

CANADA / JUDGMENT

Mong Alter Ego Trust No.1 v. Yip

2022 BCSC 1327

COURT

Supreme Court of British Columbia

DECIDED

5 August 2022

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2022 BCSC 1327 Mong Alter Ego Trust No. 1 v. Yip

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mong Alter Ego Trust No. 1 v. Yip,

2022 BCSC 1327

Date: 20220805

Docket: S175499

Registry: Vancouver

Between:

Michael Tak Yan Mong, in his capacity as Trustee of the Hilda Mong Alter Ego Trust No.1

Plaintiff

And:

Jennifer Tak Wai Yip (also known as Jennifer Tak Wai Mong) and Angela Tak Fan Mong; Victor Alan Yiu Tsun Yip; Raymond Alexander Yiu Chung Yip; Matthew Lee Ming Yiu Mong; Adam Jeffrey Lee Ming Kei Mong, by his litigation Guardian Blake Wiggs; and Jeffrey Jayden Jaksun Bhalla And Tara Sela Puiling Bhalla, by their litigation guardian Munjeet Bhalla

Defendants

And:

Michael Tak Yan Mong, in his personal capacity, and Michael Tak Yan Mong, in his capacity as the Executor of the Estate of Hilda Mong

Defendants

by way of Counterclaim

Corrected Judgment: The text of the judgment was corrected at paragraphs 22, 122, 136, 278, 292, 306 and 312, on August 16, 2022 and at paragraph 233 on September 2, 2022.

Before: The Honourable Madam Justice Watchuk

Reasons for Judgment

Counsel for the Plaintiff:

R.D. Lee

J. Driedger

Counsel for the Defendant Jennifer Tak Wai Yip:

R.P. Wu

K. Alibhai

Counsel for the Defendant Angela Tak Fan Mong:

K. Friesen

Counsel for the Defendants Jeffrey Bhalla, Tara Bhalla, and Munjeet Bhalla:

M.J. Steven

Counsel for the Defendant by Counterclaim Michael Tak Yan Mong:

K. Kuntz

Place and Dates of Trial:

Vancouver, B.C.

September 27-29, 2021

October 1, 4-8, 12-15, 18-19, 2021

October 21-22, 25, 27-29, 2021

November 3, 2021

December 1, 2021

Place and Date of Judgment:

Vancouver, B.C.

August 5, 2022

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I. INTRODUCTION

A. Overview

- [1] Hilda Mong died on March 30, 2017. Originally from Hong Kong, she and her husband Jeffrey Mong emigrated to Vancouver in 1967 with their three young children, Jennifer, Michael and Angela. Through the parents' hard work, with Jeffrey continuing to operate a business in Hong Kong and Hilda managing the household and family finances in Vancouver, the family amassed substantial assets. Jeffrey died suddenly in 1997.
- [2] This dispute amongst the three siblings concerns the beneficial ownership of two assets transferred into an alter ego trust that Hilda settled approximately eight years before her death. Jennifer also contests the validity of the trust, asserting that its subject matter is uncertain with respect to one of the assets.
- [3] Michael Mong commenced the action as trustee of the alter ego trust as a result of the defendant Jennifer Yip asserting that she holds the beneficial interest in the two assets that she held jointly with Hilda and which were transferred into the trust: a property located at 608 West 54th Avenue, Vancouver, B.C. ("608 Property"), and funds in an account at BMO Nesbitt Burns (the "BMO Account") (together "the Disputed Assets"). Michael as trustee seeks orders that Jennifer held her legal title to those two disputed assets as bare trustee for the trust which is now the sole beneficial owner.
- [4] Jennifer brought a counterclaim against Michael in his personal capacity and as executor of Hilda's estate. She alleged that Michael had unduly influenced his mother to leave the majority of her assets to him. The claim in undue influence was withdrawn during the trial but the counterclaim remains as Jennifer seeks damages with respect to breaches of trust, and claims restitution and unjust enrichment.
- [5] During the trial Angela withdrew her Response to Amended Counterclaim and now supports Michael's position as trustee of the alter ego trust.
- [6] The other parties to the action are Hilda's six grandchildren. Jennifer's children, Raymond and Victor Yip, did not file a response. Michael's sons, Matthew and Adam Mong, did not file a response. Adam is a minor and is represented by a litigation guardian. Angela's children, Jeffrey and Tara Bhalla, are both minors for whom a litigation guardian filed a response in which they took the same position as Angela.
- [7] Michael seeks an order of special costs against Jennifer and Angela for their allegations of undue influence that continued until mid-trial, and for impugning his conduct as trustee and executor.
- [8] The parties will deal with the costs issue generally after the release of these Reasons. The issue of special costs will also be addressed by the court at that time.

- [9] As many of the family members have the same last name, for ease of reference I will refer to them by their first names. In doing so I do not intend any disrespect.
- [10] The recent value of the total assets of the estate in Canada is agreed to be approximately \$15.8 million. The value of the Disputed Assets is approximately \$7.2 million including the \$3.5 million for which the 608 Property sold in 2020, and the BMO Account which has a balance of about \$3.7 million. In addition, there are assets in dispute in a related action in Hong Kong. The value in issue there is approximately \$18 million USD.
- [11] The fundamental issue is the intentions of Hilda and Jeffrey at the times of the transfers to Jennifer.
- [12] Although Michael is the plaintiff, it is Jennifer who must prove that she, not Hilda's estate, is entitled to beneficial ownership of the Disputed Assets.
- [13] I will first outline the family history over the fifty years from the move to Canada to Hilda's death. Next I will set out the views of the principal parties, Michael and Jennifer, regarding the family history. After setting out the law and the evidence in more detail and assessing the credibility of the principal parties, I will make the necessary findings of fact.

B. Terminology

- [14] The following phrases are used to refer to the two assets in dispute, the transfers, the trust and the parties:
- (a) "BMO Joint Account", "BMO Account", and "Joint Account" all refer to the funds in the account that was held jointly by Jennifer and Jeffrey at Scotia McLeod from 1994 and which were transferred to an account held jointly by Jennifer and Hilda in 1997, and then through various institutions and account numbers to finally arrive in a joint account opened by Hilda and Jennifer at BMO Nesbitt Burns in 2011. The Sanwa Bank Account was rolled into the BMO Joint Account.
 - (b) "608 Property" is periodically referred to in the documents and evidence as "608" and the "Oakridge Property".
 - (c) "Disputed Assets" is utilised when referring to the Joint Account and 608 Property together.
 - (d) "Disputed Transfers" refers to the withdrawals from the Joint Account in 2009, 2010 and 2013. The individual withdrawals will be referred to by the year in which they occur.
 - (e) The "Alter Ego Trust" is also referred to as the "Trust".
 - (f) Michael is also referred to as the "Plaintiff" and the "Trustee", and Jennifer and Angela are sometimes referred to together as the "Defendants".

C. Family history

1. Events

- [15] The facts of this dispute are set in the timeframe of the family history. Over the 50 years from the move to Vancouver from Hong Kong to Hilda's death, assets including the Disputed Assets were acquired and dealt with. From the evidence of this history the court must determine the intention of Hilda and of Jeffrey at the relevant times.
- [16] The Agreed Statement of Facts filed at trial sets out many events in some detail. For the purposes of the narrative, the family history is summarised as follows. These dates and events are not in issue between the parties; the issue is the intention of Hilda and Jeffrey when the interests in 608 and the Joint Account were transferred to Jennifer.
- [17] From shortly after their arrival in Vancouver in 1967 to 1986 the family lived in the 608 Property with Jeffrey continuing to run the business in Hong Kong. In 1979 Jennifer had moved back to Hong Kong to work with her father. She lived with him there from 1981. The Lily Court apartment in Hong Kong was purchased.
- [18] The first wills of Hilda and Jeffrey were signed in 1970. They were mirror wills in which each was the other's beneficiary with the beneficiaries if both died being Michael 50%, Jennifer 25% and Angela 25%.
- [19] In the 1980s Jennifer married Thomas Yip and gave birth to their first child, Raymond. The Mong family purchased a home on Angus Drive in Vancouver in 1986 (the "Angus Property"); it was first registered in the names of Hilda and Michael as tenants in common.
- [20] The events of 1987 centred on the family members' concern regarding Angela's relationship with her then partner. The family generally disapproved of the relationship. Jeffrey and Jennifer returned to Vancouver for family discussions that summer.
- [21] In August 1987 Jeffrey and Hilda executed new wills, the title to the Angus Property was transferred to Hilda and Michael as joint tenants, and the 608 Property was transferred from Hilda and Jeffrey to Hilda and Jennifer as joint tenants.
- [22] In the 1990s Victor was born to Jennifer and Thomas. A joint account, the predecessor account to the BMO Joint Account, was opened in the name of Jeffrey and Jennifer, and Hilda and Michael were granted full powers of attorney over that account. Prior to Michael's marriage to Anne Lee, he transferred back to Hilda his interest in the Angus Property. Jeffrey died suddenly in 1997 while on vacation in Hawaii. Jennifer then quickly transferred the funds from the joint account with her father to a joint account with her mother. Michael and his family moved into 608. Michael's first child, Matthew, was born.
- [23] In 2002 Hilda executed what would be her last will, a power of attorney to Michael, and a representation agreement. Angela and Jindy Bhalla married. Michael's second son was born. In 2007 Hilda visited Hong Kong for the last time, and saw Jennifer for the last time. Hilda added Michael back as a joint tenant on the Angus Property, and added him as a joint tenant on the Hawaii condominium. Hilda withdrew a total of \$640,000 from the Joint Account and deposited the funds in accounts in trust for Michael's two children (the first of the Disputed Transfers). Angela's twin children were born. Hilda became a client of Nicholas Smith for

the purposes of estate planning. The Alter Ego Trust documents were prepared and Michael signed declarations of trust for the assets which he held in joint tenancy with Hilda. Jennifer did not sign the declaration of trust for the 608 Property. Hilda signed the trust documents including a declaration of trust for the 608 Property on December 23, 2009.

- [24] In January and February 2010 Hilda transferred the amounts of \$1,191,868.57 and \$714,774.65 from the Joint Account to accounts in her sole name (two of the Disputed Transfers).
- [25] Hilda transferred \$50,000 from the Joint Account to an account in her sole name in February 2013 (the final Disputed Transfer).
- [26] Hilda met again with Mr. Smith and in June 2014 she executed a number of additional documents, including a deed of gift and declaration of trust by which the BMO Account was transferred to the Trust.
- [27] In December 2014 Hilda moved to Chalmers Lodge in Vancouver, which is an assisted living residence. On March 30, 2017 Hilda died.

2. The wills, the Trust and the estate

- [28] As noted above and summarised here for ease of reference, from the time of their arrival in Canada in 1967 Hilda and Jeffrey executed various wills and engaged in estate planning, both basic and then more complex.
- [29] The first wills were executed on September 30, 1970. Michael located them in old files during the trial. They left their estates to each other with the provision that if they pre-deceased each other the distribution would be 50% to Michael, and 25% to each of Jennifer and Angela.
- [30] On August 31, 1987 Hilda and Jeffrey executed new wills again leaving their estates to each other, and if they pre-deceased one another, their estates were left to Michael. Michael was named as executor in both wills. This was to be Jeffrey's last will.
- [31] Following Jeffrey's death in 1997, Hilda met with a lawyer, Anne Adrian, and executed documents including a new will on August 21, 2002. Michael was named as executor. Her estate was divided into ten shares with five to Michael, three to Jennifer, one to Angela, and one to the grandchildren alive at death. This was the last will of Hilda.
- [32] In 2009 as part of the estate plan developed with Mr. Smith, the Hilda Mong Alter Ego Trust No. 1, was created. In 2014 the BMO Account and other accounts were added to the Trust and Jennifer's share was reduced.
- [33] This chart sets out the history of the distribution of Hilda and Jeffrey's estates.

Item

Jennifer

Michael

Angela

Grandchildren

1970 Wills - Hilda and Jeffrey sole beneficiaries with residue to:

25%

50%

25%

N/A

1987 Wills - Hilda and Jeffrey sole beneficiaries with residue to:

-

100%

-

N/A

2002 Will - Hilda

3/10 shares

5/10 shares

1/10 shares

1/10 shares

Trust 2009

3/10 shares

+ ½ 608

5/10 shares

+ Angus

+ Other assets

1/10 shares

+ ½ 608

3/10 shares

Trust 2014

1/10 shares

+ ½ 608

5/10 shares

+ Angus

+ Other assets

1/10 shares

+ ½ 608

3/10 shares

[34] This chart illustrates the distribution of the estate sought by Michael as trustee, and the result sought by the defendant Jennifer:

The position of the Trustee (the Trust owns the Disputed Assets and the Disputed Transfers were valid)

Asset

Current Value

Michael

Jennifer

Angela

Grandchildren

Value (CDN)

Value

Value

Value

TOTAL:

\$15,285,130.88

\$9,951,095.21

\$1,848,597.50

\$1,848,597.50

\$1,131,000.00

The position of Jennifer (Jennifer owns the Disputed Assets and the Disputed Transfers were invalid)

Asset

Current Value

Michael

Jennifer

Angela

Grandchildren

Value (CDN)

Value

Value

Value

TOTAL:

\$15,285,130.88

~\$6,764,869.21

~\$7,462,553.00

\$0.00

\$0.00

[35] The Trustee relies on the Trust which provides that the BMO Account is to be divided into ten shares with five to Michael, one to Jennifer, one to Angela, and three to the grandchildren. The 608 Property is to be divided between Jennifer and Angela. The other properties, Angus and the Hawaii condominium, and the remaining bank accounts are left to Michael with the two Disputed Transfers of \$320,000 each to his sons remaining in trust for their benefit.

[36] It is Jennifer's position that the entirety of the BMO Account, including the Disputed Transfers, and the entirety of the 608 Property are for her solely.

[37] It is also Jennifer's position that the assets in dispute in Hong Kong are entirely hers.

[38] Jennifer and Angela made further submissions regarding the potential outcome of a finding that Hilda had severed the joint tenancy when she transferred the 608 Property to the Trust. I will return to these submissions in the conclusion.

D. Positions of the parties

[39] What has been discussed to this point has largely been events and occurrences: transfers, meetings and informal conversations, that have verifiably occurred, and about which there is little dispute. However, as noted below in the summary of the law, this matter turns on the intention of the two now deceased parents. Each of Michael and Jennifer describes the events and occurrences to paint starkly contrasting pictures of Jeffrey and Hilda's intentions. I will now summarise those positions and the parties' evidence concerning intent.

1. Michael

[40] Michael says that despite their extensive wealth, the Mongs did not engage in sophisticated estate planning. Instead, for all of Jeffrey's life and most of Hilda's, they relied on the practice of drafting simple wills and adding their children as joint tenants to most of their assets. Although their estate planning was simple, both Jeffrey and Hilda were financially savvy. They organized their affairs so as to maximize returns on their investments and minimize taxes.

[41] Michael also focussed on the control that Hilda maintained and exercised in respect of both the 608 Property (e.g. collecting rents, retaining income, paying insurance and taxes) and the various iterations of the Joint Account (e.g. controlling the investment strategy, and structuring it such that income accrued to Jennifer, a non-resident).

[42] The 608 Property was purchased in 1967 with Hilda's funds and Hilda and Jeffrey on title. Hilda raised their children in this home and Jeffrey would visit for several months every year. In 1979, Jennifer moved to Hong Kong to work with her father. Her father purchased a home there for them to live in and gave Jennifer shares in the company that owned that home.

[43] In 1987, the family convened in Vancouver to deal with a crisis involving Angela and a potential partner they did not care for. Jeffrey and Hilda became concerned about the family's assets and took steps to protect those assets: they made Jennifer a joint tenant on the 608 Property and they made Michael a joint tenant on the family's new home on Angus Drive. They also drafted new mirror wills that left the residue of their estate to Michael.

[44] Jennifer never contributed to the 608 Property, did not receive the rental income, and did not protest when Michael and his family moved to the 608 Property in 1997 and lived there rent-free.

[45] The funds that now comprise the BMO Account originated with Jeffrey and were generated by the family's business in Hong Kong long before Jennifer began to work for that business. Jennifer was added as a joint account holder in 1994 to take advantage of favourable tax treatment for non-residents as recommended by the family's long-time accountant, Noshir Sarkari. When Jeffrey died in 1997, Hilda was the sole beneficiary of his estate and the BMO Account funds were quickly moved to a new account held by Hilda and Jennifer. Hilda continued to manage the account and the interest was added to the capital. No funds were

ever paid to Jennifer.

