

CANADA / JUDGMENT

Bjornson v. Mackinnon

2024 BCSC 1209

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1209 Bjornson v. Mackinnon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bjornson v. Mackinnon,

2024 BCSC 1209

Date: 20240705

Docket: S150536

Registry: Victoria

Between:

Andrew Ernest Bjornson

Plaintiff

And:

Teresa Marie Mackinnon

Defendant

Before: The Honourable Justice Morley

Reasons for Judgment

(Summary Trial)

The Plaintiff, Appearing in Person:

A. E. Bjornson

Counsel for the Defendant:

J. K. Ough

Place and Date of Hearing:

Victoria, B.C.

June 13 - 14, 2024

Place and Date of Judgment:

Victoria, B.C.

July 5, 2024

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I. Introduction and Overview

- [1] The plaintiff Andrew Bjornson and the defendant Teresa Mackinnon are siblings. Their mother, Gloria Bjornson, died in January 2014. Shortly before her death, she transferred investments totaling over \$200,000 into a joint survivorship account with Ms. Mackinnon. The effect was that these assets did not pass into Ms. Bjornson's estate and instead became Ms. Mackinnon's by survivorship. Along with registered investments that also transferred to Ms. Mackinnon in a manner not challenged here, these were essentially all of Ms. Bjornson's assets.

- [2] When a parent makes a "gratuitous transfer" of property to an adult child, the adult child has to show that this was intended as a gift; otherwise, the transfer of legal title is presumed to give rise to a "resulting trust", such that the child is deemed to hold the property for the benefit of the parent (or, if the parent dies, the parent's estate). However, this presumption can be rebutted if there is evidence that the parent's true intention was that the child have the benefit of the transfer.
- [3] In this summary trial, Mr. Bjornson says the presumption of advancement arises and has not been rebutted, and therefore the investments must go into her estate to be distributed on an intestacy. Ms. Mackinnon says that Ms. Bjornson's clear instructions shortly before her death to her solicitor and her investment advisor make it clear that she really did mean for the transfer to be a gift. Mr. Bjornson acknowledges that his mother was concerned about his addictions and solvency and had told him she would leave his share of the inheritance to Ms. Mackinnon, but says she intended that he would get the money if he became, and stayed, sober.
- [4] In my view, the best evidence of what Ms. Bjornson intended is what she told her solicitor, Brent Kitzke. Mr. Kitzke deposes that "the Deceased specifically told me that she was transferring her annuities and investment account into the joint names of herself and Teresa [Mackinnon] as an absolute gift to Teresa." This is backed up by a contemporaneous memorandum to file and a draft Wills Variation Act declaration, all of which support a finding that Ms. Bjornson intended a gift.
- [5] I agree with Mr. Bjornson that his mother, despite her sometimes harsh words, never gave up on him and continued to love him up to her death. I accept that she may have expressed hope that Ms. Mackinnon would help him financially if he became sober. But this is consistent with an intention to give the money to Ms. Mackinnon, a decision that she made knowingly and based on reasons that made sense to her. These reasons no doubt included concerns about how Mr. Bjornson would use the money, but also included recognition of the financial and other support Ms. Mackinnon had given her and Ms. Bjornson's feeling that she had already done all she could to financially support her son.
- [6] The presumption of resulting trust applies, but here it gives way to persuasive contemporaneous evidence. Since the transfer into the joint survivorship account was valid both in law and equity, those assets never became part of Ms. Bjornson's estate and belong, absolutely, to Ms. Mackinnon. I therefore dismiss the action.

II. Background

- [7] The parties are half-siblings. Ms. Mackinnon was born on October 8, 1961. In 1963, her mother started a relationship with Gordon Bjornson, who she married on March 6, 1966. Mr. Bjornson was born on October 8, 1965. Gordon Bjornson was his biological father and stood in the place of a father to Ms. Mackinnon as well.

