

CANADA / JUDGMENT

Gaines. v. Duggan

2023 BCSC 1744

COURT

Supreme Court of British Columbia

DECIDED

5 October 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCSC 1744 Gaines. v. Duggan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gaines. v. Duggan,

2023 BCSC 1744

Date: 20231005

Docket: S188402

Registry: Vancouver

Between:

Terrence Edward Paul Gaines

also known as Terrence Gaines

Plaintiff

And

Rylan Murray Duggan and Nicole Emily Gaines

and in their capacity as Trustees

Defendants

- and -

Docket: S196097

Registry: Vancouver

Between:

Terrence Edward Paul Gaines

Plaintiff

And

Larry I. Barron and Larry I. Barron Law Corporation

dba Lynn Valley Law

Defendants

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Plaintiff:

J.H. Bryant

Counsel for the Defendant, Rylan Murray Duggan and in his capacity as Trustee:

A. Pearl

D. Gorelov, Articled Student

Counsel for the Defendants, Larry I. Barron and Larry I. Barron Law Corporation

dba Lynn Valley Law:

D. Hwang

M. Cheung

Place and Dates of Trial:

Vancouver, B.C.

September 5-8 and 11, 2023

Place and Date of Judgment:

Vancouver, B.C.

October 5, 2023

Table of Contents

I. Introduction. 4

II. Background Facts. 5

A. The Settlers and their Relationship until October 2014. 5

B. The Initial Meeting with Mr. Barron. 6

C. Purchasing the Property.	9
D. Implementing the Estate Plan.	10
E. Questions Raised in 2015.	15
F. Disagreements in 2017.	16
III. The Parties' Arguments.	19
A. Mr. Gaines.	19
B. Mr. Duggan.	22
C. Mr. Barron.	24
IV. Discussion.	26
A. The Trust Action.	26
B. The Negligence Action.	32
V. Summary and Conclusion.	36

I. Introduction

- [1] Before the court are two related actions commenced by the plaintiff, Terrence Edward Paul Gaines. Both actions stem from Mr. Gaines' belief that he has, or should have received, the right to have title to the home where he resides at 12629 25th Avenue in Surrey, British Columbia (the "Property"), transferred into his name alone.
- [2] Mr. Gaines purchased the Property on January 22, 2015, with his then common-law partner, Mary Ann Duggan, now deceased. They originally took title together as joint tenants. When they first met in 2011, both Mr. Gaines and Ms. Duggan already had children of their own from previous relationships. Prior to acquiring the Property, they decided to do some estate planning. To that end, they sought advice from a lawyer, Larry Barron. Pursuant to the advice he gave them, Nicole Emily Gaines (one of Mr. Gaines' two children) and Rylan Murray Duggan (one of Ms. Duggan's three children) were, on July 9, 2015, added on title to the Property as joint tenants.
- [3] Around the same time, all four of the co-owners signed a Declaration of Trust (the "Property Trust"), prepared by Mr. Barron, pursuant to which Mr. Gaines and Ms. Duggan, as Settlers of the trust, appointed Ms. Gaines and Mr. Duggan as trustees, to hold the trustees' interest in the Property in trust for the beneficiaries of the trust (namely, Mr. Gaines' and Ms. Duggan's children) according to the terms of the Property Trust. One of those terms, clause 10, states as follows:

Upon demand by either of the Settlers, [the trustees] will immediately take the necessary steps to reconvey legal title to the Property to them.

- [4] Ms. Duggan passed away soon after that, on July 20, 2015. Her name was later removed from title, leaving Mr. Gaines and the two trustees as the surviving joint tenants. On several occasions in 2017, Mr. Gaines demanded that they transfer their interest in the Property to him alone, pursuant to that provision. Although Ms. Gaines has agreed to do so, Mr. Duggan has refused on the basis that, in his view, Mr. Gaines has no right under the Property Trust to make such a demand.
- [5] Mr. Gaines seeks, in the first of the two actions before the court (the "Trust Action"), to compel both trustees to comply with the demand.
- [6] In the second action (the "Negligence Action"), Mr. Gaines alleges that if Mr. Duggan's interpretation of the Property Trust is correct, then the result is not what he and Ms. Duggan intended, and Mr. Barron was therefore negligent in failing to give effect to their instructions or to provide adequate advice as to the effect of the Property Trust. He seeks damages from Mr. Barron to compensate him for, among other things, the resulting limitations on his rights as owner of the Property. Mr. Barron denies that he was negligent or that he failed to follow the instructions he received, and seeks to have the Negligence Action dismissed on those and other grounds.
- [7] For the reasons that follow, I have concluded that both actions should be dismissed.

II. Background Facts

A. The Settlor's and their Relationship until October 2014

- [8] Mr. Gaines was born in 1954 and is currently 69. He is employed by a forestry company as a sales manager. He has been in that position for 11 years but has been working in the industry for approximately 30 years. Currently, he earns between \$150,000 and \$200,000 per year, and has accumulated savings of approximately \$200,000.
- [9] Mr. Gaines met Ms. Duggan online in 2011. She was five years younger than him. She had already retired from a career as a counsellor and was living off her own savings of approximately \$700,000.
- [10] Both of them had been married and separated from their former spouses by that time. Mr. Gaines has two daughters (Nicole and Natalie) from his previous relationship. Ms. Duggan is survived by three children (Rylan, Evan and Jacalyn) from hers. Both of them owned their own homes - Mr. Gaines' was in North Vancouver and Ms. Duggan's in New Westminster.
- [11] As their relationship grew closer, they decided to sell their current homes and purchase a single one together. Mr. Gaines wanted to remain in North Vancouver and Ms. Duggan agreed to relocate there. On April 30, 2013, they purchased a house on Avonlynn Crescent in the Lynn Valley area of North Vancouver, for \$1,230,000. Ms. Duggan contributed \$425,000 (54%) and Mr. Gaines \$375,000 (46%) toward the down payment and they funded the balance with a mortgage. They set up a joint account to cover the mortgage payments and shared expenses related to the home, to which they contributed equally. When the property was

sold, they divided the proceeds according to their percentage contributions. They otherwise kept their finances separate.

- [12] Ms. Duggan did not enjoy living in North Vancouver because the higher altitude there exacerbated her migraine headaches. They decided to move elsewhere. While shopping for a new neighbourhood, they also decided to do some estate planning. Mr. Gaines recalls a discussion between them around that time in which, he says, they agreed that their children would be adequately provided for with their savings and that the house they were buying would be their gift to each other.

