

CANADA / JUDGMENT

Gill v. Gill

2024 BCSC 526

COURT

Supreme Court of British Columbia

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2024 BCSC 526 Gill v. Gill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gill v. Gill,

2024 BCSC 526

Date: 20240402

Docket: S211876

Registry: Vancouver

Between:

Lakhdev Singh Gill, Amarjit Kaur Gill,

and Sarinder Kaur Gill

Plaintiffs

And

Satdev Singh Gill in his personal capacity and in his

capacity as the Executor of the Estate of Gurdarshan Singh Gill

also known as Gurdarshan Gill

Defendants

- and -

Docket: P191595

Registry: Vancouver

In the Matter of the Estate of Gurdarshan Singh Gill, Deceased

Before: The Honourable Justice Tucker

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

July 5-7, 2023

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Table of Contents

I. INTRODUCTION.. 4

II. APPLICATION HISTORY. 4

A. Application to Revoke the Grant 5

B. Application to Dismiss the Wills Variation Action. 6

C. Application to Amend the Wills Variation Action. 7

III. The Applicable Legislation.. 7

IV. Summary of Findings. 8

V. FACTS And Evidence. 8

A. Background. 8

B. The Will 10

C. The Release. 11

D. The Grant of Probate and Title Transfer 12

E. Notice Dispute. 13

VI. NOTICE DISPUTE. 18

A. Legal Framework. 18

B. Positions on Notice to Lakhdev. 21

C. Notice Findings. 22

1. Nature of the Rule 25-2(5) Presumption. 22

2. Reasonable Diligence and WESA, s. 121 26

3. Whether Deemed Delivery Rebutted. 28

4. Constructive Knowledge of Notice. 28

5. Conclusion. 30

VII. REVOCATION APPLICATION.. 30

A. Legal Framework. 30

B. Analysis. 31

VIII. Dismissal application.. 32

IX. APPLICATION TO AMend.. 36

X. disposition.. 36

I. INTRODUCTION

[1] Gurdarshan Singh Gill and Amarjit Kaur Gill married on June 9, 1969. Gurdarshan and Amarjit had three children together: Lakhdev Singh Gill, Sarinder Kaur Gill and Satdev Singh Gill.

[2] This is an estate litigation case. As is common practice in such cases, I will identify the parties and family members once by their full names and thereafter by their first names. I will refer to Amarjit, Lakhdev and Sarinder collectively as the "Plaintiffs".

[3] Gurdarshan died on July 16, 2013. Satdev was issued a grant of probate on August 6, 2019.

[4] There have been multiple actions filed with respect to matters involving Gurdarshan's estate. The matters before me deal with probate and wills variation claims.

- [5] The Plaintiffs apply to revoke a grant of probate on the basis that they did not receive notice of application for probate. The Plaintiffs have also filed wills variation claims. Satdev has applied to dismiss the wills variation claims on the basis that they are statute-barred and also, as against Amarjit, on the basis that she is estopped from making a claim. Finally, the Plaintiffs seek leave to amend their wills variation pleadings.
- [6] The parties assembled an extensive combined joint application record for these applications. Notably, the application record included transcripts from examinations for discovery that were conducted for each of the parties.

II. APPLICATION HISTORY

- [7] On July 16, 2013, Gurdarshan died, having executed an apparent last will and testament dated December 18, 2008 ("Will"). In the Will, Gurdarshan made Satdev his executor and left his entire estate ("Estate") to Satdev.
- [8] In the spring of 2019, Satdev applied for a grant of probate in respect of the Will and Estate ("Application") under Vancouver Action No. P-191595 ("Probate Proceeding").
- [9] The Application was made under the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA] and Rule 25 of the Supreme Court Civil Rules [Rules]. Lakhdev's law firm sent out notices of the Application by ordinary mail on April 26, 2019.
- [10] On August 6, 2019, a grant of probate ("Grant") was issued to Satdev under the Application.
- [11] The Plaintiffs say they never received notice of the Application. They each say that they first learned of the Application, the Grant and the contents of the Will on or about February 5, 2021.
- [12] On February 26, 2021, the Plaintiffs filed wills variation claims under s. 60 of WESA under Vancouver Registry, No. S-211876 ("Wills Variation Action"). The parties agree that if the Grant is sustained, the Wills Variation Action was filed outside the statutory time period.
- [13] On February 13, 2023, the Plaintiffs filed a separate notice of civil claim alleging the Will is invalid, by reason of undue influence, in the Vancouver Registry, No. S-231036 ("Validity Action"). On March 27, 2023, the Validity Action claim was amended to also seek to set aside certain inter vivos transfers from Gurdarshan to Satdev due to undue influence. The Validity Action had not been served as of this hearing.

A. Application to Revoke the Grant

- [14] On March 6, 2023, the Plaintiffs applied in the Probate Proceeding to revoke the Grant under R. 25-14(1)(c) based on an alleged failure to give notice in accordance with s. 121(1) of WESA and R. 25-2 ("Revocation Application").

- [15] The statutory period for filing a wills variation claim begins to run when a representation grant is issued for the estate. If the Grant is revoked, a new grant will need to be made. Thus, if the Revocation Application succeeds, the Wills Variation Action will be timely.

B. Application to Dismiss the Wills Variation Action

- [16] On February 23, 2023, Satdev filed an application in the Wills Variation Action seeking to have the action dismissed under RR. 9-5(1)(a), 9-6 and/or 9-7 ("Dismissal Application").
- [17] Dismissal is sought against all Plaintiffs' claims on the basis that the Wills Variation Action is statute-barred.
- [18] In the alternative, dismissal of Amarjit's claim is sought on the basis that she is estopped. The alleged estoppel is said to be based on Amarjit's knowledge of the contents of the Will and her having signed a form of release and consent, dated June 13, 2013 ("Release"), and/or signed, at some point between August 6-16, 2019, a Consent and Direction form ("Consent") relating to the transfer of title for a property to Satdev.
- [19] The Plaintiffs' reply pleading in the Wills Variation Action disputes the validity and enforceability of the Release. It is asserted that Amarjit signed the Release without reading it and based on Satdev's having told her that the document was related to removing a certificate of pending litigation registered against a family property. (As will be discussed below, a certificate of pending litigation was registered in prior litigation relating to Ranjit's estate.)
- [20] The reply pleading does not refer to the Consent, but in Amarjit's discovery testimony, she said that she signed the Consent without reading it and based on Satdev's having told her that it was something further required to removing the certificate of pending litigation against the family property.
- [21] The Plaintiffs oppose the Dismissal Application. They say the statutory time-bar issue is moot if the Grant is revoked, and that any estoppel claims Satdev may have against Amarjit are not suitable for summary determination and should be addressed on a full trial record.
- [22] Counsel for Satdev strenuously urges the Court, should it find that the Dismissal Application matters are not suitable for determination by summary trial, to convert the summary trial into a hybrid proceeding to enable the issues to be determined.

