IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Haug v. Millar,* 2024 BCSC 854

Date: 20240517
Docket: S132580
Registry: Kelowna

2024 BCSC 854 (CanLII)

Between:

Roslyn Frantz Haug

Plaintiff

And

Denise Yvonne Millar

Defendant

And

Roslyn Frantz Huag

Defendant by way of Counterclaim

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for the Plaintiff and Defendant by way of Counterclaim:	C.T. Hart
Counsel for the Defendant:	T.M. McCaffrey
Place and Dates of Trial/Hearing:	Kelowna, B.C. October 31, November 1-3, 2024
Place and Date of Judgment:	Kelowna, B.C. May 17, 2024

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[1] Broadly stated, this action concerns the transfer by the plaintiff, Roslyn Frantz Haug (hereinafter the "plaintiff"), of an interest in a property located at 5136 Huston Road in Peachland, British Columbia, ("the Property") to the defendant, Denise Millar.

[2] The defendant, Denise Millar (hereinafter the "defendant"), is the plaintiff's daughter.

[3] The Property has, as I will detail, been sold and thus the trial in this action addresses the dispute over distribution of the net sale proceeds as between the plaintiff and the defendant and there are no remaining *in rem* claims.

[4] There are certain nuances to the legal arguments which I will address but as I stated above, the dispute is truly about whether the plaintiff should be entitled to 50% of the net sale proceeds, something less than 50% of the net sale proceeds or 0% of the net sale proceeds.

Issues for Determination

[5] Having regard to the relatively limited number of disputed facts, I shall outline the legal issues for determination before setting out my findings as they will assist in putting those factual findings into context.

[6] The specific issues, I accept are, to adopt the language articulated by the plaintiff's counsel, as follows:

a) Has the presumption of indefeasible title regarding the Property been rebutted by agreement between the plaintiff and the defendant?

b) If so, what are the terms of the said agreement between the plaintiff and the defendant?

c) If the presumption of indefeasible title has not been rebutted, has the plaintiff been unjustly enriched?

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d) Based upon the Court's conclusion regarding the aforesaid issues, how should the net sale proceeds arising from the sale of the Property be divided?

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Factual Background

[7] The plaintiff was a musician, music teacher and musical director who enjoyed a lengthy and accomplished career in that field. Within that context, I accept the plaintiff predominately spent much of the last approximately thirty years giving music lessons to many students throughout the Okanagan Valley.

[8] The defendant, as noted, is the plaintiff's daughter. She is an artist.

[9] At the time of trial, the plaintiff was 92 years old.

[10] Although the plaintiff's mobility was somewhat impaired at trial (namely, she required the assistance of a walker and some other very minor accommodations), the plaintiff suffered from no obvious cognitive impairment.

[11] To the contrary, the plaintiff presented as a coherent and attentive witness. There were questions posed where the plaintiff acknowledged she was unable to remember certain details, but even in that context the plaintiff was readily able to distinguish between historical facts she had a specific recall of and those which she did not. Obviously, I have to rely on the documents as entered as exhibits combined with the required credibility analysis on those specific matters. However, I consider it important to recognize, as an express finding of fact, that I did not observe anything which suggested any cognitive difficulties on the part of the plaintiff, notwithstanding the plaintiff's advanced age as a litigant.

[12] Turning to the chronology of events, the plaintiff was the sole party who purchased the Property at first instance. At the time of the plaintiff's purchase of the Property, the defendant did not contribute any funds.

[13] The rationale for the plaintiff's purchase of the Property was to have a residence in the vicinity of Penticton, British Columbia, where she would be able to

meet with and teach music to her students who resided in the South Okanagan region. This reduced her personal travel time and other commuting-related issues which are not uncommon when navigating the transportation corridor between Kelowna and Penticton.

[14] At the time of the acquisition of the Property, the structures located upon it were quite dated. The purchase was, I accept, based primarily on location versus on particular attributes of the Property.

[15] Specifically, there was a house (referred to in evidence as the beach house, orchard house, or more specifically as the "Main House"), a one-bedroom cottage structure and a barn.

[16] The Main House included two bedrooms, two bathrooms, a kitchen and a living room. The living space was approximately 1,300 square feet, with an additional non-habitable crawl space. There was, I accept, no central heating and no central air conditioning in the Main House.

[17] Shortly after purchasing the Property, the plaintiff embarked on a process of renovating and otherwise improving the Property. The plaintiff's son, Damon Millar, who is the defendant's's brother, purchased materials and completed various improvements.

[18] Mr. Damon Millar, whose evidence at trial was effectively unchallenged, recalled that he had a supplementary renovation budget of approximately $55,000 (being split between a line of credit and a credit card provided to him by the plaintiff). Regardless of the precise allocation between these two sources, Mr. Millar's evidence was consistent that the renovations were paid for by the plaintiff. In reaching that factual finding, I recognize there was some minor ambiguity about whether the defendant or Mr. Millar might have very occasionally purchased items for the Property with personal funds and not sought reimbursement from the plaintiff.

