

CANADA / JUDGMENT

Weaver v. Weaver Estate

2019 BCSC 132

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 132 Weaver v. Weaver Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Weaver v. Weaver Estate,

2019 BCSC 132

Date: 20190201

Docket: S75715

Registry: Nanaimo

Between:

Corey Allen Weaver and Laurie Ann Gunter

Plaintiffs

And:

Vivian Gertrude Elizabeth Storey, as Executor of the Will and Trustee of the Estate of Carvel Alton Weaver, Deceased

Defendant

And:

Vivian Gertrude Elizabeth Storey, Marilyn Dalbergs and Steven Alton Weaver, as Beneficiaries of the Estate of Carvel Alton Weaver, Deceased

Defendants

And:

Corey Allen Weaver, Laurie Ann Gunter, Vivian Gertrude Elizabeth Storey, as Executor of the Will and Trustee of the Estate of Carvel Alton Weaver, Deceased, Vivian Gertrude Elizabeth Storey and Marilyn Dalbergs as Beneficiaries of the Estate of Carvel Alton Weaver, Deceased

Defendants by Counterclaim

Corrected Judgment: The text of the judgment was corrected at paragraphs 11 and 13 on February 15, 2019.

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

Counsel for the Plaintiffs:

J. Millbank

Counsel for the Defendant, Vivian Elizabeth Gertrude Storey:

H.A. Taylor

Counsel for Steven Weaver:

Steven Weaver

(In Person)

Place and Date of Hearing:

Nanaimo, B.C.

January 10, 2019

Place and Date of Judgment:

Nanaimo, B.C.

February 1, 2019

OVERVIEW

- [1] This case involves a dispute over the distribution of the estate of Carvel Alton Weaver who died on July 24, 2014. Given that so many of the parties share the same last name, I will use their first names in this judgment for ease of reference.
- [2] The plaintiffs Corey Allen Weaver and Laurie Ann Gunter are two of Carvel's three children who were living at the time of his death. The defendant Steven Alton Weaver is the third living child.
- [3] The value of Carvel's estate at the time of his death was approximately \$30,000. He was not married at the time of his death. In his Will, Carvel left small bequests to his three living children, in the amount of \$5,000 each.

- [4] Prior to his death, Carvel transferred most of his assets to his cousin, the defendant Vivian Gertrude Elizabeth Storey, by way of inter vivos gifts. The assets in issue are a property on Hornby Island and funds in a number of joint and registered bank accounts (collectively the "Disputed Assets"). The value of the Disputed Assets is over \$600,000.
- [5] The relief sought by the plaintiffs in the action includes a declaration that Vivian holds the Disputed Assets on resulting trust for Carvel's estate and the beneficiaries thereof. The plaintiffs ultimately seek to vary Carvel's will, but a first step to variation is determining what assets properly form part of Carvel's estate.
- [6] In addition to the claim based on a resulting trust, the plaintiffs advance other bases of relief in their notice of civil claim. Of particular note, the plaintiffs seek compensation from Vivian on the basis of unjust enrichment.
- [7] Vivian filed the present application pursuant to Rule 9-7 of the Supreme Court Civil Rules (the "Rules") seeking judgment on the resulting trust claim in isolation from the remaining matters raised in the action. The relief sought in Vivian's summary trial application consists of declarations confirming her legal and beneficial ownership of the Disputed Assets and confirming that they are not held on a resulting trust for Carvel's estate. Vivian argues that the question of whether the Disputed Assets are held on resulting trust for Carvel's estate is a discrete issue that can be resolved on the basis of affidavits. She argues that the resolution of this issue in advance of trial would simplify and advance the litigation.
- [8] The plaintiffs agree that the resulting trust issue can be resolved through a summary trial, and they join with Vivian in requesting a ruling on this limited issue. There is presently a five day trial scheduled for this action during the week of February 25, 2019. The plaintiffs say that having a ruling on the resulting trust issue in advance of trial would assist the parties in focussing the issues.
- [9] Steven appeared on the application, without counsel, but did not file a formal response. Steven made a brief submission to the court in which he expressed the view that his father's wishes in transferring his assets to Vivian should be respected. The defendant Marilyn Dalbergs, who is Carvel's sister, did not appear and has not participated in this proceeding.

BACKGROUND FACTS

- [10] The background facts are largely uncontentious. There are no conflicts in the evidence that I must resolve to decide the resulting trust issue. There is disagreement as to what inferences I can draw from the documents with respect to Carvel's intention in transferring assets to Vivian. I will address those disagreements later in this judgment.

