

CANADA / JUDGMENT

Cowper-Smith v. Morgan

2015 BCSC 1170

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 1170 Cowper-Smith v. Morgan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cowper-Smith v. Morgan,

2015 BCSC 1170

Date: 20150706

Docket: 11-3559

Registry: Victoria

Between:

Nathan Cowper-Smith and Max Wayne Cowper-Smith

Plaintiffs

And

Gloria Lynn Morgan and Gloria Lynn Morgan Executor of the Will of the Late Elizabeth Flora Cowper-Smith, Deceased

Defendants

Before: The Honourable Madam Justice B.J. Brown

Reasons for Judgment

Counsel for the plaintiffs:

H. Fisher

Counsel for the defendants:

M.J. Hargreaves

Place and Dates of Trial:

Victoria, B.C.

October 20 - 24; 27 - 29, 2014

Place and Date of Judgment:

Victoria, B.C.

July 6, 2015

Introduction

- [1] This action relates to the estate of the late Elizabeth Flora Cowper-Smith. The parties, Nathan Cowper-Smith, Max Wayne Cowper-Smith, and Gloria Lynn Morgan, are the children of Elizabeth Cowper-Smith. Elizabeth Cowper-Smith was born in 1923 and died August 5, 2010 at the age of 86.
- [2] The assets in issue are her residence at 3782 Cadboro Bay Road in Victoria, British Columbia, with an appraised value of \$670,000 (the "Cadboro Bay Property") and accounts and investments at TD Canada Trust, CIBC, Coast Capital Savings Credit Union, and Scotia McLeod with a value of approximately \$969,600 (the "Investments"). At the time of her death, these assets were held jointly with her daughter.
- [3] The plaintiffs, Nathan Cowper-Smith and Max Cowper-Smith, claim that the defendant, Gloria Morgan, holds the Cadboro Bay Property and the Investments in trust for the estate of Elizabeth Cowper-Smith, to be distributed in accordance with the deceased's 2002 will. In addition, the plaintiffs say that the plaintiff Max Cowper-Smith is entitled to purchase Gloria Morgan's one-third interest in the Cadboro Bay Property at fair market value.
- [4] The defendant disputes these claims and says that she is entitled to retain all of the assets on the basis of a land title transfer and a declaration of trust executed by Elizabeth Cowper-Smith on June 22, 2001 (the "Declaration of Trust"). Gloria Morgan disputes that she agreed that Max Cowper-Smith would be entitled to purchase her one-third interest in the Cadboro Bay Property at fair market value.

Issues

- [5] This action raises the following issues:
1. Was the transfer and the Declaration of Trust the result of undue influence?
 2. What was Elizabeth Cowper-Smith's intention when transferring various assets to Gloria Morgan? Does Gloria Morgan hold these assets in resulting trust?
 3. Is Max Cowper-Smith entitled to purchase Gloria Morgan's one-third interest in the Cadboro Bay Property at fair market value?

Evidence and Credibility

- [6] Elizabeth Cowper-Smith is survived by three children: the plaintiffs, Max and Nathan Cowper-Smith, and the defendant, Gloria Morgan. Elizabeth Cowper-Smith was predeceased by her husband, Arthur Cowper-Smith, in 1992.
- [7] For ease of reference, I will refer to the family members by their first names.
- [8] Elizabeth moved to Victoria from St. Paul, Alberta in her teens and married her husband Arthur in 1945. She had limited education, but completed at least Grade 5. She and her husband acquired the Cadboro Bay Property and raised three children there: Gloria, born in 1946; Max in 1951; and Nathan in 1954.
- [9] Elizabeth was a religious woman. She was a member of the Pentecostal church and was active in the church throughout her life. The church was a large part of her life. She and Arthur had a traditional marriage. She worked only briefly outside the home. During his life, Arthur handled all financial matters. Elizabeth deferred to her husband.
- [10] Each of her children describes her as loving, supportive, and very family-oriented. She was proud of her children.
- [11] Arthur died in December 1992 at 73 years of age. His will provided his wife with a life estate in his assets, to be divided equally between the children on Elizabeth's death. In addition to the assets that passed in his estate, Arthur held the Cadboro Bay Property, investments and bank accounts jointly with Elizabeth. These passed to her as the surviving joint tenant.
- [12] Nathan and Max both testified about a discussion with their father just prior to his death. Arthur said that he wanted to talk with Nathan, Max, Max's wife Adrienne, and Elizabeth. Arthur said that he and Elizabeth did not want any fighting between the children. They had agreed and made similar wills. Everything in his estate would go to Elizabeth for her life. After Elizabeth died, everything would be divided equally between the children. Elizabeth nodded and said, "yes".
- [13] Gloria received a degree in art and education from UBC in 1976. She worked in Comox between 1972 and 1980. She is a potter. She married Dr. Morgan in 1972. They have also raised their family in Victoria. They live a few minutes' walk from the Cadboro Bay Property and also have property at Shawnigan Lake where they summer.
- [14] Max attended university, first in New Zealand, then in Liverpool, England, obtaining his law degree in 1974. He was called to the bar in 1975 and became a member of Grey's Inn, one of the four Inns of Court in London. He practiced in England until 2007. Max's financial life has not been smooth. He described his practice as "boom and bust". His parents had provided him with some loans before his father died. Serious financial problems started for him in 1993. One creditor obtained a judgement against him. He became depressed, consumed large amounts of alcohol, and smoked marihuana. These problems caused marital difficulties and ultimately his marriage ended. In 1999, Max's uncle, David Cowper-Smith,

suggested that Max go bankrupt, or they (which I understand to be David and Gloria) would take steps to protect Max's father's estate from creditor claims by setting up a trust. In 2000, Max started to earn money again and was able to resolve his creditor problems. By 2006, Max was earning what he considered to be good money. He had an active social life, good friends, and was close to his children. He was employed and was living in a three bedroom cottage in the country. He had sufficient income to meet his needs.

[15] Nathan received an arts degree from the University of Victoria. In 1991, he obtained his masters of education in counselling psychology from the University of Alberta. He was employed by the Alberta government, working with abused children. Throughout the 1990s, Nathan would visit his parents, and later his mother, regularly, three weeks in February and a month in the summer. His common law partner, David, would accompany him on some of his visits. Elizabeth was not happy that her son was gay and would ask, "do you have to be gay?"; but they did not argue. Arthur accepted that Nathan was gay. Over the years, Nathan helped his mother look after the house and she was always happy to see him. In late 2000, Nathan's relationship with his partner David ended. Nathan became depressed and quit his employment with the Alberta government. He moved to Victoria to live with his mother in December 2000. He did odd jobs around the house, as he always had, and helped a contractor build a basement suite in Elizabeth's house. To his mind, all was going well, his mother was happy to have him live with her. However, in early 2001, his mother began to get upset, saying, "you are trying to take my house and have gay parties". He would calm her, reassuring her that he those were not his intentions.

[16] In February 2001, Nathan received a sealed envelope from his mother in Gloria's handwriting, which said, in part:

Today there was a big problem. Your shouting and abuse toward Mother was upsetting to us. This is unexceutable and will not be tolerated. As the house belongs to mother exclusively these are the things that she expects.

1. No shouting or raising your voice.
2. No entertaining Gay Males in the house at all.
3. Reasonable hours for sleeping.
4. No expectation of quietness during normal waking hours 7am - 10pm.

As your helpfulness and work around the house has given you a sense of entitlement to the house and conduct therein, we suggest you stop all work on the house.

Gloria Morgan

with love,

Mother

Enclosed please find a Cheque for [\$]500.00[.]

[17] Nathan was surprised by the letter. He and his mother had been getting along, even though his mother did not like him to sleep in or go out late. He did not understand the comments about entitlement and continued to work on the renovation. It was his perception that his mother would become agitated and raise concerns about him taking the house after she had spent time with Gloria. He said that he confronted his sister about the letter and asked her why she did not come to the house and talk to him. She refused to talk to him and threatened to call the police.

