

CANADA / JUDGMENT

Calvert v. Menzies

2024 BCSC 1302

COURT

Supreme Court of British Columbia

DECIDED

19 July 2024

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2024 BCSC 1302 Calvert v. Menzies

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Calvert v. Menzies,

2024 BCSC 1302

Date: 20240719

Docket: S226283

Registry: New Westminster

Between:

Judith Ann Calvert, in her personal capacity and as executor
of the estate of Alexandra Menzies, (the "Deceased")

Plaintiff

And

John Menzies

Defendant

Before: The Honourable Justice Iyer

Reasons for Judgment

Counsel for Plaintiff:

R. Dueckman

K. Wallis

Counsel for Defendant:

J. Patrao

J. Parmar

Place and Date of Trial:

New Westminster, B.C.

November 27-30, 2023,

December 1, 2023,

January 29-31, 2024 and

February 1, 2024

Place and Date of Judgment:

New Westminster, B.C.

July 19, 2024

OVERVIEW

- [1] The plaintiff, Judith Calvert, and the defendant, John Menzies, are siblings. In previous litigation, each claimed that the other took financial advantage of their mother. In this case, Ms. Calvert claims Mr. Menzies used their mother's money for his personal benefit, to the detriment of the mother's estate and Ms. Calvert's interest in it as a beneficiary.
- [2] In these reasons, I will refer to the parties' parents by the names used by the witnesses at trial. I do so to avoid confusion and mean no disrespect. Alexandra Menzies, mother of the parties, was referred to as "Alice", and their father, John Henry Menzies, was referred to as "Jack".
- [3] Alice and Jack Menzies purchased a 10-acre parcel in Maple Ridge in the 1950s, with a present street address of 11092- 248 St. ("Property"). Jack Menzies built a residence on the Property and added to it over the years ("Family Home"). He earned a limited income as a "jack of all trades", and Alice Menzies may have worked as a seamstress. The value of the Property increased significantly over the years. Jack sold just under half of it at some point. The remaining parcel was sold for development in November 2017 for \$2.9M.
- [4] Alice and Jack had three children, all now in their 70s. Mary McDougall, who testified for the plaintiff, is the eldest. Ms. Calvert is the middle child, and Mr. Menzies is the youngest. Ms. MacDougall has lived in D'Arcy since about 1995 and did not visit her parents often. Ms. Calvert lived on the Property with her parents and her two sons for a number of years. From about 1990 on, Mr. Menzies lived in a mobile home that he moved onto the Property.

- [5] Jack died in November 2010, leaving his estate to Alice. The Property was by far the most significant asset. Alice continued to live in the Family Home, with Mr. Menzies living in the adjacent mobile home. Mr. Menzies' partner, Louise Soucy, lived there with him for some time, as did their daughter, Morgan McKenzie.
- [6] Shortly after Jack's death, Mr. Menzies learned that there was very little money in Alice's bank accounts. He accused Ms. Calvert, who had held joint power of attorney ("POA") for both her parents (along with Ms. McDougall) since 2006, of having misappropriated Alice's funds.
- [7] Shortly afterwards, Alice revoked the POA she had given to Ms. Calvert and Ms. McDougall and granted Mr. Menzies her POA instead. Alice also made Mr. Menzies a joint account holder of her bank accounts.
- [8] After Alice's death in July 2018, the enmity between Ms. Calvert and Mr. Menzies increased. Mr. Menzies commenced an action to remove Ms. Calvert as co-executor. While that was resolved by a consent agreement, Ms. Calvert later commenced an action to remove Mr. Menzies as executor. The parties filed cross applications, each seeking to remove the other as co-executor. The Court removed Mr. Menzies as executor and named a third party, Solus Trust, as joint executor of Alice's estate along with Ms. Calvert: *Menzies Estate (Re)*, 2020 BCSC 1116.
- [9] The present action is not about Alice's will. The plaintiffs claim against Mr. Menzies to recover funds that he allegedly misappropriated from Alice while he held her POA. On behalf of the estate and as a beneficiary, Ms. Calvert seeks damages for breach of trust, breach of fiduciary duty and conversion, and orders returning misappropriated funds and property to Alice's estate. She also claims punitive and aggravated damages.
- [10] Mr. Menzies denies all allegations of wrongdoing. Although now discontinued, he filed a counterclaim alleging that it was Ms. Calvert who misappropriated funds from Alice, exercising undue influence over her in much the same way that she alleges against him.
- [11] Resolving the issues in this case is challenging because of the very poor memories of key witnesses and the lack of reliable records. These problems were compounded by a confusing presentation of the evidence that, at times, appeared to be directed by the witnesses rather than by counsel. At other times, questions on examination in chief were blatantly leading. Although not objected to, such evidence has very little weight.
- [12] Further, the pleadings on both sides are poorly drafted, making it difficult to discern what legal claims are actually being advanced and denied. Closing submissions on both sides do not track the pleadings. They seem to advance new claims or defences and/or fail to address what was pleaded.

- [13] Below, I set out the uncontroversial facts and indicate relevant conflicts in the evidence. Next, I assess credibility and reliability. I then identify the issues, outline the law and apply it to the facts to determine whither and to what extent Ms. Calvert and Alice's estate have proved their claims against Mr. Menzies.

