

CANADA / JUDGMENT

# Aulakh v. Aulakh

2016 BCSC 2414

## COURT

Supreme Court of British Columbia

## DECIDED

23 December 2016

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2016 BCSC 2414 Aulakh v. Aulakh IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Aulakh v. Aulakh, 2016 BCSC 2414 Date: 20161223 Docket: S15-16970 Registry: Williams Lake Between: Ajit Singh Aulakh Plaintiff And Gurinder Singh Aulakh, also known as Gary Aulakh and Surinder Kaur Aulakh Defendants

- and - Docket: S15-16992 Registry: Williams Lake Between: Gurinder Singh Aulakh Plaintiff And Ajit Singh Aulakh, Ajit Singh Aulakh Executor of the Estate of Amar Kaur Aulakh, Jasminder Kaur Sandhu, Davinder Kaur Gill Defendants Before: The Honourable Mr. Justice Funt Reasons for Judgment Counsel for the Plaintiff: S.J. Oliver Counsel for the Defendants: P.D. Messner, Q.C. Place and Dates of Trial: Williams Lake, B.C. March 29-30, 2016 Place and Date of Judgment: Williams Lake, B.C. December 23, 2016
- 1. Introduction
- [1] In these proceedings, two actions were consolidated and tried together.
- [2] Briefly stated, the first action (S15-16970) is brought by a father to recover approximately \$114,000 that he provided to his adult son and daughter-in-law in connection with the purchase of an investment rental property by the two of them.
- [3] The son and daughter-in-law say that the funds were not advanced as part of a loan. They plead that the funds were given to them so that the rental derived from the investment property could be used for the maintenance and benefit for their two sons (the plaintiff's grandsons). If the rental property were to be sold, they plead that the relevant proportion of the sale proceeds would be held by the two of them for their two sons. The defendants' pleaded trust did not include their daughter as a beneficiary. During argument, their counsel invited the Court to impose a trust for all three grandchildren.
- [4] The second action (S15-16992) involves a claim by the son (the defendant in the first action) against his father (the plaintiff in the first action) involving another rental property that the son says his father is holding in trust for him.

- [5] The father received the rental property under his late wife's will. The father denies his son's allegations. He further says that the property was held in trust for him by his son before the son transferred the property to his mother.
- [6] In the alternative, the son also makes a claim under the Wills, Estate and Succession Act, S.B.C 2009, c. 13 [WESA] based on his mother not making adequate provision under her will. The father is the executor of his wife's will.
- [7] For the reasons that follow, the Court finds that the father is successful with respect to each action.
- [8] The father is awarded his costs at Scale B.

## 2. Facts

### a) Background

- [9] With the parties sharing the same surname, I will refer to them by their first names. No disrespect is intended.
- [10] The father, Ajit, is 77 years old. He retired in 1998 as a millworker and has not been employed since that time.
- [11] Ajit's annual income is approximately \$30,000 to \$35,000 and consists primarily of pension income (Old Age Security, Canadian Pension Plan, and his pension with his past employer) and Workers' Compensation benefits arising from an injury he suffered at his past employer's mill.
- [12] Ajit married Amar in 1962. Amar died of cancer on August 21, 2014 at age 72.
- [13] Amar's annual income was also modest, approximately \$7,500 (Old Age Security and Canadian Pension Plan).
- [14] Ajit and Amar had three children: Gurinder (commonly known as Gary), Davinder, and Jasinder. Only Gary took an active role in these proceedings (Davinder and Jasinder were named in connection with Gary's WESA claim).
- [15] Gary is married to Surinder. Each is in their early forties. Gary's income is also modest. For the 2012 to 2014 taxation years he reported income ranging from approximately \$6,000 to \$11,000 consisting of child care benefits and Registered Retirement Savings Plan withdrawals. From Surinder's testimony, it is apparent that her income is also modest and consists of income from part-time employment and rental income. The approximate amount was not stated.
- [16] Gary and Surinder were married in 1996. They have three children: Corey (18 years old), Sonia (16 years old), and Roman (6 years old).

