IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Fulton v. Gunn,***
2008 BCSC 1159

Date: 20080828
Docket: E071932
Registry: Vancouver

2008 BCSC 1159 (CanLII)

Between

Frances Abigail Fulton

Plaintiff

And

Alan Gunn also known as Alan Gilson
and Sally Gilson, Trustee of the Sally Gilson Trust

Defendants

Docket: 07 2112
Registry: Victoria

Between

Sally Gilson, Trustee of the Sally Gilson Trust

Plaintiff

And

Alan Gunn

Defendant

Before: The Honourable Mr. Justice S.R. Romilly

Reasons for Judgment

Counsel for Frances Abigail Fulton	Lorne N. MacLean
Counsel for Sally Gilson, Trustee of the Sally Gilson Trust	Richard S. Margetts, Q.C. James C.M. Main
Alan Gunn, also known as Alan Gilson	Appearing In Person
Date and Place of Trial:	July 14-18 and 21–23, 2008 Victoria, B.C.

2008 BCSC 1159 (CanLII)

Table of Contents

NATURE OF PROCEEDINGS ... 3
EVIDENCE AND FACTUAL BACKGROUND ... 4
(i) Exchange Rates ... 4
(ii) Sally Gilson and the Sally Gilson Trust ... 4
(iii) Period before Abigail and Alan's Marriage ... 6
(iv) Background Information on Alan and Abigail and their Marriage ... 6
(v) Newport Avenue Property ... 7
(vi) Purchase of Merridale ... 8
(vii) Purchase of the Edmonton Properties and July 1, 2002 Loan ... 10
(viii) Period Alan and Abigail Lived at Merridale ... 11
(ix) Cobalt Creek Capital Inc. ... 12
(x) $80,000.00 USD Advance ... 13
(xi) Purchase of Sayward ... 13
(xii) Sale of Fresno Property ... 14
(xiii) $3,500.00 USD Advance ... 15
(xiv) March 2006 $150,000.00 USD Advance ... 15
(xv) $400,000.00 CAD Mortgage on Merridale ... 15
(xvi) Alan and Abigail's Debts ... 16
(xvii) Surpluses from the Money Advanced by Sally ... 16
(xviii) Alan and Abigail's Separation and Separation Agreement ... 17
ISSUES ... 18
ABIGAIL'S CLAIM ... 19
POSITION OF SALLY GILSON AND THE SALLY GILSON TRUST ... 20
ANALYSIS ... 22
1. Did Alan hold Merridale in Trust for the Sally Gilson Trust? ... 22
(a) Resulting Trust ... 22
(i) The Law ... 22
(ii) Application of the Facts to the Law of Resulting Trusts ... 25
(b) Unjust Enrichment and Constructive Trust ... 30
(i) The Law ... 30
(ii) Application of the Law of Constructive Trusts to the Facts of this Case ... 35
An Enrichment ... 35
Deprivation ... 36
Juristic Reason ... 37
Remedy ... 38
(c) Was the Money Sally Advanced to Alan a Loan? ... 39
(d) Does the ***Land Title Act*** or the ***Family Relations Act*** Operate to give Abigail an Interest in Merridale? ... 42
2. Is Alan's Interest in the Sally Gilson Trust a Family Asset? ... 44
CONCLUSION ... 52

2008 BCSC 1159 (CanLII)

NATURE OF PROCEEDINGS

[1] By Court Order both of these proceedings were tried together. Action No. E071932 is between Frances Abigail Fulton ("Abigail"), Alan Gunn ("Alan") and Sally Gilson ("Sally"), Trustee of the Sally Gilson Trust (the "Vancouver Action"). Action No. 07 2112 is between Sally Gilson, Trustee of the Sally Gilson Trust, and Alan Gunn (the "Victoria Action").

[2] The Vancouver Action is an application by Abigail against Alan for divorce. Abigail also claims a division of family assets, including a share of the Sally Gilson Trust. Alan has not filed an appearance or statement of claim to any of these actions.

[3] Sally, Alan's mother, has initiated a claim against Alan for a declaration that a property located at 1235 Merridale Road, Mill Bay, British Columbia ("Merridale"), which is in Alan's name, is being held by Alan in trust for Sally or her trust, the Sally Gilson Trust. Abigail, on the other hand, seeks an order enforcing her separation agreement with Alan such that she obtains ownership of Merridale.

[4] Because the decision in this case depends to a large extent on the credibility of witnesses, I propose to spend a little more time than usual on the evidence that was adduced at trial. From that evidence I will make findings of fact in order that there would be a clear "pathway" to my decision.

EVIDENCE AND FACTUAL BACKGROUND

(i) Exchange Rates

[5] At trial, the prevailing Bank of Canada American-Canadian exchange rates were marked as an exhibit for various relevant dates. I have used this Bank of Canada nominal exchange rate to convert the sums at issue in this case from American dollars ("USD") to Canadian dollars ("CAD"). These figures are estimates only. The Bank of Canada's nominal exchange rate is not a buying and selling rate and the actual exchange rate Alan obtained may differ from this rate. Also, banks typically charge a fee to exchange money, so Alan likely received less Canadian dollars for each transfer of American dollars than the nominal exchange rate figure used. There was no evidence adduced at trial to prove the exact amount of Canadian dollars Alan received on the relevant dates.

(ii) Sally Gilson and the Sally Gilson Trust

[6] Alan's mother, Sally, resides in Los Angeles where she has over the years, it is fair to say, been successful in real estate property management and the acquisition of real estate. Sally suffers Attention Deficit Disorder, which is corroborated by Alan and her accountant, Eric Jensen. Alan, in fact, stated that her letters are often "semi-unintelligible". She frequently suffers difficulties in absorbing, understanding and explaining information. Illustrations include:

a) Missing the written word "Vancouver" in regard to the location of the discovery of Alan despite typing a response on the same page as that note.

2008 BCSC 1159 (CanLII)

b) Missing the word “late” in her Affidavit filed in evidence as to the time frame in May when she returned from Tokyo.

[7] I find that this affliction, together with the difference in the methods of transfer of property in the United States of America and Canada, caused some confusion in Sally’s mind with respect to what was really happening with the assets that she purchased in British Columbia on behalf of the trust. In the United States, for instance, it would appear that the term “trust deed” was the rough equivalent of a mortgage in British Columbia. Another difference is in the way mortgages are granted on property in the United States compared with the way that is done in British Columbia.

[8] While I found it difficult to believe that Sally could not tell us the assets and liabilities of the Sally Gilson Trust, I found her evidence with respect to the nature of the advances made to Alan to be very credible.

[9] I mention this simply to point out that notwithstanding some of the inconsistencies in her testimony, I found her to be a very credible witness. I accept her evidence in total. In fact, material aspects of her testimony are corroborated by other independent evidence.

[10] Due to estate administration laws in the United States, in 1987 Sally’s assets were placed into a trust, the Sally Gilson Trust, of which she was both the trustee and the vested beneficiary. Sally had named Alan and Alan’s brother, Michael, as future contingent beneficiaries. Her interest in the Sally Gilson Trust would devolve to them upon her death. The Sally Gilson Trust has been referred to as a “Living Trust” and is primarily a legal construct to allow her to avoid high probate and estate

2008 BCSC 1159 (CanLII)

taxes in California. Sally is empowered to do anything she wishes with the Sally Gilson Trust assets, and for United States income tax purposes the trust is treated as part of her person. The value and assets of the trust are uncertain, but it is fair to say that they are substantial. The assets of the trust may be as high as between $5 and $15 million.

2008 BCSC 1159 (CanLII)

(iii) Period before Abigail and Alan's Marriage

[11] Before Alan's marriage to Abigail, Sally deeded two properties to him.

[12] Sally deeded to Alan a property in Sylmar, California in 1995 or 1996. Alan managed the property for a number of years before selling the property in either 2000 or 2001. The proceeds on the sale of the Sylmar property were approximately the same as the value of the equity of property at the time of the gift, being $72,000 to $75,000 USD.

[13] In 1997, Sally gifted to Alan a property located in Fresno, California. The value of the equity in the property at the time of the gift was estimated by Alan as $175,000 USD. Alan collected rental income from the property until he sold it in 2005.

(iv) Background Information on Alan and Abigail and their Marriage

[14] Abigail was born on May 12, 1959. Alan was born September 4, 1960. They married on January 4, 1998 at Reno, Nevada, which is when they began cohabitating. Since 1998 they have both been ordinarily resident in British

Columbia. In or around July 2006 Alan and Abigail ceased cohabitating. There are no children of the marriage.

[15] Since their separation, Abigail has been living at Merridale. This property is the subject of this dispute.

2008 BCSC 1159 (CanLII)

[16] Abigail is a lawyer who practised real estate law in Manitoba before she came to British Columbia. She has never practised law in British Columbia. She has been employed as an executive in British Columbia Construction Association from which she earns a salary of approximately $85,000.00 per year.

[17] Apart from her income, Abigail brought approximately $115,000.00 into the marriage. This sum is broken down as follows:

(a) approximately $50,000.00 in RRSP's;

(b) an inheritance of approximately $20,000.00; and

(c) approximately $45,000.00 from the sale of a property in Winnipeg.

[18] Alan obtained a Masters degree in financial planning. He was, and continues to be, a man great of aspiration. All of the business enterprises that he championed during the marriage were unsuccessful. Of the eight years of the marriage, Alan was only employed for one year.

(v) Newport Avenue Property

[19] In 2001, Alan and Abigail were living in Victoria, British Columbia in rental accommodations (the "Newport Avenue property"). Alan and Abigail wanted to

purchase the Newport Avenue property. They asked Sally to loan them a down payment to help them with the purchase.

[20] However, by mid-2002 Alan was seeking new employment. In June 2002, Alan found a new job with Global Wealth Builders in Edmonton, Alberta. His new job required him to move to Edmonton. The plan to acquire the Newport Avenue property was abandoned.

