



SUPERIOR COURT OF JUSTICE
COUNSEL SLIP/ENDORSEMENT

COURT FILE

NO.: CV-22-660300-00ES

HEAIRING

DATE: July 8, 2022

TITLE OF
PROCEEDING

CORION v. CORION ET AL

BEFORE MADAM JUSTICE KIMMEL

NAMES OF COUNSEL AND PARTY:

- APPLICANT(S) PIA HUNDAL FOR JANE CORION
- PLAINTIFF(S)

PHONE _____

EMAILS phundal@millerthomson.com

NAMES OF COUNSEL AND PARTY:

- DEFENDANT(S)
- RESPONDENT: RICHARD WORSFOLD, FOR ROBERT CORION & LISA CORION
- DEFENDANT(S)
- RESPONDENT(S)

PHONE _____

EMAILS richard.worsfold@millsandmills.ca

PHONE _____

EMAIL _____

NAMES OF COUNSEL AND OTHER PARTIES:

-
-

PHONE _____

EMAIL _____

PHONE _____

EMAIL _____

ENDORSEMENT OF JUSTICE KIMMEL:

[1] The applicant Jane Corion (“Jane”) is one of four children of Roselene Corion (“Roselene”). Jane seeks to be appointed the sole guardian for property and personal care of Roselene. Roselene has been living with Jane for most of the COVID-19 pandemic, and they have been living together in Grenada since in or about December 2020.

[2] Robert Corion (“Robert”) and Lisa Corion (“Lisa”) seek to be appointed the joint guardians for property and personal care of Roselene by a cross-application in this proceeding. Lisa currently lives in Toronto and Robert lives in Texas.

[3] The fourth sibling, Andrew Corion (“Andrew”), was appointed power of attorney for personal care of Roselene in 2016. For his own personal reasons, Andrew recently moved back to Toronto from Grenada where he had been living since July 2021. He is not seeking to be appointed Roselene’s guardian for personal care and has not formally appeared in this application to oppose the competing appointments that his other siblings seek. Andrew provided an unsworn document to Jane indicating that he supports her position and providing various factual inputs and comments in response to Robert’s affidavits, in particular Robert’s affidavit dated December 3, 2021.

[4] Jane, Robert, Lisa, and Andrew may sometimes be referred to collectively as the “siblings”. There are other proceedings pending between some of the siblings pertaining to their late father’s estate.

[5] The parties have agreed that the court only needs to decide at this time the question of who should be appointed the guardian for personal care of Roselene and that the remaining issues in the application and cross-application will be adjourned to be determined at a later date.

[6] The immediate urgency and need for the court to determine who should be the guardian for personal care arises because Roselene is currently living with Jane in Grenada. Roselene has suffered some health setbacks that are concerning to all of her children and have implications for travel.

[7] The fundamental point of disagreement is that Robert and Lisa want to bring Roselene back to Toronto and return her to the long-term care facility that she had been living in from 2016 until Jane removed her at the outset of the COVID-19 pandemic in the spring of 2020. Robert and Lisa have narrowed their immediate requests to the following:

- a. Their appointment as the Guardians of the Person of Roselene for the purpose of returning Roselene to Canada;
- b. Permission to take all reasonable steps to facilitate Roselene's safe return to Canada, including an assessment by a doctor in Grenada and any other ancillary steps necessary to ensure her return to Canada as soon as possible;
- c. Upon Roselene’s return to Canada, that they be appointed as the Guardians of the Person of Roselene and that their Guardianship Plan dated April 21, 2022 be approved.

[8] Jane wants Roselene to continue to live with Jane and Tanika in Grenada, where they have lived since December 2020. Jane wants to be appointed as the guardian for personal care of Roselene with respect to decisions concerning her health care, shelter, nutrition, clothing, hygiene, and safety. Jane asks for her June 17, 2021 proposed Guardianship Plan to be approved by the court on an interim basis, to be updated within 45 days to reflect Roselene’s current health care needs. This Guardianship Plan has not yet been sent to or approved by the Public Guardian and Trustee (“PGT”).

