

CANADA / JUDGMENT

Tribe v. Soiseth

2006 BCSC 652

COURT

Supreme Court of British Columbia

DECIDED

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2006 BCSC 652 Tribe v. Soiseth

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tribe v. Soiseth,

2006 BCSC 652

Date: 20060425

Docket: E041942

Registry: Vancouver

Between:

Camille Michelle Tribe

Plaintiff

And

Daniel Glen Soiseth

Defendant

And

Robert Norman Tribe and Camellia Longina Tribe

Third Parties

Before: The Honourable Mr. Justice Sigurdson

Reasons for Judgment

Counsel for Plaintiff and Third Parties:

G. Gordon

Counsel for Defendant:

C.M. Courtenay

Date and Place of Trial:

July 28-29, 2005

November 23-24, 2005

January 16, 2006

Vancouver, B.C.

INTRODUCTION

- [1] Near the beginning of the plaintiff's short marriage, her parents purchased a condominium in her name. It has recently gone up significantly in value.
- [2] The plaintiff seeks a declaration that neither she nor her former husband (the defendant) has any beneficial interest in the condominium.
- [3] The defendant seeks a declaration that the condominium, which was the matrimonial home, is a family asset and seeks to have it divided pursuant to Part 5 of the Family Relations Act, R.S.B.C. 1996, c. 128 ("the Act").
- [4] While the defendant says that 40% of the equity in the condominium is a proper reapportionment, the plaintiff says that, if it is a family asset, the defendant's interest should be much more modest.

BACKGROUND TO THIS LITIGATION

- [5] This litigation has been somewhat protracted. In July 2005, after argument, I concluded that the plaintiff's parents should have notice of the proceeding and they were subsequently joined as third parties. In November 2005, I found that I was unable to resolve the dispute under Rule 18A, given the conflicting evidence on the issue of ownership of the condominium (see my reasons in 2005 BCSC 1689).
- [6] The parties returned on January 16, 2006 and I heard the plaintiff, the defendant, and Robert Tribe, the third party, cross-examined on their affidavits and heard their submissions.

ISSUES

- [7] The central issue is whether the condominium is beneficially owned by the plaintiff, Michelle Tribe. In opposing the declaration sought by Ms. Tribe, the defendant not only challenges the factual assertion that Ms. Tribe has no beneficial interest, but says that there are a number of legal issues arising that, if resolved in his favour, weigh against granting the declaration she seeks. These include:
- (a) whether the presumption of advancement from parent to child can be rebutted in the circumstances;
 - (b) whether evidence of a scheme that the property was only in the plaintiff's name so that her parents might avoid capital gains tax on an eventual sale is admissible to rebut the presumption of advancement;
 - (c) whether the transaction was intended to defeat a claim by the husband should the marriage fail;
 - (d) whether a registered option to purchase in favour of the parents is unenforceable as a clog on the equity of redemption in the mortgage granted to the parents;
 - (e) whether the transaction between the plaintiff and her parents was a marriage settlement and subject to s. 68 of the Act, which allows the court to apply part of the settled property for the benefit of either or both spouses; and finally
 - (f) whether s. 58(3)(b)(ii) of the Act applies.
- [8] I will discuss these in turn. First, let me set out my findings of fact, including my conclusions after hearing the parties under cross-examination. In deciding the issue of beneficial ownership, I will have to consider whether certain evidence of the reason for the transfer of the legal title to the daughter is admissible in determining whether the plaintiff holds a beneficial interest in the property.

FACTS

- [9] The plaintiff and the defendant met at law school at the University of Saskatchewan. They began to cohabit in 2000, married on August 11, 2001 in Vancouver, and separated on January 15, 2004, after about 2½ years of marriage. There are no children of the marriage.
- [10] Both parties are lawyers in their early to mid-30s. The plaintiff was called to the bar in 2001. The defendant, who graduated two years before her and was called to the bar in Saskatchewan in 1999, worked as a lawyer in Saskatchewan and then moved to British Columbia with the plaintiff in November 2000.

- [11] The parties brought minimal assets into their marriage. They first lived together in November 2001 in an apartment in downtown Vancouver, where they paid a monthly rent of \$1,350. They resided there until they moved into the condominium that is the subject of this proceeding in July 2002.
- [12] The basic facts surrounding the condominium acquisition are not really in dispute. What is in issue is the intention of the parents and their daughter as to the ownership of the condominium, and whether the plaintiff acquired a beneficial interest, as a matter of law, in that property.
- [13] The plaintiff's parents live in the Fraser Valley and own a home there. In September 2000, they paid the initial deposits of \$82,800 (which by closing in 2002 had increased to \$89,490.44 through accumulated interest and additional payments on account) on an offer to purchase a condominium in the public harbour of Burrard Inlet for \$414,000. The condominium had not yet been built. The plaintiff and her husband the defendant lived in the apartment until July 2002. In the meantime, they were married as planned in August 2001, and there was no marriage agreement entered into between them.
- [14] The couple shared a joint bank account and contributed their savings to this account. They both worked as lawyers. The defendant was disabled for a period, not working from August 2002 to June 2003.
- [15] The condominium was completed in June 2002 and the balance of the monies were then due under the purchase contract.
- [16] The plaintiff's parents completed the purchase price of \$465,893.25 (which included the final purchase price, net of material improvements and an additional parking stall, of \$430,000, G.S.T., Property Transfer Tax and adjustment for property tax and maintenance fees), by advancing a further \$126,402.91 and with funds that the plaintiff received on a first mortgage from the Royal Bank for \$250,000.
- [17] At closing, title was registered in the plaintiff's name; she granted her parents a second mortgage for \$215,893, which was the total amount advanced by the parents in 2000 and 2002 and applied to the purchase of the condominium. That loan was documented as payable without interest, on demand.
- [18] At the same time, the plaintiff signed an option to purchase in favour of her parents. That option ran until the end of 2025 and allowed the parents to purchase the property for \$10. This option to purchase was registered but has not been exercised.
- [19] The plaintiff and her husband lived in the condo and they made the mortgage payments on the first mortgage to the Royal Bank, which amounted to \$1,285 per month, as well as maintenance fees of about \$300 per month. The parents did not declare rental income.
- [20] The parties separated in January 2004. In March 2005, the plaintiff brought a motion for the declaration she seeks in this action.

