

CANADA / JUDGMENT

# Proudfoot v. Bryant

2025 BCSC 1437

## COURT

Supreme Court of British Columbia

## DECIDED

25 July 2025

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2025 BCSC 1437 Proudfoot v. Bryant

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Proudfoot v. Bryant,

2025 BCSC 1437

Date: 20250725

Docket: S202471

Registry: Victoria

Between:

William Alexander Proudfoot

Plaintiff

And

Jeffrey Bryant and North Shore Law LLP

Defendants

Corrected Judgment: The text of the judgment was corrected on the front page and at paragraph [100] on August 29, 2025.

Before: The Honourable Justice Thomas

Reasons for Judgment

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Place and Date of Trial/Hearing:

Nanaimo, B.C.

September 23-27 and

October 1-4, 2024

Victoria, B.C

March 31, April 1-3, May 15-16 and May 30, 2025

Place and Date of Judgment:

Victoria, B.C.

July 25, 2025

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## Overview

- [1] The plaintiff hired the defendants, Mr. Bryant and North Shore Law LLP, to bring an action to vary the will of his mother. For clarity I will refer to the plaintiff's mother as mother throughout my reasons.
- [2] Mr. Bryant acknowledges that he inadvertently neglected to file the action before the limitation period expired.

- [3] The plaintiff is now barred from bringing an action to vary the will due to the expiration of the limitation period.
- [4] The plaintiff commenced this action against the defendants to recover damages that he would have received had the will variation action been filed within the limitation period.

### **Legal Principles Governing an Action Brought Against a Professional**

- [5] The defendants owe the plaintiff a duty in contract through the retainer agreement and in tort through the nature of the relationship established between them.
- [6] The defendants have admitted that they breached the standard of care owed to the plaintiff in tort and breached a term of their contract with the plaintiff by failing to file the action within the limitation period.
- [7] In an action for breach of contract, once the plaintiff establishes a breach, they are entitled to damages. If the plaintiff cannot prove any damages, they are awarded nominal damages as compensation for the breach of contract. Thus, a breach of contract action is proven once the plaintiff establishes that the defendant breached a term of the contract.
- [8] In a tort action, once the plaintiff establishes a breach of the standard of care owed to them, they must also prove that they suffered damages and that the breach of the standard of care caused those damages. Therefore, the tort action is proven once the plaintiff has established these three elements: breach, causation, and damages.
- [9] In cases of a solicitor's negligence, proving that damages were caused by the failure to file an action (the causation element of the tort) requires the court to determine whether the plaintiff would have been successful in the action that the solicitor failed to file on their behalf. This is referred to as a trial within a trial; in this case, it necessitates the court to conduct the trial of the plaintiff's action to vary mother's will as part of the trial that the plaintiff has brought against the defendants: see *Nichols v. Warner, Scarborough, Herman & Harvey*, 2009 BCCA 277 at para. 26.
- [10] If the plaintiff establishes, on a balance of probabilities, that he would have recovered damages in the trial within the trial (the trial to vary mother's will), causation is established, and the court must assess all the damages the plaintiff would have recovered at that trial, subject to appropriate contingencies. This is sometimes referred to as a loss of opportunity assessment, as the court must calculate damages that the plaintiff would have received had he had the opportunity to prosecute the action to vary the will: see *Bazar v. Chisholm*, 2020 ONSC 593 at paras. 48, 162-164.

- [11] If the court determines, on a balance of probabilities, that the plaintiff would not have recovered any damages in the trial within the trial, causation is not established, and the tort claim would be dismissed for failing to prove causation. Although the tort action would be dismissed, the plaintiff would be entitled to nominal damages in the breach of contract action for the defendants' breach of their contractual obligations: see *Fisher v. Knibbe*, 1992 ABCA 121 at paras. 12-14, and *Thind v. Smith-Gander*, 2022 BCSC 1167 at paras. 114-119.
- [12] In some cases, it may not be possible for the court to assess causation; that is, the court may not be able to determine whether the plaintiff would have been successful had the action been filed in a timely manner by the defendants. This situation could arise, for example, if evidentiary issues, such as the death of an essential witness, make it impossible to conduct a trial within a trial; see *Nichols* at para. 26.
- [13] If it is not possible to assess causation in the trial within the trial, the court may apply the loss of chance doctrine to establish causation under the principles of contract law. Under the loss of chance doctrine, causation need not be established on a balance of probabilities; however, the plaintiff is not entitled to recover all of his damages (subject to appropriate contingencies) as his damages are limited to the corresponding percentage of his loss of chance. This is sometimes referred to as a loss of chance claim: see *Manley v. Chilliwack Hospital Society*, 2000 BCSC 649 at paras. 15-18; *Thind* at paras. 114-119; and *Folland v. Reardon*, 2005 CanLII 1403 (O.N.C.A.), 74 O.R. (3d) 688.
- [14] Although "loss of opportunity" and "loss of chance" are often used interchangeably, the concepts are distinct. Confusion and overlap regarding them can arise when assessing contingencies to apply to damages assessed during the trial within a trial analysis. The distinction is discussed in *Jarbeau v. McLean*, 2017 ONCA 115 at paras. 18-33.

#### Trial Within a Trial - the Hypothetical Will's Variation Trial

##### Mother's Will

- [15] Mother's will appointed the plaintiff's brother, George, as the executor.
- [16] Her will declared that:
- a) The plaintiff's brothers, Glenn, Timothy, and Phillip, wanted to purchase the family ranch in 1996. At the time of the sale, it was agreed upon by mother and her five children that she would sell the ranch to Glenn, Timothy, and Phillip at a price significantly below fair market value. Additionally, it was agreed that this arrangement would serve as their inheritance. Consequently, she made limited provisions for these three sons in her will.
  - b) The plaintiff achieved substantial success in his life and is well able to provide for the proper support and maintenance of himself and his family. Consequently, she made limited provisions for the plaintiff in her will.

- c) The plaintiff's brother George, throughout his adult life and particularly since the death of his father, has been her greatest source of support and strength.
- d) That her will adequately provides for the proper maintenance and support of all of her children, which she believes to be adequate, just and equitable in the circumstances.

