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Estate Planning - A Litigator's Perspective

I. INTRODUCTION

The particular reasons underlying estate planning are as many and varied as the people planning their estates. There are, however, some common objectives they hope to achieve, including reducing probate fees or avoiding probate altogether, lessening tax consequences, and directing their assets to friends or family after death. Estate planning tools include creating a trust, gifts made during the person's lifetime, placing property into joint tenancy, or designating specific beneficiaries of insurance policies or RRSPs. These are generally successful strategies, and have been approved by the courts as such on various occasions (see, for example, *Mordo v. Nitting et al.*, 2006 BCSC 1761, below). However, the nature of estate and trust litigation is such that there is no guarantee that a challenge the estate plan will not be made by a disappointed family member or friend. This paper discusses various types of challenges brought to defeat such estate planning, and to seek a share of an estate or trust. In particular, this paper will discuss constructive, resulting and secret trusts as well as the *Fraudulent Conveyance Act*, RSBC 1996, c.163 in the context of a claim pursuant to the *Wills Variation Act*, RSBC 1996, c. 490.

II. CONSTRUCTIVE TRUSTS

Since the 1600s, courts have, at times, used the terms "constructive trust" and "resulting trust" interchangeably or without precision. Professor Waters, in his seminal text, *Waters' Law of Trusts in Canada* (3rd ed., Mark R. Gillen and Lionel D. Smith, eds. Toronto: Thomson, 2005) provides this description of the two terms at p. 454:

> "Resulting" describes what happens to the property subject to a trust; it goes back to the original owner or the person with the best claim to it. A "resulting" trust sometimes arises from intention, at other times from imposition of law. A constructive trust is construed or imposed by law; it never means anything else.

As such, both the constructive trust and the resulting trust can be contrasted with an express trust, which is usually drafted by a solicitor after lengthy consultations with the settlor. By contrast, constructive and resulting trusts often arise through actions taken without legal assistance or advice.

A. Constructive Trust

A constructive trust is a remedial trust. It is imposed by law, or "constructed" by the court, in order to achieve the desired result. In *Becker v. Pettkus*, [1980] 2 S.C.R. 834 ("*Becker*"), the Supreme Court of Canada ("SCC") employed the constructive trust as a remedy where one

common law partner would otherwise have been unjustly enriched by the efforts of the other. This is the seminal case for constructive trusts, and the law relating to constructive trusts has continued to develop since that time. Courts now employ the constructive trust remedy not only in unjust enrichment cases, but also to cause the return of property that was wrongfully obtained by the defendant through a breach of fiduciary or other duty.

B. Unjust Enrichment

As noted above, the *Becker* decision established the constructive trust as an appropriate remedy in unjust enrichment cases. The underlying facts were that Mr. Pettkus and Ms. Becker cohabited from 1955 through 1974 (except for a brief three month separation in 1972), without being married. During that time, Mr. Pettkus developed a beekeeping business, including purchasing various real properties, and Ms. Becker made significant contributions to same. The relationship ended, and Ms. Becker sought a declaration that she was entitled to one half of certain lands held in Mr. Pettkus' name, and for a share of the business, based on her contributions throughout the years. The trial judge considered the claim on the basis of <u>resulting</u> trust principles. The trial judge specifically found that there was no intention, either express or implied, that the parties would share in all assets equally, irrespective of which of them held legal title. Accordingly, the trial judge did not find there to be a resulting trust, and instead awarded Ms. Becker 40 beehives, without bees, and $1,500, the amount of money earned on 40 hives for the years 1973 and 1974. The Ontario Court of Appeal did not overrule the finding relating to resulting trust, but did vary the award, and gave Ms. Becker a one half interest in the property and the business.

The majority decision of the SCC agreed that where there was no evidence of necessary intention, a resulting trust could not arise. It therefore considered unjust enrichment, and the constructive trust. The three elements of unjust enrichment are:

(1) a benefit or enrichment to the defendant;

(2) a corresponding deprivation to the plaintiff; and

(3) the absence of juristic reason for the enrichment.

The SCC found that the elements of unjust enrichment had been met, and found that a constructive trust arose in favour of Ms. Becker.

Note that in a later SCC decision, *Peter v. Beblow*, [1993] 1 S.C.R. 980, the SCC recognized that domestic household services provided by one spouse to the other are an enrichment that may give rise to a claim of unjust enrichment.

The remedy for unjust enrichment is not always a constructive trust; the court may make a monetary award (see *Blake v. Wells Estate* 2007 BCCA 617, below).

