

CANADA / JUDGMENT

Stewart v. McLean

2010 BCSC 64

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 64 Stewart v. McLean

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stewart v. McLean,

2010 BCSC 64

Date: 20100119

Docket: 08-4477

Registry: Victoria

Between:

Mona Emilia Stewart

Plaintiff

And

Donald Emil McLean, Catharina Gerdina McLean, Shannon McLean-Weir and Robert McLean

Defendants

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for Plaintiff:

A. Roderick M. Johnston

Counsel for Defendants Donald Emil McLean and Catharina Gerdina McLean:

Robert C. Doell

Place and Date of Trial:

Victoria, B.C.

September 8, 9, 10 & 11, 2009

Place and Date of Judgment:

Victoria, B.C.

January 19, 2010

INTRODUCTION

- [1] The parties to this litigation were all once members of a close-knit family now torn asunder by earlier litigation respecting the estate of Hilarius West, uncle of the plaintiff Mona Emilia Stewart ("Mona") and the defendant Donald Emil McLean ("Donald"). The current litigation, which continues the estrangement, arises as a result of the previous litigation.
- [2] Donald and Mona are brother and sister. They are the only two children of the deceased, Ellen Elisa McLean (the "Deceased"). The defendant Catharina Gerdina McLean ("Catharina") is Donald's wife. The defendants Shannon McLean-Weir ("Shannon") and Robert McLean ("Robert") are Donald and Catharina's children and the plaintiff's niece and nephew.
- [3] The plaintiff alleges that Donald exercised undue influence over his late mother and that, as a result, all of the defendants have been unjustly enriched. In the alternative, the plaintiff pleads a resulting trust. She seeks to set aside the registration of the Deceased's home in the joint names of the Deceased and Donald, the forgiveness of a loan to Donald by the Deceased, and inter vivos gifts from the Deceased to Donald and Catharina.
- [4] In July 2009, the plaintiff entered into a settlement agreement with Shannon and Robert, releasing the plaintiff's claims against the inter vivos gifts they received. They are no longer parties in this litigation.

ISSUES

- [5] Was Donald in a fiduciary relationship with the Deceased and, if so, did he breach his fiduciary duty?
- [6] Were the transfer of the Deceased's home into joint tenancy with Donald, the forgiveness a loan and the cash payments to Donald and his family valid inter vivos transfers or did the defendant Donald exercise undue influence over the Deceased with respect to these transactions?
- [7] Were the transfer of the real property, the forgiveness of the loan and the cash bequests subject to a resulting trust?

BACKGROUND

The Estate of Hilarius West

- [8] As indicated earlier, this litigation has its genesis in the litigation over the estate of Hilarius West, Donald and Mona's uncle, who died on August 20, 1997. His estate was substantial.
- [9] Hilarius West lived in Alberta and was a grain farmer. Approximately two years before his death, he decided to retire to Vancouver Island. He had never married and had no children. The relatives to whom he was closest were the plaintiff and the defendant Donald.
- [10] In 1992, Donald had understood that his uncle was going to appoint him his executor but they did not discuss this further until shortly before his uncle's death.
- [11] In 1994 and 1995, Hilarius West travelled to Victoria, where Donald resides, and Donald showed him various properties for sale. He also visited Powell River, where the plaintiff resides, for the same purpose. He decided to retire to Powell River. In 1995 he purchased two vacant lots in Powell River and registered both of them jointly in his and the plaintiff's names. He began construction of a home, which the plaintiff's husband, Wendell Stewart, supervised.
- [12] In March 1996, he was diagnosed with brain cancer. As a result of surgery and various therapies, he was judged incompetent and a trustee (the plaintiff's son who is a resident of Alberta) was appointed in Alberta to administer his affairs. Despite his brain cancer, Hilarius West moved into his new home in Powell River in 1996. Donald attended in Alberta to assist his uncle with the sale of the farm equipment.
- [13] The defendant Donald had always understood from his uncle that he and the plaintiff were, other than with respect to some cash legacies, the equal beneficiaries of his estate. When his uncle was in Victoria for cancer treatment, he led the defendant to believe that he was going to change his will to take into account the fact that the plaintiff was going to receive his house by survivorship. The defendant advised the plaintiff of this.
- [14] Hilarius West died on August 20, 1997. Afterwards, the defendant learned that his uncle had prepared a new will on May 13, 1997, in Powell River. The will divided his estate into five equal shares for the plaintiff, the plaintiff's three children, and Donald. There was also a small cash bequest to the plaintiff's husband. The will left nothing to Donald and Catharina's two children.
- [15] Donald challenged probate of the new will in the Court of Queen's Bench of Alberta on the basis of suspicious circumstances surrounding the execution of the will, undue influence by the plaintiff over their deceased uncle, and lack of testamentary capacity at the time the will was signed.

