

CANADA / JUDGMENT

Bunn v. Bunn Estate

2016 BCSC 2146

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 2146 Bunn v. Bunn Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bunn v. Bunn Estate,

2016 BCSC 2146

Date: 20161118

Docket: S162940

Registry: Vancouver

Between:

Jennifer L. Bunn

Petitioner

And

Christopher Gregorig in his capacity as executor of the estate of Joyce Bunn, deceased,
Christopher B. Bunn, Master Charters Inc. and Sandra J. Dix

Respondents

Before: The Honourable Madam Justice Gray

Reasons for Judgment

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Joyce Bunn, Deceased :

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No Appearance

Place and Date of Hearing:

Vancouver, B.C.

May 9, 2016

Place and Date of Judgment:

Vancouver, B.C.

November 18, 2016

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I. Introduction

[1] The petitioner Jennifer Bunn ("Jennifer") seeks leave to commence an action in this Court in the name of and on behalf of her cousin, Christopher Gregorig ("CPG"), in his capacity as executor of the estate of Jennifer's mother, Joyce Bunn ("Joyce"), who is now deceased (the "Estate"). Jennifer relies on s. 151 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA].

- [2] The proposed action would be against Jennifer's brother, the respondent Christopher Bunn ("Chris") and a company he controls, the respondent Master Charters Inc. ("Charters", collectively, the "Proposed Defendants").
- [3] Jennifer seeks to challenge transactions benefiting Chris or Charters. The transactions she seeks to challenge are as follows:
- a) Joyce's November 2004 transfer of voting control of Bunn Holdings Ltd. ("Holdings") to Chris;
 - b) Joyce's November 2004 exchange of Holdings shares for Charters shares;
 - c) Chris's 2012 receipt of proceeds of sale of a house in Rancho Mirage, California;
 - d) Chris's 2012 receipt of \$100,000 from Joyce; and
 - e) other monies Chris may have received from Joyce while she was alive.
- [4] Jennifer alleges that the transactions should be set aside pursuant to the law of undue influence and the law of non est factum. The position of the respondents is essentially that the transactions were gifts from Joyce to Chris.
- [5] The respondents CPG, Chris, and Charters oppose the orders sought by Jennifer in this petition. The respondent Sandra Dix ("Sandra") is the sister of Jennifer and Chris. She takes no position on the orders sought.
- [6] The hearing occupied one hearing day. The evidence consisted of four affidavits: Jennifer's affidavit (with over 170 pages of exhibits); the affidavit of Carolyn Rimes, a legal assistant at the law firm acting for Jennifer (with 312 pages of exhibits); Chris's affidavit (with 33 pages of exhibits); and CPG's affidavit (with 18 pages of exhibits).
- [7] This petition raises novel legal issues concerning the interpretation of s. 151 of WESA, and difficult legal issues regarding presumptions of undue influence.

II. Parties

- [8] Joyce died at the age of 92 on May 9, 2014. She was sometimes called "Joy" but, for consistency, will be referred to as "Joyce" in these reasons for judgment. Joyce was predeceased by her husband Norman. Joyce was survived by her three children: Chris, Jennifer, and Sandra. All three children are equal beneficiaries of Joyce's Estate. I refer to Jennifer and Sandra together as the "Daughters".
- [9] CPG is the executor of Joyce's Estate. He is the son of Joyce's sister Ivy Gwendoline Gregorig ("Gwen Gregorig") and, as such, is a cousin of Chris, Jennifer, and Sandra, and a nephew of Joyce's. I use the initials CPG to avoid confusion with Joyce's son, Chris, who has the same first name. CPG is not a beneficiary of Joyce's Estate, but is entitled to be paid a fee for services pursuant to a written agreement with Joyce. CPG is a contractor and is 65 years old.

- [10] Jennifer and Sandra live in West Vancouver, B.C. Chris is a resident of Sidney, B.C. CPG lives in or near Abbotsford, B.C.

III. Positions of the Parties

A. Petitioner

- [11] Jennifer alleges that Joyce was manipulated by Chris during her life. Jennifer deposed that she tried to raise her concerns about how Chris was managing Joyce's affairs but, when she did so, Chris had a letter typed up, purportedly from Joyce, defending her son and asking the Daughters to stop causing trouble.
- [12] Jennifer alleges that at the time of the relevant transactions, Joyce was unsophisticated in business matters, of diminished capacity, and susceptible to the direction and control of Chris. She alleges that Joyce was under the undue influence of Chris for all of the challenged transactions, and that they were completed without Joyce having the benefit of legal advice or the ability to understand the consequences of her actions.
- [13] With respect to the November 2004 transactions, Jennifer submits that even if Charters did issue redeemable preference shares to Joyce in the amount of \$540,000 in exchange for her \$540,000 in redeemable preference shares in Holdings, the Charters shares would not have been worth as much, because Holdings had sufficient assets to redeem such shares, whereas Charters did not.
- [14] Jennifer submits she has demonstrated that she has an arguable case. Jennifer argues that the circumstances of the transactions raise a presumption of undue influence that the Proposed Defendants will need to rebut. Jennifer says that, given the circumstances of the transactions and the amounts involved, it is necessary and expedient for the case to proceed against the Proposed Defendants.
- [15] If the Court makes the order sought in these proceedings, Jennifer asks that the Court exercise its discretion to make the order effective as of the date of the hearing, May 9, 2016, to protect against any possible concerns relating to the application of the Limitation Act, S.B.C. 2012, c. 13 [Limitation Act].

B. Respondents Chris and Charters, the Proposed Defendants

- [16] Chris and Charters, the Proposed Defendants, submit that the challenged transactions were carried out through Joyce's advisors and reflected her express wishes, and were not the result of undue influence by Chris.

- [17] The Proposed Defendants submit that the Court should not grant Jennifer leave to commence an action under s. 151 of WESA. They argue that s. 151 was enacted to deal with circumstances where an executor is in a conflict of interest. They argue that CPG is not in any real or apparent conflict of interest, because CPG is not a beneficiary of the Estate and has no personal interest in any of the Estate's assets.
- [18] The Proposed Defendants contend that CPG is acting honestly and in good faith, and thus the Court should not intervene in his administration of the Estate.
- [19] The Proposed Defendants say that Jennifer is not acting in good faith, but rather is acting out of personal animosity towards Chris. They say that the Daughters' efforts in 2008 to have Joyce declared incompetent, notwithstanding the evidence from family members that there was no basis for such a declaration, raise further doubts about Jennifer's good faith in bringing the petition.
- [20] The Proposed Defendants submit that it is not necessary or expedient that Jennifer be permitted to commence an action under s. 151. They say that such litigation would be time-consuming and expensive. They contend that Jennifer's proposed action against them is not based on a realistic legal claim, and has little prospect of success.

C. Respondent CPG

- [21] CPG submits that he has reviewed the challenged transactions, and is satisfied that they were carried out with the informed knowledge of Joyce, on the advice of her professional advisors, and without any undue influence by Chris.
- [22] CPG says that he participated in the transfer of proceeds from the sale of the house in Rancho Mirage to Chris on Joyce's explicit instructions, after satisfying himself that the transfer was made for a valid and rational reason, with the informed knowledge of Joyce, and without undue influence by Chris.
- [23] CPG says that he also participated in a gift of \$100,000 from Joyce to Chris. As with the other transfers, CPG contends that he was satisfied that the transfer was made for a valid and rational reason, with the informed knowledge of Joyce, and without undue influence by Chris.
- [24] CPG submits that with regards to the other transfers alleged to have occurred between May 2011 and Joyce's death, the remaining transfer simply involved moving funds from one account to another, and that those funds were never owned, used, or intended to be used by or on behalf of Chris.
- [25] CPG says that he has acted honestly, reasonably, intelligently, and in good faith in managing or assisting with the management of Joyce's financial affairs before she died and of the Estate's financial affairs after Joyce's death. He said at the time of the hearing that he was waiting for a tax clearance certificate before filing for probate of the Estate.

[26] CPG argues that in any event, any action arising out of the November 2004 transactions is statute-barred by the Limitation Act. He submits that it is not in the best interests of the Estate to waste money litigating the claims against the Proposed Defendants.

[27] CPG's position is that, even if the Court made the order sought, it should not make the order effective as of the date of the hearing.

IV. initial legal analysis

[28] This is a case in which it is helpful to set out some of the legal analysis and issues before reviewing the facts. This is discussed as follows below:

- a) Test under s. 151 of WESA;
 - i) Case Law on s. 151;
 - ii) Rule 13-5(1): "Necessary or Expedient";
 - iii) Derivative Proceedings in the Name of Companies; and
 - iv) Discretion, Arguable Case, and Best Interests;
- b) Undue Influence;
 - i) First Class of Undue Influence;
 - ii) Second Class of Undue Influence and Evidentiary Presumption;
- c) Non est factum; and
- d) Whether an Order should be Effective on Hearing Date.

A. Test under s. 151 of WESA

[29] What test should apply to the requirement in s. 151 of WESA that it be "necessary or expedient" for the protection of the estate or the interests of a beneficiary for the proceeding to be brought?

[30] Jennifer's position is that it is sufficient to demonstrate an "arguable case". In contrast, CPG's position is essentially that the Court should not interfere with CPG's decision, as executor of the Estate, to not proceed with the action Jennifer proposes, unless the Court determines that CPG is clearly wrong.

[31] The relevant parts of s. 151 of WESA provide the following:

151. (1) Despite section 136 [effect of representation grant], a beneficiary or an intestate successor may, with leave of the court, commence proceedings in the name and on behalf of the personal representative of the deceased person

- (a) to recover property or to enforce a right, duty or obligation owed to the deceased person that could be recovered or enforced by the personal representative, or
- (b) to obtain damages for breach of a right, duty or obligation owed to the deceased person.
- (3) The court may grant leave under this section if
 - (a) the court determines the beneficiary or intestate successor seeking leave
 - (i) has made reasonable efforts to cause the personal representative to commence or defend the proceeding,
 - (ii) has given notice of the application for leave to
 - (A) the personal representative,
 - (B) any other beneficiaries or intestate successors, and
 - (C) any additional person the court directs that notice is to be given, and
 - (iii) is acting in good faith, and
 - (b) it appears to the court that it is necessary or expedient for the protection of the estate or the interests of a beneficiary or an intestate successor for the proceeding to be brought or defended.
- (4) On application by a beneficiary, an intestate successor or a personal representative, the court may authorize a person to control the conduct of a proceeding under this section or may give other directions for the conduct of the proceeding.

[Underlining added.]

[32] The preconditions for an order to be granted under s. 151(3) of WESA include making reasonable efforts to cause the estate's personal representative to begin proceedings, and giving notice of the application to certain parties. The respondents concede that Jennifer has made reasonable efforts to cause CPG to bring the proposed action, and it is clear that she gave notice of this petition to the appropriate parties, all of whom provided responses.

[33] As a result, the overall issues for the Court under s. 151 in this case are twofold:

- a) whether Jennifer is acting in good faith; and
 - b) whether it is "necessary or expedient" for the protection of the Estate or the interests of a beneficiary for the proceeding to be brought.
- i. Case Law on s. 151

- [34] I was only able to find one case applying s. 151 of WESA, being *Werner v. McLean*, 2016 BCSC 1510 [Werner]. In that case, Ms. Werner brought two applications. Her first application was for an order removing Mr. McLean as personal representative. Her alternative application was for an order that she be granted leave to commence a proceeding in Mr. McLean's name as personal representative, against Mr. McLean personally, regarding property known as Lot 1.
- [35] Mr. McLean did not oppose the application for an order that Ms. Werner have leave to commence the action, and Mr. Justice Thompson made that order. The Court ordered that, subject to further order, the expenses of prosecuting and defending the proceeding would be to the accounts of Ms. Werner and Mr. McLean personally. Mr. Justice Thompson concluded that, in that case, it would be "expedient" to grant leave to commence the action.
- [36] At para. 16 of *Werner*, after setting out the content of s. 151, Mr. Justice Thompson explained as follows:
- [16] Accordingly, the court is empowered to grant leave to Ms. Werner as an intestate successor to commence proceedings in the name and on behalf of the personal representative if certain preconditions (i.e., reasonable efforts, notice, and good faith) are met. I understand the administrator not to contest that the preconditions are satisfied in this case. I am satisfied that it is expedient for the interests of the intestate successors for the proceeding to be brought: I expect that a resolution of the Lot 1 trust issue will go a long way toward resolving the issues in the administration of this estate. Ms. Werner has leave to commence a proceeding.

[Underlining added.]