[17] The plaintiff's brother Timothy, died in 2012 and was subsequently removed from the will.

[18] The will left a bequest of \$50,000 to the plaintiff, Glenn and Phillip; and the residue of the estate to George.

#### Gifts to the Plaintiff's Brothers

#### The Family Ranch

[19] There was minimal documentary evidence regarding the value of the family ranch purchased by Timothy, Glenn and Phillip in 1996. In my opinion, the most reliable evidence on this matter came from the plaintiff's brothers, Glenn and Phillip, who were directly involved in the purchase, as well as the subsequent investments and operations of the ranch. Based primarily on their evidence:

- a) The value of the ranch in 1996 was approximately \$1,100,000 based on a private appraisal;
- b) He purchased the ranch on behalf of himself, Timothy and Glenn from mother for approximately \$800,000 through a mortgage. This included approximately \$100,000 of cattle.
- c) The accountants then restructured the purchase to minimize taxes through depreciation, etc.; with the effect that the price on title did not reflect what was paid.
- d) Glenn and Timothy worked the ranch, built structures, and maintained the property. This involved considerable effort. After Timothy's death in 2012, Glenn continued with these efforts.
- e) Given that Glenn purchased the ranch, I infer that Timothy's interest in the ranch reverted to Glenn.
- f) Three parcels of the ranch were sold at a considerable profit. This money was needed to finance the ranching operations.
- g) To continue financing the ranch's operations, Glenn had to invest funds into the ranch and raise the mortgage to a peak of approximately \$1,400,000 at a rate of three points above the prime rate at one point. However, this amount was gradually paid down until only around \$500,000 remained outstanding.
- h) In 2013, Phillip bought out Glenn's interest for \$585,000. Phillip still has a considerable mortgage on the ranch.

- i) Glenn experienced a financial downfall, and a ranch he owned independently in the same general area as the family ranch went into foreclosure in 2017. All of the funds he received from Phillip were part of this failed venture.
- [20] Although the plaintiff testified that the ranch was worth millions and remained hostile to Glenn and Phillip, I reject his evidence on this point because he had no direct knowledge of the appraisal, sale, or operations of the ranch after the sale. In fact, the plaintiff was estranged from Glenn and Phillip.
- [21] Based on these findings, I calculate that the value of the gift to Timothy, Glenn, and Phillip was approximately one-third of the difference between the appraised price of the ranch, which is \$1,100,000, and the purchase price of the land, which was \$700,000; amounting to roughly \$135,000 each.
- [22] The ranch was sold to the brothers so they could continue operating the family ranch. This has been, and continues to be, a difficult and financially challenging undertaking. It's hard to account for all the financial and sweat equity invested in the property; however, after hearing the evidence from Phillip and Glenn, I believe it is considerable, and they certainly have not financially benefited from their purchase of the ranch. Any increase in the land's value needs to be offset by the investments the brothers have made in the land.

### The Penticton Condominium

- [23] On August 6, 2013, George and mother purchased a condominium in Penticton for approximately \$300,000 as joint owners. Over time, George contributed around \$70,000 towards the purchase price, while mother paid the remainder. George's contribution accounted for approximately 23 percent of the total, with her paying about 77 percent.
- [24] Mother received independent legal advice from Mr. Litwin. Given Mr. Litwin's expertise in this area (including the publication of the article "Think Twice on Adding Your Child") and his standard practice, I find that he fully advised her that, as a joint owner of the condominium, it would pass directly to George outside of her estate.
- [25] The purchase was shortly after mother's will had been updated, bestowing the residue of her estate to George. There are considerable tax advantages to bestowing land through joint ownership instead of passing the land through one's estate.
- [26] In my view, mother was aware that:
  - a) having George as a joint owner of the condominium would provide him with sole ownership of the condominium upon her death; and
  - b) there were considerable tax advantages to transferring the condominium to George directly as opposed to having the condominium pass to him through her estate.

- [27] I conclude that mother intended the condominium to be a gift to George and that it would pass to him outside of her estate.
- [28] Although George and mother had purchased properties together before, I find that given the change in the will and the advice that she received from Mr. Litwin, she intended this purchase to be a gift to George, despite these past joint purchases.
- [29] Mother died in July 2017. George paid expenses for the condominium until he sold it in July 2019 for approximately \$350,000. I estimate that George's expenses for taxes, strata fees and insurance for the two years after mother's death were \$5,000. Since the condominium was purchased for \$300,000 in 2013, and sold for approximately \$350,000 in 2019, the condominium appears to have appreciated approximately \$8,000 each year after its purchase.
- [30] I estimate the value of the condominium at the time of mother's death in 2017, two years prior to the final valuation of \$350,000, to be \$334,000. From which, I subtract the \$5,000 arising from George's expenses to conclude that the value of the condominium at mother's death to be was \$329,000.
- [31] Therefore, the value of the gift of the condominium to George at the time of mother's death was approximately \$250,000, equating to 77 percent of \$329,000. This calculation is based on my finding that mother had contributed 77 percent to the purchase price of the condominium.

### The Value of Mother's Estate

- [32] The trust reconciliation shows that the trust account received approximately \$495,000 in liquid assets from mother's estate. Roughly \$55,000 in expenses were incurred in processing the estate (inclusive of taxes).
- [33] There were approximately \$30,000 in non-liquid assets, consisting of a car, some jewellery, and furnishings. Although the stated value of these assets is \$30,000, I agree with the defendant that the liquid value, which is the amount the assets could be sold for, is less than that. In my opinion, \$15,000 is a suitable cash redemption value for these items.
- [34] I accept Mr. Bryant's evidence that, considering the size of the estate, an executor's fee of \$15,000 to \$25,000 would be reasonable. Given the contentious nature of the estate and the plaintiff's conduct towards the executor, I assess this at \$25,000.
- [35] This provides the following valuation of the estate:

Addition / Deduction

Value

Total Value

Amount received in trust

\$495,000

\$495,000

Value of non-liquid assets

\$15,000

\$510,000

Processing expenses

-\$55,000

\$455,000

Executor's fee

-\$25,000

\$430,000

Glenn & Phillip bequest

-\$100,000

\$330,000

Plaintiff bequest

-\$50,000

\$280,000

[36] The total estate, before any distributions to the beneficiaries, is \$430,000. Glenn, Phillip, and the plaintiff each received approximately 12 percent of the proceeds, while George received approximately 65 percent.

