IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Webber v. Sullivan,*
2019 BCSC 1522

Date: 20190910
Docket: S165176
Registry: Vancouver

Between:

Barbara Diane Webber and Valerie Ann Sullivan

Plaintiffs

And

Bryon Albert John Sullivan, in his personal capacity and in his capacity as Executor of the Estate of Elizabeth Sullivan, deceased, and Keith Sullivan

Defendants

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

Counsel for the Plaintiffs:	T. O'Mahony K. Suprynowicz
Counsel for the Defendant Bryon Sullivan:	R.M. Stewart
Counsel for the Defendant Keith Sullivan:	D.M. Smith
Place and Date of Trial:	Vancouver, B.C. June 10-14, 2019
Written submissions from the Defendants:	June 24, 2019
Place and Date of Judgment:	Vancouver, B.C. September 10, 2019

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INTRODUCTION

[1] This action involves a dispute between siblings over the content and distribution of their deceased mother's estate. The plaintiffs say that an *inter vivos* transfer of certain real property by their mother to the defendant Keith Sullivan, the plaintiffs' brother, was the result of undue influence, and that a portion of the property should form part of the estate. The plaintiffs also seek to vary their mother's will on the basis that it does not make adequate provision for them. Other than a few specific bequests to the plaintiffs, the entire residue of the estate was left to the defendant Bryon Sullivan, who is also the plaintiffs' brother.

[2] The issues in the action tap into difficult family dynamics that have endured for many decades. Not surprisingly, the plaintiffs and defendants have very different perspectives on those dynamics, and the reasons for the plaintiffs' disinheritance. The divergence in the parties' evidence in relation to certain key events, and the tendency of many of the witnesses who testified to ground their perspectives in perception and intuition rather than verifiable fact, makes the fact-finding process particularly challenging in this case. I will attempt to unravel the complex Sullivan family history only to the extent necessary to decide the legal issues in this case.

REVIEW OF EVIDENCE

[3] While there is no dispute between the parties as to the basic chronology of relevant events in the life of members of the Sullivan family, there are large discrepancies in the parties' recollection of significant events that have shaped family relationships. I will begin with a review of the evidence adduced at trial in relation to the significant events, noting where there are disputes in the evidence. My factual findings as they relate to the claims advanced by the plaintiffs are set out in the Analysis section of this judgment.

The Sullivan family

[4] The plaintiffs Barbara Webber and Valerie Sullivan and the defendants Keith and Bryon Sullivan are all siblings. Their father, Willie, passed away in or around 2009 from Alzheimer's disease. Their mother Elizabeth ("Betty") passed away on

March 17, 2015 at the age of 92. A fifth sibling, Gail, passed away from cancer in 2001. For ease of reference, I will refer to the members of the Sullivan family by their first names.

[5] Barbara is the eldest of the Sullivan siblings. She was born in 1946 and is now 73 years old. Gail was born in 1948, and Valerie in 1954. Valerie is now 65 years old. Bryon and Keith are the youngest in the family. Bryon was born in 1960 and is now 58, and Keith was born in 1961 and is now 57.

[6] There is an evident divide in the surviving Sullivan siblings between the plaintiffs, Barbara and Valerie, and the defendants, Bryon and Keith. Barbara and Valerie both left the family home in their early 20s, and have had lives that are independent from their parents since that time. Bryon and Keith have lived with their parents for much of their adult lives. Bryon was the caretaker for both his parents in the years prior to their deaths. Keith was a partner with Willie and Betty in the family apartment business.

[7] The divide between the siblings is evident in the manner in which the parties recall their upbringing. Barbara and Valerie describe the Sullivan family home as a place of conflict and dysfunction. They say that their parents were not good communicators, and that issues were swept under the rug rather than discussed. Keith and Bryon are more positive in describing their childhood, and in particular describing their relationship with Betty. Keith and Bryon both describe Betty as someone who was intelligent and strong-willed, but who was accepting of her children and would encourage their interests.

[8] Betty was consistently described by all witnesses who knew her as determined, independent and outspoken. Joyce Daniels, a family friend who testified, described Betty as a “woman ahead of her time”. She was politically minded and liked to phone in to radio talk shows to state her views. One has the impression on listening to the witnesses’ description of Betty that she was not a woman afraid to make her opinions known.

[9] Willie and Betty raised their children in Vancouver. After Willie's retirement from BC Hydro in the early 1980s, the couple moved to Bowen Island. Keith soon joined them. Keith assisted in renovation projects at the Bowen Island house, including building a retaining wall, and doing the carpentry work on the guesthouse and garage. At some point in time, Bryon also moved to Bowen Island to live with Willie and Betty. Although the precise timing is not entirely clear from the record before me, it appears that Bryon was living on Bowen Island at least as of 1987.

[10] Bryon and Keith continued to live with Willie and Betty when they moved from Bowen Island to a recreational property that Willie and Betty had purchased in 1988 on Cluculz Lake, west of Prince George. Once again, the record is not entirely clear as to the timing of this move, but it appears that the family was living at Cluculz Lake by 2005. In 2011, after Willie's death, Keith, Bryon and Betty moved to a house on Heavenor Drive in Fort St. James, British Columbia that is owned by Keith. Keith and Bryon have continued to reside there together since Betty's death.

[11] Bryon does not work and is in receipt of a disability pension as a result of a chronic condition. Since the early 1990's, Keith has run a family business which is further described below. The business presently consists of managing an apartment building by the name of "Hillcrest Apartments" in Fort St. James. The transfer of the Hillcrest Apartments in 2014 from Betty as sole owner to Betty and Keith as joint tenants is the subject of the plaintiffs' undue influence claim in this action.

[12] For a period of time that overlapped with Willie and Betty's residence, Barbara and her husband David Webber also lived on Bowen Island with their daughter Miranda. Miranda was born in 1981. Barbara was a school teacher and she eventually became the principal of the Bowen Island school. The family moved from Bowen Island to Nanaimo at some point in the mid-1980s, and then to Denman Island and Hornby Island where Barbara finished her teaching career in 2006.

[13] Barbara and her husband David are both retired. Prior to his retirement, David's career involved managing shopping centres. David has faced a number of health issues over the years. At the age of 43, he became ill with rheumatoid arthritis

and had to stop working. More recently, he had a very serious stroke. Barbara and David live in a rented apartment in North Vancouver. They live off their combined monthly pension income of $3,200.

[14] Valerie has been married to Rod Plasman since 1982. The couple has no children. They currently live in Canmore, Alberta and own their own home which has an assessed value of $455,000. Valerie works on a casual basis at a bulk food store in Canmore. She earned $3,000 in income from that employment in 2018 and expects to earn about the same in 2019. Valerie estimates her and Rod's net worth at about $750,000. She says that after retirement, they will rely on income from their RRSPs and government pensions.

[15] After Willie and Betty moved to Cluculz Lake, there was infrequent in-person contact between the plaintiffs and Betty. For reasons that are detailed below, the plaintiffs' relationship with their mother became very difficult for a period of time. Barbara had not seen Betty in person for 14 years prior to Betty's death. Valerie had visited Betty on occasion, but her primary contact with Betty in the last few years of Betty's life was over the telephone.

The Miranda incident in the early 1980s

[16] The dynamics within the Sullivan family were heavily impacted by what was referred to by the parties at trial as the "Miranda incident" in the early 1980s. At this time, Barbara was working part-time on Bowen Island. Betty and Willie had retired to Bowen Island, and Keith had joined them there. Miranda was a toddler.

[17] Miranda stayed with Betty and Willie for an overnight visit on or around Halloween while Barbara and David went to Vancouver. Barbara says that Miranda seemed off to her after this visit, and she asked Miranda how she was feeling. Miranda reported that "grandma put her fingers in my vagina and she hurt me and made me cry". Barbara says that she told Miranda that she would talk to grandma and that Miranda should not worry.

[18] The parties had differing versions of what happened next, and the impact of the Miranda incident on Betty's relationship with Barbara and Valerie.

[19] Barbara says that the next day, she telephoned Betty and explained what Miranda had said. Barbara says that Betty stated "it's not true", and hung up on her. Barbara says that Betty then called back the following day and explained that she had just put Vaseline on Miranda's vagina because it had been red.

[20] Barbara says that she did not push the matter further because she did not want to break up the family. For this reason, she did not phone social services. Instead, she and David decided on a safety plan that included moving away from Bowen Island and ensuring that Miranda would never again be left alone with Betty. Barbara says that she told her sister Gail about the Miranda incident, and it was agreed that Gail would also never leave her children alone in Betty's care. Barbara also told the pre-school teacher on Bowen Island that Betty was not permitted to pick Miranda up from the school.

[21] Barbara says that about five years after the Miranda incident, Bryon came to visit her and her family in Nanaimo. She says that he confronted her on this occasion about what she had done to Betty, and started yelling at her in front of Miranda. Barbara told him that he had to leave the house and go back home to Bowen Island.

