COURT FILE NO.: 436/07 (Guelph)
DATE: 2009/02/23

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE ESTATE OF LILLIAN McCONOMY, deceased.

B E T W E E N:	)	
	)	
LISA GAIL McCONOMY-WOOD, In her personal capacity and in her capacity as the estate trustee of the estate of LILLIAN McCONOMY, deceased	)	Micheal Simaan, for the Applicants
Applicants	)	
	)	
- and -	)	
	)	
LEWIS VICTOR McCONOMY and RONALD DOUGLAS McCONOMY	)	Michelle M. Dwyer, for the Respondent, Ronald Douglas McConomy
	)	Lewis Victor McConomy, in person
Respondents	)	
	)	
	)	**HEARD:** Issues tried at Guelph on February 2, 3, 4 and 5, 2009

REASONS FOR JUDGMENT

The Honourable Justice Herold

[1] Douglas and Lillian McConomy were married for almost forty-nine years, having married one another in 1966. They were briefly separated in or about the fall of 2003; the separation is of no consequence in these proceedings, although some documents that were produced by them and made exhibits at trial may shed some light on the way in which they dealt between themselves with certain assets which are now in dispute. Douglas and Lillian had three children, Lewis, Ronald and Lisa. Lisa, the youngest, was born in 1964, Ronald in 1962 and Lewis some time prior to that. Lewis is divorced, and is now separated from a subsequent common-law spouse; he has four children, one from his first wife and three from his more recent partner; he lives in Brampton. Ronald has never been married and has no children; he has been, in the past, in a couple of common-law relationships. Lisa is married with two children and resides in Tennessee.

[2] Some time in or about early 2005, Douglas McConomy was diagnosed with bladder cancer. Douglas and Lillian moved into their last home together in Fergus on June 29, 2005. In the summer of 2005, Lillian McConomy was having some significant health difficulties – she was a life-long smoker and her problems appeared to be related to this, but were, as yet, undiagnosed. On August 4, 2005, unexpectedly, notwithstanding his precarious health situation, Douglas

McConomy died, and two days later on August 6th, Lillian received her diagnosis of lung cancer.

[3] Lisa McConomy had been visiting her husband's family in upstate New York in July 2005, and then travelled to Fergus to spend some time with her parents, approximately ten days prior to August 4, 2005. She and her husband were with her father, Douglas, when he died.

[4] Very shortly after August 4th, and probably, although the evidence is not absolutely clear on this point, even prior to her serious diagnosis of lung cancer, Lillian decided that she should prepare a new Will. Lisa swore in the affidavit which is part of the Trial Record that she knew that her mother had a prior Will dated May 31, 1994. In her evidence at trial, Lisa said that she didn't really know this to be so; rather, she claimed to have been told this by an unnamed lawyer; the Will was never produced by anyone during the course of this litigation. Lewis did produce a prior Will for his mother, signed on November 3, 1977, naming Douglas as her sole executor and beneficiary, and naming Lewis and the Canada Trust Company as her alternate executors, with the three children to share in her estate equally *per stirpes*. Lillian's 1977 Will is Exhibit #21.

[5] In the summer of 2005, Lewis was living in Brampton, Ronald lived part-time with his parents in the Fergus home and part-time at a cottage on Severn

Drive in Muskoka, and Lisa was residing in Tennessee. She did, however, remain in Fergus from the last week in July 2005 until a few days after mother's death on September 17, 2005.

[6] When Lillian expressed an interest in preparing a new Will she (and perhaps Lisa) obtained a reference to a well-respected solicitor in Fergus, Douglas Jack, from Lillian's new bank in Fergus. Either Lillian or Lisa made an appointment with Mr. Jack and very shortly thereafter, both of them visited him at his office, in Fergus, where he took instructions for Lillian's new Will. The new Will was executed on August 16, 2005, at Lillian's home, in Fergus, in the presence of Douglas Jack and another witness, Cheryl Redman. A copy of the Will is Exhibit #4.

[7] Mother's health continued to deteriorate fairly rapidly and she divided her time amongst the Groves Memorial Hospital in Fergus, the Kitchener-Waterloo Regional Cancer Centre and her home in Fergus. On September 17, 2005, in the early evening, she passed away as a result of her illness. Ronald was notified by an uncle or aunt of his mother's death late that evening, and Lewis was notified early on the morning of September 19th.

[8] The fight over mother's estate began on or about August 5, 2005, the day after father's death; it heated up quite dramatically in the six weeks thereafter

prior to Lillian's death. The dispute took on a somewhat tragic element as it included thereafter also a disagreement over her cremated remains, and the estate dispute has continued to this date and it would appear, although the issue was not squarely before me at trial, even the disagreement over the final resting place of mother's remains continues to boil over.

[9] In terms of the venom which has been a part of this ongoing family dispute, Lisa and Lewis are the main protagonists; Ronald is somewhat more laid back in his approach, but has been no less involved, particularly with respect to his occupation of the family home during the course of this ongoing litigation.

[10] Less than three weeks after Lillian's death, Lewis and Ronald served and filed a Notice of Objection on three alternate bases:

(a) Lisa, the named estate trustee, was in a conflict of interest, placing her own financial interest ahead of the beneficiaries both during Lillian's life and after;
(b) Lillian lacked testamentary capacity;
(c) Lisa exercised undue influence over Lillian causing her to change what had been intended "in her prior Will dated on or about May 31, 1994".

[11] That Notice of Objection was filed on or about October 5, 2005, and was not withdrawn until almost a year later on September 20, 2006, rendering any meaningful dealings with the estate assets almost impossible.

