

CANADA / JUDGMENT

Adeli-Najafi v. Adeli-Najafi

2025 BCSC 2462

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 2462 Adeli-Najafi v. Adeli-Najafi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Adeli-Najafi v. Adeli-Najafi,

2025 BCSC 2462

Date: 20251211

Docket: S188101

Registry: New Westminster

Between:

Mahdi Adeli-Najafi

Plaintiff

And

Hossein Adeli-Najafi, Pashai Holdings Ltd. and

Denali Auto Group Ltd.

Defendants

Before: The Honourable Justice Layton

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

E.J.S. Aitken

Counsel for the Defendants:

L.C. Morrison

Place and Date of Hearing:

Port Coquitlam, B.C.

August 13-14, 2025

Place and Date of Judgment:

New Westminster, B.C.

December 11, 2025

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Introduction

- [1] Lydia Adeli Nedjafi ("Lydia"), in her capacity as personal representative for the estate of her father, the plaintiff Mahdi Adeli-Najafi ("Mahdi"), applies to set aside an order made by Justice Girn on September 21, 2022 dismissing Mahdi's action for want of prosecution ("Dismissal Order"). If this relief is granted, Lydia seeks an order replacing Mahdi as plaintiff with her as personal representative of his estate.
- [2] Lydia's application is opposed by the defendants, Mahdi's brother Hossein Adeli-Najafi ("Hossein") and two companies, Pashai Holdings Ltd. ("Pashai") and Denali Auto Group Ltd. ("Denali"). Because Hossein controls both companies, I will mostly use his name as a short-form way of referencing all three defendants.
- [3] Mahdi's action was started in 2017. The last step Mahdi took in the action was in June 2019, when a mediation was held. By that point, Mahdi had advanced Parkinson's disease. He moved into a care home that fall and died in November 2023. Lydia became the executor of Mahdi's estate in July 2024, and that September she asked Hossein if he would consent to setting aside the Dismissal Order.
- [4] Hossein did not consent, and Lydia filed this application a few days later. In it, she seeks to set aside the Dismissal Order on the basis that Mahdi did not receive notice of the application before Justice Girn and was thus blameless for not responding to it. She also contends that Hossein misled Justice Girn by stating that Mahdi had been deceased for two

years, when in fact he was living in the care home. Lydia further argues that she applied to set aside the Dismissal Order as soon as reasonably possible after learning it had been made. Finally, she says the delay in prosecuting Mahdi's action is excusable because he was suffering from a debilitating illness, and that it is in the interests of justice to allow the action to continue.

- [5] Hossein disagrees with Lydia on each of these points. He contends that Lydia as Mahdi's power of attorney and main caregiver at the relevant time is at fault for not responding to the application before Justice Girn, and that the mistake about Mahdi being dead was unintentional and made no difference to the application's outcome. Hossein also says that Lydia did not act as soon as reasonably possible in bringing this application after learning of the Dismissal Order. Finally, Hossein argues that, regardless, the delay in moving the action forward after June 2019 is inexcusable, and the interests of justice favour dismissing the action, including because he will suffer substantial prejudice if it is reinstituted.

Factual Background

- [6] I will break down the relevant factual background into several components, starting with the pleadings in Mahdi's action.

Pleadings

- [7] Mahdi commenced his action on February 24, 2017, and filed an amended notice of civil claim on August 21, 2018. Hossein filed his response on April 21, 2017.
- [8] The claim concerns the transfer of shares in Denali and Pashai from Mahdi to Hossein, made in 2013 when Hossein had a power of attorney over Mahdi's affairs due to Mahdi's advancing Parkinson's disease. Mahdi had been the sole director and shareholder in both companies. Denali sold used cars, and Pashai was a holding company whose only assets were two adjacent properties on which Denali operated its business.
- [9] In the amended notice of civil claim, Mahdi alleges that the transfer of the shares to Hossein were for no consideration, were done contrary to his wishes and were not in his best interests. The claim alleges that Hossein breached his fiduciary duty to Mahdi in relation to these transfers.
- [10] In response, Hossein says the shares were transferred in satisfaction of debts owed to him by Mahdi and in exchange for Hossein agreeing to make the mortgage payments for Pashai's properties. Hossein also asserts that Mahdi was not incapacitated, and the power of attorney was not used for the transfers.

Steps Taken in the Litigation Between 2017 and June 2019

- [11] On July 17, 2017, Mahdi's counsel Duncan Magnus conducted an examination for discovery ("EFD") of Hossein.

- [12] A 10-day trial was scheduled for October 9, 2018, but at Hossein's request was adjourned on consent to January 7, 2019.
- [13] On October 10, 2018, Mahdi delivered a notice to mediate to Hossein, and two days later he served Hossein with an expert appraisal report.
- [14] On October 25, 2018, Master Caldwell made a consent order that Hossein provide responses to outstanding requests from his EFD.
- [15] On November 27, 2018, Mahdi filed an application to strike Hossein's response to civil claim for failure to comply with Master Caldwell's order. Hossein defended this application on the basis that he had provided the documents to his lawyer on October 13, but his lawyer had failed to provide them to Mahdi's counsel, and that Hossein had discharged his lawyer on November 5. The documents were delivered to Mahdi's counsel on November 29.
- [16] On November 28, 2018, Hossein applied to adjourn the January 2019 trial on the basis that he had recently discharged his counsel and could not represent himself at trial without a lawyer but anticipated being able to retain a new one within 45 days.
- [17] Mahdi opposed the adjournment, noting in his response that he was 66 years of age, suffered from Parkinson's disease and was in declining health. Mahdi stated that the earliest new trial dates could be obtained was July 2019, and should the matter be delayed, his Parkinson's disease would probably progress, and his ability to give evidence on the matter would likely be prejudiced, "due to repeated attempts of the Defendants to delay the progress of the litigation".
- [18] On December 7, 2018, Master Keighley granted Hossein's adjournment application, at which David Turner appeared as counsel for Hossein. Hossein was ordered to pay Mahdi's costs of the application in any event of the cause. Two weeks later, Mr. Turner filed a notice of appointment as lawyer for Hossein.
- [19] Between December 2018 and June 2019, Mr. Magnus and Mr. Turner or their offices had numerous communications regarding the file.
- [20] Early on during this period, Mr. Magnus was pushing for new trial dates, which might possibly be set for the summer or fall of 2019. Mr. Turner was still getting up to speed on the file, and as a result was unable to commit to a trial length or dates, but he was reasonably responsive to Mr. Magnus's inquiries. By February 2019, Mr. Turner was in a position to provide an estimate as to trial length and was ready to set dates. Mr. Turner also asked Mr. Magnus for dates to examine Mahdi for discovery. And on February 12, a mediation date was booked for June 25.

[21] The communications from this period indicate that Mr. Magnus sought the earliest possible trial dates because of concerns about Mahdi's health. On January 31, 2019, Mr. Magnus informed Mr. Turner that Mahdi's health was declining, and the matter needed to move forward. On February 7, Mr. Magnus reiterated that the matter could not be delayed further, and sent Mr. Turner a letter from Mahdi's neurologist that stated:

[Mahdi] has a long and complex history of Parkinson's disease which has been difficult to control and has, as Parkinson's disease tends to do, progressed quite significantly over time. He is very debilitated by his disease and has had a recent admission to hospital in January after a decline in his daily function and psychiatric features to his presentation as well. This was precipitated by the news that a trial that he has been waiting for had been pushed back another year.

He continues to decline functionally and I would suggest expediting his trial date in light of his ongoing and increasing medical needs .

[22] Between February and May 2019, Mr. Turner sent several communications to Mr. Magnus about scheduling, including for the trial and Mahdi's EFD, but received no response.

[23] On May 21, 2019, Mr. Magnus wrote to Mr. Turner apologizing for the delay, and stated that Mahdi's health issues had unfortunately not resolved. Mr. Magnus said that he was awaiting information from Mahdi's doctor to assist with how they would be proceeding. He stated that they were making every effort to resolve these issues so the scheduled mediation would proceed, and would be in touch as soon as he heard from Mahdi's doctor.

[24] An email from Mr. Turner sent June 14, 2019, allows me to infer that, by this point, Mr. Magnus had ascertained that Mahdi was no longer able to give cogent answers on discovery, and that the plan was to prove Mahdi's case on the documents and by the EFD evidence of Hossein. In an email to Mr. Turner sent earlier that day, Mr. Magnus said he would be applying to have Lydia appointed as Mahdi's litigation guardian.

[25] Lydia's affidavit evidence regarding her father's condition in this period is consistent with the communications between counsel and also with his neurologist's letter. For example, Lydia says that:

- (a) following the adjournment of the January 2019 trial, Mahdi's Parkinson's disease progressed to where he was unable to attend an EFD, and with his health declining he attempted to mediate the case, and she participated in the June 25 mediation to assist him;
- (b) with the significant decline in Mahdi's health, his medication was less effective, leaving him with the sensation that he could not breathe and requiring frequent trips to the hospital, and he was losing mobility even with a walker and began falling frequently, which also led to hospital trips including admission for extended periods;

- (c) by the fall of 2019 Mahdi could no longer live independently, and he moved from his apartment on Fullerton Avenue in North Vancouver, where he had been living with daily home care, into a full-time care home (231 East 15th St., North Vancouver), and then to a different full-time care home in January 2020;
- (d) Mahdi moved to the Berkeley Care Home in April 2021 (2444 Burr Pl., North Vancouver), where he resided until he died on November 11, 2023.
- [26] Lydia says that she was her father's primary caregiver when he lived on Fullerton Avenue, apart from his home care, and that she was in near daily contact with him when he was living at these care homes until his death, whether through video calls or in-person visits. Commensurate with Lydia's role in his life, Mahdi had executed an enduring power of attorney in favour of her on November 9, 2018.
- [27] On June 25, 2019, the parties attended the mediation, with Mahdi in Lydia's company, but the matter did not settle.
- [28] Viewing the period from December 2018 until June 2019 as a whole, I conclude that counsel for both parties attempted to advance the litigation forward, but that apart from the mediation they were unable to do so because of the precipitous decline in Mahdi's health.
- [29] I also conclude that Lydia was at least somewhat aware of what was happening with Mahdi's legal case. In her affidavit, Lydia says that in 2017 and 2018 she spoke to her father about the litigation on several occasions, and did what she could to assist him. Lydia indicates that her father told her that given his declining health he wanted his case to progress quickly.

