

CANADA / JUDGMENT

Sarzynick v. Skwarchuk

2021 BCSC 443

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 443 Sarzynick v. Skwarchuk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sarzynick v. Skwarchuk,

2021 BCSC 443

Date: 20210312

Docket: S199902

Registry: New Westminster

Between:

Caroline Adeline Sarzynick and Leonard William Skwarchuk, as executor and trustee of the
Estate of Mary Helen Skwarchuk, Deceased

Plaintiff

And:

Leonard William Skwarchuk

Defendant

Before: The Honourable Madam Justice Morellato

Reasons for Judgment

Counsel for the Plaintiff:

E.H. Fraser

The Defendant, Acting on his own behalf:

L.W. Skwarchuk

Place and Date of Hearing:

New Westminster, B.C.

June 22-26, 29-30, 2020

August 6, 2020

Place and Date of Judgment:

New Westminster, B.C.

March 12, 2021

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I. INTRODUCTION

- [1] This case involves a dispute between two siblings over the estate of their mother, Mary Helen Skwarchuk ("Estate"). The plaintiff, Caroline Sarzynick, is the sister of the defendant, Leonard Skwarchuk. She also prosecutes this action against the defendant on behalf of the Estate, following an order of this Court pursuant to s. 151 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13. Caroline and Leonard are the only beneficiaries under their mother's will ("Will").
- [2] For clarity and readability, I refer to the family members by their first names; no disrespect is intended.
- [3] Mary and her husband, William Skwarchuk, made their wills in 2007. Around this time, they also executed separate power of attorneys ("POAs") authorizing Leonard to act as their respective attorney over their assets. These were enduring POAs, which expressly provided that Leonard's grant of authority continue in the event of his parents' incapacity. William predeceased Mary by approximately four years. Most of Mary's assets were depleted by the time of her death.
- [4] Caroline and the Estate assert that Leonard misappropriated large sums of monies for his own exclusive benefit, which rightfully belonged to their mother and now the Estate. The plaintiffs say Leonard's misappropriations included the purchase of three properties: a home at 1035 Fir Street in Campbell River on June 2, 2008 ("1035 Fir Street"); a house at 1045 Fir Street in Campbell River on October 28, 2008 ("1045 Fir Street") [1035 Fir Street and 1045 Fir Street will be referred to together as the "Fir Street Properties"]; and a condominium at 840 Braidwood Road in Courtenay, British Columbia on May 31, 2018 for \$173,500 ("Braidwood Property").
- [5] The legal basis for the plaintiffs' claims may be summarized as follows:
- (i) Leonard breached his fiduciary obligations to his mother and the Estate;
 - (ii) Leonard misappropriated and/or converted his mother's assets for his own use;
 - (iii) in the alternative, various transactions and transfers of assets into the defendant's name were subject to his undue influence, rendering these transactions and transfers null and void;
 - (iv) in the alternative, the defendant holds the assets and any share of proceeds, and/or property acquired with those proceeds, pursuant to an express, resulting, or constructive trust;
 - (v) the defendant has been unjustly enriched by transferring the Estate's assets into his name;
 - (vi) punitive damages; and
 - (vii) special costs.

- [6] Leonard denies all of the plaintiffs' allegations, asserting that he had a loving and caring relationship with both his parents. He repeatedly stated that the allegations against him are "bald" and unsubstantiated "lies", arguing that there was "no proof" of any wrongdoing and confidently challenging the plaintiffs to "prove it".
- [7] At a number of pre-trial proceedings, Leonard was represented by legal counsel. On June 15, 2020, shortly before this trial commenced, he filed a Notice of Intention to Act in Person. Leonard represented himself during the trial, with the assistance of his daughter, Melissa Mackenzie.
- [8] I will address the parties' claims following a summary of the procedural history and the evidence before me at trial.

II. PROCEDURAL HISTORY

A. Non-Disclosure

- [9] The Court's assessment of Leonard's handling of his mother's assets, both under his POA and later as her executor, was significantly hampered and complicated by his failure and unwillingness to disclose numerous key documents. These documents included the Will, the POAs granted to him by his parents, bank records regarding his parents' accounts, joint accounts he held with his parents, and his own personal accounts.
- [10] Leonard's failure to produce relevant documents in these proceedings was the subject of a number of court orders directing that these documents be disclosed:
- (i) September 28, 2018 Order of Master Keighley;
 - (ii) November 21, 2019 Order of Master Keighley;
 - (iii) January 17, 2020 Order of Master Caldwell; and
 - (iv) June 9, 2020 Order of Master Caldwell.

Still, his non-disclosure persisted. I will briefly address each of these orders in turn.

1. September 28, 2018 Disclosure Order

- [11] The September 28, 2018 Order was comprehensive in nature, requiring Leonard to produce the following materials:
- (i) the tax files of both parents;
 - (ii) the parents' bank accounts, showing financial transactions in Flin Flon, Manitoba and Powell River, British Columbia from 2005 to the date of the Order (it is noteworthy that the reference to Powell River was in error; as the defendant pointed out, the parents moved from Flin Flon to Campbell River, and not to Powell River);

- (iii) the parents' bank accounts prior to September 2018 at the Bank of Nova Scotia in Flin Flon, the Canadian Imperial Bank of Commerce ("CIBC") in Flin Flon, the Royal Bank of Canada ("RBC") in Flin Flon, and the Coastal Community Credit Union in Nanaimo, British Columbia;
- (iv) transactions and expenditures of the parents' bank accounts after their respective deaths;
- (v) copies of the parents' documents relating to their pension income from various sources, including the pension from the Hudson Bay Mining and Smelting Company ("Pension"), and related annuities, as well as the name of who purchased the annuities in the parents' benefit;
- (vi) financial documents relating to the sale of the parents' home in Flin Flon, including where the sale proceeds of the parents' home were deposited;
- (vii) financial documents relating to the sale of the parents' farm(s); and
- (viii) documents confirming whether Leonard was named in either of the parents' POA.

[12] Leonard did not disclose most of the documents he was ordered to produce. It was only during the trial, after I expressly ordered Melissa to search for the POAs one more time that she found William's POA. She provided a portion of Mary's POA documentation which contained a declaration, sworn by the parents' lawyer at the time the POAs were executed, affirming that he witnessed Mary sign and execute the POA on April 19, 2007. Melissa explained she found this declaration relating to Mary's POA at Leonard's residence among other documents. A few other documents relating to receipts pertaining to his mother's funeral expenses, his Father's 2013 Income Tax Return, and some documents relating to the sale of a family farm, were disclosed during or near the end of the trial.

2. November 21, 2019 Disclosure Order

[13] On November 21, 2019, Master Keighley issued another disclosure order. Leonard was required to serve Caroline and the Estate with the Amended List of Documents, along with copies of the newly listed documents within 21 days. Leonard was also ordered to comply with Caroline's November 29, 2018 demand that he amend his list of documents to include:

- (a) Leonard's bank records from the period between January, 2016 and March 13, 2018 for the bank accounts into which the transfer of funds were made from the account ending with the numerals 401 ("Account 401"); and
- (b) Leonard's bank records from March 13, 2018 to the date of the order, for the bank accounts into which transfers of funds were made from Account 401.

[14] Once again, the defendant did not comply and Master Keighley's November 21, 2019 order was not honoured.

3. January 17, 2020 Disclosure Order

- [15] On January 17, 2020, Master Caldwell (as he then was) made a further disclosure order, requiring RBC to produce Leonard's bank records relating to transfers of funds in Account 401 between January 1, 2016 to March 13, 2018, and March 13, 2018 to January 17, 2020. The plaintiffs were awarded special costs, in any event of the cause for this application.
4. June 9, 2020 Trial Management Conference Disclosure Order
- [16] At Leonard's examination for discovery on April 30, 2020, Caroline and the Estate made further requests for disclosure, such as the disclosure of the copies of the parents' POAs, and copies of the defendant's personal bank records from 2009 onward. The plaintiffs also reiterated the disclosure requests they previously made regarding Leonard's expenditures from his parents' bank accounts.
- [17] Prior to the commencement of this trial on June 22, 2020, at a June 9, 2020 Trial Management Conference, Master Caldwell ordered Leonard to produce all documents in his possession or control requested by counsel for the plaintiffs at his April 30, 2020 Examination for Discovery, and that he do so by no later than June 17, 2020. Essentially, Leonard also failed to comply with this Order.
5. Late and Nominal Disclosure at Trial
- [18] As noted above, near the end of the trial Leonard disclosed part of the parents' POAs naming him as the attorney in 2007, as well as certain receipts regarding the mother's funeral expenses. Some Pension documentation was disclosed.
- [19] Caroline and the Estate were required to seek orders from the banks in question to disclose bank account statements directly to them. Notably, Leonard was expressly asked at his discovery to explain the withdrawals he made from accounts he held with his parents, including the purpose of the withdrawals and if such withdrawals were deposited into other accounts. This information was not provided before trial. Indeed, even at the end of this trial, the purpose of numerous withdrawals made on these accounts remains entirely unclear.
- [20] Though Leonard ardently maintained that he did not keep records for his parents' joint accounts and denied having his own personal bank accounts, Melissa confirmed on cross-examination that Leonard keeps documents in his home and that she assisted Leonard to "get documents." She added that "I moved father's stuff when he moved to Courtenay" and that she started to organize his documents but did not finish. Melissa testified that there was a Rubbermaid container with documents that were not organized and "another container that I tried to organize for him" which included bank statements and cable bills, etc.
- [21] Leonard's lack of disclosure was egregious. Not only did he fail to disclose numerous key documents it appears he made no effort to obtain documents that were immediately available to him such as his personal bank account statements, and the like.

B. Failure to Disclose Will as an Executor and Subpoena Requisition

- [22] Prior to the onset of this litigation, Caroline repeatedly asked Leonard for their mother's Will and he refused to produce it, despite the fact that Caroline was a named beneficiary and he was acting as an executor. Caroline was required to requisition a Subpoena, for the production and deposit of the Will at the Supreme Court Registry. Leonard evaded service of the Subpoena, requiring an order for substitute service. Still, Leonard did not disclose the Will, and it was necessary to issue a Warrant After Subpoena which resulted in the defendant actually being arrested and jailed for failing to disclose the Will. Even following his arrest, it took several weeks for Leonard to produce his mother's Will.
- [23] John Richter is Caroline's former legal counsel. He confirmed Caroline's testimony that it was necessary for his office to secure a warrant for Leonard's arrest because he failed to comply with the subpoena requiring Leonard to disclose William and Mary's Wills.
- [24] Mr. Richter testified that despite multiple requests for documents, including financial records accounting for all assets received from William and Mary, the only document Mr. Richter's office received from Leonard was a copy of Mary's Will, but only after he was arrested for its nondisclosure.

III. BACKGROUND

A. The Parties

1. Leonard

- [25] Leonard is retired and was 69 years old at the time of trial.
- [26] Leonard's testimony regarding his education level was vague. It is not clear whether he graduated from high school, and while he attempted to take some courses as a young adult, it does not appear that he completed these courses.
- [27] Leonard says he worked "his whole life" and described a number of jobs that he held over the years. Leonard was only 18 years old when Melissa was born and he went to work on oil rigs shortly afterwards. It is not clear how long he did this type of work. He explained that while oil rig work in Alberta paid well, he was away from his wife and child much of the time.
- [28] At his then wife's suggestion, Leonard started looking for an office job. He found a job as a warehouse manager for housewares. Leonard did not say how long he worked in this position. Leonard testified that he also worked as a car salesman "in the 1980s for about a year." He also worked "in TV and stereo shops."
- [29] Leonard says that he retired in 1986 and moved to Vancouver Island. He explained he was on "full disability" at that time for a back injury and was not expected to work for the rest of his life. He testified his disability was terminated when he left Flin Flon to retire in Campbell River; he was told his disability would terminate if he left Manitoba. He also stated he had

worked just two weeks short of 10 years with the Hudson Bay Mining and Smelting Company but he needed to work for them for 10 years to be entitled to a pension. His evidence is not clear regarding what period he worked for that company.

[30] After moving to Vancouver Island, Leonard and his first wife purchased and ran Dell's Drive-in in Campbell River. Their marriage fell apart and their business was sold a few years later. Leonard re-married and stated he owned a company called Pro-building Design that applied acrylic stucco; he said he ran this business in the early 1990s when he was married to his second wife. Leonard did not say how long he ran this company.

[31] Leonard also testified that he has a long history of buying and selling houses. Leonard recalls he bought his first house in Flin Flon at 18 years of age for \$13,000. Within three months he sold it for \$27,000. He thought "this was the way to go," noting he had made \$14,000 in three months that was tax-free. Leonard testified that "throughout my life I have bought and renovated, as we lived in, and sold 52 houses up to today." He added that each house made "a large amount of money" except for one house in Calgary where he lost "\$35" because "we wanted to get out of there real quick." Leonard testified that he "made anywhere from \$50,000 to \$100,000 \$125,000 per house". He pointed out that he bought a house on 19th Ave in Courtenay for \$46,000, fixed it up and sold it for \$200,000. He testified that "the lady I sold the house to paid me over \$25,000 cash" to build a six-foot fence around the property, as well as driveways around the property, sidewalks, decks, and all sorts of things. He explained this is an "example of my life" and "how I operated." Caroline testified that Leonard never held jobs for long and was frequently unemployed. When Leonard approached her for a loan in 1986 to buy a restaurant, she and her husband, Joe Sarzynick, agreed to loan him \$20,000. Caroline testified her husband felt it was important to give Leonard "a chance in life." Caroline asked for the money back in 1989 so she and her husband could purchase a house. Leonard sold the restaurant that year and the loan was paid back.

[32] Caroline testified that after the sale of the restaurant, Leonard had "infrequent jobs", that were short-term "pieces of work", such as installing windows. Before his parents moved out to Campbell River in 2008, Leonard had recently divorced his wife. Caroline testified that Leonard did not have "a steady income of any sort". He struggled financially. However, she recalled that in 2008, around the time their parents moved in with Leonard, he seemed to do very well financially.

[33] Leonard admitted that while his parents were living with him, he was not working and that his source of income was his pension. At trial, he testified he could not recall how much his pension was when his parents lived with him. On his examination for discovery in April of 2020, he testified that his pension was "\$1800 and some dollars, I think". Leonard also stated that he earned rental income from the Fir Street Properties after he renovated them. However, no supporting documents were provided to support Leonard's income during any period of time relevant to these proceedings, or at all.

[34] Leonard's health is currently compromised. Melissa, testified that her father "lost a leg and foot to diabetes, had a heart attack, and is now losing his eyesight." She did not say when the amputation and eyesight issues arose or intensified, but she confirmed that Leonard underwent heart surgery in 2016. At trial, Leonard was able to read most documents with his reading glasses; there were times when he used a magnifying glass. For the most part, however, Leonard was able to read documents put to him with his reading glasses. Again, the evidence was not clear as to when Leonard's sight impairment surfaced, although he gave evidence that he did carpentry work and extensive renovations to 1035 Fir Street when his parents were living with him.

2. Caroline

[35] Caroline is retired and she was 74 years old at the time of trial. She grew up in Flin Flon, Manitoba. She retired in 2005, after working as a clinical dietitian, consistently throughout her adult life in both hospital and home-care settings. She has been married to Joe Sarzynick for 54 years, raised two boys who are now adults, and lives in Mission.

[36] After she married, Caroline moved from Winnipeg to Ontario, and then to Edmonton, before moving to Mission when she and her husband retired. Caroline had a close and loving relationship with her parents and made concerted efforts to stay in touch. While living in Winnipeg, Caroline and her family would visit her parents frequently. When her family moved to Ontario, the visits continued but were understandably not as frequent because the children were in school and she and her husband were working full-time. However, she and her mother spoke frequently on the phone, and the family did go to Flin Flon to visit her parents.

[37] After she moved out West, Caroline kept in contact with her parents. She made arrangements in both 2006 and 2007 for her parents to come visit. She paid for their airfare. They were both frail and so she arranged for airport personnel to look after them while flying to Vancouver; wheel chairs were arranged for her father at the airports.

B. The Parents (William and Mary)

1. Lifestyle

[38] Caroline testified that her parents lived a simple lifestyle and were not the sort to spend money needlessly. This overarching picture was echoed by her husband Joe. Caroline says her father "was not a big spender", that he liked to save his money and was very frugal. She testified that having money in the bank was a status symbol for William. She explained that her father "was not a person that went out and spent money he grew-up poor and money was important to him and I think it was also status to him to have money in the bank...that's what he really liked, he was proud to, you know, to have had something." She testified that her father saved his money and by the 1960s he had paid off the mortgage on his home.

