

CANADA / JUDGMENT

Schloegl v. Schloegl

2014 BCSC 2458

COURT

Supreme Court of British Columbia

DECIDED

31 December 2014

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2014 BCSC 2458 Schloegl v. Schloegl

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Schloegl v. Schloegl,

2014 BCSC 2458

Date: 20141231

Docket: 34938

Registry: Penticton

Between:

Anna Schloegl

Applicant

And:

Alexander Schloegl and Tammy Knickerbocker

Respondent

And:

Marie-Ann Schloegl

Third Party

Before: The Honourable Madam Justice Watchuk

Reasons for Judgment

Counsel for the Applicant:

N.R. Zaseybida

The Respondent appearing, in part, on his own behalf:

A. Schloegl

The Third Party appearing on her own behalf:

M. Schloegl

Place and Dates of Trial/Hearing:

Penticton, B.C.

April 1-4, 7-11, 2014

June 2-5, 2014

Place and Date of Judgment:

Vancouver, B.C.

December 31, 2014

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I. Introduction

- [1] The central disputes in this case revolve around the legal and beneficial ownership of assets which three family members used, possessed, owned or helped to repair and manage.
- [2] Anna Schloegl, the plaintiff ("Anna"), and Alexander Schloegl, also known as Otto Sascha Schloegl, the defendant ("Sascha"), are mother and son. Marie-Ann Schloegl, the third party ("Sonia"), is the daughter of the plaintiff and the sister of the defendant.
- [3] As a matter of convenience and with no disrespect intended, as all three parties have the same last name, I will refer to the parties by their preferred first names.
- [4] Anna says that, for estate planning purposes over many years, she arranged her financial affairs so that many of the extensive properties and investments that she had acquired since 1976 were in joint names with her two children. Since making those gratuitous transfers to her son, she has become aware of his misuse or appropriation of her properties.
- [5] Anna is therefore seeking return of or compensation for properties and investments that she transferred to Sascha or that she says were wrongfully transferred from her name to his name.
- [6] Sascha says that he either funded or compensated his mother for the properties. He also says that his sister's undue influence on their mother is the cause of this litigation.
- [7] Sascha asserts that problems arose when Anna began to use the assets that she owned jointly with him for her own benefit and the benefit of Sonia, the third party. He states that he removed money from the joint accounts and tried to sever Anna's interests in jointly-owned real properties to safeguard his own interests. He also claims an interest in properties that are currently held in Anna and Sonia's names due to his contributions and Anna and Sonia's unjust enrichment.
- [8] Sonia submits that the claims of Sascha should be dismissed in their entirety.

II. The Parties

- [9] Anna is 88 years of age. She lives in Penticton, B.C.
- [10] Sascha is an industrial electrician. He recently lost his job at the Suncor site in Fort McMurray. He is 57 years of age.
- [11] At the trial, Sascha was initially represented by a retired lawyer, Mr. Kent Webb, with leave of the court. Mr. Webb had conducted the examination for discovery of Sonia. At trial, when Sascha sought to personally conduct the cross-examination of his mother, Mr. Webb withdrew as representative but remained in the courtroom for most of the balance of the trial and frequently consulted with Sascha. For example, Sascha advised the court that the decision not to call Tammy Knickerbocker as a witness was made with Mr. Webb.
- [12] Sonia is a businesswoman and resides in Summerland, B.C. She is 59 years of age. She represented herself at the trial.
- [13] The defendant, Tammy Knickerbocker was the common law spouse of Sascha. Pursuant to an order for alternative service made August 29, 2013, Tammy Knickerbocker was served with the amended notice of civil claim on September 10, 2013 by way of service to her daughter and service by mail to Sascha. Ms. Knickerbocker did not file any response.

III. The Properties, Accounts and Investments

- [14] There are nine parcels or groups of real property (the "Properties") and five investments or accounts involved directly in this matter.
- [15] For ease of reference, the following table sets out a summary of the properties owned or purchased by Anna with a brief history of each.

Property

Purchase Price

and Date

Sale Price

and Date Sold

Title

24605 Callan Road, Summerland, B.C.

PID: 011-365-595

("Callan Road")

\$87,500 (\$64,466.32 and subject to existing mortgage)

60 acres purchased on Sept. 16, 1976 (Anna)

\$120,000 (30 acres)

Sold in 2008: approx. half of land (30 acres)

Initially registered in Anna's name.

In April 2003, Anna added Sonia on title as a joint tenant without consideration.

1674 Fairview Road, Penticton, B.C.

("Fairview Road")

\$80,000 to \$90,000 (\$6,000 down payment paid by Anna)

Purchased in 1979

\$127,200

Sold on June 28, 1996

Registered in Sascha's name.

240 Lower Bench Road also known as 235 Middle Bench Road, Penticton, B.C.

PID: 009-520-333

("Middle Bench")

\$150,000 (\$131,000 and subject to Bank of Montreal mortgage)

Purchased in December 1980 (Anna)

Initially registered in Anna's name.

On October 15, 2010, Sascha added on title as a joint tenant without consideration.

In November 2011, Anna transferred her interest to Sonia without consideration.

Currently registered in Sascha and Sonia's names as joint tenants with CPL against title

313 Norton Street,

Penticton, B.C.

PID: 011-805-749

("313 Norton")

\$35,000

Purchased in December 1980 (Anna)

Initially registered in Anna's name.

On March 31, 2010, Sonia was added on title as a joint tenant without consideration.

863 and 891 Government Street, and 577 Forestbrook Drive, Penticton, B.C.

Purchased in 1983 (Anna and Pauline Maier)

\$160,000

Sold in 1994

Initially registered in Anna and Pauline Maier's names.

In October 1994, Anna sold her interest to Pauline Maier.

319 Norton Street, Penticton, B.C.

(Lot 28 and Lot 29)

PID: 011-805-676

PID: 011-805-706

("319 Norton")

\$109,000

Purchased in 1993 (Anna)

Initially registered in Anna's name.

On March 31, 2010, Sonia was added on title as a joint tenant without consideration.

7310 Cliff Avenue,

Fort McMurray, Alberta

("7310 Cliff Avenue")

\$26,200 (\$20,800 by agreement for sale/UMC Financial mortgage)

Purchased in November 1987 (Sascha)

\$61,000 (net sale proceeds after payment of legal fees: \$56,691.54)

Sold June 1999

Registered in Sascha's name.

7202 Cliff Avenue,

Fort McMurray, Alberta

Lot 12

("7202 Cliff Avenue")

\$46,500 (including property that was subdivided into 7204 Cliff Avenue)

Purchased in August 1996

(Anna)

7202 only: \$216,905.49

(net sale proceeds deposited to HSBC Account 290)

Sold 7202: May 3, 2004

Initially registered in Anna and Sascha's names as joint tenants.

February 2001: Lots 11 and 12 separated and 7204 Cliff Avenue created.

7204 Cliff Avenue,

Fort McMurray, Alberta Lot 11

("7204 Cliff Avenue")

N/A: included in purchase of 7202 Cliff Avenue

Created February 2001

Transfer registered in 2004

Initially in Anna and Sascha's names as joint tenants.

February 8, 2010: 7204 transferred to Sascha's sole name.

[16] The investments and accounts opened by Anna and that are included in her claim:

(a) National Bank Account 6X-FT88A worth approximately \$459,000 ("National Bank FT88A");

(b) National Bank Account 6X-FS5S-A worth approximately \$254,000 ("National Bank FS5S-A");

Collectively, the "National Bank Accounts"; and

(c) CIBC Account #33-81234 (the "CIBC Chequing Account") and CIBC Account #56-64284 (the "CIBC Bonus Savings Account")

Collectively, the "CIBC Accounts".

(\$71,341.52 was on deposit in the accounts when they were closed by Sascha).

[17] Anna and Sascha had a joint account at the Hong Kong Bank of Canada ("HSBC") Account #350-017808-290 ("HSBC Account 290"). This account which was opened by Sascha and later made joint is important in determining Sascha's claim.

[18] Anna had other accounts and investments which are not directly involved in the issues to be decided. Her personal chequing account at the Hong Kong Bank of Canada, # 327627-150, will be referred to as "HSBC Account 150".

IV. Claims of Parties and Relief Sought

A. Anna

- [19] Anna's claim relates to two of the properties and four of the investments and accounts that she transferred to Sascha as a joint owner. For one of the properties, she also seeks a declaration and compensation for property which Sascha wrongfully took and converted for his own use.
- [20] The property, accounts and investments involved in Anna's claim are:
- (a) Middle Bench which has a value of \$435,000. This property, which is an acreage with a house and orchard, was owned solely by Anna as of 1980. It was her residence until 2010. On October 15, 2010, Anna added Sascha to title as a joint tenant for estate planning purposes. No consideration was paid for the transfer to Sascha.
 - (b) 7204 Cliff Avenue which has a value of \$680,000. Anna and Sascha were registered as joint tenants on this property. Anna says that the purchase of this property and the construction of a home on it were funded from Anna's resources. Sascha built the home on the property. Anna claims that Sascha, without her knowledge or consent, misused the funds she permitted him to withdraw and then transferred her interest in 7204 Cliff Avenue into his name solely.
 - (c) Investments with National Bank in the approximate amount of \$713,000, being the combined total of National Bank FT88A worth approximately \$459,000 and National Bank FS5S-A worth approximately \$254,000. Both of these were joint accounts held by Anna and Sascha. It is Anna's position that these investments were accumulated through her resources.
 - (d) Two joint accounts held by Anna and Sascha at the Canadian Imperial Bank of Commerce ("CIBC") in the amount of \$71,341.52. These accounts are the CIBC Chequing Account and CIBC Bonus Savings Account. Anna says that these accounts were accumulated from her resources and that Sascha removed the money from these accounts without her knowledge or consent and converted it for his own use.
- [21] Anna seeks to have her interests in Middle Bench and 7204 Cliff Avenue returned to her from Sascha. In the alternative, she asks to be compensated for them. Anna claims in trust, in particular a resulting trust, or alternatively in quantum meruit and unjust enrichment.
- [22] Anna also claims compensation and aggravated and/or punitive damages for Sascha's taking and converting 7204 Cliff Avenue and the CIBC Accounts.
- [23] Anna seeks a declaration that Sascha holds the monies in the CIBC Accounts in trust for Anna, and she seeks return of the \$71,341.52 that he removed from the CIBC Accounts plus earned interest on that money since its removal. Anna seeks judgment in this amount with a direction for Sascha to return the funds within a specified period of time.

- [24] Anna also seeks a declaration that Sascha holds an undivided one-half interest in Middle Bench in trust for her and an order that Sascha duly execute a Form A transfer transferring his undivided half interest as a registered owner, in joint tenancy, to Anna. She asks that, if Sascha fails to sign the Form A transfer within a reasonable period of time, the registrar of the court be authorized to sign the Form A transfer on Sascha's behalf.
- [25] Anna requests a declaration that Sascha and Tammy Knickerbocker conspired to fraudulently terminate Anna's joint tenancy interest in 7204 Cliff Avenue by fraudulently transferring that property into Sascha's sole name.
- [26] Anna additionally requests a declaration that Sascha holds an unencumbered half interest in 7204 Cliff Avenue in trust for Anna, and a declaration that Anna is entitled to the sum of \$340,000 in damages or compensation for her interest in 7204 Cliff Avenue.
- [27] Anna seeks punitive and aggravated damages of \$20,000 against Sascha and Tammy Knickerbocker for breach of trust, conversion and conspiracy to commit fraud with respect to the fraudulent land transfer.
- [28] Anna seeks a declaration that she is entitled to sole ownership of the National Bank Accounts. She also seeks an order that Sascha sign all documents necessary to affect the transfer of the investments with the National Bank Accounts into Anna's sole name within a specified time period and, if Sascha fails to sign the documents, an order directing National Bank Financial to transfer National Bank FS5S-A and National Bank FT88A into Anna's sole name.
- [29] Finally, Anna seeks court ordered interest, costs and special costs.

B. Sascha

- [30] Sascha's claims are made in his response to amended civil claim which he filed personally, in his counterclaim and third party notice which were filed by counsel on his behalf, and in his handwritten submissions at the close of the trial. Throughout these reasons, I have consolidated his various claims in order to deal with the issues raised by him.
- [31] Sascha claims that Anna, at the insistence of and with the influence of Sonia, breached certain verbal agreements regarding estate planning matters.
- [32] In his written submission, Sascha refers to a "joint family venture", a "family venture" and a "family estate".
- [33] In his counterclaim, Sascha says that Fairview Road, 7310 Cliff Avenue and 7202 Cliff Avenue, were owned solely by him and that the proceeds of the sale of these properties were deposited to HSBC Account 290. At trial, he also raised an issue regarding the sale of a property in Edmonton.