Events Between June 2019 and Application Before Justice Girn

- [30] Following the unsuccessful mediation in late June 2019, there was no communication between the parties until March 13, 2022.
- [31] I will address the March 13, 2022 communication shortly. But prior to it, in May 2021 Mr. Magnus sent Lydia a notice of intention to withdraw ("NOIW") dated May 10, 2021.
- [32] The cover letter for this NOIW is addressed to email addresses for Lydia and Mahdi. It is also addressed to 4153 Madeley Rd., North Vancouver ("Madeley Address"), as well as to two addresses at which Mahdi had previously lived. The cover letter was not, however, addressed to Mahdi's then-current address.
- [33] Given the concerns discussed below regarding some of the information emanating from Mr. Magnus's office during this time, I am not prepared to find that this NOIW was sent to Mahdi's email address. Those concerns are amplified by inconsistencies between Mr. Magnus' notice of application for substituted service filed September 28, 2022, and his legal assistant's accompanying affidavit. The notice states that the NOIW was "emailed" to Mahdi and Lydia on May 11, 2021, while the affidavit states that it was "sent" to Mahdi and Lydia on May 6, 2021. But even were I to accept that the NOIW was emailed to Mahdi around this time, given his physical condition I am not prepared to find that he accessed that email

himself.

- [34] The style of cause on the NOIW states that Mahdi's action is being conducted "by and through his Litigation Guardian Lydia Adeli". However, Lydia was never Mahdi's litigation guardian. In his evidence on the application before me, Mr. Magnus says the reference to Lydia being litigation guardian was a mistake.
- [35] The NOIW also lists Mahdi's proposed address for service as the Madeley Address. The Madeley Address is the home of Mahdi's ex-wife, Soheila Pashai. They divorced in 2012. There is no suggestion Mahdi ever lived at the Madeley Address, certainly not since starting his action in 2017. However, Lydia used the Madeley Address as her mailing address at the relevant times. I also find that Lydia likely lived at the Madeley Address at those times.
- [36] Mr. Magnus did not serve the NOIW personally on Mahdi, contrary to the requirement in Rule 4-3(1)(h) of the Supreme Court Civil Rules, B.C. Reg. 168/2009. Had he effected personal service, under to Rule 22-6 Mr. Magnus would have ceased being counsel of record once he filed and served on all the parties a notice of withdrawal ("NOW"). However, Mr. Magnus' failure to personally serve the NOIW on Mahdi meant that under Rule 22-6(6) he was not permitted to file and serve a notice of withdrawal, and was thus prevented from getting off the record in this way.
- [37] Jumping ahead 10 months, on March 13, 2022, Mr. Magnus served on Mr. Turner the same NOIW that he had sent to Lydia in May 2021. In serving Mr. Turner with this NOIW, Mr. Magnus did not mention that it had not been personally served on Mahdi.
- [38] On July 28, 2022, Hossein filed his application to dismiss Mahdi's action for want of prosecution. The notice of application asserted that Mahdi had passed away in May 2020 without Hossein having had an opportunity to conduct an EFD. The inability to conduct an EFD was said to be critical to Hossein's ability to defend the action because it would be necessary to confront Mahdi with numerous documents that allegedly contradicted his position.
- [39] Later in these reasons, I will return to examine the basis for Hossein's mistaken assertion that Mahdi had passed away. For now, suffice it to say that this assertion was not supported by admissible evidence.
- [40] Hossein's notice of application further asserted that a third brother, Abby Adeli-Najafi ("Abby"), was present for many of the events forming the factual basis for Mahdi's claim, and that Hossein had intended to call Abby as a witness, "given that he likely has relevant evidence", but in 2020 Abby had suffered a stroke and his health had significantly declined, including "difficulties with cognition", rendering Abby "not medically fit to appear in court".

- [41] The notice of application stated that Hossein had suffered further prejudice because since 2018 and 2019 CPLs had been registered on the properties on which Denali conducted its business, which as noted had been owned by Pashai but were later transferred to Hossein. Hossein wished to retire and sell the business, but the notice said he was unable to do so while the CPLs remained on title.
- [42] Although the dismissal application was filed on July 28, 2022, it was not served on Mr. Magnus, even though to Mr. Turner's knowledge he was still counsel of record by reason of not yet having filed a NOW.
- [43] Instead, on August 2, 2022, Mr. Turner spoke with Mr. Magnus by phone, and on learning that Mr. Magnus was no longer acting for Mahdi asked Mr. Magnus to provide a filed NOW. I have been provided with no further information about this conversation, but I infer that either: (a) Mr. Turner did not tell Mr. Magnus that he believed Mahdi was deceased; or (b) if Mr. Turner did convey this belief, Mr. Magnus did not disabuse him of it. I have no evidence as to whether at this time Mr. Magnus believed that Mahdi was or might be deceased.
- [44] Following this phone call, Mr. Magnus served Mr. Turner with an unfiled NOW, dated that same day, and said that a filed copy would be provided on receipt from the court. Like the NOIW dated May 10, 2021, the style of cause stated that Mahdi was acting "by and through his litigation guardian" Lydia. However, the NOW also stated that Mahdi's last known address was 310-13539 102A Avenue, Surrey, which was different from the Madeley Address listed in the NOIW. In his Affidavit #1, Mr. Magnus does not explain why the Surrey address was included on the NOW, but Lydia's Affidavit #1 states that her father lived at this address in 2016 and early 2017.
- [45] On August 3, 2022, Mr. Turner sent the materials for the dismissal application to the Surrey address by ordinary mail, with a cover letter addressed to Mahdi care of Lydia as his litigation guardian.
- [46] On August 18, 2022, those materials were returned by Canada Post marked "no such address". That same day, Mr. Turner emailed Mr. Magnus indicating that he had attempted to serve Lydia at the Surrey address, but the materials had been returned by Canada Post because the address did not exist. Mr. Turner told Mr. Magnus that Hossein would be unable to proceed with the application if he could not show that Lydia had received notice. Mr. Turner also pointed out to Mr. Magnus that:
- (a) the NOIW had provided the Madeley Address, but the unfiled NOW gave the Surrey address;
 - (b) Rule 4-3 required that counsel personally serve a NOIW on the soon-to-be former client;
 - (c) until the NOW was filed and served on all parties of record, including Lydia for Mahdi, Mr. Magnus was still on the record.

- [47] Mr. Turner ended the August 18 email by asking Mr. Magnus to confirm that the NOW had been served, and if so whether the Surrey address was correct. Mr. Turner stated that he did not want Mr. Magnus to be stuck facing an application for a client for whom he continued to act by mere oversight, but that Hossein wanted to get the application on.
- [48] Mr. Magnus did not reply directly to Mr. Turner's August 18 email until November 2, 2022. However, on August 22 Mr. Magnus emailed Mr. Turner a NOW filed on August 3, 2022. This filed NOW was different from the unfiled NOW provided to Mr. Turner on August 2, 2022, in three respects. First, the style of cause no longer referred to Lydia as litigation guardian. Second, the last known address for Mahdi was now listed as the Madeley Address. Third, although filed on August 3, the notice was dated August 18, 2022.
- [49] On the same day as he received the filed NOW, Mr. Turner emailed Mr. Magnus pointing out these differences and indicating that he was perplexed. Mr. Turner stated that Hossein had had to abandon the hearing date for the application because he had relied on the Surrey address listed in the unfiled NOW. Mr. Turner asked Mr. Magnus to confirm having met all the requirements so that Hossein could rely on the Madeley Address set out in the filed NOW.
- [50] On August 23, Mr. Turner filed a requisition to have the dismissal application rescheduled from August 30 to September 19. He also sent the application materials to the Madeley Address by ordinary mail in four envelopes. The envelopes were addressed to Mahdi, but the accompanying service letter was addressed to Mahdi care of his litigation guardian Lydia. At the time of mailing, each envelope had the return address for Mr. Turner's law firm pre-printed on the back flap, and the firm's initials printed in the front upper left corner.
- [51] The next three events in the chronology relate to actions taken and information obtained by a process server acting at Mr. Magnus's direction, none of which was shared with Mr. Turner:
- (a) On August 25, 2022, a process server tried to serve the NOIW personally on Mahdi by attending "his residence" at the Madeley Address, but was advised that Mahdi no longer lived there and resided in a care home.
 - (b) On August 29, 2022, a process server tried to serve Mahdi at a care home at 231 East 15th St., North Vancouver. As noted above, Mahdi stopped residing at this care home in January 2021. The process server was told that Mahdi no longer lived there and that no additional information could be provided.
 - (c) Later that same day, the process server tried to serve Mahdi by attending his care home at the Berkeley Care Centre, located at 2444 Burr Place, North Vancouver, but was told that Mahdi was not permitted to see, speak or have any visitors as per Lydia's instructions. The evidence does not indicate how Mr. Magnus learned that Mahdi was residing at Berkeley Care Centre.