- [46] Between 2006 and 2009 Hilda became frustrated with Jennifer's refusal to provide information about the family's assets in Hong Kong. Her relationship with Angela was also marked by conflict. Hilda increasingly sought to provide for her grandchildren during her lifetime so that they would know that the money came from their grandparents.
- [47] In 2009, Hilda withdrew \$640,000 from the BMO Account and gave it to Michael to hold in trust for his two sons. She also decided to revisit her estate plan and retained Nicholas Smith at Legacy Tax & Trust Advisors. Hilda did not want to distribute her estate equally among her children and she was advised that placing assets in joint tenancy may not achieve her goal of protecting her assets from claims. Mr. Smith recommended an alter ego trust.
- [48] Hilda placed the majority of her Canadian bank accounts and real property into the Trust in 2009. She left the Joint Account out of the Trust pursuant to her long-standing advice from Mr. Sarkari regarding the advantageous tax treatment of non-resident funds. Contrary to Hilda's wishes, Jennifer refused to sign the Declarations of Trust for the 608 Property. Hilda proceeded and was assured that Jennifer's refusal did not impact her ability to settle the Trust, but her faith in Jennifer was damaged.
- [49] In early 2010, shortly after Jennifer refused to sign the Declarations of Trust, Hilda withdrew \$1,191,868.57 and \$714,774.65 from the BMO Account. When Jennifer discovered this she told Angela there was nothing much she could do because it was Hilda's money. Jennifer, seeking to preserve as much of the funds as possible, placed a restriction on the BMO Account requiring the authorization of both account holders to withdraw funds greater than \$50,000. Hilda was frustrated that she could not access her own money. She wanted to provide additional funds to her grandchildren but Jennifer blocked her efforts, finally restricting the account so that no funds could be withdrawn without the authorization of both account holders.
- [50] Hilda therefor went back to Mr. Smith at Legacy and sought his advice. She told him the BMO Account was hers. She executed a deed of gift and declaration of trust settling the entirety of the BMO Account funds into the trust on June 26, 2014 and reduced Jennifer's share to 1/10 of that asset.

2. Jennifer

- [51] Jennifer's evidence in support of her position that the transfers of the Disputed Assets were outright gifts focusses largely on two things: Hilda and Jeffrey's love of, and desire to provide for, her children; and Jeffrey's concern about the economic ramifications of the 1997 Hong Kong handover. Together, she says, these factors buttress her position that her parents intended to give up the Disputed Assets immediately and irrevocably.
- [52] Jennifer in her recounting of the family history commenced with Raymond Yip who is Jennifer's eldest son and Jeffrey and Hilda's first grandchild. Jennifer testified that her father wanted her to give birth in Vancouver in 1985. He had lived through the Cultural Revolution

in the 1960s when the communists confiscated the assets of the rich. In 1984, the Sino-British Joint Declaration, regarding the handover of Hong Kong to China in 1997, was signed. Due to their concerns about the future of Hong Kong, Jeffrey and Hilda (and Jennifer herself) wanted Jennifer's child to be born in Canada and be a "genuine" Canadian.

- [53] Jennifer testified that soon after the Angus Property was purchased, her parents told her that they wanted to give her the 608 Property so that she could have a home to return to in Vancouver. Her parents loved Raymond and wanted to make sure he was well taken care of, especially because he had a medical ailment. Jennifer recalls her parents thinking about the future and talking about what should happen if something were to happen to her. Hilda and Jeffrey wanted to take care of Raymond if Jennifer were to predecease them. They wanted Raymond to be raised in Canada by them (along with her husband Thomas) if that were to happen. As Thomas' family also lived in Vancouver, Thomas was in agreement with this. Jennifer did not want the 608 Property to fall into her estate and felt comfortable for her parents to raise Raymond if she were to predecease them.
- [54] Jennifer testified that Jeffrey asked Hilda to look into how they should go about doing the transfer. They discussed that the next time they were all in Vancouver, they would do the transfer. That occurred at the family visit to Vancouver in the summer of 1987 to deal with Angela's relationship issue.
- [55] Jennifer testified that soon after Victor was born in 1991, Jeffrey said to her that 1997 was just down the road and that it would be "handover time". Jeffrey said that he wanted to give Jennifer a bank account so that she would have some money ready in case she moved over to Canada. Jeffrey said (in Chinese), "have house, have money". Jennifer recalls Jeffrey telling his friends that he had everything prepared for his grandchildren. Jennifer recalls that when they went to Vancouver, he transferred the money from his sole name account into a joint account with Jennifer in the early to mid-1990s.
- [56] With respect to the opening of the joint account at Scotia McLeod, Jennifer recalls her father saying words to the effect of: "when 1997 comes, I may or may not be by your side. I want to make sure everything is well planned. Have house, have money, all ready for you". Jennifer remembers thinking that it was like her father had predicted he would die and would not survive the handover. Jennifer testified that she had a number of discussions with her father about the Joint Account. In those discussions, Jeffrey said that if he was not there, Hilda would help Jennifer. As a result of those discussions, it was Jennifer's understanding that she was named as a Joint Account holder because Jeffrey wanted to give her and her family the money--either for when they came back to Vancouver or for her children's education.
- [57] Jennifer testified that her mother was the one who handled the investing and management of the account. She and her father were both busy working in Hong Kong and trusted Hilda to manage the account with advice from Wilkie Kam, the family's long-time financial advisor.

[58] Following Jeffrey's death, the joint accounts that Jennifer had held with Jeffrey went to her by right of survivorship. Jennifer testified that her father had been clear that the money was for her and her children. Jennifer also said that they had gone so far as to say that if she died, her parents would help care for her children. Following Jeffrey's death, Jennifer said to Hilda that she wanted to follow what Jeffrey had laid out, and that although the money was hers, she wanted Hilda to be added to the accounts to help her take care of her children. At the time, Raymond was 12 years old and Victor was 5 years old. Jennifer was not sure how to go about doing it because she was a non-resident and Hilda was a resident. Jennifer considered granting Hilda a power of attorney, but the problem was that if Jennifer died first, the funds would go into her estate, and it would lead to high probate fees.

E. The pleadings/litigation history

[59] This chart sets out the dates and sequence of the relevant pleadings for reference when discussing the pleadings of Jennifer and Angela which were amended or withdrawn during the trial.

No.

Description

Date

1.

Notice of Civil Claim - Plaintiff Michael Mong Trustee

June 9, 2017

2.

Response - Jennifer Mong

Aug 14, 2017

3.

Counterclaim - Jennifer Mong

Aug 14, 2017

4.

Response - Counterclaim Claim - Angela Mong

Aug 14, 2017

5.

Response - Counterclaim - Michael Mong - Personal

Oct 10, 2017

6.

Response - Counterclaim - Michael Mong - Trustee

Oct 11, 2017

7.

Notice of Civil Claim - Amended - Bhalla et al. are added

Nov 14, 2018

8.

Further Amended Notice of Civil Claim - Plaintiff

Nov 25, 2019

9.

Amended Response to Amended Civil Claim - Angela Mong

Dec 3, 2019

10.

Amended Response to Amended Civil Claim - Bhallas

Dec 3, 2019

11.

Further Amended Response to Further Amended Civil Claim - Jennifer Mong

Dec 9, 2019

12.

Amended Counterclaim - Jennifer Mong (per orders Aug 16/21)

Aug 19, 2021

13.

Further Amended Response to Further Amended Civil Claim - Jennifer Mong (per orders Aug 16/21)

Aug 19, 2021

14.

Response to Amended Counterclaim - Angela Mong

Aug 20, 2021

15.

Response to Amended Counterclaim of Jennifer Mong - Michael Mong

Aug 31, 2021

F. Issues

[60] The issues are described by Jennifer as:

(a) the beneficial ownership of the following assets:

(i) net sale proceeds from the sale of residential property located at 608 West 54th Avenue, Vancouver, BC (the "608 Property"), which at the time of Hilda's death was registered in the names of Jennifer and Hilda as joint tenants; and

(ii) Account No. 805-34875-16 at BMO Nesbitt Burns, which, at the time of Hilda's death was a joint account with right of survivorship in the names of Jennifer and Hilda (the "BMO Account");

(b) whether any portion of the 608 Property and/or the BMO Account are assets of the Alter Ego Trust; and

(c) whether the following transfers and withdrawals out of a predecessor account to the BMO Account were done in breach of trust:

(i) Two \$320,000 withdrawals in or about February 2009 (which are currently in accounts in Michael's name in trust for his children);

(ii) \$1,191,868.57 transferred out in or about January 2010 (and which ultimately was transferred into the Alter Ego Trust); and

(iii) \$715,774.65 transferred out in or about February 2010 (and which ultimately was transferred into the Alter Ego Trust).

[61] I understand that the \$50,000 withdrawal made by Hilda from the BMO Account in February 2013 is also in issue.

[62] Jennifer further asserts that the Trust is invalid with respect to the 608 Property for lack of certainty of subject matter.

[63] After the withdrawal of claims by Jennifer and Angela, Michael says that the remaining issues can be placed into the following two categories:

(a) What was the legal effect of adding Jennifer as a joint tenant on the 608 Property and Joint Account? In other words, did Jeffrey or Hilda Mong intend to give the beneficial interest to Jennifer in either the Joint Account funds or the 608 Property at the time Jennifer was added to the account or at any point thereafter? Determining who held the beneficial interest in these assets will also deal with Jennifer's claim for breach of trust and unjust enrichment with respect to the Disputed Transfers - if Hilda always retained sole beneficial interest,

there could be no breach of trust and no unjust enrichment.

- (b) Are any of the parties' claims barred by a statute of limitations or by the doctrines of laches, waiver or estoppel? Jennifer claims that Michael, as trustee, is statute barred from his claims against her related to the 608 Property and Joint Account. Michael also claims that Jennifer is barred from making claims for breach of trust and unjust enrichment related to the Disputed Transfers.

[64] The primary issue is the intentions of Hilda and Jeffrey at the times that the disputed assets, 608 and the BMO Account, were transferred into joint tenancy with Jennifer.

[65] Special costs are an issue which will be addressed by the court following the parties' submissions on costs generally after these Reasons are released.

G. Witnesses at trial

[66] The witnesses called by the plaintiff were:

- Michael Mong - the plaintiff in his capacity as trustee of the Trust, and defendant personally and as executor of the estate by counterclaim;
- Nick Smith - the lawyer who advised Hilda and drafted the Trust documents;
- Richard Blake Ryder-Wiggs - a retired lawyer who is the alternate trustee of the Trust;
- Kim Soltysik - the nurse who was Director of Care at Chalmers where Hilda resided before her death;
- Wilkie Kam - now a senior financial manager at BMO and advisor to the Mong family since 1990; and
- Farley Wong - a branch manager at HSBC Bank who advised Hilda regarding investments.

[67] In addition to giving her own testimony, Jennifer called her two sons, Raymond and Victor, to give evidence on her behalf.

[68] Angela did not testify but her discovery evidence was relied upon.

H. The Hong Kong Action

[69] There is an ongoing legal proceeding in Hong Kong dealing with overseas assets that are alleged to be in the possession or control of Jennifer and/or her sons, Raymond and Victor. The assets are related to Jeffrey's estate. The approximate value in issue is \$18 million USD.

[70] Michael, in his capacity as executor of Hilda's estate (as Hilda was Jeffrey's sole beneficiary), filed a claim against Jennifer, Raymond and Victor in the High Court of Hong Kong on July 7, 2020 (the "Hong Kong Action"). The assets in dispute in the Hong Kong Action are listed at paragraph 12 of the Re-Amended Statement of Claim filed by Michael Mong as executor of Hilda Mong's Estate, on April 19, 2021:

- (a) funds originating from a bank account at UBS AG (the "Swiss bank account");
 - (b) funds in an amount exceeding \$600,000 USD that were withdrawn from Jeffrey Mong's bank accounts;
 - (c) Yue Shun Cheung Company ("YSC") Limited shares;
 - (d) Haw Yuet Enterprises Limited shares; and
 - (e) dividends from Shun Hing Electronic Trading Company.
- [71] Although these assets were referred to in the pleadings in this action, the parties request this Court not to make any findings of fact in relation to the ownership of those assets or any other aspects of the Hong Kong Action. These issues will be determined by the Hong Kong Court. I will proceed accordingly.

I. Other matters not in issue

- [72] The capacity of Hilda is not in issue. It is therefore not necessary to refer to much of the evidence regarding Hilda's medical history.
- [73] The defendant Angela withdrew her Response to Amended Counterclaim in which the issue of capacity was peripherally raised. Although incapacity was referred to in one heading in Jennifer's Further Amended Response to Further Amended Civil Claim, at trial Jennifer's counsel stated that she was making no claim with respect to incapacity, and that it was "only a heading". After she confirmed that she was not claiming incapacity the plaintiff did not call the medical witness and did not lead evidence from other witnesses regarding capacity. As a result, I ruled during submissions that Jennifer was not permitted to rely on any submissions regarding capacity to any degree of dementia or confusion.
- [74] Undue influence is not in issue as a result of Jennifer withdrawing her allegations of undue influence and Angela withdrawing her Response to Amended Counterclaim. It is therefore not necessary to refer to much of the evidence that was led regarding that issue.
- [75] The validity of trust is not in issue except with regard to Jennifer's position that the trust is invalid due to uncertainty of subject matter with regard to the 608 Property.

II. THE Law

- [76] The plaintiff seeks orders that Jennifer holds the 608 Property and the BMO Account as bare trustee for the Trustee of the Alter Ego Trust, or in the alternative that Jennifer holds those assets on a resulting trust. Jennifer submits that she holds beneficial title because both assets were inter vivos gifts to her. Further, she says that the presumption of resulting trust applies only where there is insufficient evidence to rebut the presumption on a balance of probabilities, and she has satisfied the rebuttable presumption such that a resulting trust in favour of the estate or the trust does not apply to any assets held by her.

A. Resulting trusts

[77] In *Pecore v. Pecore*, 2007 SCC 17 at para. 20, the Supreme Court of Canada discussed the concept of the resulting trust and the circumstances in which one would arise: "[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: see D.W.M. Waters, M.R. Gillen and L.D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 362." In other words, where property is gratuitously transferred into the name of a transferee, they take only the legal, as opposed to both the legal and beneficial, title to the property, unless they can prove that the transferor intended to gift them the property outright: *McKendry v. McKendry*, 2017 BCCA 48 at para. 35. This is the presumption of resulting trust. The Court in *Niles v. Lake*, [1947] S.C.R. 291 at 302, described the presumption as follows:

All these authorities, as well as many others which it would be superfluous to cite here, clearly indicate that a mere gratuitous transfer of property, real or personal, although it may convey the legal title, will not benefit the transferee unless there is some other indication to show such an intent, and the property will be deemed in equity to be held on a resulting trust for the transferor.

[78] In these circumstances, "the onus is placed on the transferee to demonstrate that a gift was intended": *Pecore* at para. 24.

[79] The question of whether a transfer was actually gratuitous is one of fact, to be determined in the circumstances of each case: *Fleming v. Kwakseestahla*, 2010 BCSC 1006 at para. 19. That a transfer is stated to be made for "\$1 and natural love and affection" will not determine the matter: *Schoppel v. Royal Trust Company* (1970), 74 W.W.R. 33 at 40 (B.C.S.C.); *Pavlovich v. Danilovic*, 2019 BCSC 153 at para. 42 *aff'd* 2020 BCCA 239.

[80] Where the presumption does arise as a result of a gratuitous transfer, the transferee is said to hold the property as a bare trustee: Bruce Ziff, *Principles of Property Law*, 7th ed. (Toronto: Carswell, 2018) at 265. Because their status as trustee is not established by way of trust deed or some other directive document which could endow them with certain powers in respect of the trust property, the bare trustee holds property "without any duty to perform except convey it to the beneficiary or beneficiaries upon demand": *Red Burrito Ltd. v. Hussain*, 2007 BCSC 1277 at para. 37 citing *Waters' Law of Trusts in Canada*, 3rd ed. at 32-33.

[81] The presumption as it applies to joint bank accounts has been dealt with most frequently in the jurisprudence; however, there is ample authority in this province for the proposition that it applies equally to transfers of real property: *Fuller v. Harper*, 2010 BCCA 421 at para. 43; *Snelling v. Snelling*, 2019 BCSC 730 at para. 15.

[82] Courts, however, are not to have resort to the presumption immediately. The presumption will only be determinative of beneficial ownership where there is insufficient evidence to rebut the presumption on a balance of probabilities: *Pecore* at para. 44; *Fuller* at paras. 47 and 69; *Creyke v. Creyke*, 2016 BCCA 499 at para. 53. *Pavlovich* offers a prime illustration of

this principle. There, Iyer J. found the evidence of both parties concerning the intention of the transferor to be unreliable; the evidence "[stood] in equipoise" leaving her with no option but to decide the case on the basis of the burden of proof: at para. 55.

