

CANADA / JUDGMENT

Sull v. Pengelly

2019 BCSC 575

COURT

Supreme Court of British Columbia

DECIDED

15 April 2019

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2019 BCSC 575 Sull v. Pengelly

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sull v. Pengelly,

2019 BCSC 575

Date: 20190415

Docket: 131897

Registry: Vancouver

Between:

TONY HALVINDER SULL in the name of and on behalf of BONNIE MANJINDER KAUR
PENGELLY, in her capacity as executor of the Estate of Jeet Kaur Sull

Plaintiff

And

BONNIE MANJINDER KAUR PENGELLY in her personal capacity and in her capacity as executor
of the Estate of Jeet Kaur Sull, and DAVID JASWINDER SULL

Defendants

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for Plaintiff:

J. D Vilvang, Q.C.

T. M. Chan

Appearing on their own behalf in person:

Bonnie Manjinder Kaur Pengelly

David Jaswinder Sull

Place and Date of Trial:

Vancouver, B.C.

January 21- 25, 2019

Place and Date of Judgment:

Vancouver, B.C.

April 15, 2019

Table of Contents

OVERVIEW OF THE FACTS. 3

RELIABILITY AND CREDIBILITY PRINCIPLES. 8

ADDITIONAL FACTUAL ISSUES AND FINDINGS. 9

- a) David's Status and Capacity. 9
- b) Care of the Deceased. 10
- c) The Deceased's Relationship with her Children and her Wishes in Relation to her Estate. 12
- d) The Deceased's Financial Status and Expenditures. 16
- e) The Defendants' Failure to Produce Documents. 20
- f) Mrs. Pengelly's Involvement in the Financial Affairs of the Deceased. 20

THE RELEVANT LEGAL FRAMEWORK AND ITS APPLICATION TO THIS CASE. 25

- a) The Obligations of Self Represented Litigants. 25
- b) Mrs. Pengelly's Obligations as Executrix. 27
- c) Mrs. Pengelly's Obligations under the POA. 29
 - i) General vs. Enduring Power of Attorney. 29
 - ii) When the Power is Effective. 31
 - iii) Improper Exercises of Authority. 31
 - iv) Duty to keep Records and to Account 31

A. The Act 31

B. The Regulation. 31

C. The Jurisprudence that Relates to an Attorney's Duty to Account 32

v) Who Presides over an Accounting by the Attorney. 34

d) The Attorney as Fiduciary. 34

i) The Act 34

ii) The Relevant Authorities. 35

e) Application of These Various Legal Principles. 36

f) Resulting Trust 37

g) Undue Influence. 41

h) Mrs. Pengelly's Reliance on Section 7(a) of the Will 42

FINAL CONCLUSIONS AND ANALYSIS. 43

The \$325,000 that was Spent before the Deceased Passed Away and that is Unaccounted for 43

The \$279,921.00 that Mrs. Pengelly Received from the Sale of the Property. 46

[1] The Plaintiff, Mr. Tony Halvinder Sull, has brought a claim, in the name of his stepsister, Bonnie Manjinder Kaur Pengelly, in her capacity as the executrix of the Estate of their mother, Jeet Kaur Sull (the "Deceased"). The action is brought against Mrs. Pengelly, in her personal capacity and as the executrix of the Estate of their mother, and against Mr. David Jaswinder Sull.

[2] The Plaintiff's claim advances several causes of action. The principal claims are that:

i) Mrs. Pengelly breached the fiduciary obligations she owed to the Deceased and to the Estate under a power of attorney that she held and in her capacity as executrix of the will of her mother respectively; and

ii) each of Mrs. Pengelly and David misappropriated the assets of their mother.

[3] At the end of the trial, counsel for the Plaintiff indicated that the Plaintiff wished to discontinue his claim against his brother David. Thus, the central issues that remain pertain primarily to the conduct of Mrs. Pengelly, both under the power of attorney that she held and as executrix of the will of her mother and, more broadly, in relation to her mother's assets during the time that she was still alive.

[4] The Plaintiff was represented by counsel. Each of Mrs. Pengelly and David were self-represented at trial.

OVERVIEW OF THE FACTS

- [5] I have first summarized the central facts that underlie this action and in relation to which there is little or no real dispute. There are several further discrete factual issues that I will return to within the context in which they arise.
- [6] The Plaintiff is the stepbrother of each of Mrs. Pengelly and David. These three individuals, who were from a very early age raised together, were the only children of the Deceased. The Deceased was a woman of East Indian descent who had lived in Canada for most of her life. It is common ground that she could neither read nor write, though she might recognize the odd written word. She did not own or use a computer or cell phone. Furthermore, she was only able to speak broken English. Various witnesses for the parties compared her English language proficiency to that of a child in early elementary school. Nevertheless, her children, her grandchildren and others generally conversed with the Deceased in English or in a mixture of Punjabi and English.
- [7] The Deceased lived with her husband and children in North Vancouver for many years. She had worked as a kitchen helper in a motor inn in North Vancouver for more than 20 years.
- [8] It is relevant that David suffers from some form of mental disability that was never identified or described at trial. I will return to this issue. For present purposes it is relevant that David, who is now in his mid-50s and who has never worked, lived with his mother until the time that she died.
- [9] On August 10, 2004, the Deceased executed an enduring power of attorney (the "POA") in favour of Mrs. Pengelly who accepted her appointment as attorney that day. The Plaintiff learned of this appointment, from his sister, in the spring of 2005. The Plaintiff, who then spoke to both his sister and his mother about the POA, was comfortable with his sister assuming the role of attorney. Because he worked, while his sister did not, the Plaintiff considered that Mrs. Pengelly was necessarily more available to assist the Deceased.
- [10] On November 23, 2004, the Deceased signed her last will and testament (the "Will"). Each of the Plaintiff, Mrs. Pengelly and David were present when the Deceased signed the Will before a lawyer. The evidence establishes that the lawyer explained the Will to the Deceased in the presence of all three children. The Deceased never prepared a further will or executed a codicil to the Will. Furthermore, there is no suggestion that the Will did not reflect the Deceased's intentions at the time.
- [11] Mrs. Pengelly was appointed executrix under the Will. The Plaintiff had discussed this issue with his mother and he was again comfortable to have his sister assume that role.
- [12] The following provisions of the Will are relevant:

THIS IS THE LAST WILL AND TESTAMENT of me, JEET KAUR SULL, now residing at 654 East 6th Avenue, in the City of North Vancouver, in the Province of British Columbia.

1. I HEREBY REVOKE all Wills and Codicils by me heretofore made.
 2. I NOMINATE, CONSTITUTE AND APPOINT my daughter, BONNIE MANJINDER KAUR PENGELLY, to be the Executor and Trustee of this my Will, and I hereinafter refer to her as my Trustee.
 - 3.
 4. I GIVE, DEVISE AND BEQUEATH all my property wherever situated, including any property over which I may have a general power of appointment, to my Trustee upon the following trusts:
 - b. TO DELIVER to my son, DAVID JASWINDER SULL, if he survives me by a period of thirty (30) days all articles of personal, domestic or household use or ornament belonging to me at my death, including my jewellery and my 1989 Cadillac Fleetwood Brougham, and all accessories thereto then owned by me.
 - d. I direct my Trustee to divide and distribute the residue of my estate then remaining into equal shares for my child or children, presently being BONNIE MANJINDER KAUR PENGELLY, DAVID JASWINDER SULL and TONY HALVINDER SULL, who shall then be living and for the child or children then living of any child of mine who shall have died, the child or children of any deceased child of mine to take the share to which his, her or their parent, if living, would have been entitled, equally by representation, but if there should be no child or children of such deceased child living at his or her death, then I direct that the capital of the share of such child, or the remainder thereof, shall be added equally to the remaining shares of my residuary estate to be held and distributed upon the trusts relating thereto as herein set out.
- [13] On June 14, 2005, the Deceased sold her home in North Vancouver, which was free of any mortgage or other charges, for \$562,000. On June 21, 2005, the Deceased purchased a home, at 1910 Lincoln Ave. in Port Coquitlam (the "Property"), for just under \$397,000. Thus, the difference in value between these two properties was approximately \$165,000. One of the documents that was produced suggests that a significant part of this amount was spent on finishings and improvements to the Property as well as on furniture and appliances.
- [14] The Property was located immediately across a lane from the home of Mrs. Pengelly and her family and it was only a few blocks away from the home of the Plaintiff and his family. It is common ground that the Deceased moved to the Property to be closer to her children and grandchildren.

- [15] At some point, the Deceased was diagnosed with Parkinson's disease. The Plaintiff fixed this date as 2006. The Plaintiff's daughter, Andrea, thought it was in 2005. Mrs. Pengelly thought it was closer to 2004. It is again common ground that after this time the Deceased's physical condition steadily deteriorated until her death, at the age of 79, on January 20, 2012. Though the evidence of various witnesses in relation to this deterioration was necessarily imprecise, it was nonetheless generally consistent.
- [16] In 2005, the Deceased could still drive her car. She was able to walk, albeit more slowly, to speak and to take care of herself. At some point in about 2006, she stopped driving. By 2007, she required a walker. Her speech had slowed. She was still able to feed herself though she had largely stopped preparing meals. She could still bathe herself albeit with some help.
- [17] By 2010 and 2011, she was unable to move without assistance. She required a wheelchair. She spent most of each day sitting in a chair either watching TV or looking out the window. She required assistance to dress and to bathe. She was incontinent. She was unable to push the buttons on the phone. All of her meals were prepared for her. She was almost completely unable to speak. Her speech was limited to either a few words or to single words that were inaudible unless one put their ear directly to her mouth. She also communicated using gestures and facial expressions. In the latter part of this period, she had difficulty swallowing either water or food.
- [18] Accordingly, the Deceased was largely homebound in the last two years of her life. Nevertheless, she would periodically be taken out, for example, to lunch or to have her nails done. Sometimes she would be brought to a family celebration or to the home of one of her children for a meal.
- [19] There was some passing evidence from the Plaintiff that the Deceased's mental faculties were also affected by her illness. There was, however, no medical evidence to support this suggestion. Instead the evidence of most witnesses suggested that the Deceased remained interested in her television shows, her family and her periodic outings. Furthermore, though she had trouble speaking, she continued to understand what was being said to her.
- [20] On September 29, 2010, or about 15 months before her death, the Deceased transferred a one half interest in the Property to Mrs. Pengelly as a joint tenant (the "Transfer").
- [21] On February 20, 2012, or shortly after her mother's death, Mrs. Pengelly transferred her mother's interest in the Property to herself as the sole surviving joint tenant. On June 6, 2012, the Property was sold for \$615,000. After a mortgage in favour of Westminster Savings Credit Union, in the amount of \$300,910.19, which had been registered on the Property in March 2011 and to which I will return, and various other real estate commissions and expenses were paid out, Mrs. Pengelly received a balance of \$279,791.01.
- [22] Thereafter Mrs. Pengelly built a laneway house on the property that is registered to both Mrs. Pengelly and her husband. David moved into the laneway house and he continues to reside there.