- [16] On February 20, 2003, the court admitted the will to probate finding that while there were suspicious circumstances, the propounders of the will had, on the balance of probabilities, established that the deceased had testamentary capacity. Donald had withdrawn the allegation of undue influence near the end of the trial.
- [17] The plaintiff sold one of the Powell River lots that she had received by survivorship for \$86,000. She retained her late uncle's house, which had a 2009 assessed value of \$494,000.
- [18] The end result was that the plaintiff and her immediate family received in excess of two million dollars (including executor's fees, costs and legal fees paid by the estate) from the estate of Hilarius West by survivorship and pursuant to his will. The defendant Donald and his family received \$322,156.74, less legal fees and costs of the litigation.

Ellen Elisa McLean

- [19] The Deceased executed a will dated July 29, 1988, which appointed her son and daughter as the executors and trustees and, other than some small bequests, divided the estate equally between them: \$60,000 to each, \$10,000 to each of the grandchildren, and the residue to be divided equally between the two children. The plaintiff also received the Deceased's Royal Albert china.
- [20] The Deceased appointed her son, Donald, as her attorney by way of an Enduring Power of Attorney dated March 25, 1999. The Enduring Power of Attorney was never delivered to Donald nor was it ever used by him.
- [21] On April 28, 2000, the Deceased transferred her interest in her Victoria home into joint tenancy with Donald. On July 6, 2002, she loaned \$50,000 to Donald which she subsequently forgave. On March 14, 2003, she prepared cheques payable to Donald, Catharina, Robert and Shannon for \$70,000 each and delivered them shortly thereafter.
- [22] Ellen Elisa McLean died of a heart attack on February 4, 2005.
- [23] The plaintiff challenges the transfer of the house, the cheques for \$50,000 (a forgiven loan) and \$70,000 to Donald, and the cheque for \$70,000 to Catharina. As previously noted, she no longer challenges the \$70,000 gifts to Robert and Shannon.
- [24] Donald sold the Deceased's home on May 20, 2005, for \$344,900.
- [25] The parties do not dispute the above facts.

EVIDENCE

Plaintiff's Witnesses

- [26] The plaintiff called three witnesses: herself; her husband, Wendell Stewart; and the Deceased's brother-in-law, Wesley McKay.

1. The Plaintiff

- [27] The plaintiff testified that although Donald is 13 years her junior, her relationship with him and his family was, until 1997, warm and comfortable. They socialized as frequently as possible and on occasion took vacations together.
- [28] The plaintiff would see her mother on long weekends and holidays, perhaps two to four times a year. Most of the time, the plaintiff traveled to Victoria, but, on occasion, her mother came to Powell River. They also spoke by phone at least six or seven times a month. That changed in 1997 - the phone calls from her mother stopped.
- [29] Prior to 1997, her mother would gift money to her, her brother and the grandchildren. The plaintiff understood that when her mother's bank account reached a certain amount, her mother would distribute the excess. The gifts to her and her brother were always equal, as were the cheques for the grandchildren. For example, when her mother inherited part of a farm and gave her interest to Donald, she gave the plaintiff \$70,000.
- [30] She acknowledged that her mother was upset by the litigation between her and her brother over their late uncle's estate and had asked her to put a stop to it. She agreed that when her mother found out that Mona's children were included in the will but not Donald's, her mother was upset because she did not think it was fair.
- [31] The plaintiff alleges that after she reviewed the Alberta court decision with her mother, her mother stated, "I have made a terrible mistake". The plaintiff could not explain what her mother meant and could only make assumptions. I draw no inference from this evidence.
- [32] The evidence of the plaintiff was problematic. On cross-examination she was evasive and argumentative, only conceding certain matters after persistent questioning.
- [33] She testified that her mother was dependent on others: she had lost her driver's licence in the late 1980s and used a walker and, at times, a wheelchair as a result of her arthritis and a failed hip replacement. She gave evidence that her mother was becoming forgetful and more socially isolated and, thus, by implication, more dependent on Donald. However, these concerns were minor and in no way indicate that the Deceased was not alert and competent. On cross-examination, she agreed that her mother was very independent and would do what she wanted to do. For example, her mother was adamant that she would not go into care and would remain in her own home.
- [34] The plaintiff had little knowledge of her mother's financial affairs or social life. She did not know that her mother arranged her own appointments or who her mother's housekeeper or financial advisor was. Yet, despite that lack of knowledge, the plaintiff sought to downplay the differences in the amount and type of care provided by her and her brother with explanations of work, ill health, and living farther away.

