
CANADA / JUDGMENT

Broad v. Broad

2013 BCSC 1581

COURT

Supreme Court of British Columbia

DECIDED

29 August 2013

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2013 BCSC 1581 Broad v. Broad

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Broad v. Broad,

2013 BCSC 1581

Date: 20130829

Docket: 97016

Registry: Kelowna

Between:

Douglas Clarence Broad, by his Committee, The

Public Guardian and Trustee of British Columbia

Plaintiff

And

Mona Lee Broad

Defendant

Before: The Honourable Madam Justice Hyslop

Reasons for Judgment

Counsel for the Plaintiff:

D.L. Polley

Mona Lee Broad appeared on her own behalf:

Place and Date of Hearing:

Kelowna, B.C.

August 14, 2013

Place and Date of Judgment:

Kelowna, B.C.

August 29, 2013

INTRODUCTION

[1] Douglas Clarence Broad by his committee, The Public Guardian and Trustee of British Columbia (the "Public Guardian"), by summary trial seeks a declaration that the transfer of undivided interest in the lands and premises known and described as:

PID: 015-877-361

Lot 5, District Lot 1239, Kootenay District, Plan 1319, Except Parcel A (Reference Plan 100711)

(the "Thrums property")

and registered in the Kamloops Land Title Office under number CA1058155 to the defendant on March 12, 2009, is void and of no effect against the plaintiff.

[2] On January 6, 2012, the Public Guardian was appointed to act as committee of the estate of Douglas Clarence Broad pursuant to s. 6(3) of the Patients Property Act, R.S.B.C. 1996 c. 349 [PPA].

[3] The Public Guardian seeks that the Thrums property be vested in Douglas Clarence Broad instead of the order sought in the notice of civil claim; that the transfer be set aside.

[4] The notice of civil claim not only seeks the relief to which I have already referred, it also seeks:

3. An order for such accounts, enquiries, directions or relief as may be necessary;

4. Damages for breach of trust;

6. Damages for conversion of personal property;

[5] The claim for damages for conversion of personal property, amongst other allegations, relates to a horse for which relief is no longer sought. Counsel for the Public Guardian stated that the other relief described above in the notice of civil claim is unlikely to be pursued.

[6] Mona Lee Broad filed a counterclaim in which she seeks:

1. A declaration and judgment that the plaintiff holds the defendant's interest in the Property in trust for the plaintiff [for her];

2. Damages for unjust enrichment as against the plaintiff;
- [7] This dispute is over the respective interests of Douglas Clarence Broad and Mona Lee Broad in the Thrums property.
- [8] Mona Lee Broad's claim for damages is quite separate and is not before me, but can be pursued by her at a later date.
- [9] The issues before me are:
 - 1) Whether Douglas Clarence Broad had the capacity to transfer an interest in the Thrums property to Mona Lee Broad; and
 - 2) Whether, at the time of the transfer, Mona Lee Broad had an unregistered interest in the Thrums property.

Suitability for Summary Trial

- [10] I find that there is sufficient evidence to make findings of facts necessary to dispose of the issues between the plaintiff and the defendant. There is little disputed evidence going to Douglas Clarence Broad's mental condition as it relates to the transfer of the Thrums property. As to Mona Lee Broad's claim of an unregistered interest in the Thrums property, it is not a matter of disputed evidence, but rather, lack of evidence. Chief Justice Finch in *Gilmore Estate v. Parchomchuk*, 2011 BCCA 207, stated:

Madam Justice Newbury in *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275 at para. 34:

It is trite law that where an application for summary determination under Rule 18A [now 9-7] is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. As this court noted in *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers of Canada, Local 8* (1988) 27 B.C.L.R. (2d) 378 at 382, a party cannot, by failing to take such steps, frustrate the benefits of the summary trial process.

- [11] Later in these reasons, I refer to this lack of evidence - evidence which Mona Lee Broad states might exist.

BACKGROUND

- [12] For purposes of clarity, I refer to the plaintiff and defendant by their first names.
- [13] Mona is the elder sibling of Douglas. Mona and Douglas have two other brothers.
- [14] Their parents are alive, but are not together, each of them having entered into new relationships. In the evidence before me, the names Ken and Paula arise. Ken is the father of Mona and Douglas. Paula is Ken's wife.