- [52] In her Affidavit #2, Lydia explains that she did not tell the Berkeley Care Centre that her father was not permitted to see or speak to any visitors. Rather, she told them that she wanted to be present when people visited with him, because although Mahdi had relatively few visitors other than Lydia and her mother, he was largely incomprehensible to anyone who did not interact with him daily, and so Lydia wanted to be there as an intermediary. She also wanted to make sure Mahdi was presentable, because on several occasions when she visited, he had missed his medication and was not alert, and other times his diaper had not been changed. Before friends came to visit, Lydia wanted to ensure he was clean and to maintain his dignity.
- [53] I accept Lydia's evidence on this point, and am not prepared to find that she instructed the care home staff that Mahdi could not have any visitors. Her explanation about her instructions and why she gave them reasonably accords with what I take to be the uncontested nature of her father's physical condition, and to the extent there is inconsistency in the evidence I find that either the care home staff unintentionally overstated Lydia's instructions or were misunderstood by the process server. In any event, I reject that whatever instructions Lydia gave to the care home were intended to prevent Mahdi from being served with legal materials relating to this case.
- [54] On September 1, 2022, the four envelopes that Mr. Turner had mailed to the Madeley Address were returned to his office. Mahdi's name and the Madeley Address had been crossed out with a pen. Under the law firm's printed initials in the upper right-hand corner of each envelope, someone had handwritten the firm's address, which as noted was pre-printed on the back flap of each envelope. In one case, the letters "RTS" were handwritten on the envelope, which I take to mean "return to sender".
- [55] On September 2, 2022, Mr. Turner emailed Mr. Magnus explaining what had happened with the four envelopes. He indicated that a title search appeared to confirm that the address was correct, because the property belonged to a relative of Lydia. Mr. Turner asked that Mr. Magnus confirm the address because Mr. Turner would be proceeding with the application on the basis that service had been made as required. More specifically, Mr. Turner asked Mr. Magnus to confirm that there was no mistake on the filed NOW that Mr. Magnus had provided to Mr. Turner.
- [56] Mr. Magnus did not respond to Mr. Turner's September 2 email. In particular, he failed to tell Mr. Turner that: (a) Mahdi had not been personally served with the NOIW; (b) Mahdi was living at the Berkeley Care Centre; and (c) the address on the NOWI and NOW was not Mahdi's address.
- [57] At no point during the August and September 2022 communications between Mr. Turner and Mr. Magnus did Mr. Turner indicate Hossein's application was to dismiss Mattie's action for want of prosecution, nor did Mr. Magnus ask about the nature of the application being brought.

Dismissal Application Before Justice Girn on September 21, 2022

- [58] No one appeared for Mahdi at the dismissal application. Mr. Turner told Justice Girn that the other party had been served but had failed to arrive and the matter was unopposed. Mr. Turner stated that Mahdi was "definitely deceased".
- [59] In reviewing the procedural history of the matter, Mr. Turner indicated that the case had been set for a trial, but the trial had been adjourned. Justice Girn said that she had read the chronology.
- [60] On the application before me, Lydia argued that Mr. Turner should also have told Justice Girn that Mahdi had Parkinson's disease, and that he had opposed the adjournment on the basis that the earliest available dates for a new trial would be in July 2019 and if the matter was delayed further his illness would negatively impact his ability to give evidence so as to cause him prejudice. Mahdi's response to the adjournment application was not included in Hossein's application record.
- [61] However, the application record contained the post-adjournment correspondence indicating that between December 2018 and February 2019 Mr. Magnus tried to set trial dates, with options starting as early as July 2019, because of a concern that Mahdi's health was deteriorating. The other correspondence regarding Mahdi's deteriorating condition was also included. I therefore reject the suggestion that Mr. Turner should have provided to Justice Girn with more information about Mahdi's response to the adjournment application.
- [62] Mr. Turner also told Justice Girn that he had tried to discover Mahdi, which Hossein's previous counsel had not done, and that Mr. Magnus had put him off but eventually indicated that Mahdi no longer had the capacity to give cogent answers on discovery. Mr. Turner said Hossein was never able to discover Mahdi because Mr. Magnus had ignored the discovery request until Mahdi was unable to give answers and now Mahdi was gone.
- [63] Mr. Turner further informed Justice Girn that after the unsuccessful mediation on June 25, 2019, nothing had happened until Mr. Magnus provided Mr. Turner with the NOIW on March 13, 2022. Mr. Turner said that at some point during this period Hossein had learned that Mahdi had died, adding that it was unclear when Hossein acquired this information.
- [64] Regarding service of the dismissal application, Mr. Turner told Justice Girn that his clients should be able to rely on Mr. Magnus' filed NOW with a last known address, and thus on the attempt made to serve the materials at that address. But Mr. Turner also reviewed in substantial detail the history of issues he had encountered pertaining to service.
- [65] As I have already reviewed this history, I will not describe Mr. Turner's oral submissions on this topic, other than an additional point raised by him for Justice Girn, which is that in his affidavit Hossein stated that he had not received a copy of Mahdi's will, if there was one, but he knew of no one else other than Lydia who would be executor or administrator of Mahdi's estate. Mr. Turner said that they had therefore done their best to, "connect Lydia back to that [Madeley Address] registered in the name of her mother". When asked by Justice Girn, Mr.

Turner confirmed that Mahdi's estate had not continued the action, and that he had not heard anything from Mahdi's estate, executors or beneficiaries.

[66] I pause here to note that, in my view, Mr. Turner was candid and comprehensive with Justice Girn in explaining the potential inconsistencies with the documents provided by Mr. Magnus and the difficulties in effecting service. The materials on the dismissal application included everything in Mr. Turner's knowledge and possession at that time. Justice Girn therefore had before her all this information.

[67] I thus reject any suggestion that Mr. Turner acted improperly with respect to the information about service he provided to Justice Girn. It would also be unfair to judge Mr. Turner's conduct with respect to service with the benefit of hindsight based on the additional information available to me on this application. While other counsel may have taken different steps had they been in Mr. Turner's place, that does not render his conduct careless or blameworthy.

[68] Returning to Mr. Turner's submissions on the dismissal application, he stated that the parties' third brother, Abby, had suffered a stroke during the period of delay. Mr. Turner described Abby as a "star witness. He did not explain why, but Hossein's affidavit stated that Abby had knowledge of the financial history between the parties and was present for many of the events that inform Mahdi's claim, including the execution of the corporate documents necessary to complete the transfer, and that his evidence would be impartial and was relevant to the defence. Hossein's affidavit did not, however, explain what that evidence would be or how its substance would benefit Hossein's case.

[69] Also filed on the application was a letter from Dr. Shamim Jetha dated July 4, 2022, appended to a legal assistant's affidavit. The letter stated that Dr. Jetha had been Abby's doctor for many years, that Abby had a stroke in 2020 that resulted in paralysis of his third nerve, subsequent to which he developed cognition difficulties as well as gait unsteadiness, plus he suffered from diabetes, hypertension and was at high risk for coronary artery disease. As a result of these issues, the letter stated that Abby, "is not medically fit to appear in court".

[70] In his oral submissions, Mr. Turner also mentioned prejudice in the form of CPLs on Hossein's properties, given that Hossein wanted to stop running the business and to sell the properties.

[71] In her brief reasons allowing the dismissal application, Justice Girn stated:

I can tell you that I don't have any issues with respect to your application given that nobody has responded given that the efforts that you have made in terms of serving anybody in terms of the last known address and given the long history of this matter where it doesn't appear that anybody seems to want to move this matter forward including, not only Mr. Mahdi Adeli-Najafi while he was alive, but also in terms of his estate executors for any beneficiaries of his estate and you have made all effort -- you have taken much effort to serve these individuals as required, so I will grant your application. And so the action that was commenced by Mahdi Adeli-Najafi is dismissed for

want of prosecution.

[72] Justice Girn's order was entered on September 21, 2022. On November 2, 2022, a registrar's Certificate of Dismissal of Proceeding was entered. These documents were never served on Mahdi, Lydia or Mr. Magnus, although it was not suggested to me that Hossein had an obligation to do so under the civil rules.

Mr. Magnus Personally Serves the NOIW and Serves a New NOW

- [73] As noted, in late August 2022 Mr. Magnus took steps to serve the NOIW on Mahdi, albeit unsuccessfully. But Mr. Magnus did not tell Mr. Turner about the steps taken or share with him the information obtained, for example that Mahdi was living at the Berkeley Care Home in North Vancouver.
- [74] On September 22, 2022, Mr. Magnus' legal assistant called the Berkeley Care Home and was told that staff were not authorized to let anyone speak to Mahdi and that she should call Lydia, who was his power of attorney. The assistant emailed Lydia the next day, asking to arrange a time for Mahdi to be served with documents. This is the same email address set out on the cover letter along with which the NOIW was sent to Lydia in May 2021.
- [75] The legal assistant also phoned Lydia's number and listened to a voicemail greeting, which stated that Lydia did not check her voice messages and callers should text or email her. The affidavit does not say that the legal assistant left a voice message or texted Lydia, only that she sent the just-mentioned email.
- [76] Not having heard back from Lydia by September 28, 2022, on that day Mr. Magnus filed a without notice application for an order permitting substituted service on Mahdi of a NOIW by sending a copy to Lydia and delivering a copy to the front desk staff at the Berkeley Care Home, where Mr. Magnus understood Mahdi to be residing. As explained, Mr. Magnus needed to bring the application because he had not personally served Mahdi with the NOIW prior to filing the NOW on August 3, 2022.
- [77] On October 19, 2022, Master Neilson granted Mr. Magnus's application, ordering that service of the NOIW was permitted by: (a) emailing a copy to Lydia at a specified email address; (b) mailing a copy to Lydia at the Madeley Address; and (c) delivering a copy to the front desk staff at Mahdi's residence at 2444 Burr Place, North Vancouver.
- [78] In her Affidavit #1, Lydia recounts receiving the NOWI by email from Mr. Magnus on October 20, 2022. She states that at the time she received this email she was on a hiking trip in Peru, but had thought her father's case was ongoing and had not been told otherwise.

