IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Chinn v. Hanrieder,***
2009 BCSC 635

Date: 20090512
Docket: S13195
Registry: Chilliwack

2009 BCSC 635 (CanLII)

Between:

Bette Chinn and Dennis Hanrieder

Plaintiffs

And

Ingrid Hedwig Hanrieder

Defendant

And

Roderick E. Mont and Allin, Anderson, Mont & Walker and Heath and Company

Third Parties

Before: The Honourable Madam Justice Loo

Reasons for Judgment

Counsel for Plaintiffs	G. J. May
Counsel for Defendant	J. A. S. Legh
Counsel for Third Parties Mr. Mont and Allin, Anderson, Mont & Walker	A. A. MacDonald
Counsel for Third Party Heath and Company	C. Bolan
Date and Place of Trial:	October 27–31 and November 3, 2008 New Westminster, B.C. December 10–11, 2008 Vancouver, B.C.

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Introduction

[1] The plaintiffs Bette Chinn and Dennis Hanrieder are siblings and the only children of Hugo Hanrieder and his first wife. The defendant Ingrid Hanrieder (at times "Mrs. Hanrieder") is the widow and second wife of Hugo Hanrieder (at trial, the deceased was referred to as Hugo). Because of the surname that is shared by the parties and the deceased, I will at times use given names, but not out of disrespect.

[2] In May 1993 Hugo and Ingrid Hanrieder purchased a condominium in Nanaimo and instructed the law firm Heath and Company to register their interest as joint tenants. Hugo died on December 8, 1997 at the age of 75. Ingrid Hanrieder was then 61 years old. She went to a notary to transfer title to the condominium and learned that title was not in their joint names.

[3] Mrs. Hanrieder spoke to Peter Giovando, a partner at Heath and Company. He recommended that she consult another law firm and agreed that his firm would pay for correcting the title error. Mrs. Hanrieder then dealt with Roderick Mont, a lawyer at the law firm now known as Allin, Anderson, Mont & Walker.

[4] At the time of his death, Hugo owned a number of assets, including the condominium where he and his wife lived. He also held an interest in underground mineral rights in Saskatchewan. He wanted the mineral rights to go to his children, but was told by his lawyer who prepared his Will that he could not bequeath the mineral rights in the Will.

[5] This action is about the mineral rights and the condominium.

[6] The plaintiffs Bette Chinn and Dennis Hanrieder claim that:

(1) their father Hugo created a secret trust: Hugo and Ingrid Hanrieder agreed that on Hugo's death she would hold the mineral rights in trust for his children; and further or alternatively,

(2) Ingrid Hanrieder breached an agreement made on May 29, 1998 that she would transfer the mineral rights to Bette Chinn and Dennis Hanrieder in return for them delivering executed releases.

[7] The issues in my view for determination are:

(1) Does Ingrid Hanrieder hold the mineral rights in trust for Bette Chinn and Dennis Hanrieder?

(2) Did Ingrid Hanrieder breach an agreement made on May 29, 1998 that she would transfer the mineral rights to the plaintiffs Bette Chinn and Dennis Hanrieder in return for them delivering executed releases?

[8] Mrs. Hanrieder denies any such agreement and considers the mineral rights to be hers. She has brought third party proceedings against Roderick Mont and the law firms Allin, Anderson, Mont & Walker, and Heath and Company.

[9] If I conclude that Mrs. Hanrieder holds the mineral rights in trust for the plaintiffs, there is no need to determine the third party action.

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The Early Background to the Mineral Rights

[10] Some time in the 1950s, Hugo read a newspaper article that led him to believe there might be oil under the family's farmlands in Saskatchewan. His parents Anton and Katharina Hanrieder owned the 230-acre farm in Saskatchewan that had been in the family for decades. His father died when Hugo was young. When his mother wanted to sell the lands, a specific trust was created to hold onto the mineral rights for Hugo and his four sisters.

[11] On July 26, 1973 Katharina Roth (formerly Katharina Hanrieder, the executor of Anton Hanrieder's estate) entered into a Trust Agreement (the "Family Trust") with her five children as the "beneficiaries" of the mineral rights, on terms including:

- Hugo and his sister Helen Hanrieder were the trustees;
- The mineral rights would be transferred to Hugo and Helen for the use and benefit of the beneficiaries;
- Income would be divided equally among the beneficiaries so that each would be entitled to a one-fifth interest;
- Various administrative terms, including allowing for replacement of the trustees;
- On the death of one of the beneficiaries, that beneficiary's share was to be delivered to that person's surviving spouse;

- If there was no surviving spouse, then the share would go to that person's surviving children equally; and
- If there was no surviving spouse or surviving children, then the share would be divided amongst the remaining beneficiaries.

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[12] On October 10, 1973 Hugo confirmed the Family Trust with the Surrogate Court for Saskatchewan.

[13] It is agreed that over the years up to Hugo Hanrieder's death, the mineral rights produced minimal income. The annual $200 rent was divided five ways. Once Hugo told his son Dennis that the money barely paid for the postage stamps required to divide the income with his siblings. Every few years, there were negotiations with the oil company to reserve the rights and then Hugo and his siblings received a $5,000 signing bonus or $1,000 each.

The Parties and Hugo Hanrieder

[14] Dennis Hanrieder is 60 years old and a retired breeding technician. He now lives in Mission, British Columbia, but at the material times, he lived in Manitoba. His sister Bette Chinn also lives in Mission. Mrs. Chinn is 57 years old, married, and a homemaker.

[15] Hugo and his first wife divorced in 1980.

[16] In 1981 Hugo met Ingrid (now Mrs. Hanrieder). They both worked in Prince George. He worked as an accountant for Northwood Pulp and Timber. She worked

at Canadian Imperial Bank of Commerce as a loans officer. She had also worked as a bookkeeper. They were married on March 24, 1984.

[17] In February 1987 Hugo retired and they moved to Nanaimo. They purchased a condominium in joint tenancy which they sold in May 1993 and purchased another condominium on Townsite Road which they also planned to own in joint tenancy. They went to Heath and Company to look after the conveyance.

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[18] By all accounts, Hugo was a very meticulous man. He kept his affairs in order, and maintained a handwritten log book of all of his finances which he kept up-to-date, if not on a weekly basis, then at least once a month. He was after all, an accountant. He kept his documents and other things relating to the mineral rights in a file-size pleather or plastic leather pouch. He was also a person of good character; he did not lie. He loved his son Dennis. They were very close to each other and spoke on the telephone at least once a week. He also loved his daughter Bette.

Hugo Hanrieder's Will

[19] Around April 1989 Hugo and Ingrid Hanrieder went to see Mr. Shabbits (now Shabbits J.), a partner at Heath and Company, to have their Wills made. Hugo provided meticulous handwritten instructions which read:

> All my interest in the mineral and sub-surface rights in South half, Section twenty seven, Township five, Range five, West second in the Province of Saskatchewan to be shared equally by my son DENNIS ALLEN HANRIEDER and my daughter BETTE LYNN CHINN. My son DENNIS ALLEN HANRIEDER shall administer the foregoing rights and shall succeed me as Trustee of the relevant Trust Agreement.

