

CANADA / JUDGMENT

Pelletier v. Pelletier

2025 BCSC 43

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 43 Pelletier v. Pelletier

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pelletier v. Pelletier,

2025 BCSC 43

Date: 20250110

Docket: E220534

Registry: Vancouver

Between:

Dora Mildred Karen Pelletier

Claimant

And

Claude Albert Pelletier

Respondent

And

Brittany Danielle Adcock aka

Brittany Danielle Pelletier and Darryl James Adcock

Defendants by Counterclaim

Corrected Judgment: The text of the judgment was corrected on the front page on January 16, 2025.

Before: The Honourable Justice Whately

Reasons for Judgment

The Claimant, appearing in Person:

D. Pelletier

Counsel for the Respondent:

J.M.W. Cudmore

D. Gorelov, Articling Student

Counsel for the Defendants by way of Counterclaim:

A.J. Eden

S.L. Seiler

Place and Date of Trial:

Vancouver, B.C.

June 10-14, 2024

June 17-21, 2024

Place and Date of Judgment:

Vancouver, B.C.

January 10, 2025

Table of Contents

Introduction.. 4

Claude and Dora's Capacity. 7

Claude. 7

Dora. 8

Background.. 12

Property. 13

Breakdown of the Relationship. 14

Diagnosis of Dementia.. 16

Medical Experts. 21

Invocation of the POA.. 22

Sale of the Farm Property and Proceeds. 23

The Graham Road Guest Suite.	25
Claude is Apprehended under the Mental Health Act.	29
Revocation of POA..	31
Separation Agreement.	31
Issues.	32
Credibility.	33
Claude.	34
Dora.	35
Brittany.	37
Darryl	39
Legal Framework..	41
Separation Agreement	41
Breach of Fiduciary Duty.	43
Unjust Enrichment.	47
Knowing Receipt.	50
Conclusion..	52

Introduction

- [1] This family claim involves the breakdown of a 60-year marriage between the claimant, Dora Pelletier, and the respondent, Claude Pelletier. The respondents by counterclaim are the Pelletiers' granddaughter, Brittany Adcock, and her husband, Darryl Adcock. Throughout these reasons I will refer to the parties by their first names, as that is how they were referred to throughout the trial and in evidence. I mean no disrespect in doing so.
- [2] In addition to the usual claims for divorce and property division, the primary issues before me include allegations of financial misconduct, breach of fiduciary duty, and unjust enrichment.
- [3] These allegations arise from a tragic series of events that culminated in the estrangement of a close-knit, loving extended family unit. Some of the events were outside of the control of the parties, and some were the result of poor decisions made in the midst of extremely challenging circumstances. Regardless of the decisions I come to herein, I know that each member of this family lost something that cannot be replaced by a financial judgement or other legal remedies.

- [4] While Dora is the named claimant in the family action, by agreement of the parties, the trial proceeded as if Claude was the claimant.
- [5] In addition to orders regarding property division and divorce, Claude seeks various declarations that Dora and Brittany breached fiduciary duties he says they owed to him during a period of time that he was believed to be suffering from dementia. He also claims that Brittany and Darryl were unjustly enriched due to those breaches. Claude seeks orders and damages against Dora, Brittany and Darryl.
- [6] While Claude makes allegations of financial misconduct against both Dora and Brittany, the evidence shows, and Claude appears to acknowledge that that Dora was not herself enriched by the alleged conduct. Like Claude, Dora is currently in a much worse financial position than she was before the events at issue.
- [7] The same cannot be said for Brittany and Darryl.
- [8] Many witnesses testified at this trial, including several medical professionals. Much of this evidence was helpful to explain the factual events that led to Claude's diagnosis and treatment, but much of the detail is not material to the legal issues before me. In the end, the evidence provided by Claude and Brittany was of central importance to my decision. For the reasons that follow, I largely find in favour of Claude, and grant most of the orders he seeks.
- [9] In this decision, I find fault with the conduct of Dora, Brittany, and, to a lesser degree, Darryl regarding their treatment of Claude during a time when he was extremely vulnerable. I acknowledge the challenges inherent in caring for family members who are suffering from debilitating health issues. That said, caregivers who accept the role of managing another person's affairs while they are incapable must do so with the utmost of care towards the person's best interests, and not with a mind to their own profit, frustration or convenience. I regret to say that Claude's family failed in this regard.
- [10] Two things can be true at the same time:
- [11] It is true that Claude suffered from serious health issues requiring medication. This medication led to catastrophic effects: his behaviour and personality changed, and I accept that he became cantankerous, less rational, and generally difficult to be around. Claude suffered from symptoms that mimic dementia, such as temporary cognitive and functional impairments, and he also likely suffered from increased impulsivity and paranoia.
- [12] It is also true that Claude had reason to be distrustful of those who were managing his finances and his care during this difficult period.
- [13] Claude's diagnosis of dementia, was, at least in part, based on collateral reporting from Brittany and to a lesser extent, Dora, which included exaggerated or blatant untruths about his behaviour, particularly with respect to his finances. Claude's treating physicians observed and commented on his distrust of his family, who he believed was withholding

information from him regarding his finances. Claude maintained that the doctors were being told lies about his spending habits and consistently denied much of the detail that ended up in multiple medical reports. He understandably developed a strong distrust of his medical team. This, in turn, was seen as part of Claude's overall paranoia and "perseverative" behavior.

- [14] I have not been asked to determine whether Claude ought to have been declared incompetent, or whether his medical diagnosis was correct. That is not the issue before me. There is no dispute that for a period of three years Claude was subject to a finding of incapacity by his general practitioner and a geriatric psychiatrist.
- [15] As a result of the finding of incapacity, Claude was subject to an enduring power of attorney first held by Dora, and later by Brittany. Brittany also acted as an ad hoc fiduciary in managing Claude's finances through most of the relevant period, before she assumed the formal power of attorney in place of Dora. While there was some dispute about whether Claude had some limited and periodic access to a joint bank accounts with Brittany, I find that Claude did not have any control of his financial or health decisions during this time.
- [16] While they acted on Claude's behalf, Dora and Brittany made financial decisions that were to their benefit, and not in Claude's interest. They did so without record keeping or accounting to justify or explain the decisions made, or to track the use of Claude's funds. I find that the claimant and the respondents by counterclaim breached fiduciary duties they owed to Claude, and that Brittany and Darryl were unjustly enriched as a result of the breaches.

Claude and Dora's Capacity

Claude

- [17] As mentioned, much of the medical evidence entered during this trial was relevant only in explaining the chronology of events concerning Claude's capacity and by extension, how, why, and when he lost control of his finances.
- [18] I cannot and do not come to conclusions about the quality-of-care Claude received, whether he was correctly diagnosed with dementia in 2018. For the purposes of this decision, I accept that he was diagnosed with dementia in 2018 and in 2021, this diagnosis was reconsidered or changed. Regardless, given the circumstances of this case, it is important to address the issue of capacity in the context of the legal proceedings.
- [19] At the time of trial, Claude displayed no outward signs of cognitive decline, nor any of the behaviours or symptoms associated with dementia or other mental disorders that featured so prominently in the evidence. Claude's counsel, Mr. Cudmore, assured the court that he had no difficulty obtaining Claude's instructions throughout the litigation.

- [20] Claude testified on his own behalf at this trial. My impression was that he was lucid, clear, thoughtful, and measured in his testimony. He had good historical recall and responded appropriately to questions both in direct and under cross examination. He was well-dressed, even dapper, and carried himself with dignity and intelligence.
- [21] Claude is clearly a proud man with strong opinions, but I observed that he demonstrated nuanced thinking and reasonable emotional regulation, even when pressed on matters that were clearly frustrating or emotional. Like many litigants, he displayed a tendency to downplay painful or traumatic events he played a part in, particularly when it came to interactions with his great grandchildren when he was unwell. However, this tendency was no more pronounced, and in fact I found it less pronounced, in Claude than with other witnesses.
- [22] Claude also relies on the independent medical examination of Dr. Passmore. Among other findings to be discussed later, Dr. Passmore concludes that Claude is capable of instructing legal counsel, and that any previous cognitive impairments were primarily due to side effects of medication and therefore temporary in nature.
- [23] Dr. Passmore's finding in this regard was not seriously contested by counsel for the Adcocks or by Dora, but there was some suggestion that Claude's capacity remained at issue leading up to the trial. For clarity, I do not hesitate to find that Claude had the capacity to instruct counsel and testify at trial.

Dora

- [24] Surprisingly, my primary concern with respect to legal capacity and trial fairness did not pertain to Claude. On the first day of trial I was informed that Dora, who had been recently represented by counsel, intended to represent herself.
- [25] With the assistance of counsel for the Adcocks, Dora applied to enter her direct evidence by way of affidavit pursuant to Rule 14-7(59) of the Supreme Court Family Rules, B.C. Reg. 169/2009, which provides that "On the application of a party at or before trial, a judge or master may order that the evidence in chief of a witness may be given by affidavit".
- [26] In support of her application, Dora relied on a late-filed report from her family GP, Dr. Daws. Dr. Daws states that Dora suffers from mild neuro cognitive decline, including failing memory, difficulty in following instructions, word recall, and concentration.
- [27] Dora claimed that stress both aggravates this cognitive deficit and poses an increased risk to her health. She refers to experiencing complications from a knee surgery, and that she recently fell, and suffered from concussion and post-concussion syndrome. She said she is able to recount major life events, but struggles with dates and details.

