# IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20240813
Docket: S222108
Registry: New Westminster

Between:

**Vance Irvine**

Plaintiff

And

**Kirsten Nadine Kime and Edward Pollard, in his capacity as Executor of the Estate of Tara Pollard, Deceased**

Defendants

Before: The Honourable Mr. Justice Hori
in Chambers

## Oral Reasons for Judgment

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| Counsel for the Plaintiff appearing by videoconference: | S. Payne |
| Counsel for the Defendant, Kirsten Nadine Kime, appearing by videoconference: | S.T. Rule |
| Counsel for the Defendant, Edward Pollard, in his capacity as Executor of the Estate of Tara Pollard, Deceased, appearing by videoconference: | M.M. Sinclair |
| Place and Date of Hearing: | Kelowna, B.C.<br>July 11, 2024 |
| Place and Date of Judgment: | Kelowna, B.C.<br>August 13, 2024 |

## Introduction

### Nature of the Plaintiff's Action

[1] **THE COURT:** The factual foundation for this action is a life insurance policy on the life of the deceased, Tara Pollard, (the "Policy"), and an alleged agreement between the deceased and the plaintiff, Vance Irvine, that the deceased would maintain him as the primary beneficiary under the Policy.

[2] In this action, Mr. Irvine seeks to recover the insurance proceeds from the Policy that the insurer paid to the primary beneficiary, who, at the time of the deceased's death, was the defendant, Kirsten Nadine Kime. The basis for the claim against Ms. Kime is unjust enrichment.

[3] The plaintiff also seeks to recover the insurance proceeds from the estate of the deceased on the basis of a breach of contract.

### Nature of the Application by Ms. Kime

[4] In the application that is before the court, Ms. Kime applies to dismiss the plaintiff's action pursuant to the summary trial rule of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

## Background

[5] The Policy insured the life of the deceased, Tara Pollard. Kirsten Kime is the sister of the deceased. At the time of the deceased's death, Ms. Kime was the primary beneficiary under the Policy.

[6] Mr. Irvine is the former spouse of the deceased. He and the deceased were married on August 30, 2008, but they separated in May 2015.

[7] The Policy was issued on March 10, 2015. The deceased was the owner of the Policy and the primary insured under the Policy. Mr. Irvine was also insured under the Policy as the deceased's spouse.

[8] The Policy provided for the payment of $150,000 to the beneficiary upon the death of the deceased. The Policy also provided for the payment of $500,000 to the beneficiary upon the death of Mr. Irvine.

[9] When the Policy was issued, the primary beneficiary upon the death of the deceased was Mr. Irvine. The primary beneficiary on the death of Mr. Irvine was the deceased. The contingent beneficiary on the death of either Mr. Irvine or the deceased was the defendant, Kirsten Kime. The beneficiary designations were not irrevocable.

[10] Mr. Irvine alleges that he and the deceased had an agreement that:

a) the deceased would name Mr. Irvine as a primary beneficiary under the Policy;

b) the deceased would not make any changes to the Policy without Mr. Irvine's consent; and

c) Mr. Irvine would pay the monthly premiums for the Policy.

[11] Mr. Irvine and the deceased separated in May 2015. The deceased commenced a family law action on January 20, 2016. By letter to the insurer dated January 25, 2016, the deceased requested a change in the beneficiaries under the Policy. The change was to remove Mr. Irvine as the beneficiary and to designate the defendant, Kirsten Kime, as the primary beneficiary on the deceased's life and the deceased's parents as the contingent beneficiary. The insurer implemented the requested beneficiary change effective January 25, 2016.

[12] The deceased died on March 25, 2018. At the time of the deceased's death, the family law action remained unresolved. Since Kirsten Kime was the primary beneficiary at the time of the deceased's death, the insurer paid the insurance proceeds to her. The payment received by Ms. Kime was $179,894.30.

[13] Mr. Irvine seeks to recover the insurance proceeds paid to Ms. Kime:

a) from the estate of the deceased in the form of damages for breach of contract; and

b) from Ms. Kime pursuant to a constructive trust based on an unjust enrichment.

**Suitability for Summary Trial**

[14] At the hearing of this application, all parties agreed that the action was suitable for disposition by summary trial. I agree.

[15] There are conflicts in the evidence tendered by the parties, but those conflicts will not prevent me from thoroughly assessing the evidence to reach a just determination of the issues.

[16] This is an application brought by Ms. Kime for an order dismissing the action against the defendants. There is no corresponding application by the estate. However, I understand that all parties agree that the lack of an application by the estate will not preclude me from deciding the issues as they relate to all parties, including the estate.