## The Law Governing Will Variation Actions

[37] In my view, the legal principles governing an application to vary a will are summarized in *Kan v. Cheong*, 2024 BCSC 1633 where the statute and leading authorities are reviewed at paras. 82-83; and then summarized the factors reviewed in *Dunsdon v. Dunsdon*, 2012 BCSC 1274:

[84] From Justice Ballance's comprehensive review in *Dunsdon v. Dunsdon*, 2012 BCSC 1274 at paras. 129 - 138, I extract the following as the correct approach:

- a) WESA has two primary objectives: 1. to ensure that adequate, just and equitable provision is made for spouses and children of a will-maker; and 2. to protect the will-maker's autonomy. The second objective is subordinate to the first.
- b) The court must first determine whether the will-maker made "adequate provision" for the plaintiff spouse or child. This is measured objectively, assessed in light of current societal legal and moral norms, and in the circumstances existing and reasonably foreseeable to the testator at the time of the testator's death.
- c) Legal norms are obligations owed to a spouse or dependent children. A testator will not generally have a legal duty to an independent adult child unless the child contributed to the estate.
- d) Moral norms reflect society's reasonable expectations of what a judicious person would do in the circumstances by reference to contemporary community standards. Courts have considered several factors as informing the existence and strength of a testator's moral duty to independent adult children including the nature and strength of the relationship between the testator and claimant; the size of the estate; any contributions by the claimant; the reasonably held expectations of the claimant; the standard of living of the testator and the claimant; any gifts and benefits made by the testator outside the will; the testator's reasons for disinheriting; financial need and other personal circumstances, including disability, of the claimant; misconduct or poor character of the claimant; and the competing claimants and other beneficiaries. These factors tend to overlap and are not approached in isolation as independent, air-tight categories.
- e) Subject to the size of the estate and the absence of circumstances that may negate a moral obligation, a testator should make provision for both a spouse and children, but in any particular situation there may be a number of ways of dividing the assets which are adequate, just and equitable. Provided the testator has chosen an option within the range, the testator's autonomy should be respected and the will should not be disturbed.
- f) A moral duty may be negated where the testator has just cause, consisting of objectively valid and rational reasons to disinherit an adult child. In this context, valid means true and rational means there is a logical connection between the reasons and the act of disinheritance. In the absence of expressed reasons for an unequal division, there is a reasonable expectation that adult children will share equally in their parents' estate.
- g) If the court concludes that the will-maker has not made "adequate provision" for his or her spouse or child, the court must then determine what is adequate, just and equitable in the circumstances existing and reasonably foreseeable at the date of the testator's death and any substantial change in circumstance that has occurred between the date of death and the trial.

- h) The factors that inform the existence and strength of a testator's moral duty to independent adult children as set out in (d) above are also relevant to determining what constitutes adequate, just, and equitable provision in the circumstances of the case.

### Application of Legal Principles

#### Neutral Factors

- [38] Some of the factors that courts have viewed as informing the existence of a testator's moral duty to an independent adult child are neutral in this case. These include the size of the estate (modest but enough to provide a meaningful gift); and misconduct or poor character of the plaintiff (there was no evidence of such).

### Comparative Financial Circumstances

#### The Plaintiff

- [39] The plaintiff was a successful businessman who retired from the oil industry in the late 1990s in Calgary. Subsequently, he managed an apartment building and rental properties he owned in Calgary with the help of his son. He sold the properties in 1998; after that, he spent most of his time abroad, engaging in various business ventures.
- [40] He owned an apartment in China and spent significant time in Hong Kong. There was limited documentary evidence regarding what the plaintiff did after retiring from the oil industry, and he only provided vague details during his testimony, leading me to infer that he was largely retired. He testified that he worked at Tesco in China, Jakarta, Australia, and Houston, and participated in two business ventures that hoped to import goods into Canada.
- [41] My impression that the plaintiff was largely retired is consistent with his son Cameron's testimony, who characterized the plaintiff as being retired since he was 40 years old, after he left the oil and gas industry in Calgary.
- [42] The plaintiff largely lived abroad from 2000 to 2011, which resulted in the loss of his Canadian residency status. Although he testified that he returned to Canada for approximately six months each year, I infer that it was less than that due to the focus of his activities abroad. The plaintiff purchased a large agricultural lot with oceanfront property on Salt Spring Island in 1996 for \$500,000. He transferred the property into a corporation he owns in 2003 for a declared value of \$668,000. When he returned to Canada in 2011, he began living on the property full-time.
- [43] There are two buildings on the property, which are relatively secluded from each other. The buildings are old and add little value to the property. The plaintiff had hoped to subdivide the property but was unable to do so.