[9] The PGT did not appear or take a position at this hearing. The most current screening letter from the PGT was provided in respect of the cross-application and in respect of Robert and Lisa’s proposed

Management and Guardianship plans. It indicates that the PGT does not object to their proposed plans. The PGT takes no position on the validity of the power of attorney documents or on whether Robert and Lisa should be appointed as Roselene's guardians.

[10] All parties agree that the overarching consideration that should dictate the court's determination of the issue to be decided at this time is Roselene's best interests. Each side contends that they, and their respective plans for Roselene's care, are in her best interests. Their assertions are genuine, and they all do appear to have Roselene's best interests at heart.

Summary of Outcome

[11] For the reasons that follow, I am granting the relief that Robert and Lisa seek (with some supplementary terms), which will allow them to bring Roselene back to Toronto if arrangements can be made for her safe travel by air ambulance, as they have proposed to do.

[12] In coming to my decision, I have considered Roselene's recent health deterioration, her enhanced need for assistance, her possible future surgeries and treatments, her cognitive decline, and her ability to access health care in Canada without additional costs. Given Robert and Lisa's willingness to arrange for Roselene to move, if it is medically safe for Roselene to be moved back to Canada, I find that it is in her best interests for those arrangements and the move to happen now, while it still can. The move will allow her to receive universal healthcare and support available to her and to return to the long-term care facility that she was previously living in, or some equivalent facility, to receive the multi-disciplinary care and support that she requires as time goes on.

[13] I find that Roselene is a person incapable of managing her personal care. I appoint the respondents, Robert and Lisa, as her guardians for personal care for the purpose of moving Roselene back to Canada and, upon her return, as the guardians of the person of Roselene since it is them, and their Guardianship Plan, that will support Roselene's move back to Canada and her residency here.

[14] The details of the orders made associated with this relief are set out at the end of this endorsement.

Factual Background

[15] Roselene was diagnosed with Alzheimer's disease in 2014.

[16] Roselene executed a power of attorney for property in 2015 appointing Robert, with Lisa as the alternate.

[17] Roselene appointed Andrew her power of attorney for personal care in March 2016 just before she moved into long-term care at the Reikai Centre ("Reikai"). No one has challenged that power of attorney or suggested that Roselene did not have the capacity to make it at that time.

[18] Roselene lived with Jane at her house in Toronto for a period of time prior to moving to Reikai.

[19] All siblings agreed that Roselene should move to a long-term care home at Reikai in 2016. At the time of her admission, the intake forms indicated an overall impression that Roselene did not have the capability to understand information that is relevant to making a decision about her admission into long-term care, nor could she appreciate the reasonably foreseeable consequences of a decision or lack of decision. Specifically, the following was noted by the case assessor at the time:

- a. Clt demonstrated no insight into her functional abilities and care needs. She was unable to identify any care needs or risks. Clt focused on previous level of functioning. As per family, she

is never left alone and cannot go outside alone. She requires assist with showering, cuing to dress and toilet, full assist with cooking, shopping cleaning, finances and phone. Frequently requires redirection throughout the day.

- b. Roselene was not able to recall short term memory tests. Easily distracted and incoherent respond.
- c. Roselene was not able to recall long term memory tests. Easily distracted and incoherent respond.
- d. Cognitive skills for daily decision making Moderately impaired- decisions poor; cues/supervision required.

[20] In a July 27, 2021 letter, the Reikai Centre confirmed that in two later cognition assessments done in November 2019 and February 2020 Roselene continued to be assessed “as moderately impaired in her cognitive skills for daily decision making and cures or supervision was required.”

[21] In February 2017, Roselene executed powers of attorney for personal care and property, appointing Jane and Robert jointly and severally as her attorneys, with Lisa and Andrew named as the alternates. There have been some questions raised as to whether Roselene was capable of giving those powers of attorney in 2017.

[22] Jane arranged for Roselene to move into her home in Toronto at the end of March 2020 because of concerns about Roselene’s safety in a long-term care facility at the outset of the COVID-19 pandemic. She made this decision when lockdown procedures began at Reikai. Jane says now that she had concerns about the level of care and support that Roselene was receiving at Reikai, even before the COVID-19 pandemic.

