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Featured Cases:

Lau v. Royal Bank of Canada, 2017 BCCA 253

Areas of Law: Aggravated Damages; Employment Law; Wrongful Dismissal; Psychological Impact

~To receive aggravated damages based on mental distress, the employee is required to show that the manner of dismissal caused injury rising beyond the normal distress and hurt feelings that arise from the fact of dismissal~

CLICK HERE TO ACCESS THE JUDGMENT

The Respondent, Marco Lau, brought a wrongful dismissal action against the Appellants Royal Bank of Canada and Royal Mutual Funds Inc. A client brought a complaint to RBC after a 27 January 2012 meeting with the Respondent. The complaint primarily concerned apparently unheeded instructions the client had given for the Respondent not to complete a transaction until the client had reviewed it with her children. An ensuing investigation revealed that the Respondent had been tracking sales incorrectly. Following some further investigation, the Appellants dismissed the Respondent for cause. The termination letter indicated that the Respondent had falsified bank records and failed to tell the truth when questioned regarding an alleged joint session with a client. It indicated that the Respondent claimed existing money as new to bolster his own sales. At trial, the judge decided that she was not satisfied that the Appellants had discharged the burden of proving that the Respondent had lied. She found that he told the truth. She also found that his recording of existing funds as new money was misconduct, but was not cause for dismissal. The judge determined that the appropriate notice period was nine months, and awarded damages of $31,125. The Respondent did not testify that he suffered from depression or mental distress as a result of the termination of his employment, or the manner of that termination. He provided no medical evidence. The trial judge nevertheless concluded that the Respondent was depressed, based on her own observations of him. She found his demeanour slow and quiet and his voice almost monotone in his testimony. The judge awarded aggravated damages in the amount of $30,000. She held that the Respondent was primarily terminated on the basis of a false accusation, and stated that she did not need medical evidence to prove that a published false accusation of failing to tell the truth can lead to mental distress.

Lau v. Royal Bank of Canada, (cont.)

APPELLATE DECISION

The appeal was allowed. The Court of Appeal noted that while the importance of the employer's conduct in a dismissal should not be understated, that doesn't mean that damages can be assumed. Nor is compensation on this basis without limitations. The Court reviewed two seminal Supreme Court of Canada decisions on damages in wrongful dismissal cases, *Wallace v. United Grain Growers Limited* and *Honda Canada Inc. v. Keays*. In *Honda*, the Court held that damages for an employer's bad faith or unfairness in the dismissal process are not compensated by an extension of the notice period, but rather by the measure of damages in contract cases. The ordinary psychological impact of termination is not compensable because the contract of employment is, by its very terms, subject to cancellation upon reasonable notice. Examples of conduct giving rise to contract damages include wrongfully alleging theft and communicating this allegation to potential employers, allegations of theft coupled with a refusal to give a reference letter, terminating an employee who is on disability leave, or terminating an employee who is in the process of moving for a work transfer. Aggravated damages may also be indicated in instances where the employer attacks the employee's reputation at the time of dismissal, misrepresents the

Lau v. Royal Bank of Canada, (cont.)

reason for dismissal, or means to deprive the employee of a pension benefit or other right. The Court found that the Respondent was not mistreated at the time of his dismissal. He was terminated in writing at an in-person interview where he was offered counselling, and the only "publication" of the allegations of dishonesty was a filing based on regulatory requirements. There was no evidentiary foundation to support the award of aggravated damages. To receive aggravated damages based on mental distress, the employee is required to show that the manner of dismissal caused injury rising beyond the normal distress and hurt feelings that arise from the fact of dismissal. The trial judge erred in relying on her own observations of the Respondent's demeanour while testifying, in the absence of any evidence or testimony other than the Respondent's own.

McDonald v. McDonald, 2017 BCCA 255

Areas of Law: Wills and Estates; Unjust Enrichment; Family Farm; Chores

~Public policy and reasonable societal expectations can provide a juristic reason to deny an unjust enrichment to a teenager in respect of unpaid chores~

CLICK HERE TO ACCESS THE JUDGMENT

The Respondents, Julie, Brian and Dean McDonald, are three of the four McDonald siblings. Throughout their childhood and teen years, they performed unpaid work on the family farm, owned by their mother, the Appellant Sylvia McDonald, and her husband Samuel McDonald, whose estate is the other Appellant in this matter. The siblings also performed paid work on the farm during their early adulthood. When the McDonald parents made their wills in 1996, their fourth child, Robert, was the only one working full-time on the farm and this was unlikely to change. The wills provided that the preferred shares in McDonald Landing Farms Ltd. would go to whichever spouse survived the other, and on the death of the survivor the preferred shares would be divided between Julie, Dean and Brian. The residue of the estate, including the common shares, a 15/100 interest in the farm's 100-acre parcel, and shareholders loans held by the parents, would go to Robert. The parents kept the wills confidential. In 2000, out of a concern that the wills could be challenged under the *Wills Variation Act*, the parents made an immediate gift to Robert of the common shares and the shareholder loans. They did not tell their other three children about the gift. The parents then revised their wills, leaving their entire estates to each other and the survivor's estate to the remaining three children in equal amounts. After Samuel died, Sylvia transferred her 15/100 interest in the 100-acre parcel to herself and Robert as joint tenants. In 2009, the Respondents became aware of the transfer to Robert, and commenced these actions. The trial judge found that the market value of the farm was more than $12 million. The judge found that as children the Respondents worked hard milking and caring for cattle on the farm, and acquired farming knowledge. He found that by the time they were in high

school they were able to do valuable work. The judge found that Samuel had told the kids that "someday this will be yours" if they worked hard. The judge found that through their work, the Respondents enriched the Appellants. He found this to be an unjust enrichment, for which there was no juristic reason, and found no policy basis to deny recovery. The judge concluded that the enrichment was the equivalent of paying a farm labourer for a period of seven years. After finding that a "value survived" approach would be insurmountably difficult to assess the value of the unjust enrichment, the judge based his calculation on the parents' 1996 will. He found that a monetary award of 3-3.5% of the farm business's current value accurately represented the Respondents' proportionate contribution to the farm during their middle to high school years. He awarded each of them $350,000 in damages. Acknowledging the risk that this might result in double recovery if the Respondents also received the preferred shares, the judge ordered that the net value of the shares would stand as a credit as against the $350,000 award to each Respondent.

