2020 BCCA 175
British Columbia Court of Appeal

Bergler v. Odenthal

2020 CarswellBC 1554, 2020 BCCA 175, 319 A.C.W.S. (3d) 698, 38 B.C.L.R. (6th) 273, 59 E.T.R. (4th) 34

Susanne Maria Bergler (Respondent / Plaintiff) And Bernd Odenthal (Appellant / Defendant)

Newbury, Tysoe, Harris JJ.A.

Heard: May 27, 2020
Judgment: June 23, 2020
Docket: Vancouver CA46548

Proceedings: reconsideration / rehearing refused *Bergler v. Odenthal* (2020), 56 E.T.R. (4th) 132, 2020 BCSC 117, 2020 CarswellBC 204, W.A. Baker J. (B.C. S.C.); and affirmed *Bergler v. Odenthal* (2020), 2020 CarswellBC 1554, 2020 BCCA 175, Harris J.A., Newbury J.A., Tysoe J.A. (B.C. C.A.)

Counsel: R.A. Kasting, for Appellant
J.W. Zaitsoff, for Respondent

Subject: Civil Practice and Procedure; Estates and Trusts

Headnote

Estates and trusts --- Trusts — Constructive trust — Secret trusts

Deceased died intestate — After her death, deceased's common law partner ("defendant") received entire estate as her heir on intestacy and did not keep estate assets separate from his own — Funds in all bank accounts were transferred to defendant and were spent as if they were his own — Several months after deceased's death, defendant entered new relationship with woman who he eventually married — Deceased's nieces A and S brought successful action for finding that secret trust had been created and that defendant had accepted obligation to ensure that deceased's estate would go to S — Trial judge found that, whether or not deceased had used word "trust", she had created trust by her instructions to defendant and that he had accepted this obligation, and that it was not open to him to derogate from that obligation — Defendant appealed — Appeal dismissed — Trial judge was aware of two necessary elements for secret trust and analyzed evidence before her in considering both elements — There was positive evidence from defendant that he agreed to do what deceased asked of him, including his acknowledgment that he knew she was relying on trust existing between deceased and defendant — Trial judge considered element of acceptance and did not err in finding that defendant had accepted trust — Defendant was required to transfer trust assets on earlier of his death or his entrance into new relationship, and time for distribution of trust assets came in 2013 or 2014 when he entered into new relationship — Creation of secret trust severed joint tenancy of property that was owned jointly by deceased and defendant — Once secret trust containing all of deceased's assets came into existence, nothing was left to pass by intestacy to defendant.

Estates and trusts --- Trustees — Breach of trust — Administration of trust assets — Misuse of trust funds

Table of Authorities

Cases considered by *Newbury J.A.*:

British Columbia (Public Trustee) v. Mee (1971), [1972] 2 W.W.R. 424, 23 D.L.R. (3d) 491, 1971 CarswellBC 258 (B.C. C.A.) — considered

Charlton v. Cipperley (1984), 32 Alta. L.R. (2d) 289, 19 E.T.R. 66, 12 D.L.R. (4th) 582, 54 A.R. 269, 1984 CarswellAlta 90, 1984 ABCA 221 (Alta. C.A.) — referred to

Clauda v. Lodge (1952), [1952] 4 D.L.R. 570, 1952 CarswellBC 168 (B.C. S.C.) — referred to

Harland v. Trigg (1782), 28 E.R. 1041, 1 Bro. C.C. 142 (Eng. Ch. Div.) — considered

Hayman v. Nicoll (1944), [1944] S.C.R. 253, [1944] 3 D.L.R. 551, 1944 CarswellNS 29 (S.C.C.) — considered

Kemp v. Wittenberg (1999), 1999 CarswellBC 771 (B.C. S.C. [In Chambers]) — referred to
Moss v. Cooper (1861), 70 E.R. 782, 1 John. & H. 352 (Eng. K.B.) — referred to
Russell v. Jackson (1851), 68 E.R. 558, 9 Hare 387 (Eng. V.-C.) — referred to
Saunders v. Vautier (1841), 41 E.R. 482, 1 Cr. & Ph. 240, [1835-42] All E.R. Rep. 58, [1841] EWHC Ch J82 (Eng. Ch. Div.) — referred to
Stonehouse v. British Columbia (Attorney General) (1961), [1962] S.C.R. 103, 37 W.W.R. 62, 31 D.L.R. (2d) 118, 1961 CarswellBC 159 (S.C.C.) — considered
Tee v. Ferris (1856), 69 E.R. 819, 2 Kay & J. 357 (Eng. Ch.) — referred to

Statutes considered:

Evidence Act, R.S.B.C. 1996, c. 124
Generally — referred to
Evidence Act, R.S.N.S. 1989, c. 154
s. 37 — referred to
Land Registry Act, R.S.B.C. 1960, c. 208
Generally — considered
Statute of Frauds, R.S.B.C. 1979, c. 393
Generally — referred to
Wills Act, R.S.B.C. 1996, c. 489
Generally — referred to
Wills, Estates and Succession Act, S.B.C. 2009, c. 13
Generally — referred to

APPEAL by defendant from judgment reported at *Bergler et al. v. Odenthal* (2019), 2019 BCSC 1882, 2019 CarswellBC 3204, 51 E.T.R. (4th) 106 (B.C. S.C.), finding that defendant was trustee of secret trust.

