

CITATION: In the Matter of the Bankruptcy of The Testamentary Estate of Jeffrey James Wilson, 2019 ONSC 1278

COURT FILE NO.: 31-2025856

DATE: 20190225

**ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY**

IN THE MATTER OF THE BANKRUPTCY OF
THE TESTAMENTARY ESTATE OF JEFFREY JAMES WILSON (aka JEFF WILSON)
Of the City of Toronto
in the Province of Ontario

AND IN THE MATTER OF THE *Bankruptcy & Insolvency Act*,
R.S.C. 1985, c.B-3, as amended

BEFORE: Madam Justice V.R. Chiappetta

COUNSEL: *Robert Klotz*, for Catherine Wilson, in her capacity as Estate Trustee of the Estate of Sophia Louis De Jonge

Domenico Magisano and Lindsay Woods, for the Trustee in Bankruptcy

Ed Esposto, for Sophia De Jonge Estate

HEARD: February 11, 2019

ENDORSEMENT

[1] Catherine Wilson (“Catherine”) in her capacity as trustee of the estate of the late Sophia De Jonge (the “Sophia Estate”) has submitted a proof of claim to Crowe Soberman Inc. in its capacity as the trustee in Bankruptcy (the “Bankruptcy Trustee”) of the estate of Jeffrey Wilson (“Jeff”). Catherine claims that the Sophia Estate has a proprietary interest in the net proceeds of two pieces of property: 1142 North Burnt Island Rd., Muskoka, Ontario (the “Cottage property”) and 27 Edgar Avenue, Toronto, Ontario (the “Family home”) (together, the “Real Property”). The Real Property has been sold. The net sale proceeds of the Real Property, totaling approximately \$1.6 million, are being held in the trust account of the Bankruptcy Trustee.

[2] The issue before the court on this appeal is whether the Bankruptcy Trustee was correct in its conclusion that the Sophia Estate does not have a proprietary claim to the net proceeds from the Real Property. For reasons set out below, I have found that the conclusion of the Bankruptcy Trustee was not correct.

Background Facts

[3] Sophia and Jeff were married and had four children. In 2008, Sophia passed away. She left two wills. Jeff was the executor and trustee under both of Sophia's wills. He was also the beneficiary under both of Sophia's wills.

[4] The first will addressed Sophia's shares and personal effects. This was the Non-Probate Will. Sophia had a substantial beneficial interest in Opas Investments Limited ("Opas"). Opas was the ultimate corporate parent of a meat packing business owned and operated by Sophia's family. The meat packing business was sold prior to Sophia's passing and her share of the proceeds were either transferred to her personally or to her holding company, Sophia De Jong Investments Limited ("SDIL"). Sophia did not declare these funds as part of her tax filings (the "Undisclosed Funds"). The most valuable asset in the Non-Probate Will was Sophia's interest in her holding company, SDIL. The relevant provisions of the Non-Probate Will are as follows:

2. TRUSTEES

2.1 I APPOINT my husband, JEFFREY WILSON, (hereinafter in this Will referred to as "my husband") the Executor and Trustee of this Will

...

2.4 I hereinafter refer to the Executor and Trustee, failing whom to the person or persons from time to time acting in the administration of the trust estate as the "Trustees".

3. TRUST CONVENYANCE

3.1 I GIVE AND APPOINT to the Trustees my Shares and my Personal Effects, both as herein defined in trust for the purposes set forth herein. In this Will or any Codicil hereto, my Shares and my Personal Effects hereby given and appointed to the Trustees and all substitutions therefor and any additions and accumulations thereto are called the "trust estate" [emphasis added]

8. FAMILY TRUST

8.1 If my husband survives me, I AUTHORIZE the Trustees, within 36 months of the date of my death to allocate any assets of the trust estate not forming part of a specific bequest under Article 7 of this Will between the trust created in Article 9 of this Will and the trust created hereunder in this Article 8. Any assets of the trust estate not specifically allocated by the Trustees prior to the expiration of the 36 month period following my death to the trust created hereunder in this Article 8 shall form part of the residue of the trust estate to be dealt with in accordance with Article 9 of this Will [emphasis added]

9. RESIDUE

9.1 I DIRECT the Trustees, during the lifetime of my husband, to keep invested the residue of the trust estate and to pay the annual net income derived therefrom to or for the benefit of my husband in such installments as the Trustees may determine in their discretion and to pay, at any time during the lifetime of my husband, to or for the benefit of my husband, such amount or amounts out of the capital of the residue of the trust estate as the Trustees may determine in their discretion. During the lifetime of my husband, I prohibit the Trustees from exercising any power or discretion in a manner that would taint the trust created herein and preclude the benefit of the tax deferral available under Section 70(6) of the Income Tax Act (Canada) as amended from time to time. [emphasis added]