A. Ms. Bjornson's Relationship with Ms. Mackinnon

- [8] Shortly after Gordon Bjornson died at the end of 1993, Ms. Bjornson moved into Ms. Mackinnon's home at 3804 Saul Street in Victoria with her then-husband and their two children. Ms. Mackinnon and her then-husband renovated the home at their expense to provide a bedroom for Ms. Bjornson. She continued to live there until her death on January 12, 2014 after a brief and unexpected battle with cancer. During the 20 years she resided with Ms. Mackinnon, Ms. Bjornson did not pay rent or mortgage, although she helped to pay for groceries and utilities.
- [9] Ms. Bjornson clearly had a close relationship with Ms. Mackinnon. They shared a home, including the kitchen and entry to the house for 20 years. Ms. Bjornson did not drive, so Ms. Mackinnon was her principal source of mobility. They spent a great deal of time together, shopping and sharing hobbies. They also traveled together for holidays. Ms. Bjornson was close to Ms. Mackinnon's children, with an easier relationship with her granddaughter, Corrie.

B. Ms. Bjornson's Relationship With Her Son

- [10] There is no question that Ms. Bjornson had conflict with her son in particular. Mr. Bjornson characterizes himself as a "recovered addict and alcoholic". His sister deposes that he "struggled with alcohol and drug issues." His substance use disorder resulted in serious personal financial problems, several attempts at rehabilitation, and a major injury to his brain as a result of a fall while he was intoxicated in 2010. He concedes that he forged cheques from his mother's account while he was struggling with addiction. (Although there is some dispute on the evidence about the amount of the forgery, as I will explain later, this is not important to the resolution of the legal issues in this summary trial.)
- [11] Mr. Bjornson says that, notwithstanding what he acknowledges were conflicts, he had a strong relationship with his mother and, up until his mother's death, with Ms. Mackinnon, and that they were a "source of strength and support" for him. In addition to his substance use disorder, Mr. Bjornson was diagnosed with Multiple Sclerosis in 1994 and suffered for some time with obesity.
- [12] I agree that the evidence is clear that Ms. Bjornson loved her son right up to her death and wanted, above all else, for him to achieve sobriety. Both parties agree that "family was everything" for Ms. Bjornson and that she loved her family above all else. This, of course, is consistent with her directing some amount of anger at family members, including Mr. Bjornson for his behaviour as a result of his substance use. Although Ms. Bjornson did not live to see it, Mr. Bjornson achieved sobriety in 2014 after hitting "rock bottom" as a result of her death.

- [13] Mr. Bjornson reports a number of conversations he had with his mother between 2010 and 2013 about her intentions for her estate. Since these go to the basic issue in this lawsuit, namely whether she intended to make a gift to Ms. Mackinnon when she transferred her investments, I will defer discussing these reports until I analyze the evidence on those intentions.

C. Ms. Bjornson's Final Illness

- [14] Ms. Bjornson's final illness was very sudden. At the end of November 2013, she and Ms. Mackinnon scheduled a 14-day trip to Mexico beginning December 22. On December 21, she complained of dizziness and feeling unwell and attended at the emergency department of the Royal Jubilee Hospital. Up until that point, she was apparently healthy and has been described by all witnesses as "feisty" and "strong-willed". There is no suggestion of any cognitive decline. She had never discussed how her affairs should be resolved after her death with her daughter and had not prepared a will.
- [15] Upon being seen in Emergency, Ms. Bjornson was told by the attending physician that she should not go to Mexico and that there should be further tests. On December 24, she was feeling worse and Ms. Mackinnon took her back to the hospital. A biopsy conducted on December 30 found a lung mass. The treating physician advised Ms. Mackinnon to arrange for hospice care. On December 31, Ms. Bjornson was diagnosed with cancer and told she had months left to live.
- [16] At the end of her life, Ms. Bjornson's primary assets were registered investments in the amount of \$144,483.12 and two non-registered investment accounts: an Investors Dividend Fund - Series A with a balance of \$138,652.60 and an Investors Growth Plus Portfolio-Series C with a balance of \$72,825.96.[1] These appear to ultimately derive from the sale of the home she had lived in with Gordon Bjornson shortly after his death. Ms. Bjornson had previously named Ms. Mackinnon as the beneficiary of her Registered Investment Fund, but when she found out about her cancer diagnosis she had not yet planned for what would happen to her non-registered investment accounts.
- [17] On January 6, 2014, Ms. Bjornson attended at the offices of Stevenson Doell Law Corporation and met with Brent Kitzke, an experienced solicitor. Ms. Mackinnon took her there, but stayed in the waiting room. Since what Ms. Bjornson said to Mr. Kitzke goes to the heart of the issues in this lawsuit, I will address it later.
- [18] On January 8, 2014, Ms. Bjornson met with her investment advisor, Bill Evans at the Saul Street home. She signed documents to transfer the amounts in her two unregistered investment funds to a joint account with a right of survivorship for Ms. Mackinnon. Ms. Mackinnon says she was in attendance at this meeting, although she did not say anything. Since her report of what Ms. Bjornson said is evidence of Ms. Bjornson's intentions in making the transfer, I will also defer analysis of that report.