- [37] I was not able to find provisions similar to s. 151 of WESA in the legislation of other provinces, and so there is no guidance from other jurisdictions.

ii. Rule 13-5(1): "Necessary or Expedient"

- [38] The terms "necessary or expedient" are used in Rule 13-5(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009. That Rule allows the court to order the sale of property if it appears "necessary or expedient" that the property be sold. In *McNiven v. McNiven* (1989), 63 D.L.R. (4th) 444 (B.C.C.A.), the Court acknowledged that the provision gives trial judges a broad and sweeping discretion to order a sale.
- [39] Rule 13-5(1) has often been applied in the matrimonial context where one party seeks a court-ordered sale of the matrimonial home. In that context, the word "expedient" has been taken to mean "advantageous to both parties": *Reilly v. Reilly* (1992), 74 B.C.L.R. (2d) 101 (C.A.) at para. 35 and *Tomic v. Tough*, 2013 BCCA 355 at para. 26. Necessity exists in that context where neither party has the financial means to buy out the other: *Von Hopffgarten Estate v. Rommel*, 2012 BCSC 393 at para. 40 [Van Hopffgarten].

[40] The wording in Rule 13-5(1) is disjunctive, so a party need only establish necessity or expediency: *Moody Estate*, 2008 BCSC 786 at para. 27. In *Van Hopffgarten* at para. 41, the Court reasoned that the words "necessary" and "expedient" may take on different meanings in different contexts.

iii. Derivative Proceedings in the Name of Companies

[41] Jennifer's position is that a court order permitting a beneficiary to sue in the name of the executor is analogous to a court order permitting a shareholder to sue in the name of a company, in the procedure known as a "derivative proceeding". Jennifer's position is that the Court should take a similar approach to determining the legal test under s. 151. She argued that it is in the best interests of the Estate for the legal proceeding to be prosecuted if there is an "arguable case" for a sufficiently large sum.

[42] The powers that the court may grant to beneficiaries to pursue claims on behalf of an estate under s. 151 of WESA are similar to those that the court may grant to shareholders to pursue claims on behalf of a company under ss. 232 and 233 of the Business Corporations Act, S.B.C. 2002, c. 57 [BCA]. The relevant parts of those BCA sections are as follows:

Derivative actions

232. (1) In this section and section 233,

"complainant" means, in relation to a company, a shareholder or director of the company;

"shareholder" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.

(2) A complainant may, with leave of the court, prosecute a legal proceeding in the name and on behalf of a company

(a) to enforce a right, duty or obligation owed to the company that could be enforced by the company itself, or

(b) to obtain damages for any breach of a right, duty or obligation referred to in paragraph (a) of this subsection.

Powers of court in relation to derivative actions

233. (1) The court may grant leave under section 232 (2) or (4), on terms it considers appropriate, if

(a) the complainant has made reasonable efforts to cause the directors of the company to prosecute or defend the legal proceeding,

(b) notice of the application for leave has been given to the company and to any other person the court may order,

- (c) the complainant is acting in good faith, and
- (d) it appears to the court that it is in the best interests of the company for the legal proceeding to be prosecuted or defended.

[Underlining added.]

[43] The leading authority on the test for whether or not it is in the best interests of a company to allow a case to proceed on its behalf is *Primex Investments Ltd. v. Northwest Sports Enterprises Ltd.* (1995), 13 B.C.L.R. (3d) 300 (S.C.), *aff'd* (1997), 26 B.C.L.R. (3d) 357 (C.A.) [Primex]. That case considered previous legislation, being the Company Act, R.S.B.C. 1979, c. 59 (since repealed) [Company Act] at s. 225(3), which read as follows:

A member or director may, on notice to the company, apply to the court for the leave referred to in subsection (1) or (2) and, if

- (a) he has made reasonable efforts to cause the directors of the company to commence or diligently prosecute or defend the action;
- (b) he is acting in good faith;
- (c) it is *prima facie* in the interests of the company that the action be brought or defended; and
- (d) in the case of an application by a member, he was a member of the company at the time of the transaction or other event giving rise to the cause of action,

the court may require that notice of the application be served on those persons, and may grant the leave on terms it considers appropriate.

[Underlining added.]

[44] In *Primex*, Mr. Justice Tysoe, then of this Court, explained that the test to be met is the "arguable case" test, and that the potential relief must be sufficient to justify the inconvenience to the company of being involved in the action. He wrote as follows:

[41] the Court should not attempt to try the case when deciding whether the requirement in s. 225(3)(c) has been satisfied. The Court should determine whether the proposed action has a reasonable prospect of success or is bound to fail. If it is asserted that the proposed defendants in the derivative action have a defence to the claim, the Court must decide whether such a defence is bound to be accepted by a trial judge following the completion of the trial of the derivative action. It is not necessary for the applicant to show that the action will be more likely to succeed than not. As noted in the Dickerson Report, the Court should also be satisfied that the potential relief in the proposed action is sufficient to justify the inconvenience to the company of being involved in the action.

- [45] The wording of the section has changed since Tysoe J. enunciated the interests of the company test in *Primex* at para. 41. Section 225(3)(c) of the Company Act required that it be "... prima facie in the interests of the company that the action be brought ...". Now, s. 233(1)(d) of the BCA requires that "it appears to the court that it is in the best interests of the company for the legal proceeding to be prosecuted ...".
- [46] Even though the statutory test has changed from a consideration of whether the proposed action is prima facie in the interests of the company to a consideration of whether it is in the company's best interests, the discussion in *Primex* continues to be of assistance. See *Carr v. Cheng*, 2005 BCSC 445 at paras. 20-21.
- [47] Although the court should not attempt to try the case when deciding whether to grant leave to commence a derivative action, some weighing of the evidence is necessary. This was discussed by Mr. Justice Hood in *LaRoche v. HARS Systems Inc.*, 2001 BCSC 140 at para. 14, as follows:
- [14] The cases say that my task is not to decide the merits of the case, or issues of credibility, on this application. This is much easier said [than] done. For it seems to me that I must consider the whole of the relevant evidence to determine the issues before me, to which I will turn in a moment, and to that extent there must be some weighing of the evidence. Were it otherwise, then the mere assertions of the Applicant would always win the day.

iv. Discretion, Arguable Case, and Best Interests

- [48] Both s. 151 of WESA and s. 233 of BCA give the court discretion as to whether to make the order sought by using the words that the court "may" grant leave.
- [49] As set out in *Primex*, an applicant for derivative leave must establish not only an arguable case, but also that the potential relief in the proposed action is sufficient to justify the inconvenience to the company of being involved in the action.
- [50] In my view, a proceeding may be "necessary" under s. 151 of WESA if the personal representative is unwilling or unable to proceed. It may be "expedient" if it is in the best interests of the estate.
- [51] In this case, the applicant is a beneficiary of the Estate and seeks the order under s. 151 of WESA on the basis that the claim, if successful, will increase the value of the Estate. In such a case, in my view, to satisfy the court that it should exercise its discretion to grant leave to commence litigation on behalf of the estate, the applicant must show not only that there is an arguable case, but also that the potential relief in the action is sufficient to justify the inconvenience to the estate of being involved in the action, and that proceeding is overall in the best interests of the estate. In my view, that must involve a consideration of the costs of proceeding, including the potential of a costs award against the estate if it fails. Further, in my view, in determining whether the proposed lawsuit appears to be in the best interests of the estate, the court can consider the strength of the proposed claim based on a limited weighing of the evidence.

- [52] I reject the argument made by the Proposed Defendants to the effect that the court should show deference to the views of the executor, and grant leave only if the executor is in a conflict of interest. The views of the executor and the basis of those views are simply a factor for consideration.

B. Undue Influence

- [53] The law of undue influence is discussed in the leading cases of *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 [Geffen], and *Ogilvie v. Ogilvie Estate* (1998), 49 B.C.L.R. (3d) 277 (C.A.) [Ogilvie].
- [54] In *Ogilvie*, Mr. Justice Goldie, on behalf of the Court, described the background principles and the two classes of undue influence as follows:
- [6] The equitable principle invoked in this case permits the court to set aside gifts and other transactions where the conduct complained of falls below the standards demanded of equity. Compendiously, this conduct is described as "constructive fraud" and classified, according to the learned authors of *Snell's Equity*, 29th Ed. (London, 1990, Sweet & Maxwell) at 551 under four headings: undue influence, abuse of confidence, unconscionable bargains, and frauds on powers. In *Allcard v. Skinner* (1887), 36 Ch.D. 145 (C.A.) - properly described as a leading case - Lord Justice Lindley described the principle applied by the courts of equity in respect of undue influence at 182-3:

What then is the principle? Is it that it is right and expedient to save persons from the consequences of their own folly? or is it that it is right and expedient to save them from being victimized by other people? In my opinion the doctrine of undue influence is founded upon the second of these two principles. Courts of Equity have never set aside gifts on the ground of the folly, imprudence, or want of foresight on the part of donors.

- [7] The courts of equity have always been careful to avoid "black letter" rules in describing their jurisdiction. In large part, the purpose of these courts was to relieve against the imposition of hard and fast rules by the common law courts. It will therefore be apparent that the particular facts of each case will require scrutiny in order to distinguish between the acts of the deliberate wastrel and those whose minds have been subjected to the influence of others. This in turn gives rise to problems of proof. These two considerations were addressed by Lord Justice Cotton in *Allcard v. Skinner*, *supra*, at 171:

The question is - Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside? These decisions may be divided into two classes - First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act

of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused. [Emphasis added.]

[Underling Added.]

i. First Class of Undue Influence

[55] As a result, in order to establish an arguable case for the first class of undue influence, Jennifer must establish an arguable case that the transactions were the result of influence expressly used by Chris for the purpose.

ii. Second Class of Undue Influence and Evidentiary Presumption

[56] In *Ogilvie*, Mr. Justice Goldie discussed the second class of undue influence as follows:

[14] The second class of undue influence does not depend on proof of reprehensible conduct. It affects those who may have acted in the sincere belief of their honesty. As was said by Lord Justice Cotton in *Allcard v. Skinner*, *supra*, at 171 the courts of equity will nevertheless intervene as a matter of public policy to prevent the influence existing from certain relationships from being abused. While the trial judge rejected the appellant's contention that the acts of the *Grahams* fell within the first class, her rejection did not of itself constitute a favourable finding of the nature and quality of their acts generally.

[57] In *Geffen*, the Supreme Court of Canada concluded that a trust agreement was valid, overruling the Alberta Court of Appeal and restoring the trial order. The Court of Appeal had held that there was a presumption that the settlor's brothers had unduly influenced the settlor, who was their sister, and that the presumption had not been rebutted on the evidence.

[58] There were three sets of reasons for judgment in the Supreme Court of Canada in *Geffen*, which all came to the same conclusion, but for different reasons. The panel consisted of five judges. Madam Justice Wilson's reasons for judgment, on behalf of herself and Mr. Justice Cory, concluded that the brothers had the ability to persuade their sister, and so the presumption applied, but it was rebutted in the circumstances. Mr. Justice La Forest and Madam Justice McLachlin (as she then was) concluded that the presumption did not apply because the evidence demonstrated that the brothers did not have the ability to dominate their sister's will. Mr. Justice Sopinka held that the presumption was immaterial, because the evidence supported the trial judge's finding that there was no undue influence.

[59] In *Ogilvie*, Mr. Justice Goldie discussed the different approaches of Madam Justice Wilson and Mr. Justice LaForest in *Geffen*, as follows:

[79] In [Geffen], supra, Madam Justice Wilson held at 380-1 that the relationship of the appellants to the testator in the circumstances at the time was such that "... it could have afforded them the potential to exercise undue influence." While Mr. Justice La Forest agreed with Madam Justice Wilson in the result he developed his own reasons for doing so. In his formulation of the question for the court he said at 394 the relevant question was:

... whether the relationship of Mrs. Goodman to her brothers was such that they had the ability to dominate her.

The difference between Madam Justice Wilson and Mr. Justice La Forest appears to be this: the former saw in the very existence of the circumstances of the relationship sufficient to trigger the presumption. The latter at 395 relied upon the findings of the trial judge to reach another conclusion:

In another situation, the relationship of brother and sister might well support a presumption of undue influence. Given these findings of fact by the trial judge, however, it is difficult to accept that the relationship between Mrs. Goodman and her brothers was one where the potential for a dominating influence existed.

[60] In Geffen, Madam Justice Wilson discussed the presumption of undue influence and rebutting the presumption at pages 377-379, as follows:

What then is the nature of the relationship that must exist in order to give rise to a presumption of undue influence? Bearing in mind the decision in Morgan, its critics and the divergence in the jurisprudence which it spawned, it is my opinion that concepts such as "confidence" and "reliance" do not adequately capture the essence of relationships which may give rise to the presumption. I would respectfully agree with Lord Scarman that there are many confidential relationships that do not give rise to the presumption just as there are many non-confidential relationships that do. It seems to me rather that when one speaks of "influence" one is really referring to the ability of one person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power. I disagree with the Court of Appeal's decision in Goldsworthy v. Brickell, supra, that it runs contrary to human experience to characterize relationships of trust or confidence as relationships of dominance. To dominate the will of another simply means to exercise a persuasive influence over him or her. The ability to exercise such influence may arise from a relationship of trust or confidence but it may arise from other relationships as well. The point is that there is nothing per se reprehensible about persons in a relationship of trust or confidence exerting influence, even undue influence, over their beneficiaries. It depends on their motivation and the objective they seek to achieve thereby.

