

SUPREME COURT OF YUKON

Citation: *J.A.M. (re Guardianship)*
2024 YKSC 9

Date: 20240229
S.C. No. 24-B0004
Registry: Whitehorse

BETWEEN:

PURSUANT TO THE *DECISION MAKING, SUPPORT AND PROTECTION TO ADULTS ACT*, S.Y. 2003, C. 21 (the “*Act*”); specifically SCHEDULE A, *THE ADULT PROTECTION AND DECISION MAKING ACT*, PART 3, COURT APPOINTED GUARDIANS (Part “3”)

IN THE MATTER OF THE APPLICATION FOR GUARDIANSHIP OF
[J.A.M.] also known as [A.M.]

Before Chief Justice S.M. Duncan

Counsel for the Applicant,
Public Guardian and Trustee

Cindy Freedman

Counsel for M.L.D.

Noel Sinclair

This decision was delivered in the form of Oral Reasons on February 29, 2024. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] DUNCAN C.J. (Oral): This application for guardianship raises issues about how to determine an adult’s best interests, the appropriate role of the Public Guardian and Trustee and of the Incapability Assessor and Adult Protection Services, and the jurisdiction of this Court over a person who is currently outside of the Yukon Territory.

[2] This application concerns J.A.M., also known as A.M., a 72-year-old man originally from Saskatchewan who has lived in Whitehorse since 1991, and is currently at [redacted], Alberta, with his wife, M.L.D., age 40. There is no argument that J.A.M. is experiencing memory issues. There is disagreement as to their extent and effect. There

is speculation that concussions he suffered during his years in the Canadian Football League and playing rugby may have caused his problems, but there has been no medical confirmation or diagnosis of this.

[3] The first question for the Court to decide is whether his memory issues render him incapable of managing his affairs in the areas of finance, healthcare, legal, and personal. If so, is he in need of guardianship and have less intrusive forms of support and assistance been tried or carefully considered; and if guardianship is appropriate, should the Public Guardian and Trustee be J.A.M.'s guardian and in what areas? Finally, is the Supreme Court of Yukon the appropriate forum to decide these issues?

[4] The hearing in this case occurred over three days. In addition to the required documentary evidence from the Public Guardian and Trustee, there was an affidavit and an exhibit filed by J.A.M.'s financial advisor at Assante Investments ("Assante"), affidavits and exhibits from two employees at Adult Protection Services, and additional affidavit material from the Public Guardian and Trustee. All of these were in support of the application by the Public Guardian and Trustee.

[5] J.A.M.'s wife, M.L.D., also filed an affidavit in support of her opposition to the Public Guardian and Trustee's application. She was represented by counsel, who filed a brief of authorities and other supplementary material for my consideration. Both counsel also filed outlines of argument.

[6] A number of people attended the hearing, in addition to the Public Guardian and Trustee and counsel. Joy Vall, the Incapability Assessor, was present in person and testified under oath about her assessment. Two Adult Protection workers, Terence Creamer and his supervisor, Tina Bunce, attended and provided additional information in answer to questions.

[7] In addition, J.A.M.'s daughter, S.M., his friend P.R., and his financial advisor, Rebecca Parry of Assante attended and gave evidence under affirmation. J.A.M.'s former wife, H.G.-T., attended by Zoom and gave evidence under affirmation. J.A.M. and his wife, M.L.D., attended by videoconference from [redacted], Alberta, and both testified by affirmation.

[8] I review this detail as it describes an unusual process for a guardianship application such as this; the thoroughness by which this application has been considered; and the intensity of the feelings, concerns, and conflicts surrounding this application. This decision will reflect the intensity and the concerns raised by all participants.

Position of the parties

[9] The Public Guardian and Trustee's application for guardianship of J.A.M. relies on the incapability assessment of Joy Vall, an occupational therapist with over 15 years' experience in the Yukon as an incapability assessor. Ms. Vall concluded that J.A.M. is not capable in all realms of decision-making. In her assessment report, her conclusions were supported by J.A.M.'s expressed needs for help with housing, finances, retaining a lawyer, as well as other collateral information from Adult Protection Services, Assante, friends - in particular, P.R. and L.C. -, J.A.M.'s daughter, and his former wife.

[10] The Public Guardian and Trustee also relies on the referral from Adult Protection Services, including the interaction between Adult Protection Services, the Public Guardian and Trustee, and Assante, with J.A.M.'s current wife, as well as objective information obtained about his financial circumstances. This information raised concerns that M.L.D. has not been acting in J.A.M.'s best interests. These concerns were echoed by P.R., his daughter, and his former wife. All are concerned that J.A.M.'s

memory issues and reduced decision-making capability make him vulnerable to external influences. They are concerned that M.L.D. has taken and is taking financial advantage of J.A.M. There is no other individual willing and able to be a guardian of J.A.M. His daughter, his former wife, and his friends say they are not willing or able for various reasons to do so. One of the reasons expressed by his daughter and his former wife is their unwillingness to communicate and deal with M.L.D.

[11] Other forms of less intrusive support have not prevented the worsening of J.A.M.'s financial circumstances and the Public Guardian and Trustee says he needs assistance with legal matters, which they cannot provide.

[12] M.L.D. has not applied to be J.A.M.'s guardian and, given the Public Guardian and Trustee's concerns about her failure to act in his best interests, she would not be considered suitable by them.

[13] Finally, the Public Guardian and Trustee says that J.A.M. is ordinarily resident in the Yukon and there is a real and substantial connection between the Yukon and the facts on which this proceeding against the person is based, relying on the presumption set out in s. 10.1(j) of the *Court Jurisdiction and Proceedings Transfer Act*, SY 2000, c 7. The Public Guardian and Trustee says there is no reason to decline to exercise jurisdiction because J.A.M. is not capable and the Public Guardian and Trustee has determined that the Yukon is a more appropriate place for him to live.

[14] M.L.D. argues that J.A.M. is capable and does not require a guardian. If he requires help with his finances, she can provide it as his wife. He is happy living with her in Alberta and she can take care of him. She argues that Joy Vall is not a competent assessor and is not qualified to perform assessments. She points out a number of problems and deficiencies with the assessment and says it does not meet the threshold

requirements for a valid incapacity assessment report and, as result, I should disregard it.

[15] M.L.D. relies on a letter from Dr. Osiogo, a psychiatrist in Alberta, who found J.A.M. capable of managing his finances. She also relies on a letter from Dr. Tirschmann, who found him capable of managing his healthcare.

[16] M.L.D. further argues that this Court has no territorial competence to decide this matter, as J.A.M. is no longer ordinarily resident in the Yukon. The proper forum for any determination of this matter, if and when necessary — which she says it currently is not — is Alberta, not only because that is where he lives but also because any assessment done in Alberta would be of a higher quality than the one conducted by Joy Vall.

[17] M.L.D. is highly offended by what she considers to be the unnecessary and ineffective intrusiveness of the Public Guardian and Trustee into J.A.M.'s and her lives.

[18] She also objects to the unsubstantiated and unreliable hearsay evidence, including from anonymous reporters, relied on in support of the Public Guardian and Trustee's application, and says it is insufficient to meet the hearing requirements not only at the threshold level but also on the merits.

Hearsay evidence

[19] M.L.D.'s counsel says that much of what the Public Guardian and Trustee relies on is hearsay, including information in Joy Vall's assessment, information provided by Adult Protection Services, and information obtained by the Public Guardian and Trustee. M.L.D. notes that she was never spoken to by Joy Vall and says that the Adult Protection Services and Public Guardian and Trustee made unfair assumptions based on information from others about her.

[20] The standard that must be met on this application by the Public Guardian and Trustee is balance of probabilities, that is, is it more likely than not that J.A.M. is incapable and needs guardianship protection by the Public Guardian and Trustee. They do not have to prove this beyond a reasonable doubt as the Crown would in a criminal case.

[21] Part 3 of the *Adult Protection and Decision Making Act*, SY 2003, c 21, Sch A (the “*Act*”), ss. 30 to 57, and the accompanying regulations are not prescriptive about the hearing process. The Court must consider the information in all the reports provided by the proposed guardian and in the guardianship plan, and hear the representations of anyone served with the application or anyone who is supporting and assisting the adult. The Court may also require the person proposed as guardian to attend and answer questions. The *Act* and regulations do not say anything about oaths or affirmations for those who make representations or answer questions. This suggests a relaxed approach to the rules of evidence normally applicable in legal proceedings which accords with the underlying purpose of the legislation, which is to ensure vulnerable adults are protected.

