

CANADA / JUDGMENT

Serbina v. Frejd

2016 BCSC 33

COURT

Supreme Court of British Columbia

DECIDED

13 January 2016

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2016 BCSC 33 Serbina v. Frejd

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Serbina v. Frejd,

2016 BCSC 33

Date: 20160113

Docket: 100740

Registry: Kelowna

Between:

Eli Serbina and Walter Serbina

Plaintiffs

And

Rita Frejd

Defendant

And

Robert Salmen, Lisabet Reschke, Reimund Salmen,

Roy Salmen, The Estate of Nina Caroline Salmen

and Nicia Carolyne Salmen

Defendants by Way

of Counterclaim

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Counsel for the Plaintiffs:

D.L. Polley

The Defendant on her own behalf:

R. Frejd

Counsel for the Defendants by Counterclaim,

Roy Salmen and Reimund Salmen

J.P. Jacoe

No other appearances

Place and Date of Trial/Hearing:

Kelowna, B.C.

November 30, December 1, 2, 3, 4, 7, 8, 9, 10 and 11, 2015

Place and Date of Judgment:

Kelowna, B.C.

January 13, 2016

Introduction

- [1] This case concerns the validity of two wills made by the late Mrs. Carolina Salmen. The issues are whether Mrs. Salmen had testamentary capacity or was subject to undue influence when she made one or both of the wills in issue.
- [2] The defendant's counter-claim raises a separate issue. That issue concerns the effect of what the defendant says was a contract for the care and housing of Mr. and Mrs. Salmen in the last years of their lives. The defendant maintains that Mrs. Salmen breached her obligation to perform a particular term of the contract.
- [3] If there was no contract, the defendant argues in the alternative that Mrs. Salmen's estate holds its interest in the defendant's real estate in trust for the defendant. The trust arises, the defendant says, out of an unjust enrichment of the estate.

The Facts

- [4] Mr. George Salmen and Mrs. Carolina Salmen married in the mid-1960s. It was a second relationship for both.

- [5] Mr. Salmen's first wife was Catherine Salmen. They lived in St. Catherines, Ontario. They had three sons and a daughter. The son's names are Roy, Reimund, and Robert. The daughter's married name is Lisabet Reschke.
- [6] Mrs. Salmen's first husband was Mr. Elko Serbina. The Serbinas lived in St. Catherines as well. The Serbinas had two children: the eldest, Eli, and his younger brother, Walter.
- [7] Mr. Salmen and Mrs. Serbina (as she then was) met and began a love affair. They separated from their respective spouses and moved in together. Initially, they lived in or near St. Catherines. The Serbina children had little contact with the new couple. The Salmen children had somewhat greater contact with them but still were not extremely close.
- [8] Mr. Salmen and Mrs. Serbina married. Mrs. Serbina became Mrs. Salmen.
- [9] In or around 1970, the couple moved from the St. Catherines area to a small town in Ontario called Ear Falls. There Mr. Salmen worked in a mine and he and Mrs. Salmen bought, developed, and operated a small hunting and fishing camp. Robert Salmen joined his father and step-mother in Ear Falls for a year or so. In or around 1975, Eli Serbina came to live with them at the camp for a while. Roy Salmen stayed briefly at the camp at Ear Falls too.
- [10] In or around 1992, the Salmens retired to Cranbrook, B.C. There they met Werner and Karla Ludwig. The two couples became very close friends. They hosted each other for meals at their homes and they socialized at Cranbrook's German Canadian Club. On special occasions they went out for restaurant dinners.
- [11] In or around 1997, Roy Salmen made a trip from his home in Ontario to B.C. to see his brother Reimund. When that visit ended, Roy Salmen travelled to Cranbrook and visited with his father and step-mother there. It was a pleasant visit. Roy Salmen visited the Salmens in Cranbrook every couple of years after that.
- [12] In or around 1999, the Salmens bought a small acreage just outside Cranbrook's city limits. They built a large and comfortable house on their property. The house contained a downstairs suite. Their idea in building the suite was that as they aged and required more help around the house a caregiver could live in the suite. By that means they would not have to move out of their home.
- [13] Even though their homes were farther apart than before, the Salmens and the Ludwigs continued their close friendship. In 2004, the Salmens attended at the office of their Notary Public, Mr. Schatschneider. They executed documents giving Werner Ludwig their powers of attorney. They also executed wills. The 2004 wills appointed Mr. Ludwig their executor and gave their estates to each other or, if one predeceased the other, then in equal shares to Mr. Salmen's sons, Roy and Reimund, and to Mrs. Salmen's sons, Eli and Walter. The wills indicated that Mr. Salmen's son Robert was to receive nothing owing to a break between Robert and his father, and that Mr. Salmen's daughter, Lisabet, was to receive nothing because she had sided with Robert on the break.

