

**SUPREME COURT OF CANADA**

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| **Citation:** Cowper-Smith *v.* Morgan, 2017 SCC 61, [2017] 2 S.C.R. 754 | **Appeal Heard:** May 26, 2017  **Judgment Rendered:** December 14, 2017  **Docket:** 37120 |

Between:

Max Wayne Cowper-Smith

Appellant

and

Gloria Lynn Morgan and Gloria Lynn Morgan Executor of the Will of the Late Elizabeth Flora Cowper-Smith, Deceased

Respondent

**Coram:** McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

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| **Reasons for Judgment:**  (paras. 1 to 60) | McLachlin C.J. (Abella, Moldaver, Karakatsanis, Wagner, Gascon and Rowe JJ. concurring) |

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| **Partially Concurring Reasons:**  (paras. 61 to 72) | Brown J. |

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| **Partially Concurring Reasons:**  (paras. 73 to 83) | Côté J. |

Cowper-Smith *v.* Morgan, 2017 SCC 61, [2017] 2 S.C.R. 754

Max Wayne Cowper‑Smith Appellant

v.

Gloria Lynn Morgan and Gloria Lynn Morgan Executor of

the Will of the Late Elizabeth Flora Cowper‑Smith, Deceased Respondent

**Indexed as:** Cowper‑Smith ***v.*** Morgan

2017 SCC 61

File No.: 37120.

2017: May 26; 2017: December 14.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

on appeal from the court of appeal for british columbia

*Wills and estates — Wills — Property — Equity — Proprietary estoppel — Remedies — Claimant relying to his detriment on promises made by co‑beneficiary of their mother’s estate to transfer co‑beneficiary’s interest in property to claimant — Whether trial judge erred in concluding that proprietary estoppel operated to enforce promisor’s promise — Whether evidence supports trial judge’s conclusion that elements of proprietary estoppel were met — Whether promisor’s lack of ownership in property at time promise was made defeats claimant’s equitable claim — What is appropriate remedy.*

As early as 1992, E and A made it clear that after their deaths, their property would be divided equally among their three children, G, M and N. After A’s death however, E’s estate planning changed dramatically: she transferred title to the family home in Victoria and all of her investments into joint ownership with G, indicating in a trust declaration that G would be entitled absolutely to those assets upon her death. Despite the fact that the trust declaration and joint ownership, if valid, assured that the estate would be virtually devoid of assets, E also executed a new will that appointed G as executor and provided that the estate would be divided equally among the three children.

In 2005, when E could no longer live on her own, M agreed to move back to Victoria to care for her, giving up his employment income, his cottage lease, his contacts with his children and his social life, but only after G agreed that M would be able to live in the family home permanently and eventually acquire G’s one‑third interest in the property. After E’s death, the trust declaration came to light and in 2011, G announced her plans to sell the family home, in which M was still living. M and N sought an order setting aside the trust declaration as the product of G’s undue influence over E and declaring that G held the property and investments in trust for E’s estate to be divided equally between the three children in accordance with E’s most recent will. They also claimed, on the basis of proprietary estoppel, that M was entitled to purchase G’s one‑third interest in the property. The brothers succeeded at trial, where the trial judge found that G had not rebutted the presumptions of undue influence and resulting trust, and declared that the property belonged to E’s estate. The Court of Appeal unanimously upheld the trial judge’s conclusions with respect to undue influence and resulting trust, but split on proprietary estoppel. The majority held that since G owned no interest in the property at the time that she made assurances to M, proprietary estoppel could not arise. M appealed on the issue of proprietary estoppel.

Held: The appeal should be allowed.

*Per* McLachlinC.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon and Rowe JJ.: The trial judge did not err in concluding that proprietary estoppel operates to enforce G’s promise. Since ownership at the time the representation or assurance was relied on is not a requirement of a proprietary estoppel claim, the fact that G did not have an interest in the property at the time M relied on her promise does not negate G’s obligation to keep her promise.

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 reliance is reasonable in all of 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 her word and insist on her strict legal rights. When the party responsible for the representation or assurance possesses an interest in the property sufficient to fulfill the claimant’s expectation, proprietary estoppel attaches to that interest and protects the equity by making the representation or assurance binding. It is not necessary that the party responsible for the expectation own an interest in the property at the time of the claimant’s reliance — when the party responsible for the expectation has or acquires sufficient interest in the property, proprietary estoppel will attach to that interest and protect the equity. Whether a claimant’s reliance was reasonable in the circumstances is a question of mixed law and fact. A trial judge’s determination of this point is, absent palpable and overriding error, entitled to deference.

Where a claimant has established proprietary estoppel, the court has considerable discretion in crafting a remedy that suits the circumstances, and an appellate court should not interfere unless the trial judge’s decision evinces an error in principle or is plainly wrong. However, a claimant who establishes the need for proprietary estoppel is entitled only to the minimum relief necessary to satisfy the equity in his favour, and cannot obtain more than he expected. Further, there must be a proportionality between the remedy and the detriment. Courts of equity must strike a balance between vindicating the claimant’s subjective expectations and correcting that detriment.

In the instant case, on the trial judge’s findings, both M and G had clearly understood for well over a decade that E’s estate, including the family home, would be divided equally between her three children upon her death. It was thus sufficiently certain that G would inherit a one‑third interest in the property for her assurance to be taken seriously as one on which M could rely. There is no basis on which to overturn the trial judge’s conclusion that M’s reliance was reasonable. An equity arose in M’s favour when he reasonably relied to his detriment on the expectation that he would be able to acquire G’s one‑third interest in the family home. That equity could not have been protected by proprietary estoppel at the time it arose, because G did not then own an interest in the property. However, proprietary estoppel will attach to G’s interest as soon as she obtains it from the estate. G, as executor, can be ordered to transfer a one‑third interest in the property to each of the estate beneficiaries so that her promise to M may be fulfilled. An *in specie* distribution of shares in the property is not contrary to E’s intent and this Court has the power to direct G to exercise her discretion as executor in a certain manner. With respect to remedy, the minimum necessary to satisfy the equity in M’s favour is an order entitling him to purchase G’s interest in the family home at its fair market value as of the approximate date on which he would reasonably have expected to be able to do so in the first place.

*Per* BrownJ.: There is agreement with the majority that the trial judge did not err in allowing the proprietary estoppel claim, but disagreement regarding the appropriate remedy. An equity sufficient to ground a claim in proprietary estoppel may arise where the promisor does not in fact hold that right or benefit at the time of making the promise, but the equity arises only if and when the promisor obtains the right or benefit that was promised to the claimant, not at the moment of detrimental reliance. Where a promisor’s attainment of the promised right or benefit rests upon the satisfaction of a future contingency, no equity capable of being remedied through proprietary estoppel can arise until that contingency is satisfied. If the promisor does not hold the right or benefit at the time of the promise, an inchoate equity arises in favour of the claimant at the moment of the claimant’s detrimental reliance thereon, but before an equity capable of conferring a proprietary right can be shown to arise, the promisor must gain the promised right or benefit because the promisor cannot grant what he does not have. To qualify as an equity justifying the operation of proprietary estoppel, the equity must be proprietary, because it must be capable of compelling a promisor to relinquish a proprietary right which he or she actually holds.

In this case, the requisite equity will only arise from the moment that G holds the right or benefit that was the subject of her promise to M, that is, from the time this Court orders her to divide the property into equal one‑third interests and to deliver these to the beneficiaries of E’s estate. Therefore, the minimum necessary to satisfy the equity, once it arises, is to permit M to purchase G’s one‑third share of the property as of the date of this Court’s order.

*Per* CôtéJ.: There is agreement with the majority that a proprietary estoppel claim can arise even where a promisor had no ownership interest in the property at the time the promise was made and that a promisee’s reliance is not unreasonable, as a matter of law, solely because the promisor does not own the property at the time the promisee acts, to his or her detriment, in reliance on the promise. Nevertheless, a court cannot order an executor to distribute shares of an estate in a manner that disregards the testator’s express intent for the sole purpose of enabling a beneficiary to make good on her promise to a third party. This principle holds true even where that beneficiary also happens to serve as the estate’s executor.

