# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hunter v. Leblond,*
2024 BCSC 846

Date: 20240517
Docket: S221378
Registry: Victoria



Between:

**Leslie Ione Hunter and Morley John Miller Hunter**

Petitioners

And

**Bianca Lee Leblond also known as Bianca Lee Durkop**

Respondent

Before: The Honourable Mr. Justice Harvey

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Petitioners: | N.J.W. Reid |
| Counsel for the Respondent: | J.P. Millbank |
| Place and Dates of Hearing: | Victoria, B.C.<br>September 6 to 8, and<br>October 18, 2023 |
| Place and Date of Judgment: | Victoria, B.C.<br>May 17, 2024 |

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## Introduction

[1] The parties raise competing claims to real property located at 2625 Shakespeare Street, Victoria, BC (the "property"). The petitioners hold their three-quarter interest in the property as joint tenants. The respondent holds her one-quarter interest as a tenant in common.

[2] The petitioners seek a declaration that the respondent holds her interest in the property in trust for them or, alternatively, that they be allowed to purchase the respondent's interest with appropriate adjustments for expenses they have paid pursuant to ss. 8(2) and (3) of the *Partition of Property Act*, R.S.B.C. 1996, c. 347 [*Partition Act*].

[3] The respondent denies the petitioners' claim and seeks an order that she be entitled to one half of the property pursuant to the doctrine of unjust enrichment.

[4] The respondent argues the petitioners' claimed is barred by either statute or equity.

[5] In the cross-petition, the respondent also seeks referral of this matter to the trial list arguing it is incapable of resolution by summary hearing.

[6] The property is currently is assessed at $1,150,000. The current value could be as high as $1,300,000.

## Background

[7] The petitioners are both retired. They continue to live in Victoria in premises separate from the subject property.

[8] The respondent resides in Port Alberni, BC. She has not lived at the property since 2020. It apparently has been vacant up until the recent rental of one of the bottom suites.

[9] The petitioners have three children, one of whom, Matthew, was in a marriage-like relationship with the respondent from 1997 to 2001. In 1998, Matthew and the respondent had a child named Zaija.

[10] The respondent and Matthew lived in a basement suite in what, according to all, was a “slightly dangerous part of town”. The petitioners wanted a better place for them to live with Zaija.

[11] Matthew and the respondent’s combined income was insufficient to qualify for a mortgage or to pay rent in a better part of town. They did not have funds for a down payment.

[12] The respondent deposed she was the person who located the property. With the financial backing of the petitioners, the property was purchased on October 1, 1999.

[13] The purchase price was $256,000, and the petitioners contributed approximately $30,000 up front. The mortgage was $236,160. At the time the proceeding was commenced, approximately $11,000 remained outstanding.

[14] There were no formal discussions as to the property’s ownership. The petitioners oversaw the purchase and directed the purchasers’ solicitor. The property was registered in the names of all four as to a one-quarter interest: each of the couples as joint tenants, but tenancy in common as between the two one-half interests.

[15] Leslie Hunter says the respondent requested four-way ownership. Both she and Morley Hunter say they never intended a gift in the equity of the one-half interest in the name of Matthew and the respondent at the time it was acquired.

[16] Leslie Hunter explained the purchase and ownership as follows:

> Before we bought the Property, my recollection is that Morley and I felt it was best to purchase a house, that the Respondent had wanted to initially purchase a condominium and that we had to convince her that a house was a better place to raise a baby. The reason why the Respondent’s name was on

> the Offer to Purchase contract is because as I recall, Morley and I were away at the time and gave the go ahead to put in the offer. To my recollection, the Respondent wanted hers and Matthew's name on any Property that Morley and I purchased, even though they were not contributing to it, and this is why the Respondent's name is on the Property.
>
> It was Morley's and my expectation that the Respondent and Matthew would eventually be able to take over the ownership of the property and the mortgage payments and maintenance of the Property. It was never our intention to provide for the Respondent or Matthew indefinitely. I approached the Respondent many times over the years about contributing to the Property, paying the rent and applying the rent that she was receiving to the mortgage, all to no avail except as outlined in my Affidavit #1 and the summary prepared by the accountants referenced in Affidavit #1 of Matthew Cohen.

[17] Morley Hunter confirmed this as his intention, as well.

[18] The respondent's description of the arrangement, as she understood it, is as follows:

> The arrangement with Morley and Leslie with respect to how the shared ownership of the Property was going to work was informal. By this point I had lived in Leslie and Morley's house and considered myself to be their daughter. They treated me like their daughter.
>
> I believe the understanding at the time among the four of us (me, Matthew, Morley and Leslie) was the following: Matt and I would own half, and Morley and Leslie would own half. I would see how much I could get from the suites to pay into the mortgage. They didn't ask for anything else. At this time they were helping us with the rent at our suite on Quadra, which was about $600 per month, so this kind of arrangement didn't seem out of the ordinary. They never asked us for repayment of any of the money they gave us for rent. Matthew didn't work very much, and I was the primary income earner. I was still working at the antique shop and Zaija was still a baby.
>
> In retrospect, I can see that the Hunters basically covered Matthew's portion of any financial responsibilities that he had towards me and Zaija.
>
> …
>
> Very occasionally I would receive cash from the tenants – sometimes if I couldn't pay my own bills, I would keep some of the cash, but I understood that this was okay given they had given us a lot of financial assistance before. Matthew was never working enough to really contribute, I was young, and we had a daughter. Leslie frequently said to me "just tell us if you need money."

[19] Upon purchase of the property, the respondent and Matthew occupied the main floor together with Zaija. The two rental suites in the lower level of the property were, for the most part, rented out until a fire occurred in the lower suite(s) in 2014.

One of the tenants was the respondent's brother. He paid less than market rent for the suite he occupied with, according to the respondent, the blessing of the petitioners.

[20] Rents were collected, save in rare instances as shall be seen, by the respondent.

[21] Matthew separated from the respondent and Zaija in 2001.

[22] It is undisputed that during her and Zaija's occupation of the main floor, the respondent paid no rent. There is a factual dispute as to the collection and use of the rent received from the lower two suites.

[23] A legal issue arises as to the entitlement to the property revenues.

[24] The petitioners assert that, in the main, the respondent received the rent from the two lower suites and used it for her own purposes. She was receiving no support from Matthew following separation; he suffered from addiction issues.

[25] The petitioners acknowledge the respondent paid some of the rents to them. The respondent additionally "made mortgage payments" by way of deduction from her salary when she worked in Morley Hunter's dental practice for approximately two years.

[26] I note here, each of the parties engaged accountants to attempt to quantify, through banking records and other documents, the payment of various property expenses over the approximate 20 years of ownership prior to the petition's commencement.

[27] The petitioners engaged Matthew Cohen, CPA; the respondent engaged Lisa Trimmer, CPA. Neither testified; neither was subject to cross examination.

[28] The petitioners deposed the total taken from the respondent's paycheques and paid toward the property is $29,291. Mr. Cohen looked through the financial documentation supporting each party's contention as to their contribution and opined

the amount was $21,300. The petitioners' calculation likely includes deductions made to repay a loan owing by the respondent because Ms. Trimmer arrived at the same figure as Mr. Cohen.

[29] The petitioners concede the respondent made some, but not all, of the utility payments for the property and do not challenge her assertion she paid for some minor repairs over the course of her occupation.

[30] Otherwise, the petitioners say she made no significant financial contribution to the payment of the mortgage, property tax and insurance, or to the extensive repairs done throughout the course of ownership. Much of the expense was related to a comprehensive renovation done to the property after the 2014 fire.

[31] They assert that they made continued demands of the respondent to apply the rent she received to the mortgage but she consistently failed to do so.