- [19] The transfer of the investment accounts was effected on January 10, 2014. Two days later, Ms. Bjornson died in the Saul Street home.

III. Suitability for Summary Trial

- [20] Ms. Mackinnon argues that this case is appropriate for summary trial on affidavit evidence. When he was represented, Mr. Bjornson agreed. Although he expressed reservations during the hearing before me, Mr. Bjornson did not abandon this position in the hearing before me. In any event, though, I must decide for myself whether this case really can be resolved by way of summary trial.
- [21] Under Supreme Court Civil Rule 9-7(15)(a), on the hearing of a summary trial application, the court may grant judgment in favour of any party, unless the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law or is of the opinion that it would be unjust to decide the issues on the application.
- [22] The Court of Appeal has discussed the way courts faced with summary trial applications should exercise their discretion in *Inspiration Management v. McDermid St. Lawrence Ltd.*, 1989 CanLII 2728, (1989), 36 B.C.L.R. (2d) 202 and more recently in *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30-31.
- [23] I am able to find the facts necessary to decide the issues of fact or law raised by this case. The legal test is clear and agreed to by both parties: a presumption of resulting trust arises, but can be rebutted by evidence of Ms. Bjornson's intention to make a gift solely to Ms. Mackinnon. If there is not enough evidence of these intentions, then Ms. Mackinnon takes the risk that judgment will be against her. In any event, given that this case is about the intentions of a person who is now dead, it inevitably has to be resolved based on contemporaneous records of what she said. While there may be issues of credibility and reliability about reports of what she said, for reasons I will discuss at greater length below, I do not find that these are determinative. This is thus the kind of case where the facts necessary to decide it can be determined on affidavits.
- [24] I also find that it would not be unjust to decide this as a summary trial. Indeed, given how long the case has taken and the principle of proportionality, it would be contrary to the interests of justice for the case to go to trial.
- [25] The Gichuru factors support disposing of the action by way of summary trial. The amount at stake, while significant, would likely not justify a full trial. The matter is not complex. The proceeding has already taken a long time and has disrupted family relationships. As I will explain further, in my view, credibility is not seriously at issue: to the extent there are disparities in the evidence that could turn on credibility, they are not important to resolving the fundamental issue of what Ms. Bjornson intended when she transferred her investments into the joint account. Finally, determining this case by way of summary trial would not result in litigation by slices, but would finally determine the legal issues.

