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# COURT OF KING'S BENCH OF MANITOBA

**B E T W E E N:**

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| MARIA TERESA ANDERSON, | ) | Ryan H.K. Gorlick |
| | ) | for the applicant |
| applicant, | ) | |
| | ) | |
| - and - | ) | |
| | ) | |
| ROSINA MARIA SOCCORSA FARINA, | ) | Lauren L. Gergely |
| as attorney for TERESA MARIA SOCCORSA FARINA, | ) | for the respondent |
| | ) | |
| respondent. | ) | |
| | ) | Jana Taylor |
| | ) | on a watching brief for the |
| | ) | Public Guardian and Trustee |
| | ) | |
| | ) | Judgment Delivered: |
| | ) | January 22, 2025 |

## INNESS J.

### INTRODUCTION

[1] This is my decision on an application to remove an attorney appointed under a Power of Attorney ("POA"), and for an order requiring the attorney to pass accounts.

[2] The applicant, Maria Teresa Anderson ("Maria"), alleges the respondent, her sister Rosina Maria Soccorsa Farina ("Rose") committed misconduct in handling the personal and property matters of their mother, Teresa Maria Soccorsa Farina ("Teresa"), while acting as Teresa's attorney or as her fiduciary. Maria seeks to have Rose removed as attorney and be named the replacement attorney. Maria also seeks an order directing Rose to provide an accounting of Teresa's accounts from May 26, 2015 to present.

[3] Because there was substantial disagreement on the facts, I directed the matter to proceed to a hybrid form of trial pursuant to Rule 38.09(b) of the ***Court of King's Bench Rules***, M.R. 553/88. The evidence consisted of extensive affidavits and the *viva voce* testimony of each party, elicited a focused cross-examination. The parties consented to this approach as it provided them with a cost-effective, fair and timely hearing that was proportionate to the interests at stake, while at the same time affording the Court the ability to assess credibility. A hybrid form of a trial accords with Rule 1.04 and the principles expressed in ***Hryniak v. Mauldin***, 2014 SCC 7.

[4] For the reasons that follow, I am granting an order directing a reference to the Associate Judge that Rose pass Teresa's accounts from May 26, 2015 to the present date. In the interim, I am making an order that Rose continue to remain as the attorney for Teresa but with restrictions on her powers.

## **BACKGROUND**

[5] Teresa and Vincenzo Farina ("Vincenzo") have three children, Maria, Guiseppe ("Joe") and Rose. Vincenzo passed away on August 9, 2014, when Teresa was 85 years old. At that time, Vincenzo and Teresa were living at a home (the "home")

they jointly own on Larche Avenue West in Winnipeg, where they raised their children. Although Teresa was not exhibiting any signs of cognitive impairment at the time of Vincenzo's death, she was suffering the effects of advanced osteoporosis, which worsened with age and resulted in her bending at a 90-degree angle while standing. Teresa informed her children that she did not want to move into a personal care home. Teresa wanted to remain living in her home, though not alone.

[6] Shortly thereafter, in 2015, it was agreed among Maria, Rose and Joe that Rose would move in with Teresa. At the time, Joe was married with two daughters, one of which filed an affidavit in this matter. Maria was married but without children. Rose was unmarried and without children. Rose sold her condominium, as it was unknown how long she would be living with Teresa. About the same time, it was arranged for a lawyer to attend the home and prepare a POA for Teresa. It was agreed by Joe, Maria, Teresa and Rose, that it would make sense for Rose to be appointed as Teresa's attorney since she was living with her. The POA was executed on May 26, 2015. Teresa executed a will on or about the same date (the "2015 will"). Teresa's children believed and understood that the 2015 will stipulated that Rose would inherit the house, with the residue of the estate being divided between Maria and Joe.

[7] For the next three years, from 2015 to the first part of 2018, no significant or irreparable issues arose in the relationship between Maria, Joe, Rose and Teresa. From approximately October 2018 to the present, significant acrimony between the siblings occurred which led to their relationship breakdown as well as Teresa's relationship with Maria and Joe. The dissention arose from allegations made by Joe and Maria towards

Rose, and to some extent Teresa, that they were misspending their father's money and allegations that Rose was isolating Teresa from Joe and Maria. These issues and the questions surrounding them formed the subject of correspondence between Maria's lawyer and Teresa's lawyer beginning in 2018 and continuing into February 2023, culminating in this application being filed with the court.