[32] The withholding of the rental income from her pay, according to the petitioners, was because she was retaining the rent that the petitioners envisioned would sustain the property without their ongoing contribution. The respondent did not detail how that arrangement came to be or why, if she was transferring rent to the petitioners, such an arrangement was necessary.

[33] Both the rent money received by the petitioners and the deductions from the respondent's pay are included in the petitioners' accounting report.

[34] The respondent engaged Ms. Trimmer to critique the Cohen report and opine as to the financial and non-financial contribution of the respondent.

[35] In addition to deductions for the mortgage payment over the course of her employment tenure in the dental practice, Morley Hunter also deducted $150 per cheque which the respondent originally characterized as a contribution to the property. She later acknowledged, in a subsequent affidavit, such was repayment of a loan to the petitioners for a holiday she took.

[36] The respondent notes she was not involved in the planning nor responsible for the long delays in restoring the suites for rental. She also deposes that the expenses of the renovation/restoration were excessive.

[37] The 2014 renovation cost slightly under $200,000. The petitioners used the insurance proceeds of approximately $27,000 but paid the remainder from their own resources. The respondent received approximately $10,000 on account of her possessions destroyed by the fire.

[38] The respondent says that the renovations were done without her permission, were beyond what was required and did not add $200,000 to the value of the property.

[39] The whole of the time that the respondent occupied the main suite she lived with Zaija. By 2020, when the respondent left the property, Zaija was an adult.

[40] The petitioners discovered other substantial damage to the main floor of the property. The respondent says that Zaija and her boyfriend, or Zaija and Matthew, who occupied portions of the property after the respondent vacated it, are responsible for this damage.

[41] Subsequent to Matthew's separation from the respondent, he made no contribution to the property or to the respondent for Zaija's support. Following his departure from the relationship, Matthew had limited involvement with the property. He stayed occasionally in an empty suite at the instance of the petitioners despite protestations from the respondent who asserts he was abusive.

[42] In 2010, Matthew transferred his interest in the property to the petitioners. No consideration was paid to him for the transfer. The respondent learned of the transfer later at an unspecified time.

[43] The respondent raises the lack of child support as one underlying reason for her assertion that she would be entitled to all or a portion of Matthew's one-quarter

interest in the property given his failure to provide for both the respondent and Zaija following separation in 2001.

[44] From 2014 onward, no rental income was received given the fire damage and consequent discovery that the suites were illegal. Proper permitting applications took time before the restoration could start, according to the petitioners. Since 2014 the petitioners have borne all costs associated with the property save for utilities.

[45] The respondent, in her first affidavit, acknowledged receiving the rent from the suites in the form of cheques “made out to Leslie Hunter or cash”. It is unclear, given her statement that “very occasionally, I would receive cash from tenants”, whether the cheques she referenced were made payable to “cash” or whether she was paid cash.

[46] She acknowledged she kept some of the cash for her family’s purposes because “she understood this was ok”. She made no mention of cash payments or electronic transfers to either of the petitioners.

[47] The petitioners deny the respondent’s assertion she collected cheques made payable to Leslie Hunter or “cash” and then presented them to Leslie Hunter. Leslie Hunter said she was not receiving the rent as expected so, from time to time, she left notices on the tenants’ doors asking for payment by cheque to her. She said the respondent took the notices down, saying they were “embarrassing”.

[48] In their affidavits, three tenants set out the manner in which they paid rent:

a) Tristan McGonigal (the respondent’s brother) said he wrote cheques to the respondent or paid her cash. He also wrote cheques to Leslie Hunter or paid her cash if the respondent was not in town. He interacted with the petitioners on less than ten occasions;

b) Carling Richards paid $1200 monthly by way of e-transfer to the respondent; and

c) Stephanie Trudeau paid $1200 cash monthly to the respondent.

[49] The tenants' evidence does not support the respondent's contention they wrote cheques payable to Leslie Hunter.

[50] In her second affidavit, the respondent says she paid 75% of the rent received to the petitioners: "sometimes there were cheques, sometime[s] I handed Morley cash, and sometimes I did bank account transfers".

[51] This is a significant reversal from her earlier assertion as to the manner in which the rent was received and then paid to the petitioners.

[52] The petitioners assert that at all times their intention when the property was purchased was to provide suitable living accommodation for their son, the respondent and their granddaughter; not to gift them title. According to their evidence, "our intention was that when they were capable of taking over the mortgage and expenses related to the property, we would transfer it to the respondent and Matthew at some point in the future, which we hoped would be as soon as possible".

[53] The respondent notes in her affidavit material that she made cash payments or provided rental cheques to the petitioners on account of rents received by her which she assumed were being paid towards the mortgage. She also deposed she dealt with the tenants, by collecting rents, dealing with all problems that arose and, as well, made contributions directly from her income to the payment of the mortgage while she was working in the petitioners' dental practice.

[54] The respondent further notes she relied, to her detriment, on the provision of housing in not pursuing Matthew for child support. She wanted to maintain cordial relationships with Zaija's grandparents and as a result, she bore the totality of responsibility for Zaija.

[55] This assertion, however, fails to account for the respondent's characterization of Matthew as a person with a substance use disorder who seldomly held employment throughout their relationship and thereafter.

[56] In June 2015, the petitioners, through counsel, wrote to the respondent asking she transfer her one-quarter interest in the property to them. Zaija was 17 at that time. This was based primarily on the facts they allege above, notably the payment of the full down payment and substantially all of the expenses surrounding the mortgage, taxes and fire repairs which caused the rental income to cease.

[57] The respondent never replied to this letter either directly or through her own counsel. She did not deny any of the factual assertions in the correspondence nor did she advise the petitioners of her current position—that she considered one-quarter or more of the property to be hers. Zaija and she continued to occupy the property until 2020.

[58] The petitioners say they took no further steps because Zaija remained in the property and they felt she needed housing stability.

[59] The situation remained the same until 2020 when the respondent left the property to move to Port Alberni. This move was of her own volition as she was remarrying. Zaija was now 21 or 22 years of age.

[60] In September 2020, again through counsel, the petitioners wrote seeking conveyance of the respondent's one-quarter interest to them. The property was vacant at that time.

[61] The respondent's counsel replied through a without prejudice letter noting her many contributions to the property and that she would not be conveying her interest to the petitioners. The respondent's counsel said she contributed $420,330 of money or value to the property while in occupation of it.

[62] No further details were provided, save for the accounting report prepared by Ms. Trimmer which suggests a much lower amount and includes a $47,000 allowance for unpaid management fees.

[63] After the respondent left the property in 2020, Leslie Hunter entered and took video of its condition. She also changed the locks, giving rise to the respondent's claim she was 'ousted' from the property.

[64] The video depicts a number of significant issues with the property—both the main floor and the suites. It displays the home in an unkempt state with broken doors, walls with holes in them and an apparent mold issue.

[65] Timothy Schauerte, owner of a contracting company, deposed to the condition of the suite after the respondent's departure. He confirmed patching of drywall was necessary to repair the damaged walls. He also said most of the interior doors were broken and the cabinets were damaged beyond repair. Windows were broken and the main upstairs bathroom had broken fixtures. Both the front and rear decks had extensive damage.

[66] The petitioners argue that the state of the home, together with her abandonment of it in 2020, supports the inference that the respondent never considered the she had an interest in the property or she would have maintained it properly. Regardless, further expense, paid solely by the petitioners, was incurred to restore the property.

[67] The respondent denies the home was in the condition depicted in the video. She attributes any damage to Matthew re-taking occupation of the property after her departure or to Zaija and her boyfriend who apparently remained in the property after the respondent left.

[68] This petition was commenced in April 2022. The respondent, in addition to denying the petitioners' claim that the petitioners beneficially own the property, claims a one-half interest in the property based on the doctrine unjust enrichment.

