

CANADA / JUDGMENT

Kalanj v. Kalanj Estate

2022 BCSC 427

COURT

Supreme Court of British Columbia

DECIDED

15 March 2022

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2022 BCSC 427 Kalanj v. Kalanj Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kalanj v. Kalanj Estate,

2022 BCSC 427

Date: 20220315

Docket: S167612

Registry: New Westminster

Between:

Peter Kalanj

Plaintiff

And

Denise Kalanj, Executrix of the Estate of Mike Emil Kalanj, Denise Kalanj also known as Denise Louise Van Rooy, and Michael Kalanj also known as Michael Richard Kalanj

Defendants

Before: The Honourable Justice Douglas

Reasons for Judgment

Counsel for Plaintiff:

J. Wingson, Q.C.

J. Jutras

(via video)

Counsel for Defendants:

T. Watkins

(via video)

Place and Date of Hearing:

New Westminster, B.C.

January 28 and February 1, 2022

Place and Date of Judgment:

New Westminster, B.C.

March 15, 2022

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I. OVERVIEW

- [1] On February 5, 2014, six days before he died and while in palliative care in hospital, Mike Emil Kalanj (the "Deceased") changed his estate plan and transferred substantially all of his assets to two of his three children, the defendants, Michael Kalanj and Denise Van Rooy. This action involves a dispute between the Deceased's three adult children regarding his inter vivos transfer of assets.
- [2] Many of the parties share a surname and, for convenience, I refer to them by their first names in these reasons. In doing so, I intend no disrespect.
- [3] The plaintiff, the Deceased's third child Peter Kalanj, seeks to set aside the following transactions (the "Transactions"):
- a) The transfer of title of the Deceased's Vancouver residence (the "Residence") into joint tenancy with the defendants (the "Transfer"); and
 - b) The appointment of the defendants as beneficiaries (the "Appointment") on a Tax Free Savings Account (the "TFSA").
- [4] Peter challenges the Transactions on three grounds. He argues:
- i. They are subject to the presumption of a resulting trust;
 - ii. The Deceased lacked capacity; and
 - iii. The circumstances give rise to the presumption of undue influence.
- [5] Peter does not challenge the Deceased's February 5, 2014 appointment of his ex-wife, Mabel Kalanj, as beneficiary of an RRSP with a value of approximately \$204,000 (the "RRSP"). While his lawyer stated that Peter chose not to sue his mother, Peter does not concede the validity of this appointment.
- [6] The defendants submit that the Transactions are both prima facie valid and were effective to convey legal ownership to the intended recipients. They rely heavily on a Deed of Gift they and the Deceased signed on February 5, 2014, and the opinion of psychiatrist, Dr. Allan Burgmann, who assessed the Deceased that day. They assert those documents are dispositive of the issues in this action, which they argue is suitable for summary trial. Peter submits that the material conflicts in the filed affidavits require an assessment of credibility and reliability by a judge at a conventional trial.
- [7] For the reasons that follow, I conclude this action is not suitable for a summary trial.

II. ISSUES

- [8] The following issues arise in this action:
- a) Did the Deceased intend the Transactions as gifts to the defendants?

- b) Did the Deceased have capacity at the time of the Transactions?
- c) Does a presumption of undue influence arise and, if so, is it rebutted?
- d) Have the defendants been unjustly enriched?

III. PROCEDURAL HISTORY

- [9] This action was commenced by notice of civil claim filed January 15, 2015. Pleadings closed on February 3, 2015. On September 7, 2018, the plaintiff issued a notice to mediate.
- [10] The defendants first set this action down for a summary trial on November 9, 2018; they did so again on January 30, 2020. It has now been more than eight years since the Deceased died and more than seven years since the start of these proceedings. The two-year anniversary of the date the defendants set down their second summary trial application has now passed.
- [11] Once the Transactions were given effect, the Deceased's estate (the "Estate") had a minimal value. Accordingly, Denise, the executor of the Estate, opted not to apply for probate. Thereafter, Peter spent a considerable amount of time applying for probate for the sole purpose of obtaining the file of involved lawyer, Trevors Bjurman, who prepared the documents necessary to give effect to the Transactions. Mr. Bjurman refused to release his file without the consent of everyone who might complain about a waiver of solicitor-client privilege, or a court order compelling him to do so. According to Peter's lawyer, the defendants refused to cooperate in his attempts to secure Mr. Bjurman's file.
- [12] On November 10, 2020, the grant of probate was issued to Peter. On January 11, 2021, Peter delivered it to Mr. Bjurman and requested production of his file. On January 27, 2021, Joseph Fingerote, the lawyer who had purchased Mr. Bjurman's practice, produced an electronic copy of Mr. Bjurman's file. To date, Mr. Bjurman's complete physical file has not been located.
- [13] No examinations for discovery have been conducted in this action. Based on the correspondence in evidence, the defendants declined to schedule examinations for discovery before the resolution of their summary trial application.
- [14] On July 8, 2021, Peter renewed his request for mediation. On August 27, 2021, the parties attended the defendants' summary trial application; it was adjourned as no judge was available to hear it. On October 22, 2021, the parties attended a Case Planning Conference to resolve the scheduling of mediation and the summary trial application. On December 14, 2021, Master Elwood (as he then was) heard Peter's application to compel the parties' attendance at mediation before the defendants' summary trial. Master Elwood declined to make such an order but directed that, if this matter was not decided by summary trial, the parties attend mediation before the date set for a conventional trial.
- [15] The parties are currently scheduled to proceed to mediation on March 15, 2022. A five-day conventional trial of this action is scheduled to commence on May 9, 2022.