[18] In mid-March 2001, the renovation was nearing completion. Gloria phoned and suggested that Nathan go to England, leaving the next morning. Nathan was reluctant, but Gloria was insistent, so he accepted her offer of a ticket to England.

[19] While he was in England, Nathan received a letter from Gloria, dated April 2, 2001, saying, in part:

We have come to the conclusion that it is not in anyone's best interest to have you continue to live in Mother's house. Therefore, we have retained an independent lawyer to deal with the problem.

If you need a few days to organize your move let us know at once. Your mother may be prepared to give you a little time to complete your move.

...

We are not willing to discuss this. If you would like to discuss this with our lawyer we will give you her name.

[20] He tried to phone his mother and Gloria several times, but got no answer. In mid-April 2001, he returned to Victoria. He went to his mother's house several times, but she was not there. On one occasion, his mother did answer and handed him a type-written letter. That letter said, in part: "you are my son and I love you... I can not live and share the turmoil of your life any longer... No Nathan, you cannot live here any longer." Nathan returned to England.

[21] In June 2001, he travelled back to Victoria. He went to the Cadboro Bay Property and found that his key did not work in the lock. No one was at home. He phoned Gloria who said that he could not stay at the house. His belongings were still in the house. He obtained tools from a neighbour and let himself in. The following morning, Gloria arrived with the police and he was escorted from the property.

[22] There is a note in Elizabeth's handwriting, dated June 15, 2001, which seems to reflect how upset she was by these events. The note is semi-coherent and her handwriting is shaky. It contains the following:

Wedday - Charlie called Gloria and Gloria called the police on Weday broke and Nathan stayed at the house that night and he broke in later and Police came and Pator Mic came to talk to Nathan. They left him and locked the house and we don't know where he was for the night.

Thursday - 10 poor me - poor me.

[Emphasis in the original.]

- [23] Nathan did not see or speak with his mother for more than a year after April 2001. Max encouraged him to stay away to avoid further police involvement. He lived with his god-mother, looked for work, lived on welfare, ate from the food bank. In December 2002, he ran into his mother by chance. His niece (Gloria's daughter) was driving the car. She immediately began to phone the police. She desisted when Elizabeth told her that she wanted to speak with Nathan. He and his mother talked for about 20 minutes. After that, he did not try and contact her, as he did not want to put pressure on her.
- [24] In 2003, the Alberta government's hiring freeze ended and Nathan was able to obtain employment in Edmonton. Before he left, his mother invited him, his new partner Chris, and his god-mother to her house. They had tea and chatted. After this meeting, Nathan did not contact his mother. In 2005, she contacted him again. They met at a restaurant. She said that she was sorry, that this separation was not what she had wanted. She asked him to forgive her. He told her that he knew it was not her fault, that it had been Gloria's doing. Elizabeth said she wanted Nathan to come back and help around the house as he used to do, so he returned to his routine of twice yearly visits. He visited twice in 2006, five or six times in 2007 and four or five times in 2008.
- [25] In 2005, Nathan learned that the title to the house was held in joint names, with Gloria and Elizabeth on title. He and Gloria had an argument. Gloria said that she was just trying to protect Elizabeth, that the joint title was to "ease the estate", taxes, etc., but the estate would still be divided one-third to each of the children. In 2006 or 2007, Nathan recorded a telephone conversation with Gloria in which she assured him that he would receive one-third of everything.
- [26] Meanwhile, in February 2001, David Cowper-Smith had prepared a new will for Elizabeth. David was Arthur's brother. He practiced law in Alberta. He moved to Victoria to retire. While in Victoria, he continued to practice law, on a semi-retired basis, as I understand, and did some estates work.
- [27] In this will, Gloria was named as executrix and trustee and was to receive half of the estate. The balance was to go to Max and Nathan, if Gloria saw fit:
- In the event that my Trustee is of the opinion that my children Nathan Cowper-Smith and Max Cowper-Smith or either or both of them have conducted themselves during my lifetime in a manner consistent with what she considers reasonable and proper toward me and herself she may deliver to them during each of their lifetimes from time to time such amounts out of the balance of my estate as she sees fit.
- [28] On March 31, 2001, David contacted a lawyer, Donna Iverson. Ms. Iverson's notes of that conversation include:

sister-in-law has a prob

having trouble w/son

...

he has no decency

Dave sugg'd she change will w/ everything to daughter w/ daughter to give to sons what she feels is reasonable

will intended to be only temp.

Dave sugg'd I write a [letter] while he's in England

Dave not sure if dangerous

he brings homosexual friends [notwithstanding] his mother

...

M[other] wants no contact

sister or [Donna Iverson]

if contact will be advising her to apply for Peace Bond

[29] On May 1, 2001, Gloria and Elizabeth attended Ms. Iverson's office. Gloria was there for much of the meeting. After she left, Elizabeth said that Gloria was always there to help her and she felt that they [Max and Nathan] really wanted the house. Elizabeth said that she wanted the house in joint tenancy with Gloria and the balance of the estate divided equally.

[30] On May 15, 2001, Ms. Iverson received a phone call from Gloria, advising her that her mother wanted "all", the house and investments, held in trust.

[31] On May 30, 2001, Ms. Iverson met with Elizabeth alone. In that meeting, she told Ms. Iverson that she wanted "all to go to Gloria to do with as she feels proper". Ms. Iverson's notes indicate that she asked Elizabeth how she would feel if Gloria kept everything. The response is noted as "Mrs. C-S is confident Gloria is kind enough that she would do the right thing".

[32] Ms. Iverson had a conversation with Gloria, asking Gloria about her mother's investments. In that conversation Ms. Iverson noted "Gloria wonders re changing if [situation] changes: I [said] it can indeed be [changed]."

[33] Ms. Iverson made arrangements for Elizabeth to meet with another lawyer, George Easdon, for independent legal advice. She prepared a transfer of the Cadboro Bay Property, a declaration of trust, a property purchase tax form, and a will for him to review with Elizabeth. In her cover letter to Mr. Easdon, she advised him "I understand that it is Mrs. Cowper-Smith's intention that her assets will become Mrs. Morgan's on her death."

[34] Ms. Iverson testified that she was satisfied that these represented Elizabeth's wishes, not Gloria's.

[35] On June 22, 2001, Elizabeth executed three documents at Mr. Easdon's office:

1. A land title transfer document transferring her interest in the Cadboro Bay Property into joint names with Gloria;
2. The Declaration of Trust; and
3. A will which simply appointed Gloria as executrix and revoked all previous wills.

[36] The Declaration of Trust provided:

A. The Trustee is the daughter of the Beneficiary.

B. The Beneficiary is the registered owner of the property located at 3782 Cadboro Road (the "Property").

C. The Beneficiary resides at the Property.

D. The Trustee is to be registered on the title of the Property as a joint tenant with the Beneficiary. This is being done as part of the Beneficiary's estate planning.

E. The Beneficiary is the owner of savings and investments ("the Investments").

F. The Beneficiary intends to transfer the Investments to herself and the Trustee as joint owners with a right of survivorship. This is being done as part of the Beneficiary's estate planning.

G. The Trustee has agreed to hold her interest in the Property and the Investments as a bare Trustee without discretion, in trust for the beneficiary, subject to the provisions of this Agreement.

Now therefore in the consideration of the premises and of the covenants herein contained, the parties agree as follows:

The Property

1. The Trustee does and shall stand seized of her interest in the property as mere nominee in trust for the Beneficiary, the Beneficiary's heirs, successors and assigns, forever, and shall only transfer or dispose of, or otherwise deal with her interest in the property in such manner as the beneficiary lawfully directs, without limiting the generality of the foregoing, the Trustee shall transfer her interest in the property to the Beneficiary forthwith upon a request by the Beneficiary that she do so.
2. The Trustee agrees not to do any transaction, act or thing relating to the Property without having first obtained the consent, authorization and direction of the Beneficiary.