[8] The parties agree that as of November 9, 2023, when the application was filed, Teresa would have been incompetent to handle her own personal and financial matters. By that time, Teresa was living in a personal care home in St. Norbert, Manitoba, having been placed there following an admission to hospital on October 6, 2023. The Geriatric Program Assessment Team Report ("GPAT Report") from September 12, 2023 noted that Teresa was experiencing "markedly impaired cognition", which may be consistent with dementia. Of note, Teresa had been previously assessed in 2015 and 2020 by the same geriatric clinician and in 2022 by a social worker. There were no demonstrated concerns regarding Teresa's cognitive functioning on those occasions.

## **ISSUES**

[9] The broad issues to be determined, as agreed by the parties, are as follows:

1. Whether Rose should be removed as the appointed attorney for Teresa;
2. If Rose is removed, whether the Court should appoint Maria as the attorney for Teresa; and
3. Whether Rose should be ordered by the Court to pass her accounts, and if so from what date.

## EVIDENCE ADDUCED ON THE MOTION

[10] In support of her application, Maria filed her own affidavits, affirmed on November 7, 2023, May 2, 2024, and September 10, 2024 as well as an affidavit of Christina Maria Teresa Farina, affirmed on November 7, 2023 ("Christina's affidavit"). Rose filed two of her own affidavits, both affirmed on September 20, 2024. As set out earlier, Maria and Rose were cross-examined on their affidavits at the hearing.

## POSITIONS OF THE PARTIES

### Maria's Position

[11] Maria submits that in and around 2018, Maria and Joe noticed a change in their relationship with Rose. Maria alleges Rose was reluctant to allow visits with Teresa and interfered with their telephone calls. Maria asserts that Rose refused to provide them with information on Teresa's well-being and her finances. Maria blames Rose for the deterioration of her relationship with Teresa.

[12] Maria learned in 2024 that Teresa had made Rose a joint account holder of her chequing and savings accounts. Maria asserts that the banking records from 2017 to 2024 demonstrate significant concerns regarding Rose's handling of Teresa's finances, including the nature and number of cash withdrawals, a payment towards Rose's line-of-credit, retail spending and payments made on Rose's Canadian Tire Mastercard ("credit card"). Maria also asserts that Rose has made no contributions towards any living expenses, such as rent, groceries and other costs, while living with Teresa.

[13] Maria argues that Rose's conduct, and specifically the management of Teresa's financial affairs, has fallen well short of the standard of care required by an attorney and

that she breached her fiduciary duties owed to Teresa by "using and enjoying" Teresa's money, which has now largely been depleted. Therefore, according to Maria, Rose must be removed as attorney and Maria ought to be substituted into that role by the Court.

[14] Finally, Maria argues that as a result of compelling evidence that gives rise to serious concerns, the Court should find that Rose has a duty to account for the entire duration of the enduring POA, commencing May 26, 2015 to the present date.

**Rose's Position**

[15] Rose argues that she reluctantly sold her condominium, which triggered a mortgage penalty, and moved in with Teresa indefinitely. She says despite her agreement to do so, she felt some resentment as neither Maria nor Joe were willing to undertake their mother's care.

[16] According to Rose, Teresa made her the joint account holder of her chequing account in 2014, shortly after Vincenzo's death and before she moved in with Teresa, for the stated purpose of assisting Teresa with her banking matters. Rose states that Teresa expressly told her that Rose would not be required to pay rent or contribute to any expenses while she was living with Teresa in the home. Rose states that in September 2018, Teresa prepared a new will, naming her the sole beneficiary of her estate. Shortly thereafter, in October 2018, Teresa made Rose co-owner of her investments. Also, according to Rose, Teresa told her that she was free to use the monies in the joint bank accounts as she pleased, in recognition of the sacrifices Rose made in moving in with her and undertaking all caretaking duties. According to Rose, Teresa

restructured her affairs and granted her free access to her accounts in accordance with Teresa's intention that Rose would inevitably receive all her assets upon Teresa's death.

[17] Rose says that Teresa continued to attend the bank and direct her own financial transactions up until she became incompetent around September of 2023. Rose argues that when Teresa authorized her to use the joint accounts with her knowledge and consent while competent, Teresa was not acting pursuant to the POA. Rose argues that to the extent that she had a duty to account to anyone while Teresa was competent, the duty was to Teresa alone, which she satisfied. She further argues that she was not in breach her fiduciary duty.

[18] Rose takes the position that she ought not be removed but if she is, the Court should decline to appoint Maria as she is self-interested in Teresa's finances, including Teresa's estate when she passes. Rose submits that if she is removed as Teresa's attorney, the Court ought to appoint the Public Guardian and Trustee as committee for Teresa. Finally, Rose submits she should only be required to pass her accounts from September 1, 2023 and onward, which is when Teresa no longer had capacity.

