
CANADA / JUDGMENT

Riley v. Riley

2010 BCSC 161

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 161 Riley v. Riley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Riley v. Riley,

2010 BCSC 161

Date: 20100205

Docket: S082785

Registry: Vancouver

Between:

Robert Christopher Riley

Plaintiff

And

Susan Doreen Riley

Defendant

Before: The Honourable Mr. Justice Greyell

Reasons for Judgment

Counsel for the Plaintiff:

R.A. Kasting

Counsel for the Defendant:

A.A. Mortimore

Place and Date of Trial:

Vancouver, B.C.

November 30;

December 1-3, 2009

Place and Date of Judgment:

Kelowna, B.C.

February 5, 2010

[1] On August 21, 2007, Mr. Christopher Riley ("Mr. Riley") conveyed his house to his daughter, the defendant Susan Riley. Mr. Riley passed away March 11, 2008, at the age of 84. The plaintiff, Robert Riley has brought this action to set aside the conveyance on the grounds his sister, Susan, had a "special relationship" with her father and unduly influenced him to make the transfer. The plaintiff also seeks a declaration the property is held in trust for and should be transferred to the estate of Mr. Riley, and an order the defendant be disqualified from acting as Executrix of the estate because of her breach of trust.

Background

- [2] Mr. Riley had four children: Susan; Robert; Lois; and Eric. Both Lois and Eric predeceased their father under separate tragic circumstances. Lois passed away in December 1999 and Eric in November 2001.
- [3] Mr. Riley's wife, Ivy, passed away in July 1997. While he did not remarry, he did form a relationship with another woman who I will refer to as Karen. Karen lived with Mr. Riley for several years. Susan did not view her father's relationship with Karen with favour. Karen was a drug user and there were a number of incidents where Susan became concerned she was removing items and cash from the house and from his bank account and was assaulting him.
- [4] Mr. Riley had retired in 1973 from the airline industry. He spent his time after retirement working around the house. He was described as a single minded, very stubborn and unyielding person. He would not easily, if ever, change his mind on a matter. He was a strict disciplinarian with his children. In his later years he did not like to leave the house, preferring to have others, mainly the defendant and her husband, Mr. Mason, do his shopping and other chores for him.
- [5] Mr. Riley became an alcoholic commencing from the mid-1980s. He would often drink daily starting at about noon. Some members of the family did not visit him in the afternoon because he could become verbally abusive. As a result of his drinking and, at times, generally abusive nature, he became estranged from each of his children for various periods of time. His drinking habit decreased in the year before his death.

- [6] While I will discuss each party's relationship with their father in more detail, the plaintiff's relationship with his father remained estranged from 1993 or 1994 to the date of his death. While the plaintiff commenced seeing his father again in 2005 or 2006 his visits were infrequent and brief. He was not involved in his father's life in any meaningful way.
- [7] While the defendant had a period of estrangement from Mr. Riley at an earlier period in her life, she and Mr. Mason had a close relationship with him since well before his wife died in 1997. In the years leading up to his death they maintained close contact with him and assisted him on a regular basis.
- [8] Mr. Riley did not like to use lawyers to assist him in organizing his affairs. He considered them to be unnecessary and expensive. He preferred to rely on the defendant to type these documents using readily available legal self-help forms.
- [9] On June 4, 1991, using such a form, Mr. Riley prepared a handwritten will in which he appointed his wife Ivy as executrix and beneficiary of his estate. He provided that if Ivy predeceased him the defendant Susan was to be appointed executrix and the estate was to be divided equally between his four children. There is a signed but not witnessed handwritten note attached to the will which appears to be dated June 3, 1991, in which he notes his wish "to be allowed to die with dignity, then cremated with no Church or burial service."
- [10] On December 18, 2001, Mr. Riley signed a Power of Attorney appointing the defendant Susan as his attorney. Although a lawyer witnessed Mr. Riley sign the document he stamped it "Witnessed as to execution only. No advice sought or given." As stated, between 1991 and December 2001 Ivy and Lois had died. At the time the Power of Attorney was signed, Eric had gone missing and the family was assuming the worst.
- [11] Several days later, on December 22, 2001, Mr. Riley executed a new will. The defendant assisted him by providing him with form similar to the one she had used to prepare her will. The new will appointed the defendant executrix and sole beneficiary.
- [12] Mr. Riley signed the will at the home of his neighbours, Mr. and Mrs. Olinyk. Mr. Olinyk testified he and his wife had been the Rileys' next-door neighbours for 39 years. He and Mr. Riley spoke almost daily about various issues including politics, taxes and other neighbourhood issues.
- [13] He recalled discussing the terms of the will with Mr. Riley. He said he suggested to Mr. Riley the will "was not what should be done" and that on "general principles", "Bob (the plaintiff) should have something". He also said the defendant was present and also tried to convince Mr. Riley he should do something different. According to Mr. Olinyk, Mr. Riley said he did not agree. He said his mind was made up and "that was the way it was going to be." I accept Mr. Olinyk's evidence on this and on the other matters to which he testified.