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While the *Becker* and *Peter v. Beblow* decisions arose from a marriage-like relationship in the family law context, unjust enrichment and the constructive trust have found a much broader application. There have been many decisions in the three decades since *Becker* in which claims were made against the estate of a deceased pursuant to unjust enrichment in circumstances such as:

(1) by a spouse: *Verbeke v. Hirst Estate*, 2000 BCSC 1387. In this case, the plaintiff, Susan Verbeke and the deceased, Harold Hirst, were not married, but lived together for 43 years. Mr. Hirst died intestate, leaving a 7.9 acre property in Maple Ridge and $23,300 cash (net of expenses). Ms. Verbeke brought a claim in unjust enrichment. The administatrix, Margery Snook, was Mr. Hirst's only daughter. Ms. Snook took the position that Ms. Verbeke and Mr. Hirst were not in a common-law relationship, but rather Ms. Verbeke was simply a non-paying boarder and friend of her father. The court held that Hirst Estate had been unjustly enriched. Verbeke's housekeeping, cooking, gardening, landscaping and health care contributions constituted a significant benefit to the deceased that he received for 43 years without paying compensation. Verbeke also sacrificed a career and employment income. The court awarded Verbke a half interest in the property and in the net cash of the estate, and stated that a monetary award on the basis of the value of services rendered was inadequate.

(2) by a friend who provided care to the deceased during his/her lifetime: *Schnogl v. Blazicevic*, 2005 BCCA 575. This was the appeal of the trial judge's award of a 90% undivided interest as a tenant in common of real property to Mr. Schnogl. The trial judge found unjust enrichment had been proven, and that the appropriate remedy was a constructive trust. Mr. Schnogl was a tenant in the basement suite of the Balens from 1977 until Mr. Balen died in 1998. During this time, the relationship between the Balens and Mr. Schnogl grew "increasingly close" such that it was "more akin to family than to landlord tenant" (para. 5). During the time Mr. Schnogl lived at the Balens' house, he performed various maintenance tasks and, as the Balens' health began to fail, he provided personal care services as well. Mrs. Balen died in 1986. As noted above, Mr. Balen died in 1998. There was evidence that the Balens encouraged Mr. Schnogl to continue to live with them, and told him that eventually he would inherit the house. In considering the elements of unjust enrichment, the court considered and ultimately rejected the estate's argument that the landlord/tenant relationship amounted to a juristic reason for the enrichment and deprivation. The Court of Appeal found no reason to interfere with the trial court's finding that while the relationship may have started as landlord/tenant, it ultimately was "considerably more filial than contractual in its essential nature" (para. 12). However, the Court of Appeal found that the extent of the award was "out of proportion to the enrichment of Mr. Balen and his estate" and "also disproportionate to the awards made in other cases" (para. 23), such that it reduced the award to a 66 2/3% undivided interest in the property as tenant in common with the estate.

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(3) by a former daughter-in-law: *Blake v. Wells Estate*, 2007 BCCA 617. The facts in this case were that Ms. Blake cohabited in a marriage-like relationship with Isabel Wells' son, Rowan Wells, from 1972 until they married in 1992. The couple lived in a house they built together on property owned by Isabel Wells and her husband, and the senior Wells lived in a different house on the same property. Rowan Wells' heath had begun to deteriorate in 1990 and he died in 1993. Ms. Blake continued to reside in the house, and carried out maintenance on it, some maintenance on Isabel Wells' home, and some maintenance of the 14 acre property. Isabel Wells died in 2004. Isabel Wells' Will left Ms. Blake 1/7th of the residue of Isabel Wells' estate. The real property was gifted to one of Isabel Wells' children. Ms. Blake brought a claim against the estate. The trial judge concluded that Ms. Blake established all the elements of unjust enrichment, and found that in this case, it could be "fairly and properly compensated by an award of damages", which were awarded in the amount of $250,000. The finding of unjust enrichment was upheld on appeal, but the amount awarded was reduced to $125,000. Note that the Court of Appeal specifically considered whether it ought to find a constructive trust over the land, or whether a monetary award would suffice (para. 79). It found that the monetary award would suffice. However, either way, the effect would be to reduce the value of the estate to be distributed under the Will.

However, not every claim of unjust enrichment is successful at trial. In *Usher v. Larabee*, 2010 BCSC 1608 two adult sons brought an action against their mother, including a claim of unjust enrichment.

In *Usher*, the adult sons alleged that their mother, Mrs. Larabee, had agreed with them that she would hold her assets in trust for themselves and their sister. At the time of trial, Mrs. Larabee was 81 years old, and her assets consisted of her home in Richmond, British Columbia and a portfolio at Canaccord Capital. Her assets totaled approximately $650,000.

The family history was generally unhappy, in that Mrs. Larabee's first husband, the father of the three children, was an alcoholic and absent from the home for significant periods of time. In 1961, while the oldest child was 10 years old, he left home and did not return. Mrs. Larabee eventually sought and obtained a declaration that he was presumed dead. Mrs. Larabee had difficulties raising the children, and they were placed in foster care. Mrs. Larabee also suffered from some health issues. It appears that the sons saw Mrs. Larabee from time to time after their placement, and into their adulthood. The daughter did resume living with Mrs. Larabee. The daughter was ultimately diagnosed with schizophrenia, and at the time of trial was living in Saskatchewan, and was unemployable. Mrs. Larabee was sending money to her daughter to assist her in buying food.