- [39] Caroline and Joe both testified that even after William and Mary moved to Campbell River, they lived a simple life and they did not drink or smoke. Nor were they the sort of couple that liked to eat out or spend a lot of money on clothes or other expenses, although they "ate well and didn't skimp on meat and potatoes." Her parents did not go on fancy vacations. Her mother sewed her own clothes. Caroline testified that her parents did not give her any "big gifts" of money with the exception of a \$1000 gift in 1967 when Caroline and her husband purchased a home. She recalled her parents always treated her and Leonard equally in this regard.
- [40] Melissa echoed Caroline's point that William and Mary tended to treat their family members equally. However, she recalls how her grandparents were very generous. She stated that when her grandmother would stay with her, she insisted on paying for groceries and always paid cash. Melissa also recalled that her grandmother "would send out \$500 for each individual person for myself and my family" and that she would have done that for "my aunt and uncle and my father." Melissa testified that her grandmother "did not believe in giving to one and not the other." In a similar vein, Melissa portrayed her grandfather as generous and as an individual who "always liked to pay in cash." Leonard testified his parents liked to pay in cash and would go on the occasional holiday.

2. Pensions

- [41] Caroline testified that her father worked as a foreman for Hudson Bay Mining and Smelting Company until he retired in 1983.
- [42] She testified that shortly after he retired, he told her that he received more than \$3000 a month in pension monies. Caroline remembers being "really impressed." Her mother was 9 years younger than her father and did not have a work-related pension at that time. When her father died, his pension monies transferred to her mother.
- [43] In addition to his Old Age Pension benefits ("OAS") and Canada Pension Plan ("CPP") benefits, William received a monthly pension annuity. The monthly annuity continued following his death for Mary's benefit for the rest of her life. Although required to do so by court order, Leonard did not disclose any documents related to the amounts of pension annuity payments his parents received from Great-West Life Assurance Company.
- [44] Regarding his father's pension, Leonard testified that "all the time he was with me, he never got a pension from the Hudson Bay Mining and Smelting Company." Leonard explained his father told him "he got a buy out for his pension and he was told he should invest it somewhere." Leonard stated he "never talked to Dad about how much pension money he was receiving" in annuities from Great-West Life. He added that he never knew how much he received monthly until "we were all living in Campbell River and the cheques started rolling in".

- [45] The documentation before me, coupled with Leonard's testimony, establishes that William invested his Pension (received from his employer) with Great-West Life and received a monthly pension annuity in return.
- [46] Joe recalls how both William and Mary would discuss the pension monies they received. Mary would receive one cheque and William received three pension cheques per month. Joe recalled William telling him that his pension totalled around \$3000. Joe testified this was plausible since William received OAS and CPP, as well as his company pension annuity.
- [47] The documentary evidence tends to confirm Joe's understanding of William and Mary's monthly incomes. For example, Leonard produced his father's income tax summary dated 2013, which was prepared by Leonard's accountant after his father died. Leonard agreed, that this tax summary, which set out his father's income from 2009 to 2013 inclusive, showed his father earned an average of approximately \$30,000 a year, or roughly \$2500 a month during this period. Leonard also testified that "I always said that Dad's cheques were between \$2400 and \$2600 per month." This figure is also consistent with the monthly deposits in Account 401 from 2011 until William's death, which ranged from \$2400-\$2600. The records for Account 401 also indicated that William received OAS in the amount of \$660 per month. As the plaintiffs point out, the most conservative estimate of William's monthly retirement earnings would be \$3,160 (i.e., \$2500 pension plus \$660 for OAS).
- [48] Leonard also confirmed that he prepared his mother's income tax documents for every year that she lived with him, as he did for his father. He confirmed that for the year 2017, his mother received OAS of \$1,157.06, plus CPP of \$2,364 and "other pension" of \$1,042 over the two-month period that she was alive. The total income including a federal supplement of \$336.52 for the two-month period (January and February) was \$4,900.51. Leonard agreed that in preparing his mother's taxes he looked at her mail. When asked if he also looked at her bank statements, he responded "I never looked at those."

3. Assets

- [49] The evidence established that William and Mary owned their home in Flin Flon outright and that the mortgage had been paid off by the time William retired in 1983.
- [50] In addition to their residential property, Caroline recalled that her parents owned other real estate. Specifically, her father owned two farms and her mother also owned a farm. She testified that the farms were sold but she was not advised when they were sold or for how much. Caroline recalled that her mother sold her farm around 2004 for about \$68,000.
- [51] Leonard testified that his father owned two farms in Saskatchewan. He claims that his father legally transferred one of the farms to him when "I was in my 20's". Later in his testimony, Leonard stated that his father gave him the farm when he was 14 years old, and transferred it to him when he was 20 years old. Leonard asserted the farm comprised about 160 acres, which he rented until he later sold this farm for \$30,000, while his parents were living with him in Campbell River.

- [52] However, on cross-examination, an "Agreement of Understanding" for the sale of this farm was put before Leonard. Leonard confirmed that this Agreement, between himself and the purchaser, was executed on May 3, 2007. No other documents regarding the sale of this farm were produced. Under cross-examination, Leonard could not remember where he kept this document, although he testified that he more than likely put this document and other important documents, along with his parents' wills and their POAs, in the top right hand drawer of his dresser.
- [53] When pressed on cross-examination about where the Agreement of Understanding relating to the sale of this farm was found, Leonard responded that "somebody was going through a bunch of boxes and found them". When pressed as to whether there were boxes of documents at his home, Leonard responded he did not have boxes of documents. When pressed further about where this Agreement of Understanding was found, Leonard quipped "It just showed up." At this and other points in time during Leonard's cross-examination, he was angry, belligerent, and evasive. He attempted to explain and dismiss his behaviour as a function of being "frustrated."
- [54] Leonard stated that his father gave his other farm to his mother. He testified her farm was sold for \$60,000. He was not sure when she sold the farm but thinks it was in 2005, remarking it was a time when he did not have a POA, explaining "I didn't have no responsibilities ". Leonard stated that he remembered his mother telling him she wanted to give him some money from her farm. He testified she told him there is some money in the bank and it's yours." While his evidence was not clear on this point, Leonard stated he assumed that the joint bank account he had with his mother in Flin Flon must have been the money she wanted to give him from her farm. Later in his testimony, he testified that he recalled having an account with his mother with CIBC and that he assumed this was the money his mother received from the sale of her farm. There is no evidence before me of an account opened between Leonard and his mother at the time of the sale of this farm.
- [55] Plaintiffs' counsel's efforts in attempting to locate Mary and William's bank accounts in Flin Flon via court order revealed an account ending with the numerals 235 at the CIBC in Flin Flon ("Account 235"). This account was held jointly between Mary and William. Leonard was not named as a joint account holder on this account. Unfortunately, only the signature card for Account 235 was available, which indicated the account was opened on November 15, 2005 by William and Mary; no monthly bank statements were provided.
- [56] The parties all rely on various hearsay statements regarding William and Mary's savings and pension or annuity income. While I rule on the admissibility of these statements below, I have reproduced them here for context only. For example, Caroline testified that her father did not tell her exactly how much he had saved over the years but he suggested the amount to her "in round about ways." In 2006, when her parents came to visit their new house in Mission, William expressed how impressed he was with the home. He asked Caroline how much she and her husband paid for it. When Caroline told him the house cost \$325,000, he smiled, nodded and said "I have more than that, I could have paid for this."

- [57] Joe testified about a conversation with William during a visit to Flin Flon in 2005. Joe recalled how William talked about how his brother had died of cancer and how William and Mary looked after him while he was ill. During this conversation, Joe responded by telling William about his own brother, who had also passed away, and how he also had taken care of him before he died. He remembered telling William how proud he was of his own brother, who had done so well with so little education and opportunity. Joe's testimony was clearly heartfelt when he shared how his brother's estate was worth around \$300,000 and how "it wasn't very often that a person like my brother or anybody, a single person, would manage to have an estate of \$300,000 ". Joe clearly recalled William's response: "Bill stated he had more money than that." Joe testified that William's response was not surprising and was "entirely believable."
- [58] In contrast, Leonard testified that his father told him that he was "broke" in 2008. On the way home from Flin Flon to Campbell River, Leonard and his parents stopped to visit Caroline and Joe at their home in Mission. Leonard testified that at the end of this visit "I told my sister, Dad has no money." Leonard also testified that his father then "put his hands in the air looked at my sister and said: I have no money Caroline." This evidence is denied by Caroline and Joe.

4. Parents' Health in Flin Flon

- [59] Joe recalled William was "feeble" and "severely sight-impaired" when he was still in Flin Flon. William had mobility problems and used a scooter prior to moving to Campbell River. He also suffered with "some asthma," although Joe found William to be "mentally pretty alert". Joe and Caroline testified that they bought Mary a scooter as well, "so they could both go out together."
- [60] Joe recalls that Mary had arthritis, and that she had a "fair amount of pain" that required injections for relief. William stopped driving prior to the couple's move in 2008, although Mary drove until she suffered a head injury in 2008. Joe testified that Mary developed dementia and was forgetful.
- [61] While in Flin Flon in February 2008, Mary slipped on ice and hit her head. It was a serious fall and she was hospitalized. She was in a coma for 3.5 days and in the hospital for three weeks. Caroline flew to Flin Flon to look after her mother, as well as her father. Caroline and her father visited her mother in the hospital every morning and afternoon. She also spent a great deal of time talking to her father during this visit. After her mom was released from hospital, Caroline accompanied her mother to Winnipeg to see a specialist who diagnosed her mother with a major traumatic brain injury and a major brain bleed. Caroline testified that her mother was also diagnosed with Alzheimer's at that time. Caroline noticed that her mother's memory loss was apparent before her parents moved to Campbell River.

C. The Granting of the Power of Attorney and the Execution of the Wills

1. Executing the POAs

- [62] Even though the POAs were not disclosed prior to trial, Leonard was insistent that he had disclosed the POAs to his former lawyer. In fact, the Lists of Documents produced by Leonard's former lawyers did not disclose the POAs. When asked under cross-examination where the POAs were, Leonard said he did not know. He attempted to blame his former lawyer for the non-disclosure. Leonard testified that he also gave the banks, and Great-West Life, copies of the POAs. He said he gave his former lawyer whatever documents he had. Under cross-examination Leonard stated that "I didn't never ever try to hide anything I never had no records." He also suggested he was not aware he should have been keeping records of expenditures from his parents' accounts.
- [63] At the time Caroline testified, Leonard had not disclosed when their parents' POAs were executed. During the trial, it became evident that his parents POAs were executed in April of 2007.
- [64] Under cross-examination, Leonard acknowledged that he had responsibilities under the POAs. He affirmed that he had "the power to make decisions for my parents and make sure I was treating them proper."
- [65] William's POA granted Leonard a POA over all his assets and makes no provision for compensation, gifts or loans to Leonard. Rather, it expressly states that it is to be used for William's benefit.
- [66] While Leonard did not at any time disclose the portion of his mother's POA relating to the duties he owed to her, he acknowledges the existence of the POA she granted him. Further, there is no evidence that Mary's POA is any different than William's POA. In addition, there is no evidence before me that her POA allowed for compensation, gifts, or loans; in any event, Leonard made no assertions and tendered no evidence to this effect.

2. The Wills

- [67] Leonard was appointed as the primary executor of his mother's Will. Caroline was appointed as the alternate executor. The Will named their father as the primary beneficiary, with a gift over to Caroline and Leonard in equal shares if the father predeceased the mother. Accordingly, Caroline and Leonard are equal beneficiaries under their mother's Will. Leonard admitted that he both understood and accepted that his mother's Will made equal provision for Caroline and himself, in the event that his father died before his mother.

D. The Purchase and Renovation of 1035 Fir Street

1. Purchase of 1035 Fir Street

- [68] Leonard acknowledged on cross-examination that he drove out to Flin Flon to see his father for his birthday on May 18, 2008. He said he likely stayed for a few days.
- [69] By the first week of June 2008, Leonard and his partner, Lisa, purchased 1035 Fir Street for \$235,000. They were registered as joint tenants. Leonard stated that Lisa had worked for a credit union for many years before this purchase. Nevertheless, Leonard was adamant that

he made the \$100,000 down-payment for the purchase of 1035 Fir Street and that the down-payment came from the sale of another house he owned on 19th Avenue ("19th Avenue Property"). Leonard acknowledged that a mortgage was obtained on May 29, 2008 for the purchase of 1035 Fir Street, in his and Lisa's name, which completed on June 2, 2008.

- [70] Leonard denied that he used his parents' money to buy 1035 Fir Street. On cross-examination, counsel put to Leonard that the reason he resisted disclosing his parents' POAs, which were executed in 2007, was because he had them in his possession before his parents moved to Campbell River and before he purchased 1035 Fir Street in June 2008. Leonard eventually stated during his cross-examination that he was not sure when he received his parents' POAs.
- [71] During cross-examination, Leonard angrily insisted his father had "no money" when he moved to Campbell River. Leonard maintained that he did not have any documents relating to the purchase of 1035 Fir Street or its mortgage. Leonard testified that Lisa took care of the mortgage payments every month. When asked whether he saw any bank statements regarding the mortgage on 1035 Fir Street, Leonard said "I don't recall". Leonard was subsequently questioned about a document located by counsel for the plaintiffs that related to the payout of the mortgage on 1035 Fir Street on March 14, 2018 in the amount of \$90,184.77. However, as a result of the non-disclosure, the actual value of the mortgage secured in 2008 was not established.
- [72] While Leonard was not working when he and Lisa purchased 1035 Fir Street, he testified that "we had good cash flow from that house from rentals". No documents were disclosed regarding Lisa's contributions to a down-payment, the cash-flow from the rentals, or the monthly mortgage payments. When asked whether he kept documents relating to the purchase, sale, and mortgages of the Fir Street Properties, Leonard stated "I didn't have no reason to save documents like this" and that he did a lot of moving and things were "moved around".
- [73] Leonard insisted that the 19th Avenue Property was exclusively his property. When shown a document registered under the Land Title Act, R.S.B.C. 1996, c. 250, which showed that he and Lisa were registered as joint tenants, with a mortgage in April 2006 of \$98,000, Leonard initially objected to the accuracy of this document. He questioned how he could have a \$98,000 mortgage on a property which he purchased for \$46,000. Leonard acknowledged he was asked at discovery for the disclosure of the documents relating to the purchase, sale, and mortgage of the 19th Avenue Property and admitted that he had not disclosed them.
- [74] Leonard testified that it was easier for him to get a mortgage with Lisa because he was "not employed and not working for anyone", but Lisa was working.

- [75] Under cross-examination, Leonard was shown a document registered under the Land Title Act, obtained by the plaintiffs, relating to the 19th Avenue Property. The document stated that the property was sold by Leonard and Lisa for \$176,500 on February 13, 2007. Leonard responded that he thought he received \$200,000, but did not dispute this document and acknowledged its contents.
- [76] Counsel for the plaintiffs put to Leonard that his repeated evidence--that he alone put a \$100,000 down-payment on 1035 Fir Street from the sale of the 19th Avenue property--was not true. There was only a \$78,500 gross difference between the mortgage of \$98,000 on the 19th Avenue Property and its sale price of \$176,500. Counsel also put to Leonard that the profit on the 19th Avenue Property would have to be split equally with Lisa. Leonard denied this was the case. He testified he bought the 19th Avenue property for \$46,000 and sold the house for \$200,000. He then testified, once again, that he built a six-foot fence around the property and "a driveway, decks and storage shed" and that the purchaser said to him "I'm in to this house for \$225,000 Len." Leonard did not produce any documents supporting these assertions. Lisa was not called as a witness.
- [77] When asked where Leonard deposited the profits from the 19th Avenue property, Leonard responded that "I don't know where I put it I guess I put it in my pocket." When asked whether he carried \$100,000 in his pocket, Leonard responded "yes."

2. Renovation of 1035 Fir Street

- [78] After the purchase of 1035 Fir Street in June 2008, Leonard said he tore down that house "to the studs" and "rebuilt it". This included putting a new roof on the house and redoing the electrical work and plumbing. Leonard did not recall "for sure" what he did because there was "a lot" to do at that house." He reiterated he was not employed at the time and that the renovations were his job.
- [79] When asked how long it took to renovate 1035 Fir Street, Leonard responded that he was not sure. He said he did not have to pay any interest on the cost of supplies because he used his Home Depot credit card, which did not require him to pay interest for 18 months. When asked what the costs of the renovations were, Leonard responded "at most it was \$20,000." When counsel suggested to Leonard that he used his parents' money to pay for the renovations, Leonard responded he thought he "sold off" his farm in Saskatchewan "to pay my Home Depot card." Notably, Leonard acknowledged earlier in his testimony that he entered into an agreement to sell his farm in May of 2007, well before 1035 Fir Street was purchased, and, therefore before the renovation's expenses were incurred.
- [80] Leonard testified that, during the renovations of 1035 Fir Street, his mother called from Flin Flon "to come and pick them up." He recalled Lisa suggesting his parents live with them but Leonard was in the midst of renovating and 1035 Fir Street "was in a shambles." He was not sure what to do.

