

CANADA / JUDGMENT

Robillard v. Robillard Estate

2015 BCSC 1417

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 1417 Robillard v. Robillard Estate IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Robillard v. Robillard Estate,
2015 BCSC 1417
Date: 20150812
Docket: S142634
Registry: Vancouver

Between: Marc Gilles Robillard
Plaintiff
And
Suzanne Marie Bandick and Suzanne Marie Bandick in her capacity
as Executrix of the Estate of Agathe Diane Robillard
Defendants
Before: The Honourable Mr. Justice Punnett

REASONS FOR JUDGMENT

Counsel for the Plaintiff:

D.R. Greig

D.P. Kuhn

Counsel for the Defendants:

I.D. Hall

Place and Date of Trial:

Vancouver, B.C.

May 5-7, 2015

Place and Date of Judgment:

Vancouver, B.C.

August 12, 2015

[1]

- [1] This is a proceeding under the Wills Variation Act, R.S.B.C. 1996, c. 490 [WVA]. The parties are the two children of Agathe Diane Robillard, their deceased mother. Both parties were on good terms with Ms. Robillard and, until the events giving rise to this litigation, each other.
- [2] The plaintiff, Marc Robillard, seeks variation their mother's Will on the basis of his contributions to his mother's care during the later years of her life and then to her estate. His sister, the defendant Suzanne Bandick, by counter-claim seeks a determination of the value of the estate, an accounting of funds paid to or taken by the plaintiff from their mother's assets both before and after her death, and an equal division of the estate in accordance with the Will.

Background

- [3] Ms. Robillard died on September 11, 2011. Her Will, dated September 29, 1986, names the plaintiff as executor and trustee. Paragraph 3(b) of the Will instructs the executor to divide the estate "equally between my child or children who shall be living at my decease." At the time of Ms. Robillard's death those children were the plaintiff and the defendant.
- [4] The plaintiff is a 69-year-old retired Air Canada aircraft mechanic. From 1987 to 1996 he and his wife lived in Montreal, Quebec. In 1996 they returned to Vancouver, British Columbia and now reside in Langley, BC. The plaintiff retired in 2006 at the age of 60.
- [5] The defendant is 52 years of age and has lived with her husband in Playa del Carmen, Mexico since 2001. Prior to that, they lived with their two children in Vernon, BC.
- [6] Beginning in 1996, the testator began to exhibit signs of memory loss, which may have been an early indicator of Alzheimer's disease. In 2003 the plaintiff realized that the testator's condition was worsening and suggested that while she remained competent to do so she should have an enduring power of attorney ("POA") prepared. He arranged an appointment for her with a notary. The plaintiff said a separate power of attorney was prepared as well, at their mother's request. This document purported to appoint the defendant as Ms. Robillard's power of attorney, but according to the plaintiff his mother never signed it. Ms. Bandick said she was never told of its existence.
- [7] In 2004, the testator gave up her driver's licence. She continued to live in her home. As her needs increased so did the responsibilities assumed by the plaintiff, as Ms. Bandick, by then, only came to Canada for a few weeks each summer.

- [8] During this period, Mr. Robillard assisted his mother by helping her with grocery shopping, banking, bill paying, trips to the hairdresser or to have her nails done, as well as her medical appointments, more so after she surrendered her driver's licence. He arranged her medications in boxes to ensure she could easily keep track of her daily prescriptions and take them when required. He had her mail redirected to him as she was misplacing it. He and his wife took her on several family vacations. He arranged through the Fraser Health Authority for home care workers to attend two hours daily (in the morning and in the evening) to assist his mother with her personal needs. He saw to household repairs for her. He would visit her three or four times a week.
- [9] The testator's condition gradually worsened. In 2008, she entered the basement suite of a home near her condo. The RCMP notified Mr. Robillard, who realized at that time that his mother could no longer be left alone. The decision was made to place Ms. Robillard in Simpson Manor, a care facility near the plaintiff's residence. While that was being arranged the plaintiff lived with his mother in her home for 2-3 weeks.
- [10] Both parties described the care facility as a good facility, recently renovated at the time of their mother's admission, with competent and caring staff. Despite that, after the deceased was placed in the home, the time spent by the plaintiff caring for his mother increased. The defendant testified that their mother did not know either of them by the time she was placed in the care facility. The plaintiff stated that it was only in the last two years of her life that she did not know who he was.
- [11] The plaintiff testified that he attended at the home seven days a week, close to 365 days a year for the entire three and a half years that his mother spent at Simpson Manor. Mr. Robillard would stay there from noon to 2:00 p.m. returning from 5:00 p.m. to 8:00 p.m. He explained that he did so in order to ensure that his mother ate lunch and dinner, as he often had to spoon-feed her or encourage her to eat. Otherwise, in his opinion, she would not have done so. He also explained that in the evenings he was concerned about some of the residents intimidating his mother as the home was, according to him, short staffed. He rarely missed his daily visits. He acknowledged that the staff fed his mother breakfast. Presumably they would have fed her lunch and dinner had he not done so.
- [12] While staying at Simpson Manor, Ms. Robillard had several falls. During her hospitalization as a result of those incidents, Mr. Robillard stayed with her at the hospital from 10:00 a.m. to 8:00 p.m. each day.
- [13] Mr. Robillard testified that he had asked Ms. Bandick for assistance with their mother's care. However, he says that the defendant did not assist other than during her regular summer visits, on one occasion when their mother had cataract surgery, and another occasion when his mother had moved out of the house and it needed to be readied for sale. For her part, Ms. Bandick testified that Mr. Robillard did not make any such requests for assistance, other than that she attend at the time of the surgery and at the time of preparing the house for sale, which she did.

