
CANADA / JUDGMENT

Hardy Estate v. Wanner

2018 BCSC 2438

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2018 BCSC 2438 Hardy Estate v. Wanner

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hardy Estate v. Wanner,

2018 BCSC 2438

Date: 20181203

Docket: S24897

Registry: Cranbrook

Between:

Sandra Smaill, Executrix of the Estate of Rachel Hardy

Plaintiff

And

Debbi Wanner

Defendant

Before: The Honourable Mr. Justice A. Saunders

Oral Reasons for Judgment

Counsel for the Plaintiff:

M.A. Matthews

Counsel for the Defendant:

T.G. Colgur

Place and Date of Hearing:

Cranbrook, B.C.

November 27-29, 2018

Place and Date of Judgment:

Cranbrook, B.C.

December 3, 2018

- [1] THE COURT: The plaintiff brings this action for a declaration of trust, in respect of funds held in joint bank accounts in the amount of just over \$250,000.
- [2] Rachel Hardy died August 30, 2012, one day before what would have been her 95th birthday. The defendant, Ms. Wanner, is a granddaughter of the sister of Ms. Hardy's late husband, William Hardy, who passed in November 2001, making her Ms. Hardy's great niece by marriage. Rachel and William Hardy were known to Ms. Wanner as Aunt Renee and Uncle Bill, and I will refer to them by their first names and at points by those nicknames in parts of these reasons.
- [3] Rachel and William were married for more than 50 years. They had no children. In 1998, when Rachel was 80 years old, she and William made mirror wills, by which - in the event one spouse predeceased or survived the other by less than 30 days - the entirety of their estate would be left to 13 charitable organizations.
- [4] Rachel and William lived simply and frugally. They resided in a modest house in Kimberley until the spring of 2000, when William moved to a care home in Kimberley known as The Pines. Rachel followed him there that summer and they lived there together until William's death on November 30, 2001. Rachel continued to live at The Pines for nearly another 11 years.
- [5] By the time of William's death, their assets consisted of their home in Kimberley, which they had not given up and which Rachel still owned 11 years later at the time of her death; and as well, two bank accounts at Kootenay Savings Credit Union (the "Credit Union").
- [6] Against a background of circumstances I will describe momentarily, on December 13, 2001, approximately two weeks after William's death, Rachel, accompanied by Ms. Wanner, went to a branch of the Credit Union to have Ms. Wanner added as a signatory on the two accounts. One of the two accounts was used for daily living expenses. As of November 30, 2001, it held shareholdings, T-bill savings, term savings, and cash balances totalling approximately \$180,600. The November 30th balance for the second account is not available, but the December 31, 2001, balance was approximately \$134,300. These amounts represented the couple's life savings and the proceeds from the earlier sale of William's mother's house on a lot. It was a substantial sum of money.

- [7] The bank staff presented Rachel with two options: joint membership in an account and joint membership with a right of survivorship. Rachel chose the latter, as a result of which, Ms. Wanner, upon Rachel's death 11 years later, became the legal owner of funds totalling \$253,255.
- [8] If Ms. Wanner's interest in those funds is upheld through this trial, the beneficiaries of Rachel's estate, the 13 charities I referred to earlier, stand to benefit only from the sale of Rachel and William's former home which, due in part to the home's poor physical condition, realized only \$80,000.
- [9] At issue in this action is whether Rachel's choice of a joint account with survivorship rights reflected an intention to gift to the defendant the balance of the accounts on her death through survivorship. As this was a gratuitous transfer of a legal interest, a resulting trust in favour of Rachel, the grantor, will be presumed as a matter of law, unless Ms. Wanner, the grantee, establishes an intention to gift on Rachel's part on a balance of probabilities.
- [10] The law on this point was neatly summarized by Madam Justice Dickson in *Creyke v. Creyke*, 2016 BCCA 499:
- [49] A trust may be created in one of two ways: by an intention to settle property by way of a trust or by imposition of law to secure a just result. In *Suen v. Suen*, 2013 BCCA 313, Madam Justice Smith reviewed the essential principles that apply to the creation of express, resulting and constructive trusts.
- [50] An express trust is created by intention. It comes into existence when the alleged settlor clearly and specifically states that certain property is to be held in trust. At para. 45 of *Suen*, Madam Justice Smith explained:
- [45] An express trust is created when the requirements of certainty of intention, subject, and objects of the transfer have been established and the trust property has been vested in the trustee: [Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Carswell, 2009)] at 132 and 167.
- [51] Intention is also a key element in a resulting trust analysis. A resulting trust does not, however, require proof of intention in precisely the same way. Rather, it is a legal doctrine imposed "to return property to the person who gave it and is entitled to it beneficially, from someone else who has title to it": A.H. Oosterhoff et al., *Oosterhoff on Trusts: Text, Commentary and Materials*, 7th ed. (Toronto: Carswell, 2009) at 25, cited with approval in *Suen*, at para. 37.