[69] She also argues the matter is incapable of resolution by summary proceedings on affidavit. She seeks referral of the matter to the trial list with an order allowing for all the pre-trial procedures associated with an action.

**Accounting Evidence**

[70] Each of the parties tendered a report from an accountant purporting to forensically track expenses and deposits of money into the petitioners' accounts over the course of ownership.

[71] Neither party questioned the expertise of the other's accountant nor sought to cross-examine them on their reports. Both are Chartered Professional Accountants.

[72] The petitioners' accountant, Mr. Cohen, reviewed banking records and invoices provided to him by the petitioners and calculated what he opined to be the petitioners' financial contribution to the acquisition, maintenance and preservation of the property. He opined as to the rental value of the upper floor occupied until 2020 by the respondent and added that notional value to the petitioners' input into the property.

[73] The respondent's accountant, Ms. Trimmer, critiqued the Cohen report and offered her own opinion as to the respective credits from each of the petitioners and respondent. Further, she valued the management services provided by the respondent during her stewardship of the rentals for the period up to and including the fire.

[74] Mr. Cohen opined that in total, the petitioners had expended $742,000 (rounded) on matters such as the mortgage, insurance and utility payments, permits and legal payments respecting the renovation to the property after the fire, incidental repairs, maintenance and the costs of the renovation.

[75] Those expenses, according to Mr. Cohen, were hard cash outlays. That amount does not include a claimed offset for occupational rent notionally charged to the respondent.

[76] For the most part, I am satisfied that the opinion, save for that regarding the value/entitlement to occupational rent, is accurate subject to the above noted criticism regarding the assumption Mr. Cohen made as to the origin of a payment

where no document in support was located. However, the amounts in question, in my view, are not so significant as to alter the outcome.

[77] Mr. Cohen also reviewed the cash inflows and opined that over the course of ownership from the date of acquisition to the date of his report, the rent received by the petitioners totalled $44,806. They also received a further $27,800 from the insurance proceeds for a total of $72,600 (rounded). There is no dispute that the petitioners paid the insurance premiums. The respondent received a lesser amount for her loss of contents.

[78] The rent that was accounted for by Mr. Cohen, which was acknowledged to have been received by Leslie Hunter, came directly from the tenants; not the respondent. The petitioners deny receiving cash from the respondent, which she deposes to have done.

[79] The only evidence from the tenants themselves, referred to earlier in these reasons, indicate that with the exception of one tenant, Ms. Trudeau, who paid $1200 cash monthly, rental payments were made to the respondent either by cheque made out to the respondent or by e-transfer to her.

[80] Mr. McGonegal's rent rose from $450 when he initially moved in, to between $700 to 800 (2002 to 2014). Throughout his tenancy, he says he dealt with Leslie Hunter less than ten times and otherwise gave cheques made payable to the respondent or cash.

[81] Such is hard to reconcile with the respondent's assertion, "Very occasionally I would receive cash from the tenants – sometimes if I couldn't pay my own bills, I would keep some of the cash, but I understood that this was okay".

[82] Of the three tenants who provided evidence, one paid only by cash; the other by e-transfers to the respondent, and her brother a mix of cash and cheque made payable to the respondent, not Leslie Hunter (save for limited times when the respondent was away).

[83] Leslie Hunter deposed that she was constantly asking the respondent for the rent.

[84] From the three sources available, it would appear well more than half the rental income received was in the form of cash or e-transfer to the respondent. The respondent notes that from January 2012 to May 2012 deductions were made from her paycheque from the dental office designated as a miscellaneous deduction or hydro. She correctly notes she paid income tax on that amount.

[85] Those contributions are captured by the Cohen report. The petitioners say they "overpaid the respondent for the position she occupied" but, in my view, resolution of that issue is not necessary to arrive at a just result giving the analysis that follows.

[86] Were, as the respondent suggests, she providing over 75% of rent to the petitioners, it is hard to understand (1) the need for deductions from her paycheque to pay towards housing expenses and (2) the respondent's acquiescence in such a scheme were she providing the rental monthly.

[87] As to other contributions to the property, noted after the receipt of Mr. Cohen's report, the respondent deposed: "my actual financial contributions to the property over the years have been significant and have frequently stretched my personal finances to the limits. In addition, I made contributions in the form of 'sweat equity' taking care of a great deal of the day-to-day work with the property".

[88] A common theme in the respondent's affidavits was that she was 'financially strapped' and never in a position of financial stability throughout the period she occupied the property. Such belies one of the respondent's assertions that "but for her belief she was an owner of the property, or part thereof, she and her brother would have invested in a piece of real estate together and her financial position would be much improved over what it currently is".

[89] The respondent referenced a letter from her earlier counsel, in which she made clear her interest would not be returned to the petitioners, claiming $420,330

of financial contributions. Such is not supported by Ms. Trimmer's opinion who, after including credit for $47,000 in management fees; all utilities (including for the upper portion of the house occupied by the respondent), yard labour and repairs, and rent of $123,000, arrived at a figure less than $300,000 representing the respondent's contribution to the property.

[90] Receipt of funds beyond those set out in the Cohen report is denied by the petitioners.

[91] The respondent acknowledges the petitioners paid the hydro from 1999 to 2002 but changed the billing in 2002 without telling her. After that, the respondent notes she sometimes asked Leslie Hunter to pay hydro "because I was broke". She maintains that for the most part she paid the hydro from 2002 to 2020.

[92] The respondent also deposes to paying "some of the gas bills".

[93] She lists a series of receipts or items she purchased, without sourcing the funds with which she used to purchase them. These receipts total approximately $5,000 to $6,000.

[94] It is conceded the respondent managed the tenants in the lower suites for the years they were rented. Management duties as referenced in the respondent's materials would have ended with the fire and the vacancies it created. Those duties included "dealing with complaints, cleaning suites, showing and advertising the suites, dealing with tenants and collecting rent".

[95] Ms. Trimmer calculated the management fees as 10% of the gross rent including notional rent attributable to the upper floor occupied by the respondent. It is difficult to understand the rationale for crediting the respondent with management fees in respect of the portion of the property she occupied unless she is to be 'debited' for her use of the property as proposed by Mr. Cohen.

[96] Ms. Trimmer estimated the actual rent received for the two suites was approximately $220,000. Of that, she opined the respondent paid $123,000 (or more) via transfers or cash.

[97] For the latter assumption, payment in cash, Ms. Trimmer clearly relies on the respondent for that information; not on documentation.

[98] The petitioners say the amount was as set out by Mr. Cohen; a much lesser figure.

[99] The factual dispute as to the amount of rent paid, begs the question of to whom the rent belonged. Such is not an accounting issue.

[100] Ms. Trimmer assumes the respondent was entitled to one-quarter of the rent given her legal ownership on title.

[101] The petitioners maintain there was never a gift to either Matthew or the respondent at the time of purchase entitling them a portion of the rent. Were that so, occupational rent would come into play. The rent was to pay the expenses. According to the petitioners, shortfalls were to be paid by Matthew and the respondent as they originally envisioned the arrangement.

[102] While I find on the evidence there was no expectation of rent from the respondent for her and Zaija's use of the home, it does not follow that the respondent had an entitlement to retain any of the rental income as her own.

[103] The reason for deduction of funds from her paycheque makes clear, in my mind, the petitioners expected all the rental revenue would be applied to the costs of maintaining the property. The rent was not the property of the respondent on any view of the evidence.

[104] Assuming the petitioners have correctly stated that the respondent received the lion's share of the rent over the period of her occupation, the respondent's acknowledged contribution, $5,000 to $6,000 of repairs, rent deducted from her pay, utilities paid by her (presumably for all three suites; the two rentals and the upper

floor), and management of the lower suites while they were rented, are the extent of her contribution.