- [15] Douglas was an educator of special needs children. Douglas holds a Master's degree. He worked in the Calgary public school system for a period of about 13 years.
- [16] In September of 1996, Douglas moved to Kamloops, British Columbia, where he took a position with the public school system. Douglas encountered mental health problems which ended his employment, and to his disappointment he never returned to work again. Eventually he was placed on a disability pension, which he continues to receive.
- [17] While living in Kamloops, Douglas purchased a home located at 2145 Glenwood Drive, Kamloops, B.C. (the "Glenwood home").
- [18] On July 10, 2002, Douglas granted Mona an enduring power of attorney to do anything on his behalf that can be lawfully done by an attorney. The power of attorney was not subject to any conditions or restrictions.
- [19] In April of 2004, Mona, as power of attorney for Douglas, sold the Glenwood home receiving \$99,439.82 for Douglas, which was placed in a bank account operated in trust for Douglas.
- [20] On June 4, 2004, Douglas received a tentative diagnosis of fronto-temporal dementia. He had previously demonstrated mental health difficulties. His treating psychiatrist, Dr. Buller, in a letter dated June 15, 2004, stated:

Please consider for your services this unfortunate young gentleman whose working diagnosis is that of a fronto-temporal dementia (yet to be confirmed by UBC neuropsychiatry unit) who has manifested a several year history of executive dysfunction including poor problem solving, poor planning, obsessive and rigid thinking, perseveration, irritability, volatility, extremely poor judgement, also associated with mood swings, depressive periods, and recently more emerging paranoia.

- [21] Counsel for Public Guardian stated that it is likely that Mona requested this letter. Mona did not disagree with this statement. Its stated purpose was to obtain for Douglas additional medical services.
- [22] In her application response, Mona agrees that prior to June 2004, Douglas exhibited these characteristics described by Dr. Buller.
- [23] In her application response under "Legal Basis" Mona states that Douglas:
- was diagnosed with Frontal Temporal Lobe Dementia, by Dr. Prystawa in Kamloops on September 2002, which was the cause of negative, uncharacteristic behaviors, that presented at inexplicable times.
- [24] In Mona's response to application, she refers to her brother's medical treatment and the names of various doctors who treated Douglas. Mona states that after hearing Dr. Prystawa's prognosis that her brother's disease was "incurable and unknown," and thereafter a diagnosis was sought.

- [25] On May 31, 2006, Mona purchased for Douglas, the Thrums property, which was registered in his name. The purchase price was \$155,000.00 payable in part by Douglas assuming a mortgage of \$96,203.35 and the balance paid in cash by Douglas.
- [26] In the latter part of 2006, Douglas started to live in the Thrums property. Mona and her two children were already living there.
- [27] In January of 2009, Mona retained a solicitor, Frederick Easton, to prepare a transfer, transferring the Thrums property from Douglas to Douglas and Mona as joint tenants in consideration of \$1.00. Mona, using the enduring power of attorney, signed the transfer on February 3, 2009.
- [28] According to Mr. Easton's notes dated January 21, 2009, Mona told Mr. Easton that Douglas had been diagnosed in 2002 with frontal-temporal lobe dementia - Picks disease. The notes disclose that in 2006 Mona purchased from an ex-partner, Ove Hals, now in Washington State, acreage in Thrums for "\$155,000 (230,000 value) intended to be a project for Doug and her". In Mr. Easton's notes, Mona gave her age as 55 and her brother's age as 46. The notes refer to the ages of her other brothers, her parents, and where they live. The notes state that Douglas has no will.
- [29] In Mr. Easton's file, there is a letter from Dr. Leon Berzen dated May 18, 2006, which states:
- RE: Mr. Douglas Broad D.O.B. 10/10/1962
- This is to certify that the above named is currently under my care as an outpatient. He was recently re-evaluated on May 1, 2006.
- Based on that evaluation he remains incompetent to manage his finances. In addition this then renders him incompetent to revoke any previous powers of attorney.
- Also in the file is Dr. Buller's letter to which I have already referred.
- [30] On February 5, 2009, the registrar of titles declined to register the transfer for the stated reason:
- UNDER SECTION 27 OF THE PROPERTY LAW ACT, AN ATTORNEY MAY NOT CONVEY TO HERSELF UNLESS THE POWER OF ATTORNEY SPECIFICALLY ALLOWS THIS. THE POWER OF ATTORNEY ON FILE HERE DOES NOT CONFER THIS RIGHT. THIS DOCUMENT MUST BE WITHDRAWN.
- [31] On March 12, 2009, Douglas signed a Form A transfer (second transfer) transferring title of the Thrums property into his name and Mona's name jointly. The transfer was registered. It is not disputed that Douglas, at the time he signed the transfer, received no consideration.
- [32] Since January of 2012, Mona has lived at the Thrums property with her daughter. Douglas no longer resides there.

- [33] It is not disputed that from the time the Thrums property was purchased, Douglas paid, at the direction of Mona, the cost to maintain the Thrums property, which includes mortgage payments, property taxes, insurance premiums and utilities.
- [34] Mona has filed detailed notes of the care that she alleges that she gave Douglas over the years. This is not something that I am to decide at this summary trial.

Positions

- [35] Douglas' position is that at the time of the transfer dated March 9, 2012, he did not have the mental capacity to transfer the Thrums property to Mona. Mona provides no evidence disputing this.
- [36] Mona's position is that when Douglas purchased the Thrums property, that she had an interest in it. She claims that her former partner, Mr. Hals, was not paid the full market value for the Thrums property when it was sold to Douglas, and he left in the property the sum of \$69,000.00 for Mona that was either an entitlement to her as a result of her relationship with Mr. Hals or a gift.
- [37] She claims that she is entitled to one-third and Douglas to two-thirds of the Thrums property. She said that at the time of the purchase of the Thrums property by Douglas, her interest was kept secret from family members who she anticipated would interfere.

