

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN THE MATTER OF THE *PATIENTS PROPERTY ACT*
R.S.B.C. 1996 CHAPTER 349 AND AMENDMENTS THERETO

-AND-

IN THE MATTER OF KATHLEEN PALAMAREK, PATIENT
WRITTEN ARGUMENT OF ROBERT AND RALPH PALAMAREK

BACKGROUND AND HISTORY

The Patient and her Relevant Details

1. Kathleen Palamarek (“Kathleen”) is an 88 year-old widow. She is the mother of 4 children 5 grandchildren and 4 great grandchildren.

Affidavit of Kindred and Fortune (Ralph and Robert Palamarek), para 3.
Chambers Record Tab # 18.

Affidavit #8 of Ralph Palamarek, (“Ralph”), Exhibit “H” p 1 and 2
Chambers Record Tab #78.

2. The application of Ralph and Robert is supported by their brother, Ernest Palamarek, (“Ernie”).

Affidavit #1 of Ernie, para 5.
Chambers Record Tab # 24.

3. Kathleen had a long-term marriage to her husband, Wasyl, but during that relationship there was abuse by Wasyl against Kathleen.

Lois Affidavit #1 para 52
Chambers Record Tab # 23.

4. In 1996, during an approximately 4 month separation from her husband due to abuse, Kathleen lived with Lois. Lois did not inform any of her brothers of their mother’s whereabouts. During that time Kathleen suffered a heart attack [stroke?] which Lois did not inform her brothers about.

Affidavit #1 of Lois, para 54

Chambers Record Tab # 23.

5. Kathleen, however, returned to live with Wasyl after some time apart in 1996 and lived with him until his death in 2001.

Affidavit #1 of Lois, para 55-57
Chambers Record Tab # 23.

6. In 1998 Kathleen made a will and power of attorney appointing her sons Ralph Palamarek (“Ralph”) and Ernest Palamarek (“Ernest”) to act as her attorneys under an enduring general Power of Attorney.

Affidavit of Kindred and Fortune para 5
Chambers Record Tab # 17.

7. At the same time she made a will naming Ralph and Ernest as her alternate executors in the event her husband predeceased her. There is no evidence that Kathleen made a subsequent will.

Affidavit of Ralph #8, para 4 and Exhibit A.
Chambers Record Tab # 78.

8. After Kathleen’s husband, Wasyl died in 2001, Robert stayed with Kathleen in her home for two weeks.

Affidavit #2 Robert Palamarek
Chambers Record Tab # 27.

9. Ralph and Donna Palamarek (Ralph’s wife) and Lois Sampson and her husband, Gil Sampson (“Gil”) alternated weeks’ staying with Kathleen. In January 2002 Donna and Ralph moved into to the basement suite in Kathleen’s home to provide companionship and care and assistance to her.

Affidavit # 2 of Ralph, para 7
Chambers Record Tab # 27.

Affidavit of Lois #1 para 57
Chambers Record Tab # 24.

Affidavit #1 of Donna para 6
Chambers Record Tab # 25.

10. Ernest has continuing health problems and has been unable to participate in the care of Kathleen.

Affidavit #1 of Ernie, para 3

Chambers Record Tab #24.

11. The decline in Kathleen's memory became more noticeable in 2004 and her ability to continue to manager her affairs was noticeably in decline and in 2004 Ralph began to provide more assistance to Kathleen in dealing with her financial affairs.

Affidavit # 2 of Ralph Para 9-10 p. 3
Chambers Record Tab # 27.

12. In 2005 Kathleen was assessed by the Vancouver Island Health Authority ("VIHA") and by Dr. Arthur Prowse, a geriatric psychiatrist because Ralph and Donna had noticed significant changes in Kathleen ability to do things for herself and increasing isolation.

Affidavit #2 of Ralph para 10-11 and paras 29, 30(c)
Chambers Record Tab # 27.

13. Throughout 2005 and 2006 Donna was increasingly called upon to attend to Kathleen's personal needs not only preparing meals and cleaning but also attending to personal hygiene, assisting Kathleen with changing her clothes and ensuring she took her medications as scheduled.

Affidavit #1of Donna para 7
Chambers Record Tab # 25.

14. By the fall of 2006, Ralph began using the power of attorney to handle Kathleen's finances as Kathleen was no longer able to handle her financial affairs.

Affidavit # 2 of Ralph para 12
Chambers Record Tab # 27.

15. In the fall of 2006 Kathleen's condition had deteriorated to the point where Kathleen expressed a wish to go into a senior's home.

Affidavit # 2 of Ralph para 13 and para 30(d)
Chambers Record Tab # 27.

16. During the fall of 2006, Ralph assisted Kathleen to visit and inspect care facilities and Kathleen chose Broadmead as the place she wanted to be.

Affidavit # 2 of Ralph para 14
Chambers Record Tab # 27.

Affidavit #1of Donna para 8
Chambers Record Tab # 25.

17. During this time Ralph communicated with his brothers Robert and Ernie as well as with Lois to advise them of what was occurring and advised them of Kathleen's choice of Broadmead as the care home she wanted to live at.

Affidavit # 2 of Ralph para 30(e) and
Chambers Record Tab # 27.

Affidavit of Ralph #8 paras 5 & 6.
Chambers Record Tab #78.

18. In November 2006 Kathleen suffered a heart attack and fell injuring her spine. She was hospitalized at the Saanich Peninsula Hospital. She remained in Saanich Peninsula Hospital until August 2007.

Affidavit #2 of Ralph
Chambers Record Tab # 27.

19. While she was at the Saanich Peninsula Hospital Kathleen, on December 12, 2006, on the advice of Dr. Prowse that it would be advisable to have a representation agreement, Kathleen appointed Ralph as her representative, and appointed Ernest, as monitor in a representation agreement made pursuant to section 7 of the Representation Agreement Act.

Affidavit of Ralph #2 para 16.
Chambers Record Tab # 27.

20. Except for a three-day period from October 28 to October 30, 2007, when Kathleen had been taken from Broadmead by Lois, Mrs. Palamarek has continuously resided in Broadmead.