[5] The Non-Probate Will was amended by a Will Amendment dated April 20, 2008. The Will Amendment stated:

The following assets will be managed by Jeff. Jeff can sell them or re-invest them at his sole discretion without requiring approval from a co-executor:

1. All Real Estate Assets...
2. Benefits from life insurance policies or Kodak death benefit plans which Sophia is entitled to...
3. All funds currently held for investment purposes by Evans Investment Counsel...

The following assets will remain in trust for the 4 children. Jeff cannot sell these assets. All interest and dividends from these assets will be re-invested by Burgundy [Asset Management] for the sole benefit of the children...

This ensures that the children receive a considerable amount of money from the Burgundy account when they are older. In giving Jeff the Evans account, it also acknowledges that Jeff must devote a considerable amount of his time to raising the children; time which he might otherwise have spent pursuing business opportunities. It also eliminates the need for a co-executor and the potential complications which may have arisen.

[6] The second will addressed the balance of Sophia's assets, the most valuable of which was the Real Property. This was the Probate Will. The relevant provisions of the Probate Will are as follows:

8. LEGACIES

I DIRECT the Trustees to pay the following legacies:

- (a) Five Thousand (\$5,000) Dollars to the Pink Tulip Group; and
- (b) One Thousand (\$1,000) Dollars to the University of Windsor, Faculty of Law with the desire that it be used to assist in the tuition payments of a single parent law student in financial need

9. RESIDUE

9.1 If my husband survives me, I DIRECT the Trustees to transfer the residue of the trust estate to my husband for his own use absolutely; provided that, with respect to any real property forming part of the residue of the trust estate, my husband shall assume all mortgages outstanding in respect of such real properties. [emphasis added]

[7] There is no evidence that Jeff exercised his discretion and created the Family Trust contemplated at article 8.1 of the Non-Probate Will.

[8] Both of Sophia's wills required the Trustees (defined as including both the Executors and Trustees) to pay all of Sophia's debts. Both of the wills also contained a provision similar to article 6.5 of the Non-Probate Will:

I CONFIRM that provisions respecting the payment of debts and taxes appears in the Will which I executed earlier today and it is not my intention that my just debts, funeral and testamentary expenses and all duties and taxes referred to in this Article 6 be paid twice. Accordingly, I DIRECT the Trustees in their absolute discretion to determine, along with the trustees of the earlier Will how my just debts, funeral and testamentary expenses, duties and taxes which are referred to in this Article 6 shall be allocated between the property disposed of by this Will and the property disposed of by the earlier Will [emphasis added]

[9] In May 2009, the Cottage property was transferred from the Sophia Estate to Jeff. In October 2010, the Family home was transferred from the Sophia Estate to Jeff. At no time did Jeff, as sole executor of the Sophia Estate, address the issue of the Undeclared Funds.

[10] In August 2010, SDIL's accountants discovered that Sophia received the Undeclared Funds and did not declare the Undeclared Funds to the Canada Revenue Agency (the "CRA").

[11] In 2015, Jeff passed away. His four children were between 17 and 22 years of age at the time of Jeff's death (the "Wilson children"). Jeff left his oldest daughter, Catherine, as estate trustee for both his and Sophia's estates.

[12] Catherine discovered that Jeff's estate was insolvent. She sought and obtained court approval to assign Jeff's estate into bankruptcy.

[13] Catherine further discovered the issue of the Undeclared Funds in Sophia's Estate. On behalf of Sophia's Estate, Catherine filed a voluntary disclosure with respect to the Undeclared Funds which was largely accepted by the CRA in May 2016. The voluntary disclosure resulted in

a reassessment of Sophia's 2007 and 2008 tax returns, resulting in a tax liability to the estate of \$866,092 plus interest of \$338,019, for a total of \$1,204,111 (the "Tax Liability").

[14] Through the Property Claim, Catherine seeks payment on behalf of the Sophia Estate, to the exclusion of Jeff's other creditors, of an amount equal to the Tax Liability from the net proceeds of sale from the Real Property. In addition to the Tax Liability, the Property Claim seeks payment of over \$70,000 in professional fees incurred in completing the voluntary disclosure to CRA. The Bankruptcy Trustee issued a Notice of Disallowance to the Property Claim on April 10, 2017 (the "Disallowance"). On April 19, 2017, Catherine, on behalf of Sophia's Estate, served a motion record seeking to appeal the Disallowance.