DISCUSSION OF EVIDENCE CONCERNING BENEFICIAL OWNERSHIP

- [21] There are affidavits from the parties, the plaintiff's father, Mr. Tribe, and from friends, on the issue of whether the intention of the parties to the transaction was that Ms. Tribe would be the beneficial owner of the condominium.
- [22] The plaintiff deposed that her parents suggested that they purchase the condominium as an investment and the defendant and she would live there as tenants, and that she agreed to this arrangement, having discussed it with the defendant. The plaintiff said that it was at all times agreed and understood by herself, the defendant and her parents that the property was acquired as an investment for them, that she was not to acquire a beneficial interest, and the agreement was in her name for income tax purposes to enable her to claim on behalf of her parents any principal residence exemption in the event of a disposition of the property. Her parents paid the deposit of \$82,800. While she received interest on the \$82,800 deposit her parents had paid pending construction of the condominium, as well as a T5 slip from the law firm holding the deposit, which required her to declare the interest as income, she deposed and her father confirmed that her parents paid the tax on that interest income.
- [23] The plaintiff said that her husband told her he was uncomfortable discussing her parents' money and found such discussions distasteful and that he would sign whatever documents her parents wished him to sign. She said that her husband was concerned that if the parents owned the property they would feel free to come and go as they pleased and he wished clarification on that point. She further deposed that she and her parents discussed and agreed that she would sign as an obligant on the bank mortgage, with her parents signing as covenantors, that she would grant her parents a second mortgage for the cash they advanced, and as well would grant an option to purchase the property, which was intended to secure to their benefit any future enhancement in the market value and foreclose any claim by her to a beneficial interest.
- [24] The defendant, Mr. Soiseth, deposed that he had never had a conversation with Mr. Tribe about the financial arrangements and all of his understanding came from conversations he had with his wife, the plaintiff. He said that he had not seen the documents relating to the purchase at any time before separation. He said he had no information about the intent behind the transactions but that it was implied that Mr. and Mrs. Tribe were being generous to their daughter in this matter as in many others. He believed that he and his wife reimbursed her parents for tax payments. He said that he heard nothing about the title being held for so-called tax purposes, and says that he would not have been a willing participant if he was aware of the scheme. He said that his wife assured him that they were free to dispose of the condominium as they wished, whatever the family dynamics might be. He deposed that she said, "It's ours, Dan". He said that, with property values rising, she never mentioned that it was her parents, and not themselves, who were benefiting from the increased equity in the property.

- [25] Ms. Tribe deposed in response to Mr. Soiseth's affidavit that the property taxes were always paid by her parents. Ms. Tribe says she never assured her husband that they were "free to dispose of the condo as we wished". She said that when they discussed it on one occasion, she simply told the defendant they would have to deal with her parents at that time.
- [26] Mr. Tribe, the plaintiff's father, said that at no time did Mr. Soiseth express gratitude or thank him or his wife for acquiring the property for himself and his daughter as he alleged and suggests that if his daughter was to be the beneficial owner, an expression of thanks would have been forthcoming.
- [27] My conclusions following the cross-examination of the parties on their affidavits are as follows.
- [28] I find that Mr. Tribe and his daughter both had the intention that the purchase would be made in his daughter's name as an investment for the parents, who would own it beneficially. I found their evidence credible in that respect and it became apparent that Mr. Soiseth really had no evidence to the contrary. I also find that the purpose of putting the property in the daughter's name, as opposed to in the parents' names and renting it to their daughter, was because the parents hoped to avoid capital gains tax on any subsequent sale on the basis that the property was the principal residence of their daughter.
- [29] Although the documents themselves (i.e. the registration of title, the mortgage and the option) indicate to some extent an intention other than that the parents were to retain beneficial ownership, I find that Ms. Tribe was prepared to do what her parents wished; I find that her parents received advice and intended that the effect of the documents, the mortgage and the option to purchase, was to be that the real value of the property or the beneficial ownership remained with them. This of course could have been easily done by a declaration of beneficial interest, but that would have contradicted the ultimate purpose, which was to avoid capital gains tax on a future sale of a second residence.
- [30] Both the father and the daughter gave evidence as to why the condominium was registered in her name. Their evidence was convincing. Both said the idea came from an accountant and that the goal was to avoid taxes and not to bestow a gift upon her. The fact that the option to purchase was done at the time the transaction was completed, as opposed to later, also supports the father's and daughter's evidence. Title could easily been put in the parents' name; it was entirely in their control. Ms. Tribe said that the reason the defendant did not sign anything, even though he said he would sign anything, was because of his lawyer's advice that it was not necessary. Ms. Tribe did not know what documents she was signing until she was at the lawyer's office at closing to sign them. She said the lawyers explained to her that purpose of the option was to secure the growth in value for her parents.

