

CANADA / JUDGMENT

Wilson v. Lougheed

2010 BCSC 1868

COURT

Supreme Court of British Columbia

DECIDED

31 December 2010

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2010 BCSC 1868 Wilson v. Lougheed

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wilson v. Lougheed,

2010 BCSC 1868

Date: 20101231

Docket: S076668

Registry: Vancouver

Between:

Kelly Janine Wilson

Plaintiff

And

William Frederick David Lougheed in his capacity

as Executor of the Estate of Norma Yvonne Lougheed,

Deceased and William Frederick David Lougheed

in his personal capacity

Defendant

AND:

Docket: S081334

Registry: Vancouver

Between:

William F. Lougheed, in his capacity
as Executor of the Estate of Norma Yvonne Lougheed,
Deceased, William F. Lougheed in his personal capacity
and Norbill Investments Ltd.

Plaintiffs

And

Kelly Janine Wilson and Charles Blair Wilson

Defendants

Corrected Judgment: The text of the judgment was corrected
at paragraphs 367, 379 and 391 on January 7, 2011.

Before: The Honourable Madam Justice Ballance

Reasons for Judgment

Counsel for the Plaintiffs:

A.S. MacKay and E. Clough

Counsel for the Defendants:

R. Massel and B. McLeod

Place and Date of Trial:

Vancouver, B.C.

November 30,

December 1-4, 7, 9-11, 14-18, 2009; May 17-19, 2010

Place and Date of Judgment:

Vancouver, B.C.

December 31, 2010

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INTRODUCTION

- [1] Norma and William Lougheed enjoyed a privileged lifestyle and were each significantly wealthy at the time of Mrs. Lougheed's death on May 24, 2007. The bulk of Mrs. Lougheed's assets were given to her surviving spouse, William, pursuant to the terms of her last will. The plaintiff, Kelly Janine Wilson, is Mrs. Lougheed's beloved only child. She was left only a minor share of her mother's multimillion dollar estate.
- [2] In the interest of clarity, I will refer to Mrs. Lougheed, the parties in these proceedings, and certain ancillary family members, by their given names. In doing so I intend no disrespect.
- [3] An unfortunate turn of events, which likely stems more from a perceived betrayal and intolerance than from misdeed, has given rise to an estrangement, and hence this fractious litigation, between Kelly and her father, William.
- [4] The primary action is brought by Kelly against her father in his personal capacity and as the executor of her late mother's will. She seeks an order varying the will in her favour (the "WVA Action") pursuant to the Wills Variation Act, R.S.B.C. 1996, c. 490 (the "WVA").
- [5] By counterclaim to Kelly's WVA Action and by way of an expansive separate debt action (the "Debt Action") subsequently launched by William in his personal and representative capacities, and as the directing mind of the Lougheed's private company, Norbill Investments Ltd. ("Norbill"), William seeks to recover monies allegedly loaned to Kelly and/or her husband, Blair Wilson. The indebtedness is said to have arisen at various times between 1989 and 2006, largely to facilitate Kelly's acquisition of six parcels of real property. In these reasons, I will refer to those properties by their respective locations: Jefferson Avenue, Gordon Avenue, Lawson Avenue, Pemberton Valley, Whistler and Roberts Creek.
- [6] Before trial, William discontinued his claim in the Debt Action for repayment of the so-called loans relative to four of those six properties, namely Jefferson Avenue, Gordon Avenue, Lawson Avenue and Pemberton Valley. Even so, he maintained his counterclaim alleging indebtedness in respect of Gordon Avenue and Lawson Avenue. During the course of trial and after Kelly had led evidence defending the counterclaim and had closed her case, William withdrew his counterclaim entirely.
- [7] In the result, the remaining claims against Kelly founded in debt pertain to her acquisition of the properties at Whistler and Roberts Creek as pled in the Debt Action.

- [8] After Kelly commenced the WVA Action, William was widely quoted in a highly unflattering newspaper article about Blair. Its contents are the subject of a counterclaim in defamation brought by Blair against William and others in the Debt Action. Pursuant to a consent order, the claims against Blair in the Debt Action and his counterclaim were severed. They are to be tried separately from these proceedings.

BACKGROUND

Early days - Norma

- [9] By all accounts, Norma was a woman of character and intelligence. She and her four siblings, Sylvia, Billie, Patricia and Gary, were raised by their parents in a close knit family. Those family connections were important to Norma. She kept in touch with her siblings and their families and socialized with them throughout her life.
- [10] On March 14, 1962, Kelly was born to Norma and her then-husband, Robert Patry. Kelly's parents divorced in about 1964.
- [11] Norma and Kelly enjoyed a harmonious and loving relationship from the time of Kelly's birth until Norma's death. There were no strong disagreements or even tiffs between mother and daughter, much less periods of acrimony or estrangement. Their bond was natural and deep.
- [12] Norma was a trained bookkeeper and could be thrifty. For a time after her divorce, she and Kelly lived with Norma's parents, George and Mary Born. That arrangement enabled Norma to save a down payment from her job running the office of a construction company, and to eventually purchase a little home nearby her parents' residence. To make it affordable, Norma and Kelly lived in the basement of their new home and rented out the main floor. At one point, they moved into an apartment so Norma could rent out the entire property.
- [13] Although Norma and her daughter lived modestly, Kelly never felt disadvantaged and led a happy and fulfilling life as a young girl.

Early days - William

- [14] William was an industrious and clever young man. Determined that he would not have a life marked by the appalling poverty he witnessed as a boy during the Great Depression, he was driven to succeed.
- [15] William married his first wife, Gwen, in the mid-1950s. In relatively quick succession between 1957 and 1965, they had four children: Lynda, Michael, Chris and Laura (collectively, the "Lougheed Children").

- [16] While still in their 20s, William and his brother Gordon started a business constructing and selling homes, one by one. William was able to put himself through university, but ended up leaving law school partway through his second year in order to focus on the burgeoning property development business. The brothers' hard work and business acumen dovetailed nicely with the sustained upward swing in the value of real estate. By the early 1960s, William and Gordon had built a significant enterprise.

Implementation of the estate freeze and creation of the Family Trust

- [17] In 1963, William incorporated Loughheed Holdings Ltd. ("LHL"). In 1964, following the recommendations of his professional advisors, William implemented a series of transactions, known colloquially as an estate freeze, in relation to his shareholdings in LHL. The main purpose of the freeze was to provide for his children by transferring the future growth of LHL to accrue to their benefit.
- [18] In broad terms, William transferred to LHL his common shares of two other operating companies which he owned with his brother. In exchange, LHL issued voting non-participating shares to William and Gwen (as William's nominee). William also received preferred shares with a fixed redeemable value of \$90,000, class A shares and 8,000 class C shares.
- [19] The future growth of LHL was represented in the 8,000 class C shares. Those shares were transferred by William to his brother Gordon in his capacity as the trustee of an inter vivos trust concurrently settled by William (the "Family Trust").
- [20] The provisions of the Family Trust stipulated that the trust fund was to be held until William's 50th birthday on December 30, 1977, or his death were he to die before age 50. Upon that date, the trust fund was to vest in and be distributed to those of William's children as they respectively attained the age of 21 years. As trustee, Gordon was given a broad discretion to use the capital of the share of any child under the age of 21 for the benefit of such child, including for his or her education and advancement in life. Gordon carried out a similar estate freeze in relation to his shareholdings of LHL and established a trust in relation to his own children.
- [21] The following year, the shareholders of LHL resolved to amend LHL's memorandum so as to provide that its class B shares, which had not yet been issued, would rank equally with the 8,000 class C shares held in the Family Trust with respect to the payment of dividends. From that time forward, the class C shares were renamed class B shares.

Gwen Loughheed's illness and death

- [22] Sometime in 1966, Gwen was diagnosed with a malignant brain tumour. Sadly, while still a young woman, she died on July 30, 1971, leaving the four Loughheed Children, who were ages 6, 9, 13 and 14, without a mother.

Norma and William

- [23] William and Norma met in September 1971. On December 30 of that year, William arranged for Norma to receive the share in LHL that Gwen had held. Norma was also appointed as a director and secretary of LHL to fill the vacancy left by Gwen.
- [24] Norma married William, who was about eight years her senior, on February 23, 1972, and she and Kelly moved into his custom-built house in a tony neighbourhood in West Vancouver. It was a luxurious home by any standard, and was far grander than anything Norma and Kelly had known.
- [25] Later that year, William legally adopted Kelly. Unbeknownst to Kelly, in consequence of her adoption she ranked alongside the Lougheed Children as a primary beneficiary of the Family Trust. Norma did not adopt any of the Lougheed Children.
- [26] Norma was generous in spirit, and she looked forward to expanding her role as a mother to encompass the Lougheed Children. As an only child, Kelly had dreamed of having brothers and sisters and was excited about combining the two families. Regrettably, the newly-merged family was far from idyllic and did not go as anyone had planned.
- [27] Perhaps understandably, given the recent loss of their mother, the Lougheed Children did not embrace Norma as a surrogate parent. Gwen's prolonged illness had made it difficult for her to tend to her children. The Lougheed Children were disobedient and unruly by the time Norma joined the family, and the atmosphere of the household became chaotic, resentful and acrimonious. Rapidly, a schism formed with the Lougheed Children on the one side and Kelly, Norma and William on the other. Kelly testified that although her material lifestyle had markedly improved upon her mother's marriage, the overall family dynamic was significantly inferior.
- [28] In relatively short order, Lynda, still a young teen, left the Lougheed home. She lived for awhile with William's mother, but was eventually placed in foster care in New Westminster where she remained for several years. She and her father quickly became estranged, and it was clear from his testimony that he had little knowledge of Lynda's life during that period. There was evidence that William disapproved of his mother assisting Lynda in this or a related matter, prompting him to sever communications with his mother for an extended period.
- [29] William's relationship with his other three children gradually declined in varying degrees. He dispatched his elder son Michael to a private boarding school on Vancouver Island for his five remaining years of secondary education. In due course, his younger son, Chris, and then the youngest, Laura, who has a cognitive disability, were also sent away to school, by William's decree.

- [30] The evidence establishes that the Lougheed Children endured protracted periods of estrangement from their father when he was disappointed in them or they had invited his disapproval. He would refuse to speak to or be in contact with various of his children during those times, and was heard to refer to them as "losers".
- [31] In contrast to the upbringing of the Lougheed Children, Norma and William raised Kelly as their own child in a supportive household with no period of rebellion on Kelly's part or even much in the way of disagreement among them. Kelly considered William her father, and he regarded her as his daughter.
- [32] For a time after the marriage, Norma worked in William's business endeavours doing paperwork, keeping the books and collecting rent. From 1982 to 1992, Norma's sister Patricia also worked for William's business, overseeing the operation of a large Lougheed apartment complex. Patricia and William developed a friendly working and personal relationship.

Incorporation of Norbill and the estate thaw

- [33] By 1979, the value of LHL's underlying assets had increased exponentially. The immense appreciation in value was represented in the shares held in the Family Trust for the benefit of Kelly and the Lougheed Children. By then, Lynda and Michael had each attained the age of 21 years, and had thereby become vested in the Trust property. However, no dividends had been paid by LHL to the Family Trust and no distributions out of the Family Trust had been made to any of the beneficiaries or on their behalf. Indeed, none of them even knew of its existence.
- [34] Around this time, William had grown concerned about the direction the lives of the Lougheed Children had taken. He thought it unwise that they receive distribution of their valuable shares held in the Family Trust. Driven by these concerns, and wishing to ensure that Norma was well taken care of financially, William embarked on a plan to effectively undo the estate freeze he had carried out in 1964.
- [35] Norbill, a new company controlled by William and Norma, was incorporated in July 12, 1979. Following that, William transferred to Norbill virtually all of LHL's assets, then worth in the neighbourhood of \$7.6 million in exchange for 20,000 class A preference shares. In the result, the growth in value of the LHL shares was basically capped at the \$7.6 million figure, and all future growth was diverted to the Norbill shares now owned by William and Norma. These transactions enabled William and Norma to participate in the future growth of LHL's assets and from that time forward they derived most of their significant personal incomes from Norbill.

Kelly - teen years and young adulthood

- [36] As a teenager, Kelly developed a passion for horses and spent grade 11 at a boarding school to avail herself of its specialized equestrian program. Until then, Kelly had attended a public school in West Vancouver. Her parents always ensured that Kelly had a nice car at her disposal and when she returned home to complete grade 12, they gave her a car of her own.
- [37] After graduating high school, Kelly and some of her girlfriends attended a finishing school and college in Switzerland for close to a year. Upon arriving home, Norma bought Kelly a horse and paid for its keep.
- [38] In 1981, at age 19, Kelly enrolled in accounting courses at Langara College in Vancouver and moved into an apartment in a building near campus owned by her parents. Norma gave Kelly sufficient funds each month to enable her to pay her rent.
- [39] The following year Kelly moved into her parents' new top-end home in West Vancouver, and worked in an accounting firm. From the fall of 1983 until 1985, she attended Simon Fraser University with the intention of obtaining a bachelor of arts degree. During that period, Kelly lived in an apartment located in a complex owned by her parents. Once again, Norma supplied Kelly with a cheque to cover her monthly rent. In 1985, Kelly returned to Langara College for two semesters with the goal of completing her accounting diploma. While there, she met her future husband, Blair.
- [40] Accounting was something that Norma enjoyed. Try as she might, Kelly found no appeal in the world of numbers and was disinterested in financial matters in general. She eventually abandoned the idea of obtaining her accounting diploma and enrolled in the early childhood education program at Capilano College which was more suited to her personality.
- [41] For whatever reason, William had never endorsed Kelly's interest in horseback riding. In around 1986, he offered to buy her a Porsche on condition that she sell her horse, and she accepted. Down the road, at her mother's suggestion Kelly sold the Porsche and used it to purchase a condominium in North Vancouver as an investment. The evidence was not clear when Kelly subsequently sold that property or whether she realized a profit on its sale and if so, what she did with it.

LHL litigation

- [42] In the early 1980s, the Lougheed brothers had falling out of some kind, and stopped communicating. Their once solid fraternal relationship was broken forever.
- [43] Meanwhile, the Lougheed Children had faced many life challenges. Lynda had married and separated; Michael was out of touch; Chris had dropped out of high school and was a drug addict and was presumed to be living on the streets somewhere, and Laura had had a child out of wedlock, and had apparently turned to welfare for support.

- [44] Around 1986, Gordon told Lynda of the existence of the Family Trust. The rest of the Loughheed Children soon learned about it and discovered the subsequent transactions undertaken to reverse the estate freeze and re-direct the post-1979 growth in LHL to Norbill.
- [45] The Loughheed Children commenced a number of proceedings against William, Norma, LHL and Norbill. In one action, they alleged fraud and conspiracy, sought an order that LHL acquire their class B shares for their fair market value as at the day before the 1979 estate thaw, plus damages. In a separate petition, they claimed for various types of relief including a declaration that LHL's affairs were being conducted in an oppressive and prejudicial manner. They also brought a derivative action.
- [46] After ten days of trial in 1989, the LHL litigation settled. When asked for his understanding about why the Loughheed Children objected to the unravelling of the estate freeze, William guessed it had "turned out to be illegal" and explained that he had to settle with them for a large sum of money.
- [47] It is not disputed that Kelly stood behind her parents with respect to the litigation and was not a party to any proceeding. She was, however, included in the LHL settlement.
- [48] In cross-examination, William testified that he had only recently come to realize that Kelly had sided with him and Norma in the LHL litigation. This was a feigned realization. It was one of the groundless postures taken by William at trial aimed at denigrating Kelly that served to taint his credibility in the eyes of the Court. It will be remembered that Norma's sister Patricia was working for William when the Loughheeds were embroiled in the litigation. I accept her testimony that William was very proud of Kelly for aligning herself with her parents. William's intelligence and superb business know-how had transformed him from rags to riches. His personal interactions throughout his life reveal a pattern of intolerance for anyone - his brother, his mother, even his own children - whom he perceives to have disappointed or offended him by either conduct or word. It is not plausible that he would have failed to appreciate the fact that Kelly was in his camp in relation to the company he had built from the ground up; it was not within William's character to overlook matters of personal loyalty. I find that William knew full well from the outset that Kelly had not been an opponent in the LHL litigation. Indeed, he, Kelly and Norma had all been represented by the same lawyer.
- [49] William testified that Kelly's inclusion in the settlement was entirely the result of his magnanimity. In my view, that depiction is not entirely accurate. By virtue of his adoption of Kelly, she had acquired equal legal standing along with the other Loughheed Children as a beneficiary of the Family Trust and, unbeknownst to her, had been a shareholder of 1,600 class B shares in the capital of LHL since 1983. The LHL litigation could hardly have been settled without addressing her legal entitlement. The simple fact is that William and Norma recognized that Kelly was on the same legal footing as the Loughheed Children and included her in the settlement on that basis.

- [50] The main objective of the settlement was to pay Kelly and each of the Loughheed Children the value of their respective shares in LHL as at the date of the estate thaw. Employing a tax efficient structure, it was decided that payments would be made to an individual holding company incorporated in respect of each child.
- [51] The holding company formed for Kelly's benefit was called Mountainside Ventures Ltd. ("Mountainside"). Kelly was issued most of the shares in Mountainside and William received a small number of voting shares in order to preserve an element of control for the first ten years or so. As part of the settlement, Kelly transferred her shares in LHL to Mountainside. LHL redeemed its shares in Norbill for roughly \$7.6 million and loaned that redemption amount, after allowing for certain minor payments and income taxes, back to Norbill. Norbill was given 20 years to repay that loan, plus interest tied to the rate of inflation. Norma and William personally guaranteed repayment of the loan. The arrangement had LHL paying cash dividends to Mountainside over the 20-year period ending December 31, 2009. Mountainside also received a lump sum payment of \$270,000 up front in December 1989. Kelly was entitled to receive a monthly stipend from Mountainside in the amount of \$2,000. The balance of the dividends paid to Mountainside were retained and invested.
- [52] Neither Kelly nor Blair injected capital into Mountainside. Its income and asset base were derived exclusively from the LHL dividends that it received, the income generated by its investments, and possibly some associated income tax refunds over the years. The total received by Mountainside from LHL during the 20-year time frame ending December 31, 2009 was \$1,979,297; the lion's share of that had been received by the time of Norma's death.
- [53] While Kelly was by no means uninformed as to the big picture of her financial life, given her disinterest in matters of money and business, she was content to rely on her parents to manage the financial side of things. William and Norma controlled Mountainside's investments from the time of its incorporation. Norma also kept Mountainside's books and knew the status of its investments, liabilities and details of its net worth at any given time.

The Loughheeds' 1989 wills

- [54] During the time frame in which the LHL settlement was being carried out, Norma and William met with Karen Rush (then Karen Brown) to have fresh wills prepared. Ms. Rush was an associate lawyer with the same law firm that had handled the Loughheeds' other tax and estate planning matters.
- [55] William executed his new will on March 16, 1989. Norma signed hers the following day. Their wills are not mirror images.

Norma's will executed March 17, 1989 (the "1989 Will")

- [56] Under Norma's 1989 Will:

- Kelly is given the following gifts outright: (i) automobiles, boats, jewellery and all bank accounts; (ii) four parcels of real property, namely Unit 806 at Delta Mountain Inn condominium, Whistler, B.C., Sinclair Bay property, Bellevue Avenue property, and Lawson Avenue property; and (iii) in the event that William predeceased Norma, the Lougheeds' property on Eagle Drive in Whistler;
- She left her parents the Duchess Avenue property if William predeceased her;
- The balance of Norma's estate passed to William. If he failed to survive her for 30 days, Norma directed that the residue be held in a discretionary trust for her grandchildren until the youngest reached age 35, at which time, the remainder would be distributed equally among the then-living grandchildren, with a gift-over to the children of any deceased grandchild. In the event that there were no surviving grandchildren or great-grandchildren, the residue passed to Norma's parents, George and Mary Born;
- The words "grandchild" and "grandchildren" were specifically defined to encompass the children of the Lougheed Children in addition to Kelly's lineage.

[57] When Norma made her 1989 Will, Kelly was 27 years old, had not yet married, had no children, and was newly entitled to a steady dividend stream for two decades worth close to \$2,000,000 when inflation was factored in.

William's will executed March 16, 1989

[58] Under William's will:

- Norma is appointed as executrix, with her brother Gary named as the substitute;
- The entire estate is given to Norma if she survives William for 30 days. In the event that she does not survive, William's estate is to be held in a discretionary trust for his grandchildren upon the same terms as set out in Norma's 1989 Will. Like Norma, William included an ultimate failure clause in favour of Norma's parents in the remote event that the grandchildren and great-grandchildren failed to survive.

[59] Neither Kelly nor any of the Lougheed Children are beneficiaries under William's will. He purported to explain the reasons for their disinheritance in paragraph 8:

8.0 CHILDREN

I, WILLIAM FREDERICK DAVID LOUGHEED, having this day executed my last Will and Testament, having considered at great length the claim to my testamentary bounty by my children: LYNDIA CARRIE BIGGER (nee Lougheed), MICHAEL WILLIAM LOUGHEED, CHRIS WILLIAM LOUGHEED, LAURA ANNE JOHNSTON (nee Lougheed) and KELLY JANINE LOUGHEED, have decided only to leave them my best wishes by reason of the fact that I believe them to be adequately provided for especially in light of the court actions brought by my said children under Action Numbers A863044, A862800 and C865578 in the Supreme Court of British Columbia, Vancouver Registry, which resulted in a settlement being reached between my wife,

myself, my said children, Norbill Investments Ltd. and Lougheed Holdings Ltd. whereby Norbill Holdings Ltd. will redeem its Preferred shares held by Lougheed Holdings Ltd. for a Promissory Note payable to Lougheed Holdings Ltd. The Promissory Note will have a principal balance of approximately 8.8 million payable to Lougheed Holdings Ltd. which amount shall be repaid to Lougheed Holdings Ltd. over a period of twenty years together with interest at a rate equal to the annual percentage rate of increase in the Consumer Price Index for the City of Vancouver, British Columbia. Since the funds repaid to Lougheed Holdings Ltd. under the said Note will be distributed to my said children, or their nominees, and since my wife and myself have personally guaranteed the repayment of the said Note, it is my belief that my children are already receiving the benefit of my estate as at the date of execution of this my Will and that as a result of the above described settlement, I have already made adequate and generous provision for my said children. It is also my belief that in light of the emotional and financial strain placed on my wife and myself and the irreparable harm done to our family life as a result of the actions of my children, any further claims made by my said children against my estate should be denied. It is my firm belief that the interests of our family can best be served by leaving the bulk of my estate to my grandchildren, should my wife predecease me, as provided for herein.

