CITATION: Conte v. Pettle, 2023 ONSC 3881
COURT FILE NO.: CV-18-135927
DATE: 20230629

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Rosetta Conte Plaintiff	Wade Morris and Elizabeth Deyoe, for the Plaintiff
– and –	
Gerald Pettle (a/k/a Gerry Pettle), and Michael Pettle, Ruthie Pettle, and Richard Pettle, as Estate Trustees of the Estate of Susan Pettle (a/k/a Susan Bidula a/k/a Susan Jane Allain), deceased	Gerald Sternberg, for the Defendant, Gerald Pettle
Defendants	Michael Cohen for the Defendants Michael Pettle, Ruthie Pettle, and Richard Pettle, as Estate Trustees of the Estate of Susan Pettle (a/k/a Susan Bidula a/k/a Susan Jane Allain), deceased
	HEARD: May 19, 2023

REASONS FOR DECISION

CHARNEY J.:

Introduction

[1] On April 16, 2010, the Plaintiff, Rosetta Conte, obtained a default judgment against the Defendant, Gerald Pettle (Gerald)[1] for $268,920. The default judgment related to a series of loans totaling approximately $250,000 that Ms. Conte made to Gerald in 2007. The loans were never repaid.

[2] Ms. Conte tried to collect on the judgment. Gerald attended an examination in aid of execution on July 5, 2010, and again on September 14, 2017, but Gerald claimed to have

[1] Since all defendants have the same last name, the defendants will be identified by their first name in this decision.

no assets to pay the judgment. Both his house and cottage (the properties) were registered in his wife's name.

[3] On May 24, 2018, Ms. Conte commenced a new action against Gerald and his wife, Susan Pettle (Susan), claiming that Gerald holds a beneficial interest in the house and cottage, and seeking a declaration that the April 16, 2010 judgment can be enforced against those properties. She also alleges that placing the properties in Susan's name was a fraudulent conveyance.

[4] Susan died on June 3, 2022, and her estate trustee now holds legal title to the house and cottage. Gerald is not a beneficiary under Susan's will. The couple's four children are the only beneficiaries under the will.

Issues

[5] This case raises the following issues:

i. Was there a fraudulent conveyance of real or personal property from Gerald to Susan?

ii. If there was such a fraudulent conveyance, can the Plaintiff trace the proceeds to any property owned by Susan (and now Susan's estate) and execute against such property?

iii. Is the Plaintiff's claim statute barred due to the expiry of the limitation period?

Facts

The 2007 and 2008 Loans

[6] Ms. Conte was married for 43 years until her husband's death in 2006, after years of disability. After her husband's passing, the life insurance proceeds paid to Ms. Conte ($100,000), combined with funds Ms. Conte had in savings, amounted to less than $300,000.

[7] Ms. Conte met Gerald and Susan through her work as manager of a banquet hall where the Pettles held functions.

[8] In October 2007, Gerald approached Ms. Conte and asked to borrow $100,000 from her. On October 21, 2007, Gerald executed a Promissory Note in favour of Ms. Conte for $100,000 payable on the 17th day of June, 2008, with interest at 15 per cent per year, payable monthly.

[9] On June 6, 2008, Gerald borrowed further monies from Ms. Conte in the amount of $150,000 and executed a Promissory Note for this amount with the due date of June 17, 2009, with interest at 15 per cent per year, payable monthly.

[10] In June 2008, the parties agreed to extend the first Promissory Note in the amount of $100,000 to June 27, 2009.

[11] The Promissory Notes were signed only by Gerald. No security was given for the loans.

[12] While Gerald did pay interest during the term of the loan, he did not pay the principal when it became due.

[13] Ms. Conte has filed a transcript of a conversation that she had with Gerald on October 28, 2009. It appears from the transcript that Gerald was aware that their conversation was being recorded. Ms. Conte begins by introducing the speakers and subject matter:

> Hi. Today, its October the 28th, and I have Gerry Pettle here, and he came to talk about the, what he owes me, about the money, so we just got to solve this situation.

[14] Gerald begins by telling Ms. Conte that he needs a letter from her:

> [T]hat says that Susan Pettle is in no way financially responsible for anything between you and I. She has no requirement to pay you. She doesn't owe you any money. She never borrowed any money from you. Then when we give this letter to Susan, she will give you the mortgage on the house because it's…she's doing it out of the goodness of her heart for me.
>
> …
>
> Just say that the money between you and I, the $250,000, has nothing to do with Susan Pettle. She doesn't owe you any money. She didn't borrow the money. She is not responsible for the money.

[15] The conversation continues for several pages. Ms. Conte and Gerald argue about what Gerald told Susan about the loan, and whether Gerald told Ms. Conte that he owned the house and would give her a mortgage on the house. Ms. Conte demands that Gerald repay the loan, but Gerald's focus is on convincing Ms. Conte to sign a letter confirming that Susan does not owe Ms. Conte any money.

[16] Gerald also states that it would be better to place the mortgage on the cottage because Susan was currently under house arrest and the house had been pledged as security in connection with Susan's conditional sentence. Gerald insisted that this is all Ms. Conte's "fault" because she threatened to call the police, and Susan risks losing the house if she is arrested again. At the end of the conversation, Ms. Conte states that she is going to see her lawyer before she signs any letter.