E. The Sale of the Flin Flon Property and the Purchase of 1045 Fir Street

- [81] Sometime in the fall of 2008, Leonard testified that he had overheard the neighbour next door from 1035 Fir Street say "I'm not spending another winter in this house." He told Lisa about this and she suggested he speak to their neighbour about buying the house. After some negotiation, Leonard and Lisa purchased 1045 Fir Street for \$235,000. Leonard explained, "we did a few things to it before I went and picked-up my mom and Dad and sold their house."
- [82] Leonard's evidence in regard to the timing of the 1045 Fir Street purchase is inconsistent with the documentary record. Leonard maintained that he and Lisa had purchased, and had taken possession of, 1045 Fir Street before going to Flin Flon to sell his parent's home and bring them back to Campbell River. Leonard was insistent that he worked on 1045 Fir Street before his parents first arrived in Campbell River. The documentary evidence, however, does not support Leonard's recollection of when 1045 Fir Street was purchased.
- [83] On October 22, 2008, William and Mary sold their mortgage-free home in Flin Flon, where they had lived for 55 years ("Flin Flon Property"). Leonard advised Caroline that the home sold for \$60,000, but she was not provided with any documentation. On cross-examination on the sale price of the Flin Flon Property, Leonard was asked to consider the result of a title search, conducted by the plaintiffs, indicating a sale price of \$70,000. Leonard did not disagree that the home was sold or who it was sold to, but maintained his recollection that it was sold for \$60,000. He also "did not dispute" that he went to pick up his parents in Flin Flon and they arrived in Campbell River "around" October 28, 2008. He stated it took him about 10 days to pick up his parents and return. However, Leonard then changed his testimony and stated that he must have picked up his parents later than he previously indicated, maintaining that he returned to Campbell River in November in time for his birthday, rather than on October 28, 2008.
- [84] On cross-examination, Leonard was shown a Land Title Act Transfer Form A, indicating that he and Lisa purchased 1045 Fir Street on October 28, 2008. Leonard agreed this was the case. Counsel put to Leonard that his parents' home in Flin Flon sold on October 22, 2008, and that 1045 Fir Street was purchased six days after on October 28, 2008. Plaintiffs' counsel then suggested to Leonard that his parents' money was used to purchase 1045 Fir Street. Leonard responded that "I didn't put a penny down on the second house."
- [85] Leonard testified that Lisa paid the down-payment for the purchase of 1045 Fir Street by selling her own home on Greenwood Street, which Leonard said he thought she could sell for \$235,000. Leonard also testified that Lisa later told him she put all her money down from the sale of her Greenwood home.

- [86] Leonard was shown a Land Title Act registered Form B document, obtained by the plaintiffs, which provides that he and Lisa took out a mortgage on 1045 Fir Street on October 29, 2008. Leonard responded "that makes sense". Leonard denied using his parents' money to purchase 1045 Fir Street, but did not disclose his bank accounts or any documentation relating to the purchase and financing of 1045 Fir Street to support his version of events.

F. Parents Move to Campbell River

- [87] William and Mary moved to Campbell River and lived there with Leonard until they passed away. Mary was 80 years old at the time of the move and William was 89. William passed away on January 21, 2013, at the age of 93. Mary passed away at the age of 89 on February 3, 2017.
- [88] Caroline testified that when her father left Flin Flon to live in Campbell River with Leonard, he was suffering from various health problems. William had very poor eyesight and was unstable on his feet. He was prone to falling and could only walk short distances, suffering from shortness of breath and incontinence, and used "puffers" to assist with his breathing. Between 2008 and her father's death in 2013, Caroline visited her parents in Campbell River and they also came to her home. She maintained regular contact with her parents; she testified that she would speak with them "pretty well every single Sunday."
- [89] After William died in 2013, Caroline recalled that her mother's Alzheimer's symptoms worsened significantly. She explained that while her mother could remember events in the distant past, "she was not here in the present." Caroline testified her mother "lost lots of weight" and her "memory was extremely poor." For example, her mother would ask her how she was and then repeat the question over and over again, right after asking it.
- [90] Leonard acknowledges that his mother was suffering from serious memory loss while she resided with him, and that her short-term memory was poor. Leonard recalls telling his mother that she could go out into the yard, but it was very important that she not leave the yard because she would get lost.
- [91] Leonard also remembers telling his father they were to stay close to home, acknowledging that his father had serious issues with his vision; although it was alright for him to visit Leonard next door while he was working there.

G. Renovations on 1045 Fir Street and the Parents' Living Arrangements

- [92] The evidence of Leonard and Melissa is inconsistent as to where his parents lived when they moved to Campbell River in 2008. Melissa testified that her grandparents lived with her while Leonard was renovating 1045 Fir Street because both houses were under renovation. However, Leonard testified that he and his parents all lived together in the second home at 1045 Fir Street, while he completed the renovations on 1035 Fir Street.

- [93] Leonard also testified that when he finished the downstairs at 1035 Fir Street, there were three bedrooms and a common area downstairs. He maintained that he rented out each bedroom downstairs for \$600 a month. Leonard stated he then finished the renovations on the upstairs portion of the first home at 1035 Fir Street. He then began renovations of the downstairs of the second home at 1045 Fir Street and rented out two bedrooms in the downstairs for \$600 each; the downstairs also had a common area. Leonard testified that he also rented the upstairs of 1045 Fir Street and at first "got \$1700 a month" but, when the tenants had financial difficulties, he reduced the rent to \$1500.
- [94] Leonard testified that there was a time when Lisa's uncle also came to live with them. They gave her uncle their bedroom and he and Lisa "moved back in the upstairs of the house." The uncle paid \$1000 a month rent.
- [95] Leonard also charged his parents \$1000 each per month for rent. Leonard also noted that in addition to this \$3000 rent received for 1035 Fir Street, with the three renters downstairs he was drawing another \$1800 for a total of \$4,800 a month. Then, says Leonard, there were also the rentals for 1045 Fir Street. He testified that in total, "we were drawing in somewhere between \$6,000 to \$7,000 a month" in rental income between the two properties in Campbell River. No invoices or documentation were tendered to support this evidence, nor were any witnesses called in this regard.
- [96] Leonard testified that with all the rentals and renovations and because "we had bad renters who did a lot of damage", he "was kept busy" but "didn't think they made much money." Leonard testified that while he was busy renovating and doing repairs, Lisa worked hard taking care of his mother and father as well as her uncle; she "prepared all the meals, washed all the clothes" and looked after them.

H. The Opening and Withdrawals on the Joint Accounts

- [97] Shortly after William and Mary moved to Campbell River in the late fall of 2008, they opened joint accounts with Leonard. These are the accounts ending in the numerals 393, 401, 490, and 796 (these accounts will be individually referred to as Account 401, Account 490, Account 796 and Account 393 (collectively these accounts will be referred to as "Joint Accounts")).
- [98] The plaintiffs submit that the opening balances of the Joint Accounts, which will be addressed in more detail below, were comprised entirely of Mary and William's savings. Leonard asserts he contributed \$100,000 to Account 401. In any event, in light of the evidence before me, I find that Mary and William deposited the bulk of their life savings into the Joint Accounts they opened with Leonard. The evidence also shows that the parents' pension and other income were deposited into these accounts.
- [99] Leonard produced no records to confirm the opening balances of the Joint Accounts opened with his parents in 2008. Pursuant to a court order, bank records were provided directly to plaintiffs' counsel. Unfortunately, bank records before 2011 were not available from these

institutions directly, as they do not keep records this far back. Leonard claims he never kept any bank records. The bank records that were produced, between October 1, 2011 and 2018, coupled with the evidence Leonard gave, show that he withdrew approximately \$303,641.34 from the Joint Accounts during this period. With the exception of withdrawals for room and board and funeral expenses, Leonard did not account for most of the withdrawals he made during this period.

1. Account 393

[100] Account 393 was a joint account in the name of Leonard and his mother at RBC in Campbell River. The historical record does not state when this account was opened, but I find it was most likely opened after Mary and William moved to Campbell River in late October or early November 2008. Bank records for Account 393 only went as far back as September 30, 2011. The balance on that date was \$11,327.00. Leonard admitted on discovery that he did not contribute to this balance in Account 393. He also confirmed that he and his mother jointly held Account 393.

[101] When taken to this account during her testimony, Caroline observed that there were monthly deposits of approximately \$658.61 into Account 393, followed by cash withdrawals on the same day for the entire amount deposited. The records show such deposits and withdrawals in November 2011, December 2011, and January 2012. On February 1, 2012, the monthly cash deposits continued but were increased to \$664.18 or \$664.14. Once again, the monthly deposits were withdrawn on the same day with a cash withdrawal equal to that month's deposit. These deposits and same-day cash withdrawals occurred for each month thereafter until June 4, 2012, when the monthly deposits and same-day cash withdrawals increased to \$714.04 per month. The bank records show that the monthly deposits fluctuated somewhat from \$664.14 to \$672.32 between July 3, 2012 to March 13, 2013. These monthly deposits were also withdrawn in cash on the same day they were deposited.

[102] There were additional monthly deposits and cash withdrawals involving larger amounts in Account 393, commencing December 2, 2011. For example:

- (a) \$2515.84 was deposited on December 2, 2011; on the same day there were two additional cash withdrawals in the amounts of \$2447.84 and \$68.00 (as previously indicated a separate deposit of \$658.61 was also deposited and withdrawn as cash on December 2, 2011);
- (b) on January 3, 2013, \$2675.10 was deposited; a cash withdraw was also made that day for this same amount; a deposit of \$669 was also made into this account on this date and the entire amount was also withdrawn in cash that day;
- (c) on March 22, 2013, \$3966.30 was deposited into Account 393 and was withdrawn as cash that same day;
- (d) on April 4, 2013, \$1607.13 was deposited and that same amount was withdrawn that day in cash;

- (e) on April 19, 2013, \$1473.88 was deposited and that same amount was withdrawn that day in cash;
- (f) on May 3, 2013, \$2315.59 was deposited and the same amount was withdrawn that day in cash; and
- (g) on February 1, 2016, \$4173.69 was deposited and the same amount was withdrawn in cash that day.

[103] In the months and years that followed, deposits were made into Account 393 every month, ranging between \$1606.59 to \$3966.30, evidencing the same pattern of deposits and cash withdrawals, the same day as the deposit. There were other withdrawals unrelated to any corresponding deposit such as:

- (a) cash withdrawal for \$5052.38 on July 2, 2015; and
- (b) cash withdrawal for \$2600.00 on October 15, 2015.

[104] These deposits and withdrawals, while not an exhaustive list, are illustrative of the distinct pattern of withdrawals evidenced in this account. The last regular monthly deposit was May 4, 2017 in the amount of \$1,492.95. There was no cash withdrawal that day. The closing balance on this account as of Sept 21, 2018 was \$6645.07.

[105] During his cross-examination, Leonard was taken to the bank records and transactions pertaining to Account 393. The bank record shows that on February 7, 2017, the sum of \$1870.07 was deposited into this account, which was the same amount withdrawn from Account 796 on the same day. Leonard denied that he arranged the branch-to-branch transfer and stated that he "knew nothing about the account in Flin Flon." He had no explanation for how this happened and stated "the banks do what they do." Leonard acknowledged that Account 393 had a balance of \$11,327 on September 30, 2011. When asked whether this was money that belonged to his Mother, Leonard responded he "didn't know where all these accounts came from." When pressed on this point, Leonard responded: "I don't know, is this a joint account with me and my mom?" When counsel patiently took him back to various bank records, and put it to him that the \$11,327 was his mother's money, Leonard responded "if it was a joint account with me if she didn't owe money to me for spending money on her it was all her money...".

[106] When it was put to Leonard that he did not make any deposits into Account 393, he responded that "I don't know...I never knew she had these accounts...." Leonard was taken to his examination for discovery transcript, dated April 30, 2020. During his discovery, it was put to Leonard that he did not deposit the \$11,327 sum in Account 393 and Leonard responded "No, that's my mom's money." Leonard also conceded that Account 393 was set up for his mother's purposes and benefit. He also testified that "My mom told me that whatever I needed to feel free to help myself but I never did." Leonard added that "Both my mom and Dad told me many times, why don't you spend the money Leonard and I told them, I can't do that, that's not the way it works."

2. Account 490

[107] Account 490 was a joint account between William, Mary, and Leonard at CIBC in Campbell River. The signature card for Account 490 and a Bank Book Reconstruction Report, dated March 14, 2014, were both provided to plaintiffs' counsel on October 11, 2018 pursuant to the court order of Master Keighley dated September 28, 2018. The cover letter provided that this account was opened on November 14, 2008 and closed on December 4, 2018. CIBC also advised that "the activity from the opening date in 2008 is no longer available."

[108] The Reconstruction Report provides that the balance of Account 490 was \$13,337.60 on December 31, 2010. The bank records indicate that no withdrawals were made on this account until December 4, 2013, when the account was entirely emptied with the withdrawal of \$13,485.84. Leonard provided no indication of the purpose of this withdrawal or where these monies went.

3. Account 796

[109] Account 796 was Mary's bank account in Flin Flon with RBC. Bank records were provided by RBC as far back as September 30, 2011. RBC was not able to provide any records or bank statements prior to this date.

[110] Leonard was taken on cross-examination to bank statements pertaining to Account 796 for November 1, 2011. Leonard denied he made the withdrawal of \$658.62 on November 1, 2011, and testified he "knew nothing about this account" and said "this is the bank's doing."

[111] Leonard was also taken to a bank statement for Account 796 dated February 1, 2017. On February 7, 2017, the entire sum of \$1870.07 was withdrawn by way of a "branch-to-branch" transfer. Leonard acknowledged this was his mother's account, and that the funds contained therein were hers, and that a bank-to-bank transfer had occurred. Leonard also acknowledged that this transfer was made four days after his Mother died. However, he responded that he did not "carry out" this transfer and that "he had nothing to do with this."

4. Account 401

[112] Account 401 was an RBC account in Campbell River opened on November 14, 2008. Mary, William, and Leonard were all named on Account 401 and each signed the signature card when the account was opened. Following William's death in February 2013, Mary and Leonard remained on Account 401.

[113] The opening balance on this account on November 14, 2008 is unknown. No records were available from RBC for the period between November 14, 2008 and September 30, 2011. The balance on September 30, 2011 on Account 401 was \$158,308.00.

- [114] Bank records from Account 401 from 2011 to William's death in 2013, indicate that, in addition to other monthly deposits, William received regular monthly deposits between \$2400 to \$2600. Leonard stated, on cross-examination, that his father received between \$2400 to \$2600 per month of pension annuity income from 2008 until his death; his mother continued to receive these monthly pension annuities after his father's death
- [115] Caroline noted the distinct pattern of deposit and immediate cash withdrawals of numerous monthly deposits in Account 401 (as was also the case for Account 393). For example:
- (a) a November 1, 2011 deposit of \$2635.71 with a cash withdrawal for that amount the same day;
 - (b) a January 3, 2012 deposit of \$2515.84 with a cash withdrawal for that amount the same day;
 - (c) a February 1, 2012 deposit of \$1737.69 with a cash withdrawal for that amount the same day;
 - (d) a March 1, 2012 deposit of \$2538.78 with a cash withdrawal for that amount the same day;
 - (e) an April 2, 2012 deposit of \$2538.78 with a cash withdrawal for that amount the same day;
 - (f) a May 2, 2012 deposit of \$2538.78 with a cash withdrawal for that amount the same day; and
 - (g) a June 4, 2012 deposit of \$2538.78 with a cash withdrawal for that amount the same day.
- [116] The same pattern of monthly deposits and cash withdrawals, of the entire amount of the deposit, continued month-after-month until and including December 3, 2012. There were additional monthly cash withdrawals of \$669 commencing August 1, 2012 that continued until December 2012. There were also further monthly withdrawals, for example:
- (a) a January 22, 2013 cash withdrawal of \$2536.02;
 - (b) a February 1, 2013 withdrawal of \$10,500 described on the Account History as "DEBIT MEMO";
 - (c) a February 15, 2013 cash withdrawal of \$314.37;
 - (d) an April 24, 2013 cash withdrawal of \$5850;
 - (e) a March 31, 2014 cash withdrawal of \$7784.50;
 - (f) an April 8, 2014 cash withdrawal of \$154.73;
 - (g) a May 7, 2014 cash withdrawal of \$333.55;
 - (h) a June, 25, 2015 cash withdrawal of \$500;
 - (i) a May 29, 2017 cash withdrawal of \$10,007.50;
 - (j) a January 3, 2018 withdrawal of \$1155 described as "Coast Discovery";
 - (k) a January 24, 2018 withdrawal described as "ICBC 305363";

- (l) a February 26, 2018 withdrawal of \$10,007.50 described as "Branch to Branch-0838";
- (m) a March 12, 2018 withdrawal of \$929.61 described as "BR-BR-0838";
- (n) a March 12, 2018 withdrawal of \$107,007.50 described as "BR-BR-0838"; and
- (o) a March 12, 2018 withdrawal of \$100 described as "PTB WITHDRAWAL BG540 0352", which exhausted the account balance of Account 401.