B. Gifts versus expressions of testamentary intent

- [83] The gift of a joint interest in property is a perfect inter vivos gift that cannot be revoked: Pecore at para. 49. The Court in McKendry described the requirements for establishing that the transferor intended an outright gift, thereby rebutting the presumption of resulting trust:
- [31] 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: Kooner at 79-80; Pecore at para. 5.
- [32] A gift may be delivered in various manners. For example, a donor may choose to transfer property directly to a donee or a trustee, or may retain possession and make a declaration of trust. Once a gift is given, the donor cannot retract it. If it is incomplete, however, the court will not perfect a gift. Accordingly, where the gift rests merely in a promise or unfulfilled intention, the court will not compel an intending donor to follow through with making the gift: Kooner at 79-80; Pecore at para. 56.
- [84] Inter vivos gifts can be contrasted with mere expressions of testamentary intent; testamentary wishes are not intended to take effect immediately and are therefore revocable: MacInnes v. MacInnes, [1935] S.C.R. 200 at 210. Where the evidence establishes an intent to possibly provide for the transferee on the death of the transferor, the presumption of resulting trust will not be rebutted. Likewise, an intention to retain control over the transferred asset is inconsistent with the concept of a completed gift; when that intention is clear on the evidence, it will govern and the presumption will not be rebutted. Bergen v. Bergen, 2013 BCCA 492 offers an example. There, the Bergens had invested in some land and asked their son Robert to construct a house on the property. The Bergens added Robert as a joint tenant and Mrs. Bergen testified that their intention at the time of the transfer "was that Robert would eventually inherit the property and this would ensure that the property by-passed probate": at para. 22. The evidence was unclear as to whether the Bergens had been advised what a transfer into joint tenancy would entail in terms of ownership. However, the evidence was clear that the Bergens intended to retain control over the asset. The fact that they also wanted to avoid probate fees did not negate their intention to retain control over the property: at paras. 43-45.

C. Evidence rebutting the presumption

- [85] Evidence adduced to rebut the presumption of resulting trust must focus on the intention of the transferor when they made the transfer, as the transferor's actual intention is the governing consideration in cases of gratuitous transfers: *Pecore* at paras. 43-44; *Bergen* at para. 38; *Creyke* at para. 52. However, this does not mean that evidence of intention subsequent to the transfer should be ignored; so long as it speaks to the transferor's intention at the time of transfer, evidence subsequent to the transfer may be given weight: *Pecore* at para. 55. Such evidence can be either direct or circumstantial, and can consist of a single piece of evidence or several considered cumulatively: *Foley (Re)*, 2015 ONCA 382 at para. 29.
- [86] The circumstances in which disputes concerning resulting trusts often emerge give rise to unique evidentiary difficulties. Gratuitous transfers frequently take place in a family context. A parent, during their lifetime, may gratuitously transfer property into the name of an adult child or loved one. This may be done to circumvent probate, for tax efficiency purposes, to protect the property from a wills variation action brought by an estranged relative, or for myriad other reasons. Whatever the motive, disputes concerning the transfer often only surface after the transferor has died. As a result, evidence of the transferor's intention is likely to be circumstantial: *Fuller* at para. 50. That said, in justifying placing the evidentiary burden of rebutting the presumption of resulting trust on the transferee, *Rothstein J.* noted that the transferee will be best positioned to give direct evidence on the circumstances in which the transfer occurred: *Pecore* at para. 26.
- [87] In *Schouten Estate v. Swagerman-Schouten*, 2014 BCSC 2320 at para. 5, *Dillon J.* helpfully summarized the jurisprudence on evidence which courts might find helpful in determining the intention of the transferor:
- [5] What type of evidence may be considered to determine the transferor's intention? Once the court has determined the proper presumption to apply, all of the relevant evidence should be weighed, depending on the facts of the case (*Pecore* at para. 55). The type of evidence that may be considered was discussed in *Pecore* at paras. 56-70. The Supreme Court of Canada at para. 59 expanded the traditional rule that evidence of intention ought to be contemporaneous with the transaction and said that evidence of intention subsequent to a transfer that is relevant to intention at the time of transfer should be assessed for reliability and weighed. Generally, the types of evidence germane to ascertaining intention include declarations and conduct contemporaneous with the transfer, evidence subsequent to the transfer, the documentary record as it relates to the asset, subsequent control and use of the property, other legal instruments, and tax treatment (*Pecore* at paras. 56-70; *Doucette v. McInnes*, 2009 BCCA 393 at paras. 56-64; *Fuller* at paras. 48-50, 66-67; *Chung* at para. 49; *Anderson v. Anderson*, 2010 BCSC 911 at para. 161 [*Anderson*]). The grant of a power of attorney at the same time as a grant of joint ownership may indicate that the transferor intended to give more than management control of property (*Pecore* at para. 67). A Property Transfer Tax Return filed in relation to a transfer is a factor to consider in relation to

intention and may suggest the intention of gift if the presumption of advancement was the applicable presumption at the time of transfer (Chung at paras. 52-54). Evidence of intention that arises subsequent to a transfer must be relevant to the intention of the transferor at the time of transfer (Pecore at para. 59; Turner v. Turner, 2010 BCSC 49 at para. 57). Continuing control and use of property after the transfer by the transferor may not be conclusive because it may not be inconsistent with a gift (Pecore at paras. 62-66; Fuller at paras. 66-67; Zukanovic v. Malkoc Estate, 2011 BCSC 625 at paras. 134-135).

[88] In Snelling, Saunders J. noted that while trusts engage sophisticated legal concepts which are often outside of the general knowledge of the public, gifts are concepts all understand. This is why it is important to bear in mind that

cases such as the present one are not a contest between weighing evidence of an intention to make a gift, against contrary evidence of an intention to create a trust arrangement. That is not the law. Instead, a resulting trust is presumed, by operation of law, when there is insufficient evidence of an intention to make a gift. Parties who engage in such transfers of property often approach the transactions without any sophisticated understanding of trusts or of the concept of beneficial entitlement, and it would defeat the purpose of the presumption if direct or circumstantial evidence of an intention to create a trust had to be adduced.

So, instead of considering whether the evidence demonstrates the transferor's intention to create a trust, "the court must consider if the transferor had any rational purpose for the transfer other than a gift": Fuller at para. 49.

[89] Pecore offers an example particularly relevant to the facts at hand. The Court at para. 73 held that statements made by the transferor to the lawyer drafting his will were an "important indicator of intention":

Although the statements were made in years subsequent to the transfer, the trial judge considered the lawyer's testimony about them reliable. The lawyer had nothing to gain from his testimony. This evidence indicates that Paula's father was of the view that the accounts had already been dealt with and understood these assets would not form part of the estate. I agree with the trial judge that "if [the father's] intention was to have his jointly held assets devolve through the estate, they were of such magnitude that he would have at least discussed that matter with his solicitor, since they constituted a substantial proportion of what he owned" (para. 43), particularly after the lawyer asked him about life insurance policies, RRIFs and other assets. All of this evidence is consistent with Paula's father having gifted away the right of survivorship when the joint accounts were opened, and thus is relevant to his intention at the time of the transfer.

[90] A final caution is warranted with regard to after-the-fact evidence of the transferor's intent: "[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. In Fuller at para. 49, our Court of Appeal added that "[t]he assessment of the reliability of post transfer conduct admitted into evidence will

include an assessment of the reasonableness of any inferences that are sought to be drawn from that conduct, including the inherent probability or improbability of competing explanations as to the transferor's intent: Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3d ed. (Markham, ON: LexisNexis Canada, 2009) at p. 209, \$5.61."

D. Inter vivos gifts and the right of survivorship

[91] It is common that when gratuitous transfers are made in the course of estate planning, the transferor will not transfer sole legal title to the transferee, but will rather transfer the property to themselves and the transferee in joint tenancy. Oftentimes, the reason for this is that the right of survivorship or *jus accrescendi* is necessarily incident to joint tenancy: *White v. Glossop*, 2019 BCSC 1044 at para. 25. The right of survivorship entails that "[w]hen one joint tenant dies, his or her interest in the property is extinguished and passes to the surviving joint tenant(s)". This right of survivorship is the principle feature that distinguishes joint tenancy from tenancy in common as a form of joint ownership: *Zeligs v. Janes*, 2016 BCCA 280 at para. 41. The practical benefits of this distinguishing feature were explained at para. 53 of Fuller:

Upon death, the interest of a tenant in common passes into his or her estate while the interest of joint tenant, which carries with it the right of survivorship, passes to the surviving joint tenant. In other words, the legal and equitable title (the right of survivorship) of a joint tenancy vests at the time the joint tenancy is created. Therefore, the gift of a joint interest in real property is an *inter vivos* rather than a testamentary gift and cannot be retracted by the donor. It is a "complete and perfect *inter vivos* gift" (*Pecore* at para. 49 referring to *Ferguson J.A.*'s comments in *Reid*, *Re* (1921), 64 D.L.R. 598, 50 O.L.R. 595 (Ont. C.A.) at 608).

[92] The content of the right of survivorship has been the subject of some confusion in the jurisprudence. As Rothstein J. pointed out in *Pecore* at para. 48, this confusion may stem from the fact that, while the transferee shares legal title immediately, "the beneficial interest of the transferee appears to arise only on the death of the transferor"; the Court then clarified that "the rights of survivorship, both legal and equitable, vest when the joint account is opened and the gift of those rights is therefore *inter vivos* in nature."

[93] However, the jurisprudence seems to support the view that, just because you have a present right of survivorship in an asset, there is no guarantee that you will ultimately receive the asset. In this sense, the right of survivorship may ultimately prove an empty one. For instance, in the context of joint bank accounts, the Court in *Pecore* at para. 50 confirmed that the fact that a donor may drain a joint bank account during their lifetime, such that it is effectively empty on their death, does not negate the fact that the right of survivorship is a perfect *inter vivos* gift:

The nature of a joint account is that the balance will fluctuate over time. The gift in these circumstances is the transferee's survivorship interest in the account balance -- whatever it may be -- at the time of the transferor's death, not to any particular amount.

In McKendry at para. 29, the Court of Appeal called the right of survivorship "a form of expectancy", that is, "a right to what is left of the jointly-held interest, if anything, when the donor dies". In Zeligs at para. 41 the right of survivorship was called "a revocable expectancy that manifests only upon success in the so-called 'ultimate gamble' - survival".

[94] Some courts have had difficulty reconciling this notion of survivorship as mere (and possibly valueless) "expectancy" with the firmly established principle that a gift, once given, cannot be revoked. This is especially so when dealing with the right of survivorship in the context of real property. Justice Newbury notes this tension in Bergen at paras. 40-41: "[w]here a joint tenancy in land is concerned, either of the joint tenants is at liberty to sever the joint tenancy at any time – a fact that clearly undermines the notion that as a matter of law, a joint tenant receives a 'full and perfect' inter vivos gift of the 'survivorship'". However, she also notes (at para. 41) that "it remains true that 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."

[95] Courts in this province have cited with approval the obiter in Simcoff v. Simcoff, 2009 MBCA 80, for the proposition that "[a] donor may gift the right of survivorship, but continue to deal freely with property throughout his or her lifetime": McKendry at para. 30; see also Zeligs at para. 41; Bergen at para. 40; Herbach v. Herbach Estate, 2019 BCCA 370 at para. 37. In Simcoff at para. 64, the Court held

Simply, and conceptually, the fact that a "complete gift" may have been given and that this gift included a right of survivorship does not, prima facie, prevent a donor from dealing with the retained joint interest while alive. The right of survivorship is only to what is left. Accordingly, if one joint owner drains a bank account (in the case of personal property) or severs a joint tenancy (in the case of real property), there is nothing in the right of survivorship itself that somehow prevents this.

Our Court of Appeal came to a similar conclusion in Herbach, which dealt with a deed of gift that purported to effect an inter vivos transfer of a mother's assets to two of her children. The deed contained a clause which would allow her to remove the children's names from title to the assets. The appellant, one of the mother's children not accounted for in the deed, submitted that this clause invalidated the deed by purporting to make the gift revocable. Justice Groberman disagreed, and held as follows:

[38] Clause 6 of the Deed did not give Laura the ability to revoke the gift of the right of survivorship. Rather, it simply recognized that Laura was, under the Deed, able to take certain actions that would have the effect of severing the joint tenancy. Upon severance, the right of survivorship would have nothing to attach to. While such an action would render the right a worthless one, the possibility of it occurring does not serve to render the gift invalid.

Conclusions

- [39] Properly analysed, the Deed transferred legal title in Laura's primary assets to Barbara and Robert. During Laura's lifetime, they held the property in trust for Laura. The Deed gave Barbara and Robert beneficial interest in the right of survivorship, an interest that constituted an inter vivos gift. While Laura might have been able to sever the joint tenancy during her lifetime, and therefore render the gift worthless, that possibility did not transform the gift into either a testamentary one, or into a trust arrangement.
- [96] While the law in Manitoba and British Columbia is that a transferor can give an inter vivos gift in joint tenancy and, during the remainder of their lifetime, take actions to sever the joint tenancy and render the right of survivorship worthless, this is not the case in Alberta and Saskatchewan: see *Pohl v. Mitdal*, 2017 ABQB 711 aff'd 2018 ABCA 403; *Thorsteinson Estate v. Olson*, 2016 SKCA 134.
- [97] Questions of whether severance of a joint tenancy constitutes an invalid revocation of an inter vivos gift will, of course, only arise after the transferee has rebutted the presumption of resulting trust and proven that an outright gift was intended. Understanding this notion, it becomes clear that the principles in the jurisprudence are not in conflict. A gift of a joint interest in land is a "perfect inter vivos gift" and therefore cannot be revoked, but transferring property into joint tenancy does not displace the presumption of a resulting trust per se. In *Beam v. Mills Estate*, 2015 BCSC 1269, Harvey J. reconciled the cases in the following way:
- [157] In my view, after considering the commentary in Schouten, it seems as though Bergen and Fuller are not in opposition, as Bergen merely notes that transfer of land into joint tenancy does not automatically result in a "complete and perfect" inter vivos gift of the right of survivorship. Rather, the transfer results in an irrevocable gift once the gratuitous intention of the transferor is confirmed by the surrounding evidence.
- [98] This reconciliation of apparently conflicting principles was recently followed and applied in *Di Giacomo v. Di Giacomo*, 2021 BCSC 2329, where the Court held that:
- [39] Placing a party on title to property as a joint tenant constitutes a legal transfer of the property at law. The legal and equitable title (i.e., the right of survivorship) of a joint tenancy vest at the time the joint tenancy is created. An inter vivos gift of a joint tenancy is a gift that cannot be retracted by the donor and is therefore a "complete and perfect inter vivos gift": *Pecore* at para. 49. See also: *McKendry* at para. 32. However, the gift is only perfected when the donor intends to transfer title in joint tenancy--and all the concomitant legal and equitable rights--to the donee: *Bergen v. Bergen*, 2013 BCCA 492 at paras. 37, 40, 42; *Beams v. Mills Estate*, 2015 BCSC 1269 at para. 147.

[40] In a case involving, as here, a gratuitous transfer of an interest in land to an independent adult child, it does not follow as a matter of law that an immediate irrevocable gift was made. Rather, the donee must rebut the legal presumption of a resulting trust: *Schouten Estate v. Swagerman-Schouten*, 2014 BCSC 2320 at paras. 2-3; *Pecore* at paras. 24-26; *Bergen* at para. 5.

[underlining added]

[99] In *Di Giacomo*, although the deceased transferor had placed his brother on title with his sons in joint tenancy, there was a lack of evidence of intention to make an outright gift:

[46] I am not persuaded that, when he signed the Transfer, the Deceased was fully informed of the consequences and intended to make an irrevocable gift of the right of survivorship. There is a paucity of evidence that the Deceased, whose understanding of English was limited at best and who obviously relied on what was said by Mr. Crescenzo being interpreted into Italian, comprehended the finality of the Transfer. For example, there is no evidence that the Deceased was advised or understood that, by irrevocably transferring the Property in joint tenancy, he would be precluded from selling the Property in the future to fund assisted living or full-time care expenses, without the consent of the joint tenants. Mr. Crescenzo gave no evidence that he advised the Deceased the Transfer would be irrevocable.

As a result, the presumption of resulting trust remained in place and the petition was dismissed.

E. Alter ego trusts

[100] The discussion of trusts so far has concerned "resulting trusts"; however, the facts at hand also concern a species of express trust, being the alter ego trust. In *Larochelle v. Soucie Estate*, 2019 BCSC 1329 at paras. 174-175, Donegan J. (quoting from *Waters*) summarized the nature and function of alter ego trusts:

[174] The particular type of trust at issue in this case is referred to as an "alter ego trust". This type of trust is defined by its tax consequences. Under the ITA, individuals over the age of 65 are allowed to transfer assets to this special type of inter vivos trust, set up exclusively for that individual's own benefit in their lifetime. At creation, the same person is generally settlor, trustee, and beneficiary. In *Waters Law of Trusts*, an alter-ego trust is explained concisely at 633:

An "alter-ego trust" allows a person of the age of 65 or over to settle property upon an inter vivos trust with the right to roll the property into the trust free of capital gains as long as the settlor is entitled to receive all of the income of the trust that arises before his or her death and as long as no person except the settlor may obtain the use of any of the income or capital of the trust before the settlor's death. This allows settlors to make inter vivos disposition of their property that might otherwise have been made under a will.