[17] Ms. Conte hired a lawyer, Alan Price, to help her recover the money. During the negotiations with Mr. Price in November 2009, Gerald suggested that one possible resolution was to put "a second mortgage on the cottage in the amount of $100,000 at a

lower interest rate than the unsecured loan" and "a small mortgage, say $50,000 on my house in Toronto". This proposal was rejected by Ms. Conte.

2010 Statement of Claim

[18] On February 2, 2010, Ms. Conte issued a Statement of Claim against Gerald for unpaid loans in the total sum of $258,000. Gerald was the only defendant to this action.

Default Judgment

[19] No Statement of Defence was filed. On April 16, 2010, Ms. Conte obtained default judgment against Gerald for $268,920.82, representing principal and pre-judgment interest. The judgment bears interest at the rate of 15% per year (the interest rate of the loans) and the costs of $1,500 bear interest at the rate of 2% per year.

[20] That judgment was never set aside or appealed from.

[21] The issues decided on that default judgment are now *res judicata*, and I will proceed on the basis that Ms. Conte is a judgment creditor and that the truth of the allegations set out in the 2010 Statement of Claim are deemed admitted: *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 19.02.

2010 Judgment Debtor Examination

[22] On July 5, 2010, Gerald attended an examination in aid of execution (judgment debtor examination) conducted by Mr. Price. Gerald was asked about his house, and answered that he believed the house was owned by his wife and that there were two mortgages on the house.

[23] Gerald also stated that he had a one-third interest in two properties in Crystal Beach, Ontario with his brother and another partner, but that the properties were in the name of his brother and the other partner.

[24] Gerald stated that his wife owned a cottage in Crystal Beach that the family used for recreation. That property was also mortgaged.

[25] Gerald testified that he paid the taxes and mortgage on the house and the household expenses for at least the past six months, and at that time he was the sole source of income for the family because his wife did not work. Up until recently, his wife had paid for the mortgage on the cottage.

[26] Gerald also indicated that he operated an unincorporated wholesale "close out business", buying and selling merchandise under the business name "CanAm Trading". He did not collect GST or PST on sales and had never filed tax returns with respect to the business. He also had an unincorporated business buying and selling gold for cash.

[27] Finally, Gerald was asked whether Susan would agree to put a mortgage on the house or cottage to secure Gerald's debt, and Gerald testified that she had considered it at one point but was no longer prepared to do so.

2017 Judgment Debtor Examination

[28] In 2017, Ms. Conte retained a new lawyer. On September 14, 2017, Gerald attended a second examination in aid of execution.

[29] Gerald testified that he kept no business records and dealt only in cash. He had not paid income tax or filed a tax return – personal or business - since some time in the 1980s.

[30] Gerald explained that he loses all of his money gambling, and that he borrows money "from bikers and from the mafia…Loan sharks" to buy merchandise and gamble.

[31] Gerald also testified that the house was owned by Susan, and that she had purchased it approximately 20 years ago for $390,000.

[32] He stated that he had not made any contribution to the purchase of the house or cottage. He claimed that since 2010 his wife made all mortgage payments for the house and cottage from her income as a part-time receptionist (two days a week) and her sales at a weekend flea market.

[33] Gerald testified that if he had money, he would give it to Susan, and Susan would use the money to make payments for expenses or the mortgage. He would always give Susan cash - "I only deal in cash" – but he was not sure what she did with it: "It's to help pay whatever she needs it for."

[34] By the time of the second judgment debtor examination, Gerald no longer had any interest in the Crystal Beach properties he had owned with his brother and another partner. He had defaulted on his payment obligations and his brother had full ownership of the properties.

2018 Statement of Claim

[35] On May 24, 2018, Ms. Conte commenced this action against Gerald and Susan, seeking a declaration that Gerald holds a beneficial interest in the house and cottage and a declaration that the 2009 default judgment against Gerald is enforceable against these properties.

Registered Ownership of the House and Cottage

[36] Although Susan passed away before the trial, Susan's evidence was set out in an affidavit sworn on May 4, 2019, on which she was cross-examined October 17, 2019.[2] By Order of R.S.J. Edwards dated May 4, 2022, the affidavit and transcript of the cross-examination

[2] This affidavit and cross-examination were prepared for a motion by Susan to delete a registered notice of unregistered interest that the Plaintiff had registered on the properties. The motion did not proceed.

was admitted as Susan's evidence, "subject to the trial judge's assessment of credibility, weight, and without prejudice to any arguments that may be made with respect to how the evidence should be interpreted".

[37] Susan is the sole registered owner of the house and the cottage. This is confirmed by the parcel registry.

[38] Susan purchased the house from the Town of Richmond Hill on August 20, 1996, for $373,277, at which time she became the sole registered owner. The house was registered in Susan's name only and has never been transferred or conveyed.

[39] Susan purchased the Cottage from the Royal Bank on April 12, 2002 for $93,500. The cottage was registered in Susan's name only and has never been transferred or conveyed.