IV. FACTUAL BACKGROUND

- [16] The Deceased was born on October 12, 1945. At all material times, he was divorced from Mabel. They had three children: Denise (who will be 49 years old in March 2022) and twins, Peter and Michael (currently 46 years old). Before his final admission to hospital on January 31, 2014, the Deceased lived at the Residence, which he owned. The parties agree it was his most valuable asset.
- [17] In addition to the Residence, the RRSP (which is not the subject of this action), and the TFSA (worth about \$14,000), the Deceased had the following additional assets:
- a) A life insurance policy which, on his death, paid each of his three children a lump sum benefit of \$6,300 as beneficiaries; and
 - b) A pension which, on his death, paid each of his three children a benefit of \$398/month until the end of November 2017.
- [18] The Deceased left a last Will and Testament dated December 11, 1998 (the "Will"). The Will was stated to have been made in contemplation of the Deceased's divorce from Mabel. It names Denise as primary executor and provides for an apportionment of the residue of the Estate equally amongst his three children.
- [19] It is common ground that the Deceased suffered multiple significant health problems in his final years. The parties disagree about the lasting impact those difficulties had on his mental status. The Deceased was diagnosed at age 60 with non-Hodgkin's lymphoma; after a period of remission, his cancer recurred in March 2013 at age 67. In June 2013, he underwent sextuple coronary bypass surgery. He suffered a post-operative infection and required a follow-up colectomy. Thereafter, he recuperated at Mabel's suite in Denise's home for seven weeks before returning to the Residence. He was later hospitalised again for chemotherapy treatment and the management of sepsis. The parties highlight various entries in the clinical notes and records in evidence to support their positions regarding the Deceased's mental status and capacity at the time of the Transactions.
- [20] On January 31, 2014, the Deceased was hospitalised for the last time and admitted to palliative care. On February 5, 2014, he signed the Transfer and the Appointment, prepared by lawyer, Mr. Bjurman. The same day, at Mr. Bjurman's request, he was assessed by psychiatrist, Dr. Burgmann, who offered the following written opinion contained within the hospital chart:

On February 5, 2014, I examined Mr. Mike Emil Kalanj for the sole purpose of determining his level of personal competency. He was made aware of this fact and participated fully in the assessment. Mr. Kalanj was fully alert and oriented in all spheres. He was organised and goal directed. He was consistent and clear in his reasoning. Throughout the assessment, Mr. Kalanj demonstrated that he is fully capable and competent in directing changes in his personal affairs.

- [21] Peter argues this opinion is conclusory and comments on the ultimate issue before the trier of fact; the defendants disagree and describe it as detailed, contemporaneous, and determinative. Following Dr. Burgmann's assessment, Mr. Bjurman witnessed the Deceased's signature on the Transfer, the Deed of Gift, and the Appointment forms. He sent the Deceased (who was then in hospital) a reporting letter (directed to the Residence), confirming registration of the Transfer and enclosing his account.
- [22] The Deed of Gift is signed by the Deceased, Denise, and Michael; Mr. Bjurman witnessed all their signatures on February 5, 2014. The Deed of Gift contains one notable error: in the first substantive paragraph, it states the "Donor gifts absolutely to the Donor" (referring to an undivided equal interest in the Residence as joint tenants). The defendants characterise this as an obvious and insignificant typographical error; they say the meaning of this document is clear on its face. Peter says this error is relevant to an assessment of the Deceased's capacity at the material time and his understanding of the nature and effect of the Deed of Gift and the Transfer.
- [23] The Deceased died on February 11, 2014.
- [24] In May 2014, the Residence was sold for \$848,888 and the net proceeds divided between Michael and Denise. The RRSP (net of tax) was conveyed to Mabel. The TFSA was conveyed to Michael and Denise.