[23] Jane did not consult with her siblings about moving Roselene from Reikai in 2020. Jane says that Roselene contracted COVID-19 while living at Reikai. She considered it an emergency and advised her siblings that she had moved their mother only after having done so. Robert wrote the following to Jane after Roselene had moved in with Jane in July of 2020:

Ok. Thanks for all u do. I love and appreciate u very much. I don't agree with how Mom left the place but I completely understand due to COVID

[24] Jane communicated with her siblings in September 2020 about her intention to move to Grenada with Roselene. However, when it was discovered that Roselene’s passport had expired, Robert (as the co-attorney for property and personal care under the 2017 Powers of Attorney) did not co-operate with the passport renewal in November 2020. Jane made other arrangements for their travel to Grenada.

[25] Jane moved with Roselene and her daughter Tanika to Grenada in December 2020. Andrew later joined them in July 2021.

[26] Lisa says that she was not aware of the move to Grenada and only found out about it when she went to Jane’s house to visit her mother and Jane on or about Christmas Day in 2020. She was advised that they had gone to Grenada. Further, Lisa was advised by Andrew and others after the fact that there had been a going away party for Roselene that Lisa was not informed about or invited to.

[27] Roselene has been living with Jane and Tanika in Grenada since December 2020. Robert and Lisa complain about the level of contact that they have been able to have with their mother since she moved

there. Jane says that she tries to facilitate WhatsApp video calls and phone calls between the siblings and Roselene. Travel to Grenada was difficult during much of 2020 and 2021 because of the pandemic.

[28] These proceedings were commenced in 2021. Initially, by a letter dated April 19, 2021, the PGT opposed Jane's appointment as court appointed guardian for Roselene because no Management Plan had been provided. Jane has since prepared a Management Plan and a Guardianship Plan, both dated June 17, 2021, in support of her application. Both documents contemplate that Roselene will continue to live with Jane and Tanika in Grenada. These plans have not been reviewed or approved by the PGT. No amended or supplementary plans have since been proposed by Jane.

[29] Jane maintains that Roselene has been healthy and happy living with her and Tanika in Grenada. Consistent with what Jane believes her mother's wishes and beliefs to be, Roselene has primarily been cared for by Jane and Tanika, and has had contact with Andrew and other family members in Grenada or surrounding islands. There is also a personal care worker who they hired in February 2022 who now assists with Roselene's daily care. Roselene has primarily been cared for by naturopathic health professionals and engaged in some aquatic therapy until her recent health decline.

[30] Concerns arose regarding Roselene's health in February 2022. Roselene was taken to see Dr. Herrera on January 24, 2022 after she fell in the bathroom. She was put on anti-inflammatory medication and antibiotics.

[31] A few weeks later, Roselene was observed to be suffering from a sudden onset of left side weakness that persisted for a few days. A Dr. Andrew examined her on February 23, 2022 at her home, and referred her to a hospital for further study and management. Later that day, she was admitted to the Grenada General Hospital.

[32] According to the May 14, 2022 report of Dr. La Rose, Roselene's neurosurgeon, a CT scan of her brain was done on February 24th, 2022. It disclosed a bilateral Chronic Sub-Dural Hematoma, after which Roselene was referred to Dr. La Rose's neurosurgical service. A surgery was performed on March 1, 2022 and Roselene was discharged into Jane's care and went home on March 4, 2022. She was re-admitted on March 10, 2022 because of oozing from the surgical site. She was treated with antibiotics, but a re-bleed was discovered. A further surgery was performed on March 22, 2022, after which she was transferred post-operatively to a private care facility on March 28, 2022. She was discharged to Jane's home on April 6, 2022.

[33] After discharge, Roselene received four physiotherapy sessions starting on April 16, 2022, but still cannot stand or walk. Various exercises were recommended for her to do at home, which Jane says continue to be followed when Roselene can tolerate them. Roselene does these exercises with the assistance of Jane, Tanika, and the personal care worker. Dr. Cox states that "Ms. Corion will benefit from additional physiotherapy for improvement in upper and lower extremity muscle strength, sitting, and standing balance and general mobility."