- [28] Dr. Daws featured prominently in this family's narrative, and came to conclusions regarding Claude's health and capacity to manage his financial affairs in the course of her care of him. Dr. Daws also testified as part of the Adcocks's case later in the trial. I accepted the late filing of Dr. Daws' report regarding Dora for the sole purpose of Dora's application, but not with respect to any of the central issues in this trial.
- [29] Dora's health issues described in the application and report did not come as a surprise to any of the counsel, or parties of record. However, the impact of these health issues were compounded by the fact that Dora was unrepresented at the time of trial, which was a recent development. The application to rely on affidavit evidence was made in the unusual circumstances of Dora being present at trial and willing and able, at least in terms of her physical presence, to testify in direct and to be cross examined.
- [30] In opposing the application, counsel for Claude pointed out that representing herself was Dora's choice, and that it was clear Dora was receiving significant assistance from counsel for the Adcocks. Dora advised the court that she could no longer afford to pay counsel to represent her. She did not want to apply for an adjournment.
- [31] I ruled on this application part way through trial, and include the substance of that ruling herein. Regardless of the reason for Dora's lack of counsel, I considered her application in terms of ensuring fairness of the proceedings and how best to ensure a full and fair canvas of the facts.
- [32] The law concerning the admissibility of affidavit evidence in these circumstances was not in dispute in this application. The dispute concerns the application of the legal principles to the circumstances of this case. The parties accept that I must find that the evidence is reliable, that it is necessary, and that the balancing of prejudice, as between the parties, favours the party seeking to rely on the affidavit.
- [33] In order to allow Dora's direct evidence to go in by affidavit, I determined whether the evidence was reliable and necessary. I also considered the balance of prejudice to each party resulting from admission or exclusion of the affidavits.
- [34] With respect to the first two factors, reliability and necessity, each had wrinkles of complexity in the circumstances.
- [35] First, the evidence showed that Dora's cognitive and memory issues have been present for some time, and were present when she swore the affidavits in question. This raises questions about reliability given that the affidavits were crafted by counsel when Dora was suffering from similar symptoms.

- [36] Second, we were not faced with the same kind of necessity as if Dora were in hospital, deceased, or so incapacitated that she could not be present at trial. Dora was present throughout the trial. While her active participation was limited, she attended every day, listened, and was addressed by the court throughout. Dora answered questions asked of her, and consistently confirmed she was able to follow along.
- [37] As part of her application to enter her evidence by affidavit, Dora confirmed that she would make herself available for cross examination, which is unusual in these applications.
- [38] The key lies in the consideration of balancing of prejudice in this case.
- [39] Dora was not represented, and there was little dispute that her cognitive decline, however mild, would negatively impact her ability to lead her own direct evidence. Her willingness to be cross-examined on her affidavits mitigates the prejudicial effect of allowing her direct evidence to go in by way of affidavit.
- [40] In most respects, Dora and the Adcocks were aligned in interest at least in terms of seeking the same result at trial. Claude argued that this naturally increased the risk of a "sweetheart" cross examination of Dora by counsel for the Adcocks, during which he could ask Dora leading questions aimed simply at confirming the mutual interest as opposed to testing or eliciting the truth.
- [41] However, this theoretical threat to the evidentiary record existed whether I allowed Dora's affidavits to go in or not. The cross examination of Dora would proceed largely in the same manner as it would if she led her own direct examination, albeit with added reference to the affidavits. She was available to be tested on her memory and the truth of her statements, and to be challenged on any inconsistencies with discovery evidence. The only difference was that the basis of her direct evidence was the affidavits and not her memory on the stand.
- [42] I found that the prejudice of not allowing the affidavits outweighed the prejudice in allowing them. In the interests of allowing Dora to participate in the trial as fulsomely as possible, and, given that she would be available for cross-examination, I allowed Dora's affidavits to go in. I advised Dora that I would be weighing that evidence in the same manner as if she led that evidence in direct.
- [43] I expressed my concern about potential conflicts of interest between Dora and the Adcocks, given the assistance Mr. Eden--counsel for the Adcocks--was clearly providing to Dora. Mr. Eden assured me that his role was limited to assisting Dora with her application, and that any ongoing efforts he would make on her behalf would be limited to procedural matters as an officer of the court. I accepted Mr. Eden's statements in this regard.
- [44] Throughout the trial, I regularly checked in with Dora to ensure she understood what procedural steps were being taken, to see if she wanted to enter any evidence, cross-examine witnesses, or make submissions.

[45] While not ideal, I was satisfied that Dora was able to understand and follow the trial proceedings. She was given the opportunity to present her evidence in the manner she preferred, and she in turn made herself available for cross examination. While on the stand, she occasionally struggled with memory, date and word recall, but she did not appear confused, and she was able to speak for herself.

Background

[46] Dora was born on January 27, 1944, and is 80 years old. Claude was born on September 10, 1938 and is 86 years old. Claude and Dora were married on May 30, 1960, in New Liskeard, Northern Ontario.

[47] Claude and Dora had three children:

- a) Daniel John Pelletier, born 1960 ("Dan");
- b) Darryl Pelletier, born 1970 (Deceased in 2007); and
- c) Christopher Pelletier, born 1980 (Deceased in 1982).

[48] Brittany, the respondent by counterclaim, is Dan's daughter and Claude and Dora's granddaughter. Brittany is married to Darryl, who is also a respondent by counterclaim. Brittany and Darryl have three children together, LA, SA and HA. Throughout the events in question, Brittany and Darryl's children were very young, and were, respectively, aged 5, 3 and 1 in 2018.

[49] Dora worked for the City of Courtenay as an administrator until she retired. Claude worked in the mining industry, and worked on his own farm. Both Claude and Dora retired in the early 2000s, but Claude continued to work on the farm, with Dora's assistance.

[50] On April 4, 2011, Claude and Dora entered the Power of Attorney ("POA") allowing for Dora to manage Claude's affairs once he was no longer capable of doing so, with Brittany as the alternate.

[51] Claude and Dora formally separated on November 3, 2021.

Property

[52] Claude and Dora moved to British Columbia in September 1970. In 1973, Claude and Dora purchased 48 acres of land in Courtenay, BC, which they cleared for farming and where they also built a house (the "Farm Property").

[53] In 1989, Claude and Dora purchased a piece of undeveloped land on Graham Road near the Farm Property, where they built another home with the intention of retiring there once done with farming (the "Graham Road Property"). They rented out this property for several years.

- [54] In 2006, the house at the Graham Road Property burned down in a fire. Claude and Dora decided to construct a new house. They eventually moved back to the Graham Road Property in 2010, but continued farming on the Farm Property. When Claude and Dora moved to the Graham Road Property in 2010, Brittany and Darryl moved to the house on the Farm Property and rented it from Claude and Dora.
- [55] In 2018, Claude and Dora sold the Graham Road Property to Brittany and Darryl. It is not disputed that Claude and Dora sold the Graham Road Property to Brittany and Darryl at a significant discount. Based on the BC Assessment of July 1, 2017, the purchase price of the Graham Road Property was \$774,000. Claude and Dora sold the property to Brittany and Darryl for \$374,000 less than the assessed value.
- [56] The specific purpose or intent of this discount is disputed between the parties. Claude says the large discount was meant to represent an advance on Brittany's inheritance. Brittany denies any such discussion about an inheritance took place, and says the discounted sale price was just something her grandparents were happy to do for her. There is no dispute that the property was generously and significantly discounted for Brittany and Darryl's benefit, due to the close relationship between Brittany and her grandparents.
- [57] Around this time, both Dora and Claude were slowing down in their advanced age. Both had health issues, particularly Claude, and neither were driving. Dora and Claude came to rely more and more on Brittany for assistance and she willingly gave it, just as Claude and Dora willingly gave financial assistance to Brittany. Prior to the sale of the Graham Road Property to Brittany and Darryl, there was discussion about granting a life estate on that property for the benefit of Dora and Claude. All parties agree that this did not come to pass for various reasons.
- [58] The circumstances surrounding the Graham Road Property transaction are part of the narrative relevant to this action, but the discounted sale to Brittany and Darryl does not form part of Claude's claim.

Breakdown of the Relationship

- [59] In 2018, Claude and Dora were experiencing significant tension in their relationship. Dora wanted to stop farming and leave the Farm Property. She was tired, and wanted to enjoy retirement. She wanted to move onto the Graham Road Property to be closer to Brittany and the great grandchildren. Claude did not want to stop farming. He had plans for the farm, including improving the buildings and he was not ready to move to the Graham Road Property.
- [60] In and around 2018, Claude purchased a tractor for approximately \$45,000, a Honda SUV for approximately \$40,000, and he ordered a Power Harrow for approximately \$13,000, all for the purpose of continuing his work at the Farm Property.

