

> [119] Thus, the authorities establish that an attorney has the obligation to account for their activities while exercising the power of attorney. Furthermore, simply providing bank and credit card statements is not sufficient for an accounting. The attorney must provide an explanation, with satisfactory evidence, that the funds expended were for the benefit of the grantor. This would include providing specific receipts which has been described as being "the most basic of requirements": *Robillard* at para. 93.

In this case, Mrs. Pengelly's disclosure was significantly inadequate. She failed to produce complete financial records, including records in relation to one of the mortgages.

Mr. Justice Voith summarized the donee's fiduciary duties at paragraphs 128 and 129 as follows:

> [128] Thus, an attorney has a fiduciary duty to act in accordance with the authority granted to the attorney by the donor and to use that power only for the benefit of the donor: s. 19(2) of the *Act*. The scope of the attorney's authority is set out in the power of attorney.
>
> [129] A fiduciary is subject to a broad duty to act in good faith and in the best interests of the person over whom he or she exercises discretion or control. She must fully disclose all information relevant to the trust and confidence placed in her and that she must not reap a personal benefit or use the property or goods that she has discretion or power over: *Ast v. Mikolas*, 2010 BCSC 127 at para. 123; *Sangha (Re)*, 2013 BCSC 1965 at para. 98 and the authorities that are cited; and Mark Ellis, *Fiduciary Duties in Canada,* Vol. 1 (Toronto: Thomson Reuters Canada, 1988) (loose-leaf updated March 2019) at 3A-4.

He further found that Mrs. Pengelly did not have authority to act under the power of attorney, as the wording provided that it "may be exercised during any subsequent mental infirmity on my part," and the deceased was not mentally incapacitated. This aspect of the decision may be open to question, as it is not clear that this was in fact a springing power of attorney. Nevertheless, Mrs. Pengelly would have required her mother's express consent to the use of the power of attorney while she was mentally capable.

Mr. Justice Voith ordered Mrs. Pengelly to pay a little over $188,000 to the plaintiff, plus compound interest, to reflect what he would have received out of the estate under their mother's will.

V. Committeeships

The powers and duties of court-appointed committees and attorneys under enduring powers of attorneys are analogous, but they are not identical. Section 18(1) of the *Patients Property Act* provides that the "committee must exercise the committee's powers for the benefit of the patient and the patient's family, having regard to the nature and value of the property of the patient and the circumstances and needs of the patient and the patient's family." A broader power to benefit the patient's family is most appropriately used for the patient's spouse or minor or other dependent children. The committee would be well advised to consult with the Public Guardian and Trustee before exercising her powers to benefit other family members. In the case of significant transactions for the benefit of other family members, especially if those family members are not financially dependent on the patient, such as the implementation of an estate freeze, it is appropriate to bring an application to court first. See, for examples:

Re Walsh, 2015 BCSC 1992, in which the proposed gift was denied;

British Columbia (Public Trustee) v. Bradley Estate, 2000 BCCA 78, in which the estate freeze was denied; and

O'Hagan v. O'Hagan, 2000 BCCA 79, in which the estate freeze was approved.

The Public Guardian and Trustee has a more direct involvement in monitoring court appointed committees in comparison to attorneys appointed under an enduring power of attorney. The Public Guardian and Trustee's supervisory role in respect of enduring powers of attorney is generally triggered by someone making a report to the Public Guardian and Trustee about concerns that the power of attorney is being abused.

In contrast, section 10(1)(d) of the *Patients Property Act,* RSBC 1996, c. 349 requires a committee to pass the committee's accounts before the Public Guardian and Trustee at such times as the Public Guardian and Trustee directs. The Public Guardian and Trustee will require periodic accountings in which the committee is required to provide information concerning the patient's assets, income and expenses.

If the Public Guardian and Trustee finds abuse, the Public Guardian and Trustee may apply to rescind the appointment of the committee, and seek to be appointed in place. It is also open to another family member or a friend to apply.

In his decision in *British Columbia (Public Guardian and Trustee) v. MacDougall*, 2016 BCSC 457, Mr. Justice Thompson cited *Re Pearce* (1984), 53 B.C.L.R. 222 (C.A.) for the proposition that, although a committee is "not a trustee in the strict sense, he or she is a fiduciary and a trustee in a more general sense…." Accordingly, the principles in *Conroy v. Stokes* are relevant to the analysis. Mr. Justice Thompson wrote at paragraph 19:

> [19] Acknowledging that a committee has been held not to be a trustee in the strict sense, I see applications to remove a trustee and applications to rescind a committee's appointment as closely analogous. In the former case, the focus is on the beneficiaries' welfare; in the latter, it is on the best interests of the patient's estate. Not every mistake or error should result in the rescission of committee's appointment. In my opinion there are sufficient grounds to rescind a committee's appointment if the committee's acts or omissions are (1) shown to endanger the patient's estate; or (2) show a want of honesty or reasonable fidelity or proper capacity to execute the duties of a committee.

Mr. Justice Thompson rescinded the appointment of the committee, Kathleen MacDougall, and appointed the Public Guardian and Trustee in her place. Ms. MacDougall had been ordered when appointed committee to provide an accounting of her handling of $46,000 that she had removed from her husband's investments when acting under an enduring power of attorney. She failed to provide an adequate accounting.

The decision in *Re: Anand*, 2018 BCSC 34 highlights a number of ways in which a committee may fall well short of his fiduciary obligations. In the decision, Mr. Justice Brown did not immediately rescind the committeeship order and appoint the Public Guardian and Trustee as committee, but instead provided the committee with the opportunity to rectify the problems.