[12] As a result of continuing difficulties in dealing with the estate even after the Notice of Objections had been withdrawn, Lisa McConomy brought an application on June 15, 2007, requesting numerous orders which appeared then to be, and probably were, necessary to attempt to deal with some of the outstanding issues amongst the parties. On December 18, 2007, The Honourable Justice John C. Murray made an order giving directions, which included among other things a direction for the trial of thirteen issues enumerated in paragraphs 1(a) through 1(m) of the said order. The parties were permitted to conduct examinations for discovery and to exchange documents, which I am advised they did, and the matter was placed on the January 19, 2009, Assignment Court list for the trial of actions scheduled to proceed in Wellington County during the five week sittings commencing Monday, January 26, 2009.

[13] At the January 19, 2009, Assignment Court, counsel for Lisa, Lewis and Ronald were present as well as Lewis personally. All counsel were available to commence a five day trial on Monday, February 2, 2009, but Mr. Murdoch, counsel for Lewis, indicated that he was taking steps to get off the record. I asked Lewis if he wished to agree to have Mr. Murdoch removed from the record at that time so that he could personally address the court with respect to scheduling issues, but he declined to do so. I suggested that he have a conversation with Mr. Murdoch outside court before making that determination

and although the conversation apparently took place, his position remained the same and Mr. Murdoch simply indicated that he, himself, would not oppose the scheduling of the trial for February 2, 2009.

[14] Some time after January 19, 2009, an order was apparently made removing Mr. Murdoch from the record and no attempt was made to adjourn the trial prior to February 2nd, although it was clear to all concerned that forty-eight hours notice had to be given because of the fact that Lisa was coming from the State of Tennessee to be present at the trial. On the morning of February 2nd, Lewis, for the first time, requested an adjournment, and after discussions with counsel and Lewis, I ordered that the trial should proceed. It was quite clear to me from the sparse pleadings which were available to me, and this view was absolutely reinforced at the trial, that there is very little conflict between the positions of Lewis and Ronald, and Ronald was very capably represented throughout by experienced trial counsel. Indeed, as the trial went on, it was obvious that Ms. Dwyer was doing her best to assist Lewis in focussing on issues and locating documents when necessary. Mr. Simaan also went to great lengths to ensure that any documents to which reference was being made were made available to Lewis or the location of same was at least pointed out to him.

[15] During the course of the trial, it became absolutely apparent to me that this estate, which was at one time worth approximately $1.2 million dollars, is being eaten up in litigation costs and other costs which regularly flow from a delayed and unfocussed disposition of estate assets. It was my view that the parties would be well served if at all possible to have an order made at the conclusion of trial with reasons to follow. I did indeed make the order at the conclusion of trial and these are the reasons which I indicated would follow shortly. I intend to refer in these reasons to a particular question or questions posed by Justice Murray (in several cases more than one question can be dealt with at the same time), and to then indicate the answer I gave at the conclusion of trial and now the reasons for that answer. I will begin, as one probably logically should, with the question of the validity of the Will.

Question 1(l) "Is the Deceased's August 16, 2005 Last Will and Testament valid?"

My answer is: "To the extent that evidence was adduced with respect to this issue, it confirms overwhelmingly that there is not the slightest reason to doubt the validity of this Will. There was no undue influence, no fraud, no duress and the testator did not lack testamentary capacity. Yes, the Will is valid."

[16] At the opening of trial, Lisa and Ronald took the position that the Will is valid and Lewis took the position that it is not valid as a result of undue influence and lack of testamentary capacity. Where capacity is put in issue, and where

there is some evidence of possible suspicious circumstances, the supporters of the Will (here Lisa and Ronald) bear the onus of showing that the testatrix had the necessary testamentary capacity – *Vout v.* Hay, [1995] 2 S.C.R. 876. If a Will could be set aside on the basis of suspicious circumstances alone, this one might well be a candidate for such an order. The suspicious circumstances in no particular order of importance would include the following:

(a) Lisa may well have been the one who arranged the appointment with Mr. Jack and she was present during the giving of instructions.

(b) Neither Lillian nor Lisa told Lewis or Ronald that a new Will had been made, although Lillian did tell all three children that she was going to be doing so.

(c) I accept the evidence of Lewis and Ronald, Lisa's protestations to the contrary notwithstanding, that Lisa hid from them the fact that mother was making a new Will and hid the paperwork in connection with it between the box spring and the mattress of the bed in Ronald's room which Lisa was using.

(d) Lisa's insistence that there was a similar Will in 1994, although it has never been disclosed by anyone in this litigation.

Countering some of these potentially suspicious circumstances, we also have the following:

(a) Although Douglas Jack did not testify at trial, and although there was no specific reference to this matter at trial (Lewis, in particular, didn't hesitate to criticize lawyers involved in this litigation whenever he found it helpful to do so), it should be apparent to those who may be considering these reasons in another place that Wellington County is a fairly tight legal community. Although I am not certain that I am permitted to take judicial notice of this fact, I am aware that Douglas

Jack has an excellent reputation as a careful and prudent solicitor with a wealth of experience in matters including estate planning. I am also aware that even the most careful professionals sometimes let their guard down.

(b) Although Lisa was present during the giving of instructions, she was not present when the Will was being read over and executed by Lillian in the presence of Douglas Jack and the other witness.

(c) The Will, on its face at least, does not appear to be the least bit unfair. Douglas and Lillian had three children – the estate was divided equally amongst the three children. I appreciate that there are issues with respect to three properties, the Tennessee property, which was expressly referred to in the Will, and the Lamont and Severn properties which were not, all of which will be the subject matter of further discussion. The Will, however, on its face, would appear to be one that one might expect from a loving mother of three children.

(d) Lisa, the youngest child, was named as the sole executrix. On the totality of the evidence, it would appear that she may have been the most financially responsible of the three children and she has certainly demonstrated an ability to keep meticulous and detailed financial records. Her personality also, however, unfortunately, led her to take charge at a very early stage in a most unfriendly and non-familial way, one of the many factors which led to a relatively quick and continuing situation of total hostility and mutual mistrust amongst the three siblings.