The Evidence Presented by Mona Lee Broad

- [38] Mona represented herself at this summary trial. I was told by counsel for the Public Guardian that she had legal representation from time to time during this proceeding. However, she filed affidavits that were sworn and she filed purported affidavits, purported because they were not sworn. Counsel for the Public Guardian advised me that he had warned Mona of the deficiencies in these affidavits. Mona did not have her own affidavit sworn. The heading of her purported affidavit is "Statutory Declaration," but it is not under oath or declared to be true.
- [39] Counsel for the Public Guardian did not go line by line as to objections contained in the affidavits. It would have been impossible given the nature of the construction of the affidavits and it would be a waste of time.
- [40] Mona filed an email statement from Mr. Hals. According to Mona, this email is essential to support her position. The email is addressed:

TO WHOM IT MAY CONCERN TO THE BEST OF MY RECOLLECTION GOING BACK TO 2006 AND BEFORE

- [41] This email is not under oath. Mr. Hals continues:

SHE REMINDED ME THAT THE ASSESSMENT WAS 224,000 \$ AND THAT THE PURCHASE PRICE WAS 155,000 WITH A DIFFERENCE OF 69,000 \$ WHICH I CONSIDERED TO BE MY GIFT TO HER FOR HER LEARNING PARTNERSHIP AND CAREGIVING TO ME SINCE MY STROKE, WHILE WE SHARED THE PROPERTY WITH CHELSI AND SABRINA.

IT IS MY UNDERSTANDING THAT SHE WOULD NOT HAVE BEEN ABLE TO PURCHASE THE PROPERTY FOR DOUG AND HERS[E]LF WITHOUT THIS PERSONAL GIFT OT HER, TO MAKE IT POSSIBLE.

...

SO I PASSED ON MY DREAM LOCATION FOR MY BROTHER IN LAW TO ENJOY WITH AN EXCELLENT UNSELFISH CAREGIVER THAT I COULD VOUCH FOR WITH MY LOVE, AS MY CONTRIBUTION TO HER, SO THAT SHE COULD HELP DOUG SHARE THIS HEALING PLACE, ENABLE THE DREAM OF HELPING [DOUG] IN LONGTERM HOME CARE

[42] Even if this email was admissible, it is untrue. The BC Assessment Authority in 2006 assessed it at \$158,100. The notice of assessment says this under the heading of "PROPERTY VALUE":

The value of your property is determined by local real estate market conditions. The ASSESSED VALUE is BC Assessment's estimate of the market value (most probable selling price) for your property had it been for sale on July 1, 2005.

This value reflects the physical condition of your property as of October 31, 2005 and ownership according to land Title and Survey Authority records as of November 30, 2005.

[43] No mention is made by Mr. Hals of an appraisal.

[44] Ron and Jackie Schumacher of Red Deer, Alberta, signed a statement dated May 6, 2013. Beside their signature is a notarial certificate stating that the Schumachers appeared before the notary and signed the document. This statement is not under oath and, therefore, inadmissible. In that statement, they stated that they have known Mona since 1975. It is most likely, as they live in Red Deer, that much of which they state is hearsay and opinion, despite stating that they had visited Mona and Douglas several times at the Thrums property.

[45] Patrick Hermary made a statutory declaration declaring to its truth before a lawyer. Mr. Hermary is a resident of Nelson, and it would appear that he is aware of many of Mona's experiences, but as to whether it is first hand is unclear. He states that he has known Mona for 18 year and says that "Doug seemed to slide further into mental illness these last few years". He appears to be a confidant of Mona and someone with whom she can share her experiences. His statutory declaration is a statement of how Mona has assisted Douglas, Mr. Hals, and other members of her family.

[46] Gary Francis Lomax swore his statement headed "To Whom It May Concern" before a notary. He states that he resides in Salmon Arm and that he has known Mona since 1999 and has visited her, her daughter, and Douglas once a year. It is really a statement of his admiration for Mona.

[47] Charles Douglas Burton's "TO WHOM IT MAY CONCERN" statement was sworn before a notary. Mr. Burton stated that he owned the Thrums property before Mona and Mr. Hals purchased it in 1997 from him (there is no evidence that Mona purchased it). Mr. Burton is aware that Mona moved to Kamloops in 2002, and he states that the reason was for Mona to look after her brother, Douglas. Mr. Burton swears that he learned in 2005, that Mr. Hals wished to move and that a decision was made to sell the residence to Mona and her brother. He states:

I was asked by Mona how would be the best way to approach this transaction. She knew I had done many real estate deals and had usually done very well by them. I informed her to first get a proper appraisal by a certified and recognized local appraiser. This way her and Ove would have a fair value on which to base their split. I believe, to the best of my recollection that this appraisal came in at approx. \$225,000. I cannot say for sure exactly how they arrived at Approx \$70,000 for Mona leaving a balance of \$155,000 which was paid with proceeds from her brothers estate.