[17] Accordingly, I will proceed to decide the issues in this action by summary trial.

**Onus of Proof**

[18] In a summary trial application, it is important to remember that all parties must come to the summary trial prepared to prove their claims or their defences. This is the case because the court may grant judgment in favour of any party, regardless of which party brought the action: *Gichuru v. Pallai*, 2013 BCCA 60 [*Gichuru*] at para. 32.

[19] A summary trial is a trial of the action for which the plaintiff (even if not the applicant) retains the onus of proving his or her claims and the defendant (even if not the applicant) retains the onus of establishing any defences: *Gichuru* at para. 35. Therefore, in this case, Mr. Irvine has the onus to prove the existence of a contract with the deceased and the breach of that contract resulting in damages. Further, Mr.

Irvine has the onus of proving the factual requirements for an unjust enrichment as against Ms. Kime.

**Contract Claim**

[20] I will deal first with the contract claim against the deceased's estate.

[21] Mr. Irvine deposes that in or around November 2014, he and the deceased met with an insurance agent, Kirsten Jenkins, to discuss their options for life insurance. Mr. Irvine further deposes that during that meeting, he and the deceased made a verbal agreement with the following terms:

a) the deceased would apply for the Policy in her name;

b) Mr. Irvine would be named as the primary beneficiary;

c) Mr. Irvine would remain the primary beneficiary and the deceased would make no changes to the Policy without Mr. Irvine's consent; and

d) Mr. Irvine would pay the monthly premiums.

[22] I cannot accept Mr. Irvine's evidence with respect to the existence of the alleged agreement because the independent evidence, the documentary evidence, and the conduct of Mr. Irvine does not support such an agreement.

[23] Firstly, at his examination for discovery, Mr. Irvine testified that he and the deceased made this agreement in the presence of the agent, Ms. Jenkins. However, Ms. Jenkins does not recall the parties discussing any agreement and believes that such a discussion did not happen. She testified at a deposition that had such a discussion occurred, it would have stuck out in her mind because the parties did not make the beneficiary designations in the Policy irrevocable.

[24] Secondly, the terms of the insurance application that the parties completed when they met with Ms. Jenkins is inconsistent with such an agreement. The insurance application that Mr. Irvine signed did not designate him as an irrevocable beneficiary.

[25] Thirdly, Ms. Jenkins testified in her deposition that it is her practice to explain what it means for a beneficiary to be irrevocable. Mr. Irvine confirmed at his discovery that he understood that if the beneficiary is not irrevocable, the owner could change the designation.

[26] Fourthly, Mr. Irvine became aware that he was no longer the beneficiary under the Policy in late 2016. However, Mr. Irvine presented no evidence that he objected to being removed as the beneficiary before the deceased's death. The only evidence before me is that Mr. Irvine sent a text message to the deceased on October 3, 2017, the year after he learned of the change, advising her that he had applied for his own life insurance and that once his insurance is in place, he would stop paying for the Policy. However, there is no mention of any breach of an agreement in this text message. In fact, Mr. Irvine continued to pay the insurance premiums for the Policy until January 2018.

[27] Mr. Irvine deposes that even though he was aware that his designation as a beneficiary was revocable, he relied on his agreement with the deceased and trusted that she would maintain him as a primary beneficiary. I do not give the evidence of Mr. Irvine any significant weight in light of the evidence of the insurance agent, Ms. Jenkins, and in light of Mr. Irvine's lack of protest after he learned that he had been removed as a beneficiary.

[28] For these reasons, I find that Mr. Irvine has not proven that the deceased agreed to irrevocably name him as the beneficiary under the Policy. Accordingly, I must dismiss Mr. Irvine's claim for breach of contract against the estate of the deceased.

**Unjust Enrichment**

[29] Mr. Irvine claims recovery of the insurance proceeds paid to Ms. Kime on the basis of unjust enrichment. Mr. Irvine seeks to have the insurance proceeds paid under the Policy impressed with a constructive trust in his favour to remedy the unjust enrichment bestowed upon Ms. Kime.

[30] As explained by the Supreme Court of Canada in *Moore v. Sweet*, 2018 SCC 52 [*Moore*] at paras. 32–33, the constructive trust is an equitable remedy through which the court will require one person, by operation of law, to hold property for the benefit of another. Therefore, a proper equitable basis must exist before the court will impress property with a remedial constructive trust. The cause of action in unjust enrichment is one such equitable basis, so long as the plaintiff can establish that a monetary award is insufficient and there is a link between a plaintiff's contribution and the disputed property.