[105] Ms. Trimmer noted many of the expenses claimed by the petitioners were paid through a family trust and, hence, less costly to the petitioners on a net of tax basis.

[106] With respect, whether begged, borrowed or stolen, the manner of payment does not change its effect upon property ownership.

[107] Neither the petitioners nor the respondent seemingly declared revenue from the rental income received from the suites. Conceivably, the suites provided no net income; more likely no one turned their mind to the need for each party on title to report revenue and expenses to the tax authorities.

[108] Like payment of expenses from the family trust, I see this as a neutral factor regarding the petitioners' intentions at the time of purchase or in the analysis of the parties' respective contributions to the property.

**Position of the Parties**

[109] The petitioners rely on the doctrine of resulting trust and point to the significant imbalance in financial contributions made towards maintaining the property following its acquisition. They seek a declaration the respondent holds her one-quarter interest in trust for the petitioners and seek its return.

[110] The respondent opposes the petitioners' claim for a declaration of trust noting the petitioners were aware, no later than June 2015, of their claim by virtue of her failure to deliver up her interest in the property as requested. This proceeding was commenced in April 2022 and, as such, is beyond the limitation period and ought to be dismissed.

[111] Alternatively, the respondent says that the petitioners' laches in bringing this matter forward have prejudiced her in terms of the destruction or loss of

documentation that would support her claims of financial contribution and/or the unavailability of witnesses who would corroborate her evidence.

[112] The respondent says the petitioners gifted her a one-quarter interest at the time the property was purchased with the expectation the other one-half in their name would be gifted to her and Matthew at a future date.

[113] In her cross-petition, the respondent asserts that she ought to retain her one-quarter interest in the property and be entitled to Matthew's former one-quarter interest based on the doctrine of unjust enrichment.



## Issues

[114] I will deal with the issues in the following order:

a) Is the matter suitable for summary proceedings?

b) Are the petitioners entitled to a declaration of resulting trust in respect of the respondent's one-quarter legal interest in the property?

c) Is the petitioners' claim barred by expiry of the limitation period?

d) Alternatively, does the delay in asserting their claim give rise to the defence of laches?

e) Is the respondent entitled to an interest in the property, either the one-quarter presently in her name, or one-half based on the doctrine of unjust enrichment?

f) If the respondent retains the one-quarter interest in her name or gains a further interest in the property are the petitioners entitled to an equitable accounting of contributions per the *Partition Act*?

## Suitability for Summary Hearing

[115] The respondent earlier sought an order seeking a case planning conference and to transfer the matter to the trial list early in this proceeding.

[116] Justice Crerar denied that application in December of 2022; he instead ordered the respondent could file ‘expanded materials’ by February 1, 2023 and the petitioners would provide responses no later than two weeks before the scheduled hearing.

[117] He ordered the petition proceed on the Assize list and directed respondent’s counsel to provide six weeks of available dates between the date of his order and April 2023.

[118] In the interim, following delivery of her material, the respondent did not seek discrete orders for any pre-trial procedures such as cross-examination of the petitioners or their accountant.

[119] Instead, the respondent renewed the application to have the matter moved to the trial list and convert the petition to an action at the commencement of the hearing. She noted she did not have the opportunity to illicit evidence from Matthew, as it related to the transfer by him of his one-quarter interest in the property to the petitioners without consideration.

[120] The respondent made no reference to any attempts, between her original application to the date of hearing, to contact Matthew regarding this evidence.

[121] Despite the earlier ruling, the respondent argues I cannot find the facts necessary in support of the competing claims so as to ensure the process is fair to both the petitioners and the respondent.

[122] With respect, I disagree. While open to me to further delay the matter for further pre-hearing procedures, I conclude it is appropriate to deal with this matter by way of a hearing on affidavits.

[123] *Cepuran v. Carlton*, 2022 BCCA 76 summarizes the court’s discretion to refer a petition to the trial list:

> [158] It should be kept in mind that the starting point for those matters that are properly brought by way of petition is that the *Rules* contemplate that a summary procedure will be appropriate: *Conseil scolaire* at paras. 29–30.

This is different than the starting point for an action. There should be good reason for dispensing with a petition's summary procedure in favour of an action. The mere fact that there is a triable issue is no longer a good reason.

[159] The modern approach to civil procedure, as encouraged in *Hryniak*, is to allow parties and the trial courts to tailor the pre-trial and trial procedures to a given case, in the interests of proportionality and access to justice, while preserving the court's ability to fairly determine a case on the merits. In my view, R. 16-1(18) and R. 22-1(4) work to reflect this modern approach within a petition proceeding.

[160] To summarize, I am of the view that a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in determining the issues, pursuant to R. 16-1(18) and R. 22-1(4). For example, the judge may decide that some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.

[161] The PGT urges this Court to provide some guidance on the factors that apply when a *PPA* application should be referred to trial, or for petitions more generally.

[162] I am reluctant to do so. It will be up to the courts to determine on a case-by-case basis whether a petition proceeding is suitable for adopting a hybrid procedure or should be converted to an action and referred to trial.

[163] I do agree with the PGT that where an enactment authorizes a petition proceeding, the statutory context will often be an important factor in determining whether a hybrid petition procedure should be adopted to assist in deciding contested issues, rather than referring the matter to trial.

[164] For example, the statutory context of the *PPA* provides many good reasons why a *PPA* application is usually a summary procedure: the adult who is the subject of the proceeding is presumed capable; any trial of capacity will be an extreme intrusion on that adult's liberty, privacy and autonomy; the adult is an involuntary participant in the proceeding; the adult may be elderly and there may be a need for a quick disposition; and all parties are likely to seek an order that the costs of the proceeding, which may be disproportionate to the size of the adult's estate, be borne by that adult. Thus, if the threshold of referring the matter to trial is met because the necessary two medical affidavits have been provided, but the court is not satisfied and wants to make further inquiry, R. 16-1(18) and R. 22-1(4) give the court discretion to order something less than a full trial. As an example, a judge in such a position might order the medical deponents to give *viva voce* evidence before the judge, so that they can be questioned on their opinions.

[165] I commend the reasoning of Justice Ballance in *Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc.*, 2009 BCSC 1701, and Justice Dardi in *Terasen Gas Inc. v. Surrey (City)*, 2009 BCSC 627, as setting out some factors that may be relevant in deciding whether to convert a

> petition proceeding to an action. These decisions were before their time in that they were before the adoption of R. 16-1(18). The factors that may be relevant will evolve with time and the circumstances of a particular case.
>
> [166] At a minimum, when considering whether to order the use of hybrid procedures within the petition proceeding itself, or to refer the matter to trial, the court will need to be mindful of the object of the *Rules* set out in R. 1-3: to secure the just, speedy and inexpensive determination of every proceeding on its merits, and so far as can be achieved, in ways that are proportionate to the amount involved, the importance of the issues, and the complexity of the proceeding.

[124] Counsel for the petitioners notes a party cannot frustrate the summary rule by failing to take pre-trial procedures: *Anglo Canadian Shipping Co. v. Pulp, Paper & Woodworkers. of Canada, Local 8* (1988), 27 B.C.L.R. (2d) 378, 1988 CanLII 2879 (C.A.).

[125] Here, despite dismissal of the respondent's application to convert the petition to an action, in my view, it remained open to her to seek pre-trial procedures and/or cross-examination of the deponents whose evidence raised the conflict the respondent argues makes a summary determination either unfair or impossible.

[126] She did not. The hearing of the petition and cross petition took place over four days.