[48] At best, the most that can be taken from Mr. Burton's sworn statement is that he advised Mona to get a proper and professional appraisal of the property. No appraisal has been produced. Mr. Burton does not state who prepared the appraisal, whether it was in writing, and the basis of his recollection as to the amount.

[49] Beverly Anne Pickard's statutory declaration is the most detailed of all the sworn or declared material filed on behalf of Mona. However, it lacks time lines and it is at times hard to follow when she moves from one topic to the other and to different periods of time. Ms. Pickard's statutory declaration can be summarized as follows:

- 1) She has known the Broad family since 1992 as a result of meeting Mona's eldest daughter at high school. As a result, in the following year she became friends with Mona and Mona's youngest daughter;
- 2) Before the birth of Sabrina (Mona's youngest daughter), Mona met Mr. Hals and started a relationship;
- 3) At the time of Sabrina's birth she first came to know Douglas who provided support to Mona during childbirth. Within three months, Mr. Hals suffered a stroke. Ms. Pickard assisted Mona by caring for Mona's seven year old daughter in Crescent Valley, when Mona was in Kelowna assisting Mr. Hals with his rehabilitation;
- 4) Ms. Pickard became very involved with many members of the Broad family, including Douglas. She socialized with Douglas in Kamloops and she describes those events. She stated that in 2002 Mona was living in Kamloops because Douglas needed help;

- 5) Ms. Pickard described Douglas' behaviour as "bizarre" at about the time when he purchased the Glenwood home. She states that Mona, her dad and step-mother were concerned with Douglas' behaviour. She gives examples of his behaviour, such as Douglas giving away his possessions and money and putting gasoline into his diesel Jetta car;
 - 6) After the Glenwood home was sold, Mona and Douglas lived with her. She described Douglas as being "like a five year old" wandering away and leaving the stove on almost causing a fire more than once;
 - 7) She stated that Douglas involved himself with a 12-step program, yet he did not drink, smoke or do drugs. Despite this, she stated that it seemed to him that it was crucial that he be involved in this program;
 - 8) Another example of his behaviour was that he became obsessive about learning French; he punished himself when he did not learn anything by not eating;
 - 9) She recalls taking Douglas to Mexico to visit his father and step-mother. During the trip, she stated that he wandered off in the airports and got lost.
- [50] Ms. Pickard admires Mona for caring for Douglas, concluding that she sacrificed herself and her immediate family for him.
- [51] At times it is difficult to determine what Ms. Pickard actually knows. In her statutory declaration, Ms. Pickard describes Douglas' behaviour as being consistent with him having mental health problems. Her observations are as a result of having contact with Douglas in Kamloops and him living in her home.
- [52] Linda Marie Broad-Kormos is a cousin of Mona and resides in Melville, Saskatchewan. It is clear from her affidavit that most of her information is hearsay. She states that she recalls the agreement between Mona and Mr. Hals was that Mona would assume "all financial commitments in the Thrums property, and Ove would retain no rights in it." That statement makes it clear that she had really no knowledge of any arrangement between Mr. Hals and Mona. She does not mention Douglas at all. In her affidavit, she does not seem to recognize that Douglas' dependency on Mona started much earlier than 2006.
- [53] These affidavits and statutory declarations shed little light on the arrangement between Mr. Hals and Mona, and shed no light on the theory that the Thrums property that Douglas purchased was worth more than what he paid for it, and that the difference was supposed to be Mona's share in the Thrums property.
- [54] All of these affidavits speak to Mona providing care for Douglas for many years. That is not in dispute here.

Medical Evidence

[55] I have already referred to two short medical reports, that is Dr. Buller's report which was for purposes of accessing services for Douglas, and Dr. Berzen's report found in Mr. Easton's file. The latter report, given its date, was likely sought by Mona. Mona has provided no explanation for its existence. I infer that Mona asked Dr. Berzen whether Douglas had the mental capacity to revoke the power of attorney that he gave her. Dr. Berzen gives his opinion based on his re-evaluation of Douglas on May 1, 2006. Dr. Berzen's letter is written just before the purchase by Douglas of the Thrums property and the assumption of the mortgage registered against it. I can only conclude that Mona wished Douglas to revoke his power of attorney and enter into the purchase of the Thrums property on his own. Why she wished this has not been explained.

[56] Dr. Berzen has provided to counsel for the Public Guardian a medical legal opinion dated June 18, 2013. Dr. Berzen is a neuropsychiatrist. He states that Douglas has been his patient from May 14, 2003 until November 22, 2010, when he last saw Douglas as an outpatient at the UBC Hospital.