[60] Ms. Rush had no recollection of composing paragraph 8 and believes that a senior colleague drew it and provided it to her for incorporation into William's will.

[61] On its face, the dominant message of paragraph 8 is that the funds payable to Kelly and the Lougheed Children through their respective holding companies as a result of the LHL settlement represented an advance payment to all of them of their entire inheritance. The purpose of its inclusion was to explain William's position that as far as he was concerned, he had made adequate and generous provision for them by way of the settlement for the purposes of the WVA. I accept that although Kelly had not been an adversary in the LHL litigation, at the time that William executed his will, he regarded the benefit flowing to her from the settlement as satisfying her inheritance.

[62] At trial, William insisted that Norma was well aware of the contents of paragraph 8 of his will and that she was in complete agreement that all of the children, including Kelly, had received their inheritance by virtue of the LHL settlement. William overstated Norma's agreement vis-à-vis Kelly. In the first place, Norma chose not to include a counterpart to William's paragraph 8 in her own 1989 Will. Her reasons seem obvious enough. Because the Lougheed Children were not Norma's children, she did not share William's obligation under the WVA to make adequate provision for them in her 1989 Will and, therefore, had no reason to explain their exclusion. More to the point, however, unlike William, Norma chose to make testamentary provision for her only child. Clearly, she did not regard Kelly's entitlement under the LHL settlement as a distribution to her of her full inheritance. That was a sentiment held by William - not Norma.

[63] William agreed that the closing portion of paragraph 8 recording that the litigious actions of his children placed an emotional and financial strain on the Lougheeds and caused irreparable harm to the family, was not meant to refer to Kelly and was not true so far as she

was concerned. Kelly's counsel suggested that William's reference to Kelly in this part of paragraph 8 was a calculated misstatement revealing William's degree of hostility towards Kelly going back two decades. I do not agree. The evidence demonstrates that the relationship between father and daughter was amicable at that time and William's subsequent conduct was not consistent with his harbouring any negative belief about her. I conclude that in all probability Kelly was inadvertently lumped in with the Lougheed Children in this part of paragraph 8 and the error was simply overlooked.

Value of the Lougheed assets when Norma made her 1989 Will

- [64] The estate planning file kept by Ms. Rush contained a bare bones summary of the nature and value of the Lougheeds' respective assets at the time they made their wills. Also in evidence was a one-page summary handwritten by Norma of the Lougheeds' "net worth as at July 1, 1990" (the "Net Worth Statement"). It recorded the Lougheeds' aggregate net worth as \$25,743,903 after the settlement of the LHL litigation. It appears as though the values of some of those assets are expressed in net figures and others reflect gross value. William agreed that the Net Worth Statement was accurate.
- [65] At the time they executed their wills, William and Norma resided in a sumptuous two-level penthouse on Duchess Avenue in West Vancouver which they owned jointly. Norma noted its net value as \$1.5 million on the Net Worth Statement. They also jointly owned property at 5-6105 Eagle Drive in Whistler which is the "Whistler Condo" referred to in the Net Worth Statement.
- [66] Also admitted into evidence, for the truth of the contents, were the 1989 property assessed values of the properties that Norma specifically bequeathed to Kelly under her 1989 Will. The values that Norma attributed to three of those properties in the Net Worth Statement, namely Sinclair Bay, Lawson Avenue and the Delta Mountain Inn unit are higher than their 1989 property assessed values. The Net Worth Statement does not refer to Norma's Bellevue Avenue property which was also devised to Kelly because Norma had sold it before she prepared that statement. The 1989 property tax assessed value of the Bellevue Avenue property was \$126,250. It was sold on July 18, 1989 for \$201,500. I find that that the sale price best reflects the true value of the Bellevue Avenue property at the time that Norma made her 1989 Will, and indicates that the property tax assessed value was significantly less than the market value.
- [67] Despite the fact that the Net Worth Statement purports to list the values of the properties (other than Bellevue Avenue) that Norma devised to Kelly under the 1989 Will more than a year after Norma signed her 1989 Will, I conclude that those values more likely reflect their true market value at the time that Norma made her 1989 Will than do the 1989 property tax assessed values.
- [68] Based on the foregoing, I find that at the time Norma made her 1989 Will and after the settlement of the LHL litigation, she and William owned the following assets:

(i) In Norma's name:

- Sinclair Bay property - \$200,000;
- 1160 Lawson Avenue - \$325,000;
- Unit 806, Delta Mountain Inn - \$150,000;
- RSP - \$82,291, with Kelly as designated beneficiary;
- Porsche - value unknown. (It is unclear whether Norma owned her 1989 Rolls Royce Corniche, valued at \$300,000 at that time.);
- 50% interest in Norbill - \$9,058,951;

(ii) In William's name:

- Unit 808, Delta Mountain Inn - \$150,000;
- 50% interest in Norbill - \$9,058,951;
- RSP - \$82,793;

(iii) Jointly held:

- Palm Springs property - \$50,000;
- stock and other investments - \$2,000,000;
- personal effects, including jewellery, furs, furniture, contents of library - \$200,000;
- shares of Interlude Projects Ltd. - \$1.5 million;
- Penthouse on Duchess Avenue - \$1.5 million;
- Whistler Condo (Eagle Drive) - \$200,000;

(iv) Miscellaneous assets: (apportionment of ownership as between Norma and William is not clear):

- powerboat, Mercedes and Jeep - \$63,000;
- mortgage receivable - \$205,000;
- Garden Bay property (cottage only) at Pender Harbour - \$200,000;
- 1990 Hunter sailboat - \$250,000.

[69] There was scant evidence concerning the particulars of Norma's bank accounts at the time that she made her 1989 Will beyond Ms. Rush's notes indicating that she had two accounts with the Royal Bank. The extracts of the passbooks for one of those accounts covering the period July 19, 1989 through June 1, 1993 shows that the amount on deposit fluctuated significantly from as much as \$226,000 in the latter part of 1989 to the comparatively nominal amount of \$758.

[70] Over the years, Norma sold each parcel of real property devised to Kelly under the 1989 Will.

Lougheed Household ledgers

[71] Given Norma's background in accounting, it is not surprising that she maintained a general ledger recording, in varying degrees of detail, income, receipts, receivables and expenses in respect of herself and the household at large. Norma referred to them as the "Lougheed Household" ledgers, and I will do likewise.

[72] Although Norma had maintained the Lougheed Household ledgers for several years, only those covering 2001 through 2006 were in evidence. Unlike her husband, Norma was computer-savvy and in recent years had used her computer to maintain the Lougheed Household ledgers. Access to her computer was not password protected. Kelly's counsel noted that it would therefore be relatively easy for someone other than Norma to gain access and make entries or deletions in her accounting program and the ledgers themselves.

[73] William had never seen the Lougheed Household ledgers before Norma's death. At some point, he and his daughter Lynda had put the past behind them and had rekindled their relationship to some degree. I find that after Norma's death, William directed Lynda to comb through the Lougheed Household ledgers for entries pertaining to Kelly and/or members of her family.

[74] On William's instructions, the Lougheeds' accountant, Garry Murdock, also reviewed the Lougheed Household ledgers after Norma's death. Mr. Murdock, who was also Norbill's accountant, had not seen those ledgers while Norma was alive. He had never discussed their contents with Norma, and was never instructed by her about the use, if any, he or others ought to make of them.

[75] Mr. Murdock recalled that Norma typically affixed yellow sticky notes on her accounting papers for Norbill and Mountainside to clarify certain entries and calculations. He did not notice any such notes on the Lougheed Household ledgers when he reviewed them after her death.

[76] Kelly asserts that because access to the Lougheed Household ledgers was basically unsecure after Norma's death and because the methodology she used in keeping those ledgers was unfamiliar to all but Norma, they are inherently unreliable and ought to be ignored by the Court. I am not prepared to disregard that evidence out of hand based on the generalized suspicion that they might have been tampered with after Norma's death.

- [77] The parties acknowledge that Norma was a meticulous and competent bookkeeper, and that William relied on her in that regard. A great deal of the content of the Lougheed Household ledgers is consistent with other viva voce and documentary evidence at trial. In my view, those ledgers provide relevant evidence of the Lougheeds' moneyed lifestyle, Norma's generosity towards family and select friends, and are also relevant to the contentious issue of Kelly's indebtedness to one or more of her parents and/or Norbill.
- [78] At the same time, I recognize that the Lougheed Household ledgers in evidence do not reach back before the year 2001, and do not purport to be a complete accounting of the Lougheeds' financial life between 2001 and 2006. In this latter connection, it is noteworthy that the Lougheeds used their respective Norbill shareholder's accounts as though they were personal bank accounts. For example, it was commonplace for them to use Norbill's funds to cover their personal expenses and then to reallocate those outgoings against each shareholder's account prior to Norbill's year end. The details of those disbursements were not necessarily reflected in the Lougheed Household ledgers.

Kelly and Blair

- [79] Kelly and Blair were married on September 30, 1989.
- [80] Blair held a bachelor of arts degree in political science and had studied accounting at the University of British Columbia. When he and Kelly married, he was articling or about to article as a chartered accountant and Kelly was unemployed.
- [81] Norma adored her new son-in-law. They had a common interest in accounting and financial matters generally and, more importantly, shared a deep love for Kelly. The relationship between Blair and William was more stilted and superficial.
- [82] Kelly and Blair wanted to start a family and in anticipation of that development were in the market to buy a safe family vehicle. They settled on a Jeep, which they lease-financed through a local car dealership. When Norma learned that they were paying interest, she insisted that they cancel the lease and gave them a cheque to cover the purchase. Kelly believes that she and Blair probably made a few payments to her mother in partial repayment for the Jeep. I conclude that the balance owing was willingly gifted by Norma to the newlyweds. This marked the first of a number of gifts freely made by Norma to her daughter, and on occasion to her son-in-law, over the course of the marriage.

Jefferson Avenue property - 1989

- [83] As planned, Kelly became pregnant early into the marriage. On November 16, 1989, the Wilsons purchased a modest bungalow on Jefferson Avenue in West Vancouver near the Lougheeds' penthouse. Its acquisition for \$295,000 was financed wholly by Norma, in part by her assuming an existing mortgage (less than \$150,000) and in part by her paying the balance out of her personal bank account. In exchange, the Wilsons granted Norma a registered mortgage in the amount of \$168,000. The following spring, Norma gave Kelly and

Blair a further sum of approximately \$30,000 so they could construct a basement suite.

- [84] I accept Blair's evidence that Norma required a formal written mortgage because it was contemplated that he and Kelly would be on title jointly, and Norma wanted to protect her investment in the event that the Wilsons' marriage faltered.
- [85] According to the mortgage document, the Wilsons' monthly mortgage payment was \$1,502.74. At the time, Blair was earning a modest income from articling and Kelly was not working. I am satisfied that Norma had no expectation that the Wilsons would make monthly payments in the amount shown in the mortgage document. I find that she and Blair worked out a budget for the Wilson household and calculated affordable mortgage payments in the area of \$550 to \$600 per month. It is not clear how many payments of this lesser amount the Wilsons actually made. Based on Kelly's evidence, there probably were not many. I find, however, that Norma was perfectly content with that, and with the financial arrangement overall.

Gordon Avenue property - 1991

- [86] The Wilsons' first child, Cara, arrived on May 15, 1990. The following spring, Kelly was expecting a second baby, and the Wilsons were soon to outgrow their two-bedroom bungalow on Jefferson Avenue.
- [87] I accept Kelly's evidence that her mother spearheaded a search for a new home for the Wilsons to accommodate their growing family. Norma enjoyed buying and selling real estate and she took a certain amount of delight in house-hunting with her daughter. She clipped advertisements of homes for sale in West Vancouver and arranged for the two of them to attend open houses together. Kelly's evidence on this point was credibly corroborated by the testimony of her Uncle Gary. He is a realtor and often assisted Norma with her real estate transactions.
- [88] The home that Norma found on Gordon Avenue was brand new and was worth nearly double the Jefferson Avenue property. It too was located very near to Norma and William's penthouse. When she accompanied her mother for a viewing, Kelly was taken aback by the superior quality of the home. She knew that she and Blair could not afford to buy it. Norma knew that too. Kelly testified that she understood that her mother would simply make the Gordon Avenue property available to the Wilsons. She explained that she did not worry about living in a home beyond her financial means because she trusted her mother and knew that she was looking after the purchase and "would not have done it to worry me".

- [89] On March 22, 1991, and before the Jefferson Avenue property was sold, Norma facilitated Kelly's acquisition of the Gordon Avenue property by paying the purchase price of \$560,000 on her behalf. Kelly explained, and I accept, that because there had been some divorces in the family at this stage, Norma preferred that title to the Gordon Avenue property be in Kelly's name alone. I find that on that basis, Norma did not require that Kelly and/or Blair sign a mortgage or provide any other form of security.
- [90] I am satisfied that Norma wanted her daughter to have the Gordon Avenue home and that she derived a great deal of maternal pleasure in making it come about. I accept Kelly's evidence that her mother did not require the Wilsons to make monthly payments in respect of the purchase of the Gordon Avenue property and that the terms of any repayment to Norma were left vague and undefined.
- [91] A few months after the purchase of Gordon Avenue, the Wilsons sold their home on Jefferson Avenue for \$300,000. From the sale proceeds, the sum of \$193,539.55 was paid to Norma. Calculations made by Norma suggest that the amount owing to her at that time was closer to \$207,000. In William's counterclaim, he characterized the approximate \$13,410.45 shortfall as a debt owing by the Wilsons to Norma's estate. The preponderance of the evidence indicates that Norma did not consider the alleged deficiency to be an account receivable or an indebtedness that she planned to collect. In any event, as mentioned, that claim was abandoned by William before trial. He now contends that the so-called deficiency amounts to an inter vivos gift made by Norma to the Wilsons, and is a factor to be taken into account in assessing Kelly's claim in the WVA Action.
- [92] Norma did not require the Wilsons to make payments on account of Gordon Avenue. Kelly says that roughly two years after that home was purchased, her mother told her that she had decided to give it to her. Blair testified that it was common knowledge within the family, including by William, that Norma had given Gordon Avenue to Kelly. The Loughheed Household ledgers in evidence show that as at 2001 there was no account receivable owed by Kelly in respect of the Gordon Avenue property. I find that evidence corroborates the testimony of Kelly and Blair and accept that Norma did eventually give Kelly the Gordon Avenue property and that William was aware of that.

Kelly's part-time work

- [93] On August 16, 1991 Kelly and Blair welcomed the birth of their second child, Bo. When Bo was an infant, Kelly began to work for her mother on a casual and part-time basis assisting with the bookkeeping of Norbill, along with other duties. Around this time, Kelly's monthly allowance from Mountainside was increased from \$2,000 to \$2,700 in order to help defray the costs of a babysitter for Cara and Bo while Kelly was at work. Kelly worked an average of 12 hours per week, and continued to do so for between four or five years.

- [94] Sometime in 1996 Kelly quit work in order to devote herself to being a full-time mother and homemaker. Norma supported Kelly's decision to do so and was proud of how her daughter excelled in those important duties. I find that William was not bothered in the least by Kelly's choice to stay at home to raise her family, and that at no time did either Norma or William suggest to Kelly that she should not do so.

Overview of Blair's businesses to 1998

- [95] William's counsel devoted a great deal of time cross-examining Blair about the minutiae of his various business endeavours. Much of the evidence elicited is not material to the issues in dispute in this proceeding.
- [96] Blair received his designation as a chartered accountant in 1991. He worked at a large accounting firm for a number of years and then started his own practice.
- [97] With William's encouragement, he started an intercom leasing business called CB Wilson Capital which required start up funds to bankroll its business. Initially, William provided a personal guarantee to secure the company's borrowing of up to \$400,000 on a revolving basis.
- [98] Within the same timeframe, Blair accepted an offer from one of his largest clients to act as the chief financial officer of a restaurant chain out of eastern Europe. As part of his remuneration package, he was given an ownership interest. When Blair left the position approximately 3½ years later, he sold his ownership interest for the sum of roughly \$150,000.
- [99] All the while, Blair continued to operate CB Wilson Capital. In 1994, he also opened Mahoney's, a sports bar/restaurant located on a busy Vancouver thoroughfare. His brother and father ran the day-to-day operations. The uncontradicted evidence of the Wilsons is that Mahoney's was a successful enterprise.
- [100] Sometime after CB Wilson Capital had established itself, around 1996, William asked to be relieved of his personal guarantee. I accept Blair's evidence to the effect that William understood that the Wilsons would need to leverage the equity in their Gordon Avenue home as replacement security. To that end, Kelly provided the HSBC with a personal guarantee of up to a maximum of \$475,000, secured by a collateral mortgage against Gordon Avenue.
- [101] In about 1998, Blair founded a start-up software company. It was a high-risk venture that was ultimately unsuccessful. Blair gave evidence of a lawsuit of some kind being brought in relation to this endeavour as well as with respect to the restaurant chain enterprise. He was not asked to clarify the nature of the litigation, his involvement in it, or its outcome.

Proposed move to Southlands

- [102] In 1993 or 1994, fuelled by her passion for riding horses, Kelly and her Uncle Gary looked at some homes with horse stables listed for sale in the Southlands area of Vancouver. Southlands is an urban horse-riding neighbourhood located approximately 45 minutes away from where the Lougheeds were then living in West Vancouver. The Southlands properties of interest to Kelly were financially out of reach. Norma was aware that Kelly and Gary were looking at homes for Kelly in that area but she did not endorse that pursuit. There were no clippings from the real estate weekly or open house outings arranged by Norma.
- [103] As was typical of the mother and daughter pattern of dealing with financial matters, they approached the subject of Kelly's desire to purchase a property in Southlands obliquely. Kelly did not pointedly ask her mother to provide financial assistance for the purchase, and Norma did not raise the matter directly. When it became apparent that her mother was not supportive, Kelly abandoned that path with no hard feelings. It was not her style to press the issue.
- [104] Kelly believes that her mother was unwilling to help because Southlands is a considerable distance from where the Lougheeds were living and Norma wanted the Wilson family to keep in close proximity. William gave similar evidence about Norma's rationale, and I find that it played a large part in her overall disinterest. I think it is reasonable to infer that William's known disapproval of Kelly riding horses also had a role in Norma's unenthusiastic reception of the proposed move.

Pender Harbour mansion

- [105] During their marriage, the Lougheeds had acquired a five-acre oceanfront lot at Pender Harbour. Starting in the late 1990s, they spent roughly two years overseeing the construction of a spectacular 23,000 plus square foot mansion on that acreage. It cost approximately \$6.5 million to build and was professionally decorated.
- [106] The Lougheeds' Pender Harbour compound had the extravagant features one would expect of a palatial estate, such as its own water collection resources, a state of the art movie theatre, a built-in music system, tennis courts, extensive landscaped grounds, a bowling alley, boathouses, an outdoor kitchen and a children's play area. Once construction was completed in late 2000, the Lougheeds divided their time between Pender Harbour and their residence in West Vancouver.
- [107] Norma and William regularly entertained family and friends at Pender Harbour. Kelly and her family routinely spent time there especially during the summer months. Norma also hosted getaways with her sisters and close women friends. Norma's brother, Gary, and his family visited regularly as well.

Cara and Bo Wilson

- [108] Norma's surviving siblings, Sylvia, Patricia and Gary (their sister Billie had died in 2003) were called as witnesses by Kelly. Each of them credibly testified that Norma dearly loved her Wilson grandchildren. The evidence of Cara and Bo confirmed that Norma, whom they affectionately called "Oma", was an attentive and nurturing grandmother.
- [109] I accept Kelly's evidence that she and Blair were content for their children to attend the local public school, but that Norma insisted that her grandchildren go to private school at the Lougheeds' expense. Blair and Kelly agreed to accept the Lougheeds' generous offer.
- [110] Cara proved to be a gifted student and excelled at school. She recalled that her grandparents were interested in her academic life, and always supportive of any scholastic activities that she wished to pursue. During her summers as a teenager, she regularly took part in academic enrichment programs in different parts of the world. While still in high school, she formed the goal of attending an Ivy League school on the American eastern seaboard, and took several courses meant to give her an advantage in being accepted. There can be no doubt that Cara and her parents routinely spoke about Cara's post-secondary educational aspirations with William and Norma, and that her grandparents endorsed them and made it known that they were prepared to foot the bill. In 2005 and 2006, Norma paid for Cara to attend debates at prestigious American universities, and later she and Cara toured at least one private college considered to be a stepping stone to the elite U.S. universities.
- [111] School was more difficult for Bo. He had a learning challenge and required one-on-one instruction. In consultation with Bo's teacher, the Wilsons decided that Kelly would school him at home. She did so for approximately two years, and then enrolled him in a private school program designed for children with learning differences. The Wilsons were disappointed with the program and moved Bo to a special school across town, and later to a novel private school at UBC. Norma and William covered all of those expensive schooling costs.
- [112] William developed a closer relationship to Cara than to Bo. He could see that she was a "bright spark", as he put it, and was proud of her exceptional academic talent and scholastic accomplishments. As Cara matured, she and her grandfather spent many enjoyable times engaged in stimulating conversations on topics like literature, philosophy and politics.
- [113] William withdrew all financial support for the Wilson grandchildren's education shortly after Norma died.

