IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Neufeld v. Neufeld,
2004 BCSC 25

Date: 20040109
Docket: 21154
Registry: Penticton

Between:

Harry Neufeld

Plaintiff

And

Seigfried Neufeld and Seigfried Neufeld as Executor of the Estate of Charlotte Neufeld

Defendant

Corrected Judgment: The text of the judgment was corrected at paragraphs 14, 18 and 19 on August 3, 2018.

Before: The Honourable Mr. Justice Cohen

Reasons for Judgment

Counsel for the Plaintiff:	W.G. Johnson
Counsel for the Defendant:	J.D. Metherell
Place and Dates of Trial:	Kelowna, B.C. November 25-28, 2003
Place and Date of Judgment:	Penticton, B.C. January 9, 2004

I. INTRODUCTION

[1] Charlotte Neufeld (the "deceased") passed away on July 29, 2003 at the age of 71. She is survived by her brothers, the plaintiff, age 70, and the defendant, age 76. The plaintiff brings this action against the defendant in his personal capacity, and in the defendant's capacity as the executor of the deceased's estate.

[2] According to the deceased's will, executed by her on May 4, 1999, the plaintiff and the defendant are each entitled to one-half of the residue of the deceased's estate. At the time of her death, the deceased's assets included savings certificates in the amounts of $17,000, $11,500 and $7,000, all held in the joint names of the deceased and the defendant, and a $43,000 (approximately) RRIF naming the defendant as beneficiary. In addition, the deceased co-owned a joint bank account with the defendant which had a balance of approximately $3,000 at the deceased's date of death. In her own name the deceased held Canada Savings Bonds valued at approximately $81,000, and some shares valued at $9,098.

[3] The plaintiff contends that, based on the authorities, the assets placed into the joint names of the deceased and the defendant are held by the defendant in a resulting trust for the deceased's estate and should be divided according to the wishes of the deceased as expressed in her will. The plaintiff claims, in the alternative, that if the defendant received the proceeds of the RRIF free of any trust, then as executor of the deceased's estate he was duty bound as a fiduciary not to prefer his interests over the interest of the estate and the beneficiaries of the estate, and to pay the tax which accrued in respect to the RRIF when it was included in the income tax return to the date of death of the deceased.

II. ISSUES

[4] There are two issues that must be decided on the evidence before the court: first, the ownership entitlement to assets held jointly in the names of the deceased and the defendant, and the ownership entitlement to the proceeds of the RRIF. In deciding this issue the court must determine whether the defendant is entitled by

right of survivorship to claim ownership of the assets in issue, or is he impressed with a trust in favour of the estate?

[5] The second issue raises the legal question of whether, in the event that the court finds in favour of the defendant on the first issue, he is required to pay the tax on the RRIF, or does the estate bear the burden of satisfying the tax liability?

III. THE RESULTING TRUST ISSUE

1. Background

[6] In 1995 the deceased was diagnosed with cancer. Sometime between 1994 and 1997, most likely after she learned of her illness, the deceased changed her bank account at the Scotiabank, main branch in Penticton, naming herself as a joint owner of the account with the defendant. At the time the deceased was living in a basement suite in the defendant's house in Penticton, where she had been residing since 1993 after moving to Penticton from Winnipeg. She moved to the Okanagan so that she could be closer to both the plaintiff and the defendant. They had also moved to the Okanagan from Winnipeg, the defendant in 1993 and the plaintiff at an earlier date.

[7] On April 21, 1999 the deceased again attended at the Scotiabank, main branch in Penticton, and instructed the bank to change some of her savings certificates from her own name into the joint names of herself and the defendant, and to change the designated beneficiary on her RRIF to name the defendant as the beneficiary.

2. The Law

[8] The law of resulting trust relating to a joint bank account is succinctly summarized by Kirkpatrick J. in *Clarke v. Hambly*, (2002) B.C.J. 1672, where at para. 10 Her Ladyship states, as follows:

> The court in *MacInnis Estate v. MacDonald* (1994), 138 N.S.R. (2d) 321 (N.S.S.C.) considered the issue of whether money deposited in joint accounts by a father in favour of himself and his daughter was an absolute gift to the daughter or held under a resulting trust for the benefit of the father's estate.

MacAdam J. extensively reviewed the law pertaining to the operation and effect of jointly held bank accounts in the context of a transfer involving a parent and child. The principles of law reviewed in that decision and others may be summarized as follows:

(a) The general rule with regard to joint bank accounts is that on the death of one customer, the survivor is not entitled, as against the estate of the deceased customer, to hold the funds as her own property, if the funds were provided entirely by the deceased customer, unless there is a presumption of gift or an intention, on the part of the deceased customer, that the survivor shall have the right to retain the funds as her own: *Re Fenton Estate* (1977), 26 N.S.R. (2d) 662 at 673.

(b) The question, in the absence of fraud or undue influence, is the intention of the donor creating the joint account. The "ordinary rule" is that where the funds are provided entirely by the deceased the funds revert to the donor upon a resulting trust: *Edwards v. Bradley*, [1957] S.C.R. 599.

(c) The "ordinary rule" may be modified when the transfer involves a parent and child, in which case the presumption of advancement may arise: *Shephard v. Cartwright*, [1955] A.C. 431 at 445.

(d) The presumption of advancement may be rebutted, but should not give way to slight circumstances: *Shephard v. Cartwright*.

(e) Because advancement is a question of intention, facts antecedent or contemporaneous with the transaction may be put in evidence to rebut the presumption or to support it: W.J. Mowbray, B.A., *Lewin on Trusts*, 16th ed. (London: Sweet & Maxwell, 1964) at 135.

(f) The subsequent acts and declarations of the parties cannot be used to support their positions but may be used against them: *Shephard v. Cartwright*.

3. The Parties' Positions

[9] The main thrust of the plaintiff's claim on the resulting trust issue is that after she learned of her illness, the deceased developed a plan to treat the plaintiff and the defendant equally in the disposition of her assets, and that the steps she took to change her bank account, change the designated beneficiary on her RRIF and name the defendant as a joint owner of her savings certificates were intended by her to avoid probate fees, and not to favour the defendant over the plaintiff with ownership of these assets. Unfortunately, if she had such a plan, the deceased did not express her intention to anyone. In fact, while the defendant signed documents at the bank at

the time of the change in the deceased's bank account, and therefore knew he was a joint holder of the account, he was not aware that his name had been placed on the savings certificates, or that he was named as a designated beneficiary on the RRIF, and neither he nor the plaintiff ever discussed the deceased's intentions regarding her estate with the deceased. Therefore, the court must determine the deceased's intentions when she took the steps she did regarding her assets from the whole of the evidence before the court.

[10] The defence concedes that a resulting trust applies on the evidence before the court, at the very least with respect to the savings certificates and the joint account. The defence also concedes that the defendant has the burden of proving that the deceased intended him to receive ownership of the joint account and the savings certificates, but counsel argues that a different standard of proof applies with respect to the ownership of the proceeds from the RRIF.