C. Application to Amend the Wills Variation Action

- [23] On March 1, 2023, the Plaintiffs applied to amend the Wills Variation Action. The proposed amendments attached to the application included an allegation that the Will is invalid by reason of undue influence. Satdev opposed the proposed amendments relating to the validity of the Will. Mid-hearing, counsel for the Plaintiffs handed-up a revised version of amendments ("Revised Proposed ANOCC") that includes amendments relating to the Wills Variation Action, but omits those seeking to challenge the validity of the Will.
- [24] Counsel for Satdev advised the Court that, if the Wills Variation Action is not dismissed under the Dismissal Applications, Satdev will not oppose leave to amend in accordance with the Revised Proposed ANOCC.

III. The Applicable Legislation

- [25] At the outset of the hearing, the Court raised whether, given the date of Gurdarshan's death, these matters were governed by the Wills Variation Act, R.S.B.C. 1996, c. 490 [WVA] and related legislation. Counsel undertook to consider the matter.
- [26] After consideration, the parties advised that the Wills Variation Action ought to have been made under the WVA, but that they agreed there was no meaningful distinction between WESA and the WVA for purposes of the application of the statutory time bar on the facts of the case. That is, counsel agreed that under either statute the Wills Variation Action will be statute-barred if the Grant is sustained.
- [27] Counsel further advised the Court that they were agreed that, under the WESA transitional provisions, the steps taken in the administration of the Estate (and, in particular, the 2019 Application and Grant) were governed by WESA and R. 25-2. I have proceeded on the basis of that stipulation.

IV. Summary of Findings

- [28] Lakhdev was not given notice of the Application in accordance with WESA, s. 121. Lakhdev first learned of the Application and reviewed the Notice and Grant in early February 2021.
- [29] I am satisfied that revoking the Grant is the appropriate remedy for the failure to give notice to Lakdev.
- [30] As a consequence of the revocation, the statutory time period for filing a wills variation claim will restart for all potential wills variation claimants. As a result, it is unnecessary to determine whether Amarjit and Sarinder were given notice in accordance with WESA, s. 121.
- [31] The estoppel issues raised in the Dismissal Application are not suitable for summary determination. Nor are the estoppel issues appropriate for severance. They should be determined by the trial judge on the trial record.

[32] The Dismissal Application is dismissed in its entirety.

[33] Given these conclusions, I intend to address the facts and issues as narrowly as possible so as to avoid potential encroachment on trial matters. I will, however, set out sufficient background to provide context for my finding on severance.

V. FACTS And Evidence

A. Background

[34] In the mid-1980s, Gurdarshan's parents, Kehar Singh Gill and Ranjit Kaur Gill, bought a large, rural property in Delta ("Delta Property"). There was a residence ("Family House") on the Delta Property. Kehar, Ranjit, Gurdarshan, Amarjit, Lakhdev, Sarinder and Satdev all resided together in the Family House.

[35] Gurdarshan worked in trucking transport and founded a company called L.P.S. 3 Industries Ltd. ("LPS"). He also owned and controlled a company called 2030 Investments Ltd. ("2030 Investments").

[36] For the most part, Amarjit did not work or earn an income. Her primary responsibilities were caring for the other members of the household and running the household.

[37] Satdev joined Gurdarshan working at LPS. Gurdarshan controlled the operations of LPS until the late 1990s, around which time Satdev began taking control over the operation. Satdev married and moved into his own house.

[38] In June 2002, Lakhdev was in a serious motorcycle accident and suffered a traumatic brain injury. He has, at least at times, been in receipt of disability benefits as a consequence. In 2006, Lakdev moved to Mexico and began residing there permanently. He did not move back to BC until about January 2021.

[39] With the exception of a brief period of time in 2013, Sarinder resided at the Family House from the time the family moved in through to the spring of 2021.

[40] Kehar died in 1986. Ranjit died in 1989. Ranjit's estate included the Delta Property and numerous properties in the Lake Cowichan area. Gurdarshan, along with another brother, was one of Ranjit's two executors. Eventually, due to his brother's disqualification by bankruptcy, Gurdarshan became Ranjit's sole executor.

[41] Some time after Ranjit's death, the Delta Property was transferred from a trust (set up under Ranjit's estate) to Gurdarshan and at least one of the Lake Cowichan properties (the "Lake Cowichan Property") was transferred to 2030 Investments. These property transfers would become part of a 2012 legal action filed by another of Gurdarshan's brother's with respect to Ranjit's estate.

- [42] Gurdarshan remained the sole shareholder of LPS and 2030 Investments until he transferred his shares, along with other assets, to Satdev in 2013 (the "Inter Vivos Transfers"). The Inter Vivos Transfers from Gurdarshan to Satdev also included title to the Delta Property and title to some properties on Vancouver Island. On Satdev's evidence, the Inter Vivos Transfers took place between March 2013 (Gurdarshan's brain cancer diagnosis) and July 16, 2013 (Gurdarshan's death).

B. The Will

- [43] On December 18, 2008, Amarjit and Gurdarshan each executed a will at the office of Christopher Boulton, a lawyer. As above, Gurdarshan's Will left his entire estate to Satdev. Amarjit's will left her entire estate to Gurdarshan. In the event Gurdarshan predeceased her, Amarjit left her estate to Satdev.
- [44] Gurdarshan and Amarjit also each signed a letter setting out reasons for excluding other family members as beneficiaries (collectively, the "Will Letters").
- [45] Amarjit's evidence is that Satdev took them to see Mr. Boulton to sign their wills and that Satdev made it clear that he was in a rush and they needed to hurry along. Amarjit testified that she had not spoken with Mr. Boulton prior to December 18, 2008. Her evidence is that the documents were already drafted and presented to her and Gurdarshan for signature and that she did not have an opportunity to read or review the wills.
- [46] Satdev's evidence is that he and his wife were there at the law firm at the same time because they were having their own wills done. Satdev says he was not in the meeting when his parents met with Mr. Boulton and that he did not give any instructions to Mr. Boulton about his parents' wills. Satdev says that after Amarjit and Gurdarshan signed, he took copies of their wills to put in his safety deposit box for safe-keeping. Satdev believes he took the original of the Will to put in his safety deposit box.
- [47] Mr. Boulton provided an affidavit stating that does not recall dealing with Amarjit and Gurdarshan. He outlined his general practices in taking wills. Satdev made an affidavit attaching what he identifies as Mr. Boulton's client file in relation to Amarjit and Gurdarshan's wills. The contents of Mr. Boulton's file indicate that there were meetings on December 16 and 18, 2008.

C. The Release

- [48] In August 2012, Gurdarshan's brother, Jagroop, filed a legal action against (among others): Gurdarshan in his personal capacity, Gurdarshan in his capacity as Ranjit's executor, and Gurdarshan in his capacity as a trustee for the trust under Ranjit's estate ("Ranjit Estate Action"). Among other things, the Ranjit Estate Action alleged that the transfer of the Delta Property to Gurdarshan and the transfer of the Lake Cowichan Property to 2030 Investments constituted breaches of trust.