- [34] In his response, Sascha alleges that money from the joint accounts was unilaterally withdrawn by Anna and was used to acquire other properties registered in Anna's name or Anna and Sonia's names jointly. As set out in the chart above, the evidence is that all properties that Anna owned solely or jointly with Sonia were acquired prior to the earliest sale of the disputed properties, being Fairview Road in 1996. Given this timeline, it is impossible for this allegation to be true with regard to the properties. The use of funds from the joint account is addressed below.
- [35] In his response, Sascha says that he contributed monies and labour to a number of the properties including those purchased with funds from the joint accounts. In his counterclaim, he seeks damages. I understand these claims to be related. In his written submissions, he says that he provided services for the family estate and that he remains unpaid for those services.
- [36] Sascha claims that he received no monies or benefits from HSBC Account 290 and that he has not received an accounting of his funds. The relief sought in the counterclaim includes an accounting of all funds that he holds jointly with the plaintiff at HSBC and CIBC, damages and costs.
- [37] The third party notice joined Sonia as a third party claiming that Sonia used undue influence to coerce Anna into transferring undivided half interests in various properties and funds to Sonia. Sascha pleads that Sonia has been unjustly enriched and that he has been correspondingly deprived by those transfers.
- [38] Sascha claims an interest by way of constructive trust or beneficial interest in properties in which Sonia has an interest: Callan Road, 313 Norton and 319 Norton, as well as un-named mutual funds or other investments.
- [39] In his written submissions, he also seeks orders that: Sonia's interest in Middle Bench be transferred to him, or damages be paid by Sonia for one-half the value of that property; the National Bank Accounts and the investments in those accounts be transferred into his name solely; Anna holds no interest in 7204 Cliff Avenue; and, that Anna return to him \$31,875.52 plus accrued interest for monies that were removed from the proceeds from the sale of 7310 Cliff Avenue.
- [40] Finally, Sascha seeks court ordered interest, and costs against both Anna and Sonia.

C. Sonia

- [41] Sonia denies that she has exerted any influence or undue influence upon Anna; that she embarked on any plan to deprive Sascha of any interest in property; and that she has been unjustly enriched. Sonia states that Sascha has no constructive trust or any trust over any property or investment. She says that any constructive trust claimed is part of his sense of entitlement.

[42] Sonia states that Anna presented an accounting to Sascha or his lawyer in March 2012.

[43] Although Sonia has not made any formal claims, she has argued generally in favour of the resolutions sought by Anna. Specifically, she requests that Sascha return Middle Bench to Anna, and that Sascha return the CIBC Accounts and National Bank Accounts to Anna and compensate Anna for monies removed from those accounts.

V. LEGAL ISSUES

[44] In the context of the long timespan at issue, the large number of properties and investments changing hands, and the allegations of various distinct trusts, both Anna and Sascha have asserted a complex list of competing claims. However, I conclude that the following are the key legal questions that must be answered in this case:

- Did Anna breach any contract or was she bound by a resulting trust by using the proceeds of sale of Fairview Road, 7310 Cliff Avenue and 7202 Cliff Avenue? If so, is Sascha entitled to \$31,875.52 as the remaining proceeds of these sales?
- Is Anna entitled to the \$71,341.52 that Sascha removed from the CIBC Accounts, either by constructive trust or as a remedy for conversion?
- What ownership interests do Anna and Sascha have in the National Bank Accounts?
- Does Sascha hold his interest in Middle Bench on resulting trust for Anna?
- Does Anna retain an interest in 7204 Cliff Avenue and, if so, what is that interest?
- Does Sascha have a constructive trust interest over Callan Road, or is he entitled to quantum meruit compensation for his contributions to the property?
- Is Sonia's interest in 313 Norton and 319 Norton held on constructive trust for Sascha because of Sonia's unjust enrichment?
- Did Sonia exert influence or undue influence on Anna?
- Is Anna entitled to aggravated or punitive damages against Sascha or Tammy Knickerbocker or both?

VI. THE LAW

A. Overview

[45] Anna's claims regarding the properties are founded on the law of resulting trusts. The Supreme Court of Canada set out the law with regard to resulting trusts in *Pecore v. Pecore*, 2007 SCC 17 at para. 20:

20 A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: 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. While the trustee almost always has the legal title, in exceptional circumstances it is also possible that the trustee has equitable title: see *Waters' Law of Trusts*, at p. 365, noting the case of *Carter v. Carter* (1969), 70 W.W.R. 237 (B.C.S.C.).

[46] Therefore, I must undertake the following analysis:

- Were the transfers of real property gratuitous?
- If so, the presumption of resulting trust applies.
- The onus is placed on the defendant to rebut the presumption and to demonstrate that a gift was intended.

[47] The court must ascertain, on a balance of probabilities, the transferor's actual intention.

[48] In deciding whether each transfer to Sascha was gratuitous, I must determine if he paid consideration or gave value to the plaintiff for the property transferred.

[49] With regard to the bank accounts and investments, although Anna's claim is based on resulting trust, it is the law of constructive trust that is applicable. Sascha also raises the issue of constructive trusts.

[50] In order to meet the test for a constructive trust, the plaintiff must prove that: (i) the defendant received a benefit; (ii) the plaintiff suffered a corresponding deprivation; and (iii) the defendant did not have a 'juristic reason' for the benefit. Juristic reason means that there is no reason in law for the enriched party to retain the benefit, thus making its retention "unjust" in the circumstances

B. The Applicable Law

1. Ownership of Assets: Resulting and Constructive Trusts

[51] Although the factual situation in this case is complex, the law is relatively straightforward. A property owner is entitled to use and dispose of her property as she sees fit, subject to the equitable interests of beneficiaries and the property rights of joint owners.

[52] Sascha claims that he is both legally and beneficially entitled to various properties or interests in properties. However, Anna alleges that these properties were received without his paying any consideration. If Anna proves that his interests in property were received by him gratuitously, then the presumption of resulting trust applies and Sascha must then prove that the properties were intended as gifts at the time of the transfer. If Sascha cannot prove this, then any properties he received from Anna were held on a resulting trust and he was not entitled to use them for his own benefit.

[53] As set out by the Court in *Pecore*, where a party has received property for no consideration, there is a presumption that he holds that property on resulting trust for the transferor. This presumption can be rebutted by the defendant proving on a balance of probabilities that the transferor intended to give that property as a gift:

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.

[54] The focus of this analysis is on the actual intention of the transferor at the time of the transfer: *Pecore* at paras. 56-59; *Lorintt v. Boda*, 2014 BCCA 354 at paras. 77-78. This is a fact-driven exercise: *Lorintt* at para. 85.

[55] Anna also alleges that Sascha removed funds from joint bank accounts and that those monies were subject to a resulting trust. With regard to funds in the joint accounts, the law is summarized in *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at 437, as cited with approval in *Bergen v. Bergen*, 2013 BCCA 492 at para. 39. As against a bank, each party is contractually entitled to withdraw any amount of monies from a joint account, regardless of his or her contribution. However, in equity, each party is entitled to a share of the account that is proportionate to his or her contribution to that account.

[56] A gift of money can be the subject of a resulting trust. Similarly, adding someone to a joint bank account can be the subject of a resulting trust. In effect, what is transferred is a half interest in a chose in action against the bank. Both of these things can be transferred, so they can both be either a gift or a resulting trust.

[57] The relationship between resulting trusts and constructive trusts with joint bank accounts is partially dependent upon the time at which the trust is alleged. A resulting trust is a trust imposed when someone receives something for free. Since equity presumes bargains and not gifts, it is presumed that the transferee holds the property that he or she was given on resulting trust for the transferor. A constructive trust applies in part because of the timing of the analysis: a resulting trust arises at the time of transfer, whereas a constructive trust arises at the time of a wrongful benefit.

[58] In *Bergen*, the Court of Appeal states that constructive trust is a remedy for someone wrongfully draining a joint account in circumstances such as those in this matter.

[39] The practicalities of a joint bank account, moreover, are different from those of a joint tenancy in respect of other forms of property. Obviously, a depositor's interest in a bank or investment account is a chose in action: the depositor is a creditor, and the bank or other depository is a debtor that is bound, subject to the terms of the agreement between them, to pay over the balance in the account on demand. In this context, it is difficult to

conceptualize the operation of the four unities (of title, interest, time and possession) from which joint tenancy historically arose. (See generally Law Reform Commission of British Columbia, Report on Co-Ownership of Land (1988), at 3.) Most importantly, where one of the holders of a joint account wishes to discontinue the arrangement and eliminate the right of survivorship, the usual course is to bring the account to an end - if necessary by draining it to a zero balance. (See generally Waters (4th ed.) at 440; see also *Edwards v. Bradley*, supra at 233, quoted above; and *Pecore* at para. 50.) The remaining account-holder who claims to have had a beneficial interest in the withdrawn funds may pursue an equitable remedy such as constructive trust or tracing (see Waters, 4th ed., at 440), but this may be a complex process.

- [59] The test for a constructive trust is more complex than the test for a resulting trust. The plaintiff must prove that: (i) the defendant received a benefit; (ii) the plaintiff suffered a corresponding deprivation; and (iii) the defendant did not have a 'juristic reason' for the benefit.
- [60] The parties in this case each dispute the amounts that were contributed by the other. However, if it is found that a party has removed more than his or her proportionate contribution from the joint account, then he or she will hold the removed monies on constructive trust for the other party if there has been unjust enrichment. There is unjust enrichment where one party has benefited and the other party has suffered a corresponding deprivation and there is no juristic reason for that benefit: *Kerr v. Baranow*, 2011 SCC 10 at para. 32.
- [61] Although "juristic reason" is a complex concept, in summary it means that there is no reason in law or justice for the enriched party to retain the benefit, making its retention "unjust" in the circumstances: *Kerr* at para. 40. Since the Supreme Court of Canada has recognized that a gift is a juristic reason for enrichment, in this case, if either party intended that his or her contributions to a joint account were a gift to the other party then there is no constructive trust: see *Kerr* at para. 41.
- [62] Sascha argues that he was entitled to certain monies in the joint accounts as the proceeds of sale of Fairview Road, 7310 Cliff Avenue and 7202 Cliff Avenue. Sascha argues in the alternative that the monies deposited in the joint accounts were valid gifts. If either of these allegations is correct then there was a juristic reason for the benefit and there is no constructive trust.
- [63] In the circumstances of this case, the intention of the transferring party is a critical factor. The entitlement to the CIBC Accounts and National Bank Accounts depends on whether Anna and Sascha intended to contribute monies into the account for themselves or for the free use of the other party. Sascha's interest in Middle Bench depends on Anna's intention to gift this property to her son or retain beneficial interest for herself.

[64] However, the factual questions in this case loom large. Specifically, the tracing of money and accountings through a long series of transactions and discerning the parties' true contributions to the disputed properties and accounts are the most fundamental issues in this case.

2. Undue Influence

[65] The issue of undue influence is raised by Sascha. Several of his claims are based on allegations that Sonia exerted undue influence over their mother, Anna.

[66] Undue influence exists when a party has exerted so much influence over another that the influenced person's will is overborne and what she does cannot in truth be described as her own act: *Modonese v. Delac Estate*, 2012 BCSC 82 at para. 96; *Longmuir v. Holland*, 2000 BCCA 538 at para. 71.

[67] In some circumstances, there is a presumption of undue influence, as described in *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353. Usually, this will occur where the potential for domination is an inherent part of the parties' relationship or where there is a relationship of dependency (at 378).

[68] However, as stated by Mr. Justice Groves in *Modonese*, the presumption of undue influence does not automatically apply whenever an elderly parent transfers property to her child. The presumption should apply in cases where an elderly parent has been dependent on their child or where the child has historically exerted dominance over that parent. The presumption should not apply where a parent is in good health and in possession of all her faculties, unless there is some other form of influence being exerted: paras. 102-110.

C. Is Either Party's Claim Precluded by the Limitation Period?

[69] Anna has raised a possible issue concerning the applicable limitation period. The notice of civil claim in these proceedings was filed on July 28, 2011. Pursuant to s. 3(3) of the Limitation Act, R.S.B.C. 1996, c. 266, which was in force when this action was commenced, the limitation period to bring a constructive trust claim is ten years: see *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.*, 2008 BCCA 278 at para. 91. This period begins from the date on which the plaintiff has a right to sue the defendant for "the conversion of trust property to the trustee's own use" or "to recover trust property": Limitation Act, s. 3(3).

[70] Since the statute states that the limitation period begins at the time when the defendant converted funds to his own use or when the plaintiff had a right to recover trust property, and since a ten-year limitations period applies to the claims in trust, the only claims that are precluded are claims seeking to recover trust property that was converted before July 28, 2001.

[71] The remainder of the parties' claims are within the applicable limitation periods.

[72] As is discussed below, no claims outside the applicable limitation periods will be allowed. It will not be necessary to deal further with this issue.

VII. The Evidence

A. Background

[73] Anna immigrated to Canada in 1951 from Germany where she had been trained as a nurse. In 1953, in Edmonton, after learning sufficient English, she became a registered nurse. She completed teacher training in special education and obtained her Master's degree in Educational Psychology. For eight years she taught in the public school system.

[74] When Anna moved to Penticton in 1975, there were not many opportunities in nursing or teaching. With her then-husband, she purchased and operated the Haven Hill Retirement Centre which had 76 beds. After Haven Hill was sold in 1978, Anna worked as a real estate agent until 1983. After that time she was employed as a psychiatric nurse at the Penticton Regional Hospital until she retired in 1991 at 65 years of age.

[75] When the Retirement Centre and an adjacent lot which had been purchased by Anna as part of Haven Hill were sold in 1978, Anna received net proceeds of approximately \$200,000. These funds were used to purchase her first rental investment, 313 Norton, in 1980.

[76] Over the years, Anna financially assisted her two children, Sonia and Sascha. She has had a steady income from employment, real estate investments and rentals, dividends, interest and pensions.

[77] Sascha began an apprenticeship as an industrial electrician in 1973 in Edmonton, and he later began to work in his trade. After an industrial accident in 1980, he moved back to Penticton. Fairview Road was purchased during this time.