[31] Justice Morellato in *Ross v. Chen*, 2024 BCSC 223 [*Ross*], conveniently summarized the legal analysis required when assessing a claim of unjust enrichment. Citing *Moore* and other cases from the Supreme Court of Canada, Justice Morellato set out a three-step analysis.

[32] The first step in the analysis requires a plaintiff to establish that the defendant has been enriched.

[33] The second step in the analysis requires the plaintiff to show that she or he has suffered a deprivation that corresponds to the benefit received by the defendant.

[34] The third step in the analysis is considered if an enrichment of the defendant and a corresponding deprivation of the plaintiff are established. The third step requires the plaintiff to show that there is no juristic reason for the defendant's enrichment at the plaintiff's expense.

[35] The third step in the analysis will proceed in two stages. The first stage requires the plaintiff to establish that the defendant's retention of the benefit at the plaintiff's expense cannot be justified on the basis of any of the established categories of juristic reasons such as a contract, a disposition of law, a donative intent, or any other valid common law, equitable, or statutory obligations. If any of these categories applies, the analysis ends and the plaintiff's claim must fail because the defendant will be justified in retaining the benefit.

[36] If the plaintiff demonstrates that none of the established categories of juristic reasons applies, then she or he has established a *prima facie* case and the analysis proceeds to the second stage. At the second stage of the analysis, the defendant has an opportunity to rebut the plaintiff's *prima facie* case by showing that there is some residual reason to deny recovery. In determining whether there is some residual reason to deny recovery, the court will consider the parties' reasonable expectations and public policy.

**Enrichment of the Defendant**

[37] On the first question in the analysis, there is no doubt that Ms. Kime was enriched when she received the insurance proceeds under the Policy.

**Detriment to the Plaintiff**

[38] The second question is whether Mr. Irvine suffered a deprivation that corresponds to the benefit received by Ms. Kime.

[39] On this question, Mr. Irvine deposes that he paid the insurance premiums for the Policy. He submits that his premium payments made it possible for Ms. Kime to receive the insurance proceeds under the Policy. Therefore, he made those payments to his detriment and Ms. Kime received the insurance proceeds at his expense.

[40] However, the evidence tendered by Mr. Irvine in support of his position is not consistent with the premiums being paid by him. He deposes in his affidavit and exhibits documents that show that the premiums for the Policy were paid for through companies. Initially, a company controlled by the deceased paid the premiums. Approximately eight months after the Policy was issued, a company controlled by Mr. Irvine began paying the premiums.

[41] The evidence does not disclose why the premiums for the Policy were paid by the companies rather than Mr. Irvine personally. Mr. Irvine brings this action in his personal capacity. The companies are not involved in this litigation.

[42] On the state of the evidence before me, I could conclude that Mr. Irvine has not proven, on a balance of probabilities, that he suffered a deprivation corresponding to the benefit received by Ms. Kime. If there was a deprivation, it was one that his company suffered.

[43] However, I prefer to base my decision on an analysis of whether there is a juristic reason for the enrichment.

**No Juristic Reasons**

[44] On the third question, Mr. Irvine must show that none of the established categories of juristic reasons would be justification for Ms. Kime retaining the insurance proceeds from the Policy.

[45] In my view, there is a juristic reason for Ms. Kime retaining the insurance proceeds. Ms. Kime was the primary beneficiary under the Policy. The insurers had a contractual obligation to pay the insurance proceeds to Ms. Kime. The deceased had no contractual obligation to designate Mr. Irvine and maintain him as the primary beneficiary under the Policy. The *Insurance Act*, R.S.B.C. 2012, c. 1 [*IA*], s. 59, authorizes an insurer to designate a beneficiary to whom the insurance money is to be paid and the deceased exercised the right to do so under the Policy.

[46] Ms. Kime had a contractual entitlement to the insurance proceeds from the insurer. She could have enforced that entitlement by an action against the insurer. Her right to the insurance proceeds was not, in this case, infringed upon by any contractual or other obligations between the deceased and Mr. Irvine.

[47] In reaching this conclusion, I am mindful of the decision in *Moore* that the provisions of the *IA* cannot justify the enrichment of a life insurance beneficiary who received the benefit of the insurance contrary to a contract between the deceased and the deceased's former spouse. The decision in *Moore* is distinguishable from this case on the basis that in *Moore*, the court found a contract existed between the deceased and his former spouse. The Court held that, in the context of that case,

nothing in the *IA* could be read as ousting the common law or equitable rights that persons other than the designated beneficiary may have in the insurance proceeds.