- [49] In April 2013, Jagroop registered certificates of pending litigation against the Delta Property and Lake Cowichan Property (collectively, the "CPLs") under the Ranjit Estate Action.
- [50] Satdev's evidence is that shortly before Gurdarshan's death, he told Amarjit that she needed to get independent legal advice. Satdev made her an appointment with a lawyer named Kirsten Wharton on June 13, 2013. Satdev says he waited outside while Amarjit met with Ms. Wharton, and that Amarjit walked out of the meeting with the signed Release.
- [51] In the Release, Amarjit acknowledged:
- a) having received and read a copy of the Will;
 - b) that the entirety of the Estate would pass to Satdev;
 - c) having received independent legal advice; and
 - d) that she did not require support from Gurdarshan or the Estate.
- [52] Under the Release, Amarjit disclaimed any interest in the Estate and released all claims pertaining to the Estate.
- [53] Amarjit's recollection regarding the signing of the Release starkly conflicts with Satdev's evidence. She says that Satdev told her that she needed to sign some papers so that the CPL registered against the Delta Property could be removed. Her evidence is that she was distraught at the time, as Gurdarshan was dying, and that she did not read the Release. She says she signed the papers because she wanted the CPL removed from the Family House and she trusted Satdev. Amarjit testified that Ms. Wharton did not provide her with any legal advice. She says that Satdev was present throughout and spoke on her behalf during the meeting with Ms. Wharton.
- [54] There is no affidavit evidence from Ms. Wharton before me, nor any documentary evidence relating to the Release meeting.
- [55] On May 9, 2019, a notice of application to dismiss the Ranjit Estate Action for want of prosecution and to strike the CPLs was filed. The application, which was unopposed, was granted on May 28, 2019.
- [56] At some point after August 6, 2019, but no later than August 16, 2019, Amarjit signed a Consent and Direction of Surviving Spouse form (as before, the "Consent"). The recitals in the Consent identify Gurdarshan as "the Deceased" and refer to a grant of probate that was issued on August 6, 2019.
- [57] At her discovery, Amarjit testified that Satdev had asked her to sign the Consent form because there was still "something left" to do to have the CPL removed from the Delta Property. She said that she did not read the recitals or the body of the form, but rather signed based on what Satdev told her.

D. The Grant of Probate and Delta Property Title Transfer

- [58] Satdev instructed legal counsel at Alexander Holburn Beaudin + Lang LLP ("AHBL") to take steps to probate the Will. A Notice of Proposed Application in Relation to Estate form was signed by AHBL's Ephraim Fung, as Satdev's representative, on April 26, 2019 ("Notice").
- [59] Jessica Quartel, an assistant at AHBL, made an affidavit of delivery in the Probate Proceeding on May 16, 2019 ("Delivery Affidavit"). In the Delivery Affidavit, Ms. Quartel stated that she mailed copies of the Notice and Will to the Plaintiffs by ordinary mail on April 26, 2019. The Plaintiffs do not dispute Ms. Quartel's evidence that she did this.
- [60] The Delivery Affidavit does not indicate the mailing addresses used.
- [61] Satdev's October 22, 2021 affidavit ("Background Affidavit") attaches two AHBL letters that were addressed to the Plaintiffs ("AHBL Letters").
- [62] The first is a letter signed by Mr. Fung, dated April 26, 2019 ("First Letter"). The First Letter is addressed to each of the Plaintiffs (and also to Shanti Kaur Gill and Akash Kaur Gill, Lakhdev's estranged daughters[1]) and lists the Family House as the mailing address for each addressee. It states that the Notice and a copy of the Will are enclosed.
- [63] The second letter attached to the Background Affidavit is dated June 7, 2019 ("Second Letter"). The Background Affidavit attests that the Second Letter was also sent by mail to the Plaintiffs and that it enclosed Gurdarshan's Will Letter. The Second Letter mirrors the First Letter in terms of addressees and addresses.
- [64] On August 29, 2019, Satdev registered the transfer for the Delta Property (signed by Gurdarshan in the Inter Vivos Transfers) with the Land Title Office. The Consent was provided to the Land Title Office to facilitate the transfer of title to Satdev.

E. Notice Dispute

- [65] Amarjit, Sarinder and Lakhdev each attest to never having received the AHBL Letters or Notice.
- [66] Lakhdev's evidence is that after he came back from Mexico to BC in January 2021, Amarjit told him that Satdev had made some comments about her residing in the Family House. He said those comments inspired him to perform a title search on January 7, 2021, which is how he learned that title to the Family House was in Satdev's name. Lakhdev says the title discovery caused him to engage in further online research and that he eventually discovered the Probate Proceeding. He then requested copies of the documents filed in the Probate Proceeding, and received those on or about February 5, 2021.
- [67] Lakhdev says this is when and how he first learned of the Will, Notice, and Grant, and first reviewed them. He says that that he shared the documents with Amarjit and Sarinder on or about February 5, 2021, the same day he received them.

- [68] All three Plaintiffs agree that the mailing address of the Family House was a proper personal mailing address for them at the time material to the Application. All three, however, assert that their ability to receive, into their actual possession, mail sent to the Family House during the relevant period was limited.
- [69] Mail addressed to the Family House is deposited by Canada Post in a Canada Post community mailbox ("Mailbox"). The Mailbox, by Satdev's estimation, is 500 metres or so from the Family House.
- [70] Satdev testified that the address for the Family House is, and always has been, the company address for LPS and 2030 Investments.
- [71] Amarjit and Sarinder say that prior to mid-June 2018, Amarjit, Sarinder and Satdev each had a key to the Mailbox. However, Satdev often collected all of the mail from the Mailbox, retained any company mail, and dropped the rest off at the front door or inside the Family House. Satdev agrees that this was his practice.
- [72] Sarinder's evidence is that she lost her key to the Mailbox in late June 2018 and reported her loss to Canada Post. Call logs obtained from Canada Post confirm that Sarinder reported a key lost on June 28, 2018. The logs also indicate that on July 30, 2018, Satdev requested new keys for the Mailbox and indicated that the new keys would be picked up.
- [73] Amarjit, Sarinder and Satdev provide conflicting evidence as to who collected the new keys and who received a new key. Amarjit and Sarinder each say they did not receive a new key and that, as of August 2018, Satdev was the only person able to open the Mailbox.
- [74] Satdev says that that Amarjit and Sarinder had at least one key for their own use. He says that when he checked the Mailbox, he continued, as before, to collect all the mail, retain any company mail, and drop the remainder at the Family House.
- [75] The issues relating to control and access to the Mailbox, and to the handling of mail removed from the Mailbox, go to whether the AHBL Letters made it from the Mailbox to the Family House and/or into the hands of the Family House residents. The Plaintiffs say their evidence regarding the Mailbox and mail collection establishes that there was real potential for mail sent to them at the Family House to be intercepted (and to be intercepted by Satdev in particular).
- [76] Lakhdev's position goes further, however. He lived in Mexico. Lakhdev contends that Satdev was aware that mail sent to Lakhdev at the Family House would not actually come to his attention unless something further were done to bring the mail to his attention.
- [77] Lakhdev's evidence is that, at some time prior to 2012, he and Satdev spoke about mail coming to the Family House for Lakhdev and agreed that Satdev would call him if anything important-looking arrived. Lakhdev says that even when he and Satdev were not getting along, Satdev still let him know about any important-looking mail for him.