- [79] This NOIW is dated August 23, 2022. Like the one sent to Lydia in May 2021, and to Mr. Turner on March 13, 2022, the style of cause indicates that Lydia is Mahdi's litigation guardian. This NOIW also states that the Madeley Address is Mahdi's last known address, to which service by mail of all further documents may be made by other parties to the proceeding unless Mahdi files an objection, a notice of change of lawyer, or a notice of intention to act in person.
- [80] On November 1, 2022, Mr. Magnus filed a new NOW after having completed substituted service pursuant to Master Neilson's order. The style of cause on the NOW did not state that Lydia was Mahdi's litigation guardian, and indicated that, "the last known address of the Plaintiff Mahdi Adeli-Najafi is 2444 Burr Place in North Vancouver, British Columbia, V7H 3A5".
- [81] On November 2, 2022, Mr. Magnus emailed an unfiled copy of the new NOW to Mr. Turner, and advised Mr. Turner that Mahdi had "now been personally served" with the NOIW in accordance with the order for substituted service, a copy of which was attached to the email. On November 22, 2022, Mr. Magnus emailed Mr. Turner a filed copy of the NOW. Mr. Turner did not respond to either of these emails.
- [82] In his two November emails to Mr. Turner, Mr. Magnus did not state that Mahdi was alive, nor did he attach the notice of application for substituted service or the accompanying affidavits. This notice and the affidavit were, however, filed on the application before me, and both indicate that in August 2022 Mahdi was alive and living at the address listed in the new NOW.
- [83] In his affidavit evidence on the application before me, Mr. Turner says that after receiving Mr. Magnus' email on November 2, 2022, he did not understand that Mahdi was still alive, but rather believed Mahdi to be deceased until he received a letter from Lydia's lawyer on September 16, 2024.
- [84] Mr. Turner further explains that, on reviewing the alternative service order provided by Mr. Magnus, he did not believe it necessary to advise Mr. Magnus or any other parties that the action had been dismissed by Justice Girn because: (a) Mr. Magnus was no longer counsel of record; and (b) the alternative service order confirmed that Mr. Turner had served the correct address for Lydia with the materials for the dismissal application. Mr. Turner says that he believed that his office had complied with its service obligations based on the information available at the time, and given his continued belief that Mahdi was deceased there would have been no purpose in serving the address listed for Mahdi in Master Neilson's order and the new NOW.

Lydia's Evidence Regarding Events from July 2019 to November 2023

- [85] I have described Lydia's evidence regarding Mahdi's deteriorating condition in the summer of 2019, leading to his admission into three different care homes, the final one being the Berkley Care Home. I have also described her evidence about receiving the NOIW from Mr. Magnus by email on October 20, 2022.
- [86] In her Affidavit #1, Lydia says she visited her father at the Berkeley Care Home many times between September 2022 and his death November 2023, and had near daily video calls with him. She says his speech was significantly impaired, and if he did not take his medication every two-and-a-half hours he experienced freezing and could not speak or move. Her father's significant speech impairment prevented many people from understanding what he was trying to say, but she could understand him having spent so much time with him over the years.
- [87] With reference to the period between September 2022 and November 2023, Lydia indicates that her father spoke on several occasions about his lawsuit against Hossein, and hoped that it could proceed.
- [88] Lydia further states that, several weeks before he died, Mahdi spoke to her about re-engaging Mr. Magnus as his lawyer if she were appointed litigation guardian. This prompted Lydia to contact Mr. Magnus in October 2023 to ask about the possibility of him acting for Mahdi were she to act as Mahdi's litigation guardian. Mr. Magnus was prepared to meet to talk about the case and the possibility of him acting, but no meeting was scheduled or held in this regard.
- [89] In her Affidavit #2, Lydia comments further on the prospect of her acting as litigation guardian, stating that:
- (a) she and her father had several discussions about her being appointed litigation guardian between 2019 and the fall of 2023;
 - (b) while Parkinson's significantly impacted her father's health including his ability to communicate effectively through speech, and there were some cognitive elements, he was never diagnosed with or treated for a mental disorder, was aware of his environment and was able to communicate appropriately with others (albeit needing her to interpret);
 - (c) after graduating from university in October 2019, she worked as an executive assistant for a candidate seeking election in the 2019 federal election, after which she was unemployed until February 2020;
 - (d) in February 2020, she started work as an account coordinator for a media company;
 - (e) in October 2022, she left that job and began working on a contract basis helping her former partner with film projects until November 2023; and

- (f) from 2019 until 2023, she was not prepared to take on the responsibilities of litigation guardian, wanting instead to focus on finding steady employment and developing a career while spending as much time as she could with her father and helping him to cope with his medical diagnosis, and together these obligations left her with no mental bandwidth to take on the responsibilities of the litigation guardian in the lawsuit against her uncle.
- [90] Mr. Magnus confirms that in October 2023 Lydia contacted him about potentially acting again in her father's action. He says they exchanged a couple of text messages about the matter. Mr. Magnus did not learn about Hossein's successful dismissal application until informed by Lydia's current counsel in December 2023.

Mahdi's Death in November 2023 and Subsequent Events

- [91] On November 11, 2023, Mahdi died aged 71 at Lion's Gate Hospital in North Vancouver.
- [92] Later in November 2023, Lydia learned from her current counsel that Hossein had successfully applied to dismiss her father's case in September 2022. She had not previously seen Hossein's application materials or known of their existence.
- [93] Mahdi's last will was made June 11, 2013, and named Lydia and Hossein as co-executors of his estate.
- [94] In February 2024, Lydia retained a law firm to prepare the appropriate application for her father's will.
- [95] On February 29, 2024, that law firm provided notice to Hossein by ordinary mail at his address of Lydia's intention to apply for probate of Mahdi's estate. Hossein states that he has no recollection of receiving this notice, but the evidence establishes that the letter containing the notice was not returned to the law firm.
- [96] Lydia says that between February and May 2024, she obtained relevant information and documents for the probate application, which was finalized and filed on May 9, 2024.
- [97] On July 31, 2024, Lydia was granted probate over her father's estate.
- [98] On August 19, 2024, Lydia filed a notice of claim against Hossein as personal representative of her father's estate for a declaration that he holds the properties previously owned by Pashai in trust for the estate, and as part of the claim she filed CPLs on those properties. These are the same properties upon which Mahdi had filed CPLs pursuant to the action that was dismissed by Justice Girn. My understanding is that these properties have since been sold and the proceeds paid into court pending a determination of the estate's claim in this other lawsuit.
- [99] On August 20, 2024, Hossein and Mahdi's brother Abby died.

[100] On September 16, 2024, Lydia's counsel wrote to Mr. Turner giving notice of her intention to apply to set aside Justice Girn's order and asking Hossein to consent to the application. Hossein indicated that he would not consent, and a few days later, on October 11, 2024, Lydia filed this application.

Hossein's Inaccurate Information About Mahdi's Death

[101] As indicated, in his oral submissions on the dismissal application Mr. Turner told Justice Girn that Mahdi had died in 2020. The only evidence supporting this assertion was in Hossein's affidavit, which refers to Mahdi being deceased in the following, rather indirect way:

After learning that Mahdi's health was declining, despite my legal counsel having made numerous attempts to schedule an examination of Mahdi, we were unable to do so prior to his passing in May, 2020. It is critical to the Defendants' case that we be able to confront Mahdi with the numerous pieces of documentary evidence that contradict the Plaintiff's position.

[Emphasis added]

[102] No source is provided for this information about Mahdi being deceased. However, given that Hossein was Mahdi's brother, I find it highly likely that Justice Girn inferred that Hossein had direct knowledge of Mahdi's death.

[103] In fact, Hossein did not have direct knowledge, but instead was relying on information from Iraj Babaei, a real estate agent who had in the past provided services to Mahdi and Hossein. In the spring of 2020, Mr. Babaei told Hossein about hearing that Mahdi had died from people in the Iranian community. Hossein says that he later heard the same thing from others in that community, although he does not recall their names.

[104] Hossein says that he asked BC Vital Statistics for a copy of Mahdi's death certificate, and attributed the lack of response to Mahdi having used different spellings for his name. Hossein also says that he unsuccessfully tried to find Mahdi's gravesite online. Hossein explains that he did not contact Lydia to ask if Mahdi had died because she had assaulted him in 2016 and the RCMP had advised him to have no further contact with her.

[105] The reason Hossein provides for not asking Lydia whether Mahdi had passed away is inconsistent with his claim in the same affidavit that he subsequently attended at the Madeley Address hoping to speak to Lydia. Lydia's description of the incident involving the RCMP, which does not appear to be contested, reveals it to have been part of a disagreement in which allegations of minor assaults passed in both directions. I also accept Lydia's evidence that: (a) Hossein had her and her mother's phone numbers, and could have texted or called them for information; and (b) Mr. Babaei did not have a close relationship with Mahdi and to the best of her knowledge had conducted no business with or even seen him for many years.