[17] As indicated, there were three properties which various parties to this litigation thought should or should not have been referred to specifically in the Will. I will deal with each of them separately in answer to the specific question referable to them. In general terms, I simply note at this point that reference was made in the Will to the Tennessee property because Lillian and Douglas had their name on title at one time, possibly it would seem although the evidence is

not entirely clear on this point up to and including their respective deaths, but it is also abundantly clear and undisputed in the evidence that the title contained a provision that the registered owners were all subject to a right of survivorship clause. Lisa survived. Including a reference to this property in the Will was, in my respectful view, done out of an unnecessary overabundance of caution.

[18] Lewis felt that there should have been a provision in the Will regarding property at 16 Lamont Place, in Brampton, to the effect that it would go to him before the estate was otherwise divided equally and Ronald felt that there should be a similar provision with respect to 24 Severn Drive, Muskoka, going to him prior to the equal division. Indeed, one of the many disputes which took place amongst Lillian, Lisa, Ronald and Lewis between August 5, 2005, and September 17, 2005, while mother was suffering the ravages of her last illness, dealt with these very issues. Mother told all three children on numerous occasions and in no uncertain terms that they would all be treated fairly and that her property or her estate or her assets (various words were used, none of them with any apparent intended legal significance) would be divided equally amongst them. It would appear that each of the three believed that the estate should have been divided equally but that his or her equal share should somehow have been bigger. All of us, to some degree or another, are burdened or blessed with enlightened self-interest; we see what we want to see, and we hear what we

want to hear. Mother told them in no uncertain terms on more than one occasion that if Ronald wanted the cottage there should be more than enough money in the estate to permit him to buy it from the estate and she told Lewis the same thing with respect to Lamont Place. At the time that mother made those comments, she was absolutely correct. As a result of delay caused by the way in which the parties have dealt with their disputes since mother died in the fall of 2005, it is most unlikely that after taxes, carrying charges, unpaid rent and no doubt absolutely staggering legal fees, a sizable estate may well no longer, unfortunately, be the case.

[19] The only evidence before me with respect to mother's testamentary capacity was that she was lucid right up until and including the day of her death. There was a reference in one of her admission reports, on August 16, 2005, that there was some indication of some sensory deprivation of some unnamed sort, but nowhere in the evidence is there any suggestion of any reduction in her mental status. The totality of the evidence makes it abundantly clear to me that she was not, and would not be, influenced by anybody with respect to a fair and just testamentary disposition and indeed, that is apparently the position that Lewis and Ronald took when they withdrew their Notice of Objection one year after having filed it. Because, however, the Order Giving Directions, which included a term that the validity of the Will would be an issue to be tried, was

made after the Notice of Objection was withdrawn, I place only little emphasis on the withdrawal of the objection and the reasons therefor. For all of these reasons, I concluded that the proponents of the Will, Lisa and Ronald, had satisfied the onus of proving that Lillian's last Will and testament dated August 16, 2005, was a valid testamentary disposition.

[20] Question 1(m) asked, "Did the Deceased have any interest in the disputed lands in Tennessee?" To which I answered, "The deceased, and hence the Estate, had no interest in the Tennessee lands after the death of the deceased." The only evidence before me with respect to this issue came from Lisa. It was her evidence that in or about the year 1995, she borrowed some money from her parents to acquire two parcels of land in Tennessee on which were constructed log cabins which were subsequently rented out to tourists. It was Lisa's evidence that when she acquired the property, she was not a U.S. citizen and she was unmarried, and because she was borrowing some money from her parents to assist her in acquiring the property it was felt prudent by all of them to have the parents' names on title. Quite frankly, I didn't understand the significance of the fact that she was not a U.S. citizen because the other two names which went on title were those of her parents, who were also not U.S. citizens. Be that as it may, it was also Lisa's evidence that she repaid her parents in full and, in a remark typical of the type of editorial which found its way

into the evidence, she also observed that she was the only one of the siblings to ever do so. According to the only evidence before me, the title to the property in Tennessee was held in three names, with right of survivorship because the somewhat quaint term used in Ontario and other common-law jurisdictions “joint tenancy” is not used in Tennessee. Mr. Jack was perhaps understandably concerned that there might be some confusion and specifically excluded the Tennessee property from the Will. This was, however, clearly redundant, in my respectful view, because the property passed by survivorship to Lisa, and I am satisfied that this is what Lillian, Douglas and Lisa always intended.

[21] Question 1(j) asks, “Has the Deceased’s personal property been properly distributed and accounted for?” And I answer, “There is no evidence to justify an order that would require any redistribution of the personal property of either Douglas or Lillian McConomy.” As is unfortunately common in litigation of this sort, each of the parties takes the position that the others took more than their fair share of personal property. What is abundantly clear in the totality of the evidence is that each of them took some things and there is absolutely no evidence before me as to the entitlement of the taker or the basis of same, nor more importantly the value of the items taken. There is simply no basis on which to make any order to the effect that there should be any redistribution of personal property whatsoever.

[22] Question 1(c) asks, “Who owned 257 Parkside Drive East, Fergus (the “Fergus Property”) as of the date of death of the Deceased?” and question 1(d) asks, “Are there any valid trust or other valid legal claims with respect to the Fergus Property or its proceeds, and if so, what is the value of those claims?” My answers were as follows, “The Estate of Lillian McConomy.” and “There are no such claims pursued at trial, nor proven, and hence no need to value.” It is quite possibly not an understatement to say that only one issue was agreed to by all parties at trial and that is that Lillian McConomy was on the date of her death the owner of the Fergus property and that there were no valid trust or legal claims against it. Indeed, long after this battle began the property was sold for a price which netted almost exactly the net amount which the brothers had offered to Lisa several years earlier (of which she says she was never made aware by her then counsel) and the net proceeds were divided equally amongst Lisa, Ronald and Lewis – each of them received approximately $66,000.00, as I understand the evidence.

