CITATION: *Hotner et al v. Norman*, 2025 ONSC 735
COURT FILE NO.: 22/471-00ES
DATE: 20250203

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Frederick Hotner in his capacity as the Estate Trustee of the Estate of Annie Hotner and the Estate of Annie Hotner, Applicant/Responding Party

AND

Elaine Norman, Respondent/Moving Party

BEFORE: C. M. SMITH J

COUNSEL: Lauren Wianecki, Counsel for the Applicant/Responding Party

G. Charles Morison, Counsel for the Respondent/Moving Party

HEARD: August 7, 2024

REASON FOR DECISION

Introduction

[1] John Hotner Sr. ("John"), and Annie Hotner ("Annie") were together the parents of six children. The Applicant, Frederick Hotner, and the Respondent, Elaine Norman, are two of those children.

[2] John died on October 16, 2016, at the age of 94. Annie survived John for approximately 5 years until her death on August 22, 2021, at the age of 96.

[3] This application arises as a result of a dispute between the Applicant and the Respondent about the Respondent's handling of Annie's finances during those five years.

[4] The Applicant alleges the Respondent misappropriated funds from Annie for her own purposes. He seeks an order directing the funds currently being held in trust from the sale of the Respondent's home be transferred to his lawyer's trust account in trust and be held there for the benefit of Annie's estate, an order the Respondent be required to repay the sum of $1,109,637.27 to the estate of Annie, damages for breach of fiduciary duty, and his costs of this application.

[5] The Respondent denies any improprieties and seeks an order the application be dismissed with costs on a substantial indemnity basis.

[6] The matter came before me for hearing on August 7, 2024. The Respondent testified virtually following which I heard submissions from counsel.

[7] These are my reasons for decision.

Factual overview

[8] Annie Hotner died testate with a Last Will and Testament that was executed on October 14, 1987. The Applicant and his sister, Irene Batty, are the sole beneficiaries of their late mother's will and both were named as estate trustees. Irene Batty has since renounced that appointment. The other siblings, including the Respondent, were not named in the will.

[9] John gave the Respondent signing authority on his chequing account in March 2015. Annie gave signing authority to the Respondent on her own account some years earlier.

[10] Sometime in 2016, John and the Respondent agreed she would act in a caregiver role for her parents. John and the Respondent agreed on a salary of $550 per week for that service which was predicated on the Respondent providing care for 20 hours per week.

[11] The Respondent testified that she and John reviewed that arrangement in 2016 and reached an agreement to increase her monthly wage to $3,500. Following John's death, the Respondent asserts she reviewed that arrangement once again with Annie and the two agreed on a monthly wage of $8,000.

[12] After the death of her husband in October 2016, Annie continued to rely solely upon the Respondent for her personal well-being and for the management of her financial affairs. That continued through her death in 2021. Annie resided with the Respondent at the Respondent's home in Oshawa, and later at the Respondent's home in Ajax, during that time.

[13] Shortly after John's death Annie moved in with the Respondent and the family home and farm property was listed for sale. It sold quickly and the transaction closed in December of that year. The net proceeds of sale were in the amount of $671,477.09.

[14] From those proceeds of sale, the Respondent gifted the amount of $15,000 to each of the six siblings as well as the sum of $5,000 to each of Annie's 13 grandchildren for a total amount of $155,000. According to the Respondent these funds were disbursed by her at the direction of Annie.

[15] At that point the Applicant sought legal advice and was advised the gifts constituted a misappropriation of funds. He discussed that advice with the Respondent and suggested she had no right to spend Annie's money unless it was for Annie's own benefit. The Applicant said the Respondent told him the sale proceeds from the farm had been invested in GIC's for Annie's benefit.

[16] In August 2021, the Respondent contacted the Applicant to advise that Annie had suffered a stroke. She also told him that she had gone through Annie's personal belongings and had discovered a power of attorney executed by Annie in 1994 in favor of the Applicant and his spouse.

The Respondent also forwarded photographs of the power of attorney and of a copy of a prepaid funeral contract purchased by Annie on December 27, 2016, which referred to the Respondent as "Daughter/POA."

