
CANADA / JUDGMENT

G. M. S. v . W. W. R.

2010 BCSC 1741

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

G. M. S. v. W. W. R.,

2010 BCSC 1741

Date: 20101206

Docket: 08-2504

Registry: Victoria

Between:

G. M. S.

Plaintiff

And:

W. W. R.

Defendant

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

Counsel for the Plaintiff:

J. Main

Counsel for the Defendant:

J. Campbell

Place and Date of Trial:

Victoria, B.C.

October 25-27, 2010

Place and Date of Judgment:

Victoria, B.C.

December 6, 2010

- [1] In this action the plaintiff seeks to set aside transfers of real property and other assets made by her stepfather to her half-brother and relies on the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163, unjust enrichment, and general trust principles.
- [2] The facts, while unfortunate, are relatively straightforward.
- [3] The plaintiff, G.M.S., was born in 1946. Her mother and father separated and her mother remarried W.S. (stepfather). The stepfather never adopted G.M.S. In 1956 the defendant, W.W.R., was born to the plaintiff's stepfather and mother.
- [4] When G.M.S. was about 10 years old, her stepfather began to sexually abuse her. The abuse continued on a more frequent basis until G.M.S. moved out of the home when she was 18.
- [5] When G.M.S. moved out of her home at age 18 she disclosed the sexual abuse to her mother in the presence of her stepfather.
- [6] After she moved out of her parents' home, G.M.S. had three children of her own. Her stepfather visited her from time to time and some form of abuse occurred during most of those visits, some of it verbal and some physical. The visits and the frequency of abuse, however, were very much reduced, and ceased entirely by the time G.M.S. was 40, when she completely severed all contact with her stepfather.
- [7] In about 1986 or 1987, G.M.S. went to her half-brother, W.W.R., and made a relatively full disclosure of the sexual abuse she had suffered at the hands of her stepfather, his father.
- [8] About a week later, G.M.S. went to her mother and made a similar disclosure. Her stepfather was not present on that occasion. The plaintiff's mother was upset and asked her to leave. The plaintiff went to her half-brother's home and told him what she had done by way of disclosure to their mother. While she was at her half-brother's, her mother and stepfather arrived and there was an emotional meeting at which G.M.S. says, and I accept, her stepfather apologised for his conduct. Several months after this event, her mother and stepfather visited G.M.S. in her home, and that visit ended with G.M.S. screaming incoherently.

- [9] G.M.S took counselling and her stepfather did as well. In late 1989 or 1990 there was a meeting attended by G.M.S. and her counsellor and her stepfather and his counsellor at the stepfather's counsellor's offices. G.M.S. says, and again I accept, that at that meeting her stepfather apologised for his actions.
- [10] The mother of both the plaintiff and defendant died in 1997, leaving a small estate. She made specific bequests to G.M.S.'s three daughters and gave the residue of her estate to the stepfather. There was so little in her mother's estate that each of the granddaughters would have received about \$3,500. At the mother's request, W.W.R. suggested to his father that his father add his own funds to the bequests to the plaintiff's daughters and his father did so, adding enough that each of G.M.S.'s daughters received about \$17,500.
- [11] Within a year of the death of the plaintiff's mother, the stepfather retained a solicitor, Mr. Newcomb, to transfer title to his home from the stepfather's name alone to the names of the stepfather and W.W.R. as joint tenants. At the same time, the stepfather arranged to have W.W.R. designated as beneficiary of accounts such as his R.R.S.P., or to put bank accounts in the joint names of himself and W.W.R. The effect of all of this was to dramatically reduce the assets that would flow to the stepfather's estate on his death.
- [12] The stepfather died in July 2003. His will appointed W.W.R. as his executor and gave all of his estate to W.W.R. It appears that just under \$90,000 fell into the stepfather's estate at the time of his death.
- [13] One of G.M.S.'s daughters filed a caveat requiring proof in solemn form of the stepfather's will.
- [14] The will was admitted to probate by an order of this court in April 2004.
- [15] In May 2004 G.M.S. sued her stepfather for damages caused by the sexual assaults.
- [16] In June 2007 G.M.S. signed executor's accounts in her capacity as a creditor of her stepfather's estate. Those accounts showed just over \$21,000 net estate available for interim distribution.
- [17] In November 2007 G.M.S. settled the claims for damages for sexual assault for \$150,000 and W.W.R., as executor, consented to judgment against the estate, in favour of G.M.S., for that amount.

