

CANADA / JUDGMENT

Armstrong v. Kotanko

2023 BCSC 989

COURT

Supreme Court of British Columbia

DECIDED

9 June 2023

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2023 BCSC 989 Armstrong v. Kotanko

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Armstrong v. Kotanko,

2023 BCSC 989

Date: 20230609

Docket: S1711291

Registry: Vancouver

Between:

Lloyd James Armstrong

Plaintiff

And:

Jerry Leonard Kotanko, Jerry Leonard Kotanko as Executor for the Estate of Jean Irene Almgren
and Michael Corey Harnden

Defendants

And:

Lloyd James Armstrong

Defendants

By Counterclaim

Before: The Honourable Madam Justice Wedge

Reasons for Judgment

Counsel for the Plaintiff:

D.J. Barker

K. Iacono

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Counsel for the Defendant Jerry Kotanko:

G.H. Fraser

Place and Dates of Trial:

Vancouver, B.C.

January 30-31, 2023

February 1, 3, 6-7, 9, 2023

Place and Date of Judgment:

Vancouver, B.C.

June 9, 2023

I. Issues in the Litigation

- [1] This litigation concerns certain gifts, a townhouse and a bank account, made by the late Jean Almgren ("the Deceased") prior to her death in 2017 to the Defendant Jerry Kotanko ("Mr. Kotanko"). The Deceased's son, the plaintiff Lloyd Armstrong ("Mr. Armstrong"), alleges that these assets were not gifted to Mr. Kotanko. Rather, he argues, the Deceased intended to, and did, create a secret trust concerning the townhouse and bank account, with himself as beneficiary and Mr. Kotanko as trustee. Mr. Armstrong argues, in the alternative, that a remedial constructive trust ought to be imposed on the townhouse in his favour.
- [2] Although much of the evidence advanced in the trial concerned the circumstances surrounding the drafting of the various wills executed by the Deceased in the years prior to her death, it is important to note that there is no issue with respect to the validity of any will executed by the Deceased. As a result of steps taken by the Deceased divesting ownership of the assets in dispute such that they did not fall within her estate upon her death, the parties agreed that the sole issue in the trial concerns the plaintiff's allegations of secret trust, or, alternatively, remedial constructive trust. The evidence concerning the drafting of the wills was relevant solely to the issue of the intentions of the Deceased when allegedly gifting her assets to Mr. Kotanko.
- [3] Before addressing the governing legal principles in this litigation, and to give context to the application of those legal principles, I will provide an overview of the evidence advanced in the course of the trial.

II. Overview of the Evidence

A. Procedural Issues

- [4] For reasons that I will not go into in detail because they are not relevant to the outcome of the trial, this litigation began as a full trial of the matter, but was converted to a summary trial at the outset due to the illness of the plaintiff and his inability to attend the trial. Both plaintiff and defendant are elderly and in poor health, and there was some urgency in proceeding with the litigation.
- [5] By way of background, the matter had been filed by Mr. Kotanko to proceed summarily some months earlier but the judge assigned to the matter refused to proceed on that basis because the time estimated for the summary trial was woefully inadequate. An earlier trial had been bumped for lack of the availability of a judge. As a result, the litigation had been languishing for approximately two years. Both parties to the matter were elderly and, in particular, I was advised at the outset of the trial that Mr. Armstrong had just been admitted to hospital with a suspected heart attack. I accepted the position of Mr. Kotanko that the matter was suitable for summary trial based on the extensive affidavit material filed previously, and updated, with respect to the issues in dispute, so long as counsel for Mr. Armstrong could cross-examine the witnesses who had provided material evidence on behalf of Mr. Kotanko by way of affidavit. On that basis, the matter proceeded as a trial heard summarily. As a result, both Mr. Kotanko and the solicitor involved in the drafting of the various wills of the Deceased, were called to give viva voce evidence and subjected to cross-examination.
- [6] Counsel for Mr. Kotanko did not seek to cross-examine any of the witnesses advanced by Mr. Armstrong on their affidavits, taking the position that their evidence, even without challenge, did not establish the plaintiff's case for a secret trust or any other form of trust.

B. Overview of the Evidence

1. Evidence Advanced by the Defendant Kotanko

- [7] The Deceased died on February 5, 2017 at the age of 76. She was survived by Mr. Armstrong and a second son, Michael Harnden. Mr. Harnden was estranged from the Deceased and although named as a defendant, did not participate in the litigation.
- [8] The Deceased's spouse, Gordon Almgren, died in February 2009, eight years before the Deceased's death.
- [9] Mr. Kotanko had been a close personal friend of the Deceased and Gordon Almgren for over 30 years, dating back to approximately 1980. He continued to be a close platonic friend of the Deceased after the death of her spouse in 2009.