3. The Beneficiary agrees that she will at all times indemnify and save harmless the Trustee from any and all liability however arising out of or in connection with the property and will reimburse the Trustee for all expenses and costs incurred by her in holding the property on behalf of the beneficiary, and provided the Trustee acts in good faith, she shall not be responsible for or held liable for exercising or failing to exercise her duties hereunder.
4. Upon the death of the Beneficiary, the Trustee will be entitled to the Property, absolutely.

The Investments

5. The Trustee does and shall stand seized of her interest in the Investments as mere nominee in trust for the Beneficiary, the Beneficiary's heirs, successors and assigns, forever, and shall only transfer or dispose of or otherwise deal with her interest in the Investments in such manner as the Beneficiary lawfully directs. Without limiting the generality of the foregoing, the Trustee shall transfer her interest in the Investments to the Beneficiary forthwith upon a request by the Beneficiary that she do so.
6. The Trustee agrees not to do any transaction, act or thing with or relating to the Investments without having first obtained the consent, authorization and direction of the Beneficiary.
8. Upon the death of the Beneficiary, the Trustee will be entitled to the Investments absolutely.

[Italics added by hand on original document.]

[37] The will provided simply:

I hereby revoke all previous Wills and Codicils of every nature or kind whatsoever made by me.

[38] Mr. Easdon testified that he did not recall meeting with Elizabeth when she executed the documents, so he gave evidence based on his usual practice. He would have explained the documents, including the concept of joint tenancy and the right of survivorship. With respect to the Declaration of Trust, he would have told Elizabeth that Gloria would inherit the assets on her death and they would not have to go to probate, that if Gloria pre-deceased her, her estate would not be affected, and that there was no interest being transferred to the trustee with this instrument. If he had been concerned that Elizabeth was being unduly influenced, he would not have signed the document. He knew that the documents had been drafted by Ms. Iverson. She did not raise any concerns regarding undue influence. There was no explanation for transferring everything to Gloria. Gloria was telephoned during this meeting, but he had no idea of the reason for the call. It was not his practice to ask the client her reasons for doing what she did or to discuss the merits.

[39] In January 2002, Ms. Iverson drew a new will for Elizabeth which revoked the June 2001 will. The 2002 will made Gloria trustee and divided the estate equally between the three children. The notes of her meeting with Elizabeth in which these instructions were provided do not include any discussion of what is to be done with the trust deed, no note of what is passing in the estate, no note of what is to happen to the house. Ms. Iverson testified that she would

not necessarily discuss which assets were to pass through the estate and which would not. She said that there was no discussion about assets that had been transferred into joint names.

- [40] At various times between May 2004 and August 2010, all of the Investments were transferred into joint names with Ms. Morgan.
- [41] Paul Scambler testified that he had acted on behalf of Gloria in her capacity as executrix for the estate of her father and of her mother. He wrote to David Humphries who acted on behalf of Max and Nathan on August 24, 2010, confirming that Elizabeth's will provided for a three way division of Elizabeth's assets amongst her children and that Gloria confirmed that she had been added as a joint owner on the Cadboro Bay Property on the advice of lawyers "to safeguard estate assets and to ease in the administration of her mother's estate. As she advised Max and Nathan, the Cadboro Bay Property forms part of Mrs. Cowper-Smith's estate and will be dealt with accordingly." He said that, until April 2011, there was no mention of the Declaration of Trust. By April 2011, relations between Gloria and her brothers were acrimonious and litigation had been discussed.
- [42] On September 2, 2010, Mr. Scambler wrote to Mr. Humphries, listing the accounts held by Arthur or Elizabeth. He did not say that any of the accounts were held jointly with Gloria. Mr. Scambler said that he could not recall if he knew that some or all were held jointly. Gloria was copied to the letter and did not advise him that the letter was incorrect. The Cadboro Bay Property was appraised on February 2, 2011.
- [43] On February 22, 2011, Mr. Scambler again wrote to Mr. Humphries, referring to the appraisal, stating that the financial institutions had been instructed to collapse the Investments and that all proceeds were to be paid to his firm in trust, presumably in furtherance of distribution under the will. He testified that Gloria had given no indication that she intended to keep the home and investments as her own.
- [44] On March 24, 2011, Mr. Scambler emailed Gloria:

Further to our conversation of yesterday:

- 1) you agree that all joint accounts relating to you mother or father's estate will form part of the assets to be distributed
- 2) the house will form part of the assets to be distributed but will be sold and not offered to Max

If I am wrong on these matters please advise.

And then you will arrange to have the proceeds of each account delivered to me ASAP?

He testified that the email reflected their conversation of the day before.

- [45] He said that litigation was threatened because Gloria had never performed an accounting of her father's estate (although she had acted as trustee for almost 20 years and Max had repeatedly asked for an accounting) and because no steps were being taken to divide her mother's estate in thirds, as Mr. Humphries had been advised would happen. The two were proceeding in tandem.
- [46] On March 31, 2011, Gloria emailed Mr. Scambler, asking if he had spoken with Ms. Iverson or Mr. Easdon. He received Mr. Easdon's file on April 8, 2011 and sought instructions from Gloria regarding the Declaration of Trust.
- [47] Elizabeth's general physician, Dr. D. L. Woodburn, gave evidence. Elizabeth had been his patient since 1991. He described her as pleasant and optimistic with simple tastes. She enjoyed gardening, her home, and her family. For some years before 2001, Elizabeth had been worried about her memory, but he detected nothing of concern. On September 20, 2001, Elizabeth said she had some anxiety over her memory problems. She wondered if it was a sign of dementia or due to her problems with her son. She said that her son moving in had caused problems. She said that he was gay, angry, and had moved out. Dr. Woodburn performed a mini mental state exam (MMSE) memory test. Elizabeth scored perfectly. On April 15, 2002, Gloria attended with her mother. Elizabeth was upset that her family was in turmoil. The notes of that meeting state:

they see him as expecting the house and assets, etc.

they say that they had no idea of his lifestyle

Nathan has stated that Gloria needs to go to therapy

Gloria stated her intent to protect her mother's plans

Nathan makes himself unavailable and maintaining control

- [48] Elizabeth attended the doctor again on Sept. 9, 2002. The notes of that attendance state "sent in by son d/t reduced [downward arrow] cognition and memory loss as seen by family." Again the MMSE elicited no problems.
- [49] Max testified that he had discussions with his mother in 2002 about her estate. She told him that she left everything equally to the three children
- [50] In 2003, Max travelled to Victoria with his fiancée. Gloria threw a party. Things went so well that they returned in the summer with his fiancée's children. He returned again in 2005. Elizabeth's health was declining. Gloria was saying that Elizabeth needed to go to a home. Elizabeth was adamant that she did not want to go. There were only three options: a home, a caregiver, or a family member to live with Elizabeth. Gloria was adamant that Nathan not live with Elizabeth, so Max said he would consider doing so. Over the next several months, Max had various discussions with Gloria about moving and the conditions on which he would consider doing so. He eventually concluded that moving to Victoria was the best

option. However, he needed reassurance from Gloria to his conditions:

- He would not come unless he could live in the Cadboro Bay Property permanently;
- He would be able to acquire Gloria's one-third interest in the house;
- He would receive cash for Elizabeth's expenses;
- He would have use of Elizabeth's car;
- He would receive funds for food and day-to-day expenses;
- He would be reimbursed for the expenses of moving and storing his furniture; and
- He would receive funds for flights to England every year.

[51] He met with Gloria in July 2007 and she agreed to his conditions. He moved to Victoria and into the Cadboro Bay Property in November 2007. He bought food, cooked meals, cleaned, and maintained the garden and house. By 2008, he also took care of Elizabeth's personal hygiene. She required constant attention. He drove her wherever she needed to go, such as church or appointments. If Max went away, Nathan would come to stay with Elizabeth. For the first while, things went smoothly with Gloria, she paid the expenses as agreed and did not demur. In 2009, her attitude changed, she did not provide funds as readily. She would say, "I haven't been to the bank" or "I'll give it to you later". In discussions regarding the title to the house, Gloria told Max that she held it in joint title with their mother simply to ease the administration of the estate.