B. The Initial Meeting with Mr. Barron

- [13] In order to formalise their estate plan, they went to see Mr. Barron, who, at the time, had an office in the Lynn Valley shopping centre, from which he practised law through his personal law corporation, doing business as Lynn Valley Law. The initial meeting took place on October 10, 2014. It lasted for about an hour.
- [14] They met first with Mary Jane Atkins, Mr. Barron's office assistant and common-law partner. After completing the client intake form with them, Ms. Atkins took the form into Mr. Barron's office, where he reviewed it before coming out to meet them himself. There was conflicting evidence as to precisely what was said.
- [15] According to Mr. Gaines, Ms. Duggan told Mr. Barron that their intention was to leave the house to each other in their wills so that they would each be looked after in their later years and that whatever was left over after that would go to the children. She also told him that the children would, in their view, receive enough from their investments. Mr. Gaines says that Mr. Barron took a different view and suggested that, instead, they create a trust in favour of the children, who would go on title now in order to avoid probate fees later, but he would include a provision in the trust deed to make sure the home was still theirs in the meantime. Mr. Gaines also recalls that Mr. Barron raised the topic of a marriage agreement to deal with a division of assets if they were to separate, but neither he nor Ms. Duggan were interested in pursuing that suggestion. Although Mr. Gaines testified at trial that he did not recall hearing mention of a life estate at the meeting, when the transcript of his examination for discovery was put to him, he adopted his earlier testimony to the effect that the concept was likely discussed.
- [16] Mr. Barron does not have a clear recollection of the meeting either. Much of his account of it was reconstructed based on what he described as his usual practice. He recalls having noted that this was a blended family situation, where each of the clients had children from previous relationships. This gave rise to a concern about a potential conflict between them, but through the discussion he satisfied himself that they were *ad idem* as to their wishes. He believes he would have explained the attributes of a joint tenancy, with its associated right of survivorship. He advised them against leaving the property to one another in their wills, and then to the children, because of the risk that the surviving partner could later change his or

her will to exclude the deceased partner's children. He proposed two alternatives:

- a) severing the joint tenancy to create a tenancy-in-common with a life estate; or
- b) adding one child from each side onto title as joint tenants, to hold their interest in trust for the children.

[17] He believes he described several disadvantages with a tenancy-in-common, including the prospect of exposing the children to probate fees and capital gains tax, given that they could not claim the principal residence exemption. Both of these disadvantages could be avoided with the trust option. With that option, he told them, the surviving settlor would be left after the death of the other with a life estate, which would limit the survivor's access to the equity in the property. Another disadvantage he believes he raised was that the Property could also be exposed to the claims of the creditors of any of the joint tenants.

[18] Further insight into what was discussed and decided at the meeting can be drawn from the client intake form that Ms. Atkins completed that day, and that she and others continued to update over the ensuing several months.

[19] On the first page, the form lists the clients' names, birth dates and places of birth. Their address was later updated after the purchase of the Property in January 2015. In the upper right corner of the first page, boxes are checked to indicate that a will, representation agreement, power of attorney and trust declaration were required. The form lists the names, ages and addresses of the clients' children.

[20] On the second page, the form provides a space to note the clients' investment assets. Under that heading, Ms. Atkins noted that Ms. Duggan held investments worth approximately \$700,000 and Mr. Gaines, \$70,000.

[21] Under the heading "Intended Executors of your will" on page 3, Ms. Atkins has written that the clients wanted their primary executors to be "each other" and their alternate executors to be their respective children.

[22] On the fourth page, there are four boxes to be completed.

[23] The first one asks about "Testamentary Wishes - Distribution." Ms. Atkins wrote the following in that space:

TO EACH OTHER (HOUSE)

SAVINGS

TO KIDS

[24] The second box asks "who should receive your estate if only you die?" but it was left blank.

[25] The third box asks "who should receive your estate if both you and your spouse die?" Ms. Atkins wrote the following in response:

HOUSE 50/50 TO KIDS

ASSETS - MARYANN'S TO HER KIDS

- TERRY'S TO HIS KIDS

[26] The fourth box asks "who should receive your estate if all of the above die" but it too was left blank.

[27] Ms. Atkins also prepared a memorandum for the file to record the discussion that took place at the meeting, the decisions taken and the follow-up work that needed to be done. That document states as follows:

Met with Terry Gaines and his common-law wife Mary Ann Duggan. They want to have Wills prepared as well as Power of Attorney (Springing/ Staggered) and Representation Agreements. We determined that the house would go to each other, with a life estate, all savings would go to their respective children. If the other dies the proceeds of the house would go 50% to Mary Ann's children and 50% to Terry's children (to be divided equally among them).

Larry joined the conversation and brought up the subject of a marriage agreement. He asked them to think about the consequences if they were to break-up, how would they want the assets distributed (contributions to the house). In the end it was decided the best way to deal with the assets would be to have three separate Trust Declarations, one for the house and one for each of Terry and Mary Ann's savings.

They need to consider the arrangement for POA but we can start on all other documents.

C. Purchasing the Property

[28] On December 13, 2014, Mr. Gaines and Ms. Duggan entered into a contract to purchase the Property for \$1,305,000. The purchase completed on January 22, 2015, with possession taken on the following day.

[29] They each contributed a down payment of \$390,000. They took out a mortgage for \$550,000 to pay the balance and also purchased mortgage insurance. Thereafter, they shared the mortgage and insurance payments equally.

D. Implementing the Estate Plan

[30] Sandra McLeod (then known as Sandra Platt) was working at the time as an assistant in Mr. Barron's office. Between the date of the initial meeting and the first week of June 2015, she communicated with Mr. Gaines and Ms. Duggan by telephone and email, in an effort to finalise the documents as instructed. On February 26, 2015, she sent Mr. Gaines an email seeking further information, as follows:

When we met with you and Mary Ann back in October of last year... We determined that the house would go to each of you, with a life estate and all savings would go to your respective children in equal shares. If the other dies, the proceeds of the house would go 50% to Mary Ann's children and 50% to your children (to be divided equally among them).

Then there was the issue of the contributions to the family home. In the end I see that Larry thought the best way to deal with the assets would be to have three separate Trust Declarations; one for the house and one for each of yours and Mary Ann's accounts/investments.

You were also going to seriously think on who would be the trustee of those trusts.

As for three separate trust declarations, I am not certain this is still the case considering your new purchase. What are the details of the purchase of your new home? Are you joint tenants and is everything 50/50? I would need to update Larry on this and get his instructions.

[31] Mr. Gaines did not respond for several weeks because, earlier that month, Ms. Duggan was unexpectedly diagnosed with a terminal illness. On March 18, 2015, Mr. Gaines called Ms. McLeod to inform her of this. Ms. McLeod relayed the news to Mr. Barron on the following day, in an email stating as follows:

Terry Gaines called yesterday afternoon with sad news. Mary Ann has pancreatic cancer and they don't know at this time how long she has. She is in a lot of pain. He wants to push forward with their estate planning documents as soon as possible and still wants us to look after same. They have just bought a house together in Whiterock and may require a home visit - Jane mentioned something about having Jay Redmond attend once we get all of the documents together. We are still waiting for information from them as per my email below to Terry last month.

[32] Mr. Barron responded with an email stating that he and Ms. Atkins would attend to have the documents signed, rather than Mr. Redmond.

[33] Later that day, March 19, 2015, Ms. McLeod emailed to Mr. Gaines a number of draft documents that she had prepared using office templates, including Ms. Duggan's power of attorney, her will, and the Property Trust. The drafts had been reviewed by Mr. Barron but still contained many blank spaces to be completed. However, the draft Property Trust included clause 10, in what would come to be its final form.

[34] In the exchange of correspondence that followed over the next several weeks, both Mr. Gaines and Ms. Duggan had input and made comments on the draft documents, although the communications shifted primarily to Mr. Gaines. In an email sent on May 27, 2015, he asked that Ms. Duggan's power of attorney be amended to make Evan her attorney rather than Rylan. In addition, he asked that Rylan be appointed as the sole executor under her will, rather than Mr. Gaines. Mr. Gaines testified that he suggested that that latter change be made because he would have no interest in the disposition of Ms. Duggan's investments, which were to go exclusively to her children. In addition, the draft wills were amended in the days before they were signed to make provision in each for the household furnishings to go to Mr. Gaines on Ms. Duggan's death, and to Ms. Duggan's children on Mr. Gaines' death,

"as required".