[11] Defence counsel submitted that there should be no presumption of a resulting trust applied in circumstances where the donor has made a designation of a beneficiary on a RRIF. According to her argument, citing *Roberts v. Martindale*, [1996] B.C.J. No. 1743 (S.C.); (1998), 55 B.C.L.R. (3d) 63 (C.A.), in the right circumstances the court may find that it is unconscionable to allow a party to retain beneficiary ownership of life insurance proceeds, a RRIF or RRSP. She contended that the proper course is the imposition of a remedial constructive trust, not the application of an evidentiary presumption against the recipient of the funds.

[12] Counsel submitted that the cases involving life insurance proceeds, RRIFs or RRSPs are different because of the legislative authority that has been established to create beneficiary designations. She said that to apply a resulting trust analysis to these types of designations would create an unreasonable distinction in the way the law applies to a beneficiary designation made in a will, versus a designation made pursuant to a statute.

[13] Counsel argued that RRIF and RRSP designations are akin to testamentary designations and should be recognized as incorporating an element of intent on the

part of the donor by the mere making of the designation. To find otherwise, she said, would create a situation where any beneficiary of such a product, whether he or she knows about the designation or not, must be prepared to demonstrate an intention on the part of the donor to the gift. She claimed that this would apply as equally to charities as to other "stranger" beneficiaries who do not benefit from the presumption of advancement as children and spouses do.

4. Decision on Resulting Trust Issue

[14] With respect, I do not agree with defence counsel's position on the RRIF. In *Dreger (Litigation Guardian of) v. Dreger*, [1994] 10 W.W.R. 293 (Man. C.A.), the guardian ad litem of the deceased's youngest child sued the deceased's son seeking to hold him accountable to the estate for the proceeds of life insurance and RRSP contracts, arguing that he was trustee of the funds for the estate under an *inter vivos* trust created by the deceased.

[15] The deceased had two grown children who were self-sufficient. She also had a young child. After learning that she had cancer, the deceased instructed a solicitor to prepare a will which provided for specific bequests to her adult children. The residue was to be held in trust for the maintenance of her youngest child to be paid in yearly increments of $5,000. The estate consisted of a house, a car, RRSP annuity contracts and life insurance policies. The RRSPs and the life insurance policies were payable to the son as a named beneficiary. The deceased never told him that he was the beneficiary of the policies. The son sold the house and the car and paid out the specific legacies, including that to himself.

[16] The scheme envisioned by the deceased was frustrated by the designation of the son as beneficiary under the contracts. There was only enough left in the estate to maintain the child for one year and nine months as opposed to her entire infancy.

[17] The Manitoba Court of Appeal held that the letter of instruction to the lawyer alone was sufficient evidence that the deceased intended the proceeds of the life insurance contracts to form part of her estate. The Court found that the funds were

held on a resulting trust in favour of the estate and that the son had to account for them with interest. At paras. 24 to 27 of the case, Huband J.A. opined, as follows:

> Where property is purchased in the name of another, or transferred to another without consideration, the possibilities of a resulting trust arise. It comes down to a question of intention on the part of the transferor. Where the purchase or transfer is to a "stranger" it gives rise to a rebuttable presumption of a resulting trust. Where the purchase or transfer is from husband to wife or father to child, the rebuttable presumption is that an advancement was intended.
>
> The first question to be addressed is whether this law applies to insurance contracts or annuity contracts which become payable, not when the designation of the beneficiary is made, but only when the death of the insured occurs. The case of *In re A Policy No. 6402 of the Scottish Equitable Life Assurance Society*, [1902] 1 Ch. D. 282, when considered along with the decision of this Court in *Northern Trust Company v. Coldwell et d*. (1914), 25 Man. R. 120, provides a definitive affirmative answer. In the first-mentioned case, a Mr. Sanderson took out a policy of insurance on his own life naming his sister-in-law as beneficiary. Mr. Sanderson' s wife died in the same year that the policy was purchased, 1850, and two years later he went through a form of marriage with Miss Stiles, the named beneficiary. Then in 1870, Miss Stiles died. The insured, Mr. Sanderson, lived on until 1900 continuing to pay the annual premiums. Upon his death an issue arose as to the equitable ownership of the proceeds of the policy. Given the passage of time there was a total absence of evidence as to Mr. Sanderson's intentions at the time the policy was taken out and the designation of beneficiary was made. In the absence of evidence of intention, the court concluded that the monies properly belonged to Mr. Sanderson's estate under a resulting trust. Joyce J. concludes his judgment in these terms (at p. 286):
>
> > Now, in the present case a policy was taken out by Mr. Sanderson a great many years ago, and the name of Miss Stiles appears in the policy as the person to whom the money is to be paid. The policy was never handed to her, and she is now dead, and the premiums were always paid, and were paid for many years after her death, by Sanderson. That, really, is a case of a man taking the policy out in the name of another, that other person being a sister of his wife, and, therefore, not standing in any relation to him "that would meet the presumption," as Lord Eldon expressed it. It comes really to this: a purchase by one in the name of another with no other circumstances at all proved. Therefore, in my opinion, although the legal personal representative of the lady in this case would be the person entitled to receive the money at law and to give a receipt for it, in equity the money belongs to the legal personal representatives of Mr. Sanderson, who took out the policy.
>
> The *Northern Trust Company v. Coldwell* case also involved a dispute as to the equitable ownership of an insurance policy. The Manitoba Court of Appeal was divided in its decision, but both the majority judgment by Howell

> C.J.M. and the dissenting opinion of Perdue J.A. make reference to the *Scottish Equitable Life Assurance Society* case as a authoritative decision. The court differed because the majority concluded that there was evidence of intention to rebut the initial presumption, while Perdue J.A. came to a different conclusion on the facts.
>
> The combination of these cases leads to the conclusion that the law with respect to resulting trusts includes insurance and annuity contracts, and the relevant time to determine intent will normally be the time when the designation of beneficiary is made.
>
> [Emphasis mine]

[18] Defence counsel argued that *Dreger*, *supra*, is not good law in this jurisdiction because of the decision of our Court of Appeal in *Roberts v. Martindale*, *supra*. In that case, Martindale and the deceased agreed in their separation agreement that each spouse relinquished all interest in the other's estate. Roberts was the deceased's sister and cared for her while she was dying of cancer. The deceased intended for Roberts to inherit her entire estate, including a life insurance policy which named Martindale as a beneficiary. Roberts and the deceased assumed that all appropriate actions had been taken to make Roberts the beneficiary of the policy. After the death, Martindale filed for payment under the life insurance policy and received $67,228.08. Roberts claimed the recovery of the money with interest. Martindale argued that the deceased never showed any interest in altering the life insurance policy. The learned trial judge found that a resulting trust had been created for the benefit of Roberts such that the deceased intended that Roberts would have all of her assets. The Court found that the learned trial judge had erred in finding that a resulting trust had been created, but went on to hold that there was a remedial constructive trust, despite the fact that Martindale committed no fraud. At paras. 13 to 27 of the case Southin J.A. said, as follows:

> [13] I need not address the first two alleged errors because, as will appear, I am satisfied that the learned judge erred in holding that a trust, whatever label it might bear (see, as to the difficulty of labels in the law of trusts, D.W.M. Waters, Law of Trusts in Canada, 2nd ed. (Toronto: Carswell, 1984) at 299), arose from the deceased's mistaken belief that she had changed the beneficiary of the policy.
>
> [14] Testators not infrequently are mistaken about the legal effect of what they have or have not done. For instance, a testator may believe that he or she has executed a valid codicil revoking a gift to X. The codicil is invalid for want of proper execution. If the learned judge's analysis is correct, X would

be a trustee of the gift to him and the gift would fall into residue. There is no authority for such a conclusion.