[78] In 1987 he moved to Fort McMurray, Alberta. 7310 Cliff Avenue was purchased as a residence. After living in Alberta, in the early 1990s he moved back to Penticton.

[79] After his later return to Fort McMurray, 7202 Cliff Avenue was purchased, and construction of a house on one of the two included lots commenced.

[80] In 2013 Sascha worked in a camp northwest of Fort McMurray. He continues to spend some time in the Fort McMurray area. His employment and income continue to be sporadic.

[81] Sonia lives in Summerland and has had a number of business ventures on her own and in conjunction with her former husband, John Gates. She is independent, self-sufficient and capable. She has completed many projects involving business, rentals, construction and repair with her knowledge and abilities.

B. The Documentary Evidence

- [82] The documentary evidence led by Anna was extensive and detailed. The banking records begin in 1989 and continue until 2010. The only missing records were those left at Middle Bench when she moved to a retirement home.
- [83] Anna was a meticulous record keeper. Her cheque record books are detailed. Bank statements are annotated, confirmed monthly with the cheque records and cross-referenced. In oral evidence, her recollection was almost perfect with regard to every entry.
- [84] Records regarding her income for tax purposes and the real estate transactions were also provided by Anna. Anna and Sonia calculated summaries of the relevant banking entries. A flow chart of all many of Anna's investments and accounts was provided.
- [85] The documentary evidence provided by Sascha was, for the most part, incomplete and problematic. One example is his response to the order of Mr. Justice Barrow on June 24, 2013 which required Sascha to produce, inter alia:
- (a) copies of the invoices and receipts for work done on 7202, 7204 and 7310 Cliff Avenue;
 - (b) copies of invoices related to the materials and labour for finishing 7204 Cliff Avenue; and
 - (c) details of how much money he had withdrawn from HSBC Account 290.
- [86] The substantial response to these provisions of the June 24, 2013 order, did not occur until trial when Sascha produced several unorganized bundles of receipts and some additional receipts. Sonia reviewed, categorized and tallied all of the receipts previously produced and the additional receipts produced at trial, some of which were duplicates. Her summary of the receipts produced by Sascha is in evidence (the "Summary"). Sascha acknowledged that the Summary accurately reflects the receipts that he had produced.
- [87] The Summary establishes that Sascha's receipts for fuel, auto, personal and materials for the years from 1992 to 2009 total \$75,625.99.

C. The Properties

- [88] The properties are the subject of various competing claims by Anna and Sascha. Sascha's claims extend to properties held jointly by Anna and Sonia as well as those he previously held jointly with Anna. He also claims damages or compensation for work he performed on some of the properties.
- [89] I will review and summarise the relevant portions of the oral and documentary evidence regarding the properties as it pertains to the claims made, but not all documents and testimony need be referenced or repeated in these reasons.
1. 24605 Callan Road, Summerland, B.C.

- [90] Sascha claims an interest by way of a constructive trust in this property. He also claims damages for work done on the property.
- [91] Callan Road is the first property owned by Anna that is in issue. She purchased it on September 16, 1976 for approximately \$87,500 which included a payment of \$64,446.32 plus assumption of a mortgage which was registered on title. Anna's evidence was that the purchase money came from her sister, Emily Strobel. Callan Road consisted of approximately 60 acres with a house.
- [92] Anna lived on the Callan Road property for approximately four years after which it was rented out. In April 2003, Anna added her daughter, Sonia, to the title of Callan Road as a joint tenant.
- [93] In the spring of 2008, 30 acres of Callan Road was sold to the Ministry of Highways for approximately \$120,000.
- [94] In Sascha's counterclaim, he claims damages and relies upon the facts set out in his reply to the notice of civil claim. At paragraph 4 of his reply, Sascha states that:

The Defendant contributed money and labour to a number of Plaintiff's properties purchased with funds from the account(s) which have not been accounted for.

- [95] There was no evidence that Sascha contributed any money toward the purchase of Callan Road. Sascha did some minimal repairs to a water line and water pump prior to 2001.
- [96] In 2008, Sascha did work on the septic system for that property. He described it as a repair or rebuild which spanned over a month. Expenses were paid by his credit card and cheques drawing from HSBC Account 290. The evidence includes an invoice dated September 6, 2008 from Sascha to Anna for \$4,800 for the repair of the septic field and tank.
- [97] Anna testified that Sascha was paid for that work, although the evidence is unclear as to whether there was an earlier payment of \$10,000, or if it was by a \$9500 payment in November 2008. Tammy Knickerbocker was also paid \$440 from HSBC Account 290 for "spotting" while Sascha worked on the septic system. Sonia's evidence was that the work done by Sascha did not resolve the problem with the sewer backing up and that she later used a snake to check the sewer pipe from the house to the septic tank. She removed a pair of underwear from the sewer pipe which resolved the problem.
- [98] Sascha also claimed he repaired the water pump for the property in 2008, by having a diver, Fred Strong, bring the pump to the surface. After the pump was repaired on Sascha's boat, Fred Strong reinstalled the pump later that day. Fred Strong, who testified about the work done, was paid for his diving by a cheque for \$500 issued to him from HSBC Account 290. Sonia's evidence was that the tenants at Callan Road had not complained to her about the water pump and, if they had, she had a new water pump available.

2. 1674 Fairview Road, Penticton, B.C.

- [99] In 1979, when Sascha was 22 or 23 years of age, he wanted to acquire a property in Penticton, B.C. Anna, who was then working in real estate, found Fairview Road which was a large lot in a commercial area. When Fairview Road was purchased in 1979, the title was registered in Sascha's name. Anna testified that she provided a down payment of \$6,000 and she arranged a mortgage to finance the remainder of the purchase price. Anna testified that Sascha was to be responsible for payment of the mortgage.
- [100] Sascha gave contradictory evidence with respect to the deposit or down payment in that:
- (a) during his direct evidence, he stated that he had to complete the purchase otherwise his mother would lose her deposit;
 - (b) when cross-examined about the \$6,000 deposit Anna testified she had made, Sascha said the deposit was minimal and would not have been as much as \$6,000; and
 - (c) Sascha's evidence from his examination for discovery on March 20, 2013 was put to him wherein he stated he had no recollection of the \$6,000 Anna advanced toward the purchase price.
- [101] Sascha lived at Fairview Road for about two years and then moved to Alberta to work. Anna testified that before Sascha left for Alberta, he felt he could not afford the house. They talked about it and he gave the house back to her. Anna said he "didn't stick it out".
- [102] Anna rented out Fairview Road from about 1981 until it sold in 1996, which was not an easy task because it was in a commercial area. Anna paid the mortgage, property taxes and insurance for Fairview Road from about 1981 until the property sold in 1996. Sascha does not dispute that Anna paid those amounts.
- [103] Sascha testified that he was partially involved in renting out Fairview Road and that he had moved back into Fairview Road for about two years while a house he had at 7310 Cliff Avenue in Fort McMurray was rented to friends. On cross-examination, Sascha was questioned about the evidence he gave during his examination for discovery about who arranged the renters at Fairview Road, wherein he stated:
- (a) he was not aware of how it was dealt with;
 - (b) it could have been his mother; and
 - (c) he had entrusted his mother with what was going on with the house and entrusted her with the mortgage.
- [104] Sascha testified that Fairview Road was not a house he liked. He considered it a poor investment and he gave detailed evidence as to the poor nature of the property and its location near to an auto wrecker, A1 Salvage, and other commercial properties. He considered the mortgage payments to be too high. However, he denied that he told his mother she could have Fairview Road when he left for Alberta in or about 1981.

- [105] Sascha testified that he was involved in the idea of selling the property. Practically, it was Anna who negotiated the sale of Fairview Road to the City of Penticton. When arrangements were made to sell Fairview Road in June 1996, Sascha checked with his mother to ensure she would release funds to him from HSBC Account 290.
- [106] Anna's evidence was consistent. She stated that after Sascha left the property, she took over all aspects of managing the property. She rented it to tenants, paid the mortgage and taxes and undertook its upkeep for the next 15 or 16 years. After about 1980 or 1981, Sascha did not make any financial contribution to the property or input by way of management or maintenance of the property.
- [107] When Fairview Road was being sold, Anna testified that she had agreed that Sascha could use the sale proceeds to acquire a property, 7202 Cliff Avenue, on which to build a house. Anna's evidence was that, as a condition to her agreeing that Sascha could use these sale proceeds for building a house, Sascha was to sell 7310 Cliff Avenue which had been purchased in 1987. Those sale proceeds would go to Anna, but Sascha could also use that money for building the house.
- [108] The parties agreed that those were the terms of the agreement regarding the use of the proceeds of sale. Sascha testified that Anna had agreed that Sascha could use these sale proceeds from Fairview Road to acquire 7202 Cliff Avenue and that, if Anna had not let him use the sale proceeds, he would have gotten a mortgage and bought 7202 Cliff Avenue.
- [109] It is noted that, although he stated that personally taking out a mortgage was a possible option, at this time his mother had recently been making mortgage payments of \$350 per month for him with respect to 7310 Cliff Avenue. Sascha's income was \$28,606 as indicated on his 1996 Notice of Assessment.
- [110] Fairview Road sold on or about June 28, 1996 for the sale price of \$127,200. The sale proceeds were deposited to HSBC Account 290 on June 27, 1996.
- [111] Anna testified that HSBC Account 290 was made joint with her shortly after Fairview Road was purchased. Sascha gave contradictory evidence about when and how HSBC Account 290 was made into a joint account. This is addressed later in these reasons.
3. 240 Lower Bench Road also known as 235 Middle Bench Road North, Penticton, B.C.
- [112] Anna claims that Sascha holds his interest in Middle Bench for her on a resulting trust. Sascha takes issue with that claim and seeks that Sonia's one-half interest be vested in him so that he holds 100% of this property, or that Sonia pay him damages equal to her one-half interest.
- [113] In December 1980, Anna purchased Middle Bench for approximately \$150,000. The purchase price was by way of a payment of approximately \$131,000 and assumption of a mortgage registered against that property.

- [114] Anna resided at Middle Bench for approximately 30 years until she moved to her current residence, a retirement centre, in 2010. On October 15, 2010, Anna added Sascha to the title of Middle Bench as a registered owner in joint tenancy.
- [115] Anna testified that when she added Sascha to title to Middle Bench she did not know that Sascha had transferred title to 7204 Cliff Avenue from a joint tenancy of Anna and Sascha into Sascha's sole name. Anna also testified that she had added Sascha to title of Middle Bench for estate planning purposes and that she would not have added Sascha to the title of Middle Bench at all if she had known about Sascha transferring the title of 7204 Cliff Avenue from joint tenancy into his own name.
- [116] After Sascha closed out the CIBC Accounts on April 19, 2011, Anna contacted her lawyer and requested that he conduct a title search on the properties that were in the joint names of Anna and Sascha. Anna testified that she discovered that 7204 Cliff Avenue had been transferred into Sascha's sole name and mortgaged when she saw a copy of the title search.
- [117] There was no evidence that Sascha paid any money toward the purchase of Middle Bench or for the transfer of an interest to him. Sascha does not suggest that he did, but does say that he made contributions through work done on the property over many years.
- [118] Sascha's claims of work done at Middle Bench over 30 years include helping install some carpet upstairs in the house shortly after Middle Bench was purchased in 1980, some repairs to the roof of the house, installation of some irrigation equipment around the house, installation of a chimney pipe which he testified was installed and hooked up in one day, clearing rocks from a large part of the orchard, and repairing the fence and road. Sascha was paid for clearing the rocks but says that it was not a fair wage for his services.
- [119] Anna and Sonia testified that the majority of upkeep and maintenance was done by Anna's spouse, Frank Sanders, until his death in 2004. Anna was also regularly assisted by Sonia and her then-spouse, John Gates. They said that Sascha helped his mother sporadically, mostly when he was living with her during his visits to Penticton.
- [120] Sascha used Middle Bench for storing various vehicles, boats and other personal items for several years. The volume and nature of the stored items became an issue in about 2009.
- [121] To protect herself and her estate, Anna transferred her remaining undivided interest in Middle Bench to Sonia in November 2011 and later caused a certificate of pending litigation to be filed against title to the property.
4. 313 Norton Street, Penticton, B.C.
- [122] Sascha says that he has a claim of constructive trust over this property. I understand that he also claims damages for work done on the property.
- [123] In December 1980, Anna purchased 313 Norton for \$35,000 from the proceeds of the sale of Haven Hill. For the most part, this was a rental property.