[23] Question 1(a) asks, “Who owns 16 Lamont Place, Brampton?” and 1(b) asks, “Are there any trust or other valid legal claims with respect to 16 Lamont Place, Brampton (the “Brampton Property”), and if so, what is the value of those claims?” My answers were as follows, “The Estate of Lillian McConomy.” and

"There are no such trust or other valid legal claims proven, and there is insufficient evidence to value them even if there were."

[24] The deed to 16 Lamont Place, Brampton, was registered on November 25, 1997, in the name of Lillian McConomy. It is Lewis' evidence that he had in the past gone through a very "messy divorce" and neither he nor his mother wanted him to be in the position of having to protect property in the event of future matrimonial litigation. As I understand it, he was at that time in a common-law relationship with Patricia Van Houten and one or two of their three children now aged 11, 12 and 17, were already born. It was Lewis' evidence that his mother wished to provide a home for Lewis, Patricia, and their children, without having to be concerned that the property would be the subject matter of some subsequent matrimonial dispute.

[25] Lewis does not claim to have put any money directly into the property at the time it was acquired, and agreed with a paper trail which was put to him in cross-examination which makes it clear that mother provided the entire down payment, both in cash and using the proceeds of the sale of a property previously owned by her. Lewis did not describe any specific arrangement between his mother and himself other than to say that she expressed the desire that the property be available for Lewis, Patricia and their children. Patricia Van

Houten was present on the first day of trial, but Lewis indicated that he would not be calling her as a witness and I did not see her thereafter. Documents filed make it clear that mother treated the property as an investment property and described the money she received from Lewis over the years as “rent”. Indeed, mother included 16 Lamont Place in her Income Tax Returns as rented property and Lewis passed this off by suggesting that his father, Douglas, had taken some tax courses at H & R Block and would do anything to try to save a few dollars on income tax. It is not at all clear to me that the inclusion of the Lamont Place property reduced rather than increased Lillian’s taxable income. In addition, Lewis undertook on his examination for discovery to produce copies of his own Income Tax Returns to disclose whether in fact he claimed that he was paying rent at Lamont Place, but he has failed or refused to do so.

[26] The closest that Lewis came to justifying any interest in the property was a suggestion that he had done repairs over the years and thereby put money into the property to increase its value and thus would have a resulting trust of some sort with respect to the alleged increase in value. Lewis purported to produce copies of receipts which he either said or suggested were receipts for items referable to 16 Lamont Place paid by him personally. When pressed in cross-examination for some proof that he had indeed paid them, his response was along the lines of, “Well I have produced those receipts so I obviously paid for

them." This quickly unraveled when it became apparent that the original receipts are and were always in the possession of Lisa, who obtained them from her parents' financial records, and the receipts which Lewis was producing and relying on were copies of documents that he had received as a result of the production which was ordered prior to the commencement of trial. Even more importantly, Lisa produced a meticulously documented cross-reference of her parents' Visa bills and bank statements to show that virtually all of the receipts that Lewis was relying on in support of his trust claim had been paid not by Lewis, as he said, but rather by either Douglas or Lillian or both jointly. Finally, and perhaps most significantly, there is simply no evidence whatsoever that Lewis improved the value of the property as a result of the work that he alleged that he did.

[27] After Lillian died, Lewis stopped paying any rent whatsoever. About two years later, there was a flood as a result of a burst pipe, and there was, not surprisingly, a dispute between Lisa and Lewis as to how the repair work was to be handled and paid for. I am satisfied on the totality of the evidence that while Lewis may have done some work and may have even paid for it, he did so in the face of clear and unequivocal instructions from Lisa that he was not to do so and that she would look after it on behalf of the estate. It was Lisa's evidence that Lewis refused to co-operate with the insurers and that any expenses he incurred

thereafter were a result of his intransigence and his refusal to co-operate with the insurers. I agree.

[28] Accordingly, there is not a scintilla of evidence that Lewis has any interest, arising by trust or otherwise, in the Lamont Place property.

[29] Question 1(e) asks, “Who owns 24 Severn Drive, Muskoka Lakes (“24 Severn Drive”)?” and question 1(f) asks, “Are there any valid legal trust or other claims with respect to 24 Severn Drive, and if so what is the value of those claims?” I answered, “The estate of Lillian McConomy who was the sole beneficiary of the estate of Douglas McConomy.” and “There are no such valid legal claims or trust claims proven and there is insufficient evidence to value them even if there were.” Ronald McConomy bought the Severn Drive property, in Muskoka, in 1998, for $70,000.00, paying $17,500.00 down with a mortgage back to the vendors for the balance. Ronald was careful to point out that although the property had a Muskoka address, the appraised value of $100,000.00 was not in dispute. He described the property as quaint, not pretty, swamp property. It had an indoor toilet, a pump and a shower, but no insulation and no road access. He used the property almost every weekend in the non-winter months, but only rarely during the winter months, perhaps twice a year when the ice was strong enough to permit access. Between 1998 and 2003, and

indeed thereafter, Lisa never visited the property, Lewis visited it once some time close to 1998, and his parents were there approximately twice per year. The property was never rented out and always solely occupied by Ronald.

[30] In 2003, Ronald made an assignment in bankruptcy. I had understood from the evidence that his father, Douglas, purchased the property from Trotter and Associates, the Trustee, but, in fact, the deed makes it clear that the property was in the name of Douglas and Lillian McConomy as joint tenants, the deed having been registered on July 4, 2003.

[31] Ronald's position is that although he agrees that title is in the name of Lillian McConomy at the time of her death (not as the beneficiary of Douglas' estate as I originally thought but rather as the sole surviving joint owner), she held the property in trust for him.

[32] According to Ronald's evidence, the property was going to be sold by his bankruptcy trustee and his father knew how much it meant to Ronald. I haven't the slightest doubt that the property was and remains extremely important to Ronald and he was very concerned about the fact that it would be lost in his bankruptcy. Unfortunately, I have also concluded that the way in which he went about trying to protect the property precludes him from now asserting an equitable claim to it against the estate of his mother.