- [31] Mr. Soiseth said that he never believed that they were giving the property to him, and he never inquired about documents. He agrees that he could have said that he found discussion about her parents' money distasteful. In substance, he really seems to say that he relies on two things for his belief that his wife owned the property: the fact that she was on title and one discussion the couple had in which she said something to the effect that, "it is ours".
- [32] I have taken into consideration the affidavit of Mr. Gabruch, a lawyer who is a friend of the couple and who deposed that in their many discussions there were opportunities for Ms. Tribe to volunteer that her parents were really the owners but she always referred to the condominium as their place or their home. Ms. Tribe denied that she told Mr. Gabruch that she and Mr. Soiseth had "succeeded in making our first home purchase". She says that the issue of the actual ownership arrangements did not come up, nor would it be appropriate to disclose the actual ownership arrangements for the condominium.
- [33] It was suggested to Ms. Tribe on cross-examination that she did not tell the Royal Bank that the property was, in reality, owned by her parents, but she says that she did, and she identified by name the banker she spoke to. I considered that in assessing her credibility. She was asked whether she knew the purpose was to deceive the Canada Customs and Revenue Agency and she said she did not know the intricacies of the arrangement, that she was told it was a legitimate means of avoiding tax, and she made no inquiry. She says when she told her husband the property was in her name for tax reasons, her husband really took no interest, something she said was not inconsistent with his character. She acknowledged a conversation where Mr. Soiseth wanted to know if they were getting anything for paying down the mortgage, but she appeared to have trouble recalling the discussion. When asked why her husband did not discuss the option or the mortgage, she said he did not want to know the details and that she had become conditioned in their marriage not to discuss what he did not want to discuss. She agreed that she did not tell her husband about the option.
- [34] Mr. Tribe also said that the transaction was done on casual advice from an accountant and that the lawyers never said he was doing anything wrong. He said that the lawyers recommended what documents would have to be drawn up in order to achieve his purpose and he went along with it.
- [35] My impression from Mr. Tribe's evidence was that there was no gift intended to his daughter at the outset of the scheme. I expect, however, that he may have made a gift of the property to her in the future.
- [36] If the issue were simply the intention of the donor and the donee in all of the circumstances, I would find that the parents' and the daughter's intention was clear and not contradicted by the husband, and that was that the purchase was an investment for the parents and that the beneficial interest in the property was to remain with the parents and not with Michelle Tribe. However, the question arises as to whether the evidence offered as proof of this intention is admissible in the circumstances and, if it is not, whether this case is to be decided on the presumption of advancement and the documents signed by the parties?

THE PRESUMPTION OF ADVANCEMENT

[37] How are the intentions of the parties determined in this case?

[38] It is well accepted that where a person transfers property into another's name, a resulting trust is presumed and the transferee must prove that a gift was intended in order to retain title: *Dyer v Dyer* (1788), 2 Cox 92, 30 ER 42.

[39] However, as Spence J. noted in *Goodfriend v. Goodfriend* (1971), [1972] S.C.R. 640 at 646:

When, however, the relationship between the transferor and transferee is husband and wife or father and child, there is a presumption of advancement, that is, the transferor intended to make a gift of the subject-matter of the transfer to the transferee. Many cases may be cited for such a proposition including in this Court *Jackman v. Jackman* [[1959] S.C.R. 702.], particularly *Locke J.* at p. 708 and *Cartwright J.* at p. 712. The presumption of advancement in the case of such a conveyance from husband to wife may be defeated upon the evidence and the resulting trust restored. *Schroeder J.*, as he then was, in *Walsh v. Walsh* [[1948] O.R. 81.], said at p. 94:

It is abundantly clear that whatever presumptions may arise from the circumstances of any particular case, the Court is under a duty to go into the actual facts, and to consider at the circumstances of the case, so as to arrive at the real intention of the transferor, giving due weight to the presumptions that are raised by the circumstances.

and most of the cases on the subject had been concerned with whether or not the transferor in an action to recover the property of the subject of the transfer was successful in rebutting the presumption of advancement.

[40] As *Snell's Equity*, 31st ed. (Toronto: Carswell, 2005) points out at p. 573:

The evidential weight to be attached to the presumption is now less than in the past. The court will always strive to determine the real intentions of the parties. It may only resort to the presumption of advancement where evidence of those real intentions is absent and a default rule is needed.

[41] The defendant's assertion is that the arrangement by which the condominium was purchased gives rise to a presumption of advancement; that is to say that, barring evidence to the contrary, there is a presumption that the condominium was a gift to Ms. Tribe from her parents and that she received both the legal and beneficial interest. While this presumption is rebuttable, the defendant further asserts that by arranging the purchase of the condominium so as to avoid capital gains tax on any subsequent sale, the plaintiff and her parents entered into an illegal scheme to defraud the Minister of National Revenue and that evidence of that illegal scheme is inadmissible to rebut the presumption of advancement. As a result, they say, the estate should lie where it falls. The defendant's counsel says that the application of this default rule leads to a result that is consistent with documentary evidence and that the after-the-fact assertions of the parties, notably the plaintiff's assertion that no gift to her was intended, can be given little weight.

- [42] The defendant also says that the documents were never acted on: no demand for payment was made and no option was ever exercised. Although the defendant is prepared to acknowledge the liability to the parents under the mortgage in their favour, he says that the option to purchase is tainted with illegality and is not enforceable to deprive the defendant to a claim to the growth in the equity in the property since the acquisition.
- [43] The defendant relies on the case of *Tucker Estate v. Gillis* (1986), 70 N.B.R. (2d) 78 (T.D.), the facts of which are similar in a number of ways to those in the case at bar. Dr. Tucker bought a sailboat and, to avoid the payment of New Brunswick provincial sales tax, had it registered in the name of his daughter, Annette Gillis, who was resident in Alberta, which does not have a sales tax. The daughter signed a chattel mortgage for the amount of the purchase price. Five years later, he sold the vessel and received the proceeds but the chattel mortgage was not discharged. Dr. Tucker then bought a second boat and registered it the same way but did not take a chattel mortgage from his daughter. When he died, the daughter, unlike her brothers and sisters, did not receive a specific bequest under the will. The estate sought a declaration that the daughter held the second vessel in trust for the estate or, in the alternative, claimed \$45,000 under the chattel mortgage.
- [44] Relying upon *Scheuerman v. Scheuerman* (1916), 52 S.C.R. 625 and *Goodfriend v. Goodfriend*, the trial judge concluded that the registration of title to the second vessel in the daughter's name gave rise to a presumption of advancement and that it was not open to the estate to rebut that presumption by evidence of an illegal scheme to defraud the provincial revenue. The judge declared that Mrs. Gillis was the owner of the boat, but also held that she must pay the estate the amount due under the undischarged chattel mortgage.
- [45] The matter was heard by the New Brunswick Court of Appeal [(1988) 90 N.B.R. (2d) 391]. Stratton, C.J.N.B., while dissenting in part, said that it was immaterial that the doctor had sought advice from professionals and honestly believed that he was acting within the law. He said at ¶16 that:

it makes no difference that the parties were unaware of the illegality of the scheme in which they were involved. They intended and indeed carried out a scheme for an illegal purpose and whether or not the parties realized the consequences of their actions, the scheme was in fact unlawful. In a case such as this one the parties' knowledge of the law is irrelevant.