- [44] Three different valuations were performed on the property. The plaintiff obtained reports from Ms. Schmidt, who assessed the property at \$1,050,000 as of July 2017 and \$1,500,000 as of February 8, 2023, and from Mr. Macleod, who assessed the property at \$902,000 as of July 2017 and \$1,117,000 as of November 2023. The defendants obtained a report from Mr. Rounis, who assessed the property at \$1,450,000 as of July 2017 and \$2,525,000 as of January 26, 2023.
- [45] The market for properties on Salt Spring Island is small, and the property in question is unique, which makes it challenging to find suitable comparables. The main point of contention between the appraisers was the potential ability to secure beach access directly from the property and the valuation of the substantial section of land away from the ocean.
- [46] I agree with Mr. Macleod's criticisms of Mr. Rounis' use of comparables, which tended to be based on properties that, in my view, were superior to the plaintiff's property. However, the unique nature of the property makes it difficult to assess, and one must rely more on intangible factors, which, in this case, the appraisers are best positioned to evaluate. I felt that Ms. Schmidt was the most neutral of the appraisers during cross-examination and placed the most trust in her assessment of these factors. I assess the property's value at \$1,000,000 as of July 2017 and \$1,500,000 as of November 2023.
- [47] The plaintiff maintains unrealistic expectations regarding property ownership. He hoped to keep his property within his family and to establish a family trust that would shield ownership of the property from marital breakdowns involving him or his children. It appears that this was not possible. The plaintiff promised Cameron that Cameron would have a 40 percent interest in the land. Cameron testified that there are no details beyond that; with respect to specifics of which part of the property he has been promised, he testified that it has never been "really finalized."
- [48] In 2015, Cameron moved onto the property with his family and lives in the larger of the two buildings, which is further from the ocean in an area that the plaintiff had hoped to be able to subdivide from the property. Cameron does not pay any rent, receives some farm income, but pays the taxes, utilities and makes necessary improvements to the property. Although Cameron built an addition to the building where he resides, it was essential for his family and did not significantly impact the property's value (which is almost entirely based on the land).
- [49] Cameron was unaware that the plaintiff had married his third wife in October 2022. She is 41 years old and currently lives in the Philippines with her four dependent children. Cameron did not know that the plaintiff was divorced from his second wife. The plaintiff periodically sends large sums of money to support his wife and her family in the Philippines and hopes to settle them permanently in his home on Salt Spring Island.

- [50] I do not accept that Cameron has a legal interest in the property. The plaintiff has taken no steps to formalize his promise to Cameron, despite having spoken with legal counsel about his affairs and possessing, at the time, ample liquid assets to formalize the promise. I am not convinced that Cameron has a strong equitable claim to the property, given that his contributions appear to be offset by the fact that he does not pay rent.
- [51] In 2014, the plaintiff had approximately \$2,000,000 in stocks and cash, in addition to the property on Salt Spring Island. During this time, he became embroiled in a risky and imprudent business venture, which left him with approximately \$50,000 in cash and stocks by the end of 2017.
- [52] The plaintiff owns the property through his company, which has significant accrued debts totalling over \$1,500,000; therefore, the tax implications of withdrawing assets from the company remain uncertain. Nonetheless, the plaintiff holds all the shares in the company, which owns the property valued at over \$1,500,000 (assuming ongoing appreciation).
- [53] Although the plaintiff lives frugally and foregoes many of life's amenities, I note the following:
- a) He is land-rich and could easily access significant wealth if he wishes;
  - b) He could have engaged in remunerative employment after suffering his financial losses to improve his circumstances. He was 64 years old at the end of 2017 (His older brother George and his younger brothers Phillip and Glenn all continue to work as of the time of trial, with no plans to stop). In my view, the plaintiff could engage in remunerative work if he wishes to do so; and
  - c) Cameron testified that it is possible that the plaintiff was living in substandard housing for strategic reasons associated with the lawsuit.

### George Proudfoot

- [54] George Proudfoot is a veterinarian. He owns a house in Penticton, which was valued at \$650,000 in July 2017 and is worth about \$1,000,000 as of November 7, 2023. He paid off the mortgage with funds he received from the sale of the condominium. George and his wife each own a car. They purchased an expensive recreational trailer with an inheritance his wife received. They had approximately \$300,000 in net assets in July 2017.
- [55] George's company has debts of around \$100,000 from a line of credit and credit cards. He earned approximately \$100,000 a year from 2017 to 2021. Currently, he works as a locum earning \$1,000 per day, working two to five days each week for three weeks of each month. He also receives \$2,500 for his pension; however, it is clawed back to \$800 per month because he continues to work.

- [56] I would assess George's financial circumstances as similar to the plaintiff's, with the exception that George has never taken a prolonged period of time off work and continues to work to support what he describes as "a comfortable middle-class lifestyle." George is a year older than the plaintiff.

### Phillip Proudfoot

- [57] Phillip Proudfoot is a rancher who owns the last two portions of the family ranch. The ranch carries a significant mortgage, and Phillip started a septic system business to supplement the ranch's income. His home is modest. He has faced tough financial times and received some modest support from mother due to his circumstances over the years before her death.
- [58] I would assess Phillip's financial circumstances as worse than the plaintiff's. Phillip has a mortgage on his property and must continue working the ranch and running his septic business to pay the mortgage and support his family.

### Glenn Proudfoot

- [59] In 2014, Glenn Proudfoot started an oil and gas exploration company with the hope of discovering profitable oil reserves. He earns approximately \$144,000 a year but anticipates significant contributions from his 1 percent gross overriding royalty in the company. This is a high-risk business, and nothing is certain. The goal is to make substantial profits if they succeed in locating large, profitable reserves. He has about \$100,000 in assets. When he is not in Alberta, he lives with his wife and two daughters in Comox. The home is in his daughters' names and is worth more than \$1,000,000. I assume that there is no mortgage on the property.
- [60] It is challenging to compare Glenn's financial circumstances to those of the plaintiff; however, on paper, the plaintiff seems to be in a more advantageous financial position. I have no idea how to quantify the likelihood of Glenn's company discovering a valuable oil reserve beyond quantifying it as "speculative" and that it is a "very high-risk" business.
- [61] Comparing the plaintiff's situation with that of his brothers depends on the type of employment he could pursue if he chose to return to work. Considering his past successes, in my view, his earning potential remains significant.

### Gifts or Benefits Outside of the Will

- [62] Phillip and George received the opportunity to purchase the family ranch at below market value in 1996. The value of this gift was \$135,000 each in 1996. It is difficult to estimate the present value of what is left of the family ranch, but neither brother appears to have profited from the venture.

[63] George received mother's share of the condominium when she died in July 2017. This gift was worth \$250,000.

[64] The plaintiff did not receive any significant gifts from mother before her death.

### Reasonably Held Expectations

[65] The plaintiff states that in 1996, he was driving with mother on the way back from the family ranch when he confronted her about giving the ranch to his brothers. He was angry because he believed the family ranch was worth millions of dollars, and the brothers had essentially pressured mother into giving it to them for free. The plaintiff claims that he did not have an opportunity to purchase the family ranch.

[66] The plaintiff claims that mother told him not to worry, stating that she would take care of him and George in her final will, and that the other brothers would receive nothing. Mother said she would split her will between the plaintiff and George.