[22] Barbara says that her confrontation with Bryon over the Miranda incident had an immediate impact on her relationship with Betty. She says that Betty called her and said that it was unfair of her to send Bryon home. Barbara decided that she needed a break from Betty at this time and the two stopped communicating for several months. Barbara says that she called Betty after a few months to suggest that they start over again, and Betty agreed. Barbara denies that the Miranda incident caused a rift between her and her mother. She says that Betty was happy to carry on their relationship as before.

[23] Valerie says that the Miranda incident put a strain on her relationship with Betty, as Betty was upset that Valerie had maintained a relationship with Barbara after the incident. Valerie says that there was a period of about a year in the early 1990s during which her mother did not contact her at all. However, Valerie says that her relationship with her mother improved after that. She says that the Miranda incident was not discussed between them again because it was easier to simply carry on.

[24] Valerie acknowledged that on a couple of occasions Betty said words to her to the effect of “why did Barb do that?”, and Valerie said that Betty had to talk to Barbara about it. She says the last time that Betty raised the topic of the Miranda incident was in 2012.

[25] Keith and Bryon have a very different recollection of the impact of the Miranda incident on the family dynamic.

[26] Bryon’s evidence is that he became aware of the abuse allegation in November of 1987 when Barbara told him about it during a visit at Barbara’s home in Nanaimo. Bryon says that he was dumbfounded and very shaken. Bryon says that he initially kept the allegation to himself, but in 1990 decided that he had to tell Betty. Bryon said that Willie, Betty and Keith were all present and sitting around the kitchen table at the Bowen Island house when Bryon reported the abuse allegation. Bryon says that Betty was shocked and began to cry. She stated: “What does Barb think she is doing, has she lost her mind? I would never do that.”

[27] Bryon says that he observed telephone calls between Betty and Barbara after 1990 in which Betty would ask Barbara to retract the allegation. He says that Barbara would always reply that she did not want to talk about the matter. Bryon says that the Miranda incident also impacted Betty’s relationship with Valerie because Betty perceived Valerie to support Barbara. Bryon says that Betty would frequently bring the allegation up on family occasions, and express how disappointed she was.

[28] Keith's evidence is consistent with Bryon's. Keith says that he became aware that Barbara had made the allegation against Betty in 1990 when Bryon told the family. Keith says that the Miranda incident "blew up the family", and that Betty lost her grandchildren over it. Keith says that Betty brought up the Miranda incident with him on many occasions over the years, as recently as Christmas of 2014. Keith says he found it very depressing and disturbing. He says that Betty would tell Barbara that the allegation made no sense and ask why Barbara was continuing with it, but Barbara ignored her.

Keith's drinking and the Christmas incident in the mid-1980s

[29] A significant amount of time at trial was directed to exploring the details of Keith's long-standing drinking problem. Keith acknowledges that he has had chronic issues with binge drinking since his late teens. Keith says that when he drinks too much, he can become talkative and carried away. He denies that he was ever violent when he drank.

[30] Valerie, Barbara, Rod Plasman, David Webber, and Barbara's daughter Miranda, all testified to an alarming recollection of Keith's behaviour when drinking. They described Keith as someone who became angry and belligerent when he was drinking. They said that Keith was "scary" and a "bully". When pressed for particulars of behaviour by Keith that warranted such labels, these witnesses invariably cited a single incident that occurred at a family Christmas gathering on Bowen Island in the mid-1980s.

[31] While the parties agree on certain basic facts about the Christmas incident, once again their evidence diverges in significant respects. It is not in dispute that the family was gathered at Willie and Betty's house on Bowen Island for Christmas dinner. Barbara and Valerie, and their families, intended to stay overnight. At some point after dinner, Barbara and David wished to go to bed downstairs. Keith and Bryon were watching a movie and Keith refused to turn the movie off. Barbara and Valerie left with their families and stayed somewhere else that night.

[32] Beyond those basic facts, the parties have conflicting recollections of what occurred. Barbara and David both testified that Keith had been drinking heavily through the day that he became belligerent when asked to turn the television off, and flew at them with a butcher knife. Valerie and Rod also described Keith as loud and threatening, but neither recall a knife being involved.

[33] Keith and Bryon agree that Keith refused to turn the television off, but they deny that Keith was loud or threatening. Keith and Bryon say that it was only about 8 pm, and that they wished to finish watching their movie before turning in. Keith says it was the plaintiffs' choice to leave the house, but denied that they were forced to do so by his behaviour. Keith and Bryon both deny that any knife was involved.

[34] The Christmas incident was the single example of an event within their direct knowledge that Barbara and Valerie, or any of the plaintiffs' witnesses, were able to point to in support of their contention that Keith was violent and scary when he drank.

The Sullivan family business

[35] In about 1993, Keith and his parents decided to start a business venture of buying and renting out apartment buildings. Keith worked in construction and building maintenance while living on Bowen Island, and Willie was good with numbers. The division of labour would be that Keith would perform any construction and renovation projects within his abilities, while Willie would be the bookkeeper. Willie and Keith would together to identify buildings for potential purchase, with input from Betty.

[36] In 1994, Willie and Betty purchased the first apartment building, as joint tenants, in Fort St. John. Over the ensuing years, they purchased buildings in Fort St. James, Houston, Lake Cowichan and Quesnel, British Columbia, along with a building in Battleford, Saskatchewan. The buildings in Quesnel and Battleford were owned by numbered companies controlled by Willie and Betty. The remaining buildings were held by Willie and Betty as joint tenants. The properties were typically

funded by a 15% down payment taken from the equity in the Cluculz Lake property, and 85% was financed.

[37] Keith testified at length at trial about the renovation work he performed on the various properties that his parents had purchased. This included an extensive renovation of the Fort St. John building, during which Keith repaired the cedar siding, replaced bathrooms and carpets, and redid the laundry room. Keith says that he performed similar renovation work on the various properties on many occasions over the years. Keith says he was not paid a salary for the work he performed, although he continued to live with his parents and they covered his living expenses.

[38] There was a significant volume of evidence adduced at trial to corroborate Keith's contributions to the maintenance and renovation of the properties purchased by Willie and Betty, including invoices and photographs of the renovations. Keith was also the person primarily responsible for managing the apartments, including dealing with the tenants. The plaintiffs do not dispute that Keith contributed a significant amount of time and labour to the family business over time.

[39] Starting in 2005, Keith and his parents encountered financial difficulties when they were unable to make mortgage payments on some of the properties. The lender began foreclosure proceedings. They eventually came up with a plan to consolidate the assets by selling off the buildings in Quesnel, Lake Cowichan and Battleford, and keeping the buildings in Fort St. John and Fort St. James.

[40] In the course of these financial difficulties, Keith approached Valerie and Rod for a short-term loan. In or about 2006, Valerie and Rod agreed to provide a loan of $10,000. It is not in dispute that Keith eventually repaid Valerie and Rod the sum of $12,000, the initial loan plus 20% interest, although the timing of repayment is contentious. Keith says that he repaid the loan within six months, whereas Valerie and Rod say it was closer to two years.

[41] In any event, this loan appears to have been the only involvement that either Valerie or Barbara ever had in the family business. Bryon was also not directly

involved in the business, although he had more knowledge than the plaintiffs did of its operation given that he lived with Willie, Betty and Keith for many years. The division of labour as between Bryon and Keith was that Keith managed the business while Bryon was a caregiver to their parents.

[42] In 2011, the Fort St. John apartment building was sold for $885,000. Prior to the sale, Keith carried out an extensive renovation project. Keith says that most of the proceeds of sale was used to pay down debt and cover the costs of the renovation project. Keith also purchased the house on Heavenor Drive in Fort St. James from the proceeds of sale. The purchase price was $210,000.

[43] Keith says that Betty encouraged him to purchase the Heavenor Drive house. By this time, Betty, Keith and Bryon had been living in the small cottage at Cluculz Lake for a number of years following Willie's death. Betty, Keith and Bryon all moved into the Heavenor Drive house in December 2011. Betty had the master bedroom. Keith built a ramp so that Betty could get in and out of the house in her scooter. They lived together at the Heavenor Drive property until Betty went into long-term care in November 2013.

[44] By the fall of 2013, Keith was primarily running the business. He and Betty were signatories to a joint account that Keith opened in 2010 at the CIBC bank in Fort St. James. The account was used for the purposes of finances associated with the Hillcrest Apartments, including receiving rental revenue.

Betty's admission to hospital on November 4, 2013

[45] The circumstances of Betty's admission to the Stuart Lake Hospital on November 4, 2013 provide the backdrop to the plaintiffs' claim of undue influence. Once again, the basic facts are not in dispute.