- [46] He went on to say, at ¶ 20:

There can, I think, be little doubt that in registering the [second boat] in his daughter's name, Dr. Tucker intended and did effectively convey ownership of the boat to Mrs. Gillis. If this were not so why would he have bothered to take back a chattel mortgage on the security of the former boat and its equipment? Be that as it may, while Dr. Tucker in his lifetime and his Estate after his death retained possession of the [second boat], to recover title the Estate must rebut the presumption of advancement which applies when a father conveys property to his daughter. To do this the Estate must rely on the illegal scheme to defraud the revenue as evidence of the deceased's true intentions. Thus, the Estate must rely on the illegal scheme to make its case.

- [47] Although there was a collusive scheme, the Court of Appeal said that the daughter had only to rely on the presumption of advancement and the fact that title to the boat was registered in her name. They also noted that the doctor made no mention of the second boat in his will, nor did he make a specific bequest to this daughter, as he had the other children.
- [48] As to the chattel mortgage, the Court of Appeal reversed the trial judge's decision and held that it was an agreement that was collateral to an illegal scheme and was similarly bad and thus unenforceable.
- [49] Tucker would appear to support the defendant's position that a transferor of property cannot rely on evidence of an illegal scheme to rebut the presumption of advancement and that agreements collateral to the illegal scheme, such as the chattel mortgage in Tucker and the option to purchase in this case, are tainted by that illegality and are unenforceable.
- [50] There are, however, some important differences between the circumstances in Tucker and those in the case at bar. First, in Tucker, the plan to defeat the provincial authorities succeeded in doing just that; no sales tax was paid and the provincial revenue was in fact defrauded. In this case, because the property has not been sold and no principal residence exemption from capital gains tax has been claimed, it remains open to Mr. Tribe, having been advised of the illegality of his scheme, to repent from it. Second, unlike the situation in Tucker and in most of the other cases in which the presumption of advancement arises, Mr. Tribe and his daughter, to whose benefit the presumption operates, are not adverse parties in this action and she has given evidence as to his true intention. Finally, there was extrinsic evidence of intention, apart from the illegal scheme.

THE PRESUMPTION OF ADVANCEMENT AND ILLEGAL SCHEMES

- [51] The question of whether the presumption of advancement can be rebutted where there is an illegal scheme has been the subject of somewhat tortuous jurisprudence in Canada, dating back to the Supreme Court of Canada's decision in *Scheuerman*. In particular, there has been controversy as to whether such evidence is admissible in situations where it is unclear if the so-called scheme has been - or indeed, could be - carried out. There is also a question as to whether the doctrine of *locus poenitentiae* - literally, "place for repentance" - operates in these circumstances.
- [52] The confusion surrounding this issue has its roots in the reasons given by the five justices of the Supreme Court of Canada who sat on *Scheuerman*, a case in which a man transferred property to his wife to avoid his creditors. The majority of three found that the intent to carry out an illegal scheme was sufficient to bar recovery. Sir Charles Fitzpatrick C.J. put it most bluntly:

I am prepared to hold that a plaintiff is not entitled to come into court and ask to be relieved of the consequences of his actions done with intent to violate the law and that though they did not and even could not succeed in such purpose.

- [53] Duff J. agreed in the result, but took a more lenient approach. He found that intent was not sufficient but that the claimant had the burden, undischarged in this case, of showing that scheme had not been carried out and no creditor prejudiced. Anglin J. dissented, agreeing with Duff J. that intent alone was not sufficient, but finding that recovery was barred only when it was shown that creditors had been delayed or defrauded. In his view, "the law condemns and punishes the fraudulent act, not the fraudulent intent "
- [54] Subsequent Supreme Court decisions have expressed varying degrees of doubt about the majority's reasons in *Scheuerman*. In *Krys v. Krys* (1928), [1929] S.C.R. 153, a farmer feared that his wife's illness would ruin him with medical bills, and therefore conveyed some land to his son. The Court declined to infer an illegal scheme where one had not been pleaded and, in doing so, called into question the authority of *Scheuerman*. Newcombe J. wrote at 164, "The facts in the *Scheuerman* case were special; that decision depends upon its own facts, and there does not seem to be that unanimity in the reasons handed down by the judges constituting the majority that is necessary for a ruling case".
- [55] *Scheuerman* was also questioned in *Goodfriend v. Goodfriend*. The case once again involved a man who transferred property to his wife, this time at her suggestion, to avoid a possible judgment creditor who never materialized. The majority found that it did not need to consider *Scheuerman*, because the transfer was at the wife's insistence and, as a result, she could not rely on the presumption of advancement. Spence J. concurred in the result, but his reasons echoed *Krys* in suggesting that *Scheuerman* was confined to its facts.
- [56] He adopted the position, similar to that of Anglin J. in *Scheuerman*, that in order to defeat the claim of the transferor in an illegal scheme, there must be proof that there were creditors prejudiced as a result of the transfer.

[57] Spence J. noted at 648 that:

The problem is whether in such a case as the present where there is no evidence whatsoever that any creditor was defeated, hindered or delayed, the plaintiff, here respondent, should be barred from recovering all the lands transferred to his wife to escape a feared execution which he though might have been issued against them in an action the cause for which does not exist in law and despite the fact that he retained other assets much more easily subject to execution throughout the whole transaction. This Court has dealt with a related situation in *Scheuerman v. Scheuerman*, *supra*, where the plaintiff had agreed to purchase certain lands and with the intention of protecting them from action by a judgment creditor had caused them to be conveyed to his wife on a parol agreement with her that the title should remain in her name until the judgment debt had been satisfied. That debt was subsequently paid by the plaintiff and upon discovering that his wife had sold the lands he brought suit claiming the unpaid balance was his as she held the lands in trust for him. In fact, the lands being homestead lands, in the Province of Alberta under the legislation then in effect in that province, were protected from execution up to the value of \$1,500.