- [10] In January 2007 the Deceased met with her solicitor, Carl Holm, to discuss the possibility of an inter vivos trust involving a distribution which included 25% of the residue to Mr. Armstrong. She provided Mr. Holm with notes describing the distribution; those notes included the statement that she had "disowned" her other son, Mr. Harnden.
- [11] However, the Deceased ultimately decided against an inter vivos trust, and instead executed a Will on February 20, 2007, naming Mr. Kotanko the sole executor and making further provisions which mirrored the inter vivos trust plan. The 2007 Will contained the following provisions:
- (a) Gordon Almgren was given a life estate in the townhouse located at #7 - 20370 53rd Avenue, Langley B.C. (the "Property");
 - (b) Gordon Almgren was given a specific bequest of \$15,000 annually;
 - (c) If Gordon Almgren predeceased the Deceased, then the residue was to be distributed among several beneficiaries, including 25% to Mr. Armstrong and 15% to Mr. Kotanko. Her son, Mr. Harnden, was specifically disinherited.
- [12] In July 2011, by written designation, the Deceased named Mr. Kotanko as the sole beneficiary of her RIF with the Bank of Montreal totalling \$144,204.22. She did not advise Mr. Kotanko of this, and he did not find out about the RIF or the beneficiary designation until after the Deceased's death in 2017.
- [13] Between 2012 and 2013, with the assistance of Mr. Holm, the Deceased arranged her affairs such that her assets would pass to Mr. Kotanko upon her death. She took the following steps within that time, during which she consulted with, and gave instructions to, Mr. Holm:
- (a) On January 23, 2012, the Deceased registered her townhouse at #7 - 20370 53rd Avenue, Langley B.C. in joint tenancy with Mr. Kotanko, with a right of survivorship (the "Transfer");
 - (b) On the same date, the Deceased executed a new will ("2012 Will") because of the death of her spouse and her desire to remove Mr. Armstrong as a residual beneficiary, in which Mr. Kotanko remained the executor and became the sole residual beneficiary. If he predeceased the Deceased, then Mr. Kotanko's estate would be the sole residual beneficiary. An additional provision allowed Mr. Armstrong to take any contents of the Property he wished to have; and
 - (c) On January 30, 2013 the Deceased executed her final will ("2013 Will"), the only change from the 2012 Will being that while Mr. Kotanko remained the sole residual beneficiary, should he predecease the Deceased, the residue would go to Mr. Armstrong because there was no one else in her life and, as she expressed it to Mr. Holm, Mr. Armstrong "may as well have the money" to pay off his debts.
- [14] Mr. Holm testified at trial that he has been a practicing solicitor for over 40 years. For the last 20 years, he has concentrated on Wills and Estates, Real Estate Law and Corporate law. He said that, as was his invariable practice when taking instructions concerning a client's

will, he screened for capacity and undue influence issues in his meetings with the Deceased, and was satisfied that her instructions represented the Deceased's true testamentary wishes. She had provided clear and consistent instructions, and articulated cogent reasons for her testamentary planning. One of the Deceased's stated reasons for leaving Mr. Armstrong out of her 2012 and 2013 Wills was that he had borrowed money from her and had not paid her back.

- [15] Mr. Holm's evidence was that the Deceased at no time expressed the intention to have Mr. Kotanko simply hold the assets for the benefit of Mr. Armstrong. To the contrary, according to Mr. Holm, the Deceased specifically expressed her intention to leave neither the townhouse nor the bank account to him because aside from money he had borrowed from her, he was in arrears of his tax obligations and owed the CRA a significant amount of money. She told Mr. Holm she did not wish to leave her assets to her son only to have the CRA confiscate them to satisfy her son's tax debts. However, she did not want Mr. Armstrong to know about those reasons, and instructed Mr. Holm not to make a note about them.
- [16] In the face of this instruction, Mr. Holm advised the Deceased that it would be prudent to leave a record explaining why she was not providing for her sons upon her death in case either or both decided to challenge her will. The Deceased said in effect that she regretted having her sons, that they had ruined her life and were little other than a burden to her. Mr. Holm did not make a note of this, but testified that he was taken aback by the Deceased's statements as they were very much out of the ordinary in his experience, and while he made no note of them, recalled them quite vividly.
- [17] As noted above, In the final 2013 Will, the Deceased instructed Mr. Holm to amend the will to name Mr. Armstrong as an alternative residual beneficiary should Mr. Kotanko predecease her. Her reason for this, said Mr. Holm, was that if both she and Mr. Kotanko were dead, Mr. Armstrong or his creditors may as well have her assets.
- [18] The Deceased died in February 2017. Before that time, Mr. Kotanko had not retained or met with Mr. Holm on any matter. In May 2017, he retained Mr. Holm for the first time, having learned of the Deceased's inter vivos gifts, to assist in transferring the Property from joint tenancy into his name alone.
- [19] Mr. Kotanko, both in his affidavit evidence and when giving evidence in the trial, denied that the Deceased had ever asked him to hold her assets in trust, or to the benefit of, Mr. Armstrong.
- [20] On May 1, 2017, Mr. Armstrong began to occupy the Property without Mr. Kotanko's permission. Despite requests by Mr. Kotanko that he vacate the Property, Mr. Armstrong has refused to do so. He continues to occupy the Property. He has not paid rent or contributed to the ongoing maintenance since he has occupied the Property. Hence the counterclaim of Mr. Kotanko for occupational rent.