[23] To date, Mrs. Pengelly has not applied for probate of the Will. She has failed to provide an accounting of the assets and liabilities of the Estate. She has failed to provide the Plaintiff with any part of the Estate.

[24] In an order dated June 25, 2017, Master Muir permitted the Plaintiff to prosecute this claim on behalf of the Estate of the Deceased.

RELIABILITY AND CREDIBILITY PRINCIPLES

[25] This is a case that engages both the concepts of reliability and credibility.

[26] The distinction between reliability and credibility, each of which is relevant to the assessment of a witness' evidence, was explained in *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.):

33. Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony.

[27] More recently, in *R. v. H.C.*, 2009 ONCA 56, Justice Watt, for the court, said:

41. Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately

i. observe;

ii. recall; and

iii. recount

events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R. v. Morrissey* (1995), 22 O.R. (3d) 514, at 526 (C.A.).

[28] Further guidance in relation to the assessment of credibility was provided in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, where the Court said:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his

recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont. H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [Farnya]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

ADDITIONAL FACTUAL ISSUES AND FINDINGS

a) David's Status and Capacity

- [29] Though the Plaintiff has discontinued his action against David, I consider that it remains necessary to briefly address David's capacity, in relation to both his capacity to defend this action and to the role he played in the events in question.
- [30] David attended at trial. He came with an aide, Ms. Wakefield, who was present to assist if he was unable to understand the things that were said to or asked of him. Ms. Wakefield's assistance was never necessary. David was able to understand my various exchanges with him. He was also able to give direct evidence, that was led by his sister, Mrs. Pengelly, and to respond to his cross-examination.
- [31] The precise nature or extent of David's disability was, as I have said, never clarified either by way of a general description or through expert evidence. At one point, Mrs. Pengelly sought to introduce a diagnostic assessment report dated October 22, 2018. I did not permit that report to be introduced into evidence or to be marked as an exhibit. The report was never listed on the Defendants' List of Documents though a copy of the document had been provided to counsel for the Plaintiff. Furthermore, though the document clearly advanced opinion evidence, no notice under R. 11-6 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 was ever provided to the Plaintiff. Finally, the front page of the report expressly stated that the document was not intended to be used in legal proceedings.
- [32] I was prepared to have the trial proceed without having David represented by a litigation guardian. In making this determination, I considered Rule 20-2 of the Supreme Court Civil Rules, which addresses persons under a legal disability. I also reviewed and considered the guidance in various authorities including *E.M.E. v. D.A.W.*, 2003 BCSC 1878 and *Pavlick v. Hunt*, 2005 BCSC 285 citing R. 6 of the Supreme Court Rules, the predecessor version of R. 20-2. The current and earlier versions of the rule are substantially the same.
- [33] The following further facts are relevant. David graduated from high school. He has friends who he sees regularly. He owns and drives a car. He was charged with much of his mother's care until the time she passed away. He administered her medications. He prepared many of her meals. He did her banking and much of her shopping.

- [34] Though I do not say that David understands what a fiduciary obligation is or what gives rise to a resulting trust, that is not the measure of his legal capacity. David told me that he understood he was being sued by his brother. He understood the need to tell the truth. He repeatedly told me that he understood my exchanges with him. It was clear that he understood the questions he was asked and that he responded concisely and precisely to those questions. He had also earlier met a lawyer on his own in relation to this litigation. I was satisfied that he would be able to provide counsel with instructions if his options were carefully and clearly explained to him.
- b) Care of the Deceased
- [35] Though the issue of who spent how much time with the Deceased over the years, or who cared for her the most in her last few years, is not directly relevant to the issues that have been raised by the pleadings, these matters were the source of some differences in the evidence.
- [36] The Plaintiff accepts that Mrs. Pengelly and David spent more time with the Deceased and were more involved with her ongoing care. This is only natural. David did not work and he lived with the Deceased. Mrs. Pengelly did not work outside of the home and her home was located directly across from the Property. Mrs. Pengelly would regularly take her mother to her doctor's appointments. She said that she was at her mother's home daily and often several times a day. So too were Mrs. Pengelly's two sons though they would have been in elementary or middle school at the time. Her husband often cooked for the Deceased.
- [37] A further reality is that in the last year or two of the Deceased's life, she had a housekeeper come in every two weeks for a few hours and she had nurses in twice a week to help bathe her. All of this is clear and uncontradicted.
- [38] The Plaintiff and his daughter, Andrea, testified that they visited the Deceased, both when she lived in North Vancouver and later at the Property, two to three times a week. The Plaintiff would generally do so over the lunch hour or at some point on the weekend. Andrea would sometimes accompany her father when she was younger and she would often drive over to visit her grandmother after she graduated from high school. Periodically they would clean or bathe or feed or dress the Deceased. Periodically they would take her out for a meal or to a family gathering or for some other activity. Periodically the Plaintiff would make various repairs to his mother's home. Neither suggested that these were regular activities. Indeed, both accepted, in their direct evidence, that such events only occurred from time to time.
- [39] Mrs. Pengelly and her two sons sought to downplay the involvement of the Plaintiff, and of his family, in the care of the Deceased. I do not accept their evidence. The evidence of the Plaintiff and his daughter, in relation to this issue, was both consistent and measured. In addition, their evidence, in relation to this issue, was generally supported by the independent evidence of Mr. Spees, a long time friend of the Deceased and a tenant in her home for two years, as well as by Ms. Allan who was the Deceased's housekeeper for a period

of time.

- [40] I am satisfied that each of the Plaintiff, Mrs. Pengelly, their respective families, and David had loving relationships with the Deceased. I am further satisfied that each of them was involved with the ongoing oversight and care of the Deceased, albeit to very different degrees.
- [41] Finally, I repeat that Mrs. Pengelly's ongoing focus on who cared for her mother more has little to do with the issues before the Court. No unjust enrichment claim is advanced by Mrs. Pengelly or David. No wills variation action is brought by either of them. The POA does not provide that Mrs. Pengelly is entitled to any compensation for her activities under the document. Indeed, as will become evident, it was Mrs. Pengelly's repeated assertion that she did not undertake any activity under the POA.
- c) The Deceased's Relationship with her Children and her Wishes in Relation to her Estate
- [42] There is no suggestion in the evidence that the Deceased loved any of her children less, or that she was angry with any of them, or that she was distanced from any of them. The converse is true. The consistent evidence, from multiple witnesses, confirmed her loving relationship with, and her pride in, each of her children.
- [43] I have indicated that the terms of the Will generally sought to divide the Deceased's Estate evenly between her three children. Various witnesses addressed the conversations they had with the Deceased, at different times, about her Estate and how she wished her assets to be divided. Those conversations raise a hearsay issue.
- [44] The legal principles that govern the admissibility of such statements are well known. They are fully canvased in the estate and wills variations context in cases such as *Modonese v. Delac Estate*, 2011 BCSC 82 at paras. 79-95, *aff'd* 2011 BCCA 501; *Anderson v. Anderson*, 2010 BCSC 911 at paras. 57-58; and *Gutierrez Estate v. Gutierrez*, 2015 BCSC 185 at paras. 29-35.
- [45] Each of the Plaintiff, Andrea, Mrs. Moore and Mr. Spees, both of whom were old family friends of the Deceased, gave evidence about what the Deceased said to them about her testamentary intentions. These conversations occurred at different times but all of them, but for one brief conversation Andrea had with her grandmother, occurred before 2010.
- [46] Mrs. Moore's conversations with the Deceased, and there were several such conversations, were more generic in nature. The Deceased repeatedly communicated to Mrs. Moore that she believed parents should distribute their assets and estates equally to their children. These comments were not, however, made specifically in relation to the Deceased's children. Mr. Spees, who was a tenant at the Property from 2007 to 2009, likely spoke to the Deceased two to three times a week. He said that she told him "multiple times" and "at least a dozen times" that she had three children and that she wanted everything to be shared equally between them.