[15] But do the facts of this case give rise to a constructive trust?

[16] By the Insurance Act, R.S.B.C. 1979, c. 200:

> 122. In this Part
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> * * *
>
> "beneficiary" means a person, other than the insured or his personal representative, to whom or for whose benefit insurance money is made payable in a contract or by a declaration;
>
> * * *
>
> "declaration" means an instrument signed by the insured
>
> (a) with respect to which an endorsement is made on the policy;
>
> (b) that identifies the contract; or
>
> (c) that describes the insurance or insurance fund or a part of it, in which he designates, or alters or revokes the designation of, his personal representative or a beneficiary as one to whom or for whose benefit insurance money is to be payable;
>
> * * *
>
> "instrument" includes a will;
>
> * * *
>
> 141. (1) An insured may in a contract or by a declaration designate himself, his personal representative or a beneficiary to receive insurance money.
>
> (2) Subject to section 142, the insured may alter or revoke the designation by a declaration.
>
> (3) A designation in favour of the "heirs", "next of kin" or "estate" of a person, or the use of words of like import in a designation, shall be deemed to be a designation of the personal representative of the person.
>
> * * *
>
> 147. (1) Where a beneficiary is designated, the insurance money, from the time of the happening of the event on which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.

[17] Mrs. Martindale made no change in her designation of beneficiary. Thus, the appellant, John Edward Martindale, was entitled to recover from the insurer, and the insurer was obliged to pay to him, the proceeds of the policy.

[18] His position is that, not only did he have a legal right to the money, but also he had a right in equity. To put it another way, he says the statute means what it says.

[19] Is he right?

[20] There is a maxim of equity that it will not permit even an act of Parliament to be used as an instrument of fraud.

[21] This principle was addressed by Lord Westbury in *McCormick v. Grogan* (1869), L.R. 4 H.L. 82, a case in which some disappointed "beneficiaries" asserted that the beneficiary under a Will held the deceased's property upon a secret trust.

[22] Lord Westbury put the matter thus at 97:

> My Lords, the jurisdiction which is invoked here by the Appellant is founded altogether on personal fraud. It is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud. Now, being a jurisdiction founded on personal fraud, it is incumbent on the Court to see that a fraud, a *malus animus*, is proved by the clearest and most indisputable evidence. It is impossible to supply presumption in the place of proof, nor are you warranted in deriving those conclusions in the absence of direct proof, for the purpose of affixing the criminal character of fraud, which you might by possibility derive in a case of simple contract. The Court of Equity has, from a very early period, decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act, and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the Statute of Frauds, and in this manner, also, it deals with the Statute of Wills. And if an individual on his deathbed, or at any other time, is persuaded by his heir-at-law, or his next of kin, to abstain from making a will, or if the same individual, having made a will, communicates the disposition to the person on the face of the will benefited by that disposition, but, at the same time, says to that individual that he has a purpose to answer which he has not expressed in the will, but which he depends on the disponee to carry into effect, and the disponee assents to it, either expressly, or by any mode of action which the disponee knows must give to the testator the impression and belief that he fully assents to the request, then, undoubtedly, the heir-at-law in the one case, and the disponee in the other, will be converted into trustees, simply on the principle that an individual shall not be benefited by his own personal fraud. You are obliged, therefore, to show most clearly and distinctly that the person you wish to convert into a trustee acted *malo animo*.

> [23] If equity is considered to have been frozen in 1869, then the appellants should succeed because Mr. Martindale did not act *malo animo*. He did not in any way contribute to the deceased's mistaken belief. There was here no fraud in the sense in which Lord Westbury used that word.
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> [24] But much has happened since 1869. Constructive trusts have been imposed in many cases where the defendant has done nothing which could properly be characterized as "fraudulent". There was no fraud, for instance, in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, or in *Hussey v. Palmer*, [1972] 3 All E.R. 744, in which Lord Denning spoke of imposing a trust "whenever justice and good conscience require it".
>
> [25] There is in this proposition the very great danger of judges invoking their personal predilections. "Good conscience" is an infinitely variable concept upon which reasonable men and women, and therefore reasonable judges, may have widely divergent opinions.
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> [26] But I am comfortable in this case in saying that it would be against good conscience for the appellants to keep this money because Mr. Martindale had, by the separation agreement, surrendered any right he might have had to the property of the deceased. A policy of life insurance is a species of property of the insured, albeit the amount payable under the contract of insurance does not fall into possession until the insured's death, and, by law, cannot be taken by the insured's creditors.
>
> [27] For the appellant, Mr. Martindale, to claim from the insurer the proceeds was a breach of the separation agreement and such a breach is sufficient, in my opinion, to call in aid the doctrine of the remedial constructive trust. To put it another way, it is not the mistaken belief of Mrs. Martindale which gives rise to a remedy; it is the bargain which Mr. Martindale made.

[19] Neither the learned trial judge nor the Court of Appeal dealt with the decision in *Dreger*, *supra*. I do not agree with defence counsel that in this jurisdiction it is not open to this Court in light of the decision in *Roberts*, *supra*, to find a resulting trust in the case of a RRIF where at the time the donor designated the beneficiary the donor intended the beneficiary to hold the proceeds of the RRIF in trust. As stated in *Dreger*, *supra*, for the imposition of a resulting trust the intention at the time of a transfer (or designation of a beneficiary) is key. In my view, what the Court decided in *Roberts*, *supra*, was simply that when the deceased named Martindale as a beneficiary of her life insurance policy, she intended that he would receive the proceeds of the policy on her death. Thus, the Court held that the learned trial judge had erred in holding that a resulting trust arose from the deceased's mistaken belief that she had changed the beneficiary of the policy, and not that in a different set of circumstances a resulting trust could not arise. I can find no support in *Roberts*,

supra, for the defence contention that *Dreger*, *supra*, is not good law in this jurisdiction.

[20] I turn then to the evidence, and whether the defendant in the instant case has overcome the presumption of a resulting trust and demonstrated that the deceased intended the defendant to own the assets.

[21] With respect to my determination of the deceased's intent, there are serious credibility issues arising from the evidence of the plaintiff and the defendant on this point. I start with the defence contention that I should reject the evidence of the plaintiff and his wife who testified that when the deceased gave the plaintiff a gift of $70,000, the deceased told them that she was making the gift to equalize what she had given to the defendant for the purchase of his house in Penticton.