- [35] On Saturday, June 6, 2015, Mr. Barron and Ms. Atkins drove to the Property from their home in Anmore to present the final documents to Mr. Gaines and Ms. Duggan for signature. Once again, the witnesses' accounts at trial of what occurred on that day differed in several important respects.
- [36] Mr. Gaines testified that the meeting took about 30-35 minutes. He remembers greeting Mr. Barron and Ms. Atkins at the front door and taking them to the upstairs bedroom where Ms. Duggan was lying in bed. According to Mr. Gaines, they went over the documents together and signed all of them there. When the transcript from his examination for discovery was put to him, Mr. Gaines confirmed his earlier testimony that Mr. Barron read each of the documents out loud, including the Property Trust, and explained what each of their clauses meant. Mr. Gaines recalled a conversation he had with Mr. Barron when they were finished, as Mr. Barron and Ms. Atkins were leaving, in which Mr. Gaines sought confirmation that he would be free to do with the Property as he saw fit and would be able to downsize later, and that Mr. Barron answered affirmatively.
- [37] In her testimony, Ms. Atkins recalled that, when they arrived, Mr. Gaines greeted them at the front door and took them into the kitchen/dining room area and that they went over the documents that Mr. Gaines would be signing with him alone there. After those documents were signed, they went upstairs to see Ms. Duggan, initially without Mr. Gaines being present. Then they had Mr. Gaines join them to sign the representation agreements and the Property Trust.
- [38] Mr. Barron's recollection was similar to Ms. Atkins'. He testified that, consistent with his usual practice, he would likely have informed Mr. Gaines and Ms. Duggan that clause 10 could be used to revoke the Property Trust while both of them were alive but not after one of them passed.
- [39] Both Mr. Barron and Ms. Atkins recall that Ms. Duggan appeared uncomfortable but alert while they were there. Neither have any memory of Mr. Gaines asking a question about the effect of the Property Trust as they were leaving. Mr. Barron testified that he doubts that he would have responded to the question that Mr. Gaines says he asked as Mr. Gaines described, because the effect of that response would be to "gut" the agreement, insofar as it would leave Mr. Gaines free to disinherit Ms. Duggan's children, the very result the document was supposed to prevent.
- [40] On the invoice for his services that Mr. Barron subsequently rendered to Mr. Gaines on August 5, 2015, he recorded two hours and Ms. Atkins, three hours, for the time spent on June 6, 2015. However, both testified that they probably did not charge for all of the time actually spent that day.
- [41] Rylan Duggan signed the Property Trust on June 8, 2015. Nicole Gaines did so on July 21, 2015.

[42] The Property Trust, as executed, states as follows:

WHEREAS:

- 1) The Settlers are the legal and beneficial owners, in joint tenancy, of the land and buildings located at 12629 - 25 Avenue, Surrey, British Columbia, with a legal description of PID #003-697-762 East Half of Lot 6 Section 19 Township 1 New Westminster District, Plan 11001 (the "Property").
- 2) The Settlers have adult children as follows: Terrence has two adult children, Nicole Emily Gaines and Natalie Jane Gaines and Mary Ann has three adult children, those being Rylan Murray Duggan, Evan Braden Duggan and Jacalyn Nicole Duggan, all of whom are the Trust Beneficiaries.
- 3) Rylan Murray Duggan and Nicole Emily Gaines are also the Trustees of this Trust.
- 4) The Settlers wish to leave the Property, upon their demise, to the Trust Beneficiaries as follows:
 - 16.67% to Rylan Murray Duggan
 - 16.67% to Evan Braden Duggan
 - 16.66% to Jacalyn Nicole Duggan
 - 25% to Nicole Emily Gaines
 - 25% to Natalie Jane Gaines
- 5) It is the direction of the Settlers that the Trustees, upon becoming holders of legal title to the Property shall deal with the beneficial ownership of the Properties in the manner laid out in this Trust Declaration.
- 6) It is the direction of the Settlers that none of the Property is to flow through their Wills or Estates upon death, and are instead to vest directly in the legal and beneficial titleholders as described herein.
- 7) It is nevertheless the Settlers' intention and direction that the Trustees shall cause to be paid as a first priority all valid estate debts, including but not limited to funeral expenses and tax obligations, owing at the time or as a result of the last Settlor's death, from the Property if necessary, before dividing the net remaining Property among the trust beneficiaries.
- 8) For purposes of ease and efficiency of succession:
 - a) It is the intention of the Settlers to add the Trustees as joint tenants of the Property, so that, upon the demise of both Settlers the Trustees shall become sole holders of legal title to the Property by right of survivorship.

- b) It is the direction of the Settlers that the Trustees, upon becoming sole holders of legal title to the Property, shall hold the beneficial title to the Property in shares as described in paragraph 4 above for each of the Trust Beneficiaries. They shall at that time acquire beneficial title personally only to that interest they are entitled to as beneficiaries to the Trust.
- c) It is the further direction of the Settlers that the Trustees shall, within one year of the death of both Settlers, either:
 - i) Sell the Property and divide the net proceeds in shares as described in paragraph 4 above amount the Trust Beneficiaries; or
 - ii) Pay to each of the Trust Beneficiaries an amount equal to their share of the then equity value of the Property, based on then current market value.

We, Rylan Murray Duggan and Nicole Emily Gaines, the Trustees, DECLARE THAT:

- 9) Although we will or have become joint tenants on the legal title to the Property along with the Settlers, we hold no beneficial ownership in the Property while either of them remain alive, and only gain beneficial ownership upon the death of the last of them.
- 10) Upon demand by either of the Settlers, we will immediately take the necessary steps to reconvey legal title to the Property to them.
- 11) Upon the death of the last Settlor we will promptly take the necessary steps to have the legal title to the Property transferred into our names as joint tenants to the legal title.
- 12) As a first priority we shall cause to be paid all valid estate debts, including but not limited to funeral expenses and tax obligations, owing at the time or as a result of the last Settlor's death, from the Property if necessary, before dividing the net remaining Accounts and Property amount the trust beneficiaries.
- 13) Upon the death of the last Settlor we will hold the beneficial title to the Property in shares as described in paragraph 4 above for each of the Trust Beneficiaries. We shall at that time acquire beneficial title personally only to that interest which we are entitled to as beneficiaries of this Trust.
- 14) Within one year of the death of the last Settlor we shall either:
 - a) sell the Property and divide the net proceeds in shares as described in paragraph 4 above amount the Trust Beneficiaries; or
 - b) pay to each of the remaining Trust Beneficiaries an amount equal to their share of the then equity value of the Property, based on then current mark value, and in that event we shall acquire the entire beneficial title to the Property for ourselves.

[43] The wills signed by Mr. Gaines and Ms. Duggan each contain the following clause:

WITH THE EXCEPTION OF any assets of mine, the legal titles of which at the time of my death are held in joint ownership or joint tenancy with any person or entity, and of which there is a WRITTEN DECLARATION OF TRUST of which I am the Settlor or one of the Settlers, dealing specifically with those jointly held assets, I give, bequeath and devise all my property of every nature and kind and wheresoever situate, including any property over which I may have a general power of appointment, (hereinafter my "Estate") to my Trustee upon the following trusts, namely:

E. Questions Raised in 2015

[44] Ms. Duggan died on July 20, 2015.

[45] Following her death, the mortgage on the Property was paid off in full by the insurer. Ms. Duggan's children each received approximately \$150,000 to \$250,000 through the investment trust that had been created for their benefit.