[40] Susan's evidence was that the down payments for these properties were made using her own funds, or funds given to her by her father, and that Gerald did not contribute to these down payments.

[41] In her Statement of Defence, Susan pled that:

> Susan and Gerald agreed that Susan would purchase the Properties on her own and would be the sole owner of the Properties due to Gerald's gambling habit. These decisions were made prior to purchasing either of the Properties and was made in an effort to protect the Properties from future potential debts.

[42] This statement was repeated in her affidavit. This is a significant point in this case. The Plaintiff argues that this is, in effect, an admission of an intention to defraud creditors. I will return to the legal significance of this pleading when I analyze the applicable law.

[43] Susan also testified that Gerald had no ownership or equitable interest in either property. There is no trust agreement, and she denies that Gerald contributed towards the properties financially.

[44] Gerald did not testify at the trial. The Plaintiff relies on Gerald's evidence from the two judgment debtor examinations, which were given under oath, and from excerpts from his examination for discovery.

Gerald's Financial Contribution to the House and Cottage

[45] There are very few relevant facts in dispute in this case. The primary factual dispute relates to Gerald's financial contribution to the house and cottage.

[46] As indicated above, in his 2010 judgment debtor examination, Gerald testified that he paid the taxes and mortgage on the house and the household expenses for at least the past six months, and at that time he was the sole source of income for the family because his wife did not work.

[47] In her Supplementary Affidavit dated May 8, 2019, Susan expressly contradicted this evidence. She testified that she was always employed, and was solely responsible for paying any mortgage payments, utility bills, property taxes, and any other charges on the properties and that Gerald never made any financial contributions, directly or indirectly, to either property.

[48] At his examination for discovery, Gerald acknowledged that he did give Susan money specifically directed to be applied towards expenses or charges relating to the matrimonial home or cottage.

[49] Since Gerald only dealt in cash, and has no business or tax records, it is difficult to "follow the money" in this case. In any event, money is fungible, and whether Gerald gave Susan money to pay for the mortgage or for some other purpose, I accept the evidence that Gerald contributed to the family's finances. Gerald cannot rely on his lack of financial records to avoid this conclusion.

[50] Moreover, Susan was asked to disclose her banking records to demonstrate how she paid for the mortgages for both properties without contributions from Gerald. Susan disclosed heavily redacted copies of her banking records from January 1, 2010, to May 2019, although the earliest date on the records appears to be from March 2013.

[51] All sources of employment income were unredacted in the bank records produced. These banking records indicate that Susan's total income from employment over this period was $15,471. Susan did not file income tax returns after 2010.

[52] During this same period – 2010 to 2019 – the total debits from Susan's bank account equals $449,668. Mortgage payments were made from the bank account for which records were produced. The mortgage payments for the properties during this time were more than $4,000 per month. The source of these funds - apart from her $15,471 employment income - is redacted. It is clear, however, that Susan's employment income was not sufficient to support her expenses, which included the mortgages for the house and cottage.

[53] At trial, I asked counsel for Susan why the source of these funds was redacted. He answered that they were redacted because they were irrelevant. I asked him why he took the position that they were irrelevant, and he answered that he could not remember.

[54] "I don't remember" is hardly a compelling answer. It appears to me that, given the allegations in this case, and Susan's position that Gerald made no financial contributions to the family finances, the source of $434,000 is highly relevant. In my view, it is open to the court to draw an adverse inference against Susan for failing to disclose the source of these funds, and I draw such an inference. I reject Susan's evidence that Gerald made no financial contribution to the mortgages or to the family finances generally.

[55] Given the dearth of financial records from both defendants, given Gerald's evidence at both judgment debtor examinations that he did transfer money to Susan, and given Susan's counsel's inability to explain why the source(s) of her funds were redacted, I find that Gerald did make significant financial contributions to the family finances, and that these

contributions were used, either directly or indirectly, toward the mortgage payments for both the house and the cottage. The full extent of the financial contribution cannot be determined.

Analysis

i. Was there a fraudulent conveyance of real or personal property from Gerald to Susan?

[56] Section 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, (*FCA*) provides:

> **Where conveyances void as against creditors**
>
> 2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

[57] The term "conveyance" is defined in s. 1 as:

> "conveyance" includes gift, grant, alienation, bargain, charge, encumbrance, limitation of use or uses of, in, to or out of real property or personal property by writing or otherwise;

[58] The *FCA* is to be given a large and liberal interpretation and construction. In *Royal Bank of Canada v. North American Assurance Co*., [1996] 1 S.C.R. 325, Gonthier J. stated for the Court, at para. 59:

> All the provincial fraud provisions are clearly remedial in nature, and their purpose is to ensure that creditors may set aside a broad range of transactions involving a broad range of property interests, where such transactions were effected for the purpose of defeating the legitimate claims of creditors. Therefore, the statutes should be given the fair, large and liberal construction and interpretation that best ensures the attainment of their objects, as required by provincial statutory interpretation legislation…

[59] There is no dispute that a creditor – even a subsequent creditor - has standing to bring a fraudulent conveyance claim: *Ontario Securities Commission v. Camerlengo Holdings Inc.*, 2023 ONCA 93, at para. 11:

> The case law interpreting s. 2 of the FCA is clear that a subsequent creditor – that is, a claimant who was not a creditor at the time of the transfer – can attack a transfer if the transfer was made with the intention to "defraud creditors generally, whether present or future.": *IAMGOLD Ltd. v. Rosenfeld,* [1998] O.J. No. 4690, at para. 11; see also *McGuire v. Ottawa*

> *Wine Vaults* Co. (1913), 1913 CanLII 7 (SCC), 48 S.C.R. 44. An intent to defraud creditors generally can be made manifest by taking steps to judgment proof oneself in anticipation of starting a new business venture. To plead a fraudulent conveyance on this basis, it is not necessary that a claimant be able to identify a particular, ascertainable creditor that the debtor sought to defeat at the time of the conveyance. It is enough, on the case law, to plead facts that support the allegation that at the time of the conveyance the settlor perceived a risk of claims from a general class of future creditors and conveyed the property with the intention of defeating such creditors should they arise. The types of facts that can support an inference of such an intention to convey property away from creditors – present or future – are often described as "badges of fraud".

[60] See also: *Wilfert v. McCallum*, 2017 ONCA 895, at para. 9; *LPIC v. Fiore et al*, 2021 ONSC 7860, at para. 85; *Indcondo v. Sloan*, 2014 ONSC 4018, at para. 47.

[61] In this case, the properties were registered in Susan's name when they were purchased in 1996 and 2002 respectively. This was several years before Ms. Conte lent money to Gerald in 2007. Ms. Conte still qualifies as a "subsequent creditor", with standing to challenge a conveyance or transfer.

[62] The Plaintiff argues the purpose of putting the property in Susan's name alone was to defraud future creditors generally. In support of this position, Ms. Conte relies on Susan's admission, made in both her Statement of Defence and her affidavit, that

> Susan and Gerald agreed that Susan would purchase the Properties on her own and would be the sole owner of the Properties due to Gerald's gambling habit. These decisions were made prior to purchasing either of the Properties and was made in an effort to protect the Properties from future potential debts.

[63] This statement is not, on its face or by itself, an admission of an intent to defraud present and future creditors. If Susan purchased the properties "on her own", with her own money, there is nothing fraudulent about registering the property in her name only. Married individuals are free to maintain separate ownership of property during their marriage, and it is only upon separation or divorce that an equalization of the value of net family property under Part I of the *Family Law Act*, R.S.O. 1990, c. F.3 takes effect.

[64] Many spouses choose to register the title of real property as a joint tenants or tenants in common, but there is no law and no legal presumption that property, including the matrimonial home, is jointly owned during the marriage. If Susan did purchase the house and cottage with her own money, it is understandable that she would not want to add Gerald as a co-owner and expose those assets to Gerald's gambling debts.

[65] The legal burden to prove fraudulent intent remains with the plaintiff throughout the trial: *FL Receivables Trust 2002-A v. Cobrand Foods Ltd.*, 2007 ONCA 425, at para. 39. The

plaintiff typically raises an inference of fraud by putting forward "badges of fraud": *Ontario Securities Commission*, at para. 12.

[66] The Court of Appeal adopted the following explanation of the role that "badges of fraud" have in determining fraudulent intent under s. 2 of the *FCA* in *Urbancorp Toronto Management Inc. (Re*), 2019 ONCA 757, at para 52:

> Whether the [fraudulent] intent exists is a question of fact to be determined from all of the circumstances as they existed at the time of the conveyance. Although the primary burden of proving his case on a reasonable balance of probabilities remains with the plaintiff, the existence of one or more of the traditional "badges of fraud" may give rise to an inference of intent to defraud in the absence of an explanation from the defendant. In such circumstances there is an onus on the defendant to adduce evidence showing an absence of fraudulent intent. Where the impugned transaction was, as here, between close relatives under suspicious circumstances, it is prudent for the court to require that the debtor's evidence on bona fides be corroborated by reliable independent evidence.

[67] In this case the Plaintiff points to several "badges of fraud" to support her position, including:

a. The relationship between Gerald and Susan is husband and wife.

b. Gerald remained an undischarged bankrupt at the time of the purchase of the house which was registered in Susan's name alone.

c. Susan and Gerald agreed that Susan would be the sole registered owner of the properties due to Gerald's gambling and potential future debts.

d. Gerald has not filed an income tax return since the 1980s, and Susan has not filed an income tax return since at least 2010, and they each deal only in cash.

e. Gerald lived in the house with Susan and they both used the cottage as a recreational property.

f. Gerald signed as the guarantor on multiple mortgages on both the house and cottage, thereby assuming a risk of liability.

g. Gerald's evidence that he deals exclusively in cash and keeps no business records.

h. Susan's failure to disclose her banking records and the source of approximately $430,000 deposited into her account between 2010 and 2019.

i. Gerald's evidence from his 2010 judgment debtor examination that he paid for the mortgages for the properties while Susan was unemployed.

[68] In the end, however, the Plaintiff's *FCA* claim in relation to the properties cannot succeed because there was no "transfer" or "conveyance" of either property from Gerald to Susan. The subject properties have only ever been registered in Susan's name. At no time did Gerald own either property or transfer or convey either of the properties to Susan.

