

CANADA / JUDGMENT

Burkett v. Burkett Estate

2018 BCSC 320

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Supreme Court of British Columbia

DECIDED

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2018 BCSC 320 Burkett v. Burkett Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Burkett v. Burkett Estate,

2018 BCSC 320

Date: 20180302

Docket: S153682

Registry: Vancouver

Between:

Josephine Ariel Burkett and Daniel William Burkett

Plaintiffs

And

Barry Robert Burkett, Executor of the Will of Rhoda Catherine Burkett,

the Estate of Rhoda Catherine Burkett, Deceased Barry Robert Burkett

and David Renton Burkett

Defendants

Before: The Honourable Madam Justice Young

Reasons for Judgment

Counsel for the Plaintiffs:

T. Millichamp

Respondent Acting on Own Behalf as Executor of the Will of Rhoda Catherine Burkett and for the Estate of Rhoda Catherine Burkett:

B.R. Burkett

Respondent Acting on Own Behalf:

D.R. Burkett

Place and Date of Trial:

Vancouver, B.C.

December 4-7 and 11-15, 2017

Place and Date of Judgment:

Vancouver, B.C.

March 2, 2018

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I. Introduction	

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- [1] This action involves several members of the Burkett family. For clarity, I will refer to each of the member by his or her first name.
- [2] In this action, the plaintiffs seek a declaration that the defendant, Barry Robert Burkett ("Barry") holds property at 5500 Wallace Ave., Delta, British Columbia, legally described as: PID number 005-474-817 Lot 1132 Section 3 Township 5 New Westminster District Plan 56510 (the "Wallace Avenue House") in trust for the Estate of Rhoda Catherine Burkett (the "Estate") by way of a resulting trust. The plaintiffs also seek a declaration that they have a beneficial interest in the Wallace Avenue House as beneficiaries of the Estate.
- [3] The plaintiffs seek damages for breach of trust committed by Barry. The plaintiffs allege that Barry used undue influence to cause Rhoda Catherine Burkett ("Rhoda") to transfer the Wallace Avenue House and other assets to him during her lifetime.
- [4] The plaintiffs seek an order prohibiting Barry from transferring or encumbering the Wallace Avenue House.
- [5] The plaintiffs seek an order passing over Barry as executor of the Will of Rhoda and appointing Rhoda's other son, David Renton Burkett ("David") as executor.
- [6] They seek an order that the Wallace Avenue House be sold and the net proceeds be paid to the credit of the Estate and that the executor appointed by the Court have conduct of sale of the Wallace Avenue House.
- [7] David gave evidence at this trial but was not a party to this action until the last day of trial when I ordered that he be added as a defendant given that he is an interested party, an alternate executor, and a beneficiary of the Estate.
- [8] In the years leading up to the impugned transaction, Rhoda is described by all family members as being in frail condition and dependent on Barry and home care providers to assist her with activities of daily living.
- [9] On April 20, 2011, approximately six months after the death of her husband, Robert Burkett ("Bob"), Rhoda signed a transfer of title of the Wallace Avenue House transferring her fee simple interest into joint tenancy with her eldest son Barry (the "Freehold Transfer"). Barry registered the Freehold Transfer in 2013.
- [10] After Bob's death, Rhoda and Barry resided in the Wallace Avenue House and lived off Rhoda's small pension income and her investments. When these investments were depleted, loans were obtained to finance their living expenses.
- [11] Rhoda died on August 21, 2014. There are no assets remaining in the Estate.

- [12] A central issue in this litigation is whether Rhoda had capacity to transfer title of the Wallace Avenue House into joint tenancy with Barry and whether she had capacity to consent to the investments Barry made with her money. The plaintiffs allege, in the alternative, that Barry unduly influenced Rhoda. Another issue is whether Barry, when using Rhoda's Power of Attorney, honoured his trust obligations and used the transfers in Rhoda's best interest or misappropriated the funds for his own use.

II. The parties

- [13] The plaintiffs are the children and survivors of Rhoda's middle son, Donald Grant Burkett ("Don") who predeceased Rhoda on June 1, 2013. Barry was Rhoda's eldest son, Don was her middle son and David was her youngest son. Barbara Burkett ("Barbara") is Don's widow and the mother of both plaintiffs. She is not a party but testified at trial.

III. Admitted facts

- [14] These background facts are taken from a synopsis of admitted facts pursuant to notices to admit and are not controversial.
- [15] Rhoda was born February 13, 1922 and died August 21, 2014 at the age of 92. Rhoda's husband, Bob predeceased Rhoda on October 3, 2010.
- [16] Rhoda died leaving a last Will and Testament dated March 27, 1997 (the "Will"). Under the Will, the executors were initially Bob and if he predeceased her (as he did), the alternative executors were her three children, Barry, Don and David or the survivors of them.
- [17] The Will provides that the residue of the Estate would pass to her husband Bob if he survived her. The alternative residual beneficiaries under the Will are her three children, Barry, Don and David.
- [18] The Will contains a provision that if any of her three sons predeceased Rhoda, the share of that son would be divided equally among the children of that predeceased son. The plaintiffs are the only children of Rhoda's predeceased son Don and as such, under the terms of the Will, are each entitled to one-half of the one-third share given to Don under the Will.
- [19] By a power of attorney dated March 27, 1997 (the "Power of Attorney"), Rhoda appointed her husband Bob, and her sons Don and Barry as her attorneys, any one of whom could act separately. When Bob died, Don and Barry were the surviving attorneys.
- [20] In addition to the Wallace Avenue house, Bob and Rhoda had funds in accounts at Envision Credit Union ("Envision") and in investments at Raymond James Financial Inc. ("Raymond James"). Their long-time financial advisor at Raymond James was Bonnie Cyre. All of these assets were in the joint names of Bob and Rhoda.

- [21] Bob and Rhoda had no significant debt apart from a deferred property tax charge of approximately \$70,000 registered against the Wallace Avenue House which did not need to be paid until the property was sold or transferred.
- [22] Following Bob's death, Rhoda became the sole registered and beneficial owner of the Wallace Avenue House as well as the Envision accounts and the Raymond James investments.
- [23] At the time of Bob's death, Barry was already living in the Wallace Avenue House in the basement and was taking meals with Bob and Rhoda.
- [24] Barry had seven years experience working at a bank and a trust company. He had started a mining exploration company and had experience in stock promotion.
- [25] In 2008, Barry was injured at his job as a lead airside escort at Vancouver airport and was off work until August 2008. Barry then returned to his former job for a short time until he was injured at work again. He received a settlement of \$7,700 from WorkSafe BC and did not return to work.
- [26] In June 2010, while residing in the Wallace Avenue House with Barry and Bob, Rhoda fell and fractured her hip and was hospitalized for a hip replacement.
- [27] In the summer of 2010, Bob became sick with leukemia. Barry then helped both Bob and Rhoda and took Bob to medical appointments. Bob entered the hospital three weeks prior to his death, returning to the Wallace Avenue House a few days prior to his death on October 3, 2010.
- [28] Since Barry was living in the Wallace Avenue House and was not employed at the time, the majority of the work around the house fell on him.
- [29] Following Bob's death, Barry assisted Rhoda by doing daily tasks and dealing with her finances. Rhoda would give Barry money for expenses or sign cheques prepared by him.
- [30] Through 2011 and into the beginning of 2012, Barry did not receive any fixed remuneration for helping Rhoda, but in addition to the free room and board he received, certain of his personal expenses were paid by Rhoda's funds.
- [31] On April 20, 2011, Rhoda and Barry attended at the offices of a lawyer, Lisa Eastwood, to sign the Freehold Transfer. Ms. Eastwood witnessed Rhoda's signature on the Freehold Transfer and stamped it with the notation "No advice requested or given. Attested to only but not drawn by Lisa Eastwood". Ms. Eastwood did not give evidence in this trial.
- [32] In the beginning of January 2012, Rhoda moved into a Kinsman retirement centre in Tsawwassen ("Kin Village").

- [33] Shortly after moving into Kin Village, Rhoda broke her other hip and spent time in Royal Columbian and Delta Hospitals including Mountain View Manor extended care wing recovering from the injury. She did not return to Kin Village until February 17, 2012 when she was placed in an extended care unit of the facility to rehabilitate. Rhoda remained in Kin Village until April 4, 2012 when she moved back into the Wallace Avenue House to live with Barry.
- [34] In late 2011 and early 2012, a dispute arose between Barry and Don regarding Barry's handling of Rhoda's finances. Don alleged that Barry was using a considerable amount of Rhoda's funds for his own personal purposes, an allegation that Barry denied.
- [35] Barry's position at the time was that Rhoda was competent to make financial decisions and that his actions in using her funds were consistent with her instructions to him. Don's position was that Rhoda was not competent to make financial decisions although there had been no definitive assessment.
- [36] On March 22, 2012, Rhoda was assessed for competency by a geriatric psychiatrist, Dr. Atul Nanda. His findings were challenged by Barry at trial and will be dealt with under the paragraphs below dealing with Rhoda's competency.
- [37] The dispute between Don and Barry regarding Rhoda's competency to handle her financial affairs and Barry's alleged use of Rhoda's funds for his personal use continued. Barry provided an accountant, Marie Vermeulen, with statements and information regarding one of Rhoda's accounts at Envision and, based on that information, Ms. Vermeulen prepared an accounting of Rhoda's spending that was provided to Don.
- [38] As Don and Barry were attorneys under the Power of Attorney who could act separately, Envision took the position that either Don or Barry could use their power to take money from Rhoda's account.
- [39] In August 2012, by letter from his lawyer, Don put Envision on notice that he would hold them liable for any of Rhoda's money that was paid out of her account without the signature of both attorneys.
- [40] Barry attempted to register the Freehold Transfer at the Land Titles Office on August 24, 2012 but registration was rejected by the Land Titles Office due to technical errors on the form.
- [41] On September 6, 2012, Rhoda and Barry attended at the offices of a lawyer, Murray Lott, who took instruction from Rhoda and thereafter prepared and had Rhoda execute a codicil to the Will (the "Codicil") to remove her sons Don and David as executors and leaving Barry as the sole executor under the Will.