***Newbury J.A.*:**

1 This case involves a so-called "secret trust" allegedly imposed by Angelika E. Stuhff, now deceased, on her common-law partner, the defendant Mr. Odenthal, and allegedly accepted by him. Secret trusts are rarely encountered today, but have a long history. As noted by Donovan Waters, Mark R. Gillen and Lionel D. Smith, the editors of *Waters' Law of Trusts in Canada* (4th ed., 2012), secret trusts were historically recognized by Equity when a testator or intestate person failed to comply with the *Wills Act* or the *Statute of Frauds*, but imposed on another the obligation to hold property on trust for a third person. In enforcing such a trust, Equity ensured that the *Statute of Frauds* could not be used as an instrument of fraud for the trustee's own benefit.

2 Professor Waters writes that the two essential features of a secret trust are a "communication" by the deceased person to his or her devisee, legatee or intestate heir, and an acceptance by that person of the request that he or she will hold the property in trust for the stated person or purposes. Waters continues:

> 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, . . . or allowed himself to die intestate relying on the fact that his intestate heir had accepted the trust. [At 288; emphasis added.]

Of course, the secret trust must also meet the usual trust requirements of certainty of intention, objects and subject-matter.

Factual Background

3 This appeal focuses on the finding of Madam Justice Baker, the trial judge below, that the defendant Mr. Odenthal accepted an obligation to ensure that Ms. Stuhff's "estate" would go to the plaintiff, Susanne Bergler ("Susanne"). This acceptance was

found to have taken place shortly before Ms. Stuhff's death in hospital in April 2013 at the age of 62. She had been diagnosed with cancer in February and had put off preparing a will until she felt better — which sadly never happened.

4 The deceased's niece Anja and sister Monika testified as to conversations they had had with Mr. Odenthal outside the hospital in the days prior to Ms. Stuhff's death. Both said he told them at that time that Ms. Stuhff had told him she wanted her estate to go to Susanne (Ms. Stuhff's niece and Anja's sister), who did not have a career or a home and was hoping to go back to school. Monika testified that she had had "similar conversations" with Ms. Stuhff about six times after her sister was diagnosed. She recalled that at least one of these conversations took place in the presence of Mr. Odenthal and Eberhard, Monika's husband. The judge recounted:

> Monika testified that Ms. Stuhff told the group that she wanted her estate to go back to her family after her death. Monika testified that Ms. Stuhff told Mr. Odenthal that he was to transfer her estate to the Bergler family when Mr. Odenthal began a relationship with a new partner. Eberhard confirmed the statements made by Ms. Stuhff in the presence of Monika and Mr. Odenthal. Mr. Odenthal also confirmed that Ms. Stuhff told the group that if he got involved in a new relationship, her estate was to go back to her family. [At para 9; emphasis added.]

Although much of this evidence was hearsay, the trial judge found that necessity and reliability had been established and that it was therefore admissible to prove the deceased's wishes.

5 A conflict arose on the evidence concerning the issue of what counsel referred to as "timing". The judge stated at para. 11 that "All living parties to the conversation" had confirmed at trial that Ms. Stuhff had told them her estate was to "go back to her family following her death, once Mr. Odenthal began a new relationship." She noted that Eberhard remembered hearing a loud conversation between Ms. Stuhff and the defendant in which she told him that when Mr. Odenthal had "a new chick", she wanted "all her money" to go back to her family. Eberhard said the conversation then stopped; he did not recall Mr. Odenthal's disagreeing with the deceased.

6 Mr. Odenthal did dispute, however, the terms on which he was to hold the assets. He asserted that Ms. Stuhff had "clarified" that the Bergler family was to receive her estate *on his death and not before*. He interpreted the obligation as a "moral" one to retain the estate assets — and enjoy the use of them — but to make provision in his will to "leave her estate to Susanne." (He was age 51 when Ms. Stuhff died.)

