

CANADA / JUDGMENT

McKersie v. Macala

2021 BCSC 2455

COURT

Supreme Court of British Columbia

DECIDED

17 December 2021

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2021 BCSC 2455 McKersie v. Macala

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McKersie v. Macala,

2021 BCSC 2455

Date: 20211217

Docket: 21482

Registry: Cranbrook

Between:

Walter Gavin McKersie and Betty Inga McKersie

Plaintiffs

And

Anthony John Macala, Valerie Evelyn Macala, Dennis Arnold Bond,

Vivian Leila Bond

Defendants

Corrected Judgment: The text of the judgment was corrected on the cover page on January 6, 2022.

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Counsel for the Plaintiffs:

B. Fairley

Counsel for the Defendants, Anthony Macala, Valerie Macala, Dennis Bond and Vivian Bond:

J. Young

Place and Dates of Trial:

Cranbrook, B.C.

June 8-11 & 14-18, 2021

Place and Date of Judgment:

Cranbrook, B.C.

December 17, 2021

Introduction

- [1] Walter McKersie is the father of the defendants Valerie Macala and Vivian Bond. His wife Betty, their mother, died in January 2018. They had four children in four years between 1958 and 1961. The children are, in birth order, Brian, Valerie, Vivian and David.
- [2] In 1964 Betty and Walter purchased six properties near Canal Flats, adjacent to Lake Columbia, one of which was Lot 287. Betty and Walter built a home on Lot 663 where the family resided.
- [3] Walter operated a ranch on five of the properties, excluding Lot 287, and did some farming. The entire family participated in chores associated with the ranch, farm and family home. Betty also worked as a school teacher in Canal Flats.
- [4] By the mid- to late-80s all of the four children and their spouses had settled on the properties. Brian and David and their spouses built houses on Lot 663. Valerie and her husband Tony Macala and Vivian and her husband Dennis Bond built their homes on Lot 287. The entire family resided on the properties along with Betty and Walter. Walter said that was what they wanted: all of their children and grandchildren would live on the ranch.
- [5] In 1991 Betty and Walter decided to gift their children properties upon which their homes were built.
- [6] The gift of property to the daughters and their husbands is not in dispute, it is the size of the gift that is disputed.

Background

Lot 287

- [7] Lot 287 is legally described as:

PID 010-798-510 DISTRICT LOT 287 EXCEPT (1) PART INCLUDED IN RW PLAN 1203 (2) PARCEL A (SEE 1438161) AND (3) PARTS

INCLUDED IN PLANS 5053 AND 5530

- [8] Lot 287 is approximately 240 acres in total. It consists of forests, lands, hay fields, a gravel pit and two developed areas where the Macalas and the Bonds built and resided in their two homes since the late-1980s.
- [9] Each of Vivian Bond, Dennis Bond, Valerie Macala and Tony Macala, along with their brother David McKersie and his wife Dawn McKersie, and a family friend, Leo Vergnano testified that Betty and Walter repeatedly expressed an intention to give a gift of Lot 287 to the "girls" (Valerie and Vivian) for many years before 1991. They also expressed the intention to gift the other five lots, along with the ranch assets, to the "boys" (Brian and David).
- [10] The Macalas and the Bonds began construction on their homes on Lot 287 in the mid-1980's, in reliance on the promise of the gift from Betty and Walter. Walter denies this; he said there were no promises and that they did not start building their homes until after 1991.
- [11] Lot 287 has not been an integral part of the ranch. Its use was limited to haying and alfalfa and some Christmas tree harvesting. It was used for non-ranching purposes such as sand extraction and an airstrip.
- [12] In 1991, Lot 287 was transferred from the sole ownership of Betty and Walter to 1/3 joint interest to each of the McKersies, Macalas, and Bonds as tenants in common.
- [13] The Form A freehold transfer document executed by Betty and Walter indicated that the consideration was \$115,333.34 (equal to the stated market value of the land). It was a gift. It is unexplained why the consideration is expressed on Form A.