- [14] On February 3, 2002, Mr. Riley signed a Health Care Declaration naming the defendant as his representative to give or refuse consent to health care in the event he was incapable of making such decisions himself. His signature was again witnessed by the Olinyks.
- [15] The defendant testified she had discussions with her father following the will drafted in December 2001 concerning whether it would withstand scrutiny under the Wills Variation Act, R.S.B.C. 1996, c. 490, should the will be challenged by the plaintiff. Mr. Riley wanted to ensure his will would withstand scrutiny under the Act. The defendant testified he initially did not want to leave the plaintiff anything. She testified she suggested he should leave the plaintiff something in the will. Mr. Riley thought the amount should be \$5,000. The defendant said she and her father discussed how much he should leave the plaintiff. She suggested \$50,000 and he ultimately agreed to that amount. She agreed she did not suggest he seek legal advice nor did he request legal advice.
- [16] On June 4, 2006, Mr. Riley signed a new will. Again the defendant prepared the will for him using the simple form she had used in preparing the 2001 will. In this will he again appointed the defendant as his executrix. However, he changed how he intended to dispose of his estate. Rather than leaving the plaintiff out of the will, he left him a specific bequest of \$50,000, with the remainder of his estate going to the defendant. Mr. and Mrs. Olinyk were again witnesses to the execution of the will.
- [17] Mr. Olinyk testified he had a discussion with Mr. Riley at the time the June 4, 2006 will was signed. Mr. Riley said the defendant had convinced him that the plaintiff should be included in his will, and Mr. Riley wanted to leave him the above sum.
- [18] On September 5, 2006, Mr. Riley signed a "statement" expressing his wishes that after his death his body be cremated and that the defendant transport his ashes "to our special family place known to my daughter Susan Riley ...". He also wrote, "I want my daughter Susan to carry out my wishes without any encumbrances whatsoever". The "statement" was written for Mr. Riley by the defendant and witnessed by her and Mr. Mason.
- [19] Subsequent to the June 4, 2006 will, the defendant testified she had discussions with her father in which he told her the plaintiff had made a number of inquiries about what he had left the plaintiff in his will. She testified Mr. Riley told her the plaintiff kept pressuring him, wanting to know what Mr. Riley had left him, commenting "you have a son, what are you leaving me". She testified her father told her he wanted her to have the house. Mr. Riley asked the defendant whether she thought his will would stand up in court. She testified her response was she did not know - that she was not a lawyer. Mr. Riley said he wanted to see a lawyer and asked the defendant to "set it up for me". The defendant asked her husband, Mr. Mason, to contact Mr. Gordon Bondoreff, a lawyer practicing in New Westminster, which Mr. Mason did. Mr. Bondoreff had acted for Mr. Mason previously concerning adoption matters. Mr. Bondoreff had also acted for the plaintiff several years earlier in divorce proceedings. After considering the issue, Mr. Bondoreff concluded he was not in a conflict position concerning the plaintiff.

- [20] Mr. Bondoreff was called as a witness at the trial by the defendant. He testified he received a telephone call from Mr. Mason on August 7, 2007. He said Mr. Mason told him the defendant's father had a falling out with the plaintiff, wanted to change his will and transfer his house to the defendant, and wanted advice "on the legalities". Specifically, Mr. Riley wanted to know if the transfer would "stand up in court" if it was contested.
- [21] Mr. Bondoreff testified Mr. Mason told him about the existing will and that Mr. Riley wanted to change it by taking out the \$50,000 bequest to the plaintiff and by providing that after a transfer of the house to the defendant his estate was to be split equally between the plaintiff and defendant. Mr. Mason told him Mr. Riley did not like to leave his house and they wanted to arrange independent legal advice for him.
- [22] Mr. Bondoreff testified Mr. Mason told him the reason for Mr. Riley's change in mind was that several years ago the plaintiff had "beat up" his dad and taken a gun out of the house; that in the last year the plaintiff had "seen his dad 4 times, maybe" and that on the previous weekend the plaintiff "had stopped in - crying about 4 kids". Mr. Riley had told him what he intended to do (concerning his will) and "Bob didn't like it". The passages quoted in this paragraph come from Mr. Bondoreff's notes made during his conversation with Mr. Mason.
- [23] Mr. Bondoreff next discussed the issue with Mr. Mason and the defendant on August 9, 2007, when they attended his office. Mr. Riley was not present. Mr. Bondoreff said he was advised Mr. Riley had recently told the plaintiff he was going to leave the house to the defendant and that the plaintiff responded that he would contest the will. Mr. Bondoreff reviewed Mr. Riley's other assets which totalled \$22,000 and the defendant advised him she would make sure "Bob will get \$50,000 even if it is not in the estate". The defendant told Mr. Bondoreff this was her decision; Mr. Riley did not want to leave the plaintiff anything.
- [24] At some stage, likely after the first conversation with Mr. Mason, Mr. Bondoreff proposed three options for Mr. Riley to consider. The first was a transfer of the house to the defendant; the second was to register the house in Mr. Riley's name and the defendant's name as joint tenants; and the third was to transfer the house to the defendant with a "bare trust agreement" (the "Agreement"). At the time of the August 9, 2007 discussion he was advised Mr. Riley preferred the first option. Mr. Bondoreff recommended the third option as in his view it better protected Mr. Riley's interest in the property. Under this scenario, the property would be transferred to the defendant but she would hold it in trust for him until the day before he died.
- [25] On August 13, 2007 Mr. Bondoreff again saw the defendant in his office. She advised him she had discussed the three options with Mr. Riley and he wanted to make the gift of the house to her "tight". His notes of that meeting read: "doesn't want to leave Bob anything, still" and "she's encouraged him to split the estate". They arranged for Mr. Bondoreff to meet with Mr. Riley several days later.