[15] The Wilson children have also submitted a proof of claim to the Bankruptcy Trustee seeking an unsecured claim of \$8,223,297 arising from Jeff's administration of the Sophia Estate (the "Unsecured Claim"). The Bankruptcy Trustee has not made a decision on the Unsecured Claim.

Analysis

[16] This is an appeal of the Disallowance of the Property Claim. The appellant's factum was silent with respect to the standard of review applicable on this appeal. When asked this question by the court, counsel of the appellant submitted that this was a trial *de novo*, considering the staggered timing of documentary disclosure. This submission in open court was the first time counsel for the Bankruptcy Trustee had heard the appellant's position on the standard of review. The record before the court fails to demonstrate any reason why this appeal should be considered a trial *de novo*, nor do I find counsel's submissions persuasive. The Bankruptcy Trustee argues that the Disallowance was primarily based on facts presented by the Sophia Estate to the Bankruptcy Trustee such that the standard of review is one of reasonableness. I disagree. In my view, the Disallowance was based primarily on the interpretation of significant elements of the law of trusts and the law of estates. This appeal will proceed as a "true appeal", therefore, and the issue before the court is whether the Bankruptcy Trustee's decision that the Sophia Estate holds no proprietary interest to the net sale proceeds of the Real Property was correct.

[17] Prior to his death, in his capacity as estate trustee, Jeff had an obligation to pay the Tax Liability, as a debt of the Sophia Estate. He had the discretion to decide how to allocate payment of the Tax Liability between the subject matter of the Non-Probate Will or the Probate Will. The main asset of value under the Non-Probate Will was the shares of SDIL. The main asset of value under the Probate Will was the Real Property. Jeff did not satisfy the Tax Liability and made no apparent decision on allocation.

[18] The Bankruptcy Trustee argues that, considering the value of the SDIL shares, Sophia's estate had sufficient funds to satisfy the Tax Liability both at the time Jeff transferred the Real Property and at the time of his death. If the Sophia Estate now cannot afford to pay the Tax Liability, the Bankruptcy Trustee argues that the shortfall stems from the management of the Sophia Estate after Jeff's death, and should not reduce the recovery of Jeff's creditors.

[19] The Appellants argue that Article 9 of the Non-Probate Will effectively created a spousal trust, the subject matter of which is all of the assets subject to the Non-Probate Will. As the value of SDIL's shares is no longer available to Sophia's estate, the Appellants argue that Jeff's transfer of the Real Property rendered Sophia's Estate insolvent, with no funds to satisfy the Tax Liability.

[20] Article 9 of the Non-Probate Will stated:

9. RESIDUE

9.1 I DIRECT the Trustees, during the lifetime of my husband, to keep invested the residue of the trust estate and to pay the annual net income derived therefrom to or for the benefit of my husband in such installments as the Trustees may determine in their discretion and to pay, at any time during the lifetime of my husband, to or for the benefit of my husband, such amount or amounts out of the capital of the residue of the trust estate as the Trustees may determine in their discretion. During the lifetime of my husband, I prohibit the Trustees from exercising any power or discretion in a manner that would taint the trust created herein and preclude the benefit of the tax deferral available under Section 70(6) of the *Income Tax Act* (Canada) as amended from time to time. [emphasis added]

[21] In order for Article 9 to create a valid trust, it must satisfy the three certainties. They are: certainty of object, certainty of subject-matter, and certainty of intention. Certainty of object requires that beneficiary or beneficiaries of the trust must be ascertainable. Certainty of subject-matter is satisfied if it is possible to identify clearly the property which is to be subject to the trust. The property must either be described in the trust instrument, or there must be a formula or method given for identifying it. In order for the trust to have sufficient certainty of intention, it must be clear that the settlor intended to have certain property held by a trustee for the benefit of the beneficiary. This intention is a matter of substance over form: Waters' Law of Trusts in Canada, 4th ed (Toronto: Carswell, 2012).

[22] There is no issue with respect to certainty of object. The object of Article 9 is Jeff, as Sophia's husband.

[23] With respect to certainty of subject matter, the Bankruptcy Trustee argues that the purported spousal trust applied to the "residue of the trust estate" which only includes assets not required to satisfy Sophia's creditors. Since Sophia's creditors had not been fully determined at any time prior to Jeff's death, it is submitted the spousal trust fails for lack of certainty of subject matter.