- [47] The Plaintiff did not discuss his mother's testamentary wishes with her often. There is one discussion, however, that is important. The Plaintiff had learned, through a friend, that there were various benefits to having a property placed into joint tenancy. These benefits included, for example, the ability to avoid probate fees. The Plaintiff testified that, in approximately 2009, he raised the matter of placing the Property in the name of the three children with his mother. He said that his mother was uninterested in the idea and that she commented that the Property was in her name and that the three children would each get their share anyway. The Plaintiff testified that he thereafter relayed this conversation to Mrs. Pengelly who responded that she thought the idea was a good one but noted that David, on account of his disability, was limited in what assets or money he could hold without jeopardizing his disability pension. The Plaintiff further said that when he later learned, in about January 2011, that the Property was now jointly held by his sister and his mother, he was upset. When he raised the matter with his sister, she responded "that's what you wanted to do" and told him "not to worry because we are family".
- [48] Andrea also gave some brief evidence about some passing conversations with her grandmother in which the Deceased spoke about giving her property to her three children.
- [49] I consider that the evidence of each of Mrs. Moore, Mr. Spees, the Plaintiff and his daughter is admissible. Their evidence is necessary because the Deceased cannot testify. Their evidence also satisfies the threshold reliability requirement. Mrs. Moore and Mr. Spees are disinterested third parties who have had long-standing relationships with the family and not with any specific member of the family. Their evidence was generally consistent with each other and with the evidence of the Plaintiff and Andrea. Furthermore, their evidence is consistent with the terms of the Will.
- [50] I also consider that the specific evidence of the Plaintiff, that I have just summarized, is reliable. The Plaintiff was not cross-examined on his conversations with his mother or his sister. Furthermore, Mrs. Pengelly did not, in her direct evidence, or in her final submissions, suggest that her brother had not, at the time, relayed his conversation with his mother to her and that she had not thereafter responded in the manner that the Plaintiff described.
- [51] Accordingly, I consider that the evidence given by each of Mrs. Moore, Mr. Spees, the Plaintiff and Andrea about their conversations with the Deceased is admissible. I further accept the evidence that each of them gave in relation to these issues.
- [52] Mrs. Pengelly testified that at some point, which was never identified, her mother expressed a concern about how David would be cared for. That conversation, or those conversations, somehow led to the Property being transferred to Mrs. Pengelly. I do not consider that this evidence meets the requirements for threshold or ultimate reliability. This is so for several reasons. First, for the reasons that are described throughout these Reasons for Judgment, I do not consider that Mrs. Pengelly was a credible witness and I do not accept many aspects of her evidence.

- [53] There are, however, several further discrete and relevant considerations. The evidence of Mrs. Pengelly was very general in nature. It was unclear whether she had one or more conversations with her mother about David's care. Other than expressing a concern about David's care, it is not clear what her mother is alleged to have said. Furthermore, these conversations would necessarily have occurred between 2009, when the Plaintiff had raised the issue of joint tenancy with his mother, and September 2010, when a one half interest in the Property was transferred to Mrs. Pengelly. In that timeframe, the Deceased was significantly weakened. Her ability to communicate was significantly diminished. Leaving aside any issue of undue influence, which I will also return to, I question whether the Deceased was able to have such a discussion with Mrs. Pengelly.
- [54] Furthermore, the conversation that Mrs. Pengelly now says that she had with her mother is completely inconsistent with what she told the Plaintiff when he learned of the Transfer. She did not say that their mother wanted the Property to be used for the care of David. She did not in any way suggest that her mother's testamentary wishes had changed. Still further, after the Deceased had passed away, the Plaintiff said that he had several further conversations with his sister about distributing the Estate and the timing for that distribution and that his sister consistently told him she was working towards achieving this end. She never told him that the Estate, or what remained of it after proper expenses were dealt with, would be used for the care of David. Accordingly, I do not consider that Mrs. Pengelly's evidence satisfied the requirements that would allow it to be admissible. Even if her evidence was admissible, I do not consider that evidence to be credible.
- [55] There is a further witness whose evidence is relevant. Mr. Poy, who is now about 75 years old and who was formerly an accountant, gave evidence, for the Defendants, about a series of conversations he had with the Deceased. Mr. Poy testified that the Deceased communicated to him that she was concerned about David's future well-being and that they had several conversations about joint tenancy and the legal attributes of such tenancy.
- [56] For present purposes I do not consider it relevant that Mr. Poy appears, based on his evidence, to have misdescribed, in some respects, what a joint tenancy is and what legal consequences flow from such tenancies. I also leave aside that Mr. Poy appears to be a close friend of the Pengelly family and that he was, for example, involved in the construction of the laneway home on their property.
- [57] What is important is that Mr. Poy appeared to be quite confused about when he had these discussions with the Deceased. He originally said that these conversations took place from when she moved into the Property to when she passed away and he placed those dates as being between 1999/2000 to 2005/2006. When he was told that the Deceased had passed away in January 2012, he then said that he had these discussions with the Deceased over the entire period from 2005 to 2011. When asked to describe the last time that he had such a conversation with the Deceased, he purported to have a clear memory of the occasion. He described an outdoor dinner at Mrs. Pengelly's home. The Deceased was present. She was moving about without a walker. She participated in preparing the meal. She had no difficulty

using eating utensils or eating. Though she spoke in a whisper, she was able to speak.

- [58] This description of the Deceased's physical condition indicates that the event Mr. Poy described could not have taken place in 2011 or anywhere near that date. As I have said, the Deceased was unable to move around without assistance and required a wheelchair by 2010 and 2011. Based on the whole of the evidence, the event described likely took place in 2005 or 2006 or perhaps even in 2007.
- [59] The last conversation that Mr. Poy said he had with the Deceased is postdated, by several years, by the Plaintiff's own discussions with the Deceased about joint tenancy at which time the Deceased had no interest in the issue of joint tenancy or in owning her home jointly with her children. Mr. Poy's last discussion with the Deceased and about her concerns or wishes is also necessarily postdated by the discussions Mr. Spees and Mrs. Moore had with her about similar issues. Though I consider that Mr. Poy was an honest witness, I do not consider that his evidence was reliable and I do not accept the evidence that he gave.

d) The Deceased's Financial Status and Expenditures

- [60] Fixing the financial position of the Deceased and her expenses, at different stages, is difficult. This is primarily because of the limited document production that was made. The Deceased had different credit cards and different bank accounts at different times. Very little of this material was available at trial. Who had the obligation to make such production and what can be drawn from the failure to make proper production are distinct issues that I will return to. For present purposes, I simply wish to make certain findings of fact based on the limited information available to me.
- [61] To be specific, I was given the Deceased's credit card statements on a single Scotiabank Visa account, ending with the digits 480 001, that the Deceased held jointly with David. Those statements run from May 7, 2009 to September 8, 2015. I was also provided with the Deceased's banking records, for a single savings account with the Scotiabank, for the period October 1, 2008 to December 31, 2012. Finally, I was provided with the statements and the history for the Deceased's line of credit, secured by a mortgage, with the G&F Financial Group from August 19, 2008 through to April 8, 2011. A G&F statement history contained a concise record of the activity on this line of credit. That record was also accompanied by more than 400 pages of diverse documents that were often not in any particular sequence.
- [62] The first issue relates to the Deceased's monthly income and to her ongoing expenses. None of the parties provided me with a summary in relation to this issue. Based on the evidence at trial and on some of the records I have reviewed, it appears, and I find, that the Deceased received monthly revenue of approximately \$2,500. This includes approximately \$825 per month for CPP, \$700 per month for old-age security, \$100 per month from a pension, approximately \$700 per month from the rental of a suite in the Property (which rent was sometimes paid in cash) and a further undefined amount from a RRIF. These are not precise amounts and they varied modestly over time. Furthermore, there are additional periodic deposits into the Deceased's accounts from sources that I cannot identify and that were not

addressed in the evidence. David receives a monthly disability payment. There was no evidence of what, if any, contributions David may have made to his mother's expenses and I have accordingly ignored these payments in that assessment.

- [63] The Deceased's expenses are harder to determine. There was uncontradicted evidence that the Deceased was a frugal person. Her property taxes were approximate \$250 per month. There was no evidence of her incurring any significant expenses. The Property had been new in 2005 and the Deceased did not undertake any significant renovations to her home after she first moved in. She obviously did not go away for vacations. Her utilities (Terrasen, BC Hydro and Rogers) varied seasonally but likely averaged about \$300-\$400 per month. Her grocery bills are difficult to ascertain but they would necessarily have been quite modest. She likely would have had to pay to insure the Property. After 2006, she did not have any automobile-related expenses. The cost of her housekeeper, based on the evidence at trial, would have been about \$100 per month. I received no evidence in relation to the ongoing costs of her medication, if any, or for the nurses who went to her home. I have no knowledge of what, if any, expenses she would have incurred, for example, for her walker and wheelchair.
- [64] There was some evidence that the Deceased would, from time to time, go out for lunch to Boston Pizza or some similar place with different family members or that she would get her nails done. She would often pay for these excursions. In the last few years, these events necessarily occurred relatively infrequently. There is also evidence that she would buy her grandchildren gifts at Christmas and for their birthdays or that she would, for example, buy them some clothes at the start of the school year.
- [65] I am satisfied that the Deceased's modest income generally matched her ongoing expenses. This would include periodic gifts to her family and her periodic outings. I am supported in this conclusion by the fact that in May 2009, there was no outstanding balance on her Scotiabank Visa account. Similarly, as of August 2008, there was no outstanding balance on her G&F account statement. It was in August of that year that a \$30,000 withdrawal was made that, in turn, created an outstanding balance.
- [66] When examining the Deceased's financial picture in the ensuing years, several further facts are important. Between August 2008 and November 3, 2009, the outstanding balance on the Deceased's G&F line of credit increased to \$62,000. In November 2009, there was an application to increase the amount of the Deceased's G&F line of credit, which was to be secured by a new mortgage, from \$100,000 to approximately \$225,000. In the month of November 2009, more than \$60,000 in online credit card bill payments were made and a further sum of approximately \$92,000 was withdrawn, in three separate amounts, from that line of credit. By the end of November 2009, the outstanding balance on the Deceased's G&F line of credit had grown to approximately \$217,000. That amount gradually increased to just over \$225,000.