[33] According to Ronald, his father made an offer to the trustee in bankruptcy to purchase the cottage for $55,000.00, but that was rejected. Father then offered $72,500.00 the amount that Ronald had paid five years earlier (He said he paid $70,000.00 but also said that there was $17,500.00 put down on the property with a mortgage back for $55,000.00.) In any event, the amount paid was approximately the same as it had been purchased for five years earlier. Ronald states, and it is not disputed, that his trustee in bankruptcy paid off the mortgage which had been registered against the property by the vendors in 1998 out of the proceeds of the sale to Douglas and Lillian. It would appear from Exhibit #2, Tab 59 that the net recovery from the sale of the Severn property by the trustee was $14,783.00. This amount presumably was made available to Ronald's creditors and there is no hard evidence before me to enable me to conclude that the sale was an improvident sale.

[34] The money used to purchase the Severn property from the trustee came from two sources – a boat and an all-terrain vehicle which Lillian sold to Big Chute Marina Limited in June 2003, for a total of $21,000.00; $10,000.00 of that found its way into the purchase price of the cottage by Douglas and Lillian from the trustee. There is no evidence, to the best of my recollection, with respect to where the other $11,000.00 went. The problem with this money is that this was really Ronald's money. His evidence was that he had purchased the boat and

that his mother had put it in her name, for reasons which are not clear, but that the boat was, in fact, his. He claims to have disclosed to the trustee in bankruptcy that he had a boat but that it was not registered in his name. He also claims to have told the trustee in bankruptcy that he had a four-wheel drive ATV but that he used it sometimes to move equipment around on a small farm where he resided. It is Ronald's evidence that the trustee told him that he did not have to include the boat because it was not in his name and he did not have to include the ATV because it was exempt property. Either Ronald is mistaken in his recollection that he told the trustee about these assets or the trustee was mistaken in his advice that these valuable assets did not have to be put into the estate for the benefit of creditors. In either case, it would be most improper to permit Ronald now to benefit from what was either an intentional or at the very least an inadvertent fraud on his creditors. As well, it is Ronald's evidence that when Douglas arranged to buy the property for him in the summer of 2003, (several months before Ronald was discharged) Douglas agreed to purchase it for him, in trust, at a time when Ronald, as an undischarged bankrupt, was not permitted to acquire an interest in property which would not become part of his estate.

[35] I agree with submissions made on behalf of Ronald that Douglas and Lillian appeared to treat the Severn Drive property differently than the Lamont

Place property. All of the documents clearly support the position that Lamont Place was a rental property and that Lewis was a tenant. The documents that father kept with respect to payments made by him to carry the Severn Drive property and payments made by Ronald on a monthly basis until some time prior to the deaths of his parents might indicate that there was some intention to keep a record of a reducing balance of a debt owing, possibly with the result that at some point in the future the property could be reconveyed to Ronald. The exact nature of the agreement between the parties and in particular when it might be reconveyed was not the subject matter of any clear evidence and more importantly, the records do not disclose what interest was chargeable and how it would affect the balance owing and indeed, whether or not there would be any equity after interest was accounted for. It is also submitted, and I agree, that the parents treated the Lamont and Severn properties differently at the time they were discussing their own separation in that there was some discussion about how Lamont would be divided between them, but no such discussion with respect to Severn Drive.

[36] At the end of the day, however, Ronald's claim for a declaration that he has an interest in the Severn Drive property is a claim for equitable relief. The evidence does not substantiate with any degree of certainty the value of what Ronald claims is his equitable trust interest in the property and more importantly,

for the reasons discussed, I am satisfied that he could not by any stretch of the imagination be said to be making this claim with clean hands. Accordingly, I have concluded that there is no trust or other valid legal claim by any person against the Severn Drive property.

[37] Question 1(i) asks, “Do Lewis and/or Ronald owe the estate on account of their occupation, possession and/or control of any or all of the Brampton Property, the Fergus Property and 24 Severn Drive, Muskoka Lakes, and if so how much do they owe?” And I answered, “Lewis owes to the Estate occupation rent for 16 Lamont Drive, Brampton for the period August 2005 to February 2009 inclusive, in the amount of $36,550.00, calculated at the rate of $850.00 per month. Ronald owes to the Estate occupation rent for 24 Severn Drive for the period March 2005 (balance of $400) to and including February 2009 in the amount of $33,300.00 calculated at the rate of $700.00 per month. Neither Ronald, nor Lewis, nor Lisa, owe to the Estate any occupation rent with respect to 257 Parkside Drive East, Fergus.”

[38] Lewis’ spouse, Patricia Van Houten, and his three children, have lived in the Lamont Place property consistently from the summer of 2005, until the present, and Lewis lived there until some time, the date of which is not at all clear, when he and Patricia separated. Neither Patricia, nor Lewis, nor anyone

on their behalf, has paid any rent to the estate for the Lamont Drive property since July 2005, nor have they paid anything on account of the principal, interest, taxes or insurance on the property. It would appear that the rent may have been increased some time in early 2005, from $850.00 to $900.00 per month, but counsel for the estate fairly conceded during the course of argument that he could not firmly establish that this was the rent being charged at the time of Lillian's death and he was prepared to calculate the occupation rent using a monthly figure of $850.00, a position with which I agree – 43 months @ $850.00 per month, for the period August 2005 to February 2009, amounts to $36,550.00.

[39] With respect to Ronald, the calculation is found at Exhibit #1, Tab 23 using the rate which Ronald was paying, namely $700.00 per month, resulting in a balance of $33,300.00 as of this date.

[40] Lisa did not adduce any admissible evidence with respect to an appropriate rental for 257 Parkside Drive East in Fergus, but no one takes serious issue with her suggestion that it should be $1,100.00 per month. The real issue is whether or not anybody should be charged occupation rent; as I understand the position of the parties the only direct target with respect to this claim is Ronald.