[127] There is no real conflict, in my view, as to the petitioners' claim that they did not intend to pass equitable title to either the respondent or their son when the property was purchased. The respondent's pleadings assert a gift but she has not described in the evidence before me how she arrived at that conclusion.

[128] In my view, her evidence, quoted earlier, is mere speculation as to what she thought the arrangement was. She points to no factual assertions that cast doubt on the petitioners' characterization of the events surrounding the property's acquisition.

[129] A fair summary of the evidence of the petitioners is that they bought the property with a view to later gifting the whole of it to the respondent and their son presuming the two of them would assume financial responsibility for the outstanding

mortgage and maintenance of the property; not just the one-half represented by their names on title.

[130] The evidence makes clear that never happened. From the onset, the petitioners were covering the major portion of the expenses. When the respondent contributed, it was from rental funds to which, on the most favourable interpretation of the evidence, she had only a limited entitlement. She also had funds withheld from her salary for the period she worked in Morley Hunter's office.

[131] The petitioners state she was paid more than market rates so as to provide the income necessary to accomplish that; the respondent disagrees. In any event, this does not affect the outcome.

[132] In my view the evidence, even where it conflicts, lends this matter to resolution in a summary fashion having regard to the applicable law relating to both resulting/constructive trust and unjust enrichment.

**Resulting Trust**

[133] It is presumed, both in law and in equity, that the person named on title owns the property, or such portion as they appear on title. However, this is a rebuttable presumption: *Suen v. Suen*, 2013 BCCA 313.

[134] In *Suen*, one of the bases upon which title could be challenged was through the doctrine of resulting trust.

[135] In the case of gratuitous transfers, the law generally presumes that the person who made the transfer of property intended a trust, not a gift.

[136] The presumption of a resulting trust can be rebutted. The onus is on the person who gave no value to establish that the person transferring the property intended a gift. The actual intention of the person transferring the property at the time of transfer governs. See *Freeland v. Farrell*, 2022 BCCA 99 as follows:

> [40] Ms. Farrell contends that the purchase would not have occurred or would not have occurred on such favourable terms if she had not been a

co-purchaser of the Property and a co-covenantor on the mortgage. She notes that the vendors did not accept Mr. Freeland's original offer and required that she be added as a co-purchaser. She also notes that Mr. Freeland was not formally approved for a mortgage on his own and that the eventual terms of the mortgage ($648,000 or 80% of the purchase price of $810,000) were more favourable than Mr. Farrell's pre-approval (65% of the purchase price to a maximum of $600,000 on a purchase price of $900,000).

[41] Ms. Farrell submits the judge's finding that Ms. Farrell gave no value for her legal interest in the property amounts to a palpable and overriding error of fact. In oral submissions she went so far as to submit that the judge was obliged, as a matter of law, to find that Ms. Farrell provided value because she was required by the vendors to be a co-purchaser and took on risk as a co-covenantor on the mortgage.

Legal Principles

[42] There is no debate that, as a registered owner, Ms. Farrell is entitled to the presumption of indefeasible title. Unless the presumption is rebutted, Ms. Farrell's title is conclusive evidence at law and in equity that she is indefeasibly entitled to an estate in fee simple to the Property: *LTA*, *s.* 23(2).

[43] One of the ways that Mr. Freeland can rebut the presumption of indefeasibility is by establishing that Ms. Farrell holds her legal interest in the Property in a resulting trust for him: *Suen* at para. 34.

[44] In *Kerr v. Baranow*, 2011 SCC 10, Justice Cromwell explained the concept of a resulting trust:

> [16] … [I]t is widely accepted that the underlying notion of the resulting trust is that it is imposed "to return property to the person who gave it and is entitled to it beneficially, from someone else who has title to it. Thus, the beneficial interest 'results' (jumps back) to the true owner": Oosterhoff, at p. 25.

[45] A resulting trust can arise in various ways and is presumed to arise where an owner of property gratuitously transfers title to another. Of relevance to the circumstances of this case, in Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, eds., *Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Thomson Reuters, 2021) at 414, the authors explain that resulting trusts can arise where one party purchases a property that is put into the names of both the purchaser and another person. They explain at 414: "[I]f property is purchased by A, and conveyance or transfer is taken from the vendor in the name of B, or in the names of both A and B, B presumptively becomes a resulting trustee of his or her interest for the benefit of A."

[46] In cases of gratuitous transfers, the law generally presumes that the person who made the transfer of property intended a trust, not a gift, and the person who gave no value for the property is under an obligation to return the property to the original title owner: *Pecore v. Pecore*, 2007 SCC 17 at para. 20; *Kerr* at para. 19.

[47] The presumption of a resulting trust can be rebutted. The onus is on the person who gave no value to establish that the person transferring the

> property intended a gift. If no gift was intended, a resulting trust is established and the person who gave no value holds the property in trust for the person who transferred the property. The actual intention of the person transferring the property at the time of the transfer governs. In *Kerr*, Cromwell J. explained:
>
> > [18] The Court's most recent decision in relation to resulting trusts is consistent with the view that, in these gratuitous transfer situations, the actual intention of the grantor is the governing consideration: *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795, at paras. 43-44. As Rothstein J. noted at para. 44 of *Pecore*, where a gratuitous transfer is being challenged, "[t]he trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention" (emphasis added).
> >
> > [19] As noted by Rothstein J. in this passage, presumptions may come into play when dealing with gratuitous transfers. The law generally presumes that the grantor intended to create a trust, rather than to make a gift, and so the presumption of resulting trust will often operate. As Rothstein J. explained, a presumption of a resulting trust is the general rule that applies to gratuitous transfers. When such a transfer is made, the onus will be on the person receiving the transfer to demonstrate that a gift was intended. Otherwise, the transferee holds the property in trust for the transferor. This presumption rests on the principle that equity presumes bargains and not gifts (*Pecore*, at para. 24).
> >
> > [Emphasis in Original.]

[137] In my view, the circumstances here are similar to *Freeland*. The respondent gave no value towards the purchase. The petitioners were well able to qualify for the mortgage on the property without the respondent and she made no contribution to the down payment.

[138] Subsequent contributions, admittedly made by the respondent, go to the issue of unjust enrichment. They do not inform the issue of the petitioners' intention at the time of the transfer.

[139] The intention to gift the property in the future to Matthew and the respondent never came into play because the petitioners ended up paying substantially all of the costs associated with the ownership of the property.

[140] By her own admission, from the passage earlier quoted, the respondent did not know what the petitioners' intent was in registering the property in all four names as opposed to just their own.

[141] Nowhere in either of her affidavits does the respondent assert the down payment or any portion thereof was gifted to her. Nor does she describe any arrangement by which she understood she would come to be entitled to the equity in the property regardless of who paid the expenses associated with it over her 20 plus years of occupation. She presumed the petitioners carried on in the fashion they did because Matthew was not providing for her and Zaija.

[142] She reasonably concluded, and I agree, the petitioners intended Matthew, Zaija and her would have the free use of the upstairs portion of the home. There is nothing in the material before me to support a claim for occupational rent for the use of the upper floor.

[143] *Pecore v. Pecore*, 2007 SCC 17 makes clear that intention is to be assessed at the time of the transfer. While subsequent acts may provide evidence of intention at the time the transfer occurred, that is the lens through which subsequent actions must be seen.

[144] The petitioners, despite the termination of Matthew's relationship with the respondent, still wanted the respondent and Zaija to have a safe and stable environment.

[145] In my view, the petitioners' ongoing largesse does not alter the nature of the earlier transaction or their intentions as expressed, which are not controverted save for speculation on the part of the respondent.

[146] Further, I agree with the petitioners' submission that the abandonment of the property (five years following the assertion of title by the petitioners) coupled with the condition they found the property in following the respondent's departure, is inconsistent with her position that she was an owner of the property.