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> All my other personal and real property to my wife INGRID HEDWIG HANRIEDER. She is hereby designated to be Executrix of the will. In the event that she does remarry, she will retain one third and one third will pass to each of my two children named [heretofore]. Upon her death the residual shall go to my children. If she predeceases me or in the event of a common disaster, all my property shall pass to my two children.
>
> A separate will for my wife. She wants to leave all her personal and real property to me except cash in bank and Canada Savings Bonds which, after funeral expenses, shall be divided one third to husband HUGH FERDINAND HANRIEDER one third to daughter MONA BROCKMAN and one third to son MICHAEL DUBE. She wishes to appoint me Executor of her Will.

[20] On April 3, 1989 Mr. Shabbits wrote a two-page letter to Hugo explaining the terms of the Family Trust and a previous agreement filed with the Saskatchewan court concerning the mineral rights, and advising him that he could not bequeath his interest in the Family Trust to his children in his Will:

> April 3, 1989
>
> Mr. Hugo F. Hanrieder
> 2185 Michigan Way
> NANAIMO, B.C.
> V9R 5K3
>
> Dear Mr. Hanrieder:
>
> **RE: LAST WILL AND TESTAMENT**
>
> Thank you for dropping off copies of the Agreements relating to the mineral rights in respect of the South one-half of 27-5-5-W2. I have had the opportunity of reviewing these Agreements, and I have kept photocopies of them for the file. I am returning the documents you dropped off at my office. My opinion is that the Agreements entered into do not permit you the unrestricted right to deal with your share of the mineral rights as your own.
>
> There are two separate Agreements. The one was in the nature of a trust declaration, and was drawn for surrogate Court purposes in the estate of Anton Hanrieder. That is the Agreement which you signed on October 10, 1973. The other Agreement is an agreement between Katharina Roth, the executrix of the Estate of Anton Hanreider of the one part, and the five beneficiaries of the Estate of the other part.
>
> The Agreement dated October 10th, 1973 (and I assume that all five beneficiaries signed an identical Agreement at about the same time) provides that you appoint Helen Marie Hanrieder and yourself as trustee of the mines and minerals, that you agree to enter into a trust agreement containing provisions with respect to the policies and duties of the trustees, and that you agree that your interests in the mines and minerals in the case of death are affected by the Agreement. The Agreement dated July 26, 1973 is, in principle, the Agreement which follows the October 10th,

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> 1973 Agreement, although it bears an earlier date for reference purposes. The July 26, 1973 Agreement, contains the following provisions. It provides that you and Helen are trustees of the mines and minerals for the benefit of the beneficiaries, and that you hold the trust property with right of survivorship. It provides that upon the death of one of the two trustees, the surviving trustee must appoint another trustee. Section 8 of the Agreement elaborates on that. The Agreement provides that income from the trust property is to be divided equally amongst the five beneficiaries, and that the expenses are to be first borne from the income, or borne equally by the beneficiaries in the event the income is insufficient to pay the expenses. Clause 9 of the Agreement provides, that by agreement between you, in the event of the death of one of the beneficiaries, his or her share shall be delivered to his or her surviving spouse, or if there is no surviving spouse, to his or her surviving children equally. If there are no children, then the deceased beneficiary's share shall be divided equally amongst the other beneficiaries.
>
> The effect of all this is as follows. As things now stand, you do not have the authority to appoint your son, Dennis, to succeed you as trustee of the Trust Agreement. Further, you do not have the right to bequeath these mineral rights to your children. Both of these matters are determined by the Trust Agreements. Accordingly, I would not recommend that you include in your Will provisions which are in conflict with the Trust Agreements.

[21] On April 3, 1989 Mr. Shabbits also made a memorandum to file:

> The instructions from Mr. Hanrieder in respect of the Wills include the following:
>
> Each of Mr. and Mrs. Hanrieder wish to leave their household effects and personal vehicle to the other. In respect of Mr. Hanrieder's estate, he has life insurance of which his wife is beneficiary, the house is owned by them jointly, as joint tenants, and he has R.R.S.P.'s in which his wife is named as beneficiary. He wishes to leave his wife with the income from his estate, with a provision that upon her death or upon her remarriage, the reside will be divided one-third to the wife, one-third to his son, Dennis, and one-third to his daughter, Bette.
>
> Mrs. Hanrieder wishes to leave her Canada Savings Bonds and her savings account at the Canadian Imperial Bank of Commerce, Island Highway branch, savings account number 80-16763, one-third to her husband, one-third to her daughter, Mona Brockman and one-third to her son, Michael Dube. All the rest and [residue] of her estate she wishes to leave to her husband, Hugh.
>
> Each of Mr. and Mrs. Hanrieder appoints the other executor(rix) of their estates.

[22] On April 11, 1989 Hugo executed his Will which contained the following terms:

a. Revocation of previous wills;

b. Appointing [his wife Ingrid Hanrieder] as Executor and Trustee;

c. Appointing [Dennis Hanrieder and Bette Chinn] as alternate executors and trustees;

d. Distributing the estate as follows:

i. Pay debts;

ii. Personal possessions to [his wife Ingrid Hanrieder];

iii. Net income from the estate to [his wife Ingrid Hanrieder] during her lifetime, with full authority to encroach on capital, in her absolute discretion;

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The Events before Hugo Hanrieder's Death

[23] On January 14, 1991 Hugo sent the following penciled letter to Mr. G. Foster Tessem, a lawyer at the firm of Kohlay & Associates in Estevan, Saskatchewan:

> Mr. G. Foster Tessem
> Kohaly & Associates
> P.O. Drawer 580
> Estevan, Sask
> S4A 2A5
>
> Jan 14/91
>
> Dear Sir,
>
> Re: Hanrieder Estate
> Your file 714258
>
> According to my file the last communication from your office is dated August 29, 1974. As a lot of water has passed under the bridge since then I hope you are well and functioning as before.
>
> I have a concern regarding clause nine (9) of agreement dated July 26, 1973 pertaining to the transfer of the property. That clause provides for the beneficiary's share at death shall be delivered to the surviving spouse.
>
> The facts in my instance are that I divorced my first wife. I re-married in 1984. My current wife and I both have adult children. In my last will and testament she is the main beneficiary. If she survives me, which is highly probably because she is younger and females live longer, the "mines and minerals" would pass to her. Subsequently, at her death, those rights would pass to her beneficiaries, probably her children. Should that come to pass my children would be very unhappy and it would most certainly negate the intentions of my parents, who bought and developed the property, as well as mine.
>
> My wife and I have discussed this matter thoroughly and we both agree that on my death my portion of the "mines and minerals" rights should be delivered equally to my two children, namely: [Emphasis added]

Mr. Dennis A. Hanrieder
…

Mrs. Bette L. Chinn
…

Would it be possible to attach and/or register (if it is necessary) a codicil or other legally acceptable amending document to achieve the aforementioned objective? If so, I hope it can be done without subjecting all the other family members to a great deal of inconvenience. My oldest sister Kay will be 82 this year and Rose 77. My sister Rita and her husband both died which could mean further complications. I am retired at age 69 so can be reached almost any time at home, telephone number … to discuss any suitable proposal. Pls note new address below.

I trust to hear from you in due course.

Yours truly

"HFH"

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[24] Receiving no reply to his letter of January 14, 1991, Hugo followed up with a handwritten letter:

Kohaly & Associates
P.O. Drawer 580
Estevan Sask
S4A 2A5

March 12, 1991

Re: Hanrieder Estate
Your file 714258

Dear Sirs,

I wrote you on January 14, 1991 but have not received any reply to date. The letter was sent to the attention of Mr. T. Foster Tessem. As I did not have any communication with him for several years I do not know if he is still with your firm. In reviewing the file I noticed that several years ago the file number was 71-L-2158. I don't know if that has any relevancy but it may be helpful in locating it.

