

CANADA / JUDGMENT

Stevens v. Esak

2025 BCSC 331

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 331 Stevens v. Esak

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stevens v. Esak,

2025 BCSC 331

Date: 20250228

Docket: S224797

Registry: New Westminster

Between:

Michael Wilhelmus Stevens

Plaintiff

And

Patricia Esak in her personal capacity, Patricia Esak in her capacity as Executor of the Estate of Arthur John Stevens, and the Estate of Arthur John Stevens

Defendants

-And-

Docket: S241283

Registry: New Westminster

Between:

Patricia Esak

Plaintiff

And

Michael Stevens and Dana Stevens

Defendants

Before: The Honourable Justice Schultes

Reasons for Judgment

Counsel for M. Stevens and D. Stevens:

G.K. Randhawa

Counsel for P. Esak:

R.W. Howarth

Place and Date of Trial:

Abbotsford, B.C.

February 5-9, 12-13, 2024

New Westminster, B.C.

February 14, 2024

Date of Written Submissions of M. Stevens:

February 23 and March 6, 2024

Date of Written Submissions of P. Esak:

March 4 and 5, 2024

Place and Date of Judgment:

New Westminster, B.C.

February 28, 2025

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Introduction

- [1] This trial involved two actions that were heard together
- [2] In the first action, the plaintiff Michael Stevens ("Mike") seeks to set aside or vary the will of his late father Arthur Stevens ("Art"), which excluded him on the basis of alleged abusive behaviour towards his father, and because he was already to receive an equal share of a property of which he was a joint tenant.
- [3] He contends that Art did not have the capacity to make a will, because of the effects of his terminal illness, and that he was unduly influenced in the making of it by the defendant Patricia Esak ("Pat"), who claims to have been Art's common law spouse.
- [4] If the will is found to be valid, he argues that it does not make adequate provision for him as an adult child, and does not reflect his agreement with Art and Pat that he would ultimately inherit both of their shares in that property, in return for contributing to the mortgage and other property expenses.
- [5] Based on the same concerns about lack of capacity and undue influence, he also disputes the legitimacy of a purported transfer to Pat of Art's interest in that property, which was executed shortly before Art's death and which reduced his interest in the property upon that death.

- [6] More generally, he takes the position that Art and Pat were never in a marriage-like relationship, so as to make her a spouse for the purposes of the Wills, Estates and Succession Act, or in the event of an intestacy.
- [7] In the second action, Pat claims that following Art's death, Mike and his wife Dana destroyed two structures on the property, stole personal items that were stored in those structures and in a container that she and Art maintained, interfered with her use and enjoyment of the jointly-owned property, and breached her privacy.
- [8] Whatever the outcome of these claims, it is common ground that because of the state of the relationship between the parties, the property in issue will need to be sold and the proceeds divided.

Overview

- [9] Mike was Art's only child. Art and Mike's mother divorced when Mike was two years old.
- [10] Art and Pat jointly purchased the property that is in issue here in 1997. It is located on Lougheed Highway in Mission. Before that they had owned another property together, which was also in Mission.
- [11] The habitable structures on the Lougheed Highway property are the original main house and a carriage house, which was formerly Art's machine shop. In 2011 the carriage house was renovated so that he and Pat could live in it.
- [12] When Art and Pat moved into the carriage house, Mike and Dana moved into the main house. Before that they had been living with Dana's parents.
- [13] These moves were carried out pursuant to an oral agreement between Mike on one side and Art and Pat on the other. The terms of the agreement are in dispute.
- [14] A new mortgage was placed on the property in August 2011, under which the amount owing under the previous mortgage was increased from just over \$171,000 to \$336,000. The borrowers in this new mortgage were Mike, Art and Pat. The increase in the amount owing - just under \$165,000 - was paid out to Art and Pat.
- [15] This mortgage provided for a monthly payment of \$1,463.38.
- [16] Mike was also placed on the title of the property with Art and Pat, with each of them then having an undivided one-third interest as joint tenants.
- [17] With the assistance of a notary Art and Pat also executed a deed of gift, which provided that upon their deaths their respective interests in the property would be given to Mike.

- [18] A joint bank account was created, from which the mortgage payments were to be withdrawn. Mike and Dana began to deposit various amounts for their contributions to the mortgage and other property-related expenses. From 2011 to 2018, they deposited amounts that were calculated for them on handwritten notes that were mainly provided by Pat, although Art's printing was identified on some of them.
- [19] Around the time that the property was remortgaged, Art and Pat bought a property in Texas, on which they placed a mobile home. Its purpose was at least in part to be a winter retirement home for them.
- [20] Mike, Art and Pat renewed the mortgage in 2016, now with a bi-weekly payment of \$572.
- [21] The disputed terms of the agreement are (1) the basis on which an interest in the property was transferred to Mike and (2) the proportion of the property-related expenses for which he and Dana were to be responsible.
- [22] Although the timing and reasons for it are disputed, it is clear on any version of events that in 2018 or 2019, a disagreement of some kind arose between Mike and Art.
- [23] In early July 2019 Art had a stroke, which resulted in him being hospitalized for ten days. During his hospitalization it was discovered that he had terminal cancer, and he received palliative care following his release - initially at home, and in the last few days in a hospice.
- [24] He executed a will on July 18. It appointed Pat as his executor, and provided that the residue of his estate was to go to her. It also provided that he was not leaving anything to Mike, on the basis that Mike had been "uncaring and abusive" towards him, and would in any case receive a half interest in the property upon his death (that is, by right of survivorship under the joint tenancy).
- [25] Through the careless reliance by the lawyer who drafted it on an unrevised precedent, the will purported to divide Art's personal property between two named individuals who had no connection with him. They later agreed to renounce the bequest, so that the personal property fell into the residue of the estate that was left to Pat.
- [26] On July 25 a transfer of Art's one-third interest in the property to Pat was filed in the Land Title Office. The transfer document purported to have been executed by Art the day before. This had the effect of severing the joint tenancy, so that Mike was left with a one-third interest as a tenant in common.
- [27] Art died on July 29.
- [28] Using property assessments as a rough indication, the value of the Lougheed Highway property increased from just over \$400,000 in 2011, when the agreement was formed, to just over \$1 million in 2023, which as of the trial dates was the latest year for which an assessment was available.

The Property Agreement

Mike and Dana

The nature of the agreement

- [29] Mike testified that "some time in 2010 or 2011" his father phoned him and asked him if he wanted to "go in on this house". He later added that this was "so they [that is, Art and Pat] could re-mortgage" and draw money out. Dana recalled him advising her that "my dad's got a deal for me" and that he had to meet with him to discuss it.
- [30] He and his father had further discussions at the property about this possibility, including some that also involved Pat.
- [31] He explained that the purpose of him "getting on title" was to lower Art and Pat's monthly mortgage rates, since they were retiring, and also to have him present on the property while they spent half of each year in Texas. When the actual mortgage documents were shown to him, he added that the \$164,000 that they drew from it was part of the purpose as well.
- [32] According to him, the agreement he eventually reached with his father and Pat was for each of them to pay one-third of the mortgage, insurance, property tax, and then "our respective bills". Despite this, during his examination for discovery he could not recall whether that issue had been specifically discussed, a response that he said had been truthful "at the time". Similarly, although he testified that there was a discussion with his father and Pat specifically about that apportionment of responsibility for the property tax and home owner's insurance before the mortgage was signed, at his discovery he had said that he did not recall whether it had been specifically discussed. However, at another point in the discovery he said that it had been.
- [33] A further term of the agreement that he described was that if one of the joint owners passed away, that person's share would pass equally to the survivors, so that they each held a 50% interest. He said that the notary who prepared the deed of gift explained that that was the effect of the document. (He did not describe having been informed of the right of survivorship that attaches to joint tenancies generally.)
- [34] Although he had no cash to contribute at the time he was placed on title, he considered his involvement to be a benefit to his father and Pat, by enabling them to remortgage the property and draw out funds. Dana also recalled that his involvement was necessary in order for Art and Pat to be able to draw out retirement funds.
- [35] In cross-examination Mike expressed the arrangement as being that "they sold the one-third to me by putting me on the mortgage", and that in order to comply with the agreement he had to pay one-third of the expenses. A benefit to him was that he would be able to get his "foot in the door into paying for a mortgage", by which I took him to mean being able to qualify for one. (Dana also understood that to be a benefit, and recalled Art and Pat's particular reference to him getting his foot in the door.) He said that he had no debt at the time he was added to the title.

- [36] Mike recalled that Dana was present for some of these discussions, which he refined on cross-examination to "at least one" of them. However, at his discovery he did not recall whether she was present when the terms were negotiated, because "it was many years ago now".
- [37] Dana testified that at the one meeting about the agreement that she attended, Art and Pat "laid it out" that Mike would get a one-third share in the property and that he would be responsible for one-third of the "mortgage payments, taxes, insurance". In addition, "[e]veryone would be responsible for their own bills, unless they're shared". She also described them saying that "[w]e're not getting any younger, and as we pass away, then you will have more responsibility for this property, to take on the payments that we make".
- [38] She said that Art and Pat also told her at one point that they had been thinking of selling the property to access the \$160,000 increase in their equity since they originally bought it, but that they would not be able to qualify for a mortgage on a new property.
- [39] Dana was not invited to be part of this agreement because her relationship had only been in place for about a year at that point. Despite this, during her testimony dealing with the benefit to Mike of getting his foot in the door on a mortgage, she said that Art and Pat explained that this opportunity was also available to her, or she could "leave at any time with no onus to anything". It was not clear from her testimony whether this was at the single meeting she attended in relation to the formation of the agreement, or at some other point.
- [40] Somewhat incongruously however, in response to the suggestion that Pat had told her that the deal was that Mike was making all the payments in return for getting half of the property when one of them dies, and all of it when the other did, she said that Pat did not describe the deal to her, that she was never a part of it, and that "it's not for me to say whether or not they [that is, Art and Pat] held up their end" of it.
- [41] Art and Pat instructed him not to tell anyone about the deal, so he only disclosed its existence to Dana and to his close family members.
- [42] He was asked in cross-examination why, if he was ultimately going to own the property, his father and Pat would pay two-thirds of the mortgage payment. He explained that it was "to make their life easier" - by enabling them to withdraw money, have a cheaper rate for the mortgage, and have someone on the property while they went away.

Execution of the mortgage

- [43] Mike's evidence was that he did not read the various mortgage documents before signing them, and that the bank representative did not provide him with any information about the mortgage. As he put it in cross-examination, "they rushed all the paperwork in front of me and, basically, tore it out of my hand right after I signed it and just kept throwing paperwork in front of me." He clarified that the person taking the documents from him would have been Art or Pat.

- [44] Dana recalled that the bank employee did not explain the payments in detail, and just took "the document" away after Mike had signed it. They did not give him any time to read it, she added. In cross examination she said that the employee did not say anything about the loan, including any explanation of the frequency of the payments. While they were there Mike's father told her and Mike not to tell anyone about the agreement underlying the mortgage.
- [45] Mike said that the process was similar for the 2016 mortgage renewal - he "just showed up, signed papers and they got me out of there as fast as possible".
- [46] In contrast, he believed that he would have read the documents that were presented to him by the notary (the deed of gift and the property transfer) because they were short.

Implementation

- [47] As I have mentioned, Mike and Dana made their contribution to the joint property expenses based on the amounts requested by Pat, which they then deposited into the joint account. He referred to copies of some of the handwritten notes that Pat provided to him and Dana each month, which itemized the payments for which they were responsible and the total that they were to deposit into the account each month. These examples were drawn from the period of 2014 to 2018 and involved total payments in the \$1700-\$1800 range, with occasional higher amounts.
- [48] The amounts were broken down as being for the mortgage, internet[1], gas, hydro, and insurance (which Mike testified was life insurance on him - and was sometimes described in the notes as "life insurance" and "mortgage insurance" - although there was occasionally a required payment in a different amount that was described only as "I"). Dana recalled Art explaining that someone had to have life insurance in order for the bank to grant a mortgage.
- [49] Of potential significance, their required mortgage contribution in the notes was frequently identical, or very close, to the required monthly payments under the mortgage.
- [50] Mike's notice of civil claim asserts that Art and Pat's share of gas expenses was approximately 20% of the total cost of gas for the property. Despite this assertion, he did not think that issue was ever discussed with them, although he noted that "it's been a lot of years". At his discovery he had stated without qualification that they had not discussed it, and that the 20% figure was his and Dana's estimate. He could not recall why he had nonetheless put it forward as one of the essential terms of the agreement in his pleading, but thought that it had been "miscommunicated". When he was asked how he had arrived at that figure, he gave the non sequitur that the carriage house is entirely heated by gas, like the house.
- [51] He also indicated at his discovery that he did not know whether they had paid the property taxes of the homeowners' insurance, but had "simply put money in an account".

- [52] He was challenged on the reasonableness of his belief that the \$1,463 per month that they were paying on the mortgage represented one-third of the total amount owing, given that the principal was only \$336,000 and the interest rate was 2.7%. He maintained that he "had no idea how any of this works", that it was his "first time dealing with it", and that "he was always told that houses were expensive". When he was asked at his discovery if he knew what the mortgage payment was going to be, he said "not exactly" and that he was taking the amount "in good faith from Pat".
- [53] Dana said that although each house had its own hydro and was billed separately, Pat told her that it would be better to pay for it all through Pat's account, since she received a senior's discount. Similarly, she told them that as a senior it would cost less for her to pay the property taxes, so their contribution should be submitted through her. Pat also told her that life insurance was required in order to get a mortgage, and since she and Mike's father were too old to qualify for it, Mike would have to obtain it.
- [54] Mike said that he and Dana did not question the requested amounts because he trusted his father. He and Dana did not have access to the records of the bank account through online banking until 2018. They simply deposited the requested amounts into it. He frequently deposited his paycheques to cover the expenses, occasionally drawing any amounts in excess of what was owed as cash in the same transaction. He assumed that his father and Pat were making similar deposits.
- [55] In their testimony, he and Dana reviewed records for the account, which show various deposits corresponding to the amounts requested by Pat over the years, and withdrawals to make the mortgage and other property-related expenses payments. Dana pointed out several instances in which the amounts they had been requested to deposit by Pat for particular expenses were higher than the corresponding debit from the account to pay them, which she characterized as "padding" by Pat. In addition, Dana pointed out that although Pat had told them that she was submitting the hydro payment to obtain the senior's discount, the hydro bills for both houses were being paid out of this account, all from funds deposited by her and Mike.
- [56] Mike testified that amount of the required payments imposed a degree of financial hardship on him and Dana, because of the relatively poorly-paid position that he held at that time, and prevented them from engaging in any non-essential activities, such as travel. In 2012 he had to borrow just over \$4000 from his grandmother, because the amount demanded by Pat increased by more than \$3000, to cover the property taxes. He also had to borrow from a family member to make the payments in 2015, after Dana suffered a serious injury and was unable to work for an extended period.
- [57] Although it was not provided for in the agreement that he alleged was made, Mike testified that he had several upgrades carried out to the house at his and Dana's own expense. These included a new roof, a new covering for the back deck, gates on his side of the property and repairs to the water system. The only one for which he sought reimbursement from Pat was

the roof, which cost \$8,820. He was unsuccessful in recovering it. In cross-examination he sought to justify requesting that payment from her, despite the absence of any provision in the agreement dealing with home repairs, on the basis that it protects the equipment that provides water to both houses.