In the instant case, this Court has no power to order G to exercise her executorial discretion in a particular manner. E’s last will was unambiguous in expressly vesting G with discretion in the administration of her estate and in entrusting her to decide the fate of the property in issue, including whether or not it should be sold. Compelling G to transfer shares of the property to the estate’s beneficiaries is to substitute the Court’s own judgment for that of G in determining how the property should be administered, effectively creating a specific bequest that E herself opted not to make. If G’s duties as executor are truly in conflict with her interests as a beneficiary such that there is a breach of fiduciary duty, the proper remedy is not to order an *in specie* distribution but to replace G as executor. However, if G is ordered to distribute the property *in specie* and compelled to sell her share to M, the sale price should be determined by the value of the property as of the date of this Court’s order.

**Cases Cited**

By McLachlin C.J.

**Considered:** *Thorner v. Major*, [2009] UKHL 18, [2009] 1 W.L.R. 776; **referred to:** *Sabey v. von Hopffgarten Estate*, 2014 BCCA 360, 378 D.L.R. (4th) 64; *Clarke v. Johnson*, 2014 ONCA 237, 371 D.L.R. (4th) 618; *Idle-O Apartments Inc. v. Charlyn Investments Ltd.*, 2014 BCCA 451, [2015] 2 W.W.R. 243; *Scholz v. Scholz*, 2013 BCCA 309, 340 B.C.A.C. 151; *Wolff v. Canada (Attorney General)*, 2017 BCCA 30, 95 B.C.L.R. (5th) 15; *Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co.*, [1981] 1 All E.R. 897; *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.*, [1982] 1 Q.B. 84; *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53; *Crabb v. Arun District Council*, [1975] 3 All E.R. 865; *Willmott v. Barber* (1880), 15 Ch. D. 96; *Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co.*, [1970] S.C.R. 932; *Sohio Petroleum Co. v. Weyburn Security Co.*, [1971] S.C.R. 81; *Sykes v. Rosebery Parklands Development Society*, 2011 BCCA 15, 330 D.L.R. (4th) 84; *Erickson v. Jones*, 2008 BCCA 379, 299 D.L.R. (4th) 465; *Delane Industry Co. v. PCI Properties Corp.*, 2014 BCCA 285, 359 B.C.A.C. 61; *Burgsteden v. Long*, 2014 SKCA 115, 378 D.L.R. (4th) 562; *Eberts v. Carleton Condominium Corp. No. 396* (2000), 136 O.A.C. 317; *Bellton Farms Ltd. v. Campbell*, 2016 NSCA 1, 394 D.L.R. (4th) 262; *Wettstein v. Wettstein*, 1992 CarswellBC 1421 (WL Can.); *Waltons Stores (Interstate) Ltd. v. Maher* (1988), 76 A.L.R. 513; *Walton v. Walton*, E.W.C.A., April 14, 1994; *Gillett v. Holt*, [2001] Ch. 210; *Cobbe v. Yeoman’s Row Management Ltd.*, [2008] UKHL 55, [2008] 1 W.L.R. 1752; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Re Basham (deceased)*, [1987] 1 All E.R. 405; *Watson v. Goldsbrough*, [1986] 1 E.G.L.R. 265; *Re Harris* (1915), 22 D.L.R. 381; *Gunn Estate, Re*, 2010 PECA 13, 200 Nfld. & P.E.I.R. 197; *Staub v. Staub Estate*, 2003 ABCA 122, 226 D.L.R. (4th) 327; *Griffiths v. Williams*, [1978] 2 E.G.L.R. 121; *de Montigny v. Brossard (Succession)*, 2010 SCC 51, [2010] 3 S.C.R. 64; *Jennings v. Rice*, [2002] EWCA Civ. 159, [2003] 1 P. & C.R. 100; *Commonwealth of Australia v. Verwayen* (1990), 170 C.L.R. 394; *Sledmore v. Dalby* (1996), 72 P. & C.R. 196; *Pilcher v. Shoemaker* (1997), 13 R.P.R. (3d) 42; *Ellis v. Eddy Holding Ltd.* (1996), 7 R.P.R. (3d) 70.

By Brown J.

**Considered:** *Southern Pacific Mortgages Ltd. v. Scott*, [2014] UKSC 52, [2015] A.C. 385; **referred to:** *Idle‑O Apartments Inc. v. Charlyn Investments Ltd.*, 2014 BCCA 451, [2015] 2 W.W.R. 243; *Sabey v. von Hopffgarten Estate*, 2014 BCCA 360, 378 D.L.R. (4th) 64; *Crabb v. Arun District Council*, [1976] 1 Ch. 179; *Clarke v. Johnson*, 2014 ONCA 237, 371 D.L.R. (4th) 618; *Tiny (Township) v. Battaglia*, 2013 ONCA 274, 305 O.A.C. 372; *Schwark Estate v. Cutting*, 2010 ONCA 61, 316 D.L.R. (4th) 105; *Thorner v. Major*, [2009] UKHL 18, [2009] 1 W.L.R. 776; *Abbey National Building Society v. Cann*, [1991] 1 A.C. 56; *Yeoman’s Row Management Ltd. v. Cobbe*, [2008] UKHL 55, [2008] 4 All E.R. 713; *Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co.*, [1982] 1 Q.B. 133; *Watson v. Goldsbrough*, [1986] 1 E.G.L.R. 265; *Jennings v. Rice*, [2002] EWCA Civ. 159, [2003] 1 P. & C.R. 100.

By Côté J.

**Referred to:** *Browne v. Moody*, [1936] 4 D.L.R. 1; *National Trust Co. v. Fleury*, [1965] S.C.R. 817; *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807; *Re Burke* (1959), 20 D.L.R. (2d) 396; *Gunn Estate, Re*, 2010 PECA 13, 200 Nfld. & P.E.I.R. 197; *Jackson Estate, Re* (2004), 192 O.A.C. 161; *Re Smith*, [1971] 1 O.R. 584; *Cooper v. Fenwick*, [1994] O.J. No. 2148 (QL).

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APPEAL from a judgment of the British Columbia Court of Appeal (Saunders, Smith and Willcock JJ.A.), 2016 BCCA 200, 400 D.L.R. (4th) 579, 386 B.C.A.C. 287, 667 W.A.C. 287, [2016] 10 W.W.R. 497, 19 E.T.R. (4th) 225, 87 B.C.L.R. (5th) 273, [2016] B.C.J. No. 927 (QL), 2016 CarswellBC 1238 (WL Can.), setting aside in part a decision of Brown J., 2015 BCSC 1170, 10 E.T.R. (4th) 218, [2015] B.C.J. No. 1428 (QL), 2015 CarswellBC 1871 (WL Can.). Appeal allowed.

G. Darren Williams, Ellen Vandergrift and *Moira Dillon*, for the appellant.

Claire E. Hunter and Ryan J. M. Androsoff, for the respondent.

The judgment of McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon and Rowe JJ. was delivered by