FACTS

Before Jack Menzies' Death

- [14] Alice and Jack Menzies bought the Property, built the Family Home, and raised their children there. After her divorce in the 1980s and until about 2006, Ms. Calvert and her sons lived in the basement suite of the Family Home.
- [15] Ms. McDougall lived in D'Arcy. She visited the Property only rarely. After her father's death, she spoke with her mother by phone about once a week. She did not visit Alice after Alice moved into the Holyrood Manor care home ("Holyrood") in 2014.
- [16] In about 1990, with the agreement of his parents, Mr. Menzies moved his mobile home onto the Property. He set it up about 400 ft. from the Family Home. It had its own utilities. Mr. Menzies lived there with his spouse, Louise Soucy, and Morgan Menzies, their daughter. Ms. Soucy and Mr. Menzies separated from 2008 to 2012. Ms. Soucy and Morgan visited Mr. Menzies at the Property during this period. Mr. Menzies and Ms. Soucy eventually reconciled.
- [17] In 1993, Jack promised Mr. Menzies that, when the Property became sub-dividable, Mr. Menzies would receive a one-acre portion of it. This promise was subsequently documented in Alice Menzies' 2011 will.
- [18] In 2008, Jack borrowed \$350,000 on a line of credit secured against the Property, to be repaid when the Property was sold. He kept \$50,000 for himself and Alice, giving \$100,000 to each of the children. There is no evidence about why this occurred and no evidence about how the money was used. Jack expected the children to pay their share of the interest. Each made some payments (in different amounts) but then stopped.
- [19] Jack died on November 17, 2010, at the age of 89.

After Jack Menzies' Death

- [20] In December 2010, Mr. Menzies took Alice to the bank to sort out her financial affairs. They discovered that Alice had virtually no money in her accounts. With the assistance of the bank manager, Alice made Mr. Menzies a joint account holder with her on her savings account ("Savings Account"), and she subsequently opened a joint chequing account with him ("Chequing Account" and collectively, "Joint Accounts"). Alice also added Mr. Menzies as an account holder on the line of credit ("Line of Credit") and revoked the POAs she had granted to Ms. Calvert and Ms. McDougall.

- [21] Mr. Menzies believed that Ms. Calvert had used her powers as a POA to misappropriate their parents' money. He so informed Ms. McDougall, who wrote an angry letter to Ms. Calvert dated December 31, 2010.
- [22] According to Mr. Menzies and Ms. Soucy (who took a very active role in these matters), Ms. Calvert and Ms. McDougall were entirely indifferent to Alice's situation after Jack's death. They did not visit or telephone, although they were repeatedly invited, they did not attend his funeral or come to the Property to select those of Jack's possessions they wanted to keep.
- [23] According to Ms. Calvert and Ms. McDougall, Mr. Menzies and Ms. Soucy prevented them from coming to the Property, warning them that they were unwelcome and threatening them. They said Mr. Menzies and Ms. Soucy did not invite them to Jack's funeral and limited their access to Alice, turning her against her daughters. Ms. Calvert described Mr. Menzies and Ms. Soucy as having "kidnapped" Alice. However, Ms. Calvert said that when she did talk to her mother she did not raise any concerns because she "didn't want to confuse her."
- [24] It is evident that, after Jack's death, the relationship between Ms. Calvert and Ms. McDougall, on the one hand, and Mr. Menzies and Ms. Soucy, on the other hand, was acrimonious.
- [25] On June 2, 2011, Alice granted Mr. Menzies her POA and appointed him as her representative under the Representation Agreement Act, R.S.B.C. 1996, c. 405. She revised her will to direct that the Property be sub-divided and that Mr. Menzies receive one acre of it as Jack had promised him. She left the residue of her estate to her three children in equal shares. In her previous will, Alice had named Ms. McDougall and Ms. Calvert as joint executors. In her 2011 will, she replaced Ms. McDougall with Mr. Menzies. She did not remove Ms. Calvert as an executor. It appears that Mr. Menzies was not aware that Ms. Calvert remained as co-executor.
- [26] Alice continued to live in the Family Home until November 2014, when she moved into Holyrood. Mr. Menzies and Ms. Soucy moved into the Family Home in early 2015. Although the Property was sold in December 2017, they continued to live there until the sale completed at the end of October 2019, renting it from the new owner.

Use of Alice Menzies' Funds

- [27] Mr. Menzies said that he had to put some of his own money into the Joint Accounts in December 2010 to cover Alice's expenses and also deposited his money into the Joint Accounts from time to time. There is no documentary evidence of this. Indeed, there no evidence about how Mr. Menzies handled his finances or what his income was.
- [28] Between 2011 and 2014, Mr. Menzies (joined by Ms. Soucy in 2012) lived in the mobile home while Alice lived in the Family Home. Mr. Menzies said that he and Ms. Soucy used Alice's pension income to repair and maintain the Property and pay her expenses.

- [29] Both Mr. Menzies and Ms. Soucy testified that the Family Home was in terrible condition after Jack Menzies' death. Mr. Menzies described it as "unliveable", with leaky and inadequate plumbing and rotting floors. Both said the home was filled with junk and garbage and that Jack Menzies' incontinence had damaged most of the carpeting in the home. Mr. Menzies described Alice's clothes as threadbare.
- [30] Neither Mr. Menzies nor Ms. Soucy explained how the Family Home fell into such a state of disrepair or why nothing was done about it prior to Jack's death. This is odd since Mr. Menzies was living on the Property. Mr. Menzies stated only that Alice "put up with it".
- [31] Mr. Menzies and Ms. Soucy testified at length about the extensive work they did to repair the Property and Family Home. They re-did the bathrooms, replaced the kitchen counter, purchased a new refrigerator and installed a stove for the first time. They replaced carpets and flooring, as well as fixtures and furniture. They repainted the interior. They renovated the basement, including its kitchen.
- [32] Mr. Menzies said he had to do a great deal of work on the exterior. This included repairing the very long driveway, taking down trees, replacing fencing and repairing the septic field and "grease pit". He also repaired leaking gutters and windows.
- [33] Ms. Soucy and Mr. Menzies testified that there was nothing of any value inside or outside the family home. They described almost all of the items in the Family Home (including furniture, fixtures and Alice's personal possessions) and on the Property (including numerous vehicles, parts, tools and other equipment) as worthless. It appears that they disposed of all of it.
- [34] In sharp contrast, Ms. Calvert (and to a lesser extent Ms. McDougall), testified that items in the Family Home and on the Property - including furniture, china, jewelry and vehicles - had significant value.
- [35] Documentation of how the money in the Joint Accounts was spent comes from three sources. First, Ms. Calvert tendered in evidence a report prepared by Kathleen Halpin, a registered chartered accountant, documenting the transactions in the Joint Accounts and from July 1, 2011 to March 13, 2018, and from the Line of Credit from January 1, 2012 to September 30, 2019, based on bank statements ("Halpin Report"). The Halpin Report categorizes incoming and outgoing transactions over this roughly seven-year period by the description reported on the bank statements, listing the total amount spent or received. The Halpin Report notes that some bank statements were missing and that there was no supporting documentation.
- [36] Second, Mr. Menzies provided bank records for the Joint Accounts from March 2018 to August 2020.