Pat

Nature of the agreement

- [58] According to her, the agreement came into being because she planned to retire, and Art's income, which was not large to begin with, had not recovered from the 2008 financial crisis. They had always seen the property as their retirement plan, and their first choice was to sell it and invest the proceeds.
- [59] As an alternative, they presented Mike with the possibility of being given a one-third interest, with the right of survivorship that accompanied it, in return for paying the mortgage, as well as the hydro, electricity, taxes and insurance. They expressed the offer as "you can be our retirement fund if you want to" - in that his contribution would be the amount that they would have received on a "retirement package" (by which I took her to mean the return on investing the sale proceeds). Mike was also to provide the funds necessary to turn the shop into a retirement suite, through the funds that could be withdrawn when he joined them on the new mortgage.
- [60] After thinking about it for approximately two weeks, Mike accepted the deal.
- [61] As part of the arrangements, she and Art paid off the debts that Mike had accumulated to that point (presumably so that he could qualify to co-sign the mortgage).
- [62] She described a contemporaneous conversation between Art and Mike that reflected the nature of the agreement. At the time that Mike and Dana took possession of the main house, Art remarked how lucky they were, in that they had a house without having to save for a mortgage, only had to pay the bills for the house, and had a mortgage payment that was less than rent would have been. In response to his further comment that they had not had to pay "one penny" for this privilege, Mike sarcastically gave him a \$5 bill[2].
- [63] Pat rejected the suggestion that she and Art put Mike on the title to the property only so they could refinance it. She and Art were already on a mortgage that would otherwise have been renewed, and they were going to sell the property to carry out their retirement plan. They had already contributed to 15 years' worth of equity, and improved the main house, so Mike's "equity" - the basis for allowing him an ownership share - was the assumption of the ongoing expenses.

Execution of the mortgage

- [64] Rather than simply presenting the documents to be signed, the bank employee, who was a male, told them that he would be going over the mortgage documents to ensure that they were aware of all of its parts, and asked them to let him know if they had any questions. He then "proceeded to cover every page" before they signed. In her view, "he made sure we knew everything about it". In particular, he explained the \$1,463 that was payable monthly. Mike never seemed confused about these documents at any point, she said.
- [65] The need for life insurance arose when Mike disclosed, in response to a question from the bank employee, that he was a smoker. The employee explained that Mike would have to be insured as a result. She identified the entries for "Cummins Insurance" on the notes that she provided to Mike and Dana as relating to that expense.
- [66] When it was put to her in cross-examination that the bank employee who dealt with them was a woman, and she was shown that three signatures on the mortgage documents were by a "Barb Pattison", who has a LinkedIn profile as a financial services officer at that bank, Pat said that Ms. Pattison was the person who came in and witnessed their signatures, but that the details had been explained by a male employee.
- [67] She maintained that Dana was not present for this signing. She subsequently explained to Dana what was in the documents, what Mike had agreed to pay, and why there needed to be life insurance. This occurred when all four of them were on the back deck of the main house, shortly after Mike and Dana had moved in. She described Dana reacting with surprise upon being informed that she and Mike would eventually receive the property.

Implementation

- [68] Pat said that the account from which the other payments were withdrawn was set up for the mortgage, and that she had never withdrawn any money from it. In an apparent contradiction of this blanket assertion, a payment from the account to her VISA account in 2022 was drawn to her attention, but she was unable to explain it.
- [69] Property taxes and insurance were not drawn from that account - she paid them directly and then Mike and Dana repaid her.
- [70] She said that she was unaware of there being any age-related discount for hydro payments. On the other hand, she agreed that with the homeowner's grant and a further reduction for owners who were over 65 the property taxes would be lower, and that she had submitted them in her personal capacity, even though Mike and Dana were paying them, in order to make that lower rate available.
- [71] She conceded that despite Mike paying the house insurance until 2018, she and Art remained the only beneficiaries of the policy. She said that the policy was never corrected, and she just renewed it every year without thinking about it.

The Dispute

Mike and Dana

- [72] There is no suggestion that anything in Mike's relationship with his father before 2018 would have justified the statements about him in the will. Although his description in his testimony of their relationship during his youth and young adulthood was not especially warm - containing terms such as "civil", "always on speaking terms" and "never violent towards each other" - it was obviously still a functional enough relationship for them to come to some form of agreement to co-own the property.
- [73] Dana described it as a "nice" relationship, although Mike and Art did not talk very much, or have many in-depth conversations. She viewed Art as an introvert and "a bit anti-social", and noted that Mike worked a lot, which also limited their interactions. Disagreements between Mike and Art generally arose from Art criticizing the way that Mike would perform tasks around the property. She accepted the suggestion that Art was not affectionate and did not seem to express any pride in his son, and added that Art was frequently rude to her and seemed to have no interest in getting to know her.
- [74] Mike described his relationship with Pat, which had extended over about 30 years, as "neutral". They did not speak much and she was basically just "around". When he was a child she did not take on any parental tasks towards him. Dana said that she had a cordial relationship with Pat, which included going shopping together sometimes, and Pat telling her about things that were on sale at Costco.
- [75] Mike and Dana were married in 2018. Mike testified that before getting married Dana wanted to review their finances. To that end, Mike obtained access to online banking for the joint account. When he and Dana reviewed the account, they found that "stuff was not right". This caused them to request the records of the entire history of the account. Pat picked up the first copy of the records from the bank before they could review them, but when they obtained a second copy it revealed that they were "paying for just about everything" in relation to the property. Dana said that Art and Pat had only deposited money into the joint account a "handful" of times.
- [76] At some later point they also discovered that Mike was not listed as a beneficiary of the home insurance policy, despite having made payments towards it.
- [77] As of the trial dates, he and Dana had continued paying the full amount of the mortgage payment and except for 2019, when it was shared with Pat, the full amount of the property taxes. They corrected the utility payments so that they were only paying their proportionate share, although Pat initially resisted their attempts to switch the hydro account for their house and the gas account for the entire property into their names. In essence, everything except the mortgage, which still comes out of the joint account, is registered in their own names and paid separately.

- [78] Mike described himself as being "mildly upset" upon making the discovery about the true extent of his and Dana's property-related payments.
- [79] He then contacted Art and asked him if he was aware that he and Pat had not paid anything. Art responded that to his knowledge he and Pat were paying their share, but that she was the one that handled the finances.
- [80] During his discovery however, he had said that did not recall what he may have said to his father, or any conversations between them about paying the full amount of the expenses. In his testimony he explained the discrepancy between those two versions by indicating that he could not recall the conversation at the discovery but "had lots of time to think and learn since then [a]nd reach back and figure stuff out."
- [81] He described the confrontation with his father over this issue as "a general argument", in which "we both got a little upset". He added that "nobody got hurt", and, as he had described their previous relationship, "it was never violent".
- [82] Dana said that she was there for "a couple" of these disagreements. She also asked Art if he knew what was going on, and how he could "sign this deal with his son and then not hold up his end". As Mike had, she described Art as being confused, because as far as he knew he had been paying his portion of the bills. She agreed with the suggestion that Mike did not interact much with Art after they discovered that they were paying all of the expenses.
- [83] According to Mike, Pat's attitude and behaviour after the payment issue arose was markedly different from his father's. In her case, "it was like a light switch went off" - she became hostile and began trying to find a way to get him off of the property. In contrast, during his discovery he had been unable to recall how his relationship with her had been in the year before his father died, including whether they had argued during that time.
- [84] Dana testified that Pat told her that she and Mike had agreed to paying all of the property expenses, and that if they did not want Mike's credit rating to "go down the drain", they would keep paying.
- [85] Shortly after that Art and Pat made a written offer through legal counsel to buy out Mike's share of the property, for \$50,000. Mike said that he and Dana made unsuccessful efforts to negotiate a settlement with them to achieve that result.
- [86] In cross-examination, he was shown the letter from counsel advancing the buy out offer, which was sent in May 2019. He maintained that the offer was the result of the problem with the payment of expenses, which he and Dana had discovered at the "end of 2018". In contrast, in his discovery evidence he had said that he did not know why his father had wanted to buy him out. He rejected the suggestion in cross-examination that it was due to his having threatened to kill his father. He explained that they still spoke "semi-frequently" after the payment problem arose.

- [87] Dana accepted the suggestion in cross-examination that the buyout offer indicated that there were "serious ongoing problems between the two families". She said that she remained cordial with Art but that "we weren't taking them at their word anymore. Mike was not getting along with them either".
- [88] When Mike was asked at his discovery whether he was saying that he had never threatened his father, or only that he did not recall whether he ever had, he had responded that he did not recall. In his testimony he explained that he had "overthought" the discovery question by including his childhood, which he could not be definitive about, and should have instead restricted his answer to his teen and adult years, for which he could firmly indicate that he had not made any such threats.
- [89] When it was put to him that he was the one who had approached his father and Pat about "selling to get out of the property" he agreed that "we inquired about trying to make a deal so we could leave". However, he denied going over to the carriage house and demanding that they sell the property, explaining that he did not remember having said that.
- [90] He was also shown an undated handwritten note which Pat's counsel suggested had been written by his father. It included the following passage:

Jul 2018 blowup threatened me wanted o [the balance of this word appears to have been cut off in the course of photocopying - the next letter, which is only partly visible, could be "u", which would be consistent with the phrase "wanted out"]

In Oct 2018 give him an out

Thurs Apr 18, 2019 I say its time to sell

(After being treated like crap for mos)

- [91] The rest of the note appears to be a list of conditions that would have to be fulfilled by Mike as part of his departure. Mike accepted that "there may have been a discussion during that time" about those conditions with his father, but they ultimately "did not go that route (that is, a buy-out of his interest).
- [92] In further support of the theory that the dispute stemmed from Mike's own behaviour, he was shown an email from his father to a different lawyer that was sent in April 2019. It had the subject line "Mr and Mrs angry" and described Mike and Dana having already "locked [him] out" and now denying him access to a small space in the garage. He also said that they had "ambushed" him when he took Pat to the airport on February 6.
- [93] When the lawyer suggested writing Mike and Dana a letter Art responded in part that "[a] letter may aggravate the situation but who cares, its not getting any better since the wedding" and that "I would like them to know my rights."

- [94] Mike agreed that during this period they had changed the locks to their house, because his father "kept ending up in there when we'd get home from work." This did not affect his father and Pat's access to the basement, where the common laundry facilities and their storage space were located. As to the denial of his father's space in the garage, Mike explained that they had asked him to park his riding lawnmower in the container next to the carriage house that he and Pat used. Addressing his father's reference to February 6 as having been a stressful day, he said that he did not recall what had happened on that day.
- [95] On April 18, 2019, the lawyer wrote to Mike and Dana, requesting that they allow Mike's father to access his riding mower in the carport, and providing the father with a key to the house to use in case of an emergency.
- [96] When it was suggested to him that the fact that his father was writing to a lawyer about the situation meant that they were not getting along, Mike described these as "minor issues", and added that they "may have had disagreements" but "were always on speaking terms". It was pointed out that during his discovery, when he was asked why he had not discussed the issue of his father and Pat paying 20% of the gas bill with them, he had answered that it was because "we weren't on proper speaking terms during that time". In his testimony, after initially suggesting that it was only Pat with whom he was not speaking, he clarified that he was only not speaking to Art about "that" (by which I took him to mean the financial dispute). They would still have been able to speak about less contentious subjects, such as their common interest in motorcycles.
- [97] In a follow up email to the lawyer, Art had added a further concern about the firewood that Mike kept stacked in the driveway, when there were no facilities for burning wood in either property. When Mike was asked whether Art had expressed some displeasure to him about the presence of this wood, which he had preserved from a job site and cut for family members to use, he conceded that "he may have said something, yes".
- [98] He was referred to notes written on his behalf by Dana, the first of which warned Art against touching the firewood or some other items that were kept in the carport, and the second of which responded to one written by Art indicating that he would need to have access to the riding mower, informing him that he would be given one further chance to remove it. As it turned out, Mike rolled the mower out of the carport himself, after which his father and Pat kept it in the container.
- [99] Despite these various issues, Mike emphasized that nothing between them "progressed to a point where an argument was basically not done at that point" (by which I took him to mean that none of their arguments continued beyond the days on which they took place).
- [100] He conceded that he and Art had not spoken much during the six months before Art's death, but said that was because of his extremely heavy work schedule and the demands of the fourth year of his trades training, which was intensive and had a high failure rate.

- [101] Taking a longer view, he said that the frequency of his contact with his father since moving on to the property in 2011 varied according to whether he was employed at the time. At times he worked seven days a week and would not see his father for longer periods, but when he was laid off he would see him "up to daily".

Pat

- [102] She recalled that the beginning of the conflict was either in late 2016 or early 2017, or as she described in cross-examination, "approximately 2017".
- [103] After a period in which each couple "did their own thing" while living on the property, an incident occurred in which Mike came into their home and screamed at Art, "You owe me, you have to pay me. I'm not living here any longer. I want to be out and if I don't get it I'll kill you." She told him that he could not speak to his father in that manner, and he left. At the time, she did not know what the subject of his unhappiness was. Despite agreeing that a threat to kill someone is very serious, she did not call the police as a result of this one. She also did not ask Art what Mike had been talking about. She explained that she was not surprised by Mike's actions, because he had already made similar threats towards his mother and her second family.
- [104] She did not consider it unlikely, if the threat she described had occurred, that Art would have attended Mike and Dana's wedding, which took place in August 2018. Art was surprised to have received an invitation to the wedding, so he went.
- [105] Following this she and Art had very little to do with Mike and Dana. However, after Mike's insistence, Art reflected on the possibility of selling the property and provided Mike with a list of things that would need to be done in order to put it up for sale. She and Art then began carrying out several of those tasks, but Mike did not assist them, so they stopped after a week.
- [106] Some time later Mike again accosted Art and demanded that the property be put up for sale. When Art told him that he had to do his part in order for that to occur, Mike said "You know you're an old man. I can kill you and I'm going to." Once again, she did not report it to the police.
- [107] She initially thought that this incident occurred shortly before her son had his stroke, which was on January 4, 2019, but on cross-examination she was only prepared to say that it happened some time before it. She attributed her difficulty in recalling to the amount of stress she was under at the time, including from Mike and Dana's behaviour, which she described as "intolerably rude".
- [108] She said that Art had "little or no contact" with Mike from the time that Mike made this threat until his death.

