

CITATION: Zigomanis Estate, 2017 ONSC 6855
COURT FILE NO.: 05-145-15
DATE: 20171117

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE ESTATE OF PAUL ZIGOMANIS, deceased

BETWEEN:

GAIL MacDONALD

Applicant

– and –

VIOLET COOPER

Respondent

)
)
) *Lincoln Caylor and Grace McKeown*, for the
) Moving Party, Jonathan Cooperman, Estate
) Trustee During Litigation of the Estate of
) Paul Zigomanis
)
) *Andrew Mercer*, for the Interested Party,
) Certas Home and Auto Insurance Company
)
) *Morgan Cassidy*, for the Interested Party,
) Giovanni Zambri
)
)
)
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)
)
) HEARD: August 15, 2017

SPIES J.

REASONS FOR DECISION

Overview

[1] Paul Zigomanis ("Paul") died on April 20, 2015 in an explosion that totally destroyed the house he lived in for 24 years; 3356 Brimley Road in Scarborough (the "Brimley House"). Title to the Brimley House was in the name of Paul's parents at the time of his death.

[2] This motion is brought by Jonathan Cooperman, the estate trustee during litigation (the "Trustee") of Paul's estate ("Paul's Estate"). After a thorough investigation, the Trustee has concluded that Paul was the true beneficial owner of the Brimley House from 1991 until his death. Accordingly, the Trustee seeks an order recognizing a trust relationship between Paul and his parents. Specifically, the Trustee seeks a declaration that the Brimley House was held in trust for Paul from the date he transferred it to his parents in 1996 (the "1996 Transfer"), and an order that title be transferred to the Trustee effective January 1, 2015, the day after the death of Paul's

father. The applicant and the respondent are Paul's sisters, Gail MacDonald ("Gail") and Violet Cooper ("Violet") and they are the sole beneficiaries of Paul's Estate. They consent to this motion.

[3] The explosion caused significant damage to many surrounding homes and some vehicles. Litigation arising from the damages suffered from the explosion has ensued. Seven claims have already been served on Aviva Canada Inc., the insurer of the Brimley House.

[4] If the relief sought by the Trustee is granted, it may limit the litigation risk to Paul's father's estate in relation to the explosion and focus the litigation on Paul's Estate. As there are more assets in Paul's father's estate this may result in adverse consequences to those persons who suffered damages as a result of the explosion and their insurers.

[5] Penny J. of this Court made an order dated March 9, 2016 approving the Trustee's proposal for service of this motion to ensure that all persons who may have an interest in the relief sought received notice. As a result two interested parties appeared on the motion; Certas Home and Auto Insurance Company (Certas), the insurer of a neighbouring property that was completely destroyed by the explosion and Giovanni Zambri who was driving a vehicle past Brimley House at the time of the explosion (collectively the interested parties). In addition, written submissions have been filed by other interested parties. All of the interested parties oppose the relief sought.

[6] The submissions of the interested parties review at length how significant prejudice to the interested parties will occur if an order granting the relief sought is made. Prejudice is probably the wrong word because no party acted to their detriment relying on the fact that the Brimley House was legally owned by Paul's parents. What the interested parties are asking this Court to do, is to consider sympathy, for those who will suffer financially if the relief sought is granted, as a factor in making my decision. However, I must be guided by the facts and the law in deciding this motion.

The Issues

[7] The main issue on this motion is whether or not the Brimley House is an asset of Paul's Estate or his father's estate. That depends to a large extent on what Paul's intention was when he transferred the Brimley House to his parents in 1996. The primary position of the Trustee is that a trust relationship was established between Paul's parents; John and Mary Zigomanis ("John" and "Mary") and Paul, whereby a resulting trust arose between John and Mary and Paul at the time of the 1996 Transfer and that title to the Brimley House "resulted back" to Paul upon John's death on December 31, 2014 by way of this resulting trust.

[8] The position of the interested parties is that a resulting trust in favour of John and Mary existed after they transferred the Brimley House to Paul in 1991 and that the 1996 Transfer was merely a transfer of the Brimley House back to his parents and was for no consideration because they already owned the property.

The Evidence and Findings of Fact

[9] The Trustee relies on an affidavit sworn by Gail which her sister Violet has adopted as correct in her affidavit. There was no cross-examination conducted of them. The Trustee has also provided this Court with both his First and Second Report of the Estate Trustee During Litigation and the Supplemental Report to the Second Report of the Estate Trustee During Litigation which report on the Trustee's activities since being appointed on October 14, 2015.

