

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *O'Hara v. Schaefer*,
2025 BCSC 1668

Date: 20250828
Docket: S253512
Registry: New Westminster

Between:

**Monica Eleanora O'Hara in her personal capacity and
on behalf of the Estate of Alfred Fredrich Arnold Schaefer**

Plaintiffs

And

The Estate of Erna Schaefer

Defendant

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for the Plaintiffs:

D. Milojkovic

Counsel for the Defendants:

A. L. Folino

Place and Date of Hearing:

New Westminster, B.C.
November 29, 2024

Place and Date of Judgment:

New Westminster, B.C.
August 28, 2025

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Introduction

[1] These are reasons for judgment on an application by the defendant for an order that the plaintiff's claim be dismissed pursuant to Supreme Court Civil Rule 9-5(1) and, in the alternative, that summary judgment be granted pursuant to Rule 9-6. The defendant also seeks an order for costs of the action. The plaintiff opposes the application.

[2] The defendant seeks an order that the funds held in the trust account of Kahn Zach Ehrlich Lithwisch LLP ("KZEL"), which are held by agreement as security with respect to the plaintiff's certificate of pending litigation (the "CPL"), be released to KZEL together with all interest accrued thereon. The CPL was filed against title to a home registered in the name of Erna Schaefer ("the Family Residence"). The Family Residence is the heart of the dispute in the overall action.

[3] The plaintiff's' claims are difficult to appreciate as drafted, because Monica O'Hara purportedly brings this claim on behalf of the Estate of Alfred Fredrich Arnold Schaefer, who died in September 2001. Records of this Court show that an Order of Probate was issued to his wife, Erna Schaefer, as the personal representative of the Mr. Schaefer's estate based on his Last Will and Testament dated July 2, 1998.

[4] No legal basis is cited in the Notice of Civil Claim ("NOCC") for the authority upon which Ms. O'Hara relies to commence this proceeding on behalf of Mr. Schaefer. In British Columbia, the primary legal authority for commencing a legal action on behalf of an estate stems from the authority granted to a personal representative under s. 150 of the *Wills, Estates and Succession Act*, SBC 2009, c. 13, [WESA]. In addition, s. 151 of WESA allows the Court to authorize a person, other than a personal representative, to bring or defend an action on behalf of an estate. There is no application pursuant to s. 151 before the Court which has been brought by the plaintiffs in this action.

[5] Ms. O'Hara is not the personal representative of Mr. Schaefer's estate. There is no reference to WESA in the NOCC nor in the proposed amendments to the NOCC filed by the plaintiffs.

[6] The NOCC contains claims that may be summarized as follows: a claim to funds, principally arising from the sale of the Family Residence, by way of a substantive constructive trust, or in the alternative, a remedial constructive trust in favour of the plaintiffs. The plaintiff alleges that the defendant settled a trust in favour of the plaintiff and held the Family Residence in trust for the plaintiff. The claims for remedies in trust are devoid of statements of material facts.

[7] The plaintiff also claims damages for breach of contract and for damages for causing injury, loss, and damage to the plaintiff, however there is no pleading of any material facts whatsoever in relation of any claim for damages. These claims have no chance of success because of this lack of compliance with the rules of pleading.

Background

[8] The plaintiff, Monica O'Hara, is Mr. Schaefer's biological daughter. Mr. Schaefer and Ms. O'Hara's mother separated in approximately 1963 when Ms. O'Hara was about 11 years old. In the years that followed the separation, Mr. Schaefer and Ms. O'Hara had little contact. In the early 1970s, Mr. Schaefer and Ms. O'Hara recommenced a father-daughter relationship.

[9] Mr. Schaefer married his second spouse, Erna Schaefer, since deceased, whose estate is at issue in these proceedings. Together, Mr. Schaefer and Mrs. Schaefer purchased the Family Residence in 1989. The Family Residence was registered in the Land Title Office in their names as joint tenants. They resided together as husband and wife in the Family Residence until Mr. Schaefer died approximately 12 years later.

[10] Mr. and Mrs. Schaefer maintained a positive relationship with Ms. O'Hara.