- [17] Ajit and Gary have never enjoyed a close father and son relationship. Gary testified that Ajit had always been an abusive father. Despite this view, Gary worked in the mid-nineties with Ajit in building a house which was then sold. In examination-in-chief, Gary testified that he received approximately \$50,000 from the sale proceeds.
- [18] In January 1997, Ajit and Gary purchased a duplex in Williams Lake, B.C. for \$180,500 with the civic address of 610 and 612 Atwood Place. Ajit and Gary were registered as joint tenants. Each of them contributed half of the purchase price. For the first years, both sides of the duplex were rented. In examination-in-chief, Gary accepted the description that the duplex represented a "joint venture between the two families".
- [19] In or around late 1999 or early 2000, Ajit and Amar, and Gary and Surinder and their son Corey all moved into one of the duplex units (610 Atwood Place). The rental income from 612 Atwood Place was shared by Ajit and Amar, and Gary and Surinder. Gary and Surinder's daughter Sonia was born while living at the duplex.
- [20] In September 2000, Ajit transferred his one-half interest in the duplex property to Gary. Ajit testified that the transfer was without consideration given by Gary. Ajit also testified that there were no discussions between Gary and himself regarding the transfer and no particular conditions. At trial, Gary testified that he doubted Ajit would have "just handed over to me [the one-half interest]". He thought that he must have been required to pay "some money" but did not now have documents to show such. At his June 14, 2015 examination for discovery, Gary testified that he did not pay for the one-half interest. I find that the transfer occurred without consideration. My finding is based upon Ajit's testimony at trial and Gary's first sworn evidence at his examination for discovery. Gary's testimony at trial made it clear that he did not think the transfer was a gift.
- [21] Although the details were disputed by Ajit and somewhat vague, Gary and Surinder testified that in 2000, Ajit threatened Gary with a sword. Ajit was arrested. Charges were subsequently dropped. Ajit's view was that he was arrested based on false accusations made by Gary and Surinder. The details do not need to be resolved for the purposes of the matters at bar. I find that that was an incident with high emotions that led to an even greater rift between Ajit and Gary. Quite properly and naturally, Ajit also disapproved of Gary's drug connections and activities in the early 2000s. In 2004, Gary was charged with trafficking a controlled substance. He was convicted and served time in jail.
- [22] Sometime after the foregoing incident, Ajit and Amar moved from the duplex to a house on Moon Avenue in Williams Lake.
- [23] In July 2001, Gary was successful in obtaining approval for the registration of 610 and 612 Atwood Place as separate strata lots.
- [24] In August 2001, Gary sold the strata lot with the 612 Atwood Place civic address for \$88,000 to an arm's length party. The strata lot was free and clear of a mortgage or other financial encumbrances. None of the proceeds were shared with Ajit or Amar.

- [25] In or around 2003, Gary and Surinder moved from 610 Atwood Place (the other strata lot) with their children to a house they had purchased on Moon Avenue near where Ajit and Amar lived. After their move, Gary and Surinder caused 610 Atwood Place to be rented and received rent until June 2009 when Gary transferred 610 Atwood Place to Amar without consideration given by Amar.
- [26] With respect to the June 2009 transfer by Gary of 610 Atwood Place to Amar for no consideration, Gary under cross-examination testified: Q Now, in 2009, were you having personal problems of some kind? A Like what? Q I don't know. You gave an answer similar to that at your examination for discovery that you were having personal problems in 2009. A Yeah. I think I was heavily drinking. Q I am sorry? A Heavily drinking. Q And that's when you transferred 610 Atwood Place to your mother in 2009? A Yes. Q Without any request for it to be transferred back or a request for money or anything of that nature, is that correct? A Yes. Q You were afraid at that time that you might lose all your assets, isn't that so? A Yep. Q So you didn't want anything to be in your name? You didn't want to own anything at that time? A No. Q Am I right? A Yeah.
- [27] At trial, the following questions and answers from Gary's examination for discovery were read-in as part of Ajit's case: Q If you go back into the history of that duplex, you would agree with me, wouldn't you, that your dad signed over his half to you back in -- I think it was 2000? A Yes. Q And you got that for free essentially? A Yes. Q I'm talking about the fact that your dad transferred a half interest of the duplex to you, he didn't ask for any money, you took that title, and then you eventually gave half the duplex to your mother about eight years later? A Uh-huh. Q That's what happened; right? A Yeah. Q So you got it for free and you gave it away for free; isn't that right? A Yeah.
- [28] In June 2013, Gary and Surinder purchased 960 Pigeon Avenue in Williams Lake at a cost of \$214,081.86. The property was registered in Surinder's name. To fund the purchase, \$114,081.86 was received from Ajit (from Ajit's and Amar's joint bank account). The Pigeon Avenue property was purchased as an investment rental property.
- [29] Ajit says the \$114,081.86 provided to fund the purchase represented a loan (or otherwise an advance he expected to be returned). As noted, Gary and Surinder pleaded that the funds were meant to benefit their two sons. There were no legal documents or contemporaneous written evidence to assist the Court in determining whether the funds were part of a loan, trust, or gift. Ajit testified that he understood from Amar that the funds were to be repaid. He did not wish the funds to be for the benefit of his grandchildren, at least until his death. Under his current will, he states that he has made provision for his grandsons. He has not provided for Sonia because he believes she caused him to be falsely arrested in relation to a recent incident allegedly involving his handling of a gun and threats he allegedly made.
- [30] With respect to the \$114,081.86 provided by Ajit to help fund the purchase of 960 Pigeon Avenue, Gary, under cross-examination, testified: Q So would I be correct in saying once the money came for the purchase of 960 Pigeon from that bank draft that your father obtained,

