IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Carley v. Birchard,*
2024 BCSC 1410

Date: 20240802
Docket: S193272
Registry: Victoria

Between:

Penelope Eileen Carley

Plaintiff

And

Terry Allen Birchard and Dawn Louise MacKinnon Birchard

Defendants

And

Penelope Eileen Carley

Defendant by way of counterclaim

Before: The Honourable Justice Mayer

Reasons for Judgment

Counsel for the Plaintiff and Defendant by way of counterclaim:	D. Williams L. Guidi
Counsel for the Defendants:	J. Hall
Place and Date of Trial/Hearing:	Victoria, B.C. May 7-10 and 13, 2024
Place and Date of Judgment:	Victoria, B.C. August 2, 2024

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[1] This case arises after the unfortunate failure of a previously-reconciled relationship between a mother and son. The parties' dispute concerns the ownership of a one-fifth undivided interest in a 25-acre parcel of recreational property located on the shore of Cowichan Lake on Vancouver Island (the "Property").

[2] Both parties allege that in 2009 they came to an agreement on the purchase and sale of an interest in the Property – but disagree with respect what portion of this interest was sold.

Background

[3] The plaintiff, Penelope Carley, is the mother of the defendant, Terry Birchard. Mr. Birchard is married to the defendant, Dawn MacKinnon Birchard (together, the "Birchards").

[4] In April 2002, Ms. Carley and her late husband, David Carley (together, the Carleys) purchased an undivided one-fifth interest in the Property from David Carley's cousin, Kathleen Holm. The Carleys held their one-fifth interest in the Property as joint tenants and were tenants in common with Ms. Holm, who retained the remaining four-fifths. At or around this time, the Carleys and Ms. Holm entered into a co-owners and licence agreement under which the Carleys were granted an exclusive license to use a five-acre portion of the Property, referred to in these reasons as Lot A. The co-owners and license agreement also included provisions concerning the sharing of common expenses and restrictions on transfers of ownership, including a right of first refusal in favour of existing owners.

[5] Lot A has approximately 252 feet of waterfront at its southern boundary and at this time is one of ten notional lots, between 2.5 and 5 acres in area, which comprise the Property.

[6] Ms. Carley testified that the Carleys purchased their one-fifth interest in the Property from Ms. Holm for $155,000, which she says David Carley paid with a down payment of $60,000 made in the fall of 2001 and a further payment of $95,000 made in 2002. The statement of adjustments signed by both David and Penelope

Carley, which appears to be incorrectly dated April 24, 1999, shows a purchase price of $95,000. The unsigned purchase agreement dated April 26, 2002, also states that the purchase price was $95,000. The amount paid by the Carleys for their interest in the Property is disputed.

[7] Starting in 2002, the Carleys with the help of friends, began clearing a portion of Lot A near the waterfront. Over time, they installed a driveway extending roughly down the middle of the lot, three-quarters of the way to the shoreline, as well as a dock, outhouse, and other improvements. The Carleys placed a trailer on the east side of the driveway for their use and later additional trailers for use by visitors.

[8] Over the next few years other undivided interests in the Property were sold by Ms. Holm. After the Carleys, the next purchasers were the Friesens and Gibsons who jointly purchased a one-fifth interest in the Property, in October 2002, for $150,000 and then the Dongs who purchased a one-tenth interest, in February 2003, for $75,000. Others followed. Each of the new co-owner signed a co-owners and licence agreement.

[9] Starting in approximately 2002, the co-owners started to investigate a future subdivision and rezoning of the Property. They initially planned to divide the Property into five five-acre lots, but over time, and with the addition of more co-owners, this plan shifted to an interest in creating ten, 2.5 acre lots. Other lakefront properties to the east and west of the Property had been similarly subdivided decades earlier. Efforts towards obtaining necessary subdivision and rezoning approval are now well advanced and it is possible that these approvals will be obtained in the near future.

[10] Mr. Birchard was not raised by Ms. Carley during most of his childhood and only lived with her for a short time when he was undergoing training with the Royal Canadian Navy. He is one of four sons. Prior to 2004, when Mr. Birchard reconciled with Ms. Carley they had a difficult relationship. Starting in around 2005, Mr. Birchard and later Ms. MacKinnon Birchard, began to visit the Carleys at their home in Saanich and at Lot A.

[11] The Birchards initially visited the Carleys at Lot A approximately one weekend per month and stayed in a camper that David Carley had placed on the east side of the driveway. In 2006, the Birchards bought their own trailer and located it on the west side of the driveway.

[12] On April 26, 2007, David Carley passed away and Ms. Carley received the entire one-fifth undivided interest in the Property as the surviving joint tenant. Some time afterwards Ms. Carley told Mr. Birchard that her plan was to leave him her interest in the Property in her will and to leave other portions of her estate to her other sons.

[13] In late spring or summer of 2009, the Birchards offered to purchase – and Ms. Carley agreed to sell – some or all of Ms. Carley's one-fifth interest in the Property. The sequencing of the exchange of offers, date of the parties' agreement and the amount of Ms. Carley's interest sold will be addressed later in these Reasons.

[14] After the parties' agreement was made, between the summer of 2009 and the fall of 2010, the Birchards, with the involvement of Ms. Carley, sought the approval of the other co-owners of the Property for a transfer of Ms. Carley's interest to them. This approval was formally obtained in October 2009.

[15] On January 29, 2010, Ms. Carley and the Birchards met with Mr. Birchard's lawyer, Michael Lawless, in Victoria to sign property transfer documents. At this meeting, Ms. Carley signed an acknowledgement that Mr. Lawless was acting solely for Mr. Birchard and signed a Freehold Transfer (the "Form A"). The Form A shows a market value of $155,200 for an undivided two-tenths interest in the Property and consideration of $1.00. Additionally, it shows that Ms. Carley, as transferor, transferred her undivided two-tenths interest to herself and the Birchards as joint tenants.

[16] Starting in 2010 the Birchards made various improvements on Lot A including putting a roof and deck on and around their trailer, purchasing a trailer for

Mr. Birchard's son, and installing a new dock. All of these improvements were placed on the west side of Lot A.