[22] The principled exceptions to admitting hearsay evidence are necessity and reliability. These two requirements are not fixed standards, but are fluid and work together. For example, if evidence is highly reliable then necessity can be relaxed (*R v Baldree*, 2013 SCC 35 at para. 72).

[23] In this case, much of the evidence relied on by Joy Vall was corroborated by the testimony of the individuals who appeared in court and by objective information obtained by or provided to the Public Guardian and Trustee, such as financial

information from Assante; bank account information; and other information, such as credit cards, insurance information, driver's information, and living arrangements.

In addition, the sworn or affirmed testimony from the support of individuals who attended in court confirmed information provided in Joy Vall's assessment report, including observations and interactions with J.A.M. that gave rise to concerns about his capability and their efforts to support and assist him. This contributed to the reliability of the information provided by the Public Guardian and Trustee and assessor.

[24] With respect to the assumptions made and inferences drawn about M.L.D., at the hearing, she provided *viva voce* affirmed testimony and she also provided affidavit evidence in advance of the hearing. All of this allowed the Court to make its own assessment of the evidence in support of the Public Guardian and Trustee's application, as well as in support of M.L.D.'s objection.

[25] For these reasons, I do not accept M.L.D.'s counsel's arguments that the hearsay evidence in this application was unacceptable.

Conclusion in brief

[26] I find that this Court does have jurisdiction to decide this application; that J.A.M. is incapable of managing his financial affairs, legal affairs, healthcare, and some aspects of his personal life, including where he will live; and that the Public Guardian and Trustee should be his guardian because there is no one else suitable and less intrusive measures have been tried and have not worked. I have carefully considered all of the extensive evidence provided by the Public Guardian and Trustee and M.L.D. in support of their positions at this hearing, as well as the oral testimony and the additional materials provided, and the applicable legal principles.

[27] Here is why I have come to my conclusions.

Jurisdiction

[28] Counsel for M.L.D. argues that this Court lacks territorial competence because: (1) as of December 26, 2023, J.A.M. was no longer resident in the Yukon, as he flew to Alberta to live with his wife; (2) there is no ability for this Court to impose coercive orders on J.A.M. while he is outside the territory; and (3) even if I were to find jurisdiction because of J.A.M.'s real and substantial connection with the Yukon, this Court should decline jurisdiction because it is not a convenient forum.

[29] More specifically, counsel for M.L.D. says that J.A.M. has since 2014 been living between Whitehorse and Alberta. He has owned a matrimonial home jointly with M.L.D. since March 2021 in Alberta as a joint tenant. Currently, in Whitehorse, he has no residence. Previously, he shared an apartment with a roommate, lived in a rooming house at [redacted], lived temporarily with his daughter, and then for a very short time over the Christmas break moved into Normandy Living, a seniors' residence.

[30] On December 26, 2023, he flew to Alberta to stay with his wife and her 20-year-old daughter. In addition to his wife and her daughter and their home, his connections to Alberta include attending the University of Alberta many years ago; the presence of his sister, who is in long-term care in Alberta; and obtaining medical care. In Alberta, he walks to a nearby recreational centre and seniors centre regularly. He does chores around the house, he makes meals, he watches television and he gardens. Unlike in Whitehorse, where there is no one to take care of his immediate needs, he has his wife to care for him in Alberta.

[31] M.L.D. relies on the definition of territorial competence in the *Court Jurisdiction and Proceedings Transfer Act*.

(1) **Definitions**

Territorial competence means the aspects of a court's jurisdiction that depend on a connection between

- (a) the territory or legal system of the state in which the court is established, and
- (b) a party to a proceeding in the court or the facts on which the proceeding is based.

[32] The legal test for territorial competence is codified in the *Court Jurisdiction and Proceedings Transfer Act*, specifically in ss. 3, 10, and 11. Territorial competence is determined exclusively by these statutory provisions and the existence of jurisdiction is not a matter of judicial discretion (*Ferrari v Feurer*, 2020 YKSC 29 ("*Ferrari*") at para. 16).

[33] The relevant part of s. 3 of the *Act* states:

A court has territorial competence in a proceeding that is brought against a person only if

...

- (d) that person is ordinarily resident in the Yukon at the time of the commencement of the proceeding; or
- (e) there is a real and substantial connection between the Yukon and the facts on which the proceeding against that person is based.

[34] Section 10(1) sets out the meaning of real and substantial connection that is particularly relevant to this case, (j):

(1) Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between the Yukon and the facts on which a proceeding is based, a real and substantial connection between the Yukon and those facts is presumed to exist if the proceeding

...

(j) is for a determination of the personal status or capacity of a person who is ordinarily resident in the Yukon;

...

[35] The analysis returns to whether J.A.M. is ordinarily resident in Whitehorse, Yukon, or [redacted], Alberta.

The party arguing for jurisdiction ... has the initial burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum. The threshold is not high. As long as the claims pleaded trigger one of the presumptions of a real and substantial connection, the onus will be met ...

The statutory presumption may be rebutted through proof by a party that there is no real and substantial connection between the Yukon and the facts on which the proceeding is based. The burden of proof is on the party challenging the assumption of jurisdiction ... to show that it 'is plain and obvious that the action pleaded' [in this case, an application is pleaded] could not lie within the territorial competence of the court [*Ferrari* at paras. 20-21].

[36] In this case, if M.L.D. adduces evidence that demonstrates the tenuousness of the claim for real and substantial connection, then the burden shifts again to the applicant to show through evidence that it has a good arguable case and that there are facts to provide a foundation for the jurisdiction. A good arguable case is a lower standard than the balance of probabilities.

[37] "Ordinarily resident" means where a person in the settled routine of their life regularly, normally, or customarily lives. This can also be described as "Where is his real home?" This is an oft repeated and a good summary of the inquiry to be made. Many cases in the areas of tax, family, and conflict of law contexts have considered the definition. It is a question of fact in each case having regard to all the circumstances, including the actual physical presence in a place and an intention to stay there. Intention

can be inferred from circumstances surrounding the person's presence and from the relationship that the person has with the place. The circumstances in which a person remains absent from a place may also determine whether he or she has stopped residing in that place.

[38] Here, in this case, in addition to the facts set out by counsel for M.L.D., the following facts are relevant. J.A.M. has lived in Whitehorse since 1991 for 33 years. He was a teacher in [redacted] from 1991 to 1998 and then he worked as a [redacted] in Whitehorse from 1998 to 2014, when he retired. He was married to H.G.-T. when he moved to the Yukon and they have one daughter, S.M., age 37, who is still in Whitehorse. Although he and H.G.-T. separated in 1997, they amicably co-parented S.M. and they did not divorce until 2011. H.G.-T. remained in the Yukon until 2020.

[39] Other indicia of residence include that J.A.M. retains a Yukon health card he has had since at least 2004; he has a Yukon driver's licence and a vehicle registered and currently present in the Yukon; he has no vehicle in [Alberta]; he has filed his tax returns as a resident of the Yukon and claimed the Northern Living Allowance available to Yukon residents since at least 2014; he has always used his Whitehorse addresses as his permanent address; he married M.L.D. in Whitehorse on October 6, 2013; they went to Ecuador for five months after their marriage — by some reports, originally planning to retire there but they returned to Whitehorse in 2014; in 2014, M.L.D. and her daughter relocated to [Alberta] while J.A.M. remained in Whitehorse.

[40] M.L.D. deposed in her affidavit that since 2014, J.A.M. has spent approximately six months a year in Alberta — his residences in Whitehorse have included a house at [redacted], which he sold in March 2014. He then purchased a property on [redacted] and lived there for some time while he was in Whitehorse. In approximately 2018, he

began sharing an apartment with L.C., a friend, in downtown Whitehorse [redacted].

During his absences from Whitehorse, he continued to pay rent for this apartment.

[41] The Public Guardian and Trustee could only get information about his time spent in Whitehorse from 2020 onwards. That information is that he was in Whitehorse from January to May 2020; from May to November 2021; in January, May, and June 2022; and from January to December 2023.

[42] J.A.M. has been a longtime member of the [redacted] in Whitehorse, according to him and his friend, P.R. They practice approximately once a week and he has many friends in the [redacted]. He regularly attends the Canada Games Centre in Whitehorse and has many other acquaintances and friends in the Whitehorse community, according to Adult Protection Services.

[43] In March 2023, L.C. needed more assistance for medical reasons so had to give up his apartment which was subsidized by Yukon Housing. J.A.M. did not qualify for Yukon Housing because of his property ownership in Alberta. He moved in with his daughter in Whitehorse temporarily until he could find another place to live. He paid rent of \$600 a month to his daughter for the first three months only. She took care of his other expenses.