Relationships between the parties

Carvel's relationship with the plaintiffs

- [11] The plaintiffs and Steven had a difficult childhood. Carvel and their mother, Heather, separated in 1974 when the children were very young. Heather left the family home. The oldest child, Steven, was 7 years old at the time and the youngest, Laurie, was an infant. Carvel and Heather had four children. The fourth child was the plaintiffs' brother Mark who committed suicide in 2010.
- [12] The four children were placed in foster care in January 1975. As reported in contemporaneous records of the Department of Human Resources, the circumstances requiring removal of the children were: "Mother absent, father unable to care for children due to work, housing condition very unsatisfactory, child neglect situation".
- [13] The children remained in foster care until February of 1976, when they were returned to Carvel's care. At that point, Carvel made a private arrangement for all four children to reside with a "Mrs. Burns", with their room and board paid by Carvel. Corey and Laurie say that Carvel removed Mark from Mrs. Burns' care when he was 12 years old, and that Mark thereafter resided in successive foster homes. The other three children were raised by Mrs. Burns until adulthood, and only occasionally visited with Carvel.
- [14] Corey says that as a teenager, he spent more time with Carvel at a property located on Gunpowder Trail, Hornby Island (the "Hornby Property"). Carvel moved to the Hornby Property in 1987, and acquired sole ownership of it in 2000. The Hornby Property is one of the Disputed Assets.
- [15] Corey's evidence as to the unpaid work he performed on the Hornby Property as a teenager forms at least part of the plaintiffs' claim for compensation for unjust enrichment in this action. Given that the unjust enrichment claim is not before me on this application, I will not review this evidence.
- [16] Corey and Laurie both depose that Carvel was an emotionally remote father, that he could be cruel and manipulative, and that he had difficulty controlling his anger. Corey says that Carvel was also physically abusive to him. Both Corey and Laurie say that Carvel provided very little to his children by way of financial support beyond paying for their room and board with Mrs. Burns.
- [17] Notwithstanding their difficult childhood, Corey and Laurie say that they maintained contact with Carvel in their early adulthood, albeit on an intermittent basis. Laurie says that she developed a father-daughter relationship with Carvel after the birth of Laurie's own children in the 1990's. She says Carvel would come and visit her family, and she would bring her children to visit Carvel at the Hornby Property. Corey says that his relationship with Carvel started to break down in or around 1994, but that by 2001 their relationship had improved to the point that Corey invited Carvel to his wedding.

- [18] Corey says that his relationship with his father came to a final end in 2006 after Carvel threatened to put a lien on Corey's home when Corey did not immediately repay a loan from Carvel towards the purchase of the house. Laurie's relationship with Carvel ended after Mark's suicide in 2010. Laurie says that she became angry and hurt when Carvel refused to pay for the cremation and funeral service that Laurie wished to arrange, and then unilaterally arranged for the cremation and scattering of Mark's ashes on Hornby Island without the presence of other family members. Laurie and other family members held their own celebration of life for Mark, and placed an obituary in the paper that did not mention Carvel.
- [19] Vivian's evidence is consistent in stating that Corey had no contact with Carvel from 2006 until the time of Carvel's death in 2014, and that Laurie had no further contact with Carvel after Mark's death in 2010. There is a dispute between the plaintiffs' evidence and Vivian's as to the circumstances surrounding Mark's cremation and funeral. I do not need to resolve this dispute for the purpose of the present application.

Carvel's relationship with Vivian

- [20] Vivian is Carvel's cousin. However, Vivian and Carvel were raised as siblings from the time of Vivian's birth. They are a year apart in age. Vivian deposes that she and Carvel only discovered that they were not biological siblings when Vivian was 58 and Carvel was 59 years of age.
- [21] Vivian says that she and Carvel had a very close relationship from the time they were children. Through their adulthood, Vivian says that she and Carvel saw each other two to three times a year and spoke on the phone several times a week. Vivian's evidence of her close relationship with Carvel was corroborated by the evidence of Carvel's neighbours on Hornby Island and the solicitor who prepared Carvel's estate planning documents.
- [22] Vivian says that she was residing in Christina Lake when Carvel was diagnosed with cancer in 2011. He began cancer treatments in Vancouver in late 2012 and early 2013. Vivian says that she regularly travelled back and forth between Christina Lake and Hornby Island starting in the summer of 2013 to assist Carvel through his illness.

The joint bank accounts and registered accounts

- [23] On October 14, 2008, Carvel and Vivian opened a joint chequing account at the Grand Forks District Savings Credit Union ("GFCU"). On the application form, signed by both Carvel and Vivian, they confirmed that the right of survivorship was to apply to the account and that the account was the parties' joint property. Carvel opened various other accounts at the GFCU prior to his death and moved funds to and from the chequing account.
- [24] At the time of Carvel's death, Carvel and Vivian had three joint accounts at the GFCU: the chequing account and two term deposits (the "GFCU Joint Accounts"). The applications for the two term deposits indicated the agreement of Vivian and Carvel that the right of

survivorship applied to these accounts. Although Vivian and Carvel did not sign these applications, the evidence is that the GFCU will permit a member to give remote instructions that other accounts (such as term deposits) to be opened provided that the member has signed an original member application.

- [25] At the time of his death, Carvel also had a number of registered accounts at GFCU, consisting of tax free savings accounts and registered retirement income funds, which listed Vivian as Carvel's beneficiary (the "GFCU Registered Accounts"). With registered accounts, the beneficiary is designated when the account is opened.
- [26] Finally, at the time of Carvel's death, Carvel and Vivian had a joint chequing account at CIBC which was originally opened in 1998 (the "CIBC Joint Account"). The original account agreement was no longer available, but the CIBC provided a copy of the original signature card showing Carvel and Vivian as joint signatories.

Carvel's estate planning and the evidence of Andrea Rowe

- [27] In 2011, Carvel was diagnosed with cancer. This apparently prompted him to turn his mind to how his estate should be distributed after his death. Carvel retained Andrea Rowe, a solicitor in Courtney, B.C. who practices in the areas of real estate and estate planning and administration.
- [28] On October 19, 2012, Ms. Rowe sent Carvel a letter that enclosed a Wills Checklist which Ms. Rowe asked Carvel to complete in advance of their first meeting. Vivian completed the Checklist, based on Carvel's instructions, on October 24, 2012. Carvel brought the completed Checklist to his first meeting with Ms. Rowe on October 31, 2012, along with some bank and property records.

