

COURT OF APPEAL FOR ONTARIO

CITATION: Donaldson v. Braybrook, 2020 ONCA 66

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Simmons, Lauwers and Nordheimer JJ.A.

BETWEEN

Wendy Elaine Donaldson

Plaintiff

(Respondent)

and

Margaret Susan Braybrook and Thomas Walker Braybrook

Defendants

(Appellants)

David N. Delagran, for the appellants

Nathaniel Read-Ellis, for the respondent

Heard: January 20, 2020

On appeal from the order of Justice Hugh K. O’Connell of the Superior Court of Justice, dated February 8, 2019, with reasons reported at 2019 ONSC 810.

REASONS FOR DECISION

[1] The defendants appeal from the summary judgment granted by the motion judge that declared that the plaintiff had a life interest, with exclusive possession,

in a particular property. For ease of reference, we will refer to all of the parties by their first names.

[2] The property at issue is the parties' family cottage. The parties are all siblings – Wendy, Susan, Thomas and Barry. The cottage property was owned by their mother, Margaret.

[3] There is no dispute that, during Margaret's lifetime, all of the children were given generous access to the cottage and all of them used it. Indeed, Margaret lived year-round in an apartment over the garage on the cottage property as her permanent residence, so that the main cottage could be used by her children. Margaret distributed cottage time in the spring of each year, allocating weeks among those of her children who wished to use the cottage. There is also no dispute that her system of allocation was always fair. Any child who asked for time at the cottage was given it.

[4] On March 13, 1995, Margaret attended at the offices of her solicitor and signed a transfer of the cottage property from herself alone to herself, Susan and Thomas ("As joint tenants and not as tenants in common as to the remainder in fee"), with "additional transferees" listed as "Wendy – As to a life estate", and Barry, also "As to a life estate". Margaret took this step in secret. That is, she did not inform any of her children that she was making these arrangements.

[5] On the same day, Margaret executed a new Last Will and Testament. In her Will, she referred to the cottage property in two respects. One was to provide that Margaret's live-in companion would be permitted to reside in the garage apartment as long as he wished. The other was to provide that the entire residue of her estate was to be held in a trust for five years to be used to pay taxes, maintenance and insurance on the cottage property. The Will's stated purpose for the trust was "that none of my children shall have the obligation to maintain the Muskoka Lakes cottage property". After five years, the residue was to be divided equally among her four children.

[6] In 1997, Margaret executed a new Will. In this Will, she continued the provision permitting her companion to live in the garage apartment. She extended the provision for the payment of expenses of the cottage property from the residue of her estate to a ten-year period. In 2003, Margaret executed a codicil to her 1997 Will in which she removed the provision permitting her companion to live in the garage apartment. In 2004, Margaret executed yet another new Will in which she removed the provision that had created a trust of the residue of the estate to pay the expenses for the cottage property.

[7] Margaret continued to live in the apartment above the cottage garage for another eight years after the 1995 transfer. Her companion also continued living there with her. Throughout, Margaret continued to maintain control over the use

of the cottage and allocated time as between her children as she had always done.

[8] In or about September 2000, Margaret told Susan of the 1995 transfer, namely that she had transferred the cottage property to Susan, Thomas, and herself as joint tenants. She did not tell Susan about the life interests to Wendy and Barry.

[9] Margaret passed away on February 24, 2007. She never told Wendy about the transfer nor did Susan or Thomas. Wendy never learned she was on title as an “additional transferee”, “[a]s to a life estate”, until five years after Margaret's death.

[10] Shortly after Margaret's death, Thomas and Susan severed the joint tenancy on the cottage property such that they each owned 50% as tenants in common. After Margaret's death, Thomas and Susan paid the expenses related to the cottage property, something that was apparently unknown to Wendy.

[11] However, Susan, Thomas and Wendy continued to use the cottage in the same manner as they had before Margaret died. Barry does not appear to have continued to use the cottage.

[12] By 2013, the annual carrying costs for the cottage property had risen substantially. Moreover, in 2013, Thomas moved to British Columbia. Accordingly, Thomas and Susan decided to sell the cottage property. They

recognized that in order to do so, they needed to have Barry and Wendy release their legal life interests registered on title.

[13] Barry immediately agreed to release his life interest without compensation. On February 25, 2013, he assigned his life interest to Thomas and Susan. Barry died some time later.

[14] Wendy did not agree. She took the position that she was an equal owner of the cottage property, and ultimately commenced this action. While, initially, Wendy claimed that the cottage property was held equally by all four children, she subsequently amended her claim to include alternative relief that she had a life interest in the cottage property, with the exclusive right to its use, occupation and possession. Other relief was also claimed including restitution for unjust enrichment.

### **THE DECISION BELOW**

[15] The motion judge held that Wendy had a life interest in the cottage property with a right to exclusive use. He also concluded that the appellants had been unjustly enriched through their use of the cottage property since Margaret's death but made no corresponding award. Rather, the motion judge ordered that the court "shall attempt to fix the quantum of damages if counsel wish to provide further written material on this topic". When further material was provided, the motion judge determined he was *functus* and, thus, could not address the issue.

[16] The motion judge concluded that the evidence as a whole demonstrated Margaret's intention to gift to Wendy a life interest in the cottage property. He rejected the suggestion that the use of the cottage property after the transfer but before Margaret's death, negated this life tenancy. He found, at para. 176:

Clearly Margaret wanted two of her four children to have a proprietary right in the cottage property, and two of the others to have a life tenancy.