2. Evidence Advanced by the Plaintiff Armstrong

- [21] Mr. Armstrong, in support of his allegation of a secret trust made on his behalf by the Deceased, relied on his affidavits and affidavits of various persons who attested that the Deceased made comments to them about her desire to provide for him after her death. In his examination for discovery and affidavits, Mr. Armstrong acknowledged that after the Deceased's husband died, he had no discussions with the Deceased about her estate planning, testamentary wishes, or her intentions as to the disposition of her property when she died. That was the case despite the fact that he lived across the street from her for nine years preceding her death, and in that time he saw her frequently. Moreover, he acknowledged that he did not hear from anyone else that the Deceased was planning to make any provision for him upon her death until after she died and this litigation was commenced.
- [22] Three friends or acquaintances of Mr. Armstrong swore affidavits in support of his claim that the Deceased intended to provide for him after her death. One of those friends deposed that the Deceased impressed upon Mr. Kotanko a trust obligation to hold her assets for the benefit of Mr. Armstrong.
- [23] William Nesteruk deposed that he had been a good friend of Mr. Armstrong for 30 years. As a result of that friendship, he also became acquainted with the Deceased and her spouse, Gordon Almgren. Mr. Nesteruk recalled that in 2009, before Gordon Almgren died, he had lunch at a Greek restaurant with Mr. Kotanko, the Deceased, and Gordon. He said he overheard the Deceased express her concern to Mr. Kotanko about Mr. Armstrong's ability to manage two properties she was planning to leave him, which included the Property at issue in this litigation, and another townhouse in Langley. According to Mr. Nesteruk, the Deceased stated that she trusted Mr. Kotanko to manage the properties for Mr. Armstrong, and to take care of him for her; and that in response, Mr. Nesteruk acknowledged her concerns and said "Don't worry, I will take care of it".
- [24] Mr. Nesteruk further deposed that soon after the Deceased's death in 2017, during a visit to the Property at which Mr. Kotanko was also present, he confronted Mr. Kotanko about his promise in 2009 to take care of Mr. Armstrong and the properties. Mr. Nesteruk said Mr. Kotanko told him to mind his own business and that he was "taking care of it". Mr. Nesteruk said that was the last time he spoke with Mr. Kotanko.
- [25] Mr. Nesteruk did not convey to Mr. Armstrong the conversation he overheard at the 2009 lunch at the time, nor at any time before these proceedings against Mr. Kotanko were commenced, despite their close friendship and frequent communications they had in the interim.
- [26] Merlyn West deposed that she encountered the Deceased by chance in a parking lot several months before her death in 2017. According to Ms. West, the Deceased looked very weak and said spontaneously that she had arranged matters such that Mr. Armstrong would be "looked after" once she died. Ms. West deposed that the Deceased stated Mr. Armstrong "would not have to worry about anything because she knew he would be very upset when she dies. She

did not state anyone else's name, or whether someone in particular would be taking care of [Mr. Armstrong]."

[27] Jack Nicholls deposed that when the Deceased was very ill prior to her death, he asked to visit her and the Deceased agreed. Mr. Nicholls stated that on one of the visits, the Deceased informed him that she was "worried about Lloyd and said she had made arrangements so that he could be taken care of once she passed away". He further deposed that, to his recollection, "she did not mention anyone else's name or in what manner [Mr. Armstrong] would be taken care of."

[28] Mr. Armstrong also pointed to certain statements of Mr. Kotanko made in the course of his examination for discovery. In discovery, it was put to Mr. Kotanko that he knew the Deceased had concerns about Mr. Armstrong wasting his money. Mr. Kotanko responded that he knew Mr. Armstrong as a fisherman who made "good money" but "never seemed to have any". Mr. Kotanko also said he knew Mr. Armstrong "liked drinking lots". The following exchange ensued:

Q: All right. And you knew that Ms. Algren wanted to ensure that her assets weren't wasted by her son. That was something she communicated to you, perhaps not in those words, is that fair?

A: Yes.

Q: As a friend, she wanted you to help and make sure that her assets weren't wasted by her son; is that fair?

A: She didn't ask me to do that, no.

Q: She didn't mention that to you?

A: No. All she said to me was, when I asked her about Lloyd, she didn't -she said to me, if you'd--if you want to, you can buy him a boat to live on. Because Lloyd was, you know--and she said, what would that be, 20, 30 thousand? And then she said do whatever you want.

Q: Well, what you understood she was communicating to you is do whatever you thought was reasonable in terms of helping Lloyd with her money, isn't that what she was communicating to you?

A: No.

Q: Whatever you thought was reasonable, she was relying on you to decide?

A: Well, she--the way I understood it was that if I wanted to buy him a boat to live on, it was up to me.

[29] Mr. Armstrong argued that in this exchange, Mr. Kotanko acknowledged the concern of the Deceased that unless Mr. Armstrong had assistance managing the assets she intended to leave him, he would waste them.