- [14] Ms. Robillard maintained an account at the Toronto Dominion Bank. The plaintiff wrote cheques and used his mother's ATM card to withdraw various sums from that account prior to her death. At some point, though it is not entirely clear when, Mr. Robillard began paying for his automobile insurance, gasoline and oil changes out of his mother's funds. He explained that he did so because he maintained his vehicle "almost fully" for his mother's benefit.
- [15] The plaintiff gave evidence that he drew on his mother's account in order to cover costs associated with various needs of his mother that were not provided by the home. These included the costs of a hairdresser, outings, medication and clothing. He testified that he kept his mother's funds separate from his own by placing them in a plastic bag. He said he would maintain a balance of several hundred dollars in the bag. He kept no receipts or records of such cash expenditures.
- [16] Ms. Robillard's stay in Simpson Manor cost approximately \$1,700 per month including accommodation, food and care. Other expenses, as noted above, remained the responsibility of his mother. He testified that he spent "easily" \$700 or \$800 of his mother's funds on her each month.
- [17] The parties understood that Ms. Robillard would not return to live in her condominium after moving to Simpson Manor, and so resolved to sell it. The plaintiff testified that it took him a year to empty the three-bedroom condo and another year to renovate it. He stated that he threw out 20 or 30 garbage bags of possessions no longer required by his mother. The renovations to the condo were done to improve its value, and included having the entire interior repainted, new kitchen cabinets and appliances installed, new flooring throughout, new light fixtures, new mirrors, blinds and new fixtures in the bathrooms. Tradespersons paid out of his mother's funds did the majority of the work.
- [18] In all, the plaintiff withdrew a total of \$90,250 from Ms. Robillard's bank account between March and August 31, 2011. The details of relevant deposits and withdrawals from Ms. Robillard's bank account in that period are as follows:
- a) Between March 16, 2009 and August 31, 2011 the plaintiff used the testator's ATM card to withdraw \$24,750. No receipts for such funds were produced;
 - b) On June 2, 2009 the plaintiff wrote a cheque on the testator's account made payable to himself in the amount of \$15,000, noted as "renovations";
 - c) On August 24, 2009 the plaintiff wrote a further cheque in the amount of \$17,000 payable to himself, also noted as "renovations";
 - d) On December 9, 2009 the testator's home was sold and the sum of \$235,807.08 was deposited to her bank account; and
 - e) On December 15, 2009 the plaintiff wrote another cheque payable to himself, this time in the sum of \$33,500 again noted as "renovations."

- [19] The plaintiff did not inform the bank of his mother's death until 12 months after she passed. As a result, using the enduring power of attorney, he continued to access Ms. Robillard's account after her death as follows:
- a) On March 3, 2012, six months after his mother's death and 15 months before the grant of probate, the plaintiff signed a cheque payable to himself in the amount of \$150,000. He deposited that sum into his own bank account; and
 - b) After his mother's death the plaintiff used her ATM card to withdraw an additional \$11,800 from her bank account, which included a withdrawal of \$500 on the day after his mother died. He offered no explanation respecting the use of these funds.
- [20] At some point after his mother's death, the plaintiff discovered that he could no longer access the remaining funds in her bank account, then \$29,702.04. Apparently the bank had become aware that their customer was deceased and insisted that the plaintiff obtain a grant of probate. He then went to extraordinary lengths to avoid probate of the estate. He enlisted the assistance of the Better Business Bureau and the bank's ombudsman in an effort to avoid having to obtain probate because, according to him, of the costs involved in doing so. As those attempts proved unsuccessful he eventually hired a lawyer (not counsel on this trial) and made the application for probate.
- [21] Ms. Bandick received no notice of Mr. Robillard's application for probate, nor did she receive a copy of the Will. Mr. Robillard did not explain whether the required notice was sent to his sister, although he testified that he believed that the court would attend to providing such notice. This gives rise to the inference that Mr. Robillard did not provide notice to Ms. Bandick, something he was required to do under s. 112 of the Estate Administration Act, R.S.B.C. 1996, c. 122 (in force at the relevant time). It is unclear what was contained in the affidavit regarding notice required under that provision, as it was not before the Court. However, in order to obtain a grant of probate there must have been sworn evidence that notice was given to Ms. Bandick, a beneficiary under the Will.
- [22] In support of the application for probate the plaintiff swore an affidavit dated March 13, 2013 wherein the gross value of the estate was said to be \$194,129.66. That figure, while including the \$150,000 taken by the plaintiff from his mother's account, and possibly the \$11,800 in cash removed with her ATM card, did not include the sums taken by him pursuant to the power of attorney prior to his mother's death.
- [23] The Court granted probate on June 18, 2013, naming the plaintiff as executor. On July 15, 2013 the defendant received from the plaintiff an email which read as follows:

Subject: Will

Hi Suz; Finally done with probate. Got the TD to hand over Mother's bank account also. Your share comes to \$29,704.00. As the executor what I need from you is a signed letter stating that you accept this payment, as stated in the Will. I will then send the check for that amount to your mother-in-law's address, or another place of your choice. I can also hold it til you come by as I understand your [sic] in B.C.

Marc

[Emphases added.]

[24] Mr. Robillard provided no accounting to the defendant.

[25] The defendant testified that as at that time she trusted the defendant she replied by email on July 16, 2013 as follows:

Dear Marc, I accept that you will send me a cheque for \$29,704.00 as my share of our mother's estate. You can send the cheque to my mother in law's address.

Suzanne Marie Bandick

[26] After sending that reply, the defendant testified that some concerns arose in her mind, given that her late mother had owned a condo in Langley. She emailed the plaintiff confirming that she was seeking an equal division of their mother's estate in accordance with the Will. She confirmed a previous request that the plaintiff provide an accounting. He failed to do so.

[27] As result Ms. Bandick retained counsel, who wrote to the plaintiff on July 31, 2013 demanding that he provide an accounting of the assets and liabilities of the estate and details of any funds disbursed. In that letter counsel reminded the plaintiff that as executor he had a duty to keep the beneficiaries informed regarding estate matters.

[28] On August 8, 2013 the plaintiff wrote a letter to the defendant setting out in considerable detail the burden and responsibility he had taken on in caring for their mother during her waning years. He concluded the letter as follows:

Throughout those early years when mother had moments of clarity I pointed out to her how unjust it was that the Will was split 50/50, with me doing all the work. She could see that and gave me permission to gift my self a bit extra as I saw fit. The other option was to hire a caregiver to be one on one with Mother. That would have cost a lot more. So here is how it calculates out.

Start \$194,129.66 minus 5% executor fee- \$9,706.48 = \$184,423.18/2 = \$92,211.59-\$2,000 = \$90,211.59 at the end refund to pensions Mother's, stop meds, hospital parking (paid by me), car use (daily), etc.

My time twelve years of effort for Mother- \$60,000

\$29,704.00 your share what is left.

[Emphasis added.]