- [14] In 2008, Roy Salmen and his life-partner, Carol, visited the Salmens in Cranbrook. They all went on a holiday trip to Radium Hot Springs. On that trip, Roy Salmen began to understand that his step-mother's mental faculties were failing. One demonstration of that process happened during the Radium holiday. On that occasion, Mrs. Salmen stepped out of a pool-side changing booth and into the public area while she was quite naked and quite unconcerned by her nakedness. Roy Salmen considered this to be very uncharacteristic behavior for her.
- [15] Also in 2008, Eli Serbina resumed contact with his mother and step-father. By then, Mr. Elko Serbina had passed away. With Elko's passing Eli felt less constrained by feelings of loyalty to his father and freer to re-establish a relationship with his mother. Eli tracked the Salmens down to their home in Cranbrook. He spoke to Mr. Salmen and his mother on the telephone. Eli found that Mr. Salmen was as he had always known him, but that his mother was vague in her conversation with him.
- [16] At Christmas 2008, Eli and his two sons traveled to Cranbrook and stayed with the Salmens over the holiday. It was a pleasant visit. However, Eli noticed that his mother was quiet and disengaged. Sometimes she failed to recognize him as her son and confused him with one of her grandsons. Given that Eli was in his late 50s and his sons were in their early 20s, this confusion was unusual and unexpected. Eli also saw that his mother would sometimes not recognize her own husband, and this would happen even when he was sitting at her side. On evening walks with his mother, Eli heard her reminisce about her early life, but there was nothing in what she said to indicate that she knew that she was at that moment actually talking to one of her children.
- [17] During this visit, Mr. Salmen confided in Eli about his difficulties looking after his wife. Mr. Salmen had to lay out her clothing in the morning. She could not cook and it was difficult for Mr. Salmen to manage meals. Worryingly, Mrs. Salmen was wandering at night and Mr. Salmen had trouble catching her. His difficulty there was a bad knee. It is unclear whether at that time Mr. Salmen knew that he was suffering from bone cancer.
- [18] After Christmas 2008, Eli returned to his home in Ontario. He continued to have telephone conversations with Mr. and Mrs. Salmen. However, his conversations with his mother were briefer and less meaningful than before.
- [19] In the middle of the night in early February 2009, Mrs. Salmen appeared at the door of her neighbors, Mr. and Mrs. Guido. Mrs. Salmen was not dressed for the weather. She was in serious distress. Mrs. Salmen was crying and upset. She advised the Guidos that she was sad because her husband George had died several weeks earlier. She was angry at her family doctor because he had not told her that her husband had died and that she had to learn this news from friends. Mrs. Salmen told the Guidos that she had already got a new man, but he was not as good as her George and that she wanted George back. None of these things were true; most particularly, George Salmen was not dead - he was at home sleeping.

- [20] Concerned by this incident, Mrs. Guido contacted Mr. Ludwig. She was worried for her friend Mrs. Salmen and suggested to Mr. Ludwig that steps be taken to assess her. That assessment process was initiated. On March 11, 2009, Ms. Pat Norton and her colleague, Bonnie Mooy, attended at the Salmen's house. Mr. and Mrs. Salmen were there as was Mr. Ludwig. Ms. Norton and Ms. Mooy were employees of the Interior Health Authority. They provided support to seniors in the area. On this first visit to the Salmen's place, Ms. Norton administered a Mini-Mental Status Exam to Mrs. Salmen. Her score was 9/30. A score of 12 or less on that exam indicates severe cognitive impairment. Ms. Norton found that Mrs. Salmen was able to participate in a simple question and answer session but that she had no concept of why it was that she was being assessed. Mrs. Salmen had no understanding of her own medical condition - she could not say anything about her medical history, for example, and had no insight into the degree of her mental impairment.
- [21] Ms. Norton was concerned about Mrs. Salmen's condition. She arranged for Mrs. Salmen to be referred to the geriatric psychiatrist Dr. Magee. Dr. Magee has practiced for many years in the field of geriatric psychiatry. He is an expert in the subject of dementia in senior citizens. Dr. Magee examined Mrs. Salmen on March 27, 2009. Dr. Magee found that Mrs. Salmen did not know where she was or why she was seeing a doctor. She was able to answer questions in a very simplistic way. Mrs. Salmen advised Dr. Magee that her husband was dead. Mr. Salmen was sitting in the room at the time. Mrs. Salmen was calm throughout the examination. Nothing about her demeanor suggested that she was upset by the fact that she believed that Mr. Salmen was dead or that she was stressed by the examination. Based upon his examination and upon the history he received from Mr. Salmen and Ms. Norton, and on Mrs. Salmen's score on the MMSE, Dr. Magee concluded that Mrs. Salmen was suffering from severe cognitive impairment due to Alzheimer's disease and multiple minor strokes attributable to her long-standing hypertension.
- [22] Because Mrs. Salmen could not cook and Mr. Salmen had no skill in the kitchen, the Ludwigs were either hosting the Salmens at the Ludwigs' home for lunches or Mr. Ludwig was bringing lunch and dinner to the Salmens. Unfortunately, in early April, Mr. Salmen lost his driving license and could no longer drive to the Ludwigs' place. Mr. Ludwig had his own job to do and could not bring food to the Salmens on a daily basis.
- [23] Mrs. Salmen was wandering at night and, owing to his illness, Mr. Salmen was not able to catch her when she left the safety of the house. Finally, he was driven to installing devices on the interior door handles to prevent Mrs. Salmen from opening doors.
- [24] By April 2009, the combination of these factors made it clear to Mr. Salmen, the Ludwigs, and Ms. Norton that the Salmens required considerable assistance and support. Mr. Salmen agreed to consider Ms. Norton's and Mr. Ludwig's suggestion that they move into an assisted living facility in Cranbrook. The facility was called Joseph's Creek Village. Mr. Salmen put his name on the waiting list and paid a deposit for accommodation at Joseph's Creek. Mr. Salmen was determined that he and his wife not be separated. He stipulated that he and Mrs. Salmen have a two bedroom unit with separate bathrooms. No such unit was

immediately available at Joseph's Creek.