[10] Virtually all of the documentary evidence I have predates the explosion and to the extent that those documents reflect the parties' intentions I do not have to worry that Gail and Violet had a motive then to tailor the evidence in order to protect their inheritance in their father's estate. I recognize that is something I have to consider now with Gail's subjective evidence as her affidavit is post the explosion and now it is clear that her position on this motion is also consistent with her and Violet's personal interests.

Paul's Death

[11] Paul died intestate. He did not have a spouse or any children. He is survived by his two sisters, Gail and Violet, and they are the beneficiaries of his estate.

[12] On October 14, 2015, Jonathan Cooperman of A. Farber & Partners Inc. was appointed the Estate Trustee During Litigation of all property and assets of Paul's Estate, including all proceeds thereof.

The Brimley House

[13] On December 31, 1990, John and Mary, took title as joint tenants to the lot known as 3356 Brimley Road from Monarch Construction for \$270,000. This is the property on which the Brimley House was built.

[14] Gail has deposed that their parents planned on helping Paul acquire a house as they had helped her and Violet pay for their weddings. I appreciate this is hearsay evidence but it is obviously necessary and it is consistent with other evidence before me which enhances its reliability.

[15] In May 1991, Paul's parents signed a Transfer/Deed of Land transferring the Brimley House to Paul. I have no evidence as to whether or not the Brimley House was then built. The Affidavit of Value of the Consideration (Affidavit of Value) states the consideration was nil and that the transfer from husband and wife to son was for "natural love and affection", (the 1991 Transfer).

[16] The position of the Trustee is that Paul actually paid to purchase the Brimley House from his parents. Gail has deposed that she recalls their parents telling her that Paul paid \$140,000 towards the purchase of the Brimley House and then made further payments towards the purchase. She found a bank book with her mother's handwriting on the front among their papers which shows a transfer into their account of \$140,000 on November 5, 1991. The interested parties point out that there is no corresponding record for an account held by Paul, but given how

long ago this was there is no evidence that any bank where such an account might have been would still have a record dating back that far. There is no documentary evidence to support the alleged further payments Gail believes that Paul made to their parents.

[17] The position of the interested parties is that John and Mary created this arrangement so that Paul could live in the Brimley House and pay them rent. The only possible evidence in support of this position is intake notes obtained by the Trustee from the file of Alexander Procope, a lawyer who acted for Paul in 2015. There is a cryptic intake note that might suggest the original transfer of the Brimley House to Paul was so that John could avoid capital gains tax. In my view even if that was the case that does not mean that was the only reason and it certainly does not negate the evidence I have that a substantial amount was paid by Paul to purchase the Brimley House a few months later.

[18] Furthermore, the bank book corroborates Gail's evidence of what she was told by her parents and although the timing of the payment is off by six months, that is not unreasonable in a transfer between parents and son. The fact this payment came later would also explain why the initial transfer was for only love and affection. Furthermore, there is no other obvious explanation for such a large payment by Paul to his parents. The evidence is that John and Mary worked hard but their salaries were modest. According to the Trustee's investigation in the late 80's early 90's, Paul was working as a unionized pipe-fitter and so he would have had a source of income to make such a payment.

[19] Furthermore, there is no dispute that from around this time Paul began to live in the Brimley House and that he lived there until his death. Gail's uncontradicted evidence is that the Brimley House was a custom home built by Monarch and that Paul chose the plans for the house, made all the choices regarding finishes and shopped for furniture with her help.

[20] Paul started his own HVAC business in 1992 and it was a success. However, Gail has deposed that unfortunately, after moving into the Brimley House, Paul's life began to spiral downward. He fell in with a bad crowd and developed a drug addiction. Gail recalls going with her parents to take Paul to a rehab centre in Trenton in or around 1994 but Paul's problems continued and his HVAC business, that was once thriving, began to suffer.

[21] The 1996 Transfer took place on August 1, 1996, when title to the Brimley House was transferred from Paul to his parents as joint tenants for \$2. The position of the Trustee is that although no formal trust documents were ever signed, Paul's parents held title to the Brimley House in trust for him and it was always understood by everyone in the Zigomanis family that Paul was the true beneficial owner and that the Brimley House was held for Paul's benefit. The position of the interested parties is that this transfer of title to the Brimley House back to Paul's parents is consistent with his parents having ownership throughout.

[22] The Affidavit of Value for the 1996 Transfer was sworn by John and states that it is a "conveyance from the son back to the parents for no consideration". The transfer was done by a lawyer for Paul's parents; Bill Tsapralis, and he did not check off the box in the Affidavit of Value that would have indicated that John was a trustee "to whom the land is being conveyed".