- [42] At the same time, on September 6 2012, Mr. Lott took instructions from Rhoda and thereafter prepared and had Rhoda execute a revocation of part of Rhoda's Power of Attorney (the "Revocation") to remove her son, Don, as attorney and leave Barry as the sole attorney.
- [43] On September 11, 2012, Don referred the matter to the office of the Public Guardian and Trustee.
- [44] Mr. Lott, with the concurrence of the family, acted on Rhoda's behalf in an attempt to arrange a family agreement to resolve issues surrounding Rhoda's care and monies but his services were terminated before an agreement could be reached. Mr. Lott gave evidence at trial and some of his evidence was challenged by Barry and will be dealt with below.
- [45] The Public Trustee indicated they would prefer that the family arrange to protect Rhoda's interest rather than having the Public Trustee act as Rhoda's committee.
- [46] Barry, Don and David continued to work both directly and through lawyers on a family agreement to, among other things, deal with Rhoda's care, payments to Barry relating to his involvement in her care, and the eventual disposition of her home on her death.
- [47] There were a number of drafts of the family agreement as the brothers negotiated. The final version of the family agreement dated November 23, 2012 was agreed to and signed by Don, David and Barry. They agreed to treat the changes to the Power of Attorney and the Codicil made at Murray Lott's office on September 6 2012 as ineffective due to questions about Rhoda's capacity to make such changes. They further agreed that the Power of Attorney and Will made in 1997 by Rhoda remained in effect. They further agreed on a household budget for Rhoda and on monthly payments to Barry for providing homecare services to Rhoda (the "Burkett Family Agreement").
- [48] In or about January 2013, Rhoda's financial assets had diminished to the point where there were insufficient funds to provide for her ongoing care and living expenses.
- [49] Using the Power of Attorney, Don and Barry obtained a line of credit from First West Credit Union on Rhoda's behalf. A mortgage was registered against the Wallace Avenue House securing the \$160,000 line of credit (the "Line of Credit").
- [50] Barry provided to the Public Trustee a monthly accounting of his and Rhoda's expenses for a number of months. After several months of these accountings and after the parties had entered into the Burkett Family Agreement, the Public Trustee withdrew from the matter.
- [51] By notice dated March 18, 2013, Don resigned as one of Rhoda's attorneys.
- [52] By letter dated April 7, 2013, Barry indicated that he did not believe that he was bound by the Burkett Family Agreement.
- [53] Don died on June 1, 2013.

- [54] On July 22, 2013, Barry registered the Freehold Transfer which transferred the Wallace Avenue House into Rhoda and Barry's name as joint tenants with right of survivorship.
- [55] On or about April 9, 2014, using the Power of Attorney, Barry borrowed \$356,496 from Home Equity Bank and caused a mortgage in that amount to be registered against the Wallace Avenue House (the "Home Equity Loan"). This mortgage continues to be registered against the Wallace Avenue House and the interest owing continues to accrue on it.
- [56] Rhoda died on August 21, 2014.
- [57] Subsequent to Rhoda's death, Barry transferred the Wallace Avenue House and the accounts containing Rhoda's funds into his name alone.
- [58] Barry has refused to apply for probate or deliver the Will and Codicil to allow David to do so, indicating that the Estate is insolvent and there is nothing to probate.
- [59] Based on appraisals of the Wallace Avenue House by a professional appraiser, Dean Doolin, the value of the property as at February 21, 2016 was \$1,250,000 and as at April 7, 2017 was \$1,125,000.
- [60] Based on an assessment of the Wallace Avenue House by realtor John Olson of Re/Max Realty, as at the date of Rhoda's death, August 21, 2014, the value of this property was between \$785,000 and \$819,000.

IV. Statements made by the deceased

- [61] Given that Rhoda and Don are deceased, all the statements allegedly made by them are hearsay. This included emails exchanged between Don and Barry.
- [62] Hearsay evidence relied on for the truth of its contents is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions of the hearsay rule remain presumptively in place.
- [63] One exception to the hearsay rule permits evidence to be given of statements made by the deceased person as to their state of mind or emotional state *R. v. Smith*, [1992] 2 S.C.R. 915 [Smith]; *Modonese v. Delac Estate*, 2011 BCSC 82 [Mondonese] at paras. 82 to 85.
- [64] Where a party seeks to rely on the evidence for the truth of its contents, the principled approach to admissibility of hearsay evidence is to be followed. The onus on is on the party tendering the evidence to establish the necessity of relying on hearsay and the reliability of the evidence on a balance of probabilities.
- [65] Due to Rhoda and Don's death, necessity is established.
- [66] When assessing the reliability of a hearsay statement, it is my task to search for indicia of trustworthiness sufficient to displace the general exclusionary hearsay rule.

V. Credibility of the witnesses

[67] Most of the witnesses who testified at this trial had an interest in the outcome and therefore their evidence has to be carefully scrutinized.

A. Daniel Burkett

[68] Daniel Burkett ("Daniel") gave evidence of his relationship with Rhoda. He was often babysat by her when he was younger. He would come to visit her when he was in school. He saw Rhoda at Christmas, Thanksgiving, birthdays, and holidays. He recalls her becoming quite forgetful toward the end of her life. The most obvious incident was when she forgot that his father had died.

[69] Daniel testified about a meeting he attended at the Wallace Avenue House sometime in April 2015 with his sister Josephine Burkett ("Josie"), and his uncles David and Barry. At the end of the meeting, his impression was that Barry was going to delay the sale of the Wallace Avenue House for a while but that he intended to sell it and divide the proceeds. This was just an impression. He did not recall a direct statement but he was hopeful that matters would resolve amicably.

[70] Daniel knew little about Rhoda's financing or substance of the dispute between Don and Barry over Rhoda's finances. None of Daniel's evidence was controversial and I accept his testimony.

B. Josephine Burkett

[71] Josie gave evidence of her relationship with Rhoda. She was very close with her when she was younger. Rhoda had a particular interest in Josie's activities such as dancing and horseback riding. She recalls incidents of Rhoda's forgetfulness. In April 2011 she recalls receiving a telephone call from Rhoda who was looking for an old iron and wondered if Barbara had her iron. She also recalls an incident where shortly after Don's death, Rhoda forgot that Don had died and asked where he was.

[72] Josie did not see Rhoda much after her father's death. She felt uncomfortable being around Barry and so she would not go to the house to visit Rhoda.

[73] She did relay her observations of the incident on March 7, 2012 at Don's chiropractic office. She saw Barry storm toward the door and she was frozen and could not get to the door and lock it. She did pick up the telephone to call 911 but Barry left the office.

[74] She recalled visiting Barry at the Wallace Avenue House on April 4, 2015 with her uncle David and her brother Daniel. She was uncomfortable. She said she "has seen her uncle's (Barry's) rages before" and she did not want to go there. She testified that Barry told them that he did not want to sell the Wallace Avenue House for six months. She testified that Barry and David spoke of the Raymond James account and David was trying to find out what the balance in the account was. Josie asked to see a statement with the balance on it and Barry

said "No the money is mine. It is my investment and that's the end of the discussion."

- [75] Josie testified that in the meeting, Barry and David made some reference to probate fees but she did not understand it.
- [76] In cross-examination, Josie denied being told that Rhoda left the house to Barry.
- [77] Josie's testimony was direct and forthright. She was unchallenged on cross-examination. I accept her evidence. Like her brother Daniel, Josie knew little about Rhoda's financing or substance of the dispute between Don and Barry over Rhoda's finances.

C. Murray Lott

- [78] Mr. Lott is an independent professional witness called by the plaintiffs who kept notes of his meetings with the Burkett family. He acted for Rhoda for a short period of time until his retainer was terminated. He believed that Barry terminated his retainer. He expressed suspicions that Barry was manipulating Rhoda and blocking her communications with him. Mr. Lott presented his evidence in a clear and forthright manner and provided a factual basis for his impressions. His testimony was supported by his contemporaneous notes. He was unshaken on cross-examination. I accept his testimony as credible and reliable.