APPELLATE DECISION

The appeal was allowed. The Court of Appeal acknowledged that none of the "established categories" of juristic reason for enrichment were present in this case. However, the Appellants contended that as a matter of public policy "work done by a teenager for a family enterprise should not be accorded a remedy in unjust enrichment absent extraordinary circumstances." The Respondents accepted that not every chore would ground a claim in unjust enrichment. The Court held that public policy and reasonable societal expectations can provide a juristic reason to deny an unjust enrichment to a teenager in respect of unpaid chores. The Court distinguished the BC Supreme Court decision in *Antrobus v. Antrobus*, noting that in that case the plaintiff had been assigned a crushing burden of chores and had been promised substantial compensation.

McDonald v. McDonald, *(cont.)*

The parties in this case did not refer to exploitative circumstances, and the trial judge specifically found that the work assigned was "not so extraordinary in the context". The trial judge erred in finding unjust enrichment. Even if he had

McDonald v. McDonald, *(cont.)*

not, he erred in relying on the parents' 1996 will in his assessment of damages. Based on the amounts that Julie was paid when she was working for a salary on the farm, the amount paid to a farmhand would have totalled $63,000. The four children would have been entitled to $63,000 of the $12 million assessed value of the farm, or 5.25%. Divided four ways, this would entitle each child to around 1.3%. This would result in an award of $145,000, not $350,000 each for the Respondents. The mother's will currently gives each of the Respondents 1/3 of the preferred shares, which are worth $907,000. This is considerably more than the $145,000 each needed to compensate them for their unpaid labours, should unjust enrichment be made out. The appeals were allowed and the claims for unjust enrichment dismissed.

COUNSEL COMMENTS

McDonald v. McDonald, 2017 BCCA 255

Counsel Comments provided by
Mark Stacey, Counsel for the Appellant Julie McDonald

"The Court of Appeal's recent decision in *McDonald* represents the Court's most recent intervention and restriction of the equitable doctrine of unjust enrichment.

While at first glance the facts of the *McDonald v. McDonald* case appear relatively straightforward, the Court of Appeal's judgment exposes the complex and intersecting public policy, family law, unjust enrichment and estate law issues invoked in the case.

Mark Stacey

After canvassing these issues in the judgment, the Court of Appeal introduced a new standard of "exploitation" for when the law of unjust enrichment may grant a remedy for work performed in familial relationships.

The well-settled unjust enrichment test requires a plaintiff to establish three elements:

1. an enrichment or benefit to the defendant;
2. a corresponding deprivation by the plaintiff; and
3. the absence of a juristic reason for the enrichment.

In *McDonald*, the Court of Appeal accepted that the first two stages of the analysis were met and *prima facie* unjust enrichment was established. The judgment focused on the third stage to determine whether a juristic reason could be found to deny a remedy to the McDonald children.

Given that there was no apparent juristic reason from a previously established category present in this case, the Court moved to the second stage of the juristic reason analysis to determine whether the parents should retain the enrichment based on public policy considerations and the reasonable expectations of the parties.

COUNSEL COMMENTS

McDonald v. McDonald, (cont.)

In considering whether and in what circumstances children and young people can be compensated in unjust enrichment, the Court recognised that work performed by young people can exist on a spectrum: from common domestic tasks and chores performed in the household to more taxing and potentially "exploitive" work performed in family businesses and other enterprises.

In its decision, the Court accepted that public policy and societal expectations can provide a juristic reason to allow parents to profit from the work and chores of their children. However, the question in *McDonald* was how far the juristic reason extends.

The evidence at trial was that the McDonald children worked significant hours performing strenuous work on the family farm. The learned trial judge determined that the children's work had contributed to the overall growth and appreciation of the farm, valued at approximately $12 million at the time of the trial.

As a result, the trial judge found unjust enrichment for the unpaid work the children performed during their middle to high school years and awarded each of them $350,000 calculated on a value survived basis.

The Court of Appeal likewise accepted that the McDonald children as teens were enlisted by their parents to perform valuable farmhand chores and determined the McDonald farm "was a joint family enterprise, into which the children's labour was invested." However, at the juristic reason stage of the analysis, the Court introduced a new category to deny recovery in this case, deciding:

> "[a]s a matter of public policy, chores performed in a family setting do not, **absent indicia of exploitation**, attract a right to compensation under the doctrine of unjust enrichment." [Emphasis Added]