[117] Caroline did not have access to this account or any other Joint Account. Leonard, however, had access to Account 401 as a joint account holder and also pursuant to his enduring POAs for his parents. Joe explained that Mary and William's physical conditions became progressively worse after they moved to British Columbia and that they were "in a very bad place." Joe noted that the bank was located more than a kilometer walk from where Mary and William lived. He explained it would not be physically possible for them to get to the bank on their own. William's eyesight was very compromised and Mary was feeble with dementia. This is consistent with Leonard's evidence that he did not let his parents stray from the Fir Street Properties.

[118] Leonard was taken to a financial statement pertaining to Account 401. He acknowledged that on September 29, 2017, he withdrew the sum of \$10,007.50 to buy a boat for himself. He testified "that was my money the Bank assumed it was money that was my Dad's ". When plaintiffs' counsel put to Leonard that none of the money in this account belonged to Leonard, Leonard loudly called counsel "a liar."

I. Purchase of the Braidwood Property

[119] Caroline asserts that the withdrawal of \$107,007.50 from Account 401 was used by Leonard to purchase the Braidwood Property for his own use. The paper trail, obtained by the plaintiffs as the result of court ordered disclosures, shows that the sum of \$107,000.00 from Account 401 was withdrawn through a branch-to-branch transfer on March 12, 2018, to another RBC Account that did not belong to Mary and William. Also on March 12, 2018, Leonard wrote a bank draft payable to Melissa in the amount of \$107,000; this sum of \$107,000 was then deposited by Melissa, again on March 12, 2018, into a newly opened CIBC bank account held jointly by Melissa and Leonard, ending in the numerals 690 ("Account 690"). Account 690 was also opened on March 12, 2018.

[120] Leonard was also taken to a bank transaction involving a February 26, 2018 branch-to-branch withdrawal of \$10,007.50 from Account 401 to another bank account. On the same day, a bank draft from RBC in Courtenay was issued in the amount of \$10,000 to "Royal Lepage in Trust" on behalf of Leonard who was describe on the bank draft as a "purchaser". On cross-examination, Leonard confirmed that the \$10,000 was the deposit necessary to purchase the Braidwood Property. Leonard had previously admitted at his examination for discovery that his use of these jointly-held funds to purchase the Braidwood Property was never discussed with his mother.

- [121] Counsel for the plaintiffs placed before Leonard, certain financial statements from Account 690 from the CIBC in Courtenay. Leonard confirmed that there was a deposit into Account 690 on March 12, 2018 of \$107,000 and a withdrawal on May 29, 2018, which he confirmed was used for the purchase of the Braidwood Property, which he also confirmed he owned jointly with Melissa. Leonard stated that the mortgage on the Braidwood Property was roughly \$70,000 and that it is currently \$70,000.
- [122] On May 29, 2018, \$94,334.98 was withdrawn from Account 690.
- [123] Melissa confirmed that \$107,000 was transferred out of Account 401 to purchase the Braidwood Property, which is now registered in her name and that of her father. On cross-examination, Melissa agreed that Account 690 was opened on March 12, 2018. She stated that she suggested to Leonard that they open a joint account together as it would be easier for "estate planning" and to take care of his expenses. Melissa also acknowledged that, on the same date, her father wrote a cheque to her in the amount of \$107,000 and that she deposited the cheque that same day in Account 690.
- [124] On cross-examination, Melissa acknowledged that she was Leonard's only surviving child and that, as such, she would inherit his assets. She also confirmed that "Dad has an account at the Bank of Montreal and a joint account [with her] at CIBC." Melissa also affirmed that she and her father are very close; they speak to each other once or twice a day and sometime three times a day. This "has been true for a number of years."
- [125] Melissa agreed that when Account 690 was opened and the \$107,000 cheque was issued to her, she was aware there was a dispute between Leonard and Caroline, and that liens had been placed on properties. She testified she "assumed" she knew her aunt had commenced litigation against her father.
- [126] Melissa agreed on cross-examination that her father could have simply done a branch-to-branch transfer from Account 401 into Account 690. She testified that she did not know why a cheque was made out to her, rather than her father making a direct deposit into Account 690 from Account 401. She denied that this was an attempt to hide the fact that her father was using the money from Account 401 inappropriately or to create the impression that the \$107,000 was her money.
- [127] When it was put to Leonard that he emptied Account 401 within two weeks of being served with the Notice of Civil Claim in this case, he maintained that this was "my money" (referring to the \$100,000 he claims to have deposited into this account when it was originally opened in 2008). Simply put, he maintains that he purchased the Braidwood Property with his own money.
- [128] Melissa acknowledged during her re-direct examination, by Leonard, that when the \$107,000 was transferred into Account 690, the two of them discussed that the money would be used to purchase the Braidwood Property for Leonard. During her closing submissions, Melissa stated that when the Braidwood Property was purchased she "had no knowledge of

Leonard's financial situation, except for the \$107,000 that was put in Account 690." She further submitted in closing argument that when Leonard was purchasing the Braidwood Property "he did not have enough money for this transaction" and:

so my father and myself went to my bank (TD Bank) where I hold my mortgage for my home at 1415 Larson Road and took out a home equity flex-line loan in the amount of \$73,000. That is why my name is on the title for Braidwood.

[129] Leonard testified he put Melissa on title to the Braidwood Property because he wanted to leave it to her.

J. Leonard's Position on the Withdrawals

[130] Leonard stated he looked after his parents' needs while they lived with him, that he never "absconded money from any one at any time", and that he "never kept any books" and he "never thought he had to keep books." Leonard also testified "I didn't run to their bank accounts all the time." He said that any money he took out of their bank accounts was his money or was his parents' money, which he spent on his parents.

[131] Leonard provided further testimony regarding Account 490. He acknowledged that on December 31, 2010, the balance of the account was \$13,337.60. When it was put to him that this was his mother's money, Leonard responded "I don't know where that money come from." When it was put to him that it was not his money, Leonard responded, "I don't know". He also testified that it might be his money. Leonard was then taken to his examination for discovery transcript where he testified that the \$13,337.60 "was money that was in my mom's bank account in Flin Flon that I never knew about." He also stated at his examination for discovery that "was mom's money in a bank account" and that "I never took no money out--I never ever had any dealings with the Bank of Commerce that we're talking about [Account 490] ". Leonard was tasked at his examination for discovery to refresh his memory about whether it was his mother withdrawing moneys for Account 490 or whether it was him; he responded that it: "It would be me" and that it would not be his mother. Specifically, he agreed it was him using his power as her attorney.

[132] A CIBC Bankbook Reconstruction Report shows that the balance on Account 490 on November 4, 2013 was \$13,485.84 and that on December 4, 2013 a withdrawal in the same amount was made on December 4, 2013. The record also discloses that on December 4, 2013, a CIBC bank draft was made out to Leonard in the amount of \$13,485.84.

[133] Leonard testified that Account 401 was "me and my Dad's account and then changed into me and my mom." Leonard stated, in regard to the balance of \$158,308 in 2011, "Dad put in \$58,000 and I put in \$100,000." Leonard asserts that he had \$100,000 left over from the sale of a house he owned with his partner; he said this money came "from his pocket." No documentation was provided to support this assertion. When it was put to Leonard that this was not so and that he never deposited any money into Account 401, Leonard denied this was the case.

- [134] Leonard's position at trial regarding the withdrawals from the Joint Accounts is difficult to reconcile with the admissions he made on his Examination for Discovery on April 30, 2020. For example, Leonard admitted that the withdrawals evidenced in the available bank records relating to the Joint Accounts were made by him, as his parents were not capable of banking on their own. Moreover, Leonard admitted that he was acting under the POAs when he withdrew monies from the Joint Accounts. Leonard acknowledged the purpose of the Joint Accounts was to facilitate the payment of expenses and bills on his parents' behalf. Apart from Leonard's contention that he contributed \$100,000 to Account 401, which I will address below, he admitted that he "never deposited a penny" into the Joint Accounts that he held with his mother.
- [135] The history of Leonard's transactions in relation to the Joint Accounts is further complicated by his failure to disclose his own personal bank account records, despite being ordered to do so.
- [136] When asked in cross-examination whether he had a personal bank account between 2007 and 2008, Leonard responded "I don't think so." When asked "whether he didn't think so or he didn't know", Leonard responded that "I don't know." Yet, he also testified he had a personal account between November 2007 and February 2017 with Lisa, "up until the time both houses were sold." He then said "I still think I have that account". Indeed, Leonard admitted that the uncorroborated rental income he was receiving was deposited in his joint account with Lisa and they used that to pay for the mortgage payments for 1035 and 1045 Fir Street.
- [137] Leonard said he did not know whether, or could not recall if, he had a different account from the one he had with Lisa. Curiously, Leonard also responded, to the question of whether he had a personal account, with "I suppose." When asked whether the bank statements would have been mailed to his home, he responded "I assume so." When asked whether he ever looked at them, he responded "never." When asked how he would check on the bank balances, he responded "I don't know maybe when I went to the bank." Towards the end of his testimony, however, Leonard admitted he had a bank account with BMO and "still does." He stated that "that's where all my pension cheques go."
- [138] The Court's task in this case was made more difficult by Leonard's failure to disclose his personal bank records, including his own savings and disposable capital. Such disclosure may have made his explanations more credible or plausible.

K. Sale of the Fir Street Properties

- [139] Both of the Fir Street Properties were sold shortly after Caroline initiated this litigation in 2018.
- [140] Leonard was shown a 2020 BC Assessment document for 1035 Fir Street. Leonard did not object to the legal description or contents of this document. The evidence is clear that 1035 Fir Street was sold shortly after Caroline filed her original Notice of Civil Claim on February

22, 2018. Leonard also confirmed on cross-examination, after being shown a letter from his old law firm to counsel for the plaintiffs dated March 28, 2018, that 1035 Fir Street was sold for \$380,000 and that his share of the proceeds after paying the mortgage and expenses was \$99,438.00.

[141] Leonard also confirmed that 1045 Fir Street sold for \$339,000 on March 29, 2018 and that his share was \$108,477.64, as per correspondence dated June 29, 2020 between Mr. Krassman at Tees Kiddle Spencer LLP and Scott Payne at CBM Lawyers LLP which sets out the moneys held in trust relating to the Fir Street Properties.

[142] As a joint tenant on both 1035 and 1045 Fir Street, Lisa received her share of the sale proceeds from the Fir Street Properties by way of agreement. Leonard's share of the net proceeds of sale for both Fir Street Properties is currently being held in trust at Tees Kiddle Spencer LLP pending court order, or agreement between the parties.

IV. ANALYSIS

A. Credibility

[143] Credibility is a significant issue in this case. For example, Leonard adamantly testified that his father was "broke" when his parents moved to Campbell River in 2008. Leonard also testified that he told Caroline that their parents were broke when they stopped in to see Caroline and Joe when they moved from Flin Flon to Campbell River. Leonard also claims that his father told Caroline that he had "no money" during that same visit. Caroline and Joe testified that William was not "broke". Several of Leonard's assertions are also contested, including that he: a) personally contributed \$100,000 to Account 401; and b) never used any of his parents' money for his own purposes.

[144] In *Gutierrez v. Gutierrez*, 2015 BCSC 185 at paras. 36-55, the Court reasoned that aspects of the defendant's testimony were of diminished or little value given credibility and hearsay concerns, particularly where there were no records substantiating the claimed right of survivorship or beneficial interest the defendant claimed as a joint account owner. This case is similar: the lack of supporting documentation concerning Leonard's assertion that he contributed \$100,000 to Account 401, and inconsistencies in his own testimony, some of it hearsay, also raises serious issues of credibility.

[145] The plaintiffs argue that *Gutierrez* also addresses the metric by which Leonard's credibility ought to be assessed. They cite the passage in that decision, where Justice Voith relies (at para. 53) on the often quoted passage of O'Halloran J.A. in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) as follows:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the

real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[146] Along a similar vein, in *Kolic v. Kolic*, 2019 BCSC 1463 at para. 69, again in circumstances similar to the one before me, Justice Punnett determined that the defendant's explanations for her transactions were not credible:

[69] Some of Mary's explanations for her actions were non-responsive, transparent, inconsistent, and not believable. She would at times retreat to saying "I don't remember" or "I don't recall" on matters that I am satisfied she did remember. It is difficult to accept that she actually believed her assertions, given her conduct in seeking to avoid this trial and her failure to produce supporting evidence.

[147] While there is no evidence that Leonard sought to avoid the trial, he failed to produce relevant documents even after court orders required him to do so. On the witness stand, he was non-responsive, inconsistent, and not believable. For example, Leonard claimed he made a profit of \$100,000 from the sale of the 19th Avenue Property and did not deposit it, keeping it in his pocket instead. He also testified at discovery that all the money in Account 401 was his father's and yet testified at trial that \$100,000 of the \$158,000 balance in 2011 was his. He was insistent during the trial that his father was "broke" when he moved to live with him in Campbell River, but acknowledged that \$58,000 in Account 401 belonged to his father. At times during the trial he was belligerent, accusatory, and disrespectful. His memory was selective; it was very clear when it supported his case but absent when it did not.

[148] Plaintiffs' counsel points out that at para. 71 of *Kolic*, the Court lists a number of factors that further compromised the defendant's credibility in that case, many of which parallel Leonard's conduct in this case. For example, Leonard:

- (a) did not produce bank records for the Joint Accounts (while some bank records were produced this was after a number of court orders and the vast majority of documents were obtained directly from the banks by the plaintiffs);
- (b) was engaged in financial transactions involving Account 401 and the other Joint Accounts, and then kept them secret from Caroline while their mother was alive and, further, was reluctant to disclose them as executor of their mother's estate; in this regard, I accept Caroline's evidence that despite asking many times about her parent's financial situation over the years before and after their mother's death, he did not provide this information;
- (c) refused to disclose his own bank accounts even after being ordered;
- (d) denied he had personal bank accounts, held only in his name, and then eventually acknowledged on cross-examination that he did (e.g., the account in which his pension cheques were automatically deposited every month);

- (e) refused or neglected to provide a copy of the Will to Caroline after their mother's death to the point where he was arrested before finally doing so;
- (f) responded to questions regarding his numerous cash withdrawals and expenditures from the Joint Accounts with "I don't remember" or "I don't know", even though he admitted that he understood that his obligations under his parent's POAs included the power, in his own words, "to make decisions for my parents and make sure I was treating them proper";
- (g) stated repeatedly that he kept no documents or financial records, such as financial statements from joint or personal bank accounts, in regard to himself or his parents, and later contradicted himself by stating that he did keep such documents, for example, for the purpose of assisting his mother file her income tax returns; in this regard I note that Melissa testified, which I accept, that her father did keep documents at his home; indeed, that is where she located the POA documents;
- (h) claimed to have purchased 1045 Fir Street before the Flin Flon Property was sold, but yet the records confirm the Flin Flon Property was sold before 1045 Fir Street was purchased;
- (i) claimed he had personally and substantially renovated 1035 Fir Street "right down to the studs" on his own (including the roof, electrical, and plumbing work) for only \$20,000.00 even though he also testified he had retired following a serious back injury which entitled him to "full disability";
- (j) equivocated about the profit he earned from selling the 19th Avenue Property; initially claiming that he made a profit of \$200,000.00 and then claiming that he earned a profit of \$100,000.00, when the official Land Title documents did not support either of Leonard's figures; and
- (k) testified he did not deposit the alleged \$100,000 profit from the sale of the 19th Avenue Property in a bank account but kept it in his pocket.

[149] This is a sufficient, but not exhaustive, list of the facts which undermined the reliability and credibility of Leonard's testimony. Leonard's testimony was not only contradictory, but was, in large part, simply not plausible in light of the totality of the evidence.

[150] In *Kolic*, Justice Punnett reasoned, at para. 72, that in proceedings involving claims against executors, executors are held to a high standard, citing the following passage in *Zielinski v. Brennan*, [2002] O.J. No. 2884 in support:

[20] In most lawsuits the credibility of the parties plays an important role in the result. In this case where the defendant is an Executor, a Trustee, a beneficiary and a member of the family, his candour should be beyond suspicion and wholly intact after detailed scrutiny. The Defendant failed the test. ...

[151] Leonard did not meet any standard of credibility. His testimony lacked transparency and candour. In addition, the lack of consistency or plausibility inherent in his own testimony, raises very serious concerns about both his credibility and the reliability of his evidence.

These concerns are further magnified by his failure to honour the integrity and responsibility required of him under his parents' POAs, and as the executor of his mother's estate. As a consequence, where Leonard's evidence is self-serving or inconsistent with the evidence before me as a whole, I give it little, if any, weight.

[152] In *McCabe v. British Columbia*, 2019 BCCA 77 at para. 5, the Court of Appeal reasoned that triers of fact must consider the evidence as a whole in assessing credibility:

A decision maker charged with the responsibility of determining the facts of a situation, particularly one in which there is a contest of credibility, is always obliged to consider the evidence as a whole. This requirement recognizes that evidence which on its own may not be sufficient to compel one result, may have a degree of weight, and may contribute to a decision on credibility that the single piece of evidence itself may not have produced.