[78] Satdev's evidence is that there was no agreement and that he had no obligation to review or to do anything about Lakhdev's mail. He says there was an informal practice whereby he would, when he happened to notice important-looking mail for Lakhdev, let Lakhdev know about it.

[79] At discovery, Satdev testified as follows:

Q ... When [Lakhdev] was in Mexico, did you see -- when you would collect the mail anyways, did you see Lakhdev receiving mail - mail addressed to Lakhdev when you -

A Yes.

Q Okay. What would you do with that mail?

A Leave it at the Delta house, or if it looked important, once in a while when we were communicating, I'd say, hey, something looked important from this. Because Lakhdev's and my communication was very sporadic.

Q M'mm-hmm.

A So -- but he's still my brother. I'm still looking out for him.

Q Okay. So there was times anyways where if you saw something important you would let him know?

A If I -- it looked important, like Sun Life, I'd say, hey, you know, you got something from Sun Life or - I don't know what they call it but the Ministry for Families or something. And then he'd say either, yeah, no big deal, or can you open it and see.

[80] In the Background Affidavit, Satdev states that Lakhdev did not maintain a good relationship with Gurdarshan and Amarjit and hardly spoke with them after moving to Mexico. He attests that to his "knowledge, and based on his near-daily contact with" Amarjit, Lakhdev had little to no contact with Amarjit between Gurdarshan's death and Lakhdev's return to BC in 2021.

[81] Satdev also attests that he (Satdev) was the member of the family who informed Lakhdev of Gurdarshan's diagnosis and health status, and also the one who called to tell Lakhdev when Gurdarshan died and to provide Lakhdev with information about the funeral.

[82] At discovery, Satdev testified as follows with respect to his expectations regarding the AHBL Letters mailed to Lakhdev at the Family House:

Q Did you ever see or hear, I guess, either your mom or your sister speak with Lakhdev about his mail at all?

A No.

Q Okay. So you don't have any knowledge of how he would have ever seen any of this mail that was in the box [i.e., the box in the Family House for Lakhdev's mail]?

A His mail wasn't really my concern.

Q No, I appreciate that. I just want to make sure there was -- there was not some other type of arrangement he had with someone in the family to get his mail?

A I wouldn't know.

Q You wouldn't know? Okay. When you instructed your lawyers to mail that probate notice to the family home -- so to mail it to Lakhdev to the family home, how did you expect that that would actually come to Lakhdev's attention?

A I didn't explicitly direct them to send it there. I just asked them what the steps were, what we needed to do, if they're all taken care of, and they said yes.

Q So is it fair to say then -- then you didn't turn your mind to how that would actually come to Lakhdev's attention in the circumstances?

A No.

[83] I note that notwithstanding Satdev's testimony above that he did not "explicitly direct" his lawyers to send Lakhdev's Notice to the Family House, Satdev also agreed at discovery that he would have been the one who gave AHBL the addresses used for the mail out.

[84] Satdev also testified to the following in discovery:

- a) He never provided Lakhdev with a copy of the Will other than by the First Letter;
- b) He never told Lakhdev that Notices had been mailed out;
- c) He never told Lakhdev that he had applied for the Grant;
- d) He never told Lakhdev that he was applying for probate for the Estate.

VI. NOTICE DISPUTE

A. Legal Framework

[85] The issue raised in the Revocation Application is whether notice was properly given to the Plaintiffs. Section 121 of WESA requires an applicant for a grant of probate to give notice:

121 (1) An applicant for a grant of probate or administration must give notice of the proposed application to the persons referred to in the Supreme Court Civil Rules.

[86] It is undisputed that the Plaintiffs were all persons entitled to notice under WESA, s. 121 and Rule 25-2(5).

[87] Rule 25-2 outlines when and how delivery of notice must be completed. At all times material[2] to the Grant application, Rule 25-2 included the following:

Notice of intended application for estate grant or resealing

- (1) Subject to this rule, unless the court otherwise orders, a person intending to apply for an estate grant or for the resealing of a foreign grant in relation to the estate of a deceased must, at least 21 days before submitting for filing the materials required for that application under this Part, deliver the following to the persons referred to in subrule (2).

When delivery occurs under this rule

- (5) Delivery of a document under this rule occurs as follows:

- (a) if the document is sent for delivery to a person by ordinary mail to the person's mailing address, the document is deemed to be delivered on the date it is mailed;

[88] The Court of Appeal previously addressed the issue of notice of application for probate on somewhat similar facts (i.e., relating to mailed notice): *Desbiens v. Smith*, 2010 BCCA 394. On appeal, the result in *Desbiens* was the revocation of the grant of probate. The revocation resulted in a consequential finding that the wills variation claim there was brought within the statutory time limit under the WVA (*Desbiens* at paras. 72-73).

[89] In *Desbiens*, the obligation to give notice of the application for probate (and the grant of probate) were governed by the Estate Administration Act, R.S.B.C. 1996, c. 122 [EAA]. Section 112 of the EAA required an applicant for probate to certify that notice had been mailed or delivered:

112 (1) A court must not grant ... probate ... unless the applicant ... certifies that ... he or she has

- (a) mailed or delivered a notice to each person other than the applicant who, to the best of ...his or her knowledge, is

...

(ii) entitled on an intestacy or partial intestacy,

(iii) entitled to apply under the Wills Variation Act with respect to the will,

... and

- (b) if there is a will, attached a copy of it to the notice.

...

(3) If a person referred to in subsection (1) (a) is dead or the person's whereabouts is unknown, on a summary application, the registrar of the court may make

- (a) an order dispensing in whole or in part with the requirements of subsection (1), or
(b) another order the registrar considers advisable.

[90] The terms "mail" and "deliver" were at the time of Desbiens (and remain at present) defined as follows under s. 29 of the Interpretation Act, R.S.B.C. 1996, c. 238:

29 In an enactment:

...

"deliver", with reference to a notice or other document, includes mail to or leave with a person, or deposit in a person's mail box or receptacle at the person's residence or place of business;

...

"mail" refers to the deposit of the matter to which the context applies in the Canada Post Office at any place in Canada, postage prepaid, for transmission by post, and includes deliver

[91] In Desbiens, the executrix, Ms. Bernacki, mailed notice of the application to the plaintiffs using addresses she found in an old address book belonging to the deceased. She used the addresses even though she was aware that it was unlikely that the deceased had kept in contact with the plaintiffs.

[92] The Court of Appeal found her efforts lacking, emphasizing that EAA, s. 112 notice was intended to be functional:

[28] In any event, I am not persuaded by Ms. Bernacki's argument that an executrix need not make inquiries to satisfy herself that a "last known address" remains current. The notice requirement in s. 112 is a functional one - it is not a meaningless pro forma exercise. It is designed to ensure that the persons listed receive notice of probate. That function will not be fulfilled unless reasonable inquiries are made to ensure that the notices are sent to the correct addresses.

...

[32] As the chambers judge pointed out, Ms. Bernacki could have sought the assistance of the court under s. 112(3) of the Estate Administration Act if she was, in the end, unable to ascertain the plaintiffs' addresses. At the very least, her affidavit in support of the grant of probate ought to have elaborated on the various conjectures that she adopted in formulating addresses for the plaintiffs, rather than simply saying that she had caused notice to be mailed to them. It also should have provided information as to what inquiries, if any, had been made to determine the plaintiffs' addresses.