- [124] On March 31, 2010, Anna signed a transfer to add Sonia as an owner of half the property in joint tenancy. Anna's evidence was that she transferred this interest to her daughter of her own free will and that she wants 313 Norton to go to Sonia when she dies.
- [125] Significant repairs have been done to 313 Norton because of damage done by renters. Repair work was done by Anna and her spouse. Much repair work was also done by Sonia and John Gates which took about one month in the early 1990s. John Gates with another individual also replaced a sewer line to the house and, later, Sonia and John Gates again did repairs taking about one month to complete after two student renters damaged the house. After an issue with bed bugs was discovered in 2008, Sonia renovated the entire house.
- [126] Anna testified that, after discovering there was a problem with bed bugs at 313 Norton, she asked Sascha and Sonia what each of them would do with that property. Sascha indicated that he would tear down the house and build on the property. Anna thought that Sascha's plan was impractical given he had been working on building a house at 7204 Cliff Avenue in Fort McMurray since about 2000. Sonia indicated to Anna that she would renovate 313 Norton and Anna thought that was a better plan. Anna stated that she gave consideration to each of her children's plans for 313 Norton when she added Sonia as an owner of this property in joint tenancy.
- [127] There was no evidence that Sascha contributed any money toward the purchase of 313 Norton. Sascha did some electrical work on this property in the late 1980s or early 1990s. He says that it was substantial work requiring a knob and tube system to be brought up to code. However, the permit obtained for the work indicates a value of \$280.
- [128] It is Anna's evidence that Sascha was compensated for his electrical work through her purchase for him of a catamaran. Sascha says that this payment, a 1969 Hobie Catamaran, was insufficient compensation.
5. 863 and 891 Government Street and 577 Forestbrook Drive, Penticton, B.C.
- [129] There are no claims involving these properties. They are included for completeness and to indicate a source of funds from which Anna made a loan to Sonia.
- [130] In 1983, Anna purchased two properties on Government Street and a property on Forestbrook Drive in Penticton, B.C. in partnership with Pauline Maier. In October 1994, Anna sold her interest in those three properties to Pauline Maier for \$160,000.
- [131] Anna lent Sonia \$140,000 from the sale proceeds of these properties for the purpose of Sonia and her husband acquiring a property in Summerland, B.C. and a concrete exposed aggregate business. Sonia makes monthly payments of \$750 to Anna toward repayment of the \$140,000 loan.
- [132] There was no evidence that Sascha contributed any money toward the purchase of the properties on Government Street or Forestbrook Drive, nor was there any evidence that Sascha did any improvements or repairs to any of those properties.

6. 319 Norton Street, Penticton, B.C.

[133] Sascha claims an interest in this property and says that he is the beneficiary of a constructive trust.

[134] In June 1993, Anna purchased 319 Norton for approximately \$109,000. 319 Norton consists of two lots, lot 28 and lot 29.

[135] On March 31, 2010, Anna signed a transfer to add Sonia to lot 28 and lot 29 as an owner of half of each lot in joint tenancy. Anna's evidence was that she transferred this interest in 319 Norton to her daughter of her own free will and that she wants this property to go to Sonia when she dies.

[136] There was no evidence that Sascha contributed any money toward the purchase of 319 Norton. Sascha and Sonia did some minor repairs with respect to a roof on the back porch which Anna estimated took about three hours.

7. 7310 Cliff Avenue, Fort McMurray, Alberta

[137] Sascha says that funds from the sale of this property belonged to him, and were used for the purchase of 7204 Cliff Avenue.

[138] In November 1987, Sascha acquired 7310 Cliff Avenue for the purchase price of \$26,200. The amount of \$4,422.28 was paid by him on the closing date, and \$20,800 of the purchase price was financed by way of a mortgage in favour of UMC Financial.

[139] In June 1993, Sascha was in arrears of the mortgage payments to UMC Financial. Anna testified that, on June 15, 1993, she paid the outstanding mortgage arrears of \$3,998.47 and, from July to December 1993, she made monthly mortgage payments on Sascha's behalf from HSBC Account 150. In February 1994, Anna paid out the balance of the UMC Financial mortgage of \$10,000. These payments are recorded in Anna's cheque registers for HSBC Account 150.

[140] 7310 Cliff Avenue sold for \$61,000 in June 1999. The net sale proceeds after payment of realtors' commission and legal expenses were \$56,691.54.

[141] Anna testified that, by the time 7310 Cliff Avenue sold in June 1999, Sascha was indebted to her in the amount of approximately \$50,000 as evidenced by the promissory notes that he signed. Sascha disputes the allegation that he paid the proceeds of sale to Anna in repayment of his debt to her.

8. 7202 Cliff Avenue, Fort McMurray, Alberta

[142] Sascha claims ownership of the proceeds of sale of this property.

[143] In August 1996, 7202 Cliff Avenue was purchased for the approximate sum of \$46,500. At the time of purchase, it consisted of two lots, lot 11 and lot 12. These properties were purchased so that Sascha could build and sell a house for profit.

- [144] In 2001, 7202 Cliff Avenue was subdivided. The empty lot 11 became 7204 Cliff Avenue and it was intended and agreed between Anna and Sascha that Sascha would build a house on this property with Anna's funds. Lot 12 and the residence on this lot remained 7202 Cliff Avenue. Anna testified that Sascha intended to live in this residence while he built a house on the other lot. As soon as enough work on the empty lot was completed, it was intended that 7202 Cliff Avenue would be sold and Sascha would move into the new house on 7204 Cliff Avenue while he continued building it.
- [145] When 7202 Cliff Avenue was purchased, title was registered in the joint names of Anna and Sascha. Anna testified that she paid the purchase price of \$46,500 for 7202 Cliff Avenue because Sascha had no money, only debt. \$11,906 of the purchase money for 7202 Cliff Avenue came from HSBC Account 150. Anna's cheque register for HSBC Account 150 indicates a withdrawal on August 27, 1996 of \$11,906 which was described as "re Ft McMurray house".
- [146] Anna testified that she felt she was taking a big chance investing money to purchase property on which Sascha could build a house. However, Anna wanted to give Sascha an opportunity and she thought it would be a good experience for Sascha to build a house. For that reason she made the agreement with Sascha regarding construction of the house.
- [147] Anna's evidence was that she would provide the money necessary to buy the property and build the house from the sale proceeds of Fairview Road, 7310 Cliff Avenue and eventually 7202 Cliff Avenue. Sascha was to provide the labour required to build the house and, when it was completed, 7204 Cliff Avenue would be sold and the money invested by Anna would be repaid.
- [148] Sascha testified that 7202 Cliff Avenue was a project when it was bought but he denied that there were any plans to subdivide the lots and build a house when 7202 Cliff Avenue was being bought. Although Sascha received a copy of the data input sheet and survey plan for 7202 Cliff Avenue when the property was purchased, and these documents indicated the property consisted of two lots, he testified that he did not discover there were two lots until about two years after the property was bought. Sascha acknowledged that he had always wanted to build a house, but he says he did not want to build a house in Fort McMurray.
- [149] 7202 Cliff Avenue sold on about May 3, 2004 for net sale proceeds of \$216,905.49. The cheque for that amount was made payable to Anna and Sascha. It was deposited into HSBC Account 290.
9. 7204 Cliff Avenue, Fort McMurray, Alberta
- [150] Sascha began building the house on lot 11 in 1999 or 2000. As stated above, lot 11 was separated from lot 12 and became 7204 Cliff Avenue in 2001. Anna and Sascha were registered as the joint tenant owners of lot 11. Sascha continued building the house after the subdivision.

- [151] When Sascha started construction of the house, he commenced writing cheques drawing on HSBC Account 290. When Sascha was writing cheques for expenses related to building the house, he would telephone Anna and tell her how much money was needed in HSBC Account 290. Initially, he also told his mother the reason for the expenses as had been agreed between them.
- [152] During the first few years of construction, Sascha called his mother more frequently than in later years and he advised her of the money he required and the reason it was necessary. Sascha testified that he later put construction expenses on his credit cards because credit card statements were a good resource to use for accounting.
- [153] When 7202 Cliff Avenue sold in May 2004, the sale proceeds of \$216,905.49 were deposited into HSBC Account 290. Again, Anna testified that she had an agreement with Sascha that the sale proceeds from 7202 Cliff Avenue would be used to build the house on 7204 Cliff Avenue. However, she testified that, within a short period of time after 7202 Cliff Avenue sold, Sascha had withdrawn \$30,000 for personal expenses, including credit card payments and a motorhome. On June 16, 2004, Anna transferred \$175,000 from HSBC Account 290 to HSBC Securities Account #3T7417A so that the funds could not be easily accessed by Sascha. HSBC Security Account #3T7417A was opened in Anna's and Sascha's joint names.
- [154] Sascha testified that, after 7202 Cliff Avenue sold, 7204 Cliff Avenue was his full time project. However, although Sascha has been building the house at 7204 Cliff Ave for approximately 14 years, it is not yet complete. 7204 Cliff Avenue had an appraised market value of \$680,000, as is, as of November 14, 2013. Sascha did not permit the appraiser to view the interior of the house.
- [155] The building expenses related to the house on 7204 Cliff Avenue are not well-documented. However, the following facts can be discerned.
- [156] The cheques Sascha wrote on HSBC Account 290 from 2000 until 2009 totaled \$395,602.03. During this time, Sascha wrote all but six cheques drawn from this account. There were no cheques available for the period of January 2003 until December 21, 2004; however, Sascha admitted to writing cheques for various expenses for which Anna had made notations on the statements.
- [157] During that time period, Anna transferred \$216,800 into that account from other accounts she had at HSBC (HSBC Account 150 and HSBC Account #327637-203 ("HSBC Account 203")).
- [158] As indicated in the summary prepared by Sonia, between 1992 and 2009, Sascha produced receipts totalling \$75,625.98, broken down as follows:
- (i) fuel \$14,434.59;
 - (ii) auto \$10,533.07;
 - (iii) personal \$10,456.87; and

(iv) materials \$40,201.45.

These receipts included numerous personal expenses, including receipts for meals and pet grooming services. Sascha testified that he accepts this summary as accurate.

[159] It was Sascha's evidence that the cheques he wrote on HSBC Account 290, including cheques drawn to pay his credit cards, were all related to the construction of 7204 Cliff Avenue. However, Sascha did not produce any of his credit card statements even though he stated that he was using credit card statements for accounting purposes.

[160] Sascha also claims that he used his credit card statements as a way to record construction expenses for 7204 Cliff Avenue. Sonia listed and totaled the cheques that Sascha wrote on HSBC Account 290 for payments on his credit cards between 2006 and 2009. I am satisfied that her analysis is accurate and that the total amount Sascha paid on his credit cards from this account between 2006 and 2009 was \$71,550.99.

[161] Sascha closed HSBC Account 290 on October 19, 2009 and withdrew the remaining \$1,832.03.

[162] On or about January 25, 2010, Sascha submitted a transfer document to the Alberta Land Title Office to transfer 7204 Cliff Avenue from the joint names of Anna and Sascha to Sascha's sole name.

[163] Anna testified that she did not sign the transfer of land document. She also testified that she had no knowledge that the title of 7204 Cliff Avenue had changed or that Sascha had mortgaged that property until after Sascha withdrew her money from the CIBC Accounts in April 2011.

[164] When Sascha was questioned as to whether he had discussed the transfer of title of 7204 Cliff Avenue with his mother, he was non-responsive and said that they seldom had discussions. Sascha testified that he filled out the top half of the first page of the Alberta transfer of land document to transfer 7204 Cliff Avenue into his sole name and that he and Tammy signed it but did not date it. This was different from the evidence he gave during his examination for discovery where he stated that he had filled in January 25, 2010 on the form and that was the date that Tammy and him had signed the transfer. Sascha testified that his evidence was in error on his examination for discovery.

[165] At trial, Sascha testified that he left the transfer document at Middle Bench and that, about one month later, he found the transfer of land document, purportedly signed by Anna, along with his mail at Middle Bench.

[166] Tammy Knickerbocker and Sascha then attended at the office of a lawyer, Mr. Gjukich, to sign the affidavit of execution, which stated that Tammy had seen Anna sign the transfer document, and for Sascha to sign the affidavit re value of land. Sascha testified that he knew that Tammy had not seen Anna sign the transfer form, but he thought the Alberta transfer of land document had changed since 7310 Cliff Avenue was sold and that the form did not

previously have an affidavit of execution. However, the transfer form that Sascha signed for the sale of 7310 Cliff Avenue in 1999 which was entered into evidence and contains substantially the same information as the transfer of land form filed in 2010 in relation to 7204 Cliff Avenue.

- [167] Sascha personally submitted the transfer of land form for registration in the Edmonton, Alberta Land Title Office. It was registered on February 8, 2010, changing the registered owner to Otto Sascha Schloegl.
- [168] On March 26, 2010, Sascha mortgaged the property to CIBC in the amount of \$100,000. He increased the mortgage to \$300,000 on or about August 6, 2010.
- [169] Sascha says that most of the \$300,000 mortgage he obtained over 7204 Cliff Avenue after the transfer to his sole name in 2010 was used to pay expenses to finish work on the property. However, he has not submitted any invoices after 2010 proving his expenses.
- [170] During cross-examination, Sascha stated that the house at 7204 Cliff Avenue was about 80% finished by the end of 2009.
- [171] Anna testified that she discovered that 7204 Cliff Avenue had been transferred into Sascha's name when her lawyer, Mr. Halbauer, obtained a historic land title certificate for 7204 Cliff Avenue. Sonia testified that when Anna saw these documents she stated: "He just couldn't wait until I died".

D. Bank Accounts and Investments

1. HSBC Account 290

- [172] Sascha opened HSBC Account 290 in 1979. Anna testified that she was a made a joint owner shortly after this account was opened. The details of this account were provided in bank statements, cheques drawn on the account and Anna's cheque registers for the account.
- [173] Sascha gave evidence that he only used HSBC Account 290 to cash cheques when he came to B.C. and that if he deposited a cheque to this account he would withdraw the same amount. He also stated that he started writing cheques on HSBC Account 290 when he starting building the house on 7204 Cliff Avenue in or around the year 2000. He also testified that he did not know Anna was a joint owner of that account until 2004, which contradicts a power of attorney form signed by Anna and Sascha in January 1989 giving Sonia a power of attorney for that account.
- [174] Anna testified that whenever Sascha deposited money into HSBC Account 290, he subsequently withdrew that money. This is displayed in Anna's written summary of the deposits Sascha made into HSBC Account 290 and it is consistent with the evidence Sascha gave during his examination for discovery, where he stated that he only used this account when he was in B.C. to deposit his paycheque, which he then withdrew.