- [67] On or about March 4, 2011, the G&F mortgage, which then had a balance of \$225,685.71, was paid out with the proceeds from a new mortgage, in favour of Westminster Savings Credit Union, that was then registered on the Property. The Westminster Mortgage was discharged, in May 2012, after the Deceased had passed away and after the Property was sold. At that time, the outstanding balance on the Westminster Mortgage was \$300,910.19.
- [68] One last set of facts is relevant. The Deceased's Scotiabank Visa account, when the Deceased passed away in January 2012, had an outstanding balance of \$19,197.69. Thereafter, David, who was jointly responsible for the debt on the card, was removed from the card and the Deceased's name was left on the card. By September 2015, the last date for which a Scotiabank Visa statement is available, the balance on that account, on account of the ongoing failure to pay interest, had grown to \$27,239.70.
- [69] What this means is that, in combination, between August 2008 and January 2012, approximately \$320,000 was spent, either using credit cards that were held by the Deceased or by making various withdrawals, in varying amounts, from the Deceased's bank accounts, from the G&F line of credit, or through unidentified withdrawals on the Westminster Mortgage. What this also means is that, during this period of approximately 40 months, an average of \$8,000.00 per month was being spent or taken from one of these sources.
- [70] After the sale of the Property, and after the payout of the Westminster Mortgage, Mrs. Pengelly received, as I have said, \$279,791.01. At her examination for discovery, Mrs. Pengelly said that this figure, which is contained in a Statement of Adjustments, was an error and that she actually received \$272,000. At her examination for discovery, Mrs. Pengelly also said that she paid \$58,000 or \$59,000 in debts that her mother had incurred. No documents were produced to support either of these assertions though such documents were requested at Mrs. Pengelly's examination for discovery. Finally, Mrs. Pengelly testified that she spent most of the balance of what remained to build the laneway home for David on her property. She produced no documents to establish what the laneway home cost.
- e) The Defendants' Failure to Produce Documents
- [71] The Defendants' failure to produce documents or records is egregious. This is particularly true for Mrs. Pengelly who has such obligations as a defendant in this action and who has further obligations on account of both the POA she held and used as well as her status as executrix under the Will.
- [72] Mrs. Pengelly was examined for discovery on November 13, 2013. Her then counsel wrote to counsel for the Plaintiff on January 20, 2014 identifying the existence of various categories of relevant documents. This included mortgage statements for the Westminster Mortgage, records from other bank accounts, a possible bank account that the Deceased held jointly with Mrs. Pengelly, other credit card bills the Deceased had at the time of her death, as well as bills and debts that were outstanding when the Deceased passed away. None of these materials were ever produced. Furthermore, Mrs. Pengelly has never, other than for the Scotiabank Visa card, produced the statements or records for the various other credit cards

her mother held. She has never produced any of the records that pertain to her own bank accounts to assist in determining what, if any, monies went from her mother to her. She has never produced the documents: (i) that relate to her role in the creation of the Westminster Mortgage, (ii) that go to the circumstances that existed when that mortgage was set up or (iii) that relate to the \$75,000 that is the difference between the amount that had been secured by the G&F Mortgage and the approximately \$300,000.00 figure under the Westminster Mortgage. It is to be remembered that by March 2011, when the Westminster Mortgage was established, the Deceased's physical condition had, in multiple respects, very significantly deteriorated.

f) Mrs. Pengelly's Involvement in the Financial Affairs of the Deceased

- [73] Mrs. Pengelly repeatedly asserted that she had never used the POA and that she had no knowledge of or involvement in her mother's financial affairs. I do not accept either aspect of her evidence.
- [74] It is clear, and Mrs. Pengelly admitted in her cross-examination, that she used the POA to assist with her mother's acquisition of the Property in 2005. It is equally clear that Mrs. Pengelly used the POA in December 2010 to borrow \$203,865 from Capital Direct Lending Corporation. This was a mere three months after the Transfer. That sum was secured by both a second mortgage over the home of Mrs. Pengelly and her husband and a mortgage over the Property. Mrs. Pengelly signed numerous documents in connection with these mortgages. This included, for example, mortgage application forms, acknowledgments of correspondence from Capital Direct, a certificate of independent legal advice and various land title registration documents. Each of these documents was signed by Mrs. Pengelly on her own behalf and on behalf of her mother using the POA.
- [75] Mrs. Pengelly asserted that she signed all of these documents in error and that, once she recognized the error she had made, she had the Capital Direct mortgage reversed. Again, I do not accept either of these propositions. First, it is not believable that Mrs. Pengelly did not appreciate what she was doing. She signed each document on her own behalf and, using the POA, on behalf of her mother. This includes a certificate of independent legal advice which expressly confirms that Mrs. Pengelly, both in her own right and on behalf of her mother, understood the documents she was signing.
- [76] It is also relevant that there are other aspects of these documents which indicate that Mrs. Pengelly was not being forthright when she applied for financing from Capital Direct. She indicated on the Capital Direct application documents, and on other Capital Direct correspondence that she signed, that she was paid \$750 per month for caring for her mother. This was untrue. She also indicated that the amount of the G&F mortgage was \$100,000 when, by that time, it was considerably more than that. She also overstated the pension that her mother received.

- [77] Furthermore, and in a related vein, I do not accept that the Capital Direct mortgage was reversed because Mrs. Pengelly discovered that an error had been made. Mrs. Pengelly produced no documents that would support this conclusion. In addition, a December 8, 2010 letter from Capital Direct to Mrs. Pengelly and her husband indicated that while the institution was prepared to advance the funds being sought, it recommended "that you consider other options, such as selling your property to secure the funds you require".
- [78] In this context it is relevant that the financial resources of Mrs. Pengelly's family were quite modest. The duplex unit they owned had an estimated value of \$370,000. The mortgage on this property had an outstanding balance of \$235,000 and required payments of approximately \$1,000 per month. Mrs. Pengelly did not work. Mr. Pengelly had an income of \$4,200 per month before taxes. They had two school-age children. The additional debt they were proposing to assume would have required further payments of \$1,200 per month. It seems clear that their ability to service this debt would have been strained.
- [79] Finally, it is relevant and important that a Direction to Pay, again signed by Mrs. Pengelly, on her own behalf and on behalf of her mother under the POA, contemplated that an amount of \$32,000 would be used to discharge a second mortgage on her home and a further amount of \$52,000 was to be disbursed to Mrs. Pengelly, her husband and her mother.
- [80] Correspondence from Capital Direct, dated January 12, 2014, confirms that though the mortgage documents relating to the property were signed and registered, the mortgage was never funded and it was discharged in February 2011. A G&F document, bearing Defendant Document number 104, indicates that the Capital Direct mortgage was discharged on February 22, 2011.
- [81] I have already said that the next month, March 2011, the mortgage in favour of G&F was discharged and the Westminster Mortgage was placed on the Property. Based on the relevant Land Title Registration document, this appears to have occurred on March 4, 2011. Thus, the Westminster Mortgage appears to have been registered on the Property immediately on the heels of Mrs. Pengelly reversing the Capital Direct Mortgage. The monthly payments on the Westminster Mortgage were \$1,336.51.
- [82] Finally, and importantly, a "Discharge Transaction Information" sheet, bearing Defendant Document number 101, indicates that the G&F Mortgage was to be discharged on account of a "refinancing". The closing date for the refinancing is March 4, 2011. The borrowers are the Deceased and Mrs. Pengelly.
- [83] Though Mrs. Pengelly banked with and had dealings with Westminster Savings and though that institution had a first mortgage on her home, Mrs. Pengelly testified that she knew nothing of the circumstances that gave rise to the Westminster Mortgage. I do not accept this. By March 2011, the Deceased was not capable of attending to such matters by herself. Furthermore, the circumstances and timing of the Capital Direct Mortgage and its discharge and of the Westminster Mortgage lead to the reasonable inference, which I make, that Mrs. Pengelly was directly involved in setting up the Westminster Mortgage. The additional

documents I have referred to further support this conclusion. Still further, by March 2011, Mrs. Pengelly was a registered one half owner of the Property. The Westminster Mortgage could not have been registered on the Property without her knowledge. Finally, I consider that these conclusions are reinforced by Mrs. Pengelly's failure to make production of any of the relevant Westminster Mortgage documents.

- [84] Mrs. Pengelly's direct involvement in the increase of the G&F line of credit and mortgage from \$100,000 to approximately \$225,000, in November 2009, is less obvious. Once again, very few documents that relate to this transaction have been produced. Mrs. Pengelly's name does not appear on those few documents that relate to this transaction. Instead these documents were signed by the Deceased alone.
- [85] Having said this, it is clear that in November 2009, the Deceased was no longer able to attend at a bank by herself and she was likely unable to communicate directly with anyone at a bank. G&F records indicate that that financial institution had a copy of the POA. In addition, on November 1, 2009, Mrs. Pengelly signed a Residential Tenancy Agreement. That agreement purported to make Mrs. Pengelly's niece, Andrea, a tenant in the home of the Deceased. It is clear that the document is a fiction. Andrea was never a tenant in her grandmother's home. Though Mrs. Pengelly accepted, during her cross examination, that the signature on the document was her signature, she had no explanation for why she had prepared and signed the document and she purported to have no memory of doing so. Counsel for the Plaintiff suggested to Mrs. Pengelly that she had prepared the document in order to support the application for an increase in the G&F line of credit that was being made that same month. I consider that this is a reasonable inference.
- [86] I also return to the Deceased's frailty at this time. Mrs. Pengelly asserted, on the one hand, that she was often at her mother's home three times a day. This assertion does not rest easily with Mrs. Pengelly having no knowledge of what banking her mother was doing or of what purchases she was making. Still further, the Plaintiff said, and Mrs. Pengelly did not deny, that when he would periodically see banking documents or bills at his mother's home and ask Mrs. Pengelly about these materials she would assure him that everything was in hand. I am accordingly satisfied that Mrs. Pengelly was both aware of and involved in the increase of the G&F mortgage in November 2009.
- [87] One last set of transactions is relevant. The various monthly Scotiabank Visa accounts indicate an ongoing and relatively significant level of expenditures that I am satisfied had nothing to do with the Deceased. There are regular and significant purchases made, for example, at the Liquor Commission though the Deceased did not drink, at children's clothing stores, at the Future Shop and at Canadian Tire. There are regular monthly payments made to ICBC. In June 2010, almost \$1,300 in groceries are purchased on the Visa card. There is a purchase of a new set of automobile tires. There are purchases of jewelry and purchases from a pet supply store.