What then must a plaintiff establish in order to trigger a presumption of undue influence? In my view, the inquiry should begin with an examination of the relationship between the parties. The first question to be addressed in all cases is whether the potential for domination inheres in the nature of the relationship itself. This test embraces those relationships which equity has already recognized as giving rise to the presumption, such as solicitor and client, parent and child, and guardian and ward, as well as other relationships of dependency which defy easy categorization.

By way of contrast, in situations where consideration is not an issue, e.g., gifts and bequests, it seems to me quite inappropriate to put a plaintiff to the proof of undue disadvantage or benefit in the result. In these situations the concern of the court is that such acts of beneficence not be tainted. It is enough, therefore, to establish the presence of a dominant relationship.

Once the plaintiff has established that the circumstances are such as to trigger the application of the presumption, i.e., that apart from the details of the particular impugned transaction the nature of the relationship between the plaintiff and defendant was such that the potential for influence existed, the onus moves to the defendant to rebut it. As Lord Evershed M.R. stated in *Zamet v. Hyman*, *supra*, at p. 938, the plaintiff must be shown to have entered into the transaction as a result of his own "full, free and informed thought". Substantively, this may entail a showing that no actual influence was deployed in the particular transaction, that the plaintiff had independent advice, and so on. Additionally, I agree with those authors who suggest that the magnitude of the disadvantage or benefit is cogent evidence going to the issue of whether influence was exercised.

[Underlining added.]

[61] Mr. Justice La Forest discussed the application of the presumption of undue influence at pages 392 and 394, as follows:

As my colleague has noted, the first issue to be considered is whether the circumstances in this case are such as to give rise to a presumption of undue influence. Wilson J. concludes that such a presumption will arise only when the parties are in a relationship of "influence", where one person is in a position to dominate the will of another. I agree with this.

Turning then to the issue of whether the presumption of undue influence should be applied in the present case, the relevant question is whether the relationship of Mrs. Goodman to her brothers was such that they had the ability to dominate her.

[62] As I will discuss below, the presumption is not automatically triggered when an elderly parent makes a transfer to an adult child. Madam Justice Wilson's reference to the "parent and child" relationship in the context of common fiduciary relationships giving rise to the presumption suggests that she was referring to the relationship between a parent and his or her dependent child as a relationship in which a parent can dominate the will of the child, and not to the relationship between an adult child and an elderly parent. Therefore, the appropriate question to ask when determining whether the presumption arises in the case of a transfer from an elderly parent to an adult child is whether the adult child was in a

dominant position over the elderly parent from which the adult child could have influenced the will of the elderly parent.

[63] The law concerning the presumption of undue influence is complex. Mr. Justice Sopinka discussed it in *Geffen* (after writing that his consideration of it was unnecessary and obiter). He wrote as follows (at pages 396-398):

The presumption of undue influence is a presumption of law. As such, its influence on the resolution of the issue is limited to the burden of proof. Text writers and courts are divided on whether presumptions of law affect only the evidential burden or both the evidential burden and the legal burden. In *S v. S*, [1972] A.C. 24, Lord Reid espoused the latter view and explained a presumption in the following language, at p. 41:

Once evidence has been led it must be weighed without using the presumption as a make-weight in the scale for legitimacy. So even weak evidence against legitimacy must prevail if there is not other evidence to counterbalance it. The presumption will only come in at that stage in the very rare case of the evidence being so evenly balanced that the court is unable to reach a decision on it.

This Court, in *Circle Film Enterprises Inc. v. Canadian Broadcasting Corp.*, [1959] S.C.R. 602, adopted the former or evidentiary burden view, citing *Wigmore on Evidence*, 3rd ed., § 2491(2). Judson J., speaking for the court, stated, at p. 606:

It must be kept in mind that the peculiar effect of a presumption "of law" (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule. [Emphasis in original.]

This view was reaffirmed in *Powell v. Cockburn*, [1977] 2 S.C.R. 218, Dickson J. (as he then was) said at p. 225:

Evidence having been led on each issue the presumptions disappeared. It fell then to the trier of fact to decide the issues upon all of the evidence adduced.

I need not resolve which of these views is the correct one because in my opinion, on either view, the presumption of undue influence played no role in this case. An evidentiary burden casts on the burdened party the obligation of going forward with some evidence while the legal burden is applied against the burdened party if the evidence, after being weighed, fails to persuade. This latter burden is also referred to as the burden of non-persuasion. The modern view of the legal burden is generally attributed to the decision of the Privy Council in *Robins v. National Trust Co.*, [1927] 2 D.L.R. 97, in which Viscount Dunedin stated at p. 101:

But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no sure conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.

[Underlining added.]

[64] In other words, Mr. Justice Sopinka wrote that in 1977, the Supreme Court of Canada had adopted the view that presumptions of law, such as the presumption of undue influence, affect only the evidential burden, and that if evidence is led to the contrary of the presumption, the presumption disappears. However, he also wrote that the matter was unresolved and he did not need to resolve it in *Geffen* (pages 395-396).

[65] The question was discussed in John E.S. Poyser's recent text, *Capacity and Undue Influence* (Toronto: Carswell, 2014) at 477-481, as follows:

The presumption of undue influence muddies the waters in some measure. The current and best view on this point is that the presumption casts an evidential burden, but not a legal one. Where it is invoked the court is simply in a position to make a factual inference against the gift and the willingness to make that inference leaves the party defending it with the evidential burden of bringing evidence to bear that will, at the end of the day, convince the court not to make the inference. On that view, the onus of proof remains on the party attacking the gift at each step and stage along the way. No shift in the legal burden occurs. If the presumption is seen to carry the day it is only because the evidence, considered in its totality, triggers the inference, which is not dispelled, and thereby supports the finding that the gift was caused by undue influence.

Sopinka [J.] made it clear that the presumption need not be considered where evidence is available to decide the issue of whether undue influence was present or absent in a given case. That outcome is common. Presumptions rarely carry the day. There may be more or less evidence available, but there is rarely a vacuum. Where evidence is present, a court is rarely left hanging in perfect equilibrium when both sides have closed their case.

Regardless of whether the presumption casts a legal onus or merely an evidential one, Sopinka [J.] made a second point clear in [*Geffen*]. Where the presumption applies, a balancing of the evidence still has to occur and, during that balancing, the presumption itself is not put on the scale. The slightest evidence one way or the other will decide the issue if that wisp of evidence is the only evidence available on point. In that sense, the presumption is not a "make-weight" as items are added to the balance. Phrased in a different way, the presumption does not have to be overcome by marshalling sufficient evidence on the other side of the issue to counterbalance it. The presumption points the finger at the party who seeks to uphold the gift, but does not pull or drag the case to any conclusion at odds with the preponderance of evidence.

[66] As a result, in considering whether Jennifer has established an arguable case that the transactions fall into the second class of undue influence, it is appropriate to take into account the presumption of undue influence in the manner suggested by Justice Sopinka in *Geffen*.

[67] First, Jennifer must establish an arguable case that at the time of or shortly before any of the relevant transactions, the relations between Joyce and Chris were such as to raise a presumption that Chris had influence over Joyce. Second, if Jennifer raises that presumption, the Court must consider whether there is evidence to the contrary such that the presumption disappears. Third, if the presumption disappears, the Court must consider whether there is any evidence establishing an arguable case that the transactions fall into the second class of undue influence.

C. Non Est Factum

[68] I set out the law regarding non est factum in *Zhang v. Soong*, 2012 BCSC 758 at paras. 76-78 as follows:

[76] The leading case in Canada on the doctrine of non est factum is the decision by the Supreme Court of Canada in *Marvco Color Research Ltd. v. Harris*, [1982] 2 S.C.R. 774.

[77] The relevant principles were recently summarized by Dardi J. in *Farrell Estates Ltd. v. Win-Up Restaurant Ltd.*, 2010 BCSC 1752 at para 100, as follows:

1. The burden of proving non est factum rests with the party seeking to disown their signature. For a person of full capacity the application of the doctrine must be kept within narrowly prescribed limits.
2. The person who seeks to invoke the remedy must show that the document signed is fundamentally different from what the person believed he or she was signing.
3. Even if the person shows such a fundamental difference, the court must examine whether the signer was careless in failing to take reasonable precautions in the execution of the document. The court must also consider the conduct of the party relying on the document and whether they qualify as an innocent party, in order to determine which party, by application of reasonable care, was in the better position to avoid the loss.

[78] The analysis remains highly fact-specific and contextual. Estey J. wrote the following in *Marvco*, at 787:

I wish only to add that the application of the principle that carelessness will disentitle a party to the document of the right to disown the document in law must depend upon the circumstances of each case. This has been said throughout the judgments written on the principle of non est factum from the earliest times. The magnitude and extent of the carelessness, the circumstances which may have contributed to such carelessness, and all other circumstances must be taken into account in each case before a court may determine whether estoppel shall arise in the defendant so as to prevent the raising of this defence. The policy considerations inherent in the plea of non

est factum were well stated by Lord Wilberforce in his judgment in *Saunders*, [[1971] A.C. 1004], at pp. 1023-24:

The law has two conflicting objectives: relief to a signer whose consent is genuinely lacking ; protection to innocent third parties who have acted upon an apparently regular and properly executed document. Because each of these factors may involve questions of degree or shading any rule of law must represent a compromise and must allow to the court some flexibility in application.

D. Whether an Order should be Effective on Hearing Date

[69] If the petition is allowed, Jennifer seeks to backdate the effect of the order to make it effective as of the date of the hearing of the application. She seeks such relief to avoid the possible expiry of a limitation period. In seeking the backdating of the order, she relies on Rule 13-1(8) and *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60.

V. SUMMARY OF ISSUES

[70] As a result, the issues are as follows:

- a) Is Jennifer acting in good faith in seeking leave to commence the proposed action?
- b) Has Jennifer established an arguable case that any of the transactions were the result of influence expressly used by Chris for the purpose?
- c) Has Jennifer established an arguable case that at the time of or shortly before any of the transactions, the relations between Joyce and Chris were such as to raise a presumption that Chris had influence over Joyce?
- d) If Jennifer has established an arguable case to raise a presumption that Chris had influence over Joyce at the time of or shortly before any of the transactions, is there evidence to the contrary such that the presumption disappears?
- e) If Jennifer has established an arguable case to raise the presumption but the presumption disappears or if the presumption was not raised, is there evidence establishing an arguable case that any of the transactions fall into the second class of undue influence?
- f) Has Jennifer established an arguable case that the transactions should be set aside on the basis of non est factum?
- g) If Jennifer has established an arguable case to challenge any of the transactions on any of these grounds, should the Court exercise its discretion to grant leave to Jennifer to commence an action?
- h) If the order should be made, should it be effective on the date of the hearing?

VI. FACTUAL OVERVIEW

[71] The factual background is set out in more detail below, but a brief summary will assist in considering it. The summary is as follows:

- a) In 2000, Joyce executed a power of attorney in California before a lawyer appointing Chris her attorney in fact, with the Daughters as alternative attorneys in fact;
- b) Joyce's husband Norman passed away in February 2001, at the age of 78. His assets included all 100 voting shares in Holdings and 63 redeemable preference shares in Holdings. The total redemption value of those shares was about \$810,000. Holdings owned a residence in West Vancouver, B.C. ("West Van Home"). At the time of Norman's death, either Charters or Chris owed Holdings \$500,000;
- c) In November 2004, Joyce transferred the Holdings voting shares to Chris, giving him legal control of Holdings;
- d) Also in November 2004, Joyce transferred 42 of the Holdings preference shares to Charters, which had a described total value of about \$540,000, apparently in exchange for redeemable preference shares in Charters with the same redemption value. Holdings then repurchased its preferred shares from Charters by effectively applying the \$500,000 debt to the purchase price, leaving Holdings owing Charters the difference of about \$40,000. The effect was that Holdings forgave Charters the \$500,000 loan, and Joyce held preference shares in Charters;
- e) Jennifer seeks to challenge those November 2004 transactions, alleging that Joyce did not understand them and participated as a result of Chris's undue influence. Chris's position is that those transactions were pursuant to Joyce's wishes, which were in furtherance of Joyce and Norman's long-standing plan to forgive the \$500,000 debt in a tax-efficient manner;
- f) In early 2007 there was discussion between Jennifer and Chris about the propriety of the November 2004 transactions;
- g) In August 14, 2007, Joyce signed a will in front of a lawyer which named Chris as the executor of the will;
- h) In early 2008, Joyce's mental capacity was examined by Dr. Comeau, apparently at Sandra's request. Dr. Comeau made a preliminary diagnosis of vascular dementia "sparing [Joyce's] testable memory but interfering on a variable basis with other aspects", and recommended further testing. Joyce and her siblings and friends believed that Joyce remained competent and Joyce declined to participate in further testing;
- i) In 2010, Joyce replaced Chris with the Daughters as her attorneys in fact and executors named in her will by executing documents before a lawyer, and moved into a West Vancouver Amica assisted living facility;
- j) Also in 2010, Chris commenced a lawsuit in California challenging the validity of the appointment of the Daughters as Joyce's attorneys and named executors, and suggesting that Joyce lacked mental capacity;

- k) In the summer of 2010, Sandra and Jennifer received about \$240,000 each from a Swiss bank account ("Swiss Account"), but Chris and Joyce did not receive any funds from it;
- l) In May 2011, Joyce replaced the Daughters with CPG as her attorney in fact and executor named in her will by executing documents before a lawyer, and moved into an Abbotsford care home;
- m) In October 2011, Dr. Chafe examined Joyce and concluded that she was capable and competent to make decisions regarding her financial affairs;
- n) Joyce paid about \$350,000 to Chris in 2012. CPG deposed that this payment was comprised of \$240,000 in lieu of money from the Swiss Bank Account, and a further sum of about \$110,000. Of that further sum, CPG deposed that \$100,000 was a gift from Joyce to Chris, and the balance of about \$10,000 was for the payment of school and orthodontic expenses for Chris's daughter, Nicole; and
- o) Jennifer suspects that Chris may have received further sums from Joyce prior to her death.