[147] In arriving at thi conclusion, and rejecting the evidence that the damage was caused by either Matthew of Zaija and her boyfriend, I refer to the evidence of the contractor, Mr. Schauerte who noted the property's deplorable condition prior to the respondent's departure in 2020.

[148] If the respondent was truly of the view she had been gifted a one-quarter interest in the property, it is curious she would not assert that claim upon leaving the property to move to Port Alberni.

[149] Lastly, I note the respondent's reply to an assertion by Leslie Hunter that she was taking advantage of the petitioners. She replied:

> … I have not taken advantage of the Petitioners. They wanted this situation. They have said numerous times they were doing it "for Zaija." I just happened to be a part of the package.
>
> [Emphasis in Original.]

[150] In my view, that statement supports the intentions of the petitioners as stated in their affidavit material and aligns with my conclusion, and the petitioners' evidence, that no immediate gift was intended, save for an intention to provide a place for their son, daughter-in-law, and granddaughter to live.

[151] The respondent, whose onus it is, has failed to rebut the presumption of resulting trust. Accordingly, I find, subject to the resolution of the following issues, the respondent holds her one-quarter interest in the property in trust for the petitioners.

## Limitation

[152] The respondent argues the petition is statute barred having been commenced long past the two-year time limit set out in the *Limitation Act*, S.B.C. 2012, c. 13 [*Limitation Act*].

[153] Trust claims are governed by particular discoverability rules: see s. 12(2):

> (2) A fraud or trust claim is discovered when the beneficiary becomes fully aware

> (a) that injury, loss or damage had occurred,
>
> (b) that the injury, loss or damage was caused by or contributed to by the
>
> (i) fraud,
>
> (ii) fraudulent breach of trust,
>
> (iii) conversion, or
>
> (iv) other act or omission
>
> on which the claim is based,
>
> (c) that the fraud, fraudulent breach of trust, conversion or other act or omission was that of the person against whom the claim is or may be made, and
>
> (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[154] This standard requires the trustee to show that the beneficiary was fully aware of the claim (i.e. actual notice) which, as noted in *Maussion v. Maussion*, 2021 BCSC 530 at para. 23, is distinct from the general discovery rule that a party "knew or reasonably ought to have known" of the factors giving rise to the claim (see *Limitation Act*, s. 8).

[155] In *Lennox v. Lennox*, 2019 BCSC 938, Justice Horsman (as she then was) dealt with a similar set of facts deciding whether the petitioner had a beneficial interest in the former family home, on the basis of resulting trust. Regarding the limitation, on the facts of that case, Horsman J. found:

> [46] … the triggering event for the operation of the limitation period was the point in time that the petitioner became fully aware that the respondent denied existence of the trust and would refuse to transfer his interest in the Property back to him: *Bacic v. Bacic Estate*, 2010 BCSC 728 at paras. 57-58.

[156] While *Bacic* was overruled on other grounds, *Brenner v*. *Brenner*, 2010 BCCA 553, *Ghag v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union Local 2009*, 2022 BCCA 360, makes clear the reversal did not affect the passage relating to consideration of the running of limitation periods: see para. 64

[157] While the respondent argues, firstly, the limitation began in March 2010, when Matthew transferred his interest to the petitioners (saying they had sufficient

knowledge to assert their claim against her) there was no interaction between the petitioners and the respondent that would inform them that the respondent, at some future time when Zaija was no long a minor, would refuse to transfer her interest.

[158] Alternatively, the respondent says the limitation began to run when the petitioners sent the June 2015 letter, because the demand demonstrates their understanding of their legal rights. Silence on the respondent's part does not amount to a denial of the petitioners' claim to her one-quarter interest. Silence is neither an affirmation nor a denial in this case, but merely an avoidance of the matter.

[159] The petitioners were first alerted to the respondent's position by her counsel's letter of October 8, 2020. Then, and only then, was it clearly made known the respondent denied the assertion of a resulting trust. Following the receipt of that correspondence, the petitioners were on notice. The petition was filed April 20, 2022, within the two-year period allowed.

[160] Hence, there is no merit in the argument that the claim is statute barred.

**Laches**

[161] The respondent notes the lengthy period between the purchase of the property and the date they claimed the respondent's interest was held in trust for them. She asserts, firstly, such is supportive of the petitioners' intention to gift her the one-quarter interest, a submission I have rejected, and secondly, that she has been prejudiced by the delay.

[162] The second argument relates to the lengthy delay in asserting their claim to title.

[163] Part of the prejudice is the respondent's assertion she did not seek financial support from Matthew following separation preferring, instead, to maintain cordial relations with the petitioners.

[164] As noted earlier, the suggestion she suffered a loss as a result of failing to pursue legal remedies against Matthew is not borne out by the facts.

[165] As to the suggestion she has been unable to locate witnesses or documents, the respondent provided affidavits from three former tenants who lived at the property. Her evidence as to the cash payments she made to the petitioners conflicts with her original evidence that she provided cheques or cheques made payable to "cash" to Leslie Hunter.

[166] The respondent has not identified any other witness who might have probative evidence to support her assertions regarding her contributions nor has she provided any detail of the nature of documentary evidence that would support her contention of cash payments.

[167] The leading case on the doctrine of laches is *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, 1992 CanLII 31. There, the Supreme Court of Canada discusses the two distinct branches of the laches doctrine, which requires claims be advanced without undue delay.

[168] Acquiescence is established if, after the deprivation of one's rights and in full knowledge of their existence, the plaintiff delays. This leads to an inference that the plaintiff waived their rights: *M.(K.)* at 78.

[169] The plaintiff must have known the facts relevant to the claim, the wrongfulness of the acts, and have knowledge of their rights. This is measured objectively: *M.(K.)* at 78–79.

[170] However, in my view, looking only to knowledge would treat laches as akin to the common law reasonable discoverability doctrine. The analysis must go one step further to ask, "in light of the plaintiff's knowledge, can it reasonably be inferred that the plaintiff has acquiesced in the defendant's conduct?" This requires an assessment of the specific circumstances of each case: *M.(K.)* at 80.

[171] The second arm of laches is detrimental reliance; occasioned where a plaintiff delays making the claim, which causes "the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo": *M.(K.)* at 77.

[172] There are two key things to consider: “the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other”: *M.(K.)* at 76–77, quoting *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221.

[173] The “conscionability of the behaviour of both parties” is relevant as well: *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 at para. 150 [*Manitoba Metis*]. Here, I do not find the behaviour of any the parties rises to the level of unconscionability; for instance, they have not committed serious or oppressive acts such as fraud or deceit.

[174] Laches “is not an arbitrary or a technical doctrine”: *Irvine v. Irvine*, [1977] 3 W.W.R. 37 at 42, 1977 CanLII 2177 (B.C.C.A.), quoting *Lindsay Petroleum Co.*

[175] As to the suggestion the respondent relied, to her detriment, on the thought pursuit of Matthew for support, either spousal or child, the reality is the evidence establishes Matthew was an unlikely source of contribution to the respondent’s or Zaija’s financial advancement.

[176] Matthew is described throughout the respondent’s material as a person who dealt with substance use and was seldom employed.

[177] In her material, the respondent infers, if not outright declares, that the petitioners’ acknowledged generosity post-2001 was, as she saw it, them stepping up because Matthew could not.

[178] Apart, possibly, from not maintaining better records over the course of her stewardship of the property, the respondent suffered no prejudice. Instead, she lived with her daughter rent-free in a property she was unlikely to be able to afford.

[179] By her own acknowledgment, as a single mother, she was “strapped for cash”. The suggestion she would have, but for her presumed entitlement to a one-quarter of the property, been in a position to pursue investment opportunities in the housing market is speculative, at best.