[17] Upon receiving those documents, the Applicant consulted with Annie's doctors and learned her death was imminent. He contacted the Respondent and asked that Annie's personal documents such as her bank statements and will be gathered up in order to be given to their lawyer when Annie died. At that point the Respondent advised the Applicant there was no money, the sale proceeds from the farm had been spent, and Annie's bank account was overdrawn by more than $30,000.

[18] The Respondent disputes the Applicant's account of that conversation. She says that in fact what she told the Applicant was "there was no money in my mother's bank account, and she might owe me $30,000." That strikes me as a distinction without a difference.

[19] This proceeding was commenced by the Applicant in April 2022.

The Respondent's Accounts

(a) Affidavit Verifying Estate Accounts

[20] On August 18, 2022, the parties consented to an order for the release of certain records including the notes of Annie's physician.

[21] On April 27, 2023, the parties entered into a consent order requiring the Respondent to pass her accounts for the period November 2016 through August 2021. Those accounts make for interesting reading.

[22] The Reconciliation in those accounts reveals that in the course of that time period Annie Hotner had $741,687.83 in capital receipts and $1,121,448.72 in capital disbursements. The difference between those two amounts, being $379,760.89, is made up by the cash balance shown in Annie's three bank accounts which together total that same amount.

[23] The last entry on the accounts was a payment to the Respondent dated August 18, 2021, in the amount of $2,510 for "24/7 care of Annie Hotner." That amount appears to have been the last of Annie's funds. That amount was paid out to the Respondent, by the Respondent, only four days before Annie's death.

[24] When asked in the course of her cross-examination how her mother would have survived financially if she had lived longer, the Respondent pointed to her own CPP benefits, and the fact of her mother's old age pension support, and suggested those amounts would have been sufficient for their monthly needs going forward. The Respondent did not explain how the bills would be paid in the event Annie ever needed professional care.

[25] As I understand the evidence at the time of the hearing of this matter in August 2024 Annie's estate consisted solely of funds in the total amount of $1,422.28.

[26] The accounts show payments to the Respondent for care totalling $411,690.36. They also show funds withdrawn by the Respondent for renovations to her home totalling $508,642.65. The entries under "Gifts and Future Bills" (including those enumerated above) total $189,304.26. Those three amounts total $1,109,637.27.

[27] The gifts included the sum of $25,000 to the Respondent "for extra work getting Farm House ready for sale" and $2,500 to her daughter's partner to pay his past due income tax. The Respondent also received a total of $4,000 for "future bills."

[28] The accounts show an entry on March 29, 2017, in the amount of $400,000 which is described as "Annie Hotner gift to Elaine Norman - Annie and Elaine agreed $8,000 per month for 24/7 personal care was fair and reasonable. Used $54,869.64 for personal expenses."

[29] The accounts also show three payments totaling $102,500 to Bryan Norman "for buyout of Ajax property." I found those entries interesting in light of the Respondent's assertions at paragraph 28 of her affidavit of May 26, 2022, that she purchased Bryan Norman's interest in the home for $250,000 by making payments as follows:

(b)	Money from my Father before & after passing	$75,000.00
(c)	2018 earnings	$25,000.00
(d)	2019 earnings	$25,000.00
(e)	2020 earnings	$25,000.00
(f)	2021 line of Credit	$25,000.00
(g)	Sale of Property	$75,000.00
	Total:	$250,000.00

[30] The Respondent's tax records show no income, other than CPP and OAS, for the taxation years 2017-2021 inclusive.[1]

[31] That is the home where Annie was living with the Respondent at the time of her death. That home was extensively renovated by the Respondent using Annie's funds. Photographs of the home depict a completely updated modern home. Indeed, when it was sold the listing agent described it as "completely renovated top to bottom."

[32] The accounts also show two separate but consecutive entries each in the amount of $53,829.81 which are labeled "To Elaine Norman Joint GIC with Annie Hotner, money to live

[1] See the T1 Comparative Summary filed as Exhibit NN to the affidavit of Arlene Galliah, sworn August 1, 2024, and filed herein.

on."[2]. I am unaware of any evidence tending to show a GIC, joint or otherwise, was ever established by or for Annie Hotner.