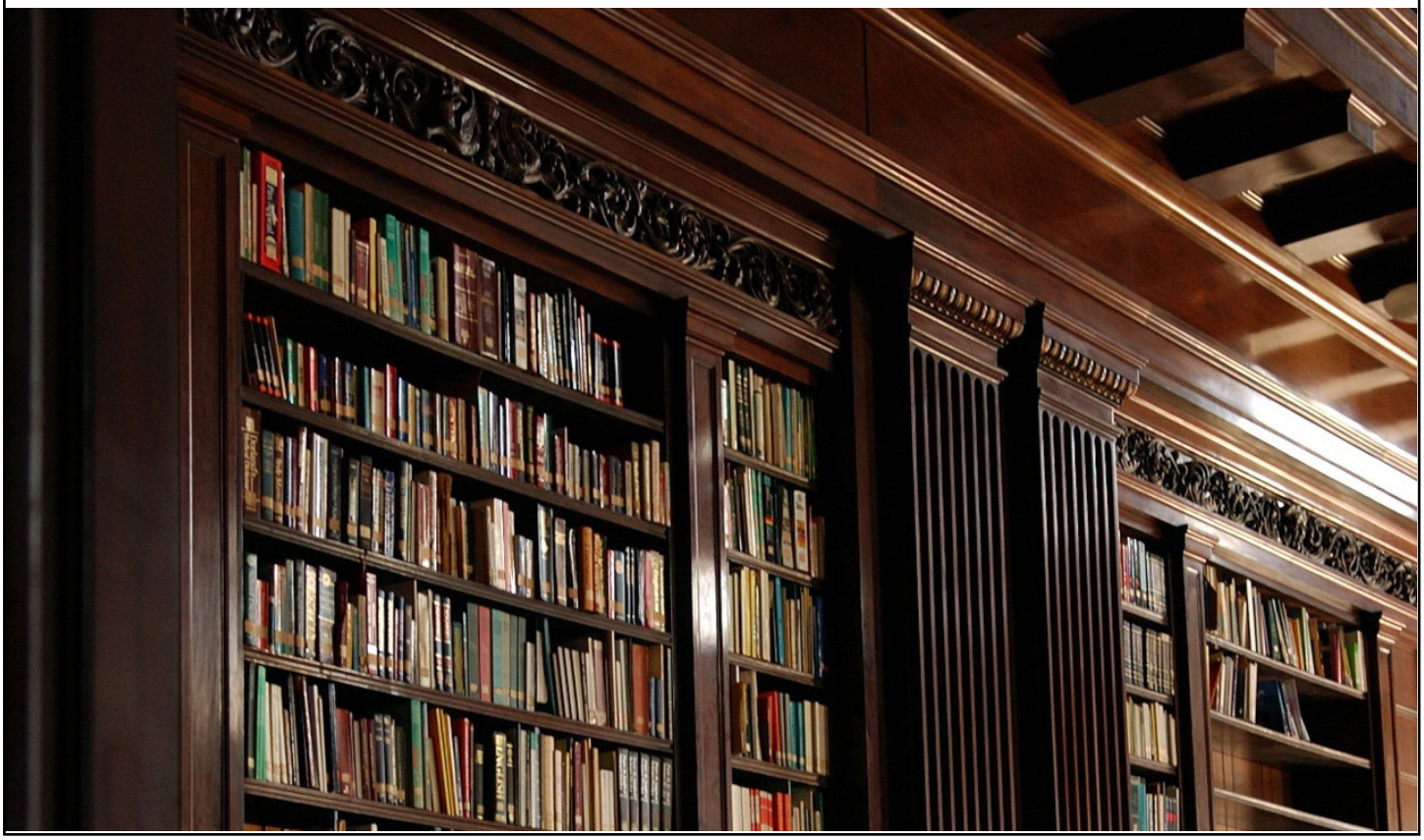
Furthermore, while the Court of Appeal acknowledged that the decision fails to provide an exhaustive enumeration of compensable "exploitive" work that may meet this new standard, it is clear from the judgment that the labour intensive farmhand work performed by the McDonald children falls short of the Court's envisioned threshold.

COUNSEL COMMENTS

McDonald v. McDonald, (cont.)

Moreover, the decision does not address the overarching question of whether unjust enrichment claims of children and young people should be denied unless the work performed is somehow "exploitive". The decision also fails to reconcile past conflicting judgments on these issues and with the introduction of the undefined threshold of "exploitation", may have the effect of introducing further confusion for adjudicating unjust enrichment claims in the familial context.

While the implications of the *McDonald* decision remain to be seen, it is an important judgment for the doctrine of unjust enrichment and the legal rights of young people. However, as alluded to by the Court of Appeal, there remain many issues, including the boundaries of this new category, to be clarified in this evolving area of law."



COUNSEL COMMENTS

McDonald v. McDonald, 2017 BCCA 255

Counsel Comments provided by
Kathy Ducey and Spencer May, Counsel for the Respondents
Sylvia McDonald and for the Estate of Samuel McDonald

"The main issue on this appeal was whether a teenager is entitled to a remedy as against their parents for "unpaid" work done as a teenager as part of a family enterprise. The plaintiffs, Julie, Brian and Dean had originally brought claims against their parents for work done on the family farm starting from the age of three until they were adults based on unjust enrichment. The trial judge dismissed the claims with respect to work done as young children as he found that work did not add value and also on public policy grounds. He also dismissed the claims for work done as adults, finding that the plaintiffs had been paid or received other benefits for that work.


Kathy Ducey


Spencer May

The only claim the trial judge allowed was for the work done as teenagers which he found was of benefit to the farm, to the detriment of the plaintiffs and without juristic reason, notwithstanding the fact that each of the plaintiffs was afforded the chance to finish high school, engage in other outside activities and was provided with room and board by their parents throughout the time in question. Essentially, their claims were placed on the same footing as the earlier common law spousal claims for unjust enrichment.