[34] At her surgical follow-up on May 9, 2022, Roselene was assessed as stable but non-verbal with a small decubitus ulcer. She was reassessed on May 16, 2022 at which time a worsening of her cognitive function was noted. Her ulcer had grown and had to be surgically treated on May 17, 2022. Dr. La Rose's prognosis for Roselene is "somewhat guarded" due to her advanced age, underlying condition of Alzheimer's Disease, and two recent surgeries. He anticipates she will become totally dependent on others for daily needs sooner or later due to her cognitive degeneration and that family support will be of cardinal importance.

[35] Justice Dietrich issued an endorsement on May 12, 2022 requiring the production of various medical and other reports from Jane, which appear to have now been obtained and produced. One of the specific directions given at that time was for Jane to produce a report from a medical doctor regarding Roselene's

fitness to fly to Canada, including an estimate of when she would likely be fit to fly on a commercial flight (as opposed to by air ambulance).

[36] The medical reports produced by Jane state the following with respect to Roselene's fitness to fly to Canada:

- a. May 10, 2022 letter from Dr. George (Grenada General Hospital): "She is not fit to fly with a commercial aircraft. Therefore, an air-ambulance is highly recommended for travel."
- b. May 14, 2022 letter from Dr. La Rose (Neurosurgeon): "As relates to fitness to fly this has to be on going, if commercial route is the chosen medium and taking into consideration the risk of long-haul flights and the patient present clinical condition, this would not be the recommendation."

[37] Robert and Lisa's counsel agreed that the medical advice at this time is that Roselene is not fit to fly on a commercial flight. They have undertaken, if appointed as Roselene's guardians, to make arrangements for her to be flown back to Toronto by air ambulance and to have her re-assessed for her fitness to travel in advance of transporting her.

[38] Robert and Lisa have amended their proposed Guardianship Plan to reflect input and comments from the PGT, who has now indicated that he has no concerns with it (in a letter received April 26, 2022).

Issues to be Decided

[39] The court must decide the following issues arising out of this hearing:

- a. Is Roselene incapable of making decisions about her personal care such that she is in need of someone to be appointed to make those decisions for her?
- b. If so, who should be appointed the guardian for personal care of Roselene and on what terms?

[40] The parties agree that this court has the originating jurisdiction to make the order sought by both the application and the cross-application for the appointment of a guardian for personal care for their mother, who is currently living in Grenada but has lived in Ontario most of her adult life. The parties have all attorned to the jurisdiction of the Ontario court, even though the applicant Jane and one of the respondents, Robert, do not live in Canada

Analysis

a) Does Roselene Need a Guardian for Personal Care?

[41] The appointment of a guardian for personal care is governed by the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 ("SDA"). Section 45 states that:

A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

[42] Pursuant to s. 58 of the SDA, an order appointing a guardian of the person must include a finding that the person is incapable of these functions, or some of them, and, as a result, needs decisions to be made on

his or her behalf by a person who is authorized to do so. An order for full guardianship of the person can only be made if the court finds that the person is incapable in respect of all of the functions referred to in s. 45 (per s. 59 of the SDA).

[43] All participating parties agree that today Roselene is not able to understand information that is relevant to making decisions concerning her own health care, nutrition, shelter, clothing, hygiene, or safety, and that a guardian for personal care needs to be appointed. There is no need to make a finding at this time about Roselene's capacity to give the powers of attorney for personal care that she did. Andrew is not acting under the 2016 power of attorney for personal care that he was granted. There is general agreement that Robert and Jane are not able to act jointly under the 2017 power of attorney for personal care that they were granted.

[44] Although Jane's application initially sought to remove Robert as her co-joint guardian of the person under the 2017 power of attorney for personal care, Jane now seeks to be appointed as guardian of the person by the court. Both sides agree that the court should appoint a guardian for personal care under the SDA. They just disagree about who it should be. Neither side is arguing that there is a less restrictive alternative course of action (such as under a power of attorney), nor are they arguing that a finding of incapacity and appointment of a guardian is not necessary.

[45] Pursuant to s. 53(1)(c) of the SDA, any existing powers of attorney for personal care will be terminated upon the court's appointment of a guardian of the person under s. 55.