[57] Dr. Berzen saw Douglas each and every year starting in 2003 until and including 2010. In his report, he does not comment for each year that he saw him. Dr. Berzen stated from the outset, the diagnosis for Douglas' condition was illusive:

At the time that he was admitted to UBC Hospital he had, had a 6 year history of "neuropsychological" difficulties. He had been having problems with organizing himself, was making errors of judgment, had become socially isolated and seemed not to be fully emotionally connected to his predicament. He seemed lost and uncertain how he should proceed to get his life and career back on track.

[58] Throughout his report, Dr. Berzen refers to Mona as providing information to him which are summarized as follows:

- 1) Douglas's impaired judgment and deterioration of his functioning had been noticeable since September [1997]. This led to his suspension from his employment;
- 2) He lost his temper with his nieces; his violence involved the authorities;
- 3) Douglas became guarded and suspicious. He thought that his phone was tapped or that he was being watched;
- 4) He lost track of time. He was often successively slow in performing tasks and neglected eating properly; and
- 5) He was seriously isolated, lost his friends and girlfriend, who left him in 2000.

[59] At this hearing, this information was not disputed by Mona. In fact, she gave further details of some of these events not found in any affidavits or declarations.

[60] Dr. Berzen reports that upon Douglas' admission to UBC Hospital in 2003, Douglas was of the view that he was being unfairly held and, as a result of his stay in hospital and upon an assessment, it would reveal that he could return to work. Dr. Berzen stated that:

He revealed no insight into any psychological problems and was not distressed by the apparent fall off in his function.

[61] As a result of testing:

There seemed to be some visual spatial deficits with predominantly right hemisphere dysfunction. However tests for frontal lobe function and tests for executive function were all within normal limits.

[62] Based on all of the tests and interviews and a MRI scan:

there was not sufficient evidence to support an organic dementing process. It appeared the patient could well have frontal lobe dysfunction particularly with regard to his interpersonal style.

[63] Upon his discharge on June 10, 2003, Dr. Berzen diagnosed Douglas as:

Based on the review of all the special tests and neuropsychological data as well as MRI scan there was not sufficient evidence to support an organic dementing process. It appeared the patient could well have frontal lobe dysfunction particularly with regard [to] his interpersonal style.

It was unclear whether this was longstanding or not. It was further clear that the patient suffered from decompensation after moving to Kamloops and his work performance dropped off. It is possible that under the scrutiny of imposed disciplinary action taken against him as well as personal life stresses that is the breakup of his relationship, the disappointment of the sexual advance by his AA sponsor and a move to a new environment the patient started to decompensate in terms of his functioning. It appeared that perhaps he was deteriorating under the scrutiny and pressure. The patient also had an obsessional personal style, functioning best in a structured environment where expectations of him are clearly laid out. It would appear that he started to decompensate when he was put under pressure at work. It may well be the patient became depressed and decompensation was secondary to the depression.

[64] Dr. Berzen saw Douglas approximately twice a year. After June 10, 2003, Douglas had regular contact with Dr. Buller in Kamloops. Dr. Berzen reports that "between 2003 and 2006 there was no significant change in his condition."

[65] In December of 2003, Dr. Berzen saw Douglas. At that time, he received information from Dr. Buller. Dr. Berzen states:

However he remained dysfunctional with regard to maintaining a normal lifestyle. He had difficulty with planning and the execution of short term, medium term and long-term goals. Dr. Buller confirmed the patient's difficulty with decision making and he believed the patient's judgment remained impaired.

[66] In 2003, Dr. Berzen reports that Douglas was not engaging in making meaningful activity and that he still had his sister organize his life and manage his finances. He reported that Douglas was able to describe to him in detail how to accomplish a task, but was unable to "initiate a task". Dr. Berzen noted that his overall function had not improved, but there had been "no significant deterioration". It may well be that Douglas did have an organic mental disorder that was slowly progressing.

[67] In 2004, Dr. Berzen interviewed Douglas' mother, step-father, and one of his brothers who revealed that "in certain areas of self-care, organizing and financial management the patient had shown significant deterioration". Repeat testing was done by another physician who found no evidence of cognitive deterioration, but found that his areas of cognitive difficulty were consistent with the white matter changes seen on his previous MRIs. This doctor concluded that Douglas' diagnosis was not consistent with Alzheimer's or typical of a fronto-temporal dementia.

[68] Dr. Berzen concluded in December of 2004:

that his condition was deterioration with regard to frontal executive function such as, organization and planning, despite not having been conclusively confirmed by formal testing.

[69] He concluded:

It was my clinical opinion at that time that the patient was deteriorating and this constituted a decline since I had last seen him. My working diagnosis at that point was that of a progressive frontal dementia. At that time I considered a newly described frontal dementia called, progressive right frontal dementia, which is more insidious in onset. The confirmatory investigations tended to be more prominent later. I therefore believed that the patient had a deteriorating course and only time would tell whether this diagnostic hypothesis was accurate. I concluded therefore that the patient was not fit to return to work nor was he fit to return to driving nor did I feel he was fit to manage his own finances. I continued to endorse that the patient should continue to live in a semi supportive way and that he may require complete supported living in future.