[88] Between June 2010 and October 2010, the outstanding balance on the Visa card increased from less than \$7,700 to more than \$16,000. Some of these purchases would have been made by David on his own behalf. There was evidence from various witnesses that David's consumption of alcohol was a source of concern. Some expenditures, having regard to the nature of the purchases, I am satisfied were made by Mrs. Pengelly for her family even though the card was not in her name. Some purchases were made by the Deceased. This would include, for example, the odd meal out, some gifts for her family, some groceries and the payment of utilities. There is, however, no means by which to precisely ascribe specific purchases to specific individuals.

THE RELEVANT LEGAL FRAMEWORK AND ITS APPLICATION TO THIS CASE

[89] There are various discrete legal issues that are relevant to the questions before the Court.

a) The Obligations of Self Represented Litigants

[90] In *Pintea v. Johns*, 2017 SCC 23, the Supreme Court of Canada endorsed the Statement of Principles on Self-represented Litigants and Accused Persons that had been established by the Canadian Judicial Council in 2006. The Statement of Principles recognizes that self represented litigants are often at a disadvantage when the other side is represented by counsel. Self represented litigants are often unaware of the legal principles and practices that govern their legal dispute and are unaware of the legal resources that may be available to assist them in bringing forward their case. Although most of the Statement of Principles considers how the courts can assist self represented litigants by making the court process simpler and more transparent, it also acknowledges that self represented litigants have various obligations. Those obligations include the need for self represented litigants to:

- i) familiarize themselves with the relevant legal practices and procedures that pertain to their case;
- ii) prepare their own case; and
- iii) be respectful of the court process and the officials within it.

[91] Both the Statement of Principles and these various specific obligations have been recognized in each of *R. v. Morillo*, 2018 ONCA 582 at para. 11; *0927613 B.C. Ltd. v. 0941187 B.C. Ltd.*, 2015 BCCA 457 at paras. 64-65; *Dewing v. Kostiuk*, 2017 MBCA 22 at para. 21; and *Clark v. Pezzente*, 2017 ABCA 220 at para. 13.

[92] The obligations of self represented litigants have been addressed in other cases. For example, in *Hanlon v. Nanaimo (Regional District)*, 2007 BCCA 538, Justice Saunders said:

16. The situation is not straight forward, in part because of Mr. Hanlon's personal medical circumstances, and in part because he is self represented. Yet the mere fact a party is self represented is not a basis on which to depart broadly from the rules that govern litigation, for the administration of justice is not well served by an imbalance in the latitude afforded litigants.
- [93] In this jurisdiction, self represented litigants are often offered guidance at the trial management conference that precedes every trial. In this case, I also provided Mrs. Pengelly, at the outset of the trial, with a summary, that was several pages long, that described to her both what she should expect during the trial and what was expected from her. Early in the trial, I also addressed Mrs. Pengelly several times to describe, for example, what issues and evidence she should address. Thereafter, to the extent permissible, I sought to have Mrs. Pengelly address various matters in her evidence that were clearly relevant and that she had failed to address.
- [94] A number of the cases that I have referred to confirm that courts should be lenient in instances, for example, where a self represented litigant has not complied with some procedural requirement. The obligation to prepare a case, however, particularly in relation to the assembly and production of documents and the presentation of relevant evidence, lies with the litigant. This includes self represented litigants. The obligation to produce relevant documents is central to the litigation process and to the fact-finding exercise that courts engage in.
- [95] In this case, Mrs. Pengelly sought to explain the gaping deficiencies in her document production by saying that her second-to-last lawyer (she has had three) had claimed a lien over her files including over the documents that she had provided to him. To the extent this is true, I do not consider that this is an adequate answer or explanation.
- [96] Section 78 of the Legal Profession Act, S.B.C. 1998, c. 9 provides:

Change of lawyer

78 (1) If a client changes lawyers or begins acting on his or her own behalf, the client or the new lawyer may apply to the court for an order directing that the client's former lawyer deliver the client's records to another lawyer nominated by the client or to the client, as the case may be.

- (2) If the court makes an order under subsection (1), the court may
- (a) make the direction conditional on the client
 - (i) paying all amounts due to the client's former lawyer from the client, or
 - (ii) giving security for the payment of the lawyer's claim in an amount and manner satisfactory to the court, and
 - (b) order a review by the registrar.

- [97] The ambit and purpose of s. 78 is clear and has recently been explained in each of *Hayes Canyon Road Maintenance Ltd. (Re)*, 2018 BCSC 1873 at para. 53; *Patry v. Rosenberg & Rosenberg*, 2016 BCSC 1113 at paras. 15-16; and *Shapray Cramer LLP v. Mitschele*, 2012 BCSC 1828 at paras. 7, 24-26, 57. Thus, there was a mechanism available to Mrs. Pengelly to access and then produce the files she says she gave her former lawyer.
- [98] Furthermore, even if Mrs. Pengelly had provided copies of the various categories of banking records that I have described to her former counsel, there was no impediment to her getting further copies of these documents. To the extent Mrs. Pengelly may have provided other categories of documents to her former solicitor, the most basic inquiries with duty counsel, with a law student at a clinic or with any one of the several non-profit organizations that assist self represented litigants would have revealed that there were comparatively straightforward means available to her to apply for and seek return of the documents she required. It was not, however, open to Mrs. Pengelly to take refuge in her status as a self represented litigant, to fail to make relevant document production, and to thereby seek to frustrate the Plaintiff's prosecution of his claim.

b) Mrs. Pengelly's Obligations as Executrix

- [99] An executor is a trustee for the beneficiaries of an estate and owes a duty to them to first pay the debts of the estate and to then hand over or distribute what remains in accordance with the terms of the will: *Robillard v. Robillard Estate*, 2015 BCSC 1417 at para. 49. An executor, being a fiduciary in relation to the beneficiaries, cannot deal with the estate in a manner that is adverse to their interests: *Cowper-Smith v. Morgan*, 2017 SCC 61 at para. 41.
- [100] Furthermore, the obligation of an executor to pass accounts for the estate is set out in s. 99 of the *Trustee Act*, R.S.B.C. 1996, c. 464 :

Passing of trustee's accounts

99 (1) Unless his or her accounts are approved and consented to in writing by all beneficiaries, or the court otherwise orders, an executor, administrator, trustee under a will and judicial trustee must, within 2 years from the date of the grant of probate or grant of administration or within 2 years from the date of his or her appointment, and every other trustee may at any time obtain from the court an order for passing his or her first accounts, and he or she must pass his or her subsequent accounts at the times the court directs.

- (3) If an executor, administrator or trustee fails to pass any accounts under this section, or if his or her accounts are incomplete or inaccurate, he or she may be required to attend before the court to show cause why the account has not been passed or a proper proceeding in connection with it taken and proper directions may be given at chambers or by adjournment into court, including the removal of a trustee and appointment of another, and payment of costs.

- [101] In *Robillard*, Justice Punnett summarized aspects of these obligations and said:

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

...

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

...

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

...

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

[103] In this case, Mrs. Pengelly has done none of these things. She has failed to keep or produce any records and, beyond being able to point to the laneway house, she is unable to provide any adequate explanation for what she did with the proceeds from the sale of the Property.

c) Mrs. Pengelly's Obligations under the POA

[104] There are five separate issues that arise in relation to the POA.

i) General vs. Enduring Power of Attorney

- [105] The Power of Attorney Act, R.S.B.C. 1996, c. 370 [Act] differentiates between a general power of attorney and an enduring power of attorney. The case law has also created a "springing" power of attorney from the latter category. On account of when these events occurred, it is primarily the Act that is relevant: *Andrew v. Andrew*, 2016 BCPC 125 at paras. 109-111. The Act was amended effective September 1, 2011 (the "Current Act"). For present purposes, there are no relevant differences between these two pieces of legislation in regards to enduring powers of attorney. In fact, s. 42 of the Current Act is a transitional provision and provides that an enduring power of attorney validly made under s. 8 of the Act, before its repeal, is deemed to be an enduring power of attorney made under Part 2 of the Current Act. I am also satisfied that, although extensive changes were made by the 2011 amendments, the Current Act largely codified and expanded the common law principles related to powers of attorney as developed under the Act.
- [106] Part 1 of the Act addresses general powers of attorney. Section 2(0.1) expressly states that Part 1 does not apply to an enduring power of attorney under Part 2 of the Act. If a person is provided a general power of attorney, that person may act as agent, or attorney, for the donor and do anything on behalf of the donor that the donor can lawfully do, subject to conditions or restrictions contained in the power of attorney, unless that person's role or status is terminated or the donor becomes incapable. It is common in any agency relationship that the mental incapacity of the principal puts an end to an agent's authority. This "accepted wisdom" is applicable to attorneys, pursuant to a general power of attorney, upon the mental incapacity of the donor: *Goodrich v. British Columbia (Registrar of Land Titles)*, 2004 BCCA 100 at para. 9.
- [107] Part 2 of the Act provides for enduring powers of attorney. In s. 10, an "enduring power of attorney" is defined as a power of attorney in which an adult authorizes the attorney to make decisions or do certain things on behalf of the adult in relation to their financial affairs and this power continues to have effect, or comes into effect, when the adult is incapable. Thus, an adult may grant an attorney the power to act or make decisions on their behalf while they are still capable. Enduring powers of attorney can thus accommodate the gradual loss of capacity of a donor and render unnecessary a determination as to whether the donor was incompetent when the power of attorney was exercised: *Goodrich* at para. 17 and *Egli v. Egli*, 2004 BCSC 529, at para. 80, *aff'd* 2005 BCCA 627; *Fareed v. Wood*, [2005] O.J. No. 2610 (C.J.) at paras. 38-39.
- [108] The case law, prior to the Act, also recognised a subcategory of enduring powers of attorney that are triggered only upon the occurrence of an event prescribed in the power of attorney, such as the donor's subsequent mental incapacity. They are often referred to as "springing" powers of attorney: *Goodrich* at paras. 14-16. Sections 10 and 14(a)(ii) of the Act appear to identify the conditions for a springing power of attorney upon the donor's mental incapacity.