[46] Section 55 of the SDA deals with the appointment of a guardian of the person. It provides the following:

(1) The court may, on any person's application, appoint a guardian of the person for a person who is incapable of personal care and, as a result, needs decisions to be made on his or her behalf by a person who is authorized to do so

(2) The court shall not appoint a guardian if it is satisfied that the need for decisions to be made will be met by an alternative course of action that,

(a) does not require the court to find the person to be incapable of personal care; and

(b) is less restrictive of the person's decision-making rights than the appointment of a guardian.

[47] Having regard to the evidence filed (including medical reports, clinical notes, and records dating back to 2016 and continuing through to as recently as May 2022) and the agreement of the parties on this point, I find that Roselene is not able to understand information that is relevant to making a decision concerning her own health care, nutrition, shelter, clothing, hygiene, or safety, and she is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision. As a result, she needs decisions to be made on her behalf by a person who is authorized to do so.

[48] The applicant served Roselene with her application. She says that she has tried to make Roselene aware that the court is being asked to appoint a guardian for her personal care, although counsel concedes that there is no guarantee that Roselene understands any of this given her current cognitive condition. This is sufficient to satisfy the service and rights advice requirements under ss. 69(3) and 70(2)(c) of the SDA.

b) Who Should be Appointed Roselene's Guardian for Personal Care and on What Terms?

[49] Given that a guardian for personal care is required, the next issue is who should be appointed and on what terms. The criteria for the court to consider in appointing a guardian of the person are set out in s. 57(3) of the SDA, which provides the following:

(3) Except in the case of an application that is being dealt with under section 77 (summary disposition), the court shall consider,

- (a) whether the proposed guardian is the attorney under a continuing power of attorney for property;
- (b) the incapable person's current wishes, if they can be ascertained; and
- (c) the closeness of the relationship of the applicant to the incapable person and, if the applicant is not the proposed guardian, the closeness of the relationship of the proposed guardian to the incapable person.

[50] The following considerations are noted in respect of the above criteria:

- a. Jane and Robert were jointly and severally named as powers of attorney for personal care by Roselene in 2017, albeit at a time when it is not clear that she had the capacity to grant a power of attorney (something that the court does not need to decide at this time). I consider this to be a neutral factor as between the applicant and cross-applicants.
- b. Roselene's wishes regarding who she would like to be appointed her guardian today cannot be ascertained. Her past conduct, in appointing Andrew in 2016 (according to Jane, as a matter of convenience) and later appointing Jane and Robert, suggests that she would like at least one of her children to be her guardian of the person.
- c. Jane appears to have had the closest relationship to Roselene in recent years, but that is, at least in part, attributable to the fact that Jane moved Roselene with her to Grenada in December 2020. Jane has been a constant in Roselene's life, but there is no evidence to suggest that Roselene did not also enjoy a warm and close relationship with Robert and Lisa. The record discloses that all of the siblings have been involved, or wanted to be involved, in decisions about their mother's care and well-being. Roselene is not estranged from any of her children. I recognize that Robert has not lived in the same city as Roselene for a number of years, and Lisa only moved back to Toronto in 2018 after Roselene had already been moved to Reka. However, once able to travel, Robert and Lisa travelled to Grenada to visit their mother in 2021, and they were there when this motion was argued. They are ready to make the necessary arrangements to bring their mother back to Toronto. All of the siblings care about their mother and appear to have her best interests at heart.

[51] Having regard to the criteria under s. 57(3) of the SDA, I find that any one of Jane, Robert, or Lisa would be appropriate to appoint as guardian for personal care of Roselene. That said, the parties have demonstrated that they cannot all three work together and should not all be jointly appointed. Further factors need to be considered to make the decision of who should be appointed at this time as Roselene's guardian of the person.

[52] Jane says she has only ever acted in her mother's best interests and has, of all the siblings, been the primary caregiver for their mother outside of the Reikai. Jane's commitment to caring for Roselene is a consideration (see e.g. *Brillinger v. Brillinger-Cain*, 2007 CanLII 2331 (Ont. S.C.), at para. 47–48). However, it is not the only consideration in the bigger picture.