[19] To the extent there were such purchases, I find they were *de minimus* in nature, and more importantly I am satisfied there were not expenses for the

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improvement of the Property that the plaintiff was asked to pay for and refused. The plaintiff cannot be faulted for failing to pay any *de minimus* expenses that she was not specifically asked by the defendant or Mr. Millar (who is not a party to the litigation and solely a witness) to be reimbursed for.

[20] Shortly after the completion of the improvements to the Property, the defendant started to reside in the Main House and paid monthly rent to the plaintiff. The defendant paid rent to the plaintiff in the approximate amount of $1,000 per month and was responsible for her own rental insurance. Subject to my above caveat about unspecified *de minimus* expenses, I accept the plaintiff paid all other costs associated with the Property.

[21] This arrangement, which was not documented, but also not disputed, continued between the plaintiff and the defendant until in or about October 2006. At that time, the plaintiff transferred what was initially her sole interest in the Property into joint tenancy with the defendant.

[22] This transfer of title to the Property occurred with the assistance of Carmen Langstaff, a local notary public at that time. Both the plaintiff and the defendant met with Ms. Langstaff to sign the documents necessary to facilitate the transfer. According to Ms. Langstaff, the transfer was signed on September 26, 2006 and sent for registration with the applicable Land Title Office on September 28, 2006.

[23] Contemporaneously, or very closely contemporaneously thereto, Ms. Langstaff assisted the plaintiff and the defendant with the registration of a mortgage against the Property from Interior Savings Credit Union (the “Interior Savings Mortgage”) wherein the plaintiff and the defendant were named, as what I colloquially describe, as co-borrowers. The Interior Savings Mortgage secured a line of credit in the approximate amount of $188,000.

[24] There was no admissible evidence before the Court of the fair market value of the Property in or about October 2006 when the title was transferred into joint tenancy with the defendant. The Form A transfer entered as an exhibit at trial listed

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the value of the Property as $300,000. This, I accept, was correlated to the relevant British Columbia Assessment Value (the “Assessment Value”) at the material time.

[25] It is acknowledged that the Assessment Value may not correspond precisely to actual fair market value at the material time. However, it is simply the best evidence on this point in the circumstances (see review of the law in this regard in *O’Connor v. Mills*, 2023 BCSC 1886 at paras. 141-151).

[26] In or about 2009, the defendant decided she wanted to build a new residence on the Property, and destroy the remaining structures. The plaintiff and the defendant obtained a construction mortgage (the “Construction Mortgage”) to fund this endeavour.

[27] Upon completion of this initiative, the cottage structure and barn were removed from the Property. Only a small part of the “Main House” remained, which portion was eventually converted into an art gallery for the use and benefit of the defendant. The new structure effectively replaced the Main House.

[28] Specifically, the “new” Main House was approximately 2,800 square feet, including some three bedrooms, three bathrooms, a new kitchen, central heating, central air conditioning and a partial concrete basement.

[29] Upon completion of the construction of this new residence on the Property, the plaintiff and the defendant replaced the Construction Mortgage with a conventional mortgage from the Bank of Nova Scotia (the “Scotia Bank Mortgage”). The Scotia Bank Mortgage paid out both the Construction Mortgage and the Interior Savings Credit Union mortgage (both of which remained registered against title to the Property prior to this refinance).

[30] The plaintiff and the defendant were again both co-borrowers under the Scotia Bank Mortgage.

[31] As the defendant did not earn an income of greater than $12,000 per annum at the material time, certain additional expenses associated with the construction of

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the “Main House” were, as noted, incurred by the defendant using a credit card in the name of the plaintiff and a line of credit in the name of the plaintiff, by Mr. Damon Millar with the plaintiff’s consent.

[32] From the time that the defendant was transferred a joint interest in the Property it is admitted by the plaintiff that the defendant made all mortgage payments associated with the Property, and further paid the property taxes, home insurance, and utilities. This was a material change from the prior rental arrangement described above.

[33] However, having regard to her limited employment/self-employment income during the material time, the defendant had roommates and/or boarders at the Property which subsidized these expenses.

[34] The evidence does not establish that there was any significant rental income beyond the expenses associated with servicing the Scotia Bank Mortgage and otherwise maintaining the Property, but the defendant had the exclusive benefit of all rental income and the plaintiff received no portion of same. There was no evidence to the contrary.

[35] I also note that the evidence confirms that the defendant never obtained financing on her own in respect of the Property. All financing was obtained in the sole name of the plaintiff or in the joint names of the parties on what I conclude was the credit strength of the plaintiff.

[36] On September 12, 2008, the plaintiff executed a deed of gift which had been drafted by the notary, Ms. Carmen Langstaff (the “Deed of Gift”).

[37] The Deed of Gift provides as follows:

> I, Roslyn Frantz Haug, of 8-3366 Casorso Road, Kelowna, BC V1W 3J5, without force or compulsion or undue influence and with my free will and in full possession of my body sense, confirm that upon my death it is my intention that my daughter become the legal and beneficial owners of my entire interest of the Property [legal description omitted] subject to any mortgage and to the principal sum and all interest to become payable in respect thereof. [Emphasis added.]