Home Construction

- [14] In 1984, the Bonds obtained a building permit and began construction of their home on Lot 287. Vivian and Dennis Bond said that they constructed their residence there because Betty and Walter informed them that they should build their residence on Lot 287 as they intended to give Lot 287 to the Bonds and the Macalas. Vivian and Dennis Bond said that they relied on the promise that Betty and Walter had expressed that Lot 287 would be gifted to them and to the Macalas.
- [15] In 1985, Betty and Walter leased a ranch located near Canal Flats. It required a certain occupancy in order to maintain its farm status. Valerie and Tony Macala said that they relied on Betty and Walter's representations that they intended to give Lot 287 to the Macalas to share with the Bonds. The Macalas sold their home in Kimberley, BC and moved to the leased ranch in order to assist Betty and Walter with the occupancy requirements, and on the understanding that the Macalas would ultimately build a residence on Lot 287. Walter agreed in his examination for discovery that the Macalas residing on the leased ranch was to maintain its farm status. He agreed that he said that at discovery, but at trial he said that was not the truth; he got no help from them at all.

- [16] The Macalas began to work on their home, obtaining a building permit in 1988.
- [17] Valerie and Tony Macala said that they would not have moved to Lot 287 if Betty and Walter had not represented to them that it would be given to them and the Bonds to share. Tony Macala said that he and his wife did not need the financial assistance from Betty and Walter and had sufficient ability on their own to get their own home and support their own mortgage.
- [18] Over the years the Bonds and the Macalas made significant improvements to Lot 287 at their own expense. Betty and Walter were aware of this. The improvements included installing infrastructure and other services such as powerlines, sewer, water systems and access roads. The improvements were completed by the Macalas and the Bonds without financial assistance from Betty and Walter, except for the payment of the installation of two Hydro lines. This money was repaid to Betty and Walter.
- [19] The five other properties to the north of Lot 287 comprise approximately 1600 acres. Both Brian and David started building their homes on Lot 663 in the mid-1980s, before the property was transferred into their names.
- [20] Both the Macalas and the Bonds said that they offered to buy Lot 287 from Betty and Walter but the response was: why should they buy it when they are going to receive it for free. In his cross-examination, Walter denied that there were any offers by the defendants to buy Lot 287.
- [21] Walter said that he had discussions with Vivian and Valerie about gifting part of Lot 287 to them beginning in 1990-1991. He said he showed them the lots at that time but that they had not yet started building their homes, they were just bare pieces of land. Walter said that he spoke to a neighbour, Hap Richardson, who was interested in surveying, about it and Walter asked him to draw up a sketch and a plan.
- [22] Walter said that he and Betty owned Lot 287 and it was their property to do with what they wanted. He asserts that the Macalas and the Bonds knew what Betty and Walter had in mind. As noted, Walter said that there was never any discussion of the "girls" having the whole Lot 287.
- [23] Hap Richardson prepared a sketch which contained two rectangles placed on Lot 287 connected by a line to the road. He also prepared a "plan" that set out two rectangles, one labelled 6.9 acres and the other 7.0 acres. Walter identified each rectangle as the property that he intended to gift to each of his daughters and their husbands.
- [24] None of Valerie, Tony, Vivian or Dennis had seen the sketch or the plan until this litigation commenced.

- [25] The Richardson plan was submitted by Betty and Walter in their application dated August 27, 1990, seeking to subdivide Lot 287 under s. 12(1) or s. 21 of the Agricultural Land Commission Act, S.B.C. 2002, c. 36. The Regional District of East Kootenay (Regional District) recommended approval of the application in November of 1990. The Bonds and the Macalas were not aware of the application or of the recommendation of the Regional District.

Property Transfers

- [26] In 1991 Betty and Walter took steps to formally transfer the five ranch properties to Brian and David and to proceed with transferring Lot 287 to Vivian, Valerie and their husbands.
- [27] Before the property was transferred, the Macalas and the Bonds sought mortgage financing to be secured by Lot 287. The financing was approved on the condition that the ownership interests of the Macalas and the Bonds in Lot 287 be formalized by Betty and Walter agreeing to the registration of Lot 287 in the names of the Macalas and the Bonds.
- [28] Vivian and Valerie and their husbands were expecting that Betty and Walter would transfer the entire of Lot 287 as a gift.
- [29] On June 14, 1991 Betty and Walter and the Macalas and the Bonds attended at the office of Sandra Smaill, a lawyer in Kimberley, BC, to affect the transfer.
- [30] The evidence concerning the meeting at Ms. Smaill's office differs significantly between Walter and that of the Macalas and the Bonds.
- [31] Walter said that he recalls a meeting where he and Betty signed the Form A. He said that in addition to himself and Betty, the Bonds, the Macalas and Sandra Smaill were present. Walter said that he and Betty intended to transfer the properties to the Macalas and the Bonds in accordance with the Richardson plan. Each couple would be registered as owning the 6-7 acre property that was specified on the Richardson plan, upon which their homes were located. Betty and Walter would retain the remaining property. He said the lawyer, Ms. Smaill, said that the only way financing could be achieved would be if the property was transferred with 1/3 interests to the McKersies, 1/3 to the Macalas and 1/3 to the Bonds. Walter said that was not his or Betty's intention to transfer the whole of the property or even the 2/3 of the property to which the Form A refers. Walter said when the lawyer told him that, he was going to walk out of the meeting but had second thoughts because he was trying to help his daughters out financially.
- [32] Walter said he had never spoken to Ms. Smaill before this and never used her as a lawyer. He said that the completed Form A was presented to Betty and Walter and they signed it, but it did not reflect their true intention. Walter insisted that Ms. Smaill's clients were Valerie and Vivian and their husbands and that Valerie was either working for her or had worked for her as a legal secretary.