[53] In contrast, Jane has identified various factors that she urges the court to consider with respect to Robert and Lisa's fitness to act as Roselene's guardians, most of which have to do with their handling of property. However, the appointment of a guardian for property for Roselene is not being decided today.

[54] Jane primarily emphasizes the consistency of her commitment and dedication to her mother's care before, during, and after Roselene was living at Reikai. In contrast, Jane emphasizes Lisa's lack of experience in living with their mother and her lack of demonstrated arrangements for her mother's care if Roselene is not able to be immediately re-admitted to Reikai upon her return to Toronto. She also points to Robert's general absence and infrequent visits.

[55] Jane is also concerned that Robert and Lisa will not involve her in decisions going forward, as she has offered to do for them. In response to this concern, Robert and Lisa have said that they will agree to provisions regarding consultation with the siblings being included in any order made appointing them as Roselene's guardian of the person. Robert and Lisa also note that, if they are believed, Jane does not have a good track record herself of transparency and consultation with them.

[56] Jane has raised a further concern about the logistics of Roselene's travel back to Canada, given the difficulty that she had in bringing Roselene to Grenada without a valid Canadian passport. There is no evidence before the court about whether Roselene, a Canadian citizen, will be prevented from returning to Canada if she does not have a valid Canadian passport. The parties will need to investigate this and work something out between them, if need be, to get her the proper documents to enable her to return to Canada.

[57] Robert and Lisa argue that the court should also have regard to the following considerations in determining what is in Roselene's best interests in deciding who to appoint as her guardian of the person:

- a. Roselene voluntarily moved into Reikai in 2016. It can be inferred that she wanted to live there at the time and there is no evidence that she has expressed a desire to live elsewhere.
- b. Reikai has said that Roselene can come back there if she returns to Toronto, subject to their capacity considerations at the time of her return. Lisa has agreed that Roselene can live with her upon returning to Toronto and can remain until there is room for her at Reikai. Lisa and Robert will arrange for in-home care as necessary.
- c. The court should not look favourably upon Jane's unilateral actions, particularly the move to Grenada, which was done without Robert's co-operation (from which it should be inferred that he was not consenting) and was overtly hidden from Lisa until after the fact. The move to Grenada was not an emergency, even if the initial removal of Roselene from Reikai was.
- d. Andrew has not actively opposed Robert and Lisa's appointment. While he wrote a letter to Jane indicating that he supports her, he has not filed any evidence or appeared formally to take a position in these proceedings. The court should infer that if he had any serious objection he would have done so, notwithstanding his own health issues.
- e. Roselene's health has seriously deteriorated in the past few months, and it is expected that she is going to be in need of constant care. She has likely already reached that point, but her care

needs are only going to increase. The current medical advice is that she would be able to travel to Toronto by air ambulance now, but that could change.

- f. Roselene is a Canadian citizen with OHIP coverage and seniors drug benefits. She can more readily (and less expensively) receive medical care here than in Grenada, where there is no evidence of free health care coverage available to Roselene.

[58] In terms of Roselene's wishes regarding Reikai, since she was determined not to have impaired capacity and not capable of making the decision to move there at the time of her admission, I have not put much weight on that factor. The fact remains that she did live there for approximately four years and Reikai has said that she can come back to live there.

[59] The court does not condone Jane taking Roselene to Grenada with her in December 2020 without the advance consent and approval of Robert and Lisa, but recognizes that there remains some controversy in the evidence about this. Jane insists that there was a family meeting, all the siblings initially agreed to the move, and Robert and Lisa only voiced their objections to it afterwards. This may have to be sorted out at a later time, but I do not need to make a final determination about whether Jane took Roselene to Grenada without Robert and Lisa's knowledge to make the decision that needs to be made at this time.

[60] In hindsight it may well have been the right decision for Roselene to spend much of the pandemic in Grenada. But the decision now is largely about where it is best for Roselene to be in her current medical condition. It is hard for the court to accept that it continues to be in Roselene's best interests to remain in Grenada in her current condition, with her recent health issues, her cognitive and physical decline, and her likely increased need for medical care that would be covered by OHIP if she were in Canada.

