

CANADA / JUDGMENT

Sandwell v. Sayers

2023 BCCA 147

COURT

British Columbia Court of Appeal

DECIDED

4 April 2023

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2023 BCCA 147 Sandwell v. Sayers

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Sandwell v. Sayers,

2023 BCCA 147

Date: 20230404

Docket: CA48264

Between:

Don Marlen Sandwell

Appellant

(Plaintiff)

And

Marleane Sayers also known Marleane Maxwell and Floyd Tayler

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Willcock

The Honourable Justice Griffin

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated

April 19, 2022 (Sandwell v. Sayers, 2022 BCSC 605, Kelowna Docket S131321).

Counsel for the Appellant:

K. Rule

S. Aidun

The Respondent, appearing in person:

M. Sayers

Place and Date of Hearing:

Vancouver, British Columbia

February 27, 2023

Place and Date of Judgment:

Vancouver, British Columbia

April 4, 2023

Written Reasons by:

The Honourable Justice Griffin

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant transferred a joint tenancy interest in his home to his daughter for no consideration. He then brought a claim to set aside the transfer. On his summary trial application, the judge dismissed the claim, finding that the appellant intended to make a gift to his daughter, the respondent. The appellant appeals, asserting that the judge should have found a resulting trust or applied the ancient equitable doctrine of unconscionable procurement to set aside the transfer. Held: Appeal dismissed. There was evidence that a notary reviewed the implications of the gift with the appellant. The appellant signed a deed of gift, a declaration of no resulting trust, and a letter from the notary acknowledging the implications of a transfer in joint tenancy. The judge did not err in finding that there was evidence that the appellant intended to make a gift of the legal and beneficial interest in his property, and that this overcame any presumption of resulting trust. This case does not require determination of whether the doctrine of unconscionable procurement is good law. The daughter did not procure the gift, and the appellant did not provide evidence to support a conclusion that he did not understand the implications of the gift.

Reasons for Judgment of the Honourable Justice Griffin:

- [1] The appellant, Don Sandwell, transferred a joint tenancy interest in his residential home for no consideration to his adult daughter, the respondent, Marleane Sayers, in December, 2020. The home was unencumbered and had an assessed value of \$363,000. Mr. Sandwell later started a claim against Ms. Sayers, seeking a declaration that she held her interest in trust for him, and to remove Ms. Sayers from title.
- [2] On a summary trial application brought by Mr. Sandwell, the judge dismissed his claim, finding that the father's intention was to make a gift to his daughter: reasons indexed at 2022 BCSC 605 (the "Trial Judge's Reasons").
- [3] On appeal, Mr. Sandwell submits the judge erred in failing to find a resulting trust, or in failing to set aside the transfer based on the ancient doctrine of unconscionable procurement, which he says applies since he did not fully understand the legal implications of the gift. Particularly, he submits he did not comprehend that the transfer could give Ms. Sayers the rights to apply to sever the joint tenancy or expose the property to creditors while he is still alive, causing him to lose the security of his home.
- [4] Ms. Sayers says her father is a strong-willed man who made up his own mind to gift the property interest to her, he fully understood what he was doing and has simply changed his mind. She says she does not intend to do anything that would cause him to have to move from the property while he is still alive.
- [5] For the reasons that follow, I would dismiss the appeal.

Background

- [6] The background facts were set out in the judgment of the summary trial judge and in affidavits filed by the parties.
- [7] Mr. Sandwell is an elderly man living in his own home. He has two adult children: the eldest, Mr. Floyd Tayler, and the youngest, the respondent, Ms. Sayers.
- [8] Mr. Sandwell saw very little of his children when they were growing up due to his separation from their mother when they were very young.
- [9] Ms. Sayers' perspective is that Mr. Sandwell was abusive to her mother and then angry about the separation. Her evidence is that she grew up in poverty, in part caused by his refusal to pay child support, and that Mr. Sandwell has been emotionally warm and then cold the few times she did see him throughout the years. Nevertheless, she has reached out to try to establish a relationship with him from time to time, including in 2017 and in 2020.
- [10] Mr. Sandwell seemed to have a closer relationship with Mr. Tayler.