7 The trial judge said she preferred Eberhard's evidence to the "clarification" alleged by the defendant. For one thing, the fact Ms. Stuhff wanted Susanne to get a better financial footing and continue her education suggested that she was intended to receive her aunt's estate "much earlier than on Mr. Odenthal's death." Further, the judge found the defendant's evidence on the alleged "clarification" to be unreliable and chose to give it no weight. (At para. 13.)

8 Baker J. *did* accept the defendant's testimony, which she described as "most compelling", that:

> a) He and Ms. Stuhff discussed her estate before she died,
>
> b) Ms. Stuhff told Mr. Odenthal that she wanted her estate to go to Susanne,
>
> c) Mr. Odenthal understood Ms. Stuhff's estate was valued at approximately $130,000, which included her share of the Osoyoos and Winthrop properties, and that the money was to go to Susanne,
>
> d) Mr. Odenthal received clear and precise instructions from Ms. Stuhff, when she knew she was terminally ill, that he was to make sure her estate would not go to anyone else and that it would go to the Bergler family,
>
> e) Mr. Odenthal agreed with Ms. Stuhff that her assets would go to Susanne because Susanne was less fortunate than Anja, and was not established financially and professionally,
>
> f) Ms. Stuhff trusted Mr. Odenthal regarding her affairs and finances, and relied on him when she told him about her estate, and

g) Mr. Odenthal told Ms. Stuhff that he would abide by her wishes.

[At para. 14; emphasis added.]

I note that the underlined finding relates to the second element of a secret trust — the defendant's *acceptance* of the trust obligation.

9 Following Ms. Stuhff's death, Mr. Odenthal received her entire estate as her heir on intestacy. He did not keep the estate assets separate from his own. The funds in all bank accounts were transferred to his accounts and spent as if they were his own. (At para. 34.) He testified that in accordance with his understanding of the Ms. Stuhff's wishes, he executed a new will shortly after she died. That will would have left 3/10 of the residue of his estate (with a value of about $130,000, his estimate of the value of Ms. Stuhff's assets at the time of her death) to Susanne.

10 In the fall of 2013, the defendant became involved romantically with a woman. In 2014, he sold the deceased's car to her for $10,000 and kept the funds for his own use. The two began living together in early 2016 and eventually married.

11 In 2015, Susanne and Anya Bergler commenced this proceeding, seeking *inter alia* a declaration of express or implied trust, a constructive trust, a secret trust, and/or restitution for unjust enrichment. At trial, the plaintiffs conceded that Anja had no claim; and the case was pursued thereafter solely for Susanne's benefit.

12 In his pleading, Mr. Odenthal denied the existence of any unjust enrichment, trust or legally enforceable obligation. He testified that once he realized a legal claim was being brought against him, he no longer felt any obligation to Susanne and felt free to remove her as a beneficiary under his will. (At para. 38.) In April 2016, he revoked the will described above and made a new one leaving nothing to Susanne or any of the Berglers. He did not assert any counterclaim against the family.

13 Baker J. found that a trust had been created and that one of the trust terms was that Mr. Odenthal was bound to transfer the trust assets to Susanne if he entered a new relationship. Susanne had argued that it was open to her to invoke *Saunders v. Vautier* (1841), 41 E.R. 482 (Eng. Ch. Div.) and bring the trust to an end by the distribution of its assets to her. However, the judge found it unnecessary to consider the applicability of *Saunders* in this case. In her analysis:

As stated above, I accept the hearsay evidence of Ms. Stuhff that she told Mr. Odenthal he did not have to transfer the trust assets until he was in a new relationship.

The plaintiff raised the rule in *Saunders v. Vautier* . . . , as to whether a sole, competent beneficiary can extinguish the trust and receive the assets of the trust in their own name, regardless of the wishes of the settlor. However, the application of the rule in *Saunders v. Vautier* is moot in this case, as the evidence was clear that Mr. Odenthal began a new relationship in the fall of 2013, and has since entered into a marriage.

As a result, even if I accept a temporal limitation on the distribution of the assets of the trust, the time to distribute the assets has already passed. Mr. Odenthal is obliged to transfer the trust assets to Susanne Bergler forthwith. [At paras. 29 — 31; emphasis added.]

14 The Court concluded that whether or not Ms. Stuhff had used the word "trust", she had created a trust by her instructions to Mr. Odenthal and that he had accepted the obligation placed on him. Having done so, the judge said, it was not open to him to derogate from that obligation. (At para. 39.) He had breached his fiduciary obligations as trustee.