- [175] Anna's summary indicates when the money deposited by Sascha was withdrawn by him. Anna gave evidence about several of the deposits on her list and corresponding withdrawals by Sascha when the cheque registers for HSBC Account 290 were reviewed with Anna. Anna testified that she made the notations in her cheque registers contemporaneously when the deposits and cheques were written or when she received the monthly bank statements.
- [176] Pursuant to the order of Mr. Justice Barrow made June 24, 2013, Sascha was to produce, inter alia, the details of the money he entrusted to Anna. During the trial, while under cross-examination, overnight, Sascha produced a list of the deposits he made into HSBC Account 290. This list included the amounts of the net sale proceeds from the sale of Fairview Road, 7310 Cliff Avenue and 7202 Cliff Avenue, as well as \$28,189.83 which Sascha claims comes from the sale of a house he had in Edmonton, Alberta in 1988. Anna and Sonia dispute that Sascha had a house in Edmonton. Sascha did not produce any documentation regarding the alleged money from the sale of an Edmonton house.
- [177] The summaries prepared by each party are similar although for slightly differing time periods. Anna shows a total of \$46,050.62 deposited and \$46,336.01 withdrawn in corresponding time frames. Sascha includes the proceeds of sale from the four property sales and states that he deposited a total of \$475,622.50. Absent the sale proceeds, he deposited \$45,484.73. Anna lists ten deposits made by Sascha; he lists eighteen deposits in total including the four amounts for house sale proceeds.
- [178] Anna testified that from 1989 to 2009 Sascha received the benefit of approximately \$539,849 from that account. After deducting the amount he contributed, \$45,484.73, his net benefit from her funds is \$494,364.27. That sum exceeds what was paid in from the sale proceeds of the three properties: Fairview Road, 7310 Cliff Avenue and 7202 Cliff Avenue.
- [179] Sonia prepared a list of all withdrawals made by Sascha from HSBC Account 290 for the time period 1990-2009. She testified that it was accurate exactly from the bank records. Sascha withdrew a total of \$506,849.03. He also received from Anna a RRSP of \$24,000, tech shares and payment for an accident which brought the total benefit received by him to \$539,849.
2. HSBC Account 150, HSBC Account 203 and Transfers
- [180] The evidence is not entirely clear as to why Anna kept the number of accounts which she had, and how she determined what funds should be held in which account at various times. What is clear from the evidence is that she was an astute money manager who at all times was acutely aware of each of her investments and accounts. Each transfer was made intentionally, and Anna testified clearly about the lengthy series of transfers to the inter-related accounts. A flow chart illustrates much of the movement of funds and the evolution of the accounts through changes to the financial institutions and Anna's decisions regarding their registered owners.

- [181] At various times many of the accounts were made joint with Sonia or Sascha or both of them. Neither child had any input into or control over the account changes into or out of their names.
- [182] HSBC Account 150 was initially a chequing account in Anna's name. Anna later added Sonia as a joint owner of this account. Bank statements and Anna's cheque registers for HSBC Account 150 are in evidence. HSBC Account 203 was initially a savings account in Anna's name. Anna later added Sonia as a joint owner of this account.
- [183] Between 2000 and 2009, Anna transferred \$216,800 from HSBC Account 150 and HSBC Account 203 into HSBC Account 290. These transactions are well-documented in bank statements and Anna's cheque registers.
- [184] Anna also transferred funds from her HSBC Account 150 to HSBC Security accounts and CIBC Mellon. Anna gave various examples of transfers from HSBC Account 150 to HSBC Security accounts.
3. CIBC Accounts: CIBC Chequing Account and CIBC Bonus Savings Account
- [185] Anna used the CIBC Chequing Account beginning in the early 1980s. This account was initially in Anna's name only.
- [186] On January 9, 2009, Anna opened the CIBC Bonus Savings Account with Sascha as a joint account holder. That same day, Anna transferred the sum of \$48,637.31 from her CIBC Chequing Account into the newly-opened CIBC Bonus Savings Account.
- [187] Anna maintained a handwritten record of the interest earned on the CIBC Bonus Savings Account.
- [188] Despite having signed the account opening and signature form, Sascha testified that he did not know about the CIBC Accounts until a credit check was done in 2010.
- [189] On April 19, 2011, Sascha closed out the CIBC Accounts and took the remaining \$71,341.52. Anna requested that Sascha return this money but Sascha refused.
- [190] Sascha testified that he first put the \$71,341.52 into another CIBC account he opened and that he later transferred those funds to his Credit Union account in Fort McMurray and placed \$70,000 into a guaranteed investment certificate in March 2012.
- [191] The use of this money is restricted by Mr. Justice Barrow's restraining order of June 24, 2013 which provides that:

The Defendant, Alexander Schloegl, is restrained from removing or using the funds in the approximate amount of \$71,341.52 held in a term deposit at the CUMIS Credit Union in Fort McMurray, Alberta and maturing February 14, 2014 until further order of this Court or written agreement of the Plaintiff and the Defendant, Alexander Schloegl.

However, the \$70,000 is security for a \$70,000 overdraft on Sascha's account at the Servus Credit Union in Fort McMurray.

[192] Anna submits that Sascha holds the \$71,341.52 in trust for her and that Sascha wrongfully converted those funds to his own use.

4. Pemberton/RBC Dominion Securities

[193] Anna had investments with RBC Dominion Securities from at least 1985 until December 12, 2000. Brian Hughes was Anna's investment advisor at RBC Dominion Securities from 1989 until December 12, 2000 when Anna moved the investments she had with RBC Dominion Securities in the amount of \$64,998.90 to HSBC Security accounts.

5. CIBC

[194] Anna had various investments with CIBC in her name solely and various other investments held in her and Sascha's joint names. Sascha had no knowledge of these investments. Anna maintained ledgers tracking her investments, the jointly-held investments and also RRSPs that she had purchased for Sascha.

[195] When 7310 Cliff Avenue was sold in 1999, Anna placed \$54,644 into CIBC Security Account #19158643, which she opened jointly in her and Sascha's names. The funds from CIBC Securities Account #19158643 were later transferred into the CIBC Bonus Savings Account.

6. HSBC Securities/National Bank

[196] As set out above, on December 12, 2000, Anna transferred approximately \$65,000 she had on deposit with RBC Dominion Securities to her HSBC Security account which was later taken over by the National Bank.

[197] HSBC Account 290 was the conduit for money being invested in HSBC securities and, later, National Bank.

[198] In June 1996, Fairview Road was sold and the sale proceeds of approximately \$127,000 were deposited into HSBC Account 290.

[199] In May 2004, the sale proceeds of 7202 Cliff Avenue of \$216,905.49 were deposited into HSBC Account 290.

[200] Anna testified that her income from all sources including CPP and OAP and various investments she had were deposited into HSBC Account 290 until Sascha started using that account in about 1999 or 2000.

[201] Anna testified that between 2000 and 2009, she deposited the sum of \$216,800 into HSBC Account 290 from HSBC Account 150 and HSBC Account 203, which she had in joint names with Sonia, to HSBC Account 290.

- [202] In October 2003, Anna deposited \$14,000 from HSBC Account 150 into HSBC Security Account #3T7417A which was an initial joint investment account that Anna had established with Sascha.
- [203] In January 2008, Anna deposited \$20,000 from HSBC Account 150 and HSBC Account 203 into another securities account, which was also jointly owned with Sascha, Account 30-D662-A.
- [204] Anna testified that all of the money in the HSBC Security accounts, now the National Bank Accounts, came from her money and investments. She repeatedly referred to the deposits in these and her other accounts as "my money", and explained the sources of the funds. Sascha's name had been added as a joint owner of these accounts by Anna for estate planning purposes and for a period of time Sonia was also added as a joint owner of various securities.
- [205] Anna testified that Sonia was added to the investments at Sascha's request because he was separating from his common law spouse, Loriann. Sascha denied that was why Sonia was added to the investment accounts. Sonia did not know why she had been added to the accounts. Sascha's evidence was that Sonia had been added without his knowledge and he only discovered that Sonia was a joint owner by chance when he opened some mail at his mother's house when she was on vacation in 2004.
- [206] As of January 31, 2014, there was \$459,446.23 in National Bank FT88A and, as of December 31, 2013, there was \$254,316.35 in National Bank FS5S-A. There is an existing order of Barrow J. made July 10, 2013 restraining the funds in these two investment accounts pending determination of beneficial ownership at trial.

E. The Falling Out

- [207] Sascha gave evidence that he and Anna did not talk for some time after an incident in 2008 regarding a water and sewer issue at Callan Road.
- [208] Anna's evidence was that, around September 2009, she told Sascha that he should finish work on 7204 Cliff Avenue himself or through a contractor and then sell the property. Anna also told Sascha that she would not be putting any more money into HSBC Account 290 unless she approved of the expense in advance. She had become concerned about his profligate spending of her funds.
- [209] On October 19, 2009, Sascha closed HSBC Account 290 and withdrew the balance of \$1,832.03. Anna was not concerned about what Sascha had done because the investments with HSBC Securities could not be accessed without her consent and she patiently felt that Sascha would come to his senses after a while.
- [210] The transfer of a one-half interest in Middle Bench was completed when Anna moved to a retirement home in 2010.

- [211] However, on April 19, 2011, Sascha closed the CIBC Accounts and took the remaining \$71,341.52 from those accounts. Anna requested that Sascha return the money. When Anna did not receive a response from Sascha, she contacted her lawyer and requested that he conduct a title search of the properties which were in the joint names of Anna and Sascha. Anna testified that when she saw a copy of the title search for 7204 Cliff Avenue, she discovered that the property had been transferred into Sascha's sole name and mortgaged.
- [212] Sonia testified that Sascha's actions regarding 7204 Cliff Avenue and the CIBC accounts caused him to lose the two best friends he ever had.

VIII. Analysis

- [213] I commence with an assessment of the credibility of Anna and Sascha prior to making findings of fact based on their evidence.

A. Credibility

- [214] Sascha gave contradictory evidence on numerous occasions and also gave evidence that does not make sense or is unbelievable.
- [215] Sascha's evidence regarding Fairview Road was inconsistent. He said that Anna made the deposit on the purchase of Fairview Road and he went through with the purchase because he did not want his mother to lose her deposit. When questioned as to whether the deposit had been \$6,000, he said it would not have been that much as his mother would have only made a minimum deposit. It is not logical to complete a land purchase because you are worried about losing a small deposit. When his examination for discovery evidence was put to him, he said he did not recall his mother contributing \$6,000 toward the purchase of Fairview Road.
- [216] Sascha also gave contradictory evidence at trial compared with his evidence on discovery with respect to who rented out Fairview Road after he had left that property, about two years after it was purchased. At trial, he also said he moved back into Fairview Road for a couple of years. This contradicts his discovery evidence wherein he said he entrusted the house to his mother and he did not know who rented it out. Although I requested that his written submissions include a timeline of when and where he resided in Penticton, that timeline was not provided.
- [217] Sascha gave contradictory evidence regarding HSBC Account 290. His evidence was that he only used HSBC Account 290 for cashing cheques when he came to B.C. and if he deposited his cheque to that account he would withdraw the same amount. That he made almost immediate withdrawals of almost equal amounts is confirmed by the documents. However, he made less than twenty deposits between 1987 and 2009 which is inconsistent with the regular use described by him.

[218] Although he said HSBC Account 290 was his account, he did not receive any of the banking statements because the statements were mailed to his mother's address at Middle Bench. Sascha also testified that he first learned that his mother was jointly on that account when he came to Penticton to deposit the cheque for \$216,905.49 in May 2004. Sascha also gave evidence on discovery that he first learned his mother was a joint owner of HSBC Account 290 when he saw some bank statements at her house when she was on vacation in 2004. Sascha's evidence contradicts the HSBC banking document that he and Anna signed on January 31, 1989 wherein Anna and Sascha granted a power of attorney to Sonia with respect to HSBC Account 290. Sascha also testified that Anna somehow had herself added as a joint owner of HSBC Account 290.

[219] It is illogical that Sascha would not have known that his mother was a joint owner of that account as she had been using that account for over 20 years, depositing rental income and her Canada pension plan and old age security cheques until about 1999 or 2000. He knew that Anna was depositing money into that account as Sascha required money for construction of the house on 7204 Cliff Avenue. Sascha's evidence at trial also contradicted his evidence on discovery wherein he stated that:

I never had anything to do with these bank accounts because I wasn't the one using them.

[220] It was Anna's evidence that she and Sascha went to HSBC shortly after Fairview Road was purchased in 1979 or 1980 and that she was added as a joint owner of that account. Anna's bank registers cover the period from September 1986 until October 2009. It is consistent that Anna would have been jointly on HSBC Account 290 from at least 1986 as she was recording the transactions on that account. She was also making deposits to that account from sources such as rental income she was receiving from various properties, orchard income, investment dividends and her employment. Examples of such deposits by Anna to HSBC Account 290 were recorded by Anna in her bank registers for HSBC Account 290.