### **ANALYSIS**

[17] In our view, the motion judge erred in both law and fact in concluding that Wendy has an exclusive life interest in the property.

[18] The appellants argue that the motion judge erred in law by failing to undertake an analysis of the mother's actual intentions at the time she executed the transfer, in failing to distinguish the difference between an intention to transfer legal title and an intention to transfer beneficial interests, and in concluding that the presumption of resulting trust had been rebutted. They also argue that the evidence simply does not support the conclusion.

[19] For the most part, we agree with the appellants.

[20] The wording on the registered transfer on title is ambiguous. It lists Margaret, Susan and Thomas as transferees without limiting their interest in any way. It states that they take title "As joint tenants and not as tenants in common as to the remainder in fee" (emphasis added), which suggests that they have

interests beyond the remainder in fee. There are no limiting words along the lines that Margaret, Susan or Thomas's interest is subject to a life interest. The Deed also lists Wendy and Barry as "additional transferees".

[21] Given this ambiguous wording, it is appropriate to look to the evidence of actual intention.

[22] In our view, the evidence as a whole supports only one reasonable conclusion as to Margaret's intent, namely, that she intended all of her children to continue to enjoy shared use of the cottage after her death in the manner that they had during her lifetime; and that she intended for Susan and Thomas alone to enjoy ownership interests beyond the shared right to use during their lifetimes.

[23] Given the history, there is nothing to suggest that Margaret intended her transfer of title in the cottage property to herself, Susan and Thomas, with an additional transfer of a life interest to Wendy and Barry, to carry with it any exclusivity rights. Margaret's children had all enjoyed the cottage property throughout their lives. There is no evidence that suddenly Margaret intended that Wendy would be the only child entitled to use the cottage property. That conclusion is not only inconsistent with the concurrent life interest that was given to Barry (whether he chose to avail himself of it or not), it is also inconsistent with Margaret's intention (as reflected by her actual use of the cottage and her 1995 Will) that her companion would also have the right to use the garage apartment.

He would not be able to do so if Wendy had the right to exclusive possession of the cottage property. Further, the motion judge's conclusion is inconsistent with Margaret's provision in the 1995 Will that the residue of her estate would be used to pay all expenses associated with the cottage property. There is no apparent reason why Margaret would have had her estate pay all of the expenses if only Wendy had the right to use the cottage property.

[24] Significantly, if the motion judge's conclusion is correct, then Margaret herself had no right to use the cottage property after she made the transfer. That reality should, on its own, have caused the motion judge to question his conclusion.

[25] In our view, it is clear on the evidence that Margaret's intention was to give title to the cottage property to Susan and Thomas while maintaining a licence to occupy to Barry and to Wendy that would permit them to continue to use the cottage property throughout their lives in the same manner as all of the siblings had throughout Margaret's life.<sup>1</sup> It is equally clear that Margaret intended that all of her children would share the use of the cottage property after her death as they had before.

[26] As for the appellants' reliance on the presumption of resulting trusts, the guiding authority is *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795. In that

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<sup>1</sup> This conclusion is consistent with the approach taken in *Moore v. Royal Trust*, [1956] S.C.R. 880.



case, the Supreme Court of Canada confirmed that, while the presumption of advancement normally applies to a transfer between parents and children, that presumption does not apply once the children are adults. As Rothstein J. said, at para. 41:

There will of course be situations where a transfer between a parent and an adult child was intended to be a gift. It is open to the party claiming that the transfer is a gift to rebut the presumption of resulting trust by bringing evidence to support his or her claim.

[27] However, the issue of the proper presumption has limited effect since the presumption only applies if the court is unable to determine the intent of the transferor. As this court said in its decision in *Pecore v. Pecore* (2005), 17 R.F.L. (6th) 261 (Ont. C.A.), at para. 9, *per* Lang J.A.:

Since both presumptions can be rebutted by evidence of actual intention, in my view, the presumptions become relevant only if, after considering all the evidence and the circumstances surrounding the transfer, a court is unable to draw a conclusion about the transferor's actual intention. Only in such a case, would a court resort to the presumptions to determine the issue.

[28] In our view, since the evidence of actual intention in this case is so clear, the presumption of resulting trust becomes irrelevant. It is easily rebutted by the evidence and circumstances surrounding the transfer that clearly demonstrate that Margaret transferred title for the purpose of succession planning and therefore with the clear intent to gift the property.

[29] Finally, two other issues need to be addressed. One is that, in light of our conclusion, it is unnecessary for us to determine whether the notes of Margaret's solicitor were admissible in evidence as business records.

[30] The other is the submission by the respondent that, if the appeal is allowed, the matter should be returned to the Superior Court of Justice to proceed to trial. We do not see any reason to do that. In light of our conclusion, there are no other issues, raised in the pleadings, that fall to be determined.

## **CONCLUSION**

[31] The appeal is allowed, the order below is set aside, and in its place an order is made that Wendy's interest in the cottage property is limited to a life-time licence to occupy the cottage property on a non-exclusive basis, consistent with the manner in which the cottage property was used in the past. Susan and Thomas also have such a life-time licence to occupy the cottage property, also on a non-exclusive basis. In addition, Susan and Thomas are entitled to the remainder in fee.

[32] The appellants are entitled to their costs of the appeal fixed in the amount of \$15,000 inclusive of disbursements and HST and the costs of the motion below in the amount of \$35,000 inclusive of disbursements and HST as fixed by the motion judge.

“Janet Simmons J.A.”  
“P. Lauwers J.A.”

“I.V.B. Nordheimer J.A.”