

CANADA / JUDGMENT

Levere v. Moore

2020 BCSC 1656

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1656 Levere v. Moore

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Levere v. Moore,

2020 BCSC 1656

Date: 20201105

Docket: 163311

Registry: Victoria

Between:

Mary Jill Levere and Leonard Arthur Levere

Petitioners

And

Tracey-Ann Moore Executor of the Estate of Barbara Moore

Respondent

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for the Petitioners:

J.C.M. Main

Counsel for the Respondent:

P. Harrison

Place and Date of Hearing:

Victoria, B.C.

September 28, 29 and

October 1, 2020

Place and Date of Judgment:

Victoria, B.C.

November 5, 2020

- [1] This proceeding relates to a family dispute over the sale proceeds of a condominium that was the residence of the deceased, Barbara Moore ("the deceased").
- [2] The petitioners are the daughter and son-in-law of the deceased. The petition was filed on August 5, 2016 while the deceased was still alive. However, she died on December 23, 2016 before it was heard. The condominium in question was purchased in 2007 as a home for the deceased, and registered as tenants in common in her name as to a 98% interest, with the petitioners each holding a one percent interest to facilitate its financing. At the time of the purchase, a second Form A transfer was prepared and executed by the deceased for the purpose of transferring the property to the petitioners. At issue are the terms on which that Form A transfer was provided to the petitioners.
- [3] The petition, when filed, sought these declarations and orders:
1. The Petitioners hold the subject Property in trust for themselves and the Respondent.
 2. A declaration that the terms of the trust are as follows:
 - (a) The Property shall be held in trust by the Petitioners until the Respondent vacates the Property or dies.
 - (b) The Respondent shall bear all costs to maintain the Property including strata fees, maintenance and repair costs, mortgage payments, Property taxes.
 3. An Order that the Respondent reimburse the Petitioners forthwith for the above costs which she has failed to pay or, in the alternative, an Order that the Petitioners be reimbursed for all such payments they have made upon sale of the Property.
 4. An Order that the Respondent promptly pay for all costs to maintain the Property until it is sold.
 5. A declaration that the Petitioners have a charge against the Property to the extent of all monies they have paid towards its purchase and maintenance and for all other costs and expenses they have incurred for the Property or for the benefit of the Respondent since purchase of the Property.

6. An Order that the proceeds of sale of the Property shall be distributed as follows:
 - (a) Payment of registered encumbrances;
 - (b) Payment to the Petitioners for all monies they have expended to purchase and maintain the Property and all costs and expenses they have incurred for the benefit of the Respondent since the purchase of the Property, plus interest incurred by the Petitioners.
7. An Order that the Petitioners may list the Property for sale and that the Respondent shall cooperate with the marketing of the Property.
8. In the alternative an Order that the Petitioners shall be at liberty to apply on seven days notice to the Respondent for an Order for sale of the Property upon breach of any term of the Order of this Court with service of that application to be effective upon delivery to the Property or upon personal service on the donee of her power of attorney, Tracey Moore.
9. Costs on a special cost basis.
- [4] The petitioners seek a portion of the relief sought in their petition filed August 5, 2016. Specifically, they claim the real property in issue was to be held by them in trust for the respondent only until her death. Two other applications are before the Court: one to amend the respondent's response and the other for document disclosure by the petitioners. Only the limited relief in the petition was heard, although the circumstances relevant to the two applications were addressed.

Background

- [5] The deceased was survived by her six children, one of whom is now deceased. The respondent, Tracey-Ann Moore, is co-executor along with her brother, Brent Moore, under their late mother's will. The estate has yet to be probated.
- [6] The petitioners provided the down payment (since repaid) on the condominium and the deceased was to pay the mortgage and strata expenses and reside in the condo.
- [7] It is not disputed that the petitioners proposed the purchase to provide a residence and security for their then 85-year-old mother and mother-in-law. None of the other siblings objected or were involved.
- [8] Although a purchase in joint tenancy had been originally planned, the property was registered in the above shares as tenants in common at the time of the purchase. The second Form A transferring the deceased's 98/100th share to the petitioners was purportedly to be only used upon her death. However, the petitioners transferred the property to themselves in 2011.

