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**Family Law Newsletters**
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**— Franks & Zalev - This Week in Family Law**

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**Trust Us**

***Yurkiw Estate v. Yurkiw*, 2026 CarswellBC 1176 (C.A.) — Iyer, Gomery and MacNaughton JJ.A.**

No one trusts trusts. In the context of a separation, there is usually more-than-enough acrimony and distrust to go around. But that distrust is often magnified and exacerbated when trusts are involved.

Trusts are also an enormous pain because of the circumstances in which they can arise; their usual complexity; and because of the general feeling that the family of a beneficiary of a trust is "up to no good." There are also many questions that arise in the context of trusts: Is a beneficial interest in a trust property? When did the beneficial interest actually accrue? Is a contingent interest in a trust property? How is a beneficial interest in a trust valued? What income, if any, is to be imputed to a beneficiary? What is the history of distributions? What is the market value of the trust assets? What are the trust terms? Who controls the trust legally and practically? You get the idea. So many questions . . .

And all of the answers to the myriad of questions — and/or the documents that can help answer these questions are available — somewhere. And that "somewhere" is usually "in the control of the Trustee."

In a family law file, the answers to such questions and the associated information and documents can sometimes be quite important. The information and supporting documents are regularly requested by the spouse that is not the beneficiary. But is the non-titled former spouse entitled to them? Or, for that matter, is the beneficiary spouse entitled to them?

The basis on which trust beneficiaries can compel the production of trust documents has been the subject of debate across Canada. Historically, jurisprudence from the United Kingdom recognized that beneficiaries with a proprietary interest in trust property also had a corresponding "proprietary right" to view trust documents. Over time, however, as trusts became more complicated and sophisticated, the proprietary rights theory was discarded in favour of other analytical disclosure frameworks, including the "common interest" theory and the "modern" theory.

Given the new theories and frameworks, at least until the British Columbia Court of Appeal offered some assistance in *Yurkiw Estate*, it has not been clear whether the "proprietary rights theory" still applies to ground a request for the production of trust documents. In *Yurkiw Estate*, the Court of Appeal confirmed that the framework to apply to requests for production from Trustees — including the proprietary rights theory — must be determined on a case-by-case basis.

*Yurkiw Estate* is not a family law case, but it certainly deals with issues that arise in family law all the time — the production of trust documents.

  

Mr. Yurkiw died in 2020. The only two beneficiaries of the estate under the will were his adult children.

In *Yurkiw Estate*, a beneficiary applied for an order that the Trustee produce its file. On a motion, the judge ordered production, recognizing the general principle that a beneficiary has a right to documents created by an Estate Trustee during the course of estate administration.

Some documents were produced, but the beneficiary was not satisfied. The beneficiary made a further motion for the Trustee's entire file, including its solicitor's file. Again, the disclosure order was granted. In making the order, the court suggested that, "[t]he beneficiaries own the file" (with some exceptions).

The Estate Trustee appealed, arguing that the motion judge erred in law in finding that the beneficiaries owned the trust documents in the Estate Trustee's possession.

The appeal gave Justice Gomery, speaking for a unanimous Court of Appeal, the opportunity to consider the different theories and frameworks for production.

The pointed issue was the extent of a Trustee's obligation to provide to a beneficiary documents in its possession — not through production in the context of adversarial litigation — but just because the beneficiary has asked to see them. According to Justice Gomery, this is a question that has vexed the courts. The question has proved difficult because of the range of different situations in which trusts arise and because of the legal, practical and policy considerations that are involved.

Justice Gomery explained that three different theories have historically been used to determine which — if any — trust documents beneficiaries might be entitled to receive.

The **first** theory is the "proprietary right" theory, discussed above. It is based on the idea that documents in the trustee's possession are also owned by a beneficiary, based on the beneficiary's equitable right of ownership. [See *Froese v. Montreal Trust Co. of Canada*, 1993 CarswellBC 2482 (S.C.), leave to appeal ref'd 1993 CarswellBC 2585 (C.A. [In Chambers]); *Cooke v. Canada Trust Co.*, 2005 CarswellBC 640 (C.A.) at paras. 14-20.] The theory is grounded in the fundamental features of trust law: in equity, the true owner of the trust assets is not the trustee, but the beneficiary. The consequential reasoning is that documents in the trustee's possession (relating to the trust) are similarly owned by the beneficiary.

The **second** is the "joint interest" theory, also known as the "common interest" theory. The joint interest theory developed from the arguable failings of the proprietary right theory. For example, based on the proprietary right theory, a contingent beneficiary would have no right to production of trust documents. On the other side of the coin, the rights of vested beneficiaries — true equitable owners — are limited in ways that a focus on proprietary rights cannot explain. For example, a beneficiary is generally not entitled to documents detailing the exercise of discretionary powers as between beneficiaries. That is, the proprietary right theory explains too little in some cases and too much in others.

This theory is based on the joint/common interests of the beneficiaries rather than proprietary rights. This was the theory on which production was ordered in the seminal case of *Ontario (Attorney General) v. Ballard Estate*, 1994 CarswellOnt 579 (Gen. Div. [Commercial List]). On account of this theory, beneficiaries without equitable ownership in trust property (such as contingent beneficiaries and the objects of a power of appointment) still have beneficiary rights.