- [33] Walter said that Ms. Smaill did not suggest that he and Betty see another lawyer and they did not. In his cross-examination Walter said that Ms. Smaill had been instructed to transfer Lot 287 entirely to his two daughters and their husbands. At the last minute, the land transfer form was changed so Betty and Walter would retain 1/3 of Lot 287. Walter said that he signed it so the Macalas and the Bonds could get financing and that Vivian had come "crying to me saying that she had no collateral and had no money."
- [34] In his examination for discovery Walter said that he knew he was transferring 1/3 ownership to each of the Bonds and the Macalas. At the trial, Walter said that he never agreed to give them more than 2.5 ha. In his March 2011 affidavit, Walter said that he intended to transfer 2.5 ha or 10 acres to each of the Bonds and the Macalas. 2.5 ha is not 10 acres, it is slightly more than 6.
- [35] Vivian Bond said that she did not retain Ms. Smaill to do the transfers. She thought that Betty and Walter had.
- [36] Valerie and Vivian said that when they attended at Ms. Smaill's office after Walter and Betty had signed the Form A and left. They understood that the transfer was to be of the entire Lot 287. When they arrived at Ms. Smaill's office, Ms. Smaill said that at the last moment Walter changed his mind and insisted that he and Betty stay on title for 1/3. The Form A reflected that. They were shocked and surprised, but they all signed because it was a gift and if Betty and Walter chose to keep 1/3, that was their choice at the time.
- [37] Vivian said that she never met up with her father at Ms. Smaill's office or came to him crying at any time. She said that she took offence to that: she was a full-time nurse and she and Dennis had a business and he was logging. She never went crying to her father for money.
- [38] In July 1991 Betty and Walter transferred the remaining five lots comprising the ranch to their sons Brian and David and their wives. Brian and David took on the ranch operation. By virtue of the transfer they acquired the ranch debt of approximately \$550,000, but this included the mortgages on their own homes, cattle, equipment, participation with Walter in the sand and gravel business (Thunder Hill Sand & Gravel) and other significant assets. With the transfer, they owned approximately 1600-1800 acres of land, plus three homes on Lot 663 (Walter and Betty's home, David and Dawn's home and Brian and Shelley's home).

Subdivision Activities Between December 1991 and July 1993

- [39] On December 5, 1991, Betty and Walter were advised by the BC Agricultural Land Commission ("ALC") that approval was granted to subdivide Lot 287 into 2 +/- 2.5 ha parcels and one +/- 95.2 ha parcel. The approval was granted provided that the subdivision was in substantial compliance with the plan that the ALC provided.
- [40] On October 1, 1991 a representative of the ALC met with a Betty McKersie on Lot 287. In October 1991, Betty and Walter attended a public meeting of the ALC to support their application.

- [41] In 1992, Walter and Betty applied to the Regional District for rezoning of Lot 287 to accommodate the new subdivision parcels. The request was adopted by the Regional District in August 1992 and the zoning was changed.
- [42] In April 1993 the Ministry of Transportation and Highways was advised of Betty and Walter's application to subdivide Lot 287. On July 19, 1993 Betty and Walter were advised by letter that the Ministry of Transportation and Highways did not approve the proposal for a two-part plus remainder lot subdivision because it did not offer access to each new parcel created by a public road "pursuant to section 75(1)(a) of the Land Title Act." The letter continued:

The following conditions would be required to provide the necessary public access:

1. Dedicate a public road 20 meters wide or 30 meters beyond cut and fill slopes, whichever is greater from number 93/95 Kootenay Columbia highway to the proposed lots. Dedication is to include a 30 m x 30 m turnaround at the end of the road.
 2. Construct the public road in the centre of the dedicated right-of-way to the Ministry of Transportation and Highways standards
- [43] Betty and Walter did not have the funds to build the public access road or to comply with the upgrade requirements. As a result Betty and Walter did not pursue the subdivision.
- [44] Neither the Macalas or the Bonds were aware of Betty and Walter's activity or applications in regard subdividing Lot 287 either before or after the transfer in June 1991. They were not aware of the approval by the Regional District or of the non-approval by the Ministry of Transportation and Highways or the conditions that that Ministry imposed upon Betty and Walter to complete the subdivision.
- [45] Betty and Walter did not advise the Bonds or the Macalas of their activities or the results of their applications. Walter said that "there was nothing to discuss about subdivision of 2 hectares. I wanted their name off the title because it belonged to us."
- [46] It is undisputed that this information was not provided to the Macalas or the Bonds by anyone including by Betty and Walter. It was never discussed with the Macalas or the Bonds. None of the documents that have been entered as exhibits related to Betty and Walter's subdivision activities and applications demonstrate that the Macalas or the Bonds were advised or copied.

Use of Lot 287

- [47] Betty and Walter used the eastern portion of Lot 287 by Walter's use of the airstrip (but only until about 2005), use of the sand pit and use of the hayfield. The western 1/3 of the property has not been used by the Macalas or the Bonds, as they considered it their parents' portion.

- [48] The Macalas and the Bonds have lived on Lot 287 for over 30 years, occupying the eastern portion of Lot 287 (roughly 2/3 of the property). The Macalas and the Bonds have each made improvements and have each used the majority of Lot 287 for their own purposes since at least in 1984. They have each built homes on Lot 287 and have installed and developed lawns, driveways, camping and recreational areas, gardens, storage buildings, storage areas, horse stables, outbuildings, and riding fields on significant portions of Lot 287.
- [49] The Macalas and the Bonds paid all of the property taxes for Lot 287 from 1991 to approximately 2011. At that time, Vivian asked Betty for some compensation for the fact that Thunder Hill Sand & Gravel was taking materials off their property but they were receiving no compensation for it. David's wife, Dawn McKersie was involved with this and with Betty's approval made a payment for the removal of sand that year. Dawn McKersie discussed the payment with Betty and a cheque was provided. That payment occurred on only one occasion. As well, Betty agreed to pay some portion of property taxes due to the use of sand and gravel by Thunder Hill Sand & Gravel. Payment of approximately \$200-\$300 of the property taxes was paid by Betty with her personal cheques as minimal compensation for the materials that were removed by Thunder Hill Sand & Gravel. Walter said that he was not aware and did not agree to those payments.
- [50] Betty and Walter started contributing to the payment of taxes on Lot 287 after the litigation began in 2011. The documentary evidence shows they paid an arbitrary amount that was not related to the amount of taxes owing. The Macalas and the Bonds continue to pay the entirety of the tax bill to this day.

Reinvigoration of the Attempt to Subdivide Lot 287

- [51] Around March 2007 Betty and Walter sought authorization from the Macalas and the Bonds to act as their agents to apply for the subdivision. The Macalas and the Bonds said that this was the first that they learned of Betty and Walter's attempts to subdivide the property into small lots. They declined the request and the matter was not raised again for nearly two years.
- [52] On December 25, 2008, Walter presented Valerie with a lawyer's letter. He delivered the letter to Vivian a short time later. The letter set out Betty and Walter's instructions to proceed with subdividing Lot 287 and transferring the titles of the two 2.5 ha parcels to each of the Macalas and the Bonds. The letter sought the signatures of Valerie, Tony, Vivian and Dennis, authorizing Betty and Walter's lawyer to proceed with the subdivision application and the transfers. The Macalas and the Bonds refused to sign the letter.
- [53] In March 2009, Vivian and Valerie confronted Walter and Betty about their reneging on the gift of property that they had made 17 years before. Walter became extremely angry and abusive. Betty begged him not to "take her girls away from her".

- [54] Until the presentation of the lawyer's letter, Betty and Walter did not express any intention to the Macalas or the Bonds (or anyone else) that the gift of the 1/3 interests in Lot 287 was not intended to be permanent.
- [55] Valerie and Vivian described the effect of Walter and Betty's actions in 2008 and 2009 insisting that they agree to the proposed subdivision. It destroyed the once-close family. Valerie did not engage with her father or mother again. Vivian does not have a relationship with Walter. She tried to maintain some relationship with her mother, but saw her only infrequently and only when Walter was not present.