- [9] The petitioner, Ms. Levere, deposes their family has been "somewhat dysfunctional" and that, when the parties' father died, probate of his estate took nine years and required a court order to conclude its administration. As a result, she deposes that experience resulted in the arrangement made with her mother to avoid a repetition of the disputes over her father's estate. She explained she wished to be protected from any estate issues: "I will not and cannot leave it to chance. I've been there..."
- [10] In April 2017, the condo was sold. In an earlier application in this proceeding, MacKenzie J. on May 31, 2017 ordered, by consent, that \$65,976.40 (relating to the down payment) be paid to the petitioners from the sale proceeds of the condominium. The remainder of the sale proceeds of \$99,020.35 was placed in trust with counsel for the petitioners.

Issue

- [11] At issue is whether the petitioners have legal and equitable title to the property under the second transfer, or whether under an oral agreement with the deceased they held the property in trust for the her until she died, at which time they were to become the sole legal and beneficial owners.
- [12] The respondents dispute the relief sought and seek an order referring the proceeding to the trial list.

Law Respecting Petition Proceedings

- [13] The preliminary issue therefore is whether the petition is to be granted or converted to an action. Petition proceedings are governed by Rule 16-1 - Petitions. Rule 16-1(18) states:

Powers of court

- (18) Without limiting the court's right under Rule 22-1 (7) (d) to transfer the proceeding referred to in this rule to the trial list, the court may, whether or not on the application of a party, apply any other of these Supreme Court Civil Rules to a proceeding referred to in this rule.

- [14] Rule 22-1 - Chambers Proceedings provides:

- (1) In this rule, "chambers proceeding" includes the following:
- (a) a petition proceeding;

Power of the court

- (7) Without limiting subrule (4), on the hearing of a chambers proceeding, the court may
- (a) grant or refuse the relief claimed in whole or in part, or dispose of any question arising on the chambers proceeding,

- (b) adjourn the chambers proceeding from time to time, either to a particular date or generally, and when the chambers proceeding is adjourned generally a party of record may set it down on 3 days' notice for further hearing,
- (c) obtain the assistance of one or more experts, in which case Rule 11-5 applies, and
- (d) order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding.

[151] Counsel for the respondent relies on *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P. / Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247 [Saputo], where the Court of Appeal described the test for referring petition proceedings to the trial list:

43 This Court has long held that proceedings brought by petition should be referred to the trial list when there are disputes of fact or law, unless the party requesting the trial is bound to lose (Citation omitted).

44 In *Robertson*, the Court set out the test to determine whether a petition should be converted to a trial:

[55] On the hearing of a petition, a judge must be satisfied that there is no dispute as to the facts or law which raises a reasonable doubt or which suggests that there is a defence that deserves to be tried: *Douglas Lake Cattle Co. v. Smith* (1991), 54 B.C.L.R. (2d) 52 (C.A.) at 59. If such a dispute exists, the judge may refer the matter to the trial list, pursuant to R. 22-1(7) (former R. 52(11)(d)).

[56] The test is not that used to determine a summary trial. Rather it is akin to that on an application for summary judgment under R. 9-6. Mr. Justice Lambert summarized the task in *Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd.* (1984), 55 B.C.L.R. 137 (C.A.) at 138-39:

We were referred by counsel for T & A Holdings Ltd. to the judgment of Esson J. (as he then was) in *Progressive Const. Ltd. v. Newton*, 25 B.C.L.R. 330, [1981] 2 W.W.R. 741, 117 D.L.R. (3d) 591 (S.C.), and particularly at p. 334. There Esson J. summarizes, in my opinion, accurately, the law in relation to establishing a defence on an application for summary judgment in these words [pp. 334-35]:

The cases do not establish an invariable rule as to what steps must be taken to resist a R. 18 application for summary judgment. On all such applications the issue is whether, on the relevant facts and applicable law, there is a bona fide triable issue. The onus of establishing that there is not such an issue rests upon the applicant, and must be carried to the point of making it "manifestly clear", which I take to mean much the same as beyond a reasonable doubt. If the judge hearing the application is left in doubt as to whether there is a triable issue, the application should be dismissed.

In essence, if the defendant is bound to lose, the application should be granted, but if he is not bound to lose, then the application should be dismissed.

[Emphasis added.]