[44] Around the same time, he made contact with Adult Protection Services because he needed help with housing options and there were financial concerns.

[45] In November and December of 2023, he told Adult Protection Services and the Public Guardian and Trustee that he wanted to move out of his daughter's house because he wanted to preserve their relationship. His daughter confirmed in oral testimony that his relationship with M.L.D. was causing her stress because there was yelling on the phone between the two of them that was disturbing her sleep and her

general well-being. A suite at Normandy Living, a relatively new seniors' home in Whitehorse, was found for J.A.M. on a temporary basis by Adult Protection Services. He moved in on December 21, 2023.

[46] Despite J.A.M.'s regular absences from Whitehorse, I find that the settled routine of his life remained in Whitehorse. The presence of his daughter in Whitehorse, his friends, his regular participation in the [redacted] and attendance at the Canada Games Centre, the presence of his long-time family physician, Dr. Tirschmann, in Whitehorse, his financial advisor at Assante, his car, his driver's licence, his health card, his consistent use of Whitehorse addresses, the Northern Living Allowance claim, his home ownership until 2014, and his continued rental payments on a shared apartment while away all support this finding.

[47] While I appreciate that he spent time and does spend time in Alberta with his wife and enjoys activities there, there is not a lot of evidence indicating residence in Alberta other than his wife and their joint ownership of the home since March 2021.

Intention

[48] Turning from these factual circumstances to intention, I accept that intention can change in one day and I note that M.L.D. argues that as of December 26, 2023, J.A.M.'s intention to relocate to Alberta was clear and his evidence at the hearing was consistent with this. However, this argument is predicated on the competent decision-making capability of J.A.M.

[49] For reasons I will explain shortly, I am of the view that J.A.M.'s decision-making ability is compromised and his testimony about his intentions is not reliable. His intention can also be inferred from his actions and other circumstances, which include no trips to Alberta in 2023 from the time he was without housing in March until

December. It is unusual that he did not relocate to live with his wife at the time he began to have housing insecurity and instead lived with his daughter for nine months. It was not until M.L.D. bought him a plane ticket to Alberta in December 2023 that he went. It is noteworthy that, at that time, the Public Guardian and Trustee had obtained statutory guardianship and M.L.D. had no access to any of J.A.M.'s finances.

[50] Having found that J.A.M. is ordinarily resident in Whitehorse, the presumption in s. 10(1)(j) of the *Court Jurisdiction and Proceedings Transfer Act* applies as well. I find this Court has territorial competence.

[51] The next legal question is whether this Court should decline to take jurisdiction in any event because there is another clearly more appropriate forum.

[52] M.L.D. says Alberta is more appropriate because J.A.M. is present there, as is M.L.D., their jointly-owned home is there, they can meet with lawyers and advisors in person, he has medical support there, and the quality of capability assessments and legislative protections for a determination of capability are higher in Alberta than in the Yukon if and when that becomes necessary.

[53] The Court is to exercise discretion in the determination of the appropriate forum. No one factor is determinative, and each factor is assigned weight by the Court in its discretion. Generally, the discretion to decline jurisdiction is only to be exercised in exceptional cases.

[54] The test of *forum non conveniens* was succinctly stated by the Supreme Court of Canada in *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at para. 109:

... jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied

the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. ...

[55] In the *Act*, there are a number of factors that are non-exhaustive, but it is helpful to review them and apply them to this case.

i) Comparative convenience and expense for parties and witnesses

[56] If this matter were transferred to Alberta, the majority of the witnesses with information about J.A.M. are in Whitehorse, including his family physician and his financial advisor. As far as this Court is aware, only his wife is in Alberta to provide information. With videoconferencing, the costs are significantly contained if there were additional witnesses and evidence to be provided from Alberta. This factor favours the Yukon.

ii) Law of Alberta or the Yukon to be applied

[57] There has been no opportunity to do an in-depth comparative analysis of the adult protection and public guardian and trustee legislation in both Yukon and Alberta. M.L.D. argues that certain aspects of the legislation with respect to the assessment in Alberta are superior because physician's reports are required in addition to an assessor's report. Further, she argues that the competence and continuing education requirements for assessors are higher under Alberta legislation than in the Yukon.

[58] I note that the *Guidelines for Conducting Incapability Assessments for the purpose of guardianship applications* ("*Guidelines*") state at page 3:

There is no one test for mental incapability accepted across North America. As thinking on mental incapability has evolved, definitions and tests have moved away from a global assessment primarily based on a medical diagnosis. Today, assessments consider:

- medical;
- cognitive; and
- functional components.

[59] The Public Guardian and Trustee did not respond directly to this argument made by M.L.D., except to refer to para. 27 of the *Ferrari*, where there is a summary of a quote from *Olney v Rainville*, 2009 BCCA 380 at para. 42:

It is not a matter of finely weighing advantages and disadvantages but of determining whether one jurisdiction enjoys a significant advantage over that where the litigation was commenced ...

[60] The law of each jurisdiction may have advantages and disadvantages, but this is not the approach. Instead, the approach is: Does Alberta enjoy a significant advantage over the Yukon? It is not clear, based on the issues raised by M.L.D.'s counsel that there are clear advantages — this is to be addressed further by me in the next section — and in any event, this is an invitation to engage in a fine weighing of the regulatory and statutory advantages and disadvantages, an exercise that the courts have said is not to be undertaken.

iii) iv) v) vi) Desirability of avoiding multiplicity of legal proceedings, avoiding conflicting decisions in different courts, the enforcement of an eventual judgment, fair and efficient working of the Canadian legal system as a whole

[61] The next factors to be considered under s. 11 of the *Court Jurisdiction and Proceedings Transfer Act*, I am going to consider together, as I did in *Ferrari*, and they are the desirability of avoiding multiplicity of legal proceedings, avoiding conflicting decisions in different courts, the enforcement of an eventual judgment, and I am also

going to add along with that the final factor, which is the fair and efficient working of the Canadian legal system as a whole. They are all relevant to an efficient, clear, and effective process.

[62] In this case, a guardianship order from either the Alberta court or the Yukon court may be enforced as an order in the other court's jurisdiction thereby avoiding the need to relitigate the matter in the other jurisdiction. Much relevant material, information, and affidavit evidence has already been gathered in the Yukon for this application. Declining to take jurisdiction would be inconsistent with the efficiencies gained by continuing the application here.

[63] Further, M.L.D. is not without ties to the Yukon. She owns property here and says she visits here on a regular basis. She has not provided or named any other witnesses from Alberta who are able to support J.A.M. or provide information to assist the Court in its determination. The one doctor's letter from Alberta was from a psychiatrist who saw J.A.M. on one occasion. There was no other information provided that would support Alberta or Yukon due to a juridical advantage.

[64] Given these factors and the absence of evidence and argument in some areas, at best, the forums are roughly equivalent. However, the existence of more witnesses and facts and documentation in the Yukon, and given my finding of J.A.M.'s more significant ties here, it will be more just and convenient to continue this proceeding in the Yukon.

[65] The fact that the Public Guardian and Trustee seeks to return J.A.M. to the Yukon if the order is granted allowing them to determine where he should live is another factor in favour of the Yukon.

[66] The final jurisdictional argument of M.L.D. is that this Court lacks competence to impose a coercive order on J.A.M. when he is outside the jurisdiction. This is based on the findings in the cases of *R v Carlyle*, 2019 YKSC 38 (“*Carlyle*”), and *Endean v British Columbia*, 2016 SCC 42 (“*Endean*”). I find that these authorities are not applicable as both address the situation where an adjudicative body can, outside of their home jurisdiction, hold hearings and make rulings and orders.

[67] Here, this Court is not venturing outside the Yukon Territory to adjudicate this matter. The hearing occurred in the Yukon and is about orders to be applied in the Yukon. The only extraterritorial issue to be determined is whether J.A.M. is ordinarily resident in the Yukon or not, and I have found that he is.

Capability assessment and its alleged inadequacies

[68] Turning now to the capability assessment and its alleged inadequacies, I will address M.L.D.’s arguments about competence of the incapability assessor, Ms. Joy Vall.

[69] M.L.D. argues that Joy Vall is not qualified to do an assessment because although she is a Registered Occupational Therapist in Alberta, she is not qualified to do assessments in that province because her training and education are lacking and she is not a designated assessor under the *Alberta Act*.