- [52] The presumption of resulting trust is engaged where an owner of property gratuitously transfers title to the property to another. The actual intention of the grantor is the governing consideration. However, where a gratuitous transfer is challenged the onus is on the transferee to demonstrate that a gift was intended. Unless the presumption is rebutted on a balance of probabilities, the transferee holds the property in trust for the grantor: *Pecore v. Pecore*, 2007 SCC 17 at paras. 24, 43-44.
- [53] The actual intention of the grantor is determined on the whole of the evidence. The presumption of resulting trust is simply a legal assumption the court will make if sufficient evidence on the point is not adduced. In many cases, persuasive and reliable evidence of the grantor's actual intention may be presented by the parties. The presumption of resulting trust will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities: *Pecore* at paras. 22-23, 44.

[Emphasis added.]

- [11] In the decision of the Supreme Court of Canada in *Pecore v. Pecore*, 2007 SCC 17, it was held that the presumption of advancement will overcome the presumption of resulting trust. The presumption of advancement is founded on the moral obligation that adults have to advance the interests of their dependants, and on the convention or tradition that parents tend to make gifts to their children rather than bargains. The presumption is converse to the rule that equity presumes bargains rather than gifts.
- [12] The defendant in the present case pleaded the presumption of advancement, and in argument referenced several cases in which that presumption was held to apply overcoming the presumption of resulting trust. However, as noted in *Pecore*, advancement has historically arisen only in cases involving transfers between spouses and between parent and child. No authority has been provided to support the proposition that advancement may be presumed in the case of a gratuitous transfer between an elderly person and a relative with the degree of relationship of a great niece by marriage, certainly not with there being no history of the transferee being in a position of economic dependence or being in such a position at the time of the transfer, and not even being in a demonstrated position of need.
- [13] I hold that the presumption of advancement has no application in this case.
- [14] I am therefore required to survey the circumstances of the transferor, Rachel, of her relationship with Ms. Wanner, as of the transfer itself, to determine if the evidence establishes an intention on the part of Rachel to make a gift, sufficient to overcome the presumption of resulting trust.
- [15] Ms. Wanner testified that beginning in about 1991, she would drop in on the Hardys occasionally. Her relationship with them was renewed and became closer beginning in the fall of 1998 when she began teaching at Meadowbrook Elementary in Kimberley. The Hardys' home was on her route to and from work, and she began to see them more frequently.