- [175] As both parties point out, inter vivos trusts in general, and alter-ego trusts specifically, have been recognized as legitimate estate-planning tools. In *Mawdsley v. Meshen*, 2012 BCCA 91, Newbury J.A. described the legitimate "protective" functions of corporations and trusts, including alter ego trusts, in the estate planning context this way:
- [2] Corporations and trusts also serve "protective" functions in the realm of estate planning. For example, individuals wishing to "freeze" the value of their estates may "roll over" their existing shares to new corporations, or exchange their appreciating shares for fixed-value shares, on a tax-deferred basis. The future appreciation of the corporation may then accrue to the benefit of the next generation, either directly or through trusts. In recent years, the "alter ego trust" has also been recognized in the Income Tax Act as an estate planning tool. Provided the settlor is age 65 or older, he or she may 'roll' assets to a trust that is for his or her sole benefit during his or her lifetime and then for the benefit of his or her chosen beneficiaries. Such trusts have several advantages: they are used to minimize or eliminate probate fees; they permit the control and management of assets located in various jurisdictions to be centralized and to 'carry on' after the settlor's death without the need for court approvals or probate; they obviate the risk of asset diminution due to incapacity or diminished capacity on the part of the settlor; and where beneficial interests are subject to the exercise of the trustee's discretion, they offer some protection from spendthrift family members, their spouses and others claiming through them: see generally M. Elena Hoffstein, *Alter Ego Trusts/Joint Partner Trusts – Tips, Traps & Planning* (2004) Ont. Tax Conf., Cdn. Tax Foundation, 12A: 1-47 at 3-4; and D.W.M. Waters, M. Gillen and Lionel Smith, *Waters' Law of Trusts in Canada* (3rd ed.), 2005, chapter 13.

F. Certainty of subject matter

- [101] Where there is no issue of capacity (as is the case here), a valid declaration of trust has three requirements known as the "three certainties": certainty of intention, certainty of subject matter of trust property and certainty of object. The three certainties are described as follows in *Donovan Waters*, *Waters' Law of Trusts in Canada*, 5th ed (Toronto: Thomson Reuters, 2021) at 140:

For a trust to come into existence, it must have three essential characteristics. As Lord Langdale M.R. remarked in *Knight v. Knight*, in words adopted by Barker J. in *Renahan v. Malone*, and considered fundamental in common law in Canada, (1) the language of the alleged settlor must be imperative; (2) the subject-matter or trust property must be certain; (3) the objects of the trust must be certain. This means that the alleged settlor, whether he is giving the property on the terms of a trust or is transferring property on trust in exchange for consideration, must employ language that clearly shows his intention that the recipient should hold on trust. No trust exists if the recipient is to take absolutely, but he is merely put under a moral obligation as to what is to be done with the property. If such imperative language exists, it must, second be shown that the settlor has so clearly described the property which is to be the subject to the trust, that it can be definitely ascertained. Third, the objects of the trust must be equally and clearly delineated.

There must be no uncertainty as to whether a person is, in fact, a beneficiary. If any one of these three certainties does not exist, the trust fails to come into existence or, to put it differently, is void.

[102] Only certainty of subject matter is at issue here. As discussed in *Mordo v. Nitting et al*, 2006 BCSC 1761 at paras. 309-310 and 313, certainty of subject matter requires first that the subject matter be clear, and that the nature of the interest due to each beneficiary also be clear:

[310] To satisfy the first of the two elements, the subject matter must be described with "sufficient exactness to permit that such matter be ascertained at the time the trust was created": *Re Beardmore Trusts*, [1952] 1 D.L.R. 41 at 46 (Ont. H.C.) [Beardmore]. Clearly, the subject matter must also be certain on future dates when the trustees are required to deal with the trust property. However, the trust property need not be fixed in quantity or nature; property can be added later, and the nature of existing property may be changed by the trustees exercising their power of investment. If the initial trust property is certain, and the property which may be added is certain, then the subject matter is certain because at any point the current trust property can be determined by tracing the original property to its current form: *Waters* at 155-156.

[313] The second element of certainty of subject matter requires that it be clear what beneficial share each beneficiary will receive in the trust property: *Boyce v. Boyce* (1949), 60 E.R. 959 (C.A.).

[103] In *Larochelle v Soucie Estate*, 2019 BCSC 1329 at para. 182, this Court held that certainty of subject matter refers to conceptual certainty - this does not mean that it must be practically easy or straightforward to determine. In order to be conceptually certain, the property must either be ascertained, in that it is a fixed amount or specific property, or (b) ascertainable, in that there is a method or formula by which the subject matter may be ascertained.

[104] The court's task is to "construe the agreement against the background facts to determine objectively the 'aim' of the transaction". In doing so, the court must look at all of the circumstances, not just the words of the trust deed: *Larochelle* at para. 193 (citing *Mohr v. C.J.A.* (1991), 40 E.T.R. 12 (B.C.C.A.)).

G. Deeds of gift

[105] A deed of gift is a form of contract under seal. In *Friedman Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34 at para. 20, the Court discussed the effects of contracts under seal and how they differ from simple contracts:

Because a contract under seal derives its validity from its form alone, there are several incidents of such a contract which differ from those of a simple contract. The fundamental difference between contracts under seal and simple contracts is in relation to the doctrine of consideration. The law will enforce a contract under seal even without consideration. Therefore, a gratuitous promise which is expressed in an instrument under seal is enforceable.

[underlining added]

[106] In *Romaine Estate v. Romaine*, 2001 BCCA 509, the Court was dealing with the relevant species of sealed contract, deeds of gift, in the context of a dispute about donative intent and resulting trusts. At para. 31, Levine J.A. noted that: "[t]he effect of the sealed contract rule in this case, assuming all of its requirements have been met, is that the Gift Documents are given legal effect as a contract rather than as an inter vivos gift." The Court in *Romaine* made a distinction between the "form and material substance" requirement for making an effective deed (being the affixation of a seal) and the "sufficient act of sealing," meaning the transferor must intend to create legal obligations: at paras. 40-41; see also *Mordo* at para. 244.

III. the Disputed ASSETS

[107] The preceding sections have summarised the undisputed evidence regarding the family history and the parties' views regarding that history. Here I will set out the evidence in more detail. Again, it is not this evidence that is in issue, but rather the conclusion to be drawn from the evidence including the parties' evidence of statements made to them by their parents during their lifetimes. The parties' evidence will be further addressed in a subsequent section discussing their credibility.

[108] In setting out the evidence, I am mindful that it is not the task of a trial judge to repeat all of the evidence of each witness or document. The evidence has been thoroughly reviewed and considered and only representative parts of the evidence from the lengthy trial are set out in these Reasons. Further, in considering the evidence of deceased individuals, I am mindful that in accordance with the exception to the hearsay rule and the principled approach to hearsay, the evidence must have some trustworthiness before it is held to be admissible. (*Pavlovich* at paras. 33-34.)

[109] Finally, with regard to post-transfer evidence of the transferor's intent, I must guard against evidence that is self-serving or that tends to reflect a change in intention. In assessing reliability of such evidence, I must assess the reasonableness of inferences sought and the inherent probability or improbability of competing explanations of the transfer's intent. (*Pecore* at para. 59; *Fuller* at para. 49)

A. The 608 Property

[110] Jeffrey and Hilda purchased this property in 1967 shortly after they moved to Vancouver from Hong Kong. Hilda raised their children in this house while Jeffrey continued to run the family's business in Hong Kong, spending a few months each year with his family in Vancouver.

[111] The entire beneficial interest in the 608 Property was Hilda's. Jeffrey wrote to the family accountant, Mr. Sarkari, in 1987 to arrange a meeting in Vancouver to discuss his personal affairs and his will. In a letter to Mr. Sarkari, Jeffrey states that he only had one Canadian asset (a term deposit), while the 608 Property beneficially belonged entirely to Hilda:

My only asset in Canada is my U.S. dollar term deposit acquired out of my own funds. As you have long known confidentially, both the shares in Mong Bros. and the old house in Vancouver, although they are in the joint names of myself and Hilda, were purchased by Hilda out of her own personal funds and are in fact are beneficially hers solely.

[112] In 1986, Hilda phoned Mr. Sarkari to discuss the possibility of transferring the 608 Property to either Jennifer or Angela. Mr. Sarkari, in a statutory declaration dated August 17, 1987, apparently for property purchase tax purposes, confirmed that Hilda was the sole beneficial interest holder. Because Hilda had purchased the property with her own funds and had always held the beneficial interest, he advised her that there was no obstacle to adding one of her daughters as a joint tenant. The declaration states in part:

2. THAT in the course of work that I have undertaken on behalf of JEFFREY MONG, one of the owners of the above- described property, I received a telephone call from HILDA MONG, wife of the said JEFFREY MONG, and one of the owners of the above-described property, in the summer of 1986. She informed me that she and JEFFREY MONG had purchased a house at 4257 Angus Drive, in the City of Vancouver, in the Province of British Columbia, and were then vacating their 608 West 54th Avenue residence

(Lot 8 described above), which she and JEFFREY MONG owned jointly and she stated that she and her husband, JEFFREY MONG, wished to transfer the said Lot 8 to herself and one of her daughters, in joint tenancy, and asked my advice as to whether such a transfer could be effected. I confirmed that she could do so, since she had purchased the property wholly out of her own funds and the beneficial interest in the said lot had always been hers.

[113] The Angus Property was purchased in 1986 and registered in the names of Hilda and Michael as tenants in common. Hilda moved there with Michael and Angela.

[114] Mr. Sarkari referred Jeffrey and Hilda to a lawyer, James Craig, who on August 6, 1987 conveyed the 608 Property from Jeffrey and Hilda to Hilda and Jennifer as joint tenants for \$1. In her testimony at trial, Jennifer recalled more specifically than in her Discovery giving her mother four quarters at the time of the transfer in the lawyer's office.

- [115] In the same month, August 1987, Michael was added as a joint tenant to the Angus Property, rather than as a tenant in common. Hilda and Jeffrey executed new wills.
- [116] The 608 Property functioned as a rental property until 1997 when Hilda requested Michael and his wife Anne move in. Michael, Anne and their two sons lived at the 608 Property until after Hilda died in 2017.
- [117] During the years that the 608 Property was rented Hilda paid all of the costs associated with its maintenance, including property taxes and home insurance. The evidence indicates that Hilda retained any excess of revenue over expenses. There is no evidence that Jennifer was consulted about the tenants or upkeep of the property.
- [118] In 1994 Mr. Sarkari wrote to Revenue Canada regarding outstanding taxes payable on rental income. The 608 Property is not mentioned by name in the letter, but it was the only rental property Hilda owned between 1988 and 1993. The stated reason for the delay in reporting the rental income was that it was unclear who actually owned the property. The letter then refers to an agreement that the owner is Hilda:

The only income which could not be reported until now has been the rental property income from 1988 through 1993, and the only reason for not having been able to report it earlier has been the question as to who in fact owned the rental property and to whom therefore the income belonged: the taxpayer or her non-resident daughter. It has now been agreed that the taxpayer owns the property and that the rental income is hers and therefore reportable by her. Prior to its conversion into rental property, it was the principal residence in which the taxpayer and some of the family members lived.

- [119] Hilda continued to pay the income tax on the rental income she received from the 608 Property until Michael and his wife moved there in 1997. At Hilda's request, Michael then began to pay the property taxes, insurance and some maintenance costs. There was extensive evidence of the detailed records kept regarding the expenses paid. There is no evidence that Jennifer made any direct contribution to the costs of maintaining the 608 Property.
- [120] The 608 Property was sold before trial with the proceeds of sale (a total of \$2,943,195.00) currently held in trust pending the resolution of this matter. Michael, as Trustee, paid the capital gains tax triggered by Hilda's death from the fund that Michael will be personally entitled to when the Trust's assets are distributed. The Trust would distribute the 608 Property equally to Jennifer and Angela. Michael seeks to uphold that intention.

B. The BMO Joint Account

- [121] Jeffrey's business concerns in Hong Kong generated the Mong Family's wealth and income. Although Hilda's funds were used to purchase the 608 Property, it was Jeffrey's income that sustained the family in Vancouver where Hilda raised their children.

- [122] The family's business was a chemical trading company called Yue Shun Cheung Company Limited ("YSC"). YSC was incorporated by Jeffrey's father and other shareholders in the 1950s. Jeffrey bought out the other shareholders in or around 1989 and made Jennifer a director and shareholder.
- [123] After Jennifer moved to Hong Kong in 1979, she began working at YSC, and worked there full-time from 1991 after Victor was born. After Jeffrey died in 1997, Jennifer continued to operate the business but testified that it became unprofitable.
- [124] In the 1990s, Jeffrey opened two Canadian bank accounts in his sole name: one at Scotia McLeod and one at Sanwa Bank Canada. Hilda and Michael were granted a full power of attorney for the Scotia McLeod account. Hilda provided investment instructions to their financial advisor, Mr. Kam. The funds in both of these accounts came from Jeffrey and the Hong Kong business. There may have also been some funds from Hilda.
- [125] There are three time periods relevant in the history of the BMO Joint Account: from its opening in 1994 to Jeffrey's death in 1997; from the transfer of funds to Jennifer and Hilda jointly in 1997 to 2009; and from 2009 to 2014 when it was gifted to the Trust.
- [126] Jeffrey and Jennifer first opened a joint account at Scotia McLeod in 1994. \$1,028,000 from Jeffrey's sole account were transferred in. Hilda and Michael continued to have a power of attorney granting full authority including withdrawal of money, and Hilda continued to manage the account.
- [127] Jennifer also became a joint account holder on the Sanwa Bank account in 1994. Hilda held a power of attorney and managed the account.
- [128] Jeffrey died suddenly on May 12, 1997 in Hawaii. At Jennifer's request the funds in the joint account with her father were transferred to a new joint account in Jennifer and Hilda's names on May 27, 1997. The detailed history of the Joint Account is included in the Agreed Statement of Facts. In that month Jennifer also directed the Sanwa Bank to transfer its account to herself and Hilda jointly. The Sanwa account was later rolled into the BMO Joint Account.
- [129] Other evidence regarding the transfer of funds to the joint account with Hilda comes from a note written by Angela and her Discovery evidence. On May 21, 1997, shortly after Jeffrey's death, Angela attended a meeting with Mr. Sarkari where a number of topics were discussed. The relevant excerpt from the notes of the meeting is:

Jt acct

212 ITA - spells out exempt of non resd.

jt acct should say with rt of survivorship (WROS)

but \$ will be txed as Jennifer's - \$ is really Jennifer and it's not a gift to mother - just

In her Discovery, Angela stated that she does not recall the discussion with Mr. Sarkari.

[130] Other evidence from Angela also refers to the Joint Account. In an email to Jennifer dated April 19, 2010 she stated:

I know that she has a US account in both your and her name and the only reason you were included was because she didn't want to pay tax on the interest .

[131] In her Discovery, Angela confirmed that this part of the email referred to the Joint Account that is now in dispute. She stated: " it doesn't really matter who's on the name. It was for the family. So I didn't believe it was Jennifer's - like, belonged to Jennifer."

[132] Mr. Wilkie Kam was called as a witness. He first met Jeffrey and Hilda Mong in 1990 or 1991. He provided financial advice to them from 1992 while he worked at various financial institutions and they and their accounts followed him.

[133] In his testimony, Mr. Kam provided some of the history of the Joint Account. He testified that he recalled discussing the concepts of joint tenancy and the right of survivorship with both Hilda and Jennifer, but recalls no such discussions with Jeffrey.

[134] He does not recall if Jeffrey ever discussed what was to happen with the Joint Account if he died. He did not have any discussion with Jeffrey regarding the difference between legal and beneficial ownership. That said, Mr. Kam specifically recalled a discussion with Hilda in which he asked if she understood that if she passed away, the money would go to Jennifer. Hilda apparently acknowledged that she was aware of this. This conversation happened before the withdrawals in February 2009.

[135] Mr. Kam testified as to the different investment strategies utilised for Hilda's personal accounts and the Joint Account. He explained that, when managing the funds in the Joint Account, he focussed on fixed income, whereas Hilda's solely-held accounts prioritized mutual funds. In the 1990s, fixed income products were not subject to a withholding tax, meaning that income could accrue to a non-resident holder without being taxable. This meant that Jennifer would not have to pay tax on the income from the Joint Account in Hong Kong. Mr. Kam testified that he spoke with Hilda about these tax benefits on numerous occasions.