IV. Presumption of Resulting Trust and How It May Be Rebutted

- [26] Ms. Bjornson effectively transferred legal title to her investments to the joint account and this legal title passed to Ms. Mackinnon by way of survivorship. However, there is an issue about whether she also passed equitable or beneficial title.
- [27] The general rule is that a gratuitous transfer (i.e., a transfer that is not in return for approximately equivalent value) gives rise to a "resulting trust" back to the transferor. If there is a resulting trust, the transferee has the powers of a trustee, but the benefit of the property remains with the transferor or, if they die, the transferor's estate.
- [28] The leading case is *Pecore v. Pecore*, 2007 SCC 17, in which an ageing father placed the bulk of his assets in joint accounts with one of his daughters who lacked the financial security of her siblings. The father named that daughter and her husband as the residual beneficiaries of his estate in his will. The daughter and husband subsequently separated. As in this case, the issue in *Pecore* was whether the assets in the joint accounts were subject to a resulting trust, in which case their value went into the estate and would be divided between the spouses, or were a gift, in which case their value went entirely to the daughter.
- [29] In *Pecore*, the Court confirmed that the presumption of resulting trust continued to apply in modern times and the contrary "presumption of advancement" does not apply to adult children. This is a "rebuttable presumption of law" or "a legal assumption that a court will make if insufficient evidence is adduced to displace the presumption". In other words, while a plaintiff normally has to prove their case, the presumption of advancement means that here the burden of persuasion is on Ms. Mackinnon: *Pecore* at para. 22.
- [30] A presumption is of course not the same thing as an absolute rule. While the onus is on the adult child to show that a gift was intended, this onus can be met with appropriate evidence. There will "of course" be situations where a transfer between a parent and adult child was intended to be a gift: *Pecore* at para. 41. The issue is what the court can determine based on a balance of probabilities: *Pecore* at para. 44. If the transferor's proven intention in creating a joint account was to gift withdrawal rights to the transferee during his or her lifetime and also to gift the balance of the account to the transferee alone on his or her death through survivorship, then the transferee alone is entitled to the balance on the transferor's death: *Pecore* at para. 45.
- [31] *Pecore* also provided guidance on how evidence of intention should be treated. In *Pecore*, the Supreme Court of Canada overruled an old rule against post-transfer evidence of intention, but held that such evidence must be relevant to the presence or absence of an intention to make a gift and assessed carefully for reliability by the trial judge, in particular by guarding against evidence that is self-serving or that might reflect a change in intention: *Pecore* at para. 59. While these cautions were specified in the context of post-transfer evidence, they logically apply to any evidence of the deceased's intention. I will thus give more weight to evidence that is contemporaneous with the transfer, spoken at a time and on an occasion when legal intentions would have been most salient and given by a witness who

has no interest in the result of the proceeding.

V. Analysis of Evidence of Ms. Bjornson's Intentions

[32] Ms. Bjornson obviously cannot testify herself as to her intentions when she transferred her investments into the joint account. However, the record discloses the following statements:

- a) Conversations reported by Mr. Bjornson occurring between 2010 and 2013 at para. 15 of his affidavit.
- b) Statements allegedly made by Ms. Bjornson to her investment advisor Bill Evans on January 8, 2014 reported by Ms. Mackinnon at paras. 116 and 117 of her first affidavit.
- c) Statements made by Ms. Bjornson to Mr. Kitzke during her meeting with him on January 7, 2014. Mr. Kitzke reports his memories of this meeting in his affidavit and appends contemporaneous notes and a memo to file.

[33] In coming to an inference about what Ms. Bjornson intended, I will consider the reliability of each of these statements, both intrinsically and as the basis for an inference about whether she intended a gift. I will do so in light of all the background information about her relationships with her two children and the circumstances that might justify (or not) a sole gift.

A. Conversations Between Mr. Bjornson and Ms. Bjornson Between 2010 and Her Death

[34] Mr. Bjornson deposes the following about conversations he had with his mother prior to her death:

Prior to our mother's death, our mother informed me on numerous occasions between 2010 and her passing that to protect me, both from my addiction issues and my creditors, she would be leaving my share of the inheritance with Teresa for me. Furthermore, that I would have to be 'nice' to Teresa, i.e. stay clean and sober, to receive it.

[35] Mr. Bjornson asks me to infer from this evidence that Ms. Bjornson did not intend an absolute gift to Ms. Mackinnon.

[36] Ultimately, I must weigh this evidence with all the other evidence to determine what it might mean. Before I do that, though, I note that even if I accept that these statements have sufficient "threshold" reliability to meet the principled exception to the hearsay rule, they are inherently vague and are not contemporaneous with the actual transfer.

[37] The statements are vague. Mr. Bjornson is unable to recall exact words or circumstances in which they were spoken. The only statement that seems like a direct quote is that Mr. Bjornson would have to be "nice" to his sister to obtain any of Ms. Bjornson's money after her death. Further, the words, even as related, are consistent with multiple interpretations. For example, Ms. Bjornson could be interpreted as saying she was going to give the money to Ms. Mackinnon with an express trust to the benefit of Mr. Bjornson, with control of the

capital and discretion as to disbursements. But this never happened and it is not what Mr. Bjornson is alleging here. Ms. Bjornson could also be interpreted as expressing a hope that Ms. Mackinnon would voluntarily help Mr. Bjornson out if he was "nice" to her and became and stayed sober, an expectation that is perfectly consistent with an absolute gift.