- [106] Given Hossein's ability to obtain direct information about Mahdi's well-being from Lydia and her mother, I find his reliance on the information received from Mr. Babaei and one or more unnamed individuals at unspecified times to be careless. More importantly, the information Hossein relied on to support his belief that Mahdi was dead should have been made clear in the affidavit filed on the dismissal application. I am not suggesting that Hossein attempted to mislead the court. But these failures left Justice Girn with the incorrect impression that Hossein had personal knowledge of Mahdi's death.
- [107] Had the full picture been presented to Justice Girn, it is probable if not certain that she would not have been satisfied that Mahdi was deceased. I say this not only because of the tenuous nature of the evidence in support, but also because this evidence was hearsay, if not double-hearsay, and hearsay evidence is inadmissible on an application for a final order: *Marzec v. Nemi*, 2022 BCSC 178 at para. 52.

Who returned the Application Materials from the Madeley Address?

- [108] In this section of my reasons, I will address the issue of who returned the four envelopes containing the materials for the dismissal application that Mr. Turner had mailed to the Madeley Address.
- [109] Lydia denies it was her or her mother. In her first affidavit, Lydia says she did not cross out her father's name or handwrite the law firm's address or "RTS" on these envelopes, and has no recollection of ever receiving envelopes addressed to her father from Mr. Turner's law firm at this address. Lydia also indicates that she has spoken to her mother, who has no recollection of these envelopes and says the handwriting is not hers and she would not write "RTS" when returning a piece of mail.
- [110] Hossein submits that Lydia must be the one who returned the envelopes, and that she was evading service. In support of the submission, Hossein's wife Laura has provided affidavit evidence indicating that she attended the Madeley Address about 10 times in September and October 2022, and saw Lydia's vehicle parked in the driveway. On each occasion they knocked on the door, one time not long after Lydia was seen entering the house, but no one answered,.
- [111] I accept Lydia's responding evidence, complete with photos, indicating that her mother's tenants live in the main portion of the house, which is accessible from the front door, while she and her mother live in a secondary suite that is reached by walking along the side of the house to a patio door in the backyard. I therefore find that Lydia was not avoiding Laura on these occasions. In so finding, I note that Laura has provided no evidence about the time of day she attended, where she saw Lydia walking, or the door on which she knocked. If Laura had seen Lydia walking towards the back of the house and then shortly afterwards followed her and knocked on the patio door, I would have expected this detail to be provided in Laura's affidavit.

- [112] I do not, however, accept Lydia's evidence that she did not return the four envelopes to Mr. Turner's office. Lydia lived at the Madeley Address and used it as her mailing address. She was her father's power of attorney, and likely received at least some mail for him at this address. Lydia also has a very similar last name as does her father. In these circumstances, I find it improbable that: (a) the tenant at the Madeley Address would unilaterally return the four envelopes sent by Mr. Turner's firm; or (b) Lydia's mother would do so without checking with Lydia.
- [113] I further find that Lydia likely knew the envelopes were related to her father's litigation with Hossein and contained legal documents. She had attended at the mediation with Mahdi, and so would have known the identity of Hossein's lawyers. Plus, by this point Lydia would have known that Mr. Magnus was not acting for her father, including because she had received the NOIW from him in May 2021.
- [114] I do not, however, find that Lydia knew that the envelopes contained materials relating to an application to dismiss her father's action. I am also not prepared to find that Lydia has knowingly provided inaccurate affidavit evidence on this point. I find it more likely that she took this action and subsequently forgot she did so, somewhat similar to Hossein forgetting that in February 2024 he was mailed a notice from Lydia's probate counsel indicating that Mahdi had died in November 2023, and not May 2020 as Hossein said in his affidavit filed on the dismissal application.

Legal Principles: Application to Reconsider Under Rule 22-1(3)

- [115] Rule 22-1(2) provides that, if a party to a chambers proceeding fails to attend at the hearing of the proceeding, the court may proceed if, considering the nature of the proceeding, the court considers that doing so will further the object of the rules, and the court may require evidence of service it considers appropriate.
- [116] When a party misses a chambers hearing, and the matter is decided and an order made in their absence, the correct way to seek a remedy is to bring an application under Rule 22-1(3): *Chinese Social Development Society v. The Vancouver Chinese Public School*, 2021 BCCA 100 at para. 12. Rule 22-1(3) states:

If the court makes an order in circumstances referred to in subrule (2) [failure of a party to attend], the order must not be reconsidered unless the court is satisfied that the person failing to attend was not guilty of wilful delay or default.

- [117] Rule 22-1(3) is an exception to the doctrine of *functus officio*, giving the court the power to reconsider an order if satisfied that the person failing to attend the chambers proceeding was not guilty of wilful delay or default. The rule applies to all chambers proceedings, including applications where final orders are sought. *Main Acquisitions Consultants Inc. v. Prior Properties Inc.*, 2022 BCCA 102 [Main Acquisitions] at paras. 20-21, 23.

- [118] The court conducts a two-step analysis on an application to reconsider an order under Rule 22-1(3). The first step is to determine whether the order should be reconsidered. If so, the court proceeds to the second step of hearing the underlying application on its merits. *Main Acquisitions* at paras. 40-41.
- [119] With respect to the first step, the order should be reconsidered if it is in the interests of justice to do so. The appropriate indicators of whether it is in the interests of justice to reconsider the order are whether the applicant has shown that: (a) they are not guilty of wilful delay or default; (b) they have applied to reconsider the order as soon as reasonably possible; and (c) they have a defence to the underlying application that is meritorious or worthy of investigation. These indicators or factors are similar to the *Miracle Feeds* factors that apply on an application to set aside a default judgment. *Ibrahim v. Hashemi*, 2024 BCCA 383 at para. 30.
- [120] The *Miracle Feeds* factors should not be applied inflexibly and are not immutable: *Ibrahim* at para. 30. Because the touchstone of the analysis is whether reconsideration is in the interest of justice, a failure to establish all three factors does not prevent reconsideration if permitting the order to stand would constitute a miscarriage of justice. *Jerry Brar Mortgages v. Schuetz*, 2025 BCSC 62 at paras. 24-26; *Owen Bird Law Corporation v. Morgan*, 2014 BCSC 927 at paras. 16 and 45. The court's inherent jurisdiction to set aside an order based on a miscarriage of justice is thus accommodated within the analysis under s. 22-1(3): *Green Arms v. Shahabaldin*, 2023 BCCA 340 at paras. 38-42.

First Stage of the Inquiry Under Rule 22-1(3)

- [121] In deciding whether it is in the interests of justice to reconsider Justice Girn's order, I will look at the three factors discussed above, starting with whether Mahdi was guilty of wilful delay or default by not responding to Hossein's dismissal application.

Was Mahdi Guilty of Wilful Delay or Default?

- [122] The phrase "not guilty of wilful delay or default" connotes a sense of blameworthiness in relation to the failure to attend the hearing. A failure can be purposeful, deliberate or intentional but in the circumstances nonetheless not be blameworthy. *Leibenzeder Estate v. MacIntyre*, 2023 BCSC 1422 at para. 22.
- [123] If Lydia had been Mahdi's litigation guardian when Hossein's application materials were mailed to the Madeley Address, her conduct in sending them back unopened might reasonably be viewed as wilful blindness with respect to the possibility that Hossein was bringing an application, and thus properly categorized as wilful delay or default in respect of Mahdi's failure to respond to the application. However, Lydia was not Mahdi's litigation guardian, and I am satisfied that Mahdi was not guilty of wilful delay or default in failing to respond to Hossein's application in September 2022. I come to this conclusion for five reasons.

- [124] First, I reject that, in returning the envelopes, Lydia was acting on her father's instructions, or that she subsequently told him what she had done, and despite this knowledge he took no action. I find it most likely that she did not share this information with her father. The evidence regarding Lydia's involvement in the litigation to this point - some discussions with her father and attendance at the mediation because of his significant health problems - does not lead me to conclude otherwise.
- [125] In coming to this conclusion, I have given substantial weight to the very significant health problems Mahdi was facing at this time. He seems to have been close to if not completely immobile. And while Mahdi could communicate through speech, Lydia appears to have been among the few people who could understand him. Although Mahdi was aware of his physical environment, the letter from his neurologist states that his condition in February 2019 included "psychiatric features" and I accept Lydia's evidence that his condition included "cognitive elements".
- [126] I have also considered that Mahdi actively pursued the litigation prior to becoming incapacitated in the winter or spring of 2019. He was the party pushing the matter forward, and he wanted to go to trial in January 2019, opposing Hossein's adjournment application because of concerns about his deteriorating health. While I accept that Mahdi's health problems made it very difficult for him to proceed with the litigation by late 2019, given his approach to that point I find it unlikely that he would have decided to abandon it altogether or knowingly taken no action if told that Hossein's lawyers had sent packages of materials to Lydia's address.
- [127] I find it more likely than not that Mahdi remained interested in pursuing the litigation if and when that became possible, and that had he known about the dismissal application or materials sent to Lydia's residence by Hossein he would have made best efforts given his health to find out what was happening. In my view, either Mahdi's illness prevented him from doing so or, more likely, Lydia never told him about the envelopes.
- [128] Second, Mr. Magnus did not comply with Rule 22-6 in his attempts to withdraw as counsel for Mahdi, because he did not personally serve the NOIW on Mahdi. Unfortunately, Mr. Magnus did not tell Mr. Turner about this non-compliance prior to the hearing of the dismissal application. Mr. Magnus' failure to comply with the rules should not be visited on Mahdi: *Derbyshire v. Tkachuk*, 1999 CanLII 4734 at para. 2; *Guards Capital Corp. v. 1220740 BC Ltd.*, 2025 BCSC 1378 at para. 24.
- [129] Put it another way, had Mr. Magnus made Mr. Turner aware of his failure to comply with the service requirements of Rule 22-6, it is likely that Mr. Turner would have served the application materials on Mr. Magnus. In that case, it is probable if not certain that Mr. Magnus would have located Mahdi and Mahdi would have learned about the application and its nature.