[41] Lisa may have known, as a result of her dealings with her brothers over the course of their lifetime and in particular, the conduct of all of the children between August 4 and September 17, 2005 that she would have to take a hard line. She also knew that Ronald had occupancy rights at the Fergus property as it was his home base when he was not living at the cottage on weekends in the non-winter months; indeed, it was the address on his driver's licence. As indicated earlier, Lillian died some time in the early evening of Saturday, September 17, 2005, and early on Sunday, September 18, 2005, Lisa had found a locksmith to come and change the locks on the home in Fergus. When Ronald arrived at the home on Monday, September 19, 2005, he was told that he was not welcome there any longer, and after some pleading he was given a one week reprieve.

[42] As a result of numerous factors, including the existence of the objection to the appointment of an estate trustee and the hostilities which were increasing amongst the three siblings, the property in Fergus was vacant for a considerable period of time. Notwithstanding the fact that the climate in Fergus is somewhat cooler than that in Tennessee, Lisa had the gas, water, and hydro cut off at some time and in or about January 2006, Ronald, desperate for a place to stay, tampered with the lock on the gas line, ran a power cord from the Fergus property to the next-door neighbour's home, and squatted in the property for

approximately four months without water and thereafter, until the property was sold. Ronald said that he didn't think that Lisa would mind if he did so. The reality is that he should have known and probably did know that Lisa would not agree to anything that he or Lewis did or said, either for legitimate reasons or simply out of spite. In any event, I am satisfied that the peremptory way in which she dispossessed Ronald was not what one would have expected from a sibling nor from an estate trustee treating the beneficiaries fairly, and in my respectful view, it would be inappropriate to award to the estate any occupation rent for the approximately twelve months that Ronald was in the property without paying rent.

[43] Question 1(g) asks, "Has the estate trustee adequately accounted for her administration of the estate?" And I answered, "Although there were some examples of possible overreaching – e.g. fax machine, passports for Trustee's spouse and children – the form of the accounts, the detail, and the back up documentation is most impressive. Provided the estate is in a position to prepare final accounts on or before Jan. 1, 2016, I will remain seized of the issue of Passing the Estate Accounts."

[44] No one else should have to revisit the squabbles which I spent four days listening to earlier this month. Subject to good behaviour, I expect to continue to preside in Wellington County until my compulsory retirement date in August of

2016, and I am quite prepared to pass the accounts of this estate when, and if, the parties ever permit the assets to be brought in and disposed of in some reasonable fashion.

[45] Question 1(h) posed the most interesting legal issue, and the greatest challenge from a legal point of view, but not from a factual point of view. The question asks, "Who owns the Deceased TD Waterhouse RIF worth approximately $392,190.00, subject to taxes, as at the date of death? Is the said RIF or its proceeds subject to a resulting trust or some other valid legal claim?" I answered, "The Estate Trustee Lisa McConomy holds the net proceeds of the T.D. Waterhouse RIF in trust for the estate."

[46] This was clearly one of the most, if not the most, contentious issue in this litigation, and requires some additional background information. The chronology of events which may be relevant to this issue is as follows:

(a) Approximately two weeks prior to August 4, 2005, Lisa and her two children arrive at her parents' home in Fergus.

(b) Douglas McConomy dies on August 4, 2005.

(c) Lillian McConomy is diagnosed with lung cancer on August 6, 2005.

(d) Lillian McConomy signs her new Will, prepared by Douglas Jack, on August 16, 2005.

(e) The Registered Retirement Income Fund (RIF) which had belonged to Douglas became the property of Lillian after Douglas' death and TD Waterhouse sent a form to her to complete. On the third page of the form, there was a space to name a beneficiary and Lillian filled in "Lisa McConomy-Wood – daughter". She then signed the document on August 29, 2005, and returned it to TD Waterhouse.

(f) Lillian dies September 17, 2005.

(g) Estate receives regular payments from the RIF between the date of Lillian's death and the spring of 2007.

(h) On February 26, 2007, a representative of TD Waterhouse indicates that in order to permit funds to be withdrawn from the RIF the original probated Will and a direction signed by the executor would be required (see Tab 9, Exhibit #1).

(i) On March 2, 2007, Lisa wrote to TD Waterhouse requesting a withdrawal of funds and asking that the funds be transferred to the estate bank account in Fergus (see Tab 10, Exhibit #1).

(j) On March 7, 2007, an Investment Services Assistant at TD Waterhouse asks Lisa if she is aware of the fact that she is the listed beneficiary on the RIF plan, and on March 8, 2007, the assistant sends further information to Lisa with respect to the question of whether or not a Will beneficiary designation overrides a RIF beneficiary designation (see Tabs 11 and 12, Exhibit #1).

(k) On March 9, 2007, Lisa directs TD Waterhouse to send the cheque to her as the "sole beneficiary designated" and a cheque in the amount of $392,636.14 is issued payable to Lisa G. McConomy-Wood on March 28, 2007 (see Tabs 13 and 14).

[47] Lisa's evidence at trial is that when she received this cheque she set up a new estate account in Tennessee and used a substantial portion of the proceeds from the cheque to pay estate taxes which were overdue in the amount of some

$254,000.00. It is not clear from the evidence, although I must infer that a substantial portion of that tax debt arose out of the deemed disposition of the RIF on Lillian's death. Lisa testified that in March 2007, she continued to believe that this money belonged to the estate and on two separate occasions she reimbursed herself for some expenses which she had incurred on behalf of the estate. It was not until November 2007, that Lisa was reading some documents with respect to assets which need not be included in probate, and she says it occurred to her for the first time that because she was the named beneficiary on the RIF that it should not have been included in the estate assets for probate purposes and that the estate had, therefore, overpaid the fees which it did pay when applying for probate. She applied for, and was able to reverse the overpayment. It seems that it was at or about that time that Lisa decided that the money was hers and not the estate's and as a result, an order was sought by Lewis' then counsel requiring Lisa to pay the balance of the proceeds of the RIF into a trust account pending a final resolution of the issue; the money remains segregated in Lisa's counsel's Trust Account.