VII. chronology of Facts

- [72] I will detail the chronology of facts as revealed in the affidavits filed in the petition proceeding, including the exhibits to those affidavits.
- [73] I will first comment about the form of evidence provided.
- [74] Some of the information consisted of statements in letters or other documents. As such the statements are hearsay and would not ordinarily be admissible at trial in the form provided. Counsel did not make submissions either challenging or explaining the form of the evidence provided on the petition.
- [75] Some of the documents were dated years ago, and were from people who were elderly at the time. Some of those people have probably either passed away or lost mental capacity.
- [76] The hearsay evidence of documents from people who have passed away, such as Joyce, might be admitted at trial. The trial court can assess whether the hearsay evidence of a deceased person is sufficiently necessary and reliable to meet the admissibility threshold and, if so, the court can consider its weight. The weight to be attributed to this evidence would be considered after all the evidence has been heard. This issue is addressed in greater detail in *Stephens v. Austin*, 2003 BCSC 341 at paras. 156-158, and *R. v. Khelawon*, 2006 SCC 57.
- [77] In the absence of a challenge to the form of evidence provided, I will make some assumptions about the evidence.
- [78] I assume for the purposes of this petition that non-party witnesses would give evidence consistent with their statements in letters and other documents discussed below, or that the statements would be admissible themselves as necessary and reliable hearsay.

- [79] Some of the letters submitted as evidence on this petition were written by parties themselves who are still living. Such documents would not ordinarily be admissible as necessary and reliable hearsay, although they may be admissible as admissions against the interest of the party quoted.
- [80] I have assumed that the parties would provide evidence consistent with the contents of these documents, even where such parties did not provide affidavit evidence to that effect and even where the statements may not be admissions against the interest of the party quoted.

A. Holdings, Norman's Will and Codicils, and Joyce's California Power of Attorney to Chris

- [81] On January 25, 1979, Norman incorporated Holdings, a British Columbia company. Upon its incorporation, Holdings issued one voting common share to Norman.
- [82] Holdings had several classes of shares. In September 1979, Norman transferred certain assets into Holdings and, in return, Holdings issued to him 70 redeemable preference shares. Each share had a redemption amount of \$12,893.52, for a total of \$902,546.40 for all 70 shares. In that same month, Norman also caused Holdings to issue 100 non-voting common shares to his wife and to each of their three children. Each received a different class of non-voting shares.
- [83] In March 1982, Norman caused Holdings to issue a further 99 voting common shares to him. At that time, he held 100 voting common shares and the 70 redeemable preference shares with a total redemption value of about \$900,000.
- [84] In June 1982, Holdings redeemed seven of Norman's redeemable preference shares, leaving him with 100 voting common shares and 63 redeemable preference shares with a total redemption value of \$812,291.76.
- [85] At some point prior to Norman's death, probably around 1990, Norman caused Holdings to lend \$500,000 to either Charters or Chris. Jennifer alleges that this money was used by Charters or Chris to build a boat for Chris's use.
- [86] Norman's last will was dated October 28, 1998. It provided that, after debts and taxes and gifts totalling \$12,000, the residue of his estate would pass to Joyce so long as she survived him for 30 days.
- [87] By codicil dated June 1, 1999, Norman changed his will to name Chris as his executor, in place of Joyce.
- [88] By further codicil dated June 1, 1999, Norman provided for gifts totalling \$27,500. This codicil included the term that "my interest in the joint effects of [Joyce] and myself will go to Joyce in the event that I predecease her", and "it is our intention that [Chris, Sandra and Jennifer] all share equally in the distribution of my remaining assets."

- [89] On December 8, 2000, in California, U.S.A., Joyce executed a "Durable Power of Attorney for Management of Property and Personal Affairs" appointing Chris as her attorney in fact, with Sandra and Jennifer as alternative attorneys in fact. Mr. Sindoni, a California lawyer, certified that he advised Joyce of her rights in connection with the power of attorney, after which Joyce signed the document.

B. Norman Passed Away in 2001

- [90] On February 18, 2001, Norman passed away at the age of 78. His estate was not probated, but Chris took steps as executor on the basis of Norman's will and codicils.
- [91] At the date of Norman's death, Holdings' assets consisted primarily of the West Van Home and the \$500,000 debt owed to it by Charters or Chris. Joyce lived in the West Van Home.
- [92] On June 25, 2004, the 100 voting common shares and 63 redeemable preference shares in Holdings, which had been held by Norman, were transferred to Joyce.

C. November 2004 Transactions: Gift of Holdings' Control and Forgiveness of Boat Loan

- [93] Joyce participated in a series of transactions in November 2004 which Jennifer challenges. These transactions had the effect of Chris obtaining voting control of Holdings, and Holdings effectively forgiving a debt of \$500,000 from Charters (or Chris).
- [94] The position of CPG and Chris is that Joyce engaged in these transactions to implement the longstanding desire of Norman and Joyce to give Chris the value of the Charters boat, in recognition of Chris's work. The position of Jennifer is that Joyce engaged in these transactions as a result of undue influence by Chris, and that Joyce did not understand the transactions. CPG deposed that he is not aware of any evidence suggesting that Chris has ever exerted undue influence over Joyce.
- [95] On November 5, 2004, Joyce, then age 82, transferred all 100 voting common shares in Holdings to Chris. As a result, Chris held all the voting shares in Holdings. He was the sole director and officer of Holdings.
- [96] Also on November 5, 2004, Joyce transferred 42 of the 63 redeemable preference shares in Holdings (with a redemption value of \$541,527.84) to Charters.
- [97] In exchange, Chris caused Charters to issue to Joyce redeemable preference shares in Charters with a redemption value of \$540,000. Around the same time, Chris caused Holdings to redeem the 42 redeemable preference shares then owned by Charters for \$541,486. Of the redemption amount, \$500,000 was set off against the debt that Charters (or Chris) owed to Holdings. The result was that the remaining \$41,486 was a debt owing by Holdings to Charters.

- [98] Jennifer alleges that the Charters preference shares were less valuable than the Holdings preference shares, because Holdings had the asset of the West Van Home while Charters had only the asset of a boat. Jennifer further alleges that Joyce did not understand the transaction, and was unduly influenced by Chris to complete it.
- [99] Jennifer's affidavit sworn April 1, 2016 attaches a copy of the petition in this proceeding as an exhibit and states that "to the best of my knowledge and belief, the facts therein are true." The petition includes paragraph 25, stating that "[t]he [November 2004 transactions] were completed without [Joyce] having the benefit of legal advice or the ability to fully understand the ramifications of the transactions and were made under the undue influence of [Chris]".
- [100] Jennifer's "evidence" adopting paragraph 25 of the petition is not admissible evidence. For example, the statement that the transactions were made "under the undue influence of Chris" is an opinion on a legal issue which does not set out either the facts that led Jennifer to that conclusion, or her understanding of the legal test for undue influence. As a result, the court must simply ignore this "evidence". It is no more than a statement of a suspicion. While an allegation like that is acceptable in a pleading, it should not be included in an affidavit.
- [101] In order to provide admissible evidence on the issue of undue influence, Jennifer should have set out her observations about what Chris or Joyce did or said, or any other facts demonstrating that the transactions were the result of undue influence.
- [102] CPG deposed that he reviewed this 2004 transaction and determined that in all probability, although the (pre-2001) transfer was structured as a loan, it was in fact a beneficial transfer from Norman to Chris. CPG referred to the Frambach Letter of December 6, 2007 (set out below), stating that when Mr. Frambach met with Joyce in 2005, she confirmed that this was her understanding, and that she agreed with the fact that the \$500,000 loan was not to be repaid.
- [103] The financial statements for Holdings for the year ended June 30, 2005 list assets consisting primarily of the West Van Home. These financial statements include a comparison with 2004. For 2004 they show an asset of "advances to related parties" of about \$500,000, which presumably refers to the debt owed to Holdings by Charters (or Chris). The "advances to related parties" amount shows as zero for the year ending in 2005, suggesting that the debt owed by Charters (or Chris) was cancelled in 2004.

D. Joyce's 2007 Explanation of Gift to Chris, Joyce's Will naming Chris Executor, and Frambach Letter

- [104] Jennifer confronted Chris in March 2007 and accused him of stealing \$500,000 from Joyce. Jennifer also advised Chris that she was concerned that Joyce was in no position to understand what Chris had done because Joyce had no understanding of business.

- [105] Chris responded with a letter essentially denying the accusations, and suggesting that Joyce was not demented.
- [106] In June 2007, Chris advised Jennifer that her signing authority with Holdings had been revoked, and would remain revoked until she formally withdrew her threats and accusations and had regained the confidence and trust of Chris and Joyce.
- [107] Joyce signed a will dated August 14, 2007, naming Chris as the executor of her will. One of the witnesses was a lawyer, Ms. Hollander. The will provided that Joyce's trustee should transfer or deliver any interest she may have in Charters at her death to Chris. It provided that the residue of the Estate would be divided equally among Joyce's children living at the time of her death.
- [108] Joyce wrote a note dated Thursday, October 11, 2007, stating that she had made a gift of her shares in Charters to Chris. The note also states "by law he is obliged to follow my [sic] what I would do".
- [109] Joyce signed a document entitled "Sworn Statement" dated November 7, 2007. The document indicates that it was sworn before Mr. Sindoni. It is as follows:

To whom it may concern,

My deceased husband [Norman] and I have always intended the funds provided to [Charters] were intended as a gift to be provided free and clear of indebtedness as compensation for Chris's long standing participation in Dycore Systems and other companies operated by Norman and Chris.

In addition, not only has the above been my understanding, both of my daughters, Sandra and Jennifer were apprised on several occasions of this condition.

- [110] Joyce's sister, Gwen Gregorig, also signed a document entitled "Sworn Statement" dated November 7, 2007. The document indicates that it was also sworn before Mr. Sindoni. It is as follows:

To whom it may concern,

I have been apprised on several occasions over the past 17 years by both my sister [Joyce] and her husband [Norman] when he was alive, that the funds provided to their son [Chris] and his company, [Charters] were to be provided free and clear of indebtedness as compensation for Chris's long standing participation in Dycore Systems and other companies operated by Norman and Chris.

In addition not only has this been my understanding I am aware both Jennifer and Sandra were informed of this.

[111] Mr. Frambach, a chartered accountant with Manning Elliott LLP, wrote Joyce a letter dated December 6, 2007 ("Frambach Letter") addressed to Holdings c/o Chris's address in Sidney, B.C. The letter refers to "Loan from [Holdings] to [Charters]". It is as follows:

When the boat that is owned by [Charters] was being built, Norman provided financing to have it built. Since the available funds at that time were in [Holdings], Norman caused [Holdings] to lend the required funds to [Charters]. It is my understanding that it was Norman's intent that this loan was not to be repaid but was beneficially intended to belong to Chris. In 2005 when we did some tax planning and share reorganization, you confirmed that this was your understanding as well and that you wanted to carry out Norman's intent, preferably in a tax effective manner.

Under Norman's will, he left you all of the shares owned by him, and these included 63 Class F preferred shares in [Holdings]. These were shares that had no voting or participating rights, but were redeemable at an amount of \$12,893 per share. These shares had no tax value, so on your death would have been subject to capital gains taxes.

To reduce these taxes and at the same time carry out Norman's wishes with respect to the inter-company loan, you transferred 42 of your Class F preferred shares in [Holdings] to [Charters], and in consideration you received 100 Class C shares in [Charters]. Subsequently, [Holdings] repurchased its preferred shares from [Charters] at their redemption amount, and paid for these shares by cancelling the inter-company loan balance. All of these transactions are legal, were legally documented and the necessary tax filings were made with the tax department.

The result of these transactions is that the loan balance on the books of [Holdings] was removed consistent with Norman's wishes, and a significant tax liability was eliminated from your estate. There was no cash payments made, and the common shareholders of [Holdings] did not have any reduction in the value of their shares in this company.

I hope that this brief summary will be of assistance to you.

[112] Joyce signed a note dated December 16, 2007, addressed to Jennifer and Sandra and entitled "Your attack on Chris". It is as follows:

You are my daughters and I love you dearly. I have attempted to see this conflict resolved but you refuse to accept that Chris has done nothing, he has changed nothing and he has refrained from reacting to your accusations and threats.