- [35] She testified that she became aware of the transfer of the Deceased's home into joint tenancy approximately six months after it was registered in April 2000. On cross-examination, she said that she had ignored it and accepted what her mother had done. She did not contest the transfer during her mother's lifetime.
- [36] Moreover, only on cross-examination did she admit that her mother would want to make things fair in light of the bulk of Hilarious West's estate going to her family.
- [37] Further, the plaintiff appeared to have an agenda and tailored her testimony to it. For example, she stated twice on direct examination that the result of the inter vivos gifts and joint tenancy was that there was no residue to be divided. This was false. In fact, the residue of her mother's estate is in excess of \$150,000 and will be divided equally between her and her brother. She admitted on cross-examination that her statements on direct were wrong.
- [38] She also testified that she did not become aware of the inter vivos gifts of \$70,000 to her brother, his wife and his children until after her mother's death and then only as a result of inquiries she made at the bank in her capacity as executrix. However, an incident involving Shannon raises concerns about the truth of this statement and the plaintiff's credibility in general.
- [39] Shannon testified that when she received the \$70,000 cheque dated March 14, 2003, she took it to the Royal Bank a few days later. A bank officer advised her that she would have to speak to her grandmother before she could accept the cheque. Shannon testified that she called her grandmother, and the plaintiff answered the phone and then transferred it to her grandmother who spoke to the bank officer. Shannon further testified that as she was leaving the bank, she noticed the plaintiff had arrived and was waiting in a teller's line-up.
- [40] In her notice to admit, the plaintiff denied that she learned of the cash gifts by way of the phone call from Shannon to her grandmother. On-cross examination, she denied having spoken to Shannon or even being present for the call notwithstanding the fact that she was visiting her mother at the time. Her presence at the Deceased's is confirmed by a reimbursement cheque from the Deceased to the plaintiff dated March 16, 2003, which she acknowledged she received while at her mother's home. She also stated she did not recall going to the bank in March 2003.
- [41] I accept the evidence of Shannon over that of the plaintiff on this issue. Shannon was responsive and credible under direct and cross-examination. There was no reason for her to fabricate this incident. I draw the inference that the plaintiff overheard the banker's call to her mother and attended at the bank seeking information.
- [42] I find that the plaintiff was aware prior to her mother's death that her mother had gifted funds to Shannon and, like the house transfer, took no steps while her mother was alive to challenge the gift.

[43] The plaintiff has failed to show that her late mother was unduly influenced by Donald. At best, she gave evidence of unfounded suspicions lacking any substance.

2. Wendell Stewart

[44] The plaintiff's husband confirmed that the families had a good relationship before 1997. When they visited with the Deceased, he would assist her with her garden, clean the gutters, and take her shopping.

[45] He confirmed that the litigation over Hilarius West's estate estranged the family. He stated that Donald changed after his uncle's death, attributing that to Donald and his family not receiving more from the estate. He acknowledged that he had not told Donald about his uncle's new will. He further confirmed that the Deceased was upset about the fallout from her brother's will.

[46] He said nothing that supported the allegation of undue influence.

3. Wesley McKay

[47] Mr. McKay's wife is the sister of the Deceased. He confirmed that the Deceased's memory seemed "okay", that she was "pretty with it" up until the end, that she was very independent, and that she wanted to die in her house.

[48] Mr. McKay stated that the Deceased had mentioned her brother's estate to him and had said that her son "got nothing"; he told her Donald got \$350,000. He acknowledged that he did not know if she was referring to the net her son received after legal costs.

[49] He provided no evidence that Donald unduly influenced the Deceased.

Defendants' Witnesses

[50] The defendants called Donald; Shannon; the Deceased's financial advisor, Darrell McIntyre; the Deceased's lawyer, Sylvia Josephine Martorana; and the Deceased's general practitioner, Dr. Melling.

1. Donald McLean

[51] The defendant testified that every summer when he was growing up, his mother would take him to Alberta to work on the farm run by his uncles. When younger, he was not paid, but once he was useful, he was. His mother was also paid and she put the money toward her dream of owning a home. His father was a caretaker for the Department of National Defence and his salary was not sufficient to allow them to save for a house.

[52] His mother and father finally purchased a home when his father retired, a year before his father died in 1972. After the death of his father, the defendant assisted his mother around the house by mowing the lawn, pruning the hedges, cleaning the gutters, painting and the like.

- [53] He testified that he was very close to his mother and, given the 13 years between him and his sister, was raised almost as an only child. As he got older, he became closer to the plaintiff. He and his wife got along well with the plaintiff and her family and they had a "nice cohesive family unit".
- [54] The defendant testified his mother managed her life the way she wanted and did what she wanted, when she wanted. She learned to drive and lived very independently until she lost her licence in the late 1980s. She became less independent in relation to getting around, going shopping and similar activities. The defendants assisted her by driving her to appointments, to stores, and to her social engagements. Notwithstanding her physical limitations, she continued to book her own appointments, and hired and paid hairdressers, gardeners, and people to work on her home. She was solely responsible for all of her finances and met every six months with Mr. McIntyre, her financial advisor, who was also Donald's financial advisor.
- [55] The Deceased's home burned down in 1981, and she and the defendant discussed whether to rebuild or to move her to a retirement home. She insisted on rebuilding - she wanted her home back. Donald helped with the planning and supervised the construction.
- [56] His mother remained an important part of his family's life. He described a close-knit family with frequent suppers together and a close relationship between his mother and his children.
- [57] In 1999, the Deceased spoke to him about a power of attorney because of the problems that had resulted from her brother not having one when he became incapacitated. She advised him that originally she was going to appoint Catharina, but now she wished to appoint him. He told her she needed to make the arrangements and inform Mona about it.
- [58] At her request, he drove her to an appointment with a lawyer. He waited in the waiting room, and later, the lawyer, Ms. Martorana, had him come in to sign for his appointment as attorney. His mother kept the Enduring Power of Attorney; she never delivered it to him nor did he ever act under it.
- [59] In 2000, his mother raised the idea of putting her home in their joint names. She explained that the plaintiff had her own home and Hilarius West's home, so she wished him to have hers. She also told him that she wanted him to have the house because he had been there for her and had assisted her when necessary. He informed her it would be her responsibility to tell Mona. At her request, he went to the Land Title Office and obtained a Form A Transfer which he completed and provided to his mother. She subsequently contacted her lawyer, Ms. Martorana, and made an appointment. He took her to her lawyer's office and left her in the waiting room since he had to return to his mother's home to pick up the Form A Transfer she had left behind. When he returned, his mother was no longer in the waiting room. He gave the Form A Transfer to the receptionist and waited about 15 minutes in his car until his mother was shown out of the office. At his mother's request, he then registered the Form A Transfer at the Land Title Office.