[48] In the case before me, as was the case before Justice Morellato in *Ross*, the application of the *IA* does not oust any common law or equitable rights of Mr. Irvine to the insurance proceeds because he has no such rights.

[49] Accordingly, Mr. Irvine has failed to establish that the defendant's retention of the benefit cannot be justified on the basis of any of the established categories of juristic reasons. Accordingly, his claim for unjust enrichment must fail on stage one of step three in the analysis.

[50] Even if I am wrong in finding that there is a juristic reason for Ms. Kime to retain the insurance proceeds, I find that there are residual reasons to deny recovery in this case.

[51] First, it is not reasonable for Mr. Irvine to have had an expectation that he would be a beneficiary under the Policy on the deceased's death for the following reasons:

a) There was no agreement between the deceased and Mr. Irvine that the deceased would maintain him as the primary beneficiary under the Policy;

b) Mr. Irvine knew from when he and the deceased applied for the Policy that his designation as the primary beneficiary was not irrevocable;

c) The insurance agent, Ms. Jenkins, explained to Mr. Irvine and Mr. Irvine understood that when the beneficiary designation is not irrevocable, the owner could change the designation;

d) Mr. Irvine became aware that he was no longer the beneficiary under the Policy in late 2016, but made no protest to the deceased; and

e) The deceased clearly intended for Ms. Kime to be the beneficiary of her life insurance proceeds by designating her as such.

[52] While Mr. Irvine continued to pay the insurance premiums for the Policy, it is more likely that he did so to maintain the insurance on his own life under the Policy, rather than to preserve his entitlement to insurance proceeds on the death of the deceased. This is evident by the content of the text messages sent to the deceased on October 3, 2017, which indicates that he has applied for his own life insurance and that he will stop paying on the Policy once his own insurance is in place.

[53] Secondly, for public policy reasons, absent a valid and enforceable contract to the contrary, a person ought to be able to designate any person of their choice as the beneficiary of their life insurance policy as part of their estate planning. That beneficiary may not always be the insured's spouse, especially after a separation. As stated by Justice Morellato in *Ross*, there are a myriad of reasons for an insured to choose someone other than a spouse as one of their designated beneficiaries. The deceased, by designating Ms. Kime as a primary beneficiary, clearly expressed her intention that she wished Ms. Kime to have the insurance proceeds rather than her former spouse, Mr. Irvine.

[54] Mr. Irvine relies extensively on *Moore* in support of his position in this action. However, the facts in *Moore* are different than the facts in this case in one significant aspect. The decision in *Moore* is based on a finding that before the deceased's death, he and his former wife entered into an agreement whereby the deceased's wife would pay the insurance premiums and would be entitled to the insurance proceeds on her husband's death. There is no such agreement in this case.

[55] For these reasons, I find that Mr. Irvine has not made out his case for unjust enrichment against Ms. Kime. Accordingly, I dismiss his claim for unjust enrichment against Ms. Kime and his claim for a constructive trust over the insurance proceeds.

## Final Remarks

[56] Before concluding my reasons, I feel compelled to make a comment on the utility of this action and this application, given the stated intention of the parties with respect to the insurance proceeds.

[57] Both parties depose that, with the exception of paying some of the insurance proceeds to retire a $15,000 debt owed by the deceased to her parents and to pay expenses for this action, the insurance proceeds are going to be held for the children of the deceased until they reach the age of majority.

[58] If that is the goal of both parties, I do not understand why the parties have not agreed to put the monies in trust for the children. Instead, they have embarked on this lawsuit and this application at significant expense to both of them.

[59] It seems to me, given the parties' common intentions, this litigation exercise was an unnecessary expenditure of time and money.

[60] In any event, the action by Mr. Irvine in this case against the estate and against Ms. Kime are dismissed.

**Costs**

[61] CNSL S. RULE: I submit that the defendants ought to receive their costs, the ordinary costs, Scale B.

[62] THE COURT: Mr. Sinclair?

[63] CNSL M. SINCLAIR: Yes, Justice, I would submit that the estate has been successful on this application and should be entitled to its costs.

[64] THE COURT: Thank you. Mr. Payne?

[65] CNSL S. PAYNE: Yes, Justice. Given that Mr. Irvine was willing at an early date to have the funds held in trust for the children, as was the common intention, we'd ask that each party carry their own costs.

[66] THE COURT: In my view, the defendants have been successful in this action. I see no reason to depart from the usual order that costs follow the event. Therefore, the defendants will have their costs of this proceeding at Scale B.

"D.K. Hori J."

HORI J.