D. Barbara Burkett

- [79] Barbara is the widow of Don. She is not a beneficiary to the Estate but her children are. Daniel lives with her and is likely at least partially dependent on her. She is clearly the driving force behind the plaintiffs commencing this action. The plaintiffs are young adults who testified at trial but who had only a superficial understanding of this litigation.
- [80] Much of Barbara's evidence is helpful in that it provides a narrative which is accompanied by documentation. She provided the bulk of the documentation found after searching through Don's records. She provided an extensive accounting of monies spent from Rhoda's accounts.
- [81] In terms of bias, Barbara was honest about her dislike for Barry. They never got along. She found him aggressive and vulgar and thought he enjoyed picking fights with her. She thought he drank too much and she asked Don not to invite Barry over to their home for dinners. Her impression was that he liked to pick on women. Both she and Josie expressed discomfort in his presence.
- [82] Barbara was not particularly close to Rhoda. She did visit Rhoda and Bob during Bob's lifetime and had them over to her home for dinner. After Bob's death she rarely went to the Wallace Avenue House because she was uncomfortable being in the house with Barry.

- [83] I have viewed Barbara's evidence with some caution because of her bias against Barry and her interest in the litigation. If her evidence is corroborated by other credible witnesses or documentation I have accepted it. Where hearsay statements were made only to her and not corroborated, I have not, out of an abundance of caution.
- [84] I accept Barbara's evidence about the aggressive behaviour by Barry she witnessed both at the bank and in the chiropractic office on March 7, 2012. I will discuss the March 7 incident in some detail below. My conclusion is that it is highly likely that the March 7 incident frightened Rhoda and that she did confide that to Barbara.
- [85] Barbara gave evidence that Rhoda said she signed the Freehold Transfer for estate planning purposes to avoid probate fees and estate fees. She was present at the Wallace Avenue House when Rhoda said this to Don. I accept that Rhoda said those words but I cannot determine if what she said was true or if she believed what she said.
- [86] On cross-examination, Barbara's evidence was not successfully challenged. I encouraged Barry to review the spreadsheets produced by Barbara and the supporting documentation to see if there were inaccuracies. He was given additional time to review his notes before completing his cross-examination of Barbara. He did not ask a single question about the spreadsheets nor did he bring any inaccuracies forward.
- [87] Accordingly, I accept Barbara's testimony as it relates to the financial documents and I accept her spreadsheets as being accurate.

E. David Burkett

- [88] David is a beneficiary to the Estate. He has lived on Vancouver Island for much of his adult life and therefore had limited contact with Rhoda during the relevant time period from 2010 to 2014.
- [89] David is a forgetful and imprecise witness whose evidence was not particularly reliable.
- [90] He testified about statements which Rhoda allegedly made to him. For example he said that Rhoda wanted to split the Raymond James account three ways and give it to each of her sons after Bob's death. She allegedly said "You should just take 1/3 now or Barry will spend it." No one else heard the statement being made and without corroboration I place no weight on that statement.
- [91] David's evidence that Barry and Rhoda did not have a warm relationship and they tried to avoid one another in the house is supported by some email communication between Barry and Don in the period from August to November 2011. My impression is that the relationship between Barry and Rhoda was very strained in the fall of 2011. It improved when Barry got some help from home care providers.

- [92] David testified that in 2011 and early 2012 when he and Don visited Rhoda for lunch, within the first 15 minutes, Rhoda would say "Why do you guys want to put me in a home?". He felt like Rhoda was being coached to say this. When Barry was not around, Rhoda did not say these things. I accept this evidence because it is supported by Barry's testimony. He clearly believed that Don and David wanted to put Rhoda in a home. I find it plausible that he would have shared that impression with Rhoda.
- [93] Some of David's evidence was confusing. For example, he testified that he did not know of the Freehold Transfer until he saw the Will and Codicil. The Will and Codicil make no reference to the Freehold Transfer and so this makes no sense. When plaintiffs' counsel tried to reorient David, he completely lost his train of thought.
- [94] When asked about obtaining the Line of Credit financing, David drew a complete blank. He was asked three times and he did not understand the question.
- [95] David said that Rhoda never told him that she was leaving the house to Barry.
- [96] It was David's impression that Rhoda would not favour one son over the other. He thought she loved all of her sons the same but if she did have a favourite it was probably him. I find this interesting because Barbara said that Don was Rhoda's favourite son and Barry testified that he was Rhoda's favourite son. I have to conclude that Rhoda had a way of making each of her sons feel special and that she likely did not have favourites.
- [97] Although David is critical of Barry's misuse of Rhoda's funds, he accepted a \$4,000 gift from her in August 2013 when she was incompetent. Barry wrote him the cheque. He also participated with Barry in investment shares using Rhoda's money.
- [98] I do not find David's evidence reliable.

F. Barry Burkett

- [99] I have a number of concerns about Barry's testimony. He appears to have blinders on when it comes to Rhoda's competency. There have been a number of assessments of Rhoda's competency which he rejects.
- [100] When Dr. Nanda was about to assess Rhoda, Barry wrote a letter to Dr. Nanda trying to influence the outcome. It is clear that he did not think that Rhoda was incompetent at that time.
- [101] Barry wrote a number of emails to Don complaining about how difficult Rhoda was to live with in the summer and fall of 2011 and how she did not understand bank statements and thought that he was stealing her money. He dismisses this evidence regarding her state of mind by saying that it was just a phase she went through.
- [102] One of the most troubling areas of Barry's testimony is regarding conversations he allegedly had with Bob and Rhoda on Bob's deathbed. He testified that Rhoda and Bob told him days before Bob's death that they wanted to leave the Wallace Avenue House to him. This was in

October 2010. Barry has sworn a number of affidavits in these proceedings as he applied on a number of occasions to dismiss these proceedings by way of summary trial. He agreed that he never mentioned in any affidavits this conversation where Bob and Rhoda allegedly said that they wanted to gift him the Wallace Avenue House.

[103] I find this evidence an unbelievable fabrication by Barry. When he was cross-examined on this point and asked if he did not think it would be important to tell the Court that Bob and Rhoda wanted him to get the house, his answer was "I don't know I'm not a lawyer."

[104] In a document dated September 10, 2012, created by Barry and entitled "Historical Burketts Since Dad's passing October 3, 2010", he never mentioned that Bob and Rhoda said they wanted him to have the house.

[105] There are many areas where I reject the evidence of Barry which I will specifically deal with below.

[106] I do accept his evidence regarding the quality of care he provided for Rhoda during the last years of her life. I accept the fact that he was the only family member who was willing to do it and that he provided very personal nursing care when required. He spoke of Rhoda in his evidence with great tenderness.

[107] John Hawkes, Eileen Peterson and Cal Bennett support this finding in their testimony about how attentive Barry was to Rhoda and how happy Rhoda seemed to them.

VI. Rhoda's competency

A. June 22, 2010

[108] Six days after having a hip replacement, Rhoda, who was still in the hospital, was assessed using a Mini Mental State Examination ("MMSE"). Her recorded score was 19/30 which is indicative of moderate cognitive deficit. The social work clinical notes say that her MMSE was 20/30 in 2009. It was also noted that she had retained some insight.

[109] At the time of the assessment, Rhoda was experiencing very little pain from her hip replacement so was likely not taking anything stronger than Tylenol for pain.

[110] The social worker noted the following day that Rhoda did not remember seeing her the previous day. On June 30, 2010, the hospital progress notes indicated that Rhoda suffered from dementia and was unable to manage activities of daily living without assistance. The assessment on July 1, 2010 stated that Rhoda's dementia was worse than it appeared to be due to her preservation of social graces.

[111] Barbara and Josie recall that Rhoda had trouble with her memory before Bob's death. They gave some examples of things Rhoda said during this time which suggest that she was displaying some deficits. David also testified that Rhoda's memory was fading and that she would repeat things two or three times an hour.

B. November 25, 2010

[112] At a social gathering for the American Thanksgiving in Custer, Washington, Rhoda spoke with Elizabeth Aumann who is a friend of Barry's. Ms. Aumann is a nurse. She works with the elderly and has experience working with dementia patients. During her conversation with Rhoda, she detected no dementia and thought she was very sharp and intellectual and presented herself well in terms of hygiene and vocabulary. This was a social gathering and Ms. Aumann did not conduct any formal testing on Rhoda. It confirms the observation that Rhoda functioned well in social gatherings. Naturally, Ms. Aumann did not conduct an in-depth interview regarding Rhoda's finances.

C. December 13 2010 Home Care Assessment

[113] A home care nurse, S. Ireland, assessed Rhoda on this day and found her to have well-masked dementia. On the MMSE performed, Rhoda scored 21/30 which is indicative of mild dementia. She had good insight into her daily activities and was capable of looking after her personal care.

D. April 2011 - Lisa Eastwood Assessment

[114] On April 20, 2011, Barry took Rhoda to the office of Ms. Eastwood for the purpose of signing the Freehold Transfer. There is no independent evidence that a capacity assessment was done by Ms. Eastwood. Ms. Eastwood did not give legal advice but merely witnessed the signature and stamped the document saying that no advice was given or sought. Ms. Eastwood was not called to give evidence.

E. September 2011 Communications between Barry and Don

[115] Barbara was able to locate some email communications between Barry and Don. On September 24, 2011, Barry wrote to Don saying that Rhoda was accusing him of taking her money. He said "She does not understand any of this she has lost her ability to reason about these things". Don said on September 27, 2011 that Rhoda went on and on to him about wanting her own money.