[153] Leonard's testimony was not corroborated by other witnesses or the documentary record in any material way. Melissa's evidence does little to assist the factual issues in dispute, as she was not privy or aware of Leonard's use and expenditures of the Joint Accounts. Further, the few additional documents Leonard and Melissa tendered at trial did not ameliorate or resolve the lack of credibility and reliability inherent in Leonard's testimony. His evidence failed to provide credible explanations for his actions or his patterns of repeated withdrawals from the Joint Accounts, which far exceed the \$1000 per month room and board he charged each of his parents, funeral expenses or the few other legitimate expenses accepted by the plaintiffs.

[154] In sum, I find that Leonard was a non-credible witness and I have rejected his uncorroborated evidence where appropriate, as I set out more specifically in these Reasons.

[155] I do not have the same credibility concerns about the other witnesses.

[156] Caroline's testimony was clear, consistent, and credible. I found her to be an honest, straightforward witness.

[157] Joe was also a straightforward and impressive witness. His testimony was consistent with that given by his wife.

[158] Melissa was not a witness to most of the important events and transactions leading to this lawsuit. She clearly cares deeply for her father and assisted him during the trial. Yet, her evidence did not remedy the inconsistencies in Leonard's evidence or his lack of disclosure.

B. Admissibility of Hearsay

[159] A number of hearsay statements were made during the course of the trial. Hearsay is an out-of-court statement in the absence of contemporaneous cross-examination that is tendered for the truth of its contents. Hearsay is presumptively inadmissible because it has the potential to jeopardize the truth-seeking function of the court and trial fairness.

Nevertheless, hearsay can be admitted through either one of the traditional exceptions to the hearsay rule, or what the Supreme Court of Canada has called "the principled approach": *R. v. Khelawon*, 2006 SCC 57 at para. 47.

[160] The principled approach requires that the impugned hearsay be both necessary and reliable to pass the threshold for admissibility: *Khelawon*, at para. 47. The criterion of necessity mandates that the hearsay evidence must be required to facilitate the interest of justice and the search for the truth in any given case. Reliability can be addressed in one of two ways. First, a statement can be deemed procedurally reliable if there are adequate substitutes for testing the veracity of the statement. Alternatively, a hearsay statement can be substantively reliable when there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy: *R v. Moir*, 2020 BCCA 116 at para. 87; *R. v. Bradshaw*, 2017 SCC 35 at para. 27.

[161] Corroborative evidence may be used to address substantive reliability if, and only if, when considered as a whole and in the context of the case, it shows that the only explanation for the impugned hearsay statement is the truthfulness or accuracy of the material aspects of the statement: *Bradshaw*, at paras. 4, 57. The court must consider other explanations, even hypothetical explanations, for the impugned statement and ask itself whether the proposed corroborating evidence eliminates those alternatives: *Bradshaw*, at para. 57; see also, *R. v. Newsham*, 2019 BCCA 126; *R. v. Poony*, 2018 BCCA 356; and, more generally, David M. Paciocco, "The Principled Use of Hearsay in Civil Cases: a Technical Guide to Avoiding Technicality" (2008) 87:2 Canadian Bar Review 277 at 279-288.

[162] In addition, if the hearsay passes the threshold admissibility stage (i.e., it is necessary and reliable) as well as the judge's residual discretion to nevertheless exclude the hearsay evidence, it is still subject to the weight ascribed to the statement by the trier of fact: *Khelawon*, at para. 49; *Surespan Structures Ltd. v. Lloyds Underwriters*, 2021 BCCA 65 at paras. 95-96. As I discuss below, I find that none of the hearsay statements meet the requirements of the principled approach. Accordingly, I need not ascribe any weight to these statements.

1. Hearsay in the Plaintiffs' Case

[163] Plaintiffs' counsel assert that the following hearsay statements, made by William to Caroline or her husband, are admissible:

- (a) During a conversation in 2005, William told Joe that he had saved more than \$300,000;
- (b) Caroline testified that when William came to see her in 2006, he told her he had saved more money than she purchased her house for (i.e., more than \$325,000) and he could have paid for her new home; and
- (c) Caroline testified that William told her in 2008 that he had saved more money than what Mr. Maluta sold his business for, which was ostensibly \$285,000.

These hearsay statements are presumptively inadmissible. They do not fall within any of the established exceptions to the hearsay rule.

[164] Plaintiffs' counsel submits that "hearsay evidence may be admissible at trial where the evidence relates to statements made by a deceased person". While I agree that hearsay statements from deceased persons can be admissible in the right circumstances, such statements must be admitted through the principled approach as there is no general exception for hearsay from deceased persons. None of the above statements fall within the well-established exception for dying declarations since William did not have a settled, hopeless expectation of death when he made the statements, as required by this exception to the hearsay rule: *R v. Glowatski*, 2001 BCCA 678 at para. 14

[165] Applying the principled approach in this case does not lead me to the conclusion that these hearsay statements are admissible. First, the criterion of necessity is not satisfied because the hearsay statements of the father are not necessary in the court's search for the truth in this case; simply put, this case does not turn on William's conception of his savings. Nor does this case turn on the statements the father is alleged to have made at any point in time. Second, as I discuss later in these reasons, I am satisfied that the objective, admissible evidence on the record nevertheless establishes that the parents' post-retirement income and expenditure patterns, from 1983 until they moved to Campbell River in 2008, yielded significant savings and that they were far from penniless in 2008, contrary to Leonard's uncorroborated contention. That is, in light of the totality of the evidence before me, none of these hearsay statements are necessary to make the findings of fact I am required to make, or to properly adjudicate this dispute. As I discuss later in these Reasons, I am satisfied that the objective, admissible evidence on the record nevertheless establishes, on a balance of probabilities, that the parents' post-retirement income and expenditure patterns, from 1983 until they moved to Campbell River in 2008, yielded sufficient savings to support my findings of fact without admitting William's hearsay statements.

2. Hearsay in the defendants' case

[166] Leonard's testimony contained several hearsay statements from his parents. For example, he says William said he was "broke" when he moved to Campbell River. Leonard also claims, perhaps somewhat inconsistently, that his mother intended to gift him the proceeds of sale from her farm.

[167] These statements are both procedurally and substantially unreliable, as discussed in the authorities cited above. There are no procedural safeguards to test these hearsay statements. Moreover, the substance of Leonard's testimony does not accord with the preponderance of other evidence, which amply demonstrates that his father was not "broke" when he arrived in Campbell River. For example: William had a mortgage-free home in Flin Flon that was sold just before he and his wife moved to Campbell River in 2008; William was receiving and continued to receive significant monthly annuities from Great-West Life, in addition to his monthly Canada Pension and his Old Age Security

payments; and William and Mary opened multiple bank accounts soon after moving to Campbell River, which indicates they must have had savings to deposit. Moreover, Leonard has failed to disclose evidence of a joint account between him and his mother at the time of the sale of her farm. This statement is inherently unreliable and self-serving. Accordingly, I have not admitted Leonard's hearsay evidence on these matters.

C. The Presumption of Resulting Trust for Gratuitous Transfers

- [168] When a parent gratuitously opens a joint account with their adult child, the law presumes that the transferee (i.e., the child) holds the funds in the account on resulting trust for the transferor (i.e., the parent): *Pecore v. Pecore*, 2007 SCC 17.
- [169] This presumption is rebuttable. The onus is on the transferee to rebut this presumption. They must show that the transferor intended an outright gift when they opened the joint account. In other words, Leonard must show that his parents intended to give him an outright ownership interest in the funds in the Joint Accounts at the time of the transfer: *Pecore*, at paras. 56-59; *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33 at paras. 37, 41.
- [170] With the exception of the \$100,000 Leonard says he contributed to Account 401, Leonard does not argue that the monies in the Joint Accounts he held with his parents belonged to him. In fact, he admits that the remainder of the monies held in the Joint Accounts belonged to his parents. He also acknowledged on discovery that his mother never said he could keep the balances in the Joint Accounts when she passed on.
- [171] In light of the evidence as a whole, I reject Leonard's claim that he deposited \$100,000 into Account 401. The evidence does not support the conclusion that Leonard actually contributed \$100,000 to Account 401. Leonard's own evidence is equivocal at best. While he repeatedly testified at trial that he contributed this sum to Account 401, he contradicted himself at discovery, where he stated that all the money in this account belonged to his father. While Leonard may have been confused on this point at his examination for discovery, his testimony at trial was, in any event, inconsistent and not persuasive on this point. His evidence amounted to a bald assertion. Leonard provided no viable explanation for the source of this \$100,000 sum. In fact, he did not disclose his own bank accounts or any other financial documentation that would support this assertion. In addition, Leonard's credibility was successfully impugned during cross-examination, in several respects on this point.
- [172] I find that Leonard has failed to rebut the presumption of resulting trust. I also find that the entirety of the Joint Accounts were held on resulting trust for his parents, and subsequently, their respective estates. He had access to the Joint Accounts only to facilitate legitimate expenditures relating to their care.

D. Breach of Fiduciary Duty

[173] The plaintiffs submit that Leonard breached the fiduciary duty owed to his mother under his POA by misappropriating funds from the Joint Accounts. They argue that, had he not done so, these funds would have properly formed part of the Estate. Further, they submit that Leonard breached his fiduciary duty as the executor of the Estate by misappropriating funds from Account 401 to purchase the Braidwood Property for his benefit. The plaintiffs rely on the decision of Justice Voith, as he then was, in *Sull v. Pengelly*, 2019 BCSC 575.

[174] Justice Laskin set out a four-part framework for assessing breach of fiduciary claims in *Can. Aero v. O'Malley*, [1974] S.C.R. 592 at 605. First, a fiduciary relationship must be identified. Second, the nature and scope of that duty must be ascertained. Third, the court must assess whether those fiduciary obligations were breached. Finally, the court should assess the liability flowing from the breach and address the appropriate remedies. I will endeavour to follow this basic analytical framework.

1. Was Leonard a fiduciary?

[175] The existence of a fiduciary relationship can arise in one of two ways. First, there are per se fiduciaries that come from certain established classes of relationships. As Justice Rothstein reaffirmed in *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71 at para. 115, the list of per se fiduciary relationships include: trustee-cestui que trust, executor-beneficiary, solicitor-client, agent-principal, director-corporation, guardian-ward, and parent-child. Second, there are ad hoc fiduciary relationships that, while not falling within the established categories of per se fiduciaries, nevertheless give rise to fiduciary obligations in the circumstances. The test for establishing an ad hoc fiduciary relationship has gone through several iterations over the years. It was most recently reformulated in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 36 and clarified in *Professional Institute*, at para. 128. The party seeking to establish the existence of an ad hoc fiduciary relationship must show:

- (i) An undertaking by the alleged fiduciary to act in the best interest of the alleged beneficiary or beneficiaries;
- (ii) A defined person or class of persons who is/are vulnerable to the fiduciary in that the fiduciary has a discretionary power over them; and
- (iii) A legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[176] As an executor-beneficiary relationship is a defined per se fiduciary relationship, I find that Leonard owed the Estate's beneficiaries (i.e., Caroline) a fiduciary duty.

[177] In *Wang v. Wang*, 2020 BCCA 15 at para. 32, Justice Saunders noted that the historical indicia of a fiduciary relationship "will always exist" in an attorney-donor relationship, thereby hinting at a per se fiduciary relationship. As noted in *Egli v. Egli*, 2004 BCSC 529 at

para. 76, aff'd 2005 BCCA 627, "[i]n most cases involving alleged breach of fiduciary duty by an attorney, it is taken as a given that where there is a power of attorney, there exists a fiduciary relationship between the attorney and the donor [citations omitted]."

Nevertheless, both Egli and Wang ultimately viewed an attorney-donor relationship through the ad hoc fiduciary framework. Accordingly, I address Leonard's attorney-donor relationship with his mother through the lens of an ad hoc fiduciary, even though there is a fair argument that, as a type of agent-principal relationship (*Houston v. Houston*, 2012 BCCA 300 at paras. 26-30), a donor-attorney relationship could arguably fall within the ambit of a per se fiduciary.

[178] I am satisfied that Leonard, as his mother's attorney, was an ad hoc fiduciary and that he owed his mother a fiduciary duty when exercising his powers under her POA. When he took the POA, he made an undertaking to act in her best interests. The language contained in the POA with his father clearly and unequivocally indicates that Leonard was to act in the donor's best interests; his father appointed Leonard to be his "true and lawful attorney for" his "sole and exclusive benefit." As Leonard failed to produce the full version of his mother's POA, I have drawn the adverse inference that the language contained in Leonard's mother's POA was identical to the language contained in his father's POA. It follows that Leonard was under an undertaking to act in his mother's best interests. Moreover, his mother was in a vulnerable position and Leonard had the discretionary power to adversely impact her interests. Neither his mother nor his father had the physical or mental capacity to do their own banking; they relied on Leonard to do so. The evidence establishes that both parents were feeble and vulnerable when they moved to Campbell River to live with Leonard and he was granted an enduring power of attorney in 2007. In short, their finances were entirely in Leonard's hands.

2. Did Leonard breach his fiduciary obligations as an attorney?

[179] At the highest level of generality, a fiduciary must act with utmost loyalty, good faith, and in the best interests of the person over whom they exercise discretion or control: *Galambos v. Perez*, 2009 SCC 48 at para. 69; *Can. Aero*, at 606; *Sull*, at para. 129. As a result of these obligations, a fiduciary exercising a power of attorney cannot act for their own personal benefit or use property under their power for their own gain: *Zeligs v. Janes*, 2016 BCCA 280 at para. 86; *Sull*, at para. 129; *Egli*, at para. 82. A fiduciary attorney must account for assets under their power and all proceeds generated from those assets: *Sull*, at paras. 112-119.

[180] The fiduciary obligations that an ad hoc fiduciary attorney would owe in equity have largely been codified in the modern version of the Power of Attorney Act, R.S.B.C. 1996, c.370 ("PAA"): *Sull*, at para. 124. For example, s. 19(1) of the PAA now mandates that an attorney must "act honestly and in good faith" and "exercise the care, diligence and skill of a reasonably prudent person". Moreover, s. 19(1)(d) requires that an attorney "keep prescribed records and produce the prescribed records for inspection and copying at the request of the adult." An attorney is required to act in the "adult's best interest's" when managing and making decisions about the adult's financial affairs: PAA, s. 19(2). Finally,

pursuant to s. 19(4) of the PAA, an attorney must keep their own property separate from the donor's property.

[181] In a similar vein, the Power of Attorney Regulation, B.C. Reg. 20/2011 ("Regulation") imposes further obligations on attorneys. Section 2(1) mandates that an attorney acting under an enduring power "must make a reasonable effort to determine the adult's property and liabilities as of the date on which the attorney first exercises authority on the adult's behalf" and "maintain a list of that property and those liabilities." Further record keeping obligations are imposed under s. 2(2) of the Regulation, which provides as follows:

- (2) An attorney acting under an enduring power of attorney must keep the following records in relation to the period for which the attorney is acting:
 - (a) a current list of the adult's property and liabilities, including an estimate of their value if it is reasonable to do so;
 - (b) accounts and other records respecting the exercise of the attorney's authority under the enduring power of attorney;
 - (c) all invoices, bank statements and other records necessary to create full accounts respecting the receipt or disbursement, on behalf of the adult, of capital or income.

In short, the Regulation imposes fairly robust record keeping obligations on those acting under an enduring power of attorney.

[182] A complexity in this case is that many of Leonard's impugned transgressions occurred before the modern PAA and the Regulation came into effect on September 1, 2011 (on the general non-retroactivity of this legislative regime see *Easingwood v. Cockroft*, 2013 BCCA 182 at paras. 34-35). The POA in question was also executed in Manitoba. Nevertheless, I am satisfied that the equitable obligations of a fiduciary at common law were well-established by 2008 and it is unnecessary to grapple with the modern statutory regime that has largely codified the common law, or the law of Manitoba, which was neither plead or argued.

[183] Leonard, as an ad hoc fiduciary, had an obligation to act in good faith, in his mother's best interests, to eschew personal profit or gain from her property, and to account for all property under the purview of his enduring POA.

[184] The standard of care for an attorney, which has now been codified under s. 19(1) of PAA, was well-established in the case law by 2008. For example, in *Andreasen v. Daniels-Ferrie*, 2001 BCSC 1503 at para. 27, the requisite standard of care for a fiduciary acting under a power of attorney was described as follows:

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.

In sum, the requisite standard of care was already well-established in the case law by 2008.