2008 BCSC 1159 (CanLII)

(vi) Purchase of Merridale

[21] After 9/11, Sally held a fear for the stability of the United States and decided to seek a place that might be a refuge for her family in the future. Alan saw Vancouver Island as being a possible location for the family refuge, and he and Abigail located a number of properties that might potentially serve that purpose. At the end of June 2002, Sally visited Victoria where she met her daughter-in-law, Abigail, for the first time.

[22] During her short stay she inspected a property near Mill Bay on Vancouver Island, which is known as Merridale. She decided that the Sally Gilson Trust would buy Merridale and an interim agreement to that effect was drawn up and completed by Alan in his capacity as “Attorney In Fact” for the Sally Gilson Trust.

[23] Sally caused the Sally Gilson Trust to advance the purchase price and money needed for maintenance and improvement for Merridale. The Sally Gilson Trust sent Alan $415,000.00 USD in total for the purchase of the Merridale property and maintenance and renovation costs. The money was electronically wired to Alan in

two separate instalments of $360,000.00 USD and $55,000 USD on October 29 and November 14, 2002, respectively. The purchase of Merridale completed on the 1st of November 2002. These sums were the equivalent of $562,716.00 CAD and $86,608.50 CAD. The final purchase price of the property, including fees, taxes, rent and the purchase of farm equipment, was $541,194.58 CAD. The Sally Gilson Trust transferred, in total, $415,000.00 USD or $649,324.50 CAD to Alan for Merridale.

2008 BCSC 1159 (CanLII)

[24] It is clear from the evidence that the original intention was for the Sally Gilson Trust to purchase Merridale and be named as the registered owner. In an e-mail dated July 18, 2002, Alan wrote to his real estate broker, Robert Barrington, and said:

> Things are progressing for us in the States and I believe we have enough ducks lined up to make an offer on the farm with a possession in about 60 days. What is the best way to get going?
>
> We would like to take title in the name of a US trust… that is okay right?

[25] Further, in the offer to purchase Merridale dated August 1, 2002, the Sally Gilson Trust is named as the buyer.

[26] However, by the time of closing on the Merridale purchase, Alan had moved to Edmonton and he told Abigail, who had remained in Victoria, to instruct a solicitor to convey the Merridale property into his name. The sale closed on November 1, 2002 and Alan was named as the buyer and he became the registered owner of Merridale.

[27] I find as a fact that Sally decided that the Merridale property should be placed in the name of Alan in trust for the Sally Gilson Trust because she was advised by Alan that it would be impossible to register Merridale into the name of the Sally Gilson Trust. I further find as a fact that the reason the Merridale property was not subsequently transferred into Sally's name was because she was advised by Alan that she would incur a very heavy tax penalty if that was done.

2008 BCSC 1159 (CanLII)

[28] The vendors of Merridale continued to live on Merridale for some time after the purchase. Abigail moved to Edmonton. After the vendors vacated Merridale, Abigail stayed on the property on occasion as she had maintained her employment in Victoria and was commuting between Edmonton and Victoria.

(vii) Purchase of the Edmonton Properties and July 1, 2002 Loan

[29] When Sally visited Victoria in June 2002, she brought with her a cheque for $150,000.00 USD which she gave to Alan, as a loan, for the purpose of acquiring an apartment in Edmonton. $150,000.00 USD was the equivalent of approximately $228,900.00 CAD on July 2, 2002.

[30] A note entitled "Personal Loan Agreement", dated July 1, 2002, was entered into evidence. It states that the principal amount of the loan from the Sally Gilson Trust to Alan is $150,000.00 USD amortized over 30 years with an interest rate of 6.75%. The note indicates that Alan will owe monthly payments of $972.90. There is also an identical copy of this note in Eric Jensen's file except that the $972.90 has been scratched out and $1,000.00 written in by hand.

[31] It was also established that there were cheques from Alan to the Sally Gilson Trust showing repayments of $1,000.00 USD dated July 29 and September 1, 2002. Then Alan paid the Sally Gilson Trust $1,080.00 USD seven times from January 2003 to July 2003; the final cheque is dated July 1, 2003.

[32] Alan purchased unit 40 in Phillip's Lofts in Edmonton. The purchase price was $268,365.00 CAD. To assist him in purchasing the condo, Alan obtained a mortgage from the Toronto-Dominion Bank (the "TD Mortgage") for the sum of approximately $192,000.00 CAD.

[33] Abigail and Alan later jointly purchased the adjacent condo, unit 39 for approximately $204,000.00 CAD. The purchase of that condo was partially funded by the $45,000.00 CAD proceeds from the sale of Abigail's property in Winnipeg. That property was also mortgaged for $153,000.00 CAD.

[34] Unfortunately, Alan lost his job in Edmonton and by August 2003 both Abigail and Alan were back in British Columbia and living full-time at Merridale. The condos were sold in March 2004. They paid off the mortgage on unit 39 and transferred the TD Mortgage from unit 40 to Merridale. Sally claims that she did not know that Alan and Abigail transferred the TD Mortgage to Merridale.

(viii) Period Alan and Abigail Lived at Merridale

[35] From the evidence, Alan and Abigail made numerous repairs and renovations to Merridale, including, building a new barn, a new septic system, renovating the interior of the home and painting the exterior of the home. Abigail admitted into

2008 BCSC 1159 (CanLII)

evidence some documents showing their expenses for these improvements, including a bill for $31,316.11 from Home Depot for supplies and an estimate of $34,442.43 from a builder to construct a new barn on an existing foundation. These improvements are currently estimated to have a replacement value of $343,800.00 CAD.

2008 BCSC 1159 (CanLII)

[36] Alan and Abigail took several trips while living at Merridale. In 2004, they traveled to Normandy, and in 2006 they travelled to Croatia and Zurich.

[37] Alan and Abigail started a small business at Merridale, Glen Abby Farms. They raised cashmere goats.

[38] Alan corresponded with Sally periodically, updating her on the status of Merridale. For example, in an e-mail dated January 19, 2004, Alan wrote Sally and said:

> I talked to Michael, and he said you were surprised about the goats for the farm. I'm [sic] thought I had mentioned it to you. Mostly, the idea came about from a necessity to have some kind of farm production in order to obtain the tax advantages of "farm status." Cashmere is in worldwide shortage, and there is also a market for goats as meat animals. Goats do not require much day to day care if they have good sized pasture. The barn is ready for animals, all the fencing is in place. Very little energy is needed to prepare for the arrival. So, I thought goats were the best animal to begin with.

(ix) Cobalt Creek Capital Inc.

[39] Alan and Abigail incorporated Cobalt Creek Capital Inc., which was an investment agency. Abigail owned 49% of the shares. However, on April 30, 2006

at a meeting of the board of directors, Abigail resigned from the board and transferred all of her shares to Alan, who then owned 100% of the shares.

(x) $80,000.00 USD Advance

[40] On August 10, 2005, Sally advanced $80,000.00 USD to Alan, which was the equivalent of approximately $96,920.00 CAD. According to a breakdown entered into evidence, the money was to be used as follows: $45,000.00 USD for a “truck loan”, $25,000.00 USD for a deposit on Sayward and $10,000.00 USD for tuition.

(xi) Purchase of Sayward

[41] In 2005, Alan located a property in Sayward, British Columbia (“Sayward”) from which he thought he might be able to operate a wood milling business. Alan asked Sally for money to finance the purchase because he thought it would be a good investment for the Sally Gilson Trust.

[42] This time, Alan is listed as the buyer on the offer; however, Sally Gilson is listed as the buyer on the final contract for sale. Sally became the registered owner of Sayward. Sayward was purchased for $427,748.82 CAD; it closed on September 29, 2005.

[43] To purchase Sayward, Sally advanced money to Alan in two instalments: (i) as discussed above, on August 10, 2005 she sent Alan $25,000.00 USD for a deposit, the equivalent of $30,287.50 CAD and (ii) on September 15, 2005, Sally sent Alan $360,000.00 USD, the equivalent of $426,852.00 CAD. In total, Sally

2008 BCSC 1159 (CanLII)

advanced to Alan $385,000.00 USD or approximately $457,139.50 CAD to purchase Sayward.

[44] Sally says that she purchased Sayward in her name because by this time she was advised that although the property could not be registered in the name of the Sally Gilson Trust, it could be registered in her name personally.

[45] Alan commenced the milling operation on Sayward. He acquired a portable mill and retained Mr. Baessler as a caretaker for Sayward and to undertake the day-to-day activities of the business. The wood milling operation was not a success. Alan testified that the portable mill was stolen.

[46] On August 31, 2007, Sayward was listed for sale at $795,000.00 CAD.

[47] In February 2008, Mr. Baessler filed a Builder's Lien Claim against Sayward and has commenced proceedings against Sally seeking recovery of approximately $103,000.00 CAD.

(xii) Sale of Fresno Property

[48] On September 14, 2005, Alan received $117,000.00 USD. This money was the proceeds from the sale of a rental property he owned located in Fresno, California. Until it was sold, Alan had collected rental income from the property. As discussed above, the Fresno property was gifted to Alan by Sally in 1997. There is a dispute as to whether Alan took a loss on this property. Alan estimated that at the time of the gift the equity in the property was valued at $175,000.00 USD. So, he claims to have taken a loss in the sense that the equity had decreased to

2008 BCSC 1159 (CanLII)

$117,000.00 USD when the property was sold in 2005. Either way, Alan received $117,000.00 USD in 2005.

(xiii) $3,500.00 USD Advance

[49] On March 6, 2006, Sally advanced to Alan $3,500.00 USD, which is the equivalent of approximately $3,990.70 CAD.

(xiv) March 2006 $150,000.00 USD Advance

[50] On March 15, 2006, the Sally Gilson Trust advanced $150,000.00 USD to Alan, the equivalent of approximately $173,295.00 CAD. Sally conceded at trial that some of this money was for improvements at Sayward.