Affidavits Ralph #8 para 23
Chambers Record Tab # 78.

Removal from Lodge

21. On October 28, 2008, without any prior consultation with Ralph, Robert or Ernie, and without any advance notice to Broadmead Lodge, Kathleen was removed from Broadmead by Lois purporting to act under a new representation agreement made by Kathleen on October 27, 2008. Broadmead Lodge's Chief Executive Officer was provided with a hand delivered copy of the new representation Agreement on October 28, 2008, at a time when the removal of Kathleen was already under way.

Affidavit # 1 of David Wayne Cheperdak para 3 and Exhibit A, pg 4.
Chambers Record Tab # 61.

22. When Kathleen was removed from Broadmead, Lois' husband, Gil Sampson "Gil" was asked by David Cheperdak to meet with staff at Broadmead to discuss

Kathleen's medications and care needs. Gil declined the offer.

Affidavit # 1 of David Wayne Cheperdak, para 7
Chambers Record Tab # 61

23. On October 28, 2008, Ralph requested that Lois provide him with the names of the health care providers Lois had arranged for Kathleen and Lois declined to provide this information.

Affidavit # 4 of Ralph, Exhibit "A"
Chambers Record Tab # 38.

24. On October 30, a Medical Certificate was signed pursuant to section 22 of the Mental Health Act by Dr. Dale Nicoll, Mrs. Palamarek's regular physician since moving to Broadmead in August 2007 authorizing Kathleen's involuntary admission to hospital.

Affidavit of Lois #3 Exhibit "N" pg 24
Chambers Record Tab 42.

25. On October 31, 2008, Kathleen was taken from Lois' apartment in Victoria to the Victoria General Hospital by persons appointed by Vancouver Island Health Association for this purpose.

Affidavit of Fiona Sudbury #3 Ex A p. 1
Chambers Record Tab # 44.

26. On October 31, 2008, Kathleen was later returned to Broadmead under a Leave Authorization.

Affidavit of Fiona Sudbury #3 Ex A p. 1(4)
Chambers Record Tab # 44.

27. On her return to Broadmead, Kathleen said that it was good to be back home again.

Affidavit # 3 of Fiona Sudbury, p. 3 and Ex B, p.7
Chambers Record Tab # 44.

28. Up to this date Kathleen continues to reside at Broadmead.

Kathleen's Health

29. Kathleen has been diagnosed as suffering from various medical conditions. While perhaps all her diagnosed conditions play a part in limiting her abilities, those which are most relevant to this proceeding are the conditions described by Dr. Prowse and Dr. Trottershaw in their respective affidavits as mixed dementia of Alzheimer's and vascular types.

Affidavit # 1 of Dr. T. Trottershaw #1 – Para 4
Chambers Record Tab # 19.

Affidavit # 1 of Dr. Arthur Prowse #1 Para 4
Chambers Record Tab # 20.

30. The diagnosis of mixed dementia of Alzheimer's and vascular types has been confirmed by a number of physicians including Dr. David Leishman, a geriatric psychiatrist, Dr. Dale Nicoll, a general practitioner, Dr. Thomas Perry a specialist in General Internal Medicine and Clinical Pharmacology, who examined Kathleen at the request of Lois.

Refer to their respective Affidavits.

31. Another physician who examined Kathleen at the request of Lois was Dr. Janet Kushner- Kow, a specialist in Internal Medicine who has experience in geriatric assessments. She deposed in her affidavit that she believed that Mrs. Palamarek's primary cause of dementia was most likely vascular, but she admitted Kathleen may have Alzheimer's pathology.

32. Kathleen in additions has suffered from strokes, though none of them is recent; she has heart disease and has suffered heart attacks and has other health conditions.

Affidavit # 1 of Kushner Kow, pages 4&5
Chambers Record Tab # 63.

The Legal Proceedings

33. There are two proceedings both under the Patient's Property Act (the "Act") relating to Kathleen Palamarek.

34. The first proceeding, Action # 07 3415 was brought by Ralph and Robert Kenneth Palamarek ("Bob"), the oldest of the sons of Kathleen Palamarek ("Kathleen"). This action was commenced on August 24, 2007.

Chambers Record Tab #1.

35. A second proceeding, Action # No. 08 0327 was brought by Lois Sampson "Lois" daughter of Kathleen and sister of Ralph and Robert on the 23rd day of January, 2008.

Chambers Record Tab #3.

36. Lois was served with the first petition and supporting materials on September 5, 2007.

Ralph Affidavit #2, Para 34

Chambers Record Tab #27.

37. Each of Ralph and Robert on the one hand and Lois on the other hand seek orders that they be appointed committee of the person of Kathleen.
38. On November 19, 2008, Kathleen was declared incapable of managing herself and her affairs by an order of Mr. Justice Johnson. Ralph was appointed as committee of Kathleen's person and estate, on an interim basis, pending a final hearing.

Chambers Record Tab #7.

39. On October 6, 2008, orders were made for the production of records from Broadmead Lodge.

On July 16, 2009 on an application by Lois, Madam Justice Dorgan ordered that Kathleen be examined by certain persons including two physicians and an occupational therapist.

40. On May 13, 2010, Madam Justice Dorgan refused an application by Lois for:
 - i. an accounting from Ralph as Interim Committee and further disclosure of the financial affairs of Kathleen
 - ii. an order for production of additional records by Broadmead;

She also ordered that the reports she ordered to be provided by her order of July 2009 be delivered not later than 309 days from the date of the hearing.

41. On October 21, 2010, Mr. Justice Metzger refused an application by Lois Simpson for:
 - i. an order that Lois Sampson be at liberty to deliver and file by or before November 12, 2010, a further and final affidavit and limited only to response to the allegations and evidence in the affidavits filed on October 15, 2010.
 - ii. an order that the Interim Committee, Ralph Palamarek obtain a copy of the Patient's complete file at Broadmead Lodge from January 1, 2010 to October 21, 2010 and that he then deliver those documents to counsel for Lois Sampson forthwith and in any event, but no later than October 29, 2010 is dismissed.
 - iii. for an order that upon receipt of the said records that Lois Sampson be at liberty to have the patient, Kathleen Palamarek, assessed by either or both of Dr. Janet Kushner-Kow or Thomas L. Perry with the Interim Committee to make such arrangements as may be necessary to accommodate any in-person

assessment by one or both, of the said doctors with the present care residence is dismissed.