The Transfer

- [11] Mr. Sandwell had a fee simple transfer prepared in April 2008, transferring his home to his son. The transfer was not registered and contained a handwritten note stating: "[t]his transfer will not be used except with your consent or in the event that your health fails and there is no likelihood of your recovery."
- [12] Although there are differences in the details of their evidence, both Mr. Sandwell and Ms. Sayers agree that in November 2020 the two of them discussed the implications of the unregistered fee simple transfer to Mr. Tayler. At the time, there was some tension between Mr. Sandwell and Mr. Tayler, and Mr. Sandwell was worried about losing his home to Mr. Tayler. Ms. Sayers and Mr. Sandwell then visited a notary, Brendon Rothwell, on November 26, 2020.
- [13] Mr. Rothwell filed an affidavit in support of Mr. Sandwell's summary trial application. His evidence on critical points is not contradicted. Because of the importance of his evidence, I will set it out:
3. The initial appointment was a consultation on November 26th 2020. I first met with Don, Marleane, and Marleane's husband. We discussed generally the reason for the visit, which was to add Marleane on title to Don's home as a joint tenant. I told Marleane that I could not take instructions from her. I then met with Don alone and reviewed with him the pros and cons of transferring title into a jointure with Marleane, and what that could mean for Floyd, Don's son. I was concerned that Don was overwhelmed and I told him to take some time to think about it.
 4. The following day Don called the firm and left voicemails with me and with Reception stating that he wanted to speak to me urgently. I talked to him on the phone and he said he did not want me to proceed with the transfer.
 5. On December 3rd 2020 Don left a total of 4 voicemails with my staff and myself indicating that he wanted to go ahead. On that same day I received an email from Marleane which stated as follows: "Hi. My Dad called asking me to get confirmation you received his phone message this morning to proceed with the transfer. Will you please send me confirmation you did receive his request. Please feel free to contact him direct. It is his hope that we can sign and complete the transfer tomorrow Friday afternoon ". Now produced and shown to me is a copy of that email attached to this my Affidavit as Exhibit "A".
 6. Don told me that he wanted to give half now in joint tenancy (as an outright gift) and she would get the other half upon his death.
 7. Now produced and shown to me and marked as Exhibit "B" is my file checklist in which I have recorded the reasons for the transfer as "Avoid Probate" and "Advance Planning."

8. I did have some concerns about Undue Influence, and those concerns were recorded by me on page 2 of my usual Checklist, attached as Exhibit "B". I noted "U.I. concerns Discussed with DS that I would contact him subsequent to meeting. MS & Hubby only in town for the day ." and on page 3 I noted "I recommended he take time to think about it, and to have a cooling off period" and under Action Item/Notes I have written "Want to talk to Don before proceeding."
9. I was cognizant of resulting trust issues and so I drafted the Deed of Gift. Now produced and shown to me and attached to this my Affidavit as Exhibit "C" is a copy of that Deed of Gift.
11. I did not ask Don what percentage of his wealth was represented in his home, and I did not discuss with him what would happen if he needed to sell his house to fund his retirement, nor whether he could get his house back from his daughter if he needed to. I told him that it was possible for him to register a life estate against title but that I as a notary public could not do that so he would need to hire a lawyer. I also mentioned that Marleane could sign a Declaration of Trust, but again it is my understanding as a notary public that I cannot draft such a document so again Don would have needed to hire a lawyer to do that and he was not interested.
12. I did not suggest that Ms. Sayer sign a Form A returning legal title to Don, registerable solely on Don's instructions, which could be used should Don need to get his house back into his own name.
13. Ultimately, I decided, based on instructions from Don and his assurance that he was "100% positive" that he wanted to proceed with the transfer, I went ahead with it.
- [14] On December 4, 2020, Mr. Sandwell met with Mr. Rothwell without Ms. Sayer and signed a number of related documents to effect the transfer: the transfer in fee simple for \$1.00; a deed of gift; a declaration that no resulting trust was intended; and an acknowledgment that he understood the contents of a letter given to him by the notary that included an explanation of the implications of joint tenancy.
- [15] The notary waited several days before filing the transfer document, only doing so on December 10, 2020.
- [16] On December 21, 2020, Mr. Sandwell contacted the notary and asked for the transfer to be unwound.
- [17] Mr. Sandwell swore three affidavits in support of his summary trial application. In his first affidavit, sworn June 18, 2021, he only referred to the December 4, 2020 meeting with the notary and not an earlier meeting or any telephone calls. His evidence was that Ms. Sayers told him she found a document, after going through his papers in December 2020, that "said my son, Floyd Tayler, had a binding claim over all my property and could leave me totally broke". She told him it was not registered yet and so "we can still save you". He stated she took him to the notary that day, and it appears she made the appointment to get title to his house. He stated at para. 11 of the affidavit:

11. I have no memory of being told by the notary that I should see a lawyer first. I do recall Mr. Rothwell repeatedly telling me that I could stay in my house until I died. He said: "you don't have to worry about ever losing your home" he told me. I do not recall any discussion of what would happen if I needed to sell my house. I was told by Mr. Rothwell that she would get half on my death.
- [18] Ms. Sayers swore an affidavit on September 22, 2021. She took issue with the suggestion that she initiated the visit to the notary. She said her father asked her to go through his documents in November 2020, which she did, and they then discussed the freehold transfer to Mr. Tayler. She said he was surprised by it, and she told him the implications meant that Mr. Tayler could kick him onto the street, and that he should see a lawyer. He told her he'd spent enough on lawyers. Her father then told her he wanted to sign over half the property to her, and he arranged to visit a notary with her on November 26, 2020.
- [19] Ms. Sayers gave evidence that Mr. Sandwell later changed his mind, and she said she had no issue with that. However, on December 3, 2020, he said he wanted to go ahead with the transfer.
- [20] Ms. Sayers did not go into Mr. Rothwell's office when Mr. Sandwell met with him on December 4, 2020. She went to an independent counsel at the suggestion of the notary. After the transfer documents were finalized, her father gave her a key at the property and said it was her Christmas gift. They then went out to dinner.

Summary Trial Application

- [21] Mr. Sandwell brought an application for summary trial. The notice of application argued that Mr. Sandwell's primary motivation for the transfer was his fear that his son could take his home. The crux of the argument was that he would not have given joint tenancy to his daughter knowingly as it created a risk that it could cause him to lose his home.
- [22] Mr. Sandwell's notice of application set out two grounds for setting aside the transfer: unconscionable procurement and unjust enrichment.
- [23] The notice of application stated that, based on the doctrine of unconscionable procurement, the court could set aside the transfer if the quality of the transferee's understanding of it was flawed, even in the absence of fraud, undue influence, or lack of capacity.
- [24] The notice of application further argued that there was unjust enrichment: the deed of gift was without "informed" thought and was internally incoherent with respect to the law of gifting and resulting trust. The notice of application submitted that the deed of gift could not be relied upon, and so there was no juristic reason for the deprivation of Mr. Sandwell and corresponding enrichment of Ms. Sayers.