- [130] Third, I am satisfied that Mahdi was unaware that Mr. Magnus was no longer acting for him and might therefore not receive service of materials relating to the case. I appreciate that Lydia received the NOIW by email on May 11, 2021. But, as with Lydia's involvement in sending back the four envelopes, I find that she did not tell her father about the NOIW and therefore also did not tell him that, unless he acted in response, documents relating to the litigation might from that point be sent by Hossein to the Madeley Address.
- [131] Fourth, Hossein relied on inadmissible hearsay and double-hearsay evidence in support of the dismissal application, but without making this evident to Justice Girn. Had Justice Girn known this evidence was inadmissible, she would not have been satisfied that Mahdi was deceased. Together with the palpable difficulties regarding service, including that it was made to an address to which Lydia but not Mahdi was connected, Justice Girn would have likely adjourned the dismissal application pending the filing of further and better information from Hossein. Hossein would have been required to exercise due diligence in determining whether Mahdi was dead, the upshot of which would have been the discovery that Mahdi was alive, and service of the application materials on him at the Berkeley Care Home.
- [132] Fifth, and although not necessary to my conclusion on this point, I agree with Lydia's submission that, because Hossein and Mr. Turner believed Mahdi was deceased, Rule 6-2(5) was engaged. Rule 6-2(5) states that where a plaintiff has died and the proceeding may be continued, a defendant "may apply" to the court for an order that the person entitled to proceed do so within the time that the court orders and that, in default, the proceeding be dismissed for want of prosecution. Despite the permissive wording in Rule 6-2(5) - "may apply" - a party seeking dismissal of an action for want of prosecution where a plaintiff has died must apply under Rule 6-2(5) and cannot simply proceed under Rule 22-7(7): *Swanson v. Hill*, 2014 BCSC 2001 at para. 7.
- [133] Had Hossein applied under Rule 6-2(5), as he was required to do based on his belief that Mahdi was deceased, the materials sent to the Madeley Address would have been addressed to Lydia, not to Mahdi. There is a good possibility that, on this scenario, Lydia would have opened the envelopes, and on discovering that Hossein was bringing an application that might result in her father's action being dismissed, informed him of the nature of that application, with the result that he would have found a way to appear to oppose the relief sought.

Did Lydia Bring the Application As Soon As Reasonably Possible?

- [134] Whether the application to reconsider the order has been brought as soon as reasonably possible is assessed in light of the circumstances, including the nature of the order the applicant seeks to have reconsidered. The need to act as soon as reasonably possible is in part a reflection of the need for finality in court orders so that parties can arrange their affairs in reliance on those orders. There must be a reasonable explanation for any delay in applying to have the order reconsidered. *CMHC v. Bhalla*, 2008 BCSC 1352 at paras. 43-44.

- [135] I have concluded that Lydia brought this application in her capacity as personal representative of her father's estate as soon as reasonably possible.
- [136] Lydia first learned of the order dismissing Mahdi's action after he had died. She then secured probate counsel, who prepared and filed a probate application, which was not granted until July 31, 2024. There is no suggestion by Hossein that this delay in obtaining probate was unduly lengthy, and I find that it was reasonable in the circumstances.
- [137] At the hearing of the application, Hossein for the first time argued that Lydia could have brought the application to set aside Justice Girn's order prior to obtaining probate as a litigation representative under Rule 20-6. Although Hossein specified no subrule and cited no case law in support of this point, I assume he is relying on Rule 20-6(3): *Hsu v. Hsu*, 2020 BCSC 185 at para. 42.
- [138] Regardless, in advancing this argument Hossein essentially accepted that Lydia would not have known about the possibility of applying under Rule 20-6, and he did not push this argument with any real force. Furthermore, in my view it would be unfair to permit Hossein to raise this point in oral argument without having pleaded it in his application response.
- [139] I also reject Hossein's argument that, altogether apart from the need to obtain probate, Lydia had an obligation to give him notice that she was intending to bring this application. In this respect, Hossein argues that Lydia's failure to do so prevented him from taking steps to preserve Abby's evidence prior to Abby's death on August 20, 2024.
- [140] In support of his position, Hossein relies on *Schindler v. Johnstone*, 2005 BCSC 476 at paras. 42-49. There, the applicant knew the respondent intended to sell the house in which she was living, and that a real estate agent was engaged for this purpose. She thereafter learned of the order terminating her life interest in the property, by reason of being physically removed from it by a bailiff. The property was sold two weeks later, in late October, but the applicant did not notify the petitioner of her intention to apply under Rule 22-1(3) until that application was filed the following January. But Justice Barrow further held that, even had the applicant put the petitioner on notice of the application sometime in early November, as she claimed, this was insufficient to constitute "as soon reasonably possible" given that she knew that the petitioner may be relying on the order to take the irrevocable step of selling the property, which is what in fact had already happened.
- [141] Unlike in *Schindler v. Johnstone*, there is no evidence in this case that Lydia did or should have known that Hossein may take irrevocable steps based on the order dismissing her father's action. Instead, I find that it was reasonable for her to wait until probate was granted to notify Hossein of her intention to apply under Rule 22-1(3).

- [142] As for Abby's death occurring in the interlude, I will deal with this issue in more detail later in these reasons. For now, suffice it to say that it does not lie in Hossein's mouth to claim that Abby's evidence could perhaps have been preserved, had notice been provided earlier, given Hossein's position before Justice Girn in 2022 that Abby's evidence became unavailable when he suffered a stroke in 2020.
- [143] Hossein also relies on *Okanagan Aggregates Ltd. v. Boake*, 2006 BCSC 466 at para. 23, where there was an unexplained delay of five weeks in obtaining counsel after the applicant learned that the impugned order may well survive his bankruptcy. By contrast, in this case Lydia contacted her current counsel about this matter in the same month her father died. This is not a case where her counsel's delay after probate was granted was so inordinate that Lydia should have obtained other counsel to bring the application: CMHC at paras. 50-51. I also note that the applicant in *Okanagan Aggregates Ltd.* failed to establish either of the other two *Miracle Feeds* factors.
- [144] In sum, having considered all the circumstances I find that Lydia acted as soon as reasonably possible in bringing this application given the time inherent in obtaining probate, and despite the delay of slightly under seven weeks before seeking Hossein's consent to set aside the order. It would have taken some time for her counsel to collect and review the materials prior to writing to Hossein's counsel. And three days after learning that consent was not forthcoming, her counsel asked to appear before Justice Girn to have the order set aside, and four days after that filed Lydia's materials on this application.
- [145] I should add that on the evidence I am not prepared to infer that Lydia held off notifying Hossein about her intention to apply to set aside the Dismissal Order because she wanted to first file a new action as personal representative of Mahdi's estate, pursuant to which she could and did file CPLs against the properties formerly owned by Pashai. I find it more likely that she was simply waiting to obtain probate before taking action on behalf of the estate.

Does Mahdi Have a Defence to the Underlying Application that is Meritorious or Worthy of Consideration?

- [146] Establishing a defence to the underlying application that is meritorious or worthy of investigation is not an onerous threshold, and the party seeking reconsideration need not demonstrate that the defence will succeed: *Leibenzeder Estate* at para. 159.
- [147] In the context of this case, the question is whether Mahdi had a defence worthy of investigation in relation to Hossein's application to dismiss Mahdi's action for want of prosecution.

- [148] I will discuss the test for dismissing an action for want of prosecution in more detail shortly. But speaking generally, the court is required to determine whether: (a) the defendant has established that the plaintiff's delay in prosecuting the proceeding is inordinate; (b) if so, the plaintiff has shown that the delay is excusable; and (c) if not, it is in the interests of justice for the proceeding to continue: *Giacomini Consulting Canada Inc. v. The Owners, Strata Plan EPS 3173*, 2023 BCCA 473 [Giacomini] at paras. 69-71.
- [149] In my view, Lydia has established that Mahdi has a defence worthy of investigation in relation to whether his action should be dismissed for want of prosecution. It cannot be said that there is no merit to the position that it is in the interests of justice to permit this action to continue. In support of this conclusion, I rely on the detailed discussion provided in the section of these reasons addressing the second stage of the inquiry under Rule 22-1(3). I therefore reject Hossein's argument that Justice Girn would necessarily have dismissed the action even had Mahdi appeared at and opposed Hossein's application.

Conclusion

- [150] I have concluded that all three components of the first stage of the test under Rule 22-1(3) have been met, and that it is in the interests of justice to reconsider Justice Girn's order dismissing the action.

Second Stage of the Inquiry Under Rule 22-1(3)

- [151] I turn now to the second stage of the inquiry under Rule 22-1(3), namely, hearing Hossein's application to dismiss Mahdi's action for want of prosecution on the merits. The parties agree that in doing so I should consider the circumstances as they existed when Lydia filed the application under Rule 22-1(3).