[52] By October 2009, Elizabeth's health was declining badly. With Gloria less supportive and more difficult about covering expenses, Max decided to write to her. He requested \$1,500 per month for caring for Elizabeth, although that had not been discussed originally. Until then, he had been comfortable with the original arrangement and did not ask for compensation. Gloria did not respond.

[53] Elizabeth died in August 2010. Max asked Gloria what the situation was now. She said everything would be divided in thirds. In January 2011, they had another conversation in which Gloria confirmed that everything would be divided in thirds and Max could buy her share of the house. Max has continued to live in the Cadboro Bay Property since 2010, pending the outcome of this litigation.

[54] Adrienne Cowper-Smith also testified. She is Max's former wife. She testified that she married Max in 1976. They divorced in the late 1990s. She knew his parents well. His parents visited them in England and they visited Canada. They took holidays together. Approximately every two years, Max's parents would come to England. They came when he got his degree and when he became a barrister. Adrienne described Max's parents as being thrilled with him. Max's parents became close to her parents. She described Arthur and Elizabeth as very close. He took care of the cars and finances. She was a homemaker. She cooked, sewed, and gardened. She deferred to Arthur.

- [55] Adrienne also knew Gloria. When they travelled to Victoria to visit Max's family, Gloria would be in charge of whatever they were doing, regardless of what she and Max wished.
- [56] When Arthur became ill, she and Max came to Victoria. In October 1992, Arthur was out of the hospital. He wanted to talk with Nathan, Max, Adrienne, and Elizabeth. He said he did not want any fighting among the children and that he and Elizabeth had agreed that everything would be divided equally. He said, "when Beth goes everything would be shared equally". Elizabeth agreed that everything would be divided equally between the three children.
- [57] They returned when Arthur died in December 1992. She said that the effect on Max was disastrous. He became massively depressed. It was the start of his economic downward spiral. He was drinking and impossible to reach.
- [58] In May 2007, she and Max spoke. He told her that he would be moving to live with his mother; otherwise she would have to go to a home. Adrienne asked if he was sure. He would be leaving behind a nice little cottage and his children. He said that he would be able to retire in Victoria and would be able to buy Gloria out of the family home.
- [59] I found Adrienne Cowper-Smith to be a credible and independent witness. There is no suggestion that she has any interest in the outcome of the litigation. Her evidence was unshaken. I accept her evidence.
- [60] Cynthia Chelle testified. She was a neighbour of Elizabeth's from 1988 until her death. From her house, she had a clear view of Elizabeth's front door, garage, and part of her backyard. Their relations were friendly. Ms. Chelle described Elizabeth as a happy, simple person. She was loyal to her family and to her church. She loved and was proud of all of her children. She greatly admired Gloria. Elizabeth would not contradict Gloria. After Arthur died, Elizabeth relied more on Gloria. Gloria almost always came up in their conversations.
- [61] Ms. Chelle observed that Nathan came to visit his mother every summer like clockwork. He did all of the maintenance on the house. Elizabeth was very positive about the work that Nathan did around the house. She was very happy when Nathan was coming to live with her. She was happy to have company. Ms. Chelle described Nathan as very loving toward his mother and congenial to the neighbourhood.
- [62] After Nathan left, Elizabeth talked more about not wanting to leave her home. She was upset and did not want to move.
- [63] Ms. Chelle was aware that Max had moved into his mother's house. Elizabeth was delighted. She knew that she now could stay in the house and was relieved and happy. Ms. Chelle said that Max was very respectful and kind to his mother and had a huge amount of patience with her. It was a full-time job to look after Elizabeth.
- [64] I found Ms. Chelle to be a credible and honest witness. Although she is acquainted with all of the parties, there was no suggestion of bias in her evidence. I accept her evidence.

[65] I accept the evidence that I have set out above.

[66] I prefer the evidence of Max and Nathan over the evidence of Gloria. Although Max and Nathan's evidence varies on some points, their evidence is largely consistent with each other and the inconsistencies are minor, as one would expect with witnesses recalling events over many years. Adrienne Cowper-Smith's evidence was consistent with that of Max and Nathan, particularly as to Max's relationship with his parents, his father's discussion with them about his estate before his death, and as to Max's understanding when moving to Victoria that he could buy Gloria's interest in the house.

[67] I found Gloria to be an unreliable and unbelievable witness. She was hostile, argumentative, and evasive. Significant elements of her evidence were patently untrue, as when she said that Max was merely visiting their mother between 2007 and 2010 and did not move into the Cadboro Bay Property until June or July 2010. She said that no one told her that Max wanted the Cadboro Bay Property, even though the transcript of her conversation with Nathan (which she says likely occurred in 2007) says:

N: Max wants the house and we have both agreed on that[.]

G: Fine, then you have to buy me out.

She testified that she would never have agreed to sell the house to Max although in this conversation she indicates that she will.

[68] In cross-examination, she insisted that Elizabeth had never been diagnosed with Alzheimer's disease. Her discovery was put to her where she said:

Q Thank you. I understand that, at some point in the last 15 years of your mother's life, she developed Alzheimer's; is that correct?

A Yes.

Q Do you know --

A Just hold on. 15 years? No.

Q I said some time in the 15 years before her death. Can you tell me when she developed Alzheimer's?

A I would think that probably it became very apparent in 2007.

Q Do you know if a diagnosis was made by her doctor at any point?

A Yes

Q So he made a diagnosis. Do you know when he made that diagnosis?

A 2007.

She justified the clear contradiction by saying "you can't diagnose Alzheimer's without an autopsy", treating her testimony as a word game. I have concluded that she is blinded by her animosity toward her brothers. I have accepted some parts of Gloria's evidence, as set out below, where the evidence was not clearly in her favour, so more likely to be reliable, or where it is not contradicted by other evidence.

[69] Much of Max's cross-examination was consumed by detailed questioning about an earlier occasion when he was in litigation with a landlord, trying to get an adjournment and lied to the court in an attempt to do so. He was caught in the lie and justly criticized by the judge. He admitted to this event in his evidence in chief and in cross-examination. He was clearly embarrassed. That he lied several years ago to the court does not mean that he is doing so before this Court. The evidence that he gave at trial was not undermined. Moreover, his evidence is consistent with common sense. It makes sense that he would not leave a job and life which he clearly enjoyed in England to move to Victoria to look after his aged mother whose health was deteriorating without compensation unless he had been told by Gloria that she would sell her interest in the house to him. Otherwise he would be giving up much in return for nothing, looking after his mother without compensation, getting expenses only from Elizabeth's account which was controlled by Gloria.

Undue Influence

[70] The plaintiffs say that there are two classes of transactions that may be set aside on grounds of undue influence. The first is where the court is satisfied that the gift was the result of undue influence. The second is where the relations between the donor and donee have at the time of or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor.

[71] The plaintiffs say that to trigger a presumption of undue influence, the court must first consider whether the potential for domination is inherent in the nature of the relationship itself. The plaintiffs say that, while the presumption does not automatically apply as a result of familial relationship, it may apply if the relationship between elderly parent and child is characterized by dependency.

[72] The plaintiffs say that there are number of facts relevant to the question of whether the potential for domination existed in the relationship between Gloria and Elizabeth:

- (a) While Arthur was alive, Elizabeth relied on him to manage their financial affairs;
- (b) After Arthur's death, Gloria began assisting her mother with the same sort of things, looking after investments, doing her tax returns;
- (c) After Arthur's death, Elizabeth relied on Gloria for advice and information;
- (d) In the spring of 2001, Elizabeth was spending a significant amount of time with Gloria;
- (e) Elizabeth told Ms. Iverson that Gloria was always there to help her;

- (f) Ms. Chelle observed that Elizabeth admired her daughter and relied on her daughter's judgment and opinion;
- (g) Elizabeth brought letters she had written to Max and Nathan to Gloria to see how she felt about them;
- (h) Nathan testified that when Elizabeth returned from visiting Gloria she was upset about things between herself and Nathan;
- (i) Gloria says that in the spring of 2001 she was concerned about her mother and her mother's best interests. At this time, Gloria became:
 - (i) Initially the primary (and possibly only) beneficiary under her mother's February 9, 2001 will;
 - (ii) Later, a joint owner of her mother's home, with the home being gifted to her on her mother's death; and
 - (iii) A possible joint owner on all of her mother's investments, with the investments being gifted to her on her mother's death.