- [185] Not every breach of duty equates with a breach of a fiduciary duty: *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 at 362 (S.C.). As Justice Harris aptly summarized, a breach of fiduciary duty typically "captures circumstances in which there is a breach of the duty of loyalty owed by the fiduciary and includes circumstances involving acting in the face of a conflict, preferring a personal interest, taking a secret profit, acting dishonestly or in bad faith, or a variety of similar or related circumstances": *Meng Estate v. Liem*, 2019 BCCA 127 at para. 35.
- [186] The question here is: did Leonard breach the fiduciary obligations owed to his mother? The answer is yes.
- [187] Leonard failed to keep, or at the very least disclose, the necessary financial records for his mother's bank accounts, including her joint accounts with William, as well as the proceeds of sale from the Flin Flon Property. In *Andreasen*, at para. 29, the Court held that the failure to keep records did not accord with the requisite standard of care of a reasonably prudent person, which ultimately made an accounting of the donor's assets impossible. I find that, in all the circumstances, Leonard's failure to keep, or produce, the requisite documentation was a breach of his fiduciary obligations. This breach went to the core of the fiduciary relationship that was created by the POA granted by his mother, as it ultimately had the effect of precluding an accounting of her assets.
- [188] Leonard also breached his fiduciary duty of utmost loyalty when he misappropriated his mother's funds for his own benefit. I will address each of the four classes of impugned misappropriations in further detail below.
- (a) Did Leonard misappropriate funds from his mother to purchase 1035 Fir Street?
- [189] The plaintiffs submit that Leonard misappropriated his mother's funds as her attorney to purchase 1035 Fir Street. They ask the Court to draw the adverse inference, in light of Leonard's non-disclosure and failure to provide the date for the POA until the end of the trial, that 1035 Fir Street was unlawfully purchased with his mother's money in June 2008. Specifically, plaintiffs' counsel argues it should be inferred that the entire \$100,000 down-payment was misappropriated by Leonard.
- [190] The imposition of an adverse inference arising from a party's failure to produce evidence is an exercise of judicial discretion: *Rimmer v. Langley*, 2007 BCCA 350 at para. 30, citing *Helm v. Pattie* (1998), 52 B.C.L.R. (3d) 81 (C.A.); *Insurance Corporation of British Columbia v. Mehat*, 2018 BCCA 242 at para. 101; *Kaye v. Troico Home Solutions & Manufacturing Inc.*, 2018 BCSC 208 at para. 41. However, as the Ontario Court of Appeal aptly noted in *Parris v. Laidley*, 2012 ONCA 755 at para. 2, an adverse inference "should not be drawn unless it is warranted in all the circumstances." Adverse inferences may be drawn where a party fails to produce relevant documents that they were required to produce, or should have produced: *Naramalta Development Corporation v. Therapy General Partner Ltd.*, 2012 BCSC 191 at paras. 89-93; *Walek v. Guardian Storage Inc.*, 2010 BCSC 365 at paras. 46-57. Moreover, the failure of a fiduciary to produce or disclose relevant records they were under a legal

obligation to keep, can be grounds to infer that such records would not support their testimony: Kolic, at para. 75.

- [191] The inference the plaintiffs ask the Court to make is predicated on five key facts. First, that Leonard's POAs with his parents were executed in 2007, well-before 1035 Fir Street was purchased in June 2008. Second, Leonard could have been presented with his parents' POAs when he visited them in Flin Flon in May 2008, or during his previous visit to Flin Flon in 2007. Third, Leonard's claim that he used the profit from selling the 19th Avenue Property is suspect: his testimony that the down-payment on 1035 Fir Street came from the profit from this sale was either \$100,000 or \$200,000 is difficult to reconcile with the objective evidence that the proceeds of sale from that property were only \$76,600. Fourth, Leonard failed to disclose his own bank accounts, annual income, or employment information from 2007 to the date of trial and the evidence does not establish that he was working at the time he purchased 1035 Fir Street or that he was earning any form of income, other than what he said was \$1800 a month pension. Finally, Leonard failed to produce his parents' bank records for 2007 to 2008 despite the execution of the POAs in 2007.
- [192] I am not prepared to draw the adverse inference that Leonard misappropriated the sum of \$100,000 from his mother for the down-payment on 1035 Fir Street. The objective evidence shows that the proceeds of sale for the 19th Avenue Property, totalled \$76,600. The plaintiffs have not satisfied me that those proceeds of sale could not have been put towards the down-payment on 1035 Fir Street.
- [193] Nevertheless, in light of Leonard's non-disclosure and failure to provide a plausible explanation for how he paid the remaining portion of the down-payment on 1035 Fir Street, I am prepared to draw the adverse inference that he misappropriated the remaining \$23,400 from his mother under his POA. Even though Leonard was not put on the Joint Accounts with his parents in Campbell River until the fall of 2008, the evidence establishes that his mother had a joint account with his father in Flin Flon [i.e., Account 235] and that Leonard could have accessed that account under the POAs executed in 2007. I am further satisfied, even though we do not know the full quantum of Leonard's parents' savings because of his non-disclosure, that his parents would have had sufficient savings to cover this amount of \$23,400. They were frugal, viewed their savings as a status symbol, received significant post-retirement incomes, had paid off their home in Flin Flon before retirement, and the account balances from 2011 show substantially more in savings than this sum. All of these facts alleviate the dangers articulated in *Wu v. Sun*, 2011 BCCA 239 at para. 41, that an adverse inference "cannot make something out of nothing". The objective, admissible evidence clearly shows that the mother had sufficient funds to cover a misappropriation of \$23,400 and, but for Leonard's non-disclosure and failure to provide a plausible alternative explanation of where these funds came from, I infer, in the circumstances, that these funds were misappropriated. Simply put, this is a reasonable inference on the facts before me.

- (b) Did Leonard misappropriate funds from his parents' accounts and/or the sale of the Flin Flon Property to purchase 1045 Fir Street?

[194] I also make the adverse inference that Leonard misappropriated \$70,000 from his mother in his capacity as her attorney in order to purchase 1045 Fir Street for his own benefit, and thereby breached his fiduciary obligations to her. I do so for four reasons.

[195] First, and foremost, Leonard has failed to account for the proceeds of sale from the Flin Flon Property and his mother's bank accounts at all material times leading up to the purchase of 1045 Fir Street. There is no evidence as to where the Flin Flon Property sale proceeds were put.

[196] Second, but for Leonard's non-disclosure and failure to account, it would be possible to ascertain where the proceeds of sale from the Flin Flon Property were deposited or whether Leonard made unauthorized withdrawals from his mother's accounts for his own benefit.

[197] Third, I find that the Flin Flon Property was sold for \$70,000 on October 22, 2008, and Leonard purchased 1045 Fir Street on October 28, 2008. I reject Leonard's contention that 1045 Fir Street was purchased before the Flin Flon Property was sold. It is conspicuous that the Flin Flon Property was sold just six days before the purchase of 1045 Fir Street. Moreover, the evidence shows that the financing for 1045 Fir Street had not been secured until after the Flin Flon Property was sold. The timing of the purchase and the procurement of financing call into question Leonard's assertion that Lisa paid the entire \$125,666.87 down-payment for 1045 Fir Street.

[198] Finally, Leonard neither provided a cogent explanation for how he purchased 1045 Fir Street, nor did he adduce any evidence to show where the down-payment actually came from. While Leonard testified he and Lisa received significant rental income from 1035 Fir Street, the evidence establishes this property was under renovations at the time 1045 Fir Street was purchased. I, therefore, reject Leonard's uncorroborated contention that they were receiving significant rental income from 1035 Fir Street. In the absence of corroborating evidence, coupled with my finding that Leonard was not a credible witness, I reject Leonard's unsubstantiated assertion that he "didn't put a penny down on the second house [1045 Fir Street]." I also note that Lisa could have been called as a witness on this point. If Lisa had indeed paid the entire down-payment, Leonard could have arranged for her to testify to this effect: see *Singh v. Reddy*, 2019 BCCA 79; *Rohl v. British Columbia*, 2018 BCCA 316.

[199] In light of the four considerations above, I have drawn the adverse inference that Leonard utilized the \$70,000 proceeds of sale from the Flin Flon Property under his mother's POA to pay a portion of the \$125,666.87 down-payment for 1045 Fir Street. I am not, however, prepared to infer that he misappropriated the remaining balance of the down-payment (\$55,666.87) from his parents, as the plaintiffs assert. I find the more likely explanation is that Lisa contributed this portion of the down-payment.

(c) Did Leonard make wrongful withdrawals from the Joint Accounts from 2011-2018?

[200] Leonard had fiduciary obligations with respect to the Joint Accounts, first under his mother's POA during her lifetime and then as the executor of her Estate after she passed on. I have already found that Leonard has not rebutted the presumption of resulting trust. Accordingly, he had no proprietary interest in these funds and he had important duties to uphold as his mother's attorney and then executor.

[201] Leonard was the only person, other than his parents, who had authority to withdraw money from the Joint Accounts. The evidence establishes that neither Leonard's mother nor father were in any condition to do their own banking during this time. I find that Leonard made all of the withdrawals in each of the Joint Accounts from 2011-2018.

[202] Between 2011 and 2018, Leonard made the following withdrawals from the Joint Accounts with his mother:

- (a) Account 796--\$2,528.78;
- (b) Account 401-- \$191,782.05;
- (c) Account 393--\$111,606.40 (closing balance of \$6,645.07 not included); and
- (d) Account 490--\$13,485.84.

TOTAL WITHDRAWALS: \$319,403.07

[203] The plaintiffs included in their tally of withdrawals, the closing balance in Account 393 of \$6,745.07. However, I have not done so since this sum appeared to not have been expended as of the date of trial. If this sum has since been expended, then it should be added to the withdrawals from the mother's accounts.

[204] Not all of the above withdrawals should be classified as misappropriations, as there are five classes of legitimate expenditures from these accounts. Leonard did not contest the plaintiffs' summation of the aggregated amounts withdrawn during this period. Instead, he contested the purpose of the withdrawals and claimed to own a portion of the funds withdrawn from Account 401 (which I have already rejected). The five categories of legitimate withdrawals are as follows.

- [205] First, \$6,361.22 of the above-noted withdrawals was evidently related to the mother's care home expenses at Evergreen Place. The plaintiffs properly concede that this expenditure constitutes a valid deduction. Second, a February 7, 2017 expenditure of \$3,017.40 relates to the mother's funeral costs. The plaintiffs properly concede that this cost constitutes a valid deduction. Third, the plaintiffs properly concede that the room and board expenditures for the parents, during this period, must also be accounted for. This would have included 16 months at \$2000 a month when both parents were alive, and 48 months (at most) at \$1000 a month for a total of \$80,000 for Mary's room and board. Fourth, Melissa explained at trial that there were \$13,028.18 in branch-to-branch transfers that did not constitute actual withdrawals from the Joint Accounts. The plaintiffs concede that such transfers must also be added to the appropriate withdrawals of funds by Leonard. Finally, Melissa stated at trial that her grandparents gave Leonard \$30,000 to purchase a truck; the plaintiffs conceded this expenditure.
- [206] Out of the \$319,403.07 in withdrawals upon the Joint Accounts from 2011-2018, only \$132,406.80 can be accounted for as legitimate expenditures. Leonard has not properly accounted for other expenditures in the Joint Accounts. Melissa made submissions on behalf of Leonard during closing arguments relating to other expenditures. The information she provided was not introduced into evidence and was, therefore, not tested by cross-examination. For example, she asserted that Leonard used the Joint Accounts to pay for his car insurance and that this was permitted by his parents. No receipts were provided and these expenses were not collated, summed-up, or quantified in any way. These submissions do not constitute admissible evidence and I reject them.
- [207] Leonard did not keep any records relating to his many withdrawals from his parents' accounts, and he provided no credible explanation for any other expenditures he incurred. After taking into account the legitimate expenditures drawn from the Joint Accounts from 2011-2018, Leonard is unable to account for the outstanding withdrawals totaling \$186,996.27. Notably, this sum includes the use of \$94,334.98 for the down-payment on the Braidwood Condo, which he made as an executor rather than an attorney, as will be addressed further below. Thus, the remaining unjustified withdrawals, many of which were cash withdrawals, total \$92,661.29.
- [208] In the absence of any evidence to the contrary, I infer these unauthorized withdrawals were put to Leonard's personal benefit. I will address the remedies that flow from the unauthorized withdrawals from 2011-2018 in greater detail below. For present purposes, it suffices to say that Leonard breached his fiduciary duty under his mother's POA when he misappropriated funds from the Joint Accounts and I find there is a direct causal nexus between his fiduciary position as an attorney and those withdrawals.
- (d) Did Leonard make wrongful withdrawals from his parents' accounts from 2008-2011?

- [209] The plaintiffs ask that I draw the adverse inference that monies were regularly misappropriated from the Joint Accounts each month in the period between November 2008 and September 2011, during which there are no available bank records. Leonard denies making any such withdrawals.
- [210] Although Leonard did not produce his parents' bank records prior to 2011 (or his own for that matter), his established pattern of making numerous cash withdrawals on the very same day deposits were made into his parents' accounts between 2011-2018, leads to the adverse inference and reasonable conclusion that he also misappropriated funds between 2008 and 2011. The inferential approach advanced by the plaintiffs mirrors the pattern of withdrawals in evidence over the seven-year period between 2011-2018. Month-after-month and year-after-year, between 2011-2018, when a deposit was made into a Joint Account, Leonard withdrew that same amount, often in cash. I have specifically reviewed the deposits and withdrawals in Account 401, Account 796, and Account 393. The pattern is clear: monthly deposits were withdrawn in total every month from these accounts. Indeed, in addition to withdrawing the total amount of deposits from the Joint Accounts during this period, Leonard also made additional withdrawals so as to virtually deplete his parent's savings altogether.
- [211] The plaintiffs submit that it is reasonable to infer that Leonard withdrew \$129,880 from the Joint Accounts between 2008 and 2011. They reach this figure by multiplying the parents' joint income of \$3820 (i.e., William's income of \$3,160, coupled with Mary's income of at minimum \$660 a month in OAS) for the 34 months between November 2008 and September 2011. In other words, they ask me to infer that Leonard was siphoning-off his parents' incomes as they were deposited into the Joint Accounts.
- [212] In light of these very unique set of circumstances, including Leonard's pattern of non-disclosure in this case, I find that an adverse and reasonable inference can be drawn, just as the plaintiffs submit. However, the cost of the parents' room and board during this period must not be overlooked, as it has only been calculated for the period from September 2011 to September 2018. The parents' room and board between November 2008 and September 2011 amounted to \$68,000 (34 months x \$2000 = \$68,000). Subtracting \$68,000 from \$129,888 yields the sum of \$61,888. As discussed above an attorney must account for their expenditures. Leonard has not done so, has therefore breached his fiduciary obligation, and must compensate the Estate for \$61,888 for this period of time.
- [213] I fully recognize the difficulty in this case in discerning the misappropriations at issue with certainty. I have done my best under the circumstances of significant non-disclosure to fairly assess and determine what occurred. Leonard may actually have withdrawn substantially more funds during this period if he encroached on his parents' capital rather than just the incoming funds, as he did from 2011-2018. Conversely, he may have withdrawn less than was being deposited into the Joint Accounts if his behaviour was not entirely consistent with his withdrawals between 2011 and 2018. It is impossible for me to delineate the exact amounts withdrawn in light of Leonard's egregious non-disclosure and

his failure to provide, or keep, records for his parents' accounts, as he was required to do as an attorney. Nevertheless, the adverse inference I have drawn strikes a balance between these two positions and is strongly supported by Leonard's well-established pattern of unexplained withdrawals from 2011-2018. In drawing this adverse inference, I am guided by the words of Justice Southin in *Le v. Milburn*, [1987] B.C.J. No. 2690 at para. 2 (S.C.):

When a litigant practices to deceive, whether by deliberate falsehood or gross exaggeration, the court has much difficulty in disentangling the truth from the web of deceit and exaggeration. If, in the course of the disentangling of the web, the court casts aside as untrue something that was indeed true, the litigant has only himself or herself to blame.

Strategic non-disclosure is a risky strategy, which typically attracts adverse consequences to the non-disclosing party: *Weintz v. Weintz*, 2014 BCCA 118 at para. 43. I find it is appropriate to do so in this case.

3. Did Leonard Breach his fiduciary obligations as an Executor?

[214] In *Sull*, Justice Voith reasons at para. 102, that executors are required to keep proper accounts and explain their expenditures:

[102] Thus, executors are required to provide full explanation to the court for all dealings with the property in an estate: *Bernhard v. Wist*, 2011 BCSC 101 at para. 99, R. 25-13(6) of the Supreme Court Civil Rules. Furthermore, executors are required to keep adequate and complete accounts and to provide an accounting to the beneficiaries, including receipts, upon request: *Coyne Estate*, 2017 BCSC 493 at para. 49. An executor who cannot satisfactorily account will be held liable.

[215] Leonard has discretionary control over his mother's Estate as its executor. As an executor is a fiduciary, he must act honourably and with the utmost loyalty to the beneficiaries of the Estate, which includes Caroline's beneficial half-interest in the Estate. Moreover, Leonard has a duty to act in a manner consistent with his mother's Will and to not use the Estate for his own benefit. A fiduciary must relinquish their self-interest: *Galambos*, at para. 78.