- [60] In 2002, the defendant was facing significant legal costs from the litigation over his late uncle's will. His mother was aware of this and offered him \$50,000 as a loan. Once the litigation concluded, he gave his mother a \$50,000 cheque which she tore up. He testified that she never mentioned the issue again.
- [61] At the end of the day he received \$48,133.58 from the estate of his uncle. But for his mother forgiving the loan, he would have been out of pocket as a result of that litigation. He testified that his mother was aware of the legal costs he had incurred.
- [62] In March 2003, his mother informed him that she wished to give some money as gifts. He assumed it was for his children. He knew she was going to discuss it with Mr. McIntyre, her financial advisor. He first became aware of her intention to gift funds to his entire family at dinner on or about March 14, 2003, when she produced the four cheques, one for him, his wife, and each of his children. He testified that she made a big production of handing out the cheques at the family dinner and telling his children that they were just as deserving as their cousins and that her brother felt no less for them. She also told them that this was all she could afford to try and equalize things. The memo portion of each of the cheques stated "Gift".

2. Shannon McLean-Weir

- [63] Donald's daughter confirmed that she and her grandmother were very close and that she would often visit her grandmother. She described her as having a sharp tongue and being "sharp as a whip" until she died.
- [64] On or about March 14, 2003, at a family dinner at her parents' home, her grandmother presented cheques for \$70,000 to each of them. When giving her and her brother their cheques, her grandmother commented, "You are just as deserving as the other grandchildren." She told her grandmother she would buy a home with the money, which is what she eventually did.
- [65] She explained that when she went to her bank to deposit the cheque, the bank sent her to the Royal Bank of Canada, her grandmother's bank, to have it certified. She described phoning her grandmother, the phone being answered by her "Auntie Mona", and the bank officer speaking to her grandmother. She then waited 10 to 20 minutes for the cheque to be certified. Upon leaving, she saw the plaintiff in the teller line. On cross-examination, she confirmed it was the plaintiff she spoke to as she knows her voice, which she described as distinctive. She further maintained that it was definitely her aunt that she saw at the bank.
- [66] In response to allegations that she had had a falling out with her Great-Uncle Hilarius, I am satisfied that the alleged incidents, which had occurred years ago, were not significant and that she got along with him for many years prior to his death.

3. Darrell McIntyre

- [67] Mr. McIntyre is a financial advisor with Investors Group with over twenty years' experience. His clients are primarily seniors and retirees. Donald had referred him to the Deceased.
- [68] He testified that the Deceased took an active interest in her financial affairs, understood her investments and met with him every six months. He described her as "sharp right up to the end".
- [69] She had informed him that she had appointed her son her attorney and given him a joint interest in her home because of his assistance over the years. She also had informed him that there had been troubles in the family over an estate matter and that the lion's share of her brother's estate had gone to the other side of the family. She was quite passionate about it and told him that she felt one side of the family had not been treated fairly. She raised this with him during two or three appointments over the course of a year or a year and a half. She did not ask him what she should do about it.
- [70] In 2003, the Deceased met with him to discuss how much money she had, what she needed and what she could afford to gift to Donald and his family so she could, as she put it, "balance the scales". As a result of that review, he advised her that she could afford to disburse \$280,000. Then, in his presence, she wrote out the four cheques for \$70,000 each. He reviewed them for accuracy and returned them to her. They were properly completed and signed. He said that she knew what she wanted and had made it clear that she wanted to gift the money to them. She rejected his suggestion of setting up individual investment accounts for them.
- [71] In summary, Mr. McIntyre confirmed that the Deceased was competent and independent until her death. Given his older client base, he was always careful to consider competency when taking instructions. He had no doubts that she was acting independently throughout.

4. Sylvia Josephine Martorana

- [72] Ms. Martorana was in private practice when she met with the Deceased about the Enduring Power of Attorney and later the Form A Transfer.
- [73] She had no specific recollection of her meetings with the Deceased given that they were ten years ago; however, she reviewed her files and produced a memorandum of her meeting with the Deceased respecting the Enduring Power of Attorney. That memorandum stated that on March 25, 1999, she met with the Deceased alone and was absolutely satisfied that the Deceased was acting voluntarily. She spent ten minutes with the Deceased explaining the nature of the document and it was very clear to her that the Deceased understood the nature and power of the document. She further noted the Deceased's "very good mental capacity". She confirmed that, based on her file memo, she had no concerns whatsoever regarding the competency and intentions of the Deceased.
- [74] She did not have a memo on file regarding the witnessing of the Form A Transfer approximately one year later. However, she confirmed that her general practice, which she would have followed, would have been to give the Deceased general legal advice about the

nature of the Form A Transfer and the effect of placing her home in joint tenancy with her son. She also would have assured herself that the Deceased had the mental capacity to execute the document and would not have witnessed her signature if she had had any concerns. This is notwithstanding her practice of stamping the Form A Transfer "No Advice Sought or Given". I accept that she followed her general practice and that the Deceased received legal advice respecting the transfer of her home into joint tenancy.