- iv. for an order that the Affidavit #3 of Dr. David Leishman be removed from the Court file forthwith and replaced with an amended version of the affidavit with paragraphs 19 and 20 and Exhibit 1 removed therefrom and that the said amended affidavit be delivered and filed not later than October 29, 2010; and
- v. for an Order that the committee disclose to Lois Sampson forthwith the accounts provided to the Public Guardian and Trustee together with any correspondence received from or sent to the Public Guardian and Trustee before with or after and in regard to those accounts.

Current Position

- 42. No appeal has been made from the Order of Mr. Justice Johnson that Kathleen is not capable of managing herself or her affairs.
- 43. There is no application before the court to set aside the foregoing order.
- 44. It appears to be common ground that Kathleen is incapable of managing herself and her affairs.

Issues

- 45. The main issue to be resolved in both proceedings is the determination of who should be committee of the person and estate of Kathleen on a permanent basis.
- 46. The Court should also consider what conditions and limitations, if any, are to be included in the Order, with respect to the power of the Committee to dispose of property as the main assets of Kathleen is her home which is referred to in the Affidavit of Kindred and Fortune and whether there be a bond.
- 47. Finally the court should consider the issue of costs.

Position of Ralph and Robert Palamarek

- 48. Ralph and Robert are seeking an order that the interim appointment of Ralph be continued and made final and that Robert be added as Co-Committee with Ralph of the person and estate of Kathleen.
- 49. Ralph and Robert are seeking costs of the proceedings against Lois in favour of the estate of Kathleen and that their costs be paid out of the estate of Kathleen on a solicitor-client basis.
- 50. Ralph and Robert oppose the relief sought by Lois.

51. The position of Ralph and Robert is that it is in the best interests of Kathleen that she continue to remain at Broadmead where she is cared for around the clock by competent professionals, who attend to her medical and dietary needs, who ensure she has access to and socializes with other seniors and more importantly where all her family have access to and can visit her.

52. Ralph and Robert are seeking costs against Lois.

Approaches to Care of Kathleen

A. Ralph and Robert

53. Ralph and Robert plan to continue to have Kathleen live and be cared for at Broadmead, where she has now resided for more than 3 years.

54. They have a number of reasons for this:

- i. Kathleen chose Broadmead as her preferred care facility at a time when she was far less incapable of making informed decisions for herself;
- ii. They say that Kathleen is happy at the Lodge and feels that it is her home;
- iii. During the past three years, while Kathleen has had some health issues, including urinary tract infections, rectal prolapse and some minor ailments, she has avoided any major issues including heart attacks, strokes and other more dangerous life threatening conditions, it is their position that Kathleen's health care needs are well attended to at Broadmead;
- iv. Kathleen has integrated into the Lodge and participates in social gatherings and activities at the Lodge.
- v. Kathleen's family remain important to her and Kathleen can be visited at the Lodge by all her children and her grandchildren and great grandchildren so this contact with her family is maintained.

55. Kathleen requires significant care. She has need for medications that manage not only her heart condition but also to protect her against stroke and her other conditions.

56. Kathleen must be given supervision and attention and requires a safe environment to ensure she is not put at further risk of falling and doing herself injury.

B. Lois

57. Lois says Kathleen hates the Lodge and wants to live with her.

58. Lois believes that Kathleen does not require the type of care provided by the Lodge and can be quote adequately and indeed be provided better care in her home.
59. Lois believes that Kathleen's doctors are providing medication that is damaging to Kathleen's health and that these medications are contributing to Kathleen's incapacity.
60. Lois does not say that Kathleen will never require a facility like Broadmead but her position is that such a facility is unnecessary now as her mother is capable of doing much more than she is given credit for.
61. Lois' plan would be to remove Kathleen from the Lodge and to care for her at her apartment. Lois would change Kathleen's physicians.

Lois' Care Plan - Affidavit #8.
Chambers Record Tab # 73.

62. Lois says she would ensure all family members had access to Kathleen.

Evidence – Kathleen's Wishes

A. Kathleen Wants to Leave Lodge

63. The parties positions relating to Kathleen's wishes are diametrically opposite. Lois and Carol Pickup, an advocate chosen by Lois depose that Kathleen constantly expressed a desire to leave the Lodge.
64. In her affidavit #2, sworn July 24, 2008 Lois states that Kathleen "has increasingly been voicing concerns about where she lives and complaining about matters at the Lodge at Broadmead".

Affidavit #2 of Fiona Sudbury, para 3.
Chambers Record Tab # 29.

65. The period referred to in Lois' affidavit 2 coincides with a period during which Kathleen was suffering from delusions. Fiona Sudbury in her affidavit #4 sworn June 29, 2009 says that:

"in May of 2008 Kathleen began suffering psychiatric symptoms and suspiciousness and paranoid ideation, sometimes of a sexual nature, expressions of anxiety, fear and agitation and difficulty sleeping.."

Affidavit #4 of Fiona Sudbury, para 4
Chambers Record Tab # 51.

66. Lois repeats these statements in her affidavit #3 sworn November 10, 2008. It was

during this period that Carol Pickup and John Jordan a solicitor who represented himself as acting for Kathleen visited Kathleen.

Affidavit # 3 of Lois Affidavit para 3 - 6
Chambers Record Tab # 42.

67. Carol Pickup deposes that she was initially contacted by Lois in May of 2008.

Affidavit # 1 of Carol Pickup para 5
Chambers Record Tab # 28.

68. From May to July 2008 she had 4 meetings with Kathleen three of which were meetings at with Lois was present. It was during the fourth meeting with Kathleen that Ms. Pickup refers to a conversation relating to Kathleen's desire to no loner live at the Lodge.

Affidavit # 1 of Carol Pickup para 10.
Chambers Record Tab # 28.