(xv) $400,000.00 CAD Mortgage on Merridale

[51] In June 2006, around the same time as Alan and Abigail separated, Alan placed a $400,000.00 CAD mortgage on Merridale (the “Medallion Mortgage”). From the mortgage, Alan received $344,841.45 cash on June 20, 2006.

[52] I find as fact that Sally was not aware of the TD Mortgage or the Medallion Mortgage on Merridale until she filed a caveat on the title to Merridale in 2007, as will be discussed below.

[53] It is not clear what Alan has done with the $400,000.00. He has paid off $80,000.00 worth of credit card debt.

2008 BCSC 1159 (CanLII)

2008 BCSC 1159 (CanLII)

(xvi) Alan and Abigail's Debts

[54] Alan and Abigail agree that they have approximately $80,000.00 CAD in credit card debt. They also owe $57,600.00 on their Lexus vehicle.

(xvii) Surpluses from the Money Advanced by Sally

[55] Sally advanced to Alan more money than was required to purchase the condo in Edmonton; when the TD Mortgage is taken into account, Alan had a surplus of approximately $152, 535.00 CAD. Sally also advanced more money than was required to purchase both Merridale and Sayward. Specifically, Sally advanced approximately $108,129.92 CAD more than the purchase price for Merridale and $202,685.68 CAD more than the purchase price for Sayward.

[56] Alan testified that the surpluses were put into Alan and Abigail's joint bank account or the Glen Abby Farm account. Sally says that she was not told about the surpluses.

[57] It is not clear what was done with the surpluses. Some was clearly used for the improvements done to the properties, which were described above. I agree with Sally that any improvements that were made to Merridale increased the value of the property, but also positively impacted Abigail and Alan's business, Glen Abby Farms.

[58] I agree with Sally that at least some of that money must have been used by Alan and Abigail for their personal use. According to Alan and Abigail's Visa statements, they incurred annual expenses of $80,000.00 to $110,000.00 CAD,

which are only those expenses charged to their credit cards. Yet, Abigail only earns $85,000.00 per year and Alan was unemployed over most of the period in question. Clearly, the money must have come from somewhere to support their lifestyle, and the money advanced by Sally may have been the source.

2008 BCSC 1159 (CanLII)

[59] Also, Alan and Abigail lived rent free at Merridale, freeing up money to be used for other expenses, such as travel and luxuries.

(xviii) Alan and Abigail's Separation and Separation Agreement

[60] Abigail and Alan ceased cohabitating in or around July 2006.

[61] Abigail and Alan prepared a separation agreement in April 2007. They reached the following agreement on their division of property:

Assets and Liabilities to Alan	Value	Assets and Liabilities to Abigail	Value
2005 Ford F350	$37,000	1235 Merridale Rd.	$1,100,000
Funds from the disposal in September 2005 of the Property in Fresno used in part to purchase Bowleven PLC Shares	$117,000	RRSP	$95,000
Livestock	$25,000	Cash	$3,000
Equalization Payment from Abigail	$50,000	Farm Equipment	$20,000
Cash from sale of the Nissan	$10,000	Gym Equipment	$20,000
Cash from the 2006 Medallion Mortgage	$400,000	Equalization Payment to Alan	-$50,000
Woodmizer Mill	$50,000	Liability for the two Mortgages	-$570,000
Credit Card Debt	-$80,000	Lexus Lease	-$57,600
Lumber	$80,000		
Total	**$689,000.00**	**Total**	**$560,400.00**

[62] Sally learned of Alan and Abigail's separation from Abigail in early 2007.

[63] In accordance with their separation agreement, on April 15, 2007, Abigail and Alan signed a contract of purchase and sale for Merridale to transfer ownership of Merridale from Alan to Abigail.

2008 BCSC 1159 (CanLII)

[64] However, on April 19, 2007, before the land transfer could be registered, the Sally Gilson Trust lodged a caveat against the title to Merridale.

[65] The Sally Gilson Trust launched an action against Alan for title to Merridale. In order to enforce the separation agreement, Abigail was forced to launch an action against Alan and the Sally Gilson Trust, from which the Sally Gilson Trust has counterclaimed against Abigail. Alan is not defending either action, and the two actions have been joined to be heard at this trial.

ISSUES

[66] The issues are:

1. Does Alan hold Merridale in trust for the Sally Gilson Trust?

   a) Is Merridale held in trust for the Sally Gilson Trust by operation of a resulting trust?

   b) In the alternative, is Merridale held in trust for the Sally Gilson Trust by operation of a constructive trust as a remedy for unjust enrichment?

   c) Was the money Sally advanced to Alan a loan?

   d) Does the ***Land Title Act*** or the ***Family Relations Act*** operate to give Abigail an interest in Merridale?

2. Is Alan's contingent interest in the Sally Gilson Trust a family asset?

ABIGAIL'S CLAIM

2008 BCSC 1159 (CanLII)

[67] Abigail wants her separation agreement with Alan to be enforced, such that she owns Merridale.

[68] Abigail claims that the advances from Sally to Alan were gifts from a mother to son. So, Sally has no claim to Merridale and the separation agreement between Abigail and Alan should be enforced.

[69] In the alternative, if the advances were not gifts, they were loans to Alan alone, and Sally is an unsecured creditor. Abigail argues that when Abigail and Alan made their separation agreement and signed the contract for purchase and sale on April 15, 2007, the Merridale property vested in Abigail. This occurred before Sally registered a caveat on April 19, 2007 against Merridale. Abigail argues that her interest was first and since Sally is an unsecured creditor, Sally cannot register any judgment she gets on the loans to Alan against the Merridale property, nor was she entitled to register a certificate of pending litigation.

[70] In the further alternative, if there was a resulting or constructive trust on the Merridale property, Alan has an interest in the Sally Gilson Trust and his interest in the trust was ordinarily used for a family purpose within the meaning of s. 58 of the ***Family Relations Act***, R.S.B.C. 1996, c. 128 (the "***FRA***"). Abigail asks that Alan's interest of the Sally Gilson Trust be reapportioned under s. 65 of the ***FRA***, such that

Abigail receives the Merridale property in it's entirety, and the remainder of Alan's interest in the Sally Gilson Trust be reapportioned to him.

[71] In support of her position, Abigail drew my attention to legal authorities that include: ***Clark v. Clark*** (1974), 47 D.L.R. (3d) 149, 16 R.F.L. 214 (B.C.S.C.); ***Cunha v. da Cunha*** (1994), 99 B.C.L.R. (2d) 93 (S.C.); ***Chou v. Chao*** (1996), 21 R.F.L. (4th) 45 (B.C.S.C.); ***French v. French***, [1994] B.C.J. No. 2371 (S.C.) (QL); ***Hall v. Hall*** (1990)***,*** 26 R.F.L. (3d) 443 (B.C.S.C.); ***Krupa v. Krupa***, 2008 BCSC 414; ***Leach v. Leach***, [1982] B.C.J. No. 1651 (S.C.) (QL); ***Locke v. Locke***, 2000 BCSC 1300; ***Miller v. Commissioner of Internal Revenue***, 71 T.C.M. (CCH) 1674 (U.S. Tax Ct., 1996); ***D. v. D.***, 2008 BCSC 306; ***Grove v. Grove***, [1996] B.C.J. No. 658 (S.C.) (QL); ***Khan v. Khan***, 2008 BCSC 396; ***Lindholm v. Lindholm*** (1999), 71 B.C.L.R. (3d) 118 (S.C.); ***MacLean v. MacLean*** (1990), 28 R.F.L. (3d) 103 (B.C.S.C.); ***M.(H.R.) v. B.(D.M.)***, 2004 BCSC 147, 28 B.C.L.R. (4th) 104; ***P.J.A. v. C.G.A.***, 2004 BCSC 1173; ***Sagl v. Sagl*** (1997), 31 R.F.L. (4th) 405 (Ont. Ct. J. (Gen.Div.)); ***Whittall v. Whittall*** (1987), 19 B.C.L.R. (2d) 202 (S.C.); ***Clark v. Clark***, 2000 BCSC 395; ***Robinson v. Robinson***, 2006 BCSC 663, 54 C.C.P.B. 79; and, ***Re Spoklie*** (1996), 18 B.C.L.R. (3d) 229, 39 C.B.R. (3d) 7 (S.C.).

POSITION OF SALLY GILSON AND THE SALLY GILSON TRUST

[72] Sally claims that the Sally Gilson Trust is the beneficial owner of Merridale based on a resulting trust or, in the alternative, a constructive trust. She claims that Merridale was not a gift to Alan. Alan held the property in trust and so he cannot transfer it to Abigail in order to fulfill their separation agreement.

2008 BCSC 1159 (CanLII)

[73] Merridale was purchased entirely with funds advanced by Sally and the evidence demonstrates that the substantial improvements to Merridale were funded both directly and indirectly by Sally.