In any event I would appreciate hearing from you regarding the concern outlined in the aforementioned letter. My current address and telephone number are shown hereunder. Thanking you in advance, I am,

Yours truly

"HFH"

[25] Hugo received a reply to his two letters from Paul Elash. Mr. Elash's letter of April 22, 1991 from the law firm Kohaly and Elash reads:

April 22, 1991

Mr. Hugo F. Hanrieder
2185 Michigan Way
Nanaimo, B.C.
V9R 5K3

Dear Sir:

RE: Mines and Minerals S½ 27-5-5W2nd
Province of Saskatchewan
Agreement re: Trust dated July 26, 1973
Our File: 714258

This is in response to your letters to our office, setting out your enquiries concerning paragraph 9 of the subject Agreement.

As I explained in our telephone conversation, it is my personal view that the reference in paragraph 9 to "...his or her surviving children..." is intended to be a reference to your children. I do not believe this would be construed as a reference to the children of your present wife. However, of course, there is no certainty that a Queen's Bench Judge would concur in my interpretation.

I think it is advisable that both you and your present wife draft your Wills to confirm the intention of both of you, which is that only your children will benefit. I understand that you have already attended to this. [Emphasis added]

I think that the only option available to you if you wish to ensure there is no possibility of the adverse interpretation would be to amend the Agreement. This would involve inconvenience and expense. The lawful heirs of the family members who have passed away would, I think, be legally entitled to execute an amending Agreement. If you wish to further consider this option, I would be pleased to discuss the matter with you.

I trust that the foregoing will be of some assistance to you. I am very sorry for my oversight in failing to respond to you promptly. Please accept my apologies.

There is no charge for this letter.

Thank-you.

Yours truly,

"Paul D. Elash"

[26] Paul Elash was called to the Saskatchewan bar in 1978 and worked with Robert Kohlay, Q.C. Mr. Elash testified that Foster Tessem left Mr. Kohaly's firm in the mid-1970s, and in 1980 he purchased Mr. Kohlay's practise.

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[27] During the course of the trial, the original January 14, 1991 letter was found in the pleather pouch. Dennis Hanrieder and Bette Chinn identified that letter and the letter of January 14, 1991 as written in their father's handwriting. Mr. Elash has no recollection of the letters of January 14, 1991, March 12, 1991 or April 22, 1991, and the law firm files relating to the matter have been destroyed. However, he has no doubt that he authored the letter of April 22, 1991, and that he spoke to Hugo on the telephone as he states in his letter, and that it was in response to the two letters Hugo wrote to the firm.

[28] Hugo then wrote to his children Dennis and Bette by letter dated May 13, 1991 and enclosed Mr. Elash's letter of April 22, 1991:

> May 13, 1991
>
> Dear Dennis & Bette, Re: 5½ Sec 27 Tsp 5 Rge 5 W 2nd
> Province of Sask.
>
> …
>
> The agreement is dated July 26, 1973. I had some concern the wording could be construed to mean my spouse of that date. Or, it could be the spouse on the date of my death. The former would not be acceptable and the latter agrees that she has not any right to inherit those rights because they should pass to direct descendants of Anton Hanrieder (my father).
>
> Being concerned I wrote the lawyers regarding this matter and I'm enclosing a copy of their reply which states their opinion. I hope you are satisfied that I have done the best for both of you. My file on this subject goes back to 1952. You are welcome to see it anytime.
>
> All my love,
> "Dad"

[29] Dennis Hanrieder recalls receiving the letter of May 13, 1991 from his father. At the time he lived in Holland, Manitoba and his father and Ingrid came to see him twice. On one of their visits, which was before he received the letter of May 13, 1991, there was a discussion amongst the three of them in his home.

[30] Dennis Hanrieder testified that his father told him, in Ingrid's presence, that he had written his Will so that on his death, Ingrid would receive everything except the mineral rights. He wanted the mineral rights to go to Dennis and Bette as his children. Ingrid said, "I have no interest in them. I have money of my own."

[31] On cross-examination, Dennis Hanrieder's evidence did not change. He testified on his examination for discovery:

> A …our dad made a special trip, I'm sure it was special, to visit each one of us and tell us that those—that was our inheritance and, in fact, he told me right in front of Ingrid and said that Ingrid is going to get everything I own except the mineral rights, which belong to you and Bette because that's Hanrieder—Hanrieder property, basically. I don't know the word he used, but it's for Hanrieders and he was, actually, adamant about that because in previous conversation, he was Hanrieder by blood, that's what the mineral right was for, and I had a step-cousin and for a while my dad was opposed to him having his share of that even because he wasn't Hanrieder by blood. Anyway, in front of Ingrid. Ingrid said, "I have no interest, no interest in mineral rights. I have money of my own." And that's a quote.
> Q What year was that?
> A Early '90s.

[32] In direct examination, Mrs. Hanrieder testified that when she and Hugo went to visit Dennis in Manitoba, there was a discussion between Hugo and his son about Hugo's Will:

> Q All right. Well, so you remember being in Manitoba visiting with Dennis?
> A Yes.
> Q And a conversation arose regarding whose will?
> A My husband's.

[33] However, Mrs. Hanrieder claims she does not recall any discussion between Hugo and his son regarding Hugo's mineral rights:

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Q Mrs. Hanrieder, Dennis Hanrieder testified that you and Hugo Hanrieder visited him in Manitoba and I assume you recall doing so?
A Yes.
Q And he testified that you were present while he and his father discussed the mineral rights?
A I don't recall that.
Q And he testified that his father said in your presence that the mineral rights would be going to Dennis and Bette.
A No. I don't really recall anything like that.

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[34] Bette Chinn recalls receiving the letter of May 13, 1991 from her father. She testified that in the summer of 1989 or 1990, her father had discussed the mineral rights with her in Ingrid's presence.

[35] Her father and Ingrid were going back east for a couple of weeks, and needed someone to look after their small dog and the flowers in the garden. Mrs. Chinn agreed to help them out. She went to Nanaimo with her own small dog, house-sat for them, and looked after their dog and the flowers.

[36] Mrs. Chinn said that her father and Ingrid returned on a Saturday. The next morning her father told her he wanted to talk to her and when she replied that she was busy, he said he wanted to talk to her "now!" It was, in her words, "like a summons".

[37] Mrs. Chinn said that her father and Ingrid were both sitting in their La-Z-boy type chairs in the living room when she walked in and sat on the sofa across from them. Her father began talking to her about the mineral rights. It was the first she had heard about them. He said it was his wish that the mineral rights that had been in his family for years were to go to her and Dennis, and Ingrid was to get everything

else. Mrs. Chinn said she asked Ingrid directly if that was all right or okay with her and she replied “yes”.

Hugo Hanrieder’s Death and His Mineral Files

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[38] When Hugo had a brain aneurysm and was hospitalized, Mrs. Hanrieder telephoned Dennis who flew to Naniamo. His father died in his presence on December 8, 1997. He stayed with Mrs. Hanrieder for about a week, attending the funeral with her, and helping her out. She handed him Hugo’s log book where he detailed all of his finances and assets, and asked him to look it over.

[39] Dennis testified that after reviewing his father’s finances, Ingrid handed him the pleather pouch and said, “This is what your dad wanted you and Bette to have.” She told him he now owned the mineral rights and he, perhaps naïvely, thought he did.