One of the sons, Michael Usher, was convicted of crimes involving his step-daughters. At about this time, Mrs. Larabee made a will that excluded Michael as a beneficiary, and cited the charges, and later the conviction, as some of the reasons for the exclusion. The sons began to leave messages on Mrs. Larabee's answering machine in about 2001, advising that they would be

challenging her will. In 2003, they threatened to place a lien against her property and demanded that she "settle with" them. At about this time, Mrs. Larabee created the *alter ego* trust in question. She was named as the Trustee, and she placed her home and the Canaccord Capital assets in the Trust. The Trust provided for the daughter during the daughter's lifetime, and upon her death, the trust assets were to be distributed to the daughter's children. The sons were not named beneficiaries.

The sons in this action alleged that their placement in foster care constituted a benefit to their mother, in that she financially benefitted from their absence from her household. The court rejected this argument.

Where the court finds that the elements of unjust enrichment have been met, it will often impose a constructive trust over estate assets or make an award of damages in favour of the plaintiff. The assets of the estate are thereby reduced, and any estate planning that has taken place is now re-written by the courts. The above examples are simply that; examples of circumstances that may give rise to a constructive trust remedy. The possible range of circumstances that may give rise to a constructive trust claim are many and varied, but inquiries ought to be made during the estate planning process to ensure that any possible claims are addressed in the overall estate plan. As will be discussed further below, inquiries into whether there may be an unjust enrichment claim are advisable if the estate planning includes transfers of assets which could be alleged to be caught by the provisions of the *Fraudulent Conveyance Act*.

III. RESULTING TRUST

A resulting trust arises when the title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original or rightful owner (*Pecore v. Pecore*, 2007 SCC 17 ("*Pecore*"), at para. 20). The term "resulting trust" therefore describes what happens to the property in question; it "results" back to the original owner (or in certain circumstances, the property results back to the person who gave value for it; the rightful owner). As noted above, because there is no express trust, the court must look to the intention of the original owner to determine the ultimate ownership of the property. The question then arises: what evidence does the court use to determine these intentions?

There are two presumptions that the court will consider in its consideration of the evidence: the presumption of resulting trust and the presumption of advancement. These are rebuttable presumptions of law. This means that they are only applicable where there is insufficient evidence at trial for the court to reach a conclusion as to the intentions of the transferor. In cases where there is insufficient evidence is adduced, the court will find the assumption to be true. The standard of proof is the normal civil standard of proof: the balance of probabilities.

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A. Presumption of Resulting Trust

The presumption of resulting trust is the general rule that applies to gratuitous transfers. The presumption places the burden of proof on the recipient of the transfer to show that it was in fact a gift. This is because equity presumes bargains, not gifts. The presumption of resulting trust is used to assist the court in determining the outcome of the dispute where the evidence of intention is lacking or, as is usually found in estate cases, unavailable.

B. Presumption of Advancement

The presumption of advancement is an exception to the presumption of resulting trust. "Advancement is a gift during the transferor's lifetime to a transferee who, by marriage or parent-child relationship, is financially dependent on the transferor" (*Pecore* at para. 21). The presumption of advancement originally applied to transfers of property from husband to wife and from father to child. The courts viewed these transfers as gifts, and thus the onus to show that they were not intended as such was on the husband/father. In more recent years, the presumption as between husband and wife has weakened. The majority of the decisions addressing this presumption arise within the family law context, and as such, are beyond the scope of this paper. The presumption as between father and child remained more constant, until the *Pecore* and *Madsen Estate v. Saylor*, 2007 SCC 18 ("*Madsen Estate*") decisions.

Significantly, the SCC decision *Pecore* modified the presumption of advancement as it relates to children. First, it brought the presumption in line with today's economic and legal reality, in that mothers now have both the financial ability and statutory obligation to support their children. The SCC expressly found that the presumption of advancement applies equally to mothers as it does to fathers (see paras. 32 and 33).

Secondly, the SCC found that the presumption of advancement does not apply to adult children, dependent or independent (see paras. 36 through 41). The rationale given by the SCC for not continuing to apply the presumption to dependent children was that it is too difficult to define a "dependent" adult child. The trial judge would have to determine dependency on a case by case basis, which would give rise to uncertainty in the law.

With respect to the exclusion of adult independent children, the SCC again brought the law into keeping with today's economic and familial reality. Many aging adults are transferring funds into an account held jointly with one of their adult children in order to facilitate the payment of bills or for that child to otherwise assist with management of the parent's financial affairs. The SCC therefore recognized that there should be a rebuttable presumption that the child is holding the property to assist in the management of the parent's financial affairs (i.e. a presumption of resulting trust), and not as a beneficial owner.

In *Pecore*, the SCC confirmed that the two above-noted presumptions continue to apply, as modified. Specifically, the presumption of resulting trust will apply in the majority of circumstances, with the presumption of advancement applying as between a parent and a minor child. The SCC noted that these presumptions will provide a measure of certainty and

predictability for individuals who transfer property into joint accounts or make other gratuitous transfers.