III. Admissibility of Hearsay Statements of the Deceased

- [30] While hearsay statements from deceased persons can be admissible in the right circumstances, "such statements must be admitted through the principled approach and there is no general exception for hearsay statements from deceased persons": *Sarzynick v. Skwarchuk*, 2021 BCSC 443 at para. 164. The Court provided a helpful summary of the issue, particularly as it applies in estate cases, at paras. 160-162:
- [160] The principled approach requires that the impugned hearsay be both necessary and reliable to pass the threshold for admissibility: *Khelawon*, [2006 SCC 57 at para. 47]. The criterion of necessity mandates that the hearsay evidence must be required to facilitate the interests of justice and the search for the truth in any given case. Reliability can be addressed in one of two ways. First, a statement can be deemed procedurally reliable if there are adequate substitutes for testing the veracity of the statement. Alternatively, a hearsay statement can be substantively reliable when there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy: *R. v. Moir*, 2020 BCCA 116 at para. 87; *R. v. Bradshaw*, 2017 SCC 35 at para. 27.
- [161] Corroborative evidence may be used to address substantive reliability if, and only if, when considered as a whole and in the context of the case, it shows that the only explanation for the impugned hearsay statement is the truthfulness or accuracy of the material aspects of the statement: *Bradshaw*, at paras. 4, 57. The court must consider other explanations, even hypothetical explanations, for the impugned statement and ask itself whether the proposed corroborating evidence eliminates those alternatives: *Bradshaw*, at para. 57; [citations omitted]
- [162] In addition, if the hearsay passes the threshold admissibility stage (i.e. it is necessary and reliable) as well as the judge's residual discretion to nevertheless exclude the hearsay evidence, it is still subject to the weight ascribed to the statement by the trier of fact: *Khelawon*, at para. 49 .
- [31] The Court has regularly accepted the hearsay evidence of a deceased's solicitor to resolve challenges to the deceased's inter vivos and estate planning. The evidence of solicitors, as disinterested professionals is typically viewed as inherently reliable and accorded significant weight. For example, in *Peterson v. Welwood*, 2018 BCSC 1379, the Court accepted hearsay statements of the deceased made by the deceased's solicitor, in part because the deceased's statements "made to a disinterested professional possess a circumstantial guarantee of trustworthiness" (at para. 129). The reliability and weight of the solicitor's evidence was enhanced by his clear recollection of his meetings with the deceased and his years of experience as a lawyer (at para. 131). The Court rejected the plaintiff's argument that the solicitor's evidence was undermined because he did not have detailed notes of his meetings with the deceased, finding that the solicitor had a clear independent recollection of his meetings with the deceased. See also: *Harshenin v. Khadikin*, 2015 BCSC 1213; *Webber v. Sullivan*, 2019 BCSC 1522; *Mitchell v. Mitchell*, 2001 [2001] O.J. No. 4746 at para. 50.

IV. The Relevant Trust Law

[32] In final argument, counsel for Mr. Armstrong relied on the law concerning secret trusts and constructive remedial trust. Although no reliance was placed on express trust in argument, the law concerning express trust is central to the establishment of a secret trust, and for that reason I will address its components as well

A. Express Trusts

[33] A party asserting the existence of an express trust, written or oral, bears the onus of establishing what is known as the "Three Certainties": i) certainty of intention, ii) certainty of subject, and iii) certainty of object: *Xu v. Hu*, 2021 BCCA 2, at paras. 12-13. The Court also stipulated at para. 17 that there must be a clear declaration of trust in order to constitute a trust.

[34] Although each of the Three Certainties must be considered individually, the certainty of subject matter and certainty of objects may inform the issue of certainty of intention: *Larochelle v. Soucie Estate*, 2019 BCSC 1329, at para. 186.

[35] *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Carswell 2005 at 132) describes the test for an express trust this way:

The alleged settlor must employ language which clearly shows his intention that the recipient should hold on trust. No trust exists if the recipient is to take absolutely, but he is merely put under a moral obligation as to what is to be done with the property. If such imperative language exists, it must, second, be shown that the settlor has so clearly described the property which is to be subject to the trust that it can be definitively ascertained. Third, the objects of the trust must be equally and clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary. If any one of these three certainties does not exist, the trust fails to come into existence or, to put it differently, is void.

[36] Statements known as "precatory expressions" do not in most circumstances create binding trusts. Where a gift is accompanied by desire, wish, recommendation, hope or expression of confidence that the donee will use it in a certain way, no trust will attach to it unless a construction of the will as a whole satisfies the court that a trust was intended. This distinction between the creation of a legally enforceable trust and, on the other hand, the imposition of an unenforceable moral obligation to serve as a guide to one's conscience, was discussed in *Milsom v. Holien*, 2001 BCSC 868, at paras. 36-38. See also: *Underhill's Law of Trusts*, 12th ed. (London: Butterworths, 1970) at p. 38. However, that is not to say that precatory words can create only a moral obligation and never form the basis of a trust if the evidence establishes that the testator clearly intended to create a trust. As in the creation of any trust, intention of the settlor is key: *Glasspool v. Glasspool Estate*, [1998] B.C.J. No. 693, aff'd 1999 BCCA 30.

B. Secret Trusts

- [37] A party asserting the existence of a secret trust must establish, in addition to the Three Certainties, that i) the donor communicated to the donee an intention that the property be dealt with in a specific way upon the happening of a specific event, and ii) the donee accepted that obligation: *Champoise v. Prost*, 2000 BCCA 426, at paras. 15-16. As with an express trust, for a secret trust to be enforceable, the Three Certainties must be established at the time the trust is created: *Gefen Estate v. Gefen*, 2022 ONCA 174, at para. 49.
- [38] The two essential features of a secret trust (once the Three Certainties are established) are first, a "communication" by the deceased person to his or her devisee, legatee or intestate heir, and second, an acceptance by that person of the request that he or she will hold the property in trust for the stated person or purposes: *Bergler v. Odenthal*, 2020 BCCA 175. The Court cited *Waters* with approval to the effect that the communication is the most essential factor: "Once it is established, acceptance, though vital, can be spelled out of the silence of the devisee, legatee or heir." In other words, "any person having received a request of this nature would be bound to say something if he rejected the idea that he himself should not enjoy the property beneficially."