Litigation

- [56] Betty and Walter commenced this litigation in 2011 by petition. It was heard and determined by Justice Harvey in a summary trial. That decision was overturned by the Court of Appeal in 2014, and converted into a trial.
- [57] In 2014, Ms. Smail advised the litigants that she did not retain her file materials in respect of the transfer of Lot 287 in June 1991, nor did she recall any of the events in issue.
- [58] Betty was declared incapable of managing her affairs on December 2016. Brian was appointed as her litigation guardian.
- [59] Two trials scheduled for 2017 did not proceed.

Legal Framework

Gifts from Parents to Children

- [60] In *Pecore v. Pecore*, 2007 SCC 17 the Court considered the presumption of advancement in the context of a gratuitous transfer from a parent to an adult child. In that case, an ageing father gratuitously placed his mutual funds, bank account and income trusts in joint accounts with his daughter, who was one of his adult children. The father alone deposited funds into the accounts. Upon his death, a balance remained in the accounts. The daughter took legal title of the balance in the accounts through the right of survivorship. Her siblings asserted that their father made the gift intending that she would hold the assets in the accounts in trust for the benefit of his estate to be distributed according to his will.
- [61] The question before the Court was whether the father intended to make a gift of the beneficial interest in the account upon his death to his daughter alone or whether he intended that his daughter hold the assets in the accounts in trust for the benefit of the estate. The Court found that the father intended to make a gift of the beneficial interest in the account upon his death to his daughter alone.
- [62] The dispute engaged the concepts of the presumptions of resulting trust and the presumption of advancement as discussed in paras. 20-21, 24, 27:

20. A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner [citations omitted]. para.
21. Advancement is a gift during the transferor's lifetime to a transferee who, by marriage or parent-child relationship, is financially dependent on the transferor [citations omitted]. para.
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 [citations omitted] This is so because equity presumes bargains, not gifts. para.
27. The presumption of resulting trust is the general rule for gratuitous transfers. However, depending on the nature of the relationship between the transferor and transferee, the presumption of a resulting trust will not arise and there will be a presumption of advancement instead [citation omitted]. If the presumption of advancement applies, it will fall on the party challenging the transfer to rebut the presumption of a gift. para.
- [63] As a result of *Pecore*, there is no presumption of advancement where the gift is from a parent to an independent adult child.
- [64] A gift is a gratuitous transfer made without consideration. Two requirements must be met for an inter vivos gift to be legally binding: the donor must have intended to make a gift and must have delivered the subject matter to the donee. The intention of the donor at the time of the transfer is the governing consideration. In addition, the donor must have done everything necessary, according to the nature of the property, to transfer it to the donee and render the settlement legally binding on him or her: *McKendry v. McKendry*, 2017 BCCA 48 at para. 31; *Pecore* at para. 5).
- [65] The evidence of intent "must be relevant to the intention of the transferor at the time of the transfer" (*Pecore* at para. 59). Evidence of intention arising subsequent to the transfer may be relevant to the intention of the transferor at the time of transfer, but "[t]he trial judge must assess the reliability of this evidence and determine what weight it should be given, guarding against evidence that is self-serving or that tends to reflect a change in intention" (*Pecore* at para. 59).
- [66] "Once a gift has been made of an interest in real property or any other type of property, the gift cannot be revoked - whether the transferee takes as a joint tenant or tenant in common": *Bergen v. Bergen*, 2013 BCCA 492 at para. 41.