[69] While there is evidence that Gerald transferred money to Susan after the properties were initially purchased (and I will return to this evidence later in these Reasons), there is no evidence that Gerald was the source of any of the original purchase funds in 1996 or 2002.

[70] All of the *FCA* cases relied on by the Plaintiff involve the transfer, gift or conveyance of the property from one spouse to another, or from one spouse to a related party: *LPIC*, at para. 2; *Anisman v. Drabinsky*, 2020 ONSC 1197, at para. 1, aff'd 2021 ONCA 120; *Indcondo v. Sloan*, 2014 ONSC 4018, at para. 39; *Miller v Debartolo-Taylor,* 2015 ONSC 2654, at paras. 1, 6.

[71] Moreover, the remedy for a fraudulent conveyance is to void the conveyance as against the creditors. In this case, there was no conveyance of either property from Gerald to Susan that can be voided. The conveyance was between the Town of Richmond Hill and Susan (the house) and the Royal Bank and Susan (the cottage). Voiding these conveyances would not accomplish the Plaintiff's objective.

[72] As Gray J. stated in *Cambone v. Okoakih*, 2016 ONSC 792, at para. 171:

> No matter how broadly the legislation [*FCA*] is to be interpreted, and no matter what fair, large and liberal construction and interpretation should be given to it, it cannot be construed so as to set aside a conveyance, to a person, of property purchased with that person's own money, even if the intent is to ensure that a creditor of some other person cannot get at the property.

[73] The Plaintiff argues that the "conveyance" at issue in this case is the registration of the house and the cottage in Susan's name alone as opposed to the properties being jointly titled between Susan and Gerald. No authorities were cited to support the argument that the original registration in Susan's name alone could qualify as a "conveyance" under s. 2 of the *FCA*.

[74] The fact that the house became, by operation of law, the matrimonial home, and that the cottage was, after its purchase, a recreational property shared by Susan and Gerald, is not, in my view, sufficient to meet the definition of "conveyance" in the *FCA*. Unless Gerald had some ownership interest in the property *prior* to its registration in Susan's name, or provided the funds to Susan to make the original purchase, there was no conveyance from Gerald to Susan.

[75] This same difficulty applies to the Plaintiff's argument of resulting trust.

[76] The principles relating to a resulting trust were summarized by Rothstein J. for the Supreme Court of Canada in *Nishi v. Rascal Trucking Ltd*., 2013 SCC 33, at paras. 1, 2:

> A purchase money resulting trust arises when a person advances funds to contribute to the purchase price of property, but does not take legal title to that property. Where the person advancing the funds is unrelated to the person taking title, the law presumes that the parties intended for the person who advanced the funds to hold a beneficial interest in the property in proportion to that person's contribution. This is called the presumption of resulting trust.
>
> The presumption can be rebutted by evidence that at the time of the contribution, the person making the contribution intended to make a gift to the person taking title. While rebutting the presumption requires evidence of the intention of the person who advanced the funds *at the time of the advance*, after the fact evidence can be admitted so long as the trier of fact is careful to consider the possibility of self-serving changes in intention over time.

[77] The Supreme Court further stated, at para. 29:

> In the context of a purchase money resulting trust, the presumption is that the person who advanced purchase money intended to assume the beneficial interest in the property in proportion to his or her contribution to the purchase price.

[78] The presumption of resulting trust applies to questions of ownership of property between spouses pursuant to s. 14 of the *Family Law Act*, unless the property is held in the name of both spouses as joint tenants. The onus is on the recipient to prove the intention was to make a gift. See *Pecore v. Pecore,* 2007 SCC 17, at paras. 20-25.

[79] For the presumption of a purchase money resulting trust to apply, the person claiming to be the beneficial owner must first show that he was the one who advanced the purchase money: see Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 4th ed., (Toronto: Carswell, 2012), at p. 401.

[80] In the present case, there is no evidence that any of the funds for the original purchases in 1996 or 2002 came from Gerald. There cannot, therefore, be a purchase money resulting trust.

[81] My conclusion that there is no evidence that any of the funds for the original purchases in 1996 or 2002 came from Gerald does not end the inquiry under the *FCA*. While most reported cases under the *FCA* deal with conveyances of real property, the *FCA* also covers the conveyance of personal property.

[82] Importantly, for the purposes of the *FCA*, it does not matter whether a conveyance of property was a resulting trust or a gift. Either might qualify as a fraudulent conveyance. Indeed, s. 1 of the *FCA* expressly defines the term "conveyance" as including a gift.

[83] The question is not whether the debtor retains some equitable interest in the property, but whether the debtor made the conveyance "with intent to defeat, hinder, delay or defraud creditors". Such an intent might be accomplished with a resulting trust, where the debtor retains some interest in the property, or by a gift, where the debtor retains no interest whatsoever. Indeed, where the gift is made to a spouse, the debtor may continue to enjoy all the benefits of the property even if he retains no exigible interest in it. Either way, if the conveyance is made with fraudulent intent, the conveyance would be void as against creditors: *Cambone*, at para. 176.