Sandra, you indicated you wanted to be my executor and manage my affairs a year ago and I told you then I was happy with Chris handling these things. You then undertook a vicious and petty attack on your brother. You have upset me to the point of tears on an almost daily basis. I have been advised that your behaviour constitutes elder abuse.

You have invaded my privacy by entering my house and searching through my personal effects to the point of forcing me to have the locks changed on my house, you invaded my privacy by regularly checking my bank balances when I have refused to give you more money forcing me to remove you from my bank accounts. In summary, you have shown no respect for me.

You have accomplished nothing but the destruction of this family. I have discussed this with friends and family and all are appalled by your repulsive behaviour.

I have reviewed my financial affairs, my will and my investments in detail. I am now aware of my rights and my financial strengths.

- There have been no changes to any of the structures established by your father to minimize taxation after both he and I have passed.
- You remain equal non-voting shareholders. My shares and assets remain for me to decide what will be done with them when I pass.
- As a result, it is my desire that Chris continues to manage my affairs and that he will remain, should he be willing, my executor.

I refuse to act as your messenger in your paranoia driven action. I insist you cease immediately these attacks on Chris and get on with your lives.

Let this be the end of this.

All my love.

[113] The letter is signed "Mum, J. Bunn" and shows a copy going to several people, including the accountant Mr. Frambach, Chris, and the lawyer Mr. Plazzer.

[114] Jennifer received a copy of the December 16, 2007 note in an envelope apparently mailed from Sidney, B.C., where Chris was residing at the time. Joyce was then living in the West Van Home. Jennifer suspects that Chris prepared the note.

E. February 2008 Examination of Joyce by Dr. Comeau, and Reactions by Joyce and her Siblings and Friends

[115] Dr. Comeau, a specialist in geriatric medicine with the Geriatric Assessment Clinic, Community Health Services, Vancouver Coastal Health, saw Joyce in the office with her daughter present (apparently Sandra) on February 7, 2008, and provided a written report. Joyce was around 85 years old at the time.

[116] Dr. Comeau's report includes the following:

Thank you for asking Geriatrics to review this patient. She will actually be taken on by the Geriatric Outreach Program as there are so many complicated things going on that the family is going to need a lot of direction and there is going to be too much to steer from the office. She was seen in the office with her daughter present on February 7, 2008.

She has been having cognitive changes and her daughter has certainly outlined a lot in the information that she provided. The patient herself thinks that her memory is slightly reduced but that is about it. Occasionally she will have some degree of possible agnosia of her daughters. Her short term memory is very bad but her long term memory is not bad. It is unclear how bad her praxis is. There are some borderline psychotic features where she is accusatory of people having

stolen things and she has said at times that her dog was dead but that was clearly not an issue. She has also had a major change in her personality, has major mood swings and more of a fiery temper than usual. Her language skills are a little bit off, her judgement is impaired and her driving is horrible. She does not have a lot of insight into the latter of these.

It has gotten to the point now that her family is really concerned about the financial situation; her husband had a big corporation with lots of money and things were going really well and the son, who has been the assigned power of attorney is doing some dealings, which both daughters think are kind of sketchy but they have been essentially locked out of almost both [sic] the house and the financial situation and the brother refuses to talk to them or show them any documentation. They think that they have seen their mother signing nasty letters that are probably authored by the brother and she does not remember this. They also think that they have found the mom doing financial transactions and signing for things, which they do not think she is competent to do because she cannot remember them and has never actually managed the finances and they do not believe that she is actually capable of knowing the outcome and extent of what might be happening. She has always been somewhat in the dark as to what the finances are but she has always known that she has had a lot and she has now complete trust in her son, which she also had in her husband.

She says that she does not have any worries and feels great.

She was pleasant enough and actually put on a good show for me. Her language skills were reasonable and intact, she made rapport easily, she was not obviously psychotic or of a low mood and was very pleasant to interview. She scored 27/30 on her mini mental, doing better with cueing even though she only got 1/3 on recall and then remembering those three items spontaneously and readily after the entire examination. She was off by a couple on the exact date. Her clock was reasonable but she did need some clarification into which hand was which but got it right. Her word list generation was just on the borderline, her abstractions were just on the borderline and she seemed pretty reasonable otherwise.

She has what sounds like vascular dementia sparing her testable memory but interfering on a variable basis with other aspects.

Because of her likely vascular nature of what is going on, we certainly should do some further screening tests and hopefully she will get those done

Her driving is an issue and I am extremely worried about having her on the road so we will send a letter out to get her tested by at least the Motor Vehicle Branch and possibly DriveABLE.

There are financial issues ongoing and it is hard to know exactly what is happening so I think with the advice I have given the daughter to call the office of the Public Guardian and Trustee and possibly get the assets frozen until a formal investigation can begin is probably the best one to do. We will also see if we can ameliorate any of the family differences because obviously there needs to be some more open communication lines but this might be actually best set up through outside services.

Her nutrition is an issue because her daughter thinks that she must have lost a ton of weight over the last number of years but she looks pretty good. Obviously we need to assess her abilities to cook and function normally at home and we will assess that and also try and get some assessment of her diabetic situation.

Considering how badly the portrayal of her by her family is, I think that it would be remiss if we did not do some formal functional assessments in her home in addition to her driving test to be sure that she is safe as it is almost impossible for her daughters who live here in West Vancouver to monitor her as the relationship between them is so stressed and strained.

[Underlining added.]

[117] Dr. Goodman, a family friend, reviewed Dr. Comeau's report and sent an undated letter to Chris commenting on it. His letter includes the following:

I know [Joyce] to be a delightful lady who enjoys life and enriches the lives of her friends and associates. Like others in her age group she has lapses in her short term memory, but in my experience, she has never been lacking in knowledge of world or current affairs, nor has she been psychotic, nor exhibited agnosis or aphasia. She appears to manage her home well, internally and externally.

[118] Jennifer sent Chris a letter dated February 25, 2008, which is marked "without prejudice". However, it does not make a settlement offer and does not appear to be subject to settlement negotiation privilege. It is as follows:

Re: Withholding Mum's Monthly Income

Mum tells me you have been withholding her monthly income from her for the past 60 days. This is causing her an incredible amount of stress, and undue hardship. Not surprisingly, Mum was hospitalized for high blood pressure two weeks ago.

I have been requesting since March 9, 2007, and I once again request all financial statement[s], and bank records for [Holdings] of which I am a Shareholder. [Counsel] tells me I am entitled to all this information and that of any other Family investments involving me.

Since you removed me from signing authority on Mum, Dad's, and [Holdings] accounts after I first requested these documents of you, and I can no longer verify Mum's financial independence, you leave me little choice, but to follow legal courses of action.

If Dad were alive today, he would be disgusted with you. Your lack of respect is appalling. The mere fact that you are behaving in such a way to allow this to carry on is unacceptable. Chris, in my opinion, your behaviour constitutes elder abuse. Your transferring the controlling shares of [Holdings] from Mum to yourself when she does not comprehend what she has done; your denying Sandi, and I access to Mum's house - we can no longer ensure her safety, health and near daily home maintenance issues when you're not around living on Vancouver Island and working in remote locations; your yelling at Mum - she openly admits she's afraid of what you might do if

she does not follow your instructions and sign everything you put in front of her.

This must STOP!

I remain,

[Underlining added.]

[119] The letter is marked as showing copies going to various parties, including Joyce, the Coastal Health Authority, Mr. Frambach, and the Public Guardian and Trustee.

[120] On March 5, 2008, Mr. Sindoni wrote a letter to Jennifer which is as follows:

Re: Your letter to [Chris] and others dated February 25, 2008

I represent the interests of your mother, [Joyce], here in California. Over the years beginning in 2000, I have drafted Durable Power of Attorney for Property Management documents for your mother as well as your late father, as well as Health Care Directive documents for the two of them.

Your mother and I have met alone to review your letter of February 25, 2008. The remainder of this letter constitutes her response.

The first paragraph of your letter states that I told you that Chris withheld my monthly income for the past 60 days causing me great stress and undue hardship and implying that the stress resulted in my hospitalization. This allegation is a complete lie. My funds have never been withheld. As you know, two transfers of income from the brokerage house to my bank account were reported on one statement. I saw the first one but failed to see the second one. The next month the brokerage house mistakenly sent the income transfer to the wrong bank account. All of this was known by you well prior to February 25th. These minor money issues did not upset me. My hospitalization had nothing to do with these things. Attached are copies of the e-mails between the brokerage firm and Chris' wife documenting the problem and its correction.

The second paragraph of your letter complains about not receiving information regarding [Holdings]. I have discussed this issue with Chris. He has assured me that the things you request will be provided. It had been my hope that my letter to you of December 16, 2007, a copy of which is attached, would have put an end to your aggression on this issue.

The third paragraph of your letter complains about the termination of your signing authority on bank accounts. Your removal from my accounts was my doing. It had nothing to do with Chris. It had to do with your bad behaviour covered in the third paragraph of my December 16, 2007 letter. Your removal from the accounts of [Holdings] was done by Chris with my knowledge and consent due to your threats to take action to financially harm [Holdings]. I can't imagine why you think any legal course of action is appropriate.

If Dad were alive today he would be disgusted with the behaviour of you and your sister. I had the locks changed on my house because I was tired of Sandra sneaking in and rummaging through my things. After the lock change I gave a key to you. Chris has looked after me through the years demonstrating every concern for my physical and emotional health as well as my financial concerns. I have never once felt that his behaviour has been improper or in any way overbearing. He has shown me nothing but kindness and respect.

You and Sandra are breaking my heart. Please let us put all of this ugliness out of our lives. I want you to apologize to Chris.

Sincerely.

[Underlining added.]

[121] The letter is signed by both Mr. Sindoni and Joyce.

[122] On March 7, 2008, Mr. McCloy, a lawyer with Shapiro Hankinson and Knutson acting for Chris, sent Jennifer a letter. It is as follows:

Re: Your Letter to [Chris] dated February 25, 2008

We are solicitors for your brother, [Chris], to whom you sent a letter dated February 25, 2008, which letter you copied to many other people.

We have also received and reviewed a copy of the letter to you from Stephen A. Sindoni, lawyer for your mother, [Joyce], dated March 5, 2008, which letter was also copied to the same people to whom you copied your letter of February 25, 2008.

In response to your letter of February 25, 2008, our client states the following:

1. Monthly income was not withheld from [Joyce] as alleged. Your allegation is a [complete] falsehood and libellous. [Joyce]'s hospitalization had nothing to do with money whatsoever as you allege.
2. Financial statements of [Holdings] will be provided to you in your capacity as a shareholder.
3. With respect to your removal as a signatory on [Joyce]'s bank accounts and those of [Holdings], we refer you to Mr. Sindoni's letter.
4. With respect to the fourth paragraph of your letter, your allegation regarding the conduct of [Chris] are, again, a complete falsehood and libellous. Your mother is not in any way afraid of your brother. We refer you to your mother's statements in Mr. Sindoni's letter.

Your rationale for these untrue, unfounded and libellous statements is unknown, but the same must cease immediately. If they do not, our client may well have to [commence] a libel action which will be very time-consuming and expensive to all, as well as exacerbating the current division in your family.

We trust such action will not be required.

[123] This letter is marked as being copied to a number of people, including Chris, Joyce, Mr. Frambach, the Public Guardian and Trustee of B.C., and a number of lawyers.

[124] Joyce's brother, John Edwards, wrote a letter dated April 17, 2008 addressed "To whom it may concern". It includes the following:

Re: Bunn, Joyce Mary, and Geriatric Assessment 05/02/2008

I am the brother of [Joyce] whom I visited in Vancouver last September, having spoken to her many times since, and again only the other day, when she expressed a lucid and clear conversation the worries she had in not understanding "why her daughter(s?) were doing this to her!" The above assessment has since been brought to my attention and I am utterly shocked by many of the statements which appear to have been derived from listening to only one side of the family

As has been correctly perceived, there is a family problem, wholly financially based. I do not believe that my sister is unable to care for herself, she is just the same now as several years ago, except for the distress and at times confusion from the effect of the constant turmoil to which she is subjected, all to do with who has control of the family finances.

I and my wife stayed with my sister for a week last September when she very ably looked after us, prepared a room, purchased groceries and organised meals including a barbecue for nine people! She's forgetful at times but little worse than ten years ago.

She doesn't understand finance, but she never has, and is not alone in this

I was drawn into this family financial problem whilst in Vancouver, because my elder niece took the opportunity of expressing to me that "she believed her brother was converting family assets to his own benefit which threatened my sister's income". Feeling that I bore some moral responsibility for my sister's welfare and financial future I decided that, with my sister's permission, I should look into the situation. She welcomed my suggestion and I was given free access to all documents and letters, Bank accounts, and statements from the family accountants regarding assets left by [Norman] upon his death. I carefully looked into her financial position, checked regular income, made copious notes and afterwards produced a report which I forwarded to my sister, her son and two daughters in December 2007, stating that I found none other than normal commercial risk evident with her investments, and her income fully accounted for.