The October 31, 2012 meeting

- [29] Ms. Rowe deposes that she met with Carvel on October 31, 2012 in her office. Carvel arrived with Vivian, but Ms. Rowe met only briefly with the two of them and then had a private meeting with Carvel to ascertain his instructions. Ms. Rowe took notes of this meeting. The notes are appended to her affidavit.
- [30] Ms. Rowe's evidence is that Carvel explained to her that he had recently been diagnosed with cancer and that he wanted to get his estate plan in order. He stated that he had been estranged from his children for a number of years. He described having a close relationship with Vivian. Carvel expressed to Ms. Rowe that he wanted to ensure that the bulk of his estate, including the Hornby Property, was given to Vivian and not to his children. He sought her advice on how to achieve that end.

- [31] Ms. Rowe says that Carvel specifically discussed with her that he had accounts and investments at the CIBC and the GFCU near Vivian's home. He said that he had set up his accounts as "joint" (with a right of survivorship) and also designated Vivian as beneficiary on his registered accounts so that she would benefit from those accounts if Carvel predeceased her.
- [32] Ms. Rowe says she explained to Carvel her concerns with respect to the Wills Variation Act, and Carvel asked her "What else can I do to make [the] will stand up?" Ms. Rowe discussed with Carvel the mechanics of transferring the Hornby Property into Carvel and Vivian's joint names. Ms. Rowe says it is her standard practice to explain to clients what it means to put property into a joint tenancy and how the right of survivorship works on death.
- [33] Ms. Rowe says that it was "very clear" to her from her meeting with Carvel and review of the completed Wills Checklist that Carvel's intention was to ensure that the bulk of his estate, especially his home and financial assets, was left to Vivian save and except a gift of \$5,000 to each of his three living children.
- [34] Carvel also instructed Ms. Rowe that he wished her to prepare a Representation Agreement, appointing Vivian to make health care decisions on his behalf.

The real estate and estate planning documents

- [35] Based on her meeting with Carvel on October 31, 2012, Ms. Rowe gave instructions to her assistant as to the documents to be prepared to give effect to Carvel's estate plan.
- [36] In relation to the Hornby Property, the plan was to transfer the property to Carvel and Vivian as joint tenants, and prepare a Deed of Gift, Statutory Declaration, a Power of Attorney for Vivian to sign in favour of Carvel (limited to the Hornby property), and a Form A transfer back to Carvel. These documents were intended to have the effect of transferring the right of survivorship in the Hornby Property to Vivian, but not the immediate beneficial interest. The Hornby Property was to remain the principal residence of Carvel until his death, at which time Carvel's interest would be extinguished and full ownership would pass to Vivian as the remaining joint tenant.
- [37] Ms. Rowe says that she also instructed her assistant to prepare a will for Carvel, with Vivian as executor and Marilyn as alternate executor. Ms. Rowe instructed that the Will was to outline that it was Carvel's intention that all assets, including real estate and bank accounts, that he held jointly with Vivian were true joint accounts with rights of survivorship and not held in trust for his estate.
- [38] Ms. Rowe sent a letter to Carvel on or about November 13, 2012, which enclosed his draft estate planning documents. Ms. Rowe's letter advised that if Carvel found the draft documents to be acceptable, he should contact Ms. Rowe's office to schedule a time to come in to have the originals executed.

Ms. Rowe's November 15, 2012 meeting with Carvel and the execution of the estate planning Documents

- [39] On the morning of November 15, 2012, Carvel arrived at Ms. Rowe's office without a prior appointment. Carvel stated that he had to go to Vancouver that day for radiation treatments and wished to execute the estate documents before he left.
- [40] In accordance with Carvel's request, Ms. Rowe reviewed the estate documents with Carvel on November 15, 2012. Ms. Rowe says that it is her standard practice to review estate planning documents paragraph by paragraph with her clients. Following a review of the documents, Carvel signed his Last Will, the Representation Agreement, and the Deed of Gift, Statutory Declaration and Form A transfer in relation to the Hornby Property. All of these documents were signed by Carvel at Ms. Rowe's office on November 15, 2012.
- [41] Carvel's November 15, 2012 Last Will appointed Vivian as Executor and Marilyn as alternate executor. The Last Will stated Carvel's intention in relation to assets he jointly owned with Vivian:

I declare that I am aware of the legal significance of the Right of Survivorship as it pertains to joint assets. I declare that any real estate or other assets (for instance, bank accounts) which are owned jointly with Vivian are deliberately held as such so that the Right of Survivorship will apply in the event of my death so that if Vivian survives me, she will own such assets, absolutely, and not on any resulting trust for my estate.

- [42] Carvel's Last Will contained the \$5,000 specific bequest to each of Carvel's living children, with Vivian as sole beneficiary of the residue of the estate and Marilyn as alternate beneficiary.
- [43] The recitals in the Deed of Gift that Carvel executed on November 15, 2012 reflect Carvel's wish to "make an immediate transfer of the right of survivorship" to Vivian in relation to the Hornby Property but not to transfer beneficial ownership. The Deed of Gift includes the following provisions:
1. Carvel hereby transfers the Land to himself and Vivian as joint tenants and in so doing makes a gift of the right of survivorship but no transfer of the beneficial ownership.
 2. Carvel will sign all further documents and instruments as may be required to effect this transfer (including a Form A Transfer and Property Transfer Tax Form).
 3. Carvel and Vivian will sign a Power of Attorney by Vivian in favour of Carvel so that Carvel may deal with the Land, unilaterally.
 4. Vivian will sign a Form A Transfer transferring the Land to Carvel to be held by Carvel.
 5. This Deed of Gift constitutes the legal transfer of the Land by Carvel to Carvel and Vivian as joint tenants. By signing this Deed of Gift, Vivian acknowledges the limited interest being transferred to her.