V. LEGAL FRAMEWORK

A. Suitability for Summary Trial

- [25] Rule 9-7 permits a party to an action (to which a response to civil claim has been filed) to apply to the court for summary judgment, either on an issue or generally. A party may tender evidence by affidavit, answers to interrogatories, evidence given on an examination for discovery, admissions, and expert reports.
- [26] If it is possible to find the facts, a chambers judge must give judgment unless it would be unjust to do so for any proper juridical reason: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at 214, [1989] B.C.J. No. 1003 (C.A.) at para. 53 [Inspiration Management]. A judge must consider whether the evidence is sufficient for adjudication and is not obliged to remit a case to the trial list just because there are conflicting affidavits: *Inspiration Management* at paras. 55-56.
- [27] In deciding whether it is just to proceed by summary trial, a judge may consider the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of proceeding with a conventional trial relative to the amount at stake, the course of the proceedings, and any other matters which arise: *Inspiration Management* at para. 49. Other relevant factors include the cost of the litigation and the time required for the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create unnecessary complexity in the resolution of the

dispute, and whether the application would result in litigation in slices: *Gichuru v. Pallai*, 2013 BCCA 60 at para. 31 [*Gichuru*].

- [28] A conventional trial is not required if summary disposition can achieve a fair and just adjudication, provide a process that allows the judge to make the necessary findings of fact and apply the law to those facts, and is a more proportionate, expeditious, and less expensive means of achieving a just result: *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 2-5, 23-33.
- [29] As noted by the Court of Appeal in *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275 at para. 34 [*Everest*], it is trite law that where an application for summary determination under Rule 18A (the predecessor to Rule 9-7) is set down, the parties are obliged to take every reasonable step to put themselves in the best position possible. A party cannot, by failing to take such steps, frustrate the benefits of the summary trial process: *Everest* at para. 34.
- [30] In *Castellan v. Muncey (Estate)*, 2004 BCCA 128 [*Castellan*], the Court of Appeal observed that "reliability, of course, is all bound up with credibility" and that "to make adverse findings on reliability without seeing the witnesses on whom the whole assessment of credibility depends, is a poor foundation for a finding of reliability or unreliability": *Castellan* at para. 9. The Court of Appeal ordered a new trial.
- [31] The defendants rely on *Lorintt v. Boda*, 2014 BCCA 354 [*Lorintt*], a case decided by summary trial. The trial judge found the presumption of undue influence did not apply to a gratuitous transfer from father to son or, if it did, the presumption was rebutted on the evidence. That decision was upheld on appeal. Notably, in *Lorintt*, the impugned transfer took place eight years (and not six days) before the deceased's death at a time when he was neither ill nor in hospital. The deceased in *Lorintt* lived independently for four years after making the transfer; there was no evidence of any mental incompetence and he was not dependent on his son. He was able to attend at the involved lawyer's office and the trial judge had sworn evidence from this lawyer about his inquiries of the transferor before the transaction in question: *Lorintt* at para. 89. In my view, *Lorintt* is distinguishable on its facts.
- [32] *Wood v. Porter*, 2015 BCSC 2354 [*Wood*], another decision relied on by the defendants, began as a summary trial but continued as a conventional trial. Ultimately, it proceeded as a hybrid trial: the parties' affidavits were entered as their evidence and additional witnesses were called. Unlike the case before me, the parties were cross-examined on their affidavits.

B. Hearsay and Evidentiary Conflicts

- [33] All parties rely on substantial hearsay evidence to support their respective positions on this summary trial. Hearsay statements cannot be tested by cross-examination and are presumptively inadmissible: *Davy v. Davy*, 2019 BCSC 1826 at para. 26 [*Davy*]. However, the presumption of inadmissibility may be overcome if admission of the statement is necessary and the surrounding circumstances provide sufficient assurance that the statement is

reliable: *R. v. Khelawon*, 2006 SCC 57 at paras. 2-3. The Deceased cannot testify and the parties agree hearsay is therefore necessary. As in *Davy*, the admissibility of the hearsay in this case turns on whether it is reliable.

[34] As noted by Justice Groves in *Modonese v. Delac Estate*, 2011 BCSC 82, aff'd 2011 BCCA 501 at para. 79 [*Modonese*], the Supreme Court of Canada has repeatedly endorsed a principled approach to the admissibility of hearsay evidence. When assessing the reliability of a hearsay statement, the court should adopt a functional approach: *Modonese* at para. 90. Starting from the premise that hearsay statements are presumptively inadmissible, a court should search for indicia of trustworthiness sufficient to displace the general exclusionary rule. In each case, the focus of the inquiry must be on the particular dangers arising from the hearsay nature of the evidence: *R. v. Blackman*, 2008 SCC 37 at para. 42.

[35] Justice Voith (then of this Court) summarised the principles that apply to such evidence in *Gutierrez v. Gutierrez*, 2015 BCSC 185 [*Gutierrez*]. At para. 34 of *Gutierrez*, Voith J. referenced the following factors as relevant to an assessment of the threshold reliability of a hearsay statement:

- a) The presence or absence of a motive to lie;
- b) Independent corroborative evidence that goes to the trustworthiness of the statement;
- c) Timing of the statement relative to the event or contemporaneity;
- d) The declarant's mental capacity at the time of making the statement; and
- e) Solemnity of the occasion and whether the declarant's statement was made in circumstances that could arguably be akin to the taking of an oath where the importance of telling the truth and the consequences of making a false statement were properly emphasized.