- [29] On September 13, 2013 the defendant filed a petition seeking an accounting pursuant to the Trustee Act, R.S.B.C. 1996, c. 464. The plaintiff opposed the application. That proceeding appears to have been superseded by this action and the defendant's action, filed in the New Westminster registry, to have the plaintiff removed as executor.
- [30] The plaintiff then commenced this action on October 7, 2013 seeking redistribution of estate assets pursuant to the WVA. He does not plead unjust enrichment or quantum meruit.
- [31] On January 14, 2014 the plaintiff renounced his position as executor of his mother's estate. A short time later, on January 24, 2014, a court order appointed Ms. Bandick as executrix in his stead. On February 14, 2014 Ms. Bandick counter-claimed in this action, seeking an accounting of amounts removed from the estate by the plaintiff.
- [32] By court order dated March 11, 2014, Ms. Bandick received the sum of \$30,000 "as an interim distribution of the Estate of Agathe Diane Robillard." It was a further term of that order that "[t]he sum of \$100,000.00 be paid into the trust account of David R. Greig of the South Coast Law Group to remain in trust until further order of this Court."

Position of the Plaintiff

- [33] As noted, the plaintiff seeks variation of the distribution of assets under the Will pursuant to s. 2 of the WVA (which remained in force until March 31, 2014). He submits that while a child does not have an obligation to assist a parent in need, if they fail to do so the court may find that they did not meet their moral obligation. The plaintiff submits he met his moral obligation and the defendant did not. As a result he submits the Court can intervene and vary the Will in his favour.
- [34] The plaintiff also argues that while he did not plead unjust enrichment and quantum meruit, such principles apply to the assessment of a moral obligation under the WVA, hence it is not necessary to plead these claims separately.

Position of the Defendant

- [35] The defendant acknowledges that Mr. Robillard was a good son to their mother and that he spent considerable time and effort supporting Ms. Robillard to her benefit. Ms. Bandick appreciates the responsibilities the plaintiff assumed. However, she says that while the plaintiff was a good son, he was a poor attorney under the POA, and a worse executor under the Will.
- [36] The defendant submits the Court should not condone the plaintiff's behaviour. She seeks orders that funds taken by the plaintiff be returned to the estate and the dismissal of the plaintiff's claim.

Law

[37] The plaintiff brings his action under s. 2 of the WVA, which provides:

2 Despite any law or statute to the contrary, if a testator dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's spouse or children, the court may, in its discretion, in an action by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the testator's estate for the spouse or children.

[38] The leading authority respecting an application under this section is *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, where the Court addressed the meaning of the words "adequate, just and equitable" by reference to distinct legal and social obligations:

If the phrase "adequate, just and equitable" is viewed in light of current societal norms, much of the uncertainty disappears. Furthermore, two sorts of norms are available and both must be addressed. The first are the obligations which the law would impose on a person during his or her life were the question of provision for the claimant to arise. These might be described as legal obligations. The second type of norms are found in society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards. These might be called moral obligations, following the language traditionally used by the courts. Together, these two norms provide a guide to what is "adequate, just and equitable" in the circumstances of the case.

[39] In *Clucas v. Clucas Estate* (1999), 25 E.T.R. (2d) 175 (B.C.S.C.), Madam Justice Kloeckman (then Satanove J.) helpfully synthesized the governing principles from *Tataryn* and other leading cases as follows:

12. Many cases have been decided under the Wills Variation Act. The considerations governing the court's decisions have evolved over time and there is a fairly comprehensive set of competing principles to which effect must be given. I have endeavoured to summarize these as follows:
 1. The main aim of the Act is the adequate, just and equitable provision for the spouses and children of testators. (*Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807)
 2. The other interest protected by the Act is testamentary autonomy. In the absence of other evidence a Will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate in the best interests of the persons and institutions closest to him. It is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only insofar as the statute requires. (*Tataryn*, *supra*)
 3. The test of what is "adequate and proper maintenance and support" as referred to in s. 2 of the Act is an objective test. The fact that the testator was of the view that he or she adequately and properly provided for the disinherited beneficiary is not relevant if an objective analysis indicates that the testator was not acting in accordance with society's reasonable expectations of what a judicious parent would do in the circumstance by

reference to contemporary community standards. (Tataryn, *supra*; Walker v. McDermott, [1930] S.C.R. 94; Price v. Lypchuk Estate (1987), 11 B.C.L.R. (2d) 371 (C.A.); Dalziel v. Bradford et al. (1985), 62 B.C.L.R. 215 (B.C.S.C.))

4. The words "adequate" and "proper" as used in s. 2 can mean two different things depending on the size of the estate. A small gift may be adequate, but not proper if the estate is large. (Price v. Lypchuk Estate, *supra*)
 5. Firstly, the court must consider any legal obligations of the testatrix to her spouse or children and secondly, the moral obligation to her spouse or children. (Tataryn, *supra*)
 6. The moral claim of independent adult children is more tenuous than the moral claim of spouses or dependent adult children. But if the size of the estate permits, and in the absence of circumstances negating the existence of such an obligation, some provision for adult independent children should be made. (Tataryn, *supra*)
 7. Examples of circumstances which bring forth a moral duty on the part of a testator to recognize in his Will the claims of adult children are: a disability on the part of an adult child; an assured expectation on the part of an adult child, or an implied expectation on the part of an adult child, arising from the abundance of the estate or from the adult child's treatment during the testator's life time; the present financial circumstances of the child; the probable future difficulties of the child; the size of the estate and other legitimate claims. (Dalziel v. Bradford, *supra* and Price v. Lypchuk, *supra*)
 8. Circumstances that will negate the moral obligation of a testatrix are "valid and rational" reasons for disinheritance. To constitute "valid and rational" reasons justifying disinheritance, the reason must be based on true facts and the reason must be logically connected to the act of disinheritance. (Bell v. Roy Estate (1993), 75 B.C.L.R. (2d) 213 (B.C.C.A.); Comeau v. Mawer Estate, [1999] B.C.J. No. 26 (B.C.S.C.); and Kelly v. Baker (1996), 15 E.T.R. (2d) 219 (B.C.C.A.))
 9. Although a needs/maintenance test is no longer the sole factor governing such claims, a consideration of needs is still relevant. (Newstead v. Newstead (1996), 11 E.T.R. (2d) 236 (B.C.S.C.))
- [40] In McBride v. Voth, 2010 BCSC 443, Madam Justice Ballance provided further guidance regarding various considerations that inform the existence and strength of a testator's moral duty to independent children, including the following:
- [129] Contributions by the claimant to the accumulation of a testator's assets with little in exchange, or providing other types of contribution or care to a testator will generally serve to strengthen the moral obligation, other things being equal. The contribution may also found a legal claim in unjust enrichment or quantum meruit.
- [130] A moral duty may arise where the testator's conduct has created a bona fide expectation on the part of the plaintiff to receive a benefit which does not come about on death ...