- [25] Near the end of April, 2009, Roy Salmen travelled to Cranbrook to visit with his father and step-mother. He came after hearing from Mr. Ludwig that his father had been in two car accidents and that he and Mrs. Salmen needed help. Roy Salmen stayed at the Salmen residence for about two weeks.
- [26] On the first night of his visit, Mr. Salmen woke Roy. He told his son that Mrs. Salmen was not in the house. Roy searched the house and grounds but Mrs. Salmen was not there. He went out to the road. He saw Mrs. Salmen walking down the road, suitcase in hand. He caught up to her and asked if he could help her. Mrs. Salmen did not recognize Roy. She told him that she was lost and looking for a place to live. Roy offered to help her. She accepted his offer of help with no hesitation or trepidation. Roy testified that he was a complete stranger to her and that he could have, had he wanted to, led her anywhere. She was very suggestible and compliant with this person who was, to her, a stranger.
- [27] During his stay with the Salmens in April 2009, Roy observed Mrs. Salmen staring at Mr. Salmen and heard her say that she did not know this fellow and ask who is this man? She repeated her belief that her husband was dead. When company was around, Mrs. Salmen was very quiet and reserved. She was, however, easily upset. When she was agitated she would cry and run from the room. Roy described Mrs. Salmen's behavior like that of a child.
- [28] While he was at the Salmen's, Roy attended to their needs. He drove them to appointments and provided their meals. Mr. Ludwig was relieved of the burden of bringing food to them on a daily basis. Mr. Salmen told Roy that he had gone to Joseph's Creek and that he wanted a two bedroom apartment there. So far as Roy understood, Mr. Salmen was content to move into Joseph's Creek so long as a two bedroom apartment was available for them. Roy spoke to IHA's Ms. Norton about Joseph's Creek. Ms. Norton assured Roy that she would do what she could to expedite Mr. Salmen's application for accommodation there.
- [29] Mr. Salmen asked his son to stay in Cranbrook, to move into their basement suite, and continue to look after them. Roy could not comply. He had a life-partner in Ontario, a job there that he liked, and a new house he had just moved into. Roy arranged for a housekeeper to come to the Salmen's house weekdays. She was to cook and clean for the Salmens. He and Mr. Ludwig agreed that on weekends the Ludwigs would provide meals and some support for the Salmens.
- [30] Shortly before Roy Salmen was set to return to Ontario, Mr. Salmen managed to find a telephone number for the defendant, Mrs. Frejd. The Salmen's connection to Mrs. Frejd arose from the latter's marriage in 1971 to Mr. Salmen's son, Reimund. Mrs. Frejd was 15 or 16 years old and living in Ontario when she met Reimund Salmen. She stayed for a short time in the Serbina's boarding house at the same time that Mr. Salmen and Reimund were there.

- [31] After a short courtship, in 1969 Mrs. Frejd and Reimund left Ontario for the West Coast. They settled in B.C.'s Lower Mainland. They married in 1971. Their relationship was not a happy one. They had two children together: Christopher, born in 1971, and Nicia, born in 1976. Mrs. Frejd and Reimund Salmen divorced in 1981. The children stayed with Mrs. Frejd.
- [32] Shortly after divorcing Reimund Salmen, Mrs. Frejd married Andrew Frejd. They have been together ever since. In 2000, Mr. and Mrs. Frejd decided to move from the Lower Mainland to Penticton, B.C. Mrs. Frejd relocated first while Mr. Frejd finished some work in Vancouver.
- [33] Once in Penticton, Mrs. Frejd rented a basement suite in a house at 150 Dauphin Place. The other tenant in the house was Mr. Hermann Schmidt. Mr. Schmidt was a very elderly retired gentleman. He was in his 80s. Over a period of a month or two Mrs. Frejd ingratiated herself with Mr. Schmidt. In a very short time, Mr. Schmidt was referring to Mrs. Frejd as 'my daughter'. Mrs. Frejd did not disabuse those to whom Mr. Schmidt made that reference of the notion that she was related to Mr. Schmidt.
- [34] The Frejds wanted to buy the rental house but they had no or very little money of their own. Mr. Schmidt, on the other hand, did have money. Mr. Schmidt put up all or most of the necessary \$30,000 down payment for the house and when the transaction was completed title to 150 Dauphin Place was registered jointly between Mr. Schmidt and Mrs. Frejd. Mr. Schmidt passed away less than a year after buying the house. Title passed to Mrs. Frejd.
- [35] Mr. and Mrs. Frejd then rented out rooms to other seniors. They relied on income from those rentals and Mr. Frejd's work as an electrician to pay the mortgage and provide for their necessities.
- [36] The Frejds were living in Penticton when, in late April or early May 2009, Mr. Salmen called them from Cranbrook. Prior to that call, Mrs. Frejd had very little contact or conversation with George and Caroline Salmen. It had been 29 or 30 years since she had spoken to them. The elder Salmens had never met their granddaughter Nicia. Mr. Salmen's telephone call to Mrs. Frejd came as a surprise to her.
- [37] Mr. Salmen advised Mrs. Frejd that he and Mrs. Salmen needed help, care, and support in Cranbrook. Mrs. Frejd agreed to travel to Cranbrook to see the Salmens. In early May 2009, Mrs. Frejd and Nicia drove to Cranbrook.
- [38] At this point, the evidence concerning Mrs. Salmen's mental state diverges. Whereas every other witness described Mrs. Salmen's conversation as vague and brief, Mrs. Frejd said that Mrs. Salmen was bright, cheerful, and fully interactive. Mrs. Frejd was at pains to emphasize that Mrs. Salmen referred to her as Pearl - the name that Mrs. Frejd used when she met Mrs. Salmen thirty or more years before.