- [61] Dora was particularly stressed about Claude's spending on the Farm and the state of their joint finances. She worried about paying the bills and taxes. Claude was not concerned, and was confident that they were spending within their means. He pointed out that they were largely debt free at this time. He suggested they could hire someone to do the books to relieve Dora's stress. In the fall of 2018, Dora visited her family in Ontario. Before she left, she wrote a letter to Claude saying that they would have to have a serious discussion when she returned.
- [62] Claude and Dora disagreed about the wisdom of purchasing expensive farm equipment, particularly given Claude's age. Dora no longer wanted to be tied to the farm, which she considered to be a "hobby" farm that did not bring in much money. She wanted a different life. The farm was clearly far more important to Claude, and formed a significant part of his identity.
- [63] From the evidence it is clear that Claude was a headstrong and determined person. In his view, he consulted with Dora and they had an equal partnership. He said they made decisions together. He said that she was "in charge" of the books, and that she largely agreed with, or at least eventually acquiesced in all decisions about equipment purchases. In Dora's view, Claude always did what he wanted, regardless of her wishes or concerns, and would never leave the farm of his own accord.
- [64] For the purposes of this decision, I need not decide who was at fault for the breakdown of Claude and Dora's relationship, or when issues between them began. There is conflicting evidence on this, some of which was arguably later conflated and possibly exaggerated in reports to physicians.
- [65] I will not delve into distant history, or poor behaviour that is not relevant to the issues in action. Dora and Claude suffered the tragic loss of two of their sons and other challenges in their long marriage. I will not comment on whether this was a long, mostly happy marriage that collapsed suddenly due to difficult circumstances, or a borderline abusive marriage that was miserable from beginning to end. As with most things, the truth likely lies somewhere in the middle. By 2018 and likely earlier, Claude and Dora's relationship had reached an impasse, one that may well have persisted even without Claude's dementia diagnosis.

Diagnosis of Dementia

- [66] Claude experienced several health issues in the years leading up to the relevant events in this case. He had cardiac surgery in 1998, cerebrovascular disease, high cholesterol, cataracts, temporal arteritis, a gallbladder infection/cholecystitis that resulted in sepsis, sleep apnea, and rheumatica.

- [67] Claude's eye issues resulted in suspension of his drivers licence in 2015. By all accounts, including his own, Claude was less than compliant with the driving suspension, particularly when it came to the roads surrounding the Farm Property and doing farm-related tasks, including transporting bales, but the accounts differ in terms of the extent of his driving during this time.
- [68] It is not clear whether Claude's persistence with respect to driving without a licence is evidence of declining mental facilities, or general stubbornness and a reluctance to give up independence. It seems likely that Claude's overarching health issues were cumulative, and further, that many symptoms and behaviours were likely related to more than one thing.
- [69] In 2018, Claude was prescribed a course of prednisone as treatment for temporal arteritis and polymyalgia rheumatica. He did not react well to the prednisone.
- [70] Several incidents occurred in 2018 which caused concern for Claude's family, specifically, Dora and Brittany. Much of the concern centred on Claude's focus on the farm, both with respect to the physical labour he still devoted to it, and the spending choices he made with respect to farm equipment and assets. Dora was uncomfortable with the latter, and it caused tension. More generally, Brittany and Darryl testified that in 2018, Claude's behaviour was changing and becoming more aggressive, irrational, and chaotic.
- [71] Brittany said that Claude asked Darryl to go with him to China to purchase an excavator. Claude was also "fixing" the barn on the Farm Property in a "band-aid" manner, which was out of character for Claude, and seemed dangerous for an elderly person to undertake. Brittany felt Claude was manic and also unusually for him, highly disorganized and erratic.
- [72] In October 2018, Claude visited his family doctor, Dr. Daws. Based on discussions with Dora and Brittany, Dr. Daws wrote a letter on October 25, 2018, stating that Claude was at risk of significant inability to manage his finances. Dr. Daws testified that the purpose of her writing the letter was to allow Dora to take it to financial institutions to restrict Claude's spending.
- [73] Dr. Daws referred Claude to Dr. Frolic, a geriatric psychiatrist, for further cognitive assessment. Claude was not aware of Dr. Daws' letter, nor that Dora sought to enact the enduring POA.
- [74] On November 20, 2018, Mr. Motley, a geriatric nurse, met with Claude. In addition to his own assessment, Mr. Motley relied on collateral information from Brittany in his reporting about Claude, including:
- Claude was spending a large amount of money on farm equipment and other items over the internet, making purchases totalling approximately \$400,000 to \$500,000.
 - Claude was going to China to purchase more farm equipment.
 - Claude was driving, transporting hay bales which fell off the tractor on the highway.

- d. Claude was having auditory and visual hallucinations where he sees young children around him.
 - e. Claude was spending most of his profits on various internet scams and unnecessary farming equipment.
- [75] On November 21, 2018, Dr. Frolic had a consultation with Claude and found he was no longer capable of managing his affairs. She wrote: "[d]ue to a chronic and persistent cognitive disorder Claude Albert Pelletier is no longer capable of making his legal and financial decisions. The enduring clause of the Power of Attorney should be enacted."
- [76] In coming to this conclusion, Dr. Frolic relied on collateral information from Brittany, including:
- a. Claude's poor relationship with his wife, including emotional abuse towards Dora. Additionally, Claude was unfaithful: he was having a relationship with another woman, who currently resides in Ontario, for 37 years.
 - b. Brittany's belief that Claude was physically aggressive with Dora, as she had observed hand-shaped bruises on Dora's arms.
 - c. Claude spent about \$400,000 on farm equipment that he did not need.
 - d. Brittany found Claude attempting to purchase a tractor online for \$40,000, in what was clearly a scam. Claude also shared passwords over the Internet, as well as passport information.
 - e. Claude spent all of his and Dora's savings and now even dipping into their retirement fund.
 - f. Claude made plans to go to either China, Korea or Germany to buy an excavator.
 - g. Claude drove on the highway without securing round bales, resulting in the bales falling off on the highway.
 - h. Claude was having hallucinations, including those of little girls.
- [77] On November 29, 2018, Dr. Daws formally diagnosed Claude with dementia and prescribed him antipsychotic medication. Claude reacted very poorly to the medication and said that it impaired his physical abilities and vision, and made him hyper and restless, likely due to akathisia.
- [78] On December 17, 2018, Dr. Daws met again with Claude regarding his progress. Dr. Daws relied on Brittany's assertions that Claude spent over \$300,000 in the last 18 months as well as other details about his behaviour.
- [79] During the course of the trial, the evidence clearly showed that some of these "facts" were either untrue, partially untrue, exaggerated or taken out of context.

- [80] For example, Claude admitted to having a brief affair after the death of one of his sons, 37 years ago. He had not been having an affair for 37 years. There was no evidence that Claude had been physically abusive to Dora. Claude had one brief hallucination following a new prescription, which was addressed immediately with his physician and never occurred again.
- [81] Given the issues of this case, the most concerning discrepancies are certain collateral facts about finances and spending that repeatedly appeared in the medical reporting as Claude's care was transferred from one doctor to another. One such discrepancy is Claude's spending on unneeded farm equipment, the total for which ranged from \$300,000 to \$500,000 in the reports, and that he had drained, or was draining his and Dora's life savings.
- [82] Neither of these collateral facts were true. The amounts Claude was apparently spending were hugely inflated by Brittany either on purpose, or in the course of constant retelling to medical professionals. All the medical professionals who testified at trial about Claude's treatment confirmed they received this information from Brittany (or from the report of the previous practitioner, who received it from Brittany), and that they believed and relied on it.
- [83] Claude's medical issues were canvassed at length during the trial. Several of his treating health professionals testified, including:
- a) Dr. Daws, Claude, and Dora's GP;
 - b) Dr. Frolic, a psychiatrist who treated Claude, and found him incapable of managing his financial affairs in November 2018;
 - c) Christine McIntosh, a nurse clinician on a geriatric specialist team in the Comox Valley;
 - d) Andrew Motley, a registered psychiatric nurse; and
 - e) Dr. Schovanek, a psychiatrist who evaluated Claude after he refused to return to Dr. Frolic, and who deemed him capable of managing his financial affairs in November 2021.
- [84] I will not go over the medical evidence or testimony in detail. Much was made at trial about Claude's diagnoses and the events, factors and tests that led to them. The doctors and nurses were tested on cross as to the level of reliance and trust they put in Brittany's reporting as "collateral information" when they dealt with Claude.
- [85] These circumstances are complicated by the fact that Claude was suffering from medical or psychological issues that impacted his cognitive and functional capacity. The health care professionals relied on the collateral information from family, but that was not the sole basis for Claude's diagnoses or treatment plans.
- [86] I can speculate about whether appropriate safeguards were in place, given that much of the reporting by Brittany, including details about Claude's spending and behaviour, was repeated over and over in the medical reporting but was shown to be exaggerated, lacking context, or completely false. I may ask whether Brittany's narrative ought to have been more

carefully scrutinized by medical professionals, or whether Claude's doctors ought to have considered whether he was experiencing an adverse reaction to medication, given its known side effects.

- [87] I am not in a position to decide these questions, and ultimately, I am not being asked to do so. The answers to these questions do not change the fact that Claude was deemed incapable of managing his own affairs, and was under the effect of a POA for a period of three years, between November 2018 and November 2021.