In our view, this was an important issue as the idea that teenagers have a legal remedy against their parents for their contributions to the family enterprise was a disconcerting one, particularly as the trial judge had found that the

COUNSEL COMMENTS

McDonald v. McDonald, (cont.)

work the McDonald children did as teenagers was similar to that done in many farming families. This could have had wide reaching implications for all types of family business enterprises, not just family farms, and would add another layer of complication to estate planning matters for families of this nature.

We argued that work done as teenagers in a family enterprise is of a very different nature than unpaid work done as an adult and should not be treated in the same manner. The court of appeal agreed with our submission and agreed that unjust enrichment claims by teenagers should be limited to those where extraordinary circumstances could be shown as in *Antrobus*, thus leaving the door open for claims by teenagers subjected to exploitation by their parents but hopefully closing the door on claims by teenagers against their parents for unjust enrichment in the ordinary family environment.

Another important issue dealt with by the court of appeal in this decision was the trial judge's finding that it was unfair to the plaintiffs that Robert had received his share of the farm while his parents were still alive while the plaintiffs had to wait until their parents' death to receive their shares. The court of appeal found that to succeed, the plaintiffs' claims had to stand on their own and that any favourable treatment to Robert had no effect on their entitlements."

Ilett v. Buckley, 2017 BCCA 257

Areas of Law: Torts; Motor Vehicle Accident; Bicycles; Duty of Care; Damages

~Under s. 158 of the Motor Vehicle Act*, bicycles are prohibited from passing on the right, including on the shoulder of the road~*

CLICK HERE TO ACCESS THE JUDGMENT

The Respondent, Kyle Ilett, was injured while riding his bicycle northbound when he crashed into the southbound vehicle of the Appellant, Leah Buckley. She was stopped at an intersection with her left turn signal activated, waiting for an opportunity to turn left. A large northbound vehicle stopped, creating a gap in traffic, and the driver of the other vehicle waved the Appellant through. The Respondent was riding northbound on the shoulder of the road. He saw the large vehicle stop, and saw the gap in traffic, but did not slow his bicycle. The large vehicle precluded the parties from seeing each other. The bicycle hit the side of the front half of the car, and the Respondent was thrown over the hood and onto the pavement. The trial judge noted that cyclists on a highway have the same rights and duties as the drivers of motor vehicles and must not operate a bicycle without due care and attention or without reasonable consideration for others using the highway. When turning left at an intersection, a driver must yield to oncoming traffic that is sufficiently close as to constitute an immediate hazard but, having done so, the driver will then have the right of way provided the proper turning signal has been used. Section 158 of the *Motor Vehicle Act* states that the driver of a vehicle must not pass on the right except in certain circumstances not present in this case, and the judge found that this provision applies to bicycles. The judge found that the Respondent was in breach of this provision, but then in effect said that while the prohibition against passing on the right could be taken into account in determining the standard of care, the breach did not prove negligence. The judge went on to note that cyclists frequently ride on the shoulder, that there were no signals requiring northbound traffic to stop, and it was commonplace for cyclists to pass slow moving and stopped traffic on the right. The judge found the Appellant solely responsible for the Respondent's injuries.

Ilett v. Buckley, *(cont.)*

APPELLATE DECISION

The appeal was allowed. The Appellant argued that the judge erred in law in failing to recognize that s. 158 affords a specific and useful standard of reasonable care governing the Respondent's conduct as he closed on the intersection. The Respondent maintained that the judge could not be said to have erred in law or otherwise, because while the breach of a statutory duty can be considered in determining the standard of care as evidence of negligence, breaching a statutory duty does not prove negligence. The Court of Appeal found it difficult to see on what basis the judge found that the Appellant had a duty to yield to the Respondent such that he effectively had the right of way, when s. 158 prohibited him from passing the large vehicle on the right and entering the intersection as he did. It is not for the court to pick and choose between interrelated sections that apply. Had the Respondent been following the rules of the road, the accident would not have happened. The judge made no finding of anything the Respondent did when he approached the intersection to discharge his own duty of care. Where a duty of care is owed, it is an error of law to conclude that the standard of care has been met when no steps at all have been taken to be careful. The judge's determination that the

Ilett v. Buckley, *(cont.)*

Appellant was solely at fault was in error. The Court of Appeal found that the cause of the accident was primarily that neither party saw the other. It was not possible to establish different degrees of fault in the circumstances of the case, and so the Court apportioned liability equally.

COUNSEL COMMENTS

Ilett v. Buckley, 2017 BCCA 257

Counsel Comments provided by
Dana Quantz, Counsel for the Respondent

"In this case, the Plaintiff was travelling down a shoulder of the road that was commonly used by other cyclists at the time of the relevant collision. The dispute at trial focused on whether the Plaintiff was in breach of the *Motor Vehicle Act* pursuant to the BC Court of Appeal's judgment in *Ormiston v. Insurance Corporation of British Columbia*, 2014 BCCA 276, and was therefore negligent. The trial judge found that the Plaintiff had breached the *Motor Vehicle Act* but, relying on the seminal case of *The Queen (Can.) v. Saskatchewan Wheat Pool*, [1983] 1 SCR 205, the trial judge also concluded that a mere breach of the legislation was not sufficient to prove negligence. In allowing the appeal, the Court of Appeal found that there were no findings of fact made by the learned trial judge on what the Plaintiff did to discharge his duty of care. The duty of care is necessarily to himself as this case pertains only to contributory negligence. Having heard the evidence, the learned trial judge concluded that the evidence at trial did not establish negligence on the Plaintiff's part. The Court of Appeal disagreed saying:


Dana Quantz

> *[28] Thus, where a person owes a duty of care, and the person takes 'no steps whatsoever' to ensure the standard of care is met, it would be an error of law to conclude that the individual met the standard of reasonable conduct as that would amount to a finding that no duty was owed in the first place, such being an erroneous characterization of the legal standard which is an extricable question of law: Housen at paras. 31 and 33.*

In effect, the Court of Appeal has concluded that the lack of evidence illustrating that the Plaintiff could or could not have taken steps to ensure the standard of care was met is to be borne by the Plaintiff in the case of contributory negligence. The characterization of contributory negligence is a duty of

COUNSEL COMMENTS

Ilett v. Buckley, (cont.)

care to oneself is an interesting feature of this judgment and it will be interesting to see how this case comes to impact the evidence required for contributory negligence in the future. For the time being in British Columbia, this case does agree with the assertion that a mere breach of the *Motor Vehicle Act* does not constitute negligence as it is simply a factor for consideration: see para 21."