- [39] On the other hand, Mr. Ludwig, the Guidos, Ms. Norton, and Drs. Magee and Robertson and Mrs. Frejd's daughter Nicia described Mrs. Salmen as being confused, delusional about her husband's death, and unaware of her surroundings.
- [40] Where the parties' evidence does not diverge is in their description of Mr. Salmen's personality. All of the witnesses described Mr. Salmen as a determined, if not bull-headed individual. He was quick to make a decision and slow to admit a mistake. Mr. Salmen was used to getting his way. He brooked no delay or resistance from others. As of the spring and early summer of 2009, Mr. Salmen's main purpose in life was to ensure that he and Mrs. Salmen not be separated.
- [41] Very shortly after Mrs. Frejd arrived in Cranbrook, Mr. Salmen began to voice resistance to moving into Joseph's Creek. Mr. Salmen seemed convinced that he and Mrs. Salmen would be separated if they did make that move. Where or from whom he got that idea is not clear. If it did not originate from Mrs. Frejd, then she uncritically adopted the notion. I say uncritically because on the evidence, Mrs. Frejd made no effort to independently investigate the availability of a two bedroom apartment at Joseph's Creek.
- [42] According to Mrs. Frejd, Mr. Salmen seized upon her arrival. She testified that Mr. Salmen implored her, and in her absence, Nicia to stay in Cranbrook, to live in the basement suite, and to provide care for the Salmens. Mrs. Frejd declined, saying that she had too many ties in Penticton. Mrs. Frejd then returned to Penticton.
- [43] Nicia stayed temporarily in Cranbrook to look after her grandparents. Nicia testified that throughout her stay at the Salmen house, Mrs. Salmen was, in her words, mentally 'out of it'.
- [44] After a short stay in Penticton, Mrs. Frejd returned to Cranbrook. At that time a plan was hatched for the Salmens to move to Penticton and to stay with the Frejds in their house. Before leaving on that trip, Mrs. Frejd telephoned Mrs. Salmen's family physician Dr. Davis. She asked whether it would be safe for Mrs. Salmen to make a road trip to Penticton. She was told yes.
- [45] By this time Mrs. Frejd had heard from Mr. Salmen that Mrs. Salmen was suffering from Alzheimer's Disease. Mrs. Frejd did not question Dr. Davis about that condition, nor did she ask whether travel would be advisable given Mrs. Salmen's mental deterioration.
- [46] On or about May 8, 2009, Nicia drove the Salmens to Penticton in the Salmen's van. Nicia testified that throughout the journey Mrs. Salmen was disoriented and confused. She did not know where she was or where she was going. Mrs. Salmen kept trying to open the van door even though the vehicle was traveling along the highway.
- [47] Mr. Salmen liked the Frejds' home. He decided that he and Mrs. Salmen would sell their house in Cranbrook and move in with the Frejds. He offered to pay the Frejds \$2,000 per month to provide care for him and his wife. Mr. and Mrs. Frejd agreed to that proposal.

- [48] Mr. and Mrs. Salmen then returned to Cranbrook. Mr. Salmen arranged for their house to be listed and sold. Mr. Salmen instructed his Notary Public Mr. Schatschneider to prepare some documents in anticipation of their relocation to Penticton. Mr. Salmen instructed Mr. Schatschneider to make up new Powers of Attorney appointing Mrs. Frejd and Nicia as attorneys for him and Mrs. Salmen. He instructed Mr. Schatschneider to prepare new wills. The new wills appointed Mrs. Frejd and Nicia as executors and left the couple's estate to each other or, if one predeceased the other, then in equal shares to Mrs. Frejd and Nicia.
- [49] On May 19, 2009, before going in to see Mr. Schatschneider, Mr. Salmen sat with Mrs. Salmen and instructed her to keep quiet. While they were with Mr. Schatschneider, Mr. Salmen did most of the talking. Mrs. Salmen said very little. The extent of her conversation with Mr. Schatschneider was to confirm Mr. Salmen's assertion that they had taken 'extreme measures' to find their respective children, that no child of theirs had responded to their requests for help, and that with the exception of Mrs. Frejd, they had had no contact with their children for many years. Mr. and Mrs. Salmen left Mr. Schatschneider with the impression that the Salmens had had regular contact with Mrs. Frejd over the years.
- [50] Mrs. Frejd was present during this conversation. She said nothing to disabuse Mr. Schatschneider of the notion that of the Salmen's family she alone had been in contact with them. Neither did she say anything to correct the Salmen's assertion that no child had responded to their requests for assistance. Mrs. Frejd could have spoken up on that issue. That is because she knew that Roy Salmen had been with the Salmens in Cranbrook only a few weeks earlier in April 2009.
- [51] Mr. Schatschneider did not make any inquiry into Mrs. Salmen's understanding of the nature and value of her estate. He read a portion of Mrs. Salmen's will to her and asked her if she understood it. He heard her say yes.
- [52] The formalities required for the signing of the Salmen's May 19, 2009 wills were satisfied.
- [53] Mr. Salmen sold the Cranbrook house shortly after the May 19, 2009 wills were signed. He and Mrs. Salmen traveled back to Penticton and moved into the Frejd's house. Friction arose between Mr. Salmen and Nicia. Nicia decided to not participate in caring for the Salmens in the Frejd household. Mr. Salmen was aggrieved by her decision and a rift developed between the two.
- [54] In July and August 2009, Mrs. Salmen saw her new family physician Dr. Robertson. Dr. Robertson was aware that Mrs. Salmen had been diagnosed with Alzheimer's Disease and dementia. Both times that he saw her he found Mrs. Salmen to be an elderly, frail lady. She was very confused. Dr. Robertson could not get a medical history from her.
- [55] In August, 2009, Mr. Salmen announced to Mr. and Mrs. Frejd that he did not want to pay them \$2,000 per month after all. Instead, he proposed that he pay off the \$235,000 mortgage debt on their house. In return, Mr. Salmen expected Mr. Frejd to quit his electrician's job and that Mr. and Mrs. Frejd would devote themselves entirely to caring for him and Mrs. Salmen.

