
CANADA / JUDGMENT

Usher v. Larabee

2010 BCSC 1608

COURT

Supreme Court of British Columbia

DECIDED

15 November 2010

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2010 BCSC 1608 Usher v. Larabee

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Usher v. Larabee,

2010 BCSC 1608

Date: 20101115

Docket: 82124

Registry: Kelowna

Between:

Patrick Usher and Michael Usher

Claimants

And

Gale Thomsley Larabee and Gale Thomsley Larabee,

Trustee of the Gale T. Larabee Alter Ego Trust

Defendants

Corrected Judgment: The style of cause on the front page of the judgment was corrected on March 14, 2011.

Before: The Honourable Madam Justice Hyslop

Reasons for Judgment

Counsel for the Claimants:

T.J. Johnston

Counsel for the Defendants:

J.D. Buchan

Place and Date of Trial:

Kelowna, B.C.

September 1, 2010

Place and Date of Judgment:

Kelowna, B.C.

November 15, 2010

- [1] Michael and Patrick Usher wish to be assured that they will receive now, or later, a portion of their mother's estate.
- [2] Mrs. Larabee, the 81 year old mother of Michael and Patrick, has made arrangements that Michael and Patrick will not receive any portion of her estate.
- [3] The defendant and her alter ego trust seek to have her sons, Michael Usher's and Patrick Usher's actions dismissed, and a certificate of pending litigation discharged from her condominium.
- [4] Michael and Patrick in this action seek a declaration that Mrs. Larabee holds her estate in trust for them. They seek that Mrs. Larabee transfer a portion of her estate to them. Alternatively, Michael and Patrick seek damages for breach of contract, or they ask that the alter ego trust set up by Mrs. Larabee be set aside.
- [5] In oral reasons given on September 1, 2010, I concluded that this action was suitable to be heard by summary trial pursuant to Rules 9-7 and in particular Rules 9-7(2)(a) and 9-7(15) of the Supreme Court Civil Rules. Having made that determination, I heard Mrs. Larabee's application and her sons' opposition to it.
- [6] I wish to add to my reasons in which I determined that this action could be disposed of by summary trial. It was conceded that the evidence of Michael and Patrick Usher is the only evidence they have relating to this action.

Evidence

- [7] The evidence of Mrs. Larabee consists of her affidavits #1 and #2. In addition, she relies on the responses to interrogatories posed to Michael and Patrick both sworn July 23, 2009; and the questions and answers as a result of an examination for discovery of each Michael and Patrick that took place on January 12, 2010. Those question and answers are as follows:

Examination for Discovery of Michael Usher:

Q 1 to 15

19 to 22

89 to 93

112 to 114

126 to 130

137 to 143

150

158 to 162

162 to 174

219 to 221

253 to 257

267 to 273

280 to 294

315 to 325

340 to 344

Examination for Discovery of Patrick Usher:

Q. 1 to 24

50 to 73

75 to 94

96 to 101

103

108 to 112

113 to 115

117 to 118

120 to 128

131 to 138

139 to 150

202

- [8] Michael and Patrick each filed two affidavits; one sworn August 6, 2009 and the other sworn August 23, 2010. In addition, Michael and Patrick relied on the question and answers posed and given at the examination for discovery conducted of Mrs. Larabee on January 11, 2010. They are as follows:

Q. 12, 13, 15 to 23, 25 to 29, 32 to 35, 38, 40 to 42, 44, 49, 52, 54, 55, 57, 59, 60, 76, 77, 79 to 87, 90, 100 to 108, 110, 114 to 120, 124 to 127, 129, 131, 147 to 149, 152, 154, 155, 162, 165, 167, 168, 170, 171, 180, 181, 185, 205, 212, 216, 223, 225, 231, 232, 234, 235, 241, 242, 246, 250, 254, 257, 260 to 265, 268 to 272, 287, 290, 291 to 296, 299, 307, 309, 315, 317 to 319, 324, 330, 333, 335, 336, 338 to 340, 343, 344, 351, 365, 377 to 379, 400 to 402, 413 to 415, 429, 431, 453 to 458, 474, 490, 491, 501 to 507, 519, 541, 542, 549, 550, 557, 561 to 563, 578 to 581, 590 to 593, 599, 602, 603, 607, 613, 614, 632 to 644, 646, 649 to 651, 654 to 656, 664, 707, 708, 712 to 714, 726, 734, 736, 737, 757, 817, and 818.

Issue

- [9] The issue is whether Mrs. Larabee agreed with her sons that she would hold her assets in trust for them and their sister, Merlyn.