[116] Barry responded:

I concluded today that mom is unable to read and understand a Bank Statement or a Brokerage Statement. This it seems is why she keeps accusing me of stealing her money. She just can't wrap her head around the numbers and what they mean. This definitely means that she will not be able to look after her affairs no matter where she lives. Of course since I told her she was number four on the Kinsman list she has been wondering whether she even wanted to move out of the house. Surprise!

Given this inability to deal with the financial stuff, I think we should continue consider advising the credit union and Raymond James so that they do not take instructions from her. She is planning to phone Bonnie Cyr at Raymond James to get the money from the investment account because she says she has no money in her bank account.

[117] On October 7, 2011 Barry wrote:

It is getting worse. She is clandestinely planning things to bypass me as she is now convinced that I am stealing her money!

[118] On November 7, 2011 Barry wrote:

I have just put up with mum berating me for six hours about me having stolen all her money and how dad would be angry and pissed off that she has no money and she can't move because she cannot afford to! I have not been able to watch TV or even be upstairs most of the time because every time I go upstairs she gets on this stuff again. She is now telling me that I can't face up to the fact that I have stolen all her money and ruined her life. This is why I am denying stealing her money. I may be faced with having to move out soon if this carries on.

[119] Barbara's evidence was that she observed a slow deterioration of Rhoda's mental health after Bob's death and that she showed significant deficits in the fall of 2011. She recalls that Barry and Don were working together to find a solution for Rhoda's care. They were visiting various home care facilities.

F. October 31, 2011 Home Care Assessments

[120] On October 31, 2011, Sally Malone from Fraser Health Authority assessed Rhoda for home care services. She described Rhoda as a frail-looking 89-year-old client presenting with well-masked dementia. She conducted a MMSE and Rhoda's scored 24/30 which is indicative of mild cognitive impairment. Ms. Malone noted that Rhoda still had good insight into her daily activities and was capable of looking after her personal care at that time. She was becoming quite obsessed with her money and not having a bankbook to know how much she had and was constantly asking her son where all her money was.

G. March 2012 Kin Village Position Progress Notes

[121] On March 7, 2012, a physician's progress note at Kin Village noted that a Montréal Cognitive Assessment ("MoCa") was done of Rhoda and her score was 10/30. No date is given for when that score was arrived at. I have concluded that this low score must have been arrived at while Rhoda was in Delta Hospital recovering from hip surgery. It was certainly much lower than her historical scores. There is a notation on the physician's progress notes that Barry does not accept the MoCa score of 10/30.

[122] On March 27, 2012, the care conference notes indicate that Rhoda scored 16/30 on the MMSE and between 10 to 13/30 on the MoCa.

a) Dr. Nanda's Report

- [123] Don arranged to have a geriatric psychiatrist, Dr. Nanda, to complete a cognitive assessment of Rhoda, which he completed on March 22, 2012.
- [124] Dr. Nanda is qualified as an expert to give opinion evidence on geriatric psychiatry. He assessed Rhoda on March 22, 2012 to determine her financial competency and deemed that she was not financially competent as a result of a major neurocognitive disorder (dementia) of an Alzheimer's type.
- [125] Dr. Nanda conducted a review of the Fraser Health Authority assessment narratives administered by various people between September 21, 2010 and January 24, 2014 before giving his evidence at trial. He also reviewed a Delta Hospital medical imaging report dated January 28, 2013 regarding a CT scan of the head of Rhoda.
- [126] On March 22, 2012, Dr. Nanda observed that Rhoda showed poor insight and poor comprehension to the risk-benefit analysis and the consequences that she may incur if wrong decisions regarding finances were made. He observed she had a MMSE score of 16/30, which placed her in a moderate range of dementia at stage V of the seven stages. She showed deficiencies in her ability to learn anything new and showed executive function changes in the areas of sequencing, planning, organizing, decision-making, and error correction.
- [127] Dr. Nanda was asked if Rhoda's cognitive condition would improve such that she might become capable of managing her affairs. On reviewing the CT scan which was taken on January 28, 2013, he saw evidence of vascular pathology indicative of an old stroke and evidence of ischemic demyelination of the white matter indicative of chronic small vessel ischemic disease. He concluded that these were permanent changes in the brain and not reversible. The disease of Alzheimer's, which is a type of dementia, is not reversible. It is a progressive illness.
- [128] In Dr. Nanda's opinion, Rhoda was more susceptible to influences by her children because of her dementia.
- [129] Her cognitive disabilities were not expected to improve but rather to deteriorate with age. It was expected that she would remain incapable of managing her finances.
- [130] Dr. Nanda explained that the MoCa score of 16/30 is clearly indicative of moderate dementia which requires 24-hour supervision and it is expected that the functional abilities would be low and would lead to safety risks.
- [131] During her March 22, 2012 interview with Dr. Nanda, Rhoda said there had been times when Barry overspent the money. She did not agree with him spending her money on fixtures for his cars, taking holidays, and also going and staying with his cousin in the United States. When she was asked whom she trusted with her money, she answered that she had no choice but to choose Barry. When asked about the nature and extent of her

Estate, Rhoda said she believed she was the sole owner of her home. She had some investments but was unsure what they were. She also believed that the investments had been divided among her children. She thought she had no income. She thought her expenses were going towards groceries and Barry's beer.

- [132] The statements made by Rhoda to Dr. Nanda are hearsay. I find that the statements were accurately recorded by Dr. Nanda but I cannot find that the contents of her statements were true.
- [133] Dr. Nanda noted that Rhoda was taking Tylenol, potassium, other vitamins, and cardiac medications at the time of this assessment.
- [134] In cross-examination, Barry suggested to Dr. Nanda that Rhoda's test scores were poor because she was on medication. I accept Dr. Nanda's opinion that the medication she was on would not affect her cognitive ability. Barry suggested that hydromorphone given to her during her surgery would linger in the body. Dr. Nanda dispelled this misconception by saying that morphine has a short acting half-life and would not linger for more than four to six hours.
- [135] No other psychiatrist was called to give evidence and Dr. Nanda's evidence was not shaken on cross-examination. I accept Dr. Nanda's opinion that Rhoda suffered from moderate dementia in March 2012 and that it was unlikely to improve and more likely to deteriorate.

H. Murray Lott - September 2012

- [136] When Mr. Lott first interviewed Rhoda on September 6, 2012, he noticed some deficits. She thought that she was 100 years old for example. She told him that her son Don expects "us" (presumably meaning she and Barry) to keep giving him money which she does not have to do. She said Don was angry about it. She said that Don said he deserves more money but she did not know why.
- [137] Barry supported these statements when he returned to the office. On the strength of both of their interviews, Mr. Lott accepted this statement at face value. He took her instruction to remove Don and David as executors but did not take instructions to change the residue clause in the Will. He thought Rhoda was competent to select a personal representative but likely not competent to make a significant change to the substance of the Will.
- [138] In her private session with Mr. Lott, Rhoda said she wanted Barry to get it all. When Mr. Lott said there may be a possible challenge to that decision, she changed her mind and said "that wouldn't work would it?"
- [139] Mr. Lott invited Don and David to discuss the situation with him and to attempt to arrive at a family agreement. After meeting with Don, he had a different perspective about the reasons for the conflict. He attempted to meet again with Rhoda but Barry would not make her available. While he was pressing for another appointment with Rhoda, he received a letter terminating his services. He was convinced that Barry had written the letter. He

expressed concern that the facts she presented to him had not proven out, that she was isolated, and that Barry was influencing her.

I. The Public Guardian's Investigation

[140] After Mr. Lott's services were terminated, Don reported his concerns to the Public Guardian and Trustee's office and an investigation was commenced.

[141] The Public Guardian accepted the medical opinions of Dr. Nanda and Dr. Germeinhardt and notified Rhoda's investment advisor that Rhoda was not capable of making any changes or adjustments to her financial or legal status.

J. The Burkett Family Agreement

[142] Barry, Don and David entered into the Burkett Family Agreement on November 23, 2012. The purpose was to set out the family operating agreements for the handling of finances, living expenses, and care of Rhoda. The first acknowledgement is as follows:

1. The parties acknowledge that evidence of Rhoda's ability to manage her own affairs includes the following:
 - a. Dr. Nanda's letter (assessment date 22 March 2012);
 - b. Dr. Germeinhardt's letter dated 14 July 2012;
 - c. Assessments by Sally Maloney of Fraser Health between March 2012 and October 2012;
 - d. Murray Lott's in office assessment on 6 September 2012;
 - e. Any further assessments by medical professionals subsequent to the above.
2. The parties agree that as of the date of this agreement, they will treat the assessments of Dr. Nanda and Dr. Germeinhardt as being determinative of Rhoda's capacity to manage her own affairs and that Rhoda is unable to direct her health or financial decisions. Barry, Don and David accept these findings unless equally credible opinions affirm her capacity to manage her own affairs.

K. Finding Regarding Rhoda's Competency

[143] It is clear from all the evidence listed above that Rhoda suffered from dementia from 2010 onward. There was some fluctuation in her capacity between 2010 and 2012. It appears in the fall of 2011 that she was seriously deteriorating and becoming paranoid and obsessive. I accept the opinion evidence of Dr. Nanda that Rhoda suffered from Alzheimer's dementia and that it was moderate by March 2012 and that the deterioration progressed from there.