[22] A document in the deceased's own handwriting establishes that on February 26, 1996 the deceased gave the plaintiff $20,000; on June 30, 1997 $15,000; on January 15, 1998 $10,000; on May 16, 1998 $10,000; on July 19, 1998 $5,000; and on November 1, 1998 $10,000. According to the plaintiff's evidence in chief, he had borrowed money against his RRSP in the amount of $20,000 and had to repay this sum within a specified time period. He told the deceased about the loan and she said that she would give him the money to repay the loan. The plaintiff said that the deceased told him that she had $70,000 in the defendant's house and that she wanted the plaintiff to have the same amount. As the deceased's investments matured she paid him $70,000.

[23] The plaintiff also said that at the times when the deceased gifted him the instalments they did not discuss her estate intentions.

[24] The plaintiff's wife testified that around the time that the deceased found out about her illness, she asked the plaintiff and his wife if they had managed to pay off their RRSP loan of $20,000. The deceased told them that she had some investments coming due and that she wanted to give them some money in order to save the income tax. The plaintiff's wife also said that the deceased told them that

she wanted to give them $70,000 because she had this same amount in the defendant's house, and she wanted to equalize the amount she had in the defendant's house.

[25] In cross-examination, the plaintiff's wife testified that at first the deceased said she would give them $20,000 to repay the RRSP loan, but that when she actually gave them the cheques she told them she wanted to give them $70,000 to equalize what she had in the defendant's house, and that each time the deceased gave them a cheque she told them it was a payment towards the $70,000.

[26] In my opinion, the recollection of the plaintiff and his wife on this point is completely unreliable and does not assist me in reaching a conclusion about what the deceased intended when she gifted the plaintiff $70,000. I find the recollection of the plaintiff and his wife to be unreliable, because the plaintiff's testimony contains major inconsistencies and is in direct conflict with his wife's testimony on this point. For example, at his examination for discovery the plaintiff testified:

> Q. Tell me exactly what Charlotte told you about loaning money to Mr. Neufeld, Seigfried Neufeld regarding the house?
>
> A. I don't know what she said, but basically, as I said before, she gave me the money saying that she wanted me to have the equal amount of money that she had in the house.
>
> Q. That's the extent of the conversation you had with her?
>
> A. That's as best as I can recollect now. I don't know if it was that abrupt or not, but basically that was it.
>
> Q. And you didn't ask her how much that was?
>
> A. I did not.
>
> Q. Did she tell you how much that was?
>
> A. No.
>
> …
>
> Q. Well, let's go back to that. I asked you about that, and you said that when she first gave you the money, that's when she said – you said she didn't say how much she had in the house?
>
> A. No.
>
> Q. Did she later tell you how much she had in the house?
>
> A. No, no, she gave me the money.

Q. Yes?

A. And I assume from the amounts that she gave me that that was the money she had in the house.

Q. Right, she never told you that?

A. She never told me any amount. The assumption that she had $70,000 was mine.

Q. Well, I want to make sure that we know the difference between what she actually said to you and what you assumed; right?

A. She never said any amount.

[27] The plaintiff agreed that he gave these answers and that they were true at the time he gave them. Defence counsel put to the plaintiff that it was true that the deceased never raised the issue of equalization for the money she had in the defendant's house, except for when she gave the plaintiff the first payment of $20,000. The plaintiff replied that he did not think she raised it until he asked her why she was gifting him the money, and she then told him that she wanted him and the defendant to have an equal amount. He could not say with any certainty what the deceased said, or did not say at the time. Counsel then read the following question and answer to the defendant:

Q. And the only time she raised the issue was when she gave you the first cheque; right?

A. Yes, I was wondering what the money was for.

[28] The plaintiff said that his answer was true. He then testified that when the deceased gave him the first installment of $20,000, he did not know how much the deceased had loaned the defendant to purchase his house, and he did not know if the defendant repaid the deceased. He also testified that he believed that after he received the $20,000 from the deceased, she gave him another $50,000 without telling him what it was for. He recalled that when he asked why she was giving him the money she told him it was to equalize her investment in the defendant's house. The plaintiff agreed with defence counsel that the deceased said this at the time of the first installment of $20,000, and he said it probably only happened at that one time. Counsel then put the following discovery questions and answers to the plaintiff:

Q. Every time she gave you a cheque, did she talk about the equalization or did that only happened once?

A. That only happened once.

Q. And you say that happened when she gave you the first cheque?

A. The first cheque, yes.

[29] In re-examination, the plaintiff changed his testimony from what he had said in cross-examination. He said that when he received the $20,000 payment from the deceased, he knew that he was receiving $70,000 from her, and said he understood that it was $70,000 to equalize what she had in the defendant's house. On further cross-examination, the plaintiff changed his evidence again. He said that when he asked the deceased why she was giving him the money, she told him it was to equalize things, but that she never gave him a figure as such and she did not tell him how much she had loaned the defendant. He also said that he could not recall where or when the deceased mentioned the amount, but he seemed to recall her saying that she had $70,000 in the defendant's house.

[30] Given his highly conflicting evidence on this point, I cannot accept the plaintiff's contention that at the time that he received $70,000 from the deceased that she told him that the payment was meant to equalize what she had in the defendant's house. On the question of how much the deceased had in the defendant's house, the evidence on this point is not much clearer.

[31] In rebuttal, the plaintiff's wife testified that after the deceased's death she and the plaintiff were visiting with the defendant and he asked them about a document in the deceased's handwriting showing payments to the plaintiff totaling $70,000. The plaintiff's wife then told the defendant that the deceased said that she had this amount in the defendant's house. According to her, the defendant said that he had repaid $101,000 to the deceased and that he could prove it. I consider the plaintiff's wife's testimony about this conversation unreliable. I think she was merely attempting to bolster the position of herself and the plaintiff that the deceased had $70,000 in the defendant's house.

[32] As for the defendant's position on this point, I find his evidence equally unreliable. He testified that when he decided to move to Penticton and purchase a house he borrowed $61,000 from the deceased. He also said that after he sold his house in Winnipeg he gave the deceased a cheque for $31,500 as partial repayment of the loan. The defendant's testimony about how he repaid the balance is somewhat unusual to say the least. According to him, for years he has kept large sums of cash in his house because of what he had experienced in Europe during the war. He testified that he always made sure he had on hand a cash reserve to keep him going for a few months to a year. Apparently it was from this cash reserve that he paid the deceased $10,000 in 1994 when she wanted money to travel to Germany on vacation; $5,000 in 1995 that he said she possibly needed for making a trip; $4,000 in 1996; $6,000 in 1997; and $5,000 in 1998. He said that the deceased needed the cash in 1997 because there were four cousins visiting Penticton from Germany and the deceased wanted the cash to pay for their flights and travel in Canada. He claimed that the deceased also traveled to Germany in 1998.