[70] On March 30, 2006, Douglas was admitted to UBC Hospital and underwent a re-assessment. Multiple investigations were performed. There was no particular diagnosis.

[71] During Douglas' stay at UBC Hospital, Dr. Berzen found him to be socially inappropriate. Dr. Berzen reported that Douglas thought that the purpose of his hospitalization was to prove that he was fit for teaching. He accused hospital staff of transgressions that did not occur, had poor insight, and had no interest in the medical investigations performed on him. Dr. Berzen comments:

He did not see himself as a patient, instead he felt he was "working with the other patients".

[72] It was observed that he had no difficulty with tasks of daily living and was able to shop and cook. In April of 2006, Douglas was discharged to a group home for the purpose of learning some independence. He made no progress in the group home.

[73] In 2007, Dr. Berzen reports that Douglas' condition was deteriorating. He had been "hospitalized on two occasions for bizarre ideation and delusional beliefs."

[74] In 2008, Dr. Berzen noted that Douglas was living with his sister:

His sister reported at that time that his behaviour was still problematic. His memory was poor and he was disorganized and involved in obsessional behaviour.

[75] In November of 2010, which was the last contact that Dr. Berzen had with Douglas, he noted that the patient appeared slightly improved. Dr. Berzen stated that he pushed Douglas as to his understanding of his predicament.

he explained it by saying that he did something in the eyes of the school authorities that was wrong and as a result he was paying the price for his misdeeds.

[76] Dr. Berzen noted that it was the first time that Douglas had made any effective connection to his predicament and he teared up at one time when talking about a previous failed relationship.

[77] Dr. Berzen concludes that it is unlikely that Douglas has progressive brain disease. He states: "I believe that his diagnosis more properly fits into the schizophreniform realm".

[78] Dr. Berzen states that Douglas, despite repeated observations over a period of seven years, presents as a person:

with dysexecutive syndrome where he is unable to properly plan and execute activities. He also markedly lacks insight into his predicament and displays overwhelmingly poor judgement with regard to social cues and social expectation. In addition, repeated evaluations have revealed that the patient has a frontal dysexecutive syndrome as part of his underlying illness. He knows what to do but has an inability to act appropriately despite this knowledge. There is a disconnect between what he knows he should do and what he actually does. "He talks the talk, but cannot walk the walk".

[79] Under the heading "Medical Legal Opinion" Dr. Berzen states that he has given his medical legal opinion as it relates to Douglas' capacity on March 12, 2009. Dr. Berzen is aware that Douglas signed legal documents transferring his interest in certain real estate:

Based on my repeated evaluations and assessments of the patient, he has consistently shown significant impairment in mental function over the period outlined above. I believe that the patient's ability to appreciate the nature and effect of transferring this property was impaired. It is likely that the patient had no realistic appreciation of his capacity or vulnerability in making these decisions based on the fact that his social judgement and insight has been persistently impaired. In May 2006 he was assessed by me to be incompetent to manage his own finances and

until last seen by myself in November 2010, there had been no improvement to justify any change in that status.

I believe the patient would have understood his legal rights and options but it is likely that his capacity to make sound decisions with respect to his financial affairs was compromised because of impairment in social insight. In addition due to his compromised interpersonal style I believe that his ability to make sound decisions could have been affected by his social vulnerability and the influences of others on him. I do believe the patient understood the consequences of his actions but do not necessarily believe that he had the insight to know the implications of these actions. In conclusion I therefore believe the patient was suffering from frontal lobe dysfunction, secondary to a mental disorder that may have perverted the sense of what was in his best interest. I believe the patient suffers from a mental disorder which to date is poorly understood by his treating physicians, that likely impairs his ability to function independently, including effective financial planning and management.

Legal Basis

Patient Property Act, R.S.B.C. 1996 c. 349 [PPA]

Section 20 [Repealed 2011-5-28.]:

Conveyances

20 Every gift, grant, alienation, conveyance or transfer of property made by a person who is or becomes a patient is deemed to be fraudulent and void as against the committee if

- (a) the gift, grant, alienation, conveyance or transfer is not made for full and valuable consideration actually paid or sufficiently secured to the person, or
- (b) the donee, grantee, transferee or person to whom the property was alienated or conveyed had notice at the time of the gift, grant alienation, conveyance or transfer of the mental condition of the person.

Adult Guardianship Act, R.S.B.C. 1996, c. 6 [AGA]

Presumption of capability

3 (1) Until the contrary is demonstrated, every adult is presumed to be capable of making decisions about the adult's personal care, health care and financial affairs.

- (2) An adult's way of communicating with others is not grounds for deciding that he or she is incapable of making decisions about anything referred to in subsection (1).

