BY R. TREVOR TODD
DISINHERITED.COM

WILLS & ESTATES

R. Trevor Todd is one of the province's most esteemed estate litigation lawyers. He has spent more than 40 years helping the disinherited contest wills and transfers – and win. From his Kerrisdale office, which looks more like an eclectic art gallery than a lawyer's office, Trevor empowers claimants and restores dignity to families across BC. Although his work is renowned, Trevor is not a suit n' tie stuffy lawyer type. He is, in fact, the very opposite. He is an outspoken advocate for the disinherited. He is a world traveller (115 countries and counting) who is approachable, creative, and a fan of pushing buttons, finding needles in haystacks, and doling out advice for free. He is a mentor to young entrepreneurs and an art buff who supports starving artists the world over. He has an eye for talent and a heart for giving back. Trevor is deeply committed to his clients and his craft. He is a Past President of the Trial Lawyers Association of BC, a regular contributor to legal publications, and a sought-after public speaker.

BROKEN PROMISES AND RELIANCE THEREON

Many estate disputes arise out of alleged "broken promises" where one person has promised to provide for another an interest in his or her real property in a certain manner, and the promisee has relied and acted on that promise but has been disappointed.

In such cases, the promisor can be held to account if the promisee successfully pursues a claim arising under the equitable law of proprietary estoppel.

Proprietary estoppel should not be confused with the related equitable doctrine of promissory estoppel, which applies to promises in general (i.e. not necessarily to promises in relation to real property). It is noteworthy that the doctrine of promissory estoppel in British Columbia can only be used as a shield, and not a sword, i.e. can only be used as a defence, and not a cause of action.

ELEMENTS OF PROPRIETARY ESTOPPEL

As set out *Burge v. Emmonds Estate*, 2017 BCSC 1526, in order to succeed in a claim of proprietary estoppel relating to a particular right or property, the claimant must prove four things, as follows:

1. that the claim is brought in a proper context;
2. that the other party made a representation to the claimant that the right or property would be granted;
3. that the claimant reasonably relied on that representation; and
4. that it would be unconscionable and unjust in all the circumstances for the other party to go back on the assumption they allowed the claimant to make.

With respect to the fourth element, the court in *Idle-O Apartments Inc. v. Charlyn Investments Ltd.*, 2013 BCSC 2158, rev'd on other grounds, 2014 BCCA 451, stated as follows at para 98:

> Furthermore, although it is broadly stated, a claimant cannot simply assert that it would be unfair for the other party to rely on their strict legal rights. Something more is required. The claimant must demonstrate *why* it would be unconscionable or unfair for the other party to be allowed to rely on and enforce its legal rights. In that regard, then, it would "rarely, if ever, be unconscionable to insist on strict legal rights" in the absence of any detriment or prejudice to the claimant. . . .Thus, the claimant typically must demonstrate that it will suffer some detriment if the other party is allowed to rely on its strict legal rights.

COWPER-SMITH V. MORGAN

The law was clarified and strengthened by the decision of *Cowper-Smith v. Morgan*, 2017 SCC 61, confirming that broken promises relating to real property that were relied upon may be legally enforceable through the law of proprietary estoppel.

The facts of *Cowper-Smith v Morgan*, the leading proprietary estoppel case, are interesting and perhaps even "common". The promise made by the sister and relied upon by her brother is a scenario that might very well be reasonably agreed upon between siblings. The facts are as follows:

1. An elderly mother had three children, being two adult sons, N and M, and an adult daughter, G.
2. In 2001, the mother made a declaration of trust, transferring her house and other assets into her own and G's names in joint tenancy. Pursuant to the declaration of trust, the mother was to be the sole beneficiary of the trust until her death, upon which the house and other assets would pass absolutely to G. The mother subsequently

made a new will, providing for an equal division of her estate among the three children, but the declaration of trust was never changed.