[33] The defendant testified that the deceased never actually said to him that the loan had been paid out in full. In cross-examination, the defendant said that there was no record of his cash payments to the deceased. He could not say what exactly the deceased did with the cash he paid her, but he assumed that she used it to purchase travelers cheques for her trips.

[34] The defendant disagreed with plaintiff's counsel's suggestion that he had borrowed $101,000 from the deceased, and he insisted that the $31,500 he paid to her in October, 1993 was partial repayment of the $61,000 he had borrowed from the deceased when he purchased his house. As for the cash payments he made to the deceased, he was not entirely certain, but he thought the deceased made trips to Germany in 1994, possibly in 1996 and a third trip that he believed was in 1997, and that the deceased probably spent the cash he paid her on these trips.

[35] I found the defendant's explanation for the repayment of the loan unconvincing, particularly the part about the deceased asking for cash to make

several trips to Germany. The defendant was most uncertain about the dates of the trips and contradicted himself on this point between his evidence in chief and in cross-examination. However, the main reason I found his evidence unconvincing about the cash repayments is that it does not ring true in the context of other evidence before me.

[36] The only record that the defendant could point to for the amount of the loan and its repayment is the joint account bank book which records a deposit on October 14, 1993 of $31,200, with handwritten initials written beside the deposit of “SHN”, which is the defendant’s initials. The defendant, who as executor of the deceased’s estate took control of her personal records after her death, testified that he was unable to find any record made by the deceased noting the amount of the loan, or his repayments. This seems implausible to me given that the deceased was a bookkeeper by trade who kept the defendant’s books when he operated a jewelry business in Winnipeg, kept the books for her share of the utilities and taxes she paid the defendant, kept a record of the payments totaling $70,000 she paid the plaintiff and who by all accounts was an intelligent, meticulous, particular person and a savvy investor. Therefore, I have serious reservations that the defendant repaid the deceased for the money he borrowed from her to purchase his house beyond perhaps the $31,200 that is recorded in the joint account bank book.

[37] At the end of the day I do not consider the evidence of the plaintiff or the defendant to be very helpful in drawing a conclusion about the deceased’s intent, either when she made the cash payments to the plaintiff in the amount of $70,000 or loaned the defendant money to bridge finance the purchase of his house in Penticton. I think I must look to the balance of the evidence to determine whether the defendant has overcome the presumption of a resulting trust.

[38] The main theory of the plaintiff’s case is that after the deceased found out about her illness in 1995, she developed an estate plan which included placing some of her assets in joint ownership in order to avoid payment of probate fees and taxes. According to the plaintiff, in early 1999 the deceased was attempting to come to

grips with her illness and she told the plaintiff and his wife that she wanted the plaintiff and the defendant to have equal amounts of her estate. The plaintiff said that when she mentioned that she held a RRIF, the plaintiff and his wife advised her to name a beneficiary rather than have the funds paid to her estate. They also discussed her savings investments, and at some point the deceased told the plaintiff and his wife that she had to drag the defendant down to the bank and to the insurance office to change her bank account to that of a joint account and add him as a co-owner of her vehicle. According to the plaintiff, the reason for these steps was so that the deceased could avoid paying probate fees and taxes.

[39] As for the deceased's will, the plaintiff testified that the deceased discussed her will with him and his wife and told them that she wanted the plaintiff and the defendant to have equal shares in her estate. The plaintiff and his wife did not discuss with the deceased specific details about her assets and they never reviewed with her a list of her assets.

[40] The plaintiff also testified that the deceased borrowed books on estate planning from his wife and kept them for several months. He claimed that this was around the time that the deceased was preparing her will. The deceased indicated to the plaintiff that the defendant would be her executor.

[41] The evidence of the frequency and timing of conversations between the deceased, the plaintiff and his wife was thoroughly challenged by defence counsel during cross-examination. The plaintiff testified that it was quite possible that there was more than one discussion between him, his wife and the deceased about her bank account, savings investments, vehicle and RRIF. He claimed that he had a clear recall of having more than one discussion. Counsel then put the following questions and answers to the plaintiff from his discovery:

> Q. What about her bank account, did she ever tell you what would happen to the contents of her bank account when she died?
>
> A. No, but I advised her of getting a cosigner for her account.
>
> Q. When did you do that?
>
> A. That's when she was diagnosed with cancer.

Q. At first?

A. Well, I don't know the time frame as the – it's same time I advised her to get a – make a will.

Q. So, you think that was 1994 or 1995?

A. Somewhere around there, yeah.

Q. And you think that's when you advised her about getting a cosigner on the account?

A. Some – somewhere in that time frame, yeah.

…

Q. What about the RRIF, you've wanted to talk about the RRIF. What do you want to tell me about the RRIF?

A. Well, I advised her, actually I should say my wife advised her after hearing a radio talk that she should put the RRIF into somebody's name as to avoid the estate tax.

Q. What do you mean by estate tax?

A. Well, there's an estate tax on the RRIF as it's cashed out for the estate, is there not?

Q. Is that what you're talking about, the income tax?

A. Yeah.

Q. That that would avoid income tax?

A. That would avoid the estate tax, not income tax.

Q. Are you talking about probate fees?

A. Not probate fee, estate tax, that was my understanding.

Q. So, you say that your wife told Charlotte this?

A. Yes.

Q. What's your wife's name?

A. Eunice Jean.

Q. So, were you present when your wife told Charlotte this?

A. Yes.

Q. When did this conversation take place?

A. Absolutely no idea.

Q. No idea?

A. No idea. It was sometimes between – and death sort of thing.

Q. Sometime between what?

A. When she got the account, the cosigner of the account. Actually, I should say it was prior to that because she did go and get my brother to become a cosigner, so it had to be prior to that.

Q. Why do you say it had to be prior to that?

A. Because she did that, and she got him to become a cosigner. He also changed her driver's – her license on a vehicle to a joint license so she would – there would be the two signatures on the license of her car.

Q. You mean the registration?

A. Registration, sorry, yeah.

Q. But let's just go back for a second here, I'm trying to pin down the sequence of events?

A. Okay.

Q. So, are you saying that she changed the RRIF beneficiary first?

A. No.

Q. No?

A. No, I'm not saying that.

Q. What did she do first?

A. I don't know, but the – if I can – we talked about the – getting a cosigner for her account. We also talked about getting a cosigner for her registration.

Q. But what was the purpose of getting a cosigner for the registration on the car?

A. Well, I'm aware that if you have a cosigner, you can drive and sell the vehicle. If you don't, then the vehicle cannot be driven or sold until the estate is settled.