Winstanley v. Winstanley, 2017 BCCA 265

Areas of Law: Wills and Estates; Trusts; Presumption of Resulting Trust; Dependency

~The presumption of a resulting trust means that it falls to the surviving joint account holder to prove that the transferor intended to gift the right of survivorship to whatever assets remained in the account~

CLICK HERE TO ACCESS THE JUDGMENT

The Appellant, Andrew Winstanley, and the Respondent, Carl Winstanley, are brothers. The Appellant became an accountant, moved far away, and was not close to his parents. The Respondent lived in the mother's basement suite from 1994 to 2008, when the mother required alternate living arrangements. The parties' parents separated in 1996, and transferred the family home to the mother and the Respondent in joint tenancy. The Respondent paid his father $50,000 for his one-half interest in the house. The Respondent and his mother also took out a $100,000 line of credit, paying a further $50,000 to the father and using the balance to make improvements to the house. Also in 1996, the Respondent and the mother opened a joint bank account. They used this account to pay household bills. They both made regular deposits to

Winstanley v. Winstanley, *(cont.)*

the account. The parties' father left his entire estate to the mother, who died four months after he did. All of the proceeds of the father's estate were paid into the joint account. The mother's will left the whole residue of her estate to the Appellant, but contained a *proviso* acknowledging that she held assets jointly with the Respondent, and that those assets would not form part of her estate. The Respondent paid $204,200 to the Appellant as "an advance on his inheritance". The Appellant took the position that the proceeds of the father's estate were not properly a joint asset held by his mother and brother, but formed part of the residue of

Winstanley v. Winstanley, *(cont.)*

the mother's estate, to which he was entitled. The Respondent argued that his brother had been paid in full. He said that the mother indicated to him her intention that each son should receive half of the father's estate. The action was dismissed other than the award of the $40,000 the Respondent had promised to pay the Appellant. The trial judge found that the Respondent was dependent, and found that the joint account was a truly joint account, held by both the Respondent and the mother legally and beneficially.

APPELLATE DECISION

The appeal was allowed and the cross-appeal dismissed. The Appellant relied on *Pecore v. Pecore*, arguing that there is no presumption of advancement as between parents and their adult children. He further submitted that the judge erred in characterizing the Respondent as dependent upon the mother, that the relationship between the Respondent and the mother gave rise to a presumption of undue influence, and that the Respondent committed breaches of trust by using his power of attorney for his mother to make certain transfers to himself and his wife. Finally, the Appellant asserted that the judge erred by awarding to the Respondent the costs of the proceedings despite the mixed success at trial. In cross-appeal, the Respondent argued that his promise to pay the Appellant a further $40,000 was a bare promise and not a legally enforceable obligation. The Court of Appeal noted that, under *Pecore*, there is a presumption of a resulting trust where a parent makes a gratuitous transfer to an adult child, such as placing funds in a jointly-held bank account. Evidence as to the degree of dependency of an adult child may rebut the presumption of a resulting trust, but in this case the Court of Appeal concluded that the judge erred in his analytical approach. He should have identified the gratuitous transfers in dispute with a view to determining whether the Respondent had presented evidence rebutting the presumption of resulting trust for each transfer. The largest deposit of the father's estate funds into the joint account occurred after the mother had a stroke. The Respondent executed other financial transactions, using his power of attorney, in the days preceding the mother's death. The judge was required to consider

Winstanley v. Winstanley, *(cont.)*

whether the Respondent had the mother's authority to deposit her funds into the joint account and/or transfer her funds to his personal account. The presumption of a resulting trust means that it falls to the surviving joint account holder to prove that the transferor intended to gift the right of survivorship to whatever assets remained in the account. While the mother was entitled to use or gift the money from the father's estate as she saw fit, the trial judge did not make any findings regarding her true intentions or whether she authorized the Respondent to deposit those funds into the joint account. Nor did the judge determine whether the presumption of undue influence set out in *Geffen v. Goodman Estate* was applicable. The Court of Appeal ordered a new trial of the Appellant's claims. The money the Respondent promised the Appellant formed part of the mother's estate and was the Appellant's money by right, even after it was deposited into the joint account. The cross-appeal was dismissed.

COUNSEL COMMENTS

Winstanley v. Winstanley, 2017 BCCA 265

Counsel Comments provided by
Michael F. Welsh, Counsel for the Respondent

"The trial of this estate action involving the Winstanley brothers (Andrew and Carl) involved three days of evidence followed by written submissions that encompassed fully the legal issues involved and how they related to each party's view of the facts. The factual issues largely turned on the credibility of the defendant, Carl, who was in the witness stand for about half the trial time. In large part, if he was found credible in his explanations of their mother, Jessie's, wish that the portion of the estate she inherited from their father be divided equally between her sons, and of her properly authorizing him to put the funds into the joint account she had with him, the plaintiff's case would mostly fail. If not, then the plaintiff would largely succeed.