Fraudulent Conveyance

- [18] The plaintiff says that the steps taken by her stepfather in 1998, namely, transferring his home to joint ownership with W.W.R., making certain of his bank accounts joint with W.W.R., and making W.W.R. the beneficiary of his R.R.S.P, all amounted to a fraudulent conveyance contrary to the Fraudulent Conveyance Act, which reads:

Fraudulent conveyance to avoid debt or duty of others

1. If made to delay, hinder or defraud creditors and others of their just and lawful remedies
 - (a) a disposition of property, by writing or otherwise,
 - (b) a bond,
 - (c) a proceeding, or
 - (d) an order

is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations by collusion, guile, malice or fraud are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

Application of Act

2. This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud.
- [19] W.W.R. had little discussion with his father about the 1998 transfers. His father contacted him, said he was making changes to his will and doing some estate planning and that W.W.R., who lived on the Lower Mainland, had to travel to Duncan on Vancouver Island where there were some papers to sign.
- [20] Mr. Newcomb, a lawyer, now retired, began to act for the stepfather and the plaintiff's mother when they purchased a home south of Duncan. Mr. Newcomb acted for the stepfather when the plaintiff's mother died, the stepfather being executor. It was during the process of probating the plaintiff's mother's estate that the stepfather told Mr. Newcomb that he wanted to settle his own affairs.
- [21] The stepfather told Mr. Newcomb that he wanted a new will, that he wanted W.W.R. appointed his attorney during his life, and that he wanted to create jointures where possible in order to avoid paying unnecessary probate fees, duties or taxes. The stepfather told Mr. Newcomb he only had one son and wanted his son to be both his beneficiary and executor.
- [22] Mr. Newcomb's only concern voiced to the stepfather was the potential for capital gains tax becoming payable if title to the home were severed as W.W.R.'s interest would be exposed to the tax.
- [23] Mr. Newcomb said that during this process there was no discussion of trying to avoid claims by any party. Mr. Newcomb never met W.W.R. during this process, although they did have some telephone conversations.
- [24] Mr. Newcomb knew of G.M.S.'s existence, he thinks probably during the probate process surrounding her mother's estate as G.M.S. would have been notified of her mother's death and the intent to seek probate of her mother's will.

- [25] Mr. Newcomb was not told anything about the family background, had no information about whether or how long G.M.S. had lived with the stepfather, nor did he have any information suggesting that the stepfather had acted in loco parentis to G.M.S.
- [26] Mr. Newcomb testified that when the plaintiff's mother died, the stepfather instructed him that he wanted to increase the amount to be paid to the plaintiff's daughters, and brought him a cheque to be added to what the grandchildren were to receive from their grandmother's estate.
- [27] It is not necessary to prove a dishonest intent or bad faith to avoid a transaction under s. 1: see *Botham Holdings Ltd. (Trustee of) v. Braydon Investments Ltd.*, 2009 BCCA 521, para. 65 [Botham].
- [28] The only intent required to avoid a transaction is the intent to put one's assets out of the reach of one's creditors: Botham, para. 73. The words, "by collusion, guile, malice or fraud" should be struck from s. 1: Botham, para. 72.
- [29] Intent is a state of mind and a question of fact (Botham, para. 74), the proof of which may be by inferences drawn from the transfer itself as well as other circumstances: Botham, para. 77.
- [30] Whether or not there is direct evidence from the transferor as to the intent behind the transfer, the circumstances surrounding an impugned transfer must be considered before either a transferor's declared intention can be accepted with confidence or, in the absence of such direct evidence, necessary inferences can be drawn regarding whether the impugned transaction was made with the intent to put an asset out of the reach of one's creditors.
- [31] In some of the authorities, judges have looked for "badges of fraud" in the circumstances surrounding an impugned transfer in order to infer the necessary intent: *Chow v. Pearson* (1992), 69 B.C.L.R. (2d) 117 (S.C.); *L.A.B. v. W.F.M. Estate*, 2004 BCSC 512. I prefer to avoid such a label as it might tend to suggest that something more than an intent to put assets out of the reach of creditors.
- [32] In this case, the stepfather told Mr. Newcomb that he would like to escape paying probate fees, estate taxes or other avoidable expenses and, as he had only one son, W.W.R., he wished to put his major assets into his name and W.W.R.'s name jointly, to appoint W.W.R. as his attorney, and to make W.W.R. his executor and sole beneficiary.
- [33] While the admissibility of that evidence was not challenged, I have concluded that it was reliable and its necessity is made obvious by the death of the stepfather.
- [34] I note that Mr. Newcomb advised the stepfather that there was a risk that half the value of his residence would be exposed to tax on capital gain from the time of transfer into joint names, which might lessen the savings of probate or estate fees and taxes.