C. *Pecore v. Pecore*, 2007 SCC 17

The facts in *Pecore* are not unlike cases that we often see in practice. The disputed funds were those held in bank and investment accounts in the joint names of the deceased father and one of his children. The father, Mr. Hughes, had three adult children, including Paula Pecore. Of the children, Ms. Pecore had the closest relationship with her father. She was also the least financially stable of the three, having worked at low-paying jobs, and also having taken care of her husband, Michael Pecore, who was quadriplegic. The Pecores were close to Mr. Hughes, and were the residual beneficiaries of his estate. The case arose during the Pecores' matrimonial property proceedings.

During his lifetime, Mr. Hughes had transferred mutual funds, bank accounts and income trusts into joint accounts with Ms. Pecore. All of the funds (which totaled approximately one million dollars at his death) were deposited by Mr. Hughes; Ms. Pecore made no financial contributions. On death, legal title passed to Ms. Pecore. The SCC was asked to determine whether the beneficial interest also passed. If so, there was little left in the estate, and thus little for Mr. Pecore to inherit.

The SCC considered the following categories of evidence:

(1) Evidence subsequent to transfer: The SCC found that evidence of statements indicating intentions that were made after the transfer could be admissible evidence in determining the intentions of the transferor. This is a departure from the traditional rule in *Shephard v. Cartwright*, [1955] A.C. 431 (H.L.) ("*Shephard*"). In *Shephard*, the English House of Lords held that evidence of the actions and statements of the parties were only admissible with respect to intention if they took place before or at the time of the transaction, or so soon thereafter as to be part of the transaction. The SCC in *Pecore* expressly found that evidence that does not meet the standard set in *Shephard* ought not to be automatically excluded. Rather, the SCC was of the view that if the evidence is relevant to the intentions of the transferor at the time of transfer, then it ought to be considered. The SCC did caution that the trial judge must be cautious in allocating weight to this type of evidence.

    At paragraph 73 of the *Pecore* decision, the SCC specifically commented on the evidence of the statements made by the transferor when drafting his Will some years after the accounts were created. These were considered "an important indicator of intention". This was in part because the evidence came from the lawyer who drafted the Will, who was uninterested in the outcome of the litigation.

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(2) Bank documentation: Until the *Pecore* decision, courts had generally found that bank documentation creating the joint account was evidence only of the relationship as between the customer and the bank regarding legal title. It was not considered as evidence relating to beneficial title as between the account holders. In another departure from the traditional view, the SCC found that while not determinative of the matter, bank documents may be considered when ascertaining the transferor's intentions in resulting trust cases. The SCC provided some explanation for this, namely that given today's more detailed banking documentation, there may be some evidentiary value regarding the transferor's intent. The more detailed the documentation, the more weight the SCC suggested it ought to carry.

(3) Control and use of the funds in the account: In the past, courts have not been consistent as to whether or not the use of the funds in a joint account following the transfer ought to be admitted as evidence of the intentions of the transferor. The SCC held that while not determinative, this type of evidence ought not to be automatically excluded. The SCC also noted that evidence of use and control may be of marginal assistance only, and without more, will not be determinative of the intentions of the transferor.

(4) Granting of Power of Attorney: The SCC confirmed that the trial judge has the discretion to consider the granting of a power of attorney in determining the transferor's intent. This is particularly true where there is other evidence that the transferor understood the distinction between granting a power of attorney and gifting the right of survivorship of an account.

(5) Tax treatment of joint accounts: The SCC again confirmed that the trial judge has discretion in considering the weight to be afforded to this type of evidence, however, this evidence is not determinative of the transferor's intentions, and thus of whether or not a resulting trust arises.

As can be seen above, the SCC in *Pecore* moved away from traditional and restrictive rules relating to admissibility of evidence in determining the intentions of the transferor. There is a movement here towards admitting all potentially relevant evidence, based on a consideration of the facts in question, so that the trial judge may discern the intention of the transferor. No type of evidence is automatically given more weight than other types of evidence; the evidence must be weighed as a whole. Indeed, while the transferor in both the *Pecore* decision and in the *Madsen Estate* decision granted a power of attorney to the transferee, and the transferor in both cases also continued to pay the taxes relating to the funds accounts, the SCC upheld the finding that there was a gift in the *Pecore* case and that there was a resulting trust in the *Madsen Estate* case.

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D. *Madsen Estate v. Saylor*, 2007 SCC 18

Madsen Estate is the companion case to *Pecore*. In *Madsen Estate*, the deceased father, Mr. Madsen, made his daughter, Patricia Brooks, the joint signatory on various bank accounts following the death of his wife. The accounts totalled some $185,000. The documentation creating the joint account provided for the right of survivorship. Mr. Madsen also granted Ms. Brooks a power of attorney. Mr. Madsen continued to control the accounts throughout his lifetime, and the funds were used solely for him. Additionally, he paid the income taxes arising from the accounts. Following his death, Ms. Brooks' two siblings alleged that beneficial ownership of the funds remained with their father, such that the $185,000 formed part of his estate.