Mr. Salmen proposed that when he passed away (all parties understood by this point that Mr. Salmen's cancer was terminal and that he did not have long to live) \$2,000 per month payments would commence so that the Frejds would house and care for Mrs. Salmen after he was gone. Mr. Salmen asked that he and Mrs. Salmen take a position on title to the Frejd's house. Mr. Salmen indicated his belief that if he and Mrs. Salmen became co-owners of the Frejd house, no one could force either to leave the residence. Mr. Salmen further indicated that he believed that being on title to the house would prevent Mrs. Frejd from breaking her promise to care for Mrs. Salmen.

- [56] Mr. and Mrs. Frejd agreed to Mr. Salmen's proposal. As Mrs. Frejd put it in her testimony, Mr. Salmen's proposal to pay off her mortgage "was a once in a lifetime opportunity".
- [57] On August 14, 2009, Mr. and Mrs. Salmen and Mrs. Frejd attended at the Penticton office of the lawyer Ms. Taylor. At that meeting, Mr. Salmen and Mrs. Frejd described the transaction they proposed to make. Mr. Salmen was to pay out the mortgage debt on the Frejd home and Mrs. Frejd would transfer a one-quarter interest in the property to each of Mr. and Mrs. Salmen. Mrs. Frejd would transfer a further one-quarter interest to her husband Mr. Frejd. The titles were to be held in joint tenancy. Mrs. Frejd made it clear to Ms. Taylor that for her part she did not want the Salmen's interest in the house to go to their estates. Mrs. Frejd expressed a concern that the Salmen's children might contest the Salmen's wills and that she did not want title to her house to be caught up in any such dispute.
- [58] Also during that meeting with Ms. Taylor on August 14, 2009, Mr. and Mrs. Salmen said words to the effect that they had not had contact with their children for a very long time. Ms. Taylor recalled the Salmens saying that it had been a 45 year estrangement from their children. Again, despite her certain knowledge to the contrary, Mrs. Frejd did not disabuse Ms. Taylor of the impression that Mrs. Frejd alone was interested in the Salmen's welfare.
- [59] Ms. Taylor effected the transaction. Through her office, Mr. Salmen paid \$235,000 to the mortgagee of the Frejd property and one-quarter interests in joint tenancy in the property were transferred to each of Mr. and Mrs. Salmen and Mr. Frejd.
- [60] On October 14, 2009, Mrs. Frejd contacted Ms. Taylor again. On that day Mrs. Frejd told Ms. Taylor that Mr. and Mrs. Salmen wanted to change their wills. She delivered copies of the May 2009 wills to Ms. Taylor's office. Those copies bore handwritten changes to some of the provisions. The most significant change was that Nicia was not to be an executor and she was no longer to be a beneficiary of the estate.
- [61] Ms. Taylor made the changes noted on the copies she received from Mrs. Frejd. On October 29, 2009, Ms. Taylor met with Mr. and Mrs. Frejd to sign the new wills. The formalities of execution were properly observed and performed. However, Ms. Taylor made no inquiry into Mrs. Salmen's understanding of the nature and value of her estate. Other than having heard two months earlier that the Salmens were estranged from their children, Ms. Taylor had no understanding of the persons who would have a claim upon the estate nor did she make any inquiry of the Salmens on that topic. The extent of Ms. Taylor's inquiry was to say

to Mrs. Salmen words to the effect of: everything to George (i.e.: Mr. Salmen) and if not to him then to Rita? Ms. Taylor recalls that Mrs. Salmen replied in the affirmative. Given that Mrs. Salmen understood that Mrs. Frejd's name was "Pearl", Mrs. Salmen's answer is rather puzzling.