Transfer of property by incapable adult

60.2 (1) If an adult transfers an interest in the adult's property while the adult is incapable, the transfer is voidable against the adult unless

- (a) the interest was transferred for full and valuable consideration, and that consideration was actually paid or secured to the adult, or
 - (b) at the time of the transfer, a reasonable person would not have known that the adult was incapable.
- (2) In a proceeding in respect of a transfer described in subsection (1), the onus of proving a matter described in subsection (1) (b) is on the person to whom the interest was transferred.

[80] Section 20 of the PPA is repealed. The obvious difference between s. 20 and s. 60.2 of the AGA is that under the PPA any transfer made by an incapable person is void and it is voidable under the AGA.

[81] Counsel for the Public Guardian argues that s. 60.2 codifies the law concerning the common law presumptions of fiduciary duty, resulting trust and undue influence. I agree.

Resulting Trust:

[82] In *Pecore v. Pecore*, 2007 SCC 17, it states:

- [2] 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.

Fiduciary Duty

[83] In *Ast v. Mikolas*, 2010 BCSC 127, Mr. Justice Cullen, as he then was, refers to *Egli v. Egli*, 2004 BCSC 529 at para. 122 and that case's summary of the indicators of a fiduciary relationship as outlined in *Frame v. Smith*, [1987] 2 S.C.R. 99. In *Ast*, Mr. Justice Cullen quotes from *Egli* at paras. 122-123:

before finding that the relationship in question was of a fiduciary nature. The indicators discussed in *Frame v. Smith* are (and I paraphrase):

1. The fiduciary has scope for the exercise of some discretion or power.
2. The fiduciary can unilaterally exercise this discretion or power to affect the beneficiary's legal or personal interests.
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary.

The court in *Burke*, while not commenting on the first two factors, held that the attorney was a fiduciary because his wife, the donor, was peculiarly vulnerable to him because of a physical illness.

Whatever approach is taken in the case at hand -- whether one takes the position that a power of attorney automatically creates a fiduciary relationship or whether one looks at the individual circumstances of the case to find a fiduciary relationship -- David Egli and Hans Egli were in a fiduciary relationship when the powers of attorney were created, owing to the complete control David had over his father's estate.

[123] As to what constitutes a breach of fiduciary duty, it is clear that a fiduciary is subject to a broad duty to act in good faith and in the best interests of the person over whom she exercises discretion or control, that she must fully disclose all information relevant to the trust and confidence placed in her, and that she must not reap a personal benefit or use the property or goods that she has discretion or power over. See *Capobianco v. Paige* (2007), 36 B.L.R. (4th) 229 (Ont. S.C.J.), *Keech v. Sanford* (1726), 25 E.R. 223, and *Bray v. Ford*, [1896] A.C. 44.

Presumption of Undue Influence

[84] In *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, Madam Justice Wilson with Mr. Justice Cory concurring states:

[42] What then must a plaintiff establish in order to trigger a presumption of undue influence? In my view, the inquiry should begin with an examination of the relationship between the parties. The first question to be addressed in all cases is whether the potential for domination inheres in the nature of the relationship itself. This test embraces those relationships which equity has already recognized as giving rise to the presumption, such as solicitor and client, parent and child, and guardian and ward, as well as other relationships of dependency which defy easy categorization.

[49] Since the trust instrument is unquestionably more akin to a gift or bequest than a commercial transaction, the existence of the required relationship without more is sufficient to trigger the presumption. It remains, therefore, to be determined whether the presumption has been rebutted.

[85] Pursuant to s. 60.2 of the AGA, the Public Guardian must prove that Douglas was incapable on March 12, 2009 when he transferred the Thrums property to himself and to Mona as joint tenants.

[86] Section 60.2 places the onus on Mona to prove that, at the time of the transfer, Douglas was capable to make the transfer. The test that Mona must meet is that a reasonable person would not have known that Douglas was incapable.

[87] It is not disputed that at the time Douglas signed the transfer of the Thrums property on March 12, 2009, there was no consideration paid or secured by Mona.

[88] I find that Mona was well aware of her brother's considerable mental difficulties, as were other family members and friends, and it was obvious to all of them.