- [26] Mr. Bondoreff met with Mr. Riley, the defendant and Mr. Mason on August 17, 2007. He testified he explained the documents to Mr. Riley, including the Agreement. Mr. Riley told Mr. Bondoreff he was grateful to the defendant for all the help she had given to him since his wife had died and he wanted to give his house to her. Mr. Bondoreff said he understood that Mr. Riley did not want to leave anything to his son and Mr. Riley responded he did not. He testified he explained the Wills Variation Act to Mr. Riley and advised him that the best way to minimize the risk of a law suit was to divide the residue equally. He testified Mr. Riley showed by his body language he was not too pleased but responded "OK, do it".
- [27] Mr. Bondoreff then asked Mr. Mason and the defendant to leave the room. He testified he started a casual conversation with Mr. Riley with a view to determining his real thoughts. He testified Mr. Riley reinforced that he was grateful to the defendant for all the help she had given him and he wanted to make sure she received the house. Mr. Bondoreff then turned the discussion to the plaintiff. Mr. Riley confirmed he had seen the plaintiff once or twice but said he did not want to talk about him. Mr. Bondoreff said he did not press the issue given that Mr. Riley appeared to be agitated by him bringing up the subject. He testified the conversation with Mr. Riley took about half an hour and that Mr. Riley said more than once he did not want to leave any part of his estate to his son. He said that given their discussion he was satisfied Mr. Riley understood what he was doing and that the transfer of the house to the defendant was what Mr. Riley wanted to do. He then called Mr. Mason and the defendant back into the room and the documents were executed.
- [28] Mr. Bondoreff's notes of the meeting with Mr. Riley read:
- Susan had been looking after him since wife died 8 yrs ago.
 - he wants her to get the house.
 - he feels he is a very lucky person to have her.
 - But - if she dies before him he wants the house back.
- [Emphasis in original.]
- [29] After the meeting Mr. Bondoreff made further notes entitled "Impression of Christopher Riley". The notes include the comment "he came across as a very friendly gentle, nice man - spoke quietly."
- [30] The will dated August 17, 2007, named the defendant as executor of the estate and provided that after payment of expenses the residue was to be divided between her and the plaintiff.
- [31] The Agreement of the same date is between the defendant as the "Nominee" and Mr. Riley as the "Owner". The terms of the Agreement are:

...

1. The Nominee hereby declares that the Nominee holds all right, title and interest in and to the Property as bare trustee and mere nominee for the Owner.
2. The Nominee hereby declares that, when so directed by the Owner, the Nominee will transfer registered title to the Property to the Owner or to such other person or entity as the Owner shall direct.
3. The Nominee hereby covenants to hold all rents and profits from the Property as bare trustee and mere nominee for the Owner.
4. The Nominee hereby covenants to execute and deliver all further documents and do such further acts and things as are necessary to give effect to the terms of this Declaration of Bare Trust.
5. This Declaration of Bare Trust shall be binding upon the Nominee and her heirs, executors, successors and assigns of the Nominee.
6. This trust shall be determined at one day prior to the death of the Owner.
- ...

[32] The transfer conveying the property to the defendant was registered in the Land Title Office in New Westminster on August 21, 2007. Mr. Bondoreff wrote a reporting letter enclosing his account to Mr. Riley on August 27, 2007. He wrote a letter of the same date to the defendant enclosing copies of the Transfer and Trust Agreement.

[33] I turn now to a discussion of Mr. Riley's relationship with the plaintiff and defendant.

The relationship between Mr. Riley and the Plaintiff

[34] The plaintiff is 56 years old, divorced and is the father of three adult children. He was employed as a civilian employee with the RCMP for a number of years, then took employment with the New Westminster Police and then became a Public Safety Officer with the City of Abbotsford. He retired in July 2009.

[35] The plaintiff testified he left home at age 17 because he did not get along with his father. He described his mother as a sweet lady but that her relationship with Mr. Riley was "trying". He said his father could be a bully and mean. He testified his father retired at age 50 and that for 34 years "he would stay home and drink; that he rarely left the house". He testified that when his father was sober he was "a bully and abusive" and this was magnified when he was drunk. He said he had received very little support from his father and when asked about his emotional connection to him he responded "none really".