Michael F. Welsh

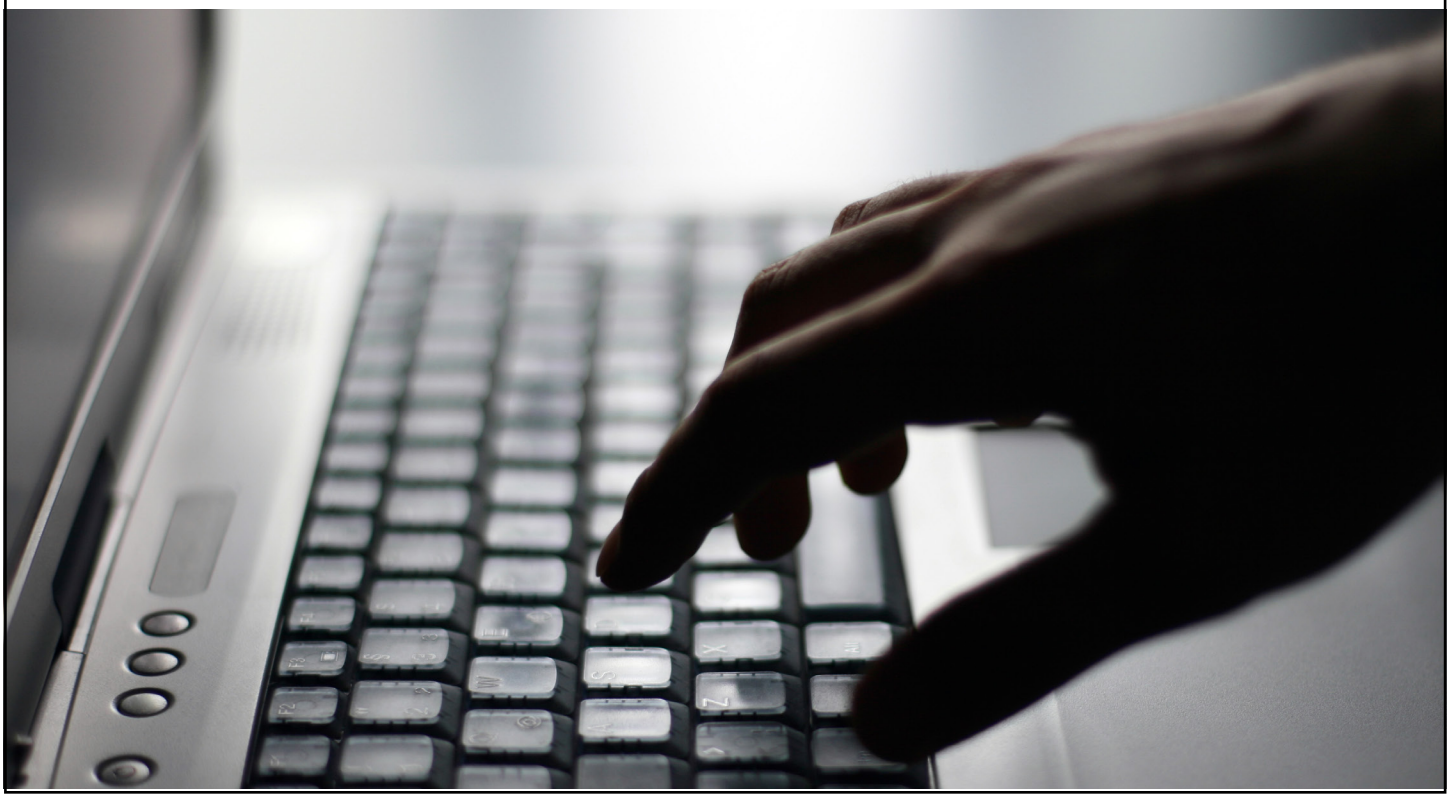
The difficulty that arose and which now throws away the time and expense of the first trial, and potentially subjects the parties to the costs of another trial, is that the trial judge failed to articulate whether he found Carl credible, and what particular part of Carl's evidence he accepted in coming to the conclusion that, (with exception of $40,000), Andrew's claims should be dismissed.

As the Court of Appeal stated, "The judge did not make the necessary findings of fact concerning Carl's authority to deposit into and withdraw from the Joint Account." And as a consequence, it further stated, "Most reluctantly, I conclude that there should be a new trial. I say this because there was some evidence from which the judge could have concluded Carl had authority to deposit to, and withdraw from, the Joint Account, but I do not think … that we are in a position to arrive at our own conclusions on the question of Jessie's wishes and whether she was unduly influenced by Carl. This court is not in a position to make the credibility and factual findings necessary to determine whether Carl has rebutted the presumptions of resulting trust and/or undue influence."

COUNSEL COMMENTS

Winstanley v. Winstanley, (cont.)

Trial judges are responsible to those who appear before them to give a decision that is intelligible; that sufficiently links factual findings with legal analysis. As recently stated by our Court of Appeal in ***R. v. Ring*** (2015 BCCA 404@ [12]), "[R]easons for judgment should tell litigants why the court has reached the conclusion that it has and must provide for appellate review." Unfortunately for all concerned in this case, these reasons did neither. The Court of Appeal considered if it could extract sufficient factual findings to which to apply to a legal analysis and so obviate the necessity of new trial, but the trial judge's analysis was too barren. Had reasons been properly framed, then the matter would likely have concluded on appeal - still an expensive proposition, but one inherent in all cases. But to have a new trial due to inadequate reasons for judgment is the worst possible, and most expensive, outcome for all concerned, and not one we should ever expect in our legal system."