[136] Hilda had a full power of attorney over the Scotia McLeod account both before and after it was registered in Jeffrey and Jennifer's names. She remained the controlling mind in terms of investment management when the account became registered to Jennifer and Hilda jointly.

[137] While the Joint Account moved through various account numbers at several different financial institutions, Jennifer made no contributions to or withdrawals from these accounts. Between 1994 and 2009 Jennifer never provided instructions to Mr. Kam, the investment advisor, about the management of the funds. Jennifer testified that she discussed interest rates and investments with Hilda.

- [138] In 2009, 2010 and 2013, Hilda withdrew funds from the Joint Account (the Disputed Transfers), and in 2014 she settled the Joint Account into the Trust. The Trust provides that the funds be distributed among her children and grandchildren. After division into ten shares, Michael will receive five shares, Jennifer and Angela each one share, and three shares go to the grandchildren.
- [139] Hilda withdrew two sums of \$320,000 in 2009 which were placed in trust for Michael's children. Jennifer was not consulted or advised about these transfers. Mr. Kam later had a conversation with Jennifer who was not happy with the transfers that had been made without her knowledge. When Mr. Kam advised Hilda, she said that it was "my money" and that she could do things with "my money".
- [140] Hilda withdrew an additional sum of almost \$1.2 million in January 2010 and another \$714,000 the following month, again without consulting with Jennifer or asking her permission. These transfers effectively emptied the Joint Account of Canadian funds. Mr. Kam said that Hilda would have given the instructions to him or to his assistant for those transfers.
- [141] Mr. Farley Wong was also a longstanding financial advisor to Hilda. The two 2010 withdrawals from the Joint Account, then at HSBC Securities where Mr. Kam worked, were ultimately deposited in an account in Hilda's sole name at HSBC Bank, a separate financial entity where Mr. Farley Wong was employed. He testified that he does not recall any discussion with Hilda regarding the deposits to her sole accounts. It was Mr. Wong's understanding that Hilda owned the funds, and not anyone else. He does not recall the reason for the transfers or for how the transfers were completed, but confirmed that the instructions had to be from Hilda herself.
- [142] After the 2010 withdrawals, at Jennifer's request, a withdrawal limit of \$50,000 was instituted for the Joint Account. Mr. Kam testified that Hilda was very unhappy with the limit, asserting it was "my money" and asking why he was setting a limit.
- [143] On February 22, 2013 Hilda transferred \$50,000 from the Joint Account into an account held by the Trust.
- [144] On May 30, 2013 Jennifer, in an email to Angela, told her that she had instructed Mr. Kam that all withdrawals from the BMO Account required the consent of both herself and Hilda.
- [145] Michael's evidence was that Hilda wanted to gift money to Jennifer's children during her lifetime. She wanted Raymond and Victor to know that these funds came from their grandparents and not their mother. In June 2012, she asked Michael to get both Raymond and Victor's banking information so she could make a transfer. In October 2012, she asked Michael to follow up, and he did, although the transfers Hilda sought to make to her grandsons were ultimately not made.

- [146] Mr. Kam remembers Hilda's desire to give money to Raymond and Victor during this same time period. Since the limit on the Joint Account was \$50,000, Hilda instructed him to give them \$50,000. When Jennifer and her son refused the transfer, Mr. Kam describes Hilda being unhappy and asking why a grandmother cannot give money to her grandchildren. Jennifer told Mr. Kam that she could give the money to her sons herself because it was her money.
- [147] In emails from December 2012 and March 2013, Michael told Raymond that Jennifer would not allow Hilda to withdraw funds from the Joint Account. He mentioned that Hilda was not pleased because she wanted to see some of these funds distributed to her grandchildren while she was still alive.
- [148] Michael testified that this caused Hilda a fair amount of annoyance. Hilda expressed concern to him that, if she and Jennifer could not resolve their dispute over access to the Joint Account, she would have to "leave this mess for you to deal with".
- [149] Hilda's decision to take charge of the Joint Account was recorded in a handwritten note written on a Tapestry brochure (one of the assisted living facilities considered before the move to Chalmers). The note is undated, and in a form of speaking notes that she often used:

Not Satisfied with the way Jennifer is controlling this joint a/c.

I have dedided to take charge of the a/c. I will inform you of my plans

Which I do not want you to interfere with

These funds are not your funds.

I will inform Wilkie of my decision.

- [150] Returning to the evidence of Mr. Kam, he testified that he discussed estate planning with Hilda and suggested that she set up a trust. These conversations started before 2010 and continued to 2012 or 2013. The reason for his suggestion of a trust was that Hilda was a person with very specific desires regarding her legacy. He knew of the UBS account in Switzerland but did not know its amount. With the vast amount he assumed they had the trust would allow her to do what she wanted in looking after specific children and grandchildren. He described Hilda as a very caring person. They continued to have visits when she was in Chalmers Lodge.
- [151] Mr. Kam was aware that the Trust was settled but did not know when and did not know the assets in the Trust.
- [152] With regard to the Canadian income tax implications of the Joint Account, Michael testified that Hilda communicated to him that the Joint Account with Jennifer was part of the "off-shore bucket" which was treated differently so as to minimize income tax.

[153] In her later years, Hilda made efforts to resolve some of the tax issues with her non-resident assets. Because of concerns about her age and diminished ability to deal with financial matters, Michael testified that he took on greater responsibilities in his mother's financial planning starting in 2015. He wanted to report Hilda's non-resident income and pay the necessary back taxes. Hilda and Michael made attempts to rectify various tax issues during Hilda's lifetime. However, they were not successful in obtaining information from Jennifer.

[154] The only bank documents in evidence are:

- (a) An account statement which shows that Jeffrey opened the Scotia McLeod account no. 800-31312 in April or May 1994 and transferred \$1,028,000 from another Scotia McLeod account held solely in his name.
- (b) An account statement from the following month, for the period ending June 30, 1994, names Jeffrey and Jennifer as "JTWROS" (joint tenants by right of survivorship).
- (c) An undated bank form signed by Jeffrey and Jennifer directing Scotia McLeod to open a joint account in their names. The form does not refer to an account number.
- (d) Powers of attorney in favour of Hilda and Michael for Jeffrey's sole account and the account Jeffrey opened with Jennifer.

C. The Assets are transferred into the Trust

[155] Both Disputed Assets were transferred into the Trust - the 608 Property in 2009 and the BMO Account in 2014. The Trust was created when Hilda sought to update her estate plan and retained Mr. Smith of Legacy Tax & Trust Advisors.

1. Mr. Smith's evidence - 2009

[156] A summary of the meetings, conversations and correspondence between Mr. Smith and Michael, Anne and Hilda is contained in the Agreed Statement of Facts. For reference, they are listed here:

Date

Description

13-May-09

Michael and Anne Lee attended meeting with Nicholas P. Smith of Legacy Tax and Trust Advisors ("Legacy").

2-Jun-09

Michael and Anne Lee attended meeting with Mr. Smith.

4-Jun-09

Legacy opened file for Hilda Mong.

23-Jul-09

Hilda and Michael attended meeting with Mr. Smith of Legacy.

23-Nov-09

Hilda and Michael attended meeting with Mr. Smith.

17-Dec-09

Hilda and Michael attend meeting with Mr. Smith and Hilda met with Mr. Smith alone for part of the meeting. Michael executed the following documents:

1. Declaration of Trust with respect to Angus Drive property was signed and dated effective February 27, 2006.
2. Declaration of Trust with respect to the Hawaii Condo signed and dated effective May 12, 2008.
3. Declaration of Trust with respect to the bank and investment accounts held in joint tenancy by Hilda and Michael dated December 17, 2009.

18-Dec-09

Mr. Smith of Legacy sent to Jennifer two Declarations of Trust in respect of the 608 Property.

21-Dec-09

Michael informed Mr. Smith that Jennifer had refused to sign the trust documents pertaining to the 608 Property.

23-Dec-09

Mr. Smith attended meeting with Hilda at Hilda's residence and Hilda executed the following documents which were all dated December 23, 2009:

4. The Alter Ego Trust No. 1;
5. A Declaration of Trust with respect to the 608 Property signed by Hilda but not signed by Jennifer;
6. A Deed of Gift gifting various accounts to the trustee of Alter Ego Trust;
7. A Declaration of Trust with respect to the bank accounts included in Schedule A of the AET;
8. A Declaration of Trust with respect to the Angus Drive property;
9. A Declaration of Trust with respect to the Hawaii Condo.

15-Jan-14

Michael met with Mr. Smith regarding the BMO Account.

8-Apr-14

Hilda and Michael attended a meeting with Mr. Smith.

26-Jun-14

Hilda signed a revocation with respect to the August 21, 2002 general Power of Attorney and the August 21, 2002 Representation Agreement.

26-Jun-14

Michael and Hilda attended a meeting with Mr. Smith and executed the following documents:

1. Testamentary Instrument Exercising Special Power of Appointment adding the BMO Account and various other accounts to the AET, executed by Hilda.
2. Expense Agreement between Hilda, Michael and Hilda as Trustee of the AET in which Hilda directs the Trustee of the AET to use funds from the Trust Fund to reimburse Michael for Hilda's Expenses which Michael has paid from his personal funds.
3. Declaration of Trust executed by Michael with respect to the bank and investment accounts held jointly with Hilda.
4. Deed of Gift and Declaration of Trust executed by Hilda in which she gifts various accounts, including the BMO Account to the AET.
5. A Representation Agreement and Enduring Power of Attorney granted by Hilda to Michael which Power of Attorney allowed Michael to, inter alia, transfer, expend or employ such parts of Hilda's real or personal property (including the whole) to or for the benefit of Hilda's issue at such times and in such manner as Michael, as Hilda's attorney, or such substitute or substitutes shall in his absolute discretion think fit.

[157] Mr. Smith testified at the trial regarding these meetings, other communications with Hilda and Michael, and the documents in his extensive solicitor's file. He relied on his notes when he did not have a specific memory of the event. I unequivocally accept Mr. Smith's evidence in its entirety.

[158] Following the May 13 meeting, Mr. Smith sent an estate planning questionnaire and a memo on alter ego trusts to Michael's wife, Anne Lee. Mr. Smith wrote in his email that he was "concerned that mere registration of assets in another person's name will not accomplish your mother-in-law's goals and indeed could compound problems as those registrations are considered to be deemed sales at fair market value, triggering gains for tax purposes". Mr. Smith's advice was that an alter ego trust could meet Hilda's needs and avoid adverse tax implications.

- [159] With Michael's assistance, Hilda completed an estate planning questionnaire for Legacy. The Joint Account is not referenced in the estate planning questionnaire.
- [160] On June 3, 2009, Michael and Anne Lee again went to see Mr. Smith at Legacy at Hilda's request. With respect to the 608 Property, Mr. Smith's notes state: "go to older sis who is on title". Michael's evidence is that this was roughly the time at which he became aware that Hilda and Jennifer were both on title to 608. With respect to the Angus Property, Mr. Smith's note states: "Did mom report Angus gift in 2006".
- [161] Hilda and Michael met with Mr. Smith on July 23, 2009. Mr. Smith made a number of handwritten notes during that meeting:
- (a) With respect to the Angus Property, Mr. Smith's notes state "only transfer docs, no deed of gift". Prior to this trial, a deed of gift for the Angus Property was produced. Writing without this knowledge, Mr. Smith notes: "Angus: held in bare trust".
 - (b) The note also states: "Real Estate - thought it would go as per JT [Joint Tenancy]". Mr. Smith agreed that Hilda probably indicated to him at this meeting that without further estate planning, she thought her real estate would go to the surviving joint tenant.
 - (c) One note states: "Bk accts joint, too. Give to Gkids in HK outright". Michael did not have a clear recollection of this note, but agreed with counsel for Jennifer that it was a good assumption that it came from something Hilda said. Mr. Smith agreed that Hilda probably indicated to him that she wanted to give joint bank accounts outright to her grandkids in Hong Kong. Raymond and Victor are Hilda's only grandchildren in Hong Kong.
- [162] In his testimony, he described Hilda as a woman of dignity and decency who was disappointed in the priorities of her daughters on economic matters. He described her as clearly independent and Michael as deferential throughout.
- [163] The November 23, 2009 meeting with Mr. Smith was the final meeting before the Alter Ego Trust documents were prepared. Mr. Smith was still under the impression that no deed of gift had been executed for the Angus Property and consequently wrote in his notes: "bare trust; do bare trust doc". With respect to the 608 Property, Hilda and Michael brought Mr. Sarkari's letter to Revenue Canada, confirming that Hilda was the owner of 608, to the meeting. Regarding the 608 Property, Mr. Smith wrote in his notes: "bare trust also".
- [164] In his December 7, 2009 letter to Hilda enclosing the draft trust documents, Mr. Smith stated at paragraph 2:
2. [] You have confirmed that you always intended to retain the beneficial interest in the Angus Property and that you never intended to make a gift of the beneficial interest to Michael at the time of the registration in joint tenancy. []
- [165] In his testimony, Mr. Smith referred to a number of factors he regarded as indicative of Hilda's intent to retain the beneficial interest in the Angus Property:

- (a) Hilda retained the hallmarks of beneficial interest;
- (b) Hilda confirmed that it was never her intention to give the gift of the Angus Property;
- (c) it is common for older parents to put property into joint tenancy with kids;
- (d) intention at the time of the transfer is key; and
- (e) Hilda indicated that it was never her intention to expose the property to division on the divorce of a child.

[166] In that letter, Mr. Smith also stated in relation to the 608 Property:

6. [] You have confirmed that you always intended to retain the beneficial interest in the [608 Property] and that you never intended to make a gift of the beneficial interest to Jennifer at the time of the registration in joint tenancy.

[167] Mr. Smith testified that the intention of the donor, Hilda, was made clear to him regarding 608. What the recipient thought of the transfer was not the issue. He spoke of receiving the intention of the donor "from the horse's mouth".

[168] Mr. Smith agreed on cross examination that he would have asked the same questions of Hilda in respect of both the 608 and Angus Properties. However, with respect to the latter, Michael was present in the meeting to confirm his view that the Angus Property was not his. Michael did not know that the deed of gift regarding the Angus Property and dated February 24, 2006 had been signed by Hilda. Hilda had apparently forgotten that this document was signed. Thus, Mr. Smith was not informed.

[169] Mr. Smith was questioned at length on cross-examination about the implications of his misunderstanding as to the Angus Property. He agreed that:

- (a) it was important for him to determine if there had been a deed of gift. If there had been one, the Angus Property could not be rolled into the Alter Ego Trust;
- (b) a declaration of bare trust that was dated back to the date of the transfer would be inconsistent with a deed of gift done at the time of the transfer;
- (c) the executed Angus deed of gift is a "full" deed of gift;
- (d) in light of the Angus deed of gift, the Angus Property was not in fact held in bare trust by Michael;
- (e) the executed Angus Deed of Gift (which Mr. Smith was not aware of before this litigation commenced) is inconsistent with what he had been told by Hilda (and presumably Michael) in 2009; and
- (f) if he had been told that a deed of gift had been executed in 2006, his advice about the Angus Property would have been different.

- [170] Mr. Smith agreed with the proposition that, had the 608 Property also been gifted, it could not have been rolled into the Alter Ego Trust. However, he did note that, even if there had been a gift, the joint tenancy still could have been severed.
- [171] When Mr. Smith wrote his December 7 letter he was not aware of Jennifer's position that she held a beneficial interest in the 608 Property. However, he stated that this knowledge would have made no difference. Hilda could still have taken the position that she owned 100% of the beneficial interest in the 608 Property and transferred her ownership interest into the Alter Ego Trust, to possibly be the subject of a subsequent dispute.
- [172] Mr. Smith's final substantive meeting with Hilda before the execution of the Alter Ego Trust documents was on December 17, 2009. At that meeting, Michael signed declarations of trust, but Hilda did not sign any documents, as they were not in executable form. Mr. Smith made plans to meet again with Hilda at 9:15 a.m. on December 23, 2009. Mr. Smith's notes make no mention of Jennifer.
- [173] Mr. Smith made several notes concerning Hilda's motivation for distributing less to Angela ("Angela is a greedy person", "Helped her with UBC law education", "Didn't charge room and board", "lent \$ to Angela's friends, not collected", "Hub greedy"). Mr. Smith understood that Jennifer had received the benefit of assets from Jeffrey and his business in Hong Kong.
- [174] The lawyers at Legacy attempted to obtain a declaration of trust from Jennifer regarding the 608 Property, just as Michael had given regarding the Angus Property. They sent declarations of trust to Jennifer and details of the Alter Ego Trust for Raymond to review.
- [175] Jennifer recalls speaking with Michael shortly before she received the email that Legacy sent to Raymond. Michael called and told her about some benefits of the Alter Ego Trust, and asked Jennifer to put the 608 Property into the Alter Ego Trust. Michael explained that if she did so, the Trust would be responsible for paying the capital gains tax, not her personally. Jennifer asserted that the house had been given to her, that it was held jointly with a right of survivorship, and that she would pay her own taxes. She told Michael that she was not interested in joining the Trust. Her evidence was that Michael had been forceful during this discussion and asked him to communicate through Raymond going forward.
- [176] In an email to Angela on April 19, 2010, Jennifer told of her discussion with Michael:
- M called me one day that they are setting this up and he told me it was to prevent you from suing and to protect me from having to pay capital gains on 608 as the trust will pay for me. But the condition was that I have to return my 608 to the pool to be reallocated. There is already no house for you and he says the remaining money has to pay for his and my capital gains on our houses that is totally ridiculous. I told him I wasn't going to talk to him ever again and he can deal with my lawyer.