Trust Assets

15 The trial judge listed Ms. Stuhff's assets at the date of her death as follows:

a) RBC Account — $1,260.54.

b) Grand Forks District Savings Credit Union — $412.50.

c) German bank account — $10,527.57.

d) Interest in joint account at Farmers State Bank, holding US$3,000.59.

e) 2011 Ford Fiesta — sold for $10,000.00 in 2014.

f) 99/100 interest in 17 — 5803 Lakeshore Drive, Osoyoos, with a legal description of PID 027-941-841, Strata Lot 17, District Lot 43, Similkameen Division Yale District, Strata Plan KAS3677 (the "Osoyoos Property").

g) 20% interest in 922 Perry Street, Winthrop, WA 98862, with a legal description of Lot 6, Pt. Lot 7 and 8, Blk. l, Sunset Add, Tax Parcel ID 279 001 0601 (the "Winthrop Property.") [At para. 20.]

16 By the time of trial, Mr. Odenthal had sold the Osoyoos Property for $308,000. The net proceeds of sale, $125,849, were being held in trust pending the outcome of this proceeding. Mr. Odenthal had continued to make mortgage payments on this property, but there was no evidence as to how much he paid. The Court accepted Susanne's submission that Ms. Stuhff's share of the property should be calculated as the sum of what she had contributed to its acquisition and maintenance during her lifetime, plus the increase in value of her share up to the date of sale. On this basis, the judge calculated the value of Ms. Stuhff's interest in the Osoyoos Property as $95,444 as of the date of sale.

17 As for the Winthrop Property, it was being held solely in Mr. Odenthal's name at the time of trial. When the couple had purchased it in 2011 for $315,000 (U.S.), Ms. Stuhff had contributed $59,960 (U.S.) towards the purchase price. The property had been registered in joint tenancy, with 20% in favour of Ms. Stuhff and 80% in favour of Mr. Odenthal, reflecting their relative contributions to the acquisition. (We were told the law of Washington permits unequal shares between joint tenants.) At trial, Susanne sought only the return of the deceased's actual contribution of $59,960 (U.S.), rather than a share of the property *per se.* (See para. 25.)

Remedy

18 In the end, the trial judge ordered that Susanne was to receive the $95,444 in respect of the Osoyoos Property and $59,960 (U.S.) in respect of the Winthrop Property. These amounts, plus pre-judgment interest, were to be paid first out of the proceeds of sale of the Osoyoos Property held in trust. The balance was to be paid by Mr. Odenthal personally. As for the bank accounts which he had received and commingled with his own funds, tracing was impractical. Instead, the defendant was ordered to pay $22,200.61 to Susanne as damages for breach of his fiduciary duties as trustee.

Supplemental Reasons

19 Baker J.'s original order was made on November 4, 2019. In January 2020, Mr. Odenthal asked the Court to reconsider the subject-matter of the secret trust insofar as the Winthrop Property was concerned. Since it was held in joint tenancy, Mr. Odenthal argued, it could not have formed part of the deceased's estate and therefore was not part of the trust assets. He argued that a miscarriage of justice would occur if it were not recognized that Ms. Stuhff's interest in the Winthrop Property was not part of her estate on death. The trial judge declined to make any change to her previous order, noting that there was no new evidence before the Court on the application. Citing *Kemp v. Wittenberg*, [1999] B.C.J. No. 810 (B.C. S.C. [In Chambers]) at para. 12, she concluded that this matter was more appropriate for this court to consider on the appeal. She dismissed the application for reconsideration.

20 Prior to the hearing of the appeal, we asked counsel to address the issue of severance of the joint tenancy of the Winthrop Property at the hearing.

On Appeal

21 Mr. Odenthal represented himself at trial, but retained counsel for the appeal. His principal ground of appeal is that the trial judge erred in law in failing to analyze the question of whether he had *accepted* the obligation which the deceased purported to

impose on him. The necessity of proving acceptance on Mr. Odenthal's part before a secret trust could be found was of course a matter of law. As well, the defence argued that although there was considerable evidence as to Ms. Stuhff's "communication" of her wishes, there was "no evidence" of Mr. Odenthal's *acceptance* — a question of fact. Counsel referred us to various passages in the defendant's discovery and in his testimony at trial concerning his conversations with Ms. Stuhff in the hospital about the transfer of her assets to Susanne. At p. 53 of the transcript, for example, the following appears:

> Q When you wrote this email what did you mean by what Angelika wanted or what you say here is "Angelika's wishes"?
>
> A Angelika's wishes are that I will be moving the funds to the Berglers once I'm dead and I'm including them in my will.

and at p. 65:

> . . . But I had a clear and precise instructions from her what — exactly what to do if she passes. And we had some of the more — the most powerful conversation you probably every can have with your partner knowing that he or she is terminally ill.

and at p. 66:

> But that was her recommendation to me and I said, so how do you want to -- she said just set up a will. Just set up a will and just make sure that if anything happens to you, that nobody else will benefit. Nobody else you meet in the future will benefit from my money. But it eventually will go back to the Bergler family. And I said, is that all you want me to do? And she says, yes, that's all I want you to do. I said, are you sure about that? And I said, I even -- I believe I ask her, I said, I don't even know that, I mean you're asking me something here I don't even know that this is legally enforceable, but now talking to my lawyer after all those years what happens, since those whole proceedings are started, I was advised that this is basically
>
> a moral obligation I had at the time.

and at p. 87:

> Q And so I'm going to suggest to you that that amount was eventually to go to the Berglers?
>
> A That's correct.
>
> Q And that was because she wanted her estate to eventually go to her family; right?
>
> A Yes.

and at p. 89:

> Q And you agreed with -- I know we have an issue on timing, but you agreed and you expressed to Angelika that you agreed that the assets would go to Susanne; right?
>
> A Yeah.
>
> Q And you had this conversation two or three times; right?
>
> A A couple of times I suppose. She wanted -- we did not have a conversation in detail how much money. It was -- that conversation was she just wanted to, in general, she picked Susanne of [*sic*; as?] being the less fortunate and therefore her estate, if, if her estate is going to go back it should be directed towards Susanne.
>
> Q And you didn't -- or I should say Angelika didn't have to discuss any amounts with you because she had just said, all of my assets; right?
>
> A We didn't -- I was assuming that and it really was not any of my concern because all this discussion was after I'm dead and I really didn't care. It doesn't include me. I'm done by that time.

Q You knew that Susanne would care?

A I really didn't care what -- it was Angelika, so, I mean, she asked me to do things and I did.

Q Until you stopped doing them?

A That's correct. [Emphasis added.]

22 Counsel for the defendant also emphasized Monika's evidence that during the conversations with Ms. Stuhff in the hospital, Mr. Odenthal had become irritated and left the room; and Eberhard's recollection that at one point, the deceased and Mr. Odenthal had been speaking loudly to each other. The issue, Monika testified, was "always hanging in the air in the end". At p. 21 of the transcript, she testified:

A Yes. Every time we had this conversation Mr. Odenthal became irritated, and Mr. Odenthal always said, well, is this the law? We are more than two years together. And my sister said, I always said I wanted my money back when you meet a new chick. Sorry, it sounds derogative towards "chick." I would like to say, when you meet a new woman in your life and stay with a new woman in your life.

Q But she used the term "new chick," is that what you're saying?

A Yes, she did. And she was very angry. And she never uses derogative [sic] language and that really pointed that she was extremely angry and that's when she wants to have estate being transferred to our family.

Q And so, to the best you can, what do you recall her saying exactly about that? This is your sister.

A She said exactly this: When -- so, when Mr. Odenthal said, but it's the law, she said when you meet a new chick in your life and she is living with you, that's when I want to have my estate back into our family.

Q And what happened next?

A Mr. Odenthal became very irritated and he left the -- he left very soon to stay at his friend['s] where he had -- where he actually rented a room before Angelika's diagnosis to stay in Vancouver while he was working the Vancouver area.

[Emphasis added.]

Monika also recalled that she asked Ms. Stuhff to make a will, but that her sister did not feel well enough to do so.

23 In Mr. Odenthal's submission, his acceptance of a binding and enforceable obligation to carry out the deceased's wishes could not have been reasonably inferred from the evidence before the Court. Counsel referred us to *Hayman v. Nicoll*, [1944] S.C.R. 253 (S.C.C.) for the proposition that the trustee's acceptance of a secret trust must be *clear* on the evidence. In *Hayman*, a testatrix left certain funds to her daughter by will "in full confidence that she will dispose of the same in accordance with the wishes which I have expressed to her." The funds in the account had been paid over to the daughter, who had then died intestate. The plaintiffs sued the daughter's estate on behalf of the mother's residuary legatees, claiming that a trust (which would have been a half-secret trust given the reference to it in the will), had been imposed upon the daughter. The daughter was said to have refused or neglected to exercise its terms and refused to disclose those terms to the residuary legatees.

24 The Court ruled that no trust had been proven, primarily on the basis of uncertainty both as to the testatrix's intention to create a trust, and the objects of the trust. Kerwin J., for himself and the Chief Justice, noted that three years had passed between the death of the original testatrix and the death of the daughter. Although matters could have been 'brought to a head' in this time, the residuary legatees had not commenced the action until after the daughter's death. In addition, s. 37 of the *Evidence Act* of Nova Scotia required that in an action by or against the heirs, executors or administrators of a deceased, the "opposite party" should not obtain a judgment based on his or her own testimony unless the testimony was corroborated. (No similar provision appears in the *Evidence Act* of British Columbia.)