The trial judge found that there was no evidence to support Ms. Brooks' position that her father intended to gift the funds to her. The Court of Appeal dismissed the appeal, as did the Supreme Court of Canada. The central reasoning for dismissing the appeals was that the trial judge had considered all of the evidence and found that the father's intention was to place Ms. Brooks on the accounts in order to facilitate management of same. Therefore, whether the presumption of advancement or the presumption of resulting trust applied was irrelevant; the trial court did not need to resort to a presumption because there was sufficient evidence to discern Mr. Madsen's intentions.

Of note are the SCC's comments relating to the banking documentation creating the joint accounts. The documents allowed Mr. Madsen to create the account with the right of survivorship, which he marked. Ms. Brooks testified that both she and her father understood at the time the account was created that in the event that one of them died, the right of survivorship would cause all of the money in the accounts to belong to the other. However, the SCC found that this was insufficient in all of the circumstances. As noted above, while some of the factors listed in the *Pecore* decision, such as the power of attorney and the tax treatment of the funds, were the same in both cases, it appears that the reason for the different result was Ms. Brooks' credibility. There were specific negative findings by the trial court with respect to her credibility.

E. Resulting Trusts in relation to Real Property

The *Pecore* and *Madsen Estate* cases involved joint accounts. They did not address the presumption of resulting trust in relation to real property. In addressing real property, there are two statutory provisions that may be considered in the context of the presumption of resulting trust. These sections are s. 19(3) of the *Property Law Act*, RSBC 1996, c. 377 and s. 23(2) of the *Land Title Act*, RSBC 1996, c. 250.

Section 19(3) of the *Property Law Act* reads:

> **19** (3) A voluntary transfer need not be expressed to be for the use or benefit of the transferee to prevent a resulting trust.

Section 23(2) of the *Land Title Act* reads in part:

> **23** (2) An indefeasible title, as long as it remains in force and uncancelled [sic], is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title, subject to the following…[emphasis added]

1. *Aujla v. Kaila*, 2010 BCSC 1793

The 2010 decision, *Aujla v. Kaila*, 2010 BCSC 1739 ("*Aujla*"), addresses the interplay between the presumption of resulting trust and the statutory presumption of ownership. In *Aujla*, the plaintiff, Ms. Aujla, was the daughter and sister, respectively, of the defendants, Nasib Kaila and Harpal Kaila. Ms. Aujla sought a beneficial interest in the home located in Surrey, BC. The history of title to the home was that Ms. Aujla, her mother and her father were each on title as joint tenants at the time of purchase. Ms. Aujla alleged in the action to have paid $20,000 towards the purchase price. She and her parents were each covenantors on the mortgage.

A few months after the purchase, the father died. Title was changed to reflect only Ms. Aujla and her mother as joint tenants. Ms. Aujla continued living in the home with her mother, and alleges to have continued to pay $500 per month towards the mortgage. Approximately three years after the purchase, Ms. Aujla transferred title to her mother. At that time, certain other debts were consolidated, and the mother became the sole mortgagor (although Ms. Aujla was a guarantor). In particular, Ms. Aujla's car loan of approximately $18,000 was paid in full from proceeds from the new mortgage. In 2006, title was transferred to the defendants jointly.

The court considered s. 23 of the *Land Title Act* as the starting point, and then added (at paragraph 32):

> It is settled law, however, that the statutory presumption that registered title is conclusive evidence of the ownership of legal and beneficial interests can be rebutted in some circumstances. It may be rebutted by the operation of the presumption of resulting trust, where there is an agreement between the parties that is contrary to the registered title, or to take into account of the underlying equitable interests between the parties…

The court then considered the trial decision of *Virk v. Pannu*, 2006 BCSC 921, (affirmed at 2007 BCCA 260 ("*Pannu*")), which also addressed the statutory presumption and resulting trusts. However, the *Pannu* decision predated *Pecore*, and as we know, *Pecore* changed the law such that the presumption of advancement to an adult child was replaced by the presumption of resulting trust.

The court in *Aujla* then carefully considered the evidence, including assessing the credibility of the parties, who had very different evidence on key issues. In weighing the evidence, the court held (at para. 38):

> The first [question] is whether Ms. Aujla held a beneficial interest in the Property when it was first acquired. On this question, Ms. Aujla has the benefit of the presumption of indefeasible title [as a result of s. 23 above]. The defendants have the onus of displacing that presumption. If Ms. Aujla gave no consideration when she went on title, Nasib is entitled to rely on the presumption of resulting trust. Ms. Aujla would then have to prove that her parents intended to make her a gift of a beneficial interest in the Property.

The court ultimately found that Ms. Aujla did not contribute funds towards the purchase price, but that she had made a material contribution to the purchase through her role as mortgagor. She therefore had a beneficial interest in the lands prior to the 1992 transfer. However, the court also found that the 1992 transfer was for value (payment out of her car loan), and thus that she no longer has any beneficial interest in the lands.