[48] Without putting too fine a point on the various positions taken, it is the position of Lisa that by virtue of section 53 of the *Succession Law Reform Act*, and the judgment of the Ontario Court of Appeal in *Amherst Crane Rentals Ltd. v. Perring*, 241 D.L.R. (4th) 176, Lisa alone is entitled to the proceeds of the RIF

absolutely and the beneficiaries of Lillian's estate have no claim against those proceeds. A fallback position is that if it is necessary to rely on a presumption one should rely on the presumption of advancement. The position of Ronald and Lewis is that one must look at all of the surrounding evidence in an attempt to ascertain mother's intention at the time she designated Lisa as the beneficiary of the RIF, that the evidence overwhelmingly supports the conclusion that mother intended to benefit all three children equally, and that the presumption of advancement does not apply in the case of an adult recipient. They also argue that if a presumption must be resorted to, one should find a resulting trust.

[49] Section 53 of the *Succession Law Reform Act* tells us that if a person is designated as the beneficiary of a plan, the person administrating the plan can pay the full proceeds thereof to the named beneficiary and the administrator is discharged from any further obligation with respect to payment and conversely that the named beneficiary may enforce payment of the benefit. Lisa argues that as a result of that provision, she is absolutely entitled to the funds. The respondents do not dispute her entitlement but only question the way in which she is to receive those funds; Lisa says for her own use absolutely and the respondents say in trust for the three equal beneficiaries of Lillian's estate. As Rothstein J. noted at para. 4 in *Pecore*, "Equity, however, recognizes a distinction between legal and beneficial ownership."

[50] Lisa also argues that while the issue may have been subject to debate prior to February 2005, when the Supreme Court of Canada refused leave to appeal from the judgment of Feldman J.A., in *Amherst Crane*, the issue is now firmly decided in her favour. I am unable to agree with the position argued by Lisa that *Amherst Crane* settles once and for all the very issue before me.

[51] In *Amherst Crane*, the question was whether or not the proceeds of an RRSP devolved directly to the designated beneficiary or became part of the deceased's estate. Creditors of the deceased were arguing that it became part of the deceased's estate in which case they would have a claim against it. Justice Feldman held that the designation of a beneficiary prevented the proceeds of the RRSP from becoming a part of the estate and hence, the creditors had no claim.

[52] The respondents, in the case at bar, do not argue that the proceeds of the RIF automatically became an asset of the estate, notwithstanding the naming of a specific beneficiary. Rather, they argue that the proceeds were properly payable to Lisa pursuant to the provisions of section 53 of the *Succession Law Reform Act*, but that Lisa then holds those proceeds in trust for the three beneficiaries each as to an equal share in accordance with Lillian's wishes and

intention. Lisa argues that Lillian's wishes and intention are not a relevant consideration.

[53] Some very helpful comments which assisted me in focussing on the competing positions are found in the simultaneously released judgments of the Supreme Court of Canada in *Pecore v. Pecore*, [2007] 1 S.C.R. 795, and *Madsen Estate v. Saylor*, [2007] 1 S.C.R. 838, in Feldman J.A. 's judgment in *Amherst Crane*, the observations of Sheppard J. in *Fekete Estate v. Simon*, [2000] O.J. No. 1020, the judgment of J.H. Clarke J. in *Gaudio Estate v. Gaudio* (2005), 16 R.F.L. (6th) 72, and of Sherstobitoff J.A., in the Saskatchewan Court of Appeal, in *Nelson v. Little Estate* (2005), 20 E.T.R. (3d) 1. Although *Pecore* and *Madsen* dealt with joint bank and investment accounts, and not the designation of a beneficiary, it is their analysis of the issues surrounding gratuitous transfers and presumptions which is invaluable.

[54] Lisa argues, relying on the words of J.H. Clarke J., in *Gaudio*, that "…it is not the role of the court to speculate as to what the deceased may have intended to do or may have thought that he had done." However, this judgment was written two year's prior to *Pecore* and *Madsen*, in which the Supreme Court of Canada makes it abundantly clear that one question to be asked in attempting to decide a dispute involving a gratuitous transfer is, "*What was the actual intention*

of the transferor at the time of the transfer?" (See for example, *Pecore*, para. 55ff and para. 75, and *Madsen*, para. 2) The Supreme Court makes it clear that intention is not always easy to ascertain from the facts available at trial, and where this is so, if necessary resort may be had to one of the presumptions, of advancement or resulting trust.

[55] In my respectful view, there is no need to resort to a presumption in the case at bar. There is an abundance of evidence with respect to what mother's intentions always were. Almost the only thing that Lisa, Ronald and Lewis agreed upon was that mother said on numerous occasions, particularly but not limited to those occasions when the topic was raised by the children, (in bad taste or otherwise), during her final days that they would all be treated equally. As I noted in para. 18, on numerous occasions mother was heard to say words to the effect of, "don't worry, you'll all be treated equally", "don't worry all of my assets will be divided equally amongst the three of you" or "you will all be treated fairly". Although Lisa seems to recall that mother used the word "estate" when she made these comments, I am not certain that this is so; unfortunately, I was left with the impression clearly exemplified in some of her evidence, that Lisa would say whatever she felt was necessary to suit her purpose and further her position in this litigation.