- [25] Ms. Sayers contested the application. She denied having any influence over her father's decision to make the gift to her. She also submitted that the notary's evidence refuted the application of any doctrine to set aside the transfer.
- [26] The judge carefully reviewed the evidence and noted the contradictions between the evidence of Mr. Sandwell and Ms. Sayers regarding the events leading up to Mr. Sandwell's visit to see the notary.
- [27] The judge reviewed the law of resulting trust and undue influence at paras. 18-21, citing *Pecore v. Pecore*, 2007 SCC 17 [Pecore], *Bostrom v. Bigford*, 2019 BCSC 79, and *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, 1991 CanLII 69 and *Cowper-Smith v. Morgan*, 2016 BCCA 200, rev'd 2017 SCC 61 on other grounds. He noted that both resulting trust and undue influence can be rebutted by evidence the person intended to make a gift.
- [28] The judge concluded that the presumption of resulting trust was rebutted by the deed of gift and that there was no undue influence, as follows:
- [24] Here the plaintiff acknowledges that the presumption of resulting trust is rebutted by the deed of gift signed by the plaintiff as prepared by the notary. Further, the plaintiff concedes there is no presumption of undue influence and there is no evidence that the defendant had the ability to "dominate the will" of the plaintiff.
- [29] I pause to note that counsel for Mr. Sandwell contests, on appeal, the notion that Mr. Sandwell acknowledged before the judge that the presumption of resulting trust was rebutted. In my view, nothing turns on this because the judge relied on the deed of gift as the principle evidence of Mr. Sandwell's intention to make a gift: Trial Judge's Reasons at para. 19. This evidence rebuts the presumption of resulting trust.
- [30] The judge also dealt with Mr. Sandwell's argument based on the ancient equitable doctrine of "unconscionable procurement". The parties disagreed as to whether the doctrine was good law: Trial Judge's Reasons at paras. 34-35. One author advocates for the position that the doctrine remains good law, although it might be more limited than it was traditionally: John E. S. Poyser, *Capacity and Undue Influence*, 2nd ed. (Toronto: Carswell, 2019). The judge noted Ontario case law describing the doctrine in *Fichera v. McAllister*, 2021 ONSC 2685, but that the Ontario Court of Appeal had expressly neither approved nor rejected the doctrine in *Gefen v. Gaertner*, 2022 ONCA 174 [Gefen ONCA]: Trial Judge's Reasons at paras. 31, 47. Two authorities in BC had touched on the doctrine, namely, *Re Klop*, 2021 BCSC 644 and *Pinsonneault v. Courtney*, 2022 BCSC 120: Trial Judge's Reasons at paras. 34-50. A court in Nova Scotia suggested that either the doctrine did not apply or it limited its application: *Fairfield v. Mitchell and Mattatall*, 1959 CanLII 371, 19 D.L.R. (2d) 521 (N.S.C.A.).
- [31] Poyser described a modern, limited interpretation of the doctrine this way, as set out by the judge at para. 43:

(A) The doctrine of unconscionable procurement applies where the party seeking to set aside a wealth transfer transaction is able to prove two things:

- (1) A person obtains a significant benefit from another by gift or other voluntary inter vivos wealth transfer.
- (2) The person obtaining the enjoyment of that benefit was actively involved in procuring or arranging the transfer from the maker.

(B) When those two elements are present a presumption of fact operates that allows the court to infer that the transfer was not properly explained or fully understood by the maker. The court is then entitled to scrutinize the situation with its moral sense awakened with a view to deciding whether the maker fully appreciated the effect, nature, and consequence of the transaction.

(C) Inasmuch as the doctrine is one of equity, the court is ultimately being asked to decide whether the transaction is conscionable or unconscionable. The onus is on the attacker to prove that the maker did not enjoy the full appreciation mentioned in point (B) and that the transaction, as a result, is unconscionable. The evidential presumption aides the attacker but will not carry the case if countervailing evidence is available to rob the basic facts in point (A) of their inferential force .

[32] The judge did not reject the possibility that unconscionable procurement has a place in current BC law, although he had "real doubt" about it: paras. 49, 61. However, he held that if the doctrine applied, "it does not afford [Mr. Sandwell] the remedy he seeks" because it was not proven on the facts and evidence before him: at para. 50. He reached this conclusion for two reasons:

- a) The evidence did not establish that Ms. Sayers had active involvement in procuring the transfer to a degree that would call for the court's intervention on this equitable doctrine. Even if Mr. Sandwell's evidence was accepted, she did no more than arrange the appointment with the notary and caused him fear that his son could take his property: at paras. 51-53.
- b) Mr. Sandwell's evidence about his actual understanding of the transaction was lacking and insufficient to invoke the doctrine.

[33] On the second point, the judge observed that, "[a]s noted in Pinsonneault, at para. 189, Gefen states that '[b]oth parties must adduce evidence about the donor's actual understanding of what she was doing': at para. 59. Mr. Sandwell had failed to adduce sufficient evidence of his intentions: at paras. 55-60.

[34] The judge further dealt with the argument that there was unjust enrichment, which requires the plaintiff to establish three things: an enrichment; a corresponding deprivation; and the lack of juristic reason for the enrichment: at para. 62. The deed of gift provided the juristic reason, but Mr. Sandwell argued that the deed was of no evidentiary value because he did not act with full, free, and informed thought. Mr. Sandwell pointed to his brain surgery in

the past, but did not suggest any issue of competence. The judge found no evidence to support the notion that Mr. Sandwell did not act with full, free and informed thought: at paras. 25-28; 64-67.