2008 BCSC 1159 (CanLII)

[74] In support of their position, counsel for the Sally Gilson Trust and Sally also cited a mountain of legal authority. These included: ***Wu v. Dipopolo***, 2008 BCSC 112; ***Berdette v. Berdette*** (1991), 3 O.R. (3d) 513, 81 D.L.R. (4th) 194 (C.A.) [***Berdette*** cited to D.L.R.]; ***Pecore v. Pecore***, 2007 SCC 17, [2007] 1 S.C.R. 795; ***Aylott v. Aylott***, [1999] B.C.J. No. 1524 (S.C.) (QL); ***Besse v. Besse***, 2006 BCSC 1662, 63 B.C.L.R. (4th) 153; ***Bell v. Bailey*** (2001), 203 D.L.R. (4th) 589, 148 O.A.C. 333; ***Biljanic v. Cacic***, [1994] B.C.J. No. 862 (S.C.) (QL); ***Biljanic v. Biljanic Estate*** (1995), 66 B.C.A.C. 131, 10 E.T.R. (2d) 148; ***Crick v. Ludwig*** (1994), 117 D.L.R. (4th) 228, 95 B.C.L.R. (2d) 72 (C.A.); ***Westergard v. Buttress***, 2005 BCSC 622, 18 R.F.L. (6th) 196; ***Delesalle v. Delesalle***, 2005 BCSC 1631, 21 R.F.L. (6th) 261; ***Ford v. Werden*** (1996), 27 B.C.L.R. (3d) 169, 78 B.C.A.C. 126; ***Goodfriend v. Goodfriend***, [1972] S.C.R. 640, 22 D.L.R. (3d) 699 [***Goodfriend*** cited to S.C.R.];***Grahame v. Grahame***, 2002 BCSC 1526, 32 R.F.L. (5th) 348; ***Hubar v. Jobling***, 2000 BCCA 661, 195 D.L.R. (4th) 123; ***J.A.B. v. H.W.C.***, 2008 BCSC 644; ***Kauwell v. Melnyk***, 2007 BCSC 485; ***Kerr v. Baranow***, 2007 BCSC 1863, 47 R.F.L. (6th) 103; ***MacLean v. MacLean***, [1992] B.C.J. No. 1709 (S.C.) (QL); ***Madsen Estate v. Saylor***, 2007 SCC 18, [2007] 1 S.C.R. 838; ***Mallen v. Mallen*** (1992), 65 B.C.L.R. (2d) 241, 11 B.C.A.C. 262; ***Massincaud v. Logie***, 2005 BCSC 1665; ***Carmichael v. Douglas***, 2003 BCSC 611, 37 R.F.L. (5th) 259; ***Pettkus v. Becker***, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257 [***Pettkus*** cited to S.C.R.];

Rathwell v. Rathwell, [1978] 2 S.C.R. 436, 83 D.L.R. (3d) 289 [***Rathwell*** cited to S.C.R.]; ***Ridley v. Ridley***, [1996] B.C.J. No. 1652 (S.C.) (QL); ***S.(M.) v. S.(W.)***, 2008 SCC 35, 79 B.C.L.R. (4th) 1; ***Toth v. de Frias*** (1996), 78 B.C.A.C. 34, 13 E.T.R. (2d) 121; and, ***Wiens v. Wiens*** (1991), 31 R.F.L. (3d) 115 (B.C.S.C.).

2008 BCSC 1159 (CanLII)

ANALYSIS

1. Did Alan hold Merridale in Trust for the Sally Gilson Trust?

(a) Resulting Trust

(i) The Law

[75] The Supreme Court of Canada in ***Pecore*** described at, para. 20, when a resulting trust arising by referring to the following passage in Donovan W.M. Waters, ed., *Waters' Law of Trusts in Canada*, 3d ed. (Toronto: Thomson Carswell, 2005) at 362:

> Broadly speaking, a resulting trust arises whenever legal or equitable title to property is in one party's name, but that party, because he is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner, or to the person who *did* give value for it.
>
> ...
>
> ... where one person has gratuitously transferred his property to another, or paid for property and had the property put into another's name. The intention of the transferor or purchaser is implied to be that the transferee is to hold the property on trust for the transferor or purchaser. The implication arises out of the fact that Equity assumes bargains, not gifts, and requires the donee to prove that a gift was intended. [Emphasis in original].

[76] The Supreme Court of Canada in ***Pecore*** described when a presumption of a resulting trust occurs and the burden of proof at paras. 24-25:

> The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see ***Waters' Law of Trusts***, at p. 375, and E.E. Gillese and M. Milczynski, ***The Law of Trusts*** (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.
>
> The presumption of resulting trust therefore alters the general practice that a plaintiff (who would be the party challenging the transfer in these cases) bears the legal burden in a civil case. Rather, the onus is on the transferee to rebut the presumption of a resulting trust.

2008 BCSC 1159 (CanLII)

[77] However, depending on the nature of the relationship between the transferor and the transferee, despite a gratuitous transfer, the presumption of a resulting trust may not arise: ***Pecore*** at para. 27. Historically, courts have found that the presumption of a resulting trust will not arise when there is a gratuitous transfer from: (i) a husband to his wife, and (ii) from a father to his child: ***Pecore*** at para. 28. Now, the presumption of a resulting trust also does not arise for a mother making a gratuitous transfer to her child: ***Pecore*** at para. 33.

[78] In ***Pecore***, the Supreme Court of Canada decided at para. 36 that when a parent makes a gratuitous transfer to an adult child the presumption of a resulting trust does arise.

[79] It is open to the party alleging that the transfer was a gift to rebut the presumption of a resulting trust on a balance of probabilities by presenting evidence on the transferor’s intention that it be a gift: ***Pecore*** at para. 43. The focus of the court is on the actual intention of the transferor at the time of the transfer: ***Pecore*** at para. 5.

[80] The trial judge must determine the transferor's intention at the time of the transfer. Historically, the rule was that evidence ought to be from the time the transaction occurred; however, the Supreme Court of Canada in ***Pecore*** relaxed that standard at paras. 56-59:

> The traditional rule is that evidence adduced to show the intention of the transferor at the time of the transfer "ought to be contemporaneous, or nearly so," to the transaction: see ***Clemens v. Clemens Estate***, [1956] S.C.R. 286, at p. 294, citing ***Jeans v. Cooke*** (1857), 24 Beav. 513, 53 E.R. 456. Whether evidence subsequent to a transfer is admissible has often been a question of whether it complies with the Viscount Simonds' rule in ***Shephard v. Cartwright***,[1955] A.C. 431 (H.L.), at p. 445, citing ***Snell's Principles of Equity*** (24th ed. 1954), at p. 153:
>
> > The acts and declarations of the parties before or at the time of the purchase, [or of the transfer] or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration.... But subsequent declarations are admissible as evidence only against the party who made them....
>
> The reason that subsequent acts and declarations have been viewed with mistrust by courts is because a transferor could have changed his or her mind subsequent to the transfer and because donors are not allowed to retract gifts. As noted by Huband J.A. in ***Dreger***, at para. 33: "Self-serving statements after the event are too easily fabricated in order to bring about a desired result."
>
> Some courts, however, have departed from the restrictive – and somewhat abstruse – rule in ***Shephard v. Cartwright***…
>
> …
>
> Similarly, I am of the view that the evidence of intention that arises subsequent to a transfer should not automatically be excluded if it does not comply with the ***Shephard v. Cartwright*** rule. Such evidence, however, must be relevant to the intention of the transferor at the time of the transfer: ***Taylor v. Wallbridge*** (1879), 2 S.C.R. 616. The trial judge must assess the reliability of this evidence and determine what weight it should be given, guarding against evidence that is self-serving or that tends to reflect a change in intention.

2008 BCSC 1159 (CanLII)

2008 BCSC 1159 (CanLII)

[81] The presumption of resulting trust is a rebuttable presumption of law: ***Rathwell*** at 451. When the presumptions arise in a case, the court must look at the actual facts and consider all of the circumstances to arrive at the real intention of the transferor: ***Goodfriend*** at 647.

[82] In ***Pecore***, Rothstein J., speaking for the majority, listed five types of evidence that a trial judge can consider to determine the intention of the transferor at the time of the transfer in a case where the father had set up a joint account with his daughter, this list is not exhaustive:

(a) Evidence subsequent to the transfer.

(b) Bank documents.

(c) Control and use of the funds in the account.

(d) Granting of Power of Attorney.

(e) Tax treatment of the joint account.

(ii) Application of the Facts to the Law of Resulting Trusts

[83] The first issue to be resolved, is who is entitled to Merridale. There are three competing versions of the intention of the transfer of money from Sally to Alan. Abigail alleges it was a gift. Alan says Sally lent the money to him for the purchase of Merridale and that she agreed title to Merridale should be registered in his name for his benefit. Sally says that the intention was that the property would always be held for the Sally Gilson Trust.

[84] Abigail alleges that this is a classic case of a parent's gifts to her son becoming loans when her son gets divorced and she is faced with the reality that the wife will leave the marriage with part of the gift. Abigail argues that often in these situations when the parties go to divorce the parent argues that the transfer was not a gift, but a loan or a resulting trust.

[85] Since the transfer of money to purchase Merridale was from a mother to an adult child, there is a presumption of a resulting trust. In my view, Abigail has not adduced sufficient evidence to rebut the presumption of resulting trust on a balance of probabilities. In deciding this issue I must focus on the intentions of the parties at the time of the transfer.

[86] Abigail submits that Sally has a history of giving money and property to both her sons, Alan and Michael. As previously mentioned, she transferred at least two properties to Alan prior to his marriage to Abigail, the Sylmar and Fresno properties, which both had considerable value. Sally has also made substantial gifts to her other son, Michael Gilson. She has been giving him $10,000.00 USD every year since 1979 or 1980. At trial she said this was in the form of a $200,000.00 property. She testified that she purchased him a truck as a gift. Counsel for Abigail submits that determining the extent to which she has contributed to his various property purchases is hampered by less than full disclosure, but it is clear Sally aided Michael financially in setting up the Ark Restaurant in Long Beach, Washington in approximately 2005.

2008 BCSC 1159 (CanLII)

2008 BCSC 1159 (CanLII)

[87] Notwithstanding the able submissions of counsel for Abigail, I am of the view that there is overwhelming evidence that at the time of the transfer of funds to purchase Merridale, Sally intended to be the beneficial owner of the property. I am also satisfied that in no way did Sally intend to advance the money for the purchase of the property as a gift.

[88] In arriving at this conclusion, it is noteworthy that at the time Merridale was acquired, Alan and Abigail were planning to move to Edmonton. It cannot be said Merridale was intended to be the matrimonial home.

[89] Alan and Abigail had already been advanced funds by Sally for the purpose of acquiring a home in Edmonton, by loan which Alan had promised to repay. It was not intended at the time Merridale was acquired that Alan and Abigail would even reside at the farm, nor was it intended that it would be a family asset of their marriage. The family purpose for which Merridale was acquired was as a refuge for Sally's family.