[36] There is substantial hearsay evidence on this summary trial relating to:

- a) How the Deceased intended to dispose of the Estate;
- b) What he intended by changing his estate plan shortly before he died; and
- c) What he told various individuals about his intentions before the Transactions.

[37] There is also some double hearsay evidence in the filed affidavit evidence suggesting that the Deceased was previously told by another unnamed lawyer at an unspecified time that he was not competent to change the Will.

VI. ISSUES ON SUMMARY TRIAL

A. Resulting Trust

- [38] The Transfer of the Residence and the TFSA were gratuitous. It is therefore common ground that they give rise to the rebuttable presumption of a resulting trust. The defendants submit that the Deed of Gift and the evidence of Dr. Burgmann are sufficient to establish that the Deceased intended the Transfer to be a gift; Peter disagrees.
- [39] Justice Rothstein, speaking for the Court in *Pecore v. Pecore*, 2007 SCC 17 [Pecore] explained the presumption this way:
- [24] The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: [cites omitted]. This is so because equity presumes bargains, not gifts.
- [25] The presumption of resulting trust therefore alters the general practice that a plaintiff (who would be the party challenging the transfer in these cases) bears the legal burden in a civil case. Rather, the onus is on the transferee to rebut the presumption of a resulting trust.
- [40] The onus is therefore on the defendants to rebut the presumption of a resulting trust by adducing evidence that the Deceased intended the Transfer to be an outright gift: *Pecore* at paras. 24-26. If they fail to rebut the presumption, the Residence is held on a resulting trust for the transferor (i.e., the Estate). If the presumption of resulting trust is displaced, the defendants lawfully became the owners of the Residence in joint tenancy by right of survivorship on the Deceased's death. The defendants say the Property never formed part of the Estate and that Peter has no claim to it.
- [41] The presumption of a resulting trust will determine the result only when there is insufficient evidence to rebut it on a balance of probabilities: *Pecore* at paras. 43-44; *Fuller v. Harper*, 2010 BCCA 421 at para. 47 [Fuller]. Evidence of the quality of the relationship between the transferor and transferee is relevant in deciding whether the presumption of a resulting trust applies or has been rebutted: *Pecore* at para. 37.
- [42] In order for a transfer of property to be a legal and binding gift, there must be:
- a) A legal transfer of the property from the owner to the beneficiaries; and
 - b) An intention by the owner to transfer the property as an outright gift to the beneficiaries: *Stade Estate (Re)*, 2017 BCSC 2354.

- [43] The key inquiry is to determine the transferor's intent at the time of the actual transfer; only the transferor's intention is relevant: *Pecore* at paras. 56-59; *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33 at paras. 37, 41. Placing a party on title to real property as a joint tenant constitutes a legal transfer of property at law. In this kind of transfer, the legal and equitable title (the right of survivorship) of a joint tenancy vest at the time the joint tenancy is created: *Pecore* at para. 49.
- [44] The defendants rely on s. 23(2) of the Land Title Act, R.S.B.C. 1996, c.250 [LTA] which provides that an uncanceled indefeasible title is "conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title", absent certain exceptions which have no application here.
- [45] Justice Savage (then of this Court) in *Fleming v. Kwakseestahla*, 2010 BCSC 1006 at para. 22 [Fleming], considered whether s. 23(2) of the LTA negates the presumption of a resulting trust in BC when applied to land. Justice Savage determined that the operation of s. 23(2) of the LTA does not oust the operation of other principles of law and equity, outside circumstances involving the acquisition of title by a bona fide purchaser for value: *Fleming* at para. 24. Ultimately, Justice Savage concluded that, despite the provisions of the LTA, where there is a transfer without consideration, there is a presumption of a resulting trust: *Fleming* at para. 26.
- [46] Similarly, Justice Groves noted in *Modonese* at para. 139, that Justice Fuller (at para. 43) appears to support the view that the presumption of a resulting trust could be applied to a gratuitous transfer of real property. He found that, because the transfer of the deceased's property into joint tenancy was gratuitous, the presumption of resulting trust discharged the statutory presumption: *Modonese* at para. 142. These authorities support the conclusion that the statutory presumption in the LTA does not displace the equitable presumption of a resulting trust, as does *Suen v. Suen*, 2013 BCCA 313 at para. 34.
- [47] The evidence required to rebut a presumption of resulting trust must be weighed on the civil standard of proof on a balance of probabilities: *Pecore* at para. 43. A trial judge must commence his or her inquiry with the applicable presumption and then weigh all of the evidence in an attempt to ascertain the transferor's actual intention: *Pecore* at para. 44; *Kerr v. Baranow*, 2011 SCC 10 at para. 18 [Kerr]. The presumption will only determine the result when there is insufficient evidence to rebut it on a balance of probabilities: *Pecore* at para. 44. Determining a party's intention is a fact-driven exercise: *Lorintt* at para. 85.
- [48] When assessing a deceased's intention, this court considers direct and indirect evidence and the surrounding circumstances: *McMaster Estate v. McMaster*, 2021 BCSC 1100 at para. 45 [McMaster], citing *Fuller* at para. 47. The content of the documents that set up the joint ownership, evidence that arises after the transfer, the control and use of assets, and the tax treatment of the assets are all relevant factors: *Pecore* at paras. 56 - 70. Considerable onus is placed on the transferee, and the professionals who assisted with the transaction, to

establish intention: McMaster at para. 46. Applied to this case, that would include lawyer, Mr. Bjurman, and psychiatrist, Dr. Burgmann.