- [37] Third, Mr. Menzies tendered in evidence a number of documents prepared by Ms. Soucy in 2019. These documents are based on bank records and those receipts that Mr. Menzies and Ms. Soucy had retained from purchases allegedly made for Alice's benefit over the 2012-2018 period.
- [38] I heard a great deal of evidence from Mr. Menzies and Ms. Soucy about how the money from the Joint Accounts was spent. While he acknowledged that his mother had no teeth and was a small elderly woman, Mr. Menzies said that she loved being taken for drives in his truck and eating fast food meals from restaurants such as A&W and KFC, as well as pizzas and Chinese food. He said that she did not go into restaurants, preferring to eat in the truck. He also said that he bought groceries and gas for her benefit. Mr. Menzies said repeatedly that if his mother wanted anything, he would buy it for her. Ms. Soucy described purchasing clothing and other items for Alice.
- [39] Both testified that only one debit card was issued to the Savings Account and that it remained in Alice Menzies' possession. When purchasing anything for Alice, Ms. Soucy said that she asked Alice in advance for permission to buy the item(s), obtained the debit card and returned it to Alice with the purchases. Mr. Menzies described himself as equally scrupulous. For example, he said that he would purchase a vanilla milkshake for Alice with her debit card and use his own money to buy one for himself.
- [40] Mr. Menzies' evidence is inconsistent with the documentary evidence of these transactions. For example, bank records of transactions are for amounts significantly greater than the costs of a milkshake or meal for an elderly person with no teeth; for example, \$21.24 at Tim Hortons in September 2011, \$30.23 at A&W in the same month, and \$34.13 at KFC in December 2012. When this was put to Mr. Menzies, he said that he probably bought multiple meals for Alice so that she could eat them later.
- [41] Mr. Menzies and Ms. Soucy also testified that they spent some of the money in the Joint Accounts on improving the Family Home as I have described above, while Alice was living there. They said that they performed the work themselves to keep the costs within Alice's limited means.
- [42] In August 2014, Alice Menzies fell and broke her hip. She was admitted to Ridge Meadows Hospital initially and then transferred to a residential rehabilitation facility. From there, she entered Holyrood, where she lived until her death on July 9, 2018, at the age of 97.
- [43] Ms. Calvert said that Mr. Menzies and Ms. Soucy did not inform her that Alice was in the hospital. When she did learn about it, she visited her mother in the hospital and at Holyrood. Her boyfriend, Gary Burns, accompanied her. Like Ms. Soucy, he has taken an active role in the litigation.
- [44] Mr. Menzies and Ms. Soucy testified that they continued to visit Alice very frequently at Holyrood and continued to buy her food and other personal items. They said they also took her for outings. They said they used the funds in the Joint Accounts to pay the costs of Alice's

accommodation at Holyrood and also deposited \$100 per month from the Joint Accounts so Alice could purchase personal items from Holyrood's tuck shop. Ms. Soucy said she continued to purchase personal items for Alice from various pharmacies, like lotions and non-prescription medication.

- [45] Mr. Menzies and Ms. Soucy said that they continued to renovate the Family Home after Alice was hospitalized. They said that, initially, they hoped she could return. After they moved into the Family Home in 2015, they did not pay rent to Alice Menzies. They said that they had to live in and continue to renovate the Family Home to attract buyers.

Sale of Property

- [46] Mr. Menzies, acting as Alice's POA, listed the Property for sale in 2014. It appears that a sale for development purposes had been contemplated for some time, as Jack's promise to gift Mr. Menzies a one-acre parcel in the 1990s was linked to subdivision.
- [47] The Property sold as a development property on November 13, 2017 for \$2.9M. The purchaser paid a deposit of \$290,000. Mr. Menzies and Ms. Soucy continued to live in the Family Home until the sale closed on October 31, 2019. They paid rent of \$2,000 per month plus utilities to the new owner.
- [48] Mr. Menzies, Ms. Soucy and her sister all testified that Alice told Mr. Menzies that she wanted him to have the \$290,000 as a gift to use for his personal benefit. However, he deposited the money into the Joint Accounts.

Alice Menzies' Health

- [49] There is conflicting evidence about Alice's mental and physical health, both when she was living at the Family Home and when she was living at Holyrood.
- [50] Ms. Calvert testified that even before Jack Menzies died, that Alice was not capable of making financial decisions. Ms. McDougall testified that in 2011, Alice was not capable of living independently and could not drive.
- [51] Mr. Menzies described Alice as physically mobile: for example, he said she would walk over to the mobile home and leave notes on the door for him or Ms. Soucy. Ms. Soucy confirmed this.
- [52] Ms. Soucy said that Alice was strong for her age. However, Ms. Soucy also said that Alice needed help with virtually all of her activities of daily living and that this responsibility fell on her. She said that, if Alice was alone at night, she would call them twenty times or more. Ms. Soucy also said that Alice had hit her with her cane.
- [53] A social worker's notes of her interview with Ms. Soucy on August 13, 2014 (while Alice was at Ridge Meadows hospital), record that Ms. Soucy reported the following:
- Alice had "at least four years of general functioning decline" after the death of her husband;

- Alice had "been repeating questions and exhibited memory loss concerns for the last 20 years";
- Alice was "passive-aggressive" and "manipulative", behaving "one way with people and another way with family", "not wanting to confront reality" or deal with issues, preferring to lock herself in her room; she could be physically and verbally aggressive;
- Ms. Soucy had been spending four to five hours a day providing care to Alice, including house cleaning, grocery shopping, laundry, banking and taking her to medical appointments; and
- Alice was receiving "Meals on Wheels" three times a week but refused to eat meals alone: she would put her meals in cups, leaving them outside the house unless Ms. Soucy put the meal on a plate and watched Alice eat it.