69. In her affidavit #2, Ms. Pickup says: "I can advise the Court that since July to say, on numerous occasions, that she does not want to live at the Lodge any more.

Affidavit #2 of Carol Pickup Para 6
Chambers Record Tab # 33.

70. Lyne England, also a nurse who has had considerable contact with Lois deposed that Kathleen said to her that "She told me that she feels she always has to watch what she does. She said she did not feel relaxed there and worries offending staff members. She also said "I don't understand why I cannot go to my own home" or words to that effect.

Affidavit #1 of Lyne England para 13.
Chambers Record Tab # 41.

B. Kathleen Content with Lodge

71. In response to Lois' affidavit #2, Ralph deposes that his mother told him that she does not want to live with Lois and is perfectly happy with the Lodge.

Affidavit #2 of Ralph para 17
Chambers Record Tab # 27.

72. Ernest Palamarek says Kathleen has expressed to him "numerous times that she is content and wishes to stay at [the Lodge.]

Affidavit #2 of Ernest

Chambers Record Tab # 74.

73. Robert Palamarek says that Kathleen “told him she liked the Lodge and wanted to stay there.”

Affidavit # 2 of Robert para 17.
Chambers Record Tab # 26.

74. On June 29, 2009 Fiona Sudbury states that Kathleen “used to occasionally state she would prefer to live in her own home but nothing has been documented like this in the records for months”.

Affidavit #4 of Fiona Sudbury, para 10
Chambers Record Tab # 51.

75. Dr Leishman who has treated Mrs. Palamarek since her admission to the Lodge says that with respect to Kathleen’s desire to leave the Lodge: “She has never made such a suggestion to me. On the contrary Ms. Palamarek has consistently expressed satisfaction with the Lodge at Broadmead and the care she is receiving.

Affidavit # 3 of Dr. David Leishman, para 22.
Chambers Record Tab # 77.

Analysis of Evidence

76. It is likely that Kathleen expressed a wish to return home and live there instead of living at the Lodge.

77. There is no suggestion made by Lois in her first affidavit that Kathleen was not content at the Lodge. In the affidavit sworn by Lois on January 18, 2008, some five months after Kathleen took up residence at Broadmead, Lois concludes with the remarks “I think my mother sufficiently enjoys the Lodge that I am entirely comfortable with her staying there. I think it is an appropriate facility that meets her needs.”

Affidavit #1 of Lois, para 11.
Chambers Record Tab # 23.

78. Lois only started making comments about her mother’s wishes to leave Broadmead Lodge during the time when Kathleen was expressing delusional thoughts and had suggested the Lodge was operating a prostitution ring and that she had been raped. The statements also coincided with a period when Lois was herself becoming increasingly assertive about her mother’s care and her medications.

79. At that point in time, Lois solicited the involvement of Carol Pickup who advocated on Lois’ behalf. In none of her affidavits does Carol Pickup ever refer to any

conversations or communications with Ralph or Robert Palamarek.

80. In none of her affidavits does Carol Pickup refer to any conversations with any of Dr. Leishman or Dr. Nicoll or any of Kathleen's health care providers concerning Kathleen's desire to leave Broadmead.
81. Carol Pickup's statements are not balanced she makes no effort to determine what the opinions of any of the family member are or what the opinions of Kathleen's care givers at the Lodge are. She made up her mind about what Kathleen wanted and failed to obtain the information necessary to determine whether this was in Kathleen's best interests or whether Kathleen could properly express her views on these matters.
82. Lyne England does not say that Kathleen expressed a wish to leave the Lodge, rather what Kathleen said to Lyne is that she could not understand why she was not living at home. Despite having had continuing contact with Kathleen apparently from the time Kathleen was at Saanich Peninsula Hospital, Lyne does not mention on any occasion where Kathleen expressed a wish to leave the Lodge or to live with Lois.
83. Even if Kathleen had expressed a wish to leave the Lodge, Kathleen was at some times delusional. During that period it would not have been wise to take her remarks as indicating her true feelings. She was obviously affected by her delusions of having been raped and the Lodge's alleged operation of a prostitute ring.
84. Dr. Leishman has stated that Kathleen is not capable of making a decision as to her health care and personal needs.

Affidavit # 1 of Dr. David Leishman, para 5.
Chambers Record Tab # 31.

85. Dr. Trottershaw deposed in August of 2007 that Mrs. Palamarek was unable to make decisions about where she should be living and to make informed health care decisions."

Affidavit #1 of Dr. T. Trottershaw, para 7
Chambers Record Tab # 19.

86. Dr. Prowse deposed in August of 2007 that Mrs. Palamarek was unable (i) to make decisions about where she should be living, (ii) to make informed health care decisions and (iii) to make decisions that would ensure her own safety.

Affidavit #1 of Dr. Arthur Prowse, para 8
Chambers Record Tab # 20.

87. The views of the physicians should be trusted on this point. They have the experience to determine whether Kathleen was in a position to make a judgment.

Carol Pickup, Lois and to a lesser extent Lyne England do not have the training necessary to make a judgment about Kathleen's mental state.

Medical Treatment

88. Lois initially questioned the extent to which Kathleen was suffering impairment of her mental functions. In her initial affidavit she requested an examination by a geriatric specialist.

Affidavit #1 of Lois, para 49.
Chambers Record Tab # 23.

89. Lois does not say anything in this regard again until her affidavit #5 sworn in July of 2009. In that affidavit Lois says ... I am concerned that my mother is not receiving the most appropriate care that she requires. She then states that the opinion of independent physicians and other professionals, in respect of Kathleen's care needs is important in determining who should be the most appropriate committee or committees.

Affidavit #5 of Lois, para 14 and 15
Chambers Record Tab # 52.

90. In July 2008, on Lois' application Madam Justice Dorgan ordered certain examinations of Kathleen be carried out with a view to having those examinations completed and the hearing of this matter to be set for October 13, 2009, preemptory on Ms. Sampson.

Chambers Record Tab # 12.

91. The reports eventually were filed in June of 2010 after Madam Justice Dorgan made an order on May 13, 2010 requiring that they be produced within 30 days of that date.

Chambers Record Tab # 14.