2. *Fuller v. Harper*, 2010 BCCA 421

In the *Fuller v. Fuller Estate*, 2010 BCCA 421 ("*Fuller*") decision of our Court of Appeal, the court did not address the legislation, but focused on whether or not the presumption of resulting trust was necessary on the facts in this case. In *Fuller*, the asset at issue was real property. Specifically, Mr. Fuller had purchased "Lot 17" in 1995, and it was registered in the names of himself, his son and his daughter-in-law. At that time, Mr. Fuller was living in his son's basement suite. Shortly after the purchase, Mr. Fuller and his son had a falling out, and Mr. Fuller moved out of the home. He also demanded that the son and daughter-in-law transfer title to Lot 17 into his sole name. They refused and litigation ensued. Ultimately, the litigation was settled when title was transferred to Mr. Fuller in exchange for his payment of $5,000 to them.

In late 2002, Mr. Fuller transferred title to himself and his good friend, Mr. Harper. Title was supposed to have been registered as joint tenants, but was erroneously registered as tenants in common. Following Mr. Fuller's death, Mr. Harper, as Executor, listed a one half interest in Lot 17 as part of Mr. Fuller's estate. The son commenced an action, claiming that the Estate was the beneficial owner of Lot 17.

After the subject litigation was commenced, Mr. Harper brought an application to have the land registered in their names as joint tenants, and subsequently transferred into his sole name. This application was not opposed by the son and the court granted an Order rectifying the registration.

At trial, the court found that there was a resulting trust, and that the whole of Lot 17 fell into the Estate of Mr. Fuller. The Court of Appeal allowed the appeal on this point. It found that there was sufficient evidence on which to determine that it was Mr. Fuller's intention at the time of

transfer to transfer title to his friend Mr. Harper in joint tenancy. The court noted that, as a result of the sufficiency of evidence, there was no need for the court to rely on the presumption of resulting trust.

The Court of Appeal also considered the nature of joint tenancy, and referenced earlier cases wherein courts have held that, because a joint tenancy may be unilaterally severed, the beneficial interest in the property does not arise until death. The court concluded that "the legal and equitable title (the right of survivorship) of a joint tenancy vests at the time the joint tenancy is created." (para. 53). It therefore follows that a transfer such as the transfer of Lot 17 was an *inter vivos* gift, not a testamentary gift.

IV. SECRET TRUSTS

Estate plans are subject to challenge on a variety of fronts, including allegations of a secret trust. A secret trust arises where a person gives property to another, communicating to that person an intention that the property be dealt with in a specific way upon the happening of an event, and the donee accepts the obligation.[1]

In addition to the above, in order to prove a secret trust, the three certainties of an express trust must be met:

a. the words making the trust must be imperative;
b. the subject of the trust must be certain; and
c. the object or person intended to take the benefit of the trust must be certain.

In the 2000 decision, *Champoise v. Prost*, 2000 BCCA 426, the court of appeal addressed an allegation of secret trust relating to real property. There, the deceased transferred certain real property from her name into her and her second husband's name as joint tenants. Following her death, title vested solely in the name of her husband, by right of survivorship. The adult son of the deceased (who was from her previous relationship) brought an action against the second husband and the estate, and alleged the property was subject to a secret trust in his favour.

The trial judge found that one half of the property was indeed held in trust for the son, but the Court of Appeal overturned this decision. It held that the evidence did not meet the requirements above. Specifically, there was no evidence that the deceased told her second husband that she was transferring the property to him to be held for her son's benefit after her death.

In the recent decision, *Usher v. Larabee*, 2010 BCSC 1608, the adult sons challenged their mother's *alter ego* trust on the basis that it was void due to an earlier secret trust in their favour. The facts in this case are set out above. In particular, however, the sons alleged that many times over an extended period of years, Mrs. Larabee had told the sons that they would share equally in her estate with their sister. They alleged that this amounted to a secret trust, and that Mrs. Larabee was not free to transfer title to her assets into the trust.

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[1] *Champoise v. Prost*, 2000 BCCA 426, para. 15.

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Mrs. Larabee denied ever having spoken to the sons about ownership of her home or assets, or stating that they would have an interest in her property.

The court found that the sons had failed to establish the existence of a secret trust. The case failed because of the lack of specific or compelling evidence brought by the sons. However, it leaves open the possibility that, on better and more compelling evidence, the court would find that a secret trust was in place prior to the creation of an *alter ego* trust, which would mean that the assets were not free to be transferred.

V. WILLS VARIATION ACT AND FRAUDULENT CONVEYANCES

During the autumn of 2010, there was much discussion within the Estate bar as to the effect of the *Fraudulent Conveyance Act* ("FCA") and estate planning. This is due, in large part, to the *Mawdsley v. Meshan* decision (2010 BCSC 1099) ("Mawdsley"), which addressed an allegation that the estate planning steps taken were void due to the FCA provisions.

Section 1 of the FCA reads:

> s. 1 If made to delay, hinder or defraud creditors and others of their just and lawful remedies
>
> a. a disposition of property, by writing or otherwise,
> b. a bond,
> c. a proceeding, or
> d. an order
>
> is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations by collusion, guile, malice or fraud are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

Section 2 of the *FCA* sets out an exception, as follows:

> s. 2 This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud.