[24] I disagree. The Non-Probate Will has a specific formula in place to ascertain the residue. The only two assets of the Non-Probate Will were Sophia's Personal Effects and the shares of SDIL. Jeff took ownership of the Personal Effects, leaving only the shares of SDIL. He did not allocate any of the SDIL shares to a Family Trust, as was within his discretion pursuant to

Article 8. The Non-Probate Will gave Jeff the discretion to allocate the payment of the debts. The subject matter of the trust, or the residue, is therefore ascertainable. It is the result of a specific and sufficient formula; namely the Shares of SDIL minus debts, subject to the discretion to allocate the debts to the Probate Will. This is sufficient to satisfy the requirement of certainty of subject-matter: *Angus v. Port Hope (Municipality)*, 2017 ONCA 566, 28 E.T.R. (4th) 169 at para. 112, *leave to appeal refused*, (2018), [2017] S.C.C.A. No. 382.

[25] The Bankruptcy Trustee relies on the letter of April 20, 2008 to argue that the purported spousal trust lacks certainty of intention. In my view, the letter of April 20, 2008 does not negate the certainty of intention reflected in Article 9 of the Non-Probate Will. Rather, it amends the Non-Probate Will to the extent that a specific family trust is created restricted to designated subject matter, thereby amending Jeff's unfettered discretion to create or not to create, a general Family Trust, as set out at Article 9 of the Non-Probate Will. Further, the letter of April 20, 2008, clarifies Sophia's intention with respect to Jeff's ability to manage certain assets without the need for a co-executor.

[26] For these reasons, I have concluded that the Non-Probate Will created an independent testamentary spousal trust such that the value of SDIL shares no longer belongs to Sophia's Estate and is not available to pay the Tax Liability.

[27] This conclusion is consistent with Jeff's conduct after the death of Sophia. While the assets were not specifically declared as part of a spousal trust, Sophia's terminal tax return did not show a deemed disposition of the SDIL shares, which would have been required but for the creation of a spousal trust pursuant to ss. 70(5) and 70(6) of the *Income Tax Act*, R.S.C. 1985, c. 1 (the "ITA"). Further, Jeff filed a spousal trust tax return in 2009, the first year after Sophia's death in 2008, which would not have been required but for the creation of a spousal trust (s. 70(6) of the *ITA*).

[28] The 2009 filing suggests that the SDIL shares vested in the spousal trust shortly after Sophia's death, despite the Tax Liability and any other debts of the Sophia Estate. There is no evidence that Jeff made a conscious decision to allocate the debts exclusively to the Probate Will, but his conduct as reflected by the 2009 tax filing would suggest that that was his intention. It makes sense from an administrative perspective that Jeff would divest the SDIL Shares to the spousal trust, (after taking possession of the Personal Effects), to avoid a deemed disposition and capital gain liability, considering the discretion he enjoyed to allocate the payment of the debts among both wills and the stated assets of the Probate Will.

[29] The SDIL shares are not available as part of Sophia's Estate to pay the Tax Liability. The Bankruptcy Trustee argues that granting a proprietary remedy in favour of the appellant for this purpose would be unjust and would unfairly disregard the interests of the intervening creditors, namely the creditors of Jeff's bankruptcy estate which appear to have been victims of Jeff's mismanagement. It submits that the disallowance of the Property Claim nonetheless permits the Wilson Children to obtain dividends from Jeff's bankruptcy estate on the basis of the Unsecured Claim, if admitted.

[30] The appellants argue that the Tax Liability is properly paid from the net proceeds of sale from the Real Property. They submit that as Jeff mishandled the Real Property by transferring it to himself prior to satisfying the Tax Liability, and as Jeff's Estate is insolvent, the Sophia Estate as the beneficiary may utilize the tracing process to maintain their beneficial interest in the Real Property.

[31] Tracing is the process by which a party can identify a substitute for an asset that the party has a proprietary or equitable interest in, and assert the party's claim over it. It is not accurate to refer to tracing as a right or a remedy: L.D. Smith, *The Law of Tracing* (Oxford: Clarendon Press, 1997), 5. When a trustee makes an unauthorized disposition of trust property, "the proceeds of that disposition, in the hands of the trustee, will themselves be treated as trust property if the beneficiaries so elect": Waters' *Law of Trusts in Canada* at p. 1335.