Lawson Avenue property - 2001

- [114] Norma had purchased a home located on Lawson Avenue, West Vancouver, in 1986 for the price of \$171,000. For many years, she rented it at a discounted rate to her stepson's former wife, Elizabeth, and their two children. In about 1992, Elizabeth and the children moved out and the Loughheids' good friends, Rick and Elaine Reynolds, moved in. Norma had enjoyed a longstanding friendship with Rick Reynolds' late mother, and would later become the godmother to the Reynolds' daughter.
- [115] Elaine Reynolds approached Norma about buying Lawson Avenue. Norma answered no. In 2001, Ms. Reynolds made a second request that Norma sell her the property. At that time, Norma agreed to sell it to the Reynolds for its market value. Norma obtained a valuation from her brother Gary, and the Reynolds obtained an independent appraisal. The value was estimated to fall between \$435,000 and \$450,000. The Reynolds arranged for financing through their bank.
- [116] Ms. Reynolds testified that she noticed Kelly and Blair walking around the Lawson Avenue property, and was told by Norma that she was sorry but Kelly wanted to have it to construct her dream home. Although I accept that Norma may have characterized the change of plans in that way, she was not being completely forthright with the Reynolds. It was Norma's idea - not Kelly's - that her daughter tear down the existing home and build a dream home from the ground up.
- [117] The evidence shows that, as had been the case with respect to the Jefferson Avenue and Gordon Avenue properties, Norma and Blair discussed how title to the Lawson Avenue property would be held. I accept that Norma's view continued to be that she would not require a formal mortgage or other form of security if title were taken in Kelly's name alone. It was agreed that Kelly would be the sole owner of Lawson Avenue.
- [118] Norma wrote a note to the notary public that she had used on previous conveyances, informing her that she wished to transfer the Lawson Avenue property to Kelly for the price of \$171,000 to be paid in full within one year. I am satisfied that there were no firm financial arrangements discussed among Norma, Kelly or Blair beyond a general understanding that Kelly would acquire title to Lawson Avenue for the sum that Norma had paid for it years earlier, and that the purchase price would be paid out of the proceeds of the Gordon Avenue property when it was sold within the year.
- [119] On October 1, 2001, Norma transferred Lawson Avenue to Kelly.
- [120] At the time, Norma owned another property in West Vancouver, on Glenmore Drive. She offered to sell it to the Reynolds in lieu of Lawson Avenue. The evidence indicates that Norma considered that property to be worth approximately \$400,000 at the time. The Reynolds believed that the home needed renovations costing in the order of \$100,000 and were prepared to purchase it for \$300,000. Norma decided to sell it to them for the deeply discounted price of \$200,000, financed by her granting a five-year, interest free, mortgage.

- [121] There was about an eight-month overlap where Kelly owned both Lawson Avenue and Gordon Avenue. Lawson Avenue was unencumbered. In early January 2002, the Wilsons obtained fresh financing in the form of a personal guarantee by Kelly up to a maximum of \$750,000, secured by way of a mortgage against Lawson Avenue. The mortgage did not secure \$750,000 in "new" money. It represented security for Kelly's \$475,000 guarantee on the CB Wilson Capital loan, which had been registered against Gordon Avenue, and also secured a construction loan in the amount of between \$275,000 and \$325,000 advanced to the Wilsons to build their new home on Lawson Avenue.
- [122] In June 2002, Kelly sold Gordon Avenue for \$795,000 and the \$475,000 collateral mortgage charging that property connected to the leasing business of CB Wilson Capital was discharged.
- [123] As had been agreed, Kelly eventually paid her mother the sum of \$171,000, or thereabouts, for Lawson Avenue out of the proceeds of sale she received from Gordon Avenue. The evidence amply demonstrates that Norma was perfectly content with selling Lawson Avenue to Kelly for its original acquisition cost, and that as far as she was concerned Kelly owed no further sum in respect of it. In that regard I note that Norma did not record an account receivable of Kelly in respect of Lawson Avenue in the Lougheed Household ledgers for 2002. By contrast, she did record the Reynolds' mortgage for their purchase of Glenmore Drive as an account receivable. It should also be recalled that under Norma's 1989 Will, she gave Lawson Avenue to Kelly outright. In light of these observations, it is difficult to conceive of the basis for William claiming against Kelly in debt in respect of Lawson Avenue and maintaining that allegation as part of his counterclaim until Kelly had closed her case at trial.

Pemberton Valley property - 2002

- [124] Kelly had long imagined building an equestrian centre outside of the Lower Mainland area, with capacity to board horses and possibly build a residence. In 2002, she found a sizeable acreage in the Pemberton Valley that she thought would be suitable to achieve those aims. Kelly discussed the prospective purchase with her mother who was supportive of Kelly's plans.
- [125] On November 29, 2002, Kelly used the sum of \$380,000 from the sale proceeds of Gordon Avenue to acquire a 16-acre parcel in the Pemberton Valley. Title was registered in her name alone.
- [126] I accept Blair's evidence that within the same timeframe, CB Wilson Capital's leasing business was expanding and he needed to augment its revolving line of credit in order to purchase new leases. To that end, Kelly also granted a \$192,000 collateral mortgage against the Pemberton Valley property in favour of the HSBC.

Whistler Property - 2003

- [127] In 1987, Norma and William jointly purchased a condominium at 5-6105 Eagle Drive in Whistler, B.C. As mentioned, Norma bequeathed that condominium to Kelly under her 1989 Will, conditional on William predeceasing her. On December 27, 1990, the Lougheeds jointly acquired a second Whistler Property located at 67-6125 Eagle Ridge Crescent (the "Whistler Property") for the sum of \$202,200. They subsequently sold their Eagle Drive condominium in 1991.
- [128] Over time, William and Norma gave up skiing and seldom used the Whistler Property. The Lougheeds extended the Wilsons an open invitation to stay at the Whistler Property during ski season free of charge other than paying for the utilities and telephone. Cara and Bo would typically ski or attend ski camp while the Wilsons spent time working out and visiting friends.
- [129] In 2001, Norma informed Kelly that William wished to sell the Whistler Property. When Kelly explained that she had already purchased the children's annual ski passes in advance for the coming season, Norma agreed that they would revisit the matter the following year. A poorly timed conversation more or less along the same lines occurred the next year and it was agreed that the Wilson family would continue to enjoy the Whistler Property. Before yet another winter season was upon them, Norma warned the Wilsons that William had "put his foot down" and was insisting that the Whistler Property be sold. This prompted Blair and Norma to discuss the possibility of the Wilsons purchasing it. Although Kelly was aware of the ongoing discussions between her mother and husband generally, she chose to be involved only peripherally as was her custom with financial matters.
- [130] On February 4, 2003, the Lougheeds executed a transfer document conveying title to the Whistler Property to Kelly. The terms of payment in respect of the Whistler Property, and specifically whether it carried interest, are in dispute.
- [131] According to Blair, Norma explained that because William was also on title, the sale arrangements relative to the Whistler Property would have to be handled differently than were the previous transactions involving Jefferson Avenue, Gordon Avenue and Lawson Avenue. Norma told him he would have to talk to William directly to settle on a purchase price.
- [132] Blair considered the sum of \$450,000 to fairly reflect the market value of the Whistler Property. Both he and Kelly testified to the effect that they went to the Lougheeds' home and sat with William in the front room, poised to discuss the potential purchase. Norma popped into the room to remind them to settle on a price for the Whistler Property and then retreated to the kitchen. William testified that it was he and not Blair who determined the price of \$450,000 which says he considered to be about \$50,000 under its actual market value. The evidence is clear that, regardless of which of two men came up with the price of \$450,000, they quickly agreed to that figure. The Lougheeds were both aware that their daughter and Blair did not have sufficient funds to pay that purchase price outright, and

recognized that they would be buying the recreational property "on terms". William insisted that when he spoke to Blair, he imposed interest at the rate of 6%. William said that their conversation had taken place at the Whistler Property, but later in his evidence, agreed that he had never crossed paths with Kelly and Blair at the Whistler Property.

- [133] William contends that at no point in his testimony did Blair actually outright deny that interest was to be charged; rather he insinuated that interest was not payable by noting that Norma had never charged interest on any arrangements with the Wilsons. In my view, the thrust of Blair's evidence taken as a whole is that neither William nor Norma stipulated an interest component and that neither he nor Kelly committed to pay any interest. It amounts to a clear denial.
- [134] According to Blair, after they settled on the price, William indicated that the financial details would be left to Norma. That is consistent with William's evidence that he left it up to Norma "to make up the schedule". There was no evidence from William that he had given Norma any instructions or even spoken to her regarding what payment terms he might find acceptable. It appears that he was content to have Norma settle the payment terms with Blair as she saw fit.
- [135] Kelly explained that she was present when her husband and father readily agreed to the \$450,000 price. Thereafter, she joined her mother in the kitchen, leaving her father and husband "to continue their conversation". William contends that her evidence on this point supports his testimony to the effect that during this conversation, he told Blair that the loan would bear interest at the rate of 6%. Kelly's evidence clearly does not stretch that far.
- [136] Blair testified that after that evening, he and Norma discussed the terms of the deal, including whether title to the Whistler Property would be registered solely in Kelly's name or in the Wilsons' joint names. I accept Blair's evidence that he and Norma together considered a number of payment scenarios as a means of determining the monthly amount to be paid by the Wilsons. He credibly testified that although he had compiled similar working papers concerning payments for the Jefferson Avenue property, the ones that he put together in respect of the Whistler Property were far more detailed because of William's involvement. Blair candidly acknowledged that Norma had to show William something "as to how it was all being laid out".
- [137] The preponderance of the evidence shows that the agreement relative to the Wilsons' purchase of the Whistler Property came about in two parts. First, the brief negotiations regarding the purchase price between Blair and William, and second the more detailed ongoing discussions between Blair and Norma which concentrated on fixing the amount of the monthly payment. The terms of payment were negotiated solely between Blair and Norma, without input by William; his involvement was restricted to settling on the purchase price with Blair. William was not present and did not participate in the second stage of the transaction. Indeed, he agreed that he had not been involved in the payment side of the arrangement.

- [138] I accept Blair's evidence that the monthly payment amount he and Norma ultimately agreed to had its roots in a payment schedule that amortized the \$450,000 over 25 years with an annual interest rate of 6%. For convenience, I will refer to that document as the "Whistler Payment Schedule". Based on those variables, the monthly mortgage amount shown in the Whistler Payment Schedule was \$2,899.36. Blair testified that he and Norma ended up agreeing that the Wilsons would pay that sum each month, but that they both understood that a monthly payment of that size was going to be challenging.
- [139] Blair testified that although the Whistler Payment Schedule incorporated an interest component in the calculation of the monthly amount, it was understood between he and Norma that an actual payment of interest was not required. He says that the Whistler Payment Schedule was merely one of several working papers that he and Norma used to determine the monthly payment amount but that it did not fully reflect the final deal they had reached.
- [140] On its face, the Whistler Payment Schedule appears to consist of 10 pages; only three of them were in evidence. On page three, the sum of \$408,154.33 is forecasted as the balance owing as at December 31, 2007. That sum is comprised of both principal and interest at 6%. It is circled with an arrow leading to the words "final payment", which was written by Blair. Near the top portion of the first page of the Whistler Payment Schedule, also written by Blair, is the following: "\$408,154.33 due December 31, 2007". Blair had also inserted the words "May" and "December" in the column relating to the payments for the 2003 year. Norma had made markings indicating the intervening months for 2003, as well as the months for 2004.
- [141] The Whistler Payment Schedule gives a running breakdown of the portion of the monthly payment attributable to reduction of principal, and the portion allocated to interest. It indicates that where the monthly payment of \$2,899.36 is applied to both principal and interest at 6%, the balance payable at the end of 2004 would be \$436,377.01. It tabulates the amount outstanding at the end of 2005 as \$427,526.56. It is significant that those figures do not correspond to Norma's handwritten notations in the margin of the Whistler Payment Schedule. Adjacent to the balance shown as owing at the end of 2004 of \$436,377.01, Norma had written "\$400,703.83". Similarly, next to the amount of \$427,526.56 computed as being due at the end of 2005, she had inserted the sum of "\$371,703.84". Those figures penned by Norma correspond to the balances owing at those respective year-ends on the basis that monthly payments she received were applied entirely to the reduction of the principal amount, with nothing allocated to interest.
- [142] Ever the bookkeeper, Norma prepared a separate sheet recording the Wilsons' payments for the Whistler Property. She titled her accounting "Kelly re Pemberton Loan". It is common ground that the reference to Pemberton is an error and that the entries correspond to the Whistler Property loan. I will refer to this sheet as "Norma's Whistler Accounting".

- [143] Norma's Whistler Accounting shows that although the Whistler Property was transferred into Kelly's name the first week of February 2003, the Wilsons' payments did not begin until May 2003. Two cheques were evidently returned for non-sufficient funds in 2003. There was no evidence that Norma or William sought to recoup those missed payments.
- [144] The Wilsons typically paid by supplying Norma with several post-dated cheques and rounded up many of their monthly payments to \$2,900 or \$3,000. They made twelve monthly payments in 2004, ten payments in 2005 and seven in 2006. Payments up to and including July 2006 were reflected in Norma's Whistler Accounting, although four more payments were made after that time.
- [145] Norma's Whistler Accounting shows that she was deducting all of the monthly payment exclusively from the principal amount and was not apportioning any portion against interest. For example, the Whistler Payment Schedule calculates the amount owing at the end of 2004 as \$436,377.01 had 6% interest been charged. Norma's Whistler Accounting indicates that Norma simply added the payments she received in 2003 and 2004, deducted them entirely from the principal amount, arriving at a balance owing of \$400,703.84. The difference between the two figures is the interest component.
- [146] The journal entries made by Norma in the Loughheed Household ledgers record the balance of Kelly's account receivable at the end of 2004 as \$400,703.84. That figure corresponds to Norma's notations on the Whistler Payment Schedule and the contents of Norma's Whistler Accounting. Kelly's account receivable for 2005 is shown as \$631,788.84 at year end. Norma made notations next to that entry indicating that, of that amount, the sum of \$371,703.84 represented the outstanding balance on the Whistler Property purchase. That is the same figure that Norma inserted in the margin of the Whistler Payment Schedule at the end of 2005.
- [147] William contends that Blair's notations on the Whistler Payment Schedule of "final payment" and "due December 31, 2007" denote an agreement that payment of the principal and interest was due in full on December 31, 2007. In my view, Norma's own treatment of the payments and her calculation of Kelly's outstanding account receivable in respect of it, undermine that assertion.
- [148] At trial, Kelly adopted her discovery evidence to the effect that her understanding of the repayment terms was "whatever it said" in the documents drawn up by her mother. She did not know whether her mother or Blair had put together the Whistler Payment Schedule. I find that in all likelihood, it was Blair and not Norma who compiled it.
- [149] At some point, Norma filled out a standard mortgage document in relation to the Whistler Property loan. The principal amount was stated to be \$450,000 with interest payable at 6%. The term of the unexecuted mortgage was from May 1, 2003 until December 31, 2007 and names Kelly as the sole mortgagor. I accept Blair's evidence that Norma did not show him the mortgage document or tell him of its existence. The particulars spelled out by Norma in the mortgage document can be interpreted as corresponding to the contents of the

Whistler Payment Schedule, absent Norma's notations in the margin, and in that way support William's position that the arrangement included interest. However, I place greater significance on that fact that ultimately Norma did not require that a mortgage on those terms be signed, which I find more persuasively supports the inference that the interest charge did not find its way into the final agreement.

- [150] Kelly also agreed that she understood that 6% interest would be charged in respect of the purchase price, but did not explain - and was not asked to explain - the basis for her understanding. Kelly's evidence is at odds with Blair's testimony and the rather compelling evidence showing that Norma was deducting the monthly payments exclusively against the principal owing, and was not charging interest.
- [151] This was not an arm's length commercial transaction. It was a sweetheart family arrangement between wealthy parents and their daughter and son-in-law. I conclude that much like all of Norma's financial dealings with the Wilsons, other than ensuring the purchase price was acceptable to William and reaching an agreement on the monthly amount payable, there was a lack of formality surrounding repayment of the loan. Blair and Norma left the terms of repayment loosely defined along the lines that the Wilsons would do their best to pay the agreed monthly amount.
- [152] Weighing the totality of the evidence on the matter of interest, and mindful that Kelly actively avoided involving herself in the fine points of financial transactions and was not privy to the discussions between her mother and Blair, I find that she was mistaken in her evidence concerning the interest requirement.
- [153] In my view, the combined effect of the contents of Norma's Whistler's Accounting, the sums that Norma wrote on the Whistler Payment Schedule, and the above-referenced entries in the Lougheed Household ledgers in conjunction with Blair's evidence, which I accept, establish that he and Norma agreed that the Wilsons' monthly payments were to be applied in their entirety against the principal amount of the \$450,000 loan, free of interest. The evidence does not establish that the Whistler Property loan was to carry a balloon payment of interest or was to be repaid by a certain deadline. Interest was not payable.

Events in 2004

- [154] Blair became increasingly more involved in politics and in 2004 was nominated as a candidate for the Federal Liberal party in the West Vancouver riding. Although he was narrowly defeated, Norma was nonetheless thrilled by her son-in-law's achievement.
- [155] In February 2004, the Lougheeds purchased property on Belmont Avenue in North Vancouver. They intended to have extensive renovations performed and then use it as their City residence when they were not at Pender Harbour.

- [156] Around this time, Norma's father passed away. As Mrs. Born had died some nine years earlier, Mr. Born gave specific legacies to Kelly and his other grandchildren and left the residue of his estate, which exceeded \$1.0 million, to Norma and her siblings.
- [157] The ten-year lease for Mahoney's was coming up for renewal in 2006. Blair testified, and I accept, that as early as 2004, it was apparent to him that the landlord would be increasing the rent to an amount that Blair considered excessive. Interested in pursuing other opportunities in the restaurant industry, Blair collaborated with his brother and father to establish a high-end steakhouse restaurant/sports bar within walking distance of the professional sports arenas (the "Steakhouse"). The intention was to outfit the Steakhouse with a state-of-the-art kitchen and opulent furnishings and improvements. It was understood that it would be an expensive venture.
- [158] Blair approached the Royal Bank with his business plan and obtained construction financing of up to \$800,000. The Royal Bank stipulated that a portion of the \$800,000 loan be secured against hard assets. To that end, on February 9, 2004, Kelly provided the bank with her guarantee of the Steakhouse's indebtedness up to a maximum of \$580,000 and granted a demand collateral mortgage in the same amount against the Whistler Property securing the Steakhouse's current or running account.
- [159] The Wilsons did not tell William or Norma that Kelly had granted a mortgage against the Whistler Property. At trial, Kelly emotionally admitted that she knew that her parents "would be mad but didn't know what else to do".
- [160] The Steakhouse opened in the summer of 2004. The timing was unfortunate because it coincided with a lockout of the NHL players that resulted in the cancellation of the 2004-2005 season. Kelly and Blair testified that as a result of the lockout, the level of business of the Steakhouse did not approach the volume they had expected and that it was never able to overcome its lacklustre start.

Events in 2005

- [161] Whatever the reason, the disappointing economic performance of the Steakhouse persisted throughout its second year of operation. The Lougheds, especially Norma, did what they could to promote business. They attended the Steakhouse on many occasions and Norma purchased gift certificates which she handed out to family and friends. The Wilsons regularly hosted family dinners at a discounted price which the Lougheds also attended.
- [162] From its inception, Mountainside's assets had only been used to pay Kelly's monthly allowance and to distribute an amount to Blair or his consulting company so as to optimize the Wilson family's income splitting from a tax standpoint. Other than those sanctioned payments, Norma and Kelly had always treated Mountainside's assets as being off limits. In May 2005, Kelly wrote a cheque to the Steakhouse for \$5,000 on Mountainside's account. Those funds were used to defray operational expenses such as payroll. As Mountainside's bookkeeper, Norma would have seen that it had become necessary for Mountainside to

provide financial assistance to the Steakhouse. Dipping into Mountainside's funds for that purpose was extraordinary, and the import of it would not have been lost on Norma.

- [163] Blair testified that, in due course the Royal Bank required that the sum of \$442,500, which had been drawn against the \$800,000 line, be "termed out". He says that, for that reason, in November 2005 Kelly granted a two-year mortgage against the Whistler Property for \$442,500, which Blair signed as a covenantor. I accept that the \$442,500 mortgage was the "termed out" portion of the \$580,000 demand mortgage already registered against the Whistler Property, and in that sense was subsumed within the larger mortgage indebtedness and was not in addition to it.
- [164] Kelly still said nothing to her parents about the mortgages charging the Whistler Property. When cross-examined about why she continued to remain silent about their existence, she answered that she was optimistic that the Steakhouse would turn around and that everything would be okay and that they would never have to know. I believe her.
- [165] In 2005 or thereabouts, the Wilsons became aware that the Pemberton Valley region had been removed, or would soon be removed, from the West Vancouver riding for which Blair had been nominated as a Liberal candidate. Because he intended to pursue his career in politics, it made no sense for the Wilsons to build a home and equestrian facility outside of Blair's desired district. Influenced in large measure by that consideration, Kelly listed her Pemberton Valley property for sale in late 2005. The listing price was \$599,000. It was not a secret that Kelly had done so and I find that Norma, and probably William, were aware that Pemberton Valley was up for sale.
- [166] In the latter part of 2005, Kelly noticed that her mother had a persistent cough and was clearing her throat excessively. Although she was not overly concerned, she urged her to consult her doctor about those symptoms. Norma did so and underwent a series of diagnostic tests.

Trading up Mountainside

- [167] As mentioned, Kelly intentionally avoided involvement in the investment of Mountainside's assets. She was comfortable letting her parents make all of those decisions, and they were not inconvenienced by doing so. Norma was more involved than was William in Mountainside's day-to-day bookkeeping and investments. I accept Blair's evidence that it was customary for him and Norma to regularly discuss the investments of and clarify bookkeeping entries for Mountainside, and to communicate more generally about the Wilsons' financial status.
- [168] At some stage, Blair took over Mountainside's investment portfolio. While in Blair's hands, Mountainside's equity portfolio suffered a dramatic decrease in value. I accept Blair's evidence that the significant losses were incurred mostly as the result of heavy investment in the dot.com sector which had plummeted throughout the global marketplace.