Medical Experts

- [88] In addition to Claude's own treating physicians and other care providers, two expert reports were tendered. The authors did not testify.
- [89] Claude tendered a report by Dr. Passmore, a physician specializing in geriatric psychiatry, who conducted an independent medical examination of Claude. Dr. Passmore opined on, among other things, Claude's capacity to manage his financial affairs, instruct counsel and to make testamentary decisions currently, and retrospectively, in December 2021.
- [90] Dr. Passmore opined that, as of the date of his examination of him, Claude was capable of managing his financial affairs, instructing legal counsel, making a will, making a POA, and making a representation agreement.
- [91] Dr. Passmore also opined that Claude's cognitive impairment and below normal MoCa (Montreal Cognitive Assessment) scores which led, in part, to his diagnosis of dementia, were primarily due to the side effects of medication.
- [92] While conceding that without the ability to directly assess Claude as of December 2021 he could not definitively opine on his retrospective capability, Dr. Passmore said that Claude was likely capable in all the same aspects in December 2021. The basis for this opinion is the extensive cognitive and functional assessment Claude received while hospitalized in October and November of 2021, which led to the reversal of the previous finding of incapacity.
- [93] Brittany and Darryl Adcock tendered a report by Dr. Sloan, a physician with a specialization in geriatric care. Claude refused to, and ultimately did not, meet with Dr. Sloan for a capacity assessment because, as his counsel communicated, he had enough of being poked and prodded, and there was no longer any question about his capacity.
- [94] Dr. Sloan opined on whether Claude suffered cognitive impairment from November 2018 onwards, whether it was reasonable for Dora and Brittany to rely on the medical opinions of Claude's physicians to enter into the separation agreement, and to provide comments on Dr. Passmore's report.

- [95] Dr. Sloan's report was of limited assistance to the court. Dr. Sloan primarily confirmed the medical opinions of other medical practitioners who cared for Claude, and did not disagree with Dr. Passmore's report. He did not meet with or evaluate Claude. He quite correctly opined that the reasonableness of Dora and Brittany's reliance on medical opinions and the actions they took as a result, specifically with respect to the separation agreement, was outside his expertise as a physician and was more likely a legal issue.
- [96] Dr. Sloan agreed with Dr. Passmore that the dementia diagnoses Claude received in 2018 through 2021 was likely the result of medication side effects, given his significant cognitive and functional improvement, and his current capacity. He said there is no question that Claude suffered from temporary deterioration in brain function. However, he stated that dementia is usually "relentlessly progressive", and Claude's problems resolved in late 2021.

Invocation of the POA

- [97] After Dr. Daws and Dr. Frolic's diagnoses in 2018, Dora removed Claude's ability to access his financing by removing his credit and debit cards and the cheque books from the Farm Property. There is dispute as to whether Claude retained, or regained use of his debit card at some point, but the evidence shows he did not have use of his credit card, and I find that he did not have access to his accounts or his money.
- [98] Dora delivered a copy of the POA to the banks to ensure they would not allow Claude to access any of his accounts. Claude states that he did not do online banking, and from this point on, he had no access to his finances. In her cross examination, Dora confirmed that the purpose of delivering a copy of the POA to the banks was to put a freeze such that Claude would be unable to withdraw funds from their bank accounts.
- [99] In January of 2019, Dora opened or reactivated a line of credit (the "LOC") in her and Claude's name against the Farm Property. Prior to this, the Farm Property had no registered debt.
- [100] Dora started drawing on the LOC to fund the construction of what became her home on the Graham Road Property ("Dora's House"). Claude says that she did so without his knowledge or agreement, even though initially, this home was meant to be for the both of them to live in once the Farm Property sold. The construction began in early 2019.
- [101] Dora, Brittany, and Darryl state that Claude knew about the construction and was involved in the decision to build the home on the Graham Road Property. Claude says he did not agree to the LOC being used to build this home. First, because he would not have agreed to go back into debt, but primarily because he never would have agreed to go into debt to build a home on someone else's land that he could not own or sell.
- [102] Claude agreed that at some point, he suspected the LOC was being used to fund the construction of what later became Dora's House.

[103] Dora's House was completed in 2019 with the help of a contractor. Brittany stated that she believed Dora's House ultimately cost about \$320,000, but a total of \$473,512 was paid to Dora and Claude's LOC between its re-activation in October 2018, and its closing in August 2020.

Sale of the Farm Property and Proceeds

[104] In the Spring of 2019, Claude started selling farm equipment and livestock in preparation to sell the Farm Property. He did not agree with the sale of the Farm Property, and did not want to sell, but he knew he had no choice, and wanted to get the best price for the equipment. He thought Dora was insufficiently knowledgeable about the value of their farm assets and was afraid she would conduct a "fire sale". He was subject to the effects of the POA at this time.

[105] Claude says he sold equipment and livestock in excess of \$240,000, including:

- a) cattle, sheep, and hay for a total of \$22,000;
- b) a diesel truck for approximately \$10,000;
- c) a Harley Davidson motorcycle to Darryl for \$9,000; and
- d) a Honda motorcycle for \$10,000 (sold in 2021).

[106] It is not clear what the remainder of the \$240,000 was comprised of, or where the funds from the sale of farm assets went. Claude says he gave the cheques from the sales to Dora as he received them, not only because he always did, but also because he had no access to his bank accounts at this time. Claude also maintained that his personal records were not returned to him when he was later made to leave the Graham Road Property.

[107] The Farm Property sold on July 3, 2020, for \$999,999. Claude did not participate in the sale. Dora completed the sale of the Farm Property as Power of Attorney for Claude.

[108] The LOC, which was at \$335,071.44 in July 2020, was immediately paid following the sale of the Farm Property.

[109] After the LOC was paid off, the amount of \$610,103.89 was transferred to Dora and Claude's joint bank account (the "Farm Sale Proceeds").

[110] On July 6, 2020, \$401,611.28 was transferred from Claude and Dora's joint bank account into Claude and Brittany's joint account. On the same day, that same amount was transferred out of Claude and Brittany's joint account, into Brittany and Darryl's joint account.

- [111] Claude does not know what happened to the approximately \$210,000 that remained from the Farm Sale Proceeds. He recalls Dora advising that these funds were put in an interest-bearing account. However, there are some subsequent large withdrawals from Dora and Claude's joint account. Dora states she invested the remainder of the Farm Sale Proceeds at Raymond James.
- [112] Brittany testified that Claude himself transferred the \$401,611.28 from his joint account with Dora into his joint account with Brittany. Claude says he did not do any online or in-person banking at this time and I find that he did not do this transfer, and if he did, it was at a time that he was not capable to do so.
- [113] Brittany's testimony, supported by Dora, is that these funds were intended represent a \$200,000 payment to compensate Brittany and Darryl for building a "guest suite" on their property for Claude's use, and \$200,000 as a gift from Dora and Claude for the benefit of the great-grandchildren's education.
- [114] Brittany said that education was very important to both Dora and Claude, and that she discussed this gift and the money for the guest suite with Claude.

The Graham Road Guest Suite

- [115] As mentioned, an additional structure was constructed on the Graham Road Property in addition to Dora's House (the "Guest Suite"). For the most part, Darryl built the Guest Suite when he was home from work. It was completed in or around April of 2020.
- [116] The evidence is in conflict as to whether Brittany and Darryl built the Guest Suite for Claude at his request, to his specifications and for his use, or they built it for themselves and let him stay in it.
- [117] Brittany said that Claude insisted that Dora's House was too small and insufficient for his needs. He demanded that the Guest Suite be built for him because he did not want to move into Dora's House with her when the Farm Property sold.
- [118] Claude denies that the Guest Suite was built solely for him, or at his request. According to Claude, Brittany told him that she was building a suite on the Graham Road Property and would eventually use it as an office or garage, and that he could live there when the Farm Property sold. He felt he had no choice as he would be kicked out of the house on the Farm Property when it sold. He reiterated that he never would have chosen to build a home or spend significant funds to build a structure on someone else's land.
- [119] I accept that Claude and Dora's relationship was not doing well at this time and that Claude's health and cognitive issues were a challenge for everyone. I accept that Claude did not want to live with Dora, and Dora did not want Claude to live with her.

- [120] I also accept that--at the very least--Brittany and Darryl built the Guest Suite with Claude in mind, and with a certain level of participation from him. I accept that Brittany and Darryl solicited Claude's preferences for what would be his living quarters. Claude may have assisted with the construction on one or more occasions, although he certainly was not integral to the process. The photographs Brittany and Darryl rely on to establish that Claude was "hands-on" in terms of the construction are less than compelling. At most, they show that Claude was present on one or two days during the construction.
- [121] Claude says that Brittany and Darryl used his funds to construct the Guest Suite during the time the POA was in effect, without his permission or knowledge. He states he had no access to his bank accounts at this time and was unaware that he had joint accounts with Brittany until April 2020.
- [122] Brittany's evidence is that Claude and Brittany opened a joint bank account in April 2019, at the request of Claude, and after discussions with Claude's doctors. The banker explained the nature of a joint account to both Brittany and Claude. Brittany confirmed that Claude opened the account himself and Dora did not use her POA to do so.
- [123] I note that throughout Brittany's evidence, Claude's capacity with respect to managing his financial affairs seem to wax and wane according to whether it was convenient or inconvenient for Claude to "have control" over his finances.
- [124] Claude states that the following are examples of transfers made with respect to the construction of the Guest Suite:
- a) August 12, 2019: \$15,000 was transferred from Claude's joint account with Brittany to Brittany and Darryl's bank account.
 - b) August 30, 2019: \$2,100 was transferred from Claude and Dora's joint bank account to Brittany and Darryl's bank account. On that same day, Brittany and Darryl paid \$1,890 for excavation and landscaping for the Guest Suite.
 - c) September 30, 2019: \$10,000 was transferred from Claude's joint account with Brittany to Brittany and Darryl's bank account.
 - d) November 12, 2019: \$2,421.30 was transferred from Claude and Dora's joint bank account to Brittany and Darryl's bank account. On that same day, Brittany and Darryl paid \$2,421.30 to Tippin Point for work completed on the Guest Suite.
 - e) December 2, 2019: \$6,010.00 was transferred from Claude's joint bank account with Brittany to Brittany and Darryl's bank account. On that same day, Brittany and Darryl transferred \$6,010.00 to Brittany and Darryl's credit card. Then, Brittany and Darryl paid \$6,010.00 from the credit card to Harbour Kitchen for work completed on the Guest Suite.