[17] During the summer of 2016, Ms. Carley and Birchards had a falling out after a disagreement concerning Mr. Birchard's plans to host a party on Lot A to mark his retirement from the Royal Canadian Navy. This disagreement led to an estrangement which persists to date.

[18] On October 12, 2021, Ms. Carley unilaterally severed the joint tenancy in respect of Lot A, such that the registered title now shows her holding one-third and the Birchards jointly holding the remaining two thirds of an undivided two-tenths interest in the Property as tenants in common.

The Claim and Counterclaim

[19] In this action, commenced in July 2019, Ms. Carley claims that she beneficially owns one-half of an undivided two-tenths interest in the Property, pursuant to an oral agreement between the parties made in 2009. In other words, Ms. Carley claims that she owns half of the parties' undivided two-tenths interest in the Property.

[20] Ms. Carley alleges that the parties agreed that the Birchards would purchase one-half of her interest in the Property for $150,000, and that they would hold their collective two-tenthsinterest in the Property with her as tenants in common. She alleges that the Form A, which did not reflect this arrangement, was signed by her without the benefit of independent legal advice. She alleges that she only became aware in 2017 that, contrary to the alleged 2009 agreement, a two-tenths undivided interest in the Property had been registered in her and the Birchards' names as joint tenants in 2010.

[21] Ms. Carley seeks, amongst related relief, a declaration of a resulting trust in her favour in respect of the difference between a one-third and one-half interest in a one-fifth undivided interest in the Property and an order that this interest be transferred into her name.

[22] In August 2019, the Birchards filed a response and counterclaim. They allege that in 2009 they agreed to purchase all of Ms. Carley's interest in the Property for $150,000 and that the parties intended, as a result of the requirement of the co-owners' agreement, that Ms. Carley would hold her registered interest in trust for them. The Birchards also allege that Ms. Carley agreed that she would not convey her registered interest to anyone else and that, on her death, this interest would transfer to them as survivors through the joint tenancy.

[23] The Birchards seek a declaration that Ms. Carley holds her legal interest in the Property in trust for them and seek a permanent injunction preventing her from selling her interest in the Property to a third party.

Summary of the Parties' Positions at Trial

[24] Both parties contend that the registered title, both that which existed when the Form A was filed in 2010 and that which currently exists after Ms. Carley purported to sever the joint tenancy in 2021, does not reflect their actual beneficial interest in Lot A, and is rebutted by the agreement made in 2009. As well, they agree that they agreed to a sale price of $150,000 – although as already stated, they disagree what portion of Ms. Carley's interest was sold.

[25] Ms. Carley alleges that in 2009 the Birchards offered to purchase, and she agreed to sell, one-half of her undivided two-tenths interests in the Property for $150,000, with the parties' holding their respective interests as tenants in common. She argues in the alternative, if the Court does not find that the statutory presumption (that registered title reflects the legal and beneficial ownership) has been rebutted, that the Birchards will be unjustly enriched if they are found to own two-thirds of an undivided two-tenths interest in the Property.

[26] The Birchards allege that in 2009 they offered to purchase, and Ms. Carley agreed to sell, her entire interest in the Property for $150,000. They say that title was registered in the parties' names in joint tenancy, in order to comply with the requirements of the co-owners' agreement in place for the Property – that is, to avoid triggering the right of other co-owners to purchase Ms. Carley's interest. They

say that the parties agreed that Ms. Carley would have the ability to use Lot A for the rest of her life. Finally, the Birchards allege that Ms. Carley agreed that she would not try to sell her registered interest in the Property, and that her interest would pass to them upon her death under the joint tenancy.

Issues

[27] Section 23(2) of the *Land Title Act,* R.S.B.C. 1996, c. 250, creates a statutory presumption that registered title is conclusive evidence of the legal and beneficial ownership of a property.

[28] There is no dispute that this statutory presumption can be rebutted in the following circumstances:

a) through the operation of a resulting trust which may be inferred where no value is given for a legal interest;

b) through the operation of an agreement between the parties that is contrary to the registered legal title; or

c) considering the underlying equitable interests between the parties (e.g., considerations that arise in claims for unjust enrichment).

Suen v. Suen, 2013 BCCA 313 at para. 34.

[29] Section 59(3) of the *Law and Equity Act,* R.S.B.C. 1996, c. 253 provides that a contract respecting the disposition of land is not enforceable unless, in summary:

a) it is writing;

b) the party to be charged has done an act or acquiesced in an act that indicates that a contract not inconsistent with that alleged has been made; and

c) the person alleging the contract has, in reasonable reliance on it, changed their position so that there would be an inequitable result if the contract is not enforced.

[30] The following issues are to be addressed:

a) Has the statutory presumption set out in s. 23(2) of the *Land Title Act* been rebutted in this case by the existence of an agreement that is contrary?

b) If so, what were the terms of the agreement?

c) Depending on the terms of the agreement found, what remedies arise?

d) If the statutory presumption has not been rebutted, have the Birchards been unjustly enriched?

[31] For the reasons which follow, I find that the statutory presumption that the registered title (both the title which existed in 2010 and after unilateral severance by Ms. Carley in 2021) reflects the parties' beneficial and legal interest in the Property, has been rebutted. In particular, I find that, pursuant to an agreement made in 2009, the Birchards agreed to purchase and Ms. Carley agreed to sell a beneficial interest in here entire undivided two-tenths interest in the Property, that is Lot A, for $150,000.

Overview of the Evidence

[32] It is not disputed that after David Carley died in 2007, Ms. Carley told the Birchards that she intended to leave them all of her interest in the Property in her will. Ms. Carley testified that, at the time of the discussions in 2009, she had been fighting cancer for some time and did not think she had long to live. After David Carley died Ms. Carley gave Mr. Birchard David Carley's binder containing all of his documents regarding the Property.