- [169] Norma and William were both aware of Mountainside's downward turn and knew that it continued to be Kelly's sole source of income. I accept Blair's evidence that during a discussion with Norma about Mountainside's losses some time in 2005, they decided it would be worthwhile to ask William, a successful investor, to assume control of Mountainside's investment account with Scotia McLeod. William agreed to do so, and Kelly gave him authority to invest and trade on Mountainside's behalf as he deemed fit.
- [170] Norma and William decided to put funds into Mountainside's investment account in order to "trade it up", meaning to enable William to take advantage of diversifying the portfolio beyond Mountainside's current investment ability. The objective was to recover the losses sustained by Mountainside. It was understood that the deposits to Mountainside's credit were not gifts, and that Mountainside was expected to repay those amounts, without interest, at some undefined future date in William's discretion. Typical of the financial dealings between the Lougheeds and Wilsons, there were no fixed repayment terms with respect to those loans.
- [171] During May and June 2005, the Lougheeds transferred the aggregate sum of \$260,000 from their joint account into Mountainside's investment account with Scotia McLeod. The Lougheed Household ledgers indicate that the Lougheeds loaned Mountainside an additional \$80,000 between December 2005 and early March 2006. Based on Norma's written answers to inquiries made of her by Mr. Murdock's assistant, I find that as at March 30, 2006, insofar as Norma was concerned, Mountainside owed the sum of \$260,000, plus \$80,000, less a payment made by Kelly of \$30,000, for a total of \$310,000. That computation is consistent with Norma's entries in Mountainside's working papers.
- [172] Also in 2006 and through to January 15, 2007, a series of five payments totalling a further \$176,500 of Norbill's funds were made to the credit of Mountainside's investment account. On November 20, 2006, another loan of \$55,000 was made by William directly into Mountainside's eTrade Canada account.
- [173] As previously noted, William and Norma regarded their respective Norbill shareholder's accounts much like a personal bank account. Consequently, even where funds are drawn on a Norbill bank account, it does not necessarily follow that those monies were being advanced by Norbill as oftentimes they were subsequently reallocated to one or both of the shareholder's accounts.
- [174] In the general ledger she kept for Mountainside, Norma recorded the loans ostensibly made by Norbill as being payable to herself and her husband. Norbill's 2006 financial statements, which were prepared by Mr. Murdock after Norma's death, report a debt due by Mountainside in the amount of \$210,500 as at December 31, 2006. The depiction of that debt as being owed to Norbill is inconsistent with Norma's entries in Mountainside's books at the time. Although little of consequence turns on it for the purposes of this litigation, I find that at the end of the day, it was the Lougheeds, not Norbill, who loaned all of those monies to Mountainside in order to rehabilitate its investment position.

Events in 2006

- [175] Blair was elected to Parliament on January 23, 2006. I find that his salary as a Member of Parliament was greater than the annual salary he typically drew from his business endeavours over the years.
- [176] Norma would occasionally ask Blair how the Steakhouse was doing, and he would update her in general terms. Of the Wilsons, it was Blair who made the decisions concerning the family finances and business matters. His uncontradicted evidence is that by the summer of 2006, the Steakhouse had become a serious cash drain. I accept his evidence that in July or August 2006, he confessed to Norma that the Steakhouse was faltering and emphasized that it was going "down, down, down, down, down". As well, I find that at around that time, Blair warned her that the post-dated cheques for the Whistler Property loan would probably not clear.
- [177] By late September 2006, Mountainside had written cheques to the Steakhouse totalling nearly \$46,000. Norma would have been aware that the Wilsons had again resorted to Mountainside's otherwise sacrosanct funds in order to cover the Steakhouse's basic operating expenses such as rent and payroll.
- [178] Faced with the mounting gravity of the financial shape of the Steakhouse, Blair had some difficult decisions to make. I accept that even at that time he clung to some residual optimism that business might turn around with the upcoming hockey season. Weighing his options, Blair decided it would be worthwhile to see the Steakhouse through the 2006-2007 hockey season in the hope that it would generate revenue sufficient to put it in the black.
- [179] Blair sought additional funding to have at the ready to keep the Steakhouse afloat. The HSBC was prepared to make funds available in exchange for a mortgage over Lawson Avenue and the Pemberton Valley property. Even at this time, Kelly was not immersed in the details of the financial circumstances of the Steakhouse and did not participate per se in the decision to try to keep it afloat. She trusted her husband's judgment and, adopting his guarded optimism, was prepared to do whatever he thought best. On July 5, 2006, she signed a collateral mortgage charging those properties in the amount of \$1,820,000, with Blair as a co-covenantor.
- [180] The evidence establishes that those mortgages did not secure \$1.82 million of new money; rather they incorporated the indebtedness that remained in respect of the \$750,000 construction loan taken in 2002 to build the home on Lawson Avenue, together with the \$192,000 mortgage on the Pemberton Valley property, both of which were subsequently discharged in October 2006. The balance of the face amount of the \$1.82 million loan was available for Blair's use to the extent that he required it to sustain the Steakhouse. The evidence indicates that Blair did not draw on the entire amount available.

[181] Concerned about the economic state of the Steakhouse, the Royal Bank demanded security for the unsecured portion of its \$800,000 loan. On August 10, 2006, Kelly granted an additional collateral mortgage in the principal amount of \$335,000 against title to Lawson Avenue and Pemberton Valley to cover the unsecured balance.

[182] The Loughheids were told nothing of these mortgages.

Roberts Creek property - July 2006

[183] During the summer of 2006, Kelly and Norma together looked for an acreage within Blair's political riding on the Sunshine Coast essentially as a replacement for Pemberton Valley. Parcels of land in that region of the kind that Kelly had in mind were somewhat hard to come by. However, Norma discovered a suitable 10-acre lot of bare land in the Roberts Creek area, about a 45 to 60-minute drive from the Loughheids' Pender Harbour mansion. I accept Kelly's evidence that the acreage her mother found had not been advertised in the usual multiple listing publications, and was part of a more extensive grouping of properties. Norma clearly had made inquiries beyond the ordinary course to learn of its availability. The asking price was \$428,000, which was less than the listing price for Pemberton Valley.

[184] Before Kelly committed to purchase the Roberts Creek property, she and her parents, and possibly Blair, walked the property envisioning where the house, barn and pastures might eventually be located. Kelly and William both testified that the location of the property was especially appealing to Norma because it had her beloved daughter and family potentially living in much closer proximity to her home at Pender Harbour.

[185] Kelly was concerned that the opportunity to purchase the unique lot would slip by if she did not act quickly. She and her mother discussed the idea that her parents would advance her the purchase price which she would repay from the sale proceeds of Pemberton Valley. I find that Norma readily agreed to the proposal and told Kelly to get her father's seal of approval.

[186] At the time, Blair was travelling to and from Ottawa on a regular basis, and had little involvement in any discussions concerning the financing of his wife's acquisition of Roberts Creek. Unaccustomed as she was to dealing with financial matters hands-on, it fell to Kelly to broach the financial arrangement with her father. Her evidence is that she asked him to supply bridge financing to facilitate her purchase pending the sale of the Pemberton Valley property, and that his response was that "that was fine".

[187] The tenor of William's evidence is that when Kelly sought his financial assistance, she used the word "imminently" to describe the timing of the sale of Pemberton Valley. He says that she did so deliberately in order to mislead him into believing that there was an accepted deal pending on the Pemberton Valley property which would put her in a position to repay the short term loan very quickly. William also testified that he had decided that "we wouldn't go over \$300,000" on the price because he did not think that the lot was worth

more than that. He did not explain how he came to change his mind and approve making a loan in the larger amount. He concedes that the Roberts Creek loan did not bear interest.

- [188] Although Kelly was not able to recall specifically, she agreed that she may have used the word "imminently" when she discussed the anticipated sale of Pemberton Valley with her father. Her evidence, which I consider to be credible, is that at various times the listing agent for Pemberton Valley told her that there third parties expressing an interest in purchasing it, and on that basis, she expected it would sell in a matter of 4 to 6 weeks. At her examination for discovery, Kelly was asked whether she thought an offer to purchase Pemberton Valley was going to be imminent, to which she answered "yes, many times". Kelly adopted that evidence at trial. She stated that if she had used the word "imminently" when speaking with her father she was referring to that projected 4 to 6 week timeframe, and not to an immediate sale.
- [189] William testified that it was never his understanding that it would take as long as 4 to 6 weeks to repay the Roberts Creek loan. Yet, at the same time, he agreed that "the way things were at that time [Norma and I] would be probably patient enough to wait until Pemberton sold". He also agreed that the prospect of the sale of Pemberton Valley taking longer than what was anticipated by the word "imminently" or not proceeding at all had never been discussed with Kelly. There was no evidence that William asked for any information concerning the status of the sale of the Pemberton Valley property or engaged in any discussions with Kelly about what he claims was represented to be an imminent sale of it.
- [190] Norma provided a personal cheque in the amount of \$16,000 for the deposit. On July 26, 2006, she issued a cheque from a Norbill account in the amount of \$445,710.29 representing the balance of the purchase price and closing costs. The transaction closed that day and the Roberts Creek property was transferred into Kelly's name alone. In the Lougheed Household ledgers, Norma entered the \$16,000 deposit she paid in respect of the Roberts Creek property as part of Kelly's account receivable; the loan for the rest is not recorded in those ledgers.
- [191] As it transpired, despite a reduction in the listing price, the Pemberton Valley property did not sell within the 4 to 6 week time frame that Kelly had anticipated. It had not sold at the time of Norma's death or by the date of trial. There is no evidence to suggestion that either Norma or William asked Kelly about the status of the sale of Pemberton Valley or demanded repayment of the financing provided at any time prior to Norma's death, which occurred some ten months later. William provided no evidence that he and Norma even discussed the matter privately. The first demand for payment was not made until after Kelly commenced the WVA Action.

- [192] William agreed that he and Norma did not plan to charge interest on this loan. His counsel suggested that the underlying rationale for foregoing interest was that the Lougheeds had been led to understand by Kelly that the loan would be paid off quickly. I reject that submission. It was the Lougheeds' habit not to charge Kelly interest on the loans they made to her or to Mountainside on her behalf, and I find that they were merely acting in accordance with that status quo.
- [193] When discussing the purchase of Roberts Creek with her parents, Kelly had still not revealed that she had encumbered the Whistler Property. Nor did she tell them that she had granted a \$1.82 million collateral mortgage against Lawson Avenue and Pemberton Valley just before the Roberts Creek transaction closed. William asserts that it would have been obvious to Kelly when she requested the bridge financing that she would be signing a mortgage charging, in part, the Pemberton Valley property. He argues that it follows that she must have known that even if Pemberton Valley had sold quickly, payment of the Roberts Creek loan from the sale proceeds would not have been possible.
- [194] Given her inexperience in the area of finances, there was a degree of naiveté in the way that Kelly dealt with those matters. She was cross-examined at length about what she understood of the nature of the collateral mortgages and the possible repercussions in granting them. She responded that she never thought about foreclosure of the properties or other negative financial implications. She also said that she understood that her mother was backing her up with all of the things that she and Blair were doing, and that her mother would be there for her if anything went wrong. In the course of that exchange, Kelly was asked whether her mother had in fact told her that. She answered that "it was something that was understood".
- [195] I accept that Kelly and Norma had an unspoken understanding that Norma would "be there" for Kelly in the sense that Kelly could rely on her for financial security. Given Kelly's history of avoiding dealing with financial matters, I also accept that she did not turn her mind to the potential that the mortgages might go into foreclosure or that she and Blair might have to sell one or more of the properties to satisfy the mortgage indebtedness.
- [196] The preponderance of the evidence does not support a finding that Kelly intentionally misrepresented the timing of the sale of her Pemberton Valley property to her parents in order to secure bridge financing to enable her to purchase Roberts Creek. I conclude that her forecasted timeline for the sale of Pemberton Valley was based on information that she had received from her real estate agent. Nor am I persuaded that Kelly deviously secured the loan to purchase Roberts Creek, recognizing that she was about to encumber the Pemberton Valley property and create complications in her ability to repay the bridge financing. The evidence satisfies me that Kelly acted in good faith in her dealings with her parents and genuinely held the belief that Pemberton Valley would be sold in two months or less, and that she would somehow be able to repay them. Indeed, there was no evidence that she would have been precluded from transferring the collateral mortgage registered against Pemberton Valley to her Roberts Creek property which was free and clear, much

like she had done in the past when Gordon Avenue was sold and the \$192,000 mortgage was discharged and transferred to Pemberton Valley. I find that Kelly informed her parents of her belief, and did not go further and represent to or assure them that Pemberton Valley would in fact be sold within a specified period. Moreover, and in any event, I find that the sale of Pemberton Valley, imminently or in the relatively near future, was not a condition precedent or even a fundamental term of the Lougheeds' agreement to make the loan.

- [197] As William himself conceded, and as their conduct demonstrated, the Lougheeds were prepared to patiently await the sale of the Pemberton Valley property before being repaid. Indeed, I found persuasive Kelly's evidence that a short time before her mother's death, her father agreed to help her develop the Roberts Creek acreage, and that when she advised her mother of his willingness, Norma responded: "your father loves you; he would do anything for you".
- [198] The Norbill working papers prepared by Mr. Murdock originally recorded the \$445,710.29 against William's shareholder's loan. After Norma died, William instructed Mr. Murdock to reclassify the loan as having been made by Norbill. Neither William nor Mr. Murdock clarified the reason for that change. Kelly's counsel contends that neither William nor Norbill have met the burden of proving who actually made the Roberts Creek loan to Kelly. I do not agree. Kelly acknowledged that she knew that the loan had been made by one or other of her parents and/or Norbill and it did not matter to her who the precise lender or lenders were. In my view, the evidence establishes that, except for the \$16,000 deposit, the bridge financing for Roberts Creek was supplied by Norbill.

Conversation between Kelly and Norma - October 2006

- [199] There can be no doubt that Kelly was a vital source of strength, care and emotional support to her mother, including throughout her illness. When undergoing chemotherapy, William would normally drop Norma off at the hospital and pick her up approximately three hours later. With her mother's favourite home-baked treats in hand, Kelly often met her mother at the hospital and stayed with her during the course of her treatments. She also accompanied her mother to medical appointments and saw her regularly outside of the hospital.
- [200] The plight of the Steakhouse did not improve in the autumn of 2006, and things were looking close to desperate. Although Kelly was prone to let financial matters fall to others, the Steakhouse's financial predicament was becoming so acute that she could not ignore it. This was the first time in her life that Kelly had to fret about money. I find that although she shared Blair's faint optimism of a financial turnaround, Kelly began to confide to her mother that the Steakhouse was not doing well. Their frank financial discussion was novel for both women.
- [201] Kelly testified that during one of those discussions at the hospital in October 2006, Kelly told her mother that things were going badly with the Steakhouse, and she did not know whether she would ever be able to pay her back all the money that she owed. According to

Kelly, her mother told her "not to worry about it". She interpreted her mother's response as forgiving the Wilsons of their obligation to make further payments against the purchase price for the Whistler Property and any obligation to repay the Roberts Creek loan. She did not construe her mother's forgiveness of indebtedness as extending to the loans made to Mountainside. Kelly recalled that it was an especially emotional conversation because of her financial distress and the intense relief she felt by what she understood to be forgiveness of the indebtedness.

- [202] Blair testified that Kelly told him that they no longer had to worry about the debts owing to her mother and that they did not have to worry about making any more payments. As Kelly relayed the conversation she had had with Norma, Blair says that the relief in her face was noticeable, as though a huge burden had been lifted. Blair too was relieved. However, he appreciated that even with Norma's generosity in the form of the forgiveness of those loans, he and Kelly remained in a compromised financial position.

Kelly doing housework for Norma - November 2006-2007

- [203] Norma had become even more attuned to the seriousness of the Wilsons' financial situation as a result of her daughter's emotional disclosure in October 2006. Yet it was not Norma's style to hand Kelly money, and it was not Kelly's habit to ask for it. I accept Kelly's evidence that her mother knew that she needed extra money and starting sometime in November 2006, offered to pay Kelly to clean the Loughheeds' newly renovated Belmont home. On those occasions, Kelly and Norma would typically share a cup of tea and chat. Kelly would then set about to clean the home, and Norma would either do some work in her office or take a nap on the couch. At Norma's suggestion, she also paid Kelly to prepare canapés to have at the ready for when company popped by. In a very stressful period, overshadowed by Norma's cancer and the Wilsons' financial woes, these visits were uplifting for both mother and daughter.
- [204] Norma's sister Patricia recalled Norma telling her that she was paying Kelly to do housework because Kelly was short on money. Patricia testified that many years earlier, when she was beginning to raise her own young family, Norma had also paid her to do light housework. According to Patricia, Norma did not want to simply give her money outright, but was happy to pay her to do chores around the house.
- [205] I find that this arrangement between Norma and Kelly amounted to nothing more than Norma's short term measure to put a little pocket money into her daughter's hands. It was not intended to address the Wilsons' larger financial difficulties and, in light of the trivial amounts of pay involved, would not have done so.

Blair's request for financial assistance - December 2006

- [206] Not only had the Wilsons invested substantial sums in the Steakhouse, Blair's brother and father had also put their personal funds at risk. For several months they had been working there for little or no wages. A great deal was on the line.
- [207] The bleak financial picture of the Steakhouse persisted through November and into December 2006. I accept Blair's evidence that he and Norma had several conversations about its worsening financial situation. By December 2006, the Steakhouse was facing receivership and Blair decided he would have to approach Norma to avert financial calamity. He laid out the Steakhouse's dire financial state, explaining that things had gotten "really bad". Norma proposed that he speak to William for advice as to how to proceed, and he did so. Blair testified, and I accept, that he told William that the Steakhouse was barely surviving, costing money to keep the doors open, and that he had to keep it going because if he lost it, "Kelly and I could lose everything". His hope in candidly reporting the situation was that William would offer to pay the \$800,000 indebtedness to the Royal Bank or help in some other concrete way. There is no dispute that William advised Blair to cut his losses and not throw good money after bad.
- [208] William recalled a slightly different version of his conversation with Blair. He denied any awareness that the Steakhouse's losses were significant and testified that Blair had asked him for \$65,000 to "save" it. The evidence is overwhelming that a contribution of \$65,000 to the Steakhouse at that stage would not have made a speck of difference. I consider it implausible that Blair, who had taken the unique and likely uncomfortable step of raising the issue directly with William, would have done so to request such an inconsequential sum.
- [209] While it is clear that William was in the dark about the Wilsons' bank indebtedness against the Whistler Property and Pemberton Valley, he knew full well that the Steakhouse had been an expensive undertaking to build, outfit and decorate, and had been told point blank by Blair that the Wilsons could lose everything if it went under. Shortly before Blair turned to William for help, his father had mentioned to William that Blair had "put the bankruptcy of the restaurant in Kelly's name". That did not sit well with William. Given his knowledge of these matters, it is difficult to credit William's assertion that when Blair came to him in December 2006, he did not understand that the losses of the Steakhouse were significant. I find that William appreciated that the Steakhouse's losses were likely substantial and that the Wilsons were in extreme financial trouble. The evidence indicates that William subsequently mentioned the failure of the Steakhouse to others, including Norma's siblings and Elaine Reynolds. I have no doubt that Norma was fully in the loop as well.
- [210] Neither Norma nor William offered to put money into the Steakhouse. Kelly and Blair did not raise the issue with them again.

Receivership of Steakhouse - 2007

- [211] The Steakhouse went into receivership and closed in January 2007. In Blair's words, he and Kelly "lost their shirts".
- [212] The Wilsons recognized that it was in their best interests to satisfy the bank indebtedness in as orderly a fashion as was possible in the circumstances. To prevent foreclosure of the Whistler Property, Kelly listed it for sale in April 2007.

William's relationship with Blair

- [213] William was inclined to criticize those who did not live up to his demanding expectations and his imperious temperament made him disinclined to forgive.
- [214] I accept Blair's evidence that William's demeanour toward him could run hot or cold depending on whether the circumstances were to William's liking at any given moment, and that Norma, ever charming, often acted as a buffer between the two men. Early on, the relationship between William and Blair was defined by their similarities and differences. On the one hand, they enjoyed spending time together, reviewing investments and discussing the stock market. On the other, William was a staunch conservative and had no tolerance for Blair's interest in liberal politics. As their relationship progressed, William became openly critical of what he perceived to be Blair's career and business shortcomings, although he was careful not to voice his complaints while in Kelly's presence.
- [215] As mentioned, Patricia came to know William fairly well in the ten years that she worked for his company. She could not recall an instance where William had ever spoken negatively about Kelly or criticized her disinterest in financial matters or her chosen domestic lifestyle. She testified, however, that over the years William had grown increasingly negative about Blair and criticized him openly and often to "everybody", and would often "go on about Blair" in a pejorative way. The criticisms revolved around William's perception that Blair mishandled or was unwise with money and in business.
- [216] Norma's brother Gary confirmed that there had been a certain amount of animosity directed at Blair by William over the years. He recalled William speaking in a disparaging tone about Blair's father having lost money in consequence of the failure of the Steakhouse. Norma's other sister, Sylvia, also gave credible evidence to the effect that going back to the days when her father was still alive, William would take "great delight" in condemning Blair. She recalled that Blair's financial ventures were a subject that William "had a lot of fun with".

2007 May long weekend

- [217] By May 2007, Norma's health was failing dramatically. Both despite and because of that, the family gathered at Pender Harbour to be with her on the May long weekend. William was there, as were Kelly, Blair and the Wilson children. Also visiting were Patricia and Gary, and his family.