C. Remedial Constructive Trusts

- [39] Mr. Armstrong argued in the alternative that in good conscience, a remedial constructive trust in his favour should be imposed over the townhouse Property. As I understand the argument, it rests on the statement made by Mr. Kotanko in his examination for discovery, cited earlier, that in the course of a discussion with the Deceased, he asked about Mr. Armstrong, whereupon the Deceased said "if you want, you can buy him a boat to live on and she said what would that be, 20,30 thousand? And then she said, do whatever you want". As a result, good conscience required that a constructive trust on behalf of Mr. Armstrong ought to be imposed.
- [40] In the case of *Solouse v. Korkontzilas*, [1997] 2 S.C.R. 2017, a majority of the Supreme Court of Canada stated at para. 36 that the situations in which a judge may consider, when deciding whether good conscience requires the imposition of a constructive trust, fall into two general categories:
- [36] The first category concerns property obtained by a wrongful act of the defendant, notably breach of fiduciary obligation or breach of duty of loyalty. . The second category concerns situations where the defendant has not acted wrongfully in obtaining the property, but where he would be unjustly enriched to the plaintiff's detriment by being permitted to keep the property for himself. The two categories are not mutually exclusive. Often wrongful acquisition of property will be associated with unjust enrichment, and vice versa. However, either situation alone may be sufficient to justify imposition of a constructive trust.

[41] Further, the situations in which a constructive trust may be imposed are not limited to breach of fiduciary duty and unjust enrichment. In Canada, it is open to a court to recognize a substantive constructive trust, and to do so outside the categories of breach of fiduciary duty and unjust enrichment: *BNSF Railway v. Teck Metals Ltd.*, 2016 BCCA 350.

V. Discussion: Application of the Law to the Facts

A. Do the Facts of this Case Establish a Secret Trust?

[42] Mr. Holm testified that the Deceased at no time expressed an intention to leave the Property or the bank account to Mr. Armstrong. Nor, he said, did the Deceased ever tell him that she wanted Mr. Kotanko to hold those assets in trust for the benefit of Mr. Armstrong. In fact, her clearly stated intention was to leave the assets to Mr. Kotanko for his own benefit, and not to her son.

[43] The evidence of Mr. Holm concerning the statements of the Deceased to him have the following markers of reliability:

- (a) The timing of the statements relating to the events: The instructions and reasons given by the Deceased to Mr. Holm were contemporaneous with the transfers and transactions challenged by Mr. Armstrong in this action;
- (b) The solemnity of the event: The statements provided by the Deceased to Mr. Holm were made in the context of a solemn occasion, where the Deceased was seeking professional assistance to formalize her estate planning;
- (c) Circumstantial or evidentiary guarantees of inherent trustworthiness: Mr. Holm was a disinterested professional under an obligation to put the Deceased's instructions into effect. He was not a personal friend of the Deceased and had no dealings with her other than in his professional capacity as a solicitor;
- (d) Independent corroborative evidence going to trustworthiness: There are objective documentary records supporting the evidence of Mr. Holm, in the form of notes, transfer documents and wills. All of the steps taken by the Deceased confirm her intention to establish inter vivos gifts to Mr. Kotanko such that none of her assets fell within her estate;
- (e) Capacity of the Deceased: Mr. Holm screened the Deceased for capacity and undue influence in accordance with his professional obligations and invariable practice as an experienced solicitor.

[44] As noted, Mr. Holm is truly a "disinterest party" in this litigation. His dealings with the Deceased were limited to his meetings with her on occasion over the years to discuss her testamentary wishes. He was not a personal friend, nor did he socialize with her. He had never met with Mr. Kotanko nor did he have any kind of contact with him until after the Deceased's death. His only relationship with Mr. Kotanko was a professional one. Nor had he ever had any dealings with Mr. Armstrong.

- [45] In short, Mr. Holm was an entirely credible and reliable witness. His evidence establishes that the Deceased, before her death, intended to gift the Property and the bank account to Mr. Kotanko and took all necessary steps to have the assets pass to him upon her death rather than having them fall within her estate.
- [46] The evidence of Mr. Nesteruk is the only evidence advanced by Mr. Armstrong which can be said to even approach proof of the existence of a secret trust. However, I do not accept the argument of Mr. Armstrong that Mr. Nesteruk was a disinterested party. He was clearly a friend of Mr. Armstrong, and had been such for 30 years. As noted earlier, Mr. Nesteruk deposed that soon after the death of the Deceased, he confronted Mr. Kotanko during a visit to the townhouse Property and, while there, pressed him about taking care of Mr. Armstrong in relation to the Property. He does not say why he was visiting the Property or why Mr. Kotanko happened to be there. If Mr. Nesteruk was a disinterested party, why was he confronting Mr. Kotanko about the Deceased's assets and advocating on Mr. Armstrong's behalf?
- [47] Mr. Kotanko denied that Mr. Nesteruk ever met with him at the Property, and denied that Mr. Nesteruk ever confronted him in the manner he described.
- [48] Mr. Nesteruk's evidence is equally questionable to the effect that he was at a lunch with the Deceased and her spouse Gordon Algren when the Deceased allegedly expressed concern about Mr. Armstrong's ability to manage the Property she intended to leave him when she died. At that time, Gordon Algren was alive. It is difficult to understand why the Deceased would discuss her estate planning when her spouse was alive and present, and who would have had to predecease her in order for Mr. Armstrong to be a beneficiary. Moreover, this discussion allegedly occurred in 2009, some eight years before her death, which hardly satisfies the requirement that the intentions be articulated contemporaneously with the death of the donor. According to both Mr. Nesteruk and Mr. Armstrong, in all of those intervening years Mr. Nesteruk did not once communicate the lunch discussion to Mr. Armstrong or to anyone else; nor did he raise it with Mr. Armstrong until well after the Deceased's death, when this litigation was commenced by Mr. Armstrong.
- [49] There is no independent evidence with which to test the veracity of the statement allegedly made by the Deceased to Mr. Kotanko and overheard by Mr. Nesteruk at the 2009 lunch. Nor are there any circumstantial or evidentiary guarantees that the statement is inherently reliable such that I can ascribe any weight to it.
- [50] Mr. Kotanko denied that he was present at a lunch with Mr. Nesteruk, the Deceased and her spouse in 2009, or at any time, when such a conversation occurred.
- [51] To accept Mr. Nesteruk's evidence, one would have to accept that the Deceased mislead her solicitor, Mr. Holm, about her feelings toward her son and her true intentions concerning the disposition of her assets. I can think of no reason why the Deceased would retain Mr. Holm to give her advice and to put into effect her wish to gift her assets to Mr. Kotanko if she actually intended to leave her assets to her son. Mr. Armstrong provided no explanation or