- [54] The social worker wrote that the burden of caring for Alice was too onerous for Ms. Soucy and recommended residential care for Alice, as well as a cognitive assessment.
- [55] Other health records, from 2014 through 2017, describe Alice as having unspecified moderate dementia, memory problems, and impaired decision-making. There is no record of a full cognitive assessment.
- [56] However, Ms. Soucy expressly denied that Alice had memory problems or any cognitive impairment, such as dementia. Mr. Menzies also described his mother as mentally competent and "in a good state of mind".
- [57] No expert evidence was led about Alice Menzies' mental health or capacity.
- [58] Medical records also describe Alice Menzies as having a good appetite but note that her lack of teeth and dentures limit what she can eat. Some records note that she was restricted to "minced food".
- [59] Alice Menzies died on July 9, 2018.

CREDIBILITY AND RELIABILITY

- [60] Credibility and reliability are different but related concepts. Credibility refers to a witness's truthfulness, whereas reliability refers to the accuracy of their testimony, which depends on their ability to accurately observe, recall and recount the events in issue. A witness whose evidence is not credible is also not reliable. However, a credible witness's evidence may or may not be reliable: *Radacina v. Aquino*, 2020 BCSC 1143 at paras. 94-96.

Plaintiff witnesses

- [61] Ms. Calvert was the plaintiffs' key witness. She acknowledged from the outset that she has significant memory problems that are growing worse, and this was one reason I declined the defendant's request for an adjournment at the beginning of the trial. She also frankly acknowledged her antipathy to Mr. Menzies and Ms. Soucy. For example, she referred to Ms. Soucy as "the worst nightmare I've ever met in my life, and I'm 75."

- [62] Ms. Calvert had very little opportunity to know what the state of the Property was between 2012 and 2018. She said she visited very rarely after Jack Menzies' death in 2010, which is now 14 years ago.
- [63] Nevertheless, Ms. Calvert tendered evidence of the value of furniture, china and other chattels that she says were on the Property and have disappeared. The evidence consisted of undated photos of items with the values of similar looking Items Mr. Burns had found through internet searches. There were also some lists of vehicles.
- [64] Ms. Calvert admitted that she had no knowledge of Alice's financial affairs after Alice revoked her POA at the end of 2010. Ms. Calvert's evidence that Mr. Menzies and Ms. Soucy spent virtually all of the money on themselves was speculative and driven by her antipathy to them.
- [65] I accept that Ms. Calvert tried to tell the truth as she sees it. However, her unreliable memory, lack of any contemporary knowledge of the contents of the Property or Alice Menzies' finances, and her admitted partiality mean that her evidence is not credible. I do not accept her evidence unless it is corroborated by credible and reliable evidence.
- [66] Ms. McDougall had even less direct knowledge than Ms. Calvert about the disputed facts. She did not visit Alice Menzies after Jack's death. Nor was she involved in Alice's financial affairs from 2011 on. Ms. McDougall had regular telephone calls with her mother but said they never talked about Mr. Menzies' treatment of her or his relationship with her. Ms. McDougall also had memory problems. Her lack of direct knowledge of the material facts means that her evidence is not helpful.
- [67] Mr. Burns, Ms. Calvert's boyfriend, had very little to contribute other than corroborating the dysfunctional relationship between the parties. His support for Ms. Calvert and her perceptions was unequivocal. His evidence does not help me resolve the issues in dispute.
- [68] Ms. Halpin has no interest in the litigation. Her analysis of the bank statements for the Joint Accounts and Line of Credit was objective and helpful. I rely on her evidence.

Defendant Witnesses

- [69] Mr. Menzies and Ms. Soucy were the key defence witnesses. Mr. Menzies' memory problems were evident throughout his testimony. He had difficulty with dates and numbers. It was clear to me that he had no actual recollection of the various transactions that he was asked about. He did not understand the financial documents Ms. Soucy had prepared, although he attempted to answer the numerous questions he was asked about specific transactions. He did not appear to understand his record-keeping and fiduciary obligations as Alice's POA. He said repeatedly that it was Ms. Soucy who would know the answers to questions.
- [70] Mr. Menzies was defensive and frustrated during cross-examination. Instead of answering questions based on his independent recollection, it was apparent that Mr. Menzies was trying to remember and relate what Ms. Soucy had discussed with him. As I have noted

above with respect to fast food purchases, Mr. Menzies' claims about about how scrupulous he was in keeping Alice's and his expenditures separate down to the last penny are not credible. It was obvious that he was simply speculating about what might have been purchased when specific transactions were put to him, for example from Husky Gas or 7-Eleven, and then guessing whether or not they were made for Alice's benefit.

- [71] I conclude that Mr. Menzies' evidence is unreliable and that he was not a credible witness. I do not rely on his evidence unless it is supported by other credible and reliable evidence or is against his self-interest.
- [72] Ms. Soucy accurately presented herself as in charge of Alice's finances and virtually all decision-making relating to her care. She considered herself to be very knowledgeable both about financial matters and about mental health of the elderly. These beliefs do not stand up to scrutiny. The voluminous and detailed financial documents Ms. Soucy prepared are unreliable. They are not contemporaneous records but, as Ms. Soucy explained, were her effort to reconstruct and present a comprehensive accounting of how Alice Menzies' money had been spent after she realized in 2019 that this was necessary.
- [73] On cross-examination, Ms. Soucy admitted that a number of expenditures that she had classified as "Alice charges" were, in fact, "John charges" - in other words, expenditures for the benefit of Mr. Menzies or herself. Ms. Soucy said that she reimbursed the Joint Accounts for expenses such as holidays for herself and Ms. Menzies or veterinary bills for their dogs. However, there is no corroborating documentary evidence. These records are unreliable, and Ms. Soucy's efforts to portray them as accurate undermines her credibility.
- [74] Ms. Soucy's evidence about Alice's mental health also demonstrates that she was not a credible witness. She insisted that Alice Menzies did not have dementia, in the face of numerous medical records stating that she did, because Alice had never had a "full cognitive assessment". She maintained this position even when confronted with notes of her interview with the social worker in August 2014. She was evasive and argumentative throughout cross-examination. I conclude that Ms. Soucy was not a credible witness, and I do not rely on her evidence except where corroborated by reliable evidence or where it is against her self-interest.
- [75] The other defence witnesses were Carol Soucy, Ms. Soucy's sister, and Morgan Menzies, Mr. Menzies' and Ms. Soucy's daughter.
- [76] The value of Carol Soucy's evidence in chief is impaired by the fact that she was asked only leading questions on the key issue of whether Alice had told her that she wanted to gift Mr. Menzies the \$290,000 deposit. Carol Soucy said that she visited Alice in Holyrood once every three or four months, that she knew the Property had sold and that Alice told her she wanted Mr. Menzies to have "whatever it is" as a gift. She was clearly partial to the defendants. I place no weight on her evidence.