[46] By early November 2013, Bryon was in crisis and he temporarily left the Heavenor Drive home. Valerie telephoned members of the RCMP in Fort St. James to express concern for Betty's safety. On the evening of November 4, 2013,

members of the RCMP attended the Heavenor Drive home, removed Betty from Keith's care and took her to Stuart Lake Hospital.

[47] The context for this event, including Bryon's reasons for leaving the home and Betty's condition at the time of her admission to hospital, is very much in dispute.

[48] According to Keith and Bryon, Betty's health had slowly deteriorated throughout 2013, and Keith and Bryon began to discuss how much longer they could keep her at home in the Heavenor Drive residence. Betty was 91 years old by this time and dependent on Bryon for her basic care. Keith wanted to keep Betty at home at least through Christmas of 2013, but Bryon was feeling burnt out.

[49] By early November 2013, Bryon had been Betty's full-time caregiver for eight years, since she became unable to walk in about 2005. For a period of time prior to his father's death, Bryon had to contend with the deteriorating health of both Willie and Betty. By 2013, Betty was incontinent and required care assistance that included frequent changes of her Depends diapers. Added to Bryon's stress was the fact that Keith began to drink again in the fall of 2013 after a lengthy period of sobriety. Bryon described himself as "emotionally and physically burned out" by early November 2013.

[50] Bryon and Keith decided that Bryon should leave the Heavenor Drive home for a period of temporary respite. Bryon was concerned about leaving Betty in Keith's care, and he emailed Valerie asking her to contact Cathy York, a care worker at the Stuart Lake Hospital in Fort St. James, to make sure that Betty was all right. Bryon says that he was particularly concerned about Betty's incontinence because he knew that Keith was not adept at changing Betty's Depends.

[51] Valerie has a very different recollection of the events of November 2013. Valerie says that Bryon called her to say that he had left the house a result of Keith's drinking, that he was in fear of his life from Keith, and that he was concerned about Betty's safety. Valerie says that Bryon also told her that he and Keith had lied to medical staff about the source of Betty's bruising during a prior attendance at

hospital, and that Keith had in fact physically harmed Betty. Barbara and Valerie both say that Bryon told them that Keith had beaten Bryon in the past.

[52] Bryon strenuously denies that he had ever lied to hospital staff about Keith's treatment of Betty, or that Keith had been violent to him or Betty. Bryon says that he was secure and happy at the Heavenor Drive house. He says that Keith was never a bully. Bryon says that although Keith could be gruff at times, he was very big-hearted and loving towards Betty and Bryon. Bryon says that Keith has always been a good brother to him.

[53] Keith says that he agreed with the RCMP members who attended his house on November 4, 2013 that Betty should be taken to hospital. Keith says that Betty was fine when the RCMP arrived, and was watching television. However, Keith says that he knew that he had not been doing a good job of caring for Betty, particularly in relation to her incontinence, and felt that it would be good to have her checked out at the hospital.

[54] Valerie cannot recall when her conversation with Bryon occurred, but the contemporaneous medical records suggest that it must have been immediately prior to Betty's admission to the Stuart Lake Hospital on November 4, 2013.

[55] Notably, the hospital records from the time of Betty's admission do not indicate any sign of physical abuse. The hospital records note that Betty had "poor hygiene" on admission, and further that Keith "has not been taking good care of his mother" due to his drinking problem. The records reference the fact that Cathy York was alerted to Betty's situation by Betty's daughter, but there is no record of Betty's daughter reporting concerns of physical abuse.

[56] In emails to her nephew and niece on November 3, 2013, Valerie mentioned having a long talk with Bryon about placement options for Betty. Valerie stated that: "Keith is not doing well as he is drinking again after being dry for almost 3 years". These emails contain no mention of Keith's alleged physical abuse of Betty. Valerie proceeded with a planned two-week trip to Cuba on November 19, 2013.

[57] There is one incident that occurred after Betty's admission to hospital which should be mentioned because it featured prominently in the plaintiffs' application to amend their pleadings to allege undue influence.

[58] On December 19, 2013, Keith checked Betty out of the hospital to take her for dinner, and then refused to return her after dinner when directed to do so by the hospital physician. Keith's evidence at trial was that he kept Betty longer than he should have because he was trying to complete year-end financial records and it was time consuming. The RCMP became involved and attended at Keith's house. By this time, Keith had calmed down. He apologized for his behaviour and promised to return Betty to the hospital by 9 pm, which he subsequently did. The information provided by the RCMP to the hospital suggested that Betty had seemed comfortable and happy in the house at the time the RCMP attended.

[59] Betty remained in the long-term care unit at Stuart Lake Hospital from the time of her admission on November 4, 2013 until her death on March 17, 2015. She was permitted to leave the hospital on occasion to stay overnight with Bryon and Keith at the Heavenor Drive house, including during Christmas of 2013 and 2014.

Transfer of Hillcrest Apartments on April 30, 2014

[60] In November 2013, Keith contacted the Prince George law firm of Heather Sadler Jenkins on behalf of Betty to request assistance with estate planning. Keith says that Betty had tried to engage him and Bryon in discussions over the summer of 2013 around what would happen with her estate after her death. Keith says he was not ready to have such discussions at that time, but by November 2013 he had to accept reality.

[61] Brad Douglas, a solicitor at Heather Sadler Jenkins, was the lawyer who attended to assist Betty in the fall of 2013. Mr. Douglas gave evidence at trial. His legal file pertaining to his retainer by Betty was adduced in evidence.

[62] Mr. Douglas says that he first met with Betty on November 25, 2013. Keith greeted Mr. Douglas, but Mr. Douglas met with Betty alone to take instructions.

Mr. Douglas said that he had a general solicitor practice at the time, working primarily out of Prince George. Mr. Douglas says that he would not have received much notice about the purpose of the meeting before attending. He brought a Wills information sheet with him in the assumption that Betty wished to have a Will prepared.

[63] Mr. Douglas says that at their first meeting, Betty explained that her wish was to benefit her two sons, and not to leave anything to her daughters. Betty told him that Keith ran the Hillcrest Apartments. She wanted Keith to get the apartment building and Bryon to get the Cluculz Lake property. Mr. Douglas says that this set off “alarm bells” for him because of the possibility of a wills variation application. He explained to Betty that if she disinherited her daughters, this could lead to a court challenge which would just mean that all the money in the estate would go to lawyers’ fees.

[64] Mr. Douglas says that he discussed with Betty the possibility of an *inter vivos* transfer of the Hillcrest Apartments. It is not clear to me from the record whether this discussion occurred at their initial meeting or a follow-up meeting. Mr. Douglas inquired as to whether Keith was providing any services that would give rise to a beneficial interest, and Betty said that Keith did have a beneficial interest arising from his many years of contribution to the property. Betty instructed Mr. Douglas to prepare the documents that would transfer the Hillcrest Apartments to her and Keith as joint tenants.

[65] Mr. Douglas was firm in his evidence that he did not suggest the joint tenancy to Betty. He says that the discussion between them turned to the subject of joint tenancy because Betty insisted she did not want to leave the Hillcrest Apartments to the plaintiffs, and she wanted Keith’s beneficial interest recognized. While Mr. Douglas had brought a wills information sheet with him to the meeting, assuming that he and Betty would be discussing the preparation of a will, the discussion turned to the option of a property transfer after Mr. Douglas explained the risk of a wills variation application by the plaintiffs.

[66] At the suggestion of Mr. Douglas, Keith prepared a one-page sheet summarizing his estimated costs for the management and repair services he provided for the Hillcrest Apartments. Keith estimated the total costs to be $389,500. Mr. Douglas told Keith that it would be helpful to have supporting documentation on hand if there was ever a challenge to his beneficial interest in the property.

[67] Following his meeting with Betty in November 2013, Mr. Douglas requested that the Stuart Lake Hospital provide him with a copy of the mini mental state examination that had been performed on Betty following her admission. Mr. Douglas says that he asked for the exam results in this case because of Betty's age and the fact that she was in a long-term care facility. Mr. Douglas believed that Betty passed the test for legal capacity, but thought it wise to have corroboration for his assessment.

[68] The mini mental state exam results were faxed from the hospital to Mr. Douglas on January 16, 2014, after Betty had signed an authorization for the records to be released. The results showed that Betty received a score of 26/30 on an exam administered on her in November 2013. Mr. Douglas did not see anything in the exam results that raised concern for him about Betty's legal capacity.

[69] Mr. Douglas determined through a property search that there was a mortgage on the Hillcrest Apartments in an amount of about $280,000. As such, the transfer required the consent of the mortgagee to adding Keith as a co-borrower. Keith was eventually added as a co-borrower on the mortgage.

[70] On April 16, 2014, Mr. Douglas met with Betty alone a final time in order to confirm that it was still her wish to transfer the Hillcrest Apartments to Keith, before she signed the Form A transfer. Mr. Douglas says that Betty confirmed that she wanted Keith to be a joint owner on title with her as she viewed Keith as deserving given all the work he had done in managing the property over the years. This discussion is reflected in a memo to file prepared by Mr. Douglas.