Background

- [10] Mrs. Larabee is 81 years old and retired. She resides at 307 - 7480 Gilbert Road, Richmond, British Columbia ("Gilbert Road Property").
- [11] Her assets consist of the Gilbert Road Property and a stock portfolio which she describes as the Canaccord Capital account ("Canaccord"). The total value of these two assets is approximately \$650,000.00.
- [12] Her income consists of old age pension, Canada Pension Plan, and the income from her investment with Canaccord.
- [13] Mrs. Larabee has three children. They are Merlyn Christine Usher, born December 27, 1951; Michael Victor Usher, born October 8, 1954; and Patrick John Usher, born November 6, 1956.
- [14] Her children were born as a result of her marriage on March 19, 1951 to Victor Durham Usher. Mrs. Larabee describes her marriage to her husband, Mr. Usher, as "difficult." Mrs. Larabee states that her husband was an alcoholic and absent from home for "significant periods" of time.
- [15] Mr. Usher disappeared. Mrs. Larabee has not seen him since March of 1961. In 1968, she applied for and obtained an order that he be presumed dead.
- [16] In 1963, Mrs. Larabee was working for the Province of British Columbia at the Crease Clinic as a clerk/stenographer. In that year she had a nervous breakdown. At that time, she stated she was unable to cope with the financial pressure of employment and caring for her children. As a result, the children went into the care of the British Columbia government.

- [17] Mrs. Larabee married Kirkland Larabee on March 12, 1971, from whom she has been separated since January 3, 1994. Despite this, they remain good friends.
- [18] In 1993, Mrs. Larabee was afflicted with Guillain-Barré Syndrome which caused blindness and paralysis. She was hospitalized for two months while she recovered. She was left with some lasting and limiting effects.
- [19] Mrs. Larabee states that the assets she owns were acquired through her lifetime of working. The Gilbert Road Property was purchased in February of 1994 for \$175,000.00. Michael has never visited Mrs. Larabee at that residence; Patrick has. Mrs. Larabee states that she saw more of Patrick than Michael, both as a child and an adult.
- [20] In December of 2000, Mrs. Larabee made a decision that she would not include Michael as a beneficiary in her will. Up to that time she had not seen Michael since Christmas of 1982. In a handwritten memorandum, she states her reasons for not including Michael in her will. The reasons revolve around his criminal activity, loaning him money and his failing to repay it, and his lying about her.
- [21] At the time of writing the memorandum, Michael had been extradited from the United States to Vancouver, British Columbia because of outstanding indecent assault charges against him. The victims of the indecent assault charges were his step-daughters. At the time of Mrs. Larabee writing the memorandum, Michael's trial was set for February 21, 2001.
- [22] Mrs. Larabee added a post-script to the memorandum stating that Michael was convicted and details of the sentence he received. Patrick had supported Michael at his trial. Mrs. Larabee decided she wanted nothing further to do with her sons as she did not approve of their lifestyles.

Merlyn

- [23] After Merlyn went into the care of the British Columbia government she kept running away from her foster home to the home of her mother. By approximately age 14, Merlyn was living with Mrs. Larabee. In her late teens, Merlyn was diagnosed as suffering from Schizophrenia. Merlyn has been married three times. She has two children: Lisa and Robbie. Mrs. Larabee describes her relationship with Merlyn as maintaining "close contact."
- [24] Merlyn resides in Saskatoon, Saskatchewan; lives on social assistance as she is unable to support herself. Mrs. Larabee sends money to Merlyn's case worker so that groceries can be purchased for Merlyn.

Michael

- [25] Michael went into the care of the British Columbia government when he was probably nine years old, although he states he was five years old. He never lived again with Mrs. Larabee other than visiting her on holidays. Michael lived in foster homes and at the New Denver Youth Centre. Michael lived in the United States from 1984 to 2000.
- [26] Michael claims that he helped his mother around the house (a home owned prior to the Gilbert Road Property). He states he cut the grass and did some house maintenance.
- [27] Michael is now 56 years old. Michael is presently living in Lillooet, B.C., working as a taxi driver, and he and Patrick are living together.