[144] Sometime prior to January 2013, Rhoda had suffered from an undetected stroke which showed on a January 28, 2013 CT scan as an old stroke. Dr. Nanda could not determine when it had occurred but thought that it likely worsened her dementia.

- [145] In 2011, when Rhoda signed the Freehold Transfer, she likely suffered only from mild dementia and it was well masked by her.
- [146] She did not know that she had transferred her interest in the Wallace Avenue House when she was interviewed by Dr. Nanda on March 22, 2012.
- [147] By the time the Freehold Transfer was registered in July 2013, Rhoda suffered from moderate dementia and I find that she was incapable of directing this change in the Estate.
- [148] It is clear from Barry's testimony at trial and from the letter he sent to Dr. Nanda trying to influence the outcome of the assessment, that Barry either did not accept the fact that Rhoda suffered from dementia or was willfully blind to her dementia. He signed the Burkett Family Agreement accepting the fact that she suffered from dementia but then took the position several months later that the Agreement was not binding because Rhoda was not a party to the Agreement. This makes no sense given that she was incapable of managing her affairs. The reason her three sons were entering into the Agreement was because she lacked the capacity to do so herself. She therefore did not have to be a party to the Agreement. I reject Barry's evidence that his own lawyer told him that the Agreement was not binding because Rhoda had not signed it. I find he took this position so that he did not have to be bound by the Burkett Family Agreement any longer.

VII. Did Rhoda intend to gift her house or other assets

- [149] I have rejected Barry's evidence that Bob and Rhoda told him before Bob's death that they wanted him to have the Wallace Avenue House.
- [150] Eileen Peterson, gave evidence that Rhoda and Barry came to their home in Custer on November 24 and 25, 2010. She had met Rhoda once before Bob became ill but cannot remember the day. During this social visit for the American Thanksgiving, Rhoda apparently told Ms. Peterson out of the blue that she wanted to give Barry the house. There was no prompting and no one else heard this conversation.
- [151] Mr. Hawkes, a long-time friend of Barry's, said that when he and his wife, Ms. Peterson visited the Wallace Avenue House in the summer of 2011, Rhoda said to him that Barry was going to get the house. Apparently, she repeated this a few times without prompting.
- [152] Barry prepared the Freehold Transfer. He selected the lawyer. He made the appointment. He printed in Rhoda's name and the words "fee simple" on the document. He did not explain the purpose of the transfer to Rhoda. He said Rhoda requested it so he did not think he had to explain it to her. He never discussed with Rhoda using the transfer to avoid probate fees. He explained that the appointment was to witness a transfer document
- [153] Barry's evidence about having Rhoda sign the Freehold Transfer was inconsistent between his trial testimony and his examination for discovery testimony. At trial, he said he contacted Ms. Eastwood because her father, John Eastwood, who practiced in the same office, had prepared Rhoda's Will. He testified that he and Rhoda went to Ms. Eastwood's

office and Rhoda told Ms. Eastwood that she wanted to transfer title of the Wallace Avenue House. Ms. Eastwood told Barry to leave so she could speak to Rhoda alone. They spent 35 minutes together and then Barry saw Ms. Eastwood go into John Eastwood's office and then come out. Rhoda had the Freehold Transfer in an envelope when they left. There was no further discussion with Ms. Eastwood.

[154] In his examination for discovery he testified regarding the appointment with Ms. Eastwood:

A Yep. And even though she says she give no advice, she spent 40 minutes talking with mom about it and doing a competency test on mom and all that stuff.

Q Now you were in the office with your mother and - -

A No, Lisa told me afterwards that she did it.

Q Lisa told you afterwards or your mom told - -

A No. Lisa told me that she had done all the necessary tests to make sure that she was competent and of capacity, and then she explained to her what the form did and asked mom if that was what she still wanted to do and mom told her yes.

[Questions 164-166]

[155] If Ms. Eastwood had conducted a competency assessment of Rhoda she would have been an excellent witness for Barry to call. She was not called to testify and I draw a negative inference from that omission. Also, Ms. Eastwood did not provide independent legal advice. She stamped the document no advice given or sought.

[156] If Rhoda was still competent and wanted Barry to receive the Wallace Avenue House, as she had told Mr. Hawkes and Ms. Peterson, then I question why she would not have met with Mr. Eastwood who drafted the Will and given him instructions to change the Will.

[157] One explanation is that Rhoda thought she was transferring the house into joint tenancy to avoid probate fees and that her sons would still each receive one third of the house.

[158] Barry's testimony is that Don came storming into the house the next day and asked Rhoda about the transfer. Barry suspected that Mr. Eastwood told Don. Don allegedly became very angry.

[159] Barbara's testimony is that Don did not find out about the transfer for over a year. If Don had found out about the transfer in April 2011, then I see no reason why he would not have shared this information with Barbara especially if he was very upset about it.

[160] Barbara's recollection is Don found out about the transfer in April 2012 when he received an email from Barry entitled "Mum Trust Agreement".

[161] The email was sent April 16, 2012 from Barry to Don and said:

Don:

Attached is a draft of points for the trust agreement. I have only included things that can be legally binding. If there are other issues, they can be addressed in a side letter agreement. Email back your comments.

[162] The relevant point in the document entitled Mum Trust Agreement draft is:

Still checking with the lawyer on this Barry's name will be added to the house title and, he will hold Don and David's 1/3 interest's in trust for estate planning purposes. A reverse mortgage or other borrowing facility will be set up to pay back taxes and provide funds for mom's ongoing costs.

[163] This suggests that Don did not know about the Freehold Transfer in April 2011. Also the February 13, 2012 document entitled Letter of Understanding which was drafted to coordinate the emptying of Wallace Avenue House and paying Barry to prepare the house list for sale suggests that Don and David did not know about the Freehold Transfer.

[164] I prefer Barbara's evidence on this point that Don did not find out about the Freehold Transfer until April 2012. When he did find out about it he asked Barry to hold off registering the document in case Rhoda changed her mind. In cross-examination, Barry acknowledged being asked to hold off with registration.

[165] Barbara's recollection is that Barry told her and Don that the Freehold Transfer was for estate planning purposes to avoid probate fees and estate taxes. Barbara witnessed a conversation with Rhoda on a Friday in April 212 when she and Don were having lunch with Rhoda at the Wallace Avenue House. Don asked Rhoda why she signed the Freehold Transfer and what it was it for. He pressed her for an answer and she said: "Oh it had something to do with estate taxes. We don't want to pay too many taxes."

[166] I am faced with competing hearsay evidence. On the one hand, Ms. Peterson and Mr. Hawkes testified that Rhoda said she wanted Barry to get the house. On the other hand, Barbara heard Rhoda say that she signed the Freehold Transfer to save taxes.

[167] When I evaluate the reliability of the hearsay, it seems unusual for Rhoda to tell Ms. Peterson, whom she did not know well in 2010, that she wanted Barry to get the house. There is nothing to corroborate this hearsay. Ms. Peterson presented as a neutral observer. Earlier in her testimony she said she was not good with dates but she was clear about the November 24 and 25, 2010 dates. She had no recollection of the 2011 barbecue at the Wallace Avenue House when Mr. Hawkes heard Rhoda say that she was going to give the house to Barry. It is possible that Ms. Peterson mixed up the two dates and that Rhoda told her this in 2011 at the Wallace Avenue House after she knew her better. I believe Ms. Peterson when she said that Rhoda told her Barry was getting the house. I am less certain that she is correct about the date.

- [168] Mr. Hawkes made it clear that he has concerns about the Canadian courts because where he lives, the person who stays home with the parents gets the house. It does not even need to be written down. He was told by Barry about the Freehold Transfer and he advised Barry to get it registered right away. He testified that Barry said he did not want to upset his brothers and he was worried that Rhoda might change her mind. In Mr. Hawkes' view, Rhoda never did change her mind. Mr. Hawkes is clearly advocating for Barry's interest.
- [169] Barbara's testimony that she overheard Rhoda say that she signed the Freehold Transfer to avoid taxes is hearsay but is supported by the Mum Trust Agreement prepared by Barry, which refers to his holding his brothers' interests in trust.
- [170] There is evidence that Rhoda told Mr. Lott in September of 2012 that she wanted Barry to get everything but she did not pursue it when she was told that Don and David could challenge this decision. Mr. Lott thought she lacked capacity to make this substantive change to her Estate plan. Mr. Lott has a September 6, 2012 notation that the house was already in joint tenancy and Barry would be the trustee of the value of the house in trust for his brothers. He could not recall who told him that.
- [171] In the Burkett Family Agreement, Don, David and Barry agreed that there were questions about Rhoda's capacity in September 2012 and they agreed to treat any changes made by Mr. Lott as ineffective.
- [172] In the draft of the Burkett Family Agreement entered as Exhibit 38, on p. 6, comments in capital letters are entered after para. 4:
4. The house will remain an asset of Rhoda Burkett without exception. No provision for joint tenancy or title alteration shall exist and any existing are revoked. NOT GOOD ESTATE PLANNING - THIS HAS BEEN ARRANGED WITH A FORM A TRANSFERRING PART TITLE TO BARRY SO THAT A TRUST AGREEMENT ALLOWS HIM TO HOLD THE ASSET FOR THE THREE BROTHERS.THIS AVOIDA [sic] PROBATE FEES AND COSTS VERY LITTLE
- [173] In cross-examination, Barry denies making these comments. I do not accept his evidence. The bold capital letters are clearly comments made by him or on his behalf by his lawyer at the time.
- [174] In the final Burkett Family Agreement at para. 22, the term referring to the title has been changed to read:

The parties agree that the written consent of all three parties to this agreement is required for any transfer of interest in the Home.