[58] Spence J. reviewed the various judgments and then referred to the decision of Krys, and commented on its previous decision in *Scheuerman v. Scheuerman*. At 650 he wrote:

In *Krys v. Krys*, the plaintiff had conveyed his homestead to his son and claimed to be entitled to a reconveyance on the basis that the title had been put in the name of the son only in trust for the plaintiff. The plaintiff was successful at trial but lost in the Appellate Division. This Court restored the trial judgment. The case was concerned with a duty cast upon the son because of the relationship between father and son, the father's illiteracy, and the form and contents of a later document which might have removed the resulting trust created in the earlier one, to convince the Court that the plaintiff father realized what he was doing and acted as a voluntary agent. The decision, however, is of interest in the present case as to the issue of whether the intention to defeat creditors would prevent father from recovering the property.

[59] Spence J. concluded, at 652, that:

I am of the opinion that the judgment of this Court in *Krys v. Krys* confines the decision in *Scheuerman v. Scheuerman* to the exact facts in that case and that the judgment in *Krys v. Krys* states the law applicable to the present case. Here as there,

there was no proof that he had creditors or that any creditor was defeated, hindered or delayed by the transfer

[60] Professor Waters, in *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Carswell, 2005) observes at 390, "The minority judgment in *Goodfriend* obviously left *Scheuerman v. Scheuerman* in an untenable position. *Scheuerman* has been a decision of ambiguous authority since the Court's decision in 1929 in *Krys v. Krys*, but now the situation was one of contradiction."

[61] Despite the ambiguity, and contradiction of *Goodfriend*, the court's decision in *Scheuerman* has subsequently been treated as good law. Mr. Gordon brought to my attention this court's decision of *Foster v. Foster* (1978), 98 D.L.R. (3d) 390 (B.C.S.C.). This decision by Toy J. (as he then was) dealt with the issue in a claim by a father that his transfer to a daughter was a resulting trust. In that case, Toy J. referred to *Scheuerman*, *Krys*, and *Goodfriend*. After setting out the facts, he said, at 400:

This case it seems to me is in an area between the *Scheuerman* and the *Krys* type situation. Unlike in *Scheuerman* there is no judgment creditor -- nor could Mrs. Elsie Irene Foster's claim for a lump sum award be described as a presently existing debt to put her in the position of being a creditor. Her rights to a money judgment, if one was ever going to be pronounced in her favour, had not yet been determined. However, her claim in the divorce petition, in my view, elevates her position above the *Krys* type situation where there were then no known claimants or creditors in existence.

On the evidence before me I am satisfied that Elsie Irene Foster was never in fact prejudiced, hindered or delayed in her claims for a lump sum settlement. However, that is not determinative of the issue I have to decide.

In *Maysels v. Maysels* (1974), 45 D.L.R. (3d) 337, 3 O.R. (2d) 321, 14 R.F.L. 286, Kelly, J.A., for the Ontario Court of Appeal, analysed the previous Supreme Court of Canada judgments and held that a husband cannot rely on his own illegal act, i.e., his intention to defeat possible future creditors even though no such creditors were in fact defeated. This judgment was appealed to the Supreme Court of Canada and the appeal was dismissed: 64 D.L.R. (3d) 765n, [1975] 1 S.C.R. v. 19 R.F.L. 256. As I interpret Kelly, J.A.'s reasons for judgment, he acknowledges what appears to me to be an inconsistency in the law, namely, that it depends whether it is the plaintiff or the defendant who is relying on the illegal agreement. However, until the Supreme Court of Canada reconsiders the matter and declares otherwise the principle enunciated by Sir Charles Fitzpatrick, C.J., it is still the law. In *Scheuerman v. Scheuerman*, supra, at p. 224 D.L.R., p. 627 S.C.R., he said:

I am prepared to hold that a plaintiff is not entitled to come into Court and ask to be relieved of the consequences of his actions done with intent to violate the law, and though they did not and even could not succeed in such purpose.

In this case all three children -- including the defendant -- were prepared to assist their father and were parties to what must be characterized as an illegal agreement. It seems to me that the defendant and her brothers were in *pari delicto* with the plaintiff in their conduct vis-à-vis their stepmother. The solicitor involved encouraged and made a contribution to illegality of the agreement and failed to give appropriate counsel and advice to the plaintiff, namely, that by executing the conveyances in question the plaintiff was putting himself into a position of jeopardy in that any one or all three children might refuse to reconvey.

It appears to me to be incongruous that the defendant and not the plaintiff derives the benefit of the illegal agreement. However, until the Supreme Court of Canada reconsiders *Scheuerman* I consider that I must apply the law as it is presently declared. The plaintiff should give anxious consideration to having this decision reviewed in the appellate Courts.

It is with great reluctance that I hold that the evidence concerning the agreement to reconvey cannot be used to rebut the presumption of advancement in favour of the defendant. The plaintiff's action therefore must be dismissed.

[62] While there may remain some confusion regarding the applicability of *Scheuerman*, it should be noted that in all the cases where recovery was denied, there were creditors, or at least potential creditors, and the illegal purpose was actually carried out. As Professor Waters notes at 389:

One has in fact to go back to the case of *Harrington v. Harrington* (1924), 56 O.L.R. 568, heard in the Appeal Court of Ontario in 1925, to find a situation where Scheuerman was regarded as good authority, but no illegal purpose was actually carried out. The claimant, a husband who had had land transferred into his wife's name, was denied the right of a resulting trust because "he was endeavouring to protect this property from claims which he seemed to anticipate." The intent seems barely to have been proved, let alone any act in furtherance of that intent.