[61] While Jane has generously offered to cover (and not seek reimbursement for) any medical expenses incurred in Grenada that would be covered by OHIP if Roselene was in Ontario, there is no evidence that Jane will actually be able to afford these costs if they begin to mount as Roselene's health deteriorates. As noted above, there is evidence that Roselene can tolerate a flight by air ambulance to Toronto now, but that could change. I find that it is presently in Roselene's best interests to return to Toronto, as long as she continues to be medically fit to do so, and while Robert and Lisa are offering to make the arrangements and cover the cost of the air ambulance. It is in Roselene's best interests that she be in Canada, so she can enjoy the benefits of OHIP, drug benefits, and the medical support that she needs.

[62] Jane argues that the court should consider, as Fitzpatrick did in *Moore v. McLean*, concerns about "moving around an elderly incapable person in the middle of a pandemic" as a factor in choosing the guardian for personal care: see *Moore v. McLean*, 2022 ONSC 295, at para. 23. That case did not have the added consideration, however, of the comparative advantages of access to OHIP and drug benefits that this case has. Furthermore, I find it difficult to accept the argument from Jane that Roselene should not be moved back because the pandemic is ongoing. This argument fails to acknowledge that Roselene has already moved twice during the pandemic; first from Reikai to Jane's house and then to Grenada with Jane.

[63] Jane further argues that Reikai may not be able to meet all of Roselene's needs. If that is the case, she can be re-assessed once she is there but that is not a reason for her not to return to Toronto.

[64] Jane has also raised concerns about long-term care more generally during the continuing COVID-19 pandemic. She has suggested I take judicial notice of the health care and personal care worker shortages in Toronto and in the long-term care sector in particular. I am not prepared to take judicial notice of this. While there were some early issues with the long-term care industry's response to the pandemic, there has been an inquiry and new protocols implemented. I would have to take judicial notice of all of that as well and I do not find it appropriate to do so at this time.

[65] Many seniors in Ontario have continued to live in long-term care throughout the pandemic. Seniors like Roselene, with cognitive decline, require special care. That need must be balanced with the emotional advantages of living with family members. This decision is not the place for an in-depth review of the pros and cons of long-term care for Alzheimer's patients. When Roselene had much higher cognitive function, she willingly moved to Re kai with the concurrence of all of her children.

[66] Barring some medical assessment upon her arrival in Toronto finding that she needs to live somewhere with different supports, I find that it is appropriate now for her to go back to live at the Re kai Centre. The PGT has also indicated that it does not oppose Robert and Lisa's Guardianship Plan, which contemplates that Roselene will move back to Toronto and live at the Re kai Centre.

[67] I find that it is in Roselene's current best interests to move back to Toronto by air ambulance and return to a long-term care facility, as long as it remains medically safe and economically feasible (e.g. Robert and Lisa remain willing to cover the cost).

[68] At this time, I find that Robert and Lisa should be jointly appointed Roselene's guardians of the person on the terms that they have proposed, supplemented by further terms that were agreed to by them during oral argument, as detailed below.

[69] The benefit and best interest of the incapable person should be at the heart of every application. D.M. Brown J., as he then was, provided the following warning, for contested guardianship applications in *Fiacco v. Lombardi*, 2009 CanLII 46170 (Ont. S.C.), at para. 36:

While *bona fide* disputes may exist amongst those interested in the well-being of the incapable person as to who should be appointed guardian, a significant risk exists that a contested guardianship application may lose sight of its purpose – to benefit the incapable person – and degenerate into a battle amongst siblings or other family members, some of whom may have only their best interests at heart.

[70] I will not go so far as to find that any of the siblings in this case have yet come to the point of putting their own best interests ahead of Roselene's, but this serves as an important caution for all parties given that this application and cross-application are continuing.