1. The Chief Justice — Equity enforces promises that the law does not. This appeal concerns such a promise, part of an arrangement between siblings to provide care for their aging mother. The sister assured the brother that, if he moved back into the family home to do so, he would be able to acquire her share of that property after their mother’s death. The question before us is whether equity — and specifically the doctrine of proprietary estoppel — now binds her to her word.
2. The trial judge concluded that all the elements of proprietary estoppel were established: the sister promised the brother that he would be able to purchase her eventual interest in their mother’s property; the brother reasonably relied on the expectation that he would be able to do so; and, because of the detriment the brother suffered as a result of his reliance, it would be unfair and unjust in the circumstances to permit the sister to resile from her promise. The evidence supports that conclusion.
3. That the sister did not have an interest in the property at the time her brother relied on her promise does not negate her obligation to keep her promise; proprietary estoppel will attach to the sister’s interest in the property as soon as she receives it from their mother’s estate. I would allow the appeal.
4. Facts and Judicial History
5. The Cowper-Smiths of Victoria were not always at odds. Elizabeth and Arthur married in 1945. Together, they raised a daughter, Gloria, and two sons, Max and Nathan. Gloria became a potter and settled with her husband in Victoria. Max practised law in England. Nathan moved to Edmonton, where he worked with abused children on behalf of the Alberta government.
6. Shortly before Arthur died in 1992, he explained to his sons that he and Elizabeth would leave everything to be divided equally between the three children. They intended to avoid family discord. In that, they failed.
7. Gloria first fell out with Nathan, who had moved back home in 2000 after his long-term relationship had ended and he had quit his job in Edmonton. He did work around the house with which Elizabeth seemed satisfied. After visits with Gloria, however, Elizabeth would return agitated, concerned that Nathan intended to take her house from her and troubled by what she said were Nathan’s plans to throw “gay parties” there. In February and April 2001, Nathan received two letters in Gloria’s handwriting. The first of these demanded that Nathan not shout or raise his voice in the home or “entertai[n] Gay Males” at home, among other things. The second announced he was no longer welcome to live with his mother and should move out at once. He returned from an overseas trip in June 2001 to find the locks changed, with his belongings still inside. He broke in. Gloria had the police escort him out. He eventually moved back to Edmonton. When, in 2005, Elizabeth asked Nathan to forgive her for what had happened, he assured her that he did not blame her; he knew the ordeal had been Gloria’s doing.
8. Max was next. In the years following his father’s death, he struggled with financial difficulties and his mental health deteriorated. He turned to alcohol and drugs. His marriage fell apart. After 2000, things improved. A visit to Victoria in 2003 was such a success that he returned later that year and again in 2005. He and Gloria got along well and, when Gloria made it clear that Elizabeth could no longer live on her own, they began to discuss options for their mother’s care. Max eventually agreed to give up his life in England, to move back to Victoria, and to care for their mother and the family home. He did so only after Gloria agreed that Max would be reimbursed for various expenses, have the use of their mother’s car, and, crucially, be able to live in the house permanently and eventually to acquire Gloria’s one-third interest in the same. The arrangement worked until 2009, when Gloria began to back away from her promises. The relationship between the siblings disintegrated, first into acrimony and then into litigation.
9. In June 2001, around the time that Gloria, accompanied by the police, confronted Nathan at the property, Elizabeth’s estate planning changed dramatically. She transferred title to the property and all her investments into joint ownership with Gloria. Pursuant to a “Declaration of Trust”, Gloria would hold her interests in the house and the investments as bare trustee, with Elizabeth as the sole beneficiary, and Gloria would be “entitled . . . absolutely” to both the property and the investments upon her mother’s death. Elizabeth also executed a new will which appointed Gloria as executor and revoked all previous wills. She revoked this will in 2002, when she executed yet another, her last. She again named Gloria as executor but this time provided that her estate would be divided equally between her three children. Neither the trust declaration nor Gloria’s joint ownership of the property and the investments — which, if valid, would have assured that Elizabeth’s estate would be virtually devoid of assets, her last will notwithstanding — was ever changed.
10. Nathan discovered Gloria’s joint ownership of the house in 2005. Gloria assured him that the arrangement was to simplify the administration of their mother’s estate and that he and Max would still each receive a one-third share. She gave Max the same assurance four years later, when he learned that Gloria’s name was on title. Gloria changed her position only in April 2011, when, eight months after Elizabeth’s death, the trust declaration entitling Gloria to Elizabeth’s assets “absolutely” came to light and Gloria announced her plans to put the house, in which Max was still living, on the market.
11. These proceedings ensued. Nathan and Max sought an order setting aside the 2001 trust declaration as the product of Gloria’s undue influence over Elizabeth and declaring that Gloria therefore held the property and investments in trust for Elizabeth’s estate, to be divided equally between the three children in accordance with the 2002 will. They also claimed, on the basis of proprietary estoppel, that Max was entitled to purchase Gloria’s one-third interest in the house.
12. The brothers succeeded at trial: 2015 BCSC 1170, 10 E.T.R. (4th) 218. The trial judge found that Gloria had not rebutted the presumptions of undue influence and resulting trust, and she declared that the property belonged to Elizabeth’s estate. She also held that the elements of proprietary estoppel had been made out. Gloria appealed. The British Columbia Court of Appeal (2016 BCCA 200, 400 D.L.R. (4th) 579) unanimously upheld the trial judge’s conclusions with respect to undue influence and resulting trust, but split on proprietary estoppel. The majority held that, since Gloria owned no interest in the property, proprietary estoppel could not arise. Smith J.A. dissented; she would have dismissed Gloria’s appeal entirely.
13. Max appeals to this Court on the issue of proprietary estoppel. Gloria has not cross-appealed with respect to undue influence or resulting trust.
14. Issues
15. The main question before us is whether the trial judge erred in concluding that proprietary estoppel operates to enforce Gloria’s promise. We must therefore consider the elements of proprietary estoppel and determine whether the evidence supports the trial judge’s conclusion that those elements are met. Specifically, we must decide whether Gloria’s lack of ownership of an interest in the property defeats Max’s claim.
16. If proprietary estoppel may indeed be established, then we must turn to the question of remedy.
17. Analysis
18. 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 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 her word: see *Thorner v. Major*, [2009] UKHL 18, [2009] 1 W.L.R. 776, at para. 29, per Lord Walker; see also *Sabey v. von Hopffgarten Estate*, 2014 BCCA 360, 378 D.L.R. (4th) 64, at para. 30; *Clarke v. Johnson*, 2014 ONCA 237, 371 D.L.R. (4th) 618, at para. 52; *Idle-O Apartments Inc. v. Charlyn Investments Ltd.*, 2014 BCCA 451, [2015] 2 W.W.R. 243, at para. 49; *Scholz v. Scholz*, 2013 BCCA 309, 340 B.C.A.C. 151,at para. 31. The representation or assurance may be express or implied: see *Wolff v. Canada (Attorney General)*, 2017 BCCA 30, 95 B.C.L.R. (5th) 15, at para. 21; *Sabey*, at para. 33; B. MacDougall, *Estoppel* (2012), at p. 446; *Snell’s Equity* (33rd ed. 2015), by J. McGhee, at p. 335.An inchoate equity arises at the time of detrimental reliance on a representation or assurance. It is not necessary to determine, in this case, whether this equity is personal or proprietary in nature. 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.
19. Proprietary estoppel protects the equity, which in turn protects the claimant’s reasonable reliance: see S. Bright and B. McFarlane, “Proprietary Estoppel and Property Rights” (2005), 64 *Cambridge L.J.* 449, at p. 452. Like other estoppels, proprietary estoppel avoids the unfairness or injustice that would result to one party if the other were permitted to break her word and insist on her strict legal rights: see *Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co.*,[1981] 1 All E.R. 897 (Ch.), at pp. 909, 915-16 and 918. As Lord Denning M.R. put it in *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.*, [1982] 1 Q.B. 84 (C.A.), at p. 122:

When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

See also *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53, at para. 51; MacDougall, at pp. 15-16.

1. Where protecting the equity of the case may demand the recognition of “new rights and interests . . . in or over land” (*Crabb v. Arun District Council*, [1975] 3 All E.R. 865 (C.A.), at p. 871, per Lord Denning M.R.), proprietary estoppel can do what other estoppels cannot — it can found a cause of action: see MacDougall, at p. 424; McGhee, at pp. 330-33. Where the ingredients for a proprietary estoppel are present, the court must determine whether it is appropriate to satisfy the equity by recognizing the modification or creation of property rights “in situations where there is want of consideration or of writing”: *Anger & Honsberger* *Law of Real Property* (3rd ed. (loose-leaf)), by A. W. La Forest, at p. 28-3.
2. Consensus as to the elements of proprietary estoppel has proved elusive: see *Thorner*, at para. 29, per Lord Walker; MacDougall, at pp. 444-47.Recent decades have seen a softening of the five criteria, or “probanda”, set out by Fry J. in *Willmott v. Barber* (1880), 15 Ch. D. 96, at pp. 105-6 — and cited by this Court in *Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co.*, [1970] S.C.R. 932, at pp. 938-39, and *Sohio Petroleum Co. v. Weyburn Security Co.*,[1971] S.C.R. 81, at pp. 85-86 — as judges have moved away from strict requirements that would constrain their ability to do justice in the circumstances of a particular case: see *Clarke*, at paras. 41-53; *Sykes v. Rosebery Parklands Development Society*, 2011 BCCA 15, 330 D.L.R. (4th) 84, at paras. 44-49; *Erickson v. Jones*, 2008 BCCA 379, 299 D.L.R. (4th) 465,at paras. 52-57; *Crabb*, at pp. 876-77, per Scarman L.J.; *Taylors Fashions*, at pp. 915-18.
3. But flexibility must not come at the expense of clarity and predictability. As Professor MacDougall has commented:

While the five probanda ought to be replaced as the criteria for the estoppel, a structured formulation for establishing the need for proprietary estoppel serves the purpose of providing a useful and reasonably clear-cut method for predicting the estoppel. The replacement of such a structure by a single factor of “unfairness” or “unconscionability” leads . . . [to] too open-ended and amorphous a doctrine that only encourages litigation, particularly given the already very flexible and open-ended nature of the effect of the estoppel. [p. 447]

1. I agree. Unfairness or injustice — sometimes referred to as “unconscionability”, albeit not in the sense in which that term is used in contract law (see *Ryan*, at para. 74) — are not stand-alone criteria; they are what proprietary estoppel aims to avoid by keeping the owner to her word.
2. It has commonly been understood in Canada that proprietary estoppel is concerned with interests in land: *Delane Industry Co. v. PCI Properties Corp.*, 2014 BCCA 285, 359 B.C.A.C. 61, at para. 49; *Burgsteden v. Long*, 2014 SKCA 115, 378 D.L.R. (4th) 562, at para. 25; *Clarke*, at para. 52; *Eberts v. Carleton Condominium Corp. No. 396* (2000), 136 O.A.C. 317, at para. 23; *Bellton Farms Ltd. v. Campbell*, 2016 NSCA 1, 394 D.L.R. (4th) 262, at para. 46. Still, as Professor MacDougall has noted, “[a] limitation to land is arguably arbitrary . . . . It arises from the somewhat chance circumstance that proprietary estoppel . . . originated as a device to get round form requirements that mainly constrained the creation of or transfer of rights to land”: p. 450; see also *Wettstein v. Wettstein*, 1992 CarswellBC 1421 (WL Can.) (S.C.),at paras. 56-57. The British Columbia Court of Appeal has acknowledged the question of whether proprietary estoppel “also extends to other proprietary rights”, although this was not at issue in the case before it: *Sabey*, at para. 32. The English courts have gone much further, allowing proprietary estoppel claims in relation to chattels, insurance policies, intellectual property rights, commercial assets, and other forms of property: see S. Wilken and K. Ghaly, *The Law of Waiver, Variation, and Estoppel* (3rd ed. 2012), at pp. 263-64; MacDougall, at pp. 452-53; see also *Thorner*, at paras. 48 and 66, per Lord Walker, and para. 104, per Lord Neuberger.
3. We need not decide, in this case, whether proprietary estoppel may attach to an interest in property other than land; Max’s expectation was that he would enjoy a right over the family home, namely, the right to acquire Gloria’s eventual interest in it. Nor need we determine whether equity more broadly enforces non-contractual promises on which claimants have detrimentally relied: see, e.g., *Waltons Stores (Interstate) Ltd. v. Maher* (1988), 76 A.L.R. 513 (H.C.), at pp. 524-25, per Mason C.J. and Wilson J. As I will explain, proprietary estoppel may prevent the inequity of unrequited detriment where a claimant has reasonably relied on an expectation that he will enjoy a right or benefit over property, even when the party responsible for that expectation does not own an interest in the property at the time of the claimant’s reliance.
   1. Was Max’s Reliance Reasonable?
4. As we have seen, to establish proprietary estoppel one must first establish an equity of the kind that proprietary estoppel protects. This requires three things: a representation or assurance on the basis of which the claimant expects to enjoy a right or benefit over property, reasonable reliance on that expectation, and detriment as a result of the reliance. When the owner of an interest in the property over which the claimant expects to enjoy a right or benefit is responsible for the representation or assurance, then the equity established by the claimant’s reasonable reliance may be given effect by proprietary estoppel.
5. There is no question that Gloria assured Max that, if he moved back to Victoria to care for their mother, he would be able to acquire her eventual interest in the house. Nor is it disputed that, as a result of his reliance on that assurance, Max has suffered a detriment. The trial judge determined, and all now agree, that “Max acted to his detriment in moving from England to Victoria, giving up employment income, the long-term lease of a cottage, his contacts with his children, and his social life to look after his aged dementing mother” and that “[h]e did so relying on Gloria’s agreement to his conditions for the move”: para. 118.
6. The question is whether Max’s reliance was reasonable. If not, then no equity arose in his favour. Gloria argues — and the Court of Appeal majority accepted — that Max’s reliance could not have been reasonable because Gloria did not own an interest in the property. As Willcock J.A. wondered, at para. 111 of his reasons, “[h]ow can there be reasonable reliance upon a promise to convey an interest in property made by one who does not have such an interest or whose interest is uncertain?”
7. Reasonableness is circumstantial. As Lord Walker put it in *Thorner*, “to establish a proprietary estoppel the relevant assurance must be clear enough”, that is, “[t]he promise must be unambiguous and must appear to have been intended to be taken seriously. Taken in its context, it must have been a promise which one might reasonably expect to be relied upon by the person to whom it was made”: para. 56, quoting *Walton v. Walton*, E.W.C.A., April 14, 1994 (unreported), at para. 16, per Hoffmann L.J.; see also *Gillett v. Holt*, [2001] Ch. 210 (C.A.), at p. 225; *Taylors Fashions*, at pp. 915-16; McGhee, at p. 338. What matters is what one party induced the other to expect; as Lord Hoffmann stated in *Thorner*, the question is whether “the meaning . . . conveyed would reasonably have been understood as intended to be taken seriously as an assurance which could be relied upon”: para. 5; see also *Crabb*,at p. 871; B. McFarlane, *The Law of Proprietary Estoppel* (2014), at p. 98.
8. In *Thorner*, one party had induced the other to expect that he would inherit farm property. Since the parties knew “that the extent of the farm was liable to fluctuate (as development opportunities arose, and tenancies came and went)”, “[t]here is no reason to doubt that their common understanding was that [the] assurance related to whatever the farm consisted of at [the owner’s] death”: para. 62. This was not the sort of uncertainty which would make reliance on the assurance unreasonable because “it is unprofitable, in view of the retrospective nature of the assessment which the doctrine of proprietary estoppel requires, to speculate on what might have been”: para. 65.
9. This approach to assessing certainty — and thus the reasonableness of reliance — permits equity “to mitigate the rigours of strict law”: *Crabb*,at p. 871; see also *Thorner*, at para. 98, per Lord Neuberger. Unlike a contract, which, “subject to the narrow doctrine of frustration, must be performed come what may”, equity “looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept”: *Walton*, at paras. 20-21, quoted in *Thorner*, at para. 57.
10. In a proprietary estoppel claim, where the equity is said to have arisen when the claimant relied on an expectation that he would enjoy some right or benefit over property, it may be that the party responsible for the expectation had such a speculative interest in the property that the claimant’s reliance could not have been reasonable: see *Cobbe v.* *Yeoman’s Row Management Ltd.*, [2008] UKHL 55, [2008] 1 W.L.R. 1752, at para. 20, per Lord Scott. But whether this is so will depend on context, not on *ex ante* doctrinal restrictions. The Court of Appeal majority’s proposed bright line rule — namely, that reliance on a promise by a party with no present interest in property can *never* be reasonable — is out of step with equity’s purpose, which is to temper the harsh effects of strict legal rules.
11. Whether, in a particular case, a claimant’s reliance was reasonable in the circumstances is a question of mixed fact and law. A trial judge’s determination of this point is, absent palpable and overriding error, entitled to deference: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36.
12. Here, on the trial judge’s findings, both Max and Gloria had clearly understood for well over a decade that their mother’s estate, including the house in which she lived, would be divided equally among her three children upon her death. Nathan, Max, and Max’s ex-wife each testified to a conversation with Elizabeth and Arthur, just prior to Arthur’s death in 1992, in which both parents made clear that everything they owned would be divided equally among their three children once Elizabeth passed away. Max’s evidence was that Elizabeth confirmed as much to him in 2002. Gloria conceded at trial that, in the years before her mother’s death, she made statements evincing the same expectation. She departed from that position — and asserted that she was entitled to *all* of her mother’s assets, the house included — only in April 2011.
13. It was thus sufficiently certain that Gloria would inherit a one-third interest in the property for her assurance to be taken seriously as one on which Max could rely. Max and Gloria negotiated for an extended period before Max uprooted his life in England and returned to Victoria. Gloria promised unequivocally that he would be able to acquire her share of the property if he did so. She made that commitment, among others, with the purpose of enticing him back to the family home. In this, she succeeded. I see no basis on which to overturn the trial judge’s conclusion that, in these circumstances, Max’s reliance was reasonable.
14. Max reasonably relied on the expectation that he would be able to acquire Gloria’s interest in the property once their mother’s estate had been administrated in the usual course. Gloria was responsible for that expectation; she promised Max as much before he returned to Victoria from England. Max suffered a detriment as a result, such that it would be unfair or unjust to permit Gloria to break her word. An equity thus arose in Max’s favour. It is this equity that proprietary estoppel will protect, if its elements are established.
    1. Does Proprietary Estoppel Protect the Equity?
15. The dispute as to whether the elements of proprietary estoppel are made out in this case turns on whether, at the time of the claimant’s reliance, the party responsible for the claimant’s expectation that he will enjoy a right or benefit over property must own an interest in the property sufficient to meet the claimant’s expectation. The Court of Appeal majority concluded that, since Gloria did not own such an interest at the time of Max’s reliance, his proprietary estoppel claim could not succeed. Willcock J.A. wrote, at para. 117:

. . . I see no reason in principle why the cause of action should be expanded to permit a person to acquire an interest in property by reliance upon an assurance by a non-owner that falls short of a contractual obligation. Such an expansion would be problematic, untying entirely from its ties to property the only estoppel that can be used as a sword.

1. I cannot agree. With respect, the conclusion reached by the Court of Appeal majority conflates proprietary estoppel with the equity to which it gives effect. That Gloria did not own an interest in her mother’s property at the time of Max’s reliance is not dispositive in itself: see MacDougall, at p. 456; see also *Thorner*, at para. 61, per Lord Walker; *Re Basham (deceased)*, [1987] 1 All E.R. 405 (Ch.),at p. 415. An equity arises when the claimant reasonably relies to his detriment on the expectation that he will enjoy a right or benefit over property, whether or not the party responsible for that expectation owns an interest in the property at the time of the claimant’s reliance. Proprietary estoppel may not protect that equity immediately. It may not protect the equity until considerable time has passed. If the party responsible for the expectation never acquires a sufficient interest in the property, proprietary estoppel may not arise at all; where there is proprietary estoppel, there must be an equity, but not vice versa. When the party responsible for the expectation has or acquires a sufficient interest in the property, however, proprietary estoppel attaches to that interest and protects the equity: see MacDougall, at p. 458; Wilken and Ghaly, at pp. 265-66; see also *Watson v. Goldsbrough*, [1986] 1 E.G.L.R. 265 (C.A.), at p. 267. Ownership at the time the representation or assurance was relied on is not a requirement of a proprietary estoppel claim.
2. An equity arose in Max’s favour when he reasonably relied to his detriment on the expectation that he would be able to acquire Gloria’s one-third interest in their mother’s house. That equity could not have been protected by proprietary estoppel at the time it arose, because Gloria did not then own an interest in the property. But that does not mean that proprietary estoppel cannot attach to Gloria’s share of the house once she receives it. I conclude that it can.
3. Gloria has yet to receive any interest in the property. The property in its entirety remains part of Elizabeth’s residuary estate. Elizabeth’s will provides that the residue of the estate is to be divided equally and distributed to her three children. The will appoints Gloria as executor, and she is named in this proceeding in that capacity. Gloria, as executor, must therefore transfer one-third interests in the property to each of the estate beneficiaries, including to herself, before proprietary estoppel can attach to her share and the equity in Max’s favour can be satisfied. As I have said, proprietary estoppel will attach to Gloria’s interest when, and only when, it is sufficient to satisfy the equity — i.e., as soon as she obtains it from the estate.
4. Gloria submits, and Côté J. agrees, that, as executor, she cannot be bound to transfer a one-third interest in the property to each of the estate beneficiaries so that her promise to Max may be fulfilled. I disagree.
5. An *in specie* distribution of shares in the property is not contrary to Elizabeth’s intent. Elizabeth’s will empowered Gloria, as executor, with the discretion to perform an *in specie* distribution of the estate; this outcome was contemplated by Elizabeth and is consistent with the intention expressed in her will. Ordering an *in specie* distribution of the property is therefore not akin to a creating a specific bequest: see Côté J.’s reasons, at para. 77.
6. Where a will allows for executorial discretion, an *in specie* distribution of real property may be effected by an executor with the consent of all beneficiaries: see *Re Harris* (1915), 22 D.L.R. 381 (Ont. S.C.), at p. 386; *Gunn Estate, Re*,2010 PECA 13, 200 Nfld. & P.E.I.R. 197, at paras. 42 and 49. A beneficiary’s objection to such a distribution should not be vexatious or manifestly unreasonable: *Re Harris*, at p. 386. In this case, Max clearly desires an *in specie* distribution of the property, Nathan has indicated that he has an agreement with Max regarding the property, and Gloria, *qua* beneficiary, has not raised a compelling objection to an *in specie* distribution of the property. Gloria’s objection to an *in specie* distribution is grounded in her desire to escape her equitable obligation and to spite her brother; this is manifestly unreasonable.
7. Moreover, this Court has the power to direct Gloria to exercise her discretion as executor in a certain manner. As executor, Gloria is a fiduciary with obligations to the beneficiaries of the estate. Courts may interfere with an executor’s exercise of discretion where there is a breach of this fiduciary duty: see *Widdifield on Executors and Trustees* (6th ed. (loose-leaf)), by C. S. Thériault, at p. 8-4. In this case, Gloria’s conflict of interest and her bad faith are grounds for ordering an *in specie* distribution.
8. Gloria’s duties *qua* executor are clearly in conflict with her interests *qua* beneficiary. As beneficiary, Gloria can only be made to fulfill her equitable obligation to Max if the elements of proprietary estoppel are satisfied. As executor, she could prevent this by deciding not to make an *in specie* distribution of property. Where a conflicted executor uses his or her discretion to convert estate property into cash without a compelling reason (and against the express wishes of beneficiaries), courts may interfere: see *Staub v. Staub Estate*, 2003 ABCA 122, 226 D.L.R. (4th) 327, at paras. 14-24. Gloria has not raised a compelling reason as to why *in specie* distribution should be refused, nor has she explained how selling the property will maximize the value of the estate. Ordering an *in specie* distribution in this case resolves Gloria’s conflict of interest without the delay or expense of replacing her as executor.
9. Further, Gloria’s bad faith provides a rationale for ordering an *in specie* distribution. The trial judge found that Gloria is “blinded by her animosity toward her brothers”: para. 68. Gloria misled her brothers with respect to the contents of the estate and the planned distribution of the shares, and the record reveals a decade-long feud with respect to the property. These acts are compelling evidence that, absent this Court’s interference, Gloria will continue to exercise her discretion in bad faith; an *in specie* distribution prevents this.
10. I would therefore order that Gloria, as executor, is to divide the property forthwith into equal one-third interests and deliver these to herself, Max, and Nathan as beneficiaries of Elizabeth’s estate. As soon as she does, the elements of proprietary estoppel will be satisfied:
11. Gloria — who, by operation of this Court’s order, will own a one-third interest in the property — made a promise to Max, on the basis of which Max expected that he would enjoy the right to purchase her interest;
12. Max, relying reasonably on this expectation, moved back to Victoria to care for their mother in the final years of her life; and,
13. In doing so, Max suffered a detriment, such that it would be unfair or unjust to permit Gloria to break her promise.
14. I therefore conclude that the trial judge did not err in allowing Max’s proprietary estoppel claim.
    1. What Is the Appropriate Remedy?
15. Where a claimant has established proprietary estoppel, the court has considerable discretion in crafting a remedy that suits the circumstances: see *Griffiths v. Williams*, [1978] 2 E.G.L.R. 121 (C.A.), at p. 122, per Goff L.J.; MacDougall, at pp. 498-501. As with any exercise of discretion, an appellate court should not interfere unless the trial judge’s decision evinces an error in principle or is plainly wrong: see *de Montigny v. Brossard (Succession)*, 2010 SCC 51, [2010] 3 S.C.R. 64, at para. 27, citing *Housen*, at paras. 10 and 25.
16. Still, “the court must take a principled approach, and cannot exercise a completely unfettered discretion according to the individual judge’s notion of what is fair in any particular case”: *Jennings v. Rice*, [2002] EWCA Civ. 159, [2003] 1 P. & C.R. 100, at para. 43, per Walker L.J. A claimant who establishes the need for proprietary estoppel is entitled only to the minimum relief necessary to satisfy the equity in his favour: see *Clarke*, at para. 81; *Sabey*,at para. 78; *Idle-O Apartments*, at para. 73; *Sykes*, at paras. 57-58; MacDougall, at p. 498; R. Megarry and W. Wade, *The Law of Real Property* (8th ed. 2012),by C. Harpum, S. Bridge and M. Dixon, at p. 731. Since the equity aims to address the unfair or unjust detriment the claimant would suffer if the owner were permitted to resile from her inducement, encouragement, or acquiescence, “there must be a proportionality between the remedy and the detriment which is its purpose to avoid”: *Commonwealth of Australia v. Verwayen* (1990), 170 C.L.R. 394 (H.C.A.), at p. 413, per Mason C.J.;see also *Sabey*, at paras. 73-75; *Idle-O Apartments*,at para. 76; *Jennings*, at para. 36, per Aldous L.J.; *Sledmore v. Dalby* (1996), 72 P. & C.R. 196 (C.A.), at pp. 208-9, per Hobhouse L.J.; S. Gardner, “The Remedial Discretion in Proprietary Estoppel — Again” (2006), 122 *L.Q.R.* 492, at pp. 499-503; Bright and McFarlane, at pp. 453-54.
17. This approach recognizes that, while proprietary estoppel arises where the claimant’s expectations are frustrated, the reasonableness of the claimant’s expectations must be assessed in light of, among other things, the detriment the claimant has actually suffered: see A. Ship, “The Primacy of Expectancy in Estoppel Remedies: An Historical and Empirical Analysis” (2008), 46 *Alta. L. Rev.* 77, at pp. 104-5. Courts of equity must therefore strike a balance between vindicating the claimant’s subjective expectations — which, in their full context, may or may not reflect a reasonable valuation of the claimant’s detriment — and correcting that detriment, which may be difficult or even impossible to measure: see *Sabey*, at paras. 80-82; *Jennings*, at paras. 50-51, per Walker L.J. In no case, however, may the claimant obtain more than he expected: see *Pilcher v. Shoemaker* (1997), 13 R.P.R. (3d) 42 (B.C.S.C.), at para. 21; *Ellis v. Eddy Holding Ltd.* (1996), 7 R.P.R. (3d) 70 (B.C.S.C.), at para. 26; Bright and McFarlane, at pp. 456-57.
18. Here, Max’s detriment lay in his returning to Victoria to live with and care for his aging mother. He expected, among other things, that he would be able to acquire Gloria’s share of their mother’s house after their mother’s death and once her estate had been administered. Having kept up his end of the bargain, he sought an order requiring Gloria to keep up hers by selling him her one-third interest in the property. The trial judge concluded that this was the minimum required to satisfy the equity.
19. Requiring Gloria to sell her interest in the house to Max is the minimum necessary to satisfy the equity in Max’s favour. The question is, at what price?
20. Max submits that he should be entitled to purchase Gloria’s share for $223,333.33, which reflects the property’s 2011 appraised value of $670,000.00. Gloria argues that, if she is ordered to sell her interest to Max, it should be at its current fair market value, which the parties agree is higher than it was in 2011.
21. I agree with Max. As soon as Gloria receives an interest in the property from their mother’s estate, all of the elements of proprietary estoppel will be satisfied. But the relevant equity will have arisen long before — namely, at the time of Max’s reliance. The equity in Max’s favour exists to avoid the unfairness and injustice that would result if Gloria were permitted to break her word and not sell her interest to Max, notwithstanding the detriment Max suffered in returning to Victoria from England. Max valued that detriment as being worth the concessions he obtained from Gloria. One of those concessions was that Max would be able to acquire Gloria’s interest in the property in exchange for an amount equal to one third of its total fair market value once the estate had been administered.
22. Neither Max nor Gloria could reasonably have expected to wait the better part of a decade to exchange Max’s cash for Gloria’s interest in the property. It is safe to assume that, had Gloria not sought to escape her promise, Max’s equity would have been satisfied and Gloria’s share of the house sold to him not long after February 2, 2011, which is when, in the course of administering their mother’s estate, the property was in fact appraised for $670,000.00. Rather than sell her interest in the house to Max at that point — that is, roughly when both she and he originally contemplated she would — Gloria took the position that she was under no obligation to do so at all. This litigation was the result. In the years since, Max has had the benefit of the money he would have had to pay Gloria in 2011 for her share of the house, Elizabeth’s estate has incurred expenses associated with the upkeep of the property, and the property, the parties agree, has increased in value.
23. February 2, 2011 is a reasonable approximation of when Max expected to be able to purchase Gloria’s one-third interest in the property. That expectation reflects the defined right that Gloria promised Max in exchange for his returning to Victoria to care for their mother. In these circumstances, the claimant’s expectation must be the court’s guide in exercising its remedial discretion. This is because, as Walker L.J. put it in *Jennings*, at para. 45:

. . . the consensual element of what has happened suggests that the claimant and the benefactor probably regarded the expected benefit and the accepted detriment as being (in a general, imprecise way) equivalent, or at any rate not obviously disproportionate.

1. Vindicating Max’s expectation will satisfy the equity in his favour, which arose at the time of his reliance, by avoiding the unfair and unjust detriment that he would suffer if Gloria were permitted to break her promise: see Gardner, at p. 497; Bright and McFarlane, at p. 458. Max’s expectation — i.e., the benefit that he and Gloria agreed would offset the detriment he would suffer by returning to Victoria — was that he would be able to purchase Gloria’s interest in the property following the administration of their mother’s estate, which they could not have expected would take years to complete. The minimum necessary to satisfy the equity in Max’s favour is thus an order entitling him to purchase Gloria’s interest at its fair market value as of the approximate date on which he would reasonably have expected to be able to do so in the first place, namely, at some point in early 2011.
2. To hold otherwise would disregard the difference between the equity and the estoppel. That no estoppel was available at the time the equity arose is of no moment. Max’s expectations must be considered broadly. Contrary to the position espoused by Brown J., the minimum required to satisfy the equity, and the court’s discretion in fashioning a remedy, is not limited by the point in time when the equity became proprietary in nature or when the cause of action arose: “The value of that equity will depend upon all the circumstances including the expectation and the detriment. The task of the court is to do justice. The most essential requirement is that there must be proportionality between the expectation and the detriment”: *Jennings*, at para. 36, per Aldous L.J. What the minimum necessary to satisfy the equity requires — including the amount for which Gloria must sell Max her share — is determined by what it protects.
3. Still, as the trial judge recognized, satisfying the equity does not require Gloria to sustain a loss. Had events unfolded as Max reasonably expected them to, Gloria would have given up her interest in the property in early 2011 in exchange for its fair market value. She would have had the benefit of those funds during the intervening years. And her mother’s estate would have been relieved of the cost of maintaining the property, increasing the residue in which Gloria and her siblings are to share equally.
4. Max will therefore be entitled to purchase Gloria’s interest in the property for $223,333.33, plus an amount equal to the post-judgment interest that would be payable on a judgment in that amount issued on February 2, 2011, once Gloria has received that interest from Elizabeth’s estate. Upon his acquisition of Gloria’s interest in the property, Max is to account to the estate for the amount of any expenses incurred by the estate in maintaining the property since February 2, 2011.
5. No submissions were made as to the existence of third party claims against the estate, which could rank in priority to the claims of the beneficiaries. Further, so long as beneficiaries are willing to pay the debts of the estate, the existence of such debts would not bar an *in specie* distribution of the property: see *Staub*, at para. 23. Nonetheless, this order will be subject to any third party claims against the estate that cannot be satisfied by the estate’s other assets (such as Elizabeth’s investments).
6. I would allow the appeal and vary the trial judge’s order accordingly, with costs to Max throughout.