(b) Respondent's journal of her personal accounting for the money spent on her mother

[33] The Respondent prepared and supplied a handwritten journal purporting to show total amounts spent monthly on her mother from January 2017 through August 2021. For some unknown reason the journal includes only nine months in 2017, and only every other month thereafter.

[34] That journal shows an entry for each of those months in the flat rate amount of $8,000 which is said to cover "Room – estimated at $700/month, Food for four weeks, Gas and insurance for car, and home insurance." Additional amounts are noted and itemized for each month which totalled anywhere between $375 and $1,750 a month. These amounts typically included a one half share of various household utilities and property taxes. They also included sundry items ranging from hand cream and haircuts to "undercoating the car". In October 2020 those expenses totalled $3,676.24 because the Respondent charged Annie a one time expense of $2,817.50, being one half of the cost of a new roof for the house.

[35] It is not clear whether those additional amounts were included in the $8,000 monthly flat rate or were charged over and above that amount.

[36] The Respondent also appears to have been in the habit of charging her mother $50 every time she took her anywhere in the car such as trips to various doctor's offices and clinics. She charged Annie $150 for three trips to the hospital so Annie could visit her dying husband. She also appears to have charged Annie $200 for four "trips to the mailbox."

Evidence of the Respondent's daughter, Jessica Norman

[37] The Respondent's daughter, Jessica Norman, also swore an affidavit. Jessica and her partner and their toddler son lived with the Respondent and Annie at the Ajax property from October 2019 to September 2020. She described seeing her mother abuse Annie physically, emotionally and verbally. She said she witnessed her mother slapping Annie on her behind, on her hands and on her face, as well as pulling her hair. She said the Respondent would threaten Annie, yell at her, insult her and call her names. She also observed the Respondent pushing, shoving, and pinching Annie in order to make sure Annie did whatever the Respondent told her to do.

[38] Jessica maintains Annie understood what was happening to her and knew she was being treated badly. Jessica tried to persuade Annie to move into an assisted living facility however Annie told her she would rather "put up with Elaine" than go into a home.

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[2] Counsel advises these are duplicate entries and the amount is in error, the correct amount being $53,629.81.

Evidence re: Capacity

[39] I have been provided with a considerable amount of evidence regarding Annie's state of mind at the relevant times. That evidence comes in the form of notes on Annie's medical file made by her family physician as well as the Respondent's sworn testimony both before me and in the course of her cross-examination on her affidavit. That evidence is concerning.

- The earliest evidence of Annie's decline cognitively is found in her doctor's notes regarding her appointment May 4, 2015, when it was noted that she shows "moments of dementia - not knowing things."

- At a subsequent appointment on July 20, 2015, Annie's doctor noted "safety risks at home – trips, falls, fire, wandering, etc."

- On July 26, 2016, her doctor noted "some memory issues has little spells - they think she forgets to eat."

- On November 4, 2016, the doctor's notes detail a telephone call from the Respondent indicating "changing Annie's will (husband just died) needs a competency letter saying she has all her faculties." The doctor noted a competency assessment would have to be done however it would appear that never occurred.

- In her testimony during her cross-examination on her affidavit the Respondent testified that the lawyer who assisted her with the farm sale transaction in the late fall of 2016 suggested to her "your mom should maybe go to the doctor to see if she's OK." The Respondent went on to say "sometimes my mother would flake out a little bit, you know, like deer in headlights. And she'd sort of have a little bit of a flake in and flake out. And he [presumably the lawyer] says "I'd really like to have her looked at by someone to know if she knows what's going on"."

- On November 21, 2016, the Respondent took Annie to see her doctor in order to do a cognitive test, specifically the Montreal Cognitive Assessment or MOCA, a copy of which was filed as an exhibit. Annie was unable to complete most of the exercises and scored only 5/30 on the test. According to the answer key for the test that score put Annie in the "Severe Dementia" category which is said to include "No capacity for making judgment. Incontinence. High dependency on others for personal care."