## **ANALYSIS**

### 1. Whether Rose should be removed as the Appointed Attorney for Teresa

[19] An attorney acting under a POA is required to "*exercise the judgment and care that a person of prudence, discretion and intelligence would exercise in the conduct of his or her own affairs*" (***Henderson Estate (Re)***, 2024 MBCA 95, at para. 16).

[20] The Court has jurisdiction pursuant to ss. 24(1)(d) and (g) of ***The Powers of Attorney Act***, C.C.S.M. c. P97 (the "***Act***"), to order the termination (removal) of an

attorney. However, "*there must be strong and compelling evidence of misconduct or neglect on the part of a donee [before a court will] ignore the clear wishes of the donor and terminate such power of attorney*" (***J.L. v. S.L.L. et al.***, 2006 MBQB 170, [2006] CarswellMan. 252, at para. 10).

[21] Before addressing the allegations of financial abuse, I will deal with the allegations made by Maria that Rose emotionally and physically abused Teresa.

**Allegations of Elder Abuse**

[22] I reject the suggestion by Maria that Rose emotionally and physically isolated Teresa from her family and others. To the extent that Teresa became increasingly confined to her home, I find it attributable to the advancing limitations on her physical health as a result of her medical condition. Also, the Covid-19 pandemic would have contributed to Teresa's isolation in and around 2021 to 2023 as a result of public health orders, her age and health status.

[23] I find Maria's and Joe's relationships with Teresa deteriorated over their self-interested pre-occupation with Teresa's handling of her financial matters. Questioning Teresa about how she was spending "their father's money" and demands to account for it ultimately led to the estrangement in their relationship.

[24] Maria led no credible evidence that people were prevented by Rose from visiting Teresa or that Rose was isolating Teresa. I accept Rose's evidence that Teresa had a telephone by her bed and that she did not block visits. I give no weight whatsoever to Christina's affidavit, wherein she describes Rose as acting hostile, difficult and attempting to block telephone calls and in-person visits with Teresa. The text messages

between Rose and Christina, appended to Rose's affidavit, dated September 20, 2024 (King's Bench Document 20, Exhibits P-V) ("Rose's Affidavit") entirely contradict Christina's assertions. On December 24, 2017, Rose tells Christina she can visit anytime. In another text, on June 19, 2019, Christina expresses how much she enjoyed their visit that day and that Rose is taking such good care of Teresa. Throughout other texts, continuing into November of 2019, Rose welcomes Christina to call Teresa and visit as often as she wishes. Rose also mentions to Christina that she was trying to get in contact with her dad, Joe. I find, based on the evidence, that it was Christina's struggles with substance abuse that led to the estrangement in her own relationship with Teresa, not Rose's attempts to isolate Teresa from their relationship.

[25] In support of her allegation of physical neglect, Maria relies on observations made by herself and Christina while visiting Teresa in the hospital on October 27, 2023. I note that Teresa's admission to the hospital occurred on October 6, 2023. The observations of unkempt hair and long, overgrown nails, as well as a vague reference to bruises is explained by the fact that Teresa had been in hospital for three weeks. I find that up to that point, Rose had been doing her best as the personal caregiver for Teresa and had been meeting her needs as set out in the GPAT Report, dated September 29, 2023 (Rose's Affidavit, Ex. D). There are no concerns of neglect or mistreatment noted in that report or any of the earlier reports.

[26] I further accept that Teresa's placement into hospital on October 6, 2023, occurred due to a rapid decline in her cognitive and physical health that had nothing to do with a lack of care by Rose. By that point, it was necessary for Teresa to be placed into a

personal care home due to her being 94 years old and with medical conditions that limited her movement. Simply put, Rose would have been unable to continue to care for Teresa, even with home care supports.

[27] On May 12, 2021 Maria made a complaint to the Winnipeg Police Service ("WPS") that Rose was committing elder abuse, despite the fact that she had not seen or spoken to Teresa in three years. The police attended to Teresa's residence. The report indicated that there was no evidence of elder abuse.

[28] I find no proof of physical or emotional abuse or neglect as alleged by Maria and Christina in their evidence. The allegations lack any credibility given the contradictory evidence contained within the text messages, the GPAT reports, the letters written by Teresa's attorney, the attendance of the WPS during a wellbeing check on May 12, 2021, and the absence of any supportive or independent evidence confirming abuse. Simply put, there is no compelling evidence of misconduct or neglect by way of physical or emotional abuse that would warrant removing Rose as attorney.

**Allegations of Financial Misconduct**

[29] The allegations of financial impropriety by Rose in the handling of Teresa's banking accounts are more difficult to resolve.

[30] While I have doubts about whether Rose's conduct meets the standard of care required of an attorney with respect to Teresa's property, I am not convinced that there is strong and compelling evidence of misconduct or neglect warranting removing Rose as attorney at this stage. I come to this conclusion, notwithstanding the possibility that Rose may be ordered to repay monies to Teresa.