- [36] The plaintiff said there were periods when each of his siblings was estranged from their father. He described an occasion in 1993 or 1994 when his family visited. One of his sons was about 6 years old at the time. His father had been drinking and his son said "grandpa, your breath stinks". This led to Mr. Riley being profane and some pushing and shoving. The plaintiff testified he had to hold Mr. Riley off his son. As a result the plaintiff did not speak to Mr. Riley for some ten years.
- [37] The plaintiff described another incident in about 1996 when he attended the house at the defendant's request to remove Mr. Riley's shotguns. When Mr. Riley found out his intentions, there was a significant verbal argument between the two.
- [38] On another occasion when the plaintiff dropped by the house to see his mother he found her moaning and complaining she had gone blind. He called his brother Eric and the defendant to help take her to the hospital. Mr. Riley objected to this and tried to stop him. Again there was pushing and shoving between the two.
- [39] The plaintiff testified that in or about 2005, with the encouragement of the defendant, and because his father was 82 years old, he did decide to see him once in a while to try to end the estrangement. He said he would stop in at the house occasionally in the early morning for between 10 and 20 minutes for a visit and coffee. He testified that on occasion he would ask Mr. Riley if he wanted to go out anywhere but Mr. Riley would not leave the house. The plaintiff testified he saw his father between three to five times a year until his death. The plaintiff did not know "Karen". He had never met her but he had heard from the defendant that Karen was stealing money and property from the house.
- [40] The plaintiff said he was not familiar with the various wills prepared by Mr. Riley although he said he always understood his estate was to be divided equally between him and the defendant. He testified he had once asked Mr. Riley "what did you leave me in the will?" He said his father responded "you'll be taken care of. Susan is the executor. You'll find out."
- [41] The plaintiff also recalled a discussion he had with his father about this time where, in a discussion about what he was going to do in his will, he made the remark: "you also have a son, too". He did recall a telephone conversation with the defendant in which she accused him of conniving to get his father's money. The conversation had reference to the plaintiff's discussions with his father about the content of his will. He said the conversation was "very trying" and he eventually hung up. He said the two became estranged and have not spoken to one another since. He testified that in December 2007, on a visit with his father, Mr. Riley attempted to give him two cheques - one to him and one to his children. He refused to take them as they were signed by his sister who had joint signing authority on Mr. Riley's chequing account. He said Mr. Riley responded "ok if this is what you want". At that time the plaintiff was estranged from the defendant as mentioned above.

- [42] In February 2008 the plaintiff said he went to visit his father but there was no one home. He talked to Mr. Olynyk who told him Mr. Riley had been taken to hospital by ambulance two weeks earlier. The plaintiff said he was shocked that no one had told him. He testified he went to the hospital three to five times before Mr. Riley passed away. He said he went in the early morning for about 10 minutes each visit.
- [43] The plaintiff testified his son informed him that Mr. Riley had passed away, after his son had received the news from a relative through a Facebook communication. He said he might have expected a telephone call from the defendant but did not receive one.
- [44] Following Mr. Riley's death the defendant sent the plaintiff a letter advising him Mr. Riley had given her the house as a gift during her lifetime and that the estate, worth roughly \$4,200 after expenses were paid, would be divided between them. Accordingly the plaintiff could expect to receive a cheque for \$2,138 along with various pictures, mementos and tools.
- [45] The defendant went on to say that "Dad's bank accounts have been in joint names with me for over 10 years and the balance goes to the surviving person." I will return to this comment later in this decision.
- [46] In cross-examination the plaintiff acknowledged the defendant had given care and assistance to his mother when she was ill - visiting her and taking her out. He did not know the extent of the defendant's involvement with his mother when she went into a long-term care home after suffering from a series of strokes. He said he visited Ivy every two to three weeks when he thought of her and when he could. His visits lasted one to two minutes. He said he was a busy man with a family of his own. He did not remember the defendant asking him to help with feeding meals to his mother and he did not remember if he gave such help. He did not know if the defendant and his father were at the hospital every day visiting with and attending to Ivy's needs.
- [47] He acknowledged he did not call or speak to Mr. Riley during the period his mother was in the long-term care institution or even after her death. He did not see him on Christmas Day, Father's Day or birthdays or send him birthday cards. The plaintiff testified "I did not want to be around him - or my kids to be around him." He volunteered he may have told the defendant "if he was dead on the street I would walk over him". At a memorial service following Eric's death in (2002), when Mr. Riley approached him the plaintiff turned away from him. When this was put to him in cross-examination he said "I can see this. I wanted nothing to do with the man."
- [48] The evidence was clear that even though the plaintiff did commence seeing his father again in late 2005 or 2006 there was no real connection between the two. The visits were of short duration. The plaintiff did not appear to be interested in anything going on in his father's life - making no inquiries about his health or other matters which may have concerned him.