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[38] In 2013, the plaintiff retained Geoffrey White, a lawyer with considerable experience in this area of practice, to assist her with certain estate planning needs, including an update to her last will and testament, drafting some specific personal planning documents, and the preparation of a power of attorney. The defendant was present with the plaintiff at one of the meetings with Mr. White. At this particular meeting, Mr. White discussed ownership of the Property in the presence of both parties.

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[39] As part of her overall estate planning with Mr. White, the plaintiff signed a declaration (the "Declaration") which states:

> I confirm that I own land and buildings with my daughter Denise Yvonne Millar ("Denise"), located at 5136 Huston Road, Peachland, British Columbia, VOH 1X2, [legal description omitted] (the "Property").
>
> I confirm that the Property is held by myself and Denise as joint tenants with right of survivorship.
>
> I hereby confirm that if Denise survives me, she will be the sole legal and beneficial owners of the Property by right of survivorship.

[40] In 2020, during the course of the COVID-19 pandemic, the plaintiff lost her employment as the musical director of the Kelowna Actors Studio. The loss of this employment had significant financial consequences to the plaintiff. Those consequences were compounded by the fact that the plaintiff was approximately 88 years of age at this time. She was not, regardless of her very accomplished musical resume, thus well positioned to obtain replacement employment—especially in the midst of a global pandemic,

[41] In early 2021, the plaintiff executed and subsequently instructed to be registered a Form A transfer to sever her joint tenancy in the Property with the defendant.

[42] Thereafter, as I will address below, the plaintiff brought a petition in which she sought sale of the Property and distribution of the proceeds in accordance with *the Partition of Property Act*, R.S.B.C. 1996, c 347, (the "Petition").

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Procedural History

[43] The Petition was filed on November 9, 2021.

[44] The Petition sought an order for sale of the Property, distribution of the proceeds of said sale in accordance the *Partition of Property Act* [*PPA*], and ancillary orders.

[45] On December 10, 2021, the [now] defendant filed a response to petition opposing the relief sought on the basis of a resulting trust in her favour and that the equal distribution of any sale proceeds would amount to an unjust enrichment to the benefit of the plaintiff. The defendant also took the position that a sale of the Property would result in her suffering hardship and be unfair to her. I am condensing the [now] defendant's position in opposing the Petition for efficiency given subsequent events but I consider that to be an accurate albeit brief summary of same.

[46] On or about February 3, 2022, the [now] defendant filed a Notice of Application seeking to have the Petition be converted to an action and other ancillary relief. This relief was generally not opposed.

[47] Accordingly, by order of Mr. Justice Betton dated March 4, 2022, the Petition was referred to the trial list pursuant to the *Supreme Court Civil Rules* [*Rules*].

[48] Pursuant to the order of Mr. Justice Betton the plaintiff filed a notice of civil claim in March 2022. The defendant filed a response to civil claim in accordance with the *Rules* and subsequently amended that response to civil claim. There was a counterclaim filed to secure a certificate of pending litigation against the Property, but the counterclaim became effectively moot after the defendant consented to the sale of the Property.

[49] On March 15, 2023, following a notice of application filed by the defendant, Associate Judge [then Master] Schwartz ordered that the Property be sold and that the defendant have sole conduct of sale (the "Schwartz Order").

[50] As noted, the Property was sold pursuant to the Schwartz Order and the net proceeds of sale are being held in the trust account of Benson Law LLP. The most recent trust report provided by Benson Law LLP at the time of trial confirmed a balance of $379,276.51. The proceeds are in an interest-bearing account and so that balance will have increased while the decision has been under reserve but not in a way that materially impacts the determination of the legal issues before the Court,

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Credibility – The Law

[51] The assessment of credibility by the trial judge is a nuanced analysis. It is also, ultimately, fact specific. However, various justices of this Court have outlined certain factors to be considered when addressing this issue which are very helpful. Having regard to the significance of this issue to the trial, I am going to refer to four decisions of the Court which I consider relevant and applicable.

[52] The first is the seminal decision in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296. In *Bradshaw*, Justice Dillon wrote the following oft-quoted passage on credibility:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.),* [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).

[53] There are three recent decisions which follow *Bradshaw* that are also instructive.

[54] In *M.L. v. R.H.*, 2022 BCSC 1580, at para. 25, Justice Wilkinson helpfully summarized *Bradshaw* as the following list of factors:

a) Is the witness able to resist the influence of interest in modifying their recollection?

b) Does the witness' evidence harmonize with independent evidence that has been accepted?

c) Does the witness change their evidence during examination for discovery, direct examination and cross-examination, or is it otherwise inconsistent in their recollections?

d) Does the witness' evidence seem generally unreasonable, impossible, or unlikely?

e) What demeanour did the witness exhibit when testifying?