Patrick

- [28] Patrick lived in foster homes, and like Michael, was in the New Denver Youth Centre. Patrick claims he went into foster care when he was three years old. If Patrick, like Michael, went into foster care in 1963, he was seven years old when he went into foster care. Both Michael and Patrick claim that during the time they were in foster care they were sexually assaulted.
- [29] Both Michael and Patrick claim they were removed from their mother's home because they were starving, their mother's neglect, and her dirty house.
- [30] It would appear that Michael and Patrick were not in the same foster home. Patrick resided at Woodlands, a home for the mentally challenged, for about one year, when he appears to have been about 14 years old.
- [31] Patrick alleges that he was beaten, kicked, deprived of food, and sexually assaulted at Woodlands. He claims that his mother was aware of these events and did nothing about them. Michael makes a similar allegation of the abuse he suffered.
- [32] Patrick states he has a genetic developmental disorder. He claims that he receives a great deal of support from Michael. He is presently on social assistance. For the last two years he has taken a daily dose of Morphine. He acknowledges a criminal record dating back to 1979 up to 2009, which mainly involves fraud.
- [33] Patrick, over the years, received cash gifts from Mrs. Larabee in the approximate amount of \$1,600.00. Mrs. Larabee paid for a trip to Reno for Patrick and Bob Savard, a roommate and a friend of Patrick's. Patrick states that after 2001, his mother refused to accept any telephone calls from him.
- [34] Both Michael and Patrick allege that their grandfather, Mrs. Larabee's father, left them money that they did not receive.
- [35] Patrick stated that when his mother lived on the Gilbert Road Property he cut the gas off so his mother could vacuum the fireplace. That he says is the extent of the work he did for his mother on any of her homes.

Telephone Messages

- [36] Starting in the fall of 2001, Michael and Patrick started to leave telephone messages on Mr. Larabee or Mrs. Larabee's answering machines stating that they were going to contest Mrs. Larabee's will. The calls were harassing in nature. Some of these messages were transcribed by a court reporter. In 2003, they threatened to put a lien against Mrs. Larabee's home and threatening to "screw you", and demanding that Mrs. Larabee "settle with us." Patrick acknowledges that he and Michael left these messages; Michael denies some of the language that is alleged that he used.

Inter Vivos Gift - Alter Ego Trust

- [37] In 2003, Mrs. Larabee was listening to a radio program in which there was a discussion about alter ego trust. Based on that radio program and her desire to make provisions for her daughter, Merlyn, she went to see a lawyer who specializes in estate planning.
- [38] As a result, an alter ego trust was set up in which Mrs. Larabee was the trustee. Mrs. Larabee placed the Gilbert Road Property and her investments in Canaccord in the trust.
- [39] The trust and her will make provisions for her daughter, Merlyn, during Merlyn's life, and upon Merlyn's death, to distribute the balance of the trust to Merlyn's children, Lisa and Robbie, equally. This effectively prevents Michael and Patrick from receiving any of Mrs. Larabee's estate.
- [40] It is not disputed that this is a valid alter ego trust. However, Michael and Patrick claim that prior to their mother setting up this alter ego trust, that they had an interest in their mother's assets. As a result of this previous arrangement with her sons, Michael and Patrick argue that Mrs. Larabee could not set up the trust with these assets. There is no dispute that neither Michael nor Patrick, or for that matter, Merlyn, contributed any money to the purchase or in the accumulation of Mrs. Larabee's assets, in particular the Gilbert Road Property and Canaccord.

The Law

- [41] It is not disputed that alter ego trusts are standard estate planning tools used to achieve estate planning objectives: *Mordo v. Nitting et al*, 2006 BCSC 1761.
- [42] A person is entitled to arrange their affairs as they choose, including dealing with potential claims of adult children such as the Wills Variation Act, R.S.B.C. 1996, c. 490: *Hossay v. Newman*, [1998] B.C.J. 3289.
- [43] In *Antrobus v. Antrobus*, May 9, 2007, Vancouver Registry S066312, Mr. Justice Powers rejected the existence of the parents' promises, who, in their 40s at the time, agreeing that the plaintiff would be the sole beneficiary of the estate was not sufficient to support an express trust. He concluded that the real nature of the plaintiff's claim may be that of a constructive trust. However, in *Antrobus*, Mr. Justice Powers concluded that before

proceeding with the summary trial pursuant to Rule 18A there ought to be examinations for discovery.

- [44] In order for the Court to make an order for constructive trust of an asset, or for that matter an order of compensation, there must be: an enrichment by one party, in this case Mrs. Larabee; there must be a corresponding deprivation by the other parties, Michael and Patrick who have not been compensated, and there must be an absence of any juristic reason for the enrichment.
- [45] An oral agreement is capable of enforcement: *Hall v. McLaughlin Estate*, 25 E.T.R. (3d) 198.
- [46] In order to have an enforceable secret trust, three certainties in an express trust must exist. These three certainties of an express trust are:
- 1) the intention to the primary donee of an obligation to a secondary donee;
 - 2) the communication is made to the primary donee; and
 - 3) the acceptance of that obligation has been made to the primary donee.