In the reporting letter to Paul's parents, which was not copied to Paul, there is no statement as to why the Brimley House was transferred back to Paul's parents.

[23] Paul did not have a lawyer on this transaction nor is there any evidence he received legal advice, save from an insolvency lawyer. Mr. Procope's intake notes include reference to Paul's financial problems and that an insolvency lawyer suggested transferring the Brimley House to John but the notes also state that it wasn't done to defeat creditors but to keep the company, which I presume is a reference to Paul's HVAC company. Mr. Procope has advised the Trustee that he can recall two explanations for the 1996 Transfer; creditor protection in the event that Paul's HVAC company became insolvent and to protect "Paul's ownership of Brimley from the repercussion of his substance abuse problem." [Emphasis added] There was no suggestion Paul's business was insolvent at the time or that Paul was trying to defeat creditors but rather credit proofing. Paul's company never filed for bankruptcy.

[24] The evidence from Mr. Procope is consistent with the evidence of Gail who has deposed that her parents shared with her that they were worried about Paul losing the Brimley House as a result of his drug addiction and that the clear understanding among their family was that the Brimley House was still Paul's and that their parents "had simply transferred title to the Brimley House into their names for Paul's protection". There is no dispute that Paul continued to live in the Brimley House and his parents in their home.

[25] In my view the evidence establishes on a balance of probabilities that that Paul made at least a \$140,000 payment towards the purchase of the Brimley House. The fact no money went back to Paul at the time of the transfer back to his parents is some evidence that supports the position of the Trustee although that is not conclusive as Gail has also deposed that their parents took over paying bills on the Brimley House. According to Gail, their parents put all the insurance, taxes and utility bills into their names and had the bills sent to their own home and they paid those bills but Paul paid their parents \$500 per month towards those expenses. As the interested parties point out, this evidence is also consistent with John and Mary having title to the Brimley House. They argue that these payments were rent but that was not Gail's evidence and I find that the payments by Paul were to reimburse his parents for expenses of the Brimley House.

[26] In her affidavit Gail explains how she and her sister had a strained relationship with Paul but that their parents never gave up hope that he would recover and return to work. Unfortunately, Paul never returned to work or overcame his addiction. As a result, John and Mary continued to hold title to the Brimley House.

[27] At the time of the explosion, the insurance policy on the Brimley House indicated that John and Mary were the named insured.

Attempts to Transfer the Brimley House Back to Paul

[28] Mary died on March 23, 2013, leaving her estate solely to John. At that time John suffered from dementia. Shortly after Mary's death, Gail and Violet, who were managing John's financial affairs, realized, based on their father's most recent bank statements that it appeared that Paul had stopped making his regular payments to their parents towards the Brimley House

bills. Gail and Violet wrote a letter to Paul on May 8, 2013 (May 2013 Letter) seeking to transfer the Brimley House to Paul effective immediately.

[29] In the May 2013 Letter Gail and Violet stated:

As we are all aware, Mom and Dad have been financially supporting the house that you live in on Brimley Road for approximately 18 years by paying all the bills associated with it. Although not specified in their will, we acknowledge it was our parents' wish upon their death that you inherit the house. ... We do not think it feasible or financially prudent to continue paying for the Brimley property. As such, Violet and I are willing to transfer the house to you effectively immediately. [Emphasis added]

[30] Gail has deposed that by using the word "inherit" in the May 2013 Letter she did not mean to suggest that the Brimley House was not already, in effect, Paul's. She deposed that she had always thought of the Brimley House as belonging to Paul even after title was transferred back into their parents' names as she knew that Paul had paid their parents money to acquire it and she knew that her parents felt strongly that it was important to Paul's financial security that he be a homeowner.

[31] Counsel for Allstate Insurance Company of Canada (Allstate), the insurers of another damaged home, who filed written submissions, submit that the sisters wanted to transfer the Brimley House to Paul so that he would have to take over the expenses related to the property. When the Trustee put this proposition to Mr. Procope he laughed because he thought initially that Paul's sisters would be adversarial but that turned out not to be the case. Given the value of the Brimley House I can understand Mr. Procope's reaction. Had Paul's sisters not believed the Brimley House belonged to him, as the May 2013 Letter was written at a time before the explosion, it would have been better for them financially to take the position that the Brimley House was part of their father's assets as they could then each expect a third of its value.

[32] Although Paul retained one lawyer and then a second at the time (this was before he retained Mr. Procope), very shortly after Paul retained the second lawyer he was criminally charged with assaulting Gail and Violet and they both suffered serious injuries. As a condition of his bail, Paul was ordered not to communicate or come within 750 metres of them. I note that this is about the strongest evidence I can think of that would put two sisters at odds with their brother and give them an incentive to take the position that the Brimley House did not belong to Paul. The fact they did not strengthens the conclusion I have come to about the 1991 Transfer and the 1996 Transfer.