if you had gone to him and asked about it, you are pretty sure he would have said I want to be paid back, isn't that correct? Just knowing how your father was and the relationship between yourself and your father? A I would not borrow money from him. Q No, I am not asking that question. You got the money from him already. My question -- A My mother gave us the money. Q You knew where the money came from? A Her account. Q It came from your mother and father's account, you knew that? A Yes. Q You knew your dad was the one that got the bank draft? A Yes. Q All right. So my question is, at that time if you had gone and asked your dad do you want to be paid back or not, do you know what that answer would have been? A From him? Q Right. A Probably, yeah.

- [31] Gary also acknowledged in other read-ins at trial that Ajit controlled Amar's and Ajit's finances: Q Okay. As I understand it, as between your mother and father, when it came to money matters your father dealt with anything to do with investments, money, paying bills, that kind of thing; isn't that right? A Well, are you saying he was the one buying the houses and selling them and making -- she would convince him. Q No, I'm talking about actual financial transactions? A Uh-huh. He controlled -- Q Writing cheques? A He controlled all the money. He took her pension too. Q All right. A She didn't have a say in any of that.
- [32] There was evidence that Ajit and Amar, and Gary and Surinder, would pool funds. I am satisfied that any of the funds pooling was limited to day-to-day expenses and did not extend to major purchases or investments. An argument of sharing based on a more general pooling of funds cannot be supported.
- [33] In examination-in-chief, Surinder testified with respect to the approximate \$114,000 used to fund the purchase of Pigeon Avenue resulted from an understanding she had with Amar. Q But then how did it come about you ended up getting \$114,000 from Amar and Ajit in order to buy a different house? A I talked about it with my mother-in-law. Q Okay. A And we discussed it, and we said that it's always in our culture, in our tradition that men always leave something for their sons or grandchildren like the grandsons. I want us to be the first women in our culture to break that cultural [barrier] and actually do something from the women's side. Like the women should have equal rights as well as men to leave something for their children and the grandchildren. So that's how I approached my mother-in-law and she totally agreed with me. Q Totally agreed with you. A Yes.
- [34] In cross-examination, Surinder confirmed that she never attempted to talk to Ajit regarding his understanding as to the purpose of the approximate \$114,000. Of particular note, Surinder testified: Q Okay. Well, your father-in-law did obtain a bank draft for \$114,000, you and your husband used that to purchase an investment property, correct? A That's correct. Q So you didn't think to make an exception and talk to your father-in-law about what he understood was happening? A No. I assumed my mother-in-law talked to him about that.
- [35] As described above, Ajit testified that he expected repayment.

- [36] As noted, on August 21, 2014, Amar died of cancer. Under Amar's will, Ajit was appointed executor. The residue of Amar's estate (after paying debts, funeral and testamentary expenses, taxes, and the disposition of personal articles) passed to Ajit. The residue included 610 Atwood Place.
- [37] Gary received the appropriate notice on a timely basis that Ajit was seeking probate and that 610 Atwood Place would pass to Ajit under Amar's will. Gary took no steps to object to the probate or transfer.
- [38] On November 17, 2014, 610 Atwood Place was transferred from Amar's name to the estate of Amar. On December 21, 2014, 610 Atwood Place was transferred from Ajit as executor of Amar's estate to Ajit as a beneficiary under Amar's will.
- [39] On February 4, 2015, Ajit started his action against Gary and Surinder for the repayment of the \$114,081.86.
- [40] On May 5, 2015, Gary started his action seeking a declaration that 610 Atwood Place is held in trust for him, or in the alternative, a will variation of Amar's will under WESA.
- [41] In read-ins from Gary's examination for discovery, Gary acknowledges that Surinder and he are capable of supporting their family. In addition, Gary testified that in 2014, Surinder and he purchased a further property (Western Avenue, Williams Lake). They paid cash to acquire the property. Gary testified that he did not ask his father for financial assistance.