- [38] The conversations are not consistent with the money becoming part of an intestate estate. I recognize that Mr. Bjornson does not have to establish a positive intention not to make a gift in order for a resulting trust to arrive, but this fact highlights the vagueness of what Ms. Bjornson is reported as having said.
- [39] Further, even if the conversations are evidence of a lack of intention to give an absolute gift to Ms. Mackinnon, they all occurred before Ms. Bjornson received her cancer diagnosis, which I find to be what prompted her to form a specific intention about what to do with the investments.
- [40] Mr. Bjornson's reliability is compromised by the fact that he has an interest and by the fact that these conversations occurred years before his affidavit was made, at a time when his perceptions may have been influenced by his substance use. To be sure, I do not doubt that some conversations occurred between Mr. Bjornson and his mother in which she expressed concerns about giving him immediate access to half of her wealth in light of his substance use. She may well have expressed some expectation that Ms. Mackinnon would use some of the money to help him if he was "nice" to his sister. However, an expectation that Ms. Mackinnon might help Mr. Bjornson out financially if he was nice to her is logically compatible with the money belonging to Ms. Mackinnon. In any event, I cannot give very much weight to his recollections as a guide to Ms. Bjornson's fixed and final intentions in January 2014.

B. Ms. Bjornson's Reported Statements to Her Investment Advisor

- [41] As I mentioned earlier, Ms. Mackinnon deposes that she was present at Ms. Bjornson's meeting with Bill Evans, her investment advisor, on January 8, when her mother provided the instructions to transfer her unregistered investments to a joint account:
113. On January 8, 2014, my mother's investment advisor, Bill Evans, from Investor's Group came to 3804 Saul Street and met with my mother and myself.
- []
115. During the meeting, I heard my mother request that her investment accounts should be transferred to pay my mortgage, which I would not agree to.
116. I also heard my mother tell Bill Evans that she did not want Andy [i.e., Mr. Bjornson] to get her investments.
117. I also heard my mother tell Bill Evans that she wanted her investments transferred to me and I saw my mother sign a form with Bill Evans during this meeting.

[42] If this account is reliable, then Ms. Bjornson presumably intended the transfer to be an absolute gift to Ms. Mackinnon, since this is the natural way by which Mr. Bjornson would not "get" the investments. To be sure, Ms. Mackinnon is an interested party and I do not have any contemporaneous record of this conversation or evidence from Mr. Evans. While his evidence clearly supports Ms. Mackinnon's position on the ultimate issue before me, it is only entitled to a medium level of weight.

C. Ms. Bjornson's Statements to Her Estate Solicitor

[43] The best evidence of Ms. Bjornson's intentions is what she told Mr. Kitzke, when she saw him to draft a will on January 7, 2014.

[44] At the time Mr. Kitzke recorded these statements, he had no interest or reason to prefer the interests of either sibling. As an experienced solicitor, he had both the training and motivation to determine her wishes clearly and record them precisely. They are thus entitled to a great deal of weight. This Court and the Supreme Court of Canada have both remarked that statements to a lawyer in drafting the transferor's last will were an important indicator of the transferor's intention in opening joint accounts: *Pecore* at para. 73; *Weaver v. Weaver Estate*, 2019 BCSC 132 at para. 88. I find that these comments apply in the circumstances of this case as well.

[45] I have Mr. Kitzke's evidence of what Ms. Bjornson told him in two forms: in the body of his affidavit made in the course of these proceedings and in his contemporaneous records for his file.

[46] In his affidavit, Mr. Kitzke is unequivocal. He says, "The Deceased specifically told me she was transferring her annuities and investment accounts into the joint names of herself and Teresa [Mackinnon] as an absolute gift to Teresa." He also says, "The Deceased clearly expressed to me that she felt Andrew had already been given financial advantages from her and that she was very firm in her desire to leave her entire estate to Teresa."