ii) When the Power is Effective

[109] The authority to act under a power of attorney, whether general, springing, or enduring, is created the moment the proper documents are executed. However, in Goodrich, Justice Saunders said:

25. The authority, in my view, is created at the moment of execution although on the words of the power of attorney the condition on which it may be exercised may not yet exist

[110] In Fareed, Justice Gordon, at para. 38, observed that an attorney "assumes full responsibility of all financial activities once he or she assumes some duties". Justice Gordon further said: "In my view, the attorney cannot avoid liability by simply saying the grantor paid or transferred her own funds to another. The attorney is responsible for the accounts from the outset."

iii) Improper Exercises of Authority

[111] Section 31 of the Act addresses the improper exercise of authority by an attorney. In this case, s. 31(1)(b) is relevant. It states "an exercise of authority by an attorney is improper if, at the time the attorney acts, the enduring power of attorney or the provision of it under which the attorney acts is not in effect, or is suspended, terminated or invalid".

iv) Duty to keep Records and to Account

A. The Act

[112] Section 19(1)(d) of the Act provides that an attorney must "keep prescribed records and produce the prescribed records for inspection and copying at the request of the adult". This duty is prescribed in greater detail in the Power of Attorney Regulations, B.C. Reg. 20/2011 (the "Regulation"). Once again, most of the events that give rise to this action took place before September 2011 when the Regulation was made effective: Andrew at paras. 109-111.

B. The Regulation

[113] Sections 2(1) and (2) of the Regulation set out the obligation on attorneys to keep records and state:

2(1) An attorney acting under an enduring power of attorney must make a reasonable effort to determine the adult's property and liabilities as of the date on which the attorney first exercises authority on the adult's behalf, and maintain a list of that property and those liabilities.

2(2) An attorney acting under an enduring power of attorney must keep the following records in relation to the period for which the attorney is acting:

- (a) a current list of the adult's property and liabilities, including an estimate of their value if it is reasonable to do so;
- (b) accounts and other records respecting the exercise of the attorney's authority under the enduring power of attorney;

- (c) all invoices, bank statements and other records necessary to create full accounts respecting the receipt or disbursement, on behalf of the adult, of capital or income.

C. The Jurisprudence that Relates to an Attorney's Duty to Account

[114] The Supreme Court of Canada, as early as 1958, has determined that a power of attorney gives rise to an obligation to account. In *McEwen v. Jenkins Estate*, [1958] S.C.R. 719, one of the defendants purported to act under a power of attorney. The Court, at 731, said:

The administration of property on behalf of another party involves the obligation to account.

This obligation also rests upon a person whose authority to act, derives from an instrument which is found to be void for lack of mental capacity. The obvious conclusion is that [J] must also account for his administration under the power of attorney. The heirs have the absolute right to know what has become of the assets of the estate

[115] Recently, in *Brown v. Brown*, 2011 BCSC 649 Justice Brown addressed the duty to account that rests with an attorney and said:

114. In *Harris v. Rudolph (Attorney for)* [2004] O.J. No. 2754, Valin J. at para. 33 summarized the attorney's duty to account as follows:

Following the grant of a power of attorney, the attorney has a duty to account for all transactions which he under takes for the grantor. The attorney is the one who has the information. An estate trustee stands in the shoes of the grantor for the enforcement of the duty owed by the attorney as agent to the deceased as principal. There is a duty on the attorney to keep accounts and to be ready upon request to produce those accounts. It is an ongoing obligation and should not be considered an imposition on the attorney if he has failed in that duty over a long period of time. *Roger Estate v. Leung* [2001] O.J. No. 2171 (S.C.J.) at para. 10.

115. At para. 43, Valin J. emphasized that only the grantor (or the grantor's estate) has the power to compel an accounting while the grantor is competent:

However, counsel for Rob and Bruce argued that there is no authority to suggest that his clients, as Barbara's agents, have a duty to account to anyone other than Barbara. I agree with that submission. As agents, the duty of Rob and Bruce to account is restricted to accounting to their principal, Barbara.

[116] Thus, only the donor/grantor of the authority, or their estate, may apply to have the attorney provide a full accounting of their activities as attorney. By contrast, any person interested in an estate administered by an executor may apply for an order for the executor to pass their accounts: R. 25-13(1)(a) of the Supreme Court Civil Rules.

[117] In this case, the Plaintiff properly applied to bring this action on behalf of his mother's estate and he is able to seek a full accounting by Mrs. Pengelly of her activities as attorney.

[118] In *Chapman (Public Trustee of) v. Watson*, [1985] B.C.J. No. 914 (S.C.), Justice Dohm determined that an accounting ought to be ordered and that the funds that were not properly expended under the power of attorney would have to be repaid to the estate. Furthermore, Justice Dohm said:

31. It seems to me that an accounting would be rather simple. We have the banking documents; they seem to be complete; we know to whom the cheques or at least most of them were payable. What we require is an explanation, and I am going to allow Mrs. Watson that opportunity without being arbitrary, but I remind her that the expenses must be for the benefit of Mrs. Chapman. No other expense is permissible. The funds which have been frozen by Court order will be payable forthwith to the Public Trustee to the credit of Mrs. Chapman.
35. Now, so far as the financial aspects of this matter are concerned, that is the financial aspects I have not dealt with specifically, I would order an accounting. The accounting will take place before myself. This is unusual in the sense that it is commonly done by the Registrar. I think I will remain involved in this matter in the hopes that it can be resolved without going before the Registrar and taking up his time. Now, I would want it done within the next two months, and I will leave it to Miss Atkinson to arrange a time with the Registry when the Defendants are ready.

[119] Thus, the authorities establish that an attorney has the obligation to account for their activities while exercising the power of attorney. Furthermore, simply providing bank and credit card statements is not sufficient for an accounting. The attorney must provide an explanation, with satisfactory evidence, that the funds expended were for the benefit of the grantor. This would include providing specific receipts which has been described as being "the most basic of requirements": Robillard at para. 93.

v) Who Presides over an Accounting by the Attorney

[120] Justice Dohm, in *Chapman*, ordered the attorney to provide an accounting before the court rather than before a Registrar, but recognized that this was uncommon. Nevertheless, in *Robillard*, Justice Punnett considered that a full accounting of the funds paid to or taken by the attorney was not required as he was satisfied, on the facts, that the attorney improperly took those funds from the deceased. He went on to order those funds be repaid to the estate.

[121] In circumstances which bear significant similarities to this case, Punnett J. said:

99. The plaintiff conducted himself secretively and misleadingly when acting as attorney and executor. He sought to mislead his sister in his communications with her; his desire to circumvent the Toronto Dominion Bank's policy was deceptive; his failure to provide the required notice and copy of the Will to his sister was contrary to the Estate Administration Act. In my view, his secrecy gives rise to the inference that he knew that his actions were inconsistent with his mother's intentions, his obligations and his sister's entitlement under

the Will.

100. I conclude that the plaintiff, contrary to his obligations as executor and trustee, treated his mother's bank account, both before and after her death, substantially as his own.

d) The Attorney as Fiduciary

i) The Act

[122] Section 19 of the Act sets out the duties of an attorney. Section 19(1) states that an attorney must (a) act honestly and in good faith, (b) exercise the care, diligence and skill of a reasonably prudent person, (c) act within the authority given in the enduring power of attorney and under any enactment, and (d) keep prescribed records and produce the prescribed records for inspection and copying at the request of the adult.

[123] Section 19(2) also states that an attorney must act in the adult's best interests, taking into account the adult's current wishes, known beliefs and values, and any directions to the attorney set out in the enduring power of attorney when managing or making decisions about the adult's financial affairs.

[124] Aspects of these provisions are consistent with the obligations of a fiduciary and they are consistent with the relevant case law.

ii) The Relevant Authorities

[125] Generally, where a power of attorney is granted, a fiduciary relationship exists between the attorney and the donor, although in some circumstances it may be necessary or appropriate to analyse whether the three traditional indicators of a fiduciary relationship are present: *Goyal v. Estate of Maisie Meng*, 2017 BCSC 2474 at para. 11 citing *Egli*.

[126] The following three indicia of a fiduciary relationship were described in *Frame v. Smith*, [1987] 2 S.C.R. 99 and have since been cited in *Egli*, *Goyal*, and numerous other authorities:

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

[127] A further requirement, an undertaking on the part of the putative fiduciary to act in the best interest of the beneficiary, was added in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 36; see also *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71 at paras. 121-123.