[44] Ms. Rowe deposes that it is her practice to prepare the form of Statutory Declaration that Carvel signed on November 15, 2012 in order to make the intentions of the donor clear and specific. In his November 15, 2012 Statutory Declaration, Carvel states as follows in relation to the transfer of the Hornby Property:

3. Prior to making this decision, I was advised about the difference between an outright gift, creating a tenancy in common, creating a joint tenancy to transfer the right of survivorship (only) and making a gift under my Will.
4. I chose joint tenancy to grant the right of survivorship because I want Vivian to be able to deal with my Home immediately after my death and I do not want my Home to form part of my estate. Still, I do not intend to grant any present beneficial interest in my Home to Vivian (other than the right of survivorship).

. . . .

6. I have required, as a condition of the transfers described above, that Vivian:
 - a. grant me a limited enduring Power of Attorney so that I may deal with my Home as I decide in my absolute discretion and without interference from Vivian; and
 - b. enter into a Bare Trust Agreement setting out that any interest Vivian may have in the home during my lifetime, other than the right of survivorship, is held by Vivian for my benefit.

[45] On Carvel's instructions, Ms. Rowe sent Vivian the documents that required her signature. Vivian returned the executed documents, including the Deed of Gift, Form A Transfer, and Power of Attorney, in early December 2012. The transfer of the Hornby Property into joint tenancy was registered at the Land Title Office on December 12, 2012.

[46] Ms. Rowe did not prepare a separate document for Vivian to sign called a "Bare Trust Agreement", as referenced in clause 6(b) of the Statutory Declaration. Ms. Rowe deposes that this was an oversight on her part. In any event, Ms. Rowe considered that the basic terms of a Bare Trust Agreement were already encompassed in the Deed of Gift.

[47] Ms. Rowe provided a final reporting letter to Carvel on January 17, 2013. Ms. Rowe confirmed that the transfer of the Hornby Property was now registered, and that the Property was held by Carvel and Vivian as joint tenants. The letter included the following advice:

Holding the home in joint tenancy with rights of survivorship will avoid probate on the death of the first joint tenant to die. If you die first, on your death Vivian will be the sole owner of the Home as the surviving joint tenant.

[48] Ms. Rowe says that this is the last contact she had with Carvel prior to his death. Carvel did not contact Ms. Rowe at any subsequent time to revoke his instructions.

Carvel's estate on death

- [49] Carvel died on July 24, 2014. A grant of probate of Carvel's Last Will was issued out of the Courtenay Registry on December 2, 2014, to Vivian as Carvel's executor. The gross value of Carvel's estate, excluding the Disputed Assets, was \$32,652 with liabilities of \$2,829 for funeral expenses.
- [50] The 2018 assessed value of the Hornby Property is \$407,000. There is approximately \$225,000 in the joint and registered bank accounts in which a right of survivorship was assigned to Vivian. The issue on this summary trial application is whether Vivian holds these assets on a resulting trust for the benefit of Carvel's estate.

ISSUES

- [51] The following issues arise for determination:

- I. Is the issue of whether the Disputed Assets are held on a resulting trust suitable for resolution on a summary trial?
- II. If so, does Vivian hold the Disputed Assets on a resulting trust for the benefit of Carvel's estate?

ISSUE I: SUITABILITY FOR SUMMARY TRIAL

- [52] As noted, the plaintiffs and Vivian are in agreement that the issue of whether the Disputed Assets are held on a resulting trust should be resolved on a summary trial. Of course, the parties' agreement does not bind the court. I must still consider whether the issue is suitable for summary trial having regard to the criteria in Rule 9 7(15)(a) of the Rules.
- [53] Rule 9-7(15)(a) of the Rules provides:
- (15) On the hearing of a summary trial application, the court may
- (a) grant judgment in favour of any party, either on an issue or generally, unless
 - (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
 - (ii) the court is of the opinion that it would be unjust to decide the issues on the application.
- [54] A court may decline to decide a discrete issue in a case on a summary trial application if it is found to be unfair or impractical to "litigate in slices". However, there is no presumption against granting judgment on discrete issues under Rule 9 7(15). It may be efficient to determine a discrete issue in advance of trial and in isolation from the remaining issues, provided this can be done without impacting the remaining issues in dispute: *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485 at paras. 95-98. Where the issues are intertwined, the case for a summary trial of a discrete issue is less compelling.

- [55] In the course of the hearing, I expressed concern to the parties as to whether the summary trial application was suitable in the circumstances. My concern arose from the fact that much of the argument and the evidence of the plaintiffs appeared to be directed at issues that will not be resolved by the present application, including the unjust enrichment claim. I was assured by counsel that the plaintiffs wished to have a decision on the limited issue of resulting trust, and that this would assist the parties in moving forward.
- [56] In the circumstances, I conclude that it would be suitable to resolve the issue raised by Vivian on a summary trial. There are no conflicts in the evidence that would prevent me from deciding the resulting trust issue and the issue is a discrete one that can be resolved in isolation from the remaining issues in dispute. Further, I heard an entire day of argument on the point, and the time and efforts of the parties and the court would have to be duplicated at trial if I do not decide the issue now. I accept the assurances of counsel a ruling from the court on this summary trial application will narrow the issues in the trial and improve settlement prospects.