[47] If I accept this evidence, it is determinative about Ms. Bjornson's intentions. If what Mr. Kitzke says is an accurate reflection of what Ms. Bjornson told him, then there can be no doubt she intended the transfer to the joint account to be a gift.

[48] In considering this evidence, I accept the relevance of Mr. Bjornson's point that Mr. Kitzke acted on his sister's behalf against Mr. Bjornson later in 2014. While there is no suggestion of a lack of integrity on Mr. Kitzke's part, if all I had to rely on were Mr. Kitzke's memories after litigation had commenced, then I would need to take his loyalties into account in determining the reliability of his memory.

[49] For that reason, I put special weight on the contemporaneous records Mr. Kitzke made of Ms. Bjornson's intentions. These come in two forms: handwritten notes presumably taken as Ms. Bjornson spoke and memorandums and drafts of legal documents made shortly afterwards.

[50] I have the notes Mr. Kitzke wrote while talking to Ms. Bjornson, but they are somewhat cryptic, and do not lend themselves to precise. They do indicate that Ms. Bjornson spoke about Mr. Bjornson and that he "took her car". They also say Ms. Bjornson intended to transfer her accounts as joint accounts to her daughter. But it is also clear that Mr. Kitzke's approach, at least on this occasion, was to record his detailed impressions in memorandum form after the meeting with his client was complete.

[51] More useful to me therefore is a memorandum to "Janet" dated January 10, 2014, which must have been written or dictated very shortly after his conversation with Ms. Bjornson. The memorandum satisfies me that Ms. Bjornson was determined not to leave Mr. Bjornson with any of her investments and instead gift them all to Ms. Mackinnon.

[52] In reference to Mr. Bjornson, Mr. Kitzke recorded the following statements:

She [i.e., Ms. Bjornson] has a son named Andrew Ernest Bjornson who she tells me was born on Oct. 8th, 1965 however, she's not going to leave anything to Andrew. I gave her some instructions and advised her regarding the Wills Variation application the son could bring, but the information that she provided to me I think justifies her position that she's exceedingly adamant that she doesn't want to leave anything to her son.

[]

She also related to me that she found that it was somewhat ironic that she has two kids, one of whom she considers almost to be a lost cause even though she's tried everything []

She also told me that the debt that the son ran up in the business was around (her best recollection) was almost up to \$100,000.00 and it was Teresa who took on the challenge of dealing with the creditors and convincing them to back away from her mom even though her mom was a director of the company []

[53] In the memo, Mr. Kitzke recorded Ms. Bjornson giving several positive reasons why she would give her investments to her daughter. One was that she would not have been able to save the money if she had not lived with Ms. Mackinnon for two decades, rent-free. Another was that Ms. Mackinnon looked after her and enabled her to be independent. She said she was "aware" that Ms. Mackinnon had made "sacrifices" putting Ms. Bjornson ahead of "her own relationships".

[54] Mr. Kitzke recorded Ms. Bjornson's intention with respect to the investments as follows:

She also told me she has an investment account where the majority of her funds are and that because she has cancer she has already started the process to have that account transferred into the joint names of herself and her daughter. She told me she was going to do that as a gift so that on her death the daughter will receive these monies outside of her Will.

[Emphasis added.]

- [55] This is as explicit a statement about Ms. Bjornson's intentions as could be made, and was recorded contemporaneously by Mr. Kitzke. It was recorded in indirect discourse, and uses legalistic terms like "monies" that Ms. Bjornson may not have employed herself. But I find it is a paraphrase of what she told him.
- [56] The memo also provides Mr. Kitzke's notes for a Wills Variation Act declaration that provided a number of reasons for not leaving property to Mr. Bjornson and for leaving her estate to Ms. Mackinnon. These provide further support for the inference that Ms. Bjornson intended an absolute gift to Ms. Mackinnon.
- [57] Mr. Bjornson has some quarrels with the facticity of some of these reasons, although these are largely not material. For example, Mr. Bjornson says it is false, as the draft declaration says that he forged a single cheque for \$35,000 and instead forged two cheques for \$10,000. Mr. Bjornson may be correct on some or all of these points. However, since the declaration was never finalized and since this is not a Wills Variation Act proceeding, the important question is not whether Ms. Bjornson was precisely correct in her claims about what her son had done against her interests, but what light the draft sheds on her intentions in making the transfer of the investment account. On this point, I find that it supports the inference, already apparent from the body of the memorandum, that Ms. Bjornson transferred the investments to the joint account as a gift for Ms. Mackinnon.