[70] In addition, counsel for M.L.D. argues that Ms. Vall’s report did not conform to the *Guidelines* in the Yukon because, first, there was nothing in the report indicating that J.A.M. was informed of potential outcomes of the assessment or that he consented to it; second, he met with her at her office contrary to the *Guidelines*, that state wherever possible an assessment is to be done in the actual circumstances in which a person functions and in an environment or time of day when they are able to function at their

best; third, she (Joy Vall) did not speak to his family physician or request his medical records; fourth, she did not speak with M.L.D.; and fifth, she did not attach copies of the cognitive tests to her assessment.

i) Qualifications of Ms. Vall

[71] Ms. Vall is an occupational therapist registered in Alberta. Section 13 of the regulations to the Yukon *Adult Protection and Decision-Making Act* provide that an occupational therapist is qualified to act as an assessor. An occupational therapist is defined as a person who is licensed or registered to practice occupational therapy in a province. There is no regulatory body for occupational therapists in the Yukon. Joy Vall therefore qualifies to do incapability assessments under the Yukon regulations.

[72] Counsel for M.L.D. argues that this regulation should be read in accordance with the underlying purpose of the *Act*, which he describes generally as ensuring that the public is adequately protected. He says that because Joy Vall has not undergone the training and continuing education required under the *Adult Guardianship and Trusteeship Act*, Statutes of Alberta, 2008, Chapter A-4.2, to be a capacity assessor and does not have a designation in Alberta to be a capacity assessor, she should not be permitted to do assessments in the Yukon. To allow her to do so is allowing for a second-rate occupational therapist to provide services in the Yukon in a sensitive area. The *Act* and regulations should be interpreted to mean that the Yukon government wants assessors to be qualified in the same way as assessors are qualified in other provinces.

[73] I disagree with this proposed interpretation. Counsel is asking the Court under the guise of modern statutory interpretation to read into the legislation and regulations something that is not there. The regulations do not require an occupational therapist to

be designated as an assessor in another province or to undergo certain training and qualifications that another province's statutes might require. Each province is regulated by its own college. They may have requirements that differ amongst jurisdictions.

Counsel is asking this Court to import words, standards, and obligations into the Yukon regulations and impose them on Ms. Vall and others that are not there. While such standards may be helpful, that is a matter for the Legislature and not this Court.

[74] Joy Vall testified at the hearing that she has done between 150 and 180 incapability assessments since 2006. She took original training with Dr. Janet Munson, a psychologist from Ontario, and, in 2008 and 2010, took additional training with Dr. Munson. She has been an occupational therapist since 1990, for 34 years.

I reject counsel's argument that she is not a qualified assessor.

[75] I want to comment on the Association of Canadian Occupational Therapy Organizations Memorandum of Understanding that was provided in the materials. Counsel for M.L.D. refers to it in support of the application of Alberta standards, as I understand it, to occupational therapists who are practising remotely, that is, not in Alberta. He says this MoU should apply to Joy Vall in this case.

[76] A careful review of that memorandum of understanding reveals that it is intended to address remote practice, which is defined as the use of information and communication technologies for the purpose of delivering occupational therapy services when the client and the occupational therapist are located in different physical locations. It does not address this situation, where the regulation requires an occupational therapist to be licensed by another jurisdiction as a result of the absence of a regulatory body in the occupational therapist's home jurisdiction in order to provide services in that jurisdiction.

[77] Here, Ms. Vall and J.A.M. were in the same jurisdiction, the Yukon, and they met in person. She was not providing services remotely or engaging in remote services as defined in the memorandum of understanding. As I read the MoU, the purpose of it is to address the protection of the public when they are receiving services of an occupational therapist who is not in person, and who may not be licensed in the jurisdiction where the client is located; or, where an occupational therapist may be providing services remotely from a jurisdiction where they are not licensed, to a client in a jurisdiction where they are licensed. In my view, the memorandum of understanding is not relevant or applicable to this case.

ii) Specific inadequacies of the report raised by M.L.D.

[78] Ms. Vall advised that she was aware of the *Guidelines*. She says that she follows them in every assessment as required. Her report states at page 4 that J.A.M. was informed of the potential outcomes of the assessment, and I quote, “He repeatedly asked why I was there even though he had been provided with the rationale for the assessment and what the outcome may be.” Ms. Vall also said that J.A.M. willingly met with her on both occasions for lengthy interviews and was compliant throughout.

[79] Joy Vall says she often meets people in their home or care environment. In this case, she was aware that J.A.M. was living with his daughter, it was temporary, and it was creating some stress. She testified that she assesses a client’s stress level and if they appear stressed, she will rebook the appointment. She did not find it necessary to do so in this case.

[80] Joy Vall said that she did not speak to his family physician or access medical records. She did not provide any real explanation for this, except to note that the doctor

made an independent assessment and it related to healthcare only. She was also aware that J.A.M. had no formal diagnosis.

[81] I note that the *Guidelines* state that the assessor is to collect relevant medical and other professional assessments that have been done. However, in this case, there was no diagnosis and no complex medical needs, only pre-diabetes and high blood pressure. At the hearing, doctors' letters were available to the Court for further consideration.

[82] Joy Vall explained in her report that Adult Protection Services did not contact M.L.D. because they had reasonable grounds to believe that J.A.M. is at risk of undue influence and financial exploitation from her, based on: (1) in 2022, he signed over title to her of the property at [redacted]; (2) she advised Adult Protection Services in March 2023 that he was still on title at [redacted]; (3) there was almost \$88,000 (\$87,891) in withdrawals from J.A.M.'s RRSP account at Assante within five years that was thought to likely be for the benefit of her properties in Alberta; and (4) Adult Protection Services was aware that separation and divorce between the two of them had been discussed.

[83] While there is no further evidence from Ms. Vall on this point of not speaking with M.L.D., given this information from Adult Protection Services, it was reasonable for Ms. Vall not to speak with M.L.D. on this basis, especially after receiving corroborating and additional concerns about M.L.D. from P.R. and others.

[84] Finally, I do not understand the last objection raised by counsel for M.L.D. because copies of the cognitive tests that were provided to J.A.M. were attached to the assessment filed with the Court.

[85] I accept the incapability assessment report of Ms. Vall.

Physician Letters

[86] I want to now discuss the physician letters that were relied on by M.L.D., one from Dr. Tirschmann, J.A.M.'s longtime family physician in Whitehorse. He concluded that J.A.M. was capable in healthcare matters. There is no evidence of how he came to this conclusion, what cognitive tests were done, how much time he spent with J.A.M. before writing the letter, what questions he asked, why he was asked to write the letter and by whom. There was no assessment by Dr. Tirschmann of J.A.M.'s legal, personal, or financial capability. There was some evidence of a MoCA screening test done in February 2023 in which J.A.M. reportedly achieved 28 points out of 30, but there is no other information other than it was done and the score. On its own, that is not especially helpful.

[87] Dr. Osiogo, a psychiatrist to whom J.A.M. was referred by M.L.D. and her family physician in Alberta, Dr. Salem, met with J.A.M. once, first with his wife and then alone. Dr. Osiogo did not check the veracity of any of the information provided by J.A.M. about his finances and health. He had medical records from Dr. Salem but it was unclear what they contained. In fact, there were errors in what J.A.M. reported to him. He said he and M.L.D. jointly owned property in Whitehorse; and he said he did not have many friends, most had passed away. This is contradicted by Adult Protection Services and many of his friends and supports in Whitehorse.

[88] There was no evidence of any cognitive testing of any kind. Dr. Osiogo was asked only to determine J.A.M.'s capacity in the area of finances and found him to be competent. There is no evidence of what kind of mental assessment he did other than orientation- J.A.M. knew his location but not the day, month, or year. He could draw a clock, follow instructions, recall, and could determine similarities and differences, but

there was no other detail provided by Dr. Osiogo. Dr. Osiogo accepted at face value what J.A.M. said to him. For example, Dr. Osiogo had no knowledge of any of the withdrawals from his bank account or any of the history of his relationships.

[89] Joy Vall's assessment was much more thorough, both in the length of interviews — there were two lengthy interviews and assessments-; the depth of her testing; and her follow-up with collateral sources. I place significantly more weight on her assessment as a result.

Merits of this application

[90] Turning now to the merits of this application, this application is brought under the *Act* and the guiding principles of this *Act* are set out in s. 2:

- (a) all adults are entitled to live in the manner they wish and to accept or refuse support, assistance, or protection as long as they do not harm others and they are capable of making decisions about those matters;
- (b) adults are entitled to be informed about and, to the best of their ability, participate in, the management of their affairs;
- (c) all adults should receive the most effective, but the least restrictive and intrusive, form of support, assistance, or protection when they are unable to care for themselves or manage their affairs;
- (d) the Supreme Court should not be asked to appoint, and should not appoint, guardians unless alternatives, such as the provision of support and assistance, have been tried or carefully considered;
- (e) the values, beliefs, wishes, and cultural norms and traditions that an adult holds should be respected in managing an adult's affairs.