[40] Inside the pouch he found the old newspaper article and documents relating to the Family Trust and mineral rights, and a few family heirlooms, including a 10 Deutsche Mark banknote.

[41] Ingrid Hanrieder denies that she gave Dennis his father’s pouch containing the mineral files, but refuses to say that he stole it or took it without her consent.

The Events after Hugo Hanrieder’s Death

[42] After her husband’s death, Ingrid Hanrieder went to a notary public and

learned that the condominium was registered to her and her husband as tenants in common, rather than as joint tenants.

[43] Peter Giovando is a partner at the law firm Heath and Company. He met Mrs. Hanrieder on January 6, 1998 when she brought in a state of title certificate for him. After learning that his firm erred by not registering title in joint tenancy, he had Mrs. Hanrieder return to his office in late January 1998. He told her that she had a potential cause of action against the firm, they were unable to act for her, and he provided her with the names of several law firms she might want to consult and left it to her as to which firm she wanted to retain. He also told her the firm would pay for the cost of rectifying the title.

[44] Mrs. Hanrieder claims that Mr. Giovando gave her only one name and telephone number and told her that Mr. Mont would "fix it" and "everything would be okay".

[45] In 1998 Roderick Mont was an associate with the law firm Allin, Anderson & McNeil. Mr. Mont's standard practise is to write fairly detailed notes concurrently as he speaks with a client.

[46] Mr. Mont testified, as reflected by his notes, that on January 30, 1998, Vaughn Allin, a partner in the firm, received a telephone call about the title problem and asked him to look after it. The same day, January 30, 1998 Mr. Mont met with Mrs. Hanrieder and she informed him that all of her late husband's assets were joint, except for the condo property and his car. She also informed him of the names of

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Hugo's two children. Mrs. Hanrieder is quite clear on what she expected Mr. Mont to do: "He was supposed to fix title and that's it."

[47] Mr. Mont thought the simplest solution would be to see if Hugo's children would release any claim to the condominium. He telephoned Mr. Hanrieder and explained the problem with the condominium. He also telephoned Mrs. Chinn who wanted to know if her father intended the property to be in joint tenancy.

[48] After writing to Mr. Giovando and receiving a number of documents, Mr. Mont sent a letter dated March 5, 1998 to Mrs. Chinn and Mr. Hanrieder enclosing a number of documents, including a copy of the notes from Heath and Company indicating that their father and his wife intended the condominium to be in joint tenancy. Mr. Mont also enclosed a release for their signature.

[49] Mrs. Chinn decided she needed to consult a lawyer. She saw Gordon Taylor, a lawyer in Mission.

[50] Mr. Mont received a letter dated March 31, 1998 from Gordon Taylor asking for a draft copy of the disclosure document for probate, and the general nature of any assets passing to Ingrid Hanrieder by right of survivorship or by virtue of joint ownership of assets. Mr. Mont also received a letter dated March 31, 1998 from Robert McCulloch, a lawyer in Treherne, Manitoba who wrote on behalf of Mr. Hanrieder who was not prepared to sign the release until he had an opportunity to discuss the matter further with his sister.

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[51] On April 15, 1998 Mr. Mont telephoned Ingrid Hanrieder and asked her about the assets. Over the telephone she gave Mr. Mont a very detailed list of all of Hugo's assets, including the serial number of her husband's vehicle and the exact value of each asset. She appeared to Mr. Mont to have a good grasp of the value of the assets. She did not include or mention any mineral rights.

[52] Using the information that Mrs. Hanrieder gave to him, Mr. Mont wrote to Mr. Taylor on April 16, 1998 and detailed the value of the assets in Hugo's estate and the assets Mrs. Hanrieder received by way of surviving joint owner or as beneficiary.

[53] Mr. Taylor replied by letter dated April 17, 1999. He noted that Mr. Mont had not mentioned the mineral rights and asked whether he was aware of them and what Mrs. Hanrieder's position was with respect to them.

[54] Mr. Mont testified that on May 7, 1998 he had a telephone conversation with Mrs. Hanrieder and she told him that she made no claim with respect to the mines and minerals trust. That was the first time that she had spoken to Mr. Mont about the mineral rights. Mr. Mont's notes of his conversation with Mrs. Hanrieder read:

> Hugh and his brother's widow are the Trustees
>
> she makes no claim WRT [with respect to] mines & minerals trust.
> [There] is a letter in Peter's file written by Mr. Shabitts re: trust.

[55] Later that day Mr. Mont received a call from Mrs. Hanrieder. She had located the April 3, 1989 opinion from Mr. Shabbits and it is apparent from Mr. Mont's notes that she told him about the contents of the letter. She said that Hugh (the name that

Hugo used) could not appoint Dennis as trustee; and that there were two agreements: October 10, 1973 and July 26, 1973. She also told Mr. Mont that she gets the income pursuant to the trust and after her death, it goes to Dennis and Bette.

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[56] Mr. Mont's notes go on to state:

> income is minimal but to help settle issues, she will assign it to Dennis + Bette.

[57] Mr. Mont asked Mr. Giovando to search the firm's files for copies of the agreements and any documents concerning the mines and mineral rights and send them to him, which he did.

[58] Mr. Mont then sent the following letter dated May 27, 1998 to Mr. Taylor:

> May 27, 1998
>
> Taylor, Tai, Ruley & Company
> Barristers & Solicitors
> 33066 First Avenue
> Mission, B.C. V2V 1G3
>
> Attention: Gordon D. Taylor
>
> Dear Sirs:
>
> Re: Estate of Hugo ("Hugh") Ferdinand Hanrieder
> Your File No.: E20225
>
> Further to your letter dated April 17, 1998, we advise that our office was unaware of the Mines and Minerals interest. We have discussed the Mines and Minerals interest with our client and can advise that she is willing to sign any interest she has in the Mines and Minerals to Dennis Hanzieder and Bette Chinn. The writer has also been in contact with Peter Giovando of Heath Giovando Hansen, the law firm which acted for Mr. Hanrieder in the preparation of his Will. Mr. Giovando has provided to our office an undated hand written note which appears to be written by Mr. Hanrieder in which Mr. Hanrieder indicates that all his interest in the Mines and Minerals shall be shared equally between Dennis Hanrieder and Bette Chinn. [Emphasis added]

> We also enclose for your review an Agreement executed by Hugo Hanrieder regarding the estate of Anton Hanrieder dated October 10, 1973, and [an] Agreement dated July 26, 1973, between Katharina Roth, Rita Mazer, Hugo Hanrieder, Katherine Moessler, Rose Turner, and Helen Hanrieder.
>
> We look forward to your response to our earlier correspondence at your earliest convenience.
>
> Yours truly,
>
> Allin, Anderson & MacNeil
>
> Per: Roderick E. Mont

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[59] A copy of Mr. Mont's May 27, 1998 letter was sent to Ingrid Hanrieder.

[60] On May 29, 1998 Mrs. Chinn went to Mr. Taylor's office and they discussed matters relating to the May 27, 1998 letter from Mr. Mont. Then they had a conference call with Mr. Mont. All three testified about the conference call during which Mrs. Hanrieder's offer of the mines and mineral rights was accepted by Mrs. Chinn and she agreed to sign the release.

[61] Mr. Mont's notes indicate that later that day, on May 29, 1998, he telephoned Mrs. Hanrieder and informed her of his telephone discussion with Mr. Taylor.