- [131] Section 6(b) of the Act empowers the court to refuse variation to a person whose character or conduct, in the opinion of the court, disentitles him or her to relief. Such misconduct is measured as at the date of death, not subsequently, and must be directed at the testator. Generally speaking, the conduct must be relatively severe in order to justify disinheritance.
- [133] Depending on the circumstances, a testator's moral duty may be diminished or negated entirely where he or she has made inter vivos gifts to the claimant, or the claimant has received assets on the testator's death outside the framework of the will. This includes benefits conferred by way of an inter vivos trust, outright gift and assets passing on death by operation of law such as joint tenancies, and by way of specific beneficiary designation of insurance proceeds, RRSPs, pension benefits, RIFs, and the like. On the same reasoning, if a testator has made pre-death gifts to individuals other than the plaintiff, or has arranged his or her affairs to facilitate a passing of assets to such individuals outside the provisions of the will, the moral duty owed to the plaintiff may be intensified.
- [134] That an independent child has not been given the same provision under a will as the testator's other child or children will not, of itself, necessarily establish a moral claim: *Re Lukie et al and Helgason et al.*, 72 D.L.R. (3d) 395, [1976] B.C.J. No. 1393 (C.A.); *Price*. On the other hand, in *Vielbig v. Waterland Estate* (1995), 1 B.C.L.R. (3d) 76, 6 E.T.R. (2d) 1 (C.A.), the Court of Appeal held that equal treatment among independent adult children is *prima facie* fair from a moral duty standpoint. In *Ryan*, the court held that in the absence of relevant reasons for an unequal distribution, there is a reasonable expectation that adult children will share equally, even though no legal obligation requiring equal distribution exists. (para. 67). The emerging rule of thumb to the effect that equal apportionment among children *prima facie* discharges a testator's moral duty was applied in *Inch*. There, the court held that an equal distribution was *prima facie* fair, despite the fact that one child received significant assets by way of inter vivos transfers. The proposition was recently revisited by the Court of Appeal in *Doucette*. In that case, the Court of Appeal appeared to have no difficulty with the disinheritance of one of the preferred beneficiaries by allocating her nothing out of the estate in light of the generous gifts that she had received outside the will via jointly held assets.
- [41] As noted earlier, Ms. Bandick takes the position that Mr. Robillard's conduct as attorney and as executor on their mother's behalf is relevant to this action. I will next outline jurisprudence and legislation concerning Mr. Robillard's legal obligations when acting in those capacities.
- [42] Subject to its terms, a POA permits the attorney to deal with the legal and financial affairs of the donor. That power and the duty that flows from it is enhanced when the donor becomes incompetent: *Egli v. Egli*, 2004 BCSC 529 at para. 80. The Court described the nature of the duty of an attorney in the following terms:

- [82] It is the attorney's duty to use the power only for the benefit of the donor and not for the attorney's own profit, benefit or advantage (Chapman). The attorney can only use the power for his or her own benefit when it is done with the full knowledge and consent of the donor (Robertson, *Mental Disability and the Law in Canada* at 183). I am not aware of any authority that detracts from this principle in circumstances where the benefit is conferred on family members.
- [43] In *Sangha (Re)*, 2013 BCSC 1965, I acknowledged that an enduring POA creates a fiduciary relationship between the person making the POA and the attorney:
- [98] It is not disputed that the relationship of a donor and his attorney under an enduring POA is a fiduciary relationship ... As such the attorney in agreeing to the appointment has accepted the obligation to act in the interests of the donor. In *Hospital Products Ltd. v. United States Surgical Corporation*, [1984] H.C.A. 64, 156 C.L.R. 41 (Aust. H.C.), Mason J. stated:
68. The fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is, therefore, one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.
- [99] The standard of care of a fiduciary acting under a power of attorney was described in *Andreasen v. Daniels-Ferrie*, 2001 BCSC 1503, as follows:
- [27] in addition to whatever duties may be enunciated on the face of the instrument, even where the attorney acts gratuitously he or she has a duty to account, to exercise reasonable care as would a typically prudent person managing his or her own affairs, and not act contrary to the interests of the donor.
- [44] The Power of Attorney Act, R.S.B.C. 1996, c. 370 [POAA] sets out various duties applicable to a person acting under an enduring power of attorney:

Duties of attorney

19 (1) An attorney must

- (a) act honestly and in good faith,
- (b) exercise the care, diligence and skill of a reasonably prudent person,
- (c) act within the authority given in the enduring power of attorney and under any enactment, and
- (d) keep prescribed records and produce the prescribed records for inspection and copying at the request of the adult.

- (2) When managing and making decisions about the adult's financial affairs, an attorney must act in the adult's best interests, taking into account the adult's current wishes, known beliefs and values, and any directions to the attorney set out in the enduring power of attorney.
 - (3) An attorney must do all of the following:
 - (a) to the extent reasonable, give priority when managing the adult's financial affairs to meeting the personal care and health care needs of the adult;
 - (b) unless the enduring power of attorney states otherwise, invest the adult's property only in accordance with the Trustee Act;
 - (d) not dispose of property that the attorney knows is subject to a specific testamentary gift in the adult's will, except if the disposition is necessary to comply with the attorney's duties;
 - (e) to the extent reasonable, keep the adult's personal effects at the disposal of the adult.
 - (4) An attorney must keep the adult's property separate from his or her own property.
- [45] The Power of Attorney Regulation, B.C. Reg. 20/2011 [POA Regulation] imposes various record-keeping obligations on attorneys acting under an enduring power of attorney. The attorney must make a "reasonable effort" to identify the property and liabilities of the person who made the power of attorney as of the date on which the attorney first exercised authority on that person's behalf: s. 2(1). The attorney must also maintain a current list of that person's property and liabilities (s. 2(2)(a)), accounts and records relating to exercise of the attorney's authority (s. 2(2)(b)), and all records necessary to create full accounts of receipt or disbursement of capital or income on behalf of the person who made the power of attorney (s. 2(2)(c)).
- [46] The POAA also deals with the payment and expenses of an attorney, providing that no compensation shall be paid to the attorney unless the enduring POA "expressly authorizes the compensation and sets the amount or rate": s. 24(1). However, s. 24(2) provides for reimbursement of an attorney for "reasonable expenses properly incurred" in acting as the attorney.
- [47] As well, the POAA stipulates termination of an enduring power of attorney upon the death of the person who made it: s. 30(4)(b). The POAA deems improper the exercise of authority by an attorney under a terminated power of attorney, unless that person "does not know and could not reasonably have known" that the exercise of authority was improper, and the attorney would otherwise have had authority to act if the enduring power of attorney had not been terminated: ss. 31(2)(b)-(c).
- [48] It is also useful to be reminded of the obligations of an executor and trustee. With respect to the obligations of a trustee, the Trustee Act defines "trust" as including "the duties incident to the office of personal representative of a deceased person" (s. 1).