[33] John died on December 31, 2014. John's will divided the remainder of his estate ("John's Estate") equally among his three children, Paul, Gail and Violet. Gail was named as John's estate trustee and she retained a lawyer, Angela Casey, to assist her with the administration of John's Estate.

[34] Ms. Casey sought tax advice and her email exchange on this issue is an exhibit to Gail's affidavit. In her first email she stated that after Paul ran into some troubles he and his parents

thought it would be better for the Brimley House “to be held in the parent’s names”. This is consistent with Gail’s position but it is also the case that Ms. Casey wanted to see if the Brimley House could be transferred to Paul without tax consequences.

[35] The tax advice in response from an accountant was that if Paul retained beneficial ownership in the Brimley House then there would be no tax consequences to John’s Estate but if he did not there would be. In response to this question Ms. Casey replied that the parents gifted the Brimley House originally to Paul and that they only took title back in their names “for reasons that have nothing to do with them actually wanting the property [Brimley House] back”. In my view this exchange is not inconsistent with Gail’s evidence given my conclusion that their parents did not insist that Paul pay full fair market value for the Brimley House. It also makes it clear that Ms. Casey was working with what she understood the facts to be, not just how best to minimize the tax.

[36] When Gail applied for probate in February 2015, she did not include the value of the Brimley House for the purpose of calculating probate tax because of her understanding that the Brimley House was held in trust for Paul. Again, as this was done before the explosion, this is strong evidence in support of the Trustee’s position.

[37] Gail instructed Ms. Casey to transfer title of the Brimley House to Paul in addition to his entitlement to one-third of John’s Estate. In her letter to Paul, Ms. Casey stated that notwithstanding that there was no provision for the Brimley House in John’s will, that Gail intended to transfer it to him provided he agreed to be responsible for any tax consequences of the transfer. This is when Paul retained Mr. Procope, who communicated with Ms. Casey. Ms. Casey suggested that a real estate lawyer simply do the transfer rather than entering into Minutes of Settlement.

[38] Mr. Procope advised Ms. Casey by email on April 8, 2015, that Paul preferred Minutes of Settlement and he provided her with a draft. The copy of the draft from Mr. Procope’s file has Paul’s signature with a date of April 8, 2015 at the end under the words: “I hereby instruct my lawyers to propose a settlement on substantially similar terms to the above”.

[39] Although in the recitals of the Minutes of Settlement the Brimley House is stated to be an asset of John’s Estate they also state that John’s will does not specifically bequest the Brimley House to Paul “or otherwise address whether the deceased intended that it form part of the Estate or was held in trust for the benefit” of Paul. More importantly one of the recitals states: “AND WHEREAS Mr. Zigomanis asserts that the Brimley Road property was transferred to the Deceased to be held in trust for the benefit of Mr. Zigomanis”. This, in my view, is the best evidence I have of what Paul’s intentions were with respect to the Brimley House when he transferred it back to his parents in 1996.

[40] I have already referred to Mr. Procope’s intake notes. It is significant that those notes also state that Paul made all payments on the Brimley House “because he owned it”. Although who paid the bills is in dispute given the evidence of Gail, the fact Paul must have asserted to Mr. Procope that he owned the Brimley House is important. There is no suggestion in Mr. Procope’s notes that Paul was giving Brimley House back to his parents because they always owned it.

[41] The Trustee obtained a letter from Mr. Procope's file to Paul dated April 8, 2015 which confirms a meeting they had on April 6, 2015. In that letter Mr. Procope stated that Paul asserted that Brimley House "was held in trust by your late father". He also advised Paul that it was not clear that a judge would "confirm that the house was held for your benefit in trust" and that his "Father had the option of taking title to the property 'in Trust' in 1996, had that been his intention, but opted not to do so". Mr. Procope told the Trustee that what he meant by this was that he was referring to the box on the Affidavit of Value that could be ticked to indicate a transfer of property was to be held in trust. Mr. Procope advised the Trustee that nobody pays attention to this box but I have not taken this evidence into account particularly as it seems at odds with his statement and in any event he was not insured to do real estate transactions and so would not likely be qualified to give such an opinion.

[42] It is concerning that there is an intake note that Paul had a "tribunal matter at landlord-tenant...repayment for things that he fixed". This is not referred to, however, in the letter from Mr. Procope as an issue, at least not with respect to the Brimley House. There is reference to Paul wanting to stop the sale of his parents' home and to get his property from it and pursue a claim for his management and labour respecting his parents' home. It may be that this note had something to do with that.