The **third** is the "modern" or "balancing" theory. This was discussed by the Privy Council in *Schmidt v. Rosewood Trust Ltd.*, [2003] 3 All E.R. 76 (England P.C.). This theory relies on the supervisory jurisdiction of courts of equity and the importance of balancing competing interests when determining which trust documents are to be disclosed to a beneficiary. The essential point of the balancing theory is that the proprietary rights of beneficiaries are qualified and sometimes must yield to other considerations.

According to the B.C. Court of Appeal, the joint/common interest theory and the modern/balancing theories are not replacements for the age-old proprietary rights theory. Even though the proprietary rights theory will not apply in all cases, it "describes many cases reasonably well." Further, "[t]he central intuition upon which it is founded — that the owners of the property are entitled to obtain documents in the trustee's possession that contain information about the property unless there are good reasons to say otherwise — is sound."

No theory is perfectly suited to every case:

> [42] The task in every case is to choose the analytical framework best adapted to the trust and circumstances at hand. The diversity and complexity of trust law is such that no single analytic framework has been devised that will be perfectly suited to every circumstance. . . .

In *Yurkiw Estate*, there were only two beneficiaries with vested interests. Therefore, the court found that the proprietary rights theory best fit the circumstances. The joint/common interest theory in this instance would likely yield the same result. And, as for the balancing/modern theory, the Trustee did not tender any evidence addressing the practicalities of compliance with the production request — so there was nothing to balance.

Ultimately, the motion judge had not erred in finding that the beneficiaries were entitled to documents that contained information about the trust that were within the Trustee's possession or control.

We trust we made this all clear.

**Is Discussing *Res Judicata* Again . . . *Res Judicata*?**

***Patrick Street Holdings Ltd. v. 11368 NL Inc.*, 2026 CarswellNfld 108 (S.C.C.) (on appeal from the Court of Appeal of Newfoundland and Labrador)**

The Supremes do not discuss the Doctrine of *Res Judicata* very often, so when they do (specifically with respect to Cause of Action Estoppel), even if not in a family case, it is certainly worth a read.

In *Patrick Street*, a majority of the Supreme Court of Canada held/confirmed that Cause of Action Estoppel will bar a plaintiff from advancing a new theory in a second proceeding to support its legal claims.

While this is not a family case, the principles of Cause of Action Estoppel certainly arise in family cases. Therefore, *Patrick Street* offers a reminder that litigants must raise all reasonably available arguments in the first proceeding, and that later attempts to relitigate the same underlying cause of action will likely be barred. Generally, there are no do-overs or second kicks at the can. Concomitantly, responding parties must raise *res judicata* as soon as possible to avail of it.

*Patrick Street* involved a commercial property dispute where a property was encumbered by multiple mortgages. Patrick Street Holdings Ltd. was one of the secured creditors. To be brutally honest — we could not care less. All we care about is that, at a first proceeding, it was determined that Patrick Street's $4 million mortgage was not to be paid from the proceeds of sale of the property — and that at a second hearing some years later, Patrick Street advanced new arguments supporting its entitlement to be paid.

Both the application judge and the Court of Appeal rejected Patrick Street's position on the basis that the issue had already been determined. The Court of Appeal *further* found that Patrick Street's claim was barred by Cause of Action Estoppel.

The Supreme Court of Canada took the opportunity to reaffirm the long-standing 4-part test for Cause of Action Estoppel:

> 1. There must be a final decision of a court of competent jurisdiction;
>
> 2. Between the same parties or their privies;
>
> 3. The cause of action must not be separate and distinct. This element of the test will be satisfied where the subsequent action arises out of the same relationship between the parties and the same subject matter as the initial litigation. Determining whether a cause of action raised in a prior proceeding is "separate and distinct" will require an assessment and comparison of the facts in the prior and subsequent proceedings. Cause of Action Estoppel will operate to bar subsequent proceedings

 

that arise out of the same matter and the same relationship between the parties, even if the subsequent proceedings are based on a different legal description or conception of the issues; and

4. The arguments advanced in the later proceeding were, or could reasonably have been, advanced earlier through reasonable diligence. (The test will not be met where circumstances such as fraud, dishonesty, or the discovery of new evidence explain why a party did not raise a matter in the first proceeding.)

In *Patrick Street*, the Supreme Court offered new direction on the third and fourth parts of the test, emphasizing that:

(i) the analysis turns on substance rather than the manner in which claims are framed, and

(ii) courts must focus on the underlying material facts giving rise to the claim and then assess whether additional legal theories could have been pursued earlier with reasonable diligence.

Litigants cannot, in a subsequent proceeding, offer a new legal theory grounded in the same material facts. *Res judicata* is about finality.

The court confirmed that courts retain a residual discretion — albeit ***narrow*** — to decline to apply Cause of Action Estoppel where doing so would result in an injustice. Application of the discretion should be exceptional and will usually only arise in cases of injustice or genuine procedural fairness — for example, "where the stakes in the first proceeding were too low to generate a full and robust response."

The Supreme Court also confirmed that litigants asserting *res judicata* as a defence must raise it *at the earliest opportunity* — preferably at the pleadings stage — so as to give the opposing party fair notice of the case to meet. No special words are needed; a responding party need not explicitly refer to "res judicata", but the claim must be clear.

In particular, the majority offered guidance on the last two components of the test for cause of action estoppel.

Finally, the majority also reiterated and endorsed the existence of a residual discretion to not apply res judicata. Even where a party has established all elements of the test for applying cause of action estoppel, courts maintain a narrow discretion to decline to apply estoppel where doing so would cause an injustice — for example, where the stakes in the first proceeding were too low to generate a full and robust response or where the first proceeding was tainted by procedural unfairness.