- [218] The evidence of Kelly, Blair, Patricia and Gary credibly establishes that although Norma was weak and drained by her illness, she took pleasure in being surrounded by her family that weekend. She did not want to be off in her bedroom and miss out on the family interactions. She insisted on resting on the couch for a large segment of each day, happy to be in the middle of the goings-on and occasionally interjecting with witty comments. She was even able to join everyone at the dinner table for awhile on the Saturday night. There is no question that Norma enjoyed that family time immensely.
- [219] One of Norma's known idiosyncrasies was that she did not speak about dying or death, especially her own, or discuss her age or celebrate her birthday. Indeed, she had previously been upset with Patricia for having revealed her illness to their niece. That unauthorized disclosure caused a short-lived falling out between the sisters which was smoothed over before Norma died, with no lingering bad feelings.
- [220] Patricia recalled that at some stage over the course of the weekend she asked Norma whether the bustling activity around her was too tiring. I accept that Norma told her that the medication was causing her to feel unwell, but she was happy that the family was there. Patricia testified that it was in the context of acknowledging her declining health in this way - which was out of character for Norma - that Norma disclosed that she would be giving her car to Kelly because she would not be driving any longer. Patricia understood her sister to be referring to her red Lexus convertible, which everyone referred to as "Norma's car". That was the extent of the sisters' discussion concerning the distribution of Norma's property upon her death.
- [221] William maintained that Norma did not want to see Patricia or anyone that long weekend. He stated that it was he who arranged the family gathering, and that he had to urge his reluctant wife to take part by reminding her that this might be "the last chance she had".
- [222] I do not accept William's evidence that Norma had not wanted to surround herself with her loved ones at Pender Harbour that weekend, and that he had to coax her to change her mind. She was a sociable woman who loved her immediate and extended family and treasured spending time with them. It was always her, not William, who made an effort to maintain ties with family over the years, including some of the Loughheed Children and their children. Norma continued to receive friends and family during her illness, right up until hours before her death.
- [223] William could see that Norma was going downhill that weekend and claims to have felt badly about what would happen afterward. Connected to that, he stated that although he asked the Born family to let her rest, Norma told them not to pay any attention and said they just "wouldn't leave" and, in that sense, felt responsible for accelerating Norma's decline.
- [224] In submissions, William's counsel tried mightily to characterize the hard feelings voiced by William as being self-directed for allegedly having pressed Norma into receiving visitors that weekend and then being unable to persuade them to let her be. In my view, his

counsel's characterization does not accurately capture the essence of William's testimony. The thrust of it was to admonish the Born family in no uncertain terms, and not himself, for hastening Norma's death by ignoring his professed requests to permit her to rest and in wearing her out by overstaying their welcome.

- [225] I found William's testimony on the subject implausible and, I am sorry to say, spiteful. It reflected poorly on his credibility.
- [226] Apparently still carrying a bitter aftertaste of the insolvency of the Steakhouse, William had grown particularly derogatory about his perception of Blair's role in its demise. Patricia stated that over the weekend, at least once William asked, "what kind of a man would put a bankruptcy in his wife's name?". She recalled a specific exchange where William joined her in the art room and, in his typical scornful fashion derided Blair for putting the bankruptcy in Kelly's name, remarking that he could not handle money. Patricia says that she pointed out to William that it appeared as though Kelly was going to come into money fairly soon, and said "boy, that must really bother you to think that Blair is going to have access to some of Norma's estate". Patricia testified that William's reply was to the effect that there were going to be "strings attached" to that money, and that Blair would not have a free hand over it.
- [227] William denies that this conversation with Patricia took place. However, in contrast to the many instances where William's credibility was compromised, I found Patricia to be a wholly credible witness and consider her testimony to be truthful and reliable. I prefer her testimony on this and all matters over William's evidence to the extent of any inconsistencies.

Final days - May 21-24, 2007

- [228] Blair and the children travelled home on the Sunday of the May long weekend. Kelly remained at the Pender Harbour property with her parents and accompanied them home on the holiday Monday.
- [229] Norma deteriorated rapidly after the May long weekend. Her organs were shutting down and she was hallucinating periodically. Her doctor did not think she would last much longer. It was clear to all that she was dying.
- [230] After Norma returned from Pender Harbour, the Wilsons brought fish and chips to the Belmont house for dinner. It was not clear whether, what has come to be referred to as the "fish-and-chips dinner", occurred on the evening of May 21, May 22 or May 23. William could not recall having a fish-and-chips dinner with the Wilsons during that period of time at all. He explained that in those days he was semi-dazed due to his own uncomfortable medical condition and his overwhelming sadness about his wife's impending death. The probabilities of the situation establish that the fish-and-chips dinner took place on May 21. The date that it occurred has relevance to Kelly's claim concerning her mother's Lexus and more broadly impacts William's credibility.

1. Transfer of Norma's Lexus - May 22

[231] William testified that months before Norma's death, she told him that she wanted him to have her Lexus and had filled out the necessary transfer form, leaving a space for William to sign as the purchaser. William said that he did not want to take the steps to effect the transfer when Norma raised it with him because he felt that doing so conveyed the undesirable message to her of having given up hope.

[232] Blair testified that during the fish-and-chips dinner, William announced to the Wilsons that Norma was leaving her Lexus, jewellery and RIF to Kelly. Kelly recounted her father making that announcement as well, but was not asked to tie it to a specific date. Both Kelly and Blair testified that after William mentioned that Norma's car would belong to Kelly, Cara and Bo began to poke fun at their dad about being a bad driver; Kelly joined in and echoed their concerns in jest. Blair said he could see that his family's light hearted exchange was making William fume. He stated that later that evening as the two men passed one another in the hallway of the Belmont home, William shook his finger at Blair and warned him that he would never drive Norma's car. Blair said that he tried to diffuse William's hostility by laughing it off. I accept that the evidence of Kelly and Blair about these events is accurate.

[233] The next day, May 22, William contacted a partner of the law firm that had prepared the Loughdees' wills in 1989. That partner, in turn, instructed a junior associate lawyer of the firm that Norma was ill and may wish to do something about her 1989 Will. The associate lawyer reviewed a copy of Norma's 1989 Will, made notes summarizing its provisions and then spoke briefly to William. William also telephoned Mr. Murdock and arranged for him to attend the Belmont home the following morning.

[234] On the morning of May 22, Kelly was tending to her mother at the Belmont home and Sylvia was also visiting. Kelly testified that her father mentioned that he had to go back to Pender Harbour to retrieve "some documents". According to Sylvia, William informed her that he was driving up to the Pender Harbour house to "look for some papers". Although Sylvia did not seek details, she was surprised by William's plans, not the least because by then, Norma was obviously on her deathbed. I accept their evidence.

[235] William then set off to Pender Harbour, leaving early and arriving back home around dinner time. When asked at his examination for discovery of the reason for his return to Pender Harbour, William testified that he "just happened to be available" that day and that "maybe [he] wanted to do something at that house - they don't run themselves - and checking it out." He adopted that evidence at trial. William added that he had also gone to Pender Harbour to retrieve the cooler box containing Norma's jewellery to bring it back to Belmont. This was inconsistent with other evidence he had given indicating that he and Norma had hidden the cooler box at the Belmont Avenue house and that it was not at Pender Harbour.

- [236] The evidence shows that William registered the transfer of Norma's Lexus to himself at the Motor Vehicle Office in Sechelt on May 22.
- [237] I accept Kelly's testimony that a day or two after the fish-and-chips dinner, her father informed her that he had been rethinking giving her the Lexus, and declared that he would instead be giving it to Cara when she was ready and would preserve it for her in the meantime. Kelly did not argue about it.
- [238] Cara testified that on the day of the funeral, her grandfather told her that her grandmother had wanted Kelly to have her car, but that he thought Cara should have it instead, and that he would retain it for her until she obtained a driver's licence. It struck Cara as a strange subject for her grandfather to raise at her Oma's memorial. She also recalled thinking that she knew that her Oma wanted her mother to have her Lexus and, therefore, she found it strange that her grandfather would choose to override her Oma's intention. William confirmed that he told Cara he planned to give the Lexus to her when she became old enough and did not contradict Cara's recollection that he had mentioned that Norma wanted Kelly to have the Lexus.
- [239] I find that William was so perturbed by the prospect that Blair might drive the Lexus once Kelly received it and by whatever else had bothered him in that regard during the fish-and-chips dinner, that he resolved to take whatever steps were necessary to transfer the Lexus into his own name. His specific intent and the sole purpose in returning to Pender Harbour on May 22 was to collect the signed transfer document and/or the Lexus and licence plates in order to effect the vehicle transfer and thereby ensure that he had taken control of the Lexus before Norma's death.

2. Meeting with Garry Murdock - May 23

- [240] Mr. Murdock arrived at Belmont between 10:00 and 11:00 a.m. on May 23 and stayed for approximately one hour. His understanding of the main purpose of the meeting was to review Norma's 1989 Will to determine whether it raised any income tax issues.
- [241] At his examination for discovery, William indicated that he had not seen Norma's 1989 Will before the lawyer attended the Belmont residence on May 23. That is not accurate. William had a copy of the 1989 Will in his possession to review at his meeting with Mr. Murdock which took place before the lawyer attended.
- [242] Upon his arrival, Mr. Murdock says that he went into Norma's bedroom to say hello and then proceeded to William's office. He testified that Kelly joined him and William in the office. He agreed that her attendance was not constant and that she came and went from the office "a couple of times". He assumed that she left the meeting to check on her mother's condition. Mr. Murdock agreed that he was not keeping track of the movements of everyone who was in the house that morning.

- [243] According to Mr. Murdock, during the meeting William represented that he had not yet registered the transfer of Norma's Lexus because it would mean "admitting defeat" to her illness. The following day, Mr. Murdock made a file note to that effect. However, William claimed that he told Mr. Murdock that he had already transferred the Lexus to himself, and that it was no longer in Norma's name. William's counsel suggested that Mr. Murdock's testimony was expressed in the past tense and that he had been explaining why William had not effected the registration of the Lexus before May 22. That does not accord with my interpretation of Mr. Murdock's evidence. I find that William elected not to tell Mr. Murdock that, just the day before, he had made the lengthy round trip to Pender Harbour for the sole purpose of transferring Norma's Lexus into his name.
- [244] Mr. Murdock and William also discussed Norma's RIF. It had a value of more than \$450,000 and designated Kelly as the sole beneficiary. William testified that at some point before his meeting with Mr. Murdock, he had been told by his investment advisor that Kelly would be liable to pay approximately \$210,000 in income tax on the transfer to her of Norma's RIF, but that if William were the beneficiary, the RIF would roll over to him without triggering immediate income tax consequences. According to William, the investment advisor filled out the necessary form to change the designated beneficiary from Kelly to William, and William took it home. At the meeting with Mr. Murdock, William had the change of beneficiary designation form in hand. He explained to Mr. Murdock the plan to change the beneficiary designation from Kelly to himself, and that he would "make her whole", meaning that he would pay Kelly the face value of the RIF without any deduction for tax.
- [245] The advice that William claims to have received regarding the income tax liability in consequence of Kelly being the designated beneficiary was wrong. In fact, the tax liability would be shouldered by Norma's estate which would effectively be paid out of William's pocket as the sole residuary beneficiary.
- [246] I do not draw an adverse inference from the fact that William's investment advisor was not called to testify. I do not find it implausible that an institutional advisor might have misapprehended the income tax consequences, and given William incorrect tax advice. Mr. Murdock, however, knew better. As an accountant, he understood that Kelly would not be responsible for the income tax arising from her receipt of Norma's RIF. He said that during the May 23 meeting, he explained that looking at it from a "family unit" perspective, meaning the combined interests of Kelly and William, a tax liability of a couple of hundred thousand dollars could be averted if the beneficiary were redesignated to William. Mr. Murdock testified that in view of William's assurance that he would "make Kelly whole", there was no need for him to go into detail as to who, between William and Kelly, would actually be saving the tax. I accept that. William recalled that Mr. Murdock did clarify that a change of beneficiary from Kelly to himself would not save Kelly any income tax. He said, and I accept, that Mr. Murdock did not emphasize that point and that the importance of his advice did not register on William at that time.

- [247] Kelly does not recall meeting with Mr. Murdock at any time on May 23. However, she does not dispute that her father told her that the investment advisor had explained that if William became the designated beneficiary, she would save approximately \$210,000 in income tax, and that he would "make her whole". Nor does Kelly deny that on May 23 she delivered the change of beneficiary form, signed by William as Norma's power of attorney, to the investment advisor to facilitate the redesignation of beneficiary. Neither William nor Mr. Murdock discussed the proposed change of beneficiary with Norma. Kelly did not raise it with her either.
- [248] William's counsel contends that Kelly's inability to remember participating in the meeting with Mr. Murdock is contrived. I do not share that view. William had intended to meet with Mr. Murdock that morning whether or not Kelly was present, and he arranged the meeting without knowing if Kelly would be at the Belmont house when it took place. Clearly, William and Mr. Murdock were the main participants in the meeting. I find that Kelly, like her father, was emotionally exhausted and distraught over the looming death of her mother, and that her focus that day revolved around her mother's well-being. I am satisfied that she did pop in and out of her father's office while he and Mr. Murdock met, and was involved in a limited degree in the discussion concerning the change of RIF beneficiary. I am also satisfied that due to the intermittent nature of her participation in the meeting and the emotional overlay of the situation, Kelly's inability to recall the meeting was genuine.
- [249] Kelly asserts that her father deliberately misrepresented the income tax consequences of her remaining as the designated RIF beneficiary in order to do her financial harm. I reject that. At the time of the May 23 meeting, Kelly and her father still enjoyed a good relationship. The evidence does not establish that William had a sinister motive in taking steps to have himself designated as the RIF beneficiary in place of Kelly, or that it was a premeditated ploy on his part to get his hands on that asset to Kelly's detriment. It was William's conduct after the change of beneficiary designation, namely his refusal to make good on his promise to make Kelly whole, which was objectionable.
3. Meeting with the lawyer - May 23
- [250] William gave inconsistent evidence about the state of Norma's mental condition in her final days. At his examination for discovery, he testified that at that stage she had around the clock nursing support, and was incapable of managing her affairs although she was experiencing lucid periods. At trial, however, William insisted that Norma was "very sharp" the day before she died.
- [251] When William spoke to the associate lawyer on May 22, she told him that she would have to satisfy herself that Norma had sufficient mental competence to give instructions to amend her 1989 Will should she wish to do so. Obviously William had alerted either the partner or the associate lawyer that there was a concern about Norma's mental competence.

- [252] On the morning of May 23, the associate lawyer called the family physician, Dr. Knight, who said that he had not expected Norma to survive the night. Dr. Knight offered to visit or telephone Norma that morning to ascertain her mental competence, so it was clearly a live issue in Dr. Knight's mind.
- [253] The lawyer spoke with Dr. Knight approximately ten minutes later, at which time he advised that he considered Norma to be mentally competent to change her 1989 Will. Dr. Knight evidently based his determination on discussions that he had over the telephone possibly with Norma, but more likely with others at the Belmont home. It was clear to the lawyer that the situation was urgent and so she arranged to see Norma later that afternoon. More than once she testified that everything was "sort of a rush".
- [254] The lawyer had not previously met the Lougheds, and was given virtually no background information about their personal or financial circumstances.
- [255] The lawyer testified that when she arrived at the Belmont home, William introduced her to Norma, who remained in bed for the duration of the meeting. She estimated that the meeting lasted just under an hour; William's recollection is that she was not there very long at all. The lawyer testified that she opened the meeting by explaining to Norma that she was there to review her 1989 Will and, because it related just to her, she preferred that William leave the room in case Norma wished to make changes that would affect William adversely. The lawyer's recollection is that Norma wanted her husband to remain and that he stayed for the entire meeting.
- [256] The lawyer testified that Norma seemed to understand things and that she spoke intelligibly. She did not agree that Norma relied on William to answer some of the questions. The lawyer did not seem to be aware of her duty to carry out an independent assessment of Norma's testamentary capacity or her general capacity to provide instructions. She did not know the basis for the concern about whether Norma had the requisite capacity and had not asked Dr. Knight, even in a general way, to elaborate on his opinion. The lawyer felt she had no reason to question Dr. Knight's viewpoint, and did not consider herself trained to be able to assess a client's competence. She said she had no doubts as to Norma's competency in any event. Although it is not alleged that Norma lacked mental capacity when the lawyer met with her, the evidence demonstrates that she was in the final stages of dying and her cognitive abilities had become intermittently compromised.
- [257] The lawyer had brought with her a copy of Norma's 1989 Will. She testified that she summarized aloud the executorship provisions, explained the legal obligation of Norma's estate to pay liabilities and then paraphrased the bequests. According to the lawyer, when she went through the specific bequest to Kelly contained in paragraph 3.3.1 of "automobiles, boats, jewellery and all bank accounts", Norma clarified that she did not own any boats. She said nothing about not owing her Lexus or having given it to William. The lawyer then individually reviewed each specific gift of real property to Kelly contained in

paragraphs 3.4 through 3.8. Starting with the first parcel, the Delta Mountain Inn condominium, the lawyer recalled that Norma advised she no longer owned it, so the lawyer marked an "X" next to its description on her copy to denote that the gift of it had adeemed. When the lawyer referred next to the gift of the Sinclair Bay property, Norma clarified that she no longer owned that property either. The lawyer once again marked an "X" adjacent to that gift, and so on with respect to the Bellevue property, Eagle Drive (devised to Kelly in the event William predeceased), Lawson Avenue and the Duchess Avenue property (also contingent on William predeceasing).

- [258] The lawyer says that she advised Norma that because she no longer owned the parcels of real property left to Kelly, Kelly would only be receiving her automobiles, jewellery and bank accounts pursuant to the terms of her 1989 Will. The lawyer testified that Norma "understood that and she was fine with that". The lawyer recalled that William expressed his view to the effect that he did not think that the remaining testamentary bequests to Kelly were "very much", and thought that Norma should consider leaving her more. William agreed that he made those remarks and that they reflected the primary reason that he arranged for the lawyer to attend. The lawyer construed William's concern to mean that Norma's cars, jewellery and bank accounts were not worth much, however, she did not attempt to ascertain their value.
- [259] The lawyer was not aware that William had adopted Kelly, and did not ask about Kelly's relationship with William or Norma. She seems to have presumed that Kelly was William's stepdaughter, and hence not in line for any inheritance from him. She told Norma that because the residue of her estate passed to her husband, he could distribute the residuary assets under his will and that there was a possibility that Kelly would get nothing because he had not adopted her. Of course both Norma and William knew that William had adopted Kelly, but evidently neither of them corrected the lawyer's misunderstanding. The Loughheids also knew that Kelly would in fact be receiving nothing from William's estate as she was not a beneficiary under his will.
- [260] The lawyer testified that she advised Norma about the provisions of the WVA with specific reference to Kelly. She recalled telling Norma that Kelly could make a claim for variation because she was not being left very much of the estate. She says she explained that the court could vary the 1989 Will so that the residue would not go entirely to William. The lawyer claimed to recall Norma stating that she "wasn't worried about it", and that Kelly "was - she had enough - well, not that she had enough money, but that she was self-sufficient, her daughter didn't depend on her for money and she lived a good life". The lawyer stated that as the meeting drew to a close, she was satisfied that Norma did not wish to make any changes to her 1989 Will, and did not appear to be worried about the prospect that Kelly might bring a WVA claim. As she departed, the lawyer left her business card inviting Norma to telephone if she changed her mind.

- [261] In answering questions posed by the Court, the lawyer resiled from her testimony that Norma had described Kelly as "self-sufficient", and conceded that she could not remember whether Norma had actually used that descriptor or not. She testified that it was nevertheless her recollection that Kelly did not depend on her mother financially. The lawyer was not aware of the LHL settlement in favour of Kelly or the pattern of gifts and financial assistance from Norma to Kelly throughout her lifetime, or in relation to her children's education. She did not know that Blair had asked Norma and William to help bail out the Steakhouse, and that it had eventually gone under, or that Norma had suspended the Wilsons' obligation to make payments relative to the Whistler Property loan. She had no knowledge that Norma had been paying Kelly to tidy her home and prepare food.
- [262] The lawyer was also in the dark as to Norma's most rudimentary economic circumstances, and evidently made no inquiries either of Norma or William for any particulars. She did not ask Norma to provide basic information about her assets beyond confirming what she did not own by surveying the terms of her 1989 Will. Looking back, the lawyer was not sure whether Norma owned an automobile although she thought that there might have been reference to an "SUV or something" in their discussions. She recalled Norma stating that she owned some assets jointly with William, but could not remember any details. She had no idea of the nature or value of any of Norma's assets passing outside of the provisions of her 1989 Will to either Kelly or William. She was similarly blank about any discussion concerning Norma's RIF. She thought that a discussion regarding loans sounded familiar, but could not say for sure whether that topic came up. Conversations about private companies also rang a bell, but she could not put her finger on the specifics. When asked whether Norma had mentioned that she had been paying for her grandchildren to be educated at a private school, the lawyer answered "that sounds familiar for some reason, but I don't know why", nor could she recall whether Norma herself may have had asked any questions about the 1989 Will or with respect to other matters.
- [263] During her entire involvement with the Lougheeds, the lawyer's only notes recording the contents of her meeting were comprised of the "X"s that she placed on her copy of the 1989 Will and the following two lines: "said it was okay to discuss will in front of Bill, no [changes] to be made to will". She did not dictate a memorandum to file following her meeting outlining the questions asked and answered, the impressions she gained in her dealings with Norma and William, or the advice given to or instructions received from Norma in relation to the potential application of the WVA relative to the testamentary bequests to Kelly. She agreed that her testimony was based only on her mark-up of the 1989 Will and her own memory. When questioned about critical details of the meeting, her memory proved to be significantly deficient and, put charitably, her notes added virtually nothing of value.
- [264] Kelly's counsel urged that William's motivation in orchestrating the meeting with the lawyer was to bring about financial harm to Kelly. I do not see it that way. William and Kelly were still on good terms at that time. Had William wished to ensure that Norma made no

further testamentary provision to Kelly, he could have simply left well enough alone and not bothered to involve the lawyer. I find that William arranged for the lawyer to meet with Norma because he truly thought that Norma should enhance the testamentary provision for their daughter, and wished to afford her a last minute opportunity to do so.