- [109] Despite the significant gap between the two threats that she described, she agreed at her discovery she had said that the second threat "wasn't very long after" the first. She explained that she had been uncertain about the times at the discovery.
- [110] She also agreed that during her discovery, which was held in 2022, she had said that these threats occurred three or four years ago, which would have been in 2018 or 2019, although she had gone on in her discovery evidence to describe them occurring in 2015 or 2016, and to indicate that she did not know whether any threats had been made after 2016.
- [111] In addition, she agreed that she had instructed her counsel in December 2022 to inform Mike and Dana's counsel by letter, in response to questions arising from her discovery, that the threats had occurred "in approximately the summer of 2017 and the approximately a couple of months after that". However, in January 2023 she had instructed her counsel to inform opposing counsel about threats by Mike on four separate dates - the spring of 2018, the summer of that year, February 6, 2019 and July 13, 2019.
- [112] At one point during this part of her cross-examination she said to the best of her recollection the threats had been made "somewhere between 2017 and 2019", and later during it that they had been made in 2017 and 2018.
- [113] She agreed that she had been in Texas on February 6, 2019, but explained that on that date Art had told her about being "ambushed" by Mike and Dana after taking her to the airport on January 8. February 6 was her "best guess" of the day on which he had told her about it.
- [114] She added that after all the "torment" that Art had received from Mike (which she also described as "putting up with Mike's terrorism for five years") he was planning to sue Mike for elder abuse when she returned from Texas. She said that he told her in March of 2019 that he had received advice that he could do so. She agreed however that none of the letters written to Mike by lawyers on Art's behalf referred to such a claim, nor do they mention any threats by Mike.
- [115] The only discussion that she ever had with Mike and Dana about the property costs was when Dana asked to see the hydro bill. This was before Art died. Upon being shown the records of the joint account, she agreed that the last date that two hydro payments were withdrawn from that account was in July 2018. She did not accept however, that the end to the two payments being withdrawn indicated that Mike and Dana had become aware at that point that they were paying for both. She maintained that they had known from the outset of the property agreement that they were responsible for all of the property-related payments. She and Art only began to cover the hydro payment for the carriage house because Mike and Dana stopped.
- [116] She denied the suggestion that she had intercepted the bank account statements that were mailed to the property in order to prevent Mike and Dana from seeing what was being paid from it. She said that those statements were addressed to her and pointed out that since it was a joint account there was nothing to stop them from obtaining their own online access.

- [117] She also maintained that until she received Mike's notice of civil claim, she was not aware that he and Dana believed that they had only been paying one-third of the property costs.
- [118] At some point during this process her and Art's access to the basement of the main house was cut off by Mike changing the lock. She did not know exactly when this had occurred, but thought it might have been during one of her trips to Texas.
- [119] With respect to the allegation that Mike had prevented Art from accessing the riding mower in the garage, she agreed that based on the date on the note responding to Art's request for access to the ride-on mower, he had made the request in April 2019. Both her discovery responses, which indicated that this difficulty had arisen in 2016 or 2017, and the follow up response on her behalf sent by her counsel, which indicated approximately the fall of 2018, were inconsistent with that acknowledgment. She agreed that she had been confused on her dates and explained that she was "not a well person from that point on". This was because of several serious health issues that arose between Art's death and the trial, including suffering from sepsis between her discovery and the follow-up responses sent by her lawyer, during which she was hospitalized in Texas and did not have access to any material at the carriage house.
- [120] The letter to Mike from Art's former counsel in May 2019 offering the buyout was part of the response to Mike saying that he wanted the house to be sold. She said that Mike had already stopped paying some bills and Art had told the lawyer that he wanted Mike out.

The Will and the Property Transfer

Art's hospitalization

- [121] Mike drove Art to the hospital on July 3, 2019, after he began experiencing stroke symptoms, which were initially difficulties with his vision and some impairment of his ability to walk.
- [122] He was kept overnight at Mission Hospital and then transferred to the hospital in Abbotsford. Mike was at a crucial point in his trades training at that time and could not miss any work, so Dana went to visit his father four or five times.
- [123] At Art's request she retrieved some items from his house, and also brought him a package that had been couriered to him there that contained the keys to his sister's house. He had become responsible for it after his sister went into long-term care. He asked Mike and Dana to check on the condition of the house, which had been vacant for some time, and they complied with his request.
- [124] Pat, who had been in Texas at the time that he suffered the stroke, caring for her son, returned nine or ten days later, either on the day that Mike's father was discharged from the hospital or the day before. Mike and Dana picked her up from the airport.

- [125] Dana said that, somewhat incongruously in light of Art's condition, Pat raised the ongoing dispute and said "So with your date, what's going on there? We've got to get you off the property". Mike responded that it was not the appropriate time to be discussing such matters.
- [126] Pat said that on this drive from the airport to Mission they had a discussion about Mike and Art's relationship, during which Mike became so angry that Dana had to halt the discussion. In cross examination she said she had told him that they could get him off the title as soon as he complied with his responsibility to leave the main house in pristine condition.
- [127] She agreed that during her discovery she had alleged that Mike had threatened her while they were in the vehicle and then accelerated it to a high rate of speed, until Dana told him to stop. She confirmed that this had indeed occurred, and that she also included the allegation in her response to civil claim in Mike's action, although she had not mentioned it in her direct testimony. She did not report this conduct to the police.
- [128] Addressing his father's cognitive abilities while he was at the hospital, Mike said that "his mental ability was okay" but that "he was a little fuzzy". He added that his father "wasn't himself, but was mostly there". By "fuzzy" he meant that his father "wasn't remembering everything". He compared him to someone with a significant hangover, who was "losing bits and pieces of your conversation here and there".
- [129] Dana's observations of Art were that he had problems with his fine motor skills and that his vision was impaired but that he seemed to be "fairly with it" (mentally, I took her to mean).
- [130] Despite his impairments, while Art was still in the hospital he sought to enlist Mike in a plan to do unnecessary upgrades to his sister's home, and then render inflated bills for them that could be submitted to the Public Guardian and Trustee, who had control over his sister's finances. Mike refused to participate, because of the failure of the agreement to make him a part owner of the family property.
- [131] Dana surreptitiously recorded another conversation with Art in which he described this plan to her. In the recording Art sounds quite lucid. Dana said that she made the recording because after the problem with the property payments she did not trust him anymore, although she then clarified that that was with respect to financial matters and she "had no reason not to trust him after having a stroke". She initially said that they had been speaking for five or ten minutes before she began the recording, although she later said it had been for a minute or two, but that it could have been five. Although she had been present for the first conversation with Mike, she did not record it because she had "someone on [her] side" there, and also did not want to record Mike speaking to his father.
- [132] Interestingly, Pat testified that she did not recognize Art's voice on the recording made by Dana at the hospital. When her counsel suggested that she was not "a hundred percent sure of that", she reaffirmed that she was "not a hundred percent sure that it's him either".

[133] By the time Art was discharged, his cancer and its extent had been diagnosed, Mike's understanding was that the diagnosis was of cancer of the liver and pancreas and he was being sent home to die.

[134] Pat described picking him up from the hospital. Although he was required to use a wheelchair to leave the hospital, he was capable of walking, and his speech was "perfect".

Art at home

Mike's observations

[135] He said that Pat did not initially permit him to see his father at home - telling him that his father was not doing well at that moment, or that he did not want to see anyone. She provided the same response to his father's friends. Dana was eventually allowed to assist Pat with some of his care though.

[136] The next time he was able to see his father was after the police contacted him to allege that he had stolen the keys to his aunt's house. Pat had never asked him to return those keys before he learned of this accusation from the police. He told them that he was happy to return the keys, but only to his father personally. When he went to the coach house Pat tried to get the keys from him but he refused. He then approached his father and had a brief conversation with him, in which he understood his father to be saying that he did not want to see anyone at that time.

[137] He described his father as being extremely thin at that point, with a yellow complexion. Rather than making eye contact he was looking at a spot on the wall. In addition, his voice was very quiet, and he could only get a few words out.

[138] This interaction was surreptitiously recorded by Mike. He did so because he was suspicious of what was going on - specifically the accusation that he had stolen the keys to his aunt's house, and Pat preventing him or any of his father's long-time friends from seeing him.

[139] Mike's father can be heard saying that he did not want to see "anybody". He also said that he was "not far away" (perhaps in relation to his impending death) and, when Mike responded that it would be nice to see him, he responded that "it isn't going to happen today". In the recording his voice is very weak and faint, but to the limited extent that a conversation may be said to have taken place, his statements had at least a basic coherence.

[140] According to Mike, after the incident involving the return of the keys, Pat began to ask him to come over to assist with certain aspects of his father's care. Dana said that Pat asked for their assistance in his father's care after he had been home for about a week. This began to occur on an "almost" daily basis until his father was moved to a hospice, for a total of about six days.

- [141] He described his father as having declined quickly in a short period of time. In addition to the observations that he had made previously his father was now largely incapable of speaking, and when he attempted to do so would taper off quickly, as though he had forgotten what he was going to say. He was also in extreme pain, was unable to see, had become incontinent, and had stopped eating and drinking. When asked to describe his father's level of alertness he said that his father had no idea what was going on and had no memory. He was in essence "a corpse with a pulse" and was "gone".
- [142] Mike was not present when his father's will was drawn up and executed. He recognized his father's initials and signature on the document however.
- [143] With respect to the property, his expectations did not extend beyond inheriting a half-interest in it, as the original provided. He had also hoped to receive his father's tools and motorcycles, which have little actual value (he estimated the replacement value of the tools as being several thousand dollars but could not offer values of the motorcycles, one of which his father had built himself) but considerable sentimental value to him.
- [144] The other assets of his father that had any value, as far as he was aware, were several firearms, and his share of the Texas property.
- [145] In contrast to the signature on the will, which he acknowledged was Art's, he did not recognize the scribble that purported to be his father's signature on the document that transferred his interest in the property to Pat. Aside from not resembling his father's usual signature in any other way, it slanted in the opposite direction from that signature.
- [146] He agreed that when he was asked at his discovery what facts he relied on to allege that Pat had exercised undue influence over his father in transferring his share of the property to her, he had been unable to provide any, and had indicated that he did not recall.

Dana

- [147] Dana recalled Pat refusing to let her see Art. When she asked if Mike could see him Pat responded "No, he'll squish him like a bug", which I took to be a reference to his frailty.
- [148] Her observations of Art's emaciated condition, his inability to care for himself, his unfocused gaze, and his pain behaviors were similar to what Mike described.
- [149] He was not very alert, and would trail off in mid-sentence and forget what he was saying, which caused her to conclude that he was no longer able to think independently. However he did make statements that she took to be expressing a wish to die. She described Pat as "leading" his conversation, either by completing his sentences or changing the subject completely.
- [150] Pat told her that the doctors had said that drinking alcohol could not do any further harm at this point, and she observed him doing so during this period.

Les Cole

[151] He and Art had been friends for many years. He saw Art at the carriage house a few days before he died. He did not think Art was doing well, because he would start talking and then "go off in la-la land somewhere, and eventually come back". He described Art's voice as slow, and quiet and said that he "wasn't all there". The next time he tried to visit Pat would not let him in. Her initial explanation was that Art was in a diaper, but when Mr. Cole suggested putting a blanket over him she still would not relent.

Pat

[152] Pat testified that even before Art was discharged, there had been discussions with Dr. Edelson, Art's family physician, that she was present for, to the effect that Art did not have long to live.

[153] She maintained that during the recorded incident in which Mike returned the keys to Art's sister's home, the RCMP were present and had escorted Mike to their door.

[154] When Art returned home, after expressing that he did not have long to live he asked to contact Tony Wattie, the lawyer who had written some of the previous letters to Mike on their behalf. Mr. Wattie, who himself passed away before the trial, then came to their home and took instructions for a will. She was present when his discussions with Art took place. She remembered Art telling Mr. Wattie that he did not want Mike to have "anything of his", which she later clarified meant his personal property, but that he would maintain the agreement under which Mike would inherit the property.

[155] However after Mr. Wattie returned with the drafted will and Art signed it, in the presence of a witness whom Mr. Wattie had brought with him (a Mr. Crellin, who has also since passed away), Art then asked "Is there anything I can do about this property that I own?" Mr. Wattie said that he did not know but that he would check, and then phoned his legal assistant.

[156] After speaking to his assistant, Mr. Wattie told them that Art had the right to sell or transfer the property at any time before his death. She then quoted either Mr. Wattie or Art (it was not clear which one she was referring to) as saying "Let's do it".

[157] Mr. Wattie then left and returned later with the property transfer documents. Pat said that these were also read out to Art.

[158] At her discovery she had agreed that Mr. Wattie had come to their home twice, but she clarified in cross-examination that she had meant twice in relation to the will, in addition to a further attendance in relation to the property transfer.

[159] Her direct testimony was that it was "not a long conversation" between Art and Mr. Wattie, but it was not clear from her counsel's question which two of the meetings in relation to the will he had been asking about. When the issue was pursued in cross-examination, Pat clarified that the limited discussion, which had to do with Art not wanting Mike to have anything, was in addition to Mr. Wattie reading out the will, suggesting that it occurred in the second meeting.

[160] Despite this, her subsequent answer to what occurred during the signing of the will involved a comment by Art of a different nature:

There was no discussion. He had -- read him the will, he signed the will, and then he asked him if there was anything that he could do to get him off the will

[161] Perhaps most significantly on this issue, at her discovery Pat had agreed that Art had changed his mind about leaving anything to Mike after Mike attended with the keys to his sister's house, which he was alleged to have stolen, and threw them on Art's bed. This was after the will, which she said did not reflect Art's final wishes on that point, had been executed.

[162] Significantly, she also agreed that she had no reason to believe that Mike had not returned the keys on July 23[3], whereas she had testified that the conversations with Mr. Wattie about not leaving anything to him had occurred on the day that the will was executed - July 18.

[163] She also struggled to explain how the will could have been read out without the presence of the two unintended beneficiaries being caught. At her discovery she had claimed that the names had not been read, and in cross-examination she said that she did not hear them being read and that "I don't recall it either". When it was put to her that like the date of execution on the will, which was corrected from July 17 to July 18, if those names had been read out they would have been crossed out and the changes initialled, she said that she had "no idea" of what should or should not have been done.

[164] Similarly, although Art had told her that he did not want a funeral service, the will referred to one. She said that she did not recall the will mentioning such a service until she read it later.

[165] A further inconsistency from her discovery evidence was that at that time she had described a notary coming to the house, but that she did not know who that person was. She clarified that she was referring to the witness to the will who came with Mr. Wattie the second time, who was the "notary on the document".

[166] She said that Art was still perfectly able to convey what he wanted Mr. Wattie to know. Other than his voice being softer, he did not have any "real difficulty" in speaking. By this point he was no longer able to walk, and was in a hospital bed that they had brought into the home.

- [167] Referring to Art's signature on the transfer document, which appears to have been signed the day after the will, she conceded that "he did struggle" in that respect. In cross-examination she agreed that it did not look like his signature.
- [168] As to his speech, she said that "you could still understand him".
- [169] According to her testimony, Art continued to deteriorate, so that by July 24-25 he was simply lying in his bed waiting to die.
- [170] According to her, the only time that Mike visited was the incident in which he returned the keys. She described the suggestion that she had requested him and Dana to assist in Art's care as "fiction". Art's attitude at that point was that he did not want to see them. However in cross-examination she said that she had asked Mike for help with Art but that he did not come over, so she had to call the ambulance service.
- [171] Although she acknowledged that Art had had some intermittent problems with his vision before the stroke, which she said stemmed from mini-strokes that he had suffered before that, she denied that as of the time he was discharged from the hospital he was unable to read. When it was put to her that he had lost 75% of his vision, she responded that may have been the result of one test, but that it was a "come and go" aspect of his illness.
- [172] She was also aware that Art was being medicated and that he had "brief bits of confusion". She denied that he was being permitted to drink alcohol.