25 Hudson J. expressed concerns about the plaintiffs' credibility and inferred that whatever had been said by the testatrix to her daughter had been "vague and indefinite as to objects, and this in itself supplies a reason why the words of the will should not be construed as obligatory." On this point, his Lordship noted *Harland v. Trigg* (1782), 1 Bro. C.C. 142 (Eng. Ch. Div.), where the Lord Chancellor had stated:

> I have no doubt but a requisition made with a clear object will amount to a trust. In the case of the Duchess of *Buckingham*'s will, the words were very gentle, but had a distinct object. But where the words are not clear, as to their object, they cannot raise a trust. Where this testator had a leasehold estate, which he meant should go to the family, he has used apt words; therefore, where he has not used such words, he had a different intent. [Quoted at p. 260 of *Hayman;* emphasis added.]

26 Rand J. for himself and Taschereau J., also agreed that no trust been created. The language in the will was precatory, whereas elsewhere in the instrument, mandatory language had been used to impose trust terms. In Rand J.'s analysis:

> Where a trust arises outside the will, the transaction may take place at any time during the life of the testator for the reason that the continuance of the legacy is on the footing of the legatee's undertaking. But the rule does not oblige us to say that the mere communication, in such a case as this, of the wishes of the testatrix, would *ipso facto* create an obligatory trust. If the language of the will, following which the communication is made, is precatory, why should a communication be considered as going beyond its mere fulfillment, and as not being intended to have the same effect as if it had been set out in full in the testamentary document? It would be necessary to show clearly not only the communication but that it was made in circumstances in which such an obligation was imposed upon and accepted by the legatee . . . . That proof here, having as its object the establishment of a claim against an estate, would in addition require corroboration.
>
> . . .
>
> These difficulties are obviated by the findings below that there is no sufficient evidence either of the fact of the communication of the wishes or of what they were; *a fortiori* there is no evidence of the acceptance by the daughter of an obligation to carry them out; and no ground has been suggested on which a presumption of any of these matters should now be raised against the estate. [At 262 — 3; emphasis added.]

27 From this, the defendant in the case at bar argues that both the intention to create a trust and the trustee's acceptance of the obligation to carry it out must be *clearly* proven. He suggests that where, as here, the existence of the trust would effectively 'disinherit' him from what he might have been entitled to under the *Wills, Estate and Succession Act* if a will had been made, there are good policy reasons to require clarity and specificity in determining whether acceptance was proven and a secret trust created. Otherwise, he says, vulnerable or grieving spouses may find themselves susceptible to "mischief, fraud and misery" on the basis of disputed conversations or adverse findings of credibility.

28 One cannot argue with the proposition of law that the trial judge was, as a condition of finding a secret trust, required to consider whether Mr. Odenthal in fact accepted the obligation imposed by Ms. Stuhff, as well as whether the three certainties were met. As *Hayman* suggests, these must all be clearly established for obvious reasons. They are matters of ordinary proof, however, and no authority has been cited to us that would require a higher standard of proof than the usual civil one.

29 With respect to the trustee's acceptance in particular, I note again Professor Waters' observation *(supra* at 288) that once the deceased's communication of the trust obligations is established, acceptance can be "spelled out of the silence" of the devisee/trustee and that the law assumes 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." (At 288.) Similarly, Albert H. Oosterhoff, Robert Chambers and Mitchell McInnes, the editors of *Oosterhoff on Trusts* (9th ed., 2019) observe that "positive acceptance obviously will suffice, but so too will silent acquiescence", citing *Russell v. Jackson* (1851), 68 E.R. 558 (Eng. V.-C.) and *Charlton v. Cipperley* (1984), 12 D.L.R. (4th) 582 (Alta. C.A.) . In addition, the editors of *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th ed., 2010) observe at]§12.87 that "Acceptance by the recipient [of the communication of the deceased] is readily inferred once communication occurs *unless he protests*." (My emphasis.) These authors cite *Moss v. Cooper* (1861), 70 E.R. 782 (Eng. K.B.) and *Tee v. Ferris* (1856), 69 E.R. 819 (Eng. Ch.).

30 In my view, the trial judge was aware of the two elements necessary for a secret trust and analyzed the evidence before her in considering both. This court may interfere with the factual findings of the trial judge only if they are shown to be clearly and palpably wrong.