- [77] Morgan Menzies did have direct contact with Alice. She testified that when she was living in the mobile home between 2012 and 2014, she would sometimes sleep at the Family Home because Alice was afraid at night. She corroborated her parents' evidence but had few independent recollections. I do not doubt that she was telling the truth as she sees it, but her evidence does not go to the central factual disputes and is of limited use.
- [78] The key witnesses' lack of credibility and reliability creates a significant challenge in determining the issues in this litigation.

IDENTIFYING THE ISSUES

- [79] The notice of civil claim pleads that Mr. Menzies breached his fiduciary duty as Alice's POA and as executor, relying on s. 20 of the Power of Attorney Act, R.S.B.C. 1996, c. 370 ("POA Act") and s. 68 of the Estate Administration Act, R.S.B.C. 1996, c. 122. It also alleges that Mr. Menzies exercised undue influence over Alice Menzies at common law and, in the alternative, pleads that he was unjustly enriched at her expense. The legal basis section does not plead fraud; however, aggravated damages are sought on the basis that Mr. Menzies' conduct "amounts to callousness and arrogance" and was "deceptive and fraudulent".
- [80] The Plaintiffs' closing submissions refer to sections of the POA Act and provisions of the Power of Attorney Regulation, B.C. Reg. 278/2022 ("Regulation") that are not mentioned in the NOCC. The closing submissions do not refer to s. 20 of the POA Act. They do not refer to the Estate Administration Act or to fraud. The submissions address undue influence, but counsel made clear that this claim was limited to the alleged gift of \$290,000. Unjust enrichment is not addressed.
- [81] In his Response to Civil Claim, Mr. Menzies expressly denies breach of fiduciary duty, undue influence and unjust enrichment. He asserts a limitation defence without specifying any section of the Limitation Act, S.B.C. 2012, c. 13 (or the applicable limitations statute) and claims that Ms. Calvert has no standing to sue in her personal capacity without saying why.
- [82] Mr. Menzies' closing submissions address the statutory duties imposed by s. 19 of the POA Act and undue influence. They indirectly address unjust enrichment. They do not address any limitation defence or Ms. Calvert's standing.
- [83] Ms. Calvert's claim regarding Mr. Menzies duties as an executor are not properly before the Court because the Estate Administration Act was not in force at the time of Alice Menzies' death. Her claim of fraud is not properly pleaded as it is a bare reference without particulars: *Sidhu v. Hiebert*, 2018 BCSC 401 at paras. 32-35. Neither the limitation defence nor the lack of capacity defence are pleaded with sufficient precision to allow them to be determined by this Court.
- [84] Therefore, the issues are:
- a) Did Mr. Menzies breach his fiduciary duties under the POA Act?

- b) Did Mr. Menzies exercise undue influence over Alice Menzies with respect to the alleged gift of \$290,000?
- c) In the alternative, did Mr. Menzies unjustly enrich himself to the detriment of Alice Menzies?

If the answer to any of these questions is yes, I must determine the appropriate remedy and consider the claim for punitive damages.

ANALYSIS

Did Mr. Menzies breach his duties under the Power of Attorney Act?

[85] Section 19 of the POA Act sets out the duties of an attorney:

Duties of attorney

19 (1) An attorney must

- (a) act honestly and in good faith,
 - (b) exercise the care, diligence and skill of a reasonably prudent person,
 - (c) act within the authority given in the enduring power of attorney and under any enactment, and
 - (d) keep prescribed records and produce the prescribed records for inspection and copying at the request of the adult.
- (2) When managing and making decisions about the adult's financial affairs, an attorney must act in the adult's best interests, taking into account the adult's current wishes, known beliefs and values, and any directions to the attorney set out in the enduring power of attorney.
- (3) An attorney must do all of the following:
- (a) to the extent reasonable, give priority when managing the adult's financial affairs to meeting the personal care and health care needs of the adult;
 - (b) unless the enduring power of attorney states otherwise, invest the adult's property only in accordance with the Trustee Act;
 - (c) to the extent reasonable, foster the independence of the adult and encourage the adult's involvement in any decision-making that affects the adult;
 - (d) not dispose of property that the attorney knows is subject to a specific testamentary gift in the adult's will, except if the disposition is necessary to comply with the attorney's duties;
 - (e) to the extent reasonable, keep the adult's personal effects at the disposal of the adult.
- (4) An attorney must keep the adult's property separate from the attorney's own property.

(5) Unless the enduring power of attorney states otherwise, subsection (4) does not apply to property that

- (a) is jointly owned by the adult and the attorney as joint tenants or otherwise, or
- (b) has been substituted for, or derived from, property described in paragraph (a).