3. In 2007, M moved from England to look after the mother on G's assurance that the mother's estate would be divided equally among the three children, and that G would sell to M her one-third interest in the house.
4. M looked after his mother until her death in 2010.
5. After the mother's death, G took no steps to divide the estate or to sell her one-third interest in the house to M, as promised.

N and M brought a successful court action in the Supreme Court of British Columbia, which granted orders declaring that G held the mother's house and investments in trust for the estate, to be distributed equally among the three children in accordance with the mother's last will.

The court further declared that on the basis of proprietary estoppel, M was entitled to purchase G's one-third interest in the house. The trial judge held that M had acted to his detriment in moving from England to look after the mother, relying on G's agreement to his conditions for the move, and that in doing so M acted reasonably. The trial judge also held that M's right to purchase G's one-third interest in the house was the minimum relief required to satisfy equity.

G appealed to the British Columbia Court of Appeal. That court upheld the trial judge's conclusions on all of the issues except proprietary estoppel, on which it split, the majority holding that since G had owned no interest in the property, proprietary estoppel could not arise. M appealed on that issue to the Supreme Court of Canada, which agreed with the trial judge, finding, inter alia, that reasonableness is circumstantial, and it would be out of step with equity's purpose to make a hard rule that reliance on a promise by a party with no present interest in property can never be reasonable.

Of legal note, G did not own any interest in the mother's estate at the time of M's reliance but this was not a barrier to the success of the proprietary estoppel claim. As soon as G received an interest in the property, the proprietary estoppel claim attaches to G's interest in the property.

EQUITABLE BASIS OF PROPRIETARY ESTOPPEL

As set out in *Cowper-Smith*, to establish proprietary estoppel, one must first establish an equity of the kind that proprietary estoppel protects. An equity arises when:

1. A representation or assurance is made to the claimant, on the basis of which the claimant expects that he will enjoy some right or benefit over property;
2. The claimant relies on that expectation by doing or refraining from doing something, and his or her reliance is reasonable in all the circumstances; and
3. The claimant suffers a detriment as a result of his reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on his or her word.

The representation or assurance may be express or implied. An equity that has not yet been realized arises at the time of a detrimental reliance on a representation or assurance.

When the party responsible for the representation or assurance possesses an interest in the property sufficient to fulfill the claimant's expectation, proprietary estoppel may give effect to the equity by making the representation or assurance binding.

THE REMEDY

Where a claimant has established a case of proprietary estoppel, the court has considerable discretion in crafting a remedy that suits the circumstances.

However, a successful claimant will be entitled only to the minimum relief necessary to satisfy the equity in his or her favour, and cannot obtain more than he or she expected.

There must be proportionality between the expectation and the detriment. Proprietary estoppel claims concern promises which, since they are unsupported by consideration, are initially revocable.

OTHER FACT SITUATIONS

> Proprietary estoppel claims need not be limited in their application to estate claims. There are a myriad of factual situations where promises are made in relation to real property and a person acts on the promises to his or her detriment.

A "classic" example occurred in *Linde v. Linde*, 2019 BCSC 1586. In that case, the parents promised to leave the family farm to their son, who worked the farm for 50 years for minimal wages and restricted his career path based on repeated assurances that he would inherit the farm on his parents' death. After a falling out with the son, the parents transferred the property to a third party. In an action brought by the son, the court set aside the transfer, finding that the son had succeeded in his claim for proprietary estoppel.

A further example occurred in *Burge v. Emmonds Estate*, where the claim for proprietary estoppel arose in a dispute over the interpretation of a mediation agreement and whether it created an easement over a piece of real property.

CONCLUSION

Not all promises made by one individual to provide an interest in real property for another are enforceable. It is the promisee's detrimental reliance on the promise which makes it irrevocable. Once that occurs, there is simply no question of the promisor changing his or her mind.

The detriment need not consist of the expenditure of money or another quantifiable financial detriment, so long as it is something substantial. V