5. Dr. Melling

- [75] Dr. Melling, a family physician with over 25 years' experience, was the Deceased's physician for 15 to 20 years. He confirmed that the Deceased, despite her declining physical health, remained of sound mind. Her physical health was what one would expect for a woman of her age.
- [76] In later years he attended on her at her home and observed that the house was tidy and clean. There was food in the fridge and nothing was rotting. It appeared that family and friends dropped in regularly. In his opinion, she had good support and was not isolated.
- [77] With respect to her mental status, he noted that she suffered from some melancholy, if not minor depression, arising from the loss of family members and friends over the years. He prescribed anti-depressants which effectively dealt with such symptoms. In general, she was a balanced individual who was careful, calm, and thoughtful, and their conversations were very meaningful.
- [78] In March 2003, she asked him to assess her to see if she was mentally competent. It was the first time in his career that a patient had made such a request. She apparently feared a dispute later on. He did an assessment of her mental status and executive functions at that time and concluded that she was completely capable of making financial decisions. He found her to be competent period, not just competent for her age, and described her as "sharp as a tack" until her death.

DISCUSSION

Fiduciary Relationship

- [79] The plaintiff submits that the defendant Donald was in a fiduciary relationship with his mother because of his appointment as her attorney and, further, because of their relationship as mother and son. The plaintiff says that as a result Donald could not legally accept benefits from his mother except in limited circumstances.
- [80] The onus is on the plaintiff to establish the duty, the breach and the resulting damages: Mark Vincent Ellis, *Fiduciary Duties in Canada*, looseleaf, vol. 1 (Toronto: Thomson Reuters Canada, 2004) at 1-25.

[81] The plaintiff relies on *Fraser (Guardian ad litem of) v. Fraser*, 2000 BCSC 211, 31 E.T.R. (2d) 52, for the proposition that a fiduciary relationship is created by the existence of an Enduring Power of Attorney whether or not it is used in a transaction.

[82] While typically a fiduciary relationship exists between an attorney and a donor, the mere existence of an Enduring Power of Attorney does not always establish the existence of a fiduciary relationship. As explained by Justice Sopinka, writing for the majority on the fiduciary issue, in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 598, 61 D.L.R. (4th) 14:

When the Court is dealing with one of the traditional relationships, the characteristics or criteria for a fiduciary relationship are assumed to exist. In special circumstances, if they are shown to be absent, the relationship itself will not suffice....

[83] Justice Sopinka accepted the criteria set forth in *Frame v. Smith*, [1987] 2 S.C.R. 99 at 135-36:

Relationships in which a fiduciary obligation have [sic] been imposed seem to possess three general characteristics:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[84] The Enduring Power of Attorney was never delivered by the Deceased to Donald; the Deceased chose to retain it. She did not intend the Enduring Power of Attorney to be used by her son until either she chose to allow him to use it or, presumably, she became incapacitated. Donald was never in a position to use the Enduring Power of Attorney. The second criterion above was therefore not met. In my view, an Enduring Power of Attorney does not bring into existence a fiduciary relationship until delivered. In *Fraser*, the power of attorney had been perfected by delivery.

[85] The plaintiff alleges as well that the Deceased and Donald were generally in a fiduciary relationship as mother and son. Once again, the three factors noted above need to be considered.

[86] The plaintiff asserts that Donald dominated their mother, implying that she was vulnerable. Justice Wedge in *Mordo v. Nitting*, 2006 BCSC 1761 at paras. 438-41, reviewed the concept of vulnerability in relation to fiduciary relationships:

[438] With respect to the issue of vulnerability, in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 [Hodgkinson], McLachlin J. (as she then was), dissenting (writing for herself, Sopinka and Major JJ.), said:

Vulnerability is the one feature which is considered to be indispensable to the existence of [a fiduciary] relationship (McLachlin J. at para. 119 citing Sopinka J. dissenting in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [citation omitted]).

[439] In Hodgkinson, LaForest J., writing for the majority, did not agree that vulnerability was an essential feature of fiduciary relationships.

[440] In Hodgkinson, McLachlin J. said the following about vulnerability:

[Vulnerability] comports the notion, not only of weakness in the dependent party, but of a relationship in which one party is in the power of the other. To use the phrase of Professor Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1, at p. 7, quoted in Guerin at p. 384 and in *Lac Minerals* at p. 600, ". . . the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion" (Hodgkinson at para. 129).