[67] Neither Glenn nor Phillip were told by mother that they would not receive any inheritance because they purchased the ranch at below market value.

[68] I have several concerns with the plaintiff's statements on this issue. They include:

- a) The brothers did not acquire the family ranch for free; they obtained it at a reasonable discount below the appraised value;
- b) I do not accept that the plaintiff was not given the opportunity to purchase the ranch with his brothers. The plaintiff believed his brothers were engaged in criminal activity on the ranch. Given these circumstances, I do not believe he would have agreed to purchase the ranch with them. While he may have preferred to buy the ranch independently, that is not what mother wanted; and
- c) Mother outlined the circumstances and implications of the purchase in her will's declaration. In my view, this declaration accurately represents the circumstances as it aligns with the details of the sale and the memories of the other brothers.

[69] The plaintiff is an emotional person; in my view, his perception and recollection of events are clouded by his emotions and beliefs. I find that his recollection of this conversation is influenced by his anger and sense of injustice stemming from his belief that his brothers were criminals who received the family ranch for free.

[70] The plaintiff became estranged from Timothy, Glenn, and Phillip, having no contact with Timothy until his death in 2012 (he did not attend the funeral) and with Glenn and Phillip until after Mother's death in July 2017.

[71] The plaintiff was stunned by the size of the mother's estate, as he believed that it was going to be worth millions. He argues that this belief supports a reasonable expectation that he should receive a larger share of the estate.

[72] I do not accept that mother told the plaintiff that her estate was worth millions. I say this because:

- a) mother was tight-lipped about finances and as a general rule did not discuss them;
- b) mother had no reason to lie to the plaintiff about the size of her estate; and
- c) I accept that the plaintiff believed that she had millions in her estate; just as he believed the family ranch was worth millions; and that the brothers received the ranch for free. In my view, the plaintiff's recollection of mother telling him her estate was worth millions is another example of his perception and recollection being influenced by his emotions.

[73] Even if mother made the statement, I do not see how it could create a reasonable expectation that would impact the other brother's entitlement to the funds as specified in the will.

## Contributions, Relationships and Conduct

### The Plaintiff

[74] The plaintiff says he had a good relationship with mother. He said she had chronic depression and he would be there to cheer her up throughout her life.

[75] After the death of her first husband, mother lived in an apartment that the plaintiff owned in Calgary rent-free. She then moved to an apartment in Banff, and he would visit her and his girlfriend on the weekends.

[76] The plaintiff recalls taking mother on a trip to Victoria for a half marathon, and that she had a vacation with the plaintiff in Ireland in 2002.

[77] The plaintiff says he provided mother with investment advice and that she profited from his advice.

[78] When mother lived in North Vancouver, he would visit her when he was passing through the area. When she lived on Vancouver Island, he would try to visit her once a month when he was in the country. He was out of the country for more than six months of the year during this time period.

[79] When mother's second husband was in poor health, the plaintiff interviewed and tried to arrange for a caregiver for her; but she did not want the caregiver that the plaintiff arranged.

[80] Mother visited the plaintiff's property on Vancouver Island on a number of occasions.

[81] The plaintiff believed it would be best for mother to move to Salt Spring Island and live with him. However, she chose to move to Penticton and reside in the condominium near George. The plaintiff believes that this decision was not in mother's best interest, and that George simply did not understand her as well as he did.

- [82] The plaintiff attempted to communicate with mother via phone or email, but this proved challenging due to her hearing impairment and lack of computer skills.
- [83] In my view, the plaintiff had a loving and caring relationship with mother and made efforts to stay in touch with her over the years. However, he was out of the country for much of that time, and it was difficult to see her while she was living further away from Salt Spring Island. In my opinion, the plaintiff did not make an extraordinary contribution to mother's estate beyond that.

### George Proudfoot

- [84] In my view, George was devoted to mother. She would travel to visit him in Penticton regularly before she moved to Vancouver Island. She wanted George to move to Vancouver Island to be near her. He did a locum there but it did not work out that he could move there. He would spend a lot of time with mother and they would look at houses together and made several purchases as investments. This was an activity that she enjoyed.
- [85] After mother's second husband died, she wanted to move to Penticton with George. George was on call then 24/7. He regularly saw her and would drive her places and check in on her.
- [86] There were allegations that George was using his relationship with mother for money or to be compensated for his services. I reject these claims. I accept George's testimony that he did not receive any money from her, and that he spent time with her because he genuinely enjoyed it.
- [87] George believes that the declaration in mother's will, which states that throughout his adult life and since the death of his father, he has been her greatest source of strength, is accurate. After assessing the evidence as a whole, I agree that it is indeed accurate. This does not diminish the relationship that mother had with her other sons; it is simply a comment on the relationship she had with George and the contributions he made to her quality of life. In my view, George made an extraordinary contribution to mother.
- [88] The plaintiff was somewhat disparaging of George's relationship with mother, characterizing the time George spent with her as George playing "Driving Miss Daisy" and that George lacked the emotional intelligence to understand mother truly the way that he did.
- [89] I accept that the plaintiff had a good relationship with mother. However, the impression I formed from the evidence was that the plaintiff was rigid in his thinking about what was best, and simply dismissed the views he disagreed with, whether they came from George or mother.

### Glenn Proudfoot

- [90] The plaintiff alleged that Glenn and Phillip pressured mother into selling them the family ranch. I have already determined that this was not the case.

- [91] Glenn helped her move to Penticton and visited her several times before her death. He maintained contact with her throughout his adult life and believed that his relationship with her was similar to that of Phillip and Timothy.
- [92] His perception is that mother had an emotionally equitable relationship with all of her children.
- [93] In my view, Glenn had a good relationship with mother, but did not provide any extraordinary contributions.

### **Phillip Proudfoot**

- [94] The plaintiff made allegations that Phillip was involved in illegal activities on the ranch. He and Tim were charged with a criminal offence prior to purchasing the ranch from mother. I understand that Phillip was not convicted. He was not examined on these allegations during his testimony.
- [95] Phillip made a point of seeing mother in person every year. The last time he saw her in person was in Penticton in the spring before she died. She visited him at the ranch on occasion.
- [96] In my view, Phillip had a similar relationship with mother as Glenn did. I do not consider the fact that he was charged, but not convicted, of a criminal offence in the 1990s before mother sold him the ranch, as evidence of any misconduct that would affect his moral entitlement to an inheritance.