[43] Mr. Procope and the two prior lawyers Paul retained have advised the Trustee that they were retained by Paul to assist him in securing title to the Brimley House.

[44] Unfortunately, Paul was killed in the explosion only eight days later, before the Minutes of Settlement could be signed or transfer could be effected.

Activities and Conclusions of the Trustee

[45] The Second Report of the Estate Trustee During Litigation and the Supplemental Report to the Second Report of the Estate Trustee During Litigation reports on the Trustee's activities since being appointed on October 14, 2015. On this motion the Trustee asks that I approve of these reports.

[46] The activities of the Trustee have included speaking with Mr. Tsapralis and Mr. Procope and reviewing Mr. Procope's file. Mr. Tsapralis has retired and sold his law practice and he does not know the whereabouts of his files. He did not recall any special reason why Paul made the 1996 Transfer. I have reviewed the evidence the Trustee obtained from Mr. Procope by speaking to him and from his files in my summary of the facts.

[47] The Trustee has done a thorough investigation and the materials communicating what was done to this court are clear. I have no issue in approving the reports of the Trustee as requested.

Analysis

The Law

[48] The Trustee has provided an extensive and helpful review of the relevant law in his factum. It is an excellent summary of the law that applies to this motion and so I have set out most of it here.

[49] A trust relationship arises when the legal and beneficial ownership of property is divided. The trustee holds legal title for the benefit of the beneficiary and is obliged to maintain the property for the beneficiary, who holds an equitable entitlement to or interest in the property. The beneficiary has been described as the "real owner of property even though it is in someone else's name".¹ A valid trust has three characteristics: (1) certainty of the intention to create the trust; (2) certainty of the subject matter or trust property; and (3) certainty of the person intended as beneficiaries of the trust.²

[50] The position of the Trustee is that a trust relationship was established between John and Mary and Paul whereby a resulting or implied trust arose between John and Mary and Paul at the time of the 1996 Transfer.

[51] As stated by the Supreme Court of Canada, a resulting trust "arises when title to 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".³ [emphasis added] While express trusts are created directly by an intention to create a trust, resulting trusts are brought about by operation of law.

[52] If a resulting trust is implied, the transferee is obligated to return the property to the transferor, as the transferor always remained seized with the beneficial interest. The underlying notion of a resulting trust is that it is imposed "to return property to the person who gave it and is entitled to it beneficially, from someone else who has title to it. Thus, the beneficial interest 'results' (jumps back) to the true owner."⁴ As stated by the Ontario Court of Appeal in *Andrade v. Andrade*, "the point of [a] resulting trust is that the claimant is asking for his or her own property back".⁵

[53] Where property is transferred without consideration, the common law creates a presumption of resulting trust. The presumption - a general rule that applies to gratuitous transfers - is intended to provide "a guide for courts in resolving disputes over transfers where

¹ *Pecore v. Pecore*, 2007 SCC 17 at ¶ 4.

² *Citizens Bank of Rhode Island v. Paramount Holdings Canada Co.* (2008), [2008] O.J. No. 1114 (S.C.J.) at ¶ 19-20.

³ *Pecore*, *supra* at ¶ 20.

⁴ *Kerr v. Baranow*, 2011 SCC 10 at ¶ 16.

⁵ 2016 ONCA 368 at ¶ 62.

evidence as to the transferor's intent in making the transfer is unavailable or unpersuasive."⁶ This is "especially true when the transferor is deceased and thus is unable to tell the court his or her intention in effecting the transfer."⁷

[54] The presumption of resulting trust is a rebuttable presumption. Where a transfer is made for no consideration, the presumption shifts the burden of persuasion to the opposing party who must rebut the presumption. Therefore, the onus is placed on the transferee to demonstrate that a gift was intended by the transferor. This is because equity presumes that the transferor intended to retain a beneficial interest in the property, and not to make a gift.⁸

[55] The focus in any dispute over a gratuitous transfer is the actual intention of the transferor at the time of the transfer. However, the court may also consider evidence arising after the transfer.⁹ In *Pecore v. Pecore*, the Supreme Court of Canada stated that the trial judge will commence his or her inquiry with the presumption of resulting trust and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention.¹⁰ Unless the evidence can show that a transfer was a gift and not a gratuitous transfer, the presumption of resulting trust stands.