[84] As of April 16, 2010, Gerald was a judgment debtor to Ms. Conte for $268,920 (plus post-judgment interest). If he made money after that date, he was legally obligated to pay it to the judgment creditor. Transferring cash to Susan was also a violation of the *FCA*, because the transfer of cash, which qualifies as personal property under the *FCA*, was made "with intent to defeat, hinder, delay or defraud creditors …of their just and lawful … damages." See *Toronto-Dominion Bank v. Miller (Bkcy.),* 1990 CanLII 6656 (ON SC); 1 O.R. (3d) 528, which held that charitable donations qualified as personal property under the *FCA*.

[85] While Susan denied receiving any cash from Gerald (an assertion that I have rejected), her estate argues, in the alternative, that if Susan did receive any cash from Gerald it was intended as a gift. For the purposes of the FCA, however, it does not matter whether Gerald gave the cash to Susan as a gift or in trust.

[86] The cases have long held "that debts must be paid before gifts can be made": *Mandryk v. Merko*, 1971 CanLII 998 (Man. C.A.); 19 D.L.R. (3d) 238, citing Lord Hatherley, L.C. in *Freeman v. Pope* (1870), L.R. 5 Ch. App. 538.

[87] In *Moody v. Ashton*, 2004 SKQB 488, the Court noted, at para. 146, "that although the subject matter of most fraudulent conveyance actions is one or two specific transactions, a series of transactions as part of a general scheme to defraud creditors can also constitute a fraudulent conveyance." Thus, the fact that Gerald gave money to Susan – money that he owed to the Plaintiff - over a period of years rather than in a single transaction is not relevant to the *FCA* analysis.

[88] In *Moody*, the Court stated, at paras. 160, 163:

> An undertaking by a spouse to gift one half of his or her prospective earnings to the other spouse is a laudable gesture so long as that spouse can meet his or her debt obligations to creditors. But such gifts became unlawful once they prevent the donor spouse from honoring his or her debt obligations. At that point, the gifts become fraudulent conveyances and void as against creditors because the donor is in effect purporting to gift something to which his or her creditors are entitled. Benevolence cannot be effected at the expense of a third party even if the intended recipient of the gift is one's spouse.

> The fact that the impugned gift is made to a spouse or to some other family member does not of itself justify or legalize what would otherwise constitute a fraudulent conveyance. Usually, it is a family member or near relative who is the recipient of a fraudulent conveyance. This is so because the intent of the transferor is not to part with his or her property but to shelter it from creditors. Conveying the legal title of an asset to a near relative while retaining the beneficial ownership in it is much more readily accomplished, and with far less risk, than making the conveyance to a stranger.

[89] That appears to be precisely the situation before me: Gerald transferred cash to Susan at a time that the debt was owed to Ms. Conte. It does not matter whether Susan used this cash to pay the mortgages or used the cash for some other purpose. Cash is fungible. It was, under the *FCA*, a fraudulent conveyance, because the cash was transferred to Susan with the intent that it would not be available to pay Gerald's creditors. As Baynton J. concluded in *Moody*, at para. 164: "Debtors cannot arrange their affairs to benefit family members at the expense of their creditors."

[90] I am satisfied, given the "badges of fraud" identified by the Plaintiff, that any transfer of cash from Gerald to Susan was a fraudulent conveyance within the meaning of s. 2 of the *FCA*.

[91] Since Gerald and Susan lived together in the house and both used the cottage property for recreation, Gerald continued to benefit from the cash as if he had retained legal title to it. While this is a badge of fraud, it is not a necessary condition to finding a fraudulent conveyance: *Toronto-Dominion Bank.*

[92] The only question is how much cash Gerald transferred to Susan in his effort to defeat his creditors. As indicated, since Gerald and Susan dealt only in cash and kept no financial records of any kind (other than the redacted bank records), it is not possible to know the answer to that question. As indicated, Gerald cannot rely on his lack of financial records, and Susan cannot rely on her refusal to disclose relevant records to avoid liability.

[93] A similar predicament confronted the court in *Cambone*, where two people contributed to the purchase of a property that was placed in the name of one of them, and it was not possible to determine the proportions in which each had contributed: at para. 204. Gray J. concluded, at para. 208:

> It would be a fairer result, in my view, that in the absence of a precise calculation of respective contributions, it should be concluded that each party is entitled to an equal share. This is particularly so in the case of married contributors. Indeed, that was the conclusion in an English case, *Jones v. Maynard*, [1951] 1 Ch. 572, where Vaisey J. decided that where a husband and wife effectively operated by a pooling of their respective monies, and it was thus impossible to determine the respective investments

made by each, it should be concluded that each is entitled to half. At p.575, Vaisey J. stated:

> I think that the principle which applies here is Plato's definition of equality as a "sort of justice": if you cannot find any other, equality is the proper basis. When monies were taken out of the joint account for the purpose of making an investment, the intention which I attribute to the parties is equality, and not some proportional entitled to be arrived at an inquiry as to the amounts contributed respectively by the husband and wife to the common purse. Where one is searching for justice, as one must, and cannot find any other source and sound basis, I think that equality is the best rule.

