
CANADA / JUDGMENT

Bergler et al. v. Odenthal

2019 BCSC 1882

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Supreme Court of British Columbia

DECIDED

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2019 BCSC 1882 Bergler et al. v. Odenthal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bergler et al. v. Odenthal,

2019 BCSC 1882

Date: 20191104

Docket: S151763

Registry: Vancouver

Between:

Susanne Maria Bergler and Anja Elisabeth Bergler

Plaintiffs

And

Bernd Odenthal

Defendant

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for the Plaintiffs:

J.W. Zaitsoff

Appearing on own behalf:

B. Odenthal

Place and Date of Trial:

Vancouver, B.C.

May 27-28, 2019

Place and Date of Judgment:

Vancouver, B.C.

November 4, 2019

I. Introduction

- [1] Angelika Stuhff died on April 25, 2013 after the rapid onset of pancreatic cancer, diagnosed only two months earlier. She did not make a will, but gave her common law spouse, Mr. Odenthal, specific instructions about her estate. She told him that she wanted her assets to be given to her niece, Susanne Bergler. This case is about whether a trust was created by Ms. Stuhff, wherein Mr. Odenthal held her assets solely for the benefit of Susanne Bergler.
- [2] While the claim was started by Susanne Bergler and her sister Anja Bergler, at trial the plaintiffs conceded that Anja Bergler had no claim and the claim was being advanced solely to the benefit of Susanne Bergler.

II. Issues

- [3] Does Mr. Odenthal hold Ms. Stuhff's assets in trust for Susanne Bergler?
- a) Did Ms. Stuhff create a secret trust?
 - b) What were Ms. Stuhff's assets at the time of her death?
 - c) At what point was Mr. Odenthal obliged to transfer the assets to the beneficiary Susanne Bergler?
- [4] Did Mr. Odenthal breach the trust?
- [5] What remedies flow?

A. Does Mr. Odenthal hold Ms. Stuhff's assets in trust for Susanne Bergler?

- [6] I heard evidence from Susanne Bergler, Anja Bergler, Monika Bergler (Ms. Stuhff's sister), Eberhard Bergler (Ms. Stuhff's brother in law), and Mr. Odenthal. As the four Bergler witnesses share a surname, I will refer to them by their first names to avoid confusion in these Reasons.
- 1. Did Ms. Stuhff create a secret trust?
- [7] Susanne alleges that she is the beneficiary of a secret trust created by Ms. Stuhff. The elements of an enforceable secret trust are clearly set out in *Champoise v. Prost*, 2000 BCCA 426:

- [15] It is useful to review the basic principles of secret trusts. A secret trust arises where a person gives property to another, communicating to that person an intention that the property be dealt with in a specific way upon the happening of an event, and the donee accepts the obligation. The essential elements are the intention of the donor, a communication of the intention to the donee and acceptance of the obligation by the donee: *Sutherland Estate v. Nicoll Estate*, [1944] S.C.R. 253 (sub nom. *Hayman v. Nicoll*), [1944] 3 D.L.R. 552; *Jankowski v. Pelek Estate*, (1995), 131 D.L.R. (4th) 717 (Man. C.A.); *Ottaway v. Norman*, [1971] 3 All E.R. 1325 (Ch.D.); D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at 215-217.
- [16] In addition to these requirements for an enforceable secret trust, the three certainties necessary for any express trust must be exhibited; the words making the trust must be imperative, the subject of the trust must be certain, and the object or person intended to take the benefit of the trust must be certain. Further, those certainties must be exhibited at the time the trust is created: *Re Beardmore Trusts*, [1951] 1 D.L.R. 41; D.W.M. Waters, *Law of Trusts in Canada*, supra at 107.
- [8] Anja testified that she was at the hospital with her sister the day before her aunt died. The two sisters met with Mr. Odenthal outside the hospital. Both sisters testified that Mr. Odenthal told them at that time that Ms. Stuhff told him that she wanted her estate to go to Susanne. Anja testified that Mr. Odenthal stated that her aunt wanted Susanne to receive all of her estate because she didn't have a career or a home, and was planning to go back to school. Mr. Odenthal confirmed this conversation happened.
- [9] Monika testified that after her sister was diagnosed, Ms. Stuhff asked Monika if she would mind if Ms. Stuhff gave all of her estate to Susanne, i.e. leaving nothing for Anja. Ms. Stuhff told her sister that she felt close to Susanne, and Susanne was not yet financially established. Ms. Stuhff told Monika that her estate would give Susanne some means of furthering her education. Monika says she had similar conversations with Ms. Stuhff about six times. At least one of these conversations happened in the presence of Eberhard and Mr. Odenthal. Monika testified that Ms. Stuhff told the group that she wanted her estate to go back to her family after her death. Monika testified that Ms. Stuhff told Mr. Odenthal that he was to transfer her estate to the Bergler family when Mr. Odenthal began a relationship with a new partner. Eberhard confirmed the statements made by Ms. Stuhff in the presence of Monika and Mr. Odenthal. Mr. Odenthal also confirmed that Ms. Stuhff told the group that if he got involved in a new relationship, her estate was to go back to her family.
- [10] I heard submissions on the admissibility of this hearsay statement of Ms. Stuhff, and admitted the testimony. Hearsay may be admitted where necessity and reliability are established on a balance of probabilities: *R. v. Bradshaw*, 2017 SCC 35 at para. 23.