Evidence of Ms. Carley

[33] Ms. Carley testified that one morning in the summer of 2008 or 2009, she took her coffee over to the Birchards' trailer, as she routinely did, and that Mr. Birchard told her that he and Ms. MacKinnon-Birchard wished to purchase "our part" or "our area" of the Property, gesturing to the area towards the front of their trailer on the west side of Lot A. She said that the Birchards explained that they wanted to purchase all of Ms. Carley's interest in the Property rather than wait to inherit it, because they were concerned she might change her mind and because Ms. Carley's other sons might challenge such a bequest.

[34] Ms. Carley testified that the Birchards made the first offer, to purchase her interest for $250,000, but she declined this offer because, in her view, it was too much. She explained that she felt this because David Carley had purchased their one-fifth undivided interest in the Property in 2002 for $150,000 and that by 2009 the value had increased to $300,000. She testified that for this reason she counter-offered to sell the Birchards' one-half of her interest for $150,000 – which they accepted.

[35] Ms. Carley testified that when she met with Mr. Birchard's lawyer in Victoria to sign the Form A, her expectation was that she was only selling the Birchards' one-half of her interest in the Property. Ms. Carley testified that she did not read the Form A, which showed that her interest was being transferred to the parties as joint tenants, but just signed the document when it was put before her. She also testified that the Birchards signed the Form A – which is not correct.

[36] During her direct examination, Ms. Carley was taken to an unsigned copy of her 2013 will. She confirmed that she recalled signing a copy of her will at this time and that the will was prepared by a lawyer. She testified that her will provided that only one-half of interest in the Property was bequeathed to Mr. Birchard. In fact, the 2013 will states that Ms. Carley bequeathed "any interest" she had in the Property to Mr. Birchard.

[37] During her cross-examination, Ms. Carley denied that she offered to sell the Birchards her interest in the Property for $95,000 and that afterwards the Birchards first proposed the $150,000 purchase price. She was insistent that the Birchards only proposed to purchase, and she agreed to sell, one-half of her interest.

[38] Ms. Carley was also taken to minutes of a meeting of the co-owners of the Property which took place on September 5, 2009. The minutes indicate that Ms. Carley was present at this meeting and state as follows under the heading "Discussion Item – Adding Terry Birchard and Dawn McKinnon [*sic*] Birchard to Penny's Lot 'A'":

> Penny owns 20% of the property and has license to Lot 'A'. Penny would like to add Terry and Dawn onto her lot, for estate planning purposes … Terry and Dawn's lawyer Michael Lawless has sent a letter with Consent to each co-owner for signature …

[39] Ms. Carley confirmed that the letter sent by Mr. Lawless, dated September 4, 2009, was the letter referred to in the September 5, 2009 minutes. She insisted that the letter concerned the transfer of one-half of her interest in the Property to the Birchards. Contrary to Ms. Birchard's testimony, Mr. Lawless' letter states as follows in the second paragraph:

> We understand that Mr. Birchard has spoken or corresponded with you with respect to the proposed transfer of the ownership interest in Site A of the Property from Ms. Carley <u>into the joint names of Ms. Carley, Mr. Birchard and Ms. Mackinnon-Birchard</u> and further that you are amenable to this transfer.
>
> [Emphasis added.]

[40] Ms. Carley was also taken to minutes of a co-owners' meeting which took place in Mill Bay on October 18, 2009. Ms. Carley again insisted that the discussion at the meeting concerning a transfer of her interest in the Property to the Birchards, concerned the transfer of only one-half of her interest. The minutes from that meeting, however, indicate that the following motion was passed by the co-owners unanimously:

> **Kathy Holm, Tricia – Motion:** To allow Penny to add her son Terry Birchard and daughter-in-law Daw McKinnon-Birchard to the title of the property and

> Co-Owner Agreement and Licence Agreement. Terry and Dawn will share in the 20% ownership that Penny owns of the property …
>
> [Emphasis added.]

[41] Finally, Ms. Carley was taken to a document entitled ADDENDUM TO CO-OWNERS and LICENCE AGREEMENT, dated December 12, 2012 which provides, in summary at s. 3(a), that the co-owners consented to the assignment of Ms. Carley's undivided interest in the Property, to be shared with the Birchards. Ms. Carley agreed that this document did not stipulate that only one-half of her interest was being assigned to the Birchards.

Evidence of Mr. Birchard

[42] Mr. Birchard testified that Ms. Carley first approached him in the summer of 2009 advising that she wanted to leave her interest in the Property to him and Ms. MacKinnon Birchard in her will. He testified that, during a second discussion a week or two later, Ms. Carley made the first offer, offering to sell her interest in the Property for $95,000 because that is what she and David Carley had paid for it. He testified that he felt this was too low and counter-offered $150,000 for the entire property, which he thought was a fair price. He testified that he did not conduct research into the value of the Property or the value of neighbouring properties before making this offer.

[43] Mr. Birchard testified that he did not want to simply wait to inherit Ms. Carley's interest in the Property because, in summary, he was interested in owning an interest in the Property, did not want any uncertainty and was worried about another family member contesting Ms. Carley's will.

[44] Mr. Birchard testified that there was no discussion between the parties regarding the purchase of Ms. Carley's interest in the Property for $250,000. He testified that he had to remortgage his home in Langford to fund the $150,000 purchase of Ms. Carley's interest in the Property and that he did not have enough equity in his home to obtain financing to pay $250,000. That is, in sum, he would not have made such an offer as he could not afford it.

[45] Mr. Birchard was taken to a type written letter requesting the consent of other co-owners of the Property for the transfer of Ms. Carley's interest to Ms. Carley and the Birchards as joint tenants. He testified that the type written letter was prepared by him, with help from a colleague, after the Birchards agreed to purchase Ms. Carley's interest for $150,000 and was distributed to the co-owners by hand or email.

[46] Mr. Birchard testified that although the Birchards bought all of Ms. Carley's interest in the Property, that Ms. Carley was left on title as a joint tenant because this was required by the co-owners' agreement in place at the time. He testified that one of the terms of the agreement with Ms. Carley was that she would retain the use of all of Lot A until her death.