[91] Section 3 of the *Act* also sets out the presumption of capability. Until the contrary is demonstrated, every adult is presumed to be capable of managing their affairs. These principles are reinforced in the Guidelines for assessors.

[92] As I said earlier, the Public Guardian and Trustee in this case relies on the assessment of incapability done by Joy Vall in the Form 6, which consisted of, as I have said, two lengthy meetings with J.A.M. on October 26, 2023, and December 1, 2023. It also included cognitive testing, the Kingston Standardized Cognitive Assessment, which is designed to screen for major neurocognitive disorders. In that test, J.A.M. was below the 2nd percentile as compared to older adults and in the 79th percentile compared to patients diagnosed with major neurocognitive disorders. His memory impairment was moderate; his language and visual motor impairments were mild.

[93] Joy Vall conducted a second test, the Repeatable Battery for the Assessment of Neuropsychological Status. J.A.M.'s score was 71 with a percentile of 3; his memory was in the 1st percentile; and delayed memory in the 0.1 percentile. This constituted a severe memory issue when compared with adults with no neurocognitive issues.

[94] In addition to her own assessment, Ms. Vall spoke with the following people:

- on November 29th, with J.A.M.'s daughter, S.M., to get an understanding of his daily living skills;
- on December 18th, with Terence Creamer of Adult Protection Services to understand why the guardianship application was initiated;
- on November 29th and 30th, with H.G-T., J.A.M.'s former wife, to get an understanding of the progression of his memory impairment and level of function; and

- on October 23rd, with P.R. to get his opinion on J.A.M.'s daily function and the progression of his memory.

[95] Joy Vall described in her report and in her oral testimony the following:

- he has significant memory impairments;
- he did not remember her name or why he was there at the second meeting and did not remember the first meeting despite her explanations;
- he said he worked in government buildings doing cleaning and repairs, but it was determined by Ms. Vall that he is not working;
- with respect to finances, he could provide no details of his financial status or details of his liabilities or managing his finances on a daily basis;
- he had no recollection of any property decisions;
- in the legal realm, he could not formulate an action plan because of his memory and confusion about past decisions;
- in the health area, he could not recall his medical history or his medications and Joy Vall noted he was influenced by his former wife to stop taking Metformin and use naturopathic remedies instead; and
- with respect to his living arrangements, she found that he could not formulate a plan to find a new place to live.

[96] In sum, Joy Vall explained that the impairment of his short-term memory prevents him from knowing what choices he has made and retaining information to enable him to consider options. His memory deficits are most significant for day-to-day events, that is, daily events, conversation, whether bills have been paid, what has been signed, and medical management.

[97] Joy Vall said that not only does his memory impairment restrict his ability to make decisions, because of his inability to understand or appreciate choices and the consequences of making or not making financial or legal decisions, but it also makes him vulnerable to external influences and manipulation. Further, Joy Vall explained that his inability to organize his thoughts clearly combined with his memory deficits make him unable to execute decisions independently and capably. He cannot understand or appreciate the facts, choices, and options for decision-making.

[98] The collateral sources spoken to by Ms. Vall supported these conclusions from their testimony in court during this hearing.

[99] First, S.M. testified that during the eight to nine months J.A.M. was living with her, from April or May 2023 to December 2023, she experienced J.A.M. asking the same questions and repeating the same things over and over again; J.A.M. leaving the stove on; leaving the door unlocked; responding to television infomercials by ordering unnecessary items and spending money on those items; responding to cryptocurrency scammers by opening bank accounts for them to access and sending money.

[100] H.G.-T. as I said earlier, co-parented with J.A.M. since they split in 1997 and has stayed good friends with him and speaks regularly with him. Several years ago, she noted that he was in an ongoing agitated state about his finances and did not know where his money was. She was also aware of his ordering from infomercials as well as responding to cryptocurrency scams, and she was able to get some of these payments reversed. She noted his confusion around his status in relation to the property at [redacted]. She noted that he became confused when M.L.D. would call him and would want to take out and give money to her. This is why H.G.-T. recommended that he withdraw cash from his bank accounts and from Assante and keep it at his daughter's

house in 2023, which he did. H.G.-T. spoke to J.A.M. regularly while he was in Whitehorse but since he has moved to Alberta, she has not spoken to him at all. When she called his phone, M.L.D. called her back.

[101] P.R. testified that he was a long-time friend through the [redacted]. They would get together once a week and have done so for the last 25 years. He said they have lots of laughs. P.R. described J.A.M. as caring, lovable, and kind. P.R. noticed memory issues as early as 2009, when he began to repeat questions. He noticed that the memory issues became more pronounced around 2018. P.R. assisted J.A.M. by attending doctor's appointments with him, to help him understand what was being explained to him, and to remember what to do afterwards. He also helped him with reminders through his phone. This included having a tracker on his phone to assist J.A.M. if he got lost or disoriented, which was happening more and more often even with places he knew well, such as his doctor's office and the financial advisor's office. P.R. bought J.A.M. an AirTag so he could find his car in parking lots. P.R. offered him a place to live when his daughters were away at university. P.R. helped J.A.M. move into Normandy Living.

[102] P.R. testified that he has no longer been in contact with J.A.M. since he went to Alberta in December of 2023. He has received emails from him from a different email address. P.R. had not known J.A.M. to email before and he said that the emails did not sound like him. In one of the emails, J.A.M. told P.R. that he was cutting off their relationship.

[103] P.R. was concerned that J.A.M. may have a different phone. He noted that his phone was his lifeline because it provided him with reminders, geographic details, and had a sharing function to help him if he got lost.

[104] P.R. said that he did not know M.L.D. He had never been in a room with the two of them, J.A.M. and M.L.D, together. He considered their relationship to be a rocky and on-and-off relationship, but also understood J.A.M. to take marriage seriously. P.R. said he respected a person's relationship and noted that J.A.M. was very private.

[105] P.R. believed that J.A.M. has been unfairly treated financially. The example he gave was the marriage agreement in which there is a clause that J.A.M. receives \$10,000 or 10%, whichever is less, if the property at [redacted] were sold.

[106] P.R. noted that he was doing maintenance yard and repair work at [redacted] and not sharing in the profits to his knowledge. He also noted that J.A.M. found the place unbearable to live in.

[107] P.R. testified that whoever is in front of J.A.M. creates his world. He does not have the ability to say what is true or not because of his inability to retain information.

[108] P.R. described his meeting with him before his trip to Alberta in December 2023 as follows. He met with him and the two of them walked the track at the Canada Games Centre. They discussed the good things about Normandy Living: the meals, the activities, the company, the fact that it was close to the Canada Games Centre; the room cleaning; and the laundry. He noted J.A.M.'s concerns about worrying that M.L.D. would lose money if he did not relocate to Alberta. By the end of the walk, however, J.A.M., according to P.R., had made the decision to stay in Whitehorse. P.R. offered to tell M.L.D. that J.A.M. would not be travelling to Alberta. The next P.R. heard, however, was that J.A.M. was going to relocate to Alberta.

[109] During this time, P.R. testified that he saw J.A.M. as exhausted, stressed, not sleeping well, and in an emotional tug of war. He noted he was living in a new place in

Whitehorse. P.R. said he understood a decision that J.A.M. wanted to be with his family and P.R. admitted that he and M.L.D. had not seen eye to eye.

[110] P.R. finally testified that he gave J.A.M. a big hug before he left. He said he did not want to put more pressure on him. He said he had not spoken to J.A.M. since he relocated to Alberta and confirmed his view that he would need someone beside him in order to give legal instructions. P.R. also said that for health matters, he would need assistance as he could not retain information or fully understand his medical conditions. P.R. testified that he did not think that J.A.M. should live on his own, that he needs assisted living or a roommate. P.R. again offered him a place to stay if J.A.M. returned to Whitehorse while he is looking for housing.

[111] Rebecca Parry from Assante also testified. I note that she was not spoken to by Joy Vall, but she provided testimony at the hearing. She had also provided an affidavit in advance of the hearing. At the hearing, she advised that she had taken time off work and attended for two half days without pay because of her concern about J.A.M. She has been assisting him as a financial advisor or financial planner since 2011. She used to see him approximately two to three times a year and more frequently in the last 12 months. Staff at Assante reported an increase in contact with him over the last four years.