Vulnerability does not mean merely "weak" or "weaker". It connotes a relationship of dependency, an "implicit dependency" by the beneficiary on the fiduciary (D. S. K. Ong, "Fiduciaries: Identification and Remedies" (1984), 8 U. of Tasm. L. Rev. 311, at p. 315); a relationship where one party has ceded power to the other and is, hence, literally "at the mercy" of the other (Hodgkinson at para. 129).

[441] Whether vulnerability is an essential feature of fiduciary relationships, or is merely an important one,

[87] I find that the deceased, up until her death, was mentally acute, independent, and strong-willed. There is no evidence that she was vulnerable in her relationship with her son nor that he controlled her in any way. She was not dependent on him. While she relied upon him to take her to appointments and stores and to assist around her home, had he been unable to do so, she was capable of making alternate arrangements as evidenced by the various third parties she hired to attend to matters that were beyond her abilities.

[88] Because of the Deceased's independence and strong-will, Donald would have been unable to exercise any power over his mother. Even if he had some discretion or power, he would not have been able to unilaterally exercise it. I find that the relationship between Donald and his mother was not a fiduciary relationship.

Presumptions of Resulting Trust and Undue Influence

[89] The plaintiff also alleges that the transfer of the real property, the cash gifts, and the forgiveness of the loan are subject to a resulting trust and were the result of undue influence by Donald over his mother. She submits that the fact that the Deceased and Donald were mother and son raises the presumptions of resulting trust and undue influence. The plaintiff contends that the defendants cannot rebut these presumptions, specifically because the Deceased did not receive independent legal advice. The plaintiff further asserts that even if the Deceased knew what she was doing, she did not have the requisite intent due to Donald's domination.

[90] The presumption of resulting trust applies to most gratuitous transfers. A transfer by a parent to an adult child without consideration raises this presumption: *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795.

[91] Therefore, the presumption of resulting trust arises in the present case.

[92] The presumption of undue influence arises when a plaintiff establishes that the potential for influence exists or existed in the relationship: *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211. In *Geffen*, Justice Wilson at 377 defined influence:

It seems to me rather that when one speaks of "influence" one is really referring to the ability of one person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power. To dominate the will of another simply means to exercise a persuasive influence over him or her. The ability to exercise such influence may arise from a relationship of trust or confidence but it may arise from other relationships as well.

Justice Southin in *Longmuir v. Holland*, 2000 BCCA 538, 192 D.L.R. (4th) 62 at para. 71, defined undue influence as "influence which overbears the will of the person influenced so that in truth what she does is not his or her own act".

[93] The evidence of Donald, the Deceased's financial advisor, her lawyer, and her doctor all indicates that the Deceased was not under the influence of Donald. The plaintiff produced no evidence that the potential for Donald to influence the Deceased existed at the time of the transfer of the real property, the cash gifts, the forgiveness of the loan, or at any other time. As a result, the presumption of undue influence does not arise.

[94] If I am incorrect and the presumption does arise, I find that the presumption is rebutted as explained below and because the Deceased would have been able to resist any attempts to influence her and knew and appreciated what she was doing up until the time of her death.

Rebuttal of the Presumptions

[95] Once the presumption of resulting trust or undue influence is triggered, the onus shifts to the defendant to rebut the presumption on the balance of probabilities. In *Pecore*, Justice Rothstein addressed this at paras. 43-44:

[43] The weight of recent authority, however, suggests that the civil standard, the balance of probabilities, is applicable to rebut the presumptions [of resulting trust and advancement]: *Burns Estate v. Mellon* (2000), 48 O.R. (3d) 641 (C.A.), at paras. 5-21; *Lohia v. Lohia*, [2001] EWCA Civ 1691 (BAILII), at paras. 19-21; *Dagle*, at p. 210; *Re Wilson*, at para. 52. See also *Sopinka et al.*, at p. 116. This is also my view. I see no reason to depart from the normal civil standard of proof. The evidence required to rebut both presumptions, therefore, is evidence of the transferor's contrary intention on the balance of probabilities.

[44] ... The trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention. ... the presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.

Justice Goepel in *Stone v. Campbell*, 2008 BCSC 1518 at para. 44, 44 E.T.R. (3d) 146, applied the above instructions to the presumption of undue influence.

[96] Respecting the presumption of resulting trust, the defendant must establish that a gift was intended: *Pecore* at para. 24.

[97] To rebut the presumption of undue influence, the defendant must show that the donor gave the gift as a result of her own "full, free and informed thought": *Geffen* at 379. A defendant could establish this by showing:

- a. no actual influence was used in the particular transaction or the lack of opportunity to influence the donor (*Geffen* at 379; *Longmuir* at para. 121);
- b. the donor had independent advice or the opportunity to obtain independent advice (*Geffen* at 379; *Longmuir* at para. 121);
- c. the donor had the ability to resist any such influence (*Calbick v. Warne*, 2009 BCSC 1222 at para. 64);
- d. the donor knew and appreciated what she was doing (*Vout v. Hay*, [1995] 2 S.C.R. 876 at para. 29, 125 D.L.R. (4th) 431); or
- e. undue delay in prosecuting the claim, acquiescence or confirmation by the deceased (*Longmuir* at para. 76).

Another relevant factor may be the magnitude of the benefit or disadvantage (*Geffen* at 379; *Longmuir* at para. 121).