[62] I conclude that Mrs. Hanrieder was fully aware that she had authorized Mr. Mont on his behalf to obtain a release to the condominium in exchange for the mineral rights and Mr. Mont informed her of the concluded agreement.

[63] Dennis Hanrieder also agreed to sign the release. It took prodding and reminders from both Mrs. Chinn and Mr. McCulloch, but he eventually went to Mr. McCulloch's office and signed the release on August 13, 1998. Unfortunately, Dennis Hanrieder separated from his wife in 1998. It was a difficult time for him and

he was content to have his sister Bette take the lead on seeing that they received the mineral rights their father wanted them to have.

[64] In the meantime, Ingrid Hanrieder received a letter from Chevron Canada Resources dated June 29, 1998 to Hugo Hanrieder informing him that there was commercial production from the mineral lands and he would receive $43,582.89 representing payment of back royalty payments from May 1 to June 30, 1998. The letter reads in part:

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> June 29, 1998
>
> Mr. Hugo F. Hanrieder
> #401, 220 Townsite Road
> Nanaimo, British Columbia V9S 5S8
>
> **Surrender of the Winnipegosis Zone**
> **From Freehold Petroleum and Natural Gas Lease**
> **Effective Date: 17-October-1995**
> **Tp5 Rg 5W2M: SW 27**
> **Our File: 105896**
>
> Dear Mr. Hanrieder;
>
> …
>
> There is commercial production being obtained from Chevron Steelman 14-27-5-5W2M, which has been producing continously since November 1, 1995. Pursuant to clause 8(d) of the same lease, the lessor is entitled to a compensatory payment equal to that as would have been payable to the lessor if the leased substance had been produced from their lands. Chevron Canada Resources will therefore pay to the lessor, Fourty Three Thousand, Five hundred Eighty Two dollars and Eighty Nine cents ($43,582.89), representing payment of back royalty payments from the date May 1, 1998 to June 30, 1998. This cheque will be sent under separate cover to Mr. Hugo F. Hanrieder as per the payment instructions of the above captioned lease.
>
> …
>
> Yours truly,
>
> "E. E. (Eleanor) Branagh"

[65] A copy of the June 29, 1998 letter was sent by Chevron to Hugo Hanrieder's sister Helen Keen (formerly Helen Hanrieder).

[66] In direct examination, Mrs. Hanrieder testified:

> Q …and this letter refers to the amount of $43,582.89. So what was your reaction to that?
> A I thought, "If I get something out of that it would really help me," because actually I was 61 when Hugh died and I still had to wait for my pension until I was 65, so it would have helped me quite a lot.

[67] Mrs. Hanrieder did not inform Mr. Mont of the letter and testified it was because the mineral rights had nothing to do with him, it had nothing to do with the condo, and she never agreed to sign over the mineral rights.

[68] Instead, Mrs. Hanrieder took the letter from Chevron to Mr. Giovando. His time records indicate that he perused the June 29, 1998 letter on July 2, 1998. He had Kim Cook, an associate with his firm review the letter and the agreements in their files. Ms. Cook prepared a memo dated July 27, 1998 with a number of recommendations including that, as a result of Hugo's death, a new trustee had to be appointed, and that Hugo's death certificate should be sent to Chevron in order to transfer the mineral rights to Ingrid Hanrieder.

[69] Mr. Giovando did not know about the dealings between Mrs. Hanrieder and Mr. Mont with respect to the mineral rights. Mrs. Hanrieder did not tell Mr. Giovando that she had agreed to sign over her interest in the mineral rights to Bette Chinn and Dennis Hanrieder.

[70] On July 28, 1998 Mr. Giovando had a telephone discussion with Mrs. Hanrieder and generally outlined to her Ms. Cook's recommendations. Later that day, Mrs. Hanrieder telephoned Mr. Mont and told him that there was a new

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trustee appointed for the mines and minerals, the money would go to her, and at this point she did not want to give any money to Bette and Dennis.

[71] Mr. Mont recalls the conversation because it was a red flag for him. Mrs. Hanrieder was changing the deal they had struck: she was to assign her mineral rights.

[72] All Mr. Mont knew at the time was based on what Mrs. Hanrieder had told him: income from the trust was minimal.

[73] On August 20, 1998 Helen Keen wrote to Ingrid Hanrieder:

> Lampman, Sask.
> Aug. 20, 1998
>
> Dear Ingrid:
>
> Thank you for your phone call. It was such a nice surprise to hear from you. I was shocked to hear about your problems and how you have been treated by Dennis and Bette.
>
> I hope that Hugo made it clear in his will that you are the sole owner of the condo. …

[74] Mrs. Keen went on to request that her sons Mark and Eric Hanrieder be the trustees under the Family Trust in the place of herself and her brother Hugo.

[75] On September 4, 1998 a new 1998 Family Trust appointed Eric and Mark Hanrieder as the new trustees, and the current beneficiaries included Ingrid Hanrieder who received her interest from Hugo.

[76] On September 16, 1998 Mrs. Hanrieder took the September 4, 1998 Family Trust document to Mr. Giovando and he witnessed her signature as a beneficiary; and, in her words, “now everything is in place.”

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[77] In 2001, Mrs. Chinn spoke to her first cousin and learned that there was money coming from the mineral rights. She wondered why she and her brother were not getting any money.

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[78] Hugo's surviving siblings in Saskatchewan and the new trustees were unaware that Hugo told his lawyer in Nanaimo and his lawyer in Estevan that he wanted his children, and not his wife Ingrid, to receive the mineral rights. They would not answer any questions either Bette or Dennis had about the mineral rights. They took the position that Ingrid as Hugo's wife was entitled to any money that resulted from the mineral rights.

[79] Between 1999 and 2001 Ingrid Hanrieder received $51,598.28 from the Trust after Hugo's death.

[80] In August 2001 she caused to be incorporated in Saskatchewan, I.H. Hanrieder Resources Ltd., a corporation which has since August 2001 to July 31, 2008 received $174,360 from the Trust.

[81] This action was commenced on December 13, 2002.

The Evidence of Ingrid Hanrieder

[82] In her examination for discovery in October 2006 and direct examination Mrs. Hanrieder insisted that Hugo wanted her to have any money from the mineral rights and "to enjoy it".

[83] She was questioned on the letter of January 14, 1991 which Hugo wrote to Mr. Tessam informing the lawyer that he and his wife had "discussed this matter thoroughly" and agreed that on his death, his mines and mineral rights would be delivered equally to his two children. Her only answer was that there must be another letter that "he was fine with that [the mineral rights] came to me and after my death to his children". However, no such letter has been produced and all the correspondence written by Hugo Hanrieder confirms that he did not want his present wife Ingrid Hanrieder to receive the mineral rights. Even if what Mrs. Hanrieder contends is true—that after her death, his children would receive the mineral rights—she has not complied with her husband's wishes. It has been more than ten years since his death and Mrs. Hanrieder has done nothing to see that any rights that belonged to Hugo Hanrieder will pass to his children.

[84] In cross-examination Mrs. Hanrieder admitted that she knew before she and her husband went to see Mr. Shabbits about making their Wills that her husband wanted the mineral rights to go to his children. She was aware of his handwritten instructions to the lawyer that he wanted his Will to "bequeath" his mineral rights to his children. She admitted to discussing with her husband his wishes that his mineral rights go to his children. She admitted to knowing about the letter dated April 3, 1989 from Mr. Shabbits because her husband showed it to her. She knew that he wanted his interest in the mineral rights to go to his children, but he could not do that through his Will.