- [16] Ms. Wanner believed that Rachel and William could do with some assistance, and she began to help them around the house with chores such as cleaning and doing laundry. Her daughter would occasionally accompany her to the Hardys' on the weekend to help out with the bigger jobs. Ms. Wanner also became concerned with their nutrition. For a short while she brought them meals, and then she arranged for Meals on Wheels to make deliveries.
- [17] When William lost his driver's licence - Ms. Wanner thinks this was sometime in about 1998 - she began to drive them into town for shopping and medical appointments, and twice a year would drive them to Trail for William to see a medical specialist. Ms. Wanner was not paid for her out-of-pocket expenses such as gas for doing so, but on occasion, such as their visits to Trail, the Hardys would buy lunch.
- [18] Ms. Wanner and her husband would also assist the Hardys with yard work, mowing the lawn in summer and shovelling snow. They would also generally assist with maintenance of the house.
- [19] Ms. Wanner stopped working at the Meadowbrook school in the year 2000, and visited the Hardys less frequently after that. I infer this was around the time that William went into The Pines, in the spring of 2000, and, as I have said, Rachel took up residence at The Pines in August 2000. After Rachel went into The Pines, Ms. Wanner testified that she would drop in and see them a couple of times a week.
- [20] It was suggested to Ms. Wanner in cross-examination, based on some notes of various doctors' observations in Rachel's medical records, that beginning around the year 2000 Ms. Wanner would have noticed signs of Rachel becoming confused. Ms. Wanner denied this. She said that around that time, Rachel was generally "alert", and although Rachel did begin to show signs of confusion as she continued to age, Ms. Wanner says that she did not notice this until sometime, by which I took her to mean some considerable period of time, more than just a few weeks, after William's death. I accept Ms. Wanner's evidence on this point.
- [21] The plaintiff tendered, in a somewhat irregular manner, viva voce opinion evidence from Rachel's family doctor, Dr. Nash, as to Rachel's competence at the time. Dr. Nash wrote a letter dated May 16, 2002, addressed "To Whom It May Concern", stating that he had examined Rachel in April of that year and found her to be "competent to sign legal papers". Dr. Nash did not recall what circumstances led to him preparing that letter; Ms. Wanner had no evidence to give on that point either. Dr. Nash stuck by that opinion as to Rachel's mental state in direct examination by plaintiff's counsel, even when he was presented both with the aforementioned records of other doctors' earlier observations of Rachel having shown signs of confusion, and with a referral letter he wrote, dated just six weeks after his May 16 letter, in which he stated that Rachel did have "mild to moderate dementia". Dr. Nash was also questioned about the results of a screening test he for dementia he had administered, in which Rachel did obtain a low score indicating some level of impairment; Dr. Nash stressed that this was not a diagnostic tool.

- [22] Although it does appear that Rachel was possibly, at a minimum, on the verge of showing clinical signs of dementia by early 2002, I cannot and do not find that was so as of December 2001 when the subject transfer of funds into the joint accounts took place.
- [23] Having made that finding, however, I also have to consider the context of Rachel's age. Rachel would then have been 84 years old. It would have been reasonable for relatives, caregivers, and persons transacting business with her to anticipate that she might have been experiencing some level of cognitive decline consistent with her age.
- [24] Rachel and William's wills had been drawn up by the plaintiff, Ms. Smaill, who is a lawyer and who was designated under both wills to act as alternative executrix if the other spouse declined or had not survived. Ms. Smaill testified. She recalls meeting with the Hardys once and perhaps twice in 1998 to take instructions regarding the wills. The Hardys wanted all of their estate to be left to the benefit of local and national charities. Ms. Smaill advised them to draw up a list, broken down into those two categories. Her recollection is that Rachel led the discussion. Ms. Smaill had no concerns about Rachel being influenced by William and no concerns as to the couple's capacity.
- [25] The wills reflect their instructions to Ms. Smaill. In the case of there being no surviving spouse, their estate would be broken up into two equal shares. One share was to be divided equally amongst five national charities: the Canadian Cancer Society, Canuck Place, the Heart and Stroke Foundation, the Canadian Diabetes Association, and the Canadian Red Cross. The other share was to be divided between eight local charities: the Kimberley New Democrat Club, of which the Hardys had been members and, to a modest degree, financial supporters for many years; and a local food bank, the community association, a local senior citizens' association, something called the Centre 64 Society, the McKim Theatre Society, the District Heritage society, and the local SPCA branch. Evidently, some thought went into the exercise.
- [26] Ms. Wanner testified that on one occasion at The Pines, she was tidying up Rachel's room and came upon Rachel's will. She thinks this was at a time when William was still alive. She does not recall if she ever saw William's will. Ms. Wanner read the will and saw the list of beneficiaries. She testified in cross-examination that she was not shocked or surprised by this list of beneficiaries. It was suggested to Ms. Wanner in cross-examination that the reason she was not surprised was that the list of beneficiaries reflected Rachel's character: "That's what she does, provides for charities?" Ms. Wanner agreed with this suggestion. Rachel and William had never indicated to her any intention to provide for relatives.
- [27] One of the tasks or chores Ms. Wanner had begun to assist the Hardys with before William's death was their banking, specifically paying bills. At first Rachel gave Ms. Wanner cash, and then began to write cheques for Ms. Wanner to deposit in order to pay monthly bills. Eventually this evolved into a practice of Rachel giving Ms. Wanner blank signed cheques, a few at a time. Ms. Wanner testified, however, that she began to feel uncomfortable carrying these blank signed cheques around, and she says that at some point in time, possibly