It is stated that her daughter says "she has lost a ton of weight". We saw her in Palm Springs seven years ago; stayed with us in England about five years ago; met us in New York to join a cruise about three years ago, and we saw her in B.C. last September. We saw no evidence at all of weight loss, perhaps a little of the opposite.

The elder daughter, apparently joined by her younger sister, still appears to be pursuing an objective to overturn her Father's financial decisions. I believe this completely unjustified referral of my sister to the Health Authority is strongly connected with this financial objective possibly hoping to gain Power of Attorney by Court Order once my sister had been declared mentally incompetent and unable to manage her life. This I strongly dispute. She is just as capable as most people in their mid-eighties.

[Joyce] is perfectly able to look after herself with the help of her son, daughter-in-law, her sister and friends and if necessary myself. She just needs to be freed from this constant stress and abuse augmented by her totally misguided daughters.

[125] Mr. Sonnenberg of Anacortes, Washington wrote a letter dated April 19, 2008 addressed to "Whom It May Concern". It includes the following:

I and my wife Janis are long time friends of [Joyce], and her deceased husband [Norman]. In recent years I have developed a friendship with her son Chris and his family.

By way of background, I have practiced law continuously in the United States since 1974. I met [Joyce and Norman] at their home in Rancho Mirage, California in the late 1980's. Their relationship with my wife goes back many years before that. I met [Chris] and his family in the Spring of 2004, when they were vacationing in the desert with [Joyce]. My relationship with all of the Bunns is purely social. I have made it a point not to discuss the various issues involving her daughters, Sandra and Jennifer, with [Joyce].

[Joyce] and I played a round of golf in 2006 and I can confirm that she keeps score more accurately than any of my other golfing companions. She beat me.

Since [Norman] passed away in 2001, we have spent time with [Joyce] periodically, more so since we moved to Anacortes, Washington in 2006. Over the years my family and I have enjoyed social occasions, including [Norman and Joyce]; the Chris Bunn family and [Joyce], which also sometimes included [Joyce]'s sister Gwen; and various times including [Joyce] and my family alone.

Based on the foregoing, I would observe:

- 1) None of us has gotten any younger.
- 2) [Joyce] was and is very comfortable in the company of all of the aforementioned people.
- 3) She thinks of Chris first when she has chores or errands to be run.
- 4) She has an active sense of humor.
- 5) She is always well dressed and well coiffed, sometimes to the point of multiple clothing changes over the course of a day.
- 6) She is not afraid to poke fun at Chris if she thinks he could be dressed better;

- 7) She has most of the normal concerns of a mother and grandmother, which she has sometimes shared with me.
- 8) I have not observed any variation in her weight over the 20 plus years that I have known her.
- 9) Her conversation has indicated, to me, that she is close to her siblings and that she has a significant circle of friends and "girlfriends".
- 10) In my experience, she is no more forgetful than other persons in my acquaintance.
- 11) In the years that I have known [Joyce] I have not observed any variation in her behaviour which could [be] interpreted as peculiar or abnormal.

[Joyce] seems to me, to be capable of looking after herself and her own affairs, with no more assistance than would be required for any other person who has lived the life she has, so far, over two continents, a World War, the wife and mother of a successful businessman, mother of three and grandmother of three.

[126] Joyce's sister, Gwen Gregorig, apparently prepared a document dated April 21, 2008 addressed "to whom it may concern". It includes the following:

I am the older sister of [Joyce] I am at a loss to understand why my sister is being tested by the Geriatric Clinic in West Vancouver (Dr. Comeau) and would very much like to know why this has come about. My sister has some short term memory loss, but her mental capacities are not impaired. I would also like to know why I was not contacted about these tests, as I see my sister quite often, and actually stayed with her over Easter 2008 from March 25th to March 29th (both dates inclusive). During the five days I was there we went out every day in her car, my sister driving, and I assure you there is nothing wrong with her driving.

I spent nearly a month with my sister from 18th October 2007, to November 13th, 2007, when we spent some time in Rancho Mirage, California and took a cruise for 10 days from San Diego, then back to Rancho Mirage for another week before going home. So I was very well able to assess any mental problem, if it existed, and it did not.

My sister has been under considerable stress during the last two years which has probably not helped the memory loss due to the repeated daily harassment by her two daughters who have together attacked their brother as they feel, without any proof, that he is not fulfilling his filial duty to his Mother. This is totally untrue. [Chris] was named his Father's Executor and Power of Attorney before his Father died, and also for his Mother, which duties he has fulfilled very well indeed.

There are many twists and turns to this situation which may or may not be appropriate here, but if you wish any more information, please do not hesitate to contact me and I will be happy to expand on the foregoing.

[127] Joyce sent a letter dated April 21, 2008 to Sandra, which includes the following:

Thank you so much for your concerns with regards to my health and welfare. This letter will confirm our telephone conversation on April 18th, 2008, in which you indicated to me "this is a huge mistake" and conveyed your apologies.

You also said that you felt Dr. Comeau misunderstood what you were saying to him.

I feel that we benefit mutually from these queries and straight forward communication.

Your loving Mum

[128] Joyce sent a letter on the same date, April 21st, 2008, to Dr. Comeau. It includes the following:

Upon reflection I have consulted with my daughter, Sandra, whom you met, it is her feeling that this entire process was "a huge mistake".

I have consulted with my attorney here in the desert and I have decided to withdraw from the entire process.

Please accept my best regards.

[129] Mr. Sindoni sent Dr. Comeau a letter dated May 1, 2008, which includes the following:

I represent the interests of [Joyce] here in California. She has asked for me to write to you and advise you that it is her decision to formally withdraw from further testing through your office.

If you need anything further by way of confirmation in this matter, please advise.

F. Joyce's 2009 Note about Daughters

[130] A note dated June 29, 2009 was located in the West Van Home which is in Joyce's handwriting. It reads as follows:

To whom this might concern --

I wish to state that since so many letters have been written saying that my two daughters do not help me -- is all wrong, I have always counted on Sandra, & Jennifer to help me when needed. There has been a big misunderstanding. Please apologize to them. J. Bunn.

P.S. Please leave where you find.

G. Swiss Account Withdrawals by Daughters in June and July 2010

[131] CPG deposed that one of Joyce's assets was a quarter interest in the "Swiss Account", a bank account in Switzerland held in the joint names of Joyce, Jennifer, Chris, and Sandra, and the balance (apparently around the summer of 2010) was about \$1 million.

[132] CPG deposed that Sandra and Jennifer each withdrew about \$240,000 from the Swiss Account apparently in June and July of 2010, and that Joyce wanted Chris to also withdraw an equivalent amount, but learned that neither he nor she was able to do so because either or both Sandra and Jennifer had frozen the Swiss Account.

H. 2010 Substitution of Daughters as Attorneys in Fact and named Executors of Joyce's Will, and Joyce's Move from West Van Home to West Van Amica

[133] Jennifer had concerns about Chris's handling of Joyce's affairs, and arranged for Joyce to meet with an estates lawyer, Mr. Peter Bonny at Ratcliff and Company.

[134] Joyce executed a Notice of Revocation of Powers of Attorney on August 24, 2010 before Mr. Bonny. It is addressed to Chris, and states that Joyce revoked the Durable Power of Attorney of December 8, 2000, and any general power of attorney made under B.C. law which she may have given to Chris.

[135] On August 24, 2010, Joyce also executed new powers of attorney naming Jennifer and Sandra as attorneys. She also executed a codicil to her will naming Jennifer and Sandra as the executors of her will, instead of Chris who was named executor in her August 14, 2007 will. Mr. Bonny was one of the witnesses to the codicil.

[136] In November 2010, at the age of 88, Joyce stopped living in the West Van Home and moved to the West Van Amica assisted living facility. Holdings decided to sell the West Van Home.

I. Chaperon's Rancho Mirage House, Chris's 2010 California Lawsuit Alleging Daughters Unduly Influencing Joyce, and Chris's Challenge of Daughters as Attorneys and named Executors and Challenge of Joyce's Mental Capacity

[137] For a period including December 2010, Joyce was the sole shareholder of an Isle of Man corporation, Chaperon Limited ("Chaperon"), which owned a house in Rancho Mirage, California ("Rancho Mirage House").

[138] Chris commenced a proceeding on December 28, 2010 in the Superior Court of California against Chaperon and "Does 1 through 20" ("California Lawsuit"). It is a complaint for injunctive relief. It apparently did not proceed to a hearing. Chris claimed that he had an equitable interest in the Rancho Mirage House and that Chaperon held legal title. Chris also alleged that Sandra and Jennifer had equitable interests in the Rancho Mirage House.

[139] The California Lawsuit refers to a "property ownership and distribution upon death agreement" between Joyce and her three children. Chris alleged that this agreement provides that, if the Rancho Mirage House was distributed during Joyce's lifetime, it was to be provided one-fourth to each of Joyce, Chris, Sandra, and Jennifer, and if it was distributed after Joyce's lifetime, it was to be provided one-third to each of Chris, Sandra, and Jennifer.

- [140] Chris also alleged that he had provided services to the Rancho Mirage House, including maintenance, management, and improvement. He claimed compensation and reimbursement.
- [141] Chris also alleged that on or about September 1, 2010, Sandra and Jennifer engaged in acts constituting undue influence, coercion, and duress against Joyce which resulted in Joyce altering the plan regarding distribution, and removing Chris as a co-participant in both the use of the Rancho Mirage House and in distribution rights. Chris alleged that he anticipated legal proceedings in British Columbia to address the violation of his distribution and inheritance rights, and he claimed injunctions restraining the conveyance of title to the Rancho Mirage House.
- [142] Joyce's sister, Gwen Gregorig, sent a letter dated April 4, 2011 to Mr. Bonny. She also made a statutory declaration dated May 16, 2011 before a notary public. The contents of the statutory declaration are similar to the contents of Gwen Gregorig's letter of April 4, 2011. The relevant passages of the statutory declaration are as follows:
2. On September 18th, 2010, I called my sister, Joyce to let her know that our cousin in Sidney had passed away. About a half an hour after my telephone call with Joyce, I received a call from Joyce's son-in-law, Michael Blomfield ("Michael"). Michael threatened me; he said that if I called Joyce again he would put a restraining order on me. I told Michael that I did not want to speak to him and never to call me again and I hung up the phone.
 3. On March 3rd, 2011, Joyce called me twice this day. During my second call from Joyce she told me that she was scared of her daughter, Sandra and did not know how to deal with her. Joyce told me that Sandra got really mad with her after she found out that Joyce had called me that morning. This is not the first time Joyce has expressed this concern to me.
 4. On March 30th, 2011, I received a distressing telephone call from Joyce. The first thing Joyce said to me when I answered the phone was "I wish I was dead", she reiterated this two more times during the conversation. Joyce then told me that Sandra had opened Joyce's will that day, March 30th, 2011 and was very angry after finding out that Joyce's son, [Chris]'s name had not been removed from Joyce's will. Joyce said her will states that Chris is to receive one third of her estate. Joyce said she did not want Chris's name removed from the will, but that she was being forced to remove it by Sandra. I reminded Joyce that it had always been her and her late husband [Norman]'s wishes that their estate was to be divided into three after she was gone. I also reminded her that [Norman] had set this up before he died and that she and [Norman] had discussed this while I was present.
 5. I feel Joyce is being bullied and manipulated into removing Chris from her will and Joyce has made it clear to me that she does not want to do this. I asked Joyce not to sign anything that her daughters ask her to and she promised me she wouldn't. I feel Sandra and her sister Jennifer are unable to handle Joyce's affairs without prejudice towards Chris and his wife Joan Bunn and their daughter Nicole Bunn, and that it is time for her affairs to be looked after by a third party that can handle matters without prejudice. Joyce's fading memory has

made Chris an easy target through misinformation and deceit.

[143] The law firm of Hollander Plazzer & Co. LLP ("HP&C") sent a letter dated April 20, 2011 to the attention of Mr. Bonny in his capacity as counsel for Joyce. This letter stated that HP&C had been retained by Chris, who also instructed HP&C on behalf of Holdings. The letter stated that Chris disputed the validity of any Power of Attorney granted by Joyce in 2010 or 2011 on the basis that Joyce lacked the mental capacity to do so, and/or was unduly influenced to do so by either or both Sandra and Jennifer. The letter also stated that Chris disputed, on the same basis, the August 24, 2010 Notice of Revocation of Powers of Attorney. It also asked Mr. Bonny to advise Joyce to move her furniture out of the West Van Home by April 30, 2011, so that Holdings could rent it out.

[144] As with Jennifer's inadmissible "evidence" adopting paragraph 25 of the petition, the Court must simply ignore Chris's allegations in this letter. It does not set out Chris's alleged observations or his understanding of the legal tests for undue influence or mental capacity.

J. May and June 2011: Joyce's Move to Abbotsford and Substitution of CPG as Attorney

[145] In May 2011, Chris arranged for Joyce to be moved to a care facility in Abbotsford, B.C. Jennifer alleges that this was done without her being informed, and says that Chris kept Joyce's whereabouts a secret from Jennifer.