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[85] Yet Ingrid Hanrieder claimed from the outset of her evidence and throughout the trial that when she and her husband made their Wills in April 1989, he told her that the mineral rights were to go to her and "to enjoy it":

[86] In direct examination she testified:

> Q And when did you discuss those [mineral rights] with Mr. Hanrieder?
> A Just before he made his will and then he talked to Dennis about it.
> …
> Q And what did he talk to Dennis about? What did he say? Were you there?
> A I was not—I wasn't listening to his phone calls really, but I know he told me he talked to Dennis about it.
> Q Ah, so what did he tell you?
> A He told me it would come to me, that was the provision in the agreement with his mother and siblings.
> …
> Q Did he tell you why it was going to come to you?
> A Because it was in the agreement with his mother and siblings. He couldn't do anything about it and it would come to me and he said, "Enjoy it."

[87] And further in direct examination she stated:

> Q And prior to Mr. Hanrieder's death had you two talked about what would happen when either of you passed away regarding your assets?
> A Yes, we did a will and we willed to each other.
> Q But aside from your wills did you and he set up plans regarding how—regarding your assets in any other way?
> A Well, there were the mineral rights and he told me it would come to me.
> …
> Q So prior to Mr. Hanrieder's death what conversations, if any, did you have with him regarding the mineral rights and what would happen after his death?
> A <u>Well, he said to me, "The mineral rights come to you," and he said, "Whatever comes out of it, enjoy it."</u>
> Q <u>And what timeframe do you recall him saying that to you in?</u>
> A <u>Oh, within the last year of his death.</u>
> Q <u>Any other time?</u>
> A <u>I can't really recall</u>, but I know when he had that aneurysm it really scared him and he would talk about things like that.
> …

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Q You indicated that under the trust agreement as a survivor you were to receive Mr. Hanrieder's interest?
A Yes.
Q When did you learn that?
A When we made our wills.

[Emphasis added]

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[88] Mrs. Hanrieder gave the following evidence on cross examination:

Q All right. You were in the courtroom when Bette gave her evidence, correct?
A I was.
Q And you heard Bette say that she was house sitting for the both of you. You heard that, didn't you?
A Yes.
Q Okay. What she said is that she picked you up—both up from the airport. Is that correct?
A That's correct.
Q She did that, didn't she?
A She did.
Q Okay. And she said the next day there was a conversation with the three of you. You two were sitting in your chairs. You heard her say that?
A I heard her say that, yes.
Q And that's true, there was a conversation, wasn't there?
A No, not—not like that.
Q You didn't have a conversation in the sitting room, is that correct?
A We talked general things, yes.
Q So there was a conversation, is that right?
A Yes.
Q There was a conversation in 1991 or 1992 when Hugo told Bette that she was going to inherit the mines and mineral rights. Isn't that right?
A No.
Q Are you absolutely sure of that?
A I'm absolutely sure.
Q Please look at the judge and tell her you're absolutely sure of that.
A I'm absolutely sure about that. I am.
THE COURT What did you say?
A I am absolutely sure there was no such encounter.
Q You're absolutely sure that Hugo never told Bette that she would inherit the mines and mineral rights?
A I'm absolutely sure.
…
Q Let me put it this way, Hugo told Bette back in 1991 or 1992 that she would inherit the mines and mineral rights, didn't he?
A Not in my [presence], I never heard anything like that.
Q So you deny that he said that?
A Yes. I—not in my [presence].

Q You knew that he said that, didn't you?
A No, I didn't.

[89] Ingrid Hanrieder's evidence at trial directly contradicted the evidence she gave in her examination for discovery on October 11, 2006:

Q But Bette knew back in 1991 or 1992—
A That's right.
Q —Hugo had told her that she was going to inherit the mines and mineral rights, don't you agree with me?
A Yes.

[90] Mrs. Hanrieder denies telling Mr. Mont anything that his notes record her as saying to him. She denies telling him that she made no claim to the mines and minerals trust. She denies telling him that the income was minimal, and went so far as to say she had "no idea" of what income there was from the mineral rights. She denies telling him that she would assign her rights in the trust to Hugo's children. She said Mr. Mont asked her if she would sign over the mineral rights and she said no, and that they "argued about that". She repeatedly said that she told Mr. Mont "over and over" and "every time he called me" that "the mineral rights have nothing to do with my condo". She claimed that she had several conversations with Mr. Mont about the mineral rights and in each of those several conversations she told him that that the mineral rights had nothing to do with her condo, that she would not be blackmailed, and that she refused to talk to him about the mineral rights.

[91] However, it was not suggested to Mr. Mont that he took inaccurate notes, or that he failed to note material points raised by Mrs. Hanrieder during their conversations. Nowhere in any of Mr. Mont's notes is there any suggestion that Mrs. Hanrieder at any time told him, let alone "over and over again", that the mineral

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rights “had nothing to do” with her condo. Nowhere in any of Mr. Mont’s notes is there any suggestion that he asked her to sign over the mineral rights, she declined, and they argued about it.

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[92] Mrs. Hanrieder admitted that Hugo did not lie to her, he did not lie to other members of his family, and he did not lie to his lawyers. She admitted that he was proud of his involvement in the creation of the Family Trust and the mineral rights; he took some pride in administering the Family Trust as one of the two trustees; and he wanted to keep the rights in his family, even though up until the time of his death, they never produced much in the way of income.

[93] In direct examination Mrs. Hanrieder testified that her husband was “scared” that the mineral rights would go to her children after his death and “she assured him that would not happen”. However, as I said earlier, it has now been more than ten years since her husband’s death, and she has done nothing to ensure that his children stand to gain anything from the mineral rights.

[94] Mrs. Hanrieder was cross-examined on the April 3, 1989 letter from Mr. Shabbits to her husband and she admitted that although Mr. Shabbits told him that he could not bequeath the mines and minerals to his children through his Will, it did not change his wish that his children inherit the mines and mineral rights:

> Q Ms. Hanrieder, my question is this: the fact that Hugo got legal advice from Mr. Shabbits in this letter that he couldn’t bequeath the mines and minerals to his children through his will didn’t change his fundamental wish for his children Dennis and Bette to inherit the mines and mineral rights. Isn’t that right?
>
> A No, he didn’t really change it.

[95] Mrs. Hanrieder, as if realizing the significance of what she had just said, then said that he “kept looking at those letters and said he had done all he could. We didn’t talk about it anymore. I can’t say what he was thinking. We didn’t talk about it anymore. It was over”.

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[96] Much later, it was suggested to Mrs. Hanrieder that she agreed with her husband in 1989 that his children would get the mineral rights on his death, and she replied, “Not to my knowledge”. When pressed for a more responsive answer she replied: “what’s the difference. I can’t really recall. I can’t say yes or no”.

[97] In her examination for discovery on October 11, 2006 Mrs. Hanrieder gave the following evidence:

> Q And back when you were involved in creating your Wills in April of 1989, did you have specific discussions with Hugo regarding what would happen with the mines and mineral rights upon his passing away?
> A He said to me if anything ever comes out of it, enjoy it.
> Q I am going to ask you that question again just so I can be specific. Did he tell you what, according to his view, should happen with the mines and mineral rights upon his passing away?
> A No, he just told me if something comes out, enjoy it. That’s all he said and there’s nothing I can add.