- [49] In determining the transferor's intention at the time of the transfer, evidence that arises after the transaction may also be considered. However, the court must approach such evidence cautiously; it must be relevant to the transferor's intention at the time of the transaction. Further, the court must assess the reliability of the evidence subsequent to the transaction and the weight to be accorded to it: Pecore at para. 59.
- [50] The defendants submit that the Deed of Gift, combined with the evidence of Dr. Burgmann, expressly refutes any presumption of resulting trust and is dispositive in defining the Deceased's intention to gift the Residence to them. Peter says the evidence regarding the Deceased's capacity to alter his estate plan on February 5, 2014 (and on the days before and after the Transactions) is inconsistent. He highlights the absence of any evidence from Mr. Bjurman, the lawyer who had conduct of the Transactions.
- [51] There is substantial conflicting evidence before me regarding the Deceased's intent in making the Transfer. Much of it comprises hearsay attributed to the Deceased. There are conflicts in the evidence regarding:
- a) The nature of the Deceased's relationship with Peter; and
 - b) Whether the Deceased had a discussion with Michael and Peter (as Peter deposes, but Michael disputes), at which time he said he wanted each of them to give Mabel \$50,000 from their share of the Estate, the remainder of which was to be divided equally amongst Denise, Michael, and Peter.
- [52] In my view, the Deceased's relationship with Peter is relevant to an assessment of his intent in effecting the Transactions and whether or not he had a motive to disinherit Peter. The disputed evidence regarding the conversation Peter alleges occurred between himself, Michael, and the Deceased before the Transactions is relevant to determining the Deceased's intentions in distributing his assets and the Estate. I am unable to resolve these evidentiary conflicts.
- [53] None of the affidavits filed on this summary trial has been tested on cross-examination. The parties have not been examined for discovery. I am unable to assess the parties' credibility or the reliability of the conflicting affidavit evidence. I am unable to examine the circumstances surrounding the Deceased's execution of the documents necessary to give effect to the Transactions. I do not know what, if any, inquiries Mr. Bjurman made of the Deceased before those documents were signed. These gaps and conflicts in the evidence preclude me from finding the facts necessary to determine whether or not the presumption of a resulting trust is rebutted.

B. Capacity

- [54] The Deceased required capacity to enter into the Transactions. The capacity to take any legal step, whether it be making a will, making a gift, or settling a trust, is a legal construct: *Geluch v. Geluch Estate*, 2019 BCSC 2203 at para. 95 [Geluch]. It is not a medical test: *Laszlo v. Lawton*, 2013 BCSC 305 at para. 198 [Laszlo]. While expert medical evidence can assist a court in determining a person's capacity at a particular point in time, it is not determinative: *Geluch* at para. 95. Accordingly, I conclude that the evidence of Dr. Burgmann alone is insufficient to rebut the presumption of a resulting trust.
- [55] As explained by Justice Francis in *Geluch* at para. 103, the test for capacity to make an inter vivos gift is not always the same as the test for capacity to make a will. The capacity to make a gift depends on the ability of the donor to understand the nature and effect of the gift they are making: *Royal Trust Co. v. Diamant*, [1953] 3 D.L.R. 102 (B.C.S.C.) at 111 [Royal Trust].
- [56] However, as noted by Francis J. in *Geluch* at para. 105, there are many cases in which the courts of this province have applied the testamentary capacity analysis to inter vivos transfers: *Rogers, Re.* (1963), 39 D.L.R. (2d) 141 (B.C.C.A.) at 148; *Re: Elsie Jones*, 2009 BCSC 1723 at paras. 98 - 101. Where an inter vivos gift is being made as part of an estate plan or the gift comprises the most significant asset in the donor's estate, the court may apply the higher test for testamentary capacity to the question of whether a donor had capacity to make an inter vivos gift: *Geluch* at para. 105. Justice Barrow explained the rationale for merging the two tests in *Miller v. Turney*, 2010 BCSC 101:
- [32] Counsel for the estate argues that the capacity necessary to make an inter vivos gift is the same as that needed to make a valid testamentary disposition. [] I accept that the capacity necessary for these two forms of giving may be the same in some situations. In particular, the more that an inter vivos gift resembles a testamentary disposition, the greater the similarity in the required capacity. For example, when a gift involves a transfer from the donor into the joint names of the donor and others, the required capacity is more likely to be akin to that necessary to make a valid Will. That is so because the gift will take full effect only on the death of the donor, assuming the donor survives the other joint owners. []
- [57] It is common ground that the Transactions formed part of the Deceased's estate plan. In Part 1, Division 2, para. 1 of their response to civil claim, the defendants expressly plead that the impugned disposition of the Deceased's assets was the result of his "deliberate and considered estate plan". Denise deposes that she understood Mr. Bjurman, the lawyer she contacted, was going to meet with the Deceased to obtain his will instructions.
- [58] Testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve the choices that have already been made: *Halliday v. Halliday Estate*, 2019 BCSC 554 at para. 178, citing John E.S. Poyser's text *Capacity and Undue Influence* (Toronto: Carswell, 2014). In applying this test in *Geluch*, Francis J. found that the defendants fell short of the burden on them to prove the deceased had knowledge and approval of the dispositions she made before her death which