- f) December 5, 2019: \$24,828 was transferred from Claude's joint bank account with Brittany, to an unknown account. Brittany and Darryl's account shows transactions of \$11,522.89 on the same day which they were unable to explain.
 - g) December 17, 2019: \$2,000 was transferred from Claude's account to Brittany and Claude's joint account. On that same day, \$2,000 was transferred from Brittany and Claude's account to Brittany and Darryl's account. Brittany and Darryl then paid a contractor \$2,000 for work completed on the Guest Suite.
 - h) On February 11, 2020, \$3,800 was transferred from Claude's and Brittany's account to Brittany and Darryl's account. On that same day, \$3,800 was transferred from Brittany and Darryl's account to Brittany and Darryl's credit card. Brittany and Darryl then paid \$3,775.00 from the credit card for blinds for the Guest Suite.
- [125] Brittany and Darryl state that, like most plans or agreements in a close-knit family, the arrangements for the Guest Suite were "quite informal". Brittany and Darryl say that they used their own funds to construct the Guest Suite for Claude, with Claude only paying for "extras" he demanded. Brittany, Darryl, and Dora also say that \$200,000 of the gift money from the Farm Sale Proceeds was intended to compensate them for out of pocket expenses, and their time and effort with respect to the Guest Suite.
- [126] I need not decide why the Guest Suite was built, or for whom. The evidence shows that Dora and Claude (while deemed incapable and under a POA), paid \$200,000 in gift money from the Farm Sale Proceeds, and Claude paid thousands more in "extra" costs towards the construction of the Guest Suite on Brittany and Darryl's land.
- [127] Claude had the benefit of residing in the Guest Suite for approximately 20 months, until October 14, 2021.
- [128] Claude has no legal interest in the Graham Road Property, Dora's House or the Guest Suite. The decisions made regarding the construction, and the payments made for the construction and materials, took place while Claude was considered incapable of managing his own finances and was subject to the POA.
- [129] The so-called "informality" of close-knit family agreements take on a different flavour under these circumstances.

Claude is Apprehended under the Mental Health Act

- [130] By the summer of 2021, Claude says that he had stopped his antipsychotic medication and he was "back to his old self." He agreed that he became more insistent on an accounting from Dora of what was going on with his money and what happened to the Farm Sale Proceeds. He also asked Brittany to show him his account statements.

- [131] Brittany and Dora dispute that Claude was improved at this time. They maintain that Claude was paranoid, agitated, and showing the same symptoms that resulted in his dementia diagnosis. Brittany continued reporting many incidents of concern to Claude's doctors from the initial diagnosis, up to the late fall of 2021. Some of the concerns involved the safety of her children in light of Claude's erratic behavior, which I do not question. As mentioned, I accept that during this period, Claude was suffering from the effects of the medication to a degree that his behaviour was akin to someone with dementia, with all that this entails.
- [132] There is no dispute that at this time, Claude had been seeking an accounting of his money, and specifically, of his share of the Farm Property sale money, and had become increasingly insistent in doing so.
- [133] On October 13, 2021, there was a serious incident at the Graham Road Property.
- [134] According to Claude, after repeatedly asking for an accounting of his finances and being denied, Claude went to visit a lawyer to revoke his POA. He needed funds to do so, but Brittany would not give him the money, and he could not access it himself. That evening, there was a confrontation between Claude, Dora, Brittany, and Darryl. Claude said that he had gone to see a lawyer and that he wanted freedom over his financial affairs.
- [135] According to Brittany and Darryl, Claude's "fixation" about Dora and the misuse of his finances reached a boiling point. Claude became belligerent and threatened his family and himself. His behaviour was paranoid and delusional, and he made cruel and accusatory comments towards Brittany and Dora. Brittany and Darryl recounted that that they, along with Dora, made the difficult decision to involve the RCMP.
- [136] Claude recalled that the next day, his sister lent him money to retain a lawyer to help him revoke the POA. However, before he could see a lawyer, on October 14, 2021 Claude was apprehended under the Mental Health Act, R.S.B.C. 1996, c. 288, and taken to North Island Hospital in Courtenay, BC.
- [137] On October 15, 2021 and November 3, 2021, Dr. Schovanek had consultations with Claude while he was hospitalized. Dr. Schovanek relied on the collateral information from Brittany, including the following:
- a) Claude's separation from Dora was the reason why Claude and Dora required two separate homes on Graham Road.
 - b) Claude's preoccupation with the idea of overturning his incapacity declaration and contacting dozens of lawyers, most of whom were not interested.
 - c) Claude's demand for \$30,000 from the family to pay a lawyer, which escalated to the point of making threats towards them and himself. For example, Claude threatened to run into highway traffic.

- d) Claude's increasing aggressiveness, impulsivity, and anger over the previous six months, including obsessing over, and harassing his family about, his financial arrangements.
- [138] While hospitalized, and after adjustments to medication regimes and presumably other treatments, Claude underwent further cognitive and functional assessments between October 20-26, 2021.
- [139] On November 3, 2021, Claude scored a "respectable" 27/30 on the MoCa examination, and Dr. Schovanek found that Claude was capable of managing his basic finances, balancing a check book, and making simple meals safely. Dr. Schovanek concluded that "Claude is believed to be capable of re-designating a power of attorney."
- [140] Dr. Schovanek did not provide much illumination as to what exactly was done between Claude's admittance to the hospital and his re-assessment, other than an adjustment to Claude's medication.
- [141] Claude was released on November 3, 2021. Prior to his release, Brittany told him that he could not come back to live at the Graham Road Property, and there was a confrontation between Claude and Brittany. Claude demanded that he be paid back for the Guest Suite, and became angry when Brittany declined. Claude went to live with his son, Dan, with whom he still lives today.

Revocation of POA

- [142] On December 20, 2021, Claude mailed a revocation of his POA to Brittany, because he understood that he was not welcome at her house. On December 23, 2021, Claude hand delivered a revocation of his POA to Dora. He left an envelope enclosing the POA revocation with Dora and requested that she read it.

Separation Agreement

- [143] In the Agreed Statement of Facts, the parties agree that Claude and Dora formally separated as of November 3, 2021.
- [144] Between October 2021 and December 2021, without Claude's knowledge, Brittany and Dora negotiated the Separation Agreement for Claude and Dora.
- [145] Brittany testified that she discussed terms of separation with Claude in Spring 2021, and said she was aware that if Dora and Claude separated, the POA over Claude would immediately revert to her. She said she confirmed this during a discussion with legal counsel.
- [146] Brittany understood, through discussions with Claude, that he wanted his Triumph (vehicle), but beyond that, he expected and wished that he and Dora would divide their assets equally and keep their respective pensions.

- [147] Brittany states that there was some "back and forth" between herself and Dora with respect to negotiating the separation agreement on Claude's behalf. Dora testified that there was no "back and forth" and that she knew what Claude's wishes were, and the agreement reflected his wishes.
- [148] The Separation Agreement "recognizes" the gift of \$200,000 to Brittany and Darryl for building the Guest Suite on their property, and a gift of \$200,000 to use for the education of Brittany and Darryl's three children. The Separation Agreement states that the \$400,000 was paid out of the Farm Sale Proceeds.
- [149] The Separation Agreement purports to divide the remainder of the family assets equally, which was limited to small day to day banking accounts and registered investment accounts.
- [150] That agreement was signed December 29, 2021, with Brittany signing for Claude as his POA.
- [151] Claude received the Separation Agreement by registered mail on January 26, 2022. According to Claude, this was the first time he learned that he and Dora were formally separating and the first time he learned of the gift to Brittany and Darryl of the lion's share of those proceeds. Whenever he had asked Brittany and Dora about his share of the Farm Sale Proceeds, they would tell him that it was in investments, earning interest.

Issues

- [152] The following issues are before me:
- a. credibility of the parties;
 - b. whether the Separation Agreement is valid;
 - c. whether the gifts from Claude and Dora to Brittany and Darryl that took place prior to, but that are "recognized" or formalized in the Separation Agreement are valid;
 - d. whether Dora owed a fiduciary duty to Claude, and whether she breached that duty;
 - e. whether Brittany owed a fiduciary duty to Claude, and whether she breached that duty;
 - f. in the alternative, whether Brittany and Darryl knowingly received property transferred in breach of Dora's fiduciary duty to Claude, or whether Brittany knowingly assisted in Dora's breach of fiduciary duty to Claude;
 - g. whether Brittany and Darryl were unjustly enriched at Claude's detriment; and
 - h. if the answers to various questions above is yes, the quantification of damages that Claude is entitled to receive.

Credibility

- [153] The leading case on assessing a witness's credibility is *Bradshaw v. Stenner* 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal to SCC refused.
- [154] In *Bradshaw*, Dillon J. summarized the law respecting assessing a witness's credibility as follows:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).
- [155] There are several challenging aspects to an assessment of credibility in this case, including Dora's current memory issues, and Claude's medical history. That said, the most challenging credibility assessment related to Brittany, who I found to be neither credible or reliable.