[146] On May 31, 2011, Joyce executed another Notice of Revocation of Powers of Attorney before a lawyer, but this time the lawyer was Mr. Elko Kroon. This Notice is directed to Sandra and Jennifer, and states that Joyce revokes any and all powers of attorney appointing Sandra or Jennifer or either of their spouses as her attorney.

[147] Also on May 31, 2011, Joyce executed a Power of Attorney appointing CPG to be her attorney. She executed this before Mr. Kroon. CPG deposed that Joyce appointed him "because she was well aware of the antipathy between her children and wanted a person with no vested interest in her estate to help her with her financial affairs". Presumably, CPG's evidence would be that Joyce said that to him. CPG also deposed that, after Joyce discussed the matter with her sister Gwen Gregorig, she asked CPG to be her attorney and he accepted. Again, presumably either Joyce or Gwen said that to him.

[148] On June 2, 2011, CPG executed a declaration that he was the attorney under the May 31, 2011 Power of Attorney and was of the full age of 19 years.

[149] Joyce completed a "mini mental state" form dated June 2, 2011, apparently in connection with her departure from the West Van Amica assisted living facility. The form gives her a score of 25 out of 30 on questions regarding orientation, registration, attention and calculation, recall, and language tests. Under the heading "write a sentence below", she has written "[w]hat a miserable day this is."

- [150] Someone (presumably one of the Daughters) reported to the West Vancouver police department on June 3, 2011 at around 10:45 p.m. that Joyce was missing from Amica. The police report refers to interviews with representatives of Amica.
- [151] One Amica representative stated that Joyce was not missing, and that she had planned a trip for the weekend and requested that her family members not be informed of her whereabouts. The police report states that, in preparation for the weekend trip, Joyce completed a mental and physical assessment and the General Manager of the West Vancouver Amica, Ms. Burrows, was satisfied that Joyce could sign herself out. Ms. Burrows stated that, of note, Joyce scored 25 out of 30 on a "mini psychological test" which was considered a reasonably high score. Ms. Burrows stated that Joyce required a walker, but was otherwise in good health. Ms. Burrows stated that Joyce suffered from minor short term memory loss, but nothing of an extent to cause concern for her wellbeing. Ms. Burrows stated that several days before her weekend trip, Joyce requested her medication for the period that she would be away, showing to Ms. Burrows that she was alert and cognizant of the issues that needed to be addressed prior to leaving.
- [152] There is a note which appears to be in Joyce's handwriting. It is undated but presumably was made in the summer of 2011. It reads as follows:

Just phoned Jenny - knows about change of P of Attorney. Says she will "never speak to me again"

- [153] CPG deposed that, "because of difficulties with both of her daughters, [Joyce] expressed a desire in early June 2011 to leave the Amica care facility because of difficulties in her relationship with her daughters over the previous year". Again CPG does not explain to whom Joyce expressed this desire, but presumably it was to CPG. CPG also deposed that it was Joyce's express wish that her daughters not be told her whereabouts, and that she relocated to a care facility in Abbotsford in order to be closer to her sister Gwen Gregorig, CPG, and CPG's family.
- [154] CPG deposed that, since Joyce routinely signed her own cheques, her proximity to him greatly enhanced his ability to assist her in financial affairs, and also facilitated the ability of CPG and his wife to take Joyce shopping and on other excursions.

- [155] Joyce sent a letter dated June 5, 2011 to Mr. Daniel Hobel, the manager of the Swiss Account. It is as follows:

I have reviewed the accusations by Sandra and Jennifer with [CPG] and wish to revoke all of my previous instructions to yourself in this matter and provide the following instruction.

I again wish to divide equally the account as of April 25th, 2010 into four equal shares of 240,220.80 dollars.

I understand the following:

- Sandra has withdrawn her $\frac{1}{4}$ share (240,220.80) in the account on June 17, 2010

· Jennifer has withdrawn her ¼ share (240,200.80) from the account July 1st, 2010.

I therefore request that [Chris] be allocated an equal ¼ share of 240,220.80 dollars with the account balance to remain in the joint account.

Your assistance with this is much appreciated. Please direct all correspondence to [CPG].

K. Joyce's Early July 2011 Naming of CPG as Executor of her Will and Fee Agreement with CPG

[156] On July 2, 2011, Joyce executed a further codicil to her will. It named CPG as the executor of her will. Joyce signed the codicil before Mr. Plazzer of HP&C.

[157] Also on July 2, 2011 and also before Mr. Plazzer, Joyce signed a "letter of agreement" with CPG. It sets out that CPG would attend to Joyce's various needs, including acting as a power of attorney, and would be entitled to compensation at the rate of \$55.00 per hour, with an annual cost of living increase, and with CPG to keep records to the nearest half hour. It also provided that CPG would be reimbursed for all costs associated with the work and for travel.

[158] On July 5, 2011, Joyce signed an authorization for the release of information addressed "to whom it may concern", requesting that all information requested by her solicitors HP&C, attention Mr. Ashton, be provided.

L. Late July 2011 Sale by Holdings of West Van Home and Jennifer's Oppression Action

[159] On July 18, 2011, Mr. Hughes of McCarthy Tétrault LLP, as solicitor for Jennifer, wrote HP&C seeking information about the anticipated sale of the West Van Home and distribution of the sale proceeds.

[160] By letter dated July 20, 2011, HP&C advised that it did not at that time act for Chris. It advised that it acted for Holdings, that there was a pending sale of the West Van Home for \$1,175,000, and that it was not aware of any plans of Holdings for deployment of the sale proceeds. By email of the following day, July 21, 2011, HP&C confirmed that there was an error in the letter, and stated that the sale price was \$1,775,000 and the completion was set for July 28, 2011.

[161] In July 2011, Jennifer commenced a petition proceeding seeking relief on the basis that the affairs of Holdings were being conducted oppressively ("Oppression Action").

[162] On or about July 28, 2011, the net proceeds of the sale of the West Van Home were paid into the trust account of HP&C, Holdings' solicitors, on undertakings not to be distributed or used except in accordance with a court order or with the consent of all the shareholders of Holdings.

M. Dr. Chafe's October 2011 Examination of Joyce

[163] On October 21, 2011, Dr. Chafe of Abbotsford Regional Hospital and Cancer Centre provided a letter addressed "To Whom It May Concern" regarding Joyce's competency and capacity for decision-making. Joyce was about 89 years old at the time. The letter states that Joyce is competent to make decisions about her financial affairs.

[164] Dr. Chafe's letter is a form letter with handwritten answers, and it includes the following:

In my evaluation of [Joyce] I have found the following and concluded that [Joyce] is capable and competent to make decisions regarding her financial affairs. Purpose of the evaluation explained to assess ability to make decisions. Persons to whom the report is to be provided explained to sister.

Procedures, Techniques and Tests Used in the Evaluation:

Finding(s): discussion and a series of questions, medical diagnosis, testing & responses.

[Joyce] is competent or does have the capacity to care for herself, to decide future care or to engage in financial decisions.

Diagnosis: Alzheimers Disease.

Clinical Observations, Findings and Opinions:

Requires assistance in some aspects of care.

Mental Status Examination: noted impairment in the following areas

Appearance well dressed & groomed

Attitude v. good

Speech clear, direct

Mood happy à resolved

Affect upbeat, fleetingly negative.

Thought Process able to assess objective info and draw conclusions

Thought Content N/A

Cognition mod dementia but capable

(Illegible) oriented to place & person & time.

and ability to work through MMSE [ticked]

N. November 2011 Sale of Rancho Mirage House and Payment to Chris

[165] On November 13, 2011, Joyce signed a document entitled "Letter of Instruction". It is addressed to CPG and witnessed by Gwen Gregorig (CPG's mother and Joyce's sister). It reads as follows:

As discussed, please ensure that my son [Chris] receives 240,000.00 dollars from the proceeds of my share sales in [Holdings] and or the sale of my property in Rancho Mirage.

Many thanks.

[166] CPG deposed that Joyce instructed him, in the presence of Gwen Gregorig, to pay from the proceeds of sale of the Rancho Mirage Home the sum of \$240,000 to Chris in lieu of his share of the Swiss Account.

[167] On November 28, 2011, Joyce signed a grant deed on behalf of Chaperon transferring the Rancho Mirage property to a purchaser. The net sale proceeds were about \$300,000 US.

O. Holdings Payments in 2012

[168] In February 2012, Holdings paid Joyce \$116,042 upon her redemption of nine class F redeemable preferred shares, and a further \$154,723 on her redemption of a further 12 class F redeemable preference shares, totalling \$270,765.00. As a result of these redemptions, Joyce no longer held any preference shares in Holdings.

[169] In October 2012, Jennifer received \$100,000, representing a dividend of \$1,000 per share on her shares in Holdings. Joyce also received \$100,000 at that time. There were other distributions from Holdings but their extent was not clear on the evidence.

[170] In November 2012, Joyce received a further distribution of \$129,944 from Holdings.

[171] Jennifer alleges that from May 2011 until Joyce's death in May 2014, Joyce made further transfers to Chris and/or members of his family. Jennifer says that the details of those transfers are known only to Chris.

P. Joyce's 2012 Payment to Chris

[172] Joyce paid Chris \$350,352.50 in 2012. CPG deposed that this is comprised of the \$240,000 from the Rancho Mirage House (in lieu of the money from the Swiss Account), and a further \$110,352.50.

[173] Chris deposed that "I was informed by [Joyce] and verily believe that the monies I received from the sale of the Rancho Mirage property was to equalize me financially with my sisters who had both received similar amounts at an earlier time".

- [174] CPG deposed that the further sum of \$110,352.50 is comprised of \$10,352.50 paid to Chris for school and orthodontic expenses for his daughter Nicole (as Joyce had done in the past), and a gift of \$100,000 from Joyce to Chris.
- [175] CPG deposed that the \$100,000 gift was first mentioned by Joyce at a family dinner at his residence that was also attended by Gwen Gregorig, Chris, Chris's wife Joni, Chris's daughter Nicole, CPG's wife Frida Gregorig, and CPG. CPG deposed that the subject was brought up by Joyce and the amount was suggested by her, and she realized that Chris had spent a great deal of time over the years on her behalf and wished to make the gift to Chris in recognition of that fact, and definitely not at the request of Chris or Joni.
- [176] CPG deposed that he later met with Joyce privately in her room at the care home and discussed the proposed gift with her and satisfied himself that she fully understood what she was doing, knew the extent of her Estate, and was making the gift of her own free will without any undue influence by or on behalf of Chris.

Q. 2013 Confusing Banking Transactions

- [177] CPG prepared a statement of banking transactions which showed that Joyce paid Chris \$176,734.30 in 2013. CPG deposed that he inadvertently characterized the transaction as a payment to Chris but, in fact, the funds were merely transferred between accounts all beneficially owned by Joyce.
- [178] CPG deposed that there was an account held in the Isle of Man ("Isle of Man Account") having the same structure as the Swiss Account. He deposed that in or about September 2013, Jennifer caused the Isle of Man Account to be frozen. CPG deposed that prior to that time, funds would be paid automatically into Joyce's TD account, from which her living expenses were paid.
- [179] CPG deposed that when the Isle of Man account was frozen, he became concerned that Jennifer might be able to freeze any account in Joyce's name, cutting off all revenue needed for her living expenses. He deposed that, as a result, he opened an account at the CIBC in the joint names of Chris and CPG, into which he transferred the sum of \$172,869.25 from the "Envision Account" on October 24, 2013.
- [180] CPG deposed that, on November 4, 2013, after he received professional advice that the funds were safe where they had been and that it was more appropriate for them to remain there, he transferred those funds back into the Envision Account. CPG deposed that at no time were any of those funds beneficially owned, or used, or intended to be used by or on behalf of Chris.

R. Joyce Passed Away on May 9, 2014

- [181] As stated, Joyce passed away on May 9, 2014, at the age of 92.

- [182] By letter dated May 23, 2014 from HP&C to McCarthy Tétrault, HP&C advised that it had been retained by CPG to apply for probate of Joyce's will and various codicils.
- [183] On February 18, 2016, Jennifer issued a citation to CPG to apply for probate of Joyce's Estate.
- [184] On March 2, 2016, CPG provided an answer to citation stating that he would apply for a grant of probate and would obtain that grant within six months after the date on which the citation was served, or within any longer period that the court may allow.
- [185] In March 2016, CPG provided Jennifer with a copy of the bank records he had in his possession for Joyce, together with a summary accounting of activity in her bank records.
- [186] CPG deposed that, because the Swiss Account was never declared by Joyce in her income tax returns, there exists a large unanswered question about how much tax Joyce's Estate may be liable to pay. CPG deposed that the accounting firm of Manning Elliott (Mr. Frambach's firm) have been, with difficulty, obtaining sufficient documents from the Swiss bank to enable them to prepare the necessary estate tax returns. CPG deposed that he was informed by Keith Elliott, senior partner of Manning Elliott, that he expected to be in a position to make a voluntary disclosure to Canada Revenue Agency on behalf of the Estate by the end of May, 2016, and thereafter to apply for a clearance certificate.
- [187] In his affidavit of April 28, 2016, CPG deposed that he had examined the transactions giving Chris voting control of Holdings and dealing with the Holdings and Charters preference shares, and satisfied himself that the Estate has no viable cause of action against Chris, because:
- a) there is no apparent evidentiary basis for a claim of undue influence or non est factum;
 - b) the transactions occurred well beyond the limitation period in the Limitation Act and therefore any claim arising out of them is statute-barred.
- [188] It is difficult to assess this evidence without CPG detailing what he understands is evidence supporting a claim of undue influence and non est factum. As with Jennifer's affidavit, CPG's affidavit contains assertions appropriate in pleadings, but which do not set out admissible evidence.
- [189] CPG further deposed that he participated in the gift of the Rancho Mirage sale proceeds and the additional transfers to Chris and satisfied himself that they were made by Joyce for a valid and rational reason, of her own free will, without any undue influence by or on behalf of Chris.
- [190] CPG deposed that he has determined that it is in the best interests of Joyce's Estate on behalf of all beneficiaries that he take no action against Chris because to do so would only deplete the Estate.