[71] Betty signed the Form A transfer the same day, transferring the Hillcrest Apartments into her and Keith's name as joint tenants. The market value of the property is stated to be $1,055,000, and the consideration for the transfer is $527,500. I presume this consists of the $389,500 that Keith valued as his contributions to the property, in addition to the mortgage liability he assumed in becoming a co-borrower.

[72] On April 30, 2014, Betty signed a Deed of Gift and Statement of Intent Re: Joint Ownership, giving the right of survivorship in relation to the Hillcrest Apartments to Keith. Mr. Douglas prepared the Deed of Gift, and witnessed Betty and Keith's signature on it. The terms included the following:

> 2. The Donor grants the Recipient a joint right of survivorship and on transmission of the Donor's ownership of the Property to the surviving Recipient, the Donor intends to advance her beneficial interest in the Property to the Recipient.
>
> 3. The Recipient shall, if still living after the Donor dies, receive the Donor's one-half interest in the Property (the "Gift") as surviving joint tenant and shall pay no consideration as a result of the transmission of the Gift into the Recipient's name.

[73] The Form A transfer of the Hillcrest Apartments was accepted for registration in the Land Title Office at the end of May 2014.

[74] Mr. Douglas says that during their meetings, Betty had also pressed for a way in which she could benefit Bryon by leaving him the Cluculz Lake property, without risk of a challenge by her daughters. Mr. Douglas says that there was some discussion of an *inter vivos* transfer of Cluculz Lake to Bryon, and Mr. Douglas went as far as consulting an accountant as to how best to structure a transfer. In January 2014, Keith telephoned Mr. Douglas to say that Betty did not want to transfer the Cluculz Property after all, and that was the end of it.

[75] Mr. Douglas says that he met with Betty alone and in person at least three times to obtain instructions, and discussed everything with her on each occasion. Mr. Douglas had no concerns about Betty's competence to provide instructions. He says that he found her to be alert and intelligent with good recollection of the

information he was asking for from her. Mr. Douglas says that it was clear to him that Betty wanted the Hillcrest Apartments transferred into a joint tenancy, and that she understood the implications of such a transfer.

[76] Mr. Douglas testified that he considered Betty to be his client and not Keith. Mr. Douglas says that he did not believe that there was any conflict of interest between Keith and Betty given Betty's advice that Keith already held a ½ beneficial interest in the Hillcrest Apartments. The transfer into joint tenancy was to ensure that the legal ownership was consistent with the beneficial ownership.

Betty's June 30, 2014 Last Will and Testament

[77] On June 30, 2014, Betty executed a new Will (the "2014 Will"), and on July 8, 2014 a new Power of Attorney. The 2014 Will is the one in issue in this proceeding. In order to understand the context for this Will, it is necessary to briefly review the terms of Betty's previous Will.

Betty's 2010 Last Will and Testament

[78] On January 14, 2010, Betty executed a Will that appointed Keith as her executor and Power of Attorney (the "2010 Will"). The 2010 Will bequeathed some specific personal property to Bryon, and the residue of the estate to Keith. If Keith did not survive Betty for 14 days, then Bryon was to receive the residue of the estate. The 2010 Will included the following clause:

> I EXPRESSLY DECLARE that I am making only a contingent provision in this my Will for my son, BRYON ALBERT JOHN SULLIVAN because I trust that my son KEITH WILLIAM SULLIVAN will provide for my son, BRYON ALBERT JOHN SULLIVAN'S proper maintenance and support during his lifetime.

[79] There were no specific bequests to either Valerie and Barbara under the 2010 Will. Valerie and Barbara had only a contingent interest in that they were to receive the residue of the estate if neither Keith nor Bryon survived Betty.

The execution of the 2014 Will

[80] By June 2014, Keith was in the midst of a serious drinking binge that would eventually lead to his hospitalization in the summer of 2014. I have already reviewed the circumstances of Betty's removal from Keith's care, in part due to Keith's drinking, in early November 2013.

[81] It was in this context that Betty executed the 2014 Will on June 30, 2014, and the Enduring Power of Attorney on July 8, 2014. The 2014 Will replaced Keith with Bryon as the executor and sole beneficiary of the residue of Betty's estate. The July 8, 2014 Enduring Power of Attorney replaced Keith with Bryon as Betty's Attorney under the *Power of Attorney Act*, R.S.B.C. 1996, c. 370.

[82] The 2014 Will and Enduring Power of Attorney were prepared by Philippa Newman, who is currently a sole practitioner in Vanderhoof. In June 2014, Ms. Newman was an articled student working under the supervision of Michael Reed. Ms. Newman testified at trial regarding her firm's retainer by Betty. Ms. Newman's legal file was adduced in evidence.

[83] Ms. Newman testified that she met with Betty alone at the Stuart Lake Hospital on June 30, 2014 to take instructions on a new Will. Ms. Newman says that she understood from her discussions with Betty that she was unhappy that Keith was drinking again. Betty was adamant that she had not intended to create a joint tenancy in relation to the Hillcrest Apartments. Betty was also clear in stating that she was not in regular contact with her daughters and had not seen them for some time. She did not want to leave her estate to Barbara and Valerie. Ms. Newman says that Betty wanted her estate to go to Bryon in light of all he had done for her.

[84] The 2014 Will made specific bequests of Betty's piano to Barbara, her jewelry to Valerie, and her household furniture to be divided equally between the two of them. Betty left the residue of her estate to Bryon. Nothing was left to Keith. The reasons for these bequests were stated as follows:

> 8.1 I am leaving the residue of my estate to BRYON ALBERT JOHN SULLIVAN because he has done everything for it and he is clearly deserving of that. I have always found him to be dependable and responsible. He has helped my husband and I throughout our lives and should be rewarded for that.
>
> 8.2 I am not leaving anything to KEITH SULLIVAN because he has a drinking problem and is not reliable. I did not intend to create a joint tenancy with him in the ownership of Hillcrest Apartments, Stuart Drive E., Fort St. James BC V0J 1P0.
>
> 8.3 I am not leaving any residue of my estate to Barbara Webber because she has never been involved. I have not seen her in ten years. When it was my 90th birthday she was meant to come and see me but she went to Europe instead.
>
> 8.4 I am not leaving any residue in my estate to Valerie Sullivan because she has not been involved.

[85] Ms. Newman says that she discussed with Betty the option of initiating court proceedings to challenge the transfer of the Hillcrest Properties, and also the more immediate option of simply severing the joint tenancy so that Betty and Keith would own the Hillcrest Apartments as tenants in common. On Betty's instructions, Ms. Newman prepared the Form A transfer that would have severed the joint tenancy. However, on July 31, 2014, Bryon telephoned Ms. Newman to say that Betty no longer wished to proceed with severing the joint tenancy as matters had been worked out with Keith. By this time, Keith was in rehab in hospital. Keith says that Betty came to visit him there and was happy that Keith had sought help.

Betty's death

[86] Betty passed away in Stuart Lake Hospital in Fort St. James on March 17, 2015. Her health had significantly deteriorated in the months immediately preceding her passing. Bryon contacted both Barbara and Valerie to suggest that if they wanted to see Betty before her death, they should come to Fort St. James. They both declined at that time. Barbara and Valerie say that they planned to visit Betty later in the spring or summer of 2015, but that she passed away before they could arrange a visit.

[87] Bryon and Keith planned a small ceremony to scatter Betty's ashes on Cluculz Lake on April 22, 2015, the date of Willie and Betty's wedding anniversary.

Bryon send a text message to Barbara on April 10, 2015 to advise her of the event, and Barbara replied, “thanks, but not planning a trip there”. Neither Barbara nor Valerie attended the ceremony to scatter Betty’s ashes.

[88] The total value of Betty’s estate at the time of her death was approximately $434,000. Of this, $427,000 was value attributable to the Cluculz Lake property.

The plaintiffs’ relationship with Betty

[89] Valerie describes her relationship with her mother at the time of her death as “congenial”. She says that they spoke on the phone a lot and that her mother shared a lot about herself and her life. Valerie visited with her mother on five occasions between 2006 and 2012. The visits were of varying duration, but none lasted longer than a few days. Valerie says that her final visit in 2012 ended in conflict after Keith became angry with her during a discussion. Valerie says that she also exchanged birthday cards, presents and photos with Betty over the years.

[90] As I have already noted, Barbara did not have in-person contact with Betty after the family’s visit with Gail in 2001.

[91] Valerie and Barbara both say that they had regular telephone contact with Betty up to the time of her death. Valerie says that her calls with Betty occurred about once a week, and more frequently after Betty went into hospital. Valerie and Barbara both claim that Bryon and Keith would monitor their calls with Betty and that Betty would hang up the phone abruptly if Bryon or Keith came into the room.