months before William died, she began to raise with them the possibility of her becoming a signatory on the bank account.

- [28] William, as I have noted, died on November 30, 2011. About a week after William's funeral, Ms. Wanner again raised with Rachel the option of having her added as a co-signatory. This led to Ms. Wanner making an appointment with the Credit Union for this purpose. Ms. Wanner could not, in her evidence, explain the timing of this decision, in relation to the funeral. There was no urgency. William's funeral had only taken place about a week previously and Rachel, not surprisingly, had been distraught at the funeral service. Ms. Wanner admitted in cross-examination that Rachel was "having a hard time" and was "not totally herself".
- [29] Ms. Wanner and Rachel attended together at the Credit Union on December 13, 2011. Ms. Wanner's only intention in doing so was to get signing authority over Rachel's account.
- [30] They met with a customer service representative, Ms. Munshaw. Ms. Wanner testified that Ms. Munshaw presented them with two options: a joint account and a joint account with a right of survivorship. Ms. Munshaw explained the difference between those two accounts, and she read out to them the text of the joint membership agreements as set out on the reverse side of the Credit Union's signature cards for both options. In all, the meeting with Ms. Munshaw in order to get the joint account arranged may have lasted, Ms. Wanner testified, an hour in total, and Ms. Munshaw may have taken possibly as much as a half hour explaining survivorship. However, it was clear to me that in giving this testimony, Ms. Wanner was not comfortable giving a precise time estimate.
- [31] The wording of the joint membership agreement with the right of survivorship reads as follows:

THE UNDERSIGNED APPLY FOR JOINT MEMBERSHIP IN THE KOOTENAY SAVINGS CREDIT UNION (hereinafter referred to as "the credit union") and in consideration of the approval of applicants in joint membership by the credit union, hereby agree each with the other and with the credit union, that all sums now invested in shares and monies placed on deposit, or hereafter paid in on shares or deposits, as the case may be and all dividends and interest therefrom, as the case may be, shall be owned by us jointly with the right of survivorship and shall be subject to withdrawal by either or the survivor of and said payments upon withdrawal shall be valid and release and discharge the credit union from any payments so made.

In the case of death of any or more of said joint members all rights and privileges of ownership in all shares and deposits held jointly in the credit union shall be vested in the survivor or survivors.

Ms. Wanner testified that neither she nor Rachel read over the card with the text of that agreement; they simply had it read to them by Ms. Munshaw.

- [32] After the difference between the two options, with and without joint survivorship, was explained, Ms. Munshaw asked Rachel what she would like to do. Rachel asked, "Is this what everyone does?" Ms. Munshaw replied, "It doesn't matter what everyone else does, this is

your choice, your decision". Ms. Munshaw said that if Rachel died and it was just a joint account, Ms. Wanner would have no more signing authority on the account, but with rights to survivorship, the money would be, as Ms. Wanner put it in her testimony, "signed over to myself".