ISSUE II: ARE THE DISPUTED ASSETS HELD ON A RESULTING TRUST?

The legal framework

The presumption of resulting trust

- [57] The doctrine of resulting trust is potentially triggered in the present case by the fact that the Disputed Assets were gratuitously transferred to Vivian by Carvel; that is, the assets were transferred for no consideration. The law presumes that such a gratuitous transfer is not intended to be a gift, rather that the transferee holds the property on a resulting trust for the transferor.
- [58] The effect of the presumption is summarized by the Supreme Court of Canada in *Pecore v. Pecore*, 2007 SCC 17 [Pecore] as follows:
- [24] The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see *Waters' Law of Trusts*, at p. 375, and *E. E. Gillese and M. Milczynski, The Law of Trusts* (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.
- [25] The presumption of resulting trust therefore alters the general practice that a plaintiff (who would be the party challenging the transfer in these cases) bears the legal burden in a civil case. Rather, the onus is on the transferee to rebut the presumption of a resulting trust.
- [59] The operation of the presumption therefore shifts the onus to the transferee to lead evidence of "the transferor's contrary intention on the balance of probabilities" in order to rebut the presumption: *Pecore* at para. 43. As further explained in *Pecore*:

[44] As in other civil cases, regardless of the legal burden, both sides to the dispute will normally bring evidence to support their position. The trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention. Thus, as discussed by Sopinka et al. in *The Law of Evidence in Canada*, at p. 116, the presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities.

[Emphasis added]

[60] In *Fuller v. Fuller Estate*, 2010 BCCA 421 [Fuller], our Court of Appeal confirmed that the court should only rely on the presumption of resulting trust where there is insufficient evidence to establish the transferor's actual intent at the time of the transfer:

[47] The effect of the presumption only becomes evident after all the evidence, both direct and circumstantial, on the surrounding circumstances in which the transfer was made, has been weighed. Only if the trial judge is unable to reach a conclusion about the transferor's actual intention at the time of the transfer, will the presumption be applied to tip the scales in favour of the transferor or his estate [citations omitted] .

[61] Evidence of intention arising subsequent to the transfer may be considered if it is relevant to the intention of the transferor at the time of the transfer. The court must assess the reliability of the evidence to determine what weight it should be given, guarding against evidence that is self-serving or reflects a change in intention: *Pecore* at para. 59.

[62] If the evidence establishes, on a balance of probabilities, that the transferor's actual intention was to gift the property, then the presumption has been rebutted. It is the intention of the donor at the time of the transfer that is the governing consideration. To rebut the presumption of resulting trust, the donee must show not only that a gift was intended, but that the donor has done everything necessary to transfer the property to the donee and render the transfer legally binding: *McKendry v. McKendry*, 2017 BCCA 48 [McKendry] at para. 31.

Joint tenancy and the right of survivorship

[63] The fact that Vivian is the registered owner of the Hornby Property does not foreclose the claim advanced by the plaintiffs that Vivian holds the Property on a resulting trust for Carvel's estate. The weight of authority from our Court of Appeal supports that the presumption of resulting trust applies to transfers of real property in British Columbia: *Fuller* at para. 43. The presumption of indefeasible title in s. 23(2) Land Title Act, R.S.B.C. 1996, c. 250, may be rebutted by the operation of a resulting trust: *Brar v. Gill*, 2017 BCSC 186 at para. 34; *Suen v. Suen*, 2013 BCCA 313 at para. 34.

[64] Before considering the application of the resulting trust doctrine to the Hornby Property, it is useful to start with a review of the nature of a joint tenancy and the operation of the right of survivorship as it relates to real property. The relevant law is summarized by our Court of Appeal in McKendry:

[27] Joint tenancy is a form of concurrent property ownership. When the "four unities" of title, interest, time and possession are present, co-owners hold an equal interest in property as a unified whole: *Zeligs v. Janes*, 2016 BCCA 280 at para. 38. However, parties may hold legal title to property as joint tenants while beneficial ownership is held differently. For example, a mother and son may own real property as joint tenants in law while the mother alone owns the beneficial interest. In such circumstances, as Rothstein J. noted in *Pecore v. Pecore*, 2007 SCC 17 at para. 4:

... The beneficial owner of property has been described as "the real owner of property even though it is in someone else's name": [citation omitted] ...

[28] The principal characteristic of joint tenancy is the right of survivorship. When a joint tenant dies, his or her interest in property is extinguished. If there is more than one surviving joint tenant, they continue to hold the property as joint tenants. The last surviving joint tenant takes full ownership of the property.

[29] So long as the requirements of a binding gift are met, the owner of property may, during his or her lifetime, make an immediate gift of a joint tenancy, including the right of survivorship. This is so regardless of whether the donee of the gift is to hold it for the benefit of the donor while he or she is alive. When gifted inter vivos, the right of survivorship is a form of expectancy regarding the future. It is a right to what is left of the jointly-held interest, if anything, when the donor dies: *Simcoff v. Simcoff*, 2009 MBCA 80 at para. 64; *Bergen v. Bergen*, 2013 BCCA 492 at para. 37; *Pecore* at paras. 45-53.

[Emphasis added]

[65] A right of survivorship is inherent in the creation of a joint tenancy. Where a joint tenancy continues until the death of a joint tenant the interest of the deceased joint tenant is extinguished and passes to the surviving tenant: *Fuller* at para. 51. The fact that the beneficial interest of the transferee who is gifted the right of survivorship may arise only on the death of the transferor does not mean that the gift is testamentary in nature. The right of survivorship vests at the time of the creation of the joint tenancy and therefore is a "complete and perfect inter vivos gift": *Fuller* at para. 53, citing *Pecore*.