[216] Leonard has clearly not met his fiduciary obligations as the executor of the Will, which included protecting Caroline's interest as an equal beneficiary. Leonard was in breach of his duties as an executor when, after his mother's death, he failed to produce the Will to Caroline, to disclose or account for the monies in his mother's bank accounts, used his mother's monies in the Joint Accounts for his own purposes and then attempted to hide that fact. Leonard withdrew \$107,000 from Account 401 to purchase the Braidwood Property and make other miscellaneous purchases for his own use, and arranged to hold that property jointly with Melissa. Were it not for court orders directing that the bank transactions surrounding the purchase of the Braidwood Property be disclosed by the banks, this specific misappropriation from Account 401 would not have come to light.

4. What are the appropriate remedies for Leonard's breaches of fiduciary duty?

[217] The Supreme Court of Canada has consistently reaffirmed that equitable remedies, including the host of equitable remedies available for a breach of fiduciary duty, are subject to the court's discretion: *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 at para. 74. Moreover, they are highly fact-specific and flexible, allowing the court to do justice "in all the circumstances of the case": *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at para. 34.

[218] The plaintiff's Second Further Amended Notice of Civil Claim seeks, among other things, the following relief related to the breach of fiduciary duty claims:

- (i) A declaration that Leonard holds "the Assets and any share of proceeds and/or property acquired with those proceeds" pursuant to a constructive trust;
- (ii) Disgorgement of any profits retained by Leonard under the POA or as executor;
- (iii) "Damages" for breach of fiduciary duty; and
- (iv) An order that Leonard account for all monies under the POA and other property legally and beneficially owned by the Estate.

I address each of these proposed remedies in turn.

(a) Constructive trusts

[219] The plaintiffs seek the imposition of two constructive trusts for the benefit of the Estate: 1) the net proceeds of sale from the Fir Street Properties presently being held in trust at Tees Kiddle Spencer LLP pending a court order or further agreement of the parties; and 2) over Leonard's interest in the Braidwood Property.

[220] A remedial constructive trust can be imposed when there has been a breach of fiduciary obligations if the following four conditions are met:

- (i) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
- (ii) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
- (iii) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
- (iv) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. (*Soulos*, at para. 45)

[221] I am satisfied that a constructive trust should be imposed over the proceeds of sale for 1035 Fir Street. I have inferred that Leonard misappropriated \$23,400 from his mother as her attorney, to pay for part of the down-payment he placed on 1035 Fir Street. In the absence of any evidence as to the path these funds may have taken, as a result of Leonard's failure to

account and disclose all relevant financial information, I am satisfied that those funds can be traced into 1035 Fir Street and then into the proceeds of sale now held in trust. I am satisfied that a proprietary remedy is necessary and that a money award would be insufficient in the circumstances because the plaintiffs will face exceptional difficulty enforcing a pecuniary judgment against Leonard: *Tracy v. Instalogs Financial Solutions Centres (B.C.) Ltd.*, 2010 BCCA 357 at paras. 35-36; *Kerr v. Baranow*, 2011 SCC 10 at paras. 52-53. The evidence shows that Leonard has a history of attempting to dispose of his assets and obfuscate his dealings. For example, Leonard put the Fir Street Properties on the market shortly after Caroline initiated her claim; he also purchased the Braidwood Property soon after. Finally, as Lisa has already been paid her share from the proceeds of sale for 1035 and 1045 Fir Street, and there are no creditors or other third parties that would be adversely impacted by the imposition of a constructive trust in favour of the Estate. As such, I find that it would not be unjust to impose a constructive trust in regard to the sale of 1035 Fir Street.

[222] I am also satisfied that a constructive trust should be imposed over the proceeds of sale for 1045 Fir Street. I have found that Leonard misappropriated \$70,000 from the Flin Flon Property as an attorney and that those funds were used to partially cover the down-payment for 1045 Fir Street. In light of the lacuna created by Leonard's failure to account and disclose all records for the sale of the Flin Flon Property and the purchase of 1045 Fir Street, I am satisfied that \$70,000 can be traced into 1045 Fir Street and then into the proceeds of sale held in trust. For the reasons articulated above, I am also satisfied that a proprietary remedy is necessary in regard to this property and that it would not be unjust to impose a constructive trust.

[223] A constructive trust should also be imposed over the Braidwood Property. The monies withdrawn from Account 401 to purchase the Braidwood Property belonged to the Estate. Those funds can be traced into the Braidwood Property through the following circuitous route taken on March 12, 2018:

- (a) Leonard Opened Account 690 with his daughter at CIBC on March 12, 2018;
- (b) The amount of \$107,007.50 was withdrawn from Account 401 on March 12, 2018, pursuant to a bank-to-bank transfer at RBC;
- (c) Leonard then issued a cheque to his daughter for \$107,000, also on March 12, 2018 from an undisclosed account with RBC in Courtenay;
- (d) That cheque was deposited into Account 690 at CIBC, held between Leonard and Melissa;
- (e) Bank records show that \$94,334.98 was withdrawn on May 29, 2018 and Leonard admitted this amount was used to the purchase of the Braidwood Property; the remaining misappropriated funds in Account 690 were put to miscellaneous purchases.

[224] I am satisfied, that the funds used from Account 690 were the same funds that originated from Account 401. Indeed, Leonard admitted that he used the funds from Account 401, placed them in Account 690, and used these funds to purchase the Braidwood Property. I am also satisfied that a money award is not appropriate in the circumstances and a propriety interest is necessary for the same reason I articulated above. On the evidence before me, there are no factors that would render the imposition of a constructive trust over the Braidwood Property unjust in all the circumstances.

[225] The remaining issue is whether the quantum of these three constructive trusts should reflect only the misappropriated funds that can be traced into the respective properties or whether they should also include the appreciated value of those properties.

(b) Disgorgement

[226] The plaintiffs also seek the disgorgement of the profits Leonard made from the sale of 1045 Fir Street and 1035 Fir Street, as well as the increase in value of the Braidwood Property since it was purchased in 2018.

[227] 1035 Fir Street was purchased for \$250,000 in June 2008 and was sold for \$380,000 on March 29, 2018, generating a gross profit of \$130,000. Likewise, 1045 Fir Street was purchased for \$225,000 in 2008 and was sold for \$339,000 on March 29, 2018, for a gross profit of \$114,000. After expenses and Lisa's interests were paid out (by agreement between the parties), Leonard's portion of the sales of 1035 and 1045 Fir Street are held in trust and total \$208,023.73.

[228] The Braidwood Property was purchased for \$173,500 on May 31, 2018. The plaintiffs point to the 2020 BC Assessment Value of \$198,300, as evidence that the Braidwood Property appreciated by roughly \$24,000. However, I am not able, as a matter of law, to rely on a BC Assessment as a viable assessment of a property's value: *Dosanjh v. Liang*, 2015 BCCA 18; *Tekamar Mortgage Fund Ltd. v. Hegel*, 2018 BCSC 1369 at para. 35. In *Dosanjh*, at para. 63, Justice Groberman for the majority reasoned that "there is, absent agreement, no scope for using assessments [BC Property Assessments] in place of expert opinion evidence in cases such as the present one". Similarly, in *Tekamar*, Justice Butler, then of this Court, reasoned as follows:

[35] Before leaving this argument, I should comment on the appellant's reliance on the BC Assessment values for the Property. I agree that the much higher value shown in the annual assessments in comparison with the sale price raises a question for the Court. However, the assessments do not provide admissible evidence of value: *Dosanjh v. Liang*, 2015 BCCA 18. Accordingly, I must consider the real evidence of value and that includes not only the appraisals but the historical evidence about the attempts to sell the Property. I am not persuaded that in these circumstances the annual assessments provide reliable, let alone admissible, evidence of value.

[Emphasis added]

- [229] I am sympathetic to the plaintiffs' assertion that the Braidwood Property has appreciated in value since it was purchased. However, as BC Property Assessments are not an admissible form of evidence for property values in a civil case, I am not in a position to make a finding on any appreciation in value at this time
- [230] I urge the parties to come to an agreement on the current market value of the Braidwood Property or to agree on a joint appraisal. Should the parties not be able to agree, they may appear before a registrar to assess the value of this property and the disgorgement amount regarding the appreciated value of this property. Alternatively, the parties have leave to appear before me and to tender a proper expert appraisal within 45 days of this judgment, or at a later date as they may otherwise agreed in writing.
- [231] The two remaining disgorgement issues are: (1) whether Leonard should be forced to disgorge the profits from the increased value of the properties; and (2) if so, whether disgorgement should be achieved via a money award or be incorporated into the constructive trusts.
- [232] The equitable remedy of disgorgement serves two purposes, one is restitutionary and the other prophylactic: *Strother*, at paras. 75-77. The restitutionary component of disgorgement aims to restore to the aggrieved party the benefits that they otherwise would have enjoyed, such as when a fiduciary usurps a business opportunity or purchases a property that otherwise would have gone to the beneficiary. The prophylactic rationale aims to deter faithless behaviour and preserve the sanctity of fiduciary relationships by forcing the fiduciary to disgorge all profits obtained from their breach. Prophylactic disgorgement arises even in circumstances where the beneficiary has suffered no loss. This can often result in a windfall for the plaintiff. As Justice Binnie noted in *Strother*, at para. 77, the prophylactic objective of disgorgement and stripping the fiduciary of their ill-gotten gains "advances the policy of equity, even at the expense of a windfall to the wronged beneficiary".
- [233] I agree with the plaintiffs that Leonard must disgorge his profits from the appreciated value of the properties. Leonard should not profit from breaching his fiduciary obligations. He must disgorge all profits arising from those breaches, even if this would result in a slight windfall to the Estate. The prophylactic objective of disgorgement necessitates that fiduciaries should not be allowed to profit from their wrongdoing. I am mindful of Justice La Forest's commentary in *Hodkinson*, at 444 that "equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behaviour." However, in these circumstances, I am satisfied this has not occurred and, further, that the ends of justice favour disgorgement.
- [234] Where a fiduciary has retained profits by breaching their fiduciary obligations, they can be disgorged of their profits in one of two ways: (1) by imposing a personal debt on the fiduciary, thereby requiring them to repay the unjustified gain; or (2) by imposing a constructive trust requiring the fiduciary to transfer the gain to the aggrieved party (Kyle

Estate v. Kyle, 2017 BCCA 329 at para. 37). The use of remedial constructive trusts for disgorgement in the breach of fiduciary duty context is well-established: e.g., Solous. As John McCamus and Peter Maddaugh note in *The Law of Restitution*, loose-leaf (Toronto: Thomson Reuters, 2020) at 27:500, "a principal may assert a proprietary claim not only for misappropriated assets, but for property and opportunities which the fiduciary has deflected and captured for personal benefit."

- [235] In my view, the quantum of the constructive trusts imposed over the proceeds of sale from both Fir Street Properties should reflect both the misappropriated funds used to purchase the properties and Leonard's share of the profits from the appreciated value of those properties; both are causally linked to Leonard's fiduciary breaches. Leonard's mother, and the Estate as a result, were deprived of the use of the funds Leonard misappropriated to purchase the two properties. Moreover, the prophylactic rationale for disgorgement mandates that Leonard should not benefit from the profits arising from his use of the misappropriated funds. There is a direct proprietary nexus between the misappropriated funds traced into 1035 and 1045 Fir Street and the profits that were generated as a result.
- [236] Notably, the evidence before me clearly indicates that Lisa, Leonard's former partner, had some interest in both 1035 Fir Street and 1045 Fir Street, and that she has now received an equal portion of the proceeds of these sales. Leonard's portion of both sales is \$208,023.73 and is currently being held in trust at Tees Kiddle Spencer LLP pending this litigation. When cross-examined on the amount of money held in trust, Leonard testified that he was clear that his portion of the funds in trust from the sale of both Fir Street Properties was \$220,000, before the deduction of fees.
- [237] The constructive trust in favour of the Estate over the proceeds of sale for 1035 Fir Street will be for \$77,356.06. I arrive at this figure by adding the misappropriated funds that can be traced into 1035 Fir Street (\$23,400) and Leonard's net recovery of half of the appreciated value of 1035 Fir Street (\$53,956.06). As Leonard and Lisa have split the proceeds of sale by agreement of the parties, I assume that Leonard and Lisa also split all real-estate and legal fees incurred in the sales of the Fir Street Properties equally. Leonard's gross half of the appreciated value for 1035 Fir Street was \$65,000 (\$130,000 divided by half). A March 28, 2018 letter to plaintiffs' counsel from Tees Kiddle Spencer LLP shows that Leonard's half of the real estate fees incurred for selling 1035 Fir Street was \$10,293.94 (\$20,595.87 divided by half). The same document indicates that Leonard's share of the legal fees was \$750 (\$1,500 divided by half). Leonard's share of the total known expenses for the sale of 1035 Fir Street are \$11,043.94. Therefore, \$53,956.06 (\$65,000 - \$11,043.94) is the best assessment of Leonard's one-half share of the \$130,000 appreciated value of 1035 Fir Street, less half of the real-estate and legal fees incurred in the sale. Thus, \$77,356.06 of the \$99,546 being held in trust from the sale of 1035 Fir Street is now held on constructive trust for the Estate. The Estate is at liberty to recover those funds immediately by calling for the constructive trust under the rule in *Saunders v. Vautier* (1941), 41 E.R. 482. The remainder of the funds in trust also belong to the Estate; the remaining balance of the funds held by Tees Kiddle

Spencer LLP, totaling \$22,189.94, is subject to a charging order, as discussed later in these reasons (i.e., \$99,546 - \$77,356.06 = \$22,189.94).

[238] The constructive trust in favour of the Estate over the proceeds of sale for 1045 Fir Street will be for \$108,477.64. Leonard's half of the gross appreciated value of 1045 Fir Street was \$57,000 (\$114,000 divided by 2). Leonard's share of the real estate fees, according to the aforementioned letter from Tees Kiddle Spencer LLP, was \$9,541.84 (\$19,083.69 divided by 2) and his share of the legal fees was \$750 (\$1,500 divided by 2). The best available information suggests that Leonard's net recovery of the appreciated value of 1045 Fir Street is \$46,708 (\$57,000.00 - \$10,291.84). As the quantum of Leonard's net half of the proceeds of 1045 Fir Street (\$46,708) and the misappropriated funds used for the down-payment (\$70,000) exceed the funds held in trust, the Estate will also have a money judgment against Leonard in debt for the difference of \$8,230 (\$116,708 - 108,477 = \$8,230). In effect, all of the funds presently held in trust from the sale of 1045 Fir Street are now held on constructive trust for the Estate and the Estate is entitled to recover the \$8,230 shortfall from Leonard in debt to disgorge his remaining unlawful profit.

[239] The constructive trust in favour of the Estate over the Braidwood Property is set at \$94,334.98 (the amount withdrawn from Account 690 for the Braidwood Property). As Leonard must disgorge all profits resulting from breaching his fiduciary obligations as the executor of the Estate, the quantum of this constructive trust may be subsequently increased if the parties come to an agreement or tender admissible evidence as to the appreciated value of the Braidwood Property.

(c) Equitable Compensation for Breach of Fiduciary Duty

[240] The plaintiffs are entitled to equitable compensation for Leonard's breaches of fiduciary duty to the extent that they are not made whole by the constructive trusts established above. As Justice Newbury noted in *Tracy v. Instalogs Financial Solutions Centres (B.C.) Ltd.*, 2010 BCCA 357 at para. 49, "only full recovery by one route (in personam or in rem relief) will eliminate the other" [emphasis original].

[241] Here, the plaintiffs do not have full recovery of the funds that have been misappropriated from them by Leonard via the in rem remedies afforded by the constructive trusts set out above. The funds traced into the properties do not remedy the full quantum of withdrawals Leonard made upon the Joint Accounts. Moreover, in my view, the profits disgorged under the prophylactic principle do not count towards the plaintiffs' restitutionary interest and they are analytically distinct claims, with no overlap as the restitutionary measure awarded for misappropriated withdrawals only compensates for what was lost. While disgorgement necessarily results in a windfall to the plaintiffs, I am satisfied that it is justified in this case because the plaintiffs were deprived of the use of those funds and the prophylactic rationale for disgorgement necessitates that Leonard be stripped of his ill-gotten gains: *Strother*, at para. 77. If Leonard was only obliged to disgorge his profits or pay restitution for the money he misappropriated, he would in effect be rewarded for breaching his

fiduciary obligations. Thus, in my view, justice demands that Leonard give up his unlawful profits and pay full restitution for the funds he misappropriated.

[242] It is well established law that the proper approach to equitable compensation for breach of a fiduciary duty is restitutionary in nature: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 383. That is, the plaintiffs are entitled to be put in as good as position as they would have been in had the breaches not occurred. Where there is no property which can be restored, the Court may award compensation in lieu of restitution in specie: *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 at 539. Accordingly, the plaintiffs must be restored, so far as is possible, to the position they would be in if the fiduciary breaches had not occurred.

[243] Leonard must compensate the Estate for the unauthorized withdrawals from 2011-2018 (\$92,661.29, which excludes the \$94,334.98 for the Braidwood Property) and 2008-2011 (\$61,888, which does not include the \$23,400 for the purchase of 1035 Fir Street). I, therefore, award the Estate \$154,549.29 in equitable compensation.