rationale for such behavior on the part of the Deceased that would accord with common sense or human experience.

- [52] The evidence of Ms. West and Mr. Nicholls is also problematic. It lacks any context. It is unclear as to what kind of friendship or relationship either one had with the Deceased, or with Mr. Armstrong, such that the Deceased would spontaneously reveal to them her concern about the ability of Mr. Armstrong to provide for himself after her death.
- [53] I do not accept that Mr. Nesteruk's evidence is corroborated by that of Ms. West and Mr. Nicholls. It does not establish that the only explanation for the hearsay statement of the Deceased to Mr. Nesteruk is the accuracy or truthfulness of the material aspects of the statements. Their evidence provides no substitute for testing the veracity of the statements. The evidence of both these witnesses is impossibly vague. As such, it does not provide the ring of truth to Mr. Nesteruk's evidence.
- [54] Most importantly, however, is the fact that the evidence of none of these witnesses, including that of Mr. Nesteruk, establishes the Three Certainties, which must be established before any consideration of a secret trust. The evidence of Mr. Nicholls and Ms. West falls far short of establishing a trust. There is no certainty as to the nature or scope of the intended assets; nor is there certainty that Mr. Armstrong was to be the beneficiary of those assets. There is no mention in their evidence of the manner in which the Deceased intended to "provide for" or "take care of" Mr. Armstrong, and no suggestion that she intended to have a third person hold her assets for the benefit of Mr. Armstrong.
- [55] Aside from the lack of credibility of Mr. Nesteruk, his evidence also falls short of establishing the Three Certainties and the additional requirements of a secret trust. His evidence does not establish that the Deceased intended to bind Mr. Kotanko to a legally enforceable trust. At most, if his evidence is worthy of belief (which in my view it is not), it creates a moral obligation to assist Mr. Armstrong by "managing the Property" and "taking care" of Mr. Armstrong for her.

B. Does the Evidence Establish the Creation of a Constructive Trust?

- [56] Mr. Armstrong argued, in the alternative, that a constructive trust in his favour should be imposed over the Property. He says that good conscience necessitates such a trust. As I understand his argument, Mr. Kotanko committed a wrongful act by representing to the Deceased that he would "buy a boat" for Mr. Armstrong and otherwise care for him. In his written argument, Mr. Armstrong asserted that the Deceased and Mr. Kotanko understood that Mr. Armstrong "may have difficulties managing the properties, and so to ensure that the assets of the deceased did not go to waste in the hands of [Mr. Armstrong], the deceased transferred her assets" to Mr. Kotanko. As a trusted friend and executor of the Deceased's estate, the Deceased "relied on this position of trust", and "induced the deceased to transfer all the significant assets of her estate" to Mr. Kotanko.

- [57] Mr. Armstrong asserted in written argument that at the time the Deceased transferred the interest in the Property to Mr. Kotanko, he "put his mind to [Mr. Armstrong]" by asking 'What about Lloyd?' . He went on to argue that as evidenced in Mr. Kotanko's examination for discovery, "It was clear that he was aware that this transfer would effectively disinherit [Mr. Armstrong] unless [he] undertook to manage the assets for the benefit of [Mr. Armstrong]."
- [58] With respect, this argument is wishful thinking. In his examination for discovery, Mr. Kotanko specifically denied promising to "take care" of Mr. Armstrong by managing the Deceased's assets for him. His evidence was that the Deceased was of the view that Mr. Armstrong would waste her assets, and that she was leaving the Property to Mr. Kotanko as a result. At most, she told Mr. Kotanko that he could buy Mr. Armstrong a boat, but that it was "up to him".
- [59] As noted earlier, Mr. Kotanko was not aware until after the Deceased's death that she had a bank account which she had instructed Mr. Holm to transfer to him upon her death.
- [60] To conclude, there is simply no evidence to suggest, much less establish, that Mr. Kotanko committed any wrongful act which deprived Mr. Armstrong of assets he would otherwise have enjoyed following the Deceased's death.