[56] Just by way of example, Lisa gave different versions as to whether or not her parents had earlier Wills and if so, who was or were the executors in those Wills. She also gave a somewhat strange response to a question (totally off topic but very much still a live issue in the minds of the litigants, in particular, Lewis) with respect to her mother's cremated remains. Lewis was cross-examining her about something which had been said by an employee of the cemetery in Brampton to the effect that Lisa had expressed a desire to take the remains to Tennessee and Lisa testified at this trial that she suspected the person confused what Lisa had told her with what Lewis had told her. It would be difficult, indeed, to confuse Lisa and Lewis. In any event, whether mother did or did not use the word "estate", I doubt very much that she was intimately familiar with the provisions of section 53 of the *Succession Law Reform Act*, nor do I suspect that she had read Justice Feldman's judgment in *Amherst Crane*. What mother was saying, and what her earlier maternal role and her entire history of treatment of her children over the years would confirm, is that all of the children would be treated equally. I haven't the slightest doubt that that was mother's intention and that that was her wish. With the greatest of respect to those who would argue otherwise, I am completely satisfied that the only logical explanation for the naming of Lisa as the designated beneficiary on the RIF on August 29, 2005, is that thirteen days earlier Lillian had named Lisa as the sole estate trustee

(interestingly there was not even an alternate named) of her estate to hold the assets of her estate in trust for the three siblings equally, and on August 29, 2005, she wished to ensure that Lisa would also receive the proceeds of her RIF, a very substantial portion of her estate, on the same terms. No other conclusion seems to me to be the least bit reasonable.

[57] I say this knowing full well that Lisa testified that during the time mother was dying and Lisa was looking after her and the boys were behaving in a most regrettable way, that she would be taken care of. To conclude that mother was suggesting that Lisa would receive an additional $400,000.00, less tax, for a couple of months of looking after mother in her last days is, with the greatest respect, preposterous.

[58] Because I haven't the slightest doubt as to what mother's intentions were when she named Lisa as the designated beneficiary of the RIF, it should not be necessary to look to the presumptions. If I had to do so, however, I would agree with the current trend expressed by the Supreme Court of Canada in *Pecore*, against applying a presumption of advancement when there is a gratuitous transfer between a parent and a non-dependent adult child. With respect to a presumption of resulting trust, there would clearly be a windfall to Lisa, a corresponding deprivation to the other two beneficiaries, but whether or not there

was a juridical reason may or may not be subject to some debate. In any event, I do not find it necessary to look to the presumptions to resolve this issue, and if I did I would find, as in *Pecore*, that there is no presumption of advancement, and any presumption of resulting trust is overwhelmingly rebutted by the evidence. Indeed, except for Lisa's uncorroborated evidence that mother told her at some point in the last several weeks of her life that "you will be rewarded" (ostensibly here on earth) the rest of the evidence clearly and consistently indicates an intention to treat all three children equally. I have, accordingly, concluded that Lisa holds the entire net proceeds of the RIF, after payment of taxes and other legitimate estate expenses that were paid from it, in trust for the beneficiaries of the estate in equal shares.

[59] The Order Giving Directions provided at paragraph 1(k) that I should determine, "Any other issues that the parties agree or this Court determines are to be tried." My response to that was as follows:

> "In the interests of saving even further litigation and dissipation of the relatively small amount of money still left in the estate, I order that the Resp. Lewis shall be entitled to purchase from the Estate within 90 days of this date (if the Estate has not lost the right to convey title by virtue of proceedings #5427/08 in Milton involving the TD Bank) the property at 16 Lamont Place, Brampton for the sum of 95% of its appraised fair market value, namely $228,000.00 cash, provided he submits an unconditional offer to do so within twenty-one days of this date. For the same reasons, I order that the Resp. Ronald shall be entitled to purchase from the Estate

> within 90 days of this date the property at 24 Severn Drive, Muskoka Lakes for the sum of 95% of its appraised fair market value, namely $95,000.00 cash, provided he submits an unconditional offer to do so within 21 days of this date."

[60] Not a great deal of further comment is necessary with respect to these orders. There was absolutely no issue taken at trial with respect to the values that have always been attributed to Lamont Place and to Severn Drive, and it is clear from the evidence that mother told the boys in the presence of all three siblings that if they wished to do so they would be able to purchase the property in which they had expressed an interest from the estate for its fair market value. Indeed, it was this comment by mother which reinforces the view that she did not intend that either of the boys would receive this property which was in her name without paying fair market value for it.

[61] The history of this litigation makes it abundantly clear that even if Lewis and/or Ronald do not purchase the property, the estate will have some considerable difficulty in being able to obtain vacant possession of the property, sell it for fair market value and distribute the proceeds. Accordingly, I also order that if Ronald does not submit an offer to purchase Lamont Place, or having submitted an offer does not close in accordance with the terms of his offer, the estate trustee may apply to me, without notice, for a judgment for possession of 16 Lamont Place, and for an order permitting the issuance of a writ of

possession. Similarly, if Lewis does not submit an offer to purchase Severn Drive, or having done so does not close in accordance with the terms of his offer, the estate trustee may also apply, without notice, to me for judgment for possession and leave to issue a writ of possession.

[62] The only other issue which I dealt with at the conclusion of trial was with respect to the issue of costs, and I have invited submissions from all parties with respect to same. I simply observe at this point that there is a possibility that the estate will be held responsible for the costs of the TD Bank in enforcing the mortgage it holds on 16 Lamont Place, the Milton proceedings to which I have referred earlier. It seems to me abundantly clear that the estate has never disputed the bank's entitlement and the litigation has basically been to deal with Lewis' claim to a possessory interest in the property, and if the estate, rather than

Lewis personally, is ordered to pay the costs awarded to the Toronto-Dominion Bank, then the issue of those costs should be the subject matter of submissions by the parties in their overall costs submissions to me.

*“original signed by
C.N. Herold, J.”*

C.N. Herold, J.

Released: February 23, 2009

COURT FILE NO.: 436/07 (Guelph)
DATE: 2009/02/23

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

LISA GAIL McCONOMY-WOOD, In her personal capacity and in her capacity as the estate trustee of the estate of LILLIAN McCONOMY, deceased

Applicants

- and –

LEWIS VICTOR McCONOMY and RONALD DOUGLAS McCONOMY

Respondents

REASONS FOR JUDGMENT

Herold, J.

Released: February 23, 2009