- [33] Rachel then said she would do the right of survivorship and leave the money to family. That was Ms. Wanner's testimony in direct. In cross-examination, Ms. Wanner testified that after her discussion with Ms. Munshaw, Rachel said, "The money should go to family".
- [34] Ms. Wanner testified that she was surprised to hear Rachel say that. Ms. Munshaw, also, may have been surprised, as Ms. Wanner testified that Ms. Munshaw then called in her supervisor, Ms. Marchi. Ms. Marchi again gave an explanation of survivorship. Ms. Wanner did not elaborate as to how Ms. Marchi's further explanation was received by Rachel, or how Rachel reacted. The only question Ms. Wanner recalls Rachel asking is the one I related earlier, "Is that what other people do?" Ms. Wanner cannot recall Rachel saying anything else that demonstrated her understanding of survivorship.
- [35] Again, to put what was transpiring during this meeting at the Credit Union in context, there is no evidence that Rachel had ever, prior to that point in time, expressed any intention to change the arrangement made in her will for her estate to pass to the charities. Ms. Wanner's evidence is that she and Rachel had never discussed a joint account with survivorship. She and Rachel, before attending at the Credit Union that day, had never discussed any arrangement other than a joint account that would have relieved Ms. Wanner of the burden of carrying around blank cheques. No alternative arrangement, such as, for example, pre-authorized payments for utilities or possibly a power of attorney. Ms. Wanner could give no explanation as to why such alternatives were not discussed.
- [36] Ms. Munshaw testified for the plaintiff's case. She has now been retired from the Credit Union for five years. She was employed at the branch for 14 years part-time. She was customer service representative at the time of this transaction. Her training had consisted mostly of viewing some online courses and then shadowing and learning on the job. Ms. Munshaw has no recollection of this particular transaction, although she did recognize the signature cards that were used and she was familiar with Ms. Wanner. Ms. Munshaw's testimony largely consisted of explaining what her practice had been in dealing with opening joint accounts. She would typically process on order of three or four account openings every day, but transactions involving adding someone as a joint account holder were much less frequent, on the order of maybe once a month. Her general practice was to explain to an applicant what a joint account was: that each account holder was liable, and only one signature would be required. She would explain the right of survivorship: that it meant that on the death of one account holder, the money would go to the survivor. She would check the account balance at some point; the amount on the balance would not have altered her procedure, but she would verify that the transferor knew how much was in the account. She would ask the transferor if they had a will. If she did ask Ms. Hardy that question on this occasion, she does not remember what reply Ms. Hardy gave. Typically, the

practice at the Credit Union was that they would not ask who the beneficiaries were under any will. The Credit Union did not have special procedures in place for dealing with the elderly.

- [37] Ms. Munshaw testified that she did not have any kind of form or checklist that she followed in making such presentations. There was no set procedure that she would follow invariably. She acknowledged it is possible that she would miss a step in her explanations.
- [38] Ms. Wanner's evidence of what transpired at the meeting was not put to Ms. Munshaw in cross-examination, either to test her memory or to test whether Ms. Wanner's evidence of what transpired was consistent with Ms. Munshaw's practice.
- [39] Ms. Munshaw also testified that had she known Ms. Hardy's spouse had died within the previous two weeks, she would have referred the parties to her supervisor, Ms. Marchi. As I have stated, Ms. Marchi, according to the defendant's testimony, did come into the room at one point and give an explanation of survivorship. Ms. Munshaw was not asked about this, and Ms. Marchi did not testify, and so I have no evidence as to what policies or practices within the branch, other than knowledge of the recent death of a spouse, might have led to Ms. Marchi's intervention in a situation such as this. Further, I have no evidence as to what Ms. Marchi's practices were in respect of advising elderly applicants, nor as to whether what she would have said to Ms. Hardy on this occasion would have depended on whether she knew of Ms. Hardy's recent bereavement.
- [40] At the very least, the intervention of Ms. Marchi implies that this was an unusual circumstance, maybe even an extraordinary one. I infer that unusual steps were taken by the Credit Union in this case to explain the concept of survivorship. However, whether Ms. Hardy understood and appreciated what she was being told is another matter entirely.
- [41] I asked Ms. Munshaw whether it was her practice to inquire as to the reasons why an applicant or transferor was adding a joint signatory, so that Ms. Munshaw could be certain that the Credit Union was offering the best possible solution. Ms. Munshaw said that she would have asked Ms. Hardy if she wanted a joint account so that the defendant, whom she referred to as Debbi, could handle the funds; or possibly a power of attorney, where Debbi could handle Ms. Hardy's banking transactions, but on her death, the money would go to her estate. This offering of a power of attorney was something she had been trained to do. However, as I have said, Ms. Munshaw could not swear that she followed each step in her usual practice invariably. Ms. Wanner did not testify that the option of a power of attorney, with its critical distinction that upon death money in account would go to the beneficiaries in her will, was offered by Ms. Munshaw.
- [42] I am left in some doubt as to what exactly Ms. Munshaw told Rachel Hardy. I do not have any evidence that there was any sort of dialogue between Ms. Munshaw and Rachel aimed at confirming Rachel's understanding of the implications of her choice.