resulted in a wholesale change in the structure of her estate plan: Geluch at para. 130.

[59] In Geluch, Francis J. found that the property transfer and declaration of trust were inextricably intertwined and that it would be artificial and unhelpful to apply a different test for capacity to the different dispositions at play: Geluch at para. 106. Peter urges me to reach the same conclusion here. He submits that, as in Geluch, a lawyer devised the Deceased's estate plan as a means of distributing his assets after his death. Accordingly, he argues it is necessary to examine closely the steps Mr. Bjurman took and the enquiries he made. Peter highlights the following holes in the evidence:

- a) There are no notes in Mr. Bjurman's file;
- b) The defendants have adduced no evidence from Mr. Bjurman;
- c) There is no copy of the Will in Mr. Bjurman's file (arguably suggesting that he may not have seen or known about it); and
- d) There is no evidence that Mr. Bjurman asked the Deceased about his assets, his family members, the provisions of the Will, or any of the other questions Peter asserts must be explored with a client when attending to his imminent estate planning.

[60] If the higher test of testamentary capacity is applied here, Mr. Bjurman's evidence becomes important. It is notably absent on this summary trial. The parties disagree about who bears the burden of adducing this evidence. There are conflicts in the filed affidavit evidence regarding:

- a) The Deceased's mental state and whether he had capacity to alter his estate plan at the material time; and
- b) Discrepancies between the opinion of Dr. Burgmann and:
 - i. Clinical notes and records in the hospital chart; and
 - ii. Family members' observations.

[61] Peter submits that the hospital records demonstrate a progressive deterioration in the Deceased's mental status; the defendants say Dr. Burgmann's opinion is consistent with transient episodic confusion and not chronic dementia or permanent cognitive dysfunction. The evidence establishes that Dr. Burgmann assessed the Deceased on February 5, 2014, before he executed the documents necessary to give effect to the Transactions later that day. However, it is unclear precisely how long after this assessment the Deceased signed these documents. The defendants assert that the Deed of Gift, combined with the opinion of Dr. Burgmann, is determinative and sufficient to rebut the presumption of a resulting trust. While they acknowledge that there is conflicting evidence from family members about the Deceased's mental state before he died, they say it cannot override the opinion of a qualified psychiatrist charged with the specific task of assessing competence at the material time for the specific purpose of estate planning.

- [62] In *Pavlovich v. Danilovic*, 2019 BCSC 153 [Pavlovic], the trial judge was asked to determine the deceased's intention on conflicting evidence. Ultimately, he found that the evidence stood in equipoise, stating as follows:
- [55] Ultimately, I am unable to rely on any of the oral evidence in the sense of preferring either the plaintiff or defendant's version of events over the other. The evidentiary difficulties in this case are such that I cannot determine [the Deceased's] intention on a balance of probabilities. The evidence stands in equipoise. Accordingly, this is one of those rare cases where the outcome must be decided based on the burden of proof.
- [56] As I have found that the transfers were gratuitous, the presumption of resulting trust applies. [The transferee] has not displaced the presumption by establishing that [the Deceased] intended to transfer the entirety of the legal and beneficial interest in the properties to him. Therefore, by operation of the presumption, [the transferee] holds both the Whyte House and the Harrison House on resulting trust for [the Deceased's] estate.
- [63] I find myself in a similar position here. I am unable to resolve the conflicts in the untested affidavit evidence on a balance of probabilities. In my view, determining whether the Deceased had the requisite capacity at the material time requires cross-examination and an assessment of the credibility and reliability of the parties and other witnesses at a conventional trial.

C. Undue Influence

- [64] A presumption of undue influence is established when the nature of the relationship between the parties demonstrates the potential for domination. To rebut the presumption, the donor must be shown to have entered into the transaction of his own "full, free and informed thought": *Cowper-Smith v. Morgan*, 2016 BCCA 200, rev'd on other grounds, 2017 SCC 61 at para. 49 [Cowper-Smith]. Factors to be considered in determining whether the donor acted of his own "full, free and informed thought" in entering the transaction include: (i) the lack of actual influence or opportunity to influence the donor; (ii) the receipt of or opportunity to obtain independent legal advice; (iii) the donor's ability to resist any such influence; and (iv) the donor's knowledge and appreciation about what he was doing: *Cowper-Smith* at para. 50.
- [65] If the presumption is established, the burden falls on the defendants to prove that the Deceased acted of his own full, free and informed thought. As in *Geluch*, the Transactions resulted in a wholesale change to the structure of the Deceased's estate plan; the involved lawyer was apparently the only person who had any discussions with the Deceased about them. In the absence of any evidence from Mr. Bjurman, a full examination of the circumstances surrounding the Deceased's execution of the Deed of Gift, the Transfer, and the Appointment forms is not possible.