[112] Ms. Parry began to notice significant memory issues with J.A.M. in 2020 and she noted they have worsened over the last four years. The increased memory concerns have coincided with increased withdrawals from his RRSP. Examples of his memory issues were: in November of 2023, he could not find the Assante office and went to a previous office where he has not been since 2015; last summer, he could not retain dates when he was reviewing financial statements from one page to the next; his only

liquid investment was the RRSP, which was converted to a RIF, and it was valued at \$155,317 in December 2014. J.A.M. retired with surplus cash flows.

[113] Withdrawals began in 2015 and continued regularly up to the present. By January 2019, the value of his RRSP was \$130,866.98. By September 2023, only \$31,491.61 remained.

[114] Before 2022, Assante had no mechanism for restricting withdrawals. They could only ask questions. J.A.M. was often vague and evasive when asked about the purpose of his withdrawals. At the end of 2022, the regulator introduced a mechanism of a temporary hold option in certain circumstances.

[115] Ms. Parry is the sole financial planner in the Whitehorse office and is therefore responsible for maintaining records. The records included details of account information, including the following information about withdrawals:

- in 2018, he withdrew \$13,947.50;
- in 2019, he withdrew approximately \$12,000;
- in 2020, he withdrew \$49,017.86;
- in 2021, he withdrew \$29,947.50;
- in 2022, he withdrew \$8,446.39; and
- in 2023, he withdrew \$12,427.77.

[116] The total withdrawals in five years, as I said earlier, is \$87,391 and his monthly pension is approximately \$3,500.

[117] Ms. Parry testified that she did not trust M.L.D. since first meeting her in 2015 because of her influence on J.A.M.'s decision-making and her distrust of financial markets. J.A.M. advised Assante in 2019 that he was working through a separation from his wife and was not sure how much he would have to transfer to her.

[118] Ms. Parry and her staff kept notes on a regular basis after J.A.M.'s visits, including issues of interest that arose. These notes were attached as exhibits to her affidavit and contained comments such as "multiple requests by him for his balance." On May 24, 2023, he stopped into Assante and asked for his balance and asked how much he had already taken out this year. The note said,

... I let him know he had just shy of 36800 in his acct and has taken @ 7500 to date for 2023. He was okay with that but doesnt know where the money was gone. ...

[119] On April 4, 2023, the note says,

[He] called to find out his balance and what his monthly payments were. I had to remind him that he is taking 4k per year and that he already took his annual amount.

[120] On March 28, 2023, the note says,

[J.A.M.] called as he didnt remember what he and Rebecca [Ms. Parry] talked about in their last meeting [which was March 23, 2023, five days earlier]. I reminded him that they have changed the RRIF payments to be 4K annual ...

[121] And on January 11, 2024, when J.A.M. was in Alberta, the note says,

I spoke with [J.A.M.] again. I called him back when he didn't call me back (after 20-30 minutes) as he said he would. I was very worried about both the paperwork and [M.L.D.]'s comment about him being on the phone. [M.L.D.] had left again already, so she was no longer there, and rather than simply confused, as during our earlier call, [J.A.M.] seemed frustrated.

I said it seems he is stuck in the middle of conflicting advice/direction between the people in his life, and that I'm very sorry for that. I added that there are people here who care about him and are trying to help and protect him, and that we would be better able to do that if he were here.

I told him I am very concerned for him and asked him to consider coming home - he said he wants to but he 'doesn't have a ticket booked.' I asked if he did, would he come home then? He said, 'Let's follow that thought, I get on a

plane and then land in Whitehorse, then what? I have no home there any longer,' he said he 'cancelled Normandy Liv [as written]

[122] Although J.A.M. told Assante in 2014 and 2016 he could survive financially on his pension and rental income, Assante was not aware of any rental income from the [redacted] property or any other property.

[123] Ms. Parry testified that she knew that he had contributed \$26,000 to a food truck, that it was sold, and she understood that M.L.D. kept the sale proceeds. Assante was also aware that he was withdrawing from his RRSP to cover credit card debts.

[124] Next is the information provided by Adult Protection Services. The Public Guardian and Trustee received a referral from the manager of Adult Protection Services on December 1, 2023, for guardianship. It contained detailed information from his daughter, his ex-wife, P.R., and L.C. Adult Protection Services wrote about his wishes as follows in the referral, page 3:

Client consistently expressed concerns about his spouse, [M.L.D.] not having his best interests. For instance, on Dec. 6/23 client stated 'he didn't want to see [M.L.D.] anymore' client states 'she treats me like an ATM'. On Dec. 8/23 client stated that '[M.L.D.] is breathing down my throat', putting so much pressure on me'. Client has stated that [M.L.D.] just wants him to work for her and give her money. Client feels torn about providing support, asking 'what is my moral obligation' and feeling as though he has been taken advantage of.

APS involvement commenced in March 2023 and therefore APS cannot speak to client's long-standing wishes. However, collateral information suggests a historical predisposition to emotional vulnerability in intimate relationships. This emotional vulnerability in combination with the client's profoundly impaired STM (short-term memory) appears to impair his ability to understand and appreciate the consequences of his expressed wishes. The client's wishes fluctuate, and he often seeks guidance from others regarding what decisions he should make.

[125] The referral contained highlights of the Adult Protection Services involvement and concerns reported to them. There were 49 entries between March 6, 2023, and January 3, 2024. J.A.M. came to Adult Protection Services on the advice of and with support of an anonymous supporter. He requested assistance with his finances, with exploring housing options, and navigating due to his memory impairment. He initially received voluntary preventative support services but was then screened as unable to seek help in July 2023 because of concerns of financial abuse and self-neglect.

[126] Before receiving the referral, the Public Guardian and Trustee was informally consulting with Adult Protection Services beginning in July 2023. On December 1, 2023, the Public Guardian and Trustee issued a statutory guardianship declaration for financial protection based on s. 13 of the *Public Guardian and Trustee Act*, Schedule C of SY 2003, c. 21, giving the Public Guardian and Trustee authority to manage J.A.M.'s estate. This was based on a certificate of need for financial protection, which was issued on December 1, 2023, under s. 61 of the *Care and Consent Act*, Schedule B of SY 2003, c. 21, by Ms. Joy Vall.

[127] The certificate of need stated:

Joy Vall determined that the Adult was incapable of giving or refusing consent to a care decision regarding taking his medication he was prescribed. Ms. Vall noted that the Adult had significant short-term memory and executive functioning impairment, which impaired his ability to reason and apply logic to both health and financial decisions. Ms. Vall noted that the adult's memory was so impaired he did not remember how he was managing his financial affairs and that he was risking financial security because he did not remember what documents he had signed or what financial information he had disclosed. The certificate of need included collateral information provided by APS that the Adult had multiple significant sources of financial risks, including being repeatedly targeted by phone scammers; repeatedly financially abused or exploited by [M.L.D.] from

whom he is separated; financially vulnerable from actions taken by his ex-wife, [H.G.-T.] and daughter [S.M.], in their efforts to safeguard his money.

[128] As statutory guardian, the Public Guardian and Trustee conducted a search of J.A.M.'s bank accounts, assets, debts, other liabilities, began to pay debts, placed holds on credit cards because he did not know where they were, froze his Assante account, and set daily cash withdrawal limits.

[129] The Public Guardian and Trustee investigation revealed the following information:

- First, J.A.M. bought the property at [redacted] in March 2014 for \$335,000 with a mortgage of \$135,675. M.L.D. had advised that she had been working there when it was the [redacted] with another business partner.
- In December 2019, M.L.D. became a joint tenant for \$380,000. No lawyer assisted with the document preparation.
- In November 2020, J.A.M. was removed from title, leaving M.L.D. as the sole owner, for a consideration of \$1 with a title value of \$380,000. No lawyer assisted with this transfer.
- In March 2022, M.L.D. registered a mortgage on [redacted] for \$640,000. There was no evidence of substantial improvements except for a furnace valued at \$12,000 bought by J.A.M., suggesting that the property was undervalued in 2019 and 2020 when M.L.D. became a joint tenant and then sole owner.
- Although M.L.D. said she fully refunded money to J.A.M., the Public Guardian and Trustee could find no evidence of this. They found transfers to his account in 2019 three times of \$36,500 in total. It was not verified if

this was from M.L.D.; and even if so, the Public Guardian and Trustee noted this was far less than the value of the property.