VI. The Counterclaim by Mr. Kotanko

- [61] Mr. Kotanko brought a counterclaim for occupational rent, on the basis that Mr. Armstrong has occupied the Property owned by Mr. Kotanko since the death of the Deceased, and has consistently refused to vacate the Property or pay for costs associated with his occupation, despite requests by Mr. Kotanko dating from November 30, 2017 that he vacate the premises. Mr. Kotanko has not condoned or acquiesced to Mr. Armstrong's occupation of the Property.
- [62] Mr. Armstrong admits that he has not paid occupational rent in respect of the Property since it was transferred to Mr. Kotanko's name.
- [63] Mr. Kotanko has provided an expert report prepared by Mr. Paul Ellis of West Coast Appraisals concerning the fair market rent of the Property. Mr. Ellis estimates that the Property could have been rented in the range of \$1250 to \$1450 per month since February 2017. Mr. Kotanko has adopted the most conservative estimate made in the report for purposes of the trial. His calculation is based on occupation from May 2017, when the Property was transferred to him and first occupied by Mr. Armstrong, to February 2023 when the trial began. By that calculation, Mr. Armstrong had by the time of the trial occupied the Property for 69 months. Multiplied by \$1250 per month, Mr. Armstrong owes \$86,250 in occupational rent in accordance with the expert evidence of Mr. Ellis, and an additional three months rent for his occupancy from the time of the trial to present.

- [64] The counterclaim includes a plea in constructive trust for payment to Mr. Kotanko of \$5,976.18 in strata fees and \$2,215.53 in utilities which Mr. Kotanko has expended as a result of Mr. Armstrong's occupation of the property and which Mr. Armstrong has failed to pay.
- [65] Mr. Armstrong did not object to the admissibility of Mr. Ellis's report, nor did he provide any rebuttal evidence. He did not seek to have Mr. Ellis attend at trial to be cross-examined on his report.
- [66] Mr. Armstrong argued that the counterclaim for occupational rent must fail as a matter of law, citing *Volovsek v. Boisvenu Alter-Ego Trust #1*, 2021 BCCA 179, where our Court of Appeal stated the following at para. 68:
- [68] In British Columbia, the existing jurisprudence is to the effect that occupational rent is limited to situations where one co-owner is ousted from jointly owned property and the other co-owner continues to occupy the property, and it usually arises in matrimonial cases [citations omitted].
- [67] Mr. Armstrong submitted that in the present case, Mr. Kotanko and Mr. Armstrong were not co-owners of the townhouse Property, he does not jointly own the property with Mr. Kotanko; rather, Mr. Armstrong is claiming that he is the beneficial owner. As a result, even if it is held that Mr. Armstrong has no beneficial interest in the townhouse Property, he does not jointly own the property with the defendant and so an order for occupational rent would be incorrect in law.

Discussion: Can the counterclaim for occupational rent succeed as a matter of law?

- [68] The law concerning occupational rent is not as straightforward as Mr. Armstrong suggests. It is true that the vast majority of decisions in which occupational rent has been awarded concern matrimonial disputes where the spouses jointly owned the family home, and one spouse is required to leave the home while the other spouse continues to occupy it. However, as noted by Justice Newbury, writing for the Court in *Wang v. Jiang*, 2021 BCCA 132 at para. 73, "The nature of and conditions necessary for the awarding of occupational rent appear to be evolving in the law". After citing both British Columbia and Ontario law on the subject, Newbury J.A. went on to say the following at para. 74:
- [74] In the family law context, courts have long taken the view that "the object of an award of occupation rent is to do equity between the parties." (See *Donovan v. Donovan* (1986) 7 B.C.L.R. 221(S.C.), per Paris J.) In *Stasiewski v. Stasiewski* 2007 BCCA 205, Mr. Justice K. Smith quoted with approval the following passage from *Donovan*:

Furthermore, if the occupying tenant put forward a claim for expenditures made to the benefit of the property (as in the case at bar), [the co-tenant out of possession] was required as a condition of that equitable relief to submit a claim for occupational rent--and this, apparently, regardless of whether or not the non-resident tenant had vacated the property voluntarily.

Smith J.A. then continued:

Continuing he [Paris J.] observed that "ouster" would be irrelevant in the case before him, since the husband made a claim for expenditures to the benefit of the property, and that, in any event, the wife's claim for occupational rent was not made as a cause of action under ordinary property law, but rather as a factor to be considered in the division of family assets. He concluded that the claims for expenses and for occupational rent should be considered relevant to the division of family assets.

More recently, in *Dacyshyn v. Semeniuk*, 2007 BCSC 71, a case in which occupation rent was claimed as a cause of action in itself, Humphries J. canvassed the case law on the subject, including *Donovan*. She dismissed the action as unsupported on the evidence, but in her useful review of the law, she came to the same conclusion as had Paris J., that occupation rent is awarded when it is just and equitable to do so. .[Emphasis added by Smith J.A.]

- [69] In *Wang*, the trial judge had framed the award for damages as occupational rent, which damages claim had not been pleaded. The Court of Appeal concluded that the claim was not for occupational rent per se, but for the defendant's breach of a joint venture agreement, and either damages for loss of rental income resulting from the defendants' unauthorized occupation of the property that was the subject of the joint venture, or restitution for the unjust enrichment of the defendants in doing so. Of note, however, the Court did not foreclose the possibility that occupational rent could be claimed in circumstances other than matrimonial disputes. That is consistent with the Court's citing, with apparent approval, the comments of Smith J.A. in *Stasiewski* that occupational rent could be awarded where it was "just and equitable to do so".
- [70] In the *Volovsek* decision, cited by Mr. Armstrong (above), the appellant, who was the trustee of an alter ego trust, appealed an order of the trial judge dismissing his counterclaim against the respondent (Ms. Volovsek) for damages in trespass. The respondent had continued to live in a condominium owned by the trust pending the outcome of her claim for a constructive trust over the unit. Her constructive trust claim was dismissed, and the trial judge then dismissed the trust's counterclaim on the basis that the trust did not have standing to bring an action for trespass because it did not have actual possession of the condominium at the time. The Court of Appeal reversed the trial judge regarding the counterclaim, holding that possession was not a prerequisite to bringing an action in trespass. However, the Court also held that the trust had not proved an actual loss due to the trespass, whether characterized as damages on account of mesne profits, since the trust did not lose money as a result of the delay in selling the unit, or characterized as occupational rent, because the strata bylaws prevented the condominium owner (in this case, the trust) from renting the unit.