Dr. Edelson

- [173] He was Art's family physician. He practiced medicine in Mission from 1974 until his retirement in 2020. He had been Art's family doctor since about 1988 and recalled that he had also attended Art's former wife with her pregnancy with Mike. Despite the amount of time he had been under his care, he said that Art "rarely saw a doctor".
- [174] He prepared an expert report, the admissibility of which was opposed.
- [175] The report contains an opinion with respect to Art's mental competence after suffering the stroke. The remaining substantive portions of it deal with Art's statements to him about his relationship with Mike and his wish not to include Mike in his will, which he also gave viva voce evidence about as a non-expert witness. (The report also contains an expression of opinion about the exercise of undue influence over Art's decisions by Pat, but it was not suggested by her counsel that Dr. Edelson was qualified to give such an opinion.)
- [176] With respect to competence, the report deals first with the allegation in Mike's notice of civil claim that Art had suffered a "severe" stroke on July 3, 2019. Dr. Edelson was "unable to say" whether what Art experienced qualified as a severe stroke, noting that the presenting problems were loss of certain areas of vision, as well as dizziness, while his speech remained clear, his recent memory was intact and he was alert and oriented.

- [177] Second, he considered the allegation in the notice of civil claim that after the stroke Art was "not of sound mind and incapable of making decisions". In addition to his own assessment that Art was mentally competent, he indicated that the findings of the neurologist notes from the attending gastroenterologist and the indication by the hospital's social services, both on July 8, that he was capable of giving consent, and nursing notes on July 11 showing him as "alert and oriented" with "no concerns", all supported his conclusion. In his view, Art's practical acceptance of his very serious medical condition when Dr. Edelson reviewed it with him on July 12, also represented the statements of a mentally competent person. Referring to this body of evidence in its entirety, he wrote that it "[a]ll shows agreement that he was mentally competent".
- [178] Finally, he advised that the notes from the neurology consult when Art was admitted contradicted the assertion in the notice that he had "limited ability to speak after the stroke".
- [179] Although the report does not contain a specific section setting out the facts and assumptions on which his opinion is based, he explained that his office and hospital records formed the basis of it.
- [180] He testified that he did not administer the Montreal Cognitive Assessment (MoCA), a series of questions that are designed to test the extent of any cognitive impairment, to Art, because his observations of him did not provide any indication that it should be done. His review of the hospital records indicated that none of the other physicians who dealt with Art in the hospital saw a necessity for it either.
- [181] He agreed with the suggestion in cross-examination that the MoCA has a high sensitivity for mild cognitive impairment, and that among its other uses it is used to detect mild cognitive decline.
- [182] He explained that whenever a doctor sees a patient they are looking for the patient's orientation as to time, place and person. When the patient becomes confused or their story does not make sense, the physician will become suspicious that there are cognitive issues. He never had any such suspicions in relation to Art, he said.
- [183] With respect to his relevant conversations with Art, he testified that he saw him daily at the Mission Hospital, after he was transferred back from Abbotsford Hospital in preparation to be discharged. By then his cancer had been diagnosed, and it had been determined that the stroke had simply been a presentation of the cancer. At times there was no one else present for those discussions, although they had some with Pat present while Art was still at Mission Hospital.
- [184] In their conversations, Art told him that he had no interest in leaving any part of his estate to Mike, and instead intended to leave it to his "common-law". He did not indicate in his report the specific dates on which he was told this by Art, and did not recall them when he testified.

- [185] Art expressed fear of Mike, and said he felt unsafe with him, but they did not pursue the reasons for that fear in their conversations. It was clear to Dr. Edelson that Art and Mike had a difficult relationship, and that Art did not want it to continue. He agreed that his note of July 12 indicating that Art had "social problems" with his son could refer to a wide arrange of issues, including a simple lack of communication.
- [186] He referred to his hospital notes from July 12 that indicated "patient and partner request restricting son and daughter in law from visiting", and that he did not want any information given out about his care. When it was put to him that Pat was out of the country until the following day, he was unable to say whether he had been referring to discussions including her on that day or previous ones. He agreed that his note implied that he spoke to both of them but he did not remember when he had had this discussion with either of them.
- [187] In contrast the nursing notes indicated that it was "ok" for his son and daughter-in-law to visit, but he did not want any "information given".
- [188] He said that Art's speech was clear and easily understandable during this period. He agreed that as a consequence of the stroke Art lost three-quarters of his visual field in each eye, and to his knowledge that did not improve over time. The hospital records indicated that Art required an ophthalmology assessment and that he was advised not to drive. Damage to the area of the brain that was affected by the stroke can also cause difficulty with reading (in addition to the difficulties caused by the restriction of the visual field, I took him to mean).
- [189] He also visited Art at home several times after he was discharged to receive palliative care there. Art's speech remained clear and understandable, although he acknowledged that, as with any person whose condition was deteriorating, and who was in constant pain and on medication, there were times when it was less clear.
- [190] He agreed that he saw a large number of patients in his practice and that he relies on his notes to refresh his memory with respect to his interactions with them. Since his retirement he was unable to access the notes that he made at the hospital, although he did have access to them when he wrote his report.
- [191] He agreed that despite his subsequent interactions with Art, the notes that support the opinion in his report only go up to July 12, the day before Art was discharged. He agreed that he did not see him in person between July 17 and 26, and that he could not assess him on the intervening days on which he did not see him, but Mike's counsel subsequently confirmed in re-cross-examination that he also saw him on July 24.
- [192] Mike's counsel reviewed the records of his post-discharge dealings with Art, and established that Art was prescribed several medications that were capable of affecting his mental functioning:

- July 15: Tramacet (can cause confusion in higher doses); hydromorphone (can cause "mental clouding");

- July 19: lactulose (can cause issues with working memory and attention, decreased reaction time, and cognitive deficits)

- July 24: haloperidol (can cause drowsiness and blurred vision).

[193] During his July 24 visit he noticed that Art's condition had deteriorated significantly, including that he was jaundiced, which is associated with cognitive impairment, and confused.

[194] The following day, relying on the observations of the palliative care nurse, he noted once again that Art was confused, as well as that he was "rapidly deteriorating" and would be admitted to hospice.

[195] When he saw Art on July 26 he was weak, in pain and had significant jaundice.

[196] To further challenge his assertions that Art was competent throughout this process, Mike's counsel also put the observations of various attending nurses to him:

- July 19: speaking slowly and getting words mixed up (although also "alert and oriented");

- July 23: "increased confusion, restlessness and agitation" and "increased bouts of confusion including grabbing at the air, picking at bed and 'seeing people in the room'".

[197] When it was suggested to him that a person who presented with those symptoms could not be considered competent to make decisions he agreed with respect to someone who "stays that way", but noted that the condition of palliative care patients can change fairly quickly, with bouts of both increased and decreased confusion. He found Art to be "over-sedated" during his visit with him in the hospice on July 27, and said that would cause the same variability in competence.

[198] He was only ever "suspicious" of Art's competency at the very end of his life, when he was in the process of actively dying, and was comatose, or almost so. The same would be true of any patient in that situation, he said.

[199] He agreed that the hospital records show Art showing mild confusion as early as July 4, the day after he was admitted for the stroke.

[200] More generally he agreed that metastatic cancer of the kind that Art had can spread to the brain, which can cause confusion and cognitive impairment. However he added that the point at which the brain will go in and out of proper functioning is "quite variable". As his illness progressed his ability to recall details would have worsened, and at some point between his discharge and his death Art's competence would have been affected. He would have had fluctuating levels of consciousness and awareness. If he drank alcohol after he was discharged, that could have affected his cognition even further.

- [201] Dr. Edelson did not accept the general proposition that as a result of his fluctuating levels of consciousness and awareness Art would not have been competent to make decisions - when a person is coming in and out of confused states there will be times when they are competent to make decisions and times when they are not. In re-examination he accepted the suggestion that the person could be confused at one point, and "succinct and competent" at another.
- [202] He agreed that Art's description of his usual alcohol consumption, and the extent to which he had previously been a smoker, varied quite widely in his discussions with the various care providers who dealt with him while he was in hospital. One of the physicians also found him to be "a fairly poor historian", to the extent that it was difficult to tell whether the (at that point) suspected strokes may have occurred.
- [203] Mike's counsel also pursued the absence of any reference to having a current spouse or to Pat specifically in all of his years of being Dr. Edelson's patient. He also did not refer to having any problems with Mike until July 2019. All of his discussions with Art about Mike took place during that month.
- [204] Despite having been requested by Pat's counsel to provide all of his records of his dealings with Art from 2016 onwards, it emerged that certain notes were not provided until he brought them to court with him on a USB stick. He explained that this was inadvertent, and that as far as he knew his staff had provided the records that counsel had requested. He discovered that there was additional material when Pat's counsel asked him to bring everything he had to court. He believed that the mistake had occurred because of the transition from paper to electronic records in his office, as well as by his retirement.
- [205] The significance for our purposes was that this late-disclosed material contained his note from July 24, in which he wrote:
- Mr. Stevens is no longer mentally competent to manage his personal affairs.
- [206] He could not recall the circumstances under which he had written that note, which was not signed.

Mr. Wattie's Assistant

- [207] Kailee Fullerton is now a legal assistant for Pat's counsel. While Mr. Wattie was still practising he rented space from Pat's counsel, and during that period Ms. Fullerton worked for him.
- [208] She knew Art and Pat as Mr. Wattie's clients. After he went to their home to receive instructions about Art's will he returned to the office and told her to prepare it. According to her he said that "everything was being left to Pat".

- [209] She was unable to find any notes by Mr. Wattie of Art's instructions. Although she believed that there was a letter from a doctor available with respect to Art's capacity to make decisions about his estate, she understood that Mr. Wattie had arrived at his own opinion on that issue. She was not aware of the steps that he had taken in order to do so, and he also had no notes in that regard.
- [210] To prepare the will she pulled up a template. The names of the unrelated residual beneficiaries were already in that template and should have been replaced by Pat's name. She confirmed that Mr. Wattie later had those beneficiaries sign a document renouncing that bequest.
- [211] Mr. Wattie dictated the clause of the will to her in which Art explained why he was not leaving anything to Mike.
- [212] After Mr. Wattie took the will to Art to be signed she received a phone call from Mr. Wattie, in which he asked her to find a way to sever the joint tenancy on the property. She was aware that Mr. Wattie had no experience with real estate matters.
- [213] After consulting with the Land Title Office on that issue, she prepared the document in which Art transferred his one-third interest in the property to Pat. She subsequently registered it using the LTO account belonging to Pat's counsel, because Mr. Wattie did not have such an account.
- [214] Ms. Fullerton's evidence was heard in a voir dire at the request of Mike's counsel, because when she came to the courthouse to bring Pat's counsel some material, she had waited for him in the courtroom while he was conducting a portion of Pat's direct examination. She recalled that the topics that Pat was being questioned about were "Texas, and Art's stroke and about the will". Those topics were not explored further in her cross-examination.

Conflict After Art's Death

Pat's claims

- [215] Pat's evidence on this issue adhered closely to the facts alleged in her notice of civil claim.
- [216] First, she alleged that the following property was destroyed or stolen by Mike and Dana (I have interpolated her testimony with respect to the replacement value of some of the items):
- A cedar shed (\$900) that had contained two bicycles (\$120-\$150 each), four truck tires (\$1700-\$2000 in total), four car tires (\$200 each), two coolers (\$20-\$40 each) and "miscellaneous items";
 - A greenhouse (\$500 for materials) that had contained gardening supplies, shovels, hoes, rakes, a redwood table, wine-making equipment, wine bottles, two sets of large truck "changes", an antique fire extinguisher, wheelbarrows, three umbrellas, ladders, antiques and garden tools ("at least" \$2000 for all of these items);

· Two glass patio tables, two sun umbrellas and four patio chairs, all of which had been located in the back yard (\$200 for each "set, of which there were two).

[217] Pat testified that these actions were carried out between the date that she was removed from the property by the police because of an allegation that she had assaulted Dana (September 20, 2020) to the date that she was allowed to return (November 17, 2020). However she agreed that in her discovery she had said that the items were removed from the property as soon as Art died. At another point in her discovery she said that she had a fence installed in December of 2019 and the items were stolen before then - between September and December of that year. In response she agreed that the fence had been put up in December of 2019 but the items had been stolen during the period in which she was banned from the property in 2020.

[218] She was unable to recall when she stopped going to the shed and greenhouse while they were still in place. She explained that she was confused and that she had "an awful lot to take care of during that time". She agreed that her notice of civil claim does not allege any dates for the destructions of these structures or the theft of the items that they contained.

[219] In one of the security videos of the backyard that were entered as exhibits, a ladder appears in the background. Pat agreed that it could be the ladder that she claimed had been stolen from the greenhouse. However she said that someone else had removed it from the greenhouse, presumably to use it, and that she had not done so.

[220] Her claim also included the allegation that on November 19, 2020, Mike and Dana cut the lock of a large container that she kept on the carriage house's side of the property and removed a John Deere lawn tractor (\$2700), a generator (\$700), a push lawnmower, and "miscellaneous items". She refers to a photo of what she said depicts the cut lock, although it is so small in the photo that the damage is difficult to see.

[221] Dave Bavington, who lives next door to the property, on the east side, described observing Mike burning down the shed, and cutting brush along the fence between their properties. Mike then used the John Deere tractor, which had been parked in the container, to "finish" along the fence where he had been cutting all the "brush and stuff".

[222] After that he loaded the tractor, which Mr. Bavington also described as a lawnmower, onto a trailer, and drove it away. Mr. Bavington wrote down the licence plate number of the pickup truck that was pulling the trailer, and gave it to Pat. He also described the truck as "Mike's truck".

[223] Mr. Bavington also described Mike using a backhoe to pull down some ivy in the corner of the property near the highway, which had the unfortunate effect of pulling that portion of Mr. Bavington's fence over.

[224] It emerged in cross-examination that Mike had actually used two tractors in this endeavour.

[225] Mr. Bavington was shown a photo of a tractor with a brush cutter attachment on it driving along the bushes by the fence, and agreed that it was not the one that Mike had loaded on the trailer. He also agreed with the suggestion that Mike used the tractor in the photo to mulch the ivy, and then "the lawn tractor" afterwards. He had used the brush cutter attachment on the tractor in the photo because there were still a lot of stumps sticking up after he had cut all the "brush and stuff". Mr. Bavington also clarified that Mike had used a tractor with a backhoe attachment to pull down the ivy and a portion of the fence, although he did not specify if that was also the tractor depicted in the photo.