Norma's death and subsequent events

- [265] William's counsel sought to exclude evidence about events that took place, particularly William's conduct, after Norma's death on the basis that it was irrelevant. In my opinion, a body of that post-death evidence is relevant to the question of the extent of Norma's knowledge of the Wilsons' precarious financial situation and Kelly's assertion that certain happenings were reasonably foreseeable to Norma or constituted a substantial change to be taken into account in assessing Kelly's WVA Action. Other aspects of the post-death evidence are plainly relevant to Kelly's alleged indebtedness to the Loughheids and Norbill, Kelly's claim of beneficial ownership of the Lexus, and her application that the partial stay ordered by Madam Justice Russell in relation to the proceeds of the RIF be lifted immediately. The events in the aftermath also had bearing on William's credibility and may be relevant to the issue of costs.
- [266] For reasons not explained at trial, William evidently travelled to and from Pender Harbour on May 24. Norma died at home in the early evening that day, with Kelly close by. Norma's siblings, Blair and friends of the Loughheids attended the Belmont home later that evening.
- [267] Kelly, Blair and the Born siblings gathered in the eating area of the kitchen to grieve and talk about the funeral. William sat with the Reynolds in the living room. There was a short conversation between Kelly and Ms. Reynolds which Ms. Reynolds interpreted as a hint that it was time for the Reynolds to leave. After that exchange, William became furious with Kelly, and the following day, he admonished her for having the gall to tell the Reynolds to leave his home. In my view, Kelly's remarks to Ms. Reynolds that evening were nothing more than an innocent miscommunication near the end of a sad and draining day.
- [268] William's extreme displeasure with Kelly over the Reynolds episode was a harbinger of things to come. He quickly changed his mind about permitting Patricia to participate in the funeral arrangements, and made it clear to Gary, who wished to deliver the eulogy, that he would not be doing so. William also let it be known that there would likewise be no opportunity for any other member of the Born family or for Kelly or Blair to speak at the funeral. Although he allowed Kelly to arrange the flowers, he had to be persuaded to permit Cara to read a poem in honour of her cherished Oma.
- [269] Around the time of Norma's funeral, William discovered that the Wilsons had encumbered the Whistler Property and that it was listed for sale. Meanwhile, at her father's direction, Lynda was scrutinizing the Loughheed Household ledgers and discovered that the Wilsons had not made a payment against the Whistler Property loan for several months. He enlisted Mr. Murdock's assistance to dig more deeply into the Wilsons' financial affairs to see what

else might have been kept from him. Learning of the existence of the other collateral mortgages apparently convinced William that Kelly and Blair had deceived him with respect to the financing of the Roberts Creek property and had generally taken advantage of the Loughheids' generosity. These revelations outraged William, who viewed them as a deception perpetrated by the Wilsons. He had a long history of cutting off those who went against his own code of conduct, and this perceived trickery tempered his relations with Kelly and her family from that point onward.

- [270] William appears to have assumed that each collateral mortgage represented a separate debt and therefore believed that the Wilsons owed the bank several million dollars. It is not clear if or when the overlapping aspect of the collateral mortgages was ever clarified to William and in his mind it may not have mattered in any event. He did not ask his daughter or son-in-law to explain the situation. He simply severed all contact with them, their children and the extended Born family. Everyone in the Wilson and Born families could see that William had broken away from their circle but did not know why.
- [271] Kelly made a number of attempts to talk to her father, but he refused to see her and their relationship deteriorated. She testified that he angrily told her that he was going to get to the bottom of what was going on. She tried to drop by on Father's Day, but William had said no. When she subsequently telephoned him, he stated that he was not able to speak to her and hung up. That was their last communication.
- [272] Patricia testified that shortly after Norma's death, she received a disturbing call from Kelly which prompted her to see William. She testified that William was upset, said that he did not want a relationship with Kelly, and complained that she was only interested in money. According to Patricia, William went on to say that he had "deep pockets" and, referring to the Wilsons, said that he was going to "grind them into the ground". Patricia could not believe what she was hearing and urged William not to break off his relationship with Cara. He replied that he felt he had no other choice. William denies that this conversation took place; however, I accept Patricia's evidence.
- [273] Cara testified that her grandfather stopped coming by after her Oma died. She knew that he was refusing to speak with her mother but did not know why. With the support of her grandmother Wilson, Cara telephoned her grandfather. He told her that he was mad at her parents for doing "unforgiveable things", but that he was not mad at her. They arranged to have lunch.
- [274] The Loughheids had previously paid for Cara to attend debates at Georgetown and Harvard University and she had submitted her application to participate again in the forthcoming school year. During lunch, Cara asked whether she would still be able to go and her grandfather answered no. After lunch, William would not drive his granddaughter home because he was not prepared to go to the Wilsons' house. Cara and William have not spoken since.

- [275] William testified that after his wife died, Kelly was only interested in money. He claimed that she relentlessly harangued him for money, and would not allow him to grieve. I reject this claim as a gross exaggeration on William's part. There is no question that the Wilsons' financial reality was grim at that time. However, the evidence is overwhelming that it was not Kelly's character and had never been her pattern to ask either of her parents for money outright, much less persistently badger them about it. She had certainly not engaged in such conduct during her mother's lifetime, even as the Steakhouse spiralled into receivership.
- [276] I find that Kelly had a general understanding that her mother had planned to give her the inheritance received from her late father's estate. I accept Kelly's evidence that she had briefly raised that matter with her father before her mother died, and he said it would not be a problem. I conclude that, after Norma's death, Kelly asked her father whether she would be receiving those monies and that she casually inquired about her RIF money as well. I am satisfied that she did so in a respectful and non-confrontational way. She also asked her father for some small mementos of her mother, such as pieces of pottery and things that she had hand-painted which were kept at Pender Harbour. William responded to this request by authorizing Lynda to deliver to Kelly a box of dried-up paints, scraps of wrapping paper and other rubbish from Norma's craft room.
- [277] Mr. Murdock met with William at the Pender Harbour home on June 17, 2007. William, who does not use a computer, instructed Mr. Murdock to access Mountainside's trading accounts and liquidate significant holdings. Mr. Murdock followed those instructions and sold approximately \$300,000 worth of Mountainside's investments. Those proceeds were then transferred into an investment account held by Norbill.
- [278] At the time that Mr. Murdock was assisting William in this way, he was still Mountainside's accountant. He did not seek authorization from Kelly on Mountainside's behalf to sell Mountainside's investments, nor did he ever report to his client that he had done so. Mr. Murdock understood that Kelly had given William authority to trade Mountainside's stock and had been told that Mountainside had been loaned money to trade up its account, but he did not verify any of this information with Kelly. As mentioned, he was aware that Norma had recorded Mountainside's indebtedness as owing to the Loughheids and that it was reclassified as a debt owing to Norbill at William's direction shortly before the liquidation was undertaken. More to the point, Mr. Murdock knew that there had been a serious falling out between William and Kelly and her family, and that William was neither a director, officer nor shareholder of Mountainside.

- [279] William did not have the slightest compunction about taking this action. He did not see any need to seek Kelly's consent beforehand on behalf of Mountainside, or even tell her what he and Mr. Murdock had done. At one point in his direct examination, William purported to justify his actions by saying that months earlier Norma had asked him to retrieve the monies that they had injected into Mountainside. In cross-examination, he admitted that Norma had never asked him to collect those funds from Mountainside or from Kelly.
- [280] William testified that when he instructed Mr. Murdock to implement the liquidation, he did not realize that Mountainside only owed Norbill the sum of \$231,500. On his calculations, he believes that he facilitated an overpayment to Norbill in the amount of \$68,500. In the course of this litigation, Kelly's counsel demanded that Norbill repay that amount to Mountainside. Although he admitted that the excess funds had been transferred to Norbill by mistake, William, acting as Norbill's operating mind, refused to repay Mountainside. Instead, 21 months or more after the fact, he caused Norbill to transfer one-half of the overpayment to himself and the remainder to Norma's estate. As I noted previously, I find that it was the Lougheds, and not Norbill, who loaned Mountainside all of those sums, and therefore Norbill was not entitled to receive them in any event.
- [281] Mountainside is not a party to these proceedings. It is therefore unnecessary for me to make findings concerning whether, in all the circumstances, William, in his personal capacity or as the representative of Norma's estate or of Norbill, had the authority to unilaterally liquidate Mountainside's assets without first seeking Mountainside's approval. I will likewise reserve comment on the propriety of Mr. Murdock's collaboration and the conflict of interest it presented.

Additional observations about credibility

- [282] Throughout my Reasons I have made observations about William's tarnished credibility in relation to discrete pieces of his evidence and find his evidence to be unreliable on many fronts.
- [283] In contrast to her father, Kelly impressed me as being thoroughly credible. She acknowledged what she did not know, and did not appear to embellish her testimony even where small embellishments could have advanced her position considerably in this litigation. In her own quiet way, Kelly was a forceful witness. Her evidence was frequently supported by other credible evidence pertaining to Norma's character in general, and the manner in which Norma comported herself in relation to Kelly and Blair and her Wilson grandchildren.
- [284] Although at times I found it challenging to follow Blair's explanations of the string of Kelly's personal guarantees and collateral mortgages, I do not find that he was deliberately obfuscating or attempting to mislead or confuse the Court. On the whole, I found him to be a credible witness, and consider his testimony reliable.

- [285] The only matter that caused me pause about the Wilsons' credibility centred around a telephone conversation that they allege Kelly had with her father in January 2006.
- [286] Blair testified that as he and Kelly were about to leave their home to attend the celebration of his election on January 23, 2006, William telephoned and asked to speak to Kelly. Kelly had no memory of her father ever telephoning her before, and she feared he was calling with bad news of some kind. According to Kelly, her father gave her the devastating news that her mother had been diagnosed with lung cancer and was "going to die". She described how she and Blair did their best to put on a brave public face so that he could give his acceptance speech that evening.
- [287] William testified that he and Norma were in bed at Pender Harbour on the evening of the 2006 election, and denies calling Kelly or Blair. After Kelly closed her case, William placed into evidence copies of statements of account for telephone numbers billed under his name as well as for numbers, including that of a cell phone noted to be in the name of his granddaughter, Michelle Loughheed, billed to Norbill. None of those statements showed a telephone call being placed from any of those telephone numbers on the evening of the election.
- [288] This incident does not bear directly on any contentious substantive issue. The purpose of introducing the statements was to establish that no such telephone call had been made by William and to thereby discredit Kelly and Blair.
- [289] The statements of account in evidence simply show that a call on the evening in question did not originate from those telephone numbers. William could have placed the call from anywhere. That to the side, I have no confidence that the statements reflect all of the land lines and cellular telephones at William's disposal in January 2006. In this regard, I notice that none of them appear to relate to a telephone in Norma's name.
- [290] Had there not been repeated instances calling into question William's credibility, the telephone records he produced into evidence may have caused me greater concern. However, I conclude that they do not serve to impugn the credibility of Kelly or Blair, and in the end have a neutral impact.

DISCUSSION

1. Ownership of the Lexus

- [291] Kelly asserts that the beneficial title to her mother's Lexus convertible was not transferred to William. She seeks a declaration that he holds the Lexus in trust for her or, alternatively, damages for his breach of trust.
- [292] William describes Kelly's assertion of a trust as nothing more than wishful thinking. He counters that Norma gave him both beneficial and legal title to the Lexus, entitling him to do with it as he pleased.

- [293] William admitted that he had planned to give the Lexus to Kelly but, as a result of their falling out after Norma's death, decided to give it to Cara instead. Though he did not explain the reason, he testified that he subsequently decided against Cara receiving the Lexus, and elected to give it to Lynda.
- [294] It is fundamental that three essential features, known as the "three certainties", be present in order to establish an express trust. They are:
- (1) certainty of the settlor's intention to create a trust;
 - (2) certainty of the property subject to the trust; and
 - (3) certainty of the objects or beneficiaries of the trust.
- [295] There is no requirement that the word "trust" or "trustee" or other special technical language be used in order to create a valid trust. What is critical is the substance of the arrangement, not the form: Donovan W.M. Waters, *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Canada Limited, 2005) at pp. 132-135.
- [296] Either shortly before or shortly after Norma's passing, William handed Kelly the cooler box containing substantially all of Norma's jewellery. Inside was a skeleton key for the Lexus. That key is not ordinarily used to operate the vehicle; rather it is used to produce a normal vehicle key. In my view, it is precisely the sort of master key that one would expect the vehicle owner to possess and control. William was not aware that the skeleton key was sitting in the container. I conclude that Norma placed it there.
- [297] I do not regard William's testimony concerning the circumstances surrounding the transfer to him of the Lexus as truthful. I am left with credible evidence from Patricia, Kelly, Cara and Blair which establishes to my satisfaction that Norma had always intended that the Lexus would belong to Kelly, and that she did not change her mind before her death. In my view, their testimony is supported by Norma's placement of the Lexus skeleton key into the cooler box containing her jewellery which she would have anticipated would be delivered to her daughter. On the totality of the evidence, I think it is reasonable to infer that Norma signed the transfer paper to William with the intention and on their mutual understanding that he in turn would deliver the Lexus to Kelly. I find that until the fish-and-chips dinner on May 21, William was aware of and supported Norma's intention. Put another way, the probabilities of the evidence do not show that Norma intended to transfer the beneficial ownership of the Lexus to William. There was no evidence that he ever drove the Lexus or even wished to drive it. In Norma's mind, at the time and after she signed the transfer document, beneficial ownership of the Lexus was to belong to Kelly.
- [298] I find that William had not bothered to register the transfer document because, until that fish-and-chips dinner, he was content to let the Lexus fall into his wife's estate and have it pass to Kelly under the terms of the 1989 Will and thereby give effect to Norma's trust intention. But something said at the fish-and-chips dinner when the Wilsons were making light-hearted remarks about Blair driving the Lexus so offended William that he dedicated

most of the next day travelling to Sechelt to register the transfer to ensure that it got put in his name.

- [299] I find that the offence taken by William also prompted him to announce to Kelly the change of plan in relation to the Lexus before Norma's memorial service and, hence, before the deterioration of their relationship.
- [300] In summary, I find that the three certainties requisite to the establishment of a valid express trust are present in this case. Accordingly, I declare that William holds Norma's Lexus convertible in trust for Kelly. The evidence suggests that William gave the Lexus to Lynda who drove it to the courthouse during the course of this trial. In the event that William has transferred the Lexus to a third party, Kelly is entitled to damages for his breach of trust.
- [301] There was virtually no evidence tendered at trial as to the value of the Lexus at Norma's death. I therefore feel constrained to quantify damages as being the equivalent to the value of Norma's Lexus as recorded in the Canada Blue Book. I award that sum plus pre-judgment interest.

2. Claim regarding Norma's RIF

- [302] On June 28, 2007, William rolled Norma's RIF into his own account. He subsequently refused to make Kelly whole as promised. At no time did William dispute that Kelly was entitled to an amount equivalent to the face value of the RIF. His position was that the RIF should be preserved in order to provide him with a set-off against the debts that he alleged were owed by Kelly to himself and Norma's estate.
- [303] Kelly brought a summary trial application seeking payment of her mother's RIF. On March 20, 2009, Madam Justice Russell found that William had breached his fiduciary duty to Norma by failing to pay Kelly an amount equal to the face value of the RIF. She granted judgment in favour of Kelly in the amount of \$422,251.33, plus interest.
- [304] In his personal capacity and as executor, William sought a stay of execution of the judgment. Russell J. granted a partial stay by ordering that \$200,000 of the judgment amount be held in trust pending the outcome of the within proceedings. At trial, Kelly seeks an order that the \$200,000 held in trust, together with interest, be released to her.
- [305] After hearing the evidence and the comprehensive submissions of counsel, it was readily apparent that Kelly would succeed in her WVA Action beyond any indebtedness that she might owe, particularly in light of William's abandonment of all the debt claims other than in respect of the Whistler Property and Roberts Creek. In my opinion, it would offend good conscience to afford William any measure of personal advantage from his breach and consider it to be unjustified and prejudicial to Kelly to maintain the stay pending the issuance of my Reasons. Consequently, at the close of trial, I directed that the partial stay be lifted and the balance of the funds paid to Kelly forthwith.

3. Kelly's Indebtedness

[306] In his various capacities, William seeks judgment against Kelly as follows:

(i)

With respect to the Whistler Property

\$231,109.50, plus 6% interest from July 19,. 2007 in favour of William personally, and the same amount in his favour as executor of the 1989 Will;

(ii)

With respect to the Roberts Creek property

\$16,000 plus pre-judgment interest in favour of William as the executor of the 1989 Will;

\$457,896 plus pre-judgment interest in favour of Norbill.

[307] Kelly is defending the claims in debt on the basis that her mother forgave the loans to purchase the Whistler Property and the Roberts Creek acreage during the mother/daughter conversation in October 2006. Her alternative position is that by the terms of the oral agreement with her parents, the loan to purchase Roberts Creek is not due and payable until the Pemberton Valley property is sold, which had not occurred at the time of trial.

[308] I find that in October 2006, Kelly and her mother had a conversation along the lines Kelly described. I accept also that Kelly interpreted that conversation as constituting her mother's present act of forgiving the monies outstanding in respect of the financing of the Whistler Property and Roberts Creek. However, as explained below, I conclude that Kelly innocently misconstrued her mother's comments and that Norma intended to convey a different meaning.

[309] On December 6, 2006 - after the October conversation - Norma deposited a cheque for \$3,000 received from the Wilsons relative to the Whistler Property loan. I conclude that the cheque deposited by Norma in December was one of the many post-dated cheques from the Wilsons and had likely been in Norma's possession for several months. I accept further that Norma deposited that cheque inadvertently along with a batch of other post-dated cheques.

[310] A few days later, the Wilsons' December cheque was returned by the bank NSF. There is no evidence that Norma ever raised the matter of the NSF cheque with Kelly or Blair, or thereafter discussed with them the status of future payments against the Whistler Property loan or sought further payments in the form of additional post-dated cheques. However, the loan did not disappear from Norma's carefully kept bookkeeping records. In the Loughheed Household ledgers, she recorded that the Wilsons' cheque had been returned by the bank, entered the bank service charge and debited Kelly's account payable. Perhaps more compelling, Norma continued to show the Whistler Property loan as a component of Kelly's

account receivable as at the 2006 calendar year end and thereafter.

- [311] Norma had forgiven loans made to Kelly to purchase the Jeep, Gordon Avenue, and possibly a small amount in respect of Jefferson Avenue, but none of those transactions involved William in any meaningful way. I find that his participation in the Whistler Property and Roberts Creek transactions was a distinguishing aspect, and shifted the dynamic. Although Norma did not fully apprise William of the details of her financial transactions, including those involving Kelly and Blair, I consider it more probable than not that because of her husband's involvement in these two loans, Norma would have felt bound to seek his approval before she committed to forgive them in their entirety. There is no evidence that she did so.
- [312] Kelly's counsel listed several bits of evidence which he contends are indicia that Norma forgave the Whistler Property and Roberts Creek loan. I reject that line of argument in its entirety, and specifically put no stock in the fact that Norma evidently did not tell the lawyer about the existence of those debts during their meeting.
- [313] Norma regarded the Roberts Creek property more or less as a straight swap for Pemberton Valley, and had agreed that repayment of the bridge financing would not be required until the Pemberton Valley property sold. Having regard to the fact that in October 2006 Kelly had no current obligation to repay those monies, I think it likely that Norma did not even contemplate that contingent liability when she assured her daughter that she did not have to worry about the monies she owed. I find that when Kelly approached Norma in October 2006 with the enormous weight of the Wilsons' financial woes pressing down on her, Norma sensed her daughter's distress and, wishing to allay it, offered to suspend the Whistler Property payments for an unspecified period. In my opinion, Norma's response to Kelly in October 2006 amounted to an assurance that Kelly did not have to worry about making the monthly payments on the Whistler Property loan for the time being, as distinct from expressing an intention to forgive the loans immediately or in the future.
- [314] The standard for proof for the forgiveness of a loan is the ordinary civil burden: *Singh Estate v. Shandil*, 2007 BCCA 303. It has not been discharged in this case.
- [315] I have concluded the Whistler Property loan carried no interest. On my arithmetic, the amount owing by Kelly at her mother's death in respect of that loan was \$350,703.84. That sum, together with pre-judgment interest, is payable in equal proportions to Norma's estate and to William.
- [316] Repayment of the loan to purchase Roberts Creek is not due until after the sale of Pemberton Valley, which had not occurred at the time of trial. I conclude that Kelly's total indebtedness in respect of that loan is \$461,719.29, and not the sum of \$473,896 sought by William and Norbill; \$16,000 is due to Norma's estate and the balance is owed to Norbill. That loan bears no interest and is payable on the sale of the Pemberton Valley property.

4. Kelly's claim under the WVA

Overview

- [317] Kelly puts forth several bases in support of her assertion that her mother breached her moral duty and failed to make adequate testamentary provision for her. She seeks variation of the 1989 Will in a manner that would have her receive between 50% and 100% of her mother's estate.
- [318] Put broadly, William contends that Norma had no legal duty to Kelly and that any moral duty she may have owed was negated through a combination of the significant inter vivos gifts and benefits conferred on Kelly, the bequests made to her under the 1989 Will and the gift of the RIF. He asserts that even if Norma did not make adequate testamentary provision for Kelly, her moral duty was negated in consequence of her valid and rational reasons for declining to amend her 1989 Will to provide Kelly with a greater portion of her estate.
- [319] Without retreating from his position that there is no principled basis to support a variation, William asserts, in the alternative, that any variation ought to be minimal. In this respect, he suggests providing for an amount sufficient to discharge the Wilsons' loans in respect of the Whistler Property and Roberts Creek or to provide enough funds to cover the education costs of the Wilson children.
- [320] Section 2 of the WVA provides that if, in the court's opinion, a will fails to make adequate provision for the proper maintenance and support of the testator's spouse or children, the court is empowered, in its discretion, to vary the will to make provision that it considers adequate, just and equitable in the circumstances.
- [321] The Supreme Court of Canada's decision in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 [Tataryn] is the governing authority in British Columbia on wills variation. McLachlin J. (now the C.J.C.), writing for the Court, affirmed and clarified the moral duty element of the equation in the analysis of whether provision consistent with the WVA had been made, and examined the interplay between it and a judicious testator's spousal and parental legal duties in light of contemporary standards. McLachlin J.'s articulation of the relevant considerations and the principles underpinning the WVA has been reiterated in virtually every case decided since then.
- [322] McLachlin J. identified the two fundamental interests protected by the WVA. The main statutory objective is the adequate, just, and equitable provision for a testator's spouse and children; the other is the testator's testamentary autonomy. The conceptual essence of the WVA is to permit judicial interference with testamentary freedom where a testator's spouse or child has not been left adequate provision. Testamentary freedom is therefore subordinate to the main objective of WVA and must yield to the extent required to achieve adequate, just and equitable provision for the applicant spouse and/or children. In that sense and to that degree only, testamentary autonomy will be curtailed by the court's revisionary powers under the WVA.