- [89] Mona was in a fiduciary relationship with her brother in accordance with the indicators of Frame. Starting in 1997, Mona started to exercise some discretion and power over her brother which increased substantially over the years and increased with his inability to perform certain tasks, which was to look after his financial affairs, direct his day-to-day needs and arrange his medical treatment. During this time, Douglas granted Mona power of attorney. This was exclusive to Mona and there was no evidence before me that Douglas had any impact on the decisions or management made by Mona. In fact, it is doubtful that he could impact those decisions and manage his affairs given his mental health problems.
- [90] After the sale of the Glenwood home in 2004, Douglas lived with Ms. Pickard, as did Mona. In 2006, after the Thrums property was purchased, Mona and her children lived in the Thrums property, as did Douglas.
- [91] Ms. Pickard described Douglas, while living with her, as like a five-year-old and "could not be left alone". Mona directed and responded to all of Douglas' medical needs as evidenced by Dr. Berzen's report. Douglas, due to his medical condition, was at the mercy of his fiduciary, Mona. I am not stating that she did not treat him properly.
- [92] The next question is whether Douglas was incapable at the time he signed the Form A transfer? Prior to signing the Form A transfer, Dr. Berzen concluded that Douglas was not fit to work, drive, or to manage his finances, and that he ought to live in a supportive living arrangement. This medical opinion of Dr. Berzen was given by him in 2004. Dr. Berzen concluded that over the period of seven years when he assessed and treated Douglas, Douglas knows how to do something, but cannot actually do it. At no time, up until November of 2010, did Dr. Berzen change his opinion.
- [93] Dr. Berzen states that Douglas would have understood his legal rights and options, but that his capacity to make decisions with respect to his financial affairs was compromised. When Douglas transferred the Thrums property, he would not appreciate the full consequences of his act. At the time that Douglas transferred the Thrums property, he was disposing of an asset that he had paid for, and paid its mortgage and other expenses relating to it. Based on Dr. Berzen's opinion, he would not have understood that. He could no longer work and increase his estate for the future, despite the fact that he believed, over the period that Dr. Berzen was treating him, that he would be going back to work. The act of transferring the Thrums property compromised his financial future. He would not appreciate that as he was vulnerable to his sister, Mona, who made all his financial decisions and who was his attorney.
- [94] There are no notes in Mr. Easton's file for this transaction, unlike the notes when the attempt to transfer the Thrums property with a power of attorney. There was no evidence as to what was said when Douglas signed the Form A transfer. There is no evidence before me whether Mona was present. In paragraph 8 under "LEGAL BASIS" in Mon's response, she states:

8 During the Spring of 2009, the defendant met with Attorney, Fredrick Eastman, to gather information of joint title. The Plaintiff was counselled about the benefit of this arrangement based upon the alternative of tenants-in-common. it was mutually agreed that joint tenants would meet our needs. This was done, as a protection of both parties. I have never desired to take the property away from Douglas and we had always agreed to divide and sell when Douglas was given "a clean bill of health", to go on our separate lives. So the Transfer occurred with legal counsel and full involvement of Douglas. There was always hope that a cure would be found for Douglas's Mental Health and youthful lifestyles that he had previously enjoyed, be returned to him.

- [95] By the spring of 2009, Mona was well aware of her brother's mental illness and initiated most of the treatment that he received. Prior to, after, and during 2009, there was no medical evidence to suggest that there was a cure available and that Douglas would regain his mental health and that each of them would go on their own ways and conduct their separate lives. There was no such prognosis.
- [96] Mona did not argue that her brother was capable, nor did she attempt to discharge the onus placed on her pursuant to s. 60.2 of the AGA.
- [97] Mona's plea before this court is that she is on and has been on a modest income (People with Disabilities Pension) since the early 1990's. She has a daughter who has completed high school and ready for university, she has no money, and her financial future is somewhat desperate. This demonstrates that she has put her interests in conflict with her brother's interests.
- [98] I conclude that Douglas received no consideration for the second transfer of the Thrums property. Mona claims that her interest in the property or the consideration was made when Mr. Hals gave her the gift, the difference between the purchase price and the actual value of the property when Douglas purchased it. From Mona's point of view, Douglas holds an interest in the Thrums property for her.
- [99] There is no evidence before me as to the value of the Thrums property in 2006, other than the purchase price of \$155,000 and the assessed value by the BC Assessment Authority of \$158,100. There is no evidence before me that there was a written appraisal of the Thrums property when it was purchased, nor a verbal estimate. Mona could have obtained a historical appraisal stating its value at the time of purchase. The only evidence before me is that of Mr. Burton who advised her to get a professional appraisal. There was no evidence that Mona followed up on Mr. Burton's advice, and there is no basis for Mr. Burton's recollection that there was an appraisal of \$225,000. There was no consideration for the transfer, nor was there any consideration paid to or accredited to Douglas at the time he purchased the Thrums property.

- [100] The Public Guardian has proved on a balance of probabilities that at the time Douglas transferred the Thrums property to himself and Mona he was incapable of making the transfer. The transfer is voidable as against him. There was no consideration for the transfer to Douglas. At the time of the transfer, a reasonable person would know that Douglas was incapable.
- [101] I declare that the transfer signed by Douglas on March 12, 2009, and registered in the Land Titles Office under CA1058155 is voidable against him.
- [102] I find that Douglas does not hold in trust any part of the Thrums property for Mona.
- [103] The Thrums property shall be conveyed to and vested in the name of Douglas.
- [104] Douglas will have his costs based on Appendix B, Schedule B, unless either party, within 30 days of the date of these reasons, notifies the Manager of Supreme Court Scheduling that they wish to speak to costs before me.

"H.C. Hyslop J."

HYSLOP J.

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