[226] In addition, Mike and Dana were alleged to have caused a nuisance by:

- Denying Pat access to the basement of the main house for three or four years (the storage was of "miscellaneous items that Mike said we could store down there");
- Keeping two aggressive dogs and refusing to restrain them. The dogs (a mastiff and a pit bull) would chase her and her small dog whenever she and her dog tried to go out in the yard;
- Blocking access to the garage portion of the carriage house by parking a vehicle in front of the door to it;
- Removing slats from "the fence", thereby denying privacy to her;
- Putting locks on the fence around the carriage house when she is away, which have to be cut in order for her to access the house;
- Taking down a fence that was put in place to restrain their dogs and relocating another fence that was put up to replace it to the rear of the property (she added in her testimony that Mike then put up a new fence to divide the property and also closed off a means of exiting the property from the back yard and the former access between the side of the carriage house and the fence); and
- Placing a camera on (that is, attaching it to) her house.

[227] Pat had some difficulty in cross-examination pinpointing the period in which she and Art were denied access to the basement of the main house. In her direct testimony she referred to the lock being changed in 2018. However she agreed that at her examination for discovery she had been doing her laundry at a laundromat or a friend's house since 2015.

[228] In support of the allegation of blocking the garage door she provided a photo of a sport utility vehicle parked next to it. Mike's actions in preventing motorcycles being moved out by means of that door meant that they remained inside the carriage house, instead of being placed into storage with other items, such as shop equipment that was used by Art, out of her living area inside the carriage house.

- [229] Addressing the allegation about a camera being put on the carriage house she provided a photo of what appears to be a rectangular electronic device hanging from a strap, positioned and also taped against the window slot of a door. She believes that Mike put this camera up, although she did not see him do it.
- [230] The allegation about removing the lock on the container and stealing certain items from it in the previous section was repeated as part of these nuisance claims.
- [231] Finally, there were claims that Mike and Dana had not "allowed [Pat] the privacy of the family home". These claims repeated the allegations in the descriptions of the other torts - repeatedly putting locks on her fence, taking down the dog restraint fence and removing and moving the one dividing the property, and removing the fence slats. The additional allegation was the positioning of numerous security cameras facing her property.
- [232] Not included in her actual claims, but part of the ongoing harassment that she described, she said that upon coming home from caring for her son in Texas she would find that the water to the carriage house, which I gather is controlled from the main house, had been cut off. Mike would provide a variety of excuses, and did not attend to having it turned on again with any sense of urgency. At one point he sent her a photo of a broken water pump, but during the period that he was referring to she had actually had water available (in other words, I took her to mean, his explanation was not truthful).
- [233] Mike addressed these allegations:
- The garden shed had been brought to the property in the 1990s by a family friend and was used as common storage by all of the occupants of the property. Mike demolished it because it was in very poor shape - the neighbour's vines had grown into it and damaged the siding and roof, the floor had rotted, the door would no longer work and there were rats living underneath it. The only property left inside at that point were his bicycles and other items belonging to him, which he disposed of. Pat's property had already been removed by her.
 - The greenhouse had been built by him and his father out of scavenged materials. After the plastic covering deteriorated, his father no longer used it as a greenhouse, and instead its sides were boarded up and, like the garden shed, it was used as common storage. Its door no longer shut and it had been open to the elements for several years. Once again, the only property remaining in this structure - a lawnmower - belonged to Mike, and any property belonging to Pat had been removed by her by the time he demolished it.
 - The patio furniture disappeared either the same day or the day after Pat was removed from the property for spray painting Dana in the face. They reoriented their cameras to show that area of Pat's back yard, because whoever took these items must have come around the other side of the carriage house, where there was no fence.

- He did not take any of the items from the container. He explained that the John Deere mower, which was primarily used by his father, had been removed from the carport at his request, and then stored in the sea can. The generator, which was used to run the well on the property when the power was out, used to be stored in the garage as well, and the push mower belonged to his aunt and so would likely have been removed by his father. His mother also had a John Deere riding mower, which he sometimes used on the property.
- He was referred to a photo of the open container that had been taken by Dana in the spring of 2020, after the fence was put up, and identified some of the items that Pat alleged he had improperly removed from the shed - coolers from the shed and the missing patio tables. He also identified items that Pat and his father had previously stored in the basement.
- He denied cutting off Pat's access to the laundry and storage area in his basement, explaining that he had not changed the locks and Pat had previously had a key to access (although he did not address how she would continue to access the area with the fence up). Dana said that after Art's death, Pat had slowly moved all of their belongings out of the basement storage of the main house.
- Neither of his dogs have ever been hostile to Pat, and she and Art had known his pit bull, who used to sit with Art in the yard, since he was eight weeks old. Pat called the local animal control agency to report the dogs' behaviour after an innocuous incident in which they barked and sniffed her as she was dumping a pot of food in the corner of the yard. The agency later exonerated the dogs of having behaved aggressively towards her.
- He admitted removing fence slats (plastic strips that are put through the links in a chain link fence to block the view through them) from the fence that Pat installed between their houses adjacent to the driveway. He was upset with his wife having been spray painted, so he removed the slats at the same time he took down Pat's chain link fence between their back yards. That was the fence that she alleged was in place to restrain his dogs.
- Mike agreed that he parked one of his vehicles in front of the large rollup door to the carriage house - a holdover from its use as a shop - after a person arrived with a truck and trailer and said he was there to purchase motorcycles. After informing the person that the motorcycles were part of a disputed estate and could not be taken, he left his vehicle in that position to prevent any large objects from being taken out that way. This was the same day that Pat had spray-painted Dana in the face. He estimated that he then left the vehicle in that position for "at most" a year.
- He has never changed any of the locks on the gate for the chain link fence that Pat installed at the front of the property. The allegation that he had done so surfaced after an incident in which she came back from Texas and had to call a locksmith to allow her to enter the carriage house. A security camera video of a locksmith attending with Pat to the front door was played in court, and although Dana claimed to be able to hear Pat referring to having left her keys in Texas, I found her comments too faint to discern, even with the volume of the audio increased substantially. Pat testified that she had never locked the fence "or at least not with the lock that was on it when she got home", and that she had called a locksmith to assist her when she had forgotten her keys to

the front door in Texas. In re-examination however, she said that there had been a lock on the gate when she returned, which she had removed with a wrench, before the locksmith dealt with the locks to the carriage house.

- Mike took down a five-foot-high chain link fence between the backyard areas of the house and carriage house that Pat had installed, put a temporary plastic fence reinforced by cables there instead and eventually replaced it with one a foot higher. He relocated her fence so that it ran across the back of the property. She had removed her belongings from the cedar shed and the greenhouse before her original fence was completed, because once it was up she would no longer have access to them for storage (they are both on Mike's side of the property). Before she put up a chain link fence, there had been a four-foot-high plastic one that contained a gate allowing Pat and Mike's father to enter his backyard and the basement of his house to use the laundry facilities and their storage area.

- Dana installed security cameras around the perimeter of the house, to address "the weird things that were going on", which he did not elaborate on. One of the security cameras shows at least half of the carriage house, another one shows part of Pat's back yard, but there is no camera that is focused directly on her front door - it is just shown incidentally. Overall, he thought that two or three of their cameras show part of the carriage house.

[234] In her evidence Dana likewise rejected the suggestion that the shed and greenhouse were of any continuing use or contained any of Pat's items at the time they were destroyed, or that they had interfered with Pat's use of the property in any other manner. The security cameras had recorded Pat moving past them carrying items in boxes, but she did not pay attention at the time to what these items were, although she later said that they included wine boxes and a wheelbarrow, which she later saw in the container.

Pat's behaviour on the property

[235] When Dana asked Pat if there was going to be a funeral service for Art and whether Mike could have some of his ashes, Pat told her that as far as she was concerned Mike was the reason that Art was dead.

[236] Although Pat did not explicitly say that their respective shares of expenses for the property were now 50% each in light of Art's death, shortly after his death she demanded an equal contribution from them for a specific payment, which appears to have been the property taxes, and Dana provided her with a cheque.

[237] Mike testified that several months after his father's death, Pat began preparations to build a gate that would have blocked his access to one of the two exits from the property onto Lougheed Highway, making it accessible solely from in front of the carriage house. This would have required him and Dana to use the other exit, which, because of its configuration, makes it very difficult to enter the highway safely. To prevent the gate from being built, he parked one of his vehicles on top of the holes for its intended posts, and chained another of his vehicles to the first one to make it more difficult to move. He

provided a video from his home security system in December 2019, which appeared to show Pat trying some of the doors of those vehicles, he believed to remove notes that he had left inside his vehicles requesting that the police or tow truck drivers call him if there was a request to move the vehicles, or they were to be towed. Before the incident shown in this video, she had parked her truck in a position to block the safer of the two exits.

- [238] He also alleged that once or twice Pat threw an unknown item over the fence to his side of the yard, and that shortly after those events one of his dogs became ill. A video of one such incident in which the defendant was recorded on security video engaging in that action, and appearing to look at the camera afterwards, was played in court. Dana said that after one of her dogs became ill, she reviewed the recordings for the preceding seven days and located this footage.
- [239] In addition, Pat repeatedly spray painted the windows of their house that faced in the direction of the carriage house. One such sequence was captured on their home security, and included her spraying one of the cameras as well.
- [240] On September 20, 2020, Dana opened one of the windows from the inside while Pat was spraying it, with the result that she was spray painted in the face. She said that after this occurred Pat asked her to close the window so that she could finish painting it. When Dana refused, Pat said, "It's my window". A photo of Dana with spray paint across her face was provided, and she described having to replace the prescription sunglasses that she had been wearing at the time, and also to have her hair coloured because the paint in it could not otherwise be dealt with without damaging it. She called the police and Pat was placed on an undertaking not to attend the property, which was in force until November 17, by which date no criminal charges had been approved and the undertaking lapsed.
- [241] Pat's explanation for the spray painting of the cameras was that five of them being focused on her was "a bit much" and she could not take it anymore. Mr. Wattie had previously written Mike and Dana demanding that the cameras be removed but that they had refused. Her explanation for the incident directly involving Dana was that Dana had opened the window unexpectedly while she was engaged in spraying it. In her view she had no control over where the paint went at that point.
- [242] She said that in the video of her throwing something over the fence, she was probably throwing "a bone or something" to the dogs, as both she and Art had done frequently in the past.
- [243] Addressing the incident in which Mike prevented her efforts to have a fence constructed, she said that he verbally accosted and interfered with the fence-builders. When she tried to stand on the spot where one of the post holes was to go, he got in his jeep, moved it to where she was, and physically pushed her out of the way with it. As a result the fence builders were "completely discouraged" and left.

- [244] She declined to share in the cost of the new roof of the main house after it was replaced in April 2022, on the basis that Mike and Dana had not shared in the new roof of the carriage house, a few years earlier.

Art and Pat's Relationship

Mike

- [245] From grade seven until the year after he graduated from high school, he lived full time with Art and Pat. Before then he had spent alternating weekends and some holidays with his father.
- [246] After a year living with his grandmother, he returned to live with Art and Pat for a year, following which he moved in with Dana and her family, staying there until he and Dana moved into the main house on the Lougheed property in 2011.
- [247] His father originally introduced Pat to him only by her first name, and never defined their relationship any further in his statements over the years. The only information that he provided about her was to describe the jobs that she worked at.
- [248] He said that from the time that he first met Pat, which was some time in the 1990s, she and Art maintained separate bedrooms, and were "essentially roommates". In the house on the Lougheed property, which had three bedrooms, she used of two of them and his father had one, requiring him to sleep in the basement.
- [249] Mike's understanding from Art was that he and Pat had purchased their first house together in Mission more as a business opportunity, rather than as a "couple thing". His father told him that he and Pat could not stand each other once they began co-habiting, resulting in them having separate bedrooms well away from each other.
- [250] Their sharing of expenses was confined to groceries and other basic requirements of living. He described them cooking meals at the same time, as opposed to "together", although he then described them engaging in complementary aspects of the preparation of common dinners. They would eat their meals together while watching TV, but on a couch that had an armrest dividing their positions. They each "cleaned up their own mess" he said, and did their own laundry.
- [251] He conceded that his father drove Pat to her appointments and that she was present after he had knee surgery, although she left for Texas shortly after that.
- [252] He did not observe any gestures of affection by them towards each other, and instead had the impression that "they hated each other more often than not" or, as he later put it, "they did not really seem to like each other in general". He described them as both being "raging alcoholics", who would drink to excess and then spend extended periods arguing with each other. He did not consider them to be loyal to each other, explaining that his father would have "figured out his own thing any chance he could have, but he wasn't that motivated."

- [253] He never saw them engaging in any form of physical intimacy with each other, even as limited as holding hands. His knowledge of the extent to which the relationship was exclusive was very limited, but once, when he was a teenager, he observed his father interact with another woman in a manner that suggested he was pursuing a sexual relationship with her.
- [254] They did not express to him or to anyone else in his presence that they were a couple. Rather, "They never really talked about being a couple or not being a Couple [i]t was never spoken of [i]t was just seen."
- [255] They did not celebrate anniversaries or each other's birthdays, and were not enthusiastic about spending time with each other's extended families.
- [256] Pat has a son from a previous relationship, whom Art repeatedly told Mike he hated, on the basis that the son was "a screwup". The son took over Art and Pat's first house and later began to live full time at their property in Texas.
- [257] He also did not observe them engaging in other activities that would be typical of intimate partners. For example, she only attended their friends Les and Penny Cole's large-scale New Year's celebration once in the many years that it was held, whereas Mike and his father attended it regularly. She also only went to the numerous other events that were held by those friends once or twice, while his father was there frequently. Although she was invited to Mike's wedding in 2018, and Art attended, she did not go.
- [258] In general, they did not really go anywhere outside the property in their spare time. In recent years his father would spend his time at the property, reading and drinking.
- [259] After one or two trips to Texas together around 2008, which I infer may have been to explore purchasing the retirement property there, Art was only there for an extended period with Pat once - for just under six months in 2011 or 2012. Mike's spouse said that his father told her that because Pat had convinced him to put her son on the title of the Texas property with him, and he disliked her son, he would not go back after that. Pat on the other hand went for just under six months every year after that, right up to the year of Mike's father's death.
- [260] To illustrate his father's view of Pat, Mike explained that when he was in elementary school she had had an adverse reaction to new medication and stopped breathing, requiring his father to revive her. In later years he repeatedly asked Art if he regretted having done so, and Art would refuse to answer him.

Dana

- [261] She observed Art and Pat's bedroom arrangements when she visited the Loughheed property in the early stages of her relationship with Mike. In addition to noting that Pat had two bedrooms of her own, she said that Pat's second bedroom was filled with her belongings.