- [11] In the case before me, as Ms. Stuhff is deceased, necessity has been established. All living parties to the conversation confirm that Ms. Stuhff told them that her estate was to go back to her family following her death, once Mr. Odenthal began a new relationship. I am satisfied that reliability has been established with respect to this statement by Ms. Stuhff.
- [12] There is conflict between the witnesses regarding a further clarification which Mr. Odenthal says Ms. Stuhff made. Eberhard stated that Mr. Odenthal did not dispute the statement made by Ms. Stuhff which I have described above. In cross examination Mr. Odenthal stated that he did dispute Ms. Stuhff's statement that her estate was to go to the Bergler family once Mr. Odenthal began a new relationship. Mr. Odenthal stated that Ms. Stuhff clarified that the Bergler family was to receive her estate on Mr. Odenthal's death. This was not confirmed by Monika or Eberhard, neither of whom are interested beneficiaries.
- [13] Further, at other points in his testimony Mr. Odenthal agreed that Ms. Stuhff wanted Susanne to have her estate so that Susanne could get on a better financial footing, and continue her education. This suggests that Ms. Stuhff intended Susanne to receive her estate much earlier than on Mr. Odenthal's death. As such, with respect to the clarification asserted by Mr. Odenthal, I prefer the evidence of Eberhard which is more consistent with the whole of the evidence. I find Mr. Odenthal's evidence as to the alleged clarification provided by Ms. Stuhff is not reliable and I place no weight upon it.
- [14] While the evidence of the Berglers was helpful, the most compelling evidence came from Mr. Odenthal himself. Mr. Odenthal confirmed in his examination for discovery and under cross examination the following:
- a) He and Ms. Stuhff discussed her estate before she died,
 - b) Ms. Stuhff told Mr. Odenthal that she wanted her estate to go to Susanne,
 - c) Mr. Odenthal understood Ms. Stuhff's estate was valued at approximately \$130,000, which included her share of the Osoyoos and Winthrop properties, and that the money was to go to Susanne,
 - d) Mr. Odenthal received clear and precise instructions from Ms. Stuhff, when she knew she was terminally ill, that he was to make sure her estate would not go to anyone else and that it would go to the Bergler family,
 - e) Mr. Odenthal agreed with Ms. Stuhff that her assets would go to Susanne because Susanne was less fortunate than Anja, and was not established financially and professionally,
 - f) Ms. Stuhff trusted Mr. Odenthal regarding her affairs and finances, and relied on him when she told him about her estate, and
 - g) Mr. Odenthal told Ms. Stuhff that he would abide by her wishes.

- [15] Following Ms. Stuhff's death, Mr. Odenthal created a will wherein he divided the residue of his estate into ten shares, and left three of those shares to Susanne. He confirmed in evidence that he estimated 3/10 of the residue of his estate to be equal to approximately \$130,000, which he confirmed was approximately the value of Ms. Stuhff's estate on her death. Mr. Odenthal confirmed that his intention in creating this will was to put Ms. Stuhff's wishes into effect.
- [16] In circumstances where a person dies intestate relying on the fact that her intestate heir has accepted the trust, the law will compel the trustee to carry out the trust: *Chinn v. Hanrieder*, 2013 BCCA 310 at paras. 66-67, relying on *Waters' Law of Trusts in Canada*.
- [17] I am satisfied on the balance of probabilities that the plaintiff has established the elements of a secret trust. Mr. Odenthal's own admissions and actions, and the statements of Ms. Stuhff heard by Monika and Eberhard, establish the following:
- a) Ms. Stuhff intended to leave her estate to her niece Susanne following her death. While the conversation recounted by Monika, Eberhard and Mr. Odenthal referred to the Bergler family receiving Ms. Stuhff's estate, I am satisfied on the whole of the evidence that Ms. Stuhff clearly articulated her intention to have her whole estate transfer to Susanne alone,
 - b) Ms. Stuhff communicated this intention to Mr. Odenthal on more than one occasion,
 - c) Mr. Odenthal accepted the obligation on him created by Ms. Stuhff,
 - d) The words used by Ms. Stuhff made the trust imperative,
 - e) The subject of the trust, i.e. the whole of Ms. Stuhff's estate, was clear, and
 - f) The person intended to take the benefit, Susanne Bergler, was certain.
- [18] I find that Mr. Odenthal holds all of Ms. Stuhff's estate assets on a trust for Susanne Bergler.
2. What were Ms. Stuhff's assets at the time of her death?
- [19] Ms. Stuhff and Mr. Odenthal began living together in 2004. Ms. Stuhff was 53 at the time, and Mr. Odenthal was 42. Both parties came to the relationship with assets they had acquired before they met each other. The parties were also careful to distinguish between their property.
- [20] At the time of her death, Ms. Stuhff had the following assets:
- a) RBC Account -- \$1,260.54.
 - b) Grand Forks District Savings Credit Union -- \$412.50.
 - c) German bank account -- \$10,527.57.
 - d) Interest in joint account at Farmers State Bank, holding US\$3,000.59.
 - e) 2011 Ford Fiesta -- sold for \$10,000.00 in 2014.