[175] The Burkett Family Agreement was breached by Barry. It appears that Barry signed agreements which he has no intention of complying with. Neither the February 13, 2012 Letter of Understanding nor the Burkett Family Agreement were binding on his conscience. I am concerned that any trust provision to hold the proceeds of sale or interest in the Wallace Avenue House in trust for his brothers or for the Estate would also not bind his conscience.

A. Finding Regarding Rhoda's Intent to Gift her Assets

[176] I conclude that Rhoda wanted Barry to get the house at some point after Bob's death but she did not act on that desire. She did not change her Will. By December 2010, she suffered from mild dementia which was well masked. It is impossible to say whether she had testamentary capacity at that time. The fact is that she did not attempt to instruct counsel. It is unclear what she understood when she signed the Freehold Transfer.

[177] In March 2012, she did not remember signing the Freehold Transfer. In April 2012, I find she said that she signed the Freehold Transfer to avoid probate fees.

[178] I find that between late 2012 and the date of her death, Rhoda had formed the intention that Barry should get everything but she lacked the capacity to make this Estate change. Mr. Hawkes was right that she never changed her mind that Barry should get the house but unfortunately her dementia had advanced to the point where she no longer had capacity. There is also a serious question as to whether she was unduly influenced to come to this intention.

VIII. Resulting Trust

A. Legal Principle

[179] A resulting trust is presumed to arise whenever a transfer is made for no consideration unless the presumption of advancement applies. The presumption of advancement does not apply if a gratuitous transfer is made from parent to independent adult children.

[180] Where there has been a gratuitous transfer to an adult child, a rebuttable presumption arises that the property in question is being held in trust for the aging parent (to facilitate the free and efficient management of that parents affairs): *Wood v. Porter*, 2015 BCSC 2354 and *Pecore v. Pecore*, 2007 SCC 17, paras. 20, 24, 27 and 36.

[181] The presumption of resulting trust can be displaced by establishing on a balance of probabilities that the transferor intended to gift the property to the transferee. I should add that it is necessary that the transferor had capacity to arrive at that intention.

B. Application to These Facts

[182] In this case, the Freehold Transfer was signed by Rhoda in 2011 and registered in 2013. She received no consideration for transferring one half interest in the Wallace Avenue House. There is no clear evidence of her understanding of this transaction. According to *Clemens v. Clemens Estate*, [1956] S.C.R. 286 at 264, the traditional rule is that the evidence to show the intention of the transfer "ought to be contemporaneous, or nearly so to the transaction". In this case, I interpret "transaction" to mean when the Freehold Transfer was registered at the Land Titles Office.

[183] The evidence is clear that Rhoda suffered from moderate dementia by 2013 and she could not have understood the ramifications of the registration of the Freehold Transfer at that time.

C. Finding of Resulting Trust

[184] Accordingly, despite her early statements that she wished Barry to have the house or her later statements that she wished Barry to have everything, Barry cannot rebut the presumption that she intended a transaction when she was incapable of doing so. The resulting trust has been found.

[185] My findings in this case are very similar to Groves J.'s findings in *Modonese* at paras. 151, 153 and 154, although in *Modonese* the relationship between the child and the mother was abusive and that is not the case here.

[151] On the facts present in this case, I am satisfied that Regina's transfer of a one-half interest in the Royal Oak property to her son, Marko, and the resulting joint tenant ownership of the Royal Oak property was a transfer to which a presumption of resulting trust applies.

...

[153] On the contrary, there is ample evidence that, at best, Regina was confused or uncertain about the transfer and at worst did not know what the transfer involved. Additionally, despite attending before a notary public to witness her signature, there was no real effort by that notary public to obtain the independence of Regina's thought process and her intention to transfer. In fact, the entire circumstances of the transfer, arranged by Marko, paid for by Marko, with Marko being physically present, vitiate against any level of independence of mind by Regina. The notary public did not know Regina and did not have an opportunity to get to know her under the circumstances of this transfer such that he could in any way be satisfied as to the independence of her actions.

[154] I conclude that this is a classic case of a presumption of a resulting trust. As such, Marko's legal interest in the Royal Oak property is subject to a resulting trust in favour of his mother and the property must be dealt with as an asset of the estate.

[186] I make a declaration that Barry holds the Wallace Avenue House in trust for the Estate. Given the finding I have made with respect to the Freehold Transfer, I also find that the funds advanced from the Home Equity Loan were Rhoda's funds and Barry held them in trust for her.

IX. Did Barry used undue influence to cause Rhoda to transfer her house and other assets to him?

A. The Law of Undue Influence

[187] In *Lorintt v. Boda*, 2014 BCCA 354, the Court of Appeal explains the presumption of undue influence in paras. 75 and 76:

[75] The presumption of undue influence arises in circumstances where the relationship between the parties gives rise to the potential domination of one party by another. Once a dominant relationship has been established such that potential for influence exists, the onus moves to the defendant to rebut it and show that the plaintiff entered into the transaction as a result of his own "free, full and informed thought": *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at paras. 42-45.

[76] The presumption of resulting trust and the presumption of undue influence can both be rebutted on the balance of probabilities. In *Pecore*, Rothstein J. explained the role of presumptions in a trial:

[44] As in other civil cases, regardless of the legal burden, both sides to the dispute will normally bring evidence to support their position. The trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention. Thus, as discussed by Sopinka et al. in *The Law of Evidence in Canada*, at p. 116, the presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.

[188] Justice Groves notes in *Modonese* at para. 106, that in the case of an old and sick parent, a child may assume a relationship of dominance over that parent. Some case law has identified such relationships as being ones of dependency: *Petrowski v. Petrowski Estate*, 2009 ABQB 196 at para. 382.

[189] After examining the relationship between the transferor and transferee, the court must then examine the transaction in question. The presumption of undue influence can be rebutted by evidence of independent legal advice.

[190] In *Modonese*, Groves J. says at para. 122:

[122] The function of independent legal advice is to remove a taint that, if not removed, might invalidate a transaction. The nature and circumstances will dictate what constitutes adequate independent legal advice for purposes of a given situation: *Cope v. Hill*, 2005 ABQB 625 at para. 209, [2005] A.J. No. 1413 [Cope], aff'd 2007 ABCA 32, [2007] A.J. No. 83, leave to appeal ref'd [2007] S.C.C.A. No. 138.

B. The Dependency Relationship Between Barry and Rhoda

[191] Rhoda was completely dependent on Barry for her physical care and financial management. Barbara, David and Mr. Lott testified that Barry manipulated Rhoda. Barbara testified that Barry bullied Rhoda and that Rhoda was afraid of him and did what he said. She and Josie observed one of Barry's angry outbursts on March 7, 2012.

a) The March 7, 2012 Incident

[192] In early 2012, Don became very concerned about the amount of Rhoda's money Barry was spending. This was the month that Barry purchased a big screen t.v. after Don had complained to him about spending. On March 7, 2012, Don tried to change Rhoda's banking from Envision to the Bank of Montréal so that Barry would not have access to her funds.

[193] Apparently, Barry found out that Barbara had taken Rhoda to the Bank of Montreal. Barbara testified that Barry stormed into the Bank of Montréal and was asked to leave by the bank manager.

[194] After this event Barbara took Rhoda for tea and scones and testified that Rhoda said to her: You saw Barry's anger-that is what I deal with. I'm afraid of him. I do whatever he tells me to do. It scares me. I don't like seeing it.

[195] This evidence is a statement of the deceased's state of mind and emotional state which is admissible under the rules established in *Smith and Modonese*.

[196] This evidence is accompanied by evidence of a further incident which is verified by Josie.

[197] After having tea and scones, Rhoda asked to go to Don's chiropractic office to have an adjustment. Josie was a receptionist at her father's office. She saw Barry's vehicle come racing into the parking lot. Barry emerged from the vehicle red-faced and appeared to her to be extremely angry. Barbara was in the office with Rhoda and asked Josie to lock the door but Josie did not get to the door quickly enough. Barry stormed into the chiropractic office and was halfway down the hall. He grabbed Rhoda's wheelchair and tried to pull Rhoda away from Barbara. Barbara braced herself and held onto the wheelchair. Apparently Don arrived and demanded that Barry leave. When Josie picked up the telephone to dial 911, Barry left the office.

- [198] Barry did not mention this incident in his examination-in-chief and so the evidence of the incident is unchallenged by him. Accordingly, I do accept Barbara and Josie's evidence that this incident did occur as described by them.
- [199] The March 7 incident provides some evidence that Rhoda was intimidated by Barry when he became angry. It is not enough to find that this was an abusive relationship. Barry apparently took good physical care of Rhoda and I find no evidence that she was generally afraid of him.
- [200] I conclude that Barry was clearly in a dominant role in this dependent relationship. As such, he has the onus to rebut the presumption of undue influence: *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 [Geffen].