- [128] Thus, an attorney has a fiduciary duty to act in accordance with the authority granted to the attorney by the donor and to use that power only for the benefit of the donor: s. 19(2) of the Act. The scope of the attorney's authority is set out in the power of attorney.
- [129] A fiduciary is subject to a broad duty to act in good faith and in the best interests of the person over whom he or she exercises discretion or control. She must fully disclose all information relevant to the trust and confidence placed in her and that she must not reap a personal benefit or use the property or goods that she has discretion or power over: *Ast v. Mikolas*, 2010 BCSC 127 at para. 123; *Sangha (Re)*, 2013 BCSC 1965 at para. 98 and the authorities that are cited; and Mark Ellis, *Fiduciary Duties in Canada*, Vol. 1 (Toronto: Thomson Reuters Canada, 1988) (loose-leaf updated March 2019) at 3A-4.
- [130] An attorney can only use the power of attorney for his or her own benefit when it is done with the full knowledge and consent of the donor: *Egli* at paras. 81-82.
- [131] Where the attorney is found to have breached their fiduciary duty to the donor/deceased the court has, inter alia, ordered (1) that funds and improperly transferred accounts be repaid to the estate: *Egli* at para. 88; *Robillard* at para. 113; and (2) a full accounting be provided by the attorney: *Chapman* at para. 30 and *McEwen* at 731.

e) Application of These Various Legal Principles

[132] The POA states:

"In accordance with the Power of Attorney Act I declare that this power of attorney may be exercised during any subsequent mental infirmity on my part".

- [133] I have said that though the Deceased's physical state steadily deteriorated over a period of six or seven years, she was never mentally incapacitated. Indeed there was no suggestion of any such incapacity in Mrs. Pengelly's evidence or submissions. What this means is that the POA was never properly relied on or exercised.
- [134] The question then becomes whether the Act or Regulations, as well as the relevant authorities, are engaged when, as in this case, an attorney acts without any lawful authority under a power of attorney. I am satisfied that this is so. Section 31(1) (b) of the Act addresses this issue. The three indicators of a fiduciary relationship that are described in *Frame* are all present. Furthermore, the recipient of a power of attorney generally becomes a fiduciary once the power of attorney is signed. Still further, an individual who misuses a power of attorney cannot be in a better position, in the sense of being insulated from the obligations that properly accompany being an attorney, than an individual who exercises a power of attorney according to its terms. In *McEwen*, the court at 731, concluded that two men, who purported to act as executors and attorneys under a will and power of attorney, later found to be invalid, were nonetheless required to provide an account of their activities.

[135] Accordingly, I am satisfied both that Mrs. Pengelly was her mother's fiduciary and, having exercised the POA she was granted, albeit improperly, she was under an obligation to maintain her mother's records, to explain what took place with her mother's bank accounts, monies and financial affairs, and to produce all records that related to these matters.

[136] While these obligations may, in concept, have arisen as early as 2005, Mrs. Pengelly's obligations do not appear to have been engaged in a meaningful way until about August of 2008. It is at this time, as I have explained, that the Deceased's financial picture began to rapidly worsen. It is also shortly after this time that I have determined that Mrs. Pengelly was actively involved in renegotiating the G&F line of credit and Mortgage.

f) Resulting Trust

[137] In *Pecore v. Pecore*, 2007 SCC 17, Justice Rothstein explained:

24. The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see *Waters' Law of Trusts*, at p. 375, and *E. E. Gillese and M. Milczynski, The Law of Trusts* (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.
25. The presumption of resulting trust therefore alters the general practice that a plaintiff (who would be the party challenging the transfer in these cases) bears the legal burden in a civil case. Rather, the onus is on the transferee to rebut the presumption of a resulting trust.
26. In cases where the transferor is deceased and the dispute is between the transferee and a third party, the presumption of resulting trust has an additional justification. In such cases, it is the transferee who is better placed to bring evidence about the circumstances of the transfer.

[138] At one time there was some question about whether these principles extended to transfers of an interest in land. That issue has, in this jurisdiction, been resolved: see *Fuller v. Fuller Estate*, 2010 BCCA 421 at para. 43; *Gutierrez* at paras. 93-98; *Aujla v. Kaila*, 2010 BCSC 1739 at paras. 38-39, *aff'd* 2013 BCCA 158.

[139] In this case, the question of whether the presumption of resulting trust is triggered arises because of the gratuitous transfer that the Deceased made to Mrs. Pengelly of a one half joint interest in the Property. In *Fuller*, the Court overturned the decision of a trial judge concluding, in essence, that the trial judge had erred in her application of the presumption of resulting trust: para. 69. The Court provided the following guidance:

42. Even though the presumption was engaged, the trial judge was obliged to examine the totality of the evidence, both direct and circumstantial, for the purpose of determining, if possible, Mr. Fuller's actual intention at the time he executed the 2002 transfer. The trial judge could only rely on the presumption of resulting trust if the evidence was insufficient to establish Mr. Fuller's actual intent at the time of the transfer: *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795.
47. The effect of the presumption only becomes evident after all the evidence, both direct and circumstantial, on the surrounding circumstances in which the transfer was made, has been weighed. Only if the trial judge is unable to reach a conclusion about the transferor's actual intention at the time of the transfer, will the presumption be applied to tip the scales in favour of the transferor or his estate: Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3d ed. (Markham, ON: LexisNexis Canada, 2009) at page 159, s. 4.60.
- [140] It is the intention of the donor at the time of the transfer that is the governing consideration: *Pecore* at paras. 5 and 55. Nevertheless other categories of evidence can be relevant. The following pieces of evidence, both direct and circumstantial, are relevant to determining the intentions of the Deceased at the time of the Transfer:
- i) the Will contemplated that the Deceased's Estate would be divided equally between the three children;
 - ii) I have described the evidence of the various witnesses the Deceased spoke to about leaving equal shares of her estate or property to her three children;
 - iii) I have described the Plaintiff's efforts to persuade his mother to put her children on title to the Property as joint tenants and her unwillingness to do so;
 - iv) I have said that, at best, Mrs. Pengelly's description of her mother's intentions or of what her mother said to her about taking care of David is unclear and imprecise;
 - v) to the extent the Deceased told Mrs. Pengelly that she wanted to ensure David was taken care of, which I do not accept, that evidence does not explain why the remaining portion of the Deceased's Estate could not still be distributed to the Plaintiff and Mrs. Pengelly. To be clear, the expression of a concern about David's future care is not the same as saying that the Deceased wished to gift the whole of the Property to Mrs. Pengelly for David;
 - vi) at her examination for discovery, Mrs. Pengelly said that she had not known what the legal effect of her being made a joint tenant in the Property was. This is inconsistent with any assertion that the Transfer was intended to make her the owner of the Property so that she could ensure that David was cared for;

vii) the joint tenancy was signed before the same lawyer who had prepared the Will. I draw no adverse inference from this but I simply note that that lawyer was not called at trial. At her examination for discovery, Mrs. Pengelly admitted that there was no discussion, before the lawyer, of the Deceased changing the Will or of her setting up some sort of trust for David. Both of these options would, arguably, have been more effective ways of ensuring that David was cared for.

[141] Courts will also sometimes look at other objective evidence to determine a transferor's intentions. In *Pecore*, which dealt with joint accounts, Rothstein J. referred to such considerations as the relevant bank documents (para. 61), who had care and control of the funds in the account (para. 63), the existence of a power of attorney over the account (para. 68), and the tax treatment of the account (para. 69). In the context of the transfer of an interest in property, courts have considered whether a transferee paid any property taxes, insurance, strata fees or utilities: Gutierrez at para. 90.

[142] In this case, there is no evidence that Mrs. Pengelly incurred any expenses of any sort in relation to the Property prior to her mother's death.

[143] There are several further factors that are not relevant to the Deceased's intentions but rather are relevant to whether the evidence that Mrs. Pengelly gave about her mother's intentions at the time of the Transfer is credible:

i) I have said that when the Plaintiff first learned of the Transfer, and when he spoke to Mrs. Pengelly, she told him "not to worry" and that "they were family". If the evidence that Mrs. Pengelly gave at trial was honest, she would, instead, have been forthright about her discussions with her mother and disclosed her mother's intentions;

ii) the Plaintiff testified that after his mother died he did various repairs on the Property. He said he did this work because he wanted to improve the Property for its intended sale and because he believed he would, based on the Will, get his share of the sale proceeds. This evidence was uncontradicted. This evidence is also consistent with the Plaintiff's evidence that he was being assured by his sister that she was working to distribute the Estate under the terms of the Will;

iii) the Plaintiff said that after his mother's death he repeatedly asked his sister about the status of the Estate. He said she repeatedly told him that she was working to move things forward. He said that he offered her his assistance but that she declined those offers. He further said that he wanted to do renovations on his own home and, to Mrs. Pengelly's knowledge, he borrowed money on a line of credit to do those renovations. His plan was to repay the monies he had borrowed from his share of the Estate. He said that after about a year, during which time he spoke to Mrs. Pengelly about these matters repeatedly, she told him to stop calling her. He said that he and his sister had effectively not spoken since that time. None of this evidence was contradicted by Mrs. Pengelly;

iv) the Plaintiff further said that Mrs. Pengelly:

- a) never told him about the \$300,000 Westminster Mortgage on the Property;
- b) never told him that she had transferred her mother's interest in the Property into her name; and
- c) never communicated, in any way, that his mother wanted the Property to be used to care for David. Once again, none of the foregoing evidence was contradicted.
- v) I have addressed the significant sums of money that were misappropriated, in various ways, from the Deceased. I will, in another section of this judgment, address why I am satisfied that Mrs. Pengelly misappropriated those monies.

[144] I consider that Mrs. Pengelly's improper conduct, in relation to her mother's financial affairs and assets, necessarily informs her credibility.