Q. So, did you suggest that Seigfried be put on?

A. I suggested to her to get somebody, I did not suggest anybody.

Q. So, she apparently is the one, then, that selected Mr. Neufeld, Seigfried Neufeld?

A. Yeah.

Q. And then you say that was it then after that that the RRIF was changed or you don't know the sequence of events?

A. Well, the RRIF was mentioned at the same time frame.

Q. Oh, this was all at the same time?

A. Basically the same time, yeah.

Q. Was it the same conversation?

A. Yes.

Q. So, you would expect that these things occurred, then, in relatively short period of time?

A. Yeah.

Q. Did you ever discuss it again with her?

A. No.

Q. Discuss with Charlotte again the signatories on the accounts or the RRIF?

A. No.

Q. You weren't present when she made these changes on her account or the RRIF?

A. I wasn't aware there was – that she had made the changes.

[42] Counsel then suggested to the plaintiff that at the discovery he said he had one conversation with the deceased when they discussed her will, the RRIF and her bank account and that this was sometime around 1994 or 1995. The plaintiff answered that he could recall a conversation but not the exact timing of the conversation. Counsel then noted his testimony in chief about a conversation in early 1999 and suggested to him that the conversation or conversations he had with the deceased were actually in 1994 or 1995, and the plaintiff agreed that it could have happened the way counsel suggested to him.

[43] The plaintiff also said in cross-examination that he knew in 1999 that the deceased was making a will because his wife had loaned some books to the deceased on this subject. He said that the deceased did not directly tell him that she was making a will but he assumed that this was the case. Counsel then reminded the plaintiff of his evidence in chief that in 1999 the deceased gave him a copy of her will. He said he believed that this was the case. He was then referred to the following discovery evidence:

Q. What about the will that's been admitted to probate, the May 1999 will, did you have any discussions with her before she prepared that will?

A. No discussion, other than suggesting that she'd make one.

Q. Back in 1994, 1995?

A. Somewhere – somewhere around that time frame, yeah.

Q. So, before she made her more recent will, the May 1999 will, you didn't have any other discussions with her about making a will?

A. Excuse me, there was a '99 will?

Q. Well, maybe I've got the date wrong, sorry. Yes, your sister's last will and testament is dated May 4th, 1999. You're not aware of that?

A. No.

Q. So, did you have any conversations with her about her will between the time that she made the will in ’94 or ’95 and when she did her new will in May of 1999?

A. Probably, yes.

Q. You recall discussing her will with her?

A. Not her will as such, no, it’s – there was a question of the – her RRIF.

Q. Well, we’ll get to the RRIF in a second?

A. Okay.

Q. I’m talking about her will?

A. No, no, there was no discussion about the will.

Q. So, you were not aware that she was making a will in May of 1999?

A. No.

Q. Did she ever talk to you about her guaranteed investment certificates?

A. No.

Q. Did you know that she had them?

A. Yes.

Q. What did you know?

A. That she had investments.

Q. Is that all you knew, that she had investments?

A. That’s right.

Q. Did you know whether they were GICs, for instance?

A. No, I didn’t know any of the details.

Q. Did you ever ask her for the details of her investments?

A. No.

Q. What about Canada Savings Bonds, did you know that she had Canada Savings Bonds?

A. I’m not aware of her investments as I said. I –

Q. Sorry, you what?

A. I know she had bonds, investments, etcetera, but the details I did not know.

Q. So, you did know she had bonds or you didn’t know?

A. Well, in general terms, like she mentioned she had bonds, investments, whatever.

Q. When did she mention that to you?

A. Conversations.

Q. Well, were you discussing her finances?

A. No, not her finances as such, but things like my bonds are due or I have to cash in some bonds or something to that effect.

Q. What about her bank accounts, did she ever tell you about her bank accounts, where they were, how they were set up?

A. No, I knew she had the bank account and the Bank of Nova Scotia because I drove her there, but that's the only reason I knew she had it at the – there.

Q. Did she ever tell you that she'd put Siegfried on as a signatory on that account?

A. No.

Q. Did she ever tell you that Seigfried was a joint owner of that account?

A. No.

Q. What about her guaranteed investment certificates, did she ever tell you that Seigfried was the joint owner of those investment certificates?

A. No.

Q. Did she ever tell you what was going to happen to the guaranteed investment certificates when she died?

A. No.

[44] Counsel then suggested to the plaintiff that he had only one conversation with the deceased about her estate and how her assets were held, and the plaintiff replied that he did not know, that he did not remember discussing her assets with her, as such, just discussing her RRIF, vehicle and bank account. He then agreed with counsel that it was possible that there was just one conversation between him, his wife and the deceased. As for the loan of the books to the deceased, he said he was not present when this happened. He knew of it because his wife had told him so.

[45] The plaintiff testified further that the deceased told him that the defendant was a co-owner of her bank account and he said that he learned this from her around the spring of 1999. He said he based this on a conversation he had with the deceased when she told him that she had to drag the defendant down to the bank to make the change to her bank account and to change the registration on her vehicle. The plaintiff also recalled a conversation in 1999 when he was at the defendant's house

and the deceased asked the defendant to act as her executor. It was at that same time that the deceased gave him an envelope and told him it contained her will.

[46] Once again the plaintiff displayed a very poor recollection of dates and events. At trial he claimed that he and his wife had a conversation with the deceased in the early part of 1999 when they discussed with her a plan for her to avoid probate fees and taxes on her estate. Yet at discovery, the plaintiff spoke of a conversation between himself, his wife and the deceased closer in time to when she learned she had cancer and when she made the changes to her bank account and the ownership of her vehicle. Moreover, his evidence is again in conflict with that of his wife, as it was in relation to the gift of the $70,000 from the deceased.

[47] The plaintiff's wife testified in chief that she loaned the deceased her own books on how to make a will and about probate fees. After reading the books the deceased apparently told the plaintiff's wife that her estate was worth about $250,000 and she wanted advice on how to reduce the probate fees. At the time the plaintiff and his wife suggested to the deceased that she place her bank account and her vehicle in joint names. The plaintiff's wife placed the timing of this conversation somewhere between 1997 and 1998. She said that the conversation took place in her home between the plaintiff, her and the deceased. The plaintiff's wife said that she also told the deceased that if she had an RRIF she should place it into the name of a designated beneficiary.

[48] The plaintiff's wife testified that in April, 1999 the deceased came to her and asked her to draft a final draft of her will. The plaintiff's wife had prepared several drafts for the deceased which she kept on her computer. After completing the final draft the deceased took the document away with her and later gave the plaintiff's wife a copy after the will had been witnessed. She said that she received the copy around May 8 or 10, 1999.

[49] The plaintiff's wife said that she and the plaintiff were at the defendant's house for supper and the deceased told her that she had been to the bank and had made the defendant a beneficiary on her RRIF. The plaintiff's wife also said that this

conversation took place before the will was finalized. She could not say whether any of the others in the house overheard what the deceased had told her.

[50] In cross-examination, the plaintiff's wife said that the deceased borrowed books from her about estate planning sometime around mid to late 1997 or early 1998. Contrary to the plaintiff's evidence that he was not present when this took place, the plaintiff's wife said that the plaintiff saw her hand the books to the deceased. She said the plaintiff was also present when the deceased said that her estate was worth $250,000.