### 3. Law

- [42] The Supreme Court of Canada's decision in *Pecore v. Pecore*, 2007 SCC 17 is the leading authority on resulting trusts and the related presumptions.
- [43] In *Pecore*, the Court describes a resulting trust:
- [20] A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 362. While the trustee almost always has the legal title, in exceptional circumstances it is also possible that the trustee has equitable title: see *Waters' Law of Trusts*, at p. 365, noting the case of *Carter v. Carter* (1969), 70 W.W.R. 237 (B.C.S.C.).
- [44] The Court describes the presumption of a resulting trust and the presumption of advancement:

- [24] The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see *Waters' Law of Trusts*, at p. 375, and E. E. Gillese and M. Milczynski, *The Law of Trusts* (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.
- [27] The presumption of resulting trust is the general rule for gratuitous transfers. However, depending on the nature of the relationship between the transferor and transferee, the presumption of a resulting trust will not arise and there will be a presumption of advancement instead: see *Waters' Law of Trusts*, at p. 378. If the presumption of advancement applies, it will fall on the party challenging the transfer to rebut the presumption of a gift.
- [45] The Court ruled that a presumption of advancement will arise only where the transferor is the spouse of the transferee or where the transfer is from a parent to his or her child and that child at the time of transfer has not reached the age of majority. The second type of situation represented a change in the law from the previous rule that a transfer from a parent to his or her child, regardless of age, attracted the presumption.
- [46] With respect to evidence of the transferor's intention at the time of the transfer arising subsequent to the transfer, the Court stated:
- [56] The traditional rule is that evidence adduced to show the intention of the transferor at the time of the transfer "ought to be contemporaneous, or nearly so", to the transaction: see *Clemens v. Clemens Estate*, [1956] S.C.R. 286, at p. 294, citing *Jeans v. Cooke* (1857), 24 Beav. 513, 53 E.R. 456. Whether evidence subsequent to a transfer is admissible has often been a question of whether it complies with the Viscount Simonds' rule in *Shephard v. Cartwright*, [1955] A.C. 431 (H.L.), at p. 445, citing *Snell's Principles of Equity* (24th ed. 1954), at p. 153: The acts and declarations of the parties before or at the time of the purchase, [or of the transfer] or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration ... . But subsequent declarations are admissible as evidence only against the party who made them ... . The reason that subsequent acts and declarations have been viewed with mistrust by courts is because a transferor could have changed his or her mind subsequent to the transfer and because donors are not allowed to retract gifts. As noted by Huband J.A. in *Dreger*, at para. 33: "Self-serving statements after the event are too easily fabricated in order to bring about a desired result."
- [57] Some courts, however, have departed from the restrictive -- and somewhat abstruse -- rule in *Shephard v. Cartwright*. In *Neazor v. Hoyle* (1962), 32 D.L.R. (2d) 131 (Alta. S.C., App. Div.), for example, a brother transferred land to his sister eight years before he died and the trial judge considered the conduct of the parties during the years after the transfer to see whether they treated the land as belonging beneficially to the brother or the sister.