- [62] On October 31, 2009, Mr. Salmen was admitted to the Penticton hospital. Although his illness was in its last stages, his mental capacity remained intact throughout. Shortly before his death, Mr. Salmen revoked the power of attorney he had given to Mrs. Frejd and substituted for it a power of attorney given to his son, Reimund Salmen. Reimund Salmen executed a transfer of Mr. Salmen's one-quarter interest in the Frejd house to Mr. Salmen, thus severing the joint tenancy. Mr. Salmen also revoked his October 29, 2009 will and made a new will. The new will reinstated his and Mrs. Salmen's children as beneficiaries after his wife and appointed Reimund as his executor.
- [63] Mr. Salmen died on December 8, 2009. Mr. Salmen's will was admitted to probate. On June 22, 2010, this court made an order that the estate's one-quarter interest in the Frejd house vest in the name of Reimund Salmen as executor of the estate. As Mr. Salmen's will prescribed, Reimund Salmen subsequently transferred the one-quarter interest in the property to Mrs. Salmen.
- [64] The suddenness of the Salmens' move to Penticton had caused Ms. Norton concern. She alerted her senior's mental health colleagues in Penticton to the situation. On November 9, 2009, Ms. Gurney of the Penticton IHA office attempted to call on Mrs. Salmen to assess her in the Frejd household. Mrs. Frejd actively and aggressively prevented Ms. Gurney from carrying out her mission. Ms. Gurney was compelled to read portions of the legislation giving her the authority to assess Mrs. Salmen. Mrs. Frejd eventually relented and agreed that members of the IHA seniors' team were to return on the next day. On November 10, 2009, Ms. Millar, a psychiatric nurse employed by the IHA, interviewed Mrs. Salmen. She found that Mrs. Salmen was unable to answer the simplest of questions. Ms. Millar tried to have Mrs. Salmen complete the MMSE. Mrs. Salmen was unable to perform any of the tests in the MMSE. Ms. Millar concluded that Mrs. Salmen's dementia was very advanced and that she had severe cognitive impairment.
- [65] On November 12, 2009, IHA acted to remove Mrs. Salmen from Mrs. Frejd's care. Shortly after that, the Public Guardian and Trustee for British Columbia became committee of Mrs. Salmen's person and estate.
- [66] In March 2010, the Public Guardian and Trustee, acting in its capacity as committee of Mrs. Salmen's estate, severed Mrs. Salmen's joint tenancy in the Frejd property. Upon the transfer to her of her late husband's interest, Mrs. Salmen became the owner as a tenant in common of a one-half interest in the Frejd property.
- [67] Mrs. Salmen remained in the care of IHA and sequestered from contact with Mr. and Mrs. Frejd. Mrs. Salmen died on November 14, 2012.

Expert Evidence

- [68] The plaintiffs filed two expert reports in support of their argument that Mrs. Salmen did not have testamentary capacity in May and October 2009. The reports were authored by Dr. Magee and Dr. Robertson.
- [69] Dr. Magee opined that as of March 2009, Mrs. Salmen was suffering from advanced dementia caused by Alzheimer's disease and multiple minor strokes likely brought on by her long-standing hypertension. In Dr. Magee's view, Mrs. Salmen may have been able to understand what a will is, but would not have been able to participate in the construction of one. He felt that given Mrs. Salmen's deluded belief that her husband was dead, she would not have been aware of the persons who would naturally expect to share in her estate or to whom she owed a moral duty to make provision in her will. Dr. Magee emphatically negated the proposition that Mrs. Salmen understood the nature and value of her property. In short, Dr. Magee was firmly of the view that as of March 2009, Mrs. Salmen's dementia had progressed to the point where she lacked testamentary capacity.
- [70] Dr. Magee further observed that Mrs. Salmen's dementia was progressive, incurable, and untreatable. He said that as time passed her cognitive function could only deteriorate.
- [71] Dr. Magee's evidence was not shaken by Mrs. Frejd's cross-examination.
- [72] Dr. Robertson's report echoed Dr. Magee's. Dr. Robertson opined that the severity of Mrs. Salmen's symptoms in 2009 were such that she could not have known the nature of a will, the kind and extent of her property, who would normally be expected to have a claim on her estate, nor would she have understood the process and reasons for revoking her previous will.
- [73] Dr. Robertson's evidence was not undermined by Mrs. Frejd's cross-examination.

Positions of the Parties

Mrs. Frejd

- [74] Shortly after Mrs. Salmen died, Mrs. Frejd asserted that as executor under Mrs. Salmen's October 2009 will she should bring the estate into probate. However, she did nothing to bring the estate forward. In March 2013, the plaintiffs, Eli and Walter Serbina, delivered to Mrs. Frejd a citation to propound Mrs. Salmen's alleged will. Mrs. Frejd replied in April 2013, saying that she intended to apply for probate with reasonable diligence. Again, Mrs. Frejd did nothing to bring the estate forward. Finally, in September 2013, Eli and Walter Serbina commenced this proceeding seeking a declaration that Mrs. Salmen did not have testamentary capacity when the May and October 2009 wills were made. Mrs. Frejd responded to the proceeding, saying that the October 2009 will is valid and, if it is not, that the May 2009 will is valid.