[51] The plaintiff's wife said that the deceased returned the books to her in mid 1998 and talked to her about reducing probate fees on her estate. This is when the deceased mentioned that her estate was worth $250,000. She said that at some point in time the deceased mentioned to her that she had put her bank account and vehicle in joint names.

[52] In the result, I am satisfied, and find, that there was probably one conversation between the plaintiff, his wife and the deceased which took place in 1998, at which time they discussed the topic of probate fees and how the deceased could reduce probate fees by placing her bank account and her vehicle in joint names and designating a beneficiary for her RRIF. I reject the plaintiff's contention that the plaintiff and his wife had a number of discussions with the deceased over the years following her diagnosis about the ways and means of avoiding the cost associated with probate of the will and administration of the estate. In fact, by the time of her conversation with the plaintiff and his wife in 1998 about reducing probate fees on her estate, she had already changed the ownership of her bank account to name the defendant as a co-owner and it was not until late April, 1999 that she changed the ownership of her savings certificates and designated the defendant as her RRIF beneficiary. It appears that the plaintiff attempted at trial to tailor his evidence to make it more closely correspond to the dates that the deceased actually took steps to change the ownership of certain of her assets.

[53] However, while I have found the plaintiff's recollection faulty and that he is an unreliable historian of the events which transpired between himself, his wife and the deceased regarding the handling of her assets and disposition of her estate, I am nevertheless of the strong view that the defendant has failed to overcome the burden upon him to rebut the presumption of a resulting trust for the reasons that follow.

[54] The defendant relies heavily upon the evidence of a former bank employee, Ms. Birgitta Faraday, and submits that her evidence was clear that she discussed survivorship consequences of placing the savings certificates and the RRIF in joint names with the deceased and that the deceased stated to her that she wanted the defendant to have these monies on her death. I do not agree with this submission for several reasons.

[55] First, in my opinion, Ms. Faraday's testimony about what the deceased actually told her when she made the changes to the savings certificates and the RRIF is unreliable. As mentioned, Ms. Faraday is a retired employee of the Scotiabank, main branch in Penticton. She worked for the bank at that branch from 1995 until 2001. She knew the deceased as a customer of the bank and she assisted the deceased with her banking.

[56] Ms. Faraday testified in chief that the deceased came to the bank and spoke to her about the beneficiary designation of her RRIF. This was in April, 1999. She also dealt with the deceased with respect to the change in her savings certificates to make them jointly held with the defendant and the change of her bank account to a jointly held account with the defendant.

[57] Ms. Faraday thought that she might have dealt with the change to the deceased's bank account at a time earlier than when the deceased made the changes to the savings certificates and the RRIF. She said that on April 21, 1999, the deceased wanted to make a change to her savings certificates and she explained to the deceased that upon her death the money would go to the defendant as joint owner of the certificates. She also explained to the deceased that by

designating the defendant as a beneficiary of the RRIF, he would receive the proceeds upon her death. Ms. Faraday explained in cross-examination that the deceased was a particular person who always provided clear instructions. She said that it is bank policy to explain to a customer the difference between a power of attorney and joint ownership and she recalled having such a discussion with the deceased when she made the changes.

[58] Although I am content to find from Ms. Faraday's testimony that when the deceased attended at the bank to make the changes to her bank account, savings certificates and the RRIF that Ms. Faraday explained the consequences to the deceased, I am not content that Ms. Faraday was given a specific reason for these changes by the deceased.

[59] In chief, Ms. Faraday said that she had the "feeling" that the defendant was going to get the deceased's money because he had been helpful to the deceased and had been there for her. Her "feeling" was that after she explained to the deceased that as a result of the changes the money would go to the defendant upon her death, that is what the deceased wanted. She said that during her meeting with the deceased there was no conversation with the deceased about the defendant holding the savings certificates in trust for her or for the plaintiff. She said that the plaintiff's name was never mentioned. She also said that there was no discussion between them about the defendant holding the RRIF or the savings certificates in trust for the deceased's estate, and that there was no mention of the deceased's estate.

[60] In chief, when counsel asked Ms. Faraday whether based on her discussion with the deceased she was left with any doubt about what the deceased wanted to have happen with the RRIF proceeds and the savings certificates, she replied "no".

[61] The reason why I have some reluctance to place great weight on Ms. Faraday's answers in chief about her understanding of the deceased's intention when she made the changes is because of the answers she gave in cross-examination and re-examination on this point.

[62] In cross-examination, Ms. Faraday recalled filling out a joint account application for the deceased and that the deceased came on her own to the bank. She set up a bring forward note for the deceased to bring the defendant to the bank to sign the documentation naming the defendant as a joint owner of the account. She said that at the time the deceased did not tell her why she was making the change to her bank account, and that the deceased did not advise her of her reasons for making the account joint with the defendant or for the change of the designated beneficiary of the RRIF.

[63] However, in re-examination, Ms. Faraday testified that the deceased told her that she lived with the defendant and that he had done a lot of things for her and had been there for her and she wanted him to have this money. When she was further cross-examined on this evidence she testified that she could not recall whether the conversation she had with the deceased took place at the time of the change to her bank account or when the savings certificates and the RRIF were changed. She said that if the change to the bank account was first in time then that is when she had the discussion with the deceased. Ms. Faraday then said that the deceased did not come to the bank and tell her at the time she made the changes that the changes were being made for a specific purpose but that during the course of a conversation with the deceased she told her that she wanted the defendant to have the money. She could not recall whether this conversation took place when the joint account was changed or when the RRIF was changed.

[64] I think it is critical to note that at no time during her examination-in-chief did Ms. Faraday testify about a conversation with the deceased during which the deceased expressed any reason for why she was making the changes to her bank account, the savings certificates or the RRIF. On the contrary, she said that she had a “feeling” that the deceased wanted the defendant to have the money. Nor in cross-examination did Ms. Faraday mention any such conversation. It was only during her re-examination that she came up with the recollection about the conversation. Even at that she could not be certain about when such a conversation took place, suggesting that if the change to the bank account pre-dated the other changes (it is

known from the bank records that the change to the bank account pre-dated the other changes by at least two years), then that is when the conversation took place. If the latter is the case then even if the deceased had such a conversation with Ms. Faraday, which I question, then it would certainly not have been in relation to the changes to the savings certificates or the RRIF. And, while I think that Ms. Faraday was attempting to give an honest recollection of the dealings she had with the deceased and what they discussed, I gained the distinct impression during her testimony that she was partial to the position of the defence.

[65] Another reason which in my mind casts large doubt on the evidence of Ms. Faraday that the deceased wanted the defendant to have the money in the joint account after her death is the conduct of the deceased, and that of the defendant following the deceased's passing.

[66] It is common ground that at no time during the deceased's life did the defendant make any deposits to or withdrawals from the joint account. Although he did attend at the bank with the deceased to sign the bank documents relating to the joint account, he had no discussion with the bank about the account and took no interest in the account. From the time the deceased made the defendant a joint owner of the account, the deceased controlled the account. She deposited all the money that went into the account; she kept the bank book; and she was the only person who drew cheques on the account or made cash withdrawals.