[31] My decision on refusing to order Rose be removed as attorney at this stage is informed by the extent to which an accounting may shed further light on Rose's handling of the accounts, both in terms of the expenditure of monies and her intentions surrounding those expenditures. I have also given significant consideration to the fact that Teresa's expenses are limited to the costs of her personal care home and some minimal expenses for personal needs. As such, I am satisfied that I can vary the terms of the POA and place restrictions on Rose's use of the accounts to protect against any potential future misconduct or abuse of Teresa's monies in the interim. In other words, I am satisfied no further harm would occasion to Teresa if Rose remained in the role, with restrictions, until the accounting is complete. This may also facilitate her ability to access receipts, records and any other documents necessary for the accounting. I am also mindful that s. 22(1) of the ***Act*** places an ongoing obligation on Rose to account now that Teresa is incompetent.

### 2. Whether Maria be should be appointed as Attorney for Teresa

[32] Upon a review of all of the evidence and having observed Maria in cross-examination, I conclude that she is self-interested in this application. I find she presumptuously took Teresa's jewelry, that was intended to be a gift to her upon Teresa's death. I further find that her description of Teresa in a text to Rose as a "low-life senior taking my father['s] money", even if she was intoxicated, to be an example of her disrespectful attitude towards her mother. I accept that Teresa felt that Maria had little interest in seeing her or inquiring about her unless it was accompanied by some financial

demand, including requests for money. I have no difficulty inferring from the letters sent by Teresa's lawyer that Teresa would not want Maria to be her attorney.

[33] In the event that Rose is removed as attorney for Teresa, which remains to be determined, I would not appoint Maria in her place. Instead, I would appoint the Public Guardian and Trustee as committee for Teresa with respect to her property pursuant to s. 71(2) of ***The Mental Health Act***, C.C.S.M. c. M110. I recognize that this would result in some cost to Teresa, which is regrettable, however I do not find there to be any other suitable person in the circumstances.

### 3. Whether an Accounting should be Ordered

[34] Rose has a duty to account to Maria and Joe as Teresa's nearest relatives, while acting under the POA following Teresa becoming incompetent pursuant to s. 22(1) of the ***Act***. The parties agree that as of the date of the filing of this application, November 9, 2023, Teresa was incompetent. Exactly when Teresa became incompetent prior to November 9, 2023 is not agreed to by the parties and is not possible to determine on the evidence before me. That said, the main issue for me to determine is whether Rose ought to be ordered to pass her accounts and if so, from what date.

[35] The Court has jurisdiction, pursuant to s. 24(1)(e) of the ***Act***, to order an accounting by the attorney in circumstances where no duty to account exists. Mental incompetence on the part of the donor is not a prerequisite, however the decision to order an accounting where the donor is competent is discretionary and requires a careful consideration of the circumstances. An accounting should not be ordered in the absence of compelling evidence giving rise to serious concerns. In deciding whether the test is

met, in addition to having regard for the terms of the POA and the donor's intentions, the Court should consider pursuant to ***Robertson v. Harding***, 2018 MBCA 67, at para. 46:

> [46] . . .
>
> a) the donor's heath and vulnerability and whether there is any evidence that the donor has been physically or mentally abused;
>
> b) the extent of the attorney's involvement in the donor's financial affairs;
>
> c) whether the applicant has raised a significant concern in respect of the management of the donor's affairs; and
>
> d) whether there are or may be limitations of actions concerns.
>
> [citations omitted]

[36] The reasons for restraint in ordering an accounting in such circumstances is set out in ***Robertson***, at para. 44:

> [44] A competent donor has the ability to appoint and replace his or her attorney and to obtain an accounting at any time. Such a donor may have any number of reasons for not wanting an accounting, and his or her privacy interests should be respected. To be clear, an accounting should not be ordered simply to satisfy the curiosity of other family members.

[37] While I have found no credible evidence to support the allegations of elder abuse, the evidence is uncontested that Teresa had a significant health condition that limited her mobility as of 2015 when Rose moved in with her. Teresa's advancing age and health status was the very reason for the family decision to have Rose move in with Teresa and be her caretaker, as she would be unable to live in her home alone. Rose undertook to look after the housekeeping, home maintenance and personal needs of Teresa, including shopping, meal preparation, laundry, cleaning and transportation. Teresa was dependent on Rose to care for her physical, emotional and financial needs. Without Rose living with

her, Teresa would have been required to move into a personal care home, which she expressly did not want to do. These facts and circumstances give rise to a relationship of dependency and trust.