VIII. Analysis

A. Is Jennifer acting in good faith?

[191] Jennifer's evidence is that she is acting in good faith. The relationship between Jennifer and Chris has been extremely strained for a period of years. However, there is no evidence that Jennifer is not acting out of a genuine view that the transactions were wrongful. The evidence did not include any cross-examination of Jennifer on this or any other evidence.

[192] On the evidence provided on the petition, Jennifer has satisfied the requirement of establishing that she is seeking relief from the Court in good faith.

B. Has Jennifer established an arguable case that any of the transactions were the result of influence expressly used by Chris for the purpose?

[193] Jennifer has not provided any evidence showing that Chris expressly exerted undue influence on Joyce, or that any of the transactions were contrary to Joyce's wishes. Jennifer has simply made allegations.

[194] This is not a case where, for example, there is correspondence from Joyce stating that Chris forced her to enter one of the challenged transactions, or evidence from a bystander who made observations that Chris made threats to Joyce concerning any of the challenged transactions.

[195] In her February 25, 2008 letter to Chris, Jennifer refers to Chris "yelling at [Joyce] - [Joyce] openly admits she's afraid of what [Chris] might do if she does not follow [Chris's] instructions and sign everything [Chris] put[s] in front of her".

[196] Jennifer did not provide evidence giving this allegation context, such as by setting out when Joyce allegedly said this and what documents were being discussed. Jennifer's letter is dated about 3½ years after the November 2004 transactions, so, on its face, it is not evidence of anything occurring at the time of the November 2004 transactions. The letter is dated three or four years before Chris's receipt of proceeds of sale of the Rancho Mirage house and \$100,000 from Joyce, so it is not evidence of anything occurring around the time of those transactions either.

[197] Joyce's lawyer's letter dated March 5, 2008 stated that Joyce "never once felt that [Chris's] behaviour has been improper or in any way overbearing".

[198] Jennifer has failed to establish an arguable case that any transaction at issue was the result of influence expressly used by Chris for the purpose.

C. Has Jennifer established an arguable case that at the time of or shortly before any of the transactions, the relations between Joyce and Chris were such as to raise a presumption that Chris had Influence over Joyce?

- [199] As set out on page 378 of Geffen, the relationship between parent and child has been recognized as giving rise to the presumption of undue influence. However, the presumption does not automatically arise when a claim is made that an adult child unduly influenced an elderly parent.
- [200] The presumption was found not to have arisen on the facts in the following cases, which all involved allegations that an adult child had exerted undue influence over a parent: *Stone v. Campbell*, 2008 BCSC 1518; *Stewart v. McLean*, 2010 BCSC 64; *Lorintt v. Boda*, 2014 BCCA 453; and *Porter Estate v. Porter*, 2015 BCSC 2354.
- [201] As stated by Mr. Justice Meiklem in *Elder Estate v. Bradshaw*, 2015 BCSC 1266 at para. 108, "[t]he nature of the specific relationship must be examined in each case to determine if the potential for domination is inherent in the relationship" and, accordingly, whether the presumption arises on the facts of the case.
- [202] In this case, there has been a history of Joyce's children alleging that a sibling was exerting undue influence over Joyce. Jennifer essentially made those allegations against Chris in 2007 and 2008, and Chris made those allegations against Jennifer and Sandra in the 2010 California Lawsuit.
- [203] Joyce's decision-making around her attorney and the executor of her will informs the consideration of whether Chris had the ability to dominate her will.
- [204] Joyce appeared to make her own decisions about who would have her power of attorney and who would be named as executor in her will, and she executed the relevant documents before lawyers. In 2000, Joyce appointed Chris her attorney, and she named him as executor of her August 2007 will. However, in May 2010, she replaced Chris with the Daughters as her attorneys in fact and executors named in her will. Then in May 2011, she replaced the Daughters with CPG as her attorney in fact and executor named in her will.
- [205] The fact that three years before her death, Joyce chose to name CPG rather than one of her children as her attorney and executor suggests that none of the children ultimately had the ability to dominate Joyce's will.
- [206] I discuss the evidence concerning each individual challenged transaction in the following section.
- [207] The evidence does not show that the relationship between Chris and Joyce was a relationship of dominance by Chris. The evidence on the petition included significant evidence to the contrary, including Joyce's statement with the assistance of legal counsel, statements from Joyce's siblings and friends, and the report of Dr. Chafe.
- [208] Jennifer has not established an arguable case that the relations between Joyce and Chris were such as to raise a presumption that Chris had influence over Joyce at the relevant times.

D. If Jennifer has established an arguable case to raise a presumption that Chris had influence over Joyce at the time of or shortly before any of the transactions, is there evidence to the contrary such that the presumption disappears?

[209] In case I am held to be wrong, and Jennifer is found to have established an arguable case that Chris had influence over Joyce at the time of or shortly before any of the transactions, I will consider whether the presumption disappears with respect to each of the transactions that Jennifer seeks to challenge.

i. November 2004 Transactions

[210] The effect of the November 2004 transactions was that the \$500,000 loan owing by Charters (or Chris) to Holdings was cancelled, and Chris obtained the controlling interest in Holdings.

[211] While the precise mechanism of setting aside the loan was not explained in argument, it is likely that Joyce's Estate could benefit by the \$500,000 which Charters or Chris would have owed to Holdings were it not for the November 2004 transactions.

[212] However, there is no evidence that Holdings has any remaining assets. As a result, there is no evidence that the voting shares have any pecuniary value, or that there would be any benefit to the Estate of setting aside the transfer to Chris of the controlling interest in Holdings. As a result, it is not necessary to consider that transaction further.

[213] The following evidence supports Chris's position that the transactions leading to the cancellation of the \$500,000 loan were pursuant to Joyce's wishes and in furtherance of Joyce and Norman's long-standing plan to forgive that loan in a tax-effective manner:

- a) the information from Mr. Frambach, set out in the December 6, 2007 Frambach Letter;
- b) Joyce's October 2007 note;
- c) Joyce's November 7, 2007 statement sworn before Mr. Sindoni; and
- d) Gwen Gregorig's statement of November 7, 2007, also sworn before Mr. Sindoni.

[214] The fact that Joyce chose to swear her statement before Mr. Sindoni, a lawyer, and that the lawyer accepted her oath, suggests that Joyce was acting of her own free and informed will at the time of the statement and at the time of the transactions.

[215] In addition, Joyce's August 14, 2007 will, which she signed before a lawyer, states that Chris would receive any interest Joyce had in Charters. That is consistent with Joyce intending that Chris should retain anything to do with Charters.

[216] The November 2004 transaction occurred when Joyce was about 82 years of age. There was no evidence that she lacked mental capacity at that time. Dr. Comeau's opinion provided about four years later was a preliminary opinion suggesting further testing. Dr. Chafe's opinion provided about seven years later, when Joyce was 89 years old, was that she was competent to make financial decisions.

[217] As a result, even if there were a presumption of undue influence regarding the November 2004 transactions, there is evidence to the contrary and the evidentiary presumption disappears.

ii. Rancho Mirage House Proceeds

[218] The evidence demonstrates that this payment to Chris of about \$240,000 from the proceeds of the Rancho Mirage house was equal to the amount that Jennifer and Sandra each received from the Swiss Account. This supports the conclusion that Joyce made this gift to Chris as a result of an exercise of her free and informed will, to equalize what Joyce's other children received from the Swiss Account.

[219] As a result, even if there were a presumption of undue influence regarding Chris's receipt of proceeds of the sale of the Rancho Mirage house, there is evidence to the contrary and the evidentiary presumption disappears.

iii. Joyce's Gift to Chris of \$100,000 in 2012

[220] CPG's evidence is that Joyce made a gift of \$100,000 to Chris, and that CPG satisfied himself personally that it was her wish. Further, his evidence is that Joyce came up with the idea and the figure.

[221] This payment occurred in 2012, after Dr. Chafe's October 2011 report, which concluded that Joyce was competent to make financial decisions, although she had Alzheimer's disease.

[222] The only evidence on the application about this gift was the evidence of CPG, which suggests that the gift was the result of a free exercise of Joyce's informed will. Again, even if there were a presumption of undue influence regarding Joyce's gift of \$100,000 to Chris, there is evidence to the contrary and the evidentiary presumption disappears.

iv. Other Transactions

[223] Jennifer seeks to challenge other transactions not known to her. She has not provided any evidence of such transactions. CPG has produced the available banking documentation, and provided explanations for their content. There is nothing demonstrating that Joyce made any other payments to Chris.

E. If Jennifer has established an arguable case to raise the presumption but the presumption disappears or if the presumption was not raised, is there any evidence establishing an arguable case that the transactions fall into the second class of undue influence?

- [224] Even if Jennifer had established that there is an arguable case that the presumption would apply, the presumption has disappeared.
- [225] Jennifer has not provided any evidence which shows that Joyce did not make the gifts to Chris as an exercise of her free and informed will.
- [226] The evidence as a whole suggests that all the transactions were the result of Joyce's exercise of her full, free, and informed thought.
- [227] Proof of an arguable case requires more than the mere allegation of a gift by an elderly parent to an adult child when, as here, there is evidence supporting the gifts.

F. Has Jennifer established an arguable case that the transactions should be set aside on the basis of non est factum?

- [228] Jennifer has made allegations that Joyce did not know what she was signing. However, Jennifer has not provided evidence demonstrating either that Joyce lacked capacity at the relevant times, or that Joyce thought she was signing something fundamentally different from what she signed.
- [229] This is not a case in which, for example, there was a medical opinion at a relevant time stating that Joyce was incompetent, or evidence that Joyce thought she was signing something different from what she actually signed.
- [230] Jennifer has not established an arguable case that the transactions should be set aside on the basis of non est factum.

G. If Jennifer has established an arguable case to challenge any of the transactions on any of these grounds, should the Court exercise its discretion to grant leave to Jennifer to commence an action?

- [231] Jennifer has not established an arguable case to challenge any of the transactions on any of the grounds. As a result, it is not necessary for me to consider whether there is a defence under the Limitation Act to Jennifer's challenge of the November 2004 transactions, which occurred almost 12 years ago.
- [232] Jennifer's evidence does not set out a plan for the litigation. She has not provided an estimate of how much the litigation would cost to prosecute, or explained who she proposes would pay the prosecution costs initially and ultimately, or detailed what funds would be available from her or in the Estate to satisfy an award of costs in favour of Chris or Charters or both of them. In my view, the court should be provided with such evidence by an applicant for leave to commence an action on behalf of an estate.

[233] If Jennifer had established an arguable case to challenge any of the transactions, and the Court were to consider whether the proposed litigation was in the best interests of Joyce's Estate, the Court would require further information to determine whether the potential relief in the action would be sufficient to justify the inconvenience to the Estate of being involved in the action.

[234] Even if I am wrong, and Jennifer has established an arguable case that any of the challenged transactions should be set aside, I would not exercise my discretion to grant leave to commence the proposed lawsuit. The evidence on this application overwhelmingly supports the conclusion that Joyce entered into all the challenged transactions as the result of her own full, free, and informed thought.

H. If the order should be made, should it be effective on the date of the hearing?

[235] Having concluded that Jennifer should not be granted leave to commence the proposed action, it is not necessary to consider this issue.

IX. Summary

[236] Jennifer has not demonstrated an arguable case to challenge any of the transactions she seeks to challenge. Further, she has not established that the potential relief in the action is sufficient to justify the inconvenience to the Estate of being involved in the action. She has not demonstrated that it would be in the best interests of Joyce's Estate to pursue any of these claims. It is neither "necessary" nor "expedient" to permit Jennifer to pursue the proposed claims against Chris and Charters on behalf of Joyce's Estate. I decline to exercise my discretion to permit Jennifer to commence the proposed action.

[237] The petition is dismissed. Unless the parties seek to make submissions on costs, the respondents CPG, Chris, and Charters are entitled to their costs of the petition from Jennifer on Scale B, for matters of ordinary difficulty.

"Gray J."

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