Legal Principles Governing an Application Under Rule 22-7(7)

- [152] Rule 22-7(7) provides that if, on application by a party, it appears to the court that there is a want of prosecution in a proceeding, the court may order that the proceeding be dismissed.
- [153] Rule 22-7(7) must be interpreted in light of the general object of the rules, which as stated in Rule 1-3(1) is, "to secure the just, speedy and inexpensive determination of every proceeding on its merits". This object reflects a potential tension between the goals of, on the one hand, determining a proceeding on its merits, and on the other hand, doing so in a just and speedy manner. *Giacomini* at para. 29; *Forgotten Treasures International Inc. v. Lloyd's Underwriters*, 2025 BCSC 222 at para. 41.
- [154] The power to dismiss for want of prosecution is not to be lightly exercised, as it deprives the plaintiff of an adjudication of their claim on the merits. An application to dismiss will succeed only if the court is persuaded the interests of justice justify depriving the plaintiff of their presumptive entitlement to an adjudication on the merits. But this entitlement cannot be given primacy to the extent that the interests of the defendants, and society more

generally, in the expeditious resolution of civil disputes are undervalued. Generally speaking, a party who has filed a proceeding should be expected to get on with it, and if in the circumstances it is not in the interests of justice to permit a proceeding characterized by inordinate and inexcusable delay to continue, then the remedy of dismissal is justified. *Giacomini* at paras. 29, 74-75.

[155] These policy considerations underlie the three-part test, described in *Giacomini* at paras. 69-71, which courts apply to determine whether to dismiss a proceeding for want of prosecution:

- (a) has the defendant established that the plaintiff's delay in prosecuting the proceeding is inordinate?
- (b) if so, has the plaintiff shown that the delay is excusable?
- (c) if not, is it in the interests of justice for the proceeding to continue?

See also *Ghag Estate v. Ghag*, 2025 BCCA 88 at para. 8; *Forgotten Treasures International Inc.* at para. 28; *0761979 B.C. Ltd. v. Scorpio Security Inc.*, 2025 BCSC 183 [*Scorpio Security*] at para. 17.

[156] At the third stage of the test, the following non-exhaustive list of factors is relevant to assessing whether it is in the interests of justice for the proceeding to continue:

- (a) the prejudice the defendant will suffer defending the case at trial;
- (b) the length of the delay;
- (c) the stage of the litigation;
- (d) the impact of the delay on the defendant's professional, business or personal interests;
- (e) the context in which the delay occurred, in particular whether the plaintiff's delay continued despite pressure from the defendant to proceed;
- (f) the reasons offered for the delay;
- (g) the role of counsel in causing the delay;
- (h) the public interest in having cases that are of genuine public importance heard on their merits; and
- (i) the merits of the action, and in particular whether it is bound to fail.

Giacomini, at paras. 66-68, 71 and 76; *Forgotten Treasures International Inc.* at para. 42; *Scorpio Security* at para. 25.

Has the Delay been Inordinate?

[157] The commencement of the proceeding is the point from which delay is measured. Delay becomes inordinate where it is uncontrolled, immoderate, excessive and out of proportion to the matters in question. The delay should be analysed holistically, in all the

circumstances, and not in a piecemeal fashion. For example, complexity of the matter and the number of litigants can inform the analysis. Some cases by their nature are susceptible to faster carriage, or in light of the allegations may call for more expeditious prosecution. *Giacomini* at paras. 38-39; *Plaza 500 Hotels Ltd. v. SRC Engineering Consultants Ltd.*, 2024 BCCA 288 at para. 70; *Forgotten Treasures International Inc.* at paras. 32-33; *Scorpio Security* at paras. 19, 24.

[158] Mahdi filed his notice of civil claim on February 24, 2017, and Lydia filed the application under Rule 22-1(3) on October 11, 2024. Nothing about the matter makes this delay proportionate to the nature of the case.

[159] Indeed, from Mahdi's perspective the case was ready to go to trial in January 2019. Hossein's need to retain new counsel, and his subsequent decision to seek to examine Mahdi for discovery, resulted in some further delay. But even accepting that it was reasonable to put off setting new trial dates for a time given the unanticipated precipitous decline in Mahdi's health, and the hope that mediation might lead to a resolution, there appears to be no reason why trial dates could not have been set shortly after the mediation and the trial have taken place sometime in 2020.

[160] The total delay of seven and two-thirds years is excessive and out of proportion to the nature of the proceeding, and I therefore conclude that it was inordinate.

Has the Delay been Inexcusable?

[161] Unless the plaintiff can establish a credible excuse, the natural inference is usually that inordinate delay is inexcusable. Whether the reason offered for the delay constitutes an excuse depends on the circumstances, including whether the delay was: (a) intentional or tactical; (b) a result of dilatoriness, negligence, impecuniosity, illness or some other relevant cause; or (c) caused by a lack of diligence by plaintiff's counsel, which viewed in proper context may or may not amount to a reasonable excuse. *Giacomini* at para. 40; *Forgotten Treasures International Inc.* at para. 36; *Scorpio Security* at paras. 22-23.

[162] In my view, the delay in this case is not excusable. Granted, it was not tactical. Mahdi was the party pushing the litigation forward prior to the steep decline in his health following the adjournment of the 2019 trial dates. On the evidence, I accept that the only reason for the delay after this point was Mahdi's illness. Mahdi was undoubtedly in a difficult position because his Parkinson's disease made him close to or completely immobile and prevented him from communicating with most other people, including his lawyer.

[163] There is a dispute about whether Mahdi would have met the test to have a litigation guardian appointed to act for him under Rule 20-2. Hossein says the statements by Mr. Magnus and Lydia that the appointment of a litigation guardian was being considered allows me to conclude that Mahdi was mentally incompetent within the meaning of Rule 22-2(10) so as to permit such an appointment. See, e.g., *Jundi v. Jundi*, 2024 BCSC 1439. However, Lydia's evidence is that Mahdi was able to react appropriately to his environment

and associate with others, provided she could act as an interpreter. Based on this evidence, Lydia argues that Mahdi was not mentally incompetent as required to justify appointing a litigation guardian. That said, his condition as described in Lydia's evidence may have permitted her to act under an agreement made pursuant to the Representation Agreement Act, RSBC 1996, c. 405: Jundi at paras. 38-39.

[164] In any event, as I have noted in her affidavit evidence Lydia says she was not willing to take on the role of conducting the litigation for her father, and that she revisited this possibility only shortly before his death, when she contacted Mr. Magnus to discuss the matter. I accept Lydia's evidence on this point, and reject Hossein's submission that her evidence about being a litigation guardian is unreliable due to inconsistencies in her first and second affidavits.

[165] While I can appreciate that Lydia's reluctance to act as litigation guardian put Mahdi in a difficult position, a party cannot hold up litigation indefinitely because they are unable to find someone to fulfil this role and because of health difficulties are not otherwise able to advance their claim: Sahyoun v. Ho, 2015 BCSC 392 at para. 55; Lambert Fenchurch Ltd. v. Specialty Underwriting Services Ltd., 1999 CanLII 5893 at paras. 15-16, affirmed 2001 BCCA 498. I therefore find the delay to have been inexcusable. In particular, given the circumstances as then known by Mahdi, between the June 2019 mediation and his death there appears to have been no prospect of him being able to advance the litigation.

Is it in the Interests of Justice to Allow the Action to Continue?

[166] Having concluded that the delay was inordinate and inexcusable, I will consider whether the interests of justice nonetheless favour allowing the action to proceed, instead of dismissing it for want of prosecution. In doing so, I will focus on the relevant factors identified in Giacomini and subsequent cases.

Prejudice to Hossein

[167] Recent developments in the law mean that prejudice to a defendant's ability to defend the underlying action is no longer a threshold requirement to obtain a dismissal for want of prosecution. But such prejudice is nonetheless a relevant consideration in the interests of justice analysis. Giacomini at paras. 57-58, 63-65, 68.

[168] The absence of prejudice to the defendant, while not conclusive, remains an important consideration in assessing the interests of justice: Giacomini at para. 79.

[169] In my view, neither of the two main prejudices to Hossein's ability to defend the case that were advanced before Justice Girn carries much weight in support of Hossein's argument that the action should be dismissed.

[170] The first main prejudice argued before Justice Girn was Mahdi's inability to be examined for discovery. Yet this prejudice crystallized prior to the mediation in June 2019. Before me, Hossein took the position that the relevant period of delay is after the mediation, because

that was the last step Mahdi took in the litigation. I agree, insofar as up to this point Mahdi was actively pushing the matter forward, apart from some understandable delay in the winter or spring of 2019 when his health declined very substantially. Hossein did not argue before me that this discrete period of delay not long before the mediation was Mahdi's fault, but instead accepted that both parties were trying to advance the litigation but were unable to do so because Mahdi's health declined unexpectedly. I therefore find that Mahdi's inability to be discovered flowed from the 2018 adjournment combined with his unanticipated steep decline in health not long thereafter, and is not the result of any inexcusable delay by him or Lydia.