[38] Rose was heavily involved in Teresa's financial affairs. Rose's affidavit explains that Teresa added Rose's name to her bank account to facilitate Rose handling her banking. The execution of the POA on May 26, 2015, naming Rose as attorney for Teresa's property, furthered that same purpose. Rose was privy to the amounts of money Teresa held in her investments and bank accounts; she had been named as a joint account holder on the investments and bank accounts and had unfettered access to the bank accounts by the POA and being a joint account holder. Rose was also made aware of Teresa's purported intentions with respect to her estate following her death. Teresa trusted Rose implicitly and without question. That is set out in the letters written by her lawyer in response to Maria's demands for access to her financial statements.

[39] Rose's affidavit states that prior to Teresa becoming incompetent, Teresa managed her own financial affairs. She says that she was not acting pursuant to the POA, but instead pursuant to verbal direction and authorization given to her by Teresa. Further, Rose's affidavit affirmed that in Teresa granting her authorization to use the monies in the bank accounts as she pleased, Teresa was mindful that she gave up her employment and became underemployed in order to live with and care for Teresa.

[40] A review of the incoming and outgoing monies in the joint chequing and savings accounts disclose expenditures that objectively raise questions and concerns, particularly

as regards to the nature and number of non-Toronto Dominion Bank ATM cash withdrawals ("TD Bank") and payments made towards Rose's credit card. For example, the bank records filed indicate cash withdrawals totaling approximately $189,000 from 2017 to 2024. This is an average of $2,000 per month in cash withdrawals. While Rose affirms that her mother liked to have "cash on hand and at home", it is inconceivable that Teresa would have spent the majority of the cash, given her circumstances. While I accept that Teresa would often gift cash to her children and grandchildren when they visited, the evidence is uncontradicted that Teresa was estranged from those relationships after 2018. Furthermore, Teresa was primarily confined to the home and no evidence has been led as to how she was spending cash.

[41] Rose gave evidence that she does not know how much money from the cash withdrawals was provided to Teresa for her sole use. Of further concern is the acknowledgment by Rose that some of the cash withdrawals occurred at the casino and she was unable to identify the dates on which those withdrawals were made. I note the evidence elicited in cross-examination that Rose would sometimes withdraw cash from non-TD ATMs in and about the same time as she was dining at Boston Pizza or Dal's restaurant, where video lottery terminals ("VLTs") were located.

[42] Between 2017 and 2024, approximately $65,000 was spent on payments towards Rose's credit card. Also, there was a payment made of $23,434.46 towards Rose's line-of-credit and "miscellaneous" expenses in the amount of $23,009.45 towards living costs or Rose's own expenses. Rose states that some of the costs on her credit card, the miscellaneous expenses and the cash withdrawals were expended on household living

expenses, such as groceries, the bank records demonstrate recurring expenditures at grocery stores, such as Sobeys. While I cannot discount that some of the monies likely went towards grocery and other living expenses, I suspect a significant amount did not.

[43] Of all of the evidence placed before me, the letters written by Mr. Bueti on behalf of Teresa provide the best indication of Teresa's intentions at the relevant times. However, what is missing from the letters is any indication that Mr. Bueti actually reviewed the bank records with his client, or that he met with Teresa alone, apart from Rose. While the letter dated December 18, 2018 states that Teresa "*is well aware of her finances, investments and accounts and has regular dealings with her Bank*", the letter does not explicitly state that Teresa personally reviews her banks records and is aware of the incoming and outgoing monies.

[44] The letter dated February 21, 2023 is the most detailed and informative. Mr. Bueti states that although Teresa's physical health has declined, her cognitive functioning is "*unimpaired*". I accept that Mr. Bueti was alive as to the importance of assessing his client's cognition. He knew her for a long time and had been addressing the issues set out in the contents of the letter on an ongoing basis over the years. Further, the letter states that Teresa "*has been and continues to be aware of her bank finances*" however this is qualified by the statement further down in the letter, that Teresa "*discusses as needed the family finances with her daughter who provides full disclosure as to monies coming into the home and the expenses related to the home*". These statements suggest, and I find, that Teresa relied upon and trusted what Rose reported to her about the expenses and that she did not thoroughly or diligently examine her bank accounts and

expenditures herself. Teresa implicitly trusted Rose to look after her finances. I find that although Teresa *believed* Rose was informing her of her financial affairs, Rose was not fully accounting to her regarding the spending on the accounts.

[45] Rose affirms in her affidavit (at para. 14) that Teresa managed her finances. This is contradicted by the February 21, 2023 letter wherein Mr. Bueti wrote that Teresa explained to him that Rose attended "*to all of her needs, including but not limited to her laundry, her meals, her personal care, her medical needs, her transportation to appointments, cleaning her home, maintaining her home, paying her bills and managing her monies*" (emphasis added).