[55] In *S.B.F. v. D.G.F.*, 2022 BCSC 2231, Justice Murray cited *Bradshaw* and adopted a helpful statement on the distinction between credibility and reliability from the Ontario Court of Appeal:

> [29] The distinction between reliable evidence and credible evidence was discussed by Doherty J.A. in *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 22 O.R. (3d) 514 (C.A.) at p. 526:
>
> > Testimonial evidence can raise veracity and accuracy concerns. The former relates to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. ...

[56] Finally, in *L.M. v. K.M.*, 2022 BCSC 689, at paras. 274–82, Justice Fleming set out a comprehensive review of the credibility issue with reference to *Bradshaw*.

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Recognizing that the overall review is instructive, albeit done in a factually distinguishable case, I will note in particular the following paragraphs:

> [275] Credibility or truthfulness and reliability or accuracy are related but distinct concepts. A truthful witness, for example, may be mistaken about what they recall.
>
> [276] Credibility and reliability are not all or nothing concepts. The trier of fact may believe some, all, or none of a witness's evidence and attach different weights to different part of their evidence: *R. v. R. (D.)*, [1996] 2 S.C.R. 291, [1996] S.C.J. No. 8 at para. 93.

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Third Party Witnesses

[57] The credibility of the third-party witnesses called at trial was not challenged. Accordingly, no substantive analysis in this regard is required. However, for the benefit of the record, I shall briefly address my credibility and reliability findings.

[58] As noted, Mr. White was called to primarily give evidence about estate planning services he provided to the plaintiff in 2013.

[59] Mr. White had what I concluded was a better than usual recall of events despite the time that has since elapsed since providing his services to the plaintiff. This is, I accept, because Mr. White knew the plaintiff from years of teaching music lessons to his daughter. Specifically, I accept that while it was not a difficult or unusual file given his preferred area of practice, it was one he had a specific recollection of because of his prior personal connection to the plaintiff.

[60] In the course of providing his legal services, Mr. White recalled a meeting with the plaintiff and defendant present. Amongst the topics discussed was the Property. It was his standard practice to confirm his clients' assets. In the course thereof, he obtained background information about the Property, including that it had been acquired first by the plaintiff, that the defendant was later added to title, and that the defendant was living at the Property. Mr. White also recalled discussing posssible tax implications associated with the Property in the presence of both parties.

[61] Mr. White further testified that in the course of this meeting, the plaintiff did not make any statements about being the 100% beneficial owner of the Property or

any statements even to that effect. Nor did the defendant make any statements to suggest the plaintiff was holding her interest in trust for the defendant. At this point, I reiterate my conclusion, set forth above, that Mr. White testified he had a specific recollection of this meeting and that recollection was not challenged on cross-examination.

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[62] The final point of significance from Mr. White's evidence is that his estate planning services included arranging for a bare trust agreement in relation to certain investments which were in joint names of the parties but which were beneficially owned in their entirety by the plaintiff. There were no instructions given to prepare a similar or equivalent agreement prepared with respect to the Property. In contrast, the parties signed the Declaration which I find is consistent with the plaintiff's theory of the case that the parties were joint owners and that the defendant would only obtain sole ownership in the event of her passing.

[63] Although pertaining to a different time period, Ms. Langstaff's evidence was generally consistent with Mr. White's testimony.

[64] Ms. Langstaff testified that she discussed the ownership of the Property with the plaintiff and the defendant, including the difference between joint tenancy and a tenancy in common when owning property. She further testified that she discussed mortgages, possible breakdowns in marital relationships, possible disagreements regarding the use or disposition of real property, and how such issues might be resolved. Again, I note that this evidence was not substantively challenged. I further accept the evidence that these are matters that Ms. Langstaff, as a very experienced notary public at that time, would routinely raise in the course of providing her services in a transaction of this nature.

[65] Further, Ms. Langstaff did not recall any conversations where either the plaintiff or the defendant said the Property was to be transferred entirely to the defendant or that the defendant was to be the 100% beneficial owner of the Property. Nor could Ms. Langstaff locate any documents which were consistent with this proposition which may have refreshed her memory.

[66] I accept Ms. Langstaff's evidence as both credible and reliable.

[67] Although Ms. Langstaff did not necessarily have quite the same degree of independent recollection of historical events as Mr. White, which is entirely understandable in the circumstances, she did have a solid recollection of her dealings with the parties and was candid with what she recalled versus what she could simply state to be her usual practice at the material time.

[68] Consistent with this, the "Acknowledgement of Services" signed by the plaintiff and the defendant when they retained Ms. Langstaff in 2006, they retained Ms. Langstaff to transfer a 50% interest in the Property to the defendant. This is also in accordance with the special property tax return signed by the plaintiff and defendant at or around the time of the transfer of the joint interest from the plaintiff to herself wherein the defendant confirmed that only a 50% interest was being transferred.

[69] Further, the 2008 Deed of Gift which was prepared by Ms. Langstaff is consistent with the Declaration prepared by Mr. White; namely, it supports the theory that the plaintiff had a continuing beneficial interest in the Property.