31 The facts of this case are quite different from those in *Hayman*. Here, there is *positive evidence* from Mr. Odenthal himself that he agreed to do what Ms. Stuhff asked of him — including his acknowledgement that he knew she was relying on the "trust that existed" between the two of them. The following excerpts from the defendant's discovery that were read in at trial are also relevant:

> Q You agree, though, that the — your current will is contrary to what the deceased expressed to you?
>
> A Yes.
>
> Q At the time the deceased expressed her wishes to you, at any time, did you ever tell her that you would not abide by her wishes?
>
> A I don't think that ever came up.
>
> Q So you never told her that you would not abide by her wishes; right?
>
> A Correct.
>
> Q You always told her that you would abide by her wishes?
>
> A That's correct.
>
> Q But you're not doing that now?
>
> A No.
>
> [Transcript p. 56; emphasis added]

and:

> Q And you agree with me the current will is contrary to Angelika's expressed wishes to you?
>
> A Absolutely.
>
> Q And that you always told Angelika that you would abide by her wishes?
>
> A Yes.
>
> Q And that you are not doing that now?
>
> A What's — sorry?
>
> Q And you are not doing that now?
>
> A That's correct.
>
> [Transcript p. 105; emphasis added.]
>
> Q . . . . I'm going to suggest to you that Angelika knew you wouldn't do such a thing as get rid of or dispose of all of her assets during your lifetime so there was nothing left. She knew you wouldn't do that because you promised her that Susanne would get those assets?

A That's correct, yes.

[Transcript, p. 93; emphasis added.]

32 In my view, the trial judge's finding that the defendant had accepted the obligation to hold Ms. Stuhff's assets for Susanne was well-supported by this and other evidence. Although Mr. Odenthal expressed some unhappiness at the deceased's request, he admitted he told her he would abide by her wishes. The circumstances were such that, in Waters' words, he would be "bound to say something if he rejected the idea that he himself should not enjoy the property beneficially." (At 288.) He did not do so. Although he may have regarded the obligations he assumed as "moral" ones only, Ms. Stuhff would reasonably have understood from him that the wishes she had communicated would be carried out. Had she not trusted in these assurances, she would likely have prepared a will or taken some other step to ensure her assets went to Susanne and that a new romantic partner of Mr. Odenthal would not share in them.

33 In all the circumstances, I am not persuaded the trial judge failed to consider the element of acceptance or that she erred in law or in fact in finding that Mr. Odenthal had accepted the trust. He was required to transfer the trust assets on death or upon entering into a new relationship, whichever first occurred; and the time for the distribution of the trust assets came in 2013 or 2014 when he entered the new relationship. (See paras. 29, 31.) No challenge was made by the defendant to the legal validity of this term.

The Winthrop Property

34 The defendant's second ground of appeal is closely related to the first. He submitted that since the Winthrop Property had been held by the couple in joint tenancy, it passed to him 'automatically' when Ms. Stuhff's death severed the tenancy. Thus it never became a part of her estate. (It will be recalled that this issue was not raised at trial and that the trial judge declined to reopen the trial judgment when the defendant sought to assert it.)

35 As far as Ms. Stuhff's intentions are concerned, Mr. Odenthal agreed in cross-examination that he knew the value of "what she had brought in" would include her interest in the Winthrop Property and that the 20/80 'split' of the joint tenancy had been intended to reflect the parties' relative contributions. When he had signed his new will shortly after Ms. Stuhff's death, he had included the approximate value of her share in coming to the $130,000 value he placed on her estate, which he had agreed was to go to Susanne. On this point, counsel for the plaintiff drew our attention to the following evidence given by Mr. Odenthal in cross-examination:

Q But you've now agreed with me that the Winthrop property was to be included in the calculation of what formed her estate; right?

A Yes

. . .

Q I'm suggesting to you that at the time you were examined you told — you gave evidence that you didn't think the Winthrop property would be — any part of that would be included in the estate?

A That is correct, simply the way how it has been registered.

Q But now you agree part of it forms how you reach[ed] the value of her estate?

A Yes. [Transcript p. 96]

36 Aside from what the deceased and the defendant understood, however, I am satisfied that as a matter of law, the creation of the secret trust would have severed the joint tenancy. On this point, I note the decision of Mr. Justice Wilson (as he then was) in *Clauda v. Lodge*, [1952] 4 D.L.R. 570 (B.C. S.C.). There, the testator Mr. Clauda named his wife as his executrix and sole

beneficiary in his will. However, as the Court noted, everything that came to her by his death came by virtue of survivorship, since she had been the joint owner with him of all property in which he had any interest. (At 570.) Mr. Clauda's brother claimed that before his death, the testator had instructed his wife to transfer various assets to the brother and his family and that she had accepted this instruction and thus become a trustee of that property for the benefit of the plaintiffs. By the time of trial, most of the assets had been transferred over to the plaintiffs, but according to the pleading, the widow refused to pay over the sum of $10,000 she had received. She admitted at trial that she had promised her husband she would "do something" for the brother's children, but took the position that the promise was of a very general nature and did not refer to any specific property.