[46] Finally, in the letter dated February 21, 2023, Mr. Bueti wrote, "*The expenses which relate to her home and the living expenses of both her daughter and herself are shared between them as cohabitants of 176 Larche Avenue West as per our client's wishes*" (emphasis added). This statement contradicts Rose's affidavit evidence and her assertion that in or about 2015, she and Teresa had reached a verbal agreement that she did not have to pay any monies towards rent, groceries, utilities, home expenses, etc. while she was living with Teresa.

[47] An attorney acting under a POA is acting as a trustee of the donor's property and is therefore subject to the obligations and duties of a trustee (***J.L. v. S.L.L. et al.***, at para. 11). A trustee bears the onus of establishing that the management and disbursement of the funds is consistent with the terms of the trust. A trustee who improperly enjoys the benefits of trust assets without authority and allows

non-beneficiaries to also benefit is liable to the trust for the amounts or value of the benefits received (***Sveinson v. Sveinson et al.***, 2012 MBQB 10, at para. 158).

[48] Although the law does not preclude an attorney from accepting any benefit or gift from the donor, such arrangements must be made with the full knowledge, consent and approval of the donor (***McDonald Estate v. McDonald***, 2023 MBKB 31, at para. 74; ***Richardson Estate v. Mew***, 2009 ONCA 403, at para. 49; ***Houston v. Houston***, 2012 BCCA 300, at para. 54).

[49] Despite Rose's assertion to the contrary, I find that Rose was acting *qua* attorney, pursuant to the POA, from its execution onward. This is supported by Rose's affidavit evidence that she would make Teresa aware of any expenditures and seek her approval prior to utilizing a large sum and her *viva voce* evidence that she would account to Teresa. This accords with a duty to account to Teresa, while Teresa was competent.

[50] However, even if I am wrong and Rose was not acting pursuant to the POA while Teresa was competent, Rose was in a fiduciary relationship with her mother. In its most fundamental terms, "*a fiduciary relationship requires the highest commitment of good faith and loyalty*" (***Todosichuk v. Daviduik***, 2004 MBCA 191, 190 Man. R. (2d) 254, leave to appeal to S.C.C. dismissed with costs [2005] S.C.C.A. No. 248 (QL), at para. 20). There is no doubt that a fiduciary who engages in "*self-dealing*" or who receives a secret benefit or profit arising from a transaction carried out on the donor's behalf, is accountable to the donor for the profit unless the donor consents to or authorizes the attorney's actions.

[51] Subject to the Court's discretion, breaches of fiduciary duty give rise to the widest array of equitable remedies to address the public's concern regarding the maintenance of the integrity of the fiduciary relationship. The Supreme Court of Canada jurisprudence on fiduciary relationships and remedies for breaches was reviewed and summarized succinctly in ***Todosichuk***, at para. 22:

> 22 . . .
>
> The essence of a fiduciary relationship, by contrast, is that one party pledges itself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged. The freedom of the fiduciary is diminished by the nature of the obligation he or she has undertaken – an obligation which 'betokens loyalty, goof faith and avoidance of a conflict of duty and self-interest": *Canadian Aero Service Ltd. v. O'Malley*, 1973 CanLII 23 (SCC), [1974] S.C.R. 592, at p. 606. In short, equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart.

[52] Rose argues that apart from shared living costs, the remaining expenditures, including cash withdrawals used for her own benefit, the payments toward her credit card and line-of-credit, as well as the cash advances, were inter vivos gifts. The law is clear that the onus to prove a valid inter vivos gift is on the person who received the gift. The evidence must demonstrate an unequivocal intention on the part of the donor to make the gift. The donor must have intended to make a gift without consideration or expectation of remuneration. Heightened scrutiny is required where the donee holds a POA over the donor. If the evidence falls short of demonstrating a clear and unmistakable intention to make an inter vivos gift, the donee will have failed to rebut the presumption of a resulting trust held by them in favour of the donor (***McDonald Estate***, at para. 42).

[53] I am mindful of the direction of the Supreme Court of Canada in ***Pecore v. Pecore***, 2007 SCC 17 (CanLII), [2007] 1 S.C.R. 795, that it is "*dangerous*" to presume, that an elderly parent is making a gift each time they put the name of an assisting child on an asset. As stated at para. 34, "*the presumption that accords with this social reality is that the child is holding the property in trust for the ageing parent, to facilitate the free and efficient management of that parent's affairs. The presumption that accords with this social reality is, in other words, the resulting trust*".