- In her affidavit in this matter sworn May 26, 2022, the Respondent states "I agree that after the death of my father, my mother had no real desire or ability to manage her own finances. Thus the *obligation* was put before me." (my emphasis)

- During her cross-examination on her affidavit the Respondent testified she "does not think [Annie] absolutely knew what was in her account." She also said "my mother would say silly things." Further, the Respondent testified her mother "had no real desire or ability to manage her finances."

- When asked about the amount of time she felt she could leave her mother alone the Respondents said "[F]rankly I didn't like leaving her alone at all. She would do things in the house that she shouldn't have done." The Respondent also testified that at the time of the sale of the farm in the fall of 2016 Annie needed "24/7 care 75 per cent of the time." By the following June the Respondent said Annie needed "24/7 care all of the time." When asked what that entailed the Respondent said "Well, my day was – could be anytime in the night. I know I was up numerous, numerous times. She tried to go – even with the light on low and the doors open, she tried to go into the linen closet to go to the bathroom."

- According to the doctor's notes regarding the appointment of December 3, 2018, the Respondent told the doctor "she felt the level of dementia had increased + +." She also told the doctor Annie could no longer remember what year it was and that she thought it was 1993.

- On January 4, 2021, the doctor noted Annie "has dementia – she is in a diaper all day", that she could not be left alone, and that she had "gotten up at night and smeared poop everywhere." In her testimony the Respondent confirmed Annie "would take her faeces and smear it all over the sheets, her blankets."

- In the cross-examination on her affidavit, at paragraphs 374-375, the Respondent testified that at one point Annie said to her "I'm sorry darling. But you know things in my head aren't right anymore."

[40] Counsel for the Respondent cautions me about making a finding regarding Annie's capacity at the relevant times and suggests I would be "be on thin ice" were I to do so. It is not my intention to make such a finding as there is no expert evidence before me on the point. However, based on the Respondent's own evidence, and based on the notes of Annie's doctor, there can be no question there was real and apparent cause for grave concern about Annie's cognition from mid 2015 through the late fall of 2016 when John died, the farm was sold, and the Respondent began to care for Annie. That concern could only have grown through the passage of time until Annie's death in 2021.

[41] The evidence clearly shows the Respondent was aware Annie was experiencing cognitive difficulties from 2015. It was the Respondent herself who raised the issue when she contacted Annie's doctor in November 2016 about a capacity assessment in order to facilitate Annie changing her will. The evidence of the continuing decline in Annie's cognition thereafter also comes largely from the Respondent.

[42] Against such a backdrop it is surely incumbent upon any responsible adult to act with great caution when considering the stated wishes and intentions of an elderly individual like Annie regarding such weighty matters as an estate valued at more than $1.1 million. That is particularly the case where, as here, there are numerous siblings and grandchildren involved. The respondent claims she did not know the details of Annie's will. If that is in fact the case, then the Respondent acted with complete and utter disregard for the potential claims those family members may have had to a share in Annie's estate. Instead, she blithely accepted the instructions she claims Annie provided, and spent the entirety of Annie's wealth, primarily on herself.

Fiduciary duty and Trustee *de son tort*

[43] There is some question in this matter as to whether the Respondent was acting in a fiduciary capacity. Her counsel suggests she was not because there is no legal authority requiring the Respondent to act solely in the best interest of Annie.

[44] I find it difficult to accept that argument in circumstances where a woman who has entered her nineties, and who all agree "had no real desire or ability to manage her own finances" after the death of her husband, allows her daughter a free hand with her accumulated lifetime savings of more than $1.1 million dollars.

[45] The Supreme Court of Canada considered the issue of fiduciary duty in the case of *Frame v Smith*, [1987] S.C.J. No. 49. The court found that relationships in which a fiduciary obligation had been imposed generally share three general characteristics:

> 1. The fiduciary has scope for the exercise of some discretion or power.
>
> 2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiaries legal or practical interests.
>
> 3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[46] These three characteristics are present in the matter at hand. The Respondent was given scope for the exercise of discretion or power when she was asked by Annie to look after her and to use her money for whatever purpose the Respondent saw fit on condition she care for her and not put her in an assisted living facility.