### **Financial Need**

- [97] In my view, none of the brothers are in dire need of financial assistance. To a large extent, their financial positions are the result of the choices they have made in their lives. I certainly would not characterize the plaintiff as being in greater financial need than his brothers. He chooses to be land-rich and cash-poor. In my opinion, this does not create financial need.

### **Moral Claims**

- [98] I have analyzed the Dunsdon factors holistically under the previous headings. In my view, the plaintiff has a stronger moral claim to an inheritance than Glenn or Phillip, largely due to their prior gift of the family ranch at a discounted price. George has a stronger moral claim to an inheritance than all of his brothers because of the nature of the relationship he had with mother and her desire to honour this obligation with a larger share of her inheritance, exceeding that of any of the other children.

### Negation of Moral Claim by Objective and Valid Reason

- [99] The will declared that the plaintiff achieved substantial success in his life and that he is well able to provide for the proper support and maintenance of himself and his family. Therefore, the will provided a limited provision for the plaintiff.
- [100] In my view, this may have been true before the plaintiff's improvident investment, in which he lost nearly \$2,000,000. However, I do not see the plaintiff as being substantially more financially successful than his brothers as of mother's death in July 2017. Through his sole ownership of the property on Salt Spring Island and his ability to work, he is able to provide for the proper maintenance of himself and his family. I state this despite the fact that the plaintiff does not wish to sell or mortgage his property, nor engage in remunerative employment. These choices do not impact the fact that he is "well able" to provide for himself and his family.
- [101] Although the plaintiff has not been disinherited, he holds at least the same moral entitlement to an inheritance as Glenn and Phillip did (absent the gift of the ranch). Therefore, in my opinion, the assertion that the plaintiff has achieved substantial success in his life does not provide objective and valid reasons to undermine the moral claim he has to an inheritance larger than what was given to Glenn and Phillip in the will.
- [102] George has a much stronger moral claim to entitlement than the plaintiff. However, George received a significant gift outside of the will through his entitlement to the condominium in Penticton.

### Adequate, Just and Equitable Provision

- [103] The factors that inform the existence and strength of a testator's moral duty to independent adult children are also relevant to determining what constitutes adequate, just, and equitable provision.
- [104] I have already discussed the relevant factors. Ultimately, they lead to the conclusion that:
- a) there is no material difference in the strength of Glenn and Phillip's claims;
  - b) the plaintiff has a stronger claim than Glenn and Phillip, considering the gift they received outside of the will; and
  - c) George has a much stronger claim than the plaintiff; however, this claim is counterbalanced by the substantial gift of the condominium outside of the Will.
- [105] I am mindful of the objective of interfering with the testator's autonomy as little as possible. However, in these circumstances, it is appropriate to give less weight to mother's autonomy to the extent that it is premised on the plaintiff achieving substantial success in his life, as this premise has been undercut by the losses he suffered immediately before her death.

[106] In my view, the fairest division, in considering all of the circumstances, would be to vary the will such that George receives a \$50,000 bequest and that George and the plaintiff equally divide the residue of the estate.

[107] Therefore, the plaintiff would have been awarded \$115,000 if his action to vary mother's will had proceeded to trial. I have calculated this sum as follows:

Addition / Deduction

Value

Total Value

Amount received in trust

\$495,000

\$495,000

Value of non-liquid assets

\$15,000

\$510,000

Processing expenses

-\$55,000

\$455,000

Executor's fee

-\$25,000

\$430,000

Glenn & Phillip bequest

-\$100,000

\$330,000

Plaintiff bequest

-\$50,000

\$280,000

George bequest

-\$50,000

\$230,000

½ of Residual

\$115,000

\$115,000

### Assessment of Damages

[108] The plaintiff has established, on a balance of probabilities, that he would have been successful in varying mother's will if he proceeded to trial and would have received an additional \$115,000 from the estate.

### Interest Recoverable in the Wills Variation Action

[109] In addition, the plaintiff is entitled to interest payable under the general law applicable to pecuniary legacies, at the rate set by the Interest Act, R.S.C. 1985, c. I-15 from July 31, 2018 until the date of trial: see *Sawchuk v. MacKenzie Estate*, 2000 BCCA 10 at para. 23.

[110] In this case, the evidence suggested that the trial was likely to occur within two years of filing the notice of civil claim. Unfortunately, this would have placed the trial at the peak of the COVID-19 pandemic, which caused significant delays. In my view, this is an additional factor that must be considered. I would also add another two years to the start of the trial to account for the pandemic, based on the general experience that the courts had with it. No evidence was presented on this point, but I take judicial notice of these circumstances.

[111] I estimate that the reasons for judgment would be provided in the same timeframe as the time taken after the trial concluded in this case. This indicates that the order would be made approximately 2 months following the trial's completion.

[112] Therefore, the plaintiff is entitled to interest at the rate established by the Interest Act from July 31, 2018, to September 30, 2022. The interest should be calculated on the amount that the plaintiff should have received from the estate, specifically \$115,000.

### Costs and Disbursements in the Wills Variation Action

[113] The final factor affecting the quantum of the award that the plaintiff would have received is an accounting of costs that he would have incurred had he proceeded in taking the wills variation action to trial.

[114] Lawsuits are generally not pursued for free. The plaintiff testified that he needed a lawyer to bring this claim and the wills variation claim. I agree. I have found that the plaintiff would have been successful through this trial within a trial, and in my opinion, it is more probable than not that he would have received partial compensation for his legal fees.

[115] The plaintiff says that a \$25,000 deduction would be appropriate using the \$50,000 in costs estimated by Mr. Bryant as a starting point, and allowing for partial compensation for fees and disbursements through an award of costs to the plaintiff following the trial.