[16] In *Kerfoot v. Richter*, 2018 BCCA 238 at paras. 27-31, Fisher J. A., referring to the test for summary judgement in *Saputo*, held that a court is not limited to examining the pleadings. Rather, "a court can and usually does consider evidence." Citing *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500, and in doing so a judge must not weigh the evidence but is limited to assessing whether it establishes a triable issue:

[12] If sufficient material facts have been pleaded to support every element of a cause of action, but one or more of those pleaded material facts are contested, then the judge ruling on a Rule 18(6) application is not to weigh the evidence to determine the issue of fact for the purpose of the application. The judge's function is limited to a determination as to whether a bona fide triable issue arises on the material before the court in the context of the applicable law. If a judge ruling on a Rule 18(6) application must assess and weigh the evidence to arrive at a summary judgment, the "plain and obvious" or "beyond a doubt" test has not been met.

[17] The respondent also cites *Canada v. Lameman*, 2008 SCC 14, for the test for a summary judgment:

10 This appeal is from an application for summary judgment. The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

11 For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 27. The defendant must prove this; it cannot rely on mere allegations or the pleadings: *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.); *Tucson Properties Ltd. v. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (Q.B. (Master)), at pp. 46-47. If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal: *Murphy Oil Co. v. Predator Corp.*, (2004), 365 A.R. 326, 2004 ABQB 688, at p. 331, *aff'd* (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69. Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried: *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14, at para. 32. The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts: *Guarantee Co. of North America*, at

para. 30.

Position of the Petitioners

[18] The petitioners' primary position is that the State of Title showing them as the registered owners is sufficient to establish legal and beneficial ownership of the property as they were the owners at the time of the deceased's death. If that is not established, they submit they orally contracted with the deceased and that the contract is established by the evidence of the circumstances of the purchase and the intentions of the parties confirmed by the evidence of the notary who completed the purchase and prepared the second Form A transfer, allegedly on the instructions of the petitioners and the deceased.

Position of the Respondent

- [19] The respondent submits the evidence supporting the alleged contract is ambiguous, the transaction occurred without the deceased having the benefit of legal advice, she was vulnerable and she herself in responding to the petitioner's claims disputed the petitioners' assessment of events. The deceased also deposed that she was assured by the petitioners the second transfer would not be used until after her death. In addition, her actions after the second transfer was registered indicate she believed the condominium was to have remained hers, and that the second Form A transfer was to protect the petitioners' right to be reimbursed for condominium related expenses and avoid estate disputes.
- [20] The respondent submits the petition should be transferred to the trial list as bona fide triable issues exist. In the alternative, they submit it is not disputed that the evidence establishes this was a gratuitous transfer. Hence, a resulting trust arose and the presumption of resulting trust has not been rebutted.
- [21] During submissions, and related to the disclosure application, the issue of the deceased having received a substantial settlement of some \$286,000 in 2001 from her former spouse as well as ongoing support was noted. Yet, the funds do not appear to be part of the deceased's estate nor has the disposition of such funds between 2001 and 2007, when the condominium was purchased, been explained. In addition, it is alleged the deceased's jewellery is missing.

Analysis

[22] I turn first to the effect of registration of the second Form A transfer effecting the transfer of the deceased's 98% interest to the petitioners. Section 23(2) of the Land Title Act, R.S.B.C. 1996, c. 250 provides:

23(2) An indefeasible title, as long as it remains in force and uncanceled, 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,

- [23] The petitioners rely on this presumption that the property's registration in their names establishes their legal and beneficial ownership.
- [24] The statutory presumption created by s. 23(2) of the Land Title Act, that the person registered on title holds the estate in fee simple may be rebutted by:
- (i) the operation of a resulting trust which may be inferred where no value is given for a legal interest;
 - (ii) the operation of an agreement between the parties that is contrary to the registered legal title; or
 - (iii) taking into account the underlying equitable interests between the parties (e.g., considerations that arise in claims for unjust enrichment).

See *Suen v. Suen*, 2013 BCCA 313 at para. 34.