[46] On September 30, 2015, Evan Duggan sent Ms. Atkins an email, copied to Rylan Duggan, posing the following question:

What happens to mom's share of the equity in the house belonging to Rylan, Jacki and myself, should Terry sell the house at any point?

[47] Mr. Barron responded to the email two hours later, without consulting with Mr. Gaines or copying him on the response. His email stated as follows:

Terry will have use of the house, or any property or funds resulting from the sale of the house, until he dies. However, if the property was sold before he died (which would formally require your signatures since you are on title), it would have to go into an account that was held jointly by the three present joint owners. The purpose is to protect the ultimate equity in the property for both sets of children, but to allow Terry what is in essence a life estate.

[48] Rylan Duggan responded the following day, October 1, 2015, with a follow-up question, as follows:

I'm a bit confused where you say he will have use of the funds resulting from the sale of the property until his death.

Then you say if the property was sold before his death the money would go into an account.

Seems ambiguous to me.

So in scenario one: he dies in that house, the house is sold, 50% of the profit is transferred to his children, 50% to Mary Ann's children.

Scenario two: he sells the house before he dies, 50% of the profit goes into an account for Mary Ann's children, he keeps the other 50%.

Do I have this correct?

Thanks for clarifying.

[49] Mr. Barron responded a half-hour later, this time copying Mr. Gaines on the entire exchange, stating as follows:

Hi Rylan. Terry in essence has a life estate in the house. If it is sold before he dies, then presumably he will need other living accommodation. The funds from sale of the present residence could be used for that purpose. If funds are left over, then if everyone is in agreement they could be disbursed at that time. If there is no agreement, then the funds would have to remain in a joint account until Terry dies or a court orders something different. The funds cannot be used in a manner which would decrease their value, such as payments for Terry's care in a nursing facility. And they could not be used for rent payments since that would definitely decrease the value of the asset, whereas a purchased accommodation would be expected not to lose value over the years (at least not the land, although the building would depreciate).

If the funds went into an account whereby they are generating interest, then presumably Terry could access those interest funds instead of actually benefiting from residing in the residence at no cost (other than utilities and municipal tax payments). There is no detriment to the children on either side since there is no expectation under the trust agreement for any of the 6 of you to receive the sale proceeds until Terry dies.

Finally Terry could not sell the residence, put the money into trust, and disburse some to his own children but not you three. It would have to be equal distributions to all to be fair.

[50] In his testimony, Mr. Gaines confirmed that he received the email. Although he says he did not agree with its contents, he chose not to respond to it.

[51] On October 15, 2015, Mr. Barron billed Rylan Duggan for his time in responding to those questions, among other things.

F. Disagreements in 2017

[52] In the summer of 2017, Mr. Gaines decided that he wanted to buy out the lease on the vehicle he was driving, which was being paid by his employer. He resolved to borrow the requisite funds, approximately \$30,000, by obtaining a line of credit secured on the Property. The bank suggested that he apply for a \$500,000 facility, even if he was not currently intending to use it. Mr. Gaines liked the idea. The bank also told him that if he did not hold title to the Property alone, then he would have to have all of the co-owners sign the mortgage and be responsible for the debt.

[53] On July 1, 2017, Mr. Gaines emailed Mr. Duggan asking him to agree to remove his name from title temporarily, along with Ms. Gaines, so that the new mortgage could be added on title while Mr. Gaines held title alone. He proposed to place their names back on title again after that was done.

- [54] Without a positive response from Mr. Duggan, Mr. Gaines sought assistance from Mr. Barron. In an email sent on July 14, 2017, Mr. Barron asked Mr. Duggan to speak to him about Mr. Gaines' request. Mr. Barron added that Mr. Duggan should obtain his own independent legal advice, which he did.
- [55] In an email sent on August 10, 2017, Mr. Gaines asked Mr. Barron how Mr. Duggan could refuse to comply with his request when he had "signed a trust agreement agreeing to come off title at either my or Mary Ann's request." Mr. Barron responded with a lengthy email the following day, August 11, 2017, explaining that the issue was "complex." He proceeded to discuss the nature of trusts and the difference between legal and beneficial title. He then advised Mr. Gaines that if Mr. Duggan "refuses to acknowledge the trust agreement and sign transfer docs voluntarily, we will need a court order to transfer title". He then offered the following opinion as to what would occur should the matter end up in court:

Assuming that it has to go to court, the judge would examine the trust agreement, and in most cases there would be no hesitation in ordering the legal title transferred back to you alone. The one factor that is different here from the usual case is that this involves a blended family, so to speak. If both Rylan and Nicole were your natural children, and since it is not disputed that neither contributed anything to the purchase or upkeep of the property, the court would not hesitate to find that they both hold their interests on a true trust for you. The hitch in this case is that Rylan is not your child, and the question is whether Mary Ann intended that, following her death, you would have the right to cast him aside completely if you desire.

- [56] Mr. Barron then explained why the Property Trust did not contain terms that clarified the situation, stating as follows:

[i]f there would been more time to discuss this issue before Mary Ann died, then we likely would have fleshed out in more detail. But due to her circumstances at the time, it was not an issue that one comfortably had time to envision and deal with.

- [57] He then offered the following opinion as to what a judge would be likely to do if faced with this problem:

I think he would recognise that the children made no financial contribution at all to the property, and so they have no beneficial interest until after you die. And I think that he would find that Mary Ann would have intended for you to be able to sell the property and use whatever proceeds were necessary to supplement your income, but that any proceeds left over at the time of your death be split among both your and her children.

- [58] In the end, Mr. Barron suggested that it would be preferable to try and reach an agreement with Mr. Duggan, rather than litigate.

- [59] Mr. Gaines responded by email on August 14, 2017, stating as follows:

Morning Larry.. first.. thanks for the effort put forth. I understand and see what you think about this.. let's go ahead with assigning back on title as suggested. However, I would like it understood that for the future need, if there is one, I would simply like the request to be honored without fuss. There is no intention of changing the final outcome. Never has, never will be. I don't think anyone wants to go to court, spend the time and money for an outcome that likely accomplishes the original goal. I don't think the expense to myself or Rylan needs to be incurred. So, so long as we can accomplish the above, should there be a next time, it will be done, without hesitation and without dispute. Just a request to be honored. Your thoughts?

[60] Mr. Barron sent an email to Mr. Duggan's newly retained counsel, Dustin Griffin, on August 15, 2017, conveying the request that Mr. Duggan agree to come off title to allow Mr. Gaines to obtain a line of credit. He noted that "[a]s Terry put it, the home was their gift to each other." He also asked that Mr. Duggan consider amending the Property Trust to allow Mr. Gaines to sell the Property and downsize on certain terms.

[61] Mr. Griffin responded by letter on September 7, 2017, refusing to agree to Mr. Gaines' proposal. In conveying that letter to Mr. Gaines, Mr. Barron described it as "very disappointing" and commented as follows:

My view is that you have what is akin to a life estate interest in the entire property, and upon your death whatever remains is split among the children, but other side is of a different view.

Depending on the urgency or necessity with which you consider that you need to mortgage the house, you may have to consider litigation. (In that event, I would most likely be called as a witness.) If not, then you may choose to simply leave things alone until you want to sell the house, and deal with it then

[62] Following further exchanges that failed to yield an agreement, Mr. Gaines commenced the Trust Action on July 31, 2018, and the Negligence Action on May 27, 2019.