Tenancy in Common

- [67] The State of Title Certificate for Lot 287 states that the land is owned by six people, each jointly holding their 1/3 interest as tenants in common. The transfer of 1/3 of the property to each of the Macalas and the Bonds was as tenants in common.
- [68] It appears from the cases provided by the parties that these types of transfers are typically done to create a joint tenancy. The principal characteristic of joint tenancy is the right of survivorship, i.e., when one joint tenant dies, his or her interest in the property is extinguished and passes to the surviving joint tenant(s): *Zeligs v. Janes*, 2016 BCCA 280 at para. 41).
- [69] Tenancy in common does not come with the right of survivorship (*Zeligs* at para. 42). The holder of an interest can dispose of his or her interest by sale or testamentary gift without the consent of his or her co-owners.
- [70] Section 11 of the Property Law Act, R.S.B.C. 1996, c. 377 creates the presumption that in the absence of evidence of a contrary intention, parties to a transfer of land are tenants in common who hold equal interests:
- (1) In this section, "transferred" includes a vesting by declaration of trust or order of court.
 - (2) If, by an instrument executed after April 20, 1891, land is transferred or devised in fee simple, charged, or contracted to be sold by a valid agreement for sale in which the vendor agrees to transfer the land to 2 or more persons, other than personal representatives or trustees, they are tenants in common unless a contrary intention appears in the instrument.
 - (3) If the interests of the tenants in common are not stated in the instrument, they are presumed to be equal.
- [71] The property in issue here is stated as being in 1/3 interests, not joint ownership of the whole of Lot 287, which makes it ownership in accordance with s. 11 as tenants in common. While each couple held their own interest jointly (thus with rights of survivorship within each couple), the 1/3 interest itself was not held jointly with the other owners. As such, each of the McKersies, Macalas and Bonds could have sold, encumbered or disposed of their interest in Lot 287 without the consent or knowledge of the other 1/3 owners.

Credibility

- [72] Both parties assert that the outcome of this dispute relies on the credibility of the witness. They refer to the decision of *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (BCCA) states at p. 357:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject [the witness's] story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short,

the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

- [73] I will first address Walter's credibility. While demeanour is not the sole factor, I must address it in Walter's case. In his examination in chief, Walter was fairly responsive. This is because his counsel led him through much of his evidence and reminded him to remain calm. His demeanor was entirely different in cross-examination. It can best be described as cantankerous. He changed his answers from those he gave in his examination in chief and in examination for discovery, and then denied that he had been asked the question or provided the answer recorded in the transcript. When confronted with the affidavits sworn by him and Betty, he called them forgeries. He went so far as to say that there was no transfer of any portion of Lot 287 to the Macalas or the Bonds at any time, moments after he agreed that the land was transferred. He denied that the transfer was signed before the ALC approved the subdivision, requiring that his counsel consent to the fact that that was incorrect: the transfer occurred before the ALC's approval of the subdivision.
- [74] At best, Walter was a poor historian. At worst he was prepared to say anything that he felt supported his position whether or not it was true. The fact that he was asked leading questions in his examination in chief weakens the weight of that evidence. Where Walter's evidence conflicts with the evidence of other witnesses in this case, I must prefer the evidence of the other witnesses.
- [75] In respect of those other witnesses, the Macalas and the Bonds, I find that their evidence was straight-forward and consistent. It was not shaken in cross-examination. It was consistent with the documentary evidence. It was consistent with the other evidence, with the exception of that given by Walter and Brian in their evidence at trial and Betty's affidavits sworn before her death.
- [76] Valerie and Vivian's descriptions of the effect of Walter and Betty's actions in 2008 and 2009 had on this once close-knit family were particularly poignant and entirely believable.
- [77] The evidence of the Macalas and the Bonds was consistent with evidence of their brother David and sister-in-law Dawn, as well as a family friend, Leo Vergnano, all of whom supported the evidence that Walter and Betty expressed their intention to give the ranch properties to their sons and Lot 287 to Vivian and Valerie many times and over many years. Mr. Vergnano said that an intention to give them only small lots of 2.5 ha each was inconsistent with their expressed intention.