- [323] The basic approach formulated in *Tataryn* to determine the adequacy of the testamentary provision asks whether a testator has acted as a judicious parent or spouse as measured by an objective standard, assessed in light of current societal legal and moral norms. As Her Ladyship powerfully observed, "the search is for contemporary justice": *Tataryn* at 815.
- [324] In this context, legal norms are said to be the obligations that would be imposed upon the testator during his or her life if the question of provision for the claimant spouse or child were to arise. While McLachlin J. recognized that the legal obligations that contemporary society imposes on living testators vis-à-vis their spouses and children are not necessarily parallel to those on death, she observed that there should be some symmetry between them. In her words, a testator's legal responsibilities while alive "reflect a clear and unequivocal social expectation, expressed through society's elected representatives and the judicial doctrine of its courts": *Tataryn* at 821. Accordingly, a testator's legal obligations, had he or she not died, arising in relation to support, division of matrimonial property and the law of constructive trust are relevant factors in the assessment. McLachlin J. expressly acknowledged that a testator's legal obligations may extend to dependent children and left open the prospect that an independent adult child might have a legal claim against a parent based on unjust enrichment: *Tataryn* at 822.
- [325] Turning to the guidelines for moral norms, McLachlin J. acknowledged that because there is no clear applicable legal standard, they are more susceptible to being differently interpreted by different individuals: *Tataryn* at 822. She proposed that moral norms are found in "society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards": *Tataryn* at 821.
- [326] The *Tataryn* Court recognized that there is no single way for a testator to divide the estate in order to discharge his or her legal and moral duties. In this connection, McLachlin J. reminded that it is only where the testator has chosen an option which falls below his or her obligation defined by reference to the contemporary notion of legal and moral norms, that a court will make an order "which achieves the justice the testator failed to achieve": *Tataryn* at 824.
- [327] McLachlin J. held that all legal and competing moral claims should be satisfied where the magnitude of the estate permits. If that is not possible, the court must prioritize the competing claims. Claims that would have been recognized as legal obligations during a testator's lifetime should generally take precedence over moral claims: *Tataryn* at 823. The court must also weigh the competing moral claims and rank them according to their strength.

- [328] The Tataryn Court clarified that because they are "two sides of the same coin", the factors taken into account to determine whether a testator has made adequate provision are also relevant to the determination of what would constitute adequate, just and equitable provision in the particular circumstances. The concept of adequate provision under the WVA is not static. It is a flexible notion which is highly dependent upon the particular circumstances of the case.
- [329] Kelly concedes that her mother owed her no legal duty. William likewise agrees that he was not owed a legal duty by his wife. This case turns on a determination of the nature and extent of the moral obligation Norma may have owed Kelly, and whether it has been negated. The essential question is whether in all of the circumstances Norma's testamentary dispositions to Kelly fall within the range of adequate provision made by a judicious parent assessed objectively by reference to contemporary community standards.

Foreseeable circumstances

- [330] The assessment of whether Norma has made adequate testamentary provision for Kelly is based on the circumstances that existed at Norma's death, as that was her last opportunity to make a just and proper will. Circumstances that were reasonably foreseeable to Norma will also be relevant: *Landy v. Landy Estate* (1991), 60 B.C.L.R. (2d) 282 (B.C.C.A.) [*Landy*]; *Graham v. Chalmers*, 2010 BCCA 13; *Wilson v. Loughheed*, 2009 BCSC 1841.
- [331] In *Landy*, the Court of Appeal also held that a substantial change in the circumstances of a claimant or beneficiary occurring in the intervening period between the date of death and the date of trial may also be relevant. There, it was determined that the death of a primary beneficiary constituted a substantial change; however, the Court of Appeal did not purport to lay down any hard and fast rules.
- [332] In the case at hand there is controversy about the extent of Norma's knowledge of the Wilsons' deteriorating financial situation and what she could have reasonably foreseen at the time of her death.
- [333] There can be no question that Norma was intimately involved in the Wilsons' financial life. In my view, it is more probable than not that when she and Blair were discussing the affordability of the Whistler loan payments in 2003, Norma would have been aware of the existence of the mortgage charging the Lawson Avenue property. Even in the absence of that discussion, I find that she would have appreciated that the Wilsons had borrowed funds in order to construct their new home. While I accept that Norma did not have specific knowledge of the mortgages registered against the Whistler Property or Pemberton Valley, or the collateral mortgage granted in 2006, I find that she nonetheless understood that the Wilsons had relied on bank financing to bring the Steakhouse into operation and accept Blair's evidence that through his discussions with Norma, she was aware that it had cost in the neighbourhood of between \$800,000 and \$1.0 million to construct.

- [334] Norma was also aware that Mountainside had suffered a significant financial setback and that William was working on rehabilitating that situation. She knew too that Mountainside was the sole source of her daughter's income and that the dividend payments to Mountainside would cease on December 31, 2009. Based on the foregoing and the discussions between Norma and Kelly in October 2006 which resulted in Norma suspending monthly payments on the Whistler Property loan for an indefinite time; Norma's awareness that Kelly was dipping into Mountainside to cover some of the Steakhouse's operational expenses; Blair's frank disclosure to Norma in December 2006 and her knowledge of the closure and receivership of the Steakhouse, I find that as of the time of her death, Norma knew that the Wilsons were facing serious financial trouble.
- [335] Additionally, and among the other things, Norma would have known that after twenty years as a stay-at-home mother, Kelly lacked the education, training and experience necessary to enter the workforce; that the Wilsons were relying on Norma to pay the education costs of their children and that Cara would likely attend an expensive U.S. college and/or university to obtain at least one post-secondary degree. She would have known further that William had a significant net worth independent of her assets, that his Norbill income was nearly double hers, that their respective incomes would increase significantly when the LHL settlement payments came to an end in December 2009, and that William would have more than enough in his own right to maintain his standard of living for the rest of his life. She was also aware that Kelly was not a beneficiary of William's estate.
- [336] Kelly's counsel submits that Norma would have been attuned to her husband's habitual complaints of Blair over the years, and points out that she would have witnessed him cutting ties with his brother, mother, and even his own children whom he left to fend for themselves in times of need. Her counsel asserts that, therefore, it was reasonably foreseeable to Norma that William might banish Kelly and her family from his life and refuse all financial assistance.
- [337] Norma had observed a positive relationship between her husband and daughter with no conflict for more than 35 years. Although she may have regarded it as theoretically possible that William could become displeased with Kelly and estrange himself from her, I do not agree that Norma would have reasonably foreseen the likelihood of the collapse of their relationship.
- [338] Counsel for Kelly also contends that the substantial negative change in Kelly's financial status after her mother's death ought to be taken into account in determining whether she has been adequately provided for. These changes include the diminishment of her asset base caused by the requirement to pay off the debts connected to the Steakhouse; the dramatic drop in the Wilsons' household income that has resulted, in part, by Blair losing the re-election in 2008; and the cessation of the payments of dividends to Mountainside at the end of 2009. Her counsel further asserts that an integral component of Kelly's declining financial picture is the result of William's vindictive treatment of her to her financial detriment. Kelly's position is that William's post-death conduct in this regard includes his

declaration to grind the Wilsons into the ground; secretly removing money from Mountainside in the aftermath of his unilateral estrangement from her; wrongfully retaining the Lexus; refusing to pay her the proceeds of the RIF; cutting off financial support to Cara and Bo; bringing manifestly unfounded claims in debt relative to Kelly's acquisition of Jefferson Avenue, Gordon Avenue, Pemberton Valley and Lawson Avenue; and generally refusing to contribute financial support at a time of Kelly's greatest need.

- [339] In my opinion, Kelly's financial situation did not substantially worsen after Norma's death. She and Blair were already in deep trouble before Norma died. The Steakhouse had failed, Mountainside was indebted for the loans made to trade up its investment portfolio, the collateral mortgages had been granted, and it had been established in 1989 that the LHL dividends would end on December 31, 2009. Exposure to those financial risks and realities did not change in any substantial way after Norma's death - they merely played out to conclusion.
- [340] Having said that, however, certain steps taken by William after Norma's death aggravated the Wilsons' financial predicament and those steps, in combination with his withdrawal of all financial support to the Wilson household, could arguably amount to a substantial change in Kelly's life. It seems to me, however, that the proper focus of the inquiry must be on the effect, if any, that the substantial change has produced.
- [341] It is undeniable that the breakdown of the father and daughter relationship after Norma's death has caused Kelly immense emotional turmoil and distress. I expect it has probably been trying for William as well. However, the entailing financial aftermath has not been significant. Except for William's refusal to make good on the Loughheids' longstanding arrangement to cover the education costs of the Wilson children, this element of change has only caused Kelly a temporary financial detriment for the most part. She had never relied on her father for financial support to the same extent or in the same way as she had on her mother. It was well known that she was not a beneficiary under William's will, and that from his standpoint, she and his other children had already received their full inheritance by way of the settlement of the LHL litigation. There was no evidence that William had ever softened his view on that point prior to Norma's death, or had considered amending his will to include Kelly. Consequently, although the post-death termination of the father and daughter relationship may qualify as a substantial change in the sense that it is a profound emotional change in the life circumstances of both Kelly and William, I find that it did not cause financial peril to Kelly in an appreciable way, and has no influence in the determination of the pivotal issue.
- [342] There was evidence that under William's management, Norbill had suffered a reduction in value after Norma's death, possibly as much as a few million dollars. Neither he nor Kelly submitted that such a reduction in value qualified as a substantial change of circumstances to be taken into account on the key issue. In light of the poor state of the evidence on the point and absence of submissions, it has not been taken in account.

Other relevant factors

[343] It is well settled in the post-Tataryn era that several considerations will inform the existence and strength of a testator's moral duty to independent children. They are:

- relationship between the testator and claimant, including abandonment, neglect and estrangement by one or the other;
- size of the estate;
- contributions by the claimant;
- reasonably held expectations of the claimant;
- standard of living of the testator and claimant;
- gifts and benefits made by the testator outside the will;
- testator's reasons for disinheriting;
- financial need and other personal circumstances, including disability, of the claimant;
- misconduct or poor character of the claimant;
- competing claimants and other beneficiaries:

(Clucas v. Clucas Estate, [1999] B.C.J. No. 436 [Clucas]; McBride v. McBride Estate, 2010 BCSC 443 [McBride]; Yee v. Yu, 2010 BCSC 1464.)

[344] In addressing the considerations central to this case, it should be borne in mind that they tend to overlap and should not be approached as independent, air-tight categories.

Relationship between Kelly and Norma

[345] It is common ground that Norma and Kelly were devoted to one another and that Kelly was a dutiful daughter who enhanced her mother's life and well-being.

Size of the Estate

[346] The position of a testator's independent adult child under the WVA has been controversial since the inception of the statute. In directing her mind to the moral claims of such children, McLachlin J. noted in Tataryn that while they may be more tenuous than that of a spouse or dependent child, where the size of the estate permits, some provision for such children should be made unless circumstances would negate such an obligation: Tataryn at 822.

[347] The post-Tataryn jurisprudence establishes that a relatively small estate will not necessarily preclude a variation; by the same token, a large estate will not guarantee a variation in favour of an otherwise undeserving child. Although it cannot be confidently stated that the authorities endorse a linear correspondence between the size of an estate and the size of

an award, the reality is that where the estate is very large and able to fairly accommodate all competing interests, a claimant's moral claim may not need to be as strong or compelling in order for the court to invoke its revisionary powers, as would be the case where the estate is modest.

- [348] Kelly submits that for the purposes of quantifying her claim under the WVA, the size of her mother's estate should be taken as encompassing all assets controlled by Norma at her death. That formulation would include the significant assets that Norma jointly owned with William and which devolved to him on her death as the surviving joint tenant, independent from the terms of the 1989 Will. While there is no longer debate that the nature and extent of assets distributable on a testator's death outside his or her estate are relevant considerations in the determination of whether there has been adequate provision, assets of that kind do not comprise the testator's estate per se, are not governed by the terms of the will or influenced by a variation of it: see generally *Hossay v. Newman*, [1998] B.C.J. No. 3289 (S.C.) and *Gallagher v. Hunt*, 2005 BCSC 415, 15 E.T.R. (3d) 182.
- [349] A disclosure document itemizing the estate assets at Norma's death was compiled through the collective efforts of Mr. Murdock, William and the estate lawyer and was filed as an exhibit to an affidavit sworn by William in support of his probate application. As the trial progressed and it became apparent that the disclosure document contained many errors, William admitted that he could not verify its accuracy, and both he and Mr. Murdock attempted to distance themselves from responsibility for its preparation. The duty for accurate disclosure belongs to William as executor.
- [350] Most of the inaccuracies in the disclosure document pertain to Kelly's alleged indebtedness to the estate. It listed as debts sums that Norma had used to purchase properties for Kelly going back decades. For example, it disclosed an indebtedness for Lawson Avenue which Kelly had paid for and which was, in any case, given to her under the 1989 Will. The disclosure statement also recorded as a debt owed to the estate the sum that Kelly had used out of her own funds to acquire Pemberton Valley. Inclusion of those so-called debts in the disclosure statement which William swore to be accurate roughly seven months after Norma's death indicate that he has a deeply flawed understanding of the reality of the financial transactions between Kelly and her mother, or adopted a careless approach in compiling the information, or both. It is a problem either way, and reflected poorly on the reliability of William's evidence on that subject.
- [351] On my assessment of the evidence, the moment before Norma's death, the aggregate value of her assets was approximately \$26,204,032. Of that amount, the sum of approximately \$6,657,830 became distributable on her death outside her estate, leaving the date of death value of her estate at \$19,546,202, plus her share of the monies owed by Mountainside.

[352] A breakdown of Norma's assets that passed outside of her estate as a result of her death and hence not subject to her 1989 Will, are set out below. I note that the Lougheeds' Pender Harbour mansion was jointly owned by William and Norma at her death. William estimated its value at between \$5.0 million and \$7.0 million. In light of his evidence that it cost approximately \$6.5 million to construct that home several years ago, I find that its value at Norma's death was at least \$7 million.

(i) Joint assets passing to William:

Pender Harbour property - \$7,000,000 (50%) \$ 3,500,000

Belmont home - \$2,381,000 (50%) \$ 1,190,500

Shares of Interlude - \$1,127,043 (50%) \$ 563,521

Fast Norma boat - \$250,000 (50%) \$ 125,000

2006 Lexus Hybrid - \$40,000 (50%) \$ 20,000

Joint account with Scotia McLeod - \$1,673,117 (50%) \$ 836,558

(ii) RIF designated to Kelly \$ 422,251

TOTAL: \$ 6,657,830

[353] The main asset of Norma's estate are her shares in Norbill. Kelly accepts William's midpoint valuation of them at \$15,978,250. I am satisfied that the amount of Norma's shareholder's loan was \$2,677,475, for a total interest in Norbill at death of \$18,655,725. In addition to the Norbill assets and Norma's share of the debt owed by Mountainside, the assets comprising her estate are broken down as follows:

· jewellery \$ 273,025

· funds in bank account \$ 500

· shareholder's loan in Interlude Projects Ltd.

("Interlude") \$ 25,600

· Laura Carver mortgage receivable \$ 400,000

· 50% of the unpaid principal on the

Whistler Property loan \$ 175,351.92

· loan for down payment of Roberts Creek

payable on the sale of Pemberton Valley \$ 16,000

- [354] Under the terms of Norma's 1989 Will, William's proportionate share of Norma's estate works out to be approximately 98.59% and Kelly's entitlement is the remaining 1.41%. William also received approximately 93.6% of Norma's significant non-estate assets distributable as a result of her death.

Contribution

- [355] Other things being equal, a testator's moral obligation will generally be strengthened where the claimant has contributed to the accumulation of a testator's assets with little in exchange, or has provided other types of contribution or care to a testator: *Tataryn*; *Re Sleno Estate* (1977), 78 D.L.R. (3d) 155 (S.C.); *Lee v. King Estate*, [1975] B.C.J. No. 893 (S.C.); *Harris v. Harris*, [1980] B.C.J. No. 1417 (S.C.); *Ryan v. Delahaye Estate*, 2003 BCSC 1081, 2 E.T.R. (3d) 107; *McBride*.
- [356] Substantially all of the value of Norma's estate was generated by the work and enterprise of William. That factor intensifies the moral duty that Norma owed to him. Although Kelly made no financial contribution to her mother's estate, it must not be overlooked that she enriched her mother's spirit and contributed to the quality of her life in ways that money cannot.

Standard of living and Kelly's expectations

- [357] Moral obligations are independent of a claimant's financial need. The standard of living a claimant ought to have had or which he or she has become accustomed as facilitated by the testator, may influence the degree of a testator's moral obligation: *Re Berger*, [1978] 2 E.T.R. 275 (B.C.S.C.); *Mordo v. Nitting*, 2006 BCSC 1761 [Mordo]; *Walker v. McDermid*, [1931] S.C.R. 94; *Marsh v. Marsh (Estate)*, 19 E.T.R. (2d) 184, [1997] B.C.J. No. 1286 [Marsh]. The standard of living and relative financial situation of each person to whom the testator owed a moral obligation are relevant when considering their competing moral claims: *Mordo*. The standard of living peculiar to the testator may also play a role in determining what constitutes adequate provision: *Sawchuk v. MacKenzie Estate*, 2000 BCCA 10 [Sawchuk].
- [358] It is frequently the case that a claimant's expectation will be linked to his or her standard of living and the standard of living of the testator, as well as to an appreciation of the nature of any competing interests at play. A testator who has given an assured or implied expectation to an adult child arising from the magnitude of the estate and/or from the testator's treatment of the child may bring forth or heighten a moral duty: *Clucas*; *Marsh*; *Saugestad v. Saugestad*, 2008 BCCA 38; *DeLeeuw v. DeLeeuw*, 2003 BCSC 1472.
- [359] Throughout their 35-year marriage, William showered Norma with expensive jewellery and other gifts. They drove luxury brand vehicles such as Porsche, Mercedes and Rolls Royce, and owned valuable yachts which they had towed to regattas on the eastern seaboard and raced using hired crews. The palatial custom homes that the Loughneys constructed over the years were of the finest quality and decorated with the assistance of Norma's

professional designer. Over the years, they owned various vacation properties, including in Hawaii, Palm Desert and on Bowen Island which was purchased, in part, with the proceeds from the sale of Norma's pre-marriage home. Although Norma was occasionally thrifty over small things, by and large she and William lived in lavish style.

- [360] From the time that she married William, Norma looked out for her daughter's financial prosperity. Although it did not match the pampering that the Lougheeds permitted for themselves, Norma ensured that Kelly enjoyed a financially carefree and privileged lifestyle as a young girl and into her adulthood. Providing for Kelly was considered by the Lougheeds as a natural thing to do given their affluence and love for her.
- [361] On account of her parents' economic means and largesse, Kelly was given vehicles, the use of apartments, her own horse and was able to attend private school, a European finishing school, and other post-secondary institutions, without cost to herself.
- [362] Upon Kelly's marriage, Norma's benevolence expanded to include Blair and the Wilson children. She periodically helped defray the cost of Kelly's horseback riding, paid for a membership at the North Shore Winter Club, and covered the initial membership fee of approximately \$19,440 for the Wilsons to join an exclusive family recreational club. Kelly was also treated to an occasional shopping spree. The Lougheeds paid for Kelly and Blair to accompany them on holidays abroad, and arranged for the Wilson family to vacation at the Lougheeds' recreational properties.
- [363] Although the gifts and other lifestyle comforts were often paid for using the Lougheeds' commingled funds or funds out of a Norbill account, I find that as between Norma and William, it was typically her idea to confer such benefits and that she usually funded them. William was not always made privy to the details and did not care to be. He was content to allow Norma to do as she pleased.
- [364] Kelly was grateful for her parents' generosity. She was not a grasping or spoiled daughter, and did not have an inflated sense of entitlement. It was not Kelly's habit to ask her parents directly for sums of money or other material benefits.
- [365] The Lougheeds' generosity - especially Norma's - was not confined to just Kelly and her family. Over the years, it extended to some of the Lougheed Children and their children and select friends. For example, the Lougheeds paid for Michael's drug rehabilitation at the Betty Ford Clinic in California. For years Norma subsidized the rent for his former spouse and children, and although the evidence is not entirely clear on the point, she may have eventually purchased a home for them. The Lougheeds covered the education costs for Michael's children and provided his daughter with a monthly allowance over an extended period and contributed thousands of dollars to her educational pursuits. Norma also loaned \$400,000 to her stepdaughter, Laura, on preferred terms to enable her to purchase a home. According to William, she intended either to forgive that loan in the future or to invest the payments received in respect of it into an annuity for Laura's future or otherwise convert the loan into a gift for Laura. William also testified that it was Norma's desire that a

house be purchased outright for Michael which William attended to shortly after Norma's death. Norma also absorbed the considerable legal costs incurred in respect of the respective divorces of Laura and Lynda.