[98] However, Mrs. Hanrieder added more to her version of what occurred. She claimed in cross-examination that they talked about it later, and her husband said, “What’s the difference. Dennis hasn’t any children and Bette hasn’t any children, so if they die it would go out of the family anyways.”

[99] It is true that Bette has no children. But the answer that Dennis has no children is not true. Dennis’ only child, Jennifer, was born in 1981, raised by her

mother, and adopted by her step-father when she was an infant. However, despite that, Dennis Hanrieder has life insurance in her name and she is the beneficiary of his RRSPs and other monies. Hugo maintained a close relationship with Jennifer. He bought a bond for her every year, and Hugo and Ingrid Hanrieder saw her quite often when she attended college in Victoria. As Ingrid Hanrieder testified, Hugo was proud to have Jennifer as his granddaughter.

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[100] The evidence given by Ingrid Hanrieder on her examination for discovery, and in her direct examination and cross-examination is at odds and totally inconsistent with what Hugo Hanrieder confirmed in writing, and what he told his children.

[101] I was left with the impression that Ingrid Hanrieder made up a story that her late husband told her to “enjoy” anything that became of the mineral rights. She appeared to make up her answers as the questions arose, with the result that her evidence fails to hang together and is inconsistent when examined carefully. I found her answers were unresponsive to the questions that she was asked. Her evidence is at direct odds with what Hugo wrote to his lawyers and to his children. While Mrs. Hanrieder admits that she and Hugo visited Dennis and they discussed his Will, it makes no sense for Hugo to tell his son that his Will gave him nothing and not discuss the mineral rights. I do not accept Mrs. Hanrieder’s evidence that she cannot recall her husband discussing the mineral rights with his son at the same time as he discussed his Will.

[102] In cross-examination, Mrs. Hanrieder asserted that she was the sole owner of the Townsite condominium. That is not true. Since November 30, 2006, shortly

before the trial was initially set to commence in January 2007, she and her daughter Mona McCrae became joint tenants of the condominium.

[103] I find that when Ingrid Hanrieder gave Mr. Mont a detailed listing of all of her husband's assets, including for example, a joint bank account at CIBC for $112,984, $2,525 for taxes, $5,202 for funeral costs, and the registration number of his 1990 Jetta, she knew precisely what was in his estate and what she stood to inherit. She did not include the mineral rights because as far as she was concerned, in accordance with her husband's wishes, she had given them to Dennis Hanrieder when she gave him his father's pouch containing all of the documents relating to the Family Trust and the mineral rights.

[104] I reject Ingrid Hanrieder's denial of giving instructions to Mr. Mont that she had no claim with respect to the mines and minerals rights as a clear fabrication on her part. Where the evidence of Ingrid Hanrieder conflicts with the evidence of the other witnesses, I regrettably reject her evidence. I do not find her to be a credible witness. In all likelihood she started to change what Hugo wanted when she told Mr. Mont in their initial conversation of the mineral rights that it "goes to" her and then after her death to his children. She deliberately set out to change what Hugo wanted when she read the June 29, 1998 letter from Chevron. She decided to take the money for herself.

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Discussion

[105] *Waters' Law of Trusts in Canada*, 3rd ed, (Toronto: Thompson Canada Limited, 2005), at 268-270, summarizes the history and principles governing secret trusts as follows (footnotes omitted):

> The secret trust arose out of these provisions of the *Statute of Frauds* and later of the *Wills Acts*. No disposition of property to take effect on the death of the person disposing is valid unless it is in testamentary form; and this applies to all property, whether real or personal. What then was to be done if it was shown that, though A appears on the face of a will as a legatee, the testator had in fact given that legacy or allowed the legacy to stand because the legatee had promised orally to hold the property on trust for certain persons or purposes? Could the legatee plead the Statute, or the *Wills Act*, and thus avoid the obligation which had caused the testator to make the gift? From the beginning, as we have seen, the courts had no difficulty in laying down the principle that the Statute could not be used as an instrument of fraud, and evidence was therefore permitted of these trusts, though they were not created in proper testamentary form. So the will beneficiary was held to his obligation. During the eighteenth and nineteenth centuries trusts of this kind were enforced, whether they arose out of testacy or intestacy, and today the principles established can be stated in the following way.
>
> …
>
> Whenever a person takes property beneficially under a will or on an intestacy, and it is shown that during the testator's, or the intestate's, lifetime the devisee, legatee, or intestate successor undertook to hold the property on trust for specified objects, he will be held to that obligation on the death of the deceased. What must be shown is that there was a communication to the devisee, legatee, or intestate heir of the deceased's intentions, and an acceptance by that person of the request that he hold the property on trust for the enumerated persons or purposes. The communication is the most essential factor. Once it is established, acceptance, though vital, can be spelled out of the silence of the devisee, legatee, or heir. The courts take the view that any person having received a request of this nature would be bound to say something if he rejected the idea that he himself should not enjoy the property beneficially. The crucial requirements therefore being communication and acceptance of trust obligation and trust objects, it is of secondary importance whether the deceased made his will on the

> strength of the acceptance, left his will unchanged on that basis, or allowed himself to die intestate relying on the fact that his intestate heir had accepted the trust.

[106] Secret trusts arise from the Court's equitable jurisdiction and operate independently of the terms of a Will.

[107] In ***Blackwell v. Blackwell***, [1929] A.C. 318 at 334-335, Viscount Sumner makes clear that the Court's equitable jurisdiction to find a secret trust stands apart from, and operates independently of, the terms of the testator's Will:

> A Court of conscience finds a man in the position of an absolute legal owner of a sum of money, which has been bequeathed to him under a valid will, and it declares that, on proof of certain facts relating to the motives and actions of the testator, it will not allow the legal owner to exercise his legal right to do what he will with his own. This seems to be a perfectly normal exercise of general equitable jurisdiction. The facts commonly but not necessarily involve some immoral and selfish conduct on the part of the legal owner. The necessary elements, on which the question turns, are intention, communication, and acquiescence. The testator intends his absolute gift to be employed as he and not as the donee desires; he tells the proposed donee of this intention and, either by express promise or by the tacit promise, which is signified by acquiescence, the proposed donee encourages him to bequeath the money in the faith that his intentions will be carried out. The special circumstances, that the gift is by bequest only makes this rule a special case of the exercise of a general jurisdiction, but in its application to a bequest the doctrine must in principle rest on the assumption that the will has first operated according to its terms. It is because there is no one to whom the law can give relief in the premises, that relief, if any, must be sought in equity. So far, and in the bare case of a legacy absolute on the face of it, I do not see how the statute-law relating to the form of a valid will is concerned at all, and the expression, in which the doctrine has been habitually described, seem to bear this out. For the prevention of fraud equity fastens of the conscience of the legatee a trust, a trust, that is, which otherwise would be inoperative; in other words it makes him do what the will in itself had nothing to do with; it lets him take what the will gives him and then makes him apply it, as the Court of conscience directs, and it does so in order to give effect to wishes of the testator, which would not otherwise be effectual.

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[108] In ***Blackwell***, Viscount Summer at 334 stated that:

> In itself the doctrine of equity, by which parol evidence is admissible to prove what is called "fraud" in connection with secret trusts, and effect is given to such trusts when established, would not seem to conflict with any of the Acts under which from time to time the Legislature has regulated the right of testamentary disposition.