[67] In my view, it is also a critical piece of evidence that after the deceased's passing the defendant treated the joint account as an estate account. He paid estate expenses by withdrawals from the account in August and September, 1999. Even more significantly he swore an affidavit as executor on February 11, 2000 which attached as an exhibit a disclosure document listing the joint account as personal property of the deceased. Moreover, shortly after the deceased's passing the defendant got together with the plaintiff to prepare a list of the deceased's assets for probate purposes. In a document prepared by them they listed the joint account.

[68] The defendant attempted to explain away why he treated the joint account as an estate asset by giving what I consider to be several rather weak excuses. He said that he made the payments out of the joint account since the account was jointly held by him and the deceased and he felt that he was responsible to pay the estate debts out of this account. He claimed that he did not know that as a joint holder of the account that the money in the account may be his alone. He also said that at the time he got together with the plaintiff to list the estate assets he had not yet been to the bank or consulted a lawyer. He admitted that he knew before the deceased died that he was a joint owner of the account, but that he did not know he was a joint owner of the savings certificates or a named beneficiary of the RRIF. He said that when he was preparing the probate documents he did not think about whether the bank account was his alone.

[69] Even if I accept the defendant's explanation for why at the initial stage of preparing the probate documents he listed the bank account as an estate asset and used the account to pay estate debts, I do not accept his explanation for why he listed the account as an estate asset when he swore the affidavit and included the joint account in the disclosure document attached to the affidavit.

[70] The defendant testified that after he completed the probate documents he went to see Mr. William Oliver, a solicitor in Penticton. Mr. Oliver apparently told him that the documents were incomplete. He nevertheless went to the courthouse to submit the documentation, but the clerk rejected the application. He then returned to Mr. Oliver for assistance and to act for him in the administration of the deceased's estate. The defendant said that he did not tell Mr. Oliver to include the joint account on the list of assets, and that he did not realize when he signed the affidavit that it was on the list. He said it was his mistake when he swore the affidavit.

[71] In cross-examination, the defendant said that he told Mr. Oliver not to list the joint account, but despite his instructions it was listed. When asked why he signed the affidavit which included an item against his instructions he said he was "confused", and when counsel asked him what he was confused about, he said that

he was confused about everything in the affidavit and that he assumed that what Mr. Oliver included in the affidavit was what he was required to disclose. He said he trusted Mr. Oliver. He also said that Mr. Oliver told him about the two items listed in the disclosure statement under the heading of personal property of the deceased, one of them being the joint account and the other an $11,500 savings certificate held in the joint names of the deceased and the defendant, but said that he did not know any better about whether these assets formed part of the estate. He repeated that he did not know before the deceased died that he was a joint owner of the savings certificates or a beneficiary of the RRIF. He also said he took everything to Mr. Oliver and that Mr. Oliver told him that the joint account and the savings certificate were not part of the estate but he recommended that they be included because they totaled such a small amount. The defendant said that after Mr. Oliver told him this he went home and thought about it and then told Mr. Oliver not to include these items, but Mr. Oliver did anyway, and the defendant signed the affidavit without realizing that they were listed. He said he did not read the affidavit when he signed it.

[72] I strongly doubt that, notwithstanding his instructions to Mr. Oliver not to include the joint account, Mr. Oliver would have done so in any event. It simply does not ring true to me that the defendant signed the affidavit without reading it first, or that he signed the affidavit without realizing that it listed the joint account. Most significantly, the defendant did not call Mr. Oliver as a witness to confirm his testimony, nor did he offer any explanation for why Mr. Oliver was not called as a witness, and I am satisfied that an adverse interest should be drawn against the defendant on this point.

[73] Thus, I find that at the time he signed the affidavit the defendant knew full well that the joint account was listed as an estate asset, and that he fully intended that it be so listed.

[74] Moreover, I think that the defendant’s conduct in listing the joint account is completely consistent with his other conduct relating to the proceeds from the RRIF.

[75] When the RRIF proceeds in the amount of $43,356.84 were paid out to the defendant as beneficiary, rather than treat them as his own by depositing them in a separate account from the joint account, he deposited them into the joint account on November 26, 1999, which when deposited together with the proceeds from the savings certificates that had been deposited into the account by the bank as per the instructions of the deceased, brought the total of the joint account to around $75,000. It was not until the middle of March, 2000, according to the defendant at the urging of an unnamed bank employee to invest the funds on deposit, that the defendant withdrew two amounts of $35,000 and treated these funds as his own with no intention of accounting to the plaintiff or the estate for the withdrawals.

IV. CONCLUSION

[76] In my opinion, the only reasonable inference to be drawn from the totality of the evidence is that, when the deceased named the defendant as a joint owner of her bank account and savings certificates and as a beneficiary of the RRIF, her intent in doing so was to reduce probate fees and taxes and not to benefit the defendant to the exclusion of the plaintiff. Her intention is borne out I think by the way she controlled the joint account during her life; the fact that she was a savvy investor who did some research on estate planning and probate fees and then made her own will; and perhaps the most compelling evidence being that she made the changes to her savings certificates and the RRIF just days before she made her will leaving the plaintiff and defendant equal shares in her estate. In my opinion, this fact makes it highly improbable that she would deprive the will of all its effect by making changes to her substantial assets on the eve of making her will to benefit the defendant over the plaintiff.

[77] Moreover, I think that the defendant was well aware of the deceased's intention when he testified about the addition of his name to the deceased's vehicle as a joint owner. He said that this took place just months before she died and that when he asked her why she was doing it she told him it was to save taxes. In fact, after the deceased died, the defendant sold her vehicle in the year 2000 and gave the plaintiff one half of the $3,000 sale price.

[78] Accordingly, I find that the defendant has not overcome the burden placed upon him to rebut the presumption of a resulting trust. I am satisfied, on the whole of the evidence, that it would be inequitable for the defendant to have ownership of the joint account, savings certificates and proceeds from the RRIF because I am also satisfied that at the time the deceased made him a joint owner of these assets and named him as a beneficiary of her RRIF, she clearly intended the plaintiff and defendant to share equally in these assets. Therefore I find that there is a resulting trust over all these assets, and the defendant holds the joint account, the savings certificates and the proceeds from the RIFF in trust for the benefit of the deceased's estate. With this finding on the first issue, the second issue regarding tax liability does not arise and need not be decided.

[79] In the result, the plaintiff is entitled to an order that all of the funds or monies that were held in the joint names of the deceased and the defendant are declared to be held by the defendant in trust for the deceased's estate, including the proceeds from the deceased's RRIF. Further, within sixty days of this order, the defendant shall provide to the plaintiff a full and complete accounting of all joint assets which were registered by the deceased in the joint names of the deceased and the defendant, and the defendant shall account for all funds and monies in the joint names of the deceased and the defendant, or of which the defendant is the named beneficiary.

"B.I. Cohen, J."
The Honourable Mr. Justice B.I. Cohen