[11] Mr. Schaefer died on September 1, 2001. Title and sole ownership of the Family Residence, by virtue of the joint tenancy, was transmitted to Mrs. Schaefer upon his death.

[12] Mrs. Schaefer died on May 19, 2023. Her will, dated January 26, 2021, appointed her great niece, Kendra Hefti (“Ms. Hefti”), as executor (the “Will”). On January 8, 2024, this Court granted an Order of Probate to Ms. Hefti as administrator of Mrs. Schaefer’s estate.

[13] The Will contained a clause which specifically excluded three of Mr. Schaefer’s children, Monica, Fred and Raphaela, from any share in Mrs. Schaefer’s estate. The Will included a statement that the reasons for the exclusion of these three as beneficiaries were “that the said children of my late spouse have neither contacted me since the death of their father, the said Fred Schaefer, nor have they made any efforts to respond to my communications”.

[14] The Will also provided that her sister, Rita Lanch, was authorized to live out her final days in the Family Residence, which would thereafter be sold with the proceeds to be divided as provided in the Will. The Family Residence was sold, and the proceeds of that sale are, by agreement between legal counsel, held in trust pending judgment in this case

[15] Mrs. Schaefer continued to live in the Family Residence after Mr. Schaefer’s death in 2001. She lived there until she died.

[16] The plaintiff made no claim against Mr. Schaefer’s estate, notwithstanding her claim that Mr. Schaefer had severed the joint tenancy with Mrs. Schaefer.

Legal Principles

[17] Supreme Court Civil Rule 9-5(1) provides that:

At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

- (a) it discloses no reasonable claim or defence, as the case may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious,
- (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
- (d) it is otherwise an abuse or the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and order the costs of the application to be paid as special costs.

[18] No evidence is admissible on such an application.

[19] The test for striking pleadings on the basis that they fail to disclose a reasonable cause of action was set out in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17 as follows:

[17] The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) [now Rule 9–5(1)(a)] of the B.C. Supreme Court Rules. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at para 980. Another way of putting this test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists the matter should be allowed to proceed to trial...

[20] A plaintiff, at minimum, must define the issues and set out a concise statement of material facts supporting each element of the various causes of action. If there is not a material fact that goes to an element or to elements of the cause of action, the pleadings are insufficient. Bald assertions, statements of speculation, assumptions, or conclusions of law are not material facts: *Kindylides v. Jon Does*, 2020 BCCA 330 at paras. 28–35.

[21] In *Cimaco International Sales Inc. v. British Columbia (Attorney General)*, 2010 BCCA 342 at para. 40, Justice Kirkpatrick provided a helpful guideline for determining whether it is “plain and obvious” that a claim will fail:

(1) whether there is a question fit to be tried regardless of complexity or novelty; (2) whether the outcome of the claim at trial is beyond reasonable doubt; (3) whether serious questions of law or questions of general importance are raised or if facts should be known before rights are decided; (4) whether the pleadings might be amended; and (5) whether there is an element of abuse of process.

[22] In *Lessor v. Toll Estate*, 2015 BCSC 427, the Court stated at para. 20:

A successful application under Rule 9-5(1)(a) can lead to an order striking the pleadings with leave to amend, or an order dismissing the claim of right. If the defect in the pleading may be cured by amendment, the court may grant leave to amend: *Henry v. British Columbia (Attorney General)*, 2012 BCSC 1401 at para. 38. If, however, the claim is without legal foundation regardless of how it is pleaded the court may dismiss the claim: *Henry* at para. 38; *Extra*

Gift Exchange Inc. v. Ernest & Twins Ventures (PP) Ltd., 2007 BC SC 426 at para. 22.

[23] In *Lessor*, the plaintiffs claimed entitlement to the estate of Ms. Toll on the basis of various alleged trusts. Justice Verhoeven struck the pleadings on the basis that the claim was little more than a vague reference to asserted facts in support of the trusts. The notice of civil claim in *Lessor* clearly did not “accomplish what is required of it”: at para. 25.

Analysis

[24] Plaintiff’s counsel clarified that Ms. O’Hara did not receive any portion of the Mr. Schaefer’s estate and she did not make any claim against his estate when it was administered by Mrs. Schaeffer.