- [262] Her observation during her dealings with Art and Pat was that "they didn't seem to have any relationship". They were very rude to each other, frequently barking orders, snapping and swearing. Like Mike, she saw no signs of affection between them, including any physical contact, which they actually appeared to avoid. Other than living in the same house, she would not see them doing things together.
- [263] They also made comments to her about each other. Pat told her that they "couldn't stand each other" and Art told her that "he doesn't really care for her and he hates her son, even more."
- [264] She only ever saw them when they were on the property, so she could not comment on whether there were any public displays of affection. In the same vein, she conceded that her belief that they did not celebrate anniversaries or give each other gifts was an assumption based on not having seen these activities occurring.
- [265] In July of 2018 Dana surreptitiously recorded a conversation with Pat, in which Pat related that she and Art had purchased their first house by combining Art's father's large amount of cash with her ability to qualify for credit. Pat said that after six months in the house together she could not stand it anymore and was going to leave, but that Art told her that he would leave instead.
- [266] The conversation between them had been ongoing for four to five minutes before she began recording, and it continued after she stopped. It arose when Pat approached her, apparently in response to Art's request that she and Mike speak to Pat about the contributions to expenses. She was not able to recall any details of the unrecorded portions, other than that Pat had said that she wanted to talk to her about what was going on.
- [267] Despite this, Dana said that in the unrecorded portion, in the course of telling her about the arrangement under which they purchased their first house together, Pat told her that she was not looking for a boyfriend at that time and that Mike's father "never was that to her". It is not clear from Dana's evidence whether this was part of the same conversation on that day - if it was, it was not part of the recorded portion.
- [268] As a result of her observations and Art and Pat's statements to her, she did not view them as being "a couple".
- [269] She expressed the view that Pat drank as much alcohol as Art, but clarified that she only saw Pat drinking approximately once per month, and that the cup that she routinely saw her drinking from may not have contained alcohol.
- [270] She conceded that Art was not an affectionate person in general, including to Mike, and that he tended to be rude. She also agreed that both Art and Pat were quite "bullheaded" and opinionated, which I took to be an alternative explanation for how they interacted.

Les and Penny Cole

- [271] Mr. Cole, a long-time friend of Art's, testified that he did not believe that there was "any relationship" between Art and Pat. He found it significant that Art only ever introduced by her by her first name, rather than as his wife or some equivalent term. Like the other witnesses, he observed that they slept in separate bedrooms in the carriage house and that there were no signs of physical affection between them.
- [272] During his visits to the carriage house, which were a couple of times per week around dinner time, Pat was usually either elsewhere in the house or was out. He confirmed Mike's evidence that Pat never came to the New Year's parties that he and his wife threw, but she did attend their 25th anniversary celebration.
- [273] The only thing that Art told him about Pat was that she had good credit and was able to get a mortgage. He recalled that Art had one girlfriend over the years that they knew each other, some time in the 1990s.
- [274] Penny Cole, Mr. Cole's spouse, described spending time with Pat when she and her husband would visit the Loughheed property. This was during the period when Art and Pat still lived in the main house.
- [275] Pat showed Ms. Cole her bedroom and explained that it had "nothing of Art's" in it, and that none of her belongings were in his bedroom. This was because they had filed their income tax returns as each being single and did not want an inspection of their house to reveal that they were "living together". At some point she also showed Ms. Cole her bedroom downstairs, and provided the same explanation in relation to it. Pat used the term "business arrangement" in the course of these explanations.
- [276] She said that Pat rarely attended when Art visited at their house. More frequently he would bring Mike with him.
- [277] Ms. Cole's impression was that Art and Pat were not in a romantic relationship, but instead that they "just seemed to cohabitate". She saw no signs of affection between them, they never described each other as spouses and other than their trips to Texas she only recalled one event - a wine tasting at Pat's workplace - that they attended together.
- [278] As Mike had, she described Art being angry that Pat's son was living at their Texas property, and that he did not want to go down there anymore as a result.

Pat

- [279] She said that she met Art through a shared interest in riding motorcycles, in a year that she could not specifically recall. They began a dating relationship a few years later. During the intervening period she actually attended his wedding to his first wife. Mike was two or three years old at the time they began dating.

- [280] This relationship progressed to them "moving in properties together in common law". She said that she loved him, and that "I always had his back and he always had mine". Their relationship included sexual activity on an ongoing basis. Her response to the suggestion in cross-examination that they were never "intimate" was, "Wow. You sure don't know Art".
- [281] With respect to their bedroom arrangements, she explained Art used a CPAP machine, which made a noise that disturbed her, and her work shifts required her to get up at odd hours, so despite their physical relationship they maintained separate bedrooms so that they would be able to sleep. They did not have separate bedrooms at the first house they owned together.
- [282] She said that Art was not affectionate to anyone in public, even with her. He did not believe in celebrating birthdays or most holidays, although he was willing to get together with family at Thanksgiving and Christmas. Their finances did not allow them to exchange gifts frequently, but at one point he invited her to pick out a ring for herself at a jeweller, and bought them a membership at a gun club. Over the years she bought him two watches, and regularly took him to a brunch at the Vancouver Wine Festival.
- [283] Beginning in about 2000 and continuing until to 2018, they filed their income tax returns representing that they were spouses. She provided copies of her one-page "tax return summar[ies]" for 2011 and 2015-2018, which was all her accountant had access to. Art is listed as her spouse on each of these documents.
- [284] She said that she routinely introduced him to others as her "partner".
- [285] Her explanation for Art moving out of the first house that they bought together was that after six months of bad behaviour by Mike, who was still a child at the time, she was unable to stand the situation any more, and proposed to move out. Art told her that she did not need to do so, and instead rented a house in Abbotsford for himself and Mike. They continued "dating" during the intervening five years.
- [286] She denied the suggestion that their original home purchase was purely a business arrangement. She maintained that they lived together because they loved each other, and that the only reason Art left was because "Mike was not a nice kid".
- [287] She said the surreptitious recording by Dana was part of a discussion about how they had each provided support to their respective partners - in her case by making all of the mortgage payments on their house while Art was living elsewhere, after he had put down more money than her to buy it. She repeated her evidence about the reason for his departure and his suggestion that they resume sharing a house, which was not captured on the recording, and denied ever having told Dana that they were not in an intimate relationship.

- [288] About eight months before the mortgage was to be renewed, Art pointed out to her that they were not making any financial progress by maintaining two separate households (she was paying for everything at their house while she was living there alone), so he moved back in and they began to look for a new property on which he could also have a shop (he was a machinist). That plan eventually resulted in their joint purchase of the Lougheed property.
- [289] One of the reasons she offered for not attending social events with Art and his friends was the lengthy commute that she had to her workplaces (in Vancouver and Chilliwack) which ranged from an hour to an hour and a half each way, and her work shifts, which often required her to be there until midnight. In addition, Penny Cole had indicated that she disliked Art, so Pat did not want to go to their house to socialize. She said that they had some joint friends, but not a lot, because neither of them had a lot of friends overall.
- [290] She conceded that Art drank alcohol daily, but said that her own alcohol intake consisted of one or two drinks, once or twice a week.
- [291] Contrary to Mike's assertion, she said that Art accompanied her to their property in Texas every year from 2011 until approximately 2016. In cross-examination she said that he went with her "several times", including at least once after she allowed her son to live there.
- [292] Once Mike had threatened him (which I will describe further), Art did not feel comfortable leaving the property unattended. After her son had a serious stroke in Texas in January 2019, she began to travel down there more frequently. Whenever she was in Texas without Art, they would speak to each other every day, or every other day.
- [293] She also contradicted the suggestion that Art did not like her son. They did not see each other often because her son was a long-haul truck driver, but when her son was in town they would all get together. As an indication of the warmth of their relationship, she said that Art actually built her son a motorcycle.

Discussion

Overview on credibility

- [294] I will be referring to the parties' credibility as it relates to the specific issues, but as a general observation I would say that they have unfortunately allowed their hostility towards each other and the financial motivation underlying the litigation to colour their evidence to a very significant degree. As I have summarized, both Mike and Pat testified in a manner that was frequently inconsistent with their previous statements on important issues, and clung to positions on important issues that did not make sense in light of the surrounding circumstances.
- [295] While Dana's evidence was not inconsistent to the same degree, she allied herself with Mike's sometimes untenable assertions in a way that also undermines her credibility.

- [296] As a result, I think I must be cautious before relying on any of their evidence, except where it is confirmed by independent reliable evidence, or it accords with what would be reasonable to expect in the circumstances. This caution applies particularly strongly to their purported recollections of specific conversations, including statements by Art.

Preliminary Evidentiary Issues

Statements by the deceased

- [297] Neither party objected to the other's reliance on Art's statements, but it is still essential to identify the basis on which those statements could be admitted and the uses to which they can be put.
- [298] Such statements can be introduced to show the deceased's state of mind and intentions: *R. v. Smith*, [1992] 2 S.C.R. 915, at para. 25. If they are received on that basis - that is, as original evidence (non-hearsay) - the statements are not admissible to prove the truth of their contents.
- [299] Statements of the deceased can also be admitted pursuant to the principled exception to the hearsay rule. Statements that meet the criteria for its application are admissible for their truth.
- [300] First, they must be reasonably necessary, which is obviously established by the death of the declarant: *R. v. Blackman*, 2008 SCC 37 at para. 34.
- [301] The statements must also be reliable. This can be established by showing that there are adequate procedural substitutes for the absence of the deceased and the inability to cross-examine them under oath. These substitutes must provide a satisfactory basis for the trier of fact to rationally evaluate the truth and accuracy of the statements. Reliability can also be demonstrated on a substantive basis. This requires that the statements be inherently trustworthy - so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process. Consideration must be given to the circumstances in which the statements were made and evidence that corroborates, or conflicts with them. Corroborating evidence can only be relied on to establish reliability if it shows "that the only likely explanation for the hearsay statement[s] is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement[s]". Such corroboration must go to the truthfulness or accuracy of the material aspects of the statements, and address the specific hearsay dangers that they raise: *R. v. Bradshaw*, 2017 SCC 35 at paras. 28-31, 44-45, 47-48.
- [302] In this case Art's various statements have meaningful probative value as expressions of his state of mind and intent, quite aside from the truth of the facts asserted by them, and it is appropriate to receive them on that basis. In some cases, the fact that they were made is itself probative, as non-hearsay.

- [303] I cannot identify any procedural safeguards attaching to them, whether they were made orally or in writing, that would provide sufficient guarantees of reliability to admit them. Nor can it be said that they are so inherently trustworthy, in light of available confirmatory evidence, that cross-examination would not have added anything to the assessment of them by the trier of fact. As a result they cannot be admitted for the truth of their contents pursuant to the principled exception.
- [304] For the most part I think it is obvious that the statements attributed to Art show his state of mind in relation to the relevant events that were occurring at the time, principally Mike's (and to a limited extent Dana's) behaviour towards him. This includes his notes, his emails to his lawyers, and his statements to Dr. Edelson. Mr. Cole's recollection that Mike would be "getting" Art's share and "was paying the mortgage" shows Art's contemporaneous understanding of the agreement at a time before any dispute about its terms had arisen.
- [305] The only caution that must be applied, since these statements are admissible only to show Art's state of mind and intention, is that they are not proof that any actions by Mike that they describe actually occurred.

Surreptitious recording

- [306] While the courts have generally recognized it as an odious practice that should be discouraged, if the content is relevant to an issue in the proceeding, the speakers are known, the recording is trustworthy, and its probative value outweighs its prejudicial effect, the recording should be received: *Surrett v. Butkiewicz*, 2018 BCSC 1380 at para. 15. The fact that the recordings being tendered are incomplete do not render them untrustworthy - what is required before that conclusion is reached is some concern that they do not accurately represent the events they purport to have recorded: *M.Y.T.C. v. L.H.N.*, 2019 BCSC 2454 at para. 15. The lack of completeness may of course erode a recording's probative value in the balancing exercise, if the omissions mean that it lacks sufficient context to give meaning to the words: *R. v. Merritt*, 2023 ONCA 3, at para. 63.
- [307] Here the usual judicial disapproval of the practice is called for, since the tactic was clearly used by Mike and Dana in an effort to gain an advantage in their dispute with Art and Pat.
- [308] That acknowledged, and despite Pat's reservations about the identity of the speaker in the hospital recording, I am satisfied that the speakers in these recordings are known, that even though they capture only a portion of some of the conversations in question there is no suggestion that the recordings have been altered, and that they are relevant and have probative value that outweighs their prejudicial effect.
- [309] Dana's conversation with Pat is capable of shedding light on the purchase of her and Art's first property together, which in turn may support inferences about the nature of their relationship, and the recording of Art at the hospital and upon the return of the keys to his house may shed light on his physical and mental condition during those interactions.

[310] As a result, these recordings are admissible.

[311] I have not included the video recordings of Pat from the security cameras outside the main house in the category of surreptitious recordings. While she has claimed a breach of her privacy arising from their use, she does not claim to have been unaware of their presence, or that her actions would be captured by them.

The Rule in *Browne v. Dunn*

[312] Much of the version of events that Pat testified to was not put to Mike in cross-examination. Such an approach potentially engages this rule, which was helpfully explained in Paciocco and Stuesser, *The Law of Evidence*, 8th, ed. (Toronto: Irwin Law, 2020) at 619-620:

A party who intends to impeach significant testimony provided by an opponent's witness, with unanticipated contradictory evidence or argument on a matter the witness is not apt to know about, must direct the witness's attention to that contradictory information during cross-examination. This is a matter of fairness to the witness, opposing counsel, and the court. If the cross-examiner fails to confront the witness, as required, there is no fixed consequence; the effect depends upon the circumstances of each case. The court should first see if the witness can be recalled. If that is not possible or appropriate, the absence of confrontation may affect the weight of the unchallenged testimony and/or of the contradictory evidence.

[313] If the failure to cross-examine is used to assess the credibility of the party who was guilty of that omission, it should only be done with respect to the specific areas on which cross-examination was not carried out, not with respect to their credibility at large: *R. v. Poole*, 2015 BCCA 464 at paras. 46-47.

[314] Adapted to the civil context, *R. v. Paris*, [2000] O.J. No. 4687 (C.A.), leave to appeal ref'd [2001] S.C.C.A. No. 124, helpfully explains the factors that may influence the application of the rule:

23 These include the nature of the matters on which the witness was not cross-examined, the overall tenor of the cross-examination, and the overall conduct of the defence. In some circumstances, the position of the defence on the matters on which the [witness] was not cross-examined will be clear even without cross-examination. In other circumstances, the areas not touched upon in cross-examination will not be significant in the overall context of the case. In such situations, the failure to cross-examine will have no significance in the assessment of the [other party]'s credibility. In other circumstances, however, where a central feature of the [witness]'s evidence is left untouched in cross-examination or even implicitly accepted in that cross-examination, then the absence of cross-examination may have a negative impact on the [other party's]'s credibility.

[315] Without condoning the very significant breach of the rule in Pat's testimony, I am satisfied that no specific remedy is called for here. In my opinion there is no possibility whatsoever that Mike would have agreed with these additional factual assertions if they had been put to

him since, like the ones that were put to him, they were fundamentally opposed to his narrative of events. More importantly, as I have previously indicated, I would not accept Pat's evidence except where it is reliably supported or makes sense in the circumstances in any event, because of its inherent deficiencies. As a result, her unsupported testimony, even if he did not have a chance to respond to it, is incapable of prejudicing his position.