III. The Parties' Arguments

A. Mr. Gaines

[63] In support of his claim in the Trust Action, Mr. Gaines submits that the applicable principles of interpretation in discerning the correct meaning of clause 10 of the Property Trust are to be found in *The Canada Trust Company v. Browne*, 2012 ONCA 862. There, Feldman J.A., writing for the Court, stated as follows, at para. 64:

When the court is interpreting a trust contractual interpretation principles are applied to determine the objective intent of the parties. However, because the agreement is a trust, trust principles must also inform that interpretation.

[64] Mr. Gaines also relies in that regard on the dissenting judgment of Karakatsanis J. in *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8, in which she wrote as follows, at para. 58:

The obligations imposed upon a trustee are first and foremost determined by the terms of the trust instrument itself, but can be supplemented or modified by general principles of equity.

- [65] Applying those principles to this case, Mr. Gaines contends that clause 10 of the Property Trust, on its face, requires the trustees to transfer their interest in the Property to him on demand, and that Mr. Duggan is therefore in breach of trust for having refused to do so. He submits that his interpretation is the correct one, having regard to both the language of the document itself and the surrounding circumstances.
- [66] He says he would never have agreed to allow the trustees to be added on title had he not received a concurrent right to revoke the trust and remove them from title whenever he wished. Mr. Duggan's interpretation would, he says, leave him with no access to the equity in the Property for his retirement, and no ability to sell the Property and downsize, which is clearly not what he and Ms. Duggan intended. Their intention was, he says, to make a gift of the home to each other, with any residue to be divided among the children only after they were both gone. In Mr. Gaines' submission, the Property Trust was created solely for the purpose of avoiding probate fees after the last of the settlors' deaths.
- [67] Further, Mr. Gaines urges me to accept his testimony over Mr. Barron's where their accounts differ, relying on a line of authority holding that a client's version of events is to be preferred over that of a lawyer, particularly where the lawyer has failed to keep a record of their dealings: *Waldock v. Bissett* (1992), 67 B.C.L.R. (2d) 389, 1992 CanLII 1002 (C.A.); *Davis & Co. v. Jiwan*, 2007 BCSC 1775 and *Stikeman Elliott LLP v. Matthews*, 2021 BCSC 2563.
- [68] Turning to the Negligence Action, Mr. Gaines relies on a number of authorities for the test he must meet to establish negligence on the part of Mr. Barron, including *Tellini v. Bell Alliance*, 2022 BCCA 106 [Tellini]; *Graybriar Industries Ltd. v. Davis & Co.* (1990), 46 B.C.L.R. (2d) 164 (S.C.); *Tiffin Holdings Ltd. v. Millican* (1964), 49 D.L.R. (2d) 216 (Alta. S.C.), aff'd [1967] S.C.R. 183 [Tiffin]; *Mac v. Wong*, 2019 BCSC 902 and *Lau and Aptex Canada Corporation v. Ogilvie*, 2010 BCSC 1589 [Lau].
- [69] Those authorities set out a three-part test, whereby a plaintiff seeking to establish liability in negligence against a lawyer must establish that:
- a) the lawyer owed a duty of care to the claimant;
 - b) the lawyer breached that duty of care in that they failed to meet the standard of care required of a reasonably competent solicitor; and
 - c) but for the breach by the lawyer, the claimant would not have suffered the damages claimed.
- [70] Mr. Gaines argues that he has satisfied all three elements of that test. The first element is not contested. With respect to the second element, Mr. Gaines contends that Mr. Barron breached his duty of care in the following ways:
- a) failing to obtain adequate instructions from his clients prior to finalising the Property Trust;

- b) failing to warn Mr. Gaines about the effect of the Property Trust;
 - c) failing to draft the Property Trust so that it would achieve its intended purposes;
 - d) providing faulty advice to Mr. Duggan about the meaning of the Property Trust in 2015 and 2017;
 - e) failing to advise Mr. Gaines that the Property Trust contains errors in drafting;
 - f) failing to advise Mr. Gaines about the limitation period governing his claims;
 - g) failing to copy Mr. Gaines on his 2015 communications with Evan and Rylan Duggan; and
 - h) negotiating on Mr. Gaines' behalf with Mr. Duggan, who was also a client, without recognising the inherent conflict of interest.
- [71] With respect to the third element of the test, Mr. Gaines argues that those breaches of duty caused him the following losses, for which he seeks to be compensated in damages:
- a) the present value of the Property (\$2.45 million); and
 - b) full indemnity costs for his legal fees incurred in both actions.

B. Mr. Duggan

- [72] Mr. Duggan submits that trust instruments, such as the Property Trust, are generally to be interpreted like testamentary documents, citing *Stewart v. Stewart*, 2018 BCSC 556 and *Souch v. Johnson*, 2014 BCSC 1889. The principles to be applied in that context were, he submits, conveniently summarised in *Killam v. Killam*, 2017 BCSC 175, aff'd 2018 BCCA 64. Those authorities hold that the analysis must begin with document itself, but the court may also look to the surrounding circumstances, particularly if necessary to resolve an ambiguity, with the ultimate object of the exercise being to discern the settlors' intention.
- [73] Although there is conflicting authority on the point (*Ali Estate (Re)*, 2014 BCSC 340; *Bovey v. Bovey Estate*, [1991] B.C.J. No. 3370 (S.C.)), Mr. Duggan submits that direct extrinsic evidence, that is, evidence of the settlor's own statements of his or her intentions, may also be considered. Such an approach is now legislatively mandated by s. 4 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13, when dealing with testamentary instruments such as wills. Although that provision is not directly applicable to trust declarations of the kind in issue in this case, Mr. Duggan submits that the more modern approach reflected in that provision should be applied in this context as well.
- [74] Applying those principles to this case, Mr. Duggan contends that clause 10 of the Property Trust, on its face, cannot bear the interpretation that Mr. Gaines seeks to impose on it. He says that the clause confers a right on either settlor to have legal title returned to both settlors, not just one, as indicated by the use of the plural "to them."

[75] In addition, Mr. Duggan refers to the following aspects of the Property Trust itself in support of his proposed interpretation:

- a) the Property Trust begins with the statement that the purpose of the document is to settle the trust "for the benefit" of the settlors' children;
- b) the settlors' stated intention is to leave the Property to the beneficiaries upon their demise (as stated at clause 4), an intention that is not qualified or otherwise expressed conditionally;
- c) other clauses, such as 6 and 8, set out the mechanics for allowing the Property to pass to the beneficiaries after the death of the settlors; and
- d) there is no language to support Mr. Gaines' suggestion that the Property was intended as a gift from one settlor to the other.

[76] It follows, Mr. Duggan says, that clause 10 can bear only one of the following two possible interpretations:

- a) the clause is no longer operable at all, now that Ms. Duggan is unable to receive her former half interest as a joint tenant; or
- b) Mr. Gaines may invoke the clause at his option, but only to compel a transfer of title back to himself and Ms. Duggan's estate (the effect of which would be to sever the joint tenancy, with the result that Mr. Gaines and the estate would each hold a half interest as tenants-in-common).