[90] Abigail was not privy to any of the discussions respecting the acquisition of Merridale. Abigail's belief that Merridale was acquired by Sally as a gift for Alan is a conclusion drawn from observations she made as to how Alan employed the property for his own benefit. She says Alan never stated to her that Merridale was a gift to him from Sally. She says Alan never told her that the purchase price was a loan. Her evidence as to title only goes to directions given her by Alan to instruct the solicitor as to how title was to be taken. She provided no explanation for such instructions, and indeed, left that to Alan.

[91] Alan has no recollection of any discussion with his mother wherein the title to Merridale was addressed at the time its acquisition. At best, his evidence amounts to a favourable reconstruction of his present beliefs and hopes. It was, as he testified, "speculation".

[92] Sally testified that Alan said it would be difficult to register title in the name of the Sally Gilson Trust. It is clear from the evidence that it was initially intended that the Sally Gilson Trust would take title to the property. Alan confirmed this with the realtor in the email discussed above, and the interim agreement is drawn in favour of the Sally Gilson Trust, or its nominee.

[93] Two letters written by Abigail to Sally are also informative. Abigail sent Sally a thank you note for considering giving Alan money to purchase a condo in Edmonton. Yet, there is no similar thank you letter in evidence for the substantially larger sum advanced by Sally to purchase and improve Merridale. Further, Abigail wrote to Sally when she and Alan began living at Merridale to thank her for letting them stay at Merridale.

[94] Alan's correspondence with his mother is also telling. A number of letters were submitted into evidence and in many of them Alan provides Sally with an update of the status of Merridale. Alan's letters go beyond the normal mother and son exchange of information; the letters imply that Sally had a role in overseeing the operation of the property, a role larger than one would expect of a gift-giver or creditor.

2008 BCSC 1159 (CanLII)

[95] There is also evidence that Sally would have incurred significant tax consequences had she sent Alan the money as a gift, making it further unlikely that Sally intended to send Alan a substantial gift. Sally's accountant, Mr. Jensen, testified that it was always his understanding that Sally was the beneficial owner of Merridale.

2008 BCSC 1159 (CanLII)

[96] The only reasonable conclusion to be drawn when the evidence is viewed in its totality is that it was intended that the property be purchased for the Sally Gilson Trust beneficially. The presumption of a resulting trust has not been rebutted.

[97] There is no evidence to suggest that at some later time Sally determined the beneficial interest in Merridale should vest in Alan. Alan's residence upon the land arose as a result of a change in his personal circumstances, and it was, as time progressed, that Alan decided that he wanted Merridale to be his own, and at no time (prior to the caveat being filed by Sally) did he disclose this to Sally. However, possession does not amount to ownership, and in the circumstances in the case at bar, occupation is not evidence of possession.

[98] The essence of Abigail's position is that Sally, by her conduct, ought to be taken as having acquiesced in Alan's claim to legal and beneficial title to Merridale. Acquiescence in and of itself, and especially in family circumstances, evidences nothing. In any event, the common law doctrine of prescription, and the doctrine of the lost modern grant are abolished by reason of s. 24 of the ***Land Title Act***, R.S.B.C. 1996, c. 250 (the "***LTA***").

[99] I find that Merridale is held by Alan in trust for the Sally Gilson Trust pursuant to a resulting trust. In view of this finding, I order that Alan transfer title to the Merridale property to the Sally Gilson Trust or its nominee forthwith. In the event that he fails to comply with this order within 30 days of the entry of this order, I direct the Registrar of this Court to execute such documents that are necessary to have Merridale property transferred into the name of the Sally Gilson Trust or its nominee.

2008 BCSC 1159 (CanLII)

(b) Unjust Enrichment and Constructive Trust

(i) The Law

[100] Constructive trusts are different from resulting trusts. The distinction was articulated by Dickson J. in ***Rathwell*** at 453-454:

> The difficulty experienced in the cases is the situation where no agreement or common intention is evidenced, and the contribution of the spouse without title can be characterized as performance of the usual duties growing out of matrimony. There are many examples of this. ... Some of these situations may be analyzed as agreement or common intention situations. Such intention is generally presumed from a financial contribution. The doctrine of resulting trust applies. In others a common intention is clearly lacking and cannot be presumed. The doctrine of resulting trust then cannot apply. It is here that we must turn to the doctrine of constructive trust.
>
> ... The hallmark of the constructive trust is that it is imposed irrespective of intention; indeed, it is imposed quite against the wishes of the constructive trustee.

[101] Thus, if I am incorrect in finding that Sally intended that the money she gave Alan be used to buy Merridale to hold in trust for the Sally Gilson Trust, I must decide nonetheless if a constructive trust exists.

[102] The law of unjust enrichment and constructive trusts in a family context was discussed by the Supreme Court of Canada in ***Peter v. Beblow***, [1993] 1 S.C.R. 980, 101 D.L.R. (4th) 621 [***Beblow*** cited to S.C.R.]. For a constructive trust to arise in a family law context the same principles apply as in the commercial context. Madam Justice McLachlin set out the elements of unjust enrichment in ***Beblow*** at 987:

1. an enrichment;
2. a corresponding deprivation; and
3. the absence of a juristic reason for the enrichment.

[103] The remedy may be an award of monetary damages, and if so, the "value received" approach should generally be employed to calculate the monetary award: ***Beblow*** at 999.

[104] In cases where a monetary award is deemed inadequate, and where there is a link between the contribution and property in which the constructive trust is claimed, the remedy may be to impose a constructive trust and thereby a portion of the profits or equity in the property: ***Beblow*** at 997. In ***Beblow***, McLachlin J. at 987-988 described when a monetary award will be insufficient such that a constructive trust will be awarded:

> "Unjust enrichment" in equity permitted a number of remedies, depending on the circumstances. One was a payment for services rendered on the basis of *quantum meruit* or *quantum valebat*. Another equitable remedy, available traditionally where one person was possessed of legal title to property in which another had an interest, was the constructive trust. While the first remedy to be considered was a monetary award, the Canadian jurisprudence recognized that in

2008 BCSC 1159 (CanLII)

some cases it might be insufficient. This may occur, to quote La Forest J. in ***Lac Minerals Ltd. v. International Corona Resources Ltd***., [1989] 2 S.C.R. 574, at p. 678, "if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property." Or to quote Dickson J., as he then was, in ***Pettkus v. Becker*** , [1980] 2 S.C.R. 834, at p. 852, where there is a "contribution [to the property] sufficiently substantial and direct as to entitle [the plaintiff] to a portion of the profits realized upon sale of [the property]." In other words, the remedy of constructive trust arises, where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed.

2008 BCSC 1159 (CanLII)

[105] Madam Justice McLachlin went on to explain in ***Beblow*** at 995-996:

In Canada the concept of the constructive trust has been used as a vehicle for compensating for unjust enrichment in appropriate cases. The constructive trust, based on analogy to the formal trust of traditional equity, is a proprietary concept. The plaintiff is found to have an interest in the property. A finding that a plaintiff is entitled to a remedy for unjust enrichment does not imply that there is a constructive trust. As I wrote in ***Rawluk***, *supra*, for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution. This is the notion underlying the constructive trust in ***Pettkus v. Becker***, supra, and ***Sorochan v. Sorochan***, *supra*, and ***Sorochan v. Sorochan,*** *supra,* as I understand those cases. It was also affirmed by La Forest J. in ***Lac Minerals***, *supra*.

[106] And at 997:

For these reasons, I hold the view that in order for a constructive trust to be found, in a family case as in other cases, monetary compensation must be inadequate and there must be a link between the services rendered and the property in which the trust is claimed. Having said this, I echo the comments of Cory J. at p. 1023 that the courts should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases.

[107] In ***Beblow***, the Supreme Court of Canada upheld the trial judge's finding that a monetary award for unjust enrichment would be inadequate on the grounds that the enriched spouse had few resources and so compensation would not be paid and the deprived spouse had made a special contribution to the property.

2008 BCSC 1159 (CanLII)

[108] If a constructive trust is found, the court must decide the extent of the constructive trust. Madam Justice McLachlin in ***Bablow***, for the majority, at 998-999 decided that the extent of the constructive trust should be determined by the value survived approach:

> From the point of view of doctrine, "[t]he extent of the interest must be proportionate to the contribution" to the property: ***Pettkus v. Becker***, *supra*, at p. 852. How is the contribution to the property to be determined? One starts, of necessity, by defining the property. One goes on to determine what portion of that property is attributable to the claimant's efforts. This is the "value survived" approach. For a monetary award, the "value received" approach is appropriate; the value conferred on the property is irrelevant. But where the claim is for an interest in the property one must of necessity, it seems to me, determine what portion of the value of the property claimed is attributable to the claimant's services.
>
> I note, as does my colleague, that there may also be practical reasons for favouring a "value survived" approach. Cory J., alludes to the practical problems with balancing benefits and detriments as required by the "value received" approach, leading some to question whether it is the least attractive approach in most family property cases (see ***Davidson v. Worthing*** (1986), 6 R.F.L. (3d) 113, McEachern C.J.S.C.; Hovius and Youdan, *supra,* at pp. 136 *et seq.*). Moreover, a "value survived" approach arguably accords best with the expectations of most parties; it is more likely that a couple expects to share in the wealth generated from their partnership, rather than to receive compensation for the services performed during the relationship.
>
> To summarize, it seems to me that the first step in determining the proper remedy for unjust enrichment is to determine whether a monetary award is insufficient and whether the nexus between the contribution and the property described in ***Pettkus v. Becker*** has been made out. If these questions are answered in the affirmative the

> plaintiff is entitled to the proprietary remedy of constructive trust. In looking at whether a monetary award is insufficient the court may take into account the probability of the award's being paid as well as the special interest in the property acquired by the contributions: per La Forest J. in ***Lac Minerals***. The value of that trust is to be determined on the basis of the actual value of the matrimonial property – the "value survived" approach. It reflects the court's best estimate of what is fair having regard to the contribution which the claimant's services have made to the value surviving, bearing in mind the practical difficulty of calculating with mathematical precision the value of particular contributions to the family property.