COUNSEL COMMENTS

Winstanley v. Winstanley, 2017 BCCA 265

Counsel Comments provided by
Eileen Vanderburgh, Counsel for the Appellants

"The action underlying this appeal arose out of a dispute between two brothers, Carl and Andrew Winstanley, over the division of the estate of their mother, Jessie Winstanley, and indirectly, the residue of their father's estate. The family history and relationships set out in the Court's reasons are important to understanding the genesis of the dispute.


Eileen Vanderburgh

Andrew was the sole beneficiary under his mother's will. At the time of his mother's death, her assets included the proceeds from his father's estate and a life insurance policy. As part of the separation agreement between the parents, Carl and Jessie jointly acquired his father's half-interest in the Winstanley family home and, on his mother's death, Carl became the sole owner. The dispute arose over the deposit of funds belonging to his mother into a joint account of Carl and Jessie, established to pay household expenses. The status of that joint account was a key issue on the appeal.

The trial judge found that the joint account was a "truly" joint account owned by Carl and Jessie both legally and beneficially. Carl did not lead any evidence of the circumstances surrounding the creation of the joint account, other than its purpose to share and pay household expenses. There were no bank agreements or other records in evidence that would support the contention that Jessie had made an irrevocable inter vivos gift to Carl of the right of survivorship to the assets in the account. The only evidence of Jessie's intention with respect to the joint account was a clause in her will acknowledging that some of her assets were held in joint tenancy with her sons and that those jointly held assets should go to the son named as the joint owner on her death. The direction in the will is not irrevocable and is not evidence of an *inter vivos* gift of the right of survivorship at the time the joint account was established.

COUNSEL COMMENTS

Winstanley v. Winstanley, (cont.)

The Court of Appeal did not treat the will as evidence of an *inter vivos* gift of the right of survivorship in the assets that were in the joint account at the time of Jessie's death. The Court of Appeal found that the trial judge erred in law in failing to examine the transfers into and out of the joint account and determine, for each transfer, whether Jessie authorized the transfer into the joint account and the transfer to Carl from the joint account.

On the issue of undue influence, the trial judge did not determine whether the presumption applied to the relationship between Carl and Jessie or whether Carl had rebutted the presumption. The Court of Appeal held that the trial judge erred by failing to consider the evidence and determine if Andrew had met his burden to establish undue influence based on Jessie's deteriorating health, and if Carl met his burden to rebut the presumption.

The only evidence at trial on Jessie's intentions with respect to the transfers of funds into the joint account was the evidence of Carl. Carl's evidence at trial was equivocal and at times at odds with his evidence on discovery. In addition, Carl made some transfers using his power of attorney and made other transfers after Jessie's death. The Court, noting that the trial judge had not made any express findings on Carl's credibility or on the admissibility of Jessie's statements, concluded that it was unable to make the necessary findings of fact to determine whether Carl had rebutted the presumption of resulting trust and/or the presumption of undue influence. Reluctantly, the Court ordered a new trial.

This case demonstrates the issues that can arise in the administration of an estate where the testator holds assets in a joint account with an adult child. In order for the right of survivorship of the assets in the joint account to be considered an effective *inter vivos* gift to the adult child, the testator's intentions in establishing the joint account should be properly documented at the time the account is opened."

Zongshen (Canada) Environtech Ltd. v. Bowen Island (Municipality), 2017 BCCA 267

Areas of Law: Municipal Law; Building Permits; Prohibited Uses; Moorage

~Interpreting the definition of a facility in a bylaw is a question of law, subject to review on a correctness standard~

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The Appellant, Zongshen (Canada) Environtech Ltd., bought waterfront property on Bowen Island in 2011. To build a dock, the Appellant sought federal, provincial, and municipal approval. The Respondent Municipality of Bowen Island amended its Land Use and Building Bylaws in November 2013, with the result that building permits were now required for docks. The Appellant had begun the approval application process well before this time, and in March 2013 had informed the Respondent of its application to the provincial Ministry of Forests, Lands and Natural Resource Operations to obtain tenure to the foreshore. Attached to its application were the particulars of the dock, among other documents. When the bylaws were changed, the permissible length of a dock structure became less than what the Appellant had planned. The Appellant revised its plan and resubmitted its Ministry application in August 2014. The Respondent insisted that the Appellant provide a new biophysical survey and marine assessment, which it did. In the fall of 2014, several new members were elected to the municipal council on a "Stop the Docks" platform. In early 2015 the new council asked the Ministry to delay its consideration of the Appellant's tenure application to afford the Respondent time to further review and comment on the matter. The Ministry said it would allow a 30-day delay, provided there was a good reason for requesting such suspension. In mid-March, the council passed a "Bylaw Preparation Resolution", directing staff to prepare an amendment to the Land Use Bylaw prohibiting "all private docks at the lands known as Cape Roger Curtis." One week later, the amending bylaw passed. On the same day, the Respondent refused to accept the Appellant's building permit application on the basis that it was not accompanied by a tenure document. In mid-April, the Ministry indicated that it would be proceeding to make its decision. In May 2015, the Respondent amended the Land Use Bylaw by creating various exceptions to the permitted uses in the zone. It prohibited the uses of community

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dock, group moorage facility, private moorage facility, and permanent moorage at the Cape. In early June, the Appellant received unsigned tenure documentation from the Ministry, and again attempted to file a building permit application. The Respondent rejected the application because the tenure documentation was unsigned. The next month the Appellant again applied, with signed tenure documentation. This time, the Respondent informed the Appellant that the application was rejected because the Land Use Bylaw prohibited the proposed dock. The Appellant applied for judicial review. The questions before the judge were whether provincial permission was either not required to be provided, or was sufficiently established, before the new bylaw was enacted, and whether the bylaw did not prevent issuing a building permit. The judicial review judge found that absent the provincial grant of tenure the applications were not valid and so there was no basis for *mandamus* relief. No work had been done on the proposed dock, so it could not constitute a non-conforming use, and it would constitute a structure to be used as a "private moorage facility", as defined and prohibited in the bylaw.