The recent discussion within the Estate bar of the *FCA* in the estate context was also fuelled by the 2009 decision of the British Columbia Court of Appeal, *Abakhan & Associates v. Braydon Investments Ltd.*, 2009 BCCA 521 ("*Braydon Investments*"). It was a unanimous decision and was written by Chief Justice Finch.

At paragraph 14, the Court of Appeal succinctly stated the question to be determined:

> Whether a transfer of property made with a view to protecting assets from creditors, present or future, if made honestly, without moral blameworthiness, and for other legitimate business purposes, is prohibited by the *Fraudulent Conveyance Act*.

The facts, briefly, in *Braydon Investments*, were typical of business planning. A company, Botham Holdings Ltd. ("BHL"), had been incorporated for a number of years and had accumulated approximately $20 million in assets. In 2004 BHL sold a significant asset and paid a "large amount" of capital gains tax. Shortly thereafter, the principal of BHL was persuaded by a friend to invest in a car leasing business, which would be started by acquiring the portfolio of the failed Totem Ford business. While the car leasing business would be a separate entity from BHL, if BHL was a general partner in the new business, BHL would be able to obtain refunds of the capital tax paid. However, BHL's assets were greater than the amount that the principal wished to invest in the new business. Therefore, after receiving professional advice, the principal caused a new company to be created, with the same shareholders as BHL, and transferred significant assets from BHL to the new company.[2] The transfer completed two months after the new business commenced operations.

Unfortunately, the new business did not do well, and in less than two years, the partnership and BHL were assigned into bankruptcy. There were claims of more than $20 million.

While it was conceded by the plaintiff that the principal of BHL had "no dishonest intent or any intent to defraud creditors", the trial court concluded that this transfer of assets was in fact a fraudulent conveyance. Specifically, it was "an honest intent to defeat one's creditors" and "precisely one of the situations caught by the" *FCA*.[3]

The Court of Appeal reviewed various authorities, and concluded that "a dishonest intent, or *mala fides*, is not necessary to avoid a transaction under s. 1" of the *FCA*.[4] Rather, all that must be shown is that the transfer took place with the intent to delay, hinder or defraud current or future creditors.

The Court of Appeal concluded that the words "by collusion, guile, malice or fraud" are remnants of earlier versions of the *FCA*, which imposed penal consequences for a civil fraud, and held that they ought to be struck.[5] This means the question for a court to consider under an *FCA* claim is whether a transfer was made with "the intent to put one's assets out of the reach of one's creditors".[6]

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[2] The transfer was not a straight transfer, but was instead was a rather complicated series of transactions with share transfers, promissory notes, and an intermediary company. It is summarized in the Court of Appeal's decision at paragraph 6.
[3] As set out in the Court of Appeal decision, paragraph 11.
[4] *Braydon Investments*, paragraph 65.
[5] *Braydon Investments*, paragraph 72.
[6] *Braydon Investments*, paragraph 73.

The Court of Appeal held that there was no error in the court below. It found that it was true that BHL could have created a new company with which to commence its car business, but it chose not to do so. Instead, it chose to transfer the majority of the assets away for little or no consideration, and to take advantage of the tax benefits available through the car business. The intention of the transfer was to defeat current or future creditors, and it was thus caught by the provisions of the *FCA*.

A. Fraudulent Conveyances in the Context of Estate Planning

The was much discussion of potential *FCA* claims in an estate litigation context in the latter part of 2010, due in large part to the decision of Madam Justice Ballance in *Mawdsley v. Meshen*, 2010 BCSC 1099, which put the issue squarely before the court. There, the deceased, a wealthy businesswoman, effected a number of *inter vivos* transfers into joint tenancy, made gifts of certain assets, and created an *inter vivos* trust as part of her estate planning in the months before her death. Mr. Mawdsley, her common law spouse of 18 years alleged that these transactions were caught by the provisions of the *FCA*. He alleged that these transactions "effectively neutralized his [*Wills Variation Act*] claim" (para.179).

The deceased, Joan Meshen, had been widowed twice. She had three adult children from her two marriages. Her second husband had started a garden supply business, which she, her children, and the second husband's brother (Bill Meshan) carried on after his death. At the time of the second husband's death, the net value of his estate was just shy of $1.5 million. At the time the transactions were carried out, Joan Meshen's estate was worth in excess of $10 million.

As noted, the three children worked at the family business since childhood, to the limit of their own abilities. Additionally, Bill Meshen worked at the business for more than 40 years. Mr. Mawdsley was injured about the time he and the deceased began living together, and he received workers' compensation benefits throughout the relationship. He was not employed in the family business.

In 2000, Joan Meshen began meeting with various lawyers and accountants to take steps to plan her estate. Mr. Mawdsley was present at the majority of these meetings discussing various estate planning strategies, in which he participated. The estate planning continued throughout the next six years, until shortly before her death in 2006.