Issues on Appeal

[35] Mr. Sandwell alleges that the judge made two categories of errors.

[36] First, Mr. Sandwell says that the judge erred in his approach to resulting trust as follows:

- a) in finding that the deed of gift was determinative rather than looking at all of the evidence of intention; and
- b) in the alternative, in characterizing the donative intent as an intention to make an immediate gift of ownership rather than an immediate gift of the right of survivorship, should the asset still be owned on Mr. Sandwell's death.

[37] Second, Mr. Sandwell says that the judge ought to have found that the facts attracted the equitable doctrine of unconscionable procurement.

[38] For the reasons that follow, I have concluded that Mr. Sandwell has not established that the judge made an error on either ground.

Analysis

Resulting Trust

[39] The presumption of resulting trust provides a tool to determine the intent of a transferor who makes a gratuitous transfer, where evidence as to the intent is unavailable or ambiguous, such as where the transferor is dead. However, the presumption can be displaced by the evidence that the transferor intended the transfer to be a gift.

[40] The presumption was explained by Justice Rothstein in *Pecore*:

24 The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see *Waters' Law of Trusts*, at p. 375, and E. E. Gillese and M. Milczynski, *The Law of Trusts* (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.

25 The presumption of resulting trust therefore alters the general practice that a plaintiff (who would be the party challenging the transfer in these cases) bears the legal burden in a civil case. Rather, the onus is on the transferee to rebut the presumption of a resulting trust.

26 In cases where the transferor is deceased and the dispute is between the transferee and a third party, the presumption of resulting trust has an additional justification. In such cases, it is the transferee who is better placed to bring evidence about the circumstances of the transfer.

[41] The burden of proof remains on the civil standard, a balance of probabilities: Pecore at para. 43. Of importance in this case is that the Court said, where the donor was still alive, and where a party has evidence on the matter, it is expected they will bring evidence to support their position:

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.

[Emphasis added.]

[42] Further, the Court observed that evidence that is contemporaneous with the gift may be seen as less self-serving than evidence developed after the gift, which although admissible, might be more reflective of a change in intention: Pecore at paras. 56-59.

[43] The judge correctly found in the present case that if there is evidence that the transferor intended to make a gift, that rebuts the presumption of resulting trust and any presumption of undue influence that might arise from the facts. Here there was evidence to rebut the presumption.

[44] In my view, Mr. Sandwell's position on appeal fails to recognize that the resulting trust presumption is simply a tool to assist a court in determining a donor's intention where the evidence is unavailable, lacking, or ambiguous. It does not displace the evidence where there is evidence of the donor's intention, and it does not displace the donor's obligation to provide evidence when the donor is able to do so.

[45] On appeal, Mr. Sandwell relies on *Petrick (Trustee) v. Petrick*, 2019 BCSC 1319 to argue that, in some cases, the gift of a joint tenancy may be intended to be only a gift of the right of survivorship, allowing the donor to retain the whole beneficial interest during the donor's lifetime: at para. 40. However, as that case notes, the single determinative factor is the intention of the donor; see also *Bergen v. Bergen*, 2013 BCCA 492 at para. 38.

[46] In my view, *Petrick* does not help Mr. Sandwell on appeal as there was considerable evidence Mr. Sandwell intended to make a present gift of a legal and beneficial interest in the home, not only a right of survivorship.

[47] Mr. Rothwell's affidavit states that he explained the "pros and cons" of the transfer to Mr. Sandwell at their first meeting on November 26, 2020: Trial Judge's Reasons at para. 3.

[48] Mr. Rothwell's affidavit evidence does not provide any detail as to what he meant by the "pros and cons", but the contents of his file attached to his affidavit demonstrates that Mr. Rothwell knew of the implications of joint tenancy and explained these implications to Mr. Sandwell.