[underlining added]

[177] Jennifer also recalls speaking with Hilda after receiving the email from Legacy. Jennifer described the discussion as follows:

- (a) She asked her mother why she was doing this to her, as the property have been given to her.
- (b) Hilda said that Michael suggested it.
- (c) Hilda said that Michael suggested that in Canada you cannot not give something to one of your children or you will be sued for it, but if you put it into the trust, the trust cannot be sued.
- (d) Jennifer said that she was not interested in putting her house into the Trust and that she was not interested in the tax benefits.
- (e) Jennifer felt that Hilda understood what she said, and that Hilda did not seem unhappy.

[178] In email exchanges between Michael and Mr. Smith on December 21 and 22, 2009, they wrote as follows. After learning that Jennifer had refused to sign the declaration of trust, Mr. Smith wrote to Michael: "the question is, does Jennifer think she owns a half interest in the equity in 608 now? [] [B]y not signing the documents, she is either saying she has a half beneficial ownership now (which means it could be carved up on her divorce, she would pay Canadian capital gains on a sale, she could mortgage her half without your mom's consent, etc. [] or she is refusing to comply with her implied legal duty as bare trustee ."

[179] In a separate email sent on the day before, Michael asked Mr. Smith whether he would still be able to go over to Hilda's house on the morning of December 23 "given what Jennifer has done". Michael asked if it would be okay to leave the references to the 608 Property in the Alter Ego Trust. Mr. Smith responded that they could proceed as planned. He said that the documents that Jennifer was asked to sign were "merely to confirm the current status of ownership and did not change anything".

[180] The following morning, December 23, 2009, Mr. Smith went to the Angus Property to meet with Hilda for the execution of the Alter Ego Trust documents. He had no specific memory of telling Hilda that Jennifer was not willing to sign the declaration of trust; that said, he expects he would have alerted her to that. Mr. Smith also testified that he would have reviewed the consequences if Jennifer did indeed have a beneficial interest, being that 608 could be subject to division in a divorce, Jennifer would pay capital gains tax in a sale, and that Jennifer could mortgage half of the property. Hilda would have confirmed that these were consequences she had never intended. He would have alerted Hilda to a subsequent dispute about beneficial ownership. He also stated that the information from Jennifer did not change anything as to planning.

[181] There is no evidence that Mr. Smith advised Hilda about the possibility of severing the joint tenancy, and no evidence that Hilda had any intention to sever the joint tenancy.

[182] By letter dated January 25, 2010, Mr. Smith wrote to Hilda enclosing the executed Alter Ego Trust documents. He wrote:

it appears that Jennifer is confused as to the nature of the ownership in the [608] Property, and may believe that you and she own that property beneficially as joint tenants such that on your death, the property will pass to her outright as the surviving joint tenant. If she asserts this position, and if it is not challenged after your death, then the gift of a one-half interest in the [608] Property to Angela under the Alter Ego Trust may not be made.

[]

Any property remaining in the Alter Ego Trust on your death will be deemed to be disposed of for tax purposes at its then fair market value and any resulting capital gains will be subject to tax within the Alter Ego Trust.

[183] On page 4 of the letter, he stated:

As mentioned above, Jennifer has declined to execute the Declarations of Trust as she is taking the position that she should be entitled to the property on your demise. As we understand that this is contrary to your intention and in order to ensure that the gift to Angela of a one-half interest in the [608] Property is effected upon your death, we recommend that you try to resolve the matter with Jennifer as soon as possible. If the matter is not resolved, then Michael, as the successor trustee of the Alter Ego Trust, may be put in a position of having to challenge Jennifer's ownership of the [608] Property (especially if Angela insists upon it). We should also record in writing, signed by you, an affirmation that it was never your intention to gift half of the beneficial interest in the [608] Property to Jennifer.

[underlining added]

[184] Mr. Smith confirmed that Hilda never asked him to prepare the affirmation referred to in the final line of the letter.

2. Mr. Smith's evidence - 2014

[185] On January 15, 2014, Michael communicated with Mr. Smith at Legacy about the BMO Joint Account joint with Jennifer. The note stated "Hilda does not intend for her to get all of it". The note also stated that Mr. Smith told Michael that Hilda should "do deeds of gift if she is gifting assets to him and should be witnessed by [an independent] person (LLB) and capacity of HM verified".

[186] On April 8, 2014, Michael and Hilda met with Mr. Smith. Hilda had two concerns: she wanted to give part of the money in the Joint Account to grandchildren now, and she wanted to use the income from the Trust.

- [187] Mr. Smith testified that Hilda did not intend the Joint Account to go to Jennifer. He understood that the account was a tax plan orchestrated by Jeffrey. When asked if Hilda told him who had beneficial ownership of the Joint Account, Mr. Smith replied that Hilda had told him pretty clearly that it was her property. It was Mr. Smith's opinion at the time that Hilda was the beneficial owner of the account although it was a joint account in name.
- [188] A different lawyer at Legacy made notes to file that same day. She was not in the meeting, so the information in her notes would have come from Mr. Smith or her review of the file. The lawyer notes that Hilda had early dementia. On the second page of the notes the lawyer notes: "Hilda to [withdraw] funds and set up new account. Need to put new account into [AET] - Some to J, J's kids, Michael". The words "most to" are also there, although it is unclear whether that refers to Michael or "J's kids". There is no mention of Angela or any of the other grandchildren.
- [189] Mr. Smith wrote to Hilda on April 29, 2014 to provide initial drafts of the documents, detailing the distribution of each asset in the Trust. The proposed distribution of the BMO Joint Account was 50% to Michael, 30% to Jennifer, 10% to Angela and 10% to the grandchildren's fund. This is the same as the distribution scheme under the residue clause of the Alter Ego Trust.
- [190] On May 27, 2014, Michael emailed Legacy to give instructions that distribution of the Joint Account had changed: the grandchildren were now to receive 30% and Jennifer was to receive 10%.
- [191] On June 11, 2014, a lawyer at Legacy spoke with Michael about a potential court application based on resulting trust if BMO continued to enforce the restrictions on withdrawal that Jennifer had placed on the Joint Account.
- [192] On June 13, 2014, the lawyer at Legacy emailed Michael to advise that BMO had exercised its discretion to require authorization from both parties where they deem appropriate. The lawyer again confirmed that:
- either both account holders will need to work together or your mother will need to make a court application. As discussed on Wednesday, if your mom takes no action, then the account will automatically transfer to your sister when your mom dies.
- [193] In an internal Legacy email on June 19, 2014, the legal administrative assistant notes that she has spoken with Michael, and that he is trying to "work things out" with Jennifer to avoid court.
- [194] By letter on June 20, 2014, Mr. Smith wrote to Hilda enclosing the revised draft documentation. In that letter, Mr. Smith stated:

BMO has advised us that, without a court order, they will not allow you to deal with the joint BMO account on your own without Jennifer's consent (and vice versa). Once the enclosed documents are signed, I suggest that we provide them to BMO together with a letter explaining that the account is beneficially wholly owned by the Trust, that there has been no gift to Jennifer."

[195] A declaration of trust was not sent to Jennifer in advance, and documents were not sent to BMO after they were signed.

[196] On June 26, 2014, Hilda executed a deed of gift and declaration of trust with respect to the assets being added to the Alter Ego Trust, including the Joint Account.

[197] Mr. Smith testified that prior to signing the documents, he met with Hilda alone. He was aware of the dementia concern and verified Hilda's capacity with discussion and probing to test her rational thinking, mental acuity and memory designed to elicit fault lines. He did not detect any fault lines and was satisfied of Hilda's capacity. Mr. Smith testified that he respected Hilda who he described as having dignity and class. He valued his rapport with her.

IV. CREDIBILITY OF MICHAEL AND JENNIFER

[198] The credibility of both primary parties is a particularly important part of the assessment of the evidence in order to arrive at the necessary findings of fact in this case.

[199] I am mindful of the oft-cited case law on the assessment of credibility, particularly *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C.C.A.). Also instructive is *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739 at paras. 91 and 92, *aff'd* 2020 BCCA 130, *leave ref'd* [2020] S.C.C.A. No. 218.

[200] I commence with Michael as he is the plaintiff in his capacity of Trustee.

A. Michael

[201] Michael Mong is now 63 years old. In describing himself to the court he referenced his education, work history, hobbies, and family.

[202] When his family moved to Vancouver he started school in Grade 4. After high school he attended UBC and graduated in 1980 with degrees in Science and Engineering. He lived at home and paid his own university tuition and fees with a student loan.

[203] After graduation he went straight to work for BC Tel, now Telus, where he worked designing and building their fibreoptic network. After retiring to stay home with his children, he started another planning job until his retirement in 2018 due to downsizing.

[204] Michael's interests have been running, including marathons, and photography. He was the photographer at the wedding of Jennifer and Thomas in 1983.

- [205] In November 1996 Michael and Anne Lee married. Their two sons, Matthew and Adam, are now 22 and 18 years of age and attending university.
- [206] It is a part of the family history that his parents, particularly Jeffrey, did not support their marriage. Michael had arguments with Jeffrey at the time, and they had also argued when he was a teenager. In time, they developed a good relationship - for example, his father had told him things that he had not discussed with Jennifer and Angela. But Michael had little understanding of his father's financial position overseas. He testified that before his father died he knew only of his father's Hong Kong companies, YSC and Haw-Yuet, but not of his other financial affairs. In about 2003 Hilda told Michael that Jeffrey had had bank accounts overseas which she said were now clearly hers. He knew only that they were in a substantial amount.
- [207] With regard to his impending marriage, Michael's parents expressed a concern that, if the marriage did not work out, the Angus Property (in joint names with Hilda) would be subject to division in a divorce. Michael offered to take his name off title to the property. He signed the documents before his marriage to transfer his interest to Hilda.
- [208] It is apparent that throughout his life Michael had a very good relationship with his mother, Hilda. When Michael gave his testimony, Jennifer had not yet withdrawn her allegations of undue influence. As a result, much of Michael's evidence went to establishing Hilda's independence and his own supportive role in her life. It is clear that Michael was continuingly a great support, and indeed comfort, to his mother who was an intelligent, independent and caring person.
- [209] After Jeffrey's death in 1997, Michael assumed a greater role in assisting his mother. From 1999 to 2006 when Michael was travelling much of the time for work he spent time talking with his mother on the phone. When he was home he would assist with anything she needed done such as house repairs. She spent a fair amount of time with his children and participated in their lives, and he and his family regularly took her out for meals and once on a cruise. When he was in Vancouver he would stop by after work about three times a week and on weekends. After 2014 while she lived in Chalmers he would regularly join her for tea at about 3:45 p.m., and take her on weekend excursions.
- [210] Michael described Hilda's dependence on Jennifer relaying news of all that was going on in Hong Kong. Hilda felt that Jennifer was not forthcoming with information. Jennifer would call Hilda frequently, but after about 2009 he understood that they rarely spoke. The last time that Jennifer saw Hilda was at her uncle's 80th birthday in Hong Kong in November 2007. Hilda commented that Jennifer had taken other long trips, to Rome and South Africa, but not had not come to Vancouver to visit. Michael encouraged Jennifer to come to Vancouver but she never came.
- [211] Michael described his mother's relationship with Angela who also lived in Vancouver. Hilda had assisted Angela by paying for Angela's university education and providing a loan for her when she entered a law firm partnership. Angela often took her mother shopping and

assisted her with medical appointments. There was some friction between Hilda and Angela about the estate; Angela wanted to know more about what she stood to inherit than Hilda was willing to tell. Later it became a love/hate relationship with things sometimes going well as well as some arguments.

- [212] With regard to her finances and investments, Hilda would ask for Michael's opinion, but would make her own choices. She did not always agree with him, and always tried to get him thinking about other ways to do things. Michael emphasised that the assets that his mother owned were her assets to allocate as she saw fit. Even while living in the 608 Property he always knew that it was her asset. He kept thorough records of the payment of expenses for both 608 and the Angus Properties and created spreadsheets in preparation for the trial.
- [213] Michael also expressed to Hilda that she should take into account everybody with her estate, and assisted her in attempting to transfer money to Raymond and Victor in 2012 and 2013. Jennifer testified that Michael tried for years to get Hilda to forgive Angela's loan and to leave something to Angela.
- [214] Michael described his mother as a very caring person who honestly loved all of her family. He agreed that she was intelligent and knowledgeable, adding that she continued to go to seminars to learn more about investing and dividends. She could be very quiet and could speak her mind. She was willing to listen but did not easily change her opinions. Hilda was both stubborn and flexible. Michael said that Hilda was his best friend and was always there for him.
- [215] Other witnesses described Michael. Mr. Kam has known Michael through his work with Hilda and Jeffrey since about 1990 but has not had many direct interactions as Hilda gave him the instructions on the accounts. His understanding from his observations and from what Hilda told him were that she relied on Michael a lot, especially after 2010. Michael was present at one meeting with Hilda and Mr. Kam where Hilda got upset about her inability to access her funds in the Joint Account. When Hilda was in Chalmers Lodge Mr. Kam discussed her accommodation with Michael and was satisfied that she was in a good place with her present circumstances.
- [216] Mr. Smith came to know Michael when he met him and his wife in 2009 to discuss estate planning for Hilda. As set out above in the section regarding the evidence of the Trust, Mr. Smith had a number of meetings and conversations with Michael in 2009 and in 2014.
- [217] Mr. Smith described Michael as being deferential, acceding to and helping his mother to achieve her wishes, and not pursuing his own. He was dutiful and caring. He would visit and meet her needs. To him, they clearly had a warm and loving mother-son relationship.

- [218] Richard Blake Ryder-Wiggs is the alternate trustee of the Trust. He has been a friend of Michael's for about forty years since meeting in a running race. He kept in touch with Hilda over the years in group gatherings at Chinese restaurants. He testified that Michael would bring Hilda to these social events and was always solicitous of her.
- [219] Ms. Kim Soltysik met Michael when Hilda became a resident of Chalmers Lodge. She held the position of Director of Care at Chalmers, and was the registered nurse in charge. Her education includes a BA and a Master's degree. She now teaches at Kwantlen University in the health care program. As part of her duties at Chalmers, she talked to each resident every morning at breakfast as she was distributing their medications.
- [220] Ms. Soltysik has a very clear memory of Hilda who she described as a kind, thoughtful, gentle woman who really touched her heart. She described Michael as being a quiet, sincere, conscientious man who was very concerned with his mother's wellbeing. He wanted the best for his mother. They had a very loving relationship.
- [221] Most days Michael came for afternoon tea and when he arrived he lit up Hilda's day. Ms. Soltysik's observations of them together were that they shared each other's counsel and opinions. Hilda was worldly and enjoyed discussing events, not people. Other residents gravitated to them.
- [222] Jennifer described her childhood relationship with Michael as being a bit different than her close relationship with Angela. She said that, as a boy, Hilda favoured him. Michael was sometimes a bit rougher with her, such as pulling her hair. There were good times as well - she loved him and still cares about him but things changed after his marriage.
- [223] Raymond said of his Uncle Michael that overall their relationship was very close before this litigation. Since he was four or five years old they had spent a lot of time together, went on trips, and enjoyed photography together.
- [224] While on the witness stand for lengthy testimony, Michael was fair, kind, thoughtful, soft-spoken, and generous of spirit regarding his sisters and nephews notwithstanding the litigation in this case and the Hong Kong action. He was calm under extensive cross-examination; his cadence, tone and manner did not change when he was challenged or asked repetitive questions. I observed Michael to have a genuine desire to assist the court with all the information that he could impart. Even when it took him longer to answer, he was always responsive to the questions asked. His testimony was internally consistent and consistent with the documentary evidence.
- [225] I have no hesitation in concluding on the totality of the evidence that I find Michael to be a wholly credible and reliable witness. I accept his evidence in its entirety.