92. The medical reports of Dr. Kushner-Kow and Dr. Perry, both of whom are internists and Dr. Perry is as well a specialist in Clinical Pharmacology. Dr. Perry does have experience with elderly patients and Dr. Kushner-Kow has a sub-specialty in geriatrics. Their respective affidavits contain a review of the medication prescribed for Kathleen and they do offer some suggestions and criticism.

Affidavit #2 of Dr. Perry Para 1, also Exhibit "A", page 4 "Qualifications"
Chambers Record Tab # 59.

Affidavit #1 of Dr. Kushner Kow, para also Exhibit "A" first paragraph. p 4
Chambers Record Tab # 63.

93. Affidavit #1 of Dr. Perry in general comments on visiting restrictions and is not directed at assisting in resolving the main question. The report of Dr. Perry contained in his second affidavit
94. The facts as assumed by Dr. Perry contain information which in part is hearsay and is not admissible. It should also be pointed out that Dr. Perry had contact not only with Lois' then solicitor Irene Faulkner which is referred to in his assessment but also with John Jordan, the solicitor then purporting to act on behalf of Kathleen and Carol Pickup. He also visited with Lois and Gil Sampson at their apartment, where Lyne England was also present.

Affidavit #2 of Dr. Thomas Perry, Exhibit A page 16
Chambers Record Tab # 59.

95. Dr. Perry makes no reference to any contact or communications with Dr. Nicoll or Dr. Leishman, his only point of reference in relation to Kathleen's health care being the records at Broadmead Lodge to which he was given full access by Fiona Sudbury, the Lodge's director of nursing.

Affidavit #2 of Dr. Thomas Perry, Exhibit A page 15
Chambers Record Tab # 59.

96. Dr. Perry's general assessment is what Kathleen suffers from what he described as

“significant dementia, but her intellectual function appears adequate for her present environment where she is supported in such a way as to require little initiative to meet her daily needs and to avoid falls, burns, cold exposure, malnutrition or intoxication from alcohol, prescription or over the counter drugs or other dangers that confront the elderly. Some of her intellectual limitations are of no functional importance to her, in an appropriately supportive environment.”

Affidavit #2 of Dr. Thomas Perry, Exhibit A page 18
Chambers Record Tab # 59.

97. Dr. Perry summarizes his examination as follows:

“In sum, Mrs. Palamarek, is a very elderly woman with advanced atherosclerosis and significant cognitive impairment and short term memory loss (dementia). She may also have underlying congestive heart failure, but if so, this is compensated by a low dose diuretic (furosemide) and ramipril. Because of her buttock claudication and angina pectoris, any degree of congestive heart failure (CHF) is relatively insignificant to her presently, in comparison with the other limitations on her physical activity imposed by angina pectoris and buttock claudication, and the limits on her social function imposed by

dementia and its consequences.

Affidavit #2 of Dr. Perry, Exhibit A page 20
Chambers Record Tab # 59.

98. Dr. Perry offers, as does Dr. Kushner Kow comments on various medications and questions the need for some Fenatnyl, now discontinued.

Affidavit #2 of Dr. Perry, Exhibit A pages 20-21
Chambers Record Tab # 59.

Affidavit #1 of Dr. Kushner-Kow, Exhibit "A" para 9 p.6
Chambers Record Tab # 63.

Affidavit #3 of Dr. Leishman para16.
Chambers Record Tab # 77.

99. With regard to antipsychotic drugs which were first prescribed for Kathleen while she was in the Saanich Peninsula Hospital, Dr. Kushner-Kow says

"I found no evidence of depression on my visit, however, SSRI's can be used to prevent BPSD and as such I cannot comment on whether it may be preventing other symptoms.

Affidavit #1 of Kushner-Kow Exhibit "A" para 7 page 6
Chambers Record Tab # 63.

100. Dr. Perry refers to the fact that antipsychotic drugs are widely prescribed for sedation of patients with dementia. He goes no to say this practice is discouraged because the use of such drugs in patients with dementia is associated with increased mortality.

Affidavit #2 of Dr. Perry, Exhibit "A" page 38 q #1
Chambers Record Tab # 59.

101. Mr. Tisdell in his affidavit makes a number of statements about the use of antipsychotics.

"Mrs. Palamarek is a member of a class of patients who have been found to be at increased risk of death from antipsychotic medications."

"Geriatric patients receiving antipsychotic drugs for dementia are at a very high risk of death.

Affidavit #1 of Ron Tisdell, para 32 and para 34
Chambers Record Tab # 72.

102. He concludes that

Mrs. Palamarek's physicians knew, or should have known that their decision to administer antipsychotic medications to Mrs. Palamarek would significantly increase the probability of her early death because warnings are published in peer reviewed medical and scientific literature and is readily available in the prescribing information and scientific warnings carried in the Compendium of Pharmaceuticals and Specialties (CPS).

Tisdell Affidavit #1 para 38
Chambers Record Tab # 72.

103. Dr. Leishman addressed the use of antipsychotic drugs and noted that Dr. Tisdell had not contacted him as to the reasons why antipsychotics were prescribed for Kathleen.

Affidavit #3 of Dr. Leishman, para7.
Chambers Record Tab # 77.

104. Dr. Leishman addressed the use of antipsychotics in paragraphs 8 and 9 of his affidavit he says:

I wish to state firstly that the only reason any medication was prescribed by me for Mrs. Palamarek was to treat symptoms of distress, anxiety and delusions from which Mrs. Palamarek was suffering. Initially different drug therapies were used to treat Mrs. Palamarek's delusions, anxiety and aggravation. Some medications had been prescribed while she was at Saanich Peninsula Hospital and some had been prescribed before that time. Ultimately, I prescribed Olazapine for Mrs. Palamarek because other medications which had been prescribed were not producing the desired benefit for her. After prescribing Olazapine, Mrs. Palamarek's symptoms of agitation, anxiety and her delusions of having been sexually violated diminished.

The effects of the anti-psychotic medications prescribed were monitored and the nursing staff at Broadmead Lodge were instructed to look for certain symptoms that were associated with the use of the medications prescribed including parkinsonian like tremors. Mrs. Palamarek has developed those tremors prior to becoming a resident at Broadmead. That condition has not materially worsened and does not materially impair her control of her hands.