The following are the reasons delivered by

Brown J. —

1. Introduction
2. While I concur with the Chief Justice that the trial judge did not err in allowing Max Cowper-Smith’s proprietary estoppel claim, I find myself in respectful disagreement regarding the appropriate remedy.
3. Briefly, in cases of proprietary estoppel the proper remedy is the “minimum necessary to satisfy the equity” (reasons of the Chief Justice, at paras. 50 and 55-56). Where a promisor does not hold the promised right or benefit in the subject property at the time of making his or her promise, an equity capable of being satisfied via proprietary estoppel arises only if and when that right or benefit is acquired by the promisor. In this case, Gloria Morgan will not attain the promised property until the date of this Court’s order. The minimum necessary to satisfy the equity cannot, therefore, be an order permitting Max to purchase the property as of a time which predates the equity itself.
4. Analysis

The Test for Proprietary Estoppel Requires a Proprietary Right Which Cannot Arise Until the Promisor Holds the Promised Right or Benefit

1. As the Chief Justice explains, a claim in proprietary estoppel requires a court to make three determinations:
   * + 1. Is an equity established?
       2. If an equity is established, what is the extent of the equity?
       3. What remedy is appropriate to satisfy the equity?

(*Idle-O Apartments Inc. v. Charlyn Investments Ltd.*, 2014 BCCA 451, [2015] 2 W.W.R. 243, at para. 49; *Sabey v. von Hopffgarten Estate*, 2014 BCCA 360, 378 D.L.R. (4th) 64, at para. 25, citing *Crabb v. Arun District Council*, [1976] 1 Ch. 179 (C.A.), at pp. 192-93.)

1. As to the first determination — whether an equity is established — I agree with the Chief Justice that an equity arises under the doctrine of proprietary estoppel where

(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 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 her word . . . . [Emphasis added.]

(Reasons of the Chief Justice, at para. 15; *Idle-O*, at para. 49; *Sabey*, at para. 27; *Clarke v. Johnson*, 2014 ONCA 237, 371 D.L.R. (4th) 618,at paras. 48 and 52; *Tiny (Township) v. Battaglia*, 2013 ONCA 274, 305 O.A.C. 372, at para. 131; and *Schwark Estate v. Cutting*, 2010 ONCA 61, 316 D.L.R. (4th) 105, at paras. 16 and 34)

1. Generally, the promisor who makes the “representation or assurance” regarding the “right or benefit” must hold the promised right or benefit at the time of making the promise (*Idle-O*,at para. 49; *Sabey*,at para. 30; *Clarke*, at para. 26; *Tiny*, at para. 131; *Schwark*, at para. 16; but see *Thorner v. Major*, [2009] UKHL 18, [2009] 1 W.L.R. 776, at para. 61). The question presented by this appeal, then, is whether an equity sufficient to ground a claim in proprietary estoppel *may* still arise where the promisor does *not* in fact hold that right or benefit at the time of making the promise. While I agree with the Chief Justice that it can, my principal disagreement is on the time at which such an equity arises. While the Chief Justice finds that it arises at the moment of detrimental reliance, I view it as arising only if and when the promisor obtains the right or benefit that was promised to the claimant. Where, as here, a promisor’s attainment of the promised right or benefit rests upon the satisfaction of a future contingency, no equity capable of being remedied through proprietary estoppel can arise until that contingency is satisfied.
2. The Chief Justice states that, where a representation or assurance is made pertaining to a right or benefit which the promisor does not hold at the time of the promise, an inchoate equity nonetheless arises in favour of the claimant at the moment of the claimant’s detrimental reliance thereon. This is undoubtedly so. Courts in the United Kingdom, for example, have recognized that in such circumstances an equity may arise in favour of the claimant before the promisor holds the promised right or benefit (*Abbey National Building Society v. Cann*, [1991] 1 A.C. 56 (H.L.), at pp. 95 and 102; *Southern Pacific Mortgages Ltd. v. Scott*, [2014] UKSC 52, [2015] A.C. 385, at para. 79). But such an equity cannot confer a *proprietary* right in the promised property, but rather a mere *personal* right against the promisor (*Abbey*,at pp. 89 and 95; *Scott*,at paras. 104 and 111; S. Wilken and K. Ghaly, *The Law of Waiver, Variation, and Estoppel* (3rd ed. 2012), at §11.130). Before an equity capable of conferring a proprietary right can be shown to arise, the promisor must gain the right or benefit that was the subject of his or her promise “[s]ince no one can grant what he does not have” (*Abbey*,at p. 102). As Lord Collins explained for (on this point) a unanimous Supreme Court of the United Kingdom in *Scott*, at para. 79, “the [claimants] acquired no more than personal rights against the [promisors] when they agreed to sell their properties on the basis of the [promisors’] promises that they would be entitled to remain in occupation. Those rights would only become proprietary and capable of taking priority over a mortgage when they were fed by the [promisors’] acquisition of the legal estate on completion” (emphasis added).
3. The Chief Justice holds that it is unnecessary in this case to decide whether the inchoate equity which grounds the remedy in proprietary estoppel is personal or proprietary in nature (para. 15). Respectfully, I disagree. In my view, to qualify as an equity justifying the operation of proprietary estoppel, the equity must be proprietary, because it must be capable of compelling a promisor to relinquish a proprietary right which he or she actually holds. While the three conditions necessary to prove an equity under the test for proprietary estoppel do not explicitly state this requirement, the broader question which those conditions serve to answer demonstrates that this is so. Specifically, those three conditions have been described as part of a broader inquiry into whether it would be “unconscionable” to permit the promisor to renege on the promise made to the claimant (*Crabb*, at p. 195; *Sabey*, at para. 27; *Idle-O*,at para. 61). The concept of unconscionability is not a separate element of the test for establishing the equity sufficient to ground proprietary estoppel, but rather serves as a mechanism for “unifying and confirming” the three conditions (*Yeoman’s Row Management Ltd. v. Cobbe*, [2008] UKHL 55, [2008] 4 All E.R. 713, at para. 92). In this sense, the three conditions are designed to answer the question of “whether upon the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it” (*Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co.*, [1982] 1 Q.B. 133 (Ch.), at p. 154 (emphasis added); see also *Crabb*, at p. 195). Alternatively put, “[t]he equity of estoppel arises in an ‘inchoate’ form as soon as . . . the landowner unconscionably sets up his rights adversely to the legitimate demands of the estoppel claimant” (K. Gray and S. F. Gray, *Land Law* (5th ed. 2007), at §10.22 (emphasis added)).
4. Where the promisor does not yet have the benefit or interest which was promised to the claimant, the test for unconscionability as described above cannot be met. Indeed, in such circumstances, the personal equitable right that results from the claimant’s detrimental reliance arises specifically because the promisor does not yet hold the “right or benefit” that was the subject of his or her promise. At that point, it would be impossible to find that it is unconscionable for the promisor to “continue to seek to enforce” his or her legal right to the promised right or benefit, since the promisor has yet to obtain that right or benefit.
5. In my respectful view, imprecision in characterizing the type of equitable interest at stake in these cases risks introducing legal uncertainty to cases where competing equitable claims are advanced in relation to the same property. More particularly, the notion that a mere personal equitable right may be sufficient to give rise to a proprietary estoppel is difficult to reconcile with the principles governing the priority of equitable interests in land (*Snell’s Equity* (33rd ed. 2015), by J. McGhee, at para. 4-047). In the United Kingdom, the House of Lords and, in turn, the Supreme Court have each recognized that where a promise gives rise to a merely personal equitable right in favour of the claimant (because the promisor does not have the promised right or benefit at the time of his or her promise), the promisor’s subsequent acquisition of the right or benefit does not permit the claimant to assert an equity which takes priority over a third party’s proprietary right that was established in the meantime — that is, after the claimant’s personal equitable right against the promisor arose, but before the promisor attained the right or benefit. Seen in this light, Lord Collins’ statement at para. 79 in *Scott*,cited above, that mere personal rights “would only become proprietary and capable of taking priority over a mortgage when they were fed by the [promisor’s] acquisition of the [promised right or benefit]” is not a suggestion that personal equitable rights could be retroactively transformed into proprietary rights. Rather, he meant that the establishment of the equity underlying the claimant’s personal right prior to the establishment of the third party’s proprietary right is insufficient to elevate the claimant’s personal right so as to displace the priority enjoyed by the third party’s proprietary right (*Scott*,at para. 71; *Abbey*, at pp. 89 and 95; see also *Watson v. Goldsbrough*, [1986] 1 E.G.L.R. 265 (C.A.)). But were it possible, as is necessarily suggested by the Chief Justice’s reasons, to satisfy the requirement for “an equity” within the test for proprietary estoppel by showing a mere personal equitable right, priority could be accorded to an interest that does not ground an equitable claim in land, to the detriment of an interest that does.
6. I add this. If it is clear that, in cases of competing proprietary claims, the prior establishment of a personal right cannot be considered when determining the priority of those claims, it is all the more puzzling that a claimant’s establishment of a personal right should be at all relevant where, as here, a competing proprietary equitable claim does *not* exist. In other words, the only underlying equity that should *ever* be considered in determining whether the test for proprietary estoppel is satisfied is one capable of conferring a proprietary right.
7. It follows that I disagree that, in this case, the requisite equity was established at the moment of Max’s detrimental reliance. In my view, it will only arise from the moment that Gloria holds the right or benefit that was the subject of her promise to Max — that is, from the time that this Court orders her, as executor, to “divide the property forthwith into equal one-third interests and deliver these to herself, Max and Nathan [Cowper-Smith] as beneficiaries of Elizabeth’s estate” (reasons of the Chief Justice, at para. 44). While I agree with the Chief Justice that a court’s task, when determining the remedy which is “appropriate to satisfy the equity” (para. 17) under the test for proprietary estoppel, is “to do justice” (para. 56, citing *Jennings v. Rice*, [2002] EWCA Civ. 159, [2003] 1 P. & C.R. 100, at para. 36), “do[ing] justice” — even at equity — does not permit a court to take into consideration a merely personal equitable right. Therefore, the minimum necessary to satisfy the equity, once it arises, is to permit Max to purchase Gloria’s one-third share of the property as of the date of this Court’s order.
8. Conclusion
9. I would allow the appeal and vary the trial judge’s order as proposed by the Chief Justice, save that I would permit Max to purchase Gloria’s one-third interest in the property at its fair market value as of the date of this Court’s order.