Claude

- [156] First, it is clear that regardless of whether he was properly diagnosed with dementia, between approximately 2018 and 2021 Claude suffered from serious health issues and side effects from medication that caused cognitive and functional challenges. The evidence does not allow me to draw bright lines in the chronology as to when Claude was doing well, and when he was not. He testified to various periods when he was feeling better, or "back to his old self", but this is often inconsistent with his physicians' reporting, or with the evidence of Brittany, Dora, and Darryl.
- [157] As a result, I must carefully consider the reliability of Claude's evidence pertaining to certain events and conversations, his memory during certain periods of time, and his view of other parties' intentions or actions.

[158] To his credit, Claude admitted to certain behaviours and decisions that did not put him in a good light. For example, he admitted to driving with a suspended licence, and he admitted to being angry and rude to his family, particularly Dora, and towards Dr. Daws and Dr. Frolic, who he did not trust and felt had done him wrong. He tended to downplay emotional or difficult events or conflicts, but given my findings about Dora and Brittany's credibility, I am not convinced that others have not exaggerated those same events.

[159] I accept that there are stretches of time where his memory is vague and non-specific. There is no real dispute that Claude was suffering from symptoms that in many respects and at certain times, mimicked dementia. That said, I certainly cannot rely on Brittany's reporting to doctors as an accurate depiction of Claude's life during this period.

[160] I find the following:

- a) Claude demonstrated a firm memory and recollection of many of the relevant events in dispute.
- b) Claude made his best effort to provide an accurate account of events.
- c) Claude readily conceded facts when appropriate, such as his history of being financially generous to Brittany, including the substantial reduction of the sale price of the Graham Road Property, which he did not wish to contest.
- d) Claude's testimony was consistent as between his examination for discovery, and his examination in chief and his cross examination at trial.
- e) Claude was well spoken, thoughtful and declined opportunities to attribute blame to Brittany, other than just telling the facts as he knew them. He was measured, calm, respectful and polite.

[161] On balance, I find Claude to be a credible witness. On the material points, where his testimony conflicts with that of Brittany or Dora, I prefer Claude's evidence.

Dora

[162] Dora provided limited evidence. She testified briefly and tendered affidavits that were carefully crafted by counsel. She had difficulty remembering details, or chronologies of events. Where she was able to provide her view, Dora largely supported Brittany's story and positions.

[163] Dora could not recall the answers she gave at her examination for discovery. She could not remember when bank accounts were opened or by whom. She confirmed that Claude did not do any online banking, but she could not say how finances were managed during the POA. She said she transferred the Farm Sale Proceeds to Brittany, but could not recall how, when, or where. She stated that she possibly made other transfers, but again, could not remember how, when, or why.

- [164] Dora did not recall Claude coming to visit her to drop off the revocation of the POA, even though the evidence establishes that he did so. She said it wouldn't have mattered, as she gave the POA up to Brittany in November because of the separation.
- [165] Dora did not want to stay on the Farm Property and she did not want to continue with the farming life. She struggles to stand up to others with stronger personalities, Claude in particular. I suspect this became even more difficult when he was suffering from cognitive issues and behaving strangely. She worried about money and thought that Claude spent needless amounts on the farm.
- [166] Dora agreed that the amounts provided to health professionals with respect to Claude's alleged spending were incorrect but she did not correct them at the time. Many of the health professionals that dealt with the family commented on the fact that Dora rarely spoke, and that most, if not all the collateral information came from Brittany, not Dora.
- [167] I accept that Dora had a very difficult time with Claude in the latter years of their marriage. I do not believe she set out to harm him emotionally or financially. I do not believe that she intends to lie or prevaricate in these legal proceedings. I find that her capacity to be a credible and reliable witness is much compromised by her own recent health issues, and possibly, by her devotion to Brittany and her family.
- [168] For the most part, I do not find Dora to be a reliable witness. While her evidence was limited in nature, where it conflicts with Claude's evidence on the material issues, I prefer Claude's evidence.

Brittany

- [169] Based on the factors set out in Bradshaw, I find that Brittany is neither credible nor reliable with respect to her evidence on the key issues before me. She was successfully challenged with respect to several serious inconsistencies in evidence during her examination for discovery, answers to interrogatories she provided prior to trial, and her testimony at trial, as well as her failure to provide fulsome disclosure of her accounts, or a reliable accounting of her use of Claude's funds.
- [170] I found her to be evasive and flippant when pressed on financial transactions made during the time Claude had no access to his bank accounts or funds. She provided incomplete or false answers to interrogatories. She did not keep records of financial transactions she did on Claude's behalf. She denied facts that were obvious on their face, and could not, or would not explain or take responsibility for financial transactions that she had clearly made. I was left in doubt about all of Brittany's evidence.
- [171] Some examples are:
- a) In her examination for discovery, Brittany denied managing any of Claude's finances. This was clearly untrue, based on the banking records.

- b) In her examination for discovery, Brittany denied completing transactions in excess of \$1,000 out of her and Claude's joint accounts. This was clearly untrue, based on the banking records. At trial, she said she thought the original question was only about bank card transactions, which was not believable.
 - c) Brittany denied that, in 2019, she made several large transfers of funds (\$15,000, \$4,842.60, and \$6,010.00) out of Claude's account, to the joint account she held with Claude, and then out again. She said variously that Claude transferred the money from the joint account back into his account with Dora, or that she did not know where the money went. In interrogatories, she flatly denied making this and other transactions. This was untrue. Brittany made the transfers, with the funds clearly going into her joint account with Darryl.
 - d) In December of 2019, \$24,828 was transferred out of Claude's TFSA account, into his regular account. Those funds were transferred from that account to Claude and Brittany's joint account, then immediately out to an unknown location. Brittany denied making this transaction, but did not provide disclosure of certain requested bank accounts. She could not explain a large deposit into her account from an unknown location on that same day.
- [172] This pattern continued well into 2020-2021, with unexplained transfers from Claude and Brittany's account, usually ending up in Brittany and Darryl's account.
- [173] On several occasions, the funds were immediately used to pay Brittany and Darryl's bills, credit cards, and property taxes for the Graham Road Property. With respect to the latter, Brittany denied charging Claude any rent or asking him to contribute to the expenses of the property, on top of the amounts he already paid towards the property. She denied this even after it was pointed out to her that an amount that was exactly equal to one quarter of the property taxes was taken from Claude's funds at the time taxes were due.
- [174] Claude's monthly pension of \$1,430 was often transferred to Brittany and Darryl's bank account. She claimed this was done to provide Claude with cash, which is not supported by the bank account evidence.
- [175] Brittany made various statements to Claude's medical professionals later shown to be untrue, exaggerated, or misleading. Some of these include:
- a) As of November 2018, Brittany variously told different health care providers that Claude had spent \$300,000, \$350,000, or \$400,000-\$500,000 on farm equipment. She informed one doctor that she had "tallied" the spending, which totalled at least \$300,000.
 - b) As of November 2018, Claude had gone through all his and Dora's savings and was starting to dip into their retirement fund. In fact, in November 2018, Dora and Claude were in a financially positive position.
 - c) Claude had continued an affair for 37 years with a woman in Ontario.

- d) Claude was making paranoid and obsessive demands about accounting of his money and demanded \$30,000 from the family to hire a lawyer to revoke the POA.

[176] All of the above were shown at trial to be untrue or significantly exaggerated.

[177] I do not hesitate in finding that Claude suffered from cognitive and functional issues that caused strain and stress on his immediate family. I do not take issue with Brittany's version of events with respect to how difficult it must have been for her to manage care of her very young children alongside the growing needs of her grandparents, especially Claude, during this time. I accept that she provided day-to-day assistance for both of her grandparents, and that at times she was overburdened and overwhelmed.

[178] Unfortunately, however, the above is not an exhaustive list of areas where Brittany was shown to be dishonest or less than forthcoming with respect to details when it served her interests. I do not find her to be a credible witness, particularly with respect to the key issue of her management of Claude's money during the time he did not have access to his accounts, or control over his financial decisions.

Darryl

[179] Darryl testified about some of the events at issue. I found him to be a credible and reliable witness when it came to recounting the difficulties surrounding Claude's health and the impact it had on the family at large. I did not find him to be credible or reliable when it came to financial matters.

[180] He could not shed light on the financial arrangements surrounding the construction of the Guest Suite, other than trying to support the contention that they had to build it for Claude, and that the \$200,000 was meant to compensate him and Brittany for building it.

[181] Darryl struggled to admit that he and Brittany were given a significant discount on the Graham Road Property as a gift from Dora and Claude. When asked if he was grateful, he maintained that that was all they were asked to pay and so that's what they paid.

[182] Darryl could not explain why Claude paid several thousand dollars for "extras" on top of the \$200,000 that was ultimately gifted to them for the construction, when he agreed that the hard costs of the Guest Suite construction came in at \$120,000-\$130,000. Darryl agreed that no record was kept to track the "extras", and could not articulate whether he charged for his time or labour, or what Claude was expected to pay in total for the privilege of staying in a Guest Suite on Brittany and Darryl's property.

[183] Darryl was not able to do more than guess at the transactions going in and out of his joint account with Brittany, including the deposits of Claude's pension. He claimed to go over the finances with Brittany on a regular basis, but I find that he had little to no knowledge about what was happening regarding monies going in and out of his accounts, and did not directly engage with transactions involving Claude's money.