[49] Turning to the duties of an executor, the personal representative who winds up the estate of a deceased person is obligated to gather in the assets of the deceased, to arrange for payment of funeral and testamentary expenses and debts and then to distribute the remaining assets among those who are entitled to receive them. That latter obligation in this instance is to distribute the assets in accordance with the Will. In *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Thomson Reuters Canada Limited, 2012) the nature of the personal representative's role is summarized as follows (at 48-49):

It is evident at once that the personal representative has a role very like the trustee. He steps into the shoes of the deceased, title in both personal and real property vests in him, and his duties require him to act disinterestedly for the creditors of, and successors to, the deceased. A trustee, and the personal representative also, even if he is not appointed by the court, must be prepared to account for his acts to the court, as well as to the claimants under the will or intestacy.

Accordingly, both for historical reasons and because of the similarity of roles, the trustee and the personal representative are fiduciaries. This requires of each that he act disinterestedly, that he derive no profit through his office other than that which the settlor, the deceased, or statute has conferred upon him, and that he delegate only the administrative duties of his office, reserving to himself all those decisions that involve the disposition of property. The trustee or the executor derives his instructions from the instrument of another, and each is essentially carrying out his instructions for the benefit of others.

[50] The following section of the Estate Administration Act, in force during the relevant period, also provides guidance:

Liability of deceased executor for waste

69 The executor or administrator of a person who, as executor under a will or as administrator of an intestate, has wasted or converted to the person's own use a part of the estate of the testator or intestate, is liable and chargeable in the same manner as the testator or intestate should or might have been if living.

[51] There are two preliminary matters to be addressed before considering the relief sought. The first is the credibility of the parties and the second is the plaintiff's reliance on what his mother said to him.

Credibility

[52] The main witnesses were the parties. The evidence of the plaintiff was unsatisfactory. There were contradictions between his evidence at trial and his discovery, as well as inconsistencies in his evidence in his attempts to explain his conduct.

[53] As noted above, in 2009 Mr. Robillard removed the sums of \$15,000, \$17,000 and \$33,500 from his mother's bank account via cheques payable to himself. On discovery, Mr. Robillard stated that he used the sum of \$33,500 to pay real estate fees associated with the sale of his

mother's condo. However, at trial, he contradicted that account, instead stating that he took those funds as his pay for acting as a general contractor in relation to the renovation of the condo. This involved a significant amount of money and the evolution of his explanation leads to concerns respecting both his credibility and his reliability.

- [54] Further, in an affidavit sworn January 3, 2013, the plaintiff said that he used the cheque for \$17,000 to pay for the renovations to the condo, stating that the renovations cost that same amount. However, at trial Mr. Robillard stated that the actual monies spent on the renovations exceeded \$17,000 and may have been between \$21,000 and \$27,000. This again raises concerns respecting his credibility and reliability, particularly as he at times attributed the entirety of the \$65,500 drawn against his mother's account in 2009 to the cost of conducting the renovations.
- [55] On discovery, Mr. Robillard stated that of the \$65,500 drawn in 2009, he paid \$20,000 or \$30,000 into a Bank of Montreal account that he controlled. He did not volunteer that this was an account in his name, a fact that came out at trial. Further, he declined to produce banking records for this account, citing privacy concerns, notwithstanding the fact that this account apparently contained only his mother's funds.
- [56] The plaintiff also refused to produce any records relating to a 47 foot Bayliner pleasure craft called "Seize the Day" that he purchased in the United States just prior to Christmas, 2011. He paid \$220,000 USD in cash for the vessel. He then spent \$50,000 on vessel repairs and to add bow-thrusts and other improvements. He still owns the vessel and keeps it moored in Washington State. He denied using his mother's funds to purchase the vessel but agreed he used some of the funds received from the estate for the \$50,000 in improvements to the vessel. He failed to produce documents relating to the vessel purchase and expenditures on it.
- [57] At trial the plaintiff continued to maintain that he did not have to produce any of the requested documentation because it was not relevant.
- [58] Mr. Robillard claimed in his direct examination that he failed to keep his sister apprised of developments relating to their mother's health and estate because he did not have Ms. Bandick's phone number in Mexico. On cross-examination however, he acknowledged that he did have Ms. Bandick's number, which was posted near the phone in their mother's house. He then changed his explanation, stating that he did not communicate with his sister because she did not want him to contact her.
- [59] The plaintiff displayed a reluctance to acknowledge anything positive about his sister's assistance and downplayed it whenever possible. In my view his antipathy to his sister coloured his evidence and showed a lack of objectivity. He was clearly biased against her and his continued hostility to her was evident.

[60] Mr. Robillard also claims that the Will permitted him to reapportion his mother's estate as he saw fit, an interpretation that in my view beggars belief. I find his reliance on this interpretation as justification for his actions is not credible. The provision the plaintiff relies on provides:

6 For the purposes of facilitating the administration of my estate in accordance with my intentions, I do further will and direct as follows:

- a) My trustee may in his or her discretion fix the value of my estate, or any part thereof, for the purpose of making any division, setting aside or payment of any share or interest therein, and make such division or setting aside or payment either wholly or in part in the assets forming my estate at the time of such division, setting aside or payment on the basis of such value, with no obligation whatever to give each beneficiary a proportional share of any individual asset or investment holding. [Emphasis added.]
- [61] The plaintiff's explanation is untenable. No possible reading of the Will supports his assertion. The provision above relieves the trustee of Ms. Robillard's estate from giving a beneficiary a proportional share of individual assets or investment holdings. It in no way permits deviation from the testator's stated intention regarding the equal distribution of her the estate.
- [62] In addition, Mr. Robillard's letter of August 8, 2013 acknowledges his awareness of the fact that the Will divided his mother's estate equally between him and Ms. Bandick. His first letter to his sister was disingenuous, misleading and false given he stated that her share of the estate was \$29,704 "as stated in the will" when the Will said no such thing. Mr. Robillard did not, for example, state this was what he proposed would be her share, he did not account for the total value of the estate and he did not mention that he was taking the bulk of the estate for himself.
- [63] The plaintiff's efforts to remove the remaining funds from his mother's account after she died and before the bank became aware of her death, along with his failure to inform his sister regarding funds taken prior to his mother's death, and his efforts to avoid probate, all indicate a desire to avoid scrutiny by the courts and his sister.
- [64] His refusal to produce relevant documents during the course of the litigation, his actions throughout, his use of the power of attorney and his role as executor reveal a reluctance to share information and a preference to retain control and to operate in secrecy. This, in combination with his conduct throughout, raises what Madam Justice Southin referred to in *Girardet v. Crease & Company* (1987), 11 B.C.L.R. (2d) 361 (S.C.), when addressing an allegation of breach of fiduciary duty, as carrying with it the "stench of dishonesty" (para. 3).