Joint bank accounts and the right of survivorship

[66] *Pecore* specifically concerned the application of the presumption of resulting trust in the context of joint bank and investment accounts where only one account holder deposited and controlled funds. The facts of the case involved an aging father who placed his mutual funds, bank account and income trusts in joint accounts with his adult daughter, who was

one of his three children. The question that arose was whether the father intended to make a gift to his daughter of the beneficial interest in his accounts on his death or whether he intended that his daughter hold the accounts in trust for the benefit of his estate.

[67] The Court in *Pecore* noted that there may be a number of reasons why an individual would gratuitously transfer funds into a joint account that is controlled by the transferor with the intent to gift the right of survivorship. The reasons include a wish to avoid probate fees or to facilitate after-death disposition. The Court rejected the view taken by some courts that the gift of survivorship in such circumstances is testamentary in nature. Rothstein J, for the majority, stated:

[48] Courts have understandably struggled with whether they are permitted to give effect to the transferor's intention in this situation. One of the difficulties in these circumstances is that the beneficial interest of the transferee appears to arise only on the death of the transferor. This has led some judges to conclude that the gift of survivorship is testamentary in nature and must fail as a result of not being in proper testamentary form: [citations omitted] For the reasons that follow, however, I am of the view that the rights of survivorship, both legal and equitable, vest when the joint account is opened and the gift of those rights is therefore *inter vivos* in nature.

....

[50] Some judges have found that a gift of survivorship cannot be a complete and perfect *inter vivos* gift because of the ability of the transferor to drain a joint account prior to his or her death: [citations omitted], I would reject this view. The nature of a joint account is that the balance will fluctuate over time. The gift in these circumstances is the transferee's survivorship interest in the account balance - whatever it may be - at the time of the transferor's death, not to any particular amount.

[68] The presumption of a resulting trust means that it will fall to the surviving joint bank account holder to prove that the transferor intended the transferee to acquire the balance of the account on the transferor's death. The fact that a transferor controlled and used the funds during their lifetime is not inconsistent with an intention to gift the right of survivorship: *Pecore* at para. 66.

Application of the law to the Disputed Assets

[69] Before turning to consideration of whether the Disputed Assets are held by Vivian on a resulting trust, I will address an overarching argument that was a persistent theme of the plaintiffs' submissions.

[70] Counsel for the plaintiffs placed considerable emphasis on the unfortunate circumstances of the plaintiffs' childhood and Carvel's alleged mistreatment of his children. The plaintiffs argue that it is inequitable to allow Carvel to disinherit his children entirely, without even the possibility of a wills variation application, through the use of the estate planning tools

that he has employed. The plaintiffs suggest that Carvel was permitted to amass wealth at least in part by abdicating his financial obligations to his children, and it is unfair to allow Vivian to benefit at their expense when the plaintiffs have so consistently been deprived of parental support over time.

- [71] These arguments appear to me to be directed at issues that are not before me. I understand the law of resulting trust to require me to ascertain Carvel's actual intentions in making the inter vivos transfers to Vivian and to ensure Carvel took all necessary steps to perfect the transfers. The plaintiffs did not draw my attention to any cases in which courts have applied the presumption of resulting trust on the basis of general equitable concerns in the face of clear evidence of intention that would otherwise rebut the presumption. The Supreme Court of Canada's decision in *Kerr v. Baranow*, 2011 SCC 10 provides support for the contrary proposition; that is, that general equitable considerations are more appropriately addressed through principles of unjust enrichment.
- [72] The parties expressly agreed that the plaintiff's claim for compensation against Vivian based on unjust enrichment would be left for resolution at trial. By agreement of the parties, I will not address the plaintiffs' remaining claims on this summary trial application. I do not consider the plaintiff's arguments based on Carvel's moral, legal or equitable obligations to the plaintiffs to be relevant to the determinations I am asked to make.

The Hornby Property

- [73] I have already reviewed (at paras. 36-47) the circumstances by which the Hornby Property was transferred to Vivian and Carvel as joint tenants in 2012. The evidence shows a clear intention on Carvel's part to gift the right of survivorship in the Hornby Property to Vivian. By way of summary:
- a) The Deed of Gift signed by Carvel on November 15, 2012, the same day he signed the Form A transfer, expressly states Carvel's intention to "gift the right of survivorship" to Vivian;
 - b) Carvel's intention to gift the right of survivorship to Vivian is confirmed in the Statutory Declaration he signed on November 15, 2012;
 - c) Ms. Rowe deposes that Carvel told her that he had a close relationship with Vivian and was estranged from his children and wished to ensure that the Hornby Property went to Vivian and did not form part of his estate on death; and
 - d) Ms. Rowe deposes that Carvel instructed her to proceed with the registration of the transfer once Vivian signed and returned the documents and those instructions were never revoked.
- [74] There is further confirmatory evidence of Carvel's intentions from his former neighbour, Katherine Gibson, and a long-time friend, Jacob Crocker. Both of these witnesses depose to discussions with Carvel in which he explained his estrangement from his children and his desire to ensure that Vivian received his assets after Carvel's death. Ms. Gibson recalls that, at some point in time, Carvel told her he was going to Courtenay to speak to a lawyer and

that he had to "spend a fortune" in legal fees to ensure the transfer of assets to Vivian was done right.