[70] Finally, as noted, like the evidence of Mr. White and Ms. Langstaff, Mr. Damon Millar's evidence was generally unchallenged by the defendant. Mr. Millar told the Court that he had regularly communicated with the defendant since 2002, most usually on a weekly basis (though with occasional periods of silence), and he confirmed the defendant had never said to him that she owned the entirety of the Property. In saying this, I acknowledge that there was no evidence that this question was ever specifically asked by Mr. Damon Millar of the defendant in their discussions as siblings. Mr. Millar's evidence, which I accept as credible and reliable, is simply supportive in a general way of the plaintiff's evidence that the parties held true joint title to the Property. It does not amount to any adverse admission to the contrary by the defendant. To do so would, in my view, improperly overstate Mr. Damon Millar's evidence.

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The Evidence of the Parties

[71] As I have already acknowledged above, I concluded that the plaintiff was, notwithstanding her age, a competent and reliable witness. When applying the above law regarding the assessment of credibility, there were no *indicia* whatsoever that undermined the credibility of her evidence. There were gaps in her evidence where she was unable to recall certain details. Having regard to the circumstances, including the passage of time, I do not find that this impacts her credibility. I distinctly did not observe this to be a situation where the plaintiff intentionally "forgot" relevant matters which might be adverse to her claims or where the plaintiff reconstructed the evidence in her favour to fill in the gaps in her memory to her advantage. I accept she simply does not remember certain matters and was forthright in acknowledging this whether under direct examination or cross-examination. Her demeanour did not change. Her evidence also harmonizes with the third party witnesses whose evidence I have accepted as both credible and reliable.

[72] The assessment of the credibility of the defendant is more challenging. The defendant was a cooperative witness. There was some change in demeanour between direct examination and cross-examination, but it was minor and I conclude likely due to anxiety about the cross-examination process as this demeanour change generally subsided as the cross-examination proceeded. I consider that notable because the latter portion of the cross-examination covered more of the substantive issues in the action where a change in demeanour would have, in my view, been a more significant consideration in the credibility analysis.

[73] The greater concern with the defendant's evidence pertains to its lack of harmony with the independent witnesses. Mr. White and Ms. Langstaff have no financial interest in this action. They were acting in their professional capacity in rendering services and preparing documents. Mr. Damon Miller appears to hold no animosity towards the defendant and I already acknowledged that he never specifically asked the question about whether the parties had true joint title and weighed his evidence accordingly.

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[74] This accords with my assessment of the defendant's evidence that the plaintiff remained on title to avoid capital gains. There is a true lack of air of reality to this evidence. Keeping title to the Property in the plaintiff's sole name would have avoided any capital gains issue until the ultimate disposition of the Property. Moreover, the plaintiff, whose evidence I accepted on points where she had specific recall, denied any specific discussion with the defendant about the transfer of the Property being contrived or structured to avoid capital gains.

[75] In this same vein, another concern is with the defendant's inability to resist the intent to modify her testimony to advance her position that, notwithstanding the considerable financial benefit she received in respect of the Property from the plaintiff, she ought now to receive the entirety of the sale proceeds. This is inconsistent with the obvious conclusion, described above, that the defendant required the credit and financial resources of the plaintiff to obtain and improve the Property. It was not the reverse. And whilst the defendant did take over expenses associated with maintaining the Property in lieu of rent, as described, the plaintiff made no effort to obtain a portion of the rental income the defendant was receiving in this regard. The plaintiff's ability to maintain her level of parental financial generosity was compromised by the combination of the COVID-19 related loss of her employment and her age. It was not out of malice or some unrelated breakdown of the mother/daughter relationship which trickled over to the Property.

Resulting Trust, the Presumption of Trust and Gratuitous Transfers

[76] Given the state of title of the Property, the plaintiff is presumed to have a legal and equitable interest in the Property, in accordance with s. 23(2) of the *Land Title Act*, R.S.B.C. 1996, c. 250. Similarly, the defendant is presumed to have a legal and equitable interest in the Property. However, because the defendant challenges the state of title, the defendant bears the burden of proof in this action.

[77] As explained in *Wood* v. *Walsh,* 2009 BCSC 569:

> [14] Section 23(2) of the *Land Title Act*, R.S.B.C. 1996, c. 250, outlines the legal effects of registration and provides:

> (2) An indefeasible title, as long as it remains in force and uncancelled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title …

> [15] This section creates a statutory presumption that persons registered on the title of the property are presumed to hold the legal and equitable interest conveyed by the registrar. They are presumed to be indefeasibly entitled to an estate in fee simple. The burden is on the party seeking to challenge the state of the title to prove otherwise: *Bajwa v. Pannu*, 2006 BCSC 921, 57 B.C.L.R. (4th) 161, aff'd 2007 BCCA 260, 66 B.C.L.R. (4th) 192. The presumption can be displaced by two equitable principles: *Skender v. Skender*, 2005 BCSC 418, aff'd 2006 BCCA 162, 52 B.C.L.R. (4th) 6: first, the presumption of advancement, which is not applicable here as this is a common-law relationship; and second, the enforcement of an agreement between the parties to prevent unjust enrichment if the face of a title is upheld.