- [63] Recently, the effect of the existence of an illegal scheme, realized and otherwise, on the ability of a claimant to rebut the presumption of advancement has been considered by a number of Commonwealth courts.
- [64] In *Tinsley v. Milligan*, [1993] All E.R. 65, the House of Lords considered the effect of an illegal scheme on the presumption of a resulting trust and, by way of contrast, on the presumption of advancement. In that case, two women purchased a house together. They registered it in the name of the plaintiff so that the defendant could continue to collect social assistance, which would have been cut off if the authorities learned she owned the property. When the plaintiff and defendant fell out after a number of years, the plaintiff moved out and sought a declaration that she was the sole owner, while the defendant sought an order that the plaintiff held the property on trust for both of them in equal shares.
- [65] The defendant succeeded at trial and at the Court of Appeal, which held that illegality would not be a bar to recovery unless the illegality was an affront to the public conscience. The Law Lords all rejected this reasoning, but split on whether the plaintiff should succeed in her appeal. The minority (Lord Keith and Lord Goff) would have allowed the appeal on the grounds that the respondent did not come to court with clean hands; in Lord Goff's words, "he who has committed iniquity shall not have equity."
- [66] The majority dismissed the appeal and held that the respondent could succeed since she did not have to rely on the illegal scheme to establish her equitable interest in the property. As Lord Browne-Wilkinson said at ¶72, once she had established a resulting trust, "[s]he had no need to allege or prove why the house was conveyed into the name of Miss Tinsley alone, since that fact was irrelevant to her claim; it was enough to show that the house was in fact vested in Miss Tinsley alone". He suggested, however, that a claimant seeking to rebut a presumption of advancement would fail, because she would be bound to disclose and rely upon her own illegal purpose.
- [67] It should be noted that both Lord Goff (at ¶24) and Lord Browne-Wilkinson (at ¶64) recognized that the principle regarding the admissibility of evidence of an illegal scheme, whether widely or narrowly construed, was subject to the doctrine of *locus poenitentiae* and that the doctrine exists in both law and equity. As Lord Browne-Wilkinson observed at ¶64:

The doctrine of locus poenitentiae therefore demonstrates that the effect of illegality is not to prevent a proprietary interest in equity from arising or to produce a forfeiture of such right: the effect is to render the equitable interest unenforceable in certain circumstances. The effect of illegality is not substantive but procedural. The question therefore is, "In what circumstances will equity refuse to enforce equitable rights which undoubtedly exist".

- [68] While the Court in *Tinsley v. Mulligan* seemed to indicate that an illegal purpose could not be relied on to rebut the presumption of advancement, in *Tribe v. Tribe*, [1995] 3 W.L.R. 913, [1995] E.W.J. No. 390 (QL), the Court of Appeal found that it could, so long as the claimant had repented from the illegal scheme.
- [69] In *Tribe*, the plaintiff transferred all the shares in his company to his son after learning that he would be liable for a number of expensive repairs to leasehold properties occupied by the company. When the crisis passed - the claims were settled and there was no evidence that the senior Mr. Tribe's creditors were even aware of the transfer - he sought to recover the shares, but his son, who was expected to inherit the business, refused to return them. The trial judge made a number of findings of fact, including, significantly, that there was no evidence that the plaintiff "carried his illegal purpose into effect in any way". On this basis, he held that the plaintiff was entitled to lead the evidence of the scheme in rebuttal of the presumption of advancement.
- [70] On appeal, the defendant argued that locus poenitentiae is not available in presumption of advancement cases. The Court of Appeal rejected this argument. Nourse L.J. found support for the applicability of the doctrine in these circumstances in both *Chettiar v. Chettiar*, [1962] A.C. 294, where Lord Denning said, at 302, "If the fraudulent purpose had not been carried out, there might well have been room for repentance and the father might have been allowed to have the land retransferred to him " and *Perpetual Executors and Trustees Association of Australia Ltd. v. Wright* (1917), 23 C.L.R. 185. In the latter case, the plaintiff said he registered land in his wife's name for a variety of reasons, including as a precaution against the possible failure of his business. When she died, he sought to recover the property from her estate. The Australian High Court found in his favour and Barton A.C.J. said, at 193:

Had there been creditors to hoodwink or, at any rate, had there been any attempt at such an act, the case would probably have been different. But, so far as we know, there were no creditors to hoodwink, and the whole thing rested on what might happen but never did happen. That such a state of things, carried no further, is not a bar to the respondent's claim to what is beneficially his own is to me apparent, and I need only mention three cases, namely, *Symes v. Hughes* (1870),⁹ Eq. 475, *Taylor v. Bowers* (1876), 1 Q.B.D. and *Payne v. McDonald*, 6 C.L.R. 208.

- [71] In his reasons in *Tribe*, Millet L.J. made an observation similar to that of Professor Waters, noting at ¶ 91: "There is no modern case in which restitution has been denied in circumstances comparable to those of the present case where the illegal purpose has not been carried out". He described the relationship of locus poenitentiae and the primary rule at ¶92:

At heart the question for decision in the present case is one of legal policy. The primary rule which precludes the Court from lending its assistance to a man who founds his cause of action on an illegal or immoral act often leads to a denial of justice. The justification for this is that the rule is not a principle of justice but a principle of policy: see the much quoted statement of Lord Mansfield in *Holman v Johnson* (1775), 1 Cowp. 341, 343. The doctrine of the locus poenitentiae is an exception which operates to mitigate the harshness of the primary rule. It enables the Court to do justice between the parties even though, in order to do so, it must allow a plaintiff to give evidence of his own dishonest intent. But he must have withdrawn from the transaction while his dishonesty still lay in intention only. The law draws the line once the intention has been wholly or partly carried into effect.