- [49] Mr. Rothwell's notes to file, attached to his affidavit record, indicate that when he met with Mr. Sandwell on November 26, 2020, Mr. Sandwell was unsure about the consequences of adding Ms. Sayers on title as joint tenant, and so Mr. Rothwell explained the "pros and cons related to transferring legal and beneficial ownership to [Ms. Sayers]" (emphasis added) and, after his explanation, Mr. Sandwell gave him "the go-ahead to proceed as that was what he wanted".
- [50] The evidence from Mr. Rothwell is that, in addition to explaining these implications to Mr. Sandwell, he explained to him that he could hire a lawyer if he wanted a life estate against title or declaration of trust signed by Ms. Sayers: Mr. Rothwell's affidavit at para. 11.
- [51] In addition to Mr. Rothwell's evidence that he explained the pros and cons of the transfer to Mr. Sandwell on November 26, 2020, Mr. Sandwell had time to reflect. He changed his mind once, before changing it again to make up his mind and go ahead with the transfer on December 4, 2020.
- [52] Mr. Rothwell's file documents include a December 3, 2020 letter from him to Mr. Sandwell. The letter contains a written acknowledgement by Mr. Sandwell, dated December 4, 2020, acknowledging that he read and understood the content of the letter. The letter states that they discussed several specific legal issues related to the transferring of property in joint tenancy with another person, including among other items listed, the loss of control, the ability of any joint tenant to sever the joint tenancy, and possible exposure to creditors. The letter states as follows:

JOINT TENANCY CONSIDERATIONS

You acknowledge that we have discussed specific legal issues related to the transferring of properties in to joint tenancy with others, including:

1. Loss of Control
 - You will not be able to mortgage or transfer the property without the permission of the Transferee(s).
2. Marriage Breakdown of the Transferee (or one of the Transferees)
 - If a Transferee is involved in a marriage breakdown, their ex-spouse may claim a share in the interest of the property.
3. Ability to Sever [sic] Joint Tenancy
 - Any joint tenant owner can sever [sic] the joint tenancy independent of the other owner(s).
4. Potential Tax Obligations - Property Transfer Tax

· There are always property transfer tax considerations that will need to be reviewed. Depending on the circumstances (based on the person and/or the use of the property), property transfer tax may be payable.

5. Potential Tax Obligations owed - Other.

· We make no representations regarding Capital Gains Tax or any other taxes that may be payable due to this transfer. We advise you to seek the advice of an accountant.

6. Possibility of Exposure to Transferee(s) Creditors

· Creditors may register judgments or potentially even apply to have the property sold to settle debts.

[53] Mr. Rothwell's December 3, 2020 letter to Mr. Sandwell also contained a heading "intention of the transfer", with three items under the heading, as follows:

INTENTION OF THE TRANSFER

Initials

D / S

Gift to the Transferee(s)

· Of both legal and beneficial interest in the property.

— / —

A Transfer of Legal Title only

· The Transferee holds the Property on resulting trust for the Transferor's estate.

— / —

A Transfer of Legal Title with the Right of Survivorship

· The Transferee accepts Beneficial Title only upon the death of the Transferor

[54] Each of the above three "intention" items contained an adjacent space and line for initials. Opposite the first of the three items, that is, the gift of both the legal and beneficial interest in the property, were the handwritten initials "DS". The other two choices were not initialled. This suggests that Mr. Sandwell intended to make a present gift of both the legal and beneficial interest in the property when he gifted a joint tenancy interest to Ms. Sayers, as opposed to a transfer of title on resulting trust or a gift of a right of survivorship only.

[55] I turn to the actual deed of gift.