[33] I do not suggest that executors and administrators face onerous requirements in determining the addresses of persons entitled to notice under s. 112 of the Estate Administration Act. All that is required is that the person giving notice exercise reasonable diligence in ascertaining the recipients' addresses. In cases where, having exercised reasonable diligence, they still do not have confidence that they have obtained correct addresses, they must be fully candid in their affidavit in support of probate, and, in appropriate cases, should make application under s. 112(3) of the Act.

- [34] In the case before us, no effort was made to ascertain whether the addresses that were used were accurate. The information available to Ms. Bernacki could not have given her any confidence that they were; she understood that the testator had not had contact with the plaintiffs for many years (indeed, she appears to have been under the impression that he had had even less contact with them than was the case).
- [35] I am of the view that the trial judge made no error in finding that Ms. Bernacki failed to exercise sufficient diligence in undertaking the notice requirements, and I would not interfere with his finding that she failed to fulfill the notice requirements referred to in s. 112(3) of the Estate Administration Act.

[Emphasis added.]

B. Positions on Notice to Lakhdev

- [93] Satdev contends that WESA and Rule 25-2 do not contemplate the personal delivery of notice of an application for probate, nor require an applicant to confirm with intended recipients that notice was received. Rather, the applicant need only meet the minimum threshold of having conducted reasonable efforts in terms of directing the notice to a valid address.
- [94] Satdev argues that the presumption of deemed delivery under Rule 25-2 is operative here, as it is undisputed that the AHBL Letters were mailed by Ms. Quartel and the mailing addresses used are admittedly valid.
- [95] The Plaintiffs, in turn, argue that the deemed delivery presumption under Rule 25-2(5) is rebutted on the evidence and, with regard to Lakhdev, that the evidence shows that Satdev failed to exercise reasonable diligence to ensuring the Notice was likely received.
- [96] In reply, Satdev conceded that the deemed delivery under Rule 25-2(5) is not a conclusive presumption, but contended that a bare assertion that notice was not received cannot suffice to rebut the presumption. He contends that there must be an evidentiary threshold, otherwise the statutory time limit would be rendered meaningless. He notes that the Plaintiffs have offered no evidence as to what actually happened to the Notices that Ms. Quartel mailed.
- [97] In the alternative, Satdev contends that the evidence shows that Lakhdev had "constructive" knowledge of the Application and of the contents of the Will. Satdev relies on two 2017 text messages written by Lakhdev that refer to things having been "signed over" to Satdev and a 2019 newspaper article ("2019 Article") quoting Satdev speaking of final probate in relation to the possible demolition of buildings on (what at least appears to be) the Lake Cowichan Property.

C. Notice Findings

1. Nature of the Rule 25-2(5) Presumption

[98] In *Gray v. Kerslake*, [1958] S.C.R. 3 at 9, 1957 CanLII 21, while the majority of the Court determined the case on a separate legal basis, Kerwin C.J. and Cartwright J. found that a statutory provision reading that "a contract is deemed to be made" in Ontario in certain circumstances could not be interpreted as a conclusive presumption. Justice Cartwright wrote:

The question of the meaning to be given to the word "deemed" when used in a statute has been considered in many decisions, a number of which are collected and discussed in the judgments delivered in the Appellate Division in *Hickey v. Stalker*, [1923 CanLII 494 (ON CA), 53 O.L.R. 414, [1924] 1 D.L.R. 440], a case dealing with an Ontario statute different from the one with which we are concerned. As is pointed out by Meredith C.J.C.P., at p. 416, the word may mean "deemed conclusively" or "deemed until the contrary is proved".

At pp. 418-9 Middleton J., as he then was, after referring to the treatment of the word in the dictionaries, continued:

Far more important are two decisions of the Supreme Court of Nova Scotia. In *Regina v. Freeman* (1890), 22 N.S.R. 506, Townshend, J., speaking for the full Court, says (p. 513): "The word 'deemed' has acquired no technical or peculiar signification when used in legislation, but, like other words, must be interpreted with reference to the whole Act of which it forms a part."

[99] The courts of this province have endorsed this approach to deeming provisions on numerous occasions: *R. v. Moore* (1970), 1 C.C.C. (2d) 521 at 535, 1970 CanLII 1037 (B.C.C.A.); *McManamna v. Chorus*, 2008 BCCA 471 at para. 14; *Peier v. Cressey Whistler Townhomes Limited Partnership*, 2011 BCSC 773 at para. 61; *Lawson v. Bajpai* (1989), 36 BCLR (2d) 106 at paras. 14-16, 1989 CanLII 2724 (S.C.); *British Columbia (Forests)*, 1996 CanLII 1540 (B.C.S.C.) at paras. 13 and 14, *aff'd* *Foley v. British Columbia (Ministry of Forests)*, 1999 BCCA 261 at paras. 26 and 27.

[100] Here, while Satdev conceded that R. 25-2(5) is not a conclusive presumption, he argues that it should be interpreted to require a particular type of evidence (e.g., positive evidence of what became of a mailed notice) or a certain threshold of evidence in order to be rebutted.

[101] Satdev did not provide any legal authority in support of these propositions, whether specific to the wording of Rule 25-2(5), with respect to estate administration, or generally. He did not articulate how the suggested standard or threshold would be defined, except by asserting that a bare denial of having received notice should not suffice and that evidence that the address was incorrect or positively establishing the notice was intercepted or destroyed after entering the mail system would.

[102] As already noted, in *Desbiens*, the Court of Appeal described the notice required under s. 112 of the EAA as a functional notice. When an application for probate is made, notice under WESA, s. 121 is the only notice the intended recipient is entitled to receive. There is no period when an intended recipient of WESA, s. 121 notice should expect the notice to arrive (as compared to, for example, an annual assessment notice or license renewal

notice). In fact, the intended recipient for WESA, s. 121 notice may be unaware the deceased is dead. Section 121 notice is not pro forma administration -- the function of the notice to bring the application to the intended recipient's actual attention.

[103] Further, the notice called for under s. 112 of the EAA was fairly minimal. The relevant subsections of the EAA read:

- (6) The notice under subsection (1), (1.1) or (1.2) must state
 - (a) the name, address, occupation and date of death of the deceased,
 - (b) the name and address of the applicant, and
 - (c) the court to which application is to be made.
- (7) The notice under subsection (1), (1.1) or (1.2) may be in the following form, with the necessary changes:

In the Estate of A.B., of the City of Victoria, in the Province of British Columbia, labourer, who died on the first day of April, 1972.

Take notice that the undersigned is applying for probate [or letters of administration] of the above estate in the Supreme Court of British Columbia at, British Columbia.

[104] In comparison, the notice form mandated under Rule 25-5 (Form P1) includes the following information:

- (2) You have a right to oppose, by filing a notice of dispute in accordance with Rule 25-10 (1),
 - (a) if the intended application is for an estate grant, the granting of either or both of an authorization to obtain estate information and the estate grant[.]
- (3) You may or may not be entitled to claim against the estate for relief, including a claim under
 - (a) the Family Law Act, or
 - (b) Division 6 of Part 4 of the Wills, Estates and Succession Act.
- (4) If you choose to take a step referred to in paragraph (2) or (3), you must do so within the time limited by any relevant rule of court or other enactment.