B. Jennifer

- [226] In her evidence, Jennifer, who is now 66 years old, told the court of her childhood in Vancouver since age 12, her education at UBC, her move to Hong Kong in 1979, her family including her parents and two children, and her work at her father's company in Hong Kong.
- [227] As the oldest child, her mother relied on Jennifer a lot after the move to Canada with three young children. She had a major role in helping her mother with the housework. Due to poor eyesight, she could not drive and so spent more time housebound. Jennifer was very close to her father and missed him terribly after the move.
- [228] Jennifer attended UBC where she obtained her Bachelor of Science and then an MBA in 1979. After graduation she moved to Hong Kong and joined her father's company. In 1981 when her father offered to buy her an apartment she moved to the Lily Court residence where she continues to reside.
- [229] The company, YSC, was a chemical trade business started by her grandfather in 1951. Her father gave her shares and appointed her as a director. After Victor was born in 1991 she started working there full-time as general manager. Her working relationship with her father was very good. He was grooming her to be his successor.
- [230] Mr. Kam described Jennifer as a leader in the family business.
- [231] Jennifer married Thomas in Vancouver in June 1983, despite Jeffrey's concerns that, as a dentist, Thomas could not support Jennifer. Raymond was born in 1985 and Victor in 1991, both in Vancouver as her father wanted the children to be "genuine" Canadian citizens. They all lived together at Lily Court. Raymond had eczema as a child and needed special care so her mother visited often to assist. The family spent summers in Vancouver with Hilda.
- [232] Jennifer testified regarding her father's worries about the political future of Hong Kong. The looming 1997 handover was stated to be the main reason for their move to Canada. Jeffrey's worries intensified after the Tiananmen Square protests in 1989.
- [233] Jennifer testified that Jeffrey wanted to eventually raise Raymond in Canada with the whole family. This was the reason Jeffrey instructed Hilda to place the 608 Property into joint tenancy with Jennifer. Thomas took the dental board exams in Vancouver so they could someday move back. They were getting ready.
- [234] When the documents were signed in the lawyer's office, Jennifer gave Hilda the \$1 consideration in four quarters. Hilda said to her words to the effect of "now you have the house as Daddy and I want you to have the house for you and Raymond to be ready to move back at any time". Jennifer says that the 608 Property was a gift to her and was meant to be their house whether they moved back or not. Since they were not moving right away, it was rented.

- [235] Jennifer testified that after Victor was born, her father became more worried about the future of Hong Kong. He gave her a bank account to have money ready for their future. He said to her (in Cantonese) "have house have money ready for you". He also said that he may or may not be by her side, and that "mother is here to help you". Jennifer felt as though her father was predicting his own death, as he died a few months before the handover of Hong Kong to China.
- [236] With regard to the evidence on the issue of intention, I will proceed to consider the testimony of Jennifer on its own, followed by an analysis of whether Jennifer's story is inherently believable in the context of the facts of the entire case: Youyi Group at para. 91.
- [237] In assessing Jennifer's evidence and credibility, I first note that on the witness stand she was often evasive, argumentative and unresponsive to the questions asked.
- [238] I commence with Jennifer's evidence regarding the fact that, after Hilda's last trip to Hong Kong in November 2007 at the Uncle's birthday party, Jennifer did not ever travel to Vancouver to see her mother, including the times she was in the hospital or when Hilda lived in Chalmers Lodge. Jennifer last saw Hilda in 2007, ten years before her death.
- [239] The evidence first arose in direct examination when Jennifer said that the reason she did not come to Vancouver was because she could not drive. In cross-examination when she was questioned on her reason, she also stated that she feared Michael as a result of an incident before his wedding in 1996 when he hit her head on the hood of a car in the driveway of the Angus Property. When it was suggested to her that that was an exaggeration as Michael had stayed in the Lily Court apartment with them afterwards, she testified that she was not coming to Vancouver because it would lead to conversations with her siblings that would upset her mother. When it was put to her that she could visit Hilda without her siblings being present, she again stated that she did not come because she could not drive. She asked how, if she came over, would she go to the hospital to visit mother.
- [240] Repeatedly Jennifer stated that she could not come to Vancouver because she could not drive. She testified that her whole family knew that the reason she could not come to Vancouver was because she could not drive. This was her rationale notwithstanding that she is an educated person who grew up and went to university in this city, and is a businessperson in Hong Kong. It defies common sense that she could believe a proposition so devoid of logic - that she could not take taxis or arrange transport to her mother's home on Angus Drive or in later years to the hospital or Chalmers Lodge. However, in the most sincere manner, Jennifer appeared to believe her own incredible statements. I find rather that Jennifer was avoiding face to face conversations with Hilda, and with her siblings, especially after 2009.

[241] Jennifer's evidence regarding intention, on which she bears the onus, is primarily her testimony concerning the statements made by Hilda in 1987 that 608 was meant to be their house, and by Jeffrey in 1994 that the Joint Account was to be hers. She also testified that her mother later confirmed those statements to her.

[242] However, in cross examination when she was asked about emails she sent to Angela expressing that the money in the Joint Account was Hilda's money, she denied meaning what she said, and explained that she was only making "chit chat" with Angela. Excerpts from some of those emails in 2010 after the Trust was settled are set out here:

- (a) April 18, 2010: "I received documents from HSBC to give P/A to [Michael] over my joint a/c with [Hilda]. I confronted [Hilda] and asked her why she didn't tell me before hand. ... I told her I would deal with her assets fairly and you is not to trust [Michael]".
- (b) April 18, 2010: "[Michael] says her half share of 608 has gone into [the Trust] too but when I asked H, she said she didn't give half share of 608 to you. Raymond is not sure if she can legally allocate her so called half share in a joint tenant [sic]. The same applies to the cash".
- (c) April 21, 2010: "big news. I just called H because I found C\$2million missing from her HSBC statement. I talked to her nicely that I was reconciling her statements which she always accuse me of not doing but I have no way of checking what she agreed to Wilkie. ... I reminded her that I was only calling to inform her that money was missing from her a/c. All she had to say was that she has transferred it out. nothing much I can do, it's her money."

[underlining added]

[243] I note that these emails were in documents not produced by Jennifer but by Angela.

[244] Jennifer testified to having phone conversations with Hilda wherein Hilda would become upset and Jennifer would hang up so that her mother could calm down. Often in describing those conversations, Jennifer would describe Hilda as saying "random" things starting in 2009 to 2010. The following are some transcript excerpts wherein it was put to Jennifer that Hilda was asserting that the Joint Account was hers:

Q And this is an email from you to Angela dated February 21st, 2013:

H has some money at Wilkie in our joint name. She has been nagging to get it back.

Now, Ms. Mong, you say that's your money, so why would your mother be nagging at you to get that money back?

A Well, she always talked random things like that, and this was one of her random moments.

Q You don't say in this email oh, she was upset; she was flustered. You don't say that it was one of these random moments. You say:

H has some money at Wilkie in our joint name. She has been nagging to get it back.

That's what you say, isn't it, Ms. Mong?

A Yes. That is what I say.

[245] Further with regard to that email to Angela:

Q And you write:

H has some money at Wilkie in our joint name. She has been nagging to get it back. She told me that she has spent up the \$1.9 million with M at HSBC with Farley. She is short of money she claims to pay her taxes because you won't pay her back for the money you borrowed. M is pumping all her money. Told her when he took the 1.9, he said it was to pay for her living expenses. So I told her, how could she use up so much money?

Do you recall the discussions with Hilda that are referenced in these emails?

A Well, from time to time Hilda would say random things like saying that I was stealing her money and all that. But when she calmed down I would explain to her that all this money is money that daddy had given me; she would understand. But again, sometimes when she is pressured she comes and says to me all these random things. I try not to have an argument with her. I don't want to upset her. But when she calms down, I would explain to her again. So when she says to me that I have taken her money, I -

[underlining added]

[246] Another example is:

Q Okay.

She also accused me of stealing her money in her HSBC current account which she has had since 1953. I reminded her that we only put the dividend cheques into that account and she has been giving away most of that as laisee.

So just with respect to those portions of the email does that -- do you recall this discussion with Hilda?

A Yes, I recall this discussion. That discussion I -- had me really worried about my mother. I didn't know why she was rambling off all sorts of -- all sorts of random stuff. And often my mother would speak in this way randomly, rattling on about random stuff when she is being pressured by Michael. So what happens is Michael will go and ask her things like oh, what has happened with all your dividends and what has happened with all -- with everything? And then she would come back with questions to me, and she would be all frustrated, and she would want to get an answer from me to go back -- to take back to Michael.

[247] Jennifer attributes the "random" statements to pressure applied on Hilda by Michael. In general she thought Hilda to be of sound mind.

- [248] Jennifer asserts above that in 2013 Hilda understood that the Joint Account was money given to her by Jeffrey. Yet in 2014 Hilda gifted the Joint Account to the Trust. In addition to Jennifer's testimony being inconsistent with the actions taken by Hilda, Jennifer's testimony is internally inconsistent. Despite her statements that the Joint Account was a gift to her from Jeffrey which was confirmed by Hilda, she, when confronted, agreed that she wrote to Angela stating that the funds were Hilda's assets, and agreed that Hilda had both asked for it back and accused her of stealing the funds.
- [249] Jennifer's statements are also inconsistent with her actions. Within fifteen days of Jeffrey's sudden death in May 1997 Jennifer directed the bank to transfer the joint account with Jeffrey to a joint account with Hilda. These actions are consistent with the family understanding and practice that the assets were in a family pool and in joint names in name only. When Hilda told Mr. Kam that "Jennifer knows what to do [with the Joint Account]", she was referring to the fact that Jennifer had known what to do with the joint account on Jeffrey's death - it was to be transferred to joint names with Hilda who was Jeffrey's sole beneficiary for holding as the family had historically done in joint names with no transfer of beneficial title.
- [250] I do not believe Jennifer's testimony that the transfer of the Joint Account was for convenience for her estate planning purposes. If that were so, a transfer to joint tenancy with Thomas was the logical step.
- [251] Further, Jennifer's failure to notice when the two first Disputed Transfers of \$320,000 were made in 2009 is inconsistent with her assertion of ownership of the Joint Account. When she realized that almost \$2,000,000 was withdrawn in 2010 she took no steps to retrieve the money from Hilda. I do not believe Jennifer, a sophisticated businessperson, when she says that she did not know where the money had been transferred to. There were no attempts to conceal the transfers. They were plain on the face of the bank statements. Jennifer did later attempt through Mr. Kam to limit further withdrawals.
- [252] In addition to being internally inconsistent, Jennifer's evidence is inconsistent with the evidence that I accept. Mr. Kam testified that Hilda told him on a number of occasions that the funds in the Joint Account were hers. Mr. Smith was satisfied after many conversations with Hilda that the beneficial ownership of both the 608 Property and the Joint Account was solely hers. Michael testified that he was always told that 608 was his parents' asset, and that his mother told him that the funds in the Joint Account belonged to her. Mr. Sarkari wrote in 1994 that 608 beneficially belong to Hilda.
- [253] I place no weight on the evidence of Jennifer's children, Raymond and Victor. They are both lawyers and dedicated sons; their evidence of their view of their mother's ownership of the Disputed Assets is of no assistance to the court. Although their testimony appeared somewhat rehearsed, I accept their close relationship with Jeffrey and Hilda. However, it does not determine the intentions of their grandparents in 1987 before Victor was born, and in 1994 when the children were nine and three years of age.

- [254] That Jeffrey told Jennifer that he wanted their family to have a house and money in Canada is evidence of a desire to take care of Jennifer's family but does not establish, on a balance of probabilities, in the context of the substantial evidence to the contrary, that Jeffrey in 1994, or Hilda in 1987, intended the money and house to be gifts as opposed to resulting trusts. The latter option is more in accordance with the family practice of holding assets in joint names as part of the family pool with the parents' retaining control and beneficial ownership. The rational purpose for the transfers was the family estate planning. That they were caring parents is used by Jennifer in testimony that is self-serving in support of her inherently improbable conclusion of having been the recipient of gifts.
- [255] After considering the totality of the extensive evidence regarding the history of the family and of the Disputed Assets, I conclude that Jennifer's evidence with regard to the intention of Jeffrey and Hilda and the statements made by them to her is not credible. It cannot be relied upon.

V. ANALYSIS

- [256] I return to the time periods for the purpose of the discussion of the evidence in order to make findings of fact. With the onus on Jennifer to establish that the transfers to her of interests in 608 and the Joint Account were gifts, I will again discuss her evidence as well as the evidence of the other witnesses.
- A. 1967 to 1987
- [257] This time period extends from the arrival of the Mong family in Canada to the transfer of 608 to Jennifer and Hilda jointly in 1987.
- [258] On all of the evidence I find that only legal title was transferred to Jennifer by Hilda who held the entirety of the beneficial title in the 608 Property. It was thus the intention of Hilda at the time of the transfer which is determinative. Hilda intended to retain her beneficial interest in property she continued to consider her own property.
- [259] When 608 was transferred into joint tenancy with Jennifer, the Mongs were deeply concerned about Angela's potential marriage to a man of whom they disapproved. Jennifer testified that her father was heartbroken by this prospect. He acknowledged that he could not stop Angela from making choices he disapproved of, but said that they had to take care of themselves and their assets.
- [260] At this time, Hilda and Jeffrey took a number of steps with their assets and estates. I conclude that their actions were for the purpose of protecting their assets generally, and from Angela's potential spouse specifically, in the event that either Hilda or Jeffrey passed away. The previous year they had taken the step of inquiring with Mr. Sarkari as to whether the 608 Property could be transferred into joint names with one of their daughters. Mr. Sarkari concluded that they could. He described that conversation in his statutory declaration.

- [261] Hilda and Jeffrey's estate plan in 1987 was not sophisticated. There were also documents filed naming Michael and Hilda as joint tenants on the Angus Property. Whether they were correct in their belief that placing someone on title would protect the assets from claims against their estates without actually transferring the beneficial interest is not the issue - it is their intention that matters: Bergen at paras. 44 and 47.
- [262] Hilda and Jeffrey also executed new wills on August 31, 1987, in which they left the entirety of their estate to one another. Upon the death of the survivor, their wills provided that their estates would pass to Michael. This was Jeffrey's last will.
- [263] Further evidence that it was only legal title that was transferred in 1987 to both Jennifer (in 608) and to Michael (in Angus) is Michael's return of his interest in the Angus Property to Hilda in 1996. Both Jennifer and Michael gave evidence that Jeffrey did not initially approve of Michael's partner, Anne Lee. When Michael informed his parents that he intended to marry her, Jeffrey in particular was not pleased.
- [264] I accept Michael's evidence that he offered to return his interest in the Angus Property to his mother. He did so notwithstanding that he had financially contributed to the Angus Property. He believed that house still belonged to his parents.
- [265] Angela witnessed the documents that removed Michael from title to the Angus Property. When Angela was asked in her discovery why Michael was removed from title in 1996, she said:
- Because my -- my brother was going to get married, and my parents were worried about the assets that Michael had. So they told him they wanted Michael off.
- [266] That Jeffrey and Hilda believed it to be their right to take the Angus Property back indicates that it was not an irrevocable gift in 1987. Even if they did express a testamentary intention that Michael would some day have the property, this was subject to reconsideration. I conclude that their intention regarding the 608 Property was the same; it was a testamentary intention.
- [267] The one dollar Jennifer gave Hilda, whether it was a dollar bill or four quarters, is not consideration. In the context of the evidence as a whole, I find that the transfer was a gratuitous transfer: Pavlovich at para. 43.
- [268] On December 23, 2009, Hilda executed a declaration of trust which transferred her entire beneficial interest in the 608 Property to the Trustee of the Alter Ego Trust. Hilda was consistent throughout as the evidence of Michael and Mr. Smith, and the documents of Mr. Sarkari (referring to a transfer to a daughter and not to a gift, and confirming Hilda's ownership) indicate. Hilda had retained beneficial ownership and decided to distribute the 608 Property to her daughters equally through the Trust.

[269] Mr. Smith was satisfied that Hilda was the beneficial owner of 608. Although he did not know of the earlier deed of gift to Michael for Angus, Mr. Smith's evidence was entirely clear, reliable and credible. Hilda told him that 608 was hers and in the highest professional manner he took the steps necessary to reach his conclusion that Hilda retained the entire beneficial interest.

B. 1987 to 1997

[270] In this time period the Joint Account was first opened with Jeffrey and then with Hilda. Hilda continued to manage the 608 Property with Michael's assistance after he lived there.

[271] Until his death in 1997, Jeffrey worked with Jennifer in Hong Kong at YSC, the family company. After Victor was born in 1991 Jennifer began working full-time at YSC as general manager. Michael testified that he observed some arguments about the business between Jennifer and Jeffrey but understood theirs to be a good working relationship.

[272] Jeffrey, Jennifer, the two children, and Thomas lived together at Lily Court. Jeffrey had a lovely relationship with his grandsons. They travelled to Vancouver in summers and often travelled to other places including Hawaii.