[32] Tracing is not available only to express trust beneficiaries, but also where a person holds or deals with the property of another in a fiduciary capacity: *Re 389179 Ontario Ltd.* (1980), 29 O.R. (2d) 304 (Ont. S.C.) at para. 12. Canadian courts have also allowed the victims of theft to trace, even in the absence of a fiduciary relationship: *British Columbia Teachers' Credit Union v. Betterly* (1975), 61 D.L.R. (3d) 755 (S.C.); *Simpsons-Sears Ltd. v. Fraser* (1974), 7 O.R. (2d) 61 (H.C.).

[33] A precondition for tracing is that the party intending to claim the substitute has some kind of property or beneficial interest in the original asset. Although a trust relationship is not necessary, to enable tracing the property held by the fiduciary must be the property of another.

[34] At the time that Jeff transferred the Real Property to himself from the Sophia Estate, it was not the subject-matter of any trust pursuant to the Probate Will.

[35] Section 2(1) of the *Estates Administration Act*, R.S.O. 1990, c. E.22 states that on a person's death, all real and personal property that is vested in that person devolves to and becomes vested in their personal representative, as trustee for the estate's beneficiaries and subject to the payment of the person's debts. However, although the estate executor holds the estate property for the benefit of beneficiaries and creditors, and has a duty to them in respect of how the executor manages those assets, the common law has long held that beneficiaries of a will or estate do not have an interest in the estate property until the estate is fully administered. This was recently affirmed by the Divisional Court in *Milne Estate (Re)*, 2019 ONSC 579 at paras. 37-40.

[36] The leading case of *Commissioner of Stamp Duties (Queensland) v. Livingston*, [1965] A.C. 694, [1964] 3 All E.R. 692 (P.C.) at 712-713 states that the executor of the estate holds the "whole right of property" of the estate assets – both the legal and equitable interest. Therefore Jeff, as executor, was able to transfer both the legal and equitable interest in the Real Property to himself in his personal capacity. The beneficiaries of the will, and on their behalf a succeeding estate executor, may have a right against Jeff concerning how he dealt with the Real Property, but the law does not show that the beneficiaries have a proprietary interest in the Real Property.

[37] Therefore, to permit tracing in this scenario, a beneficial interest must be found by way of resulting or constructive trust. The beneficiaries of a constructive trust can claim traceable proceeds in the hands of the trustee: *Waters' Law of Trusts in Canada* at p. 1336.

[38] The court will impose a constructive trust to remedy a breach of fiduciary duty. If a constructive trust is imposed over the Real Property with the Sophia Estate as the beneficiary, the Sophia Estate will be entitled to trace its beneficial interest in the Real Property into its substitute, the sale proceeds.

[39] Jeff committed a breach of his duty as executor when he transferred the Real Property to himself without having satisfied, or ensuring that the estate had enough assets to satisfy, the estate's liabilities. Under Article 9 of the Probate Will, he was entitled to transfer the residue of the estate to himself for his own personal use. However, as executor, he was obligated to first satisfy the estate's liabilities. Failure to pay the estate's debts before making distributions to beneficiaries is a breach of the executor's fiduciary duty. In a case where the executors had paid the estate's beneficiaries while a contingent debt was outstanding, *Taylor v. Taylor* (1870), L.R. 10 Eq. 477, Lord Romilly M.R. held at p. 478 that "The executors had committed a breach of trust in paying the legacy without providing for the liability attaching to the testator's estate at the time of his death in respect of these shares."

[40] The breach of fiduciary duty gives rise to a potential constructive trust remedy. The Supreme Court in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at para. 45 outlined four conditions that should generally be satisfied in order for a constructive trust based on wrongful conduct to arise:

- (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands.

[41] Jeff was under an equitable obligation of the type that courts of equity have enforced. As executor, he was obliged to satisfy the debts of the Sophia Estate before distributing the remaining assets of the Estate to its beneficiaries.

- (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff.

[42] Jeff obtained a proprietary interest in the Real Property as a direct result of the breach of his equitable obligation.

- (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties.

[43] The reason the Sophia Estate is seeking proprietary remedy is to satisfy the liability that remains subject to the Estate despite the intent of the testator. Imposing a proprietary remedy also helps to ensure that executors like Jeff will remain faithful to their duties.

(4) There must be no facts which would render the imposition of a constructive trust unjust in all the circumstances of the case.

[44] The Bankruptcy Trustee submits that the interests of intervening creditors must be protected. It is the interests of the intervening creditors, it argues, that renders the imposition of a constructive trust unjust. I disagree.