Chinn v. Hanrieder, 2009 BCSC 635.

Discussion

- [47] The evidence of Mrs. Larabee is straightforward. She states that she has never spoken to either Michael or Patrick about ownership of the Gilbert Road Property, nor has she stated that they would have an interest in that property.
- [48] Mrs. Larabee further states that there was never an agreement to pay them money through her estate or in any other manner.
- [49] She also denies that she promised Michael and Patrick that she would make equal provisions in her will for her children.
- [50] She further states that she never discussed her financial affairs with Michael or Patrick, and specifically denies any conversation that took place between her and Michael and Patrick, as alleged by them.
- [51] Mrs. Larabee denies that she was aware of any abuse suffered by Michael and Patrick while in the care of the government, except for one complaint made by Michael which she states she reported.
- [52] Mrs. Larabee denies that she did not want Michael and Patrick back from foster care. She states that social services refused to return Michael and Patrick as the boys were "too disturbed".

- [53] Mrs. Larabee stated that she was bequeathed \$10,000.00 from her father's estate. She stated her brother was the executor, and that she was one of six siblings. Mrs. Larabee states that there was no discussion with her father prior to his death about money, and her father never stated to her that any money she received would be for Michael and Patrick.
- [54] Mrs. Larabee states that Michael lived with her for less than six months after he went into the care of the government. She denies that Michael ever cut the grass. Michael, she says, has never been in her current home, nor in the home she owned prior to her purchase of the Gilbert Road Property.
- [55] Mrs. Larabee denies that Michael telephoned her while living in the United States.
- [56] The evidence of Michael and Patrick is much the same with some variations. Michael, in his affidavit #2, states:
9. ... I moved to the United States of America from 1984 to 2000, and during that time, I kept in telephone contact with my mother usually once a week. My mother told me that Merlyn, Patrick, and myself would share equally in her estate as it was the least she could do, given everything that she had not done for us during our childhood. That promise was repeated during virtually every telephone call and my mother continued to affirm that agreement right up until I was convicted of indecent assault in British Columbia Supreme Court before Madam Justice Gill in 2001. The promise was always made by my mother who talked about how badly she felt that she was not able to provide for us when we were children and that she wanted to provide for all three of us by giving us an equal share of her estate. After my court case, we quit hearing from mother.
- [57] Patrick, in his affidavit #2, states:
9. When I reached adulthood at the age of 19 years and left the care of the Ministry, I had great difficulties "making it". I often visited with my mother although I did not live with her. Throughout the 1990s, I was told by my mother that all three of her children - Merlyn, Michael and myself, would share equally in her entire estate for everything that she had not done for us during our childhood. That promise was repeated numerous times throughout the 1980s and 1990s and my mother continued to repeat it right up to the point where my brother was convicted of indecent assault in British Columbia Supreme Court before Madam Justice Gill in approximately 2001. The conversation was always initiated by my mother. My mother always said how badly she felt that she was not able to provide for us when we were children and that she wanted to provide for all three of us in her estate equally. The conversations were short and went something like this:

Mother: I want you, Michael, and Merlyn to each share in my estate equally.

Patrick: That's good, that's the way it should.

Mother: I will make sure that happens.

Patrick: That's good. I trust you.

[58] These numerous promises made by Mrs. Larabee, as alleged by Michael and Patrick, have no context to them. They are bald assertions.

[59] Mrs. Larabee posed the same interrogatories to each Michael and Patrick. Michael and Patrick gave the same answers to their interrogatories. The interrogatories and answers are as follows:

1. What is the basis for the allegation contained in paragraph 5 of the Statement of Claim that the Plaintiffs and Defendant agreed to as to how the Property would be held?

A. In answer to question 1 of the interrogatories, there were numerous conversations between myself, Patrick Usher ("Patrick"), and the Defendant, Gale Thomsley Larabee ("Gale"); as well as actions, birth, and a verbal agreement (the "Verbal Agreement").

2. If there is a document evidencing the alleged agreement, identify the document by date and description and produce the same if not already produced in your List of Documents.

A. In answer to question 2 of the Interrogatories, there are numerous documents; as well as course of conduct and oral conversations between myself, Patrick, and Gale.

3. On what date did the alleged agreement in paragraph 5 of the Statement of Claim take place?

A. In answer to question 3 of the Interrogatories, the Verbal Agreement was made and confirmed on a number of different dates between 1979 and the mid-1990's.