[73] The plaintiffs submit that these factors show a relationship between Gloria and Elizabeth that gives rise to a presumption of undue influence. They say that once the circumstances trigger the presumption, the donee must show that the donor entered into the transaction as a result of her own full, free, and informed thought. Legal advice alone may not be adequate to successfully rebut the presumption. It is not enough for an independent solicitor to carry out the proposal which had been previously settled. There must be some objective advice on the merits and prudence of the transaction. The plaintiffs say that Mr. Easdon's advice did not meet this requirement. They say that the presumption has not been rebutted.

[74] The defendant does not concede that the circumstances of this case raise a presumption of undue influence. In the alternative, the defendant says that the presumption has been rebutted. The presumption need only be rebutted on a balance of probabilities.

[75] The defendant argues that she had no understanding what the Declaration of Trust meant and that her statements from June 2001 to August 2010 to the effect that she understood that all assets would be shared equally, suggests that she did not exercise undue influence on her mother. She says that her evidence that she had no understanding of the meaning or memory of the execution of the Declaration of Trust is corroborated by her behaviour.

[76] She says that I should accept her evidence that she was put on inquiry as to why Mr. Easdon rendered an invoice to her mother and that in turn led to Mr. Scambler learning of the Declaration of Trust. It was at this point that she decided to maintain a claim to the Cadboro Bay Property and the Investments that belonged to her by right of survivorship. She says that with this in mind, she clearly did not actually influence Elizabeth to create the current situation.

- [77] The defendant argues that Elizabeth had independent legal advice or the opportunity to obtain independent legal advice. She acknowledges that Mr. Easdon's evidence falls short of what one would have hoped for in terms of knowing exactly what was said to Elizabeth. She accepts that he may not have questioned her about the merits of the transaction and it may have been preferable had he done so. She argues, however, that the evidence of Ms. Iverson reveals that the merits were understood by Elizabeth. Moreover, she says that even imperfect independent legal advice may be sufficient to rebut the presumption in conjunction with other evidence that the transaction was in accord with the transferor's wishes.
- [78] She argues that it is clear from the evidence of Ms. Iverson that Elizabeth knew and appreciated what she was doing.
- [79] She argues that, while her mother may have been influenced by her in various aspects of her life, there is nothing improper in that. The transaction should be set aside only if the influence was undue. The court has to be satisfied that the transaction was entered into contrary to the true will and intent of the person acting under the influence of another.
- [80] She acknowledges that Elizabeth was undoubtedly influenced to some degree by David. She was also influenced by Ms. Iverson and the relationship between herself and her daughter as well as her relationship with her sons.
- [81] She argues "that at the end of the day, the court may be unhappy with the effect of what has happened." However, she says that the court should focus on the timeframe of June 2001 and not October 2014.
- [82] She argues that she has demonstrated that at least three of the five factors set out in *Stewart v. McLean*, 2010 BCSC 64 at para. 97 and referred to in *Modonese v. Delac Estate*, 2011 BCSC 82 at para. 119, aff'd 2011 BCCA 501, as rebutting the presumption of undue influence have been made out.
- [83] In *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at 378-379, 381, the Supreme Court of Canada considered undue influence. There the court said:

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.

Having established the requisite type of relationship to support the presumption, the next phase of the inquiry involves an examination of the nature of the transaction

[I]n 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. [T]he plaintiff must be shown to have entered into the transaction as a result of his own "full free and informed thought"[.]

Since the trust instrument is unquestionably more akin to a gift or bequest than a commercial transaction, the existence of the required relationship without more is sufficient to trigger the presumption. It remains, therefore, to be determined whether the presumption has been rebutted. In making that determination, it is necessary to conduct a "meticulous examination of the facts"[.]

[84] In *Stewart* at para. 97, Mr. Justice Punnett summarized factors that may be considered to rebut the presumption of undue influence:

[97] To rebut the presumption of undue influence, the defendant must show that the donor gave the gift as a result of her own "full, free and informed thought": *Geffen* at 379. A defendant could establish this by showing:

- 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).

[85] In *Coish v. Walsh, 2001 NFCA 41* at para. 23, the court said:

The trial judge also correctly set forth the law respecting the manner in which a presumption may be rebutted. [F]actors to be taken into account in considering whether or not evidence of legal advice given to the granting party is sufficient to rebut the presumption. At paragraph 24 of *Fowler Estate [v. Barnes (1996), 142 Nfld. & P.E.I.R. 223 (Nfld. T.D.)]*, Green, J. identified factors which may affect the character of legal advice to be as follows:

1. Whether the party benefiting from the transaction is also present at the time the advice is given and/or at the time the documents are executed.
2. Whether, though technically acting for the grantor, the lawyer was engaged by and took instructions from the person alleged to be exercising the influence.

3. In a situation where the proposed transaction involves the transfer of all or substantially all of a person's assets, whether the lawyer was aware of that fact and discussed the financial implications with the grantor.
4. Whether the lawyer enquired as to whether the donor discussed the proposed transaction with other family members who might otherwise have benefited if the transaction did not take place.
5. Whether the solicitor discussed with the grantor other options whereby she could achieve her objective with less risk to her.

[Emphasis in the original, citations omitted.]

- [86] Was the relationship between Gloria and Elizabeth one in which there was the potential for domination? I am satisfied it was.
- [87] Both Max and Nathan testified about Elizabeth's reliance on Gloria's judgment. Nathan testified as to his mother's response to visits with Gloria, how she would become agitated and say that he was trying to take her house. Adrienne testified that, even before Arthur died, Gloria was a dominant personality, people did what Gloria wanted. After Arthur died, Elizabeth relied even more on Gloria's judgment. By Gloria's evidence, she had to teach Elizabeth how to write a cheque. Elizabeth would even seek her advice about letters that she proposed to write to her sons (and Gloria would keep copies of the letters). Elizabeth's neighbour, Ms. Chelle, testified that Elizabeth admired Gloria. Elizabeth told her that Gloria ran the doctor's office and made financial decisions. When Gloria was present, Elizabeth would nod along with Gloria's views. Elizabeth would not contradict Gloria. After Arthur died, Elizabeth relied more on Gloria and Gloria was around more often. In the meeting of March 31, 2001, Elizabeth told Ms. Iverson that Gloria was always there to help her; that she spent a lot of time at Gloria's; that Gloria paid her bills. On May 30, 2001, she told Ms. Iverson that Gloria looked after her investments.
- [88] Letters to Max or Nathan from Elizabeth in this timeframe are written jointly in some cases with Gloria or are in Gloria's hand, signed by both. In other cases, Gloria writes on behalf of her mother, her uncle David, and herself.
- [89] All of the witnesses describe Elizabeth as a quiet, home-loving, family-oriented person who did not like conflict.
- [90] After Arthur's death, Gloria was the family member that Elizabeth spent most time with. She socialized with her frequently and trusted her to handle her banking and investments. Gloria prepared her tax returns. Elizabeth was deferential to Gloria. She did not like conflict. She sought Gloria's advice. I am satisfied that Gloria had the ability to dominate Elizabeth's will, whether through manipulation, coercion, or outright but subtle abuse of power. In my view, the relationship was one in which there was a potential for domination.

[91] Has the defendant rebutted the presumption of undue influence? Does the evidence satisfy me on the balance of probabilities that the Declaration of Trust and the transfer of the Cadboro Road Property into joint tenancy were the result of Elizabeth's full, free, and informed thought? I am not satisfied that they were.

[92] What constitutes undue influence?

[A]ll influences are not unlawful pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint. Importunity or threats, such as the [donor/beneficiary] has not the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort, these, if carried to a degree in which the free play of the [donor/beneficiary]'s judgment, discretion or wishes, is overborne, will constitute undue influence[.]