D. Conclusion on the Analysis of the Evidence

- [58] I have not referred to the affidavits of Susan Nelson (Mr. Bjornson's ex-spouse), Matthew Mackinnon (Ms. Mackinnon's son), Corrie Cavanagh (Ms. Mackinnon's daughter), Daniel Cavanagh (Ms. Mackinnon's son-in-law) or Michelle Griffin (Ms. Mackinnon's friend) because none of them received any communications or statements from Ms. Bjornson that shed light on her intentions. While they disagree on points of detail or emphasis, they all confirm that Ms. Bjornson and Mr. Bjornson's relationship was strained at the time of her death by his substance use and that Ms. Bjornson and Ms. Mackinnon had a close relationship. It is also clear from this evidence that this litigation has exacerbated a rift between the siblings that Mr. Bjornson's sobriety might otherwise have helped to heal. While the evidence is helpful as background, it does not assist me with the basic factual issue at stake in this lawsuit.
- [59] Mr. Bjornson's evidence of his conversations with his mother in the years before she became terminally ill is relevant, but not ultimately very helpful. What he reports her as saying on those occasions is too vague to support a clear intention one way or the other. However, I note that taking it at its highest, Ms. Bjornson's statements to her son are perfectly consistent with an intention to give her money to Ms. Mackinnon along with a wish that Ms. Mackinnon help Mr. Bjornson out if she thought this wise and fair. Legally, that is just an absolute gift to Ms. Mackinnon.

[60] Mr. Kitzke's and Ms. Mackinnon's evidence support the inference that Ms. Bjornson intended to make a gift to Ms. Mackinnon when she transferred her investments to a joint account. She said as much both to her solicitor and her investment advisor. Given how clear this evidence is, it does not need much in the way of support from the surrounding circumstances. But, in any event, this evidence is quite consistent with the uncontroverted background facts that Ms. Bjornson lived with Ms. Mackinnon rent-free for 20 years and obtained emotional and practical support from her, while she had a difficult relationship with Mr. Bjornson because of behaviour that can be traced to his substance use. While I agree with Mr. Bjornson that this meant she was worried that he would misuse any funds that came to him, quite possibly at the expense of his health or even life, I do not agree that this was the only thing that motivated her.

VI. Conclusion and Order

[61] This is an appropriate case for summary trial. Since I have accepted the evidence of Mr. Kitzke's contemporaneous memorandum and draft declaration, in particular, and since these unequivocally demonstrate an intention on Ms. Bjornson's part in transferring her investments to a joint account to thereby create an absolute gift to the benefit of Ms. Mackinnon, the presumption of resulting trust has been rebutted. There was a gift. Ms. Mackinnon obtained both legal and beneficial ownership of the unregistered investment assets.

[62] As a result, the action must be dismissed and I so order.

[63] The default rule would be that costs of the action would be to Ms. Mackinnon at Scale B. If either party thinks a different result should occur, they have leave to provide a written submission by email on why to Supreme Court Scheduling, sc.scheduling_vi@BCCourts.ca, no more than 7 days after the date of these reasons. The written submissions are not to be more than 1,500 words in length. If either (or both) parties submit the cost result should be different, then the other party may respond with a written submission, also not to be more than 1,500 words in length. The response must be provided no more than 14 days after the date of these reasons.

[64] If neither party makes a submission within the 7 days, the order may be entered without Mr. Bjornson's signature as dismissal of the action with costs to the plaintiff at Scale B.

"J. G. Morley, J."

The Honourable Justice Morley

[1] Ms. Mackinnon refers to the non-registered investment accounts as an "RRSP", but this appears to be a mistake. She says she received \$209,742.41 from them, which is slightly different from the total balance at the time of death of \$211,478.56. I have no explanation for the difference, but it is not material.

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