- [25] The Court must determine whether the petitioners are the beneficial owners of the condominium. This requires determination of the circumstances leading to the purchase, the circumstances respecting the deceased's apparent but disputed acquiescence or agreement and the circumstances relating to the purpose and terms of exercise of the second Form A transfer. That is, whether there was an oral agreement, its terms and their legal effect.
- [26] The evidence of the circumstances leading to the purchase of the condominium, the preparation and execution of the documents and the deceased's affidavit filed in response to the petition in 2016 are relied on by the petitioners.
- [27] The petitioner Ms. Levere states:
- 14. My mother and I spoke about the purchase and the financing of the purchase as arranged by my husband and me. We told her, and agreed, that she could reside in the Property as long as she wished. She agreed that she would make all of the mortgage payments and the strata fee payments. She said that she would pay us back for all of the monies we expended and might expend on the Property. I told her that she would not need to pay us back anything until the Property was sold and any money left would go to her.
 - 15. My husband and I agreed to purchase the Property on the above terms on condition that my mother sign a transfer of her interest in the Property to us which we would be at liberty to file whenever we chose. My husband and I stated to my mother that we would not and did not agree that her estate would have any control over repayment to us of all monies we invested in the Property.
 - 18. My husband and my mother and I spoke of our verbal agreement when we met with the notary public to sign the documents for the mortgage and purchase of the Property. I stated at that time that we wanted my mother to be on title so that she would have pride of ownership, that we hoped that the equity would build for her benefit and that we required

that our financial investment be protected and that there be protection from any estate issues. We emphasized that we needed this financial protection and needed and insisted that our investment and interest in the Property be kept separate from her estate. We said that the equity in the Property was hers. She agreed with all of this and was and is sophisticated partly as a result of the experience and training she had as a former realtor.

19. The Property was first registered in the names of the three of us, my mother as to a 98/100th interest, my husband and I 1/100th interest each.
20. My mother agreed to and did sign the transfer of title in accordance with this agreement on the 26th day of April, 2007. My husband and I agreed that we would refrain from filing the transfer if the three of us entered into a further agreement that protected our investment and protected us from any estate issues.

22 On a number of occasions since April, 2007, I tried to engage my mother in a discussion to settle the issues of concern to my husband and I as we had previously addressed (and as I have addressed above in this my affidavit). She declined to discuss the issue.

23. In March, 2011, I sent a letter to my mother addressing the issue and proposed written agreements in the alternative. I made these proposals as an alternative to filing the transfer she had signed in April, 2007. A copy of that letter is attached as Exhibit "C" hereto. The statements of fact I made therein are true and accurate.
24. My mother failed to respond to my letter and therefore on or about the 1st of June, 2011, my husband I filed the transfer from my mother to us

[28] The now deceased respondent states in her affidavit sworn September 15, 2016 in response to the petition:

3. I recall the meeting with the notary held in April 2007 when the condominium property where I currently reside which is the subject of this proceeding was being purchased (the "Property").
4. Initially I was to be the sole owner of the Property but I was told that to qualify for the mortgage the Petitioner would have to be on title to the property. As a result title was prepared and I was shown as a 98/100ths owner with the Petitioners each holding a 1/100ths interest in the property. Now shown to me and attached as Exhibit A hereto is a copy of the transfer filed when the property was purchased in 2007.
5. At the meeting with the notary, Katherine A. McVie, I was presented with a Form A - Freehold transferring my interest in the Property as Joint Tenants.
6. There was to my recollection no prior discussion about this transfer to the Petitioners.
7. I was not given an opportunity to obtain independent legal advice and in fact did not obtain independent legal advice and was no advised by the notary that I should do so. I felt pressure to sign the transfer because of the circumstances I was in.

8. I was assured by the Petitioners that the transfer would not be used until I died and only then to protect them against disputes relating to my estate and to ensure they could recover their deposit.
 9. Now shown to me and attached as Exhibit B to this my affidavit is a copy of the transfer filed in June 2011. The transfer was filed without my knowledge or agreement.
 10. Now shown to me and attached as Exhibit C to this my affidavit is a true copy of a letter from me to my daughter, Jill, one of the Petitioners, wherein I requested that I be able to access the equity in the Property for my continuing expenses.
 11. By a letter dated December 4, 2015 a true copy of which is shown to me and attached as Exhibit D to this my affidavit from the Petitioners to me threatening to sell the Property and telling me to find alternate accommodations.
 12. By an email dated December 8, 2015 a true copy of which is shown to me and attached as Exhibit E to this my affidavit my daughter Tracy, responded to my daughter Jill, one of the Petitioners.
 13. I am old and frail and my health cannot stand the stress of these proceedings but the facts in the Petition are not accurate.
- [29] The notary public who prepared the documents and acted on the purchase was chosen by the petitioners. She deposes:
1. I practiced as a Notary Public and on that note have personal knowledge of the facts and matters hereinafter referred to save and except where stated to be made upon information and belief and where so stated I verily believe the same to be true.
 2. I acted for Jill and Len Levere for many years.
 3. In April 2007, I handled a purchase for the Leveres and Jill's mother, Barbara Moore.
 4. Prior to my first meeting with them about the purchase I received a telephone call from Jill Levere who told me that she wanted to help her mother purchase a condominium and that she had spoken to her mother's lawyer, Jill Turner, who recommended that they purchase the condo in joint tenancy. I recommended that to her as well. Jill Levere told me that she and her husband were providing all of the monies required for the down payment.
 5. I met with the Leveres and Barbara Moore on April 26, 2007. By this time the transfer documents had been prepared for the three of them to purchase as joint tenants. However, during this meeting, Jill told me that she would really like her mother to enjoy a sense of ownership so could we draw up something different than joint tenancy but so that we would end up in the same position. We also found out that Mrs. Moore was a first-time home owner so she would qualify for the exemption.