[184] That said, Darryl knew about, and accepted the \$400,000 gift from the Farm Sale Proceeds, he knew that \$200,000 of those funds was intended to pay for, or "compensate" Brittany and Darryl for the construction of the Guest Suite on their property. Darryl testified that he knew that Claude paid for the so-called "extras" throughout the construction. Darryl also was aware of how much the Guest Suite actually cost to build.

Legal Framework

Separation Agreement

[185] Section 93(3) of the Family Law Act, S.B.C. 2011, c. 25 provides that the Supreme Court may set aside or replace an agreement with an order if any of the following circumstances existed when the parties entered the agreement:

- a. a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
- b. a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
- c. a spouse did not understand the nature or consequences of the agreement;
- d. other circumstances that would, under the common law, cause all or part of a contract to be voidable.

[186] If any of the s. 93(3) factors existed at the time that the agreement was entered into, the court may find that the agreement was unfairly reached. However, the court should consider the s. 93(3) considerations holistically, and not in isolation to each other as the combination of certain factors may lead to setting aside the agreement where each of the factors alone would not: *Ma v. Liu*, 2023 BCSC 283 at para. 107, and *Y.L. v. G.L.*, 2020 BCSC 808 at para. 285.

[187] Whether the party had input into the content of the agreement is relevant to assessing the vulnerability factor: *Y.L.* at para. 285.

[188] The Separation Agreement was entered into without financial disclosure or independent legal advice for Claude. Claude's testimony is that he did not know of his separation from Dora until he received the Separation Agreement in the mail on January 26, 2022. Brittany's evidence is that she discussed the terms with Claude in the Spring 2021, and in the hospital after he was apprehended.

[189] I do not believe Brittany discussed the separation agreement with Claude in any depth at any time. In her cross examination, Dora testified that there was no "back and forth" between Brittany and herself. There is no evidence Dora spoke to Claude about the specific terms of separation at any time in the Fall 2021.

- [190] Given Claude's longstanding pre-occupation with his finances, it belies belief that he agreed to, or was consulted on the Separation Agreement.
- [191] Brittany claims she consulted legal counsel but I cannot rely on her evidence. Regardless, it is not clear what she consulted legal counsel on. It is likely that the consultation was limited to whether she could effect the Agreement as alternate POA, and not whether, under all the circumstances she ought to, or whether Claude had been adequately protected.
- [192] I find that no efforts were made to do anything other than push the Agreement through quickly, once it became clear that Claude's capacity was being re-evaluated, and that as a result, the POA may be revoked.
- [193] The Separation Agreement was entered into by Brittany, on behalf of Claude, via the POA on December 29, 2021. Claude testified that he notified Brittany and Dora of the revocation of the POA prior to the parties entering into the Separation Agreement. Claude hand delivered a revocation of the POA to Dora on December 23, 2021, and he mailed the revocation of his POA to Brittany on December 20, 2021. I find that Brittany and Dora were aware of the revocation of the POA.
- [194] Even if the POA had not been revoked, Brittany and Claude were not in a positive relationship when the separation agreement was signed. Claude had made accusations and demands about finances and his payments towards the Guest Suite that directly impacted Brittany, and the gifts recognized in the Separation Agreement. Brittany benefitted directly from the distribution of gifts from the Farm Proceeds when Claude was subject to the POA. The Farm Proceeds were marital assets that the Separation Agreement purported to deal with, even if the "gifts" had been distributed in 2020.
- [195] I find that the Separation Agreement was entered into without the knowledge, consent or direction of Claude. It was not only entered into after he had revoked the POA, but it is clear that his interests were not adequately considered or protected. As a result, the Separation Agreement must be set aside.

Breach of Fiduciary Duty

- [196] A breach of fiduciary duty typically "captures circumstances in which there is a breach of the duty of loyalty owed by the fiduciary and includes circumstances involving acting in the face of a conflict, preferring a personal interest, taking a secret profit, acting dishonestly or in bad faith, or a variety of similar or related circumstances": *Meng Estate v. Liem*, 2019 BCCA 127 at para. 35.
- [197] A breach of fiduciary duty claim is frequently assessed based on a four-part framework developed by the Supreme Court of Canada in *Can. Aero v. O'Malley*, 1973 CanLII 23 (SCC), [1974] SCR 592 at 605:
- a. establishment of a fiduciary duty between the parties;

- b. consideration of the nature and scope of the fiduciary duty;
- c. consideration of whether the obligations were breached; and
- d. an assessment of the liability flowing from the breach of duty, and consideration of the appropriate remedies.

[198] It is well-established in the jurisprudence that a power of attorney creates a fiduciary relationship between the donor and the attorney: *Wang v. Wang*, 2020 BCCA 15 at paras. 29-32, and *Shen v. West Continent Development Inc.* (BC0844848), 2020 BCSC 5 at para. 92.

[199] Certain categories of relationships are presumptively fiduciary in nature because they have as their essence discretion, influence over interests, and an inherent vulnerability. The case law confirms that the key features of a fiduciary relationship are present when an attorney acts pursuant to a power of attorney: *Shen* at paras. 87-89.

[200] An ad hoc fiduciary relationship is one that arises out of the specific circumstances and dynamics of the particular relationship: *Sledin Estate v. Rusin*, 2011 BCSC 1207 at para. 65.

[201] In *Frame v. Smith*, [1987] 2 S.C.R. 99, Justice Wilson (in dissent), identified three characteristics that are common to most relationships in which fiduciary obligations have been imposed:

1. The fiduciary has scope for the exercise of some discretion or power;
2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power

(the "Frame Factors").

[202] The Frame Factors are still widely cited in the case law as "indicia" of an ad hoc fiduciary relationship. However, they are no longer considered to be the complete test for establishment of a fiduciary relationship. In *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, the Supreme Court of Canada restated the test for the existence of an ad hoc fiduciary relationship as follows:

[F]or an ad hoc fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*:

an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;

a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and

a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

- [203] Fiduciary duties can arise without formal appointment as attorney, where an individual takes on the role of managing the financial affairs of a relative. For example, the addition of an adult child to an elderly parent's bank account for the purpose of assisting with their finances may be sufficient to trigger fiduciary duties, regardless of the parent's capacity and regardless of whether the child was actually acting as power of attorney for their parent: see e.g. *Wedemire v. Wedemire*, 2017 ONSC 6891, and *Miller v. Miller*, 2011 ONSC 7239.
- [204] Claude referred me to *Mackay Estate v. Mackay*, 2015 ONSC 7429, in which a deceased person's son and daughter-in-law were both involved in managing her financial affairs. Only the son was formally appointed as attorney for the mother. However, the daughter-in-law also assisted the mother in managing her finances and had been appointed joint account holder of the mother's primary bank account. After the mother died, the son and daughter-in-law separated, and the son brought an action against the daughter-in-law for breach of fiduciary duty for making payments to herself from the joint bank account.
- [205] The court found that, although the daughter-in-law was never formally appointed as the mother's attorney, she nonetheless owed fiduciary obligations to her arising from her management of the joint account. In coming to this decision, the court noted that, as a joint account holder, the daughter-in-law had complete discretion in the exercise of the accounts--she could unilaterally write cheques and transfer funds from the account, which affected the mother's material interests. Combined with evidence that the mother was physically and mentally vulnerable, and that the daughter-in-law had voluntarily undertaken to assist her in managing her financial affairs, the court found that the daughter-in-law acted in a fiduciary role with the mother.
- [206] Section 19(1) of the Power of Attorney Act, R.S.B.C. 1996, c. 370 [PAA] mandates that an attorney must "act honestly and in good faith" and "exercise the care, diligence and skill of a reasonably prudent person".
- [207] Section 19(1)(d) requires that an attorney "keep prescribed records and produce the prescribed records for inspection and copying at the request of the adult."
- [208] Section 19(2) requires an attorney to act in the "adult's best interests" when managing and making decisions about the adult's financial affairs.
- [209] Section 19(3)(c) mandates the attorney to "foster the independence of the adult and encourage the adult's involvement in any decision-making that affects the adult".
- [210] Section 19(4) mandates the attorney to keep their own property separate from the donor's property.

[211] Section 2(1) of the Regulations mandates that an attorney acting under an enduring power "must make a reasonable effort to determine the adult's property and liabilities as of the date on which the attorney first exercises authority on the adult's behalf" and "maintain a list of that property and those liabilities." Section 2(2) of the Regulations provides that an attorney must keep records of

- a. the adult's property and liabilities;
- b. the accounts and other records respecting the exercise of the attorney's authority under the enduring power of attorney; and
- c. all invoices, bank statements and other records necessary to create full accounts in respecting receipt or disbursement.

[212] I find that while Dora acted as Claude's POA, she was his fiduciary. I find that Brittany acted as an "ad-hoc" fiduciary and also owed a duty to Claude. Dr. Daws and Dr. Frolic confirmed that it was their understanding from all the circumstances, and from Brittany herself that she acted on behalf of Claude and in fact was his POA prior to November of 2021.

[213] When Brittany formally became the POA for Claude in November of 2021 following the separation these duties persisted. I find Claude was a vulnerable person whose interests stood to be, and were adversely affected by Dora and Brittany's exercise of discretion or control over his financial and legal decisions.

[214] I find that Dora breached her fiduciary duty to Claude. I do not find that Dora benefitted, at least not in the long term. The primary beneficiaries of both Dora and Brittany's breaches of their duty to Claude were Brittany and Darryl.