[56] An *inter vivos* gift is a gratuitous, voluntary transfer of property from its owner to another person with the intention that the transfer have a present effect and the title of the property passes to the donee. Three requirements are necessary to establish a valid *inter vivos* gift: (i) an intention to donate; (ii) a sufficient act of delivery; and, (iii) acceptance of the gift.¹¹

[57] To establish an intention to donate, it must be shown that the donor intended to part with the property and did not intend to reserve the ultimate right of disposal. In fact, "the evidence should be inconsistent with any other intention or purpose than that the donor intended to divest himself or herself of the possession of the property."¹² The intention of a donor may be inferred from an examination of their acts, as well as the nature of the relationship between the parties to the transaction, the size of the gift as measured against the total of the donor's property, and the importance of the gifted item in relation to the donor's overall property.¹³

[58] I note that there is no suggestion in any of this case law that sympathy for one party should govern.

⁶ *Pecore, supra* at ¶ 23.

⁷ *Ibid.*

⁸ *Ibid* at ¶ 24-26, 43-44.

⁹ *Ibid* at ¶ 5, 43-44, 59; *Rascal Trucking Ltd v. Nishi*, 2013 SCC 33, at ¶ 41.

¹⁰ *Pecore, supra* at ¶ 44.

¹¹ *Colangelo v Amore*, 2010 ONSC 5657 at ¶ 57.

¹² *Ibid* at ¶ 59.

¹³ *Ibid.*

Conclusions

[59] The primary position of the Trustee is that a trust relationship was established between John and Mary and Paul whereby a resulting trust arose between John and Mary and Paul at the time of the 1996 Transfer. The position of the interested parties is that a resulting trust in favour of John and Mary existed after the 1991 Transfer of the Brimley House to Paul and that the 1996 Transfer was merely a transfer of the Brimley House back to Paul's parents and was for no consideration because they already owned the Brimley House

[60] Based on the Trustee's activities and the totality of all the available information and evidence, the Trustee has concluded that although there is room for interpretation, the Brimley House was held and was always meant to be held for the benefit of Paul by John and Mary, and that from 1991 until his death, Paul was the true beneficial owner of the Brimley House.

[61] The Trustee has done a thorough investigation, leaving no stone unturned and as an impartial court officer his position is of some weight although obviously not binding on this Court. As Mr. Caylor submitted, he must advocate for the position that he has come to, based on his review of the evidence available to him.

(a) 1991 Transfer to Paul

[62] Although the transfer documents describe the 1991 Transfer as a "transfer from husband and wife to son for natural love and affection", and on its face, indicate that the Brimley House was transferred for no consideration, I have found, for reasons already stated, that Paul paid his parents at least an initial \$140,000 for the Brimley House six months after the date of the transfer. There is no corroboration of Gail's belief that he then made further payments to their parents but in my view even if further payments were not made, that does not change the analysis. Gail's evidence is that their parents wanted to assist Paul in becoming a homeowner, since they had helped Gail and Violet by paying for their weddings. In those circumstances it would not be expected that Paul would pay full fair market value for the Brimley House.

[63] There is no evidence that Paul was suffering from a drug addiction at the time of the 1991 Transfer and, to the contrary, the evidence is that he was working as an HVAC mechanic. Therefore, Paul was capable of making such a payment toward the house. There is no evidence to suggest that Paul paid rent to his parents during this time, or that he did not pay the bills associated with the Brimley House.

[64] I am satisfied on a balance of probabilities, considering all of the evidence, that John and Mary transferred both legal and beneficial ownership in the Brimley House to Paul in 1991 for valuable consideration.

[65] Having found that the 1991 Transfer was a conveyance for valuable consideration, no presumption of resulting trust applies to this transaction.

(b) 1996 Transfer to John and Mary

[66] As already stated, the position of the Trustee is that a resulting trust arose between John and Mary and Paul by the 1996 Transfer. Title to the Brimley House was transferred by Paul to John and Mary for nominal consideration of \$2. That nominal consideration was, in effect, no consideration and therefore triggers the presumption of resulting trust.¹⁴ As already stated, the presumption of resulting trust is a rebuttable presumption.