[86] In *Sarzynick v. Skwarchuk*, 2021 BCSC 443, Justice Morellato held that a person holding a POA is a fiduciary of the adult: para 178. She summarized the obligations of such a fiduciary as follows:

[180] The fiduciary obligations that an ad hoc fiduciary attorney would owe in equity have largely been codified in the modern version of the Power of Attorney Act, R.S.B.C. 1996, c.370 ("PAA"): Sull, at para. 124. For example, s. 19(1) of the PAA now mandates that an attorney must "act honestly and in good faith" and "exercise the care, diligence and skill of a reasonably prudent person". Moreover, s. 19(1)(d) requires that an attorney "keep prescribed records and produce the prescribed records for inspection and copying at the request of the adult." An attorney is required to act in the "adult's best interest's" when managing and making decisions about the adult's financial affairs: PAA, s. 19(2). Finally, pursuant to s. 19(4) of the PAA, an attorney must keep their own property separate from the donor's property.

[181] In a similar vein, the Power of Attorney Regulation, B.C. Reg. 20/2011 ("Regulation") imposes further obligations on attorneys. Section 2(1) mandates that an attorney acting under an enduring power "must make a reasonable effort to determine the adult's property and liabilities as of the date on which the attorney first exercises authority on the adult's behalf" and "maintain a list of that property and those liabilities." Further record keeping obligations are imposed under s. 2(2) of the Regulation, which provides as follows:

- (2) An attorney acting under an enduring power of attorney must keep the following records in relation to the period for which the attorney is acting:
 - (a) a current list of the adult's property and liabilities, including an estimate of their value if it is reasonable to do so;
 - (b) accounts and other records respecting the exercise of the attorney's authority under the enduring power of attorney;
 - (c) all invoices, bank statements and other records necessary to create full accounts respecting the receipt or disbursement, on behalf of the adult, of capital or income.

In short, the Regulation imposes fairly robust record keeping obligations on those acting under an enduring power of attorney.

(See also *British Columbia (Public Guardian and Trustee) v. Ferrier*, 2017 BCSC 2142 at paras. 10-11).

- [87] In this action, the plaintiffs are effectively seeking an accounting from the deceased adult's attorney. While plaintiffs bear the burden of proving claims of undue influence, misappropriation of funds and/or unjust enrichment, as attorney, Mr. Menzies carries the burden of proving that he complied with his statutorily imposed responsibilities *Robillard v. Robillard Estate*, 2015 BCSC 1417 at para. 92; Sarzynick.
- [88] Ms. Calvert submits that the evidence establishes that Mr. Menzies intermingled his money with Alice's in the Joint Accounts, contrary to s. 19(4) of the POA Act, that he failed to comply with his statutory record-keeping obligations, contrary to s. 19(1)(d) and the Regulation, and that he used Alice's money for his and Ms. Soucy's personal benefit, contrary to s. 19(2).
- [89] Mr. Menzies relies on the exception in s. 19(5), which provides that the duty not to intermingle property does not apply to the money in the Joint Accounts and the Line of Credit, because he was co-owner of those accounts with Alice Menzies before he became her POA.
- [90] I agree that the exception in s. 19(5) applies because Mr. Menzies was added to the Joint Accounts and the Line of Credit some six months before he became Alice's POA in June 2011. However, as Alice's POA, Mr. Menzies was subject to the record-keeping obligations in s. 19(1)(d) and the Regulation, and he was required to manage Alice's money in her best interests as required by s. 19(2).
- [91] Mr. Menzies failed to comply with both of these obligations.
- [92] With respect to record-keeping, Mr. Menzies failed to tender any evidence that he kept any of the records required by s. 2 of the Regulation. For example, there is no list of Alice's assets and liabilities made at any time between June 2011 and her death in July 2018. The Halpin Report documents missing bank statements.
- [93] The records Mr. Menzies provided were insufficient. As Justice Voith (as he then was) stated in *Sull*:
- [119] simply providing bank and credit card statements is not sufficient for an accounting. The attorney must provide an explanation, with satisfactory evidence, that the funds expended were for the benefit of the grantor. This would include providing specific receipts which has been described as being "the most basic of requirements": *Robillard* at para. 93.
- [94] I find that Mr. Menzies failed to keep or produce the requisite documents in breach of his statutory record-keeping obligations under s. 19(1)(d) and the Regulation. This made an accounting of Alice's assets impossible: Sarzynick at para. 187.
- [95] Turning to s. 19(2), it imposes a positive obligation on the attorney to manage an adult's affairs in their best interests. That is, the attorney must appreciate the difference between the best interests of the adult and the best interests of the attorney. The evidence shows not only that Mr. Menzies failed to manage Alice's affairs in her best interests, he also failed to appreciate that her best interests could differ from his own.

- [96] As I have noted, the documents of Joint Account expenditures created by Ms. Soucy misidentify as "Alice expenses" what were in fact "John expenses". It was clear that "John expenses" referred to expenditures that were not in Alice's best interests. There is no evidence at all, beyond Ms. Soucy's and Mr. Menzies' assertions, that Mr. Menzies deposited any money into the Joint Accounts or that any "John expenses" were otherwise repaid.
- [97] I am not persuaded that the many transactions related to purchase of food (groceries, fast food or take-out restaurant items, ready meals and delivered meals) were for the exclusive benefit of Alice Menzies. More generally, I do not believe Mr. Menzies and Ms. Soucy were telling the truth when they testified that they obtained Alice's permission for every single expense paid with her debit card from the time it was issued until her death.
- [98] The evidence does not prove that the repairs and renovations Mr. Menzies and Ms. Soucy continued to make to the Family Home after Alice Menzies moved into Holyrood were in Alice's best interests. It was clear by then that she would not be returning. I reject Mr. Menzies' contention that these expenses were necessary to sell the Property. There is no reliable evidence (for example, from a real estate agent) to establish that fact, nor is there evidence that it was necessary for Mr. Menzies to continue to live in the Family Home. The absence of such evidence is telling in the face of some evidence that the Property may have been marketed and sold as a development Property. I find that, from November 2014 on, the money Mr. Menzies spent on the Property was for his and Ms. Soucy's personal benefit, not for Alice Menzies' benefit or in her best interests.
- [99] Reviewing the evidence on this issue as a whole, it is clear that Mr. Menzies did not distinguish between his interests and those of his mother. Rather, he assumed that her best interests were identical to his own. To give one example, Mr. Menzies purchased a large television and an internet package for the Family Home. He acknowledged that Alice had vision problems and could not use a remote, much less use the internet, but maintained that this purchase was in her best interests.
- [100] I conclude that Mr. Menzies breached his obligations under the POA Act, both by failing to keep required records and by failing to manage Alice's money in her best interests and for her benefit.