(Hall v. Hall (1868), L.R. 1 P. & D. 451 at 482 [Sir J.P. Wilde]).

[93] I have concluded that Elizabeth's will and judgment were overborne by Gloria's concerns in the spring of 2001. Gloria and David together put pressure on Elizabeth in the spring of 2001 to move her assets into Gloria's control, to make sure that her sons were kept at bay. It is clear that Gloria and her uncle David, were of the view that Nathan should no longer live with his mother. Rather than simply discuss it between themselves, that is, Gloria, David, Elizabeth, and Nathan, Gloria and David took steps to remove Nathan from the residence and Elizabeth's assets from his influence.

[94] I have accepted the evidence of Ms. Chelle that Elizabeth was always happy to see Nathan and got along well with him. He came every summer like clockwork. Elizabeth loved it. Nathan helped Elizabeth by doing repairs and maintenance around the house. She was proud of him and would say, "Look what he has done, isn't it beautiful." She was happy to have his company.

[95] Yet in the spring of 2001, David moved very quickly to prepare a new will for Elizabeth which left the entitlement of Max and Nathan to Gloria's discretion. The will was executed February 9, 2001, just a few weeks after Nathan arrived. It was presumably executed at Gloria's house because her neighbours were the witnesses. By February 9, 2001, Nathan had been in Victoria only a few weeks. He had been in the habit of staying with Elizabeth for three to four weeks, so it is surprising that she would have had such a strong reaction to Nathan staying with her that she felt the need for a new will. I think likely that the new will was driven by Gloria and David, who were consistently adverse to Nathan in the spring of 2001.

[96] Elizabeth's letters and statements are also inconsistent with her past reactions to Nathan's visits and inconsistent from day to day. In the summer of 2000, Elizabeth wrote a note to Nathan saying "Thank you for all the work you have done for me. I really appreciated you - you seem to know what to do." I accept Nathan's evidence that, in the spring of 2001, his

mother would be happy with him and with the renovation work he was doing until she spent time with Gloria. When she returned, she would be upset, saying he was trying to take the house and have gay parties.

- [97] I am satisfied that whatever discomfort Elizabeth may have felt with Nathan being gay, this did not affect their relationship before the spring of 2001. She accepted Nathan. He and his previous partner David had also stayed with Elizabeth without a problem. Yet, in the spring of 2001, their relationship quickly deteriorated to the point where Elizabeth (and Gloria) wrote, saying that she could not live with Nathan. Matters escalated again when Gloria had the police escort Nathan from the property. As Gloria acknowledged in cross-examination, Elizabeth was very upset by these events, as Gloria knew that she would be. The note that Elizabeth wrote at that time demonstrates how upset she was. In the note she not only describes herself as "poor me" but her handwriting and spelling are poor, and not representative of her abilities at the time. This note is an indication of the pressure on Elizabeth, who loved all of her family members, hated conflict, and wanted peace.
- [98] It is in this context that David contacted Ms. Iverson. He provided the initial instructions and gave her the background: Nathan had no decency; David was not sure if Nathan was dangerous; David was afraid for Elizabeth's health; Elizabeth wanted no contact with Nathan. This conversation undoubtedly set the tone for Ms. Iverson's first meeting with Elizabeth. Gloria was present for much of Ms. Iverson's first meeting with Elizabeth. Some of the information provided to Ms. Iverson was clearly false, such as that Max had to be begged to come when his father was dying; that he had largely rejected his family for over 30 years; that Max was doing "smack" when he was in Victoria.
- [99] On May 15, 2001, Gloria provided the initial instruction to Ms. Iverson that her mother wanted the house and investments to be held in trust (by Gloria). These instructions were confirmed by Elizabeth on May 30, 2001. At that time, Ms. Iverson asked Elizabeth how she would feel if Gloria decided to keep everything. Interestingly she did not say "that's exactly what I want" or "she can divide it as she wishes". What she said was she was confident that Gloria was a nice enough person that she would do the right thing. This suggests to me that Elizabeth did not want Gloria to keep everything and did not anticipate that she would do so.
- [100] Ms. Iverson was of the view that Elizabeth needed independent legal advice, so she made arrangements for Elizabeth to meet with Mr. Easdon for advice. Although Mr. Easdon provided advice with respect to the documents, he did not probe the reason for putting the assets into trust or provide any advice as to the proposed arrangement.
- [101] Turning to the factors listed in Stewart:

1. I am not satisfied that no influence was used in the transaction. In my view, both Gloria and David exercised their influence to the same end. I am satisfied that in the months leading up to and including the execution of the Declaration of Trust and transfer Elizabeth relied heavily on Gloria and took her advice. She also relied on David for his advice. Both influenced her to transfer the assets to Gloria's control.
2. The donor received independent legal advice but, as detailed below, I am not satisfied that the advice in this case was sufficient to rebut the presumption, to satisfy me that the transaction resulted from Elizabeth's free will.
3. Elizabeth did not have the ability to resist this influence. The two people she relied heavily on were both telling her that her sons (particularly Nathan) were after her assets and she should move them to Gloria's control. She was a person who deferred to those on whom she relied. She avoided conflict and wanted peace in the family. She would succumb to the pressure she was under and do what Gloria and David wanted to obtain peace in the family.
4. I am not satisfied that Elizabeth was fully aware of what she was doing. Her response to Ms. Iverson as noted above suggests to me that she may well have thought that all would still be divided equally between the children.
5. There was no acquiescence or confirmation by the deceased. The will that she prepared in January 2002 divided her assets equally between the three children. Unfortunately, Ms. Iverson did not clarify Elizabeth's intentions regarding the Declaration of Trust when the new will was executed. However, the new will suggests that Elizabeth did not intend to leave everything to Gloria. Moreover, Elizabeth later told Max that everything would be divided equally between them.

[102] Turning to the legal advice that Elizabeth received, and the factors identified in Coish:

1. Gloria was present for much of the interaction between Elizabeth and Ms. Iverson.
2. Both Gloria and David provided Ms. Iverson with information and instructions.
3. Mr. Easdon was not aware of the extent of Elizabeth's assets and did not discuss the financial implications of placing all of her assets in trust with a right of survivorship to Gloria.
4. Mr. Easdon did not ask Elizabeth about other family members who might have benefitted if the transaction did not take place.
5. Mr. Easdon did not discuss with Elizabeth the wisdom of the proposed transaction or other options whereby she could achieve her objective with less risk.

[103] As I have noted above, it is my view that Gloria was not alone in placing undue influence on Elizabeth. David also placed pressure on her. However, the pressure that overwhelms the donor's independent judgment need not come from the recipient or the recipient alone: *Bridgeman v. Green* (1957), Wilm. 58 at 65, 97 E.R. 22; *Re Marsh Estate* (1990), [1990] CarswellNS 95 at para. 47, 99 N.S.R. (2d) 221 (Prob. Ct.), aff'd 104 N.S.R. (2d) 266 (C.A.). In

addition, even if Gloria and David thought that they were acting for the best in pressing Elizabeth, good intentions do not alter a finding of undue influence. I am not persuaded that either was acting selflessly and in Elizabeth's interests in pushing Elizabeth to place the assets in Gloria's control. David had always disliked Nathan because he was gay. From Gloria's perspective, once she had the assets, she could do with them as she pleased. Gloria saw controlling her mother's assets as a means of controlling her brothers, as she said in her conversation with Nathan in 2007:

N: I am asking you why you have your name on the Deed to the family home.

G: because I do not want to put up with crap from you[.]

N: what does that have to do with anything?

G: because if I have the money then you won't be rude to me.

[104] In summary, the instructions given to Ms. Iverson and the advice that she provided to Elizabeth were influenced by Gloria and David to the extent that I have no confidence that Elizabeth had an opportunity to exercise her independent will and judgment. This circumstance was not corrected by the attendance before Mr. Easdon. He told her of the effect of the documents as he understood them, but did not discuss matters fully with her with a view to eliciting her own views and obtaining her own instructions.