[47] Mr. Birchard testified that after the Birchards acquired their interest in the Property in 2010 and prior to his estrangement with Ms. Carley in 2016, they never discussed the proportion of their respective interest in the Property. He said that the first time he became aware that Ms. Carley was taking the position that she owned one-half of an undivided two-tenths interest in the Property was when he received correspondence from Ms. Carley's counsel and this lawsuit was commenced.

[48] During his cross-examination, Mr. Birchard re-iterated that the parties agreed that the Birchards would purchase all of Ms. Carley's interest in the property for $150,000. He testified that he did not believe that they had purchased a lesser interest with the balance to be transferred after her death. Mr. Birchard denied making any gesture suggesting that he had proposed that he and Ms. MacKinnon wished to purchase only the property on their side of the driveway. He denied that there was ever any discussion about who owned which side of Lot A.

[49] With respect to how he came up with the $150,000 figure, Mr. Birchard confirmed during his cross-examination that he had not done any research including, for example, looking at sales of similar properties. Mr. Birchard insisted that he learned that the Carleys had paid $95,000 for their interest in the Property in 2002, on the day that offers were exchanged with Ms. Carley in 2009.

[50] Also during his cross-examination, Mr. Birchard testified that, in general, Ms. Carley occupied one side of Lot A and he and Ms. MacKinnon Birchard occupied the other, but stated that they were not restricted to such use. For example, he says that he mowed the lawn on Lot A, including on Ms. Carley's side, until Ms. Carley asked him to stop doing so in 2023 and that the Birchards used the outhouse located on Ms. Carley's side of the driveway.

[51] Mr. Birchard testified that he never felt as though he needed to ask Ms. Carley permission to make various improvements on his side of Lot A, such as installing a roof over and deck around the Birchard's trailer and never told Ms. Carley what she could or could not do on any part of Lot A.

Evidence of Dawn MacKinnon Birchard

[52] Ms. MacKinnon Birchard recollection of the discussion concerning the sale of Ms. Carley's interest in the property to the Birchards was generally consistent with that of Mr. Birchard.

[53] She testified that, during a discussion in the spring or summer of 2008, after Ms. Carley told the Birchards that she was planning on leaving her interest in the Property to them that, Mr. Birchard first raised the possibility of Ms. Carley selling her interest to them. She says that in response, Ms. Carley said that she would have to think about it.

[54] Ms. MacKinnon Birchard testified that some weeks after their initial discussion, Ms. Carley approached the Birchards and proposed to sell them her interest for $95,000. She also said that Mr. Birchard responded that the $95,000 figure was too low and counteroffered for $150,000 – which Ms. Carley accepted. She did not know how Mr. Birchard came up with the proposed $150,000 purchase price.

[55] Ms. MacKinnon Birchard further testified that Ms. Carley said she was happy to sell her interest in the Property to family, and was pleased that she could enjoy the Property the rest of her life. Ms. MacKinnon Birchard testified that there was no

discussion amongst the parties regarding a purchase of only one-half of Ms. Carley's interest in the Property.

[56] During her cross-examination, Ms. MacKinnon Birchard testified that she did not know that Ms. Carley's interest in the Property was assessed at $155,000 at the time that the Birchards agreed to acquire their interest. As well she testified that the Birchards and Ms. Carley shared Lot A and denied that the use of their respective areas was restricted. She testified that the parties would mow the grass on each others' side and that, until the Birchards built a dock in 2018, that the Birchards used the dock on Ms. Carley's side of the driveway. The Birchards would also join Ms. Carley on her patio for coffee or drinks.

[57] Ms. MacKinnon Birchard was referred to a number of emails exchanged after the Birchards and Ms. Carley had a falling out in her cross-examination.

[58] The first was an email sent by Ms. MacKinnon Birchard to Ms. Carley dated June 11, 2017, in which the Birchards proposed to pay all of the property taxes for Lot A or at least two-thirds. Ms. MacKinnon Birchard's email states "[t]o be fair we should pay for all the taxes since we paid you $150,000 for the property."

[59] Ms. MacKinnon Birchard was also referred to a second email she sent to Ms. Carley on June 20, 2017, which set out a calculation for the sharing of property taxes divided on a one-third/two-thirds. The correspondence also set out the Birchards' position at that time on their interest in the Property as follows:

> …[a]t the time [2010] we could only add our names and could not take your name off due to the co-owners agreement. And upon your passing Terry would be willed the other 1/3rd. We remortgaged our house to buy the property so that you could have the money for your retirement. As the amount we paid you for the property … You had asked for $95,000 (what Dave had paid) but we did not want to take advantage, so we paid you $150,000 for the property. We paid what the assessed value was at the time.

[60] Ms. MacKinnon Birchard denied that when she sent these emails in June 2017 that she thought that she and Mr. Birchard only owned a 2/3 interest in Lot A. She testified that, when she sent this correspondence, she was trying to "put

everything on the table" and be "transparent". Ms. MacKinnon Birchard testified that, at the time, she thought Ms. Carley was going to "come after" her and Mr. Birchard. I interpret this as a concern that Ms. Carley was going to assert a beneficial ownership interest in the Property.

[61] Ms. MacKinnon Birchard was also referred to an email dated September 20, 2017, which appears to attach an email sent by Mr. Birchard to Marty Hansen, the husband of Ms. Carley's niece, concerning a dispute regarding a $4,000 contribution towards the cost of a dock repair on Lot A. In this email Mr. Birchard states that "… In 2009 Dawn and I bought 2/3 of the property for a very substantial sum of money, and had it registered through the land title with our lawyers with the understanding we will be getting the other 1/3rd later." Ms. MacKinnon Birchard testified that this correspondence was not clear but was meant to indicate that the Birchards expected to inherit Ms. Carley's one-third registered interest in the Property when she died.

[62] Ms. MacKinnon Birchard was also referred to a 2015 email exchange with co-owners Wayne Friesen and Craig Gibson in which she sought their advice concerning Ms. Carley's recently adopted position that Lot A should remain as a five-acre parcel, and not be subdivided into two 2.5-acre parcels.