[109] In ***Massincaud***, Ballance J. reviewed the law that governs constructive trusts. She stated at paras. 37-39:

> One spouse may be enriched by the other in a variety of ways. In ***Peter v. Beblow***, Mr. Beblow was found to have been enriched by the extensive unpaid homemaker and child rearing duties performed by Ms. Peter. In ***Crick v. Ludwig*** (1994), 95 B.C.L.R. (2d) 72, 9 R.F.L. (4th) 114 (C.A.), leave to appeal to S.C.C. refused, [1994] S.C.C.A. No. 399, the Court of Appeal found that Mr. Ludwig was enriched by Ms. Crick's decorating assistance and overseeing the renovation of the subject property; the housekeeping and entertaining services she supplied; and the domestic services she contributed when Mr. Ludwig became ill. In ***Hubar v. Jobling*** (2000), 82 B.C.L.R. (3d) 341, 10 R.F.L. (5th) 295, 2000 BCCA 661, the Court of Appeal concluded that Mr. Jobling had been enriched by Ms. Hubar's direct financial contribution of $5,000 toward the subject property and, to a lesser extent, by her gardening and household activities. The fact that Mr. Jobling also contributed to housekeeping and outdoor work on the property was found not to detract from Ms. Hubar's contributions.
>
> Although the contributions giving rise to enrichment may come in many different forms, in order to give rise to a remedy in constructive trust, the contribution must not be insignificant…

[110] In ***Kauwell***, Shabbits J. discussed when a court will find deprivation and held at para. 97 that:

> If a deprivation is not presumed from a finding of enrichment, in order to determine whether a deprivation exists the court must look at direct

2008 BCSC 1159 (CanLII)

> and indirect contributions of the claimant and the effect that those contributions have had on her career, training, opportunities to earn income, and whether she has forgone remuneration for the services provided.

2008 BCSC 1159 (CanLII)

[111] The court will consider a number of factors when determining whether there is an absence of juristic reason for the enrichment. In addition to looking at whether there is a contractual, statutory or other legal obligation for the enrichment, the court will also consider whether the enrichment is "unjust" and whether the expectation to share in the property is legitimate: ***Massincaud*** at para. 48.

[112] The claimant seeking the imposition of a constructive trust in respect of property as a remedy for unjust enrichment must generally show a connection between the contributions and the acquisition, accumulation, or preservation of that asset: ***Beblow*** at 997; ***Pettkus*** at 849; ***Westergard*** at para. 33; and ***Carmichael*** at paras. 83-85.

[113] It is also important to note that the courts also tend to analyze whether the contributions were offset by benefits received during the relationship. This approach was approved by the Court of Appeal in ***Toth***. Although this approach is sometimes followed in evaluating whether there has been an enrichment or deprivation, it is also used under the rubric of juristic reason: see ***Massincaud*** at para. 44.

(ii) Application of the Law of Constructive Trusts to the Facts of this Case

An Enrichment

[114] The first question to consider is whether Abigail and Alan have been enriched as a result of the monies advanced by Sally.

[115] It is clear from the evidence that both Abigail and Alan were enriched as a result of Sally's contributions. All of the money used to purchase Merridale came from Sally. Abigail and Alan lived at Merridale rent free. They did not make any payments to Sally to return to money she sent to purchase the property.

[116] Sally also contributed significant amounts of money to improve Merridale. It is not clear what proportion of money spent on the improvements to Merridale came from Sally versus Alan and Abigail. The money Sally sent for Merridale mixed with Alan and Abigail's other sources of funds (i.e. the mortgages, Abigail's salary and any income from Alan's many business ventures) and was used to pay for the improvments to Merridale. But it is clear that Sally made a significant contribution to the improvements at Merridale and those improvements have also helped Alan and Abigail's business, Glen Abby Farms.

[117] It is also important to note that Sally's money, and Alan and Abigail's rent-free living at Merridale, allowed them to save money they would have otherwise spent. The savings allowed Alan and Abigail to maintain their lifestyle, which included travel, the purchase of expensive equipment and luxury personal items.

[118] I find that Alan and Abigail were enriched as a result of Sally's money to purchase and improve Merridale.

Deprivation

[119] Sally advanced significant sums to Alan and has received no benefits other than payments of approximately $1,000.00 per month on one loan only, and that

2008 BCSC 1159 (CanLII)

being for less than a year and only for the $150,000.00 USD loan from July 2002. Sally advanced $649,324.50 CAD for the purchase and improvements on Merridale. She has not received any of that money back and she has been denied ownership of Merridale.

[120] There was evidence submitted as to Sally's net worth and income. Sally failed to disclose all of her assets and so it is impossible to know exactly how much the Sally Gilson Trust is worth. However, the fact that Sally Gilson is a wealthy woman capable of absorbing the deprivation created by sending Alan money is irrelevant. The question is whether Sally was deprived and it is clear that she was.

Juristic Reason

[121] I also find that there was no juristic reason that would oblige Sally to have advanced those funds that provide the basis for Abigail's continuing benefit at the expense of Sally's continuing deprivation. Sally was never obliged, nor is she now, to maintain Abigail and Alan's lifestyle and to fund the terms of the separation agreement. Sally received no benefit from those advances or the purchases made with them.

[122] There was no contractual, legal or equitable obligation upon Sally to have provided monies for Abigail and Alan's benefit. There may have been a moral obligation on Sally to support her son while he tried to create a successful business, but that is not a juristic reason.

2008 BCSC 1159 (CanLII)

[123] I agree with the submission of counsel for Sally and the Sally Gilson Trust that it is a gross exaggeration to say that if the Court finds in favour of Sally and determines that Merridale is held for her benefit that Abigail is left "emerging from her eight year marriage with nothing but her RRSP, some furniture, a leased car and a pair of donkeys", as she submitted in her opening.

2008 BCSC 1159 (CanLII)

[124] She leaves having had the benefit of extensive travel and eight years of "the good life", and the opportunity to pursue business ventures with Alan, without any risk to her, which could have resulted in significant financial benefit to her, whereas in all likelihood, Sally will lose everything she advanced unless the Court provides her with a remedy.

Remedy

[125] I find that monetary compensation is inadequate in this case to remedy Sally's deprivation and Abigail and Alan's unjust enrichment. Having Alan and Abigail repay the money Sally advanced is not an adequate remedy because Sally sent the money thinking she was gaining an interest in property, which she could have used as a family refuge, and, like in ***Beblow***, given the financial circumstances of Abigail and Alan, it is unlikely that Sally would receive the money.

[126] In my view, the most appropriate remedy, and the only practical remedy available in the circumstances, is to declare that Merridale is held by way of constructive trust for the Sally Gilson Trust.

[127] I must quantify the constructive trust. I find that Sally contributed the entire purchase price. and the majority if not all of the funds, for the improvements to the property. I find that Sally is entitled to 100% of Merridale.

(c) Was the Money Sally Advanced to Alan a Loan?

[128] In ***Berdette***, the Ontario Court of Appeal stated that a finding that a transfer of money or property is a gift defeats any possibility of a resulting trust or a constructive trust. Mr. Justice Galligan stated at 202:

> The second and third grounds of appeal [resulting trust and constructive trust] can be dealt with together and briefly. Counsel for the appellant contended that on the facts of this case the respondent's half-interest in the two properties are held by him in trust for the appellant under either a resulting trust or a constructive trust. Granger J. concluded that the finding of gifts defeated any claim based upon either resulting or constructive trusts. I agree.
>
> In ***Cowan v. Cowan*** (1988), 13 R.F.L. (3d) 381, 9 A.C.W.S. (3d) 366, this court held that a valid gift defeats a claim based on either a resulting trust or a constructive trust. In ***Kirikos v. Kirikos***, released June 3, 1988, Walsh J. stated, at p. 7, that "an absolute and irrevocable gift defeats both a resulting trust and a constructive trust". That decision was affirmed by this court in a decision released January 29, 1991 [summarized 25 A.C.W.S. (3d) 119].
>
> Therefore, it is now clear that a gift defeats a claim based on either a resulting trust or a constructive trust. Granger J. correctly decided these issues and the grounds of appeal based upon a claim of trust must therefore fail.

[129] A finding that the advances were loans would equally defeat a claim based on resulting trust or constructive trust.

[130] In a recent case, ***Krupa***, the issue was whether monies advanced by parents to their adult child were a loan or a gift. Madam Justice Ross considered the current

2008 BCSC 1159 (CanLII)

state of the Law of British Columbia dealing with characterizing advances made by parent to their children at paras 76-79:

> The leading case in British Columbia dealing with the issue of characterization of advances made by parents to their children has been ***Wiens v. Wiens*** (1991), 31 R.F.L (3d) 265. In that decision, Harvey J. stated that in the absence of clear evidence confirming the loan and the manner in which repayment is to be made, advances from parents are to be construed as gifts.
>
> In ***Locke v. Locke***, 2000 BCSC 1300, Wilson J. summarized the factors to be considered by the courts in the characterization of such advances at para. 20 as follows:
>
> > 1. whether there were any contemporaneous documents evidencing a loan;
> >
> > 2. whether the manner for repayment is specified;
> >
> > 3. whether there is security held for the loan;
> >
> > 4. whether there are advances to one child and not others, or advances of unequal amounts to various children;
> >
> > 5. whether there has been any demand for payment before the separation of the parties;
> >
> > 6. whether there has been any partial repayment; and
> >
> > 7. whether there was any expectation, or likelihood, of repayment.
>
> In ***Pecore v. Pecore***, 2007 SCC 17, [2007] 1 S.C.R. 795, the court concluded that the presumption of advancement with respect to gratuitous transfers from parent to child is limited to transfers involving minor children. There is a presumption of resulting trust with respect to gratuitous transfers from a parent to an adult child. That presumption can be rebutted by evidence that the transfer was a gift…
>
> …
>
> In ***D.L.M. v. J.A.M.***, 2008 NBCA 2, the New Brunswick Court of Appeal considered ***Pecore*** and then applied the ***Locke*** factors in considering whether transfers to an adult child were a loan or a gift. I conclude that the factors identified in ***Locke*** continue to be relevant matters to consider in ascertaining intent.