[105] In 2010, the British Columbia Law Institute ("BCLI") authored the Report on New Probate Rules (BCLI Report no. 57, October 2010), proposing modernized probate rules. The overall approach and framework of the BCLI report provided the foundation for what eventually became Part 25 of the Rules: *Mortimer v Bender*, 2020 BCSC 483 at para. 118.

[106] In Section II, the authors of the BCLI Report state:

The most prominent new feature of common form procedure under the draft probate rules is a 21-day period that must elapse between notice to interested persons of an application for a grant and the filing of the application itself. Prescribed text in the notice would inform the recipient of the right to oppose the application by filing an estate caveat, and refer to the possibility that rights may exist against the estate under the Family Relations Act or the will variation provisions of the WESA. It would warn the recipient that any steps to pursue these rights, if they exist, must be taken within legally established time limits.

This will transform the largely illusory notice under section 112 of the Estate Administration Act into a true informative statutory notice allowing an opportunity to the recipient to assess his or her legal position and take the steps warranted, such as filing a caveat or making a counter-application. The present "section 112 notice" is often a perfunctory exercise because it can be sent at the same time the application is filed

[Emphasis added.]

[107] The notice form mandated under Rule 25-2 specifically alerts the recipient to the existence of R. 25-10 and the WESA provisions regarding wills variation claims. This is not incidental information. Rather, as indicated in the BCLI Report, conveying this information is one of the central functions of notice under R. 25. Thus, notice under WESA, s. 121 and Rule 25-2 has an increased function, as compared to the EAA notice under consideration in *Desbiens*.

[108] Just as the wording, function and statutory context of Rule 25-2(5) do not support a finding that the presumption is conclusive, they do not support the assertion that there is or ought to be any specific required to rebut the presumption. Imposing such a threshold would countervail the intended functionality and related obligation to act with reasonable diligence in giving notice.

[109] A presumption of law is generally rebuttable on a balance of probabilities on evidence satisfactory to the court. Although not a case cited by either of the parties, I endorse the comments of Justice Roudinelli in *Toronto (City) v. Alloway*, 2022 ONCJ 557 [Alloway] with respect to the general principle of application:

[3] Section 87(2) of the Provincial Offences Act ("POA") states:

Rebuttable presumption, mail delivery

(2) If a notice or document that is to be given or delivered to a person under this Act is mailed to the person at the person's last known address appearing on the records of the court in the proceeding, there is a rebuttable presumption that the notice or document is given or delivered to the person.

- [4] By operation of this section, where there is proof that a Notice of Trial was mailed out to a defendant's last known address, a rebuttable presumption is established that the defendant received the notice. As a presumption of law, a defendant will have the burden of rebutting the presumption on a balance of probabilities: See *R. v. Proudlock*, 1978 CanLII 15 (SCC).
- [5] It should be noted that s. 87(2) speaks of ordinary mail and not registered mail, which would provide greater proof of delivery. In dealing with ordinary mail, it would not be a stretch to take judicial notice that Canada Post is not a perfect delivery service. Many issues may arise that would prevent a letter from being delivered to the intended addressee. Section 87(2) of the POA provides relief for such lapses but places an evidentiary burden on a defendant to rebut the presumption of receipt.
- [6] The issue of non-receipt of a Notice of Trial is a common claim dealt with by this court. Many times, a defendant appeals on the basis of a mere denial of receiving the Notice of Trial. Despite its conclusory nature, I see no reason why such a denial, if believed on a balance of probabilities, should not be sufficient to displace the presumption. In my view, what else is a defendant - who in fact did not receive the notice in the mail - expected to say other than, "I never received it"? Such a denial may gain further strength if made under oath or affirmation. However, such a denial need not always be believed. Cross-examination of a defendant may serve to impeach or discredit a defendant's testimony that they never received the notice in the mail.

[Emphasis added.]

- [110] That said, it is fair to add that context is always central to the assessment of probability, as was noted Justice Rothstein in *F.H. v McDougall*, 2008 SCC 53 at para 40:
- [40] Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof. ...

2. Reasonable Diligence and WESA, s. 121

- [111] Satdev does not deny that an applicant has an obligation to make reasonable efforts to comply with WESA, s. 121. He contends, however, that Desbiens and Rule 25-2(5), taken together, indicate that evidence establishing that the proper form of notice was mailed to a valid personal mailing address establishes the standard was met.

- [112] In *Desbiens*, the only efforts Ms. Bernacki made consisted of mailing notices by ordinary mail to speculative addresses. In *Russell Estate v. Larson*, 2019 BCSC 135 at paras. 57-60, the facts were again that the applicant mailed notice out without making any effort to ascertain whether the address was current. In both cases, the court looked at what the applicant had actually done and measured that specific conduct against the standard of reasonable diligence.
- [113] However, *Desbiens* did not merely establish a diligence obligation in relation to the addressing of mail. It established the broader proposition that an applicant is obliged to make reasonable efforts to ensure persons entitled to notice of application are likely to receive notice.
- [114] *WESA*, s. 121 notice is a functional notice. The function is served when the notice is received. Thus, the diligence obligation requires an applicant to make reasonable efforts to give effective notice. If the goal is effective notice, then the applicant's reasonable efforts must take into account the relevant facts and circumstances known to them.
- [115] Accordingly, an applicant who mails a notice to an address knowing that it is improbable that the notice will come to the intended recipient's attention thereby has not made a reasonable effort. In such circumstances, more effort is required. The applicant might, for example, also alert the intended recipient to the mail out or send additional notice to alternative addresses. The affidavit of delivery should set out why and what additional steps were taken.
- [116] If an applicant remains uncertain as to whether what has done is sufficient in the circumstances, an order setting terms of service can be sought under Rule 25-2(1), in which case the subsequent affidavit of delivery should reference the order and its terms.
- [117] Here, Satdev knew that Lakhdev was in Mexico. He was aware that it was unlikely that mail sent to Lakhdev at the Family House would come to Lakhdev's attention unless additional steps were taken. Satdev had no basis for believing that, if he did not take additional steps himself, the AHBL Letters would be brought to Lakhdev's attention. Yet nothing further was done. The result was a failure to make reasonable efforts to give notice.
- [118] It does not matter whether Satdev and Lakhdev did or did not have an agreement about Lakhdev's mail. Satdev's had an obligation to make reasonable efforts rooted in *WESA*, s. 121, regardless of any obligations he have owed in contract.
- [119] I find that Satdev failed to make reasonable efforts to give notice to Lakhdev for the purposes of *WESA*, s. 121.

3. Whether Deemed Delivery Rebutted

- [120] In light of the above, I find that the question of whether Lakhdev received the Notice can be fairly and finally resolved on the record before me (as was the case in *Desbiens* at para. 69).

[121] Lakhdev attests that he did not receive the Notice. His evidence on the point withstood cross-examination at discovery.

[122] The evidence shows that Satdev failed to make a reasonable effort to provide Lakhdev with Notice.