[54] Rose filed Teresa's will from 2018 (Rose's Affidavit, Ex. I) (the "2018 will"), in support of her argument that the presumption of advancement displaces the presumption of resulting trust as regards the inter vivos gift of monies. I raised concerns regarding the admissibility of the will and suggested it be the subject of a *voir dire*, to be ruled upon following argument.

[55] I have determined that the 2018 will itself is inadmissible on the grounds that its validity is not an issue for my determination, including regard for the likelihood that it will be challenged when Teresa ultimately passes. Furthermore, there is always the possibility that Teresa, unknown to Rose, revoked her 2018 will and made a new one. The 2018 will itself serves no evidentiary purpose in this case. Therefore, I am exercising my discretion and excluding it (***Y.P. v. M.I.S.***, 2006 MBCA 32, at paras. 36-38).

[56] Rose's belief about the 2018 will, however, is relevant to assessing her credibility and her conduct as it relates to her handling of Teresa's finances. Rose affirms in her affidavit that in and around October 2018, Teresa made Rose the beneficiary of her

investments and changed her will to make Rose the sole beneficiary of her estate. Rose further affirmed:

> In or about October 6, 2018, after making me the sole beneficiary of her estate and her investment funds, Mom advised me, and I do believe, that I was free to use the monies in our joint account as I pleased, while she was alive. While I was expressly authorized to use the funds in the joint account, I still made Mom aware of any expenditures, and sought her approval, prior to utilizing a large sum.
>
> [emphasis added]

No indication is given as to what amounts to a "*large sum*".

[57] There is law to support the proposition that a gift alleged to have been made by a deceased (or incompetent) person to their attorney cannot, as a general rule, be established without some corroborative evidence. At the very least, an inter vivos gift in such circumstances will be examined with, "*scrupulous care and upheld only if the evidence to support it is convincing and unimpeachable*"(***Kessler (Estate) v. Kessler***, 2015 SKQB 369, at para. 81).

[58] A gift may be set aside if the presumption of undue influence is found to apply. The first question to be addressed is whether the potential for domination inheres in the nature of the relationship, including those of dependency, fiduciary, and trust. A finding of undue influence will be more likely where a parent is experiencing mental decline and aging. A finding of incapacity is not necessary to engage the presumption of undue influence. Once the Court makes a finding that a special relationship with the potential for domination exists, the onus shifts to the donee to rebut the presumption of undue influence by showing the donor entered into the transfer as a result of an independent and informed judgment, or alternatively, after full, free and informed thought. This is

usually established by showing either that the donor received independent legal advice or that no actual influence occurred (***McDonald Estate***, at paras. 50-54). While it is unnecessary to show undue disadvantage or benefit in order to engage the presumption, it does tend to make the presumption more compelling and is relevant to determining whether influence was exercised (***Drewniak v. Smith***, 2024 MBCA 86, quoting ***Goodman Estate v. Geffen***, 1991 CanLII 69 (SCC), [1991] 2 S.C.R. 353, at para. 64).

[59] In ***McDonald Estate***, the Court held the following regarding independent legal advice, at para. 55:

> [55] When assessing the benefit of independent legal advice, the Court should examine: (1) who counsel really took instructions from; (2) whether the party benefitting from the transaction was present at the time of the transfer; (3) whether counsel discussed the financial implications of the transfer with the donor; (4) whether counsel discussed the matter with those who stood to benefit from the transfer; and (5) whether counsel had any prior relationship with the person purporting to exercise influence over the donor (*Fowler*, at para. 46).

[60] I accept that Rose felt pressured by her siblings and by circumstances to sell her condominium, at no profit, and move in with Teresa indefinitely. Her feelings of resentment at the time are understandable. In all likelihood the resentment remained, if not grew, over the period of approximately eight years that she was the full-time caretaker to Teresa. Within this context, I find the lines between her mother's assets and what Rose was gifted, or felt entitled to, blurred. While I have little doubt that Teresa would have wanted to see Rose receive some gifts or benefits for the sacrifices she made and the extensive caretaking duties she undertook, I have a difficult time accepting she provided Rose with open and free access to her accounts in the manner described by

Rose. As acknowledged in Rose's affidavit, Teresa's initial purpose for adding Rose as a joint account holder to her chequing account was to facilitate Rose assisting Teresa with her banking matters, not to grant her free use of it.

[61] In the case of ***Robillard v. Robillard Estate***, 2015 BCSC 1417, an attorney under a POA removed significant amounts of money from his mother's accounts, including noteworthy cash withdrawals. He asserted that his mother gave him permission to "*gift my self a bit extra as I saw fit*" (at para. 28) in consideration for his caretaking duties. The Court rejected his evidence and held that it was satisfied on a balance of probabilities that the attorney was not authorized to use the funds in the manner suggested, and that the majority of the funds expended were for his benefit alone.