Relationship between the defendant and Mr. Riley

- [49] The evidence consistently supports the conclusion the defendant was the mainstay of support for Mr. Riley as well as all other members of her family when they were experiencing difficulties. She appears to have been the glue that held the family together. The evidence in the main is not disputed by the plaintiff.
- [50] In short, the defendant assisted her brother and sister, Eric and Lois, when they were having difficulties in their lives. She assisted the plaintiff when he was having employment issues and when he went through his divorce. The plaintiff lived with her for several months in 2004. She assisted him in preparing résumés when he was applying for work, and helped him in many other respects. Although there were minor issues from time to time, as in any family, the evidence established the defendant was there to help when help was needed. She is and has been a caring person to family members and many others in her community.
- [51] The defendant described her upbringing and relationship with her parents in very different terms than the plaintiff. She said she had fond memories of growing up although she agreed her father was a strict disciplinarian and could be verbally abusive and mean when he was drinking.
- [52] The defendant spent a great deal of time assisting her mother during the later years of her life. Ivy had had several strokes and eventually became blind. She had serious health issues for a number of years prior to her death and was hospitalized a number of times commencing in the 1970s. She had to be placed in long-term care and then an extended care facility. The defendant and Mr. Riley spent much time at these facilities over the last twenty years visiting with Ivy and assisting in her feeding. The defendant took time off work to do so. Lois and Eric also assisted in Ivy's feeding at times. The plaintiff did not assist as he had a young family at the time.
- [53] Over the decade prior to his death the defendant testified she had visited her father with increasing frequency. She said he appeared lonely. His relationship with Karen was on and off. She testified his health took a dramatic decline in about 2006 after he stopped going to see the doctor. He stopped eating as much and found it harder to walk. She said prior to 2004 she would visit him sometimes every weekend but starting that year she visited much more frequently. By 2006 she said she and Mr. Mason were seeing him a minimum of four days and sometimes seven days a week, and seven days a week leading up to his death. She set up a meal delivery program and made meals for him. She cleaned the house and did his laundry. She or Mr. Mason took him to his physician when he needed to go. When he came down with pneumonia in 2007 the defendant moved in and stayed with him while he was bed ridden.

- [54] Mr. Mason cut the grass, did yard work and other odd jobs around the house including washing walls and painting. Mr. Mason and the defendant did all Mr. Riley's shopping for him. Mr. Riley seldom if ever left the house and when he did the defendant or Mr. Mason drove him.
- [55] The defendant also took steps to try to protect Mr. Riley and his assets. She removed the fuses from the stove when it became a concern he was leaving it on, and she forwarded his calls to her home to block Karen from contacting him. She used her Power of Attorney to transfer his bank accounts into their joint names, again to ensure Karen could not access them. She had the duplicate certificate of title to the house put in her safely deposit box. I accept her evidence that she took these steps to protect her father from Karen's influence and to assist Mr. Riley manage his financial affairs, not, as alleged by the plaintiff, from self interest to preserve or appropriate his assets for herself. There is no foundation in the evidence for such a finding.
- [56] Mr. Olinyk testified he saw the defendant and Mr. Mason at Mr. Riley's house many times during this period. He said they often spoke and that Mr. Riley and the defendant appeared to have a "very good" father-daughter relationship.
- [57] In the weeks preceding Mr. Riley's death the defendant spent many days and hours at the hospital with him.

Discussion of Legal Principles

- [58] Both parties agree the Supreme Court of Canada's decision in *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 sets out the principles to be followed in my determination of the issues in this case. In *Geffen*, Wilson J. stated the following at pp. 367-68:

The Presumption of Undue Influence

This appeal raises important questions concerning the doctrine of undue influence and, in particular, the application of the presumption of undue influence. It was over this issue that the trial judge and the Court of Appeal parted company. As well, the scope of the doctrine of undue influence and its evidentiary companion, the presumption of undue influence, has recently been addressed by the House of Lords in *Morgan*. Not surprisingly, the parties to this appeal devoted the bulk of their argument both on the leave application and the appeal itself to the question whether or not we should follow the House of Lords in Canada. Indeed, the primary ground of appeal advanced by the appellant was whether there could be a presumption of undue influence where the trust agreement was not found by the trial judge to be "manifestly disadvantageous" to the party seeking to have it set aside. The respondent's response was that the doctrine of "manifest disadvantage" applies only to commercial transactions and does not apply to gifts. The Court has thus been called upon not only to resolve the dispute between the parties to this appeal but to clarify the law and provide some guidance to our courts in this area.

...

The equitable doctrine of undue influence was developed, as was pointed out by Lindley L.J. in *Allcard v. Skinner* (1887), 36 Ch. D. 145, not to save people from the consequences of their own folly but to save them from being victimized by other people (at pp. 182-83). In the context of gifts and other transactions, equity will intervene and set aside such arrangements if procured by undue influence. Over the years it became accepted that equitable protection could be invoked in two ways.