In considering the claim, the court noted that in order for Mr. Mawdsley to have standing under the *FCA*, he must have had a legal or equitable claim against Joan Meshen <u>during her lifetime</u>. The court then referenced a "compatible body of jurisprudence" that "recognized the standing of a spouse to set aside transfers intended to defeat his or her right to matrimonial assets…whether or not a triggering event has occurred" (para. 206). The court then recognized that determining whether or not Mr. Mawdsley had standing to bring a claim under the *FCA* was "complex and nuanced", but found that it was not necessary to make the determination in this case. Instead, she concluded that Joan Meshen did not carry out the impugned transactions with the intent to deprive Mr. Mawdsley of a remedy under the wills variation legislation. She based this conclusion on a number of facts, including:

a. Joan Meshen and Mr. Mawdsley kept their personal finances separate from one another;
b. Joan Meshen and Mr. Mawdsley had an agreement to equally share daily living expenses;
c. Joan Meshen and Mr. Mawdsley had an agreement regarding their assets: 'what is mine is mine and what is yours is yours';
d. during the numerous estate planning meetings, including those where Mr. Mawdsley was in attendance, Joan Meshen made it clear that her estate would not provide for Mr. Mawdsley and he made no objection; and
e. over the years, it was clear that Joan Meshen believed that the family business would go to Bill Meshen and her children, in part to compensate them for working for many years for modest remuneration.

Two earlier decisions of our Supreme Court ought to be noted as well. The first is *Hossay v. Newman* (1998), 22 E.T.R. (2d) 150 (B.C.S.C.) ("*Hossay*"). *Hossay* was not a full trial, but rather was an application to have the following question answered:

> Do the provisions of the Fraudulent Conveyance Act apply to inter vivos dispositions by a person which may have the effect of defeating or hindering claims that may be made against that person's estate pursuant to the Wills Variation Act?

There, the deceased had placed the majority of his assets into joint tenancy with one of the defendants shortly before his death. Accordingly, those assets did not form part of his estate after death, and thus were not available to satisfy any claim that the plaintiff, who was the deceased's adult son, made pursuant to the *Wills Variation Act*. The court held that the *FCA* does not apply unless the person making the claim had a legal or equitable claim during the deceased's lifetime. Specifically, paragraphs 9 and 10 read:

> 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 claims 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.
>
> 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.

The court contrasted the circumstances of the adult son, Mr. Hossay, decision with the plaintiff in another case, *Jack v. Parkinson* (1994), 91 B.C.L.R. (2d) 29, where the plaintiff was the estranged wife of the deceased, and involved in divorce proceedings at the time of death. The court concluded that those circumstances "may be been sufficient for Mrs. Jack to fall within the category of persons who have legal or equitable claims against the grantor or settlor" (para. 8).

Hossay was more recently confirmed in *Mordo v. Nitting*, 2006 BCSC 1761 ("*Mordo*"). In *Mordo*, there is no doubt that the *inter vivos* gifts and transfers and, in particular, the creation of an *inter vivos* trust by the mother for the benefit of her adult daughter were made for the express purpose of defeating any claim made by her adult son against the mother's estate. The estate planning carried on over a number of years and involved two different solicitors who assisted the mother.

The court considered whether or not the trust was void on public policy grounds, as nothing more than a "device employed…to defeat his anticipated ***WVA*** claim" (para. 381). The court rejected this argument, and characterized an *inter vivos* trust as a "standard estate planning tool", used to "achieve …legitimate estate planning objectives." The court also referred to *Hossay* wherein the court found that an independent adult child was not a creditor or other as contemplated in the *FCA*, and noted that despite "the passage of eighteen years…, the legislature has not seen fit to pass legislation or amend existing legislation to prevent the avoidance of claims under the *WVA*" (para. 382).

With respect to legislation, it is of note that, unlike dependants' relief legislation in other jurisdictions, our *Wills Variation Act* does not include anti-avoidance provisions. Further, the current draft of the successor legislation, *WESA*, is similar in that regard.

The law relating to *FCA* claims, then, is that where there is an existing claim against the person planning their estate, special care must be taken to ascertain the reasons for the estate planning. If it is to defeat that claim, or, potentially, to defeat that person's claim under the *Wills Variation Act*, it may well be caught by the provisions of the *FCA*. If, however, there is no claim except one which may arise upon death, the planning is not likely to be caught by the provisions of the *FCA*.

B. Professional Obligations

An additional consideration for estate planning solicitors when considering whether their suggested estate plans may run afoul of the *FCA* provision is the *Professional Conduct Handbook*, Chapter 4, paragraph 6, which reads:

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> A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud, including a fraudulent conveyance, preference or settlement.

VI. CONCLUSION

Constructive, resulting and secret trusts arise in many varied circumstances in estate litigation, but when proven, they all have the effect of altering the distribution of the estate. While each case is based on its facts, this paper contains some examples of circumstances that may give rise to findings of constructive, resulting, or secret trusts, and sets out some evidence that the courts will consider in resulting trust claims. As well, the concern of potential fraudulent conveyances, particularly in the context of the *Wills Variation Act*, should be addressed during the estate planning session, and all potential claims (including claims for unjust enrichment) ought to be addressed with the client.

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