Specific findings of fact

The nature of the agreement

- [316] I think that Mike and Dana's counsel has correctly characterized the deed of gift from Art and Pat to Mike, which was entered into and sealed before a notary, as a form of contract under seal: *Romaine v. Romaine*, 2001 BCCA 509 at para. 21. Although simply making Mike a joint tenant as to a one-third interest in the property endowed him with the right of survivorship with respect to it, specifying Art and Pat's intention to make him a gift of it made clear that no resulting trust to them applied, despite the lack of consideration.
- [317] Of course in this case, despite the deed having the status of a contract, that was clearly not the whole agreement between the parties. There is no question that Mike was placed on title in return for making specified payments towards the mortgage and other property-related expenses. What matters is whether it was also agreed that he also agreed with Art and Pat that he would make all of those payments or, as he asserts, that each of the parties to the agreement would contribute one-third, in keeping with their shares as joint tenants.
- [318] I am not satisfied on a balance of probabilities that the oral component of the agreement was the one that Mike describes. His testimony was inconsistent with what he said at his discovery about whether he could recall having discussed the disputed aspect of the arrangement, and while it is certainly possible that he made a conscious decision not to read the mortgage documents before signing them, I find it unbelievable that a bank employee would simply place them before him for signature without explaining the contents. Similarly, Dana's detailed recollection of that term of the deal was contradicted by her response in cross-examination that Pat did not describe the deal to her, and that it was not her to say whether Art and Pat had held up their end of it.
- [319] More significantly, the essential term that they say was included does not make sense. Art and Pat would have been giving him a one-third interest and the right of survivorship in return for a fairly modest reduction in their monthly expenses and the ability to draw out \$160,000. Compared to the overall value of the property at the time, even leaving aside the likelihood that it would increase, that would be quite disproportionate in Mike's favour. And even if Mike and Dana were relative neophytes as property owners, I cannot accept that they thought that their mortgage payment was only one-third of the total payment - which would have been more than \$5000 per month under that state of belief - given the amount that was being borrowed. More fundamentally, I am satisfied that the monthly mortgage payment must have been explained to Mike by the bank employee, whether or not Dana

was also present, and it cannot plausibly have escaped him that the amount that he and Dana were contributing towards it was the same as that payment.

- [320] In contrast, Pat's description of the basis of the agreement - to have Mike essentially be her and Art's retirement plan by covering their monthly shelter expenses in return for the right of survivorship - is a much more plausible one, and conforms more closely to what the parties objectively demonstrated by their conduct.
- [321] In reaching this conclusion, I acknowledge that Mike and Dana clearly became discontented with the agreement in 2018. That would account for Mike's demand in 2018 or early 2019 that the property be sold, which is reliably confirmed by Art's note about his pre-sale responsibilities and the offer from Art's lawyer to purchase Mike's interest, as well as the separation of the hydro bills in July 2018. It is quite possible that they grew discontented with the extent of their payments under the agreement. But I cannot find that they were told at the outset that their contribution would only be one-third of the expenses, and that they entered into an agreement on that basis.
- [322] I would say that the complete agreement that the parties objectively demonstrated was that Mike would pay the amounts for the mortgage and property-related expenses that Pat requested from them, which were largely in keeping with the amounts that were withdrawn from the joint account or provided directly to Pat for those purposes, in return for the property interest having been provided to him at the outset. It was not a term of the agreement, essential or otherwise, that Art and Pat were paying some additional portion themselves.
- [323] It seems to be common ground that Mike and Dana successfully stopped the withdrawal of any payments from the joint account except for the mortgage, had the hydro and gas accounts for the main house switched into their own names, did not pay the insurance arranged by Pat after 2019, and required her to pay half of the property taxes in that year. These actions were not in accordance with the terms of the property agreement as I have found them.

Pat's status as a spouse

- [324] The determination of whether a relationship was marriage-like requires a "holistic approach", in which all of the relevant factors are considered and weighed, but none of them are treated as being determinative of the question: *Austin v. Goerz*, 2007 BCCA 586 at paras. 58 and 62.
- [325] While a "checklist" of attributes is not appropriate, it can still be helpful during the analysis to consider the presence or absence of commonly-accepted "indicators of the sorts of behaviour that society, at a given point in time, associates with a marital relationship": *Weber v. Leclerc*, 2015 BCCA 492 at para. 25. A frequently-cited authority has identified these indicators as including "shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the

couple": M. v. H., [1999] 2 S.C.R. 3 at para. 59, citing Molodowich v. Penttinen, (1980), 17 R.F.L. (2d) 376 at para. 16 (Ont. Dist. Ct.).

- [326] Consideration of such factors must be moderated by the acknowledgment that spousal relationships are "many and varied", and that there is no uniform template for them: Austin at para. 58, citing Yakiwchuk v. Oaks, 2003 SKQB 124, at para. 10.
- [327] While financial dependence was at one time considered an essential aspect of a marriage-like relationship, this is no longer so: Austin at paras. 55-56.
- [328] The intentions of the parties, particularly whether they saw the relationship as being "of a lengthy, indeterminate duration", will be important to the determination of whether the relationship was marriage-like. However, evidence of their intentions must be tested against objective evidence of their lifestyle and interactions, which will provide direct guidance on the nature of the relationship: Weber, at paras. 23, 24. In other words, "subjective or conscious intentions may be overtaken by conduct such that whilst a person living with another might not say he or she was living in a marriage-like relationship, the reality is that the relationship has become such": Takacs v. Gallo, (1998), 48 B.C.L.R. (3d) 265 (C.A.) leave to appeal to SCC ref'd, [1998] S.C.C.A. No. 238, at para. 53.
- [329] I think it is more likely than not that Art and Pat were in a marriage-like relationship. In addition to the overall caution that attaches to their testimony, I would say that Mike and Dana have conflated the degree of happiness of a spousal relationship with the question of its existence. The fact that Art and Pat were not affectionate to each other and bickered frequently is not really that informative, in comparison to the more general attributes of their long-term cohabitation, joint property ownership (including an additional recreational property), joint financial retirement planning through the agreement with Mike, as well as the actions of Pat allying herself completely with Art's interests in the dispute with Mike, and her care through Art's final illness, which went far beyond what was needed to influence his will.
- [330] The recorded conversation with Dana does not advance Mike's position on this issue. I find it all too convenient that the disavowal of a romantic relationship that Dana claims Pat provided during that conversation was not recorded, and the recorded portion does no more than confirm Art and Pat's respective contributions to being able to purchase their first property.
- [331] Their separate sleeping arrangements weigh against the finding of a marriage-like relationship in the broadest sense, but they have been plausibly explained by Art's use of a CPAP machine and Pat's work hours. Pat's statement to Penny Cole about the reason they maintained separate bedrooms does not necessarily contradict Pat's disclosed tax returns, because we do not know exactly when that conversation occurred.

- [332] I have also weighed the observations of Les Cole, who was called as a witness by Mike but did not seem partial to either party, that it did not appear that Art and Pat were in a relationship. Despite that general observation, his testimony on this issue seemed to focus on the absence in their interactions of features that he personally would expect to see in the equivalent to a marriage, such as Art not introducing Pat as his wife, rather than on observations of behaviour that is objectively unlikely to be found in any spousal relationship. At the end of the day, he seems to have been describing no more than his impression of the situation.
- [333] Pat's explanation of the reason that she and Art lived separately for five years - blaming it entirely on Mike's behaviour - was not particularly convincing, but even if the relationship shed some of its marriage-like attributes during that period, I am satisfied that they were in place again from at least their joint purchase of the Lougheed property onward.

Mike's behaviour towards Art

- [334] I found Mike's testimony on the issue of his conflict with his father quite evasive. He seemed unwilling to concede the obvious fact that he and Art were not on good terms during the year before Art's death, and consistently sought to downplay the significance of their disagreement, despite the fact that it escalated to involving a lawyer and proposed buy out. I have rejected as implausible his and Dana's claim to only have become aware in 2018 that Art and Pat were not paying any of the property expenses, but it is clear that during that period Mike expressed his unhappiness with the arrangements and at one point demanded a sale.
- [335] Pat's account of the explicit threats she says Mike uttered to kill Art are not particularly credible either. It seems unlikely that they would not have involved the police if statements of that nature had been made or, given that the correspondence with his lawyer was on issues as mundane as access to the garage, that he would not have enlisted the lawyer to address it in the correspondence with Mike.
- [336] I think that all the objective reliable evidence - at the end of the day, the lawyer's letters - is capable of showing is that there was a serious rupture in the relationship by early 2019, one that went to the fundamental question of whether the two couples could continue to share the same property. I cannot confidently attribute any misbehaviour to Mike beyond the angry expression of his position in the dispute towards Art, although it is clear from Art's personal note, his recourse to legal assistance and his statements to Dr. Edelson that Mike's behaviour instilled some sense of insecurity and, after his stroke, fear in him.

Capacity

- [337] To have testamentary capacity, the deceased had to have known the nature and extent of their property, the "natural objects" of the disposition of it, and the testamentary provisions that they are making. They also have to be capable of appreciating these factors in relation to each other, and "forming an orderly desire" with respect to the disposition of their property: *Re Schwartz*, (1970), 10 D.L.R. (3d) 15 at 32 (Ont. C.A.).
- [338] Capacity can fluctuate, and a will made by a compromised testator during a lucid moment may still be valid: *Laszlo v. Lawton*, 2013 BCSC 305 at para. 191.
- [339] Because it is a legal construct and not a medical diagnosis, medical evidence is not conclusive, and it is open to the court to give greater weight to lay evidence, or reject the medical evidence entirely: *Laszlo* at para. 198.
- [340] If the statutory requirements of execution were complied with (in this case s. 37(1) of WESA), after the deceased read over the will and appeared to understand it, there is a rebuttable presumption that they had testamentary capacity: *Vout v. Hay*, [1995] 2 S.C.R. 876 at para. 26.
- [341] Even in the absence of testimony about the execution of the will, where all of the aspects of its execution appear to be regular, there is a presumption that it was duly executed: *Hsia v. Yen-Zimmerman*, 2012 BCSC 1620 at para. 24.
- [342] The presumption of testamentary capacity can be rebutted by the presence of suspicious circumstances with respect to the execution of the will, or the capacity of the testator. If either is shown, the presumption is "spent" and the party propounding the will reassumes the burden of proving the essential elements: *Vout* at paras. 25, 27.
- [343] When the circumstances of an inter vivos gift closely resemble a testamentary disposition (for example, by a connection to the donor's death) the test for the donor's capacity will be the same: *Schretlen Estate v. Turney*, 2010 BCSC 101, at para. 32.
- [344] There is no suggestion that Art lacked capacity immediately following his stroke or while he was at the hospital. Mike and Dana described a fairly minimal degree of impairment at that stage and, as I have noted, Art sounded quite lucid in his recorded explanation of his plan to bill the PGT in inflated amounts for worker on his sister's house.
- [345] It is once Art returned home for the final stages of his cancer that concerns arise.
- [346] Pat's evidence about this period had significant inconsistencies. She struggled to explain in which of Art's meetings with Mr. Wattie he expressed the wish for Mike not to "have anything", leading to the presentation to him of the transfer document. More concerning was her inability to explain how the unconnected beneficiaries could have been missed if the will had been read to him, and her discovery evidence that described his motivation for changing his will as an event (Mike's return of the keys) that she accepted in her testimony had happened five days after the will had been executed. As a result, I would not put any

weight on her account of how the will was executed or her denial that Mike and Dana provided at least some assistance with Art, although Art was only home for another three days after the 23rd.

- [347] With respect to Dr. Edelson's report, I would not exclude it based on its failure to disclose his qualifications, the instructions that were provided to him, and the factual assumptions on which it is based as set out in Rule 11-6, as Mike's counsel seeks. While these are important components of an expert report and their absence should not be taken lightly, the prejudice caused by their absence is quite limited. It would have been clear from the outset of his involvement that he was Art's family doctor and that he is qualified to practice in that regard, and the instructions and the facts he relies on to give his opinion can readily be inferred from the passages in Mike's notice of civil claim that he was asked to comment on.
- [348] I also did not find that Dr. Edelson was biased or acted as an advocate for Pat, as Mike's counsel also suggested. I perceived him to be a well-intentioned caregiver, one who was not discernibly partial to Pat in his notes or testimony, unless taking her various assertions at face value can be considered partiality. The only advocacy that I could detect in this testimony was on Art's behalf, which was appropriate given his role at the time these events occurred.
- [349] Unfortunately he provided a report shortly after his retirement that did not take into account all of the records that he actually generated during the final stages of his care for Art. This led to the embarrassing disclosure of a note about Art's competence on July 24 that contradicted the unqualified opinion in his report, which had drawn only on hospital notes that did not extend beyond July 12. Despite this, I would not attribute a deliberate intention to mislead to him, as Mike's counsel sought. I find it highly unlikely that he would deliberately omit reference to a note that presented such a flat contradiction to the opinion that he had expressed, and then hand it over to cross-examining counsel to reveal it. I think this fatal contradiction instead resulted from his failure to obtain and review all of the relevant documents in advance, and the fallibility of his unaided recollection of his involvement.
- [350] I do not think I can give a significant amount of weight to his opinion even for matters before July 24. His hospital notes, which are not extensive and end well before the critical period, form only a portion of the overall basis of that opinion, which also relies on the inferences drawn from the notes of other practitioners. Those inferences add nothing meaningful to what I might infer from them myself as the trier of fact. The notes of his attendances on Art are quite terse and to the extent that they refer to his cognitive state ("confused") they were made after the execution of the will and the transfer and contradict his position that Art was competent, as of course his note of July 24 does directly. Given the size of his practice and the length of time since these matters arose it is not surprising that he could add little in his testimony to what he may have noted about his observations at the time.