[67] On this issue, *Andrade v. Andrade*, is of much assistance as it makes it clear that my focus should not be on whether John and Mary, legal title holders of the Brimley House, intended to create a trust. Rather, the question is what Paul intended. As stated by the Court of Appeal:

The question was not whether the legal title holders [*i.e.*, John and Mary] intended to create a trust for Luisa [*i.e.*, Paul] (hence the trial judge's focus on the fact that there was no "trust" document, that the parties did not understand the concept of a trust, and that the tax and other documents did not refer to Luisa as the beneficial owner). Rather, the question was Luisa's intention. Having contributed the money toward the purchase of the property, did *she* intend to confer beneficial ownership of the property on the legal title holders, to the exclusion of herself and her other children? (at para. 67, Emphasis in original)

[68] In *Andrade* the Court of Appeal found that the trial judge incorrectly focused on the fact that there was no trust document, that the parties did not understand the concept of a trust, and that documents did not refer to a beneficiary. This focus was misplaced because it should have been on whether the transferor intended to confer beneficial ownership. Likewise then, in determining Paul's intention, the focus should not be on the fact that there was no formal trust document indicating a trust relationship between Paul and his parents, that Paul's sisters did not use the correct words to indicate the concept of a legal trust, or that the 1996 Transfer documents do not refer to Paul as the beneficial owner. The focus should be on Paul's intent at the time of the transfer and in that regard I should consider all of the evidence.

[69] It is true that the Affidavit of Value signed by John did not indicate that the transfer of the Brimley House by Paul in August 1996 was in trust. Given this transaction was between parents and their son I do not find this fatal to the Trustee's position. Certas argues that this is despite the form "prompting" John to so indicate. Apart from the fact that there is a box that could have been checked off, there is no evidence that John was "prompted" or asked about a trust when Paul transferred the Brimley House back to him and his wife.

[70] There is also the fact that in the May 2013 Letter, Gail stated that her parents wanted Paul to "inherit" the house upon their death but she has given an explanation for why she used that word and she also said that the Brimley House was "not specified" in their will. That is, as Mr.

¹⁴ *Lor v. Lor*, 2016 ABQB 238 at ¶ 34.

Caylor concedes, "an after-the-fact explanation" but there is other evidence that corroborates this. Furthermore, I would not expect someone in Gail's position to be able to distinguish the legalities between an inheritance and a trust and she wrote the May 2013 Letter before she sought legal advice.

[71] The best evidence of Paul's intention at the time of the 1996 Transfer is the draft Minutes of Settlement prepared by Mr. Procope, and the recital in those draft Minutes of Settlement that states "Mr. Zigomanis asserts that the Brimley Road Property was transferred to the Deceased to be held in trust for the benefit of Mr. Zigomanis." Although the Minutes of Settlement were never signed by the parties, Paul indicated with his signature, just 12 days before his death, that he wanted Mr. Procope to propose a settlement on "substantially similar terms to the above".

[72] The evidence of Paul's understanding in 2015 is consistent with the evidence of his intent in 1996. I have reviewed the reasons why John and Mary intended to hold the Brimley House in trust for Paul and have found that this was done for legitimate reasons. As it was understood by everyone in the Zigomanis family that Paul was the true owner, it follows that John and Mary intended to transfer legal title back to Paul, once they were reassured in his ability to control ownership once again.

[73] Consistent with this intention, John and Mary owned their own home and continued to live there. Although John and Mary took over paying the bills associated with the Brimley House in 1996, the arrangement was that Paul would give John and Mary \$500.00 each month towards the bills. Certas argues that the fact that John and Mary became financially responsible for the expenses of the Brimley House is counterintuitive to the position that Paul was the true owner but again this position ignores the fact that Paul was their son. To the extent John and Mary were assisting Paul in carrying the house, in my view that is equally consistent with how parents might choose to help an adult son who needs help and in my view does not alter the fundamentals of the 1996 Transfer.

[74] This conclusion is also strengthened by the fact that there is strong evidence that Gail and Violet would have no reason, before the explosion, to give Paul a significant asset if they did not feel they were at least morally obligated to do so to respect their parents' wishes. Gail valued the Brimley House at \$700,000 in her affidavit in support of her probate application. There is no document that confirms there was a trust relationship. There are only inferences that can be drawn from the facts as I have found them to be. Gail and Violet could have tried to take the position the Brimley House was part of John's Estate and claim entitlement to two-thirds of the Brimley House

[75] I accept the position of the Trustee that John and Mary's reassurance as to Paul's ability to control ownership was not a condition on the transfer of the Brimley House back to Paul. It was the reason for the transfer. Paul remained seized of the beneficial ownership of the Brimley House. Having found that Paul made a substantial financial contribution to the purchase of the Brimley House, there would be no reason for Paul to gift the Brimley House to his parents. There is no evidence of donative intent. The available evidence is to the contrary – everyone (including Paul) intended and understood that the transfer was to "protect" Paul and that it would always be

his home. Gail, John's estate trustee, does not dispute this and supports the conclusion that the gratuitous transfer was intended as a trust.