- [56] On December 4, 2020, Mr. Sandwell signed a "deed of gift" prepared and witnessed by Mr. Rothwell. It acknowledges the fair market value of his property and states he wishes to give a 50% share of the property to his daughter as an "inter vivos gift" that should not "be deducted from [sic] share of my estate"; that the transfer would occur on December 10, 2020; and that, as current owner of the property, he would be responsible for all of the expenses, taxes, and legal fees related to the gift of the property to Ms. Sayers.
- [57] Mr. Sandwell also signed another formal document, prepared and witnessed by Mr. Rothwell. It is a solemn declaration, under oath, stating, among other things, that Mr. Sandwell agreed to transfer 50% of his right, title and interest in the property to his daughter for \$1.00; and that it is his intention that no resulting trust would be created by the transfer.
- [58] On the same day, Mr. Sandwell signed a freehold transfer form, prepared and witnessed by Mr. Rothwell, transferring his property to himself and his daughter as joint tenants for \$1.00 "with love and consideration".
- [59] Counsel for Mr. Sandwell suggests that describing the transfer or gift as a 50% share of the property, in the deed of gift and in the declaration of no resulting trust, does not fully capture all of the implications of joint tenancy. I accept this, but it does capture the gist that they would be equal owners while he was alive, and Mr. Rothwell's discussion and letter provided him with further information about the implications of joint tenancy.
- [60] All of the documents signed by Mr. Sandwell at the notary's office, together with the evidence of the notary as to their discussions, are inconsistent with the notion that Mr. Sandwell did not intend a gift and that he intended only a gift of a right of survivorship.
- [61] Unlike Pecore, this is not a case where the transferor was not available to provide evidence as to his intention. This is a case where there is evidence that Mr. Sandwell intended to make an immediate gift of a joint tenancy interest to his daughter and signed documents to this effect. He provided no affidavit evidence to challenge the evidence provided by the notary. The many documents signed by Mr. Sandwell cried out for an explanation if he was to say they did not reflect his understanding.
- [62] Mr. Sandwell's sole evidence to support his submission that he did not intend a gift or alternatively only intended a gift of a survivorship interest is his evidence in his first affidavit that: the notary told him that he could stay in his home until he died, he did not have to worry about ever losing his home, and that Ms. Sayers would get half on his death. He also did not recall any discussion of the consequences that would ensue if he needed to sell his house. In my view, this evidence is not determinative. His first affidavit was sworn before the notary's affidavit was sworn and omitted mention of the November 26, 2020 meeting with the notary or the many documents that Mr. Sandwell signed confirming his intention.

- [63] Most importantly, in giving this evidence, Mr. Sandwell did not disclaim his understanding, as evidenced by the documents he signed, that Ms. Sayers would, after the transfer, have an equal interest with him in the property, which is consistent with the deed of gift and declaration.
- [64] Counsel for Mr. Sandwell submits that Mr. Sandwell has a poor memory, and that is why he was unable to address the notary's evidence. However, even if counsel believes this, there was no medical opinion evidence to support this suggestion. Mr. Rothwell's evidence is still left uncontradicted and the failure to answer it does not give rise to a presumption that Mr. Rothwell's evidence cannot be believed. Mr. Sandwell did not suggest that he was incapable of understanding what the notary discussed with him or the documents he signed. To put it another way, Mr. Rothwell's evidence, including his file documents, rules out any basis for a presumption in Mr. Sandwell's favour and necessitates evidence from Mr. Sandwell if he wishes to prove his case.
- [65] Significantly, Mr. Sandwell filed Mr. Rothwell's affidavit as part of Mr. Sandwell's case. We heard no arguments from Mr. Sandwell that it was not admissible. Mr. Rothwell's evidence is credible, especially when combined with the documents signed by Mr. Sandwell, and supports the conclusion that Mr. Sandwell intended to make a gift to Ms. Sayers of joint tenancy in the property, a present legal and beneficial interest, which was not limited to a right of survivorship only, and he held this intention after receiving advice about the implications of a joint tenancy and after having time to reflect.
- [66] Therefore, I do not see any basis for interfering with the judge's findings that the presumption of resulting trust was rebutted on the evidence.

Unconscionable Procurement

- [67] I turn to the doctrine of unconscionable procurement. The judge expressed doubt as to whether the doctrine of unconscionable procurement applies in BC or has been overtaken by other equitable doctrines, including the law of resulting trust and undue influence.
- [68] I am of the view that the case at hand does not require the doctrine of unconscionable procurement to be decided.
- [69] After the judge's decision, John Poyser wrote another article, arguing that the law of unconscionable procurement is the law in BC: John. E. S. Poyser, Case Comment: Sandwell v. Sayers - The State of Unconscionable Procurement in British Columbia, 76 E.T.R. (4th) 249. Mr. Poyser suggests that the doctrine has a place in protecting vulnerable people from giving away large amounts of their wealth without being fully informed of all the consequences, in situations where they intend to make a gift and there is no undue influence so other equitable doctrines do not apply.