- [366] The Lougheeds were exceptionally generous with the Reynolds. Not only did Norma sell them the Glenmore Drive property for 50% of its market value and provide interest-free financing, she and William also gave them a 1,200 square foot cottage (without the land) which the Reynolds affixed to their recreational lot at Pender Harbour. They also gave Rick Reynolds a sailboat worth as much as \$300,000 and paid for the private school tuition of the Reynolds' daughter. On many occasions, the Reynolds were the Lougheeds' guests at their Palm Desert condominium, and had their expenses covered when they attended regattas to race the Lougheeds' yachts.
- [367] William would not acknowledge that he and Norma led an extravagant lifestyle, and attempted to downplay their standard of living. He described his lifestyle as "fairly simple" and, in a blatant swipe at Kelly, added "I haven't got any horses". William said that he had tried to set an example for his children through his hard work and thrift. He agreed that he had never tried to teach Kelly the value of money other than by his example of not being foolish. Somewhat at odds with that evidence, he went on to describe his gift to Rick Reynolds of a \$300,000 sailboat as "such a small thing. It's just like a person going out and buying an all-day sucker. That money was peanuts to what I was making." He also characterized an asset worth about \$1.0 million as "not significant". William's remarks were telling, and aptly illustrate an attitude toward money unique to those who enjoy immense personal wealth.
- [368] Through their actions, Norma and William instilled in Kelly their views about the value of money. Norma encouraged Kelly to look to her for financial assistance and security, and to take comfort in knowing that she would ensure that Kelly would not have to want financially. At no time did Norma tell Kelly or even hint that the financial security would effectively dry up on Norma's death. Kelly's upbringing by her generous parents and especially her beneficent mother, coupled with the abundance of Norma's estate and the independent wealth of her father who did not intend to provide for Kelly in his will, could not help but implicitly raise a legitimate expectation on Kelly's part that her mother would continue to ensure her worry-free financial well-being in death as it had been in life. These factors also support the companion expectation that Kelly would receive a greater share of her mother's estate than was left to her under the 1989 Will.
- [369] In keeping with her discomfort in speaking about death or dying, Norma did not discuss the contents of her 1989 Will with Kelly. In my view, Kelly had every reason to believe that her mother would provide for her on her death in a manner consistent with her pattern of ensuring a lifestyle of financial security and privilege while she was alive. In this case, Kelly's bona fide expectations significantly strengthen the moral duty that Norma owed to her.

Kelly's financial circumstances

[370] Kelly was not in necessitous circumstances at the time of Norma's death. However, she and Blair had suffered a significant financial setback on account of the failure of the Steakhouse which struck a blow to their standard of living and future financial security. According to Blair, when all was said and done, they lost approximately \$1.6 million in the receivership. Although Norma was not aware of the full extent of the details, she nonetheless knew that the Wilsons' economic position was extremely grim.

[371] I am satisfied that the sale of the Whistler Property in August 2007 and the subsequent sale of Lawson Avenue are relevant to the determination of Kelly's financial circumstances at her mother's death. On my assessment of the evidence, Kelly's worth at that time can be estimated as follows:

- (1) Lawson Avenue - equity approximately \$40,000;
- (2) Whistler Property - equity approximately \$30,000, less the principal amount outstanding to her parents of \$350,703.84 = (-\$320,703.84);
- (3) Roberts Creek - listed for sale at \$540,000, less the principal amount owing of \$461,710.84 = \$78,289.16;
- (4) Pemberton Valley property - listed for sale at \$550,000;
- (5) Mountainside - shareholder's equity of \$1,401,932 less indebtedness to the Loughdeeds of \$541,500 = equity of \$860,432;
- (6) Kelly's RSP, Blair's RSP, vehicle and miscellaneous assets - under \$75,000.

Approximate worth (without deduction for income tax) = \$1,283,017.

[372] I find that at Norma's death Blair did not own any assets of substantial value other than his RSP and vehicle, as noted above. Kelly's 2007 T1 tax return reports her line 150 income as \$50,000 derived solely from the dividends paid to her by Mountainside. In 2006, her line 150 income was greater because she was paid approximately \$25,000 more in dividends, and cashed in an RSP in the amount of just under \$58,000. Blair's line 150 income for 2007 is reported at \$180,564.98. Of that figure, the sum of \$27,500 represents the proceeds of an RSP he redeemed, and most of the remainder is his employment income as an MP. Blair's reported income for the 2006 tax year was similar, including the redemption of nearly \$35,000 in RSPs. Among other things, those tax returns reveal that the Wilsons were depleting their savings to help service their growing and soon to be overwhelming debt load in 2006 and 2007.

Relevance of Intestate Succession Regime

- [373] Kelly submits that for guidance as to contemporary societal norms relative to Kelly's moral claim, the Court should turn its eye to the child support obligations mandated by the Guidelines and the intestate succession regime under the Estate Administration Act, R.S.B.C. 1995, c. 122 (the "EAA") as if Norma had died intestate. I cannot accede to either proposition.
- [374] With respect to the Guidelines, it is a full answer that they are not applicable to adult independent children. To that, I would add that Tataryn makes it clear that obligations the law imposes on a testator during his or her lifetime, such as those established by statute, reflect societal legal norms and thus inform the legal obligations of a testator, not the moral duty component.
- [375] In my respectful view, the line of argument promoting the intestate succession provisions of the EAA as a proper consideration in quantifying Kelly's entitlement is similarly misconceived. In support of this branch of Kelly's argument, her counsel relies primarily on the recent decisions of *Picketts v. Hall (Estate)*, 2009 BCCA 329, 95 B.C.L.R. (4th) 83, application for leave to appeal ref'd [2009] S.C.C.A. 389 [Picketts], and *Rose v. Bloomfield*, 2010 BCSC 315 [Rose].
- [376] *Picketts* concerned the successful variation claim brought by a long time common law spouse against the estate of her wealthy partner. At trial, Ms. Picketts argued that morally she should be treated as though she were a lawful wife under the Family Relations Act, R.S.B.C. 1996, c. 128 (the "FRA"), and presumptively entitled to 50% of the family assets. The trial judge noted that a common law spouse is not afforded the same property rights as a married spouse under the FRA, and rejected her argument as an effort to attain morally what she could not achieve legally. A key issue squarely before the appellate Court was whether different considerations apply to a common law spouse than to a married spouse on a variation application. In my view, the main significance of the *Picketts* decision is found in the Court of Appeal's answer to that question.
- [377] In the context of that analysis, Low J.A. referred to the provisions of the EAA and noted that the definition of spouse under that statute and under the WVA were virtually identical and that, unlike the FRA, those statutes drew no distinction between the two types of spouses. He commented that the more encompassing definition of spouse found under the WVA and EAA had come about at the same time, and reflected current societal norms, namely that a common law spouse and married spouse were to share the same rights on the death of their partner. Low J.A. further observed that the broad definition of spouse under the WVA opened the door to the prospect that a common law spouse may even have a superior claim for variation over that of a married spouse.
- [378] In *Rose*, this Court interpreted Low J.A.'s reasons in *Picketts* as adopting "the distribution scheme legislated under the EAA as a means to assess whether a testator's provision for a spouse is adequate, just and equitable": *Rose* at 49. Based on that reading of *Picketts*, the

trial judge in *Rose* considered he was bound to take guidance from the intestacy provisions of the EAA in determining whether adequate provision had been made. With the greatest respect, I do not share the trial judge's interpretation of the analysis in *Picketts* as it concerns the Court of Appeal's view of the relevance of the intestacy provisions of the EAA. In this regard, I point out that *Low J.A.* found that the legal aspect of Ms. *Picketts*'s claim was confined to spousal support and expressly stated that the provisions of the EAA do not directly affect the legal considerations under *Tataryn*. In articulating the factors relied on in assessing Mr. *Hall*'s moral duty to Ms. *Picketts*, *Low J.A.* made no reference to the intestate succession regime of the EAA.

[379] I would respectfully suggest that utilizing the statutory scheme of intestate succession as a guidepost is not in harmony with the approach developed in *Tataryn*. The laws of intestate succession represent a mechanical "one size fits all" legislative response to be applied as a backup in all instances where an individual has died without leaving a valid will. That formulaic approach that applies across the board is blind to *Tataryn*'s construct of circumstantial moral norms, and its emphasis that testamentary autonomy be preserved to the extent possible. In her reasons, *McLachlin J.* briefly observed that in searching for a predictable yardstick to measure whether adequate provision had been made, an earlier court had looked to intestate distribution, and then noted that the Court of Appeal subsequently rejected that model. Although clearly aware that legislated succession laws had been attempted as a guidepost, *McLachlin J.* did not identify them as an appropriate factor in the assessment of legal or moral obligations. I think that omission was deliberate and is significant. I take it to mean that the *Tataryn* Court did not endorse resort to the intestacy provisions as a means of informing a testator's duty for the purposes of the WVA.

Misconduct/Poor character of Kelly

[380] Section 6(b) of the WVA empowers the court to refuse variation to a person whose character or conduct disentitles him or her to relief. In order to justify disinheritance, the misconduct is measured at the date of death, must be relatively severe, and be directed at the testator: *Gieni v. Richardson Estate*, [1995] B.C.J. No. 1227 (S.C.); *Sammon v. Stabbler*, 2000 BCSC 1048, 77 B.C.L.R. (3d) 283; *Re Bailey Estate*, [1972] 1 W.W.R. 99, 1971 CarswellBC 195 (S.C.); *Sawchuk*.

[381] William condemned Kelly for concealing the fact that she had encumbered the Whistler Property before the *Wilsons* had finished paying for it, and for keeping that fact and other pertinent financial dealings secret from he and Norma when she borrowed the money to buy *Roberts Creek*.

- [382] Although Norma did not know about those mortgage transactions, it seems to me that a testator's awareness of misconduct may not be essential in order to deny relief under s. 6(b). One can conceive of instances where a claimant may have acted in a dishonourable or even unlawful manner vis-à-vis the testator, but has successfully hidden such impropriety from the testator. The example of a claimant who has stolen from or otherwise defrauded the testator without his or her knowledge illustrates the point.
- [383] In my opinion, although such conduct may only come to light after the testator's death, in appropriate circumstances and especially if the conduct is egregious, it should be open to the Court to view it as negating any moral duty and rely on it to justify dismissal of the claim under s. 6(b).
- [384] As explained earlier, Kelly's financial naiveté shielded her mind from considering the possible fallout in the event that the Steakhouse was not successful. She later relied on her husband's optimistic assessment that the Steakhouse might reverse its financial spiral, and that everything would be "okay" and thus thought it unnecessary to tell her parents about the encumbrances against the Whistler Property and Pemberton Valley. Although William's counsel did not develop an argument based on s. 6(b), for the sake of completeness I find that there is nothing in Kelly's character or her conduct directed towards her mother that diminished Norma's moral duty to Kelly, or would disentitle Kelly from relief under the WVA.

Inter vivos gifts and benefits to Kelly and Norma's alleged reasons

- [385] Depending on the circumstances, a testator's moral duty may be weakened or even negated where he or she has made inter vivos gifts to the claimant, or the claimant has received assets on the testator's death outside the framework of the will. On the same reasoning, if a testator has made pre-death gifts to individuals other than the claimant, or has arranged his or her affairs to facilitate a passing of assets to such individuals outside the provisions of the will, the moral duty owed to the claimant could be intensified: *Inch v. Battie*, 2007 BCSC 1249, 36 E.T.R. (3d) 79; *McBride*; *Gould v. Gould Estate (Trustee)*, 2009 BCSC 1528; *aff'd* 2010 BCCA 424.
- [386] William asserts that the gifts and benefits Kelly received from her mother throughout her life were excessive and fully discharged Norma's moral obligation to Kelly. I find it difficult to reconcile this assertion - which is the cornerstone of William's position - with his evidence that he did not think that Norma was leaving enough to Kelly and went to some lengths to have a lawyer attend in an attempt to rectify the inadequacy.
- [387] William's position is that chief among those inter vivos benefits are the dividends paid to Mountainside stemming from the LHL settlement which he quantifies as close to \$2 million. While there is no question that Kelly benefited directly from the settlement, as a small point I consider it debatable as to whether the benefits constitute a gift from Norma. When the context giving rise to the settlement is taken into account, it would seem more

accurate to view the settlement benefits flowing from a negotiated transaction aimed at resolving the litigation and restoring to Kelly and the Loughheed Children the gift that William alone had made through the Family Trust that he alone created.

- [388] Even accepting that the LHL settlement can be construed as a gift from Norma to Kelly, it should be remembered that Norma was not the sole source of the settlement funds. Through her Norbill shareholdings, she and William contributed equally to Kelly's entitlement under the settlement. In that sense, it is fair to say that the value of Norma's contribution to the benefits flowing to Kelly as a result of the LHL settlement was exactly one-half of the dividends paid to Mountainside.
- [389] Another contextual feature to be borne in mind in evaluating William's contention that the gifts Norma conferred on Kelly were excessive is that Kelly was not alone in receiving the fruits of the LHL settlement or the benefits of her mother's generosity at large. With respect to the LHL settlement, Norma gave identical benefits to her stepchildren, some of whom she had an unhappy relationship with or was estranged from at the time.
- [390] Tied to this prong of his argument, William further submits that the inter vivos gifts and preferential loans made to Kelly which enabled her to acquire valuable real estate were effectively made in substitution for the four parcels of real property given to her under the 1989 Will. In developing these submissions, William purports to compare the aggregate value of those adeemed gifts to the aggregate value of the inter vivos gifts, and concludes that the latter is superior to the former. Having laid that groundwork, he asserts that Norma would be a foolish and fond testator - not a judicious one - if she had made any greater provision for Kelly, and offers it as an explanation for why Norma did not leave anything more to her.
- [391] In my view, William's comparative valuation involved some double counting, failed to adjust for inflationary effects, and is conceptually flawed. Moreover, his assertion is premised on the notion that had those four parcels not adeemed, Kelly would have been adequately provided for under the 1989 Will. That is a dubious proposition. More to the point, however, is that the evidence does not indicate that Norma turned her mind to the consequences to Kelly of selling those real estate parcels. To the contrary, William testified that when Norma sold them, she did not discuss how that might affect Kelly under the 1989 Will, nor mention that she regarded the sale of those parcels as being one less thing for Kelly or considered Gordon Avenue, Lawson Avenue or any other benefit as a gift in lieu. In my view, this line of argument does not assist William.
- [392] William submits that Norma's generosity to Kelly began to dwindle over time. He argues that after selling Lawson Avenue to her in 2001 for less than its market value, Norma became fed up with Kelly's lack of appreciation for the value of money and the fact that it must be earned rather than given. William theorizes that in 2001, Norma decided to stop "pouring money into the Wilson family bank accounts" and to teach Kelly the value of a dollar. He contends that for that reason Norma did not confer any further benefits of

significance on Kelly without demanding a corresponding obligation to repay from that point onward. He suggested that part of Norma's motivation was to try to save her daughter from an imprudent husband.

- [393] William further submits that these considerations were in Norma's mind when she did not act upon a form letter received from an estate lawyer inviting her to update the 1989 Will, and when she elected not to revise her 1989 Will in Kelly's favour. He further contends that Norma declined to give Kelly more because she regarded her to be economically self-sufficient, not financially dependent on her, and living a good life. William asserts that Norma relayed her reasons to the lawyer and that they represent a valid (ie. true) and rational (ie. logically connected) statement of Norma's testamentary intent within the meaning of the authorities of *Bell v. Roy Estate* (1993), 75 B.C.L.R. (2d) 213, 48 E.T.R. 209 (C.A.) [Bell], and *Kelly v. Baker* (1996), 82 B.C.A.C. 150, 15 E.T.R. (2d) 219 (C.A.) [Kelly]. He argues that the onus therefore shifted to Kelly to show that her mother's reasons were not valid or not rational, and that she has failed to discharge it.
- [394] Leaving to the side the notable fact that this theory was not put to Kelly, I nonetheless reject it.
- [395] The lawyer's evidence at trial was derived from the cryptic jottings made on her copy of the 1989 Will, and on incomplete memories which were two and a half years old, concerning a dying woman who she had met only once, and about whom she knew little. Despite her standing as a lawyer, I have no confidence as to the reliability of her testimony and am particularly unaccepting of her reconstruction of her exchange with Norma about why Norma did not wish to change her 1989 Will. I conclude that the lawyer's evidence in relation to the reasons purportedly given by Norma for declining to make greater testamentary provision for her daughter is unreliable and that it would be unsafe for the Court to afford it any weight. I found that William's limited evidence on the point was no more enlightening by his own admission during that meeting he was in bad shape physically, was fatigued, and his mind kept wandering off.
- [396] I conclude that Norma's reasons for declining to amend her 1989 Will in Kelly's favour while on her deathbed are not reliably ascertainable on the evidence, and that the analysis formulated in *Bell* and endorsed in *Kelly* is not engaged.
- [397] The appellate authorities do not endorse the court conducting an open-ended roving inquiry of the circumstantial evidence to ascertain whether a testator's estate plan has a valid and rational basis. The inquiry is meant to evaluate the testator's reasons for disinheriting a claimant and/or for making the gifts in the will. That point aside, apart from William's sweeping statement to the effect that Norma developed these views of Kelly, the preponderance of the evidence does not support his theory and, indeed, is to the opposite effect. The Born siblings convincingly testified that they never heard Norma complain about providing financial assistance to Kelly or criticize the Wilsons' lifestyle. It was William, not Norma, who disapproved of Blair's handling of financial matters, and it is

William who, upon discovering the pending sale of the Whistler Property and mortgages registered against it and Pemberton Valley after Norma's death, concluded that Kelly was improvident with money and did not appreciate the value of it. I conclude that the basis of William's theory is rooted in his personal chastisement of the Wilsons, and does not reflect Norma's views.

[398] The reality is that through Norma's assistance Kelly was well-positioned financially by 2001, and until the demise of the Steakhouse did not have the same level of financial need as in her early years. Even so, Norma continued to provide financial support to the Wilsons. She paid for the children's private schooling and Cara's additional expensive scholastic pursuits; she and William stepped in to help Mountainside regain its investment losses and offered a no-interest loan to Kelly to acquire the Whistler Property at a price that was, according to William, \$50,000 under market; she treated the Wilsons to holidays; and decided to suspend further payments against the Whistler Property in order to alleviate some of the financial pressure that Kelly was under. Norma and William also provided bridge financing on highly advantageous terms to enable Kelly to acquire Roberts Creek. I am satisfied that William had promised Kelly that he would assist in developing an equestrian centre on the Roberts Creek acreage in due course.

[399] I acknowledge that it is possible to draw an inference that would fit with William's theory from the fact that Norma did not offer to bail out the Steakhouse in December 2006. However, an equally plausible inference supported by the evidence, and the one I prefer, is that Norma simply deferred to William's assessment of the situation and adopted his view that, as a matter of business efficacy, it would be futile to help because it would amount to throwing good money after bad.

William's financial circumstances

[400] Although Norma and William were equal shareholders of Norbill, William's level of income from it was often double or more than was Norma's. Norma's line 150 income from all sources in 2005 was \$251,410.29, and William's was \$479,969. In 2006, her reported income was \$197,373.25 and William's was \$292,886.27. In the year of death, William's income exceeded \$1.0 million, which may or may not have included the amount of Norma's RIF.

[401] William acknowledged that unless there was runaway inflation, as he put it, his income would be more than enough to continue to provide for his privileged lifestyle, and that he could increase the amount of his income through Norbill if he wished to do so. Along the same lines, he agreed that the joint assets he received on Norma's death gave him enough money to maintain his standard of living for the rest of his life. He also agreed that his standard of living would not change as a result of receiving the inheritance from Norma under the 1989 Will.

- [402] William testified that he intended to donate some part of his assets toward educational and medical causes and to send disadvantaged children to the same private school that the Wilson grandchildren attended.
- [403] I have recited multiple problems with William's credibility. His less than forthcoming testimony about the state of his assets at Norma's death and related matters tainted it further. For example, he did not provide an accurate date of death valuation of the Belmont home and was coy to the point of being misleading in answering questions about whether he had transferred that property to Lynda. In answer to an interrogatory, he deposed that at Norma's death, his net worth was \$21.4 million. He refused to disclose how he calculated that figure, but confirmed that it did not include the value of the Belmont home or the value of Norma's one-half interest in Pender Harbour. He also gave several different versions of his understanding of what Norma intended to do with respect to the mortgage to his daughter, Laura.
- [404] I have calculated William's net worth at Norma's death (incorporating his one-half ownership only of their joint assets) to be \$25,933,059, plus his share of the monies owing by Mountainside, as follows:

(i) Norbill: Shareholder loan \$3,543,879

Shares \$15,978,250

(ii) One-half interest in joint assets:

Pender Harbour \$3,500,000

Belmont home \$1,190,500

Shares of Interlude \$563,521

Fast Norma boat \$125,000

2006 Lexus hybrid \$20,000

Joint account with Scotia McLeod \$836,558

(iii) 50% of unpaid principal on the

Whistler Property loan \$175,351.92

- [405] As a result of receiving Norma's one-half interest in their joint assets passing to William outside her estate, his worth increased to roughly \$32,168,638. Adding that to the estimated gross value of the residue of Norma's estate, William's assets would swell to a whopping \$51,133,064.
- [406] In weighing the totality of the relevant circumstances and based the foregoing, including (stated in abbreviated form) the abundance of Norma's wealth and her lavish standard of living, the value of the assets passing to William outside of the estate and his independent

wealth; what Norma knew about Kelly and Blair's comparatively inferior financial circumstances, the significant financial setback brought on by the demise of the Steakhouse and that Kelly would not inherit from William; Norma's promise to pay for the Wilson grandchildren's education; Kelly's bona fide expectations that she would be securely provided for by her mother engendered by her mother; the devotion and love showed by Kelly to her mother; the value of the testamentary gifts to Kelly as well as the RIF, I find that Kelly's moral claim is by no means tenuous. Although Norma's moral obligation to Kelly does not overtake and is not on par with the intense duty that she owed her husband, it is my opinion that Norma owed her daughter a strong moral duty. I find that duty was not negated by the gifts and financial advantages bestowed on Kelly by her mother over the years or by any other factor.

- [407] In my opinion, the testamentary provision made for Kelly under the 1989 Will falls below the moral obligation of a contemporary judicious parent in all of the objectively assessed circumstances. Although by no means conclusive, it is not without relevance that William himself believed that Norma ought to make greater testamentary provision for Kelly.
- [408] It is incumbent on this Court to exercise its discretion so as to vary 1989 Will only to the extent required to provide the justice to Kelly that the 1989 Will failed to achieve, commensurate with Norma's moral obligation.
- [409] In the circumstances, and having regard to the incompatibility of Kelly and William, varying Norma's 1989 Will so as to give Kelly a share of the residue would invite further strife. I exercise my discretion to vary paragraph 3.3.1 of the 1989 Will so as to add a specific legacy to Kelly in the amount of \$5.5 million.

COSTS

- [410] If the parties are unable to agree on costs, they have liberty to file written submissions in accordance with a schedule of their making.

___ "Ballance J." ___

The Honourable Madam Justice Ballance

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