- [35] The stepfather retained a joint interest in the assets transferred for the rest of his life, thus leaving them exposed to the risk of claims, should the plaintiff have commenced action while the stepfather was still alive. Had the plaintiff sued and recovered judgment against her stepfather while he still lived, any attempt to recover on a judgment against his interest in his assets would have been more difficult, and would have taken longer because of the transfers.
- [36] At the time of the transfer, the stepfather clearly knew that he had caused injury to the plaintiff for which the plaintiff had not forgiven him and I find that it was within the contemplation of the stepfather that the plaintiff could at any time sue him for damages for those injuries.
- [37] At the time of the transfers the quantum of any damages to which the plaintiff was entitled was not known and, while it may have been capable of accurate prediction, there is no evidence that the plaintiff or her stepfather had sought legal advice on the matter.
- [38] The stepfather transferred joint interest to his son, W.W.R., and retained a joint interest in the money assets as well as remaining in the home that was subject to the transfer, thus retaining the benefit of those assets for the rest of his life. Indeed, W.W.R. stated that, while he knew his father had transferred an interest in these assets to him, he at all times considered these assets to be his father's during his father's lifetime.
- [39] There was no valuable consideration for the transfers.
- [40] As stated earlier, the effect of the transfers would have been to delay the plaintiff had she sued and taken judgment during her stepfather's lifetime and, after his death, defeat the plaintiff's claims in large part, unless the transfers are set aside.
- [41] In order to establish that the transfers made by the stepfather were intended to protect his assets from the plaintiff, it was not necessary for the plaintiff to have received judgment or even commenced an action at the time of the transfers. As stated in *Jaston & Co. v. McCarthy* (1996), 41 C.B.R. (3d) 212 (B.C.S.C) at para. 86, and cited in *Botham*, "It is sufficient to fix the defendants with liability if they foresaw potential creditors who might be defeated by the conveyance."
- [42] At minimum, the plaintiff was a potential creditor at the time of the transfers. In fact, as the stepfather had caused the plaintiff injury, the plaintiff was entitled to damages to compensate her for that injury. All that remained was for the plaintiff to claim those damages and, if necessary, take action to enforce her claim. This would have been foreseeable to and was in the contemplation of the stepfather when he made the transfers.

- [43] I find that the transfers were made by the stepfather with the intent to put the assets transferred out of the reach of the plaintiff or, at minimum, to delay the plaintiff from recovering any damages to which she may have been entitled. The stepfather intended to protect his assets, to the extent reasonably possible, for his only child while preserving some element of control over those assets for the rest of his life.
- [44] I find that the transfers, particularly title to the real property described as: Strata Lot 357, Section 11, Range 10, Shawnigan District, Strata Plan 1601 (Phase 11), together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on Form 1, was a fraudulent conveyance within the meaning of the Fraudulent Conveyance Act.
- [45] That real property has since been transferred to a bona fide purchaser for value who had no notice of either the plaintiff's claim for damages or this action.
- [46] The appropriate remedy therefore is that W.W.R. hold the proceeds of the sale of that land in trust for the estate of his father. And I so declare.
- [47] The transfer to W.W.R. of his father's R.R.S.P., estimated to be worth about \$46,000 at the time of his father's death, as well as the interest in the Bank of Montreal accounts, again, estimated to be worth just over \$77,000 at the time of his father's death, are as well set aside, and, as with the property, the proper declaration is that W.W.R. holds those funds in trust for the estate of his father.

Unjust Enrichment

- [48] The plaintiff argued unjust enrichment in the alternative. In the event that I am wrong in my conclusion under the Fraudulent Conveyance Act, I should address the unjust enrichment argument.
- [49] I conclude that the plaintiff's claim in unjust enrichment must fail. I do so because, while W.W.R. has derived a benefit from his father's estate, before and after his father's death, and while the plaintiff has suffered a detriment in that she has been unable to recover on his consent judgment, there is no causal link or necessary nexus between benefit and detriment.
- [50] The Court of Appeal has recently dealt with unjust enrichment in *Wilson v. Fotsch*, 2010 BCCA 226. In paras. 12 through 20 the court reviewed the benefit and detriment stages of an unjust enrichment analysis and confirmed that the person making a claim in unjust enrichment must be able to demonstrate that he or she has conferred a benefit, whether positive or negative, upon the person against whom the claim is made. An incidental or collateral benefit is not sufficient to support an unjust enrichment claim: "An incidental collateral benefit will not support an unjust enrichment claim - the benefit must be 'conferred directly and specifically on the defendant'": *Peel (Regional Municipality) v. Canada; Peel (Regional Municipality) v. Ontario*, [1992] 3 S.C.R. 762 at 797.

- [51] Similarly, a plaintiff must be able to establish a causal link between the contribution and the enrichment. The required corresponding deprivation may derive from a transfer of wealth by the plaintiff to the defendant or from an infringement of an interest of the plaintiff (Wilson, para. 17):
17. It will be unusual to find a plaintiff has not suffered a deprivation if the defendant has received a benefit, so long as the plaintiff can establish a causal link between the contribution and the enrichment: Pettkus [Pettkus v. Becker, [1980] 2 S.C.R. 834] at 852; Peter [Peter v. Beblow, [1993] 1 S.C.R. 980] at 1012-13 (Cory J.). Deprivation may derive from a transfer of wealth by the plaintiff to the defendant or from an infringement of an interest of the plaintiff.
- [52] If the unjust enrichment analysis had reached the juristic reason stage, in this case it appears to me that the stepfather here had a clear donative intent, that is, intent to make a gift to W.W.R. That this intent leads to the result already established under the Fraudulent Conveyance Act does not, in my view, take it out of the established category of juristic reason established in Peter v. Beblow.
- [53] The action is allowed with the declarations of trust referred to.

"R.T.C. Johnston, J."

The Honourable Mr. Justice Johnston

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