[109] In ***Blackwell***, Lord Warrington of Clyffe stated at 341 that:

> It has long been settled that if a gift be made to a person or persons in terms absolutely but in fact upon a trust communicated to the legatee and accepted by him, the legatee would be bound to give effect to the trust, on the principle that the gift may be presumed to have been made on the faith of his acceptance of the trust, and a refusal after the death of the testator to give effect to it would be a fraud on the part of the legatee. Of course in these cases the trust is proved by parol evidence, and such evidence is clearly admissible.
>
> It is also settled that in such cases it is immaterial whether the trust is communicated and accepted before or after the execution of the will, inasmuch as in the latter case the testator, if it had not been accepted, might have revoked the will.
>
> …
>
> I think the principle on which this doctrine is founded is that the parol evidence is not adduced for the purpose of altering or affecting the will itself, the legatee still takes under the will, but is under a personal obligation the breach of which would be a fraud on the testator…

[110] In ***Glasspool v. Glasspool Estate*** (1998), 53 B.C.L.R. (3d) 371, 22 E.T.R. (2d) 66 (S.C.), aff'd, 25 E.T.R. (2d) 8, 1999 BCCA 30, Madam Justice Satanove, in concluding that a secret trust had been established, stated:

> [22] In order for me to find that Ethel McKillop created a secret trust in favour of the plaintiff, I must be satisfied of:
>
> 1. the intention of the testator (Ethel McKillop) to subject the primary donee (Lawrence Glasspool) to an obligation in favour of the secondary donee (the plaintiff);

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2. the communication of that intention to the primary donee; and

3. the acceptance of that obligation by the primary donee.

(*Ottaway v. Norman*, [1971] 3 All E.R. 1325 (Eng. Ch. Div.); *Snowden Re*, [1979] 2 W.L.R. 654 (Eng. Ex. Ch.); and *Hayman v. Nicoll*, [1944] 2 D.L.R. 4 (N.S.S.C.)).

[23] As in the creation of any trust, intention of the settlor is key. Professor Waters, in his learned text *Law of Trusts in Canada*, 2d ed. (Carswell, 1984) discusses this issue in length in Chapter 5. He explains that in England prior to the passing of the *Executors Act* of 1830 the executor of an estate took the residue of the estate beneficially if it was not otherwise disposed of. Therefore the courts went to extremes to find that testamentary language of a precatory kind revealed the intention to transfer on trust. By the time *Lambe v. Eames* (1871), L.R. 6 Ch. 597 (Eng. Ch. Div.), was decided the courts had noticeably turned away from this approach.

[24] In *Atkinson Re* (1911), 103 L.T. 860 (C.A.) at 862, Cozens-Hardy, M.R. stated:

> And I think I may go further and say that the leaning of the courts is now not to construe words used in a will, not being words of a strictly definite legal character beyond all doubt - equivalent words, in short - as creating a trust.

[25] *Atkinson Re*, *supra*, is cited by Waters, D.W.M. as authority for the proposition that:

> Every care has to be taken not to make mandatory words from those which are the mere indication of a wish or request and that to construe the true intention of the testator, the courts must examine the will as a whole and not be mesmerised by particular words. (The Law of Trusts, p. 110)

[26] While I do not disagree with the learned author's statement I think one should pay heed also to the words of Fletcher Moulton, L.J. in *Atkinson Re*. He said this:

> I can see that there has been a very great change of opinion in later years, if one regards the words which are considered to create a precatory trust now and what words were so considered in olden times. But I do not think that the principle on which the courts have acted can have changed. The principle is that you have to find

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> from the words of the will the intention of the testator. The doctrine of precatory trusts does not mean that the courts may create an intention which they do not think from the words of the will was in the mind of the testator. It means that they may come to the assistance of weak or even inapt words and recognise his intention to create a trust in spite of the language being such that lawyers would not have used it for that purpose. It only meets the case of recognition of the intention of the testator and is not a doctrine by which an intention that did not exist is read into the will.

> [27] Therefore it is not correct to say that precatory words can only create a moral obligation and never form the basis of a trust, if it can be established on the evidence that the testator clearly intended to create a trust.

> [28] The standard of proof has been addressed by both the English and Canadian courts. All are in agreement that the onus lies with the plaintiff to show the testator's intentions but the standard against which to measure whether the onus has been met is not entirely clear. Sir Robert Megarry V.-C. *Snowden Re, supra*, after reviewing the English law concluded that in order to establish a secret trust where no question of fraud arises, the standard of proof is the ordinary civil standard of proof that is required to establish an ordinary trust.

[111] In ***Champoise v. Prost***, 2000 BCCA 426, (*sub nom.* ***Champoise v. Champoise-Prost Estate***) 77 B.C.L.R. (3d) 228, Madam Justice Saunders stated:

> [15] It is useful to review the basic principles of secret trusts. A secret trust arises where a person gives property to another, communicating to that person an intention that the property be dealt with in a specific way upon the happening of an event, and the donee accepts the obligation. The essential elements are the intention of the donor, a communication of the intention to the donee and acceptance of the obligation by the donee: ***Sutherland Estate v. Nicoll Estate***, [1944] S.C.R. 253 (*sub nom.* ***Hayman v. Nicoll***), [1944] 3 D.L.R. 551; ***Jankowski v. Pelek Estate***, (1995), 131 D.L.R. (4th) 717 (Man. C.A.); ***Ottaway v. Norman***, [1971] 3 All E.R. 1325 (Ch.D.); D.W.M. Waters, ***Law of Trusts in Canada***, 2d ed. (Toronto: Carswell, 1984) at 215-217.

> [16] In addition to these requirements for an enforceable secret trust, the three certainties necessary for any express trust must be exhibited;

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> the words making the trust must be imperative, the subject of the trust must be certain, and the object or person intended to take the benefit of the trust must be certain. Further, those certainties must be exhibited at the time the trust is created: ***Re Beardmore Trusts***, [1952] 1 D.L.R. 41; D.W.M. Waters, ***Law of Trusts in Canada***, *supra* at 107.

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[112] I find that the evidence in this case clearly establishes that Ingrid Hanrieder agreed with her late husband Hugo Hanrieder that, on his death, she held the mineral rights in trust for his children Bette Chinn and Dennis Hanrieder.

Conclusion

[113] I conclude as follows:

(1) Hugo and Ingrid Hanrieder agreed that on his death she would hold the mineral rights in trust for Bette Chinn and Dennis Hanrieder; and

(2) Ingrid Hanrieder breached an agreement made on May 29, 1998 that she would transfer the mineral rights to Bette Chinn and Dennis Hanrieder in return for them delivering executed releases.

[114] It is agreed that Ingrid Hanrieder or I.H. Hanrieder Resources Ltd. received the sum of $51,598.28 and $174,360 to July 31, 2008 for a total of $225,958.28. There is no agreement that these are the only funds she has received. Ingrid Hanrieder has disclosed no sums received by her or on her behalf since July 2008.

[115] In accordance with the relief sought by the plaintiffs in their further amended statement of claim there will be:

(1) an accounting of any monies received by Ingrid Hanrieder on account of the Family Trust;

(2) an order that the plaintiffs recover damages against Ingrid Hanrieder in the amount determined by the accounting, including loss of interest; and

(3) a tracing order.

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[116] The third party proceedings are dismissed with costs.

[117] The plaintiffs and the third parties will recover their costs from the defendant Ingrid Hanrieder.

"D. Brenner, CJSC for Loo J."