[273] In April and May 1994 in Vancouver, the Joint Account was opened in the names of Jennifer and Jeffrey, and Jeffrey transferred \$1,028,000 into the Joint Account from an account in his sole name. A similar process occurred with the Sanwa account which was later rolled into the Joint Account.

[274] It is Jeffrey's intention at this time that determines whether a gift was intended. The burden is on Jennifer to prove that in 1994 Jeffrey intended to transfer a beneficial interest in the Scotia McLeod account when he added her as a joint tenant and that it was his intention that she receive the entirety of the joint account funds by right of survivorship.

[275] When Jeffrey died in May 1997, Hilda was the sole beneficiary of his estate. The Joint Account funds were transferred into the Joint Account opened in the name of Jennifer and Hilda 15 days later. It is Jennifer's evidence that she added Hilda as a matter of convenience for her own estate planning. She says that Hilda held title on an express, implied or resulting trust for Jennifer. If Hilda's interest was in trust, then it follows that Jennifer can dispute the three withdrawals which form the Disputed Transfers of approximately \$2.5 million. If, however, the Joint Account was held in true joint tenancy, then either Hilda or Jennifer would be entitled to withdraw funds.

[276] Jennifer's evidence that Jeffrey gifted the entirety of the funds to her does not bear scrutiny. She asserts that in 1994 Jeffrey was disappointed in Angela and disapproved of Michael's relationship with Anne Lee. She says he felt Jennifer was the only child he could entrust with his hard-earned money and these were her father's last instructions leading up to Michael's wedding in November 1996, two- and one-half years later.

- [277] Firstly, I place no weight of Jennifer's assertions regarding her father's statements to her about his intentions in 1994. Much of her evidence is statements she said her parents made. I have above made a finding that Jennifer's evidence lacks credibility: It is not possible to believe much of what Jennifer says her parents said. I will repeat some of the reasons for this finding here.
- [278] Considering the family estate planning in advance of 1994, it is not logical that Jeffrey intended that Jennifer inherit most of his entire estate to the detriment of Hilda, or that he intended that his other two children be disinherited. I find that he sought to protect these family assets by entrusting them to Jennifer. Jeffrey trusted Jennifer as she was the eldest child and the child with whom he lived and worked with on a daily basis. He did not anoint her as the sole beneficiary of a large part of his estate in Canada.
- [279] Jennifer first testified that Jeffrey acted out of concern that Michael would become the sole beneficiary of Hilda. However, in cross examination she could not recall Jeffrey saying this to her.
- [280] The more probable explanation is that Jeffrey and Hilda had a practice of putting their children on title of their assets. In her discovery, when Angela was asked if she knew why Michael was put on title to the Angus Property, she said she understood that Michael was on title because her "parents did things like that ... it was old school. They always thought whatever they had belonged to the family, regardless of who was on title".
- [281] Jennifer also stated that Jeffrey was worried about the future of Hong Kong and wanted Jennifer to have funds in Canada in case she and her family had to suddenly leave Hong Kong. As discussed above in the context of the accepted evidence, Jeffrey's statements do not, standing alone, establish that he or Hilda intended to transfer a beneficial interest in either the 608 Property or the Joint Account to Jennifer. Similarly, Hilda's statements that she would take care of Jennifer's children if Jennifer died are taken, in the context of the other evidence, to mean that she would act as the caring grandmother she was.
- [282] The evidence regarding the history of the Joint Account after the 1994 transfer by Jeffrey confirms that his intention was to transfer only the legal interest to Jennifer.
- [283] Jennifer testified that that she added Hilda to the Joint Account after Jeffrey died to assist with her own estate planning. Her evidence that Hilda knew that the funds were intended for Jennifer and Jennifer's children if she predeceased her mother is rejected. It is inconsistent with her own evidence and actions, and inconsistent with evidence that I accept.
- [284] Jennifer instructed the bank to open a new joint account with her and Hilda on title. Within fifteen days, the funds were transferred to that account in the names of Jennifer and Hilda jointly. Although Jennifer asserts that her status as the applicant of the account and Hilda's status as the "co-applicant" conveys that Jennifer was the primary account holder, it simply confirms that Jennifer was an account holder for income tax purposes as a non-resident.

- [285] In this regard Mr. Kam testified that historically it was the applicant on an account who received the T-slip for income tax purposes. This is consistent with Hilda's plan that the Joint Account was set up to allocate interest for tax purposes for Jennifer to avoid tax on the interest, not to transfer beneficial interest in the account. As Michael testified, it was part of the offshore bucket.
- [286] Jennifer denies that she participated in this tax evasion scheme and stated that neither she nor her father would ever evade taxes or do anything improper. However, in cross examination Jennifer said that Jeffrey's standing instructions were for Jennifer to use a void power of attorney to empty his Hong Kong bank account after his death in order to avoid probate fees, and Jennifer followed those instructions. Further, the allocation of interest to Jennifer is not determinative of beneficial ownership in the absence of other evidence.
- [287] Further, while courts are no longer barred from considering whether bank documents evidence an intent to transfer beneficial title, this should only be done where something "in the bank documents that specifically suggests the transferor's intent regarding the beneficial interest in the account": Pecore at paras. 60-61. Mere designation of Jennifer as the primary account holder does not rise to the requisite level of specificity to constitute evidence of Jeffrey's intent to transfer a beneficial interest.
- [288] In setting up a new account after Jeffrey's death, if the funds were beneficially Jennifer's, it does not make sense that she did not name Thomas as a joint account holder for the purposes of her estate planning. Hilda could have been granted a power of attorney to manage the investments. Thomas could have been named trustee. Although little is known about Thomas, who died in 2018, the evidence indicates that he ran his own dental practice and was a capable businessman, husband and father.
- [289] Hilda confirmed her intention to retain the beneficial interest in the Joint Account, in statements to Michael and Wilkie Kam and Mr. Smith. Her handwritten note is also confirmation. And in telephone conversations with Jennifer she accused Jennifer of stealing her money and told Jennifer she wanted it back.
- [290] I find on all of the evidence that Hilda was the beneficial owner of the entire Joint Account from the time that the account was opened. Jennifer, in quickly transferring the joint account with her father to a new joint account with her mother, acted in accordance with her knowledge that the funds in the Joint Account were beneficially owned by her father and on his death went to her mother as sole beneficiary of his estate.

C. 1997 to 2009

- [291] After Jeffrey's death in 1997, with the funds having been transferred to a joint account with Hilda and Jennifer, Hilda continued to manage and control the investments. Her investment strategy did not change. The account was focussed on fixed income and as the income was allocated to Jennifer as the non-resident, no taxes were payable. As Mr. Kam testified, Hilda was well aware of the tax implications and capable of effecting strategies to minimise income tax.
- [292] Jennifer and Hilda last met face to face in Hong Kong in November 2007 at the 80th birthday party for Jennifer's uncle.

D. 2009 to 2014

- [293] In this time period much changed. The fundamental change was Hilda as a grandmother increasingly desiring to provide funds directly to her grandchildren. Jennifer reacted by asserting control rather than by facilitating Hilda's wishes.
- [294] Hilda made the Disputed Transfers from the Joint Account, the Trust was settled with assets including the 608 Property in 2009 and the Joint Account in 2014, and Jennifer first asserted her ownership of the beneficial interests in 608 and the Joint Account. Some of this evidence has been addressed above in the section assessing Jennifer's credibility.
- [295] I agree with Michael who submitted that: "the most significant evidence is that Jennifer herself did not believe that she had a beneficial interest in the Joint Account during Hilda's lifetime. This is made abundantly clear by Jennifer's acquiescence to Hilda's withdrawal of funds and Jennifer's own emails to Angela in which she repeatedly refers to the funds as Hilda's."
- [296] Excerpts from some of those emails are:
- (d) April 18, 2010: "I received documents from HSBC to give P/A to [Michael] over my joint a/c with [Hilda]. I confronted [Hilda] and asked her why she didn't tell me before hand. ... I told her I would deal with her assets fairly and you is not to trust [Michael]".
 - (e) April 18, 2010: "[Michael] says her half share of 608 has gone into [the Trust] too but when I asked H, she said she didn't give half share of 608 to you. Raymond is not sure if she can legally allocate her so called half share in a joint tenant [sic]. The same applies to the cash".
 - (f) April 21, 2010: "big news. I just called H because I found C\$2million missing from her HSBC statement. I talked to her nicely that I was reconciling her statements which she always accuse me of not doing but I have no way of checking what she agreed to Wilkie. ... I reminded her that I was only calling to inform her that money was missing from her a/c. All she had to say was that she has transferred it out. nothing much I can do, it's her money."

[underlining added]

- [297] I reject Jennifer's explanation that she was bound by secrecy and had promised her mother that she would not tell Angela that the Joint Account was meant for her, Jennifer. The emails to Angela, Jennifer says, were only "chit chat".
- [298] I do not accept that Hilda or Jeffrey instructed Jennifer to keep these secrets. Jennifer's behaviour is inconsistent with any such instructions from her parents. Jennifer says that Hilda specifically told her not to tell Angela about the transfer of the Haw Yuet and YSC shares to Jennifer in 2006; however, Jennifer admitted to telling Angela about these assets.
- [299] Jennifer did nothing to restrict access to the account after the 2009 Transfers. She says this is because she did not know about them, and said that she was late learning of the 2010 Transfers offering as explanation the slow mail to Hong Kong or that her bookkeeper did not pass on the bank statements to her. The evidence did not support her view that the mail to Hong Kong was slow.
- [300] Jennifer's evidence is that after she learned of the 2010 transfers she placed restrictions on the Joint Account, requiring both account holders to authorize withdrawals of \$50,000 or more. She says she did this because she believed the account was hers; however, she did nothing to try and recover the almost \$2 million that had been taken from her account. She explains her inaction by saying that she was reassured by Mr. Kam that the funds had gone into a joint account at HSBC Bank. However, she did not make further investigations.
- [301] Jennifer also attempts to explain her acquiescence by saying that her mother would often move money if she could get a better rate at another institution. She says that sometimes the Joint Account at HSBC Securities was almost empty because Hilda had moved the funds to HSBC Bank to take advantage of a special rate.
- [302] However, on cross examination, Jennifer's explanation did not bear scrutiny. There was only one example in eight years where Hilda transferred a large sum of money from the HSBC Securities Joint Account for the purpose of obtaining a better rate. There was no pattern of investments by Hilda where she withdrew and then returned large sums of money to the Joint Account.
- [303] Jennifer's testimony that Hilda frequently affirmed that the money belonged to Jennifer is fundamentally inconsistent with Hilda's management of the investments, withdrawal of funds, and her statements to Michael, Mr. Kam and Mr. Smith. It is also inconsistent with her evidence, set out above, that when her mother said random things to Jennifer, she also said that Jennifer had stolen her money and that she wanted her money back from Jennifer.
- [304] I conclude that the Joint Account belonged to Hilda beneficially. As such, she could distribute it as she pleased during her lifetime and upon her death.

E. Conclusion

- [305] Jennifer has not discharged the onus on her to establish on a balance of probabilities that the transfers to her of interests in 608 and the Joint Account were gifts.
- [306] I therefore find that both of the Disputed Assets, 608 and the Joint Account were held on bare trust by Jennifer. The beneficial interest remained with Hilda when she effected the gratuitous transfer into joint tenancy in 1987. The beneficial interest in the Joint Account remained with Jeffrey (and, after his death, his estate) when he gratuitously added Jennifer as a joint tenant to the Joint Account in 1994.
- [307] Jennifer submits that, on the law, Hilda could not transfer a joint bank account or jointly held real estate into the Trust. She relies on Bergen at para. 41 for the proposition that "it remains true that once a gift has been made of an interest in real property or any other type of property, the gift cannot be revoked" as well as the proposition from Fuller at para. 53 that the "gift of a joint interest in real property is an inter vivos rather than a testamentary gift and cannot be retracted by the donor."
- [308] These are, of course, good and longstanding propositions of law. But a prerequisite to the irrevocability of a true gift is proof that the transferor indeed intended to make a gift, thereby rebutting the presumption of resulting trust: Beam at para. 157; Di Giacomo at para. 40. Jennifer has failed to rebut the presumption in respect of both the 608 Property and the Joint Account and, as a result, the principle that gifts are irrevocable has no application here.
- [309] I find that Jennifer held her interest in the 608 Property as a bare trustee. The Trustee is the sole beneficial owner of the entirety of the funds in the Joint Account.

VI. CERTAINTY OF TRUST

- [310] Jennifer submits that the Trust fails for lack of certainty. More specifically, she submits that Jennifer possessed at least some beneficial interest in the Disputed Assets at the time the Trust was settled. If this was the case, then Hilda could not have placed 100% of the beneficial interest in the 608 Property into the Trust, which she purported to do.
- [311] The issue with this submission is that it depends on Jennifer successfully rebutting the presumption of resulting trust, which she failed to do. Hilda did not transfer something into the Trust which she did not have; she claimed to own the entire beneficial interest in the Disputed Assets and she did, in fact, own the entire beneficial interest. There can only be one existing state of affairs regarding ownership of the subject matter of a trust; one party's refusal to accept that state of affairs will not render it uncertain.
- [312] Hilda intended to settle the entirety of the beneficial interest in both the 608 Property and Joint Account into the Trust in 2009 and 2014 respectively. Mr. Smith knew that both of these assets were jointly held and testified that Hilda believed the assets were solely hers and it was only the legal interest in the property that was jointly held. The subject matter is

clearly identifiable and the interests to which the beneficiary is entitled is also clearly defined: Larochelle at para. 181. Jennifer's refusal to accept how those interests were defined is not relevant.

- [313] There is no ambiguity in the trust declarations themselves. Even if there was, the "aim of the transaction" based on the surrounding circumstances was not ambiguous.

VII. THE COUNTERCLAIM OF JENNIFER

- [314] Jennifer claims that she is the sole legal and beneficial owner of the Disputed Assets. She also claims that the Disputed Transfers in 2009, 2010 and 2013 amounted to a breach of trust. The basis of her claim is that Hilda held legal title to the Joint Account in trust for Jennifer to be used for the benefit of Jennifer or her sons. Her other claims include declarations sought, and damages against Michael.

- [315] For the reasons set out above, I find that Hilda held full beneficial ownership of the Disputed Assets. Jennifer has not proven that the Joint Account or 608 were irrevocably gifted to her.

- [316] The counterclaim of Jennifer is therefore dismissed in its entirety.

VIII. LIMITATION PERIODS AND LACHES

- [317] Jennifer claims that the actions regarding 608 and the Joint Account are statute barred. I reject her submissions as they rely on her view of the evidence which I do not accept.

- [318] Jennifer first asserted ownership of the Joint Account in 2010, and for 608, in 2009 when she refused to sign the Declaration of Trust. The ten-year limitation periods therefore did not expire prior to the plaintiff's claim filed in 2017.

- [319] With regard to laches, Jennifer appears to rely on acquiescence alleging prejudice from Michael's delay in bringing the action. I do not find that any delay was such that the doctrine of laches would apply. Further, to the extent that Jennifer alleges that she was unaware of the Trust or the transfer of the Disputed Assets to the Trust, the responsibility is Jennifer's who was informed of the Trust by Michael in 2009 and who may have preferred to remain wilfully blind. Although Hilda's evidence would have been helpful if either party had brought an action prior to her death, it is the nature of estate litigation that the most important witness is no longer present.

IX. ANGELA'S APPLICATION

- [320] At the conclusion of the trial proper, Angela brought an application seeking rectification of the Trust in the event that the court determined that Jennifer and Hilda both legally and beneficially held the 608 Property as joint tenants at the time that Hilda transferred her interest in 608 to the Trust.

[321] However, since I have found that Hilda beneficially held all of 608 at the time of the transfer to the Trust on 2009, it is not necessary to decide this issue.

X. ORDERS

[322] In the result, the plaintiff is granted the declarations he sought:

1. The defendant, Jennifer Tak Fan Mong, held her legal title to the property described below as bare trustee for Michael Tak Yan Mong, in his capacity as Trustee of the Hilda Mong Alter Ego Trust No., (the "Trustee"), who is now the sole beneficial owner of the proceeds of sale held in trust for the property described as:

608 West 54 Avenue, Vancouver, British Columbia

Parcel Identifier: 008-307-865

Lot 8 Block 885

Plan VAP9858

District Lot 526

Group 1, New Westminster Land District

2. The Trustee is the sole beneficial owner of the entirety of the funds comprising the account described as:

BMO Nesbitt Burns

1800-885 West Georgia Street

Vancouver, BC V6C 3E8

Account no: 805-38475-16

[323] The counterclaim of Jennifer is dismissed in its entirety.

[324] The parties are at liberty to make submissions regarding costs. If the parties are unable to agree on costs, or the process for determining costs generally and completing any submissions regarding special costs, I request that a one hour hearing be arranged with Scheduling for the purpose of determining how best to proceed.

"The Honourable Madam Justice Watchuk"

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