[59] Wilson J. continued at pp. 370-71, and 377:

What are the factors that go to establishing a presumption of undue influence? This question has been the focus of much debate in recent years. Equity has recognized that transactions between persons standing in certain relationships with one another will be presumed to be relationships of influence until the contrary is shown. These include the relationship between trustee and beneficiary (*Ellis v. Barker* (1871), 7 Ch. App. 104); solicitor and client (*Wright v. Carter*, [1903] 1 Ch. 27); doctor and patient (*Mitchell v. Homfray* (1881), 8 Q.B.D. 587); parent and child (*Lancashire Loans, Ltd. v. Black*, [1934] 1 K.B. 380); guardian and ward (*Hylton v. Hylton* (1754), 2 Ves. Sen. 547, 28 E.R. 349); and future husband and fiancée (*In re Lloyds Bank, Ltd.*, [1931] 1 Ch. 289). Beginning, however, with *Zamet v. Hyman*, [1961] 3 All E.R. 933, it came to be accepted that the relationships in which undue influence will be presumed are not confined to fixed categories and that each case must be considered on its own facts. Since then it has been generally agreed that the existence of some "special" relationship must be shown in order to support the presumption although what constitutes such a "special" relationship is a matter of some doubt. In *Snell's Principles of Equity* (1982), for instance, it is stated at p. 540 that the presumption applies when the transaction has been effected between parties in a fiduciary relationship to one another. Others suggest that influence flows naturally from confidential relationships: see *Canadian Encyclopedic Digest* (Western), Title 67, para. 94. In *Lloyds Bank Ltd. v. Bundy*, [1974] 3 All E.R. 757, this issue was canvassed in some detail by Sir Eric Sachs who indicated that the existence of an advisory relationship is relevant to the determination. He went on to say at p. 767:

Such cases tend to arise where someone relies on the guidance or advice of another, where the other is aware of that reliance and where the person on whom reliance is placed obtains, or may well obtain, a benefit from the transaction or has some other interest in it being concluded.

...

What then is the nature of the relationship that must exist in order to give rise to a presumption of undue influence? Bearing in mind the decision in *Morgan*, its critics and the divergence in the jurisprudence which it spawned, it is my opinion that concepts such as "confidence" and "reliance" do not adequately capture the essence of relationships which may give rise to the presumption. I would respectfully agree with Lord Scarman that there are many confidential relationships that do not give rise to the presumption just as there are many non-confidential relationships that do. It seems to me rather that when one speaks of "influence" one is really referring to the ability of one person to dominate the will of another, whether through

manipulation, coercion, or outright but subtle abuse of power. I disagree with the Court of Appeal's decision in *Goldsworthy v. Brickell*, supra, that it runs contrary to human experience to characterize relationships of trust or confidence as relationships of dominance. To dominate the will of another simply means to exercise a persuasive influence over him or her. The ability to exercise such influence may arise from a relationship of trust or confidence but it may arise from other relationships as well. The point is that there is nothing per se reprehensible about persons in a relationship of trust or confidence exerting influence, even undue influence, over their beneficiaries. It depends on their motivation and the objective they seek to achieve thereby.

[60] The facts of the case before the Court involved the alleged exercise of undue influence of brothers over their sister. In this context, Madam Justice Wilson found that a "meticulous examination of the facts" was necessary to determine whether the presumption of undue influence had been rebutted.

[61] Counsel for the plaintiff also relied heavily on the Supreme Court of Canada's decision in *Pecore v. Pecore*, 2007 SCC 17, for the legal proposition that when a transfer or gift is made between a parent and an adult child there is a presumption of resulting trust which is open to the adult transferee to rebut. The Court stated at paras. 40-41, 44 and 55:

40 As compelling as some cases might be, I am reluctant to apply the presumption of advancement to gratuitous transfers to "dependent" adult children because it would be impossible to list the wide variety of the circumstances that make someone "dependent" for the purpose of applying the presumption. Courts would have to determine on a case-by-case basis whether or not a particular individual is "dependent", creating uncertainty and unpredictability in almost every instance. I am therefore of the opinion that the rebuttable presumption of advancement with regard to gratuitous transfers from parent to child should be preserved but be limited in application to transfers by mothers and fathers to minor children.

41 There will of course be situations where a transfer between a parent and an adult child was intended to be a gift. It is open to the party claiming that the transfer is a gift to rebut the presumption of resulting trust by bringing evidence to support his or her claim. In addition, while dependency will not be a basis on which to apply the presumption of advancement, evidence as to the degree of dependency of an adult transferee child on the transferor parent may provide strong evidence to rebut the presumption of a resulting trust.

...

44 As in other civil cases, regardless of the legal burden, both sides to the dispute will normally bring evidence to support their position. The trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention. Thus, as discussed by Sopinka et al. in *The Law of Evidence in Canada*, at p. 116, the presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.

...