Did Mr. Menzies exercise undue influence over Alice Menzies with respect to the alleged gift of \$290,000?

- [101] There is no dispute that Mr. Menzies sold the Property as Alice's POA and received \$290,000 as a deposit on the sale of her home, which he put into the Joint Accounts.
- [102] Mr. Menzies claims that Alice gifted the deposit to him. Ms. Calvert says that the gift should be set aside because Mr. Menzies exercised undue influence over Alice.

[103] In *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, the Supreme Court of Canada held that a presumption of undue influence arises only where the evidence establishes that the transferee is in a position of dominance over the transferor. If so, the transferee may rebut the presumption by showing that the gift was given as a result of the transferee's "full, free and informed thought": at 379.

[104] In *Stewart v. McLean*, 2010 BCSC 64 at para. 97, Justice Punnett set out factors that can demonstrate "full, free and informed thought" sufficient to rebut the presumption:

- a. no actual influence was used in the particular transaction or the lack of opportunity to influence the donor (*Geffen* at 379; *Longmuir [v. Holland]*, 2000 BCCA 538] at para. 121);
- b. the donor had independent advice or the opportunity to obtain independent advice (*Geffen* at 379; *Longmuir* at para. 121);
- c. the donor had the ability to resist any such influence (*Calbick v. Warne*, 2009 BCSC 1222 at para. 64);
- d. the donor knew and appreciated what she was doing (*Vout v. Hay*, [1995] 2 S.C.R. 876 at para. 29, 125 D.L.R. (4th) 431); or
- e. undue delay in prosecuting the claim, acquiescence or confirmation by the deceased (*Longmuir* at para. 76).

[105] The evidence shows that Mr. Menzies was in a position to influence Alice Menzies because (a) he held her POA; (b) there is no evidence that Alice had any opportunity to obtain independent advice; (c) Alice was completely dependent on Mr. Menzies and had no ability to resist his influence or that of Ms. Soucy; and (d) there is no evidence that Alice had the mental capacity to make the gift.

[106] With respect to the last factor, although Alice Menzies did not have a full cognitive assessment, the medical records raise real doubt about whether Alice knew and appreciated that she was making a gift.

[107] In any event, there is no credible evidence that Alice made a gift at all. Although not addressed by the parties, the evidence strongly suggests that Mr. Menzies had no beneficial interest in these funds because the transfer from Alice to Mr. Menzies could have given rise to the presumption of resulting trust without the evidence necessary to rebut it: see *Pecore v. Pecore*, 2007 SCC 17.

[108] I conclude that Mr. Menzies exercised undue influence over Alice Menzies in respect of the \$290,000 deposit.

In the alternative, did Mr. Menzies unjustly enrich himself to the detriment of Alice Menzies?

- [109] Neither party addressed unjust enrichment in their closing submissions. Having found that Mr. Menzies breached his fiduciary duties under the POA Act and that he exercised undue influence over Alice with respect to the \$290,000 deposit, it is not necessary to conduct an independent unjust enrichment analysis.

REMEDIES

- [110] Having found Mr. Menzies liable, it follows that he must repay the funds he owes Alice's estate. The evidence makes the calculation of damages challenging.
- [111] As Alice Menzies's attorney, Mr. Menzies bears the burden of proving that the money he spent was for Alice's benefit. Any uncertainties arising from his poor accounting are to his detriment, not the plaintiffs' detriment. As the Court stated in *Richter v. Chemerinski*, 2020 ABQB 307 at para. 267, a "trustee must bear the brunt of problems arising out of the absence of financial records". See also *Robillard* at paras. 16, 93-94, 106; *Sarzynick* at paras. 206-208, 243.
- [112] That said, the Court retains a discretion to fashion a common-sense solution despite poor accounting. In doing so, I have kept in mind Mr. Menzies' and Ms. Soucy's lack of credibility as well the inadequate bank records. I have relied primarily on the Halpin Report and on the March 2018 to August 2020 bank records. I do not consider that any useful purpose would be served by sending the matter to the Registrar for an accounting because of the time that has elapsed and the fact that the Registrar would be faced with the same evidentiary inadequacies.
- [113] Based on the evidence I have, approximately \$580,500 was spent from the Joint Accounts from July 2011 to August 2020. The accounts are now virtually empty.
- [114] In her closing submissions, Ms. Calvert did not address her claim for the value of chattels (such as collectibles and cars). I infer that she is not pursuing this claim. If I am wrong, I would dismiss it on the basis that Ms. Calvert failed to adduce evidence sufficient to prove the value of any of these items.
- [115] Ms. Calvert concedes that certain of the expenses Mr. Menzies made, including insurance charges, a security system for the Property, the costs of Alice's accommodation at Holyrood, interest charges on the Line of Credit before receiving the \$290,000 deposit, property taxes, "Meals on Wheels", probate and funeral expenses were for Alice's benefit. She does not seek their reimbursement. These amounts total \$203,500.
- [116] Ms. Calvert argued that Mr. Menzies should have paid down or paid off the Line of Credit with the \$290,000 deposit instead of paying outstanding taxes and the like. I am not satisfied that Mr. Menzies' decision to prioritize other debts was unreasonable. I find that the interest of \$20,600 on the Line of Credit paid after receipt of the deposit was for Alice's benefit. However, I am not satisfied that the \$7,000 in legal fees paid from the Chequing Account were for Alice's benefit because they were not adequately explained.