- [71] The Court of Appeal in *Volovsek* noted that the Ontario jurisprudence, which held that occupational rent was an appropriate measure of damages for both trespass and unjust enrichment, differed somewhat from that of British Columbia, but held that on the facts of the *Volovsek* case it was not necessary to explore that difference because there was no evidentiary basis to assess either mesne profits or an award for occupational rent. Hence the statement of the Court in that decision with respect to occupational rent is obiter.
- [72] On my reading of the jurisprudence, there is authority in this province for the proposition that while occupational rent has in most cases been awarded in the context of matrimonial disputes, it is not limited to circumstances of joint ownership of matrimonial property, but can extend to other circumstances in which it is just and equitable to make such an award.
- [73] In the present case, Mr. Armstrong has occupied the townhouse Property rent free since May 2017, refusing all requests to vacate, despite the fact that the Deceased took steps before her death to place the Property in joint tenancy with Mr. Kotanko. Upon her death, Mr. Kotanko became the sole title holder of the Property.
- [74] Mr. Armstrong did not challenge the expert opinion concerning the fair market rent the townhouse could have commanded had it been available to rent. The only contribution Mr. Armstrong made to the Property was payment of the strata fees for 2021 and 2022 (coincidentally, at the time he commenced the lawsuit). The only other payments Mr. Armstrong made were for his own use and benefit as the tenant--cablevision and internet (Shaw), B.C. Hydro and Fortis Gas--which cannot fairly be characterized as maintaining or improving the Property.
- [75] In short, Mr. Armstrong has suffered no deprivation, nor has Mr. Kotanko been unjustly enriched. On the contrary, it is Mr. Kotanko who has been deprived of the Property and Mr. Armstrong who has been unjustly enriched by his ongoing occupation of the Property rent free. In the circumstances, it is just and equitable to award Mr. Kotanko occupational rent in the amount claimed, that is, \$86,250.00, for which he has established a sound evidentiary basis, and an additional three months rent for Mr. Armstrong's occupancy from March to May 2023 in the amount of \$3,750. Mr. Kotanko is also entitled to an award of \$2,215.53 for the cost of utilities incurred by Mr. Armstrong during his occupancy of the Property.
- [76] The strata fees are a different matter. As the owner of the Property, the strata fees are the responsibility of Mr. Kotanko. There was no evidence to suggest that Mr. Armstrong would be responsible for the strata fees over and above the monthly rent. Mr. Armstrong did pay the strata fees for 2021 and 2022 thus he should receive credit for that payment, deducted from the amount he owes for occupational rent. Should the parties wish to pursue the matter further to obtain a precise accounting of the strata fees during the material time, they may apply to the Registrar.

VII. Orders

- [77] In conclusion, Mr. Kotanko is entitled to the following Orders:

- (a) An Order that the Notice of Civil Claim is dismissed;
- (b) An Order cancelling Mr. Armstrong's Certificate of Pending Litigation CA6494221 registered against property located at #7 - 20370 53rd Avenue, Township of Langley, British Columbia, also known as: PID: 001-238-949; Strata Lot 36 Group 2 New Westminster District Strata Plan NW 266
- (c) An Order that upon registration at the New Westminster Land Title Office of a court-certified copy of the Order, together with a letter from CBM Lawyers to the Registrar of Titles authorizing such discharge and release, the Registrar is directed to discharge and release Mr. Armstrong's Certificate of Pending Litigation CA6494221 registered against the Property;
- (d) An Order that the last will and testament, dated January 30, 2013 of the late Jean Irene Almgren be pronounced valid in solemn form;
- (e) An Order of \$86,250.00, and an additional \$3,500.00, for occupational rent against Mr. Armstrong, less strata fees paid by Mr. Armstrong in 2021 and 2022;
- (f) An Order of \$2,215.53 against Mr. Armstrong for payment of utilities made by Mr. Kotanko;
- (g) The following Orders for vacant possession of the Property:
- (i) An Order that Mr. Armstrong vacate the Property by no later than fifteen (15) business days after the pronouncement of this Order (the "Vacancy Date");
- (ii) An Order that Mr. Armstrong provide to CBM Lawyers LLP all keys and common area keys relating the Property by no later than the Vacancy Date, and that Mr. Armstrong shall retain no copies of such keys for himself;
- (iii) An Order that Mr. Armstrong maintain the Property in a clean and good condition up to and including the Vacancy Date;
- (iv) An Order that Mr. Armstrong not impede access to the Property by Mr. Kotanko or his agents from the Vacancy Date onward.

[78] As the successful party, Mr. Kotanko is entitled to his costs.

"The Honourable Madam Justice C.A. Wedge"

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