[92] Valerie says that she regretted not visiting Betty after Betty was admitted to hospital in November 2013. Valerie says that 2013 and 2014 were difficult years for her and Rod. Rod worked in the summers, and that they could not travel in the winter due to weather conditions. Valerie says that she would not go visit on her own because she did not feel safe around Keith.

[93] Barbara says that following the temporary break with Betty after the Miranda incident, their relationship continued as before. Barbara says that she visited Willie

and Betty on Bowen Island, and organized their 50th wedding anniversary party. Barbara says that she also exchanged cards, emails, and gifts with Betty. Barbara invited Betty to come and visit her in Vancouver, and Miranda invited Betty to her wedding, but Betty never visited.

[94] Barbara listed a number of reasons why she had not seen Betty in person in the 14 years prior to Betty's death. The reasons included her financial restrictions and David's health. Barbara says that her fear of Keith was a big reason why she would not visit. She says that she would only visit if someone else was with her, and the only person she could have gone with was Valerie. Barbara says that she and Valerie talked tentatively about a visit, but then Betty passed away and it became too late.

[95] Valerie said she was hurt when she found out that Betty had not left her anything in her will. She says that she had made an effort to be involved with her mother under difficult circumstances, and believes it was incorrect for Betty to say that she was not involved.

[96] Barbara says that the reasons Betty states in her will for disinheriting her are not true. She says that she does not recall being invited to Betty's 90th birthday, and had not gone to Europe or ever mentioned to Betty that she was going to Europe.

THE PLAINTIFFS' CLAIMS

[97] The plaintiffs filed their original notice of civil claim on June 7, 2016. The original pleading advanced a claim based on the doctrine of resulting trust in relation to the Hillcrest Apartments, and under the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 [*WESA*], seeking to vary Betty's 2014 Will.

[98] At the outset of trial, I granted the plaintiffs' application to amend their notice of civil claim to add a claim that the transfer of the Hillcrest Apartments to Keith was the result of undue influence. Bryon took no position on the application. While objecting to the allegation of undue influence on the merits, Keith did not point to any prejudice arising from the late nature of the amendment. In the absence of any

prejudice to Keith, I determined that the pleadings amendment should be allowed to ensure a full adjudication of all issues.

[99] The plaintiffs' explanation for the delay in advancing a claim of undue influence related to timing of receipt of Stuart Lake Hospital medical records. The plaintiffs say that it was only when the Stuart Lake Hospital records were delivered to plaintiffs' counsel on May 7, 2019 that the facts supporting a claim of undue influence were apparent. I will address the significance of the hospital records in greater detail in addressing the plaintiffs' claim of undue influence.

ISSUES

[100] The following issues arise for determination:

I. Was the transfer of the Hillcrest Apartments from Betty to Betty and Keith as joint tenants the result of undue influence?

II. Should Betty's 2014 Will be varied on the ground that it does not adequately provide for Valerie and Barbara?

ANALYSIS

Issue I: Was the transfer of the Hillcrest Apartments due to undue influence?

[101] The plaintiffs challenge the validity of Betty's *inter vivos* transfer of the Hillcrest Apartments to herself and Keith as joint tenants on the ground that it was the result of undue influence. The plaintiffs do not argue that the transfer is subject to the presumption of resulting trust, as described in *Pecore v. Pecore*, 2007 SCC 17. Presumably this is because they accept that Keith provided value for, and had a beneficial interest in, the property due to the free property management and maintenance services he performed as part of the family business. Where there is consideration for a transfer, the presumption of resulting trust does not arise: *Petrick (Trustee) v. Petrick*, 2019 BCSC 1319 at paras. 55-68.

[102] The plaintiffs advised in the course of final argument at trial that the claim of undue influence only applied to Betty's beneficial interest in the Hillcrest Apartments at the time of her death, which the plaintiffs agree is 50%. The plaintiffs accept that Keith held a 50% beneficial interest as a result of his contributions to the property over time.

[103] As I understand the plaintiffs' argument, their position is that Betty's transfer of a 50% share of the Hillcrest Apartments to Keith was valid, but the structure of the transfer (as a joint tenancy) is objectionable because the right of survivorship was gifted for no consideration and is the result of undue influence exerted by Keith. The plaintiffs therefore only seek relief in relation to the 50% share of the disputed property that automatically transferred to Keith upon Betty's death by his right of survivorship. They say that Betty's 50% interest ought to form part of her estate.

[104] The issue, therefore, is whether Betty's gift to Keith of the right of survivorship in the Hillcrest Apartments was the result of undue influence.

Legal Framework

[105] Undue influence is an equitable doctrine that is designed to redress an abuse of trust, confidence or power in a broad range of transactions, including gratuitous *inter vivos* transfers or gifts, testamentary gifts, and commercial transactions. There are two classes of undue influence: actual and presumed. In the leading case of *Allcard v. Skinner* (1887), 36 Ch. D. 145 (Eng. C.A.) at 171, Cotton L.J. described the two classes as follows:

> First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor.

[106] Actual influence requires proof that the transferee actually exerted undue influence, and the onus rests with the challenger of the transaction. Presumed influence arises from the existence of a relationship of dependency between the transferor and transferee which, if established, shifts the burden of proof to the

transferee to rebut the presumption: *Modonese v. Delac Estate*, 2011 BCSC 82 [*Modonese*] at para. 101, aff'd 2011 BCCA 501.

[107] Where the party challenging a transaction relies on the presumption of undue influence, the first stage of the inquiry involves a determination as to whether the parties to the transaction were in a relationship of dependency. It must be shown that there is the potential for domination inherent in the relationship: *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 [*Geffen*] at 378. The test embraces those relationships that equity has already recognized as giving rise to the presumption, such as solicitor and client or guardian and ward, as well as "other relationships of dependency that defy easy categorization": *Geffen* at 378.

[108] A gratuitous transfer from a parent to an adult child does not automatically create a presumption of undue influence. In order for the parent/adult child relationship to trigger the presumption of undue influence, the challenger must establish the existence of a relationship of potential dominance between the parent and the adult child: *Modonese* at para. 111.

[109] Where the requisite relationship exists or has been established, the court then goes on to consider the nature of the transaction. In order to rebut the presumption of undue influence, it must be shown that the transferor entered the transaction as a result of their own "full, free and informed thought": *Geffen* at 379. Substantively, that will require the transferee to demonstrate that they deployed no actual influence on the transferor. In making this determination, the court will generally consider whether the transferor had independent legal advice, the motivations of the transferor and transferee, and the magnitude of the disadvantage or benefit: *Geffen* at 379; *Modonese* at paras. 119-120.

Is there a presumption of undue influence in this case?

[110] The plaintiffs accept that a presumption of undue influence does not arise automatically within the context of a relationship between a parent and an adult child. They say that the following evidence establishes that the potential for domination inhered in the relationship between Keith and Betty:

- Betty relied on Keith to manage her financial affairs, including banking and tax returns, and the finances of the family business, particularly after Willie's death.

- Betty lived with Keith since moving to Northern British Columbia, and, given her limited mobility, has relied on Keith to travel outside the home.

- Betty's health was declining in recent years and she was removed from her home in November 2013 due to concerns over lack of care from Keith. The plaintiffs rely on their own evidence as to what Bryon told them about Keith's abusive behaviour.

- The plaintiffs rely on their own evidence, and the evidence of other family members, that the plaintiffs' telephone conversations with Betty ended abruptly. They ask me to infer that Keith was behind this and that it was his method of controlling access to Betty.

- The plaintiffs and their witnesses all testified that Keith was an aggressive and dominant personality who had violently threatened them during the Christmas incident as a result of his drinking.

[111] The difficulty with the evidence of the plaintiffs, and their witnesses, is that they had so little contact with Betty in the 14 years before her death that their case is largely one of impression and intuition rather than direct observation and fact. I do not find that the plaintiffs were deliberately dishonest in their evidence. However, I do find that both Barbara and Valerie had a tendency to testify about events from a perspective that was tailored to justify the outcome sought in this action. That, and the fact that they had little direct evidence to give about the circumstances of Betty's life between 2001 and the time of her death in 2015, leads me to view their evidence with skepticism. On certain key points, they were simply not credible.

[112] I will illustrate my concerns with the plaintiffs' evidence by reference to the factors that the plaintiffs cite as establishing Keith's dominance over Betty.

[113] There is no evidence that Betty relied on Keith to manage her personal and business affairs to the point that she lacked independent will, as the plaintiffs assert. The evidence is to the contrary. Keith testified that he, Willie and Betty were equal partners in the family apartment business, and this continued after Willie died. Keith also says that while he prepared Betty's tax filings, he did so with Betty present and after they had discussed tax strategies. Bryon corroborates Keith's evidence. He describes the business relationship between Keith and Betty as a "two-way street" with each relying on the judgment of the other.