[47] The Respondent clearly had power and discretion to affect Annie's legal or practical interests in as much as she had complete freedom and discretion to deal with Annie's assets as she saw fit.

[48] Finally, Annie was obviously vulnerable to and at the mercy of the Respondent at all times during the period in question. She was completely dependant on the Respondent for everything.

[49] The Applicant has directed me to case of *Estate of Annie McKay v. Dawn McKay (Evans)*, 2015 ONSC 7429 ("*McKay*"), a decision of Woodley J. of this court, who I note parenthetically has a considerable amount of experience and expertise in estate law. The circumstances in that case are strikingly similar to the circumstances of this case in that the Respondent had discretion in the exercise of the bank account of an elderly woman, who was her mother in law, and could write cheques and transfer funds which affected that woman's interests. Furthermore, that elderly woman's mental health was failing which rendered her vulnerable.

[50] Woodley J. found the Respondent in that case was a fiduciary who owed her mother in law fiduciary duties in the operation of her bank account.

[51] Woodley J. also found the Respondent in that case was acting as a trustee *de son tort*, being a person who while not appointed as a trustee, nevertheless takes it upon themself to possess and administer trust property for a beneficiary. Such a person will be treated as if they were a trustee: see *Waters' Law of Trusts in Canada*, Third Edition, Ch. 11, page 490 and Ch. 12, page 402.

[52] Like the case before me, the factual matrix in *McKay* involved a non-contributing joint bank account holder with an elderly parent, in that case a mother in law, who was paying herself from that joint account for caring for that elderly parent. Unlike this case, the amounts involved in McKay, being weekly payments for care in the amount of $250, were relatively insignificant. Nevertheless, the joint account holder/caregiver was found to be a fiduciary. There is nothing about this case that suggests or requires a different approach. I therefore find the Respondent in this case was Annie's fiduciary. She owed fiduciary duties to Annie, and indeed the rest of the family, regarding the management of Annie's bank accounts.

[53] I also find the Respondent acted as trustee *de san tort*. Not only did she take it upon herself to possess and administer trust property, she actually held herself out as Annie's power of attorney when she purchased Annie's prepaid funeral.

[54] The Respondent was therefore obliged to act with honesty, integrity and in good faith for the benefit of Annie.

Passing of Accounts

[55] The Respondent argues the Applicant was not entitled to seek a passing of accounts because the Applicant is not a person listed in section 41(4) of the *Substitute Decisions Act.*

[56] The Respondent consented to the order for the passing of accounts, she served and filed her Notice of Application to Pass Accounts, and she responded to the Applicant's Notice of Objection. The Respondent was represented by counsel at the time who, according to the recitals in the order, signed the consent to the order.

[57] It would appear the Respondent is seeking a second kick at the can.

[58] The Respondent had the opportunity to make her arguments against an order directing the passing of accounts when the matter was before Corkery J. on April 27, 2023. Instead, she and her counsel chose to consent to the order.

[59] The Ontario Court of Appeal has found that allowing a party a second chance to raise an issue that was already before the court "undermines the integrity of the rules governing the conduct of litigation.": see *Kendall v Sirard,* 2007 ONCA 468, at paragraphs 42-45.

[60] As the Applicant suggests, "[a] Passing of Accounts is a presentation to the courts of the actions taken by a fiduciary." I have found the Respondent was a fiduciary. As such she had an obligation to provide an accounting of her handling of Annie's funds. She has now done so. That cannot, and should not, now be undone.

Gift

[61] It is the Respondent's position that Annie gifted her entire wealth and life savings to her on the understanding that the Respondent would care for her and would not put her in an assisted living facility.

[62] When aging parents transfer their assets into joint accounts with their adult children in order to have that child's assistance in managing their financial affairs, there is a rebuttable presumption the adult child is holding the property in trust for the aging parent to facilitate the free and efficient management of that parent's affairs. The presumption of resulting trust is the general rule for gratuitous transfers and the onus is placed on the transferee to demonstrate that a gift was intended: see *Pecore v Pecore* [2007] S.C.J. No. 17.