6. I should state that I recall this meeting and what we discussed quite well. Mrs. Moore participated in the discussions. She appeared to me to be very sharp mentally, relaxed, pleased with the discussion and the plans, understood them, and completely in agreement. At no time did she raise any concerns nor did I sense that she had any. I engaged her in conversation, asked her questions, she responded appropriately and no one tried to persuade her of anything. I even recall where she was sitting, which was to the left of Len Levere with Jill Levere sitting to his right. I even recall the coat that Mrs. Moore was wearing.
7. Mrs. Moore told me that she wanted Jill and Len to be protected and said that the property must go to them, meaning on her death.
8. During the meeting, I spoke with the lender, National trust, who stated that the required that Jill and Len remain on title given that they were mortgagees.
9. Given the agreement of the three of them I prepared a Form A transfer from the three of them to Jill and Len. Mrs. Moore signed that and by agreement of the three of them I held it in my file.
10. The agreement and intention of the three of them as expressed to me was that Jill and Len wanted her mother to have a home, that they would provide the down payment - which was over \$60,000 - and the property would revert to Jill and Len on the death of her mother. They did not speak of nor did they say that they intended this to be a loan at all. Furthermore, if they had spoken of the loan I would have insisted that a promissory note and probably a second mortgage be prepared to secure that note. I and we did not do that. If there was ever a reference to a loan it was the loan being taken out by Jill and Len Levere to fund the purchase.
11. Attached as Exhibit "A" hereto is a copy of my file notes of April 21 and April 26, 2007, my letter to the solicitor for the vendor or the original Form A showing the three as joint tenants, the Form A that I amended in handwriting to accord with the agreement that Jill and Len own an undivided 1/100 interest each and Barbara Moore 9 8/100ths interest.
15. I have reviewed the said affidavit of Barbara Moore and the Statutory Declaration dated July 7th, 2016 and filed on May 18, 2017. My comments follow:
 - (a) at no time was I told by any of the three that Mrs. Moore was to be the sole beneficial owner of the property. As I've said my initial instructions where that it was to be in joint tenancy. Sole ownership was considered at the request of Jill not Mrs. Moore but on the basis, as the three of them agreed, that the property would revert to Jill and Len upon death of Mrs. Moore.
 - (b) we did discuss the Form A Transfer of the property from the three to just Jill and Len prior to Barbara Moore signing it and she agreed to sign it and, indeed, it conformed to Barbara Moore's statement to me that the property shall revert to Jill and Len.

- (c) under the circumstances, I have referred to including the fact that the three of them were clearly in agreement I did not recommend that Mrs. Moore obtain independent legal advice. As I've said above, I understood that counsel for Mrs. Moore had recommended joint tenancy in any event.
 - (d) paragraph 8 of Mrs. Moore's affidavit is consistent with what she told me in its effect, that is that the property would revert to Jill and Len upon her death.
 - (e) No pressure was put on Mrs. Moore in my presence or that I was aware of to sign the transfer nor did she express any concern about the transfer other than the concern that she and we ensure that the property would end up being owned by Jill and Len.
16. Attached as Exhibit "E" hereto is an email I sent to Amber Rooke of the Society of Notaries Public in response to her email that I ask questions about this transaction. As can be seen in that email, I stated that Mrs. Moore was to be the sole registered owner on title. I refer to what I have said above: I was told the Property was initially to be in joint tenancy and at no time was I told that Mrs. Moore was to be the sole beneficial owner.
17. I also stated in the said email Exhibit "E" that the Leveres were prepared to "lend" Mrs. Moore the down payment monies. As I have said above, this was not a loan and not a gift, it was more in the form of an investment or a co-ownership. It was not accurate for me to the use the word "lend".