[105] Given the pressure that Elizabeth was under and the level of conflict within the family, I am not satisfied that the Declaration of Trust and the transfer of title of the Cadboro Bay property were made without undue influence. Rather, I am of the view that the documents executed on June 22, 2001 were the result of undue influence and are set aside.

Resulting Trust

[106] Gloria concedes that she paid no consideration for the transfer to her of the Cadboro Road Property or the Investments. She accepts that this gives rise to a rebuttable presumption that she holds the assets in trust for her mother's estate.

[107] I have concluded that the Declaration of Trust was the result of undue influence, and does not reflect Elizabeth's intentions. As such, it is not evidence of her intentions.

[108] Such evidence as there is supports the conclusion Elizabeth intended that Gloria hold the assets in trust for her estate. The 2002 will, as evidence of intention, suggests Elizabeth intended assets to be divided equally. The will was made within 6 months of the date of the transfer of title and before the transfer of investments into joint names. (There is no challenge by any of the parties: the January 2002 is Elizabeth's last will and is valid.) There is also evidence that Elizabeth paid the taxes on the income from the investments and that Gloria did not take funds without her mother's approval. Max testified that his mother told him that everything would be divided equally

[109] In *Pecore v. Pecore*, 2007 SCC 17, the Court said:

[24] The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see *Waters' Law of Trusts*, at p. 375, and E. E. Gillese and M. Milczynski, *The Law of Trusts* (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.

[25] The presumption of resulting trust therefore alters the general practice that a plaintiff (who would be the party challenging the transfer in these cases) bears the legal burden in a civil case. Rather, the onus is on the transferee to rebut the presumption of a resulting trust.

[26] In cases where the transferor is deceased and the dispute is between the transferee and a third party, the presumption of resulting trust has an additional justification. In such cases, it is the transferee who is better placed to bring evidence about the circumstances of the transfer.

[44] As in other civil cases, regardless of the legal burden, both sides to the dispute will normally bring evidence to support their position. The trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention. Thus, as discussed by Sopinka et al. in *The Law of Evidence in Canada*, at p. 116, the presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities....

59 Similarly, I am of the view that the evidence of intention that arises subsequent to a transfer should not automatically be excluded if it does not comply with the *Shephard v. Cartright* rule. Such evidence, however, must be relevant to the intention of the transferor at the time of the transfer: *Taylor v. Wallbridge* (1879), 2 S.C.R. 616. The trial judge must assess the reliability of this evidence and determine what weight it should be given, guarding against evidence that is self-serving or that tends to reflect a change in intention.

[110] I am not persuaded that, when transferring assets into joint title with Gloria, Elizabeth intended that Gloria would receive those assets as a gift. Gloria has not rebutted the presumption of resulting trust. In my view, Elizabeth intended that all of the assets held in joint tenancy with Gloria would be divided equally between the children on Elizabeth's death.

Proprietary Estoppel

[111] The plaintiffs seek a declaration that Gloria is precluded from insisting on her right to deal with the whole of the Cadboro Bay Property as she wishes on the basis of the equitable doctrine of proprietary estoppel and seek a declaration that Max is entitled to purchase Gloria's one-third interest in the Cadboro Bay Property at fair market value.

- [112] The plaintiffs argue that the principle of proprietary estoppel may be founded on an agreement in principle or a mere expectation created or encouraged by the party to be bound, where the other party has acted to his or her detriment in reliance on the agreement or expectation. The question is whether upon the facts of the particular case it would be unconscionable for the person having the right sought to be enforced to continue to seek to enforce it.
- [113] The defendant argues that the claim stands or falls on the credibility of Max. She describes him as a self-professed liar and perjurer. She argues that the court should reject Max's evidence of his social life, cottage, and income in England. She argues that Max's letter of October 2009 "puts the lie" to an agreement in 2007. She argues that he voluntarily came to Victoria to escape his failed life in London. He came to Victoria to find a free home where his everyday requirements would be funded by his mother or his father's estate. As his mother became increasingly dependent, his response was to demand compensation from his sister. She says that the claim for proprietary estoppel simply does not exist and need not be considered further. She says that the claim was fabricated and that everything that Max said about it was a lie.
- [114] As I have indicated above, I accept Max's evidence with respect to the discussions that he had with Gloria in 2007 before he moved to Victoria. I accept the evidence that he set out his seven conditions before he was prepared to move to Victoria and that Gloria agreed to those conditions. The evidence of Nathan and Adrienne support Max's evidence in this regard. While Max's statements to Adrienne cannot be accepted for the truth of their contents, i.e., that Gloria agreed to his terms, it does provide evidence of his state of mind. It belies the argument that he simply made up this story for trial purposes or at some point after living with his mother became too difficult, possibly in October 2009. As I have said, I do not believe that Max would have moved to Victoria and left his life in England without Gloria's agreement to his terms. Otherwise, he was leaving a life which he found to be quite comfortable in return for little or nothing. By 2007, Elizabeth was clearly in decline. All would have known that she would continue to decline and that she would require increasing levels of assistance. It would make no sense for Max to leave England to care for his mother without some conditions. The conditions that he set forth make sense.
- [115] The Court of Appeal has recently considered the law with respect to proprietary estoppel in *Sabey v. Rommel*, 2014 BCCA 360:
- [25] The foundation of a claim in proprietary estoppel is an equitable right arising out of the conduct of the parties. In *Crabb v. Arun District Council*, [1976] Ch. 179 at 192-93, [1975] 3 All E.R. 865 (C.A.), Scarman L.J. stated the test in a claim for a proprietary right on the basis of equity:
1. Is there an equity established?
 2. If so, what is the extent of the equity?

3. What is the relief appropriate to satisfy the equity?

[26] Crabb is a leading case in the U.K. for the doctrine of proprietary estoppel and has been consistently applied by this Court: see, for example, *Zelmer v. Victor Projects Ltd.* (1997), 34 B.C.L.R. (3d) 125 (C.A.); *Trethewey-Edge Dyking District v. Coniagas Ranches Ltd.*, 2003 BCCA 197; *Sykes v. Rosebery Parklands Development Society*, 2011 BCCA 15.

[27] The bulk of the analysis in a claim for proprietary estoppel often takes place at the first stage--is there an equity established? It is at this stage that findings with regard to assurances, reliance and detriment are made. These requirements are also often referred to as part of a broader inquiry into whether it would be unconscionable for the person who has the legal right to continue to enforce it or to fail to make good on a promise to create a legal right in favour of someone else. For instance, courts frequently rely on the following statement from *Halsbury's Laws of England*, 4th ed. vol. 16 (London: Butterworths, 1992) at para. 1072:

The real test is said to be whether upon the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it. The belief on which the person seeking protection from equity relies need not relate to an existing right nor to a particular property. It may be easier to establish acquiescence where the right in question is equitable only. Where, on the hypothesis that liability has been established, the question is whether equitable relief should be withheld in the case of a continuing legal wrong, the true test is that the facts must be such that the owner of the legal right has done something beyond mere delay to encourage the wrongdoer to believe that he does not intend to rely on his strict rights, and the wrongdoer must have acted to his prejudice in that belief. The modern approach is a broad one and the tendency is to reject any classification of equitable estoppel into exclusive and defined categories.

[Emphasis added.]

[28] This statement was referred to by Madam Justice Newbury in her concurring reasons in *Trethewey-Edge Dyking District* at para. 64. In her view, based on the formulation in *Taylor's Fashions Ltd. v. Liverpool Trustees Co. Ltd.*, [1982] 1 Q.B. 133 (Ch. Div.), an equity is established if, first, the defendants by their words or conduct encouraged the plaintiff to believe that they did not intend to rely on their strict legal rights (at para. 70), and second, if, in all the circumstances, it would be unconscionable for the defendants to go back on the assumption they had allowed the plaintiffs to make (at para. 73). If these requirements were met, then the final question; what is the remedy appropriate to satisfy the equity (at para. 75).