[63] The mere assertion of gift by the Respondent is not sufficient in and of itself. Section 13 of the Evidence Act, R.S.O. 1990, c. E.23 requires more than such an assertion. It reads as follows:

> In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

[64] Oftentimes in cases of this nature courts are asked to consider documentary evidence in order to try and ascertain the intent of a transferor. Bank documents, or the granting of a power of attorney, or some other written agreement or acknowledgment evidencing the gift are all useful as tools to prove the fact of a gift. The Respondent is not able to offer any such evidence.

[65] The Respondent has however proffered affidavit evidence from 11 family members in support of her position. Those affidavits all consist of two virtually identical paragraphs in which the affiants identify themselves and assert their support of the Respondent in defending the claims of the Applicant. Each of the affidavits has a single exhibit attached, being a written statement from the affiant setting out their observations.

[66] I have carefully reviewed those statements[3]. The affiants are unanimous in their praise for the Respondent's care for Annie. They are also unanimous in their condemnation and rejection of Jessica Norman's allegations of abusive behaviour. Their statements clearly show there is considerable animus between the Respondent and her daughter Jessica.

[67] Only some of the statements address the financial issues raised in this Application. Those comments are set out below:

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[3] The reproduction of the materials filed by Jessica Joy, which appear to be a series of Facebook screen shots, was of such poor quality as to make them unreadable.

- Annie's daughter, Jane Parkin, acknowledged receipt of the $15,000 gift from her mother in 2017, said she understood that to be her inheritance, and that Annie had given the remainder of her money to the Respondent on the promise she would not be placed in a nursing home. Ms Parkin also said she "cared little for mother's money, only that she was happy and well looked after."

- Xaver Dangl is the spouse of Annie's daughter Merie. He too acknowledged the fact of Annie's $15,000 gift to his spouse, as well as the $5,000 gift to each of the grandchildren. He said Annie "confirmed in a conversation with me that she had wanted this distribution ("I want everybody to have some money") and further that she had wanted Elaine to have *some extra money* on top of the $15,000 ("for all the work she do"). He also said the Respondent told him the proceeds of the sale of the family property, which I took to be a reference to the sale of John and Annie's home and farm, "were transferred to a money manger and subsequently into GICs". He also said Annie told him "she was *sharing* the money with Elaine and that Elaine could spend it any way she deemed appropriate."(my emphasis). Mr. Dangl did not explain whether he understood the words "some extra money" meant the sum of 1.1 million dollars.

- Sharon Killin, a long time friend of the Respondent, said Annie told her she gave her money to Elaine "because she didn't need it and Elaine was looking after her "real good."

- Gloria Becker, a neighbour of the Respondent, said Annie "made Elaine promise that she would never have to go to a nursing home. After Elaine promised to keep Annie in her home Mom said that the remainder of her estate would go to Elaine."

[68] None of those four individuals made any reference to Annie's mental condition at the time she made those comments. Indeed, the only mention of Annie's cognitive capacity in the 11 statements was made by Olga Bergs who mentioned the Respondent leaving her job as an investigator "when Annie was diagnosed with dementia", which of course was in 2015, a full year before the farm was sold.

[69] There is no evidence before me tending to suggest any of the affiants knew Annie scored only 5/32 on the MOCA capacity test in November 2016, only a month before Annie received the proceeds of sale of her property.

[70] There is no suggestion the affiants knew the Respondent lied to the Applicant, and to Mr. Dangl, about the funds being transferred to a money manager and put into GICs, and that she had instead transferred the bulk of the sale proceeds into her own bank account almost as soon as those funds were received.

[71] There is no suggestion any of these affiants knew the Respondent was charging Annie $8,000 per month for her care and did not disclose any of that income on her tax returns for the years 2017 through 2021.[4]

[72] Similarly, there is nothing to show the affiants knew the Respondent withdrew over $500,000 from Annie's accounts in order to complete the purchase of her home and then renovate it "from top to bottom", which included a new "porcelain floor", a six burner gas range, as well as a new refrigerator, dishwasher, and wine fridge.