- [65] Mr. Robillard's suggestion that his mother authorized him to take the funds also goes to his credibility. At trial he testified that she authorized him to take compensation for all that he had done for her, apparently without any limitation. However in the email referred to earlier he stated: "[s]he ... gave me permission to gift my self a bit extra as I saw fit." This is clearly inconsistent with the *carte blanche* access to her funds for compensation that he implied entitlement to when testifying at trial.
- [66] As a result I find that the plaintiff's evidence was lacking credibility, unreliable and in some respects unbelievable. Much of it appeared to be an after the fact effort to explain or rationalize his improper appropriation of his mother's funds. Where his evidence conflicts with that of the defendant or is not supported by other evidence I accept the evidence of the Ms. Bandick, who I found to be forthright and believable.

Hearsay

- [67] Aside from the plaintiff's credibility issues, his evidence concerning what his mother told him is largely hearsay in any event. However, s. 5 of the WVA states:

Evidence

5 (1) In an action under section 2 the court may accept the evidence it considers proper of the testator's reasons, so far as ascertainable,

- (a) for making the dispositions made in the will, or
- (b) for not making adequate provision for the spouse or children,

including any written statement signed by the testator.

- (2) In estimating the weight to be given to a statement referred to in subsection (1), the court must have regard to all the circumstances from which an inference may reasonably be drawn about the accuracy or otherwise of the statement.

- [68] The Court of Appeal considered this provision of the WVA in *Bell v. Roy Estate* (1993), 75 B.C.L.R. (2d) 213 (C.A.), holding that by this section "[i]t is clear the legislature wished to ensure that otherwise inadmissible evidence was before the court as an aid to the court in the exercise of its discretion" to vary the Will. However, the weight to be given evidence of the testator's reasons must be evaluated in light of its "accuracy" (paras. 37-38).

- [69] On that point, the decision of Mr. Justice Voith in *Gutierrez Estate v. Gutierrez*, 2015 BCSC 185, is of assistance:

- [30] Hearsay evidence is presumptively inadmissible, and so the court must look first to the established exceptions to that rule, and then to the principles of necessity and reliability in order to determine whether the evidence should be admitted; *R. v. Khelawon*, 2006 SCC 57 at para. 42. Here, none of the established exceptions apply, and so the evidence proffered must meet the "twin criteria" of both necessity and reliability; *Khelawon* at paras. 2, 42.

- [33] Turning to the second circumstance, inherent trustworthiness, I must consider whether there are "indicia of trustworthiness sufficient to displace the general exclusionary rule"; Blackman at para. 38.
- [70] Justice Voith then proceeded to evaluate the reliability of the hearsay evidence in that case, emphasizing concerns with the defendant's credibility and the self-serving nature of his testimony (paras. 35-37, 55). I note that similar concerns arise in the present case, where, in my view, the admissibility of Ms. Robillard's statements to the plaintiff hinge on the credibility of the plaintiff. Given my findings respecting his credibility, I conclude that such evidence is not admissible as it lacks trustworthiness and reliability.
- [71] Even if such evidence of Ms. Robillard's intentions were admissible, the plaintiff's conduct in taking close to 90% of the estate while acting as attorney and executor can in no way be described as consistent with the "little bit" he claims his mother authorized him to take.

Discussion

- [72] As noted, the plaintiff seeks to vary his mother's Will under s. 2 of the WVA. He primarily relies on the proposition that he should be rewarded for the time he spent attending to his mother in the last years of her life, and for the time he spent preparing her house for sale, or as he put it, because "I was working full time for mother." He characterizes his claim in two ways: as a claim for unjust enrichment or quantum meruit giving rise to a legal obligation, or, alternatively, as an unfulfilled moral obligation.
- [73] It is not disputed that the plaintiff was a loving son who was devoted to his mother. Nor does the defendant deny the sacrifices Mr. Robillard made for their mother. Indeed, she is grateful. What is at issue is whether, in the circumstances of this case, the plaintiff should be compensated for his devotion to his mother.
- [74] I propose to first deal with the evidence concerning the extent of Mr. Robillard's care and attention to his mother.
- [75] Unlike many other cases, the parties' mother did not move in with the plaintiff and his wife, nor did they move in with her with the resulting assumption of 24-hour responsibility for her care. As a result the application of the WVA and the adequacy of Mr. Robillard's moral claim must take into account the unique circumstances of this case, including the plaintiff's conduct both before and after his mother's death.
- [76] The assistance the plaintiff provided to his mother prior to her move into the care home appears to be within the normal responsibilities children take for their parents when the parent is still living independently but requires aid. There is nothing exceptional in what the plaintiff did during that period and his commitment to his mother did not prevent him from living his own life. While the defendant was not able to match her brother's efforts, that was not a matter of choice or reluctance on her part but rather was due to the fact that she resided in Mexico.