- [75] Ms. Frejd says that throughout the time she was with Mrs. Salmen in 2009, Mrs. Salmen's mental state was normal and unaffected by any sign of dementia. Mrs. Frejd asserts that if Mrs. Salmen was suffering from dementia at that time, her family physicians, Dr. Davis in Cranbrook and Dr. Robertson in Penticton, would have alerted her to that fact. Further, she says that neither Mr. Schatschneider nor Ms. Taylor detected abnormality in Mrs. Salmen's presentation when Mrs. Salmen attended to sign her wills in May and October respectively. For those reasons Mrs. Frejd argues that the October 2009 will must be found to be valid or, failing that, the May 2009 will be found valid and admitted to probate.
- [76] Mrs. Frejd filed a counter-claim against Mr. Salmen's children, Nicia Salmen, and Mrs. Salmen's estate. The counter-claim asserts a contract between the Salmens and Mrs. Frejd, one term of which was that the title to the Frejd house should remain in joint tenancy and asserting that Mrs. Salmen's estate breached that term when it severed the joint tenancy. The counter-claim also asserts that Reimund Salmen breached that same term by causing Mr. Salmen to sever his joint tenancy in the house.
- [77] Oddly, the counter-claim does not name Mr. Salmen's estate as a defendant by counter-claim. Equally oddly, the counter-claim cites no allegations of fact against Robert or Roy Salmen, against their sister Lisabet Reschke, or against Nicia Salmen.
- [78] In any event, Mrs. Frejd's position concerning the counterclaim is that Mrs. Salmen's estate holds all or part of its interest in the Frejd house in trust for Mrs. Frejd. Mrs. Frejd's theory is that the Public Guardian and Trustee acted in breach of contract when it severed the joint tenancy. She argues that the severance should be rescinded and that title to the property be vested in her name. Alternatively, Mrs. Frejd asserts that Mrs. Salmen's estate was unjustly enriched by receiving a half-interest in the property in return for payment of less than half of the property's value.

The Plaintiffs and Defendants by Counterclaim

- [79] The plaintiffs and defendants by counterclaim argue that at all material times Mrs. Salmen did not have testamentary capacity. They point to the evidence from the witnesses other than Mrs. Frejd. They say that evidence conclusively establishes that Mrs. Salmen was suffering from severe cognitive impairment.
- [80] The plaintiffs and defendants by counterclaim say that Mrs. Frejd's counterclaim cannot succeed because there was no contract between the parties in August 2009, and that in any event owing to her dementia Mrs. Salmen cannot have been a party to such a contract. They say that Mrs. Frejd's unjust enrichment claim cannot succeed because there is no evidence that the \$235,000 paid on the mortgage represented anything other than one-half of the value of the property.

The Law

Testamentary Capacity

[81] To have testamentary capacity, the testator must have sufficient mental capacity to understand what he or she is doing in making a will, the nature and extent of the estate that is being disposed of, and the persons who would have an expectation of benefiting from the estate. As Sigurdson J. said in *Araujo v. Neto*, 2001 BCSC 935:

[127] What is testamentary capacity? In Feeney's *Canadian Law of Wills*, 4th ed. (Toronto: Butterworths, 2000) at page 2.5, J. MacKenzie describes the standards of mental acuity that must be possessed by a testator in order to make a valid will:

To use the time-honoured phrase, a person must be "of sound mind, memory and understanding" to be able to make a valid will. When a will is contested on the ground of mental incapacity, the propounder must prove that the testator understood what he or she was doing; that the testator understood the "nature and quality of the act." The testator must be able to comprehend and recollect what property he or she possessed, the persons that ordinarily might be expected to benefit, the extent of what is being given to each beneficiary and, finally, the nature of the claims of others who are being excluded.

[128] The legal test for testamentary capacity that was set out in *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549 has been adopted in Canada. Cockburn C.J. said, at page 565:

It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effect; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

Breach of Contract

[82] It is trite law that in order for a contract to exist, there must be a meeting of the minds of the contracting parties - i.e.: they mutually understand what it is that they are agreeing to. Put simply, if the parties agree to the purchase and sale of a motor car then a Ford or a Chevrolet will do and a contract has been made. If, however, one party agrees to buy a Ford and nothing else while the other party agrees to sell a Chevrolet and nothing else, they cannot be said to have agreed on anything at all and no contract exists.

[83] If there is a meeting of the minds of the parties on the subject of the contract, then, in order for there to be a binding agreement, the terms of the contract must be certain and the contract must provide for consideration to both parties.

Unjust Enrichment

- [84] Unjust enrichment is an equitable principle. Recovery of an award for unjust enrichment depends upon three essential elements: an enrichment of or benefit to the recipient, a corresponding deprivation of the donor, and the absence of a juristic reason for the enrichment.
- [85] In *Watson v. Bank of America Corporation*, 2015 BCCA 362, Saunders JA supplied this useful description of the test for the presence of a juristic reason:
- [180] The starting point in considering the juristic reason for an enrichment is the judgment of Justice Iacobucci in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629. In *Garland*, Justice Iacobucci described a two-step process. The plaintiff claiming the unjust enrichment must demonstrate the absence of a juristic reason for the enrichment, such as contract, gift, or legal obligation. If this is established, the plaintiff will have established a *prima facie* case subject to rebuttal by the defendant. At the second stage the defendant may contend for retaining the benefit, considering such factors as reasonable expectations of the parties and public policy. In *Wilson*, Madam Justice Huddart explained that reciprocal or mutual benefits may bear on the reasonable expectation of the parties.
- [86] If the three essential elements of unjust enrichment exist then the conventional remedy is a monetary award. Where a monetary award is not an adequate remedy, the court may instead order that the recipient holds the benefit in trust for the donor.