- [70] Ms. Sayers, who is unrepresented by counsel on this appeal, does not address the existence of the doctrine other than to say that the judge made no error. In the response to the summary trial application, her counsel took issue with the existence of the doctrine and argued that it had been subsumed in the law of undue influence. Before the judge, counsel for Ms. Sayers also asserted that, to the extent the doctrine might apply, at a minimum it would require both parties to adduce evidence about the donor's understanding of the gift, and the onus would remain on the party attacking the gift. He cited *Gefen v. Gaertner*, 2019 ONSC 6015 at para. 161 to support his submission, which was a case where a trial judge adopted Mr. Poyser's analysis of the doctrine, but, on appeal, the court expressly did not rule on the question of whether the doctrine was the law in Ontario: *Gefen ONCA* at para. 61.
- [71] There may be unrecognized concerns about the appellant's liberal description of the doctrine that require careful consideration. The doctrine might be seen as inconsistent with individual autonomy and the freedom of competent persons to choose what they want to do with their assets. History recognizes many people who have given away their material possessions and wealth, whether motivated by goodness, glory, or otherwise. If the doctrine was found to exist, it could upend certainty for recipients of intended gifts, including for charities whose employees cultivate relationships in order to encourage donations. The parameters of such a doctrine would have to be carefully considered, including whether if affirmed, it should be limited to donors who become unconscionably financially vulnerable by the gift at the time it is made. Further, one would expect the approach in *Pecore* to the presumption of resulting trust would equally apply: the presumption would only determine the result where the evidence to rebut it is insufficient on a balance of probabilities, and both parties to the transaction are expected to provide evidence if available.
- [72] The present case is not the best case to determine the existence of the doctrine, given the judge's findings that Mr. Sandwell did not establish the factual basis for application of the doctrine, and given the lack of full legal argument on appeal.
- [73] The judge found as a fact that Ms. Sayers did not procure the gift. There was evidence to support this conclusion and it cannot be said that the judge overlooked material evidence. The judge appreciated the evidence that Ms. Sayers helped facilitate the notary appointments, and her discussions with Mr. Sandwell may have contributed to him feeling alarmed at the implications of a freehold transfer to Mr. Tayler. However, Ms. Sayers' evidence was that it was her father that initiated the gift idea and pushed it forward and, in her experience, he is a stubborn man. The judge also understood the evidence that Mr. Sandwell had time to reflect on his wishes, before finally giving his instructions to the notary.

- [74] Turning to the question of whether there should be a presumption that Mr. Sandwell did not appreciate the implications of the gift, the judge did not need to address it given his conclusion that there was no procurement. However, the judge found that this factual issue could not be resolved in Mr. Sandwell's favour as Mr. Sandwell simply failed to address his full understanding of the impact of his actions: Trial Judge's Reasons at para. 55.
- [75] Counsel for Mr. Sandwell takes the position that, in order to rebut the presumption of unconscionable procurement, Ms. Sayers must show that Mr. Sandwell had full independent legal advice. I consider that a difficult position to maintain in the face of the notary's evidence, including the evidence that he told Mr. Sandwell that he would have to hire a lawyer if he wanted to register a life interest against the property or ask that Ms. Sayers sign a declaration of trust, but Mr. Sandwell was not interested in those options. Ms. Sayers also provided evidence that she recommended to her father that he see a lawyer about the implications of the freehold transfer to Mr. Tayler, but he refused.
- [76] As I set out above, not only was there insufficient evidence from Mr. Sandwell establishing that he did not understand the gift, he did not challenge or answer the notary's evidence supporting the conclusion that he was informed of the gift's implications. In other words, there was no basis for relying on a presumption.
- [77] In short, Mr. Sandwell has not shown that the judge misapprehended the evidence or otherwise made a palpable and overriding error in concluding that, factually, the elements of the doctrine of unconscionable procurement as proposed by Mr. Sandwell were not made out.
- [78] The underlying theme of Mr. Sandwell's position on appeal is that, after he put his daughter on title to his home as a joint tenant, he developed a fear of being put out of his home by his daughter. However, the law does not give him a remedy for changing his mind: Bergen at para. 41. I regret this turn of affairs but I hope that Mr. Sandwell will be able to take some comfort in the fact that Ms. Sayers has taken no steps to put Mr. Sandwell out of his home, and she confirmed, on appeal, that she has no intention of doing so now or in the future.

Disposition

- [79] For these reasons, I would therefore dismiss the appeal.

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

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