[25] The essence of the plaintiff’s claim is that Mr. Schaefer, before his death, represented to her that she would share his estate with Mrs. Schaefer upon his death. The plaintiff also alleges that Mrs. Schaefer promised to transfer the Family Residence to Ms. O’Hara upon her death. Ms. O’Hara claims that when Mr. Schaefer died, the Family Residence was transferred to Mrs. Schaefer in title only, and that the Family Residence was held in trust for Ms. O’Hara after that point. The plaintiff alleges that there is a presumption of a resulting trust, an express trust, as well as a constructive trust on the basis that Mrs. Schaefer was unjustly enriched.

[26] The material facts upon which the plaintiff relies for the various trust claims are as follows:

- a) Mrs. Schaefer did not financially contribute to the purchase of the Family Residence in 1989. This statement is a conclusion devoid of any material facts, such as purchase price, date of purchase, or actual source of the funds. Apart from this statement by Ms. O’Hara, there are no other facts pleaded that relate to the purchase of and financial contributions to the Family Residence.

- b) Mr. Schaeffer mentioned to Ms. O'Hara prior to his death, that she and Mrs. Schaefer should share his estate.
- c) Ms. O'Hara cared for Mr. Schaefer leading up to and at the time of his death and was present when he died.
- d) Mrs. Schaefer promised to transfer the Family Residence upon her death to Ms. O'Hara. Mrs. Schaefer was to reside there until she died.

[28] The rest of the plaintiff's statement of facts in the NOCC that relate to the trust claims are non-material or are statements which are in the nature of evidence or argument. I will address each claim of trust in turn. As I address each trust claim, the three hallmarks of a trust must be kept in mind. A valid trust requires three certainties at the time of settlement: certainty of intention, objects, and subject matter

Express Trust

[27] The plaintiff pleads that Mrs. Schaefer's representation to Ms. O'Hara that she would bequeath her the Family Residence when she died created an express trust. Here, the plaintiff pleads material facts outlining Mrs. Schaefer's stated intentions at the time, but there are no facts setting out how or when Mrs. Schaefer put her stated intention into effect.

[28] In *Lessor*, Justice Verhoeven was likewise assessing whether various trust claims were made out in a disputed estates matter. Justice Verhoeven outlined the requirements for a valid trust to be constituted:

[40] To establish certainty of intention, "the language used by the settlor is critical and must show a clear intention that the recipient of the trust property holds that property on trust": *Mordo* at para. 293.

[41] Moreover, a trust must be properly constituted to be valid and effectual; the settlor of the trust must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done to transfer it and render the settlement binding upon the settlor: *Mordo* at para. 266.

[29] The facts as plead are clearly not sufficient to show a certainty of intention. There are no facts plead that go to Mrs. Schaefer intending to create a trust, nor are there any facts plead that would go to Mrs. Schaefer taking any steps whatsoever to put her purported stated intention into effect. The specific words of the settlor, being Mrs. Schaefer, are not plead,

Resulting Trust

[30] The plaintiff pleads that Mr. Schaefer stated that he intended Ms. O'Hara and Mrs. Schaefer to share his estate. She pleads that upon Mr. Schaefer's death, though Mrs. Schaefer was, on title, the sole owner of the Family Residence, it was at that point held in a resulting trust for Ms. O'Hara.

[31] The material facts related to this trust claim are Mr. Schaefer's purported statement to Ms. O'Hara. Mrs. Schaefer's promise to provide Ms. O'Hara title to the Family Residence may also go to the claim for resulting trust.

[32] The Supreme Court of Canada addressed the law of resulting trusts in *Pecore v. Pecore*, 2007 SCC 17. The Court outlined that a resulting trust "arises when title to the property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner": at para. 20. Our Court of Appeal in *McKendry v. McKendry*, 2017 BCCA 48 summarized a resulting trust as a trust that "arises when title to property is held in the name of a party who gave no value for it": at para. 35.

[33] No material facts regarding the purchase of the Family Residence were contained in the pleadings. The plaintiff has made a bald assertion in her pleading that her father provided all the funds for the purchase of the Family Residence without any other material facts.