- [78] Brian is the only child of Walter and Betty's that maintains a relationship with Walter. He maintained that he never heard that his mom and dad wanted to give the entirety of Lot 287 to his sisters. He is also a proponent of the subdivision plan and has been active in providing advice and information to his parents about ways to pursue it. He put them in touch with a planner and surveyor and the Ministry of Transportation and Highways. He is still in business with Walter through Thunder Hill Sand & Gravel.
- [79] Leo Vergnano said that in April 2021, Brian contacted him by telephone. Mr. Vergnano did not know that he would be a witness at this trial at the time. He said that Brian asked him not to get involved in the litigation. Brian suggested in cross-examination that Mr. Vergnano had actually called him to give him the "heads up" that he was testifying. Brian agreed that he might have told Mr. Vergnano that it was a "line in that sand", although he did not suggest that they could not be friends anymore.
- [80] I do not believe Brian's evidence regarding his contact with Mr. Vergnano. It is more likely that he called Mr. Vergnano, because Mr. Vergnano did not know that he would be a witness at the time. Not only did Brian take it upon himself to contact one of the defence witnesses before the trial to dissuade him from getting involved, his evidence that he might have expressed that this is a line in the sand is completely inconsistent with his assertion that he did not mean to suggest that their friendship was over.
- [81] I am circumspect about Brian's evidence. He is not simply aligned with Walter. He interfered with one of the defence witnesses and was untruthful about that. As a result, where Brian's evidence conflicts with the evidence of witnesses other than Walter, I must prefer the other witnesses' evidence.
- [82] Finally, I must address the evidence contained in Betty's affidavits. The defence objected to their admissibility at trial because they had not cross-examined Betty before her death. I found that they had an opportunity to cross-examine her, before she was declared incompetent in December 2016. I admitted Betty's affidavits in accordance with the principled exception to the admission of hearsay based upon necessity and reliability. However, I stated clearly that they only passed the threshold reliability aspect of that test. The defendants continued to have the opportunity to demonstrate that the affidavits did not reflect Betty's true intention at the time of the transfer. I would determine the substantive reliability of the affidavits after the trial was concluded.
- [83] The essence of Betty's affidavit evidence is that when she transferred an interest in Lot 287 to her daughters and their husbands, she intended that they receive parcels as shown on Hap Richardson's sketch plan, regardless of the size of the parcels. She, like Walter, asserts that there was no discussion of transferring the whole of Lot 287 to her daughter and their husbands. She gave some evidence of her involvement with the ALC and the subdivision.

- [84] There was significant evidence at the trial about Betty and Walter's relationship and his influence upon her as well as the state of her cognitive abilities at the time she swore the affidavits. It is clear from the evidence, with the exception of that of Walter and Brian, as well as Walter's demeanor, that he was the person in charge in that relationship, including if it meant alienating Betty from her daughters.
- [85] I do not accept the substantive reliability of the affidavits because they simply raise more questions than they answer. Why is her evidence about the promises that she made to her daughters about transferring the entire Lot 287 to her daughters and their husbands inconsistent with the evidence of her daughters, son David and friend Mr. Vergnano? Did she discuss the Hap Richardson sketch plan or the subdivision plans with her daughters before or after the transfer, and if not, why not? Did she tell her daughters of her intention to transfer only the parcels shown on the Richardson sketch plan and if not, why not? If that was her intention, why did she transfer 1/3 interests in Lot 287 to each of her daughters and their husbands in June 1991? What happened in Ms. Smaill's office and why is it not referred to in her affidavits? Was she prepared to forego her relationship with her daughters to pursue the subdivision plan, and if so, why?

Analysis

- [86] I have carefully considered the evidence and submissions provided. I accept the evidence of the defendants and their witnesses in preference to that of Walter and Brian.
- [87] Betty and Walter wished their children and grandchildren to reside on the properties. In furtherance of that wish, they promised their children that they would gift the properties to them: the five properties constituting the ranch, as well as the business of the ranch would be gifted equally to Brian and David and Lot 287 would be gifted equally to Valerie and Vivian. This was discussed among the family and with others on many occasions over many years.
- [88] Relying on that promise, the Macalas and the Bonds constructed their houses on Lot 287 beginning in the mid-1980's and lived on the property.
- [89] In 1990, unbeknownst to the Macalas or the Bonds, Betty and Walter asked Hap Richardson to draw up a plan and used the Richardson plan as a basis to seek subdivision of Lot 287 and create two lots of approximately 7 acres each. The ALC approved the subdivision in August 1990.
- [90] Betty and Walter took steps to formally transfer the properties to their children in June 1991. They attended to Ms. Smaill's office to sign the Form A transfer. The Macalas and the Bonds were not in attendance. While they had promised to transfer the entire Lot 287 to the Macalas and the Bonds, they did not; instead they transferred 1/3 of the property to the Macalas and 1/3 to the Bonds and retained the other 1/3 for themselves.