[145] Based on the whole of this evidence, I do not accept Mrs. Pengelly's evidence in relation to her mother's intentions at the time of the Transfer. In particular, I am satisfied, on the whole of the evidence, both direct and circumstantial, that the Deceased did not intend to gift either the right of survivorship or any other interest in the Property to Mrs. Pengelly.

g) Undue Influence

[146] It has long been the case that a gift, made as a result of undue influence, can be set aside: *Allcard v. Skinner* (1887), 36 Ch. Div. 145 at 171. Once a relationship with the "potential for domination" has been established, it becomes necessary to examine the nature of the transaction in question. Where a gratuitous transfer is involved, the plaintiff need only establish that the circumstances or relationship gives rise to the potential for domination for the onus to shift to a defendant to rebut the presumption of undue influence: *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at 378-379; *Stone v. Campbell*, 2008 BCSC 1518 at para. 44, and *Modonese* at para. 101.

[147] Because I have concluded that Mrs. Pengelly's one half interest in the Property was not gifted to her, I do not consider that I need to further address either the law or the facts that would ground a finding that Mrs. Pengelly had exercised undue influence on the Deceased to achieve the Transfer.

h) Mrs. Pengelly's Reliance on Section 7(a) of the Will

[148] Section 7(a) of the Will provides:

7. FOR THE PURPOSE of facilitating the administration of my estate in accordance with my intentions, I do further will and direct as follows:

- a. MY TRUSTEE exercising discretion may fix the value of my estate, or any part thereof, for the purpose of making any division, setting aside or payment of any share or interest therein, and make such division or setting aside or payment either wholly or in part in the assets forming my estate at the time of such division, setting aside or payment on the basis of such value, with no obligation whatever to give each beneficiary a proportional share of any individual asset or investment holding.

[149] Mrs. Pengelly said in her evidence, and she argued in her submissions, that she believed s. 7(a) of the Will provided her with the authority and discretion to make whatever distributions under the Will she considered appropriate. Justice Punnett, in Robillard, addressed the same submission in relation to an identical provision in the will that he was required to deal with. He said:

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

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

- a) My trustee may in his or her discretion fix the value of my estate, or any part thereof, for the purpose of making any division, setting aside or payment of any share or interest therein, and make such division or setting aside or payment either wholly or in part in the assets forming my estate at the time of such division, setting aside or payment on the basis of such value, with no obligation whatever to give each beneficiary a proportional share of any individual asset or investment holding. [Emphasis added.]

...

61. The plaintiff's explanation is untenable. No possible reading of the Will supports his assertion. The provision above relieves the trustee of Ms. Robillard's estate from giving a beneficiary a proportional share of individual assets or investment holdings. It in no way permits deviation from the testator's stated intention regarding the equal distribution of her the estate.

[Emphasis in original.]

[150] The foregoing conclusions are dispositive of this issue and of this part of Mrs. Pengelly's submissions.

FINAL CONCLUSIONS AND ANALYSIS

[151] Earlier in these Reasons for Judgment, and based on the documents that have been produced, I explained the basis for the following two conclusions:

- i) in August 2008, the Deceased, subject to some possible credit card debt in an undetermined amount, was debt-free. By January 2012, there was a balance of \$300,910 on the Westminster Mortgage on the Property (that amount had grown to \$305,000 when it was discharged) and an outstanding balance of \$19,197.69 on her Scotiabank Visa credit card; and
- ii) the net proceeds from the sale of the Property were \$279,971.01. The Plaintiff has not received any funds from the sale of the Property or from the Estate.

[152] These two conclusions are governed by different legal principles and have to be analysed separately.

The \$325,000 that was Spent before the Deceased Passed Away and that is Unaccounted for

[153] Mrs. Pengelly's evidence was that she had no knowledge of what happened to any of these funds other than for perhaps a handful of expenses on her mother's Scotiabank Visa card. This \$325,000 figure can be broken into six discrete categories:

- i) Approximately \$61,000 was withdrawn between August 19, 2008 and October 10, 2009 on the Deceased's G&F line of credit. The first such withdrawal was for \$30,000. Thereafter, there were 31 further withdrawals for amounts between \$100 and \$6,500. It is also relevant that, but for one online bill payment, each of these withdrawals were made by cheque. None of these cheques have been produced by Mrs. Pengelly.
- ii) The G&F Balance History indicates that on November 4, 2009, seven separate online bill payments, totalling approximately \$60,000, were made. Neither the Deceased nor David ever paid bills online. Defendants' Document 51 indicates that each of those payments was made on account of various outstanding credit card balances. None of these records have been produced by Mrs. Pengelly. It is to be remembered that it was in or about November 4, 2009 that the G&F line of credit and Mortgage increased from \$100,000 to \$225,000.
- iii) Approximately \$92,000 was withdrawn from the G&F line of credit in a one week period in November 2009. The G&F Balance History indicates that on November 4, 2009, November 6, 2009, and November 13, 2009, the amounts of approximately \$12,008.00, \$30,006.00 and \$50,006.00 respectively, for a total of approximately \$92,020.00, were withdrawn from the G&F line of credit. Those three withdrawals are also reflected on the November 1-30, 2009 G&F Statement of Account. The specific documents that relate to these withdrawals have not been produced.
- iv) Between November 5, 2009 and March 8, 2011, when the G&F Mortgage was discharged, fourteen further withdrawals, by way of cheque, in amounts between \$100 and \$1,000, were made from the G&F line of credit. These withdrawals add up to \$8,450. None of these cheques have been produced by Mrs. Pengelly.

- v) At some unknown time, \$75,000 was withdrawn under the Westminster Mortgage. That \$75,000 reflects the approximate difference between the \$225,000 amount that had been secured by the G&F Mortgage before it was discharged on March 8, 2011, and the new \$300,000 Westminster Mortgage. I have said that none of the documents that relate to the application for the Westminster Mortgage or to the disbursement of funds under that mortgage have been produced by Mrs. Pengelly.
- vi) I have dealt with the approximately \$19,000 that was outstanding on the Deceased's Scotiabank Visa card at the time of her death, with the nature of some of the expenditures that made up that outstanding amount and with when the bulk of that debt was incurred.
- [154] I am satisfied that Mrs. Pengelly is responsible for the misappropriation of the amounts in each of the first five of these categories of loss. These five categories of loss total \$305,000. This conclusion is based on her status as a fiduciary under the POA, her failure to account and to provide any explanation of any sort for what happened with these funds and financial transactions, her lack of candor before the Court during this trial, her significant failure to produce relevant records, and her clear involvement in significant aspects of the Deceased's financial affairs in the years after the Deceased became physically disabled.
- [155] I also do not consider that any useful purpose would be served by sending the matter to the Registrar for an accounting. The Deceased passed away more than seven years ago. Nothing in Mrs. Pengelly's conduct suggests that an accounting would provide the Registrar with any better or more precise information than I presently have. Furthermore, the amounts involved do not, on balance, warrant having the Plaintiff expend the further funds and suffer the further delay that would arise from a further hearing before the Registrar.
- [156] I do not, however, consider that the sixth category of loss or impropriety, arising from the Deceased's Scotiabank Visa account, should be dealt with in similar fashion. This is so for two reasons. First, it is not possible to determine with any degree of comfort what expenses were incurred by the Deceased, by David and/or by Mrs. Pengelly. Second, though I am satisfied the Deceased's Visa card was used improperly, the present victim of that improper use is Scotiabank or the creditor on the account. Though Scotiabank was owed more than \$19,000 in 2012, it has made no efforts to collect on the debt. At this point, again more than seven years later, it seems unlikely that it will do so.
- [157] One last point is relevant. The Plaintiff acknowledged that in May 2010 he borrowed \$15,000 from his mother. He said he repaid \$5,000 of that amount. That evidence is not contradicted and I accept it. Accordingly, the Plaintiff owed his mother \$10,000 when she passed away.

The \$279,921.00 that Mrs. Pengelly Received from the Sale of the Property

- [158] The Will required, subject to certain specific exceptions, that the Estate of the Deceased be distributed equally between her three children. I have, for the reasons I have described, not accepted that the Property was gifted to Mrs. Pengelly or that the proceeds from its sale were to be distributed otherwise than in accordance with the terms of the Will. Thus, the

\$279,921.00 that remained, after proper expenses from the sale of the Property were deducted, plus the \$305,000.00 that Mrs. Pengelly misappropriated, and that should have been available on an equal distribution of the Estate between the Plaintiff, Mrs. Pengelly and David, totals \$584,921.00. One third of this \$584,921.00 figure, that being the Plaintiff's entitlement under the Will, is \$194,974.00. The Plaintiff, however, owed his mother, or her Estate, \$10,000.00. One third of this amount would have come to him if the Deceased's Estate was properly distributed. Two thirds of the amount, or \$6,667.00, would have gone to Mrs. Pengelly and David. The resulting calculation indicates that the balance owed to the Plaintiff is \$188,307.00.

[159] Accordingly, the Defendant, Mrs. Pengelly, is to pay \$188,307.00 to the Plaintiff. The Plaintiff also seeks compound interest on this award. Such an order is available under the Court's inherent jurisdiction, is consistent with the order made in Brown at paras. 119-122, and is, I am satisfied, appropriate in the circumstances of this case.

[160] The Plaintiff also asked the Court to address the issue of costs after it received these Reasons for Judgment. I do not consider that this issue should be addressed in writing alone. The Plaintiff should, accordingly, contact the Registry for a hearing date that would also be convenient for Mrs. Pengelly.

[161] Finally, the Plaintiff, in its closing submissions, discontinued its claim against David. David was, with his sister's assistance, to contact counsel and to thereafter advise me, through the Registry, on his position on costs arising from the discontinuance. Having heard nothing, I wrote to the parties on March 13, 2019 asking for an update. I received no substantive response to this issue. Application of the usual rule under Rule 9-8(4) would require the Plaintiff to pay David's costs. I see no reason to depart from the application of this rule. Accordingly the Plaintiff is to pay David's costs throughout the conduct of this action

"Voith J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/19/05/2019BCSC0575.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/sull-v-pengelly-2019-bcsc-575>

Prepared on 26 October 2026 · Esheria