[73] What would these affiants have thought had they known the accounts show the Respondent spent Annie's money at such a pace that by February 2020 only $38,960 remained, meaning if Annie deteriorated such that she needed professional care there would be no money available to pay for it.

[74] And finally, what would the affiants think if they learned the Respondent claimed in her sworn affidavit of May 26, 2022, that she used her own annual earnings and her own line of credit to complete her purchase of the home when the Respondent's tax records clearly show she had no such earnings, and when the accounts she passed a year later in June 2023 clearly show she used Annie's funds for that purpose.

[75] The Respondent's mendacities about investing Annie's money in GICs, about how she finished paying for the house, and her failure to disclose the alleged $8,000 monthly income on her tax returns, cause me to conclude she is careless with the truth. In the absence of any evidence tending to show any of the affiants proffered by the Respondent are aware of any of the factors I have just enumerated I am obliged to conclude their evidence does not rise to the level contemplated by the Supreme Court in the *Pecore* case or by s. 13 of the *Evidence Act.*

[76] As a result, I find the Respondent has not met her onus of proving the funds in question were a gift, and that Annie entered into the transaction of her own volition; see *Pecore, supra,* and see *Morden (attorney of) v. Currie*, 2008 CarswellOnt 756 (Ont. S.C.J.).

Conclusions

[77] I am unable to accept Jessica Norman's allegations about Annie being mistreated by the Respondent. While those allegations are disturbing, the fact is the evidence of Jessica's own behavior proffered by the other affiants in this manner, suggests there is a high degree of animus between Jessica and the Respondent. That gives rise to significant concern about Jessica's motivations in filing her affidavit.

[78] I have found the Respondent has not met her onus of proof on the question of whether Annie gifted her funds to her.

[79] I have also found the Respondent owed Annie a fiduciary duty and was acting as trustee *de son tort* at all relevant times. For the reasons above I am satisfied the Respondent has breached

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[4] See footnote 1 above.

that fiduciary duty, and her obligations as trustee *de son tort*, by converting Annie's money to her own use for the purpose of enriching herself.

[80] The Application is therefore granted. The Respondent shall repay all funds received by her from Annie subject to certain as yet undetermined credits and adjustments.

[81] Unfortunately, I find I am unable to quantify those credits and adjustments without further input from counsel on the following points:

- The exact amount of the funds currently being held in trust with the law firm of Polak, McKay Hawkshaw, being the net proceeds of the sale of the Respondent's Ajax property;

- The value of any payment owing to the Respondent, if any, for her care of Annie from the time the Respondent and John entered into the care agreement in 2015 until Annie's death in 2021. Counsel should understand that in the event I find such payment is appropriate and owing then it would be my intention to set an amount somewhere between the $550 per week originally agreed by the Respondent and John, and the subsequently agreed amount of $3,500 per month for the care of both Annie and John, an amount which I believe the Respondent found to be "more than satisfactory" for the daily care of two people. If Annie did in fact agree to pay the Respondent $8,000 per month for care then I find such an amount to be both grossly excessive and improvident.

- Whether the Respondent should be ordered to pay damages to the Applicant, and if so in what amount. I am not prepared to make such an award, in any amount, without the benefit of submissions from counsel for each party.

- There is also the question of costs, including type and quantum.

[82] As I am content to proceed by way of oral or written submissions I will defer to counsel's wishes in that regard. I ask that counsel advise the trial coordinator of their preference at which point I will make any necessary further endorsements.

[83] In the meantime, I make the following order:

1) All funds from the sale of Elaine Norman's Ajax property, currently being held in trust by Polak, McKay, Hawkshaw, shall be transferred forthwith to Elm Law Professional Corporation in trust for the Estate of Annie Hotner.

Justice C. M. Smith

Date: February 03, 2025

Postscript: I would like to offer my apologies to the parties and to counsel for the long delay in the preparation and delivery of these reasons for decision. My trial schedule since the hearing of his matter last August has been heavy and has prevented me from attending to other matters. I thank you all for your patience.