[221] Sascha was also cross-examined about the evidence that he gave on his examination for discovery on March 20, 2013 that he discovered his mother was a joint owner of HSBC Account 290 about in about 2008:

Q. No, but what I want to ask you about is you said it was over a period of time. You said, you know, there were funds removed from bank accounts, and so how long did this - you come back - I take it this happens after you've come back to Penticton.

A. That's right. It was about five years ago (sic) my mother was on a holiday, and the mail showed up, and my sister's name was on documents that shouldn't have been there (sic), and we had that removed. And then I found out her name was on - my mother had taken my -- bank account, put her name on it[.]

[222] Sascha gave evidence that he had a house in Edmonton, Alberta in 1973 when he would have been 14 or 15 years old and, in 1973, he shared a house with his sister and her boyfriend, when he would have been 17 years of age. Sascha did not know what happened

to the sale proceeds from the house he lived in with his sister. Anna and Sonia's evidence was that Sascha did not have a house in Edmonton as he claimed. It is not logical that Sascha would have owned a house when he was 14 to 17 years of age. His written submissions refer to a house that he says was later owned in Edmonton.

- [223] Sascha had given evidence that if Anna would have not allowed him to access the sale proceeds from the sale of Fairview Road he would have obtained a mortgage and purchased 7202 Cliff Avenue. That would have been at a time when he had previously not been able to manage monthly mortgage payments of \$350 on 7310 Cliff Avenue and had an income of approximately \$28,600 in 1996.
- [224] Sascha testified that when he bought 7310 Cliff Avenue (November 1987), he worked as an electrician 12 hours a day for three years. Sascha's income in 1989 and 1990 was \$25,445 and \$46,087 respectively.
- [225] When Fairview Road was scheduled to sell and Sascha wanted to acquire 7202 Cliff Avenue, Sascha denied that he had discussed with his mother that he wanted to build a house on 7202 Cliff Avenue. Despite this, he testified that he had always wanted to build a house and planned to build a log house. Sascha testified that he wanted to ensure that Anna would release funds to him from HSBC Account 290 and that Anna was not receptive to him using the money from the sale of Fairview Road, which contradicts his discovery evidence wherein he stated:

Q Okay. Wasn't it her position that you had basically abandoned that property and she had taken care of it for - - whatever - - 16-plus years, paid off the mortgage, and that basically that was her money?

A Her response was that those monies would be for me to use with - - which, if I was to reinvest and buy another property, that's what the proceeds were for. That was always my understanding.

- [226] Sascha denied that he had met with his mother and reviewed banking records in 2004 when he was separating from his common law spouse, Loriann. Sascha also denied that he had a hand in creating the series of promissory notes. On cross-examination, his discovery evidence was put to him wherein he gave evidence that he had gone through the banking records and he came up with the amounts and dates for the promissory notes.
- [227] Sascha denied that he owed his mother approximately \$50,000 in 1996 for money she had lent or advanced to him with respect to 7310 Cliff Avenue. He stated that he had lots of money despite his mother having made his mortgage payments and paying out the balance he owed to UMC Financial. When asked on cross-examination as to why he gave the sale proceeds from 7310 Cliff Avenue to his mother, he said that it was for the purpose of building trust in the family as he also had money. Anna's evidence was that Sascha owed her approximately \$50,000 when they had discussions about the purchase of 7202 Cliff Avenue. The amount owed to Anna is substantiated by the first promissory note dated August 12, 1995 in the amount of \$50,000.

- [228] Sascha testified that he registered 7202 Cliff Avenue in his name and later added his mother as a joint owner in case something happened to him. His evidence on discovery was put to him on cross-examination wherein he told his mother when 7202 Cliff Avenue was being purchased that she was going to be on title and she would have to sign documents too. The land title search document contradicts Sascha's evidence at trial in that the title document indicates that 7202 Cliff Avenue was registered in Anna and Sascha's names when it was purchased on September 3, 1996.
- [229] Sascha's evidence was that he had little income in 2003 and 2004 because he was working on the construction of the house at 7204 Cliff Avenue. When he was cross-examined as to whether he had little income those years because there was no work for electricians in Fort McMurray, he gave evidence that there has always been work for electricians in Fort McMurray. This evidence is contrary to the evidence which he gave on discovery, which was put to him at trial, wherein he had stated that there had been no work for an industrial electrician in Fort McMurray through the union in 2003 and 2004.
- [230] Sascha gave evidence that he did not know that Sonia had been added as a joint owner of accounts at HSBC Securities/National Bank until about 2008 when he saw some mail at his mother's residence at Middle Bench when she was away on a vacation. Sascha's evidence contradicts the evidence of Anna and Sonia in that Sascha wanted to add Sonia on to the investment accounts when he was separating from Loriann. The evidence of Dale Krushel, who was a financial advisor at HSBC from 1996 to 2011, was that all individual account holders had to sign account opening and closing documents, which supports the evidence that Sascha knew that Sonia was being added as an owner of the securities accounts in July 2004.
- [231] Sascha testified that the only information he got about investments was when he saw mail at Anna's house when he housesat. Sascha also testified that he went to Dale Krushel's office on a regular basis several times a year but never without his mother requesting that he go and he also testified that he only reviewed investments with his mother about six times in 15 years.
- [232] The appraisal report by the appraiser, Michael Sceviour, indicates that Sascha would not allow pictures to be taken of the interior of the house at 7204 Cliff Avenue, which Sascha denied.
- [233] On cross-examination, Sascha denied that he had any discussions with his mother before he took the money out of the CIBC Accounts. However, on discovery, he gave evidence that, "I talked to her, and she said it's none of my business when it comes to financing..." and that was before he closed out the CIBC Accounts.

- [234] On cross-examination, Sascha admitted that on February 27, 2014 he had told Master Young that he had not seen Tammy Knickerbocker since June 2013. Yet Sascha had seen Tammy Knickerbocker on about January 16, 2014. The reason he told Master Young that he had not seen Tammy Knickerbocker was because he thought that Master Young was asking him whether he had seen her as a partner (i.e., as a couple).
- [235] Sascha testified that he prepared the Alberta land transfer document to transfer 7204 Cliff Avenue into his name from joint names with his mother. When Tammy Knickerbocker and Sascha attended at Mr. Gjukich's office to sign the affidavit of witness that Tammy had seen Anna sign the transfer document, Sascha's evidence was he did not know that the form had changed since 7310 Cliff Avenue had been sold.
- [236] However, on further cross-examination that transfer form that Sascha had signed for the sale of 7310 Cliff Avenue in 1999 was put to him. Sascha signed the transfer document before a witness who had to sign an affidavit of execution for witness deposing that she had seen Sascha sign the transfer. The only change to the transfer form was such that the 1999 transfer form had the affidavit of the witness on the second page (the back of the transfer form) and the affidavit of witness signed by Tammy Knickerbocker was on the first page of the transfer.
- [237] As stated above, Sascha did not comply with orders for the production of documents.
- [238] Although the continuation of Sascha's discovery was adjourned by consent from January 17, 2014 to February 28, 2014 to accommodate Sascha's travel plans and for his convenience because a trial management conference was scheduled for February 27, 2014, Sascha failed to attend the examination for discovery on February 28, 2014. Instead, he went and saw Mr. Webb and obtained his file documents from him and he was seen by Anna and Sonia after they had left the scheduled discovery after about 40 minutes.
- [239] In April 2011, Sascha removed \$71,341.52 from the CIBC Accounts. On June 24, 2013, Mr. Justice Barrow made a restraining order with respect to the \$71,341.52 which Sascha has on deposit at Servus Credit Union in Fort McMurray. Sascha was not forthright with the court when he indicated that the \$71,341.52 was being held in an investment at his Credit Union, which was true. However, he did not disclose that the money was held as security for his credit line of \$70,000 which was at its limit.
- [240] At a minimum I conclude that Sascha is not an accurate historian. Despite gentle cross-examination, his demeanour changed noticeably from that of a person who had been wronged to a person who displayed arrogance and chippiness and who was slightly derisive. A strong sense of entitlement pervaded his testimony: I conclude that that sense of entitlement detrimentally affected his relationship with the truth.

- [241] Anna is a hard-working individual who was a nurse, educator, businessperson and realtor. She amassed a significant amount of wealth and assets over the years. She assisted both of her children financially, including helping them acquire properties - although on conditions. Despite her age, Anna had an excellent memory of the historical facts. Anna had maintained detailed banking records over the years which substantiated the evidence she gave.
- [242] Although there was the odd slip regarding a date or momentary confusion regarding a document, her evidence throughout was articulate, consistent, calm and fair. Her testimony remained calm and objective during Sascha's cross-examination of her. Her voice was measured and her answers precise.
- [243] Where the evidence of Anna differs from the evidence given by Sascha, I have no difficulty in preferring Anna's evidence. Her recall, clarity and fairness in addition to the documentary support for her financial and personal history persuade me that her evidence is entirely credible.
- [244] I also find the evidence of Sonia to be credible. Although she is upset at her brother for his actions toward their mother, her evidence for the most part was based on her thorough understanding of all of the properties and their history. Sonia also completed an intensive review of Anna's banking records and assisted the court with summaries of the transactions, particularly HSBC Account 290.

B. Conclusions Regarding Property Issues

1. Anna's Claims

- [245] With regard to the claims of resulting trust, I must first determine if the transfers from Anna to Sascha of the interests in Middle Bench and 7204 Cliff Avenue were gratuitous, or if there was consideration paid by Sascha or a contribution made. The resulting trust, if created, is created at the time of the transfer. Thus the issue is whether Sascha paid consideration or made a contribution at that time. However, since Sascha claims that he made a contribution by way of labour and materials to some of the properties after their purchase, I will review that evidence with regard to his claim for damages. I am also mindful that evidence of intention that arises subsequent to a transfer should not automatically be excluded. However, such evidence must be relevant to the intention of the transferor at the time of the transfer: see *Pecore* at para. 59.
- [246] Anna argues that the facts in the case of *Kuo v. Kuo*, 2014 BCSC 519 are similar to this case except that, in this case, the donor is alive and gave evidence.
- [247] In *Kuo*, the court dealt with various properties that were held in joint tenancy by the deceased, Yuan-His Kuo, and his children. The court found that with respect to the son, John Kuo, that there was a resulting trust as all of the properties (even some that were never in the deceased's name) came from funds that were originally earned by Yuan-His or brought with him to Canada from China. The court relied on *Pecore* and held that John

held an interest in all of the properties and accounts at issue in trust for the estate of Yuan-His.

- [248] Anna submits that Sascha holds an undivided half interest in Middle Bench in trust for her. I agree. I find that the transfer of the one-half interest to Sascha by Anna was gratuitous and that there is therefore a presumption of resulting trust, which presumption has not been rebutted by Sascha.
- [249] It is not submitted by Sascha that he gave any consideration for the transfer to his name of the interest in Middle Bench. The claims of work done on his mother's property over 30 years, much of it during times he was staying there, is not evidence of a contribution for the acquisition of an interest. The presumption of resulting trust arises and the onus shifts to him to rebut the presumption and prove that a gift was intended.
- [250] There is no evidence that Anna intended to gift the interest in her home on Middle Bench Road to Sascha. At the time that the transfer was registered, she was moving to a retirement residence as the house and yard had become too much for her to maintain. Anna intended that the property would pass to him on her death. She did not intend to transfer an immediate beneficial interest. Anna testified that she would not have put Sascha on title to Middle Bench if she had known about the fraudulent transfer of the title to 7204 Cliff Avenue. Having learned of his dishonesty, it scared her and she asked him to return Middle Bench to her. I conclude that she was not taking back a gift, which in law cannot be done, but revoking a trust.
- [251] I find that Sascha holds his undivided one-half interest in trust for Anna. He is under an obligation to return that interest to her.
- [252] Anna also seeks the return of the one-half interest in 7204 Cliff Avenue which was registered in her name. She does not claim a resulting trust over the half interest which is registered in Sascha's name.
- [253] Although the evidence was conflicted, I find that the parties had an agreement by which Anna purchased the property first known as 7202 Cliff Avenue on the basis that Sascha would build a house on the other lot.
- [254] However, the initial purchase of 7202 Cliff Avenue in August 1996 with Anna's funds, including funds as she agreed with Sascha from Fairview Road, was gratuitous and a presumption of resulting trust arises. It is not rebutted as Anna did not intend a gift at that time. She had had the experience of Sascha not sticking it out with Fairview Road and took a cautious approach. Her testimony was that she could not rely on him after Fairview as he was irresponsible. Anna stated that it was a risk to buy that property and it was never the idea that Sascha was the owner.