[98] The adequacy of independent legal advice was considered in *Coish v. Walsh*, 2001 NFCA 41, 203 Nfld. & P.E.I.R. 226 at para. 23, which accepted the factors from *Fowler Estate v. Barnes* (1996), 142 Nfld. & P.E.I.R. 223, 13 E.T.R. (2d) 150 at para. 24 (Nfld. S.C. (T.D.)):

1. Whether the party benefiting from the transaction is also present at the time the advice is given and/or at the time the documents are executed.
2. Whether, though technically acting for the grantor, the lawyer was engaged by and took instructions from the person alleged to be exercising the influence.
3. In a situation where the proposed transaction involves the transfer of all or substantially all of a person's assets, whether the lawyer was aware of that fact and discussed the financial implications with the grantor.

4. Whether the lawyer enquired as to whether the donor discussed the proposed transaction with other family members who might otherwise have benefited if the transaction did not take place.
5. Whether the solicitor discussed with the grantor other options whereby she could achieve her objective with less risk to her.

[Citations omitted.]

1. The Joint Tenancy

- [99] The plaintiff submits that the presumption is not rebutted because the Deceased did not receive independent legal advice. She relies on the fact that the Form A Transfer is stamped "Witnessed Only - No Advice Sought or Given".
- [100] However, the evidence of Ms. Martorana, which I accept, is that she would have advised the Deceased with respect to the nature and effect of a transfer into joint tenancy and, further, that the Deceased had the mental capacity to understand what she was doing. In this instance, the Deceased contacted, retained, and instructed the lawyer of her choice. The defendant Donald was not present while the lawyer informed the Deceased of the effect of the Form A Transfer and witnessed her signing it. The Deceased received sufficient independent advice to rebut a presumption of undue influence.
- [101] Further, taken in the context of all the evidence in this matter, I am satisfied that the Deceased understood the effect of the transfer into joint tenancy and that it reflected her wishes. She treated her children equally throughout her life and her placing the property in joint tenancy was one of her attempts to equalize what she perceived of as the unfairness in the disposition of her late brother's estate. This too would rebut any presumption of undue influence.
- [102] It is also of note that the plaintiff did not seek to set aside the transfer despite being aware of it since 2000. Her evidence is that she had decided to accept her mother's decision. I find that she had acquiesced to it. It would be inequitable for her to now advance a claim, particularly after her mother's death.
- [103] I find that the presumption of resulting trust with respect to the transfer of the real property into joint tenancy has been rebutted. The Deceased was clearly concerned about what she perceived as the unfairness of her late brother's will and expressed that concern to her family and her financial advisor. She also specifically addressed the issue of her daughter having both her own home and an interest by survivorship in the home and property of her late brother. I am satisfied that the Deceased intended that her son would receive the home as a gift on her death. The transfer of the home is not subject to a resulting trust.

2. Forgiveness of the Loan

[104] At the time of the loan, the Deceased was aware of the financial stresses the estate litigation was placing on her son. Initially this \$50,000 was not a gift - it was a loan. Her son attempted to repay the loan and she tore up the cheque. In doing so, she clearly converted the loan to a gift. It is also consistent with her clear efforts to attempt to equalize matters to the extent that she could. The plaintiff on cross-examination agreed that this was entirely in character for the Deceased.

3. The Cash Gifts

[105] As mentioned, the Deceased treated her children equally throughout her life. The extra gifts to Donald and his family were an attempt to continue that equal treatment given the inequality created by her late brother's will. She was distressed by the fact that her late brother's estate left her daughter's family over two million dollars, while her son's family only received a fraction of that. She also clearly stated on the cheques themselves that they were gifts. As such, the presumption of resulting trust is rebutted.

[106] Concerning the presumption of undue influence, there is no evidence that the Deceased relied on her son for financial advice or that he had any involvement in these gifts. Rather, the Deceased discussed the matter and received independent advice from her financial advisor.

[107] Additionally, in light of the events surrounding her late brother's estate, the Deceased took the unusual step of having her doctor examine her mental capacity before she made the cash gifts. This was an attempt on her part to prevent these gifts from being challenged.

[108] In general, the plaintiff's allegations of undue influence are unfounded suspicions and are based on an unfair view of the relationship between Donald and their mother. At best, the plaintiff's case is that Donald, by his presence in Victoria, his driving his mother to appointments, his working around her house, his visiting her frequently, and his receiving a benefit from his mother leads to the conclusion that he unduly influenced her.

[109] Objectively viewed, this was a loving and caring mother-son relationship, in which the son did what most mothers would expect:

- a. he remained in close contact with his mother and she remained an active member of his family;
- b. he assisted her in the reconstruction of her home;
- c. he assisted her when necessary with certain physical tasks yet, at the same time, respected and supported her desire to remain independent and self-sufficient to the extent that she was capable.

[110] There is no evidence that Donald dominated the Deceased. In fact, all of the evidence is to the contrary. The evidence consistently establishes that the Deceased was competent, "sharp", and independent until her death. Certainly when it came to financial matters, she exercised a mind of her own. While she may have depended somewhat on Donald and his family due to her physical limitations, given her financial and intellectual independence, she could have made alternate arrangements.