[78] As articulated by the Supreme Court of Canada in *Kerr v. Baranow,* 2011 SCC 10 at para. 18, a resulting trust arises when title to property is held in the name of a party who gave no value for it. In such circumstances, that party is obliged to return the property to the original title owner unless he or she can establish it was given as a gift. In the case of a gratuitous transfer, a rebuttable presumption of resulting trust applies when the transfer is challenged. The judge assigned with this task must commence the inquiry the aforesaid presumption, must weigh all of the evidence, and must attempt to ascertain the actual intention of the transferor. The governing consideration is the transferor's actual intention. The presumption of resulting trust can only determine the result only where there is insufficient evidence to rebut the presumption on a balance of probabilities.

[79] The above summary is also consistent with the law set forward by the Supreme Court of Canada in *Pecore v. Pecore*, 2007 SCC 17 (see in particular paras. 20, 22–25 and 44).

[80] *Wood* also refers to the decision of our Court of Appeal in in *Bajwa v. Pannu,* 2007 BCCA 260. The operative paragraph in *Bajwa* is para. 16:

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> [16] The Virks rely on Professor Waters' text, *Law of Trusts in Canada*, 2d. ed. (Toronto: Carswell, 1984) at 299. The passage on that page of the text says that for a resulting trust to be inferred the person said to be a trustee must have given no value for his legal interest. It follows that if it is found as a fact that the person whose equitable interest is challenged did give value, there can be no resulting trust. Whether value was given is a question of fact to be determined on the evidence in each case. The trial judge here found that Mr. Pannu gave value and there was evidence to support that conclusion. This is not a case like so many others in which one party has transferred an asset to another for no consideration. The evidence here supported the conclusion that Mr. Pannu was a co-purchaser which, in effect, is what the trial judge found to be the case.

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[81] In this regard, I accept the plaintiff's submission that when there is a gratuitous transfer of property from one party to another, there is a presumption of resulting trust. If the Court is able to determine that the transferor's intentions were to make a gift of the interest to the transferee, then that factual determination should govern the result of the dispute. However, if the Court cannot make such a determination, then the presumption of resulting trust should cause the Court to determine that one party holds the property on a resulting trust for the other.

[82] There is, however, an important distinction between a resulting trust and the presumption of resulting trust. The former is a trust arising by operation of law and the latter is an evidentiary rule pertaining to the burden of proof in the case of a gratuitous transfer.

[83] As stated in *McKendry v. McKendry*, 2017 BCCA 48, at paras. 31–35:

> [31] A gift is a gratuitous transfer made without consideration. Two requirements must be met for an *inter vivos* gift to be legally binding: the donor must have intended to make a gift and must have delivered the subject matter to the donee. The intention of the donor at the time of the transfer is the governing consideration. In addition, the donor must have done everything necessary, according to the nature of the property, to transfer it to the donee and render the settlement legally binding on him or her: *Kooner* at 79-80; *Pecore* at para. 5.
>
> [32] A gift may be delivered in various manners. For example, a donor may choose to transfer property directly to a donee or a trustee, or may retain possession and make a declaration of trust. Once a gift is given, the donor cannot retract it. If it is incomplete, however, the court will not perfect a gift. Accordingly, where the gift rests merely in a promise or unfulfilled intention, the court will not compel an intending donor to follow through with making the gift: *Kooner* at 79-80; *Pecore* at para. 56.

> [33] The standard for proving a gift is the usual civil standard of a balance of probabilities: *Singh Estate v. Shandil*, 2007 BCCA 303 at paras. 24-27.
>
> [34] The intention of a person who transfers property gratuitously to another is sometimes difficult to determine. This is particularly true where the transferor is deceased. For this reason, common law rules have developed to guide the court's inquiry. In *Pecore*, the Supreme Court of Canada explained those rules and how they apply to property held in joint tenancy.
>
> [35] In summary, a resulting trust arises when title to property is held in the name of a party who gave no value for it. In such circumstances, that party is obliged to return the property to the original title owner unless he or she can establish it was given as a gift. In the case of a gratuitous transfer, a rebuttable presumption of resulting trust applies when the transfer is challenged. The judge commences the inquiry with the presumption, weighs all of the evidence, and attempts to ascertain the actual intention of the transferor. The governing consideration is the transferor's actual intention. The presumption of resulting trust determines the result only where there is insufficient evidence to rebut the presumption on a balance of probabilities: *Pecore* at paras. 20, 22-25, 44; *Kerr v. Baranow*, 2011 SCC 10 at para. 18.