- [77] However, I have no difficulty in finding that Mr. Robillard rendered assistance to his mother over and above what was expected, and indeed, what was necessary, in the time following her placement in Simpson Manor.
- [78] Mr. Robillard testified about his dedication following his mother's move into Simpson Manor, stating that his mother benefited from his company even when she no longer knew who he was. As he put it, he was a "friendly face." In addition, as noted earlier, he asserted that if he had not attended every day at lunch and dinner his mother would not have eaten. There is no expert evidence that is the case, no evidence that she did not eat on the days he did not attend, indeed he conceded that the staff of the care home fed his mother breakfast. He asserted that he extended his mother's life by acting as he did, although there is no evidence upon which I can conclude that this was so.
- [79] One would have expected that Ms. Robillard's move from her condo into Simpson Manor would have reduced rather than increased the burden on the plaintiff. However, from that point on, the plaintiff says he spent at least four hours a day with his mother, every day of each year until her death, except for when he was ill or on rare occasions unavailable. As he put it, he gave up the best years of his retirement, took no holidays and dedicated himself to his mother's care.
- [80] The plaintiff has failed to establish that what he did for his mother was necessary, nor has he established that he sought the assistance of his sister, or that such was not forthcoming when he did request it. To the contrary, I accept that when he asked Ms. Bandick to come and render assistance, she did so. In addition I question how reasonable it is to expect someone who resides in another country to attend where they are not needed, given the testator's needs were substantially met by the care home, supplemented to excess by Mr. Robillard's efforts. That is particularly so since, due to the devastating nature of Alzheimer's disease, Ms. Bandick's mother would not have recognized that her daughter was there.
- [81] While commendable, Mr. Robillard's dedication was his choice. What the plaintiff did for his mother was entirely self-imposed.
- [82] In addition, the plaintiff also emphasized his efforts to realize on his mother's estate by dealing with her major asset, her condo. This was a three-bedroom condo in a strata development. All exterior work was the responsibility of the Strata Council, excepting a section of fence.
- [83] I cannot accept the evidence of the plaintiff that he put a full year into cleaning the premises and another year supervising its renovations. With respect to the cleanup of the condo and the disposal of its contents, the defendant testified that she came to Langley from Mexico to assist. She stated that she stayed at the condo and did the entire cleanup herself. She says she cleaned out the fridge, cupboards and closets, resulting in 25-30 garbage bags being removed by garbage collectors. She testified that when she left there were only a few pieces of furniture remaining in the condo. This would leave little to be done by Mr. Robillard, and certainly a year's worth of effort was not required. I accept Ms. Bandick's evidence both

because of my credibility findings, and because her description of what cleanup work was done and how long it took are consistent with common sense.

- [84] The plaintiff attempted to justify the cheques paid to himself for \$15,000 and \$17,000 on the basis that they related to the renovations, yet he produced receipts accounting for only \$21,000 or thereabout, a shortfall of \$11,000 from the amount taken for that purpose. Further, some of the expenses in that \$21,000 sum were paid for directly by other cheques drawn on his mother's account, meaning that the shortfall is even greater than \$11,000.
- [85] Given the extent of the renovations and the fact that for the most part contractors carried out the work, I do not accept that a year was required to complete them. Indeed it is difficult to accept that the plaintiff invested the kind of time and effort that he says he did (which I note was not supported by any contemporaneously kept records in any event). I find on the evidence he simply appropriated for his own use a large portion of the funds that he attributed to the cost of renovations.
- [86] The defendant concedes renovation expenses of \$17,000. Given the lack of proper records and the unreliability of the plaintiff, that is the figure upon which I will rely as having been legitimately expended on the condo renovations. The additional \$15,000 cheque drawn by the plaintiff against his mother's account therefore remains unaccounted for.
- [87] With respect to the cheque for \$33,500, which was noted for "renovations" and payable to the plaintiff, on discovery he stated that part of it and the other two cheques included payment for real estate commission fees. It was only at trial that for the first time he characterized this sum as his own fee for acting as general contractor in relation to the renovations. At no time prior did he tell the defendant he had charged for his time relating to the condo renovation. I do not accept the plaintiff's late explanation that it was a fee for his acting as general contractor. Nor for that matter, even if I found otherwise, is there sufficient evidence to justify a fee in that amount.
- [88] The plaintiff also submits that his renovation of the condo improved its value. In support he submitted the BC Assessment value of the condo as of 2007 as compared to the eventual sale price. No expert evidence was tendered respecting the value of the premises prior to renovation, the effect of those renovations on the value of the condo or the issue of market changes independent of the renovations.
- [89] The British Columbia Court of Appeal recently addressed the issue of reliance on BC Assessment property valuations as evidence in *Dosanjh v. Liang*, 2015 BCCA 18. That case involved a contractual dispute arising out of a failed real estate sale. The trial judge admitted the property assessment as evidence of market value. Mr. Justice Groberman said this for the Court of Appeal:
- [57] A more serious difficulty with the assessment of damages was the trial judge's reliance on the assessment to determine the property value.

- [59] There is some difficulty in relying on family law cases for the proposition that assessments should be admissible evidence to determine the value of real property. While the rules of evidence are applicable to family law proceedings, they are often applied in a relaxed manner. ...
- [62] It seems to me that different considerations arise in non-family cases, where one party or the other will generally bear the onus of producing evidence of property value.
- [63] In my view, however, there is, absent agreement, no scope for using assessments in place of expert opinion evidence in cases such as the present one.
- [67] The basic difficulty with the property assessment as evidence of property value is that the court had no basis on which to evaluate its cogency. The court was not able to determine how the assessor went about making the assessment, and had no basis for determining what weight to give it. This was a particular problem in this case, as the court had no basis for determining the effect of the recent use of the property to grow marijuana on the property value.
- [90] Firstly, this is not a family law case. Secondly, as was the case in *Dosanjh*, there is no basis on which to evaluate the cogency of the assessed value as evidence of the value of the condo. Thirdly, again as in *Dosanjh*, the matter is complicated by a confounding factor affecting the value of the property, here the impact of the renovations on the condo's valuation, a circumstance I find analogous to the use of the property in *Dosanjh* as a grow-op. As a result I reject the property assessment as evidence that the renovations increased the value of the condo. Given the complete lack of evidence on the point of increased value, I decline to find that the work done increased the sale value of the condo. It would be purely speculative to attempt to attribute a portion of the final sale price to the improvements, market forces or any other factor potentially related to value.
- [91] Given this evidentiary gap, there is no evidence to justify the fee for general contracting taken by the plaintiff, if indeed it can be properly construed as such.
- [92] As discussed earlier, an attorney is a fiduciary of the donor. The burden is on the attorney to act in accordance with that duty and in compliance with the mandatory statutory requirements. It is no excuse to suggest a failure to do so was an oversight or arose through ignorance of an attorney's obligations. While there is no evidence that the plaintiff had his obligations and duties explained to him by the notary who prepared the enduring power of attorney, that does not relieve him of the obligation to inform himself of those duties and obligations.