4. Where was the agreement entered into?

A. In answer to question 4 of the Interrogatories, the Verbal Agreement was made at Gale's residence on E. 8th Avenue and on many social occasions.

5. Who are the parties to the agreement?

A. In answer to question 5 of the Interrogatories, the parties to the Verbal Agreement were myself, Patrick, Gale, and my sister, Merlyn Christine Forrest ("Merlyn").

6. Who was present at the time the agreement was entered into?

A. In answer to question 6 of the Interrogatories, myself, Patrick, Gale, Kirk Larabee, and Merlyn were all present during numerous conversations discussing the Verbal Agreement.

7. What is the basis for the allegation in paragraph 6 of the Statement of Claim that the Defendant would hold her estate in trust for you?

A. In answer to question 7 of the Interrogatories, Gale told me that she would hold 1/3 of her estate in trust for me.

8. When was that intention expressed by the Defendant?

A. In answer to question 8 of the Interrogatories, Gale expressed this intention to me many times, namely from the 1960's to the 1990's.

9. How was the intention expressed?

A. In answer to question 9 of the Interrogatories, the intention was expressed orally.

[60] Had Mrs. Larabee given the promises or made the agreement as alleged by Michael and Patrick in the 1960's, Michael would have ranged from age 6 to 16 and Patrick age 4 to 14.

[61] Mrs. Larabee, for the most part of the 1960's, was poor and ill. Neither Michael nor Patrick state where they and their mother were living when these statements were made, nor do they state what prompted the conversations.

[62] Michael makes the bald assertion that he spoke to his mother once a week while living in the United States. He does not place these telephone conversations with his mother in context; for instance, was there a pattern when the telephone conversations occurred, such as every Sunday, does he recall when he had these telephone conversations with his mother as to where he was living and with whom he was living? None of this information is provided by Michael.

[63] By Michael making these bald assertions without details, requires Mrs. Larabee to make bald denials to allegations.

[64] Patrick was living in the Lower Mainland and saw his mother from time-to-time. Michael did not. You would expect Patrick to remember the occasions when and where these promises were made.

[65] The response to interrogatory #3, Michael and Patrick swear that the verbal agreement was made and confirmed on a number of different dates between 1979 and mid-1990s.

[66] In response to interrogatory #6, Michael and Patrick state that the people present when their mother made the agreement with them were Mrs. Larabee, Michael and Patrick, Kirk Larabee and Merlyn. They were all present "during the numerous conversations discussing the verbal agreement". Based on Michael and Patrick's evidence, this is not possible as Michael was residing in the United States for a period of 16 years. There is no evidence before me as to where Merlyn was residing during the 1960s to the 1990s. Nor do Michael and Patrick state how it came about that Meryln and her brothers were together when these conversations took place, despite Michael living in the United States for a period of time.

[67] Michael's examination for discovery took place January 12, 2010. On this occasion, Michael said: (Q. 158-174):

Q Well -

A See, at the time she told me there was going to be something for us equally she owned the house on East 8th.

Q Okay. So we're going back to East 8th is when you believe there was -

A She had -

Q - some sort of agreement -

A - a house there. She bought a house there.

Q Okay. When was that approximately?

A Oh, that would have been back when I was a kid still and visiting her. I just got out of New Denver. Probably playing in a band and -

Q How old would you be then?

A I might have been 18, 19. Twenty maybe. It was several times I made trips down to her.

Q Okay.

A And I brought friends sometimes with me and introduced her to friends and stuff, and I was experiencing music back then. Like most kids, would try to, you know, do something different, you know.

Q Okay. With respect to paragraph 5 of your Statement of Claim, you're indicating that the intention was expressed and there was an agreement -

A That's correct.

Q - back when -

A She always meant she would -

Q - she was living in the East 8th property?

A Any - any other property she acquired after. She said, "You know - you know, if I sell this house, which is what I'm planning to do, 'cause they're going to build condos here, I'm going to get a good price, and - and then I might buy two more, or I might buy three more. I don't know." She said, "But whatever I end up getting you will all be treated equally. You all - are all equal."

Q And who was present when she made those statements?

A Um, I don't remember. Gerry was in and out sometimes.

Q Was anybody else there that you can recollect?

A I don't remember. I can't remember that far back. She always talked about her Christian plaques and all that stuff and that the church - she told me the church told her not to take us out of the will.

Q Now, paragraph 6 there's a statement that it was the intention of the plaintiffs and the defendant that the defendant would hold her estate in trust for the plaintiffs?

A Yeah.

Q What's the basis for that statement?