[77] Mr. Duggan also argues that, if it is necessary to look to the surrounding circumstances to shed light on the meaning of clause 10, then the following factors support his proposed interpretation:

- a) the settlors met each other late in life and had been living together for only 18 months when they first met with Mr. Barron on October 10, 2014;
- b) they kept their finances separate and contributed equally to the purchase of the Property;
- c) they had purchased mortgage insurance jointly so that the surviving settlor would not be burdened by a mortgage after one of them died;
- d) they held title as joint tenants before embarking on their estate planning, so if they wanted to make a gift of the house to each other, as Mr. Gaines contends, then a trust would not have been necessary;
- e) the settlors felt an urgent need to put their estate plans in place because Ms. Duggan was terminally ill and they wanted to change the status quo before she died;
- f) Ms. Duggan had a close and loving relationship with her children and would therefore not have wanted to allow them to be disinherited;
- g) Mr. Gaines had stable employment and was earning a substantial salary;

- h) Mr. Gaines had experience in buying and selling properties and would have understood the meaning and purpose of the Property Trust; and
 - i) Mr. Gaines would not have wanted to risk leaving his children only the \$70,000 in investments assets he had accumulated as of October 2014.
- [78] Finally, Mr. Duggan argues that the direct extrinsic evidence also supports his interpretation. He relies in that regard on the evidence of Mr. Barron, who drafted the Property Trust, as to the result he intended to achieve. He also refers to the statements that Ms. Duggan made to others and in her journal following her signing of the Property Trust, to the effect that she expected that after she was gone, Mr. Gaines could live in the Property as long as he wanted and that, after his death, her children would then inherit her half share of the equity. On the other hand, Mr. Gaines' accounts of the conversations he claims to have had with Ms. Duggan and Mr. Barron, even if accepted as true, do not support his interpretation of clause 10. Rather, Mr. Gaines himself has acknowledged that the intention was for the children to inherit their parents' share of the equity after his death.

C. Mr. Barron

- [79] Mr. Barron contends that the Negligence Action should be dismissed on a number of grounds.
- [80] First, Mr. Barron submits that Mr. Gaines has failed to establish any breach of the applicable standard of care. In particular, Mr. Barron denies that he was instructed to make provision in the Property Trust for Mr. Gaines to be in a position to have title conveyed to him alone, on demand, at any time after Ms. Duggan's death, or that his clients expressed any such intention to him at the material time.
- [81] Rather, according to Mr. Barron, Mr. Gaines did not express an interest in accessing the equity in the Property at any time before the fall of 2017, when he decided that he wanted to buy out the lease on his vehicle. Mr. Barron also denies that he had a duty to inquire into Mr. Gaines' financial circumstances when drafting the estate planning documents, arguing that he cannot be held to such a duty in the absence of expert evidence indicating that this was required of him.
- [82] Although Mr. Barron has acknowledged that the Property Trust could, if he had had more time, have been bolstered with additional terms to provide a means for Mr. Gaines to gain access to his share of the equity in the Property after Ms. Duggan's death (such as those proposed in his letter of August 15, 2017 to Mr. Griffin), he says that he did not pursue that possibility at the time because the documents had to be prepared and executed quickly. In particular, Mr. Gaines and Ms. Duggan needed to have their estate plan in place before Ms. Duggan succumbed to her illness. Moreover, Mr. Barron did not believe that it would have been appropriate to broach those issues with Mr. Gaines when he was unable to do so with Ms. Duggan as well, given her condition. His decision to finalise the Property Trust as he did was, he argues, a reasonable one to make in the circumstances.

- [83] Second, Mr. Barron argues that, even if there was a breach of duty on his part, Mr. Gaines has not established that it caused him any loss. In particular, Mr. Barron says that Mr. Gaines has not demonstrated that Ms. Duggan would have agreed to add any of the terms that Mr. Gaines now claims to be missing from the Property Trust. In addition, Mr. Barron denies that any damages flow from Mr. Gaines' inability to take out a line of credit secured on the Property while he enjoys his life estate, even if that inability is attributable to negligence on the part of Mr. Barron. That is because, even on Mr. Duggan's interpretation of the Property Trust, Mr. Gaines still retains the ability to sell the Property and gain access to his half share of the equity, whenever he wishes to do so.
- [84] Third, Mr. Barron argues that any damages award must be reduced to reflect Mr. Gaines' contributory negligence in failing to review the Property Trust and raise any deficiencies with him before signing it.
- [85] Finally, Mr. Barron argues that the Negligence Action should be dismissed as statute-barred, pursuant to s. 6(1) of the Limitation Act, S.B.C. 2012, c. 13, which states that a court proceeding in respect of a claim must not be commenced more than two years after the day on which the claim is discovered. Mr. Barron says that this occurred no later than October 1, 2015, when Mr. Gaines read Mr. Barron's emails to Evan and Rylan Duggan describing how the Property Trust was supposed to operate.

IV. Discussion

A. The Trust Action

- [86] The outcome of the Trust Action turns on the correct reading of clause 10 of the Property Trust. The following competing interpretations have been advanced by the parties, with each party claiming that the language of the Property Trust lends itself unambiguously to only one (or perhaps two) of them:
- a) Mr. Gaines may invoke the clause at any time to compel the trustees to transfer title to him alone;
 - b) the clause is no longer operative now that one of the settlors has died; and
 - c) Mr. Gaines may invoke the clause at any time to compel the trustees to transfer title to himself and Ms. Duggan's estate, sharing equally as tenants-in-common.
- [87] In my view, none of these alternatives align squarely with the plain and ordinary meaning of the clause as drafted. In particular, I agree with the submission of the defendants that option (a) is problematic because the clause contemplates title being reconveyed, upon demand by either settlor, to both of them rather than just one. On the other hand, option (b) is also problematic because the clause contemplates either settlor having the right to compel a reconveyance on demand, without specifying any temporal or other qualification on when the right may be exercised. Option (c) raises a problem similar to that affecting option (a), inasmuch as it is questionable whether a transfer of an interest as a tenant-in-common to a

deceased settlor's estate is truly a "reconveyance" of the original title formerly held by that settlor. Compared with the other options, however, option (c) does the least violence to the language of the clause itself.

- [88] Moreover, I also find, for a variety of reasons, that option (c) aligns most closely with the settlors' intentions, insofar as these can be discerned from the circumstances in which the Property Trust was created.
- [89] First, I agree with Mr. Duggan that the factors he identified in his closing argument, enumerated above, weigh decisively against option (a). Mr. Gaines' arguments to the contrary are simply not persuasive.
- [90] In arguing in favour of option (a), Mr. Gaines relies primarily on a number of conversations he reports having had with Ms. Duggan, Mr. Barron and others before and after the Property Trust was signed.
- [91] He and Ms. Duggan, he says, agreed before they first went to see Mr. Barron that the house was to be their gift to each other, while the children will be adequately provided for with the investments each of them had accumulated to that point. It is noteworthy that Mr. Gaines had by then accumulated about \$70,000 in savings. By far the largest share of his net worth was, and would continue to be, in the Property, particularly after the mortgage was paid off through their insurance policy.
- [92] That Ms. Duggan did not believe her own investments, although more extensive, to be sufficient for that purpose is apparent from the following journal entry, apparently made sometime after the signing of the estate planning documents on June 6, 2015:

Two good things. I can leave each of [the children] some money that I know will help them. I just wish it were more. And Terry has this beautiful home for as long as he pleases. And I'll enjoy it from afar.

[Emphasis added.]

- [93] The comment that "Terry has this beautiful home for as long as he pleases" reads less like a description of a gift of unencumbered title than it does a gift of a more limited kind of life estate. Had she been talking about the former, then the sentence could have ended after the word "home."
- [94] Ms. Duggan's understanding of the effect of the estate plan as implemented can also be gleaned from other remarks she is reported to have made to others. Both Rylan and Evan Duggan testified that when they asked her about the Property after the estate planning documents had been signed, she told them that Mr. Gaines would be able to reside there for life and that when he dies or the Property is sold, the proceeds will be split among the children. I received similar evidence from Kathy Thompson, who had been Ms. Duggan's friend since childhood. She visited Ms. Duggan while she was in palliative care in July 2015 and recalled hearing Ms. Duggan make a similar remark.