C. Conduct of Barry

- [201] Barry had Rhoda sign the Freehold Transfer and then kept the document a secret for over a year. He agreed not to register it in case Rhoda changed her mind. He was afraid that his brothers would be angry. He registered the Freehold Transfer after Don died and from that point on he treated the Wallace Avenue House as if it were half his.
- [202] Eventually Don renounced his power of attorney and Barry held the sole power of attorney over Rhoda's assets. He paid Rhoda's expenses and his own and did not retain the surplus funds in trust for Rhoda. He used funds for his own investments. He felt entitled to do so because the house was half his so the loan money was half his also. He would be responsible for the repayment of the mortgage on the house that he would ultimately own outright.
- [203] Rhoda and Barry had joint bank accounts and he felt entitled to the money in the accounts for his needs as well as Rhoda's needs.
- [204] There is evidence that Barry turned Rhoda against Don and David. Rhoda blamed Don and David for the conflict between the brothers. She told Mr. Lott that Don and David were after her money. This was not true.
- [205] Rhoda did not want to stay in an assisted living facility and clearly blamed Don and David for making her go to one. Barry's evidence is that Don and David were trying to get Rhoda to move into a home so that they could sell the Wallace Avenue House. When he checked Rhoda out of Kin Village he did so behind Don and David's back and was delighted by their surprise when they came to the Wallace Avenue House to find Rhoda there. I find he had convinced Rhoda that they were the reason that she had to go to the home and he was rescuing her from that place.
- [206] He referred to this in the document entitled "Historical Burkett's Since Dad's Passing October 3, 2010". In the document he wrote, "By late December 2011, Don and David had convinced Rhoda that she should try living in Kin Village."

- [207] After reading the emails between Barry and Don in the fall of 2011, I come to the conclusion that in 2011, Barry very much wanted Rhoda to move into Kin Village as he could not cope with her care.
- [208] On February 13, 2012, after Rhoda's 90 birthday, Don and David presented Barry with an agreement instructing him to empty the house and prepare it for sale. He signed the agreement in order to ensure he had a hard copy with their intentions but he did not do as they wanted.
- [209] In August 2012, Rhoda was aware that Don and David froze the Envision bank account so that no money could be withdrawn. She believed that they were after her money. I find that this belief was not true and that it was placed there by Barry.
- [210] Rhoda told Dr. Nanda that she would trust Don the most with her money but she could not anymore because he had changed in the past two weeks. This was because Barry had told her that Don wanted her to stay in Kin Village and wanted to sell the home.
- [211] David said that every time he visited his mother she asked why he wanted her to live in a home.
- [212] Mr. Lott was clearly of the view that Barry spoke for Rhoda and when challenged, he refused to bring her back in for a further meeting with her own lawyer and he fired Mr. Lott.
- [213] Rhoda clearly lacked capacity to make financial decisions in 2012 - 2014 yet Barry insists that she authorize new investments and sign loans and cheques.

D. Finding of Undue Influence

- [214] I find that Barry has not rebutted the presumption of undue influence. I find that he encouraged and misled Rhoda about the intentions of Don and David. Rhoda was suspicious that Don and David were just after her money and he used this suspicion to manipulate her. Whether Barry was honestly blind to his mother's lack of capacity or wilfully blind in order to take advantage of her financially is immaterial. He was in a position of control and he did not rebut the presumption of undue influence. With his extensive experience working for a bank and a trust company, I am satisfied that he understands the concepts.
- [215] The remedy for an un-rebutted finding of undue influence is described in Geffen at para. 23:

23 The equitable doctrine of undue influence was developed, as was pointed out by Lindley L.J. in *Allcard v. Skinner* (1887), 36 Ch. D. 145, not to save people from the consequences of their own folly but to save them from being victimized by other people (at pp. 182-83). In the context of gifts and other transactions, equity will intervene and set aside such arrangements if procured by undue influence. ...

- [216] Barry's evidence to rebut the presumption of undue influence is that Rhoda consented to the Freehold Transfer and to the Home Equity Loan and investments. Given my decision that Rhoda lacked capacity to consent, I find that Barry has not rebutted the presumption.
- [217] I find that Barry unduly influenced Rhoda. I set aside the arrangements he made to transfer the Wallace Avenue House into his name. The funds from the Home Equity Loan were Rhoda's funds and Barry held them in trust for her. Barry must account for those funds. This is an alternative relief to my finding of a result trust.

X. Questionable Financial transactions

- [218] In the two years before Rhoda's death, her income was about \$1,422 a month. Her monthly expenses including paying for in-home caregivers and Barry's remuneration and personal expenses was \$6,193 a month. The shortfall was coming from her Raymond James account and the Line of Credit. This is not disputed by the plaintiffs.
- [219] Barry paid himself between \$1,250 and \$1,800 a month from Rhoda's funds as a wage for caring for Rhoda. Between January 2013 and August 21, 2014, he paid himself \$28,325 in wages plus room board and a \$3,533 auto allowance vehicle. In addition, he purchased auto parts for the car totalling \$12,299.
- [220] These figures were obtained from monthly spreadsheets prepared by Barry. Barbara incorporated his figures into spreadsheets breaking down the expenses.
- [221] The spreadsheets show that Barry took large "gifts" from Rhoda's funds and purchased investments. Nineteen thousand was "advanced" to Barry and \$9,500 was "advanced" to David prior to Rhoda's death.
- [222] When the Line of Credit debt exceeded the credit limit, in March 2014 Barry obtained the Home Equity Loan by using the Power of Attorney to sign Rhoda's name for her half interest in the property. His explanation that Rhoda could not hold a pen and did not want to go to town is unbelievable and inconsistent with his examination for discovery evidence.
- [223] This transaction is clear evidence that Barry found Rhoda to be incapable when it suited him and capable when it did not.
- [224] From the borrowed \$356,495, Barry paid out the Line of Credit of \$160,130.56 which is not disputed. From the remaining \$196,364.44, Barry transferred \$150,000 of the Home Equity Loan proceeds into a Raymond James account in his own name using a different financial advisor than the one that Rhoda had used for years. He transferred \$30,000 into a joint savings account in his and Rhoda's name. He apparently had closed Rhoda's Raymond James account after they had depleted it for living expenses.
- [225] In December 2013, January 2014 and May 2014, Barry used Rhoda's funds to purchase Word Logic shares in his and David's name for a total expenditure of \$33,207. Barry purported to get Rhoda's approval for these purchases when she was incompetent. His intention was that

he would return the borrowed funds to Rhoda if the stock increased in value and he and David would split the profit. When asked in cross-examination if he did not think that this was an inappropriate investment for a senior he answered, "Yes that's why we made the investment in David and my name. Mom just gave her money to do it." That answer misses the point that she was an incapacitated elderly person on a modest income who needed her money to last for her care.

- [226] Between September 2014 and July 2015, Barry paid himself "executor fees" of \$23,500 despite the fact that he had not obtained a grant of probate and has taken the position that the Estate has no assets. In addition, he paid himself advances of \$25,000 on the Estate. He paid advances of \$5,000 on the Estate to David.
- [227] No issue is taken about the \$20,327.75 he spent to maintain the home after Rhoda's death.
- [228] Barry paid \$10,582 for his personal expenses during this period.
- [229] In July 2015, he withdrew the balance from his Raymond James account in the amount of \$37,093 which was the balance left of the \$150,000 from the Home Equity Loan.
- [230] The plaintiffs are not claiming reimbursement of all of the advances that Barry made to himself or to David prior to Rhoda's death but they do seek repayment of the \$150,000 Barry paid to his own Raymond James account and the \$33,207 of Rhoda's money he used to purchase the Word Logic shares.
- [231] After Rhoda's death and before the Grant of Probate, Barry advanced a further \$48,500 to himself in "advances" and "executor fees". In addition, he has continued to reside in the Wallace Avenue House for 43 months and owes the Estate occupational rent for that time period. The plaintiffs suggest that the interest on the Home Equity Loan should be considered the equivalency of the occupational rent. As at November 30, 2017 that interest is \$69,350. This is likely a lower amount than the house could rent for on the open market.

A. Finding of Money Owed to the Estate

- [232] I accept the payments Barry made to himself as a salary for taking care of Rhoda. He was not required to care for her for no remuneration. In addition to being paid, Barry had all of his accommodation and food expenses paid for several years. The additional advances that he made to himself from Rhoda's funds for car parts and gifts may be acceptable as part of his remuneration.
- [233] I find that Barry has used \$183,207 of Rhoda's funds from the Home Equity Loan for his own investments. The investments were disappointed and at the time of Rhoda's death, only \$ 37,093 remained.
- [234] Half of the cost of the Word Logic shares should be deducted from David's share of the Estate as he was complicit.