2008 BCSC 1159 (CanLII)

[131] The case law shows that it is not enough that both the parent and the child claim an advance to be a loan. Abigail cited numerous cases where the parent now claims it was a loan or resulting trust, the cases illustrate that while in such a situation it can be said there might be a moral duty on the child to repay the advance, it is the ***Locke*** factors that are determinative of whether there is a legal duty to repay.

[132] Abigail argues that the ***Locke*** factors are made out and the money Sally sent to Alan to purchase Merridale was a loan. She argues that it was a loan and not a gratuitous transfer and thus there is no resulting trust. To emphasize his submissions, counsel for Abigail painstakingly took me through the ***Locke*** factors with respect to all of the advances made by Sally to Alan.

[133] I find as a fact, that all of the advances made by Sally to Alan, except the purchase price for Merridale, were loans and not gifts.

[134] There is clearly a difference between the money Sally advanced to purchase the condo in Edmonton, for example, compared with the money sent to purchase and improve Merridale. For the Edmonton loan there is a loan agreement, Alan paid back some of the money, and it was referred to as a loan.

[135] On the other hand, for Merridale there are no such documents and Alan has never paid any money or arranged to pay any money to Sally for the property. The only evidence to support the assertion that the monies advanced for the purchase were to be a loan comes from the confusing facts of two letters Sally wrote; (i) a letter to Alan dated June 18, 2006, and (ii) a letter to Alan and Michael dated June

2008 BCSC 1159 (CanLII)

28, 2006. In these letters Sally asks Alan to provide her with information on loans that she has given him for the purposes of managing the Sally Gilson Trust. In the second letter, Sally references a loan for "the Farm", which is likely Merridale. By themselves, these letters are inadequate to prove that the money sent to purchase and improve Merridale was a loan.

2008 BCSC 1159 (CanLII)

[136] Since I find that the money sent to purchase and improve Merridale was not a loan, my findings that Sally is entitled to Merridale by operation of a resulting trust or, in the alternative, a constructive trust stand.

[137] I find that Alan is liable to repay all of the loans he has received from Sally and the Sally Gilson Trust. These loans were from Sally to Alan alone. Alan has not submitted that these are family debts under the ***FRA***. Therefore, Abigail is not liable for the loans.

(d) Does the *Land Title Act* or the *Family Relations Act* Operate to give Abigail an Interest in Merridale?

[138] Abigail argues that her separation agreement with Alan was a valid separation agreement and, therefore, when the agreement was signed is a triggering event under s. 56 of the ***FRA***: see ***Clark***. At the triggering point, an undivided one-half interest in Merridale vested in her, since she claims that Merridale is a family asset. Therefore, Abigail argues that when Sally lodged a caveat on Merridale's title, Abigail had already acquired an interest in Merridale.

[139] Abigail argued that if Sally were found to be an unsecured creditor of Alan, she cannot register her judgment against Merridale because Abigail has priority.

[140] I instead agree with the submissions of Sally and the Sally Gilson Trust on this issue. The priorities as between Sally and Abigail are not determined according to the ***FRA***, but rather the ***LTA****.* When Sally filed a caveat and a Certificate of Pending Litigation on Merridale's title, she placed Abigail on notice that she had a pre-existing claim to an interest in Merridale. The effect was that Abigail could no longer claim to be a bona fide purchaser for value without notice.

[141] Priority for caveats and Certificates of Pending Litigation are governed by s. 31 of the ***LTA***:

> If a caveat has been lodged or a certificate of pending litigation has been registered against the title to land,
>
> (a) the caveator or plaintiff, if that person's claim is subsequently established by a judgment or order or admitted by an instrument duly executed and produced, is entitled to claim priority for that person's application for registration of the title or charge so claimed over a title, charge or claim, the application for registration, deposit or filing of which is made after the date of the lodging of the caveat or registration of the certificate of pending litigation, and
>
> (b) if proof of service of notice of claim to priority on the subsequent applicant is provided to the registrar before registration is effected, the registration of the title or charge claimed by the caveator or plaintiff relates back to and takes effect from the time of the lodging of the caveat or registration of the certificate of pending litigation, and that time, as well as the time of the application for registration of the title or charge so claimed, must be endorsed on the register.

[142] I have ordered that the Sally Gilson Trust or its nominee be named the registered owner of Merridale, so Sally's claim has been established and under

2008 BCSC 1159 (CanLII)

s. 31(a) of the ***LTA*** Sally and the Sally Gilson Trust can claim priority for registration of the title to Merridale in its name.

2. Is Alan's Interest in the Sally Gilson Trust a Family Asset?

[143] The next issue is whether Alan's interest in the Sally Gilson Trust is a family asset under the ***FRA***.

[144] Under s. 56 of the ***FRA***, each spouse is entitled to an undivided half interest of each family asset. Under s. 58(3)(a) of the ***FRA***, an interest in a trust can be considered a family asset:

> 58(1) Subject to section 59, this section defines family asset for the purposes of this Act.
>
> …
>
> (3) Without restricting subsection (2), the definition of family asset includes the following:
>
> (a) if a corporation or trust owns property that would be a family asset if owned by a spouse,
>
> (i) a share in the corporation, or
>
> (ii) an interest in the trust
>
> owned by the spouse;

[145] The apportionment of family assets is governed by s. 65 of the ***FRA***:

> 65(1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to
>
> (a) the duration of the marriage,

2008 BCSC 1159 (CanLII)

(b) the duration of the period during which the spouses have lived separate and apart,

(c) the date when property was acquired or disposed of,

(d) the extent to which property was acquired by one spouse through inheritance or gift,

(e) the needs of each spouse to become or remain economically independent and self sufficient, or

(f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

(2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

(3) If the division of a pension under Part 6 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.

[146] In ***Whittall***, Madam Justice Prowse (as she was then) found at 212 that for the purposes of what is now s. 58(3)(a)(ii), it is unnecessary to distinguish between vested and contingent interests in a trust for the purpose of determining if it is a family asset.

[147] In ***M.(H.R.) v. B.(D.M.)***, 2004 BCSC 147, 28 B.C.L.R. (4th) 104, the husband had a contingent interest in a family trust, which was discretionary, much like Alan's interest in the Sally Gilson Trust. Mr. Justice Bauman (as he was then) considered the law on contingent interests in matrimonial property division at paras. 120-124:

2008 BCSC 1159 (CanLII)

Evetts v. Evetts (1996), 85 B.C.A.C. 19 (C.A.) provides guidance on this issue.

That case did not concern a contingent interest in a trust, it dealt with income, capital appreciation and capital funds in a holding company owned by the husband.

Justice Lambert described the jurisprudential backdrop to the issue before the court (at p. 25):

> There are many decided cases on the question of whether a capital asset can be regarded as a family asset under s. 45(2) of the ***Family Relations Act***, as "Property … ordinarily used by a spouse… for a family purpose", where some or all of the income derived from the capital asset and, in some cases, part of the capital itself are used to meet household or other family expenses. The cases turn on what constitutes "ordinary use" in the circumstances of each case. Some cases decide that the capital asset is a family asset and some decide that it is not. But the cases do not seem to me to be inconsistent with each other; rather they rest on findings of fact about the nature of the use to which the capital asset was put and about whether that use was, in the particular circumstances, an ordinary use in that family for a family purpose.

Justice Lambert then provides this helpful summary of the cases (at p. 25):

> I think it would be unwise to try to establish any rules for the determination of whether a capital asset will be considered to be a family asset. However one or two guidelines are readily revealed from the cases. The fact that income from a capital asset is used occasionally for a family purpose does not of itself make the capital asset a family asset (***Stuart v. Stuart***). The fact that capital from the asset is used from time to time, when required, for a family purpose may be an indication that the asset is a family asset (***Brainerd v. Brainerd***). But the distinction between income being used for a family purpose and capital being used for a family purpose is not, in itself, determinative (***Starko v. Starko***). So the fact that only income is used for family purposes does not necessarily mean that the capital asset itself is not used for a family purpose. The use of the asset to provide financial security and protection against erosion of income or other family misadventure in the future may constitute a present ordinary use for a family purpose (***Tezcan v. Tezcan***; ***Folk v. Folk***). The fact that the words

2008 BCSC 1159 (CanLII)

> "ordinarily used … for a family purpose" are the governing words in the statute means that the use pattern must be examined in each case to determine whether, in the ordinary course, the present use commitment to meet a present or future need includes a use for a family purpose. Ordinary use for a family purpose is not inconsistent with ordinary use for other purposes.

For the purposes of the analysis in the case before me, I stress the observation: "The use of the asset to provide financial security and protection against erosion of income or other family misadventure in the future may constitute a present ordinary use for a family purpose …."

2008 BCSC 1159 (CanLII)

[148] Mr. Justice Bauman cited numerous cases on whether a contingent interest in a trust is a family asset and listed the following principles at para. 146:

I distil these principles in summary form from the cases:

- a contingent interest in a discretionary trust can be a "family asset";
- in determining whether the trust was ordinarily used for a family purpose, that is "in the customary mode of life of the family concerned," the fact that it is income that is used, not capital, is a factor to be considered, but it is not determinative;
- presently holding assets, or an interest therein (whether contingent or vested), to secure the family's future, to provide financial security for the family, is a family purpose provided there is evidence to support such a conclusion beyond merely talk or thought about such a possibility.

[149] In ***M.(H.R.)***, Mr. Justice Bauman decided that there was evidence that the parties not only talked about how the husband's family trust would provide them with financial security in the future, the husband also took risks in his business ventures that can only be explained by the fact that he felt he had a safety net for his future. Thus, the family trust was declared a family asset.