[114] The plaintiffs had no involvement in the business and therefore cannot counter this evidence other than through suspicion and innuendo. For example, the plaintiffs emphasize that Keith had signing authority on the business accounts by way of implying that Keith had the ability to unilaterally access business revenue for his own use. However, there is no evidence that Keith has ever done so. The one exception is the purchase of the Heavenor Drive house. Keith's evidence, which I accept, is that Betty participated in the decision to purchase a house and also the specific decision to purchase the Heavenor Drive house. The purchase was to Betty's advantage as it allowed her to reside with family until the age of 91 in a house that accommodated her physical disabilities.

[115] There is no direct evidence that Keith physically abused Betty, as the plaintiffs allege. The only evidence the plaintiffs adduced on this point was their own recollection that this is what they had been told by Bryon. This evidence is hearsay. Bryon denies making such statements, and denies that Keith has ever been violent to Betty or to Bryon. I accept Bryon's evidence. Bryon has no obvious motive to lie in his evidence. On the contrary, the plaintiffs' success on the undue influence claim would be of primary financial benefit to Bryon as the presumptive sole beneficiary of Betty's estate.

[116] The allegations of abuse are also inconsistent with the objective evidence adduced at trial. As I have already reviewed, the records from Stuart Lake Hospital did not indicate any signs of physical abuse at the time of Betty's admission. Betty did not report abuse by Keith to anyone at Stuart Lake Hospital, or to either Mr. Douglas or Ms. Newman. Betty did have concerns about Keith's drinking, and had no difficulty conveying that to hospital staff and to Ms. Newman. However, she said nothing about abuse.

[117] The plaintiffs both agreed in their evidence that Betty never reported to them that Keith was abusive, and they never witnessed abuse.

[118] To extent that the plaintiffs' rely on their characterization of Keith as a generally domineering and bullying personality in support of the allegation of abuse, this simply illustrates the impressionistic and speculative nature of their case. Although the plaintiffs, and the family members who testified on their behalf, repeatedly characterize Keith's behaviour as aggressive and bullying, the only example anyone could cite when asked for particulars was the Christmas incident.

[119] Even if one accepts the plaintiffs' version of the Christmas incident, I do not find that a single incident of family drama that occurred 30 years prior to Betty's death provides any support for the serious allegation that Keith was physically abusive to Betty. I do not accept, as the plaintiffs assert, that a straight line can be drawn from the Christmas incident in the mid-1980s to Betty's admission to hospital in November 2013. In the meantime, Keith lived with his parents without apparent incident for decades, and was a partner with them in the family business. While Keith obviously struggled with alcohol abuse, and he was admittedly incapable of providing the level of personal care to Betty that Bryon provided, the evidence is clear, and I find, that Keith contributed in different ways. He contributed time and labour to the renovation of the family residences, including ensuring that the Heavenor Drive residence was wheelchair friendly, as well as to the family business. He provided companionship and support to Betty as her health declined.

[120] The plaintiffs' theory that Betty was being monitored by Keith in her telephone contact with the plaintiffs is further speculation. Keith and Bryon both testified that Betty was free to speak to and visit with anyone she chose, and that Betty was a forceful personality who would not be shy about exercising such a choice. I accept that characterization. It is generally consistent with the evidence of all witnesses that Betty was intellectually curious and not afraid to state an opinion. Furthermore, it is not evident to me why, if the plaintiffs were concerned that Keith was physically abusive and restricting Betty's access to them, they allowed Betty to reside with Keith for decades without oversight.

[121] Finally, I note that the plaintiffs did not advance an allegation of undue influence until the eve of trial. The plaintiffs applied to amend their pleadings on the first day of trial, and explained the delay by reference to the timing of their receipt of the Stuart Lake Hospital records. On the pleadings amendment motion, the plaintiffs argued that the records provided "clear evidence" of Keith's dominant relationship with Betty and the steps he took to influence her. The plaintiffs placed particular reliance on a record from December 19, 2013 that relate to Keith's temporary removal of Betty from the hospital. The record includes a statement from a hospital physician expressing concern that Betty may be "taken advantage of" by Keith given the history of previous neglect.

[122] In their final argument, the plaintiffs did not seriously press the point that the Stuart Lake Hospital records established undue influence. The concern expressed by the physician on December 19, 2013 is in the nature of an opinion rather than a statement of fact. The author of the report was not called to testify at trial. In any event, even if statements of opinion contained in the Stuart Lake Hospital records were admissible for their truth, it is difficult to see how they would advance the plaintiffs' claim. The hospital records also suggest that Keith apologized for his behaviour, and that Betty strongly expressed to hospital staff that she felt comfortable with Keith and Bryon and wanted to stay with them over Christmas, which she was permitted to do.

[123] The fact that the plaintiffs did not consider that they had sufficient evidence to pursue a claim of undue influence prior to receiving the hospital records simply underscores the tenuous nature of the claim.

[124] In my view, the evidence does not establish that the potential for domination was inherent in the relationship between Keith and Betty. As I have already reviewed, Betty was consistently described by all witnesses who testified at trial as determined, outspoken and independent. While her physical health failed in the years leading to her death, the evidence is that she remained mentally sharp until the end. Betty had no apparent difficulty voicing her displeasure with Keith's drinking to others, including Bryon, hospital staff, and Ms. Newman. She was also capable of acting on her displeasure, for example taking steps to amend her will to replace Keith with Bryon as her beneficiary and Power of Attorney.

[125] While it is true that Betty depended on Keith, and Bryon, after she became unable to walk, that fact in my view does not in itself establish that a potential for domination inhered in their relationship. Betty continued to live an active life, including active participation in the family business, even after her mobility became impaired. This was in large part due to the efforts of Bryon and Keith.

[126] The plaintiffs' claim of undue influence generally ignores the role that Bryon played in Betty's life. It is impossible to conceive that Keith could have been the abusive, domineering son to Betty that the plaintiffs allege without intervention, or at least detection, by Bryon. As I have already noted, Bryon has no motive to cover for Keith as Bryon stands to gain the most from the plaintiffs' success on the allegation of undue influence. I reject the plaintiffs' suggestion that Bryon is also "under Keith's thumb" as nothing more than speculation that is ungrounded in the evidence. I found Bryon to be a thoughtful and articulate witness who was able to express in clear and compelling terms his close relationship with Betty and Keith over the years.

[127] In my view, the evidence supports a finding that Keith had a close and loving relationship with Betty, with whom he lived for most of his adult life. Keith's issues with alcohol have, on a cyclical basis, impacted his relationship with Betty, who

obviously disapproved of Keith's drinking. However, there is no evidence that Keith had the ability to dominate the will of Betty "whether through manipulation, coercion, or outright but subtle abuse of power": *Geffen* at 377.

[128] Accordingly, I find that the plaintiffs have not established that the presumption of undue influence arises in this case.

Has the presumption been rebutted?

[129] In light of my conclusion that the presumption of undue influence does not arise on the facts of this case, it is not strictly necessary for me to address the second stage of the inquiry: whether the presumption has been rebutted. However, for the purpose of completeness I will state my reasons for concluding that a presumption of undue influence, if one in fact had arisen, has been rebutted.

[130] I have already reviewed (at paras. 60-76) the evidence of Mr. Douglas of his discussions with Betty around the conveyance of the Hillcrest Apartments. By way of brief recap, Mr. Douglas met with Betty at least three times alone and in-person; the possibility of conveying the property into a joint tenancy arose did not come from Keith but from Betty's stated desire to disinherit the plaintiffs; and Betty's advice to Mr. Douglas was that Keith already had a 50% beneficial ownership in the Hillcrest Apartments because of his contributions over time.

[131] The plaintiffs say that I should view Mr. Douglas' evidence with suspicion because his notes of his meeting with Betty do not reflect the advice that Keith had a 50% beneficial interest in the property. The plaintiffs say that Mr. Douglas offered no reasonable explanation for his ability to recall the details of his discussions with Betty after six years when there are no notes to file detailing the discussion.

[132] I do not accept the plaintiffs' criticism of Mr. Douglas' ability to recall his discussion with Betty about Keith's beneficial interest without the assistance of contemporaneous notes. First, Mr. Douglas did have a reasonable explanation, which is that the discussion of Keith's contribution to the Hillcrest Apartment stood out to him because it is what drove the entire conveyance. Second, the plaintiffs

accept that Keith held a beneficial interest in the Hillcrest Apartments so Mr. Douglas' recollection is consistent with the undisputed facts of this case. Third, the plaintiffs' submission implicitly accuses Mr. Douglas not simply of error in his evidence but of deliberate fabrication. I reject any such suggestion. I found Mr. Douglas to be a forthright witness who testified to events impartially and to the best of his recollection.