Evidence of Wayne Friesen and Janet Dong

[63] Ms. Carley called evidence from Wayne Friesen, who had purchased an interest in the Property with his wife and the Gibsons in 2002, and from Janet Dong, who purchased an interest along with her husband in 2003. I do not intend to review much of the evidence of Mr. Friesen or Ms. Dong as, in my view it mainly involves events after the alleged 2009 agreement was made between Ms. Carley and Birchards, and in many cases does not assist in determining the parties pre-contract intention.

[64] Mr. Friesen testified that efforts to rezone and subdivide the Property started in 2002 and that he took the lead role in progressing these efforts on behalf of the co-owners. He testified that at this time the co-owners have contributed towards relevant costs, including $5,000 from Ms. Carley and $12,700 from the Birchards.

He testified that Ms. Carley continued to exercise voting rights as a co-owner of the Property and continued to contribute to common expenses following the Birchards' acquisition of their interest in 2010. He was not asked, however, exactly how much was contributed after that year.

[65] Mr. Friesen vaguely remembered speaking with Mr. Birchard about the Birchards being added to title for the Property, in around 2009, but did not specifically recall receiving the typewritten letter prepared by Mr. Birchard.

[66] Ms. Dong testified that she first heard about the Birchards being added to title when she received the letter of Mr. Lawless in 2009, although she had a vague recollection of plans to do so prior to this. Like Mr. Friesen, she did not recall receiving Mr. Birchard's typewritten letter.

Analysis and Findings of Fact

[67] Again, it is not disputed that in 2009 the parties agreed that the Birchards would purchase an interest in Ms. Carley's two-tenths undivided interest in the Property for $150,000. What is disputed is whether they agreed to purchase her entire interest for $150,000, as the Birchards allege, or one-half of her interest for this amount as Ms. Carley alleges.

[68] It is also not disputed that at the time of the parties' agreement, it was Ms. Carley's intention to leave her interest in the Property to Mr. Birchard. I find that this was the case from 2008 through until at least 2013 when Ms. Carley signed a new will.

When was an agreement made?

[69] I will first address the question and make a finding regarding when the parties' entered into an agreement for Birchards' purchase of an interest of Ms. Carley's interest in the Property. Ms. Carley's testimony at trial with respect to the date of the parties' discussion was vague, saying that this occurred in the summer of 2008 or 2009. Mr. Birchard was similarly vague in his evidence on this point. Ms. MacKinnon Birchard, however, was confident that the discussion took place in the summer of

2008. She testified that she was sure that this is the case because this was the year that she married Mr. Birchard and was put on title to his home in Langford.

[70] In her pleadings and during submissions, counsel for Ms. Carley took the position that the discussion or discussions resulting in an agreement took place in the summer of 2009. In submissions, counsel for the Birchards conceded that Ms. MacKinnon Birchard was likely in error when she testified that the meeting took place in 2008. Although Ms. MacKinnon Birchard may have been mistaken with respect to when the initial discussion between the parties took place, and therefore the reliability of her evidence on this point is suspect, I do not find that she was being intentionally untruthful.

[71] Given the parties concessions during trial, I accept that the discussions between the parties regarding a purchase of Ms. Carley's interest in the Property, leading to an agreement, took place in the summer of 2009.

Who made the initial offer and counteroffer(s) and for what amount?

[72] The evidence before the Court is that, in 2009, the assessed value of the Property was $819,000. Accordingly, it can be estimated that the value of Ms. Carley's undivided two-tenths interest was approximately $163,000 at that time.

[73] Ms. Carley testified that Mr. Birchard first offered to purchase one-half of her interest in the property for $250,000. She says that she rejected this offer, which she thought was too high, and countered with an offer of $150,000.

[74] At trial, Mr. Birchard testified that Ms. Carley made the first offer – to sell her interest in the Property for $95,000 and he counter-offered for $150,000 which offer was accepted by Ms. Carley. He testified he had not conducted research into value prior to making the $150,000 counter-offer.

[75] In cross-examination, Mr. Birchard testified that he sought to make an offer that was fair in light of the "surrounding" or "current" climate. He testified that by "fair" he meant in light of the real estate market or tax assessments related to the Property

at the time. Ms. MacKinnon Birchard testified that Mr. Birchard picked the $150,000 offer amount out of “thin air” and that she had no advance knowledge of his intention to offer this amount. In his evidence, Mr. Birchard confirmed that he had not discussed his $150,000 with Ms. MacKinnon Birchard before he made it.

[76] I conclude that the Birchards were not aware of the assessed value of the Property, and therefore the value of Ms. Carley’s interest in the Property, when offers were exchanged in 2009. Indeed, during cross-examination, Ms. MacKinnon Birchard confirmed that she did not know the assessed value of the Property at this time.

[77] Conversely, I find that Ms. Carley, who must have paid property taxes on her interest in the Property after David Carley’s death, probably knew that the assessed value of the Property in 2009 was $819,000. As I will discuss later in these Reasons, this has some relevance to the parties’ intentions concerning what portion of Ms. Carley’s interest in the Property the Birchards agreed to purchase.

[78] I find it unlikely that the Birchards made a first offer to purchase one-half of Ms. Carley’s interest in the Property for $250,000, without having some understanding of the value of her interest. Mr. Birchard denied any such discussion. I find it more likely that Mr. Birchard offered $150,000 in response to Ms. Carley’s proposal – which I will address below – that the Birchards purchase her interest for $95,000. I do not find it necessary to address the evidence or the submissions of Ms. Carley concerning whether Mr. Birchard could have afforded to pay $250,000.

[79] Ms. Carley relies on her testimony that the Carleys had purchased their interest in the Property for $150,000 in 2002 to support her submission that that amount would be equivalent to the value, in 2009, of half of her interest. The documentary evidence does not show that the Carleys paid $150,000 for their interest in 2002. In particular, the 2002 purchase agreement between the Carleys and Ms. Holm shows that a down payment of $5,000 was made with the $90,000 balance to be paid on the closing date. As well, the statement of adjustments shows that the price paid by the Carleys in 2002 was $95,000.