[30] I turn to the alleged agreement. In *Suen*, the Court of Appeal addressed the law relating to contracts and real property:

1. An agreement in contract

40 A contract is promissory in nature, that is, it is an undertaking by the promisor to do something for the promisee in exchange for something. The exchange of promises is enforceable only if there is an agreement or consensus on the "existence, nature and scope of their [respective] rights and duties" (G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Ontario: Carswell, 2011) at 6).

41 Professor Fridman discusses the development of the doctrine of consideration, or the concept of a bargain, as an essential feature of the common law of contract at 8:

... what is an essential ingredient of a valid, enforceable, legally acceptable contract, is an agreement that can be called "serious," that is, made with the kind of serious, binding intent that demarcates the casual promise, undeserving of legal recognition, from a promise which should be effective in law and should be obligatory on the future action, as well as the conscience of the promisor.

42 The common law of contract is distinguishable from equitable or promissory estoppel where, absent consideration, reliance on a promise that is not fulfilled and gives rise to injury or damage, may be actionable. Consequently, if a promise is supported only by "moral consideration", it is generally not enforceable at common law:

The idea that moral justification could be the basis of a contract, for example, where a promise was made because of the familial relation of the parties, or out of "natural love and affection," has long since been rejected by the common law (Fridman at 9).

43 Communications in the family context are often no more than statements of intent or wishes. For a promise, in that context, to rise to the level of a binding enforceable contract there must be strict proof of the terms of the bargain including: the parties, the property, and the consideration. See *McKenzie v. Walsh* (1920), 61 S.C.R. 312, and *Ross v. Ross*, [1958] O.R. 49, 11 D.L.R. (2d) 561 (O.N.C.A.).

44 Agreements involving real property are also subject to s. 59(3) of the Law and Equity Act, R.S.B.C. 1996, c. 253. That section provides, in part, that:

A contract respecting land or a disposition of land is not enforceable unless

(a) there is, in a writing signed by the party to be charged ... both an indication that it has been made and a reasonable indication of the subject matter ...

[31] I appreciate that the desirability of avoiding unnecessary cost and delay as set out in Rule 1-3(1) and (2) is a significant concern as the available assets of the estate are not substantial and further litigation will likely result in legal fees and costs consuming the bulk of the estate. However, proportionality does not override the rules of court generally, nor just disposition of the issues on the merits.

[32] The petitioners submit this is a case regarding an agreement, not a resulting trust. However, it is unclear what the agreement was. For example, even the evidence of the petitioners speaks about regaining their investment in the property and the transfer to them to avoid estate litigation but fails to establish what disposition of equity in the property was agreed to. The affidavit of the notary, when read in context of her letter to the Society of Notaries and the affidavit of the deceased, does not resolve the issue in dispute. This is aside from the issue of enforceability of an agreement regarding land not in writing, although the petitioners submit s. 59 of the Law and Equity Act does not apply as the interest created was a life estate.

[33] The petitioner also submits that, since there is no application before the Court to convert the petition to a trial, the Court cannot do so. As noted above, Rule 16-1(7)(d) provides that the court may:

order a trial of the chambers proceeding, either generally or on an issue, and order pleadings to be filed and, in that event, give directions for the conduct of the trial and of pre-trial proceedings and for the disposition of the chambers proceeding.

[34] An application to do so is not required. (See *Sherar v. Samom's Poultry Farm (1973) Ltd.*, [1979] B.C.J. No. 927).

[35] For the above reasons, it is not "manifestly clear" that there is no bona fide triable issue. The Court must engage in a weighing of the evidence in determining the terms of the agreement at issue. As such, I am satisfied that this petition be converted to an action and so order.

[36] The petition is to be transferred to the trial list. In addition, new pleadings are to be filed as the state of the petition and the reply do not sufficiently fulfill the requirements of civil pleadings where a trial is contemplated. The matter should proceed through the trial process as contemplated by the Supreme Court Civil Rules.

Costs

[37] The parties wish to make submissions on costs. They may do so in writing within 30 days of these reasons.

"The Honourable Mr. Justice Punnett"

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