The Bare Trust Agreement

[75] The plaintiffs rely heavily on the fact that Vivian failed to execute the Bare Trust Agreement anticipated by Carvel's November 15, 2012 Statutory Declaration. As noted, Ms. Rowe's evidence is that this was an oversight on her part.

[76] The intent of the Bare Trust Agreement, as explained by Ms. Rowe, was to provide a further level of assurance that Vivian could not act unilaterally in relation to the Hornby Property during Carvel's lifetime. Ms. Rowe gave the following evidence of the purpose of the Statutory Declaration and Bare Trust Agreement:

It is my practise to prepare the Statutory Declaration found in Exhibit "I", to make clear and explicit the intentions of the donor on a contemporaneous basis. In particular, it is meant to assist third parties like the Canada Revenue Agency, to understand the nature of the gift made by the Deed of Gift and the limitations on that gift.

The Statutory Declaration refers to a "Bare Trust Agreement". Like the Statutory Declaration, my standard Bare Trust Agreement does not expand on the gift or create the gift. It makes clear that all profits, rents, accretions, etc., are for the account of the donor and the donee must act on the directions of the donor and cannot act unilaterally. In this case, Carvel and Vivian did not sign a Bare Trust Agreement, but Vivian did sign a Form A Transfer (back to Carvel) and a Power of Attorney in favour of Carvel, in respect of the Hornby Property. In this way he had control of the Hornby Property .

[77] It is difficult to see how the absence of a Bare Trust Agreement undermines the consistent evidence of Carvel's actual intention to transfer the right of survivorship in the Hornby Property to Vivian. As noted, Ms. Rowe's evidence is that Vivian's failure to execute a separate Bare Trust Agreement was an oversight on Ms. Rowe's part, and one that Ms. Rowe considered inconsequential in terms of giving effect to Carvel's intention.

[78] In their written argument, the plaintiffs suggest that the gift to Vivian of the right of survivorship in the Hornby Property was "specifically subject to a precondition" that was not met. This appears to advance an alternative argument that Carvel's gift to Vivian, even if intended, was conditional on Vivian entering into a further Bare Trust Agreement. On this theory, as I understand it, in the absence of an executed Bare Trust Agreement the gift was not legally effective. There are difficulties with this argument, apart from the fact that it is not pleaded.

[79] First, the operative document is the Deed of Gift, which already encompasses the terms of the Bare Trust Agreement that were anticipated by the Statutory Declaration. The Deed of Gift transferred the right of survivorship in the Hornby Property to Vivian, but not the immediate beneficial ownership. In signing the Deed of Gift, Vivian acknowledged "the

limited interest being transferred to her". The Deed of Gift thus set out that any interest Vivian had in Carvel's home during his lifetime, other than the right of survivorship, was held by Vivian for Carvel's benefit.

- [80] Second, the transfer of legal title to the Hornby Property to Carvel and Vivian as joint tenants was completed through the registration of the transfer in the Land Title Office. Carvel maintained control of the Hornby Property during his lifetime, and protected his beneficial ownership, through the Power of Attorney and Form A transfer back, both of which were documents that Vivian signed. Vivian and Carvel held the Hornby Property as joint tenants until Carvel's death, Carvel had beneficial ownership of the Property during his lifetime, and after his death Vivian had full ownership as the surviving joint tenant. All of this was in accordance with the terms of the Deed of Gift that Vivian and Carvel had signed.
- [81] The present case bears some parallels to McKendry. In McKendry, a mother (Mary) transferred property to herself and one of her children (John) as joint tenants. Mary originally intended John to hold the beneficial interest in trust, to be divided among all of Mary's children upon her death. Mary's lawyer prepared a trust declaration for John to sign that reflected Mary's intentions, but John did not sign it. Two years later, Mary changed her mind and decided that she wanted the property to go to John absolutely on her death. Mary signed a will and 2-page document reflecting her changed intention. However, no deed of gift was signed.
- [82] The trial judge in McKendry held that the gift to John had not been perfected because no deed of gift was signed under seal. The Court of Appeal reversed this judgment on the basis that it was Mary's clear and unambiguous intentions that governed:
- [40] In January 2008, when Mary gratuitously transferred legal title to the property to John in joint tenancy, she did so with the intent that he hold the property in trust. The judge found that she intended to retain the entire beneficial interest, including the right of survivorship, for herself and her estate: paras. 124-133. Although John did not sign the trust declaration prepared by counsel, Mary's intentions were clear and unambiguous. In consequence, while John held legal title with Mary jointly from January 2008 onward, he held all of the beneficial interest, including survivorship rights, in trust.
- [41] Unless something changed, upon Mary's death John would have continued to hold legal title to the property only and to hold the beneficial interest in trust. However, in December 2010 something did change. As evidenced by the November note and the two-page document prepared by her lawyer, Mary unambiguously renounced her beneficial interest in the right of survivorship in John's favour should he survive her. In doing so, she clearly intended to make an immediate inter vivos gift of that incident of the joint tenancy to John. As explained in Simcoff, the gift was to whatever remained when Mary died.

....

[43] Given that she had previously transferred legal title to the property to John in joint tenancy, Mary did everything necessary in December 2010 to give her beneficial interest to John, bearing in mind the nature of that interest. Her intention was made manifest in the signed two-page document her lawyer prepared and no further act of delivery was required because of the existing joint tenancy. In particular, nothing more would have been gained had Mary executed a deed of gift under seal, given her clear and formally expressed intention. The immediate inter vivos gift was complete and binding. In my view, Mary's intention should prevail.