A Well, the - in other words, we would hold our share. Third share each.

Q But why did you think you were -

A Becau -

Q - entitled to -

A Because she told us. We were, you know, the blood. You know, there was no mention of nobody else at that time, the Richmond Hospital or Robbie or Lisa Harms [phonetic], or any of them, were not mentioned at that time.

Q Okay. And this -

A Just Merlyn, Patrick and Michael, a third split.

Q Okay. And this was back at the time of the East 8th property that she was living in?

A All the time. She always maintained that - that we'd all be treated equally, whether it was five bucks or a million bucks.

[68] This excerpt from Michael's examination for discovery is the only evidence that Michael specifically refers to as to when and where he had conversations with his mother.

[69] This conversation, based on Michael's estimate of his age, would have taken place in the early 1970's. Mrs. Larabee did not purchase the Gilbert Road Property until 1994, and prior to that she owned and lived in another real property and not on East 8th Street.

[70] Patrick, by all accounts, was living at various times in the Lower Mainland and visited his mother more often than Michael.

[71] Patrick, at his examination for discovery, recollects his first visit to his mother at the Gilbert Road Property in the late 1990's. He stated that Bob Savard was with him when he visited his mother and at that time he was living in New Westminster.

[72] When asked about his memory of the conversations with his mother, Patrick cannot recall. He claims that Mr. Larabee may have been there. He states that after the first visit at the Gilbert Road Property, there were other visits "through to almost the year 2000".

[73] In Patrick and Michael's statement of claim, they allege in paras. 5 and 6 the following:

5. At the time the Property was acquired by the Defendant, or shortly thereafter, the Plaintiffs and Defendant intended and agreed that the Property would be held in the name of the Defendant.

6. At all material times, it was the intention of the Plaintiffs and the Defendant that the Defendant would hold her Estate in trust for the Plaintiffs.

[74] At Patrick's examination for discovery, he was asked whether he and his mother discussed her buying the Gilbert Road Property. He acknowledges that they did and that it was on the telephone, and that she had told him what she paid for it. In that conversation, Patrick states that Mrs. Larabee said nothing else. Patrick answered in response to those questions the following (Q. 84):

Q Now, I note in paragraph 6 of the Statement of Claim that it's alleged that it was the intention that the defendant would hold her estate in trust for you?

A Yeah, for both me and my brother. Yeah.

[75] This evidence is contradictory and untrue. Mrs. Larabee did not own the Gilbert Road Property (described as the Property in the statement of claim) until 1994. Patrick did not visit Mrs. Larabee at the Gilbert Road Property until the late 1990's. When he was asked about the specific recollections of his mother's promise to leave her property to her children, Patrick answered in response to those questions (Q. 108 - Q. 112):

Q Now, is there any document or anything in writing that your mother signed or you signed that indicates that she was giving to you an interest in the property?

A No, there -- there never was. I mean how many people write down on a piece of paper what they're getting from a will? Nobody does that. This was all verbal.

Q And when's the first time that you can recall obtaining this verbal assurance or agreement?

A In -- in around 1990.

Q Okay. Prior to that there was no mention of it?

A Oh, way back. Way, way back. Like in the eighties and -- seventies and eighties she talked about it then, aye.

Q Do you have any specific recollection of that?

A No. No pacific [sic] dates or -- or when it was, but around this time.

Q To the best of your recollection now what was said?

A That we'd all get an equal share and that anything else that was left, like pots and pans and that, that would be divided up in the family.

[76] As I stated earlier, under Material Relied On, in the response filed by Michael and Patrick, certain questions and answers from Mrs. Larabee's examination for discovery held January 11, 2010 are relied on by Michael and Patrick as part of their evidence. Mrs. Larabee, at her examination for discovery, confirms the following:

- Merlyn is poor and relies on social assistance;
- Merlyn has suffered from Schizophrenia her whole life;
- prior to 2004, Mrs. Larabee benefited each of her children equally as it relates to gifts, except Michael because she did not know where he was;
- Mrs. Larabee did not discuss her financial business with her children;
- Mrs. Larabee had contact with Patrick and his friend, Bob Savard, to whom Mrs. Larabee gave money from time to time;
- Mrs. Larabee had contact with her children when they were in foster care on holidays;
- Michael moved to the United States and she did not know where he was until she received a telephone call from his probation officer stating that he was in jail; this related to the sexual assault of his step-children;
- up to Michael's trial, Mrs. Larabee and Patrick got along and were closer;
- Mrs. Larabee was of the view that Michael was a bad influence on Patrick;
- Mrs. Larabee was unaware that Patrick had been in Woodlands;
- Patrick and Bob Savard would visit Mrs. Larabee;
- her sons, Michael and Patrick, were "con men";
- Mrs. Larabee told no one that she cut Patrick out of her estate;
- Patrick visited her while she was hospitalized with the Guillain-Barre Syndrome;
- She did not discuss the house purchase with Patrick;
- Mrs. Larabee sends money to Merlyn's case worker and the case worker buys groceries with Merlyn for her consumption;
- Mrs. Larabee states she did not discuss with anyone dividing her condominium in three portions;
- Michael has never been a beneficiary under her will or wills;
- in January 2004, Mrs. Larabee's estate was the largest it had been in her lifetime;
- social workers recommended to Mrs. Larabee that her children be separated from her due to her health and financial circumstances, and that they would be better off;
- social workers placed conditions on Mrs. Larabee before the children could be returned from the care of the British Columbia government;

- Mrs. Larabee knew she could not handle and look after her sons because Michael was showing himself and Patrick was borderline retarded, as a result, she was not prepared to go to court to get them back;
- she acknowledges that the trust was set up to be in place when she died;
- despite the trust, Mrs. Larabee acknowledges that she could give her money to whomever she wanted.
- the trust was set up to protect any claims from Michael and Patrick, and also to provide for her daughter, Merlyn;
- the alter ego trust was set up for the future and that she could spend her money as she wished;
- Valerie, the wife of Michael, and other people, told Mrs. Larabee that Michael told her and others that Mrs. Larabee was dead, and at one time he stated she was a prostitute and lived on "skid road";
- at Christmas in 1982, Michael was just out of jail;
- Michael was jailed for fraud in Idaho for check cutting in the amount of \$32,000.00 (US);
- Mrs. Larabee says she does not hate her boys, but has no use for them.

[77] I asked Michael and Patrick's counsel what he relied on to support the enrichment that Mrs. Larabee received from Michael and Patrick. In response, counsel stated that as a result of Michael and Patrick being in foster care, Mrs. Larabee's estate was enhanced as she was not financially supporting Michael and Patrick. Nowhere in the statement of claim is this set out as the basis of the constructive trust. The pleading as to the unjust enrichment leading to the constructive trust is at para. 11:

Further, and in the alternative, the Plaintiffs state that the Defendants have been unjustly enriched, without lawful justification or excuse by:

- (a) depriving the Plaintiffs, and each of them, of their respective beneficial interests in the Property; and
- (b) having no legal or equitable juristic reason for the Defendants' benefit and the Plaintiff's deprivation.

[78] In Michael and Patrick's application response they claim at para. 10:

Further, and in the alternative, the application respondents state that the Defendant has been unjustly enriched, without lawful justification or excuse by:

- (a) depriving the APPLICATION RESPONDENTS, and each of them, of their respective beneficial interests in the Estate; and

- (b) having no legal or equitable juristic reason for the Defendants' benefit and the APPLICATION RESPONDENTS' deprivation.
- [79] This claim is brought in the alternative. Neither Michael nor Patrick have contributed to their mother's assets directly or indirectly. Patrick refers to only one event - shutting off the gas so his mother could vacuum. Michael vaguely refers to cutting the grass. These contributions do not support a constructive trust to Mrs. Larabee's assets. That part of the claim by Michael and Patrick fails.
- [80] Michael and Patrick claim that as a result of their conversations with their mother, she agreed that the Gilbert Road Property and Canaccord were held in trust for them and Merlyn. This, they allege, all occurred prior to setting up the alter ego trust. If this is so, then Mrs. Larabee would not be free to transfer these assets; that is, the Gilbert Road Property and Canaccord to her alter ego trust.
- [81] The onus is on Michael and Patrick to prove on a balance of probabilities the verbal agreement they have with their mother. They have not met that onus.
- [82] The evidence given by Michael and Patrick is vague and contradictory. Their real complaint against their mother is her giving them up to foster care, they hold her responsible for the way in which they allege they were treated in foster care, and the way their lives have turned out. However, that is not the claim made by Michael and Patrick.
- [83] Verbal agreements can be made and enforced which could result in an express trust imposed, in this case on Mrs. Larabee's assets as referred to in Chinn.
- [84] However, the evidence falls short of establishing such an agreement. Hall is an example of evidence needed for an oral agreement. In Hall, Mr. Justice Pierce of the Ontario Superior Court of Justice found at para. 96:

In summary, I find that there is clear and satisfactory evidence that Emily and John McLaughlin intended to enter into an agreement and did enter into a binding agreement that the survivor of them would divide his or her estate into two equal shares, to be divided among their beneficiaries, as set out in their wills dated June 12, 1992.