[84] When there is a gratuitous transfer of property, there, I accept, thus typically three legal scenarios that may arise. As explained helpfully in *Kennedy v. Smith,* 2022 BCSC 1622, at paras. 78–80:

> [78] When a property is purchased by one party but title is held jointly by two parties, there is a presumption that the party providing the purchase funds intended to retain the entire beneficial interest, including the right of survivorship, unless there is evidence to the contrary: *McKendry,* at para. 36; and *Bergen v. Bergen*, 2013 BCCA 492 at para. 42.
>
> [79] The presumption is only invoked if there is insufficient evidence to determine the intention of the transferor on a balance of probabilities: *Fuller v. Harper,* 2010 BCCA 421 at para. 47.
>
> [80] In *Petrick*, I reviewed the three legal scenarios that may arise when a gratuitous transfer of property into joint tenancy is made:
>
> > [40] Not all jointly owned property is subject to a true joint tenancy. Pursuant to the Supreme Court of Canada's decision in *Pecore v. Pecore,* 2007 SCC 17 [*Pecore*], property that is held in joint tenancy can give rise to three potential scenarios in terms of the beneficial interests of the title holders:
> >
> > > a) A true joint tenancy, in which the joint tenants are each owner of the whole. Each enjoys the full benefit of property ownership and the ultimate survivor will enjoy the whole title for him or herself.

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> b) A resulting trust, wherein only one joint tenant has any beneficial interest in the property and the other joint tenant, usually a gratuitous transferee, holds title in trust for the other and has no beneficial interest in the property.
>
> c) A scenario which is sometimes referred to as a "gift of the right of survivorship," wherein a joint tenant is gratuitously placed on title and has no beneficial entitlement to the property during the lifetime of the donor, but if the donee survives the donor, the donee will receive the entire property by right of survivorship. In *Bergen v. Bergen,* 2013 BCCA 492 at para. 37 [*Bergen*], Newbury J.A. described a gift of the right of survivorship in a joint account as "an immediate gift of a joint interest consisting of whatever balance exists in the account on the transferor's death, assuming he or she dies first."
>
> There has been some debate as to whether the *inter vivos* gift of a right of survivorship as described in *Pecore* is a new kind of gift, or whether Rothstein J. was simply describing an implied trust when discussing the beneficial entitlement that arose on the facts in *Pecore*: Michael Welters and Emma McArthur, "Pecore's Troubles" (2010) 29 Est. Tr. & Pensions J. 139 at 156–157; Donovan Waters, "Sawdon Estate v. Sawdon: The Ontario Court of Appeal Rejects the Existence of Any Pecore Confusion" (2015) 34 Est. Tr. & Pensions J. 113 at 117–118. Either way, post-*Pecore*, it is possible for a donor to make a gratuitous transfer into joint tenancy which will be an immediate *inter vivos* gift but will allow the donor to retain the whole beneficial interest during the donor's lifetime, and have the property pass to the surviving joint tenant on the donor's death.

[85] In the particular factual matrix of this case it is therefore necessary to prove that:

a) the defendant transferred property to the plaintiff in relation to the Property; and

b) the transfer from the defendant to the plaintiff in respect of the Property was gratuitous, or, stated another way, made without consideration.

[86] In my view, the evidence adduced at trial is inconsistent with both of these propositions.

[87] It is a conceded fact that the plaintiff was the sole owner of the Property and made the decision to transfer the Property to herself and the defendant jointly in 2006. This was done with the benefit of some legal advice as described. There is no

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evidence that the defendant provided any consideration to the plaintiff in conjunction with this transfer of the Property. The defendant did become jointly indebted with the plaintiff through the secured financing of the Property as also described above. However, I have expressly found as a fact that funds were advanced by the relevant lending institutions on the basis of the equity in the Property and the plaintiff's credit. The defendant simply did not have an income which could have possibly secured the relevant credit facilities for the Property. It was thus a gratuitous transfer to the benefit of the defendant.

[88] On the above basis, I conclude that the defendant has not displaced the applicable *Land Title Act* presumption.

Unjust Enrichment

[89] On the basis of a creative application of the law of unjust enrichment, the defendant is seeking what I accept, from the plaintiff's submissions, to effectively be an accounting as between the parties regarding the Property.

[90] Unjust enrichment is definitively described by the Supreme Court of Canada in *Kerr*. I shall simply refer to paras. 31-32 and 36-39 as follows:

> [31] At the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain: *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 788. For recovery, something must have been given by the plaintiff and received and retained by the defendant without juristic reason. A series of categories developed in which retention of a conferred benefit was considered unjust. These included, for example: benefits conferred under mistakes of fact or law; under compulsion; out of necessity; as a result of ineffective transactions; or at the defendant's request: see *Peel*, at p. 789; see, generally, G. H. L. Fridman, *Restitution* (2nd ed. 1992), c. 3-5, 7, 8 and 10; and Lord Goff of Chieveley and G. Jones, *The Law of Restitution* (7th ed. 2007), c. 4-11, 17 and 19-26.
>
> [32] Canadian law, however, does not limit unjust enrichment claims to these categories. It permits recovery whenever the plaintiff can establish three elements: an enrichment of or benefit to the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment: *Pettkus*; *Peel*, at p. 784. By retaining the existing categories, while recognizing other claims that fall within the principles underlying unjust enrichment, the law is able "to develop in a flexible way as required to meet changing perceptions of justice": *Peel*, at p. 788.