APPELLATE DECISION

The appeal was allowed. The Appellant argued that the judge erred in law in his interpretation of "private moorage facility", and that properly interpreted the prohibition does not preclude the proposed dock. The Respondent maintained that the proposed dock fell within the meaning of "private moorage facility" and that the judge's interpretation is entitled to deference. In the alternative, it argued that the dock is prohibited because "permanent moorage" is not permitted under the bylaw amendment. The Court of Appeal reviewed the bylaws, noting that a "private moorage facility" is defined in the Land Use Bylaw as "a float on the surface of the water that is affixed to the sea bed." The proposed dock would not be such a facility, as it is not a float. The judge's conclusion engaged a question of law and was subject to a standard of review of correctness. Permanent moorage is generally associated with floating facilities, like residential barges and floating restaurants, that are not used in navigation. The

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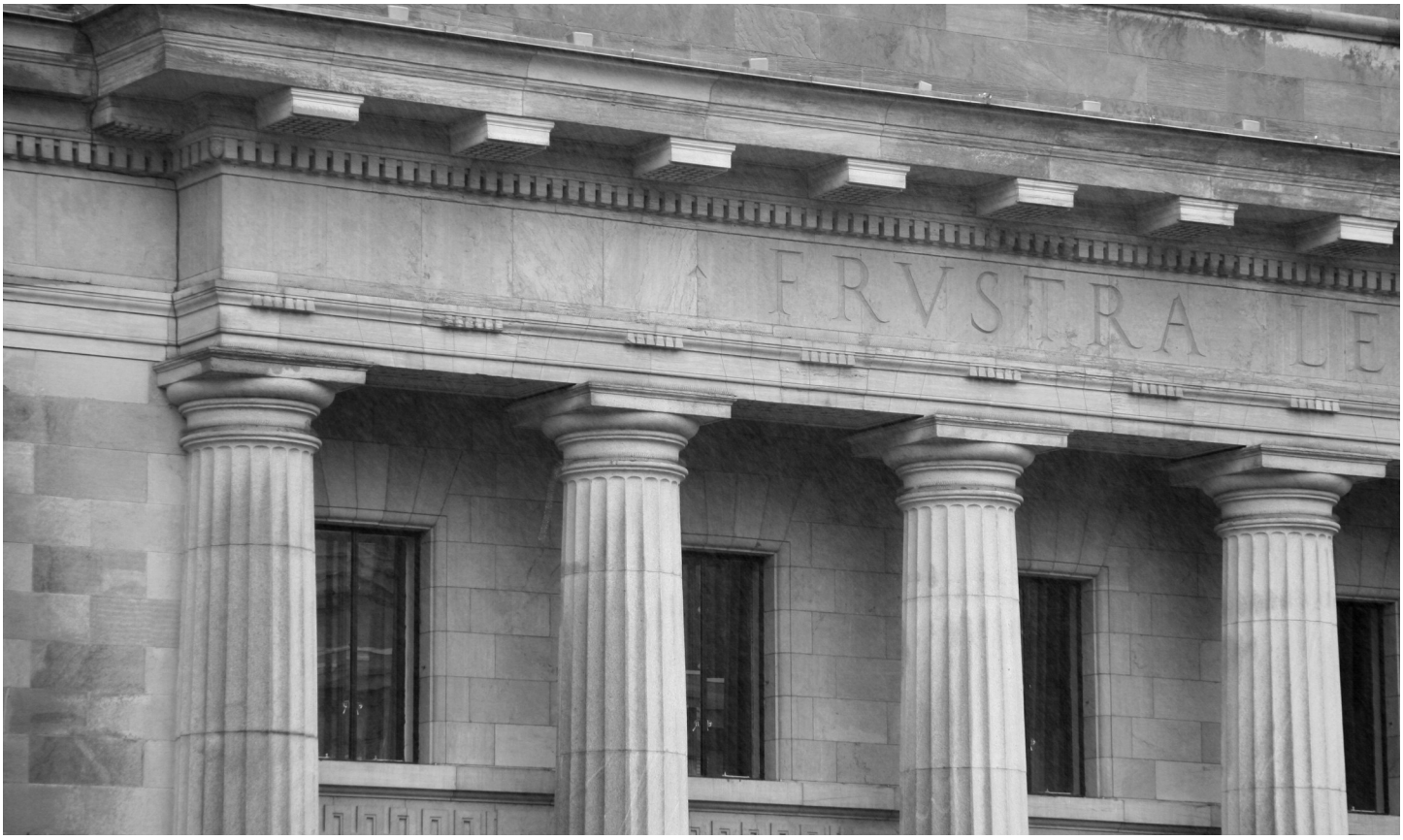
dock would afford moorage for boats regularly engaged in navigation. It would not be a structure for the purpose of permanent moorage. Its use falls within the permitted use of "boat moorage" and is permitted as a structure accessory to that use under the Land Use Bylaw. The parties had entered an agreement that the Appellant would be entitled to a building permit unless the proposed dock was prohibited by the May 2015 Land Use Bylaw amendment. As it was not prohibited, the Court ordered the Respondent to issue the Appellant a building permit.



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