- [91] The obvious question to Walter is: why did you transfer 1/3 of the property to each of Macalas and the Bonds, approximately 80 acres each, when you say you intended to only transfer what is shown on the Richardson plan, approximately 2.5 ha? In response, Walter asserts that Ms. Smaill told him it was the only way it could be done and, facing Vivian's tears, he followed her advice.
- [92] Walter's counsel argues that Ms. Smaill acted for the Macalas and the Bonds. She was instructed by Valerie and/or Vivian. She did not tell Walter and Betty to seek independent legal advice. She was acting against Walter and Betty's interests and was an incompetent solicitor.
- [93] There is no evidence to support this but Walter's, and I do not believe him. He is wrong or lying about who was in attendance and embellished that lie with one that offends his daughter, Vivian. Vivian was not there and did not cry or ask him for money.
- [94] Walter did not mention that he was forced into signing the transfer against his wishes by Ms. Smaill until after he learned that Ms. Smaill did not have a file and did not recall the events. Betty's affidavits make no mention of this. The reason that they do not is because it is not true.
- [95] While Walter maintains that his portion of Lot 287 was the last piece of property that he could retain, it was not. He had not transferred the properties to his sons at the time and owned all five properties and the other ranch assets. He willingly transferred Lot 663, upon which his and Betty's home was located, to his sons in July 1991. He did not express any concern about that.
- [96] If one applies the test in *Faryna* to this: "its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions", there is only one finding available. It is not the concocted story of a lawyer acting against her professional responsibilities. It is that Ms. Smaill drew the Form A in accordance with Walter and Betty's instructions and it reflected their intentions at the time of transfer. It was not what they had promised to their daughters, but it is what they intended to do at the time of the transfer.
- [97] The transferred interests were as tenants in common as opposed to joint ownership. It meant that the 1/3 interests of Valerie and Tony or Vivian and Dennis could be alienated/sold to third parties without the consent or knowledge of Walter and Betty. This is consistent with the intention that it be a complete gift, not a trust interest.
- [98] In 1992, after the property was transferred to the Macalas and the Bonds, Walter and Betty decided to pursue the subdivision plan, again without the knowledge of the Macalas or the Bonds. They did not tell the Macalas or the Bonds of their plan or what they were doing to pursue them. Without the permission or authority of the Macalas and the Bonds, they proceeded to get rezoning approval by the Regional District. They pursued the matter with the Ministry of Transportation and Highways. They stopped when that Ministry insisted on a

public access road being built to the two properties shown on the Richardson plan.

- [99] This "after the transfer" conduct does not show that this was their intention at the time of the transfer. Rather, it shows that Betty and Walter changed their minds. This is supported by various facts. The evidence of the Macalas and the Bonds is that they did not know of the subdivision plans or activities. Walter said he did not discuss it with them because it was his property and there was nothing to discuss. I find that they did not discuss the subdivision plans with the Macalas and the Bonds because they did not want them to know that they had changed their minds and wanted to revoke the gift that they made in transferring the 1/3 interests to each of the Macalas and the Bonds.
- [100] Walter's counsel makes that argument that the Macalas and the Bonds must have known. He asserts that the documents show that they received copies of the correspondence with the government authorities about the subdivision. He also asserts that Walter was acting as their agent in matters related to the subdivision.
- [101] These assertions are contrary to the evidence. The Macalas and the Bonds gave direct evidence that they were not aware of the subdivision activities. Walter did not discuss it with them. There is no evidence that Betty did. The documents that Walter relies upon were provided pursuant to a Freedom of Information request and are redacted. Valerie or Tony Macala's or Vivian or Dennis Bond's names do not appear on any of the documents entered as evidence. They do not provide any basis for any other inferences or assumptions to be made.
- [102] To suggest that Betty and Walter acted as the agents for the Macalas and the Bonds is absurd. They did not know of Walter and Betty's subdivision activities, they clearly did not authorize Walter and Betty to act as their agents and Walter and Betty were acting entirely against the interests of the Macalas and the Bonds, which is contrary to the existence of any agency relationship. The Macalas and the Bonds were not asked at trial if Walter and Betty were acting as their agents.
- [103] With these specific findings of fact, I will address the framework set out in Pecore and McKendry.
- [104] Betty and Walter made a gratuitous effective transfer of property to their daughters and their husbands in June 1991. It was a gift, as there was no consideration. Their intention regarding the gift and the size of the gift is reflected in the Form A transferring 1/3 interest in Lot 287 to each of the Macalas and the Bonds as tenants in common.
- [105] I begin with a presumption that the Macalas and the Bonds hold the property on a resulting trust for Betty and Walter. For the reasons that I have given, I find that the Macalas and the Bonds have met their onus of proving, on a balance of probabilities, that Betty and Walter's intention at the time of the transfer was to transfer the property as a gift and that they intended to transfer a 1/3 interest in Lot 287 to each of the Macalas and the Bonds. They do not hold the property on a resulting trust for Betty and Walter.

Conclusion

[106] The plaintiffs' claim is dismissed.

[107] Unless there are matters of which I am not aware, the defendants are entitled to their costs at scale B.

"Gropper J."

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