- [116] The defendant says that this cost deduction is not nearly high enough.
- [117] There is a lack of evidence on this point outside of what Mr. Bryant estimated. The plaintiff estimates a cost entitlement of \$8,250 for a 5-day trial, in addition to costs for any pre-trial steps that may be taken.
- [118] In my opinion, a \$40,000 net deduction in costs (accounting for consideration of a potential award of costs in the wills variation trial) is appropriate in this case. This assessment also accounts for the possibility that not all disbursements would be compensated by the other party and for the fact that the trial may have lasted longer than five days, considering the length of this trial.
- [119] Mr. Bryant refunded the \$3,000 retainer to the plaintiff because he neglected to file the plaintiff's action before the expiration of the limitation period. This \$3,000 should be added to the costs deducted as Mr. Bryant would not have provided the refund of his initial retainer (equal to the work he had performed) if the action had been filed in time.
- [120] Although I have based the cost estimate on a lawyer charging an hourly rate, I see no principled reason why this would not fairly reflect a contingency fee arrangement given the value of the plaintiff's action.
- [121] Therefore, the total net costs that the plaintiff would have incurred are \$43,000. The \$43,000 should be subtracted from the \$115,000 as the plaintiff is only entitled to receive the net amount of what he would have received.
- [122] As an alternative argument, the plaintiff submits that costs associated with advancing the wills variation action should not be deducted, as the plaintiff was compelled to proceed with the wills variation action during the trial within the trial in this case.
- [123] This argument is misconceived. The plaintiff is entitled to recover the net benefit he lost due to the failure to bring the wills variation action within the limitation period. Costs that he would have incurred in prosecuting the wills variation action must be accounted for. Any entitlement the plaintiff has to costs and disbursements for this action are set out in the Rules of Court and will be determined at the conclusion of this action.

## Contingencies

- [124] The plaintiff is entitled to recover what he would have received, but for the fact that the limitation period to bring the wills variation action was irrevocably missed. In this case, I have calculated what the plaintiff would have received had he proceeded to the wills variation trial.

- [125] Under the term, 'contingencies', the defendants raised several hypothetical events that, if they occurred, could potentially impact the amount of damages the plaintiff is entitled to recover in this action. Care must be taken to ensure these are genuine contingencies and not issues encompassed by causation that were addressed in the "trial within a trial" analysis.
- [126] In assessing whether a past hypothetical event should impact the damages awarded to the plaintiff, I am satisfied that the procedure set out by our Court of Appeal in *Rab v. Prescott*, 2021 BCCA 345, in which it set out the steps to be taken in determining whether there exists a "real and substantial possibility" of a future loss of earning, is appropriate. The procedure requires the court to consider three questions:
- a) Does the evidence disclose a hypothetical past event that could impact the damages that the plaintiff is entitled to due to the missed limitation period?
  - b) Is there a real and substantial possibility that the hypothetical past event will impact the damages that the plaintiff is entitled?
  - c) What is the value of that hypothetical past event, given the relative likelihood of it occurring?
- [127] In assessing whether a potential past event is a real and substantial possibility, such a contingency must be "grounded in the evidence" such that it is not impermissibly speculative.

## Settlement

- [128] The defendants argue that over 90 percent of cases settle; therefore, some provision for settlement must be considered in relation to the assessed value of proceeding to trial as a contingency.
- [129] This evidence, on its own, may disclose a potential past event that could impact the damages to which the plaintiff is entitled. However, in the absence of specific evidence regarding the settlement, I question whether there is a reasonable possibility of any effect on the damages the plaintiff is entitled.
- [130] The procedure used to determine damages for an improvident settlement is described in *Hopkins v. Murphy*, 2024 ONSC 3698 as:
- [41] Based on the above case law, I conclude that to determine liability and damages in a solicitor's negligence case alleging an improvident settlement, the court must conduct a trial within a trial to determine liability and the amount of damages the plaintiff would have received following a trial. The court must then determine if the difference between the amount settled for and what the plaintiff would have received after a trial is within a reasonable range of possible choices that could have been made by a competent member of the profession.

[131] In my view, simply asserting that most cases settle before trial does not meet the requirement of a genuine and substantial possibility that the plaintiff might have entered into an improvident settlement with the defendants. Furthermore, the proposition that such a settlement would be materially greater or less than the value determined to be appropriate in the trial within a trial is pure speculation.

#### \$50,000 Settlement

[132] The defendants assert a second settlement contingency: that the plaintiff would have obtained a settlement of \$50,000 on an expedited basis through a limited retainer. This differs from the general proposition that most claims simply settle. Given the net value of the claim established through the trial within the trial, as well as the time and costs required to proceed to trial, it would not have been improvident.

[133] On May 2, 2018, before the expiration of the limitation period, Mr. Bryant understood that the plaintiff had minimal financial resources. Mr. Bryant thought that the best way to proceed would be to draft a persuasive letter to the executor, George's lawyer, and to see if they could expeditiously negotiate the payment to the plaintiff of additional funds from the estate

[134] Mr. Bryant understood that the plaintiff was willing to explore obtaining an additional \$50,000 for a \$3,000 retainer.

[135] The plaintiff indicates that he was willing to explore the possibility of negotiating an expedited settlement. He testified that he asked Mr. Bryant to cap his fees at \$3,000 and not to exceed that amount. However, the plaintiff was open to paying more if necessary. He had a previous negative experience with a lawyer who incurred excessive costs on an unlimited retainer and did not want his bill with Mr. Bryant to rise beyond established amounts without his consent.

[136] I accept the plaintiff's evidence on this issue. In my view, the plaintiff initially sought to pursue a quick settlement on a limited retainer. This aligns with Mr. Bryant's notes and the email that the plaintiff later sent to Mr. Bryant proposing additional compensation if a better result could be negotiated.

[137] The plaintiff asserts that he did not inform Mr. Bryant that he would accept \$50,000, and he would never have done so. Mother had informed the plaintiff that Glenn and Phillip would not inherit anything from her will, and that George and he would share her estate; therefore, he would never have accepted an additional \$50,000 as settlement of his claim.