[215] Dora opened or reactivated the LOC in January 2019 against the farm property for her personal benefit at the time. In January 2019, Dora started drawing on the LOC to fund the build of her home on Graham Road, without Claude's knowledge or agreement. Like the Guest Suite, however, this expenditure of Dora and Claude's funds ultimately went towards improvements on Brittany's land.

[216] Dora no longer lives on the Graham Road Property, and at the time of trial it was up for sale. Dora lives in assisted living, and, as discovered on the morning of trial, cannot afford to pay for legal counsel.

Unjust Enrichment

[217] To succeed in a claim for unjust enrichment, a plaintiff must establish:

- an enrichment of the defendant;
- a corresponding deprivation of the plaintiff; and
- an absence of juristic reason for the enrichment.

Moore v. Sweet, 2018 SCC 52 at para. 37; Garland v Consumers' Gas Co., 2004 SCC 25 at para. 30.

[218] The first two elements of the unjust enrichment framework are related and are a straightforward economic question. Kerr v. Baranow, 2011 SCC 10 at para. 38-39.

[219] This third element has two stages:

At the first stage, the plaintiff must establish that "the defendant's retention of the benefit at the plaintiff's expenses cannot be justified on the basis of any of the 'established' categories of juristic reasons: a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations". If the plaintiff succeeds here, they have established a prima facie case.

At the second stage, "the defendant has an opportunity to rebut the plaintiff's prima facie case by showing that there is some residual reason to deny recovery".

Moore at paras. 57-58

[220] From the net proceeds of sale of the Farm Property of \$610,000, Dora gave \$401,610.57 to Brittany and Darryl without Claude's knowledge or consent. At the very least, this was done at a time that Claude was not capable of consenting without significantly more advice, planning and protection than he was provided by Dora or Brittany. Claude did not benefit from this transfer of funds, or from any subsequent payment for "extras" save for his temporary residence in the Guest Suite from the Spring of 2019 to October 2021.

[221] Neither Dora, nor Brittany kept records or provided an accounting of how Claude's funds were used during his period of incapacity.

[222] From the proceeds of the Farm Sale Proceeds, Claude and Dora paid for the construction of Dora's house on the Graham Road Property, and the Guest Suite on the Graham Road Property, and gifted an additional \$200,000 for the purpose of an education fund for Brittany and Darryl's children.

[223] As a result, from the \$999,000 Dora and Claude obtained from the sale of the Farm Property, Brittany and Darryl obtained directly, or gained the benefit of improvements to their property, amounts totalling at least \$720,000. This amount does not include the "extras" charged to Claude during the construction of the Guest Suite that Brittany and Darryl saw fit to charge above the \$200,000 they were gifted for this purpose.

[224] At the conclusion of Dora and Brittany's fiduciary relationship over Claude, the vast majority of his share of funds from the Farm Sale Proceeds had been dissipated, and he was left without ownership of, or interest in any real property. His financial circumstances were significantly and gravely impacted by decisions made on his behalf by Dora and Brittany, largely to the benefit of Brittany and Darryl.

[225] I find no juristic reason for Brittany and Darryl to retain this benefit.

[226] Claude submits that he had ownership of the following assets immediately prior to his temporary loss of capacity:

- half share of the farm house: \$472,587;
- half share of the farm machinery: \$112,125;
- half share of the cattle, sheep and hay sold: \$11,495;
- half share of the vehicles: \$26,500
 - o 2500 Dodge Ram: \$5,000;
 - o 5 Tonne Ford flat bed truck: \$500;
 - o 1970 Mustang convertible: \$2,500;
 - o Honda SUV: \$14,000;
 - o Harley Davidson: \$4500
- RRIF with Raymond James: \$97,640;
- RRIF with Sunlife, later combined with Raymond James: \$73,856; and
- TFSA of \$44,828.

[227] Claude says his assets totalled approximately \$839,531.

[228] During the period where his financial affairs were managed by Dora and Brittany, Claude lost control of his funds including the following entitlements through September 2021:

- 2018-2021 RRIF payouts: \$14,243.52;
- 34 months of mutual life dividends: \$4,566.20;
- 34 months of Claude's WorkSafe BC payouts: \$5723.22;
- 34 months of Claude's CPP payouts: \$26,714.82;
- 34 months of Claude's London Life Pensions: \$48,641.76; and
- 31 months of Claude's OAS payments, which stopped in July 2021: \$7,679.63.

[229] The Separation Agreement left Claude with financial assets in the amount of \$73,068.09. Until the eve of trial, Claude had not received payments owed to him pursuant to the purported equal division of bank and investment accounts under the Separation Agreement, in the amount of \$127,438.

[230] On May 31, 2024, an associate judge of this court ordered that Dora transfer Claude \$50,000 as an interim advance for legal fees, which she provided shortly before the start of trial.

Knowing Receipt

[231] The elements of a claim for knowing receipt have been set out in *Citadel General Assurance Co. v. Lloyds Bank of Canada*, [1997] 3 SCR 805 [Citadel], as follows:

- a. receipt of trust property for one's own benefit (as opposed to as an agent for someone else); and
- b. knowledge or constructive knowledge that the property was transferred in breach of trust or fiduciary duty.

[232] The threshold of knowledge required to satisfy the second element of the test is low. In *Citadel*, at para. 49, La Forest J. described the knowledge standard as follows:

relief will be granted where a stranger to the trust, having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property.

[233] Liability for knowing assistance is imposed where a third party (1) assists in a breach of fiduciary duty with (2) actual knowledge that the fiduciary is in breach: *Air Canada v. M&L Travel Ltd.*, [1993] 3 S.C.R. 787.

[234] Brittany and Darryl knowingly received and personally benefitted from Dora's breach of fiduciary duty.

[235] Brittany knew, or ought to have known that the property was transferred in breach of Dora's fiduciary duty. The evidence establishes that Brittany knew that Dora had a fiduciary obligation to Claude pursuant to the POA. Brittany knew, or ought to have known, that a gift of Claude's money by Dora to Brittany and Darryl was not in not in Claude's best interest and that he was either not aware or did not consent to such a gift. Alternatively, even if Claude did consent to some form of gift being made during the period of his incapacity, there are safeguards in place to prevent incapable persons from making gifts that are contrary to their best interests. (see s. 60.2 of the *Adult Guardianship Act*, R.S.B.C. 1996, c. 6 and s. 20 of the *PAA and Regulations*). Claude's best interests, specifically with respect to his financial security, were entirely ignored by his fiduciaries in this case.

[236] I note that Dora's own financial best interests seemed to have been forgotten or ignored by both Dora herself and certainly by Brittany, but Dora was not under an order of incapacity at the relevant time.

[237] Brittany testified that the Graham Road Property, which she and Darryl purchased with significant help from Dora and Claude, and which was substantially improved using Dora and Claude's funds, is currently listed for sale at a price of \$2,500,000.

Conclusion

[238] I make the following orders

- a. An order setting aside, in its entirety, the Separation Agreement dated December 29, 2021.
- b. Division of Claude and Dora's property in the following ways:
 - i. an order vesting Dora's accounts with Raymond James to Claude;
 - ii. Dora will pay any remaining balance owing Claude in accordance with an equal division of the financial accounts as at November 3, 2021;
 - iii. equal division of Dora's Municipal Pension Plan
 - iv. equal division of Dora and Claude's CPP and OAS benefits, as based on a November 3, 2021 separation date and 1960 as the year of marriage; and
 - v. that Dora and Claude retain the balance of their financial accounts and personal property in their possession, including retention of the Triumph automobile by Claude.

[239] Claude seeks a declaration that Dora breached her fiduciary duty owing to Claude, which I make. However, I decline to order damages against Dora for said breach.

[240] Claude seeks a declaration that Brittany breached her fiduciary duty owing to Claude. I find that Brittany breached her fiduciary duty to Claude.

[241] I also find that Brittany and Darryl knowingly received property transferred in breach of Dora's duty, and that Darryl knowingly received property in breach of Brittany's duty to Claude. Brittany and Darryl were also unjustly enriched by the breaches of Dora and Brittany's duty to Claude.

[242] I order that Brittany and Darryl pay damages to Claude in the amount of \$437,535.00. For clarity, I notionally base this amount on:

- 50% of the 200,000 gift for the education fund (\$100,000)
- 50% of the 200,000 gift for the guest suite (\$100,000)
- 50% of the amount paid against Dora and Claude's LOC from the Farm Sale proceeds, which was ostensibly used to pay for the construction of Dora's House on the Graham Road Property (\$167,535)
- \$70,000 to approximate the various amounts taken or used by Brittany during the period of incapacity, including the "extras" or other unexplained withdrawals from Claude's funds.

[243] This amount does not put Claude back to his original position. It does not account for the amounts paid to the LOC over and above the final payment, does not address living costs, loss of access to his pension and other payments, tax costs, or living expenses during the time of incapacity. The intermingling of the extended family's financial interests and living situation during a time of significant transition and stress, along with a failure to keep or make records during Claude's incapacity, makes a precise accounting impossible on the evidence before me.

[244] Also, this result does not account for the fact that Claude and Dora cherished Brittany and her family, and in the ordinary course, likely would have continued to show her the generosity they had shown her throughout her life.

[245] If such an order has not already been made in earlier proceedings, I order that Claude and Dora be divorced, to take effect 30 days after the date of this decision.

[246] As the successful party, Claude is due his costs.

"J. Whately J."

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