[45] Regarding the fourth requirement of the *Soulos* test, the courts have considered the interests of intervening creditors and the public interest in having certainty about the operation of priority schemes: *Hollinger Inc. (Re)*, 2013 ONSC 5431, 3 C.B.R. (6th) 73 at paras. 40-43. However, that interest will not always carry the day. Maintaining commercial morality is also an important consideration. In finding a constructive trust where the bankrupt Ascent had ignored an order to hold an amount of money in trust for the claimant Cafo, Deputy Registrar Nettie stated:

It also important to consider that imposition of a remedial constructive trust will take out of the hands of the Estate and the creditors the sum in dispute, and turn it over, in its entirety, to Cafo. This will clearly be a disruption of the scheme laid out in the BIA. This was the position of the Trustee at the hearing. I have considered this, but I have also considered *Brown* and the cases cited therein. I am satisfied that it is, in certain cases, appropriate to do injustice to the BIA in order to do justice to commercial morality. After all, the cases are too numerous to cite wherein commercial morality is considered in insolvency settings. It is the clear role of the Bankruptcy Court to act as the arbiter of commercial morality, and I find no offence in equity intervening, even at the expense of the formulaic aspects of the BIA scheme of distribution. It is simply not right for Ascent and its creditors to benefit from Ascent's failure to obey the Hoy Order, and then come to this Court to seek to retain such an unjust enrichment.

Ascent Ltd. (Re) (2006), 18 C.B.R. (5th) 269 (Ont S.C.J.) at para. 17.

[46] With reference to *Ascent*, the Court of Appeal in *Credifinance Securities Ltd. (Re)*, 2011 ONCA 160, 74 C.B.R. (5th) 161 stated:

Thus, a constructive trust in bankruptcy proceedings can be ordered to remedy an injustice; for example, where permitting the creditors access to the bankrupt's property would result in them being unjustly enriched. The prerequisite is that the bankrupt obtained the property through misconduct. The added necessary feature is that it would be unjust to permit the bankrupt and creditors to benefit from the misconduct.

[47] In my view, considering all of the circumstances, this is one of the rare and exceptional cases wherein it is appropriate for equity to intervene to impose a remedial constructive trust despite the reality that to do so would deplete the bankruptcy assets and defy the formal process of the BIA. Jeff breached his fiduciary duties as executor of the Sophia Estate. The net sale proceeds of the Real Property only form part of Jeff's bankrupt estate because of his wrongdoing. Had Jeff not engaged in such misconduct, his creditors, whether formed before or after the transfer, would not have had access to the net sale proceeds of the Real Property. Jeff's estate and by extension his creditors therefore would be unjustly enriched by his neglect of duties. The Tax Liability that Jeff was obligated to pay prior to transferring the Real Property to himself remains a debt of the Estate. The Liability cannot otherwise be satisfied from the assets of the Estate without the intervention of equity. A constructive trust is ordered to remedy the described injustice. To do otherwise would be to ignore that Jeff's estate has been enriched to the detriment of Sophia's Estate as a direct result of Jeff's culpability.

[48] I have found that the Sophia Estate enjoys a beneficial interest in the Real Property. It can therefore trace that interest in the Real Property to the sale proceeds. As opposed to a constructive trust analysis, in the tracing analysis, the interests of Jeff's creditors are not relevant. They cannot stand in any better position than Jeff with regard to trust property. The Supreme Court in *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15 at para. 85 confirmed that it is possible at common law and equity to trace funds into bank accounts if it is possible to identify the funds. Citing *Banque Belge pour l'Etranger v. Hambrouck*, [1921] 1 K.B. 321 (C.A.) at 331, per Atkin L.J., Deschamps J. stated that "the question to be asked is whether the money deposited in those accounts was "the product of, or substitute for, the original thing." In this case, the sale proceeds are easily identifiable, as they are still held by Bankruptcy Trustee in trust and have not been intermingled with other assets or dispersed in any way.

[49] I have concluded therefore that the Sophia Estate had a proprietary interest in the two pieces of property: 1142 North Burnt Island Rd., Muskoka, Ontario (the "Cottage property") and 27 Edgar Avenue, Toronto, Ontario (the "Family home") (together, the "Real Property"), which it can trace into their net proceeds of sale. The Appeal is allowed. I will remain seized should there be any issues with respect to the proper amount of the Property Claim.

V.R. Chiappetta J.

Date: February 25, 2019