- [255] As construction progressed from 1999 or 2000, Anna funded it and Sascha contributed the labour. When 7202 Cliff Avenue was sold in 2004, the funds which were Anna's were deposited to HSBC Account 290 with her agreement that they too could be used by Sascha for the construction of 7204 Cliff Avenue. In accordance with their agreement he sought and she granted permission to make withdrawals for the purposes which she approved.
- [256] I conclude that it later became her intention that when construction was complete and the house was sold, that she and Sascha would share jointly in the proceeds of sale. The interest which he had held in trust for her would, by way of his contribution of labour, become his beneficial interest. That is consistent with her position at trial that she is not seeking any remedy regarding the half interest that has long been registered in Sascha's name.
- [257] Anna does seek return of the undivided one-half interest held by her prior to its transfer to Sascha in 2010.
- [258] The evidence regarding the transfer is strikingly different between the parties. Anna learned of the transfer after she asked her lawyer to do title searches of property held jointly with Sascha when she learned of Sascha's withdrawal of funds from HSBC Account 290 in 2011. I accept her evidence that she had no knowledge of the transfer before receiving the title search results.
- [259] Sascha's evidence regarding the transfer form was detailed and is set out above. He filled out part of the form and after about a month he found the form purportedly signed by Anna with his mail at Middle Bench. He and Tammy took the form to a lawyer in Penticton, then he personally registered it in the Land Title Office in Edmonton.
- [260] After registering the transfer of Anna's half interest to him, he mortgaged the property in the total amount of \$300,000. He says that those funds were used for completing the house although there is no evidence before me to support that statement. Anna and Sonia testified that Sascha spent the money other than on the house. For example, he and Tammy purchased the Voodoo's nightclub in Penticton.
- [261] On the evidence, I find that the transfer is highly suspicious. Sascha's evidence regarding the transfer lacks common sense and is fraught with inconsistencies. However, I cannot find on the evidence before me that the transfer was a result of the fraud of Sascha and Tammy Knickerbocker.
- [262] This issue can be dealt with on the evidence of Anna that she did not sign the transfer form by which her interest in 7204 Cliff Avenue was transferred to Sascha on February 8, 2010. I accept her evidence without hesitation and find that she did not sign the transfer form. She neither intended to nor did she at any time execute a transfer of her one-half interest to Sascha. Having not transferred her interest to him, she is entitled to its return.

- [263] There is a declaration that Sascha holds an undivided one-half interest in 7204 in trust for Anna.
- [264] 7204 Cliff Avenue has an appraised value of \$680,000 as of November 14, 2013 and it is encumbered with a \$300,000 mortgage that Sascha granted to CIBC after he transferred that property into his sole name. As the mortgage encumbers the entire property, Anna's interest will not be unencumbered. However, as between Anna and Sascha, the mortgage is Sascha's responsibility.
- [265] If Sascha wishes to pursue his claim that the mortgage proceeds were invested in the property, as the evidence before me is insufficient to make a finding on that issue, he may set down a reference to the Registrar of the Court for an accounting of the proceeds of the mortgage proceeds. The terms of that reference may be addressed by the parties in writing or by setting down a hearing before me.

2. Sascha's Claims

- [266] Sascha's claims for interests in property are founded on his submission that the funds he earned from the sales of an Edmonton property, Fairview Road, 7310 Cliff Avenue and 7202 Cliff Avenue were misappropriated or misused by Anna and Sonia. If properly traced, he appears to submit, it would be clear that the entirety of 7204 Cliff Avenue is beneficially owned by him.
- [267] It is therefore necessary for completeness to review the history of the purchases and sales of those properties. However, the issue can be resolved on the basis of straightforward accounting: the funds withdrawn from HSBC Account 290 by Sascha exceed the proceeds of sale of all property sales.
- [268] The sale of a house at 9336-94 Street, Edmonton arose at trial. Sascha says that he purchased the house as an investment while living with his aunt at 9338-94 Street, and that he lived in the house and rented space to fellow electricians. The house was sold on January 30, 1988 and proceeds of sale of \$28,139.83 were deposited into HSBC Account 290. There is no documentary evidence of the sale of this property. Although the deposit is recorded in Anna's cheque register, I cannot find that Sascha owned this property, sold it, and earned proceeds as he stated. If I am wrong on this conclusion, the proceeds from this sale together with the other proceeds to which Sascha claims entitlement are less than the amount withdrawn or used by him from HSBC Account 290.
- [269] The first Penticton property, Fairview Road, was acquired in 1979 because Sascha wanted to own a house and Anna wanted to assist him. The down payment of \$6000 was paid by Anna who put the title in the name of Sascha. For two years, Sascha lived in the house, maintained it and made tax and mortgage payments. The house became too expensive for him to maintain and Sascha decided to move to Alberta. I accept Anna's evidence that he gave the house back to her when he moved from Penticton. She rented and maintained it and paid the mortgage and taxes for 15 years.

- [270] Fairview Road was sold on June 28, 1996. Net sale proceeds of approximately \$128,000 were deposited into HSBC Account 290. Anna's evidence that she permitted Sascha to use the proceeds of the sale to purchase the property at 7202 Cliff Avenue is not contradicted.
- [271] I find that the presumption of resulting trust applies. Anna gratuitously transferred the property to Sascha. However, the evidence that Anna wanted Sascha to have the house at the time that it was purchased in 1979, some 35 years ago when she was optimistic about his ability to manage property, rebuts the presumption. I find that Anna did intend to gift Fairview Road to Sascha at the time of its purchase by her.
- [272] However, on the basis of Anna's evidence that Sascha gave her back the house two years later, I find that the house reverted to Anna on Sascha's gift to Anna. Sascha's visits to the house on his trips to Penticton do not establish any further contribution or indicia of ownership by him. Thus, the proceeds of sale were the property of Anna.
- [273] If I am wrong on that conclusion, Sascha has received and spent more than the amount of the proceeds of sale of Fairview Road. No further amount is owing to him as damages for work done on the property or for proceeds of sale.
- [274] The second property, 7310 Cliff Avenue, was purchased in 1987 for \$26,200 and sold on June 30, 1999 for net sale proceeds of approximately \$56,700. It was registered solely in Sascha's name. Sascha paid the initial amount of \$4,422.28 and \$20,800 was financed by a UMC Financial mortgage. However, he was unable to maintain the payments and Anna assisted him financially by making monthly mortgage payments and then by paying out the balance of \$10,000 owing on the mortgage.
- [275] Anna testified that when 7310 Cliff Avenue was sold, Sascha owed her approximately \$50,000 for funds she had expended on that property for him. Sascha denied owing her that amount. I accept her evidence. I do not find his testimony credible for the following reasons.
- [276] First, Sascha did not deny the monetary contributions made by Anna, including her payments towards the UMC Financial mortgage. Second and most importantly, this debt is supported by promissory notes dated August 12, 1995 for \$50,000 and October 20, 1999 for \$15,000. On cross-examination, Sascha denied that he had been involved in the creation of these promissory notes, but during his examination for discovery he had stated that he had gone through the banking records and he came up with the amounts and dates for these promissory notes. I do not believe his evidence that the promissory notes were solely for the purpose of a domestic dispute and did not reflect the debt owing by him to Anna for her payments on his behalf for 7310 Cliff Avenue.

- [277] Sascha testified that he told his mother he would deposit the net sale proceeds from the sale of 7310 Cliff Avenue to her CIBC account. However, he initially deposited the sale proceeds to his Credit Union account in Fort McMurray, rather than Anna's CIBC account because his name was misspelt on the cheque. In October 1999, Sascha provided Anna with a bank draft in the approximate amount of net sale proceeds. She permitted him to use those funds for construction of the new house at 7204 Cliff Avenue.
- [278] In summary, I find that the proceeds of sale of 7310 Cliff Avenue were Anna's funds which Sascha repaid to her as a result of his debt owing to her for payments made by Anna on 7310 Cliff Avenue from her funds.
- [279] The third property, 7202 Cliff Avenue, was purchased in August 1996 for \$46,500 which was paid by Anna. The property was registered in joint title in the names of Anna and Sascha. It consisted of two lots, lot 11 and lot 12 which were separated in 2001. Lot 12 remained 7202 Cliff Avenue and lot 11 became 7204 Cliff Avenue.
- [280] 7202 Cliff Avenue was sold on May 3, 2004 for net sale proceeds of approximately \$216,900. The proceeds were deposited into HSBC Account 290, the account in the joint names of Anna and Sascha.
- [281] Sascha alleges, as I understand his argument, that those funds were his property. That argument is without merit. The purchase price for both properties before subdivision (7202 and 7204) was paid by Anna with no contribution by Sascha. A presumption of resulting trust arises. The onus shifts to Sascha to prove that a gift was intended. There is no evidence that Anna intended that Sascha receive a half interest as a gift. Indeed, the evidence establishes that Anna was concerned about Sascha's ability to manage money and complete the construction of a house. Her intention was clearly to retain the beneficial interest in the property which was registered in Sascha's name. The agreement regarding funding for the construction of the house being controlled by Anna is not seriously in issue.
- [282] The total proceeds of sale claimed by Sascha are:

Fairview Road

\$128,000

7310 Cliff Avenue

\$56,700

7202 Cliff Avenue

\$216,900

\$401,600

Edmonton house

\$28,139

\$429,739

- [283] The accounting provided by Anna and Sonia establishes that Sascha received more than the total sale proceeds of three properties. Since the year 2000, Sascha has withdrawn approximately \$506,849 from HSBC Account 290, an amount which exceeds the total net sale proceeds from the sale of Fairview Road, 7310 Cliff Avenue and 7202 Cliff Avenue, and the Edmonton house as well as his other deposits as listed by Anna. He has received funds and benefits from that account in the total amount of \$539,849. After allowing for his deposits from other sources, his net benefit is \$494,364.27. Based on the bank records and the documentary evidence provided by him and accurately summarised by Sonia as set out above, I find that a small percentage of these funds and benefits were invested by him in the construction of the house at 7202 Cliff Avenue.
- [284] Sascha has no further claim to any funds realized from the sale of Fairview Road, 7310 Cliff Avenue and 7202 Cliff Avenue by way of trust or damages.
- [285] Title to the fourth property, 7204 Cliff Avenue, was transferred into Sascha's sole name on February 8, 2010 by the use of a transfer document which Anna refers to as fraudulent. Anna seeks the return of the property and, as determined above, I have made the finding that she is entitled to its return. As Sascha seeks a 100% interest in 7204 Cliff Avenue, it is necessary to make the finding that he is not entitled to any further interest in that property. When the whole property (7202 and 7204) was purchased, it was subject to a resulting trust because Anna gratuitously registered an interest in his name as is discussed above regarding 7202 Cliff Avenue. The presumption of resulting trust is not rebutted. No gift to Sascha of a half interest was intended by Anna at that time.
- [286] At this time, Anna is not seeking return of the half interest registered in Sascha's name and which she acknowledges can remain in his name as discussed above.
- [287] No money from the sale of any property that Sascha owned solely or jointly went toward the acquisition of any other properties purchased by Anna. All other properties owned by Anna were acquired prior to the sale of Fairview Road, which is the first property that Sascha could claim an interest in.
- [288] There is no evidence that Sascha did any improvements to any of the following properties: 863 and 891 Government Street, 577 Forestbrook Drive and 319 Norton. There is no evidence as to the value of the work that Sascha did at any other property Anna owns, other than an invoice produced for \$4,800 for water and sewer work at Callan Road. Anna testified Sascha was paid for the water and sewer work at Callan Road and Sascha denies he was paid. Sascha received a boat for the electrical work he did at 313 Norton. The evidence presented does not support the claim by Sascha for compensation or an interest in any property owned by Anna.

- [289] Finally, Sascha refers in his written submission to a joint family venture, a family estate, and a family venture. This concept appears to have its source in the Kerr case which he relies upon.
- [290] Absent cogent argument on this point, I note two matters. First, the concept of a joint family venture arises in para. 87 of Kerr with regard to cohabiting couples and their intention to share the wealth they jointly create. In this case there was no such intention by Anna who was a capable business person who acquired and managed substantial assets created from and with her hard work and skill. That she was a generous mother attempting to provide for her children by way of creating trusts during her lifetime to ultimately benefit her children is not evidence of a joint family venture.
- [291] Further, to the extent that Sascha had an expectation that he was entitled to a share of her assets during her lifetime, and that that is alleged to be a reasonable expectation relevant to the juristic reason analysis of a constructive trust, that expectation is neither reasonable nor legitimate.

C. The Properties

- [292] In order to summarize the findings made above regarding Anna, I repeat them here for each property in issue. Findings regarding Sascha's claims against Sonia are set out below.

1. Callan Road

- [293] With regard to a claim for damages for work done, I find that no amount is owing to Sascha for the work he did on Callan Road. I find that he was paid for all substantial work that he carried out on Callan Road.

- [294] Callan Road was purchased prior to the sale of any property in which Sascha had an interest. It is not possible that any funds which he claims to be his were used to purchase Callan Road.

- [295] I find that Sascha has no interest in Callan Road, either through a claim for debt or damages, or by constructive trust.

2. 313 Norton and 319 Norton - Is Sonia's interest in 313 Norton and 319 Norton held on constructive trust for Sascha because of Sonia's unjust enrichment?

- [296] A considerable amount of Sascha's argument was spent on allegations that he had an interest in 313 Norton and 319 Norton. These arguments were based on the law of undue influence and remedial constructive trust. I would dismiss Sascha's claim on both bases.

- [297] As summarized above, there may be a presumption of undue influence where an elderly parent has transferred property to her child if there was a potential domination of the parent's will or if there was historic dependency on the child: see Geffen at 378; Modonese at para. 96. However, in the case at bar, Anna lived independently from her children, was in good health, retained all her faculties, and understood her financial situation. The

presumption of undue influence does not apply in this case. If I am mistaken, there is sufficient evidence to disprove actual undue influence in fact.