- [72] It should be noted that, in *Tribe*, the Court of Appeal did not require a genuine repentance; so long as the withdrawal from the scheme is voluntary, Millet L.J. wrote, "genuine repentance is not required. Justice is not a reward for merit; restitution should not be confined to the penitent."
- [73] In *Nelson v. Nelson* (1995), 132 A.L.R. 133, the High Court of Australia took this proposition a step further, holding that the existence of an illegal scheme, even one that is carried out, can in some circumstances be admitted to rebut the presumption of advancement.
- [74] In *Nelson*, the plaintiff was a widow of a military veteran who was entitled to apply for a subsidized loan under the Defence Service Homes Act 1918 (Cth) to help her buy a house. In 1987, she gave her son and daughter money to purchase a house, which was registered in their names. She did this, it was agreed, so she would remain eligible for a subsidy under the Act, the application for which required her to state that she did not own or have any financial interest in a house other than one for which she was to receive the subsidy. In 1989, she applied for and received the subsidy and used it to buy another property. In 1990, the first property sold at a substantial profit and she claimed the proceeds. Her son complied but her daughter refused to turn over her share.
- [75] The mother sought a declaration that the daughter held the proceeds on a resulting trust, while the daughter relied on the presumption of advancement, which she said could not be rebutted by evidence of an illegal scheme. While the daughter recognized the exception to this rule provided by the doctrine of locus poenitentiae, she said it was not available in this case, because the mother had carried out her illegal scheme by claiming the subsidy when she bought the second property.

[76] The High Court of Australia disagreed with this final proposition. Referring to the oft-repeated statement of Lord Mansfield in *Holman v. Johnson* that it is not morality but policy that underlies the rule that "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act", Toohey J. said at ¶45:

Although the public policy in discouraging unlawful acts and refusing them judicial approval is important, it is not the only relevant policy consideration. There is also the consideration of preventing injustice and the enrichment of one party at the expense of the other . [T]o refuse Mrs. Nelson's claim is to give Elizabeth Nelson a "windfall gain" of nearly \$200,000 with a corresponding detriment to Mrs. Nelson. In those circumstances there is no rule of public policy that demands that relief to Mrs Nelson must be refused. In particular there is no such rule that precludes giving effect to a resulting trust in her favour.

[77] In cases where the scheme is contrary to a statute, the Court said, the proper question is not whether the illegal scheme was carried out, but whether the underlying policy of the Act would be defeated if the court enforced the claimant's equitable rights. After considering the purpose of the statute under which the mother claimed the subsidy, the majority of the court granted the relief on the condition that she reimburse the government of any benefit she received. (Toohey J. dissented on the imposition of the term on the grounds that the government, which was not a party, had its own remedies against the mother should it choose to pursue them.)

[78] In the case at bar, I need not consider the policy underlying the capital gains exemption; it is clear, as I have noted above, that while Mr. Tribe may have arranged his affairs so as to avail himself of a capital gains exemption to which he was not entitled, neither he nor his daughter have yet claimed any exemption. As such, I find that it is open to him to repent from the scheme and give evidence of his true intention in registering the property in his daughter's name in order to rebut the presumption of advancement and recover the property.

[79] If I am wrong in this, the question remains whether Mr. Tribe is indeed forced to rely on the illegal scheme to rebut the presumption of advancement. As Professor Waters notes at page 387 of his text, two things must be established to allow the rule against the transferor setting up his own illegality to operate:" First, the disposition itself must be illegal or fraudulent . Second, the evidence of illegality seeking to rebut the presumption must be central to the case of the claimant".

[80] On the second point, Waters notes that, "If such a person reveals an illegal or fraudulent motive, which a more skilful person could have concealed, he may yet recover ". On this point, Waters cites the reasons of Idington J. in *Scheuerman*, where he said at 629:

I find cases where the man has accidentally as it were or incidentally to the relation of his story told that which he might if skillfully directed both in pleading and in giving evidence have avoided telling, yet has told enough to disclose that he was far from being always guided by the law or morality in his intentions, and still entitled to succeed because he had in fact established by the untainted part of his story as it were, enough to entitle him to succeed without reliance upon that which was either illegal or immoral.

[81] This passage, which distinguishes between the incidental disclosure of the scheme and the necessary reliance on it, is consistent with the comments of Lord Browne-Wilkinson in *Tinsley v. Milligan*. In reviewing the Privy Council's decisions in *Singh v. Ali*, [1960] A.C. 167 and *Chettiar v. Chettiar*, *supra* he said, at ¶70-71:

In my judgment these two cases show that the Privy Council was applying exactly the same principle in both cases although in one case the plaintiff's claim rested on a legal title and in the other on an equitable title. The claim based on the equitable title did not fail simply because the plaintiff was a party to the illegal transaction; it only failed because the plaintiff was bound to disclose and rely upon his own illegal purpose in order to rebut the presumption of advancement. The Privy Council was plainly treating the principle applicable both at law and in equity as being that a man can recover property provided that he is not forced to rely on his own illegality .

In my judgment the time has come to decide clearly that the rule is the same whether a plaintiff founds himself on a legal or equitable title: he is entitled to recover if he is not forced to plead or rely on the illegality, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction.

[emphasis added]

[82] In both *Scheuerman* and *Tinsley v. Milligan*, the courts found that it is only if the claimant's confession of the illegal scheme is his sole or central means to contradict that presumption that he must fail.

[83] In the case at bar, I think that there is ample credible evidence, beyond the evidence of the illegal scheme, that persuades me that the intention of the parties to the transaction was that the beneficial ownership would remain in the parents. As I noted above, this case is unusual in that the presumption of advancement usually arises in cases where the parties are adverse or one party has died. Here, Mr. Tribe and, more significantly, his daughter, to whose benefit the presumption operates, have both testified that it was their mutual intention, at the time the property was purchased, that the parents would have the beneficial interest. I recognize that it may be convenient for the plaintiff and her father to take the position that they are taking now, given the divorce proceedings, but I have considered that in assessing their evidence, which I found to be credible.