Affidavit #3 of Dr. David Leishman, para 8 and 9

Chambers Record Tab # 77.

105. The overall impression created by the Affidavits of Dr. Perry and Dr. Kushner-Kow while containing some questions about the efficacy of some medications and suggesting reductions of some, and the elimination of others, with possible substitutes for some medications, is not generally indicative that Kathleen was or is being unnecessarily medicated.
106. Mr. Tisdell's affidavit was designed to leave the impression that Kathleen is systematically over medicated and that her physicians are endangering her life and indeed are creating or at a minimum contributing to the effects of her dementia.
107. It should be pointed out that Mr. Tisdell did not testing of Mrs. Palamarek for any toxicity. He reviewed records up to September 2008, thought these are not enumerated in detail so it is impossible to determine if they were complete.
108. Mr. Tisdell's opinions and conclusions says Kathleen is unnecessarily impaired by her medication, that she is subjected to repeated risk of injury and potentially fatal consequences because of the actions of all her health care providers and legal representatives in ignoring prescribing guidelines.

Affidavit #1 of Ron Tisdell, para 75 et seq.
Chambers Record Tab # 72.

108. Lastly Mr. Tisdell visited Kathleen in March 2009 but his affidavit was not produces until October 2010. It is difficult to understand the purpose of producing an affidavit more 18 months after the examination when it contained what could only be considered to be dire warnings and substantial criticism of not only Kathleen's physicians, but also of her care givers, the nursing staff at Broadmead and her pharmacists. It is submitted that this reflects a lack of judgment and demonstrates irresponsible conduct.
109. Neither Dr. Kushner Kow nor Dr. Perry, both of whom were engaged by and paid for by Lois suggested that the medications prescribed by Dr. Leishman or by Dr. Nicoll were causing serious harm to Kathleen.
110. It might well be that had there been better communication with Dr. Nicoll and Dr. Leishman that a better and more effective review of her mediations might well have been conducted earlier.
111. It should be said, however, while Dr. Perry's affidavit #2, was sworn in January of 2010, it was not produces until June of 2010 after its production was ordered by Madam Justice Dorgan. No explanation has been provided by Lois as to why its production was delayed particularly as it did contain information which might have been useful to Kathleen's health care providers including her physicians and may have led to an earlier withdrawal of fentanyl and an earlier re-evaluation of the

dosage in anti-psychotics. It should be pointed out, however, that the latter remain prescribed for Kathleen as she had a recurrence of psychotic symptoms in September 2010.

Affidavit #3 of Dr. David Leishman para 10.
Chambers Record Tab # 77.

112. Lastly, the court should consider that Dr. Perry, who was engaged by Lois, and who was led by Lois' counsel to address a number of issues leaves the overall impression that Kathleen has not been medically mistreated nor has she suffered significantly as a result of the medications prescribed for her. In his comments he remarks that Kathleen appeared approximately 10 years younger than her chronological age of 87.

Affidavit #2 of Dr. Perry, Exhibit "A" p 12 (under heading "Detailed Physical Examination, including walking")
Chambers Record Tab # 59.

113. Dr. Kushner Kow, states that subject to certain caveats Kathleen's medication regime should be continued.

Affidavit #1 of Kushner-Kow para 21
Chambers Record Tab # 63.

Care at the Lodge

114. The other battle-ground separating Lois and her brothers is the appropriate place for Kathleen to reside. Expressions of Kathleen's intentions aside, it should be pointed out that none of the physicians who examined or visited Kathleen have indicated that the Lodge does not provide good care for Kathleen.

115. Lois clearly wants to remove Kathleen from the Lodge, her brothers do not wish to see this.

116. Through out Lois Affidavits there are criticisms of the Lodge and the physicians and care-givers attending Kathleen as well as the restrictions placed on her.

Affidavit #8 of Lois, paras 57 through 59
Chambers Record Tab # 73.

118. Ralph and his brothers present a different picture of the Lodge which they see as a place where Kathleen is safe and gets excellent care and where other benefits including social interaction as well as accessibility to her family are maintained.

Ralph Affidavit #8 para 21, 23 and 24.
Chambers Record Tab # 78.

119. Both Dr. Perry and Dr Kushner-Kow have stated that Kathleen can be cared for in terms of her medical needs in a home setting.

Affidavit #1 of Dr. Kushner-Kow, Exhibit “A”, para 22 and 23.
Chambers Record Tab # 63.

120. Dr. Perry does provide a caution:

... it is reasonable to expect that Mrs. Palamarek’s condition will deteriorate. Gradually perhaps abruptly as she continues to age. – unless death intervenes. Even though many of her needs are currently intermittent, I consider over the longer term (weeks, months or years) she would almost certainly require the capacity for some caregiver (family friends or paid attendants) to attend to her needs around the clock....

Affidavit #2 of Dr. Thomas Perry, Exhibit A page 25.
Chambers Record Tab # 59.

121. Dr. Leishman’s view remains that Kathleen has been well cared for at the Lodge and that the care she receives there has contributed to her health stabilizing

Affidavit #3 of Dr. David Leishman para 6
Chambers Record Tab # 77.

Appropriateness of Applicants for Committee

122. There is little evidence criticizing of Ralph and whether he is appropriate as a committee. Lois’ criticism relates to whether he is paying rent and in relation to other financial matters which Lois feels she has not been provided.

Affidavit #2 of Lois para 71-74.
Chambers Record Tab # 29.

123. Similar comments are made in Lois’ Affidavit #7 at paras 6- 10 inclusive

Affidavit #7 of Lois paras 6-10
Chambers Record Tab # 60.

124. Lois criticized Robert being a committee in part because he lives in St. Albert, Alberta and because she alleges he is in a conflict because he has a loan outstanding to Kathleen.

Affidavit # 2 of Lois para 80.
Chambers Record Tab # 29.