- [93] While \$17,000 of the funds removed from his mother's account have been found to be used for renovations, I have concluded on the balance of probabilities that he used most of the remaining funds for his own purposes, including the \$24,750 withdrawn using her ATM card. While some of the funds most likely were used to meet his mother's needs, the amount is unknown due to his failure to adhere to the most basic of requirements -- that of keeping receipts.
- [94] I am satisfied that Mr. Robillard did not spend anything near the \$700 to \$800 or so per month he states he spent on his mother's costs for a hairdresser, outings, medication and clothing. Other than the plaintiff's assertion that he did so there is no evidence supporting that he expended the funds as he described. Given his mother was in a care facility that met the majority of her needs, expenditures of \$800 per month appear highly improbable. As the plaintiff has failed to establish the use of any such funds for his mother, he is not entitled to a credit for funds allegedly spent in that way.
- [95] In any event the complete lack of receipts, records and an accounting make it impossible to conclude what funds were used for the benefit of his mother. Aside from his conduct in failing to account, of more significance is his use of her funds for his own purposes.
- [96] The plaintiff breached his obligations as POA in at least four distinct ways. Firstly, he completely failed in his obligation to keep the records and documents required under the POAA and the POA Regulation. Secondly, contrary to the specific prohibition in section 24 of the POAA, he paid himself for purportedly acting as the general contractor on the condo renovation. The enduring power of attorney provided him with no authorization to do so, and given the total absence of supporting documentation, there is no basis upon which I can accept that these were reasonable expenses incurred by Mr. Robillard as attorney. Thirdly, he continued to use the power of attorney after his mother's death contrary to s. 30(4)(b) of the POAA. I find he deliberately did not inform the bank of his mother's death in an effort to strip the account of funds. Fourthly, the funds taken in cash, ostensibly for his mother's needs not only lack supporting records but greatly exceed any such possible needs.
- [97] The Court cannot countenance conduct of this sort. At risk individuals are to be protected.
- [98] In addition, as executor, he swore an affidavit stating that he would "administer according to law all of the estate which by law devolves to and vests in the personal representatives of the deceased and I will exhibit a true and perfect inventory of the estate and render a just and true account thereof whenever required by law to do so." Despite this, Mr. Robillard not only failed to administer the Will in accordance with the law, he failed to account as well. He explained under cross-examination that he felt that that his actions as executor of his mother's estate were his "personal business," asserting that nothing in the Will required him to discuss his conduct with anyone else.
- [99] The plaintiff conducted himself secretly and misleadingly when acting as attorney and executor. He sought to mislead his sister in his communications with her; his desire to circumvent the Toronto Dominion Bank's policy was deceptive; his failure to provide the

required notice and copy of the Will to his sister was contrary to the Estate Administration Act. In my view, his secrecy gives rise to the inference that he knew that his actions were inconsistent with his mother's intentions, his obligations and his sister's entitlement under the Will.

- [100] I conclude that the plaintiff, contrary to his obligations as executor and trustee, treated his mother's bank account, both before and after her death, substantially as his own. His practice of paying for his automobile insurance, oil and gas from his mother's funds is particularly telling in this regard.
- [101] I find that Mr. Robillard is not entitled to a variation in the Will on the basis of a moral obligation. I reach this conclusion because he has failed to establish that his mother did not to make adequate, just, and equitable provision for the plaintiff in her Will. I find that Ms. Robillard discharged any moral obligation to her son by dividing her assets equally between her children. I reach that conclusion because Mr. Robillard's conduct as his mother's attorney and later her executor offset any enhanced moral obligation that might have been owed to Mr. Robillard, and because, in any event, his dedication to his mother in her later years, though commendable, arose out of his own choices rather than any need on her part.
- [102] In this case the equal division between the two children stipulated in the Will satisfies the moral obligation of the testator to the parties, even without consideration of the plaintiff's discreditable and self-serving conduct. The plaintiff has not shown that the distribution under the Will fails to fulfill the testator's moral obligation to the plaintiff.
- [103] While the plaintiff did not plead unjust enrichment or a claim in quantum meruit he submitted that his contribution to the estate of the testator by way of his care of the testator and his enhancement of the value of the condominium found such claims. There is no evidence to indicate that the plaintiff has built-up the estate. Instead he has depleted it. Given that and the other findings made above, I cannot find that any contribution of this sort justifies enhancing his entitlement under the Will.
- [104] Ms. Robillard owed no legal obligation to either of her children, as they both achieved financial independence on their own terms.
- [105] Mr. Robillard's claim under s. 2 of the WVA is therefore dismissed.
- [106] With respect to the defendant's counter-claim, she seeks, as executrix of her mother's estate, an accounting of the funds paid to or taken by the plaintiff from the testator's assets and estate both before and after September 11, 2011. For the reasons given I am satisfied that the plaintiff improperly took from the testator and her estate the sums of \$15,000, \$11,800, \$24,750, \$33,500 and \$150,000, totalling \$235,050.

- [107] It is not disputed that the \$150,000 taken from the testator's estate is included in the sworn estate value of \$194,129.66. The evidence is unclear with respect to whether the \$11,800 taken from the account after the testator's death is included in the sworn estate value or not. The balance of \$73,250 taken by the plaintiff is the property of the estate. However, the \$17,000 taken in respect of the renovations of the condo is acknowledged as a legitimate expenditure.
- [108] As a result, if the \$11,800 is included in the sworn estate value of \$194,129.66 then the estate value is \$267,379.66 (\$194,129.66 + \$73,250) and each party's half share is \$133,689.83. If the \$11,800 is not included then the estate value is \$279,179.66 (\$194,129.66 + \$73,250 + \$11,800) and the half share is \$139,589.83. The defendant is entitled to a declaration that the value of the estate accordingly is \$267,376.66 or \$279,179.66 depending on the inclusion or exclusion of the sum of \$11,800 from the \$194,129.66.
- [109] The defendant is entitled to one-half of the estate value so determined, less the \$30,000 already received by her. She is entitled to judgment against the plaintiff for the appropriate one-half figure less \$30,000.
- [110] The sum of \$100,000 held in the trust account of David Greig is to be immediately released to the solicitor for the defendant in partial satisfaction of the aforesaid judgment amount.
- [111] The defendant as executrix is to file an amended affidavit in the probate proceeding.
- [112] Given the conduct of the plaintiff, he is not entitled to fees for acting as executor.
- [113] The estate shall have judgment against the plaintiff in the sum of \$235,050 and Court ordered interest.

Costs

- [114] Counsel agreed that they wished to address costs after these reasons were delivered. They are at liberty to do so on a schedule to be arranged between them with such schedule to be provided to the court within 14 days of the date of these reasons.

"Punnett J."

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