[138] I do not accept this evidence. In my view, the plaintiff told Mr. Bryant that he would accept \$50,000 if presented with the opportunity to do so within the scope of a \$3,000 retainer. I say this because:

- a) this amount is consistent with Mr. Bryant's notes and the subsequent email sent by the plaintiff to Mr. Bryant on May 9, 2018; which in my view confirms the evidence provided by Mr. Bryant;
- b) Mr. Bryant was not in a position to provide an opinion on the value of any entitlement that the plaintiff might have to additional funds; and
- c) the plaintiff was in desperate need of cash.

[139] In my opinion, the plaintiff would have been satisfied and relieved if Mr. Bryant obtained a \$50,000 settlement on a \$3,000 retainer on an expedited basis.

[140] The defendants have established that the plaintiff wanted Mr. Bryant to try to settle his claim on an expedited basis for \$50,000 (or more) on a limited retainer. This constitutes a hypothetical past event that could impact the plaintiff's entitlement to damages.

[141] The next issue is whether there was a real and substantial possibility of achieving such a settlement.

[142] Initially, Mr. Bryant was optimistic that a quick settlement might be reached. Such a settlement would be based on the following factors:

- a) the threat of litigation, which might deplete funds in the estate;
- b) the plaintiff's lack of assets; and
- c) the goodwill of the plaintiff's brothers and their wish to assist in alleviating the plaintiff's financial situation.

[143] Mr. Bryant's view on the possibility of settlement changed when the plaintiff sent an emotional and ill-conceived email to Glenn and George's lawyer on July 30, 2018.

[144] Mr. Bryant testified that this email was a pivotal moment that negatively impacted his ability to negotiate a settlement. The email detailed a family history and allegations spanning 60 years and contained "very troubling" claims. There were multiple pages of statements that Mr. Bryant believed would be impossible to overcome in a negotiation.

[145] The plaintiff testified that he is a passionate person and was angry when he wrote the email. He felt that his brothers owed him obligations and expected them to fulfill their duties towards him.

[146] In my view, this email made a settlement very unlikely. The only possibility would be if George could set aside the emotions generated by the email and follow any advice provided to him by his lawyer.

[147] However, there was another issue. The plaintiff made it clear to Mr. Bryant that he was in desperate financial straits, down to his last \$55,000. The plaintiff was not forthcoming about his ownership of property on Salt Spring Island, which was a significant factor in this trial within a trial and would have dramatically altered the negotiations. While Mr. Bryant was

unaware of the plaintiff's property ownership, all of the plaintiff's brothers were aware of it. The plaintiff's ownership of valuable property on Salt Spring Island would have made negotiations based on financial need impossible on an expedited basis and would have rendered Mr. Bryant's strategy ineffective.

[148] The combination of the July 30, 2018 email and the plaintiff's ownership of the property on Salt Spring Island rendered an expedited settlement impossible. Therefore, there is no real and substantial possibility that an expedited settlement would have an impact on the damages that the plaintiff is entitled.

### **Abandonment of Action**

[149] The defendants argue that the plaintiff would have abandoned the action against them had he been unable to secure an expedited settlement for a limited retainer, as he did not have sufficient liquid assets to prosecute the action to trial.

[150] Mr. Bryant testified that the plaintiff had essentially two options to prosecute the action with counsel if it could not be settled on a limited retainer, the plaintiff could:

- a) use his property on Salt Spring Island as security for legal fees; or
- b) retain a lawyer to prosecute the action on a contingency fee arrangement.

[151] The plaintiff testified that he could not pursue the action without a lawyer and that he would not put his property at risk. In my view, the plaintiff would need to obtain a lawyer on a contingency basis to prosecute the action on his behalf.

[152] The onus is on the defendants to provide an evidentiary basis upon which a court could determine that a real and substantial possibility of impacting the damages that the plaintiff is entitled exists. The only evidence on this point was from Mr. Bryant who testified:

He could have taken the case to trial with a lawyer on contingency. That is a possibility.

[153] In my view, on this evidence, the contingency that the plaintiff would not have been able to find a lawyer to take his case on a contingency fee arrangement is pure speculation and falls short of the real and substantial possibility requirement.

### **Credibility of the plaintiff**

[154] The defendants argue that the plaintiff was neither a credible nor a reliable witness, which creates a contingency that should reduce his award of damages. I incorporated my assessment of the plaintiff's evidence on relevant issues during the trial within the trial, made findings on those issues, and determined damages based on those findings. The assessment and conclusions I drew in the trial within the trial reflect my evaluation of these matters. There is no basis for applying such a contingency to these findings. This is not a loss of chance assessment.

### Pre-judgment Interest in this Action

[155] The plaintiff asserts that he is entitled to post-judgment interest from the date of judgment in the wills variation action. I disagree. This misinterprets the nature of this action and the purposes of the quantum determined in the trial within the trial. This action has established that the plaintiff is entitled to damages from the defendants. Those damages are owed to the plaintiff as of the date of judgment in the wills variation action.

[156] The plaintiff is entitled to pre-judgment interest from the date of judgment in the wills variation action (September 30, 2022) to the date of judgment in this action. The pre-judgement interest will be calculated on the following:

- a) \$115,000;
- b) plus the amount of prejudgment interest calculated in the wills variation action; and
- c) minus \$43,000 in costs.

### Breach of Fiduciary Duty

[157] The plaintiff claims that the defendants breached their fiduciary duty to him by not filing the action before the limitation period expired.

[158] A professional in a fiduciary relationship who makes an honest mistake that breaches the standard of care does not automatically breach the fiduciary obligations owed to their client. A breach of fiduciary duty requires evidence that the professional exploited the plaintiff for their direct or indirect personal gain: see *A.(C.) v. Critchley*, 1998 CanLII 9129 (B.C.C.A.), 166 D.L.R. (4th) 475 at paras. 81 and 85.

[159] There is no evidence that the defendants took advantage of the plaintiff in such a manner. The allegations of breach of fiduciary duty are dismissed.

### Disposition

[160] The plaintiff is awarded damages against the defendants in tort for their failure to file the wills variation action within the limitation period.

[161] The claim for breach of fiduciary duty against the defendants is dismissed.

[162] If necessary, the parties may request to appear before me to speak to costs within 45 days of the date of judgment.

"Thomas J."

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