[150] In ***Grove***, Coultas J. dealt with a case similar to the case at bar. In that case, Mr. Grove's parents had established a family trust. Mr. Groves would receive his interest in that trust upon the death of both his parents; it was a discretionary trust since the trustees could vary Mr. Grove's interest in the trust at any time. Over the course of their marriage, Mr. and Mrs. Grove had borrowed money from the trust for family purposes and had not repaid the loans. The loans were used to pay down the mortgage on the family home, which freed up money to be used for family purposes. Mr. Justice Coultas found that Mr. Grove's contingent interest in the family trust was intended by the parties to form the basis of their future joint financial security and is a family asset under the ***FRA***: ***Grove*** at paras. 72-74.

[151] In ***Lindholm***, the husband had an interest in a family trust and shares in family corporations. Madam Justice Levine considered when she could find that inherited property was used for future financial security such that it is a family asset at paras. 65-69:

> The "use" of property for the future financial security of the family has been considered in a number of cases in finding that property is a family asset: ***Tezcan v. Tezcan*** (1990), 44 B.C.L.R. (2d) 343 (B.C. S.C.); ***Rettie; Ogilvie v. Ogilvie*** (1995), 17 R.F.L. (4th) 16 (B.C. C.A.); ***Wilder***; ***Hefti***.
>
> In ***Hefti***, Finch J.A. stated at para. 32:
>
>> In my view, in the absence of any finding by the learned trial judge as to the use of these assets for future financial security, and in the absence of persuasive evidence that there was no such mutual intention, I would hold that the inherited accounts are family assets because they must be taken to have been held, as a matter of natural and probable inference, for the purposes of providing both parties with financial security in their later years.

2008 BCSC 1159 (CanLII)

> McEachern C.J.B.C., with whom Cumming J.A. agreed, concurred with Finch J.A. in the result, but disagreed that the inherited property in that case was ordinarily used for a family purpose. He said at para. 41:
>
> > As Mr. Justice Finch notes, the trial judge found specifically against these assets being family assets, and I am not satisfied that the authorities cited by Mr. Justice Finch finally establish that inherited wealth becomes a family asset in the circumstances described in this case.
>
> I interpret McEachern C.J.B.C.'s reasons as a rejection of the "natural and probable inference" drawn by Finch J.A., in the absence of evidence of intention, that inherited property is held for the future financial security of both parties, but not as a rejection of such a finding where there is evidence to support it. There is such evidence in this case.
>
> Taking into account all of the factors with respect to the "use" of Mr. Lindholm's interests in Lindholm Land, I find that Mr. Lindholm's interests in Lindholm Land were ordinarily used for a family purpose and are family assets.

[152] Madam Justice Levine went on to find at para. 72:

> I find that each of these assets either gave rise to income and/or is held for the future financial security of the family and is a family asset. Ms. Lindholm's interest in each asset is, of course, subject to all of the limitations and contingencies affecting Mr. Lindholm's interest.

[153] Counsel for Abigail point out that she has lived on the Merridale property for nearly 5 years. Alan lived on the Merridale Property between 2003 and June 2006. Both Alan and Abigail contributed considerable sums to the maintenance and improvement of the Merridale property. They also collected the rent, paid the property taxes and paid the insurance.

[154] Counsel submits that during this time Sally, both in her regular capacity and in her capacity as trustee of the Sally Gilson Trust, was completely uninvolved with the management of the Merridale property. When notified in 2006 by Alan that he

2008 BCSC 1159 (CanLII)

intended to put a mortgage on the property, she did not object. I have already indicated that I accept that she did not understand that reference in the letter. It was her view, based on the system in the United States, that Alan would not have been able to register a "trust deed" or mortgage against the property.

2008 BCSC 1159 (CanLII)

[155] At any rate, counsel further submits that Sally never claimed the farm losses on her taxes, though she would have been entitled to if she owned the Merridale property. She never asked for the segregated account to claim real estate investment losses. Abigail claimed those farm losses. Counsel for Abigail submits that Sally never spent a single night at the farm; she did not even visit between 2002 and 2006. Counsel for Abigail submits that if the Merridale property was held in trust by Alan for the Sally Gilson Trust during this period, then the behaviour of the parties indicates that the Merridale portion of Alan's interest in the Sally Gilson trust was not contingent, but in fact was registered in his name, and this interest was ordinarily used for a family purpose by Abigail and Alan.

[156] If the Merridale property is held in a resulting trust for the Sally Gilson trust, Abigail asks that Alan's interest in the Sally Gilson Trust be declared a family asset. Sally refers to Alan as a beneficiary of the trust in a number of documents, and has stated that she plans to split everything evenly between her sons. She has produced a handwritten codicil that supposedly disinherits Alan. However, it is unclear if such an instrument would even be valid under California law, or if they have an equivalent of our ***Wills Variation Act***, R.S.B.C. 1996, c. 490. In any case, there is nothing to prevent Sally from tearing up the codicil after the end of this litigation, something that seems entirely possible given the fact that it appears that

Sally has continued to give money to Alan since the litigation started. Sally can change beneficiaries at any time.

[157] Counsel for Abigail submits that it is difficult to ascertain the value of Alan's interest in the Sally Gilson Trust due to the non-disclosure by Sally Gilson of documents she was ordered to produce by Mr. Justice Pitfield on April 3, 2008, and by Mr. Justice Grauer on May 7, 2008. However, in her own letter written June 13, 2001, Sally indicates that the trust has a value of approximately $15 million. In her testimony, Sally Gilson estimated a trust value of approximately $4 million. Considering the mortgages, Merridale has total equity of approximately $400,000.00 Under the circumstances, the plaintiff asks that the Merridale property be reapportioned under s. 65 of the ***FRA*** entirely to her, and that the remainder of Alan's interest in the Sally Gilson Trust be reapportioned entirely to him, and that his mother can deduct whatever money he owes her from his share of the Sally Gilson Trust.

[158] From a review of the above authorities, I find that Alan's contingent interest in the Sally Gilson Trust is a family asset for a number of reasons. Alan has received loans from the Sally Gilson Trust, which have been used for family purposes, such as buying a matrimonial home in Edmonton. Alan and Abigail lived at Merridale, a Sally Gilson Trust asset, from August 2003 to when they separated and so they clearly used a trust asset for a family purpose. Also, Alan and Abigail took business risks, which they only would have done knowing that the Sally Gilson Trust was there as a safety net.

2008 BCSC 1159 (CanLII)

[159] At present, Alan's share in the Sally Gilson Trust is nil because Sally has disinherited him. In the event that Alan again gets an interest in the Sally Gilson Trust, I find that he would be obligated to live up to the terms of the separation agreement that he signed with Abigail. Alan would be obligated to pay to Abigail the monetary value of the present equity in Merridale plus interest from the date of entry of this judgment and Abigail would have to pay to the Alan the remaining sum of $40,000.00 (after deducting the $10,000.00 loan to Alan after their separation) with interest from the date of entry of this judgment.

[160] In the interest of fairness, under s. 65 of the ***FRA*** I find that Alan and Abigail's separation agreement must be altered since Merridale is not a family asset. I find that Alan is liable for the $400,000.00 mortgage from which he kept the funds, not Abigail. As I said above, until Alan receives a share in the Sally Gilson Trust, Abigail does not have to pay Alan the agreed $50,000.00 equalization payment. Further, both Abigail and Alan are equally liable for the TD Mortgage.

CONCLUSION

[161] After reviewing the massive list of legal authorities which were drawn to my attention and applying them to the facts as found by me, I make the following orders:

i) I declare that the lands described in title PID 024-091-570, that part of Section 6, range 7, Shawnigan District, except the east 75 acres thereof and except part in Plan 39699, as shown on Plan VIP 66806 (hereinafter the "Lands"), now standing in the name of Alan, are held by him in trust for the Sally Gilson Trust absolutely.

ii) I order that Alan execute such documents as may be necessary or required to transfer the Lands to the Sally Gilson Trust or its nominee forthwith. In the event that he fails to comply with this

2008 BCSC 1159 (CanLII)

order within 30 days of the entry of this order, I direct the Registrar of this Court to execute such documents that are necessary to have Merridale property transferred into the name of the Sally Gilson Trust or its nominee.

iii) Judgment against Abigail and Alan in the amount required to payout and discharge that mortgage granted to the Toronto-Dominion Bank, and registered under No. EW 31868 at the Victoria Land Title office against title PID 024-091-570, that part of Section 6, range 7, Shawnigan District, except the east 75 acres thereof and except part in Plan 39699, as shown on Plan VIP 66806 (hereinafter the "Lands).

iv) Abigail's Certificate of Pending Litigation with respect to the Lands be removed from the Lands forthwith.

v) Judgment against Alan in the amount required to payout and discharge that mortgage granted to the Medallion Investment Corporation, and registered under No. FA 3218 at the Victoria Land Title Office against the lands.

vi) I declare that Alan's interest in the Sally Gilson Trust is a family asset. At present that share is nil because Sally has disinherited him. In the event that he ever gets an interest in that trust I find that he would be obligated to live up to the terms of the separation agreement which he signed with Abigail. Alan would be obligated to pay to Abigail the monetary value of the present equity in the Lands plus interest from the date of entry of this judgment and Abigail would have to pay to the Allan the remaining sum of $40,000.00 (after deducting the $10,000.00 loan to Alan after their separation) with interest from the date of entry of this judgment.

vii) I order that Alan is liable to repay to the Sally Gilson Trust his debt for the loans he has taken. The terms of repayment are to be determined in accordance with the loan agreements between Alan and the Sally Gilson Trust.

viii) Sally and the Sally Gilson Trust are entitled to their costs in these actions.

2008 BCSC 1159 (CanLII)

[162] In closing I would like to say that I would be remiss if I did not take this opportunity to profusely thank all counsel in this matter for their very helpful submissions. Without their help it would have taken me months to write this judgment.

"Romilly J."

2008 BCSC 1159 (CanLII)