[123] Nothing in the evidence before me indicates that Lakhdev somehow received the Notice notwithstanding the insufficiency of Satdev efforts.

[124] Adopting the principles from Alloway, I accept, on a balance of probabilities, that Lakhdev did not receive the Notice.

4. Constructive Knowledge of Notice

[125] Satdev submits, in the alternative, that Lakhdev had "constructive knowledge" of the Notice.

[126] Satdev has provided no legal authority for the proposition that it is possible to have constructive knowledge of a WESA, s. 121 notice in the manner alleged here.

[127] I note the discussion of "functional satisfaction" the notice requirement in Desbiens and Russell. In both cases, the analysis was performed to assess whether the applicant for revocation had sought to file a wills variation claim in a timely manner after discovering and reviewing the probate proceeding documents.

[128] In Russell, Madam Justice Dardi stated:

[67] In Desbiens, the Court endorsed a "functional satisfaction" approach of the notice requirement under the EAA, when analyzing when probate ought to have issued (at para. 75). The Court stated:

the requirements of s.112 were functionally satisfied, in respect of Ms. Desbiens, on March 13, 2007, when she received the documents that she was entitled to. It does not appear that the documents were sent directly to the other plaintiffs, but they would have had effective notice of the situation, through Ms. Desbiens, within days of her receipt of the documents. Accordingly, probate in this case ought not to have issued until some date shortly after March 13, 2007.

[68] On my reading of Desbiens, the Court determined that probate ought not to have been issued until "some date shortly after" Ms. Desbiens received the documents because that is when the other plaintiffs, who did not receive direct notice, would have received functional notice through Ms. Desbiens. In the case of a sole plaintiff, the date the plaintiff receives actual notice of the date probate was issued is the date on which functional satisfaction of the requirements of the EAA is effected and the date when probate ought to have been issued. Consequently, it is six months from this date that the limitation period for an application under the WVA would expire.

- [69] In this case, the notice requirement of the EAA was functionally satisfied in respect of Ms. Knudsen on or about May 2, 2011, when she received and reviewed not only the probate application in respect of her father's Will, but also a copy of the Grant and a copy of the Will. Accordingly, she ought to have commenced her variation claim within six months of May 2, 2011.
- [129] There is no discussion of "constructive knowledge" in either decision. Notably, this is notwithstanding the degree of knowledge that Ms. Knudsen was found to have had in Russell: see. paras. 19-25 and 70-74. Rather, the courts considered functional satisfaction of the notice to be the point in time when the relevant documents were actually reviewed.
- [130] The functional satisfaction analysis in Desbiens and Russell is consistent with my view that WESA, s. 121 and R. 25 contemplate notice consisting of an entitlement to review the relevant documentation.
- [131] I conclude that there is no basis in law for Satdev's assertion that Lakhdev had "constructive knowledge" of the Notice.

5. Conclusion

- [132] In sum, I find that Satdev did not give notice of the Application to Lakhdev in accordance with WESA, s. 121. As noted in the introduction, it is unnecessary in the circumstances to determine whether Amarjit and Sarinder received their Notices.

VII. REVOCATION APPLICATION

- [133] Given my finding that Lakhdev did not receive notice of the Application, I will consider whether revocation is an appropriate remedy in the circumstances of the case.

A. Legal Framework

- [134] A failure to provide notice under WESA, s. 121 does automatically result in a revocation. A failure to comply with WESA, s. 121 only "opens the door" for an application for a revocation order. A revocation order is discretionary and should be approached with restraint: Desbiens at paras. 68 and 70.
- [135] In Desbiens, the Court of Appeal also emphasized the relationship between the function of notice, the obligation to make reasonable efforts to provide notice, and the appropriateness of revocation as a remedy:
- [68] Where reasonable efforts to comply with s. 112 of the Estate Administration Act have not been made, probate should not issue. Where a grant of probate has issued notwithstanding a failure to comply with s. 112 of the Estate Administration Act, the Supreme Court has jurisdiction to revoke the grant, just as it would have if another condition precedent to the grant of probate had not been satisfied.

[73] I do not agree with Ms. Bernacki's submission that a grant of probate that is revoked for a failure to give notice under s. 112 of the Estate Administration Act is nonetheless effective to bar the bringing of an action under the Wills Variation Act by a person to whom notice ought to have been given. Indeed, the very purpose of revoking the grant is to ensure that a condition precedent to a grant - the giving of proper notice under s. 112 - is fulfilled. The limitation period for the bringing of the action under the Wills Variation Act would not, in the circumstances of this case, be measured from the date that the first grant of probate was issued.

[74] In considering whether it is appropriate to revoke the grant, the court must consider whether, by doing so, it is acting in a manner that is unduly favourable to the plaintiffs. The limitation period for the bringing of an action under the Wills Variation Act is six months from the date that probate is issued. The court ought not, by revoking the original grant, allow the plaintiffs to bring their action more than six months from the earliest date that probate could have issued. It is necessary, therefore, to consider whether revoking the original grant would have that effect in this case.

[Emphasis added.]

[136] In order to determine whether revocation is appropriate, particularly where the result would be to render a wills variation action timely, the Court of Appeal outlined the following factors for consideration in *Desbiens* at para. 70:

- a) Are the plaintiffs correct in asserting that revocation would affect the limitation period for filing a claim under the WVA?
- b) Would the result treat the wills variation claim plaintiffs unduly favourably?
- c) Is the wills variation claim of sufficient merit to justify revocation?
- d) What effect would revocation have on transactions that have already taken place?
- e) Would third parties would be prejudiced by revocation?
- f) Would revocation cause the executor or beneficiaries to suffer inequitable treatment?

B. Analysis

[137] Adopting the approach in *Russell* and *Desbiens*, I find that the WESA, s. 121 notice requirement was not "functionally satisfied" here until February 5, 2021, when Lakhdev received and reviewed copies of the Notice, Grant and Will.

[138] The Wills Variation Action was filed on February 26, 2021.

[139] An order revoking the Grant would not be unduly favourable to Lakhdev in in the circumstances as the claim was filed less than a month after functional notice.

- [140] Satdev did not indicate that revocation would have any problematic impact on transactions that have already taken place, nor identify any adverse effects that would flow from revocation.
- [141] No third parties were identified as being prejudiced. Satdev is the sole beneficiary under the Will. The only other persons entitled to Notice of the Grant application were Amarjit and Sarinder, and both support revocation.
- [142] In consideration of the merits of the Wills Variation Action, I am satisfied that the revocation is not a futile exercise. Lakhdev's claim has sufficient merit to warrant a revocation. The sufficient merit threshold is not a high one. Although Lakhdev is an adult child, the Application valued the Estate at almost \$1.4 million, substantial assets were transferred inter vivos to the Will beneficiary.
- [143] I am satisfied that the Grant should be revoked in the circumstances.
- [144] An estate is either subject to a representation grant or it is not. Thus, the revocation of a grant will reset the statutory filing period for all potential wills variation claimants.