R&R Book of Authorities, Tab 4

125. Robert gave a full response to Lois admitting that the was at that time a balance remaining owing by him to Kathleen of \$12,413.78

Affidavit #2 of Robert, para 27
Chambers Record Tab # 26.

126. While a conflict of interest may be a factor to consider the conflict must raise a serious concern that calls into question her honesty or loyalty to the patient.

127. Lois also objects to Robert because he is not living in Victoria.

128. Lois position is essentially that only she can provide what is best for her mother. Which is to be cared for at Lois' home.

129. With respect to Lois and her suitability, however, there are sharp differences between her view and those of her brothers.

130. All three of Lois' brothers comment negatively on Lois' behaviour Robert describes Lois as a difficult person and he refers to her erratic behaviour and what he refers to as "violence by her against him"

Affidavit #2 of Robert, para 10.
Chambers Record Tab # 26.

131. Ernie refers to Lois' hostile verbal behaviour.

Affidavit #1 of Ernie, para 25
Chambers Record Tab #24.

132. Ralph deposes that Lois relationship wit Kathleen has been sporadic during the 6 year prior to 2008. He says that Lois' has problems controlling her anger.

Affidavit # 2 of Ralph Para 21
Chambers Record Tab # 27.

133. There are other assertions that indicate the depth of the breakdown in relations between Lois on the one hand and her brothers on the other. Indeed Lois has commenced an action against all of her brothers

See Supplemental Material
R&R Book of Authorities, Tab7

134. Fiona Sudbury also refers to Lois' behavior as creating problems with Kathleen's care. She says that Lois does not respect the views of the staff at the Lodge and does not engage in any meaningful dialogue.

“Lois often takes a very angry and confrontational approach when dealing with the staff.”

Affidavit #1 of Fiona Sudbury, para 9
Chambers Record Tab # 29.

135. Ralph deposes too that he is concerned with Lois being able to accept advice from and follow instructions from care givers.

Ralph Affidavit #2, para 22
Chambers Record Tab # 27.

136. The actions taken by Lois in making a decision to remove Kathleen from the Lodge and the manner in which that was done, not only without consultation with any of her brothers, without any communication with the Lodge relating to Kathleen's needs; without any communication with her physicians relating to the provision of medications. Is indicative of the way in which Lois will act.

137. There is also a marked difference between the descriptions of Lois and Ralph when describing Lois' relationship with her mother.

138. Lois describes her relationship with Kathleen as being very close, almost in idyllic terms as if they never had any differences.

Affidavit #1 of Lois, para 13
Chambers Record Tab # 23.

139. Ralph and his brothers describe the relationship as one which was strained and which was punctuated with periods of long periods without any communication

Affidavit #2 of Ralph, para 17 and 18,
Chambers Record Tab # 27.

Affidavit #1 of Ernie, para 24
Chambers Record Tab # 74.

Affidavit # 2 of Robert, para 7.
Chambers Record Tab # 26.

140. The statements of the parties are irreconcilable. Whatever else can be said, the Court

should not disregard entirely the concerns expressed by Kathleen's sons

The Law

141. The test to be applied in relation to the appointment of a committee is what is in the best interests of the patient.

Re Pollen [1996] BCJ No 2394 (BCSC),

R&R Book of Authorities, Tab 8

In the Matter of the Committeeship of Yuan Hsi Kuo [2005] BCSC 1296

Re Blackwell, 2007 BCSC 1337,

R&R Book of Authorities, Tab 2

142. The court should also consider who the patient appointed as her attorney when she was capable, and nominated as her committee.

Patients Property Act, section 9

R&R Book of Authorities, Tab 1

Re Blackwell, 2007 BCSC 1337

R&R Book of Authorities, Tab 2

Re Easton, 2000 BCSC 876

R&R Book of Authorities, Tab 4

143. It is submitted that in Kathleen's best interest that the appointment of Ralph as Interim Committee of the person and estate of Kathleen be made final and that Robert be appointed as Co-Committee with him of Kathleen for the following reasons:

- a) While capable, Kathleen chose her sons, Ralph and Ernest to make decisions about her financial affairs should she become incapable and to administer her estate upon her death.
- b) Kathleen expressed a preference to have Ralph make health care decisions for her when she appointed him as her representative and her son, Ernest, as her monitor in a section 7 Representation Agreement dated December 12, 2006.
- c) As Ernest is not able to undertake the duties delegated to him by the Power of Attorney or the Representation Agreement; Bob is willing and

able to act with Ralph in Ernest's stead, and Ernest supports his appointment as a co committee.

- d) Ralph, with the assistance of his wife, Donna, has provided ongoing assistance and care to Kathleen since 2001, first in her home and latterly at the Saanich Peninsula Hospital and Lodge at Broadmead.
 - e) Ralph properly performed the duties of an attorney and a Representative while so acting. He had ongoing consultations with Kathleen to determine her current wishes.
 - f) Kathleen has settled into life at the Lodge for more than three years. The accounts of her care present an overall picture of a person who is well cared for, perhaps albeit not perfectly, but certainly to a level acceptable to ensure that her best interests and well-being are maintained.
144. It is not in Kathleen's best interests to appoint Lois as committee of Kathleen's person and estate for the following reasons:
- a) While capable Kathleen did not choose Lois as her attorney, her executor and her representative.
 - b) The relationship between Lois and Kathleen was not a happy one while Kathleen was capable.
 - c) The relationship between Lois and her brothers is virtually beyond repair and choosing Lois over Ralph and Robert would not resolve matters. If Lois is appointed committee, given the existing legal proceedings and the recrimination that have characterized this proceeding, it is unlikely that Lois will facilitate her brothers' relationship with their mother. The concern expressed by all three to the effect that an Order appointing Lois would effectively end their relationship with their mother is not unfounded.

Affidavit #8 of Ralph, para 24.
Chambers Record Tab #78.

Affidavit #2 of Ernie, para 7 and 8
Chambers Record Tab #74.

Affidavit #4 of Robert, para 13 and 14
Chambers Record Tab # 75.

- d) Kathleen's ongoing care may be jeopardized by Lois if Lois is appointed as Kathleen's committee; in particular, there is a concern that Kathleen will be removed from the Lodge at Broadmead and cared for by Lois privately. The medical evidence is clear that Kathleen's needs are best met at the Lodge.