[76] The Allstate submissions claim that the moving party does not have clean hands and submit that the Brimley House was flipped back and forth "when it became expedient to alienate the property from creditors or when necessary to show Paul was without assets in order to qualify for government assistance." It is their position that this motion is yet a further attempt by the heirs of John's Estate to "shelter the estate assets and to effectively leave the nearly 200 claimants ... to fend for themselves." That is a very serious allegation to make against Paul's sisters and I reject it for reasons already stated.

[77] The only allegation of this nature made by counsel for Allstate that I have not yet dealt with is the allegation that Paul was paying rent so he could get Ontario Disability Support payments (ODSP). The Trustee has determined, however, that ownership of a home does not disqualify someone for collecting ODSP. The evidence of Gail was that the \$500 Paul was to pay his parents was to offset the expenses they were paying, not rent, and in my view this evidence is not inconsistent with the position of the Trustee that Paul was still the beneficial owner of the Brimley House.

[78] I have rejected the submission of the interested parties that the 1996 Transfer was done for improper purposes. In any event, even if that were the case, that does not preclude a finding that Paul was nevertheless the beneficial owner of the Brimley House. As noted by the Court of Appeal in *Andrade*, at para. 92: "the fact that a party represents or deals with property in a certain way that is inconsistent with beneficial ownership does not preclude a claim of beneficial ownership in litigation." In fact, "even if a party has transferred ownership of property in one way for one purpose (such as to defeat creditors) a resulting trust claim is not precluded. The question remains one of the transferor's intention at the time of the transfer" (at para. 106).

[79] Finally the Allstate submissions make what I could only describe as an "over the top" submission that the Zigomanis family was clearly "in a state of conflict over the ultimate disposition of the Home at the time of the explosion" and Paul "apparently" took his own life and destroyed the Brimley House in the process and this is evidence of that fact and that this Court ought not to grant the relief sought because then innocent creditors will be the ones to bear the burden of this "unfortunate family fight".

[80] This submission is totally without merit. First of all, although I understand there is evidence from the Fire Marshall that a gas union was separated by direct human intervention at some point prior to the explosion; the ignition source could not be identified. The Trustee has determined that a new water meter was installed in the Brimley House as part of the City of Toronto's Water Meter Program on April 16, 2015. Furthermore, after the explosion, the Trustee was advised that a problem had been detected with the water meter installed at the Brimley House and an inspection to determine the problem and make repairs was necessary. This certainly raises other possible causes of the explosion. Furthermore, the Coroner could not conclude whether Paul's cause of death was suicide or an accident. Finally, at this time there was no family fight. There was no dispute that the Brimley House was being transferred back to Paul.

[81] For these reasons I find that the Brimley House was and has been held in trust for Paul by his parents since August 1, 1996. The Trustee has asked for an order declaring that title to the Brimley House be transferred to the Trustee of Paul's Estate effective *nunc pro tunc* January 1, 2015, being the day following the death of his father, John. In my view that order should be made to give effect to my findings and conclusions.

(c) The Trustee's Alternative Position: The Brimley House Was Held In Trust For Paul By Implied Trust

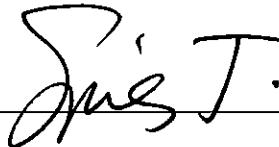
[82] In the alternative, it is the Trustee's position that an implied trust arose between John and Mary and Paul at the time of the 1996 Transfer. Although I would say that the Trustee's alternative position has merit, given my conclusions it is not necessary to deal with this alternative position.

Disposition

[83] For the reasons set out herein, I make the following orders:

- a) an order declaring that the Brimley House was and has been held in trust for Paul since August 1, 1996;
- b) an order declaring that title to the Brimley House be transferred to the Trustee of Paul's Estate effective *nunc pro tunc* January 1, 2015, being the day following the death of his father, John; and
- c) an order approving the Trustee's Second Report and Supplemental Report to the Second Report and the activities of the Trustee for the period from October 14, 2015 to October 14, 2016.

[84] The Trustee has not asked for approval of any legal fees and disbursements at this time and has stated that he will apply to the Court in the future to do so. The interested parties do not seek costs nor are they entitled to costs as they are not parties to this motion. Accordingly, no order as to costs is necessary.



SPIESS J.

Released: November 17, 2017

CITATION: Zigomanis Estate, 2017 ONSC 6855
COURT FILE NO.: 05-145-15
DATE: 20171117

ONTARIO

SUPERIOR COURT OF JUSTICE

**IN THE MATTER OF
THE ESTATE OF PAUL ZIGOMANIS, deceased**

BETWEEN:

GAIL MacDONALD

Applicant

- and -

VIOLET COOPER

Respondent

REASONS FOR DECISION

SPIES J.

Released: November 17, 2017