- [43] Rachel and Ms. Wanner then proceeded to sign the two signature cards, giving Ms. Wanner joint account holder status with survivorship over both accounts. I have no evidence as to how or why it came about that both Rachel's accounts became joint accounts, when only one of the two accounts had been used for the purpose of paying expenses and when the sole purpose of Ms. Wanner's attendance at the bank with Rachel that day had been to obviate the need for her to be carrying around signed cheques drawn on one of the accounts.
- [44] Ms. Wanner testified as to her own reaction when Rachel said that she would go with the survivorship option, so that the money would go "to family". In her direct evidence, Ms. Wanner said that she was not shocked, but surprised. In cross-examination, it was put to Ms. Wanner that she never expected this money. She agreed with this proposition. Asked why she did not have that expectation, she replied, "Because it was not my money". It was then put to Ms. Wanner that she knew that the money was supposed to go to somebody else, the charities. Ms. Wanner agreed. It was put to her that when the account cards were being signed, she knew the money was supposed to go to the charities. Again, she answered, "Yes".
- [45] Later in the cross-examination, however, Ms. Wanner contradicted herself. It was put to her that the reason she was surprised when Ms. Hardy chose the survivorship option was because she knew the charities were supposed to be the beneficiaries. Ms. Wanner, at that point in her testimony, disagreed and said that she did not recall that at the time. She testified the reason she was surprised was because she was a great niece and "I was surprised that she was wanting to leave that money to myself".
- [46] Ms. Wanner testified that she does not recall discussing survivorship with Rachel after they left the bank that day. Asked in cross-examination if she ever discussed with Rachel after that day what would happen to the money, Ms. Wanner said they may have, but she does not recall.
- [47] In these circumstances, can I be satisfied that Rachel Hardy probably intended to make a gift of these monies to the defendant?
- [48] The defendant pleads that the wording of the joint membership agreement itself is detailed and clear enough that it provides strong substantial evidence of Rachel's intentions. I do not make that finding. Rachel, by the plaintiff's own admission, had minimal education, she was elderly, and she was grieving. A person of some education and sophistication might understand the implications of a phrase read to them, such as, "shall be vested in the survivor", but it cannot be taken for granted that Ms. Hardy probably would have had the same understanding.
- [49] The decision in *Madsen Estate v. Saylor*, 2007 SCC 18 dealt with banking documents with similar wording, described in the majority judgment of Mr. Justice Rothstein as follows:
25. Beyond the fact that both accounts were designated as carrying the right of survivorship, the banking documents do not contain any express reference to beneficial entitlement to the assets in the accounts. The Toronto-Dominion Account Agreement provided:

If the account has a right of survivorship then if any one or more of us dies any moneys standing to the credit of the account are to be subject to withdrawal by the survivor or, if more than one, by any one or more of the survivors; [Emphasis in original.]