- [235] I find that Barry owes a debt to the Estate in the amount of \$150,000 for the money he transferred into his Raymond James account and then spent. He owes the estate \$16,603.50 for one half of the cost of the Word Logic Shares.
- [236] After Rhoda's death, he was not entitled to pay himself executors fees as he had not obtained a grant of probate or done anything to earn executor's fees. Barry will have to account to the Estate for \$48,500.
- [237] After Rhoda's death, Barry was no longer entitled to live in the Wallace Avenue House for free and does owe the estate a fee for occupational rent. I waive repayment of the \$10,582 he advanced himself for personal expenses and consider that a care-taking fee. In addition, I find it reasonable to charge Barry \$1,000 a month for occupational rent of the Wallace Avenue House.
- [238] I set the fee for occupational rent from September 1, 2014 to the date of release of this decision in March 2018 is \$43,000. This is intentionally modest because of the services Barry did provide to Rhoda and because he was caring for the Wallace Avenue House at the time and therefore the Estate did not have to pay for a care-taker.
- [239] The total debt that Barry owes to the Estate is \$258,103.50. The total amount may exceed his one third share of the Wallace Avenue House.
- [240] David has received unauthorized advances of \$5,000 after Rhoda's death which should be accounted for during the Estate distribution. He also owes \$16,603.50 which is half of the \$33,207 invested in Word Logic. This should be treated as a debt to the Estate and deducted from his share of the Estate distribution.

XI. Estate matters

A. Removal of Executor

- [241] I find the Codicil executed by Rhoda on September 6, 2012 is invalid. The Will provides that Robert Eric Burkett be the executor and if he predeceased Rhoda which he did, then Barry Robert Burkett, Donald Grant Burkett and David Renton Burkett, or the survivors of them as executor of the will and the Estate.
- [242] A personal representative should act impartially on behalf of all beneficiaries. Barry distributed advances primarily to himself and never made an advance to the survivors of Don. He was clearly acting in breach of his duties as a trustee.
- [243] Barry used Estate funds in a manner unauthorized by the Trustee Act, R.S.B.C. 1996, c. 464, both during Rhoda's lifetime and after her death. A trustee is required to exercise the care, skill, diligence, and judgment of a prudent investor. At no time did Barry treat the investments in his Raymond James account as trust assets but he considered them his personal assets.

- [244] Barry has not applied for a grant of probate for three years. In *Oldfield v. Hewson* (2005), 14 E.T.R.(3d) 290 (Ont. S.C.J.), the Ontario Supreme Court dealt with a similar situation where the executor had care and control of estate assets for seven years and never applied for probate. The court removed him as executor.
- [245] Barry's executor duties have been in conflict with his personal interests and Estate assets have been endangered by his conduct. He has benefitted at the expense of the Estate similar to the cases of: *Hall v. Hall* (1983), 45 B.C.L.R. 154 (S.C.) and *Veitch Estate*, 2007 BCSC 952.
- [246] Barry should be passed over as executor and disentitled to apply for probate on the basis of his misconduct acting in a manner that endangers the Estate and for acting without reasonable fidelity: *Dunsdon v. Dunsdon*, 2012 BCSC 1274 at para. 202:
- [202] Put broadly, a trustee may be removed where his or her acts or omissions endanger the trust property or demonstrate a want of honesty, of reasonable fidelity, or of the proper capacity to execute the duties of office: *Conroy v. Stokes* [1952] 4 D.L.R. 124 (B.C.C.A.). The existence of friction between the trustee and one or more beneficiaries is usually not sufficient, of itself, to justify removal of the trustee: *Erlichman v. Erlichman*, 2000 BCSC 173; *Re Blitz Estate*, 2000 BCSC 1596. However, where there is dissension among the trustees themselves by which the trust administration grinds to a standstill or otherwise hampers the proper administration, the courts tend to remove one or more of them. In those instances, misconduct per se is not an essential prerequisite: *Re Consiglio Trusts* (No. 1) (1973), 36 D.L.R. (3d) 658 (Ont. C.A.); *Wilson v. Heathcote*, 2009 BCSC 554.
- [247] A personal representative should not deal with the assets or otherwise intermeddle in the estate until he or she has decided to act as the personal representative. Barry breached this rule by advancing Estate money to himself and paying himself executor fees without ever assuming the responsibility of personal representative.
- [248] Here the acts or omissions complained of go beyond friction and support a conclusion that the conduct of the trustees has endangered the trust property or show a want of honesty or of proper capacity to execute the duties or a want of reasonable fidelity.
- [249] David is not guilty of misconduct nor has he shown a lack of honesty. He did receive unauthorized advances from his incapacitated mother and from the Estate and participated in the Word Logic investment during his mother's lifetime using her funds. I find that Barry was the instigator of those advances and investments and not David, although he potentially benefited from them to the detriment of Rhoda and Estate.
- [250] It is my view, having witnessed the difficulties that David had in giving his testimony, that he would have difficulty assuming the responsibilities of executor and should not apply for a grant of probate so should also be passed over.

[251] That leaves then the survivors of Don. Based on the testimony I heard at trial, I find Josie to be the most appropriate of the two plaintiffs to apply for probate and act in the capacity of executor of this Estate. I find that an appointment of Josie would be appropriate as she is a survivor and she will have the assistance of her capable mother and counsel who have represented her during these proceedings.

[252] I order that Josie make application for a grant of probate.

XII. Power to Sell Assets

[253] The plaintiffs seek an order to sell the Wallace Avenue House.

[254] At common law, a personal representative has power to sell personal property in order to pay debts. This power was extended to real estate by s. 162 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 which is summarized below:

1. Real estate must be administered in the same manner as personal property (s. 162(3));
2. A personal representative will hold real property as a trustee for those beneficially entitled to it (s. 162(2)); and
3. The section applies to land over which the deceased exercises by will a power of appointment as if the land were vested in the deceased person.

[255] Once Josie has obtained a grant of probate and is the personal representative, Barry is ordered to execute a transfer of the title of the Wallace Avenue House to Josie in her capacity as personal representative of the Estate.

[256] Once she is in receipt of the grant of probate, Josie is authorized to sell the Wallace Avenue House on the terms I will set out in detail below.

XIII. Conclusion

[257] I make a declaration that the defendant, Barry Robert Burkett holds the Wallace Avenue House in trust for the Estate of Rhoda Catherine Burkett.

[258] Barry Robert Burkett is passed over as executor of the Estate and is prohibited from applying for a grant of probate.

[259] Josephine Ariel Burkett is ordered to apply for a grant of probate to act as the sole executor of the Estate (the "Executor").

[260] Barry is hereby prohibited from selling the Wallace Avenue House and is ordered to execute a transfer of title to the Wallace Avenue House into the name of the Executor in trust for the Estate of Rhoda Catherine Burkett;

[261] Barry is hereby ordered to deliver to the Executor keys for access to the Wallace Avenue House.

- [262] I make an order that once the grant of probate is issued, the Executor shall place the Wallace Avenue House for sale on an MLS listing service at a price she finds is appropriate. As Executor, she shall have sole conduct of sale of the Wallace Avenue House. Upon the sale of the Wallace Avenue House, the net proceeds of sale shall be paid to the credit of the Estate after paying necessary costs for the sale and discharge of encumbrances.
- [263] On a 24-hour notice by email, Barry or any person or persons on behalf of Barry, including any person or persons in possession of the Wallace Avenue House, shall permit any duly authorized agent on behalf of the Executor to inspect, appraise or show to any prospective purchaser, the Wallace Avenue House including the interior of it between 9:00 a.m. and 5:00 p.m., seven days a week and to post signs on the property stating that the Wallace Avenue House is offered for sale.
- [264] Any person in possession of the Wallace Avenue House will temporarily vacate the house during showing appointments on reasonable notice by the realtor that a prospective purchaser wishes to view the Wallace Avenue House between the hours of 9:00 a.m. and 5:00 p.m., seven days a week and are ordered to leave the Wallace Avenue House in a clean and tidy condition for viewing by prospective purchasers who will have access to all rooms, closets, and storage spaces in the Wallace Avenue House.
- [265] Barry is at liberty to continue to occupy the Wallace Avenue house until it is sold provided he gives written notice of his desire to do so by no later than 30 days after the issuance of the grant of probate and he agrees to pay into the Estate, rent in an amount set by the executor commencing 60 days after the grant of probate and on the first day of each and every month thereafter. Barry is ordered to vacate the Wallace Avenue House no later than the day before the possession date on a contract of purchase and sale of the Wallace Avenue House.
- [266] In the event that Barry does not give notice of his desire to continue to occupy the Wallace Avenue House, he will vacate it by no later than noon on the date that is 60 days after the date of the grant of probate.
- [267] I grant a declaration that the plaintiffs have a beneficial interest in the Wallace Avenue House as beneficiaries of the Estate.
- [268] I make a further declaration, though not formally sought, that David has a beneficial interest in the Wallace Avenue house and is a beneficiary of the Estate of Rhoda Catherine Burkett, subject to the advance of \$5,000 which he has received and the debt of \$16,603.50 which he owes to the Estate.
- [269] I make a further declaration, though not formally sought, that Barry has a beneficial interest in the Wallace Avenue House and is a beneficiary of the Estate subject to the debt which he owes the Estate.

[270] Barry Robert Burkett owes a debt to the Estate in the amount of \$258,103.50 which shall be subtracted from his interest in the Estate. Given the size of this debt, I will not assess further damages against him.

[271] The plaintiffs have been successful and are entitled to their costs of these proceedings payable by Barry Robert Burkett at Scale B. I have not exercised my discretion to order special costs although the plaintiffs are clearly entitled to them. Given the size of the debt owed by Barry to the Estate, I am of the view that he will not have the means to pay special costs and a special cost award would necessitate further proceedings before the district registrar. In my view the plaintiffs would have difficulty recovering them.

"Young J."

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