[94] Gerald transferred cash to Susan with the intent to defeat or defraud his creditors and, pursuant to s. 2 of the *FCA*, the transactions under which the cash was transferred to Susan are void as against Gerald's creditors. Based on the bank records disclosed by Susan, we know that between 2010 and 2019, Susan received approximately $434,000 from unidentified sources. Using the principle relied on by Gray J. in *Cambone*, I am prepared to attribute half this amount to Gerald's fraudulent conveyances, or $217,000.

ii. If there was such a fraudulent conveyance, can the Plaintiff trace the proceeds to any property owned by Susan (and now Susan's estate) and execute against such property?

[95] The remedies available under the *FCA* were summarized by Myers, J. in *Purcaru v. Seliverstova et a*l., 2015 ONSC 6679, at para. 10:

> [T]he *Fraudulent Conveyances Act* provides that the court can declare a transfer of property void if the intention of the person who made the transfer was to defeat or delay his or her creditors. The statute is designed to stop a debtor from hiding assets from creditors by fraudulently transferring the assets to another person. If it is applicable, an order under the statute makes property that was fraudulently conveyed available for execution on behalf of the creditors of the transferor. In addition, if the transferred property has been disposed of prior to the transaction being declared void, s. 12 of the *Assignments and Preferences Act*, R.S.O. 1990, c. A-33 allows the creditors to execute against proceeds received by the transferee.

[96] In many respects, the facts of this case are similar to the facts in *Purcaru*. In that case, Myers, J. applied s. 12(1) of the *Assignments and Preferences Act*, R.S.O. 1990, c. A-33, which gives a remedy to creditors of the debtor where the fraudulently conveyed property has been disposed of by the transferee: *Westinghouse Canada Ltd. v. Buchar et al*., 1975 CanLII 638 (ON CA); (1975), 9 O.R. (2d) 137. Myers, J., at para. 115, held that the proceeds of disposition of the fraudulently conveyed cash in that case were in the titles to three properties, and therefore issued judgment binding the respondents' interests in the

title to those properties, and authorizing the sheriff to take position and sell the properties to pay the creditors the sums fraudulently conveyed on each unit, plus interest, and costs. This decision was upheld by the Court of Appeal in *Purcaru v. Seliverstova*, 2016 ONCA 610.

[97] Section 12(1) of the *Assignments and Preferences Act* provides:

> **Following proceeds of property fraudulently transferred**
>
> 12 (1) In the case of a gift, conveyance, assignment or transfer of any property, real or personal, that is invalid against creditors, if the person to whom the gift, conveyance, assignment or transfer was made has sold or disposed of, realized or collected the property or any part thereof, the money or other proceeds may be seized or recovered in an action by a person who would be entitled to seize and recover the property if it had remained in the possession or control of the debtor or of the person to whom the gift, conveyance, transfer, delivery or payment was made, and such right to seize and recover belongs not only to an assignee for the general benefit of the creditors of the debtor but, where there is no such assignment, to all creditors of the debtor.

[98] Since the money transferred from Gerald to Susan in this case was used, either directly or indirectly, to pay for the mortgages of the house and cottage, I also conclude that Gerald has a beneficial interest in the properties in the amount of $217,000, against which Ms. Conte can execute her judgment. This amount does not properly form part of Susan's estate, because the transfer from Gerald to Susan is void as against Ms. Conte.

[99] The Defendants argued that the Plaintiff lacks standing to assert that Gerald holds a beneficial interest in the properties. They argue that only Gerald has the requisite personal legal interest in the determination of whether he has a beneficial interest in the properties forming part of Susan's estate.: *Karatzoglou v. Commisso*, 2023 ONSC 58; *Vandokkumberg v. H. Meyer Construction Ltd.*, 2007 BCSC 1341; *Rusinek & Associates Inc. v. Arachchilage*, 2021 ONCA 112, at para. 54.

[100] Other cases have noted that there is some uncertainty as to whether a creditor has standing to argue that a debtor has a beneficial interest in a property: *Shanghai Lianyin Investment v. Lu*, 2023 ONSC 399, at paras. 29-31; *Lad v. Marcos*, 2020 ONSC 6215, at paras. 71-74.

[101] None of these cases involved fraudulent conveyances. This was specifically referenced in *Vandokkumberg*, where the Court stated, at para. 21:

> While there is *obiter dicta* in both cases suggesting the potentiality of a pre-transfer beneficial interest being held by way of resulting trust, I am satisfied that the cases are not applicable to a case such as this where there has been no triggering event under British Columbia family law legislation and where there has been no fraudulent conveyance or transfer. [Emphasis added.]

[102] There can be no dispute that where property is conveyed or transferred by a fraudulent conveyance, the creditors have standing to challenge the validity of that conveyance and to trace the property and the proceeds from any sale of the property: *Westinghouse*; *Tsui-Wong v. Xiao*, 2018 ONSC 3315, at para. 254; *Cambone*, at paras. 2, 176, 211-213.

[103] This principle was summarized by J. Wilson J. in *Tsui-Wong*, at para. 252:

> A fraudulent conveyance is void against creditors of the debtor. The transferee of the property becomes a trustee for the creditor, and the creditor can remain entitled to the property. Where the transferee has sold the property to a *bona fide* purchaser, the creditor's remedy is the proceeds of the sale.