Final Disposition

[71] For the foregoing reasons, the following declarations and orders are made:

- a. That Roselene is a person incapable of managing her personal care and specifically is incapable of managing her health care, nutrition, shelter, clothing, hygiene, and safety, and that, as a result, it is necessary for decisions to be made on her behalf by a person who is authorized to do so;
- b. That the respondents, Robert and Lisa, are appointed as the Guardians of the Person of Roselene for the purpose of returning Roselene to Canada and that the Guardianship is in full;
- c. That the respondents Robert and Lisa, as the Guardians of the Person of Roselene, are permitted to take all reasonable steps to facilitate Roselene's safe return to Canada by air ambulance, including an assessment by a doctor in Grenada and any other ancillary steps necessary to ensure her return to Canada as soon as possible. In particular, and without limitation, the respondents Robert and Lisa shall:

- i. cover the cost of Roselene's return to Canada by air ambulance at first instance, subject to further agreement of the parties or order of this court;
 - ii. obtain a further medical assessment to confirm Roselene's ability to travel by air ambulance on the proposed date of travel, once known; and
 - iii. investigate what, if anything, Roselene needs to return to Canada as a Canadian citizen without a valid Canadian passport;
- d. To that end, the parties shall all co-operate as necessary to obtain the proper documents to enable Roselene to return to Canada;
- e. That, in the interim, the *status quo* shall remain in place while Roselene remains in Grenada in terms of any immediate and urgent health care and other decisions that may need to be made on Roselene's behalf. Until now, Jane has made decisions on Roselene's behalf (as Roselene's next of kin living in Grenada), which are accepted by medical professionals in Grenada, and she may continue to do so, in consultation with her siblings in respect of same;
- f. That once Roselene has returned to Canada, Robert and Lisa are appointed as the Guardians of the Person of Roselene with respect to decisions concerning her health care, shelter, nutrition, clothing, hygiene, and safety and that the Guardianship is in full;
- g. That the Guardianship Plan found in the Supplementary Cross-Application dated April 21, 2022 is approved and that the respondents shall act in accordance with the Guardianship Plan if and when Roselene has returned to Canada;
- h. That the respondents, Robert and Lisa shall within 45 days provide an updated Guardianship Plan in respect of Roselene and shall serve same on the applicant Jane, their brother Andrew, and the PGT, which plan shall reflect Roselene's current health and care needs and where she is living;
- i. That the respondents, Robert and Lisa, shall facilitate and encourage communication and visitation between Roselene and the applicant Jane and their brother Andrew;
- j. That the respondents, Robert and Lisa, shall consult with the applicant Jane and their brother Andrew from time to time regarding personal care decisions for Roselene and shall consult with them regarding all major medical decisions;
- k. That the Application and Cross-Application are otherwise adjourned to a date to be fixed at a scheduling appointment to be requested by the parties by no later than thirty days after Roselene has returned to Canada, or earlier upon the request of any party, and that this Order may be reviewed at that time;
- l. That the parties are granted leave to move for further directions as may appear advisable or necessary; and
- m. That, upon the agreement of the parties at the hearing, the costs of this attendance are deferred and shall be determined at the final disposition of this proceeding, or on such other basis as the parties may agree to or as the court may further order.

[72] While the general preference and predisposition of the court is to fix the costs of a step in a proceeding when a decision is made, there is overlap between some of the issues and evidence that were considered now

(relating to the appointment of a guardian of the person for Roselene) and that have been deferred (relating to the appointment of a guardian for property of Roselene, among other things). Further, there are requests for reimbursement of expenses, costs, and accountings that will have to all eventually be reconciled. The court, and the parties, will benefit from having the full picture of who is seeking what amounts from whom in all of these respects and in the final analysis. A fuller picture will be particularly helpful in assessing the reasonable expectations of the parties and proportionality, which are among the factors to be considered by the court under r. 57 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 in making a costs award.

[73] A further consideration in the decision to defer the costs of this appearance is that the parties have not yet exchanged costs outlines for this hearing and would require time and incur further expense to do so. As a general rule, I require cost outlines to be exchanged before I release my decisions. Given Roselene's current health situation, all agreed that this decision should not be delayed.

[74] This endorsement and the orders and directions contained in it shall have the immediate effect of a court order without the necessity of formal issuance and entry, although any party make take out a formal order by following the procedure under Rule 59, if so advised.

A handwritten signature in black ink that reads "Kimmel J." The signature is written in a cursive, slightly slanted style.

KIMMEL J.
July 13, 2022