[34] Taking this fact as true, the right of survivorship still operates to give Mrs. Schaefer, as joint tenant, full ownership of the Family Residence upon Mr. Schaefer's death. As stated by our Court of Appeal in *McKendry* at para. 28:

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

[35] Further, in *McMillan v. Nordahl*, 2010 BCSC 1929, rev'd on other grounds 2011 BCCA 48, Justice Voith set out the law regarding the right of survivorship in a joint tenancy at para. 39:

Where two people have a beneficial interest in property as joint tenants, upon the death of one of the tenants, the tenant who remains alive takes beneficial ownership of the entire property automatically by right of survivorship: *Parrott-Ericson v. Stockwell*, 2006 BCSC 1409, 61 B.C.L.R. (4th) 190, at paragraphs 9 and 10 quoting *Anger & Honsburger: Law of Real Property*, 3rd ed., at 14-7. If both spouses have contributed to the acquisition of an asset there is a presumption of joint tenancy ownership and a presumption that the deceased spouse intended to gift to the surviving spouse the beneficial interest in his share in the asset. Even if both spouses did not contribute, a joint tenancy between spouses is presumed to be an advancement and the burden is on the claimant to rebut the presumption: *Kogler v. Schabernig*, 2004 BCSC 522, 7 E.T.R. (3d) 31, at paragraphs 41 to 57.

[36] There are no material facts plead that could reasonably establish certainty of intention. There are no facts plead that state there was a written declaration of this intention, either in Mr. Schaefer's will or elsewhere, nor are there any facts plead that would show Mr. Schaefer executing on this intention. On the other hand, there are the facts that the joint tenancy was not severed, and Mrs. Schaefer became the sole owner of the Family Residence upon Mr. Schaefer's death. It is not plead that Mr. Schaefer transferred title to Mrs. Schaefer on the understanding that Mrs. Schaefer would hold title for the benefit of Ms. O'Hara. Rather, sole ownership transferred to Mrs. Schaefer as a matter of law as the surviving tenant under the joint tenancy. No material facts in the pleadings go to displacing this right of survivorship.

[37] In the case of *Bergler et al v. Odenthal*, 2019 BCSC 1882, Ms. A. Stuhff died without a will. Before her death, she gave clear instructions to her common law spouse that, on her death, she wanted her assets to be given to her niece, Susanne Bergler. The primary issue in that case was whether a trust was created by

Ms. Stuhff, wherein Mr. Odenthal held her assets solely for the benefit of Ms. Bergler.

[38] The Court in *Bergler* provided an overview of secret trusts:

[7] ... The elements of an enforceable secret trust are clearly set out in *Champoise v. Prost*, 2000 BCCA 426:

[15] It is useful to review the basic principles of secret trusts. A secret trust arises where a person gives property to another, communicating to that person an intention that the property be dealt with in a specific way upon the happening of an event, and the donee accepts the obligation. The essential elements are the intention of the donor, a communication of the intention to the donee and acceptance of the obligation by the donee: ***Sutherland Estate v. Nicoll Estate***, 1944 CanLII 70 (SCC), [1944] S.C.R. 253 (sub nom. ***Hayman v. Nicoll***), [1944] 3 D.L.R. 552; ***Jankowski v. Pelek Estate***, (1995), 1995 CanLII 11066 (MB CA), 131 D.L.R. (4th) 717 (Man. C.A.); ***Ottaway v. Norman***, [1971] 3 All E.R. 1325 (Ch.D.); D.W.M. Waters, ***Law of Trusts in Canada***, 2d ed. (Toronto: Carswell, 1984) at 215-217.

[16] In addition to these requirements for an enforceable secret trust, the three certainties necessary for any express trust must be exhibited; the words making the trust must be imperative, the subject of the trust must be certain, and the object or person intended to take the benefit of the trust must be certain. Further, those certainties must be exhibited at the time the trust is created: ***Re Beardmore Trusts***, [1951] 1 D.L.R. 41; D.W.M. Waters, ***Law of Trusts in Canada***, *supra* at 107.