- f) 99/100 interest in 17-5803 Lakeshore Drive, Osoyoos, with a legal description of PID 027-941-841, Strata Lot 17, District Lot 43, Similkameen Division Yale District, Strata Plan KAS3677 (the "Osoyoos Property").
- g) 20% interest in 922 Perry Street, Winthrop, WA 98862, with a legal description of Lot 6, Pt. Lot 7 and 8, Blk. 1, Sunset Add, Tax Parcel ID 279 001 0601 (the "Winthrop Property").
- [21] The Osoyoos Property was purchased in 2012 for \$270,912.80 and sold in 2018 for \$308,413.98. The net proceeds of sale are presently held in trust pending the outcome of this proceeding. As of the end of May 2019, the trust amount was \$125,849.
- [22] Ms. Stuhff paid the deposit of \$15,000 for the purchase of the property, and paid a further \$43,317.75 on the closing of the purchase. There was a mortgage taken out in the amount of \$227,269.75. Mr. Odenthal testified that he made the mortgage payments. No details of the mortgage payments were tendered at trial.
- [23] The Osoyoos Property was registered at the time of purchase with a 99% ownership interest in favour of Ms. Stuhff and 1% ownership interest in favour of Mr. Odenthal.
- [24] Susanne Bergler argues that Ms. Stuhff's share of the Osoyoos Property at the time of her death should be calculated as the sum of the purchase monies she paid, plus the increase in value of the property. I agree with Susanne Bergler's analysis. Ms. Stuhff's 99% share of the increase in value is \$37,126. Her contribution to the purchase price was \$58,318. I find that Ms. Stuhff's interest in the Osoyoos Property is valued at \$95,444 as of the date of sale on May 22, 2018.
- [25] The Winthrop Property is presently held solely in the name of Mr. Odenthal. The property was purchased in 2011 for US\$315,000. No mortgage was taken out. Ms. Stuhff paid US\$59,960 towards the purchase price. The parties registered their interests as 20% in favour of Ms. Stuhff and 80% in favour of Mr. Odenthal. I was not provided with any current value of the Winthrop Property, or a value of the Winthrop Property at the time of Ms. Stuhff's death. Susanne Bergler seeks only a return of Ms. Stuhff's contribution to the purchase price in the amount of US\$59,960. I accept that at the time of her death Ms. Stuhff had an interest in the Winthrop Property valued at US\$59,960.
- [26] All of the bank accounts except for the account at Farmers State Bank, holding US\$3,000.59, were in Ms. Stuhff's sole name and the value of these accounts, as set out above, form part of her assets at the time of her death. There was evidence that Ms. Stuhff contributed to the Farmers State Bank account which was held jointly with Mr. Odenthal; however, the exact amount of her contribution is unclear. As this was a joint account with Mr. Odenthal, I find that this account passes directly to Mr. Odenthal as the joint account holder and does not form part of the trust assets.
- [27] The subject of the trust includes all of the assets set out above with the exception of the Farmers State Bank account.

3. At what point was Mr. Odenthal obliged to transfer the assets to the beneficiary Susanne Bergler?
- [28] I do not accept Mr. Odenthal's evidence that he was not required to transfer the trust assets to Susanne until his own death.
- [29] As stated above, I accept the hearsay evidence of Ms. Stuhff that she told Mr. Odenthal he did not have to transfer the trust assets until he was in a new relationship.
- [30] The plaintiff raised the rule in *Saunders v. Vautier* (1841), Cr. & Ph. 240, 41 E.R. 482 (Ch.D.), as to whether a sole, competent beneficiary can extinguish the trust and receive the assets of the trust in their own name, regardless of the wishes of the settlor. However, the application of the rule in *Saunders v. Vautier* is moot in this case, as the evidence was clear that Mr. Odenthal began a new relationship in the fall of 2013, and has since entered into a marriage.
- [31] As a result, even if I accept a temporal limitation on the distribution of the assets of the trust, the time to distribute the assets has already passed. Mr. Odenthal is obliged to transfer the trust assets to Susanne Bergler forthwith.