55 Where a gratuitous transfer is being challenged, the trial judge must begin his or her inquiry by determining the proper presumption to apply and then weigh all the evidence relating to the actual intention of the transferor to determine whether the presumption has been rebutted. It is not my intention to list all of the types of evidence that a trial judge can or should consider in ascertaining intent. This will depend on the facts of each case. However, I will discuss particular types of evidence at issue in this appeal and its companion case that have been the subject of divergent approaches by courts.

See also *Hawley v. Paradis*, 2008 BCSC 1255.

- [62] In *Ogilvie v. Ogilvie*, [1997] 1 W.W.R. 707 (S.C.), aff'd (1998) 49 B.C.L.R. (3d) 277 (C.A.), Madam Justice Satanove (as she then was) set aside various transactions made to a deceased's brother-in-law and his wife based on what she found to be a special relationship between them. She further stated she was unable to find the defendants had discharged the onus of proof on them. Part of her reasoning was based on the fact the defendants were unable to give any detailed recollection around the transfers and that they should have made sure the deceased had professional advice.
- [63] In *Nietsche v. Nietsche*, 2007 BCSC 172, Madam Justice Allan set aside what were alleged to be gifts made to the defendant by his great aunt. She had given him a number of cheques representing virtually the whole of the proceeds from the sale of her house. The plaintiffs sought the return of the monies to her estate. Again the Court considered the defendant to have been in a special relationship with his great aunt and found he had failed to discharge the onus on him to establish he had not improperly influenced her to bestow the gifts upon him. The Court found the defendant's evidence to be "incredible and unbelievable."
- [64] In *Stone v. Campbell*, 2008 BCSC 1518, Mr. Justice Goepel considered whether a mother's conveyance of her residence to the defendant should be set aside for undue influence and on the basis of resulting trust. As here, the home was the mother's only asset of substance. The defendant had lived with the mother and assumed responsibility for the maintenance of the home and had assisted the mother by preparing meals, shopping, and doing housekeeping work. Goepel J. applied both *Geffen* and *Pecore* to his analysis. In doing so he concluded the mother had received independent advice and had made a "free and informed" decision to make the transfer. He stated at para. 47:

If the presumption of undue influence does arise, I find it is in any event rebutted. Ms. Littlejohns testified that she was alert to matters of undue influence and she saw nothing that raised her suspicion. It is noteworthy that when the instructions were given to Ms. Littlejohns concerning the Transfer, Larry was not present. Ms. Littlejohns met with Mrs. Campbell alone and provided her detailed advice as to the ramifications of the transfer. She was satisfied that Mrs. Campbell was making a free and informed decision. So am I, and I so find.

Analysis and Conclusion

- [65] I have proceeded on the basis there was a special relationship between Mr. Riley and the defendant arising not only from their parent-adult child relationship, but also from the very close relationship of reliance Mr. Riley placed upon the defendant. I include in this latter category her position as holder of his Power of Attorney and joint bank accounts and his reliance on her and Mr. Mason to provide day-to-day assistance and advice to him. Accordingly, the defendant has an onus to establish she has not acted improperly in such a manner as to place undue influence on Mr. Riley to convey the property to her.
- [66] In approaching my assessment of the evidence I have endeavoured to conduct a "meticulous" examination of the facts as referred to by Madam Justice Wilson in Geffen. Having done so, for the reasons that follow, I conclude there is no evidence to suggest Mr. Riley was influenced in any manner by the defendant. I conclude the transfer of the property to the defendant was his idea and that it was motivated by his desire to reward the defendant for the support she had given to him and his wife. I also conclude he specifically did not wish to include the plaintiff in his estate based on the relationship he had with him. I conclude Mr. Riley was not influenced to exclude the plaintiff from his estate by the defendant - in fact, the converse is true.
- [67] The evidence established that throughout his life Mr. Riley had been a very independent man with strong views. He was a stubborn and single minded person that, once having made up his mind on a matter, there was little that could change his point of view. Those who knew him, including the plaintiff, the defendant, Mr. Olynyk, and Mr. Mason testified to this characteristic.
- [68] Mr. Riley had a decision to make when he drafted his will. Part of that decision involved who he would leave his home to when he died. He chose to leave it to the person who had provided both him and his deceased wife with care and support in their lives. I am sure he had in mind his relationship with the plaintiff, who had been estranged from him for at least 12 years before he died. The comments made by the plaintiff about his feelings toward Mr. Riley were very likely known to or felt by him. The plaintiff cut Mr. Riley out of his life and simply put, Mr. Riley decided to effectively cut the plaintiff out from sharing in his estate. It is reasonable to conclude he was not influenced in doing so by the defendant but, rather, was firmly of the view the plaintiff should not share in his estate because of how he had been treated by him.
- [69] The plaintiff took the position that because the defendant took steps to protect Mr. Riley (placing her name on his joint accounts, doing much of his banking, paying his bills, forwarding his calls so she could screen them, supplying him with alcohol, et cetera) that she was in effect in control of his life and that he was easily influenced by her. I do not accept this argument as the evidence does not support such a conclusion.