[39] In *Bergler*, the sisters and the common law spouse all acknowledged that Ms. Stuhff had, prior to her death, instructed Mr. Odenthal to provide her assets to Susanne Bergler. Mr. Odenthal and the two sisters discussed this promise concerning the gift of Ms. Stuhff's assets to Ms. Bergler, and Mr. Odenthal confirmed that this conversation happened. These facts were not in dispute.

[40] In *Bergler*, the facts were that there was a conversation with a clear expression of intention. In the case at bar, there are no material facts similar to those in *Bergler*. There are no material facts that demonstrate a clear intention to form a trust. No words or actions that would support a clear intention are plead.

Constructive Trust

[41] The plaintiff pleads that she assisted Mr. Schaefer after his diagnosis and cared for him in his final days. The plaintiff does not plead any facts relating to any contributions she made, financial or otherwise, to the Family Residence.

[42] There are no facts which could support a claim of unjust enrichment with a remedy of constructive trust. The plaintiff needed to plead facts going to an enrichment of Mrs. Schaefer, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment. The pleadings disclose only bare and vague assertions that Ms. O'Hara assisted in providing care for Mr. Schaefer when his health was deteriorating prior to his death. This is insufficient to ground a claim for unjust enrichment.

Summary of Trust Claims in the NOCC

[43] This case is in line with *Lessor*. Specifically, Verhoeven J. assessed a similar set of facts where a third-party made a trust claim to a property that had been a joint tenancy but, upon the death of one of the tenants, had vested solely in the remaining tenant. As in the case at bar, the plaintiff in *Lessor* plead that there had been a representation to him by one of the owners that the impugned property would be his upon her death. After the death of that owner, title vested solely in the name of the remaining owner and she continued to reside there until her death.

[44] Justice Verhoeven stated the following regarding the promise which the plaintiff claimed created a trust:

[36] ...Quite obviously that did not occur. The home was in joint tenancy and passed to the surviving joint tenant, Ms. Toll on the death of Ms. Hayes. Ms. Hayes did not sever the joint tenancy prior to her death, so her interest in the property did not form part of her estate at all. At most, the suggestion could be interpreted as an oral statement of Ms. Hayes intentions at the time she made the statement. She did not take any steps whatsoever to put her stated intentions into effect.

[45] The conclusion in *Lessor* was that there was no written declaration of trust, no execution of an instrument of transfer, nor any other act whatsoever which was

sufficient to satisfy the necessary requirements of a trust. This is also a conclusion which applies in the current case. The facts plead are insufficient, even taken as true, to support any trust claims raised by the plaintiff.

[46] I am satisfied that, based on the limited facts as pleaded, there is no reasonable prospect of success, and the trust claims advanced by the plaintiff are bound to fail. The proposed amendments put forward by the plaintiff do not assist her claim.

Proposed Amendments

[47] The plaintiff has provided proposed amendments to her NOCC which she submits further substantiate her trust claim by pleading further material facts.

[48] I have reviewed the proposed amendments and find that they too fail to disclose a reasonable cause of action. The facts plead are, like in the NOCC, in the nature of arguments or evidence. For example, the plaintiff asserts in the facts that Mr. Schaefer's "intention was to make a declaration of trust". Further, there are no material facts that would support this assertion. There are no facts including any express words of Mr. Schaefer or Mrs. Schaefer that would support the intention to create an express trust or in any way support the severing of the joint tenancy, nor is there even a time period or date provided for when these promises occurred.

[49] As a result of these findings, the proposed amendments shall not be permitted and the application to allow those amendments is dismissed.

Conclusion

[50] The pleadings of the plaintiff as drafted fail to disclose a reasonable cause of action. I am satisfied that there is no reasonable prospect of success. The proposed amendments do not cure the deficiencies identified. The pleadings are therefore struck in their entirety without leave to amend and this claim is dismissed in its entirety.

[51] The defendant has also sought an order for the release of funds held in trust by court order which are the proceeds of the sale of the Family Residence. This order is also granted given the action of the plaintiff has been dismissed.

[52] The plaintiff shall pay the costs of the action to the defendant forthwith after review pursuant to Appendix "B", Scale "B" as a matter of ordinary difficulty.

[53] As I have decided this case on the basis of the deficiencies in the pleading, it is unnecessary to address the *Limitations Act* issue which was addressed in argument.

"Ball J".