- [95] There is other evidence weighing against Mr. Gaines' assertion that he and Ms. Duggan instructed Mr. Barron to ensure that Mr. Gaines could demand a transfer of title to himself alone after Ms. Duggan died. That is not Mr. Barron's recollection of his instructions and it is not consistent with the client intake form, the memorandum to file prepared by Ms. Atkins shortly after the initial meeting on October 10, 2014, or the email that Ms. McLeod sent to Mr. Gaines on February 26, 2015, reiterating the terms of the plan to be implemented, all of which speak of an intention to confer a "life estate" on the surviving settlor. Although Mr. Gaines claimed in his examination-in-chief to have no recollection of the concept of a life estate having been discussed at that initial meeting, when the transcript from his examination for discovery was put to him in cross-examination, he acknowledged that the concept probably was discussed at that time.
- [96] I heard conflicting testimony about the exchange between Mr. Gaines and Mr. Barron that, according to Mr. Gaines, occurred while Mr. Barron and Ms. Atkins were leaving the Property on June 6, 2015, after the estate planning documents were signed. Mr. Gaines testified that Mr. Barron assured him on that occasion that he would be free to do with the Property as he saw fit and would be able to downsize later. Mr. Barron doubts that he would have said such a thing, and Ms. Atkins has no memory of such an exchange. According to Mr. Barron, he had just explained to Mr. Gaines before he signed the Property Trust that clause 10 would no longer be available to him after Ms. Duggan died.
- [97] I disagree with Mr. Gaines' submission that I am bound by law to accept his version of events over Mr. Barron's wherever they conflict. In *Tellini*, Newbury J.A., writing for the Court, discussed the line of authority, beginning with *Waldock*, upon which Mr. Gaines relies for that proposition, and offered the following guidance in that regard:
- [12] In a more recent decision, *Jiwan v. Davis & Company, A Partnership* 2008 BCCA 494 (also a dispute about a retainer agreement), this court agreed with counsel's characterization of the ratio of *Waldock* as follows:

... The *Waldock* "rule", on which the Appellants rely, is no more than this: a statement that in cases of conflict decision-makers should accept the evidence of clients over the evidence of their solicitors where findings of credibility have not been made and where there is no other evidence tipping the scales in favour of one version of events over the other. [At para. 52; emphasis added.]

In *Jiwan*, the registrar had made an express and unfavourable finding as to the credibility of the clients in the course of her reasons. This court therefore concluded at para. 54 that no error based on an application of the "so-called *Waldock* 'rule'" could be sustained in the circumstances. I also note that in *Morton v. Harper Grey* itself, Mr. Justice Wilson qualified his formulation of the 'proper approach' as being limited to situations where 'all things' were equal -- which I take to mean where the scales are not otherwise "tipped" in favour of one party or the other.

- [13] Finally on this point, I note *Gregory N. Harney Law Corporation v. Angleland Holdings Inc.* 2016 BCCA 262. There the Court rejected a client's argument that a master in the Supreme Court had erred in failing to prefer the client's evidence over that of the lawyer in a dispute about a retainer. The Court stated that since there had been cogent reasons to prefer the lawyer's evidence, *Waldock* did not apply. (See paras. 49-50.)
- [14] Although the defendants in the case at bar did not argue on appeal that the trial judge had erred in applying the principle expressed in *Re Dickie*, I would discourage any tendency to regard it as a hard and fast rule to be followed in all contests of credibility between solicitors and their clients and regardless of the other factors normally considered in assessing the credibility of witnesses. In my respectful view, the principle expressed in *Re Dickie* should not be applied outside the context of fee agreements or where it is possible to make findings as to credibility and reliability in the usual manner. In particular, it should not be applied by a trial judge in such a way as to obviate the necessity of assessing credibility in accordance with the well-known criteria described in *Faryna v. Chorny* [1952] 2 D.L.R. 354.
- [98] In light of those remarks, I am satisfied that the rule has no application in this case. In any event, I am not persuaded that either Mr. Gaines' or Mr. Barron's accounts of those conversations is entirely accurate. Both of their memories are likely to have been distorted by the dispute that subsequently arose in 2017 and the course this litigation has taken. Had either of them actually said to the other what they now claim to have said, matters would likely have been brought to a head then and there. The more likely scenario is that neither was sufficiently clear in what they said to signal that there was an issue in need of resolution.
- [99] Mr. Gaines called two other witnesses, Karen and Gordon Smith, both of whom recounted a conversation they had with Mr. Gaines shortly after he and Ms. Duggan had begun cohabiting. They recall Mr. Gaines telling them that their home (which at the time, would have been the home on Avonlynn, where they were then residing) was going to be for his and Ms. Duggan's retirement. I am not persuaded that the conversation, even if it occurred as described, supports the inference that Mr. Gaines urges upon me. Any conversation between Mr. Gaines and Ms. Duggan at that time would have been about a different house, without the benefit of the estate planning advice that Mr. Barron would later give them and long before they learned that, tragically, they would not be sharing their retirement together as they had planned.
- [100] Mr. Gaines maintains that the sole purpose for the Property Trust was to avoid probate fees when the children came to inherit their share of the Property. However, another purpose it appears to have been intended to serve was to protect the children's interest in their inheritance after one of the settlors died. I agree with Mr. Duggan that after Mr. Gaines and Ms. Duggan learned of Ms. Duggan's diagnosis, they evidently felt the need, among other things, to alter the status quo on an urgent basis, rather than let title to the Property pass to Mr. Gaines alone by way of his right of survivorship.

- [101] Overall, I see little if any support in the evidence for Mr. Gaines' contention that option (a) comports with the settlors' intentions, as reflected in the circumstances surrounding the creation of the Property Trust.
- [102] There is, on the other hand, a similar dearth of support in the evidence for option (b). Clause 10 must have been intended to serve some purpose. It would have made little sense to include it in the Property Trust if the settlors intended for it to remain in effect only for the brief period of time that Ms. Duggan was expected to remain alive, as Mr. Barron testified. On the contrary, I accept Mr. Gaines' evidence that he agreed to proceed with Mr. Barron's proposed estate plan in part because clause 10 was understood to be an integral part of the arrangement, and that it would be available to the surviving settlor for the duration of the lifetime of the trust.
- [103] What remains is option (c). For various reasons, I have concluded that that option tracks the apparent intentions of the settlors much more faithfully than the other proposed alternatives.
- [104] Option (c) fulfills the essential objectives of the original estate plan. Mr. Gaines retains the right to enjoy the Property for the rest of his life, or for as long as he wishes to reside there. When he dies, assuming he has not revoked the trust before then, the children will receive their share of their parent's equity, less any estate debts, which will be paid first from the proceeds of sale of the Property pursuant to clause 7. If Mr. Gaines elects to revoke the trust before his death, he will receive access to his half share of the equity in the Property. This places him in no worse a position than he would have been in had clause 10 been triggered while Ms. Duggan was still alive and she decided to sever the joint tenancy for the sake of her children.
- [105] I appreciate that that result does not accommodate Mr. Gaines' more recent wishes insofar as it restricts his ability both to continue to reside at the Property and to access his share of the equity, as would have been possible, for example, had the supplemental terms that Mr. Barron proposed to Mr. Duggan in 2017 been accepted. Although a solution to that dilemma proved to be elusive in 2017, it does not follow that an accommodation can never be found. It would also be open to either of the trustees to seek the court's directions pursuant to s. 86 of the Trustee Act, R.S.B.C. 1996, c. 464, if they are unable to agree on the appropriate course of action.
- [106] In summary, I have concluded that, among the alternatives presented by the parties, option (c) aligns most closely with the plain and ordinary meaning of the words of the Property Trust as well as the apparent intentions of the settlors as reflected in the circumstances surrounding its creation. Accordingly, Mr. Gaines may, at any time while he is still alive and at his option, invoke clause 10 to compel a transfer of the trustees' interest in the Property to himself and Ms. Duggan's estate, sharing equally as tenants-in-common. However, he does not have the right under the Property Trust to compel the trustees to transfer title to him alone, as he claims.