- [66] The defendants say it is debatable whether a presumption of undue influence arises from the mere fact of a child/parent relationship. Justice Groves considered this question in *Modonese* at paras. 102 and 105, concluding that the presumption may apply if the relationship between an elderly parent and child is characterized by dependency. In the case of an old and sick parent, a child may assume a relationship of dominance over that parent: *Modonese* at para. 106; *Wood* at para. 43. The Court of Appeal considered this issue in *Lorintt*:
- [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.
- [67] In *Davy* at para. 52, Gomery J. described two classes of cases involving undue influence. The first arises when the party seeking to set aside the transaction proves the defendant engaged in improper conduct that dominated the will of the victim. As in *Davy*, that is not Peter's claim here. The second class of case arises in the context of a relationship of dependency involving the potential for domination of the transferor by the defendant. In those cases, if the transaction involved a gift or bequest (as opposed to a commercial transaction), undue influence is presumed and the burden lies on the defendant to show that the transferor entered into the transaction as a result of his or her own full, free, and informed thought: *Davy* at para. 53. Justice Gomery confirmed that a relationship of dependency involving a potential for domination may arise among family members including an elderly parent and child: *Davy* at para. 55. What is important is whether there is a potential for domination specifically in relation to the transaction in issue: *Davy* at para. 56.
- [68] In *Davy*, Gomery J. found the absence of discussion by the involved lawyer of the potential financial implications of the joint tenancy to be important. He observed that the jurisprudence emphasizes that the lawyer's duty is to ensure the client understands and freely assents to the transaction at hand and this sometimes requires the lawyer to go well beyond an explanation of the narrow legalities to an assessment of the client's understanding of the substance of the transaction and its implications: *Davy* at para. 118. Justice Gomery noted this broader duty is engaged when it should appear to the lawyer, on the facts presented, that there is a real possibility of undue influence: *Davy* at para. 118.
- [69] Cowper-Smith references two branches for assessing the adequacy of the independent legal advice given when an allegation of undue influence is raised at paras. 52-53 as follows:
- [] (i) advice as to understanding and voluntariness (attendance on execution); and (ii) advice as to the merits of a transaction (the wisdom of entering into the transaction). The first branch of the test requires that the independent advisor is satisfied the donor understands the transaction and enters into it freely and voluntarily. The second branch of the test requires something more

than the independent advisor being satisfied that the donor understands the effect of the transaction and wishes to make the gift; it also requires that the independent advisor is satisfied that "the gift is one that is right and proper in all the circumstances of the case, and if he cannot so satisfy himself he should advise his client not to proceed." [cites omitted]

Assessing the adequacy of the legal advice given is a fact-specific inquiry. It does not reduce to any precise test. In some circumstances, it may require advice on only the nature and consequences of the transaction. However, where concerns or allegations of undue influence arise, generally there will be a need to give "informed advice" on the merits of the transaction

- [70] Undue influence does not depend on proof of reprehensible conduct or malicious intent: Modonese at para. 99. The transferee may have acted in the sincere belief of their honesty: McMaster at para. 55, citing *Ogilvie v. Ogilvie Estate*, (1998) 106 B.C.A.C. 55 (C.A.) at para. 14. It is sufficient to establish that the deceased was reliant on a person and that person exercised dominance over the deceased's transactions through persuasive influence: *Halliday v. Halliday Estate*, 2019 BCSC 554 at paras. 215 - 216.
- [71] As in McMaster, a question arises in this case about why the Deceased would have disinherited Peter: McMaster at para. 132. It is also unclear why, if it was his intention to do so, the Deceased did not alter his estate plan before he was admitted to palliative care and required assistance. I am unable to find the facts necessary to answer those questions.
- [72] Peter submits that suspicious circumstances are present in this case, giving rise to the rebuttable presumption of undue influence. He says the defendants bear the onus of rebutting this presumption and that they have not done so here. The defendants deny this presumption arises and submit that, if it does, it is rebutted on the evidence. They deny they occupied a dominant position in relation to the Deceased, noting they neither resided with him nor had exclusive access to him. They say there is no evidence that he was isolated or dependent exclusively on them.
- [73] The defendants concede that a presumption of undue influence can arise if the evidence establishes suspicious circumstances related to the Transactions. They deny there is any such evidence here. They acknowledge that they provided the Deceased with some assistance in his final years, describing it as conventional and unremarkable. They admit they drove him to medical appointments and telephoned him periodically but say he lived more or less independently, with the assistance of care aides, until his final hospitalisation. Notably, at the time of the Transactions, the Deceased was not living independently in his own home. He was terminally ill, in palliative care in hospital, and unable to effect any changes to his estate plan without assistance. He did not change the Will or his estate plan after any of his other significant health crises (including bypass surgery and a cancer diagnosis) when he could have done so independently.