- [171] The second main prejudice that Hossein argued before Justice Girn was that his "star witness", Abby, had suffered a stroke in 2020, causing difficulties in cognition among other things, and making Abby, "not medically fit to appear in court". Hossein's position before Justice Girn was thus that Abby was no longer able to provide witness evidence.
- [172] However, the materials before me, which include everything put before Justice Girn, do not indicate when in 2020 Abby suffered the stroke. I therefore have real difficulty in concluding that the inordinate delay in not setting the matter down for trial within a reasonable time after the mediation in June 2019 played a material role in preventing Hossein from calling Abby as a witness.
- [173] Moreover, nowhere in the materials before me does Hossein indicate what Abby would have said if called as a witness. I would have expected at least some detail in this regard if Abby's evidence would truly have assisted Hossein's defence. I am not prepared to infer that, simply because he was on Hossein's witness list in early 2019, Abby had evidence to give that was helpful to Hossein.
- [174] Finally, on the application before me Hossein appeared to suggest that Abby would or might have been able to testify or provide evidence in some form up until the point of his death in August 2024. Yet this suggestion is substantially inconsistent with the position he took before Justice Girn, which was that Abby's evidence became unavailable at some point in 2020. Absent a satisfactory explanation for this change in position, such as evidence that Abby's condition improved after September 2022, Hossein ought to be held to the position he took before Justice Girn.
- [175] While I accept that the passage of time can negatively impact the memories of witnesses, and that this factor may have some relevance in the case at bar, I have not been pointed to any particular concern in this regard by Hossein.
- [176] I have also considered possible prejudice to Hossein's professional, business or personal interests in the form of the negative impact of the delay on his professional, business or personal interests.

- [177] In this respect, Hossein notes that the CPLs were removed from the properties implicated in the litigation once Mahdi's action was dismissed by Justice Girn. At that time, Hossein stated that he wanted to retire but needed to sell the properties to do so, because they constituted the bulk of his assets.
- [178] Ultimately, Hossein did not sell the properties, and Lydia filed new CPLs on them shortly after she became Mahdi's executor. However, those CPLs arise from a new action filed by Lydia as personal representative of Mahdi's estate on August 19, 2024. As noted, the properties have since been sold and the money paid into court. But in any event, the associated prejudice to Hossein appears unrelated to the application before me. Absent evidence or submissions as to whether re-instituting Mahdi's action might somehow increase this prejudice, I am unable to find that it moves the needle in determining whether the interests of justice favours allowing Mahdi's action to continue.

Length of Delay

- [179] The longer the unjustifiable delay, the more likely allowing the proceeding to continue will be inappropriate: *Khela Excavating Ltd. v. Olin*, 2025 BCSC 1156 [*Khela Excavating*] at para. 17(b). Also, while the length of delay is typically measured from the start of the proceeding, in assessing the interests of justice the court may consider whether there was activity relating to the litigation between that point and the filing of the application to dismiss for want of prosecution. *Giacomini* at para. 81.
- [180] In this case, the length of delay is significant - almost eight years in total. True, Mahdi actively advanced his case from its filing until 2019. But no steps were taken between June 2019 and September 2024, when Lydia as personal representative for Mahdi's estate informed Hossein's counsel of her intention to apply to set aside the Dismissal Order. Overall, this factor favours not setting aside that order.

Stage of the Litigation

- [181] Generally speaking, a court will be less inclined to strike a proceeding that is well advanced, as opposed to one that is still in its early stages, and the interests of justice will normally weigh in favour of allowing a case to be determined on its merits if it has stalled just short of that mark. *Khela Excavating Ltd.* at para. 17(c); *Scorpio Security* at para. 59.
- [182] In this case, the matter appears ready for trial. The parties were about to set trial dates in the winter and spring of 2019, and I have not been provided with any information suggesting that trial dates could not be set at this point.
- [183] The stage this proceeding has reached thus weighs somewhat in favour of allowing it to be determined on the merits.

Action Taken by Respondent in Face of Delay

- [184] A defendant has no obligation to take steps to move the plaintiff's claim forward. But a defendant's inaction in the face of lengthy delays may weigh against finding that dismissing the action is in the interests of justice. By contrast, delay in the face of repeated requests by the defendant to move the matter forward may be more serious. *Giacomini*, at para. 76, 82-83; *Khela Excavating Ltd.* at 17(e); *Forgotten Treasures International Inc.* at paras. 58-59, 68.
- [185] Hossein did not press Mahdi to move the matter forward after the mediation in June 2019 until he brought his application to dismiss the action for want of prosecution. Bringing that application was a concrete step taken to address the delay to that point, but unfortunately Mahdi did not receive notice of the application. As noted, this lack of notice was not Hossein's fault, but rather arose because of Mr. Magnus' noncompliance with the rules.
- [186] However, in bringing the dismissal application Hossein relied on inadmissible and unreliable hearsay evidence to establish that Mahdi was dead. I have already concluded that, because these problematic aspects of this evidence were not evident, Justice Girn was left with the misimpression that Hossein had first-hand knowledge of his brother's demise and as a result mistakenly accepted that Mahdi was dead. I have also concluded that had Justice Girn been aware of the true nature of this evidence she would not have dismissed the action, and instead would have adjourned the dismissal application. That, in turn, would likely have resulted in Mahdi receiving notice of the application and having been able to oppose the application were it brought back on.
- [187] In this regard, I do not accept Hossein's submission that Mahdi would have failed to respond to the application were he to have received proper notice. I have already found that Mahdi never abandoned his desire to proceed with his action, but was unable to do so because of his illness. I am satisfied that if he had received notice Mahdi would have convinced Lydia to assist at least in attempting to stave off having the action dismissed.
- [188] For these reasons, I conclude that Hossein's reliance on undisclosed hearsay evidence about Mahdi's death played some role in contributing to a portion of the delay following the Dismissal Order being made in September 2024.
- [189] Given this conclusion, I need not consider whether, on receiving the November 2022 emails from Mr. Magnus, which arguably indicated that Mahdi was residing at a specified address in North Vancouver, Mr. Turner ought to have made inquiries to ascertain whether Mahdi was alive, and if so to have taken steps to rectify the unintentional error made by putting inaccurate information before Justice Girn.

Reasons Offered for the Delay

- [190] At the interests of justice stage, the court can revisit the reasons for delay offered by the plaintiff. An explanation that falls short of establishing an excuse may therefore inform the interests of justice analysis: *Khela Excavating Ltd.* at para. 17(f).
- [191] The delay in this case was not carried out to obtain a tactical advantage. I have no trouble concluding that, but for his debilitating illness, Mahdi would have continued to push the litigation forward, as he did until early 2019. While I have found that the delay was inexcusable because Hossein should not have been expected to wait for an indeterminate period while Mahdi was prevented from advancing the litigation, Mahdi's dilemma was not of own making and thus mitigates his blameworthiness in taking no action in the case between June 2019 and his death in November 2023.
- [192] What is more, by October 2023 Lydia had changed her mind and was open to acting as litigation guardian. As at this point, there was a real prospect that she would take on this role and the litigation would be able to proceed as a result; i.e., it would no longer be frozen by virtue of Mahdi's illness combined with Lydia's reluctance to become involved in the action in a significant way. The problem of litigation being indefinitely frozen had ended: *Font v. Segal*, 2018 BCSC 693 at paras. 16-18. As it turned out, Mahdi passed away at around this time, but Lydia has pursued the action in her capacity as personal representative for his estate.
- [193] While Lydia acted rashly in sending the application materials back to Mr. Turner's office in August 2022, I have found that Mahdi was unaware that this had occurred and was not complicit in the failure to respond. Were Lydia acting as litigation guardian or personal representative at that point, the analysis would be different: *Sahyoun* at paras. 26-28, 44 and 55. But as noted earlier, I am not prepared to treat Lydia as her father's surrogate in this regard, nor am I prepared to do so with respect to her not being proactive in moving her father's case forward between June 2019 and his death.
- [194] Finally, the most substantial part of the delay after Mahdi's death was the result of Lydia having to obtain probate. There is no suggestion that she was dilatory in doing so. And as noted, I do not accept that the delay between Mahdi's death and Lydia bringing this application was, as Hossein asserts in his written argument, "for purely tactical reasons".

Role of Counsel in Causing Delay

- [195] Mr. Magnus' conduct in failing to comply with the requirements of Rule 22-6 and not informing Mr. Turner that Mahdi had not been personally served was a material factor in Mahdi never finding out about the dismissal application. Mahdi should not be held responsible for Mr. Magnus' conduct in this regard. On the other hand, there is no evidence to suggest that Mr. Magnus was responsible for the matter not moving forward after June 2019. As I have found, that delay was the result of Mahdi's illness.

Interest in Cases of Genuine Public Importance being Heard on Merits

[196] This action does not present a matter of genuine public importance extending beyond the interests of the parties themselves. Accordingly, this factor does not favour allowing the action to proceed, and can be seen as neutral in the analysis.

Merits of the Action

[197] This factor involves looking at whether the matter is bound to fail, and does not involve a searching assessment of the merits. Giacomini para. 71. The parties gave me limited material on the merits of the action. Importantly, Hossein does not argue that Mahdi's action is bound to fail, only that it is weak.

Summary of Interests of Justice Analysis

[198] Some of the factors engaged in the interests of justice analysis support dismissing the action for want of prosecution, such as the length of delay. Other factors favour allowing this action to proceed, for example the limited prejudice to Hossein, and the fact that Mahdi's illness prevented him from pressing the matter forward but now that Lydia is prepared to act on behalf of his estate the matter is ready for trial.

[199] Having considered all the factors, in my view Lydia in her capacity as personal representative for her father has established that, despite the inordinate and inexcusable delay, it is in the interests of justice to allow the action to proceed. This is not a case where the interests of justice justify depriving Mahdi's estate of its presumptive entitlement to adjudication on the merits.

Conclusion

[200] Justice Girn's order dismissing this action for want of prosecution is set aside, as is the registrar's certificate of dismissal of proceeding entered on November 2, 2022.

[201] The style of cause in this proceeding will be amended to replace Mahdi as plaintiff with Lydia as personal representative of Mattie's estate.

"D. Layton J."

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