B. Did Mr. Odenthal breach the trust?

- [32] As Ms. Stuhff's common law spouse and intestate heir, Mr. Odenthal received all of Ms. Stuhff's assets on her death. These assets were subject to the trust in favour of Susanne Bergler and Mr. Odenthal was obliged as trustee to maintain these assets separate and apart for the benefit of Susanne. Mr. Odenthal had a fiduciary duty to protect the trust assets.
- [33] He held the Osoyoos Property wholly in his name at the time of its sale, and presently holds the Winthrop Property wholly in his name.
- [34] Mr. Odenthal did not keep Ms. Stuhff's estate assets separate from his own following her death. Mr. Odenthal received the funds in all bank accounts held by Ms. Stuhff, including the account in Germany. Mr. Odenthal added those funds to his own accounts, and spent the funds as if they were his own.
- [35] In the fall of 2013 Mr. Odenthal met Ms. Steinbach, who he later married. They began living together in the beginning of 2016. In 2014 Mr. Odenthal sold Ms. Stuhff's car to his new partner for \$10,000 and kept the funds for his own use.
- [36] In April 2016 Mr. Odenthal revoked his will leaving 3/10 of his estate to Susanne. He made a new will leaving nothing to any of the Berglers.
- [37] Mr. Odenthal candidly agreed under cross examination that in making a new will that left nothing to the Bergler family, Mr. Odenthal was acting contrary to Ms. Stuhff's wishes, that he had told Ms. Stuhff that he would abide by her wishes, and that he was no longer abiding by her wishes.

- [38] Mr. Odenthal submits that he understood his obligation to Ms. Stuhff and Susanne was a moral obligation only, and that he never heard the word trust until this lawsuit began. He says that once he understood there would be a lawsuit, he felt he was no longer obliged towards Susanne and felt he could take her out of his will.
- [39] I have found that, regardless of whether Ms. Stuhff used the word "trust", she created a trust by her words of instruction to Mr. Odenthal, and Mr. Odenthal accepted the obligation placed upon him. Having accepted the trust obligation, it is not open to Mr. Odenthal to derogate from that obligation. He must perform his fiduciary duties as a trustee, to the benefit of Susanne Bergler. He has failed completely in this respect.
- [40] I find that Mr. Odenthal breached the trust in favour of Susanne Bergler and breached his fiduciary obligations as trustee.

C. What remedies flow?

- [41] Susanne Bergler seeks a declaration that Mr. Odenthal holds the trust assets I have described above in trust for the sole benefit of Susanne Bergler. I make this declaration.
- [42] Susanne Bergler also seeks an accounting of the trust assets, damages, an order that all right, title and interest in and to the trust assets be conveyed to and vested in her name, and an order that any award be payable out of the proceeds of sale of the Osoyoos Property currently held in trust.
- [43] The interest of the trust in the Osoyoos Property has been preserved, as has the interest of the trust in the Winthrop Property. In relation to the Osoyoos Property, the trust is entitled to the value of \$95,444 plus pre-judgment interest from May 22, 2018 to the date of judgment.
- [44] In relation to the Winthrop Property, because the Winthrop Property is still held by Mr. Odenthal, rather than making an order against the property itself, which is located out of British Columbia, I order that the trust is entitled to the value of this interest, being US\$59,960, plus pre-judgment interest from the date of Ms. Stuhff's death to the date of judgment.
- [45] I order that Susanne Bergler is entitled to receive forthwith the trust assets in relation to the Winthrop and Osoyoos Properties, and that such funds shall be paid in the first instance out of the proceeds of sale of the Osoyoos Property currently held in trust. To the extent there are insufficient funds available in the funds held in trust to satisfy payment to Susanne Bergler of these trust assets, I order Mr. Odenthal is personally liable for the difference.
- [46] The other trust funds have been comingled by Mr. Odenthal with his own monies and have potentially been spent by Mr. Odenthal pending this trial. The total value of these trust funds is \$22,200.61. As the value of these trust funds is relatively low, and originated in a number of small accounts, I find it is impractical to order a tracing of these trust assets. Instead, I order Mr. Odenthal to pay to Susanne Bergler \$22,200.61 as damages for breach of his fiduciary duties as trustee.

[47] I order costs of this proceeding in favour of Susanne Bergler.

"Baker J."

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