- The property is now a boarding home with rental units. It is registered with the Yukon Corporate Registries.
- There is no evidence of any rental income from the property going into J.A.M.'s accounts. M.L.D. testified that in a good year, the income was \$10,000 a month and at other times, it was \$6,000 to \$7,000 a month.
- J.A.M. paid \$545 a month mortgage after being removed from the title of [redacted] in November and December 2021 and January 2022. He also paid the ATCO utility bill for several months after he was no longer in title. P.R. helped with removing him from this account.
- In 2021, the business corporation's name was amended from Firewood Rooming House to [redacted]. M.L.D. was added to the title in September 2021 and J.A.M.'s name was removed in August 2023.
- In March 2021, J.A.M. and M.L.D. bought property at [redacted], Alberta, where they currently live for \$183,000 with no mortgage.
- In July 2021, a mortgage was registered for \$219,000 and the arrangement was that he would pay the mortgage and M.L.D. would pay all other expenses, such as tax, insurance, and utilities.
- M.L.D. is the sole director of [redacted], which was incorporated in 2021, and the listed owner of four commercial properties in Alberta. J.A.M. has never been a director of this Alberta company that owns the Alberta properties. All of these properties are mortgaged to individuals and three of the four properties are mortgaged for amounts higher than the purchase

- price. The first was bought for \$365,000 and mortgaged for \$370,000. The second was bought for \$476,400 and the mortgage is for \$468,000. The third was purchased for \$325,000 and the mortgage is for \$400,000. And the fourth was purchased for \$250,000 and the mortgage is for \$300,000.
- J.A.M.'s name is listed on HUB corporate insurance policy for the Yukon, not Alberta company. It insures the Whitehorse property and five Alberta properties. It was begun in 2017 and M.L.D. was added in 2021. The policy is now cancelled, and it was financed by a third party, and a finance contract was in J.A.M.'s name. There is no evidence that the Public Guardian and Trustee could find of J.A.M. receiving any income from these properties.

The testimony of M.L.D.

[130] After reviewing M.L.D.'s affidavit evidence and hearing her sworn testimony, I note the following.

[131] M.L.D. minimized J.A.M.'s memory issues. She says his memory impairment is due to distraction, lack of focus, and stress. She compares it to her not remembering where her car is when she leaves a store. She says he does not repeat questions because she tells him, "We've already had that conversation" and she tells him to write notes.

[132] This contradicts the descriptions provided by J.A.M.'s daughter, friends, former wife, financial advisor, and Adult Protection Services. It also contradicts M.L.D.'s own statements made by email to the Public Guardian and Trustee, telling them that he needed supportive housing because of his mental health. I will read an excerpt from that email from M.L.D. to Kyla Gifford and Lucretia Flemming on December 9, 2023:

The help that [J.A.M.] needs is not an affordable housing, but be placed in a supportive housing facilities where he can have mental health support. I'm myself working in the health care system for over a decade. I'm totally aware that when a spouse need placement, we never ask the other spouse to sell they [as written] houses and live in the street in measure to provide care and housing to the spouse in need.

[133] M.L.D. has cut J.A.M. off from his many friends and supports, including the Public Guardian and Trustee, who are trying to assist him. She has done this by changing his email address, by forwarding his phone to her number so she receives all incoming calls to him, writing emails using his email address, and pointedly telling Adult Protection Services and P.R. that he (J.A.M.) no longer wants to have any relationship with them, and by refusing to allow the Public Guardian and Trustee to talk with him, even though they have statutory guardianship.

[134] Although M.L.D. said that J.A.M. agreed to what was written by her in the emails from his email address, this was contradicted by J.A.M.'s testimony in which he expressed warmth towards P.R., spoke of him as a good friend with no indication that he wanted to cut off their relationship. In his testimony, he also expressed no hostility towards Tina Bunce or Terence Creamer of Adult Protection Services. M.L.D.'s lack of honesty in disclosing to the email recipients that she was involved in writing them is troubling.

[135] I have further concerns about M.L.D.'s ability to see and act in J.A.M.'s best interests. When J.A.M. became housing insecure in March of 2023, after he lost his shared apartment with L.C., M.L.D. did not assist him in finding a new place to live. J.A.M. went to Adult Protection Services for help and his daughter took him in until he was temporarily housed in Normandy Living.

[136] M.L.D. did not know why him taking over L.C.'s apartment did not work out.

M.L.D. apparently came to the Yukon in November or December 2023 but apparently provided no help in finding J.A.M. a place to live.

[137] Despite making assertions, she did not provide any evidence to the Public Guardian and Trustee before or at the hearing of the following: her repayment to J.A.M. of any loans provided to her by him, payment to J.A.M. of consideration for being on title at [redacted], payment of rental income to J.A.M. from [redacted], any income from the Alberta commercial properties payable to J.A.M., and proceeds to J.A.M. from the sale of the food truck in Alberta that he apparently provided \$26,000 to purchase.

[138] Further, M.L.D. withdrew \$1,900 from his bank account the day after he arrived in Alberta, which she says was to reimburse herself for the airline ticket and to pay the mortgage. However, she also told the Public Guardian and Trustee that it was used to fund her legal claim against the Public Guardian and Trustee. This was after the Public Guardian and Trustee had put a \$150 day limit on his bank account.

[139] M.L.D. made personal and unfounded attacks and insults against all of J.A.M.'s supporters. Examples of these are found in the emails. In Affidavit #2 of Kyla Gifford, page 5 is an email from M.L.D. to Kyla Gifford, dated February 6, 2024:

Kyla,
You are a terrible person. Karma will come to you. I don't need to seek vengeance, it's always come on it own. ...

We will sue you to the bone. You know very well that [P.R.] is only using [J.A.M.] as vengeance and terrace Creamer who didn't sign his affidavit realized he did do his job properly. He should address his concern before 8 months and the mortgage go for foreclosures.

...

What a conflicts of interests. you kept \$2000 more on his account for your shitty services. ... [as written in original]

[140] Page 6 contains an email from M.L.D. to Kyla Gifford, dated Tuesday, February 6:

Hi Kyla, we are at the bank and unable to withdraw money. Your shitty services are not welcome.

[141] Finally, in Form 4, at page 45, is an email dated January 2, 2024, from M.L.D. to Kyla Gifford and Lucretia Flemming:

As I mentioned to you before, I cannot be with [J.A.M.] for his money, because he doesn't have money. The money used for the house located at [redacted] was refunded totally to [J.A.M.], after that title was transferred to me. It is very common to use OPT (other people's money) to fund business projects. This is what I'm doing to finance all my houses, as well as all the entrepreneur and business owner to take loan.

I explain to [J.A.M.] that I know a lot of successful entrepreneurs and business owner who will be happy to have a beautiful black and beautiful partner. Those men have a lot of money and are very successful. So, I have other option, I am not as that desepered [as written] to be with someone who has \$3500 a month when my Yukon rental property makes \$10,000 per month in full occupancy. I have a permanent job at the government, so I can pay my bills

[142] And then with respect to P.R.:

[P.R.] has been in love with me for several years and he cannot accept that I will never be with him, so he his vengeance me. He is married with an old woman and needs some fresh and exotic in his life. (He told all his colleague, how attractive women I was before coming to partially reopen my rooming house) Now, he use the public trustee as the family court will not agree with his nonsense. If Tina Bounce and Terry Creamer were so worried, they should go in family court to get the divorce and the property solved. They are totally aware that will never fly. So the public trustee is their last hope. Especially for [P.R.] because I'm suing him. He thinks that put me in jail will get him out of his law sue [as written]. When [P.R.] was in the city, he caused

a lot of damage to my business and family. The city fired him because they were tired of his nonsense.

[143] In her testimony, M.L.D. said that the Public Guardian and Trustee did nothing good for J.A.M., that they do not understand business, that she did more for him in two weeks than they did in over six months, that they put his money in such a safe place that J.A.M. cannot get it, and that she started a lawsuit against the Public Guardian and Trustee and Kyla Gifford in Small Claims Court in Alberta for abuse of power.

[144] She also described P.R. as only an acquaintance of J.A.M. from the [redacted] and not a friend. As her email suggested, she is suing him but there are no details of that. She says he lost his job at the City of Whitehorse because of complaints she made against him so he is motivated to work against her and is in conflict of interest, according to her. He cannot properly and ethically assist J.A.M. She asserts further that he was trying to put her in jail.

[145] This is contradicted by the evidence and behaviour of P.R., who I have found has only the best interests of his friend at heart. He has offered him a place to live. He has assisted him with his memory loss. He has admitted not seeing eye to eye with M.L.D. He stopped pressuring J.A.M. when he saw the emotional turmoil he was in around the decision to stay or leave Whitehorse. And, in his words, he gave him a big hug and let him go, although it was against his better judgment. At the time, what was in J.A.M.'s best interests was to reduce the conflict that he was experiencing.