- [84] As well, I think that the documents drawn up at the time, the mortgage and, in particular, the option to purchase, both of which were registered, show an intention on the part of the parties that the true value of the land would be for the benefit of the parents. The effect of the documents signed by the daughter was to give the parents the means to ensure that that intention could be realized. These are not new or secret documents. The parents had full control of the property and these documents were registered on the closing of the transaction. The parents could have put legal title in their names at that time if they wished.
- [85] I also find that the surrounding circumstances, taken as a whole, support the position that it was the intention of both parties that the property be held in trust for the parents. There were no circumstances that suggested a gift of the equity. While the parents were generous with both the plaintiff and her sibling nothing in their prior or subsequent dealings with either child suggests that a gift of this magnitude was expected by the children or intended by the parents. The communications between the defendant and the plaintiff's parents do not support the suggestion of a gift. The suggestion that it was a place for the plaintiff and her husband to live comfortably, while being an investment for the parents, accords with my understanding of the evidence. I think it is very likely that if the defendant was asked to sign documentation reflecting the parents' beneficial interest, he would have done so.
- [86] I turn to the next point. The defendant says that he had no or imprecise knowledge of the documents underlying the transaction and that, given the purpose was to defeat a spousal claim, the appropriate document was a consensual marriage agreement. The defendant relies on *Wilson v. Wilson*, [1995] B.C.J. No. 1688 (S.C.)(QL), [1995] W.D.F.L. 1313 and *Chan v. Chan*, [1993] B.C.J. No. 442 (S.C.)(QL), 38 A.C.W.S. (3d) 1253, [1993] W.D.F.L. 489. I think that these cases are distinguishable.
- [87] In *Wilson*, the wife purchased a property with the help of her parents and had owned it for seven years when she became pregnant by and married the plaintiff, who was an alcoholic and frequently abusive. Seeing this and concerned the marriage would not last, the parents hired a solicitor to draw up a secret trust deed stating that they were the beneficial owners of the property, which she signed. That is not the case here at all. Here, the intention of all the parties from the outset and at all times was that the beneficial interest in the property would remain with the parents. Moreover, if Mr Soiseth had wanted to know the details of the arrangement, which I find he did not, he need only have reviewed the documentation, an option that was available to him at the time. There was nothing secret about this transaction.
- [88] In *Chan*, the wife granted her parents a mortgage against the matrimonial home after the end of the marriage and argued it was to secure interest due on money they had loaned the couple to buy the property. The court found no evidence of an agreement to pay interest and set aside the mortgage as a fraudulent conveyance. Again, the situation in the case at bar is significantly different.

- [89] Even though a marriage agreement, if signed by Mr. Soiseth, would have resolved this issue, its absence is not a basis for dismissing the plaintiff's claim. Although the parents may have been concerned about a possible claim by Mr. Soiseth when the closing documents were signed, I still find that the understanding throughout was that the plaintiff would not have beneficial ownership of the property.
- [90] Next, the defendant says that the option operates as a clog on the equity of redemption on the mortgage and is unenforceable. If this was a dispute between the plaintiff and her parents and they were enforcing their mortgage by way of foreclosure, I think that would be a good argument; however, I do not think that it is a clog because the option is not triggered by default under the mortgage. Both the mortgage and the option were part of an overall transaction by which the parties attempted, however crudely, to accomplish their intent that the beneficial title remained with the parents.
- [91] The defendant also says that the property is a Marriage Settlement within the meaning of the Family Relations Act and that it is subject to a discretionary order pursuant to s. 68(2), which allows the court to inquire into its effect upon the spouse and make a discretionary order to apply part of the settled property for the benefit of either or both spouses. In *R.(E.J.) v. K.(A.D.)* (2002), 118 A.C.W.S. (3d) 245, 2002 BCSC 1649, Davies J. noted at ¶158 that "the types of 'settlements' considered under s. 68 of the Family Relations Act and in predecessor sections have, for the most part, been post-nuptial separation agreements that have not been determined to be marriage agreements". He noted that "it should not preclude a determination that a 'settlement' may include a deed or other form of transfer of ownership that has the effect of depriving one spouse of property to which he or she might otherwise be entitled". But here, I find that there has not been a transfer of ownership that deprives the defendant to a claim to an interest; the property, I find, always was that of the parents.
- [92] The final issue is the application of s. 58(3)(b)(ii) of the Family Relations Act. The defendants say that the plaintiff knew that this was a family use property and that it was disposed of by the granting of the option and the plaintiff could have refused. I do not think that section applies, as the plaintiff did not dispose of the property or have the power to revoke the disposition or dispose of the property. That power was, at all relevant times, in the control of her parents.
- [93] For all of these reasons, I grant the declaration sought by the plaintiff.
- [94] In the alternative, if I am wrong and the property belongs beneficially to the plaintiff and is a family asset, the question becomes to what extent should that asset be reapportioned. The defendant seeks an order giving him 40% of the equity in the property after payment of the mortgages. The plaintiff relies on ss. 65(1)(a), (d), and (f) in arguing that there should be a substantial reapportionment in her favour. Mr. Gordon says that the property came from the capital of the plaintiff's parents, that if the property is a family asset, Mr. Soiseth should reimburse the plaintiff for half of the joint debt of \$27,382 or \$13,691, that the marriage was short and that the parents paid the property taxes. All these factors, Mr. Gordon argues,

support his view that the defendant's claim to the equity should be in the range of 10%-15%.

- [95] It is important to note that, if this was a family asset, the increase in the value occurred largely during the marriage. An appraisal in evidence put the market value of the unit in the range of \$825,000 to \$850,000.
- [96] If I were to find that the condominium belongs to the plaintiff and is a family asset, I would exercise my discretion under s. 65 and award the defendant 20% of the equity. If the plaintiff failed to pay to the defendant this portion of the equity, I would order a sale of the unit.
- [97] However, as I have found that the plaintiff, Ms. Tribe, has no beneficial interest in the property the declaration that she seeks is granted, and the claim of the defendant, Mr Soiseth, is dismissed.
- [98] My present inclination is that each side should bear their own costs but if the parties disagree they may file written submissions within fourteen days.

"J.S. Sigurdson, J."

The Honourable Mr. Justice J.S. Sigurdson

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