26. The CIBC Wood Gundy Account Agreement provided:

The following provisions shall apply upon the death of any Applicant: (i) the survivor(s) will promptly notify you of such death; (ii) the survivor(s) will provide you with a certified copy of the death certificate . . .; (iii) the estate of the deceased shall continue to be liable for any amounts owing . . .; and (iv) the survivor(s) shall continue to have the same rights as described in paragraph 12(c) [providing for the operation of the accounts by the survivor].

[50] Noting the lack of any express reference to beneficial entitlement in the document, Rothstein J. held that the bank documents would only be accorded little weight with respect to the issue of beneficial entitlement. I make the same finding in respect of the wording of the present document. While it is true that the Credit Union's membership agreement did, in addition, use the phrase "shall be vested", for the reasons I have said, I do not think those words can be deemed sufficient to have focused Ms. Hardy's attention and conveyed a full explanation of the consequences of the account survivorship rights, especially vis-à-vis the rights of beneficiaries named in her will.

[51] The defendant pleads in her response to civil claim that:

An elderly person who gratuitously enters into a joint bank account with an adult niece on whom she depends for assistance, intends to make a gift in gratitude for this assistance.

However, there is no evidence that Rachel ever expressed any connection between her decision to sign the joint account survivorship membership agreement and any sense of gratitude she may have been feeling to Ms. Wanner. I also note there is no evidence that Rachel's relationship with the defendant was any closer than her relationship with her brother, who survived at that point in time, her 12 nieces and nephews, or with any of the other uncounted great nieces and great nephews that she had.

[52] I accept that Rachel, while at the bank, did make some comment about money going to family by way of explaining her choice of the survivorship option, but that remark itself was ambiguous and did not necessarily reflect a probable understanding that her decision would constitute an absolute gift to the defendant.

[53] There is no evidence of post-transaction conduct on the part of Rachel Hardy confirming an understanding on her part that an absolute gift of survivorship rights had been made.

[54] The defendant concedes that Mr. and Ms. Hardy's decision to benefit charities in their will, made only about three and a half years previously, was in keeping with their character. The granting of legal successorship rights to someone else obviously had momentous consequences for those beneficiaries. It is not the kind of decision one would expect to be made on impulse.

- [55] Finally, I am struck by the lack of evidence of any discussion between the defendant and Rachel Hardy concerning the survivorship rights at any time after the transfer was effected. One would reasonably expect that someone in the position of Ms. Wanner would at the time of the Credit Union meeting, or shortly thereafter, have said something memorable - something that she could have given evidence of to this court - along the lines of, "Aunty Renee, if you want to provide for family, why don't we get Ms. Smaill to take another look at your will?"; or, "Aunty Renee, that is not what is in your will. Are you sure this is what Uncle Bill would have wanted?"; or at least, "Thank you, Aunty Renee, this is incredibly generous. My family will make good use of this money." But there is no evidence the defendant said anything like this to Rachel, ever. In the circumstances, I am driven to infer that this was probably because Ms. Wanner appreciated just how tenuous Rachel's apparent decision had been, and that any further discussion might have made clear to Rachel the exact consequences of her decision and would have made evident her probable lack of understanding when the transfer had been made.
- [56] On the evidence, I am not satisfied that there was probably a genuine intention on the part of Rachel Hardy to make an absolute gift of survivorship rights, and I conclude that the presumption of resulting trust has not been defeated.
- [57] The plaintiff will have a declaration in her favour that the defendant holds the entire proceeds of Kootenay Savings Credit Union Accounts 47787 and 47779, as of August 30, 2012, including all such sums as were transferred from those accounts to Account 1442672 on January 30, 2013, in trust for the estate of Rachel Hardy. The plaintiff will have an accounting of all dividends, interests, monies, and income received by the defendant in respect of the accounts, and the plaintiff will have interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.
- [SUBMISSIONS ON COSTS]
- [58] THE COURT: The onus was on the defendant to persuade the court that the presumption of resulting trust did not apply. That presumption has not been overcome. The plaintiff was successful in that regard, and so the defendant personally will be responsible for the estate's costs of the action on a party-and-party basis.

"A. Saunders J."

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