[146] M.L.D. also did not agree with Ms. Parry and said why should she have any faith in her as a financial planner when she could only afford a two-week vacation and M.L.D. can afford not to work for five months each year. M.L.D. says that the Adult Protection Services is confusing for J.A.M. and confusing for her, and that they refuse to talk with

her. She called Terence Creamer “a hundred percent useless and not able to manage the file.” She says that Terence Creamer and Kyla Gifford were trying to make money off of J.A.M.’s investment. They did nothing about the cryptocurrency scam. They have zero knowledge about business, unlike her, who is good at finding deals.

[147] In reality, there was no personal gain by the Adult Protection Services or the Public Guardian and Trustee. They are paid by the Yukon government and they have a fiduciary duty to act in J.A.M.’s best interests. They did advise him to change his phone number when they learned of the cryptocurrency scams and they knew that H.G.-T. had reversed the charges.

[148] M.L.D. testified that L.C. was overweight, rude, gave J.A.M. bad advice, and confused him. In fact, according to the Adult Protection Services information, L.C. helped with paying rent for J.A.M., with his expenses, with his banking. He advised him not to make mortgage payments. It appears that L.C. was protecting J.A.M. as a friend.

[149] M.L.D. said that H.G.-T. cannot be trusted with financial decisions because she had a business that went bankrupt years ago.

[150] M.L.D. also said that the rooming house at [redacted] was a suitable place for J.A.M. to live. Many people live, survive, and thrive there. In reality, J.A.M. moved out because he did not want to share space with the chaotic lifestyles of the people who live there. M.L.D. does not appear, in my view, to care or be interested in J.A.M.’s choices.

[151] M.L.D. also testified that his daughter is not competent to and will not look after him or meet his needs. Yet, S.M. took J.A.M. in for nine months, charged him \$600 a month only for three months, did not require him to contribute to any expenses, made sure he was safe, and only terminated the arrangement because of stress caused by the conflict between M.L.D. and J.A.M., which was affecting her sleep and well-being.

[152] M.L.D. also admitted that she was under financial pressure when she no longer had access to J.A.M.'s money for mortgage payments. However, she has a job that pays \$66,000 a year; she receives rental income from [redacted]; presumably she receives income from her other properties in Alberta, although this is unclear because she has refused to provide any financial information; and she makes much more, in any event, than J.A.M.'s annual income of \$42,000 and his depleted investment account.

[153] Other indicia of failure to act in his best interests include:

- the marriage agreement, which was signed in October 2013 in which she had legal advice but J.A.M. did not. It provides for them to have separate bank accounts and there is a clause, as P.R. indicated, that when [redacted] sells, he is entitled to the lesser of 10% or \$10,000;
- She had no knowledge of the healthcare benefits that he gets from her work in Alberta;
- She did not indicate she gave any help with his memory issues on a day-to-day basis other than to tell him to "write notes", and there was no indication that she was seeking advice from experts or professionals about his memory issues;
- She has no relationship with his daughter, his former wife, and is, in fact, deliberately alienating them; and
- She wanted to know only from the doctor in Alberta his capacity for financial issues — not health, personal, or legal affairs.

[154] In sum, after a review of all the evidence, I do not accept counsel for M.L.D.'s explanation for M.L.D.'s behaviours that M.L.D. is merely frustrated by the unwarranted and unjustified intrusion, in her view, of Adult Protection Services and the Public

Guardian and Trustee into J.A.M.'s and her life. Her deliberately aggressive personalized attacks and insults on all of J.A.M.'s supports, her concerted efforts to alienate J.A.M. from them, her failure to provide concrete verifiable explanations and evidence to explain his deteriorating financial status, and her current minimizing of his memory issues — which contradicts her earlier statements that he needs supportive housing — all demonstrate a desire to isolate and control him, not in his best interests. She did not insist that he move to Alberta until the Public Guardian and Trustee had statutory guardianship and she could not obtain money from his accounts. Meanwhile, he had been housing insecure for nine months before this.

[155] M.L.D.'s counsel is right- M.L.D. has a very strong personality and she exerts a tremendous influence over J.A.M. that I do not find is in his best interests.

J.A.M.'s evidence

[156] J.A.M.'s evidence was mixed and supported the description of the assessor, Joy Vall, in her oral testimony that his presentation is unusual. He remembered some things very well, suggesting a certain capacity — such as his current address, his past achievements as a football player in the Canadian Football League and as a rugby player — but other things he could not remember well at all.

[157] In oral testimony, when asked about the day, month, and year, he guessed incorrectly it was Tuesday when it was Thursday, and he could not answer the month or year. He said he met his wife seven years ago; it was 11. He could not remember how they met. He said, "Through friends, I guess." He said he lived in Whitehorse for 12 years; it was 33. He described his activities in Alberta of going to the recreation centre by walking there, saying it was similar to the Canada Games Centre. He gave

some detail, saying that there was a pool, hockey rink, racquetball court, sauna, steam, but he repeated this three or four more times using almost the same words each time.

[158] He clearly stated in oral testimony many times that he wanted to be in Alberta with his wife. He described his wife as a goal-oriented business person and said that she wanted his support for her. This is consistent with the comments to others in Whitehorse that he feels guilty about not being with her to provide her with financial support. He testified that when he was in Alberta, they were working together as a team financially and emotionally, and it was easier than being apart. They were saving money by being in the same place. He said he was married, he wanted to make it work:

“What’s the point of being married if not together? That’s my feeling.”

[159] He said he misses his [redacted] in Whitehorse. The one he went to in Alberta was not the same.

[160] He did not indicate any hostility towards P.R. or desire to end that relationship. Neither did he express hostility or dislike towards Terence Creamer or Tina Bunce, contrary to the emails sent under his name in December, emails that both he and his wife admitted were not written by him but by his wife.

[161] He said he prefers smaller communities than the [redacted], such as Regina or [redacted], where he used to live. He said he had no plans to return to Whitehorse.

[162] He described his activities in Alberta, aside from the rec centre, as doing chores like cutting the grass, shoveling sidewalks, cooking meals, watching television, and said there was a large garage where he could do hobbies, which were not specified.

[163] He referred to his doctor as Dr. Tirschmann, who was the doctor in Whitehorse, not his family doctor in Alberta, who is Dr. Salem. He did not know what medication he was taking or whether he had any conditions or what they were. He said he had

difficulty remembering things, especially day-to-day matters, and described it as age-related. He knew that his monthly income was \$3,500 through pensions and he knew that he paid a mortgage in Alberta. He also said he shared expenses. He did not say how much the mortgage payments were. In fact, M.L.D. said that she paid all expenses while he paid the mortgage. He said he contributed to the house in Whitehorse and believed that he was still on title. He said it takes care of itself with income from renters. Other than repairs to the furnace in the house in Whitehorse and purchasing properties in Alberta, he did not know where the \$87,000 from his RRSP was spent.

[164] Although his wishes to stay in Alberta with his wife and his wish to have the Public Guardian and Trustee out of his life were expressed consistently and strongly by him at the hearing, they directly contradict the many, many statements he has made to his supports in Whitehorse over the last few years, such as “There’s nothing for me in Alberta. Whitehorse is my home and I’m an ATM to [M.L.D.]”, and his expression of relief when the Public Guardian and Trustee said they would manage his finances and communicate with M.L.D.

[165] This contradiction supports the consistent observations and conclusions of Joy Vall, P.R., the Assante advisors, and others that he is highly vulnerable to immediate external influences and lacks the ability to discern what is true or not.

[166] His presence in Alberta, for now, appears to have decreased the conflict between him and his wife because her anger is directed towards the Public Guardian and Trustee and the Adult Protection Services, P.R., and others who are trying to help J.A.M.

[167] It is understandable that J.A.M. does not want to live alone and he does not want a conflict with M.L.D. However, his short-term memory issues and his inability to make freely informed rational decisions combined with all of the other evidence I have heard and reviewed have persuaded me that he is not capable of managing his affairs in the areas of finance, legal, health, and some personal.

[168] With respect to health, I note that he does have an enduring power of attorney, which is not yet in force. His daughter has signed it and his wife is the secondary power of attorney, but she has not signed the agreement. His daughter indicated that she does not feel capable of acting as a power of attorney. I note that in matters of health, the Public Guardian and Trustee will only act when deemed necessary because he is incapable of understanding the options available to him.

[169] I find that other forms of assistance and support less intrusive than guardianship have been attempted but are not sufficient, and I find that there is no one willing and able to act as a guardian other than the Public Guardian and Trustee.

DUNCAN C.J.