- [298] In this case, I find that any inference of undue influence is substantially weaker than in *Lorintt*. Anna and Sonia lived independently at all times. Anna gave comparable amounts of property and monies to Sascha, so any influence exerted by Sonia would not seem to have led to her receiving more gifts than Sascha. Most importantly, there is absolutely no evidence of any vulnerability on Anna's part. She has retained her full faculties, and she aptly demonstrated her full understanding of the situation in her testimony at all times. She continues to manage her properties and investments in a most detailed manner as she has done throughout her life.
- [299] It is worth noting that, even if Sascha had proven undue influence, it is unclear why this would entitle him to an interest in 313 Norton and 319 Norton. With different facts, undue influence may have provided a basis for setting aside Anna's transfer of half interest in these properties to Sonia, but if those transactions were declared void then the interests would return to Anna. Since Anna still retains her full capacity to complete legal transactions, there would be no basis for transferring the properties to Sascha rather than returning them to Anna.
- [300] Sascha's claim on the basis of unjust enrichment and remedial constructive trust fails for a similar reason. To impose a remedial constructive trust, Sascha must demonstrate that Sonia has received a benefit, that he has suffered a corresponding loss, and that Sonia had no juristic reason for receiving that benefit: see *Kerr* at para. 32. Sascha is simply unable to prove that he has suffered any corresponding loss, and his claim must fail.
- [301] To show a corresponding deprivation, Sascha must demonstrate that he has suffered some loss or failed to receive a benefit, and that this has some nexus with the benefit received by his sister, Sonia: *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 at 50. In this case, Sascha has failed to show any deprivation at all. He received some interest in property from his mother, such as Fairview Road, Middle Bench, and 7204 Cliff Avenue, and his sister received different interests property from his mother, such as 313 Norton and 319 Norton. Anna did not deprive her son of anything by giving property to her daughter.
- [302] Similarly as with Callan Road, these properties were acquired prior to the sale of any property in which Sascha had an interest. It is not possible that any funds that he claims to be his were used to purchase 313 Norton or 319 Norton.
- [303] Where a person has no legal entitlement to property, He or she is not deprived by that property being gifted to another as a windfall. I would adopt the following comments of Mr. Justice Echlin in *946648 Ontario Ltd. v. Discount Car & Truck Rentals Ltd.*, [2007] O.J. No. 3646, 2007 CanLII 39762 (S.C.J.) at para. 14:

The essential requirement that the Plaintiff must be correspondingly deprived does not exist in this instance. While Discount received a distinct and unwarranted windfall, it cannot be said that unjust enrichment has occurred in this instance because 946648 never had a legal entitlement to the monies.

[304] If I am mistaken, I would find that Sascha's claim fails due to Sonia having a juristic reason for receiving her interest in 313 Norton and 319 Norton. In *Sorochan* at 52-53, the Supreme Court of Canada held that the plaintiff contributing to property over a period of years was a tangible benefit to the property owner and she had acquired a reasonable expectation that she would receive an interest in the land. The evidence here was that Sonia helped to manage 313 Norton as a rental property and that she and John Gates helped with significant amounts of repair work and bedbug renovations. There was also evidence that she helped with less-extensive repairs to the roof and back porch of 319 Norton.

[305] Given nonexistent, or at best minimal, deprivation to Sascha, I would find these contributions to be a sufficient juristic reason for Sonia's receiving her joint interest in 313 Norton and 319 Norton.

[306] Further, Sascha has not proven any entitlement in debt or for damages as a result of work done on these properties.

3. Government Street and Forestbrook Drive

[307] There is no claim regarding these properties. Their sale was a source of funds for Anna.

4. 7310 Cliff Avenue

[308] As determined above, although this property was purchased and owned by Sascha, he paid the proceeds of sale of approximately \$57,000 to Anna in repayment of a debt to her for financing this property. The proceeds of sale were Anna's funds.

5. 7202 Cliff Avenue

[309] As determined above, Sascha held his interest in this property in a resulting trust with Anna as the beneficiary. The proceeds of this sale also belonged to Anna.

6. 7204 Cliff Avenue

[310] The issue with regard to this property is the nature of the relief to be granted to Anna. I have determined above that, as she did not sign the land transfer form by which her interest was transferred to Sascha, it must be returned to her.

[311] Anna alleges that in February 2010 Sascha knowingly used a fraudulent document to transfer title of 7204 Cliff Avenue into his sole name after which he mortgaged that property for \$300,000.

[312] However, on the evidence in this trial, I cannot make a finding of fraud against either Sascha or Tammy Knickerbocker. I do find, as stated above, that Anna did not sign the transfer.

[313] 7204 Cliff Avenue was appraised at \$680,000 and it was encumbered by Sascha in the amount of \$300,000. Therefore, there is approximately \$380,000 equity in the property. Anna submits that she should be entitled to at least \$340,000, being half of the unencumbered value of 7204 Cliff Avenue.

[314] I decline to make an order for a judgment in monetary terms as the declaration granted, which it is submitted can be given effect in Alberta, will restore Anna to her position on title before the transfer was registered.

D. Bank Accounts and Investments in Issue

1. CIBC Funds of \$71,341.52

[315] Anna submits that Sascha holds funds from the CIBC Accounts amounting to \$71, 341.52 plus accrued interest (the "CIBC Funds") in trust for Anna based on a resulting trust.

[316] The evidence supports a constructive trust.

[317] Although a portion of the CIBC Funds came from money that Anna initially received from the sale proceeds of 7310 Cliff Avenue, as determined above, the money Anna received from that sale in October 1999 was for repayment of money Sascha owed to Anna. Anna agreed that those funds could be used for construction of the house at 7204 Cliff Avenue.

[318] Anna invested the sale proceeds of 7310 Cliff Avenue and gratuitously added Sascha as a joint owner of that investment. Later, Anna put some of the CIBC investment into her CIBC Bonus Savings Account.

[319] On January 9, 2009, Anna opened the CIBC Bonus Savings Account in joint names with Sascha and transferred \$48,637.31 from the CIBC Chequing Account into the CIBC Bonus Savings Account. On January 12, 2009, Anna transferred the sum of \$7,000 from HSBC Account 290 into the CIBC Bonus Savings Account. Also, on January 19, 2009, Anna deposited a cheque of \$17,753.38 from a fruit co-op into the CIBC Bonus Savings Account. The balance in the CIBC Bonus Savings Account as of January 31, 2009 was \$68,939.06.

[320] Sascha did not know he was listed as an owner on the CIBC Accounts until a credit check in 2010.

[321] After January 2009, only interest accumulated in the CIBC Bonus Savings Account. There were no further transactions until Sascha withdrew the sums of \$70,029.33 from the CIBC Bonus Savings Account and \$1,312.19 from the CIBC Chequing Account and closed both accounts on April 19, 2011.

- [322] Notwithstanding that some of the funds may have their source in the proceeds of sale of properties in which Sascha claimed an interest, Sascha removed more from these accounts than he could have contributed. As set out above, even if he was entitled to those proceeds of sale (and I have found he was not) he received more from HSBC Account 290 than he could have contributed.
- [323] By draining these accounts he received a wrongful benefit. Anna suffered a deprivation because the monies in those accounts were beneficially her property. There is no juristic reason for Sascha's benefit. I find that Anna did not intend a gift to Sascha of all or any part of those funds. Indeed, she accurately stated that most of the money in the account was money she put in and if he wanted to access it, he had to clear it with her. There "was never a question he could just take it out, never."
- [324] Sascha contributed nothing to the CIBC accounts. He holds the entirety of the funds plus accrued interest on constructive trust for Anna.

2. National Bank Financial Accounts FS5S-A and FT88A

- [325] Anna submits that Sascha holds joint title to National Bank FS5S-A and National Bank FT88A in trust for her. The evidence supports a constructive trust and those funds are also subject to a constructive trust.
- [326] There is no evidence that Sascha contributed any money to the National Bank Accounts. If any money from the proceeds of sale claimed by Sascha was put into the National Bank Accounts, Sascha has received more money from Anna than he is entitled to. He is not entitled to any further funds from Anna.
- [327] I find that Anna had no intention to gift any of these funds to Sascha. As Sonia described her mother's accounts which were held in joint names, it was a matter of trust. Joint deposits were to make it easier when Anna passed on, and until then she, Anna, was in control.
- [328] For the same reasons as are set out regarding the CIBC accounts, I find that Sascha holds his interest in these funds in trust for Anna. Anna is entitled to revoke that trust. The funds are to be transferred to her sole name. A declaration to that effect is granted.

E. Is Anna Entitled to Aggravated or Punitive Damages Against Sascha or Tammy Knickerbocker or Both?

- [329] As stated above, on the evidence before me, I am not able to declare that Sascha or Tammy Knickerbocker defrauded Anna. Although the transfer of 7204 Cliff Avenue into Sascha's sole name was not valid, I cannot find on this evidence that this was fraud. I understand that criminal proceedings in Alberta are dealing with this issue more thoroughly.
- [330] For similar reasons, I am not satisfied that it is appropriate to award additional damages for conversion or fraudulent transfer. The usual remedy for conversion of funds is the value of the converted funds as assessed at the time of conversion plus any consequential damages

flowing from the loss of funds: *Columere Park Developments Ltd. v. Enviro Custom Homes Inc.*, 2010 BCSC 1248 at paras. 31-35. I am satisfied that the return to Anna of her interest in 7204 Cliff Avenue with Sascha responsible for the mortgage payments on the property is an appropriate remedy.

- [331] I am also not satisfied that it would be appropriate to award damages against Sascha for breach of fiduciary duties that he owed to Anna in relation to the monies that are subject to a constructive trust. A constructive trustee "does not generally owe the fiduciary obligations of loyalty, which are always undertaken voluntarily"; rather, a constructive trustee is required to hold the trust property on trust for the beneficial owner, but he does not 'become a trustee' as understood in relation to express trusts: see *Waters' Law of Trusts in Canada* at 500-501. Although Sascha was not entitled to use those monies for his own benefit, he did not breach any fiduciary duties by doing so and a damage award would not be appropriate in these circumstances.
- [332] Finally, I would decline to order aggravated and punitive damages in this case for similar reasons to those discussed above.
- [333] Aggravated damages may be awarded to compensate a plaintiff for non-pecuniary loss and suffering that result from the defendant's wrongful conduct but would not be fully compensated by an ordinary damage award: *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 at 1098-99; *Huff v. Price*, [1991] 51 B.C.L.R. (2d) 282 at 298-299, 76 D.L.R. (4th) 138 (C.A.). In this case, there is insufficient evidence that Anna is not adequately compensated by the pecuniary awards being ordered. As such, an award of aggravated damages would be inappropriate.
- [334] Concerning punitive damages, the law was recently discussed by the Court of Appeal in *Bowen Contracting Ltd. v. B.C. Log Spill Recovery Co-operative Assn.*, 2009 BCCA 457, drawing heavily upon the Supreme Court of Canada's decision in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18. Punitive damages are an exceptional remedy that should only be imposed to further one or more of the objectives of punishment, deterrence or denunciation: *Bowen Contracting* at para. 23. Since there are currently criminal proceedings against Sascha, it is not clear how these objectives would be better addressed by a civil punitive damages award. Further, punitive damages are most appropriate where compensatory awards amount to nothing more than a 'licence fee' for the wrongdoer's bad conduct: *Bowen Contracting* at para. 23, citing *Whiten* at para. 72. Due to the other remedies that apply in this case, Sascha is already under a significant burden and punitive damages would be excessive.
- [335] In summary, I would not award additional damages for conversion, fraudulent transfer, breach of fiduciary duty or aggravated or punitive damages. Entitlement to these remedies has not been established on the evidence before me.

IX. ORDERS MADE

- [336] Regarding Middle Bench, there is a declaration that Sascha holds an undivided interest in 240 Lower Bench Road also known as 235 Middle Bench Road North, Penticton, B.C. in trust for Anna. There is an order that Sascha duly execute a Form A transfer transferring his undivided half interest as a registered owner in joint tenancy to Anna. If Sascha fails to duly sign the Form A transfer within 30 days of the date of these Reasons, then the Deputy District Registrar of the court is authorized to sign the Form A transfer on behalf of Sascha.
- [337] Regarding the CIBC Funds of \$71,341.52, there is a declaration that Sascha holds those funds in trust for Anna. Anna is granted judgment in this amount together with earned interest from the date of the transfer by Sascha.
- [338] Regarding 7204 Cliff Avenue, there is a declaration that Sascha holds an undivided one-half interest in 7204 Cliff Avenue in trust for Anna. As between the parties, Sascha is responsible for the mortgage.
- [339] If Sascha seeks to establish that the mortgage proceeds were utilised for improvement of the property, he may set down a reference to the Registrar of the Court for the purposes of the necessary accounting. The parties may make submissions in writing or by appearance regarding the terms of that reference. He must advise the court and the other parties within 60 days of that intention to set down a hearing.
- [340] Regarding the National Bank Accounts, there is a declaration that Anna is entitled to sole ownership of National Bank FS5S-A and National Bank FT88A.
- [341] There is an order that Sascha is to sign all documents necessary to affect the transfer of the National Bank Accounts into Anna's sole name within 30 days of the date of these Reasons. If Sascha fails to sign the documents within that time, there is an order directing National Bank Financial to transfer National Bank FS5S-A and National Bank FT88-A into Anna's sole name.
- [342] Anna's claim against Tammy Knickerbocker is dismissed.
- [343] Anna is entitled to her costs against Sascha on Scale B.
- [344] Sascha's claims are dismissed in their entirety for the reasons set out above.
- [345] Sonia is entitled to her costs against Sascha on Scale B.
- [346] If any issues arise with regard to effecting any order, the parties are at liberty to apply in writing within 60 days of the date of these Reasons.

"The Honourable Madam Justice Watchuk"

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