VIII. Dismissal application

- [145] There is no dispute between the parties as to the tests to be applied under RR. 9-5(1), 9-6 and 9-7.
- [146] To the extent the Dismissal Application seeks orders dismissing the Wills Variation Action on the basis that is statute-barred, the outcome in the Revocation Application has disposed of that issue.
- [147] What remains under the Dismissal Application is Satdev's claim of estoppel against Amarjit based on the Release. Satdev's arguments on the application indicate that reliance may also be placed on the Consent. The Plaintiffs reply pleading already address the Release and, based on Amarjit's discovery evidence, essentially the same position would be taken with respect to the Consent.
- [148] In essence, Satdev argues that because was aware of the contents of the Will and signed the Release (and/or Consent), Amarjit is estopped from advancing a wills variation claim and her claim should be dismissed, either under RR. 9-5(1), 9-6, or 9-7.
- [149] The question for the judge under R. 9-5(1)(a) is whether it is "plain and obvious", assuming the facts pled to be true, that that no reasonable cause of action is disclosed" or whether the claim has "no reasonable prospect of success": *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2021 BCCA 142 at para. 48.

- [143] Under R. 9-6, summary judgment will be granted if it is "beyond a doubt" or "plain and obvious" that there is no genuine issue for trial. The court cannot weigh the evidence before it. If there is contested evidence on a material point, then there is a triable issue and the matter cannot be resolved by summary judgment: *Apex Packaging v. Winterland Beverages Ltd.*, 2023 BCSC 69 at para. 22.
- [150] The Plaintiffs plead in reply that Amarjit signed the Release due to misrepresentations and without knowing the nature of the document. Thus, it is not "plain and obvious" that Amarjit is estopped by the Release. There are triable issues as to what she was told and what she thought she signed. The same issues would arise in respect of the Consent. Therefore, the matter is not suitable for dismissal under RR. 9-5(1) or 9-6.
- [151] Turning to R. 9-7, in *Lee v Chau*, 2021 BCSC 70, Madam Justice Douglas discussed the factors applicable to determining whether a matter should proceed by summary trial:
- [13] In deciding whether it is just to proceed by summary trial, a judge may consider the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of proceeding with a conventional trial relative to the amount at stake, the course of the proceedings, and any other matters which arise: *Inspiration Management [Ltd. v. McDermid St. Lawrence Ltd.]* (1989), 36 B.C.L.R. (2d) 202 at para. 53, 1989 CanLII 229 (C.A.), at para. 49. Other relevant factors include the cost of the litigation and the time required for the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create unnecessary complexity in the resolution of the dispute, and whether the application would result in litigation in slices: *Gichuru v. Pallai*, 2013 BCCA 60 at para. 31 [Gichuru]; *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241 at paras. 64-66.
- [152] The misrepresentation, inducement and related estoppel issues pertaining to the Release (and/or Consent) are not appropriate for summary determination. These matters are the subject of conflicting testimony and will fundamentally rest on credibility findings. There is no documentary or independent evidence before me that could be relied upon, at this stage, to make a credibility finding.
- [153] Counsel for Satdev urged me to consider whether the issues in the Dismissal Application could be justly determined under a hybrid procedure. In my view it would be inappropriate to sever the estoppel issues from the full trial in any event.
- [154] Rule 9-7 permits the court to hear and decide only a specific issue or issues by way of summary trial:
- (2) A party may apply to the court for judgment under this rule, either on an issue or generally, in any of the following:
- (a) an action in which a response to civil claim has been filed; .
- (15) On the hearing of a summary trial application, the court may

- (a) grant judgment in favour of any party, either on an issue or generally, unless
- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- (ii) the court is of the opinion that it would be unjust to decide the issues on the application[.]

[155] In *Ferrer v. 589557 B.C. Ltd.*, 2020 BCCA 83, the Court of Appeal discussed when it was appropriate to "hive off" an issue or issues on a summary trial as opposed to dealing with the entirety of a claim:

[27] In *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485, the court considered a large number of authorities (most of which emanated from the British Columbia Supreme Court) on when it is appropriate to hive off an issue in litigation for summary trial. It distilled from the cases a list of factors to be considered:

[110] In summary, the authorities in BC, including *Hryniak*, make clear that the factors the court must consider on applications to determine by summary trial only part of the issues in the lawsuit are:

- a) whether the court can find the facts necessary to decide the issues of fact or law;
- b) whether it would be unjust to decide the issues by way of summary trial, considering amongst other things:
 - i. the implications of determining only some of the issues in the litigation, which requires consideration of such things as:
 - (1) the potential for duplication or inconsistent findings, which relates to whether the issues are intertwined with issues remaining for trial;
 - (2) the potential for multiple appeals; and
 - (3) the novelty of the issues to be determined;
 - ii. the amount involved;
 - iii. the complexity of the matter;
 - iv. its urgency;
 - v. any prejudice likely to arise by reason of delay; and
 - vi. the cost of a conventional trial in relation to the amount involved.

[28] This list is a good indication of the factors that are typically of concern when a court is asked to deal with a single issue on a summary trial. I would not, however, suggest that all of these factors will be relevant in every case, and I would discourage a checklist approach to the question.

[36] While the judge did not specifically mention it, I would observe that one of the most important considerations in determining whether a single issue should be separated out and determined in a summary trial is the question of whether it is intertwined with other issues. ...

[156] The estoppel issues are not appropriate for severance on consideration of the factors outlined and approved in Ferrer. The conflicting evidence and credibility issues relating to Amarjit's knowledge of the contents of the Will and her signing of the Release and Consent are thoroughly intertwined with the other credibility issues in the litigation.

[157] The estoppel matters should be determined by a trial judge on a full trial record.

IX. APPLICATION TO AMend

[158] Rule 6-1 governs the amendment of pleadings. Having previously filed a notice of trial, the Plaintiffs may not amend their pleadings without leave of the court, per R. 6-1(b).

[159] Satdev advised that he will not oppose the Revised Proposed ANOCC. However, the Revised Proposed ANOCC was not part of the record before me. Further, the Revised Proposed ANOCC should be further amended to reflect that the claim is made under the WVA.

[160] Leave is granted to the Plaintiff's to file amendments in the form of the Revised Proposed ANOCC and reflecting the application of the WVA.

[161] Counsel for the Plaintiff should provide the form of the amendments to counsel for Satdev for review prior to filing. Should there be any dispute as to whether the amendments are consistent with the Revised Proposed ANOCC, the dispute should be brought before me prior to filing.

X. disposition

[162] In summary:

- a) the Revocation Application is granted;
- b) the Dismissal Application is dismissed; and
- c) the Plaintiffs' are granted leave to amend their pleadings in accordance paras. 160 and 161 above.

[163] As the Plaintiffs were substantially successful on these applications, they are entitled to their costs in the cause.

"Tucker J."

[1] The parties agree that Shanti and Akash were not entitled to notice under Rule 25-2 and that sending the ABHL Letters to them was not required. It is also undisputed that neither Shanti nor Akash lived at the Family House or used the Family House as a mailing address.)

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- [2] The Notices were mailed out on April 26, 2019. On December 1, 2021, Rule 25-2(1.1) came into force: OIC No. 540, Oct. 1, 2021. Neither side contends the revisions to Rule 25-2 are relevant to the applications before me nor of any assistance in interpreting the provisions at issue here.
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