[244] It is noteworthy that at the time of trial, the evidence indicated that there was a closing balance on Account 393 of \$6,645.07 in 2018 which had not been spent; assuming this sum has not been spent, it remains part of the Estate. If it has been spent by Leonard since 2018, this amount should be added to the quantum of the compensatory money award above.

(d) Full Accounting

[245] It is patent that Leonard failed to meet his duty to keep accounts. In *Sull*, Justice Voith reasoned, at para. 116, that only the donor/grantor of the POA, or their estate, may apply to have the attorney provide a full accounting of their activities as attorney. Of course, the difficulty in this case is that Leonard is also the executor of the Estate and he has failed to meet his obligations in that regard as well. Caroline now brings this claim on behalf of the Estate.

[246] In *Sull*, Justice Voith concluded that the plaintiff properly applied to bring the action on behalf of the mother's estate and sought a full accounting. In *Chapman v. Watson*, [1985] B.C.J. No. 914 (S.C.), Justice Dohm ordered an accounting and directed that the funds that were not properly expended under the POA would have to be repaid to the estate. He reasoned that an accounting would be "rather simple" and the banking documents "seem to be complete." He also underscored, at para. 34-35, that all expenditures by the POA had to be for the benefit of the grantor only and not the attorney.

[247] In this case, however, the banking records are far from complete, as is the remainder of the documentary record relating to numerous deposits and expenditures. As such, despite pleading for an accounting remedy, counsel for the plaintiffs submit that a formal accounting remedy would be unduly expensive given the relative size of the estate and, further, would be unlikely to add further value given Leonard's poor record keeping and non-disclosure. I agree. An accounting, beyond what has already been done in this

judgment, is unnecessary.

5. Should an equitable charging order be given in favour of the Estate over remaining proceeds of sale held in trust for 1035 Fir Street?

[248] In light of my analysis above, Tees Kiddle Spencer LLP holds \$22,189.94 that is not accounted for or included in the constructive trust over the proceeds of sale for 1035 Fir Street (i.e., \$99,546-\$77,356.06). The plaintiffs have requested that any remaining funds held in trust be rendered exigible by way of attachment. In essence, they seek to be able to enforce their compensatory and debt judgment contained herein against those monies.

[249] An equitable charging order typically issues where funds have been already paid into court (see e.g., *HMTQ v. Millar*, 2006 BCSC 734, *aff'd* 2007 BCCA 401). However, as noted in *Accredit Mortgage Ltd. v. Grealy*, 1999 CanLII 5698 at para. 17 (B.C.S.C.), "it appears that the very purpose of equitable execution is to defeat hindrances" with conventional, that is to say legal, execution. Though equitable charging orders are usually made via an order nisi with a six-month delay for potential creditors to come forward to contest the funds, the order may be made absolute if the court is satisfied there are no other equities which might be attached to those funds: *Chima v. Hayduk* (1976), 10 B.C.L.R. 30 (B.C. Co. Ct). I am so satisfied, as discussed below.

[250] The funds in question here are being held subject to the outcome of this litigation and pending further court order. I am satisfied that these assets are not presently exigible by conventional legal means. Moreover, I am mindful that the Estate will need to pursue subsequent applications to enforce this judgment if the remaining funds held in trust are not charged. I am satisfied that there are no other potential creditors or other parties in these circumstances that could attach an interest to the funds held in trust; the mortgages have all been paid out and Lisa has already received her net share of the proceeds. Accordingly, I grant an equitable charging order absolute in favour of the Estate for the remaining \$22,189.94 held in trust by Tees Kiddle Spencer LLP.

6. Does Leonard's pre-litigation conduct warrant punitive damages?

[251] The plaintiffs submit that Leonard's conduct should attract punitive damages.

[252] In *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 94, the Supreme Court of Canada set out the following criteria for assessing whether punitive damages are warranted:

- (1) Punitive damages are very much the exception rather than the rule, (2) imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be

unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient. [Emphasis in original]

[253] I have considered each of these factors and have concluded that punitive damages are not necessary given the very unique circumstances of the defendant in this case. In almost any other circumstance, Leonard's egregious pre-litigation conduct, both as an attorney and an executor, would be sufficient to invoke punitive damages. He took advantage of his mother's trust, when she was in a highly vulnerable position and relied upon him for assistance with her banking and other financial affairs. Leonard also acted in a manner deserving of condemnation and rebuke as the Estate's executor, when he refused to disclose the Will and misappropriated funds from the Estate. These sorts of reprehensible conduct are worthy of condemnation and rebuke. Nevertheless, I am mindful of Leonard's unique circumstances. He is retired and currently in poor health, with diabetes, amputations, and poor eyesight. He is approaching his 70s and has a fixed income, receiving a modest pension. I am satisfied that the remedies provided for in these reasons will, in all likelihood, in and of themselves, have a profound and negative effect on Leonard's life and lifestyle. While, ultimately, punitive damages are not compensatory in nature; they are intended to punish the wrongdoer. If Leonard were a younger, working man, I would not hesitate to award punitive damages to further punish his pre-litigation behaviour. However, in these very unique circumstances, I am not satisfied that punitive damages are necessary to rebuke and deter Leonard's misconduct. The remedies afforded in these reasons are sufficient in my view to address the underlying policy rationales for punitive damages.

7. Does Leonard's litigation conduct warrant special costs?

[254] While punitive damages speak to the defendant's pre-litigation conduct, special costs address a party's behaviour during the course of the litigation: *Kyle Estate*, at para. 46; *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 129-134. It is open for a plaintiff to claim both punitive damages and special costs because they engage different temporal periods and, therefore, analytically distinct conduct, despite overlap in their shared rationale in punishing and deterring reprehensible conduct that demands rebuke and condemnation. In *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2018 BCSC 1831 at para.

56, Justice Gomery observed as follows:

- [56] It is not even clear that punitive damages and special costs are wholly inconsistent remedies. In the leading case of *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 [Whiten], both were awarded at trial and the Supreme Court upheld the award of punitive damages. The better view seems to be that one form of punishment being ordered weighs in the exercise of the court's discretion when another form is under consideration in respect of the same conduct; see Whiten at para. 94, items (4) and (5).

Thus, when considering whether to award special costs and punitive damages concurrently, the court should consider the impact of one on the other. I have declined to award punitive damages here in part because of the impact a special cost award will have on Leonard.

- [255] Leonard's egregious non-disclosure and wanton disregard for interlocutory orders in this litigation is reprehensible and deserving of condemnation in the form of special costs. This litigation was considerably more arduous than it needed to be; the fact finding process was materially impaired by Leonard's flagrant disregard for his disclosure obligations. While material non-disclosure on its own may be insufficient to attract special costs, there are certain circumstances in which the non-disclosure is so egregious that it is obstructive in its purpose and result: see *Sull v. Pengelly*, 2019 BCSC 1565 paras. 31-35; *Manning v. Dhalla*, 2019 BCSC 1514; *Pirani v. Pirani*, 2020 BCSC 1711 50-62. In this case, the entire trial was tainted by Leonard's non-disclosure. Only near the end of the trial did Leonard produce his father's POA and a document confirming that his mother had also given her POA to Leonard. It also became evident at this time that Leonard had financial records at his residence which he had not disclosed, despite his previous claim that he never kept any financial records. I find that Leonard's non-disclosure during this litigation was deliberate and calculated, thereby deserving of a special costs award.

E. Conversion

- [256] The plaintiffs plead the tort of conversion. They seek a declaration that Leonard "converted funds" from Mary and the Estate, and the damages that flow from the alleged conversion. The plaintiffs submit that Leonard's "withdrawals from the joint accounts constitute conversion of the Deceased's funds." They rely on *Egger v. Dessureault*, 2010 BCSC 880 at para. 109, which in turn cites *Ast v. Mikolas*, 2010 BCSC at para. 126, for the proposition that funds held in a bank account "can be the subject of conversion and that a defendant who takes money without the plaintiff's consent and uses it for his or her own purposes has committed the tort of conversion."
- [257] I have trouble accepting that funds held in a bank account are capable of giving rise to a tort claim for conversion for three reasons.
- [258] First, and foremost, the tort of conversion only applies to "goods". As Justice Iacobucci held in *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727 at para. 31, the tort of conversion "involves a wrongful interference with the goods of another,

such as taking, using these goods in a manner inconsistent with the owner's right of possession" [emphasis added]. The requirement that conversion applies to the "goods" of another has been subsequently reaffirmed by the Supreme Court of Canada in 373409 Alberta Ltd. v. Bank of Montreal, 2002 SCC 8 at para. 8 and Teva Canada Ltd. v. TD Canada Trust, 2017 SCC 51 at para. 3.

- [259] Second, it is well-established that bank accounts do not fall within the ambit of "goods". A bank account is legally classified as a debt: Citadel General Assurance Co. v. Lloyds Bank Canada, [1997] 3 S.C.R. 805 at para. 29. As Justice Newbury aptly noted in Bergen v. Bergen, 2013 BCCA 492 at para. 39, "[o]bviously, a depositor's interest in a bank or investment account is a chose in action: the depositor is a creditor, and the bank or other depository is a debtor that is bound, subject to the terms of the agreement between them, to pay over the balance in the account on demand." A bank account, as a chose in action, is undoubtedly a species of property: Lipkin Gorman v. Karpnale Ltd., [1991] 3 W.L.R. 10 at 28-29 per Lord Goff of Chieveley [U.K.H.L], cited with approval by the Supreme Court of Canada in Citadel, at para. 29. However, it is a form of intangible property and intangibles have historically fallen outside the ambit of "goods."
- [260] According to legal scholar, Philip Osbourne, the "accepted position in Canada" is that conversion "only applies to tangible personal property such as goods" and it "does not apply to intangible property such as contractual rights or other choses in action": The Law of Torts, 6th ed. (Toronto: Irwin Law, 2020) at 330-331. A similar conclusion was reached in England by the House of Lords in OBG v. Allan, 2007 UKHL 21, wherein the majority upheld that the tort of conversion is confined to tangible chattels and does not apply to choses in action or other intangible property.
- [261] Third, if bank accounts were directly convertible, there would have been no need for the common law to carve out a principled analytical exception for cheques and other negotiable instruments as the proper subject of a conversion claim. In Arrow Transfer Company Limited v. Royal Bank of Canada (1971), 19 D.L.R. (3d) 420 at 435 (B.C.C.A.), the Court of Appeal reproduced the following passage from Lord Denning (then L.J.) in "The Recovery of Money":

An action for conversion is now allowed to the person whose account a cheque is drawn without his authority. Wherever a man's cash at a bank is misappropriated by means of cheque drawn on his account, he has an action for conversion of the cheque. In such cases the plain fact is that the owner of the money -- the cash at the bank -- is suing for conversion of the money: but as the common law knows of no action for conversion of money, resort is had to the device of an action for conversion of the cheque by which the money is obtained. [emphasis added]

It is trite law that a cheque and other bills of exchange are classified as chattel: Boma, at para. 82. Accordingly, the rightful holder of a cheque can bring a conversion claim if the cheque is wrongfully disposed of: 373409 Alberta, at para. 8. While a cheque is clearly a chattel and within the ambit of goods, there would be no need for this exception if the bank account itself could be the subject of a conversion claim.

[262] It is difficult to reconcile Egger, as well as more recent cases such as Reliable Mortgages Investment Corp. v. Chan, 2016 BCSC 405 and McKnight v. Hutchison, 2019 BCSC 944, where funds in bank accounts have been held to be convertible, with appellate authorities and first principles. Moreover, I am hesitant to engage in an analysis to determine whether I am bound by the Egger line of authorities, since it unnecessary for me to do so in this case. I have already found that the plaintiffs are entitled to equitable compensation for breach of fiduciary duty.

[263] The question of whether our Court is bound by the more recent line of authorities is best left for another day and another court: see Re Hansard Spruce Mills Limited, 1954 CanLII 253 (B.C.S.C.).

F. Unjust Enrichment

[264] In light of my finding on breach of fiduciary duty, it is unnecessary for me to consider the allegations of unjust enrichment. The plaintiffs' remedies as outlined above will fully compensate them.

G. Undue Influence

[265] Based on my above analysis, it is unnecessary for me to determine whether Leonard exerted undue influence over his mother.

H. Passing Over the Executor

[266] Leonard is the primary executor under the Will. I have found that he has breached his fiduciary duty in several ways by misappropriating funds and investing them for his own benefit. Further, he has not made proper disclosure, he has not taken steps to obtain an estate grant, and he has not accounted for his dealings with the Estate. It is clear that Leonard is in no position to represent the Estate as its executor.

[267] Leonard's role as executor of the Will is hereby suspended. Caroline is the alternate executor appointed under the Will. The parties indicated at trial that they may very well agree to an independent third-party executor. Accordingly, they are to appear before me to appoint a new executor within 60 days of this judgment, or at a time that the parties may otherwise agree in writing, to address this matter. If they are unable to agree on who the new executor will be, Caroline may make an application before me to be appointed as the alternate executor under the Will, within 60 days of this judgment, or at a time that the parties may otherwise agree in writing.

I. Approving the Will in Solemn Form

[268] Section 37(1) of WESA establishes the formal requirements for a valid will:

37 (1) To be valid, a will must be

- (a) in writing,
- (b) signed at its end by the will-maker, or the signature at the end must be acknowledged by the will-maker as his or hers, in the presence of 2 or more witnesses present at the same time, and
- (c) signed by 2 or more of the witnesses in the presence of the will-maker.

[269] The evidence before me satisfies each of these statutory criteria. I am also satisfied that the mother possessed the requisite testamentary capacity and that she knew and approved of her Will's contents in 2007 when her Will was executed: see *Leung v. Chang*, 2013 BCSC 976 at para. 28. Indeed, no evidence was led to the contrary and the parties agreed that the mother's Will, entered as an exhibit, was valid.

[270] As noted earlier, the Will provides that the mother's estate is to be distributed to the father with a gift over to Caroline and Leonard in equal shares should the father predecease the mother. The Will was prepared for and witnessed by Mr. Paul Bishop, a lawyer based in Flin Flon, Manitoba. The Will was accompanied by a sworn declaration by Mr. Bishop confirming, among other things, that:

- (a) he knew the mother;
- (b) he witnessed the mother execute the Will; and
- (c) prior to its execution, the Will was read over to the mother, who had knowledge of its contents and appeared to clearly understand it.

[271] The Will meets the formal requirements of s. 37 of WESA. Furthermore, the sworn declaration of Mr. Bishop confirms the applicability of the presumption of testamentary capacity, knowledge, and approval articulated in *Leung*.

[272] Accordingly, I find the Will proven in solemn form. However, as discussed earlier in these Reasons, Leonard's role as primary executor of the Will is suspended until the appointment of a new executor.

V. SUMMARY OF DISPOSITION

[273] I make the following orders:

- (a) Leonard's role as executor of the Estate is suspended until a new executor is appointed, as set out earlier in this judgment;

- (b) Leonard will pay the Estate \$154,549.29 in equitable compensation for his wrongful withdrawals from the Joint Accounts during the period from 2008-2018; if the sum of \$6,745.07 was withdrawn from Account 393, this amount shall be added to the award of \$154,549.29;
- (c) Tees Kiddle Spencer LLP now holds \$77,356.06 on constructive trust in favour of the Estate in respect of the proceeds of sale for 1035 Fir Street; the Estate is at liberty to call for this sum, currently held in trust, once a new executor of the Estate is appointed;
- (d) Tees Kiddle Spencer LLP now holds \$108,477.64 on constructive trust in favour of the Estate in respect of the proceeds of sale for 1045 Fir Street; the Estate is at liberty to call for this sum, currently held in trust, once a new executor of the Estate is appointed;
- (e) The Estate will have an equitable charging order absolute over the remaining \$22,189.94 held in trust by Tees Kiddle Spencer LLP from the sale of 1035 Fir Street; this sum may be taken in satisfaction of this judgment directly, once a new executor of the Estate is appointed;
- (f) The Estate is entitled to a constructive trust over the Braidwood Property for \$94,334.98. In addition, the Estate is entitled to the appreciated value of the Braidwood Property and may make additional submissions as to its appreciated value as set out earlier in this judgment (note: the remainder of the \$107,007.50 misappropriated from Account 401 is accounted for in the sum of \$154,549.29 set out in sub-paragraph "(a)" above);
- (g) The Estate will have judgment against Leonard in debt for \$8,230 for the disgorgement of Leonard's remaining profits from 1045 Fir Street that have not been accounted for in the constructive trust, over the said proceeds of sale; and
- (h) Leonard will pay the Estate's special costs, to be determined by the Registrar.

[274] In summary, the total quantum of recovery, is \$442,943.85, plus the appreciated value to be assessed in regard to the Braidwood Property and, in addition, special costs.

[275] I will remain available to facilitate the implementation of this judgment as necessary.

"MORELLATO J."

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