- [85] In finding such an agreement existed between Mr. and Mrs. McLaughlin, Mr. Justice Pierce imposed a constructive trust upon the estate of the late Mr. McLaughlin.
- [86] In Hall, there was specific evidence that over the years Mr. and Mrs. McLaughlin agreed that their individual estates would be left to their respective children.

- [87] In Hall, besides the wills that Mr. and Mrs. McLaughlin executed in accordance with their agreement, there was some written evidence of their intention, and detailed evidence of conversations, not only of the deceased, but others who heard and participated in conversations over a period of 14 years, which determined that Mr. and Mrs. McLaughlin's agreement was never changed. The evidence before Mr. Justice Pierce was not vague, as is the evidence in this case.
- [88] The evidence before me of the alleged agreement is continuous statements made by Mrs. Larabee as to her intention to divide her assets into three portions and hold those assets for the benefit of her children. This is denied by Mrs. Larabee. The evidence does not support the finding of an agreement or a trust. The evidence lacks specificity, and lacks time and place. Some of the evidence is simply unbelievable.
- [89] Michael and Patrick argue that the inter vivos and the alter ego trust are a sham, and that Mrs. Larabee is trying to defeat Michael and Patrick's claims under the Wills Variation Act. Mrs. Larabee is doing that.
- [90] Madam Justice Wedge in Mordo states::
- [300] Eida was advanced in years. Her stated objective was to put the Warehouse property beyond the reach of a WVA claim. She intended to create a trust on the understanding that she would receive the benefit of the property for life, but that it would then pass to Viviane such that Alex could not reach it. As a woman of advanced years, she also understood she may not remain competent to handle her affairs until her death. For that reason, she included a provision in the Trust Indenture that should she become incompetent, the Trustees would deal with the income and Trust property in a manner that would provide for her care until she died. The inclusion of a clause addressing the possibility of her incompetence is indicative, in my view, of a bona fide intention to create a trust.
- ...
- [357] ... Similarly, motive is not relevant to whether the Trust was properly constituted. It is of no consequence that Eida, by creating the Trust, sought to defeat Alex's WVA claim.
- [91] In Hossay, Mr. Justice Mackenzie stated the following:
- [9] In the circumstances of this case, the plaintiff would have no claim against the testator during the testator's lifetime and the claim arises against the estate solely on death. In my view, s. 1 of the Fraudulent Conveyance Act in using the term "creditors and others" contemplates a situation where the person claiming, if not a creditor, at least has some legal or equitable claim against the debtor during the debtor's lifetime. I cannot interpret s. 1 as extending to claims that arise solely on the death of the debtor/testator.
- [10] In my view, therefore, the answer to the question posed must be qualified. If the claim under the Wills Variation Act can be supported by a legal or equitable claim of the plaintiff against the testator prior to the testator's death, that claim may be capable of being transformed into

a claim under the Wills Variation Act after death. On one interpretation at least, Jack supports that proposition and it is not necessary for me today to answer that question definitively. However, if there is no legal or equitable claim which pre-exists the death of the testator, then the claim is solely one arising on death under the Wills Variation Act. Without any prior foundation, the claimant does not have the status of creditor or others within the meaning of s. 1 of the Fraudulent Conveyance Act.

- [92] Other than the vague verbal statements, there is no evidence to support an express trust or a contractual agreement between Michael and Patrick and their mother, Mrs. Larabee. There is neither evidence of an agreement, nor any consideration for that agreement. As a result, Mrs. Larabee was free to set up her alter ego trust to benefit her daughter, Merlyn, and defeat any future claims as against Michael and Patrick.
- [93] The plaintiffs, Patrick Usher and Michael Usher's, action is dismissed with costs to the defendants, Gale Thomsley Larabee and Gale Thomsley Larabee, trustee of Gale T. Larabee Alter Ego trust.
- [94] I order that the certificate of pending litigation BB1053586, filed by the complainants, Patrick Usher and Michael Usher, against the lands and premises more particularly known and described as:

P.I.D. 012-358-312

Strata Lot 27, Section 17 Block 4 North Range 6 West New Westminster District Strata Plan NW2887 together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on Form 1.

be removed from Certificate of Title No. BW052729.

- [95] Such costs are to be Appendix B of the Supreme Court Civil Rules, Scale B.

"H.C. Hyslop J."

HYSLOP J.

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Prepared on 29 October 2026 · Esheria