[Emphasis added]

[83] In the present case, Carvel's intention was similarly manifest and unambiguous. In transferring the Hornby Property to himself and Vivian as joint tenants in accordance with the Deed of Gift, Carvel did everything necessary to gift the right of survivorship to Vivian. His intention to do so is evident in the documents that effected the transfer. Nothing more would have been gained had Vivian executed a separate Bare Trust Agreement.

[84] I find that the evidence clearly establishes on a balance of probabilities that Carvel intended to gift the right of survivorship in the Hornby Property to Vivian, and that he did all that was necessary to render the transfer legally binding. It is unnecessary to resort to the presumption of resulting trust to decide this case. The evidence clearly establishes that Carvel's actual intention was to gift the right of survivorship in the Hornby Property to Vivian.

The joint bank accounts and registered accounts

[85] I have reviewed (at paras. 23-26) the evidence related to the remaining Disputed Assets: the GFCU Joint Accounts, the CIBC Joint Account, and the GFCU Registered Accounts. The plaintiffs allege that Vivian holds the funds from all of these accounts on a resulting trust for Carvel's estate.

[86] All of the joint accounts in issue, at both GFCU and CIBC, were created from the outset as joint accounts. The GFCU Joint Accounts expressly provided that Vivian had a right of survivorship. Carvel expressly designated Vivian as the beneficiary on the GFCU Registered Accounts. While the original account agreement for the CIBC Joint Account could not be located, there is a signature card evidencing that Carvel and Vivian jointly held the account.

[87] The plaintiffs rely on *Kyle Estate v. Kyle*, 2017 BCCA 329 and *Stade Estate (Re)*, 2017 BCSC 2354, in support of the proposition that bank records indicating a right of survivorship may not, on their own, be sufficient to rebut the presumption of a resulting trust. This proposition is not contentious. Every case must turn on its facts as they relate to the intention of the donor.

[88] In the present case, the banking records confirming the right of survivorship (on the GFCU Joint Accounts) or designating Vivian as beneficiary (on the GFCU Registered Accounts) are not the only evidence of Carvel's intention. Other relevant evidence includes the evidence of Ms. Rowe as to her discussions with Carvel in preparing his estate plan. In *Pecore* at para. 73, the Supreme Court of Canada held that statements by a transferor to a lawyer in drafting the transferor's last will were an important indicator of the transferor's intention in opening joint accounts.

[89] Ms. Rowe's evidence is that Carvel brought statements of his accounts at the GFCU and CIBC to their meeting on October 31, 2012. The account statements showed the funds that were then in the CIBC Joint Account, the GFCU Joint Accounts, and the GFCU Registered Accounts. Ms. Rowe deposes that:

With respect to Carvel's assets, he told me (and from my review of the account statements at Exhibit "D") that he had accounts and investments at CIBC and the Grand Forks Credit Union near Vivian's home. Carvel told me that he wanted all his assets to go to Vivian so he had set up his accounts as "joint" (with right of survivorship) and also designated Vivian as beneficiary on his registered accounts.

[90] Carvel's Last Will was accordingly drafted to confirm that jointly owned bank accounts were intended by Carvel to give Vivian the right of survivorship, and that such assets were not held on any resulting trust.

[91] I have already reviewed the evidence of other witnesses, including Ms. Gibson and Mr. Crocker, that Carvel was vocal about his wish to leave his assets to Vivian and to prevent his children from receiving his estate. I find the evidence of all of these witnesses - Ms. Rowe, Ms. Gibson and Mr. Crocker - to be reliable and deserving of considerable weight. None of these witnesses have any direct interest in the outcome of this litigation and no reason to be anything but forthright in their evidence as to Carvel's intention.

[92] Accordingly, I conclude that the evidence establishes on a balance of probabilities that Carvel intended to gift to Vivian the right of survivorship in the GFCU Joint Accounts, the GFCU Registered Accounts, and the CIBC Joint Account. These assets are not held on a resulting trust for the benefit of Carvel's estate. Once again, given that the summary trial application is only concerned with the issue of resulting trust, I make no findings as to whether the transfer of assets to Vivian was otherwise unjust or inequitable.

CONCLUSION

[93] I grant summary judgment to Vivian on the resulting trust claim and issue the following declarations:

- a) Carvel intended to gift to Vivian the right of survivorship in the Hornby Property, and Vivian does not hold the Hornby Property on a resulting trust for the benefit of Carvel's estate; and

- b) Carvel intended to gift to Vivian the right of survivorship in the GFCU Joint Accounts, the GFCU Registered Accounts, and the CIBC Joint Account, and Vivian does not hold these assets on a resulting trust for the benefit of Carvel's estate.
- [94] The relief sought by the plaintiffs at para. 2 of Part 2 of the Notice of Civil Claim is dismissed as it relates to the Hornby Property, the GFCU Joint Accounts, the GFCU Registered Accounts, and the CIBC Joint Accounts.
- [95] I wish to be clear that I have not granted the broader declarations sought by Vivian on this application because it is not clear to me whether the plaintiffs have advanced, or intend to advance, a proprietary claim based on unjust enrichment. The parties have agreed that I should restrict my judgment to the resulting trust claim. In the circumstances, I wish to avoid issuing any form of relief that may be overbroad and impact on the remaining issues in the action in unintended ways.
- [96] Unless there are circumstances of which I am unaware, Vivian is entitled to her costs of the summary judgment application from the plaintiffs at scale B.

"Horsman J."

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