- [117] With respect to the money spent on maintaining and improving the Property and Family Home, the expenditures on these items after Alice moved into Holyrood, were not for her benefit. I have rejected Mr. Menzies' claim that renovations were necessary to sell the property. While some maintenance and/or renovations would have been necessary and for Alice's benefit while she continued to live in the Family Home, the evidence of these expenses is so unreliable that I apply a significant negative contingency. Of the approximately \$8,300 Mr. Menzies claims he spent on these items, I allow \$3,000.
- [118] With respect to money spent on food, the Halpin Report records \$51,000 spent on groceries, restaurants and the like from July 2011 to August 2018. Alice moved into Holyrood in November 2014, and all her meals were provided by Holyrood after that date. However, it appears that food expenditures charged to the Joint Accounts increased after August 2018. The Plaintiffs have agreed that the "Meals on Wheels" Alice received while living in the Family Home were a legitimate expense. Inexplicably, neither party organized their submissions on food expenses to differentiate between the period before Alice moved into Holyrood and the period after.
- [119] In light of all of this, I consider that \$12,500 of the food expenditures in the Halpin Report were incurred for Alice's benefit. This reflects the fact that she moved to Holyrood in November 2014, and the lack of credible evidence about what food items were actually purchased for her. I am not satisfied that any of the food expenditures claimed after August 2018 were for Alice's benefit.
- [120] I agree that expenditures for utilities for the Family Home were for Alice's benefit while she lived there. I am not satisfied that utilities expenses incurred afterwards were for Alice's benefit, as there is no credible evidence that the Family Home had to be habitable in order to sell the Property. Of the \$10,600 spent on utilities documented in the Halpin Report, I accept that half (\$5,300) was for Alice's benefit.
- [121] I accept that some of the gas expenditures were for Alice's benefit. I apply a 50% negative contingency to the amount recorded in the Halpin Report and find \$4,500 was incurred for Alice's benefit.
- [122] Accordingly, of the \$580,500 spent from the Joint Accounts from July 2011 to August 2020, \$249,400 was for Alice's benefit. Therefore, \$331,100 must be repaid.
- [123] The plaintiffs also claim for occupational rent from December 2014 to September 2019 at a rate of \$2,000 per month, which is the rent Mr. Menzies paid to the new owner after the sale in December 2017.
- [124] Mr. Menzies claims that occupational rent should not be awarded because he had to live in the Family Home to make the Property marketable, that he was performing necessary renovations and maintenance while living there, that he had been moving between the mobile home and the Family Home for a long time, and that the mobile home was in such disrepair that he needed to move into the Family Home

- [125] I do not agree. I find that that, at least from the time Alice Menzies moved to Holyrood, Mr. Menzies and Ms. Soucy repaired and renovated the Family Home to their tastes in the anticipation of living in it. There is no evidence other than that of Mr. Menzies that the mobile home was no longer habitable, and there was no explanation about why that occurred. There is no credible evidence that Mr. Menzies and Ms. Soucy could not live elsewhere and, as I have said, no credible evidence that the Family Home had to be occupied to be sold. I consider an award of occupational rent justified.
- [126] I accept that \$2,000 per month is a reasonable amount. However, there is no evidence about the date Mr. Menzies moved into the Family Home. Mr. Menzies admitted it was before March 2015. Alice moved into Holyrood in November 2014. I consider January 2015 is an appropriate start date. With respect to end date, absent any evidence other than the December 13, 2017 contract of purchase and sale, I use January 1, 2018 as the date Mr. Menzies started paying rent to the new owner.
- [127] That means that Mr. Menzies must pay 36 months of occupational rent at \$2,000 per month, a total of \$72,000.
- [128] The plaintiffs do not explain why they say Mr. Menzies should have to pay occupational rent to the estate after he began paying rent to the new owner, other than to say, based on *Wang v. Wang*, 2020 BCCA 15, that a fiduciary must disgorge all wrongful profit. I do not understand how that applies here. There is no evidence that Mr. Menzies breached his fiduciary obligations in selling the Property or in renting it back from the new owner. I decline to award occupational rent after the end of December 2017.
- [129] The plaintiffs seek punitive damages of \$75,000, on the basis that Mr. Menzies' treatment of Alice Menzies, while she dependent on him, betrayed her trust in him and that his claims against Ms. Calvert were an attempt to prevent her from discovering his own wrongdoing. In their closing submissions, the plaintiffs write:
- Mr. Menzies is in fact seeking to be compensated twice, and the cost of Mr. Menzies' greed was Alice Menzies' care, and her relationship with her daughters.
- [130] The plaintiffs rely on cases where breaches of fiduciary duty led to a punitive damages award. The defendants did not address this issue in their closing submission. Instead, they argued that special costs are not warranted.
- [131] I agree that punitive damages can be awarded for breaches of fiduciary duty in appropriate cases. In *Shen v. West Continent Development Inc.* (BC0844848), 2020 BCSC 5, a case involving breach of fiduciary duty by a person acting under a power of attorney, the Court reviewed the applicable principles:

[140] Punitive damages are a type of non-compensatory damages which are imposed solely to punish the defendant. The Supreme Court in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 29 [Hill], articulated the following purposes of an award of punitive damages:

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is a means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine, which is meant to act as a deterrent to the defendant and to others from acting in this manner.

[132] The plaintiffs have not established that a punitive damages award is warranted. There is no question that Ms. Calvert feels deeply wronged by Mr. Menzies (and Ms. Soucy). However, the proceeding before me was a chapter in a much longer story of intra-family conflict. In such circumstances, it is difficult to assign blame. Based on the evidence before me, I cannot say that Mr. Menzies' conduct is so egregious, in the sense of being "oppressive, malicious and high-handed" as to warrant punishment.

CONCLUSION

[133] In conclusion, I find that Mr. Menzies breached his obligations under s. 19(1)(d) and 19(2) of the POA Act and exercised undue influence over Alice with respect to the \$290,000 deposit.

[134] I award damages in the amount of \$403,100 to the plaintiffs.

[135] I would award costs to the plaintiffs on Scale B. If there are matters the parties wish to bring to my attention relating to costs, they may apply to me in writing with submissions not exceeding five pages.

"Iyer J."

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