David Anand was appointed as committee of the estate of his son, Shane Anand, on June 15, 2010. Shane Anand had been in a car accident when he was 12 and suffered a brain injury. In 2010, the court approved a personal injury settlement for Shane, pursuant to which he received a lump sum of $268,000 and an indexed annuity, which in 2011 Shane was receving about $5,000 monthly. The settlement also provided an in trust award for Shane's parents of $72,000.

Shane continued to live with his parents in the family home. Title was held in the names of his parents.

The Public Guardian and Trustee alleged, and the court found, significant problems in David Anand's handling of his son's funds, including the following:

1. David used Shane's funds to pay household expenses for the family home such as property taxes, utilities and mortgage payments;
2. The mortgage payments included a lump sum payment of $105,000. The total amount that Shane paid toward the mortgage was approximately $243,000;
3. Shane was not given an interest in the title to the family home;
4. David used Shane's funds for signficiant travel expenses, including trips to Fiji, the United States and several trips per year to Edmonton where Shane's sister resided. David used Shane's funds to cover his and his wife's expenses, as well as Shane's for these trips;
5. David gave a gift on behalf of Shane to Shane's sister of $62,000 to pay her wedding expenses;
6. David did not keep proper records and receipts of expenses;
7. David did not get professional investment advice in managing Shane's funds; and
8. David was not responsive to the Public Guardian and Trustee's request for an accounting and for financial information.

David's evidence was that Shane would inherit the home. The expenditures on travel were meant to provide Shane with a better quality of life and assist with his recovery. He had been taking drugs and was suicidal, and the trips had a positive impact on his recovery. The gift for Shane's sister reflected their very close relationship. David acknowledged that his record keeping was inadequate.

Shane gave affidavit evidence that he wanted his father to continue to act as the committee, and he deposed that the trips benefitted his recovery, particularly the trip to Fiji where he bonded with his extended family. Shane wished to become more independent and eventually manage his own affairs. He also stated that his father was involving him with decisions and helping him become more independent.

Mr. Justice Brown found that David had not acted prudently and was critical of David's failure to get professional financial advice and look for the best options in investing Shane's funds. He said that it was not a question of "malafides but of prudence." He was also quite critical of David's failure to provide the information to the Public Guardian and Trustee. He would have removed David as committee, but for the wishes of Shane.

Mr. Justice Brown ordered that David complete a number of steps before he could be confirmed as committee. The steps include:

1. That the parties were to retain a joint expert to determine the value of Shane's interest in the family home, which would reflect his financial contributions, and include $40,000 to be imputed to the wedding gift. Once his equitable interest is determined, then the title would be changed to reflect his interest;
2. David was ordered to pass his accounts, which included an order that the accounts be passed every four months before the Public Guardian and Trustee unless otherwise directed by the Public Guardian and Trustee or the court;
3. David was ordered to retain an accredited bookkeeper to confirm the accounting and prepare the reports;
4. Shane's funds could not be used to pay travel expenses for other family members to travel to Edmonton, and other travel expenses for other family members would have to be approved by the Public Guardian and Trustee; and
5. Shane's contributions to the expenses for the family home would have to be approved by the Public Guardian and Trustee, and after his interest is registered in the title, then his share of utilities, insurance and property taxes would be proportionate to his interest.

Mr. Justice Brown also ordered that if David did not comply with the steps set out in the order, then his appointment as committee would be rescinded.

VI. Conclusion

The overriding duties of trustees of express trusts, attorneys under enduring powers of attorney and committees to act in good faith, competently, and in the best interest of the beneficiaries (or objects), donors and patients respectively are substantially similar. However, the frameworks are different. The duties of trustees are primarily governed by common law equitable principles, with slight legislative modifications. Apart from the Attorney General's role in charitable purpose trusts, there is no public oversight of trustees' conduct. Beneficiaries resort to court to enforce trustee fiduciary duties. In contrast, committees are appointed pursuant to the statute, the *Patients Property Act*, and are overseen by the Public Guardian and Trustee, to whom committees must account periodically. Since the amendments to the *Power of Attorney Act* came into effect in September, 2011, powers of attorney fall somewhere in between. The duties of an attorney are derived from common law of agency and statute. The Public Guardian and Trustee may requre an accounting from an attorney if the donor is incapacitated, and has broad investigative powers, but is generally reliant on reports from others. There is no central power of attorney registry.

The different frameworks have practical implications. If your client is a capacitated adult beneficiary of a trust, and if the bad trustee cannot be pursuaded to change her behaviour, your client's recourse is to sue. The most common remedy is to remove and replace the trustee, but the court may also compensate the beneficiary for loss and disgorge any benefit the trustee has derived from her breach. In the case of subspected abuse of an enduring power of attorney over an incapacitated beneficiary, it may be sufficient to contact the Public Guardian and Trustee and make a report. If your client makes a report she would then have standing to apply to court under section 36 (5) of the *Power of Attorney Act*. Alternatively, if an attorney under an enduring power of attorney is abusing the power of attorney in respect of an incapacitated donor, your client could apply to be appointed a committee, which upon appointment will terminate the power of attorney, and give your client standing to sue to recover any property misappropriated by the attorney. In the case of a court-appointed committee, your client may contact the Public Guardian and Trustee to express her concerns, and could also apply to replace the committee.