Discussion

Testamentary Capacity

- [87] I find that I am not convinced by Mrs. Frejd's assertion that Mrs. Salmen was mentally competent to make a will in either of May or October 2009. Mrs. Frejd's own evidence as to competency was based upon casual conversation that she and Mr. Frejd had with Mrs. Salmen between May and the end of October 2009. Nothing that Mrs. Frejd said about that conversation suggested that Mrs. Salmen was, in fact, aware of her property or knew who had a moral claim on her estate.
- [88] I was not impressed by the evidence of Mr. Schatschneider or Ms. Taylor. Neither practitioner made any meaningful effort to inquire into Mrs. Salmen's mental faculties. More specifically, they did not determine whether Mrs. Salmen knew, independent of coaching from Mr. Salmen, what her estate comprised or the value of those assets.
- [89] I accept the evidence of Roy Salmen, Mr. Ludwig, Mr. and Mrs. Guido, Ms. Norton, and Dr. Magee concerning Mrs. Salmen's delusion that her husband was dead. I find that they had no reason to fabricate such a story. I also accept that Mrs. Salmen believed that she had had no contact with the Salmen or the Serbina children for 35 to 45 years. This, too, was a delusion. It was a delusion because Eli Serbina and the Salmen's grandchildren visited the Salmens at Christmas 2008 and because Roy Salmen spent approximately two weeks with

the Salmens shortly before Mrs. Frejd injected herself into the Salmens' affairs.

- [90] I also accept the opinions of Dr. Magee and Dr. Robertson as to Mrs. Salmen's mental state in early 2009. I find that in March 2009, Mrs. Salmen was suffering from advanced dementia attributable to Alzheimer's disease and multiple minor strokes. Mrs. Salmen could not have understood the process of making a will. Neither could she have appreciated the nature and extent of her property. Mrs. Salmen was suffering from delusions concerning her husband and having been abandoned by the Salmen and Serbina children.
- [91] I am therefore compelled to find that Mrs. Salmen's May 19 and October 29 2009 wills are not valid and may not be admitted to probate.
- [92] Having come to that conclusion, it is not necessary for me to address the plaintiffs' argument that Mrs. Salmen was subject to undue influence from Mrs. Frejd.

Contract

- [93] Mrs. Salmen was not mentally competent to enter into any kind of contractual arrangement with Mrs. Frejd in August 2009. She and her estate cannot be bound by the terms of the contract Mrs. Frejd alleges in her counterclaim. It follows that Mrs. Frejd cannot advance a breach of contract claim against Mrs. Salmen's estate. That element of the counterclaim must be dismissed.
- [94] If Mrs. Frejd had a contract - and I do not find that she did - the contract was with Mr. Salmen. For reasons of her own, Mrs. Frejd elected to not take action against Mr. Salmen or his estate. Mrs. Frejd did name Reimund Salmen as a defendant by counterclaim. There was, however, no evidence at trial to suggest that when Reimund Salmen severed the joint tenancy in December 2009, he did so in any capacity other than as his father's duly appointed attorney. Nor was there any evidence that Reimund Salmen was exercising the power of attorney in any way other than in accord with his father's direction. In the absence of such evidence, I cannot find that in severing the joint tenancy Reimund acted in his own interest such that he could be held personally liable. It follows that any claim that Mrs. Frejd might have arising from the severance of the joint tenancy is a claim against Mr. Salmen and his estate. Mrs. Frejd elected to not name the estate as a party to her counterclaim and it is therefore not open to me to grant Mrs. Frejd any relief for the breach of contract she alleges.
- [95] To the extent that Mrs. Frejd claims relief against Reimund Salmen and Roy Salmen, that claim is dismissed.
- [96] The counter-claim does not actually make any allegations against Robert Salmen, Lisabet Reschke, or Nicia Salmen. It is not necessary for me to order dismissal of claims that do not exist. I will, however, direct that those portions of the counter-claim that name Robert Salmen, Lisabet Reschke, and Nicia Salmen be struck from the pleading.

Unjust Enrichment

- [97] Mrs. Frejd says that Mrs. Salmen's estate was unjustly enriched at her expense. She argues that the Salmens received the benefit of a one-half interest in the Dauphin Place property but gave her less than one-half of the value of the property in return. Put another way, Mrs. Frejd says that Mrs. Salmen's estate was enriched by the difference between the value of Mr. Salmen's contribution to the property - i.e.: \$235,000 - and the value of the interest that the Salmens received - i.e.: one-half of the property's worth.
- [98] The fatal flaw in Mrs. Frejd's argument is that she led no evidence at trial of the value of the house on Dauphin Place in 2009. In the absence of such evidence, I cannot say that Mr. Salmen's payment of \$235,000 was more or less or equal to one-half of the fair market value of the property. If I cannot say that the Salmens got more from Mrs. Frejd than they gave her, then I cannot say that the Salmens were, in fact, enriched unjustly or otherwise.
- [99] Because enrichment is an essential element of this species of claim, and because Mrs. Frejd has not shown that it exists, I must dismiss Mrs. Frejd's claim that Mrs. Salmen's estate holds its interest in the Dauphin Property in trust for her.

Conclusion

- [100] Mrs. Salmen lacked testamentary capacity as of March 2009. The wills that Mrs. Salmen made on May 19, 2009 and October 29, 2009, are not valid and may not be admitted to probate.
- [101] Mrs. Frejd's counterclaim is dismissed.

Costs

- [102] Mrs. Frejd's failure to propound the 2009 wills forced the plaintiffs to commence this proceeding. The plaintiffs have succeeded in defeating the 2009 wills. They are entitled to a single bill of costs on Scale B against Mrs. Frejd.
- [103] Reimund Salmen and Roy Salmen have succeeded in defeating Mrs. Frejd's counterclaim. They are entitled to a single bill of costs on Scale B against Mrs. Frejd.
- [104] Robert Salmen, Lisabet Reschke, and Nicia Salmen did not respond to the counter-claim. They were not active parties in the litigation and for that reason are not entitled to an award of costs.

"Rogers J."

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