[180] Acquiescence is more problematic. The petitioners knew, no later than 2015, of their legal foundation to require return of the property. Matthew had already returned his interest. While the transfer is described as gratuitous, it is not clear what knowledge the petitioners had in 2010 of their equitable rights given the situation they have described.

[181] *Irvine* at 42, notes:

> … The legislature, in enacting a statute of limitation, specifies fixed periods after which claims are barred; equity does not fix a specific limit, but considers the circumstances of each case: *Smith v. Clay* (1767), 3 Bro. C.C. 639, 27 E.R. 419. In determining whether there has been such delay as to amount to laches the chief points to be considered are (1) acquiescence on the plaintiff's part, and (2) any change of position that has occurred on the defendant's part. Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the plaintiff has become aware of it. It is unjust to give the plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these conditions rests the doctrine of laches: *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221 at 239, per Lord Selborne.

[182] The question arises as to why they made no demands of the respondent at the same time as Matthew's conveyance of his interest. Title in the respondent's name was unnecessary to provide for the continued occupation of the upper suite by the respondent and Zaija.

[183] By 2015, when its return was demanded, no revenue was being received from tenants.

[184] The totality of the evidence makes clear the important role Zaija, and the petitioners' ongoing relationship with her, meant to the petitioners.

[185] In their material the petitioners, or at least Leslie Hunter, expressed concern for Zaija's stability and they accordingly delayed taking active steps.

[186] Part of their consideration to not initiate an action is the fact the respondent did not reply with a denial of their claim; only silence. It is reasonable to infer from

the petitioners' expressed concern for Zaija, post-2015, that they were dissuaded from embarking on this litigation while she remained there with her mother.

[187] Lastly, only in 2020 did it become apparent the respondent would not transfer title to the petitioners.

[188] Throughout the entirety of the respondent's occupation the petitioners made clear they were looking to the rental revenue to maintain the mortgage and other expenses. Such is clear from the deduction from the respondent's salary of mortgage payments over a period of several years.

[189] Acquiescence depends on knowledge, capacity and freedom: *Manitoba Metis* at para. 147.

[190] While the petitioners, by 2015 at the latest, had the knowledge and capacity to exercise their rights, I accept the deferral of those rights was not occasioned by ongoing acquiescence to the respondent's ownership of one-quarter of the property but rather to further the original intent of the property purchase: to secure a stable home for Zaija (who according to the evidence was going through her own challenges at age 17).

[191] To commence the present proceeding against the respondent in 2015, given there was no outright denial of their entitlement, would likely have eroded any ongoing relationship between Zaija and the petitioners.

[192] *Irvine* dealt with an elderly mother who was unduly influenced by her son to transfer title to him. The other children found out shortly after. They did not obtain legal advice until 13 years later, when he put the property up for sale. The defendant son relied on laches.

[193] The Court of Appeal rejected this defence, on the basis that the son's position had not changed with respect to the property for 13 years. Although he spent money on repairs and taxes, he had also received intermittent revenue by way of rentals. The defendant had not been prejudiced; the situation essentially remained

unchanged. The plaintiffs succeeded despite the delay. I find the situation to be similar here.

[194] *Irvine* at 41 cited the trial court's decision, which noted the following passage from *Holder v. Holder*, [1968] Ch. 353, [1968] 1 All E.R. 665 (C.A.). There, Lord Justice Harman said:

> There is therefore no hard and fast rule that ignorance of a legal right is a bar, but the whole of the circumstances must be looked at to see whether it is just that the complaining beneficiary should succeed against the trustee.

[195] The trial court had also said in part:

> Whether the defence of acquiescence be raised in cases involving alleged breach of trust, as in *Pauling's* and *Holder*, or estoppel, as in *Watson*, or laches, as in this case, I regard the test set out by Wilberforce J. as equally applicable. That test requires me to decide here whether it is just that the plaintiffs succeed against the defendant, given my decision as to the merits of their complaint.

See *Irvine*, at 41.

[196] Here, as I have already noted, there is no conduct on behalf of the petitioners that would objectively confirm the respondent's speculation that the transfer was a gift or that she was at liberty to retain a substantial amount of the rental while in occupation.

[197] While there is an obvious delay in the assertion of the petitioners' legal rights, the respondent was the beneficiary of that delay and, in my view, it would be unjust to deny the petitioners' claim based solely upon delay.

[198] The respondent knew since 2015 of the petitioners' assertion of equitable title and the reasons underlying it.

[199] The defence of laches has no application to the circumstances here.

**Unjust Enrichment**

[200] The respondent asserts that she is entitled to an interest in the property based upon the doctrine of unjust enrichment.

[201] She asserts the combination of her financial contribution, coupled with her physical contribution to the management of the suites, enriched the petitioners thus entitling her to an interest in the property; be it one-half as claimed or retention of the interest registered in her name.

[202] The claim for one-half the property is fueled, in part, by the respondent's view that the petitioners stepped into the shoes of their son and assumed the financial responsibilities of Matthew. The respondent says she took no steps against Matthew for relief under the *Family Law Act*, S.B.C. 2011, c. 25 [*FLA*], for fear of upsetting the relationship with the petitioners.

[203] With respect, the evidence makes clear Matthew could not meet his obligations towards either the respondent or Zaija under the *FLA*. He had no better right than the respondent to the one-quarter interest in the property and the evidence makes clear he was an unlikely source of financial support for either the respondent or their daughter.

[204] The Trimmer report notes there is little factual difference in the respective accounting reports save for a different view as to the calculation of rental revenue paid by the respondent to the petitioners. Ms. Trimmer, correctly in my view, allows for no credit to the petitioners for occupational rent (despite assessing the value of management fees to the whole of the property; not just the two rental suites).

[205] As I earlier stated, the surrounding circumstances of the property's purchase make clear the petitioners had no expectation of being credited with rent for the portion occupied by their granddaughter and the respondent.

[206] The corollary of that is Matthew and the respondent had no personal entitlement to receive and use the rental income intended to pay for the expenses.

[207] Ms. Trimmer ascribes a financial value to non-cash contributions such as the payment of utilities, repairs and the deduction from the respondent's income of mortgage payments. Such is fair to an extent.

[208] The management fees ‘credited’ to the respondent are 10% of the entire rental value of the property; not just the two suites the respondent managed. The fee should be 10% of the collected rent; approximately $240,000; not $47,000.

[209] She assigned value to lawn maintenance done by the respondent, although one would reasonably expect a tenant, especially one living rent-free, to perform such tasks.

[210] She also credits the respondent with value for utilities she paid, noting the rent from the two suites included utilities. Any expenses she contributed towards utilities after 2014 were for her singular benefit. Those she paid when the tenants were in possession were approximately 50% for her benefit of occupying half of the property.

[211] Both parties agree that the prevailing law respecting unjust enrichment is succinctly set out in *Kerr v. Baranow*, 2011 SCC 10 at para. 32, where the Supreme Court of Canada affirms the basic legal framework for unjust enrichment and the remedy of constructive trust. The respondent must establish:

a) an enrichment of or benefit to the petitioners;

b) a corresponding deprivation of the respondent; and

c) the absence of a juristic reason for the enrichment.

[212] The respondent’s claim for constructive trust is based on, according to her affidavit, the unequal day-to-day labour supplied by her, a burden originally intended to be carried out by two people, and by the fact she would have had a claim against Matthew’s one-quarter interest under the *FLA* if the petitioners “had made their claim and [she] had acted on her legal rights at the time”.

[213] Such is circular reasoning in my view. Matthew had, according to the same principles set out above, no equitable title in the property and, unlike the respondent, conveyed his one-quarter interest to his parents on request. While the circumstances surrounding that request, whether it was accompanied by a legal

demand is unknown, there is no suggestion that Matthew was compensated in any fashion for the transfer of his legal title.