[133] I accept Mr. Douglas' evidence and find that he advised Betty about the possibility of a transfer of the Hillcrest Properties into joint tenancy after Betty informed Mr. Douglas of Keith's beneficial interest in the property.

[134] The plaintiffs alternatively argue that Mr. Douglas' advice to Betty was inadequate to rebut the presumption of undue influence because he was in a position of conflict and could not represent both Betty and Keith in the transaction. The plaintiffs say that Mr. Douglas did not act in accordance with Appendix C of the *Code of Professional Conduct for British Columbia* which governs the conflict of interest inherent in acting for both parties in a real estate transaction.

[135] Whether or not Mr. Douglas was compliant with his *Code* obligation, a point on which I express no opinion, is not the issue. The issue is whether Betty received adequate independent legal advice for the purposes of establishing that she understood the transaction and entered into it freely and voluntarily: *Modonese* at para. 123. This is a situation-specific inquiry. Even imperfect independent legal advice may be sufficient to rebut the presumption in conjunction with other evidence that the transfer was in accordance with the transferor's wishes: *Modonese* at para. 124; *Geffen* at 389-90.

[136] The plaintiffs point to the statement in Betty's 2014 Will that she "did not intend to create a joint tenancy" with Keith in the Hillcrest Apartments as evidence that the transfer was the result of actual influence by Keith. In my view the evidence does not support such a conclusion.

[137] The context for the 2014 Will must be considered. As of June 30, 2014, Keith was in the midst of a serious relapse into alcohol abuse that would eventually lead to his hospitalization. In her 2010 Will, Betty had appointed Keith as her Power of Attorney and left her entire estate to Keith, with the proviso that she trusted Keith to provide maintenance and support for Bryon throughout his lifetime. By June 2014, Betty no longer had such trust in Keith because of his drinking. Betty therefore addressed the situation by replacing Keith with Bryon as the sole beneficiary and Betty's Power of Attorney.

[138] Bryon and Keith have both testified that Betty had a change of heart after Keith entered rehab in the summer of 2014. Although Ms. Newman had prepared the Form A to sever the joint tenancy in the Hillcrest Apartments and create a tenancy in common, she was subsequently advised by Bryon (not Keith) that the family had worked the situation out and Betty no longer wished to proceed. There is nothing in the evidence to suggest that Betty was incapable of instructing Ms. Newman to sever the joint tenancy if that had been Betty's wish. Betty was living at Stuart Lake Hospital at the time, and not with Keith.

[139] In summary, I conclude that if, contrary to my primary finding, a presumption of undue influence does arise on the facts of this case then it has been rebutted by evidence that establishes that Keith exercised no actual influence over Betty. The evidence includes the fact that Keith was not living with Betty at the time of the transfer, the evidence of Mr. Douglas that the idea of a joint tenancy emerged from his discussions with Betty and did not originate with Keith, and the evidence I have already reviewed that Betty was competent to, and did, exercise independent judgment in her estate planning decisions. There is also the evidence, which the plaintiffs do not contest, that Keith had a 50% beneficial interest in the Hillcrest Apartments at the time of the transfer.

[140] I therefore dismiss the plaintiffs' claim based on undue influence.

Issue II: The plaintiffs' application to vary Betty's 2014 Will

Legal Framework

[141] Betty died after Part 4 of *WESA* came into force on March 31, 2014. As such, the plaintiffs' application for a variation of Betty's 2014 Will is governed by s. 60 of *WESA*, which states:

> 60 Despite any law or enactment to the contrary, if a will-maker dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the will-maker's spouse or children, the court may, in a proceeding by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the will-maker's estate for the spouse or children.

[142] Section 60 of *WESA* is substantially the same terms as s. 2 of the former *Wills Variation Act*, R.S.B.C. 1996, c. 490, and therefore wills variation cases decided under the *WVA* are also applicable under *WESA*.

[143] The leading decision continues to be the judgment of the Supreme Court of Canada in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 [*Tataryn*]. As held in *Tataryn*, the primary statutory objective of the *WVA* is the adequate, just and equitable provision for a testator's spouse and children. This does not mean that testamentary autonomy is unimportant. However, on a wills variation application, a balance must be maintained between testamentary autonomy and the legislative requirement that adequate, just and equitable provision be made for a testator's spouse and children.

[144] In *Tataryn*, the Court held that what is adequate, just and equitable is to be determined objectively by reference to contemporary legal and moral norms. Legal norms are the obligations that the law would have imposed on the testator to provide for a spouse or child during the testator's lifetime. Moral norms are grounded in "society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards": *Tataryn* at 820-821.

[145] The Court in *Tataryn* noted (at 822-823) that although the moral claim of independent adult children may be "more tenuous" than that of a spouse or dependent child, if the size of the estate permits and in the absence of circumstances negating an obligation, some provision for adult children should be made by a testator.

[146] A testator's moral obligation may be extinguished in situations where there has been a lengthy estrangement. As stated by our Court of Appeal in *Pryce v. Lypchuk Estate* (1987), 11 B.C.L.R. (2d) 371 (C.A.) at p. 381:

> But the moral duty imposed by the Act does not require a testator who has been rejected by a member of his family to ignore the rejection, nor does it require that all family members be treated equally, even when all are in need and the estate is small. If the members of the family have, for their parts, treated the testator either more considerately or less considerately, or if some of them are less well suited than others for the "battle of life", or if the testator has made gifts to family members during their lifetimes, then the moral duty of the testator may be discharged or depleted. The testator must be judicious; he need not be impervious.

[147] In *Dunsdon v. Dunsdon*, 2012 BCSC 1274 [*Dunsdon*] at para. 134, Madam Justice Ballance summarized considerations relevant to the existence and strength of a testator's moral duty to independent children:

> * 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: …

[148] The court must examine the reasons why a spouse or child was disinherited to determine if they were valid and rational. Validity requires the reasons to be based

on true facts, and rationality refers to a logical connection between the disinheritance and the reasons stated for it: *Kong v. Kong*, 2015 BCSC 1669 at para. 72.

[149] The date of the testator's death is the appropriate date at which to assess the value of the estate, and to determine whether the testator has made adequate provision for a spouse or child: *Peterson v. Welwood*, 2018 BCSC 1379 at para. 191; *Eckford v. Vanderwood*, 2014 BCCA 261 [*Eckford*] at para. 50. The court must consider circumstances existing at the time of the testator's death as well as those that were reasonable foreseeable at the time of death: *Eckford* at paras. 50-53.

Application to the facts

[150] The question to be answered is whether, having regard to all the circumstances, Betty's specific bequests to the plaintiffs in her 2014 Will fall within the range of adequate provision that would have been made by a judicious parent. The adequacy of the provision must be assessed objectively by reference to contemporary community standards.

[151] The plaintiffs do not allege that Betty owed them any legal duty to make adequate and just provision to them, rather their claim is premised on the existence of a moral obligation. The plaintiffs seek a variation of Betty's 2014 Will so that each of them receive 25% of the residue of Betty's estate and Bryon retains 50%.

[152] I will assess the existence and strength of the plaintiffs' moral claim by reference to the factors listed by Madam Justice Ballance in *Dunsdon*.

Relationship between Betty and the plaintiffs

[153] I have already reviewed in some detail the relationship between the plaintiffs and Betty over time. For many years prior to Betty's death, family relationships were strained by the weight of the Miranda incident. To what extent is a matter of dispute between the parties.

[154] In my view, both sides had a tendency to either exaggerate or minimize the impact of the Miranda incident, depending on their perspectives.

[155] The plaintiffs' evidence that Betty was happy to continue on in her relationship with them as before is implausible given the gravity of the allegation against Betty and the impact it must have had on her. This is especially so considering that Barbara's safety plan involved Betty never being alone with her grandchildren. I note that Valerie's evidence is that Betty tried to raise the Miranda incident with her as recently as 2012, which is the last time that Valerie ever saw Betty in person. The fact that Betty was still raising the Miranda incident with Valerie 30 years after-the-fact speaks to the significance it must have had for Betty.

[156] I do not accept the plaintiffs' evidence that they did not visit Betty due to their fear of Keith. This explanation appeared to me to be a post-*facto* justification that defies logic and common sense. Barbara and Valerie could have arranged a visit with Betty together, they could have picked Betty up and brought her to their own homes for a visit, they could have arranged a visit during one of Keith's frequent absences when he was working on renovation project. It is impossible to avoid the inference that the Miranda incident was a key factor in the limited relationship between Betty and both plaintiffs, and particularly Barbara, in the last 15 years of Betty's life.

[157] At the same time, the evidence does not support Keith and Bryon's contention that the Miranda incident "blew up the family" in the sense that it permanently ended Betty's relationship with the plaintiffs. It is an overstatement to suggest that there was a complete estrangement. The defendants concede that the plaintiffs had frequent telephone contact with Betty, and that they exchanged gifts and cards. When Bryon was concerned about leaving Betty in Keith's care, it was Valerie that he turned to.