[29] With regard to determining the appropriate remedy, Newbury J.A. reviewed many authorities and emphasized "the ability of the courts to fashion a remedy that will be appropriate but which also comports with the 'minimum equity' doctrine", that is, a remedy that achieves the minimum required to do justice between the parties (at para. 84).

[30] Although the test for proprietary estoppel has been framed in many different ways in the case law, it always bears the same essential qualities. In my view, they can be summarized as follows:

1. Is an equity established? An equity will be established where:
 - a. There was an assurance or representation, attributable to the owner, that the claimant has or will have some right to the property, and
 - b. The claimant relied on this assurance to his or her detriment so that it would be unconscionable for the owner to go back on that assurance.
2. If an equity is established, the court must determine the extent of the equity and the remedy appropriate to satisfy the equity.

[116] The claim for proprietary estoppel begins with an assurance or representation in relation to an interest in land. The assurance can be made through words or conduct and does not have to be as precise as it would need to be in order to give rise to a binding contract. The claimant's belief in the assurance must be reasonable. A finding of reliance does not necessarily lead to a finding of detriment and the court must be satisfied that there has been detriment because this is what gives rise to an unfairness. Reliance is a change in a person's conduct as a result of the assurance. Detriment does not flow automatically from reliance and detriment must be assessed on a holistic basis, looking at the overall benefits gained and losses suffered by the claimant. Once inequity has been established, the court must determine the extent of the inequity and the relief needed to satisfy it.

[117] The court referred to the decision of *Jennings v. Rice*, [2002] EWCA CIV 159. In that decision, Lord Justice Aldous included, at para. 36:

The value of that equity will depend upon all the circumstances including the expectation and the detriment. The task of the court is to do justice. The most essential requirement is that there must be proportionality between the expectation and detriment.

[118] I am satisfied that Max acted to his detriment in moving from England to Victoria, giving up employment income, the long-term lease of a cottage, his contacts with his children, and his social life to look after his aged dementing mother. He did so relying on Gloria's agreement to his conditions for the move. In doing so, he acted reasonably. His discussions with Gloria were not done in a moment, they covered several months.

[119] The relief that Max seeks is the right to purchase Gloria's one-third interest in the house. I consider the relief sought by Max to be the minimum required to satisfy the equity. In a sense it will cost Gloria nothing. That Gloria now would rather not sell to Max for personal reasons has no bearing on the equity, or the reasonableness, of the relief sought.

Admissibility and Use of Elizabeth Cowper-Smith's Letters

- [120] The plaintiffs argue that the contents of Elizabeth's letters are hearsay. They say that the letters do not go to her intention to make a gift to her daughter (by the documents executed in June 2001). At most, they are some evidence of her state of mind but not of her intention when signing the Declaration of Trust and transfer of the real property. They are not evidence of her intention to confer a gift on Gloria.
- [121] They say that a declaration as to state of mind is the traditional exception to the hearsay rule. They argue, however, that the letters are inherently unreliable because they were written under the influence of or with the assistance of Gloria. They say this is especially true of the typed letter; that the words and language are uncharacteristic of Elizabeth and Elizabeth did not have access to a typewriter or word processor. They say that, if the letters are admissible, they are only admissible to prove her state of mind at the time of writing and should be given little weight.
- [122] The defendant argues that Elizabeth's letters should be admitted for the truth of their contents and as evidence of her intentions.
- [123] Mr. Justice Groves considered the admissibility of such evidence at the trial level in *Modonese*.
- [124] In that case, he applied the principled approach as set out by the Supreme Court of Canada in *R. v. Khelawon*, 2006 SCC 57 at para. 2, where the Court said:
- [2] As a general principle, all relevant evidence is admissible. The rule excluding hearsay is a well-established exception to this general principle. While no single rationale underlies its historical development, the central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability. Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity. The statement itself may not be accurately recorded. Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts. Hence, the rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its truth-seeking function. However, the extent to which hearsay evidence will present difficulties in assessing its worth obviously varies with the context. In some circumstances, the evidence presents minimal dangers and its exclusion, rather than its admission, would impede accurate fact finding. Hence, over time a number of exceptions to the rule were created by the courts. Just as traditional exceptions to the exclusionary rule were largely crafted around those circumstances where the dangers of receiving the evidence were sufficiently alleviated, so too must be founded the overarching principled exception to hearsay. When it is necessary to resort to evidence in this form, a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails. The trial judge acts as a gate-keeper in

making this preliminary assessment of the "threshold reliability" of the hearsay statement and leaves the ultimate determination of its worth to the fact finder.

- [125] Mr. Justice Groves also noted two traditional exceptions to the hearsay rule. First, there is an exception to the hearsay rule that permits evidence to be given of statements made by deceased persons as to their present state of mind (including intention) provided that the deceased's person's state of mind is relevant to an issue in the case: see *Pasko v. Pasko*, 2002 BCSC 435 at para. 10.
- [126] Second, declarations of mental or emotional state are also an established exception to the rule against hearsay: see *R. v. Smith*, [1992] 2 S.C.R. 915. The state of mind exception to the hearsay rule permits the reception of evidence to prove the declarant's state of mind, but not the truth of the factual assertion which may be contained in it.
- [127] Elizabeth's letters are admissible in this case to show her state of mind at the time that the letters were written. They are also admissible to show the circumstances in which they were written, for example, that Gloria and she were writing the letters together. However, I am not satisfied that they are admissible as proof of the truth of their contents. So, for example, I accept that the letter of April 23, 2001 addressed to Max and Nathan represents evidence of Elizabeth's state of mind. However, I do not accept it is proof that Nathan was "sneaking in and out of Elizabeth's residence when he knew that she was not at home."
- [128] I am not persuaded that the letters should be admitted as proof of the truth of their contents under the principled exception to the hearsay rule. Although Elizabeth is not able to give the evidence herself, the evidence is not necessary evidence at this trial. Whether Nathan was or was not sneaking in and out of the house and whether he did or did not shout at his mother are not the issues at trial: Elizabeth's state of mind is relevant for the purposes of the undue influence analysis. I am also not persuaded that the evidence is reliable. While what she says may have been Elizabeth's perception at the time and is certainly some evidence of her state of mind at the time, in that Elizabeth may well have thought that Nathan was shouting at her or that he was sneaking in and out, she was undoubtedly upset at the time as I have indicated above. In addition, she may have been dissembling in the letters to appease Gloria or to persuade her sons to behave in a way she found more acceptable. I am not persuaded that her statements of fact in her correspondence with her sons were reliable.

Mutual Wills

- [129] The plaintiff's plead an agreement between Elizabeth and Arthur to make mutual wills and to divide all of the assets between their children as a basis of the relief they seek. This was not pursued at trial. However, I have considered the evidence of Max, Nathan, and Adrienne as to Arthur's statements and Elizabeth's concurrence (which I have accepted) when assessing the circumstances and Elizabeth's intentions in June 2001 when she signed the Declaration of Trust and the transfer document. It is one of the factors that lead me to

conclude that Elizabeth was likely unduly influenced to execute the documents in 2001. A woman of her character and disposition who relied heavily on her husband for all financial matters and who deferred to her husband would be unlikely to deviate from their agreement to leave everything equally among their three children unless she were under extreme pressure.

Declaration of Trust as Testamentary Disposition

[130] The parties raised the issue of whether the declaration of trust was a testamentary disposition. Because I have concluded that the declaration of trust was the result of undue influence and is set aside, I need not decide whether it was a testamentary disposition.

Conclusion

[131] The plaintiffs are entitled to the following relief:

1. A declaration that the Cadboro Bay Property and the Investments are assets belonging to the estate of Elizabeth Cowper-Smith to be distributed in accordance with the January 2002 will.
2. Max Cowper-Smith is entitled to purchase the one-third interest of Gloria Morgan in the Cadboro Bay Property.
3. Gloria Morgan will provide an accounting of her use of these assets and, if necessary, there will be a tracing order.
4. Costs.

"B.J. Brown J."

The Honourable Madam Justice B.J. Brown

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