[80] There was no documentary or other independent evidence showing that David Carley paid Ms. Holm a $60,000 down payment in 2001. During her direct examination Ms. Carley says that this amount was paid to assist Ms. Holm with sub-division costs and payment of back taxes. During her cross-examination Ms. Carley testified that she was not sure how David Carley paid $60,000 to Ms. Holm.

[81] It is unclear why Ms. Holm, who might have been able to resolve uncertainties with respect to the price paid by the Carleys in 2002, was not called to testify at trial.

[82] More broadly, the evidence before me does not support a finding that in 2009, Ms. Carley believed that her two-tenths undivided interest in the property was worth approximately $300,000. She offered no basis for this estimate of value. I note Mr. Friesen's testimony that efforts of the co-owners of the Property to obtain approval to subdivide failed in 2005 and on two occasions afterwards. This does not suggest that there would have been a significant increase in the value of Ms. Carley's interest in the Property prior to 2009.

[83] In my view, Ms. Carley's testimony that she considered her two-tenths interest in the Property to be worth $300,000 in 2009 was self-serving, in that it supported her position at trial that she agreed to sell the Birchards' one-half of her one-fifth interest for $150,000.

[84] I have considered the submissions of Ms. Carley that her evidence that the Carleys purchased their property for $150,000 in 2002 is objectively reasonable, given that in October 2002 the Friesens and Gibsons paid a total of $150,000 for two one-tenth interests of the property and the Dongs paid $75,000 for a 1/10 interest the following year. I do not find this submission to be helpful.

[85] David Carley was Ms. Holm's cousin and there is no evidence that the Friesens, Gibsons or Dongs were related to her. Ms. Holm may well have decided to sell a two-tenths of her interest in the Property to her cousin for less. In addition, the Friesens, Gibsons and Dongs purchased a one-tenth interest and the Carleys

purchased two-tenths. It does not logically flow that a piece of property twice as large as another is worth twice as much.

[86] In any case, Ms. Carley has not provided any evidence that at the time she exchanged offers with the Birchards in 2009 that she was aware what the Friesens, Gibsons and Dongs paid for their interest in the property in 2002 and 2003. As a result, I do not find the purchase price paid by others for their interest in the Property to be relevant to her intention in 2009.

[87] Ultimately, I do not find Ms. Carley's testimony that the Carleys paid $150,000 for an undivided two-tenths interest in the Property in 2002 to be credible. Rather, as the documentary evidence indicates, I find that they paid $95,000. I conclude that Ms. Carley sought to buttress her testimony that the parties agreed in 2009 that the Birchards were purchasing 50% of her interest in the Property for $150,000 by inflating the price the Carleys paid for their entire interest in 2002. This has a significant impact on my assessment of Ms. Carley's credibility in general.

[88] In addition, I prefer the testimony of the Birchards in respect of the sequencing of offers for Ms. Carley's interest in the property. Mr. Birchard and Ms. McKinnon Birchard's testimony that Ms. Carley initially offered to sell her interest in the Property for $95,000, and that she told him this is what she and David Carley paid for this interest, is consistent with my findings above and I accept this evidence. There is no dispute that Ms. Carley told Mr. Birchard that she intended to leave him all of her interest in the Property in her will. Given these findings, I also accept the Birchards' evidence that Mr. Birchard made a counteroffer of $150,000, in response to Ms. Carley's offer to sell them her interest for $95,000.

[89] It appears to be common ground that the $150,000 offer, which was accepted, was not based on market comparisons or other analysis completed by either party, and I find this to be the case. Given that this was a transaction between close family members, which the evidence establishes was part of an estate planning exercise, it is not surprising that they did not conduct such research.

[90] In summary, I find the following facts:

a) At a meeting in the summer of 2009, Ms. Carley told the Birchards that she intended to leave them her interest in the Property in her will.

b) At a subsequent meeting a week or so later, Mr. Birchard proposed purchasing an interest in the Property (I will discuss the amount of this interest below) and Ms. Carley offered to sell for $95,000. Mr. Birchard then counteroffered to purchase an interest for $150,000 and Ms. Carley accepted this offer.

[91] I turn next to the key question in this case, being whether the parties agreed that the Birchards were purchasing all of Ms. Carley's interest in the Property for $150,000 or only a portion of it for $150,000.

What portion of Ms. Carley's interest in the Property did the parties agree was being sold?

[92] As was set out above, Ms. Carley testified that at the time she signed the Form A in January 2010, she believed that she was selling only one-half of her interest in the Property and that the parties had agreed this was the case.

[93] Mr. Birchard testified the parties agreed that the Birchards were to acquire all of Ms. Carley's interest in the Property. He testified that although a joint interest in a two-tenths interest in the Property was registered, this was done because he thought that it was necessary that Ms. Carley remain on title due to the requirements of the co-owners' agreement.

[94] For the reasons set out below, considering the circumstances at the time of contracting and subsequent conduct of the parties, I am satisfied that the Birchards have established the existence of an oral agreement wherein the parties agreed that the Birchards were purchasing all of Ms. Carley's interest for $150,000, with the mutual understanding that Ms. Carley would have the right to utilize Lot A during her lifetime.

Pre-Contract Circumstances

[95] I will first address Ms. Carley's testimony.

[96] As set out earlier there is no dispute that from approximately 2007 to at least 2013, when Ms. Carley signed a new will, she intended to leave all of her interest in the Property to Mr. Birchard, or to both of the Birchards, and had told them that this was her plan. In addition, in or about 2006 after David Carley died, Ms. Carley gave Mr. Birchard David Carley's binder which contained all of his documents regarding Lot A. This pre-contract conduct suggests that the parties, when they decided that the Birchards were going to purchase an interest in the Property, intended that the Birchards were to purchase Ms. Carley's entire interest.

[97] There was no testimony from Ms. Carley at trial with respect to why she decided, as she alleges, to only sell one-half of her interest in the Property to the Birchards in 2009. That is, there is no explanation why, if her evidence is accepted, she suddenly pivoted from planning to leave all of her interest in the Property to the Birchards, to deciding to sell them only one-half of her interest.