[214] The respondent asserts that through her labour, management of the property and “the significant financial contributions” she made (given her circumstances) the value has increased from $256,000 to a present value of approximately $1.150 million; a 450% appreciation.

[215] The respondent can point to nothing she did that enhanced the value of the property. Absent evidence to the contrary, the growth in the property is due to market forces. The structure was enhanced by the renovation paid for entirely by the petitioners, Conversely, the condition of the property, under the stewardship of the respondent, significantly deteriorated according to the evidence of the petitioners, by way of video, and the affidavit of the contractor.

[216] In submissions, the respondent references her “significant labour and managing tenants” but little detail is provided. Apparently, her brother was in occupation of one of the suites between 2007 to 2014. Little, if anything, can be ascribed to her management of that property for the period of his occupation with the exception of collecting rent. She would not have needed to clean, advertise or re-let the suite. As to tenants’ complaints, she provided little by way of specifics of the demands of that aspect of her duties.

[217] Two other tenants are identified. No detail was provided how those tenants demands warranted anything other than the 10% management fee ‘credited’ to her by Ms. Trimmer.

[218] There is no question but that over the course of at least two years, money was deducted from the paycheque she received from the dental clinic and applied towards the mortgage. It is also acknowledged by the petitioners that some of the rent received was passed on to them.

[219] While the former is no doubt a financial contribution giving rise to an enrichment of the petitioners, the latter is not. The respondent had no legal

entitlement to the rental revenue; it rightfully belonged to the petitioners who, on any view of the arrangement, were entitled to devote all of the revenue from the property to its expenses.

[220] There is a disagreement as to the amount of rent paid to the petitioners or directly to the mortgage. Ms. Trimmer estimates the total rent of the suites below at approximately $240,000 allowing for periods when they were unoccupied and estimating the rent for each.

[221] The respondent says 75% of the rent received was ultimately paid to the petitioners, be it Leslie Hunter or Morley Hunter. The petitioners, through Mr. Cohen's analysis, say the amount was significantly less; approximately $45,000.

[222] Ms. Trimmer estimates the rent paid as $123,000 but relies on the assumption of cash payments made by the respondent. A matter of which she has no personal knowledge.

[223] The rent, all of it, was the property of the petitioners; no portion of it was the respondent's. Whatever amount was transferred over was not the respondent's.

[224] Using Ms. Trimmer's figures, the respondent paid the petitioners $123,000 of 'their money' and retained the other $117,000 for her personal use.

[225] If I rely on the Cohen report, the amount retained by the respondent exceeded 75%.

[226] While admittedly impossible to precisely determine on conflicting affidavits the amount of the rent received by of the petitioners, I note the following as supporting the conclusion it was less than 75% of the total rent as asserted by the respondent.

[227] Were 75% of the rent being received, as described by the respondent, it is implausible that the petitioners would then deduct money from the respondent's pay cheque in the fashion described in the material or that the respondent would allow such to happen.

[228] All of that said, absent the rent money received and used by the respondent to which she had no entitlement, she has, through expenses paid for utilities for the suites and money deducted from her cheques, and management of the two suites, "enriched" the petitioners in the fashion described in *Kerr*, suffered a corresponding deprivation.

[229] The third element, lack of juristic reason, has two stages. In *Moore v. Sweet*, 2018 SCC 52, the Court noted:

> [57] The first stage requires the plaintiff to demonstrate that the defendant's retention of the benefit at the plaintiff's expense cannot be justified on the basis of any of the "established" categories of juristic reasons: a contract, a disposition of law, a donative intent, and other valid common law, equitable or statutory obligations (*Garland*, at para. 44; *Kerr*, at para. 41). If any of these categories applies, the analysis ends; the plaintiff's claim must fail because the defendant will be justified in retaining the disputed benefit. For example, a plaintiff will be denied recovery in circumstances where he or she conferred a benefit on a defendant by way of gift, since there is nothing unjust about a defendant retaining a gift of money that was made to him or her by (and that resulted in the corresponding deprivation of) the plaintiff. In this way, these established categories limit the subjectivity and discretion inherent in the unjust enrichment analysis and help to delineate the boundaries of this cause of action (*Garland*, at para. 43).
>
> [58] If the plaintiff successfully demonstrates that none of the established categories of juristic reasons applies, then he or she has established a *prima facie* case and the analysis proceeds to the second stage. At this stage, the defendant has an opportunity to rebut the plaintiff's *prima facie* case by showing that there is some residual reason to deny recovery (*Garland*, at para. 45). The *de facto* burden of proof falls on the defendant to show why the enrichment should be retained. In determining whether this may be the case, the court should have regard to two considerations: the parties' reasonable expectations and public policy (*Garland*, at para. 46; *Kerr*, at para. 43).
>
> [59] This two-stage approach to juristic reason was designed to strike a balance between the need for predictability and stability on the one hand, and the importance of applying the doctrine of unjust enrichment flexibly, and in a manner that reflects our evolving perception of justice, on the other.
>
> [Emphasis added.]

[230] By virtue of my findings described previously, I conclude the respondent has satisfied the first two stages of the test, but, the petitioners have similarly enriched the respondent to an extent greater than the enrichment received by them.

[231] I say that exclusive of the calculation made in the Cohen report as to occupational rent. I have no hesitation in concluding that the gift made by the petitioners to both their son and the respondent was the accommodation on the main floor of the property for them and Zaija.

[232] There was never an expectation that either would pay rent in respect of their occupation. That did not change when Matthew left the property.

[233] However, I find as a fact that the respondent received substantially more of the rent for her own use than she has disclosed, albeit perhaps somewhat less than set out in the Cohen report.

[234] In addition, it is uncontroverted that there were other contributions by the petitioners to the respondent, which balance out the unpaid work of the respondent over the 15 to 16 years she managed the tenants and contributed to utilities.

[235] Leslie Hunter deposed as to the assistance given in forms other than use of the upper floor of the property:

> Over the years, we helped the Respondent with daycare, glasses and contacts for our granddaughter, birthday parties, dinners, trips, large veterinary bills, furniture and household items and gardening. I did after school care for the Respondent. One of our daughters did after school care for at least a year and possibly two. We supported the Respondent in every possible way. A lot of this is the kind of help parents and relatives give their children if they are able. We had no idea that we would be expected to support our ex-daughter-in-law for over twenty years. We did not expect to continue with the extraordinary help, i.e., the costs associated with the Property, for more than a year or two after it was purchased and certainly not 23 years. The Respondent had lots of help caring for Zaija. While she worked for us, we paid her a very good living wage ($67,200 per annum). She should have been able to cover most of the expenses of the property but chose not to.

[236] In summary, even discounting the occupation of the upper suite for over twenty years, the respondent received far more than she gave. That was by design.

[237] Regardless of motives, the unbalanced contributions noted above are sufficient to defeat the respondent’s claim based on unjust enrichment. Even were

the respondent entitled to equitable relief, it would be in the form of a monetary award based on *quantum meruit*; not an interest in the property.

## Conclusion

[238] In the result the petition is allowed. I order that the respondent transfer her one-quarter interest in the property to the petitioners when presented with transfer forms prepared at the petitioners' expense. In the event the respondent fails to execute the transfer within 60 days of the date of these reasons, I direct that the District Registrar for the Land Title Office in which the property is registered be empowered to sign on behalf of the respondent and affect the registration of the property into the sole names of the petitioners.

[239] Given my conclusion, I need not consider the alternate claims of the petitioners under the *Partition Act*.

[240] The counter-petition is dismissed.

[241] The petitioners are entitled to the costs of the proceedings at Scale B.

"Harvey J."