- [74] Peter submits that a meticulous examination of the facts is required, citing Cowper-Smith at para. 40. He says the following considerations, referenced in Cowper-Smith at para. 51, are relevant to an assessment of the legal advice Mr. Bjurman provided to the Deceased donor:
- i. Whether the party benefiting from the transaction was also present at the time the advice was given and/or at the time the documents were executed;
 - ii. Whether, though technically acting for the grantor, the lawyer was engaged by and took instructions from the person alleged to be exercising the influence;
 - iii. In a situation where the proposed transaction involves the transfer of all or substantially all of a person's assets, whether the lawyer was aware of that fact and discussed the financial implications with the grantor;
 - iv. Whether the lawyer enquired as to whether the donor discussed the proposed transaction with other family members who might otherwise have benefited if the transaction did not take place; and
 - v. Whether the solicitor discussed other options whereby the donor could achieve their objective with less risk to themselves.
- [75] The medical records in evidence are consistent with a man in declining health. Based on those records, and the observations of family members, it appears his mental state fluctuated in his final days. It is unclear on the evidence before me precisely what the Deceased was told before he signed the documentation necessary to give effect to the Transactions. It is also unclear precisely when, in relation to the Deceased's execution of the documents necessary to give effect to the Transactions, Dr. Burgmann assessed him on February 5, 2014. The defendants attribute the Deceased's transient confusion to infection (which they say improved with antibiotic treatment) rather than to any permanent dementia or cognitive decline. Peter says the records demonstrate a progressive deterioration in the Deceased's mental status in the days before his death.
- [76] There are material conflicts in the affidavit evidence regarding:
- a) Whether (based on the affidavits of Peter and his ex-wife, Teresa), Denise isolated the Deceased in hospital and prevented family members from visiting;
 - b) Whether Denise misled Peter and Teresa about the gravity of the Deceased's medical condition during his final hospitalisation and about the status of the administration of the Estate after his death; and
 - c) Whether (on Denise's evidence) Mr. Bjurman met the Deceased twice or only once (as Peter argues is suggested by his account, which references only one meeting).

[77] This evidence is relevant to an assessment of whether or not suspicious circumstances, giving rise to a presumption of undue influence, were present. I am unable to resolve these evidentiary conflicts or, by extension, to find the facts necessary to decide this issue by summary trial.

D. Unjust Enrichment

[78] The test to establish an equitable claim in unjust enrichment is threefold. The plaintiff must prove that: 1) the defendant received a benefit; 2) the plaintiff suffered a corresponding deprivation; and 3) there is an absence of juristic reason for the defendant to retain the benefit: *Moore v. Sweet*, 2018 SCC 52 at para. 37. A constructive trust may be imposed where good conscience so requires when there is unconscionable unjust enrichment: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at paras. 34 and 43.

[79] The elements of an unjust enrichment claim require that the enrichment or benefit and the corresponding deprivation or detriment must have occurred without a juristic reason: *Kerr* at para. 13. The defendants submit that a gift constitutes a juristic reason.

[80] In my view, examining whether or not the Deceased intended the Transactions to be gifts requires an assessment of credibility and reliability at a conventional trial.

E. Conclusion

[81] I have considered the factors set out in *Gichuru* in determining whether it is just to proceed by summary trial. There is no urgency in doing so: the parties have a scheduled mediation this month and a five-day trial in May 2022. A summary trial would not unduly delay the resolution of the matter. I agree the complexity of the issues in this case do not necessarily preclude a summary trial. I am not persuaded that summary disposition would result in litigation in slices.

[82] The defendants say that the relatively modest amount at stake in this litigation favours a summary trial. On their math, their entitlement to the Deceased's estate under the Will was \$354,333; based on the Transactions, it increased to \$429,500 (i.e., a difference of about \$75,000). By contrast, Peter submits that the difference between his inheritance under the Will (including a one-third share of the Residence, which sold for about \$850,000) and what he ultimately received (\$24,000) is substantial.

[83] While I agree that proportionality and the relatively modest amount at stake in this litigation are the factors weighing most heavily in favour of a summary trial, ultimately, I share the conclusion of *Skolrood J.* in *Cadwell Estate v. Martin*, 2020 BCSC 2091 at para. 62, that they are not sufficient to support judgment by way of summary trial here.

[84] I conclude that the evidentiary conflicts preclude me finding the facts necessary to decide this case on a summary trial. For the same reason, I conclude it would not be just to proceed by summary trial. I decline to decide this case based on presumptions; in my view, the interests of justice require a conventional trial, if the parties are unable to resolve this dispute at mediation.

VII. DISPOSITION

[85] The application is dismissed, with costs in the cause.

"Douglas J."

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