[98] As well, in my view if a partial interest in Lot A was being sold, it is logical that the parties would have discussed more detail. For example, in 2009, the parties jointly used a common driveway and the only dock and outhouse on the property were located on the side of Lot A where Ms. Carley's trailer was located. If they had had agreed that the Birchards were only purchasing one-half of Ms. Carley's interest in the property it would seem logical that they would have discussed how this infrastructure would be divided or used.

[99] As well, as I set out above, Ms. Carley likely knew that the assessed value of the Property was $819,000 in 2009. I note that the assessed value of the Property in 2010, when the Form A was signed, was $776,000. One fifth of this amount is $155,200, which is the precise amount recorded on the Form A as the market value for an two-tenths undivided interest in the Property. As a result, I infer that she was aware that the value of her undivided two-tenths interest was approximately $163,000 in 2009 and $155,200 in 2010.

[100] I pause to address expert evidence tendered at trial by Ms. Carley from a property appraiser, David Steele. Mr. Steele's opinion, given on January 29, 2024, was that the fair market value of Ms. Carley's undivided two-tenths interest in the Property in 2010 was $375,000. In addition to challenging Mr. Steele's retrospective valuation of $375,000, which they say is inflated, the Birchards take the position that Mr. Steele's opinion is not relevant in the determination of the parties' subjective belief with respect to value some 14 years earlier. I agree on this point, and do not find that Mr. Steele's opinion assists in my determining whether the parties indicated to the outside world their intention to contract and the terms of such a contract.

Post Contract Conduct

[101] In this case it is also helpful to review the parties post contract conduct in determining their intentions in 2008 and, as the law requires, whether the parties indicated to the outside world their intention to contract and the terms of such contract. In this exercise, I give greater weight to the parties conduct closer to the time of their agreement in 2009. I give significantly less weight to the parties conduct after they had a falling out in 2016.

[102] I note first that some of Ms. Carley's testimony at trial regarding the signing of the Form A on January 29, 2010 was plainly incorrect. Ms. Carley testified that she did not read the Form A carefully and that after she signed it, it was signed first by Mr. Birchard and then by Ms. MacKinnon Birchard. The Form A was, and could only have been signed by Ms. Carley as transferor. It did not include signature lines for the Birchards.

[103] As Mr. Birchard testified, a typewritten letter was circulated to co-owners of the property (which I find occurred in the summer of 2009) seeking approval to transfer Ms. Carley's interest to her and Birchards as joint tenants. The letter indicated this was being done for estate planning purposes.

[104] At trial, Ms. Carley agreed that she was involved in seeking consent of co-owners of the Property to allow a transfer of her interest to the Birchards. Although she initially denied that she had seen Mr. Birchard's type written letter, she

eventually conceded that she must have been aware of it and knew that the Birchards had taken it around or sent it to other co-owners.

[105] In the letter sent by the Birchards' lawyer, Mr. Lawless, to the co-owners dated September 4, 2009, consent was requested for a transfer of Ms. Carley's interest in the Property. This letter described the proposed transaction as the "transfer of the ownership interest in Site A of the Property from Ms. Carley "into the joint names of Ms. Carley, Mr. Birchard and Ms. Mackinnon-Birchard". While Ms. Carley insisted that this letter concerned the transfer of only half of her interest in the property, the letter is quite clear that a transfer of all of Ms. Carley's undivided interest into a joint tenancy with the Birchards was contemplated.

[106] The minutes of a meeting of the co-owners on September 5, 2009, at which Ms. Carley was present, during which Mr. Lawless' letter was reviewed, recorded that Ms. Carley would like to add the Birchards "onto her lot, for estate planning purposes". If Ms. Carley believed that she had only agreed to convey one-half of her interest to the Birchards by this time, it would seem logical that she would have raised this at the meeting. I infer that Ms. Carley must have told the other co-owners that the transfer was being done for estate planning purposes, as is reflected in the minutes, given that estate planning was not referred to in Mr. Lawless' letter.

[107] The minutes of a meeting of the co-owners on October 18, 2009, at which Ms. Carley was present, indicate that a motion was passed approving the Birchards sharing in Ms. Carley's interest in the Property. Ms. Carley's testimony at trial, that the discussion at this meeting concerned the transfer of only one-half of her interest in the Property, is not reflected in the minutes. I do not find Ms. Carley's evidence that a sale of only one-half of her interest was discussed at this meeting to be credible. I note that at this meeting the minutes indicate that the co-owners appeared to agree that the right of first refusal set out in the co-owners' agreement did not apply to someone who took title as a surviving joint tenant or in a will.

[108] The ADDENDUM TO CO-OWNERS and LICENCE AGREEMENT, dated December 12, 2012, which was signed by Ms. Carley, the Birchards, and other co-

owners, provides that the co-owners consented to the assignment of Ms. Carley's undivided interest in the Property, to be shared with the Birchards. Although this agreement was drafted by Ms. Dong who is not a lawyer, and is in some respects unclear as to the interest the Birchards were acquiring (in the recitals, for example, it suggested that the Birchards were acquiring all of Lot A), it does not indicate that they were only acquiring one-half of Ms. Carley's interest.

[109] In her 2013 will, Ms. Carley bequeathed "any interest" she had in the Property to Mr. Birchard. The will did not specify that she was bequeathing only a residual one-half of a two-tenths interest in the Property. I find Ms. Carley's testimony at trial that her will provided that only one-half of interest in the Property was bequeathed to Mr. Birchard to be incorrect and lacking in credibility.

[110] In addition, I have considered whether the parties' use of Lot A after 2009 supports the existence of the agreement as alleged by Ms. Carley. In my view, it does not.