37 After reviewing various admissions made by the widow, the Court found that the husband had made "specific, not general, provision for the family of [the brother]" (at 574) and that the property to be transferred had included the $10,000 cash. Wilson J. reasoned:

> In *McCormick v. Grogan*, L.R. 4 H.L. at p. 97, Lord Westbury says this: "The Court of Equity has, from a very early period, decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetuating a fraud an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets title under that Act, and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the *Statute of Frauds*, and in this manner, also, it deals with the *Statute of Wills*. And if an individual on his deathbed, or at any other time, is persuaded by his heir-at-law, or his next of kin, to abstain from making a will, or if the same individual, having made a will communicates the disposition to the person on the face of the will benefited by that disposition, but, at the same time, says to that individual that he has a purpose to answer which he has not expressed in the will, but which he depends on the disponee to carry into effect, and the disponee assents to it, either expressly, or by any mode of action which the disponee knows must give to the testator the impression and belief that he fully assents to the request, then, undoubtedly, the heir-at-law . . . will be converted into trustees, simply on the principle that an individual shall not be benefited by his own personal fraud." See also *Re Gardner*, [1920] 2 Ch. 523.
>
> If the property which the defendant received as a consequence of the death of Charles Clauda had come to her under the terms of this will there would, I think, be no doubt that the law would apply to the facts I have stated. . . .
>
> The property which came to the defendant on the death of Charles Clauda came by survivorship and not as part of his estate. Counsel for the plaintiff asserts, and counsel for the defendant agrees, that this is not in itself fatal to the plaintiff's claim; the property jointly held may be impressed with a secret trust. [At 574 — 5; emphasis added.]

Ultimately, the Court held that the testator's giving of instructions to his wife and her acceptance of those instructions impressed the jointly-held assets with the secret trust.

38 Reference may also be made to this court's decision in *British Columbia (Public Trustee) v. Mee* (1971), 23 D.L.R. (3d) 491 (B.C. C.A.) , where Bull J.A. for the Court observed:

> There is no doubt, . . . that a valid declaration of trust (although not registered in the appropriate Land Registry Office) could effectively sever a joint tenancy to the same extent as a transfer made to a trustee would do. The principle that a declaration of trust has the same binding effect as a transfer to a trustee has long been the law and is set out in the oft-cited case of *Milroy v. Lord* (1862) . . . 45 E.R. 1185. [At 494.]

The Court discussed the seminal case of *Stonehouse v. British Columbia (Attorney General)* (1961), [1962] S.C.R. 103 (S.C.C.), in which it was held that the *Land Registry Act* did not change the common law principle that a joint tenancy is destroyed by the alienation (even though not registered) by a joint tenant of his or her interest, thus ending the unity of title. Bull J.A. then went on in *Re Mee* to observe:

> I fail to see any distinction in a case where a joint tenant alienated his interest in a property direct to the person he wishes to benefit to one where he alienated it to a trustee to hold and deal with for the benefit or interest of that person. If the first be inconsistent with the maintenance of the joint tenancy and destroys one basis upon which that title can only exist,

> then, in my respectful opinion, so also is and does the second. Both would effect a severance of the tenancy so long as the owner of the interest binds himself by his dealings and therein, in my opinion, lies the main factor as to whether a severance is effected . . . Of course, equity will not enforce an imperfect voluntary trust but it will enforce a voluntary one if it is "completely constituted". A trust can be so "completely constituted" when a settlor declares himself to be a trustee . . . . [At 495 — 6; emphasis added.]

39 The Court also rejected the notion that the declaration of trust had not effected severance because the beneficiary, being an infant, could not compel the settlor to transfer the undivided one-half interest to him. Again in Bull J.A.'s words, "What is relevant is whether the father had bound himself by the trust instrument to carry out its terms, and, I have no doubt that he could have been compelled to do so had he lived, and his successors in the trust can be compelled to do so in the future." (At 496.) Thus the father's "ineptly drawn declaration" of trust had effectively severed the joint tenancy in respect of the subject property.

40 I see no difference in principle between an ordinary declaration of trust like that discussed in *Mee*, and the acceptance by a trustee of an obligation of secret trust. The trustee becomes the legal owner of the subject assets immediately, holding for the benefit of the beneficiaries. No will was necessary after this point. Indeed in theory, once the secret trust containing all Ms. Stuhff's assets came into existence, nothing was left to pass by the intestacy to the defendant. In practice, however, Susanne is content to forgo tracing the assets themselves, and to receive instead the value thereof in cash, thus avoiding the time and expense of pursuing the equitable remedies available to her.

Disposition

41 In these circumstances, I see no error in the trial judgment, whether of fact, law or mixed fact and law. I would dismiss the appeal.

***Tysoe J.A.*:**

I agree

***Harris J.A.*:**

I agree

Appeal dismissed.