[62] In the present case, there is evidence of Teresa being generous with gifting monies to her children and grandchildren. It is entirely possible her generosity towards Rose increased following the estranged relationship with her other children, and out of a sense of gratitude towards Rose. However, there is nothing in the evidence to support a history of excessive gifting on the part of Teresa that would put her own financial circumstances at risk, as it did here. The total amounts deposited into Teresa's bank accounts from her investments or other sources between 2017 and 2024 was approximately $612,297.00. As of October 6, 2023, when Teresa was admitted to hospital, there was $990.45 in the chequing account and $6,103.87 in the savings account. Following Teresa's hospitalization and placement into a personal care home, at a time when Teresa was clearly incompetent, Rose continued to use the joint accounts for her own personal use, including cash withdrawals, payments towards her credit card

and restaurants. Upon a review of all of the banking records, I have concluded that the level of spending or "gifting", as it has been asserted by Rose, is out of proportion to any of Teresa's prior generosity towards any of her children. The disproportionate nature of the spending on alleged gifts also supports a finding of undue influence.

[63] I find the statements made by Mr. Bueti on behalf of Teresa, do not meet the test for demonstrating that Teresa had independent legal advice on how to structure her affairs with Rose, nor are the letters evidence that Teresa had a clear, informed and knowledgeable understanding of how Rose was handling her finances. The letters certainly do not express an intention to allow Rose to spend monies from the accounts as she pleased.

[64] I am unable to conclude that there is any evidence before me sufficient to rebut the presumptions of undue influence or resulting trust that arise in the context of this relationship, in these circumstances. I do not lose sight of the fact that although Teresa was mentally competent for the majority of the time frame in issue, she was elderly, in poor physical health and almost entirely reliant on Rose to care for her. The persons who would be best placed to provide evidence rebutting the presumptions of undue influence and resulting trust are Teresa's financial advisor at the TD bank, Katherine Epp, and Teresa's solicitor, Vince Bueti. Without their evidence, and on the evidence Rose has submitted, I am not satisfied that all of the monies that passed to Rose from the joint accounts amount to gifts or fair and reasonable compensation pursuant to an agreement for Teresa's care.

[65] Whether Rose ought to be removed as the attorney for property is best determined following her passing of accounts. While the evidence demonstrates sufficient and compelling concerns to justify an accounting during the time Teresa was competent and since the execution of the POA, I defer any further findings regarding misconduct, and the extent to which it was based on negligence or intentional misappropriation, until the accounting is complete.

## ORDERS GRANTED

[66] I am directing, pursuant to s. 24(1)(f) of the ***Act*** that Teresa's POA be varied as follows:

1. Rose, in her capacity as attorney for Teresa, shall remain in the role of attorney with the limited power to expend funds for any just expenses relating to Teresa's care and wellbeing until further order of this Court, including the following terms:
    a. Rose is not permitted to make any cash withdrawals from any joint banking account she holds with Teresa;
    b. Rose is not permitted to list for sale, transfer, sell or otherwise encumber with any debt, the property at 176 Larche Avenue West, Winnipeg, Manitoba; and
    c. Rose shall personally assume payment of the expenses related to 176 Larche Avenue West, Winnipeg, Manitoba, including all utilities, a 50 % contribution to the property taxes and any other maintenance expenses until further order of this Court.

[67] I am also granting an order directing a reference to the Associate Judge for an accounting pursuant to s. 24(1)(e) of the ***Act*** on the following terms:

1. The Respondent is required to pass her accounts regarding her management of the donor's financial affairs from the inception of the POA on May 26, 2015 to the present.

[68] I am also directing that the Associate Judge determine, to the extent possible, the following:

1. The amount of monies expended on the combined household living expenses for Rose and her mother, including groceries, insurance, and transportation between May 26, 2015 and October 6, 2023; and
2. The amount of monies expended from all accounts for Rose's exclusive use and benefit (including her boyfriend Scott Hutchinson) from May 26, 2015 to present.

[69] The determination of funds to be repaid and on what basis shall be made after the accounting has been completed and the parties have had an opportunity to make submissions regarding same.

## **COSTS**

[70] The general rule is that costs are awarded to the successful party. In this case there has been mixed success. To be clear, although I have granted some of the relief sought by Maria, I have done so to further equity's purpose in ensuring the trust and integrity of fiduciary relationship is upheld. My findings regarding her credibility and motivations for bringing this application remain. As such, I am

deferring the issue of costs until the accounting reference is completed and the matter appears back before me for a determination of whether Rose is obligated to repay monies.

_____ J.