[104] See also *Allen v. Hennessey* (1997), 1997 CanLII 1182 (Ont. C.A.), at para. 5:

> A creditor is entitled to invoke the *Fraudulent Conveyances Act* to recover the proceeds of a conveyance void under the statute from a fraudulent transferee. The fraudulent transferee is and bears all the liability of a trustee of the property or its proceeds for the benefit of creditors.

[105] A debtor cannot avoid the operation of the *FCA* by transferring property that is then sold by the recipient for cash, nor by transferring cash that is used by the recipient to purchase other property. Just as proceeds from the sale of a property fraudulently conveyed may be traced and recovered by the creditor: *Westinghouse*, so too, if cash is fraudulently conveyed, any property purchased with cash can be traced and recovered by the creditor *Purcaru*.

iii. Is the Plaintiff's claim statute barred due to the expiry of the limitation period?

[106] The Estate Trustee takes the position that the Plaintiff's action is subject to the two-year limitation period in the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, and the claim against Susan, and now her estate, is statute barred. The Plaintiff discovered that Gerald had made payments toward the mortgages at the July 5, 2010 judgment debtor examination, but the action against Susan was not commenced until May 14, 2018.

[107] The Plaintiff argues that this action is subject to the ten-year limitation period in s. 4 of the *Real Property Limitations Act*, R.S.O. 1990, c. L.15 (*RPLA*), which, she argues, applies to fraudulent conveyance claims.

[108] Section 4 of the *RPLA* provides:

> 4. No person shall … bring an action to recover any land or rent, but within ten years next after the time at which the right to …bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to … bring such action, first accrued to the person making or bringing it.

[109] In *Conde v. Ripley et al.*, 2015 ONSC 3342, Dunphy J. held, at para. 2:

> [I]f a claim is brought under the *FCA* to set aside a conveyance of real property, such a claim is on its face a claim to "recover any land" to which the *RPLA* applies a ten-year limitation period whereas conveyances of personal property give rise to "claims" under the Limitations Act, 2002 which governs other types of conveyances attacked under the *FCA*.

[110] This approach has been confirmed by the Court of Appeal: *Anisman v. Drabinsky* (Ont. C.A.)

[111] *Conde* held that not every fraudulent conveyance claim is subject to the ten-year limitation period in the *RPLA*; the applicable limitation period depends on the nature of the property fraudulently conveyed. If the property conveyed is real property, the ten-year limitation period applies. If the property conveyed is personal property, the two-year limitation period applies.

[112] In the present case, the Plaintiff's claims of fraudulent conveyance of real property and of resulting trust are both subject to the ten-year limitation period in the *RPLA*, but both claims have been dismissed.

[113] Instead, I have found a fraudulent conveyance of personal property, and the applicable limitation period is the two-year limitation period in the *Limitations Act, 2002*.

[114] Even though the two-year limitation period applies, this action was commenced within two years of the Plaintiff's discovery of the conveyances. The fraudulent conveyances of cash from Gerald to Susan were not a single transaction, they were multiple transactions over a period of years. All occurred after Gerald's July 5, 2010 judgment debtor examination (the earliest banking record provided by Susan is dated March 2013). These transfers were not discovered by the Plaintiff until Gerald's 2017 judgment debtor examination. Indeed, some of the transfers did not even occur until after Gerald's 2017 examination. Each transfer was a distinct cause of action.

[115] The Plaintiff commenced this action on May 24, 2018, less than two years after Gerald's 2017 examination.

Conclusion

[116] The Court therefore makes the following Orders:

a. Gerald Pettle's transfer of $217,000 to Susan Pettle, is declared void as against the Plaintiff;

b. The Estate of Susan Pettle shall forthwith pay the sum of $217,000 to the Plaintiff;

c. The Plaintiff is entitled to prejudgment interest pursuant to section 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43 on the foregoing amount. Since the date and

amount of each conveyance are not known, the mid-point between the first bank record (March 22, 2013) and the last bank record (May 7, 2019) shall be used as the date the cause of action arose.

[117] It is my understanding that the house has now been sold, and pursuant to the Order of R.S.J. Edwards dated May 4, 2023, the net proceeds from the sale have been paid into court. This judgment plus prejudgment interest and any costs that may be ordered against the Defendants may be recovered from the funds paid into court.

[118] The issue of costs is reserved. If the parties are not able to agree on costs, the Plaintiff may file costs submissions of no more than 3 pages, plus costs outline and any offer to settle, within 20 days of the release of this decision, and the Defendants may file responding costs submissions of no more than 3 pages each, plus costs outline and any offers to settle, within a further 15 days.

Justice R.E. Charney

Released: June 29, 2023

CITATION: Conte v. Pettle, 2023 ONSC 3881

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Rosetta Conte

Plaintiff

– and –

Gerald Pettle (a/k/a Gerry Pettle), and Michael Pettle, Ruthie Pettle, and Richard Pettle, as Estate Trustees of the Estate of Susan Pettle (a/k/a Susan Bidula a/k/a Susan Jane Allain), deceased

Defendants

REASONS FOR DECISION

Justice R.E. Charney

Released: June 29, 2023