[111] Although the parties agree that they each generally occupied one side of Lot A, the evidence indicates that after 2009, they continued to share rights over the entire property. For example, they used a common driveway and shared an outhouse. Additionally, until 2018, they shared the use of a dock and, until just recently, the Birchards mowed lawn on both sides of Lot A. It is not disputed that the parties would spend time at each others' trailers for coffee or drinks. Finally, when he was planning his retirement party in 2016, Mr. Birchard felt it necessary to speak with Ms. Carley to request that she address any problems she had with his guests to him. This evidence does not suggest that the Birchards had exclusive rights to one side of Lot A only and is consistent with Mr. Birchard's testimony that the parties agreed that Ms. Carley would be able to use all of Lot A during her lifetime.

[112] I acknowledge the evidence at trial that neither party sought approval from the other to make various improvements on their respective sides of the driveway. Arguably, this could be taken to suggest that the parties agreed that they would retain an ownership interest over, including the sole right to make decisions

concerning, their respective sides of Lot A. The same could be said of evidence that the parties equally shared common costs for Lot A and the fact that the parties attended and exercised voting rights at meetings of the co-owners of the Property after 2009. However, this conduct is equally consistent with Mr. Birchard's testimony that he felt that Ms. Carley should be able to use all of Lot A during her lifetime and that Mr. Birchard thought that the co-owners' agreement required Ms. Carley to remain on title to the Property.

[113] Ms. Carley testimony that she equally shared sub-division costs with the Birchards was not corroborated by Mr. Friesen's testimony. He testified that after 2010, Ms. Carley contributed approximately $5,000 and the Birchards contributed $12,500. The ratio of their respective contributions bears no resemblance to a 50-50% interest in the Property. The evidence at trial does not establish when Ms. Carley contributed towards subdivision costs. In my view it makes a difference if Ms. Carley made such contributions after the parties' relationship deteriorated in 2016. Ultimately, I am not sure what to make of Ms. Carley's contribution towards subdivision costs after 2010.

[114] I have also considered the significance of correspondence sent by Ms. MacKinnon Birchard to Ms. Carley in June 2017, in which the Birchards proposed to pay either all or at least two-thirds of the property taxes on their interest in the Property. I find this correspondence to be of little assistance in determining the parties' intentions at the time of their agreement in 2009. In my view, it appears that Ms. MacKinnon Birchard was seeking to create a paper trail to establish a baseline interest on the Birchards' part over Lot A. This conclusion is supported by Ms. MacKinnon Birchard's testimony at trial that she sent these emails because she was told that Ms. Carley was going to "come after" them.

[115] Similarly, I find the email that Mr. Birchard sent to Marty Hansen in September 2017, in which he stated, in summary, that the Birchards bought all of Ms. Carley's interest in the property for a substantial sum of money to be self-serving and I give this evidence little weight.

[116] The evidence at trial, in particular the exchange of emails between Ms. MacKinnon Birchard and Mr. Friesen and Mr. Gibson, suggests that at least until 2015, Ms. Carley was content that if the Property was to be subdivided that Lot A should remain as a five-acre parcel and not be divided into two 2.5-acre parcels. While I would not view this evidence as supporting Ms. Carley's view of a 50-50% interest, I do not give this evidence much weight given its timing.

[117] Finally, Mr. Birchard testified that Ms. Carley was left on title as a joint tenant because he understood that this was necessary by the terms of the co-owners' agreement. Counsel for the Birchards submitted that regardless of whether or not Mr. Birchard's view of the requirements of the co-owners' agreement was correct, his testimony on this point was not challenged at trial and should be believed. I am satisfied that this belief of Mr. Birchard, together with the agreement that Ms. Carley would have use of Lot A for the rest of her life, explains why Ms. Carley's two-tenths undivided interest in the Property was transferred to the Birchards and Ms. Carley as joint tenants.

Summary of Factual Findings

[118] In summary, I find that the Birchards have proven that in 2009 the parties orally agreed that the Birchards would purchase all of Ms. Carley's undivided two-tenths interest in the Property for $150,000.

[119] In addition, given the parties pre and post-contract conduct, I find, that it was either an express or implied term of the oral agreement that Ms. Carley would retain the right to use Lot A, during her lifetime and that the parties would share common costs arising from her exercise of those rights.

[120] There was no evidence called at trial proving that Ms. Carley specifically agreed that she would not convey her interest in the Property to anyone else. I find that it was an implied term of the agreement that Ms. Carley would preserve the interest she maintained in the Property such that this interest would transfer to the Birchards after her death.

[121] I accept Mr. Birchard's testimony that in 2010 Ms. Carley was left on title as a joint tenant because he felt that this was required under the co-owners' agreement. This finding is consistent with the conduct of the parties when they sought approval from co-owners for a transfer of the interest of Ms. Carley in the latter part of 2009 and in 2010.

Conclusion

[122] Ms. Carley's claim that she has a 50% beneficial interest in two-tenths of the Property is dismissed.

[123] I find that, in 2009, the parties agreed that the Birchards would purchase, and they did purchase, all of Ms. Carley's undivided two-tenths interest in the Property for $150,000, on condition that Ms. Carley has the right to use Lot A on the Property for her life.

[124] I also find that it was an implied term of the agreement that, as a condition of Ms. Carley exercising her right to use Lot A, the parties would share 50% of the common costs, although this does not include any amounts the parties contributed after 2009 towards the cost of subdivision and rezoning.

[125] I find that it was an implied term of the agreement, and declare, that Ms. Carley is unable to transfer her registered interest in the Property to anyone other than the Birchards, such that this interest will transfer to the Birchards after her death.

[126] I find that in 2010 the Birchards acquired a beneficial interest in 100% of the undivided 2/10 interest in the Property. I find that Ms. Carley holds her current legal interest, described in the 2021 title as an undivided 2/30 interest in the Property, in trust for the Birchards.

[127] As a result of my findings that ownership of the parties' interest in the property flows from the 2009 agreement, it is not necessary to address Ms. Carley's alternative claim with respect to unjust enrichment.

[128] With respect to the remedies which flow from these determinations, in particular, changes to the current registered title to reflect the Birchards' legal and beneficial interest in the Property, I reserve making any rulings in this respect until further submissions are made by the parties.

"Mayer J."