- e) While capable, Kathleen expressed the wish to reside at the Lodge. Lois nevertheless removed her from the Lodge in October 2008 on the basis of wishes expressed by Kathleen when she was no longer capable.
 - f) While capable, Kathleen expressed the wish she did not want Lois making decisions for her, that she was happy at the Lodge and that she did not wish to live with Lois.
145. There may be some argument that there were two representation agreements and that the second in favour of Lois gives her a preference in relation to the appointment. The difficulty with this is that such agreement had not been signed until Kathleen was already residing at Broadmead for more than a year and her mental deterioration was well known, though the extent of her impairment was in dispute.
146. Ralph's appointment as representative was also not made in ideal circumstances. Kathleen was in hospital and was likely then in the early stages of dementia. Kathleen's appointment of Ralph as her attorney with Ernie in 1998, however, is not subject to the same criticism. The preference expressed by Kathleen at that time was not for Lois but for her son.
147. Once the declaration of incapability was made, the existing power of attorney in favour of Ralph, and both representation agreements, are terminated.

Patient's Property Act, Section 19

R&R Book of Authorities, Tab 1

148. It is respectfully submitted that consideration of the Representation Agreements, the circumstances in which they were made and the revocation of the Representation Agreement made in 2006 do not directly consider what is in Kathleen's best interests. All that can be said is that the circumstances surrounding the making of the Representation Agreement in 2008 were less than satisfactory

Kathleen's Best Interests

149. Even if Kathleen expressed wishes not to live at the Lodge, which of course is disputed, it is not reasonable to comply with a wish expressed by Kathleen to leave the Lodge because:
- a) Some if not most of those statements were made by Kathleen at a time when she was suffering delusional thoughts about the Lodge and how it was being operated and her sense of being violated.
 - b) It is the opinion of Kathleen's doctors that Kathleen's health has been maintained to the degree that it has because of the environment, supervision

and routines provided in Broadmead. The Lodge provides the environment, and the structured and reliable care needed for Kathleen's dementia and medical conditions;

- c) While capable, Kathleen chose the Lodge as her residence;
- d) Kathleen's dementia and other medical conditions has resulted in an inability on Kathleen's part to presently understand her care and health needs. She may well be able to express views, but there is doubt about whether Kathleen appreciates the implications of leaving the lodge and what that might mean to her.
- e) Care should also be taken in complying with a wish expressed by Kathleen to leave the Lodge in light of the evidence that, as a result of her dementia, Kathleen is very vulnerable and easily influenced. To the extent that currently expressed wishes are not consistent with statements made while Kathleen was still capable, they should not be relied upon.

Affidavit # 1 of Dr. David Leishman, ph 8
Chambers Record, Tab #48.

Affidavit of #3 of Ralph, ph 5, 15
Chambers Record, Tab #32.

Affidavit #1 of Fiona Sudbury, ph 20, 21
Chambers Record, Tab # 30.

- 150. In light of Kathleen's dementia and her current medical conditions, remaining at the Lodge is in her best interest.
- 151. Structure for decisions concerning Kathleen's health care, including her residency, has been stable for the past three years. It should continue.
- 152. Kathleen's best interests are not served by making an order appointing Lois when the effect of that order would be to isolate Kathleen from the rest of her family.
- 153. Maintaining the *status quo* appears to be in the interests of Kathleen. At the lodge she has supervision of a significant number of professionals and staff all looking out for her. Regardless of the benefits that Kathleen may receive by being cared for in Lois' home. Care in Lois' home will mean there is a diminution in supervision.
- 154. In the final analysis such an order would entail risks that the care provided, might not be adequate in dealing with Kathleen's present and future needs as Kathleen's condition continues to deteriorate over time.

Costs

155. These proceedings have been protracted. Lois has caused much of the delay. Lois has changed counsel frequently during the proceedings. She has had at least 8 counsel file either an Appearance or Notice of Change of Solicitor for her.
156. In addition she took 10 months to file physicians reports which she urge the court were critical and in at least one of those cases the material was ready and yet Lois failed to produce the same for a period of over 5 months all without explanation.
157. Further Lois has persisted in applications for additional clinical records and financial information which have been refused twice by the Court.
158. While it is not suggested that Lois does not want what is best for her mother, it is clear that she has undertaken a very hostile and combative approach to dealing with this matter. She has taken steps without regard to the opinions expressed by Kathleen's care-givers or her brothers. She has been on a mission to prove a point regardless of the impact that has had on Kathleen's estate.
159. In the circumstances, costs against Lois would be appropriate.
Fraser v. Fraser [2008] BCSC 1737
R&R Book of Authorities, Tab 5
Stubban v. Stubban [2002] BCSC 1101.
R&R Book of Authorities, Tab 9
- All of which is respectfully submitted.
Dated this 16th day of November, 2010

Solicitor for Ralph and Robert Palamarek

Costs

155. These proceedings have been protracted. Lois has caused much of the delay. Lois has changed counsel frequently during the proceedings. She has had at least 8 counsel file either an Appearance or Notice of Change of Solicitor for her.
156. In addition she took 10 months to file physicians reports which she urge the court were critical and in at least one of those cases the material was ready and yet Lois failed to produce the same for a period of over 5 months all without explanation.
157. Further Lois has persisted in applications for additional clinical records and financial information which have been refused twice by the Court.
158. While it is not suggested that Lois does not want what is best for her mother, it is clear that she has undertaken a very hostile and combative approach to dealing with this matter. She has taken steps without regard to the opinions expressed by Kathleen's care-givers or her brothers. She has been on a mission to prove a point regardless of the impact that has had on Kathleen's estate.
159. In the circumstances, costs against Lois would be appropriate.
Fraser v. Fraser [2008] BCSC 1737
R&R Book of Authorities, Tab 5
Stubban v. Stubban [2002] BCSC 1101.
R&R Book of Authorities, Tab 9

All of which is respectfully submitted.

Dated this 16th day of November, 2010



Solicitor for Ralph and Robert Palamarek