[70] As Mr. Bondoreff related during his testimony, when he spoke with Mr. Riley separately with a view to trying to determine his true wishes, Mr. Riley did not want to talk about his son but, rather, referred several times to how lucky he was to have had his daughter's assistance. Mr. Bondoreff is an experienced estate and conveyancing counsel. He was alive to the issue of whether Mr. Riley was voluntarily transferring the house to the defendant. I accept his opinion that is what Mr. Riley wanted to do and that he was not influenced in doing so by the defendant. Mr. Bondoreff's notes made in his August 17, 2007 meeting alone with Mr. Riley reflect Mr. Riley's true intentions. I repeat them:

"Susan had been looking after him since wife died 8 yrs ago.

- he wants her to get the house.
- he feels he is a very lucky person to have her.
- But - if she dies before him he wants the house back."

[Emphasis in original.]

[71] Mr. Olinyk, his neighbour, testified that in his daily conversations with Mr. Riley, the latter appeared mentally alert to him right up to before his death. He said that in the year before his death whenever the two had discussed topics such as taxes or other matters relating to the house, Mr. Riley had raised the point that the house was now in the defendant's name and she would look after such matters.

[72] There was evidence the defendant had reimbursed herself and Mr. Mason for groceries, monies lost from employment when the defendant had taken time off work to assist Mr. Riley, and for several gifts. I accept the defendant's evidence such reimbursement and any gifts were with Mr. Riley's knowledge and at his direction. The gifts were not exceptional and were consistent with cheques Mr. Riley gave to the plaintiff from time to time.

[73] The plaintiff pointed to the fact the defendant and Mr. Mason purchased alcohol on a regular basis for Mr. Riley. That fact was true. However, I also accept that the defendant commenced watering down the liquor she bought him so that his alcohol intake would be less and that Mr. Riley gradually started drinking less. The defendant testified, and I accept, that Mr. Riley's consumption of alcohol decreased substantially in 2006. In any event, there was no evidence from Mr. Olinyk that in their daily discussions or on the occasions when he had witnessed the execution of the wills, that consumption of alcohol was affecting Mr. Riley. Further, Mr. Bondoreff testified Mr. Riley was not under any influence of alcohol at the time he met with him.

[74] I conclude the defendant did not exercise undue influence over Mr. Riley in the inter vivos transfer of the property from Mr. Riley to her name. Any presumption of undue influence or of resulting trust that may arise from the cases has been fully rebutted by the evidence.

[75] I return to the issue raised earlier of the joint bank accounts and the defendant's view of those accounts as expressed in her letter to the plaintiff after Mr. Riley's death. While ownership of the joint bank accounts was not raised as an issue in the statement of claim, based on the evidence before me, the defendant's statement that the bank account balances belong to her as a result of joint survivorship is not correct. The evidence established she became a joint signatory on his accounts to protect his accounts from being depleted by Karen and because she paid many of his bills and bought his groceries. It is my view she was in essence acting as a trustee of the accounts on Mr. Riley's behalf. While I make no order in connection with this matter I have no doubt the defendant will do the right thing in her role as executor of the estate.

The Bare Trust Agreement

- [76] I turn to the plaintiff's argument that the Bare Trust Transfer signed on August 17, 2007, did not specify what would happen to the property upon termination of the trust. The plaintiff argues that if the Agreement was to have effectively transferred ownership of the trust asset to the trustee as beneficiary, to be effective it should have included the following clause: "and upon the termination of the trust, the trust property results to the Nominee as beneficial owner". The plaintiff argues the property should result back to the deceased's estate. In support the plaintiff referred to D.W.M. Waters, *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Carswell, 2005) at p. 437, where the learned author states that a trustee cannot take property beneficially but rather the property subject to a trust must be returned to the settlor or, if he is dead, returned to his estate.
- [77] In my view the plaintiff's argument ignores the fact that Mr. Riley signed and registered a transfer of his property to the defendant at the same time he executed the Agreement. The two documents must be read together. The effect of the transfer and the Agreement was that so long as Mr. Riley was alive, the trust was in effect. That is, the defendant held the property in trust pursuant to the provision that if Mr. Riley directed her to convey the property in a particular manner she would do so. However, the trust ended the day before he died by reason of paragraph 6 of the Agreement which provided "This trust shall be determined at one day prior to the death of the Owner." On the date of his death, by reason of the transfer of the property she was no longer his "Nominee" and he was no longer the "Owner". Mr. Riley no longer had any interest in the property which could revert back to his estate. Professor Waters appear to me to be referring to a situation where the purpose of the trust fails and the trustees are left holding the property. In the present circumstances the trust had ended. The defendant did not hold the property in trust at the date of Mr. Riley's death.
- [78] Accordingly, I dismiss the plaintiff's claim.
- [79] Unless there are matters of which I am unaware, the defendant will be entitled to costs. If there are such matters the parties may make submissions to me within 21 days of the date of this judgment.

GREYELL J.

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