- [58] The rule has also lost much of its force in England. In *Lavelle v. Lavelle*, [2004] EWCA Civ 223 (BAILII), at para. 19, Lord Phillips, M.R., had this to say about *Shephard v. Cartwright* and certain other authorities relied on by the appellant in that case: It seems to me that it is not satisfactory to apply rigid rules of law to the evidence that is admissible to rebut the presumption of advancement. Plainly, self-serving statements or conduct of a transferor, who may long after the transaction be regretting earlier generosity, carry little or no weight. [Emphasis added.]
- [59] Similarly, I am of the view that the evidence of intention that arises subsequent to a transfer should not automatically be excluded if it does not comply with the *Shephard v. Cartwright* rule. Such evidence, however, must be relevant to the intention of the transferor at the time of the transfer: *Taylor v. Wallbridge* (1879), 2 S.C.R. 616. The trial judge must assess the reliability of this evidence and determine what weight it should be given, guarding against evidence that is self-serving or that tends to reflect a change in intention.
- [47] The balance of probabilities is the applicable standard to rebut either a presumption of a resulting trust or a presumption of advancement: *Pecore* at para. 43.
- [48] The Court also describes the task of a trial judge:
- [44] As in other civil cases, regardless of the legal burden, both sides to the dispute will normally bring evidence to support their position. The trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention. Thus, as discussed by Sopinka et al. in *The Law of Evidence in Canada*, at p. 116, the presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.
4. Analysis
- a) The \$114,081.66 to help fund the Pigeon Avenue purchase
- [49] I accept Ajit's testimony that he expected repayment of the \$114,081.66 and did not intend to give the funds to Gary and Surinder.
- [50] Even if the \$114,081.66 were a gratuitous transfer from a parent to his adult son (and daughter-in-law), the presumption of a resulting trust would arise.
- [51] Gary and Surinder have not presented evidence sufficient to rebut the presumption. There was only Surinder's testimony that she and Amar had an agreement or arrangement to benefit the grandchildren. There was no legal documentation in connection with such an agreement or arrangement and no supporting written evidence (such as emails, notes, or correspondence).

- [52] Gary and Surinder each knew the funds were coming from Ajit. Neither chose to speak or otherwise communicate (including through counsel) with Ajit to document or confirm any arrangement or agreement that Surinder says was reached with Amar. I find that each of them knew that Ajit did not intend to provide the funds as a gift or to settle a trust as currently pleaded by them.
- [53] The evidence shows that Ajit is a man with modest and limited means. He also disliked his son. As noted, Ajit testified that he understood from Amar that the funds were to be repaid. He also testified that he did not wish the funds to be for the benefit of his grandchildren, at least until his death. He states that under his current will, he has made provision for his two grandsons. He says he has not provided for Sonia because she caused him to be falsely arrested in connection with the alleged gun incident.
- [54] In short, I find that Ajit had no intention to give the funds to Gary and Surinder or to settle a trust for the benefit of his grandsons (or grandchildren). He expected repayment. Accordingly, Ajit succeeds in his claim in the first action (S15-16970).
- b) 610 Atwood Place
- [55] Gary argued that the transfer of 610 Atwood Place by him to Amar gave rise to a trust or, alternatively, attracted the presumption of a resulting trust as a gratuitous transfer from a son (of the age of majority) to his mother which was not rebutted by Ajit. Importantly, the earlier transfer by Ajit to Gary of 610 Atwood Place in 2000 attracts the presumption of resulting trust in Ajit's favour. If this presumption is not rebutted, Gary would hold the property in trust for his father and his intentions when transferring legal title to his mother would not be relevant.
- [56] Again, I am not satisfied on a balance of probabilities that Gary has provided sufficient evidence to rebut the presumption. Gary's acknowledgement that he received 610 Atwood Place "for free" and "gave it away for free" combined with his testimony at trial that he did not view the transfer from Ajit as a gift defeats Gary's claim of a resulting trust. Gary has not shown that Ajit intended to give 610 Atwood Place to him. From the beginning, he had no more than legal title to give. He held 610 Atwood Place under a resulting trust for Ajit.
- [57] Gary's subsequent conduct is consistent with having no interest in 610 Atwood Place. As noted, Gary did not challenge the grant of probate or take any related steps to claim an interest in 610 Atwood Place after Amar's death (other than his current claim represented by the second action).
- [58] In short, Gary's claim to an interest in 610 Atwood Place fails.
- c) Wills Variation

[59] Gary's alternative claim based on s. 60 of WESA also fails. Amar left her small estate (even if the value of 610 Atwood Place is included) to Ajit who also enjoyed only a modest income and limited means. Gary and Surinder own a home and two investment rental properties. Gary acknowledges that Surinder and he can provide for their family. Gary does not fall within the scope of s. 60 of WESA.

## 5. Conclusion

[60] In the first action (S15-16970), the Court orders that Gurinder (Gary) Singh Aulakh and Surinder Kaur Aulakh are jointly and severally liable to pay Ajit Singh Aulakh \$114,081.89 with interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.

[61] The second action (S15-16992) is dismissed.

[62] Ajit Singh Aulakh is awarded his costs in each action at Scale B. "Funt J."

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