> [36] The first and second steps in the unjust enrichment analysis concern first, whether the defendant has been enriched by the plaintiff and second, whether the plaintiff has suffered a corresponding deprivation.
>
> [37] The Court has taken a straightforward economic approach to the first two elements — enrichment and corresponding deprivation. Accordingly, other considerations, such as moral and policy questions, are appropriately dealt with at the juristic reason stage of the analysis: see *Peter*, at p. 990, referring to *Pettkus*, *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, and *Peel*, affirmed in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 31.
>
> [38] For the first requirement — enrichment — the plaintiff must show that he or she gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff *in specie* or by money. Moreover, the benefit must be tangible. It may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake (*Peel*, at pp. 788 and 790; *Garland*, at paras. 31 and 37).
>
> [39] Turning to the second element — a *corresponding* deprivation — the plaintiff's loss is material only if the defendant has gained a benefit or been enriched (*Peel*, at pp. 789–90). That is why the second requirement obligates the plaintiff to establish not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff as suffered (*Pettkus*, at p. 852; *Rathwell*, at p. 455).

[91] The doctrinal difficulty with the unjust enrichment analysis in the context of the distribution of proceeds of sale of the Property is that because the proceeds of sale have not been distributed, there is nothing to restore. In other words, the plaintiff asserts that the defendant has not received and retained anything.

[92] However, I do recognize, as cited by counsel, that the law in relation to the distribution of proceeds under the *PPA* permits the court to make adjustment between the accounts. This is articulated in *Hedrick v. Graham,* 2012 BCSC 1760, at para. 53.

[93] However, I further accept that in the context of an accounting between the parties under a *PPA* proceeding, there are a number of principles which are appropriately incorporated into the above described unjust enrichment analysis. Of those cited, I consider the most important to be that financing on the Property was dependent on the credit of the plaintiff and that the defendant had exclusive use of the rental/room and board revenue for the Property at the material times.

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[94] In reaching this conclusion, I do not reject the fact that the defendant incurred out-of-pocket expenses for the Property. These are enumerated in the record and summarized in the defendant's closing submissions. These expenses did confer some benefit to the plaintiff as the Property was being maintained without her having to incur these expenses.

[95] However, the defendant's argument submission that the plaintiff will be unjustly enriched if the plaintiff receives 50% of the net sale proceeds fails to recognize the significant benefits which the defendant received as a result of the plaintiff's transfer of a joint interest in the Property at first instance. A transfer for which she provided no consideration.

[96] I accordingly find that both parties conferred benefits to the other in relation to the Property and there was no corresponding detriment suffered by the defendant. This is fatal to the defendant's unjust enrichment claim.

[97] Based on the foregoing, there shall be an order that the net sale proceeds arising from the sale of the Property which remain in trust, including all interest accrued thereon, shall be equally distributed between the parties within 14 days of this Order. The parties shall sign any necessary documents with Benson Law LLP to facilitate this distribution.

Costs

[98] Costs are awardable in the discretion of the trial judge.

[99] Rule 16-1(7) of the *Rules* states the general principle that costs are awarded to the successful party:

> **Costs to follow event**
>
> (7) Subject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders.

[100] The standard of "success" required for the award of the costs of an action under R. 16-1(7) is "substantial success".

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[101] The Court of Appeal in *Harras v. Lhotka*, 2016 BCCA 246, describes the substantial success standard:

> [48] "Success" for the purposes of costs means substantial success. The "substantial success" standard was described by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45, endorsed by this Court in *Marquez v. Zapiola*, 2014 BCCA 35 at para. 16:
>
> > Success in the event has been interpreted as "substantial success": see *Fotheringham v. Fotheringham*, 2001 BCSC 1321, 13 C.P.C. (5th) 302, leave to appeal ref'd 2002 BCCA 454. In *Fotheringham*, Mr. Justice Bouck described this standard as follows:
> >
> > > [45] *Gold* now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when [looking] at all the disputed matters globally.

[102] The plaintiff was the substantially successful party at trial and she, subject to the below *proviso* in my order, is presumptively entitled to her costs as ordinary costs in accordance with the *Rules*. There is no reason of which I am aware for me to exercise my discretion to deny her those costs unless there are formal offers to settle which factor into this analysis.

[103] Therefore, in the event that there have been formal offers which require the Court's consideration, the party seeking to rely upon the formal offer shall file written submissions with 14 days of these reasons for judgment and the responding party shall respond within seven days thereafter. These submissions shall be submitted through Supreme Court Scheduling.

[104] Upon receipt of any written submissions, the Court reserves the right to require the parties to attend at a mutually agreeable date for one hour of oral submissions. Failing receipt of written submissions within this time frame, or such other time frame as might be agreed upon in a consent order of the parties to

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address counsel availability, the presumptive order that the plaintiff is entitled to her costs shall govern.

"Hardwick J."

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