The following are the reasons delivered by

1. Côté J. — I concur with the Chief Justice that a proprietary estoppel claim can arise even where a promisor had no ownership interest in the property at the time the promise was made. I also agree that a promisee’s reliance is not unreasonable, as a matter of law, solely because the promisor does not own the property at the time the promisee acts, to his or her detriment, in reliance on the promise.
2. However, I part ways with both the Chief Justice and Justice Brown as to scope of the Court’s remedial power in this case. In my view, a court cannot order an executor to distribute shares of an estate in a manner that disregards the testator’s express intent for the sole purpose of enabling a beneficiary to make good on her promise to a third party. This principle holds true even where, as here, that beneficiary — the defendant in a proprietary estoppel action — also happens to serve as the estate’s executor.
3. Elizabeth’s last will and testament was unambiguous in expressly vesting the executor, Gloria, with discretion in the administration of her estate. Elizabeth directed that Gloria “may convert [the] estate . . . into money, and decide how, when, and on what terms”, or that she “maykeep [the] estate, or any part of it, in the form it is in at [Elizabeth’s] death” (A.R., at p. 101). In other words, Elizabeth did not specifically bequeath the property at issue in this appeal. She entrusted Gloria to decide its fate, including whether or not it should be sold.
4. “[T]he golden rule in interpreting wills is to give effect to the testator’s intention as ascertained from the language which he has used” (*Browne v. Moody*, [1936] 4 D.L.R. 1 (P.C.), at pp. 4-5; see also *National Trust Co. v. Fleury*,[1965] S.C.R. 817, at pp. 828-29; *Feeney’s Canadian Law of Wills* (4th ed. (loose-leaf)), by J. MacKenzie, at §10.1). The importance of testamentary autonomy is firmly rooted in our law. As McLachlin J. (as she then was) previously noted, a will “is the exercise by the testator of his freedom to dispose of his property and is [not] to be interfered with . . . lightly” (*Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, at p. 824) (see also *Re Burke* (1959), 20 D.L.R. (2d) 396 (Ont. C.A.), at p. 398: “. . . the Court should strive to give effect to [the testator’s intention] and should do so unless there is some rule or principle of law that prohibits it from doing so”).
5. The effect of the Court’s remedy in this appeal — an order compelling Gloria to transfer shares of the property to the estate’s beneficiaries — is to substitute the Court’s own judgment for that of Gloria in determining how the property should be administered. It effectively creates a specific bequest that Elizabeth herself opted not to make. The fact that Elizabeth contemplated the possibility of an *in specie* distribution does not make a court-ordered distribution consistent with her wishes. The relevant intent at issue is that Elizabeth wanted Gloria, not the courts, to decide how her estate should be managed. With great respect, I am of the view thatequity affords no justification for disregarding that intent — especially since Max would be free to purchase the property (using, in part, his share of the sale proceeds) if Gloria did decide to sell it at auction.
6. It is convenient, in this case, that Gloria stands in the shoes of both beneficiary and executor. But if Gloria had resigned as executor, or if someone else had been appointed in the first place, what jurisdiction would this Court have to order that executor to distribute shares of the property in a particular manner? In my view, those scenarios are no different than the case at bar. The distinction between Gloria *qua* executor and Gloria *qua* beneficiary should not be casually cast aside in the interests of equity, particularly where the effect is to disregard the express intent of the testatrix.
7. The Chief Justice’s answer is that “[w]here a will allows for executorial discretion, an *in specie* distribution of real property may be effected by an executor with the consent of all beneficiaries”, and that Gloria is unreasonably withholding her consent (para. 40). There is no question in this appeal that Gloria has the executorial authority to make an *in specie* distribution — this power is expressly provided for in Elizabeth’s will. But as to Gloria’s interest as a beneficiary, she may have good reason to prefer a sale of the property instead of giving her consent to an *in specie* distribution. If the property is sold and the proceeds are distributed among the three beneficiaries, Gloria will receive a one-third share at current market value. If the property is distributed *in specie*, she will be compelled to sell her share of the property to Max for, as the reasons of the Chief Justice indicate, one third of the property’s appraised value in 2011, which the parties agree is lower than the current value of the property. Thus, regardless of whether she is the executor, it would not be unreasonable for Gloria, *qua* beneficiary, to refuse to consent to an *in specie* distribution. It is improper to compel her to consent to an *in specie* distribution in this context. It is noteworthy that the promise Gloria made was to *sell* her third of the property, not to *give it away*. In the present case, the testatrix wanted each child to share equally in the residue of her estate. In a rising market, allowing Max to buy the one-third interest for a past price does not respect her wish, since it effectively gives Gloria less than one third of the current value of the estate, and correspondingly more to Max.
8. Moreover, the fact that an *in specie* distribution *may* be effected with the consent of all beneficiaries does not imply that the executor is obligated to elect this option (see *Gunn Estate, Re*, 2010 PECA 13, 200 Nfld. & P.E.I.R. 197, at paras. 45 and 49; *Widdifield on Executors and Trustees* (6th ed. (loose-leaf)), by C. S. Thériault, heading 5.1.6). “[T]he intention of the testator or the settlor must be adhered to” in determining whether an *in specie* distribution is appropriate (*Gunn Estate*,at para. 45) and here, the testatrix intended that Gloria make that determination. If Gloria’s duties as executor are truly in conflict with her interests as a beneficiary such that there is a breach of fiduciary duty, the proper remedy is not to order an *in specie* distribution but to replace Gloria as executor (see, e.g., *Jackson Estate,* *Re* (2004), 192 O.A.C. 161, at paras. 8-9; *Re Smith*, [1971] 1 O.R. 584 (H.C.J.), at pp. 587-88; *Cooper v. Fenwick*, [1994] O.J. No. 2148 (QL) (Gen. Div.), at paras. 14-15 and 21). This would afford Max, Nathan, and Gloria the benefit of unbiased and sound advice regarding the administration of the estate. With respect, it is no answer, in my view, to order a different remedy simply because the installation of a new executor may involve some cost or delay.
9. For these reasons, I am of the view that this Court has no power to order Gloria to exercise her executorial discretion in a particular manner.
10. However, if Gloria is ordered to distribute the property *in specie* and compelled to sell her share to Max, I concur with Justice Brown that the sale price should be determined by the value of the property as of the date of this Court’s order. I would add that imposing a sale price equal to that value of the property would be consistent with the testatrix’s wishes. Indeed, the testatrix wanted each child to share equally in the residue of her estate. In a rising market, letting Max buy the one-third interest for a past price does not respect her wishes since it effectively gives Gloria less than one third of the current value of the estate, and correspondingly more to Max.
11. I would allow the appeal in part.

Appeal allowed with costs throughout.

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