[158] To the extent that on a wills variation application it is relevant to consider who is at fault for an estrangement, I find it impossible to attribute fault in the circumstances of this case. The Miranda incident raised strong emotions on all

sides. Barbara was understandably concerned to protect her daughter as her first priority, and Valerie wished to provide support to her sister. Betty's reaction on being accused of such an egregious act is also understandable. It was obviously difficult for Betty to carry on a close relationship with her daughters with such an allegation unresolved.

[159] In the end, Barbara, Valerie and Betty did their best to maintain a relationship without having achieved closure on the Miranda incident. Barbara and Valerie's efforts to remain in contact with Betty, even if on a limited basis, continued up until the time of her death. The fact that they were motivated to do so in such difficult family circumstances is a factor that strengthens Betty's moral duty to make adequate provision for Barbara and Valerie in her Will.

Size of the estate

[160] The value of Betty's estate at the time of her death was $434,000. While the plaintiffs say that an estate of this size is sufficient to permit adequate provision to the plaintiffs, Bryon's personal and financial circumstances must be considered in the balance in making such an assessment. Any provision to the plaintiffs is at Bryon's expense. I will return to this point in addressing the factor of competing beneficiaries.

Contributions and reasonably held expectations of the plaintiffs

[161] The plaintiffs did not make any contributions to Betty's estate, beyond the $10,000 loan by Valerie and Rod in 2006 that was eventually repaid with 20% interest. They also did not provide assistance to Betty with her personal care, even after her mobility became impaired in or about 2005.

[162] Nonetheless, the plaintiffs say that they reasonably expected that property would devolve to them on Betty's death. They both describe being hurt and surprised on learning that they had been disinherited. The plaintiffs considered it particularly unfair that the reasons Betty gave for their disinheritance were untrue. In this sense, the factor of the plaintiffs' reasonably held expectation overlaps with the

factor of Betty's reasons for the disinheritance. Put another way, if Betty's reasons for the disinheritance are true, then the plaintiffs' expectation of an inheritance may not be reasonably held.

[163] I will therefore return to this issue in addressing Betty's reasons for disinheritance.

The plaintiffs' personal circumstances and gifts outside the Will

[164] I have reviewed (at paras. 13-14) the plaintiffs' personal circumstances, which existed as of the date of Betty's death. Both have limited resources as they enter retirement. Barbara and David have no assets and live off their combined monthly pension income. Valerie and Rod own a home in Canmore, and have an estimated net worth of $750,000. They plan to rely on their RRSP income and government pensions in their retirement. Neither of the plaintiffs have received any gifts from Betty outside of the Will.

Betty's reasons for the disinheritance

[165] Betty's reasons for disinheriting Barbara, as stated in Betty's 2014 Will, are that: Barbara has "never been involved"; Betty has not seen Barbara for 10 years; and when it was Betty's 90th birthday Barbara went to Europe instead of attending Betty's birthday party. Betty's reason for disinheriting Valerie is that Valerie "has not been involved".

[166] The plaintiffs say that Betty's stated reasons for the disinheritance are not valid and rational. Barbara denies that she went to Europe instead of attending Betty's 90th birthday party, and says that she does not recall ever receiving an invitation to the party. I accept Barbara's evidence in this regard. There is no evidence to the contrary, and certainly no evidence that Barbara was in Europe at a time that coincided with Betty's 90th birthday.

[167] The plaintiffs also deny that they were uninvolved in Betty's life. They say that they remained involved up to the time of Betty's death through phone calls, the exchange of cards and gifts, and (in Valerie's case) in-person visits. As I have

already noted, the defendants do not dispute that there was consistent contact between the plaintiffs and Betty, even if the relationship was strained by the Miranda incident.

[168] Bryon and Keith suggest that the reference in Betty's will was to the plaintiffs being uninvolved in the family business. It is not apparent to me why one would interpret the reference in that manner. The fact that the plaintiffs were not involved in the family business is, to my mind, irrelevant to the question of whether they should share in Betty's estate.

[169] I agree with the plaintiffs that Betty's stated reasons in her Will for disinheriting the plaintiffs are not entirely valid and rational, although there is some truth in Betty's reasons for disinheriting Barbara, in particular. It is true that Barbara had not visited Betty for 10 years. Valerie certainly had a greater involvement than Barbara in Betty's life after the Miranda incident. While it is not strictly necessary for me to assess the validity of Betty's reasons for disinheriting Keith since Keith does not apply for a variation of the Will, I note that Betty's statement that she did not intend to create a joint tenancy with Keith is of questionable veracity. In drafting her 2014 Will, Betty seemed primarily motivated to justify leaving the entire residue of her estate to Bryon to the exclusion of her other children. Betty's desire to justify the disposition led to a lack of precision in her articulated reasons for doing so.

[170] I conclude that Betty's stated reasons for disinheriting the plaintiffs do not, on their own, justify the negation of Betty's moral duty to the plaintiffs. In my view, the plaintiffs had a reasonably held expectation that they would receive some form of inheritance on Betty's death.

Competing beneficiaries

[171] There is a competing beneficiary in this case, namely Bryon. Any redistribution of Betty's estate would be to Bryon's disadvantage. Bryon's personal, financial circumstances are much more restrictive than that of the plaintiffs. As of the time of Betty's death, Bryon lived off a disability pension that provided him with an annual income of $10,912. As noted, Bryon has lived with his parents and Keith for

much of his adult life. It is uncertain how Bryon could financially survive without the support of his inheritance from Betty, and from his brother Keith.

Conclusion on WESA claim

[172] *Tataryn* instructs that, if the size of the estate permits and there are no circumstances negating an obligation, a testator should make some provision for adult children in a will. In the present case, the size of Betty's estate does permit some provision for the plaintiffs, and I conclude that there are no circumstances which would negate Betty's moral obligation to the plaintiffs. In particular, the evidence does not establish any wrongful conduct on the part of the plaintiffs, or an estrangement with Betty that would justify their complete disinheritance.

[173] For these reasons, I find that Betty's Will does not make adequate provision for either Barbara or Valerie.

[174] The question then arises as to what is an appropriate level of adjustment. The required adjustment must respect, to the extent possible, the principle of testamentary freedom. As Madam Justice Ballance stated in *McBride v. Voth*, 2010 BCSC 443 at para. 125:

> [125] …Testamentary freedom must therefore 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 application of the *Act*.

[175] In determining the appropriate level of adjustment, I place significant weight on the competing moral claim of Bryon. Any adjustment in favour of the plaintiffs will be to Bryon's detriment. The plaintiffs do not contest that Betty had valid reasons to favour Bryon in the distribution of her estate. He had been Betty's personal caregiver, in addition to Willie's, for many years before her death. The job was an all-consuming one for Bryon, and his fulfillment of the role gave Betty a quality of life she would not otherwise have enjoyed for the last decade of her life.

[176] While I have found that Betty's moral duty to the plaintiffs was not negated by their partial estrangement, it is relevant to also consider the strained nature of the

relationship between Betty and the plaintiffs. By way of example, while Bryon cared for Betty around the clock for the last decade of her life, Valerie's in-person contact with Betty over the same period was limited to short visits every other year while Barbara did not visit at all. Neither Barbara nor Valerie visited Betty as her health deteriorated in the last three years of her life.

[177] At the time of her death, Betty would have been acutely aware of Bryon's disabilities and his restricted financial situation. It is clear from the evidence that Betty was strongly motivated to ensure that Bryon would receive some measure of financial security as a "reward" for the assistance he provided to Betty and Willie throughout their lives.

[178] In my view, the adjustment to Betty's Will that is proposed by the plaintiffs – with each receiving 25% of the residue of the estate – does not sufficiently balance the principle of testamentary freedom. Betty had valid and rational reasons for favouring Bryon, and those reasons should be respected to the extent possible in any adjustment to Betty's will.

[179] I conclude, having regard to the principles set out in *Tataryn* and the factors enumerated in *Dunsdon*, that a distribution of 5% of the residue of Betty's estate to Barbara and 10% to Valerie would be an "adequate, just and equitable" provision. The evidence is clear that Valerie had a closer relationship with Betty than Barbara, thus strengthening her moral claim to a portion of Betty's estate. Bryon will retain 85% of the residue of the estate, in keeping with Betty's testamentary wishes that Bryon should benefit from his years of assistance to Betty and Willie.

CONCLUSION/ORDERS

[180] I dismiss the plaintiffs' claim based on undue influence.

[181] Pursuant to s. 60 of *WESA*, I order a variation of the 2014 Will so that the residue of Betty's estate is divided 5% to Barbara, 10% to Valerie, and 85% to Bryon.

[182] If the parties are unable to agree on costs, they are at liberty to provide a further written submission on costs, not to exceed three pages, within 30 days of the date of this judgment.

"Horsman J."