[107] It follows that the Trust Action must be dismissed.

B. The Negligence Action

[108] The parties generally agree on the legal test to be applied in determining whether Mr. Barron should be found liable to Mr. Gaines in negligence. They cite and rely on many of the same authorities. At issue is whether:

- a) Mr. Barron breached his duty of care by failing to adhere to the standard of care expected of a reasonably competent solicitor; and
- b) but for that breach, Mr. Gaines would not have suffered the loss claimed.

[109] In addition, Mr. Barron raises the defences of contributory negligence and the expiry of the governing limitation period.

[110] The first question to be answered is therefore whether Mr. Barron breached the duty of care that he owed to Mr. Gaines. In *Lau, Masuhara J.* summarised the standard of care owed by a solicitor who had been retained to draft and explain the effect of an agreement, as follows:

[32] The obligations of a lawyer were defined in *Tiffin Holdings Ltd. v. Millican* (1964), 49 D.L.R. (2d) 216 at 219, 50 W.W.R. 673 (Alta. S.C.), aff'd [1967] S.C.R. 183, and have been adopted by many decisions in this province: *Zink v. Adrian*, 2005 BCCA 93; *Chaster (Guardian ad Litem of) v. LeBlanc*, 2007 BCSC 1250; *Olenga v. Sisett & Co.*, 2010 BCSC 271:

1. To be skilful and careful;
2. To advise the client on all matters relevant to the retainer, so far as may be reasonably necessary;
3. To protect the interest of the client;
4. To carry out the client's instructions by all proper means;
5. To consult with the client on all questions of doubt which do not fall within the express or implied discretion left to the lawyer; and
6. To keep the client informed to such an extent as reasonably necessary, according to the same criteria.

[33] In *Tiffin*, it was also said at para. 7:

It is not enough to prove that the lawyer has made an error of judgment or shown ignorance of some particular part of the law; it must be shown that the error or ignorance was such that an ordinarily competent lawyer would not have made or shown it.

See also *Banyay v. Christie and Co.*, 2001 BCSC 1165 at para. 24, citing *Brenner v. Gregory*, [1973] 1 O.R. 252, 30 D.L.R. (3d) 672 at 677 (H.C.J.).

[34] The standard of care of a competent solicitor was set out in *Central Trust* at para. 58:

A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken ... The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor.

[35] The standard of care is not to be judged with the benefit of hindsight, but is to be judged in light of the knowledge that the solicitor possessed, or reasonably ought to have possessed, at the time of the negligence alleged: Chaster at para. 102.

[111] Next, Mr. Gaines must demonstrate that any such breach of duty caused him a compensable loss. That element has been held to include both a factual and a legal component. Mr. Gaines must prove not only that Mr. Barron's carelessness actually caused him to suffer a loss (factual causation), but also that the loss suffered was a reasonably foreseeable result of the defendant's carelessness (legal causation): Tellini.

[112] Of the various breaches of duty that Mr. Gaines advanced in closing argument, only those that may have led to a loss of his rights as owner of the Property are covered by the claim. In Part 2 of the Notice of Civil Claim (Relief Sought), Mr. Gaines seeks only "general damages representing the interest in the Property he may lose to the Trustees." He does not plead any other category of damages, such as litigation costs that he incurred in the Trust Action.

[113] The allegations that do fall into that category include Mr. Barron's alleged failures to do the following:

- a) draft the Property Trust to achieve its intended purpose; and
- b) advise Mr. Gaines adequately as to its effects.

[114] I have already rejected Mr. Gaines' contention that the settlors' instructions included the need for a term that would have allowed Mr. Gaines to have title transferred to him alone after Ms. Duggan's death. I have instead found that their instructions contemplated that the surviving settlor was to receive an interest in the nature of a life estate. Inherent in the concept of a life estate is the inability to encroach on capital, a consequence that, I am satisfied, Mr. Barron explained to Mr. Gaines and Ms. Duggan during their initial meeting.

[115] However, the interest that Mr. Gaines received through the Property Trust is not expressly stated to be a "life estate" as such. The Property Trust does not expressly set out the terms that Mr. Barron described to Evan and Rylan Duggan in his emails to them of September 30 and October 1, 2015, or to Mr. Gaines in his emails of August 11 and September 17, 2017, all of which are said to be implicit.

- [116] Mr. Barron says he did not have enough time to raise those issues with Mr. Gaines and Ms. Duggan, given Ms. Duggan's condition and the apparent urgency of the situation. I am not persuaded that is so. Mr. Barron learned of Ms. Duggan's diagnosis in March 2015. The estate planning documents were not finalised and signed until June of that year. In that interval, Mr. Barron's office was able to seek and obtain instructions from both Mr. Gaines and Ms. Duggan on a variety of issues as needed.
- [117] On the other hand, there is no evidence that, prior to 2017, Mr. Gaines let Mr. Barron know that he might need or want the ability to access the equity in the Property after Ms. Duggan's death, while still residing there. Rather, Mr. Gaines argues that Mr. Barron should have inferred from the size of Mr. Gaines' savings (\$70,000 in October 2014) that he would need such access so that he could provide for his retirement, or downsize, and consequently, that Mr. Barron should have made express provision in the Property Trust for Mr. Gaines to be in a position to do so.
- [118] I am not persuaded that Mr. Barron's duty extended that far. Mr. Gaines had ample opportunity to review and consider the draft Property Trust that Ms. McLeod sent him on March 19, 2015. He was satisfied that his interests were sufficiently protected by clause 10, which he understood would operate to allow him to revoke the trust on demand, whenever he wished to do so. The clause remained unchanged when the Property Trust was signed the following June. I have now found that Mr. Gaines retains his right to invoke that clause on demand, despite Ms. Duggan's death. I have also found that if he chooses to do so, he will be in as good a position as he would have been in had he or Ms. Duggan severed their joint tenancy while she was still alive.
- [119] In the meantime, he may yet reach agreement with the trustees on a compromise that would allow him, while still residing at the Property, to access his half share of the equity or downsize, or failing that, he may yet receive the desired relief on an application by one or both of the trustees for directions from the court.
- [120] In these circumstances, I am not satisfied that Mr. Gaines has suffered any compensable loss as a result of any breach of duty on the part of Mr. Barron.
- [121] It follows that the Negligence Action must be dismissed and it is unnecessary to consider Mr. Barron's other defences.

V. Summary and Conclusion

- [122] Both actions are dismissed.
- [123] The parties have leave to speak to costs if they are unable to agree on the appropriate order in light of my decision.

"Milman J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/23/17/2023BCSC1744.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/gaines-v-duggan-2023>

Prepared on 25 October 2026 · Esheria