- [351] The only part of his evidence that I find helpful in the analysis was his explanation of the fluctuating levels of consciousness that a palliative care patient can experience, despite their medication levels and their overall deterioration towards death.
- [352] I do not think Ms. Fullerton's evidence offers any particular assistance on this issue either, since she was acting only on Mr. Wattie's determination that Art's instructions could be taken, which she no doubt had confidence in but was not in a position to verify. If her evidence had been helpful, I would not have rejected it based on the fact that she spent a short period in court during Pat's evidence in breach of the order excluding witnesses, as Mike's counsel argued. Ms. Fullerton's evidence was of a very basic and mechanical nature, and Mike's counsel did not demonstrate how whatever she may have heard from Pat could possibly have altered it.
- [353] The observations made by Mike, Dana and Mr. Cole are not helpful of course, because Mike and Dana's begin from July 23, when Mike recorded the return of the keys, and Mr. Cole spoke of visiting "a few days" before Art's death, which seems highly unlikely to have been as early as July 18. The recording of Mike's return of the keys shows him speaking very faintly, in keeping with Mike's description of his overall condition, but with his comments having at least a basic coherence. Mike's subsequent observations, as well as those by Dana and Mr. Cole share the common thread of Art speaking on a particular topic, then trailing off and seemingly forgetting what he was going to say. Mr. Cole said he would resume speaking after a pause, but also said that he "wasn't all there".
- [354] Perhaps the most helpful evidence on the issue of capacity in this case is the circumstantial evidence surrounding the execution of the will itself. It acquires greater importance than it might otherwise have because Mike and Dana did not see Art until well after that execution had been carried out. Pat's evidence does not offer a reliable basis to make any findings, and Dr. Edelson's notes add little in the crucial period, except perhaps that Art was "less aware" on the 19th, although the nursing note on the same day that he was alert and oriented, despite speaking slowly and getting words mixed up, tends to balance that out. Mr. Wattie and the witness have both passed away and Mr. Wattie left no notes, so it is difficult to draw anything but the most general inference about the safeguards inherent in a lawyer having taken the instructions.
- [355] In the face of these shortcomings in the evidence the will itself supports an inference of capacity. In addition to referring to behaviour by Mike towards him of which there is other objective pre-existing evidence (although Mike disputes the accusation of abusiveness of course), it shows Art distinguishing between his decision not to leave Mike anything under the will and his awareness of the substantial property that will pass to Mike outside of the estate by the right of survivorship as a joint tenant.
- [356] Thus, although the presumption of capacity in Vout is spent because it appears that the will was not read to Art before he signed it, and although there is evidence of his subsequent physical and mental condition that suggests that he eventually lost competence to make a

will (certainly no later than July 24, when Dr. Edelson stated it affirmatively) I am satisfied by the circumstantial evidence in the terms of the will itself, and the apparent regularity of its formal execution, that Art understood what his property was, who the natural objects of his will were and what he was doing with it, both individually and relation to each other.

[357] I would not set the will aside on the basis of lack of capacity.

[358] The transfer is another matter. It benefits from none of the circumstantial connections with Art's actions before his illness that provide support for his capacity to execute the will. In fact, it directly contradicts one of the basic premises of the will - that Mike got nothing because of what he would inherit separately. Most importantly, it was executed by Art on the day that Dr. Edelson asserted that he no longer had capacity to manage his affairs, and was noting his confusion. While I accept that his condition was capable of fluctuating, it was also the day after he had been recorded as hallucinating people in his room.

[359] In addition, the observations of Mike, Dana and Mr. Cole during this period were of Art being unable to complete his sentences and, according to Mr. Cole, not being "all there", although as I have said the recording on the 23rd shows some minimal coherence.

[360] Ms. Fullerton's evidence does not assist on this point. While she has Mr. Wattie's request for information on how to sever the joint tenancy being posed after he took the will back to be signed, which must have been on or before July 18, there is no evidence that when Art executed the transfer he was capable of accessing his memories of any previous request and approving of it, and in fact all of the evidence points strongly in the opposite direction.

[361] Since this transfer was the effective equivalent of a testamentary disposition, in that it terminated the right of survivorship that formed the basis of cutting Mike out of the will, the same standard for showing capacity applies. Applying that standard, I have no difficulty in concluding that Art did not have the required capacity to execute it.

Undue influence

[362] The party contesting the validity of a will may point to evidence of undue influence having been exerted over the deceased. In general, that party bears the burden of establishing such an affirmative defence.

[363] However, s. 52 of WESA places an onus on the party who is seeking to uphold the will to rebut undue influence when specific circumstances are present:

In a proceeding, if a person claims that a will or any provision of it resulted from another person

(a) being in a position where the potential for dependence or domination of the will-maker was present, and

(b) using that position to unduly influence the will-maker to make the will or the provision of it that is challenged,

and establishes that the other person was in a position where the potential for dependence or domination of the will-maker was present, the party seeking to defend the will or the provision of it that is challenged or to uphold the gift has the onus of establishing that the person in the position where the potential for dependence or domination of the will-maker was present did not exercise undue influence over the will-maker with respect to the will or the provision of it that is challenged.

[Emphasis added]

- [364] If the circumstances that would impose that statutory onus are not established, the party opposing the will may still prove actual undue influence. This requires proof of influence amounting to coercion, resulting in a will that did not reflect the deceased's true intentions and was not their own act. In other words, the influence was of a degree that could not be resisted by the deceased, and which destroyed their "free agency". On the other hand, if the deceased remained free to act, the exercise of significant advice or persuasion on them or an appeal to them, or the fact that the deceased was trying to fulfill that person's wishes, are not undue influence: *Chang Estate v. Chang*, 2013 BCSC 976 at para. 35, *aff'd* 2014 BCCA 28, leave to appeal refused [2014] S.C.C.A. No. 261.
- [365] Undue influence can also arise in inter vivos transfers. A presumption that it has occurred will arise when the nature of the relationship between the donor and recipient shows the potential for domination. To rebut it, the recipient must show that the donor entered into the transaction of their own "full, free and informed thought": *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, at paras. 42,44-45. Relevant factors in assessing whether the donor had such a state of mind are: the lack of actual influence or opportunity to influence the donor; the receipt of or opportunity to obtain independent legal advice; the donor's ability to resist any such influence; and the donor's knowledge and appreciation about what she was doing: *Stewart v. McLean*, 2010 BCSC 64 at para. 97.
- [366] When legal advice is relied on to rebut the presumption its adequacy will be assessed not just on the basis of whether the donor understood the transaction and entered into it voluntarily, but also whether they were advised with respect to the wisdom of the transaction: *Cowper-Smith v. Morgan*, 2016 BCCA 200, *rev'd* on other grounds [2017] 2 SCR 754.
- [367] I am satisfied that Pat's situation falls within the description in s.52 of WESA and that the onus is on her to show that she did not exert undue influence over Art in making the will. There is no dispute that she was his deathbed caregiver and that he was completely dependent on her for meeting all of his needs, except those that fell to medical care providers.
- [368] Once again, while her own evidence does not provide a reliable basis on which to meet her onus, and the medical evidence surrounding the date of execution is sparse and equivocal, the contents of the will meet the onus circumstantially. The events referred to in the clause with respect to Mike's behaviour had a longstanding history. In addition, Art's allocation of

his personal property (and, if the will had been drafted properly, the residue of the estate) to Pat represented but a small fraction of what he owned, in comparison to the half-share of the property - his only valuable asset - which he was content to have pass to Mike by the right of survivorship. The existence of a provision that works directly contrary to her financial interests in this way tends to weigh against her having exercised any influence over Art's decision, much less undue influence.

- [369] As in the case of capacity, the circumstances surrounding the execution of the property transfer are starkly different. The attempt to undo the gift to Mike at a point when his doctor had found him incompetent to manage his affairs and he had been actively hallucinating leads to the inescapable inference that Pat was driving the process completely by that point, with no exercise of his intentions, whatever they may previously have been. Any legal advice that accompanied Art's execution of the transfer could not have preserved it in such circumstances, and of course we have no idea what was said in that regard in any event.
- [370] I find therefore that the transfer was the product of undue influence on Pat's part, and must be set aside on that basis as well.

Balance of relief claimed by Mike

- [371] My conclusion with respect to the invalidity of the property transfer makes it unnecessary to address Mike's alternative claims to a greater interest in the property. The substantial share of it that he receives through the right of survivorship makes it unnecessary to vary the will to meet Art's moral and legal obligations to him[4]. That property interest passing to him also makes it unnecessary to remedy any unjust enrichment of Pat that would have arisen from the difference between a one-third share for him as a tenant in common and the value of his contribution, or to enforce through proprietary estoppel a promise by Art and Pat not to alter his interest from the original gift.
- [372] Pat's defences to those claims, which were that Mike did not fulfill the agreement under which he would maintain his interest in the property because he did not continue to make all of the required payments towards the property after 2018, and because his conduct deprived Art and Pat of their quiet enjoyment of it, do not need to be considered either.
- [373] I should add that these allegations have not been put forward on any substantive basis by Pat, either in a counterclaim to Mike's claim or as part of her own claim, so no remedy in her favour - presumably varying Mike's interest if the transfer were found to be invalid - could have been granted based on them.
- [374] I do not believe a reversal of the original transfer to Mike could result from such claims in any event. This was an executed contract, one in which Art and Pat performed their part of it at the outset, in return for payment of their expenses over time, analogous to a sale: *S.W. MacKay & Associates Ltd. v. Park Lane Ventures Ltd.*, (1997) 32 B.C.L.R. (3d) 338 at para. 8(S.C.). Where such a contract deals with an interest in land, it can only be rescinded for

fraud or "an error as to substantial matters", such that the party or parties received something different from what they bargained for: *Houle v. Knelsen Sand and Gravel Ltd.*, 2015 ABQB 659 at paras. 67-71, rev'd on other grounds 2016 ABCA 247; *Dyrland v. Miller*, 2012 BCSC 585 at para. 37. Neither of those factors are present here. Thus, any claim put forward by Pat on those grounds would have to be for damages, based on not having received the contributions towards property expenses that were bargained for.

[375] Mike's claims also included one for Pat's alleged misrepresentation to him about the allocation of the property-related expenses. Based on my inability to find that Pat led him to believe that he would be paying only a third of those expenses, this claim must be dismissed.

[376] Damages were also claimed for costs incidental to Dana being spray painted, but there are no pleadings in support of them, so they cannot be granted.

Pat's claims

[377] As best as I can determine them in the absence of specific pleadings, the civil wrongs that correspond to the acts that Mike is alleged to have committed are: conversion for the destruction of the shed and greenhouse[5], as well as for the items alleged to have been taken from them and the storage container; nuisance for the various acts that interfered with Pat's enjoyment of the property; and violation of her privacy (pursuant to s.1(1) of the Privacy Act, RSBC 1996 c.373) in relation to the positioning of the security cameras.

[378] Dealing first with the necessary findings of fact, Mike admitted destroying the shed and the greenhouse; removing and relocating fences in the backyard and removing the slats from the fence that Pat had installed adjacent to the driveway; and parking his vehicle to block the garage door of the carriage house. There is also no issue that he and Dana installed security cameras that face and can record activity outside the carriage house. Liability for these acts depends on whether his actions meet the elements of the various applicable torts.

[379] With respect to the theft of their contents, as well as some of the contents of the container and the basement storage area, there is no principled basis on which to prefer Pat's allegations that these items went missing under circumstances that give rise to the inference that Mike took them, over his flat denial of having done so. The same is true of the allegations that his and Dana's dogs were aggressive and that they allowed the dogs the freedom to harass her and her small dog, that he locked the fence to the property, and cut off her water supply while she was away and refused to turn it back on. Those claims must be dismissed.

- [380] The essential elements of conversion of the shed and greenhouse are that "the property must be specific personal property; ii) the plaintiff must have a possessory interest in the chattel; and iii) the defendant must commit an intentional and wrongful act in respect of the chattel. [T]he wrongful act may take the form of any intentional dealing or interference with the chattel inconsistent with the rights of the person entitled to its possession": Klar, c. 4.7.
- [381] However when, as in this case, the chattels are fixtures, conversion is available only if "they were affixed to the property for the purpose of trade or for the more complete use and enjoyment of them as chattels; or ii) they were not intended to become part of the realty but to remain severable": Klar 4.8. If the purpose of affixing the chattels is for their better use of the land, then they will become part of the realty even if they are only lightly affixed. On the other hand, if the intention of affixing them is their better enjoyment as chattels, then they do not become part of the realty (and an action can be brought for conversion of them: Davis (Re), [1954] O.W.N. 187 (Ont. H.C.) at p. 190.
- [382] It seems clear that these two structures were intended to be used, and were used, for purposes that enhanced the overall enjoyment of the property, principally by offering storage, although Art apparently also grew plants in the greenhouse at some earlier stage. There was no suggestion that they had an inherent purpose separate from that overall enjoyment, or were subject to being removed at any time before Mike decided to destroy them. As a result, I think they formed part of the property and a conversion action is not tenable in relation to them.
- [383] The difficulty with the various claims in nuisance, assuming that some interference with Pat's use and enjoyment could be found to have occurred, is that nuisance is a remedy that is intended to protect the interests of a property owner against interference by actions that are external to that property and its ownership. Problems occurring on the property itself are not actionable under this tort: W. Eric Whebby Ltd. v. Doug Boehner Trucking & Excavating Ltd., 2007 NSCA 92, at para.13. As the court expressed it:
- [I]t is not the dead hand of ancient legal technicality that justifies maintaining this distinction. Rather it reflects the role of the modern law of nuisance as a means of reconciling conflicting interests in connection with competing uses of land. Before there can be conflicting interests in connection with the use of land, there must be uses of different lands which come into conflict.
- [384] These claims must also be dismissed.
- [385] Finally, there is the question of an interference with Pat's privacy from the installation of the security cameras on the main house. Section 1(2) of the Privacy Act provides:

The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

[386] Once again, I think the common nature of the property occupied by the two houses and their proximity to each other undermines a meaningful expectation of privacy on Pat's part when she was outside her house. In those circumstances she was in the immediate view of the occupants of the main house, and what was viewed and recorded would not tend to capture any intimate details of her lifestyle, only the mundane ones that she was forced to expose to Mike and Dana's view in any case. While a photo of a camera taped to the window opening of her door and facing into her residence was part of the exhibits, Pat did not elaborate on it beyond describing what was depicted, so I do not have a basis on which to infer that Mike mounted it there, or that it was capable of recording activities in the interior of the carriage house.

[387] I would dismiss this claim as well.

Summary

[388] The transfer of Art's interest in the property executed on July 24, 2019 is set aside, on the basis of a lack of capacity on his part to execute the transfer and undue influence on him to do so. As a result, Mike remained a joint tenant throughout and as a result of Art's death he now holds a 50% interest in the property as joint tenant with Pat.

[389] The will made by Art on July 18, 2019 is valid.

[390] Pat's action is dismissed.

[391] By consent, pursuant to s.6 of the Partition of Property Act, the property will be listed for sale, with the parties having joint conduct of sale. They would seem to be equally motivated to obtain the highest possible price, and my hope is that they can put aside their differences for the limited purposes of marketing and selling the property in an efficient way. There is liberty to apply for directions if necessary.

[392] Mike (and Dana as a defendant in Pat's action) have achieved substantial success, and in the absence of any other matters that would affect costs, they are entitled to their costs, at the ordinary scale of difficulty.

[393] If there are matters relating to costs that need to be addressed, counsel may arrange to make written submissions through Supreme Court Scheduling.

"Schultes J."

[1] It seems to be common ground that at some point before the dispute about the agreement arose, the occupants of each house obtained separate internet services and began to pay for them themselves.

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- [2] Art's long-time friend Les Cole also described a statement by Art that offers circumstantial evidence of Art's state of mind with respect to the terms of the agreement before any dispute had arisen. He said that Art told him that Mike would be getting Art's "share", and that Mike was paying the mortgage.
- [3] In his testimony Mike did not indicate the date on which he had made that recording.
- [4] The nature of Art's interest in the Texas property and what expectations Mike might have had with respect to it were not explored in the evidence or the submissions.
- [5] Although there is a separate tort of trespass to chattels, it appears that the action of trover, which is now conversion, developed to cover situations in which the defendant disposed of the chattel, as opposed to merely damaging it: Lewis N Klar et al, Remedies in Tort (Toronto: Thomson Reuters, updated 2025), c.4.4
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