[111] As a result, I find that the presumption of undue influence has been rebutted with respect to the house transfer, the forgiven loan and the cash gifts.

COSTS

[112] The defendants seek special costs. An award of special costs should be made when a party's conduct is reprehensible. In *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 at 747, 9 B.C.L.R. (3d) 242 (C.A.), Lambart J.A. explained "reprehensible":

... the word "reprehensible" is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word "reprehensible", taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

[113] He then clarified at 748:

the fact that an action or an appeal "has little merit" is not in itself a reason for awarding special costs. Something more is required, such as improper allegations of fraud, or an improper motive for bringing the proceedings, or improper conduct of the proceedings themselves, before the conduct becomes sufficiently reprehensible to require an award of special costs.

[114] I find the plaintiff's allegations reprehensible. They were completely unfounded and attacked her brother's character. In her statement of claim, the plaintiff alleged that the transfer of the house was made "while the Deceased was in failing health and subject to undue influence exerted on her by the said Defendant"; that the gifts of funds were at "the instigation of the Defendant Donald Emil McLean who deliberately misinformed the Deceased"; and that the defendants "have been unjustly enriched through the Defendant Donald Emil McLean's manipulations of the Deceased" (emphasis added). The statement of claim also referred to "the abuse of fiduciary duty by the said Defendant" (emphasis added). These are serious allegations, which, as Goldie J.A. noted, "sto[p] just short of fraud": *Hamilton v. Sutherland*, [1992] 5 W.W.R. 151 at 163, 68 B.C.L.R. (2d) 115 (C.A.).

[115] In *McLean v. Gonzalez-Calvo*, 2007 BCSC 648, 36 E.T.R. (3d) 126, MacKenzie J. reviewed the law of special costs in British Columbia estate cases in which the unsuccessful party alleged undue influence or proceeded with a claim that was bound to fail because of the absence of any basis for it. Justice MacKenzie noted that in a number of cases, special costs have been awarded when undue influence was unsuccessfully alleged. These include *Benekritis v.*

Benekritis Estate, [1998] B.C.J. No. 171 (S.C.); Bates v. Finley, 2002 BCSC 159, 43 E.T.R. (2d) 1; and Kouwenhoven Estate v. Kouwenhoven, 2001 BCSC 1402, 14 C.P.C. (5th) 154.

- [116] In determining whether special costs should be awarded on this basis, MacKenzie J. considered whether the plaintiff had substantial time to consider his or her allegations and whether the allegations were based on speculation and innuendo. She also took into account the fact that the defendants had warned the plaintiff and his counsel that they intended to seek special costs and had given them cases in which special costs had been awarded because the allegations of undue influence were made without supporting evidence. Thus, the plaintiff could not say that he was unaware of the seriousness of his allegations or the law on the topic.
- [117] In the present case, the plaintiff was well aware of the gravity of her allegations against her brother. In the previous litigation between the parties (Stewart v. McLean, 2003 ABQB 205, 49 E.T.R. (2d) 294), Belzil J. found:
- [12] An allegation of undue influence on any testator is extremely serious, and as was pointed out in Vout v. Hay, this is a species of fraud. It was clear from her testimony before me that this allegation had a devastating emotional impact on Mona Stewart in particular, and was the cause of enormous embarrassment and humiliation for her, not only within her extended family but within her community of Powell River, B.C., as well.
- [14] Courts have long held that serious costs consequences must flow from an unproven allegation of undue influence. These costs consequences are intended to discourage litigation of unsubstantiated allegations which have virtually no chance of success but which cause enormous distress.
- [21] In my view, the allegation of undue influence should have been abandoned months before this trial started, and certainly should not have been advanced at trial as there was no realistic possibility that Donald McLean could prove, on a balance of probabilities, that there was any undue influence surrounding the execution of the Will of May 13th, 1997.
- [118] Justice Belzil assigned ten percent of the solicitor-client costs awarded to the plaintiffs from the estate to the undue influence issue and directed that the Defendant reimburse the estate this amount.
- [119] The plaintiff knew that these were serious allegations which would likely cause emotional distress to Donald McLean and which could result in a significant costs order. She persisted with her claim despite having received the medical evidence that her late mother was competent and despite knowing that her mother wished to equalize financial matters between her son's and daughter's families. The plaintiff knew she had no evidence except for speculation and innuendo. Notwithstanding this, she pursued her claim.

[120] The plaintiff's pursuit of this lawsuit in light of the facts and her complete lack of evidence appears to have been motivated by greed and retaliation directed towards her brother for opposing probate of their late uncle's will. It is one thing to pursue litigation based on suspicious conduct grounded in facts, which may or may not be accepted by the trier of fact; it is another to pursue it and provide no substantive evidence in support. Her allegations were unfounded and her motive improper.

[121] For these reasons, I find the defendants are entitled to special costs.

Conclusion

[122] The claims of the plaintiff are dismissed. The plaintiff shall pay the costs of the defendants Donald Emil McLean and Catharina Gerdina McLean as special costs.

"The Honourable Mr. Justice Punnett"

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